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Credible Fear and Defensive Asylum Processes: Frequently Asked Questions

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Credible Fear and Defensive Asylum Processes: Frequently Asked Questions

SUMMARY

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Non-U.S. nationals (*aliens* under federal statute and regulation) subject to removal from the United States may seek asylum and other forms of humanitarian protection during formal and expedited removal processes. Asylum may be granted to persons in the United States, regardless of their immigration status, who are unable or unwilling to return to their country because of persecution or a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion.

The Immigration and Nationality Act authorizes the U.S. Department of Homeland Security (DHS) to charge aliens with immigration violations and process them for formal removal proceedings in immigration court. During removal proceedings, an alien may apply for asylum, withholding of removal, and protection from removal under the Convention Against Torture (CAT) as a defense against removal. Immigration courts are within the Executive Office for Immigration Review, an agency within the U.S. Department of Justice.

Certain recently arrived aliens, including those apprehended by DHS at or near a U.S. border, may be subject to expedited removal in which they may be removed by DHS without a hearing. During expedited removal, individuals who express fear of persecution or torture if returned to their country of origin or an intent to apply for asylum may undergo a credible fear screening to determine whether they may qualify for asylum or other forms of protection from removal. Those who meet the threshold for a credible fear of persecution or torture may be referred for formal removal proceedings.

Although the law specifies which aliens may be subject to expedited removal, DHS generally has discretion over whether to place those individuals in either expedited or formal removal and may make such decisions based on operational circumstances on a case-by-case basis. Those persons whom DHS processes directly for formal removal—even if they are subject to expedited removal under the law—do not undergo a credible fear screening.

This report addresses frequently asked questions about credible fear and asylum, including those related to expedited and formal removal processes; credible fear screening processes, criteria, and legislative history; procedural protections; and data regarding credible fear and asylum outcomes.

Contents

Tables

Appendixes

Contacts

Introduction

The Immigration and Nationality Act (INA)[1] provides multiple processes for the removal of individuals who are not citizens or nationals of the United States (defined as *aliens* under the INA, but also colloquially referred to as *foreign nationals* in this report)[2] charged with immigration violations, including formal and expedited removal pathways. Both pathways allow individuals subject to removal to seek humanitarian protection, including through asylum, withholding of removal, and protection under the Convention Against Torture (CAT).

During formal removal proceedings, immigration judges[3] in the U.S. Department of Justice's (DOJ's) Executive Office for Immigration Review (EOIR) determine whether a foreign national who has been charged with an immigration violation by the U.S. Department of Homeland Security (DHS) is removable and whether that individual qualifies for any relief or protection from removal for which they have applied, including asylum.

DHS generally has discretion over whether to place an individual in either expedited or formal removal. Persons placed directly in formal removal do not undergo a credible fear screening. Under expedited removal, DHS may remove from the United States certain recently arrived migrants[4] without a formal hearing. If an individual subject to expedited removal expresses a fear of persecution or torture if returned to their country of origin or an intent to apply for asylum, they are referred for a *credible fear interview* with a DHS U.S. Citizenship and Immigration Services (USCIS) asylum officer. Under the law, interviewed individuals who show during a credible fear interview a *significant possibility* of establishing eligibility for asylum or related protections are referred to formal removal proceedings, where they may file an asylum application with the immigration court. In other cases, DHS may process individuals—including those who may be subject to expedited removal—for formal removal proceedings in immigration court instead of placing them in expedited removal.

This report addresses frequently asked questions related to asylum and credible fear,[5] including those related to formal and expedited removal processes; credible fear screening processes, criteria, and legislative history; procedural protections; and data regarding credible fear and asylum outcomes.

[1] INA §§101 et seq.; 8 U.S.C. §§1101 et seq.

[2] INA §101(a)(3); 8 U.S.C. §1101(a)(3). Although this report uses interchangeably *foreign national* and *alien*, the terms are not legally identical in scope. While an alien is neither a U.S. national nor a U.S. citizen, it is possible for a U.S. citizen or national to also be a national or citizen of a foreign country; INA §101(a)(22); 8 U.S.C. §1101(a)(22). See also U.S. Department of State, Bureau of Consular Affairs, Dual Nationality, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/Relinquishing-US-Nationality/Dual-Nationality.html.

[3] Immigration judges are attorneys appointed by the Attorney General as administrative judges. See INA §101(b)(4); 8 U.S.C. §1101(b)(4).

[4] In this report, *migrant* refers to a person who has arrived at or crossed the U.S.-Mexico border without valid entry documents and is no longer residing in his or her country of origin or habitual residence. Migrants may include asylum seekers. The term migrant is not defined in statute.

[5] Because this report focuses on asylum, its use of the term *credible fear* typically refers to a credible fear of persecution except where otherwise noted.

Asylum and Related Forms of Relief

What is asylum?

Asylum is a discretionary form[6] of immigration relief that can be granted to foreign nationals in the United States who are unable or unwilling to return to their home country because of past persecution or a well-founded fear of future persecution based on one of five statutorily defined protected grounds (race, religion, nationality, membership in a particular social group, or political opinion) and who satisfy other requirements.[7] Persons granted asylum (asylees) can become U.S. lawful permanent residents (LPRs) after one year of physical presence in the United States as asylees.[8] When an individual in removal proceedings applies for asylum, it is considered a *defensive* asylum application.[9]

What related forms of relief may be available to asylum seekers?

In some cases, an alien may be statutorily barred from either applying for or receiving asylum (e.g., because the application is untimely or the applicant has been convicted of a particularly serious crime).[10] Even if an alien is ineligible for asylum, he or she may still pursue related forms of relief, including withholding of removal and protection under the CAT.[11] An applicant for withholding of removal must meet a higher burden of proving that it is more likely than not that he or she will be persecuted because of one of the five protected grounds.[12] An applicant for CAT protection must show that it is more likely than not that he or she will be tortured by a public official or other person acting with the consent or acquiescence of an official.[13]

Unlike asylum, withholding of removal and CAT protection are mandatory forms of protection from removal and may not be denied as a matter of discretion.[14] Nonetheless, while asylum

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[6] Because asylum is a discretionary form of relief, an alien might be denied such relief despite meeting eligibility requirements. See INS v. Cardoza-Fonseca, 480 U.S. 421, 428 n.6 (1987) ("[A]s we have mentioned, there is no entitlement to asylum, it is only granted to eligible refugees pursuant to the Attorney General's discretion."). For further discussion on the parameters of discretionary determinations by immigration authorities, see DHS, USCIS, *Policy Manual*, vol. 1, part E, chapter 8, https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8.

[7] INA §101(a)(42); 8 U.S.C. §1101(a)(42), INA 208(a)-(b); 8 U.S.C. §1158(a)-(b).

[8] INA §209; 8 U.S.C. §1159.

[9] Individuals who are not in removal proceedings may *affirmatively* apply for asylum with USCIS. This report does not cover the affirmative asylum application process.

[10] INA §208(a)(2), (b)(2)(A); 8 U.S.C. §1158(a)(2), (b)(2)(A).

[11] See 8 C.F.R. §1208.16(a) ("In exclusion, deportation, or removal proceedings, an immigration judge may adjudicate both an asylum claim and a request for withholding of removal whether or not asylum is granted.").

[12] INA §241(b)(3)(A); 8 U.S.C. §1231(b)(3)(A); INS v. Stevic, 467 U.S. 407, 424, 429–30 (1984) (explaining that an application for withholding of removal must "be supported by evidence establishing that it is more likely than not that the alien would be subject to persecution on one of the specified grounds."). There are also statutory bars to withholding of removal, and some of them overlap with the asylum bars (e.g., ineligibility based on a particularly serious crime conviction). INA §241(b)(3)(B); 8 U.S.C. §1231(b)(3)(B). There are no similar limitations to CAT protection.

[13] 8 C.F.R. §§208.16(c)(2), 208.18(a)(1), 1208.16(c)(2), 1208.18(a)(1). An applicant for CAT protection does not have to show that the alleged torture would be on account of one of the five specified grounds for which asylum or withholding of removal may be granted. See Hamoui v. Ashcroft, 389 F.3d 821, 826 (9th Cir. 2004) ("A claim under the Convention differs from an asylum claim because there is no requirement that the petitioner show that torture will occur on account of a statutorily protected ground.").

[14] See INS v. Aguirre-Aguirre, 526 U.S. 415, 420 (1999) (explaining that "whereas withholding is mandatory unless the (continued...)

affords the recipient an opportunity to pursue LPR status, a grant of withholding of removal or CAT protection provides no path to LPR status and only prevents removal to the country where the aliens would likely face persecution or torture (but not necessarily to a third country).[15]

Do all asylum seekers have credible fear interviews?

