§ 212.5 Parole of aliens into the United States.

* * * * *

(e) * * *

(2) * * *

(iii) Any alien granted parole into the United States so that he or she may transit through the United States in the course of removal from Canada shall have his or her parole status terminated upon notice, as specified in 8 CFR 212.5(e)(2)(i), if he or she makes known to an immigration officer of the United States a fear of persecution or an intention to apply for asylum. Upon termination of parole, any such alien shall be regarded as an arriving alien, and processed accordingly by the Department of Homeland Security.

* * * * *

PART 235—INSPECTION OF PERSONS APPLYING FOR ADMISSION

■ 6. The authority citation for part 235 continues to read as follows:

Authority: 8 U.S.C. 1101 and note, 1103, 1183, 1185 (pursuant to E.O. 13323, published January 2, 2004), 1201, 1224, 1225, 1226, 1228, 1365a note, 1379, 1731–32.7.

■ 7. Section 235.3 is amended by revising the first sentence of paragraph (b)(4) to read as follows:

§ 235.3 Inadmissible aliens and expedited removal.

* * * * *

(b) * * *

(4) * * * If an alien subject to the expedited removal provisions indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country, the inspecting officer shall not proceed further with removal of the alien until the alien has been referred for an interview by an asylum officer in accordance with 8 CFR 208.30. * * *

* * * * *

Dated: November 19, 2004.

Tom Ridge,

Secretary of Homeland Security.

[FR Doc. 04–26239 Filed 11–26–04; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF JUSTICE

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

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

RIN 1125–AA46

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

AGENCY: Executive Office for Immigration Review, Justice.

ACTION: Final rule.

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

DATES: This rule is effective December 29, 2004.

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

SUPPLEMENTARY INFORMATION:

Introduction

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

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

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

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

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

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

decision will not be reviewed by an immigration judge. These aliens are not eligible to apply for asylum via the credible fear process, by operation of the Agreement and section 208(a)(2)(A) of the Act.

Finally, this rule recognizes that DHS may choose, in certain cases, to place an arriving alien into removal proceedings under section 240 of the Act, rather than expedited removal under section 235 of the Act. The immigration judges will apply the terms of the Agreement with respect to the alien. In that case, if the immigration judge determines that the Agreement is applicable and orders the alien removed, the alien will be returned to Canada to seek protection under Canadian law. This rule also provides that aliens whom DHS places in removal proceedings and who are ineligible to apply for protection by operation of the Agreement may, nevertheless, apply for any other form of relief from removal for which they may be eligible. *See* 8 CFR 1240.11(g)(4).

Public Comments

The public was provided a 60-day comment period that ended on May 7, 2004. The Department received comments from the United Nations High Commissioner for Refugees, three non-governmental organizations, and an interested individual. The comments covered a broad range of issues, and included arguments for both expanding the rule, and for making it more restrictive. The comments also included some general opposition to the Agreement itself.[1] The DHS final rule published elsewhere in this edition of the **Federal Register** addresses public comments received in response to the DHS proposed rule.

Several commenters asserted that there should be a provision permitting independent review of an asylum officer's negative threshold determination, or that the evaluation should be conducted as part of the credible fear determination, which would include review by an immigration judge. In contrast, one commenter took the position that positive threshold determinations should be automatically reviewed by an immigration judge, but there should be no review of negative determinations. Other comments related to the procedures to be applied when the Agreement is applied in removal proceeding under section 240 of the Act.

[1] The Department notes that the public was provided an opportunity to express their views about the proposed Agreement during a meeting at the former Immigration and Naturalization Service. *See* 67 FR 46212 (July 12, 2002). The Agreement is now final.

Several commenters were concerned about precluding aliens covered by the Agreement from applying for withholding of removal and protection under the Convention Against Torture. The commenters also raised issues related to the administration of the Agreement's exceptions, procedures for asylum seekers returned to the United States under the Agreement, requests for reconsideration of decisions made by the Canadian government to return asylum seekers to the United States, the inadmissibility of aliens subsequent to removal to Canada, and the possibility of accepting motions to reopen or reconsider filed by asylum seekers after they are returned to Canada.

These and other comments about the proposed rule are summarized by subject matter and responded to below. After careful review and consideration of all comments, the Department will retain the structure of the proposed rule without modification except for a few minor technical changes and corrections.

A. The Threshold Screening Interview

As outlined in the DHS proposed rule and summarized above, the Agreement will be implemented by DHS in expedited removal proceedings by means of a ''threshold screening interview.'' During this interview, an asylum officer will question aliens who are subject to the Agreement to determine whether they meet one of the Agreement's exceptions. *See* 8 CFR 208.30(e)(6). Aliens in expedited removal proceedings who do not meet one of the exceptions will be returned to Canada without initiation of the credible fear process or involvement of the Department's immigration judges. Several commenters asserted that the asylum officer's decision in the threshold screening interview should be subject to independent review by an immigration judge. The Department declines to adopt this suggestion.

