

**PETITION FOR RULEMAKING TO PROMULGATE REGULATIONS
VINDICATING THE STATUTORY RIGHT TO SEEK ASYLUM
NOTWITHSTANDING REINSTATEMENT OF REMOVAL ORDERS**

**SUBMITTED TO
THE UNITED STATES DEPARTMENT OF JUSTICE
AND
THE UNITED STATES DEPARTMENT OF HOMELAND SECURITY**

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**American Immigration Lawyers Association
National Immigrant Justice Center**

TABLE OF CONTENTS

| | |
|--|----|
| I. STATEMENT OF PETITION | 1 |
| II. SUMMARY OF PETITION | 1 |
| III. STATEMENT OF INTEREST | 2 |
| IV. STATUTORY AND REGULATORY BACKGROUND | 3 |
| A. Asylum | 3 |
| B. Statutory Withholding of Removal..... | 4 |
| C. Protection Under the Convention Against Torture | 5 |
| D. Reinstatement of Removal | 6 |
| E. The Relevant Regulations Interpreting 8 U.S.C. § 1231(a)(5) | 6 |
| V. ARGUMENT IN SUPPORT OF AMENDING THE CURRENT RULES..... | 7 |
| A. Current agency regulations are inconsistent with the statutory scheme..... | 7 |
| B. Legislative History Does Not Support the Current Regulatory Approach..... | 10 |
| C. The current regulations’ limitation on asylum eligibility is inconsistent with the United States’ obligations under international agreements..... | 11 |
| D. The rule of lenity also supports regulatory reform..... | 13 |
| E. Assuming arguendo that any statutory ambiguity exists, the agency failed to acknowledge it and to resolve that ambiguity in a reasonable manner..... | 13 |
| VI. APPLICATION OF THE CURRENT RULE ILLUSTRATES ITS UNFAIRNESS AND THE HARDSHIP IS CAUSES..... | 14 |
| A. The current rule prevents genuine refugees from ever obtaining permanent resident status, and the benefits that attach to such status. | 14 |
| Case #1: B.B.M..... | 15 |
| B. The current rule bars asylum applications from individuals persecuted after a prior removal order. | 15 |
| Case #2: Y.M.L..... | 15 |
| Case #3: C.G.G. | 16 |
| Case #4: J.A.B..... | 16 |
| C. The current rule prevents genuine refugees from reuniting with family members who remain abroad. | 17 |
| Case #5: R.S.C. | 17 |
| D. The current rule has the result of potentially separating parents from their children who arrive to the U.S. as a family unit to seek protection. | 17 |
| Case #6: C.P.I | 18 |

| | |
|--|----|
| E. The current rule precludes access to asylum even if a prior denial of asylum was based on prejudicial ineffective assistance of counsel. | 18 |
| Case #7: G.G.S..... | 19 |
| F. The need to change the current rule is particularly great because of the potential for error caused by summary removal proceedings, particularly expedited removal under 8 U.S.C. § 1225(b). | 19 |
| VII. COMMENTS ON SPECIFICS OF THE PROPOSAL | 22 |
| VIII. CONCLUSION..... | 23 |

I. STATEMENT OF PETITION

The National Immigrant Justice Center (NIJC) and the American Immigration Lawyers Association (AILA) petition the Department of Justice (DOJ) and the Department of Homeland Security (DHS) to initiate rulemaking proceedings under the Administrative Procedure Act, 5 U.S.C. § 553, to amend relevant regulations to permit individuals subject to orders of reinstatement of removal under 8 U.S.C. § 1231(a)(5) to apply for asylum under 8 U.S.C. § 1158. This petition implicates multiple statutory provisions and the authority of both DHS and the DOJ, via the Executive Office for Immigration Review (EOIR). Both the DOJ and the DHS have authority to promulgate rules that would address the problem identified in this petition. The Attorney General possesses authority to “establish such regulations” when doing so is “necessary for carrying out [the Immigration and Nationality Act (INA)].”¹ The Attorney General also has ultimate authority over the immigration courts under the INA.² Separately, the Secretary of DHS is “charged with the administration and enforcement of [all] laws relating to the immigration and naturalization of aliens, except insofar as [those] laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers.”³ This Petition therefore asks the Secretary of DHS and the Attorney General to jointly promulgate regulations that make asylum available to individuals with prior orders of removal who remain otherwise eligible.

II. SUMMARY OF PETITION

This request for rulemaking seeks to amend current regulations that bar thousands of eligible noncitizens from seeking asylum. These regulations, promulgated jointly in 1997 by the former Immigration and Naturalization Service (INS) and EOIR, interpret the bar to “relief” contained in 8 U.S.C. § 1231(a)(5) as precluding individuals subject to reinstatement from applying for, or receiving, asylum. This regulatory scheme, however, conflicts with the asylum statute. That statute guarantees that “*any alien* who is physically present in the United States or who arrives in the United States..., *irrespective of such alien’s* status, may apply for asylum,”⁴ and it provides a comprehensive scheme for determining eligibility to apply for asylum.⁵ Yet, the asylum statute was not addressed when the reinstatement regulations were promulgated, and there is no evidence that the former INS recognized the tension between the regulations it adopted and the asylum statute, or that it considered the conflict with U.S. treaty obligations toward refugees.⁶

The current regulations have unduly grave consequences for individuals who are precluded from asylum eligibility due to outstanding removal orders:

¹ 8 U.S.C. § 1103(g)(2).

² *Id.* § 1103(g).

³ *Id.* § 1103(a)(1).

⁴ *Id.* § 1158(a).

⁵ *Id.* §§ 1158(a), (b).