The only asylum seekers who undergo credible fear interviews (also known as *credible fear screenings*) are those who are placed in expedited removal proceedings (see "What is expedited removal?") and express a fear of persecution or torture, a fear of returning to their home country, or an intent to apply for asylum.[16]

Persons placed directly in formal removal proceedings do not have credible fear interviews. These persons do not have to establish a credible fear to be able to request asylum from an immigration judge (see "What is formal removal?").

Formal and Expedited Removal Processes

DHS's U.S. Customs and Border Protection (CBP) is responsible for immigration enforcement at ports of entry and between ports of entry along the border. All foreign nationals who arrive in the United States and those who are already in the country but have not been admitted (e.g., those who entered unlawfully) are considered *applicants for admission.*[17] These individuals are subject to inspection by an immigration officer, who may determine whether they are subject to removal.[18]

What is formal removal?

The INA provides for the removal of aliens whom DHS charges with immigration violations.[19] DHS may process such individuals for formal removal proceedings by issuing a Notice to Appear (NTA) charging document and filing it with an immigration court.[20] DHS is required to detain certain individuals during their removal proceedings (e.g., those who have been convicted of

Attorney General determines one of the exceptions applies, the decision whether asylum should be granted to an eligible alien is committed to the Attorney General's discretion."); Niang v. Gonzales, 422 F.3d 1187, 1194 (3d Cir. 2005) ("Relief under the CAT is mandatory if the convention's criteria are satisfied.").

[15] See Aguirre-Aguirre, 526 U.S. at 419 ("Under the immigration laws, withholding is distinct from asylum, although the two forms of relief serve similar purposes. Whereas withholding only bars deporting an alien to a particular country or countries, a grant of asylum permits an alien to remain in the United States and to apply for permanent residency after one year."); Sathanthrasa v. Attorney Gen., 968 F.3d 285, 289 (3d Cir. 2020) ("But while withholding is mandatory if the statutory criteria are satisfied, the decision to grant asylum is ultimately left to the discretion of the Attorney General and, between the two forms of relief, only the latter provides a pathway to legal permanent resident status and a basis to petition for admission of family members as derivative asylees.").

[16] 8 C.F.R. §235.3(b)(4).

[17] INA §235(a)(1); 8 U.S.C. §1225(a)(1).

[18] INA §235(a)(3); 8 U.S.C. §1225(a)(3).

[19] INA §240(a); 8 U.S.C. §1229a(a). These include grounds of inadmissibility (INA §212(a); 8 U.S.C. §1182(a)) and deportability (INA §237(a); 8 U.S.C. §1227(a)).

[20] INA §239; 8 U.S.C. §1229, and 8 C.F.R. §239.1. For more information about formal removal proceedings, see CRS In Focus IF11536, *Formal Removal Proceedings: An Introduction*; for more information about immigration courts, see CRS Report R47077, *U.S. Immigration Courts and the Pending Cases Backlog*.

committing certain crimes); in other cases, DHS has discretion to release individuals on bond or their own recognizance.[21]

During formal removal proceedings, an immigration judge determines whether the alien (referred to as the *respondent*) is removable as charged in the NTA, and if that individual is eligible for any forms of relief or protection from removal, including asylum.[22] To be considered for asylum, the respondent must file an application for asylum with the immigration court. Individuals placed in formal removal proceedings do not undergo a credible fear screening as part of the asylum application process, although they may have been referred to formal removal proceedings as the result of a positive credible fear finding (see "What is expedited removal?").

Parties in formal removal proceedings include the respondent, who may or may not have counsel (see "Do asylum applicants have legal representation during formal removal proceedings?"), and DHS, which is represented by counsel from the Office of the Principal Legal Advisor, a component of DHS's Immigration and Customs Enforcement (ICE).

What is the process for formal removal proceedings?

Formal removal proceedings consist of multiple hearings before an immigration judge. A respondent who fails to appear for any hearing may be ordered removed *in absentia* (see "How many asylum applicants fail to appear for their immigration court hearings?").[23] During the initial *master calendar hearing*, the immigration judge explains the respondent's rights, the charges against the respondent, and the nature of the proceedings; verifies the respondent's contact information; provides information about legal representation; and sets filing dates for applications.[24] To apply for asylum, the respondent must file an application with the court, generally within one year of arrival in the United States.[25] Respondents may use the same application to apply for withholding of removal and CAT protection, which may be available to those who are ineligible for asylum.[26]

During an evidentiary *merits hearing* (also called an *individual hearing*), the immigration judge addresses any challenges to DHS's charges of removability and considers the respondent's application(s) for relief and protection from removal. Parties may present witnesses, testimony, and evidence. At the conclusion of the proceedings, the immigration judge issues a decision.

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[21] INA §236(a), (c); 8 U.S.C. §1226(a), (c). For more information about immigration detention, see CRS In Focus IF11343, *The Law of Immigration Detention: A Brief Introduction*.

[22] INA §240; 8 U.S.C. §1229a. For information about other types of protection and relief from removal, see CRS Report R47077, *U.S. Immigration Courts and the Pending Cases Backlog*, Table 2.

[23] INA §240(b)(5)(A); 8 U.S.C. §1229a(b)(5)(A). For more information about in absentia removal orders, see CRS In Focus IF11892, *At What Rate Do Noncitizens Appear for Their Removal Hearings? Measuring In Absentia Removal Order Rates*.

[24] See DOJ, EOIR, "Chapter 4.15 – Master Calendar Hearing," *Immigration Court Practice Manual*, https://www.justice.gov/eoir/reference-materials/ic/chapter-4/15.

[25] INA §208(a)(2)(B); 8 U.S.C. §1158(a)(2)(B). The one-year filing deadline may be excused if the alien can establish changed or extraordinary circumstances. For more information about the asylum process in immigration court, see CRS Report R47504, *Asylum Process in Immigration Courts and Selected Trends*.

[26] An alien is eligible for asylum if he or she has suffered past persecution or has a well-founded fear of future persecution on account of his or her race, religion, nationality, membership in a particular social group, or political opinion; INA §§101(a)(42), 208(b)(1)(B)(i); 8 U.S.C. §§1101(a)(42), 1158(b)(1)(B)(i). An alien qualifies for withholding of removal if the individual can show it is more likely than not that he or she will be persecuted on account of one of these enumerated grounds; INA §241(b)(3)(A); 8 U.S.C. §1231(b)(3)(A), and 8 C.F.R. §208.16(b)(2). To qualify for CAT protection, an alien must show that it is more likely than not that he or she will be tortured by a government official or person acting with the consent or acquiescence of that official; 8 C.F.R. §§208.16(c)(2), 208.18(a)(1).

What are the possible outcomes of formal removal proceedings?

At the conclusion of the formal removal hearings, the immigration judge may do the following:

- issue a removal order;[27]
- find the respondent removable and allow him or her to request *voluntary departure* and leave the United States at his or her own expense;[28]
- grant relief or protection from removal, such as asylum; or
- terminate or dismiss a case.[29]

The immigration judge may terminate a case in some circumstances, including, for example, if the respondent establishes eligibility for U.S. citizenship or demonstrates that the charges on the NTA are substantively or procedurally defective.[30] The immigration judge may dismiss a case when DHS moves to dismiss proceedings, for example, as a matter of prosecutorial discretion.[31] Parties may appeal an immigration judge's decision within 30 days to the Board of Immigration Appeals, EOIR's appellate component.[32]

An immigration judge may also administratively close proceedings, which means cases are temporarily moved to an inactive docket, typically to allow the respondent to apply for a form of relief outside of immigration court; for example, in a case where the respondent is pursuing a family-based immigrant visa with USCIS.[33] While an immigration judge generally may grant administrative closure when that request is unopposed, the immigration judge has discretion to determine whether an opposed request for administrative closure is warranted.[34]

Do asylum applicants have legal representation during formal removal proceedings?

The INA provides respondents with the privilege of being represented by counsel at no expense to the government.[35] Respondents may obtain counsel at their own expense, obtain pro bono

[27] INA §240(a)(1); 8 U.S.C. §1229a(a)(1), INA §240(c)(1); 8 U.S.C. §1229(c)(1)

[28] If the immigration judge grants a respondent's request for voluntary departure, there is no removal order. Voluntary departure may be granted before the completion of removal proceedings or at the conclusion of removal proceedings. See INA §240B; 8 U.S.C. §1229c and 8 C.F.R. §1240.26.

[29] 8 C.F.R. §1239.2. For more information about these outcomes and 2023 outcomes data, see CRS Insight IN12318, *FY2023 Immigration Court Data: Case Outcomes*.