In the supplementary information to the Department's proposed rule, the Department explained that, compared to the myriad of issues that can arise in a credible fear interview, the matters in a threshold screening interview are narrow in scope. *See* 69 FR at 10630. The commenters contest this characterization, and assert that many complicated issues could arise. Specifically, the commenters gave examples of age determination of ''unaccompanied minors,'' and of whether an asylum seeker has a qualifying relative under the relevant Agreement exceptions.

The Department remains confident that asylum officers will be able to adequately address the issues that could arise during the threshold screening interview, and that further review by an immigration judge is unnecessary, regardless of whether the ultimate determination is positive or negative. Asylum officers are trained personnel who must regularly make factual and legal determinations. Additionally, the DHS final rule has been amended to require that a supervisory asylum officer must concur in any negative threshold determination by an asylum officer. These requirements ensure a comprehensive review at the screening level, and one which comports with due process.

Relatedly, several commenters asserted that any determination under the Agreement should be part of the credible fear interview process, and that the proposed screening process would controvert the existing statutory and regulatory scheme governing the credible fear process. The commenters argue that an assessment under the Agreement is really a question of eligibility for asylum and related relief, and, under current 8 CFR 208.30(e), once credible fear is established, any question of eligibility for relief must occur in removal proceedings.

The Department has concluded that the threshold screening interview is not inconsistent with the Immigration and Nationality Act. *See* 8 U.S.C. 1158(d)(5)(B). The threshold factual determinations under the Agreement—*e.g.*, whether the alien is under the age of 18 or has a qualifying relative in the United States—relate only to the applicability of the terms of the Agreement, which is expressly authorized by section 208(a)(2)(A) of the Act, not to a determination whether the alien has suffered past persecution or faces future persecution or torture if returned to his or her country. In short, the purpose of the determinations under the Agreement is not to evaluate the merits of the alien's claims for asylum or other protections, but instead relate to which forum will consider the merits of those claims. There is no requirement under the Agreement that an immigration judge review a decision that an alien is ineligible to apply for asylum in the United States. An asylum officer's determination that the alien should be returned to Canada under the Agreement means that the alien will then pursue his or her protection claims in Canada under Canadian law rather than in the United States, pursuant to section 208(a)(2)(A). Although the current version of the regulations referenced by commenters does not permit asylum officers to apply the asylum bars during the credible fear

process, the threshold screening process created in the DHS rules is separate and distinct from the credible fear process. Further, with respect to this concern about the inconsistency between the ''threshold screening interview'' and existing regulatory provisions, the Department and DHS rules, after notice to the public and opportunity for comment, are amending these existing regulations under authorized rulemaking procedures.

The Department also notes that, under the DHS rule, once an alien satisfies any of the exceptions under the Agreement, an asylum officer will then make a credible fear determination relating to the alien's protection claims. *See* 8 CFR 208.30(e)(6) and 235.3(b)(4). As with any other credible fear determination, the alien will be able to seek a review of any adverse decision by an immigration judge.

The commenters also refer to section 235(b)(1)(A)(ii) of the Act, which states that immigration officers shall refer an arriving alien for a credible fear interview before an asylum officer if that alien indicates an intention to apply for asylum or expresses a fear of persecution. The Act generally requires that an arriving alien be given a credible fear interview if the alien expresses either an intention to apply for asylum under section 208 of the Act or a fear of persecution. In particular, section 208(a)(1) of the Act recognizes the right of an arriving alien to present a claim for asylum, specifically by means of the credible fear process under section 235(b) of the Act. However, section 208(a)(2)(A) of the Act provides that the right to apply for asylum as stated in section 208(a)(1) of the Act shall not apply in the case of an alien who can be removed to a safe third country pursuant to a bilateral or multilateral agreement. That is, aliens who can be removed to a safe third country under this process do not have a right to apply for asylum in the United States. Since, as noted in section 208(a)(1) of the Act, the credible fear process is the means by which arriving aliens present their claim for asylum, this necessarily means that aliens who can be removed to a safe third country do not have a statutory right to a credible fear review. Accordingly, an arriving alien who is subject to the bilateral Agreement with Canada, and does not qualify for an exception to that Agreement, would not have the right to present a claim for asylum through the credible fear process, including immigration judge review. Rather, in accord with the Act, the alien would be returned to Canada so that Canadian officials can consider the merits of his or her protection claims under Canadian law.

Finally, as the Department discussed in the supplementary information to the proposed rule, permitting immigration judge review of an asylum officer's determination to return the alien to Canada under the Agreement would likely result in prolonging the detention of arriving aliens who otherwise could be returned promptly to Canada to pursue their asylum claims there. *See* 69 FR at 10630.

