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THE ASYLUM PROCEDURES RULE

PURPOSE: Provide guidance to adjudicators on a recently published interim final rule entitled "Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers."

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AUTHORITY: 8 C.F.R. § 1003.0(b)

CANCELLATION: None

I. Introduction

On March 29, 2022, the Department of Homeland Security (DHS) and the Department of Justice (DOJ) published an interim final rule with request for comments entitled "Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers."[1] The rule took effect on May 31, 2022. The rule affects noncitizens who enter the United States, are placed in expedited removal proceedings, and allege fears of persecution or torture. The rule does two main things: (1) it gives United States Citizenship and Immigration Services (USCIS) the option to adjudicate, in the first instance, asylum claims made by noncitizens found to have credible fears of persecution or torture, and (2) it provides that, where USCIS declines to grant such an asylum claim, the noncitizen will be placed in "streamlined removal proceedings" before an immigration judge, and the record created before USCIS will be forwarded to the immigration court. Going forward under the interim final rule, immigration judges will continue to review asylum officers' credible fear determinations. They will also adjudicate cases in the new streamlined removal proceedings, with the benefit of the USCIS record, if USCIS does not grant asylum. Appellate immigration judges will adjudicate appeals arising out of streamlined removal proceedings. This

[1] *See* 87 Fed. Reg. 18078 (Mar. 29, 2022), *available at* https://www.federalregister.gov/documents/2022/03/29/2022-06148/procedures-for-credible-fear-screening-and-consideration-of-asylum-withholding-of-removal-and-cat. DHS and DOJ had originally published a notice of proposed rulemaking (NPRM) on August 20, 2021. *See* 86 Fed. Reg. 46906 (Aug. 20, 2021). In the interim final rule, DHS and DOJ: (1) made changes to the proposed rule in response to comments received, and (2) solicited additional comments on the interim final rule's revisions, to be submitted on or before May 31, 2022.

memorandum summarizes certain key provisions of the interim final rule and provides guidance on the new streamlined removal proceedings.

II. Initial Proceedings

Under the interim final rule, where a USCIS asylum officer or an immigration judge finds a noncitizen to have a credible fear of persecution or torture, USCIS has a choice how to proceed. USCIS can, as it has traditionally done, serve a Notice to Appear (NTA) on the noncitizen and file it with an immigration court, thereby placing the noncitizen in removal proceedings. *See* 8 C.F.R. § 208.30(f). Or USCIS can retain the case and decide the noncitizen's asylum eligibility in the first instance. Where USCIS retains the case, it construes the written record of the positive credible fear finding as an application for asylum, withholding of removal under the Immigration and Nationality Act (Act), and withholding or deferral of removal under the Convention Against Torture (CAT). *See* 8 C.F.R. § 208.3(a)(2). The date USCIS serves the record of the credible fear finding on the noncitizen is treated as the date of filing of the application. *See id.* An asylum merits interview (AMI) is scheduled before an asylum officer. Subject to certain exceptions, the AMI takes place between 21 and 45 days from the service of the record of the positive credible fear finding. *See* 8 C.F.R. § 208.9(a)(1). In contrast with USCIS's general practice for interviews on asylum claims, the AMI is recorded. *See* 8 C.F.R. § 208.9(f)(2).

The asylum officer subsequently issues a written decision either granting or declining to grant the noncitizen's asylum application. *See* 8 C.F.R. § 208.14(b)(c).[2] Where the asylum officer declines to grant the asylum application, the asylum officer also evaluates, in the decision, the noncitizen's eligibility for withholding of removal under the Act, and for withholding or deferral of removal under the CAT. *See* 8 C.F.R. § 208.16(a). Where the asylum officer grants the noncitizen's asylum application, the case is finished and never arrives at an immigration court. Where the asylum officer declines to grant the noncitizen's asylum application, USCIS places the noncitizen in streamlined removal proceedings by serving an NTA on the noncitizen and filing it with an immigration court. This is done regardless of the asylum officer's findings as to the noncitizen's eligibility for withholding of removal under the Act, and for withholding or deferral of removal under the CAT. *See* 8 C.F.R. §§ 208.14(c)(1), 1240.17(a).

III. Streamlined Removal Proceedings

The interim final rule creates a new type of proceeding before the Executive Office for Immigration Review (EOIR) called streamlined removal proceedings. Streamlined removal proceedings are conducted on an expedited timeline, and certain procedures apply that do not apply in ordinary removal proceedings. The specific timeline and procedures are set out in the new 8 C.F.R. § 1240.17. As discussed below, in adjudicating claims for asylum and related protection in streamlined removal proceedings, immigration judges will have the benefit of the record created before USCIS. The expectation is that having the record will assist immigration judges to adjudicate these claims efficiently. That said, even though streamlined removal proceedings are conducted on an expedited timeline, they are governed by section 240 of the Act. Except where specified in the new 8 C.F.R. § 1240.17, streamlined removal proceedings

[2] Decisions by asylum officers whether to grant asylum applications are subject to review within USCIS before they are finalized. *See* 8 C.F.R. § 208.14(b), (c).

are subject to the same rules that apply to all other removal proceedings. *See* 8 C.F.R. § 1240.17(a).