[30] See 8 C.F.R. §1239.2(f) (authorizing termination of proceedings "when the alien has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors"); Matter of J-A-B- & I-J-V-A-, 27 I. & N. Dec. 168, 169 (B.I.A. 2017) ("It is well settled that an Immigration Judge may only 'terminate proceedings when the DHS cannot sustain the charges [of removability] or in other specific circumstances consistent with the law and applicable regulations'") (quoting Matter of Sanchez-Herbert, 26 I. & N. Dec. 43, 45 [B.I.A. 2012]).

[31] For more information about prosecutorial discretion, see CRS Legal Sidebar LSB10578, *The Biden Administration's Immigration Enforcement Priorities: Background and Legal Considerations*.

[32] 8 C.F.R. §§1003.3(a)(1), 1003.38.

[33] See Matter of Cruz-Valdez, 28 I. & N. Dec. 326, 326 (A.G. 2021) ("Administrative closure is 'a docket management tool that is used to temporarily pause removal proceedings.' It does not terminate or dismiss the case, but rather 'remove[s] a case from an Immigration Judge's active calendar or from the Board's docket.'") (quoting Matter of W-Y-U-, 27 I. & N. Dec. 17, 18 [B.I.A. 2017]; Matter of Avetisyan, 25 I. & N. Dec. 688, 692 [B.I.A. 2012]).

[34] Memorandum from David L. Neal, Director, EOIR, *Administrative Closure*, November 22, 2021.

[35] INA §240(b)(4); 8 U.S.C. §1229a(b)(4). For more information about access to counsel and EOIR's legal access programs, see CRS In Focus IF12158, *U.S. Immigration Courts: Access to Counsel in Removal Proceedings and Legal Access Programs*.

services, or represent themselves (pro se); the federal government generally may not fund counsel, but there are exceptions. EOIR provides respondents with a list of free or low-cost legal service providers[36] and its Office of Legal Access Programs provides different programs to facilitate legal orientations and referrals. Persons eligible to serve as respondents' representatives in immigration court are specified in federal regulation.[37]

As of the third quarter of FY2024, among all pending immigration court cases, 32% of respondents were represented.[38] Among pending cases that had at least one hearing, 50% were represented.[39] Among pending asylum cases, 62% were represented; and among completed asylum cases, 80% were represented.

Under certain circumstances, the government may provide counsel to a respondent. Under EOIR's National Qualified Representative Program (NQRP), counsel is provided to unrepresented detained respondents with mental disorders and disabilities whom immigration judges or the Board of Immigration Appeals have deemed to be "mentally incompetent to represent themselves in proceedings."[40]

The U.S. Department of Health and Human Services (HHS), Office of Refugee Resettlement (ORR), which is responsible for the cases and custody of unaccompanied alien children (unaccompanied children; UAC) also funds representation for some children under requirements specified in the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA; P.L. 110-457).[41] As of the third quarter of FY2024, 57% of pending UAC cases were represented; among cases pending more than one year, 62% were represented.[42]

What is expedited removal?

Expedited removal is a streamlined removal process that typically applies to certain arriving aliens and aliens who recently entered the United States without inspection. Under 8 U.S.C. §1225(b)(1), an immigration officer may order the removal of a person arriving in the United States without a hearing or further review of the order to remove the individual if that person is inadmissible because he or she lacks valid entry documents or attempted to obtain admission by fraud or misrepresentation.[43] In addition, Section 1225(b)(1) authorizes the DHS Secretary[44] to apply the expedited removal process to persons present in the United States who have not been admitted or paroled[45] if they have been in the country less than two years and are inadmissible

[36] 8 C.F.R. §1003.61(b).

[37] 8 C.F.R. §1292.1.

[38] DOJ, EOIR, "Current Representation Rates," Adjudication Statistics, July 19, 2024.

[39] Ibid.

[40] EOIR established the NQRP following a district court's decision in the matter of *Franco-Gonzalez v. Holder*.

[41] The TVPRA requires HHS to "ensure, to the greatest extent practicable" that unaccompanied children in its care have counsel. For more information about unaccompanied children, see CRS Report R43599, *Unaccompanied Alien Children: An Overview*.

[42] DOJ, EOIR, "Current Representation Rates," Adjudication Statistics, July 19, 2024.

[43] INA §235(b)(1)(A)(i); 8 U.S.C. §1225(b)(1)(A)(i).

[44] Although the statutory provisions under 8 U.S.C. §1225(b)(1) refer to the "Attorney General," the Homeland Security Act of 2002 subsequently transferred many immigration-related functions to the DHS Secretary, including the authority related to the detention and removal of aliens; 6 U.S.C. §251.

[45] Parole is a process by which a person may enter the United States temporarily pending his or her application for admission; INA §212(d)(5); 8 U.S.C. §1182(d)(5); Samirah v. O'Connell, 335 F.3d 545, 547 (7th Cir. 2003) ("Parole allows an alien temporarily to remain in the United States pending a decision on his application for admission.") (continued...)

because they lack valid entry documents or have attempted to obtain their admission by fraud or misrepresentation.[46]

Based on this statutory authority, DHS has employed expedited removal for three categories of inadmissible aliens: (1) individuals arriving at U.S. ports of entry (e.g., a land border-crossing or an international airport), (2) individuals who arrived in the United States by sea within the last two years and have not been admitted or paroled by immigration authorities, and (3) individuals found in the United States within 100 air miles of the border within 14 days of entering the country who have not been admitted or paroled by immigration authorities.[47] During the expedited removal process, a CBP agent generally asks the alien questions to assess whether the individual fears returning to their home country, including asking why they left their home or country, whether they have any fear of being returned, and whether they would be harmed in their country.[48]

Although a person in expedited removal proceedings typically has no right to a hearing or review of the expedited removal order, there is an exception for individuals who express an intent to apply for asylum, a fear of persecution or torture, or a fear of returning to their home country.[49] In these cases, the immigration officer must refer the individual for an interview with an asylum officer (see "Who conducts credible fear interviews?") to make a credible fear determination.[50]

What is a credible fear determination?

A credible fear determination results from a screening process that evaluates whether a person placed in expedited removal proceedings might qualify for asylum, withholding of removal, or protection from removal under the CAT.[51] Federal statute defines a "credible fear of persecution" 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."[52] Federal regulations define a "credible fear of torture" as "a significant possibility that the alien is eligible for [protection] under the Convention Against Torture."[53] As discussed in this report, depending on the outcome of the credible fear interview, the applicant may potentially apply for asylum and related protections in formal removal proceedings.

(quoting 8 U.S.C. §1182(d)(5)). For more information about parole, see CRS Report R46570, *Immigration Parole*; and CRS Legal Sidebar LSB11102, *Humanitarian Parole Authority: A Legal Overview and Recent Developments*.

[46] INA §235(b)(1)(A)(iii); 8 U.S.C. §1225(b)(1)(A)(iii).

[47] See Inspection and Expedited Removal of Aliens, 62 *Federal Register* 10312, March 6, 1997; Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 *Federal Register* 68924, November 13, 2002; and Notice Designating Aliens for Expedited Removal, 69 *Federal Register* 48877, August 11, 2004.

[48] See CBP, "Claims of Fear," July 17, 2020, https://www.cbp.gov/newsroom/stats/sw-border-migration/claims-fear.

[49] INA §235(b)(1)(A)(ii); 8 U.S.C. §1225(b)(1)(A)(ii), and 8 C.F.R. §235.3(b)(4).

[50] INA §235(b)(1)(A)(ii); 8 U.S.C. §1225(b)(1)(A)(ii) ("If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B)."); 8 C.F.R. §208.30(b) ("A USCIS asylum officer shall then screen the alien for a credible fear of persecution or torture.").

[51] 8 C.F.R. §208.30(e)(2), (3).

[52] INA §235(b)(1)(B)(v); 8 U.S.C. §1225(b)(1)(B)(v). See also 8 C.F.R. §208.30(e)(2).

[53] 8 C.F.R. §208.30(e)(3).

How does DHS determine whether to put someone in formal removal proceedings or expedited removal?

As described previously (see "What is expedited removal?"), expedited removal is primarily applied to foreign nationals who have recently arrived without valid entry documents or who have been apprehended at a U.S. land border.[54] The statute also authorizes (but does not require) the expedited removal process for other foreign nationals physically present in the country for less than two years if they are inadmissible on the same grounds.[55]

If an immigration officer determines that an individual is inadmissible on certain other grounds, such as having engaged in specified criminal activity, he or she must be detained and processed for formal removal.[56] In other situations, DHS has discretion to place certain aliens subject to expedited removal directly into the formal removal process by issuing an NTA (see "What is formal removal?") and release them from custody. [57] For example, DHS may process for formal removal and release individuals who pose no threat to safety or national security and are a low flight risk. This may happen during times when CBP experiences operational constraints—for instance, lack of capacity in CBP holding facilities for migrants to await a credible fear screening.

