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**DEPARTMENT OF HOMELAND SECURITY**

**8 CFR Part 208**

**RIN 1615-AC57**

**[Docket No: USCIS 2020-0013]**

**DEPARTMENT OF JUSTICE**

**Executive Office for Immigration Review**

**8 CFR Part 1208**

**[A.G. Order No. 4747-2020]**

**RIN 1125-AB08**

**Security Bars and Processing**

**AGENCY:** U.S. Citizenship and Immigration Services, Department of Homeland Security (“DHS”); Executive Office for Immigration Review, Department of Justice (“DOJ”).

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This proposed rule would amend existing DHS and DOJ (collectively, “the Departments”) regulations to clarify that the Departments may consider emergency public health concerns based on communicable disease due to potential international threats from the spread of pandemics when making a determination as to whether “there are reasonable grounds for regarding [an] alien as a danger to the security of the United States” and, thus, ineligible to be granted asylum or the protection of withholding of removal in the United States under Immigration and Nationality Act (“INA”) sections 208 and 241 and DHS and DOJ regulations. The proposed rule also would provide that this application of the statutory bars to eligibility for asylum and withholding of removal will be effectuated at the credible fear screening stage for

aliens in expedited removal proceedings in order to streamline the protection review process and minimize the spread and possible introduction into the United States of communicable and widespread disease. The proposed rule further would allow DHS to exercise its prosecutorial discretion regarding how to process individuals subject to expedited removal who are determined to be ineligible for asylum in the United States on certain grounds, including being reasonably regarded as a danger to the security of the United States. Finally, the proposed rule would modify the process for evaluating the eligibility of aliens for deferral of removal who are ineligible for withholding of removal as presenting a danger to the security of the United States.

**DATES:** Comments must be submitted on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**ADDRESSES:** You may submit comments, identified by Docket Number USCIS 2020-0013 through the *Federal eRulemaking Portal*: <http://www.regulations.gov>. If you cannot submit your material using <http://www.regulations.gov>, contact the person in the FOR FURTHER INFORMATION CONTACT section of this document for alternate instructions.

**FOR FURTHER INFORMATION CONTACT:** FOR USCIS: Andrew Davidson, Asylum Division Chief, Refugee, Asylum and International Affairs Directorate, U.S. Citizenship and Immigration Services, DHS; telephone 202-272-8377 (not a toll-free call).

For EOIR: Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, telephone (703) 305-0289 (not a toll-free call).

**SUPPLEMENTARY INFORMATION:**

**I. Public Participation**

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this rule. The Departments also invite comments

that relate to the potential economic or federalism effects of this rule. To provide the most assistance to the Departments, comments should reference a specific portion of the rule; explain the reason for any recommended change; and include data, information, or authority that supports the recommended change. Comments received will be considered and addressed in the process of drafting the final rule.

All comments submitted for this rulemaking should include the agency name and Docket Number USCIS 2020-0013. Please note that all comments received are considered part of the public record and made available for public inspection at <http://www.regulations.gov>. Such information includes personally identifiable information (such as a person's name, address, or any other data that might personally identify that individual) that the commenter voluntarily submits.

## **II. Executive Summary**

The Departments seek to mitigate the risk of a deadly communicable disease being brought to the United States, or being further spread within the country. Thus, the Departments propose making four fundamental and necessary reforms to the Nation's immigration system: (1) clarifying that the "danger to the security of the United States" bars to eligibility for asylum and withholding of removal apply in the context of public health emergencies related to the possible threat of introduction or further spread of international pandemics into the United States; (2) making these bars applicable in "credible fear" screenings in the expedited removal process so that aliens subject to the bars can be expeditiously removed; (3) streamlining screening for deferral of removal eligibility in the expedited removal process to similarly allow for the expeditious removal of aliens ineligible for deferral; and (4) as to aliens determined to be ineligible for asylum and withholding of removal as dangers to the security of the United States

during credible fear screenings but who nevertheless affirmatively establish that torture in the prospective country of removal is more likely than not, restoring DHS’s discretion to either place the aliens into removal proceedings under section 240 of the INA (“240 proceedings”), 8 U.S.C. 1229a, or remove them to third countries where they would not face persecution or torture—to allow for the expeditious removal of aliens whose entry during a serious public health emergency would represent a danger to the security of the United States on public health grounds.

The amendments made by this proposed rule would apply to aliens who enter the United States after the effective date, except that the amendments would not apply to aliens who had before the date of the applicable designation (1) affirmatively filed asylum and withholding applications, or (2) indicated a fear of return in expedited removal proceedings.

### **III. Background**

#### **A. Pandemics**

The Centers for Disease Control and Prevention (“CDC”) has stated that: “A pandemic is a global outbreak of disease. Pandemics happen when a new virus emerges to infect people and can spread between people sustainably. Because there is little to no pre-existing immunity against the new virus, it spreads worldwide.”<sup>1</sup> Of the twentieth century’s three pandemics involving influenza, the 1918 pandemic killed up to 50 million persons around the world and up to 675,000 in the United States; the 1957 pandemic killed approximately 2 million and 70,000, respectively; and the 1968 pandemic killed approximately 1 million and 34,000, respectively.<sup>2</sup>

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<sup>1</sup> CDC, *Coronavirus Disease 2019 (COVID-19), Situation Summary* (“*Situation Summary*”) (updated April 19, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html> (last visited May 15, 2020).

<sup>2</sup> Congressional Budget Office (“CBO”), *A Potential Influenza Pandemic: Possible Macroeconomic Effects and Policy Issues* at 6-7 (December 8, 2005, revised July 27, 2006), <https://www.cbo.gov/sites/default/files/109th-congress-2005-2006/reports/12-08-birdflu.pdf>; *see also* Homeland Security Council, White House, *National*

The White House’s Homeland Security Council (“HSC”) projected in 2006 that “a modern pandemic could lead to the deaths of 200,000 to 2 million U.S. citizens”<sup>3</sup> and further explained that:

A pandemic . . . differ[s] from most natural or manmade disasters in nearly every respect. Unlike events that are discretely bounded in space or time, a pandemic will spread across the globe over the course of months or over a year, possibly in waves, and will affect communities of all sizes and compositions. The impact of a severe pandemic may be more comparable to that of a widespread economic crisis than to a hurricane, earthquake, or act of terrorism. It may . . . overwhelm the health and medical infrastructure of cities and have secondary and tertiary impacts on the stability of institutions and the economy. These consequences are impossible to predict before a pandemic emerges because the biological characteristics of the virus and the impact of our interventions cannot be known in advance.<sup>4</sup>

The HSC further warned that:

The economic and societal disruption of [an influenza] . . . pandemic could be significant. Absenteeism across multiple sectors related to personal illness, illness in family members, fear of contagion, or public health measures to limit contact with others could threaten the functioning of critical infrastructure, the movement of goods and services, and operation of institutions such as schools and universities. A pandemic would thus have significant implications for the economy, national security, and the basic functioning of society.<sup>5</sup>

Then-Secretary of Homeland Security Michael Chertoff similarly stated in 2006 that “[a] severe pandemic . . . may affect the lives of millions of Americans, cause significant numbers of illnesses and fatalities, and substantially disrupt our economic and social stability.”<sup>6</sup> In addition, components of the U.S. military have indicated that the global spread of pandemics

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*Strategy for Pandemic Influenza* at 1 (2005), <https://www.cdc.gov/flu/pandemic-resources/pdf/pandemic-influenza-strategy-2005.pdf>.

<sup>3</sup> Homeland Security Council, White House, *National Strategy for Pandemic Influenza: Implementation Plan* at 15 (2006), <https://www.cdc.gov/flu/pandemic-resources/pdf/pandemic-influenza-implementation.pdf>.

<sup>4</sup> *Id.* at 27.

<sup>5</sup> *Id.* at 1.

<sup>6</sup> DHS, *Pandemic Influenza: Preparedness, Response, and Recovery: Guide for Critical Infrastructure and Key Resources*, Introduction at 1 (2006) (Michael Chertoff, Secretary of Homeland Security), <https://www.dhs.gov/sites/default/files/publications/cikrpandemicinfluenzaguide.pdf>.

can impact military readiness, thus posing a direct threat to U.S. national security. *See* Diane DiEuliis & Laura Junor, *Ready or Not: Regaining Military Readiness During COVID19*, Strategic Insights, U.S. Army Europe (Apr. 10, 2020), <https://www.eur.army.mil/COVID-19/COVID19Archive/Article/2145444/ready-or-not-regaining-military-readiness-during-covid19/> (discussing the spread within the military of twentieth-century pandemics and consequences of the spread this year of COVID-19). For example, the military noted that the risk of further spread of COVID-19 this year has led to the cancellation or reduction of various large-scale military exercises and a 60-day stop-movement order. *See id.*

## **B. COVID-19**

Fears regarding the effects of a catastrophic global pandemic have unfortunately been realized in the emergency of COVID-19, a communicable disease caused by a novel (new) coronavirus, SARS-CoV-2, that was first identified as the cause of an outbreak of respiratory illness in Wuhan, Hubei Province, in the People’s Republic of China (“PRC”).<sup>7</sup> COVID-19 spreads easily and sustainably within communities, primarily by person-to-person contact through respiratory droplets; it may also transfer through contact with surfaces or objects contaminated with these droplets when people touch such surfaces and then touch their own mouths, noses, or, possibly, their eyes.<sup>8</sup> There is also evidence of pre-symptomatic and asymptomatic transmission, in which an individual infected with COVID-19 is capable of

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<sup>7</sup> CDC, *Situation Summary* (updated June 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html> (last visited June 22, 2020).

<sup>8</sup> CDC, *Interim Infection Prevention and Control Recommendations for Patients with Suspected or Confirmed Coronavirus Disease 2019 (COVID-19) in Healthcare Settings* (updated May 18, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/infection-control/control-recommendations.html> (last visited June 8, 2020).

spreading the virus to others before, or without ever, exhibiting symptoms.<sup>9</sup> COVID-19's ease of transmission presents a risk of a surge in hospitalizations, which has been identified as a likely contributing factor to COVID-19's high mortality rate in countries such as Italy and the PRC.<sup>10</sup>

Symptoms of COVID-19 include fever, cough, and shortness of breath, and typically appear 2 to 14 days after exposure.<sup>11</sup> Severe manifestations of the disease have included acute pneumonia, acute respiratory distress syndrome, septic shock, and multi-organ failure.<sup>12</sup> As of March 3, 2020, approximately 3.4 percent of COVID-19 cases reported around the world had resulted in death.<sup>13</sup> The mortality rate is higher among older adults and those with compromised immune systems.<sup>14</sup> During the height of the spread of COVID-19 within the United States and internationally, there were significant numbers of deaths and the rates of infection increased rapidly, indicating the critical need to reduce the risk of further spread by limiting and restricting admission and relief to aliens who may be carrying the disease and could pose further risk to the U.S. population. As in many other countries that, during the

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<sup>9</sup> CDC, *Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)* (updated June 2, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html> (last visited June 8, 2020).

<sup>10</sup> Ariana Eunjung Cha, *Spiking U.S. Coronavirus Cases Could Force Rationing Decisions Similar to Those Made in Italy, China*, Wash. Post (Mar. 15, 2020), <https://www.washingtonpost.com/health/2020/03/15/coronavirus-rationing-us/>; see also CDC, *Healthcare Facilities: Preparing for Community*, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-hcf.html> (last visited May 15, 2020).

<sup>11</sup> CDC, *Coronavirus Disease 2019 (COVID-19), Symptoms of Coronavirus*, <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (last visited May 15, 2020).

<sup>12</sup> CDC, *Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)* (updated June 2, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html> (last visited June 8, 2020).

<sup>13</sup> World Health Organization Director-General, *Opening Remarks at the Media Briefing on COVID-19* (Mar. 3, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---3-march-2020>.

<sup>14</sup> CDC, *Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)* (updated June 2, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html> (last visited June 8, 2020).

spread of COVID-19, closed their borders and restrained international travel, pandemic-related risks raise security threats for the United States.<sup>15</sup>

On January 31, 2020, the Secretary of the U.S. Department of Health and Human Services (“HHS”) declared COVID-19 to be a public health emergency under the Public Health Service Act (“PHSA”).<sup>16</sup> On March 13, 2020, the President issued a proclamation declaring a national emergency concerning COVID-19.<sup>17</sup> Likewise, all U.S. States, territories, and the District of Columbia have declared a state of emergency in response to the growing spread of COVID-19.<sup>18</sup>

As of May 2020, the President had suspended the entry of most travelers from the PRC (excluding Hong Kong and Macau), Iran, the Schengen Area of Europe,<sup>19</sup> the United Kingdom, and the Republic of Ireland, due to COVID-19.<sup>20</sup> In mid-March, the CDC issued Level 3 Travel Health Notices recommending that travelers avoid all nonessential travel to the PRC (excluding

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<sup>15</sup> See, e.g., WHO, *Coronavirus disease 2019 (COVID-19) Situation Report – 65* (Mar. 25, 2020), [https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200325-sitrep-65-covid-19.pdf?sfvrsn=2b74edd8\\_2](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200325-sitrep-65-covid-19.pdf?sfvrsn=2b74edd8_2) (confirming 413,467 cases and 18,433 deaths globally as of March 25, 2020 and documenting the growth in the global epidemic curve); CDC, *Coronavirus Disease 2019 (COVID-19): Cases in U.S.*, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (providing the total number of domestic cases every day starting on January 22, 2020 and listing 1,551,095 cases and 93,061 deaths domestically as of May 21, 2020) (last visited May 21, 2020).

<sup>16</sup> Determination of Public Health Emergency, 85 FR 7316 (Feb. 7, 2020).

<sup>17</sup> Proclamation 9994 of Mar. 13, 2020, Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 85 FR 15337 (Mar. 18, 2020).

<sup>18</sup> National Governors Association (“NGA”), *Coronavirus: What You Need to Know*, <https://www.nga.org/coronavirus> (state action tracking chart) (last visited May 21, 2020).

