



# Federal Register

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**Monday,  
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## **Part III**

### **Department of Homeland Security**

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**8 CFR Parts 208, 212, and 235  
Implementation of the Agreement  
Between the Government of the United  
States of America and the Government of  
Canada Regarding Asylum Claims Made  
in Transit and at Land Border Ports-of-  
Entry; Final Rule**

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### **Department of Justice**

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**8 CFR Part 1003 et seq.  
Asylum Claims Made by Aliens Arriving  
From Canada at Land Border Ports-of-  
Entry; Final Rule**

**DEPARTMENT OF HOMELAND SECURITY****8 CFR Parts 208, 212, and 235**

[CIS No. 2255-03]

RIN 1615-AA91

**Implementation of the Agreement Between the Government of the United States of America and the Government of Canada Regarding Asylum Claims Made in Transit and at Land Border Ports-of-Entry**

AGENCY: Department of Homeland Security.

ACTION: Final rule.

**SUMMARY:** This rule codifies specific terms of an agreement between the United States and Canada that permits the respective governments to manage which government decides certain aliens' requests for protection from persecution or torture pursuant to domestic implementation of international treaty obligations. This rule establishes U.S. Citizenship and Immigration Services ("USCIS") asylum officers' authority to make threshold determinations concerning applicability of this agreement in the expedited removal context. In addition, this rule codifies the existing definitions of "credible fear of persecution" and "credible fear of torture" without altering those definitions.

**DATES:** This final rule is effective December 29, 2004.

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**I. Background**

On March 8, 2004, the Secretary of Homeland Security and the Attorney General promulgated proposed rules to implement terms of the "Agreement Between the Government of the United States of America and the Government of Canada for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries" ("Safe Third Country Agreement" or "Agreement"), which, consistent with section 208(a)(2)(A) of the Immigration and Nationality Act ("Act") (8 U.S.C. 1158(a)(2)(A)), provide for the return of certain asylum seekers to the "country of last presence." 69 FR 10620, 69 FR 10627. The Agreement is available both on the USCIS Web site, <http://www.uscis.gov>, and the Web site for the U.S. Embassy in Canada, [http://www.usembassycanada.gov/content/can\\_usa/safethirdfinal\\_agreement.pdf](http://www.usembassycanada.gov/content/can_usa/safethirdfinal_agreement.pdf).

The proposed rules outlined how the Department of Homeland Security (DHS) and the Department of Justice (DOJ) proposed to address the asylum, withholding of removal, and Convention Against Torture claims ("protection claims") of aliens seeking to enter the U.S. at U.S.-Canada land border ports-of-entry, or in transit through the U.S. during removal by the Canadian government, in accordance with the Safe Third Country Agreement. The Agreement allocates responsibility between the United States and Canada whereby one country or the other (but not both) will assume responsibility for processing the claims of certain asylum seekers who are traveling from Canada into the United States or from the United States into Canada. The Agreement provides for a threshold determination to be made concerning which country will consider the merits of an alien's protection claim, enhancing the two nations' ability to manage, in an orderly fashion, asylum claims brought by persons crossing our common border. As discussed in the **SUPPLEMENTARY INFORMATION** section in

the preamble to those proposed rules, the Agreement allocates resources and provides for prescreening of asylum and related claims in certain instances during the expedited removal process, where the asylum officer would determine whether any of the Agreement's exceptions apply or whether aliens should be returned to Canada for consideration of their protection claims. The limited number of aliens arriving from Canada at land border ports-of-entry or in transit during removal by the Canadian government who are placed in removal proceedings under section 240 of the Act (8 U.S.C. 1229a) (instead of being processed through expedited removal procedures) would have the Agreement applied to them in the first instance by immigration judges of the Executive Office for Immigration Review ("EOIR"), as outlined in the DOJ proposed rule at 69 FR 10627 *et seq.* In response to the DHS proposed rule, DHS received 7 sets of comments from non-governmental organizations ("NGOs") and the Office of the United Nations High Commissioner for Refugees ("UNHCR"). While incorporating several of the comments, this final rule implements the basic approach discussed in the March 8 rule proposed by DHS.

The following discussion of the comments received by DHS corresponds generally to the variety of issues raised by commenters and is arranged into the following categories: Validity of the threshold screening process identified in the proposed rule; issues related to detention of asylum seekers; procedural safeguards under the threshold screening process; adjudication of the Agreement's several exceptions to its general rule of returning certain asylum seekers to Canada; procedures for asylum seekers bound for and returned from Canada; monitoring of the Agreement's implementation and impact; and Agreement terms unrelated to processing asylum seekers coming to the United States from Canada. Within each category, the discussion summarizes the relevant comments and offers the Department's responses, including an explanation of any changes made to the rule. Following the discussion of the comments is an explanation of one minor conforming regulatory amendment included in the final rule to ensure that existing regulations governing the expedited removal process are consistent with the threshold screening interview mechanism adopted in DHS' final rule. Many commenters took issue with the Agreement itself, challenging its wisdom on policy grounds. This

Supplementary Information to the final rule, while endeavoring to address each comment as fully as possible, does not engage in a policy debate about the Agreement itself.

## II. Validity of the Threshold Screening Process

One commenter indicated that creating a special process to assess the applicability of the Agreement and its exceptions would result in increased inefficiency and bureaucracy. The Department disagrees and, to the contrary, believes that the threshold screening process is the most efficient mechanism for implementing the Agreement. It will not create additional bureaucracy. The threshold screening process adopts existing processes from the credible fear process, will be a streamlined determination, and can be transitioned seamlessly to the credible fear process if an exception to the Agreement is found.

Other commenters argued that the new threshold screening process is legally insufficient, if not contrary to existing laws, because it does not occur as part of the credible fear determination and does not provide for independent administrative review of negative decisions by immigration judges. These commenters have concluded that the proposed process does not, therefore, comport with statutory expedited removal provisions. Specifically, the commenters identify sections 235(b)(1)(A)(ii) and 235(b)(1)(B) of the Act (8 U.S.C. 1225(b)(1)(A)(ii), 1225(b)(1)(B)), which provide that asylum officers shall interview arriving aliens who are inadmissible under section 212(a)(6)(C) or 212(a)(7) of the Act (8 U.S.C. 1182(a)(6)(C), 1182(a)(7)) and who indicate either an intention to apply for asylum or a fear of persecution in order to determine whether such aliens have a "credible fear of persecution," and further provide that negative credible fear determinations may be reviewed by immigration judges. Similarly, arriving aliens who express a fear of torture are subject to these same procedures as a matter of regulation. 8 CFR 208.30(e).

