DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 208

[CIS No. 2776–24; DHS Docket No. USCIS–2024–0005]

RIN 1615–AC91

Application of Certain Mandatory Bars in Fear Screenings

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Final rule.

SUMMARY: The Department of Homeland Security (DHS or Department) is amending its regulations to allow asylum officers (AOs) to consider the potential applicability of certain bars to asylum and statutory withholding of removal during credible fear and reasonable fear screenings, including credible fear screenings where the Circumvention of Lawful Pathways or Securing the Border rules apply. The rule is intended to enhance operational flexibility and help DHS more swiftly remove certain noncitizens who are barred from asylum and statutory withholding of removal.

DATES: This final rule is effective January 17, 2025.

FOR FURTHER INFORMATION CONTACT: Daniel Delgado, Acting Deputy Assistant Secretary for Immigration Policy, Office of Strategy, Policy, and Plans, U.S. Department of Homeland Security; telephone (202) 447–3459 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

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I. Background

A. Mandatory Bars NPRM

On May 13, 2024, DHS issued a notice of proposed rulemaking (NPRM) that proposed to allow AOs to consider the potential applicability of certain bars to asylum and statutory withholding of removal during certain credible and reasonable fear screenings. Application of Certain Mandatory Bars in Fear Screenings, 89 FR 41347 (May 13, 2024). Following careful consideration of public comments received, the Department has not made substantive modifications to the regulatory text proposed in the NPRM, 89 FR 41347 (May 13, 2024), but has made clarifying amendments. The rationale and the reasoning provided in the proposed rule preamble remain valid, except where a new or supplemental rationale is reflected in this Final Rule.

B. Securing the Border

After DHS issued the NPRM, on June 3, 2024, the President signed Presidential Proclamation 10773, *Securing the Border,* under sections 212(f) and 215(a) of the INA, 8 U.S.C. 1182(f) and 1185(a), finding that because the border security and immigration systems of the United States were unduly strained, the entry into the United States of certain categories of noncitizens was detrimental to the interests of the United States, and suspending and limiting the entry of such noncitizens. 89 FR 48487, 48487–91 (June 7, 2024) (''June 3 Proclamation''). The June 3 Proclamation directed DHS and DOJ to promptly consider issuing any regulations ''as may be necessary to address the circumstances at the southern border, including any additional limitations and conditions on asylum eligibility that they determine are warranted, subject to any exceptions that they determine are warranted.'' 89 FR at 48491 (sec. 3(d)).

DHS and DOJ subsequently published an Interim Final Rule (IFR) on June 7, 2024, during the comment period of this rule, to implement the policies and objectives of the June 3 Proclamation. 89 FR 48710 (June 7, 2024) (Securing the Border IFR). The Securing the Border IFR effectuated three key changes to the process for those noncitizens who are encountered at the southern border during the emergency border circumstances giving rise to the suspension and limitation on entry under the June 3 Proclamation: (1) adding a limitation on asylum eligibility; (2) rather than asking specific questions of every noncitizen encountered and processed for expedited removal, providing general notice regarding the process for seeking asylum and related protection and referring a noncitizen for a credible fear interview only if the noncitizen manifests a fear of return, expresses an intention to apply for asylum or protection, or expresses a fear of persecution or torture or a fear of return to his or her country or the country of removal; and (3) for those found not to have a credible fear of persecution for

asylum purposes because of the IFR's limitation on asylum eligibility, screening for statutory withholding of removal and CAT protection under a ''reasonable probability'' standard. *Id.* at 48718. In the credible fear screening context, if there is not a significant possibility that the noncitizen could demonstrate that the limitation on asylum eligibility does not apply to them or could demonstrate by a preponderance of the evidence that they are eligible for an exception to the limitation (*i.e.,* there is not a significant possibility that the noncitizen could establish eligibility for asylum), the AO will enter a negative credible fear determination with respect to the noncitizen's asylum claim. 8 CFR 208.35(b)(1). The AO then screens the noncitizen for statutory withholding of removal and protection under CAT by determining whether there is a reasonable probability the noncitizen would face persecution or torture in the country (or countries) of removal. 8 CFR 208.35(b)(2). The reasonable probability standard is defined as ''substantially more than a 'reasonable possibility' but somewhat less than more likely than not.'' 8 CFR 208.35(b)(2)(i).

On September 27, 2024, the President issued a proclamation amending the June 3 Proclamation. 89 FR 80351 (Oct. 2, 2024) (September 27 Proclamation). The September 27 Proclamation amended the calculations for when the suspension and limitation on entry established in the June 3 Proclamation would be discontinued, continued, or reactivated. *Id.* On October 7, 2024, the Departments published a final rule responding to public comments on the IFR and implementing changes that parallel those made in the September 27 Proclamation. Securing the Border Final Rule, 89 FR 81156 (Oct. 7, 2024) (Securing the Border final rule).[1]

II. Legal Authority

The Secretary of Homeland Security's (Secretary) authority for this rule is found in various provisions of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.,* as amended by the Homeland Security Act of 2002 (HSA), Public Law 107–296, 116 Stat. 2135, as amended. The INA charges the Secretary ''with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens,'' except insofar as those laws assign functions to the President or other agencies. INA sec. 103(a)(1), 8 U.S.C. 1103(a)(1). The INA also authorizes the Secretary to establish regulations and take other actions ''necessary for carrying out'' the Secretary's authority to administer and enforce the immigration laws. INA secs. 103(a)(1) and (3), 8 U.S.C. 1103(a)(1) and (3); *see also* 6 U.S.C. 202 (authorities of the Secretary), 271(a)(3) (conferring authority on U.S. Citizenship and Immigration Services (USCIS) Director to establish ''policies for performing [immigration adjudication] functions'').

Under the INA, DHS has authority to adjudicate asylum applications and to conduct credible fear interviews, make credible fear determinations in the context of expedited removal, and to establish procedures for further consideration of asylum applications after an individual is found to have a credible fear. INA sec. 103(a)(1), (a)(3), 8 U.S.C. 1103(a)(1), (a)(3); INA sec. 208(b)(1)(A), (d)(1), (d)(5)(B), 8 U.S.C. 1158(b)(1)(A), (d)(1), (d)(5)(B); INA sec. 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B); *see also* 6 U.S.C. 271(b) (providing for the transfer of the Commissioner of Immigration and Naturalization's functions relating to adjudication of asylum and refugee applications to the Director of the Bureau of Citizenship and Immigration Services, now USCIS); 6 U.S.C. 557 (providing that references to any officer from whom functions are transferred under the HSA are to be understood as referring to the Secretary of Homeland Security). Within DHS, the Secretary has delegated some of those authorities to the Director of USCIS. USCIS AOs conduct credible fear interviews, make credible fear determinations, and determine whether a noncitizen's [2] asylum application should be granted, all of which are subject to review by a supervisory AO. *See* DHS, Delegation to the Bureau of Citizenship and Immigration Services, No. 0150.1 (June 5, 2003); 8 CFR 208.2(a), 208.9, 208.14(b), 208.30(b), (e)(6)(i), (e)(8).

The INA also authorizes the Secretary and Attorney General to publish regulatory amendments governing their respective roles regarding inspection and admission, detention and removal, withholding of removal, and deferral of removal. *See* INA secs. 235, 236, 241, 8 U.S.C. 1225, 1226, 1231.

The United States is a party to the 1967 Protocol Relating to the Status of Refugees, January 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268 (''Refugee Protocol''), which incorporates Articles 2 through 34 of the 1951 Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (''Refugee Convention''). Article 33 of the Refugee Convention generally prohibits parties to the Convention from expelling or returning (''refouler'') ''a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'' *Id.*

Congress has implemented U.S. non-refoulement obligations under the 1967 Protocol through the INA, as amended by the Refugee Act of 1980, Public Law 96–212, 94 Stat. 102, extending the form of protection from removal now known as statutory withholding of removal. *See* INA sec. 241(b)(3), 8 U.S.C. 1231(b)(3) (formerly 8 U.S.C. 1253(h) (1952)); *see also Sale* v. *Haitian Ctrs. Council, Inc.,* 509 U.S. 155, 174–77 (1993) (describing the history of the statutory withholding provision and the Refugee Act amendments). The Supreme Court has long recognized that the United States implements its non-refoulement obligations under Article 33 of the Refugee Convention (via the Refugee Protocol) through the statutory withholding of removal provision in section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), which provides that a noncitizen may not be removed to a country where their life or freedom would be threatened because of one of the protected grounds listed in Article 33 of the Refugee Convention. *See* INA sec. 241(b)(3), 8 U.S.C. 1231(b)(3), 8 CFR 208.16, 1208.16; *see also INS* v. *Cardoza-Fonseca,* 480 U.S. 421, 429–30 (1987) (discussing the statutory precursor to section 241(b)(3) of the INA—former section 243(h), 8 U.S.C. 1253(h) (1952)); *INS* v. *Stevic,* 467 U.S. 407, 414–22 (1984) (same). The INA also authorizes the Secretary and the Attorney General to implement statutory withholding of removal under section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3). *See* INA sec. 103(a)(1) and (3), (g)(1) and (2), 8 U.S.C. 1103(a)(1) and (3), (g)(1) and (2).

DHS and DOJ also have authority to implement U.S. obligations under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 85 (entered into force for United States Nov. 20, 1994) (CAT). The Foreign Affairs Reform and Restructuring Act of 1998 (FARRA) provides the Secretary with the authority to ''prescribe regulations to implement the obligations of the United

[1] This rule refers generally to the ''Securing the Border rule'' when it is not necessary to specify between the Securing the Border IFR or Securing the Border final rule.

[2] For purposes of this preamble, DHS uses the term ''noncitizen'' to be synonymous with the term ''alien'' as it is used in the INA. *See* INA sec. 101(a)(3), 8 U.S.C. 1101(a)(3); *Barton* v. *Barr,* 590 U.S. 222, 226 n.2 (2020).

States under Article 3 of the [CAT], subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.'' Public Law 105–277, div. G, sec. 2242(b), 112 Stat. 2681, 2681–822 (8 U.S.C. 1231 note). DHS and DOJ have implemented U.S. obligations under Article 3 of the CAT in their respective immigration regulations, consistent with FARRA. *See, e.g.,* 8 CFR 208.16(c) through 208.18, 1208.16(c) through 1208.18; 64 FR 8478 (Feb. 19, 1999) (''Regulations Concerning the Convention Against Torture''), as corrected by 64 FR 13881 (Mar. 23, 1999).

Overall, this rule is authorized because Congress has conferred upon the Secretary express rulemaking power to create certain procedures for screening for and adjudicating asylum claims. INA sec. 103(a)(1), (a)(3), 8 U.S.C. 1103(a)(1), (a)(3); INA sec. 208(b)(1)(A), (b)(2)(C), (d)(5)(B), 8 U.S.C. 1158(b)(1)(A), (b)(2)(C), (d)(5)(B); INA sec. 235(b)(1), 8 U.S.C. 1225(b)(1).

III. Provisions of the Final Rule and Revisions From the NPRM

The rule amends provisions at 8 CFR 208.30(e), 208.31, and 208.33(b) that effectuate the following changes to the credible fear and reasonable fear screening procedures:

- The rule provides AOs the discretion to consider mandatory bars to asylum under INA sec. 208(b)(2)(A)(i)–(v), 8 U.S.C. 1158(b)(2)(A)(i)–(v) or to statutory withholding of removal under INA sec. 241(b)(3)(B), 8 U.S.C. 1231(b)(3)(B) (mandatory bars) in credible fear screenings if the AO finds the noncitizen is able to establish a credible fear of persecution but not a credible fear of torture.
- The rule provides that when the mandatory bars are considered, the AO will find a noncitizen to have a credible fear of persecution if there is a significant possibility that the noncitizen can establish eligibility for asylum or withholding of removal, including the AO's determination that no bar applies or will be applied by the AO in that case.
- The rule allows AOs to enter a negative credible fear finding with regard to the noncitizen's eligibility for asylum or withholding of removal under INA sec. 208, 8 U.S.C. 1158, INA sec. 241(b)(3), 8 U.S.C. 1231(b)(3), or 8 CFR 208.16(c) if the AO determines there is not a significant possibility the noncitizen would be able to establish by a preponderance of the evidence that the mandatory bars do not apply.
- The rule provides AOs the discretion to consider mandatory bars when conducting credible fear screenings under the additional procedures in 8 CFR 208.33(b)(2).
- The rule provides that DHS will issue a Form I–862, Notice to Appear, if an AO conducting a credible fear screening under the additional procedures in 8 CFR 208.33(b)(2) determines that the noncitizen established a reasonable possibility of persecution with respect to the identified country or countries of removal and, to the extent bars were considered, that there is a reasonable possibility that none of the mandatory bars apply, or if the noncitizen established a reasonable possibility of torture.
- The rule provides that an AO will enter a negative credible fear determination when conducting a credible fear screening under the additional procedures in 8 CFR 208.33(b)(2) if the AO determines that the noncitizen failed to show a reasonable possibility that a mandatory bar does not apply and was unable to demonstrate a reasonable possibility of torture.
- The rule provides AOs the discretion to consider mandatory bars to statutory withholding of removal under INA sec. 241(b)(3)(B), 8 U.S.C. 1231(b)(3)(B), in reasonable fear screenings.
- The rule provides that, if an AO considers the mandatory bars to statutory withholding of removal under INA sec. 241(b)(3)(B), 8 U.S.C. 1231(b)(3)(B), a noncitizen will be found to have a reasonable fear of persecution if there is a reasonable possibility that the noncitizen would be persecuted on account of their race, religion, nationality, membership in a particular social group or political opinion, and the noncitizen has established a reasonable possibility that no bar applies.[3]

This Final Rule makes the following clarifying edits to the regulatory text proposed in the NPRM:

- The rule adds the phrase ''in a proceeding on the merits'' to 8 CFR 208.30(e)(5)(ii)(A) and (B) to clarify how AOs will apply in credible fear screenings the ''significant possibility'' standard with respect to mandatory bars to asylum and statutory withholding of removal, that is, by determining whether there is a significant possibility that, in a proceeding on the merits, the noncitizen would be able to establish by a preponderance of the evidence that such bar(s) do not apply.
- The rule removes the phrase ''persecution or'' from the last sentence of 8 CFR 208.31(c) to clarify that the sentence concerns ''reasonable fear of torture'' only, as ''reasonable fear of persecution'' is defined earlier in the paragraph.

[3] As described in the NPRM, this rule makes a non-substantive change to 8 CFR 208.31(g) and replaces the last sentence of 8 CFR 208.31(g) and paragraphs (g)(1)–(2). 89 FR at 41355 n.39. Because those provisions describe the procedures for immigration judge review of an AO's reasonable fear finding and are duplicative with the corresponding provision governing immigration court procedures at 8 CFR 1208.31(g), they are not needed in the DHS regulations in chapter I of title 8 of the CFR. Accordingly, this rule replaces those provisions in 8 CFR 208.31(g) with a short statement that informs the reader that the immigration judge review procedures are set forth at 8 CFR 1208.31(g).

IV. Response to Public Comments on the Proposed Rule

A. Summary of Comments on the Proposed Rule

In response to the proposed rule, DHS received 4,293 comments during the 30-day public comment period. Approximately 3,864 of the comments were letters submitted through mass mailing campaigns, and 297 comments were unique submissions. Primarily, individuals and anonymous entities submitted comments, as did multiple advocacy groups and legal services providers. Other commenters included attorneys, religious and community organizations, elected officials, and research and educational institutions, among others.

Comments received during the 30-day comment period are organized by topic below. DHS reviewed the public comments received in response to the proposed rule and addresses relevant comments in this Final Rule, grouped by subject area. DHS does not address comments seeking changes in U.S. laws, regulations, or agency policies that are unrelated to the changes made by this rule. This Final Rule does not resolve issues that are outside the scope of this rulemaking. A brief summary of comments DHS deemed to be out of scope or unrelated to this rulemaking, making a substantive response unnecessary, is provided at the end of the section. Comments may be reviewed at *https://www.regulations.gov*, docket number USCIS–2024–0005.

Following careful consideration of public comments received, DHS in this Final Rule has not made substantive modifications to the regulatory text proposed in the NPRM but has made clarifying edits as described in Part III above. The rationale for the proposed rule and the reasoning provided in the background section of that rule remain valid with respect to the regulatory

amendments made by this Final Rule, except where a new or supplemental rationale is reflected in this Final Rule.

B. General Feedback on the Proposed Rule

1. General Support for the Proposed Rule

a. Positive or Minimal Impacts on Noncitizens and Their Support Systems

Comment: A commenter said that the proposed rule would not increase the risk of erroneous denials, stating that most of the people requesting asylum are economic migrants.

Response: DHS appreciates the commenter's support for the rule and agrees that the rule will not increase the risk of erroneous determinations. DHS believes the rule will result in AOs issuing negative fear determinations in certain cases where there is evidence that a mandatory bar applies to a noncitizen, there is a lack of evidence that the bar should not be applied (*e.g.,* due to an exception to the bar or the application of an exemption to the bar, such as an exemption applied pursuant to INA sec. 212(d)(3)(B)(i), 8 U.S.C. 1182(d)(3)(B)(i)) and the noncitizen is not otherwise able to establish a positive fear of torture at the applicable standard. The rule will provide the Department greater flexibility to quickly screen out noncitizens with non-meritorious protection claims and swiftly remove noncitizens who present a national security or public safety concern. The Department does not otherwise rely on the commenter's assertion—that most people requesting asylum are economic migrants—as a justification for the rule.

b. Positive Impacts on Immigration System and Government Operations and Resources

Comment: Some commenters expressed support for the proposed rule and were concerned about abuse of the asylum system. These commenters expressed concern about fraudulent asylum claims and high levels of unlawful entry. These commenters also believe that noncitizens are exploiting the immigration processes and that application of the mandatory bars at the screening stage will eliminate removal delays. One commenter stated that AOs are capable of assessing mandatory bars at the credible fear stage and that AOs are well-trained in asylum law. One comment supported the proposed rule, agreeing that it will help avoid unnecessary detention of noncitizens and enhance public safety.

Response: DHS appreciates the commenters' support for the rule. DHS believes it is appropriate to authorize additional procedures by which to deliver swift decisions on non-meritorious claims and consequences for irregular migration,[4] rather than allowing ineligible individuals to further tax limited resources. DHS agrees that AOs are highly capable of assessing mandatory bars at the credible fear screening stage, as well as the reasonable fear screening stage, based on their specialized training in asylum law, including in applying mandatory bars.[5]

DHS agrees with the commenter that the rule will help avoid unnecessary detention and enhance public safety by prioritizing the speedy removal of noncitizens who may pose security threats. Noncitizens who may have otherwise remained in detention throughout the immigration court process for a full adjudication on the merits of their claim, despite the existence of easily verifiable evidence showing that they would be subject to a mandatory bar, will be quickly removed, thereby conserving the government's detention capacity.

2. General Opposition to the Proposed Rule

a. Conflicts With Humanitarian Values

Comment: Numerous commenters expressed concerns that the rule conflicts with humanitarian values. These commenters asserted that U.S. immigration policy should embody the values of compassion and humanitarianism and affirm the right to asylum and that the rule does not do so. These commenters stated that the rule would violate the international and universal right to safety and asylum. These commenters also stated that the rule is immoral and contrary to U.S. values, as they believe it would return asylum seekers to countries without meaningful protection and where they would still be in harm's way. These commenters believe the rule would contradict the United States' long-standing history of welcoming immigrants and supporting the international asylum system. Several commenters believe the proposed rule would have negative impacts on asylum seekers who are at risk of persecution in their home countries and have experienced hardships to reach the border. Another commenter stated that the proposed rule undermines the current asylum system and could send noncitizens with legitimate asylum claims back to danger. A few commenters said that the right to seek asylum is crucial to the safety and justice of all people, and that the immigration system should be more welcoming instead of limiting asylum access. Other commenters remarked that the asylum system needs to be reformed to make it fair and just because denying asylum could endanger those who are seeking safety. Another commenter stated that people do not willingly leave their homes and family to seek asylum. Some commenters believe that U.S. policies have created the conditions in other countries that force individuals to flee from their homes. Some commenters believe that deterrence policies and detention of noncitizens seeking asylum is immoral and that the rule is based on racism and xenophobia. One commenter believes the rule would serve more as a barrier to asylum than as a measure to protect U.S. national security.

Response: DHS disagrees with these commenters' claims concerning the rule. This rule focuses on enhancing DHS's ability to swiftly remove noncitizens who are ineligible for asylum and statutory withholding of removal and are enforcement priorities: those who present a threat to national security or public safety, while maintaining DHS's authority to create and implement safe, orderly, and humane migration pathways. As explained in the NPRM, the population to which this rule will apply is likely to be relatively small, as informed by the number of cases identified as potentially implicating mandatory bars that are flagged by USCIS during screenings.[6] The U.S. government has implemented, and will continue to implement, a number of measures designed to enhance and expand lawful pathways and processes for noncitizens seeking to enter the United States, including to seek asylum. Examples of lawful pathways include: the Uniting for Ukraine process, which allows Ukrainian nationals to receive humanitarian parole into the United States, enabling them to travel by air to the United States and be resettled;[7] the multilateral Safe Mobility initiative, currently operating in Colombia, Costa Rica, Ecuador, and Guatemala, which

[4] In this preamble, ''irregular migration'' refers to the movement of people into another country without authorization.

[5] *See, e.g.,* USCIS, ''RAIO Directorate—Officer Training: Mandatory Bars'' (May 9, 2013); USCIS, ''RAIO Directorate—Officer Training: Definition of Persecution and Eligibility Based on Past Persecution'' (Apr. 24, 2024); USCIS, ''RAIO Directorate—Officer Training: Nexus and the Protected Grounds'' (Apr. 24, 2024); USCIS, ''RAIO Directorate—Officer Training: Well-Founded Fear'' (Apr. 24, 2024).

[6] 89 FR 41347, 41351–52 (May 13, 2024).

[7] *See* U.S. Citizenship and Immigration Services, Uniting for Ukraine, *https://www.uscis.gov/ukraine* (last visited Sept. 25, 2024).

provides access to information and education about other lawful pathways to the United States and partner countries, local integration, and, for eligible individuals, expedited refugee processing to the United States; [8] the new processes for up to 30,000 Cuban, Haitian, Nicaraguan, and Venezuelan (CHNV) nationals per month to apply for advance authorization to seek parole into the United States, enabling them to travel by air to the United States; [9] and country-specific family reunification parole processes for certain nationals of Colombia, Cuba, Ecuador, El Salvador, Guatemala, Haiti, and Honduras who have U.S. citizen relatives in the United States.[10] DHS and its interagency partners have also increased H–2B nonimmigrant visa availability [11] and refugee processing for countries within the Western Hemisphere.[12] Noncitizens who do not avail themselves of these pathways can schedule an appointment through the Customs and Border Protection (CBP) One app, a scheduling tool used by noncitizens to present themselves at a southwest land border port of entry (POE) [13] The use of the CBP One app for scheduling has contributed to U.S. Customs and Border Protection's efforts to expand its southwest border POE migrant processing capacity well beyond the 2010–2016 daily POE average,[14] resulting in increased access for noncitizens to POEs.

b. Due Process Concerns

Comment: Many commenters expressed general due process concerns. Commenters stated that individual due process protections are critical and that, under the proposed rule, DHS would undermine or abandon due process in order to expedite the asylum process. Commenters stated that to alleviate due process concerns, the Department should refrain from implementing the rule.

Response: The Department disagrees with these commenters' claims concerning due process. This rule does not affect the provisions that address who DHS may refer for a credible fear screening or reasonable fear screening. *See* INA sec. 235(b)(1)(A)(ii), 8 U.S.C. 1225(b)(1)(A)(ii), 8 CFR 235.3(b)(4), 8 CFR 235.15(b)(4), 208.30(b), and 208.31(b). This rule does not impinge noncitizens' statutory right to representation in the credible and reasonable fear processes. *See, e.g.,* 8 CFR 208.30(d)(4),8 CFR 208.31(c), 8 CFR 235.15(b)(4)(i)(B). Additionally, noncitizens in credible fear may continue to consult with persons of their choosing. 8 CFR 208.30(d)(4); 8 CFR 235.15(b)(4)(i)(B). Further, the rule does not alter the preexisting rights or opportunities for noncitizens in credible or reasonable fear proceedings to seek immigration judge review of negative credible fear or reasonable fear determinations. *See* 8 CFR 208.30(g)(1), 208.31(g), 208.33(b)(2), 208.35(b)(2) 1003.42, 1208.31(g), 1208.33(b). Accordingly, the rule preserves noncitizens' process rights as provided in the INA. *See DHS* v. *Thuraissigiam,* 591 U.S. 103, 140 (2022) (reaffirming that noncitizens who arrive at U.S. ports of entry or are encountered shortly after unlawfully crossing the U.S. border and are placed in expedited removal proceedings, including those in the credible fear screening process, have ''only those rights regarding admission that Congress has provided by statute'').

Comment: Many commenters expressed concerns regarding access to legal counsel under the proposed rule. Commenters voiced concerns that the rule would inhibit access to legal counsel. Commenters noted that the credible fear process occurs shortly after individuals reach the United States, and they lack access to an attorney or have experienced trauma. Commenters also noted that individuals in the asylum process need sufficient time to find legal counsel and that as a result of the proposed rule, individuals would not be able to pass the initial credible fear screening and would be removed before even being able to secure legal representation. Some commenters pointed to the low representation rates of detained asylum seekers stemming from the reliance on telephone access from remote detention facilities to obtain counsel and the rapid timelines associated with screening determinations. Commenters believe that attempts to provide legal representation to detained individuals in screenings have been compromised or obstructed. A commenter said that it is hard to establish a credible fear of persecution and some noncitizens are not prepared to address the nuances asked of them in screenings; thus, they need lawyers to help them understand the law. Several commenters remarked on the particular need for access to counsel if AOs were to consider mandatory bars because challenging the applicability of a bar would be difficult without an attorney. A commenter stated that every noncitizen whose case is flagged with a possible mandatory bar should be notified of their right to counsel and allowed time to secure an attorney, and contrasted the reported difficulty of securing an attorney during the expedited removal process with the relative ease of doing so in section 240 removal proceedings.

Response: The Department disagrees with the commenters' claims that this rule inhibits access to counsel. As an initial matter, because this rule does not alter procedures governing consultation or representation, commenters' concerns regarding those issues are outside the scope of this rulemaking. Procedures regarding consultation and representation are governed by other DHS regulations, guidance, and policies. *See* 8 CFR 235.3(b)(4)(ii); 208.30(d)(4), 8 CFR 208.31(c).

This rule does not amend the pre-existing rights of noncitizens regarding their rights to representation during fear screenings. Specifically, during credible fear screenings, the INA provides that a noncitizen ''may consult with a person or persons of the [noncitizen]'s choosing prior to the interview or any review thereof, according to regulations prescribed by the Attorney General,'' provided that ''[s]uch consultation shall be at no expense to the Government and shall not unreasonably delay the process.'' INA 235(b)(1)(B)(iv), 8 U.S.C. 1225(b)(1)(B)(iv). This statutory right to consult does not attach until a noncitizen becomes eligible for a

[8] U.S. Dep't of State, Safe Mobility Initiative, *https://www.state.gov/refugeeadmissions/safe-mobility-initiative* (last visited Aug. 23, 2024); The White House, Fact Sheet: Biden-Harris Administration on World Refugee Day Celebrates a Rebuilt U.S. Refugee Admissions Program, June 20, 2024, *https://www.whitehouse.gov/briefing-room/statements-releases/2024/06/20/fact-sheet-biden-harris-administration-on-world-refugee-day-celebrates-a-rebuilt-u-s-refugee-admissions-program/* (last visited Aug. 29, 2024).

[9] *See* U.S. Citizenship and Immigration Services, Processes for Cubans, Haitians, Nicaraguans, and Venezuelans, *https://www.uscis.gov/CHNV* (last visited Sept. 25, 2024).

[10] *See generally* U.S. Citizenship and Immigration Services, Family Reunification Parole Processes, *https://www.uscis.gov/FRP* (last visited Aug. 23, 2024).

[11] *See, e.g.,* 88 FR 80394 (Nov. 17, 2023) (authorizing up to 64,716 additional H–2B nonimmigrant visas for Fiscal year 2024).

[12] *See* Memorandum on Presidential Determination on Refugee Admission for Fiscal Year 2024, Presidential Determination No. 2023–13 (Sept. 29, 2023) (providing for the admission of 35,000–50,000 refugees from the Latin America/Caribbean region to the United States during Fiscal Year (FY) 2024); Memorandum on Presidential Determination on Refugee Admission for Fiscal Year 2025, Presidential Determination No. 2024–13 (Sept. 30, 2024) (providing for the admission of 35,000–50,000 refugees from the Latin America/Caribbean region to the United States during FY 2025).

[13] *See* CBP, ''CBP One™ Mobile Application,'' *https://www.cbp.gov/about/mobile-apps-directory/cbpone* (last visited Aug. 14, 2024).

[14] *See* CBP STAT Division, ''U.S. Customs and Border Protection (CBP) Enforcement Encounters—Southwest Border (SBO), Office of Field Operations (OFO) Daily Average'' (internal data report, retrieved Apr. 13, 2023).

credible fear interview, and it does not guarantee an absolute right to retain counsel. *See id.* The credible fear review regulations further provide that a noncitizen ''may consult with a person or persons of the [noncitizen's] choosing prior to the interview or any review thereof,'' ''[s]uch consultation shall be at no expense to the Government and shall not unreasonably delay the process,'' and that the person(s) with whom the noncitizen consulted ''may be present at the interview and may be permitted, in the discretion of the asylum officer, to present a statement at the end of the interview.'' 8 CFR 208.30(d)(4). During the reasonable fear screening process, individuals may be represented by an attorney or an accredited representative at no cost to the government.

Individuals who may be subject to a mandatory bar will have the opportunity to show that the bar does not apply during the screening interview. Credible fear and reasonable fear screening determinations are based on non-adversarial interviews that occur in an expedited manner, such that the scope of representation is necessarily limited when compared to a lengthy adversarial hearing before EOIR. In addition to substantive training on applying mandatory bars, AOs receive training and have practical experience conducting non-adversarial interviews, eliciting testimony, working with interpreters, cross-cultural communication, and working with vulnerable populations.[15] AOs regularly assess the mandatory bars in affirmative asylum adjudications and asylum merits interviews (AMIs); therefore, it is not unusual for AOs to consider these issues. Accordingly, AOs are well-suited in a screening interview to develop the record regarding a potential mandatory bar and to ensure the noncitizen has an opportunity to provide evidence as to why a given bar does not apply at the appropriate standard of proof. Moreover, all credible fear and reasonable fear determinations are reviewed by a supervisory AO for procedural and substantive accuracy and completeness before becoming final.[16] DHS also believes that the non-adversarial nature of credible fear and reasonable fear screenings, in contrast with adversarial section 240 removal proceedings, sufficiently mitigates the commenters' concerns about the more compressed timeframe noncitizens have to secure an attorney during the expedited removal process, and challenges of accessing counsel in detention.

Finally, DHS disagrees that the consideration of mandatory bars is categorically more complex than the consideration of the full array of issues that are currently presented in screening cases on a routine basis. For example, determining whether a noncitizen's testimony is credible, whether harm experienced or feared was or would be inflicted on account of a protected ground, or whether torture feared would be inflicted with the consent or acquiescence of a person acting in an official capacity are all potentially complex issues that AOs regularly consider and analyze in fear screenings. As such, and in view of AOs' training and experience previously described, the Department does not agree that a noncitizen's ability to obtain counsel for such an interview presents new or greater concerns than those presented by a screening interview where mandatory bars are not considered.

Comment: A commenter expressed concern that AOs would rely on evidence such as Interpol Red Notices issued by authoritarian regimes as a basis for considering the applicability of bars.

Response: The Department has implemented measures to combat the impact of abusive or unwarranted INTERPOL notices separate and apart from this rule. For example, DHS has issued internal guidance on the appropriate handling of INTERPOL notices that are suspected of having been issued by a country for the purpose of persecuting an individual or otherwise appear to be prohibited or noncompliant.

