Monday, November 29, 2004

Part III

Department of Homeland Security

8 CFR Parts 208, 212, and 235
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; Final Rule

Department of Justice

8 CFR Part 1003 et seq.
Asylum Claims Made by Aliens Arriving From Canada at Land Border Ports-of-Entry; Final Rule
DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 208, 212, and 235
[CIS No. 2255–03]
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Implementation of the Agreement Between the Government of the United States of America and the Government of Canada Regarding Asylum Claims Made in Transit and at Land Border Ports-of-Entry

AGENCY: Department of Homeland Security.

ACTION: Final rule.

SUMMARY: This rule codifies specific terms of an agreement between the United States and Canada that permits the respective governments to manage which government decides certain aliens’ requests for protection from persecution or torture pursuant to domestic implementation of international treaty obligations. This rule establishes U.S. Citizenship and Immigration Services (“USCIS”) asylum officers’ authority to make threshold determinations concerning applicability of this agreement in the expedited removal context. In addition, this rule codifies the existing definitions of “credible fear of persecution” and “credible fear of torture” without altering those definitions.

DATES: This final rule is effective December 29, 2004.

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I. Background


The proposed rules outlined how the Department of Homeland Security (DHS) and the Department of Justice (DOJ) proposed to address the asylum, withholding of removal, and Convention Against Torture claims ("protection claims") of aliens seeking to enter the U.S. at U.S.-Canada land border ports-of-entry, or in transit through the U.S. during removal by the Canadian government, in accordance with the Safe Third Country Agreement. The Agreement allocates responsibility between the United States and Canada whereby one country or the other (but not both) will assume responsibility for processing the claims of certain asylum seekers who are traveling from Canada into the United States or from the United States into Canada. The Agreement provides for a threshold determination to be made concerning which country will consider the merits of an alien’s protection claim, enhancing the two nations’ ability to manage, in an orderly fashion, asylum claims brought by persons crossing our common border. As discussed in the SUPPLEMENTARY INFORMATION section in the preamble to those proposed rules, the Agreement allocates resources and provides for prescreening of asylum and related claims in certain instances during the expedited removal process, where the asylum officer would determine whether any of the Agreement’s exceptions apply or whether aliens should be returned to Canada for consideration of their protection claims. The limited number of aliens arriving from Canada at land border ports-of-entry or in transit during removal by the Canadian government who are placed in removal proceedings under section 240 of the Act (8 U.S.C. 1229a) (instead of being processed through expedited removal procedures) would have the Agreement applied to them in the first instance by immigration judges of the Executive Office for Immigration Review ("EOIR"), as outlined in the DOJ proposed rule at 69 FR 10627 et seq. In response to the DHS proposed rule, DHS received 7 sets of comments from non-governmental organizations ("NGOs") and the Office of the United Nations High Commissioner for Refugees ("UNHCR"). While incorporating several of the comments, this final rule implements the basic approach discussed in the March 8 rule proposed by DHS.

The following discussion of the comments received by DHS corresponds generally to the variety of issues raised by commenters and is arranged into the following categories: Validity of the threshold screening process identified in the proposed rule; issues related to detention of asylum seekers; procedural safeguards under the threshold screening process; adjudication of the Agreement’s several exceptions to its general rule of returning certain asylum seekers to Canada; procedures for asylum seekers bound for and returned from Canada; monitoring of the Agreement’s implementation and impact; and Agreement terms unrelated to processing asylum seekers coming to the United States from Canada. Within each category, the discussion summarizes the relevant comments and offers the Department’s responses, including an explanation of any changes made to the rule. Following the discussion of the comments is an explanation of one minor conforming regulatory amendment included in the final rule to ensure that existing regulations governing the expedited removal process are consistent with the threshold screening interview mechanism adopted in DHS’ final rule. Many commenters took issue with the Agreement itself, challenging its wisdom on policy grounds. This
Supplementary Information to the final rule, while endeavoring to address each comment as fully as possible, does not engage in a policy debate about the Agreement itself.

II. Validity of the Threshold Screening Process

One commenter indicated that creating a special process to assess the applicability of the Agreement and its exceptions would result in increased inefficiency and bureaucracy. The Department disagrees and, to the contrary, believes that the threshold screening process is the most efficient mechanism for implementing the Agreement. It will not create additional bureaucracy. The threshold screening process adopts existing processes from the credible fear process, will be a streamlined determination, and can be transitioned seamlessly to the credible fear process if an exception to the Agreement is found.

Other commenters argued that the new threshold screening process is legally insufficient, if not contrary to existing laws, because it does not occur as part of the credible fear determination and does not provide for independent administrative review of negative decisions by immigration judges. These commenters have concluded that the proposed process does not, therefore, comport with existing laws, because it does not occur as part of the credible fear process, does not articulate any legitimate basis for treating aliens without lawful immigration status in the United States differently from other asylum seekers in the United States, does not provide for independent administrative review of negative decisions by immigration judges, and does not comply with the Act.

The Department disagrees and, to the contrary, believes that the threshold screening process is the most efficient mechanism for implementing the Agreement. While the Department agrees that credible fear determinations and reviews are important and constitute the initiation of the asylum application process described in section 208(a)(1) of the Act (8 U.S.C. 1158(a)(1)), review of the application for asylum must be made in accordance with section 208(a)(1) of the Act (8 U.S.C. 1158(a)(1)(A)), which provide that aliens who are inadmissible under sections 236, 236A and 241 of the Act (8 U.S.C. 1226, 1226a, 1231) or require that DHS alter its current detention policies or practices. No amendments to the detention regulations were proposed in the proposed rule, and any changes in these regulations would require a new proposed rule. After reviewing the comments, DHS is not convinced that there is any reason to amend the detention provisions of the regulations because of the implementation of the Agreement or this rule. The comments do not articulate any legitimate basis for treating aliens without lawful immigration status in the United States who are returned under the Agreement differently from other asylum seekers in the United States without lawful immigration status.

IV. Procedural Safeguards Under the Threshold Screening Interview Process: Arrivals From Canada

Screening Process Guarantees

Several commenters were concerned that the rule does not specify that individuals arriving from Canada would receive the same procedural safeguards in the threshold screening interview process that are provided to arriving aliens who receive credible fear interviews. In particular, the Department was urged to incorporate, in the final rule, the following safeguards:

1. Option to consult with a person of the alien’s choosing: sufficient time to contact a consultant, relative, or relevant advocates, at no expense to the U.S. government; sufficient time to prepare for the eligibility interview; and an assurance that the interview would not occur sooner than 48 hours after the asylum seeker’s arrival at a detention facility, unless the individual waives this preparation period.