While the Department agrees that these provisions generally do call for the administration of credible fear interviews to those aliens in expedited removal processing who express an intent to apply for asylum or a fear of persecution or torture, a careful reading of the Act makes clear that credible fear interviews are not required for aliens subject to the Safe Third Country Agreement. Under section 208(a)(1) of the Act (8 U.S.C. 1158(a)(1)), any alien physically present in or arriving in the

United States may apply for asylum in accordance with that section, or where applicable, section 235(b) of the Act (8 U.S.C. 1225(b)). The following paragraph, section 208(a)(2)(A) of the Act (8 U.S.C. 1158(a)(2)(A)), however, creates an exception to this generally permissive asylum filing standard, revealing Congress' intent that an alien may not apply for asylum in accordance with section 235(b) (8 U.S.C. 1225(b)) if the alien "may be removed, pursuant to a bilateral or multilateral agreement, to a country \* \* \* in which the alien's life or freedom would not be threatened. \* \* \* Section 235(b)(1)(B)(ii) of the Act (8 U.S.C. 1225(b)(1)(B)(ii)) states that, when an alien successfully completes the credible fear interview process, "the alien shall be detained for *further consideration* of the application for asylum." (emphasis added). Clearly, then, the credible fear interview process constitutes the initiation of the asylum application process described in section 208(a)(1) or the Act (8 U.S.C. 1158(a)(1)). For this reason, and in light of section 208(d)(5)(B)'s (8 U.S.C. 1158(d)(5)(B)) authorization to promulgate regulations that impose "conditions or limitations on the consideration of an application for asylum," as long as they are "not inconsistent with this Act," the Department finds the threshold screening interview process described in the proposed rule to be in accord with the Act.

A closely related comment raised by some commenters is the request that the rule include an independent review or appeals process for asylum officer findings that an alien does not meet one of the Agreement's exceptions and is, accordingly, ineligible to pursue an asylum application via the credible fear interview process. The Department believes that, given the narrow legal and factual issues present in the threshold screening process, review of an asylum officer's threshold determination by a supervisory asylum officer will adequately serve to ensure that proper decisions are made on this limited issue. In light of the comments received, the requirement that a supervisory asylum officer must concur in the asylum officer's finding that the alien is subject to return to Canada under the Agreement has been expressly added to the final rule at 8 CFR 208.30(e)(6)(i).

## III. Detention Issues

Several commenters addressed the issue of detention. For instance, some commenters suggested adding to the rule the statement that asylum seekers subject to the Agreement generally should not be detained. Another

commenter advocated a mechanism for the Department to refer individuals entering the United States or being returned by Canada under the Agreement to NGOs in the United States, to facilitate alternatives to detention. Commenters also expressed concern about the detention of returnees from Canada. One commenter would have the rule prohibit detention of this group under any circumstances, while another suggested that the Department only detain returnees under exceptional circumstances, and, if detention is necessary, to avoid detention in local and county jails. The Agreement does not amend the detention authority under sections 236, 236A and 241 of the Act (8 U.S.C. 1226, 1226a, 1231) or require that DHS alter its current detention policies or practices. No amendments to the detention regulations were proposed in the proposed rule, and any changes in these regulations would require a new proposed rule. After reviewing the comments, DHS is not convinced that there is any reason to amend the detention provisions of the regulations because of the implementation of the Agreement or this rule. The comments do not articulate any legitimate basis for treating aliens without lawful immigration status in the United States who are returned under the Agreement differently from other asylum seekers in the United States without lawful immigration status.

## IV. Procedural Safeguards Under the Threshold Screening Interview Process: Arrivals From Canada

### *Screening Process Guarantees*

Several commenters were concerned that the rule does not specify that individuals arriving from Canada would receive the same procedural safeguards in the threshold screening interview process that are provided to arriving aliens who receive credible fear interviews. In particular, the Department was urged to incorporate, in the final rule, the following such safeguards: Option to consult with a person of the alien's choosing; sufficient time to contact a consultant, relative, or relevant advocates, at no expense to the U.S. government; sufficient time to prepare for the eligibility interview; an assurance that the interview would not occur sooner than 48 hours after the asylum seeker's arrival at a detention facility, unless the individual waives this preparation period; the ability to request that the threshold screening interview be postponed, which the Department should grant if there are good reasons to do so; use of an

interpreter; explanation of and guidance on the interview procedure; and the issuance of a reasoned written decision.

The Department has clarified, in the final rule, that the same safeguards accorded to aliens who are eligible for a credible fear determination will be accorded to aliens who receive threshold screening interviews. However, the suggestion that the threshold screening interview be postponed upon an alien's request has no parallel in the sections of 8 CFR 208.30 outlining the credible fear process. Also, this suggestion would compromise the principle underlying the Agreement that aliens be returned promptly to the country of last presence; therefore, it will not be incorporated into the final rule. In appropriate cases, the Department may exercise its discretion to delay the threshold screening process where the delay is justified.

One commenter recommended that the final rule include a statement requiring the Department to accommodate reasonable requests for assistance in securing evidence in support of an asylum seeker's claim arising from the asylum seeker's detention. For example, an asylum seeker may need access to a telephone or fax machine to secure evidence establishing relationships, a family member's legal status, or the asylum seeker's age. The Department currently provides access to telephones to detained asylum seekers who are subject to expedited removal. If additional assistance is needed, such as access to a fax machine, an asylum officer may be able to facilitate such access. However, the Department does not believe it is necessary to incorporate this suggestion into the final rule, because it is operational in nature and instead will be incorporated into field guidance upon implementation of the rule.

#### *Post-Interview Process*

One commenter suggested that the rule should clarify that return to Canada under the Agreement would not render a person inadmissible to the United States on that basis. While the Agreement does not address matters of inadmissibility, the Department may only remove aliens from the United States using a mechanism provided by Congress. Generally, for aliens arriving in the United States without valid documents required for admission, expedited removal under section 235(b) of the Act (8 U.S.C. 1225(b)) is the removal mechanism provided by Congress. A removal order under section 235(b) of the Act would, as a matter of law, constitute a temporary

inadmissibility ground under section 212(a)(9)(A)(i) of the Act (8 U.S.C. 1182(a)(9)(A)(i)). Waivers and exceptions to this inadmissibility ground do exist and will be considered by the Department on a case-by-case basis, consistent with existing regulations and operational directives. Similarly, discretion exists on the part of Customs and Border Protection ("CBP") officers to allow aliens to withdraw their applications for admission (so that they would face no inadmissibility bar to a subsequent admission to the United States) and this discretion will continue to be used on a case-by-case basis.

