THE NEW ASYLUM RULE ON CREDIBLE FEAR SCREENINGS AND CONSIDERATION OF ASYLUM CLAIMS BY USCIS OFFICERS:
FAQs FOR IMMIGRATION PRACTITIONERS

The Department of Homeland Security (DHS) and the Department of Justice (DOJ) have jointly issued an interim final rule that revises the processing of certain applications. These include applications for asylum, withholding of removal, and protection under the Convention Against Torture (CAT).[1] The timing of this rule coincided with the planned end of Title 42, a mechanism used to expel hundreds of thousands of asylum seekers from the United States without a hearing. Title 42 of the U.S. Code, section 265, has been used under both the Trump and Biden administrations to prohibit the entry of individuals into the United States based on the COVID-19 pandemic. This law allows the Director of the Centers for Disease Control and Prevention (CDC) to prohibit the entry of individuals if they present a danger of introduction of a communicable disease.

The Biden administration announced that use of Title 42 for this purpose would end on May 23, 2022. However, on May 20, 2022, a U.S. district court in Lafayette, Louisiana issued a preliminary injunction that prevented the administration from ending reliance on this law to expel immigrants. The administration has indicated that it plans to appeal this decision.

Even though the use of Title 42 remains in place for now, the new regulations have become effective as of May 31, 2022. The purpose of the new rule is to speed up the asylum process, with the goal of completing it within six months. The Biden administration has indicated that the new rule will be phased in slowly, with the administration initially processing only single adults from two Texas detention facilities. In addition, only asylum-seekers who plan to relocate near Boston, Los Angeles, Miami, New York, Newark, or San Francisco upon their release from detention will be enrolled in this initial phase of the program, as these cities already have "help desks" available at their local immigration courts. The

[1] 87 FR 18078 (May 31, 2022).

administration plans to process under this new rule only a few hundred asylum seekers per month during this first phase.[2]

The notable regulatory changes in the interim final rule include authorizing asylum officers within U.S. Citizenship and Immigration Services (USCIS)—instead of immigration judges (IJs)—to adjudicate the initial asylum claims. They will be limited to adjudicating the asylum claims of individuals who receive a positive credible fear determination after being placed into expedited removal. Following a positive credible fear interview (CFI), the applicant will be provided an Asylum Merits Interview (AMI) during which USCIS will decide whether to grant asylum or, in the alternative, determine the applicant's eligibility for withholding of removal or protection under CAT. Prior to this rule, those asylum claims were decided only by an IJ within the DOJ's Executive Office for Immigration Review (EOIR). USCIS will issue a Notice to Appear (NTA) to any applicant not granted asylum at an AMI. The proceedings before the IJ are to be concluded pursuant to an accelerated processing timeline the federal government is calling "streamlined" section 240 proceedings. The FAQs below address many of the concerns and questions raised by practitioners about how the new regulations will affect their clients.

Frequently Asked Questions about the Interim Final Rule

What changes does the new rule make to the screening standards for credible fear interviews?

The amendment at 8 CFR § 208.30(b) represents a return to the prior screening standards used before the Trump administration's proposal to redefine the screening standard.[3] Specifically, the new rule establishes an intentionally low standard by which an applicant is screened for a "credible fear of persecution or torture." The regulations at 8 CFR § 208.30(e) have been amended to state that the applicant must demonstrate only a "significant possibility" of establishing eligibility for asylum, withholding of removal, or protection under CAT. The new

[2] Fact Sheet, Department of Homeland Security, Implementation of the Credible Fear and Asylum Processing Interim Final Rule, May 26, 2022, https://www.dhs.gov/news/2022/05/26/fact-sheet-implementation-credible-fear-and-asylum-processing-interim-final-rule; *see also* Camilo Montoya-Galvez, U.S. to Start Interviewing Asylum-Seekers at Two Texas Detention Cites Under New Policy, CBS News, May 26, 2022, https://www.cbsnews.com/news/immigration-policy-asylum-seekers-interview-texas-detention-sites/?intcid=CNM-00-10abd1h.