2. The ability to apply for asylum or a fear of persecution or torture, a careful reading of the Act makes clear that credible fear interviews are not required for aliens subject to the Safe Third Country Agreement. Under section 208(a)(1) of the Act (8 U.S.C. 1158(a)(1)), any alien physically present in or arriving in the United States may apply for asylum in accordance with that section, or where applicable, section 235(b)(2)(A) of the Act (8 U.S.C. 1225(b)). The following paragraph, section 208(a)(2)(A) of the Act (8 U.S.C. 1158(a)(2)(A)), however, creates an exception to this generally permissive asylum filing standard, revealing Congress’ intent that an alien may not apply for asylum in accordance with section 235(b)(2)(A) if the alien “may be removed, pursuant to a bilateral or multilateral agreement, to a country * * * in which the alien’s life or freedom would not be threatened.” Clearly, then, the credible fear interview process constitutes the initiation of the asylum application process described in section 208(a)(1) of the Act (8 U.S.C. 1158(a)(1)). For this reason, and in light of section 208(d)(5)(B)’s (8 U.S.C. 1158(d)(5)(B)) authorization to promulgate regulations that impose conditions or limitations on the consideration of an application for asylum, as long as they are “not inconsistent with this Act,” the Department finds the threshold screening interview process described in the proposed rule to be in accord with the Act.

3. A closely related comment raised by some commenters is the request that the rule include an independent review or appeals process for asylum officer findings that an alien does not meet one of the Agreement’s exceptions and is, accordingly, ineligible to pursue an asylum application via the credible fear interview process. The Department believes that, given the narrow legal and factual issues present in the threshold screening process, review of an asylum officer’s threshold determination by a supervisory asylum officer will adequately serve to ensure that proper decisions are made on this limited issue. In light of the comments received, the requirement that a supervisory asylum officer must concur in the asylum officer’s finding that the alien is subject to return to Canada under the Agreement has been expressly added to the final rule at 8 CFR 208.30(e)(6)(i).

III. Detention Issues

Several commenters addressed the issue of detention. For instance, some commenters suggested adding to the rule that asylum seekers subject to the Agreement generally should not be detained. Another commenter advocated a mechanism for the Department to refer individuals entering the United States or being returned by Canada under the Agreement to NGOs in the United States, to facilitate alternatives to detention. Commenters also expressed concern about the detention of returnees from Canada. One commenter would have the rule prohibit detention of this group under any circumstances, while another suggested that the Department only detain returnees under exceptional circumstances, and, if detention is necessary, to avoid detention in local county jails. The Agreement does not amend the detention authority under sections 236, 236A and 241 of the Act (8 U.S.C. 1226, 1226a, 1231) or require that DHS alter its current detention policies or practices. No amendments to the detention regulations were proposed in the proposed rule, and any changes in these regulations would require a new proposed rule. After reviewing the comments, DHS is not convinced that there is any reason to amend the detention provisions of the regulations because of the implementation of the Agreement or this rule. The comments do not articulate any legitimate basis for treating aliens without lawful immigration status in the United States who are returned under the Agreement differently from other asylum seekers in the United States without lawful immigration status.
interpreter; explanation of and guidance on the interview procedure; and the issuance of a reasoned written decision. 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. However, the suggestion that the threshold screening interview be postponed upon an alien’s request has no parallel in the sections of 8 CFR 208.30 outlining the credible fear process. Also, this suggestion would compromise the principle underlying the Agreement that aliens be returned promptly to the country of last presence; therefore, it will not be incorporated into the final rule. In appropriate cases, the Department may exercise its discretion to delay the threshold screening process where the delay is justified.

One commenter recommended that the final rule include a statement requiring the Department to accommodate reasonable requests for assistance in securing evidence in support of an asylum seeker’s claim arising from the asylum seeker’s detention. For example, an asylum seeker may need access to a telephone or fax machine to secure evidence establishing relationships, a family member’s legal status, or the asylum seeker’s age. The Department currently provides access to telephones to detained asylum seekers who are subject to expedited removal. If additional assistance is needed, such as access to a fax machine, an asylum officer may be able to facilitate such access. However, the Department does not believe it is necessary to incorporate this suggestion into the final rule, because it is operational in nature and instead will be incorporated into field guidance upon implementation of the rule.

Post-Interview Process

One commenter suggested that the rule should clarify that return to Canada under the Agreement would not render a person inadmissible to the United States on that basis. While the Agreement does not address matters of inadmissibility, the Department may only remove aliens from the United States using a mechanism provided by Congress. Generally, for aliens arriving in the United States without valid documents required for admission, expedited removal under section 235(b) of the Act (8 U.S.C. 1225(b)) is the removal mechanism provided by Congress. A removal order under section 235(b) of the Act would, as a matter of law, constitute a temporary inadmissibility ground under section 212(a)(9)(A)(i) of the Act (8 U.S.C. 1182(a)(9)(A)(i)). Waivers and exceptions to this inadmissibility ground do exist and will be considered by the Department on a case-by-case basis, consistent with existing regulations and operational directives. Similarly, discretion exists on the part of Customs and Border Protection (“CBP”) officers to allow aliens to withdraw their applications for admission (so that they would face no inadmissibility bar to a subsequent admission to the United States) and this discretion will continue to be used on a case-by-case basis.

Another commenter recommended that either the final rule or operating procedures should include a mechanism for reconsideration by the Department of its decision to remove an asylum seeker to Canada following a decision that he or she does not qualify for one of the Agreement’s exceptions if new evidence subsequently becomes available. The Department plans to continue working with its Canadian counterparts to establish common procedures to resolve matters like these at the local level through operational guidance.

V. Adjudicating Exceptions to the Agreement

A substantial number of the comments to the proposed rule concerned the interpretation and adjudication of Agreement exceptions for asylum seekers arriving at land border ports-of-entry. These comments corresponded roughly to the specific exceptions themselves, and can be addressed with reference to the following categories: family unity; unaccompanied minors; public interest; validly issued visas; and other exceptions. Many of the concerns evident from these comments were raised initially at meetings with NGOs, including a public meeting in August 2002, before the Agreement was signed. The Department carefully considered several of the issues outlined in these comments at that time and incorporated many suggestions into the text of the Agreement.

