

exception under the Agreement during this threshold screening interview, the alien is ineligible to apply for asylum in the United States. After review of this finding 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 an alien has a credible fear of persecution or torture.

(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 U.S. 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. of 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, 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 Department of Homeland Security 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 § 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, 1225, 1226, 1227, 1228; 8 CFR part 2.

5. Section 212.5 is amended by adding 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 § 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 applicant for admission, and processed accordingly by the Department of Homeland Security.

* * * * *

Dated: January 26, 2004.

Tom Ridge,

Secretary of Homeland Security.

[FR Doc. 04-5077 Filed 3-5-04; 8:45 am]

BILLING CODE 4410-10-P

DEPARTMENT OF JUSTICE

8 CFR Parts 1003, 1208, 1212, and 1240

[EOIR No. 142P; AG Order No. 2709-2004]

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: Proposed rule.

SUMMARY: The recent Safe Third Country agreement between the United States and Canada provides new procedures for dealing with certain categories of aliens crossing at land border ports-of-entry between the United States and Canada, or in transit from Canada or the United States, and who express a fear of persecution or torture if returned to the country of their nationality or habitual residence. The Agreement recognizes that the United States and Canada are safe third countries, each of which offers full procedures for nationals of other countries to seek asylum or other protection. Accordingly, 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 for asylum in the United States. Subject to the stated exceptions, such aliens attempting to travel from Canada to the United States, or vice versa, will be allowed to seek asylum or other protection in one country or the other, but not in both.

Elsewhere in this issue of the **Federal Register**, the Department of Homeland Security (DHS) is publishing a proposed rule that would, among other things, give asylum officers the authority to apply the Agreement with respect to arriving aliens. This proposed rule provides that the immigration judges will not review the threshold factual determinations by asylum officers that an alien does not satisfy any of the exceptions under the Agreement. However, for any alien who the asylum officer determines is not barred by the Agreement, the existing credible fear process under section 235(b) of the Immigration and Nationality Act (Act) remains unchanged, including the right to seek review by an immigration judge. Finally, this rule provides authority for an immigration judge to apply the Agreement with respect to aliens whom DHS has chosen to place in removal proceedings under section 240 of the Act.

DATES: Written comments must be submitted on or before May 7, 2004.

FOR FURTHER INFORMATION CONTACT: Chuck Adkins-Blanch, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041, telephone (703) 305-0470.

ADDRESSES: Please submit written comments to Chuck Adkins-Blanch, General Counsel, Executive Office for Immigration Review, Office of the General Counsel, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia, 22041. To ensure proper handling, please reference RIN No. 1125-AA46 on your correspondence. The public may also submit comments electronically to the EOIR at eoir.regs@usdoj.gov. When submitting comments electronically, you must include RIN No. 1125-AA46 in the subject box.

SUPPLEMENTARY INFORMATION: On December 5, 2002, the governments of the United States and Canada signed 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 ("bilateral Agreement with Canada" or "Agreement"). The Agreement will not take effect until the United States has promulgated implementing regulations and Canada has completed its own necessary domestic procedures to bring the Agreement into force. The supplementary information in the proposed rule of the Department of Homeland Security published elsewhere in this issue of the **Federal Register** explains in greater detail the goals of the Agreement and the reasons for including its particular terms and exceptions, and persons commenting on this rule should keep in mind the discussion of these issues in the DHS proposed rule.

Terms of the Agreement

This Agreement permits the United States to return to Canada, the country of last presence, certain aliens seeking protection who attempt to enter the United States from Canada at a land border port-of-entry, or are being removed from Canada in transit through the United States. Such aliens are not eligible to apply for asylum, withholding of removal, or protection under the Convention Against Torture in the United States, unless one of the exceptions stated in the Agreement applies. Under the Agreement, those aliens who are returned to Canada will have their protection claims adjudicated by Canadian authorities under Canadian law. Similarly, the Agreement permits

Canada to return to the United States certain aliens seeking protection attempting to enter Canada from the United States at land border ports-of-entry, and certain aliens being removed from the United States in transit through Canada. In either case, the Agreement ensures that the asylum seekers will have access to a full and fair procedure for determining their asylum or other protection claims, either by the United States or by Canada, before the alien can be returned to the country of his or her nationality or habitual residence.