[3] None of the changes to the credible fear screening standard made by the Trump administration are currently in effect. Many of the proposed regulatory changes were blocked by litigation and the current administration delayed implementation of one regulatory change. 87 FR 18078 (describing proposed changes to the credible fear screening standard that are not currently in effect).

rule also returns to the practice of not screening for mandatory bars to asylum at the credible fear interview stage.[4]

What other changes does the rule make with respect to the credible fear screening and interview process?

- The regulations at 8 CFR § 208.30(b) codify USCIS's discretionary ability to refer an asylum applicant to section 240 removal proceedings without a credible fear determination;

- The regulations at 8 CFR § 208.30(c) allow an applicant to include a concurrently arriving spouse or child in the positive credible fear evaluation and determination, unless the family declines to do so;

- The regulations at 8 CFR § 208.30(c) provide USCIS the discretion to allow an applicant to include other concurrently arriving family members in the credible fear evaluation for purposes of family unity;

- The regulations at 8 CFR § 208.30(g) establish that if a noncitizen fails to either request or decline IJ review after a negative CFI, that will be considered a request for IJ review. If an IJ finds a credible fear of persecution, the IJ will vacate the negative CFI determination and remand to DHS for further consideration of the application for asylum. If the IJ concurs with the negative credible fear determination, the individual can at that point be removed from the United States;

- The regulations at 8 CFR § 208.30(g) allow USCIS in its discretion to reconsider a negative credible fear determination with which IJ has concurred if such request for reconsideration is filed no more than seven days after IJ concurrence or prior to removal, whichever comes first, and provided no previous requests for reconsideration have been made. Any reconsideration request made prior to IJ review will be treated as an election for review by an IJ.

[4] The mandatory bars to asylum are found at INA § 208(b)(2)(A). These bars apply to a person who: ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion (commonly referred to as the "persecutor bar"); has been convicted by a final judgment of a "particularly serious crime" (which includes an aggravated felony) that constitutes a danger to the community of the United States; DHS has reasons for believing has committed a serious nonpolitical crime outside the United States prior to arrival in the United States; DHS determines, based on reasonable grounds, is a danger to the security of the United States; has firmly resettled in a third country prior to arriving in the Unites States; or has engaged in or incited terrorist activity, as described in INA §§ 212(a)(3)(B)(i) or 237(a)(4)(B).

What changes does the new rule make to the asylum application process for those in expedited removal who receive a positive credible fear determination?

Perhaps the biggest and most significant change is that USCIS, under 8 CFR § 208.30(f), may now consider the asylum application on the merits for those in expedited removal proceedings who pass a credible fear interview. Previously, an applicant who passed a credible fear interview was referred directly to section 240 removal proceedings for presentation of the case before an IJ. The new rule will allow USCIS to grant asylum to those individuals who pass a credible fear interview. An applicant who passes a credible fear interview is later scheduled for an AMI before a USCIS asylum officer, who has the authority to grant asylum following this merits interview.

What changes does the new rule make with respect to the filing of an asylum application by those in expedited removal proceedings who receive a positive credible fear determination?

Under 8 CFR § 208.3(a)(2), a written record of a positive credible fear finding satisfies the asylum application filing requirements. Therefore, noncitizens placed into the asylum merits process are not subject to the normal requirements of filing a Form I-589. Under 8 CFR § 208.3(a), the written record of a positive credible fear determination is considered an asylum application for all purposes, including the one-year filing deadline and for applying for employment authorization.[5] Under 8 CFR § 208.3(a)(2), the date that the positive credible fear determination is served on the noncitizen is considered the date of filing and receipt.

What changes does the new rule make to the biometrics requirement for those in expedited removal proceedings who receive a positive credible fear determination?

USCIS will reuse biometrics captured during the credible fear process for the AMI and any other subsequent immigration benefit. 8 CFR § 208.3(a)(2). This portion of the new rule is intended to eliminate the unnecessary and duplicative collection of biometrics.

Does the rule allow for modifications to the asylum application following a positive credible fear finding and prior to the AMI?