For the foregoing reasons, the Department believes that the threshold screening interview to determine if an arriving alien should be returned to Canada should remain separate from the credible fear process, which relates to the merits of an alien's claims of past or future persecution. The Department acknowledges the legal sufficiency of the threshold screening interview approach specified in the DHS rule and declines to adopt the commenters' suggested changes to this approach.

B. Consideration of the Agreement in Removal Proceedings

One commenter sought clarification as to whether certain provisions normally applicable in removal proceedings would apply to arriving aliens whom DHS has chosen to place in removal proceedings. The Department notes that individuals placed in removal proceedings pursuant to section 240 of the Act who are subject to the terms of the Agreement will be subject to the usual statutory and regulatory provisions applicable in removal proceedings before an immigration judge.

The commenter specifically requested the issuance of regulatory or field guidance for the immigration judges to make clear that a reasonable request for a continuance to obtain evidence for Agreement-related issues should be granted. The Department declines to take this action. The regulations governing removal proceedings provide that the immigration judge has the discretion to deny a request for a continuance, or to grant one when ''good cause'' is shown. *See* 8 CFR 1003.29. This rule would apply to any removal proceeding where the applicability of the Agreement is at issue. The parties therefore have an established procedure by which to make a request for a continuance, and the immigration judge will adjudicate such requests on a case-by-case basis.

One commenter questioned whether individuals placed in removal proceedings will be permitted to appeal the findings of an immigration judge under the Agreement to the Board of Immigration Appeals (''Board''). The Board has jurisdiction to review appeals from all decisions of immigration judges in removal proceedings. *See* 8 CFR 1003.1(b)(3) and 1240.15. This would include a decision of an immigration judge concerning the applicability of the Agreement.

C. Withholding of Removal and Convention Against Torture Claims

Several commenters challenged the provision of the proposed rule that states that aliens who are ineligible to apply for asylum in the United States under the Agreement are also precluded from applying for withholding of removal or protection under the Convention Against Torture. The commenters assert that section 208(a)(2)(A) of the Act only provides for safe third country agreements as a bar to asylum, and does not extend to withholding of removal or protection under CAT.

As the Department pointed out in the supplementary information to the proposed rule, there is nothing in section 241(b)(3)(A) of the Act, or in Article 3 of CAT, and their respective implementing regulations, which prevents the United States from removing an alien to a safe third country so that the alien can pursue his or her protection claims in that country. *See* 69 FR at 10631. In this discussion, we explained that the specific terms of the Agreement are consistent with the United States' obligation not to return an individual to a country where the person would face persecution or torture. *See id.*

The Department agrees that withholding of removal under section 241(b)(3)(A) of the Act, and withholding or deferral of removal under CAT, are mandatory forms of relief for aliens who establish that they are entitled to such relief. However, it is essential to keep in mind that, in order to be entitled to such relief, 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, to other countries where he or she would not face a likelihood of persecution or torture.

In the context of aliens covered by the Agreement, the United States and Canada have acknowledged that Canada is a safe third country where aliens will have resort to its asylum system, and where they will have access to a full and

fair procedure for determining their claims for protection against persecution or torture if returned to any country in which they fear such harm. Canada is a safe third country, and in the absence of a showing that an alien would face the likelihood of persecution or torture in Canada, the United States clearly would not be in violation of its international obligations (as those obligations are codified in the Act and its implementing regulations) by returning such an alien to Canada.[2] Thus this rule is fully consistent with the legal requirements under section 241(b)(3) of the Act and CAT.

The commenters also assert that Canada's mere accession to CAT is an insufficient basis to exclude aliens from seeking CAT relief, arguing that the Department and DHS rules somehow set a precedent for a ''safe country of origin'' list that is a step beyond the safe third country concept. They argue that adjudication of refugee claims should not be precluded based upon a blanket determination that a country is ''safe.'' In support of their argument, the commenters state that aliens presently seek CAT protection from countries that are signatories to CAT, mentioning those countries by name.

The Department is not persuaded by this line of argument, because the provisions of this rule only apply with respect to a safe third country agreement that satisfies all of the requirements of section 208(a)(2)(A) of the Act. At present the only such Agreement is between the United States and Canada. The Agreement was created in recognition of that country's relationship with the United States, and other specific factors. These include Canada's generous refugee system, tradition of assisting refugees and displaced persons, and agreement to provide each refugee status claimant access to a full and fair refugee status determination procedure as a means to guarantee the protections of the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, and the Convention Against Torture.