Another commenter recommended that either the final rule or operating procedures should include a mechanism for reconsideration by the Department of its decision to remove an asylum seeker to Canada following a decision that he or she does not qualify for one of the Agreement's exceptions if new evidence subsequently becomes available. The Department plans to continue working with its Canadian counterparts to establish common procedures to resolve matters like these at the local level through operational guidance.

#### **V. Adjudicating Exceptions to the Agreement**

A substantial number of the comments to the proposed rule concerned the interpretation and adjudication of Agreement exceptions for asylum seekers arriving at land border ports-of-entry. These comments corresponded roughly to the specific exceptions themselves, and can be addressed with reference to the following categories: family unity; unaccompanied minors; public interest; validly issued visas; and other exceptions. Many of the concerns evident from these comments were raised initially at meetings with NGOs, including a public meeting in August 2002, before the Agreement was signed. The Department carefully considered several of the issues outlined in these comments at that time and incorporated many suggestions into the text of the Agreement.

#### *Family-Based Exceptions*

Many commenters believe that the rule should define "family member" broadly and in a more culturally sensitive manner that reflects the reality of the refugee experience. For example, one commenter recommended considering "de facto" family members as eligible anchor relatives within this exception, or, in the alternative, as part of the public interest exception. The definition of "family member" was the

subject of prolonged discussion while negotiating the Agreement. The United States delegation advocated and succeeded in achieving a definition much broader than the class of family members recognized for other purposes under United States and Canadian immigration law. During negotiations, both Canada and the United States took into account the reality that different cultures define "family member" differently. Given the specificity of the Agreement's enumerated relationships in its "family member" definition, the Department will not now, in effect, unilaterally amend the Agreement's definition by means of this rule to include additional individuals. The Department's position is that using the regulatory process to create new definitions at this stage would serve to undermine the compromise represented by this carefully negotiated, bilateral agreement.

Other commenters suggested including "cousins" as part of the "family member" definition in the rule. As explained above, the Agreement's list of who may qualify as an anchor "family member" is not subject to amendment by the rule. For the same reason, the Department will not include, as suggested in a separate comment, "other close relatives" to the list of family members.

Several commenters recommended that the rule specifically include a "common-law partners" exception, as it is included in the Canadian regulations' definition of "family member." Canada has included common-law partners in the definition of "family member" in the Canadian regulations implementing the Agreement because this relationship has often been recognized as a matter of Canadian law. Article 1 of the Agreement provides that each Party will apply the Agreement's family member exceptions in a manner that is consistent with its national law. While valid foreign marriages, including common law marriages, are generally given effect under U.S. immigration law, see *Matter of H-*, 9 I&N Dec. 640, 641 (BIA 1962); but see section 101(a)(35) of the Act (8 U.S.C. 1101(a)(35)), U.S. federal law precludes use of the terms "marriage" or "spouse" to refer to same-sex partnerships. See Defense of Marriage Act, Public Law 104-199, section 3, 110 Stat. 2419 (1996) (providing that, for purposes of federal law, "marriage" means only a legal union between one man and one woman as husband and wife, and \* \* \* 'spouse' refers only to a person of the opposite sex who is a husband or a wife.'). Because the Department cannot promulgate regulations that are contrary

to law, the Department did not adopt the commenters' suggestion to add a "common-law partner" interpretation of the term "spouse," as used in the Agreement's family member exceptions.

A few commenters believe that the rule should eliminate the Agreement's age and immigration status limits on anchor relatives, reasoning that the limits result in separating families when children cannot serve as anchors for their parents. Both countries have expressed their concern for reuniting separated families. To that end, both intend to work with the UNHCR and NGOs to monitor the Agreement's effect, addressing this potential problem operationally rather than by regulation. A key reason that age limits were included in the Agreement's family unity exceptions was that neither government wanted to trigger an increase in the smuggling and trafficking of minors, sent ahead by family members for the purpose of serving as anchors in either country. Further, the requirement that anchor relatives hold lawful, non-visitor immigration status derives from the negotiated Agreement terms, see art. 4, para. 2(a), which will not be modified through the rule-making process.

#### *Unaccompanied Minor Exception*

Some commenters felt that the rule should expand the Agreement's definition of "unaccompanied minor" to include a minor who is "separated from both parents and is not being cared for by an adult who by law has the responsibility to do so." The Department declines to incorporate this change to the Agreement's definition into the final rule. The Agreement's definition of "unaccompanied minor," as explained in the **SUPPLEMENTARY INFORMATION** accompanying the proposed rule, differs from the definition customarily used for purposes of U.S. immigration processing. As previously explained, the definitions in the Agreement were carefully negotiated with the Canadian government and the Department will not use the rule-making process to alter unilaterally the clear definitions in the Agreement. However, by applying DHS' customary operational definition to unaccompanied minors seeking asylum so that they are generally referred for a hearing by an immigration judge in proceedings under section 240 of the Act (8 U.S.C. 1229a), the Department is providing them ample process to explain whether they meet one of the Agreement's exceptions and to present their protection claims.

The same commenters also recommended that the rule should shift

the burden of proof concerning the location of an unaccompanied minor's parents from the unaccompanied minor to the government, requiring the government to demonstrate that the unaccompanied minor is in the care of his or her parents or is following to join them. While the Department understands the need to proceed with heightened restraint and sensitivity in the cases of unaccompanied minors, there is concern that this recommendation could adversely affect the unaccompanied minor by resulting in fact-finding delays before a final determination. The child likely will have more information than DHS as to the location of his or her parents and therefore it is more appropriate for the child to bear the burden of proof in establishing the parents' locations. Moreover, aliens in removal proceedings—regardless of age—generally bear the burden of proving their admissibility to the United States, 8 U.S.C. 1129a(c)(2), and, similarly, applicants for asylum, withholding of removal, and protection under the Convention Against Torture, bear the burden of proof to establish eligibility, even in cases where the applicant is a child. The commenters did not provide sound rationales for shifting the burden of proof for purposes of establishing that an exception to the Agreement applies.

These commenters also suggested that the rule include a mechanism for determining a child's relationship to an accompanying adult or to individuals present in the United States or Canada, including an interview with a child welfare specialist, if the child arrives at the border with an individual who is not his or her legal guardian. The mechanism, they suggest, should include procedures to identify potential family members and determine their suitability to serve as the child's guardian. The Department agrees that this is an area requiring further consideration; however, the issues surrounding identification of individuals accompanying alien children and verification of relationships between adults and children are broader than the scope of this rule and are not unique to those children subject to this rule. These issues may be raised at all borders, and all ports-of-entry, even in the case of aliens with lawful status here. Therefore, these issues would be more appropriately addressed systemically, as a coordinated effort among the Department's various agencies to create a uniform approach, rather than within this rule. Consequently, the Department declines to incorporate the process

proposed by commenters within the rule.