Family-Based Exceptions

Many commenters believe that the rule should define “family member” broadly and in a more culturally sensitive manner that reflects the reality of the refugee experience. For example, one commenter recommended considering “de facto” family members as eligible anchor relatives within this exception, in the alternative, as part of the public interest exception. The definition of “family member” was the subject of prolonged discussion while negotiating the Agreement. The United States delegation advocated and succeeded in achieving a definition much broader than the class of family members recognized for other purposes under United States and Canadian immigration law. During negotiations, both Canada and the United States took into account the reality that different cultures define “family member” differently. Given the specificity of the Agreement’s enumerated relationships in its “family member” definition, the Department will not now, in effect, unilaterally amend the Agreement’s definition by means of this rule to include additional individuals. The Department’s position is that using the regulatory process to create new definitions at this stage would serve to undermine the compromise represented by this carefully negotiated, bilateral agreement.

Other commenters suggested including “cousins” as part of the “family member” definition in the rule. As explained above, the Agreement’s list of who may qualify as an anchor “family member” is not subject to amendment by the rule. For the same reason, the Department will not include, as suggested in a separate comment, “other close relatives” to the list of family members.

Several commenters recommended that the rule specifically include a “common-law partners” exception, as it is included in the Canadian regulations’ definition of “family member.” Canada has included common-law partners in the definition of “family member” in the Canadian regulations implementing the Agreement because this relationship has often been recognized as a matter of Canadian law. Article 1 of the Agreement provides that each Party will apply the Agreement’s family member exceptions in a manner that is consistent with its national law. While valid foreign marriages, including common law marriages, are generally given effect under U.S. immigration law, see Matter of H-, 9 I&N Dec. 640, 641 (BIA 1962); but see section 101(a)(35) of the Act (8 U.S.C. 1101(a)(35)), U.S. federal law precludes use of the terms “marriage” or “spouse” to refer to same-sex partnerships. See Defense of Marriage Act, Public Law 104–199, section 3, 110 Stat. 2419 (1996) (providing that, for purposes of federal law, “marriage” means only a legal union between one man and one woman as husband and wife, and “spouse” refers only to a person of the opposite sex who is a husband or a wife”). Because the Department cannot promulgate regulations that are contrary
to law, the Department did not adopt
the commenters' suggestion to add a
“common-law partner” interpretation
of the term “spouse,” as used in the
Agreement's family member exceptions.
A few commenters believe that the
rule should eliminate the Agreement’s
age and immigration status limits on
anchor relatives, reasoning that the
limits result in separating families when
children cannot serve as anchors for
their parents. Both countries have
expressed their concern for reuniting
separated families. To that end, both
intend to work with the UNHCR and
NGOs to monitor the Agreement's effect,
addressing this potential problem
operationally rather than by regulation.
A key reason that age limits were
included in the Agreement's family
unity exceptions was that neither
government wanted to trigger an
increase in the smuggling and
trafficking of minors, sent ahead by
family members for the purpose of
serving as anchors in either country.
Further, the requirement that anchor
relatives hold lawful, non-visitor
immigration status derives from the
negotiated Agreement terms, see art. 4,
para. 2(a), which will not be modified
through the rule-making process.
Unaccompanied Minor Exception
Some commenters felt that the rule
should expand the Agreement’s
definition of “unaccompanied minor” to
include a minor who is “separated from
both parents and is not being cared for
by an adult who by law has the
responsibility to do so.” The
Department declines to incorporate this
change to the Agreement’s definition
into the final rule. The Agreement’s
definition of “unaccompanied minor,”
as explained in the SUPPLEMENTARY
INFORMATION accompanying the
proposed rule, differs from the
definition customarily used for
purposes of U.S. immigration
processing. As previously explained, the
definitions in the Agreement were
carefully negotiated with the Canadian
government and the Department will
not use the rule-making process to alter
unilaterally the clear definitions in the
Agreement. However, by applying DHS’
customary operational definition to
unaccompanied minors seeking asylum
so that they are generally referred for a
hearing by an immigration judge in
proceedings under section 240 of the
Act (8 U.S.C. 1229a), the Department is
providing them ample process to
explain whether they meet one of the
Agreement’s exceptions and to present
their protection claims.
These commenters also
recommended that the rule should shift
the burden of proof concerning the
location of an unaccompanied minor’s
parents from the unaccompanied minor
to the government, requiring the
government to demonstrate that the
unaccompanied minor is in the care of
his or her parents or is following to join
them. While the Department
understands the need to proceed with
heightened restraint and sensitivity in
the cases of unaccompanied minors,
there is concern that this
recommendation could adversely affect
the unaccompanied minor by resulting
in fact-finding delays before a final
determination. The child likely will
have more information than DHS as to
the location of his or her parents and
therefore it is more appropriate for the
child to bear the burden of proof in
establishing the parents’ locations.
Moreover, aliens in removal
proceedings—regardless of age—
generally bear the burden of proving
their admissibility to the United States,
8 U.S.C. 1129a(c)(2), and, similarly,
applicants for asylum, withholding of
removal, and protection under the
Convention Against Torture, bear the
burden of proof to establish eligibility,
even in cases where the applicant is a
child. The commenters did not provide
sound rationale for shifting the burden
of proof for purposes of establishing that
an exception to the Agreement applies.
These commenters also suggested that
the rule include a mechanism for
determining a child’s relationship to an
accompanying adult or to individuals
present in the United States or Canada,
including an interview with a child
welfare specialist, if the child arrives at
the border with an individual who is
not his or her legal guardian. The
mechanism, they suggest, should
include procedures to identify potential
family members and determine their
suitability to serve as the child’s
guardian. The Department agrees that
this is an area requiring further
cconsideration; however, the issues
surrounding identification of
individuals accompanying alien
children and verification of
relationships between adults and
children are broader than the scope of
this rule and are not unique to those
children subject to this rule. These
issues may be raised at all borders, and
all ports-of-entry, even in the case of
aliens with lawful status here.
Therefore, these issues would be more
appropriately addressed systemically, as
a coordinated effort among the
Department’s various agencies to create
a uniform approach, rather than within
this rule. Consequently, the Department
decides to incorporate the process
proposed by commenters within the
rule.
Many commenters, as previously
stated, urged the Department to consider
“separated children,” who are not with
either parent or with an adult
responsible for their care, as part of the
discretionary public interest exception
under Article 6 of the Agreement. The
Department is sensitive to the unique
issues facing unaccompanied minors
and will proceed carefully in cases
where an unaccompanied minor
arriving in the United States appears to
be a “separated child.” The Department
will consider, on a case-by-case basis,
whether such a child might meet the
Agreement’s public interest exception.
Public Interest Exception
Many of the commenters
recommended that the rule should state
that “humanitarian concern is a public
interest.” The Department believes that
the Agreement’s public interest
exception is best administered through
operational guidance and on an
individualized, case-by-case basis, but
does acknowledge that “humanitarian
interest” is certainly an important
consideration to factor into a public
interest assessment.
Some commenters suggested that the
rule include a non-exhaustive list of
categories that would merit
consideration under the public interest
exception. Three of the suggested
categories—common-law spouses, de
farto family members, and separated
children with parents or legal guardians
in the U.S. who are ineligible to serve
as anchors—were addressed above in
the discussion reply to comments about
the proposed rule’s sections concerning
the “family member” and
“unaccompanied minor” exceptions.
Other categories suggested by
commenters for consideration under the
public interest exception include:

