CENTER FOR IMMIGRATION STUDIES

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U.S. Department of Homeland Security
5900 Capital Gateway Drive
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RE: DHS Docket No. USCIS-2024-0005: Application of Certain Mandatory Bars in Fear Screenings

Dear Mr. Delgado,

The Center for Immigration Studies (CIS) respectfully submits the following public comment to the U.S. Department of Homeland Security (DHS) in response to the agency's request for information, as published in the Federal Register on May 13, 2024. *See Application of Certain Mandatory Bars in Fear Screenings;* Notice of proposed rulemaking (NPRM); DHS Docket No. USCIS-2024-0005; RIN: 1615-AC91.

CIS is a national, nonprofit, public-interest organization comprised of millions of concerned citizens who share a common belief that our nation's immigration laws must be enforced, and that policies must be reformed to better serve the national interest. CIS examines trends and effects, educates the public on the impacts of sustained high-volume immigration, and advocates for sensible solutions that enhance America's environmental, societal, and economic interests today, and into the future.

I. Introduction

The United States, under the Biden administration, has endured the worst border crisis in the nation's history. Since 2021, there have been more than 9.2 million encounters of inadmissible aliens nationwide and over 7.6 million encounters at the Southwest border.[1] These numbers do not include "got-aways," the term the U.S. Customs and Border Protection (CBP) officers use to refer to aliens who are detected entering the United States illegally, but ultimately not apprehended. As of March 2024, at least 1.8 million known got-aways have evaded U.S. Border Patrol under this administration's policies.[2]

The illegal immigration crisis is not limited to the Southwest border. Encounters at the northern borer in March of FY 2024 increased 716% compared to March FY 2021. In the

[1] U.S. Customs and Border Protection, Nationwide Encounters (June 2024).
[2] U.S. House of Representatives Homeland Security Committee, *Border Crisis Startling Stats, Biden Administration is on Track to Reach 10 Million Border Encounters Before End of Fiscal Year* (May 2024).

Swanton Sector, specifically, encounters reached their highest total on CBP record at 1,109 in the month of March 2024 alone – a 2,897% increase compared to March 2021 and a 46% increase compared to March 2023.[3]

The administration's failure to effectively enforce the nation's immigration laws and deter illegal immigration has put public safety recklessly at risk. As of February 2024, 351 individuals whose names appear on the terrorist watchlist were stopped trying to cross the U.S.-Mexico border between ports of entry. In just the first half of fiscal year (FY) 2024, CBP has arrested 18,465 aliens with criminal convictions or outstanding warrants nationwide, including 248 known gang members.[4]

DHS published this NPRM on May 13, 2024, to authorize asylum officers to apply the mandatory bars to asylum found at section 208(b)(2)(A)(i) through (v) of the INA and the mandatory bars to asylum under section 241(b)(3) of the INA in the determination as to whether an alien has a credible or reasonable fear of persecution. Application of these bars is not required under this NPRM and does not authorize asylum officers to apply the bar to asylum found at section 208(b)(20(A)(vi) of the INA (i.e., the firm resettlement bar") to credible fear screenings.[5]

DHS explained the NPRM was issued "to provide DHS additional operational flexibility in screening determinations by giving [asylum officers] discretion, at the earliest stage possible, to consider whether a given [alien] is unlikely to be able to establish eligibility for asylum or statutory withholding of removal because of a mandatory bar that related to participation in persecution, or national security, criminal or other public safety concern, and …issue a negative fear of persecution determination based on application of the bar."[6] DHS further elaborated that, "the purpose of the screening process is to identify individuals who are ineligible for relief at the earliest stage possible in order to create systematic efficiencies while simultaneously protecting legal rights, ignoring statutory bars to such relief with serious implications, including terrorism and significant criminality, during this process runs counter to the policy goals."[7]