⁶ *Cf.* 62 FED. REG. 444, 451 (Jan. 3, 1997); 62 FED. REG. 10,312, 10,326, 10,379 (Mar. 6, 1997) (interim rule discussing 8 U.S.C. § 1231(a)(3) and § 1231(a)(5)); 64 FED. REG. 8478, 8485 (Feb. 19, 1999) (interim rule implementing the Convention Against Torture (CAT) and stating without analysis that aliens with reinstated removal orders are ineligible for asylum).

- An individual cannot seek asylum, if she was persecuted in her homeland *after* a deportation. This petition recounts two examples of individuals facing this situation. Under the current regulations, the best they can hope to receive is the inferior protection provided by withholding of removal.
- An individual is barred from asylum if immigration officers mistakenly entered an expedited removal order against her without allowing her to seek asylum. This petition describes several individuals who had that experience and who have filed a separate complaint with the Office of Civil Rights and Civil Liberties.⁷ The regulations effectively “double down” on that mistake, preventing them from applying for asylum because of an agency error when they first entered the country.
- Unlike asylees, individuals granted withholding of removal or protection under the Convention Against Torture (CAT) cannot reunite with their families.
- Individuals actually granted withholding of removal or protection under the CAT are not granted permanent status in this country, even though they have demonstrated a clear probability of torture or persecution abroad. Rather, they are ordered removed, and placed in long-term legal limbo that limits travel and can even impair one’s ability to work.
- Individuals who suffer persecution upon return to their home countries and find themselves forced to flee for a second time face prolonged detention. If they enter with their children, they will likely be separated for prolonged periods. This petition includes an example of a mother who was forced to return to the United States following a prior deportation with her minor child, only to find herself subject to detention and excluded from asylum protection, while her minor child remains eligible both for release and asylum.

In sum, legitimate refugees are regularly denied the right to seek asylum because of the current regulations, which do not reasonably or properly interpret the immigration statute. And this interpretation has dire humanitarian consequences. The Attorney General and the Secretary of DHS have an obligation to amend the regulations to eliminate inconsistencies with the statute, and to bring our country into compliance with international treaty obligations.

Because of ongoing harms to hundreds of *bona fide* refugees annually, Petitioners ask that this petition be considered expeditiously.

III. STATEMENT OF INTEREST

AILA is a national association with more than 14,000 members throughout the United States, including lawyers and law school professors who practice and teach immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration,

⁷ National Immigrant Justice Center et al., Complaint re: Inadequate U.S. Customs and Border Protection (CBP) screening practices block individuals fleeing persecution from access to the asylum process, Nov. 13, 2014, available at <http://immigrantjustice.org/sites/immigrantjustice.org/files/images/Right%20to%20Asylum%20-%20CRCL%20Complaint%20Cover%20Letter%20-%2011.13.14%20FINAL%20PUBLIC.pdf> (hereinafter 2014 CRCL Complaint).

nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before DHS and EOIR, as well as in Federal Courts.

NIJC, a program of the Heartland Alliance for Human Needs and Human Rights, is a national non-profit organization that provides free legal representation to low-income refugees and asylum seekers. With collaboration from more than 1,500 *pro bono* attorneys, NIJC represents approximately 350 asylum seekers at any given time before the Asylum Office, the Immigration Courts, the Board of Immigration Appeals, and the Federal Courts. In addition to the cases that NIJC accepts for individual representation, it also screens and provides legal orientation to hundreds of potential asylum applicants every year. Through this screening process, NIJC has encountered many immigrants who, because of a prior removal order, are denied the right to seek asylum. Many of those prior removal orders were issued through summary removal proceedings, so the applicant never received an opportunity to seek asylum.

IV. STATUTORY AND REGULATORY BACKGROUND

A. Asylum

In 1980, the United States undertook a significant effort to amend its asylum laws and align them with international norms.⁸ The culmination of that effort was the Refugee Act of 1980, which sought “to provide a permanent and systematic procedure for the admission to [the United States] of refugees of special humanitarian concern to the United States.”⁹ Specifically, the Act helped bring federal law into compliance with the United States’ “obligations under the United Nations Protocol Relating to the Status of Refugees.”¹⁰ One of those obligations, the “Prohibition of Expulsion or Return” states that “[n]o Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion.”¹¹

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).¹² In IIRIRA, Congress reenacted and clarified the right to apply for, and the right to be granted, asylum. First, 8 U.S.C. § 1158 provides that “*any alien* who is physically present

⁸ See E. Dana Neacsu, *Gender-Based Persecution as a Basis for Asylum: An Annotated Bibliography, 1993-2002*, 95 LAW LIBR. J. 191, 193 (2003).

⁹ Refugee Act of 1980, Pub. L. No. 96-212, § 101(b), 94 Stat. 102, 102 (1980).

¹⁰ *Marincas v. Lewis*, 92 F.3d 195, 198 (10th Cir. 1996).

¹¹ Convention Relating to the Status of Refugees, art. 33(1), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150; see also Kathleen M. Keller, *A Comparative and International Law Perspective on the United States (Non)Compliance with its Duty of Non-Refoulement*, 2 YALE HUM. RTS. & DEV. L.J. 183, 183 (1999) (“The duty of non-refoulement is at the heart of the Convention Relating to the Status of Refugees.”). Note that the United States was not a party to the original *Convention Relating to the Status of Refugees*, but acquired obligations to comply with the standards adopted in the *Convention* when it ratified the *Protocol Relating to the Status of Refugees*. Protocol Relating to the Status of Refugees, art. 1(1), Nov. 1, 1968, 19 U.S.T. 6223, 606 U.N.T.S. 267.

