OOD
PM 25-28
Effective: April 11, 2025

To: All of EOIR
From: Sirce E. Owen, Acting Director
Date: April 11, 2025

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Date: 2025.04.11 14:42:06 -04'00'

# PRETERMISSION OF LEGALLY INSUFFICIENT APPLICATIONS FOR ASYLUM

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| PURPOSE: | Provide guidance on the legal standards related to the pretermission of a legally insufficient application for asylum |
| OWNER: | Office of the Director |
| AUTHORITY: | 8 C.F.R. § 1003.0(b) |
| CANCELLATION: | None |

EOIR adjudicators have a duty to efficiently manage their dockets. *See, e.g.,* 8 C.F.R. 1003.10(b). It is clear from the almost 4 million pending cases on EOIR's docket, that has not been happening. Accordingly, this Policy Memorandum (PM) makes clear that adjudicators are not prohibited from taking—and, in fact, should take—all appropriate action to immediately resolve cases on their dockets that do not have viable legal paths for relief or protection from removal.

Aliens in removal proceedings have the burden of demonstrating eligibility for any type of relief or protection from removal. 8 U.S.C. 1229a(C)(4); 8 C.F.R. § 1240.8(d). If an alien fails to set forth prima facie eligibility for relief, such application generally can be pretermitted. Although it is well-settled that aliens must demonstrate prima facie eligibility for relief for certain applications, in certain contexts there appears to be a misapprehension by adjudicators regarding whether those same principles apply to applications for asylum. Consequently, this PM provides guidance to adjudicators who encounter legally insufficient asylum applications.

The Board of Immigration Appeals addressed pretermission of legally insufficient asylum applications more than three decades ago in *Matter of Fefe*, 20 I&N Dec. 116 (BIA 1989). However, the regulations at issue in *Matter of Fefe* are no longer in effect, and the continuing applicability of that decision is, thus, an open question. Moreover, the only other BIA decision to address the matter was subsequently vacated by the Attorney General and no longer has any precedential effect. *See Matter of E-F-H-L-*, 26 I&N Dec. 319, 322 (BIA 2014), *vacated on other grounds*, 27 I&N Dec. 226 (A.G. 2018). As a result, adjudicators lack clearly-applicable guidance as to pretermission of legally deficient asylum applications.

EOIR's interpretation of applicable law is that adjudicators may pretermit legally deficient asylum applications without a hearing. Current regulations require a hearing on an asylum application only

"to resolve factual issues in dispute." 8 CFR § 1240.11(c)(3). However, no existing regulation requires a hearing when there are no factual issues in dispute, including when the facts underlying the legal claim for asylum are undisputed, but the claim itself is legally deficient. In fact, current regulations expressly note that no further hearing is necessary once an immigration judge determines that an asylum application is subject to certain grounds for mandatory denial. *Id.*

Caselaw bolsters this conclusion. Adjudicators routinely pretermit asylum applications for a host of legal deficiencies. *E.g.*, *Valencia v. Garland*, 2023 WL 8449194, *1 (9th Cir. 2023) (untimely filing); *Zhu v. Gonzales*, 218 F. App'x 21, 23 (2d Cir. 2007) (lack of a legal nexus to a protected ground); *Matter of J-G-P-*, 27 I&N Dec. 642, 643 (BIA 2019) (disqualifying criminal conviction). Moreover, other immigration applications are subject to pretermission without a hearing when they are not legally sufficient. *See Matter of Moreno-Escobosa*, 25 I&N Dec. 114 (BIA 2009) (pretermission of application for a waiver of inadmissibility under former section 212(c) of the Immigration and Nationality Act (INA)). Asylum applications should receive similar treatment.

Additionally, the pretermission of legally deficient asylum applications is consistent with other existing law, including an immigration judge's ability to take any action consistent with his or her authorities under the law that is appropriate and necessary for the disposition of cases, 8 CFR § 1003.10(b), to generally take any appropriate action consistent with applicable law and regulations, 8 CFR § 1240.1(a)(1)(iv), and to regulate the course of a hearing, 8 CFR § 1240.1(c).

To be sure, regulations note that "[d]uring the removal hearing, the alien shall be examined under oath on his or her application." 8 CFR § 1240.11(c)(3)(iii). But the regulations also clarify that adjudicators need not take this evidence unless there are "factual issues in dispute." *Id.* § 1240.11(c)(3). Moreover, it would be highly inefficient and make little sense for adjudicators to inquire into every fact asserted in an asylum application if the fact makes no difference to the legal outcome. This is not the system contemplated in the regulations.

Similarly, the INA does not compel adjudicators to hear irrelevant evidence. Section 240(b)(1) of the INA authorizes immigration judges to "interrogate, examine, and cross-examine the alien and any witnesses" but does not establish a mandatory requirement for them to do so in every case on every application or issue.

In short, adjudicators may properly consider pretermission of a legally deficient asylum application, though the ultimate decision on pretermission remains with the presiding adjudicator.

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

Please contact your supervisor if you have any questions.