In general –

In streamlined removal proceedings, the respondent may continue to seek asylum and related protection. If the respondent is eligible for another form of immigration relief, the respondent may apply for that relief as well. In addition, a respondent in streamlined removal proceedings, like any respondent in removal proceedings, may argue that they are not subject to removal as charged.[3]

Both parties in streamlined removal proceedings may submit testimony or evidence for the immigration judge to consider. Should a party elect to do so, the evidence or testimony is excluded only if it is not relevant or probative, if its use is fundamentally unfair, or, subject to exceptions, if it is untimely. *See* 8 C.F.R. § 1240.17(g).

Record –

No later than the initial master calendar hearing, DHS must serve the respondent and the immigration court with the written record of the positive credible fear determination, all non-classified documentation considered by the asylum officer, a verbatim transcript of the AMI, the asylum officer's written decision, and the Form I-213, *Record of Deportable/Inadmissible Alien*, pertaining to the respondent. *See* 8 C.F.R. §§ 208.9(f), 1240.17(c). The respondent is not required to file a Form I-589, *Application for Asylum and for Withholding of Removal*; the written record of the positive credible fear determination is construed as the application for asylum, withholding of removal under the Act, and withholding or deferral of removal under the CAT. *See* 8 C.F.R. § 1208.3(a)(2).

Schedule –

For all cases in streamlined removal proceedings, the immigration court holds an initial master calendar hearing and a subsequent status conference. At both the hearing and the status conference, the immigration judge must give the respondent specific advisals as to the nature of streamlined removal proceedings. *See* 8 C.F.R. § 1240.17(f)(1), (2). In general terms, the purpose of the status conference is for the immigration judge to take pleadings, for DHS counsel to state the extent to which DHS expects to participate in the case, and for the parties to narrow the issues to the extent possible. *See* 8 C.F.R. § 1240.17(f)(2). There are certain requirements for the status conference that are specific to represented cases and do not apply to pro se respondents. *See* 8 C.F.R. § 1240.17(f)(2)(i)(A). Both parties are subject to filing deadlines set forth in the interim final rule. *See* 8 C.F.R. § 1240.17(f)(2)(i)(A)(*1*)(*iii*), (f)(2)(ii)(B)(*4*), (f)(3)(i), (f)(3)(ii). The interim final rule anticipates that immigration judges will be able to resolve some cases without a merits hearing, and the rule sets forth criteria for judges to apply in determining whether a merits hearing is needed in a particular case. *See* 8 C.F.R. § 1240.17(f)(4).

[3] As noted below, certain of the interim final rule's streamlining provisions do not apply in some cases where the respondent has made a prima facie showing that they are not subject to removal as charged, or that they are eligible for relief other than asylum, related protection, or voluntary departure.

The interim final rule specifies when the initial master calendar hearing, the status conference, and any merits hearings are held. Unless the immigration judge has granted a continuance under the standards of the interim final rule, or service of the record of the positive credible fear determination was delayed, hearings and status conferences must be held on the timeline below.[4]

- The initial master calendar hearing is held 30 days after the NTA is served or, if it cannot be held on that date, no later than 35 days after service. *See* 8 C.F.R. § 1240.17(b).

- The status conference is held 30 days after the master calendar hearing or, if it cannot be held on that date, no later than 35 days after the master calendar hearing. *See* 8 C.F.R. § 1240.17(f)(1).

- Where a merits hearing is needed, it is held 60 days after the master calendar hearing. If it cannot be held on that date, it is held no later than 65 days after the master calendar hearing. *See* 8 C.F.R. § 1240.17(f)(2). Where more than one merits hearing is needed, any and all merits hearings subsequent to the initial merits hearing are held no later than 30 days after the initial merits hearing. *See* 8 C.F.R. § 1240.17(f)(4)(iii)(B).

Finally, the interim final rule specifies, at 8 C.F.R. § 1240.17(f)(5), when the immigration judge must issue their decision. Under this provision –

- Whenever practicable, the immigration judge shall issue an oral decision on the date of the final merits hearing or, if the immigration judge determines that no merits hearing is warranted, no later than 30 days after the status conference.

- Where issuance of an oral decision on the date specified above is not practicable, the immigration judge shall issue an oral or written decision as soon as practicable, and in no case more than 45 days after that date.

The interim final rule sets forth certain limited exceptions to the above requirements for the timing of decisions; these exceptions are set out at 8 C.F.R. § 1240.17(f)(5). Unless these exceptions apply, immigration judges must issue their decisions on the above timeline.