¹² Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, 110 Stat. 3009-546.

in the United States or who arrives in the United States . . . , *irrespective of such alien’s status*, may apply for asylum.”¹³ The asylum statute thus mandates that asylum should be widely available to “*every alien*,” regardless of his or her “status.” In the words of the Eleventh Circuit Court of Appeals: “Section 1158 is neither vague nor ambiguous. The statute means exactly what it says: “[a]ny alien . . . may apply for asylum.””¹⁴ Section 1158 represents Congress’s intention that, absent an articulated statutory exception, asylum should be broadly available to any and all noncitizens, including those subject to reinstatement of removal.

Having specified a general rule that all noncitizens present in the United States may apply for asylum, Congress listed three limited situations in which a noncitizen is barred from applying for asylum: (a) if the individual could be removed to a safe third country; (b) if the individual failed to apply for asylum within one year; and (c) if the individual had previously applied for asylum and been denied.¹⁵ Congress then created exceptions to the second and third of these exceptions: these two exceptions are tempered by a “changed circumstances” provision that permits an application for asylum if the individual demonstrates “either the existence of changed circumstances which materially affect the applicant’s eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the [1 year] period.”¹⁶

Second, having enunciated the rules for who may “apply” for asylum, Congress then specified conditions under which asylum may be granted.¹⁷ At the most basic level, the noncitizen seeking asylum has the burden of demonstrating that he or she qualifies as a “refugee.”¹⁸ Congress also set forth circumstances that would disqualify an applicant from asylum. An individual is barred from asylum if he or she (a) is found to be a persecutor of another protected group; (b) is convicted of a particularly serious crime; (c) has committed a serious nonpolitical crime abroad; (d) is a danger to national security; (e) is inadmissible as a terrorist; or (f) was firmly resettled in another country before coming to the United States.¹⁹

B. *Statutory Withholding of Removal*

The eligibility rules for withholding of removal under 8 U.S.C. § 1231(b)(3)—as opposed to withholding under the Convention Against Torture, discussed *infra*—parallel those for asylum.²⁰ Both apply the refugee definition and provide a mechanism whereby a noncitizen in the United States—lawfully or unlawfully—may seek protection from persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Asylum and withholding of removal differ in significant respects, however. As an initial matter, while asylum is granted at the discretion of the Attorney General, withholding of removal

¹³ See 8 U.S.C. § 1158(a).

¹⁴ *Gonzalez v. Reno*, 212 F.3d 1338, 1347 (11th Cir. 2000); see also *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 553 (9th Cir. 1990) (noting “It is undisputed that all aliens possess [the right to apply for asylum] under the Act”).

¹⁵ 8 U.S.C. §§ 1158(a)(2)(A)-(C).

¹⁶ *Id.* § 1158(a)(2)(D).

¹⁷ See *id.* § 1158(b).

¹⁸ *Id.* § 1158(b)(1)(B)(i).

¹⁹ See *id.* §§ 1158(b)(2)(A)(i)-(vi).

²⁰ 8 U.S.C. §§ 1101(a)(42); 1231(b)(3). Protection under the Convention Against Torture is discussed below.

is not; i.e. where an individual meets her burden of proof, the statute mandates that withholding be granted.²¹ Further, there are critical differences between asylum and withholding of removal that make withholding of removal a much more limited form of protection.

First, the protections guaranteed to a noncitizen in the form of withholding of removal are not permanent and do not permit effective resettlement. “Under asylum, an applicant granted relief may apply for permanent residence after one year. Under withholding [of removal], the successful applicant is only given a right not to be removed to the country of persecution. Withholding does not confer protection from removal to any other country.”²² A grant of withholding of removal also does not place an individual on a path to permanent residence; instead it results in a removal order and a requirement that the individual apply for permission to work and submit to regular check-ins with immigration officials.

Second, the Refugee Protocol requires the United States to provide documented refugees or asylees with certain benefits, including the right to travel internationally,²³ but federal regulations deny this right to recipients of withholding of removal.²⁴ Indeed, rather than acquiring legal status, an individual granted withholding—unlike an individual granted asylum—must simultaneously be ordered removed, and that removal order can be effectuated to any country that will accept the individual.²⁵ Further, by regulation, any foreign travel by a person ordered removed (which would include all withholding recipients) constitutes a “self-deportation.”²⁶ Individuals granted withholding of removal are effectively trapped within the United States, on pain of losing their protection if they depart the country even briefly.

Third, a grant of withholding precludes family reunification, because it does not permit an individual to petition for a dependent spouse or child abroad, even if those family members face similar risks of persecution or rely financially on the individual granted withholding.

Finally, withholding not only lacks some protections required by treaty for refugees; it is also more difficult to obtain than asylum because it carries a much higher standard of proof.²⁷ Thus, some individuals with viable asylum claims will be unable to prevail under the withholding standard and will be subject to deportation to countries where they face persecution.

C. *Protection Under the Convention Against Torture*

The Convention Against Torture (CAT) provides that “[n]o State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for

²¹ *INS v. Stevic*, 467 U.S. 407, 429-30, 423 (1984).

²² CHERI L. HO, IMMIGRATION LAW IN THE NINTH CIRCUIT, B-97 (2013) (internal citations omitted), available at <http://1.usa.gov/1IZkzoQ>.

²³ Protocol Art. 1, 19 U.S.T. 6223 (adopting Convention Relating to the Status of Refugees art. 28).

²⁴ 8 C.F.R. § 223.1.

²⁵ See *Matter of I-S- & C-S-*, 24 I. & N. Dec. 432, 434 & n.3 (BIA 2008).