Many commenters, as previously stated, urged the Department to consider "separated children," who are not with either parent or with an adult responsible for their care, as part of the discretionary public interest exception under Article 6 of the Agreement. The Department is sensitive to the unique issues facing unaccompanied minors and will proceed carefully in cases where an unaccompanied minor arriving in the United States appears to be a "separated child." The Department will consider, on a case-by-case basis, whether such a child might meet the Agreement's public interest exception.

#### *Public Interest Exception*

Many of the commenters recommended that the rule should state that "humanitarian concern is a public interest." The Department believes that the Agreement's public interest exception is best administered through operational guidance and on an individualized, case-by-case basis, but does acknowledge that "humanitarian concern" is certainly an important consideration to factor in to a public interest assessment.

Some commenters suggested that the rule include a non-exhaustive list of categories that would merit consideration under the public interest exception. Three of the suggested categories—common-law spouses, de facto family members, and separated children with parents or legal guardians in the U.S. who are ineligible to serve as anchors—were addressed above in the discussion replying to comments about the proposed rule's sections concerning the "family member" and "unaccompanied minor" exceptions.

Other categories suggested by commenters for consideration under the public interest exception include:

a. Cases where effective protection cannot be guaranteed in Canada because of that country's asylum laws; and, similarly, cases where U.S. law and practice are not consistent with Canadian law and practice;

b. Cases in which the anchor relatives are under age 18 and have pending asylum applications;

c. Cases of survivors of torture; and

d. Cases of individuals with physical and psychological health needs.

Issues of minor anchor relatives, past torture, and health needs are some of the factors that may be considered under the Agreement's public interest exception, along with all other relevant circumstances, on a case-by-case basis. The intent behind this provision of the Agreement was to allow each

government to make case-by-case determinations with broad discretion. Had the parties' intent been to include the broad categories of individuals listed above, the categories would have been spelled out in the Agreement in the same manner as the other exceptions.

For reasons stated in the Supplementary Information to the proposed rule, the Department does not consider differences in Canadian and U.S. protection laws germane to decisions made under the Agreement. The commenters urged, with respect to this suggestion, that the rule include a mechanism for the UNHCR and NGOs to help the Department analyze Canadian law and practice, including approval rates by nationality and basis for approval, to ensure that the Department exercises discretion in cases where there are discrepancies with U.S. law. The Department will not apply the public interest exception in a manner that would undermine the Agreement's allocation of responsibility for adjudication of protection claims. Also, as explained in the Supplementary Information to the proposed rule, differences in our protection systems were contemplated by the United States and Canada during negotiations. In either country, asylum seekers will have their protection claims fully and fairly considered.

Other commenters suggested specific procedures in the rule concerning the exercise of discretion, in the public interest, to allow an individual to pursue a protection claim in the United States. One recommended explaining who specifically may exercise this discretion, and the other called for a clear procedure between EOIR and DHS to ensure that the Department properly considers cases pending before EOIR for the public interest exception. In response to these suggestions, the final rule has been amended at 8 CFR 208.30(e)(6)(iii)(F) to specify that the Director of USCIS, or the Director's designee, will be responsible for DHS determinations made under the Agreement's public interest exception. Any party wishing to present a case for consideration under this exception should provide relevant case information to the Director's office or that of his or her designee.

#### *Valid Visa Exception*

One commenter noted that the rule should define "validly issued visa" so as not to link the validity of its issue to the asylum seeker's presumed subjective intentions. For example, U.S. immigration authorities have determined in some instances that valid

tourist or business visas were obtained by "fraud" because of the visa holder's true intent to seek asylum. For the limited purposes of applying this exception to the Agreement, USCIS will construe the term "validly issued" to refer to visas that are genuine (*i.e.*, not counterfeit) and were issued to the alien by the U.S. government.

#### *Other Exceptions*

One commenter forwarded comments made in response to a review of an earlier draft of the Agreement in 2002, in which it recommended that, to avoid the separation of families and minimize social and economic costs for states, the Agreement add a transit exception. Additionally, the commenter suggested a "community support contact" exception, which could include friends or colleagues willing to submit statements about their willingness to support the asylum seeker during the process. A transit exception would effectively invalidate the Agreement, as the Agreement's stated purpose is quite clearly to return asylum seekers to the "country of last presence." With respect to the "community support contact" exception, the Department reiterates that the exceptions to the Agreement were determined through careful negotiations with the Canadian government, and that to create additional exceptions through rule-making would serve to undermine the process. Therefore, the Department declines to adopt this recommendation.

#### **VI. Procedures for Asylum Seekers Going to and Being Returned From Canada**

##### *Process for Asylum Seekers Bound for Canada*

Several commenters recommended that the rule include a mechanism whereby the Department could refer Canada-bound asylum seekers to NGOs in the United States for assistance in locating relatives and providing advice regarding eligibility before arriving at a land border port-of-entry. The commenters do not explain how the Department would identify these asylum seekers and implement this recommendation. While the Department appreciates the participation of NGOs in the process to date and will continue to seek their assistance to educate populations likely to be affected by the Agreement, it will not adopt this recommendation, because it would be administratively impracticable to implement and could unnecessarily delay travel for thousands of individuals crossing from the United States to Canada. U.S. officials generally do not

stop and address individuals leaving the United States to go to Canada. Even if immigration officials were to stop individuals traveling from the United States into Canada, it is unclear how they would identify those who intend to seek asylum in Canada—certainly a minimal portion of individuals crossing the border each day—in order to refer them to an NGO.

##### *Process for Asylum Seekers Returned From Canada*

Several commenters expressed a desire to have the rule clarify the process affecting those asylum seekers who are determined to be ineligible by Canada and returned to the United States—the group anticipated to constitute the majority of asylum seekers affected by the Agreement. One non-governmental organization recommended that the rule guarantee that these individuals be exempt from the expedited removal process.

The Department declines to codify the process affecting those returned to the United States under the Agreement, because existing regulations already govern how they will be treated by DHS. For purposes of U.S. immigration law, these returnees will be in the same position they would be in had they not left the United States. As the Department stated in the Supplementary Information to the proposed rule, individuals returned from Canada to the United States, with the rare exception noted below, will not be subject to expedited removal because they will not meet the definition of "arriving alien." Depending on the individual's immigration status in the United States, he or she may be subject to removal proceedings under section 240 of the Act (8 U.S.C. 1229a). However, it is not possible, practical or advisable for the Department to codify such a guarantee in this rule. There may be a rare circumstance in which the expedited removal provisions of the Act would apply. For example, someone initially paroled into the United States may attempt to enter Canada and then be returned to the United States after his or her parole period here expired. Such a person, as an individual whose parole period has expired, may be subject to expedited removal. 8 U.S.C. 1182(d)(5)(A), 1225(a)(1)–(b)(1)(A)(i); 8 CFR 1.1(q).

