



November 9, 2018

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Procedural Guidance

TO: All USCIS Employees

FROM: L. Francis Cissna
Director

SUBJECT: Procedural Guidance for Implementing Regulatory Changes Created by Interim Final Rule, *Aliens Subject to a Bar on Entry under Certain Presidential Proclamations; Procedures for Protection Claims*

Purpose

This memorandum provides U.S. Citizenship and Immigration Services (USCIS) asylum officers with guidance for considering and processing claims of asylum, statutory withholding of removal, and protection under the Convention Against Torture (CAT), including in the credible fear context, to conform to the Interim Final Rule (IFR), *Aliens Subject to a Bar on Entry under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55,934 (Nov. 9, 2018).

Scope

This memorandum supersedes all previous guidance dealing with asylum, refugee, statutory withholding of removal, and CAT issues that is inconsistent with this memorandum or with the Interim Final Rule.

Authority

Sections 101(a)(42), 207, 208, and 235 of the Immigration and Nationality Act (INA) (8 U.S.C. §§ 1101(a)(42), 1157, 1158, 1225); Section 451 of the Homeland Security Act of 2002 (6 U.S.C. § 271); Section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (8 U.S.C. 1231 note); Title 8 Code of Federal Regulations (8 C.F.R.) Parts 207, 208, and 235.

Background

On November 8, 2018, the Secretary of Homeland Security and the Attorney General jointly released an Interim Final Rule, *Aliens Subject to a Bar on Entry under Certain Presidential Proclamations; Procedures for Protection Claims*, which was published in the *Federal Register* on November 9, 2018. 83 Fed. Reg. 55,934. This rule amends or adds regulations to 8 CFR parts 208, 1003, and 1208, effective immediately.

Field Guidance

USCIS asylum officers are required to read the Interim Final Rule in its entirety. To summarize, the Interim Final Rule changes USCIS operational practice in two primary ways.

A. The Addition of an INA § 212(f) and § 215(a)(1) Bar to Asylum

First, the Interim Final Rule added paragraph 8 CFR 208.13(c)(3):

(c) *Mandatory denials*— * * *

(3) Additional limitation on eligibility for asylum. For applications filed after November 9, 2018, an alien shall be ineligible for asylum if the alien is subject to a presidential proclamation or other presidential order suspending or limiting the entry of aliens along the southern border with Mexico that is issued pursuant to subsection 212(f) or 215(a)(1) of the Act on or after November 9, 2018 and the alien enters the United States after the effective date of the proclamation or order contrary to the terms of the proclamation or order. This limitation on eligibility does not apply if the proclamation or order expressly provides that it does not affect eligibility for asylum, or expressly provides for a waiver or exception that makes the suspension or limitation inapplicable to the alien.

Under the new paragraph (c)(3), aliens subject to a suspension or limitation of entry under an INA § 212(f) or § 215(a)(1) presidential proclamation concerning the southern land border, but who nonetheless enter the United States in contravention of such an order, are ineligible for asylum. As the new regulation indicates, however, this new asylum bar is subject to five limitations:

- 1.) The bar applies only prospectively to INA § 212(f) or § 215(a)(1) orders that go into effect on or after November 9, 2018 (the date that this rule went into effect).
- 2.) The INA § 212(f) or § 215(a)(1) order must involve the suspension or limitation of entry.
- 3.) The INA § 212(f) or § 215(a)(1) order must be aimed at some specified class of aliens and would apply only to entry along the southern border with Mexico.
- 4.) The INA § 212(f) or § 215(a)(1) order is not a bar to asylum eligibility if it disclaims any effect on asylum eligibility for aliens within its scope, or expressly provides for a waiver or exception for which the alien may be eligible.¹
- 5.) The bar on asylum eligibility applies only to aliens who seek entry from outside the United States and became subject to an INA § 212(f) or § 215(a)(1) order after November 9, 2018 (regardless of whether they were inside the United States on that date).

¹ For example, the INA § 212(f) or § 215(a)(1) proclamation might state, as one last year did: “Nothing in this proclamation shall be construed to limit the ability of an individual to seek asylum, refugee status, withholding of removal, or protection under the Convention Against Torture, consistent with the laws of the United States.” Pres. Proc. 9645, § 6(e), 2017 WL 4231190 (Sept. 24, 2017).

Asylum officers shall carefully read any future presidential proclamation issued under INA § 212(f) or § 215(a)(1) to understand its terms, the classes of aliens to which it applies, whether it expressly provides that it does not affect eligibility for asylum, and whether there are waivers or exceptions for which an applicant may be eligible.

Although this new rule may affect the eligibility for asylum of an alien who is subject to an INA § 212(f) or § 215(a)(1) order, such aliens are still subject to various procedures under immigration laws. Under existing law, expedited removal procedures—streamlined procedures for expeditiously reviewing claims and removing certain aliens—apply to those individuals who arrive at a port of entry or those who are specifically designated such as those who have entered illegally and are encountered by an immigration officer within 100 miles of the border and within 14 days of entering. *See* 8 U.S.C. 1225(b); Designating Aliens For Expedited Removal, 69 Fed. Reg. 48,877, 48,880 (Aug. 11, 2004). To be subject to expedited removal, aliens must also be inadmissible under INA §§ 212(a)(6)(C) or (a)(7). The interim final rule does not change this framework.