Additionally, one commenter argued that returning an alien to Canada under the Agreement would constitute ''indirect'' refoulement in violation the United States' international obligation to protect refugees. The commenter argues that returning the asylum seeker to Canada may indirectly constitute refoulement if Canadian authorities subsequently send the alien back to the place of feared persecution. This rule, however, only deals with returning an individual to Canada pursuant to the terms of the Agreement, where the alien will have a full opportunity to pursue their claims for protection. As previously stated, returning an alien to a safe third country is fully consistent with the United States' obligations not to return an individual to a country where the person would face persecution or torture.

D. Exceptions to the Agreement

One commenter expressed several specific concerns about the exceptions provided for by the Agreement, and these suggestions will be addressed in turn. The Department initially points out that the exceptions to the Agreement are found in the DHS final rule at 8 CFR 208.30(e)(6)(iii), and are incorporated by reference into this final rule at 8 CFR 1240.11(g)(3). The DHS rule provides a detailed discussion of the exceptions.

1. Family Unity Provisions

The commenter recommended that under the family unity provisions, the term ''spouse'' should be interpreted to include a common-law spouse. DHS has not expanded the definition of spouse; similarly, the Department will not undertake this action. The Department does point out that the Act and case law have addressed the definition of ''spouse'' under the immigration law. *See, e.g.*, section 101(a)(35) of the Act; *Matter of H-*, 9 I&N Dec. 640 (BIA 1962) (recognizing the general rule that the validity of a marriage is determined by the law of the place where it is contracted or celebrated). The parties are free to present any proper arguments regarding the interpretation of the term ''spouse'' before the immigration judge in the course of removal proceedings.

The commenter also recommended that ''de facto'' relatives be considered eligible ''anchor'' relatives if the individual serves or has served as the alien's primary source of emotional or material support, regardless of their relationship to the alien. As explained in the supplementary information to the DHS final rule, the definition of ''family member'' was the subject of much negotiation in the context of the Agreement, and DHS has declined to further expand the definition in its final rule. The Department accordingly declines to make this change.

On the other hand, one commenter stated that the family unity exceptions in the Agreement are too broad, and that they should include a provision requiring family members to assume full financial responsibility for any alien falling under an exception. The commenter also expressed other objections to the exceptions, arguing for example that minors should not be treated any differently than adults. The Department declines to narrow or limit any exceptions to the Agreement, just as the Department has declined to expand upon them.

2. Valid Visa Exception

One commenter expressed concern about the exception for asylum seekers who arrive in the United States pursuant to a validly issued United States visa or other valid admission document. The commenter effectively noted that DHS may consider such documents, even if genuine, to support a charge of fraud in violation of section 212(a)(6)(C) of the Act if they were procured by applicants whose true intentions were to enter the United States to apply for asylum. The commenter sought clarification as to whether such United States visas would be considered ''validly issued'' under the exception to the Agreement. The DHS has not amended its rule in this area; however, the supplementary information to the DHS final rule states that for the limited purposes of applying the exception to the Agreement, USCIS will issue and apply operational guidance interpreting the term ''validly issued'' without regard to the asylum seeker's subjective intent. If an alien is placed into removal proceedings under section 240 of the Act, the parties may raise any issues concerning the interpretation of this exception before the immigration judge in the course of removal proceedings. The Department notes that the factual basis for a possible finding of inadmissibility under section 212(a)(6)(C) of the Act will be scrutinized, because such a finding may permanently bar an alien from admission. *See Matter of Y-G-*, 20 I&N Dec. 794 (BIA 1994).

3. Public Interest Exception

One commenter raised several issues concerning the application of the public interest exception for aliens in removal proceedings. For example, the commenter recommended that minors who have a parent or legal guardian in the United States and do not meet any of the specific exceptions to the Agreement should be considered under the public interest exception. The DHS rule provides that an asylum officer may

[2] The commenters do not appear to be challenging the designation of Canada as a safe third country. We note that Article 2 of the Agreement provides that the Agreement does not apply to refugee claimants who are citizens of Canada or the United States or to aliens who, not having a country of nationality, are habitual residents of Canada or the United States. If an alien has any additional arguments about why return to Canada is not appropriate under the Agreement, they could be raised with DHS in the context of the public interest exception.

decide in the public interest to allow an alien covered by the Agreement to pursue a claim for asylum or other protection even though the alien does not meet a specific exception to the Agreement. If the alien is in removal proceedings, DHS may file a written notice of its decision before the immigration judge. *See* 8 CFR 240.11(g)(3). The Attorney General has decided that the decision to invoke this authority will be left solely within the discretion of DHS and will not be within the discretion of the immigration judges to review or adjudicate in the first instance. The Department therefore declines to expand or amend the public interest definition as has been suggested by the commenter. We note that the supplementary information to the DHS rule concluded that the public interest exception is best administered through operational guidance and on a case-by-case basis. In addition, DHS has stated in the preamble to its rule that it will be sensitive to the unique issues facing minors and will proceed carefully in those cases.