Many commenters suggested that the rule include a mechanism to enable Canada, in the event that it decides that the Agreement exceptions are inapplicable to an individual alien, to address any possible errors in its decision or consider new information offered by the alien that he or she

qualifies for an exception and is eligible to present a protection claim in Canada. DHS regulations do not govern Canadian authorities. It would be inappropriate for DHS regulations to outline a mechanism for the Canadian authorities to correct errors or address new information. Nonetheless, the Canadian and United States governments have agreed to consult with each other on these matters and to address them operationally.

One commenter also stressed that, in this context, the Department should release detainees or provide transport to the nearest land border port-of-entry if Canada agrees to reconsider a claim and requires the asylum seeker's presence at the border. Release of detainees will be determined on a case-by-case basis, depending on the facts of the case and applicability of immigration laws. Should an individual be released, the logistics for how that person will get to the border is best determined on a case-by-case basis and through operational, as opposed to regulatory, guidance.

#### *Cost of Processing Returned Asylum Seekers*

The majority of the commenters disagreed with the proposed rule's assessment of the costs that will result from the rule's implementation, as outlined in the proposed rule's determination made under Executive Order 12866. They allege that certain tangible costs—including increases in adjudications, detention, Border Patrol deployment, and criminality—were not adequately addressed. They argue that, among the intangible costs of this Agreement that were ignored by the proposed rule, are the increased risks to life and safety of those seeking to enter either country outside land border ports-of-entry, and the potential for the Agreement to attract more smugglers and traffickers, which would make this land border more dangerous.

The costs identified in discussing Executive Order 12866 were the costs associated with implementation of the provisions proposed in the rule, not the costs associated with the Agreement itself. The proposed and final rules are focused solely on asylum seekers seeking to enter the United States who may be returned to Canada pursuant to the Agreement, not those who are returned from Canada pursuant to the Agreement or who seek to cross the border illegally. As such, those costs were properly not considered in addressing Executive Order 12866. However, the United States Government carefully considered all of the potential costs identified by the commenters before it entered into the Agreement and

determined that the benefits of the Agreement outweigh its costs.

#### **VII. Monitoring Plans**

Nearly all of the commenters recommended that the rule explicitly refer to the UNHCR's monitoring role, as specified in Article 8 of the Agreement. They added that the rule should specify exactly what type of information the UNHCR will receive, such as numbers of applicants, their ages, their countries of origin, and the disposition of their eligibility and credibility determinations. They also recommended that the rule establish a timetable for the reports, preferably quarterly or whenever a special situation warrants one. In addition, the commenters recommended that the rule authorize the UNHCR to monitor eligibility and credibility determinations and to intercede in cases in which it believes erroneous decisions were made. The same commenters also felt that the rule should allow NGOs to operate as the UNHCR's implementing partners to monitor the Agreement.

The Department has not incorporated these recommendations into this rule, but plans to take them into consideration when finalizing its arrangements with Canada and the UNHCR concerning monitoring of the Agreement. The Department also would welcome the assistance and input of NGOs. It is fully the intent of the Department to abide by the Agreement, which, at Article 8, provides that "The Parties shall cooperate with UNHCR in the monitoring of this Agreement and seek input from non-governmental organizations." The Department values the longstanding consultative, cooperative relationship the UNHCR has had with the U.S. government, which includes monitoring the United States' application of the Convention Relating to the Status of Refugees, Jul. 28, 1951, 189 U.N.T.S. 150 ("Refugee Convention"). For example, the UNHCR recently monitored and analyzed the expedited removal process and made several useful recommendations for the Department. However, the Department considers it inappropriate to codify the nature of this relationship, or the relationship between the Department and the NGO community, in these rules. Details of monitoring plans often change and develop over time, as unforeseen events arise, and those involved in the monitoring plan identify methods, consistent with evolving events, to better gather and analyze data. As such, it is more appropriate to include details of such plans in formal action plans and memoranda. One comment suggested that the rule include a monitoring plan

concerning smuggling and trafficking developments. As stated earlier, the Department is aware of the potential for increased smuggling and trafficking after the Agreement is implemented and intends to monitor these developments. The Department does not believe, however, that it is appropriate to codify such a monitoring plan in regulations for the same reasons noted above.

#### **VIII. Agreement Terms Unrelated to Processing Asylum Seekers Coming to the United States From Canada**

##### *Resettlement Under the Agreement*

Most commenters wanted the rule to include details concerning the implementation of the resettlement side agreement addressed in Article 9 of the Agreement. Another commenter recommended that the Department of State introduce its own proposed rule to implement the resettlement agreement.

This comment concerns an issue separate and distinct from that of returning asylum seekers to the country of last presence. The scope of this rule will remain limited to implementing the Agreement's terms as they concern two limited categories of asylum seekers: Those seeking entry to the United States at a land border port-of-entry on the Canadian border and those who seek protection while being removed from Canada and transiting through the United States.

##### *Terminating the Agreement*

One commenter suggested that the rule include criteria to determine whether the Agreement should be cancelled because of negative impacts, particularly any increase in smuggling or trafficking. Another made a similar, though less specific suggestion, that the rule should include procedures for revising or terminating the Agreement, should that prove necessary. One commenter added that the Department of State should propose its own separate rule concerning the procedures for suspending or terminating the Agreement, including adequate or appropriate termination grounds.

With respect to termination procedures, Article 10 of the Agreement between the United States and Canada specifically provides that termination may occur with six months' written notice from either party, and that three months' written notice would result in suspension. It would be inappropriate for the U.S. Government to negotiate an Agreement with Canada and then unilaterally adopt specific criteria that would result in the Agreement's termination. The efficacy and ongoing commitment to an international

agreement is a matter of foreign policy of the United States, the proper subject of diplomacy, and inappropriate for regulation under the Administrative Procedure Act (5 U.S.C. 551–59, 701–06, 1305, 3105, 3344, 5372, 7521).