What percentage of migrants arriving at the Southwest border are placed in expedited removal?

CBP publishes monthly data on the different *dispositions* under which migrants encountered by CBP at the Southwest border—including those deemed inadmissible at ports of entry or apprehended between ports of entry—are processed.[58] These data show the number of migrants processed for expedited removal and for formal removal (with an NTA), among other dispositions.[59]

At ports of entry along the Southwest border in FY2024 (through August), approximately 2% of arriving inadmissible migrants were processed for expedited removal; 98% were processed with an NTA for formal removal.[60] Between ports of entry during the same period, 20% of encountered migrants were processed for expedited removal; approximately 65% were processed for formal removal.[61] The proportion of persons processed for expedited removal between ports of entry increased markedly following implementation of a June 2024 interim final rule, from 25% in May 2024 to 51% in August 2024 (see "What are the recent executive branch actions related to asylum

[54] INA §235(b)(1); 8 U.S.C. §1225(b)(1). For more information, see CRS In Focus IF11357, *Expedited Removal of Aliens: An Introduction*.

[55] INA §235(b)(1)(A)(ii); 8 U.S.C. §1225(b)(1)(A)(ii).

[56] INA §235(b)(2)(A); 8 U.S.C. §1225(b)(2)(A), and 8 C.F.R. §235.3(c).

[57] See Matter of E-R-M- & L-R-M-, 25 I. & N. Dec. 520, 523 (B.I.A. 2011) ("DHS has discretion to put aliens in section 240 removal proceedings even though they may also be subject to expedited removal under section 235(b)(1)(A)(i) of the Act.").

[58] DHS, CBP, "Custody and Transfer Statistics," July 19, 2024, https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics.

[59] Other processing dispositions include reinstatement of a prior order of removal and voluntary return.

[60] CBP has established a process for asylum-seeking migrants located in central or northern Mexico to make an advance appointment to appear at a port of entry to be processed for removal. The rate of formal removal processing is likely reflected in this policy, as are other changing conditions related to individuals seeking asylum at the border (such as capacity, etc.). For more information about scheduled appointments at a port of entry, see DHS, CBP, "CBP One Mobile Application," https://www.cbp.gov/about/mobile-apps-directory/cbpone.

[61] Other dispositions included voluntary return (9.7%) and reinstatement of a prior order of removal (3.6%).

and how might they impact the credible fear screening process?").[62] Note that dispositions may change (e.g., someone processed for expedited removal may subsequently be placed in formal removal following a credible fear screening).

Credible Fear Screening Process

Has credible fear screening always been part of the asylum process for migrants arriving at a U.S. border?

Asylum regulations and statutory provisions did not originally include a credible fear screening process. In the 1970s, the former Immigration and Naturalization Service (INS), the DOJ agency primarily responsible for administering and enforcing immigration laws prior to the creation of DHS, issued regulations that established procedures for applying for asylum in the United States and for adjudicating asylum applications. In 1980, with the enactment of the Refugee Act of 1980, a three-paragraph asylum section was added to the INA.[63] INS asylum regulations, which were revised in the years between 1980 and 1994, continued to set forth procedures. It was not until enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 (P.L. 104-208, Division C, §302(a)) that expedited removal and credible fear screening became features of the asylum system.[64]

What proportion of all defensive asylum seekers go through the credible fear process?

Data are not available to determine the number of credible fear screenings as a proportion of *all defensive asylum seekers* (those seeking asylum as a defense against removal). However, EOIR data show the proportion of *all pending removal proceedings* that originated with a credible fear claim, regardless of whether the respondent has filed an asylum application. These figures provide a measure of the proportion of formal removal proceedings that resulted from individuals placed in expedited removal who passed their credible fear screenings. Among 2,773,145 total proceedings pending at the end of calendar year 2023, 221,408 (about 8%) originated with a credible fear claim.[65]

What is the process for a credible fear interview?

Who conducts credible fear interviews?

USCIS asylum officers conduct credible fear interviews. An asylum officer is an immigration officer who "has had professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of [asylum] applications."[66] The

[62] DHS and DOJ, EOIR, "Securing the Border," 89 *Federal Register* 48710, 48718, June 7, 2024 (codified at 8 C.F.R. §§208, 235, and 1208). See CRS Insight IN12417, *The Impact of the "Securing the Border" Interim Final Rule on Migrant Encounters and Processing*.

[63] INA §208; 8 U.S.C. §1158.

[64] For further historical discussion, see archived CRS Report R45539, *Immigration: U.S. Asylum Policy*.

[65] DOJ, EOIR, "Pending I-862 Proceedings Originating with a Credible Fear Claim and All Pending I-862s," Adjudication Statistics, January 18, 2024. I-862 proceedings are removal proceedings (Form I-862 is a Notice to Appear).

[66] INA §235(b)(1)(E)(i); 8 U.S.C. §1225(b)(1)(E)(i).

asylum officer is "supervised by an officer" who has the same training and qualifications, and who "has had substantial experience adjudicating asylum applications."[67] Currently, all credible fear interviews are conducted virtually.[68]

What rights are available to applicants who are referred for credible fear interviews?

The asylum officer is required to explain to the applicant the credible fear interview process, the right to consultation before the interview, the right to request a review of the asylum officer's determination, and the consequences of failing to show a credible fear of persecution or torture.[69] If the applicant cannot proceed with the interview in English, the asylum officer is required to obtain the assistance of an interpreter.[70] The asylum officer must also create a summary of the material facts as stated by the applicant and, at the end of the interview, review the summary with the applicant and provide him or her with an opportunity to correct any errors in it.[71]

An applicant may consult any person before a credible fear interview.[72] According to 8 U.S.C. §1225(b)(1) and its implementing regulations, "[s]uch consultation shall be at no expense to the Government and shall not unreasonably delay the process."[73] The consulted person may be present at the interview and permitted, at the discretion of the asylum officer, to offer a statement at the end of the interview.[74] The applicant may also present evidence during the interview.[75]

Are applicants detained pending the outcome of their credible fear screenings?

According to 8 U.S.C. §1225(b)(1) and its implementing regulations, an alien "shall be detained" pending a determination of whether that person has a credible fear of persecution or torture.[76] DHS's ICE is responsible for immigration detention. Although detention is generally mandatory, immigration officials, at their discretion, have statutory authority to parole applicants for admission into the United States temporarily "on a case-by-case basis for urgent humanitarian reasons or significant public benefit."[77] Under DHS regulations, the agency may parole aliens who have been placed in expedited removal proceedings, including those who are being detained

[67] INA §235(b)(1)(E)(ii); 8 U.S.C. §1225(b)(1)(E)(ii).

[68] CRS communication with CBP, May 1, 2024.

[69] INA §235(b)(1)(B)(iv); 8 U.S.C. §1225(b)(1)(B)(iv), and 8 C.F.R. §235.3(b)(4)(i).

[70] 8 C.F.R. §208.30(d)(5) ("If the alien is unable to proceed effectively in English, and if the asylum officer is unable to proceed competently in a language the aliens speaks and understands, the asylum officer shall arrange for the assistance of an interpreter in conducting the interview.").

[71] 8 C.F.R. §208.30(d)(6).

[72] INA §235(b)(1)(B)(iv); 8 U.S.C. §1225(b)(1)(B)(iv), and 8 C.F.R. §§208.30(d)(4), 235.3(b)(4)(i)(B), (ii). The consulted person may be a relative, friend, clergy person, attorney, or other representative. DHS, USCIS, Refugee, Asylum, and International Operations (RAIO) Directorate Officer Training, "Credible Fear of Persecution and Torture Determinations," April 30, 2019, https://perma.cc/AB7Q-W8MU.

[73] INA §235(b)(1)(B)(iv); 8 U.S.C. §1225(b)(1)(B)(iv), and 8 C.F.R. §208.30(d)(4).

[74] 8 C.F.R. §208.30(d)(4). Under the regulation, "[t]he asylum officer, in his or her discretion, may place reasonable limits on the number of persons who may be present at the interview and on the length of the statement."

[75] 8 C.F.R. §208.30(d)(4).

[76] INA §235(b)(1)(B)(iii)(IV); 8 U.S.C. §1225(b)(1)(B)(iii)(IV), and 8 C.F.R. §235.3(b)(4)(ii). See also Jennings v. Rodriguez, 583 U.S. 281, 297 (2018) ("Read most naturally, §§1225(b)(1) and (b)(2) thus mandate detention of applicants for admission until certain proceedings have concluded.").