To further DHS's stated objective in "more expeditiously removing those without a lawful basis to remain in the United States, while providing immigration relief or protection to those who merit it at the earliest point possible,"[8] while promoting both public safety and the integrity of the immigration system, CIS strongly recommends strengthening the NPRM to require – rather than merely allow – asylum officers to consider the mandatory bars to asylum and withholding of removal. DHS should also

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[3] *Id.*
[4] *Id.*
[5] 89 Fed. Reg. 41347 (May 13, 2024).
[6] *Id.* at 41351.
[7] *Id.*
[8] *Id.*

strengthen the rule by requiring asylum officers to apply all mandatory bars to asylum and withholding of removal, rather than arbitrarily excluding non-terrorism or public safety-related bars, such as the "firm resettlement" bar.

Additionally, to more effectively deter illegal immigration to the United States, CIS recommends that DHS address the root causes of the border crisis by implementing policies that discourage illegal immigration to the United States, including either expanding use of expedited removal or utilizing the procedures authorized by section 235(b)(2)(C) of the INA. DHS must also strengthen the asylum system and terminate its policies that hinder immigration enforcement or exempt entire classes of removable aliens from enforcement actions. To have a properly functioning legal immigration system, the executive branch must enforce the laws passed by Congress.

II. Applying the Mandatory Bars to Asylum and Withholding of Removal is Consistent with Federal Law and the United States's International Nonrefoulment Commitments.

CIS strongly disagrees with commenters that argue that applying the mandatory bars to asylum and withholding of removal at the credible fear stage is unlawful or violates the United States's commitments under its internation nonrefoulment obligations. CIS believes regulatory amendments that allow asylum officers to apply the mandatory bars to asylum and withholding of removal better align with Congress's intent in crafting INA § 235 that the expedited removal process provide a streamlined and efficient removal process for certain inadmissible aliens.[9]

First, the proposed rule is consistent with U.S. obligations under the 1967 Protocol relating to the Status of Refugees ("Refugee Protocol") (incorporating Articles 2 through 34 of the 1951 Convention relating to the Status of Refugees ("Refugee Convention")) and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Neither the 1967 Refugee Protocol nor the CAT is self-executing.[10] This means that these treaties are only enforceable to the extent that they have been implemented by legislation. To state this another way, the United States is only bound by its own laws and regulations implementing these treaties.

The United States implements its nonrefoulement obligations under Article 33 of the Refugee Convention, via the Refugee Protocol, through the statutory withholding of removal statute at section 241(b)(3) of the INA. This section provides that an alien may not be removed to a country where their life or freedom would be threatened because of the alien's race, religion, nationality, membership in a particular social group, or political

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[9] *See* 85 Fed. Reg. 36264, 36267 (Jun. 15, 2020).

[10] *See Khan* v. *Holder*, 584 F.3d 773, 783 (9th Cir. 2009) (`[T]he [1967 Refugee] Protocol is not self-executing."); *Auguste* v. *Ridge*, 395 F.3d 123, 132 (3d Cir. 2005) (the CAT "was not self-executing").

opinion. They are not implemented by the asylum statute, which provides a discretionary benefit.[11]

Protection under CAT, on the other hand, is governed by the CAT regulations, authorized by the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA").[12] These regulations prohibit the United States from removing an alien to a country in which they are "more likely than not" to be tortured. Protection under CAT is granted either in the form of withholding of removal or deferral of removal.[13]

The asylum statute, section 208 of the INA, does not itself implement Article 33 of the Refugee Convention. As stated above, asylum is a discretionary immigration benefit that can be granted by the Attorney General or the Secretary of Homeland Security if the alien establishes eligibility for asylum under section 208 of the INA and warrants a positive exercise of discretion.[14] No applicant has a right to receive asylum, and the INA affords the Attorney General the right to establish additional bars to asylum eligibility consistent with the asylum statute, as well as the authority to establish "any other conditions or limitations on the considerations of an application for asylum" that are consistent with the INA.[15] Aliens who are denied asylum may still qualify statutory withholding of removal or protection under the regulations implementing the Convention Against Torture (CAT) (governing withholding or deferral of removal for CAT).