The commenter also recommended that the proposed rule establish a procedure between the Department and DHS to ensure that DHS fully considers the application of the public interest exception in those cases being adjudicated before an immigration judge. The Department declines to accept the commenter's recommendation. This rule provides that an immigration judge may consider asylum issues regarding an alien who otherwise would be barred by the Agreement if DHS notifies the immigration judge that it has invoked the public interest exception. If an issue arises in removal proceedings related to the public interest exception, and it is within the jurisdiction of the immigration judge to address, the parties may raise the matter during the proceedings under the existing rules.

E. Procedures for Asylum Seekers Returned to the United States

One commenter sought an explanation as to how asylum seekers returned to the United States from Canada under the Agreement will be received and processed. The commenter understood that these returnees, without lawful status in the United States, will be processed as if apprehended in the interior of the United States and thus will be placed in removal proceedings, rather than being treated as arriving aliens subject to expedited removal.

The manner in which asylum seekers returned to the United States from Canada under the Agreement will be received and processed is within the province of DHS. *See, e.g., Matter of Bahta,* 22 I&N Dec. 1381, 1391 (BIA 2000) (addressing the former Immigration and Naturalization Service's fundamental authority to exercise procedural discretion on whether to commence removal proceedings). The supplementary information to the DHS final rule provides a discussion of how these asylum seekers will be received and processed.

The commenter recommended that, if DHS decides to detain an asylum seeker returned under the Agreement, immigration judges should either order the release of the individual or set a low bond if the person does not pose a danger to the community and his or her identity has been established.

The Department declines to adopt special rules in this situation. In general, an alien whom DHS has chosen to place in removal proceedings before an immigration judge will be subject to the established procedures governing custody and bond determinations. *See* 8 CFR 236.1, 1003.19, and 1236.1(d). Those procedures do not apply, however, with respect to arriving aliens whom DHS has placed in expedited removal under section 235 of the Act. *See also* 8 CFR 235.3(c) (arriving aliens remain subject to detention as arriving aliens even if they are placed into removal proceedings under section 240 of the Act, but may be paroled by DHS). An arriving alien's custody status is not subject to review by an immigration judge. *See* 8 CFR 1003.19(h)(2)(i)(B); *Matter of Oseiwusu,* 22 I&N Dec. 19 (BIA 1998).

The commenter further expressed concern about a possible surge of asylum seekers to the United States-Canadian ports-of-entry before the implementation of the Agreement, which would result in the Canadian authorities being overwhelmed with requests and having to ''direct back'' aliens to the United States with re-scheduled Canadian interviews. This has reportedly happened in the past, and one consequence was that asylum seekers were detained in the United States and unable to return to Canada for their interviews. The commenter recommended that, with respect to asylum seekers placed in removal proceedings ''as a result of a Canadian direct-back, and absent any serious security concerns,'' immigration judges either release these individuals on their own recognizance or set a low bond so that they can return to Canada to attend their scheduled hearings. The commenter also recommended that the removal proceedings of such individuals be administratively closed while they pursue their refugee claims in Canada.

The Department declines to accept the commenter's recommendations. Because the Agreement does not contemplate that special consideration be given to such aliens, DHS will in the first instance decide how to deal with these individuals in the exercise of its enforcement discretion. If the aliens are placed into removal proceedings before an immigration judge, they will have recourse to existing procedures, including procedures for custody and bond redeterminations, and requests for administrative closure. For a more complete discussion of how these aliens may be processed should this situation arise, *see* the **SUPPLEMENTARY INFORMATION** section in the DHS final rule published elsewhere in this **Federal Register**.

F. Reconsideration by Canada for Asylum Seekers Returned to the United States

One commenter has encouraged Canada to establish a mechanism to reconsider cases, based on new evidence or changed circumstances, after a person has been returned to the United States under the Agreement. The commenter seeks an explanation as to how the Department would assist Canadian authorities if such a reconsideration was sought. The commenter specifically recommends that, in the event Canadian authorities seek the alien's presence at the United States-Canadian border to reconsider a claim, the immigration judge should order the release or appropriately lower the bond of that alien, and administratively close the alien's case if he or she is admitted into Canada to pursue a refugee claim.

The Agreement does not address the issue of reconsideration of claims after they are adjudicated by either country. The Department will not speculate about what future developments in this area might occur. If Canadian officials do seek to reconsider the case of an alien who is in removal proceedings, the initial determination on how to respond would be made by DHS, not by the immigration judge. The parties to the proceedings may present their positions concerning the alien's detention in the course of any custody review properly before the immigration judge. Further, any request for administrative closure of a removal proceeding should be addressed on a case-by-case basis. *See generally Matter of Gutierrez,* 21 I&N Dec. 479, 480 (BIA 1996) (administrative closure is used to temporarily remove a case from the docket, and is not permitted if opposed by either party).