<sup>19</sup> For purposes of this proposed rule, the Schengen Area comprises 26 European states: Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and Switzerland.

<sup>20</sup> Proclamation 9984 of Jan. 31, 2020, Suspension of Entry as Immigrants and Non-Immigrants of Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus and Other Appropriate Measures to Address This Risk, 85 FR 6709 (Feb. 5, 2020); Proclamation 9992 of Feb. 29, 2020, Suspension of Entry as Immigrants and Non-Immigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus, 85 FR 12855 (Mar. 4, 2020); Proclamation 9993 of Mar. 11, 2020, Suspension of Entry as Immigrants and Non-Immigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus, 85 FR 15045 (Mar. 16, 2020); Proclamation 9996 of Mar. 14, 2020, Suspension of Entry as Immigrants and Non-Immigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus, 85 FR 15341 (Mar. 18, 2020).



Hong Kong and Macau), Iran, South Korea, and most of Europe.<sup>21</sup> The U.S. Department of State (“DOS”) then issued a global Level 4 Do Not Travel Advisory advising travelers to avoid all international travel due to the global impact of COVID-19.<sup>22</sup> In two joint statements issued on March 20, 2020, the United States, along with Canada and Mexico, announced a temporary restriction on all non-essential travel across the nations’ shared borders.<sup>23</sup> And during the course of the pandemic, the Federal Government announced guidelines stating that when outside their homes, persons should maintain six feet of distance from others, not gather in groups, stay out of crowded places, and avoid mass gatherings.<sup>24</sup> All but seven states issued stay-at-home orders or similar guidance for various time periods during the pandemic.<sup>25</sup>

### **C. The Threat of COVID-19 and Future Pandemics to the Security of the United States**

On March 20, 2020, the CDC Director exercised his authority under section 362 of the PHSA, 42 U.S.C. 265,<sup>26</sup> to prohibit the introduction of certain persons into the United States

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<sup>21</sup> CDC, *Travelers’ Health, Global COVID – 19 Pandemic Notice, Warning – Level 3, Avoid Nonessential Travel – Widespread Ongoing Transmission* (Mar. 27, 2020), <https://wwwnc.cdc.gov/travel/notices/warning/coronavirus-europe>.

<sup>22</sup> DOS, *Bureau of Consular Affairs, Global Level 4 Health Advisory – Do Not Travel* (Mar. 31, 2020), <https://travel.state.gov/content/travel/en/traveladvisories/ea/travel-advisory-alert-global-level-4-health-advisory-issue.html>.

<sup>23</sup> DHS, *Joint Statement on US-Canada Joint Initiative: Temporary Restriction of Travelers Crossing the US-Canada Land Border for Non-Essential Purposes* (Mar. 20, 2020), <https://www.dhs.gov/news/2020/03/20/joint-statement-us-canada-joint-initiative-temporary-restriction-travelers-crossing> and DHS, *Joint Statement on US-Mexico Joint Initiative to Combat the COVID-19 Pandemic* (Mar. 20, 2020), <https://www.dhs.gov/news/2020/03/20/joint-statement-us-mexico-joint-initiative-combat-covid-19-pandemic>.

<sup>24</sup> CDC, *How to Protect Yourself & Others*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last visited May 21, 2020).

<sup>25</sup> NGA, *Coronavirus: What You Need to Know*, <https://www.nga.org/coronavirus> (state action tracking chart) (last visited May 21, 2020).

<sup>26</sup> The statute assigns this authority to the Surgeon General of the Public Health Service. However, Reorganization Plan No. 3 of 1966 abolished the Office of the Surgeon General and transferred all statutory powers and functions of the Surgeon General and other officers of the Public Health Service and of all agencies of or in the Public Health Service to the Secretary of Health, Education, and Welfare, now the Secretary of Health and Human Services, 31 FR 8855, 80 Stat. 1610 (June 25, 1966); *see also* Public Law 96-88, 509(b), 93 Stat. 695 (codified at 20 U.S.C. 3508(b)). References in the PHSA to the Surgeon General are to be read in light of the transfer of statutory

from Canada and Mexico whose entry at this time, due to the continued existence of COVID-19 in countries or places from which such persons are traveling, would create an increase in the serious danger of the introduction of such disease into and through the United States (“CDC Order”).<sup>27</sup> The Director further requested that DHS aid in the enforcement of the order, which aid DHS is required to provide pursuant to section 365 of the PHSA, 42 U.S.C. 268(b).

According to the CDC Order, Mexico and Canada both had numerous confirmed cases of COVID-19, and the entry of aliens traveling from these countries currently continues to pose a risk of further transmission to the United States, which otherwise has been making progress within its borders to stem the further spread of the pandemic.<sup>28</sup> On March 30, 2020, the Government of Mexico declared a national public health emergency and ordered the suspension of non-essential public activity through April 30, 2020, and the total number of confirmed cases and confirmed deaths in Mexico as of May 21, 2020, exceeded 59,500, and 6,500, respectively.<sup>29</sup> In addition, in early May, the *New York Times* reported that:

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functions and re-designation. Although the Office of the Surgeon General was re-established in 1987, the Secretary of HHS has retained the authorities previously held by the Surgeon General.

<sup>27</sup> See HHS, CDC, Order Suspending Introduction of Persons from a Country Where a Communicable Disease Exists (“CDC Order”), 85 FR 17060 (Mar. 26, 2020) (publishing CDC Order with effective date of March 20, 2020), [https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons\\_Final\\_3-20-20\\_3-p.pdf](https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons_Final_3-20-20_3-p.pdf). The CDC Order stated that:

This order is necessary to protect the public health from an increase in the serious danger of the introduction of . . . COVID-19 . . . into the land POEs, and the Border Patrol stations between POEs, at or near the United States borders with Canada and Mexico. . . . This order is also necessary to protect the public health from an increase in the serious danger of the introduction of COVID-19 into the interior of the country when certain persons are processed through the same land POEs and Border Patrol stations and move into the interior of the United States.

85 FR at 17061.

<sup>28</sup> See HHS, CDC, Extension of Order Under Sections 362 and 365 of the Public Health Service Act; Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 FR 22424, 22425-26 (Apr. 22, 2020).

<sup>29</sup> See Daniel Borunda, *Coronavirus: Mexico Declares National Public Health Emergency, Bans Nonessential Activity*, El Paso Times (Mar. 31, 2020), <https://www.elpasotimes.com/story/news/health/2020/03/31/coronavirus-pandemic-mexico-declares-national-public-health-emergency/5093905002/>; Subsecretaría de Prevención y Promoción de la Salud, Secretaría de Salud, Gobierno de México, *Comunicado Técnico Diario COVID-19 MÉXICO* (reporting that there were 59,567 confirmed cases and 6,510 confirmed deaths in Mexico as of May 21,

Mexico City officials have tabulated more than 2,500 deaths from the virus and from serious respiratory illnesses that doctors suspect were related to Covid-19 . . . . Yet the federal government is reporting about 700 in the area . . . .

[E]xperts say Mexico has only a minimal sense of the real scale of the epidemic because it is testing so few people.

Far fewer than one in 1,000 people in Mexico are tested for the virus — by far the lowest of the dozens of nations in the Organization for Economic Cooperation and Development, which average about 23 tests for every 1,000 people.

More worrisome, they say, are the many deaths absent from the data altogether, as suggested by the figures from Mexico City, where the virus has struck hardest of all. Some people die from acute respiratory illness and are cremated without ever getting tested, officials say. Others are dying at home without being admitted to a hospital—and are not even counted under Mexico City’s statistics.<sup>30</sup>

The existence of COVID-19 in Mexico presents a serious danger of the further introduction of COVID-19 into the United States due to the high level of migration across the United States border with Mexico. The danger posed by cross-border COVID-19 transmission is not only from Mexican nationals, but also from non-Mexicans seeking to cross the U.S.-Mexico border at ports-of-entry (“POEs”) and those seeking to enter the United States illegally between POEs. The CDC Order notes that “[m]edical experts believe that . . . spread of COVID-19 at asylum camps and shelters along the U.S. border is inevitable.”<sup>31</sup> Of the approximately 34,000 inadmissible aliens that DHS has processed to date in Fiscal Year 2020 at

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2020) <https://www.gob.mx/salud/documentos/coronavirus-covid-19-comunicado-tecnico-diario-238449> (updates posted regularly, last visited May 21, 2020).

<sup>30</sup> Azam Ahmed, *Hidden Toll: Mexico Ignores Wave of Coronavirus Deaths in Capital*, New York Times (May 8, 2020), <https://www.nytimes.com/2020/05/08/world/americas/mexico-coronavirus-count.html?smid=em-share> (reporting that, according to a *Times* analysis, more than three times as many people may have died from COVID-19 in Mexico City than the country’s federal statistics show).

<sup>31</sup> CDC Order, 85 FR at 17064; *see also* Rick Jervis, *Migrants Waiting at U.S.-Mexico Border at Risk of Coronavirus, Health Experts Warn*, USA Today (Mar. 17, 2020), <https://www.usatoday.com/story/news/nation/2020/03/17/us-border-could-hit-hard-coronavirus-migrants-wait-mexico/5062446002/>; Rafael Carranza, *New World’s Largest Border Crossing, Tijuana Shelters Eye the New Coronavirus with Worry*, Arizona Republic (Mar. 14, 2020), <https://www.azcentral.com/story/news/politics/immigration/2020/03/14/tijuana-migrant-shelters-coronavirus-covid-19/5038134002/>.

POEs along the U.S.-Mexico border and the approximately 117,000 aliens that the United States Border Patrol (“USBP”) has apprehended attempting to unlawfully enter the United States between the POEs, almost 110,000 are Mexican nationals and more than 15,000 are nationals of other countries who are now experiencing sustained human-to-human transmission of COVID-19, including approximately 1,500 Chinese nationals.<sup>32</sup>

As set forth in the CDC Order, community transmission is occurring throughout Canada, and the number of cases in the country continues to increase.<sup>33</sup> Through February of FY 2020, DHS processed 20,166 inadmissible aliens at POEs at the U.S.-Canadian border, and USBP apprehended 1,185 inadmissible aliens attempting to unlawfully enter the United States between POEs.<sup>34</sup> These aliens included not only Canadian nationals but also 1,062 Iranian nationals, 1,396 Chinese nationals, and 1,326 nationals of Schengen Area countries.<sup>35</sup>

### **1. Danger to Border Security and Law Enforcement Personnel**

Because of the continued prevalence of COVID-19 in both Mexico and Canada, the CDC has determined that the entry of aliens crossing the northern and southern borders into the United States (regardless of their country of origin) would continue to present a serious danger of introducing COVID-19 into POEs and Border Patrol Stations at or near the Mexico and Canada land borders. Transmission of COVID-19 at facilities under the jurisdiction of U.S. Customs and Border Protection (“CBP”) could lead to the infection of aliens in CBP custody, as well as infection of CBP officers, agents, and others who come into contact with such aliens in custody.

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<sup>32</sup> CDC Order, 85 FR at 17060.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

CBP officers and agents come into regular, sustained contact with aliens seeking to enter the United States between POEs, or whose entry is otherwise contrary to law, who have no travel documents or medical history. Aliens arriving from countries suffering the acute circumstances of an international pandemic, whose entry presents the risk of spreading infectious or highly contagious illnesses or diseases of public health significance, pose a significant danger to other aliens in congregate settings and to CBP operations. The longer CBP must hold such aliens for processing prior to expedited removal, the greater the danger to CBP personnel and other aliens in CBP custody.

Although CBP has policies and procedures in place to handle communicable diseases, the unprecedented challenges posed by the COVID-19 pandemic (and similar pandemics in the future) cannot reliably be contained by those policies and procedures, and thus this or another infectious or highly contagious illness or disease could cripple the already-strained capacities at CBP's facilities. Such a pandemic could lead to significant reductions in available personnel, which would lead to severe vulnerabilities and gaps in securing the border. Additionally, an outbreak of a highly communicable disease in a CBP facility could result in CBP being forced to close that facility, which would limit how CBP conducts operations or where CBP can detain aliens whom it apprehends.

As a law enforcement agency, CBP is not equipped to provide medical support to treat infectious or highly contagious illnesses or diseases brought into CBP facilities.<sup>36</sup> Of the 136 CBP facilities along the land and coastal borders, only 46 facilities, all located on the southern land border with Mexico, have contracted medical support on location. Even that contracted medical support is not currently designed to diagnose, treat, and manage certain infectious or

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<sup>36</sup> CDC Order, 85 FR at 17060.

highly contagious illnesses or diseases—particularly novel diseases. Moreover, many CBP facilities, particularly along the southern land border, are located in remote locations distant from hospitals and other medical care and supplies. In short, if an infectious or highly contagious illness or disease were to be transmitted within a CBP facility, CBP operations could face significant disruption.

After spending time in CBP custody, an alien may, depending on the facts and circumstances, be transferred to ICE custody. In some ways, the dangers to ICE operations posed by aliens who are at risk of spreading infectious or highly contagious illnesses or diseases are greater than those posed to CBP operations, due to the longer amount of time aliens spend detained in ICE custody. ICE often detains aliens for time periods ranging from several days to many weeks, including while an alien’s 240 proceeding is pending; the average time an alien spends in ICE custody is approximately 55 days.<sup>37</sup>

The length of an alien’s stay in ICE custody after being transferred to CBP is often tied directly to the time it takes to adjudicate an alien’s immigration claims in 240 proceedings. If an asylum officer determines that an alien placed into expedited removal has not shown that the alien has a credible fear of persecution, the alien may still be determined to have a credible or reasonable fear of persecution or a credible fear of torture after review by an immigration judge (“IJ”), in which case the alien would be placed into 240 proceedings for the adjudication of their claims for relief and protection under the immigration laws, and may remain in ICE custody while those claims are adjudicated. Many of these adjudications require multiple hearings, which lengthen the time an alien may remain in custody and in close contact with ICE

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<sup>37</sup> DHS, *ICE Average Daily Population (ADP) and ICE Average Length of Stay (ALOS) – FY2020 YTD* (May 9, 2020), <https://www.ice.gov/detention-management#tab2> (last visited May 15, 2020).

personnel. Furthermore, once a non-detained alien is placed into 240 proceedings, it can be months or years before their cases are adjudicated, as immigration courts in DOJ's Executive Office for Immigration Review have a backlog of more than 1,000,000 pending cases, at least 517,000 of which include an asylum application.