Applying the mandatory bars of asylum and withholding of removal at the credible fear screening stage is also consistent with the INA. The INA provides mandatory bars to applying for asylum at section 208(a)(2) of the INA, to asylum eligibility at section 208(b)(2)(A) of the INA, and to eligibility for withholding of removal at section 241(b)(3)(B) of the INA. There are no bars to deferral of removal under the regulations implementing U.S. obligations under Article 3 of the CAT.

Notably, the INA specifically requires asylum officers conducting credible fear screenings to determine whether an "alien could establish eligibility for asylum under

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[11] *See* INA 241(b)(3); 8 CFR 208.16, 1208.16; *see also INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 429-30 (1987) (discussing the statutory precursor to INA 241(b)(3), INA 243(h)); *INS* v. *Stevic*, 467 U.S. 407 (1984) (same).

[12] Public Law 105-277, 112 Stat. 2681-822.

[13] *See* 8 C.F.R. § 208.16, § 1208.16.

[14] *See* INA § 208(b)(1) (providing that the Attorney General and Secretary of Homeland Security *may* grant asylum to refugees); *see also Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 at 1965 n.4 ("A grant of asylum enables an alien to enter the country, but even if an applicant qualifies, an actual grant of asylum is discretionary."). Aliens who are barred from asylum or denied asylum based on the Attorney General or Secretary of Homeland Security's discretion may, nonetheless, avoid removal from their country of origin by either qualifying for another form of protection or immigration benefit, such as withholding or deferral of removal, or by traveling to a third country. There are currently 145 signatories to the Convention Relating the Status of Refugees.

[15] *See* INA § 208(b)(2)(C), (d)(5)(B).

section 1158 of this title," which would by extension include the application of the bars listed in section 208 of the INA (section 1158 of the U.S. Code) that are a part of this NPRM.[16] Screening for statutory withholding of removal and withholding or deferral of removal under the CAT regulations are not required by the INA, but regulation.

Finally, CIS disagrees with commenters who argue that this NPRM violates aliens' due process rights. Applying the mandatory bars to asylum and withholding of removal does not deny due process to any alien. As an initial matter, federal courts have found that aliens have no cognizable due process interest in the discretionary benefit of asylum.[17] Additionally, applying the mandatory bars to asylum and withholding of removal do not alter any of the basic procedural protections – such as notice and an opportunity to be heard – for aliens who make a credible fear claim.[18]

Aliens, under the framework created by this NPRM, will continue to have their claims heard by asylum officers, have their credible fear determination reviewed by a supervisory asylum officer, [19] and be provided an opportunity to appeal their credible fear determination to an immigration judge.[20] The NPRM does not change the existing process governing how a credible fear determination is handled after it has been issued by an asylum officer. [21] As a result, applying the mandatory bars to credible fear screenings in no way makes the determination "final."

III. DHS Should Require Asylum Officers to Apply All of the Mandatory Bars to Asylum and Withholding of Removal to Credible Fear Screenings.

CIS strongly recommends that DHS require USCIS asylum officers to apply all of the mandatory bars to asylum and statutory withholding of removal at the credible fear stage. Specifically, DHS should require asylum officers to determine (1) whether an alien is subject to one or more of the mandatory bars to being able to apply for asylum under section 208(a)(2)(B)-(D) of the INA, or the bars to asylum eligibility under section 208(b)(2) of the INA, including any eligibility bars established by regulation under section 208(b)(2)(C) of the INA; and (2) if so, whether the bar at issue is also a bar to