The Agreement applies to aliens arriving from Canada who are inadmissible under section 212(a)(6)(C) (fraud or willful misrepresentation) or section 212(a)(7) (failure to present proper documents) of the Immigration and Nationality Act (Act), 8 U.S.C. 1182(a)(6)(C), (7). In general, all arriving aliens who are inadmissible on either of those grounds are subject to expedited removal pursuant to section 235(b) of the Act. Under 8 CFR 235.3(b)(4), aliens subject to expedited removal who seek asylum in the United States or otherwise express a fear of persecution or torture are referred to an asylum officer employed by U.S. Citizenship and Immigration Services, a component of DHS, for a credible fear determination in accordance with 8 CFR 208.30.

As stated last year when the Agreement was being negotiated, "Such an arrangement would limit the access of asylum seekers, under appropriate circumstances, to the system of only one of the two countries." 67 FR 46213 (July 12, 2002). Thus, the Agreement provides a threshold basis for returning certain arriving aliens to Canada to pursue their protection claims under Canadian law, but also provides several specific exceptions in which arriving aliens would be permitted to remain in the United States in order to pursue protection under United States law.

In particular, the Agreement provides important exceptions based on concerns for family unity, allowing an arriving alien to remain in the United States to pursue protection claims if the alien has a qualifying family member living in the United States and that family member either has been granted lawful status in the United States (other than visitor), or the family member is over the age of 18 and has filed a pending application for asylum. The range of family members who may qualify as "anchor" relatives due to their presence in the United States is far broader than those recognized under other provisions of immigration law. It includes spouses, sons, daughters, parents, legal guardians, siblings, grandparents, grandchildren, aunts, uncles, nieces,

and nephews. There is a separate exception for minors who do not have a parent in either the United States or Canada, though the definition of "unaccompanied minor" under the Agreement is also different than that used in other contexts under the immigration laws.

The Agreement also has exceptions for an arriving alien who is a citizen of Canada (or a habitual resident of Canada not having a country of nationality), as well as for aliens who presented a valid visa or other travel document (other than for transiting the United States) or were exempt from the requirement to present a passport.

Finally, the Agreement recognizes that the United States Government may conclude, in its discretion, that it is in the public interest to allow an arriving alien to remain in the United States to pursue protection even though the alien does not meet any of the specific exceptions under the Agreement. This latter discretionary determination is reserved to DHS alone and is not within the province of the immigration judges to review or grant.

The DHS proposed rule on this subject provides a more complete discussion of the Agreement, and the exceptions under the Agreement that would be codified at 8 CFR 208.30. The specific terms of the bilateral Agreement with Canada can be found on the DHS Web site at <http://www.uscis.gov>.

Legal Authority Permitting the Use of a Bilateral Agreement as a Bar to Applying for Asylum

Section 208(a)(1) of the Act permits any alien who is physically present in or who arrives at the United States to apply for asylum, and specifically recognizes the right of arriving aliens to present claims for asylum through the credible fear review process under section 235(b) of the Act. However, section 208(a)(2)(A) of the Act states that the right to apply for asylum under paragraph (1) shall not apply where, "pursuant to a bilateral or multilateral agreement, the alien may be removed to a country where the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General [or the Secretary of Homeland Security] finds that it is in the public interest for the alien to receive asylum in the United States."

The bilateral Agreement with Canada allocates responsibility between the

United States and Canada for processing claims of certain asylum-seekers, enhancing the two nations' ability to manage, in an orderly fashion, asylum claims brought by persons crossing our common border. At present, it is the only agreement, for purposes of section 208(a)(2)(A) of the Act, that would bar an arriving alien from applying for asylum in the United States.

Implementation of the Agreement

The DHS rule published elsewhere in this issue of the **Federal Register** proposes to revise the DHS rules in 8 CFR chapter I, parts 208 and 212 to implement the provisions of the Agreement. This rule proposes revisions to the regulations of the Department of Justice relating to the role of immigration judges in implementing the Agreement.