An applicant will be able to amend, correct or supplement information in the Form I-870, Record of Determination/Credible Fear Worksheet, within a specified time frame. 8 CFR § 208.4(b)(2). This additional information must be provided to USCIS at least seven days prior to the AMI or postmarked ten days prior if the

[5] An asylum applicant may generally apply for employment authorization after the asylum application has been pending for 150 days.

evidence is mailed. USCIS in its discretion may extend this deadline. However, USCIS cannot grant extensions for submission of additional evidence if this extension would prevent an asylum decision from being issued within 60 days after service of the credible fear determination.

Advocates are concerned that this strict timeline will make it difficult on a practical level for most applicants to present meaningful evidence in support of their asylum application or to correct any prejudicial errors. The short timeline means that applicants will have only a few weeks following the positive credible fear interview to obtain additional evidence, to translate this evidence, and to present it to USCIS in a timely fashion before the merits interview. Applicants will also have to correct any errors within that time, likely without the assistance of counsel. The concern is that the accelerated asylum merits process will not present a meaningful opportunity for applicants to establish eligibility for asylum.

How will the AMI work?

An AMI following a positive credible fear determination will operate in much the same way that an affirmative asylum interview does. Many applicants will be released on parole following a positive credible fear interview so they will no longer be in detention at the time of the AMI. The regulations at 8 CFR § 208.9(b) provide that the officer should ask questions intended to elicit information on the applicant's eligibility for asylum. The applicant will also have the right to counsel at no cost to the government. USCIS will be responsible for arranging an interpreter for the applicant. 8 CFR § 208.9(g)(2).

What is the timing of the AMI?

The AMI is to be scheduled no fewer than 21 days but not more than 45 days after service of the positive credible fear finding. 8 CFR § 208.9(a). USCIS may conduct the interview after 45 days only if exigent circumstances exist. As with the tight timeline on submission of evidence, there is a real concern that this small window of time means that most applicants will not be represented at the AMI. Once the rule has been implemented to full capacity, it is very likely that there will be an inadequate number of immigration law practitioners available to attend these interviews or consult with applicants within the 45-day window.

What will happen after the AMI?

The officer can determine whether to grant the applicant asylum or to refer the matter to accelerated section 240 removal proceedings, described in more detail below. If the matter is referred for accelerated proceedings, a verbatim transcript of the interview will be included in the referral packet. 8 CFR § 208.9(f)(2). If an officer does not grant asylum, the officer may also consider the applicant's eligibility for withholding of removal or protection under CAT. 8 CFR §

208.16(a). The asylum officer cannot grant the applicant withholding of removal or CAT, but the IJ must generally defer to the asylum officer's findings, as explained in further detail below.

How are dependents treated if the matter is referred to immigration court?

A case that is referred to immigration court under the new process will include all dependents in the application if they were included in the credible fear determination. 8 CFR §§ 208.3(a)(2), 208.14(c). Before USCIS, the spouse and children may choose to be included as dependents of the principal applicant's case or may choose to file separately for asylum as principal applicants. Even if the spouse and children move forward only as dependents of the principal's claim, the asylum officer is also required to conduct a separate screening of the dependent's claim for asylum. 8 CFR §§ 208.9(b), (i).

If the spouse and children proceed solely as dependents and are included in the referral to court for the principal, the principal's application will be deemed by EOIR to satisfy the filing requirements for the spouse and child as principal applicants. This allows the dependents to present their own claims on the merits in immigration court. 8 CFR § 1208.3(a)(2).

What is the consequence of failure to appear at an AMI?

Failure to appear at an AMI will result in a referral to accelerated section 240 removal proceedings. The original notice of proposed rulemaking allowed an asylum officer to issue an *in absentia* order of removal for failure to appear at an AMI. The interim final rule removes this provision and provides instead that a failure to appear will result in a referral to section 240 removal proceedings for "streamlined" processing. 8 CFR § 208.10(a)(1).

Who is exempt from the new rule on AMIs?

