



OOD
PM 21-09

Effective: January 11, 2021

To: All of EOIR
From: James R. McHenry III, Director
Date: December 11, 2020

**GUIDANCE REGARDING NEW REGULATIONS GOVERNING PROCEDURES FOR
ASYLUM AND WITHHOLDING OF REMOVAL AND CREDIBLE FEAR AND
REASONABLE FEAR REVIEWS**

PURPOSE:	Establishes EOIR policy and procedures regarding new regulations about credible fear and reasonable fear review screenings and the adjudication of asylum, statutory withholding of removal, and protection under the Convention Against Torture claims.
OWNER:	Office of the Director
AUTHORITY:	8 U.S.C. §§ 1225, 1158; 8 CFR §§ 1003.0(b), 1003.1, 1003.42; 1208.1, 1208.2, 1208.5, 1208.6, 1208.13, 1208.15, 1208.16, 1208.18, 1208.20, 1208.25, 1208.30, 1208.31; 1212.13; 1235.6; and 1244.4.
CANCELLATION:	None

On December 11, 2020, the Department of Justice and Department of Homeland Security (DHS) published a joint final rule, 85 FR 80274, amending the standards and procedures for credible fear and reasonable fear review screenings and for adjudicating applications for asylum, statutory withholding of removal, and protection under the Convention Against Torture (CAT). Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 80274 (Dec. 11, 2020). The final rule amends 8 CFR Parts 208, 235, 1003, 1208, and 1235, as discussed below. Although this Policy Memorandum (PM) provides an overview and summary of that rulemaking, all Immigration Judges and Appellate Immigration Judges are strongly encouraged to review both the complete final rulemaking and the Notice of Proposed Rulemaking (NPRM), *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 36264 (Jun. 15, 2020), each of which extensively details the applicable law upon which the rule is based.

The rule is effective on January 11, 2021. The changes to the credible fear review procedures and reasonable fear review procedures apply to all aliens apprehended or otherwise encountered by DHS on or after that effective date. The remaining provisions of the rule apply only to asylum, statutory withholding of removal, and protection under CAT applications filed on or after the effective date. As detailed in the NPRM and the final rule, many parts of the rule merely incorporate established principles of existing statutory or case law into the regulations applicable

to EOIR. Accordingly, nothing in the rule precludes the appropriate application of existing law— independently of the rule—to cases with pending asylum applications. *See also* Section X, *infra* (discussing the difference between the prospective application of the rule itself and the application of existing law which is incorporated into the regulations by the rule).

I. Standard of Proof for Withholding of Removal and Torture-Related Fear Determinations in Expedited Removal Proceedings and Stowaways

The rule amends 8 CFR §§ 208.30, 1003.42, and 1208.30 to raise the standards of proof in statutory withholding of removal and torture-related screenings for stowaways or aliens in expedited removal proceedings from a “significant possibility” to a “reasonable possibility” that the alien would be persecuted on account of a protected ground, or tortured. Immigration Judges will apply the “reasonable possibility” standard when reviewing negative fear determinations related to potential eligibility for statutory withholding of removal and protection under CAT. The “significant possibility” standard for potential asylum eligibility in credible fear proceedings continues to apply.

II. Consideration of Internal Relocation and Mandatory Eligibility Bars in the Credible Fear Screening Process

The rule amends 8 CFR §§ 208.30, 1003.42, and 1208.30 relating to the consideration of internal relocation and mandatory eligibility bars during the credible fear screening process and subsequent Immigration Judge review. The rule requires asylum officers to consider internal relocation and mandatory asylum and statutory withholding of removal eligibility bars when making fear determinations during the credible fear screening process.

During the credible fear screening process, when determining whether the alien has established a credible fear of persecution, a reasonable possibility of persecution, or a reasonable possibility of torture, asylum officers will be required to consider whether the alien could avoid future harm by internally relocating within his or her country. If the asylum officer determines that the alien could reasonably relocate, then the officer will issue a negative fear determination.

Similarly, during the credible fear screening process, asylum officers will determine whether a mandatory asylum or statutory withholding of removal eligibility bar applies pursuant to INA § 208(a)(2)(B)–(D), INA § 208(b)(2), or established by regulation under section 208(b)(2)(C). Previously, an alien who received a positive fear determination but appeared subject to a mandatory eligibility bar would be placed in full INA § 240 removal proceedings. Under this rule, if a mandatory eligibility bar applies, the officer will enter a negative credible fear of persecution determination or a negative reasonable possibility of persecution determination, as applicable. However, if a mandatory eligibility bar applies to one form of relief, it does not preclude the asylum officer from making a positive determination regarding another form of relief.