The Department therefore declines to accept the commenter's recommendation.

G. Inadmissibility of Aliens Removed to Canada Under the Agreement

One commenter recommended that an alien who is returned to Canada under the Agreement should not subsequently be found inadmissible to the United States under section 212(a)(9)(A)(i) of the Act (providing that any alien who has been ordered removed under section 235(b)(1) of the Act, or at the end of removal proceedings under section 240 of the Act initiated upon the alien's arrival, is inadmissible for 5 years after the date of such removal).

The Department notes that the applicability of the Agreement does not change the fact that an alien has been ordered removed in the context of expedited removal proceedings or removal proceedings under section 240 of the Act. The Department finds no reason why section 212(a)(9)(A) of the Act, or any related provisions concerning aliens removed from the United States, would not apply in the case of an alien subject to the Agreement who is subject to expedited removal or is ordered removed to Canada by an immigration judge. As for other arriving aliens who have been ordered removed, the alien may seek DHS' consent to reapply for admission, pursuant to section 212(a)(9)(A)(iii) of the Act.

H. Requests for Reconsideration for Asylum Seekers Returned to Canada

One commenter recommended that the immigration judge and the Board permit requests by the individual asylum seeker, or the Canadian government, to reconsider a decision that an alien did not qualify for an exception to the Agreement, even after an alien has been removed to Canada.

The Department declines to accept the commenter's recommendation. The rules governing motions for reopening and reconsideration do not provide authority for third parties, such as the Canadian government, to file motions in proceedings before the immigration judge or the Board. *See* 8 CFR 1003.2(a) and 1003.23(b). In addition, the regulations provide that a motion to reopen or reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States. *See* 8 CFR 1003.2(d) and 1003.23(b). The Department declines to make any amendments to these existing regulations.

The commenter requested that, at a minimum, individuals returned to Canada be permitted to resubmit asylum claims at the border, assuming they are not detained. With respect to an alien who already has been returned to Canada under the Agreement in order to seek protection under Canadian law, allowing such an alien to return once again to the United States and resubmit his or her asylum claims after being denied relief in Canada would undermine a general premise of the Agreement, which is that a covered alien is able to seek protection in one country or the other, but not both. If such an alien later returns to a U.S.-Canada land border port-of-entry seeking protection, he or she would remain subject to the Agreement and be removed to Canada again unless he or she was able to establish an exception to the Agreement.

I. Miscellaneous Issues

The Department also received several miscellaneous comments from one commenter who asserted that the United States has too many illegal immigrants (which drives up various costs), that battered women should stay in their own countries and work to change laws there, and that this rule is a ''major rule'' that will costs taxpayers millions of dollars.

In response, it is the Department's long-standing position that America is a welcoming country to persons who come here lawfully—whether they come here as immigrants or non-immigrants (including as refugees from human rights abuses)—and that lawful immigration benefits this country. However, the Department and other agencies of the United States government vigorously enforce American immigration laws against illegal immigration. The Department disagrees that this rule is a ''major rule'' under the Small Business Regulatory Enforcement Fairness Act or that it is ''economically significant'' within the meaning of Executive Order 12866. This rule simply implements a statutorily-authorized agreement between the United States and Canada that allocates responsibility between the United States and Canada for processing claims of certain asylum seekers.

Finally, the Department has added one minor conforming amendment at 8 CFR 1235.3(b)(4) to accommodate DHS' use of the threshold screening process in applying the Agreement. For more details concerning the DHS amendment to 8 CFR 235.3(b)(4), see the DHS final rule also appearing in this **Federal Register**. This rule makes a conforming amendment to 8 CFR 1235.3(b)(4) to cross-reference the provisions of the DHS rule rather than restating them. The Department is also correcting a typographical error to the part heading of 8 CFR 1235.

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule affects individual aliens, as it relates to claims of asylum. It does not affect small entities, as that term is defined in 5 U.S.C. 601(6).

Unfunded Mandates Reform Act of 1995

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

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Act of 1996 (5 U.S.C. 804). This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

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

The rule would implement a bilateral Agreement that allocates responsibility between the United States and Canada for processing claims of certain asylum-seekers, enhancing the two nations' ability to manage, in an orderly fashion,

asylum claims brought by persons crossing our common border. The rule applies to certain individuals in removal proceedings who apply for asylum. This rule simply adds another factor for immigration judges to consider in removal proceedings. Therefore, the ''tangible'' costs of this rulemaking to the U.S. Government are minimal. Applicants who are found to be subject to the bilateral Agreement with Canada will be returned to Canada to seek asylum, saving the U.S. Government the cost of adjudicating their asylum claims.