This rule applies prospectively and only to adults and families who are placed in expedited removal proceedings and indicate an intention to apply for asylum after the rule's effective date. The rule does not apply to unaccompanied children, who are exempt from expedited removal proceedings. The rule also does not apply to individuals in the United States who are not apprehended at or near the border and subject to expedited removal. Finally, the rule does not apply to: (1) stowaways or (2) noncitizens who are physically present in or arriving in the Commonwealth of the Northern Mariana Islands who are determined to have a credible fear.

The administration has also explained that the program will be rolled out slowly beginning with just a few hundred applicants per month. This means that even those who fall under the provisions of the rule requiring placement into the

accelerated proceedings may not be placed into them until the administration works to scale up the program.

Where are the new regulations governing the accelerated removal proceedings?

A new section, 8 CFR § 1240.17, was added to the regulations to govern these new accelerated EOIR proceedings.

How does USCIS refer a case to removal proceedings before EOIR?

To commence proceedings, USCIS must issue and serve a Notice to Appear (NTA). The first master calendar hearing (MCH) should occur within 30 days—but no later than 35 days—after service of the NTA. Each NTA must identify the court in which the case will proceed and make clear that the case is subject to this new section of the regulations. 8 CFR § 1240.17(b).

What other documents must the asylum officer file and serve?

DHS must also serve on the respondent and file in immigration court the AMI record, the Form I-213, Record of Deportable Alien, and the asylum officer's written decision. These must be served no later than the first MCH. Removal proceedings will be delayed until all these initial documents are served. 8 CFR § 1240.17(c).

What is the consequence of a failure to appear at a hearing before EOIR?

If the written notice requirements under INA § 240(b)(5) and 8 CFR § 1003.26 were satisfied and the respondent failed to appear at the hearing, an immigration judge must issue an *in absentia* removal order, unless the respondent's presence was waived. If the asylum officer had indicated for that same respondent eligibility for withholding of removal and/or protection under CAT, the IJ must defer to that determination and grant that/those form(s) of relief unless DHS makes prima facie showing that the respondent is not eligible for the relief. The regulations provide that, should DHS make this showing at the hearing the respondent misses, the respondent has between 10 to 30 days to respond. 8 CFR § 1240.17(d). The regulations are silent as to whether DHS may be given a later opportunity to present prima facie evidence against the respondent's eligibility for withholding or CAT, or what opportunity the respondent has to respond in such a situation.

What form must an asylum application take under the new rule?

As indicated above, the written record of a positive credible fear determination issued in accordance with 8 CFR § 208.30(f) satisfies respondent's filing requirement for asylum, withholding of removal, or protection under CAT. No new

form need be submitted to the immigration court. The record of proceedings before USCIS, including the decision, amendments, corrections, and supplements, must be admitted as evidence under the new regulation. 8 CFR § 1240.17(d). Given the tight timeline in initiating proceedings under this new rule, advocates are concerned that applicants will not have an adequate opportunity to seek counsel to amend and correct any errors in the CFI and AMI records or to gather evidence in support of their claims.

What effect will the newly accelerated schedule of proceedings have?

Perhaps the most troubling change under the new rule is the accelerated timeline of removal proceedings. Cases must be completed within no more than 135 days following the initial MCH, including any continuances, extensions, or adjournments. Below is a summary timeline under the new schedule, pursuant to 8 CFR § 1240.17(f):

- MCH: within 30-35 days after service/filing of NTA.
- Status Conference: within 30-35 days after MCH. Additional status conferences may be scheduled, but all must occur within the 60–65-day window for the merits.
- Merits Hearing: within 60-65 days after MCH.
- Continuances/extensions/adjournments: no longer than 10 days, unless the IJ finds more time will enable more efficient proceedings.
- Continued Merits Hearings: in certain circumstances described below, merits hearings may be continued for up to 90 days. In even more limited circumstances, merits may be continued up to 135 days.
- Decision: the oral decision is to be issued at the end of the merits hearing. If no merits hearing is held, then the decision must be issued 30 days after the status conference. Where this is not practicable, the decision must be issued no later than 45 days after the initial decision deadline.