²⁶ See 8 C.F.R. § 241.7.

²⁷ Compare *Stevic*, 467 U.S. at 424 (burden of proof for withholding of removal is “more likely than not”) with *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (burden of proof for asylum is a “well-founded fear”).

believing that he would be in danger of being subjected to torture.”²⁸ The CAT was not self-executing, but Congress passed implementing legislation in 1998.²⁹ Protection under the CAT does not turn on the refugee definition or the likelihood of persecution, but rather, on the probability that an individual will be tortured if removed.³⁰

Protection under the CAT comes in two forms: withholding of removal and deferral of removal. The standard for eligibility for each is identical: an individual must establish that future “torture” is “more likely than not.”³¹ However, the same bars that apply to statutory withholding (e.g. the particularly-serious crime bar) also apply to withholding under the CAT; individuals subject to these bars can only receive deferral of removal.³² Both forms of protection under CAT are subject to significant limits. Neither leads to permanent residence, authorizes automatic work authorization, enables one to petition for family members, or affords any foreign travel rights.³³

D. Reinstatement of Removal

When Congress amended the INA in 1996, it amended the reinstatement of removal provision, now codified at 8 U.S.C. § 1231(a)(5), to read as follows:

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.³⁴

The revised reinstatement provision does not specify what provisions are covered by the bar to relief, nor does it define the term “relief.”

E. The Relevant Regulations Interpreting 8 U.S.C. § 1231(a)(5)

In 1997, the INS and EOIR promulgated regulations to implement § 1231(a)(5). Those regulations provide that individuals who reenter the United States illegally after being subject to a previous order of removal may apply for withholding of removal, but not asylum.³⁵ The regulations make no regard of the noncitizen’s reasons for returning to the United States, and they create an absolute procedural bar to asylum for individuals that were previously removed.

²⁸ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, art. III, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, 114.

²⁹ See The Foreign Affairs Reform and Restructuring Act, Pub.L. No. 105-227, Div. G., Title XXII, § 2242, 112 Stat. 2681, 2681-822, codified as note to 8 U.S.C. § 1231.

³⁰ See 8 C.F.R. § 1208.18(a)(1).

³¹ See 8 C.F.R. §§ 208.16(c), 208.17(a); see also 64 FED. REG. 8478, 8481 (“[Section] 208.17(a) is subject to the same standard of proof and definitional provisions as § 208.16(c).”).

³² See 8 C.F.R. §§ 1208.16(d)(2); 1208.17.

³³ See *supra*, Part IV.B.

³⁴ 8 U.S.C. § 1231(a)(5).

³⁵ See 8 C.F.R. §§ 241.8, 1208.31(e).

The regulations require individuals to be referred to an asylum officer for a “reasonable fear interview” if the individual “expresses a fear of returning to the country designated in [the original removal] order.”³⁶ A positive reasonable fear finding leads to “withholding-only proceedings” before an immigration judge.³⁷ Implicitly, the regulations interpret the bar to “any relief” to bar asylum but not “withholding of removal”—which is nondiscretionary.

V. ARGUMENT IN SUPPORT OF AMENDING THE CURRENT RULES

Under the plain language of the asylum statute, any individual “irrespective of status” is eligible to apply for asylum. Congress spoke clearly when it meant to bar certain individuals from asylum, and none of the bars Congress imposed covers individuals with prior effectuated removal orders. Perhaps the agency has relied on general language in the reinstatement provision barring individuals with reinstated removal orders from “relief,” without consideration of the more explicit language in the asylum provisions, but that interpretation is erroneous. Further, the interpretation disregards U.S. obligations under international law. To the extent the reinstatement provision is ambiguous, it should be construed in favor of the noncitizen, particularly given this context, which involves the protection of *bona fide* refugees.

A. *Current agency regulations are inconsistent with the statutory scheme.*

The asylum statute contains a comprehensive scheme for determining when individuals are eligible to apply for asylum. Significantly, it does not preclude individuals subject to reinstated removal orders from applying for asylum. Neither does the statute prohibit asylum applications by noncitizens who are inadmissible or deportable, who have previously been removed from the United States, or who have reentered the United States without permission.³⁸ Indeed, conceding deportability is a prerequisite to filing a defensive asylum application.³⁹ To the contrary, the INA unambiguously gives all individuals the right to apply for asylum, except for limited classes of individuals delineated in the asylum statute.

As discussed in Part IV.A above, when Congress wished to bar noncitizens from seeking asylum, it did so explicitly. The bars to asylum eligibility are specific and do not contemplate an interpretation that precludes asylum eligibility for individuals unlawfully present after being previously removed. Much like the eligibility exceptions previously discussed, each of these substantive exceptions covers *specific* situations in which Congress has determined that asylum would be inappropriate. Furthermore, like the bars to eligibility, each of these provisions is provided explicitly in § 1158. The inclusion of each of these exceptions in § 1158 is not coincidental. Rather, the inclusion of these exceptions reflects Congress’ intent to deal with asylum eligibility and qualification comprehensively in § 1158.

The only possible argument in derogation of the unambiguous rule in § 1158(a) permitting an asylum application “irrespective of status” would be language in the reinstatement

³⁶ *Id.* § 241.8(e).

³⁷ *Id.* §§ 241.8, 1208.31(e).

³⁸ *See, e.g., Matter of F-P-R-*, 24 I. & N. Dec. 681, 685 (BIA 2008) (finding applicant met burden for asylum despite illegal reentry).