Comment: A few commenters expressed concern regarding the ability to collect and present evidence during credible fear screenings. The commenters stated that the inability to compile evidence would adversely impact noncitizens, as they would not be able to gather evidence disputing the application of a bar. Commenters stated that consideration of the bars to asylum and statutory withholding of removal in credible fear or reasonable fear interviews does not afford an asylum seeker the opportunity to present the extensive evidence needed to rebut a finding that one of the asylum bars applies. Commenters stated that the expedited removal process does not afford sufficient opportunity for noncitizens to gather the evidence needed to demonstrate a bar does not apply to them and that the rule would require noncitizens to understand highly complex bars to eligibility that newly arriving people cannot be expected to understand. Commenters asserted that often, the evidence these bars apply comes from unverified or difficult-to-verify sources. Several commenters opposed the proposed rule on the basis that detained noncitizens in expedited removal proceedings would have difficulty discussing or adequately defending themselves against the application of mandatory bars because of the effect of trauma resulting from past harm or their journey to the United States, hunger, and linguistic or cultural barriers.

Response: The Department disagrees that this rule would negatively impact noncitizens in this manner. AOs have a duty to elicit all relevant and useful information on a fear claim. *See, e.g.,* 8 CFR 208.30(d). Credible testimony alone may be the basis of a positive fear determination without the need for any corroborative documentary evidence. Where an AO exercises discretion to consider a mandatory bar in a fear screening, the AO will provide the noncitizen with an opportunity to present evidence that the bar does not apply, and credible testimony alone may be sufficient evidence to make that showing. As noted above, AOs have training and experience in the substantive application of mandatory bars and in non-adversarial interviewing and eliciting testimony and are therefore well-positioned to develop and evaluate the record in such cases, including weighing the reliability and probative value of available evidence.[17] Further, all credible fear and reasonable fear determinations undergo supervisory review prior to service.

Noncitizens undergoing fear screenings where a bar is considered would be able to demonstrate that the bar does not apply at the relevant standard. For example, in credible fear under 8 CFR 208.30, a noncitizen must

[15] *See* USCIS, *RAIO Directorate—Officer Training: Mandatory Bars* (May 9, 2013); USCIS, *RAIO Directorate—Officer Training: Interviewing—Introduction to the Non-Adversarial Interview* (Apr. 24, 2024); USCIS, *RAIO Directorate—Officer Training: Interviewing—Eliciting Testimony* (Apr. 24, 2024); USCIS, *RAIO Directorate—Officer Training: Interviewing—Working with an Interpreter* (Apr. 24, 2024); USCIS, *RAIO Directorate—Officer Training: Cross-Cultural Communication and Other Factors That May Impede Communication at an Interview* (Apr. 24, 2024); USCIS, *RAIO Directorate—Officer Training: Interviewing Survivors of Torture and Other Severe Trauma* (Apr. 24, 2024).

[16] *See* 8 CFR 208.30(e)(8); *see also* Memorandum for the Record, from Ted Kim, Assoc. Dir., Refugee, Asylum, and Int'l Operations Directorate, USCIS, *Re: Asylum Division Training, Staffing, Capacity, and Credible Fear Procedures* (Sept. 26, 2024).

[17] *See* USCIS, *RAIO Directorate—Officer Training: Mandatory Bars* (May 9, 2013); USCIS, *RAIO Directorate—Officer Training: Interviewing—Introduction to the Non-Adversarial Interview* (Apr. 24, 2024); USCIS, *RAIO Directorate—Officer Training: Interviewing—Eliciting Testimony* (Apr. 24, 2024).

demonstrate that there is a significant possibility that they could establish that the bar does not apply by a preponderance of evidence at a future proceeding. Similarly, noncitizens would need to establish a reasonable possibility that the bar does not apply in credible fear screenings under 8 CFR 208.33, or in reasonable fear screenings under 8 CFR 208.31, and noncitizens need to establish a reasonable probability that the bar does not apply in credible fear screenings conducted under 8 CFR 208.35. The screening standards themselves ensure a fair process in that the noncitizen need only meet the significant possibility, reasonable possibility, or reasonable probability standard in order to pass through the screening process. These standards, which are either lower or the same as the standards that apply in full adjudications of asylum and statutory withholding of removal requests, do not require the presentation of the same extent of evidence that would be needed in a full merits hearing or interview. Furthermore, this rule does not create a complicated process requiring full evidence gathering and determinations to be made on possible bars to eligibility. Rather, AOs will only consider a bar in those cases where there is easily verifiable (as opposed to unverified or difficult-to-verify) evidence available to the AO that, in their discretion, warrants an inquiry into a bar, and the AO can consider that bar efficiently at the screening stage. AOs are trained to elicit all relevant testimony in a non-adversarial manner [18] to ensure noncitizens have a fair opportunity to provide any evidence necessary to evaluate their claim, which under this rule may include the applicability of any bars or the availability of any exceptions or exemptions.

DHS rejects the notion that it is categorically more difficult for a noncitizen to discuss issues surrounding mandatory bars than it is to discuss other issues that are already the subject of screening interviews. AOs are trained to work with noncitizens who are experiencing the effects of trauma and to communicate across cultural and linguistic barriers.[19] AOs routinely interview noncitizens in protection screening interviews on matters that many find challenging to discuss, including torture, sexual assault, familial violence, and the deaths of family members.

The permissive nature of the rule is also well-tailored to a situation where the noncitizen is unable to testify in depth due to the effects of trauma, or a situation where the noncitizen may be better able to provide evidence that a mandatory bar does not apply to them in a full hearing. As explained in the proposed rule, AOs should only apply a mandatory bar in a screening interview where there is ''easily verifiable information'' that the bar may apply, and even then, to only do so if the inquiry can be done efficiently. 89 FR at 41354. Should the AO determine that the issue would be better considered at a later stage, they retain the discretion under this proposed rule to decline to consider mandatory bars during the screening determination.

Comment: Many commenters expressed concerns regarding the application of mandatory bars by AOs and officer discretion, emphasizing that the application of the bars is complex, and asserting that immigration judges—not AOs—should evaluate the complex legal issues associated with the application of the mandatory bars. Several commenters noted that bars to asylum and statutory withholding of removal can involve complex factual and legal inquiries, with some pointing out that DHS itself, in a prior rulemaking removing bars from consideration in credible fear screenings, concluded that such a ''fact-intensive inquiry requiring complex legal analysis [] would be more appropriate in a full adjudication before an asylum officer or in section 240 proceedings with the availability of judicial review than in credible fear screenings.'' 87 FR 18078, 18093 (Mar. 29, 2022) (''Asylum Processing IFR''). Commenters argued that DHS's representation that AOs would consider bars only in those cases where there is easily verifiable evidence available to the AO that in their discretion warrants an inquiry into a bar and where the AO is confident that they can consider that bar efficiently is insufficient given the complexity of this area of the law.

Commenters stated that the bars could be applied incorrectly, arbitrarily, or unfairly, endangering individuals. Commenters also stated that the application of bars may be based on evidence from foreign entities, which U.S. immigration officials cannot independently verify and which may be inaccurate. Commenters stated that noncitizens in credible and reasonable fear processes should be subject to the same rules and that individuals are entitled to a transparent, humane process. Commenters also stated that AOs could be more likely to issue negative determinations of credible fear as a result of the proposed rule, especially if they do not listen to a noncitizen fully or fairly.

A few commenters discussed officer bias or misconduct during the screening process. Commenters stated that, according to a complaint filed with the DHS Office for Civil Rights and Civil Liberties, AOs scheduled credible fear interviews without notifying the attorney of the interview; incorrectly applied standards when evaluating claims; used adversarial interview techniques on individuals; subjected noncitizens to interviews in languages in which they are not fluent; and failed to provide noncitizens with appropriate language interpreters. Commenters stated that there would be no mechanisms for upholding accountability under the proposed rule. Other commenters stated that the proposed rule would yield an asylum process that is less consistent and transparent, in part because of the discretion with which AOs would ask questions, and the lack of consistency and transparency would thwart efforts to monitor the process.

A commenter asserted that the rule would confuse the role of AOs during the screening process with that of a final adjudicator. According to the commenter, although the proposed rule may purport to avoid adverse outcomes by making the application of the bars at the fear screening stage discretionary instead of mandatory, the distinction would be negligible.

Response: The Department disagrees with the claim that only immigration judges, not both immigration judges and AOs, should evaluate or apply the mandatory bars. DHS also rejects the notion that the consideration of mandatory bars is categorically more complex than the consideration of the full array of issues that AOs address on a routine basis. AOs regularly assess the mandatory bars in affirmative asylum adjudications and asylum merits interviews (AMIs); therefore, it is not unusual for AOs to consider these issues.[20]

The Department also rejects the assertion that the rule should not be implemented due to potential officer bias or misconduct in the interview and

[18] *See* USCIS, ''RAIO Directorate—Officer Training: Interviewing—Eliciting Testimony'' (Dec. 20, 2019).

[19] *See* USCIS, ''RAIO Directorate—Officer Training: Cross-Cultural Communication and Other Factors That May Impede Communication at an Interview'' (Apr. 24, 2024); USCIS, ''RAIO Directorate—Officer Training: Interviewing Survivors of Torture and Other Severe Trauma'' (Apr. 24, 2024).

[20] As noted in the NPRM, *see* 89 FR at 41353 n.30, DHS has long applied in the expedited removal process the ''safe-third-country'' bar to eligibility to apply for asylum at INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A). *See* 8 CFR 208.30(e)(6).

lack of accountability through the process. AOs are capable of conducting thorough screening interviews, applying the mandatory bars when applicable, and maintaining fairness throughout the process, as is required by their role.[21] AOs are well trained in asylum law, and all credible fear and reasonable fear determinations are reviewed by a supervisory asylum officer (SAO) for accuracy and legal sufficiency.[22] As explained above, AOs receive training in and have experience in non-adversarial interviewing and eliciting testimony, in addition to substantive training on applying mandatory bars and experience applying mandatory bars in full asylum adjudications.[23]

The Department also rejects the claim that this new process will confuse the role of the AO with a final adjudicator. At the start of the screening interview, the AO will introduce themselves and explain the interview process so as to avoid confusion about roles or procedures. Noncitizens are also provided with an information sheet on the credible or reasonable fear process that explains the purpose and nature of the screening interview, including possible outcomes and what to expect following the interview. In addition, making a determination regarding a mandatory bar, when considered, does not make an AO any more or less of a final adjudicator than making a determination regarding substantive eligibility, as is currently done and is unaffected by this rule.

Furthermore, the Department disagrees with the claims that, as a result of the complexity of analyzing the mandatory bars, AOs may apply the bars incorrectly or unfairly. Considering the training and experience AOs possess, they are well-suited to exercise discretion to apply mandatory bars in the screening context and, where evidence related to a mandatory bar is too complex to be fully explored in the screening context, to exercise their discretion not to apply the bar in the screening determination. AOs will continue to issue positive fear determinations where a noncitizen demonstrates a credible or reasonable fear at the applicable screening standard, even where there may be indicia of a mandatory bar but the available evidence at the screening stage as to the bar or any available exception or exemption is limited.

DHS acknowledges that properly analyzing bars to asylum and statutory withholding of removal can involve complicated, extensive factfinding and legal analysis. Furthermore, some aspects of this area of law remain unsettled, and different courts have come to different conclusions on certain legal questions related to these bars. USCIS Asylum Officers must follow precedent Board of Immigration Appeals (BIA) and Attorney General decisions, except when they have been modified or overruled by subsequent decisions of the BIA or the Attorney General, or there is a conflicting published opinion on the issue by the U.S. Supreme Court or by the U.S. Court of Appeals with jurisdiction over the matter.[24] It is not the case that the considerations relating to legal analysis hold true in every case in which a mandatory bar arises. For example, a noncitizen who claims to fear persecution by the government of Colombia on account of political opinion, but who credibly testifies to being a current member of the Revolutionary Armed Forces of Colombia—People's Army, would clearly be barred from both asylum and withholding of removal pursuant to INA sec. 208(b)(2)(A)(v), 8 U.S.C. 1158(b)(2)(A)(v) and INA sec. 241(b)(3)(B), 8 U.S.C. 1231(b)(3)(B), as a current member of a designated foreign terrorist organization,[25] regardless of whether the noncitizen could demonstrate they are a refugee or would be persecuted on account of a protected ground if returned to Colombia. DHS disagrees that AOs should be categorically foreclosed from determining there is no significant possibility or reasonable possibility such an individual could establish eligibility for these forms of relief or protection in a full merits hearing. This rule allows, but does not require, an AO encountering such a scenario to consider the applicable bar in a fear screening and to enter a negative determination with regard to the noncitizen's eligibility for asylum or statutory withholding of removal, preventing the noncitizen from entering a potentially years-long immigration court process in pursuit of relief for which they are ineligible and allowing DHS and EOIR resources that would have been expended on such processes to be conserved for potentially meritorious cases.

Comment: Many commenters expressed concerns with AOs considering mandatory bars during the fear screening stage, instead of immigration judges during section 240 removal proceedings. Commenters stated that applying mandatory bars at the credible fear screening stage would preclude individuals from a full hearing that would provide them the opportunity to prepare their cases, present witnesses and evidence, and allow a court to determine the true nature of foreign convictions, which are often a part of the persecution that the noncitizen experienced in their home country for voicing dissent against an authoritarian government. Commenters stated these decisions should be made by immigration judges and that individuals should be able to appear before an immigration judge or have a fair hearing, be it at the onset of seeking status in the United States or when trying to overturn an order of removal. Commenters asserted that eliminating hearings at an earlier stage would deny noncitizens who have strong or pressing cases and that the proposed rule would increase negative determinations in credible fear and expedited removals.

Several commenters additionally discussed the accuracy of negative credible fear determinations, stating that negative credible fear determinations are often dismissed or reversed after review by an immigration judge. A commenter referenced multiple examples when courts have questioned the reliability and value afforded to credible fear interviews, reasoning that rulings or removal orders have been overturned in part because of unreliable information elicited during the interviews. According to the commenter, the proposed rule would restrict asylum by placing even greater value on screenings that are already

[21] *See* USCIS, ''RAIO Directorate—Officer Training: Mandatory Bars'' (May 9, 2013); USCIS, ''RAIO Directorate—Officer Training: Interviewing—Introduction to the Non-Adversarial Interview (Apr. 24, 2024); USCIS, ''RAIO Directorate—Officer Training: Interviewing—Eliciting Testimony (Apr. 24, 2024); USCIS, ''RAIO Directorate—Officer Training: Interviewing—Working with an Interpreter'' (Apr. 24, 2024); USCIS, ''RAIO Directorate—Officer Training: Cross-Cultural Communication and Other Factors That May Impede Communication at an Interview'' (Apr. 24, 2024).

[22] *See* 8 CFR 208.30(e)(8); *see also* Memorandum for the Record, from Ted Kim, Assoc. Dir., Refugee, Asylum, and Int'l Operations Directorate, USCIS, *Re: Asylum Division Training, Staffing, Capacity, and Credible Fear Procedures* (Sept. 26, 2024).

[23] *See* USCIS, ''RAIO Directorate—Officer Training: Mandatory Bars'' (May 9, 2013); USCIS, ''RAIO Directorate—Officer Training: Interviewing—Introduction to the Non-Adversarial Interview (Apr. 24, 2024); USCIS, ''RAIO Directorate—Officer Training: Interviewing—Eliciting Testimony (Apr. 24, 2024); USCIS, ''RAIO Directorate—Officer Training: Interviewing—Working with an Interpreter'' (Apr. 24, 2024); USCIS, ''RAIO Directorate—Officer Training: Cross-Cultural Communication and Other Factors That May Impede Communication at an Interview'' (Apr. 24, 2024); USCIS, ''RAIO Directorate—Officer Training: Interviewing Survivors of Torture and Other Severe Trauma'' (Apr. 24, 2024).

[24] *See* 8 CFR 103.10(b), 1003.1(g); *see also* USCIS, ''RAIO Directorate—Officer Training: Reading and Using Case Law'' 14 (April 24, 2024).

[25] *See* INA secs. 212(a)(3)(B)(i)(V), 237(a)(4)(B), 8 U.S.C. 1182(a)(3)(B)(i)(V), 1227(a)(4)(B); *see also* 86 FR 68294 (Dec. 1, 2021).

unreliable, and the bars would be applied without the safeguards afforded by section 240 removal proceedings. The commenter further stated that both the Biden and Trump administrations have distanced credible fear interviews from the low screening standard framed by Congress.

Response: The Department disagrees with the claim that the mandatory bars should only be considered during section 240 removal proceedings before an immigration judge. As discussed above, AOs receive training in and have experience in non-adversarial interviewing and eliciting testimony, in addition to substantive training on applying mandatory bars and experience applying mandatory bars in full asylum adjudications.[26]

In addition, the Department disagrees that applying the bars earlier would preclude noncitizens from fully presenting their case compared to if the bars were only applied in a subsequent section 240 removal proceeding. Where evidence related to a mandatory bar is too complex to be fully explored in the screening context or where there is additional evidence that the noncitizen may not be subject to the bar because of an exception or exemption, AOs may exercise their discretion not to apply the mandatory bar in the screening determination. In those cases, if the noncitizen establishes a fear of persecution or torture at the applicable standard, the AO will issue a positive determination so that the bar may be further explored by the immigration judge. Where there is evidence available to the AO that triggers an inquiry into an applicable mandatory bar, and the AO determines that they can address that bar efficiently at the credible fear or reasonable fear interview, then the AO will give the noncitizen the opportunity to establish, at the relevant standard, that the bar would not apply. The Department believes this discretion will ensure that application of the mandatory bars in fear screenings only occurs in cases where USCIS can effectively and accurately apply the bar without creating inefficiencies or frustrating the streamlined nature of the screening process. This rule will allow AOs to, in their discretion, consider bars in the issuance of negative fear determinations only in certain cases where there is sufficient, easily verifiable evidence that a bar applies to a noncitizen, there is a lack of evidence that no bar applies or shall be applied, and the noncitizen is not otherwise able to establish a positive fear of torture at the applicable standard.

Finally, the Department disagrees with comments that question the accuracy and reliability of the screening interviews and determinations and the claim that this rule will restrict asylum. AOs are trained to conduct thorough, fair, and non-adversarial interviews, and AOs play an integral role in the credible fear and reasonable fear screening process. Regarding immigration judge review of AOs' credible fear or reasonable fear determinations, DHS notes that immigration judges have the authority to conduct de novo review of negative credible fear and reasonable fear determinations. 8 CFR 1003.42; 8 CFR 1208.31(g). Otherwise, the procedures for immigration judge decisions vacating screening determinations are outside the scope of this rulemaking.

Comment: Several commenters objected to the proposed rule on the basis that the rule would curtail the avenues for review of application of the mandatory bars. While the noncitizen would be able to seek review of an AO's negative determination by an immigration judge, they would not be able to appeal the immigration judge's decision to the Board of Immigration Appeals (BIA) or the Federal Court system. Commenters also stated the rule forecloses judicial review.

Commenters wrote that the rule's provisions for immigration judge review provide insufficient protections against erroneous negative screening determinations and raise due process concerns. One commenter indicated immigration judges, who frequently do not cite any law in their fear review denials, do not have time to devote to in-depth analysis with an additional layer of complexity added to hearings. A commenter stated that AOs' credible fear determinations would be reversed more frequently if immigration judge review included basic due process protections, such as access to counsel. Another stated noncitizens might not know that immigration judge review of negative fear determination is available unless an AO tells them.

Response: Negative screening determinations of all types are subject to review by an immigration judge. *See* 8 CFR 208.30(g)(1), 208.31(g), 208.33(b)(2), 208.35(b)(2). Should an immigration judge make a negative credible fear determination, no appeal of that determination is available. *See* 8 CFR 1003.42(f)(2), 8 CFR 1208.31(g)(1). Nothing in the proposed rule alters these procedures, although the rule would allow AOs to base a negative determination on the application of a mandatory bar.

The comments that the rule forecloses review of negative determinations are incorrect, as the regulations establish procedures for referring negative determinations for review by an immigration judge. Noncitizens are provided written notification of their right to request an immigration judge's review of the AO's credible fear determination. 8 CFR 235.3(b)(4)(i)(C). Where a noncitizen is issued a negative credible fear determination, they are served by asylum office staff with one of the following forms: Form I–869, Record of Negative Credible Fear Finding and Request for Review by Immigration Judge (where the negative credible fear determination is issued pursuant to 208.30); Form I–869B, Record of Negative Credible Fear and Reasonable Possibility Finding and Request for Review by Immigration Judge for Noncitizens Subject to the Condition on Asylum Eligibility Pursuant to 8 CFR 208.33(a); or Form I–869SB, Record of Negative Credible Fear and Reasonable Probability Finding and Request for Review by Immigration Judge for Noncitizens Subject to the Limitation on Asylum Eligibility Pursuant to 8 CFR 208.35(a). In all negative determinations, the form is read to the noncitizen aloud at service of the decision in a language they understand (via an interpreter if necessary) and includes an explanation of the noncitizen's right to request immigration judge review of the negative determination, pursuant to 8 CFR 208.30(g)(1), 208.33(b)(2)(iii), or 208.35(b)(2)(iii).[27] The noncitizen selects on the Form I–869, Form I–869B, or Form I–869SB, whether they request immigration judge review of the negative determination and signs the form, which also includes the signature of the interpreter, where applicable (or where the interpretation was via a USCIS telephonic contract interpreter, the interpreter ID number is recorded).[28]

[26] *See* USCIS, ''RAIO Directorate—Officer Training: Mandatory Bars'' (May 9, 2013); USCIS, ''RAIO Directorate—Officer Training: Interviewing—Introduction to the Non-Adversarial Interview (Apr. 24, 2024); USCIS, ''RAIO Directorate—Officer Training: Interviewing—Eliciting Testimony (Apr. 24, 2024); USCIS, ''RAIO Directorate—Officer Training: Interviewing—Working with an Interpreter'' (Apr. 24, 2024); USCIS, ''RAIO Directorate—Officer Training: Cross-Cultural Communication and Other Factors That May Impede Communication at an Interview'' (Apr. 24, 2024); USCIS, ''RAIO Directorate—Officer Training: Interviewing Survivors of Torture and Other Severe Trauma'' (Apr. 24, 2024).

[27] *See* Memorandum for the Record, from Ted Kim, Assoc. Dir., Refugee, Asylum, and Int'l Operations Directorate, USCIS, *Re: Asylum Division Training, Staffing, Capacity, and Credible Fear Procedures* (Sept. 26, 2024).

[28] *See* Memorandum for the Record, from Ted Kim, Assoc. Dir., Refugee, Asylum, and Int'l Operations Directorate, USCIS, *Re: Asylum Division*

An immigration officer who refers a noncitizen subject to expedited removal to an AO for a credible fear interview will provide the noncitizen with a written disclosure describing, among other things, the right to request a review by an immigration judge of the AO's credible fear determination. 8 CFR 235.3(b)(4)(i).

Where a noncitizen is issued a negative reasonable fear determination, they are served by asylum office staff with a Form I–898, Record of Negative Reasonable Fear Finding and Request for Review by Immigration Judge, which is read to them aloud in a language they understand (via an interpreter if necessary) and includes an explanation of the noncitizen's right to request immigration judge review of the negative determination, pursuant to 8 CFR 208.31(f)–(g). The noncitizen selects on the Form I–898 whether they request immigration judge review and signs the form, which also includes the signature of the interpreter, where applicable (or where the interpretation was via a USCIS telephonic contract interpreter, the interpreter ID number is recorded).[29]

DHS disagrees with the commenters stating that the rule's provisions for immigration judge review are inadequate to ensure that sufficient procedural safeguards are provided or protect against erroneous screening determinations. Immigration judges are familiar with applying bars to asylum and statutory withholding of removal, as well as the applicable standards of proof involved in both fear screenings and full merits adjudications of asylum, statutory withholding of removal, and protection under the CAT.[30] As discussed above, multiple provisions in title 8 of the Code of Federal Regulations provide notice of the right to access counsel.[31]

Furthermore, review of negative credible fear determinations is limited under INA sec. 235(b)(2)(C), 8 U.S.C. 1225(b)(2)(C), to the review by an immigration judge previously described, so DHS has no authority to create additional mechanisms for a noncitizen to appeal a credible fear determination made during the expedited removal process pursuant to INA sec. 235(b), 8 U.S.C. 1225(b).[32] DHS acknowledges that, before this rule, mandatory bars were only applied during a full adjudication of the noncitizen's application for asylum or withholding of removal, and any such decision on a bar was subject to review by both the BIA and the relevant Federal court. *See* 8 CFR 1003.1(b)(3), INA sec. 242, 8 U.S.C. 1252. Under this rule, however, noncitizens who receive negative credible fear determinations solely because of the applicability of a bar and who have those determinations affirmed by an immigration judge will be removed. However, as discussed elsewhere in this preamble, the Department considers the safeguards in place sufficient to ensure against erroneous removals, and the benefits of allowing DHS and EOIR resources that would have been expended on potentially years-long immigration court processes involving noncitizens pursuing relief for which they are ineligible to be conserved for potentially meritorious cases outweigh the loss to this small population of noncitizens of these additional avenues for appeal or review.

As mentioned above, DHS rejects the suggestion in these comments that determinations based on mandatory bars are categorically more complex as a factual or legal matter than other issues routinely decided in screening interviews and subject to these same review provisions.

Comment: Commenters stated that noncitizens would be denied protections at the border and could be unjustly removed; lack of transparency would leave no way to assess whether the process would lead to erroneous removals; and an expedited removal process would rush individuals through credible fear interviews that unfairly require individuals to disclose personal information about fear or trauma to officials and without the presence of an attorney. In line with the above remarks, a commenter encouraged DHS to retain current due process protections to prevent the erroneous return of people to countries where their lives would be threatened.

Response: The Department acknowledges the concern relating to the possibility for erroneous removals but assesses the possibility to be rare. AOs are trained in asylum law and are well-suited to apply mandatory bars in the screening context in their discretion and, where evidence related to a mandatory bar is limited or unavailable, or analysis would be too complex to be fully explored in the screening context, to exercise their discretion not to apply the bar in the screening determination. AOs will continue to issue positive fear determinations where a noncitizen demonstrates a credible or reasonable fear at the applicable screening standard, even where there may be indicia of a mandatory bar but the available evidence at the screening stage as to the mandatory bar or available exceptions or exemptions is limited. Retaining this discretion will safeguard against erroneous applications of the mandatory bars. In addition to substantive training on analyzing mandatory bars, AOs are trained to conduct non-adversarial interviews, to elicit testimony, and to work with interpreters.[33] The Department also rejects the assertion that noncitizens will be unfairly required to disclose trauma and will not have access to counsel. AOs are trained to work with noncitizens who are experiencing the effects of trauma and to communicate across cultural and linguistic barriers.[34] AOs routinely interview noncitizens during protection screening interviews involving sensitive matters that many may find challenging to discuss, including torture, sexual assault, familial violence, and the deaths of family members. Additionally, noncitizens in the credible and reasonable fear processes may be represented by an attorney at no cost to the government. 8 CFR 208.30(d)(4), 8 CFR 208.31(c). Finally, noncitizens in credible fear may consult with persons of their choosing. 8 CFR 208.30(d)(4).

By their nature, the application of the mandatory bars may result in the possible removal of noncitizens to countries where they fear harm. This is consistent with both domestic law and international standards identified in section II of this preamble. DHS also notes that nothing in the rule would affect protections available to noncitizens under regulations implementing U.S. obligations under Article 3 of the CAT.

Comment: Commenters asserted that language access issues in general, and particularly for speakers of rare or indigenous languages, impede

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[29] *See* USCIS, ''Reasonable Fear Procedures Manual,'' Section III, *https://www.uscis.gov/sites/default/files/document/guides/ReasonableFearProceduresManual.pdf*.

[30] *See* 8 CFR 1208.13(c); 1208.16(b); 1208.16(c);1208.16(d)(2); 1208.30(c)(2); 1208.30(g)(2); 1208.31(c); and 1208.31(g).

[31] *See, e.g.,* 8 CFR 1240.10(a)(1)-(2), 1240.11(c)(1)(iii), 1240.17(f)(1), 1240.32(a), 1240.48(a).

[32] INA sec. 242(a)(2)(A), 8 U.S.C. 1252(a)(2)(A).

[33] *See* USCIS, ''RAIO Directorate—Officer Training: Cross-Cultural Communication and Other Factors That May Impede Communication at an Interview'' (Apr. 24, 2024); USCIS, ''RAIO Directorate—Officer Training: Interviewing Survivors of Torture and Other Severe Trauma'' (Apr. 24, 2024).

[34] *See* USCIS, ''RAIO Directorate—Officer Training: Cross-Cultural Communication and Other Factors That May Impede Communication at an Interview'' (Apr. 24, 2024); USCIS, ''RAIO Directorate—Officer Training: Interviewing Survivors of Torture and Other Severe Trauma'' (Apr. 24, 2024).

noncitizens' ability to demonstrate a bar does not apply to them.

Response: 8 CFR 208.30(d)(5) requires AOs to provide for the assistance of an interpreter in credible fear interviews where the noncitizen is unable to effectively proceed in English and the AO is unable to proceed competently in a language the noncitizen speaks and understands. 8 CFR 208.31(c) imposes the same requirement for reasonable fear interviews. Furthermore, USCIS has developed a language access plan to ensure that limited English proficient individuals have meaningful access to the agency's services and information.[35] USCIS has also issued guidance to AOs on providing language access in credible fear interviews.[36] This guidance provides for situations where the AO is unable to communicate with the noncitizen because their preferred language is not serviced by an asylum interpreter contract and, if applicable, the noncitizen does not agree to proceed with the credible fear interview in another language for which the AO confirms understanding. In such a situation, the Asylum Office issues a Form I–862, Notice to Appear (NTA), and refers the noncitizen to removal proceedings without making a credible fear determination in such situations. DHS is confident these measures are sufficient to ensure limited English proficient noncitizens, including speakers of rare and indigenous languages, are able to effectively understand the screening process and participate in credible fear and reasonable interviews, including addressing the applicability of any bars. Furthermore, DHS notes that limitations in communicating in English or with an interpreter in a language other than the noncitizen's preferred language would weigh against an AO exercising discretion to consider the bars, since they could limit testimony and impede efficiency.

c. Impacts on Specific Vulnerable Populations

Comment: Some commenters expressed opposition to the proposed rule, stating that it would increase the odds that people would have to return to countries where their political beliefs, sexual orientation or gender identity are under threat. A commenter urged the Department to not make the process more difficult for women who are fleeing from the abuse of a partner. Another commenter said that the proposed rule could make it more difficult for those seeking to flee authoritarian governments and countries where they face marginalization and persecution. A commenter stated that their clients include indigent, black, brown, indigenous, and LGBTQI+ (lesbian, gay, bisexual, transgender, queer, and intersex) noncitizens who often have no other avenue to seek safety than to come to the United States. The commenter stated that the rule depends on the discretion of AOs to decide when to apply mandatory bars to asylum eligibility during screenings, which would disproportionately penalize some noncitizens based on their race, nationality, religion, LGBTQI+ identity, or disability status because those who have been criminalized for these statuses could be barred from asylum.

Response: The Department disagrees with the commenters' claims regarding the Final Rule's impact on particularly vulnerable individuals. Under this rule, AOs will have the flexibility in screenings to apply mandatory bars that relate to an individual's participation in the persecution of others, or national security, criminal, or other public safety concerns. The Department does not believe that this rule would penalize any of the vulnerable populations commenters identified. AOs are trained to elicit testimony in a non-adversarial and sensitive manner and to work with vulnerable populations.[37] AOs are also trained to apply the mandatory bars and analyze available evidence, including the circumstances surrounding arrests and criminal records outside the United States, which may, in certain instances, demonstrate a pretextual or discriminatory intent by a foreign government.[38] Indeed, AOs regularly analyze mandatory bars, including criminal bars, in asylum adjudications and are experienced in evaluating context related to arrests, criminal charges, and foreign convictions, which, in some circumstances, may be evidence that an individual has suffered persecution, rather than evidence of a mandatory bar.[39] Accordingly, considering the training and experience AOs possess, they are well-suited to apply mandatory bars in the screening context in their discretion and, where evidence related to a mandatory bar is too limited or unavailable, or the analysis of the bar would be too complex to be fully explored in the screening context, to exercise their discretion not to apply the bar in the screening determination.