If an asylum officer enters a negative fear finding and the alien requests Immigration Judge review, any determinations made by an asylum officer relating to internal relocation or mandatory eligibility bars are subject to review by the Immigration Judge as part of a *de novo* review. If an asylum officer enters a negative fear determination based on a mandatory eligibility bar, the

Immigration Judge should first review the applicability of the bar. If the Immigration Judge finds that the bar does not apply, the Immigration Judge should vacate the asylum officer's determination, and DHS may commence asylum-and-withholding-only proceedings. If the Immigration Judge finds that the bar does apply, the Immigration Judge should then review the asylum officer's negative fear determination.

Lastly, if an asylum officer issues a negative fear determination, the asylum officer currently inquires as to whether the alien wishes to have an Immigration Judge review the determination. This rule will now treat an alien's refusal to indicate whether he or she desires such review as declining to request such review.

III. Consideration of Precedent When Reviewing Credible Fear Determinations

The rule amends 8 CFR § 1003.42(f) to specify that an Immigration Judge is required to consider all applicable legal precedent when reviewing an asylum officer's negative fear determination. In particular, the rule codifies a "law of the circuit" standard, only requiring Immigration Judges to consider precedential decisions of the Federal circuit court in the jurisdiction where the Request for Review is filed, rather than precedent from all Federal circuits. The rule also codifies existing standards requiring Immigration Judges to consider precedential decisions of the Board of Immigration Appeals ("BIA"), Attorney General, and the Supreme Court.

IV. Asylum-and-Withholding-Only Proceedings

The rule amends 8 CFR §§ 208.2, 208.30, 235.6, 1003.1, 1003.42, 1208.2, 1208.30, and 1235.6 to modify existing procedures so that aliens who establish a credible fear of persecution, a reasonable possibility of persecution, or a reasonable possibility of torture—either in front of an asylum officer or on review by an Immigration Judge—will be placed into asylum-and-withholding-only proceedings before an Immigration Judge, similar to proceedings applicable to other categories of asylum applicants such as aliens utilizing the Visa Waiver Program. Aliens maintain appeal rights to the Board of Immigration Appeals in asylum-and-withholding-only proceedings. In addition, when the alien first expresses a fear of persecution or harm, DHS will be required to provide the alien with the necessary application forms and notice regarding the right to counsel at no expense to the Government and the consequences of knowingly filing a frivolous asylum application.

V. Frivolous Asylum Applications

An asylum applicant is subject to the penalty provisions of INA § 208(d)(6) only if the alien received the notice required by INA § 208(d)(4)(A) and a final order by an Immigration Judge or the Board specifically finds that the alien knowingly filed a frivolous asylum application. The rule revises the definition of a "frivolous" asylum application. An asylum application is frivolous if it: (1) contains a fabricated material element; (2) is premised on false or fabricated evidence unless the application would have been granted without such evidence; (3) is filed without regard to the merits of the claim; or, (4) is clearly foreclosed by applicable law.

The rule also allows asylum officers adjudicating affirmative asylum applications to make frivolous findings and to refer cases on that basis to Immigration Judges (for aliens not in lawful

status) or to deny the applications (for aliens in lawful status). However, a finding by an asylum officer that an asylum application is frivolous is not binding on the Immigration Judge or the Board. Rather, the Immigration Judge or Board must make a separate finding on the issue of frivolousness upon *de novo* review of the application.

The rule codifies the principle, consistent with Federal case law, that once an alien has been provided a warning of the consequences of knowingly filing a frivolous application, as required by INA § 208(d)(4)(A), no further warning is necessary; thus, an Immigration Judge or the Board is not required to give the alien additional opportunities to account for any frivolousness issues prior to the entry of a frivolous finding. *See, e.g., Niang v. Holder*, 762 F.3d 251, 254–55 (2d Cir. 2014)

Finally, the rule, consistent with case law, codifies the principle that an application may be found frivolous even if the application is untimely or withdrawn. However, the alien can avoid a frivolousness finding and the associated penalties on a withdrawn application if the alien (1) withdraws the application with prejudice; (2) accepts an order of voluntary departure for a period of no more than 30 days; (3) withdraws all other applications for relief or protection with prejudice; and (4) waives any rights to file an appeal, motion to reopen, and motion to reconsider.