ICE expends significant resources to ensure the health and welfare of all those detained in its custody.<sup>38</sup> In the case of an infectious disease outbreak, ICE has protocols in place to ensure the health and welfare of the detained population and to halt the spread of disease. But many of these protocols, such as keeping affected detainees in single-cell rooms or cohorts, can impact the availability of detention beds, and thus could impair ICE's ability to operate its facilities at normal capacity.

To protect its personnel, migrants, and the domestic population, DHS must be able to mitigate the harmful effects of any infectious or highly contagious illnesses or diseases. A unique challenge is posed by diseases such as COVID-19 that have a high rate of transmission may require intensive hospital treatment, are not currently preventable through a vaccine, and are prevalent in countries from which aliens seeking to enter the United States between POEs or otherwise contrary to law. The dangers of such diseases are exacerbated if the Government must provide lengthy process and review to aliens arriving from countries where COVID-19 remains prevalent, as their entry would bring them into sustained contact with DHS personnel and other aliens in DHS facilities.

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<sup>38</sup> ICE's estimated average adult bed cost per day for detention is \$124.13 for fiscal year 2020. *See* DHS, *U.S. Immigration and Customs Enforcement, Budget Overview – Fiscal Year 2021 Congressional Justification* at 7, [https://www.dhs.gov/sites/default/files/publications/u.s.\\_immigration\\_and\\_customs\\_enforcement.pdf](https://www.dhs.gov/sites/default/files/publications/u.s._immigration_and_customs_enforcement.pdf) (last visited June 8, 2020).

If aliens seeking to enter the United States without proper travel documents or who are otherwise subject to travel restrictions arrive at land POEs, or between the POEs, and become infected with COVID-19 while in DHS custody, they would need to be transported to medical providers for treatment, and many of these providers are in states with some of the lowest numbers of hospital beds per 1,000 inhabitants in the United States.<sup>39</sup> Unless an alien is returned to Mexico during the pendency of his or her proceedings pursuant to the Migrant Protection Protocols, *see* INA 235(b)(2)(C), 8 U.S.C. 1225(b)(2)(C), many, if not most, of these aliens are released into American communities.

Finally, aliens who are at risk of spreading infectious or highly contagious illnesses or diseases, and who therefore pose a danger to DHS personnel and operations, also pose a danger to the safety and health of other persons in the United States. As the CDC Order concludes:

[T]here is a serious danger of the introduction of COVID-19 into the POEs and Border Patrol stations at or nearby the United States borders with Canada and Mexico, and the interior of the country as a whole . . . . The faster a covered alien is returned . . . the lower the risk the alien poses of introducing, transmitting, or spreading COVID-19 into POEs, Border Patrol stations, other congregate settings, and the interior.<sup>40</sup>

## **2. The Potential Economic Devastation of a Pandemic**

Pandemics also threaten the United States economy. DHS reported in 2006 that “[c]onsumer and business spending fuel[s] the nation’s economic engine. Regardless of the available liquidity and supporting financial processes, a dramatic and extended reduction in spending and the corresponding cascading effects in the private sector [caused by a pandemic]

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<sup>39</sup> Arizona has 1.9 hospital beds per 1,000 inhabitants; California has 1.8; New Mexico has 1.8, and Texas has 2.3. Kaiser Family Found., *State Health Facts: Hospitals Per 1,000 Population by Ownership Type* (2018), <https://www.kff.org/other/state-indicator/beds-by-ownership/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Total%22,%22sort%22:%22asc%22%7D>. By contrast, the states with the highest number of hospital beds per 1,000 inhabitants have nearly double, or more than double, the number of beds per 1,000 inhabitants—such as South Dakota, at 4.8; North Dakota, at 4.3; and Mississippi, at 4.0. *Id.*

<sup>40</sup> CDC Order, 85 FR at 17067.



may cause an unprecedented national economic disruption.”<sup>41</sup> The Congressional Budget Office (“CBO”) was more measured, finding that if the country were to experience a severe pandemic similar to the 1918-1919 Spanish flu, “real [gross domestic product] would be about 4-1/4 percent lower over the subsequent year than it would have been had the pandemic not taken place. . . . comparable to the effect of a typical business-cycle recession in the United States . . . since World War II.”<sup>42</sup> However, the CBO did note that:

[S]ome [factors] might suggest a worse outbreak than the one that occurred in 1918. The world is now more densely populated, and a larger proportion of the population is elderly or has compromised immune systems (as a result of HIV). Moreover, there are interconnections among countries and continents— faster air travel and just-in-time inventory systems, for example—that suggest faster spread of the disease and greater disruption if a pandemic was to occur.<sup>43</sup>

As of mid-spring 2020, the economic impact of the COVID-19 pandemic was predicted to be more akin to the impact feared by Secretary Chertoff than the impact predicted by the CBO. The International Monetary Fund (“IMF”) predicted in April 2020 that “[t]he output loss associated with [the COVID-19] health emergency and related containment measures likely dwarfs the losses that triggered the global financial crisis. . . . It is very likely that this year the global economy will experience its worst recession since the Great Depression, surpassing that seen during the global financial crisis a decade ago.”<sup>44</sup>

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<sup>41</sup> DHS, *Pandemic Influenza: Preparedness, Response, and Recovery: Guide for Critical Infrastructure and Key Resources*, at 25 (2006), <https://www.dhs.gov/sites/default/files/publications/cikrpandemicinfluenzaguide.pdf>.

<sup>42</sup> CBO, *A Potential Influenza Pandemic: Possible Macroeconomic Effects and Policy Issues* at 1-2 (December 8, 2005, revised July 27, 2006), <https://www.cbo.gov/sites/default/files/109th-congress-2005-2006/reports/12-08-birdflu.pdf>.

<sup>43</sup> *Id.* at 9.

<sup>44</sup> IMF, *World Economic Outlook: Chapter 1: The Great Lockdown* at v (April 2020) (Foreword by Gita Gopinath), available at <https://www.imf.org/en/Publications/WEO/Issues/2020/04/14/weo-april-2020>.

The IMF further predicted that the United States economy is likely to contract by 5.9 percent in 2020.<sup>45</sup> While projecting a partial recovery in 2021 (with advanced economies forecast to grow at 4.5 percent), it warned that there is “considerable uncertainty about the strength of the rebound. Much worse growth outcomes are possible and maybe even likely. This would follow if the pandemic and containment measures last longer . . . , tight financial conditions persist, or if widespread scarring effects emerge due to firm closures and extended unemployment.”<sup>46</sup>

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<sup>45</sup> *Id.* at x (Executive Summary), Table 1.1. The IMF notes that “[i]n normal crises, policymakers try to encourage economic activity by stimulating aggregate demand as quickly as possible. This time, the crisis is to a large extent the consequence of needed containment measures. This makes stimulating activity more challenging and, at least for the most affected sectors, undesirable.” *Id.* at v (Foreword by Gita Gopinath).

<sup>46</sup> *Id.* The IMF report goes on to find that:

The rebound in 2021 depends critically on the pandemic fading in the second half of 2020, allowing containment efforts to be gradually scaled back and restoring consumer and investor confidence. . . . The projected recovery assumes that . . . policy [responses] are effective in preventing widespread firm bankruptcies, extended job losses, and system-wide financial strains.

. . . .  
. . . .

[R]isks to the outlook are on the downside. The pandemic could prove more persistent than assumed . . . . Of course, if a therapy or a vaccine is found earlier than expected . . . the rebound may occur faster than anticipated.

. . . . Strong containment efforts in place to slow the spread of the virus may need to remain in force for longer than the first half of the year . . . . Once containment efforts are lifted and people start moving about more freely, the virus could again spread rapidly from residual localized clusters. [P]laces that successfully bring down domestic community spread could be vulnerable to renewed infections from imported cases. In such instances, public health measures will need to be ramped up again, leading to a longer downturn . . . .

The recovery of the global economy could be weaker than expected after the spread of the virus has slowed for a host of other reasons. These include lingering uncertainty about contagion, confidence failing to improve, and establishment closures and structural shifts in firm and household behavior, leading to more lasting supply chain disruptions and weakness in aggregate demand. Scars left by reduced investment and bankruptcies may run more extensively through the economy . . . as occurred, for example, in previous deep downturns . . . . Depending on the duration, global business confidence could be severely affected, leading to weaker investment and growth than projected . . . .

The United States Congress, on a bipartisan basis, has shared these concerns. Senate Majority Leader Mitch McConnell stated regarding the COVID-19 pandemic and the need for economic relief legislation on the scale of more than a trillion dollars, that:

Combating this disease has forced our country to put huge parts of our national life on pause[,] triggered layoffs at a breathtaking pace[ and] has forced our Nation onto something like a wartime footing. . . . We ha[ve] to get direct . . . financial assistance to the American people. We ha[ve] to get historic aid to small businesses to keep paychecks flowing, stabilize key industries to prevent mass layoffs, and, of course, flood more resources into the frontline healthcare battle itself. . . . No economic policy could fully end the hardship so long as the public health requires that we put so much of our Nation’s commerce on ice. This is . . . . emergency relief.<sup>47</sup>

Similarly, discussing the same emergency relief legislation, Senate Minority Leader Charles Schumer stated that:

Our workers are without work. Our businesses cannot do business. Our factories lie idle. The gears of the American economy have ground to a halt. . . . It will be worth it to save millions of small businesses and tens of millions of jobs. It will be worth it to see that Americans who have lost their jobs through no fault of their own will be able to pay their rent and mortgages and put food on the table . . . . It will be worth it to save industries from the brink of collapse in order to save the jobs of hundreds of thousands of Americans in those industries.<sup>48</sup>

## **D. Current Law**

### **1. Eligibility for Asylum, Statutory Withholding of Removal, and Protection Under the Convention Against Torture Regulations**

Asylum is a form of discretionary relief that, generally, keeps an alien from being subject to removal and creates a path to lawful permanent resident status and U.S. citizenship.

*See* INA 208, 209(b), 8 U.S.C. 1158, 1159(b); 8 CFR 209.2. In order to apply for asylum, an

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*Id.*, Chapter 1, at 5-9 (citations omitted), available at <https://www.imf.org/en/Publications/WEO/Issues/2020/04/14/weo-april-2020>.

<sup>47</sup> 166 Cong. Rec. S2021-22 (Mar. 25, 2020).

<sup>48</sup> 166 Cong. Rec. S2059 (March 25, 2020).

applicant must be “physically present” or “arriv[ing]” in the United States, INA 208(a)(1), 8 U.S.C. 1158(a)(1). To obtain asylum, the alien must demonstrate that he or she meets the definition of a “refugee.” INA 101(a)(42)(A), 208(b)(1)(A), 8 U.S.C. 1101(a)(42)(A), 1158(b)(1)(A). The alien must also not be subject to a bar to applying for asylum or to eligibility for asylum. *See* INA 208(a)(2), (b)(2), 8 U.S.C. 1158(a)(2), (b)(2).

Aliens who are not eligible to apply for or receive a grant of asylum, or who are denied asylum in an exercise of discretion, may nonetheless qualify for protection from removal under other provisions of the immigration laws. Under statutory withholding of removal, the Secretary may not, subject to certain exceptions, remove an alien to a country if he or the “Attorney General decide[] that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.” INA 241(b)(3)(A), 8 U.S.C. 1231(b)(3)(A); *see also* 8 CFR 208.16 and 1208.16(b)(2).

Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) provides that “[n]o State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>49</sup> While the United States is a signatory to the CAT, the treaty is not self-executing, *see Khan v. Holder*, 584 F.3d 773, 783 (9th Cir. 2009); *Auguste v. Ridge*, 395 F.3d 123, 132 (3d Cir. 2005). However, the regulations authorized by the legislation implementing CAT, the Foreign Affairs Reform and Restructuring Act (“FARRA”), Pub. L. 105-277, div. G, subdiv. B, title XXII, sec. 2242(b),

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<sup>49</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3(1), December 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 84.

112 Stat. 2681-822 (1998), codified at U.S.C. 1231 note, provide that an alien who establishes that he or she will more likely than not face torture in the proposed country of removal qualifies for protection. *See* 8 CFR 208.16(c), 208.17, 1208.16(c), 1208.17 (“CAT regulations”).

Unlike asylum, statutory withholding of removal and protection under the CAT regulations provide protection from removal only when an alien has established that persecution or torture, respectively, is more likely than not to occur if removed to that particular country. Aliens can be removed to other countries as provided in INA 241(b), 8 U.S.C. 1231(b). As DOJ stated in the final rule implementing the U.S.-Canada Safe Third Country Agreement:

[I]t is essential to keep in mind that, in order to be entitled to [statutory withholding of removal or protection under the CAT regulations], an alien must demonstrate that it is more likely than not that he or she would be persecuted, or tortured, in the particular removal country. That is, withholding or deferral of removal relates only to the country as to which the alien has established a likelihood of persecution or torture—the alien may nonetheless be returned, consistent with CAT and section 241(b)(1) and (b)(2) of the Act [INA], to other countries where he or she would not face a likelihood of persecution or torture.

Asylum Claims Made by Aliens Arriving From Canada at Land Border Ports-of-Entry, 69 FR 69490, 69492 (Nov. 29, 2004).