Until February 28, 2003, the regulations governing the immigration judges and the Board of Immigration Appeals (BIA) were also in 8 CFR chapter I because the former Immigration and Naturalization Service (INS) and the Executive Office for Immigration Review (EOIR) were both part of the Department of Justice under the authority of the Attorney General. On March 1, 2003, however, the functions of the former INS were transferred from the Department of Justice to DHS pursuant to the Homeland Security Act (HSA), Public Law 107-296, 116 Stat. 2135, 2178 (2002). That law also provided that EOIR (including the administrative adjudications conducted by the immigration judges and the BIA) remains in the Department of Justice under the authority of the Attorney General. Accordingly, on February 28, 2003, the Attorney General published a technical rule that reorganized title 8 of the Code of Federal Regulations to reflect the transfer of the functions of the former INS to DHS while creating a separate set of regulations pertaining to EOIR. *See Aliens and Nationality; Homeland Security; Reorganization of Regulations*, 68 FR 9824 (Feb. 28, 2003). This technical rule created a new chapter V in 8 CFR and transferred or duplicated certain parts and sections from chapter I to the new chapter V and made other amendments. The regulations governing proceedings before EOIR are now contained in 8 CFR chapter V, beginning with part 1001. The DHS regulations pertaining to the Act remain in 8 CFR chapter I.

In its rule, DHS proposes to implement the Agreement by revising 8 CFR 208.4 and 208.30 to permit asylum officers to conduct a threshold screening to determine whether or not an alien

qualifies for an exception under the Agreement that would allow the alien to pursue an asylum or protection claim in the United States. The exceptions are listed in 8 CFR 208.30(e)(6)(iii) of the DHS proposed rule. If the arriving alien does not qualify for an exception under the Agreement, there would be no need for a credible fear determination on the merits of the alien's asylum claims and, accordingly, no right to seek review of the merits of the asylum claims by an immigration judge, as discussed below. The alien would be returned to Canada to pursue an asylum or protection claim under Canadian law. If the arriving alien does qualify for an exception to the Agreement, the asylum officer would proceed promptly to consider the merits of the alien's claims for protection under United States law through the regular credible fear process. Finally, DHS adopts definitions of "credible fear of persecution" and "credible fear of torture" in the 8 CFR 208.30(e).

This proposed rule is a companion to the DHS rule. Because the immigration judges and the BIA have independent authority over asylum and withholding claims made by aliens in removal proceedings, the Attorney General duplicated all of the provisions of 8 CFR part 208 as a new part in 8 CFR chapter V, part 1208. While DHS is making changes to its regulations in part 208 governing the asylum officers, the Attorney General in this rule is proposing to make changes to parts 1003 and 1208, relating to review of negative credible fear determinations by immigration judges, and part 1240, relating to the application of the Agreement to aliens in removal proceedings.

This rule takes account of the proposed changes being made by DHS in 8 CFR part 208, but does not propose to duplicate in part 1208 the full text of all of those changes. Many of the changes that DHS is proposing to make to 8 CFR 208.30 pertain only to the actions of the asylum officers, and do not directly affect the authority of the immigration judges and the BIA. Thus, in many instances, this rule will remove existing language from 8 CFR part 1208.30 and simply insert cross-references to the provisions of the DHS regulations in part 208.30 rather than reprinting them in full. In addition, because the provisions in 8 CFR 212.5 relating to the granting of parole pertain to actions by the Department of Homeland Security, and do not directly affect the authority of the immigration judges and the BIA, this rule does not attempt to track the changes that DHS is proposing to make to 8 CFR 212.5. Instead, this rule proposes to remove the

entire text of the parallel provision in 8 CFR 1212.5 and merely insert a cross-reference to the DHS regulations in 8 CFR 212.5.