VI. Pretermission of Applications for Asylum, Withholding of Removal, or Protection Under the Convention Against Torture

The rule amends 8 CFR § 1208.13 to specify procedures for an Immigration Judge to follow if an application for asylum, statutory withholding of removal, or protection under CAT warrants pretermission due to the failure to establish a *prima facie* claim. Immigration Judges may pretermit an asylum application following an oral or written motion by DHS or on the Immigration Judge's own authority. Before the Immigration Judge pretermits an application based on a DHS motion, the alien must have an opportunity to respond. If the Immigration Judge intends to pretermit the application on his or her own authority, the parties must be given notice and at least ten days to respond.

VII. Standards for Adjudicating Applications for Asylum, Statutory Withholding of Removal, and Protection Under the Convention Against Torture

As discussed below, for purposes of asylum, statutory withholding of removal, or protection under CAT, the rule clarifies and codifies adjudicatory definitions and standards regarding the following: membership in a particular social group, political opinion, persecution, nexus, internal relocation, firm resettlement, public officials acting under color of law, evidence based on stereotypes, and the exercise of discretion.

A. Membership in a Particular Social Group

The rule amends 8 CFR §§ 208.1 and 1208.1 to codify the requirements, consistent with case law, that a particular social group must be (1) composed of members who share a common immutable characteristic; (2) defined with particularity; and (3) socially distinct in the society in question. In addition, the rule reiterates the longstanding principle that a particular social group cannot be

defined exclusively by the alleged persecutory acts or harm and clarifies that the group must also have existed independently of the alleged persecutory acts or harm that form the basis of the claim.

Additionally, regarding the composition of particular social groups, the rule articulates nine specific but non-exhaustive bases that would not, in general, result in a favorable adjudication:¹

- (1) Past or present criminal activity or association (including gang membership);
- (2) Presence in a country with generalized violence or a high crime rate;
- (3) Being the subject of a recruitment effort by criminal, terrorist, or persecutory groups;
- (4) The targeting of the applicant for criminal activity for financial gain based on perceptions of wealth or affluence;
- (5) Interpersonal disputes of which governmental authorities were unaware or uninvolved;
- (6) Private criminal acts of which governmental authorities were unaware or uninvolved;
- (7) Past or present terrorist activity or association;
- (8) Past or present persecutory activity or association; or
- (9) Status as an alien returning from the United States.

The rule also requires the alien to articulate on the record, or provide a basis on the record for determining, the definition and boundaries of any proposed particular social group. A failure to define, or provide a basis for defining, a formulation of a particular social group before an Immigration Judge waives any claim based on that particular social group for all purposes under the INA, including on appeal. Any waived claim on this basis cannot serve as the basis for that alien's motion to reopen or reconsider for any reason, including a claim of ineffective assistance of counsel, unless the alien complies with the procedural requirements for such a motion and demonstrates that counsel's failure to define, or provide a basis for defining, a formulation of a particular social group both constituted egregious conduct and was not a strategic choice.

B. Political Opinion

¹ The rule notes types of claims premised on membership in a particular social group that "in general" do not warrant favorable adjudication, but nothing in the rule should be construed as categorically barring claims in every case. Whether a proposed group has—*see, e.g., Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822 (BIA 1990) (designated as precedent by Attorney General Order No. 1895-94 (June 12, 1994)) (homosexuals in Cuba may be a particular social group)—or has not—*see, e.g., Matter of Vigil*, 19 I&N Dec. 572, 575 (BIA 1988) (young, male, urban, unenlisted Salvadorans do not constitute a particular social group)—been recognized in other cases is not dispositive of whether the proposed particular social group in an individual case is cognizable. Recognition in one case does not mean recognition in all cases. *See S.E.R.L. v. Att'y Gen.*, 894 F.3d 535, 556 (3d Cir. 2018) ("Consequently, it does not follow that because the BIA has accepted that one society recognizes a particular group as distinct that all societies must be seen as recognizing such a group."). Other sections of the rule referring to concepts "in general" should similarly not be construed as categorical determinations.

The rule amends 8 CFR §§ 208.1 and 1208.1 to define “political opinion” as an opinion expressed by, or imputed to, an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof.

In addition, the rule also states that, in general, adjudicators will not favorably adjudicate political opinion claims defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state.