## **2. Application of Bars to Eligibility for Asylum and Withholding of Removal**

Through the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub. L. 104-208, 110 Stat. 3009, and the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub. L. 104-132, 110 Stat. 1214, Congress adopted six mandatory bars to asylum eligibility, which largely tracked pre-existing asylum regulations. These bars prohibit granting asylum to aliens who (1) “ordered, incited, assisted, or otherwise participated” in the persecution of others on account of a protected ground; (2) were convicted of a “particularly serious crime”; (3) committed a “serious nonpolitical crime outside the United

States” before arriving in the United States; (4) are a “danger to the security of the United States”; (5) are inadmissible or removable under a set of specified grounds relating to terrorist activity; or (6) were “firmly resettled in another country prior to arriving in the United States.” IIRIRA sec. 604(a) (codified at INA 208(b)(2)(A)(i)-(vi), 8 U.S.C. 1158(b)(2)(A)(i)-(vi)).

Congress further provided the Attorney General and the Secretary with the authority to “establish additional limitations and conditions, consistent with [section 208 of the INA], under which an alien shall be ineligible for asylum.” IIRIRA, sec. 604(a) (codified at INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C)). The only statutory limitations are that the additional bars to eligibility must be established “by regulation” and must be “consistent with” the rest of section 208. INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C). As the Tenth Circuit has recognized, “the statute clearly empowers” the Attorney General and the Secretary to “adopt[] further limitations” on asylum eligibility. *R-S-C v. Sessions*, 869 F.3d 1176, 1187 n.9 (10th Cir. 2017).

As to statutory withholding of removal, the INA provides that an alien is ineligible who is deportable for participation in Nazi persecution, genocide, or the commission of an act of torture or extrajudicial killing, or who the Secretary or the Attorney General has decided (1) ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual’s race, religion, nationality, membership in a particular social group, or political opinion, (2) has been convicted by a final judgment of a particularly serious crime and is therefore a danger to the community of the United States, (3) there are serious reasons to believe has committed a serious nonpolitical crime outside the United States before arriving in the United States, or (4) there are reasonable grounds to believe is a danger to the security of the United States. *See* INA 241(b)(3)(B), 8 U.S.C. 1231(b)(3)(B).

In FARRA, Congress directed that the CAT regulations exclude from their protection those aliens subject to the withholding of removal eligibility bars “[t]o the maximum extent consistent with the obligations of the United States under the Convention” subject to reservations provided by the U.S. Senate in its ratification resolution. *See* FARRA sec. 2242(c), 8 U.S.C. 1231 note (c). Thus, an alien determined to be ineligible for statutory withholding of removal is also ineligible for withholding of removal under the CAT regulations. *See* 8 CFR 208.16(d)(2), 1208.16(d)(2). However, such an alien, if ordered removed and more likely than not to be tortured in the proposed country of removal, is nonetheless eligible for deferral of removal under the CAT regulations. *See* 8 CFR 208.17, 1208.17.

### **3. Expedited Removal**

In IIRIRA, Congress granted the Federal Government the ability to apply expedited removal procedures to aliens who arrive at a POE or who have entered illegally and are encountered by an immigration officer within parameters established by the Secretary of Homeland Security by designation. *See* INA 235(b), 8 U.S.C. 1225(b); *see also* Designating Aliens For Expedited Removal, 69 FR 48877, 48880 (Aug. 11, 2004). To be subject to expedited removal, an alien must also be inadmissible under section 212(a)(6)(C) or 212(a)(7) of the INA, 8 U.S.C. 1182(a)(6)(C) or 1182(a)(7), meaning that the alien has either tried to procure documentation through misrepresentation or lacks such documentation altogether. Such aliens who are inadmissible under INA 212(a)(6)(C) or 212(a)(7) shall be “removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum . . . or a fear of persecution.” INA 235(b)(1)(A)(i), 8 U.S.C. 1225(b)(1)(A)(i).

If an alien does indicate a fear of persecution, he or she is referred for a credible fear interview by an asylum officer. *See* INA 235(b)(1)(A)(ii), 8 U.S.C. 1225(b)(1)(A)(ii). During that interview, an alien must demonstrate a credible fear, defined as 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, that the alien could establish eligibility for asylum.” INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). If the asylum officer determines that the alien lacks a credible fear, then, following supervisory review, the alien shall be removed from the United States without further review of the negative fear determination absent the alien’s specific request for an IJ’s review. INA 235(b)(1)(B)(iii)(I), (III), (b)(1)(C), 242(a)(2)(A)(iii), (e)(5), 8 U.S.C. 1225(b)(1)(B)(iii)(I), (III), (b)(1)(C), 1252(a)(2)(A)(iii), (e)(5).

If, however, the asylum officer or IJ determines that the alien has a credible fear, then the alien, under current regulations, is placed in 240 proceedings, for a full removal hearing before an IJ. *See* INA 235(b)(1)(B)(ii), (b)(2)(A), 242(a)(1), 8 U.S.C. 1225(b)(1)(B)(ii), (b)(2)(A), 1252(a)(1); 8 CFR 208.30(e)(5), 1003.42, 1208.30(g)(2)(iv)(B).

Under current regulations, the bars to asylum and withholding of removal are generally not applied during the credible fear process, which leads to considerable inefficiencies for the United States Government.<sup>50</sup> Under the current regulations at 8 CFR 208.30(e)(5), aliens who

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<sup>50</sup> One bar to asylum eligibility currently is being applied at the credible fear stage. On July 16, 2019, the Departments issued an interim final rule providing that certain aliens described in 8 CFR 208.13(c)(4) or 1208.13(c)(4) who enter, attempt to enter, or arrive in the United States across the southern land border on or after such date, 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, will be found ineligible for asylum (and, because they are subject to this bar, not be able to establish a credible fear of persecution) unless they qualify for certain exceptions. *See Asylum Eligibility and Procedural Modifications*, 84 FR 33829 (July 16, 2019). On July 24, 2019, the U.S. District Court for the Northern District of California enjoined the Departments “from taking any action continuing to implement the Rule” and ordered the Departments “to return to the pre-Rule practices for processing asylum applications.” *E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 960 (N.D. Cal. 2019). On August 16,



establish a credible fear of persecution or torture, despite appearing to be subject to one or more of the mandatory bars, are nonetheless generally placed in lengthy 240 proceedings.

#### **IV. Discussion of the Proposed Rule**

This proposed rule is designed primarily to implement necessary reforms to our Nation’s immigration system so that the Departments may better respond to the COVID-19 crisis and, importantly, may better respond to, ameliorate, and even forestall future public health emergencies. For similar reasons, HHS recently published an interim final rule to “implement a permanent regulatory structure regarding the potential suspension of introduction of persons into the United States in the event a serious danger of the introduction of communicable disease arises in the future.” *Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into the United States From Designated Foreign Countries or Places for Public Health Purposes*, 85 FR 16559, 16563 (Mar. 24, 2020) (interim final rule with request for comments). As HHS has explained, “[t]he COVID-19 pandemic highlights why CDC needs an efficient regulatory mechanism to suspend the introduction of persons who would otherwise increase the serious danger of the introduction of a communicable disease into the United States. . . .” *Id.* at 16562. HHS has also noted that beyond the COVID-19 pandemic, there is always a risk of another emerging or re-emerging communicable disease that may harm the public in the United States. Such a risk includes pandemic influenza (as opposed to seasonal influenza), which occurs when a novel, or new, influenza strain spreads over a large geographic area and effects an exceptionally high percentage of the population. In such cases, the virus

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2019, the United States Court of Appeals for the Ninth Circuit issued a partial stay of the preliminary injunction so that the injunction remained in force only in the Ninth Circuit. 934 F.3d 1026. On September 9, 2019, the district court then reinstated the nationwide scope of the injunction. 391 F.Supp.3d 974. Two days later, the Supreme Court stayed the district court’s injunction. *See Barr v. East Bay Sanctuary Covenant*, 140 S. Ct. 3 (Mem.) (2019).

strain is new, there usually is no vaccine available, and humans do not typically have immunity to the virus, often resulting in a more severe illness. The severity and unpredictable nature of an influenza pandemic requires public health systems to prepare constantly for the next occurrence. And whenever a new strain of influenza appears, or a major change to a preexisting virus occurs, individuals may have little or no immunity, which can lead to a pandemic. It is difficult to predict the impact that another emerging, or re-emerging communicable disease would have on the United States public health system. Modern pandemics, spread through international travel, can engulf the world in three months or less, can last from 12 to 18 months, and are not considered one-time events. *See generally id.* at 16562-63

The Departments similarly seek to mitigate the risk of another deadly communicable disease being brought to the United States, or being further spread within the country, by the entry of aliens from countries where the disease is prevalent. Thus, the Departments propose making four fundamental and needed reforms to the immigration system: (1) clarifying that the “danger to the security of the United States” bars to eligibility for asylum and withholding of removal apply in the context of public health emergencies, (2) applying these bars in “credible fear” screenings during the expedited removal process so that aliens subject to the bars can be expeditiously removed, (3) streamlining screening for deferral of removal eligibility in the expedited removal process to similarly allow for the expeditious removal of aliens ineligible for deferral, and (4) as to aliens who are determined to be ineligible for asylum and withholding of removal because they are deemed dangers to the security of the United States during credible fear screenings but who nevertheless affirmatively establish that torture in the prospective country of removal would be more likely than not, restoring DHS’s discretion to either place the aliens in 240 proceedings or remove them to third countries where they would not face

persecution or torture—again, to allow for the expeditious removal of aliens who represent a danger to the security of the United States on public health grounds.

**A. The “Danger to the Security of the United States” Bar to Eligibility for Asylum and Withholding of Removal**

Due to the significant dangers to the security of the United States posed by COVID-19 and possible future pandemics, including the economic toll, the Departments are proposing to clarify that they can categorically bar from eligibility for asylum, statutory withholding of removal and withholding of removal under the CAT regulations as dangers to the security of the United States aliens who potentially risk bringing in deadly infectious disease to, or facilitating its spread within, the United States. This bar would reduce the danger to the United States public, the security of our borders, and the national economy, during the current COVID-19 public health emergency,<sup>51</sup> as well as any future health emergencies.

Specifically, this rule would clarify that aliens whose entry poses a significant public health danger to the United States may constitute a “danger to the security of the United States,” and thus be ineligible for asylum or withholding of removal protections in the United States under INA 208 and 241, 8 U.S.C. 1158 and 1231, and 8 CFR 208.16 and 1208.16. Specifically, aliens whose entry would pose a risk of further spreading infectious or highly contagious illnesses or diseases, because of declared public health emergencies in the United States or because of conditions in their country of origin or point of embarkation to the United States, pose a significant danger to the security of the United States.

The entry of these aliens during a public health emergency poses unique risk for two primary reasons. First, the entry of these aliens would present the risk of spreading an

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<sup>51</sup> Determination of Public Health Emergency, 85 FR 7316 (Feb. 7, 2020).

infectious disease to key DHS personnel and facilities, particularly those related to CBP and ICE, and this spread would greatly reduce DHS's ability to accomplish its mission. The spread of an infectious disease into CBP facilities and to CBP personnel could disrupt CBP operations to such an extent that it significantly impacts CBP's critical border functions. CBP officers and agents are not readily replaceable, in part because their missions include complex immigration, customs, and national security functions that require specialized training. Gaps in the USBP's ability to patrol the border caused by personnel shortages and facility closures would create severe safety and national security risks for the United States. Further, CBP processes all cargo being imported into the United States, and any substantial reduction in CBP staffing capacity at ports of entry could have enormous consequences on trade and the economy.<sup>52</sup> Without a full complement of officers at POEs, CBP's ability to process and facilitate the entry of much of the cargo that arrives at these installations every day could be impacted, even causing significant delays and a corresponding impact on local, and the national, economies.

More generally, the entry of such aliens during a public health emergency may pose a danger to the health and safety of other aliens detained in DHS custody and all other individuals with whom such aliens come into contact, posing an escalating danger the longer they remain in DHS custody as their claims for asylum or withholding are adjudicated. Such aliens also pose a danger to local communities and medical facilities if they are released into the United States pending adjudication of their claims, or if they receive protection or other relief. By reducing

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<sup>52</sup> See CBP, Trade Statistics, <https://www.cbp.gov/newsroom/stats/trade> (last visited June 4, 2020) (showing more than \$2.6 trillion in imported goods on a yearly basis for fiscal years 2018 and 2019, and significant imports for goods such as aluminum and steel); *see also* CBP, Trade and Travel Fiscal Year 2019 Report (Jan. 30, 2020), <https://www.cbp.gov/document/annual-report/cbp-trade-and-travel-fiscal-year-2019-report> (providing a detailed analysis of trade facilitation by CBP).

the required processing time for aliens whom the Departments determine pose a danger to the United States, this rule could significantly reduce the likelihood that an infectious or highly contagious illness or disease would be transmitted to other persons in the United States.

Second, as discussed, pandemics such as COVID-19 can inflict catastrophic damage to America's, and the world's, economy and thus, to the security of the United States. To the extent that such damage may have its origin with or be exacerbated by infected aliens seeking to enter the United States illegally or without proper documents, or seeking to apply for asylum or withholding of removal, the entry and presence of potentially infected aliens can rise to the level of a threat to the security of the United States.

While the INA provides that “an alien who is described [as deportable on terrorism-related grounds] shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States,” INA 241(b)(3)(B), 8 U.S.C. 1231(b)(3)(B), the scope of the term extends well beyond terrorism considerations, and “national defense” considerations as well. The Attorney General has previously determined that “danger to the security of the United States” in the context of the bar to eligibility for withholding of removal encompasses considerations of defense, foreign relations, and the economy, writing that:

The INA defines “national security” [in the context of the designation process for foreign terrorist organizations] to mean “the national defense, foreign relations, or economic interests of the United States.” Section 219(c)(2) of the Act, 8 U.S.C. 1189(c)(2) (2000). Read as a whole, therefore, the phrase “danger to the security of the United States” is best understood to mean a risk to the Nation's defense, foreign relations, or economic interests.