AOs will continue to issue positive fear determinations where a noncitizen demonstrates a credible or reasonable fear at the applicable screening standard, even where there may be indicia of a mandatory bar but the available evidence at the screening stage as to the bar or available exceptions or exemptions is limited. By preserving AO discretion in the application of the mandatory bars, the rule will protect vulnerable noncitizens who may have complicated evidentiary and legal issues involving a mandatory bar.

d. Other/General Negative Impacts on Noncitizens and Their Support Systems

Comment: Many commenters expressed concerns about the hardships noncitizens face in their home countries, on the journey to the United States, and throughout the immigration process. A commenter stated that the proposed rule does not serve long-term migrants who are waiting on a resolution for their cases, or new migrants who deserve to be treated with fairness. A commenter believes that the number of migrants attempting to enter the United States is the ''result of global political and climate crises,'' and that solutions should be targeted towards those issues. Further, the commenter stated that the proposed rule would increase the suffering of noncitizens, while not addressing the underlying problems that drive migration. Another commenter discussed the need to ensure that noncitizens with similar claims would not experience different outcomes based on the constraints of government resources. A nonprofit organization opposed the rule because it would impose additional burdens on their resources. Finally, several commenters expressed the importance of access to asylum for vulnerable noncitizens.

Response: The Department acknowledges the commenters' concerns for noncitizens who may be fleeing harm in their home countries or otherwise face hardships. To that end, the U.S. government has implemented,

[35] *See* USCIS ''Language Access Plan,'' *https://www.dhs.gov/sites/default/files/publications/uscisc-updated-language-access-plan-2020.pdf* (last visited Aug. 5, 2024).

[36] USCIS, Memorandum from Acting Asylum Division Chief Ashley Caudill-Mirillo to Asylum Division Staff: Language Access in Credible Fear Screenings (July 6, 2022), *https://www.uscis.gov/sites/default/files/document/memos/Language-Access-in-Credible-Fear-Screenings.pdf.*

[37] *See* USCIS, ''RAIO Directorate—Officer Training: Interviewing—Introduction to the Non-Adversarial Interview'' (Apr. 24, 2024); USCIS, ''RAIO Directorate—Officer Training: Interviewing—Eliciting Testimony'' (Apr. 24, 2024).

[38] *See* USCIS, ''RAIO Directorate—Officer Training: Mandatory Bars'' (May 9, 2013); USCIS, ''RAIO Directorate—Officer Training: Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims'' (Apr. 24, 2024); USCIS, ''RAIO Directorate—Officer Training: Definition of Persecution and Eligibility Based on Past Persecution'' (Apr. 24, 2024).

[39] *See id.*

a number of measures designed to enhance and expand lawful pathways and processes for noncitizens seeking to enter the United States, including to seek asylum or other protection. Examples of lawful pathways include: the Uniting for Ukraine process, which allows Ukrainian nationals to receive humanitarian parole into the United States, enabling them to travel by air to the United States; the Safe Mobility initiative; [40] the new CHNV processes; [41] and country-specific family reunification parole processes.[42] DHS and its interagency partners have also increased H–2B nonimmigrant visa availability [43] and refugee processing for Western Hemisphere countries.[44] Noncitizens who are not eligible for these pathways can schedule an appointment to present themselves at a southwest land border port of entry through the CBP One app.[45] The Department agrees with the comment that we must address the underlying drivers of migration. For example, the *U.S. Strategy for Addressing the Root Causes of Migration in Central America,* directed by the President in Executive Order 14010, 86 FR 8267 (Feb. 5, 2021), focuses on a coordinated, place-based approach to improve the underlying causes that push Central Americans to migrate, and it takes into account, as appropriate, the views of bilateral, multilateral, and private sector partners, as well as civil society.[46] The strategy includes addressing economic, governance, and security challenges through five pillars: (1) addressing economic insecurity and inequality; (2) combating corruption and strengthening democratic governance; (3) promoting human rights and labor rights; (4) countering and preventing violence; and (5) combating sexual and gender-based violence.[47] In March 2024, the White House announced that the Administration is on track to meet its commitment in the root causes strategy to provide $4 billion to the region over four years.[48]

The Department disagrees with the comment that the rule will increase suffering of noncitizens and negatively impact both new and long-term noncitizens waiting on case resolutions. Instead, the Department believes the rule will increase efficiencies for noncitizens and decrease the time noncitizens must wait for a final decision on their protection claim, including those who may be in detention. Noncitizens who are subject to a bar but would nevertheless receive a positive fear determination absent this rule may, under this rule, be more swiftly removed instead of being detained throughout their removal proceedings, and therefore spend less time in detention. The Department is committed to conducting screening interviews with fairness, and AOs are trained to review each case on its own merits, even when there are similarities between claims.

DHS acknowledges the comment regarding burden on nonprofit resources and has included a description of impacts of the Final Rule in Section V.B. of this preamble. This rule does not directly regulate any organizations, and consistent with longstanding case law, a regulatory flexibility analysis is not required when a rule has only indirect effects on small entities, rather than directly regulating those entities. *See, e.g., Mid-Tex Elec. Co-op., Inc.* v. *FERC,* 773 F.2d 327, 342–43 (D.C. Cir. 1985).

e. Negative or Minimal Impacts on Immigration System and Government Operations and Resources

Comment: Many commenters expressed concerns that considering mandatory bars during the fear screening stage would introduce complexities, inconsistencies, and inefficiencies in the fear screening process, and the asylum system needs fair and comprehensive reform. One commenter stated that the proposed rule would make the asylum process more complicated for noncitizens and AOs, while also putting noncitizens in danger. One commenter expressed concerns that applying bars during fear interviews could slow down the fear screening process and become arduous for AOs to consider. One commenter expressed concerns that AOs may not be able to make these decisions with clarity, empathy, or fairness, while also potentially causing officers psychological distress.

In line with the above remarks, a commenter stated that the proposed rule would not increase efficiency because a small number of people would be impacted, and that given this small numeric impact, the Department should weigh the adverse fairness implications that the proposed rule would impose on the few cases where the mandatory bars are applied. In addition, they wrote that AOs face pressure to make findings with limited resources, which would leave doubt that the rule would increase efficiency. The same commenter further stated that the consideration of the bars, a step not systematically taken in the credible fear process, requires extensive factual development and legal analysis that would lengthen credible fear and reasonable fear interviews, thereby undermining the purported efficiency goals of the proposed rule. Citing an interview with a representative for USCIS AOs, the commenter raised concerns with the proposed rule's impact on the agency's limited time and resources for conducting fear interviews. The commenter warned that if the proposed rule were finalized, the application of complex mandatory bars at the screening stage would drain more time and resources from already strained AOs.

Response: The Department disagrees with the commenters' concerns that consideration of the mandatory bars would be inefficient due to time and resource constraints and that AOs would have difficulty making decisions with clarity and fairness. As noted by commenters, the Department expects only a small percentage of screening cases to be impacted by the mandatory bars; therefore, the length of interviews would not increase across all credible and reasonable fear interviews. The Department also believes that while a small number of people would be impacted by this rule, those individuals would be enforcement priorities because

[40] U.S. Dep't of State, Safe Mobility Initiative, *https://www.state.gov/refugeeadmissions/safe-mobility-initiative* (last visited Aug. 23, 2024); The White House, Fact Sheet: Biden-Harris Administration on World Refugee Day Celebrates a Rebuilt U.S. Refugee Admissions Program, June 20, 2024, *https://www.whitehouse.gov/briefing-room/statements-releases/2024/06/20/fact-sheet-biden-harris-administration-on-world-refugee-day-celebrates-a-rebuilt-u-s-refugee-admissions-program/* (last visited Aug. 29, 2024).

[41] *See* U.S. Citizenship and Immigration Services, Processes for Cubans, Haitians, Nicaraguans, and Venezuelans, *https://www.uscis.gov/CHNV* (last visited Sept. 25, 2024).

[42] *See* U.S. Citizenship and Immigration Services, Family Reunification Parole Processes, *https://www.uscis.gov/FRP* (last visited Aug. 23, 2024).

[43] 88 FR 80394 (Nov. 17, 2023).

[44] *See* Memorandum on Presidential Determination on Refugee Admission for Fiscal Year 2024, Presidential Determination No. 2023–13 (Sept. 29, 2023) (providing for the admission of 35,000–50,000 refugees from the Latin America/Caribbean region to the United States during Fiscal Year (FY) 2024); Memorandum on Presidential Determination on Refugee Admission for Fiscal Year 2025, Presidential Determination No. 2024–13 (Sept. 30, 2024) (providing for the admission of 35,000–50,000 refugees from the Latin America/Caribbean region to the United States during FY 2025).

[45] *See* CBP, ''CBP One™ Mobile Application,'' *https://www.cbp.gov/about/mobile-apps-directory/cbpone* (last visited Aug. 14, 2024).

[46] Nat'l Sec. Council, *U.S. Strategy for Addressing the Root Causes of Migration in Central America* at 4 (July 2021), *https://www.whitehouse.gov/wp-content/uploads/2021/07/Root-Causes-Strategy.pdf.*

[47] The White House, *Fact Sheet: Update on the U.S. Strategy for Addressing the Root Causes of Migration in Central America* (Mar. 25, 2024), *https://www.whitehouse.gov/briefing-room/statements-releases/2024/03/25/fact-sheet-update-on-the-u-s-strategy-for-addressing-the-root-causes-of-migration-in-central-america-3/.*

[48] *Id.*

of national security and public safety concerns.[49] Safeguarding national security is one of the Department's highest priorities, and this rule will allow the Department to efficiently identify and remove noncitizens who are found subject to one of the outlined mandatory bars without subjecting them to lengthy proceedings. AOs interview noncitizens with complex cases on a regular basis and are trained in interviewing noncitizens in credible fear and reasonable fear screenings, as well as in interviewing affirmative asylum applicants.[50] AOs are capable of conducting thorough screening interviews, applying the mandatory bars when applicable, and maintaining fairness throughout the process, as is required by their roles.

Comment: Commenters suggested that DHS look elsewhere to improve the immigration system, such as employing and training more immigration officers, or focusing on adjudicating pending cases in the backlog instead of imposing additional burdens on officers who are performing fear screenings. One commenter stated that backlogs at USCIS and the Executive Office for Immigration Review (EOIR) would make the successful implementation of this rule difficult, and it is unclear where the resources would come from to execute the proposed rule fairly. A few other commenters stated that resources should be spent creating accessible pathways to citizenship and policies that reduce poverty and violence in the countries from which noncitizens are fleeing.

Response: The Department continues to expand its workforce to meet different priorities and believes that resources can be, and are being, allocated to both reducing the backlog and increasing efficiencies in the credible and reasonable fear processes.[51] While the Department appreciates the resource allocation suggestions made by some commenters and would direct those commenters to E.O. 14010,[52] which aims to address root causes of migration and create a strategy for managing migration, and E.O. 14012,[53] which aims to identify and eliminate barriers to immigration access and improve the naturalization process, the Department also notes that these suggestions are outside the scope of this rule. Finally, the comment suggesting increased immigration judge hiring and training is outside the scope of this rule.

Comment: Several commenters expressed concern that the proposed rule could exacerbate the existing inequities in asylum processing, which they stated served neither noncitizens nor the U.S. government's need to manage the border. One commenter stated that the mandatory bars are very complex and that in a screening interview where the noncitizen is unlikely to have legal representation, applying those bars will lead to inconsistent and erroneous outcomes. Commenters indicated the rule leaves excessive discretion to AOs to determine whether to consider bars to asylum and withholding of removal in credible fear and reasonable fear screenings, which would lead to inconsistent results and undermine the efficiency of screenings. Commenters predicted the discretion the rule accords to AOs to consider bars in fear screenings will lead to discrimination and inequity, including profiling on the basis of race, religion, or nationality.

Response: The Department disagrees with the comment that the rule will exacerbate inequities in the asylum system and does not serve border management needs. The commenters did not explain what they were referring to as existing inequities in asylum processing. The Department has outlined its commitment to increase access and equity in the immigration process in the DHS Equity Action Plan.[54] The Department also disagrees that the rule does not serve noncitizens or the U.S. government's border management needs. The rule will allow DHS to quickly screen out certain non-meritorious claims and remove those noncitizens who pose a national security or public safety threat more expeditiously. This serves both government and noncitizen needs, as it safeguards national security while allowing the Department to use resources more efficiently. Applying the mandatory bars earlier in the process means that the Department can more effectively use its resources to adjudicate other cases in a more expedient manner.

The Department disagrees that application of the mandatory bars during the screening process will lead to erroneous and inconsistent decisions. AOs are trained to analyze and apply the mandatory bars in affirmative asylum cases; therefore, they are well-suited to exercise discretion to apply mandatory bars in the screening context. If evidence related to a mandatory bar is too complex to be fully explored in the screening context, the rule will allow AOs to exercise their discretion not to apply the bar in the screening determination. In those cases, AOs will continue to issue positive fear determinations where a noncitizen demonstrates a credible or reasonable fear at the applicable screening standard, even where there may be indicia of a mandatory bar but the available evidence at the screening stage as to the bar or any available exception or exemption is limited.

DHS disagrees that providing discretion to AOs to consider bars in fear screenings will lead to inconsistent or inequitable results. AOs already receive standardized training on how to apply the bars to asylum in full adjudications. The five bars to statutory withholding of removal that could be considered under this rule generally correspond to five of the six mandatory bars to asylum. *See* INA secs. 208(b)(2)(A)(i)–(v), 241(b)(3)(B)(i)–(iv) and (b)(3)(B), 8 U.S.C. 1158(b)(2)(A)(i)–(v), 1231(b)(2)(B)(i)–(iv) and (b)(3)(B). Therefore, AOs understand the types of evidence that would indicate the potential applicability of these bars to both forms of relief. AOs are also trained, in cases where there is evidence a bar may apply, to note the possible applicability of the bar in the credible fear or reasonable fear determination.[55] Such training helps to ensure consistent application of AO discretion in determining whether to consider bars in fear screenings.

DHS also disagrees that providing AOs discretion to consider bars will

[49] Memorandum from Alejandro N. Mayorkas, Sec'y of Homeland Security, *Guidelines for the Enforcement of Civil Immigration Law* 3–4 (Sept. 30, 2021).

[50] *See* Memorandum for the Record, from Ted Kim, Assoc. Dir., Refugee, Asylum, and Int'l Operations Directorate, USCIS, *Re: Asylum Division Training, Staffing, Capacity, and Credible Fear Procedures* (Sept. 26, 2024).

[51] *See, e.g.,* DHS, ''Statement from Secretary Mayorkas on the Recognition of DHS Advancement on Partnership for Public Service List of 'Best Places to Work') (May 20, 2024) (''Secretary Mayorkas helped to secure the first increase in Border Patrol staffing in over a decade with 300 additional Agents added in Fiscal Year 2023, and another 1,400 added in Fiscal Year 2024.''), *https://www.dhs.gov/news/2024/05/20/statement-secretary-mayorkas-recognition-dhs-advancement-partnership-public-service* (last visited Aug. 15, 2024); USCIS, ''Talking Points, Asylum National Engagement; March 6, 2024,'' *https://www.uscis.gov/sites/default/files/document/outreach-engagements/Asylum-National-Engagement-talking-points-3-6-24.pdf* (last visited Aug. 15, 2024).

[52] E.O. 14010, 86 FR 8267 (Feb. 5, 2021).

[53] E.O. 14012, 86 FR 8277 (Feb. 5, 2021).

[54] *See* DHS, ''DHS Equity Action Plan,'' *https://www.dhs.gov/publication/equity* (last visited Aug. 15, 2024).

[55] *See USCIS, RAIO Directorate—Officer Training: Credible Fear of Persecution and Torture Determinations* (May 9, 2024); USCIS, *RAIO Directorate—Officer Training: Reasonable Fear of Persecution and Torture Determinations* (Feb. 13, 2017); *see also* Credible Fear Procedures Manual (CFPM), Section III.E.7; Reasonable Fear Procedures Manual (RFPM), Section III.F.

undermine the efficiency of screenings. It is precisely this concern for efficiency that, in part, motivates the Department's decision not to require AOs to consider bars in every screening conducted, but rather permit them to do so in those cases where there is easily verifiable evidence available to the AO that, in their discretion, warrants an inquiry into a bar, and the AO can consider that bar efficiently.

DHS further disagrees that providing AOs this discretion will lead to discrimination and profiling on the basis of race, religion, or nationality. Such discrimination is not only unlawful and against USCIS policy,[56] but contrary to the fundamental purpose of fear screenings, which exist to ensure the United States does not return eligible noncitizens to torture or to persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Furthermore, AOs are trained to be neutral decisionmakers,[57] to conduct interviews in a non-adversarial manner, to not let personal biases interfere with their work, and to treat each individual who appears before them with courtesy, professionalism, and respect.[58]

Comment: One commenter opposed the rule for doing too little to address the high level of border crossings, and address the asylum and immigration court pending caseload, describing it as too narrow in scope and containing numerous loopholes that would do little to stem what they described as the tide of asylum fraud that plagues the system.

Response: The rule is not intended to address high levels of border crossings, or primarily, to address backlogs in the immigration system. Neither is it intended to address fraud in the asylum system. While the Department does expect the rule to conserve some government resources that may be used on other cases, it does not expect that the rule will substantially decrease the pending caseload at the immigration courts or at USCIS.

f. Negative Impacts on the U.S. Economy and Workforce, U.S. Citizens, Public Health and Safety

Comment: Several commenters expressed opposition to the proposed rule, stating that it would raise additional barriers to gaining asylum during a time when noncitizens could help strengthen the United States and increase government tax revenue. A commenter noted that immigrants help the economy. Another commenter added that there could be concerns with accommodating large numbers of noncitizens, but the pros outweigh the cons. Several commenters stated that the U.S. population and workforce is projected to decline, so the United States should be accepting noncitizens to help fill gaps in the workforce. Some commenters stated that noncitizens are often eager to rebuild their lives and contribute to their communities. Other commenters noted that noncitizens are resourceful, which is why we should welcome them. A commenter stated that because of the many hazards that noncitizens have faced, they will become strong model citizens.

Response: The Department agrees that immigrants contribute significantly to the U.S. economy and workforce. This rule does not curtail access to the immigration system for individuals who are eligible for protection or relief from removal. By allowing AOs to apply certain mandatory bars in screenings, the Department is working to ensure that individuals who will not ultimately be eligible for protection or relief from removal are not unnecessarily consuming U.S. Government resources during their pursuit of non-meritorious protection claims.

g. Other Opposition to the Rule

Comment: Several commenters remarked that this is the incorrect approach to dealing with the asylum system. Further, a commenter said that the current immigration policy is costly and traumatizing, especially to those who are vulnerable. Another commenter remarked that those seeking asylum should not be criminalized, since noncitizens seeking asylum are fleeing oppressive environments. A commenter urged the Department to withdraw the proposed rule in its entirety to instead adopt humane solutions to the humanitarian and operational challenges at the border. They offered several alternatives, such as increasing capacity at ports of entry; engaging civil society entities to provide respite services; improving communication and cooperation between civil society, State and local governments, and Federal agencies; ending detention and monitoring of asylum seekers; and providing legal representation and social services to asylum seekers. A few commenters expressed disappointment towards the Biden administration because of the restrictiveness of the proposed rule.

Response: The Department disagrees with the commenters' claims and declines to adopt their suggestions, which are beyond the scope of this rulemaking in any event. With this rule, the Department is considering the application of mandatory bars at an earlier stage in the process. Concerning legal representation, the Department notes that during the credible and reasonable fear processes, noncitizens may be represented by an attorney at no cost to the government. Additionally, noncitizens in credible fear may consult with persons of their choosing. 8 CFR 208.30(d)(4). Noncitizens who are referred to USCIS for a credible fear or reasonable fear interview are provided with an information sheet related to the applicable screening interview process (*e.g.,* M–444, Information About Credible Fear Interview; M–488, Information About Reasonable Fear Interview; Information About Credible Fear Interview Sheet (for credible fear cases referred to USCIS under the Securing the Border rule)), in addition to a list of free or low-cost legal service providers. Certain suggestions, including those to increase processing capacity at ports of entry, strengthening communication and cooperation between civil society, State and local governments, and Federal agencies, ending the detention and monitoring of asylum seekers, and providing legal and social services to newly arrived asylum seekers, are outside the scope of this rule.

Comment: One commenter opposed the proposed rule stating that a future ''more overtly hostile anti-immigrant administration'' could abuse the discretion that the rule allows AOs, such as if a future administration sought to expand the use of expedited removal across the country.

Response: The Department emphasizes that the NPRM and this rule allow AOs to exercise discretion to consider a mandatory bar during a fear screening interview. The discretion the rule provides is not unbounded. AOs should only expend resources considering mandatory bars where there is easily verifiable evidence that a bar may apply and where they determine that they can address the issue efficiently in the context of a screening interview.

Under section 235(b)(1) of the INA, 8 U.S.C. 1225(b)(1), DHS may remove certain noncitizens without a hearing before an immigration judge through expedited removal proceedings. The INA also grants the Secretary authority to apply expedited removal procedures

[56] *See* 42 U.S.C. 1983; *see also* USCIS, ''USCIS Policy Manual,'' Vol. 1, Part A, Ch.9, Section (D)(1), *https://www.uscis.gov/policy-manual.*

[57] *See USCIS,* ''RAIO Directorate—Training Module: Decision Making'' (Apr. 4, 2024).

[58] *See* USCIS, RAIO Directorate—Officer Training: Interviewing—Introduction to the Non-Adversarial Interview (Apr. 24, 2024) *and* USCIS, RAIO Directorate—Training Module: Core Values and Guiding Principles for RAIO Employees (Apr. 24, 2024).

(by designation) to ''any or all'' noncitizens referred to in the statute as ''certain other aliens.'' INA 235(b)(1)(A)(iii)(I), 8 U.S.C. 1225(b)(1)(A)(iii)(I). A noncitizen is within the class of ''certain other aliens'' if the noncitizen ''has not been admitted or paroled into the United States, and . . . has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility.'' INA 235(b)(1)(A)(iii)(II), 8 U.S.C. 1225(b)(1)(A)(iii)(II). Such designation ''shall be in the sole and unreviewable discretion'' of the Secretary and ''may be modified at any time.'' INA 235(b)(1)(A)(iii)(I), 8 U.S.C. 1225(b)(1)(A)(iii)(I); 8 CFR 235.3(b)(1)(ii).

In case of a hypothetical future policy choice to expand the use of expedited removal to additional contexts, DHS emphasizes that noncitizens found under this rule to lack a credible fear or reasonable fear of persecution due to the application of a mandatory bar would ultimately be ineligible for the underlying relief in a merits hearing if they were instead placed into immigration court proceedings directly through service of a Notice to Appear.

Moreover, the concerns about future administrations abusing their discretion by, for example, expanding expedited removal's use across the country, are misplaced. The application of expedited removal is not geographically limited by statute. *See* INA 235(b)(1), 8 U.S.C. 1225(b)(1). Currently, the regulations implementing expedited removal allow for its use if a noncitizen has failed to establish they have been continuously present in the United States for at least two years prior to their date of inadmissibility, but there is no limit as to its nationwide use. 8 CFR 235.3(b)(ii).

Comment: One commenter faulted the proposed rule for allegedly seeking to deter asylum seekers from entering the United States.

Response: DHS rejects this characterization. The rule is not designed to deter noncitizens from seeking asylum. The rule simply is intended to provide flexibility to AOs to apply the covered mandatory bars where there is easily verifiable evidence so that, when possible, noncitizens who would otherwise ultimately be found ineligible for relief or protection after a lengthy immigration process may instead have their cases handled more efficiently. In addition, this flexibility allows DHS to more expeditiously remove some noncitizens who pose a threat to the safety or security of the United States. As noted above, DHS has established numerous new pathways to facilitate the lawful entry of noncitizens into the United States, which enables noncitizens to more easily seek asylum or other immigration benefits in appropriate cases.

Comment: One commenter criticized the rule as a reinstatement of the ''Asylum Ban'' and characterized it as going against President Biden's campaign promises.

Response: This rule is not equivalent to an ''asylum'' ban or any other sort of categorical ban. As discussed elsewhere in this preamble, this rule is intended to simply provide AOs with the discretionary authority to consider certain statutory bars to asylum and withholding of removal during fear screenings when doing so could increase efficiency. Individuals subject to these bars are already ineligible for asylum or withholding of removal as relevant, but, without the rule, the bars are only fully applied at a later stage in a noncitizen's immigration proceedings.

C. Legal Authority and Background

1. DHS Legal Authority

Comment: Many commenters asserted that the proposed rule is in contravention of international and domestic law regarding refugee protection and non-refoulement. In support of this assertion, several commenters cited the 2003 Office of the U.N. High Commissioner for Refugees (UNHCR) Guidelines, which direct that exclusion clauses only be considered during regular refugee determinations proceedings and not during expedited proceedings. A commenter stated that the proposed provisions in the rule will create barriers to asylum and withholding of removal for asylum seekers and violates the 1967 Protocol Relating to the Status of Refugees.

Response: DHS disagrees with the assertion that the proposed rule is in contravention of applicable law. The INA provides mandatory bars to applying for asylum at section 208(a)(2) of the INA, 8 U.S.C. 1158(a)(2); to asylum eligibility at section 208(b)(2)(A) of the INA, 8 U.S.C. 1158(b)(2)(A); and to eligibility for withholding of removal at section 241(b)(3)(B) of the INA, 8 U.S.C. 1231(b)(3)(B) (referred to collectively as ''mandatory bars''). Further, as explained above, Congress has conferred upon the Secretary express rulemaking power to create certain procedures for screening for and adjudicating asylum claims. INA sec. 103(a)(1), (a)(3), 8 U.S.C. 1103(a)(1), (a)(3); INA sec. 208(b)(1)(A), (b)(2)(C), (d)(5)(B), 8 U.S.C. 1158(b)(1)(A), (b)(2)(C), (d)(5)(B); INA sec. 235(b)(1), 8 U.S.C. 1225(b)(1).

There are no bars to deferral of removal under the regulations implementing U.S. obligations under Article 3 of the CAT. Prior to being granted asylum or statutory withholding of removal in the United States, noncitizens are required to show that the mandatory bars do not apply to them.

The relevant statutory provisions are silent as to the consideration of the mandatory bars during screening interviews. All relevant domestic legal provisions on this topic have taken the form of regulatory action. The former Immigration and Naturalization Service issued a rule in 2000 precluding, in response to comments, consideration of the asylum bars at the credible fear stage.[59] Additional regulatory action on this subject was taken in 2020 and 2022. *See* 85 FR 80274, 80278 (Dec. 11, 2020) (''Global Asylum Rule''); 87 FR at 18221–22. In none of these actions that precluded consideration of bars has the government concluded that considering mandatory bars at the screening stage would violate statutory provisions or other legal requirements. Instead, the basis of these rules, when it has been articulated, has focused primarily on efficiency of eliciting testimony related to and analyzing the mandatory bars at the screening stage. *See* 87 FR 18078, 18093 (Mar. 29, 2022). This rule is based on a judgment by DHS that, under certain limited circumstances, the consideration of the mandatory bars at the screening stage represents an appropriate expenditure of resources.

DHS notes that while international guidelines represent helpful interpretative guidance, they are not binding authority on DHS. As such, the 2003 UNHCR guidance[60] does not carry the force of law. The guidance raised by the commenters states that

> it is essential that rigorous procedural safeguards are built into the exclusion determination procedures. Exclusion decisions should in principle be dealt with

[59] *See* 65 FR 76121, 76129 (Dec. 6, 2000) (''Asylum Procedures'') (codifying the statement in 8 CFR 208.30 that a noncitizen who appears to be subject to one or more of the mandatory bars would nevertheless be referred to section 240 removal proceedings for full consideration of their claim and explaining that this change was done in response to comments suggesting such a referral ''regardless of any apparent statutory ineligibility under section 208(a)(2) or 208(b)(2)(A) of the Act'').

[60] UNHCR, ''Guidelines on International Protection No. 5, Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating of the Status of Refugees'' (Sept. 4, 2003), *https://www.unhcr.org/us/media/guidelines-international-protection-no-5-application-exclusion-clauses-article-1f-1951.*

in the context of the regular refugee status determination procedure and not in either admissibility or accelerated procedures, so that a full factual and legal assessment of the case can be made.[61]

We note that the guidance speaks generally (''in principle'') and is not a categorical prohibition against considering exclusion provisions in a screening interview. DHS screening procedures do contain ''rigorous procedural safeguards,'' including 100% supervisory review of all decisions[62] and the right to review of any negative decision by an immigration judge.[63] Additionally, noncitizens in screening interviews have the right to consult with an individual of their choosing, including counsel, at no cost to the government, the right to have a consultant or counsel attend the interview, the right to provide evidence in their native language or a language that they are comfortable with, and the right to a non-adversarial interview with an AO. 8 CFR 208.30(d); 208.31(c).

Furthermore, the rule instructs that the AO should only consider any possible mandatory bar when the noncitizen does not establish a fear of torture and when there is easily verifiable evidence indicating that the noncitizen could be subject to a mandatory bar and, where the noncitizen is unable to establish at the relevant standard that the bar would not apply. As the standards of proof for screening interviews are lower than those applicable at the merits stage, the AO would only enter a negative fear determination if the noncitizen were unable to demonstrate at the applicable screening standard that a mandatory bar does not apply. Furthermore, if there are significant factual or legal issues that would necessitate further development at a later stage, AOs may exercise discretion to not apply the mandatory bar at the screening stage.

DHS disagrees that the rule will create barriers to asylum and withholding of removal for noncitizens with potentially meritorious claims. In the current fear screening process, AOs already identify possible mandatory bars. The rule simply permits an AO to apply the bars at the screening stage when there is evidence that a bar may apply, the AO determines that the bar can be addressed efficiently at the interview, and the noncitizen is unable to demonstrate at the applicable standard of proof that the bar does not apply or that the noncitizen qualifies for an exception or exemption to the bar. Further, any noncitizen who is subject to one of the mandatory bars that that this rule permits AOs to consider at the screening stage would already be ineligible for asylum or withholding of removal, as relevant.

Comment: Several commenters stated that DHS lacks the statutory authority to enact the proposed rule as the expedited removal statute does not mention mandatory bars to asylum and instructs the agency to find a credible fear whenever an asylum seeker demonstrates a ''significant possibility'' that they ''could'' be eligible for asylum.

Response: DHS disagrees with the assertion that it lacks the authority to enact the proposed rule. The legal authorities for this rule are described in section II of this preamble.

As mentioned earlier, the consideration of mandatory bars in screening interviews has been the subject of several prior rulemaking actions. Under INA sec. 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v), the term ''credible fear of persecution'' means that there is a ''significant possibility, taking into account the credibility of the statements made by the [noncitizen] in support of the [noncitizen]'s claim and such other facts as are known to the [asylum] officer, that the [noncitizen] could establish eligibility for asylum under'' INA sec. 208, 8 U.S.C. 1158. Section 208(b)(2)(A)(i)–(vi) of the INA contains the mandatory bars to asylum and states that the eligibility conditions for granting asylum at section 208(b)(1) of the INA, 8 U.S.C. 1158(b)(1), ''shall not apply'' to a noncitizen if one of the mandatory bars is determined to apply. As such, if the noncitizen is subject to one of the mandatory bars, they are not eligible for asylum. It follows that when considering whether a noncitizen has a significant possibility of establishing eligibility for asylum, an AO may consider factors that would render the noncitizen ineligible for asylum.

Comment: Many commenters stated that consideration of the mandatory bars at the screening stage is inconsistent with congressional intent that the ''significant possibility'' standard be a low threshold to avoid the risk that people would erroneously be screened out and remarked that making decisions on mandatory bars is too complex to be done fairly under the circumstances during screening interviews.