The rule also expressly incorporates a statutory expansion of the definition of political opinion into the regulations by stating that a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.

C. Persecution

Consistent with case law, the rule amends 8 CFR §§ 208.1 and 1208.1 to define “persecution” as requiring an intent to target a belief or characteristic, a severe level of harm, and the infliction of a severe level of harm by the government of a country or by persons or an organization that the government was unable or unwilling to control. The rule reiterates that, for purposes of evaluating the severity of the level of harm, persecution is an extreme concept involving a severe level of harm that includes actions so severe that they constitute an exigent threat.

In addition, based on case law, the rule provides a list of non-exhaustive circumstances that do not constitute persecution, including (1) generalized harm that arises out of civil, criminal, or military strife in a country; (2) any and all treatment that the United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional; (3) intermittent harassment, including brief detentions; (4) threats with no actual effort to carry out the threats, except that particularized threats of a severe harm of an immediate and menacing nature made by an identified entity may constitute persecution; and (5) non-severe economic harm or property damage. The rule provides that the existence of government laws or policies that are unenforced or infrequently enforced do not, by themselves, constitute persecution, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally.

D. Nexus

The rule amends 8 CFR §§ 208.1 and 1208.1 to provide a non-exhaustive list of circumstances that will, in general, not be sufficient to establish nexus for purposes of asylum or statutory withholding of removal. The list includes:

- (1) Interpersonal animus or retribution;
- (2) Interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue;
- (3) Generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state;
- (4) Resistance to recruitment or coercion by guerilla, criminal, gang, terrorist or other non-state organizations;
- (5) The targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence;
- (6) Criminal activity;
- (7) Perceived, past or present, gang affiliation; or
- (8) Gender.²

E. Evidence Based on Stereotypes

The rule amends 8 CFR §§ 208.1 and 1208.1 to make clear that, for purposes of adjudicating applications for asylum or statutory withholding of removal, evidence offered in support of such applications which promotes cultural stereotypes about a country, its inhabitants, or an alleged persecutor, including stereotypes based on race, religion, nationality, or gender, is not admissible. However, the rule does not prohibit the submission of evidence that an alleged persecutor holds stereotypical views of the applicant.

F. Internal Relocation

The rule amends 8 CFR §§ 208.13, 208.16, 1208.13, and 1208.16 to revise the standards governing internal relocation determinations. The rule adopts a “totality of the circumstances” test for determining the reasonableness of internal relocation and provides a non-exhaustive list of

² Although the rule lists “gender” as an example under the groupings regarding nexus, it may also be appropriately considered under the definition of “particular social group” as many courts have done. *See, e.g., Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991) (“Like the traits which distinguish the other four enumerated categories—race, religion, nationality and political opinion—the attributes of a particular social group must be recognizable and discrete. Possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group.”); *Da Silva v. U.S. Att’y Gen.*, 459 F. App’x 838, 841 (11th Cir. 2012) (“The BIA determined that ‘women’ was too broad to constitute a particular social group. We agree that such a group is too numerous and broadly defined to be considered a ‘social group’ under the INA.”). The lists in the rule under each definition are non-exhaustive.

considerations in making this determination, including (1) the size of the country of nationality or last habitual residence; (2) the geographic locus of the alleged persecution; (3) the size, reach, or numerosity of the alleged persecutor; and (4) the applicant's demonstrated ability to relocate to the United States in order to apply for asylum or statutory withholding of removal.

The rule also revises the presumptions applicable in assessing the reasonableness of internal relocation. In cases in which the persecutor is a government or is government-sponsored, it shall be presumed that internal relocation would not be reasonable, unless DHS establishes by a preponderance of the evidence that, under the totality of the circumstances, it would be reasonable for the applicant to relocate. In cases in which the persecutor is not the government or a government-sponsored actor, or otherwise is a private actor, regardless of whether an applicant established past persecution, there shall be a presumption that internal relocation would be reasonable unless the applicant establishes, by a preponderance of the evidence, that it would be unreasonable to relocate.

G. Firm Resettlement

The rule amends 8 CFR §§ 208.15 and 1208.15 to revise the definition of "firm resettlement." Under the new definition, an alien is considered to be firmly resettled if, after the events giving rise to the alien's asylum claim, at least one of three circumstances applies.