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[16] *See* INA § 235(b)(1)(B)(v).
[17] *See Yuen Jin* v. *Mukasey*, 538 F.3d 143, 156-57 (2d Cir. 2008); *Ticoalu* v. *Gonzales*, 472 F.3d 8, 11 (1st Cir. 2006) (citing *DaCosta* v. *Gonzales*, 449 F.3d 45, 49-50 (1st Cir. 2006)).
[18] *See LaChance* v. *Erickson*, 522 U.S. 262, 266 (1998) ("The core of due process is the right to notice and a meaningful opportunity to be heard."); *see also Lapaix* v. *U.S. Att'y Gen.*, 605 F.3d 1138, 1143 (11th Cir. 2010) ("Due process requires that aliens be given notice and an opportunity to be heard in their removal proceedings.").
[19] *See* 8 C.F.R. § 208.30(e)(8).
[20] *See* INA § 235(b)(1)(B)(iii)(III).
[21] *See* 8 C.F.R. § 208.30(g).

statutory withholding of removal under section 241(b)(3)(B) of the INA and withholding of removal under the regulations implementing the Convention Against Torture (CAT).

Under CIS's proposed framework, if a mandatory bar to asylum applies, the alien should be screened only for statutory withholding of removal and withholding of removal under the CAT regulations. If the alien is subject to a mandatory bar to asylum that is also a mandatory bar to statutory withholding of removal, then the alien should be screened only for deferral of removal under the CAT regulations.

An alien in expedited removal proceedings who could establish a credible fear of persecution or reasonable possibility of persecution but for the fact that he or she is subject to one of the bars that applies to both asylum and statutory withholding of removal should receive a negative fear determination, unless the alien establishes a significant possibility (or reasonable possibility if DHS adopts CIS's recommendation to raise the screening standard for statutory withholding of removal and CAT protection, discussed below) of torture, in which case they should be referred to an immigration court with a Notice to Appear for full consideration of their claims by an immigration judge.[22] Aliens who receive negative credible fear determinations retain the opportunity to have that negative determination reviewed by an immigration judge.[23]

The NPRM, however, arbitrarily excluded the mandatory bar found at section 208(b)(2)(A)(vi) of the INA (i.e., the "firm resettlement bar"), which bars an alien from asylum eligibility if they have already been "firmly resettled" in a third country, or the bars to applying for asylum found at section 208(a)(2) of the INA. DHS has not adequately explained why it has chosen to allow asylum officers to apply the other bars to asylum and withholding of removal, but not the firm resettlement bar which aligns with Congress's overall intent to discourage forum shopping and "not to provide [aliens] with a broader choice of safe homelands, but rather, to protect [refugees] with nowhere else to turn."[24]

Moreover, CIS does not believe that the explanation DHS did provide – that the terrorism and public safety-related bars are more aligned with Secretary Mayorkas's "enforcement

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[22] On March 29, 2022, DHS issued a regulation, *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, 85 Fed. Reg. 80274 (Mar. 29, 2022), to allow asylum officers to refer aliens who receive positive credible fear determinations to USCIS for an "Asylum Merits Interview" for a final adjudication on their asylum application by an asylum officer, rather than to EOIR for section 240 removal proceedings. For reasons not discussed in this comment, CIS believes this regulation is poor policy and legally deficient. Accordingly, CIS does not recommend DHS utilize the procedures created under the regulation.

[23] *See* INA § 235(b)(1)(B)(iii)(III).

[24] *See* Matter of B-R-, 26 I&N Dec. at 122 (quotation marks omitted); *see also Matter of A-G-G-*, 25 I&N Dec. at 503 (explaining the purpose of the firm resettlement bar "is to limit refugee protection to those with nowhere else to turn").

priorities" – is a sufficient basis to exclude application of a statutory bar to eligibility.[25] Priorities set out in a policy memorandum are subject to change, often because of changing world, domestic, and/or political conditions or a change of administration. Accordingly, CIS does not believe that DHS provided adequate rational to allow asylum officers to apply the remaining bars to asylum and withholding of removal eligibility to credible fear determinations but prohibit application of the firm resettlement bar.