The cost to asylum-seekers who, under the rule, will be returned to Canada are the costs of pursuing an asylum claim in Canada, as opposed to the United States. There is no fee to apply for asylum in Canada and, under Canadian law, asylum-seekers are provided social benefits for which they are not eligible in the United States. Therefore, the tangible costs of seeking asylum in Canada are no greater than they are in the United States. The ''intangible'' costs to asylum-seekers who would be returned to Canada under the rule are the costs of potential separation from support networks they may be seeking to join in the United States. However, the Agreement contains broad exceptions based on principles of family unity that would allow many of those with family connections in the United States to seek asylum in the United States under existing regulations.

Executive Order 13132

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

Executive Order 12988 Civil Justice Reform

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

Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this final rule because there are no new or revised recordkeeping or reporting requirements.

Family Assessment Statement

The Attorney General has reviewed this regulation and assessed this action in accordance with the criteria specified by section 654(c)(1) of the Treasury General Appropriations Act, 1999, Public Law 105–277, Div. A. The Attorney General has determined that it will not affect family well-being as that term is defined in section 654.

The separate final rule published by the Department of Homeland Security explains that an alien arriving at U.S.-Canada land border port-of-entry may qualify for an exception to the bilateral Agreement with Canada, which otherwise requires individuals to seek protection in the country of last presence (Canada), by establishing a relationship to a family member in the United States who has lawful status in the United States, other than a visitor, or is 18 years of age or older and has an asylum application pending. The DHS proposed rule addresses issues relating to family well-being in connection with that rule.

This rule provides that the immigration judges will apply the definition of ''family member'' used in the Agreement and DHS rule, in those cases where DHS has chosen to place an alien who is subject to the Agreement into removal proceedings under section 240 of the Act. However, that is expected to occur only very rarely. In any other case, where DHS does not choose to place an arriving alien into removal proceedings under section 240 of the Act, this rule has no effect on family well-being, because the immigration judges will not be involved. DHS determinations made under the Agreement will not be reviewed by the Department of Justice.

List of Subjects

8 CFR Part 1003

Administrative practice and procedure, Aliens, Immigration, Legal Services, Organization and function (Government agencies).

8 CFR Part 1208

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

8 CFR Part 1212

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

8 CFR Part 1235

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

8 CFR Part 1240

Administrative practice and procedure and Aliens.

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

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

■ 1. The authority citation for part 1003 continues to read as follows:

Authority: 5 U.S.C. 301; 8 U.S.C. 1101 note, 1103, 1252 note, 1252b, 1324b, 1362; 28 U.S.C. 509, 510, 1746; sec. 2, Reorg. Plan No. 2 of 1950, 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub. L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub. L. 106–386; 114 Stat. 1527–29, 1531–32; section 1505 of Pub. L. 106–554, 114 Stat. 2763A–326 to –328.

■ 2. Section 1003.42 is amended by adding new paragraph (h) to read as follows:

§ 1003.42 Review of credible fear determinations.

* * * * *

(h) *Safe third country agreement.* (1) *Arriving alien.* An immigration judge has no jurisdiction to review a determination by an asylum officer that an arriving alien is not eligible to apply for asylum pursuant to a bilateral or multilateral agreement (the Agreement) under section 208(a)(2)(A) of the Act and should be returned to a safe third country to pursue his or her claims for asylum or other protection under the laws of that country. See 8 CFR 208.30(e)(6). However, in any case where an asylum officer has found that an arriving alien qualifies for an exception to the Agreement, an immigration judge does have jurisdiction to review a negative credible fear finding made thereafter by the asylum officer as provided in this section.

(2) *Aliens in transit.* An immigration judge has no jurisdiction to review any determination by DHS that an alien being removed from Canada in transit through the United States should be returned to Canada to pursue asylum claims under Canadian law, under the terms of a safe third country agreement with Canada.

* * * * *

PART 1208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

■ 3. The authority citation for part 1208 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1158, 1226, 1252, 1282.

■ 4. Section 1208.4 is amended by adding new paragraph (a)(6) to read as follows:

§ 1208.4 Filing the application.

* * * * *

(a) * * *

(6) *Safe third country agreement.* Immigration judges have authority to consider issues under section 208(a)(2)(A) of the Act, relating to the determination of whether an alien is ineligible to apply for asylum and should be removed to a safe third country pursuant to a bilateral or multilateral agreement, only with respect to aliens whom DHS has chosen to place in removal proceedings under section 240 of the Act, as provided in 8 CFR 1240.11(g). For DHS regulations relating to determinations by asylum officers on this subject, see 8 CFR 208.30(e)(6).

* * * * *

■ 5. Section 1208.30 is amended by:

■ a. Revising paragraphs (a) and (e); and by

■ b. Removing and reserving paragraphs (c), (d), (f), and (g)(1).