First, the alien will be considered to be firmly resettled if the alien resided in a country through which the alien transited prior to arriving in or entering the United States and (1) received or was eligible for any permanent legal immigration status in that country; (2) resided in such a country with any non-permanent but indefinitely renewable legal immigration status (including asylee, refugee, or similar status but excluding status such as of a tourist); or (3) resided in such a country and could have applied for and obtained any non-permanent but indefinitely renewable legal immigration status in that country.

Second, the alien will be considered to be firmly resettled if the alien physically resided voluntarily, and without continuing to suffer persecution, in any one country for one year or more after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States. However, time spent in Mexico by an alien who is not a native or citizen of Mexico solely as a direct result of being returned to Mexico pursuant to INA § 235(b)(2)(C) or after being subject to metering is not counted for purposes of this ground.

Third, the alien will be considered to be firmly resettled if (1) the alien is a citizen of a country other than the one where the alien alleges a fear of persecution and the alien was present in that country after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States, or (2) the alien was a citizen of a country other than the one where the alien alleges a fear of persecution, the alien was present in that country after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States, and the alien renounced that citizenship after arriving in the United States.

The rule also clarifies that, consistent with 8 CFR § 1240.8(d), the Immigration Judge must consider the firm resettlement bar when the evidence of record indicates that the alien may have

been firmly resettled. Either DHS or the Immigration Judge may raise the issue of whether the firm resettlement bar applies based on the evidence of record and regardless of which party introduced the evidence into the record. If the evidence of record indicates that the bar may apply, the alien bears the burden of proving the bar does not apply.

Finally, the rule imputes the firm resettlement of an alien's parent(s) to the alien if the resettlement occurred before the alien turned 18 and the alien resided with his or her parent(s) at the time of the firm resettlement unless he or she could not have derived any permanent legal immigration status or any non-permanent but indefinitely renewable legal immigration status (including asylee, refugee, or similar status but excluding status such as of a tourist) from his or her parent(s).

H. Public Officials Acting Under Color of Law

The rule amends 8 CFR §§ 208.18 and 1208.18 to provide guidance regarding “public officials” for purposes of applications for protection under CAT. The rule clarifies that, for purposes of defining “torture” under CAT, pain or suffering inflicted by a public official who is not acting under color of law does not constitute pain or suffering inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official acting in an official capacity or other person acting in an official capacity. The rule further states that a different public official acting in an official capacity or other person acting in an official capacity could instigate, consent to, or acquiesce in the pain or suffering inflicted by the public official who is not acting under color of law.

The rule further clarifies that demonstrating a public official's awareness of the underlying activity constituting torture requires a finding of actual knowledge of, or willful blindness to, the activity. The rule further defines “willful blindness” as an awareness of a high probability of activity constituting torture and deliberately avoiding learning the truth—the definition does not include negligently failing to inquire, being mistaken, or having reckless disregard for the truth.

Regarding “acquiescence,” the rule also clarifies that, in order for a public official to breach his or her legal responsibility to intervene to prevent an activity constituting torture, the official must have been charged with preventing the activity as part of his or her duties and have failed to intervene. Under the rule, no person will be deemed to have breached a legal responsibility to intervene if such person is unable to intervene, or if the person intervenes but is unable to prevent the activity that constitutes torture.

The rule also removes all references to the term “rogue official” in 8 CFR §§ 208.16, 208.18, and 1208.18, and replaces it with references to a “public official who is not acting under color of law.”

I. Discretionary Factors in Asylum Determinations

The rule amends 8 CFR §§ 208.13 and 1208.13 to provide adjudicators with factors to consider when determining whether an alien merits asylum relief as a matter of discretion. The rule includes three significant adverse discretionary factors that adjudicators must consider in all asylum cases:

- (1) An alien's unlawful entry or unlawful attempted entry into the United States unless such entry or attempted entry was made in immediate flight from persecution in a

contiguous country or unless such entry or attempted entry was made by an alien under the age of 18 at the time the entry or attempted entry was made;

- (2) The failure of an alien to apply for protection from persecution or torture in at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited before entering the United States unless:
 - (A) The alien received a final judgment denying the alien protection in such country;
 - (B) The alien demonstrates that he or she satisfies the definition of "victim of a severe form of trafficking in persons" provided in 8 CFR § 214.11; or
 - (C) Such country or countries were, at the time of the transit, not parties to the 1951 United Nations Convention relating to the Status of Refugees, the 1967 Protocol, or CAT; and
- (3) An alien's use of fraudulent documents to enter the United States, unless the alien arrived in the United States by air, sea, or land directly from the applicant's home country without transiting through any other country.