*Matter of A-H-*, 23 I&N Dec. 774, 788 (AG 2005).

The INA's definition of “national security” referred to by the Attorney General provides additional evidence that the term—along with the term “danger to the security of the United

States—should be read to encompass concerns beyond those concerning national defense and terrorism. The definition was enacted in 1996 as section 401(a) of title IV of AEDPA and was added as enacted by the House-Senate Conference Committee. *See* H.R. Rep. No. 104-518, at 38 (1996) (Conf. Rep.). The proposed legislation as originally passed by the Senate defined “national security” to mean “the national defense and foreign relations of the United States.” 142 Cong. Rec. H2268-03, at H2276 (Mar. 14, 1996) (S. 735, title VI, 401(a)). That version of the bill may have considered economic concerns as separate from national security concerns. For example, it provided that in designating a foreign terrorist organization, the Secretary of State would have had to find that “the organization’s terrorism activities threaten the security of United States citizens, national security, foreign policy, or the economy of the United States”—listing “national security” and “the economy” as two independent considerations. Section 401(a) of title IV of S. 735 (as passed the Senate on June 7, 1995), 141 Cong. Rec. S7864 (July 7, 1995). In addition, the section included a finding that also differentiated between national security concerns and those related to foreign policy and the economy. Congress found that:

- (B) [T]he Nation’s security interests are gravely affected by the terrorist attacks carried out overseas against United States Government facilities and officials, and against American citizens present in foreign countries;
- (C) United States foreign policy and economic interests are profoundly affected by terrorist acts overseas directed against foreign governments and their people

.....

*Id.* But we do not find such a distinction to be informative. First, Congress decided to merge economic considerations into the definition of national security in the Conference Report. Therefore, to the extent one accepts legislative history as a relevant consideration when interpreting the meaning of statutory terms, the change in phrasing in the Conference Report could suggest a conscious decision that economic considerations are subsumed within a general reference to national security. Second, the explicit reference to economic considerations in the

earlier draft of the legislation, when discussing the threats posed by terroristic activities, also implies a connection between national security and economics concerns—suggesting that considerations related to security in this context are quite broad.

Finally, the definition in AEDPA operated in the context of the designation of foreign terrorist organizations. When national security is considered in a much broader context beyond the risk of terrorism, as is the case in this proposed rule, it makes even greater sense to encompass within it economic concerns and public health concerns of such magnitude that they become economic concerns. A pandemic can cause immense economic damage. Thus, the entry of aliens who may further introduce infectious diseases to our country or facilitate the spread of such disease within the interior of the country could pose a danger to U.S. security well within the scope of the statutory bars to eligibility for asylum and withholding of removal. The entry of such aliens could also pose a danger to national security by threatening DHS’s ability to secure our border and facilitate lawful trade and commerce. To determine that an alien represents a danger to the security of the United States, the Departments generally do not have to quantify the extent of that danger. The Attorney General has ruled that:

In contrast to other parallel provisions in former section 243(h)(2) [INA’s withholding of removal provision before 1996]—which provide, for example, that a crime be “serious” or “particularly serious” to constitute ineligibility for withholding of deportation . . . the statute’s reference to “danger” is not qualified. Any level of danger to national security is deemed unacceptable; it need not be a “serious,” “significant,” or “grave” danger. That understanding is supported by the Government’s use, in other contexts, of gradations of danger to national security. For example, for purposes of determining information classification levels, Executive Order No. 12958 categorizes the relative “damage” to national security caused by disclosure of certain types of information. . . . in descending order of severity as “grave damage,” “serious damage,” and “damage”. . . . As these terms have common parlance in assessing risks to national security, Congress’s decision not to qualify the word “danger” in former section 243(h)(2)(D) makes clear that Congress intended that any nontrivial level of danger to national security is sufficient to trigger this statutory bar to withholding of deportation.

*Matter of A-H-*, 23 I&N Dec. at 788. The Attorney General also made clear that this “nontrivial degree of risk” standard is satisfied where there is a reasonable belief that an alien poses a danger. *Id.*

In *Yusupov v. Attorney General*, 518 F.3d 185, 204 (3rd Cir. 2008) (as amended Mar. 27, 2008), the Third Circuit determined that the Attorney General’s understanding that the eligibility bar “applied to any ‘nontrivial level of danger’ or ‘nontrivial degree of risk’ to U.S. security” was a reasonable interpretation of the INA, and the court deferred to the Attorney General in upholding that statutory interpretation. The court explained that the eligibility bar “does not easily accord acceptable gradations, as almost any ‘danger’ to U.S. security is serious.” *Id.* It concluded that “Congress did not announce a clear intent that the danger to U.S. security be ‘serious’ because such a modifier likely would be redundant. . . . [I]t would be illogical for us to hold that Congress clearly intended for an alien to be non-removable if he poses only a moderate danger to national security.”<sup>53</sup> *Id.*

In *Matter of A-H-*, the Attorney General also ruled that “reasonable” in the context of the exception for asylum eligibility at 8 U.S.C. 1158(b)(2)(A)(iv)—which requires a determination that “there are *reasonable grounds* for regarding the alien as a danger to the United States”—“implied the use of a ‘reasonable person’ standard” that was “substantially less stringent than

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<sup>53</sup> The alien must actually pose this level of danger. “The bottom line in *Yusupov*, which we adopt, is that . . . the alien must ‘actually pose a danger’ to United States security . . . . [T]he appropriate [standard is the] affirmative ‘is’ language rather than the incorrect ‘may pose’ standard.” *Malkandi v. Holder*, 576 F.3d 906, 914 (9th Cir. 2009); *see also Yusupov*, 518 F.3d at 201. The danger posed by the entry of aliens during a pandemic is unique. In many cases it is not possible to know whether any particular individual is infected at the time of apprehension. Many individuals who are actually infected may be asymptomatic, reliable testing may not be available, and, even where available, the time frame required to obtain test results may both be operationally unfeasible and expose DHS officers, other aliens, and domestic communities to possible infection while results are pending. Nonetheless, an individual’s membership within a class of aliens arriving from a country in which the spread of a pandemic poses serious danger itself presents a serious security risk.



preponderance of the evidence,” and instead akin to “probable cause.” 23 I&N Dec. at 788-89 (emphasis added). The standard “is satisfied if there is information that would permit a reasonable person to believe that the alien may pose a danger to the national security.” *Id.* at 789 (citation omitted). Further, “[t]he information relied on to support the . . . determination need not meet standards for admissibility of evidence in court proceedings . . . . ‘It [is enough that the information relied upon by the Government [i]s not ‘intrinsically suspect.’” *Id.* at 789-90 (quoting *Adams v. Baker*, 909 F.2d 643, 649 (1st Cir. 1990)). These standards that have been previously applied to interpretations of the security eligibility bar suggest that application of the bar need not be limited to instances where each individual alien is known to be carrying a particular disease. Rather, it is enough that the presence of disease in the countries through which the alien has traveled to reach the United States makes it reasonable to believe that the entry of aliens from that country presents a serious danger of introduction of the disease into the United States.

**B. Application of the Danger to the Security of the United States Bars to Eligibility for Asylum and Withholding of Removal in the Expedited Removal Process**

The Departments’ current regulations under title 8 of the United States Code preclude DHS from efficiently and expeditiously removing aliens from the United States who may pose significant public health risks or who present other dangers to the security of the United States. Beyond creating health risks that may endanger the United States, the COVID-19 crisis highlights the fact that the existing expedited removal procedures require the Departments to engage in redundant and inefficient screening mechanisms to remove aliens who would not be able to establish eligibility for asylum and withholding of removal in the first place.

To address these public health concerns, especially in light of the current COVID-19 public health emergency, the Departments are proposing regulatory changes to expedite the processing of certain aliens amendable to expedited removal, including those who potentially have deadly contagious diseases. These changes are necessary because the existing regulatory structure is inadequate to protect the security of the United States and must be updated to allow for the efficient and expeditious removal of aliens subject to the bars to asylum and withholding eligibility because they present a danger to the security of the United States. These bars would be applied at the credible fear screening stage for aliens in expedited removal proceedings, thereby avoiding potentially lengthy periods of detention for aliens awaiting the adjudication of their asylum and withholding claims and minimizing the inefficient use of government resources.

Applying the “danger to the security of the United States” asylum and withholding eligibility bars in the expedited removal process is necessary to reduce health and safety dangers to DHS personnel and to the general public. And permitting asylum officers to apply these bars will ensure a more efficient and expeditious removal process for aliens who will not be eligible to receive asylum or withholding at the conclusion of 240 proceedings in immigration court.

It is unnecessary and inefficient to adjudicate claims for relief or protection in 240 proceedings when it can be determined that an alien is subject to a mandatory bar to eligibility for asylum or statutory withholding, and is ineligible for deferral of removal, at the credible fear screening stage. The existing rules provide aliens additional adjudicatory procedures notwithstanding an eligibility bar for asylum or withholding of removal, and those procedures place DHS operations and personnel in danger. Accordingly, applying the danger to the security of the United States bars to asylum and withholding of removal at the credible fear

stage would eliminate delays inherent in the full expenditure of resources required by 240 proceedings, when such expenditure is unnecessary and would serve no purpose due to the threshold ineligibility of the alien to receive asylum due to a statutory bar.

### **C. Streamlining Screening for Deferral of Removal in Expedited Removal**

As previously discussed, Congress required the application of the withholding of removal eligibility bars “[t]o the maximum extent consistent with the obligations of the United States under [CAT]” to aliens seeking protection under the CAT regulations. FARRA sec. 2242(c), 8 U.S.C. 1231 note (c). The sole purpose of CAT deferral is to provide protection to such aliens barred from eligibility for withholding of removal. The preamble to the 1999 CAT rule states that “[d]eferral of removal will be granted . . . to an alien who is likely to be tortured in the country of removal but who is barred from withholding of removal[.]” Regulations Concerning the Convention Against Torture, 64 FR 8478, 8480 (Feb. 19, 1999), and the regulatory text itself states that to be eligible for deferral an alien must be “subject to the provisions for mandatory denial of withholding of removal under § 208.16(d)(2) or (d)(3).” 8 CFR 208.17(a), 1208.17(a).

This rule proposes to further FARRA’s command that the withholding of removal eligibility bars apply to aliens seeking protection under the CAT regulations “[t]o the maximum extent consistent with the obligations of the United States under [CAT]” by requiring that such aliens seeking such protection meet, at the credible fear stage, their ultimate burden to demonstrate eligibility for deferral of removal under the CAT regulations—i.e., that it is more likely than not that they would be tortured in the country of removal. *See* 8 CFR 208.16(c)(2), 208.17(a). The proposed change will also contribute to the streamlining of the expedited

removal process.<sup>54</sup> If the alien has not affirmatively established during the credible fear process that the alien is more likely than not to face torture in the country of removal, the alien may be expeditiously removed. The alien would not need to be placed in 240 proceedings, which often necessitate an alien remaining in the United States for many years while such proceedings are pending. This proposed rule change thus will facilitate removal of aliens subject to the danger to the security of the United States bars as expeditiously as possible during times of pandemic, in order to reduce physical interactions with DHS personnel, other aliens, and the general public.

This screening standard for deferral of removal is consistent with DOJ's longstanding rationale that "aliens ineligible for asylum," who could only be granted statutory withholding of removal or protection under the CAT regulations, should be subject to a different screening standard corresponding to the higher bar for actually obtaining these forms of protection. *See* Regulations Concerning the Convention Against Torture, 64 FR at 8485 ("Because the standard for showing entitlement to these forms of protection (a probability of persecution or torture) is significantly higher than the standard for asylum (a well-founded fear of persecution), the screening standard adopted for initial consideration of withholding and deferral requests in these contexts is also higher.").

#### **D. Restoring Prosecutorial Discretion**

The proposed rule would also amend the Departments' existing regulations to enable DHS to exercise its statutorily authorized discretion about how to process individuals subject to

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<sup>54</sup> Article 3 of CAT is silent on specific implementing procedures, except to the extent that it states that "for the purpose of determining whether there are such [substantial] grounds [for believing that a person would be tortured], the competent authorities shall take into account all relevant considerations . . . ." CAT, art. 3(1).

expedited removal who are determined to be ineligible for asylum and withholding of removal based on the danger to security, but who may be eligible for deferral of removal. The proposed rule would provide DHS with the option, to be exercised as a matter of prosecutorial discretion, to either place such an alien into 240 proceedings or to remove the alien to a country where the alien has not affirmatively established that it is more likely than not that the alien's life or freedom would be threatened on a protected ground, or that the alien would be tortured. This discretion is important because it would give DHS flexibility to quickly process aliens during national health emergencies during which placing an alien into full 240 proceedings may pose a danger to the health and safety of other aliens with whom the alien is detained, or to DHS officials who come into close contact with the alien. It would restore DHS's ability in the expedited removal process to remove such aliens to third countries rather than having to place them in 240 proceedings.

This discretion is inherent in section 235 of the INA, 8 U.S.C. 1225. Current regulations instruct asylum officers and IJs to treat an alien's request for asylum in expedited removal proceedings as a request for statutory withholding of removal and withholding and deferral or removal under the CAT regulations as well. *See* 8 CFR 208.13(c)(1), 208.30(e)(2)-(4), 1208.13(c)(1), 1208.16(a). However, the INA neither mandates this, nor even references consideration of statutory withholding or protection under the CAT regulations as a part of the credible fear screening process. Indeed, the INA provides that an alien enters that process only if he or she "indicates either an intention to apply for asylum . . . or a fear of persecution," INA 235(a)(2), 8 U.S.C. 1225(a)(2), in which case he or she is interviewed by an asylum officer who determines whether he or she has a "credible fear of persecution," which is defined as "a significant possibility . . . that the alien could establish eligibility for asylum." INA

235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). Only if the alien establishes such a possibility of eligibility for asylum (with no mention of eligibility for withholding of removal) is he or she entitled to “further consideration of the application for asylum.” INA 235(b)(1)(A)(i)-(ii), (B)(ii), (v), 8 U.S.C. 1225(b)(1)(A)(i)-(ii), (B)(ii), (v). The Departments’ current regulations generally effectuate this “further consideration” through the placement of an alien in 240 proceedings.<sup>55</sup> However, section 235 does not require (or even refer to) “further consideration” of eligibility for withholding or deferral of removal. While DHS will of course not remove an alien to a country contrary to section 241(b)(3) of the INA, 8 U.S.C. 1241(b)(3), or to FARRA and the CAT regulations, the immigration laws do not prevent DHS from removing an alien who is ineligible for asylum to a third country.