The revisions read as follows:

§ 1208.30 Credible fear determinations involving stowaways and applicants for admission found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act.

(a) *Jurisdiction.* The provisions of this subpart apply to aliens subject to sections 235(a)(2) and 235(b)(1) of the Act. Pursuant to section 235(b)(1)(B), asylum officers have exclusive jurisdiction to make credible fear determinations, and the immigration judges have exclusive jurisdiction to review such determinations.

* * * * *

(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.

* * * * *

PART 1212—DOCUMENTARY REQUIREMENTS; NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

■ 6. The authority citation for part 1212 is revised to read as follows:

Authority: 8 U.S.C. 1101 and note, 1103.

■ 7. Section 1212.5 is revised to read as follows:

§ 1212.5 Parole of aliens into the United States.

Procedures and standards for the granting of parole by the Department of Homeland Security can be found at 8 CFR 212.5.

PART 1235—INSPECTION OF PERSONS APPLYING FOR ADMISSION

■ 8. The authority citation for part 1235 is revised to read as follows:

Authority: 8 U.S.C. 1101 and note; 1103; 1183; 1201; 1224; 1225; 1226; 1228.

■ 9. The heading for part 1235 is revised to read as above.

■ 10. Section 1235.3 is amended by revising paragraph (b)(4) introductory text and paragraph (b)(4)(i) to read as follows:

§ 1235.3 Inadmissible aliens and expedited removal.

* * * * *

(b) * * *

(4) *Claim of asylum or fear of persecution or torture.* (i) The DHS regulations at 8 CFR 235.3(b)(4) provide for referring an alien to an asylum officer if the alien indicates an intention to apply for asylum or expresses a fear of persecution or torture or a fear of return to his or her country.

* * * * *

PART 1240—PROCEEDINGS TO DETERMINE REMOVABILITY OF ALIENS IN THE UNITED STATES

■ 11. The authority citation for part 1240 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1182, 1186a, 1224, 1225, 1226, 1227, 1251, 1252 note, 1252a, 1252b, 1362; secs. 202 and 203, Pub. L. 105–100, 111 Stat. 2160, 2193; sec. 902, Pub. L. 105–277, 112 Stat. 2681; sec. 1101, Pub. L. 107–269, 116 Stat. 2135.

■ 12. Section 1240.11 is amended by adding a new paragraph (g), to read as follows:

§ 1240.11 Ancillary matters, applications.

* * * * *

(g) *Safe third country agreement.* (1) The immigration judge has authority to apply section 208(a)(2)(A) of the Act, relating to a determination that an alien may be removed to a safe third country pursuant to a bilateral or multilateral agreement (Agreement), in the case of an alien who is subject to the terms of the Agreement and is placed in proceedings pursuant to section 240 of the Act. In an appropriate case, the immigration judge shall determine whether under the Agreement the alien should be returned to the safe third country, or whether the alien should be permitted to pursue asylum or other protection claims in the United States.

(2) An alien described in paragraph (g)(1) of this section is ineligible to apply for asylum, pursuant to section 208(a)(2)(A) of the Act, unless the immigration judge determines, by preponderance of the evidence, that:

(i) The Agreement does not apply to the alien or does not preclude the alien from applying for asylum in the United States; or

(ii) The alien qualifies for an exception to the Agreement as set forth in paragraph (g)(3) of this section.

(3) The immigration judge shall apply the applicable regulations in deciding whether the alien qualifies for any exception under the Agreement that would permit the United States to exercise authority over the alien's asylum claim. The exceptions under the Agreement are codified at 8 CFR 208.30(e)(6)(iii). The immigration judge shall not review, consider, or decide any issues pertaining to any discretionary determination on whether the alien should be permitted to pursue an asylum claim in the United States notwithstanding the general terms of the Agreement, as such discretionary public interest determinations are reserved to DHS. However, an alien in removal proceedings who is otherwise ineligible to apply for asylum under the Agreement may apply for asylum if DHS files a written notice in the proceedings before the immigration judge that it has decided in the public interest to allow the alien to pursue claims for asylum or withholding of removal in the United States.

(4) An alien who is found to be ineligible to apply for asylum under section 208(a)(2)(A) of the Act is ineligible to apply for withholding of removal pursuant to section 241(b)(3) of the Act and the Convention against Torture. However, the alien may apply for any other relief from removal for which the alien may be eligible. If an alien who is subject to section 208(a)(2)(A) of the Act is ordered removed, the alien shall be ordered removed to the safe third country in which the alien will be able to pursue his or her claims for asylum or

protection against persecution or torture under the laws of that country.

Dated: November 22, 2004.

John Ashcroft,

Attorney General.

[FR Doc. 04–26238 Filed 11–26–04; 8:45 am]

BILLING CODE 4410–30–P