Response: Nothing in this rule modifies the standard of proof for any of the screening interviews that would be affected by the rule. DHS believes that the rule is consistent with Congress' intent for expedited removal proceedings. In the Asylum Processing NPRM, DHS and DOJ explained that Congress created a ''low screening standard'' for expedited removal proceedings and stated that it may be inconsistent with Congress' intent for the Departments to ''creat[e] a complicated screening process that requires full evidence gathering and determinations to be made on possible bars to eligibility.'' 86 FR 46906, 46914 (Aug. 20, 2021).[64] This rule, however, does not create any such process because AOs have the discretion, but are not required, to consider a mandatory bar in those cases where there is easily verifiable evidence that a bar may apply. If the AO determines that they can consider that bar efficiently at the screening stage, the AO could then, in their discretion, make a further inquiry into the mandatory bar. DHS does not believe Congress' intent that the expedited removal process be swift requires reading the statute to forbid the application of mandatory bars during fear screenings in all cases, particularly where, as here, DHS will apply those bars in a manner that would not increase the length of the expedited removal process except in those cases in which there is evidence indicating that a mandatory bar may apply. Accordingly, this rule is consistent with Congress's intent for expedited removal proceedings and DHS and DOJ's prior statements regarding that intent.

DHS rejects the assertion that the mandatory bars present issues that are inherently more complex than other issues that are regularly considered in screening interviews. While the Department acknowledges that certain issues in the consideration of mandatory bars can present complex factual and legal issues, it also believes that other issues routinely considered by AOs as part of a credible fear or reasonable fear determination, including, for example, the viability of certain particular social groups, whether certain types of harm rise to the level of persecution, complex issues surrounding the motivation of the persecutor, whether the noncitizen has provided credible testimony, and whether certain types of feared harm would constitute torture if carried out, also involve complex legal and factual determinations.

[61] *Id.*

[62] USCIS ''Credible Fear Procedures Manual,'' Section III.I, *https://www.uscis.gov/sites/default/files/document/guides/CredibleFearProceduresManual.pdf*; USCIS, ''Reasonable Fear Procedures Manual,'' Section III.F.3, *https://www.uscis.gov/sites/default/files/document/guides/ReasonableFearProceduresManual.pdf.*

[63] 8 CFR 208.30(g) and 208.31(g).

[64] *See also* 87 FR at 18135 (''The Departments agree with these commenters that a complicated process requiring full evidence gathering and determinations to be made on possible bars to eligibility is incompatible with the function of the credible fear interview'').

Furthermore, because the rule allows for permissive consideration of the mandatory bars, it is well-tailored to address cases that present particularly complex legal or factual issues. The NPRM explained that AOs should consider mandatory bars only in situations where there is easily verifiable information that the bar may apply, and even then, to only do so if the inquiry can be done efficiently. If applying a mandatory bar would require extensive legal research, or would require extensive fact gathering, it would not be appropriate for the AO to consider that bar as part of a noncitizen's credible fear or reasonable fear interview under this rule.

Comment: Several commenters stated that the proposed rule conflicts with the decision in *Pangea Legal Servs.* v. *Dep't of Homeland Sec.,* 512 F. Supp. 3d 966 (N.D. Cal. 2021). Commenters noted that the consideration of mandatory bars during credible fear screening was at issue, and the court blocked that effort.

Response: DHS disagrees with commenters on these points. First, this rule is distinguishable from the Global Asylum Rule, which was at issue in *Pangea Legal Servs.* and which required the mandatory consideration of bars during credible fear screenings. *See* 85 FR 80274 (Dec. 11, 2020). This rule is different as it affords discretion to consider bars when there is easily verifiable evidence available but does not mandate their consideration in any particular case. Moreover, the district court in *Pangea Legal Servs.* did not opine on the merits of the substance of the Global Asylum Rule, including its provisions regarding the consideration of mandatory bars by AOs. Instead, as noted in the proposed rule, the *Pangea* court concluded that the plaintiffs were likely to succeed on the merits of their claim that the Global Asylum Rule ''was done without authority of law'' because the court found that the DHS official who approved it, then-Acting Secretary Chad Wolf, was not properly designated as Acting Secretary. 512 F. Supp. 3d at 975.

Comment: Several commenters objected to the proposed rule by pointing to DHS's historical practice, dating back to the 2000 implementing regulations for expedited removal, of not applying mandatory bars in protection screenings. Many commenters pointed to DHS's previous rejection of considering mandatory bars in protection screening interviews in the Asylum Processing IFR, where DHS stated that applying asylum bars in screenings would hurt efficiency by making interviews longer while also undermining due process rights of asylum seekers. Several commenters objected to the proposed rule as arbitrary, capricious, and/or an abuse of discretion not in accordance with the law due to DHS's failure to properly explain its change in position from the 2022 Asylum Processing IFR despite no change in circumstance or law.

One commenter wrote that while the Department claims the rule is narrow and will impact a small number of people, in fact, the rule amounts to a significant change to asylum processing. The commenter further argued that that while DHS claims that the current credible fear process would remain the same, AOs have never been permitted to apply bars during the screening process since its creation, and accordingly, the rule actually significantly alters the expedited removal screening process created by Congress over 25 years ago.

Response: DHS acknowledges its historical policy choice to not consider the mandatory bars in screening interviews. The Department notes that the practice established by the 2000 regulations was enacted without substantive explanation. *See Asylum Procedures,* 65 FR at 76129 (Dec. 6, 2000) (codifying in 8 CFR 208.30 that a noncitizen who appears to be subject to one or more of the mandatory bars would nevertheless be referred to section 240 removal proceedings for full consideration of their claim and explaining that this change was done in response to comments suggesting such a referral ''regardless of any apparent statutory ineligibility under section 208(a)(2) or 208(b)(2)(A) of the Act'').

DHS recognizes that the inclusion of mandatory bars in credible fear screenings has been a focus of several rules since 2020 that have made numerous changes in this area, as explained in the NPRM. The Global Asylum Rule instructed adjudicators for the first time to apply the statutory mandatory bars in INA secs. 208(b)(2)(A) and 241(b)(3), 8 U.S.C. 1158(b)(2)(A) and 1231(b)(3), during credible fear interviews. 85 FR at 80390. Subsequently, in 2022, DHS and DOJ rejected the consideration of all statutory mandatory bars during credible fear screenings and recodified the prior practice of not doing so. 87 FR at 18092–94, 18134–36; *see also* 86 FR at 46914–15. DHS and DOJ reasoned that applying the mandatory bars during all credible fear screening interviews would make those credible fear screenings less efficient,[65] which could jeopardize DHS's ability to use expedited removal,[66] undermine Congress' intent that the expedited removal process be swift,[67] and undermine procedural fairness.[68] The Departments did not, however, conclude that applying the mandatory bars would lead to these potentially negative repercussions in all, or even most, cases. *See* 87 FR at 18093 (stating that the factual and legal inquiries required to consider the mandatory bars were ''*in general and depending on the facts,* most appropriately made in the context of a full merits interview or hearing'') (emphasis added). Although the Departments' policy choices in this area have shifted over time, all these choices have remained consistent with the Department's longstanding statutory authority to manage asylum and related fear screenings, as discussed in Section II.

DHS acknowledges that this rule implements a policy choice that is different from its position in 2022 but believes that this rule is not inconsistent with that earlier position. The 2022 rule rejected the consideration of the mandatory bars in screening interviews due primarily to concerns of inefficiency. The permissive nature of the current rule obviates those prior concerns about inefficient use of resources. The Department believes, just as it did in 2022, that the consideration of mandatory bars in instances where evidence related to a mandatory bar is too limited or is unavailable, or where the analysis of the bar would be too complex to be fully explored in the screening context, would constitute an inefficient use of resources. However, in cases where the evidence is clear, consideration of mandatory bars in a screening interview will help preserve the government's resources by allowing decisions to be made at the earliest possible stage.

DHS disagrees that the rule significantly changes asylum processing or expedited removal. As explained in the NPRM, under this rule, the current credible fear process will remain the same. The only aspect of the determination that will change is that the AO will have the discretion to consider the application of mandatory bars to asylum (other than firm resettlement) and statutory withholding of removal when screening the noncitizen for a credible fear of persecution or to consider the potential

[65] *See* 87 FR 18078, 18093, 18134 (Mar. 29, 2022) (''Asylum Processing IFR''); 88 FR 11704, 11744 (Feb. 23, 2023) (''Lawful Pathways NPRM'').

[66] *See* 87 FR 18078, 18093 (Mar. 29, 2022) (''Asylum Processing IFR'').

[67] *See* 86 FR 46906, 46914 (Aug. 20, 2021) (''Asylum Processing NPRM''); 87 FR 18078, 18094, 18134–35 (''Asylum Processing IFR'').

[68] 87 FR 18078, 18093–94, 18097 (''Asylum Processing IFR'').

application of the mandatory bars to statutory withholding of removal. Also, as also noted in the NPRM, the Department has experience applying both the Third-Country-Transit Bar and the CLP presumption of ineligibility for asylum. *See* 89 FR at 41354. Further, since the Securing the Border IFR's publication, the Department has experience applying the Securing the Border rule's limitation on eligibility for asylum during the credible fear stage. *See* 8 CFR 208.35, 1208.35. Although these limitations on asylum eligibility differ from the mandatory bars that AOs will have discretion to consider under this rule, AOs' demonstrated ability to apply them of asylum ineligibility in credible fear screenings supports the Department's assessment that certain statutory mandatory bars that may be easily verifiable can be effectively applied in screening interviews. Additionally, DHS remains confident that the population to which this rule will apply is likely to be relatively small, as informed by the number of cases with bars flagged by USCIS during screenings conducted during FY 2020–FY 2024. Please refer to Section V.A.2 and Table 4 below. Furthermore, the Department believes that the permissive nature of the rule obviates the due process concerns that were articulated in the 2022 Asylum Processing IFR. Under the current rule, AOs will only consider the mandatory bars where there is easily verifiable evidence that a mandatory bar applies, and AOs will retain the discretion to decline to consider a mandatory bar if they determine that the evidence is not easily verifiable, that they cannot efficiently gather sufficient information to make a determination on a mandatory bar, or if they believe that the evidence is such that the issue would be more fairly considered at a later stage.

This rule will not require the expenditure of resources in most screening interviews. Instead, it will rather serve as an operational flexibility when the AO determines that there is easily verifiable information that a mandatory bar applies and that they can efficiently handle the issue in the context of a screening interview. Thus, DHS does not believe that the current rule is inconsistent with the central concerns that drove USCIS' historical practice and does not represent a reversal of prior judgment. Instead, the rule will allow for consideration of mandatory bars in limited instances where applying the bar at the earliest possible stage would enhance public safety or national security and overall operational efficiency.

Comment: One commenter stated that the proposed rule would permit ''AOs to violate the non-refoulement mandate so long as an 'indicia' of the five bars is present.''

Response: DHS believes this comment misstates the provisions of the proposed rule. Prior to conducting a more fulsome consideration of a mandatory bar, the AO would determine whether there is easily verifiable information in the record that the mandatory bar applies to the noncitizen. However, under the rule, before the issuance of a negative determination, the AO would need to elicit all relevant testimony to provide the noncitizen an opportunity to demonstrate the relevant likelihood that the bar does not apply, or that an exception or exemption to the bar applies, and determine that the noncitizen failed to so demonstrate at the appropriate standard of proof.[69] In the credible fear context, for example, the evidence would need to be sufficient to show that there is not a significant possibility that the bar would not apply and that there is not a significant possibility that an exemption or an exception applies, including, for example, that the noncitizen can establish a reasonable possibility of torture. The application of this standard of proof is substantially different from AOs issuing negative screening determinations based on ''an indicia [sic]'' that one of the bars might apply.

Further, the application of the statutory bars to a noncitizen's claim does not violate the United States' non-refoulement obligations as discussed earlier in this section IV.C.1.

Comment: One commenter opposed the proposed rule on the basis of their belief that current USCIS policy for overcoming mandatory bars requires that the noncitizen show by a preponderance of the evidence that the ground does not apply, if the evidence indicated that a ground for mandatory denial or referral exists. The commenter's stated understanding is that the rule would contradict congressional intent and Federal court ruling that apply a significant possibility standard to credible fear screenings.

Response: Nothing in this proposed rule modifies the standard of proof that applies to any of USCIS' screenings. In the credible fear context, the significant possibility standard of proof would continue to apply to all questions related to asylum, including the possible application of the mandatory bars. These include, where applicable, whether there is a significant possibility a noncitizen could demonstrate they are not subject to or are excepted from the CLP rule's presumption of ineligibility for asylum (or that they could rebut the presumption), or whether there is a significant possibility they could demonstrate they are not subject to or are excepted from the Securing the Border rule's limitation on asylum eligibility. DHS acknowledges that noncitizens subject to the CLP rule's presumption of ineligibility for asylum or to the Securing the Border rule's limitation on eligibility for asylum would be screened for statutory withholding of removal, including mandatory bars (if considered), and protection under the CAT at the reasonable possibility and reasonable probability standards, respectively.

2. DHS's Justification, Background, and Statements on Need for the Rule

Comment: One commenter objected to the proposed rule for not adequately explaining how AOs would reliably be able to apply the mandatory bars during screening interviews without wasting resources or making unwarranted negative findings.

Response: AOs regularly receive training on screening and adjudication, including the application of mandatory bars. AOs will consider the mandatory bars only in cases where the evidence is easily verifiable that a bar may apply, and where they believe they can efficiently address the issue during the screening interview. Determinations by AOs are subject to review within USCIS, including review by a supervisory asylum officer. *See, e.g.,* 8 CFR 208.30(e)(8). Noncitizens also have the right to request immigration judge review of any negative screening determination.

Comment: Several commenters argued that DHS's reliance on its success in implementing the CLP rule to help justify this proposed rule is misplaced because the application of the CLP rule has resulted in unlawful refoulement of noncitizens.

Response: DHS's experience with the CLP rule is relevant to this rule as it demonstrates that AOs are able to fairly and efficiently apply a rebuttable presumption of asylum ineligibility as part of a screening interview. The CLP rule and complementary measures have been in effect since May 11, 2023, and DHS and DOJ have been able to implement it without interruption. This experience has helped DHS significantly increase its capacity to screen noncitizens encountered at the border

[69] *See* 8 CFR 208.30(d) (''The purpose of the interview shall be to elicit all relevant and useful information bearing on whether the alien can establish a credible fear of persecution or torture.'').

under expedited removal and move them through the process more quickly than before the rule and complementary measures.[70] Now that it is clear a rebuttable presumption of asylum ineligibility can be applied effectively during the credible fear process, the Department wishes to provide the AOs with discretion to apply certain mandatory statutory bars that may be easily verifiable in screening interviews.

The Department disputes the assertion that noncitizens have been unlawfully removed from the United States due to the application of the CLP rule. Under the CLP rule, noncitizens have several protections against removal, including demonstrating exceptionally compelling circumstances at the time of entry to rebut the presumption of ineligibility for asylum, as well as screening for statutory withholding of removal and protection under the regulations implementing U.S. obligations under Article 3 of the CAT.[71] In addition, as noted above, the United States has implemented its non-refoulement obligations through statutory withholding of removal under INA sec. 241, 8 U.S.C. 1231, not the discretionary asylum provisions in section 208 of the INA, 8 U.S.C. 1158. Accordingly, it is not unlawful, or a violation of the United States' non-refoulement obligations, to remove a noncitizen found ineligible for asylum because they lack a credible fear under CLP and further found not to have demonstrated a reasonable possibility of persecution or torture for the purposes of statutory withholding of removal or protection under the Convention Against Torture regulations.

Comment: Several commenters opposed the justification for the proposed rule stating that if at most 4 percent of the cases would be affected, the proposed rule would not result in a meaningful portion of the EOIR caseload being eliminated. Similarly, several commenters objected to the justification for the proposed rule stating that the extremely limited number of cases it would apply to does not justify the unfairness of expecting newly arrived and often unrepresented noncitizens to prove that mandatory bars do not apply to them.

Response: The proposed rule is not intended primarily as a backlog reduction tool. The rule expands DHS's ability to more quickly remove noncitizens who are enforcement priorities: those who present national security or public safety threats.

DHS does believe that the rule will conserve interagency government resources. Most significantly, noncitizens who are subject to the mandatory bars often must be detained throughout their removal proceedings. By issuing a decision at the earliest possible stage, Immigration and Customs Enforcement's (ICE's) detention resources are conserved in these cases. In addition, the rule would prevent some non-meritorious cases from adding to the immigration court pending caseload.

The Department acknowledges, however, that this rule will apply only to a small subset of cases, as explained in section V.A.3 of this preamble describing the low percentage of credible fear and reasonable fear cases in which AOs have flagged the possible applicability of mandatory bars and is therefore not likely to result in a significant reduction in EOIR's caseload. See Section V.A.2 and Table 4 below. Nevertheless, in the context of an immigration system that lacks the full resources needed to handle its workload, even small efficiency gains are important and may result in speedier decisions for other noncitizens.

Comment: One commenter took issue with the justification for the proposed rule based on efficiency gains, stating that the proposed rule ''will most certainly increase the time spent interviewing and writing up a decision for those asylum officers who choose to consider a bar in any given credible or reasonable fear interview and for their supervisors.'' The same commenter stated that the proposed rule is silent on scheduling procedures for cases potentially impacted by the proposed rule, and does not acknowledge that the additional time spent considering bars will contribute to the asylum backlog. Another commenter similarly stated that by adding time to screening interviews, the proposed rule does not save resources so much as frontload the expenditure of resources on issues that may end up being relitigated at a later stage.

Response: DHS disagrees with the commenter that the rule will significantly increase the time spent on screening interviews and decision making by USCIS. As the rule allows for permissive consideration of the mandatory bars, AOs will only expend additional resources interviewing when there is easily verifiable evidence that a mandatory bar may apply and the AO believes they can efficiently address the issue during a screening interview. Under current procedures, AOs are already required to ask questions regarding the mandatory bars in all screenings. DHS expects that, in the majority of cases, no additional new questions will need to be asked under this rule.

DHS does not anticipate the need to change the way it schedules screening interviews as a result of this rule. Scheduling procedures must be able to be quickly modified due to changes in workflow and are not managed through regulations.

The Department recognizes that where AOs exercise discretion to apply a mandatory bar at the screening stage because they believe the bar can efficiently and effectively be addressed in the screening, AOs may need to devote additional time developing the record as to that bar and analyzing the bar in the written determination. At the same time, where the AO bases a negative credible fear of persecution determination on the application of a mandatory bar, they will not have to perform a written credible fear of persecution analysis as to the merits of the persecution claim. Additionally, the Department believes that, in those cases, any possible added time will be offset by the efficiency gain to the broader immigration system as a whole of preventing noncitizens who are subject to a mandatory bar and would not otherwise be able to establish eligibility for protection under CAT from being placed in removal proceedings.

Comment: One commenter objected to the amount of discretion for individual AOs provided by the proposed rule, coupled with the lack of guidance provided by the proposed rule regarding when AOs should consider mandatory bars. The commenter stated that this amount of discretion could lead to impermissible discrimination or profiling based on characteristics of the noncitizen. Another commenter objected to the lack of guidance or examples provided in the proposed rule about when the permissive consideration of bars would be appropriate, stating that AOs would need to ''prophesy that such consideration would be fair and efficient before spending the time to delve into all the nuances of the case.''

Response: The rule provides discretion for AOs to consider mandatory bars as a tool to maximize operational flexibility. However, AOs'

[70] For example, as discussed in the Securing the Border IFR, CBP placed, on average, more than 970 individuals encountered at and between POEs each day into expedited removal between May 12, 2023, and March 31, 2024, and USCIS conducted a record number of credible fear interviews (more than 152,000) resulting from such cases. 89 FR at 48724. This is more interviews from SWB encounters at and between POEs during the same time span than in any full fiscal year prior to 2023, and more than twice as many as the annual average from FY 2010 to FY 2019. *Id.*

[71] *See* 88 FR at 31452; *Moncrieffe* v. *Holder,* 569 U.S. 184, 187 n.1 (2013).

discretion under the rule is not unbounded. All of the determinations made by AOs in a screening interview are subject to supervisory review, and, for negative determinations, to review by immigration judges if requested by the noncitizen.

Decisions on whether the evidence of a mandatory bar present in the case is easily verifiable and can be dealt with efficiently in the context of a screening interview is necessarily fact specific. AOs are trained to consider evidence [72] in the context of where and from whom the noncitizen claims fear, to assess the reliability of that evidence, and to consider testimonial evidence from the noncitizen. Moreover, AOs are well-versed in evaluating evidence as it relates to applying mandatory bars in the context of the affirmative asylum caseload and in conducting fear determinations generally; accordingly, they are well-positioned to make the discretionary decision whether it would be efficient and effective to apply a mandatory bar in an individual fear screening, given the evidence available in the record.

Comment: Several commenters stated that DHS failed to provide any basis for what they described as a conclusory statement that the juncture at which the bars' applicability is considered would have any bearing on public safety or national security merely because those issues are the subject of the relevant mandatory bars.

Response: Quickly removing noncitizens who may constitute a public safety or security threat is a high priority for the Department. Many of the noncitizens who would ultimately be subject to the mandatory bars that AOs may consider under this rule could, based on the same evidence, be considered public safety or national security threats. By prioritizing decisions and consequences for these noncitizens, the Department hopes to create disincentives to other noncitizens who may constitute public safety or national security threats who may be considering travelling to the United States.

D. Proposed Application of Mandatory Bars

1. Noncitizens in Credible Fear and Reasonable Fear Screenings (8 CFR 208.30 and 8 CFR 208.31)

Comment: One commenter expressed concerns over potential limitations of telephonic credible and reasonable fear interviews, including privacy during the interview and the ability of the AO to assess non-verbal cues. Some commenters expressed concern that noncitizens in the screening process do not have adequate time to rest and prepare for their interviews.

Response: Concerns about privacy during screening interviews and the limitations of telephonic interviews are outside the scope of this rulemaking, as this rulemaking will not affect the mechanics how DHS conducts credible fear and reasonable fear interviews. AOs already elicit information related to potential mandatory bars during screening interviews, and screening interviews are protected by regulations governing confidentiality. 8 CFR 208.6, 1208.6. For detained noncitizens, DHS provides private spaces so that noncitizens may speak freely to the AO during their interview, although, in some facilities, an officer may be present on site for safety purposes.[73] Telephonic credible fear and reasonable fear interviews are the current, longstanding policy,[74] and while AOs are not able to assess all nonverbal cues telephonically, they are able to assess some, such as tone of voice, inflection, and other auditory nonverbal communications. The Department notes that it, along with DOJ, addressed similar comments related to the conditions in which credible fear interviews are conducted in the Securing the Border Final Rule.[75]

2. Noncitizens Subject to CLP Presumption of Ineligibility, Statutory Withholding of Removal Screening (§ 208.33)

Comment: A few commenters expressed opposition to the proposed rule's inclusion of noncitizens subject to the CLP presumption of eligibility. One such commenter wrote that the provision to assess certain bars when the CLP rule applies could detrimentally affect the most vulnerable, including those fleeing oppressive regimes, adding that people fleeing countries where they face persecution do not have the time or means to navigate the complex and, at times, inaccessible legal pathways to asylum in the United States. The commenter also stated that empowering AOs to apply the bars would defy basic principles of fairness, increasing barriers for those subject to both the CLP rule and this proposed rule.

Response: The Department rejects the commenters' claims that analysis of the mandatory bars alongside the application of CLP could disproportionately impact certain vulnerable populations and that the rule defies principles of fairness. Commenters did not provide any explanation for why applying mandatory bars in the context of screenings under the CLP rule, which is intended to promote lawful, safe, and orderly pathways to the United States and to benefit particularly vulnerable groups by removing the incentive to make a dangerous irregular migration journey, would disproportionately impact any class of noncitizens. *See* 88 FR at 31314. Further, as noted elsewhere, this rule does not change substantive eligibility for asylum or for withholding of removal, so the discretionary authority of AOs provided by this rule to consider the covered statutory bars in CLP screening interviews will not affect the ultimate forms of relief available to a noncitizen. The Department will apply the rule fairly and emphasizes that the Department believes that this rule will impact a relatively small number of individuals who are not eligible for protection because they present a national security or public safety threat.

To the extent that commenters' concerns regard the merits of the CLP limitation on asylum eligibility, such concerns are outside the scope of this rule. The Department previously accepted comments on that rule and responded to those in the CLP final rule. 88 FR at 31324–441.

3. Inclusion of Specific Bars (*e.g.,* Particularly Serious Crimes Bar, Security Bar)

Comment: Some commenters expressed concerns over the potential application of the persecutor bar with the limited time available for a screening interview. A commenter wrote that the persecutor bar should not be applied in fear screenings because it involves complex factual inquiries and has unsettled legal questions. Some commenters wrote that key questions of fact and law remained as to whether international treaty obligations required the consideration of duress in determinations involving the persecutor bar, or as to whether the failure to recognize the duress exception unfairly

[72] USCIS, RAIO Directorate—Officer Training: Evidence (Apr. 24, 2024).

[73] Credible Fear Procedures Manual, Section III.D.3 (May 10, 2023); Perryman, Brian R. INS Office of Field Operations. Security and Privacy Provisions for Credible Fear Interviews Under Expedited Removal, Memorandum to Regional Directors, District Directors, Assistant District Directors for Detention and Deportation and Asylum Office Directors (Washington, DC: 1 July 1997).

[74] *See* USCIS ''Credible Fear Procedures Manual,'' Section III.E.1, *https://www.uscis.gov/sites/default/files/document/guides/CredibleFearProcedures Manual.pdf*; USCIS, ''Reasonable Fear Procedures Manual,'' Section III.E.1, *https://www.uscis.gov/sites/default/files/document/guides/ReasonableFearProceduresManual.pdf*.

[75] *See* 89 FR at 81201–02.

harms bona fide asylum seekers, among other issues. Commenters also stated that AOs would need to make a prompt assessment of whether the duress exception applies, an area of law that is unsettled. The result, the commenter stated, would be erroneous applications of the bar based on poor factual development and rushed legal analysis. These commenters wrote that this analysis should occur at the merits stage, not in the expedited removal setting.

Response: The Department understands the complexities of the persecutor bar,[76] but it disagrees with the commenters' statements that analysis of the persecutor bar is legally and factually too complex to be analyzed in a screening interview and that the extensive factual development required would lead to erroneous application of the bar. AOs already inquire into the potential applicability of mandatory bars, including the persecutor bar, during credible fear and reasonable fear screenings, noting any relevant information in the record. While many cases implicating the persecutor bar involve complex factual and legal issues, not all do. For example, a noncitizen who admits in credible testimony under oath to having voluntarily forced a woman to abort a pregnancy as part of the noncitizen's work as a health ministry official charged with enforcing the Chinese government's ''one child policy'' when it was in effect would clearly be barred from asylum and statutory withholding of removal as a persecutor.[77]

Furthermore, the persecutor bar shares multiple elements with the refugee definition at section 101(a)(42)(A) of the INA, 8 U.S.C. 1101(a)(42)(A), that officers must analyze in every asylum case, including whether the harm at issue rises to the level of persecution and whether it was or would be inflicted on account of one of the five protected grounds. The only additional considerations in the persecutor bar analysis involve analyzing the applicant's participation in (rather than experience or fear of) persecution, that is, whether the applicant ordered, incited, assisted, or otherwise participated in the persecution, and analyzing whether the applicant had the requisite knowledge that the persecution was being or would be carried out. While these additional elements may in some cases introduce a level of complexity that would counsel against consideration of the persecutor bar in a screening context, they do not necessarily do so in every case. This significant overlap with the refugee definition analysis, which AOs must routinely conduct in both credible fear screenings and affirmative asylum adjudications, demonstrates that considering the persecutor bar need not involve complex legal or factual issues in every case in which it arises and that in some cases where there is clear evidence it does apply, AOs will be able to address it efficiently in credible fear or reasonable fear screenings.

Where there is evidence available to the AO that triggers an inquiry into an applicable mandatory bar, and the AO can address that bar efficiently at the screening interview, then the noncitizen will be given the opportunity to establish, at the relevant standard, that the bar would not apply. Under this rule, AOs will have the flexibility to apply certain mandatory bars during screenings as it relates to eligibility for asylum and statutory withholding of removal, and the individual will continue to have the opportunity to establish a credible or reasonable fear of torture. Notably, this rule would not *require* AOs to consider applicability of mandatory bars as part of a fear determination.[78] Such a requirement would reduce operational flexibility by potentially adding hours to interviews in which there are indicia that a bar might apply, but for which applicability is unclear.[79] Moreover, this proposed rule would not disturb the long-standing regulation establishing that in making credible fear determinations, AOs ''shall consider whether the [ ] case presents novel or unique issues that merit consideration in a full hearing before an immigration judge.'' 8 CFR 208.30(e)(4). This rule also preserves the option for noncitizens to be placed in an AMI or in proceedings before an immigration judge when evidence surrounding a possible mandatory bar needs to be further developed, as is currently the practice. Likewise, ICE will retain the ability to detain or otherwise monitor the noncitizen in those cases. *See* INA sec. 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(1)(ii); 8 CFR 208.9; *see also* INA sec. 212(d)(5)(A), 8 U.S.C 1182(d)(5)(A); 8 CFR 212.5(d), 235.3(b)(4)(ii). The Department believes this discretion will safeguard against erroneous application of the bar when it is clear that further evidence or interviews are needed. This is why preserving the AO's discretion in analyzing the mandatory bars is integral to the rule.

Comment: Some commenters also stated that the particularly serious crime bar is legally and factually complex and thus is inappropriate for inclusion in screening interviews. Commenters added that, since the bar is different for asylum and statutory withholding of removal, applying this bar in both credible fear and reasonable fear interviews would be confusing for AOs who are assigned to do both types of screenings. A commenter further reasoned that there is no indication that the application of the particularly serious crime bar would have any meaningful impact on screening interview efficiency because the particularly serious crime provision applies in circumstances where an individual has a conviction inside the United States, and most people undergoing a credible fear interview will not have been present in the United States previously and thus are unlikely to have been convicted of such a crime. Instead, the commenter wrote, this bar would likely only apply in the reasonable fear context to narrow subset of individuals. The commenter suggested that, if the Department moves forward with this proposed rule, it should, at minimum, remove the application of this bar from the factors to be considered.

Response: The Department disagrees with commenters' statements that the particularly serious crime bar analysis is

[76] For example, the possible ''duress exception'' referenced by commenters has had multiple interpretations over the years from the Board of Immigration Appeals and the Attorney General. *See Negusie* v. *Holder,* 555 U.S. 511 (2009) (''*Negusie I*'') (overruling a prior Board decision finding the plain language of the statute not allowing for a duress defense or exception and declaring the persecutor bar ambiguous as to consideration of duress or coercion); *Matter of Negusie,* 27 I&N Dec. 347 (BIA 2018) (''*Negusie II*'') (interpreting the persecutor bar for asylum as including a narrow duress defense); *Matter of Negusie,* 28 I&N Dec. 120 (A.G. 2020) (''*Negusie III*'') (finding the plain language of the persecutor bar as not allowing for consideration of duress); *Matter of Negusie,* 28 I&N Dec. 399 (A.G. 2021) (''*Negusie IV*'') (ordering the Board to refer Negusie's case to the Attorney General and staying Negusie's case pending the Attorney General's review). The Attorney General's decision in *Negusie III* remains in effect, and any further review remains pending.

[77] *See Xie* v. *INS,* 434 F.3d 136, 143 (2d Cir. 2006) (holding that ''transporting captive women to undergo forced abortions'' pursuant to the one-child policy was assistance in persecution).

[78] The Global Asylum Rule took a different approach than this proposal, requiring that AOs consider multiple mandatory bars. *See* 85 FR 80274, 80278 (Dec. 11, 2020) (''DHS requires asylum officers to determine . . . whether an alien is subject to one or more of the mandatory bars''). This proposed rule would not require such consideration.