As DHS and DOJ jointly acknowledged in 2020, it is pointless, wasteful, and inefficient to adjudicate claims for relief in section 240 proceedings when it can be determined that an alien is subject to one or more of the mandatory bars to asylum or statutory withholding at the screening stage.[26] Applying all of the mandatory bars to aliens at the credible fear screening stage would eliminate removal delays inherent in section 240 proceedings that serve no purpose and eliminate the waste of adjudicatory resources currently expended in vain. These resources could instead be used to process and adjudicate claims from applicants that have a greater likelihood of success in their asylum application.

CIS also strongly disagrees with comments that argue that asylum officers will not be capable of assessing whether the bars apply at the credible fear stage. As DHS has already noted, asylum officers are "well trained in asylum law" and "already assess whether certain bars may apply to applications in the credible fear setting – they simply do not apply them under current regulations."[27] Credible fear determinations are themselves complicated and fact intensive inquires that asylum officers receive significant training to conduct.[28]

Moreover, because a credible fear determination is a screening, asylum officers only need to assess whether there is a significant possibility that an applicants can overcome the bars. As discussed above, the significant possibility standard is a low screening that merely requires the applicant to establish "a substantial and realistic possibility of

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[25] *See* 89 Fed. Reg. 41347, 41352 (May 13, 2024).
[26] 85 Fed. Reg. 36264, 36272 (Jun. 15, 2020).
[27] 85 Fed. Reg. 80274, 80296 (Dec. 11, 2020); *See* Government Accountability Office, *Actions Needed to Strengthen USCIS's Oversight and Data Quality of Credible and Reasonable Fear Screenings* at 10 (Feb. 2020), ("In screening noncitizens for credible or reasonable fear . . . . [a] USCIS asylum officer is to determine if the individual has any bars to asylum or withholding of removal that will be pertinent if the individual is referred to immigration court for full removal proceedings."); U.S. Citizenship and Immigr. Serv., *Lesson Plan on Credible Fear of Persecution and Torture Determinations* at 31 (2019), ("Even though the bars to asylum do not apply to the credible fear determination, the interviewing officer must elicit and make note of all information relevant to whether a bar to asylum or withholding applies or not.").
[28] INA § 235(b)(1)(E), (defining an asylum officer as one who "has had professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of applications under [INA 208], and . . . is supervised by an officer who [has had similar training] and has had substantial experience adjudicating asylum applications."); *see generally* 8 C.F.R. § 208.1(b) (covering training of asylum officers).

succeeding" on their asylum applicant. USCIS has, at times, described as requiring a showing of "as little as a 10 percent change of persecution on account of a protected ground."[29] Additionally, an alien's testimony alone may be sufficient evidence to establish asylum or statutory withholding of removal eligibility.[30] Because testimony is already used as evidence to establish a part or whole credible fear claim in many cases, there is no reason to believe that an alien cannot also provide testimony establishing a significant possibility whether they are subject to a bar to asylum or withholding.

IV. DHS Should Implement Additional Deterrence Policies to Discourage Illegal Immigration Across the Southwest Border.

DHS's failure to secure its border, deter illegal immigration, and detain inadmissible aliens who are subject to section 235 of the INA's mandatory detention provisions has significantly increased the population of aliens who are eligible to apply for work authorization in the United States and strained DHS's resources. The availability of prompt release from detention under Biden administration policies, as well as employment authorization availability has caused the number of encounters to skyrocket to past levels in the past decade, and most drastically since 2021.[31]

The need for administrative deterrence is critical given the current crisis at the southern border, specifically the sharp increase of encounters with aliens at the border, a subsequent dramatic increase in requests for asylum relief, and the large number of meritless, fraudulent, or frivolous asylum claims that are straining the nation's immigration system. All applicants for asylum and aliens paroled into the United States are eligible to apply for work authorization under the INA.