### IX. Miscellaneous

#### *Resolving U.S.-Canadian Differences in Interpreting the Agreement*

Most commenters agreed that the rule should provide a detailed mechanism to resolve differences between Canada and the United States regarding the interpretation and implementation of the Agreement. In accordance with the second paragraph of Article 8 of the Agreement, which provides that standard operating procedures “shall include mechanisms for resolving differences respecting the interpretation and implementation of the terms of this Agreement,” the Department intends to cooperate with its Canadian colleagues to address and resolve differences in the same spirit in which the Agreement was negotiated. As reflected in the Agreement itself, resolution of such differences is more appropriately addressed through operating procedures than through the promulgation of regulations.

#### *Defining “Land Border Port-of-Entry”*

Over half of the commenters suggested that this rule provide a definition of “land border port-of-entry,” as that term is used in the Agreement. Prior regulatory attempts to define “port-of-entry” have done so in reference to geographical locations where federal officers have authority to perform their official functions. For example, in the customs regulations at 19 CFR 101.1, this term simply “refer[s] to any place designated by Executive Order of the President, by order of the Secretary of Treasury, or by Act of Congress, at which a Customs officer is authorized to \* \* \* enforce the various provisions of the Customs and navigation laws.” Pursuant to this approach of port-of-entry designation, these regulations enumerate specific ports-of-entry that have been designated as “Customs port of entry.” 19 CFR 101.3(b)(1). Existing immigration regulations take a similar approach, defining “ports-of-entry” with an exhaustive list of locations, broken down into three “classes.” 8 CFR 100.4(c)(2). These definitional approaches reveal the difficulty of providing one uniform definition of “port-of-entry.” Indeed, beyond the fact of CBP officers’ presence, “ports-of-entry” can vary in nearly every way imaginable. For instance, some ports-of-

entry may sit on federally owned property, while others may be located on private or municipally owned property. Similarly, some land ports-of-entry border waterways or bridges, while others are located on busy highways or railroad tracks, while still others are situated in remote, rural areas. Given the impracticability of a one-size-fits-all definitional approach to “land border ports-of-entry,” the Department will rely on the current definitions of 8 CFR 100.4(c)(2) and 19 CFR 101.3(b)(1) in implementing the Agreement. Thus, where an alien arrives at a “port-of-entry,” as designated in one of these regulatory provisions, which is located at the shared U.S.-Canada border, the alien will be subject to the Agreement. Aliens apprehended in the immediate vicinity of such ports-of-entry attempting to avoid inspection will, where reasonable, be regarded as having “arrive[d] at a land border port of entry” and, consequently, be subject to the Agreement. Finally, the Department intends to work closely with the Canadian government to provide operational guidance concerning the Agreement’s applicability in marginal cases.

#### *Aliens “Directed Back” From Canada*

Two commenters raised the issue of aliens “directed back” by the Canadian government pending an interview by Canadian immigration officials. These commenters explained that, while Canadian authorities generally interview an alien who requests protection at the time he or she seeks to enter Canada from the United States, Canadian authorities have had occasion to direct such aliens back to the U.S. for future interview appointments in Canada during periods of increased attempted migration that outstrip Canadian processing resources. According to these commenters, such an increase is possible during the period immediately preceding Agreement implementation. The commenters have therefore requested that the Department work to accommodate such aliens’ attempts to enter Canada for a consideration of their protection claims. The Department will not adopt this suggestion. As discussed in the Supplementary Information to the proposed rule and, again, earlier in the Supplementary Information to this final rule, aliens who unsuccessfully attempt to enter Canada do not alter their immigration status by the attempted entry. Thus, if an alien who is present in the U.S. without having been inspected and admitted (or paroled) by an immigration officer unsuccessfully attempts to enter Canada, then he or she

remains an unlawfully present alien subject to removal from the United States under sections 212(a)(6)(A)(i) and 240(a) of the Act (8 U.S.C. 1182(a)(6)(A)(i), 1229a(a)), just as if an immigration officer had apprehended the alien before he or she sought to enter Canada. An alien’s appointment with Canadian immigration officials, while relevant to the Department’s prosecutorial discretion concerning any decision to place the alien in removal proceedings, does not confer legal status upon an unlawfully present alien.

#### *Indirect Refoulement*

One commenter argued that returning aliens to Canada under the Agreement would constitute “indirect” refoulement, and would therefore violate U.S. obligations under the Refugee Convention and the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T.S. 6223 (“Refugee Protocol”). The Department disagrees. Article 33 of the Refugee Convention obligates the U.S., through its accession to the Refugee Protocol, not to “expel or return (‘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.” (emphasis supplied). Absent some claim that an alien’s life or freedom would be threatened in Canada, which the commenter did not suggest, the return of the alien to Canada for a full and fair consideration of his or her protection claims is consistent with U.S. obligations.

### X. Conforming Amendment to 8 CFR Part 235

In preparing this final rule, the Department determined that 8 CFR 235.3(b)(4) must also be amended to reflect the proposed rule’s use of a threshold screening interview mechanism preceding the initiation of credible fear interviews for those aliens in expedited removal proceedings who are subject to the Safe Third Country Agreement. This existing regulatory provision explicitly makes reference to a CBP officer’s referral of protection claims for a “credible fear” determination under 8 CFR 208.30. As aliens subject to expedited removal who are covered by the Agreement must first pass a threshold screening interview to determine whether their protection claims may be considered in the U.S., 8 CFR 235.3(b)(4) has been revised to refer more generally to 8 CFR 208.30 without reference to the credible fear process. This amendment ensures that the expedited removal regulations conform



to the threshold screening interview process explained in the proposed rule.

#### **Regulatory Flexibility Act**

DHS has reviewed this rule in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) and by approving it, DHS certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule, which relates to asylum claims, applies to individual aliens only. As such, a substantial number of small entities, as that term is defined in 5 U.S.C. 601(6), will not be affected by the rule.

#### **Unfunded Mandates Reform Act of 1995**

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

#### **Small Business Regulatory Enforcement Fairness Act of 1996**

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

#### **Executive Order 12866**

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

The rule implements a bilateral agreement that allocates responsibility between the United States and Canada for processing claims of certain asylum seekers by codifying the process by which individuals seeking entry into the United States, or being removed by Canada in transit through the United

States, may be returned to Canada pursuant to the Agreement. The rule applies to individuals who are subject to expedited removal and, under existing regulations, would receive a credible fear interview by an asylum officer. This rule simply provides a preliminary screening by asylum officers to determine whether the alien is even eligible to seek protection in the United States, in which case the asylum officer will then proceed to make the credible fear determination under existing rules. Based on statistical evidence, it is anticipated that approximately 200 aliens may seek to enter the United States from Canada at a land border port-of-entry and be placed into expedited removal proceedings. A significant number of these aliens will be found exempt from the Agreement and eligible to seek protection in the United States after the threshold screening interview proposed in this rule. It is difficult to predict how many aliens will be returned to Canada under the Agreement, but the costs incurred in detaining and transporting them are not likely to be substantial. Therefore, the "tangible" costs of this rulemaking to the U.S. Government are minimal. Applicants who are found to be subject to the Agreement will be returned to Canada to seek protection, saving the U.S. Government the cost of adjudicating their asylum claims and, in some cases, the cost of detention throughout the asylum process.

