



DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1003, 1103, 1208, and 1240

[Docket No. EOIR 19-0010; Dir. Order No. 04-2021]

RIN 1125-AA93

Procedures for Asylum and Withholding of Removal

AGENCY: Executive Office for Immigration Review, Department of Justice.

ACTION: Final rule.

SUMMARY: On September 23, 2020, the Department of Justice (“DOJ” or “the Department”) published a notice of proposed rulemaking (“NPRM” or “proposed rule”) that proposed to amend the regulations governing the adjudication of applications for asylum and withholding of removal before the Executive Office for Immigration Review (“EOIR”), including outlining requirements for filing a complete application for relief and the consequences of filing an incomplete application, and establishing a 15-day filing deadline for aliens applying for asylum in asylum-and-withholding-only-proceedings, and clarifying evidentiary standards in adjudicating such applications. Further, the Department proposed changes related to the 180-day asylum adjudication clock. This final rule responds to comments received in response to the NPRM and adopts the NPRM with few changes.

DATES: This rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Falls Church, VA 22041, telephone (703) 305-0289 (not a toll free call).

SUPPLEMENTARY INFORMATION:

I. Background

A. Proposed Rule

On September 23, 2020, the Department published an NPRM that would amend EOIR's regulations regarding the procedures for the submission and consideration of applications for asylum, statutory withholding of removal, and protection under the regulations issued pursuant to the legislation implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"). Procedures for Asylum and Withholding of Removal, 85 FR 59692 (Sept. 23, 2020). Through the NPRM, the Department proposed changes to 8 CFR parts 1003, 1208, and 1240 regarding completeness requirements for such an application, and the consequences of filing an incomplete application. Further, it proposed to establish a 15-day filing deadline for aliens applying for asylum¹ in asylum-and-withholding only proceedings and proposed changes to improve adherence to the statutory requirement that asylum applications be adjudicated within 180 days absent exceptional circumstances. The rule also proposed to clarify evidentiary standards in adjudicating such applications.

B. Authority

The Attorney General is issuing this final rule pursuant to the authority at sections 103(g) and 208(d)(5)(B) of the Immigration and Nationality Act ("INA" or "the Act"), 8 U.S.C. 1103(g) and 1158(d)(5)(B).

C. Final Rule

Following consideration of the public comments received, discussed below in section II, the Department has determined to publish the provisions of the proposed rule as final except for the changes noted in I.C.1 below and certain technical amendments. The rationale for those provisions that are unchanged from the proposed rule remains valid. 85 FR at 59693-97.

1. Filing Deadline for Aliens in Asylum-and-Withholding-Only Proceedings

¹ An application for asylum is also an application for statutory withholding of removal, 8 CFR 1208.3(b), and this rule clarifies that it is also an application for protection under the CAT. Moreover, as discussed, *infra*, the final rule contains provisions related to aliens seeking withholding of removal or CAT protection—but not asylum—in proceedings under 8 CFR 1208.2(c)(2). Thus, unless the context indicates otherwise, references to an asylum application in this final rule encompass references to statutory withholding of removal and protection under the CAT

The NPRM added a new paragraph (d) to 8 CFR 1208.4, but the final rule splits that paragraph into three parts, including adding a clarification regarding fee receipts in response to commenters' concerns. Paragraph (d)(1) of the final rule mirrors paragraph (d) in the proposed rule; it establishes an initial 15-day filing deadline for the submission of Form I-589, Application for Asylum and for Withholding of Removal, including applications for protection under the CAT, by aliens in asylum-and-withholding-only proceedings under 8 CFR 1208.2(c)(1) and 1208.4(b)(3)(iii). The 15-day period is calculated from the date of the alien's first hearing before an immigration judge and is subject to possible extension for good cause by the immigration judge. For aliens who do not file the application by the deadline set by the immigration judge, the immigration judge will deem the alien's opportunity to submit the application waived in the proceedings pending before EOIR, and the case will be returned to the Department of Homeland Security ("DHS").

If the Form I-589 requires payment of a fee, this final rule at paragraph (d)(2) maintains the general requirement for applications and motions before EOIR: the alien must submit a fee receipt together with the application by the deadline set by the immigration judge. In response to commenters' concerns, however, this final rule adds a provision at paragraph (d)(3) to allow flexibility for aliens to meet the filing deadline when the aliens cannot meet all requirements due to no fault of their own. Accordingly, if the alien has not yet received a copy of the fee receipt from DHS in time to meet the Form I-589 filing deadline, the alien may instead provide the immigration court with a copy of the payment submitted to DHS when the alien submits his or her application to EOIR. Aliens who provide this alternative proof of payment must still provide a copy of the fee receipt. In such an instance, the fee receipt will be due by the deadline the immigration judge sets. If the immigration judge does not set a separate deadline for the

submission of the fee receipt, the alien must submit the fee receipt within 45 days² of the date of filing the associated application.³

In response to a recommendation by a commenter, the Department is also amending 8 CFR 1208.4(d)(1) in the final rule to apply the 15-day deadline to applications for statutory withholding of removal and protection under the CAT for aliens in proceedings under 8 CFR 1208.2(c)(2). The Department sees no reason to distinguish between aliens subject to proceedings under 8 CFR 1208.2(c)(1) and those subject to proceedings under 8 CFR 1208.2(c)(2), as both groups are generally detained. Moreover, the reasons underpinning the application deadline for 8 CFR 1208.2(c)(1) apply with equal force to proceedings under 8 CFR 1208.2(c)(2). Accordingly, in response to the recommendation of at least one commenter, the final rule adopts the commenter's suggestion and edits the language in 8 CFR 1208.4(d)(1) to make the 15-day deadline, with the possibility of an extension for good cause, applicable to aliens in proceedings under 8 CFR 1208.2(c)(2) seeking statutory withholding of removal or protection under the CAT regulations.

Finally, the final rule makes a syntax change to the language in 8 CFR 1208.4(d)(1) to clarify that if an alien does not file an appropriate application by the deadline set by the immigration judge, the immigration judge shall deem the opportunity to file such an application waived, and the case shall be returned to DHS. The proposed rule included the phrase “for execution of an order of removal” after “DHS,” but that phrasing risks confusion because not every alien in proceedings under 8 CFR 1208.2(c)(1) is subject to an order of removal. *See, e.g.*, 8 CFR 1208.2(c)(1)(iii) (VWP applicant for admission who is denied admission). Accordingly,

² The INA states both that a fee may be charged for an asylum application, INA 208(d)(3), 8 U.S.C. 1158(d)(3), and that the initial hearing on an asylum application occur within 45 days of filing the application absent exceptional circumstances, INA 208(d)(5)(A)(ii), 8 U.S.C. 1158(d)(5)(A)(ii). Thus—for an asylum application that requires a fee—because the application cannot be filed until the fee is paid and because a hearing cannot occur on the application until it is filed, the Department finds that the statutory scheme in INA 208, 8 U.S.C. 1158, contemplates that it is reasonable to expect an alien to have received a fee receipt within 45 days of filing the asylum application.

³ In addition, this final rule adds corresponding cross-references to 8 CFR 1003.8, 1003.24, 1003.31, and 1103.7 to account for this exception to the general requirement that any form or application that requires a fee must be submitted together with the fee receipt.

the final rule deletes that phrase to make clear that in the circumstances of 8 CFR 1208.4(d)(1), the case will simply be returned to DHS, and DHS will take whatever subsequent action it deems appropriate.

2. Requirements for the Filing of an Application

The rule amends 8 CFR 1208.3(c)(3) regarding the requirements for filing a Form I-589, Application for Asylum and for Withholding of Removal, and the procedures for correcting errors in filed applications. These amendments apply to the submission of any Form I-589 before EOIR, including aliens in removal proceedings under section 240 of the Act, 8 U.S.C. 1229a, aliens in asylum-and-withholding-only proceedings under 8 CFR 1208.2(c)(1) and 1208.4(b)(3)(iii), and aliens in withholding-only proceedings under 8 CFR 1208.2(c)(2).

First, the rule specifies that the application must be filed in accordance with the form instructions and the general requirements for filings before the immigration court at 8 CFR 1003.24, 1003.31(b), and 1103.7(a)(3), including the payment of any required fee. The rule provides that an application is incomplete if, in addition to existing grounds, it is not completed and submitted in accordance with the form instructions or is unaccompanied by any required fee receipt (or alternate proof, as necessary).

Second, the rule further revises 8 CFR 1208.3(c)(3) by removing the current provision that deems an alien's incomplete asylum application to be complete if the immigration court fails to return the application within 30 days of receipt. Instead, the rule provides that immigration courts will reject all incomplete applications. Moreover, the rule adds a maximum of 30 days from the date of rejection for the alien to correct any deficiencies in his or her application. Under the rule, an asylum applicant's failure to re-file a corrected application within the 30-day time period, absent exceptional circumstances, shall result in a finding that the alien has abandoned that application and waived the opportunity to file such an application in the proceedings pending before EOIR.

Lastly, the rule updates language in 8 CFR 1208.3(c)(3) regarding incomplete asylum applications and potential work authorization, changing a reference to the “150-day period after which the applicant may file an application for employment authorization” to remove the specific time period to ensure that EOIR regulations do not contradict DHS regulations regarding employment authorization eligibility.

3. Clarification Regarding Immigration Judge Evidentiary Considerations

The rule clarifies what type of external materials an immigration judge may rely on under 8 CFR 1208.12 when deciding an asylum application, which includes an application for withholding of removal and protection under the CAT, or deciding whether an alien has a credible fear of persecution or torture pursuant to 8 CFR 1208.30, or a reasonable fear of persecution or torture pursuant to 8 CFR 1208.31. The rule allows immigration judges to rely on resources provided by the Department of State, other DOJ offices, DHS, or other U.S. government agencies. The rule also provides that immigration judges may rely on foreign government and non-governmental sources when the judge determines those sources are credible and the material is probative.

Additionally, the rule expands 8 CFR 1208.12 to allow an immigration judge, on his or her own authority, to submit probative evidence from credible sources into the record. The immigration judge may consider such evidence in ruling on an asylum application, including an application for withholding of removal and protection under the CAT, so long as the judge has provided a copy to both parties and both parties have had an opportunity to comment on or object to the evidence prior to the issuance of the immigration judge’s decision.

4. Asylum Adjudication

The rule removes and reserves 8 CFR 1208.7, relating to obtaining work authorization from DHS, and 1208.9, relating to procedures for interviews before DHS asylum officers. The rule also amends 8 CFR 1003.10(b) to make clear that, in the absence of exceptional

circumstances, an immigration judge shall complete adjudication of an asylum application within 180 days after the application's filing date.

The rule amends 8 CFR 1003.10(b) to provide a definition of "exceptional circumstances" for purposes of 1003.10(b), 1003.29, and 1240.6, and to clarify that the section's use of the phrase "exceptional circumstances" refers to those scenarios that are beyond the control of the parties or the immigration court.

Furthermore, the rule amends 8 CFR 1003.29 to specify that nothing in that section authorizes a continuance that causes the adjudication of an asylum application to exceed 180 days. Similarly, the rule revises 8 CFR 1003.31 to provide that the section shall not authorize setting or extending time limits for the filing of documents after an asylum application has been filed that would cause the adjudication of an asylum application to exceed 180 days. Consistent with INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii), both of these changes provide for an exception if exceptional circumstances as defined in 8 CFR 1003.10(b) apply. The rule also revises 8 CFR 1240.6 to include that the section does not authorize an adjournment that causes the adjudication of an asylum application to exceed 180 days in the absence of exceptional circumstances as defined in 8 CFR 1003.10(b).

5. Technical Amendments

The file rule adopts the proposal that any required fee be submitted by the time of filing, but further provides for cross-references to both 8 CFR 103.7 and 8 CFR part 106 to prevent confusion and ensure consistency regardless of how the litigation over the DHS rule⁴ is resolved.

⁴ The final rule related to fees charged by USCIS for filing of an I-589 was preliminarily enjoined by two federal district courts prior to its effective date. *Immigrant Legal Resource Ctr. v. Wolf*, No. 20-cv-05883-JSW, 2020 WL 5798269 (N.D. Cal. Sept. 29, 2020); *Nw. Immigrant Rights Project v. U.S. Citizenship & Immigration Servs.*, No. 19-3283 (RDM), 2020 WL 5995206 (Oct. 8, 2020). Although this final rule updates cross-references in EOIR's regulations to DHS's regulations to account for the USCIS rule's amendments of DHS's regulations, the USCIS fees remain governed by DHS's previous regulations while the aforementioned injunctions remain in effect. Because the ultimate resolution of the litigation challenging the DHS fee rule is unknown, this final rule amends EOIR's regulations to include cross-references to both the previous DHS regulations and the new regulations to ensure that the cross-references do not become inaccurate regardless of how the litigation is resolved.

In addition, this rule provides for technical amendments not addressed in the proposed rule. It corrects outdated references to “Service” to properly reference “DHS” in 8 CFR 1001.31(b). Similarly, it clarifies references to “withholding of removal” by referencing section 241(b)(3) of the INA in order to distinguish that form of protection from protection under the CAT. Additionally, for precision, it replaces references to the CAT with reference to 8 CFR 1208.16 through 1208.18. No substantive changes are intended by these amendments.

D. Effective Date

As noted above, this rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Further, the Department clarifies herein the rule’s mostly prospective temporal application. The provisions of the rule regarding the 15-day filing deadline for the submission of asylum applications apply only to asylum-and-withholding-only proceedings initiated after the effective date of the final rule. The provisions of the rule related to the I-589 completeness and filing requirements apply only to asylum applications submitted after the rule’s effective date. Except as noted below, the provisions of the rule related to immigration judge evidentiary considerations apply to proceedings of any type initiated after the rule’s effective date.

The rule incorporates the statutory requirement that “in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed.” INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii). That provision was enacted nearly 25 years ago and is currently in force. Moreover, EOIR reiterated its policy to comply with that statutory provision, including the legal conclusion that “good cause” is not synonymous with “exceptional circumstances,” over two years ago. EOIR Policy Memorandum 19-05, *Guidance Regarding the Adjudication of Asylum Applications Consistent with INA § 208(d)(5)(A)(iii)* (Nov. 19, 2018), <https://www.justice.gov/eoir/page/file/1112581/download>. Thus, the provisions of the rule relating to INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii) and continuances based on

exceptional circumstances, which are already in effect by both statute and policy, apply to pending cases. These provisions are simply adoptions of existing law or, at most, clarifications of existing law. Accordingly, they do not have an impermissible retroactive effect if applied to pending cases. *See Levy v. Sterling Holding Co., LLC*, 544 F.3d 493, 506 (3d Cir. 2008) (“Thus, where a new rule constitutes a clarification—rather than a substantive change—of the law as it existed beforehand, the application of that new rule to pre-promulgation conduct necessarily does *not* have an impermissible retroactive effect, regardless of whether Congress has delegated retroactive rulemaking power to the agency.” (emphasis in original)).

Similarly, the rule incorporates principles established by binding precedent allowing—if not also requiring, in some instances—an immigration judge to submit evidence in an asylum adjudication. *See* 85 FR at 59695 (collecting authorities, including *Matter of S-M-J-*, 21 I&N Dec. 722, 729 (BIA 1997) (en banc)). Thus, the provisions of the rule relating to an immigration judge’s submission of evidence, which are already in effect through binding precedent, apply to pending cases. These provisions are simply adoptions of existing law or, at most, clarifications of existing law and, thus, do not have an impermissible retroactive effect if applied to pending cases. *See Sterling Holding Co., LLC*, 544 F.3d at 506.

Additionally, EOIR does not adjudicate—and has never adjudicated—applications for employment authorization documents (EADs) for aliens with pending asylum applications; rather, DHS does. 8 CFR 274a.13(a) (2020). Further, the settlement agreement applicable to the processing of asylum applications and EAD applications in *A.B.T. v. U.S. Citizenship and Immigration Servs.*, No. CV11-2108-RAJ (W.D. Wash.) (“ABT Settlement Agreement”) expired in 2019, and EOIR has already announced that it will no longer provide aliens or their representatives with a copy of a 180-Day Asylum EAD Clock Notice. *See* EOIR Policy Memorandum 21-02, *Withdrawal of Operating Policies and Procedures Memoranda 13-03 and 16-01* (Nov. 6, 2020). Accordingly, the provisions of the rule deleting a regulation regarding EAD applications that is inapplicable to EOIR, 8 CFR 1208.7, will be effective on the effective

date. Finally, and for similar reasons, the provisions of the rule deleting a regulation regarding asylum officers, 8 CFR 1208.9, that is inapplicable to EOIR—because asylum officers are employees of DHS, not EOIR—will be effective on the effective date

II. Public Comments on the Proposed Rule

A. Summary of Public Comments

The comment period for the proposed rule ended on October 23, 2020. Of the 2,031 comments received, the majority were from individual and anonymous commenters. The minority of comments came from non-profit organizations, law firms, and members of Congress. While some commenters supported the NPRM, the majority of commenters expressed opposition to the rule, either in whole or in part.

In general, comments opposing the rule misapprehended its impact; misstated its contents; failed to recognize that significant portions of it merely incorporate longstanding law—from either statute or binding precedent—into the regulations, provided no evidence—other than isolated and often distinguishable anecdotes—to support broad claims of particular impacts; made unverified, speculative, and hypothetical generalizations that do not account for the case-by-case and individualized decision-making associated with adjudicating asylum applications; were inconsistent with applicable law, contrary to the Department’s considerable experience in adjudicating asylum applications, or otherwise untethered to a reasoned basis; lacked an understanding of relevant law and procedures regarding asylum application adjudications or the overall immigration system; failed to engage with the specific reasons and language put forth by the Department in lieu of broad generalizations or hyperbolic, unsupported presumptions; or, reflected assertions rooted in the rule’s failure to agree with the commenters’ policy preferences rather than the identification of specific legal deficiencies or other factors the Department should consider. As the vast majority of comments in opposition fall within one of these categories, the

Department offers the following general responses to them, supplemented by more detailed, comment-specific responses below.⁵

In particular, the Department notes that many, if not most, commenters failed to engage with or acknowledge the existing law that informed the NPRM, much of which has been in existence for years with no noted challenges or expressions of concerns. For example, the provisions incorporating the statutory requirement that “in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed,” INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii), do not reflect any novel or recent legal development. That statutory provision was enacted nearly 25 years ago and is currently in force with no noted challenges since it was enacted. Moreover, EOIR reiterated its policy to comply with that statutory provision over two years ago, including the legal conclusion that “good cause” is not synonymous with “exceptional circumstances,” over two years ago. EOIR Policy Memorandum 19-05, *Guidance Regarding the Adjudication of Asylum Applications Consistent with INA § 208(d)(5)(A)(iii)* (Nov. 19, 2018), <https://www.justice.gov/eoir/page/file/1112581/download>.

Similarly, the rule incorporates principles established by binding precedent allowing—if not also requiring, in some instances—an immigration judge to submit evidence in an asylum adjudication. *See* 85 FR at 59695. In particular, *Matter of S-M-J-* has been binding for over 20 years, again with no noted challenge to it. Further, the rule, in multiple ways, reflects influence from longstanding existing regulations that have also not been the subject of challenge or concern. *See e.g.*, 8 CFR 1208.5(a) (“Where possible, expedited consideration shall be given to

⁵ Many comments were also inconsistent, both internally and with other comments. For example, some comments posited that the rule focused too much on efficiency whereas others argued that the rule did not promote efficiency at all. Some comments asserted that immigration judges are “biased,” while others suggested that the Department should allow immigration judges to continue to set deadlines rather than providing deadlines through rulemaking or should even promote immigration judges to become judges under Article I of the Constitution. The Department has addressed all of these comments individually herein and acknowledges that inconsistencies make many of the comments even less persuasive.

[adjudicating asylum] applications of detained aliens.”); 8 CFR 1208.5(b) (“An alien crewmember shall be provided the appropriate application forms and information required by section 208(d)(4) of the Act and may then have 10 days within which to submit an asylum application to the district director having jurisdiction over the port-of-entry. The district director may extend the 10-day filing period for good cause.”); 8 CFR 1208.3(c)(3) (“An asylum application that does not include a response to each of the questions contained in the Form I-589, is unsigned, or is unaccompanied by the required materials specified in paragraph (a) of this section is incomplete.”). Commenters did not persuasively explain—if they attempted to explain at all—why these well-established legal principles are inappropriate bases for the rule.

Most commenters failed to acknowledge the benefits of the rule, such as expeditious consideration of meritorious asylum claims by detained aliens. Indeed, commenters did not explain why it would be preferable for the Department not to expedite consideration of asylum claims, particularly those made by detained aliens, given the risks of faded memories and evidence degradation that adjudicatory delays invite. Relatedly, few, if any, commenters acknowledged or addressed the issue of how a delay in adjudication also makes it more difficult for aliens to obtain pro bono representation. *See, e.g.*, Human Rights First, *The U.S. Immigration Court*, <https://www.humanrightsfirst.org/sites/default/files/HRF-Court-Backlog-Brief.pdf> (last visited Dec. 4, 2020) (hereinafter “HRF Report”) (“In a February 2016 survey conducted by Human Rights First of 24 pro bono coordinators at many of the nation’s major law firms, nearly 75 percent of pro bono professionals indicated that delays at the immigration court are a significant or very significant negative factor in their ability to take on a pro bono case for legal representation before the court.”). In short, commenters failed to put forth a persuasive argument for why the Department should not expeditiously consider asylum applications, especially for

detained aliens with meritorious claims,⁶ and the Department is unaware of any such argument that would outweigh the benefits in that regard in the rule.

Most, if not all, commenters opposed to the rule appeared to view its procedural changes wholly through a results-oriented lens such that a proposal that commenters speculatively believed would cause aliens to “win” fewer cases was deemed objectionable, even without evidence that such a result would follow. Such a view appeared to have been based on a tacit belief that aliens were entitled to specific outcomes in specific cases, notwithstanding the relevant evidence or law applicable to a case, and that the rule inappropriately required adjudicators to maintain impartiality in adjudicating cases rather than continuing to provide what commenters viewed as favorable treatment toward aliens. To the extent that commenters simply disagree as a policy matter that asylum cases should be adjudicated in a timely manner, *Doherty*, 502 U.S. at 323 (“As a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.”), or that the Department should take measures, consistent with due process, to ensure the timely completion of such cases, the Department finds such policy disagreements utterly unpersuasive.

Many, if not all, commenters failed to acknowledge the reality that no one rulemaking can cover every conceivable adjudicatory scenario. EOIR currently has over 570,000 asylum applications pending adjudication, and each one is subject to adjudication based on its own individual facts. Consequently, the Department cannot rule out the possibility that at least one claim will present an issue not contemplated by the rule, including a unique scenario posited by a commenter. Nevertheless, the rule is expected to cover most applications and contains

⁶ To the extent that commenters tacitly acknowledged that most asylum claims are not meritorious and, thus, that such claims should not be expedited in order to allow aliens additional time in the United States, the Department finds such an argument hardly compelling. The Department recognizes and agrees with the Supreme Court’s observation that “as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.” *INS v. Doherty*, 502 U.S. 314, 323 (1992). Any rationale for encouraging or supporting the dilatory adjudication of cases both is both inherently unpersuasive and wholly outweighed by the importance of timeliness and fairness—especially to detained aliens with meritorious claims—in adjudicating asylum applications.

appropriate safeguards—e.g., extension of a filing deadline for good cause—that should adequately address any unique or unexpected situations.

Relatedly, many commenters criticized the Department for not providing more quantitative data in the NPRM, yet did not explain what type of data that is actually tracked would be appropriate, particularly to address unique or hypothetical scenarios put forth by commenters. The level of granularity presumed by commenters for hundreds of thousands of asylum applications does not exist, and even if it did, the Department could not be expected to consider every speculative possibility presented by commenters. Moreover, the portions of the rule incorporating existing law—e.g., the 180-day adjudication deadline, the authority of an immigration judge to submit evidence—are not dependent on data because they stem from already-binding authority.

Many commenters raised questions about the possibility of the Department issuing multiple final rules related to asylum in 2020. The Department acknowledges that it has proposed and finalized multiple rules in 2019 and 2020 but categorically rejects any assertions that it has done so for any sort of nefarious purpose. Each of the Department's rules stands on its own, however, and each includes explanations of its basis and purpose, while allowing for public comment. Further, the interplay and impact of all of the rules is speculative at the present time, particularly due to ongoing and expected future litigation, which may allow all, some, or none of the rules to ultimately take effect. Nevertheless, to the extent commenters noted some potential overlap or joint impacts, the Department regularly considers the existing and potential legal framework when a specific rule is proposed or implemented.

Regarding the interplay of this rule and other recent proposed and finalized rules, the Department notes that commenters generally focused on the Department's proposed joint rule with DHS from June 2020, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 36264 (June 15, 2020). According to commenters, that proposed rule, if implemented, would result in a significant number of aliens being subject to

proceedings under 8 CFR 1208.2(c) and, thus, subject to the new 15-day filing deadline under this rule.⁷ Although the Department does not dispute that by finalizing that proposed rule, there will be an additional category of aliens subject to proceedings under 8 CFR 1208.2(c) and, thus, subject to the new filing deadline under this rule, it does note that commenters' suggestion of the size of that category is both grossly speculative—because the number would depend on variables that cannot be accurately predicted such as new inflows of illegal immigration, the validity of any claims made by aliens in those inflows subject to the credible fear screening process, and DHS's exercise of prosecutorial discretion—and wholly outside the Department's control.

Moreover, commenters did not explain why the size of the population subject to proceedings under 8 CFR 1208.2(c) matters for purposes of the rule. Regardless of the size of the population subject to a 15-day filing deadline, the Department, DHS, and the asylum applicant all have a strong interest in the expedited consideration of an asylum claim, particularly where that claim is a meritorious one put forth by a detained alien. Further, even if the size of the population of aliens subject to 8 CFR 1208.2(c) mattered to the degree alleged by commenters, the Department has determined, as a matter of policy, that the benefits of the rule as a whole—e.g., better effectuation of statutory directives, the expedited consideration of meritorious asylum claims, and the elimination of provisions that are immaterial to EOIR—far outweigh any negative impacts that it would, including in tandem with other rules.

Additionally, commenters who raised the issue of the interplay between this rule and the June 2020 proposed rule failed to acknowledge that this rule would actually provide an additional safeguard to that rule to ensure that an alien's asylum claims is not inadvertently pretermitted. *See* 85 FR at 36277; *see also* note 47, *infra*. For all of these reasons—and as

⁷ Commenters also posited that DHS's expansion of expedited removal authority would further increase the number of affected aliens subject to this rule. *See* Designating Aliens for Expedited Removal, 84 FR 35409 (July 23, 2019); *see also* *Make the Rd. New York v. Wolf*, 962 F.3d 612, 618 (D.C. Cir. 2020). As discussed, *infra*, the size of the population affected has little relationship to the import of the rule, and even if the size were material to some degree of operational impact, the benefits of the rule far outweigh any such impacts.

discussed in more detail below—the Department simply finds commenters’ concerns about this rule in connection with other proposed and finalized rules to be unavailing.

Relatedly, regarding the 15-day filing deadline in particular, many, if not most commenters, failed to acknowledge that the 15-day deadline in the rule for filing an asylum application applies principally to detained aliens. That provision applies to aliens in proceedings under 8 CFR 1208.2(c), and those categories are usually subject to detention unless paroled from custody by DHS. The categories of aliens described in 8 CFR 1208.2(c) encompass aliens subject to inspection and detention as applicants for admission, INA 232(a), 235(a)(3) and (d)(2), 8 U.S.C. 1222(a), 1225(a)(3) and (d)(2); 8 CFR 235.3(a), including those who are later denied admission, and aliens who have entered the United States and subsequently become subject to removal through an administratively final removal order issued by DHS outside of immigration proceedings conducted by the Department, INA 241(a)(2), 8 U.S.C. 1231(a)(2). In either case, however, the Department lacks authority to either parole the aliens into the United States—and, thus, order them as applicants for admission released from DHS custody—or to order the release of aliens subject to a final order of removal. Consequently, unless released by DHS, such aliens would be subject to custody during the adjudication of their asylum applications.

More specifically, alien crewmembers described in 8 CFR 1208.2(c)(1)(i)(A) who are applicants for a landing permit are subject to detention during inspection. INA 232(a), 235(a)(3) and (d)(2), 254(a)(1), 8 U.S.C. 1222(a), 1225(a)(3) and (d)(2), 1284(a)(1); 8 CFR 235.3(a), 252.1(a). Alien crewmembers described in 8 CFR 1208.2(c)(1)(i)(B) who have been refused permission to land are also subject to detention. INA 254(a)(2), 8 U.S.C. 1284(a)(2). Alien crewmembers described in 8 CFR 1208.2(c)(1)(i)(C) who have been granted permission to land are subject to detention and removal if their landing permits are subsequently revoked.⁸ INA 252(b), 8 U.S.C. 1282(b); 8 CFR 252.2.

⁸ Landing permits are typically valid for 29 days. 8 CFR 252.1(d). An alien crewman who applies for asylum during that 29-day period expresses an intent not to depart on the vessel or aircraft on which the crewman arrived and, thus,

Alien stowaways described in 8 CFR 1208.2(c)(1)(ii) found to have a credible fear of persecution or torture are subject to detention pursuant to INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii). Alien applicants for admission under the Visa Waiver Program (“VWP”) described in 8 CFR 1208.2(c)(1)(iii) are subject to detention during inspection, like all arriving aliens. INA 232(a), 235(a)(3) and (d)(2), 8 U.S.C. 1222(a), 1225(a)(3) and (d)(2); 8 CFR 235.3(a). An alien admitted under the VWP who is found to be deportable is ordered removed. 8 CFR 217.4(b).⁹ Accordingly, an alien admitted under the VWP described in 8 CFR 1208.2(c)(1)(iv) is subject to detention as an alien with an order of removal. INA 241(a)(2), 8 U.S.C. 1231(a)(2).¹⁰

Alien applicants for admission with an S visa described in 8 CFR 1208.2(c)(1)(vi) are subject to detention during inspection, like all arriving aliens. INA 232(a), 235(a)(3) and (d)(2), 8 U.S.C. 1222(a), 1225(a)(3) and (d)(2); 8 CFR 235.3(a). An alien admitted as an S nonimmigrant described in 8 CFR 1208.2(c)(1)(vi) who is subsequently ordered removed, 8 CFR 236.4(b), is also subject to detention. INA 241(a)(2), 8 U.S.C. 1231(a)(2).¹¹

Aliens described in 8 CFR 1208.2(c)(1)(v) are those ordered removed under INA 235(c), 8 U.S.C. 1225(c). Such aliens are subject to detention as aliens with final orders of removal. INA 241(a)(2), 8 U.S.C. 1231(a)(2). Similarly, aliens described in 8 CFR 1208.2(c)(2) are those subject to removal orders, either through reinstating a prior order, INA 241(a)(5), 8 U.S.C. 1231(a)(5), or through the issuance of an administrative order of removal as an alien convicted of

triggers the possibility of revocation of the crewman’s landing permit. INA 252(b), 8 U.S.C. 1282(b); *cf.* 8 CFR 1208.5(b)(1) (“If the alien [crewman] makes such fear known to an official while off such conveyance, the alien shall not be returned to the conveyance but shall be retained in or transferred to the custody of the [DHS].”).

⁹ As a condition of participation in the VWP, an alien agrees to waive any right to contest any removal action against the alien, other than through an application for asylum, which would necessarily include detention. INA 217(b)(2), 8 U.S.C. 1187(b)(2).

¹⁰ Aliens subject to the Guam-Commonwealth of the Northern Mariana Islands VWP are subject to similar procedures regarding refusal of admission and removal as aliens subject to the regular VWP. 8 CFR 212.1(q)(8). Consequently, aliens described in 8 CFR 1208.2(c)(1)(vii) and (viii) are subject to detention on the same bases as aliens described in 8 CFR 1208.2(c)(1)(iii) and (iv).

¹¹ As a condition of being granted S nonimmigrant status, an alien waives any right to contest, other than an application for withholding of removal, any removal action against the alien, including detention, before the alien obtains lawful permanent resident status. INA 214(k)(3)(C), 8 U.S.C. 1184(k)(3)(C); 8 CFR 236.4(a).

an aggravated felony, INA 238(b), 8 U.S.C. 1228(b). Such aliens are subject to detention as aliens with orders of removal. INA 241(a), 8 U.S.C. 1231(a).

The June 2020 proposed joint rule on asylum procedures was recently finalized without change to the provision cited by commenters. *See* Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, signed by the Attorney General and the Acting Secretary of Homeland Security on December 2, 2020. The Department expects that there will be a litigation challenge to that rule, just as there has been to most of its recent immigration-related rulemakings.¹² Thus, the Department cannot predict definitively whether that rule will go into effect as finalized.

Nevertheless, even if that joint rule goes into effect and aliens who receive a positive credible fear determination are placed in proceedings under 8 CFR 1208.2(c), 85 FR at 36267, such aliens would still be subject to detention unless paroled by DHS. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) (“Read most naturally, [8 U.S.C.] §§ 1225(b)(1) and (b)(2) thus mandate detention of applicants for admission until certain proceedings have concluded. Section 1225(b)(1) aliens are detained for “further consideration of the application for asylum,” and § 1225(b)(2) aliens are in turn detained for “[removal] proceeding[s].” Once those proceedings end, detention under § 1225(b) must end as well. Until that point, however, nothing in the

¹² The Department recognizes that litigation, including the potential for an initial nationwide injunction, has become almost inevitable regarding any immigration policy or regulation that does not provide a perceived benefit to aliens, and it is aware that litigation will likely follow this rule, just as it has others of a similar nature. *Cf. DHS v. New York*, 140 S. Ct. 599, 599 (2020) (Gorsuch, J. concurring in the grant of a stay) (“On October 10, 2018, the Department of Homeland Security began a rulemaking process to define the term ‘public charge,’ as it is used in the Nation’s immigration laws. Approximately 10 months and 266,000 comments later, the agency issued a final rule. Litigation swiftly followed, with a number of States, organizations, and individual plaintiffs variously alleging that the new definition violates the Constitution, the Administrative Procedure Act, and the immigration laws themselves. These plaintiffs have urged courts to enjoin the rule’s enforcement not only as it applies to them, or even to some definable group having something to do with their claimed injury, but as it applies to *anyone*.”). The Department is also aware of the pernicious effects of nationwide injunctions. *See, e.g., Trump v. Hawaii*, 138 S. Ct. 2392, 2424–25 (2018) (Thomas, J. concurring) (“Injunctions that prohibit the Executive Branch from applying a law or policy against anyone—often called ‘universal’ or ‘nationwide’ injunctions—have become increasingly common. District courts, including the one here, have begun imposing universal injunctions without considering their authority to grant such sweeping relief. These injunctions are beginning to take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch.” (footnote omitted)). Nevertheless, the Department does not believe that the inevitability of litigation over contested issues is a sufficient basis to preclude the exercise of statutory and regulatory authority in furtherance of the law and the policies of the Executive Branch.

statutory text imposes any limit on the length of detention. And neither § 1225(b)(1) nor § 1225(b)(2) says anything whatsoever about bond hearings.”); *see also Matter of M-S-*, 27 I&N Dec. 476 (A.G. 2018) (“The [INA] provides that, if an alien in expedited proceedings establishes a credible fear, he ‘*shall be detained* for further consideration of the application for asylum.’ . . . There is no way to apply those provisions except as they are written—unless paroled, an alien must be detained until his asylum claim is adjudicated. The Supreme Court recently held exactly that, concluding that section 235(b)(1) ‘mandate[s] detention throughout the completion of [removal] proceedings’ unless the alien is paroled.” (emphasis added) (citations omitted) (quoting *Jennings*, 138 S. Ct. at 844-45)).¹³

In short, aliens described in 8 CFR 1208.2(c) are generally subject to detention by DHS under various statutes and regulations with no authorization for the Department to reconsider DHS’s detention determination and, thus, unless paroled by DHS, will be detained while their

¹³ The Ninth Circuit has affirmed a preliminary injunction restoring the availability of bond hearings for aliens who have received positive credible fear determinations, though that decision was premised on a putative constitutional due process right to a bond hearing rather than the statutory interpretation of INA 235(b)(1), 8 U.S.C. 1225(b)(1), advanced by the Supreme Court in *Jennings* and the Attorney General in *Matter of M-S-*. *See Padilla v. Immig. And Cust. Enforc.*, 953 F.3d 1134 (9th Cir. 2020), *petition for cert. filed*, Dkt. 20-234 (Aug. 27, 2020). As noted, *supra*, the Department also expects the rulemaking referenced by commenters, which places aliens who receive a positive credible fear determination in proceedings under 8 CFR 1208.2(c), to be challenged through litigation. The Department cannot predict the outcomes of either litigation, but the possible outcomes would not affect this final rule or the Department’s consideration of comments regarding it. If the provisions of the joint rulemaking referenced by commenters are finalized as proposed but then permanently enjoined, then that rule would, of course, have no effect on this final rule. If the provisions of the joint rulemaking referenced by commenters are finalized as proposed and go into effect and if the Government’s position in *Padilla* is ultimately determined to be correct, then this final rule addresses that situation as discussed herein. In that situation, all aliens subject to proceedings under 8 CFR 1208.2(c) would remain ineligible for bond hearings, and their cases would warrant expeditious treatment accordingly, consistent with longstanding regulatory language, 8 CFR 1208.5(a) (“Where possible, expedited consideration shall be given to [asylum] applications of detained aliens”). Finally, if the provisions of the joint rulemaking referenced by commenters are finalized as proposed and go into effect but the Government’s position in *Padilla* is ultimately determined not to be correct, then aliens who receive a positive credible fear determination would still be subject to both detention and proceedings under 8 CFR 1208.2(c), but would be eligible for bond hearings before an immigration judge. In that situation, any impacts of this rule have also been accounted for, contrary to commenters’ suggestions. Aliens seeking bond in that situation would have a strong incentive—consistent with this final rule—to file an asylum application expeditiously to bolster their arguments in support of release from custody. *See, e.g., Matter of Andrade*, 19 I&N Dec. 488, 491 (BIA 1997) (alien’s potential eligibility for relief reflects on the likelihood of the alien’s appearance at future hearings which addresses whether an alien is a likely flight risk). To be sure, the filing of an asylum application does not automatically entitle an alien to bond. *See Matter of R-A-V-P-*, 27 I&N Dec. 803 (BIA 2020) (alien with a pending asylum application but no family, employment, community ties, or probable path to obtain lawful status is a flight risk who does not warrant release on bond). But, consistent with 8 CFR 1208.5(a), an alien who is not granted bond still warrants expeditious consideration of his or her asylum application which is facilitated by this final rule. In short, regardless of the possible permutations of litigation outcomes related to relevant other rulemakings referenced by commenters, this final rule has fully considered the possible variations and commenters’ attendant concerns.

asylum applications are adjudicated by immigration judges. A pre-existing regulation unaltered by this rule already directs the Department to adjudicate such applications expeditiously. 8 CFR 1208.5(a) (“Where possible, expedited consideration shall be given to [asylum] applications of detained aliens.”). Commenters did not challenge this longstanding directive or provide persuasive reasons why detained aliens—e.g., those subject to proceedings under 8 CFR 1208.2(c), including those are subject to such proceedings if the recent joint rule goes into effect—should not be given expedited consideration, particularly if such aliens have meritorious claims and the approval of the claim will lead to release from detention. The Department believes strongly that asylum claims of detained aliens should receive expeditious considerations, and commenters’ suggestions to the contrary overall were not sufficiently compelling to warrant changing this rule.

Finally, many comments appeared rooted in a belief that EOIR’s adjudicators are incompetent or unethical and are either incapable or unwilling to adhere to applicable law. Some commenters explicitly traduced immigration judges; for example, one commenter asserted that immigration judges have a “routine bias” against aliens and that immigration judges routinely “engage in a host of other unethical behavior toward respondents.” Such generalized, ad hominem allegations of bias or impropriety are insufficient to “overcome a presumption of honesty and integrity in those serving as adjudicators.” *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *see also United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926) (“The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.”). Moreover, they provide no principled basis for the Department to consider changes to the NPRM.