B. Applying the Reasonable Fear Standard for Aliens Subject to an Asylum Bar under 8 C.F.R. § 208.13(c)(3)

Second, the Interim Final Rule added language to the end of 8 C.F.R. § 208.30(e)(5):

(5) * * * If the alien is found to be an alien described in 8 CFR 208.13(c)(3), then the asylum officer shall enter a negative credible fear determination with respect to the alien's application for asylum. The Department shall nonetheless place the alien in proceedings under section 240 of the Act for full 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 Convention Against Torture if the alien establishes a reasonable fear of persecution or torture. However, if an alien fails to establish, during the interview with the asylum officer, a reasonable fear of either persecution or torture, the asylum officer will provide the alien with a written notice of decision, which will be subject to immigration judge review consistent with paragraph (g) of this section, except that the immigration judge 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).

As this language demonstrates, the Department of Homeland Security has specified a new screening process for aliens who are subject to the new 8 C.F.R. § 208.13(c)(3) mandatory bar to asylum eligibility—that is, aliens who may be barred from receiving asylum because of an INA § 212(f) or § 215(a)(1) order. Such aliens who are ineligible for asylum necessarily cannot establish a credible fear of persecution. Ordinarily, USCIS asylum officers would also determine whether such aliens have a credible fear of persecution or torture for statutory withholding and CAT purposes.

Effective with this Interim Final Rule, aliens who are barred from receiving asylum under § 208.13(c)(3) must show a *reasonable fear* of persecution or torture during the expedited removal process to be placed into INA § 240 proceedings where they can be considered for statutory withholding or CAT protection, respectively. In other words, such aliens cannot be placed in proceedings before an immigration judge to determine whether they are entitled to statutory withholding or CAT protection by showing a mere *significant possibility* that they would be persecuted or tortured. Notably, the higher reasonable fear standard does not apply to the statutory withholding and CAT protection screening for *all* aliens subject to expedited removal under INA § 235. This higher standard applies *only* to aliens subject to the mandatory bar in 8 C.F.R. § 208.13(c)(3), as stated in the new § 208.30(e)(5). All other aliens need only show a credible fear of persecution or torture to pass the screening to be considered by an immigration judge for statutory withholding and CAT.

Although asylum officers will now apply a new standard to the statutory withholding and CAT protection screening for aliens subject to the § 208.13(c)(3) mandatory bar, that standard is a familiar one. Since 1999, regulations have provided for a “reasonable fear” screening process for certain aliens who are categorically ineligible for asylum and can thus only make claims for statutory withholding or CAT protections. *See* 8 C.F.R. § 208.31. Specifically, aliens subject to having a previous order of removal reinstated or those non-permanent resident aliens subject to administrative orders of removal resulting from an aggravated felony conviction can go into withholding-only proceedings to adjudicate their withholding or CAT claims, but only if they first establish a “reasonable fear” of persecution or torture through a screening process that is structured similar to the credible fear process. *See id.* § 208.31(b), (e).

Reasonable fear is defined by regulation to mean a “reasonable possibility that [the alien] would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that he or she would be tortured in the country of removal.” *Id.* § 208.31(c). “This . . . screening process is modeled on the credible fear screening process, but requires the alien to meet a higher screening standard.” Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8484, 8485 (1999); *see also Garcia v. Johnson*, No. 14-CV-01775-YGR, 2014 WL 6657591, at *2 (N.D. Cal. Nov. 21, 2014) (describing aim of providing “fair and efficient procedures” in reasonable-fear screening that would comport with U.S. international obligations). Reasonable fear “is the same standard required to establish a ‘well-founded fear’ of persecution in the asylum context.” *Bartolome v. Sessions*, 904 F.3d 803, 809 (9th Cir. 2018). These same definitions and interpretations also apply to the new reasonable fear screening standard for 8 C.F.R. § 208.13(c)(3) aliens seeking statutory withholding and CAT protection. In other words, an asylum officer must evaluate whether there is a reasonable possibility that the alien will be persecuted or tortured, not a reasonable possibility that the alien will more likely than not be persecuted or tortured.

Consistent with the changes to 8 C.F.R. § 208.30(e)(5), the new screening process proceeds as follows. For an alien subject to expedited removal, an asylum officer will ascertain whether the alien seeks protection, consistent with INA § 235(b)(1)(A)(ii). All aliens seeking asylum, statutory withholding of removal, or CAT protection would continue to go before an asylum

officer for screening, consistent with INA § 235(b)(1)(B). The asylum officer will determine whether an alien is ineligible for asylum under 8 C.F.R. § 208.13(c)(3). If there were a significant possibility that the alien was not subject to the eligibility bar (and the alien otherwise demonstrated a significant possibility of establishing eligibility for asylum), then the alien would have established a credible fear. If, however, an alien lacks a significant possibility of eligibility for asylum because of the § 208.13(c)(3) bar, the asylum officer will make a negative credible fear finding. The asylum officer will then apply the reasonable fear standard to assess the alien's claims for statutory withholding of removal or CAT protection.