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

The Executive Order 12866 cost analysis captures the costs which apply to those instances where an alien requests protection from the United

States government under one of two scenarios: when arriving at a port-of-entry on the United States-Canada land border; or, when transiting through the United States as part of the Canadian government's effort to remove the alien to a third country. In either scenario, the rule provides asylum officers with authority to make basic, threshold screening determinations about how the Agreement applies to the alien. Although additional costs may be incurred as part of the Safe Third Country Agreement between the United States and Canada, the costs discussed in the Executive Order 12866 are limited to those costs arising under the two scenarios outlined in the rule and not the cost impact of the overall Agreement between the two countries.

The Agreement provides for a threshold determination to be made concerning which country will assume responsibility for processing claims of asylum seekers. This rule only clarifies the threshold screening determination for a United States asylum officer when determining whether an alien should be returned to Canada. It is unclear how many individuals will seek asylum in the United States from Canada. Similarly, the Agreement permits Canada to return to the United States certain asylum seekers attempting to enter Canada from the United States at a land border port-of-entry. The Department does not know how many asylum seekers Canada will return to the United States. As discussed in the proposed rule and above, individuals returned from Canada to the United States will be in the same position as they would be in had they not sought entry in Canada. This analysis is beyond the purview of the rule. However, the Department will continue to monitor the costs associated with handling asylum seekers at land border ports-of-entry.

The Department recognizes that there have been pre-existing periodic costs associated with the departure of aliens from the United States to Canada for purposes of seeking asylum, particularly during the period in which the National Security Entry-Exit Registration System (NSEERS) was operating. These costs arose when, during a period of increased attempted migration to Canada from the United States, the Government of Canada decided not to admit asylum seekers until they could be scheduled for interview appointments. The Department recognizes that many of these costs were directly borne by aliens, State and local agencies, and nonprofit organizations. While costs similar to those incurred in the past may be borne by aliens attempting to enter Canada before the

Agreement becomes effective, they are not affected by the terms of this rule. However, the Department will continue to monitor the costs associated with handling asylum seekers at land border ports-of-entry.

The rule benefits the United States because it enhances the ability of the United States and Canada to manage, in an orderly fashion, asylum claims brought by persons crossing our common border. By implementing the Agreement, the rule furthers U.S. and Canadian goals, as outlined in the 30-Point Action Plan under the Smart Border Declaration signed by Secretary Ridge and former Canadian Deputy Foreign Minister John Manley, to ensure a secure flow of people between the two countries while preserving asylum seekers' access to a full and fair asylum process in a manner consistent with U.S. law and international obligations.

**Executive Order 13132**

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

**Executive Order 12988 Civil Justice Reform**

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

**Paperwork Reduction Act**

The regulations at 8 CFR 208.30 require that an asylum officer conduct a threshold screening interview to determine whether an alien is ineligible to apply for asylum pursuant to section 208(a)(2)(A) of the Act (8 U.S.C. 1158(a)(2)(A)). The threshold screening interview is considered an information collection under the Paperwork Reduction Act (PRA) of 1995. On March 8, 2004, the Department of Homeland Security, published a proposed rule in the **Federal Register** to provide USCIS asylum officers' with authority to make threshold determinations concerning applicability of the Agreement Between the Government of the United States of America and the Government of Canada regarding asylum claims made in transit and at land border ports-of-entry. In the Supplementary Information in the proposed rule under the heading "Paperwork Reduction Act" the USCIS

published a 60 day notice encouraging the public to submit comments specifically to the information collection requirements contained in 8 CFR 208.30. The USCIS did not receive any comments on the information collection requirements. Accordingly, the USCIS has submitted an information collection package to OMB in accordance with the PRA and OMB has approved this information collection.

**Family Assessment Statement**

The Department has reviewed this rule and determined that it may affect family well-being as that term is defined in section 654 of the Treasury General Appropriations Act, 1999, Public Law 105-277, Div. A. Accordingly, the Department has assessed this action in accordance with the criteria specified by section 654(c)(1). In this rule, an alien arriving at a land border port-of-entry with Canada may qualify for an exception to the Safe Third Country Agreement, which otherwise requires individuals to seek protection in the country of last presence (Canada), by establishing a relationship to a family member in the United States ("anchor relative") who has lawful status in the United States, other than a visitor, or is 18 years of age or older and has an asylum application pending. This rule incorporates the Agreement's definition of "family member," which may be a spouse, son, daughter, parent, legal guardian, sibling, grandparent, grandchild, aunt, uncle, niece, or nephew. The "family member" definition was intended to be broad in scope to promote family unity. This rule thereby strengthens the stability of the family by providing a mechanism to reunite separated family members in the United States.

In some cases, the rule will have a negative effect resulting in the separation of family members. The Agreement's exceptions, as expressed in the rule, require an anchor relative to have either lawful status in the United States, other than visitor, or else to be 18 years of age or older and have a pending asylum application. Family members who do not meet one of these conditions, therefore, would be separated under the rule. However, this rule's definition of "family member," which derives from the exceptions to the Agreement, is more generous than other family-based immigration laws, which require the anchor relative to have more permanent status in the United States (such as that of citizen, lawful permanent resident, asylee or refugee) and which have a more restricted list of the type of family relationships that can be used to

sponsor someone for immigration to the United States (although, unlike those laws, this Agreement provides only an opportunity to apply for protection and does not directly confer an affirmative immigration benefit). Under this rule, family members will be able to reunite even if the anchor relative's status is less than permanent in the United States. Further, on a case-by-case basis, the Agreement's "public interest" exception can be used to minimize this cost.

**List of Subjects**

*8 CFR Part 208*

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

*8 CFR Part 212*

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

*8 CFR Part 235*

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

**Amendments to the Regulations**

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

**PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL**

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

**Authority:** 8 U.S.C. 1103, 1158, 1226, 1252, 1282; 8 CFR part 2.

■ 2. Section 208.4 is amended by adding a new paragraph (a)(6) to read as follows:

**§ 208.4 Filing the application.**

\* \* \* \* \*

(a) \* \* \*

(6) *Safe Third Country Agreement.* Asylum officers have authority to apply section 208(a)(2)(A) of the Act, relating to the determination that the alien may be removed to a safe country pursuant to a bilateral or multilateral agreement, only as provided in 8 CFR 208.30(e). For provisions relating to the authority of immigration judges with respect to section 208(a)(2)(A), see 8 CFR 1240.11(g).