[77] 8 U.S.C. §1182(d)(5)(A). Parole is not considered a lawful admission into the United States or a determination of admissibility, and the decision whether to grant parole is subject to DHS's discretion and may be revoked at any time; INA §§101(a)(13)(B), 212(d)(5)(A); 8 U.S.C. §§1101(a)(13)(B), 1182(d)(5)(A).

pending a credible fear interview, if they do not present a security or flight risk and fall within certain categories (e.g., those who have serious medical conditions, those who will be witnesses in judicial proceedings, or those "whose continued detention is not in the public interest").[78]

In April 2023, CBP initiated a new procedure, Enhanced Expedited Removal (EER), to hold certain foreign nationals in CBP short-term holding facilities, rather than ICE detention facilities, while they are processed through the expedited removal process.[79] According to the DHS Office of Inspector General, when U.S. Border Patrol (USBP)[80] takes an individual into custody for expedited removal processing and the individual claims a fear of persecution or torture, they are referred to USCIS and complete the expedited removal process. If the asylum officer renders a negative credible fear determination and review by an immigration judge is not requested, or the immigration judge affirms the negative determination, USBP coordinates the removal of the person. If the result of the credible fear interview is positive (or an immigration judge overrules a negative determination), USBP serves an NTA, and the individual is released pending formal removal proceedings.[81]

Additionally, certain migrants may be processed for expedited removal, released, and monitored under ICE's Alternatives to Detention (ATD) programs.[82] The Family Expedited Removal Management (FERM) program, introduced by ICE in May 2023, is designated for family units[83] apprehended at the Southwest border and placed in expedited removal. Families in this program have indicated that they intend to apply for asylum and will reside in one of the destinations in the interior of the United States where the program is in operation.[84] Under the FERM program, household heads in such families are subject to a curfew and enrolled in ATD for the duration of the expedited removal process.[85]

What is the difference between the requirement to establish credible fear and the requirement to establish reasonable fear?

Aliens placed in expedited removal proceedings who indicate an intention to apply for asylum or fear of returning to their country of origin are interviewed to determine whether they have a credible fear of persecution or torture.[86]

[78] 8 C.F.R. §§208.30(f), 212.5(b), 235.3(b)(2)(iii), 235.3(b)(4)(ii); see also Jennings v. Rodriguez, 583 U.S. 281, 300 (2018) ("With few exceptions not relevant here, the [DHS Secretary] may 'for urgent humanitarian reasons or significant public benefit' temporarily parole aliens detained under §§1225(b)(1) and (b)(2). That express exception to detention implies that there are no *other* circumstances under which aliens detained under §1225(b) may be released.") (quoting 8 U.S.C. §1182(d)(5)(A)).

[79] EER is a procedure where CBP screens individuals in USBP custody and coordinates with USCIS and DOJ while they proceed through expedited removal. DHS, Office of Inspector General, *Results of Unannounced Inspections of CBP Holding Facilities in the San Diego Area*, November 15, 2023.

[80] USBP is the CBP component responsible for immigration enforcement between ports of entry along the border.

[81] Ibid., Appendix C.

[82] For additional information on ICE's ATD programs, see CRS Report R45804, *Immigration: Alternatives to Detention (ATD) Programs*.

[83] *Family unit* is defined in regulation as a group of two or more aliens consisting of a minor or minors (children under age 18) accompanied by his/her/their adult parent(s) or legal guardian(s). See 8 C.F.R. §236.3(b)(7).

[84] DHS, ICE, "ICE announces new process for placing family units in expedited removal," press release, May 10, 2023, https://www.ice.gov/news/releases/ice-announces-new-process-placing-family-units-expedited-removal.

[85] Ibid.

[86] INA §235(b)(1)(A)(ii); 8 U.S.C. §1225(b)(1)(A)(ii), and 8 C.F.R. §§208.30(b), 235.3(b)(4).

A separate streamlined procedure applies to the removal of aliens who have unlawfully reentered the United States after having been previously removed under an order of removal and who, upon threat of being removed again, express a fear of persecution or torture if returned to their native country.[87] Under this process, called reinstated removal proceedings, the alien's prior removal order is reinstated and may not be reopened or reviewed, and the alien is typically removed without a hearing or opportunity to pursue relief from removal.[88] An alien with a reinstated removal order who expresses a fear of returning to the country of removal is entitled to administrative review of that claim.[89] An asylum officer will interview the alien to determine whether he or she has a *reasonable fear* of persecution or torture.[90]

The reasonable fear standard is a higher standard of proof than the credible fear standard. In expedited removal proceedings, a person must show a "significant possibility" of establishing eligibility for asylum, withholding of removal, or CAT protection.[91] To establish reasonable fear in reinstated removal proceedings, an alien must show a "reasonable possibility" that he or she would be persecuted or tortured in the country of removal.[92] The reasonable possibility standard is the same standard used to determine whether an applicant has shown a "well-founded fear" of persecution for the purpose of asylum.[93] By contrast, a credible fear determination is a "low screening standard"[94] that considers only whether the alien has shown a "substantial and realistic possibility of success on the merits" of an application for asylum and related protections.[95]

In addition, an alien with a reinstated removal order who shows a reasonable fear of persecution or torture is placed in proceedings before an immigration judge for consideration of the alien's eligibility for withholding of removal and CAT protection only.[96] The alien may not apply for

[87] INA §241(a)(5); 8 U.S.C. §1231(a)(5), and 8 C.F.R. §241.8.

[88] INA §241(a)(5); 8 U.S.C. §1231(a)(5), and 8 C.F.R. §241.8(a).

[89] 8 C.F.R. §241.8(e).

[90] 8 C.F.R. §§208.31(b), 241.8(e).

[91] See DHS, USCIS, "Asylum Division Officer Training Course: Reasonable Fear of Persecution and Torture Determinations," February 13, 2017, https://www.uscis.gov/sites/default/files/document/lesson-plans/Reasonable_Fear_Asylum_Lesson_Plan.pdf.

[92] 8 C.F.R. §208.31(c).

[93] See INS v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987) ("As we pointed out in *Stevic*, a moderate interpretation of the 'well-founded fear' standard would indicate 'that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility.'") (quoting INS v. Stevic, 467 U.S. 407, 424–25 [1984]); 8 C.F.R. §1208.13(b)(2)(i)(B); DHS, USCIS, "Asylum Division Officer Training Course: Reasonable Fear of Persecution and Torture Determinations," February 13, 2017, https://www.uscis.gov/sites/default/files/document/lesson-plans/Reasonable_Fear_Asylum_Lesson_Plan.pdf.) ("This is the same standard required to establish a 'well-founded fear' of persecution in the asylum context.").

[94] See Grace v. Whitaker, 344 F. Supp. 3d 96, 107 (D.C. Cir. 2018) (citing 142 CONG. REC. S11491–02 daily ed. Sept. 27, 1996) (statement of Sen. Hatch)), *aff'd in part, rev'd in part sub nom.* Grace v. Barr, 965 F.3d 883 (D.C. Cir. 2020).

[95] DHS, USCIS, Asylum Division Officer Training Course: Credible Fear 15, February 28, 2014, (citing Holmes v. Amerex Rent-a-Car, 180 F.3d 294, 297 [D.C. Cir. 1999]), https://www.uscis.gov/sites/default/files/document/lesson-plans/Asylum_and_Female_Genital_Mutilation.pdf; see also DHS, USCIS, RAIO Directorate Officer Training, "Credible Fear of Persecution and Torture Determinations," April 30, 2019, https://perma.cc/AB7Q-W8MU. ("A claim that has no possibility, or only a minimal or mere possibility, of success, would not meet the 'significant possibility' standard.")

[96] See Johnson v. Guzman Chavez, 594 U.S. 523, 531 (2021) ("If the asylum officer concludes that the alien has a reasonable fear, he will refer the matter to an immigration judge for initiation of withholding-only proceedings. Those proceedings are 'limited to a determination of whether the alien is eligible for withholding or deferral of removal,' and as such, 'all parties are prohibited from raising or considering any other issues, including but not limited to issues of admissibility, deportability, eligibility for waivers, and eligibility for any other form of relief.'") (citing and quoting 8 U.S.C. §§208.2(c)(3)(i), 208.31(e), and 8 C.F.R. §§1208.2(c)(3)(i), 1208.31(e)).

asylum in those proceedings.[97] On the other hand, an alien in expedited removal proceedings who shows a credible fear of persecution or torture may apply for asylum as well as withholding of removal and CAT protection.[98] This distinction is significant because, unlike asylum, which provides an alien with the opportunity to pursue LPR status,[99] a grant of withholding of removal or CAT protection only bars removal to the country where the alien fears persecution or torture (but not necessarily to a third country), and affords no pathway to LPR status.[100]

What are the recent executive branch actions related to asylum and how might they impact the credible fear screening process?