³⁹ *See, e.g., Wang v. INS*, 352 F.3d 1250, 1253 (9th Cir. 2003).

of removal statute that bars individuals from being “eligible” to “apply for” any “relief.”⁴⁰ The current regulations do not discuss the matter explicitly, but they appear to assume that asylum would fall within the statute’s preclusion of “relief.”⁴¹ Under the current regulations, an immigration judge is effectively barred from considering an application for asylum by an individual whose prior order of removal was reinstated under § 1231(a)(5).⁴²

Neither the reinstatement provision nor any other provision of the INA defines “relief,” and there is no fixed, consistent use of that term in the INA. For example, it appears to be the agency’s position that “relief” as used in § 1231(a)(5) does not encompass withholding of removal,⁴³ even though withholding of removal would likely be a form of relief from deportation in ordinary parlance and is commonly referred to as “relief” by the Board of Immigration Appeals (BIA) in published decisions.⁴⁴ Petitioners submit that asylum is distinct from other discretionary applications in the INA in ways that suggest that it should be treated differently from other applications. First, as noted above, asylum was enacted in order to comply with treaty obligations, and these obligations constitute a voluntarily-accepted limit on discretionary freedom.⁴⁵ Second, asylum is grammatically unique in the INA in that the statute creates the right to “apply” for that remedy; all other discretionary relief is directed to the authority of the decision-maker.⁴⁶ (Indeed, this textual distinction creates a potential conflict between the asylum and reinstatement statutes, unique in the statute.) Third, the INA distinguishes between asylum and discretionary applications by creating numerous special or separate procedures for asylum and asylees.⁴⁷ The structure of the statute suggests that Congress sees asylum as distinct from discretionary relief in the more general sense. These strong textual clues confirm Petitioners’ understanding of the statute. Asylum is first and foremost a form of protection, not merely “relief”; it is an appeal to international right, not merely to the mercy of national authority. It should not be read, absent clear Congressional command, to fit within a general bar to “relief.”

⁴⁰ 8 U.S.C. § 1231(a)(5).

⁴¹ See 8 C.F.R. § 241.8(a) and (e) (Non-citizens subject to prior orders of removal “shall be removed . . . by reinstating the prior order,” except that non-citizens “express[ing] a fear of returning” to their home country may be referred for a reasonable-fear-of-persecution determination under 8 C.F.R. § 208.31.); see also *id.* § 208.31(e) (If an asylum officer determines that a non-citizen subject to a prior order of removal has a reasonable fear of persecution, he may refer the individual to a judge “for full consideration of the request for withholding of removal only.”).

⁴² See 8 C.F.R. §§ 1208.2(c)(2)(i), (c)(3)(i) (indicating that individuals subject to reinstated removal orders can appear before a judge, but the proceedings are “limited to a determination of whether the alien is eligible for withholding or deferral of removal”).

⁴³ Cf. 8 C.F.R. § 208.2(c)(2)(i).

⁴⁴ See, e.g., *Matter of E-A-*, 26 I. & N. Dec. 1, 1 (BIA 2012) (referring to “relief pursuant to sections 208(b)(2)(A)(iii) and 241(b)(3)(B)(iii) of the Act”); *Matter of G-K-*, 26 I. & N. Dec. 88, 89 (BIA 2013) (referring to “respondent’s requests for relief from removal” including withholding and protection from torture).

⁴⁵ See *supra* at 3-5

⁴⁶ Cf. 8 U.S.C. § 1158(a) (individual present in U.S. “may apply” for asylum) with 8 U.S.C. §§ 1182(h) (“may, in his discretion, waive”); 1182(i) (“may, in the discretion of the Attorney General, waive”); 1229b(a) (“may cancel removal”), 1229b(b)(1) (“may cancel the removal of, and adjust to the status of an alien lawfully admitted for permanent residence”); 1255(a) (“may be adjusted”)

⁴⁷ See, e.g., 8 U.S.C. §§ 1159(b), (c) (special adjustment of status provisions for asylees); 8 U.S.C. § 1157(b)(2) (barring Visa Waiver entrant from contesting “other than on the basis for an application for asylum, any action for removal”); 8 U.S.C. § 1229a(c)(7)(ii) (creating separate reopening rule for asylum and protection cases).

At any rate, the inconsistent use of “relief” throughout the INA and by various agencies precludes the term from bearing the kind of substantial weight that could eliminate this form of relief for over a third of noncitizens removed annually. It cannot be said that the reference to “relief” in § 1231(a)(5) is so specific as to bar asylum eligibility, particularly in the face of conflicting statutory provisions that appear to expressly permit asylum eligibility.

Several traditional canons of statutory interpretation show that the Petitioners’ interpretation is the better one.

First, a statutory provision must be interpreted in light of the overall statutory scheme, not in isolation.⁴⁸ The current regulations interpret the “any relief” provision in isolation from the overall statutory scheme, ignoring separate statutory guarantees of asylum access, as well as specific provisions governing successive asylum applications. They ignore the underlying concerns driving the asylum provisions, both in terms of national tradition of harboring political dissidents and international treaty obligations requiring protection of asylum seekers.