\* \* \* \* \*

■ 3. Section 208.30 is amended by:  
 a. Redesignating paragraph (e)(4) as (e)(7);

b. Redesignating paragraph (e)(2) as paragraph (e)(4), and by revising newly redesignated paragraph (e)(4);

c. Redesignating paragraph (e)(3) as paragraph (e)(5) and by revising newly redesignated paragraph (e)(5);

d. Adding new paragraphs (e)(2), (e)(3), and (e)(6);

e. Revising paragraph (g)(2)(i), and by

f. Removing paragraphs (g)(2)(iii) and (g)(2)(iv).

The additions and revisions 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, 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.

(3) An alien will be found to have a credible fear of torture if the alien shows that there is a significant possibility that he or she is eligible for withholding of removal or deferral of removal under the Convention Against Torture, pursuant to 8 CFR 208.16 or 208.17.

(4) In determining whether the alien has a credible fear of persecution, as defined in section 235(b)(1)(B)(v) of the Act, or a credible fear of torture, the asylum officer shall consider whether the alien's case presents novel or unique issues that merit consideration in a full hearing before an immigration judge.

(5) Except as provided in paragraph (e)(6) of this section, 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 208(b)(2) of the Act, or to withholding of removal contained in section 241(b)(3)(B) of the Act, the Department of Homeland Security shall nonetheless place the alien in proceedings under section 240 of the Act for full consideration of the alien's claim, if the alien is not a stowaway. If the alien is a stowaway, the Department shall place the alien in proceedings for consideration of the alien's claim pursuant to 8 CFR 208.2(c)(3).

(6) Prior to any determination concerning whether an alien arriving in the United States at a U.S.-Canada land border port-of-entry or in transit through

the U.S. during removal by Canada has a credible fear of persecution or torture, the asylum officer shall conduct a threshold screening interview to determine whether such an alien is ineligible to apply for asylum pursuant to section 208(a)(2)(A) of the Act and subject to removal to Canada by operation of the Agreement Between the Government of the United States and the Government of Canada For Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries ("Agreement"). In conducting this threshold screening interview, the asylum officer shall apply all relevant interview procedures outlined in paragraph (d) of this section, provided, however, that paragraph (d)(2) of this section shall not apply to aliens described in this paragraph. The asylum officer shall advise the alien of the Agreement's exceptions and question the alien as to applicability of any of these exceptions to the alien's case.

(i) If the asylum officer, with concurrence from a supervisory asylum officer, determines that an alien does not qualify for an exception under the Agreement during this threshold screening interview, the alien is ineligible to apply for asylum in the United States. After the asylum officer's documented finding is reviewed by a supervisory asylum officer, the alien shall be advised that he or she will be removed to Canada in order to pursue his or her claims relating to a fear of persecution or torture under Canadian law. Aliens found ineligible to apply for asylum under this paragraph shall be removed to Canada.

(ii) If the alien establishes by a preponderance of the evidence that he or she qualifies for an exception under the terms of the Agreement, the asylum officer shall make a written notation of the basis of the exception, and then proceed immediately to a determination concerning whether the alien has a credible fear of persecution or torture under paragraph (d) of this section.

(iii) An alien qualifies for an exception to the Agreement if the alien is not being removed from Canada in transit through the United States and

(A) Is a citizen of Canada or, not having a country of nationality, is a habitual resident of Canada;

(B) Has in the United States a spouse, son, daughter, parent, legal guardian, sibling, grandparent, grandchild, aunt, uncle, niece, or nephew who has been granted asylum, refugee, or other lawful status in the United States, provided, however, that this exception shall not apply to an alien whose relative maintains only nonimmigrant visitor status, as defined in section

101(a)(15)(B) of the Act, or whose relative maintains only visitor status based on admission to the United States pursuant to the Visa Waiver Program;

(C) Has in the United States a spouse, son, daughter, parent, legal guardian, sibling, grandparent, grandchild, aunt, uncle, niece, or nephew who is at least 18 years of age and has an asylum application pending before U.S. Citizenship and Immigration Services, the Executive Office for Immigration Review, or on appeal in federal court in the United States;

(D) Is unmarried, under 18 years of age, and does not have a parent or legal guardian in either Canada or the United States;

(E) Arrived in the United States with a validly issued visa or other valid admission document, other than for transit, issued by the United States to the alien, or, being required to hold a visa to enter Canada, was not required to obtain a visa to enter the United States; or

(F) The Director of USCIS, or the Director's designee, determines, in the exercise of unreviewable discretion, that it is in the public interest to allow the alien to pursue a claim for asylum, withholding of removal, or protection under the Convention Against Torture, in the United States.

(iv) As used in 8 CFR 208.30(e)(6)(iii)(B), (C) and (D) only, "legal guardian" means a person currently vested with legal custody of such an alien or vested with legal authority to act on the alien's behalf, provided that such an alien is both unmarried and less than 18 years of age, and provided further that any dispute with respect to whether an individual is a legal guardian will be resolved on the basis of U.S. law.

\* \* \* \* \*

(g) \* \* \*

(2) \* \* \*

(i) Immigration judges will review negative credible fear findings as provided in 8 CFR 1208.30(g)(2).

\* \* \* \* \*

**PART 212—DOCUMENTARY REQUIREMENTS; NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE**

■ 4. The authority citation for part 212 continues to read as follows:

**Authority:** 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1187, 1223, 1225, 1226, 1227.

■ 5. Section 212.5 is amended by adding a new paragraph (e)(2)(iii) to read as follows:

§ 212.5 Parole of aliens into the United States.

\* \* \* \*

(e) \* \* \*

(2) \* \* \*

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

\* \* \* \*

PART 235—INSPECTION OF PERSONS APPLYING FOR ADMISSION

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

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

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

§ 235.3 Inadmissible aliens and expedited removal.

\* \* \* \*

(b) \* \* \*

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

\* \* \* \*

Dated: November 19, 2004.

Tom Ridge,

Secretary of Homeland Security.

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

BILLING CODE 4410–10–P

DEPARTMENT OF JUSTICE

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

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

RIN 1125–AA46

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

AGENCY: Executive Office for Immigration Review, Justice.

ACTION: Final rule.

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

DATES: This rule is effective December 29, 2004.

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

SUPPLEMENTARY INFORMATION:

Introduction

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

The Agreement covers certain aliens who are arriving at U.S.-Canada land border ports-of-entry or arriving in

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

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

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

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

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