As with the accelerated timeline of the AMI, and especially because the entire record of the CFI and AMI must be admitted into evidence in the removal proceedings, the expedited timeline of these proceedings presents issues of due process and access to justice for applicants subject to the rule. In addition, because no changes have been made to the employment authorization provisions, during this period the applicants are unable to work lawfully. This will likely limit the pool of private counsel willing to take such cases and thus place a high burden on an already overstretched network of nonprofit agencies and pro

bono attorneys. Without access to counsel, history has shown that applicants are much less likely to succeed on their claims.

How does the grant of a change of venue affect this timeline?

Where a change of venue is granted, the schedule of proceedings begins again with the MCH at the new court where venue has been transferred.

What occurs at an MCH under the new accelerated process?

The new process limits what occurs at the initial MCH. The IJ must provide advisals to the respondent under 8 CFR § 1240.10(a) and advise the respondent as to the nature of the proceedings. This includes advising them that they have pending applications for asylum, withholding of removal and protection under CAT. The judge must also advise the respondents of their right to present evidence, testify, and call witnesses, and of their obligation to comply with all deadlines. Finally, the judge must order a status conference to be scheduled within 30 to 35 days after the MCH. 8 CFR § 1240.17(f).

What occurs at a status conference under the new rule?

Under the new rule, only the first hearing before the IJ is called an MCH. All other hearings up until the final merits hearing are termed "status conferences" (SCs), with the first SC being scheduled within 30-35 days after the MCH. During SCs, the respondent pleads to the allegations, the parties and court identify and narrow the issues to be decided, and the court determines whether the case can be decided on the paper record. If the court deems a merits hearing will be necessary, the case is readied and a merits hearing date is set no later than 60-65 days following the MCH. While any number of SCs may be held before the merits hearing, they must occur within this window of time. 8 CFR § 1240.17(f). The interim final rule provides additional guidance on the exact events that must occur at an SC. In addition to pleading to the NTA, the respondents must indicate what relief they are seeking. They must also: (1) express whether they want to testify, (2) identify witnesses, (3) provide supporting documents, (4) describe errors in the AMI record or decision, and (5) state any additional bases for asylum or other relief. Requirements indicated in (4) and (5) do not apply to pro se applicants. Where a respondent does not contest removal or seek further relief, the IJ shall order removal and defer to any asylum officer's determination that the respondent is eligible for withholding of removal or protection under CAT, unless DHS presents prima facie evidence that the respondent is not eligible for those forms of relief. 8 CFR § 1240.17(f).

Practitioners must evaluate the asylum claims made at the AMI and be prepared to present additional claims where possible to preserve the client's eligibility for relief. Practitioners should also closely review the AMI record for any legal or

factual errors that should be corrected at this stage. The language of the rule is troubling because it does not appear to allow for the objection to the admission of evidence from the AMI record. Practitioners, however, should always object to evidence where fundamental fairness and due process mandate its exclusion. *See Matter of Ponce-Hernandez*, 22 I&N Dec. 784 (BIA 1999), *Matter of Y-S-L-C-*, 26 I&N Dec. 688 (BIA 2015). All respondents, represented or otherwise, must indicate whether they will testify and/or present additional witness testimony or documentary evidence. Practitioners should make sure that their clients preserve the right to testify. Attorneys and accredited representatives assisting *pro se* respondents must highlight this requirement so that these individuals do not waive this right. All this must occur within only 30-35 days following the MCH.

DHS, for its part, must indicate in a written statement at the SC whether it intends to rest its case, waive cross-examination, or otherwise participate in the hearings. It must also indicate whether it intends to waive appeal in the event the IJ grants relief to the respondent. Where DHS elects to participate in the case, it must express its position, identify those elements of the case it will contest, and name witnesses. DHS must also describe additional non-rebuttal or non-impeachment evidence and whether any background checks have been completed. Where the written statement is not provided at the SC, DHS must provide it no later than 15 days prior to the merits hearing or 15 days following the SC if no merits is to be scheduled. Any issue not timely addressed by DHS at the SC or in its written statement may be deemed unopposed by the judge, unless DHS is responding to claims the respondent made after the SC. Any position taken by DHS may be revoked prior to the final merits hearing, or prior to the judge's decision where no merits is held. 8 CFR § 1240.17(f).