An Immigration Judge must address these factors, if applicable, in each asylum case, but these factors do not constitute categorical bars to the granting of an asylum application.

The rule also includes nine additional adverse discretionary factors for adjudicators to apply, as applicable, when the alien:

- (1) Immediately prior to his or her arrival in the United States or en route to the United States from the alien's country of citizenship, nationality, or last lawful habitual residence, spent more than 14 days in any one country unless:
 - (A) The alien demonstrates that he or she applied for protection from persecution or torture in such country and the alien received a final judgment denying the alien protection in such country;
 - (B) The alien demonstrates that he or she satisfies the definition of "victim of a severe form of trafficking in persons" provided in 8 CFR § 214.11; or
 - (C) Such country was, at the time of the alien's transit, not a party to the 1951 United Nations Convention relating to the Status of Refugees the 1967 Protocol, or CAT;
- (2) Transits through more than one country between his or her country of citizenship, nationality, or last habitual residence and the United States unless:

- (A) The alien demonstrates that he or she applied for protection from persecution or torture in at least one such country and the alien received a final judgment denying the alien protection in such country;
 - (B) The alien demonstrates that he or she satisfies the definition of “victim of a severe form of trafficking in persons” provided in 8 CFR § 214.11; or
 - (C) All such countries through which the alien transited en route to the United States were, at the time of the transit, not parties to the 1951 United Nations Convention relating to the Status of Refugees, the 1967 Protocol, or CAT;
- (3) Would otherwise be subject to § 1208.13(c) but for the reversal, vacatur, expungement, or modification of a conviction or sentence unless the alien was found not guilty;
- (4) Accrued more than one year of unlawful presence in the United States, as defined in sections 212(a)(9)(B)(ii) and (iii) of the Act, prior to filing an application for asylum;
- (5) At the time the asylum application is filed with the immigration court or is referred from DHS has:
- (A) Failed to timely file (or timely file a request for an extension of time to file) any required Federal, State, or local income tax returns;
 - (B) Failed to satisfy any outstanding Federal, State, or local tax obligations; or
 - (C) Has income that would result in tax liability under section 1 of the Internal Revenue Code of 1986 and that was not reported to the Internal Revenue Service;
- (6) Has had two or more prior asylum applications denied for any reason;
- (7) Has withdrawn a prior asylum application with prejudice or been found to have abandoned a prior asylum application;
- (8) Failed to attend an interview regarding his or her asylum application with DHS, unless the alien shows by a preponderance of the evidence that:
- (A) Exceptional circumstances prevented the alien from attending the interview; or
 - (B) The interview notice was not mailed to the last address provided by the alien or the alien’s representative and neither the alien nor the alien’s representative received notice of the interview; or
- (9) Was subject to a final order of removal, deportation, or exclusion and did not file a motion to reopen to seek asylum based on changed country conditions within one year of the changes in country conditions.

If any of the nine adverse discretionary factors apply, the adjudicator may favorably exercise discretion only in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien, by clear and convincing evidence, demonstrates that the denial of the asylum application would result in exceptional and extremely unusual hardship to the alien. However, depending on the gravity of the circumstances underlying the adverse discretionary factor, a showing of extraordinary circumstances may still be insufficient to warrant a favorable exercise of discretion.

VIII. Information Disclosure

The rule amends 8 CFR §§ 208.6 and 1208.6 to specify the grounds upon which information contained in an application for asylum, statutory withholding of removal, or protection under CAT, as well as any relevant and applicable information supporting such applications, any information regarding the applicant, or any relevant and applicable information regarding an alien subject to a credible fear or reasonable fear determination, may be disclosed. Specifically, such information may be disclosed:

- (1) As part of an investigation or adjudication of the merits of that application or of any other application under the immigration laws;
- (2) As part of a State or Federal criminal investigation, proceeding, or prosecution;
- (3) Pursuant to any State or Federal mandatory reporting requirement;
- (4) To deter, prevent, or ameliorate the effects of child abuse;
- (5) As part of any proceeding arising under the immigration laws, including proceedings arising under the Act; or
- (6) As part of the Government's defense of any legal action relating to the alien's immigration or custody status, including petitions for review filed in accordance with INA § 242.