Apprehending and processing the growing number of aliens who arrive illegally into the United States and make fear claims consumes an ever-increasing amount of DHS resources, which must surveil, apprehend, screen, and process the aliens who enter the country and must represent the U.S. Government in cases before Department of Justice (DOJ) immigration judges, the Board of Immigration Appeals, and the U.S. Courts of Appeals. Most asylum claims, however, ultimately fail, and many are fraudulent.

Over the past decade, most credible fear claims were determined to be meritless. The Supreme Court noted, when evaluating the expedited removal process, that a random sampling of asylum claims found 58 percent possessed indications of fraud, while 12 percent were conclusively fraudulent.[32] Moreover, of the applicants determined to have a

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[29] *See I.N.S.* v. *Cardoza-Fonseca*, 480 U.S. 421, 431-32 (1987).
[30] *See Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987).
[31] U.S. Customs and Border Protection, *Southwest Land Border Encounters* (May 2024).
[32] *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. at 1959, 1967-68.

credible fear (or a significant possibility of establishing eligibility for asylum or withholding of removal), about 50% over the same 10-year period, ultimately did not submit an asylum application after their fear screening.[33] In 2019, a grant of asylum followed a credible fear determination just 15% of the time.[34]

Given these facts, CIS urges DHS to adopt the following reforms to deter fraud and abuse of the asylum system, obtain control over the southern border, and deter illegal immigration into the United States. These policies will significantly reduce the resource strain mass illegal immigration is imposing on CBP, USCIS, and ICE resources and may significantly reduce processing times for aliens with legitimate fear claims.

A. Utilize Section 235(b)(2)(C) of the INA or Reinstate the Migrant Protection Protocols (MPP)

CIS urges DHS to continue operation of section 235(b)(2)(C) of the INA and require certain arriving aliens to wait in Mexico pending their removal proceedings with an immigration judge in the United States as an alternative to detaining arriving aliens in the United States under section 235(b)(1) (governing "expedited removal" proceedings) or removal proceedings pursuant to section 235(b)(2)(a)(i). DHS's operation of MPP, which implemented section 235(b)(2)(C), has a proven track record to reduce illegal immigration across the southern border and successfully ended the 2019 border crisis. DHS should reinstate MPP to end the current crisis.

The availability of employment authorization with a pending asylum application, combined with "catch-and-release" policies that ensure most aliens can avoid detention and be released into the United States, provides a strong incentive for illegal border crosses, and once apprehended by DHS, for making a fraudulent or frivolous asylum claims and later disappear into the interior of the United States. By eliminating the possibility of release into the interior of the United States pending an alien's immigration court hearing, MPP eliminated the most significant pull factor for illegal border crossings. MPP also provides amenable aliens a significantly quicker avenue to an immigration hearing, where they may pursue a claim for any relief or benefits for which they may be eligible. Reducing the overall numbers of fraudulent and frivolous claims is critical to allow both DHS and DOJ to reduce their backlogs and allow legitimate asylum seekers access to benefits without unreasonable delays.

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[33] *See* Executive Office of Immigration Review, *Adjudication Statistics: Rates of Asylum Filings in Cases Originating With a Credible Fear Claim* (Nov. 2018); *see also* 84 Fed. Reg. 33841 (noting that many instead abscond).

[34] *See* Executive Office of Immigration Review, *Asylum Decision Rates in Cases Originating With a Credible Fear Claim* (Oct. 2019).

B. Rescind Restrictive Enforcement Priorities and Enforce Immigration Law in the Interior of the United States

CIS urges DHS to allow the U.S. Immigration and Customs Enforcement (ICE) to enforce immigration law by removing arbitrary limitations on who may be arrested or removed. DHS must immediately rescind its policy guidance: *Guidelines for the enforcement of Civil Immigration Law*, September 30, 2021*; Memorandum on Worksite* Enforcement, October 12, 2021; *Rescission of Civil Penalties for Failure-to-Depart* policy, April 23, 2021; *Civil Immigration Enforcement Actions in or near Courthouses*, April 27, 2021. Relatedly, ICE Office of the Principal Legal Advisor (OPLA) should rescind its memorandum *Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion*, Apr. 3, 2022, that instructs ICE attorneys to cancel cases in removal proceedings that do not meet the enforcement priorities outlined in Secretary Mayorkas's *Guidelines for the enforcement of Civil Immigration Law* memorandum. Together, these policies signal to the world that ICE will not strictly enforce the immigration laws of the United States against most aliens living in violation of these laws.