Threshold Screening of an Alien's Eligibility Under the Agreement

Under section 235(b)(1)(B)(iii)(III) of the Act, an arriving alien who has received a negative credible fear determination by an asylum officer may request a prompt review by an immigration judge. The purpose of this review by an immigration judge is to allay concerns that an arriving alien might be returned to the country of his or her nationality or habitual residence to face persecution or torture, without having had an adequate opportunity to present his or her claims to U.S. immigration officials. The current regulations governing review of credible fear determinations by immigration judges are codified in 8 CFR 1003.42 and 1208.30(g)(2). In the credible fear review process, the alien is able to present any information relating to the likelihood of persecution or torture if the alien were removed to the country of his or her nationality or habitual residence.

For aliens who are subject to the Agreement, however, the threshold question is whether the alien should be returned to Canada for Canadian authorities to consider the merits of that alien's claims, or whether the alien will be allowed to pursue protection in the United States. Because the threshold nature of the issues under the Agreement is quite different from the issues relating to the merits of an alien's claimed fear of persecution or torture if returned to his or her country of nationality, this proposed rule, like the DHS rule, does not provide for an immigration judge to review an asylum officer's threshold determination under the Agreement that the alien should be returned to Canada for a determination of his or her asylum claims under Canadian law.

In the credible fear process, asylum officers consider the merits of the claimed fear of persecution or torture in making a credible fear determination. If the asylum officer makes a negative credible fear determination, the alien has the right to have an immigration judge review the merits of that determination. In contrast, in the case of an arriving alien from Canada who is subject to the Agreement and does not meet any of the exceptions, the merits of the alien's claims would not even arise in any proceedings before an immigration judge, and there would be no occasion for an immigration judge to consider or determine whether or not

the alien in fact has a credible fear of facing persecution or torture if returned to the country of his or her nationality or habitual residence. Such issues are irrelevant to a review of the specific exceptions under the Agreement (since the public interest exception under the Agreement is for DHS alone to consider, not an immigration judge). Unless the alien is under the age of 18 and unaccompanied, the principal issue for DHS to consider under the Agreement as a practical matter in deciding if the alien meets one of the exceptions will be whether the alien has a qualifying family member living in the United States (*i.e.*, a qualifying family member who is either in lawful immigration status in the United States, other than as a visitor, or has a pending asylum application).

Given the narrowness of the factual issues, the Department believes that the applicability of the Agreement can readily be considered and adjudicated by asylum officers. None of the threshold factual determinations under the Agreement has any relationship to the merits of an arriving alien's asylum claims, and none calls for the kind of expert judgment exercised by immigration judges in conducting credible fear reviews concerning the merits of an arriving alien's asylum claims. In addition, because the law requires that arriving aliens be detained, providing for reviews by immigration judges of these threshold issues under the Agreement through a credible fear review would likely result in prolonging the detention of such aliens, since the law provides that such a credible fear review can occur as late as 7 days after the asylum officer's determination. For these reasons, this rule provides that an immigration judge will not have jurisdiction to review an asylum officer's threshold determination under the Agreement that an alien is to be returned to Canada in order to pursue an adjudication of his or her asylum claims under Canadian law.

Removal Proceedings

New § 1240.11(g) provides rules pertaining to an arriving alien who is subject to the Agreement but DHS, in its discretion, decides to place the alien into removal proceedings under section 240 of the Act, rather than in expedited removal. Thus, if the immigration judge determines that the alien was placed into removal proceedings in connection with his or her arrival at a United States port-of-entry on the United States/Canadian land border, the alien would not be eligible to apply for asylum pursuant to section 208(a)(2)(A) of the Act unless an exception to the

Agreement is applicable. DHS might decide, in its discretion, to place an arriving alien into regular removal proceedings, for example, in order to lodge additional charges of inadmissibility against the alien, or, as suggested in the supplementary information in the DHS draft rule, because the alien is a minor. However, if DHS is seeking removal of the alien upon his or her arrival from Canada at a United States land border, it does not make any legal difference under the Agreement and under section 208(a)(2)(A) of the Act whether DHS has decided to use expedited removal procedures under section 235 of the Act or regular removal proceedings under section 240 of the Act.