In 2023, DHS and DOJ issued a final rule, "Circumvention of Lawful Pathways," that applies to aliens without valid entry documents who arrive at "the southwest land border or adjacent coastal borders" from May 11, 2023, to May 11, 2025, after traveling through a third country (a country other than the United States or their country of citizenship or nationality).[101] The rule makes these aliens subject to a rebuttable presumption of asylum ineligibility unless certain exceptions apply. For individuals placed in expedited removal and referred for a credible fear interview, the rule requires the asylum officer conducting the interview to determine whether the alien is covered by the new rule and, if so, whether the alien has rebutted the presumption.[102] If the alien is determined to be ineligible for asylum, the asylum officer will make a negative credible fear determination and will consider whether the alien can show eligibility for withholding of removal and protection from removal under the CAT.[103]

In 2024, DHS and DOJ promulgated an interim final rule, "Securing the Border," in conjunction with an associated presidential proclamation that makes aliens arriving in the United States at the southern border during "emergency border circumstances" ineligible for asylum unless certain exceptions apply.[104] Like the "Circumvention of Lawful Pathways" rule, this rule requires consideration of whether an alien is subject to this asylum limitation during a credible fear interview.[105]

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[97] See Ibid.

[98] INA §235(b)(1)(B)(ii); 8 U.S.C. §1225(b)(1)(B)(ii), and 8 C.F.R. §§208.30(f), 1208.30(g)(2)(iv)(B).

[99] See INA §209(b); 8 U.S.C. §1159(b) (providing that a person granted asylum may apply for adjustment to LPR status if that person has been physically present in the United States for at least one year after being granted asylum and meets other requirements).

[100] See Johnson v. Guzman Chavez, 594 U.S. at 531 ("If an alien is granted withholding-only relief, DHS may not remove the alien to the country designated in the removal order unless the order of withholding is terminated. But because withholding of removal is a form of 'country-specific' relief, nothing prevents DHS 'from removing [the] alien to a third country other than the country to which removal has been withheld or deferred.'") (citing and quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 428 n.6 (1987); 8 C.F.R. §§208.16(f), 208.22, 1208.16(f) 1208.22).

[101] DHS and DOJ, EOIR, "Circumvention of Lawful Pathways," 88 *Federal Register* 31314, 31321-31322, May 16, 2023 (codified at 8 C.F.R. §§208, 1003, and 1208).

[102] Ibid., p. 31322; 8 C.F.R. §208.33(b)(1), (2). For more information about the 2023 rule, see CRS Legal Sidebar LSB11044, *The Biden Administration's Final Rule on Arriving Aliens Seeking Asylum (Part One)*.

[103] Ibid.

[104] DHS and DOJ, EOIR, "Securing the Border," 89 *Federal Register* 48710, 48718, June 7, 2024 (codified at 8 C.F.R. §§208, 235, and 1208). Under the rule, the term "emergency border circumstances" refers to a situation in which encounters at the southern border exceed certain thresholds. Ibid., p. 48711.

[105] Ibid. For more information about the 2024 rule, see CRS Legal Sidebar LSB11178, *The Biden Administration's June 2024 Proclamation and Rule, Securing the Border* and CRS Insight IN12383, *The Biden Administration's Proclamation and Rule, Securing the Border, and DHS Operational Constraints*.

Under the "Securing the Border" rule, CBP officers do not affirmatively ask individuals whether they fear returning to their country to determine whether they should be placed in credible fear proceedings. Instead, to be considered for a credible fear interview, the individual must affirmatively express either a fear of return or an intention to apply for asylum or protection from removal.[106] If the alien makes an affirmative statement and the asylum officer finds that the alien is subject to the rule's limitation, the asylum officer will automatically make a negative credible fear determination and will, instead, consider whether the alien can show eligibility for withholding of removal and CAT protection.[107]

Also, in 2024 USCIS proposed a rule that would allow asylum officers to consider whether certain mandatory statutory bars to eligibility for asylum or withholding of removal (e.g., those applicable to persons who have been convicted of particularly serious crimes or who have engaged in terrorist activity) apply in determining whether an individual can show a credible fear of persecution.[108] Under this rule, if there is evidence that a mandatory bar could apply, the asylum officer would be permitted to issue a negative credible fear finding if the alien fails to show that there is a significant possibility that they would be unable to prove by a preponderance of the evidence that the mandatory bar does not apply and if the alien is otherwise unable to show a credible fear of torture.[109]

Credible Fear Outcomes

What are the possible outcomes of a credible fear screening?

If an asylum officer finds that an alien has a credible fear of persecution or torture, that individual is typically placed in formal removal proceedings (see "What is formal removal?").[110]

When an asylum officer finds that an alien does not have a credible fear of persecution or torture, the alien may request that an immigration judge review that determination.[111] The immigration judge's review "shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days" after the asylum officer's decision.[112] If the alien declines further review, the asylum officer must order the alien removed from the United States without further hearing or review.[113]

[106] Ibid., p. 48718.

[107] Under the interim final rule, aliens are subject to a *reasonable probability* standard, which is "substantially more than a reasonable possibility but somewhat less than more likely than not" (which is the standard used to qualify for withholding of removal or CAT protection). Ibid.

[108] DHS, USCIS, "Application of Certain Mandatory Bars in Fear Screenings," 89 *Federal Register* 41347, May 13, 2024. This represents a change in practice—"historically, [asylum officers] have not considered the applicability of mandatory bars to asylum or statutory withholding of removal when determining whether a noncitizen could establish eligibility for asylum or other forms of protection during the initial screening interview." Ibid., p. 41350.

[109] Ibid., p. 41355. For more information about the bars to being granted asylum, see CRS Legal Sidebar LSB10816, *An Overview of the Statutory Bars to Asylum: Limitations on Granting Asylum (Part Two)*.

[110] INA §235(b)(1)(B)(ii); 8 U.S.C. §1225(b)(1)(B)(ii), and 8 C.F.R. §208.30(f).

[111] INA §235(b)(1)(B)(iii)(III); 8 U.S.C. §1225(b)(1)(B)(iii)(III), and 8 C.F.R. §208.30(g)(1).

[112] INA §235(b)(1)(B)(iii)(III); 8 U.S.C. §1225(b)(1)(B)(iii)(III). See also 8 C.F.R. §§208.30(g)(1)(i), 1003.42(e) ("The immigration judge shall conclude the review to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date the supervisory asylum officer has approved the asylum officer's negative credible fear determination issued on the Record of Negative Credible Fear Finding and Request for Review.").

[113] INA §235(b)(1)(B)(iii)(I); 8 U.S.C. §1225(b)(1)(B)(iii)(I), and 8 C.F.R. §208.30(g)(1)(ii).

If the immigration judge concurs with the asylum officer's negative credible fear finding, the applicant is to be removed from the United States and the immigration judge's decision may not be appealed.[114] However, DHS may reconsider a negative credible fear determination after providing notice to the immigration judge.[115]

Conversely, if the immigration judge determines that the alien has a credible fear of persecution or torture, the immigration judge must vacate the asylum officer's negative credible fear determination and the alien may be placed in formal removal proceedings.[116] During those proceedings, the alien may pursue asylum, withholding of removal, and CAT protection.[117]

Can USCIS adjudicate an asylum application following a positive credible fear of persecution determination?

A person who is found by an asylum officer to have a credible fear of persecution "shall be detained for further consideration of the application for asylum."[118] The statute does not specify whether, in those cases, the asylum officer may adjudicate the alien's asylum application or whether the application can be considered only by an immigration judge in formal removal proceedings.[119] Until 2022, long-standing DHS and DOJ regulations have stated that aliens who establish a credible fear shall be placed in formal removal proceedings for an immigration judge's consideration of their claim for asylum and related protections.[120]

In 2022, citing increasing numbers of asylum claims and immigration court backlogs, DHS and DOJ promulgated a rule that allows USCIS asylum officers, at their discretion, to adjudicate asylum applications filed by aliens who establish a credible fear rather than refer those cases to an immigration judge.[121] Under the rule, the asylum officer may grant asylum to an applicant who qualifies for relief, and that decision may be subject to review by USCIS.[122] If the asylum officer denies asylum, the alien may request an immigration judge's review of that decision in "streamlined removal proceedings."[123] During those proceedings, the immigration judge may consider the alien's eligibility for asylum, withholding of removal, and CAT protection.[124] The

[114] 8 C.F.R. §§1003.42(f)(2), 1208.30(g)(2)(iv)(A).

[115] 8 C.F.R. §§208.30(g)(1)(i), 1208.30(g)(2)(iv)(A).

[116] 8 C.F.R. §1208.30(g)(2)(iv)(B).

[117] Ibid. For more information about how recent executive branch actions may impact the process for seeking asylum, withholding of removal, and CAT protection, as well as eligibility for these forms of relief and protection, see "What are the recent executive branch actions related to asylum and how might they impact the credible fear screening process?"