After DHS's submission of its written statement, the respondent has until five days prior to the merits or 25 days following the SC to submit a final written statement in which he or she may reply to DHS and identify any additional witnesses or documents. At this time, practitioners may also consider pointing out any issues not addressed by DHS that should be considered waived by the court.

Will merits hearings always be held under these accelerated proceedings?

No. If DHS waives cross examination of a respondent's witnesses and neither party elects to present witness testimony, the IJ *shall* decide the case on the documentary record, unless the judge decides the record must be more fully developed. This again highlights the importance of practitioners ensuring the documentary record is complete and accurate and requesting the opportunity to present testimony to preserve the client's right to do so. If the respondent has timely requested the opportunity to present testimony and DHS has waived cross examination and is not presenting any testimony or additional evidence, the IJ shall grant the case without holding a merits hearing if the judge finds the record is fully developed (including any supplemental documentary evidence submitted

by the parties earlier in the proceedings, as described above) and the application merits approval. Otherwise, if the IJ believes the proceedings can be completed at the merits hearing, he or she shall hold such a hearing and issue an oral decision at its conclusion. If the IJ determines that proceedings cannot be completed at the merits hearing, the judge may conduct a portion of the hearing, order a SC, or take any steps deemed necessary to ensure the progression of the case towards completion. Any subsequent merits hearing cannot be scheduled later than 30 days after the initial merits hearing.

When must a decision on the applications be made by the IJ?

The IJ shall issue an oral decision on the day of the final merits hearing. If there is no merits hearing, the IJ shall issue a decision no more than 30 days after the SC. The judge may not issue a decision in a case where DHS has made a *prima facie* showing that the respondent is ineligible for withholding of removal or protection under CAT without first giving the respondent between 10-30 days to respond. Where an oral decision at the hearing or within 30 days after the SC is not practicable, the decision shall be issued no later than 45 days after those initial deadlines. 8 CFR § 1240.17(f).

When may continuances, extensions, or adjournments be granted and for how long?

Continuances requested by a respondent may only be granted for good cause shown by the respondent. They must not be longer than 10 days unless the judge finds a longer continuance or extension will result in more efficient proceedings. No continuance or extension may be granted that would cause the merits hearing to be scheduled more than 90 days after the MCH, even for good cause. The only exception is if the respondent shows that the continuance or extension is necessary to ensure a fair proceeding and notwithstanding the respondent's exercise of due diligence. Such extensions or continuances, limited to whatever time is necessary to ensure a fair proceeding, must not cause the merits hearing to be scheduled more than 135 days after the MCH. Any extensions or continuances past 135 days may only be granted if the respondent demonstrates that not doing so would violate a statute or the Constitution. 8 CFR § 1240.17(h). Although the standard for continuances under this new rule is the same as for continuances generally, the short duration of any such continuances likely offers little relief to a respondent who has good cause to request one.

DHS requests for continuances or extensions may be granted where DHS shows a significant government need. Such a need would include confirming any law enforcement agency interest in respondent, conducting a forensic or fraud-related investigation or analysis of documents, compiling information regarding the respondent's criminal history, or obtaining translations of documents. No time

limitation on such continuances or extensions appears in the rule, and the time necessary for DHS continuances or extensions is not counted in ensuring the merits hearing is scheduled within 90 or 135 days after the MCH. Practitioners may consider requesting DHS to join in a motion for continuance where a respondent needs additional time, given the lack of any time limits on such continuances when initiated by the government.