a. Cases where effective protection
cannot be guaranteed in Canada because
of that country’s asylum laws; and,

b. Cases in which the anchor relatives
are under age 18 and have pending
asylum applications;

c. Cases of survivors of torture; and

d. Cases of individuals with physical
and psychological health needs.

Issues of minor anchor relatives, past
torture, and health needs are some of
the factors that may be considered
under the Agreement’s public interest
exception, along with all other relevant
circumstances, on a case-by-case basis.
The intent behind this provision of the
Agreement was to allow each
government to make case-by-case determinations with broad discretion. Had the parties’ intent been to include the broad categories of individuals listed above, the categories would have been spelled out in the Agreement in the same manner as the other exceptions.

For reasons stated in the Supplementary Information to the proposed rule, the Department does not consider differences in Canadian and U.S. protection laws germane to decisions made under the Agreement. The commenters urged, with respect to this suggestion, that the rule include a mechanism for the UNHCR and NGOs to help the Department analyze Canadian law and practice, including approval rates by nationality and basis for approval, to ensure that the Department exercises discretion in cases where there are discrepancies with U.S. law. The Department will not apply the public interest exception in a manner that would undermine the Agreement’s allocation of responsibility for adjudication of protection claims. Also, as explained in the Supplementary Information to the proposed rule, differences in our protection systems were contemplated by the United States and Canada during negotiations. In either country, asylum seekers will have their protection claims fully and fairly considered.

Other commenters suggested specific procedures in the rule concerning the exercise of discretion, in the public interest, to allow an individual to pursue a protection claim in the United States. One recommended explaining those who specifically may exercise this discretion, and the other called for a clear procedure between EOIR and DHS to ensure that the Department properly considers cases pending before EOIR for the public interest exception. In response to these suggestions, the final rule has been amended at 8 CFR 208.30(e)(6)(ii)(F) to specify that the Director of USCIS, or the Director’s designee, will be responsible for making determinations made under the Agreement’s public interest exception. Any party wishing to present a case for consideration under this exception should provide relevant case information to the Director’s office or that of his or her designee.

Valid Visa Exception

One commenter noted that the rule should define “validly issued visa” so as not to link the validity of its issue to the asylum seeker’s presumed subjective intention. For example, U.S. immigration authorities have determined in some instances that valid tourist or business visas were obtained by “fraud” because of the visa holder’s true intent to seek asylum. For the limited purposes of applying this exception to the Agreement, USCIS will construe the term “validly issued” to refer to visas that are genuine (i.e., not counterfeit) and were issued to the alien by the U.S. government.

Other Exceptions

One commenter forwarded comments made in response to a review of an earlier draft of the Agreement in 2002, in which it recommended that, to avoid the separation of families and minimize social and economic costs for states, the Agreement add a transit exception. Additionally, the commenter suggested a “community support contact” exception, which could include friends or colleagues willing to submit statements about their willingness to support the asylum seeker during the process. A transit exception would effectively invalidate the Agreement, as the Agreement’s stated purpose is quite clearly to return asylum seekers to the “country of last presence.” With respect to the “community support contact” exception, the Department reiterates that the exceptions to the Agreement were determined through careful negotiations with the Canadian government, and that to create additional exceptions through rule-making would serve to undermine the process. Therefore, the Department declines to adopt this recommendation.

VI. Procedures for Asylum Seekers Going to and Being Returned From Canada

Process for Asylum Seekers Bound for Canada

Several commenters recommended that the rule include a mechanism whereby the Department could refer Canada-bound asylum seekers to NGOs in the United States for assistance in locating relatives and providing advice regarding eligibility before arriving at a land border port-of-entry. The Department declines to codify the process affecting those returned to the United States under the Agreement, because existing regulations already govern how they will be treated by DHS. For purposes of U.S. immigration law, these returnees will be in the same position they would have been had they not left the United States. As the Department stated in the Supplementary Information to the proposed rule, individuals returned from Canada to the United States, with the rare exception noted below, will not be subject to expedited removal because they will not meet the definition of “arriving alien.” Depending on the individual’s immigration status in the United States, he or she may be subject to removal proceedings under section 240 of the Act (8 U.S.C. 1229a). However, it is not possible, practical or advisable for the Department to codify such a guarantee in this rule. There may be a rare circumstance in which the expedited removal provisions of the Act would apply. For example, someone initially paroled into the United States may attempt to enter Canada and then be returned to the United States after his or her parole period here expired. Such a person, as an individual whose parole period has expired, may be subject to expedited removal. 8 U.S.C. 1182(d)(5)(A), 1225(a)(1)-(b)(1)(A)(i); 8 CFR 1.1(q).

Many commenters suggested that the rule include a mechanism to enable Canada, in the event that it decides that the Agreement exceptions are not applicable to an individual alien, to address any possible errors in its decision or consider new information offered by the alien. That is to say, even if immigration officials were to stop individuals traveling from the United States into Canada, it is unclear how the department would identify those who intend to seek asylum in Canada—certainly a minimal portion of individuals crossing the border each day—in order to refer them to an NGO.

Process for Asylum Seekers Returned From Canada

Several commenters expressed a desire to have the rule clarify the process affecting those asylum seekers who are determined to be ineligible by Canada and returned to the United States—the group anticipated to constitute the majority of asylum seekers affected by the Agreement. One non-governmental organization recommended that the rule guarantee that these individuals be exempt from the expedited removal process.