[79] Because credible fear screenings are conducted at the significant possibility standard, in cases where the application of a bar is not obvious, requiring the AO to consider application of a bar would likely result in significantly extended interviews with no meaningful outcome because relevant information might not be available to the officer at screening even with a significantly extended interview.

legally and factually too complex to be analyzed in a screening interview and that any factual development required during a screening interview would lead to erroneous application of the bar. AOs already inquire into the potential applicability of mandatory bars, including the particularly serious crime bar, during credible fear and reasonable fear screenings, noting any relevant information in the record. The Department also disagrees with the comment that because the particularly serious crime bar is applied differently in asylum and withholding of removal, it will be confusing for AOs to analyze. As previously stated, AOs are highly capable of assessing mandatory bars at the credible fear screening, based on their specialized training in asylum law. AOs will also retain discretion not to analyze the bars, especially where it is clear that further evidence and fact-gathering is needed. AOs receive continuous training on relevant topics to ensure their ability to conduct thorough interviews and make legally sufficient determinations.

The Department also disagrees with the comment that the rule will lack meaningful impact on interview efficiency because the particularly serious crime bar applies to U.S. convictions and is unlikely to impact many noncitizens. The particularly serious crime bar may apply to both U.S. and foreign convictions, depending on the facts surrounding the noncitizen's conviction, the noncitizens' immigration history, and when a fear claim is made. *See* 8 CFR 208.13(c); INA secs. 208(b)(2)(A)(ii), 241(b)(3)(B)(ii), 8 U.S.C. 1158(b)(2)(A)(ii), 1231(b)(3)(B)(ii). While the Department believes this rule will impact a very small number of noncitizens who will be removed early on in the immigration process, this impact is still meaningful because it will free resources further in the process, specifically with EOIR, ICE, and CBP to process other cases more expeditiously. Inclusion of the particularly serious crime bar in this rule serves a Department priority: to protect the public from noncitizens who pose national security and public safety concerns.

Comment: Some commenters expressed concern with the application of the serious nonpolitical crime bar. Another wrote that the serious nonpolitical crime bar is not defined in the INA and does not require an arrest or conviction and the application of this bar is legally and factually intensive and contingent on the reliability of the available evidence. A commenter stated the reliability of the evidence would be subject to the circumstances of hundreds of different legal systems from around the world. Some commenters expressed concern that the analysis of the bar is too complex for screening interviews and applying this bar could require extensive factual development and review of evidence by AOs, which would further delay findings or lead to erroneous application of the bar. A commenter is contingent on available and reliable evidence from foreign legal authorities.

Response: While the INA does not define the phrase ''serious nonpolitical crime,'' there is substantial case law involving the serious nonpolitical crime bar[80] that provides guidelines for AOs when they encounter potential bar concerns. AOs already inquire into the potential applicability of mandatory bars, including the serious nonpolitical crime bar, during credible fear and reasonable fear screenings, noting any relevant information in the record. The Department appreciates the concerns noted in some of the comments, namely that application of the serious nonpolitical crime bar is legally and factually intensive and that, if improperly applied, noncitizens may be denied due process or returned to places of persecution. The Department is aware that analysis of the bar requires a case-by-case evaluation of the facts and circumstances presented, but as previously stated, AOs retain discretion to analyze the mandatory bars, and may choose not to analyze the bar when it is clear in a given case that additional analysis is needed. The Department is fully committed to providing sufficient procedural safeguards consistent with the purpose of the expedited removal process and believes that where the potential bar analysis requires more fact-gathering and analysis than can be completed during the screening interview, the noncitizen may be placed in the AMI process or section 240 removal proceedings before an immigration judge so that further analysis can occur. Furthermore, not every case involving the serious nonpolitical crime bar is factually and legally complex. For example, if the record contains an authenticated record of conviction of the noncitizen for rape from the government of the United Kingdom, such easily verifiable evidence could be efficiently considered by an AO in the context of a credible fear or reasonable fear screening.

Comment: Commenters also expressed concerns regarding the inclusion of the statutory security bars at INA secs. 208(b)(2)(A)(iv) and 241(b)(3)(B)(iv), 8 U.S.C. 1158(b)(2)(A)(iv) and 1231(b)(3)(B)(iv). A commenter expressed concern about expecting AOs to assess whether an individual poses what the commenter called a ''true security threat'' to the United States during a screening interview. Citing case law, the commenter stated there is unanimous agreement among foreign courts, international law experts, and Congress' legislative history that this bar was conceived as a narrow exception to non-refoulement obligations. In considering the high threshold for meeting the bar, the commenter said Congress did not intend to allow DHS to improperly subject asylum seekers to this bar and remove ''otherwise-eligible asylees who do not present genuine security threats to the United States,'' citing *Hernandez* v. *Sessions,* 884 F.3d 107, 113 (2d Cir. 2018). Echoing other comments on the bars, the commenter additionally stated that the security bar requires a factual and legal analysis that would substantively lengthen the time and resources that AOs need. Furthermore, the commenter wrote, the risk of misapplying this bar would be great.

Response: The Department rejects the concerns about AOs' ability to assess whether a noncitizen poses a danger to the security of the United States, that bar analysis will increase time and resources needed, and that the risk of misapplication of the bar is great. As previously stated, AOs will retain discretion to consider the bars at the screening interview. AOs already inquire into the potential applicability of mandatory bars, including the danger to the security of the United States bar, during credible fear and reasonable fear screenings, noting any relevant information in the record. Furthermore, while the danger to the security of the United States bar often involves complex factual and legal analysis, not every case in which it arises does. For example, testimony under oath by a noncitizen who admits to being an agent of a hostile foreign government who attempted to irregularly enter the United States for the sole purpose of conducting espionage targeting U.S. military bases would clearly indicate the bar may apply. Faced with such evidence, AOs should not be precluded from considering the applicability of the bar in a screening interview.

Comment: Commenters also expressed concern over the inclusion of the terrorism-related statutory bars at INA secs. 208(b)(2)(A)(v) and 241(b)(3)(B)(iv), 8 U.S.C. 1158(b)(2)(A)(v) and 1231(b)(3)(B)(iv). A commenter stated that the terrorism bars have a history of wrongfully labeling

[80] *See INS* v. *Aguirre-Aguirre,* 526 U.S. 415 (1999); *Matter of E-A-,* 26 I&N Dec. 1 (BIA 2012).

individuals as terrorists and barring them from protection in the United States, writing that these provisions have been used against Afghan individuals and have been a vehicle for family separation. The commenter concluded that applying the terrorism bars at the credible fear interview and reasonable fear screening stage neither complies with domestic and international refugee law, nor comports with U.S. national security interests.

Response: The Department disagrees with the comment that applying the terrorism bars in the screening interview neither complies with domestic and international refugee law, nor comports with U.S. national security interests. One of the Department's primary purposes is to maintain national security by securing U.S. borders and protecting the country from national security threats, including terrorism. As previously mentioned, the number of noncitizens impacted by this rule is expected to be modest. The Department believes that identifying and removing noncitizens subject to the bars early in the process increases efficiencies in the immigration system while also maintaining national security. The U.S. government works to protect national security while upholding our humanitarian mandates, in accordance with our domestic and international obligations. In applying the terrorism bars, the Department also considers numerous exceptions or discretionary exemptions to the bars that may apply, including, for example, situational exemptions for insignificant material support, certain limited material support, exemptions for Afghan allies and civil servants, and group-based exemptions.[81] These exemptions are a reflection of the Department's understanding that mandatory bar application is a case-by-case analysis and that noncitizens seeking protection may have faced unique circumstances that may warrant a discretionary exemption from the mandatory bar if threshold requirements are met and an exemption is warranted in the totality of the circumstances. The Department again states that the AO would retain discretion to analyze a mandatory bar at the screening stage and if further evidence, interviews, or analysis are needed, may opt not to analyze that bar during the screening. Instead, if the noncitizen receives a positive determination, the bar would be fully explored in an AMI or in front of the immigration judge. Finally, the claim that the terrorism bars have wrongfully labelled noncitizens as terrorists, and specifically has been used against Afghan noncitizens and as a vehicle for family separation, is inapposite, as this rule does not substantively amend the contours of who may be subject to this statutory bar.

4. Exclusion of the Bars To Applying for Asylum and of the ''Firm Resettlement'' Bar, INA Secs. 208(a)(2), (b)(2)(A)(vi)

Comment: A few commenters expressed appreciation that the firm resettlement bar is excluded from this rule. A few commenters expressed concern that the rule excludes consideration of the firm resettlement bar and believe that officers should be required to consider all bars during the screening process. Another commenter expressed concern that the rule excludes consideration of the safe third country exception. A commenter found the decision to not extend the consideration of the firm resettlement bar to protection screenings selective and makes the decision to consider the other bars at this stage ''questionable.'' A commenter suggested DHS should require AOs to consider all bars to asylum and statutory withholding of removal in fear screenings, including the bars to applying for asylum at INA sec. 208(a)(2), 8 U.S.C. 1158(a)(2). The comment stated that it is arbitrary to exclude all the bars from the rule. A commenter expressed concern that analysis of the firm resettlement bar in particular is complex and it will be difficult to properly analyze the bar during the screening process.

Response: DHS declines to include consideration of the bars to applying for asylum—other than the safe third country bar as already provided in 8 CFR 208.30(e)(6) for purposes of implementing the U.S.-Canada Safe Third Country Agreement—and the firm resettlement bar in fear screenings. Doing so would undermine the efficiency of fear screenings and would not be a productive use of Department resources. The overwhelming majority of noncitizens placed into the expedited removal process who are referred for credible fear screenings appear before an AO within days or weeks of arrival in the United States and are therefore not subject to the 1-year filing requirement at INA sec. 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B). Furthermore, the safe third country bar to applying for asylum at INA sec. 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A) currently only applies to certain noncitizens arriving from Canada. The regulation at 8 CFR 208.30(e)(6) already provides procedures for credible fear screening of such noncitizens, so doing so in this rule would be duplicative. The bar to applying for asylum based on the noncitizen having previously applied for and been denied asylum at INA sec. 208(a)(2)(C), 8 U.S.C. 1158(a)(2)(C) is subject to an exception for changed circumstances materially affecting eligibility for asylum codified at INA sec. 208(a)(2)(D), 8 U.S.C. 1158(a)(2)(D). The necessity of exploring the applicability of this exception during a credible fear interview would undermine the efficiency of the screening, which is designed to quickly identify noncitizens without a legal basis to remain in the United States and ensure those with viable claims are able to pursue them in a full merits hearing or AMI. In addition, these bars do not serve the same public safety purpose as the bars that AOs will have the discretion to consider under this rule.

The Department acknowledges the comments expressing appreciation that the Department did not include the firm resettlement bar in this rule, DHS disagrees with comments that the firm resettlement bar should be included and that AOs should be required to analyze all bars. One of the purposes of this rule is to give AOs discretion, at the earliest stage possible, to consider whether a noncitizen is unlikely to be able to establish eligibility for asylum or statutory withholding of removal because of a mandatory bar that relates to participation in persecution, or national security, criminal, or other public safety concerns. The Department believes that ignoring these serious concerns runs counter to its policy goals. The firm resettlement bar, however, does not fall into one of the categories listed above. Moreover, although firm resettlement constitutes a mandatory bar to asylum eligibility, it is not a bar to eligibility for statutory withholding.

Furthermore, as DHS explained in the NPRM, 89 FR at 41355, the firm resettlement regulations currently in effect, 8 CFR 208.15, 1208.15 (2020), include a burden-shifting framework that requires the Department to bear the initial ''burden of presenting prima facie evidence of an offer of firm resettlement'' that can be rebutted by the noncitizen. *Matter of A-G-G-,* 25 I&N Dec. 486, 501 (BIA 2011). This framework differs from the analytical

[81] *See* USCIS, ''Terrorism-Related Inadmissibility Grounds—Group-Based Exemptions,'' *https://www.uscis.gov/laws-and-policy/other-resources/terrorism-related-inadmissibility-grounds-trig/terrorism-related-inadmissibility-grounds-trig-group-based-exemptions* (last visited Aug. 29, 2024); *and* USCIS, ''Terrorism-Related Inadmissibility Grounds—Situational Exemptions,'' *https://www.uscis.gov/laws-and-policy/other-resources/terrorism-related-inadmissibility-grounds-trig/terrorism-related-inadmissibility-grounds-trig-situational-exemptions* (last visited Aug. 29, 2024).

framework for the security-related bars that are the subject of this rulemaking. The *Matter of A-G-G-* framework and firm resettlement definition could make it difficult for AOs to easily verify whether a noncitizen is subject to the bar. This difficulty would also undermine the efficiency of credible fear screenings, which is contrary to the intent of Congress and the purpose of this rule.

5. Exclusion of CAT Screenings (Withholding of Removal) (§§ 208.30(e)(3), 208.33(b)(2)(i), 208.35(b)(2)(i))

Comment: A commenter expressed concern that noncitizens found ineligible for asylum and withholding of removal because of a mandatory bar will only be eligible for protection under CAT. This commenter believes that CAT protection is an inadequate form of protection. Another commenter expressed concern that the rule would provide AOs too much discretion to consider mandatory bars and requested limiting discretion as related to trafficking victims and those seeking protection under CAT.

Response: This rule does not change the underlying grounds of eligibility for asylum, withholding of removal, or protection under the Convention Against Torture. The rule only amends the credible fear and reasonable fear interview processes to allow AOs to apply certain statutory mandatory bars earlier in the process—at the interview stage rather than at a later full merits adjudication—than would occur without this rule. Accordingly, a noncitizen who is determined to only be eligible for CAT protection would also only be eligible for CAT protection absent this rule. For these reasons, the Department declines to further address commenters' concerns that CAT protection is ''inadequate'' as they are outside the scope of this rule's changes.

The Department disagrees with the claim that the rule will provide AOs with too much discretion to consider mandatory bars and that discretion should be limited as related to certain noncitizens. As previously stated, AOs will have discretion to analyze the mandatory bars, but where more information or evidence is needed concerning the bar and the determination is positive, the noncitizen would proceed to an AMI or a hearing before an immigration judge. Furthermore, AOs are trained not only in asylum law but also to recognize signs of trafficking and follow procedures to assist potential trafficking victims.[82]

6. Other/General Comments on the Application of Bars

Comment: A commenter stated that the rule should not apply to family units in the Family Expedited Removal Management (FERM) program [83] because family units often lack legal counsel, may speak uncommon languages, and may not have enough time to gather evidence for their interviews.

Response: DHS currently places certain non-detained family units in the credible fear process in the FERM program. FERM leverages alternatives to detention to process families through expedited removal, including credible fear screenings, in a non-detained setting. FERM is designed to ensure family units in the credible fear process participate in a timely credible fear interview and any requested review by an immigration judge without being detained.[84] Placement in the FERM program has no impact on the substantive credible fear screening nor changes the applicable legal standards. This rule applies to credible fear screenings in the non-detained FERM program the same as it applies to credible fear screenings that take place in detention. As with any other noncitizen in the credible fear screening process, AOs have the discretion to apply certain mandatory bars pursuant to this rule at the credible fear screening and if applied, noncitizens will have the opportunity to present evidence that the bar does not apply at the appropriate standard depending on the case. The concerns noted in this comment are no different than those mentioned by other commenters about the overall population of noncitizens in the screening process. As previously stated, noncitizens in credible fear may be represented by an attorney at no cost to the government and may consult with persons of their choosing. INA sec. 235(b)(1)(B)(iv), 8 U.S.C. 1225(b)(1)(B)(iv), 8 CFR 235.3(b)(4)(ii); 208.30(d)(4), 8 CFR 208.31(c). The Department also provides government-contracted interpreters if the noncitizen is unable to proceed with the interview in English. 8 CFR 208.30(d)(5). The Department emphasizes that the rule does not require AOs to consider applicability of the bars in the fear determination, including FERM cases, and that the Department estimates this will impact a relatively small number of individuals who are not eligible for protection.

7. Screening Procedures, AO Determinations, Immigration Judge Review of Negative Fear Determinations

Comment: A few commenters expressed concern with the proposal to make AOs' consideration of the bars at the fear screening stage discretionary. For example, commenters expressed concern that the opacity of the screening interview process and the discretion given to AOs would make it impossible to verify DHS's implied claim that there is an easily identifiable population of individuals who are ineligible for asylum but are nonetheless subject to screening interviews. The commenters indicated this dynamic necessarily means the rule's effects would ultimately be obscure and unaccountable to the public.

Response: DHS disagrees that the processes under which it conducts screening interviews are opaque. Regulations governing credible fear and reasonable fear screenings conducting by DHS are published at 8 CFR 208.30, 208.31, 208.33, 208.35, 235.3, and 235.15. USCIS maintains information about credible fear and reasonable fear screenings on its public website.[85] Individuals undergoing credible fear screenings receive written disclosures about the process. 8 CFR 235.3(b)(4)(i) and 235.15(b)(4)(i)(B). AOs are required to determine that noncitizens undergoing reasonable fear screenings understand the reasonable fear determination process. 8 CFR 208.31(c). Noncitizens have the right to consult with a person or persons of their choosing before undergoing a credible fear interview, and such person or persons may also be present at the interview. 8 CFR 208.30(d)(4).

[82] USCIS, RAIO Directorate—Officer Training: Detecting Possible Victims of Trafficking (Apr. 24, 2024).

[83] DHS–ICE, ''ICE announces new process for placing family units in expedited removal,'' *https://www.ice.gov/news/releases/ice-announces-new-process-placing-family-units-expedited-removal* (May 10, 2023).

[84] DHS–ICE, ''ICE announces new process for placing family units in expedited removal,'' *https://www.ice.gov/news/releases/ice-announces-new-process-placing-family-units-expedited-removal* (May 10, 2023).

[85] *See* USCIS, ''Credible Fear Screenings,'' *https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/credible-fear-screenings* (last visited June 24, 2024); USCIS, ''Questions and Answers: Credible Fear Screening,'' *https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-credible-fear-screening* (last visited June 24, 2024); USCIS, ''Reasonable Fear Screenings,'' *https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/reasonable-fear-screenings* (last visited June 24, 2024); and USCIS, ''Questions and Answers: Reasonable Fear Screenings,'' *https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-reasonable-fear-screenings* (last visited June 24, 2024).

Noncitizens undergoing reasonable fear interviews may be represented by counsel or an accredited representative at the interview. 8 CFR 208.31(c). After an AO conducts a credible fear screening, the officer issues the noncitizen a record of the credible fear determination, including copies of the AO's notes, the summary of the material facts, and other materials upon which the determination was based. 8 CFR 208.30(f), (g), 208.33(b)(2)(v), 208.35(b)(2)(v). Noncitizens determined to lack a credible fear of persecution or torture may have such determinations reviewed by an immigration judge. 8 CFR 208.30(g), 208.33(b)(2), 208.35(b)(2), 1003.42, and 1208.30(g). Noncitizens determined to lack a reasonable fear of persecution or torture are informed of the decision in writing and may request review of the decision by an immigration judge. 8 CFR 208.31(f) and (g). Supervisors review all credible fear and reasonable fear determinations for legal sufficiency and compliance with applicable procedures before such determinations are issued.[86] These measures and others ensure the credible fear and reasonable fear screening processes are transparent and subject to accountability through review, including before an immigration judge at the noncitizen's request.

DHS disagrees with comments asserting that the discretion the rule provides to AOs would make it impossible to verify the implied premise of the rule that there is an easily identifiable population of individuals who are ineligible for asylum but are nonetheless subject to screening interviews and that the effects of the rule would be obscure and unaccountable to the public. As discussed in the NPRM and in this rule, the premise of the rule is that there are certain cases where there is information at the screening stage to show that the noncitizen is both (1) subject to a mandatory bar to asylum and/or withholding of removal and (2) otherwise unable to meet the requisite screening standard for protection under CAT and it is those cases that the Department seeks to screen out at an earlier stage, rather than having them move forward in the process. 89 FR 41351. The Department has been fully transparent and clear about the potential impact of this rule as limited to cases where application of a mandatory bar to asylum and statutory withholding of removal results in a negative credible fear of persecution determination or application of a mandatory bar to statutory withholding of removal results in a negative reasonable fear of persecution determination, and the noncitizen is otherwise unable to establish a fear of torture at the requisite screening standard, since application of a mandatory bar will only be outcome determinative if the noncitizen is otherwise unable to establish a fear of torture. 89 FR 41351.

In individual cases, the application of a mandatory bar resulting in a negative credible fear or reasonable fear determination will be documented in the record and available for a noncitizen and their representative to review. For example, where an AO issues a negative credible fear determination with respect to asylum and statutory withholding of removal based on the application of a mandatory bar, the AO will provide the noncitizen with a written notice of decision and issue the noncitizen a record of the credible fear determination, including copies of the AO's notes, the summary of the material facts, and other materials upon which the determination was based. *See* 8 CFR 208.30(g)(1). In any screening determination where the negative credible fear or reasonable fear of persecution determination is based on the application of a mandatory bar, these materials documenting the determination that are served on the noncitizen and their representative (if applicable) will provide transparency into how application of the mandatory bar resulted in a negative credible fear or reasonable fear of persecution determination, in addition to why the noncitizen also failed to establish a credible fear or reasonable fear of torture.

Comment: Commenters indicated that the rule provides insufficiently clear guidance on how AOs will determine whether a noncitizen is clearly ineligible for relief because of a mandatory bar, whether there is easily verifiable evidence that warrants inquiry into a mandatory bar, or whether the AO can efficiently address the bar in a screening interview. A commenter noted that that DHS did not include in the regulatory text the limitation that AOs would only consider bars in cases where a noncitizen is clearly ineligible and there is easily verifiable evidence of bar and did not define ''clearly ineligible'' and ''easily verifiable'' in the regulatory text. One commenter suggested that the sort of easily verifiable evidence envisioned in the rule is a fiction, pointing specifically to foreign legal records as problematic given the possibility that they are part of a pretextual prosecution. This commenter suggested that there is not a single situation of evidence that might appear to be easily verifiable where the asylum officer should be confident that they can consider that bar efficiently.

Response: The Department notes that under current practice, AOs do not apply mandatory bars to eligibility for asylum and withholding of removal during fear screenings, but in cases where there is evidence a bar may apply, AOs note the possible applicability of the bar in the record. In some such cases, the evidence that a bar applies is clear. For example, a noncitizen undergoing a reasonable fear interview may have been ordered removed from the United States due to a conviction by a final judgment for an aggravated felony under 18 U.S.C. 1956 (money laundering), if the amount of funds exceeds $10,000 and the noncitizen received a sentence of at least five years' imprisonment. If DHS records confirm the noncitizen's identity matches that of the convicted person, the noncitizen would clearly be barred from statutory withholding of removal due to their conviction for an aggravated felony under INA 101(a)(43)(D), 8 U.S.C. 1101(a)(43)(D), and aggregate term of imprisonment of at least 5 years. *See* INA sec. 241(b)(3)(B)(ii), (iv), 8 U.S.C. 1231(b)(3)(B)(ii), (iv). This rule ends the practice of having the AO set aside the bar in making the reasonable fear determination in such a case and allows the AO to enter a negative determination if the noncitizen is unable to establish a reasonable possibility that the bar does not apply or is unable to establish a reasonable fear of torture.

AOs must complete screenings efficiently and there is no incentive for them to consider bars in the absence of easily verifiable evidence. DHS believes the regulatory text, along with the guidance in this preamble and that of the NPRM, is sufficient to alert the public about how AOs will determine whether to consider mandatory bars in fear screenings without defining the terms ''clearly ineligible'' and ''easily verifiable'' in regulatory text. Although

[86] 89 FR 41347, 41353 (May 13, 2024) (''Rather this rule would create the flexibility for the AO to exercise discretion—with supervisory review of any decision—on the applicability of bars during the screening stage.''); *see also* USCIS, ''Semi-Monthly Credible Fear and Reasonable Fear Receipts and Decisions'' (''All credible fear and reasonable fear screening determinations were reviewed by either a supervisory asylum officer, occupational series 0930 or one of a small number of supervisory refugee officers, occupational series 1801, serving in the capacity of supervisory asylum officers. The supervisory refugee officers are either former asylum officers or have been trained and have experience consistent with the regulatory and statutory requirements to conduct reviews of these cases.''), *https://www.uscis.gov/tools/reports-and-studies/semi-monthly-credible-fear-and-reasonable-fear-receipts-and-decisions* (last visited June 17, 2024).

the Department acknowledges that the type of easily verifiable evidence envisioned by this rule may not be available in every case, DHS disagrees with the assertion that such evidence is never present in a case. AOs are trained to evaluate criminal convictions, including the possibility that an arrest or conviction may be the result of a pretextual prosecution.[87] The rule provides that, where such easily verifiable evidence exists, the AO may consider gathering additional information about the possible application of a mandatory bar, including evidence of any exemption or exception to the bar that the noncitizen may present.

Comment: A commenter suggested that noncitizens be provided with a complete copy of all information relied on by the AO in applying a bar to their claim. Another stated DHS should be required to provide evidence to the person seeking asylum regarding any potential bar in advance of the credible fear interview.

Response: DHS believes the procedures under current regulations provide noncitizens sufficient information about the basis for the screening determination. Following the credible fear interview, noncitizens receive a copy of all the items required by regulation, including copies of the AO's notes, the summary of the material facts, and other materials upon which the determination was based. 8 CFR 208.30(f)–(g). In any case where the application of a mandatory bar to asylum or statutory withholding of removal is outcome determinative to the credible fear or reasonable fear determination, the AO will provide a written analysis related to the application of the mandatory bar in the record, which will be served on the noncitizen. If the noncitizen has a properly executed Form G–28 on file, a copy of the relevant documents will be provided to their legal representative.[88] For negative determinations referred to the IJ for review, USCIS will file copies of outcome determinative documents with the immigration court.[89]

The Department declines to adopt the commenter's suggestion related to sharing information in advance of a credible fear interview. USCIS does not share information that may relate to mandatory bars with noncitizens in advance of their screening determinations or asylum adjudications. Rather, when evidence related to a mandatory bar is known to USCIS, the noncitizen is given an opportunity to address the evidence during the interview. 8 CFR 208.9(e). When information related to a mandatory bar is present in the record for a credible fear or reasonable fear screening, the AO will ask the noncitizen about the information, and the noncitizen will be given an opportunity to address any concerns and provide evidence that the mandatory bar does not apply.

Comment: A commenter wrote that it is inappropriate to allow AOs to consider bars to statutory withholding of removal because AOs do not make decisions on applications for withholding of removal. Commenters noted the difference in treatment of aggravated felonies in relation to the particularly serious crime bar to withholding of removal under INA sec. 241(b)(3)(B)(ii), 8 U.S.C. 1231(b)(3)(B)(ii) and the particularly serious crime bar to asylum under INA sec. 208(b)(2)(A)(ii), 8 U.S.C. 1158(b)(2)(A)(ii).

Response: DHS acknowledges that in the context of the particularly serious crime bar to withholding of removal, the statute requires that noncitizens convicted of aggravated felonies for which the noncitizen has been sentenced to an aggregate term of imprisonment of at least 5 years be considered to have been convicted of particularly serious crimes, while leaving to the Attorney General's discretion the ability to consider as particularly serious crimes convictions for aggravated felonies for which the noncitizen has been sentenced to an aggregate term of imprisonment of less than 5 years. INA sec. 241(b)(3)(B), 8 U.S.C. 1231(b)(3)(B). The particularly serious crime bar to asylum contains no such discretion, requiring that noncitizens convicted of any aggravated felony, without reference to any sentence imposed, be considered to have committed a particularly serious crime. INA sec. 208(b)(2)(B)(i), 8 U.S.C. 1158(b)(2)(B)(i). An AO encountering a noncitizen in a fear screening with a conviction for an aggravated felony for which a sentence of less than 5 years was imposed would likely be unable to efficiently address the particularly serious crime bar to statutory withholding of removal and would therefore not exercise their discretion to consider the bar.

However, DHS disagrees that it is inappropriate as a general matter for AOs to consider bars to statutory withholding of removal in fear screenings. As noted above, the five bars to statutory withholding of removal that AOs may consider under this rule generally correspond to five of the six mandatory bars to asylum, on which AOs receive training and which they consider in affirmative asylum and asylum merits (AMI) adjudications. *See* INA secs. 208(b)(2)(A)(i)–(v), 241(b)(3)(B)(i)–(iv) and (b)(3)(B), 8 U.S.C. 1158(b)(2)(A)(i)–(v), 1231(b)(2)(B)(i)–(iv) and (b)(3)(B). Moreover, AOs conducting AMIs also make determinations on eligibility for statutory withholding of removal pursuant to 8 CFR 208.16, including the consideration of bars at 8 CFR 208.16(d)(2). 8 CFR 208.9(b). Therefore, DHS is confident in AOs' ability to exercise their discretion to consider and correctly apply bars to statutory withholding of removal in credible fear and reasonable fear screenings.

Comment: Some commenters recommended requiring AOs to consider bars in fear screenings. One commenter suggested that leaving such consideration to the discretion of AOs where there is easily verifiable evidence of a bar and the AO is confident they can address the bar efficiently, fails to consider the years that otherwise inadmissible noncitizens would spend in the country if referred to removal proceedings and the additional fiscal and time burdens to ICE and EOIR to handle such cases. These burdens, the commenter argued, create strains on public resources and potential danger to officers.

Response: DHS disagrees that requiring AOs to apply bars in fear screenings in all cases would necessarily reduce the burdens on ICE, EOIR, or public resources. Imposing a blanket requirement for AOs to consider bars in fear screenings would result, in many cases, in protracted screening interviews to fully explore the complex factual and legal considerations that often arise in connection with bars to asylum and statutory withholding of removal.[90] Doing so would reduce the number of fear screenings DHS is able to conduct, resulting in more noncitizens being referred for section 240 removal proceedings without any screening at all. While DHS appreciates the commenter's concern for officer safety, the Department is confident in its ability to protect its personnel, and the commenter provides no evidence to indicate otherwise.

8. Burden and Standard of Proof

Comment: A commenter wrote in support of requiring individuals in the

[87] *See* USCIS, ''RAIO Directorate—Officer Training: Mandatory Bars to Asylum'' (May 9, 2013).

[88] Credible Fear Procedures Manual (CFPM), Section III.J; Reasonable Fear Procedures Manual (RFPM), Section III.I.

[89] Credible Fear Procedures Manual (CFPM), Section III.K; Reasonable Fear Procedures Manual (RFPM), Section III.J.

[90] *See* 87 FR 18093–94.

asylum process to bear the burden of proof, reasoning that if the individual's claim is real, they could easily provide the evidence. Commenters suggested that the government should bear the burden of proof to demonstrate the applicability of any bars, rather than requiring noncitizens to bear the burden of proof.

Response: The Department agrees to the extent that it is appropriate to require noncitizens to bear the burden of proof to demonstrate they have a credible fear or reasonable fear determination, and notes that this is the current standard and will not change under this regulation. Under INA sec. 291, 8 U.S.C. 1361, the burden of proof is generally on the person requesting an immigration benefit to establish their eligibility for the benefit.[91] Because mandatory bars to asylum and withholding of removal exclude noncitizens from eligibility for those forms of relief or protection, noncitizens must demonstrate that such bars do not apply according to the relevant legal standard. The purpose of fear screenings is to identify noncitizen who may be eligible for particular benefits or forms of relief or protection from removal, and it is consistent with the INA to place the burden of proof on noncitizens to establish a bar considered by the AO in the fear screening does not apply.

DHS believes it is reasonable in fear screenings to require noncitizens to bear the burden of proof to demonstrate at the applicable standard that a mandatory bar, if considered, does not apply to them. This approach is consistent with requiring noncitizens in credible fear and reasonable fear screenings to demonstrate at the applicable standard that they could establish, in a proceeding on the merits, eligibility for asylum or that they would be persecuted on account of a protected ground. The commenters' suggestion would represent a departure from this longstanding framework and introduce a burden-shifting element that could unnecessarily complicate and prolong screening interviews. DHS also notes that requiring noncitizens to bear the burden of proof in credible fear and reasonable fear screenings to demonstrate a bar, if considered, does not apply them, is analogous to the requirement in proceedings on the merits that applicants bear the burden of proof to demonstrate eligibility for any immigration benefit or relief sought under INA sec. 291, 8 U.S.C. 1361.

Comment: One commenter, in noting that a noncitizen whom an AO determines may be a threat to national security would be given the opportunity to show that they are not, stated that it is extremely difficult to prove one is not a threat.

