

# Credible Fear Review Outline

## **I. Sources of Authority**

- [INA § 235](#)/8 U.S.C. § 1225
- 8 C.F.R. §§ [208.30](#), [1003.42](#), [1208.30](#), [1235.3](#).
- [Immigration Court Practice Manual, Chapter 7.4](#)
- [Interim Operating Policy and Procedure Memorandum \(OPPM\) 97-3: Procedures for Credible Fear and Claimed Status Reviews.](#)

## **II. Background/Process for how a credible fear review gets before the IJ**

- General rule - expedited removal
  - i. Under INA § 235(b)(1)(A)(i) and 8 C.F.R. § 1253.3(b)(1)(i), the following classes of aliens “shall” be ordered removed under expedited removal proceedings if DHS determines that they are inadmissible under either INA § 212(a)(6)(C) (regarding fraud/willful misrepresentations) or INA § 212(a)(7) (documentation requirements). *But see* [Matter of E-R-M- & L-R-M-](#), 25 I&N Dec. 520 (BIA 2011) (finding that DHS has prosecutorial discretion to place arriving aliens in removal proceedings under INA § 240 rather than using expedited removal proceedings under INA § 235).
    1. All arriving aliens.<sup>1</sup> *See* 8 C.F.R. § 1001.1(q) (defining “arriving aliens”).
    2. Other aliens who DHS determines have not been admitted or paroled into the United States and who have not demonstrated to DHS that they have been continuously physically present in the United States for the two years immediately prior to DHS’s determination of inadmissibility. *See* INA § 235(b)(1)(A)(iii)(II);
      - a. Note that this class of aliens was previously limited as a matter of policy to individuals encountered within 100 miles of the border who could not demonstrate their presence in the United States for at least the prior fourteen days. Designating Aliens for Expedited Removal, 69 Fed. Reg. 154 (effective Aug. 11, 2004), *available at* <https://www.gpo.gov/fdsys/pkg/FR-2004-08-11/html/04-18469.htm>. However, DHS announced on February 20, 2017 that it intends to expand the use of expedited removal to include the full range of aliens described at INA § 235(b)(1)(A)(iii)(II). *See* Department of Homeland Security, *Implementing the President’s Border Security and Immigration Enforcement Improvements Policies* (Feb. 20, 2017) (Kelly memo), *available online at* [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf).

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<sup>1</sup> There is a limited statutory exception for an arriving alien “who is a native or citizen of a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations and who arrives by aircraft at a port of entry.” INA § 235(b)(1)(F). However, as of March 2017, this provision does not actually affect any class of aliens because diplomatic relations with Cuba were restored in 2016. For more information, see [Eliminating Exception to Expedited Removal Authority for Cuban Nationals Arriving by Air](#), 82 Fed. Reg. 4769 (effective Jan. 13, 2017) (to be codified at 8 C.F.R. § 235).

- b. DHS also specifically applies the expedited removal procedures to aliens who arrive in the United States by sea. *See Notice Designating Aliens Subject to Expedited Removal under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act*, 67 Fed. Reg. 68924 (effective Nov. 13, 2002), available online at <https://www.gpo.gov/fdsys/pkg/FR-2002-11-13/pdf/02-29038.pdf>.
        - ii. Under INA § 235(a)(2), stowaways are ineligible for admission to the United States and “shall be ordered removed upon inspection by an immigration officer.”
- One exception to expedited removal – asylum applicants or aliens who fear persecution
  - i. A stowaway or an alien otherwise subject to expedited removal who “indicates either an intention to apply for asylum under [INA § 208] or a fear of persecution” “shall” be referred for an interview by an asylum officer under INA § 235(b)(1)(B). INA §§ 235(a)(2), (b)(1)(A)(i)-(ii).
    - 1. The Asylum Officer’s review is limited to a determination of whether or not the alien has a “credible fear of persecution,” which is statutorily defined as “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, that the alien could establish eligibility for asylum under [INA § 208].” INA § 235(b)(1)(B)(v). Asylum Officers also consider the probability of the alien establishing eligibility for withholding of removal under INA § 241(b)(3) and withholding or deferral of removal under the Convention Against Torture. 8 C.F.R. § 208.30(e)(2)-(3).
    - 2. Representation? The alien “shall be given time to contact and consult with any person or persons of his or her choosing . . . in accordance with the policies and procedures of the detention facility . . . , . . . at no expense to the government.” 8 C.F.R. § 1235.3(b)(4)(ii). The consultation cannot “unreasonably delay” the credible fear process. *Id.*
- Positive credible fear finding
  - i. If the asylum officer finds that the alien has a credible fear . . .
    - 1. . . . and the alien is not a stowaway, then DHS issues a Notice to Appear (NTA), Form I-862, and initiates removal proceedings under INA § 240. 8 C.F.R. § 208.30(f).
    - 2. . . . and the alien is a stowaway, then DHS issues the alien a Form I-863, Notice of Referral to the Immigration Judge, for consideration only of the alien’s application for asylum or withholding of removal. *Id.*
      - ii. The INA provides that an alien with a positive credible fear finding “shall be detained” during the immigration court’s consideration of his or her application for relief. INA § 235(b)(1)(B)(ii).
        - 1. Nevertheless, the regulations provide DHS with discretion to parole aliens with a positive credible fear finding into the United States so long as the aliens “present neither a security risk nor a risk of absconding.” 8 C.F.R. § 208.30(f); 8 C.F.R. § 212.5.