The Department declines to codify the process affecting those returned to the United States under the Agreement, because existing regulations already govern how they will be treated by DHS. For purposes of U.S. immigration law, these returnees will be in the same position they would have been had they not left the United States. As the Department stated in the Supplementary Information to the proposed rule, individuals returned from Canada to the United States, with the rare exception noted below, will not be subject to expedited removal because they will not meet the definition of “arriving alien.” Depending on the individual’s immigration status in the United States, he or she may be subject to removal proceedings under section 240 of the Act (8 U.S.C. 1229a). However, it is not possible, practical or advisable for the Department to codify such a guarantee in this rule. There may be a rare circumstance in which the expedited removal provisions of the Act would apply. For example, someone initially paroled into the United States may attempt to enter Canada and then be returned to the United States after his or her parole period here expired. Such a person, as an individual whose parole period has expired, may be subject to expedited removal. 8 U.S.C. 1182(d)(5)(A), 1225(a)(1)-(b)(1)(A)(i); 8 CFR 1.1(q).

Many commenters suggested that the rule include a mechanism to enable Canada, in the event that it decides that the Agreement exceptions are not applicable to an individual alien, to address any possible errors in its decision or consider new information offered by the alien. That is to say, even if immigration officials were to stop individuals traveling from the United States into Canada, it is unclear how the department would identify those who intend to seek asylum in Canada—certainly a minimal portion of individuals crossing the border each day—in order to refer them to an NGO.
requires the asylum seeker with each other on these matters and to
governments have agreed to consult
Canadian and United States
new information. Nonetheless, the
authorities to correct errors or address
outline a mechanism for the Canadian
Canadian authorities. It would be
to present a protection claim in Canada.

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Cost of Processing Returned Asylum Seekers

The majority of the commenters
disagreed with the proposed rule’s
evaluation of the costs that will result
from the rule’s implementation, as
evaluated in the proposed rule’s
determination made under Executive
Order 12866. They allege that certain
tangible costs—including increases in
adjudications, detention, Border Patrol
deployment, and criminality—were not
adequately addressed. They argue that,

One commenter also stressed that, in
this context, the Department should
release detainees or provide transport to
the nearest land border port-of-entry if
Canada agrees to reconsider a claim and
requires the asylum seeker’s presence at
the border. Release of detainees will be
determined on a case-by-case basis,
depending on the facts of the case and
applicability of immigration laws.

Should an individual be released, the
logistics for how that person will get to
the border is best determined on a case-
by-case basis and through operational,
as opposed to regulatory, guidance.

VII. Monitoring Plans

Nearly all of the commenters
recommended that the rule explicitly
refer to the UNHCR’s monitoring role, as
specified in Article 8 of the Agreement.
They added that the rule should specify
exactly what type of information the
UNHCR will receive, such as numbers of
applicants, their ages, their countries
of origin, and the disposition of their
eligibility and credibility
determinations. They also
recommended that the rule establish a
timetable for the reports, preferably
quarterly or whenever a special
situation warrants one. In addition, the
commenters recommended that the rule
authorize the UNHCR to monitor
eligibility and credibility
determinations and to intercede in cases
in which it believes erroneous decisions
were made. The same commenters also
felt that the rule should allow NGOs to
operate as the UNHCR’s implementing
partners to monitor the Agreement.

The Department has not incorporated
these recommendations into this rule,
but plans to take them into
consideration when finalizing its
arrangements with Canada and the
UNHCR concerning monitoring of the
Agreement. The Department also would
welcome the assistance and input of
NGOs. It is fully the intent of the
Department to abide by the Agreement,
which, at Article 8, provides that “The
Parties shall cooperate with UNHCR in
the monitoring of this Agreement and
seek input from non-governmental
organizations.” The Department values
the longstanding consultative,
cooperative relationship the UNHCR has
had with the U.S. government, which
includes monitoring the United States’
application of the Convention Relating
to the Status of Refugees, Jul. 28, 1951,
189 U.N.T.S. 150 (“Refugee
Convention”). For example, the UNHCR
recently monitored and analyzed the
expedited removal process and made
several useful recommendations for the
Department. However, the Department
considers it inappropriate to codify the
nature of this relationship, or the
relationship between the Department
and the NGO community, in these rules.
Details of monitoring plans often change
and develop over time, as unforeseen
events arise, and those involved in the
monitoring plan identify methods,
consistent with evolving events, to
to better gather and analyze data. As such,
it is more appropriate to include details of
such plans in formal action plans and
memoranda. One comment suggested
that the rule include a monitoring plan
concerning smuggling and trafficking
developments. As stated earlier, the
Department is aware of the potential for
increased smuggling and trafficking
after the Agreement is implemented and
intends to monitor these developments.
The Department does not believe,
however, that it is appropriate to codify
such a monitoring plan in regulations
for the same reasons noted above.

VIII. Agreement Terms Unrelated to
Processing Asylum Seekers Coming to
the United States From Canada

Resettlement Under the Agreement

Most commenters wanted the rule to
include details concerning the
implementation of the resettlement side
agreement addressed in Article 9 of the
Agreement. Another commenter
recommended that the Department of
State introduce its own proposed rule to
implement the resettlement agreement.

This comment concerns an issue
separate and distinct from that of
returning asylum seekers to the country of
last presence. The scope of this rule
will remain limited to implementing the
Agreement’s terms as they concern two
limited categories of asylum seekers:
Those seeking entry to the United States
at a land border port-of-entry on the
Canadian border and those who seek
protection while being removed from
Canada and transiting through the
United States.

Terminating the Agreement

One commenter suggested that the
rule include criteria to determine
whether the Agreement should be
cancelled because of negative impacts,
particular any increase in smuggling
or trafficking. Another made a similar,
though less specific suggestion, that the
rule should include procedures for
revising or terminating the Agreement,
should that prove necessary. One
commenter added that the Department
of State should propose its own separate
rule concerning the procedures for
suspending or terminating the
Agreement, including adequate or
appropriate termination grounds.