Second, the canon against superfluity holds that statutes should not be read in a way that would make any section, word, or part thereof, superfluous.⁴⁹ The related *in pari materia* canon requires that statutes relating to similar subject matter should be read in conjunction with one another.⁵⁰ When two statutes appear to conflict, courts must attempt to read them in harmony to give effect to both.⁵¹ Reading § 1231(a)(5) to prohibit all asylum applications by noncitizens who reenter the United States after prior orders of removal—as the regulations do—renders that provision flatly inconsistent with the broad right to apply for asylum encompassed at § 1158(a). Moreover, as noted earlier, such a reading results in other inconsistencies as well. Interpreting § 1231(a)(5) to prohibit asylum applications by noncitizens subject to removal orders renders that provision inconsistent with § 1158(a)(2)(C), which governs the filing of an asylum application by an individual who “has previously applied for asylum and had such application denied.” Under that provision, an individual whose prior asylum application was denied may apply again if the individual “demonstrates . . . the existence of changed circumstances which materially affect the applicant’s eligibility for asylum.”⁵² A denial of asylum, as defined for purposes of § 1158(a)(2)(C), would trigger entry of an order of removal as a matter of course.⁵³ Upon an unlawful reentry—and the removal order would generally prevent a lawful reentry—the

⁴⁸ See *Chen v. Mukasey*, 524 F.3d 1028, 1031-32 (9th Cir. 2008); see also *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007).

⁴⁹ See *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001); see also 2A Norman J. Singer, *Sutherland Statutory Constr.* § 47.06 at 104 (4th Ed. 1984).

⁵⁰ See *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 315-16, (2006) (“[U]nder the *in pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read as if they were one law.”); 2A Norman J. Singer, *Sutherland Statutory Construction* § 51.02 (4th Ed. 1984) (whenever possible courts construe statutes and regulations *in pari materia*).

⁵¹ See *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253 (1992) (“Redundancies across statutes are not unusual events in drafting, and so long as there is no ‘positive repugnancy’ between the two laws . . . a court must give effect to both.”) (internal citation omitted).

⁵² 8 U.S.C. § 1158(a)(2)(D).

⁵³ See *Matter of I-S- & C-S-*, 24 I. & N. Dec. at 433 (requiring entry of removal order where asylum was denied); see also *Matter of Chamizo*, 13 I. & N. Dec. 435, 438 (BIA 1969). In some cases, the removal order might be entered in the alternative, allowing for voluntary departure; but courts have found such individuals subject to reinstatement of removal as well. See *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 496 n.14 (9th Cir. 2007) (en banc).

prior order would be subject to reinstatement under § 1231(a)(5).⁵⁴ As a result, individuals who “previously applied for asylum and had such application denied” under § 1158(a)(2)(C) would generally be prohibited from applying for asylum under DHS’s interpretation of § 1231(a)(5)—even though § 1158(a)(2)(C) expressly authorizes a second asylum application where the applicant can demonstrate changed circumstances. This contradiction in terms is untenable.⁵⁵

Finally, the canon of the specific holds that “[h]owever inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the enactment.”⁵⁶ Where two conflicting statutes, one general and one specific, cover the same ground, the specific will be interpreted to qualify and provide exceptions to the general.⁵⁷ “‘It is a commonplace of statutory construction that the specific governs the general.’ That is particularly true where . . . ‘Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.’”⁵⁸ The provisions of § 1158 are a comprehensive scheme governing asylum eligibility. That section includes specific rules governing eligibility in the successive application context, which would have evident applicability to individuals who return to the United States after prior removal orders. Applying the canon of the specific, the generalized prohibition on “relief” embedded in § 1231(a)(5) cannot be read to trump the specific rules governing asylum eligibility in § 1158(a).

In sum, whatever ambiguity exists in the reinstatement bar as to an applicant’s ability to seek relief, it cannot be interpreted as a bar to asylum. The asylum statute provides a comprehensive scheme for adjudicating asylum claims, and the general proclamation that individuals in reinstatement are barred from seeking “relief” in § 1231(a)(5) cannot trump the detailed, specific provisions in § 1158.⁵⁹

B. Legislative History Does Not Support the Current Regulatory Approach.

The asylum statute implements the United States’ commitment to address “the urgent needs of persons subject to persecution in their homelands,”⁶⁰ and thus “to provide a haven for refugees and asylum-seekers . . . unable or unwilling to return to their home country because of persecution.”⁶¹ Consistent with this objective, § 1158(a) authorizes a process for noncitizens

⁵⁴ See 8 U.S.C. § 1182(a)(9)(A); *Morales-Izquierdo*, 486 F.3d at 496.

⁵⁵ Cf. *Bona v. Gonzales*, 425 F.3d 663, 670 (9th Cir. 2005) (invalidating regulation that excluded parolees from applying for adjustment of status because it directly conflicted with a provision of the INA and created “absurd results when viewed in light of the larger statutory scheme”).

⁵⁶ *MacEvoy Co. v. United States*, 322 U.S. 102, 107 (1944); see also *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976).

⁵⁷ *United States v. Gallenardo*, 579 F.3d 1076, 1085 (9th Cir. 2009); *United States v. Navarro*, 160 F.3d 1254, 1256-57 (9th Cir. 1998).

⁵⁸ *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) and *Varity Corp. v. Howe*, 516 U.S. 489, 519 (1996) (Thomas, J., dissenting)).

⁵⁹ *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) and *Varity Corp. v. Howe*, 516 U.S. 489, 519 (1996) (Thomas, J., dissenting)).

⁶⁰ Refugee Act of 1980, Pub. L. No. 96-212, § 101, 94 Stat. 102 (1980).

⁶¹ CONG. BUDGET OFFICE, IMMIGRATION POLICY IN THE UNITED STATES 6 (2006).

fearing persecution to be heard before being removed from the United States, and confirms that all noncitizens have a right to apply for asylum.⁶²

Section 1231(a)(5) does not purport to repeal, amend, or modify § 1158 in any fashion. It does not include any “notwithstanding” clause that would suggest it is intended to trump other statutory provisions—unlike § 1158, which applies “irrespective of such alien’s status.” Had Congress in 1996 intended a prior order of removal to prohibit an application by a first-time asylum applicant, it could have said as much.