Response: AOs conducting fear screenings would only consider a mandatory bar in those cases where there is easily verifiable evidence available to the AO that a mandatory bar may apply, and the AO can consider that bar efficiently at the credible fear stage. The rule would not require noncitizens to prove generally that they are not a threat. Rather, it allows AOs the discretion to consider particular statutory bars to asylum and withholding of removal where evidence that such a bar may apply exists and is easily verifiable. The Department considers it fair and appropriate to provide such discretion to AOs and to remove noncitizens without a legal basis to remain in the United States when screenings determine they would not be able to establish eligibility in a full merits hearing before an immigration judge or AMI before an AO. Furthermore, noncitizens already bear the burden of proof in merits determinations to demonstrate a bar does not apply. The commenter did not explain how allowing AOs to consider mandatory bars in fear screenings is more problematic than this current posture.

Comment: Commenters asserted that the rule requires noncitizens in fear screenings to meet the preponderance of the evidence standard to demonstrate a bar does not apply. Commenters indicated the significant possibility standard should apply uniformly to all aspects of credible fear interviews. A commenter asserted that allowing the consideration of bars to asylum and statutory withholding of removal in the context of other recent rulemakings that provide for different standards of proof for the different forms of relief for which noncitizens are screened in credible fear interviews will create confusion and increase the risk of erroneous fear determinations. One commenter wrote that the differing standards for consideration of exceptions to the mandatory bars—a significant possibility for an exception to an asylum bar and a reasonable possibility for an exception to a statutory withholding of removal bar—will create confusion among noncitizens and AOs and increase the likelihood of erroneous determinations.

Response: The rule does not require noncitizens in fear screenings to meet the preponderance of the evidence standard to demonstrate a bar does not apply. Rather, in credible fear screenings under 8 CFR 208.30, it requires them to show a significant possibility that they would be able to demonstrate by a preponderance of the evidence (in the context of a full merits hearing) that a mandatory bar to asylum does not apply. 8 CFR 208.30(e)(5)(ii)(A) and (B). Noncitizens screened for statutory withholding of removal under the application of the CLP rule's presumption of ineligibility for asylum must demonstrate that there is a reasonable possibility that no mandatory bar applies, if the AO has considered the applicability of a bar. 8 CFR 208.33(b)(2)(i). Noncitizens subject to the Securing the Border rule's limitation on asylum eligibility must demonstrate a reasonable probability. 8 CFR 208.35(b)(2), 208.33(b)(2)(i). In the reasonable fear context, if the AO considers the applicability of a bar, the noncitizen must demonstrate there is a reasonable possibility that the bar does not apply. 8 CFR 208.31(c). All of these standards are lower than the preponderance of the evidence standard applicable to asylum applications being considered in full merits hearings.

DHS disagrees that screening for mandatory bars under varying standards of proof will create confusion and increase the risk of erroneous screening determinations. As stated above, AOs are trained to properly apply the different standards of proof in screening interviews and full adjudications,[92] and AOs and have extensive experience applying different standards in the course of a case and across their workloads. The non-adversarial nature of screening interviews, along with the AO's duty to elicit testimony from noncitizens and examine other evidence in the record, including the results of security checks and country conditions, combined with 100-percent supervisory review of screening determinations and the availability of immigration judge review for negative determinations, all ensure the correct standard of proof is applied to the various forms of relief being screened in credible fear and reasonable interviews and minimize the risk of erroneous determinations.

DHS disagrees that shifting standards of proof applied during fear screenings will create prejudicial confusion among noncitizens. AOs are trained to elicit all relevant information from the noncitizen, including eliciting testimony to assist the noncitizen with

[91] The same is true in removal proceedings under section 240 of the INA, 8 U.S.C. 1229a. *See* INA 240(c)(4)(A), 8 U.S.C. 1229a(c)(4)(A).

[92] *See* USCIS, RAIO Directorate—Officer Training: Evidence (Apr. 24, 2024). USCIS will develop additional training on this rule prior to its implementation, including guidance on standards of proof for AOs tasked with implementing the rule.

meeting their burden of proof in a given determination or adjudication.[93] The comment appears to contemplate a noncitizen calibrating their response to an inquiry based on the standard of proof, rather than working with the AO to provide all the available evidence on an issue. Given the non-adversarial nature of screening interviews and AOs' duty to elicit the testimony needed to determine whether a noncitizen has met the applicable standard of proof, DHS believes the commenter misapprehends the dynamics of screening interviews.

DHS acknowledges the commenter's suggestion that the significant possibility standard should apply uniformly to all aspects of credible fear interviews. However, this rule does not change the standards applicable in credible fear interviews.

DHS acknowledges that the CLP rule and Securing the Border Interim Final Rule (IFR) and final rule impacted the credible fear review procedures (but not reasonable fear procedures), including, in some cases, the standards of proof applicable to certain noncitizens in credible fear screenings. *See* 8 CFR 208.33(b), 208.35(b). DHS and DOJ explained in the CLP and Securing the Border rules why the reasonable possibility and reasonable probability standards, respectively, are needed in the context of screening for statutory withholding of removal and CAT protection, even though it might be more straightforward to apply the significant possibility standard across the board. This rule, however, does not make any further changes to these standards of proof, nor were such changes proposed in the NPRM. Instead, it maintains the status quo.

DHS disagrees that providing discretion to AOs to consider bars in fear screenings in the context of the varying standards of proof implemented by these other rules will cause confusion and result in erroneous fear determinations. AOs have been effectively implementing the CLP rule for over a year and have demonstrated their ability to apply the significant possibility and reasonable possibility standards accurately in accordance with DHS regulations. Early indications suggest the same for the Securing the Border IFR and final rule. DHS has no reason to believe that providing AOs the discretion to consider mandatory bars in fear screenings where information makes it clear that a bar may apply, and the AO can analyze the bars efficiently, will undermine the integrity of these screenings.

Furthermore, this rule does not require noncitizens undergoing fear screenings where bars are considered to demonstrate by a preponderance of the evidence that the bars do not apply. That is the standard of proof to demonstrate eligibility for asylum in a full merits hearing or AMI, not in the credible fear context. The standards of proof applicable to the consideration of bars in fear screenings will remain the same as those for the other eligibility criteria for the forms of relief or protection considered in credible fear and reasonable fear screenings under current regulations.

Comment: A commenter stated that the ''reasonable probability'' standard implemented under the Securing the Border IFR would create a difficult standard to administer and understand, and that under the IFR, certain noncitizens will be screened under a higher standard than that applied to similarly situated noncitizens under the CLP rule. The commenter wrote that the ''reasonable probability'' standard does not appear in the INA and is not defined clearly. Commenters noted that DHS's new regulations have created overlapping and inconsistent legal standards and were unsure whether this rule would conform to the IFR standard.

Response: This rule does not propose changes to the substantive screening standards by which AOs make their fear determinations. *See generally* 89 FR at 41347–61. Instead, this rule amends the regulations to provide AOs discretion to consider mandatory bars at the appropriate standard of proof that applies to the type of screening they are conducting.

Regarding the ''reasonable probability'' standard specifically, as discussed above in Section I.B, the Securing the Border IFR established that standard at 8 CFR 208.35(b)(2). Specifically, in cases where the AO first finds that the noncitizen is subject to the Securing the Border limitation on asylum eligibility and accordingly does not have a credible fear with respect to the noncitizen's asylum claim, the AO then assesses whether the noncitizen has established a ''reasonable probability'' of persecution or torture for the purposes of eligibility for withholding of removal or protection under the Convention Against Torture. 8 CFR 208.35(b)(2). When this rule is implemented, the AO may consider the applicability of the covered mandatory bars as part of this ''reasonable probability'' determination in cases where the Securing the Border rule's limitation on asylum eligibility is found to apply. Should the Securing the Border rule's limitation on asylum eligibility not apply to a noncitizen in a credible fear screening, either because there is a significant possibility the noncitizen could demonstrate either they are not subject to the limitation or they are eligible for an exception to the limitation, the AO would consider the mandatory bars under this rule at the ''significant possibility'' standard in line with credible fear determinations made pursuant to 8 CFR 208.30, or, if appropriate, the ''reasonable possibility'' standard, if the noncitizen is subject to a presumption of asylum ineligibility under 8 CFR 208.33.

In all cases, the AO will only consider mandatory bars under this rule as a matter of discretion and only when there is easily verifiable information that a mandatory bar applies to the noncitizen and when the AO can handle the issue efficiently at the screening stage.

To the extent that commenters' concerns regard the merits of the ''reasonable probability'' standard in general, such concerns are outside the scope of this rule. Comments regarding the reasonable probability standard are addressed in Section III.C.3 of the Securing the Border final rule preamble. 87 FR at 81245–50.

9. Other General/Mixed Feedback and Suggested Alternatives

Comment: One commenter stated that while they understand the rule's intention to streamline the asylum process and uphold the integrity of the immigration system, they have recommendations for improvements. The commenter suggested increased training for AOs to better understand global issues, exceptions to applicability of the rule for specific vulnerable populations, access to legal counsel in the screening process, increased transparency around the screening process, and periodic review and public reporting on the rule's impact. One commenter expressed concern that noncitizens may face exploitation, and many other commenters suggested increasing capacity and resources, including AOs and immigration judges, so that noncitizens face shorter wait times and receive thorough interviews. One commenter suggested that increased use of Temporary Protected Status, parole processes such as the processes for Cubans, Haitians, Nicaraguans, and Venezuelans, and humanitarian parole could reduce the number of border crossings. One commenter recommended that the Department disincentivize border crossings by expanding its use of

[93] *See id.; see also* USCIS, ''RAIO Directorate—Officer Training: Interviewing—Eliciting Testimony'' (Apr. 24, 2024); USCIS, ''RAIO Directorate—Officer Training: Evidence'' (Apr. 24, 2024).

expedited removal, rescinding ICE enforcement priorities memos, and raising the legal standards applied in screening cases.

Response: The Department emphasizes that AOs are trained in asylum law, receive regular trainings in specific areas of asylum law, and are experienced in analyzing mandatory bars.[94]

The Department declines the suggestion to create exceptions to applicability of the rule for certain vulnerable populations because all applicants for asylum, regardless of population, are subject to all mandatory bars.

An explanation of access to counsel in the screening process is provided in section 2(b), due process concerns, of this rule.

The Department appreciates the suggestion to increase transparency and provide periodic review and public reporting on the rule's impact. USCIS already provides certain asylum statistics to the public through its website and reports to Congress on a variety of immigration initiatives and statistics. The Department will take this suggestion under consideration.

The Department also continues to use a variety of processes, including parole, to discourage unlawful entries into the United States and safeguard against exploitation of noncitizens.

The Department acknowledges the recommendation to increase capacity and resources by hiring more AOs and immigration judges. The Department continues to expand its workforce to meet the growth in immigration benefit applications and requests, but staffing and hiring of AOs is out of the scope of this rule, as is the staffing and hiring of immigration judges, which is managed by the Department of Justice. This rule is intended to provide DHS additional operational flexibility in screening determinations and, as explained in the NPRM preamble, the Department anticipates that it will also expand its ability to more quickly remove noncitizens who present national security or public safety threats, may provide efficiencies for ICE Office of the Principal Legal Advisor (OPLA) and ICE Enforcement and Removal Operations (ERO), and may reduce referrals to EOIR in cases in which a negative fear determination can be made at the screening stage for an individual who the Department would otherwise place into potentially lengthy proceedings in immigration court, including possible appeals to the BIA.

Certain suggestions, specifically those to disincentivize unlawful border crossings by expanding the use of expedited removal and removing ICE enforcement priorities, are outside the scope of this rule. This rule encompasses USCIS regulations and procedures and does not amend ICE regulations and procedures.

Finally, regarding the suggestion to increase the legal standards applied in screening cases in order to disincentivize unlawful border crossings, the Department emphasizes that this rule does not affect the standard of proof applicable in screening procedures. Furthermore, the intent of this rule is to increase efficiency and enhance public safety, rather than to function as a broader deterrence measure.

Comment: A commenter stated that to speed removal of high enforcement priorities and reduce the EOIR pending caseload and the burden on OPLA and ERO, DHS failed to consider policies that it can exercise in its discretion to not prosecute non-priority cases at a greater scale.

Response: DHS acknowledges the comment and has provided an estimated reduction in EOIR workload after the implementation of this rule. *See* section V.A.3.c of this preamble. The regulation will prevent noncitizens from entering a potentially years-long immigration court process in pursuit of relief for which they are ineligible, and it will allow DHS and EOIR resources that would have been expended on such processes to be conserved for potentially meritorious cases. However, the main purpose of this rule is not to reduce EOIR pending caseload or the burden on ICE OPLA and ERO. Instead, as explained in the NPRM and in this preamble, the purpose of this rule is to facilitate efficiency in the expedited removal process by providing AOs additional operational discretion to choose to apply certain mandatory bars during fear screenings. The commenter's suggestions are outside the scope of this rule.

E. Other Issues Relating to the Rule

1. Coordination With DOJ in the Rulemaking

Comment: A commenter suggested that the lack of a corresponding proposed rule by DOJ demonstrates that DHS failed to coordinate with EOIR, undermining DHS's claims that the rule will promote efficiency and consistency and betraying a lack of preparedness to promulgate a final rule. Similarly, another commenter suggested that the lack of a corresponding DOJ rule highlights the irregular nature of this proposed rulemaking.

Response: As an initial matter, the Department emphasizes that it has the authority to pursue this rulemaking independently and without a corresponding rule issued by DOJ. As the rule pertains to the procedures AOs follow, no DOJ rule is necessary to implement the changes described in the rule.

Nevertheless, DHS emphasizes that DOJ was consulted during the development of the NPRM and this rule. As a significant rule, OIRA conducted a review of this rule under Executive Order 12866. 58 FR 51735 (Oct. 4, 1993).[95] OIRA review includes the coordination of interagency Executive Branch review of significant rules, including review by the Department of Justice.[96]

Finally, as noted in the NPRM, DOJ may issue its own separate rule to clarify the procedures immigration judges will follow when reviewing the findings of AOs in credible fear or reasonable fear review proceedings. 89 FR at 41355 n.37.

Comment: One commenter suggested that the lack of a corresponding rulemaking by the DOJ may cause immigration judges to waste valuable time and resources trying to comprehend whether they are required to apply the rule and if so how to do so. Similarly, another commenter objected that the proposed rule does not contain any discussion of how or why this change will not impact review of a negative credible fear determination or whether that review will now encompass immigration judge review of a mandatory bar determination at this stage. A commenter also stated that the lack of a corresponding rule from the

[94] *See* USCIS, *RAIO Directorate—Officer Training: Mandatory Bars* (May 9, 2013); USCIS, *RAIO Directorate—Officer Training: Interviewing—Introduction to the Non-Adversarial Interview* (Apr. 24, 2024); USCIS, *RAIO Directorate—Officer Training: Interviewing—Eliciting Testimony* (Apr. 24, 2024); USCIS, *RAIO Directorate—Officer Training: Interviewing—Working with an Interpreter* (Apr. 24, 2024); USCIS, *RAIO Directorate—Officer Training: Cross-Cultural Communication and Other Factors That May Impede Communication at an Interview* (Apr. 24, 2024); USCIS, *RAIO Directorate—Officer Training: Interviewing Survivors of Torture and Other Severe Trauma* (Apr. 24, 2024).

[95] *See also* Office of Information and Regulatory Affairs, OIRA Conclusion of E.O. 12866 Regulatory Review, Rin 1615–AC91, *https://www.reginfo.gov/public/do/eoDetails?rrid=524411* (last reviewed Sept. 26, 2024).

[96] *See* Office of Information and Regulatory Affairs, Frequently Asked Questions: What is OIRA's Role in the Rulemaking Process?, *https://www.reginfo.gov/public/jsp/Utilities/faq.myjsp#oira* (last reviewed Sept. 26, 2024).

DOJ leaves open the question of whether immigration judges have the authority to consider a mandatory bar in the first instance when reviewing negative credible fear screenings where the AO declined to consider a mandatory bar.

Response: The procedures for immigration judge review of AOs' credible fear and reasonable fear decisions are set out at 8 CFR 1003.42, 1208.30, 1208.31, 1208.33, and 1208.35. In general, DHS notes that immigration judges have the authority to review negative credible fear and reasonable fear determinations of AOs de novo, and such review is available for all negative fear determinations. *See, e.g.,* 8 CFR 1003.42(d); 8 CFR 1208.30(g). Should DOJ determine that further clarity is needed, DHS again notes that the DOJ may issue its own rule to clarify the procedures for immigration judge review.

2. Security Bars Rulemaking

Comment: Some commenters wrote that it was not clear whether this rule would result in AOs applying the additional public-health related bars in the Security Bars final rule in fear screenings, should that rule go into effect.

A commenter expressed concern that the proposed rule would interact with the Security Bars final rule when it goes into effect December 31, 2024, by reinforcing or endorsing the applicability of what the commenter characterized as that rule's illegal interpretation of the security bars during credible and reasonable fear screenings. The commenter stated the Security Bars final rule is incompatible with non-refoulement obligations under international law and the INA, citing case law and noting that there is no public health exception to non-refoulement obligations. After recommending redrafting, the commenter encouraged DHS to at least amend the proposed rule to clarify that public health considerations would not be tasked to AOs under the proposed rule, suggesting a statement in both the rule and its preamble that it does not enable decisions of public health issues in the fear screening process under the guise of ''security.''

Another commenter expressed concern that the proposed rules could interact with the Security Bars final rule by complicating pre-screening procedures that are already highly complex and recommended that the Department rescind the Security Bars rule to avoid causing or worsening inefficiencies in the U.S. immigration system.

A commenter wrote that the proposed rule could become more broadly applicable if the Security Bars final rule goes into effect as scheduled on December 31, 2024, and expressed concern that asylum opportunities would be severely limited as a result. The commenter urged the Department to rescind both the Security Bars final rule along with the proposed rule to provide greater support for noncitizens seeking protection in the United States.

Finally, a commenter expressed concern that the proposed rule would automate the wrongful removal of asylum seekers if this proposed rule were finalized and the Security Bars final rule goes into effect. The commenter provided an example of a noncitizen who may be subject to a statutory bar to asylum due to the public health provision in the Security Bars final rule.

Response: As an initial matter, DHS emphasizes that comments related to the substance, legality, merits, or other specific issues focused on the Security Bars final rule itself are outside the scope of this rulemaking.

On December 23, 2020, DHS and DOJ jointly published the Security Bars final rule to clarify that the Departments may consider emergency public health concerns based on communicable disease (not limited to COVID–19) when determining whether a noncitizen is subject to the existing statutory bars to asylum and withholding of removal at INA secs. 208(b)(2)(A)(iv) and 241(b)(3)(B)(iv), 8 U.S.C. 1158(b)(2)(A)(iv) and 1231(b)(3)(B)(iv), for noncitizens for whom ''there are reasonable grounds to believe'' that they are ''a danger to the security of the United States'' (commonly known as the ''security bars'').[97] Specifically, the Security Bars final rule delineates certain circumstances when, in the context of a public health emergency under Federal law or regarding a communicable disease of public health significance as defined at 42 CFR 34.2(b), a noncitizen would be ineligible for asylum under the statutory security bars. *See* 85 FR at 84193 (amending 8 CFR 208.13(c)).

The Security Bars Final Rule is scheduled to become effective on December 31, 2024. 87 FR 79789 (Dec. 28, 2022). However, DHS emphasizes that DHS and DOJ continue to consider further action related to the security bars final rule,[98] and OIRA received a rule on this topic on December 3, 2024 for review under Executive Order 12866.

In addition, no public health emergency relevant to the Security Bars final rule currently exists. As a result, there would be no direct, immediate impact on eligibility for asylum or other protection if the Security Bars final rule were to go into effect because there is no existing relevant public health situation that would trigger the bars.

As explained in the NPRM and elsewhere in this preamble, DHS considers it appropriate to provide AOs discretion to consider security- and public safety-related bars to asylum and statutory withholding of removal in fear screenings to facilitate the swift removal of noncitizens who pose security and public safety risks and are clearly ineligible for asylum or withholding of removal. DHS therefore declines to rescind this rule, limit AOs' discretion regarding the statutory security bars, or provide other restrictions related to the statutory security bars, including the pending Security Bars final rule, in credible fear and reasonable fear screenings.

Finally, the Department disagrees with the claim that the rule will ''automate'' the removal of noncitizens if the Security Bars final rule also goes into effect. Under this rule, AOs consider any mandatory bar on a case-by-case basis with respect to the specific facts presented in a case. The AO will not automatically apply a bar in any case.

3. Other Out of Scope Comments

Comment: Commenters provided feedback and suggestions outside the scope of this rulemaking. Examples of these out-of-scope comments include the following. Commenters:

- suggested if immigration lawyers are opposed to this regulation, they should provide their services for free.
- stated that locals in Ecuador laughed and joked about a headline related to this rulemaking.
- suggested building and staffing something like what was done at Ellis Island.
- suggested creating a resettlement program for asylum seekers, while others suggested creating paths to citizenship for immigrants.
- noted the positive impacts of immigrants on our nation and its economy.
- urged that migrants be treated fairly and with dignity.
- expressed opposition to President Biden's Proclamation on Securing the Border.

[97] Security Bars and Processing, 85 FR 84160 (Dec. 23, 2020).

[98] *See, e.g.,* OIRA, Spring 2024 Unified Agenda, *Asylum Eligibility and Public Health* (RIN 1615–AC57), *https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202404&RIN=1615-AC57.*

• criticized purported shortcomings of the CBP One mobile app.
• expressed concern for the wellbeing of LGBTQI+ persons and torture survivors.
• urged a pathway to citizenship for Deferred Action for Childhood Arrivals students and their families.
• urged Congress to build a more welcoming immigration system and provide increased legal representation for asylum seekers, additional resources for government entities that administer the immigration system, and more accessible pathways to citizenship.
• stated that all criminals should be deported immediately.
• called for hiring and training more immigration judges.

Response: DHS acknowledges these comments but declines to address them, as they are outside the scope of this rulemaking.

F. Statutory and Regulatory Requirements

1. Administrative Procedure Act

Comment: Commenters raised concerns that this rule violated the Administrative Procedure Act's (APA's) requirements, as set forth in 5 U.S.C. 553(b) through (d). Commenters stated that the 30-day comment period was not sufficient and that, at a minimum, the comment period should have been 60 days. Numerous commenters requested that DHS extend the comment period. In support, commenters referenced Executive Orders 12866[99] and 13563,[100] both of which recommend providing the public a meaningful opportunity to comment with a comment period of not less than 60 days in most cases. Commenters stated that the NPRM's complexity and length, its departure from long-standing agency policy, its interaction with other policy and regulatory issues, and its impact on asylum-seekers and those supporting them demonstrate the 30-day comment period was insufficient.

Other commenters stated that 30 days was an insufficient period to collect information and evidence of the rule's impact or to develop alternatives to the changes made by the rule, particularly because providing comments on the rule requires organizations to divert resources away from assisting migrants.

Commenters disagreed with DHS's statements that a 30-day comment period was reasonable and appropriate because the rule relates to a discrete topic, is relatively short, and has been addressed in multiple recent notice-and-comment rulemakings. Commenters stated that the proposed rule addresses a complex topic that involves Federal and international law, and that, because the rule did not provide sufficient notice of how AOs would exercise their discretion, the scope of the rule could not be determined. Commenters also stated that the rule interacts with recent regulatory and policy changes in complex ways that could not have been considered during earlier notice-and-comment rulemakings that addressed the same topic. Commenters specifically stated that additional time was needed to analyze the proposed rule in relation to the CLP rule including the ramifications of the proposed rule if the CLP rule is vacated or modified as a result of legal challenges against it, and in relation to the Securing the Border IFR, which was published and became effective during the comment period for this rule.

Commenters also contend that because this rule repeals or reverses existing policy, DHS has a greater burden to justify providing a comment period that is shorter than the 60-day period that was provided for the Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers rule, which rescinded regulations applying mandatory bars during credible fear screenings. 87 FR 18078 (Mar. 29, 2022).

Commenters stated that DHS justified the 30-day comment period, in part, on its stated interest in acting quickly to provide an additional tool and operational flexibility to more promptly remove noncitizens who pose public safety and national security risks. Commenters stated that the desire to act quickly cannot be a justification to shorten the comment period, and some commenters expressed concern that the process would not leave DHS sufficient time to fully consider public comments before issuing a final rule. Further, commenters asserted that DHS did not present evidence of an urgent security threat or other exigent circumstance, did not explain why it did not propose the rule earlier, and did not justify the 30-day period in consideration of its expectation that the affected population will be relatively small.

Finally, commenters stated that the 30-day comment period was not justified in view of the potential consequences of implementing the rule without sufficient consideration of public comments, namely, that an erroneous application of the bars could result in individuals being returned to countries where they face persecution or torture.

Response: DHS disagrees with commenters' statements that the 30-day comment period was inadequate and that the changes being made are overly complex, do not involve minimal regulatory changes, and do not relate to a discrete change describing when an AO has the discretion to consider certain mandatory bars earlier in the fear screening process than has normally been the case.

The APA does not require a specific comment period length, *see* 5 U.S.C. 553(b), (c), and although Executive Orders 12866 and 13563 recommend a comment period of at least 60 days, a 60-day period is not required. The APA only requires that an agency provide interested persons ''an opportunity to participate in the rule making through submission of written data, views, or arguments.'' 5 U.S.C. 553(c). For example, the D.C. Circuit has stated that, although a 30-day period is often the ''shortest'' period that will satisfy the APA, such a period is generally ''sufficient for interested persons to meaningfully review a proposed rule and provide informed comment,'' even when ''substantial rule changes are proposed.'' *Nat'l Lifeline Ass'n* v. *FCC,* 921 F.3d 1102, 1117 (D.C. Cir. 2019) (citing *Petry* v. *Block,* 737 F.2d 1193, 1201 (D.C. Cir. 1984)).

Here, the comment period spanned 30 days, from May 13, 2024, through June 12, 2024, which DHS believes was sufficient to allow for meaningful participation, as evidenced by the almost 4,300 public comments received, including numerous detailed comments from interested organizations. Many of the comments expressing opposition to this rule are similar in their nature and raise many of the same issues or concerns. The fact that the commenters raise the same issues and concerns reflects the narrow scope of the rule and a common recognition and understanding of the substance in the rule and the issues raised therein. There were also many instances of commenters providing more than one comment. Commenters who submitted more than one comment generally submitted an initial comment at the beginning of the comment period arguing against the 30-day comment period (during which the Department received a number of substantive comments on the proposed rule itself), and then submitted a subsequent comment later in the comment period commenting on additional issues they have with the proposed rule, but also reiterating many of the same comments and arguments that were previously

[99] 58 FR 51735 (Oct. 4, 1993).
[100] 76 FR 3821 (Jan. 21, 2011).

made in the initial comment. Submitting multiple comments in this way is an indication that commenters had sufficient time to provide comments and then revisit those comments during the course of the comment period. Additionally, many of the comments are duplicative and indicative of a mass mailing campaign, which demonstrates that the public had sufficient time to coordinate their efforts, collaborate on and draft uniform responses, disseminate such responses among interested individuals and organizations, and for those individuals and organizations to submit those comments in an organized and collective manner via the **Federal Register**. The number of comments received and the content of those comments all indicate that the public was provided the opportunity to, and did in fact, meaningfully engage with this rulemaking.

DHS disagrees with the comments asserting that a 30-day comment period for a rule that reverses the existing policy—under which AOs do not apply mandatory bars during credible fear screenings—requires more justification. The cases cited in support of this assertion do not require that an agency provide a comment period equal to or greater than the period for the initial rule, nor do they impose heightened requirements for an agency's decision to provide a shorter comment period for a rescission; rather, they identify the lack of parity in those rulemakings as a supporting factor for their conclusions that the agencies failed to satisfy the APA requirements for notice and comment.[101] The Sixth Circuit examined these decisions and observed that ''the feature of the challenged rescissions that ran afoul of the APA in both [cases] was the agency's imposition of content restrictions on the comments that interested parties could submit during the comment window.'' *Chamber of Commerce of U.S.* v. *SEC,* 115 F.4th 740, 756 (6th Cir. 2024) (finding that the 31-day comment period for a proposed rescission of a rule was sufficient under the APA, even though the initial rulemaking offered a 60-day comment period). There is no such content restriction at issue here. As stated above, the APA does not require a specific comment period length, *see* 5 U.S.C. 553(b), (c). For the reasons described here and in the NPRM, DHS believes that the 30-day comment period provided the public a meaningful opportunity to participate. *See* 89 FR 41347, 41358 (May 13, 2024)

DHS reiterates that the rule does not involve an overly complex topic that necessitates a comment period beyond 30 days. Fundamentally, the changes do not affect the substantive analysis of those bars, they only move forward the point in time at which certain mandatory bars will be considered and allow AOs to consider those certain mandatory bars during the fear screening process as a threshold issue, making the process more efficient. Additionally, DHS will provide sub-regulatory guidance to asylum officers regarding their exercise of discretion.

The 30-day comment period also afforded adequate time for commenters to consider the combined effects of this rule with other DHS rules and policy changes. Commenters stated that additional time was needed to analyze the proposed rule in relation to the CLP rule, including the ramifications on the proposed rule if the CLP rule is vacated or modified as a result of pending legal challenges. The CLP rule became effective May 11, 2023, now over 15 months ago. 88 FR 31314 (May 16, 2023). DHS described in specific detail how this rule would interact with the CLP rule in section IV.C. of the NPRM. There it was explained that 8 CFR 208.33(b)(2)(i) was being amended to provide AOs with the discretion to consider the applicability of the bars to withholding of removal contained in INA sec. 241(b), 8 U.S.C. 1231(b), when determining whether there is a reasonable possibility that the noncitizen would suffer persecution or torture in the country of removal. If an AO determines that the presumption of asylum ineligibility under the CLP rule applies, and there is evidence of a mandatory bar to withholding of removal and the noncitizen is unable to demonstrate there is a reasonable possibility that the mandatory bar does not apply, the AO may base a negative credible fear of persecution determination on a mandatory bar to statutory withholding of removal pursuant to 8 CFR 208.33 if there is evidence in the record that it would be more efficient to do so. 89 FR 41347, 41357 (May 13, 2024).

DHS also disagrees that the 30-day comment period prohibited commentators from considering the combined impact of this rule and the Securing the Border IFR, which was issued June 6, 2024, during the comment period for this rule and became effective on June 5, 2024. 89 FR 48710 (June 7, 2024). This rule interacts similarly with the Securing the Border IFR as it does with the CLP rule, which has been in place since May 2023 and which uses the same general framework. As explained in the Securing the Border IFR, the ''reasonable probability'' standard would apply to determinations involving a noncitizen who is subject to the Securing the Border IFR's limitation on asylum eligibility. 89 FR at 48739 n.186. The Securing the Border IFR places a limitation on asylum eligibility for noncitizens who enter across the southern border in violation of the suspension and limitation on entry created by the June 3 Presidential Proclamation, unless they are excepted under section 3(b) of the Proclamation or eligible for an exception based on exceptionally compelling circumstances. 8 CFR 208.35(a), 1208.35(a). Additionally, noncitizens who cross the southern border and are processed for expedited removal while the limitation is in effect will only be referred for a credible fear screening with an AO if they manifest or express a fear of return to their country or country of removal, a fear of persecution or torture, or an intention to apply for asylum. 8 CFR 235.15(b)(4). Finally, under the Securing the Border FR the United States will continue to adhere to its international obligations and commitments by screening individuals who manifest a fear and do not qualify for an exception to the Securing the Border rule for statutory withholding of removal and CAT protections at a ''reasonable probability'' of persecution or torture standard—a standard that is higher than the ''reasonable possibility'' standard currently applied under the CLP rule. 8 CFR 208.35(b)(2), Again, this rule allows an AO the discretion to consider evidence indicating that a mandatory bar applies and to apply that mandatory bar during fear screening.