With respect to termination
procedures, Article 10 of the Agreement
between the United States and Canada
specifically provides that termination
may occur with six months’ written
notice from either party, and that three
months’ written notice would result in
suspension. It would be inappropriate
for the U.S. Government to negotiate an
Agreement with Canada and then
unilaterally adopt specific criteria that
would result in the Agreement’s
termination. The efficacy and ongoing
commitment to an international
agreement is a matter of foreign policy of the United States, the proper subject of diplomacy, and inappropriate for regulation under the Administrative Procedure Act (5 U.S.C. 551–59, 701–06, 1305, 3105, 3344, 5372, 7521).

IX. Miscellaneous

Resolving U.S.-Canadian Differences in Interpreting the Agreement

Most commenters agreed that the rule should provide a detailed mechanism to resolve differences between Canada and the United States regarding the interpretation and implementation of the Agreement. In accordance with the second paragraph of Article 8 of the Agreement, which provides that standard operating procedures “shall include mechanisms for resolving differences respecting the interpretation and implementation of the terms of this Agreement,” the Department intends to cooperate with its Canadian colleagues to address and resolve differences in the same spirit in which the Agreement was negotiated. As reflected in the Agreement itself, resolution of such differences is more appropriately addressed through operating procedures than through the promulgation of regulations.

Defining “Land Border Port-of-Entry”

Over half of the commenters suggested that this rule provide a definition of “land border port-of-entry,” as that term is used in the Agreement. Prior regulatory attempts to define “port-of-entry” have done so in reference to geographical locations where federal officers have authority to perform their official functions. For example, in the customs regulations at 19 CFR 101.1, this term simply “refer[s] to any place designated by Executive Order of the President, by order of the Secretary of Treasury, or by Act of Congress, at which a Customs officer is authorized to * * * enforce the various provisions of the Customs and navigation laws.” Pursuant to this approach of port-of-entry designation, these regulations enumerate specific ports-of-entry that have been designated as “Customs port of entry.” 19 CFR 101.3(b)(1). Existing immigration regulations take a similar approach, defining “ports-of-entry” with an exhaustive list of locations, broken down into three “classes.” 8 CFR 100.4(c)(2). These definitional approaches reveal the difficulty of providing one uniform definition of “port-of-entry.” Indeed, beyond the fact of CBP officers’ presence, “ports-of-entry” can vary in nearly every way imaginable. For instance, some ports-of-entry may sit on federally owned property, while others may be located on private or municipally owned property. Similarly, some land ports-of-entry border waterways or bridges, while others are located on busy highways or railroad tracks, while still others are situated in remote, rural areas. Given the impracticability of a one-size-fits-all definitional approach to “land border ports-of-entry,” the Department will rely on the current definitions of 8 CFR 100.4(c)(2) and 19 CFR 101.3(b)(1) in implementing the Agreement. Thus, where an alien arrives at a “port-of-entry,” as designated in one of these regulatory provisions, which is located at the shared U.S.-Canada border, the alien will be subject to the Agreement. Aliens apprehended in the immediate vicinity of such ports-of-entry attempting to avoid inspection will, where reasonable, be regarded as having “arrive[d] at a land border port of entry” and, consequently, be subject to the Agreement. Finally, the Department intends to work closely with the Canadian government to provide operational guidance concerning the Agreement’s applicability in marginal cases.

Aliens “Directed Back” From Canada

Two commenters raised the issue of aliens “directed back” by the Canadian government pending an interview by Canadian immigration officials. These commenters explained that, while Canadian authorities generally interview an alien who requests protection at the time he or she seeks to enter Canada from the United States, Canadian authorities have had occasion to direct such aliens back to the U.S. for future interview appointments in Canada during periods of increased attempted migration that outstrip Canadian processing resources. According to these commenters, such an increase is possible during the period immediately preceding Agreement implementation. The commenters have therefore requested that the Department work to accommodate such aliens’ attempts to enter Canada for a consideration of their protection claims. The Department will not adopt this suggestion. As discussed in the Supplementary Information to the proposed rule and, again, earlier in the Supplementary Information to this final rule, aliens who unsuccessfully attempt to enter Canada do not alter their immigration status by the attempted entry. Thus, if an alien who is present in the U.S. without having been inspected and paroled by an immigration officer unsuccessfully attempts to enter Canada, then he or she remains an unlawfully present alien subject to removal from the United States under sections 212(a)(6)(A)(i) and 240(a) of the Act (8 U.S.C. 1182(a)(6)(A)(i). 1229(a)(i)), just as if an immigration officer had apprehended the alien before he or she sought to enter Canada. An alien’s appointment with Canadian immigration officials, while relevant to the Department’s prosecutorial discretion concerning any decision to place the alien in removal proceedings, does not confer legal status upon an unlawfully present alien.

Indirect Refoulement

One commenter argued that returning aliens to Canada under the Agreement would constitute “indirect” refoulement, and would therefore violate U.S. obligations under the Refugee Convention and the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T.S. 6223 (“Refugee Protocol”). The Department disagrees. Article 33 of the Refugee Convention obligates the U.S., through its accession to the Refugee Protocol, not to “expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” (emphasis supplied). Absent some claim that an alien’s life or freedom would be threatened in Canada, which the commenter did not suggest, the return of the alien to Canada for a full and fair consideration of his or her protection claims is consistent with U.S. obligations.

X. Conforming Amendment to 8 CFR Part 235

In preparing this final rule, the Department determined that 8 CFR 235.3(b)(4) must also be amended to reflect the proposed rule’s use of a threshold screening interview mechanism preceding the initiation of credible fear interviews for those aliens in expedited removal proceedings who are subject to the Safe Third Country Agreement. This existing regulatory provision explicitly makes reference to a CBP officer’s referral of protection claims for a “credible fear” determination under 8 CFR 208.30. As aliens subject to expedited removal who are covered by the Agreement must first pass a threshold screening interview to determine whether their protection claims may be considered in the U.S., 8 CFR 235.3(b)(4) has been revised to refer more generally to 8 CFR 208.30 without reference to the Safe Third Country Agreement. This amendment ensures that the expedited removal regulations conform
to the threshold screening interview process explained in the proposed rule.

**Regulatory Flexibility Act**

DHS has reviewed this rule in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) and by approving it, DHS certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule, which relates to asylum claims, applies to individual aliens only. As such, a substantial number of small entities, as that term is defined in 5 U.S.C. 601(b), will not be affected by the rule.