Under this rule, an alien in regular removal proceedings who is subject to the Agreement would not be able to pursue an application for asylum, withholding of removal, or protection under the Convention Against Torture before the immigration judge, unless the alien satisfies the burden of proof to establish by a preponderance of the evidence that he or she qualifies for an exception to the Agreement, other than the public interest exception. (As previously noted, the decision to invoke the public interest exception is solely within the discretion of DHS. If DHS determines that it is in the public interest to allow a covered alien to pursue a claim for asylum or withholding of removal in removal proceedings, then DHS will file a written notice of its decision before the immigration judge, as provided in new 8 CFR 1240.11(g)(3).) If the alien does not establish an exception, he/she will be returned to Canada (the country of the alien's last presence) in order to pursue his or her protection claims there under Canadian law. As provided in the Agreement, the United States cannot remove an arriving alien who is covered by the Agreement to any country other than Canada in order to have recourse to protection under Canadian law.

This rule does not affect any other individuals applying for asylum in removal proceedings who are not subject to the Agreement. In particular, under the terms of the Agreement, an alien who is charged with grounds of deportability after being found in the United States will not be subject to the limitations of the Agreement, even if the alien had previously entered the United States from Canada, or any alien who arrived in the United States by air or water, or who entered the United States illegally at any point between the established land border port-of-entry.

As suggested in the supplementary information in the DHS proposed rule, DHS may exercise its discretion to place certain minors into removal proceedings under section 240 of the Act, rather than in expedited removal, when they arrive at a port-of-entry at the United States/Canadian land border. The Agreement uses a different definition of the term "unaccompanied minor" than is used in other contexts under the immigration laws. An unmarried arriving alien under the age of 18 who does not have a parent either in the United States or Canada will be exempt from the Agreement as an "unaccompanied minor," and will be permitted to pursue claims for asylum, withholding of removal, and protection under the Convention Against Torture before the immigration judge. However, a minor arriving from Canada who does have a parent either in the United States or in Canada will not be eligible for the exception as an unaccompanied minor under the terms of the Agreement (whether or not the alien may be considered an unaccompanied minor for other purposes under the immigration laws). Unless such an alien is able to satisfy one of the other exceptions under the Agreement—such as having a qualifying family member in the United States who either has been granted lawful status or has a pending asylum application—then the minor would not be eligible to apply for asylum, withholding of removal, or protection under the Convention Against Torture before the immigration judge. The immigration judge would consider applications for any other forms of relief for which the alien might be eligible and, if the alien is ultimately ordered removed, he or she would be returned to Canada in order to pursue claims for asylum or refugee protection under Canadian law.

For example, if a 15-year-old asylum-seeker arrives at a United States/Canada land-border port-of-entry without other family members, DHS may choose to place the alien in removal proceedings according to its own policies. In the course of the removal proceedings, the immigration judge will first determine whether the minor has a parent or legal guardian in the United States or Canada, in order to determine whether the "unaccompanied minor" exception to the Agreement applies. If the minor does have a parent or legal guardian in the United States or Canada, the immigration judge will determine whether any of the other exceptions to the Agreement apply. For example, if the alien's parent is living in the United States, the minor would not be an "unaccompanied minor" under the

Agreement, but the parent may be a qualifying relative if the parent either has been granted lawful status in the United States other than as a visitor or has a pending asylum application, as provided in other exceptions to the Agreement.

An alien who is found to be ineligible to apply for asylum pursuant to section 208(a)(2)(A) of the Act and the bilateral Agreement with Canada will be removed to Canada to have all of his or her claims for protection adjudicated by Canadian authorities under Canadian law. Accordingly, this rule adds § 1240.11(g)(4) to provide that an alien in removal proceedings who is subject to the Agreement is ineligible to apply for withholding of removal under section 241(b)(3) of the Act and the Convention Against Torture if it is determined that he or she is ineligible to apply for asylum based on the Agreement.

Section 241(b)(3)(A) of the Act prohibits removal of an alien to a country where the alien's life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. Similarly, Article 3 of the Convention Against Torture prohibits the return of an individual to another country where there are substantial grounds for believing that he or she would be subject to torture. These provisions, however, do not prevent the United States from removing an individual to any safe third country in which the person would not face the threat of persecution or torture.