ICE has a Congressionally mandated role to enforce our immigration laws in the interior of the country. Preventing ICE officers from initiating enforcement actions serves no purpose aside to signaling to the world that the U.S. Government does not intend to enforce immigration laws. These policies not only threaten public safety and undermine the integrity of the immigration system, but also incentivize illegal immigration and wayward employers to hire unauthorized aliens. These policies must be rescinded immediately to reduce the significant and needless strains on the asylum system and restore order on our border.

C. Expand DHS's Utilization of Expedited Removal Proceedings

CIS also strongly urges DHS to expand its use of expedited removal procedures, governed by section 235(b)(1) of the INA. In the first half of FY 2024, CBP reported processing just 15% of encounters using expedited removal.[35] Expansion of expedited removal will both save DHS resources as well as discourage illegal immigration by 1) requiring that DHS detain migrants placed in expedited removal proceedings and 2) ensure the prompt removal of migrants who lack a credible fear of persecution or torture.

Congress created expedited removal procedures in section 235 of the INA to provide the executive an effective and efficient tool to address recent border crossers and process asylum claims.

[35] U.S. Customs and Border Protection, *Custody and Transfer Statistics* (May 28, 2024).

The Biden administration, however, has been reluctant to use expedited removal procedures in favor of paroling aliens out of detention and into the interior of the United States. This policy preference (i.e., the near guarantee of release from detention and availability of work authorization that a grant of parole provides) has, itself, encouraged illegal immigration to the United States on an enormous scale.

D. Raise the Screening Standard for Statutory Withholding of Removal and Withholding or Deferral of Removal Under the Convention Against Torture Regulations.

CIS strongly recommends that DHS amend its regulations to raise the screening standard for statutory withholding of removal and withholding or deferral of removal under the Convention Against Torture to at least the reasonable possibility standard. Raising the screening standard above "significant possibility," which has been interpreted by the Department to be a low standard,[36] will reduce the number of meritless asylum claims that are brought in front of the immigration court and allow the immigration system to more efficiently process claims that have a likelihood of success.

Raising the standard to reasonable possibility is consistent with the higher standards for establishing eligibility for statutory withholding of removal and CAT. Specifically, under the statutory withholding provision in section 241(b)(3)(A) of the INA, an alien may not be removed "to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." This has been interpreted to require the alien to "establish that it is more likely than not" such persecution would occur upon removal to the country in question to be granted statutory withholding of removal.

Similarly, to be granted protection under CAT, aliens must "establish that it is more likely than not that they would be tortured if removed to a specific country."[37] "More likely than not" means a greater than 50 percent chance that something will occur.[38]

The INA only requires asylum officers to apply the "significant possibility" standard when determining whether an alien has a "credible fear of persecution" for asylum eligibility, but is silent on the standard that mut be applied for statutory withholding of removal and withholding and deferral of removal under the CAT regulations.[39] Current regulations require asylum officer to apply the "significant possibility" standard, the

[36] *See* 85 Fed. Reg. 36271, 36271 (Jun. 15, 2020).
[37] 8 C.F.R. § 1208.16(c)(2).
[38] *See INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring).
[39] *See* INA § 235(b)(1)(B)(v).