Moreover, the 1996 statute did not merely revamp the asylum statute and comprehensively prescribe the authority for who can and who cannot apply for asylum.⁶³ Congress also expanded the asylum statute’s coverage from “an alien” to “any alien” “irrespective of such alien’s status.”⁶⁴ The word “any” is generally held to have “an expansive meaning.”⁶⁵ Thus, when it enacted the changes to the reinstatement of removal provision, Congress simultaneously adopted a broad proclamation of the right to apply for asylum if eligible under the asylum statute. This legislative history is far more consistent with the Petitioners’ view of these two statutes than with the agency’s current interpretation.

Nothing in the legislative history suggests that Congress wished radically to alter asylum eligibility *sub silentio* within the reinstatement statute. Rather, they support Petitioners’ point that § 1158 and § 1231(a)(5) should be interpreted consistently, so as to permit individuals to seek asylum even in the context of reinstatement proceedings.

C. *The current regulations’ limitation on asylum eligibility is inconsistent with the United States’ obligations under international agreements.*

It is a longstanding canon of construction that federal statutes “ought never to be construed to violate the law of nations if any other possible construction remains.”⁶⁶ This canon is particularly appropriate here, given the statute’s roots in international law. The Refugee Act of 1980 was adopted in large part to bring U.S. federal law into compliance with the *Protocol Relating to the Status of Refugees* (“Protocol”),⁶⁷ which the United States joined in 1968.⁶⁸ The

⁶² See *Orantes-Hernandez*, 919 F.2d at 553; see also *Gonzalez*, 212 F.3d at 1347.

⁶³ Compare 8 U.S.C. § 1158(a) (1995), with Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, Title VI, § 604, 110 Stat. 3009.

⁶⁴ *Id.*

⁶⁵ *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997); Webster’s Third New International Dictionary 97 (1976)).

⁶⁶ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 64 (1804).

⁶⁷ Protocol Relating to the Status of Refugees, Nov. 1, 1968, 19 U.S.T. 6223, 606 U.N.T.S. 267.

⁶⁸ *Cardoza-Fonseca*, 480 U.S. at 424 (“The Act’s establishment of a broad class of refugees who are eligible for a discretionary grant of asylum, and a narrower class of aliens who are given a statutory right not to be deported to the country where they are in danger, mirrors the provisions of the United Nations Protocol Relating to the Status of Refugees, which provided the motivation for the enactment of the Refugee Act of 1980.”).

asylum statute represents a congressional determination of the contours and boundaries of the United States' obligations under the Protocol.⁶⁹

It is true that the 8 U.S.C. § 1231(b)(3) prevents the return of an individual to a country where he or she would likely be persecuted—one of the chief aims of the Protocol.⁷⁰ But that is not the only requirement of the Protocol. For instance, the Protocol also requires the United States to provide documented refugees or asylees with various benefits, including the right to obtain documentation that allows them to travel outside that nation's territory.⁷¹ As discussed in Part IV.B above, this right to travel abroad is not available to recipients of withholding of removal.⁷²

National treaty obligations require the United States to facilitate, to the extent possible, the assimilation of refugees into national society.⁷³ Under current immigration law, an order granting withholding of removal or protection under the CAT cannot achieve this; only a grant of asylum helps to achieve lawful permanent residence status and thus permits full assimilation. Legal status permits the noncitizen to seek U.S. citizenship after a period of permanent residence in which the individual shows good moral character, and meets various other criteria, including a public oath of allegiance.⁷⁴

Moreover, these flaws cause real harm to refugees. At the practical level, both asylum and permanent resident status confer work authorization incident to status, without the need to separately apply for work authorization at a cost of hundreds of dollars per year.⁷⁵ Individuals precluded from asylum status must therefore budget around \$500 (not counting legal fees) to renew a work permit. Likewise, permanent status permits access to certain health benefits, which may be crucial for refugees needing various forms of medical treatment.⁷⁶ But the larger harm

⁶⁹ See *Stevic*, 467 U.S. at 426 n.20 (“As with the asylum provision, the Committee feels that the proposed change in section 243(h) is necessary so that U.S. statutory law clearly reflects our legal obligations under international agreements.”) (quoting H.R. Rep. No. 96-608, at 17–18 (1979)).

⁷⁰ Moreover, asylum-seekers returning to the United States with prior removal orders may face criminal prosecution. In a recent report, the Office of Inspector General noted Border Patrol's practice of referring asylum-seekers for federal criminal prosecution. See Department of Homeland Security Office of Inspector General, *Streamline: Measuring its Effects on Illegal Border Crossing*, May 15, 2015, available at <http://1.usa.gov/1SiHFZ2>.

⁷¹ Convention Relating to the Status of Refugees, art. 28(1), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (“The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.”).

⁷² 8 C.F.R. § 241.7; see also Kate Aschenbrenner, *Discretionary (In)Justice: The Exercise of Discretion in Claims for Asylum*, 45 U. MICH. J.L. REFORM 595, 608 (2012) (“Unlike an asylee, an individual granted withholding of removal has an order of removal against him or her and therefore cannot easily travel outside the United States, cannot apply to bring family members to the United States, and is not entitled to apply for legal permanent residency or United States citizenship.”).

⁷³ Protocol Relating to the Status of Refugees, art. 34, Nov. 1, 1968, 19 U.S.T. 6223, 606 U.N.T.S. 267.

⁷⁴ 8 U.S.C. §§ 1445-1448.

⁷⁵ 8 C.F.R. §§ 274a.12(a)(1), (a)(5).