Although DHS expressed a desire to act as quickly as possible to make this rule's regulatory changes when explaining the 30-day comment period, the desire for quick action was not the sole justification for the 30-day comment period. Rather, in reviewing the nature of the rule and the fact that the rule was narrow in scope, addressed a discrete topic, and made modest changes to the regulatory text, DHS determined that a 30-day comment period would be sufficient for the public to engage with the rule, provide comments, and participate in the rulemaking. Having recognized that a 30-day comment period is sufficient for meaningful public engagement, DHS expressed its desire to finalize the rule quickly to provide AOs with this additional tool to more promptly

[101] *See N. Carolina Growers' Ass'n, Inc.* v. *United Farm Workers,* 702 F.3d 755, 770 (4th Cir. 2012); *California by & through Becerra* v. *U.S. Dep't of the Interior,* 381 F. Supp. 3d 1153, 1176 (N.D. Cal. 2019).

remove noncitizens who pose public safety and national security risks, and thus set the comment period at 30 days. To the extent that commenters argue that a desire for swift action cannot be a valid consideration when setting the comment period, DHS disagrees. Although the Department expects that the number of cases when AOs would consider a mandatory bar under this rule to be relatively small, as discussed further below in Section V.A.1, DHS believes it is important to act expeditiously to increase efficiency wherever possible, especially in light of the current strains on processing and capacity at the southern border. *See generally* 89 FR 48710 (June 7, 2024) (DHS and DOJ describing the emergency circumstances necessitating the Securing the Border IFR).

Finally, the length of the comment period, whether 30 days or longer, has no bearing on the amount of time or level of consideration that DHS will give when evaluating, addressing, and responding to public comments before issuing a final rule. DHS has carefully and appropriately considered the comments it received from the public on this rule.

Comment: Commenters stated that DHS failed to consider significant reliance interests engendered by legal service organizations under the existing policy and detrimental impacts that the proposed rule would have on those organizations.

Commenters stated that legal service providers that assist noncitizens during fear screenings have relied on the previous policy—under which screenings did not entail adjudication of legally and factually complex matters, such as the application of mandatory bars—in developing their internal protocols, preparing informational materials, and delivering legal services to clients during credible and reasonable fear screenings. They stated that the changes will require legal services providers to dedicate financial and human resources to train their staff and volunteers and to revise, translate, and publish updated guidance for noncitizens.

A legal services provider commented that it would be adversely impacted as an organization that primarily serves noncitizens whose cases are being processed at an asylum office. The commenter stated that implementing the rule would likely result in more experienced AOs being detailed away from the local asylum office to conduct screening interviews at the southwest border, which would leave fewer, or less skilled, AOs in the local asylum office. Consequently, the commenter stated that cases would be processed more slowly in asylum offices, exacerbating existing backlogs. The commenter also stated that these changes would disrupt allocation of finite resources for non-profit organizations and that the increased complexity and processing times would increase the difficulty of recruiting pro bono attorneys and constrain its ability to serve potential clients.

Another commenter stated that because its legal services program is primarily designed to assist asylum seekers after they have been placed in full removal proceedings, it has a reliance interest in ensuring that noncitizens with asylum claims are able to pass their fear screenings.

Response: DHS has broad authority to establish and amend regulations and to take other actions ''necessary for carrying out'' the Secretary's authority to administer and enforce the immigration laws. *See* INA sec. 103(a)(1), (3), 8 U.S.C. 1103(a)(1), (3) (granting the Secretary the authority to establish regulations and take other actions ''necessary for carrying out'' the Secretary's authority under the immigration laws); *see also* 6 U.S.C. 202 (authorities of the Secretary); *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 42 (1983) (emphasizing that agencies ''must be given ample latitude to adapt their rules and policies to the demands of changing circumstances'' (quotation marks omitted)); *and see* Section II of this preamble.

When an agency changes a policy position, it must provide a reasoned explanation for the change, but ''need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate,'' so long as it can show ''good reasons'' for the change. *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 505, 515 (2009). If the established policy has engendered serious reliance interests, the agency's reasoned explanation must take those interests into account. *Id.*

DHS has considered the commenters' asserted reliance interests but believes that their concerns do not outweigh DHS's reasons for implementing these changes. As discussed in the NPRM, *see* 89 FR 41347, 41350 (May 13, 2024), the applicability of mandatory bars during credible fear screenings has been the subject of numerous regulatory actions since 2020, including the Global Asylum rule, the Security Bars rule, and the Asylum Processing IFR. Although the Global Asylum rule did not go into effect because of the preliminary injunction against implementation of the Global Asylum Rule, and the Security Bars rule has not yet gone into effect because the Departments have delayed its effective date, their promulgation weighs against commenters' assertions of long-settled reliance interests in the status quo. *See Pangea Legal Servs.* v. *DHS,* 512 F. Supp. 3d 966, 977 (N.D. Cal. 2021). DHS and DOJ published the Asylum Processing IFR rescinding the requirement to apply mandatory bars during credible fear screenings on March 29, 2022, and it became effective on May 31, 2022. *See* 87 FR 18078 (Mar. 29, 2022). During the 2-year period between publication of the Asylum Processing IFR and the publication of the NPRM for this rule, the Departments published and implemented the CLP rule, which made significant changes to credible fear screenings. 88 FR 31314 (May 16, 2023). Although the CLP rule did not alter the practice of not applying mandatory statutory bars at the credible fear stage, it did establish a rebuttable presumption of asylum ineligibility that AOs apply, when applicable, during credible fear screenings. These recent changing circumstances undermine the assertions that legal service providers have engendered significant reliance interests under the current policy. Rather, changing circumstances involving irregular immigration and the efforts DHS has employed to respond to the issue at the southwest land border demonstrate that the processes and procedures surrounding credible fear screenings remain fluid as DHS continues to respond to these challenges; as a result, the opportunity to develop a strong reliance interest in the status quo when it comes to the credible fear screening process is limited.

DHS acknowledges that policy changes often require training and other efforts within organizations, including its own. *See* section IV of this preamble, explaining the training that AOs will receive upon implementation of this rule. Nonetheless, these impacts do not alone preclude an agency from changing its position when it has good reasons to do so. In the NPRM for this rule, DHS described the reasons why the Department had pursued the different regulatory changes affecting the application of mandatory bars during fear screenings. *See* 89 FR 41347, 41353–54 (May 13, 2024). The common thread between these changes has been the Department's pursuit of greater efficiency in the fear screening process in furtherance of Congress' intent that the administrative removal processes be swift. *See* 85 FR 36264, 36272; 85 FR 41201, 41210; 87 FR 18078, 18134–36;

and 89 FR 41347, 41351. DHS's position on the application of mandatory bars during credible fear screenings has evolved since implementing the CLP rule, and the NPRM for this rule explained that the Department identified a previously unconsidered alternative that would decrease the costs of applying the mandatory bars while maintaining many of the benefits—namely, conducting a factual and legal inquiry into the bars only in those cases for which doing so is likely to be an efficient and appropriate use of resources. 89 FR 41347, 41354 (May 13, 2024). DHS believes that the anticipated benefits of this rule outweigh the commenters' concerns for the administrative impact on their organizations.

DHS also disagrees that some of the claimed reliance interests are cognizable. The assertion that this rule will increase backlogs or other staffing changes at local asylum offices and, ultimately, impede legal service providers' ability to serve their clients is based on a series of suppositions about the rule's effects on asylum office operations and staffing. Without factual support for the hypothetical chain of events, the Department finds this comment to be unpersuasive.

The comment asserting legal service providers' reliance interest in ensuring that noncitizens with asylum claims are able to pass their fear screenings does not explain how implementation of this rule would upset that claimed interest. As the NPRM states, this rule will allow DHS to quickly screen out certain non-meritorious protection claims by allowing AOs to promptly issue negative fear determinations in cases in which there is easily verifiable evidence indicating that the noncitizen could be subject to a bar; the noncitizen is unable to establish, at the relevant standard, that the bar would not apply; and the noncitizen is not otherwise able to establish a credible or reasonable fear of torture. *See* 89 FR 41347, 41351 (May 13, 2024). The regulation will prevent noncitizens from entering a potentially years-long immigration court process in pursuit of relief for which they are ineligible, and it will allow DHS and EOIR resources that would have been expended on such processes to be conserved for potentially meritorious cases. *Id.* It is unclear how such an outcome would adversely impact a legal services organization that serves noncitizens in immigration court proceedings or what reliance interest would have been engendered under the status quo.

2. Regulatory Impact Analysis Impacts and Benefits (E.O. 12866 and E.O. 13563)

a. Impacts to Noncitizens (*e.g.,* Individuals in the Credible Fear or Reasonable Fear Process)

Comment: A commenter stated that the proposed provisions in the NPRM will make a marginal reduction in EOIR pending caseload at the cost of the broader impact on asylum seekers. The commenter further added that the process of applying mandatory bars is extremely complex factually and legally and will lead to erroneous negative credible fear and reasonable fear determinations with no legal recourse available to asylum seekers.

Response: The final rule allows AOs the discretion to consider particular statutory bars to asylum and statutory withholding of removal where evidence that such a bar may apply is easily verifiable. The final rule will enable the Department to more swiftly remove individuals who are not eligible for protection in the United States based on national security or public safety concerns, preventing such cases from using valuable government resources to complete their adjudication beyond screening determinations. DHS considers it fair and appropriate to provide such discretion to AOs and to remove noncitizens without a legal basis to remain in the United States when screenings determine they would not be able to establish eligibility in a full merits hearing before an immigration judge or an AMI before an AO. As explained in section IV.B.2.b of this preamble, DHS has assessed that the possibility of erroneous removals is low. In analyzing any evidence that a bar to asylum or statutory withholding of removal may apply, this rule would allow AOs the flexibility to choose to consider a bar based on the individual facts and circumstances and information available to the AO to avoid erroneous negative determinations. Nothing in this rule alters the ability of a noncitizen who is the subject of a negative credible fear or reasonable fear determination to seek review of such determination by an immigration judge.

Comment: A commenter stated that the NPRM will lead to longer detention times and increase likelihood of family separation due to disparities in credible fear determinations among family members and an increase in negative credible fear determinations. Another commenter stated that the rule could lead to family separations and disregards the impact on vulnerable families.

Response: Commenters' concerns regarding the impact of this rule on family separations are highly speculative. The current regulations provide a process for the consideration of family units in expedited removal. Specifically, under 8 CFR 208.30(c), a spouse or child of a principal asylum seeker who arrived in the United States concurrently with the principal asylum seeker is included in that asylum seeker's positive credible fear evaluation and determination, unless the principal asylum seeker or the spouse or child declines such inclusion. The AO must complete background and security checks for each family member and screen each family member for mandatory bars to asylum eligibility. If the family unit is placed into section 240 removal proceedings, the Department serves an NTA on each family member and file an NTA for each family member with EOIR. If the AO finds that the principal noncitizen does not have a credible fear of persecution or torture, then the AO must interview the other family members to determine if any other family member can establish a credible fear. If the AO finds any family unit member positive for credible fear, then the AO does not interview the remaining family members except to screen for mandatory bars. The other family members do not need separate credible fear determinations and may be included in the positive family member's determination in the officer's discretion for purposes of family unity on a case-by-case basis, unless they indicate they wish to receive a separate determination.[102]

In other words, regardless of this rule, any family member subject to a mandatory bar is ineligible for the relevant form of relief or protection. This rule does not change the underlying merits of the family unit members' claims or the ability of other family members to ultimately qualify for asylum or withholding of removal.

b. Impacts on U.S. Economy, Taxpayers, Public Safety

Comment: A commenter described the additional time burden on asylum seekers to gather evidence, on stakeholder organizations involved in providing direct services, such as preparing asylum seekers for credible fear and reasonable fear interviews; and psychological costs imposed on asylum seekers by the NPRM.

[102] USCIS, ''Credible Fear Procedures Manual,'' Section III.E, *https://www.uscis.gov/sites/default/files/document/guides/CredibleFearProceduresManual.pdf* (last accessed July 31, 2024).

Response: DHS acknowledges this comment and has included a description of impacts of the Final Rule under Executive Order 12866 and Executive Order 13563 in Section V.A. of this preamble.

Comment: A commenter stated that the rule will increase the asylum application backlog and detention times because of the time required for an AO to apply mandatory bars while also considering exemptions and waivers, and the time required for an AO to determine at the credible fear and reasonable fear stage if an asylum seeker has committed a particularly serious crime. The commenter argued the law is unclear about whether there is an exception to the persecutor bar for individuals forced to engage in persecution under duress; that asylum seekers face the challenge of lack of access to legal counsel in CBP custody and other detention facilities, and insufficient time to gather evidence; and that a consequence of the rule will be erroneous negative credible fear or reasonable fear determinations, leading to wrongful deportation and separation of families in certain situations.

Response: DHS has described procedures used by AOs to identify possible mandatory bars while screening noncitizens for credible fear claims. Nothing in this rule alters the ability of a noncitizen who is the subject of a negative credible fear or reasonable fear determination to seek review of such determination by an immigration judge. DHS anticipates that cases raising such novel or complex legal questions would not be appropriate for AOs to use their discretion to consider the bar at issue, as it is unlikely the AO could do so efficiently in a screening interview. DHS disagrees that the rule will lead to additional erroneous negative credible fear or reasonable fear determinations, as the rule only allows AOs to enter a negative credible fear determination if the AO determines there is not a significant possibility the noncitizen would be able to establish by a preponderance of the evidence that the mandatory bars to asylum under INA sec. 208(b)(2)(A)(i)–(v), 8 U.S.C. 1158(b)(2)(A)(i)–(v) or to statutory withholding of removal under INA sec. 241(b)(3)(B), 8 U.S.C. 1231(b)(3)(B) do not apply. Further, as explained in the description of impacts of the Final Rule under Executive Order 12866 and Executive Order 13563 in Section V.A. of this preamble, noncitizens who receive a negative credible fear or reasonable fear determination because of the application of mandatory bars may spend less time in detention since they are deemed ineligible for relief at the screening stage. This rule would conserve DHS resources to the extent it precludes additional or more extended detention or monitoring of individuals in cases in which an AO has determined at the screening stage that a mandatory bar applies.

c. Benefits and Cost Savings

Comment: A commenter stated that given the relatively small number of cases the rule would affect and the difficulty of analyzing mandatory bars, the risk of mistaken removal far outweighs DHS's claimed expediency.

Response: As previously explained, DHS disagrees that the rule will lead to erroneous determinations. The Department is confident in the ability of AOs to apply the provisions of the rule correctly and in the safeguards in place—including 100-percent supervisory review and the ability of noncitizens to request immigration judge review of negative fear determinations—to ensure fear determinations and any resulting removals are conducted in accordance with the law. DHS has provided a detailed description of impacts of the Final Rule under Executive Order 12866 and Executive Order 13563 in Section V.A. of this preamble.

V. Statutory and Regulatory Requirements

A. Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)

Executive Order 12866 (''Regulatory Planning and Review''), as amended by Executive Order 14094 (''Modernizing Regulatory Review''), and Executive Order 13563 (''Improving Regulation and Regulatory Review'') direct agencies to assess the costs and benefits of available regulatory alternatives and, if a regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

The Office of Management and Budget (OMB) has designated this rule a ''significant regulatory action'' as defined under section 3(f) of E.O. 12866, as amended by Executive Order 14094, but it is not significant under section 3(f)(1) because its annual effects on the economy do not exceed $200 million in any year of the analysis. Accordingly, OMB has reviewed this rule.

1. Summary of Costs and Benefits of the Final Rule

DHS is amending its regulations governing credible fear and reasonable fear screenings by allowing AOs the discretion to consider of mandatory bars to asylum contained in INA sec. 208(b)(2)(A)(i)–(v), 8 U.S.C. 1158(b)(2)(A)(i)–(v), or the mandatory bars to statutory withholding of removal in INA sec. 241(b)(3)(B), 8 U.S.C. 1231(b)(3)(B), and, consequently, reducing the amount of time that some noncitizens who are subject to those bars remain in the United States. AOs would have the discretion to consider the potential application of certain mandatory bars to asylum and statutory withholding of removal when screening the noncitizen for a credible fear of persecution (including cases where the CLP rule's presumption of asylum ineligibility applies and no exception or rebuttal is established, as well as credible fear determinations subject to the limitation on asylum eligibility pursuant to the Securing the Border rule where no exception is established) or reasonable fear of persecution.

The final rule changes and streamlines the adjudicatory process for affected asylum or statutory withholding of removal claims arising out of the expedited removal process, as well as reinstatement of removal and certain final administrative removal order processes. By providing USCIS AOs flexibility to apply the public safety and national security statutory bars, the rule could enhance the public safety of the United States with the swift removal of some noncitizens from the country who pose a threat to public safety or national security.

Table 1 provides a detailed summary of estimated quantifiable and unquantifiable impacts of the Final Rule's provisions.

TABLE 1—SUMMARY OF THE EXPECTED IMPACTS OF THE FINAL RULE

Population impacted	Annual population estimate	Expected impacts
Noncitizens issued credible fear determinations by USCIS.	USCIS credible fear determinations have ranged from 28,000 to 125,000 noncitizens per year in the last 5 fiscal years (see Table 3).	• Noncitizens who receive a positive credible fear determination and are referred to EOIR by USCIS might benefit from less time waiting for an immigration judge's decision on their protection claims. This is a benefit in terms of equity and fairness, for noncitizens. • Noncitizens who receive a negative credible fear determination due to application of mandatory bars may spend less time in detention, if they do not otherwise establish potential eligibility for protection under the Convention Against Torture. • Noncitizens who receive a negative credible fear determination due to application of mandatory bars might lose the opportunity to gather evidence during the period of time between the fear screening and the merits immigration judge hearing. The noncitizen might either contest application of mandatory bars in full merits proceedings, or seek appellate review of the adjudicator's application of the bar during a merits proceeding.
Noncitizens issued reasonable fear determinations by USCIS.	USCIS reasonable fear determinations have ranged from 3,400 to 8,000 noncitizens per year in the last 5 fiscal years (see Table 3).	• Noncitizens who receive a positive reasonable fear determination and are referred to EOIR by USCIS might benefit from shorter waiting times for an immigration judge's decision on withholding or deferral of removal only. • Noncitizens who receive a negative reasonable fear determination due to application of mandatory bars may spend less time in detention, if they do not otherwise establish potential eligibility for protection under the Convention Against Torture. • Noncitizens who receive a negative reasonable fear determination due to application of mandatory bars might lose the opportunity to gather evidence during the period of time between the fear screening and the merits immigration judge hearing. The noncitizen might either contest application of mandatory bars, or seek appellate review of the adjudicator's application of the bar during a merits proceeding.
DHS–USCIS	850 AOs onboard as of Aug. 15, 2024 [103].	• In credible/reasonable fear cases where the AO exercises discretion to apply one of the mandatory bars, additional time may be spent developing the record as to the mandatory bar during fear screening interviews and conducting the written analysis related to the mandatory bar for the fear determination. This additional time may be offset to an extent by not having to include a separate analysis on the merits of the persecution claim in the fear determination where the negative credible or reasonable fear of persecution finding rests solely on the application of a mandatory bar. SAOs, in turn, may also spend additional time reviewing mandatory bar analyses in fear determinations where AOs exercise discretion to apply a mandatory bar at the screening stage.
EOIR	734 immigration judges at end of FY 2023, as well as support staff and other personnel [104].	• Potential non-budgetary cost savings if time worked on credible fear cases and reasonable fear cases decreases due to a reduction of referrals of credible fear and reasonable fear cases for full proceedings on the merits before immigration judges.

In addition to the impacts summarized above, and as required by OMB Circular A–4, Table 2 presents the prepared accounting statement showing the costs and benefits to individuals affected by this rule.[105]

TABLE 2—OMB A–4 ACCOUNTING STATEMENT TIME PERIOD: FY 2019 THROUGH FY 2023

Category	Primary estimate	Minimum estimate	Maximum estimate	Source citation
BENEFITS				
Monetized Benefits	N/A	N/A	N/A	RIA
Annualized quantified, but unmonetized, benefits.	N/A	N/A	N/A	RIA
Unquantified Benefits	The final rule will enable some asylum seekers to move through the asylum process more quickly than may be the case currently, with potential decreases in adjudication timelines, thus promoting both fairness with potentially less time in confinement for those noncitizens subject to a bar, if they do not otherwise establish potential eligibility for protection under the Convention Against Torture regulations and equity for those noncitizens in removal proceedings who are not subject to a mandatory bar. In this rule the swift removal of these noncitizens may create disincentives for other noncitizens who would be subject to these mandatory bars when considering attempting to enter the United States. The final rule might enhance the public safety of the United States due to swift removal of some noncitizens from the country who pose a threat to public safety or national security.			RIA
COSTS				
Annualized monetized costs	N/A	N/A	N/A	RIA

[103] Memorandum for the Record, from Ted Kim, Assoc. Dir., Refugee, Asylum, and Int'l Operations Directorate, USCIS, *Re: Asylum Division Training, Staffing, Capacity, and Credible Fear Procedures* (Sept. 26, 2024).

[104] EOIR, ''Immigration Judge (IJ) Hiring, Data Generated: July 19, 2024'' *https://www.justice.gov/eoir/media/1344911/dl?inline* (last accessed Oct. 3, 2024).

[105] OMB, ''Circular A–4'' (Nov. 9, 2023) *https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf.*

TABLE 2—OMB A–4 ACCOUNTING STATEMENT TIME PERIOD: FY 2019 THROUGH FY 2023—Continued

Category	Primary estimate	Minimum estimate	Maximum estimate	Source citation
Annualized quantified, but unmonetized, costs.	N/A	N/A	There could be potential non-budget related cost savings due to reduction of annual credible fear of persecution referrals and reasonable fear of persecution referrals for full proceedings on the merits by immigration judges, by 2.56 percent (808 credible fear of persecution cases on average per year) and 17.61 percent (174 reasonable fear of persecution cases on average per year) respectively, as this would allow resources at EOIR to be directed to other work..	RIA
Qualitative (unquantified) costs	Noncitizens who receive a negative credible fear or reasonable fear determination might lose the opportunity to gather evidence and contest the application of mandatory bars in full merits hearing or seek appellate review of the immigration judge's decision, as they will be removed quickly under this rule. Where AOs exercise discretion to apply a mandatory bar at the screening stage, AOs will spend additional time eliciting testimony related to and analyzing the mandatory bar in the screening determination, and SAOs will spend additional time reviewing fear determinations containing a mandatory bar analysis. This additional time spent by AOs may be offset to an extent by not having to include a separate persecution analysis in the fear determination where the negative credible or reasonable fear of persecution finding rests solely on the application of a mandatory bar.			RIA
TRANSFERS				
Annualized monetized transfers	N/A	N/A	N/A	RIA
Annualized unquantified transfers	N/A	N/A	N/A	RIA
Miscellaneous Analyses/Category	*Effects*			*Source citation*
Effects on State, local, or Tribal governments.	None.			RIA
Effects on small businesses	This rule does not directly regulate small entities, but rather individuals.			RIA
Effects on wages	None.			RIA
Effects on growth	None.			RIA

DHS is unable to quantify the impact of this rule with respect to the consideration of the mandatory bars for noncitizens who are a danger to the security of the United States at INA secs. 208(b)(2)(A)(iv) and 241(b)(3)(B)(iv), 8 U.S.C. 1158(b)(2)(A)(iv) and 1231(b)(3)(B)(iv), should the Security Bars rule go into effect. 85 FR 84160. Because the Departments have delayed the effective date of that rule and it has never been implemented, the Department is unable to draw on historical data where this public health-related security bar has been flagged in credible fear and reasonable fear screenings. Furthermore, as explained above in Section IV.E.2, the bars to asylum and withholding of removal promulgated under the Security Bars rule would only apply in particular public health-related circumstances. *See* 85 FR at 84193 (amending 8 CFR 208.13(c)).[106] Because those circumstances are not currently in effect, DHS is unable to assess the potential population of noncitizens who would be subject to the provisions of the Security Bars and Processing rule under this rule. Finally, it is impossible to predict the number of cases when an AO would choose to use their discretion afforded by this rule to apply the security bars during a credible fear or reasonable fear screening.

2. Background and Purpose of the Rule

A DHS immigration officer who encounters a noncitizen subject to expedited removal may order the noncitizen to be ''removed from the United States without further hearing or review'' unless the noncitizen indicates ''an intention to apply for asylum'' or ''a fear of persecution'' or torture. INA sec. 235(b)(1)(A)(i), 8 U.S.C. 1225(b)(1)(A)(i); *see* 8 CFR 235.3(b)(4). If the noncitizen indicates such an intention or fear, the immigration officer must refer the noncitizen for an interview by an AO to determine whether the noncitizen has a ''credible fear of persecution.'' INA sec. 235(b)(1)(A)(ii), (B)(ii), 8 U.S.C. 1225(b)(1)(A)(ii), (B)(ii). A credible fear is defined by statute as a ''significant possibility'' that the noncitizen could establish eligibility for asylum. INA sec. 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). Under current regulations, a credible fear of persecution is a ''significant possibility'' that a noncitizen can establish eligibility for asylum under INA sec. 208, 8 U.S.C. 1158 or for statutory withholding of removal under INA sec. 241(b)(3), 8 U.S.C. 1231(b)(3). 8 CFR 208.30(e)(2). A credible fear of torture is a ''significant possibility'' that a noncitizen can establish that the noncitizen is eligible for withholding of removal or deferral of removal under the Convention Against Torture, pursuant to 8 CFR 208.16 or 8 CFR 208.17. 8 CFR 208.30(e)(3).[107]

Certain noncitizens are prohibited from contesting removability before an immigration judge or from seeking any relief from removal. *See* INA sec. 238(b)(5), 8 U.S.C. 1228(b)(5) and INA sec. 241(a)(5), 8 U.S.C.1231(a)(5). If such an individual, who is ordered removed under INA sec. 238(b), 8 U.S.C. 1228(b) or whose order of removal is reinstated under INA sec. 241(a)(5), 8

[106] Specifically, the Security Bars rule would apply to a noncitizen if a communicable disease has triggered an ongoing declaration of a public health emergency under Federal law and they (1) have symptoms indicating that they are afflicted with the disease or (2) have come into contact with the disease within the number of days equivalent to the longest known incubation and contagion period for the disease, both per guidance issued by the Secretary or the Attorney General, as appropriate. 85 FR at 84193. The rule would also allow the Secretary and the Attorney General jointly, in consultation with the Secretary of Health and Human Services, to apply the bars in other circumstances, such as where a noncitizen ''comes'' from a place where a communicable disease of public health significance is prevalent or epidemic and traveled within a period determined by the Secretary and Attorney General. *Id.*

[107] USCIS, ''Questions and Answers: Credible fear screenings,'' *https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-credible-fear-screening.* (last accessed July 31, 2024).

U.S.C.1231(a)(5), expresses a fear of return to the country to which they have been ordered removed, the case must be referred to an AO, who will determine whether the individual has a ''reasonable fear'' of persecution or torture. 8 CFR 208.31(a) and (b). A reasonable fear of persecution or torture is a reasonable possibility that the noncitizen would be persecuted on account of their race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that they would be tortured in the country of removal. 8 CFR 208.31(c).

Though mandatory bars to asylum and withholding of removal had no impact on a credible fear or reasonable fear of persecution or torture determination before the current rulemaking, pursuant to existing procedures, AOs elicit testimony related to possible mandatory bars in credible fear and reasonable fear interviews.[108] Under existing procedures, when information in the record indicates that a mandatory bar may apply to a noncitizen, the AO identifies the possible bar,[109] and if, after consultation with a supervisory AO, there are reasonable grounds to believe a mandatory bar (other than firm resettlement) applies to a noncitizen, the AO completes a Memo of Adverse Information that is forwarded to ICE to notify ICE of the potential bar.[110] Identifying any one of the possible mandatory bars does not affect the determination of whether a noncitizen has a credible fear or reasonable fear of persecution or torture.[111] In credible fear cases, regardless of whether the AO flags a mandatory bar to asylum or withholding of removal, where the AO issues a positive credible fear determination, USCIS issues the noncitizen a Form I–862, Notice to Appear (NTA), for section 240 removal proceedings for further consideration of the noncitizen's claim. 8 CFR 208.30(e)(5). In reasonable fear cases, regardless of whether the AO flags a mandatory bar to withholding of removal, where the AO issues a positive reasonable fear determination, USCIS issues the noncitizen a Form I–863, Notice of Referral to the Immigration Judge, for consideration of the noncitizen's request for withholding of removal only. 8 CFR 208.31(e).

Table 3 illustrates the total credible fear determinations (positive and negative) issued by USCIS, the total credible fear completions by USCIS (including administrative closures), the total reasonable fear determinations (positive and negative) issued by USCIS, and the total reasonable fear completions by USCIS (including administrative closures) for FY 2019 through FY 2023. From FY 2019 through FY 2023, in the aggregate and excluding administrative closures, the majority of credible fear determinations made by USCIS resulted in positive determinations: 68.76 percent of credible fear determinations issued by USCIS were positive,[112] and 31.24 percent were negative.[113] When administrative closures are included in the aggregate for that same period, 62.63 percent of credible fear completions resulted in positive determinations,[114] 28.45 percent resulted in negative determinations,[115] and 8.92 percent were administratively closed.[116] For reasonable fear determinations issued by USCIS from FY 2019 to FY 2023, in the aggregate and excluding administrative closures, 36.52 percent resulted in positive determinations,[117] and 63.48 percent resulted in negative determinations.[118] For those same years, if administrative closures are included, 25.73 percent of reasonable fear completions by USCIS resulted in positive determinations,[119] 44.72 percent resulted in negative determinations,[120] and 29.55 percent were administratively closed.[121]

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[108] *See USCIS, RAIO Directorate—Officer Training: Credible Fear of Persecution and Torture Determinations* (May 9, 2024); USCIS, *RAIO Directorate—Officer Training: Reasonable Fear of Persecution and Torture Determinations* (Feb. 13, 2017); *see also* Credible Fear Procedures Manual (CFPM), Section III.E.7; Reasonable Fear Procedures Manual (RFPM), Section III.F.

[109] In credible fear determinations, AOs flag possible bars on the Form I–870, Record of Determination/Credible fear Worksheet, and in the Global case management system; in reasonable fear determinations, AOs flag possible bars in the Global case management system.

[110] *See* CFPM, Section IV.G; *see also* RFPM Sections III.F.2. and IV.E.

[111] USCIS, ''Credible Fear Procedures Manual,'' Section IV.G, *https://www.uscis.gov/sites/default/files/document/guides/CredibleFearProceduresManual.pdf;* USCIS, ''Reasonable Fear Procedures Manual,'' Section IV.E, *https://www.uscis.gov/sites/default/files/document/guides/ReasonableFearProceduresManual.pdf.*

[112] 232,479 total positive credible fear determination/338,087 FY 2019–FY 2023 all positive and negative credible fear determinations = 68.76%

[113] 105,608 total negative credible fear determination/338,087 FY 2019–FY 2023 all positive and negative credible fear determinations = 31.24%

[114] 232,479 total positive credible fear determination/371,208 FY 2019–FY 2023 total credible fear completions = 62.63%

[115] 105,608 total negative credible fear determination/371,208 FY 2019–FY 2023 total credible fear completions = 28.45%

[116] (371,208 total credible fear completions—338,087 all positive and negative credible fear determinations)/371,208 FY 2019–FY 2023 total credible fear completions = 8.92%

[117] 10,334 total positive reasonable fear determination/28,294 FY 2019–FY 2023 all positive and negative reasonable fear determinations = 36.52%

[118] 17,960 total negative reasonable fear determination/28,294 FY 2019–FY 2023 all positive and negative reasonable fear determinations = 63.48%

[119] 10,334 total positive reasonable fear determination/40,161 FY 2019–FY 2023 total reasonable fear completions = 25.73%

[120] 17,960 total negative reasonable fear determination/40,161 FY 2019–FY 2023 total reasonable fear completions = 44.72%

[121] (40,161 total reasonable fear completions—28,294 all positive and negative reasonable fear determinations)/40,161 FY 2019–FY 2023 total reasonable fear completions = 29.55%

Table 3. Credible Fear and Reasonable Fear Data (FY 2019 through FY 2023)

	Credible Fear Data				Reasonable Fear Data			
	Credible Fear Determinations			Total Credible Fear Completions (includes administrative closures)	Reasonable Fear Determinations			Total Reasonable Fear Completions (includes administrative closures)
Fiscal Year	Positive Determinations	Negative Determinations	All Positive and Negative Determinations		Positive Determinations	Negative Determinations	All Positive and Negative Determinations	
2019	76,162	16,403	92,565	103,322	3,324	4,645	7,969	12,268
2020	12,879	16,071	28,950	33,543	1,016	3,427	4,443	7,491
2021	29,901	11,682	41,583	43,974	1,073	2,362	3,435	4,496
2022	31,571	18,740	50,311	54,097	1,873	3,052	4,925	6,092
2023	81,966	42,712	124,678	136,272	3,048	4,474	7,522	9,814
5-year Total	**232,479**	**105,608**	**338,087**	**371,208**	**10,334**	**17,960**	**28,294**	**40,161**
5-year Average	**46,496**	**21,122**	**67,617**	**74,242**	**2,067**	**3,592**	**5,659**	**8,032**

Source: USCIS Refugee, Asylum, and International Operations Directorate (RAIO), Global (queried July 31, 2024).
Notes: Fiscal Year refers to Case Completion Year.