In addition, the rule clarifies that nothing in 8 CFR §§ 208.6 or 1208.6 prohibits the disclosure of such information among specified government employees with a need to examine such information for official purposes, or where a government employee or contractor has a good faith and reasonable belief that the disclosure is necessary to prevent the commission of a crime, the furtherance of an ongoing crime, or to ameliorate the effects of a crime.

IX. Removing and Reserving DHS-Specific Procedures From EOIR Regulations

The rule removes and reserves DHS-specific procedures regarding examinations at ports of entry, parole for deferred inspection, expedited removal procedures, and preinspection of passengers and crew from EOIR's regulations at 8 CFR §§ 1235.1, 1235.2, 1235.3, and 1235.5. The regulations

regarding withdrawals of applications for admission at 8 CFR § 1235.4 and the referral of cases to Immigration Judges at 8 CFR § 1235.6 remain unchanged.

X. Application of the New Regulations

As discussed, *supra*, the rulemaking itself is not retroactive. The regulatory changes apply only prospectively—*i.e.*, to all asylum applications (including applications for statutory withholding of removal and protection under the CAT regulations) filed on or after its effective date³ and, for purposes of the changes to the credible fear and related screening procedures and reasonable fear review procedures, to all aliens apprehended or otherwise encountered by DHS on or after the effective date. Nevertheless, although the rulemaking itself is not retroactive, nothing in the rule precludes adjudicators from applying existing authority codified by the rule to pending cases, independent of the prospective application of the rule.⁴ Accordingly, the statutory authority and case law incorporated into the rule, as reflected in both the NPRM and the final rule, would continue to apply if the rule itself does not go into effect as scheduled.⁵

This PM is not intended to, does not, and may not be relied upon to create, any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Nothing herein should be construed as mandating a particular outcome in any specific case. Nothing in this PM limits an Immigration Judge’s or Appellate Immigration Judge’s independent judgment and discretion in adjudicating cases or an Immigration Judge’s or Appellate Immigration Judge’s authority under applicable law.

³ The concept of firm resettlement also operates as a bar to the adjustment of status of an asylee. INA § 209(b)(4); 8 C.F.R. § 1209.2(a)(1)(iv). Consistent with the prospective nature of the rule, EOIR will apply the revised regulatory definition of “firm resettlement” in 8 C.F.R. § 1208.15 for purposes of INA § 209(b)(4), only to aliens who apply for asylum, are granted asylum, and then subsequently apply for adjustment of status, where all of these events occur on or after the effective date of this rule.

⁴ For example, the rule states that the Secretary or Attorney General, subject to an exception, will not favorably exercise discretion in adjudicating an asylum application for an alien who has failed to satisfy certain tax obligations. 8 C.F.R. § 1208.13(d)(2)(i)(E). That provision applies only to asylum applications filed on or after the effective date of the rule. However, the rule does not preclude the consideration of unfulfilled tax obligations as a discretionary factor in adjudicating a pending asylum application based on established case law that may be applied to pending applications. *See, e.g., Matter of A-H-*, 23 I&N Dec. at 782–83 (“Moreover, certain additional factors weigh against asylum for respondent: Specifically, respondent testified that he received money from overseas for his political work, yet he never filed income tax returns in the United States and his children nevertheless received financial assistance from the Commonwealth of Virginia. Respondent’s apparent tax violations and his abuse of a system designed to provide relief to the needy exhibit both a disrespect for the rule of law and a willingness to gain advantage at the expense of those who are more deserving.” (footnote omitted)).

⁵ The rule is scheduled to take effect on January 11, 2021. Most recent immigration-related rulemakings have been challenged in litigation. *See, e.g., Pangea Legal Services v. U.S. DHS*, 2020 WL 6802474 (N.D. Cal. 2020); *City and County of San Francisco v. USCIS*, 408 F. Supp. 3d 1057 (N.D. Cal. 2019); *East Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922 (N.D. Cal. 2019); *East Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838 (N.D. Cal. 2018). Many of these rulemakings have been restrained or enjoined initially, *see id.*, though the scope of the injunctions—nationwide or more limited—has varied, and some of the injunctions have later been stayed by higher courts. The rule discussed in this PM will likely be challenged through litigation as well. If litigation alters the effective date of the rule in any part, the Office of General Counsel, in consultation with the Office of the Chief Immigration Judge and the Office of the Director, will provide further guidance as appropriate.

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