Continuances, extensions, or adjournments due to exigent circumstances may be granted by the IJ. Such circumstances include where either party or the judge is unavailable due to illness, the closure of the court, or closure of the local DHS office. A continuance, extension or adjournment granted due to exigency must be for the shortest feasible time and a finding of exigency must be made. Any time granted for such a continuance is not counted in ensuring the merits is scheduled within 90 or 135 days after the MCH. Where practitioners can argue that an exigency beyond "good cause" exists, they should consider doing so, given the time granted for such continuances or adjournments is not counted against the total 90 or 135 days allowed for the entire process.

What evidence may be excluded from the record by the IJ?

The interim rule provides that an IJ may only exclude evidence where it is not relevant or probative, if its use would be fundamentally unfair, or where it was not submitted by the applicable deadline and no timely request for extension was granted. Untimely submissions may be considered only if the evidence could not have been reasonably obtained prior to the deadline, or the exclusion of the evidence violates a statute or the Constitution. 8 CFR § 1240.17(g). As discussed above, practitioners should object to prejudicial evidence in the CFI/AMI record where its admission would violate this fundamental fairness standard. Practitioners must also, as always, be diligent in meeting deadlines, given this high standard for the admission of untimely evidence.

What does the interim final rule say about an IJ's decision(s) on the application(s)?

Where an asylum officer did not grant any relief or find any eligibility for withholding of removal or protection under CAT, the IJ shall review the application *de novo*. Where the asylum officer did not grant asylum but found eligibility for withholding of removal or protection under CAT, the IJ must review the asylum claim *de novo*. If the IJ denies the asylum claim, he or she must defer to the asylum officer decision regarding withholding of removal and/or protection under CAT, unless DHS provides prima facie evidence that the respondent is not eligible for these forms of relief. The IJ shall also grant any additional protection for which the judge finds the applicant eligible. How this will play out in practice is unclear, given that individuals who qualify for additional relief may be exempted from

accelerated processing, as discussed below. DHS cannot appeal the grant of any relief for which the asylum office made an eligibility finding, except to argue that the IJ should have denied relief based on the evidence submitted by DHS in making its prima facie case of non-eligibility. 8 CFR § 1240.17(i).

Are there individuals excepted from the accelerated proceedings under the new rule?

The regulations at 8 CFR § 1240.17(f)-(h) do not apply to certain groups of individuals. These provisions include the accelerated schedule of hearings, the provisions on the exclusion of evidence and testimony, and the limitations on continuances, extensions, and adjournments. Excepted from these sections include the following respondents who:

- Are minors, unless part of a family;
- Exhibit indicia of incompetency;
- Have produced prima facie evidence of eligibility for additional relief and indicate a desire to apply for it;
- Have produced prima facie evidence that they are not subject to removal as charged;
- The IJ finds are subject to removal to third countries to which the respondents fear return; and
- Have had their cases reopened or remanded following an immigration judge's order.

In addition, as discussed above, DHS has indicated in an early stakeholder engagement that the implementation of the interim final rule will be gradual. For some time, therefore, there will be individuals who are subject to the rule's provisions but who will not be processed under them.

How has the interim final rule changed the regulations governing the release of individuals detained pending their proceedings?

First, the interim rule added language to the regulations clarifying that individuals subject to these new, accelerated asylum proceedings are subject to detention under the expedited removal provisions for detention at INA § 235(b). Second, the regulations were amended to indicate that the only avenue for release from detention under INA § 235(b) detention is parole under INA § 212(d)(5) and 8 CFR § 212.5(b). Finally, the regulations now provide that any such parole from INA § 235(b) detention is for the limited purpose of release from custody and does not

serve as an independent basis for employment authorization under 8 CFR § 247a.12(c)(11). If any individuals released under these provisions seek to adjust status under INA § 245(a), they may argue that they are eligible given their release constitutes parole under INA § 212(d)(5). Unfortunately, for those released under these provisions, they are unlikely to access employment authorization, given that this parole does not qualify them for an employment authorization document (EAD) under 8 CFR § 247a.12(c)(11). In addition, their proceedings may conclude before they establish EAD eligibility under 8 CFR § 247a.12(c)(8) for having a pending asylum application.

THE AMI AND ACCELERATED HEARING PROCESS UNDER THE NEW RULE