Like the United States, Canada is a signatory to the 1967 Protocol Relating to the Status of Refugees ("Protocol")¹ and the Convention against Torture. Article 3 of the bilateral Agreement with Canada provides that "the Parties shall not return or remove a refugee status claimant referred by either Party under the terms of [the Agreement] to another country until an adjudication of the person's refugee status claim has been made." In Article 1, the Agreement defines a refugee status claim to include a request for protection consistent with the Protocol and the Convention Against Torture. Therefore, returning an individual to Canada pursuant to the terms of the Agreement is consistent with United States' obligations not to return an individual to a country where

the person would face persecution or torture.

Individuals Being Removed from Canada Who Seek Protection While in Transit Through the United States

Pursuant to the Agreement, if a person is being removed from Canada in transit through the United States and expresses a fear of persecution or torture or an intention to apply for asylum, the person will be returned to Canada for Canadian authorities to determine the refugee status claim, in accordance with Canadian law. The inspection of an alien who falls into this category is explained in the supplementary information in the DHS proposed rule. Generally, an individual being removed from Canada in transit through the United States will be placed in expedited removal proceedings, though there may be some rare instances in which the individual will be placed in removal proceedings under section 240 of the Act. The DHS rule provides that such individuals will receive the same threshold screening by an asylum officer as an alien who seeks entry to the United States at a land border port-of-entry between Canada and the United States. However, the exceptions for unaccompanied minors, qualifying family members, and valid travel documents do not apply to an alien being removed from Canada in transit through the United States. Because the Agreement provides no exceptions to the obligation to return such alien to Canada, except for the public interest exception, and the public interest exception itself would not be within the authority of an immigration judge to consider in any event, there is essentially nothing for an immigration judge to review in this context and no purpose to be served by providing for such review. For those rare instances in which an alien being removed in transit through the United States is placed in removal proceedings pursuant to section 240 of the Act, the immigration judge will not consider any claims of asylum, withholding of removal, or protection under the Convention Against Torture (unless DHS files a written notice in the proceedings that it has decided it is in the public interest to allow the alien to pursue those claims in the United States), and after completion of the proceedings, if the alien is ordered removed, the alien will be returned to Canada. On the other hand, if DHS files a written notice in the proceedings that it is in the public interest to allow the alien to pursue protection claims in the United States, then the alien will pursue his or her claim for protection in the removal proceedings, and, if ordered

removed, will be ordered removed to an appropriate country of removal.

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule affects individual aliens, as it relates to claims of asylum. It does not affect small entities, as that term is defined in 5 U.S.C. 601(6).

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 251 of the Small Business Regulatory Enforcement Act of 1996 (5 U.S.C. 804). 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 Attorney General 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 regulation justify its costs.

The proposed rule would implement a bilateral agreement that allocates responsibility between the United States and Canada for processing claims of certain asylum-seekers, enhancing the two nations' ability to manage, in an orderly fashion, asylum claims brought by persons crossing our common border. The rule applies to certain individuals

¹ Section 241(b)(3) of the Act is based on Article 33 of the Protocol. See *INS v Stevic*, 467 U.S. 407, 421 (1984) ("Section 203(e) of the Refugee Act of 1980 amended the language of § 243(h) [currently § 241(b)(3) of the Act] basically conforming it to the language of Article 33 of the United Nations Protocol.")

in removal proceedings who apply for asylum. This rule simply adds another factor for immigration judges to consider in removal proceedings. Therefore, the “tangible” costs of this rulemaking to the U.S. Government are minimal. Applicants who are found to be subject to the bilateral Agreement with Canada will be returned to Canada to seek asylum, saving the U.S. Government the cost of adjudicating their asylum claims.

The cost to asylum-seekers who, under the proposed 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. 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.

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 provisions of the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this proposed rule because there are no new or revised recordkeeping or reporting requirements.

Family Assessment Statement

The Attorney General has reviewed this regulation and assessed this action in accordance with the criteria specified by section 654(c)(1) of the Treasury General Appropriations Act, 1999, Public Law 105–277, Div. A. The Attorney General has determined that it will not affect family well-being as that term is defined in section 654.