lowest screening standard, to statutory withholding of removal and withholding or deferral of removal under CAT determinations.[40] The "significant possibility" standard has historically been interpreted by DHS as requiring that the alien "demonstrate a substantial and realistic possibility of succeeding" in immigration court.[41] The "reasonable possibility" standard, on the other hand, requires considering whether there is a reasonable possibility that the alien would be persecuted such that the alien should be referred to a hearing in immigration court to adjudicate eligibility for statutory withholding of removal. In effect, it is a higher standard than "significant possibility," while still lower than the adjudication standards of "clear likelihood" or "more likely than not."[42]

The reasonable possibility standard will also be easy for asylum officers and immigration judges to consider and apply. DHS already applies the reasonable possibility standard when determining whether an alien objectively has a well-founded fear of persecution to merit asylum. Notably, asylum officers and immigration judges have also applied the reasonable possibility standard for more than two decades in assessing whether to allow aliens to apply for statutory withholding of removal or CAT in reinstatement of removal cases and expedited removal cases involving non-permanent resident aliens who have committed or been convicted of aggravated felonies.[43]

Screening for protection under statutory withholding of removal generally involves considering whether there is a significant possibility that the alien could establish in a hearing that it is more likely than not that he or she would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion, if removed to the proposed country of removal.[44] Currently, screening for protection under the CAT regulations generally involves considering whether the alien can establish that there is a significant possibility that he or she could establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal.

CIS believes the reasonable possibility standard is a more appropriate screening standard to apply to statutory withholding of removal and withholding and deferral of removal under CAT because it is (1) lower than the standard that the alien will ultimately have to

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[40] *See* 8 C.F.R. § 208.16(c); 208.30(e)(2)-(3); 1208.16(c).
[41] *See* Memorandum from John Lafferty, Chief, Asylum Div., U.S. Citizenship and Immigration Servs., *Release of Updated Asylum Division Officer Training Course Lesson Plan, Credible Fear of Persecution and Torture Determinations* 2 (Feb. 28, 2014); *see also Holmes* v. *Amerex Rent-A-Car,* 180 F.3d 294, 297 (D.C. Cir. 1999) (stating in a non-immigration context that establishing a significant possibility involves demonstrating "a substantial and realistic possibility of succeeding" (quoting *Holmes* v. *Amerex Rent-a-Car,* 710 A.2d 846, 852 (D.C. 1998))).
[42] *See* U.S. Citizenship and Immigration Services, *Questions and Answers: Reasonable Fear Screenings* (last updated Jun. 2013); 8 C.F.R. § 208.31; 8 C.F.R. § 1208.31.
[43] *Id*.
[44] *See* 8 C.F.R. § 208.16(b), 208.30(e)(2), 1208.16(b).

meet to be granted statutory withholding or CAT while still (2) higher than the standard for aliens in credible fear seeking asylum, for which the burden of proof is much lower. Applying this standard will result in fewer aliens with nonmeritorious (and sometimes fraudulent) claims being referred to the immigration court docket, enabling the U.S. government to more efficiently process aliens with legitimate or meritorious fear claims. And, as noted, it is a screening standard with which asylum officers are already familiar.

E. Terminate USCIS's Practice of Accepting Motions for Reconsideration after an Immigration Judge Has Concurred with a Fear Screening Determination

DHS should amend 8 C.F.R. § 208.30(g) and §1003.23 to terminate its policy of accepting motions or requests for reconsideration for all credible fear or reasonable fear determinations that have been reviewed by an immigration judge. The practice of filing requests for reconsideration for claims that have already been screened or adjudicated and subsequently reviewed *de novo* by an immigration judge in section 240 removal proceedings[45] has become an overwhelmingly popular tactic to delay the removal of aliens in expedited removal without meritorious fear claims. Such tactics only serve to further drain DHS resources and divert resources away from aliens with legitimate and unresolved fear claims. Accordingly, CIS urges DHS and DOJ to amend 8 C.F.R. § 208.30(g) and § 1003.23 and end its practice of reconsidering or reopening all credible fear and reasonable fear determinations after USCIS has transferred jurisdiction of a case to the DOJ.

Sincerely,

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[45] 8 C.F.R.§ 1003.42.