In sum, the Department issued the NPRM for the reasons given in order to ensure asylum claims are expeditiously considered, especially claims of detained aliens, to better effectuate statutory directives in the INA, to ensure authority is appropriately exercised, to ensure

immigration judges consider only complete asylum applications and a developed record containing probative evidence from credible sources, and to promote impartial and timely adjudications consistent with the law. It did not do so for any nefarious purpose, nor did it intend for its procedural changes to have any substantive bearing on the outcomes of additional cases, which flow from the evidence and the law, not the Department's process. As discussed herein, nothing in the NPRM singles out specific populations of aliens, including unrepresented aliens,¹⁴ nor do any of its changes fall disproportionately upon such groups in unacceptable manner. To the extent that commenters did not engage with the NPRM itself, provided unsupported assertions of fact or law, attacked, tacitly or explicitly, the motivations of the Department's adjudicators, or otherwise put forward suggestions based on their preferred results rather than an impartial and timely process, the Department declines to adopt those comments. Further, to the extent that commenters provided substantive analysis and raised important issues, the Department has considered all of them; however, on balance, except for changes noted above, it has determined that the policy and operational benefits of the rule expressed above outweigh all of the issues raised by commenters. Accordingly, although the Department has reviewed all comments received, the vast majority of them fall into the groupings outlined above, and few of them are persuasive for reasons explained in more detail below.

B. Comments Expressing Support

Comment: Several commenters expressed general support for the rule and immigration reform. Commenters noted the need for regulatory reform given the delays in asylum adjudications. These commenters supported all aspects of the rule, which they stated would allow the Department to resolve cases in an expeditious manner. One commenter stated that the

¹⁴ The Department has fully considered the possible impacts of this rule on the relatively small pro se population of aliens with asylum applications. As discussed below, however, the rule neither singles such aliens out for particular treatment, nor does it restrict or alter any of the many procedural avenues such aliens already have available to them in advancing their cases. Further, nothing in the rule inhibits the availability of pro bono counsel to assist such aliens as appropriate.

rule will increase efficiency and bring asylum and withholding regulations within the plain meaning and intent of the INA.

Response: The Department agrees with the commenters that these regulatory changes will better support congressional intent and increase operational efficiencies.

C. Comments Expressing Opposition

1. Administrative Procedure Act: Concerns Regarding the Ability to Comment

Comment: Many commenters objected to the Department's allowance of a 30-day comment period instead of a 60-day or longer period and requested an extension of the 30-day comment period. Commenters cited Executive Order 12866 and stated that a 60-day comment period is the standard period of time that should be provided for a complex rule like the NPRM.

Commenters stated that the 30-day comment period is an insufficient period of time for them to adequately consider and respond to the significance of the rule's proposed changes. Many commenters emphasized that the comment period is particularly inadequate given the broader context that DOJ independent and DHS and DOJ jointly have recently published a number of complex proposed rules on a wide range of immigration-related topics.¹⁵ Commenters noted that the closeness of the comment periods for these rules and that, because the Departments have not yet issued final rules, commenters cannot accurately know the broader regulatory context for providing comment on the instant rule in a short period of time.

Commenters also stated that the 30-day comment period is insufficient in the context of the COVID-19 pandemic, which, commenters explained, has strained commenters' ability to prepare comments due to unique childcare, work-life, and academic difficulties. Commenters

¹⁵ For example, commenters noted, *inter alia*, the following recent rulemaking actions: Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 FR 52491 (Aug. 26, 2020); Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 36264 (June 15, 2020).

noted examples of other Federal agencies that have extended comment periods due to the impact of COVID-19.¹⁶

Other commenters further noted that there was a Federal holiday (Labor Day) during the comment period or that natural disasters and wildfires have caused other personal difficulties that make the 30-day comment period particularly short for meaningful comment.

Some commenters stated that there is no need for urgency given the lengthiness of the immigration court process, delays due to COVID-19, and the effective closure of the border by the Centers for Disease Control and Prevention under Title 42 authority.¹⁷ Other commenters explained that the 30-day comment period was particularly short as they were also working extra hours during the comment period to take action for clients in advance of the October 2, 2020 effective date for U.S. Citizenship and Immigration Services' ("USCIS") new fees. U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 85 FR 46788 (Aug. 3, 2020).

Some commenters noted that DHS has provided 60-day comment periods for much less complex or significant items related to forms. *See, e.g.*, Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: Petition for U Nonimmigrant Status, 85 FR 58381 (Sept. 18, 2020).

Response: The Department believes the 30-day comment period was sufficient to allow for meaningful public input, as evidenced by the 2,031 public comments received, including numerous detailed comments from interested organizations. The NPRM was comparatively short (seven full pages in the Federal Register plus parts of two other pages), it proposed to amend only nine paragraphs in all of chapter V of 8 CFR, and the issues it addressed were either already set by statute (e.g., the 180-day adjudication deadline in INA 208(d)(5)(A)(iii), 8 U.S.C.

¹⁶ *See, e.g.*, Bureau of Consumer Financial Protection, Debt Collection Practices (Regulation F); Extension of Comment Period, 85 FR 30890 (May 21, 2020).

¹⁷ *See* Order Suspending the Right to Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists, 85 FR 65806 (Oct. 16, 2020).

1158(d)(5)(A)(iii)), well-known to aliens and practitioners (e.g., completing and filing an application), well-established as immigration court practices (e.g., the setting of filing deadlines and the development of the record by an immigration judge), or the deletion of provisions that were practically inapplicable to EOIR (e.g., former 8 CFR 1208.7 and 1208.9). Moreover, commenters generally did not explain what additional issues they would raise during a longer comment period, and the volume of comments—as well as their breadth—reflects an ample consideration of issues during the comment period. In short, there is no indication that the comment period was insufficient.

Additionally, to the extent that commenters referred to other proposed rulemakings as a basis for asserting the comment period should have been longer, their comparisons are inapposite. No other proposed rulemaking cited by commenters addressed small, discrete changes which relate to well-established provisions and with which aliens and practitioners have been quite familiar with for decades. In short, the Department acknowledges and has reviewed commenters' concerns about the 30-day comment period, but those comments are unavailing for all of the reasons given herein.

Similarly, contrary to commenters' assertions, there is no evidence that either the COVID-19 pandemic or the Labor Day holiday had any effect on the sufficiency of the 30-day comment period. To the contrary, the number of comments received, as well as their breadth, are strong evidence that the comment period was sufficient, particularly for a short NPRM that made few substantive changes. Employers around the country have adopted telework flexibilities to the greatest extent possible, and the Department believes that interested parties can use the available technological tools to prepare their comments and submit them electronically. Indeed, nearly every comment was received in this manner. Further, crediting the assertions of commenters would effectively preclude rulemaking by the Department for the duration of the COVID-19 outbreak, regardless of the length of the comment period. The Department finds no basis to suspend all rulemaking while the COVID-19 outbreak is ongoing. Similarly, commenters'

assertions regarding Labor Day reflect an intent to impose a blanket rule that any comment period encompassing a Federal holiday should always be extended, but that position is not supported by law, policy, or practice. The Department acknowledges that particular commenters may have faced individual personal circumstances which created challenges to commenting, but that assertion is true of every rulemaking. Further, there is no evidence of a systemic inability of commenters to provide comments based on personal circumstances, and commenters' assertions appear to reflect a desire to slow the rulemaking due to policy disagreements rather than an actual inability to comment on the rule. Overall, the Department finds that neither the COVID-19 pandemic nor any other particular circumstances alleged by commenters limited the public's ability to meaningfully engage in the notice and comment period.

The Administrative Procedure Act ("APA") does not require a specific comment period length, *see generally* 5 U.S.C. 553(b)–(c). While it is true that Executive Order 12866 recommends a comment period of at least 60 days, no specific length is required. Rather, Federal courts have presumed 30 days to be a reasonable comment period length. For example, the D.C. Circuit has stated that "[w]hen substantial rule changes are proposed, a 30-day comment period is generally the shortest time period sufficient for interested persons to meaningfully review a proposed rule and provide informed comment." *Nat'l Lifeline Ass'n v. Fed. Commc'ns Comm'n*, 921 F.3d 1102, 1117 (D.C. Cir. 2019) (citing *Petry v. Block*, 737 F.2d 1193, 1201 (D.C. Cir. 1984)).

Further, litigation has mainly focused on the reasonableness of comment periods shorter than 30 days, often in the face of exigent circumstances. *See, e.g., North Carolina Growers' Ass'n v. United Farm Workers*, 702 F.3d 755, 770 (4th Cir. 2012) (analyzing the sufficiency of a 10-day comment period); *Omnipoint Corp. v. FCC*, 78 F.3d 620, 629–30 (D.C. Cir. 1996) (15-day comment period); *Northwest Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1321 (8th Cir. 1981) (7-day comment period). Here, the significant number of detailed public comments is evidence that the 30-day period was sufficient for the public to meaningfully review and provide

informed comment. *See, e.g., Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2385 (2020) (“The object [of notice and comment], in short, is one of fair notice.” (citation omitted)).

Finally, commenters’ comparisons to the time allowed for comment on changes related to forms are inapposite. By statute, the Paperwork Reduction Act (“PRA”) requires a 60-day comment period for proposed information collections like those referenced by the commenters. 44 U.S.C. 3506(c)(2)(A). In contrast, as explained above, there is no similar statutory requirement for the proposed rule itself. Overall, the Department disagrees that the comment period was too short or that commenters did not receive fair notice and an opportunity to respond.

Comment: Some commenters accused the Department of engaging in “staggered rulemaking,” which, according to commenters, has made it impossible for them to adequately comment on the potential effect of this rule. According to commenters, several pending rulemakings could “radically alter” procedures before the EOIR. As such, commenters asserted that, without knowing which proposed rules will ultimately be published and how they might be altered in their final form, they are being forced to comment without being able to consider the full aggregate effect of all of the Department’s proposed rules.

Response: The Department did not purposefully separate its policy goals into separate regulations in order to prevent the public from being able to meaningfully review and provide comment and rejects any assertions to the contrary. The Department acknowledges that it has proposed multiple rules in 2019 and 2020 but categorically rejects any assertions that it has done so for any sort of nefarious purpose. Each of the Department’s rules stands on its own, includes explanations of their basis and purpose, and allows for public comment, as required by the APA. *See Little Sisters of the Poor Saints Peter & Paul Home*, 140 S. Ct. at 2386 (explaining that the APA provides the “maximum procedural requirements” that an agency must follow in order to promulgate a rule). Further, the interplay and impact of all of the rules is speculative at the

present time, both because many of them are not yet finalized and because of ongoing and expected future litigation, which may allow all, some, or none of the rules to ultimately take effect. Nevertheless, to the extent commenters noted some potential overlap or joint impacts, the Department regularly considers the existing and potential legal framework when a specific rule is proposed or implemented. Further, nothing in any rule proposed by the Department, including the one underlying this final rule, precludes the public from meaningfully reviewing and commenting on that rule. Moreover, even if all rules were in effect, the Department has concluded that the benefits of the instant rule discussed in the NPRM, e.g., 85 FR at 59693-98 and herein—as well as the benefits discussed in the other rules ultimately outweigh any combined impact the rules may have.

2. General Opposition

The majority of commenters opposed the rule, and many commenters expressed generalized statements of opposition, sometimes in overwrought and tendentious terms, that were not specifically related to the rule's substantive changes.

Comment: Several commenters stated that the rule conflicts with American values and its deeply rooted policy of welcoming immigrants and refugees, which, commenters asserted, would damage the Nation's standing in the world. Moreover, a number of commenters stated that the rule is immoral, cruel, or the product of racist or other ill-intent. Other commenters expressed statements of admiration for immigrants or asylum seekers, such as commenters' belief that asylum seekers as a group contribute positively to the United States.

Response: The rule is not immoral, cruel, motivated by racial animus, or promulgated with discriminatory intent. Instead, the rule is intended to help the Department better allocate limited resources in order to more expeditiously adjudicate meritorious asylum and statutory withholding of removal claims. For example, setting a 15-day deadline for asylum applications in asylum-and-withholding-only proceedings will help streamline the process by ensuring that immigration judges can adjudicate such claims expeditiously. Similarly, establishing a deadline

by which an incomplete application must be returned will allow cases to be adjudicated in a timely and predictable manner. Likewise, the clarifications regarding what materials an immigration judge may consider will prevent time being wasted on from non-credible sources or material that is not probative.

Further, this rule is not representative of a particular value judgment regarding the contributions or relative merits of immigrants or asylum seekers in the United States. Instead, the rule is intended to increase overall efficiencies for the processing and adjudication of asylum applications before EOIR, which in turn would benefit asylum seekers by enabling individuals with meritorious claims to more quickly receive relief and gain stability in the United States.

Comment: Similarly, many commenters expressed a belief that the rule was designed to make the asylum process more difficult and an attempt to severely limit immigration through asylum. Commenters stated that the rule erects needless barriers for those fleeing violence and persecution. Numerous commenters also asserted that the rule would virtually negate the United States' asylum system and turn immigration courts into deportation-focused entities, which would prioritize the deportation of asylum seekers rather than the fair adjudication of their claims. Several of the commenters suggested that the underlying motive behind the rule is a desire by the administration to end the ability of people to seek asylum in the United States. Likewise, many commenters stated that the rule would essentially lead to the denial of all asylum claims.

In addition, commenters also asserted that the rule would result in more backlogs in the immigration court system because more appeals would be filed.

Response: This rule does not in any way “negate” the United States' asylum system, prevent aliens from applying for asylum, or prevent the granting of meritorious claims, contrary to commenters' claims. To the contrary, the changes make the asylum system more efficient and uniform, and will ultimately benefit those with meritorious claims. The Department agrees with commenters that asylum remains an important form of possible relief for individuals seeking

protection, and notes that these changes are needed to better address the backlog of pending asylum cases and address current inefficiencies in the asylum system. *See, e.g.*, EOIR, *Adjudication Statistics: Total Asylum Applications* (July 14, 2020), <https://www.justice.gov/eoir/page/file/1106366/download>. In addition, this rule will help ensure that the system is more effective for those who truly have “nowhere else to turn.” *Matter of B-R-*, 26 I&N Dec. 119, 122 (BIA 2013) (internal citations omitted).

Additionally, the Department rejects the assertion that this rule will lead to further backlogs. The Department has made or proposed numerous regulatory changes recently to address inefficiencies where appropriate, and this rule is another tool to do so. *See, e.g.*, Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 FR 52491 (Aug. 26, 2020) (proposed) (addressing inefficiencies in case adjudications at the Board of Immigration Appeals (BIA)); Expanding the Size of the Board of Immigration Appeals, 85 FR 18105 (Apr. 1, 2020) (interim rule) (adding two member positions to the BIA so that the BIA may more efficiently and timely adjudicate appeals); Organization of the Executive Office for Immigration Review, 84 FR 44537 (Aug. 26, 2019) (interim rule) (providing, in part, for more efficient disposition of cases through a delegation of authority); EOIR Electronic Filing Pilot Program, 83 FR 29575 (June 25, 2018) (public notice) (creating a pilot program to test an electronic filing system that would greatly improve immigration adjudication processing in the immigration courts and eventually the BIA). Overall, the Department believes that the rule will not exacerbate inefficiencies considering all changes in the aggregate. Moreover, commenters’ prediction that more appeals will be filed because of the rule is purely speculative and ignores the case-by-case way in which asylum applications are adjudicated.

Comment: Some commenters expressed concerns with the Department’s exercise of authority and jurisdiction related to the rule. For example, commenters stated that Congress, not the Department, must be the entity to make the sorts of changes to the asylum procedures set out

in the proposed rule. Commenters cited a variety of reasons why these changes are most appropriately the province of Congress, including commenters' belief, as mentioned above, that the rule would effectively end or eliminate asylum availability and limit how many asylum seekers would get relief annually, the breadth of the changes in the proposed rule, and alleged inconsistencies between the Act and the rule. Commenters expressed a belief that changes as significant as those proposed should only be undertaken by Congress. Other commenters asserted that the Department should not amend its regulations in such close proximity to a presidential election.

Response: To the extent that commenters intimated that the Department should adhere to laws passed by Congress regarding asylum adjudications such as INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii), which is incorporated into the rule, the Department agrees that it should effectuate the laws passed by Congress. Commenters are incorrect, however, that Congress, not the Department, must make the sorts of changes to the asylum procedures set out in the proposed rule. Both the proposed rule and this final rule are issued pursuant to the Attorney General's statutory authority provided by Congress. *See* INA 103(g) and 208(d)(5)(B), 8 U.S.C. 1103(g) and 1158(d)(5)(B). Despite commenters' statements, the provisions of the rule are consistent with the Act. Should Congress enact legislation that amends the provisions of the Act that are interpreted and affected by this rule, the Department will engage in future rulemaking as needed.

The Department also rejects commenters' argument that the Department's authority to engage in rulemaking is related to the relative timing of a presidential election. The APA already allows for democratic input in agency decision-making through the required notice and comment procedures. *See* 5 U.S.C. 553(c). Moreover, the Supreme Court has stated that "an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely on the incumbent administration's views of wise policy to inform its judgments." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984). As such, it is irrelevant that the presidential election was set to occur in close proximity to the

rule's publication and comment period. Further, there is no law suspending rulemaking within a certain period before a presidential election, and the American system of government does not generally countenance the cessation of work on important policies for an extended period of time, such as a presidential election cycle.

Comment: Many commenters also expressed broad concern that the rule would erode aliens' due process rights in immigration court proceedings. Specifically, commenters asserted that the rule would diminish aliens' due process rights by rushing the asylum process and by making it more difficult for them to have enough time to obtain representation, pay fees, or gather records.

Response: Commenters are incorrect that the rule will impede aliens' due process rights in the manner speculated by commenters. It should be noted that EOIR's mission remains "to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws." EOIR, *About the Office* (Aug. 14, 2018), <https://www.justice.gov/eoir/about-office>. In other words, the Department must balance fairness concerns with the countervailing need for efficiency and expeditiousness in EOIR proceedings. Although the rule changes timing and other procedural requirements, the rule does not deny due process to any alien. Due process in an immigration proceeding requires notice and a meaningful opportunity to be heard, neither of which are affected by this rule. *See LaChance v. Erickson*, 522 U.S. 262, 266 (1998) ("The core of due process is the right to notice and a meaningful opportunity to be heard."). None of the changes in the rule limit aliens in immigration proceedings before EOIR from obtaining representation, presenting evidence, or applying for immigration relief such that it violates their due process rights.

3. Violates International Law

Comment: Several commenters were concerned that the rule violates the United States' ostensible obligations under international law, citing the 1948 Universal Declaration of Human Rights ("UDHR"), the 1951 Convention relating to the Status of Refugees ("1951 Refugee

Convention”), the 1967 Protocol relating to the Status of Refugees (“1967 Protocol”), and the CAT. Specifically, commenters asserted that the rule violates the international right to seek asylum, the principle of non-refoulement, and the international obligation to provide fair and efficient asylum procedures.

Commenters stated that the rule’s provisions implementing a 15-day filing deadline, requiring an asylum application fee, and mandatorily rejecting incomplete applications violates the applicant’s right to seek asylum and the United States’ non-refoulement obligations.

Commenters explained that the 15-day deadline was too short and would prevent asylum seekers from applying for asylum or accessing legal representation, thereby subjecting them to the possibility of return to a country where their life or freedom may be threatened. Commenters also stated that the 15-day filing deadline, when read in conjunction with the Department’s other recently proposed asylum rules, would create a categorical bar to asylum for many asylum seekers in violation of the applicant’s right to seek asylum.

Similarly, commenters stated that requiring an asylum application fee would prevent asylum seekers from applying for asylum and that the Department should include an income-based or other exception. Commenters noted that only three other countries impose an asylum fee but that even those countries allowed for exceptions. Commenters stated that requiring such a fee without an exception raises the risk of refoulement.

Commenters likewise argued that mandatorily rejecting incomplete applications would subject applicants to potential refoulement for even minor omissions, such as failing to complete a field on the Form I-589 that is not applicable to the applicant. One commenter noted that the 1951 Refugee Convention obligates countries to give applicants the benefit of the doubt, which should apply to minor errors or omissions on the form.

Lastly, commenters stated that the rule does not provide for fair and efficient procedures, which commenters explain are an essential element in applying the 1951 Refugee Convention and related international obligations. Commenters explained that implementing these standards

includes providing a realistic opportunity for asylum seekers to have their claims developed, heard in full, and fairly decided. Commenters alleged that the 15-day filing deadline, the mandatory rejection of incomplete applications, the charging of asylum application fees, and the 180-day adjudication deadline are not fair procedures because they do not take into account the difficulties and needs of asylum-seekers, such as lack of English language skills, lack of counsel, unfamiliarity with the U.S. legal system, and the lasting effects of trauma, among others. Rather, commenters alleged that the changes appear to be intended to prevent asylum seekers from applying for relief.

Response: This rule is consistent with the United States' obligations as a party to the 1967 Protocol, which incorporates Articles 2 through 34 of the 1951 Refugee Convention. This rule is also consistent with U.S. obligations under Article 3 of the CAT, as implemented in the immigration regulations pursuant to the implementing legislation. These treaties are not directly enforceable in U.S. law, but some of their obligations have been implemented by domestic legislation and implementing regulations. *See INS v. Stevic*, 467 U.S. 407, 428 & n.22 (1984); *Al-Fara v. Gonzales*, 404 F.3d 733, 743 (3d Cir. 2005) ("The 1967 Protocol is not self-executing, nor does it confer any rights beyond those granted by implementing domestic legislation."); Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub. L. 105-277, sec. 2242(b), 112 Stat. 2681, 2631-822 (8 U.S.C. 1231 note); 8 CFR 208.16(b) and (c), 208.17 and 208.18; 1208.16(b) and (c), 1208.17, and 1208.18. Similarly, the UDHR does not create enforceable obligations on its own. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004) ("But the [UDHR] does not of its own force impose obligations as a matter of international law.").

The Department disagrees that this rule contravenes the UDHR's article stating that everyone has the right to seek asylum protections in other countries. The rule does not prohibit anyone from seeking asylum. Instead, the rule simply requires all applicants to comply with established filing requirements, including, for aliens in asylum-and-withholding-only proceedings, complying with delineated filing deadlines. Further, in the rare instances where an

applicant has good cause to miss the filing deadline, the immigration judge may extend the filing deadline after considering the relevant facts.

Immigration laws should enable the granting of immigration relief or protection to eligible individuals, and the prompt removal of those who are ineligible. This revision will expedite the consideration of meritorious claims and help such aliens obtain relief quickly while similarly reducing the likelihood that those with non-meritorious claims will be able to remain in the United States for longer and substantial periods of time. It is in the national interest and is consistent with U.S. non-refoulement obligations that meritorious claims are granted as quickly as possible while unwarranted claims are similarly screened out expeditiously.

The Department disagrees with comments that the rule's requirement that the applicant must pay the required fee, if any, for submitting a Form I-589 for the purposes of asylum violates non-refoulement obligations.¹⁸ Because the rule does not impose a fee for statutory withholding of removal or protection under the CAT regulations,¹⁹ the rule would still be consistent with the provisions of the 1951 Refugee Convention, 1967 Protocol, and the CAT. *See R-S-C- v Sessions*, 869 F.3d 1176, 1188 n.11 (10th Cir. 2017) (explaining that “the Refugee Convention’s non-refoulement principle—which prohibits the deportation of aliens to countries where the alien will experience persecution—is given full effect by the Attorney General’s withholding-only rule”); *Cazun v. Att’y Gen. U.S.*, 856 F.3d 249, 257 & n.16 (3d Cir. 2017); *Ramirez-Mejia v. Lynch*, 813

¹⁸ Comments objecting to that fee are beyond the scope of the rule and the Department generally. Whether a fee is required for the Form I-589 is a matter determined by DHS, not by the Department. *See* 8 CFR 1103.7(b)(4)(ii). DHS issued a final rule imposing a \$50 fee for asylum applications—other than for genuine unaccompanied alien children (UAC) who file for asylum while in immigration proceedings before EOIR—that was scheduled to go into effect on October 2, 2020. *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements*, 85 FR at 46791. That rule was enjoined on September 29, 2020, *Immigrant Legal Res. Ctr. v. Wolf*, --- F. Supp. 3d ---, 2020 WL 5798269 (N.D. Cal. 2020). *See supra*. While that injunction is in effect, EOIR cannot charge a fee for asylum applications in its proceedings. Further discussion of the rule’s provisions regarding the requirement of aliens to pay a fee is below in section II.c.4.d.

¹⁹ This rule only provides that “a fee must be submitted if DHS requires one.” As DHS noted in its final rule regarding a fee for an asylum application: “No fee would apply where an applicant submits a Form I–589 for the sole purpose of seeking withholding of removal under INA section 241(b)(3), 8 U.S.C. 1231(b)(3), or protection from removal under the regulations implementing U.S. obligations under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).” 85 FR at 46793 n.17. As noted, *supra*, the DHS final rule is currently enjoined and, thus, has not yet taken effect.

F.3d 240, 241 (5th Cir. 2016); *Maldonado v. Lynch*, 786 F.3d 1155, 1162 (9th Cir. 2015) (explaining that Article 3 of the CAT, which sets out the non-refoulement obligations of signatories, was implemented in the United States by the Foreign Affairs Reform and Restructuring Act of 1998 (“FARRA”) (Pub. L. 105-277, sec. 2242(b), 112 Stat. 2681, 2631-822 (8 U.S.C. 1231 note)) and its implementing regulations); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 429, 441 (1987) (“[Withholding of removal] corresponds to Article 33.1 of the Convention [Asylum] by contrast, is a discretionary mechanism which gives the Attorney General the *authority* to grant the broader relief of asylum to refugees. As such, it does not correspond to Article 33 of the Convention, but instead corresponds to Article 34.”) (emphasis in original).

The Department also notes that rejecting incomplete or deficient asylum applications does not violate non-refoulement principles. Again, this rule does not alter any applicant’s substantive rights regarding eligibility for asylum, statutory withholding of removal, and protection under the regulations issued pursuant to legislation implementing the CAT. When applicants comply with the filing requirements, including submission of a completed application, and are otherwise eligible for consideration, their applications receive full review and deliberation. Additionally, even where the applicant errs in submitting an incomplete application, the applicant has the opportunity to correct any deficiencies within 30 days. Rejection of an application for failure to comply with these reasonable filing deadlines and requirements does not conflict with the United States’ international obligations. *See, e.g., Hui Zheng v. Holder*, 562 F.3d 647, 655–56 (4th Cir. 2009) (“[T]he U.N. Protocol [and] the CAT [are] . . . effectuated through a statutory scheme that Congress has established, and which the Attorney General has implemented through regulations governing both the BIA and the procedures available to aliens seeking entry to the United States.”); *Yuen Jin v. Mukasey*, 538 F.3d 143, 159 (2d Cir. 2008); *Chen v. Mukasey*, 524 F.3d 1028, 1033 (9th Cir. 2008); *Foroglou v. Reno*, 241 F.3d 111, 113 (1st Cir. 2001).

Finally, as stated before, it is widely accepted that meritorious claims should be granted as rapidly as possible while acknowledging that frivolous or untenable claims be identified as soon as is feasible in the screening process. This rule benefits legitimate asylum claims by clarifying statutory requirements and streamlining the asylum process.

4. Concerns with Changes Regarding I-589 Filing Requirements

a. 15-Day Filing Deadline in Asylum-and-Withholding-Only Proceedings

i. General Opposition to the Deadline

Comment: The majority of commenters expressed opposition to the 15-day deadline. Commenters asserted that establishing a 15-day deadline would likely prevent legitimate claims from being submitted or would be too short for legitimate claims to adequately be raised; thus commenters alleged that the rule would effectively end the U.S. asylum system and ensure deportations.

Response: As an initial point, few, if any, commenters acknowledged that existing regulations have contained a 10-day application filing deadline for many years for a particular category of asylum seekers, with no noted opposition or complaints. 8 CFR 1208.5(b)(1)(ii). Similarly, most commenters ignored or downplayed the rule's provision of an extension of the 15-day filing deadline for good cause without addressing why the possibility of such an extension would not respond to concerns about timing. Similarly, most commenters asserted that the rule required the submission of both an application and all supporting documents with no further opportunity to update or supplement it, but the rule requires no such thing. The rule requires only the filing of an application by a deadline and does not alter existing provisions regarding the supplementation of an existing application. 8 CFR 1208.4(c); *cf. Matter of Interiano-Rosa*, 25 I&N Dec. 264 (BIA 2010) (distinguishing between the submission of an application itself and the later submission of supporting documents). To the extent that commenters ignored or misstated the actual provisions of the rule, otherwise failed to engage

with the safeguards provided by the rule, or conflated different types of filings, the Department acknowledges such comments but declines to adopt them based on such misapprehensions.

Further, commenters' hyperbolic statements that the imposition of a filing deadline that is nevertheless subject to extension somehow effectively precludes asylum eligibility or prevents the filing of an asylum application are without merit. Moreover, such statements ignore the reality that those with meritorious claims typically want their claims heard as quickly as possible to avoid evidence becoming stale and to receive the benefits associated with asylee status. The Department seeks to continue extending protection and relief to aliens with meritorious claims, but the realities of the size of EOIR's pending caseload and the continued increase in notices to appear filed in immigration court cannot be understated. *See* EOIR, *Adjudication Statistics: Pending Cases, New Cases, and Total Completions* (Oct. 13, 2020), <https://www.justice.gov/eoir/page/file/1242166/download>. Accordingly, as noted in the NPRM, this rule is designed to ensure that protection and relief is not delayed for meritorious claims and that evidence is preserved to the fullest extent possible. *See* 85 FR at 59696 (“[D]elaying filing of the claim risks delaying protection or relief for meritorious claims and increases the likelihood that important evidence, including personal recollections, may degrade or be lost over time.”). The Department believes that establishing this deadline, as well as availability of an extension for good cause and the retained ability to supplement or amend the application later in proceedings, will best facilitate those aims. *See* 8 CFR 1208.4(c), (d).

Further, this deadline appropriately eliminates unnecessary delays in what should be a streamlined proceeding, notwithstanding the possibility of an extension for good cause in unusual situations. Moreover, as discussed, *supra*, aliens subject to proceedings under 8 CFR 1208.2(c)(1) generally are detained, and the filing deadline is in keeping with the instruction that detained aliens should receive “expedited consideration” of their asylum claims. *Id.*

Moreover, commenters alleged that establishing a 15-day deadline violated the APA for various reasons, as has been addressed at length, *supra*. See section II.C.4.a.iii for further discussion regarding this issue.

Comment: Commenters expressed general opposition to the 15-day deadline in light of other regulatory changes that commenters alleged would drastically increase the number of aliens subject to the 15-day filing deadline by increasing the number of aliens in asylum-and-withholding-only proceedings. Commenters explained that these changes are contrary to the small number of alien crewmembers subject to the current 10-day filing deadline, to which the Department compared the proposed rule.

For example, commenters cited the Department's proposed joint rule with DHS, 85 FR 36264, which commenters explained would expand the number of aliens subject to asylum-only proceedings, would allow immigration judges to pretermite asylum applications that failed to establish *prima facie* claims for relief, and would expand the definition of a "frivolous" claim. Commenters stated that the impact of this rule and that proposed rule, if implemented, would result in a massive amount of people subject to the new filing deadline.

Similarly, commenters asserted concerns that the Department failed to consider the impact of DHS's expansion of expedited removal authority, which commenters stated would further increase the number of affected aliens. See *Designating Aliens for Expedited Removal*, 84 FR 35409 (July 23, 2019); see also *Make the Rd. New York*, 962 F.3d at 618.

Response: As an initial point, the number of aliens who may be placed in asylum-and-withholding-only proceedings is both speculative and unpredictable because a precise chain of events has to occur—involving, inter alia, international migration flows, the possibility of the exercise of prosecutorial discretion, and legal determinations by adjudicators—in order to reach that result, and those events, both discretely and especially in combination, cannot be predicted with any degree of precision; moreover, several links in that chain are wholly outside the Department's control. See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977)

(per curiam) (“Moreover, comments which themselves are purely speculative and do not disclose the factual or policy basis on which they rest require no response. There must be some basis for thinking a position taken in opposition to the agency is true.”). For example, under the recently-finalized joint rule, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, signed by the Attorney General and the Acting Secretary of Homeland Security on December 2, 2020, the Department is unable to accurately predict the future number of aliens who would enter or seek to enter the United States illegally, be subjected to a credible fear screening by DHS, receive a positive credible fear determination by either DHS or an immigration judge, and, in turn, be placed into asylum-and-withholding-only proceedings. Similarly, DHS has autonomy over its own enforcement-related decisions and is tasked by Congress with “[e]stablishing national immigration enforcement policies and priorities.” Homeland Security Act of 2002, Pub. L. 107-296, sec. 402(5), 116 Stat. 2135, 2178 (codified at 6 U.S.C. 202(5)). Consequently, the Department has neither control over nor the means to predict how many aliens DHS may subject to expedited removal procedures as opposed to other enforcement options or the exercise of prosecutorial discretion. Thus, while the Department is aware that these other rules may have some impact on immigration proceedings relevant to this rule, the size and nature of that impact is speculative and unknowable because of intervening factors, namely levels of illegal immigration and DHS’s exercise of its prosecutorial discretion authority. Moreover, even if that impact were predictable, the Department has determined, as a matter of policy, that the benefits of the rule—e.g., better effectuation of statutory directives, the expedited consideration of meritorious asylum claims, and the elimination of provisions that are immaterial to EOIR—far outweigh any negative impacts that the rule would have, either singularly or in tandem with other rules.

Moreover, assuming, *arguendo*, that other rules increase the number of aliens subject to asylum-and-withholding proceedings under 8 CFR 1208.2(c), the provisions of this rule would remain important to effectuate. As discussed, *supra*, aliens subject to proceedings under 8 CFR

1208.2(c) are generally subject to detention unless paroled by DHS. Both parties, especially in cases of aliens with meritorious claims, and the immigration courts have an interest in the expeditious consideration of asylum claims made by detained aliens. In fact, current regulations already provide for such expedited consideration, 8 CFR 1208.5(a), and commenters did not explain why detained aliens should not receive expedited consideration of their asylum claims nor challenge the application of 8 CFR 1208.5(a). In short, regardless of whether the rule is considered alone or in conjunction with other rules, it simply reaffirms the importance of well-established principles, namely adhering to statutory deadlines and providing expedited consideration of asylum claims for detained aliens, particularly for meritorious claims. Commenters' suggestions that the Department should depart from these principles are unpersuasive.

Furthermore, the Department's reasoning for the 15-day deadline does not rely on or involve the number of aliens who may be affected. In other words, the proposed rule at 85 FR 36264—nor the finalized rule, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, signed by the Attorney General and the Acting Secretary of Homeland Security on December 2, 2020—had no bearing on the reasoning underlying the deadline in the rule at hand. In the proposed rule, 85 FR at 59693–94, the Department explained that aliens in asylum-and-withholding-only proceedings are “generally already subject to removal orders, denials of applications for admission, or denials of permission to land in the case of crewmembers, and are often also detained [T]heir only avenues for relief or protection are applications for asylum, statutory withholding of removal, and protection under the regulations issued pursuant to legislation implementing U.S. obligations under the [CAT] . . . and they would not be in asylum-and-withholding-only proceedings if they had not already claimed a fear of persecution or torture upon being returned to their home countries.” The Department subsequently concluded that because asylum and withholding of removal are the “sole issues to be resolved in the proceeding and are squarely presented at the outset of the

proceeding... there is no reason not to expect the alien to be prepared to state his or her claim as quickly as possible.” 85 FR at 59694. In addition, the Department provided further reasoning for its decision to establish a deadline: delayed filing risks delayed protection or relief for meritorious claims; delayed filing increases the likelihood that evidence may degrade or be lost; and applicants may simply delay proceedings, thus causing inefficiencies in what should be a streamlined proceeding. *See id.* The Department also noted that a deadline was consistent with current regulations establishing a 10-day deadline for detained crewmembers to file an asylum application, 8 CFR 1208.5(b)(1)(ii), and directing the agency to provide “expedited consideration” to asylum applications filed by detained aliens, 8 CFR 1208.5(a). *Id.* None of these factors relies upon or is altered based on the number of aliens subject to proceedings under 8 CFR 1208.2(c)(1).²⁰

Comment: Commenters claimed the rule’s inclusion of the possibility of an extension of the filing period for good cause was disingenuous for several reasons. First, commenters claimed that case quotas and performance metrics would incentivize judges to deny requests for extensions. Second, commenters claimed that adjudicating an extension request, which takes time and effort from all parties involved, did not align with the Department’s purported aims of streamlining the process.

Response: As an initial point, immigration judges are not subject to any performance metric related to the length of a case adjudication; thus, whether they would grant an extension or not would have no bearing on any applicable performance measure.²¹ Even if immigration

²⁰ The Department notes, however, that to the extent commenters argue more aliens will be in asylum-and-withholding-only proceedings and subject to the 15-day filing deadline in the future, such arguments further the Department’s reasoning rather than counter it. In other words, the Department’s concerns to ensure efficiency, accurate recall of claims, and avoiding gamesmanship are greater if more proceedings are benefited than fewer.

²¹ Non-supervisory immigration judges are subject to a biannual performance work plan based on three elements and a combined total of fourteen sub-elements. A non-supervisory immigration judge’s seven performance measures are one of six sub-elements of one of three job elements. Although one of the performance measures—i.e., one of seven sub-sub-elements of one of six sub-elements of one of three elements—is a case completion goal, the establishment of a filing deadline has little correlation with how many cases an immigration judge may ultimately complete. Moreover, the failure to meet any performance measure does not automatically result in the lowering of an immigration judge’s performance rating. For instance, for the rating cycle that concluded at the end of FY 2019,

judges were subject to a performance measure that was relevant to the rule, immigration judges are well aware that it is not appropriate to base continuance or extension decisions solely on case-completion goals. *See, e.g., Matter of L-A-B-R-*, 27 I&N Dec. 405, 416-17 (A.G. 2018) (stating that it is inappropriate to base a decision on a continuance request solely on case completion goals). As discussed, *supra*, commenters' suggestions that immigration judges are biased or incompetent and will either ignore applicable law or will make decisions on factors other than the record and the law are not well-taken. The Department is confident that EOIR's immigration judge corps adheres to the highest levels of professionalism and will continue to apply their independent judgment and discretion, 8 CFR 1003.10(b), when evaluating good cause in relation to requests for extensions. Further, immigration judges regularly adjudicate requests for continuances as part of their duties, and there is no reason to expect that any new requests as a result of this rule would exacerbate the time required for adjudication of these motions.

Comment: Multiple commenters alleged that the extension for good cause was limited to 10 days and disagreed with a 10-day limit.

Response: Commenters misread the rule. The extension for good cause is not limited to 10 days; rather, the immigration judge in his or her discretion determines the length of the extension.

ii. 15 days is Too Short

(1) Evidence-Related Concerns

Comment: Commenters asserted that a 15-day deadline is an improper solution to the Department's evidence concerns because 15 days is insufficient to collect relevant evidence. Commenters explained that gathering evidence—including declarations, corroborating documents such as medical and police reports, letters from witnesses, country conditions documentation, and reports from expert witnesses—and then paying for certain documents to be

although not all non-supervisory immigration judges met the numeric performance measures, every non-supervisory immigration judge nevertheless received a performance rating of satisfactory for the job element encompassing those measures.

translated takes much longer than 15 days, especially considering that evidence may be located abroad or possessed by a foreign government.

Commenters stated that the government should have an interest in considering the complete facts of a claim. Commenters alleged, however, that immigration judges would not have all of the evidence before them for consideration because (1) aliens would be unable to submit evidence in such a short timeframe, or (2) the short deadline would rush aliens and inevitably cause contradictions or omissions in the evidence, thereby creating unnecessary false credibility issues.

Commenters explained that aliens who need or request more than 15 days are not trying to circumvent the immigration process; rather, those aliens seek to engage in the legal immigration process by gathering all relevant information and evidence for their claim, which commenters emphasized takes longer than 15 days. Further, commenters explained that aliens who unnecessarily delay their proceedings accept the risk of degradation or loss of evidence. Commenters stated that such concern should incentivize aliens to act efficiently but does not warrant a 15-day deadline.

Response: As discussed, *supra*, commenters either misread the rule or misstated its contents. Nothing in the rule requires that all supporting evidence be submitted within 15 days. Nothing in the rule precludes amending or supplementing an application after it has been filed in accordance with existing regulations. Further, nothing in the rule requires an immigration judge to render a decision within 15 days or to schedule a hearing at any particular time, subject to the general deadline contains in INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii).

Similarly, commenters did not address why aliens in proceedings under 8 CFR 1208.2(c)(1), who are the one of the subjects of the rule, should not receive expedited consideration of their asylum claims because they are detained. The rule ensures that such aliens receive expedited consideration of their applications consistent with existing regulations, 8 CFR 1208.5(a), but it does not alter an alien's ability to submit evidence in support of an application.

The rule does not limit evidence-gathering to 15 days; rather, it requires the application and available supporting evidence to be submitted within 15 days of the alien’s first hearing before the immigration judge. *See* 8 CFR 1208.4(d) (“[T]he immigration judge . . . shall set a deadline of fifteen days from the date of the alien's first hearing before an immigration judge by which the alien must file an asylum application”). The Department believes the 15-day deadline appropriately balances the concern regarding risk of degradation or loss of evidence with the need to provide adequate time for preparation and the need to provide expedited consideration of the claims of detained aliens, especially those with meritorious claims.

The Department notes that the 15-day deadline begins from the date of the alien’s first hearing with the immigration judge, which may not occur until several weeks after the alien was first encountered by DHS²² and, in some cases, until after the alien has already resided in the United States for an extended length of time.²³ Thus, contrary to commenters’ suggestions, aliens are not limited to a 15-day period to prepare an application or to gather evidence, and many aliens will have had a considerably longer period of time to prepare their claims. In fact, some aliens subject to the rule will have already filed an asylum application even before the 15-day deadline begins. *Compare* 8 CFR 1208.2(c)(1)(i) (alien crewmembers subject to asylum-and-withholding-only proceedings before an immigration judge), *with* 8 CFR 1208.5(b)(1)(ii) (requiring an alien crewmember seeking asylum to file the application with DHS first—and giving the alien ten days to do so, subject to an extension for good cause—before being placed in

²² As of October 23, 2020—and excluding aliens detained in the Institutional Hearing Program and the Migrant Protection Protocols program, detained aliens with competency issues, and detained UAC in the custody of the Department of Health and Human Services—the median time between the issuance of a notice to appear for a detained alien and the filing of a notice to appear with an immigration court is seven days, and the median time between the receipt of a notice to appear for a detained alien and that alien’s first hearing is sixteen days. Thus, detained aliens will, on average, have 23 days before the 15-day deadline even begins to run, and commenters did not persuasively explain why 38 days, which is more than five weeks and may be extended due to good cause, is an insufficient amount of time for an alien to file an asylum application, especially for an alien who has recently made a claim of a fear of return to his or her country of nationality.

²³ For example, aliens who have overstayed an authorized period of admission under the Visa Waiver Program (VWP) and later seek asylum under 8 CFR 1208.2(c)(1)(iv) may have already spent years in the United States prior to applying for asylum and, thus, will have already had ample time to prepare their case. *See, e.g., Matter of D-M-C-P-*, 26 I&N Dec. 644, 644–45 (BIA 2015) (alien admitted under the VWP in 1999 but did not make an asylum claim in proceedings under 8 CFR 1208.2(c)(1) until 2011).

proceedings under 8 CFR 1208.2(c)(1)). Moreover, aliens in DHS custody who express a desire to seek asylum or a fear of return are provided an asylum application at that time,²⁴ and that expression necessarily occurs before an alien is placed in proceedings under 8 CFR 1208.2(c)(1) or (2) and before the alien's first hearing is subsequently scheduled. 8 CFR 208.5(a), 1208.5(a). Thus, aliens will always have had time beyond the 15-day deadline in order to complete the application, and few, if any, commenters acknowledged this additional time in their opposition to the rule.

Additionally, the aliens affected by the 15-day filing deadline have necessarily already considered and made a claim for asylum or protection, either through the credible fear process or when faced with removal or the denial of an application for admission under other provisions. Accordingly, there is no reason to believe—and commenters did not provide one—that such aliens cannot memorialize the claim they recently made on an asylum application. To the contrary, the Department expects that aliens with meritorious claims will generally welcome the opportunity to have their claims heard expeditiously by an immigration judge so that they may obtain protection and the benefits of asylum as quickly as possible.

The Department again emphasizes that the alien may also seek an extension of the filing deadline for good cause. 8 CFR 1208.4(d). Thus, in appropriate circumstances, an alien may

²⁴ Although DHS does not have a duty to provide an asylum application to a detained alien pending a credible fear determination, it may do so upon request. 8 CFR 208.5(a). Thus, aliens may be able to obtain an asylum application even before a credible fear determination. Even in cases in which DHS does not provide an asylum application while a credible fear determination is pending, once a detained alien receives a positive credible fear determination—and, thus, may become subject to proceedings under 8 CFR 1208.2(c)(1)—DHS would provide an application at that point consistent with 8 CFR 208.5(a). Moreover, although it was not addressed by commenters, the Department notes that, in conjunction with DHS, it proposed a rule in June 2020 that was recently finalized, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, signed by the Attorney General and the Acting Secretary of Homeland Security on December 2, 2020, and—if it goes into effect, *see* note 12, *supra*—would explicitly codify this requirement and ensure that it applies to aliens in detention following the receipt of a positive credible fear determination. 85 FR at 36267 (“Additionally, to ensure that these claims [i.e., asylum claims by aliens who have received a positive credible determination and are subject to proceedings under 8 CFR 1208.2(c)(1)] receive the most expeditious consideration reasonably possible, the Departments propose to amend 8 CFR 208.5 and 8 CFR 1208.5 to require DHS to make available appropriate applications and relevant warnings to aliens in its custody who have expressed a fear in the expedited removal process and received a positive determination.”). In short, all detained aliens subject to proceedings under 8 CFR 1208.2(c)(1) will have already received an asylum application before those proceedings commence and before the first hearing is even scheduled. Thus, aliens subject to the rule will actually receive more than 15 days to file an asylum application, even without an extension under 8 CFR 1208.4(d).

receive an extension of the deadline in which to file an application, obviating the concerns connected to many of the hypothetical scenarios raised by commenters.

The Department also reiterates that aliens may amend or supplement the application later in proceedings, pursuant to an immigration judge's discretion. Accordingly, aliens and counsel are welcome to begin gathering evidence, including translating or coordinating delivery of certain documents as referenced by commenters, at any time and, subject to any separate filing deadlines set by the immigration judge, may submit additional supporting evidence as it becomes available.

The Department also notes that an alien's testimony alone "may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee." INA 208(b)(1)(B)(ii), 8 U.S.C. 1158(b)(1)(B)(ii). Thus, particularly for meritorious claims, an alien may not need extensive documentation to support his or her claim because an alien can meet the relevant burden of proof through credible, persuasive, and specific testimony. Commenters did not explain why aliens who would testify credibly, persuasively, and specifically would need lengthy amounts of time to file an application or to obtain supporting documentation, and the Department is unaware of any such reasons.

The deadline itself does not preclude an immigration judge's full consideration of the facts of a claim. Because applicants for asylum and for withholding of removal bear the full burden of proof, *see* INA 240(c)(4)(A), 8 U.S.C. 1229a(c)(4)(A) (asylum); INA 241(b)(3)(C), 8 U.S.C. 1231(b)(3)(C) (withholding of removal), the alien is responsible for ensuring that the immigration judge has all relevant facts to consider. If, for example, an alien needs additional time to file an application, the alien may request an extension for good cause. 8 CFR 1208.4(d). Likewise, if the application needs to be amended or supplemented later in the proceedings due to evidence-issues, the alien may request to amend or supplement the application. 8 CFR 1208.4(c). Similarly, nothing in the rule prohibits an immigration judge from granting a continuance to

obtain corroborating evidence in appropriate cases. *Matter of L-A-C-*, 26 I&N Dec. 516 (BIA 2015). Moreover, the rule itself provides that immigration judges themselves may submit relevant evidence consistent with their duty to develop the record in appropriate circumstances. Through these mechanisms, the Department provides aliens a full opportunity to present all relevant facts to an immigration judge within the deadline, and there is no reason why the establishment of a filing deadline for the application—as opposed to supporting documents—would necessarily create a credibility issue for the alien.

Although the rule referenced the possibility that, without a deadline, aliens may attempt to delay proceedings, the Department does not believe that is the case for all aliens, nor did the rule exclusively consider or rely on that point in establishing the deadline. For the reasons discussed above and in section II.C.4.a.iii, the Department established the deadline and believes 15 days is an appropriate timeframe in which an alien must file an application. The Department disagrees with the commenters' conclusion that evidence-related risks should simply incentivize aliens to reduce delays or else accept those risks. The impact of delayed proceedings reaches far beyond the alien's case; delays result in inefficiencies that affect the entire immigration system. *See generally* 85 FR at 59694. In part for that reason, the rule established the 15-day deadline rather than rely on aliens responding to incentives or accepting the risks associated with delays.

(2) Events Outside of the Alien's Control

Comment: Commenters argued that the 15-day filing deadline is too short in effect due to various circumstances outside of the alien's control that may preclude submission of the application within the required time period. Commenters explained that the U.S. Postal Service ("USPS") or other carriers may be delayed. Relatedly, commenters said that aliens' documents may have been lost or stolen in transit to the United States.

Some commenters also alleged that DHS would seize documents at the border, such that aliens would no longer have them in their possession to include with an application for protection or relief.

Response: As an initial point, the Department notes that filing delays and missing filing deadlines due to third-party carriers such as the USPS are already a possibility in the current system for considering asylum applications, and the rule does not alter that risk. The Department is also unaware of any systemic issues with third-party carriers delaying filings, and any isolated anecdotal instances identified by commenters are redressable through existing procedures such as a motion to accept an untimely filing. Immigration Court Practice Manual, ch. 3.1(d)(ii), (iii) (July 2, 2020).

Moreover, as discussed *supra*, most aliens subject to the filing deadline will be detained. Because detained hearings are generally expedited, there is a greater possibility that the alien will be able to file the application directly with the court and, thus, not need to rely on an outside carrier. Nevertheless, even in cases in which there is a legitimate carrier delay, nothing in the rule precludes an alien from filing either a motion to accept the untimely filing, *id.*, or an extension of the filing deadline, 8 CFR 1204.8(d).

In addition, the Department emphasizes that an alien may begin the application at any time. The 15-day deadline is merely 15 days from the date of the first hearing with the immigration judge; thus, aliens are not prohibited from beginning an application prior to the first hearing, nor are they limited to only a single 15-day period to gather evidence. As noted above, detained aliens will have already a copy of an asylum application from DHS prior to their first hearing before an immigration judge and, thus, will have had already more than 15 days to complete the application even without an extension.

The Department is unaware of any practice by DHS of routinely seizing documents from aliens at the border and failing to maintain or to return them, as appropriate. In the Department's experience, any documents seized from aliens that are not returned are maintained in DHS's administrative file on the alien and are available to the DHS attorney representing the agency before the immigration judge. Mechanisms for DHS to return documents to aliens in custody are substantially beyond the scope of the rule. Nevertheless, as officers of the court with an interest

in justice in all immigration proceedings, the Department expects that DHS attorneys would submit any probative evidence in DHS's possession in the course of a proceeding under 8 CFR 1208.2(c)(1) or (2) and would ensure that no misrepresentations are made to an immigration judge.

Comment: Commenters explained that it usually takes USCIS three to five weeks to issue the receipt that the rule requires be attached to a "complete" application; thus, submitting a complete application within 15 days is impossible and outside of a practitioner's or alien's control.

Response: The Department acknowledges the commenters' concerns regarding timing with USCIS to receive a fee receipt, although in the Department's experience, USCIS typically provides a one-day turnaround in issuing fee receipts and most receipts are issued within seven days. Moreover, USCIS allows electronic payment for some of its most common applications, USCIS, *Forms Available to File Online* (June 11, 2020), <https://www.uscis.gov/file-online/forms-available-to-file-online>, and the Department does not know whether USCIS intends to allow electronic payment for asylum applications if the injunction on charging a fee is lifted. Nevertheless, in response to commenters' concerns, the Department has amended 8 CFR 1208.4(d) and related cross-references to that regulation to allow for submission of alternative proof of payment in the event that an alien has not received a fee receipt from USCIS within the filing deadline. *See* section I.C.1 for further discussion regarding this change.

(3) Concerns Related to the Complexity of the Form I-589

Comment: Commenters argued that the 15-day filing deadline is too short due to the complexity of the Form I-589 and most applicants' lack of English-language proficiency. Commenters explained that aliens must usually find a translator, interpreter, and counsel to fill out the form and prepare certain documents. Commenters alleged that this process often takes weeks but that such assistance is crucial.

Response: Again, the Department notes that regulations have contained a 10-day application filing deadline for many years for a particular category of asylum seekers, with no noted opposition or complaints, including concerns about the complexity of the form or its requirement to be completed in English. 8 CFR 1208.5(b)(1)(ii). Further, as discussed above, the rule provides an alien an opportunity to request an extension of the deadline if the alien needs additional time to complete the form. Additionally, most aliens with pending asylum cases, 85 percent, have representation, and an alien's representative can assist with completing the application or, as appropriate, requesting an extension of the filing deadline. EOIR, *Current Representation Rates* (Oct. 13, 2020), <https://www.justice.gov/eoir/page/file/1062991/download>.

As discussed, *supra*, in practice, aliens subject to the rule will have additional time beyond 15 days to complete an asylum application, even without an extension, and the Department disagrees with commenters that the Form I-589 is too complex for aliens to complete within weeks. The substantive portion of the Form I-589 is currently eight pages, half of which call for biographic information and half of which request information about the alien's claim.²⁵ Tens of thousands of aliens—and hundreds of thousands in recent years, EOIR, *Total Asylum Applications* (Oct. 13, 2020), <https://www.justice.gov/eoir/page/file/1106366/download>—whose first language is not English file for asylum every year, and there is simply no indication that applicants cannot complete the application and file it within a few weeks.²⁶ In short, although the

²⁵ If the recent joint rulemaking, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, signed by the Attorney General and the Acting Secretary of Homeland Security on December 2, 2020, goes into effect, the substantive portion of the Form I-589 will increase to thirteen pages, though only nine of those pages call for information about an alien's claim.

²⁶ The Department also notes there is a plethora of information regarding asylum available to aliens in multiple languages from pro bono or nonprofit organizations or from international organizations. For example, the UNHCR maintains a Spanish-language translation of the instructions for the *Form I-589*, <https://www.unhcr.org/585ae89c4.pdf> (last visited Dec. 4, 2020), and multiple advocacy organizations within the United States, including ones affiliated with commenters opposing the rule, have created Spanish-language versions of the form itself, e.g., Immigration Justice Campaign, *I-589 in Spanish*, <https://immigrationjustice.us/get-trained/asylum/application-declaration-evidence/sample-i-589-in-spanish/> (last visited Oct. 31, 2020). Although non-English versions of the I-589 are not official, they reflect a much greater availability of information to asylum seekers in languages other than English—and thus a greater capacity to complete the form in a timely manner—than most commenters acknowledged.

Department acknowledges the commenters' concerns and has fully considered, they are ultimately unpersuasive.

The Department believes the 15-day deadline provides sufficient time for the alien, in coordination with counsel, an interpreter, or translator if the alien so chooses, to apply for relief, particularly because the actual deadline will be more than 15 days in practice and because an alien may request an extension as appropriate. Further, the Department reiterates that the 15-day timeframe begins from the date of the first hearing before the immigration judge. An alien is not precluded from beginning the application or seeking assistance from counsel, an interpreter, or a translator to prepare the application before the first hearing.

(4) Concerns Related to Aliens' Personal Circumstances and Challenges

Comment: Commenters also explained that aliens often have limited financial resources, are usually uneducated or even illiterate, have experienced trauma, and are in need of mental health resources. Considering those facts, commenters explained that 15 days was especially insufficient to secure representation or complete the form on their own, let alone pay the filing fee.

Response: For many of the same reasons noted above, the Department finds these concerns to be both gross generalizations and unpersuasive. The Department does not have data—and commenters did not provide any—and, thus, declines to agree with a blanket characterization that most aliens applying for asylum are illiterate or in need of mental health treatment. Further, commenters raising these issues did not engage with, *inter alia*, the existence of a longstanding 10-day deadline for filing an asylum application for a particular category of applicants, 8 CFR 1208.5(b); the availability of an extension of the 15-day deadline for good cause; the fact that most aliens applying for asylum are represented; the fact that all aliens subject to the rule will, in reality, have more than 15 days to file the application; the demonstrated ability of approximately 200,000 aliens to file for asylum in FY 2019 and FY 2020; the desire of aliens with meritorious claims to have those claims adjudicated quickly; the

longstanding regulatory directive to complete asylum cases of detained aliens expeditiously; and, the risks associated with needless delays in asylum adjudications, including the degradation of evidence. To the extent that commenters posited hypothetical scenarios about particular characteristics of aliens, the Department notes that if such scenarios are reflected by actual applicants, then the immigration judge can consider whether any of the factors referenced by the commenters warrant an extension of the filing deadline.

(5) Concerns that the Deadline is Too Short for Preparation by Counsel

Comment: Commenters explained that even if an alien was able to timely hire counsel, counsel would need more than 15 days to prepare and submit the application. Commenters provided examples of common challenges faced by counsel when working with detained aliens, which they claimed have only been exacerbated by the pandemic. Examples include: difficulty in arranging meetings with aliens at detention centers, especially with pandemic-related restrictions on visitors; difficulty in securing interpreters; and gathering evidence. Many commenters explained that representation made a significant difference to the likelihood of aliens' success.

Commenters also stated that the 15-day period is too short of a time period to prepare a sufficient application that is sufficiently thorough to meet the higher burden of proof required for success on the application as opposed to the lower standard for credible fear reviews.

Commenters explained that the rule failed to acknowledge the difference between the burden of proving "significant possibility" of succeeding on an asylum claim required to establish credible fear and the burden of proving every element of an asylum claim under *Matter of A-C-A-A-*, 28 I&N Dec. 84 (A.G. 2020). Relatedly, other commenters claimed the rule's reasoning that "there is no reason not to expect the alien to be prepared to state his or her claim as quickly as possible," 85 FR at 59694, improperly conflated the significant possibility standard used in the credible fear interview with the preponderance of the evidence standard used at the hearing.

Commenters explained that the distinction between these standards—one imposing a reduced burden while the other imposed a greater burden that requires a fully developed record to satisfy

all elements of the claim—demonstrates that aliens who satisfy the lesser burden are not necessarily ready to satisfy the greater burden in such a short timeframe. In short, given the increased burden of proof, commenters stated that 15 days would be far too short to prepare the application, despite the alien having met the lesser burden of proof in the credible fear interview.

Response: Again, commenters either misread or affirmatively misstated the contents of the rule. Nothing in the rule limits the alien, or the alien’s representative, to a single 15-day period to prepare the application; rather, the application must be submitted within 15 days of the alien’s first hearing before the immigration judge. Thus, the alien will have more than 15 days to prepare the application, an alien or the alien’s representative may begin to prepare the application or gather evidence at any time, the alien may seek an extension of the filing deadline as appropriate, and the alien may supplement the application consistent with existing regulations. To the extent that commenters raise concerns that COVID-19 has created or exacerbated logistical challenges for representatives, the Department notes that cases of detained aliens, such as those who are subject to the rule, have generally been heard during the pandemic to avoid raising significant questions about prolonged detention and that DHS has made arrangements to ensure unimpeded communications between aliens and representatives. *See, e.g., Nat’l Immigration Project of Nat’l Lawyers Guild v. Exec. Office for Immigration Review*, 456 F. Supp. 3d 16, 22–23 (D.D.C. 2020) (summarizing DHS actions taken to ensure communication between detained aliens and representatives continue during the outbreak of COVID-19). In isolated instances in which communication between a representative and a detained alien has been interrupted due to COVID-19, the Department reiterates that the rule provides for an extension for good cause, 8 CFR 1208.4(d).

The Department did not conflate the burdens of proof in credible fear interviews and the merits of asylum adjudications. The Department recognizes the distinction between the burdens of proof in the interview and the hearing but believes the rule’s timeframe is sufficient for aliens to file their application and meet the requisite burden of proof. *See* INA 240(c)(4)(a), 8 U.S.C.

1229a(c)(4)(A) (burden of proof for asylum); INA 241(b)(3)(C), 8 U.S.C. 1231(b)(3)(C) (burden of proof for withholding of removal). The Department referenced the interview in the proposed rule simply to demonstrate that aliens who pass the credible fear interview are on notice of their eligibility for various forms of relief or protection, that such aliens would logically be expected to want to perfect an application for asylum and soon as possible thereafter, and that it is not unreasonable to expect an alien who has passed a credible fear screening to be anticipating and preparing for consideration of their ultimate application for asylum, including the preparation of their application and gathering of evidence, especially if the alien's claim is meritorious.

(6) The 15-day Filing Deadline will Limit the Availability of Low Cost or Pro Bono Legal Services

Comment: Commenters alleged that the 15-day deadline would put undue pressure on services funded by local governments, as well as nonprofit organizations and pro bono volunteers, including clinics and law students, to assist aliens with their applications in an effort to reduce the likelihood that applications would be rejected. Commenters specifically asserted that the deadline would interfere with local government investments into funding legal service providers, specifically such providers' case management processes. Relatedly, commenters explained that the deadline would require nonprofit organizations and clinics to substantially change their operations and would limit the number of aliens they could assist. For example, because students working in law clinics take a full course load in addition to taking a pro bono case, commenters explained that they would be unable to devote the hours necessary to meet the 15-day deadline, thus preventing them from taking cases, which in turn would harm aliens who rely on such assistance.

Response: For all of the reasons previously given—including, *inter alia*, the existence of a longstanding 10-day deadline for a particular category of asylum applicants with no noted effects on low cost or pro bono representation, the similar longstanding existence of immigration judge authority to set deadlines for filing applications for relief, the availability of an extension

of the 15-day deadline for good cause, the desire of aliens with meritorious claims to have those claims adjudicated quickly, the longstanding regulatory directive to complete asylum cases of detained aliens expeditiously, and, the risks associated with needless delays in asylum adjudications, including the degradation of evidence—the Department believes that a general 15-day filing period, while providing for exceptions where the immigration judge finds good cause, strikes the appropriate balance between expediency and fairness and would not impact the availability of low cost or pro bono representation. To the contrary, ensuring that detained aliens file an asylum application expeditiously may help ensure that a law school clinic can assist the alien before a student completes the clinical course or graduates. *Cf.* Registry for Attorneys and Representatives, 78 FR 19400, 19404 (Apr. 1, 2013) (declining to require law students to register with EOIR due to, among other things, “the transient nature of law students’ participation in clinical programs and the limited circumstances under which students can represent individuals before EOIR. . . . the absence of any mechanism to inform EOIR when a student leaves a program . . . [and the lack of a] regulatory provision permitting a law student to appear before EOIR if not enrolled in a ‘legal aid program or clinic,’ [making] it . . . problematic for those students to remain registered after leaving a clinical program”). Similarly, because lengthy delays in immigration proceedings often dissuade pro bono representation, ensuring expeditious consideration of asylum applications filed by detained aliens may encourage more pro bono representation. *See, e.g.,* HRF Report *supra*. To the extent that commenters posited hypothetical scenarios about particular low cost or pro bono service providers or particular types of aliens, the Department notes that if such scenarios are reflected by actual applicants, then the immigration judge can consider whether any of the factors referenced by the commenters warrant an extension of the filing deadline.

Further, nothing in this rule requires the diversion of resources or alteration of the mission of any low cost and pro bono legal service providers, including nonprofit organizations, pro bono volunteers, clinics and law students, and government-funded representatives, beyond

what is already required by existing regulations and professional responsibility requirements. In other words, immigration judges already possess the authority to set application filing deadlines, 8 CFR 1003.31(c), and asylum cases of detained aliens are already subject to expeditious processing, 8 CFR 1208.5(a). Further, practitioners are already prohibited from taking on more work than they can handle competently. 8 CFR 1003.102(q)(1). Thus, pro bono organizations already operate under the conditions outlined in this rule, and commenters did not identify any changes that the rule itself would require that are independent of longstanding and well-established regulatory requirements.

Furthermore, the Department believes that low cost and pro bono legal service providers, including nonprofit organizations, pro bono volunteers, including clinics and law students, and government-funded representatives, can meet this deadline, absent situations in which the deadline may be extended for good cause. Given the alien's already-limited available avenues for relief, the common goal of providing relief or protection to aliens with meritorious claims as quickly as possible, and the risk of loss or degradation of evidence with the passing of time—none of which were challenged by commenters, including low cost and pro bono organizations themselves—the Department believes it is prudent to establish the 15-day deadline. Although the Department acknowledges that nonprofit organizations, pro bono volunteers, and government-funded representatives, like all legal representatives, may face unforeseen challenges confronting deadlines set by a judge, the Department is confident that such representatives will be able to handle such deadlines, just as they do in other courts and just as they handle all regulatory changes inherent across government agencies, and will continue to be able to provide assistance and resources to aliens in proceedings before EOIR.

Finally, the Department notes that nothing in the rule prohibits nonprofits, pro bono groups, local government-funded representatives, or any other class of representatives from taking on an alien's case at a later point in the proceedings. An alien who obtains counsel may choose a representative at any point in the proceedings, including after the filing of an

application, and the ability to provide representation does not require assistance from the very first hearing. Thus, low cost or pro bono organizations, local government-funded representatives, and law school clinics realistically have more opportunities to provide assistance than many commenters suggested.

iii. 15-Day Deadline is Arbitrary

(1) In General

Comment: Commenters generally characterized the 15-day deadline as being arbitrarily short. Commenters expressed concern that the Department failed to include specific data regarding the selection of 15 days as the specific deadline for filing an asylum application in asylum-and-withholding-only proceedings rather than some other period of time. Commenters alleged that the Department's reasoning for the deadline conflated efficiency with speed.

Commenters also stated that the deadline was arbitrary because the Department's reasoning was flawed: commenters stated the application process and the adjudication process were distinct from one another with separate time periods. Thus, commenters alleged that changing the time limit for the application process would not affect the separate period of time required for adjudication.

Response: The Department disagrees that the 15-day deadline is arbitrary, unrealistic, or unjust. First, the current regulation at 8 CFR 1208.5(a) directs that "[w]here possible, *expedited* consideration shall be given to applications of detained aliens" (emphasis added). The Department believes that establishing a deadline will better provide expedited consideration for aliens described in 8 CFR 1208.2(c)(1) and 1208.4(b)(3)(ii). Second, and relatedly, EOIR has had a longstanding policy of allowing asylum merits hearings for detained aliens to be scheduled within 14 days of a master calendar hearing with no noted objections or problems with that policy. *See, e.g.,* EOIR Operating Policies and Procedures Memorandum ("OPPM") 00-01, *Asylum Request Processing* at 8 (Aug. 4, 2000) ("Generally, when setting a case from the Master Calendar to the Individual Calendar, a minimum of 14 days should be allowed before the case is

set for the Individual Calendar.”); EOIR OPPM 13-03, *Guidelines for Implementation of the ABT Settlement Agreement* at 6 (Dec. 2, 2013) (“Generally, when setting a detained [asylum] case from a master calendar hearing to an individual calendar hearing, a minimum of 14 days should be allowed.”).²⁷ Because—for over two decades with no noted challenge—the Department has found two weeks a potentially sufficient amount of time to prepare a case for a merits hearing on a detained alien’s asylum application, it finds that 15 days is similarly a sufficient time to simply file the application, particularly because, as discussed, *supra*, the alien will actually receive more than 15 days to do so. Third, in determining an appropriate deadline, the Department considered the current regulation establishing a 10-day deadline for detained crewmembers to file an application for asylum. 8 CFR 1208.5(b)(1)(ii). Because detained crewmembers are listed in the regulation at 8 CFR 1208.2(c)(1) as a class of aliens subject to asylum-and-withholding-only proceedings, the Department determined it was appropriate to set a comparable deadline for other classes of aliens subject to asylum-and-withholding-only proceedings included in 8 CFR 1208.2(c)(1), as well as aliens subject to withholding-only proceedings under 8 CFR 1208.2(c)(2).

Regarding commenters’ concerns about the lack of supporting data, the Department notes first that because each asylum application is adjudicated on a case-by-case basis and each application will vary accordingly in its facts and support, there is no common metric for determining how long it will typically take an alien to fill out and submit a Form I-589 because there is not a “typical” asylum case. Thus, the data suggested by commenters is not available and is untraceable due to the inherently fact-specific nature of each case. Moreover, commenters did not suggest that such data was available or could be obtained. To the extent that the PRA, 44 U.S.C. 3501 *et seq.*, offers data and a potential metric for completing and submitting an asylum application, the Department notes that—in contrast to commenters’ concerns—it supports an

²⁷ Although OPPM 13-03 has been rescinded because the ABT Settlement Agreement expired in 2019, EOIR maintains a policy of providing at least 14 days between a master calendar hearing and an individual hearing on an asylum application for detained aliens.

even quicker deadline than that proposed by the Department. *See Form I-589 Instructions* at 14 (Aug. 25, 2020), <https://www.uscis.gov/sites/default/files/document/forms/i-589instr.pdf> (providing a response time of 12 hours, “including the time for reviewing instructions, and completing and submitting the form”).²⁸ As discussed, the provision of the rule setting a deadline follows from well-established comparable regulations or policies and is not intended to turn on data. Nevertheless, even if it were, the best available data regarding the time it takes to complete the Form I-589—i.e., the PRA determination—supports the deadline chosen by the Department.

Additionally, the Department emphasizes that the deadline is an exercise of the Attorney General’s statutory authority and judgement to “establish such regulations, prescribe such forms of bond, reports, entries, and other papers, issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section.” INA 103(g)(2), 8 U.S.C. 1103(g)(2). Congress acknowledged that there may be instances in which the Attorney General may have to act in order to effectuate the statutory scheme. And, given the statute’s silence on a filing timeframe for aliens in asylum-and-withholding-only proceedings, the Department presumes Congress intended for the Attorney General to determine such timeframe as necessary.

In drafting the rule, the Department considered that the particular aliens affected—those in asylum-and-withholding-only proceedings—are (1) already subject to removal orders, denied applications for admission, or, for crewmembers, denied permission to land; (2) generally detained; and (3) solely limited to claims for asylum and withholding of removal, which are presented at the outset of the proceeding. *See* 85 FR at 59694. Given the unique position of these aliens, the Department concluded there was “no reason not to expect the alien to be prepared to

²⁸ If the recent joint rulemaking, *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, signed by the Attorney General and the Acting Secretary of Homeland Security on December 2, 2020, goes into effect, the response time for the Form I-589 will increase to 18.5 hours. That length of time to complete the application would still support the Department’s position that between 15 and 38 days—if not longer based on extensions due to good cause—is sufficient time to complete the Form I-589. *See also* note 22, *supra*.

state his or her claim as quickly as possible,” thereby enabling timely provision of relief or protection for meritorious claims. *Id.* The rule also noted that delaying proceedings risked degradation or loss of evidence, which could affect adjudication of the claim.

The Department recognizes that the deadline for filing the application is distinct from the general 180-day deadline for adjudicating the application established by INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii), and the rule as a whole addresses both the filing deadline and the adjudication deadline. Finally, the Department notes that the rule does not conflate an interest in efficiency with pure speed, as commenters claimed. As discussed throughout, the rule is rooted in concerns about the expeditious consideration of claims made by detained aliens, the need to ensure meritorious claims are adjudicated as swiftly as possible, the risk of evidence becoming stale, and the expectation that aliens who have recently claimed a fear of persecution or torture will be well-situated to perfect that claim quickly through the filing of an asylum application. In short, the Department—as well as asylum applicants and DHS—has a strong interest in adjudicating cases expeditiously, particularly cases of valid claims for asylum, and the rule does not simply make proceedings more efficient for the sake of speed alone.

(2) Arbitrary Because the Deadline Demands Expediency not Followed by the Government Itself

Comment: Some commenters alleged that the rule creates an arbitrary deadline because it demands expediency that commenters alleged EOIR and DHS do not follow. Commenters alleged that DHS routinely fails to file notices to appear (“NTA”) with EOIR for more than a year. Likewise, commenters alleged that it takes EOIR six months to a year to schedule a hearing. Commenters explained that these delays by EOIR and DHS impose an unreasonable burden on aliens to constantly check the automated system to determine when they can file.

In a similar vein, commenters surmised that the Department-facilitated general Legal Orientation Program (“LOP”) would be unable to meet alien’s needs from the 15-day deadline.

Citing to the *LOP Cohort Analysis Phase II* study,²⁹ commenters emphasized that 24% of participants failed to receive any services until after their first hearing, while participants who received services prior to their first hearing received services on average only seven days prior to the hearing.

Some commenters stated that the 15-day deadline was arbitrary because backlogs in the immigration courts would preclude review of such applications for months or years. Commenters stated that the rule failed to address the inefficiencies caused by the Department itself, such as hiring new immigration judges without hiring support staff, restricting immigration judges' ability to manage their dockets, and shifting prioritization of particular dockets.

Response: As an initial point, many commenters failed to apprehend that most aliens subject to the rule will be detained. Consequently, DHS is unlikely to wait over a year to file a charging document, *cf.* 8 CFR 287.3(d) (except in an emergency or exceptional circumstance DHS will determine within 48 hours of detention whether to file an NTA), and EOIR is unlikely to wait six months to a year to schedule a hearing, EOIR Policy Memorandum 20-07, *Case Management and Docketing Practices* at 2 (Jan. 31, 2020) (detained cases should be entered into EOIR's case management system within three days of filing the charging document), <https://www.justice.gov/eoir/page/file/1242501/download>. Similarly, detained aliens are unlikely to need to check the automated case system to determine when to file an application.³⁰

This rule does not purport to address every inefficiency in the U.S. immigration system. The 15-day filing deadline instead is designed to increase one efficiency in asylum-and-withholding-only proceedings—the timeframe for aliens in such proceedings to file an

²⁹ See Executive Office for Immigration Review, *LOP Cohort Analysis: Phase II* (Jan. 29, 2019), <https://www.justice.gov/eoir/file/1125621/download>.

³⁰ Even if an alien is not detained, he or she would not need to check the automated case system to determine when to file. The rule clearly states that the application deadline is 15 days after the first hearing, which the alien will have attended. Thus, an alien will always know when the application is due.

application for protection or relief.³¹ As explained above, that timeframe is not arbitrary; rather, it was promulgated to address a number of the Department's concerns. *See generally* 85 FR at 59693–94. Thus, the commenters' concerns with other inefficiencies at DHS and EOIR, including the automated system and the LOP,³² are outside the scope of this particular rulemaking.

The Department disagrees with commenters' allegation that the rule is arbitrary because the backlog would nonetheless delay hearings for such applications. Again, commenters generally did not apprehend that the rule will apply principally to detained aliens, whose cases are generally adjudicated within 180 days already, EOIR, *Median Completion Times for Detained Cases* (Oct. 23, 2019), <https://www.justice.gov/eoir/page/file/1163621/download>, and do not constitute a backlog. Because detained cases are already subject to expeditious consideration, 8 CFR 1208.5(a), the rule should not create new delays, contrary to commenters' assertions.

(3) Arbitrary Because the Rule Failed to Analyze Certain Impacts of the Rule

Comment: Commenters asserted that the rule was arbitrary because it failed to analyze the impact of other proposed or enacted regulatory changes that commenters explained would increase the number of aliens subject to the 15-day filing deadline.³³ Commenters noted this

³¹ In recent rulemakings, the Department has sought, in part, to reduce various inefficiencies throughout the immigration system. *See, e.g.*, Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 FR 52491 (Aug. 26, 2020) (proposed) (addressing inefficiencies in case adjudications at the BIA); Expanding the Size of the Board of Immigration Appeals, 85 FR 18105 (Apr. 1, 2020) (interim rule) (adding two Board member positions to the BIA so that the BIA may more efficiently and timely adjudicate appeals); Organization of the Executive Office for Immigration Review, 84 FR 44537 (Aug. 26, 2019) (interim rule) (providing, in part, for more efficient disposition of cases through a delegation of authority); EOIR Electronic Filing Pilot Program, 83 FR 29575 (June 25, 2018) (public notice) (creating a pilot program to test an electronic filing system that would greatly improve immigration adjudication processing in the immigration courts and eventually the BIA).

³² The Department notes that the same study cited by commenters disclosed that the general LOP cost the government over \$100 million annually, increased an alien's length of detention, did not generally affect an alien's case outcome, and did not increase representation for detained aliens. *See* EOIR, *LOP Cohort Analysis* at 4 (Sept. 5, 2018), <https://www.justice.gov/eoir/file/1091801/download>; *cf.* 5 CFR 2635.101(b)(11) (requiring the disclosure of government waste). Consequently, even prior to the NPRM, the general LOP provided no benefit to detained aliens, and the rule's impact on detained aliens served by the general LOP is accordingly minimal, if any.

³³ *See also* section II.C.4.a.i above for further discussion of these proposed changes.

increase is contrary to the small number of alien crewmembers subject to the current 10-day filing deadline, to which the Department compares the proposed rule.

Response: As discussed, *supra*, the number of aliens who may be placed in asylum-and-withholding-only proceedings and, thus, subject to the deadline established by the rule is speculative, unpredictable, and ultimately wholly outside the Department's control. *See Home Box Office*, 567 F.2d at 35 n.58 ("Moreover, comments which themselves are purely speculative and do not disclose the factual or policy basis on which they rest require no response."). The Department is unable to accurately or precisely predict the future number of aliens who would both enter or seek to enter the United States illegally and, in turn, be placed into asylum-and-withholding-only proceedings following a positive credible fear or reasonable fear interview; further, commenters did not offer a prediction, apart from unsupported generalizations. Similarly, DHS has autonomy over its own enforcement-related decisions and is statutorily tasked by Congress with "[e]stablishing national immigration enforcement policies and priorities." Homeland Security Act of 2002, Pub. L. 107-296, section 402(5), 116 Stat. 2135, 2178 (codified at 6 U.S.C. 202(5)). Consequently, the Department has neither control over nor the means to predict how many aliens DHS may subject to expedited removal procedures as opposed to other enforcement options or the exercise of prosecutorial discretion. Thus, while the Department is cognizant that other rules may have some impact on immigration proceedings relevant to this rule, the size and nature of that impact is speculative. Moreover, even if that impact were predictable, the Department has determined, as a matter of policy, that the benefits of the rule—e.g., better effectuation of statutory directives, the expedited consideration of meritorious asylum claims, and the elimination of provisions that are immaterial to EOIR—far outweigh any negative impacts that the rule would have, either singularly or in tandem with other rules. Such balancing of preferences is not arbitrary and capricious.

Moreover, assuming, *arguendo*, that other rules increase the number of aliens subject to asylum-and-withholding proceedings under 8 CFR 1208.2(c), the provisions of this rule would

remain important to effectuate. As discussed, *supra*, aliens subject to proceedings under 8 CFR 1208.2(c) are generally subject to detention unless paroled by DHS. Both parties, especially in cases of aliens with meritorious claims, and the immigration courts have an interest in the expeditious consideration of asylum claims made by detained aliens. In fact, current regulations already provide for such expedited consideration, 8 CFR 1208.5(a), and commenters did not explain why it would be arbitrary and capricious for detained aliens to receive expedited consideration of their asylum claims consistent with existing regulations. The rule simply reaffirms the importance of well-established principles, namely adhering to statutory deadlines and providing expedited consideration of asylum claims for detained aliens, especially meritorious claims. Such re-affirmation is not arbitrary and capricious.

Furthermore, the Department's reasoning for the 15-day deadline does not rely on or involve the number of aliens who may be affected. In other words, the proposed rule at 85 FR 36264, and the recently-finalized rule, had no bearing on the reasoning underlying the deadline in the rule at hand. In the proposed rule, 85 FR at 59693–94, the Department explained that aliens in asylum-and-withholding-only proceedings are “generally already subject to removal orders, denials of applications for admission, or denials of permission to land in the case of crewmembers, and are often also detained [T]heir only avenues for relief or protection are applications for asylum, statutory withholding of removal, and protection under the regulations issued pursuant to legislation implementing U.S. obligations under the [CAT] . . . and they would not be in asylum-and-withholding-only proceedings if they had not already claimed a fear of persecution or torture upon being returned to their home countries.” The Department subsequently concluded that because asylum and withholding of removal are the “sole issues to be resolved in the proceeding and are squarely presented at the outset of the proceeding . . . there is no reason not to expect the alien to be prepared to state his or her claim as quickly as possible.” 85 FR at 59694. In addition, the Department provided further reasoning for its decision to establish a deadline: delayed filing risks delayed protection or relief for meritorious

claims; delayed filing increases the likelihood that evidence may degrade or be lost; and applicants may simply delay proceedings, thus causing inefficiencies in what should be a streamlined proceeding. *See id.* The Department also noted that a deadline was consistent with current regulations establishing a 10-day deadline for detained crewmembers to file an asylum application, 8 CFR 1208.5(b)(1)(ii), and directing the agency to provide “expedited consideration” to asylum applications filed by detained aliens, 8 CFR 1208.5(a). *Id.* None of these factors relies upon or is altered based on the number of aliens subject to proceedings under 8 CFR 1208.2(c)(1).³⁴

Furthermore, pursuant to 5 U.S.C. 706(2)(A), an agency must articulate a “rational connection between the facts found and the choice made.” *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962). Those facts must be “relevant” and considered with no “clear error in judgment,” *see Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971), but a court will “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.” *Motor Vehicles Mfrs. Ass’s of U.S., Inc. v. State Farm Mutual Auto. Ins.*, 463 U.S. 29, 43 (1983) (quoting *Bowman Transp. Inc. v. Arkansas-Best Freight System*, 419 U.S. 281, 286 (1974)). Under that standard, the rule is not arbitrary and capricious. The rule clearly discussed the relevant factors considered in establishing the 15-day filing deadline, at least to an extent that the rule was “reasonably discerned.” *See* 85 FR at 59693–94; *see also* section II.C.4.a.iii.(1), *supra*.

Factors over which the Department has no control were considered, but as discussed, they do not impact the nature of the rule. For example, DHS’s expansion of expedited removal stems from DHS’s “sole and unreviewable” authority to determine the scope of aliens to whom expedited removal provisions may be applied. INA 235(b)(1)(A)(iii)(I), 8 U.S.C.

³⁴ The Department notes, however, that to the extent commenters argue more aliens will be in asylum-and-withholding-only proceedings and subject to the 15-day filing deadline in the future, such arguments further the Department’s reasoning rather than counter it. In other words, the Department’s concerns to ensure efficiency, accurate recall of claims, and avoiding gamesmanship are greater if more proceedings are benefited than fewer.

1235(b)(1)(A)(iii)(I). The Department and DHS are separate agencies with distinct authorities and responsibilities, and EOIR played no part in developing or implementing that notice. Further, the notice bore no effect on the Department's decision to establish a filing deadline for aliens in asylum-and-withholding-only proceedings in an effort to address inefficiencies in the system and reduce delayed protection or relief for meritorious claims. And, to the extent that DHS's action may result in more aliens subject to proceedings under 8 CFR 1208.2(c)(1), that outcome, which is highly speculative, would not undermine or alter the rule for the reasons given.

Comment: In addition, commenters explained that the rule should have analyzed the impact of the deadline on aliens, counsel, and court operations, including the reliance interests of those parties on the current timeframe to seek and engage representation. Commenters stated that the rule's lack of a cost benefit analysis on the 15-day deadline evidenced the Department's failure to assess the harms caused by the rule.

More specifically, commenters stated that the Department failed to consider the "severe consequences" on aliens from imposing a 15-day deadline, which they alleged could lead to denials of thousands of asylum applications and subsequent orders of removal under the BIA's decision in *Matter of R-C-R-*, 28 I&N Dec. 74 (BIA 2020). Commenters stated this would deprive pro se aliens the opportunity to request extensions or build a record to explain why they did not meet the deadline. In regard to nonprofits, commenters stated that the Department failed to consider that with such a short deadline, pro bono attorneys would be less willing to take cases and nonprofits would be unable to place attorneys with detained aliens. In regard to court operations, commenters stated that the Department failed to consider that courts would be overwhelmed by the number of pro se cases.

Response: As an initial point, commenters did not quantify the asserted "severe consequences" they alleged would flow from the rule, and because the Department believes such consequences are unsupported, hypothetical, unrealistic, or based on an incorrect understanding of the rule, it declines to seek to develop a metric for measuring them. Moreover, most of the

alleged “harms” asserted by commenters are, in reality, founded in policy disagreements over a belief that not enough asylum applications are being granted or simply repeat tendentious or spurious claims about how the Department considers asylum cases under the applicable law.

As with other rules issued by the Department, many, if not most, commenters asserted that this rule was “arbitrary and capricious,” though nearly all of those assertions were ultimately rooted in the rule’s failure to adopt the commenters’ policy preferences rather than the identification of specific legal deficiencies. The Department has considered all comments and looked at alternatives. The Department understands that many, if not most, commenters opposing the rule believe that most asylum applications are meritorious and, thus, would prefer that nearly all applications for asylum be granted, that border restrictions be loosened accordingly if not eliminated, and that the Department, as a matter of forbearance or discretion, decline to follow the law in situations where doing so would be beneficial to aliens. For all of the reasons discussed in the NPRM, and reiterated herein, however, the Department declines to adopt those positions. In short, although the Department has considered the issues raised and policy perspectives advanced by commenters, it finds them unpersuasive and insufficient to warrant withdrawing the rule.

Similarly, the Department further understands that, at the least, most commenters would prefer to maintain the status quo, believing that it is preferable to the changes in the rule. The Department has been forthright in acknowledging the changes created by the rule from the status quo, but has also explained the reasoning behind those changes, including the better effectuation of statutory directives, the expedited consideration of meritorious asylum claims, and the elimination of provisions that are immaterial to EOIR. The Department has acknowledged changes in positions, where applicable, it has provided good reasons for those changes, it believes the changes are better implementations of the law than the status quo, and it has provided a “reasoned analysis” for the changes, which is contained in the NPRM and reiterated

herein in response to the comments received; in short, the rule is not “arbitrary and capricious” under existing law. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

Many of commenters’ concerns are also addressed, *supra*, and the Department reiterates its prior responses accordingly. For example, commenters did not engage with the many reasons supporting the deadline in the rule—e.g., the existence of a longstanding 10-day deadline for a particular category of asylum applicants with no noted effects on pro bono representation, the similar longstanding existence of immigration judge authority to set deadlines for filing applications for relief, the availability of an extension of the 15-day deadline for good cause, the desire of aliens with meritorious claims to have those claims adjudicated quickly, the longstanding regulatory directive to complete asylum cases of detained aliens expeditiously, and, the risks associated with needless delays in asylum adjudications, including the degradation of evidence. The Department considered those issues, as well as the ones raised by commenters, but determined for the reasons given that a general 15-day filing period, while providing for exceptions where the immigration judge finds good cause, strikes the appropriate balance between expediency and fairness.

The Department further finds that the rule would not impact the availability of pro bono representation. To the contrary, as discussed, *supra*, ensuring expeditious consideration of asylum applications filed by detained aliens may promote increased pro bono representation which is often dissuaded by lengthy delays in immigration proceedings. *See, e.g.*, HRF Report *supra* (“In a February 2016 survey conducted by Human Rights First of 24 pro bono coordinators at many of the nation’s major law firms, nearly 75 percent of pro bono professionals indicated that delays at the immigration court are a significant or very significant negative factor in their ability to take on a pro bono case for legal representation before the court.”). To the extent that commenters posited hypothetical scenarios about particular pro bono groups or particular types of aliens, the Department notes that if such scenarios are reflected by actual

applicants, then the immigration judge can consider whether any of the factors referenced by the commenters warrant an extension of the filing deadline.

Overall, the Department believes that nonprofit organizations and pro bono volunteers can meet this deadline, absent situations in which the deadline may be extended for good cause. Given the alien's already-limited available avenues for relief, the common goal of providing relief or protection to aliens with meritorious claims as quickly as possible, and the risk of loss or degradation of evidence with the passing of time—none of which were challenged by commenters, including pro bono organizations themselves—the Department believes it is prudent to establish the 15-day deadline. Although the Department acknowledges that nonprofit organizations and pro bono volunteers, like all legal representatives, may face unforeseen challenges confronting deadlines set by a judge, the Department is confident that such representatives will be able to handle such deadlines, just as they do in other courts and just as they handle all regulatory changes inherent across government agencies, and will continue to be able to provide assistance and resources to aliens in proceedings before EOIR.

The Department further notes that nothing in the rule prohibits nonprofits, pro bono groups, or any other class of representatives from taking on an alien's case at a later point in the proceedings. An alien who obtains counsel may choose a representative at any point in the proceedings, including after the filing of an application, and the ability to provide representation does not require assistance from the very first hearing. Thus, pro bono organizations have more opportunities to provide assistance that many commenters suggested.

In drafting this rule, the Department considered the potential impacts of the deadline on various referenced groups, but finds assertions of deleterious impacts unsupported, grossly speculative, and ultimately unpersuasive. The rule's extension for good cause, 8 CFR 1208.4(d), and the retained provision allowing for future amendments or supplements to the application, 8 CFR 1208.4(c), stem from consideration of aliens, counsel (including pro bono counsel), and nonprofit organizations who may encounter unusual situations that prevent them from meeting

the deadline. 85 FR at 59694. Commenters' concerns regarding "thousands" of denied applications and subsequent orders of removal are speculative and overwrought almost to the point of histrionic. In fact, commenters' concerns on this point appear to tacitly suggest that most asylum claims are non-meritorious, as commenters generally failed to address the need for detained aliens with meritorious claims to have those claims adjudicated as efficiently as possible.

The deadline, in and of itself, does not prevent aliens from requesting an extension or explaining why they did not meet the deadline. Aliens may request an extension at any point during the 15-day timeframe following their initial hearing. *See* 8 CFR 1208.4(d). Further, the deadline is not subject to retroactive application and does not infringe on the reliance interests of aliens subject to the current regulations.

In addition, a significant motivation for establishing the deadline stemmed from the Department's consideration of inefficiencies in court operations due to the delayed filing of applications. *See* 85 FR at 59693–94. Commenters' concerns that courts will be "overwhelmed" with *pro se* cases is both speculative and unsupported by evidence. To be sure, immigration courts have seen an increase in cases in recent years due to increased illegal immigration, but the rule will neither increase nor decrease the number of overall cases filed with the immigration courts. *See* EOIR, *Workload and Adjudication Statistics, New Cases and Total Completions—Historical*, <https://www.justice.gov/eoir/page/file/1139176/download> (reflecting that DHS filed a record number of new cases—over 500,000—in FY 2019 and then filed the second highest number of new cases—over 361,000—in FY 2020). Furthermore, most asylum cases have legal representation notwithstanding this dramatic increase in new case filings. *See* EOIR, *Workload and Adjudication Statistics, Current Representation Rates*, <https://www.justice.gov/eoir/page/file/1062991/download>. Nothing in the rule would logically cause representation rates to decline or suggests a reason why aliens would be unable to secure representation. Moreover, ample resources for *pro se* aliens are available in immigration court.

See, e.g., EOIR, *List of Pro Bono Service Providers*, <https://www.justice.gov/eoir/list-pro-bono-legal-service-providers>; EOIR, *Pro Bono Portal*, <https://probono.eoir.justice.gov/>; EOIR, *Immigration Court Online Resource*, <https://icor.eoir.justice.gov/en/>; cf. *EOIR Launches Resources to Increase Information and Representation* (Oct. 1, 2020), <https://www.justice.gov/eoir/pr/eoir-launches-resources-increase-information-and-representation>. In short, suggestions that immigration courts will be “overwhelmed” by pro se cases are not rooted in the current reality of asylum adjudications.

Finally, the Department considered the potential impact of the deadline on nonprofit or pro bono organizations as discussed above. See section C.4.a.ii(6), *supra*.

iv. Deadline Removes Immigration Judge Discretion

Comment: Commenters opposed the deadline because they alleged that it removed all immigration judge discretion by requiring judges to deem an application abandoned if a deadline is not met. Commenters stated that if immigration judges did not exercise discretion in considering the unique circumstances in each case, due process would be violated. Commenters explained that such discretion was necessary for immigration judges to manage their dockets, given that immigration judges were best suited to set filing deadlines. Commenters also contended that the rule allegedly did not allow for an immigration judge to further extend a filing deadline beyond the initial extension for good cause.

Response: Again, commenters misapprehend the rule, existing regulations, and the Department’s administrative interests. Current regulations, 8 CFR 1003.31(c), already provide that the “Immigration Judge may set and extend time limits for the filing of applications and related documents and responses thereto, if any,” and that “[i]f an application or document is not filed within the time set by the Immigration Judge, the opportunity to file that application or document shall be deemed waived.” The rule does not change this longstanding principle, and many commenters failed to acknowledge that immigration judges already have well-established

authority to set filing deadlines and are already authorized to find applications abandoned for failing to comply with such deadlines.

Instead, the rule acknowledges the inefficiency of the current case-by-case system in which immigration judges may set varying filing deadlines for similarly-situated cases. Such a situation is ripe for rulemaking. *See Lopez v. Davis*, 531 U.S. 230, 244 (2001) (observing that “a single rulemaking proceeding” may allow an agency to more “fairly and efficiently” address an issue than would “case-by-case decisionmaking” (quotation marks omitted)); *Marin-Rodriguez v. Holder*, 612 F.3d 591, 593 (7th Cir. 2010) (“An agency may exercise discretion categorically, by regulation, and is not limited to making discretionary decisions one case at a time under open-ended standards.”). The Department is appropriately using rulemaking to provide guidance in order to streamline determinations consistent with its statutory authority. Although the Department acknowledges that the rule may proscribe immigration judge discretion to a degree, the rule’s promotion of consistency, clear deadlines, and continued expeditious treatment of asylum claims, especially meritorious asylum claims, by detained aliens far outweigh its limitation on immigration judge discretion. *See Heckler v. Campbell*, 461 U.S. 458, 467 (1983) (“The Court has recognized that even where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration. . . . A contrary holding would require the agency continually to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding.” (internal citations omitted)); *see also Lopez*, 531 U.S. at 243-44 (“[E]ven if a statutory scheme requires individualized determinations, which this scheme does not, the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority. The approach pressed by *Lopez*—case-by-case decision-making in thousands of cases each year—could invite favoritism, disunity, and inconsistency.” (internal citations omitted)).

In addition, immigration judges are appointed by the Attorney General and act as his delegates in cases that come before them. 8 CFR 1003.10(a). They exercise delegated authority in accordance with the Act and from the Attorney General by way of regulations. 8 CFR 1003.10(b); *see also* INA 103(g)(2), 8 U.S.C. 1103(g)(2). As generally explained by the Supreme Court, “[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.” *Chevron*, 467 U.S. at 843–44 (1984). This section of the rule was promulgated in light of the Act’s silence on a timeframe for filing applications in asylum-and-withholding-only proceedings. Regardless of whether immigration judges previously had discretion under the regulations to set deadlines, this rule amends the regulations to establish in asylum-and-withholding-only proceedings a 15-day deadline from the date of the alien’s first hearing to file an application. EOIR acknowledges this is a change from the previous regulation; however, agencies are “free to change their existing policies” if they provide a reasoned explanation for the change. *Encino Motor Cars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (citing *Nat’l Cable & Telecomm. Ass’n. v. Brand X Internet Services*, 545 U.S. 967, 981–982 (2005)). That explanation was provided in the proposed rule, 85 FR at 59693–94, and is reiterated throughout this final rule. Generally, the Department established a 15-day deadline, subject to an extension for good cause, in order to reduce the risk of degradation or loss of evidence, reduce the risk of delayed grants of protection or relief for meritorious claims, accomplish the regulatory directive that detained aliens receive “expedited consideration” of their applications, and reduce inefficiencies caused by delayed filings. *See id.*

Accordingly, consistent with applicable law and existing regulations, the rule removes individual immigration judge discretion only as it applies to the initial deadline for filing an application for asylum and withholding of removal. *See* 85 FR at 59694. It does not preclude immigration judges from managing their dockets. In fact, the rule expressly provides discretion to immigration judges to extend the filing deadline for good cause shown, 8 CFR 1208.4(d)(1),

and the rule does not affect immigration judges' discretion to allow an alien to amend or supplement the application later in the proceedings, 8 CFR 1208.4(c).

This does not violate due process. Due process in immigration proceedings requires notice and a meaningful opportunity to be heard, neither of which are affected by this rule. *See LaChance*, 522 U.S. at 266 (“The core of due process is the right to notice and a meaningful opportunity to be heard.”). Aliens in asylum-and-withholding-only proceedings will continue to be provided notice of removability, 8 CFR 235.6, 1003.13 (defining “charging document” used by DHS to initiate immigration proceedings before an immigration judge); have an opportunity to present the case to an immigration judge, INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii), and 8 CFR 1208.2(c); and have an opportunity to appeal, 8 CFR 1003.1(b)(9).

Without an initial filing deadline, aliens have no established timeframe in which to expect consideration of their applications for relief or protection. The Department is unaware of any reason why an alien with a valid claim for asylum would oppose a clear, defined filing deadline, especially one that expeditiously allows the alien to obtain the benefit he or she seeks (including release from detention), in favor of uncircumscribed discretion that could delay consideration of the alien's claims.³⁵ In addition, without an initial filing deadline, proceedings may be delayed, resulting in degradation or loss of evidence that is oftentimes crucial to an alien's claims. The Department is similarly unaware of why an alien would oppose a deadline that facilitates expeditious presentation of oftentimes time-sensitive evidence that may be crucial to the outcome of the alien's case.

Finally, commenters misinterpret the rule in regard to the extension provision. There is no limitation to a single good-cause extension. The only requirement for the extension would be

³⁵ The Department recognizes and agrees with the Supreme Court's observation that “as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.” *Doherty*, 502 U.S. at 323. Thus, it is aware that aliens without valid claims may likely prefer substantial delays in the adjudications of their cases and, accordingly, oppose any efforts to increase the efficiency of such adjudications. Nevertheless, the Department finds any rationale for encouraging or supporting the dilatory adjudication of cases both inherently unpersuasive and wholly outweighed by the importance of timeliness and fairness—especially to detained aliens with meritorious claims—in adjudicating asylum applications.

that the alien must demonstrate good cause for any extension. *Cf. Matter of L-A-B-R-*, 27 I&N Dec. at 405 (providing non-exhaustive factors for consideration when determining whether or not a party has demonstrated good cause for a continuance).

v. Deadline Raises Efficiency Concerns

(1) Agency Incorrectly Prioritizes Efficiency Above All Else

Comment: Commenters alleged that the deadline improperly prioritizes efficiency over all other concerns and factors.

Response: Commenters are correct that this section of the rule relates to efficiency. *See* 85 FR at 59694 (“[T]he deadline would ensure only that the application is filed in a timely manner consistent with the streamlined and focused nature of asylum-and-withholding-only proceedings.”). However, commenters are incorrect that the Department considered only efficiency to the exclusion of all other factors. As discussed throughout this rule, the Department considered, *inter alia*, that most aliens subject to the rule are detained, that aliens with meritorious claims have a strong incentive to obtain relief—and release from detention—as quickly as possible, that aliens who have recently claimed a fear of persecution or torture will be well-situated to perfect that claim quickly through the filing of an asylum application, that most asylum applicants have representation, that filing deadlines are a well-established part of immigration court practice and are utilized by courts at all levels, that an even shorter filing deadline has existed for many years for a particular class of asylum applicants with no noted challenges or complaints, that delays in adjudication may risk evidence degradation and may make it more difficult to obtain pro bono representation, that the deadline is not absolute because it may be extended in appropriate circumstances, and that the rule does not alter longstanding rules and practices allowing aliens to supplement an application and to seek to have an immigration consider late-filed evidence. The Department has also fully considered the issues raised by commenters and finds them largely unavailing for the reasons given. Moreover, even if the comments were more founded or persuasive, the Department nevertheless believes that the

concerns asserted by most commenters are outweighed by the benefits provided by the rule, namely consistency in setting filing deadlines, better effectuation of the regulatory directive to provided expeditious consideration to adjudicating asylum applications of detained aliens, faster resolution of meritorious claims, and better protection against claims going stale due to delay.

In drafting the rule, the Department considered that the particular aliens affected—those in asylum-and-withholding-only proceedings—are (1) already subject to removal orders, denied applications for admission, or, for crewmembers, denied permission to land; (2) generally detained; and (3) solely limited to claims for asylum and withholding of removal, which are presented at the outset of the proceeding. *See* 85 FR at 59694. Given the unique position of these aliens, the Department concluded there was “no reason not to expect the alien to be prepared to state his or her claim as quickly as possible,” thereby enabling timely provision of relief or protection for meritorious claims. *Id.* The rule also noted that delaying proceedings risked degradation or loss of evidence, which could affect adjudication of the claim(s).

To be sure, the realities of the pending caseload and the continued increase in new cases filed by DHS in immigration court should not be underestimated. *See* EOIR, *Adjudication Statistics: New Cases and Total Completions – Historical* (Oct. 13, 2020), <https://www.justice.gov/eoir/page/file/1139176/download>; *see also* EOIR, *Adjudication Statistics: Pending Cases, New Cases, and Total Completions* (Oct. 13, 2020), <https://www.justice.gov/eoir/page/file/1242166/download>. Further, the regulation at 8 CFR 1208.5(a) provides that detained aliens should receive “expedited consideration.” Consistent with those observations, this deadline appropriately eliminates unnecessary delays in what should be a streamlined proceeding.

Nevertheless, although the rule referenced the possibility that, without a deadline, aliens may attempt to delay proceedings, the rule did not exclusively rely on that point in establishing the 15-day deadline. Further, most commenters failed to appreciate the rule’s acknowledgment of “unusual situations” in which an alien may need additional time to file an application. *Id.* In such

situations, despite efficiency concerns, the regulation authorizes the immigration judge to extend the deadline for good cause. 8 CFR 1208.4(d)(1). In short, contrary to commenters' arguably tendentious views, efficiency does not trump due process, and nothing in the rule suggests otherwise.

Comment: As an overarching concern, commenters claimed that the Department is attempting to speed up proceedings, by imposing the 15-day deadline, in the name of efficiency. Commenters alleged such action violates due process because aliens and counsel are deprived of meaningful presentation of their cases.

Response: The Department reiterates its response to similar comments, *supra*, and adds the following further response. Due process in immigration proceedings requires notice and a meaningful opportunity to be heard, neither of which are affected by this rule. *See LaChance*, 522 U.S. at 266 (“The core of due process is the right to notice and a meaningful opportunity to be heard.”). The Department will continue to provide aliens in asylum-and-withholding-only proceedings notice of the charges of removability, 8 CFR 235.6, 1003.13 (defining “charging document” used by DHS to initiate immigration proceedings before an immigration judge); an opportunity to present the case to an immigration judge, INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii), and 8 CFR 1208.2(c); and an opportunity to appeal, 8 CFR 1003.1(b)(9). In short, nothing in the rule compromises the provision of notice to an alien or an alien’s ability to be heard on any asylum application. To the contrary, the rule provides an alien clearer notice of the relevant filing deadline and seeks to ensure that an alien will have the opportunity to be heard before memories or other evidence fade. *See generally* 85 FR at 59693-94.

Further, nothing in the rule inhibits an alien’s ability to meaningfully present his or her case. The alien will, in reality, have more than 15 days to file an asylum application, and the immigration judge does not adjudicate the application at the same time that it is filed. An alien’s testimony alone “may be sufficient to sustain the applicant’s burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant’s testimony is credible, is

persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee.” INA 208(b)(1)(B)(ii), 8 U.S.C. 1158(b)(1)(B)(ii). Thus, particularly for meritorious claims, an alien may not need extensive documentation or preparation to support and present his or her claim because an alien can meet the relevant burden of proof through credible, persuasive, and specific testimony. In appropriate cases, aliens can also request an extension of the filing deadline and, if necessary, a continuance of any hearing. In short, commenters’ allegations that the rule prohibits aliens and representatives from presenting their cases are wholly unfounded.

(2) Deadline Does Not Promote Efficiency

Comment: Commenters stated that the 15-day deadline would incentivize the use of “placeholder” applications and boilerplate language, increased filings of motions to amend and supplement, and subsequent piecemeal submission of supplemental evidence. Commenters stated that the Department failed to consider these administrative burdens on both DHS, adjudicators, and court staff. The commenters asserted that allowing at the outset adequate time to submit a well-prepared application, rather than rush an application that consequently needs further paperwork, would benefit the entire immigration system.

Response: As an initial point, commenters did not explain why these allegations are unique to the rule. Many aliens currently file “placeholder” applications and boilerplate language, file motions to amend and supplement, and submit supplemental evidence for review piecemeal; thus, immigration judges are already well-accustomed to such scenarios. Commenters’ suggestion that the rule will cause more of these actions is speculative at best, but even if it were more well-founded, the Department expects any additional burdens to be minimal because it would represent little change from the adjudicatory status quo and immigration judges are already experienced at handling these actions.

Additionally, commenters again misstate or misapprehend the rule. It does not require all paperwork to be filed by the 15-day deadline—only the application. Because the alien, by definition, will have recently made his or her claim to DHS, the claim should be fresh and ripe

for memorialization. In fact, because memories fade over time, it will generally be to the benefit of the alien to memorialize the claim and file the application as soon as possible. Further, commenters simply discount the availability of an extension of the deadline to file the application, 8 CFR 1208.4(d), even though it should obviate concerns about allegedly too-soon filing deadlines. Further, as stated in the proposed rule, the purpose of the initial 15-day deadline was to “ensure only that the application is filed in a timely manner consistent with the streamlined and focused nature of asylum-and-withholding-only proceedings.” 85 FR at 59694. The Department promulgates this rule in part to effectuate the regulatory directive of 8 CFR 1208.5(a) to provide these aliens with expedited consideration.

Finally, commenters’ suggestions on this point may also implicate ethics or professional responsibility issues. Although placeholder applications with boilerplate language are not uncommon currently, in certain circumstances the filing of such documents may warrant disciplinary sanction. *See* 8 CFR 1003.102(u) (“Repeatedly files notices, motions, briefs, or claims that reflect little or no attention to the specific factual or legal issues applicable to a client's case, but rather rely on boilerplate language indicative of a substantial failure to competently and diligently represent the client”).³⁶ To the extent that commenters assert that the rule will cause representatives to violate their ethical and professional responsibility obligations, that assertion is not well-taken. The Department expects that all representatives will comport themselves in accordance with relevant ethics and professional responsibility rules, and nothing in the rule excuses engaging in conduct or behavior that may constitute grounds for disciplinary sanctions. *See* 8 CFR 1003.101(a).

³⁶ Conduct in violation of 8 CFR 1003.102(u) may implicate other disciplinary grounds as well. For example, 8 CFR 1003.102(j)(1) prohibits engaging in frivolous behavior, which includes a practitioner who “knows or reasonably should have known that his or her actions lack an arguable basis in law or in fact, or are taken for an improper purpose, such as . . . to cause unnecessary delay.” Further, 8 CFR 1003.102(o) states that a practitioner may be subject to disciplinary sanctions if he or she “[f]ails to provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.”

Comment: Commenters explained that the vague “good cause” standard for extension requests was prone to inconsistent application that would lead to confusion and an increased number of appeals. Commenters stated this result conflicts with the rule’s purported efficiency justifications.

Response: The Department appreciates commenters’ concerns about the ambiguity of a “good cause” standard and the possibility of inconsistent application. For those reasons, among others, the Department recently proposed regulatory clarifications of the definition of “good cause” in the context of continuance requests in immigration proceedings. *See* Good Cause for a Continuance in Immigration Proceedings, 85 FR 75925 (Nov. 27, 2020). Although that rulemaking is not final, the Department expects that when it is finalized, it will provide helpful guidance to adjudicators considering questions of “good cause” across different situations. Until guidance in that rule is finalized, however, immigration judges will continue to adjudicate requests alleging “good cause”—including extension requests, which are tantamount to requests for a continuance—as they currently do so.³⁷

To the extent that commenters believe an increased number of appeals will result from the rule, such a concern is speculative, ignores the inherently fact-specific and case-by-case nature of asylum adjudications, and tacitly suggests that most asylum claims are unmeritorious necessitating the need for an appeal. Commenters did not support this assertion regarding appeals, and the Department declines to endorse the speculative and unfounded bases for it.

³⁷ The phrase “good cause” currently appears in at least 26 places in the Department’s regulations in 8 CFR chapter V. *See, e.g.*, 8 CFR 1003.20(b), 1003.29, 1240.6. As noted, the Department acknowledges that “good cause” is not currently defined in the regulations and, thus, may be subject to inconsistent application. Nevertheless, the Department did not propose defining “good cause” in the NPRM for this final rule because continuance requests are not limited solely to cases involving asylum applications and, thus, a separate rulemaking on the subject applicable to all cases was more appropriate. *See* 85 FR at 75926-28 (discussing the application of the “good cause” standard in multiple contexts, including those unrelated to an asylum application). Accordingly, the Department does not believe that interjecting a new definition in the final rule would be appropriate, particularly because commenters did not supply a workable suggestion for such a definition. Nevertheless, the Department will consider commenters’ concerns about the ambiguity of the “good cause” standard and the possibility of inconsistent application when it finalizes the separate rule on “good cause.”

vi. Deadline Deprives Aliens of Right to Counsel³⁸

Comment: Commenters alleged that the 15-day deadline, including the extension for good cause, violates an alien’s right to counsel at no expense to the government.³⁹ Commenters alleged that the deadline restricts aliens’ access to meaningful representation because 15 days is too short to hire counsel and for such counsel to prepare the application.

Commenters referenced case law that held that denial of a continuance to seek counsel deprives aliens of their rights—*Chlomos v. INS*, 516 F.2d 310, 313–14 (3d Cir. 1975) and *Njoroge v. Holder*, 753 F.3d 809, 812 (8th Cir. 2014). Commenters stated that those cases are analogous to the 15-day deadline’s deprivation of an alien’s right to counsel.

Relatedly, commenters alleged that the 15-day deadline would undermine the practice of informing aliens of pro bono services at their master calendar hearings, pursuant to 8 CFR 1240.10(a)(2) and (3), thus defeating the purpose of pro bono organizations’ inclusion in the “List of Pro Bono Legal Service Providers.”

Response: As discussed both above and below in more detail, the rule does not affect an alien’s authority or ability to obtain counsel at no expense to the government in proceedings subject to the rule. Accordingly, the Department reiterates its response to similar comments elsewhere in the rule and adds the following further response.

The rule does not limit an alien to 15 days to find counsel. The 15-day deadline applies to the time in which an alien must file an application, absent an extension for good cause, and begins from the date of the first hearing before the immigration judge. The deadline does not

³⁸ This section focuses specifically on representation by attorneys because commenters’ concerns focused specifically on attorneys. However, the Department notes that aliens may also be represented by a wide range of representatives beyond traditional attorneys. *See generally* 8 CFR 1292.1 (providing who may represent aliens in proceedings before EOIR).

³⁹ In removal proceedings before an immigration judge or the Board aliens “have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.” INA 292, 8 U.S.C. 1362; *see also* INA 240(b)(4)(A), 8 U.S.C. 1229a(b)(4)(A). Although the proceedings subject to the rule under 8 CFR 1208.2(c)(1) are not removal proceedings, they are generally governed by the same procedural rules as removal proceedings set forth in 8 CFR part 1240, subpart A. 8 CFR 1208.2(c)(3)(i). Thus, they incorporate by reference an alien’s privilege of being represented at a hearing conducted under 8 CFR 1208.2(c). *See* 8 CFR 1240.3 (“The respondent may be represented at the hearing by an attorney or other representative qualified under 8 CFR part 1292.”).

establish a time period in which an alien must secure representation, and an alien may secure representation at any time—before, during, or after the alien files an asylum application.

In particular, nothing precludes an alien from hiring counsel before the first hearing, and as noted above, some aliens subject to the rule may have already been in the United States for a considerable amount of time and, thus, have had years to procure counsel. An alien may procure representation at multiple points between the time the alien expresses a fear of return and the commencement of the 15-day period, as the alien receives information that may assist in procuring counsel multiple times before the 15-day period runs, even without an extension of that period.

As an initial point, every alien detained by DHS, including those subject to the rule, is “notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States.” 8 CFR 236.1(e). Through that communication, an alien’s consulate may assist the alien with obtaining representation, including an “accredited official” of the alien’s country of nationality. *See* 8 CFR 1292.1(a)(5) (authorizing an accredited official, defined as “[a]n accredited official, in the United States, of the government to which an alien owes allegiance, if the official appears solely in his official capacity and with the alien’s consent,” to represent an alien in immigration court proceedings).

Although aliens alleging persecution by the government of their country of nationality may not be expected to utilize that same government to obtain representation, other mechanisms also exist to assist aliens with understanding their situation and obtaining representation. For example, DHS detention standards authorize the presentation of information to detained aliens regarding U.S. immigration law and procedures and their rights and options within the U.S. immigration system. *See, e.g., Standard 6.4(I), National Detention Standards* (rev. 2019), https://www.ice.gov/doclib/detention-standards/2019/6_4.pdf (“Facilities shall permit authorized persons to make presentations to groups of detainees for the purpose of informing them of U.S. immigration law and procedures, consistent with the security and orderly operation of each

facility. ICE/ERO encourages such presentations, which instruct detainees about the immigration system and their rights and options within it.”). Additionally, DHS detention centers typically provide detainees with EOIR’s list of pro bono representatives and also provide links to that list publicly. *See, e.g.,* Laredo Detention Center, *Legal & Case Information, Nationwide pro bono representatives listing*, <https://www.ice.gov/detention-facility/laredo-detention-center>. Thus, aliens may be informed of options and the availability of representation while in DHS custody.

Additionally, for aliens subject to credible fear procedures, following an alien’s indication to apply for asylum, expression of fear of persecution or torture, or expression of fear of return to his or her country, the referring officer provides a written disclosure on Form M-444 that describes the alien’s “right to consult with other persons prior to the interview and any review thereof at no expense to the United States Government.” 8 CFR 235.3(b)(4)(i)(B), 1235.3(b)(4)(i)(B). Next, prior to the credible fear interview, the alien is “given time to contact and consult with any person or persons of his or her choosing.” 8 CFR 235.3(b)(4)(ii), 1235.3(b)(4)(ii). Once the asylum officer determines that an alien has a credible fear, the alien is provided Form I-863, Notice of Referral to Immigration Judge, *see* 8 CFR 235.6(a)(2), 1235.6(a)(2), which includes an advisal regarding the alien’s right to representation at no expense to the government and an attached copy of EOIR’s pro bono list. *Cf.* INA 239(a)(1)(E), 8 U.S.C. 1229(a)(1)(E) (requiring the provision of a list of available pro bono representatives at the time a notice to appear is issued). Moreover, for all cases subject to the rule, DHS provides a copy of the pro bono list as part of the notice to the alien when it issues the Form I-863.

Finally, at the first hearing, the immigration judge also (1) advises the alien that he or she may apply for asylum in the United States or withholding of removal to those countries; (2) makes available the appropriate application forms; (3) advises the alien of the privilege of being represented by counsel at no expense to the government and of the consequences, pursuant to section 208(d)(6) of the Act, of knowingly filing a frivolous application for asylum; and (4) provides to the alien a list of persons who have indicated their availability to represent aliens in

asylum proceedings on a pro bono basis. 8 CFR 1240.11(c)(1)(i)–(iii). These procedures are enshrined in current regulations and are not altered by the rule. In other words, existing regulations already suggest that an immigration judge will provide an alien with an asylum application and the pro bono list at the same hearing and, presumably, will also set a deadline for the filing of the application provided. Commenters did not address this existing procedure, did not appear to recognize that the rule does not alter it, except to provide a clear filing deadline subject to an extension, and did not explain why this existing procedure is problematic.⁴⁰

Given the multiple points at which aliens are advised of the availability of consultation or representation prior to the completion of the 15-day deadline and the availability of an extension of that deadline for good cause, the Department rejects commenters’ assertions that the rule inhibits or eliminates an alien’s meaningful opportunity to obtain representation.⁴¹ Moreover, as noted elsewhere, in practice, aliens have far more time than 15 days to obtain representation.

Similarly, the rule does not deprive counsel of time to prepare an alien’s claim. Because the government is not required to provide aliens with representation, the alien is responsible for securing or consulting with counsel, and the time afforded counsel is often a function of how

⁴⁰ Most, if not all, commenters also failed to acknowledge that the INA provides only a minimum 10-day window for an alien to obtain representation before an alien’s first hearing in removal proceedings, INA 239(b)(1), (3), 8 U.S.C. 1229(b)(1), (3), and by practice EOIR extends that period to asylum-and-withholding-only proceedings. Thus, an alien will have the statutorily-required minimum amount of time to obtain counsel, and the rule does not alter that procedure.

⁴¹ Despite the availability of the option for representation at no expense to the government in proceedings subject to this rule, 8 CFR 1240.3, and the fact that the overwhelming majority of aliens seeking asylum obtain representation, the Department recognizes that a certain small percentage of aliens do not obtain representation. The Department understands that some aliens do not secure representation because they do not wish to pay the fee charged by a potential representative. The Department also understands that many representatives, due to ethical or professional responsibility obligations, will not take cases of aliens who are ineligible or present weak claims for relief or protection from removal because they do not wish to charge money for representation when representation is unlikely to affect the outcome of the proceeding. These situations illustrate only that some aliens may not ultimately secure representation for reasons common to issues of representation in all civil cases—i.e., the cost of the representation and the strength of the case—not that aliens are limited or prohibited from obtaining representation by this or any other Department regulation. *See United States v. Torres-Sanchez*, 68 F.3d 227, 231 (8th Cir. 1995) (“Although Torres-Sanchez expressed some frustration over his attempt to obtain counsel, that frustration, in our view of the record, stemmed from his realization that he faced the inevitable consequence of deportation, not from a lack of opportunity to retain counsel. In any event, the mere inability to obtain counsel does not constitute a violation of due process.”). As the Department is not involved in discussions between respondents and potential representatives, it cannot definitively state every reason that an alien who seeks representation may not obtain it. Nevertheless, it can state that this rule does not limit or restrict any alien’s ability to obtain representation in immigration proceedings.

diligent an alien is in seeking representation. *See* INA 240(b)(4)(A), 8 U.S.C. 1229a(b)(4)(A); *Cf. Hidalgo-Disla v. INS*, 52 F.3d 444 (2d Cir. 1995) (finding an immigration judge’s decision to proceed with a hearing after providing an alien 26 days to seek counsel was not erroneous and dismissing as frivolous an appeal asserting that it was); *Ghajar v. INS*, 652 F.2d 1347, 1348–49 (9th Cir. 1981) (“Ghajar’s assertion that she was denied due process because she was not granted a second continuance to allow her attorney further time to prepare for the deportation hearing is without merit. . . . One full month elapsed between the date of the show cause order and the date on which the hearing ultimately took place. . . . The immigration judge did not abuse his discretion in refusing to grant a second continuance.”). Further, a representative may seek an extension of the deadline to file an application and may seek a continuance of any scheduled hearing. Thus, the rule’s 15-day deadline itself does not deprive counsel of adequate time to prepare the application.

To reiterate, the deadline does not affect an immigration judge’s ability to grant a continuance for good cause, *see* 8 CFR 1003.39, including one to find counsel.⁴² The 15-day deadline applies to the time period in which an alien must file an application, absent an extension for good cause; it does not establish a time period in which an alien must secure counsel and thus does not interfere with an immigration judge’s discretion to grant a continuance in that regard. For these reasons, the deadline does not deprive an alien of the opportunity to obtain counsel of his her choosing at no expense to the government.

Likewise, the deadline does not affect the requirement that an immigration judge advise the alien of (1) the right to representation at no expense to the government, and (2) the availability of pro bono legal services and whether the alien received a list of such pro bono legal

⁴² The Department recognizes that aliens should receive a fair opportunity to secure counsel. *Matter of C-B-*, 25 I&N Dec. 888 (BIA 2015). The Board has not specifically defined what a reasonable amount of time is for purposes of obtaining representation, and the respondent in *Matter of C-B-* was given only eight days between the issuance of an NTA and his first hearing, in apparent contravention of INA 239(b)(1), 8 U.S.C. 1229(b)(1). *See id.* at 889. Nevertheless, *Matter of C-B-* cannot be interpreted to contradict the INA, and the INA clearly indicates that 10 days between the service of a notice to appear and the first hearing is a sufficient amount of time to obtain representation. *See* INA 239(b)(3), 8 U.S.C. 1229(b)(3). Accordingly, this rule is not in tension with *Matter of C-B-* and does not deviate from recognizing the statutory parameters for providing time for an alien to obtain representation.

service provider, *see* 8 CFR 1240.10(a)(1) and (2), at the first hearing, nor does it affect the requirement of the immigration judge to provide certain advisals to aliens with an intent to apply for asylum, including the provision of an asylum application and a copy of the pro bono list, 8 CFR 1240.11(c)(1). In fact, the rule makes it explicit that immigration judges must follow those procedures in proceedings conducted under 8 CFR 1208.2(c)(1) and (2). 8 CFR 1208.4(d).

vii. Deadline is Biased in Favor of the Government

Comment: Commenters explained that, under recently enacted rules, the government could “file evidence without it being contested,” thereby increasing bias toward the government in these proceedings.

Response: In response to commenters’ specific concerns with evidence filed by the government, that concern relates to a separate rulemaking and is thus outside the scope of this final rule.

In regard to a general concern of bias towards the government, which the Department understands comments to have implicitly referenced, the Department disagrees that the deadline disfavors aliens or shows bias in favor of the government. The deadline is intended to effectuate efficient processing, consistent with the regulatory directive that applications of detained aliens be given “expedited consideration” where possible, 8 CFR 1208.5(a), and is fully consistent with longstanding authority to set deadlines in immigration proceedings, 8 CFR 1003.31(c). Efficient processing benefits both the government and aliens, especially aliens who have meritorious claims.⁴³ Given the pending caseload and the recent uptick in proceedings initiated by DHS,⁴⁴ the government has an interest in timely adjudications, consistent with applicable law and

⁴³ To the extent commenters suggest that the rule disadvantages aliens without meritorious claims by making it more difficult for such aliens to delay their removal from the United States, the Department finds such a suggestion unavailing. Overall, the Department finds any rationale for encouraging or supporting the dilatory adjudication of cases, especially cases lacking merit, both inherently unpersuasive and wholly outweighed by the importance of timeliness and fairness—especially to detained aliens with meritorious claims—in adjudicating asylum applications.

⁴⁴ *See* EOIR, *Adjudication Statistics: New Cases and Total Completions – Historical* (Oct. 13, 2020), <https://www.justice.gov/eoir/page/file/1139176/download>; *see also* EOIR, *Adjudication Statistics: Pending Cases, New Cases, and Total Completions* (Oct. 13, 2020), <https://www.justice.gov/eoir/page/file/1242166/download>.

regulations, so that it may continue to accomplish its mission of fairly, expeditiously, and uniformly interpreting and administering the nation's immigration laws. Likewise, detained aliens should want their claims considered in a timely fashion in order to receive relief or protection and subsequent release from detention as quickly as possible.

Finally, as discussed *supra*, the Department rejects any insinuation that its adjudicators are biased or that it is engaging in this rulemaking for biased reasons against either party in immigration proceedings. Generalized, ad hominem allegations of bias or impropriety are insufficient to “overcome a presumption of honesty and integrity in those serving as adjudicators.” *Withrow*, 421 U.S. at 47. Accordingly, the Department declines to accept commenters’ unfounded suggestions of bias. *Chem. Found., Inc.*, 272 U.S. at 14–15 (“The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.”).

viii. Conflicts with the INA

Comment: Commenters argued that the 15-day filing deadline conflicts with the INA for multiple reasons. For example, many commenters argued that the 15-day filing deadline conflicts with the statutory one-year bar for asylum applications. INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B). Commenters further argued that applying the 15-day filing deadline to aliens’ applications for withholding of removal and protection under the CAT conflicts with the Act because Congress did not include any similar filing deadline requirement for those applications. *See generally* INA 241(b)(3), 8 U.S.C. 1231(b)(3).

Response: As an initial point, most, if not all, commenters on this issue failed to recognize or address (1) the existence of the 10-day filing deadline in 8 CFR 1208.5(b) with no noted challenges to its alleged inconsistency with the INA; (2) the longstanding ability of Department adjudicators, under 8 CFR 1003.31(c) and *Matter of R-R-*, 20 I&N Dec. 547, 549 (BIA 1992) (“The Board has long held that applications for benefits under the Act are properly

denied as abandoned when the alien fails to timely file them.”), to set filing deadlines, including for asylum applications within one year of an alien’s arrival in the United States; (3) the affirmation of the enforcement of such deadlines by the Board and by Federal courts, including for deadlines set well within one year of arrival, *see, e.g., Matter of R-C-R-*, 28 I&N Dec. 74, 75–77 (BIA 2020) (affirming a decision finding an alien’s opportunity to file for asylum abandoned for an alien who entered the United States on March 13, 2019, and failed to file an asylum application by the deadline set by the immigration judge of December 6, 2019); *Jie Zhu v. U.S. Att’y Gen.*, 648 F. App’x 957, 960-62 (11th Cir. 2016) (affirming a decision finding an alien’s opportunity to file for asylum abandoned for an alien who entered the United States on June 8, 2014, and failed to file an asylum application by the deadline set by the immigration judge of September 3, 2014); *Rageevan v. U.S. Att’y Gen.*, 151 F. App’x 751, 753–56 (11th Cir. 2005) (affirming a decision finding an alien’s opportunity to file for asylum abandoned for an alien who arrived in the United States on January 18, 2004, and failed to file a complete asylum application by the deadline set by the immigration judge of May 7, 2004); *cf. Alsamhour v. Gonzales*, 484 F.3d 117, 123 (1st Cir. 2007) (“The IJ was then well within his discretion to find that, as against [the alien’s] disregard of a known deadline, the government’s strong interest in the orderly and expeditious management of immigration cases justified the denial of a continuance.”); (4) Federal case law holding that a filing deadline can be applied to an application for withholding of removal under the INA and for protection under the CAT, *see, e.g., Taggar v. Holder*, 736 F.3d 886, 889-90 (9th Cir. 2013) (“Taggar separately argues that no deadline can lawfully be imposed on applications for relief under the Convention Against Torture. This is incorrect.”); *Lakhavani v. Mukasey*, 255 F. App’x 819, 822-23 (5th Cir. 2007) (“Other circuits have held that petitioners can waive CAT or asylum claims by failing to raise them at the time designated by the IJ under 8 C.F.R. § 1003.31. The IJ gave Lakhavani the opportunity to file an application for withholding at his April 2002 hearing, and he failed to do so. The BIA correctly affirmed the IJ’s decision denying Lakhavani leave to file an untimely

application for withholding of removal.” (internal citations omitted)); *cf. Foroglou v. Reno*, 241 F.3d 111, 113 (1st Cir. 2001) (“On review, Foroglou's main argument is that the Board's time limit on petitions to reopen is itself invalid because it would result in denying relief to deportees who might then suffer torture, contrary to the [CAT] and to the policies embodied in federal legislation and regulations that implement the [CAT] or otherwise protect the rights of aliens. The short answer to this argument is that Foroglou points to nothing in the [CAT] or legislation that precludes the United States from setting reasonable time limits on the assertion of claims under the [CAT] in connection with an ongoing proceeding or an already effective order of deportation. Even in criminal cases, constitutional and other rights must be asserted in a timely fashion.”); and, (5) the logical and legal ramifications of the position that an immigration judge must wait in every case of an alien who has been in the United States less than one year—and regardless of whether the alien is detained—until one year has elapsed from the time of an alien’s arrival in the United States before proceeding with the case to ensure that an alien is provided one year in which to file for asylum. To the extent that commenters’ concerns on this point failed to address relevant law or to engage with the implications of their position, especially for detained aliens, the Department finds them unavailing.

Under what is commonly referred to as the “one-year bar,” an alien seeking asylum must generally file his or her application within one year of arrival in the United States. INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B) (providing that an alien may not apply for asylum “unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien’s arrival in the United States”); *see also* 8 CFR 1208.4(a)(2). An alien may be excepted from the one-year requirement due to “changed circumstances [that] materially affect the applicant’s eligibility for asylum or extraordinary circumstances related to the delay in filing an application within” the one-year period. INA 208(a)(2)(D), 8 U.S.C. 1158(a)(2)(D); *see also* 8 CFR 1208.4(a)(4) and (5).

The ability of immigration judges to set and enforce filing deadlines for applications does not conflict with the statutory one-year bar. Immigration judges have long maintained the authority to set and enforce time limits on the filing of applications for asylum and withholding of removal in the proceedings before them. *See Matter of Jean*, 17 I&N Dec. 100, 102 (BIA 1979) (explaining that “it is well within the authority of the immigration judge . . . to set reasonable time limits for the filing of written applications for asylum”) Similarly, immigration judges have long maintain the authority to set and enforce time limits on the filing of applications for protection under the CAT. *Taggar*, 736 F.3d 890 (holding that immigration judges can set and enforce deadlines for the filing of CAT applications). This authority reflects “the government’s strong interest in the orderly and expeditious management of immigration cases.” *Gomez-Medina v. Holder*, 687 F.3d 33, 37 (1st Cir. 2012). Although Congress enacted a maximum outer limit of one year from arrival for aliens to apply for asylum in INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B), nothing in that provision⁴⁵ or the INA precludes immigration judges from setting a specific deadline for the filing of an asylum application in immigration proceedings in order to promote the “orderly and expeditious management of immigration cases.” *Gomez-Medina*, 687 F.3d at 37.

⁴⁵ Congress enacted the one-year bar in INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B) against the backdrop of longstanding Department regulations and practice finding asylum applications to be abandoned if they were not filed by a deadline specified by an immigration judge, e.g., *Matter of R-R-*, 20 I&N Dec. at 549 (“The Board has long held that applications for benefits under the Act are properly denied as abandoned when the alien fails to timely file them.”), and it could have easily phrased it in the affirmative to state that an alien shall be afforded one year from the date of arrival in order to apply for asylum, rather than by framing it in the negative as an outer deadline, INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B) (“paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien’s arrival in the United States”). In other words, the statutory phrasing indicates that an alien has, at most, one year after arrival to apply for asylum—not at least one year, as urged by commenters. Moreover, Congress’s phrasing against the backdrop of longstanding agency practice is additional evidence that the language in in INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B) was not intended to displace the Department’s ability to set filing deadlines in immigration proceedings for asylum applications. *Cf. NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 275 (1974) (“[C]ongressional failure to revise or repeal the agency’s interpretation is persuasive evidence that the interpretation is the one intended by Congress”). Indeed, as discussed, *infra*, if commenters were correct, then the Department’s practice of setting filing deadlines prior to the enactment of INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B) was arguably inappropriate because the INA provided no deadline for an alien to apply for asylum and, thus—according to the commenters’ logic—immigration judges could never have set a deadline consistent with the statute. However, there is no evidence, either before or after the enactment of INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B) that Congress intended to displace an immigration judge’s authority to set filing deadlines in order to manage dockets efficiently.

Moreover, if the Department accepted commenters' logic, aliens in removal proceedings would, for example, be able to delay their proceedings for up to a year by simply stating that they intend to file an asylum application by some future date. *See Matter of Jean*, 17 I&N Dec. at 102 (“To allow otherwise would permit a deportable alien to avoid the conclusion of his deportation case and thus his departure by merely requesting the relief but not choosing to file the claims.”). This is an erroneous reading of the statute and regulations and would eviscerate immigration judges' ability to manage proceedings. *See, e.g.*, 8 CFR 1240.1(c) (providing immigration judges the ability to “regulate the course of the hearing”).

Commenters' reading of INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B) would also raise additional issues, including potential constitutional issues related to prolonged detention. For example, under the commenters' view, a detained alien, such as one covered by the rule, could continue to delay his or her proceedings up to a year after arrival without filing for asylum while simultaneously raising arguments that he or she should be released from custody because the prolonged detention has implicated constitutional rights. *See, e.g., Velasco Lopez v. Decker*, 978 F.3d 842, 852 (2d Cir. 2020) (“Detention under [INA 236(a),] § 1226(a) is frequently prolonged because it continues until all proceedings and appeals are concluded. . . . The longer the duration of incarceration, the greater the deprivation.”). Nothing in INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B), however, contemplates its use as a basis for either prolonging immigration proceedings or as a wedge to obtain an alien's release from detention, especially in situations where Congress has otherwise indicated that proceedings should be expedited. *Cf. Matter of L-N-Y*, 27 I&N Dec. 755, 759 (BIA 2020) (“The Immigration Courts and the Board expedite the adjudication of cases involving detained aliens, recognizing the liberty interest of detained aliens and the interest of the Government to reasonably limit the expense of detention.”). Additionally, if commenters were correct that INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B) provides an alien with an absolute right to file for asylum at any time within one year after arrival in the United States, then, by that same logic, the lack of a filing deadline prior to the enactment of that

provision meant that previously aliens had an absolute right to apply for asylum at any time after arrival. However, the Department is unaware of any court adopting such a position, nor is it aware of any court adopting the view urged by commenters regarding the relationship between INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B) and the 15-day deadline in the rule. In short, although the Department acknowledges and has fully considered commenters' assertions on this point, it finds them unavailing and unpersuasive for all of the reasons given herein.

ix. Recommendations

Comment: Many commenters provided a wide range of recommendations to the Department.

For example, commenters suggested that if EOIR imposed this short deadline, then government should provide aliens with attorneys and translators to ensure that they can meet the deadline. Some commenters acknowledged the Department's concern regarding degradation or loss of evidence, but they suggested a deadline longer than 15 days to balance evidence-related concerns with concerns that aliens need adequate time to gather evidence.

Commenters suggested that the Department should include an exception to the filing deadline for pandemic-related delays, such as filing delays due to COVID-19.

Commenters asserted that aliens should be granted a "per se extension" whenever due process rights are threatened, such as the right to counsel, to ensure those rights are not violated. For example, the commenters explained that an alien who seeks to retain counsel should get an automatic extension on the 15-day deadline to find representation who can assist with the application. The commenters predicted that the exceptions would render the rule unworkable.

One commenter, who generally supported the Department's inclusion of the 15-day submission deadline, recommended that the Department provide the same 15-day deadline for aliens in "withholding-only" proceedings under 8 CFR 1208.2(c)(2).

Response: The Department acknowledges and appreciates the commenters' recommendations. It has considered all of them and adopted one as discussed below. Some

recommendations are beyond the scope of this rulemaking and potentially beyond the scope of rulemaking altogether. For example, the Department cannot simply provide aliens a right to counsel or to personal translators in all immigration cases by regulation due to the significant amount of Congressional appropriations—far in excess of EOIR’s current budget—that would be required to effectuate such a rule. Further, as such a proposal was not part of the NPRM—and implicates a potentially massive overhaul of immigration court procedures—it would not be appropriate to include it in a final rule without additional comment and study.

Regarding recommendations related to exceptions to the deadline, the Department believes that the rule’s allowance of an extension of that deadline for good cause addresses and responds to those recommendations, as well as the continued availability of continuances in appropriate cases, which is not affected by the rule. The Department recognizes that no rule can cover every potential scenario, particularly in the context of hundreds of thousands of cases with asylum applications. Consequently, it declines to establish any per se rules about whether an extension or a continuance is warranted and expects that immigration judges will adjudicate such requests consistent with applicable law and mindful of an alien’s detention status and the direction in 8 CFR 1208.5(a) to adjudicate such cases expeditiously.

The Department agrees with the commenter who recommended applying the 15-day deadline to applications for statutory withholding of removal and protection under the CAT for aliens in proceedings under 8 CFR 1208.2(c)(2). The Department sees no reason to distinguish between aliens subject to proceedings under 8 CFR 1208.2(c)(1) and those subject to proceedings under 8 CFR 1208.2(c)(2), as both groups are generally detained. Moreover, the reasons underpinning the application deadline for 8 CFR 1208.2(c)(1)—e.g., most aliens subject to the rule are detained, that aliens with meritorious claims have a strong incentive to obtain relief or protection—and potentially release from detention—as quickly as possible, that aliens who have recently claimed a fear of persecution or torture will be well-situated to perfect that claim quickly through the filing of an application, that filing deadlines are a well-established part

of immigration court practice and are utilized by courts at all levels, that an even shorter filing deadline has existed for many years for a particular class of asylum applicants with no noted challenges or complaints, that delays in adjudication may risk evidence degradation and may make it more difficult to obtain pro bono representation, that the deadline is not absolute because it may be extended in appropriate circumstances, and that the rule does not alter longstanding rules and practices allowing aliens to supplement an application and to seek to have an immigration consider late-filed evidence—apply with equal force to proceedings under 8 CFR 1208.2(c)(2). Accordingly, in response to the recommendation of at least one commenter, the final rule adopts the commenter’s suggestion and edits the language in 8 CFR 1208.4(d)(1) to make the 15-day deadline, with the possibility of an extension for good cause, applicable to aliens in proceedings under 8 CFR 1208.2(c)(2) seeking statutory withholding of removal or protection under the CAT.

b. Concerns with Changes Regarding Refiling Incomplete Applications

i. Completeness Requirement

Comment: Commenters expressed concerns about requiring the immigration court to reject applications that are incomplete or that have other minor mistakes without providing any exceptions. Commenters explained that this provision would result in applications being rejected for technicalities or due to minor instances of confusion, citing, for example, hypotheticals of the immigration court denying the application of an asylum seeker without a middle name or children because the corresponding name and children boxes were purposefully left blank.

Commenters asserted that the rule was unnecessary and complained that the Department did not address why the change was necessary—specifically, why applicants could no longer complete their applications before the court during a hearing.

Commenters also stated that it will be difficult, if not impossible, for some applicants to submit a complete application due to a lack of command of the English language, a lack of access to supporting evidence, and the effects of trauma. Other commenters noted that the

structure of the form itself increases this difficulty because of the number of questions and blank boxes; the formatting of multiple boxes or lines per questions; and a lack of clarity regarding how to address a question that does not apply based on answering “no” to the immediately preceding question. Commenters noted that their concerns may be even greater in the future if DHS moves forward with codifying proposed amendments to the Form I-589, *Instructions*, which would add to the form’s length and general complexity.

Other commenters suggested that inaccuracies and mistakes will be inevitable for aliens subject to the filing deadline imposed by the rule.

Numerous commenters compared the rule’s requirement to what commenters described as USCIS’s policy of rejecting applications that fail to follow form instructions, namely answering every question. Commenters explained that the USCIS policy has led to confusion and inconsistencies, and commenters predicted that the rule will create similar issues before the immigration courts.

Lastly, commenters expressed concerns that the rule removes the completeness determination from immigration judges and places it on untrained agency staff; such a shift, commenters alleged, is inefficient and will further strain an already overburdened system.

Response: As an initial matter, commenters misconstrue the changes implemented by this rule or fail to acknowledge what the rule does not actually change. For instance, it does not create a new completeness requirement for the submission of Forms I-589. Indeed, this requirement already exists in the relevant regulations. *See* 8 CFR 1208.3(c)(3) (“An asylum application that does not include a response to each of the questions contained in the Form I-589, is unsigned, or is unaccompanied by the required materials specified in paragraph (a) of this section is incomplete.”); *see also* Form I-589 Instructions, Pt. 1, Sec. V. (“You must provide the specific information requested about you and your family and *answer all the questions asked*. If any question does not apply to you or you do not know the information requested, answer “none,” “not applicable,” or “unknown.”) (emphasis in original). This rule merely clarifies this

existing standard by including the necessity to follow the Form I-589 instructions and other filing-related regulations.

In response to commenters who requested an explanation for why applicants would no longer be allowed to supply missing information during a hearing before an immigration judge, the Department notes that such a process does not comply with these existing regulations.⁴⁶ By ensuring that applications are complete at filing, the parties and court can be confident that they are proceeding with an adjudication on the full application and, as noted in the proposed rule, that the application is completed as timely as possible. Further, requiring a complete application protects the alien by ensuring that there are no incorrect assumptions regarding the facts of an alien's claim or personal status as set out in the application.⁴⁷ Moreover, allowing applicants to complete applications in court is inefficient and uses valuable court time that is better spent adjudicating issues in dispute. *See* 8 CFR 1240.11(c)(3) (requiring a hearing on an asylum application only when necessary "to resolve factual issues in dispute"). As noted in the proposed rule, however, aliens may continue to supplement or amend a previously filed asylum application after the application is filed, subject to an immigration judge's discretion. *See* 8 CFR 1208.4(c).

The Department also disagrees with concerns regarding agency staff making completeness determinations rather than adjudicators and categorically rejects the ugly, underlying insinuation that its legal support employees are too ignorant or incompetent to determine whether an application is complete. By requiring all questions to be answered, there is no room for discretion as to what responses are necessary; thus, all applicants are subject to the same requirements. Similarly, commenters did not explain why the acceptance of an incomplete

⁴⁶ To the extent that immigration courts may have previously failed to follow the existing regulations, the Department reiterates that its employees are expected to follow all applicable regulations.

⁴⁷ The Department further notes that the recently-finalized joint rule, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, signed by the Attorney General and the Acting Secretary of Homeland Security on December 2, 2020, codifies an immigration judge's authority to pretermit asylum applications that fail to present a *prima facie* claim for relief. *See* 85 FR at 36277. Even if that codification does not go into effect, immigration judges nevertheless possess authority to pretermit legally deficient asylum applications in certain instances. *Id.* Thus, this rule would ensure that aliens are afforded all opportunities to correct deficiencies in their applications in order to ensure that their claim for relief is fully presented before an immigration judge would consider any questions of pretermission.

application would be either desirable or efficient, and the Department is aware of no bases for doing so. The completeness requirement provides a clear, logical, and straightforward guidepost and one that most individuals understand. Moreover, a completeness requirement has existed in the regulations for many years with no noted difficulties; to the contrary, asylum applications have risen significantly in recent years, even with the requirement that the application be complete. *See, e.g.,* EOIR, *Adjudication Statistics: Total Asylum Applications* (Oct. 13, 2020), <https://www.justice.gov/eoir/page/file/1106366/download>. Immigration court staff receive training on reviewing filings for sufficiency and regularly reject deficient filings as part of their duties.

Regarding commenters' concerns about the grammatical structure of the Form I-589's questions, the amount of questions, or the English language requirement, the Department notes that this rule does not make any changes to the Form I-589 itself. Further, to the extent that commenters' suggest that the Department should amend the Form I-589 to address such concerns, the Department notes that although the Form I-589 is a shared form between EOIR and DHS, it is managed and updated by DHS. Accordingly, altering the form is beyond the scope of this rulemaking and the Department's authority, and commenters' concerns about the form itself are most appropriately directed to DHS.

Similarly, commenters' concerns about USCIS are beyond the scope of this rulemaking, as USCIS is a separate agency beyond the purview of the Department. Further, the Department reiterates that the completeness requirement is not novel; rather, it has been an existing requirement for many years, and the Department is unaware of any issues, challenges, or complaints regarding it previously. Thus, commenters' suggestion that an existing regulation will lead to future confusion at EOIR is purely speculative and unpersuasive.

Regarding concerns about applicants' past trauma and limited access to evidence, and its effect on applicants' ability to complete their applications, the Department reiterates that the completeness requirement has existed for many years and that allegations of trauma or access to

evidence have not previously been alleged to be such a pervasive or systemic issue as to warrant an exception to the general rule that applications should be filled out completely. The Department certainly recognizes the potential existence of trauma for aliens with meritorious claims and associated difficulties, but this rule, overall, helps ensure that such aliens receive expeditious consideration of their claims and favorable adjudications so that they can obtain the relief they deserve without any undue delay. Moreover, at a minimum, every applicant must present his or her case for adjudication, which requires filing an application in accordance with the regulations and form instructions. This includes responding to every question on the Form I-589 and submitting any supporting evidence.

The Department rejects the notion that the completeness requirement is unnecessarily complicated or confusing, and it is unaware of any situation—and commenters did not provide one—in which an incomplete application is deemed acceptable or even desirable. Rather, the Department believes that incomplete applications may cause confusion and that such confusion will be eliminated by requiring applications to be fully completed before they are filed and accepted for adjudication. The Department believes requiring completion of the Form I-589 will avoid potentially differing interpretations from immigration staff as to what is “complete” and will prevent the possibility of uneven filing acceptance practices at the immigration courts. In addition, by following this requirement, applicants can ensure that they did not inadvertently fail to complete any fields and can be confident that the immigration judge is adjudicating a complete asylum application.

Lastly, commenters’ assertions that incomplete applications will be rejected and result in a denial of relief are incorrect. The return of an incomplete application is not an adjudication on the merits and does not automatically result in an immediate “denial” of relief. Rather, incomplete applications will be returned to the applicants, who will have 30 days to complete and return the application. This is discussed in more detail in section II.C.4.b.iii.

ii. Removal of Deadline for Immigration Court

Comment: Many commenters objected to the proposed amendment at 8 CFR 1208.3(c)(3) that an alien's incomplete asylum application would not be deemed complete if the immigration court failed to return the incomplete application within 30 days. Instead, the immigration courts would continue to reject incomplete applications in a "timely" manner but without a maximum allowable period of time.

Commenters objected that the rule would give the immigration courts an indeterminate amount of time to reject asylum applications for incompleteness. Commenters raised concerns that the lack of a deadline would make proceedings less predictable and make it more difficult for asylum seekers to appropriately budget their savings before being able to possibly obtain work authorization.

Other commenters argued that the removal of the deadline for the immigration courts is contrary to the Department's justifications elsewhere in the rule to ensure that proceedings occur in a timely and predictable manner and noted that shortening the 30-day time period for the rejection of applications, rather than removing the deadline altogether, would instead be more efficient. Other commenters argued that the Department did not sufficiently justify this provision in general.

Further, commenters stated that the rule's requirement that immigration courts return incomplete asylum applications to applicants in a "timely fashion" to be vague and arbitrary and argued that the Department should provide some sort of definition or specific standard. At least one commenter expressed concern that the standard is vague enough to allow gamesmanship, citing a hypothetical where the immigration judge waits to reject an application as incomplete until just after the alien's one-year filing deadline expires.

Moreover, commenters expressed general disbelief that the courts would return incomplete applications or alert aliens of deficient applications in a timely manner, noting, for example, general processing delays by USCIS or other agencies.

Commenters also thought it was generally unfair that asylum seekers would be held to time restrictions, such as a 30-day correction deadline, while immigration courts are not held to a similar standard.

Response: As an initial point, the Department categorically rejects the suggestion of at least one commenter that an immigration judge would engage in gamesmanship by purposefully delaying the rejection of an application solely to be able to deny it.⁴⁸ As discussed, *supra*, commenters' attacks on the integrity of immigration judges are unfounded and have no place in this rulemaking.

Further, comments about USCIS are beyond the scope of this rulemaking, as USCIS is a separate agency beyond the purview of the Department. USCIS is part of DHS, while EOIR is part of the Department. *See* Department of Homeland Security, *Operational and Support Components* (Nov. 17, 2018), <https://www.dhs.gov/operational-and-support-components>. To the extent that commenters have concerns about procedures utilized by USCIS, those concerns are most appropriately directed to DHS.

As discussed above in section II.C.4.b.i, all asylum applications must be submitted “in accordance with the instructions on the form.” 8 CFR 1208.3(a). The instructions, in turn, inform applicants that they “must provide the specific information requested about [their] family and answer all the questions asked.” *See* Form I-589, *Application for Asylum and for Withholding of Removal, Instructions*, 5 (Aug. 25, 2020), <https://www.uscis.gov/sites/default/files/document/forms/i-589instr.pdf> (emphasis in original). Further, “[a]n asylum application that does not include a response to each of the questions contained in the Form I-589, is unsigned, or is unaccompanied by the required materials

⁴⁸ The Department notes, parenthetically, that the commenter's hypothetical is also legally inaccurate. An alien whose asylum application is filed before the one-year deadline but is rejected as incomplete may be able to demonstrate extraordinary circumstances excusing the application of the deadline provided that the alien refiles the application within a “reasonable period thereafter,” which the 30 days allowed for by this rule would certainly be. 8 CFR 1208.4(a)(5)(v). Thus, the commenter's hypothetical, even if it were realistic, would not result in the denial of the alien's application as untimely.

specified in [8 CFR 1208.3(a)] is incomplete.” 8 CFR 1208.3(c)(3). Accordingly, the Department disagrees with commenters’ general concerns that the Department should not remove the 30-day deadline for the immigration court to return an incomplete application or else have the application deemed complete. Without this change, the provision at 8 CFR 1208.3(c)(3) is inconsistent with the overarching requirement that aliens must submit the asylum application in accordance with the instructions on the form—in other words, completely filled out.

Additionally, the Department finds that the removal of the 30-day return period will better ensure that all asylum claims before the immigration courts for adjudication are fully presented for adjudication and review. Incorrectly deeming an incomplete application complete does not ensure that the alien is able to fully pursue his or her claim as the missing information may in fact be integral to the alien’s claim for relief, and the Department does not want to risk having an immigration judge consider an incomplete application without the relevant information.⁴⁹ For this reason, the Department further rejects commenters’ alternative suggestions that the Department should instead shorten the 30-day time period as an alternative way to increase efficiencies.

In general, commenters failed to explain why the default in the existing regulation—i.e., an immigration court accepts an incomplete application—based on a legal fiction that an incomplete application is deemed complete if the immigration court fails to return the application as incomplete provides any benefit to the alien, DHS, or the immigration courts. To the contrary, an application that is incomplete in fact—regardless of whether it is “deemed” complete by regulation—benefits neither the parties nor the immigration judge. It risks creating credibility issues for the respondent based on the parts that are incomplete even if those parts do not go to the merits of the claim. INA 208(b)(1)(B)(iii), 8 U.S.C. 1158(b)(1)(B)(iii) (inconsistencies may form the basis of an adverse credibility determination without regard as to whether they go to the

⁴⁹ Again, the Department reiterates that, as noted in footnote 47 above, this provision would further benefit aliens who may wish to prevent an immigration judge from considering whether to pretermite an incomplete application.

heart of an alien's claim). It inhibits the ability of the opposing party—and potentially the immigration judge—to prepare for a hearing on that application and risks springing surprises on the opposing party at the hearing that may require a postponement to investigate further. It further increases inefficiency in the overall proceeding, particularly at the merits hearing where the parties and the immigration judge may have to go over each incomplete part first to determine its bearing on the case before being able to proceed to the merits of the case. In short, commenters did not identify any reasonable benefit provided by filing and accepting an incomplete application and the Department is unaware of any; moreover, the costs associated with such an application in terms of the risk of an adverse credibility finding, unfair surprise to the opposing party, and overall inefficiency in adjudicating the case all strongly militate in favor of the Department's decision to replace the current regulatory language with that contained in this rule.

In addition, commenters are incorrect regarding the effect this provision would have on the calculation of aliens' possible eligibility for employment authorization.⁵⁰ To reiterate, existing regulations already provide that the filing of an incomplete application does not begin the timeframe by which DHS adjudicates an application for employment authorization based on an asylum application, and nothing in this rule alters that longstanding principle. Accordingly, the Department disagrees that an alien who submits a Form I-589 that is incomplete would begin to accrue time towards his or her employment authorization eligibility. In short, aliens seeking employment authorization have an incentive to submit a complete asylum application as soon as possible, and nothing in this rule either affects that incentive or changes the Department's position that the submission of an incomplete application does not begin the timeframe to adjudicate an employment authorization application.

⁵⁰ As a general matter, the Department emphasizes that questions of employment authorization eligibility are adjudicated by DHS and not by the Department. Indeed, that is why this rule removes regulatory provisions from chapter V of 8 CFR pertaining to alien employment authorization. Nevertheless, the Department addresses commenters' concerns to the extent they are directly related to the provisions of this rule.

Commenters are incorrect that EOIR will be unable to return incomplete asylum applications in a timely manner following the removal of the 30-day period. To the contrary, as discussed throughout this rule, EOIR has a powerful incentive to ensure that proceedings are conducted in as expeditious manner as possible consistent with due process. The rule's "timely fashion" requirement obligates immigration courts to act promptly in returning incomplete asylum applications, and the insulting suggestion that EOIR's employees lack the competence or diligence to effectuate that requirement is unsupported. Immigration court staff receive training on how to process filings, and defective filings are already subject to review and return, as appropriate.

Finally, the Department believes that commenters are incorrect in asserting that the rule is unfair because asylum seekers are being held to time restrictions, while immigration courts are not. As discussed, *supra*, the Department has powerful incentives to promptly return incomplete asylum applications to ensure efficiency, especially as the number of asylum applications filed has risen astronomically in recent years. EOIR, *Workload and Adjudication Statistics, Total Asylum Applications* (Oct. 13, 2020), <https://www.justice.gov/eoir/page/file/1106366/download>. Moreover, the Department is held to a 180-day adjudication deadline for asylum applications absent exceptional circumstances, INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii), and that deadline is only triggered once an alien files a complete asylum application. Thus, there is no asymmetry between asylum seekers and the immigration courts; rather, both are held to intertwined and mutually-reinforcing deadlines regarding asylum applications.

iii. 30-Day Correction Deadline

Comment: Commenters expressed concern about the rule's requirement that aliens only be allowed a 30-day period to re-file an application that is rejected for being incomplete. According to commenters, the imposition of a 30-day time period is arbitrary and too limited for aliens to correct any errors with the application or gather missing evidence. Commenters asserted

that by establishing such a timeframe, the Department is inappropriately prioritizing efficiency over all other concerns.

Some commenters requested that the deadline, if any, be extended to 45 days rather than 30 days.

Commenters also worried the 30-day correction deadline will lead to unnecessary and inadvertent waivers of aliens' right to seek asylum. For example, some commenters stated that a failure by a mail carrier could result in the foreclosing of relief. Other commenters expressed general disbelief that the government will timely return or alert aliens of deficient applications.

Some commenters asserted that the rule was both redundant and unduly restrictive because immigration judges already possess the authority to set and extend filing deadlines without requiring the alien to demonstrate the high exceptional circumstances standard. Commenters also claimed that applicants would not understand the rejection from the court nor how to remedy it.

Commenters also argued that the Department's assertion that a 30-day period is sufficient for remediation of application defects because of EAD incentives is incorrect. Commenters disagreed with the Department regarding this alleged incentive due to the combined effect of DHS's recent regulatory changes extending the minimum timeline for obtaining EAD eligibility and the Department's clarification in this rule regarding the 180-day timeline for the adjudication of asylum applications.

Response: As an initial point, commenters provided no evidence that asylum applications are routinely filed in such a grossly incomplete manner with errors so great that they cannot be corrected within one month, and the Department is unaware of any systemic trend of asylum applications being filed in such a manner. Accordingly, the Department declines to address further commenters' hyperbolic and unfounded assertions regarding the scale of deficiencies in initial asylum applications.

The Department rejects commenters' assertions that that 30-day deadline to re-file an application is too short, arbitrary, or prioritizes efficiency above all other concerns. The Department believes that 30 days is a reasonable time period that balances both the time necessary for a respondent to amend and return a complete application and the needs of the immigration court to operate efficiently. The Department notes that affected applicants must necessarily have already attempted to file an application, so any additional changes should be few in number and limited only to those fields that were incomplete. Applicants in general must meet their obligation to file an application that is full and complete as part of the applicant's burden of proof for relief as an initial matter and should not be relying on this additional 30-day time period to make significant changes to their applications. The Department also notes that this 30-day timeline only applies to the Form I-589 itself and does not prevent applicants from filing additional supporting documentation after the deadline, provided such filings comply with any deadlines set by the immigration court.

Further, the 30-day timeline is fully consistent with existing regulatory provisions requiring the refiling of incomplete asylum applications "within a reasonable period" after return in order to demonstrate extraordinary circumstances and avoid the application of the one-year bar. 8 CFR 1208.4(a)(5)(v). Moreover, 30-day filing deadlines are already well-established in immigration proceedings—e.g., a motion to reconsider, 8 CFR 1003.23(a)(1); an appeal to the Board, 8 CFR 1003.38(b)—and the resubmission of an asylum application is roughly analogous to these other procedures because it requires the correction of an initial determination.

Accordingly, the Department finds that 30 days is an appropriate amount of time to correct an incomplete asylum application and disagrees that an additional 15 days would result in any meaningful benefit, especially when aliens already have a strong incentive to file quickly in order to begin the process of attaining eligibility for work authorization and ultimately obtain relief or protection.

The Department rejects commenters' assertions that the rule is both redundant and unduly restrictive because immigration judges already possess the authority to set filing deadlines and are able to extend these deadlines without establishing exceptional circumstances. *See* 8 CFR 1003.31(c). When an immigration judge sets a filing deadline under 8 CFR 1003.31, he or she is setting a deadline for the initial filing of applications and supporting evidence. If an applicant fails to comply with the deadline, the opportunity to file such applications or evidence is deemed waived. *Id.* In contrast, this 30-day deadline focuses on applicants who have already attempted to file their application and must merely fix an incomplete application. This re-filing deadline ensures that applications are ready for adjudication in a reasonable time period and serves to increase the uniformity, fairness, and efficiency of the adjudication process. In addition, the Department believes that the "exceptional circumstances" exception is appropriate in this context because the 30-day deadline commences only after the initial filing period.

Additionally, as discussed, *supra*, the Department notes that commenters' concerns that general delays, including mail carrier mistakes, could prevent applicants from submitting the Form I-589 within the deadline are true for every deadline—including other important 30-day deadlines such as for filing appeals to the Board, 8 CFR 1003.38(b)—and that risk is not altered by the rule. Again, the Department recognizes that no rule can cover every hypothetical scenario, and the existence of speculative assertions does not warrant the removal of deadline requirements, particularly when other similar deadlines have existed for years without the "parade of horrors" posited by commenters occurring. The Department believes—and commenters have not meaningfully or persuasively disputed—that 30 days is a reasonable time period for applicants to correct minor mistakes and re-file the application.

As to commenters' concerns regarding applicants' understanding of a rejection, the Department notes that the rule does not change the rejection process. EOIR will continue to follow current practice in rejecting documents, which includes returning the filing with an explanation for the rejection. *See Immigration Court Practice Manual, Ch. 3.1(d)(i)*,

<https://www.justice.gov/eoir/page/file/1258536/download> (last revised July 2, 2020) (“If an application, motion, brief, exhibit, or other submission is not properly filed, it is rejected by the Immigration Court with an explanation for the rejection.”). Commenters have not expressed confusion with the existing process, and it is well-established. As such, the Department finds changes to these existing processes unnecessary.

Finally, the Department disagrees with commenters and reiterates the discussion in the proposed rule that aliens who seek to file asylum applications are motivated to do so promptly in part because of the possibility of obtaining employment authorization. *See* 85 FR at 59624. While employment authorization eligibility is adjudicated solely by DHS, the Department finds that the possibility of employment authorization is generally a desirable benefit for asylum seekers, and it is illogical that the possibility of obtaining such a benefit would not be a motivating factor to promptly file a complete asylum application.

The Department disagrees that DHS’s extension of the waiting period to be eligible to apply for asylum-based employment authorization from 150 days to 365 days would negatively affect this incentive, though it notes that DHS’s extension has been temporarily enjoined with respect to the individual members of the Plaintiff organizations, CASA de Maryland, Inc. (“CASA”) and Asylum Seeker Advocacy Project (“ASAP”). *See Casa de Md. v. Wolf*, --- F.Supp.3d---, 2020 WL 5500165 (D. Md. Sept. 11, 2020) (preliminarily enjoining, *inter alia*, DHS’s increase to the waiting period for employment authorization eligibility for individual members of Plaintiffs CASA and ASAP). Rather, the Department finds that the longer period would only further increase the incentive for aliens to start their accrual period for employment authorization as quickly as possible.

The Department acknowledges comments that the 180-day asylum adjudication period in INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii), which this rule incorporates as discussed, *infra*, counter-balances the 180-day statutory period before which an alien who has filed an asylum application can apply for employment authorization under INA 208(d)(2), 8 U.S.C.

1158(d)(2), but notes that counter-balanced system was established by Congress. Thus, to the extent that commenters disagree with the interplay of those statutory sections, their comments are beyond the Department's authority in this rulemaking and are more appropriately addressed to Congress. The Department disagrees that this system reduces an alien's incentive to file promptly for the purposes of earning time towards employment authorization. Many asylum applications are not currently adjudicated within 180 days due to operational constraints and the size of the pending caseload, and the presence of exceptional circumstances causes adjudicatory delays beyond the 180-day mark for other cases. Moreover, litigation has effectively forced DHS to adjudicate employment authorization applications within 30 days after an alien files such an application once the alien's asylum application has been pending for the applicable period of time, *Gonzalez Rosario v. USCIS*, 365 F.Supp.3d 1156, 1163 (W.D. Wash. 2018), and DHS's efforts to change its regulations to adjust the time periods for adjudicating such applications have also been enjoined, *Casa de Md. v. Wolf*, --- F.Supp.3d ---, 2020 WL 5500165 (D. Md. Sept. 11, 2020). Consequently, aliens retain very strong incentives to file complete asylum applications as soon as possible, and nothing about this rule or the relevant statutory framework reduces those incentives, particularly in light of the persistent litigation on this issue.

c. Submission of Form I-589 Fee

Comment: Many commenters broadly criticized the existence or requirement of a fee for asylum applications, regardless of the dollar amount of the fee. In addition, commenters objected to the rule's requirement that aliens must submit a required filing fee in connection with an asylum application at the time of filing. Commenters stated that the Department failed to provide any reasoning to justify the imposition of a fee or to consider the negative impact of the fee. At least one commenter argued that the Department must separately justify the inclusion of a fee for the submission of a Form I-589 and cannot just rely on DHS's determinations without independent analysis or justification.

The majority of commenters who discussed the fee for asylum applications raised concerns that asylum applicants would not be able to afford a \$50 filing fee and that their applications would be rejected as a result.⁵¹ Accordingly, commenters stated that the rule violates the United States' non-refoulement obligations. Commenters provided a wide range of reasons for why asylum seekers would not be able to afford the \$50 fee, including asserting that asylum seekers do not have the funds to pay such a fee given that those seeking asylum are often fleeing conflict and arriving to the United States lacking any resources. Moreover, commenters stated that many asylum seekers are already severely impoverished, a condition which commenters claim has only been exacerbated by COVID-19. Several commenters were especially concerned that asylum seekers who are either detained or subject to the Migrant Protection Protocols ("MPP") would be unable to pursue asylum applications due to an inability to afford the fee. Commenters explained that detained asylum seekers are only able to earn a trivial amount of income in detention facilities and noted that many are currently quarantined, and unable to work at all, during their first 14 days in detention due to the COVID-19 pandemic. Similarly, commenters explained that individuals subject to the MPP have limited access to funds. Several commenters also urged the Department to allow fee waivers for asylum seekers, particularly for individuals who are detained or subject to MPP.

Commenters were also concerned with the possible impact that other pending EOIR rules⁵² would have on this provision. Commenters asserted that because these pending rules have not been published as final rules yet, it is impossible for them to be able to fully comment on this rule's provisions regarding the requirement to pay a fee.

⁵¹ DHS recently established a \$50 fee for Form I-589 submitted for the purposes of applying for asylum in most circumstances. *See* 85 FR at 46791. This fee would have entered into effect on October 2, 2020, but, as noted *supra*, it is currently enjoined as a result of litigation. *Immigrant Legal Res. Ctr. v. Wolf*, 2020 WL 5798269 (N.D. Cal. Sept. 29, 2020) (granting nationwide preliminary injunction barring DHS from implementing or enforcing any part of the rule).

⁵² For example, some commenters were specifically concerned with the impact that the Department's pending fee rule would have on this provision. *See* Executive Office for Immigration Review Fee Review, 85 FR 11866 (Feb. 28, 2020).

Commenters further voiced concern about the alleged difficulties that unrepresented detained asylum seekers would face in trying to “fee in” a Form I-589 with DHS due to the possible methods of payment. Similarly, commenters stated that asylum seekers in Mexico would not be able to visit a DHS office in the United States to “fee in” a Form I-589. Commenters further noted that children, who do not have bank accounts or their own funds, would have unique difficulties paying a fee to submit the I-589.

Response: Overall, commenters’ concerns related to a fee for an asylum application were both beyond the scope of the rulemaking and misguided or inapposite in three principal respects. First, few, if any, commenters acknowledged that the INA authorizes charging a fee for an asylum application, provided that such a fee does not exceed the cost of adjudicating the application. INA 208(d)(3), 8 U.S.C. 1158(d)(3). Thus, to the extent that commenters oppose charging a fee for an asylum application under any circumstance and believe that such a fee is unauthorized or unlawful, their comments are both beyond the scope of this rulemaking and are more appropriately addressed to Congress.

Second, few, if any, commenters acknowledged that the fee for an asylum application is set by DHS because the asylum application is a DHS form. Longstanding EOIR regulations make clear that “[t]he fees for applications published by the Department of Homeland Security and used in immigration proceedings are governed by [DHS regulations].” 8 CFR 1103.7(b)(4)(ii). As stated in the proposed rule, given this longstanding cross-referenced fee provision, the inextricable nature of the two agencies’ asylum processes and the benefit of not treating applicants differently for substantially similar benefits based on whether they file with DOJ or with DHS, the Department did not propose to alter that provision. See 85 FR 59698. Thus, this rule maintains the same provision as proposed regarding a fee for an asylum application and does not impose a new fee for such an application. To the extent that commenters challenge the propriety of DHS assessing a fee under INA 208(d)(3), 8 U.S.C. 1158(d)(3) for an asylum application, their concerns are more appropriately addressed to DHS.

Third, and relatedly, this rule does not alter the longstanding procedures regarding how DHS forms are treated in immigration court. 8 CFR 1103.7(b)(4)(ii). Rather, this rule merely adds instructions regarding the submission of the Form I-589 fee, if any, to a provision of EOIR's regulations that is topically specific to the conditions and requirements for filing an asylum application. Although language already exists elsewhere in EOIR's regulations, *see, e.g.*, 8 CFR 1103.7(a)(3) ("The Department of Homeland Security shall return to the payer, at the time of payment, a receipt for any fee paid, and shall also return to the payer any documents, submitted with the fee, relating to any immigration proceeding. The fee receipt and the application or motion shall then be submitted to the Executive Office for Immigration Review."), this amendment is meant as an aid to the public should a fee be enforced at a future date. Thus, to the extent that commenters challenge the appropriateness of the prior promulgation of 8 CFR 1103.7(b)(4)(ii), those concerns are also well beyond the scope of this rulemaking.

To reiterate, as a general matter, commenters' broad concerns regarding the appropriateness of requiring a fee for asylum applications, the specific amount of the fee, and whether to allow for a fee waiver for the Form I-589 are outside the scope of this rule.⁵³ DHS determines the fee amounts for DHS-maintained forms such as the Form I-589, and the Department did not change this longstanding practice in this rule. *See, e.g.*, 8 CFR 1103.7(b)(4)(ii) ("The fees for applications published by the Department of Homeland Security and used in immigration proceedings are governed by 8 CFR 103.7.") and 1103.7(c) ("No waiver may be granted with respect to the fee prescribed for a Department of Homeland Security form or action that is identified as non-waivable in regulations of the Department of Homeland Security.").

⁵³ As noted *supra*, the \$50 asylum application fee established by DHS is currently enjoined as the result of litigation. *Immigrant Legal Res. Ctr. v. Wolf*, 2020 WL 5798269 (N.D. Cal. Sept. 29, 2020) (granting a nationwide preliminary injunction barring DHS from implementing or enforcing any part of the rule). Nevertheless, the response to commenters' concerns in this section discusses the enjoined \$50 fee, as discussed by commenters, given the possibility of its future application as litigation proceeds.

Overall the imposition of a non-waivable \$50 fee for the Form I-589 for the purposes of asylum is a decision made by DHS following publication of a proposed rule and the consideration of the public comments received thereon. *See* 84 FR 62280 (proposed rule), 85 FR 46788 (final rule). This rule does not amend the well-established regulatory provisions distinguishing between fees for DHS forms and fees for EOIR forms, and fees for DHS forms adjudicated by EOIR, including the Form I-589, continue to be set by DHS. Rather, this rule merely clarifies when the Form I-589 fee, as determined by DHS, must be paid in the course of EOIR adjudications.

Nevertheless, even though these concerns are outside the scope of this rulemaking, the Department disagrees with commenters' concerns that a \$50 filing fee is inappropriate or would be unaffordable, thus discouraging or preventing individuals from filing meritorious asylum claims. *Cf. Ayuda, Inc. v. Att'y Gen.*, 661 F. Supp. 33, 35 (D.D.C. 1987) (rejecting concern that increased fees would limit access to courts), *aff'd sub nom. Ayuda, Inc. v. Att'y Gen.*, 848 F.2d 1297 (D.C. Cir. 1988). The Department has no evidence—and commenters did not provide any—to dispute DHS's assessment that a \$50 fee “could be paid in one payment, would not require an alien an unreasonable amount of time to save, would generate some revenue to offset costs, discourage frivolous filings, and not be so high as to be unaffordable to even an indigent alien.” 84 FR at 62320. Almost by definition, aliens seeking asylum have demonstrated access to financial resources by the very nature of their ability to travel to the United States, further suggesting that \$50 is not an unreasonable amount to charge for an asylum application.⁵⁴ For

⁵⁴ The Department also observes that most, if not all, aliens seeking asylum have, almost by definition, already demonstrated access to financial resources in order to travel to the United States, further suggesting that \$50 is not an unreasonable amount to charge for such an application:

While there's no fee to apply for asylum, it's not the case that there are no resources involved in the process. Those migrating from Europe or Asia need to pay for transit to the United States, as well as for visas allowing them onto U.S. soil. (You can't apply for asylum unless you're in the United States.) Those fees start at about \$160.

If you're migrating from Central America, you may need to pay to ensure you make it to the border safely. The New York Times reported last year that a family from El Salvador paid \$6,000 to smugglers to transport them to the U.S.-Mexico border. Part of the goal of the migrant caravans that have come north in recent months is to provide a low-cost, safe way for migrants to get north.

similar reasons, the Department sees no reason for DHS not to assess a \$50 fee for asylum applications filed by categories of aliens cited by commenters: aliens in detention, aliens in removal proceedings who were returned to Mexico pursuant to the MPP, and children.⁵⁵ The Department also notes that unverified generalized statements and anecdotal reports about asylum seekers' financial status do not provide information about actual hardship, particularly when they do not also address or account for how the alien obtained financial resources to make the journey to the United States in the first instance.

The Department further notes that an application for statutory withholding of removal under section 241 of the Act, 8 U.S.C. 1231, or protection under the regulations implementing the CAT does not require a fee. *See* 8 CFR 106.2(a)(20) (establishing a \$50 fee when the Form I-589 is submitted “[f]or filing an application for asylum status”). Accordingly, commenters are incorrect that the rule violates the United States’ non-refoulement obligations set forth in the 1951 Refugee Convention, the 1967 Protocol, and the CAT. *See R-S-C- v. Sessions*, 869 F.3d 1176, 1188 n.11 (10th Cir. 2017) (explaining that “the Refugee Convention’s non-refoulement principle—which prohibits the deportation of aliens to countries where the alien will experience persecution—is given full effect by the Attorney General’s withholding-only rule”); *Cazun*, 856 F.3d at 257 & n.16; *Ramirez-Mejia*, 813 F.3d at 241; *Maldonado*, 786 F.3d at 1162 (explaining that Article 3 of the CAT, which sets out the non-refoulement obligations of signatories, was implemented in the United States by FARRA (Pub. L. 105-277, sec. 2242(b), 112 Stat. 2681, 2631-822) and its implementing regulations); *see also Cardoza-Fonseca*, 480 U.S. at 429, 441

Philip Bump, *Most migration to the U.S. costs money. There’s a reason asylum doesn’t*. Wash. Post (Apr. 30, 2019) (referencing a New York Times report about an El Salvadorean family who paid \$6,000 to smugglers to transport them to the U.S. southern land border). Similarly, the Department also notes that 85 percent of pending asylum applicants in immigration proceedings, more than 507,000 cases, have representation. EOIR, *Workload and Adjudication Statistics, Current Representation Rates*, (Oct. 13, 2020), <https://www.justice.gov/eoir/page/file/1062991/download>). Although some of those approximately 507,000 cases with representation may have obtained representation pro bono, most did not. As of September 30, 2020, EOIR records identified approximately 14,400 asylum cases with pro bono representation, out of over 507,000 asylum cases with representation overall. The ability of most aliens applying for asylum to retain representation at cost further suggests that a \$50 fee is not unreasonable.

⁵⁵ As mentioned in note 18, *supra*, DHS has determined to exempt UAC in removal proceedings from the \$50 fee.

("[Withholding of removal] corresponds to Article 33.1 of the Convention . . . [Asylum] by contrast, is a discretionary mechanism which gives the Attorney General the *authority* to grant the broader relief of asylum to refugees. As such, it does not correspond to Article 33 of the Convention, but instead corresponds to Article 34.") (emphasis in original).

Regarding commenters concerns that the Department must separately justify the establishment of an asylum application fee, the Department reiterates that it is not altering its longstanding treatment of fees related to DHS applications. 8 CFR 1103.7(b)(4)(ii). DHS has assessed a fee for most asylum applications, and concerns about the justifications for that fee are beyond the scope of this rulemaking.

Regarding commenters' concerns about the interplay between this rule and other rules proposed by the Department, none of the Department's pending rules would impact this provision. As noted in other rules, and as discussed above, DHS determines whether or not to impose filing fees for asylum applications. None of the Department's pending rules, including its fee review, propose to change this regulatory scheme. As such, commenters' concerns over not being able to fully comment on this provision without seeing certain pending rules published as final rules are unpersuasive.

In addition, regarding commenters' concerns about the ability of aliens to pay the \$50 fee given USCIS's available methods of payment and commenters' concerns regarding the supposed difficulties that detained unrepresented asylum seekers and aliens subject to MPP will face in paying the fee, although such concerns are far beyond the scope of this rulemaking and more appropriately addressed to DHS, the Department does note that aliens who submit payments to DHS for forms, applications, or motions for EOIR adjudications may submit a wide range of payment methods to USCIS, including personal check, cashier's check, certified bank check, bank international money order, or foreign draft drawn on a financial institution in the United States and payable to the "Department of Homeland Security" in United States currency. In addition, aliens may have a third party provide the payment on their behalf. Nevertheless, as with

the determination of whether to charge a fee for the Form I-589, the available methods of payment are determined by USCIS as the payment processing entity for the immigration courts. See 8 CFR 103.7(a)(1), 1103.7(a)(3).⁵⁶

d. Impact on Discrete Populations⁵⁷

Comment: Commenters raised a broad range of concerns with respect to the rule's impact on various populations that commenters have identified as uniquely vulnerable groups, including, *inter alia*, alleged victims of gender-based persecution, detained individuals, family asylum applicants, indigenous language speakers or non-English speakers, children, teenagers in custody, individuals with disabilities, LGBTQ individuals, and individuals with mental-competency issues. Commenters were primarily concerned with the ability of these categories of aliens to meet the 15-day filing deadline or 30-day re-filing correction deadlines.

Commenters expressed concerns that members of such groups need more time than other applicants to prepare, submit, and present their cases in support of their applications for a variety of reasons. For example, commenters stated that due to severe trauma or post-traumatic stress, some of these populations might need additional time and the assistance of medical and mental health services to articulate their claims. Additionally, commenters stated, certain populations might face unique difficulties obtaining corroborative evidence to support their claims; for example, commenters stated that victims of gender-based violence may have been prevented by their traffickers or perpetrators from owning items that might serve as evidence. Commenters also asserted that some populations, such as children, might need additional time to familiarize themselves with processes and become comfortable with their advocates.

⁵⁶ The Department further notes that USCIS accepts electronic payments in certain contexts, and the Department expects that the availability of electronic payment methods will continue to expand over time. USCIS, *Forms Available to File Online* (June 11, 2020), <https://www.uscis.gov/file-online/forms-available-to-file-online>.

⁵⁷ The Department notes that many of the concerns commenters raised with respect to the effect that this rule would have on discrete populations are similar to concerns that commenters also raised with respect to asylum applicants, generally. To the extent there is overlap, the Department reiterates the discussion above in section II.C.2.

Commenters asserted that some groups faced other unique challenges in preparing, submitting, and presenting their applications that may require additional time. For example, applicants submitting family-based claims might need child care during proceedings because they may not want to speak about the harm they have suffered in front of their children. Additionally, commenters stated, indigenous-language speakers may be unable to find an interpreter to translate the Form I-589 or documents for submission within the regulatory deadlines. Commenters anecdotally asserted that some indigenous-language speakers did not receive credible fear interviews before being placed into proceedings because the government was unable to find an interpreter within the requisite period of time.

Commenters also asserted that some applicants, such as children or those with mental competency issues, need or require counsel to assist with preparation, submission, and presentation of their claims. For example, commenters explained that the deadline would present challenges for counsel working with children because their age, development, dependence on adults, particular vulnerabilities, and experienced traumas (if any) typically increase the time necessary to develop and corroborate their asylum claims. Further, commenters explained that children in government custody would have a particularly difficult time discussing the persecution they faced. Accordingly, commenters stated that immigration judges should have discretion to set and extend deadlines pursuant to children's specific and unique needs.

Additionally, commenters asserted that recent changes to the law, such as *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), have rendered certain claims uniquely complex. Some commenters asserted that Congress had recognized a specific obligation to treat children humanely and fairly, and EOIR had recognized that cases involving children could be uniquely complex. Commenters asserted that some uniquely situated applicants, such as detained individuals and children, already face logistical barriers to access to counsel and legal information. Accordingly, commenters asserted, such applicants may be especially

disadvantaged by the rule to the extent that it would limit or further exacerbate their already limited access to counsel.

Furthermore, with respect to individuals with mental competency issues, some commenters expressed concerns that issues of incompetence might not be identified until an individual had made several court appearances. One organization anecdotally stated that it had accepted National Qualified Representative Program (NQRP) cases, *see* EOIR, *National Qualified Representative Program* (Feb. 18, 2020) (hereinafter “EOIR, NQRP”), *available at* <https://www.justice.gov/eoir/national-qualified-representative-program-nqrp>, in which detained clients had appeared in court for months before anyone raised the issue of incompetence. Commenters also generally asserted that the 15-day deadline for submitting applications might be violated. Lastly, commenters alleged that the rule would violate the Rehabilitation Act of 1973. *See* 29 U.S.C. 794(a).

Response: The Department reiterates its response to similar comments, *supra*, and adds the following further response. In general, commenters on this point misapprehended the rule; provided speculative hypothetical generalizations that do not account for the case-by-case, individualized decision-making associated with adjudicating asylum applications; and made assertions rooted in the rule’s failure to align with the commenters’ policy preferences, rather than the identification of specific legal deficiencies or other factors the Department should consider. *See Home Box Office*, 567 F.2d at 35 n.58 (“In determining what points are significant, the ‘arbitrary and capricious’ standard of review must be kept in mind. Thus only comments which, if true, raise points relevant to the agency’s decision and which, if adopted, would require a change in an agency’s proposed rule cast doubt on the reasonableness of a position taken by the agency. Moreover, comments which themselves are purely speculative and do not disclose the factual or policy basis on which they rest require no response. There must be some basis for thinking a position taken in opposition to the agency is true.”).

Asylum seekers come from a wide range of backgrounds and personal circumstances, and the Department recognizes that no rule can account for the backgrounds and circumstances of the hundreds of thousands of aliens who seek asylum. Nevertheless, the Department disagrees that the sorts of speculative challenges raised by the commenters are sufficient to outweigh the benefits obtained from this rule's implementation, including benefits that would inure to those with meritorious asylum claims. Further, in a vacuum, the Department has difficulty responding to commenters' generalized statements about various populations, trauma experienced by those populations, and other asserted difficulties because asylum applications are adjudicated based on their specific facts, not on generalized speculative assertions.⁵⁸ The Department believes that the timelines set are generally appropriate for the majority of cases for the reasons discussed above, and that determinations about extending such deadlines are more appropriately made on a case-by-case basis rather than providing a categorical exception for certain types of applicants, as commenters suggest.

Neither the 15-day filing deadline nor the 30-day correction deadline imposes one-size-fits-all deadlines. In cases where applicants' unique circumstances necessitate additional time to prepare, submit, or present their asylum applications, the Department reiterates that the immigration judge is authorized to consider extending these timelines on a case-by-case basis. *See* 8 CFR 1208.3(c)(3) (stating that failure to correct deficiencies within 30 days will result in abandonment of an application and waiver of the opportunity to file such application "absent exceptional circumstances as defined in § 1003.10(b)"); 8 CFR 1208.4(d) (stating, with respect to the 15-day filing deadline, that "[t]he immigration judge may extend the deadline for good cause."). In general, determining whether "good cause" or "exceptional circumstances" exist

⁵⁸ For example, commenters' concerns about mental illness, trauma, and developmental challenges may certainly fall within the rule's good-cause exception for the filing deadline or within the exceptional circumstances exception to the statutory 180-day adjudication deadline in particular cases if those concerns are credible. However, the Department cannot make a blanket determination based solely on generalizations without context that such situations will always constitute exceptions because each case is considered on its own merits. Moreover, the credibility of such assertions will always be at issue because they provide an exception to the general rule, and it is difficult, if not impossible, for the Department to make generalized credibility determinations in a rulemaking.

would likely include consideration of the factors that commenters asserted arise with respect to the broad types of asylum applicants identified by the commenters.

In addition, the Department notes that an immigration judge's discretionary determination with respect to whether an alien merits either an extension of the 15-day deadline or demonstrated exceptional circumstances to extend the 30-day refiling deadline may be appealed to the Board in cases where the issue has been properly preserved for appeal. Accordingly, further review and protection is available for these classes of applicants.

In short, the Department acknowledges commenters' concerns about discrete groups of individuals and has fully considered them; however, the rule does not single out any discretely-labeled groups, nor does it preclude the groups identified by commenters from pursuing their claims. To the extent that aliens within those groups have meritorious claims, the rule will, in fact, ensure that those claims are adjudicated expeditiously, especially for aliens in detention. The rule also provides sufficient safeguards in situations in which individuals may need additional time, and commenters' unfounded assertions to the contrary are not persuasive. The rule is consistent with due process, aids in the protection of the groups identified, and provides benefits that far outweigh any concrete concerns raised by commenters.

With respect to commenter concerns regarding mental competency issues, the Department notes that there is existing agency protocol for ensuring that proceedings involving such individuals are fair, including forensic competency evaluations and implementing safeguards, where appropriate. *See Matter of M-A-M-*, 25 I&N Dec. 474, 474, 477, 480-81 (BIA 2011); EOIR, NQRP. The Department acknowledges, as commenters stated, that mental competency issues might arise after numerous hearings. However, as case law has always considered, mental competency "is not a static condition." *Matter of M-A-M-*, 25 I&N Dec. at 480. "It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways." *Id.* (quotation omitted). Thus, immigration judges must "consider indicia of incompetency throughout the course of proceedings to determine whether an

alien's condition has deteriorated or, on the other hand, whether competency has been restored.”

Id. The Department notes that “neither party bears a formal burden of proof to establish the respondent's mental competency or incompetency.” *Matter of J-S-S-*, 26 I&N Dec. 679, 681 (BIA 2015). Thus, if an immigration judge observes indicia of incompetency, regardless of whether a party argues that such indicia are present, an immigration judge must make a competency determination and implement the appropriate safeguards, where necessary. *Id.* at 680, 681 (citing *Matter of M-A-M-*, 25 I&N Dec. at 474, 477, 480-81).

Although an immigration judge must make a competency determination when indicia of competency are present, this does not mean that an immigration judge should delay proceedings indefinitely simply because indicia might arise later in any particular case. The Department believes that the existing protocols, in conjunction with the immigration judge’s authority to extend filing deadlines in appropriate situations and the various exceptions provided by the rule, are sufficient to ensure fairness towards applicants with mental competency issues. Moreover, the Department disagrees with commenter concerns that this rule would violate the Rehabilitation Act of 1973. *See* 29 U.S.C. 794(a). This rule is broadly applicable to all applicants, does not impose any particular requirements on applicants with disabilities, does not prevent applicants with disabilities from participating in immigration proceedings, and provides that immigration judges may extend regulatory timelines in appropriate situations.

e. Impact on Pro Se Aliens

Comment: Commenters were concerned that the filing deadlines would disproportionately and detrimentally affect pro se aliens and interfere with the ability of those aliens to seek and obtain counsel. As a result, commenters alleged that the Department was engaging in a pattern or practice of discrimination against a discrete and insular minority comprised of current and future pro se asylum applicants. The commenters alleged that the deadline deprived pro se asylum seekers equal protection under the law and therefore violated the Fifth Amendment’s equal protection guarantee. *See* U.S. Const. amend. V.

Further, for pro se aliens, commenters were concerned that the rule's deadlines were too short for pro se aliens to complete the complex application on their own, particularly considering language barriers, trauma, education levels, and lack of familiarity or understanding of complex immigration laws.

Response: The Department reiterates its response to similar comments, *supra*, and adds the following further response. In general, commenters on this point again misapprehended the rule; provided speculative, hypothetical generalizations that do not account for the case-by-case and individualized decision-making used to adjudicate asylum applications; and, made assertions rooted in the rule's failure to align with the commenters' policy preferences rather than the identification of specific legal deficiencies or other factors the Department should consider.

The rule does not harm pro se aliens and does not impact the availability of pro bono representation. To the contrary, expeditious consideration of the asylum applications that detained aliens file may increase pro bono representation. *See, e.g.*, HRF Report *supra*. To the extent that commenters posited hypothetical scenarios about particular characteristics of pro se aliens, the Department notes that if such scenarios are reflected by actual applicants, then the immigration judge can consider whether any factors referenced by the commenters warrant an extension of the filing deadline.

Given the limited available avenues for relief or protection; the common goal of providing relief or protection to aliens with meritorious claims as quickly as possible, especially those who are detained; and the risk of loss or degradation of evidence with the passing of time, the Department believes the benefits of the rule, on balance, far outweigh the speculative concerns raised by commenters.

The Department further notes that nothing in the rule prohibits nonprofit organizations, pro bono groups, or any other class of representatives from taking an alien's case at a later point in the proceedings. An alien who obtains counsel may also choose a representative at any point

in the proceedings, including after filing an application. Thus, pro se aliens have more opportunities to obtain assistance that many commenters suggested.

The Department also notes that 85% of aliens with pending asylum cases have representation. EOIR, *Adjudication Statistics: Current Representation Rates* (Oct. 13, 2020), available at <https://www.justice.gov/eoir/page/file/1062991/download>. For those who do not, there are multiple avenues they may pursue to obtain representation. See EOIR, *Find Legal Representation* (Oct. 1, 2020), available at <https://www.justice.gov/eoir/find-legal-representation>.⁵⁹ Nevertheless, the Department has fully considered the possible impacts of this rule on the relatively small pro se population of aliens who seek asylum before EOIR. However, the rule does not single such aliens out for particular treatment under EOIR's procedures. Moreover, immigration court procedures are generally not excused for pro se respondents, just as they are not excused generally for pro se civil litigants. See, e.g., *McNeil v. United States*, 508 U.S. 106, 113 (1993) (“[W]e have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel.”); *Edwards v. INS*, 59 F.3d 5, 8-9 (2d Cir. 1995) (rejecting a pro se alien litigant's arguments for being excused from Federal court procedural requirements due to his pro se status). Although the Department acknowledges the challenges faced by pro se litigants and recommends that all aliens obtain representation, nothing in the rule singles out pro se aliens or has the effect of exacerbating their situation.⁶⁰

⁵⁹ Although the Department acknowledges that nonprofit organizations and pro bono volunteers, like all legal representatives, may face unforeseen challenges confronting new rules or procedures, the Department is confident that such representatives will be able to handle such changes, just as they do in any other court system, and will continue to be able to provide assistance and resources to aliens in proceedings before EOIR. Moreover, as discussed throughout this rule, most of this rule's provisions are simply codifications of longstanding principles that have been applicable to practitioners for years, including the ability of an immigration judge to establish and extend filing deadlines, to introduce evidence, and to ensure asylum applications are adjudicated consistent with regulatory and statutory authorities.

⁶⁰ There is no evidence that the shorter filing deadline in 8 CFR 1208.5(b) has discriminated against pro se aliens in any way, and commenters did not allege that it had. Further, even if that deadline had a discriminatory impact, as commenters alleged the rule will, it would not—and the rule does not—violate the Fifth Amendment's equal protection guarantee, see U.S. Const. amend. V., because it does not burden fundamental rights. See *Heller v. Doe*, 509 U.S. 312, 319 (1993) (affording a strong presumption of validity to a classification that does not involve fundamental rights or proceedings along suspect lines).

Further, there is at least a rational basis for the rule’s deadline. Establishing a deadline, as explained in 85 FR at 59694, reduces the risk of delayed filing, which, in turn, reduces the risk of delayed grants of protection or relief for meritorious claims and reduces the risk of degradation or loss of evidence over time. *Cf. DeSousa v. Reno*, 190 F.3d 175, 184 (3d Cir. 1999) (“[D]isparate treatment of different groups of aliens triggers only rational basis review under equal protection doctrine. . . . Under this minimal standard of review, a classification is accorded ‘a strong presumption of validity’ and the government has no obligation to produce evidence to sustain its rationality.”) (citing *Francis v. Immigration and Naturalization Serv.*, 532 F.2d 268, 272 (2d Cir. 1976) (internal citations omitted)). It is also consistent with a similar existing deadline in 8 CFR 1208.5(b), a regulatory directive in 8 CFR 1208.5(a) to adjudicate cases of detained aliens expeditiously, and the longstanding authority in 8 CFR 1003.31(c) of immigration judges to set deadlines. In short, the rule does not violate due process for pro se aliens, just as it does not violate due process for any category of aliens.

Additionally, the Department disagrees that pro se aliens cannot meet the 15-day filing deadline or cure any deficiencies in their applications within 30 days. The Form I-589 spans eight pages—plus an additional page for signatures and supplemental pages, as needed—and DHS estimates the time necessary to review the instructions and complete and submit the form is 12 hours. *See* U.S. Citizenship and Immigration Services, *Form I-589, Application for Asylum and for Withholding of Removal*, OMB No. 1615-0067 (Aug. 25, 2020), available at <https://www.uscis.gov/sites/default/files/document/forms/i-589.pdf>; U.S. Citizenship and Immigration Services, *Form I-589, Application for Asylum and for Withholding of Removal, Instructions*, OMB No. 1615-0067 (Aug. 25, 2020), available at <https://www.uscis.gov/sites/default/files/document/forms/i-589instr.pdf>. Instructions to Form I-589 are available and written to assist applicants with or without representation. *See id.*; *see also*

note 26, *supra* (discussing the wide availability of information on applying for asylum, including information in multiple languages).

Further, apart from seeking representation, many pro se aliens may access various resources to assist them in completing this form. Within the Department's Office of Legal Access Programs, a wide variety of self-help materials and legal centers, workshops, and orientations are available to assist aliens if they so choose. *See* Executive Office for Immigration Review, *Office of Legal Access Programs* (Feb. 19, 2020), available at <https://www.justice.gov/eoir/office-of-legal-access-programs>. Considering that aliens in asylum-and-withholding-only proceedings are only eligible for relief available through Form I-589, *see* 8 CFR 1208.2(c)(3)(i), the Department believes that the 15-day deadline is sufficient to complete the Form I-589 and that 30 days is sufficient to correct any deficiencies, including for a pro se alien. The existence of the possibility of an extension of those deadlines further provides a safety net for pro se aliens to ensure that their applications are completed in a timely and accurate manner.

5. Concerns with Form I-589 Procedures

a. Supplementing the Record

i. Evidence from Non-Governmental Sources

Comment: Commenters raised concerns with the rule's clarification on the evidentiary standards for the admission of non-governmental source evidence. Commenters claimed that the rule would create a double standard by treating governmental sources as automatically reliable while requiring foreign government and non-governmental sources to meet a "credible and probative" standard. Commenters stated that this was particularly problematic because United States governmental sources are subject to political pressures and often do not present accurate or complete depictions of conditions in other countries. One commenter claimed that this would violate the Refugee Act, which aimed to remove political or foreign policy influence from asylum determinations.

Commenters were also concerned that the “credible and probative” standard was a new, higher standard than the existing probative standard for evidentiary submissions and that the term “credible” only exists in asylum law as it relates to oral testimony. Commenters further claimed that requiring a “credible and probative” standard would limit or exclude the evidence that an alien could submit, which would in turn violate an alien’s due process right to present evidence.

Moreover, commenters expressed concern that the “credible and probative standard” could be used in conjunction with a separate proposed rulemaking which would establish that evidence promoting cultural stereotypes was inadmissible, to inappropriately exclude evidence that would support an applicant’s claim. *See* 85 FR at 36264. Specifically, commenters expressed concern that immigration judges would mischaracterize the “quality” of submitted evidence in order to bar admission of evidence that might support an applicant’s claim and, under the other proposed rule, refuse to submit evidence based on the substance. Commenters suggested that it would be inappropriate for immigration judges to bar the admission of evidence that might in substance support an applicant’s claim based on the “quality of the messenger.” Additionally, commenters stated that the standard would minimize the value of non-governmental sources such as non-governmental organization reports, which commenters claimed were very reliable, and would thereby diminish the credibility of such sources.

Lastly, commenters requested the Department provide a definition of “credible and probative,” claiming that the standard was unclear and could fail a vagueness challenge.

Response: As an initial point, commenters did not generally explain why it would be appropriate for an immigration judge to consider evidence from non-credible source or that is not probative, and the Department is aware of no such reason. Evidence from non-credible sources of that is not probative provides no assistance to an adjudicator almost by definition, and the Department is unaware of any justification for allowing the consideration of such evidence. Similarly, commenters’ assertions that immigration judges would mischaracterize evidence rest

on the tacit suggestion that immigration judges are incompetent or unethical and are either incapable or unwilling to adhere to applicable law. As discussed elsewhere in this final rule, that assertion is unsupported and appears to stem from the personal biases or policy preferences of commenters, rather than any objective evaluation of immigration judges. *Chem. Found., Inc.*, 272 U.S. at 14–15 (“The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.”). Moreover, such unsupported and tendentious assertions provide no basis for the Department to alter the NPRM.

Further, this rule does not change the longstanding standards for the admission of evidence in immigration proceedings—whether the evidence is probative and its admission is fundamentally fair. *See Matter of Y-S-L-C-*, 26 I&N Dec. 688, 690 (BIA 2015) (explaining that “the test for admitting evidence is whether it is probative and its admission is fundamentally fair”); *Nyama v. Ashcroft*, 357 F.3d 812, 816 (8th Cir. 2004) (stating that the “traditional rules of evidence do not apply to immigration proceedings” and that the “sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair”) (quoting *Espinoza v. INS*, 45 F.3d 308, 310 (9th Cir. 1995)). Once admitted, the immigration judge must then weigh the evidence to determine whether the burden of proof has been met. *See, e.g., Le Bin Zhu v. Holder*, 622 F.3d 87, 92 (1st Cir. 2010) (affording less evidentiary weight to an unauthenticated foreign local government notice); *Song Wang v. Keisler*, 505 F.3d 615, 622 (7th Cir. 2007) (giving “little weight” to an unauthenticated foreign certificate). In weighing the evidence, the immigration judge may look to the credibility of the source. The rule simply clarifies that foreign government and non-governmental⁶¹ sources are not automatically

⁶¹ The Department notes that, consistent with common understanding and typical linguistic usage, an alien testifying in support of his or her own application is not considered a “non-governmental source.” Whether an alien’s testimony in support of his or her own application is credible will continue to be assessed based on applicable law. *See, e.g., INA 208(b)(1)(B)(iii)*, 8 U.S.C. 1158(b)(1)(B)(iii) (outlining the bases for the credibility determination of an asylum applicant).

presumed credible, and evidence from these sources is not presumed probative, as the prior regulatory language may have unintentionally implied.

Contrary to commenters' claims, this clarification has no effect on the ability of aliens to present evidence. *See, e.g., Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000) (finding a due process violation when the alien was not provided a reasonable opportunity to present evidence). Instead, immigration judges will continue to review all evidence presented and determine admissibility and weight accordingly. The rule is also not intended to make any implicit negative judgments on the general credibility of foreign government or non-governmental sources and does not change the immigration judges' process of weighing evidence in applying burdens of proof. *See, e.g., 8 CFR 1240.8* (burdens of proof in removal proceedings).

Moreover, the rule does not mean that evidence from governmental sources is always admissible, as such evidence must still be relevant or probative. For example, in an asylum case involving an alien from Guatemala, the State Department report on conditions in Australia would not be probative of conditions in Guatemala. In general, however, State Department reports are considered "highly probative evidence and are usually the best source of information on conditions in foreign nations." *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209, 213 (BIA 2010) (*abrogated on other grounds by Hui Lin Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012)); *see also Sowe v. Mukasey*, 538 F.3d 1281, 1285 (9th Cir. 2008) ("U.S. Department of State country reports are the 'most appropriate and perhaps the best resource for information on political situations in foreign nations.'") (quoting *Kazlauskas v. INS*, 46 F.3d 902, 906 (9th Cir. 1995)); *accord 8 CFR 1208.11* (expressly allowing immigration judges to seek comments from the State Department regarding asylum applications). In particular, State Department reports offer both a country-wide perspective and localized comparisons that are particularly relevant for internal relocation determinations, 8 CFR 1208.13(b)(1)(i)(B), (2)(ii), and are often missing from reports from other sources. *See, e.g., Department of State, Bureau of Conflict and Stabilization Operations, Northern Triangle Country Conditions: Ranking the Highest and Lowest Areas of*

Reported Homicides, Disappearances, and Extortion (May 2019),

<https://www.justice.gov/eoir/page/file/1180706/download> (discussing rates of homicides, disappearances, and extortion at a municipality level in countries with high rates of asylum applications).

Despite commenters' concerns, once admitted as evidence, State Department reports warrant particular consideration because of their credible source: the "collective expertise and experience of the Department of State, which has diplomatic and consular representatives throughout the world." *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. at 213. The same logic applies to documents from other United States governmental agencies within their areas of expertise.

Based on this assessment, the Department believes that immigration judges should continue to rely on United States governmental sources, if relevant or probative, and should generally consider them as evidence when deciding an asylum case. The Department notes that the rule does not prevent asylum applicants from submitting additional probative evidence from credible sources if they believe that evidence from a United States governmental source has not provided a complete account of conditions in a foreign country or from arguing why, in a particular case, an immigration judge should afford less weight to any particular evidence, including evidence from government sources. Similarly, the rule does not prevent the immigration judge from weighing such information together in making the judge's final determination on whether the parties have met their burden of proof.

The Department disagrees with commenters that this rule could be used in conjunction with an earlier proposed rule which, if finalized, would bar admission of pernicious, unfounded evidence that is predicated upon harmful stereotypes from being entered into the record, to improperly reject evidence that may support an applicant's claim. 85 FR at 6282; *cf. Matter of A-B-*, 27 I&N Dec. at 336 n. 9 ("On this point, I note that conclusory assertions of countrywide negative cultural stereotypes, such as *A-R-C-G-*'s broad charge that Guatemala has a 'culture of machismo and family violence' based on an unsourced partial quotation from a news article eight

years earlier, neither contribute to an analysis of the particularity requirement nor constitute appropriate evidence to support such asylum determinations.”). Both rules are ultimately about barring admission of baseless, incredible, and non-probative evidence, whether because of the source or the content of the evidence. To the extent that commenters suggest that immigration judges would choose to bar evidence that does not support a particular narrative, i.e., suggesting that immigration judges are partial to a particular narrative or disposition, the Department strongly disagrees. As discussed at length, *infra*, section II.C.5.a.ii, EOIR’s immigration judges are impartial adjudicators, and are not expected to predetermine the admissibility of evidence based upon whether it supports a particular narrative.

Finally, the Department does not believe that the credible and probative standards require any additional definitional language, as these have been part of the evidentiary standards for decades without apparent confusion. *See, e.g., Trias-Hernandez v. INS*, 528 F.2d 366, 369–70 (9th Cir. 1975) (applying the probative evidence test).

ii. Authority of the Immigration Judge to Supplement the Record

Comment: Commenters expressed concerns that the rule would undermine the immigration judge’s neutrality or exacerbate an existing lack of neutrality. Specifically, commenters stated that the rule would improperly expand an immigration judge’s power and that allowing immigration judges to introduce evidence into the record conflicts with their role as neutral arbiters of the law. Other commenters complained that immigration judges are already biased, citing some immigration judges’ previous employment history with DHS, decisions from the Federal courts that acknowledge biased decisions from immigration judges, and records alleging EOIR misconduct. Commenters stated that allowing immigration judges to submit their own evidence would put them in the posture of a prosecutor or defense attorney rather than a judge. Some commenters suggested that immigration judges would work in tandem with DHS attorneys to deny asylum claims. Commenters stated that a rule that undermined an adjudicator’s impartiality would undermine aliens’ due process rights. Commenters expressed concerns that

immigration judges would have pre-prepared country conditions evidence packets to submit during removal proceedings, which they alleged would be improper.

Commenters generally stated that this rule would be harmful to aliens, and several commenters alleged that the rule would be particularly harmful to certain discrete populations or pro se aliens. Commenters asserted that pro se aliens may be less able to present evidence on their own behalf in support of their claims. Additionally, commenters stated that the rule does not explicitly state whether pro se aliens will be told that they have a right to object to the evidence.

Commenters expressed concern that the rule did not provide sufficient guidance or protections for aliens in proceedings in which the immigration judge introduces evidence into the record. For example, commenters expressed concern that the rule did not specify the period of time in which parties must respond to evidence submitted by the immigration judge or provide guidance that parties could respond to such evidence. Commenters suggested that the rule's language stating that parties should have an opportunity to respond or object to evidence was at odds with the chapter 3.1(b) of the Immigration Court Practice Manual, which requires parties to submit evidence at least 15 days before a hearing.

Commenters suggested that immigration judges would not fairly hear challenges to the evidence the immigration judge may have submitted. Some commenters speculated that parties, particularly pro se immigrants and vulnerable populations, would be too intimidated to raise objections to evidence submitted by the immigration judge. Other commenters expressed concerns that the rule failed to provide guidance regarding what types of evidence immigration judges may include. Further, commenters opposed the rule because they claimed it failed to specify whether parties would have the opportunity to submit comments or objections in writing to evidence submitted by the immigration judge.

Commenters were concerned that non-English speakers would not understand English-language documents submitted by an immigration judge. Commenters stated that there was no

provision allowing for a continuance for the parties to review and respond to the newly introduced evidence.

Commenters stated that the rule would violate section 240(b)(1) of the Act, 8 U.S.C. 1229a(b)(1), which provides that “[t]he immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses.” Specifically, commenters asserted that Congress did not intend to confer authority on immigration judges to submit evidence because the statute specified only that the immigration judge may receive evidence but was silent with respect to whether the immigration judge could submit evidence. Commenters further stated that, prior to the IIRIRA amendments, the Act authorized immigration judges to “present and receive evidence,” which commenters believed further demonstrated that Congress did not intend for immigration judges to have the authority to submit evidence into the record. Commenters similarly stated that the rule conflicts with the regulations at 8 CFR 1003.10(b) (stating that immigration judges may “receive evidence”) and 8 CFR 1240.1(c) (stating that immigration judges may “receive and consider material and relevant evidence”).

Some commenters suggested that the rule was at odds with other recent agency rulemakings, such as 85 FR 36264 (addressing admissibility of stereotype evidence) (proposed), and 85 FR 52491 (limiting immigration judges’ discretion by restricting their sua sponte authority to reopen cases) (proposed).

Some commenters stated that the rule would be ineffective at addressing inconsistencies and defects in immigration courts, such as, the commenters claimed, disparate patterns in immigration-judge decisions. Commenters stated that the rule would similarly be ineffective at achieving its purpose of allowing decisions to be made after full consideration of the evidence.

Some commenters stated that the rule would be inefficient at reducing overloaded dockets because immigration judges would be responsible for searching for evidence and

consulting with parties about such evidence, which the commenter opined would require a great deal of time and resources and result in more appeals to the Federal circuit courts.

Commenters recommended a number of changes to the rule, including allowing immigration judges to submit only favorable evidence to the alien. Commenters suggested that such a rule would be similar to procedures already in place at other government agencies, such as the Social Security Administration and Department of Veterans Affairs.

Commenters were concerned that the rule did not provide sufficient guidance regarding how immigration judges should consider and respond to objections to their admission of evidence on the record.

Response: The Department reiterates its response to similar comments, *supra*, and adds the following further response. As an initial point, few, if any, commenters acknowledged that immigration judges have been tasked with developing the record in asylum cases for many years, including by submitting evidence on their own authority, with no noted concerns, challenges, or complaints. *See* 85 FR at 59695 (collecting authorities). Indeed, “various guidelines for asylum adjudicators,” including ones such as the UNHCR whose views most commenters otherwise supported, “recommend the introduction of evidence by the adjudicator.” *Matter of S-M-J-*, 21 I&N Dec. at 729 (citing UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* paras. 203, 204, at 48 (1992)). Thus, the rule merely codifies a long-accepted and well-recognized practice.

As discussed, *supra*, the Department strongly disagrees with commenters’ suggestions that immigration judges are biased or incompetent and will ignore applicable law or make decisions on factors outside of the record and the law. The Department is confident that EOIR’s immigration judge corps adheres to the highest levels of professionalism and will continue to apply their independent judgment and discretion, 8 CFR 1003.10(b), when evaluating asylum applications. Generalized, ad hominem allegations of bias or impropriety are insufficient to

“overcome a presumption of honesty and integrity in those serving as adjudicators.” *Withrow v. Larkin*, 421 U.S. at 47. As such, the Department declines to accept commenters’ broad and unfounded asseverations that immigration judges are biased against aliens and will utilize this rule to effectuate those biases. *Chem. Found., Inc.*, 272 U.S. at 14–15 (“The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.”).

Relatedly, most commenters failed to recognize or acknowledge the inherent neutrality and impartiality of immigration judges. See Executive Office for Immigration Review, *Ethics and Professionalism Guide for Immigration Judges*, sec. V (Jan. 26, 2011), available at <https://www.justice.gov/eoir/sibpages/IJConduct/EthicsandProfessionalismGuideforIJs.pdf> (“An Immigration Judge shall act impartially and shall not give preferential treatment to any organization or individual when adjudicating the merits of a particular case.”); see also 5 CFR 2635.101(b)(8) (“[Federal Government] [e]mployees shall act impartially and not give preferential treatment to any private organization or individual.”). Further, commenters failed to understand that evidence is designed to assist the factfinder—i.e., the immigration judge—rather than to benefit one party over another. In short, commenters’ tendentious views that immigration judges are routinely biased against aliens and that the rule will promote their biases is wholly unfounded in law and practice⁶² and completely inapposite to the purposes served by evidentiary submissions in an immigration hearing.

The Department disagrees with commenters’ concerns that this rule would undermine the immigration judge’s role as a neutral arbiter. The rule amends the regulations so that immigration judges may, in their discretion, consider evidence that has not been presented by the parties in order to make their determinations. Nothing in the rule has any bearing on judicial

⁶² The Department further notes that complaints of misconduct against immigration judges have declined for three consecutive fiscal years, even as the size of the corps has grown to its largest level in the Department’s history. See EOIR, *Adjudication Statistics* (Oct. 23, 2019), <https://www.justice.gov/eoir/page/file/1163621/download>; *Immigration Judge (IJ) Complaints* (Oct. 2020), available at <https://www.justice.gov/eoir/page/file/1104851/download>.

interpretations of such evidence. The Department fully expects, as mandated by regulation, that in complying with this rule, immigration judges to continue to conduct themselves as neutral arbiters of the law. *See* 8 CFR 1003.10(b); *see also* 5 CFR 2635.101(b)(8).

Notably, immigration judges have long had the authority and duty to manage immigration court hearings, including creating and controlling the record of proceeding, and to fully develop the record, while impartially adjudicating cases before them. 8 CFR 1003.10(b); *see also* 8 CFR 1003.36 (“The Immigration Court shall create and control the Record of Proceeding.”). It is also consistent with an immigration judge’s duty to develop the record. *See* 85 FR at 59695 (collecting authorities).

Commenters’ suggestions that immigration judges might create standard country conditions packets of evidence that they might enter into the record did not explain why such evidence would be inappropriate or improper. As a matter of standard practice, both parties already submit standard (and voluminous) packets of country conditions evidence of varying degrees of probative value. In cases where country conditions evidence is lacking—e.g., the most recent relevant State Department Country Report on Human Rights Practices—many immigration judges already provide copies of such evidence to both parties. Commenters did not explain why allowing immigration judges to provide standard country conditions reports—longstanding and credible sources of directly relevant information that frequently require the submitting party to print out hundreds of pages—would be improper, and the Department is unaware of any reason to conclude that it would be. Further, such a procedure, which, again, is already commonly employed by immigration judges, particularly pursuant to *Matter of S-M-J-*, would not undermine the immigration judge’s neutrality or the fairness of proceedings. The immigration judge would weigh such evidence, like any evidence submitted into the record pursuant to this rule, against all other evidence of record in issuing a final determination. Moreover, to the extent that commenters’ concerns are actually rooted in a tacit belief that additional probative evidence exists that has not been submitted by an asylum applicant and

would call into doubt the validity of the applicant’s claim, the Department finds the suggestions that immigration judges should decide cases without as much probative evidence as possible or that it is preferable for immigration judges to decide cases with less probative evidence utterly unpersuasive.

The Department reiterates its rejection of any implication that EOIR’s corps of immigration judges is biased. Immigration judges, who have been selected based on merit, are required to adjudicate cases in an “impartial manner,” 8 CFR 1003.10(b), exercise “independent judgment and discretion,” *id.*, and “should not be swayed by partisan interests or public clamor,” Executive Office for Immigration Review, *Ethics and Professionalism Guide for Immigration Judges*, sec. VIII (Jan. 26, 2011), available at <https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf>. Regardless of previous experience, immigration judges are sworn in and governed by the same regulations and ethical standards to be neutral and impartial. Nothing in this rule affects those obligations, and commenters’ unfounded accusations of bias leading to due process violations are insufficient to “overcome a presumption of honesty and integrity in those serving as adjudicators.” *Withrow v. Larkin*, 421 U.S. at 47.⁶³

⁶³ Although the Department acknowledges prior high-profile criticisms of immigration judge bias by circuit courts, *see, e.g., Islam v. Gonzales*, 469 F.3d 53, 56 (2d Cir. 2006) (“Unfortunately, this is not the first time that the courtroom conduct of IJ [Jeffrey] Chase has been later questioned by this Court. By our count, this is the seventh time that we have criticized IJ Chase’s conduct during hearings. Our recent opinion . . . described IJ Chase’s ‘apparent bias against [the applicant] and perhaps other Chinese asylum applicants,’ . . . and five summary orders in our Circuit have expressed similar concerns about IJ Chase’s remarks and demeanor while conducting hearings.”) (internal citations omitted), and notes that commenters also cited to federal court cases that discuss or touch upon immigration judge bias, *Ali v. Mukasey*, 529 F.3d 478 (2d Cir. 2008); *Wang v. Att’y Gen. of U.S.*, 423 F.3d 260 (3d Cir. 2005); *Zuh v. Mukasey*, 547 F.3d 504 (4th Cir. 2008); *Floroiu v. Gonzales*, 481 F.3d 970 (7th Cir. 2007); *Tun v. Gonzales*, 485 F.3d 1014 (8th Cir. 2007), the concerns reflected by these cases are more than a decade old. More recent information reflects that complaints of misconduct against immigration judges have fallen for three consecutive fiscal years despite a significant increase in the size of the corps. *See* Executive Office for Immigration Review, *Adjudication Statistics: Immigration Judge (IJ) Complaints* (Oct. 2020), available at <https://www.justice.gov/eoir/page/file/1104851/download>. Nevertheless, to the extent that commenters remain concerned about the bias or other conduct of immigration judges, the Department notes that EOIR has developed a mechanism for raising such complaints specifically for the purpose of addressing bias by EOIR adjudicators. *See* Executive Office for Immigration Review, *EOIR Adjudicator Complaint Process Summary* (rev. Oct. 15, 2018), available at <https://www.justice.gov/eoir/page/file/1100946/download> (“In instances where concerns regarding the conduct of an immigration judge, board member, or administrative law judge (collectively, adjudicator) arise, EOIR is committed to ensuring that any allegations of judicial misconduct are investigated and resolved in a fair and expeditious manner.”).

The Department rejects commenters' insinuations that immigration judges would not be impartial in entering evidence to the record or would only introduce evidence that would be damaging to an alien's claim. Immigration judges are bound by regulation to "resolve the questions before them in a timely and *impartial* manner." 8 CFR 1003.10(b) (emphasis added); *see also* 5 CFR 2635.101(b)(8) ("[Immigration judges] shall act impartially and not give preferential treatment to any private organization or individual."). The rule permits immigration judges to submit probative evidence from credible sources into the record. Such evidence may benefit either party, depending on the larger context and facts of the case, but the purpose of the rule is not to assist either party. The purpose is to allow the adjudicator, consistent with current practice and case law, to develop the record sufficiently to make an informed decision regarding the merits of the case. Allegations regarding whether such procedures, which are already well-established, will benefit one party over another are both grossly speculative and wholly inapposite. Additionally, this rulemaking does not bar parties from submitting their own evidence, so long as it is admissible. It merely permits the immigration judge to submit additional evidence where necessary and in an exercise of discretion, so that the immigration judge may render a decision based upon a fully developed and probative record.

The Department disagrees with commenters' concerns that authorizing the immigration judge to supplement the record would harm pro se aliens. To the contrary, immigration judges already have a well-established obligation to develop the record in cases of pro se aliens. *See Mendoza-Garcia v. Barr*, 918 F.3d 498, 504 (6th Cir. 2019) (collecting cases); *see also Al Khouri v. Ashcroft*, 362 F.3d 461, 464-65 (8th Cir. 2004) ("[I]t is the IJ's duty to fully develop the record. Because aliens appearing pro se often lack the legal knowledge to navigate their way successfully through the morass of immigration law, and because their failure to do so successfully might result in their expulsion from this country, it is critical that the IJ scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts.") (citations and internal quotation marks omitted). Further, this rule will ensure pro se aliens, who may not be as

aware as an immigration judge of available probative evidence from credible sources of country conditions, receive due process and full consideration of their claims. This provision of the rule is consistent with an immigration judge's regulatory directive to "take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of [individual cases before them]," 8 CFR 1003.10(b); *see also* 85 FR at 59695, and the immigration judge's unique role to ensure full consideration of all relevant evidence and full development of the record for cases involving a pro se respondent, *see Matter of S-M-J*, 21 I&N Dec. at 729 (noting that "various guidelines for asylum adjudicators recommend the introduction of evidence by the adjudicator").

Commenters' concerns that, under this rule, parties would not have the opportunity to respond to evidence that the immigration judge submits, are plainly refuted by the regulatory language, which requires that the parties "have had an opportunity to comment on or object to the evidence prior to the issuance of the immigration judge's decision." 8 CFR 1208.12(a). Additionally, the Department has previously explained that requiring the immigration judge to provide a copy of submitted evidence to both parties was specifically intended to "give the parties an opportunity to respond to or address the information appropriately." 85 FR at 59695.⁶⁴

The Department disagrees with commenters' concerns that immigration judges would be unable to adequately address objections to evidence that they submit. Immigration judges have been hired based upon their merit and receive "comprehensive, continuing training and support" directed at "promot[ing] the quality and consistency of adjudications." 8 CFR 1003.0(b)(1)(vii).

⁶⁴ The NPRM declined to propose a bright line rule for precisely how a party may have an opportunity to comment on the evidence because the reasonableness of a party's opportunity to comment will vary based on the overall context of the case and the nature of the evidence the immigration judge proposes to submit. For example, if the record already contains thousands of pages of country conditions evidence submitted by attorneys for both parties and the immigration judge merely submits the most recent State Department Country Report on Human Rights Practices that the parties simply forgot to submit, the opportunity to comment should not be lengthy. In contrast, if an immigration judge submits hundreds of pages of country conditions evidence in a proceeding involving a pro se alien who does not speak English, then a continuance may be warranted to allow the alien an opportunity to comment on the evidence. The Department recognizes that the nature of the opportunity to comment will vary from case to case based on the particular facts of each case, and it expects immigration judges to address such situations consistent with applicable laws and policies.

The Department believes that immigration judges are well-equipped to address any arguments raised with respect to evidence that they submit, including how to weigh that evidence against all other evidence of record and, if appropriate, acknowledging successful challenges to its admission.

Further, parties will have the opportunity to object to the evidence, and the Department expects that if parties have an objection, they will make it contemporaneously when the immigration judge submits the evidence in order to preserve the issue for appeal. The Department believes that existing appellate procedures would mitigate commenter concerns, though unfounded as an initial matter, that immigration judges may be unwilling to fairly consider objections to evidence that they submitted or that parties may not have sufficient time to respond to such evidence.

With respect to commenter concerns that non-English speakers may not be able to understand English documents that the immigration judge may choose to submit into the record, the Department notes that there is no existing requirement for immigration judges to translate documents submitted into evidence into an alien's native language when developing the record. *See Matter of S-M-J-*, 21 I&N Dec. at 727 (observing that "if background information is central to an alien's claim, and the Immigration Judge relies on the country conditions in adjudicating the alien's case, the source of the Immigration Judge's knowledge of the particular country must be made part of the record" but nowhere requiring that such information be submitted in the alien's native language). Further, most commenters failed to acknowledge that all evidence submitted in an immigration hearing, regardless of who submits it, is to be submitted in English or with an English translation. 8 CFR 1003.33.⁶⁵ Additionally, nothing in the statute or regulations requires that evidence of record be written or explained in the respondent's native language. *Cf. Singh v. Holder*, 749 F.3d 622, 626 (7th Cir. 2014) ("[i]n the immigration context,

⁶⁵ The Department notes that there is no existing requirement that evidence submitted by DHS be translated into an alien's native language or even that an alien's representative translate all evidence submitted on the alien's behalf into the alien's native language.

personal service in English to a non-English-speaker typically satisfies due process because it puts the alien on notice that further inquiry is needed, leaving the alien to seek help from someone who can overcome the language barrier.”); *Ojeda-Calderon v. Holder*, 726 F.3d 669, 675 (5th Cir. 2013) (“Due process allows notice of a hearing to be given solely in English to a non-English speaker if the notice would put a reasonable recipient on notice that further inquiry is required.”). Finally, as discussed *supra*, and notwithstanding the longstanding rule that evidence must be submitted in English or with a certified translation, the Department also expects immigration judges to account for an alien’s native language when considering what opportunity to provide to the alien to respond to evidence submitted by an immigration judge, particularly for the small minority of aliens who are pro se.⁶⁶

The Department disagrees with comments alleging that the rule is inconsistent with section 240(b)(1) of the Act, 8 U.S.C. 1229a(b)(1), which provides that “[i]mmigration judges shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses,” and commenters did not reconcile their interpretation of that provision with case law allowing, if not also requiring, immigration judges to submit evidence in order to develop the record, *see* 85 FR at 59695 (collecting cases). As commenters noted, the statute does not explicitly direct immigration judges to submit evidence into the record, but it does not purport to represent the complete and exclusive scope of immigration judge authority with regard to proceedings. Further, the Department disagrees with commenters that the amendments to the statutory language from “present and receive evidence” to simply “receive evidence” indicate a prohibition on the ability of immigration judges to introduce evidence, given the continued duty of immigration judges to develop the record. *See Constanza-Martinez v. Holder*, 739 F.3d at

⁶⁶ The Department notes that the State Department Country Reports on Human Rights Practices, which are the most common evidence submitted by immigration judges, are available in multiple languages, including Spanish. *See*, Department of State, *2019 Country Reports on Human Rights Practices Translations*, available at <https://www.state.gov/2019-country-reports-on-human-rights-practices-translations/> (last visited Nov. 20, 2020). Nothing in this rule precludes an immigration judge from providing a translated copy of the Country Report to an alien in addition to the English-language version.

1102 (“The parties agree it is unclear why ‘present’ was removed from the INA. Even so, IJs maintain an affirmative duty to develop the record.”).⁶⁷

Commenters’ concerns that the regulations do not allow immigration judges to submit evidence into the record need not be addressed because this rule, enacted through the appropriate APA procedures, amends the Department’s regulations to specifically authorize immigration judges to do so. Moreover, as discussed, *supra*, ample case law already provides a basis, independent of regulatory one, for immigration judges to submit evidence. And, as also discussed elsewhere, the Department does not believe that this rule would undermine the neutrality of immigration judges and accordingly rejects commenters’ arguments that this rule conflicts with the regulations requiring immigration judges to act with impartiality.

The Department disagrees with commenter’s concerns that this rulemaking will overburden immigration judges and exacerbate docket-management issues. To the contrary, this rule empowers immigration judges with additional tools to resolve the cases before them based on a full and complete record. It does not mandate immigration judges introduce evidence in any case or otherwise require additional work if an immigration judge determines it is not needed or would be inefficient in a particular case.

Commenters made a number of recommendations regarding changes or alternatives to this provision of the rule, including incorporating a checklist for immigration judges to follow to prevent bias in assessing country conditions evidence; altering the rule so that immigration judges do not submit evidence themselves but instead suggest to the parties the inclusion of

⁶⁷ See also 8 CFR 1003.10(b) (“In deciding the individual cases before them, . . . immigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases.”); 8 CFR 1003.36 (“The Immigration Court shall create and control the Record of Proceeding.”); *Yang v. McElroy*, 277 F.3d 158, 162 (2d Cir. 2002) (per curiam) (“[T]he IJ whose decision the Board reviews, unlike an Article III judge, is not merely the fact finder and adjudicator but also has an obligation to establish the record.”); *Richardson v. Perales*, 402 U.S. 389, 410 (1971) (finding that an administrative law judge “acts as an examiner charged with developing the facts”); Charles H. Koch, Jr. & Richard Murphy, *Administrative Law and Practice* § 5.25 (3d ed. 2020) (noting that “[t]he administrative judge is pivotal to the fact-finding function of an evidentiary hearing and hence, unlike the trial judge, an administrative judge has a well-established affirmative duty to develop the record”); *Matter of S-M-J-*, 21 I&N Dec. at 729 (noting that “various guidelines for asylum adjudicators recommend the introduction of evidence by the adjudicator”).

evidence, such as country conditions evidence from the EOIR database, they would like to consider; or only permitting immigration judges to submit evidence that is favorable to the alien. The Department appreciates the recommendations submitted by commenters, but each one is problematic, and none is preferable to the rule.

For example, the suggestion for a checklist is premised on the assertion that immigration judges may be biased, but as discussed previously, that assertion is wholly unfounded. Moreover, immigration judges are well-versed in assessing the admissibility and weight of evidence, and there is no indication that a checklist would aid them in that regard. Suggesting that the parties introduce particular evidence, rather than allowing the immigration judge to introduce it, would not aid pro se aliens who may lack the resources or access to print tens or hundreds of pages of country conditions reports. Finally, the suggestion that immigration judges only submit evidence favorable to aliens would be anathema to an immigration judge's role as a neutral adjudicator and would violate both an immigration judge's ethical and professional responsibility obligations, *see Ethics and Professionalism Guide for Immigration Judges*, sec. V (Jan. 26, 2011), *available at* <https://www.justice.gov/eoir/sibpages/IJConduct/EthicsandProfessionalismGuideforIJs.pdf> (“An Immigration Judge shall act impartially and shall not give preferential treatment to any organization or individual when adjudicating the merits of a particular case.”); *see also* 5 CFR 2635.101(b)(8) (“[Immigration judges] shall act impartially and not give preferential treatment to any private organization or individual.”), and an immigration judge's regulatory duty of impartiality, 8 CFR 1003.10(b) (“In all cases, immigration judges shall seek to resolve the questions before them in a timely and impartial manner”).

The Department also disagrees with commenters' concerns that this provision of the rule conflicts with recent rules proposed—and now finalized—by the Department, specifically those (1) limiting EOIR adjudicators' sua sponte authority, 85 FR 52491 (“The Board shall not *sua sponte* remand a case unless the basis for such a remand is solely a question of jurisdiction over

an application or the proceedings.”) (proposed)), and (2) barring admissibility of stereotype evidence, 85 FR 36264.

Regarding stereotype evidence, the Department proposed to exclude the admission of pernicious, unfounded evidence that is predicated upon harmful stereotypes from being entered into the record, 85 FR at 36282; *cf. Matter of A-B-*, 27 I&N Dec. at 336 n.9, and finalized that proposal with some minor, non-substantive edits for clarity in response to commenters’ concerns, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, signed by the Attorney General and the Acting Secretary of Homeland Security on December 2, 2020. Nothing in this rule would encourage immigration judges to submit pernicious, unfounded evidence that is predicated upon harmful stereotypes. As plainly noted in the regulation, evidence submitted by an immigration judge must be “relevant . . . if the source is credible and the evidence is probative,” *see* 8 CFR 1208.12(a), and evidence of pernicious stereotypes about a country would not meet those criteria.

Commenters’ concerns with respect to EOIR adjudicators’ sua sponte authority is unrelated to this rulemaking. Indeed, the rule focuses on the adjudication of asylum applications in pending cases, whereas sua sponte authority is used to reopen a case in which a decision has already been rendered. Nothing in the present rule interacts with or is connected to the Department’s proposal to limit the Attorney General’s delegation of sua sponte authority to EOIR adjudicators.

b. Asylum Adjudication Clock

Comment: Commenters stated that, despite recognizing the statutory 180-day asylum adjudication deadline in the Act, INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii), it was unreasonable for the Department to implement this regulation due to the significant number of pending cases at EOIR. Commenters explained that requiring asylum applications to be completed within 180 days would not allow attorneys and aliens sufficient time to prepare cases for adjudication, would require immigration judges to unfairly delay non-asylum cases on their

dockets, would strip immigration judges of the ability to manage their dockets, would prevent asylum seekers from fully presenting their cases due to a lack of individual hearing slots, would result in a significant number of suddenly advanced hearings, would lessen the ability of asylum seekers to obtain counsel, and would cause unsuccessful applicants to be removed before pending ancillary relief with USCIS could be adjudicated.

Commenters claimed that Congress's use of the word "shall" when discussing the 180-day asylum adjudication deadline was permissive rather than mandatory and, therefore, EOIR should not issue regulations indicating a mandatory deadline.

Commenters also raised concerns about the 180-day asylum adjudication deadline's effect on child asylum applicants. Commenters stated that child applicants face unique challenges in presenting their claims and are deserving of enhanced procedural protections, such as an exception to the adjudication deadline. In addition, commenters questioned whether the 180-day adjudication deadline would apply to USCIS's initial adjudication of asylum applications filed by UAC.

Commenters were separately concerned about the 180-day asylum adjudication deadline and its effect on work authorization. Commenters stated that the rule would prevent asylum seekers from obtaining work authorization, particularly in light of recent DHS regulatory changes increasing the minimum wait time, which would result in the inability of asylum seekers to afford representation.⁶⁸ Commenters recommended that the Department replace 8 CFR 1208.7 with language clarifying EOIR's role in the work authorization process rather than remove and reserve the section entirely, which would remove guidance for the parties and the court from the regulations.

Response: The Department reiterates its response to similar comments, *supra*, and adds the following further response. To the extent that commenters disagreed with the general

⁶⁸ This provision is currently subject to a preliminary injunction in *Casa de Maryland v. Wolf*, No. 8:20-cv-02118-PX (D. Md. Sept. 11, 2020), *appeal docketed*, No. 20-2217 (4th Cir. Nov. 12, 2020).

existence of a 180-day adjudication deadline for asylum applications absent exceptional circumstances, the Department notes that deadline is established by statute, INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii), and cannot be altered by rulemaking. Accordingly, such concerns are beyond the scope of this rulemaking and the Department's rulemaking authority and therefore more appropriately addressed to Congress.

Specifically, as commenters recognize, adjudicating asylum applications within 180 days of filing is a statutory requirement set by Congress. *See* INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii). Therefore, issuing regulations to implement this requirement effectuates congressional intent that asylum applications be promptly adjudicated.⁶⁹ Complaints that the Department should not issue regulations implementing this deadline because immigration courts are overburdened is not a valid reason to simply ignore congressional mandates. Rather, ensuring that asylum applications are adjudicated within a 180-day timeframe will help to decrease immigration court backlogs and ensure that asylum applicants are not forced to wait in limbo in the United States for extended periods of time to receive a determination on their applications.

With regard to commenters' concerns about the effect of the 180-day asylum adjudication deadline on the ability of asylum seekers to obtain counsel and prepare their case, the Department again notes that Congress set the 180-day deadline. *See* INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii). By implementing this provision, Congress necessarily expressed their belief that 180 days is a reasonable time period for asylum seekers to prepare and present their case once they have filed their application. In addition, the Department emphasizes that this 180-day adjudication period does not begin until the asylum application is filed and not from when DHS serves the alien with a charging document or at some other earlier point in the proceeding.

⁶⁹ To the extent commenters assert that the Department failed to previously adhere to the law regarding this adjudication period, the Department acknowledges a lack of prior diligence in maintaining compliance. Nevertheless, there is no reason to continue to ignore a clear statutory directive, and the Department has maintained a policy that seeks to comply with that directive for more than two years. EOIR Policy Memorandum 19-05, *Guidance Regarding the Adjudication of Asylum Applications Consistent with INA § 208(d)(5)(A)(iii)* (Nov. 19, 2018), available at <https://www.justice.gov/eoir/page/file/1112581/download>. This rule will bolster that policy and further emphasize the importance of adhering to statutory directives.

Once the asylum application is filed, applicants and their attorneys would have additional time within the 180 days to obtain any additional necessary supporting evidence and to prepare for any hearings on the application, which the Department believes is a reasonable time period, as reflected by the congressional enactment.

The Department disagrees with commenters that this rule will prevent immigration judges from managing their dockets or providing sufficient hearing time to asylum applicants or that it will result in the unfair delay of non-asylum cases. As an initial point, immigration judge authority is circumscribed by both the Act and applicable regulations. 8 CFR 1003.10(b) (providing that “immigration judges . . . may take any action *consistent with their authorities under the Act and regulations* that is appropriate and necessary for the disposition of such cases”) (emphasis added), 1240.1(a)(1)(iv) (providing that immigration judges have the authority in removal proceedings “[t]o take any other action consistent *with applicable law and regulations* as may be appropriate”) (emphasis added)). Thus, the codification of a statutory requirement in the Act in applicable regulations does not alter the pre-existing limits on an immigration judge’s authority. Further, this rule makes no changes to immigration judges’ authority to manage their dockets, and commenters have not adequately explained how implementing a statutorily-required adjudication deadline, which immigration judges are already expected to follow as a matter of both law and policy would alter this authority. *See* 8 CFR 1003.10(b). The Department has no concerns that immigration judges will fail to provide sufficient hearing time to asylum applicants as necessary to the adjudication of the application. *See, e.g.,* INA 240(b)(1), 8 U.S.C. 1229a(b)(1) (providing immigration judges with authority to “receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses”); 8 CFR 1240.11(c)(3) (requiring a hearing on an asylum application only “to resolve factual issues in dispute”).

In regard to commenters’ concerns that adjudicating asylum applications within the statutorily-mandated timeframe will prevent immigration judges from adjudicating other cases,

the Department notes that this rule does not prioritize any application or case over another. Rather, the rule merely implements a statutorily-mandated adjudication deadline for asylum applications. To the extent that implementing this deadline may affect the adjudication of other cases, the Department believes that the timely adjudication of asylum applications will help to reduce the immigration court backlog, thereby allowing immigration judges to more quickly adjudicate the cases before them.

Regarding concerns about EOIR advancing hearings, the Department notes that such concerns are speculative, particularly in the current operational environment in which many hearings are postponed due to the outbreak of COVID-19. Nevertheless, there is no reason to expect this rule to result in an overwhelming number of advanced hearings once EOIR's operating posture returns to normal, as most immigration judges already have a significant number of deadline-eligible asylum applications pending on their immediate dockets. And, in the event that an immigration judge does choose to advance a case, practitioners can request a continuance as appropriate, 8 CFR 1003.29, although as the Department has discussed, *supra*, it is not clear why aliens with valid asylum claims would desire further delay in the adjudication of their case.

The Department also disagrees with commenters that this provision raises due process concerns. In immigration proceedings, due process concerns are only implicated if proceedings are "so fundamentally unfair that the alien was prevented from reasonably presenting his case." *Gutierrez v. Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011) (citations omitted). Requiring asylum applications to be adjudicated within 180 days of filing, as explicitly required by statute, does not itself make proceedings fundamentally unfair or prevent an alien from exercising the statutory right to present evidence. *See* INA 240(b)(4)(B), 8 U.S.C. 1229a(b)(4)(B). For example, detained applicants routinely have their applications adjudicated within 180 days without apparent due process concerns stemming from this timeframe.

In regard to concerns about the asylum adjudication deadline and its effect on pending non-asylum applications with USCIS, the Department notes that this rule does not make any changes for non-asylum applications, including those pending with USCIS. Moreover, a separate pending application with USCIS does not prevent the immigration court from proceeding on the asylum application to ensure its timely adjudication. In addition, once the immigration court has timely adjudicated the asylum application, this rule does not prohibit applicants from requesting a continuance under the “good cause” standard or working with DHS counsel to file a motion to dismiss based on a pending application with USCIS. *See* 8 CFR 1003.29, 1239.2(c).

The Department understands and has considered the comments related to UAC but finds them either largely inapplicable to the rule, insufficiently persuasive, or outweighed by the rule’s benefits to warrant changing the rule. First, the timeframes applied by USCIS to adjudicating asylum applications filed by genuine UAC are beyond the scope of this rulemaking because USCIS is a DHS component, and the Department offers no opinion regarding USCIS’s views on section 208(d)(5)(A)(iii) of the Act, 8 U.S.C. 1158(d)(5)(A)(iii). Second, for purposes of immigration judge adjudication, the provisions of section 208(d)(5)(A)(iii) of the Act, 8 U.S.C. 1158(d)(5)(A)(iii), apply to “final administrative adjudication of the asylum application, not including administrative appeal” and, thus, would only become applicable to the asylum application filed by a UAC in removal proceedings after that application has been returned by USCIS back to the immigration court following USCIS’s decision not to grant it. In other words, the 180-day adjudication deadline in immigration proceedings for an asylum application filed by a UAC in removal proceedings would not be triggered until after USCIS has made its initial determination on that application under section 208(b)(3)(C) of the Act, 8 U.S.C. 1158(b)(3)(C). Moreover, nothing in this rule affects USCIS’s initial adjudication of asylum applications filed by UAC. *Id.*

Significantly, Congress did not exempt UAC asylum applications from the provisions of section 208(d)(5)(A)(iii) of the Act, 8 U.S.C. 1158(d)(5)(A)(iii), as it did for other provisions.

Compare INA 208(a)(2)(E), 8 U.S.C. 1158(a)(2)(E) (exempting UAC asylum applications from limitations imposed by asylum cooperative agreements and the one-year filing deadline). This evinces congressional judgment that all asylum applicants should have their applications adjudicated within 180 days of filing, regardless of the applicant's individual characteristics or status. This also makes particular sense for UAC asylum applications, as USCIS will already have adjudicated their asylum application, and the child applicant will only be renewing that application with EOIR, as opposed to submitting an entirely new claim.

In short, the Department has fully considered the issues raised by commenters pertaining to UAC. As noted, most of the concerns reflect a misapprehension of the rule's contents, are directed at statutory provisions that cannot be changed by rulemaking, or confuse adjudications by the Department with those by USCIS. The Department is aware of the special circumstances and needs of genuine UAC and maintains clear policies to ensure that their cases are adjudicated efficiently and consistent with due process. *See* EOIR, *Operating Policies and Procedures Memorandum 17-03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children* (Dec. 20, 2017), *available at* gov/eoir/file/oppm17-03/download. Nothing in the rule alters those policies, and the Department finds that the rule will not have any greater effect on UAC than on any other group of aliens. If anything, the rule will have minimal to no effect on UAC because they are unlikely to fall within the classes of aliens in 8 CFR 1208.2(c) and their asylum applications are subject to INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii), regardless of this rule. Accordingly, on balance, commenters' assertions regarding the rule's impact on UAC are unfounded and ultimately unpersuasive.

In response to commenters' concerns about this rule's effect on the ability of aliens to receive work authorization, particularly in light of recent DHS regulatory changes, the Department notes that Congress explicitly intended for asylum applications to be adjudicated before the asylum seeker is eligible for work authorization. *Compare* INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii) (requiring adjudication of asylum applications within 180 days of

filing), *with* INA 208(d)(2), 8 U.S.C. 1158(d)(2) (permitting work authorization only after a minimum of 180 days has elapsed from the filing of an asylum application). In this manner, eligibility for work authorization is meant to be the exception for aliens whose cases exceed the reasonable period of time for adjudication, as set by Congress, but not the standard or expectation for asylum seekers as a matter of course.

Relatedly, and contrary to commenters' assertions, this rule does not interfere with an asylum seeker's statutory right to representation, INA 240(b)(4)(A), 8 U.S.C. 1229a(b)(4)(A), due to an inability to receive work authorization and thus afford an attorney. Rather, aliens who are unable to afford fee-based counsel may seek pro bono representation or avail themselves of other programs to obtain information to prepare their cases. Moreover, as noted *supra*, this statutory provision has been in effect for more than 20 years, and the current representation rate of 85% strongly suggests it has not impacted an alien's ability to obtain representation.

Lastly, the Department considered the commenters' suggestion that, rather than remove and reserve existing 8 CFR 1208.7, the Department should amend 8 CFR 1208.7 with clarified regulatory language regarding EOIR's role related to work authorization. After consideration, the Department continues to believe that regulatory language regarding work authorization is better located solely within DHS's regulations because DHS has sole authority over work authorization. Further, as discussed in the NPRM, removing and reserving 8 CFR 1208.7 would avoid any potential future conflict should DHS amend 8 CFR 208.7. *See* 85 FR at 59695. In short, EOIR plays no part in adjudicating applications for alien EADs, and there is no reason to maintain vestigial regulations related to a process in which EOIR has no role.⁷⁰

⁷⁰ The Department notes that retaining 8 CFR 1208.7 would have no effect on EOIR operations—other than risking confusion by the parties regarding which agency is responsible for adjudicating an EAD application—because its previous provisions simply do not apply to EOIR. To the contrary, EOIR already excludes applicant-caused delays that meet the exceptional circumstances standard from calculating the statutory 180-day asylum adjudication clock as noted in 8 CFR 1208.7(a)(2). *See* EOIR Policy Memorandum 19-05, *Guidance Regarding the Adjudication of Asylum Applications Consistent with INA § 208(d)(5)(A)(iii)* at 2-3 (Nov. 19, 2018) (“But, absent delays that qualify as exceptional circumstances, 8 C.F.R. § 1208.7(a)(2) does not relieve Immigration Judges of their obligation to adjudicate asylum claims within 180 days.”), <https://www.justice.gov/eoir/page/file/1112581/download>. Further, although EOIR provides DHS with access to a separate “clock” for purposes of adjudicating EAD applications, EOIR

Comment: Commenters were opposed to the rule’s “exceptional circumstances” definition, stating that there are many situations that may not rise to the level of exceptional circumstances as defined in the rule but nevertheless should be sufficient to grant additional time beyond 180 days. As examples, commenters pointed to asylum seekers requiring mental health services before they can fully discuss their asylum claim or the need to obtain corroborating evidence from their home countries. Commenters stated that the definition as drafted would result in increased appeals and remands. Similarly, commenters stated that the Department should not mirror the statutory “exceptional circumstances” definition in section 240(e)(5) of the Act, 8 U.S.C. 1229a(e)(5), because failing to appear at a hearing has different equities than needing more time to support an asylum application. Commenters also stated that the exceptional circumstances requirement should apply to DHS attorneys and the immigration judge as well. One commenter likewise requested that the Department modify the final rule to explicitly include immigration judge requests for Department of State comments to qualify as an exceptional circumstance.

Response: In regard to concerns with the “exceptional circumstances” standard, the Department first notes that Congress mandated this standard. *See* INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii). The Department has reasonably chosen to interpret this language in accordance with its explicit definition elsewhere in the statute to ensure consistency within the statute and the long-held definition used by parties and the courts. *See* INA 240(e)(1), 8 U.S.C. 1229a(e)(1). The Department acknowledges commenters’ concerns that there may be circumstances in which an alien may not meet the standard, but that is true of any standard. Congress provided an undefined standard in the Act, and the Department has determined that an existing statutory definition elsewhere in that statute is a reasonable interpretation of a phrase

does not adjudicate EAD applications themselves and, thus, does not interpret the time period related to EAD applications in INA 208(d)(2), 8 U.S.C. 1158(d)(2). Accordingly, although retention of 8 CFR 1208.7 would not alter EOIR’s existing processes, its superfluosity and the risk of confusion related to maintaining it regarding which agency is responsible for adjudicating EAD applications militate strongly in favor of removing it.

connoting circumstances that are generally considered “severe impediments.” *See Chevron*, 467 U.S at 844 (requiring deference to an agency’s reasonable interpretation of an ambiguous statute); *see also Singh-Bhathal v. INS*, 170 F.3d 943, 947 (9th Cir. 1999) (interpreting exceptional circumstances to involve “severe impediment[s]”). Commenters have not provided support for the contention that implementing such a definition will result in increased appeals or remands or explained why the Department should not adopt a compelling existing statutory definition, particularly one that comports with common-sense notions of “exceptional circumstances.”

The Department declines to create any specific exceptions to the definition, and it recognizes that no rule can cover every possible factual scenario, particularly when considering the existence of more than 500,000 pending asylum applications currently. *See* Executive Office for Immigration Review, *Adjudication Statistics: Total Asylum Applications* (Oct. 13, 2020), available at <https://www.justice.gov/eoir/page/file/1106366/download>. Thus, although the Department has considered commenters’ suggestion to list Department of State comment requests as constituting an extraordinary circumstance, *see* 8 CFR 1208.11, the Department declines to provide that specific exception. Rather, the Department will allow immigration judges, who are better positioned to evaluate the specific facts in each case, to make a case-by-case determination on whether extraordinary circumstances exist. *See, e.g., Arredondo v. Lynch*, 824 F.3d 801, 805 (9th Cir. 2016) (explaining that, in the failure to appear context, the court must look to the particularized facts in each case when determining whether exceptional circumstances exist).

Similarly, in a vacuum, the Department cannot respond to commenters’ generalized statements about various proposed exceptions because asylum applications are adjudicated based on their specific facts, not on generalized speculative assertions or extrapolations. For example, a commenter’s suggestion that a need for mental health services is an exceptional circumstance may be true in some cases because it may be indicative of “serious illness of the alien;” however,

unmoored from any larger context, the Department cannot say that it would be exceptional in all cases, particularly if it is unrelated to the claim at issue.⁷¹ Further, some aliens with valid claims who are receiving mental health treatment may not wish to use that treatment as a basis to delay adjudication of their case because they seek to obtain relief as quickly as possible. The Department cannot make a blanket determination based solely on generalizations without context that such situations will always constitute an exceptional circumstance because each case is different and considered on its own merits. Moreover, the credibility of such assertions will always be at issue because they provide an exception to the general rule, and it is difficult, if not impossible, for the Department to make generalized credibility determinations in a rulemaking. Rather, the Department believes that the definition established by the rule is appropriate and determinations regarding which facts may meet the standard are more appropriately made on a case-by-case basis by an immigration judge.

Finally, in response to other commenters' concerns, the Department notes that the definition of exceptional circumstances is not limited to circumstances faced by aliens. Although the rule provides examples of exceptional circumstances that may affect the alien, which the Department expects will be the most common situation, the rule explicitly states that exceptional circumstances are those "beyond the control of the *parties or the immigration court.*" 8 CFR 1003.10(b) (final rule) (emphasis added). Consequently, exceptional circumstances may involve those affecting DHS, an immigration judge, or the alien.

6. Retroactivity

Comment: Several commenters were concerned with the rule's silence on the issue of retroactive applicability. Commenters asserted that the rule should not apply to anyone whose latest entry into the United States was prior to the rule's effective date or to any case where an

⁷¹ For instance, the Department notes that individuals may receive treatment for a variety of mental health conditions—e.g., obstructive sleep apnea hypopnea; caffeine intoxication; tobacco withdrawal; gambling disorders—that are not normally associated with grounds for asylum and would ordinarily not be considered exceptional circumstances. See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)* (5th ed. 2013).

NTA has been filed. Commenters also urged the Department to explicitly specify that the rule does not have any retroactive effect or, in the alternative, specifically identify the individuals and claims to which the rule would apply.

Commenters believed that applying the rule retroactively would create waste, uncertainty, and inefficiency in the immigration court system and overburden DHS. For example, commenters stated that DHS trial attorneys, immigration judges, court staff, and asylum officers would be immediately overwhelmed if they were forced to adjudicate all current pending cases within the rule's 180-day timeframe. Moreover, commenters noted that work may need to be repeated to conform to the rule's new evidentiary standards. Commenters raised concerns that court staff would have to spend an inordinate amount of unnecessary hours going through recently submitted I-589 forms that have not yet been deemed complete to see whether every box is filled.

Moreover, commenters claimed that thousands of asylum seekers have relied on and structured their lives around the current asylum system and would be seriously harmed if the rule was applied retroactively. For example, commenters pointed out that many asylum seekers have spent significant amounts of money on legal representation to prepare and file asylum applications that, according to commenters, would be unprovable if the rule is applied retroactively. Furthermore, commenters asserted that asylum seekers likely would have made different decisions when pursuing immigration relief had they known the rules would change before their claims were adjudicated. Commenters stated that the Department failed to adequately consider such reliance interests on the current legal structure. Several commenters were also specifically concerned with the impact that retroactivity would have on pro se asylum seekers.

Furthermore, commenters stated that applying the rule retroactively would violate both the APA and aliens' due process rights. In addition, commenters asserted that the rule's retroactive application would conflict with congressional intent.

Other commenters questioned whether the 180-day asylum adjudication deadline provisions apply retroactively to pending cases. Commenters stated that the rule would create difficulties if applied retroactively because large numbers of pending cases would need to be advanced at the same time. Alternatively, commenters stated that prospective application of the rule would result in existing cases being indefinitely delayed as new asylum applications are required to be adjudicated within 180 days of filing.

Response: The Department recognizes that the potential retroactivity of the rule was not clear in the NPRM. To the extent that the rule changes any existing law, the Department intends to apply it prospectively to apply to all asylum applications—as well as applications for statutory withholding of removal and protection under the CAT regulations where applicable—that are filed⁷² on or after the rule’s effective date and, for purposes of the 15-day filing deadline, to all proceedings initiated under 8 CFR 1208.2(c) on or after the rule’s effective date.

To the extent that the rule merely codifies existing law or authority, however, it will apply to pending cases. For example, the provisions of the rule incorporating section 208(d)(5)(A)(iii) of the Act, 8 U.S.C. 1158(d)(5)(A)(iii), into the regulations are simply adoptions of existing law. In fact, as statutory provisions in effect for decades, the Department has already been applying them to asylum cases, independently of the rule.⁷³ Accordingly, they do not have an impermissible retroactive effect applied to pending cases. *See Sterling Holding Co., LLC*, 544 F.3d at 506 (“Thus, where a new rule constitutes a clarification—rather than a substantive change—of the law as it existed beforehand, the application of that new rule to pre-promulgation conduct necessarily does *not* have an impermissible retroactive effect, regardless

⁷² For purposes of the 30-day correction period for an incomplete or deficient asylum application, this rule will apply to any asylum application that is attempted to be filed on or after the effective date.

⁷³ The Department recognizes that the precise regulatory definition of “exceptional circumstances” in 8 CFR 1003.10(b) for purposes of section 208(d)(5)(A)(iii) of the Act, 8 U.S.C. 1158(d)(5)(A)(iii), is new. Accordingly, that precise definition will apply only to asylum applications filed on or after the effective date of the rule, even though the provisions of section 208(d)(5)(A)(iii) of the Act, 8 U.S.C. 1158(d)(5)(A)(iii), continue to apply to all asylum applications currently pending that were filed on or after April 1, 1997.

of whether Congress has delegated retroactive rulemaking power to the agency.” (emphasis in original)).

Similarly, the dictates of *Matter of S-M-J-* and applicable case law, e.g., 85 FR at 59695, regarding an immigration judge’s authority to submit evidence and develop the record are pre-existing authorities that are merely incorporated into the regulations by this rule. Accordingly, the provisions incorporating that authority also apply to pending cases. In fact, as with section 208(d)(5)(A)(iii) of the Act, 8 U.S.C. 1158(d)(5)(A)(iii), the Department has already been applying these principles to asylum cases independently of this rule.

Otherwise, the Department declines to adopt commenters’ assertions about potential implications of the rule’s application to pending cases because those comments are wholly speculative due to the case-by-case and fact-intensive nature of many asylum adjudications. *See Home Box Office*, 567 F.2d at 35 n.58 (“In determining what points are significant, the ‘arbitrary and capricious’ standard of review must be kept in mind . . . Moreover, comments which themselves are purely speculative and do not disclose the factual or policy basis on which they rest require no response. There must be some basis for thinking a position taken in opposition to the agency is true.”). Moreover, as noted, the Department is applying much of the rule prospectively, and the provisions that are not prospective are already applicable to pending cases through either the Act itself or binding precedent. Thus, the alleged underlying factual premise of the commenters’ concerns is erroneous.

7. Miscellaneous

a. Independent Immigration Courts

Comment: Commenters generally expressed concerns that the rule undermines the independence of the immigration courts from political or other inappropriate influence. At least one commenter stated that the rule highlighted the need for the immigration courts and immigration judges to be “independent” and outside the executive branch.

Response: These commenters' recommendations are both beyond the scope of this rulemaking and the Department's authority. Congress has provided for a system of administrative hearings for immigration cases, and the Department believes that system should be maintained. *See generally* INA 240, 8 U.S.C. 1229a (establishing administrative procedures for removal proceedings); *cf. Strengthening and Reforming America's Immigration Court System: Hearing before the Subcomm. on Border Sec. & Immigration of the S. Comm. on the Judiciary*, 115th Cong. 1 (2018) (written response to Questions for the Record of James McHenry, Director, Executive Office for Immigration Review) ("The financial costs and logistical hurdles to implementing an Article I immigration court system would be monumental and would likely delay pending cases even further."). Only Congress has the authority to create a new Article I court or other framework for the adjudication of immigration cases.

Moreover, the Department reiterates that immigration judges already exercise "independent judgment and discretion" in deciding cases, 8 CFR 1003.10(b), and are prohibited from considering political influences in their decision-making, *Ethics and Professionalism Guide for Immigration Judges*, sec. VIII ("An Immigration Judge should not be swayed by partisan interests or public clamor.") (Jan. 26, 2011). Thus, contrary to commenters' assertions, immigration judges are already independent adjudicators who do not render decisions based on political influence or political interests. As commenters' claims are unfounded in law or practice and well beyond the scope of this rulemaking, the Department declines to base revisions to the rule on them.

b. Requests for Data

Comment: Multiple commenters included specific requests for further information or data points together with their comments. For example, one commenter requested, *inter alia*, the "[n]umber of successful asylum claims as a percentage of total asylum claims filed, broken down by immigration court, broken down by represented v. pro se applicants."

Response: The Department believes that it has provided the relevant needed justifications and explanations for this rule in both the preamble to the proposed rule and the discussion above. To the extent commenters seek further specific information, the Department first notes that raw data from EOIR's case management database is available online, EOIR, *FOIA Library: EOIR Case Data* (Nov. 12, 2020), available at <https://www.justice.gov/eoir/foia-library-0>, and that EOIR maintains a number of publicly-available statistics and reports, including those related to asylum applications, see EOIR, *EOIR Workload and Adjudication Statistics* (Oct. 30, 2020), available at <https://www.justice.gov/eoir/workload-and-adjudication-statistics>. The Department also reminds commenters of the ability to submit requests to the Department pursuant to the Freedom of Information Act (FOIA). Such requests should be submitted to the EOIR Office of General Counsel:

U.S. Department of Justice

Executive Office for Immigration Review

Office of General Counsel – FOIA Service Center

5107 Leesburg Pike, Suite 2150

Falls Church, VA 22041

E-mail address: EOIR.FOIARequests@usdoj.gov

FOIA Public Liaison: Crystal Souza

Telephone: 703-605-1297

Further information regarding EOIR's FOIA request procedures is available on the EOIR website at: <https://www.justice.gov/eoir/freedom-information-act-foia>.

8. Concerns with Regulatory Requirements

Comment: Commenters generally expressed concern that the Department did not comply with Executive Orders 12866 and 13563 because the Department did not adequately consider the costs and possible alternatives to the provisions in the rule due to the significance of many of the rule's provisions. For example, commenters asserted that the rule's effects on filing deadlines,

the availability of continuances, and evidentiary submissions would in fact impact aliens in proceedings, particularly pro se individuals, and immigration practitioners, contrary to the Department's assertions in the proposed rule.

Similarly, commenters disagreed with the Department's assertion, pursuant to the Regulatory Flexibility Act requirements, that the rule would "not have a significant economic impact on a substantial number of small entities" and that the rule only regulates individuals and not small entities. 85 FR at 59697. For example, commenters stated that the combined effect of the rule's provisions would, *inter alia*, affect how practitioners accept cases, manage dockets, or assess fees. Commenters asserted that these effects would, in turn, impact the overall ability of practitioners to provide services and affect aliens' access to representation. In addition, commenters stated that these changes demonstrate the rule would in fact regulate small entities, namely law firms or other organizations that appear before EOIR. Commenters compared the rule to other recent proposed rule where the Department acknowledged the effect on practitioners,⁷⁴ which the commenters stated is further evidence of the rule's effect.

At least one commenter argued that the rule should be considered a "major rule" under the Congressional Review Act ("CRA") because the rule's effect will exceed the \$100 million threshold. The commenter explained that the rule's economic effect would result from increased DHS detention costs due to increased application rejections, effects on reduced employment authorization availability, and increased costs to government agencies or subsidized entities that administer social services programs.

Response: The Department reiterates its response to similar comments regarding the rule's alleged effects on particular groups, *supra*, and adds the following further response. Overall, the Department disagrees with commenters' contention that it did not comply with Executive Orders 12866 and 13653. The Department considered all costs and possible

⁷⁴ See, e.g., 85 FR at 52491.

alternatives to the provisions in the rule, and the fact that the Department did not adopt an alternative suggested by commenters—or did not retain the status quo—does not mean that such alternatives were not considered.

As noted in the NPRM, the Department believes that the rule will provide a significant net benefit by allowing for the expeditious and efficient resolution of asylum cases. 85 FR at 59698. These benefits will ensure that the Department’s case volume does not increase to an insurmountable degree, which in turn will leave additional resources available for a greater number of asylum seekers. Contrary to commenters’ claims, the rule will not prevent aliens from submitting asylum applications, requesting continuances, or presenting evidence in immigration court. Moreover, the rule is not imposing any new costs on asylum seekers. Respondents are already required to submit completed asylum applications in order to have them adjudicated, and immigration judges already have the authority to set deadlines. Additionally, any costs imposed on attorneys or entities will be minimal and limited to the time it will take to become familiar with the rule.⁷⁵ Immigration practitioners are already subject to professional responsibility rules regarding workload management, 8 CFR 1003.102(q)(1), and are already accustomed to preparing and filing documents related to asylum claims according to deadlines established by immigration judges. Further, the Department notes that attorneys have been aware of the 180-day adjudication deadline for asylum applications for over two decades. Finally, the generally prospective application of the rule—other than the parts that are already established by statute or precedent and under which practitioners have been practicing for over 20 years—further

⁷⁵ As discussed, *supra*, substantial parts of the rule merely incorporate existing law, including principles enshrined in statute or binding precedent. The new portions include: a new filing deadline for aliens in proceedings under 8 CFR 1208.2(c), a new deadline for returning asylum applications rejected as incomplete or deficient, a new definition of “exceptional circumstances” for purposes of section 208(d)(5)(A)(iii) of the Act, 8 U.S.C. 1158(d)(5)(A)(iii), and clarification of the evidentiary status of government and non-government reports. None of what is new should require an extensive amount of time to review or understand by practitioners who are already experienced at meeting deadlines, correcting incomplete applications, and arguing both whether a particular circumstance meets the definition of an exceptional circumstance and the weight that an adjudicator should accord to various evidentiary submissions.

diminishes the already-minimal effect of the rule on practitioners, as no practitioners will be required to reevaluate any cases or arguments that they are currently pursuing.

The Department also rejects the assertion that the rule would have a significant impact on small entities. The rule applies to asylum applicants, who are individuals, not entities. *See* 5 U.S.C. 601(6). The rule does not limit in any way the ability of practitioners to accept cases, manage dockets, or assess fees. Indeed, nothing in the rule in any fashion regulates the legal representatives of such individuals or the organizations by which those representatives are employed, and the Department is unaware of cases in which the RFA's requirements have been applied to legal representatives of entities subject to its provisions, in addition to or in lieu of the entities themselves. *See* 5 U.S.C. 603(b)(3) (requiring that an RFA analysis include a description of and, if feasible, an estimate of the number of "small entities" to which the rule "will apply"). To the contrary, case law indicates that indirect effects on entities not regulated by a proposed rule are not subject to an RFA analysis. *See, e.g., Mid-Tex Elec. Co-op, Inc. v. FERC*, 773 F.2d 327, 342–43 (D.C. Cir. 1985) ("[W]e conclude that an agency may properly certify that no regulatory flexibility analysis is necessary when it determines that the rule will not have a significant economic impact on a substantial number of small entities that are subject to the requirements of the rule. . . . Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy. That is a very broad and ambitious agenda, and we think that Congress is unlikely to have embarked on such a course without airing the matter."); *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001) ("Contrary to what [petitioner] supposes, application of the RFA does turn on whether particular entities are the 'targets' of a given rule. The statute requires that the agency conduct the relevant analysis or certify 'no impact' for those small businesses that are 'subject to' the regulation, that is, those to which the regulation 'will apply.' . . . The rule will doubtless have economic impacts in many sectors of the economy. But to require an agency to assess the impact on all of the nation's small businesses possibly affected by a rule

would be to convert every rulemaking process into a massive exercise in economic modeling, an approach we have already rejected.” (citing *Mid-Tex*, 773 F.2d 327 at 343)); *see also White Eagle Co-op Ass’n v. Conner*, 553 F.3d 467, 480 (7th Cir. 2009) (“The rule that emerges from this line of cases is that small entities directly regulated by the proposed [rulemaking]—whose conduct is circumscribed or mandated—may bring a challenge to the RFA analysis or certification of an agency. . . . However, when the regulation reaches small entities only indirectly, they do not have standing to bring an RFA challenge.”).

Further, no commenters on this point acknowledged or recognized that the Department reached a similar conclusion in 1997 involving a far more sweeping and comprehensive rulemaking regarding asylum adjudications. *See* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 444, 453 (Jan. 3, 1997) (certifying that the rule would not have a significant impact on a substantial number of small entities because it “affects only Federal government operations” by revising the procedures for the “examination, detention, and removal of aliens”). That conclusion was reiterated in the interim rule, 62 FR 10312, 10328 (Mar. 6, 1997), which was adopted with no noted challenge or dispute.

This final rule is far less significant in scope than the 1997 rulemaking, and part of the rule simply incorporates principles that are already in effect through statutory enactment or binding precedent. Moreover, this final rule is similar to previous rules, in that it, too, affects only the operations of the Federal government by amending a subset of the procedures the government uses to process certain aliens.⁷⁶ The Department thus believe that the experience of

⁷⁶ The Department’s position for decades has been that for purposes of the RFA and rulemakings related to EOIR proceedings, rulemakings which directly regulate aliens—rather than directly regulating practitioners—do not regulate small entities. *See, e.g.,* Powers and Duties of Service Officers; Availability of Service Records, 51 FR 2895 (Jan. 22, 1986) (proposed rule for changes to EOIR’s fee schedule for appeals and motions and stating, “In accordance with 5 U.S.C. 605(b), the Attorney General certifies that the rule will not have a significant economic impact on a substantial number of small entities.”) and 51 FR 39993, 39994 (Nov. 4, 1986) (final rule adopting in pertinent part the proposed changes to the fee schedule and maintaining the position that changes to the fee schedule will not have a significant impact on a substantial number of small entities). Even when the Department has directly regulated practitioners, it has found no significant impact on a substantial number of small entities when the rule is

implementing prior rules supports its conclusion that there is no evidence that the current rule will have a significant impact on small entities as contemplated by the RFA or an applicable executive order.

The rule does not limit in any way the ability of practitioners to accept cases, manage dockets, or assess fees. Nothing in the rule directly, or indirectly, regulates practitioners or entities; rather, the rule regulates individual asylum seekers. Practitioners remain free to accept cases, manage dockets, and charge fees as they see fit. Moreover, commenters' concerns regarding how practitioners will be affected by the rule either are wholly speculative due to the case-by-case nature of asylum adjudication, fail to account for the provisions of the rule that have already been in effect for decades, or are beyond the scope of this rulemaking. As such, the Department finds that further analysis under the Regulatory Flexibility Act is not warranted. In short, there is no evidence that the rule will have a significant impact on small entities as contemplated by the Regulatory Flexibility Act or an applicable executive order.

Furthermore, the Department does not believe that the rule should be considered a “major rule” under the CRA. Assertions that the rule will result in increased DHS detention costs, decreased employment authorization availability, and increased costs to government agencies and subsidized entities are purely speculative. In fact, the rule will likely reduce costs to the government by allowing for a more streamlined and efficient asylum process. Additionally, the commenter who raised this concern presented no evidence that the rule would result in an annual effect on the economy of \$100 million or more, and the Department is aware of no such evidence.

III. Regulatory Requirements

simply similar to existing regulatory procedures. *See, e.g.*, Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearances, 73 FR 76914, 76922 (Dec. 18, 2008) (“The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule affects only those practitioners who practice immigration law before EOIR. This rule will not affect small entities, as that term is defined in 5 U.S.C. 601(6), because the rule is similar in substance to the existing regulatory process.”). The Department is unaware of any reasonable dispute or challenge to this longstanding position and finds no reason to depart from its previous well-established and accepted view.

A. Administrative Procedure Act

This final rule is being published with a 30-day effective date as required by the Administrative Procedure Act. 5 U.S.C. 553(d).

B. Regulatory Flexibility Act

The Department has reviewed this rule in accordance with the Regulatory Flexibility Act and has determined that it will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). The rule will not regulate “small entities” as that term is defined in 5 U.S.C. 601(6). Only individuals, rather than entities, are eligible to apply for asylum, and only individuals are placed in immigration proceedings. The Department also incorporates by reference herein the discussion in Section II.C.8, *supra*.

C. Unfunded Mandates Reform Act of 1995

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

D. Congressional Review Act

This rule would not be a major rule as defined by section 804 of the Congressional Review Act. 5 U.S.C. 804(2). This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

E. Executive Orders 12866, 13563 and 13771

The Office of Information and Regulatory Affairs of the Office of Management and Budget (“OMB”) has determined that this rule is a “significant regulatory action” under section 3(f) of Executive Order 12866. Accordingly, the regulation has been submitted to OMB for

review. The Department certifies that this regulation has been drafted in accordance with the principles of Executive Order 12866, section 1(b), Executive Order 13563, and Executive Order 13771.

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of using the best available methods to quantify costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

The Department believes that this rule will effectuate congressional intent to resolve cases in an expeditious manner and will provide significant net benefits relating to EOIR proceedings by allowing the agency to resolve cases more quickly. Section 1(b)(6) of Executive Order 12866 states that “[e]ach agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.” As of October 13, 2020, EOIR had over 580,000 pending cases with an application for asylum and withholding of removal, and the median processing time for a non-detained case with an asylum application is 1133 days. EOIR, *Adjudication Statistics: Total Asylum Applications* (Oct. 13, 2020), available at <https://www.justice.gov/eoir/page/file/1106366/download>. This rule will assist EOIR in adjudicating new asylum cases more efficiently to ensure that this volume does not increase to an insurmountable degree. No costs to the Department or to respondents are expected. Respondents are already required to submit complete asylum applications to have them adjudicated, and immigration judges already have authority to set deadlines.

The Department notes that this rule will not impose any new fees. Consistent with the treatment of other applications referred by USCIS that are renewed in immigration proceedings,

an alien filing a USCIS Form I-589 with USCIS who is then referred to DOJ for immigration proceedings would pay the application fee only once. The Department's fees for applications published by DHS are established in accordance with 8 CFR 1103.7(b)(4)(ii), which, in turn, cross-references the DHS fee schedule. Given the inextricable nature of the two agencies' asylum processes and the benefit of not treating applicants for substantially similar benefits differently if they file with DOJ or with DHS, the Department's regulations have included this cross-reference for several years, and this rule does not alter it. The Department is also not authorized, per regulation, to waive the application fee for an application published by DHS if DHS identifies that fee as non-waivable. 8 CFR 1103.7(c). The proposed rule does not alter that regulatory structure.

The Department believes that this rule will impose only minimal, if any, direct costs on the public. Any new minimal cost would be limited to the cost of the public familiarizing itself with this rule, though because parts of the rule merely codify longstanding statutory provisions and certain precedents or otherwise reflect longstanding pre-existing regulatory provisions, there is little new in the rule that requires familiarization. An immigration judge's ability to set filing deadlines is already established by regulation, and filing deadlines for both applications and supporting documents are already a well-established aspect of immigration court proceedings guided by regulations and the Immigration Court Practice Manual. *See generally* EOIR, *Immigration Court Practice Manual* (Nov. 25, 2020), available at <https://www.justice.gov/eoir/office-chief-immigration-judge-0>. The rule also does not require an immigration judge to schedule a merits hearing at any particular time after the application is filed, as long as the application is adjudicated within 180 days absent exceptional circumstances, which is an existing and longstanding statutory requirement, *see* INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii).

Moreover, this rule does not require that an alien wait until the immigration judge sets a filing deadline before filing an application, and an alien remains free to file his or her asylum

application with the immigration court before the first hearing. Asylum applications are frequently filed prior to or at an initial immigration court hearing already, and existing regulations allow for supplementing an initial application as appropriate, subject to an immigration judge's discretion. Most aliens filing asylum applications in pending immigration proceedings—85 percent—have representation, *see* EOIR, *Current Representation Rates* (Oct. 13, 2020), available at <https://www.justice.gov/eoir/page/file/1062991/download>, and the proposed rule is not expected to increase any burdens on practitioners, who are already subject to professional responsibility rules regarding workload management, 8 CFR 1003.102(q)(1), and who are already accustomed to preparing and filing documents related to asylum claims according to deadlines established by an immigration judge. The Department acknowledges that establishing a fixed deadline to file an asylum application in some types of immigration proceedings may reduce the availability of prior dilatory tactics as a matter of strategy, though it also recognizes that attorneys have been aware of the 180-day adjudication deadline for asylum applications for over two decades and are familiar with the similar existing 10-day deadline for alien crewmember asylum applications in 8 CFR 1208.5(b)(1)(ii).

No costs to the Department are associated with the rule. The changes do not create an incentive that would cause DHS to file more cases and, thus, are not expected to result in an increase in the number of cases to be adjudicated by EOIR. Further, the changes provide guidance for administrative decision-making but do not require immigration judges to make more decisions or to prolong immigration proceedings. This costs of this rule are considered *de minimis* for purposes of Executive Order 13771.

F. Executive Order 13132 (Federalism)

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive

Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

G. Executive Order 12988 (Civil Justice Reform)

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

H. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Pub. L. 104-13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320, all agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. This rule may require edits to the USCIS Form I-589, Application for Asylum and for Withholding of Removal, because the filing of an asylum application now requires submission, for any required fee, of a fee receipt or alternate proof of payment. If necessary, a separate notice will be published in the *Federal Register* requesting comments on the information collection impacts of this rule and the revised USCIS Form I-589.

List of Subjects

8 CFR Part 1003

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

8 CFR Part 1103

Administrative practice and procedure, Authority delegations (Government agencies), Reporting and recordkeeping requirements

8 CFR Part 1208

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

8 CFR Part 1240

Administrative practice and procedure, Aliens.

Accordingly, for the reasons set forth in the preamble, and by the authority vested in the Director, Executive Office for Immigration Review, by the Attorney General Order Number 4910-2020, the Department amends 8 CFR parts 1003, 1103, 1208, and 1240 as follows:

PART 1003 – EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

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

Authority: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949-1953 Comp., p. 1002; section 203 of Pub. L. 105-100, 111 Stat. 2196-200; sections 1506 and 1510 of Pub. L. 106-386, 114 Stat. 1527-29, 1531-32; section 1505 of Pub. L. 106-554, 114 Stat. 2763A-326 to -328.

2. In § 1003.8, revise paragraph (a)(1) to read as follows:

§ 1003.8 Fees before the Board.

(a) * * *

(1) *When a fee is required.* Except as provided in paragraph (a)(2) of this section and 8 CFR 1208.4(d)(3), a filing fee prescribed in 8 CFR 1103.7, or a fee waiver request pursuant to paragraph (a)(3) of this section, is required in connection with the filing of an appeal, a motion to reopen, or a motion to reconsider before the Board.

* * * * *

3. In § 1003.10, add three sentences at the end of paragraph (b) to read as follows:

§ 1003.10 Immigration judges.

* * * * *

(b) * * * In the absence of exceptional circumstances, an immigration judge shall complete administrative adjudication of an asylum application within 180 days after the date an application is filed. For purposes of this paragraph (b) and of §§ 1003.29 and 1240.6 of this chapter, the term *exceptional circumstances* refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the party or

immigration judge, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the parties or the immigration court. A finding of good cause does not necessarily mean that an exceptional circumstance has also been established.

* * * * *

4. In § 1003.24, revise paragraph (c)(1) to as follows:

§ 1003.24 Fees pertaining to matters within the jurisdiction of an immigration judge.

* * * * *

(c) * * *

(1) *When filed during proceedings.* When an application for relief is filed during the course of proceedings, the fee for that application must be paid in advance to the Department of Homeland Security in accordance with 8 CFR 103.7 and 8 CFR part 106. The fee receipt must accompany the application when it is filed with the immigration court except as provided by 8 CFR 1208.4(d)(3).

* * * * *

5. Revise § 1003.29 to read as follows:

§ 1003.29 Continuances.

The immigration judge may grant a motion for continuance for good cause shown, provided that nothing in this section shall authorize a continuance that causes the adjudication of an asylum application to exceed 180 days in the absence of exceptional circumstances, consistent with section 208(d)(5)(A)(iii) of the Act and § 1003.10(b).

6. In § 1003.31, revise paragraphs (b) and (c) to read as follows:

§ 1003.31 Filing documents and applications.

* * * * *

(b) Except as provided in 8 CFR 1240.11(f) and 1208.4(d)(3), all documents or applications requiring the payment of a fee must be accompanied by a fee receipt from the

Department of Homeland Security, an alternate proof of payment consistent with § 1208.4(d)(3), or by an application for a waiver of fees pursuant to § 1003.24. Except as provided in § 1003.8(a) and (c), any fee relating to Immigration Judge proceedings shall be paid to, and accepted by, any Department of Homeland Security office authorized to accept fees for other purposes pursuant to § 1103.7(a) of this chapter.

(c) Subject to § 1208.4(d) of this chapter, the immigration judge may set and extend time limits for the filing of applications and related documents and responses thereto, if any, provided that nothing in this section shall authorize setting or extending time limits for the filing of documents after an asylum application has been filed that would cause the adjudication of an asylum application to exceed 180 days in the absence of exceptional circumstances, consistent with section 208(d)(5)(A)(iii) of the Act and § 1003.10(b). If an application or document is not filed within the time set by the immigration judge, the opportunity to file that application or document shall be deemed waived.

* * * * *

PART 1103 – APPEALS, RECORDS, AND FEES

7. The authority citation for part 1103 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1304, 1356; 31 U.S.C. 9701; 28 U.S.C. 509, 510.

8. In § 1103.7, revise paragraph (a)(3) to read as follows:

§ 1103.7 Fees.

(a) * * *

(3) *All other fees payable in connection with immigration proceedings.* Except as provided in 8 CFR 1003.8, the Executive Office for Immigration Review does not accept the payment of any fee relating to Executive Office for Immigration Review proceedings. Instead, such fees, when required, shall be paid to, and accepted by, an office of the Department of Homeland Security authorized to accept fees, as provided in 8 CFR 103.7(a)(1) and 8 CFR part 106. The Department of Homeland Security shall return to the payer, at the time of payment, a

receipt for any fee paid, and shall also return to the payer any documents, submitted with the fee, relating to any immigration proceeding. The fee receipt and the application or motion shall then be submitted to the Executive Office for Immigration Review except as provided by 8 CFR 1208.4(d)(3). Remittances to the Department of Homeland Security for applications, motions, or forms filed in connection with immigration proceedings shall be payable subject to the provisions of 8 CFR 103.7(a)(2) and 8 CFR part 106.

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PART 1208 – PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

9. The authority citation for part 1208 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Pub. L. 110-229; Pub. L. 115-218.

10. In § 1208.3, revise paragraph (c)(3) to read as follows:

§ 1208.3 Form of application.

* * * * *

(c) * * *

(3) An asylum application must be properly filed in accordance with the form instructions and with §§ 1003.24, 1003.31(b), and 1103.7(a)(3) of this chapter, including payment of a fee, if any, as explained in the instructions to the application. For purposes of filing with an immigration court, an asylum application is incomplete if it does not include a response to each of the required questions contained in the form, is unsigned, is unaccompanied by the required materials specified in paragraph (a) of this section, is not completed and submitted in accordance with the form instructions, or is unaccompanied by any required fee receipt or other proof of payment as provided in § 1208.4(d)(3). The filing of an incomplete application shall not commence the period after which the applicant may file an application for employment authorization. An application that is incomplete shall be rejected by the immigration court. If an applicant wishes to have his or her application for asylum considered, he or she shall correct the

deficiencies in the incomplete application and refile it within 30 days of rejection. Failure to correct the deficiencies in an incomplete application or failure to timely refile the application with the deficiencies corrected, absent exceptional circumstances as defined in § 1003.10(b) of this chapter, shall result in a finding that the alien has abandoned that application and waived the opportunity to file such an application;

* * * * *

11. In § 1208.4, add paragraph (d) to read as follows:

§ 1208.4 Filing the application.

* * * * *

(d) *Filing deadline.* (1) For any alien in asylum-and-withholding-only proceedings pursuant to § 1208.2(c)(1) and paragraph (b)(3)(iii) of this section, the immigration judge shall comply with the requirements of § 1240.11(c)(1)(i) through (iii) of this chapter and shall set a deadline of fifteen days from the date of the alien's first hearing before an immigration judge by which the alien must file an asylum application, which includes an application for withholding of removal under section 241(b)(3) of the Act and protection under §§ 1208.16 through 1208.18. The immigration judge may extend the deadline for good cause. If the alien does not file an asylum application by the deadline set by the immigration judge, the immigration judge shall deem the opportunity to file such an application waived, and the case shall be returned to the Department of Homeland Security. For any alien in proceedings pursuant to § 1208.2(c)(2), the immigration judge shall comply with the requirements of § 1240.11(c)(1)(i) through (iii) and shall set a deadline of fifteen days from the date of the alien's first hearing before an immigration judge by which the alien must file an application for withholding of removal under section 241(b)(3) of the Act, which includes an application for protection under §§ 1208.16 through 1208.18. The immigration judge may extend the deadline for good cause. If the alien does not file an application by the deadline set by the immigration judge, the immigration judge shall

deem the opportunity to file such an application waived, and the case shall be returned to the Department of Homeland Security.

(2) If the alien must pay a fee for submission of the asylum application, the alien must submit the DHS-issued fee receipt together with the application by the deadline set by the immigration judge in paragraph (d)(1) of this section.

(3) If the alien has paid any required fee but has not received the fee receipt from DHS by the deadline set by the immigration judge, the alien must instead provide to the immigration court a copy of proof of the payment to DHS with the asylum application. The alien must then submit a copy of the fee receipt by a new deadline set by the immigration judge. If the immigration judge does not set a deadline, the alien must submit the fee receipt no later than 45 days after the date of filing of the application.

§ 1208.7 [Removed and Reserved]

12. Remove and reserve § 1208.7.

§ 1208.9 [Removed and Reserved]

13. Remove and reserve § 1208.9.

14. In § 1208.12, revise paragraph (a) to read as follows:

§ 1208.12 Reliance on information compiled by other sources.

(a) In deciding an asylum application, which includes an application for withholding of removal under 241(b)(3) of the Act and protection under §§ 1208.16 through 1208.18, or in deciding whether the alien has a credible fear of persecution or torture pursuant to § 1208.30, or a reasonable fear of persecution or torture pursuant to § 1208.31, an immigration judge may rely on material provided by the Department of State, other Department of Justice offices, the Department of Homeland Security, or other U.S. Government agencies, and may rely on foreign government and non-governmental sources if those sources are determined by the judge to be credible and the material is probative. On his or her own authority, an immigration judge may submit relevant evidence into the record, if the source is credible and the evidence is probative,

and may consider it in deciding an asylum application, which includes an application for withholding of removal under section 241(b)(3) of the Act and protection under §§ 1208.16 through 1208.18, provided that a copy of the evidence has been provided to both parties and both parties have had an opportunity to comment on or object to the evidence prior to the issuance of the immigration judge's decision.

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

15. The authority citation for part 1240 continues to read as follows:

Authority: 8 U.S.C. 1103, 1158, 1182, 1186a, 1186b, 1225, 1226, 1227, 1228, 1229a, 1229b, 1229c, 1252 note, 1361, 1362; secs. 202 and 203, Pub. L. 105-100 (111 Stat. 2160, 2193); sec. 902, Pub. L. 105-277 (112 Stat. 2681).

16. Revise § 1240.6 to read as follows:

§ 1240.6 Postponement and adjournment of hearing.

After the commencement of the hearing, the immigration judge may grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the Department of Homeland Security, provided that nothing in this section shall authorize an adjournment that causes the adjudication of an asylum application to exceed 180 days in the absence of exceptional circumstances, consistent with section 208(d)(5)(A)(iii) of the Act and § 1003.10(b) of this chapter.

James R. McHenry III,
Director,
Executive Office for Immigration Review,
Department of Justice.