An alien subject to the § 208.13(c)(3) asylum bar who clears the reasonable fear screening standard will be placed in INA § 240 proceedings, just as any other alien who cleared the credible fear standard would be. In those proceedings, the alien will also have an opportunity to raise whether the alien was correctly identified as subject to the § 208.13(c)(3) ineligibility bar, as well as other claims. *See* 8 C.F.R. §§ 1003.42(d), 1208.30(g)(1)(i) (new language governing immigration court procedure in such instances). If an immigration judge determines that the alien was incorrectly identified as subject to 8 C.F.R. § 208.13(c)(3), then the alien would be able to apply for asylum.

Conversely, an alien subject to the § 208.13(c)(3) asylum bar who does not clear the reasonable fear screening standard could obtain review of both credible and reasonable fear determinations before an immigration judge, *See id.* §§ 208.30(e)(5), 1208.30(g)(1)(i). If the immigration judge finds that either determination was incorrect, the alien will be placed into INA § 240 proceedings. In reviewing the determinations, the immigration judge would decide *de novo* whether the alien is subject to the proclamation asylum bar. If, however, the immigration judge affirms both determinations, then the alien would be subject to removal without further appeal, consistent with the existing process under INA § 235.

In short, aliens subject to the proclamation eligibility bar would be processed through existing procedures by USCIS in accordance with 8 C.F.R. §§ 208.30 and 1208.30, but would be subject to the reasonable-fear standard for screening of their statutory withholding and CAT protection claims. Therefore, an asylum officer must determine whether an alien has established a reasonable fear of persecution or torture by evaluating whether there is a "reasonable possibility" that the alien will face such persecution or torture.

C. The Procedures Unaffected by the IFR

Per usual protocol, asylum officers shall create a record consistent with INA § 235(b)(1)(B)(iii)(II) and 8 C.F.R. § 208.30(e)(1). Supervisory review is required for all determinations issued under § 208.30. 8 C.F.R. § 208.30(e)(7). Thus, a supervisory officer must concur in a finding that an alien is subject to an INA § 212(f) or § 215(a)(1) bar and therefore does not establish a credible fear of persecution before the asylum officer's credible fear determination becomes final.

USCIS' policy regarding family unity notices to appear (NTAs) continues to apply in this context. Policy Memorandum, PM-602-0050.1, *Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens* (June 28, 2018). That memorandum states, "An asylum applicant who has been issued an NTA may request issuance for family members not included on the asylum application as dependents for family unification purposes. The request must be made in writing, and USCIS retains discretion to deny such a request." If a family unit is subject to the § 208.13(c)(3) asylum bar, and at least one member of the family demonstrates a reasonable fear of persecution or torture, but others do not, USCIS retains the discretion to issue an NTA for the family unit.

Unaccompanied alien children (UACs) are not subject to credible fear or reasonable fear screening. 8 U.S.C. § 1232(a)(5)(D). The IFR, by its terms, does not change that. However, the *Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States* issued on November 9, 2018 renders UACs who cross the international boundary between the United States and Mexico outside of a port of entry and who do not properly present themselves for inspection would be subject to a suspension of entry. Therefore, while such UACs will continue to be processed in accordance with 6 U.S.C. § 279 and 8 U.S.C. § 1232, they would per the terms of this proclamation and the IFR be barred from asylum eligibility.

Finally, nothing about this screening process or in the Interim Final Rule alters the existing procedures for processing alien stowaways under the INA or its implementing regulations. An alien stowaway is unlikely to be subject to 8 C.F.R. §§ 208.13(c)(3) and 1208.13(c)(3) unless a proclamation specifically applies to stowaways or to entry by vessels or aircraft. *See* INA § 101(a)(49). As always, asylum officers should read carefully any INA § 212(f) or § 215(a)(1) proclamation issued by the President. Moreover, an alien stowaway is barred from being placed into proceedings under INA § 240 regardless of the level of fear of persecution he establishes. INA § 235(a)(2).

Similarly, despite the incorporation of a reasonable fear standard into the evaluation of certain cases, nothing about this screening process or in the Interim Final Rule implicates existing reasonable fear procedures in 8 C.F.R. §§ 208.31 or 1208.31.

D. Updates to the Adjudicator's Field Manual and the USCIS Policy Manual May Be Forthcoming

This memorandum supersedes anything in USCIS training materials that is inconsistent with this memorandum. The Office of Policy and Strategy and the Refugee, Asylum, and International Operations Directorate should review the Adjudicator's Field Manual and the USCIS Policy Manual to assess whether changes are necessary to conform to the Interim Final Rule and to this memorandum. If so, those offices should make the necessary changes to update those materials.

Contact

Questions regarding this memorandum should be addressed through appropriate channels to the Refugee, Asylum, and International Operations Directorate.