The separate proposed rule published by the Department of Homeland Security explains that an alien arriving at a land border port-of-entry with Canada may qualify for an exception to the bilateral Agreement with Canada, 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 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. The DHS proposed rule addresses issues relating to family well-being in connection with that rule.

This proposed rule provides that the immigration judges will apply the same administrative guidelines of “family member” in the DHS proposed rule, in those cases where DHS has chosen to place an alien who is subject to the Agreement into removal proceedings under section 240 of the Act. However, that is expected to occur only very rarely. In any other case, where DHS does not choose to place an arriving alien into removal proceedings under section 240 of the Act, this rule has no effect on family well-being, because the immigration judges will not be involved.

List of Subjects

8 CFR Part 1003

Administrative practice and procedure, Aliens, Immigration, Legal services, Organization and function (Government agencies).

8 CFR Part 1208

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

8 CFR Part 1212

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

8 CFR Part 1240

Administrative practice and procedure and Aliens.

Accordingly, chapter V of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

1. The authority citation for part 1003 continues to read as follows:

Authority: 5 U.S.C. 301; 8 U.S.C. 1101 note, 1103, 1252 note, 1252b, 1324b, 1362; 28 U.S.C. 509, 510, 1746; sec. 2, Reorg. Plan No. 2 of 1950, 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub. L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub. L. 106–386; 114 Stat. 1527–29, 1531–32; section 1505 of Pub. L. 106–554, 114 Stat. 2763A–326 to –328.

2. Section 1003.42 is amended by adding new paragraph (h) to read as follows:

§ 1003.42 Review of credible fear determinations.

* * * * *

(h) Safe third country agreement—(1) Arriving alien. An immigration judge shall have no jurisdiction to review a determination by an asylum officer that an arriving alien is not eligible to apply for asylum pursuant to a bilateral or multilateral agreement (the agreement) under section 208(a)(2)(A) of the Act and should be returned to a safe third country to pursue his or her asylum claims under the laws of that country. See 8 CFR 208.30(e)(6).

(2) Aliens in transit. An immigration judge has no jurisdiction to review any determination by DHS that an alien being removed from Canada in transit through the United States should be returned to Canada to pursue asylum claims under Canadian law, under the terms of a safe third country agreement with Canada.

* * * * *

PART 1208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

3. The authority citation for part 1208 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1158, 1226, 1252, 1282.

4. Section 1208.4 is amended by adding new paragraph (a)(6) to read as follows:

§ 1208.4 Filing the application.

* * * * *

(a) * * *
(6) Safe third country agreement. Immigration judges have authority to consider issues under section 208(a)(2)(A) of the Act, relating to the determination of whether an alien is ineligible to apply for asylum and should be removed to a safe third

country pursuant to a bilateral or multilateral agreement, only with respect to aliens whom DHS has chosen to place in removal proceedings under section 240 of the Act, as provided in 8 CFR 1240.11(g). For DHS regulations relating to determinations by asylum officers on this subject, see 8 CFR 208.30(e)(6).

* * * * *

5. Section 1208.30 is amended by:
- a. Revising paragraphs (a) and (e); and
 - b. Removing and reserving paragraphs (c), (d), (f) and (g)(1).

The revisions read as follows:

§ 1208.30 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.

(a) Jurisdiction. The provisions of this subpart apply to aliens subject to sections 235(a)(2) and 235(b)(1) of the Act. Pursuant to section 235(b)(1)(B), asylum officers have exclusive jurisdiction to make credible fear determinations, and the immigration judges have exclusive jurisdiction to review such determinations.

* * * * *

(e) Determination. For the standards and procedures for asylum officers in conducting credible fear interviews and in making positive and negative credible fear determinations, see 8 CFR 208.30(b), (c), (d), (e), (f), and (g)(1). The immigration judges will review such determinations as provided in paragraph (g)(2) of this section and 8 CFR 1003.42.