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Table 4 presents instances where AOs flagged a potential bar to asylum or withholding of removal in a screening interview. It illustrates the distribution of possible mandatory bars across credible fear and reasonable fear completions. Without accounting for the ''firm resettlement'' bar, these mandatory bars protect the public from individuals who have persecuted others, have been convicted of significant crimes, represent a danger to the public, or have engaged in terrorist activity. Currently, flagging of any of the mandatory bars does not affect the credible or reasonable fear determination. Records show that of 232,479 total positive credible fear determinations and 10,334 total positive reasonable fear determinations for FY 2019 through FY 2023, AOs flagged mandatory bars in 15,982 total positive credible fear determinations (6.87 percent [122]) and 2,598 total positive reasonable fear determinations (25.14 percent [123]). In some instances, AOs may have flagged multiple mandatory bars in one case. Of those determinations, AOs flagged a mandatory bar other than the firm resettlement bar in 7,653 positive credible fear determinations and 2,407 positive reasonable fear determinations. Overall, AOs flagged a mandatory bar, other than the firm resettlement bar, in 3.29 percent [124] of total positive credible fear determinations and 23.29 percent [125] of total positive reasonable fear determinations.

TABLE 4—FEAR DETERMINATIONS BY SPECIFIC POSSIBLE MANDATORY BARS
[FY 2019 through FY 2023 total]

5-Year total	Positive credible fear determination	Negative credible fear determination	Positive reasonable fear determination	Negative reasonable fear determination
Total Determinations Flagging Mandatory Bars	15,982	8,923	2,598	5,242
Total Determinations Flagging Mandatory Bars Excl. Firm Resettlement Bar	7,653	4,004	2,407	4,979
Total Determinations *	232,479	105,608	10,334	17,960
Mandatory Bars as % of Total Determinations	6.87%	8.45%	25.14%	29.19%
Possible Mandatory Bars Excl. Firm Resettlement as % of Total Determinations	3.29%	3.79%	23.29%	27.72%

Source: USCIS Refugee, Asylum, and International Operations (''RAIO'') Directorate, Global (queried Sept. 9, 2024).
Note: Fiscal Year refers to Case Completion Year. Cases can have more than one possible bar. * Total Determinations row derived from Table 3: Credible Fear and Reasonable Fear Data (FY 2019 through FY 2023), 5-year totals.

[122] Calculation: 15,982 total positive credible fear determination with possible mandatory bars/232,479 FY 2019–FY2023 total positive credible fear determination = 6.87%

[123] Calculation: 2,598 total positive reasonable fear determinations with possible mandatory bars/10,334 FY 2019–FY2023 total positive reasonable fear determinations = 25.14%

[124] Calculation: 7,653 total positive credible fear determination with mandatory bar excluding firm resettlement/232,479 FY 2019–FY2023 total positive credible fear determination = 3.29%

[125] Calculation: 2,407 total positive reasonable fear determinations with mandatory bar excluding firm resettlement/10,334 FY 2019–FY2023 total positive reasonable fear determinations = 23.29%

During removal proceedings, the immigration judge determines whether a mandatory bar applies. ICE OPLA may consider and further develop the information identified by the AO when litigating before EOIR, and EOIR may consider this information along with other relevant factors in the case during the adjudication in immigration court proceedings.[126] ICE ERO and EOIR may rely upon the identification of the potential bar in making custodial determinations.[127] In Table 5, USCIS illustrates the EOIR pending caseload over the last five fiscal years. As of FY 2023, there were approximately 2.47 million pending cases. The EOIR pending caseload is a cumulative effect of multiple factors, such as, though not limited to, pending cases from previous years, new cases filed by DHS, the number of immigration judges onboard to adjudicate cases, and the space available on each judge's docket.[128]

TABLE 5—PENDING CASES, INITIAL RECEIPTS AND TOTAL COMPLETIONS AT EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (EOIR)

[FY 2019 through FY 2023]

Fiscal year	Pending cases at end of fiscal year [1]	Initial receipts [2]	Total completions [3]
2019	1,088,606	547,289	277,078
2020	1,261,077	369,705	232,296
2021	1,408,801	244,277	115,941
2022	1,791,493	707,589	314,696
2023	2,469,960	1,206,201	526,203
5-Year Total	8,019,937	3,075,061	1,466,214
5-Year Annual Average	1,603,987	615,012	293,243

Source: EOIR, ''Pending Cases, New Cases, and Total Completions, Data Generated: July 19, 2024'' *https://www.justice.gov/eoir/media/1344791/dl?inline* last accessed Oct. 3, 2024).

Notes: [1] Pending cases equals removal, deportation, exclusion, asylum-only, and withholding only.

[2] Initial receipts equals removal, deportation, exclusions, asylum-only, and withholding only.

[3] Total completions equals initial case completions plus subsequent case completions.

The purpose of this rule is to allow for consideration of mandatory bars during the credible fear of persecution screening process for certain noncitizens who are placed into expedited removal under INA sec. 235(b)(1), 8 U.S.C. 1225(b)(1) and have been referred to USCIS for a fear screening pursuant to 8 CFR 208.30, 208.33, 208.35, INA sec. 235(b)(1)(A)(ii), 8 U.S.C. 1225(b)(1)(A)(ii), and to allow for the consideration of mandatory bars during the reasonable fear screening process for certain noncitizens who have been ordered removed under INA sec. 238(b), 8 U.S.C. 1228(b), or whose deportation, exclusion, or removal order has been reinstated under INA sec. 241(a)(5), 8 U.S.C. 1231(a)(5) and who are referred to USCIS for a reasonable fear screening pursuant to 8 CFR 208.31. The rule would allow AOs discretion to consider certain mandatory bars during a screening interview and, if an AO exercises that discretion, require AOs to enter a negative fear determination where there is evidence the mandatory bar may apply, the noncitizen is unable to establish at the relevant standard that the bar does not apply, and the noncitizen is otherwise unable to demonstrate a fear of torture at the applicable standard in a given case. The specific mandatory bars this rule would allow AOs to consider are those relating to public safety and/or national security threats, with the intent of allowing the Department flexibility in some cases to more quickly remove individuals who present such concerns. As the rule is not changing the current treatment of the ''firm resettlement'' mandatory bar, any fear screening determination will not be affected by information in the record related to a possible firm resettlement bar.[129]

The rule does not apply to unaccompanied children statutorily exempted from placement into expedited removal. It also does not apply to individuals already residing in the United States and whose presence in the United States is outside the coverage of noncitizens designated by the Secretary as subject to expedited removal, provided such individuals have not been ordered removed under INA sec. 238(b), 8 U.S.C. 1228(b), or have not had an order of removal are reinstated under INA sec. 241(a)(5), 8 U.S.C.1231(a)(5). The rule also does not apply to stowaways or noncitizens who are physically present in or arriving in the Commonwealth of the Northern Mariana Islands (CNMI). Those classes of noncitizens will continue to be referred to asylum/withholding-only hearings before an immigration judge under 8 CFR 208.2(c).

3. Impacts of the Rule

a. Impacts on the Population Screened for Credible Fear or Reasonable Fear

The final rule will impact certain individuals who undergo credible fear or reasonable fear screenings. These individuals are noncitizens who, where an AO exercises discretion to consider certain mandatory bars to asylum or statutory withholding of removal, are unable to establish at the relevant standard of proof that the bar or bars at issue do not apply to them and are otherwise unable to establish a fear of torture at the applicable standard for the given case. The type of credible fear or reasonable fear screenings where this rule could be outcome-determinative is limited to cases where a noncitizen is not found to have a credible fear or reasonable fear of torture and would

[126] *See Matter of D-R-,* 25 I&N Dec. 445, 458 (BIA 2011) (''In immigration proceedings, the sole test for admission of evidence is whether the evidence is probative and its admission fundamentally fair.'' (quotation marks omitted)); *Matter of Velasquez,* 19 I&N Dec. 377, 380 (BIA 1986) (same).

[127] *Matter of R-A-V-P-,* 27 I&N Dec. 803, 805 (BIA 2020) (''The immigration judge may also consider the likelihood that relief from removal will be granted in determining whether [a noncitizen] warrants bond.'').

[128] Executive Office for Immigration Review (2024). Current Operation Environment. EOIR Strategic Plan. Available at *https://www.justice.gov/eoir/strategic-plan/strategic-context/current-operating-enviroment.* (last accessed Oct. 23, 2024).

[129] This rule will not change current treatment of the ''firm resettlement'' bar at INA sec. 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi).

have been found to have a credible fear of persecution or a reasonable fear of persecution but for the application of a bar under this rule. The type of credible or reasonable fear determination where this rule will not be outcome-determinative are cases where a positive credible or reasonable fear of torture is found. Table 6 shows positive credible fear of persecution only cases and positive reasonable fear of persecution only cases; and a subset of those cases that were identified during the last five fiscal years as having mandatory bars other than the firm resettlement bar. For FY 2019 through FY 2023, USCIS records indicated that of total positive credible fear of persecution determinations, USCIS identified a potential mandatory bar (other than firm resettlement) in 2.56 percent of total cases with a positive credible fear of persecution determination. From FY 2019 through FY 2023, USCIS identified a potential bar to withholding of removal in 17.61 percent of positive reasonable fear of persecution determinations.

TABLE 6—POSITIVE CREDIBLE FEAR OF PERSECUTION, POSITIVE REASONABLE FEAR OF PERSECUTION, POSSIBLE MANDATORY BAR FLAG EXCLUDING FIRM RESETTLEMENT

[FY 2019 through FY 2023]

Fiscal year	Credible fear of persecution			Reasonable fear of persecution		
	Positive determination		Possible mandatory bar excl. firm resettlement as share of credible fear of persecution cases (%)	Positive determination		Possible mandatory bar excl. firm resettlement as share of reasonable fear of persecution cases (%)
	Possible mandatory bar excluding firm resettlement	Total credible fear of persecution cases		Possible mandatory bar excluding firm resettlement	Total reasonable fear of persecution cases	
2019	898	50,074	1.79	173	1,333	12.98
2020	357	8,887	4.02	56	394	14.21
2021	522	24,512	2.13	82	541	15.16
2022	664	24,277	2.74	239	1,127	21.21
2023	1,600	50,132	3.19	318	1,534	20.73
5-Year Total	4,041	157,882	2.56	868	4,929	17.61
5-Year Annual Average	808	31,576		174	986	

Source: USCIS RAIO Directorate, Global (queried Sept. 9, 2024).
Note: Fiscal Year refers to Case Completion Year.
Note: Table 6 excludes Credible Fear of Torture and Reasonable Fear of Torture cases.

Table 6 does not include positive credible fear of torture and positive reasonable fear of torture determinations. This rule will not impact credible or reasonable fear cases that receive a positive fear of torture determination, since the screening for torture encompasses screening for deferral of removal under CAT, for which there are no bars. Likewise, this rule will not affect negative credible or reasonable fear determinations where the AO did not flag a mandatory bar because in those cases, the application of a mandatory bar would not change the outcome. For the latter two categories, AOs will continue to identify bars where they may be evident in the record, even if they are not outcome determinative in a given case. Based on the information provided in Table 6, the additional annualized population that could receive a negative credible fear of persecution determination in a typical year is 808, and the additional annualized population that could receive a negative reasonable fear of persecution determination is 174 due to this rule. The Department expects that AOs would choose to apply a mandatory bar to an even smaller subset of these flagged cases, because not all flagged cases have sufficient supporting evidence easily available to the AO. Under the rule, noncitizens subject to the above cited bars will be more quickly removed from the United States, freeing up the Department's resources to safely, humanely, and effectively enforce and administer the immigration laws. The public safety of the United States may be enhanced as some noncitizens who have engaged in certain criminal activity, persecuted others, or been involved in terrorist activities are quickly removed from the country. The swift removal of these noncitizens may create disincentives for other noncitizens who would be subject to these mandatory bars when considering attempting to enter the United States.

The pending caseload at EOIR (*see* Table 5) leads to extended wait times for noncitizens who received a positive credible fear determination and were then referred to EOIR by USCIS, which creates uncertainty for a subset of those ultimately determined to merit asylum and other forms of humanitarian protection. This rule might help such noncitizens experience shorter wait times, advancing equity for those noncitizens in removal proceedings who are not subject to a mandatory bar, less detention time for those noncitizens to whom a bar is applied and who otherwise have not been able to establish potential eligibility for protection under the Convention Against Torture regulations, and fairness.

Noncitizens would primarily bear the costs of the final rule. Noncitizens to whom an AO would apply the above-cited bars in credible fear and reasonable fear screenings would lose the opportunity to contest the application of the mandatory bars in a full section 240 merits hearing before an immigration judge or to seek appellate review of the immigration judge's decision should the immigration judge determine that a mandatory bar applies and affirm the negative determination. Such noncitizens would experience a shorter period of time between the fear screening before USCIS and removal under the final rule than they currently do. Therefore, they would lose the opportunity to gather additional evidence to show that the mandatory bar in question should not be applied in their case.

b. Impacts to USCIS

AOs will have the discretion to consider certain mandatory bars, while evaluating whether the noncitizen has met the requisite standard of proof with respect to their eligibility for asylum or statutory withholding of removal, as

applicable, when making credible fear determinations and reasonable fear determinations under this rule. Under this rule, noncitizens will still be able to seek review of negative credible fear or reasonable fear determinations before an immigration judge. AOs already identify potential mandatory bars in credible fear or reasonable fear determinations, and under this rule will only consider a bar in those cases where there is easily verifiable evidence available to the AO that a mandatory bar may apply, and the AO can consider that bar efficiently during a screening interview.

In some cases, the final rule will result in AOs spending additional time during fear screenings to inquire into the applicability of mandatory bars, additional time documenting the mandatory bar analysis for the credible or reasonable fear determination, and additional time spent by SAOs to review any mandatory bar analysis. This additional time may be offset to an extent by not having to include a separate persecution analysis in the fear determination where the negative credible or reasonable fear of persecution finding rests solely on the application of a mandatory bar. AOs will have discretion whether to consider such bars at the screening stage and could therefore minimize the government costs associated with the final rule in cases where the additional development of the record and analysis would not be outcome determinative or an otherwise effective use of resources.

The benefits of the final rule are expected to include a modest, unquantified reduction of the resources expended to detain noncitizens subject to the above cited mandatory bars for potentially lengthy periods of time while their cases are considered by immigration courts.

c. Impacts to EOIR

Where application of this rule results in a negative credible fear or reasonable fear determination that would have otherwise been a positive credible fear of persecution or reasonable fear of persecution determination, those cases will not be referred to EOIR for removal proceedings. This rule is therefore expected to reduce the number of credible fears of persecution and reasonable fear of persecution cases being referred to EOIR for removal proceedings. Additionally, immigration judges will continue to conduct de novo review of a negative credible fear and reasonable fear determinations when requested by a noncitizen. Preventing certain cases where a mandatory bar applied at the screening stage from being placed into removal proceedings before EOIR, may create additional capacity for immigration judges to work on their existing caseloads and other high-priority matters.

Accordingly, every such positive credible fear or reasonable fear of persecution determination that would have been referred to EOIR for removal proceedings that, instead, results in a negative determination under this rule will constitute a direct reduction in new cases that EOIR would have to adjudicate. If the negative determination is concurred upon by an immigration judge where a review is requested. Given EOIR's significant pending caseload of approximately 2.47 million cases (*see* Table 5), reducing the number of positive credible fear of persecution cases referred to EOIR by 2.56 percent [130] and positive reasonable fear of persecution cases referred to EOIR by 17.61 percent [131] (*see* Table 6) as upper bound estimates, will enable EOIR to focus limited resources on existing pending cases and reduce the overall pending caseload.

The estimated reduction in new cases is based on positive credible or reasonable fear of persecution cases referred to EOIR from FY 2019 through FY 2023 and should be considered as an upper bound due to (a) lack of sufficient supporting evidence of application of mandatory bars except for firm resettlement available to AOs during the screening stage and (b) conversion of a subset of fear of persecution cases to fear of torture cases after application of mandatory bars. A reduction in the pending caseload will reduce the overall time required for adjudications because dockets would not have to be set as far into the future. This reduction in turn would better enable EOIR to meet its mission of fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws, including granting relief or protection to noncitizens who are eligible.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law 104–121 (March 29, 1996), requires Federal agencies to consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, or governmental jurisdictions with populations of less than 50,000.[132]

DHS has reviewed this rule in accordance with the RFA, Public Law 96–354, 94 Stat. 1164 (1980), as amended (codified at 5 U.S.C. 601–612) and has certified that this rule would not have a significant economic impact on a substantial number of small entities. The rule would not regulate ''small entities'' as that term is defined in 5 U.S.C. 601(6). Only individuals, rather than entities, are eligible to apply for asylum or are otherwise placed in immigration proceedings.

C. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and Tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed rule, or final rule for which the agency published a proposed rule, which includes any Federal mandate that may result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector.[133] The inflation adjusted value of $100 million in 1995 is approximately $200 million in 2023 based on the Consumer Price Index for All Urban Consumers (CPI–U).[134]

[130] Calculation: 808 5-Year Average of Positive credible fear of persecution cases with a flag of mandatory bar excluding ''firm resettlement''/ 31,576 5-Year Average of Positive credible fear of persecution cases = 2.56 percent.

[131] Calculation:- 174 5-Year Average of Positive credible fear of persecution cases with a flag of mandatory bar excluding ''firm resettlement''/986 5-Year Average of Positive credible fear of persecution cases = 17.61 percent.

[132] A small business is defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act, 15 U.S.C. 632.

[133] *See* Public Law 104–4, 109 Stat. 48; *see also* 2 U.S.C. 1532(a).

[134] *See* Bureau of Labor Statistics, ''Historical Consumer Price Index for All Urban Consumers (CPI–U): U.S. city average, all items, by month,'' *https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202312.pdf* (last visited Jan. 17, 2024). Calculation of inflation: (1) Calculate the average monthly CPI–U for the reference year (1995) and the current year (2023); (2) Subtract reference year CPI–U from current year CPI–U; (3) Divide the difference of the reference year CPI–U and current year CPI–U by the reference year CPI–U; (4) Multiply by 100 = [(Average monthly CPI–U for 2023 − Average monthly CPI–U for 1995) ÷ (Average monthly CPI–U for 1995)] × 100 = [(304.702–152.383) ÷ 152.383] = (152.319/152.383) = 0.99958001 × 100 = 99.96 percent = 100 percent (rounded). Calculation of inflation-adjusted value:

Continued

The term ''Federal mandate'' means a Federal intergovernmental mandate or a Federal private sector mandate.[135] The term ''Federal intergovernmental mandate'' means, in relevant part, a provision that would impose an enforceable duty upon State, local, or Tribal governments (except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program).[136] The term ''Federal private sector mandate'' means, in relevant part, a provision that would impose an enforceable duty upon the private sector except (except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program).[137]

This rule does not contain such a mandate, because it does not impose any enforceable duty upon any other level of government or private sector entity. Any downstream effects on such entities would arise solely due to their voluntary choices and would not be a consequence of an enforceable duty. Similarly, any costs or transfer effects on State and local governments would not result from a Federal mandate as that term is defined under UMRA.[138] The requirements of title II of UMRA, therefore, do not apply, and DHS has not prepared a statement under UMRA.

D. Small Business Regulatory Enforcement Fairness Act of 1996 (Congressional Review Act)

The Congressional Review Act (CRA) was included as part of SBREFA by section 804 of SBREFA, Public Law 104–121, 110 Stat. 847, 868, *et seq.* The Office of Information and Regulatory Affairs has determined that this rule does not meet the criteria set forth in 5 U.S.C. 804(2). DHS has complied with the CRA's reporting requirements and has sent this rule to Congress and to the Comptroller General as required by 5 U.S.C. 801(a)(1).

E. Executive Order 13132 (Federalism)

Executive Order 13132 was issued to ensure the appropriate division of policymaking authority between the States and the Federal Government and to further the policies of UMRA. 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.

F. Executive Order 12988 (Civil Justice Reform)

This rule was drafted and reviewed in accordance with Executive Order 12988, Civil Justice Reform. DHS has determined that this rule meets the applicable standards provided in section 3 of Executive Order 12988.

G. Family Assessment

DHS has reviewed this rule in line with the requirements of section 654 of the Treasury and General Government Appropriations Act, 1999,[139] enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999.[140] DHS has systematically reviewed the criteria specified in section 654(c)(1), by evaluating whether this regulatory action: (1) impacts the stability or safety of the family, particularly in terms of marital commitment; (2) impacts the authority of parents in the education, nurture, and supervision of their children; (3) helps the family perform its functions; (4) affects disposable income or poverty of families and children; (5) only financially impacts families, if at all, to the extent such impacts are justified; (6) may be carried out by State or local government or by the family; or (7) establishes a policy concerning the relationship between the behavior and personal responsibility of youth and the norms of society. If the agency determines a regulation may negatively affect family well-being, then the agency must provide an adequate rationale for its implementation.

DHS has determined that this rule will not negatively affect family well-being or the autonomy or integrity of the family as an institution, as it does not change the process for family credible fear screenings.

H. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

This rule does not have Tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

I. Executive Order 13045 (Protection of Children From Environmental Health Risks and Safety Risks)

Executive Order 13045 requires agencies to consider the impacts of environmental health risks or safety risks that may disproportionately affect children. DHS has reviewed this rule and have determined that this rule is not a covered regulatory action under Executive Order 13045. The rule is not considered significant under Section 3(f)(1) of Executive Order 12866 and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

J. National Environmental Policy Act

DHS and its components analyze final actions to determine whether the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.,* applies to them and, if so, what degree of analysis is required. DHS Directive 023–01 Rev. 01 and Instruction Manual 023–01–001–01 Rev. 01 (Instruction Manual) [141] establish the policies and procedures that DHS and its components use to comply with NEPA.

NEPA implementing procedures allow Federal agencies to establish categories of actions (''categorical exclusions'') that experience has shown do not, individually or cumulatively, have a significant effect on the human environment and, therefore, do not require an environmental assessment (EA) or environmental impact statement (EIS).[142] An agency is not required to prepare an EA or EIS for a proposed action ''if the proposed agency action is excluded pursuant to one of the agency's categorical exclusions.'' 42 U.S.C. 4336(a)(2). The Instruction Manual, Appendix A lists the DHS Categorical Exclusions.[143]

Under DHS NEPA implementing procedures, for an action to be categorically excluded, it must satisfy each of the following three conditions: (1) the entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that

$100 million in 1995 dollars × 2.00 = $200 million in 2023 dollars.

[135] *See* 2 U.S.C. 1502(1), 658(6).

[136] 2 U.S.C. 658(5).

[137] 2 U.S.C. 658(7).

[138] *See* 2 U.S.C. 1502(1), 658(6).

[139] *See* 5 U.S.C. 601 note.

[140] Public Law 105–277, 112 Stat. 2681 (1998).

[141] The Instruction Manual contains DHS's procedures for implementing NEPA and was issued November 6, 2014, available at DHS, ''Implementing the National Environmental Policy Act,'' *https://www.dhs.gov/publication/directive-023-01-rev-01-and-instruction-manual-023-01-001-01-rev-01-and-catex* (last visited July 25, 2024).

[142] 40 CFR 1507.3(e)(2)(ii) and 1501.4.

[143] *See* Appendix A, Table 1.

create the potential for a significant environmental effect.[144]

The rule allows AOs to apply certain bars to asylum and statutory withholding of removal at the fear screening stage. DHS has determined that the promulgation of this rule satisfies all three requirements for a categorical exclusion. First, the rule fits clearly within categorical exclusion A3 of the Instruction Manual, Appendix A, for the promulgation of rules that ''interpret or amend an existing regulation without changing its environmental effect.'' The rule only changes the point in time at which certain statutory bars are considered but would not change any environmental effect of the bars. Second, this rule is a standalone rule and is not part of any larger action. Third, DHS is not aware of any extraordinary circumstances that would cause a significant environmental impact. Therefore, this rule is categorically excluded, and no further NEPA analysis or documentation is required.

K. Paperwork Reduction Act

This rule does not propose new, or revisions to existing, ''collection[s] of information'' as that term is defined under the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 109 Stat. 163, 44 U.S.C. chapter 35) and its implementing regulations, 5 CFR part 1320.

List of Subjects in 8 CFR Part 208

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

Accordingly, for the reasons set forth in the preamble, the Secretary of Homeland Security amends 8 CFR part 208 as set forth below.

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

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

■ 2. Amend § 208.30 by revising the first sentence of paragraph (e)(2) and revising paragraph (e)(5) to read as follows:

§ 208.30 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.

* * * * *

(e) * * *

(2) An alien will be found to have a credible fear of persecution if there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien can establish eligibility for asylum under section 208 of the Act or for withholding of removal under section 241(b)(3) of the Act, including that the alien is not subject to a mandatory bar, if considered under paragraph (e)(5)(ii) of this section. * * *

* * * * *

(5) Except as provided in paragraph (e)(6) or (7) of this section:

(i) If an alien is able to establish a credible fear of persecution or torture but appears to be subject to one or more of the mandatory bars to applying for, or being granted, asylum contained in section 208(a)(2) and (b)(2)(A)(vi) of the Act, the Department of Homeland Security shall nonetheless issue a Notice to Appear or retain jurisdiction over the alien's case for further consideration of the alien's claim pursuant to paragraph (f) of this section, if the alien is not a stowaway.

(ii) If an alien, who is unable to establish a credible fear of torture, is able to establish a credible fear of persecution but appears to be subject to one or more of the mandatory bars to being granted either asylum or withholding of removal, as set forth in section 208(b)(2)(A)(i) through (v) of the Act or section 241(b)(3)(B) of the Act, respectively, the asylum officer may consider the applicability of such bar(s) as part of the asylum officer's credible fear determination.

(A) The asylum officer shall issue a negative credible fear finding with regard to the alien's eligibility for asylum or withholding of removal under the Act if the asylum officer determines there is not a significant possibility that, in a proceeding on the merits, the alien would be able to establish by a preponderance of the evidence that such bar(s) do not apply.

(B) The asylum officer shall issue a Notice to Appear or retain jurisdiction over the alien's case for further consideration of the alien's claim pursuant to paragraph (f) of this section, if the asylum officer finds that there is a significant possibility that, in a proceeding on the merits, the alien would be able to establish by a preponderance of the evidence that such bar(s) do not apply.

(iii) In all cases, if the alien is a stowaway and the Department would otherwise initiate proceedings under paragraphs (e)(5)(i) and (ii) of this section, the Department shall place the alien in proceedings for consideration of the alien's claim pursuant to § 208.2(c)(3) and shall not retain jurisdiction over the case for further consideration nor issue a Notice to Appear.

* * * * *

■ 3. Amend § 208.31 by revising paragraphs (c) and (g) to read as follows:

§ 208.31 Reasonable fear of persecution or torture determinations involving aliens ordered removed under section 238(b) of the Act and aliens whose removal is reinstated under section 241(a)(5) of the Act.

* * * * *

(c) *Interview and procedure.* The asylum officer shall conduct the interview in a non-adversarial manner, separate and apart from the general public. At the time of the interview, the asylum officer shall determine that the alien has an understanding of the reasonable fear determination process. The alien may be represented by counsel or an accredited representative at the interview, at no expense to the Government, and may present evidence, if available, relevant to the possibility of persecution or torture. The alien's representative may present a statement at the end of the interview. The asylum officer, in his or her discretion, may place reasonable limits on the number of persons who may be present at the interview and the length of the statement. If the alien is unable to proceed effectively in English, and if the asylum officer is unable to proceed competently in a language chosen by the alien, the asylum officer shall arrange for the assistance of an interpreter in conducting the interview. The interpreter may not be a representative or employee of the applicant's country or nationality, or if the applicant is stateless, the applicant's country of last habitual residence. The asylum officer shall create a summary of the material facts as stated by the applicant. At the conclusion of the interview, the officer shall review the summary with the alien and provide the alien with an opportunity to correct errors therein. The asylum officer shall create a written record of his or her determination, including a summary of the material facts as stated by the applicant, any additional facts relied on by the officers, and the officer's determination of whether, in light of such facts, the alien has established a reasonable fear of persecution or torture. The alien shall be determined to have a reasonable fear of persecution if the alien establishes a reasonable possibility that he or she would be persecuted on account of his

[144] DHS, ''Instruction Manual 023–01–001–01, Revision 01, Implementation of the National Environmental Policy Act (NEPA),'' V.B(2)(a)–(c), *https://www.dhs.gov/sites/default/files/publications/DHS_Instruction%20Manual%20023-01-001-01%20Rev%2001_508%20Admin%20Rev.pdf.*

or her race, religion, nationality, membership in a particular social group or political opinion, unless the alien appears to be subject to one or more of the mandatory bars to being granted withholding of removal under the Act contained in section 241(b)(3)(B) of the Act and the alien fails to show that there is a reasonable possibility that no mandatory bar applies, if the asylum officer considers such bars. The alien shall be determined to have a reasonable fear of torture if the alien establishes a reasonable possibility that he or she would be tortured in the country of removal.

* * * * *

(g) *Review by immigration judge.* The asylum officer's negative decision regarding reasonable fear shall be subject to review by an immigration judge upon the alien's request. If the alien requests such review, the asylum officer shall serve him or her with a Notice of Referral to Immigration Judge. The record of determination, including copies of the Notice of Referral to Immigration Judge, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative determination. The immigration judge's review shall proceed under the procedures set forth in 8 CFR 1208.31(g).

■ 4. Amend § 208.33 by revising paragraphs (b)(2)(i) through (iii) to read as follows:

§ 208.33 Lawful pathways condition on asylum eligibility.

* * * * *

(b) * * *

(2) * * *

(i) In cases in which the asylum officer enters a negative credible fear determination under paragraph (b)(1)(i) of this section, the asylum officer will assess whether the alien has established a reasonable possibility of persecution (meaning a reasonable possibility of being persecuted because of their race, religion, nationality, membership in a particular social group, or political opinion) or torture, with respect to the identified country or countries of removal identified pursuant to section 241(b) of the Act. As part of this reasonable possibility determination, if there is evidence that the alien is subject to one or more of the mandatory bars to being granted withholding of removal under the Act contained in section 241(b)(3)(B) of the Act, the asylum officer may consider the applicability of such bar(s).

(ii) In cases described in paragraph (b)(2)(i) of this section, if the alien establishes a reasonable possibility of persecution with respect to the identified country or countries of removal and, to the extent bars are considered, that there is a reasonable possibility that no mandatory bar applies, the Department will issue a Form I–862, Notice to Appear. If the alien establishes a reasonable possibility of torture with respect to the identified country or countries of removal, the Department will issue a Form I–862, Notice to Appear.

(iii) In cases described in paragraph (b)(2)(i) of this section, if an alien fails to establish a reasonable possibility of persecution with respect to the identified country or countries of removal or, to the extent bars are considered, fails to establish that there is a reasonable possibility that no mandatory bar applies, and fails to establish a reasonable possibility of torture with respect to the identified country or countries of removal, the asylum officer will provide the alien with a written notice of decision and inquire whether the alien wishes to have an immigration judge review the negative credible fear determination.

* * * * *

Alejandro N. Mayorkas,

Secretary, U.S. Department of Homeland Security.

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