- a. On February 20, 2017, DHS confirmed in a policy memorandum that parole will be considered on a case-by-case basis for aliens with a positive credible fear finding who (1) establish their identity to the satisfaction of an ICE officer, (2) demonstrate that they are neither a security risk nor at risk of absconding, and (3) agree to comply with any relevant conditions of release. Kelly Memo at 3.

- Negative Credible Fear Finding
  - i. If the asylum officer finds that the alien does not have a credible fear, then DHS will order the alien removed and file a Form I-860, Notice and Order of Expedited Removal.

### **III. Initiation of Credible Fear Review Proceedings**

- An alien with a negative credible fear finding may have that finding reviewed by an Immigration Judge. This limited proceeding is initiated by filing a Notice of Referral to Immigration Judge, Form I-863, along with the administrative “written record”, which consists of:
  - i. the report of Asylum Officer’s interview including a summary of the material facts as stated by the applicant and the Officer’s analysis,
  - ii. additional facts and other materials (if any) relied upon by the Asylum Officer,
  - iii. the Officer’s interview notes, and
  - iv. the Notice and Order of Expedited Removal, Form I-860.  
INA § 235(b)(1)(B)(iii)(II); 8 C.F.R. §§ 1003.42(a), 1208.30(g)(2)(ii); OPPM 97-3, p. 6.
- Therefore, before an Immigration Judge can review the DHS’s determination that an alien lacks a credible fear, the Immigration Judge must receive:
  - i. the Form I-863;
  - ii. Form I-860 (Notice and Order of Expedited Removal);<sup>2</sup>
  - iii. Form I-867AB (Record of Sworn Statement in Proceedings under section 235(b)(1) of the INA);
  - iv. Form I-869 (Record of Negative Credible Fear Finding and Request for Review by Immigration Judge);
  - v. Record of Determination/Credible Fear Worksheet (DHS APSO Form E); and
  - vi. any other materials, such as the DHS officer’s notes, pertaining to the alien’s credible fear interview.
- Note – DHS will file a Form I-863 and initiate credible fear review proceedings for an alien who is not a stowaway if the alien a) expressly requests the review or b) refuses to either request or decline the review. *See* 8 C.F.R. § 208.30(g)(1)(i)-(ii). However, DHS will only initiate credible fear review proceedings for a stowaway if the alien expressly requests the review. *See* 8 C.F.R. § 208.30(g)(1)(iii).

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<sup>2</sup> The alien must sign the reverse of this form acknowledging receipt.

#### IV. Procedure

- The court procedures for credible fear reviews are governed by 8 C.F.R. § 1003.42 and not by 8 C.F.R. § 1003.12, *et seq.*, which generally governs the rules of procedure in Immigration Court. 8 C.F.R. § 1003.12 (“The sole procedures for review of credible fear determinations by Immigration Judges are provided for in § 1003.42.”).
- Timing
  - i. The Immigration Judge must conduct the credible fear review within seven days of the date the negative credible fear finding is approved by a supervisory asylum officer. INA § 235(b)(1)(B)(iii)(III); 8 C.F.R. § 1003.42(d). However, the judge should conduct the review “to the maximum extent possible within 24 hours.” *Id.*
    1. Any request for a continuance by the parties is subject to the seven day statutory time limit. ICPM, Chapter 7.4(d)(iv)(E).
- Logistics
  - i. The court “shall create a Record of Proceeding,” which will not be merged with any possible later proceedings involving the same alien. 8 C.F.R. § 1003.42(b).
  - ii. Hearing
    1. A credible fear review may be held in person, telephonically, or via video teleconference (VTC). 8 C.F.R. § 1003.42(c). The court may conduct a credible fear review by telephone conference without the alien’s consent. 8 C.F.R. § 1003.25(c).
      - a. For more information on VTC or hearings by telephone, *see* ICPM, Chapter 4.7, Hearings by Video or Telephone Conference.
    2. The hearing is recorded. ICPM, Chapter 7.4(d)(iv)(E).
    3. The hearing is closed to the public unless the alien consents on the record or in writing. 8 C.F.R. § 1208.30(g)(2)(iii).
    4. The court will afford the alien with an interpreter if necessary. ICPM, Chapter 7.4(d)(iv)(E).
- Evidence
  - i. The administrative “written record” from DHS. 8 U.S.C. § 235(b)(1)(B)(iii)(II); 8 C.F.R. §§ 1003.42(a), 1208.30(g)(2)(ii); OPPM 97-3, p. 6.
  - ii. The judge also “may receive into evidence any oral or written statement [that] is material and relevant.” 8 C.F.R. § 1003.42(c).
    1. Receipt of evidence is in the discretion of the Immigration Judge. ICPM, Chapter 7.4(d)(iv)(E).
  - iii. The alien may offer testimony under oath. 8 C.F.R. § 1003.42(c).
- Representation:
  - i. There is no right to representation during a credible fear review. Instead, the INA provides that “an alien who is eligible for [a credible fear] interview may *consult* with a person or persons of the alien’s choosing *prior to* the interview