**Unfunded Mandates Reform Act of 1995**

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

**Small Business Regulatory Enforcement Fairness Act of 1996**

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

**Executive Order 12866**

The Department of Homeland Security has determined that this rule is a “significant regulatory action” under Executive Order 12866, section 3(f), Regulatory Planning and Review, and, accordingly, this rule has been submitted to the Office of Management and Budget for review. In particular, the Department has assessed both the costs and benefits of this rule as required by Executive Order 12866, section 1(b)(6) and has made a reasoned determination that the benefits of this rule justify its costs.

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

The cost to asylum seekers who, under the rule, will be returned to Canada in adjudicating an asylum claim in Canada, as opposed to the United States. There is no fee to apply for asylum in Canada and, under Canadian law, asylum seekers are provided social benefits that they are not eligible for in the United States, including access to medical coverage, adult public education, and public benefits. Therefore, the tangible costs of seeking asylum in Canada are no greater than they are in the United States. The “intangible” costs to asylum seekers who would be returned to Canada under the proposed rule are the costs of potential separation from support networks they may be seeking to join in the United States. However, the Agreement contains broad exceptions based on principles of family unity that would generally allow those with family connections in the United States to seek asylum in the United States under existing regulations governing the credible fear process.

The Executive Order 12866 cost analysis features the costs which apply to those instances where an alien requests protection from the United States government under one of two scenarios: when arriving at a port-of-entry on the United States-Canada land border; or, when transiting through the United States as part of the Canadian government’s effort to remove the alien to a third country. In either scenario, the rule provides asylum officers with authority to make basic, threshold screening determinations about how the Agreement applies to the alien.

Although additional costs may be incurred as part of the Safe Third Country Agreement between the United States and Canada, the costs discussed in the Executive Order 12866 are limited to those costs arising under the two scenarios outlined in the rule and not the cost impact of the overall Agreement between the two countries. The Agreement provides for a threshold determination to be made concerning which country will assume responsibility for processing claims of asylum seekers. This rule only clarifies the threshold screening determination for a United States asylum officer when determining whether an alien should be returned to Canada. It is unclear how many individuals will seek asylum in the United States from Canada. Similarly, the Agreement permits Canada to return to the United States certain asylum seekers attempting to enter Canada from the United States at a land border port-of-entry. The Department does not know how many asylum seekers Canada will return to the United States. As discussed in the proposed rule and above, individuals returned from Canada to the United States will be in the same position as they would be in had they not sought entry in Canada. This analysis is beyond the purview of the rule. However, the Department will continue to monitor the costs associated with handling asylum seekers at land border ports-of-entry.

The Department recognizes that there have been pre-existing periodic costs associated with the departure of aliens from the United States to Canada for purposes of seeking asylum, particularly during the period when the National Security Entry-Exit Registration System (NSEERS) was operating. These costs arose when, during a period of increased attempted migration to Canada from the United States, the Government of Canada decided not to admit asylum seekers until they could be scheduled for interview appointments. The Department recognizes that many of these costs were directly borne by aliens, State and local agencies, and nonprofit organizations. While costs similar incurred in the past may be borne by aliens attempting to enter Canada before the
Agreement becomes effective, they are not affected by the terms of this rule. However, the Department will continue to monitor the costs associated with handling asylum seekers at land border ports-of-entry.

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

Executive Order 13132

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

Executive Order 12988 Civil Justice Reform

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

Paperwork Reduction Act

The regulations at 8 CFR 208.30 require that an asylum officer conduct a threshold screening interview to determine whether an alien is ineligible to apply for asylum pursuant to section 208(a)(2)(A) of the Act (8 U.S.C. 1158(a)(2)(A)). The threshold screening interview is considered an information collection under the Paperwork Reduction Act (PRA) of 1995. On March 8, 2004, the Department of Homeland and Security, published a proposed rule in the Federal Register to provide USCIS asylum officers’ authority to make threshold determinations concerning applicability 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. In the Supplementary Information in the proposed rule under the heading “Paperwork Reduction Act” the USCIS published a 60 day notice encouraging the public to submit comments specifically to the information collection requirements contained in 8 CFR 208.30. The USCIS did not receive any comments on the information collection requirements. Accordingly, the USCIS has submitted an information collection package to OMB in accordance with the PRA and OMB has approved this information collection.

Family Assessment Statement

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

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

List of Subjects

8 CFR Part 208

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

8 CFR Part 212

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

8 CFR Part 235

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

Amendments to the Regulations

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

PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

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


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

§ 208.4 Filing the application.

(a) * * * * *

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

3. Section 208.30 is amended by:

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

The additions and revisions read as follows:

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

(e) * * *

(2) An alien will be found to have a credible fear of persecution if there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, the alien can establish eligibility for asylum under section 208 of the Act or for withholding of removal under section 241(b)(3) of the Act.

(3) An alien will be found to have a credible fear of torture if the alien shows that there is a significant possibility that he or she is eligible for withholding of removal or deferral of removal under the Convention Against Torture, pursuant to 8 CFR 208.16 or 208.17.

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

(5) Except as provided in paragraph (e)(6) of this section, if an alien is able to establish a credible fear of persecution or torture but appears to be subject to one or more of the mandatory bars to applying for, or being granted, asylum contained in section 208(a)(2) and 208(b)(2) of the Act, or to withholding of removal contained in section 241(b)(3)(B) of the Act, the Department of Homeland Security shall nonetheless place the alien in proceedings under section 240 of the Act for full consideration of the alien’s claim, if the alien is not a stowaway. If the alien is a stowaway, the Department shall place the alien in proceedings for consideration of the alien’s claim pursuant to 8 CFR 208.2(c)(3).

(6) Prior to any determination concerning whether an alien arriving in the United States at a U.S.-Canada land border port-of-entry or in transit through the U.S. during removal by Canada has a credible fear of persecution or torture, the asylum officer shall conduct a threshold screening interview to determine whether such an alien is ineligible to apply for asylum pursuant to section 208(a)(2)(A) of the Act and subject to removal to Canada by operation of the Agreement Between the Government of the United States and the Government of Canada For Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries (“Agreement”). In conducting this threshold screening interview, the asylum officer shall apply all relevant interview procedures outlined in paragraph (d) of this section, provided, however, that paragraph (d)(2) of this section shall not apply to aliens described in this paragraph. The asylum officer shall advise the alien of the Agreement’s exceptions and question the alien as to applicability of any of these exceptions to the alien’s case.