Continuances and filing extensions –

The interim final rule contains detailed provisions addressing continuances and extensions of filing deadlines. The rule sets forth varying standards for when the immigration judge can continue a case or extend a filing deadline; the standard the judge applies depends on which party requested the continuance or extension and how long the case has already been delayed. *See* 8 C.F.R. § 1240.17(h)(1)-(3). Regardless of how long a case has already been delayed, an immigration judge may always grant a respondent's request for a continuance or filing extension if the respondent demonstrates that failure to grant the request would be contrary to statute or the Constitution. *See* 8 C.F.R. § 1240.17(h)(2)(iii). In addition, regardless of other factors, an immigration judge may continue a case, or extend a filing deadline, due to exigent

[4] Initial master calendar hearings are scheduled by DHS; status conferences and other hearings are scheduled by the immigration court.

circumstances, such as where the judge, the respondent, or a counsel is unavailable due to illness. *See* 8 C.F.R. § 1240.17(h)(4).

Adjudications –

In streamlined removal proceedings, as in all removal proceedings, the immigration judge must rule on any arguments that the respondent is not subject to removal as charged, and must adjudicate any claims to immigration relief the respondent makes.

With respect to claims for asylum and related protection already considered by the asylum officer, the immigration judge adjudicates these claims de novo. *See* 8 C.F.R. § 1240.17(i)(1). The only exception is that, where the asylum officer found the respondent eligible for withholding of removal under the Act, or for withholding or deferral of removal under the CAT, and the immigration judge denies the respondent's asylum application, the judge *must*, unless certain, specified circumstances are present, give effect to the protections under the Act or the CAT for which the asylum officer found the respondent eligible. *See* 8 C.F.R. § 1240.17(i)(2).

In absentia –

Subject to limited exceptions, where an asylum officer found the respondent eligible for withholding of removal under the Act, or for withholding or deferral of removal under the CAT, and the respondent subsequently fails to appear in court, the immigration judge must give effect to the applicable protection if the immigration judge orders the respondent removed in absentia. *See* 8 C.F.R. § 1240.17(d). The immigration judge otherwise handles respondents' failure to appear in court the same as in standard, non-streamlined removal proceedings.

Appeals –

An immigration judge's decision in streamlined removal proceedings is subject to appeal to the Board of Immigration Appeals. However, where an asylum officer found the respondent eligible for withholding of removal under the Act, or for withholding or deferral of removal under the CAT, and the immigration judge gives effect to this protection, DHS' authority to appeal is limited. *See* 8 C.F.R. § 1240.17(i)(2).

Exceptions –

The interim final rule specifies situations in which certain of the rule's streamlining provisions do not apply. Examples include where the respondent has exhibited indicia of mental incompetency or the case has been reopened or remanded. Other examples include some cases where the respondent has made a prima facie showing that they are not subject to removal as charged, or that they are eligible for relief other than asylum, related protection, or voluntary departure. *See* 8 C.F.R. § 1240.17(k).

Comment period –

The interim final rule was published with a 60-day comment period that ran through May 31, 2022, the day the rule took effect. Comments received from the public on the rule's provisions will be considered and addressed by DOJ and DHS in a future rule. *See* 87 Fed. Reg. 18078. Thus, the above procedures may be changed in light of the comments received.

For EOIR adjudicators –

All immigration judges, at both the trial and appellate level, and appropriate legal staff shall receive training on streamlined removal proceedings. When adjudicating such cases in the courts, immigration judges must adhere to the timelines set out in 8 C.F.R. § 1240.17 and discussed above. The interim final rule contains detailed provisions addressing the topics discussed above. It is critical that immigration judges and legal staff carefully review the text of 8 C.F.R. § 1240.17 before handling cases in streamlined removal proceedings. They are also encouraged to familiarize themselves with the interim final rule's preamble, which elaborates on the rule's provisions.

Immigration judges and legal staff should bear in mind that, though streamlined removal proceedings are novel in some respects, they are governed by section 240 of the Act. All rights guaranteed to parties by section 240 of the Act apply in streamlined removal proceedings. For example, respondents in streamlined removal proceedings have the right to be represented by counsel at no expense to the Government, and they have the right to a reasonable opportunity to present evidence and to examine DHS' evidence. *See* section 240(b)(4) of the Act. In addition, the normal burdens of proof under section 240 of the Act and 8 C.F.R. § 1240.8 apply in streamlined removal proceedings. For example, where a respondent in streamlined removal proceedings is charged as being in the United States without being admitted or paroled, DHS has the initial burden to establish the alienage of the respondent; where DHS does so, the burden on inadmissibility then flips to the respondent. *See* section 240(c)(2) of the Act; 8 C.F.R. § 1240.8(c). Where a respondent in streamlined removal proceedings applies for discretionary relief from removal, the respondent has the burden to establish that he or she is eligible and merits relief in the exercise of discretion. *See* section 240(c)(4)(A) of the Act.

IV. Conclusion

This Director's Memorandum has summarized the interim final rule's major provisions. Updated guidance may be forthcoming once DOJ and DHS, taking into account comments received from the public, engage in further rulemaking. If you have any questions, please contact your supervisor.[5]

[5] This memorandum is not intended to, does not, and may not be relied up on 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. Immigration judges and appellate immigration judges must always exercise their independent judgment and discretion in adjudicating cases, consistent with the law. *See* 8 C.F.R. §§ 1003.1(d)(1)(ii), 1003.10(b).