[118] INA §235(b)(1)(B)(ii); 8 U.S.C. §1225(b)(1)(B)(ii).

[119] Ibid.

[120] See, for example, 8 C.F.R. §§208.30(f), 1208.30(g)(2)(iv)(B) (2019).

[121] Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 *Federal Register* 18078, 18081, March 29, 2022 (codified at 8 C.F.R. pts. 208, 212, 235, 1003, 1208, 1235, and 1240) (hereinafter, "2022 Asylum Rule"). If USCIS adjudicates the asylum application, it generally cannot schedule an interview on the application fewer than 21 days after the applicant is served with notice of the positive credible fear determination, and the asylum officer generally must conduct the interview within 45 days of the applicant being served with a positive credible fear determination made by an asylum officer or an immigration judge; 8 C.F.R. §208.9(a)(1).

[122] 8 C.F.R. §208.14(b).

[123] See 2022 Asylum Rule, supra note 26, 87 *Federal Register* at 18078; 8 C.F.R. §1240.17.

[124] 8 C.F.R. §1240.17(i).

alien may administratively appeal the immigration judge's decision on those applications and (as specified by statute) petition for judicial review of a final order of removal.[125]

USCIS is currently implementing the 2022 rule in a limited and phased manner.[126] Under the rule, certain non-detained family units who are in expedited removal proceedings under supervision in the FERM program (see "Are applicants detained pending the outcome of their credible fear screenings?") are being scheduled for "asylum merits interviews" with an asylum officer following a positive credible fear determination if they have conveyed an intent to reside in or near certain cities in the United States where the interviews take place.[127]

Can asylum seekers withdraw their applications for admission during the credible fear screening process?

DHS may permit an individual, including those placed in expedited removal, to voluntarily withdraw an application for admission if he or she intends, and is able to depart, the United States immediately.[128] An alien does not have a right to withdraw his or her application for admission; instead, it is up to the discretion of the agency whether to permit the alien to withdraw the application and immediately leave the United States in lieu of undergoing removal proceedings.[129]

Under current DHS guidance, single adult nationals of Cuba, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, and Venezuela who are encountered between ports of entry by USBP and being processed under EER (see "Are applicants detained pending the outcome of their credible fear screenings?") are offered a chance to withdraw at the beginning of the process. Individuals are offered a chance to withdraw their application for admission and voluntarily return to Mexico once in USBP custody unless they pose safety or security risks or cannot depart the United States immediately.[130]

Prior to the beginning of a credible fear interview, a USCIS asylum officer will present the alien with the option to withdraw their application for admission and voluntarily return to Mexico. If at that point the individual chooses this option, the credible fear interview will end and USCIS will administratively close the case before notifying CBP that the alien has chosen to withdraw their application for admission and voluntarily return to Mexico.[131]

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[125] INA §242(a)(1), (b)(1); 8 U.S.C. §1252(a)(1), (b)(1), and 8 C.F.R. §1003.3(a)(1).

[126] See DHS, *Asylum Processing Rule Cohort Reports*, https://www.dhs.gov/immigration-statistics/special-reports/asylum-processing-rule-report (last updated February 1, 2024) ("The rule is being implemented in a phased manner, beginning with a small number of individuals, and continues to grow as USCIS builds operational capacity."). DHS, USCIS, *FACT SHEET: Implementation of the Credible Fear and Asylum Processing Interim Final Rule*, https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/fact-sheet-implementation-of-the-credible-fear-and-asylum-processing-interim-final-rule (last updated October 17, 2023) (hereinafter, "USCIS Fact Sheet").

[127] See USCIS Fact Sheet, supra note 30. Many states have challenged the 2022 rule in federal district courts. See Complaint, Texas v. Mayorkas, No. 2:22-cv-00094-Z (N.D. Tex. Apr. 28, 2022), ECF No. 1; Complaint, Arizona, et al. v. Garland, No. 6:22-cv-01130 (W.D. La. Apr. 28, 2022), ECF No. 2. The district courts have not yet issued final judgments in these cases, and the litigation remains pending.

[128] INA §235(a)(4); 8 U.S.C. §1225(a)(4).

[129] 8 C.F.R. §235.4.

[130] CRS correspondence with DHS, May 6, 2024.

[131] Ibid. An additional opportunity to withdraw their application for admission is available to aliens upon USCIS' determination that the individual does not meet the stated criteria for an exception to the Circumvention of Lawful Pathways rule. For more on the Circumvention of Lawful Pathways rule, see CRS Legal Sidebar LSB11044, *The Biden*
(continued...)

What percentage of people pass their credible fear interviews?

The DHS Office of Homeland Security Statistics (OHSS) publishes the outcomes of nationwide credible fear screenings.[132] These data cover credible fear of persecution screenings and credible fear of torture screenings combined. **Table 1** shows the percentage of nationwide screenings for the past 10 years with positive findings, meaning that the person established credible fear and could pursue a claim for asylum or other relief in immigration court. The significant drop in positive credible fear findings from FY2019 to FY2020 reflected the impact of various DHS asylum-related policies, among other factors.[133]

Table 1. Percentage of Nationwide Credible Fear Screenings with Positive Outcomes, FY2014-FY2023

Fiscal Year	Percentage of Positive Outcomes
2014	73%
2015	72%
2016	80%
2017	77%
2018	77%
2019	74%
2020	38%
2021	68%
2022	58%
2023	60%

Source: DHS, OHSS.

Do asylum seekers automatically receive work authorization once they pass their credible fear screenings?

By law, an asylum applicant who is not otherwise eligible for employment authorization cannot be granted such authorization until 180 days have passed since the filing of a completed asylum application.[134] By regulation, the applicant must also wait 150 days after the receipt of a completed asylum application to apply for employment authorization.[135] These restrictions do not

Administration's Final Rule on Arriving Aliens Seeking Asylum (Part One); and DHS, "Circumvention of Lawful Pathways," 88 *Federal Register* 31314, May 16, 2023.

[132] DHS, OHSS, Immigration Enforcement and Legal Processes Monthly Tables, December 2023, "Nationwide Credible Fear Screenings Referred to USCIS by Selected Citizenship," table, https://www.dhs.gov/ohss/topics/immigration/enforcement-and-legal-processes-monthly-tables.

[133] For example, in April 2019 and September 2019, USCIS revised its guidance (known as a *lesson plan*) for asylum officers on making credible fear determinations, making it more difficult for individuals to pass the screening. In 2020, several asylum seekers who received negative credible fear findings successfully challenged "the unlawful changes to the Credible Fear Interview Lesson Plan." International Refugee Assistance Project, "Kiakombua v. Wolf: Protecting the credible fear process for seeking asylum," https://refugeerights.org/news-resources/kiakombua-v-mcaleenan-protecting-the-rights-of-asylum-seekers.

[134] INA §208(d)(2); 8 U.S.C. §1158(d)(2).

[135] 8 C.F.R. §208.7(a)(1).

apply to asylum applicants who are authorized to work under another immigration category, such as immigration parole or Deferred Action for Childhood Arrivals (DACA).

An asylum seeker granted work authorization through this application process receives an Employment Authorization Document (EAD). Under USCIS policy guidance in effect as of the cover date of this report, the maximum validity period for an initial or renewal EAD issued to an asylum applicant is five years.[136]

Asylum Outcomes in Immigration Court

What percentage of individuals who pass a credible fear screening subsequently file an application for asylum?

EOIR data show immigration court asylum filing rates for all credible fear referrals received from DHS (i.e., the percentage of persons in expedited removal referred for formal removal who subsequently filed an asylum application) and decisions on those asylum applications.[137]

Among *decided* removal cases originating with a credible fear claim during the period FY2014-FY2024(Q3), the annual rate at which asylum applications were filed ranged between 46% (FY2014) and 72% (FY2022) (see **Table 2**). Among the total cases decided during that period (384,834), 61% (236,304) of respondents filed an asylum application.

Table 2. Asylum Application Filings in Decided Cases Originating with a Credible Fear Claim, FY2014-FY2024(Q3)

Fiscal Year	Total Decisions	Asylum Applications Filed (Number)	Asylum Applications Filed (Percentage)
2014	12,963	5,947	46%
2015	14,047	8,029	57%
2016	20,338	11,525	57%
2017	28,099	15,599	56%
2018	33,714	20,510	61%
2019	54,820	32,086	59%
2020	33,415	22,196	66%
2021	17,128	10,532	61%
2022	48,052	34,669	72%
2023	68,838	44,288	64%
2024(Q3)	*53,420*	*30,923*	*58%*
Total	**384,834**	**236,304**	**61%**

[136] DHS, USCIS, "Some EADs Can be Valid for up to 5 Years," November 16, 2023, https://www.uscis.gov/save/whats-new/some-eads-can-be-valid-for-up-to-5-years-0#:~:text=USCIS%20increased%20the%20maximum%20validity,exceed%20length%20of%20parole)%3B.