(i) If the asylum officer, with concurrence from a supervisory asylum officer, determines that an alien does not qualify for an exception under the Agreement during this threshold screening interview, the alien is ineligible to apply for asylum in the United States. After 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 Canada in order to pursue his or her claims relating to a fear of persecution or torture under Canadian law. Aliens found ineligible to apply for asylum under this paragraph shall be removed to Canada.

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

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

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

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

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

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

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

(F) The Director of USCIS, or the Director’s designee, determines, in the exercise of unreviewable discretion, that it is in the public interest to allow the alien to pursue a claim for asylum, withholding of removal, or protection under the Convention Against Torture, in the United States.

(iv) As used in 8 CFR 208.30(e)(6)(iii)(B), (C) and (D) only, “legal guardian” means a person currently residing with legal custody of such an alien or vested with legal authority to act on the alien’s behalf, provided that such an alien is both unmarried and less than 18 years of age, and provided further that any dispute with respect to whether an individual is a legal guardian will be resolved on the basis of U.S. law.

(g) * * *

(2) * * *

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

* * * * *

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

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

Authority: 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1187, 1223, 1225, 1226, 1227.

5. Section 212.5 is amended by adding a new paragraph (e)(2)(iii) to read as follows:
§ 212.5 Parole of aliens into the United States.

* * * * *

(e) * * *

(ii) Any alien granted parole into the United States so that he or she may transit through the United States during removal by the Canadian government who express a fear of persecution or torture. Subject to several specific exceptions, the Agreement provides for the United States to return such arriving aliens to Canada, the country of last presence, to seek protection under Canadian law, rather than applying in the United States for the protective claims of asylum, withholding of removal, or protection under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("Convention Against Torture" or "CAT"). Therefore, aliens covered by the Agreement will be allowed to seek asylum and related protections in one country or the other, but not in both.

The Agreement specifically recognizes that Canada offers a generous system of refugee protection, and has a tradition of assisting refugees and displaced persons abroad. The Agreement also ensures that asylum seekers returned to Canada will have access to a full and fair procedure for determining their protection claims before they can be removed to a third country.

As implemented in the United States, the Agreement will operate as follows. First, a United States Citizenship and Immigration Services ("USCIS") asylum officer will conduct a threshold screening interview in the context of expedited removal proceedings. The DHS final rule, published elsewhere in this Federal Register, the role of the Executive Office of Immigration Review ("EOIR") is limited to an evaluation of how the Agreement applies to aliens whom DHS has chosen to place in removal proceedings.

DATES: This rule is effective December 29, 2004.

FOR FURTHER INFORMATION CONTACT: Mary Beth Keller, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041, telephone (703) 305-0470.

SUPPLEMENTAL INFORMATION:

Introduction

On March 8, 2004, the Department of Justice ("Department") and DHS promulgated proposed rules implementing the Agreement. See 69 FR 10627 (March 8, 2004). This final rule adopts the Department's proposed rule without significant change. The proposed rule described procedures implementing the Agreement in removal proceedings under section 240 of the Immigration and Nationality Act ("Act").

The Agreement covers certain aliens who are arriving at U.S.-Canada land border ports-of-entry or arriving in

DEPARTMENT OF JUSTICE

8 CFR Parts 1003, 1208, 1212, 1235, and 1240

[EOIR No. 142F; AG Order No. 2740–2004]

RIN 1125-AA46

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

AGENCY: Executive Office for Immigration Review, Justice.

ACTION: Final rule.

SUMMARY: This rule adopts without substantial change the proposed rule to implement the December 5, 2002, 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 ("bilateral Agreement with Canada" or "Agreement"). The Agreement bars certain aliens who are arriving from Canada, or in transit during removal from Canada, from applying for asylum and related protections in the United States. In the context of expedited removal proceedings, the Department of Homeland Security ("DHS") will conduct a threshold screening interview to determine whether the Agreement applies to an alien. The DHS final rule is published elsewhere in this Federal Register. The role of the Executive Office of Immigration Review ("EOIR") is limited to an evaluation of how the Agreement applies to aliens whom DHS has chosen to place in removal proceedings.

DATES: This rule is effective December 29, 2004.

FOR FURTHER INFORMATION CONTACT: Mary Beth Keller, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041, telephone (703) 305-0470.

SUPPLEMENTAL INFORMATION:

Introduction

On March 8, 2004, the Department of Justice ("Department") and DHS promulgated proposed rules implementing the Agreement. See 69 FR 10627 (March 8, 2004). This final rule adopts the Department's proposed rule without significant change. The proposed rule described procedures implementing the Agreement in removal proceedings under section 240 of the Immigration and Nationality Act ("Act").

The Agreement covers certain aliens who are arriving at U.S.-Canada land border ports-of-entry or arriving in transit through the U.S. during removal by the Canadian government who express a fear of persecution or torture. Subject to several specific exceptions, the Agreement provides for the United States to return such arriving aliens to Canada, the country of last presence, to seek protection under Canadian law, rather than applying in the United States for the protective claims of asylum, withholding of removal, or protection under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("Convention Against Torture" or "CAT"). Therefore, aliens covered by the Agreement will be allowed to seek asylum and related protections in one country or the other, but not in both.

The Agreement specifically recognizes that Canada offers a generous system of refugee protection, and has a tradition of assisting refugees and displaced persons abroad. The Agreement also ensures that asylum seekers returned to Canada will have access to a full and fair procedure for determining their protection claims before they can be removed to a third country.

As implemented in the United States, the Agreement will operate as follows. First, a United States Citizenship and Immigration Services ("USCIS") asylum officer will conduct a threshold screening interview in the context of expedited removal proceedings. The DHS final rule, published elsewhere in this edition of the Federal Register, and the DHS proposed rule, published at 69 FR 10620 (March 8, 2004), address this process in more detail. To summarize, the asylum officer will conduct a threshold screening interview to determine whether an arriving alien who is subject to the Agreement meets any of its exceptions, or whether the alien should be returned to Canada for consideration of his or her protection claims in that country.

If the asylum officer determines that the alien qualifies for an exception to the Agreement, the asylum officer will then proceed immediately to a consideration of whether the alien has a credible fear of persecution or torture if returned to his or her country. The existing credible fear process of section 235(b) of the Act will apply to those aliens, including the potential for review by an immigration judge.

On the other hand, if the asylum officer determines that an arriving alien does not meet an exception to the Agreement and should be returned to Canada for consideration of his or her asylum or other protection claims under Canadian law, the asylum officer's