- or any review thereof” and that “[s]uch consultation shall not unreasonably delay the process.” INA § 235(b)(1)(B)(iv) (emphasis added). The corresponding Regulations provide that “[t]he alien may consult with a person or persons of the alien’s choosing *prior* to the review.” 8 C.F.R. §§ 208.30(d)(4), 1003.42(c) (emphasis added).
1. “In the discretion of the IJ, persons consulted may be present during the credible fear review. However, the alien is not represented at the credible fear review. Accordingly, persons acting on the alien’s behalf are not entitled to make opening statements, call and question witnesses, conduct cross examinations, object to evidence, or make closing arguments.” ICPM, Chapter 7.4(d)(iv)(C).
  2. Any request for a continuance to find representation must be considered in light of the statutory time limits at INA § 235(b)(1)(B)(iii)(III).
- ii. The regulations are silent regarding representation on behalf of DHS.
- Standard of Review:
    - i. “A credible fear review is simply a review of the DHS asylum officer’s decision.” ICPM ¶ 7.4(d)(iv)(E). “Credible fear review proceedings should not be as in depth as a full asylum hearing.” OPPM 97-3, p. 9.
    - ii. “The immigration judge shall make a de novo determination as to whether 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 immigration judge, that the alien could establish eligibility for asylum under [INA § 208] or withholding under [INA § 241(b)(3)] or withholding under the Convention Against Torture.” 8 C.F.R. § 1003.42(d).
      1. This standard is “lower than the “well-founded fear” standard needed to receive asylum [and] intended to separate meritorious claims from clearly non-meritorious claims.” H.R. Rep. 104-879, 107 (Jan. 2, 1997).
      2. The scope of the proceedings is limited solely to the review of the asylum officer’s credible fear finding.
  - IJ Decision
    - i. At the end of the review, the Immigration judge must promptly issue a decision using the following standard form: “Order of the Immigration Judge, in: Credible Fear Review Proceedings” (form U2).
    - ii. If the Immigration Judge finds that the alien does in fact have a credible fear, then he or she vacates the Asylum Officer’s determination. 8 C.F.R. § 1208.30(g)(2)(iv)(B).
      1. If the alien is not a stowaway, then DHS files a Notice to Appear, and the alien is placed in regular removal proceedings under INA § 240. 8 C.F.R. §§ 1003.42(f), 1208.30(g)(2)(iv)(B).
      2. If the alien is a stowaway, then DHS will fill a Form I-863, Notice of Referral to the Immigration Judge, and the Immigration Judge may only consider the alien’s application for asylum and withholding for removal in accordance with 8 C.F.R. § 1208.4(b)(3)(iii). 8 C.F.R. § 1208.30(g)(2)(IV)(C).

- iii. However, if the Immigration Judge finds that the alien does not have a credible fear, then he or she affirms the Asylum Officer's determination & remands the respondent's case to DHS for execution of the underlying administrative removal order. 8 C.F.R. § 1208.30(g)(2)(iv)(A).
  - 1. "The [DHS], however, may reconsider a negative credible fear finding that has been concurred upon by an immigration judge after providing notice of its reconsideration to the immigration judge." *Id.*
- Judicial Review
  - i. There is no right to appeal the Immigration Judge's decision. *Id.*; INA § 242(a)(2)(A); *see also Castro v. Lynch*, 835 F.3d 422 (3d Cir. 2016) (affirming district court's dismissal of the respondents' habeas petitions regarding their expedited orders of removal for lack of jurisdiction), *petition for cert filed* (No. 16-812) (Dec. 22, 2016); *Pena v. Lynch*, 815 F.3d 452 (9th Cir. 2015) (holding that the Court of Appeals lacked jurisdiction to consider the alien's petition for review of his expedited removal order).
    - 1. Accordingly, no Notice of Appeal (Form EOIR-26) shall be given to the alien at the conclusion of the review.
  - ii. However, once the matter has been returned to the DHS, the alien may request that the DHS reconsider its negative credible fear finding. 8 C.F.R. § 1208.30(g)(2)(iv)(A). If, after an Immigration Judge affirms the DHS's finding that an alien does not have a credible fear of persecution or torture, the DHS reconsiders its finding and determines that an alien does have a credible fear, the DHS must provide notice of its reconsideration to the Immigration Judge. 8 C.F.R. § 1208.30(g)(2)(iv)(A).