[137] There are likely a number of reasons that such an individual would not subsequently file an application for asylum; for example, because they decided to pursue another form of relief or because the individual is included as a dependent on their spouse's or parent's asylum application. U.S. Government Accountability Office, *Immigration: Actions Needed to Strengthen USCIS's Oversight and Data Quality of Credible and Reasonable Fear Screenings*, GAO-20-250, February 2020, pp. 20-21.

Source: CRS analysis of DOJ, EOIR, "Asylum Decisions in Cases Originating with a Credible Fear Claim," Adjudication Statistics, July 19, 2024.

Notes: FY2024 contains data through the third quarter only. CRS computed the number of asylum applications filed by subtracting from the total asylum decisions the number of cases EOIR reported where no asylum application was filed, and the percentage of asylum applications filed by dividing the number of asylum applications filed by total asylum decisions.

What percentage of individuals who pass a credible fear screening are granted asylum?

EOIR reports the following decision outcomes for completed asylum cases: asylum grants, asylum denials, "other" outcomes (including cases that were abandoned, not adjudicated, or withdrawn), and cases that were administratively closed.[138] Administratively closed cases are temporarily removed from the docket (e.g., while the respondent pursues an application for relief outside immigration court).

During the period FY2014-FY2024(Q3), EOIR issued decisions for 236,304 cases referred from a credible fear claim in which an application for asylum was filed (**Table 3**). The annual grant rate ranged between approximately 18% (FY2023)[139] and 28% (FY2014). The overall grant rate from FY2014-FY2024(Q3) was approximately 22%. The annual denial rate ranged between 15% (FY2022 and FY2023) and 56% (FY2020). The overall denial rate for the period was approximately 32%.

In recent years, there has been an increase in "other" outcomes. These may reflect, in part, increases in the number of cases dismissed by DHS as a matter of prosecutorial discretion[140] and/or by the immigration judge in instances where DHS failed to file the NTA with the immigration court.[141]

Table 3. Asylum Outcomes for Cases Originating with a Credible Fear Claim, FY2014-FY2024(Q3)

FY	Grants	Grant Rate	Denials	Denial Rate	Other	Other Rate	Admin. Closure	Admin. Closure Rate	Total Out-comes
2014	1,687	28%	2,621	44%	1,239	21%	400	7%	5,947
2015	1,949	24%	2,726	34%	1,304	16%	2,050	26%	8,029
2016	2,463	21%	3,683	32%	1,700	15%	3,679	32%	11,525
2017	3,969	25%	7,142	46%	2,572	16%	1,916	12%	15,599
2018	5,585	27%	9,885	48%	4,701	23%	339	2%	20,510

[138] For more information about these outcomes, see CRS Insight IN12318, *FY2023 Immigration Court Data: Case Outcomes*. For more information about administrative closure and its use under different Administrations, see the "Docket Management and Administrative Closure" section in CRS Report R47077, *U.S. Immigration Courts and the Pending Cases Backlog*.

[139] CRS is not considering the grant or denial rates in the first three quarters of FY2024 as annual rates because they represent only three quarters of data. During that period, the grant rate was 14%; the denial rate was 10%.

[140] DHS, ICE, memorandum from Kerry E. Doyle, Principal Legal Advisor to Office of the Principal Legal Advisor attorneys, "Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion," April 3, 2022. See also CRS Legal Sidebar LSB10578, *The Biden Administration's Immigration Enforcement Priorities: Background and Legal Considerations*.

[141] See, for example, Transactional Records Access Clearinghouse (TRAC) at Syracuse University, "200,000 Immigration Court Cases Dismissed Because DHS Failed to File Paperwork," March 20, 2024.

FY	Grants	Grant Rate	Denials	Denial Rate	Other	Other Rate	Admin. Closure	Admin. Closure Rate	Total Out-comes
2019	8,497	26%	17,436	54%	6,136	19%	17	0%	32,086
2020	5,584	25%	12,473	56%	3,998	18%	141	1%	22,196
2021	2,458	23%	3,734	35%	3,721	35%	619	6%	10,532
2022	6,521	19%	5,268	15%	19,204	55%	3,676	11%	34,669
2023	7,966	18%	6,557	15%	26,433	60%	3,332	8%	44,288
2024(Q3)	*4,468*	*14%*	*3,137*	*10%*	*21,486*	*69%*	*1,832*	*6%*	*30,923*
Total	**51,147**	**22%**	**74,662**	**32%**	**92,494**	**39%**	**18,001**	**8%**	**236,304**

Source: CRS analysis of DOJ, EOIR, "Asylum Decisions in Cases Originating with a Credible Fear Claim," Adjudication Statistics, July 19, 2024.

Notes: FY2024 contains data through the third quarter only. Specific rates are computed by dividing specific outcomes by total outcomes. "Other" includes abandoned, not adjudicated, other, and withdrawn.

How many asylum applicants fail to appear for their immigration court hearings?

Under the law, individuals who fail to appear for their immigration court hearings must be ordered removed in absentia.[142] Therefore, the number of in absentia removal orders issued by immigration judges may be used as a measure of the number of individuals who fail to appear for their hearings.

EOIR publishes the annual number of in absentia removal orders for proceedings that originated with a credible fear claim (see **Table 4**) and for all proceedings with a filed asylum application (see **Table 5**). There is likely overlap between these two sets of data (i.e., some cases that originated with credible fear claims also will have filed applications for asylum); they are not additive.

Recent declines in the number of in absentia removal orders may be related to the COVID-19 pandemic and DHS enforcement policies. According to EOIR:

> The COVID-19 pandemic resulted in fewer non-detained hearings overall and, therefore, fewer occasions in which *in absentia* orders of removal may have occurred. Additionally, the Department of Homeland Security's policy modifications led to an increase in terminations and dismissals, which impacted the number of *in absentia* orders of removal.[143]

EOIR publishes in absentia rates that are the result of dividing the number of in absentia removals by the number of total initial case completions in a fiscal year;[144] however, these rates are not available for credible fear cases or cases with an asylum application, specifically.

[142] INA §240(b)(5); 8 U.S.C. §1229a(b)(5). For more information, see CRS In Focus IF11892, *At What Rate Do Noncitizens Appear for Their Removal Hearings? Measuring In Absentia Removal Order Rates*.

[143] DOJ, EOIR, "Comparison of *In Absentia* Rates," Adjudication Statistics, January 18, 2024.

[144] Ibid.

Table 4. In Absentia Removal Orders in Cases Originating with a Credible Fear Claim, FY2014-FY2024(Q3)

Fiscal Year	In Absentia Removal Orders
2014	4,077
2015	3,821
2016	5,565
2017	9,381
2018	10,659
2019	17,772
2020	7,309
2021	1,040
2022	5,635
2023	13,748
2024(Q3)	*11,448*

Source: DOJ, EOIR, "*In Absentia* Removal Orders in Cases Originating with a Credible Fear Claim," July 19, 2024.

Notes: FY2024 contains data through the third quarter only.

Table 5. In Absentia Removal Orders for Asylum Applicants, FY2014-FY2024(Q3)

Fiscal Year	In Absentia Removal Orders
2014	2,086
2015	2,127
2016	3,203
2017	4,794
2018	7,110
2019	10,584
2020	6,952
2021	2,279
2022	7,458
2023	13,773
2024(Q3)	12,702

Source: DOJ, EOIR, "Asylum Applicant *In Absentia* Removal Orders," July 19, 2024.

Notes: FY2024 contains data through the third quarter only.

Appendix. Acronyms Used in This Report

Acronym	Definition
ATD	Alternatives to Detention
CAT	Convention Against Torture
CBP	U.S. Customs and Border Protection
DACA	Deferred Action for Childhood Arrivals
DHS	U.S. Department of Homeland Security
DOJ	U.S. Department of Justice
EAD	Employment Authorization Document
EER	Enhanced Expedited Removal
EOIR	Executive Office for Immigration Review
FERM	Family Expedited Removal Management
HHS	U.S. Department of Health and Human Services
ICE	Immigration and Customs Enforcement
IIRIRA	Illegal Immigration Reform and Immigrant Responsibility Act of 1996
INA	Immigration and Nationality Act
INS	Immigration and Naturalization Service
LPR	Lawful permanent resident
NTA	Notice to Appear
NQRP	National Qualified Representative Program
ORR	Office of Refugee Resettlement
TVPRA	Trafficking Victims Protection Reauthorization Act of 2008
UAC	Unaccompanied alien children
USBP	U.S. Border Patrol
USCIS	U.S. Citizenship and Immigration Services

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