The Departments acknowledge that these procedures for processing individuals in expedited removal proceedings who are subject to the danger to national security bar differ from expedited removal procedures set forth in the Notice of Proposed Rulemaking, “Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review.” 85 FR 36264 (June 15, 2020). The Departments will reconcile the procedures set forth in the two proposed rules at the final rulemaking stage, and request comment regarding how to best reconcile the procedures set forth in the proposed rules.

In sum, this rule not only would provide the Departments with important tools for safeguarding America from COVID-19 (should the disease still be a threat when a final rule is

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<sup>55</sup> The interim final rule establishing a bar to asylum eligibility for certain aliens who enter, attempt to enter, or arrive 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 provides that if an alien is determined not to have a credible fear of persecution as a consequence of being subject to such bar, the alien will nonetheless be placed in removal proceedings before EOIR if the alien establishes a reasonable fear of persecution or torture. In such an instance, the rule provides that the scope of review is limited to a determination of whether the alien is eligible for withholding or deferral of removal. *See* Asylum Eligibility and Procedural Modifications, 84 FR 33829 (July 16, 2019).

published), but it would also clarify the availability of critical tools within the Departments' statutory authority should another pandemic strike.

## **V. Detailed Discussion of the Proposed Regulatory Changes**

### **A. Proposed 8 CFR 208.13(c)(10) and 1208.13(c)(10)**

These paragraphs propose to clarify that the Departments may rely on certain public health risks and considerations as reasonable grounds for regarding an alien or a class of aliens to be a danger to the security of the United States, and thus subject to a mandatory bar to eligibility for asylum. Specifically, in determining whether an alien or a class of aliens can reasonably be regarded as a danger to the security of the United States under section 208(b)(2)(A)(iv) of the Act, the Secretary and the Attorney General may determine whether the alien exhibits symptoms consistent with being afflicted with any contagious or infectious disease or has come into contact with such a disease, or whether the alien or class of aliens is coming from a country, or a political subdivision or region of a country, or has embarked at a place, where such disease is prevalent or epidemic (or had come from that country, subdivision, or region, or had embarked at that place, during a period in which the disease was prevalent or epidemic there), if:

- the disease has triggered an ongoing declaration of a public health emergency under Federal law, including under section 319 of the PHSA, 42 U.S.C. 247d, or section 564 of the Food, Drug, and Cosmetic Act, 21 U.S.C. 360bbb-3, or
- the Secretary and the Attorney General have, in consultation with HHS, jointly
  - determined that because the disease is a communicable disease of public health significance (in accordance with regulations prescribed by the Secretary of Health and Human Services (currently at 42 CFR 34.2(b))) that is prevalent or

epidemic in another country or place, the physical presence in the United States of an alien or a class of aliens who are coming from such country or countries (or one or more political subdivisions or regions thereof) or have embarked at that place or places (or had come from that country or countries (or one or more subdivisions or regions thereof) or embarked at that place or places during a period in which the disease was prevalent or epidemic there), would cause a danger to the public health in the United States, and

- designated the foreign country or countries (or one or more political subdivisions or regions thereof) or place or places and the period of time or circumstances under which the Secretary and the Attorney General jointly deem it necessary for the public health that such alien or class of aliens who either are still within the number of days equivalent to the longest known incubation and contagion period for the disease or exhibit symptoms indicating they are afflicted with the disease be regarded as a danger to the security of the United States under section 208(b)(2)(A)(iv) of the Act, including any relevant exceptions as appropriate.

The Departments solicit comment on the nature of the consultation that the Secretary and the Attorney General should engage in with the Secretary of Health and Human Services.

**B. Proposed 8 CFR 208.16(d)(2) and 1208.16(d)(2)**

The rule proposes to clarify that the Departments may similarly use public health risks and considerations to determine if an alien or a class of aliens can reasonably be regarded as a danger to the security of the United States, and thus be subject to a mandatory bar to eligibility for statutory withholding of removal and withholding of removal under the CAT regulations,



under the same standards they would use regarding the “danger to the security of the United States” bar to asylum eligibility.

The Departments solicit comment on the nature of the consultation that the Secretary and the Attorney General should engage in with the Secretary of Health and Human Services.

**C. Proposed 8 CFR 208.16(f) and 1208.16(f)**

The rule proposes to amend 8 CFR 208.16(f) and 1208.16(f), which provide that nothing in those sections or § 208.17 or § 1208.17 would prevent the Service from removing an alien to a third country other than the country to which removal has been withheld or deferred. The rule would clarify that, after providing an alien with the appropriate advisal and allowing the alien the opportunity to withdraw his or her request for withholding or deferral of removal, if the alien does not withdraw, DHS may remove an alien to a third country prior to an adjudication of the alien’s request for withholding or deferral of removal if the alien has not affirmatively established that it is more likely than not that the alien would be tortured in that country (pursuant to the procedure set forth in 8 CFR 208.30(e)(5) for an alien in expedited removal proceedings).

**D. Proposed 8 CFR 1208.30(e) and (g)**

The rule proposes to amend 8 CFR 1208.30(e) to make conforming changes consistent with the amendment to 8 CFR 1208.13(c) concerning the bar to eligibility for asylum based on there being reasonable grounds for regarding an alien as a danger to the security of the United States. The rule also proposes to amend 8 CFR 1208.30(g) to make conforming changes consistent with the amendments to 8 CFR 208.30 regarding IJ review of determinations made by DHS, including the treatment of aliens who are subject to the “danger to the security of the United States” bar to asylum.

**E. Proposed 8 CFR 208.30(e)(1), (3)-(4), (5)(i), (iii)**

The rule would propose amending 8 CFR 208.30(e)(1), (3)-(4) to make conforming changes consistent with proposed amendments to 8 CFR 208.30(e)(5)(i), (iii), regarding the treatment of aliens who are subject to the “danger to the security of the United States” and third-country-transit asylum bars.

Under the current version of 8 CFR 208.30(e)(5)(i), with certain exceptions, if an alien is able to establish a credible fear of persecution 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, DHS shall nonetheless place the alien in proceedings under section 240 of the Act for full consideration of the alien’s claim, unless the alien is 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).

The rule proposes to amend § 208.30(e)(5)(i) to remove the requirement that DHS “nonetheless place the alien in proceedings under section 240 of the Act” in the case of an alien ineligible for asylum and withholding of removal pursuant to the “danger to the security of the United States” bars but who nevertheless affirmatively establishes that he or she is more likely than not to be tortured in the prospective country of removal, and, consistent with DHS’s statutory authority, give the Secretary the option, in his or her unreviewable discretion, to either place the alien in full 240 proceedings, or remove the alien pursuant to expedited removal to a third country. This rule change consequently would require asylum officers to make negative credible fear of persecution determinations for aliens who are subject to the mandatory bar to asylum eligibility based on danger to the security of the United States.

If DHS were to nevertheless determine that an alien should be placed in full 240 proceedings, its determination that the alien had established that he or she is more likely than not to be tortured in the prospective country of removal would not be dispositive of any subsequent consideration of an application for protection under the CAT in those proceedings, consistent with an IJ's general authority to review DHS determinations de novo in immigration proceedings. *Cf.* 8 CFR 1003.42(d) (IJ reviews negative credible fear determinations de novo). If DHS were to remove the alien to a third country, it would do so consistent with section 241(b)(1)-(2) of the Act and 8 CFR 241.15.

The rule does not propose changing the credible fear standard for asylum claims, although the regulation would expand the scope of the credible fear inquiry. An alien who is subject to the "danger to the security of the United States" bar to asylum eligibility would be ineligible for asylum and thus would not be able to establish a "significant possibility . . . [of] eligibility for asylum under section 1158." INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). That alien would also be subject to the identical bar to withholding of removal at INA 241(b)(3)(B)(iv), 8 U.S.C. 1231(b)(3)(B)(iv). *See also* 8 CFR 1208.16(d)(2) (incorporating the bar at 8 U.S.C. 1231(b)(3)(B)(iv) for purposes of withholding of removal under the CAT). Consistent with section 235(b)(1)(B)(iii)(III) of the INA, the alien could still obtain review from an IJ regarding whether the asylum officer correctly determined that the alien was subject to the bar. Further, consistent with section 235(b)(1)(B) of the INA, if the IJ reversed the asylum officer's determination, then the alien could assert the asylum claim in 240 proceedings.

Aliens determined to be ineligible for asylum and withholding of removal by virtue of being subject to the bars would have no remaining viable claim unless an alien is able to affirmatively establish that it is more likely than not that removal to the prospective country

would result in the alien's torture, in which case there would be a possible claim for deferral of removal under the CAT regulations. If the alien makes this showing, then DHS can choose in its discretion to place the alien in 240 proceedings, just as with aliens who establish a credible fear of persecution with respect to eligibility for asylum, or return the alien to a third country under appropriate standards.

The proposed screening process would 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), 8 U.S.C. 1225(b)(1)(A)(ii). All such aliens will continue to go before an asylum officer for screening, consistent with INA 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B). The asylum officer will ask threshold questions to elicit whether an alien is ineligible for asylum pursuant to the "danger to the security of the United States" bar. If there is a significant possibility that the alien is not subject to the eligibility bar (and the alien otherwise demonstrates that there is a significant possibility that he or she can establish eligibility for asylum), then the alien will have established a credible fear.

If, however, an alien is unable to establish a significant possibility of eligibility for asylum because of the "danger to the security of the United States" bar, then the asylum officer will make a negative credible fear finding for purposes of asylum (and similarly, because the alien is also subject to the "danger to the security of the United States" bar to withholding of removal, a negative credible fear finding for purposes of statutory withholding of removal and withholding of removal under the CAT regulations). If the alien affirmatively raises fear of torture, however, the asylum officer will then assess, as appropriate, the alien's eligibility for deferral of removal under the CAT regulations. If the alien establishes that it is more likely than

not that he or she would be tortured in the country of removal, then DHS may in its discretion either place the alien in 240 proceedings or remove him or her to a third country.

If placed in 240 proceedings, then the alien will have an opportunity to raise whether he or she was correctly identified as subject to the “danger to the security of the United States” bars to asylum and withholding of removal, as well as other claims. If an IJ determines that the alien was incorrectly identified as subject to the bar, then the alien will be able to apply for asylum and withholding of removal. Such an alien can appeal the IJ’s decision in these proceedings to the Board of Immigration Appeals and then seek review from a Federal court of appeals.

An alien who is found by the asylum officer to be subject to the bars and who affirmatively raises a fear of torture but does not establish that it is more likely than not that he or she would be tortured can obtain review of both of those determinations by an IJ. In reviewing the determinations, the IJ will decide *de novo* whether the alien is subject to the “danger to the security of the United States” asylum and withholding eligibility bars. If the IJ affirms the determinations, then the alien will be subject to removal without further appeal, consistent with the existing process under section 235 of the INA. If the IJ finds that the determinations were incorrect, then the alien will be placed into 240 proceedings or removed to a third country. An IJ’s review determination that an alien is more likely than not to be tortured would not be binding in any subsequent 240 proceedings, and the IJ presiding over those proceedings would consider the alien’s eligibility for CAT protection *de novo*. Thus, the proposed rule would reasonably balance the various interests at stake. It would promote efficiency by avoiding duplicative administrative efforts while ensuring that those who are subject to a bar receive an opportunity to have the asylum officer’s finding reviewed by an IJ.

Under the current version of 8 CFR 208.30(e)(5)(iii), if the alien is found to be an alien described as ineligible for asylum in § 208.13(c)(4), then the asylum officer must enter a negative credible fear determination with respect to the alien's application for asylum. The Department must nonetheless place the alien in proceedings under section 240 of the Act for consideration of the alien's claim for withholding of removal under section 241(b)(3) of the Act, or for withholding or deferral of removal under the CAT, if the alien establishes, respectively, a reasonable fear of persecution or torture. The scope of review is limited to a determination of whether the alien is eligible for withholding or deferral of removal, accordingly. However, if an alien fails to establish, during the interview with the asylum officer, a reasonable fear of either persecution or torture, then the asylum officer will provide the alien with a written notice of decision that will be subject to IJ review consistent with paragraph (g) of § 208.30, except that the IJ will review the reasonable fear findings under the "reasonable fear" standard instead of the "credible fear standard" described in paragraph (g) and in 8 CFR 1208.30(g).

The rule proposes to amend 8 CFR 208.30(e)(5)(iii) to provide that if an alien is not able to establish that he or she has a credible fear because of being subject to the third-country-transit asylum bar, but is nonetheless able to establish a reasonable fear of persecution or torture, or that it is more likely than not that the alien will be tortured in the country of removal, DHS may, in the unreviewable discretion of the Secretary, either place the alien in 240 proceedings (with the scope of review limited to a determination of whether the alien is eligible for statutory withholding of removal or withholding or deferral of removal under the CAT regulations), or remove the alien to a third country. If DHS decides to remove the alien to a third country, it shall do so consistent with section 241(b)(1)-(2) of the Act and 8 CFR 241.15.

The proposed amendments underscore DHS’s discretion to determine whether to place an alien in proceedings under section 240 after the alien is found to be subject to the mandatory bar to asylum eligibility for being reasonably regarded as a danger to the security of the United States or found to be subject to the third-country-transit bar.