* * * * *

PART 1212—DOCUMENTARY REQUIREMENTS; NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

6. The authority citation for part 1212 is revised to read as follows:

Authority: 8 U.S.C. 1101 and note, 1103.

7. Section 1212.5 is revised to read as follows:

§ 1212.5 Parole of aliens into the United States.

Procedures and standards for the granting of parole by the Department of Homeland Security can be found at 8 CFR 212.5.

PART 1240—PROCEEDINGS TO DETERMINE REMOVABILITY OF ALIENS IN THE UNITED STATES

8. The authority citation for part 1240 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1182, 1186a, 1224, 1225, 1226, 1227, 1251, 1252 note,

1252a, 1252b, 1362; secs. 202 and 203, Pub. L. 105–100, 111 Stat. 2160, 2193; sec. 902, Pub. L. 105–277, 112 Stat. 2681; sec. 1101, Pub. L. 107–269, 116 Stat. 2135.

9. Section 1240.11 is amended by adding a new paragraph (g), to read as follows:

§ 1240.11 Ancillary matters, applications.

* * * * *

(g) Safe third country agreement. (1) The immigration judge has authority to apply section 208(a)(2)(A) of the Act, relating to a determination that an alien may be removed to a safe third country pursuant to a bilateral or multilateral agreement, in the case of an alien who is subject to the terms of the agreement and is placed in proceedings pursuant to section 240 of the Act without being processed under section 235 of the Act. In an appropriate case, the immigration judge shall determine whether under the Agreement the alien should be returned to the safe third country, or whether the alien should be permitted to pursue asylum or other protection claims in the United States.

(2) An alien described in paragraph (g)(1) of this section is ineligible to apply for asylum, pursuant to section 208(a)(2)(A) of the Act, unless the immigration judge determines, by preponderance of the evidence, that:

(i) The agreement does not apply to the alien or does not preclude the alien from applying for asylum in the United States; or

(ii) The alien qualifies for an exception to the agreement as set forth in paragraph (g)(3) of this section.

(3) The immigration judge shall apply the applicable regulations in deciding whether the alien qualifies for any exception under the agreement that would permit the United States to exercise authority over the alien's asylum claim. The exceptions under the agreement are codified at 8 CFR 208.30(e)(6)(iii). The immigration judge shall not review, consider, or decide any issues pertaining to any discretionary determination on whether the alien should be permitted to pursue an asylum claim in the United States notwithstanding the general terms of the agreement, as such discretionary public interest determinations are reserved to the Department of Homeland Security. However, an alien in removal proceedings who is otherwise ineligible to apply for asylum under the agreement may apply for asylum if the Department of Homeland Security files a written notice in the proceedings before the immigration judge that it has decided in the public interest to allow the alien to pursue claims for asylum or

withholding of removal in the United States.

(4) An alien who is found to be ineligible to apply for asylum under section 208(a)(2)(A) of the Act is ineligible to apply for withholding of removal pursuant to section 241(b)(3) of the Act and the Convention against Torture. However, the alien may apply for any other relief from removal for which the alien may be eligible. If an alien who is subject to section 208(a)(2)(A) of the Act is ordered removed, the alien shall be ordered removed to the safe third country in which the alien will be able to pursue his or her claims for asylum or protection under the laws of that country.

Dated: March 1, 2004.

John Ashcroft,

Attorney General.

[FR Doc. 04–5065 Filed 3–5–04; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Parts 93, 94, and 95

[Docket No. 03–080–2]

RIN 0579–AB73

Bovine Spongiform Encephalopathy; Minimal Risk Regions and Importation of Commodities

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: We are reopening the comment period for our proposed rule that would amend the regulations regarding the importation of animals and animal products to recognize, and add Canada to, a category of regions that present a minimal risk of introducing bovine spongiform encephalopathy into the United States via live ruminants and ruminant products. The proposed rule also set out conditions under which we would allow the importation of certain live ruminants and ruminant products and byproducts from such regions. This action will allow interested persons additional time to prepare and submit comments.

DATES: We will consider all comments that we receive on or before April 7, 2004.

ADDRESSES: You may submit comments by any of the following methods: