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IN FOCUS

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Federal Agency Rule Expands Asylum Officers' Authority

Under a Department of Homeland Security (DHS) and Department of Justice (DOJ) interim final rule (IFR) issued in March 2022, asylum officers (AOs) within DHS's U.S. Citizenship and Immigration Services (USCIS) may determine whether non-U.S. nationals ("aliens" under governing law) encountered at the border who show a credible fear of persecution or torture ("credible fear") are entitled to asylum and related protections. *See* Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18,078 (Mar. 29, 2022). The IFR, which shall be implemented in a phased manner, departs from prior regulations that strictly authorized immigration judges (IJs) within DOJ's Executive Office for Immigration Review to adjudicate those asylum claims. This In Focus provides an overview of the IFR.

Statutory and Regulatory Background

In general, aliens within the interior of the United States who commit immigration violations may be placed in "formal," adversarial removal proceedings, and may pursue relief from removal in the course of those proceedings. In contrast, many aliens arriving to the United States, or who have recently entered the country without inspection, are subject to an "expedited removal" process under § 235(b)(1) of the Immigration and Nationality Act (INA). This process generally permits immigration officers to order the removal of covered aliens without further review. However, if an alien subject to expedited removal shows an intent to seek asylum or fear of persecution if removed, an AO must assess whether the alien has a "credible fear" supporting consideration of the alien's claim for relief. The INA instructs that, if a credible fear is shown, the alien "shall be detained for further consideration of the application for asylum." If a credible fear is not shown, the alien may request an IJ's review of the negative credible fear finding. Since the implementation of expedited removal in 1997, DHS and DOJ regulations have provided that aliens who establish a credible fear shall be placed in formal removal proceedings for an IJ's consideration of their claim for asylum or related relief. 8 C.F.R. §§ 208.30, 1208.30. These regulations have also provided that, if USCIS makes a negative credible fear determination and an IJ overturns that finding upon review, the alien may pursue asylum and related relief in formal removal proceedings.

Justification for the IFR

DHS and DOJ have argued that increasing numbers of asylum claims—driven largely by changing demographics of alien encounters at the southwest border—have caused long asylum adjudication backlogs in immigration courts. According to the agencies, the number of individuals initially screened for expedited removal who presented asylum claims rose to 105,000 in 2019. The pending immigration courts caseload reached about 1.3 million cases in 2021, including 610,000 with pending asylum applications (more recent DOJ statistics show even higher figures). *See* Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 86 Fed. Reg. 46,906 (Aug. 20, 2021). As a result, average adjudication times for asylum claims originating at the border have often been several years. Thus, the agencies argued, transferring initial responsibility for adjudicating those claims from IJs to USCIS would reduce backlogs and create a more efficient asylum processing system.

Credible Fear and Asylum Process under the IFR

If an alien subject to expedited removal shows a credible fear, USCIS—rather than referring the case for an IJ's adjudication in formal removal proceedings—may schedule a nonadversarial, "asylum merits interview" for an AO's consideration of asylum. Following the interview, the AO will issue a decision granting or denying asylum. If the alien fails to show a credible fear and requests an IJ's review of the negative credible fear finding (or refuses or fails to either request or decline such review), the AO will refer the case for an IJ's review. If the IJ determines that the alien has a credible fear, the IJ will refer the case to USCIS for adjudication (alternatively, DHS may begin formal removal proceedings during which the alien may pursue asylum before an IJ). If the IJ concurs with the negative credible fear finding, the alien is subject to removal, but USCIS may reconsider that finding.

If USCIS adjudicates asylum, the written record of the positive credible fear finding will serve as the alien's asylum application (in most other cases, an alien seeking asylum has to separately file an application). The AO generally must conduct the asylum merits interview within 45 days after serving the alien with a positive credible fear finding (made either by the AO or an IJ), but the interview may not be scheduled fewer than 21 days after service to afford the alien time to prepare. The alien has a right to counsel at no expense to the government, and may present witnesses or affidavits during the interview. The AO may obtain an interpreter's assistance at the interview. Failure to appear at the interview may result in referral of the alien to formal removal proceedings.

If an asylum claim is denied, the AO will issue an order of removal, but may consider the alien's eligibility for withholding of removal and protection under the Convention Against Torture (CAT). These protections bar an alien's removal to the country of persecution or torture (but not necessarily to another country). Unlike asylum, they provide no path to lawful permanent resident status. If the alien requests further review of the asylum denial, the AO will refer the alien's asylum application, along with any

written findings on withholding of removal and CAT protection, to an IJ for de novo adjudication in "streamlined removal proceedings." The AO's decision and removal order are final unless the alien requests review.

If an AO denies asylum and the case is referred for streamlined removal proceedings, a master calendar (MC) hearing (where the IJ advises the alien of his or her rights and the purpose of the proceedings) is to occur 30–35 days after a Notice to Appear (the charging document that starts removal proceedings) is served. A status conference must be held 30 days after the MC hearing (or no later than 35 days if it cannot be held on that date). The status conference is intended to address the charges of removability against the alien, identify and narrow the issues, determine whether the case can be decided on the documentary record, and potentially prepare the case for a merits hearing. The IJ may hold more status conferences if necessary.

An IJ may waive a merits hearing and decide the alien's application for asylum and related protections based solely on the documentary record (i.e., the record of proceedings before the AO and the AO's decision) if (1) neither party has requested to present testimony and DHS has stated that it waives cross-examination; or (2) the alien has requested to present testimony, DHS has stated that it waives cross-examination and does not intend to present testimony or other evidence, and the IJ determines that the application can be granted without further testimony.

If the case cannot be decided on the documentary record, the IJ must hold a merits hearing within 60 days after the MC hearing (or no later than 65 days if it cannot be held earlier). The alien may testify and potentially offer more evidence at the hearing. The IJ may schedule a "continued merits hearing" (generally no later than 30 days after the initial merits hearing) if the case cannot be completed at that time. The IJ generally must issue an oral decision on the date of the final merits hearing, or no later than 30 days after the status conference if the IJ determines that no hearing is necessary.

If the IJ grants asylum, the alien's removal order will be vacated. If the IJ denies asylum but the AO had determined that the alien is eligible for withholding of removal or CAT protection, the IJ will enter an order of removal but grant the applicable protection, unless DHS produces evidence that was not part of the AO proceedings showing that the alien does not qualify for such protection. Conversely, if the AO had found (or DHS later shows) the alien ineligible for withholding or CAT protection, the IJ must independently determine whether the alien qualifies for those protections. The alien may appeal the IJ's decisions on asylum, withholding, and CAT protection to the Board of Immigration Appeals.

Detention and Parole Provisions

The IFR also addresses the detention of aliens in expedited removal. INA § 235(b)(1) provides that aliens screened for expedited removal, including those found to have a credible fear, are subject to mandatory detention. Under INA § 212(d)(5), however, DHS may "parole" applicants for admission (including aliens subject to expedited removal) "for urgent humanitarian reasons or significant public benefit," enabling paroled aliens to be released from the agency's physical custody. Long-standing regulations, codified at 8 C.F.R. § 235.3, have allowed parole of aliens placed in expedited removal, including pending a credible fear determination, only if parole "is required to meet a medical emergency or is necessary for a legitimate law enforcement objective." The regulations have also permitted parole on other grounds if an alien subject to expedited removal is placed into formal removal proceedings, including when the "continued detention is not in the public interest" and the alien is not a security or flight risk. 8 C.F.R. §§ 208.30(f), 212.5(b).

The IFR amends the regulations by authorizing parole of those who are still in expedited removal, including pending a credible fear determination, on a less restricted basis, including if "continued detention is not in the public interest" and the alien is not a security or flight risk. Aliens with positive credible fear determinations whose asylum claims are being considered by USCIS may also be paroled on similar grounds.

Implementation of the IFR

USCIS began implementation of the IFR on May 31, 2022. According to an agency fact sheet, only adults and families placed in expedited removal after that date, and who show intention to seek asylum or express a fear of persecution, might be subject to the new asylum process. The IFR does not apply to unaccompanied children, who under federal law can only be placed in formal removal proceedings, not expedited removal. 8 U.S.C. § 1232(a)(5)(D).

USCIS is implementing the IFR in a phased manner, starting with the referral of a few hundred aliens each month for asylum merits interviews. The new procedures will first be implemented only for aliens housed at two detention facilities in Texas. At these locations, AOs will conduct credible fear interviews telephonically, and refer those who establish a credible fear for asylum merits interviews *only* if they indicate an intent to reside in Boston, Los Angeles, Miami, New York, Newark, or San Francisco (where the merits interviews will take place), and DHS decides to release them from detention. Upon release, the aliens may be supervised and monitored under an alternatives to detention program. If USCIS denies asylum, it will refer the case (including its findings on withholding and CAT protection) for streamlined removal proceedings that will take place in the six cities listed above.

Legal Challenges

The States of Arizona, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, Texas, and West Virginia have brought suit challenging the IFR. They argue that the IFR violates governing statute by allowing AOs, rather than IJs, to adjudicate asylum applications filed by those with positive credible fear determinations. The states also claim that the IFR unlawfully expands DHS's use of parole for aliens subject to expedited removal. To date, the federal district courts have not issued decisions on the merits of the states' claims.

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