#### **F. Proposed 8 CFR 208.25 and 1208.25**

The Departments are proposing to add severability provisions in each of the amended 8 CFR parts. The Departments believe that each of the provisions of part 208 functions sensibly independent of the other provisions in the part. To protect the goals for which this rule is being proposed, the Departments are proposing to codify their intent that the provisions be severable so that, if necessary, the regulations can continue to function without a stricken provision.

### **VI. Regulatory Requirements**

#### **A. Regulatory Flexibility Act**

The Departments have reviewed this proposed rule in accordance with the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) and have determined that this rule will not have a significant economic impact on a substantial number of small entities. The rule would not regulate “small entities” as that term is defined in 5 U.S.C. 601(6). Only individuals, rather than entities, are eligible to apply for asylum and related forms of relief, and only individuals are placed in immigration proceedings.

#### **B. Unfunded Mandates Reform Act of 1995**

This proposed rule would 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 are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

### **C. Congressional Review Act**

This proposed rule is anticipated not to be a major rule as defined by section 804 of the Congressional Review Act. 5 U.S.C. 804. This rule would 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 enterprises to compete with foreign-based enterprises in domestic and export markets.

### **D. Executive Order 12866, Executive Order 13563, and Executive Order 13771**

This proposed rule would amend existing regulations to clarify that the Departments may consider emergency public health concerns based on communicable disease when making a determination as to whether “there are reasonable grounds for regarding [an] alien as a danger to the security of the United States” and, thus, ineligible to be granted asylum or the protection of withholding of removal in the United States under INA sections 208 and 241 and 8 CFR 208.13 and 1208.13 and 8 CFR 208.16 and 1208.16, respectively. The rule would also provide that this application of the statutory bars to eligibility for asylum and withholding of removal will be effectuated at the credible fear screening stage for aliens in expedited removal proceedings, in order to streamline the protection review process and minimize the spread of communicable disease.

The proposed rule would further allow DHS to exercise its prosecutorial discretion regarding how to process individuals subject to expedited removal who are determined to be ineligible for asylum and withholding of removal in the United States on certain grounds, including being reasonably regarded as a danger to the security of the United States, but who nevertheless establish a likelihood that they will be tortured in the prospective country of



removal. It would provide DHS with the option to either place such aliens into 240 proceedings, or remove them to a country with respect to which an alien has not established that it is more likely than not that the alien's life or freedom would be threatened on a protected ground or that the alien would be tortured. Finally, the proposed rule would modify the process for evaluating the eligibility for deferral of removal of aliens who are ineligible for withholding of removal because they are reasonably regarded as a danger to the security of the United States.

In some cases, asylum officers and IJs would need to spend additional time during the credible fear process to determine whether an alien were ineligible for asylum or withholding of removal based on being reasonably regarded as a danger to the security of the United States. However, the overall impact on the time spent making (and, in the case of IJs, reviewing) screening determinations would be minimal. Additionally, the Departments do not expect the proposed changes to increase the adjudication time for immigration court proceedings. The Departments note that the proposed changes may result in fewer asylum and withholding and deferral of removal grants annually.

Upon a determination of an emergency public health concern under 8 CFR 208.13 and 1208.13, aliens placed into expedited removal proceedings who exhibit symptoms of a designated communicable disease, have come into contact with the disease, or were present in an impacted region preceding entry anytime within the number of days equivalent to the longest known incubation and contagion period for the disease may be examined for symptoms or recent contact with the disease and removed on the ground that they are a danger to the security of the United States (unless they have demonstrated that it is more likely than not that they will be tortured in the prospective country of removal, in which case they will be placed either in 240 proceedings or removed to a third country). Those in 240 proceedings will be ineligible for

asylum or withholding of removal. The bar would not apply to aliens who had before the date of a public health emergency declaration or joint Secretary-Attorney General determination (1) affirmatively filed asylum or withholding applications, or (2) indicated a fear of return in expedited removal proceedings.

However, because cases are inherently fact-specific, and because there may be multiple bases for denying relief or protection, neither DOJ nor DHS can quantify precisely the expected decrease in grants of relief. The full extent of the impacts on this population is unclear and would depend on the specific circumstances and personal characteristics of each alien, and neither DOJ nor DHS collects such data at such a level of granularity. Finally, the proposed changes may also result in fewer aliens being placed in 240 proceedings to the extent that DHS exercises its discretion to remove aliens to third countries. However, as these will be discretionary decisions, it is not possible to quantify the reduction.

This proposed rule is a significant regulatory action under Executive Order 12866, though not an economically significant regulatory action. Accordingly, the Office of Management and Budget has reviewed this proposed regulation.

#### **E. Executive Order 13132 (Federalism)**

This proposed rule would 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, the Departments believe that this rule would not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

#### **F. Executive Order 12988 (Civil Justice Reform)**

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

#### **G. Paperwork Reduction Act**

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

#### **H. Signature for DHS**

The Acting Secretary of Homeland Security, Chad F. Wolf, having reviewed and approved this document, is delegating the authority to electronically sign this document to Chad R. Mizelle, who is the Senior Official Performing the Duties of the General Counsel for DHS, for purposes of publication in the **Federal Register**.

#### **List of Subjects**

8 CFR Part 208

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

8 CFR Part 1208

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

#### **Proposed Regulatory Amendments**

#### **DEPARTMENT OF HOMELAND SECURITY**

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

#### **PART 208 – PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL**

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

**Authority:** 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Pub. L. 110-229; 8 CFR part 2; Pub. L. 115-218.

2. Further amend § 208.13, as proposed to be amended at 84 FR 69659, by adding paragraph (c)(10) to read as follows:

**§ 208.13 Establishing asylum eligibility.**

\* \* \* \* \*

(c) \* \* \*

(10) *Aliens who pose a danger to the security of the United States.* In determining whether there are reasonable grounds for regarding an alien or a class of aliens as a danger to the security of the United States under section 208(b)(2)(A)(iv) of the Act, the Secretary of Homeland Security may consider whether the alien exhibits symptoms consistent with being afflicted with any contagious or infectious disease or has come into contact with such disease, or whether the alien or class of aliens is coming from a country, or a political subdivision or region of that country, or has embarked at a place, where such disease is prevalent or epidemic (or had come from that country, subdivision, or region, or had embarked at that place, during a period in which the disease was prevalent or epidemic there), if:

(i) The disease has triggered an ongoing declaration of a public health emergency under Federal law, including under section 319 of the Public Health Service Act, 42 U.S.C. 247d, or section 564 of the Food, Drug, and Cosmetic Act, 21 U.S.C. 360bbb-3; or

(ii) The Secretary and the Attorney General have, in consultation with the Secretary of Health and Human Services, jointly:

(A) Determined that because the disease is a communicable disease of public health significance (in accordance with regulations prescribed by the Secretary of Health and Human Services (42 CFR 34.2(b))) that is prevalent or epidemic in another country or countries (or one or more political subdivisions or regions thereof) or place or places, the physical presence in the United States of aliens who are coming from such country or countries (or one or more subdivisions or regions thereof) or have embarked at that place or places (or had come from that country or countries (or one or more subdivisions or regions thereof) or had embarked at that place or places during a period in which the disease was prevalent or epidemic there) would cause a danger to the public health in the United States; and

(B) Designated the foreign country or countries (or one or more political subdivisions or regions thereof) or place or places and the period of time or circumstances under which the Secretary and the Attorney General jointly deem it necessary for the public health that aliens described in paragraph (c)(10)(ii)(A) of this section who either are still within the number of days equivalent to the longest known incubation and contagion period for the disease or exhibit symptoms indicating they are afflicted with the disease be regarded as a danger to the security of the United States under section 208(b)(2)(A)(iv) of the Act, including any relevant exceptions as appropriate.

3. Amend § 208.16 by revising paragraphs (d)(2) and (f) to read as follows:

**§ 208.16 Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.**

\* \* \* \* \*

(d) \* \* \*

(2) *Mandatory denials.* Except as provided in paragraph (d)(3) of this section, an application for withholding of removal under section 241(b)(3) of the Act or under paragraph (c) of this section shall be denied if the applicant falls within section 241(b)(3)(B) of the Act or, for applications for withholding of deportation adjudicated in proceedings commenced prior to April 1, 1997, within section 243(h)(2) of the Act as it appeared prior to that date. For purposes of section 241(b)(3)(B)(ii) of the Act, or section 243(h)(2)(B) of the Act as it appeared prior to April 1, 1997, an alien who has been convicted of a particularly serious crime shall be considered to constitute a danger to the community. If the evidence indicates the applicability of one or more of the grounds for denial of withholding enumerated in the Act, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply. In determining whether an alien or a class of aliens can reasonably be regarded as a danger to the security of the United States under section 241(b)(3)(B)(iv) of the Act, the Secretary of Homeland Security may consider whether the alien exhibits symptoms consistent with being afflicted with any contagious or infectious disease or has come into contact with such disease, or whether the alien or class of aliens is coming from a country, or political subdivision or region of a country, or has embarked at a place, where such disease is prevalent or epidemic (or had come from that country, subdivision, or region, or had embarked at that place, during a period in which the disease was prevalent or epidemic there), if:

(i) The disease has triggered an ongoing declaration of a public health emergency under Federal law, including under section 319 of the Public Health Service Act, 42 U.S.C. 247d, or section 564 of the Food, Drug, and Cosmetic Act, 21 U.S.C. 360bbb-3; or

(ii) The Secretary and the Attorney General have, in consultation with the Secretary of Health and Human Services, jointly:

(A) Determined that because the disease is a communicable disease of public health significance (in accordance with regulations prescribed by the Secretary of Health and Human Services (42 CFR 34.2(b))) that is prevalent or epidemic in another country or countries (or one or more political subdivisions or regions thereof) or place or places, that the physical presence in the United States of aliens who are coming from such country or countries (or one or more political subdivisions or regions thereof) or have embarked at that place or places (or had come from that country or countries (or one or more subdivisions or regions thereof) or had embarked at that place or places during a period in which the disease was prevalent or epidemic there) would cause a danger to the public health in the United States; and

(B) Designated the foreign country or countries (or one or more political subdivisions or regions thereof) or place or places and the period of time or circumstances under which the Secretary and the Attorney General jointly deem it necessary for the public health that aliens described in paragraph (d)(2)(ii)(A) of this section who either are still within the number of days equivalent to the longest known incubation and contagion period for the disease or exhibit symptoms indicating they are afflicted with the disease be regarded as a danger to the security of the United States under section 241(b)(3)(B)(iv) of the Act, including any relevant exceptions as appropriate.

\* \* \* \* \*

(f) *Removal to third country.* (1) Nothing in this section or § 208.17 shall prevent the Department from removing an alien requesting protection to a third country other than a country to which removal is currently withheld or deferred.

(2) If an alien requests withholding or deferral of removal to his or her home country or another specific country, nothing in this section or § 208.17 precludes the Department from

removing the alien to a third country prior to a determination or adjudication of the alien's initial request for withholding or deferral of removal if the alien has not established that his or her life or freedom would be threatened on account of a protected ground in that third country and that he or she is not subject to the mandatory bar to eligibility for withholding of removal under section 241(b)(3)(B)(iv) of the Act, or that it is more likely than not that he or she would be tortured in that third country. However, such a removal shall be executed only if the alien was:

(i) Advised at the time of requesting withholding or deferral of removal of the possibility of being removed to a third country prior to a determination or adjudication of the same under the conditions set forth in this paragraph (f); and

(ii) Provided, but did not accept, an opportunity to withdraw the request for withholding or deferral of removal in order to prevent such removal and, instead, proceed to removal pursuant to section 241(b) of the Act, as appropriate.

4. Add § 208.25 to read as follows:

**§ 208.25 Severability.**

The provisions of this part are separate and severable from one another. In the event that any provision in this part is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as independent rules and continue in effect.

5. Amend § 208.30 by revising paragraphs (e)(1), (3), and (4) and (e)(5)(i) and (iii) to read as follows:

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



**entry is limited or suspended under section 212(f) or 215(a)(1) of the Act, or who failed to apply for protection from persecution in a third country where potential relief is available while en route to the United States.**

\* \* \* \* \*

(e) \* \* \*

(1) Subject to paragraph (e)(5) of this section, the asylum officer shall create a written record of his or her determination, including a summary of the material facts as stated by the applicant, any additional facts relied on by the officer, and the officer's determination of whether, in light of such facts, the alien has established a credible fear of persecution or torture.

\* \* \* \* \*

(3) Subject to paragraph (e)(5) of this section, 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 pursuant to § 208.16(c), a regulation issued pursuant to the legislation implementing the Convention Against Torture.

(4) Subject to paragraph (e)(5) of this section, 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 (IJ).

(5)(i) Except as provided in paragraph (e)(5)(ii) through (iv), (e)(6), or (e)(7) of this section, if an alien:

(A) Is able to establish a credible fear of persecution but appears to be subject to one or more of the mandatory bars to applying for, or being granted, asylum under section 208(a)(2) and 208(b)(2)(A)(i)-(iii), (v)-(vi) of the Act, or withholding of removal under section

241(b)(3)(B)(i)-(iii) 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 § 208.2(c)(3).

(B) Would be able to establish a credible fear of persecution but for the fact that he or she is subject to the mandatory bars to eligibility for asylum under section 208(b)(2)(A)(iv) of the Act and to withholding of removal under section 241(b)(3)(B)(iv) of the Act, but nevertheless establishes that it is more likely than not that he or she would be tortured in the prospective country of removal, the Department of Homeland Security may, in the unreviewable discretion of the Secretary, either place the alien in proceedings under section 240 of the Act for full consideration of the alien's claim, or remove the alien to another country.

(1) If the Department places the alien in proceedings under section 240 of the Act, then the IJ shall review all issues de novo, including whether the alien has established that it is more likely than not that he or she would be tortured in the prospective country of removal.

(2) If the Department decides to remove the alien to another country, it shall do so in a manner consistent with section 241 of the Act and 8 CFR 241.15, including by not removing the alien to a country where the alien has established that his or her life or freedom would be threatened because of the alien's race, religion, nationality, membership in a particular social group, or political opinion (if the alien has also established that he or she is not subject to any mandatory bar to eligibility for withholding of removal under section 241(b)(3)(B) of the Act), or to a country where the

alien has established that he or she would more likely than not be tortured. Further, such a removal shall be executed only if the alien was:

(i) Advised at the time of requesting withholding or deferral of removal of the possibility of being removed to a third country prior to a determination or adjudication of the same under the conditions set forth in this paragraph (e)(5)(i); and

(ii) Provided, but did not accept, an opportunity to withdraw the request for withholding or deferral of removal in order to prevent such removal and, instead, proceed to removal pursuant to section 241(b) of the Act, as appropriate.

(3) If the alien fails to affirmatively establish, during an interview with the asylum officer, that it is more likely than not that he or she would be tortured in the prospective country of removal, then the asylum officer will provide the alien with a written notice of decision that will be subject to IJ review consistent with paragraph (g) of this section. If the alien is a stowaway, the Department shall place the alien in proceedings for consideration of the alien's claim pursuant to § 208.2(c)(3).

\* \* \* \* \*

(iii) If the alien is found to be an alien described as ineligible for asylum in § 208.13(c)(4), then the asylum officer shall enter a negative credible fear determination with respect to the alien's intention to apply for asylum. If the alien:

(A) Establishes a reasonable fear of persecution or torture (as both terms are defined in § 208.31(c), except that the bar to eligibility for withholding of removal under section 241(b)(3)(B)(iv) of the Act shall be considered); or

(B) Would be able to establish a reasonable fear of torture (as defined in § 208.31(c)) but for the fact that he or she is subject to the mandatory bar to eligibility for withholding of removal under section 241(b)(3)(B)(iv) of the Act, but nevertheless affirmatively establishes that it is more likely than not that he or she would be tortured in the prospective country of removal, the Department of Homeland Security may, in the unreviewable discretion of the Secretary, either place the alien in proceedings under section 240 of the Act for consideration of the alien's claim for withholding of removal under section 241(b)(3) of the Act or under the Convention Against Torture, or remove the alien to another country.

(1) If the Department places the alien in proceedings under section 240 of the Act, then the IJ shall review all issues de novo, including whether the alien has established that it is more likely than not that he or she would be tortured in the prospective country of removal.

(2) If the Department decides to remove the alien to another country, it shall do so in a manner consistent with section 241(b)(2) of the Act and 8 CFR 241.15, including by not removing the alien to a country where the alien has established that his or her life or freedom would be threatened because of the alien's race, religion, nationality, membership in a particular social group, or political opinion (if the alien has also established that he or she is not subject to any mandatory bar to eligibility for withholding of removal under section 241(b)(3)(B) of the Act), or to a country where the alien has established that he or she would more likely than not be tortured. Further, such a removal shall be executed only if the alien was:

(i) Advised at the time of requesting withholding or deferral of removal of the possibility of being removed to a third country prior to a determination or

adjudication of the same under the conditions set forth in this paragraph  
(e)(5)(iii); and

(ii) Provided, but did not accept, an opportunity to withdraw the request for withholding or deferral of removal in order to prevent such removal and, instead, proceed to removal pursuant to section 241(b) of the Act, as appropriate.

(3) If the alien fails to affirmatively establish, during the interview with the asylum officer, that it is more likely than not that the alien would be tortured in the prospective country of removal, then the asylum officer will provide the alien with a written notice of decision, which will be subject to IJ review consistent with paragraph (g) of this section. If the alien is a stowaway, the Department shall place the alien in proceedings for consideration of the alien's claim pursuant to § 208.2(c)(3).

\* \* \* \* \*

## **DEPARTMENT OF JUSTICE**

Accordingly, for the reasons set forth in the preamble, the Attorney General proposes to amend 8 CFR part 1208 as follows:

### **PART 1208 – PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL**

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

**Authority:** 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Pub. L. 110-229; Pub. L. 115-218.

7. Further amend § 1208.13, as proposed to be amended at 84 FR 69660, by adding paragraph (c)(10) to read as follows:

#### **§ 1208.13 Establishing asylum eligibility.**

\* \* \* \* \*

(c) \* \* \*

(10) *Aliens who pose a danger to the security of the United States.* In determining whether an alien or a class of aliens can reasonably be regarded as a danger to the security of the United States under section 208(b)(2)(A)(iv) of the Act, the Attorney General may consider whether the alien exhibits symptoms consistent with being afflicted with any contagious or infectious disease or has come into contact with such a disease, or whether the alien or class of aliens is coming from a country, or a political subdivision or region of a country, or has embarked at a place, where such disease is prevalent or epidemic (or had come from that country, subdivision, or region, or had embarked at that place, during a period in which the disease was prevalent or epidemic there), if:

(i) The disease has triggered an ongoing declaration of a public health emergency under Federal law, including under section 319 of the Public Health Service Act, 42 U.S.C. 247d, or section 564 of the Food, Drug, and Cosmetic Act, 21 U.S.C. 360bbb-3; or

(ii) The Attorney General and the Secretary of Homeland Security have, in consultation with the Secretary of Health and Human Services, jointly:

(A) Determined that because the disease is a communicable disease of public health significance (in accordance with regulations prescribed by the Secretary of Health and Human Services (42 CFR 34.2(b))) that is prevalent or epidemic in another country or countries (or one or more political subdivisions or regions thereof) or place or places, the physical presence in the United States of aliens who are coming from such country or countries (or one or more political subdivisions or regions thereof) or have embarked at that place or places (or had come from that country or countries (or one or more subdivisions or regions thereof) or embarked at that place

or places during a period in which the disease was prevalent or epidemic there), would cause a danger to the public health in the United States; and

(B) Designated the foreign country or countries (or one or more political subdivisions or regions thereof) or place or places and the period of time or circumstances under which the Attorney General and the Secretary of Homeland Security jointly deem it necessary for the public health that aliens described in paragraph (c)(10)(ii)(A) who either are still within the number of days equivalent to the longest known incubation and contagion period for the disease or exhibit symptoms consistent with being afflicted with the disease be regarded as a danger to the security of the United States under section 208(b)(2)(A)(iv) of the Act, including any relevant exceptions as appropriate.

8. Amend § 1208.16 by revising paragraphs (d)(2) and (f) to read as follows:

**§ 1208.16 Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.**

\* \* \* \* \*

(d) \* \* \*

(2) *Mandatory denials.* Except as provided in paragraph (d)(3) of this section, an application for withholding of removal under section 241(b)(3) of the Act or under paragraph (c) of this section shall be denied if the applicant falls within section 241(b)(3)(B) of the Act or, for applications for withholding of deportation adjudicated in proceedings commenced prior to April 1, 1997, within section 243(h)(2) of the Act as it appeared prior to that date. For purposes of section 241(b)(3)(B)(ii) of the Act, or section 243(h)(2)(B) of the Act as it appeared prior to April 1, 1997, an alien who has been convicted of a particularly serious crime shall be considered to constitute a danger to the community. If the evidence indicates the applicability

of one or more of the grounds for denial of withholding enumerated in the Act, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply. In determining whether an alien or a class of aliens can reasonably be regarded as a danger to the security of the United States under section 241(b)(3)(B)(iv) of the Act, the Attorney General may consider whether the alien exhibits symptoms consistent with being afflicted with any contagious or infectious disease or has come into contact with such disease, or whether the alien or class of aliens is coming from a country, or a political subdivision or region of a country, or has embarked at a place, where such disease is prevalent or epidemic (or had come from that country, subdivision, or region, or embarked at that place, during a period in which the disease was prevalent or epidemic there), if:

(i) The disease has triggered an ongoing declaration of a public health emergency under Federal law, including under section 319 of the Public Health Service Act, 42 U.S.C. 247d, or section 564 of the Food, Drug, and Cosmetic Act, 21 U.S.C. 360bbb-3; or

(ii) The Attorney General and the Secretary of Homeland Security have, in consultation with the Secretary of Health and Human Services, jointly:

(A) Determined that because the disease is a communicable disease of public health significance (in accordance with regulations prescribed by the Secretary of Health and Human Services (42 CFR 34.2(b))) that is prevalent or epidemic in another country or countries (or one or more political subdivisions or regions thereof) or place or places, the physical presence in the United States of aliens who are coming from such country or countries (or one or more subdivisions or regions thereof) or have embarked at that place or places (or had come from that country or countries (or one or more subdivisions or regions thereof) or embarked at that place



or places during a period in which the disease was prevalent or epidemic there), would cause a danger to the public health in the United States; and

(B) Designated the foreign country or countries (or one or more political subdivisions or regions thereof) or place or places and the period of time or circumstances under which the Attorney General and the Secretary of Homeland Security jointly deem it necessary for the public health that aliens described in paragraph (d)(2)(ii)(A) of this section who either are still within the number of days equivalent to the longest known incubation and contagion period for the disease or exhibit symptoms indicating they are afflicted with the disease be regarded as a danger to the security of the United States under section 241(b)(3)(B)(iv) of the Act, including any relevant exceptions as appropriate.

\* \* \* \* \*

(f) *Removal to third country.* (1) Nothing in this section or § 1208.17 shall prevent the Department of Homeland Security from removing an alien requesting protection to a third country other than a country to which removal is currently withheld or deferred.

(2) If an alien requests withholding or deferral of removal to the applicable home country or another specific country, nothing in this section or § 1208.17 precludes the Department of Homeland Security from removing the alien to a third country prior to a determination or adjudication of the alien's initial request for withholding or deferral of removal if the alien has not established that his or her life or freedom would be threatened on account of a protected ground in that third country and that he or she is not subject to the mandatory bar to eligibility for withholding of removal under section 241(b)(3)(B)(iv) of the Act, or that it is more likely than not that he or she would be tortured in that third country. However, such a removal shall be executed only if the alien was:

(i) Advised at the time of requesting withholding or deferral of removal of the possibility of being removed to a third country prior to a determination or adjudication of the same under the conditions set forth in this paragraph (f); and

(ii) Provided, but did not accept, an opportunity to withdraw the request for withholding or deferral of removal in order to prevent such removal and, instead, proceed to removal pursuant to section 241(b) of the Act, as appropriate.

9. Add § 1208.25 to read as follows:

**§ 1208.25 Severability.**

The provisions of this part are separate and severable from one another. In the event that any provision in this part is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as independent rules and continue in effect.

10. Amend § 1208.30 by revising paragraphs (e) and (g)(2)(iv)(A) and (B) to read as follows:

**§ 1208.30 Credible fear determinations involving stowaways and applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act, whose entry is limited or suspended under section 212(f) or 215(a)(1) of the Act, or who failed to apply for protection from persecution in a third country where potential relief is available while en route to the United States.**

\* \* \* \* \*

(e) *Determination.* For the standards and procedures for asylum officers in conducting credible fear interviews and in making positive and negative credible fear determinations, see 8 CFR 208.30. The immigration judges will review such determinations as provided in paragraph

(g)(2) of this section and 8 CFR 1003.42. If the alien is found to be an alien ineligible for asylum under § 1208.13(c)(4), (6), or (7), then the immigration judge shall find that the alien does not have a credible fear of persecution with respect to the alien's intention to apply for asylum. The immigration judge's decision is final and may not be appealed. This finding, as well as all other findings of a lack of credible or reasonable fear of persecution or torture made by immigration judges under section 235(b)(1)(B)(iii)(III) of the Act and § 1003.42 and paragraph (g) of this section, does not constitute a denial of an asylum application by an immigration judge under §§ 208.4(a)(3) of this title and 1208.4(a)(3).

\* \* \* \* \*

(g) \* \* \*

(2) \* \* \*

(iv) \* \* \*

(A) If the immigration judge concurs with the determinations of the asylum officer that the alien does not have a credible fear of persecution or torture or a reasonable fear of persecution or torture and that the alien has not affirmatively established that it is more likely than not that he or she would be tortured in the prospective country of removal, after having reviewed the asylum officer's reasonable fear findings under the reasonable fear standard (as defined in § 1208.31(c), except that the bar to eligibility for withholding of removal under section 241(b)(3)(B)(iv) of the Act shall be considered), and the officer's finding regarding whether the alien is more likely than not to be tortured under the more likely than not standard, then the case shall be returned to the Department of Homeland Security for removal of the alien. The immigration judge's decision is final and may not be appealed.

(B) If the immigration judge, after having reviewed the asylum officer's reasonable fear findings under the reasonable fear standard and the officer's finding regarding whether the alien is more likely than not to be tortured under the more likely than not standard, finds that the alien, other than an alien stowaway, has a credible fear of persecution or torture or a reasonable fear of persecution or torture (as reasonable fear of persecution or torture is defined in § 1208.31(c), except that the bar to eligibility for withholding of removal under section 241(b)(3)(B)(iv) of the Act shall be considered), or has established that it is more likely than not that he or she would be tortured in the prospective country of removal, the immigration judge shall vacate the order of the asylum officer issued on Form I-860 and the Department of Homeland Security may commence removal proceedings under section 240 of the Act, during which time the alien may file an application for asylum or withholding of removal in accordance with § 1208.4(b)(3)(i), or remove the alien to a third country pursuant to 8 CFR 208.30(e)(5). If the Department of Homeland Security commences removal proceedings under section 240 of the Act, the immigration judge presiding in those proceedings shall consider all issues de novo, including whether the alien has established that it is more likely than not that he or she would be tortured in the prospective country of removal.

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Approved:

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Chad R. Mizelle,  
Senior Official Performing the Duties of  
the General Counsel.

Approved: June 30, 2020.

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William P. Barr,  
Attorney General.

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