⁷⁶ For eligibility for health benefits, see, e.g., 8 U.S.C. §§ 1612(a)(2)(A), (a)(3)(C); “EOIR Posts Notice of Asylee Eligibility for ORR Assistance” 82 Interpreter Releases 391 (Feb. 28, 2005).

is not due to this fee. Legal status confers a measure of stability for individuals often fleeing dangerous or traumatic experiences in their homeland.⁷⁷ Placing refugees into permanent limbo leaves them in a traumatic position, and represents a statement that this country declines to assimilate them into our society; for the sole reason that they were previously ordered removed.

For these reasons, apart from the possibility that the current rules would result in the removal of individuals with legitimate claims to refugee status, the current regulatory approach is in square conflict with the nation's obligations of the Protocol.⁷⁸

D. The rule of lenity also supports regulatory reform.

To the extent the relationship between the asylum statute and the reinstatement of removal provision is ambiguous, any ambiguity should be resolved in favor of putative asylum-seekers, in light of the “longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.”⁷⁹ This is especially true in the asylum context, since removal is “a harsh measure . . . all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country.”⁸⁰ Here, the longstanding policy of granting refuge to legitimate asylum-seekers and the statutory right to seek and obtain asylum makes invocation of the rule of lenity even more appropriate with regard to the current regulations.

E. Assuming arguendo that any statutory ambiguity exists, the agency failed to acknowledge it and to resolve that ambiguity in a reasonable manner.

As Petitioners have explained above, the current regulations are substantively unreasonable and unlawful because they conflict with the relevant statutes. The current regulations are also unreasonable because they did not acknowledge any ambiguity, and did not purport to resolve that ambiguity in a reasonable manner.

The former INS gave only generalized explanations for its reinstatement regulations, and nowhere expressly considered the conflict created by its reading of § 1231(a)(5) and § 1158. The agency failed to consider § 1231(a)(5)'s generalized prohibition on “relief” in light of § 1158's specific authorization that “any alien” may apply for asylum, “regardless of status,” and its specific, detailed rules for individuals previously denied asylum. Nor did it consider

⁷⁷ Cf. Rachel D. Settlage, *Affirmatively Denied: The Detrimental Effects of A Reduced Grant Rate for Affirmative Asylum Seekers*, 27 B.U. Int'l L.J. 61, 98-103 (2009).

⁷⁸ As discussed previously, this “obligation” was actually a part of the *Convention Relating to the Status of Refugees* (*Convention*). *Convention Relating to the Status of Refugees*, art. 28, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150. While the United States was not a party to the *Convention*, they did become obligated to many of its obligations when they agreed to comply with the Protocol. *Protocol Relating to the Status of Refugees*, art. 1(1), Nov. 1, 1968, 19 U.S.T. 6223, 606 U.N.T.S. 267.

⁷⁹ *Cardoza-Fonseca*, 480 U.S. at 449; *see also Costello v. INS*, 376 U.S. 120, 128 (1964) (“Since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the word used.”) (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)).

⁸⁰ *Cardoza-Fonseca*, 480 U.S. at 449.

Congress' intent in enacting these provisions, nor how any interpretation should give effect to the United States' obligations under international law.

The agency also failed to consider the adverse effect of this rule on legitimate asylum-seekers. Even if a protection-seeker is ultimately granted relief in the form of withholding of removal, she will never be able to petition for her children to join her as derivatives.⁸¹ Nor can she travel abroad to see them, even in a third country.⁸² She will never be able to apply for permanent residence.⁸³ She will need to periodically request work authorization, and will be subject in perpetuity to periodic check-ins with immigration officials.⁸⁴

This is sufficient to mandate re-analysis of the regulatory scheme: “if an agency erroneously contends that Congress' intent has been clearly expressed and has rested on that ground, ... the agency [must] consider the question afresh.”⁸⁵ Petitioners believe that the statutory provisions point in one clear direction, once appropriate canons of construction are applied. But even if the statute were thought to be ambiguous – which would permit regulations to fill in gaps in the statute – any regulations would have to be “reasonable in light of the legislature’s revealed design.”⁸⁶ The agency’s resolution of any ambiguity here not only failed to note ambiguity, but gave no consideration to the statute’s overall design; an error sufficient in itself to support renewed rulemaking consideration.⁸⁷

VI. APPLICATION OF THE CURRENT RULE ILLUSTRATES ITS UNFAIRNESS AND THE HARDSHIP IT CAUSES.

The above reasoning illustrates the legal flaws of the current rule. The following examples illustrate the grave injustices worked by the rule, and the need to correct it.

A. The current rule prevents genuine refugees from ever obtaining permanent resident status, and the benefits that attach to such status.

A grant of asylum confers an actual lawful status on a noncitizen, and also gives that individual the opportunity to obtain lawful permanent resident status after one year.⁸⁸ By

⁸¹ See *Ali v. Ashcroft*, 394 F.3d 780, 782 n.1 (9th Cir. 2005) (asylees, unlike those who receive withholding of removal, are entitled to derivative benefits).

⁸² Compare 8 C.F.R. § 223.1(b) (granting right to asylees), with *id.* § 241.8 (any departure from United States executes her removal order).

⁸³ Cf. *id.* § 245.1(d)(1); *id.* § 209.2(a)(1) (granting right to asylees).

⁸⁴ See *id.* § 274a.12(a)(10); *id.* § 208.7; *id.* § 241.4(b)(3), *id.* § 241.5.

⁸⁵ *Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006) (stating also that “deference to an agency's interpretation of a statute is not appropriate when the agency wrongly believes that interpretation is compelled by Congress.”); see also *Cajun Elec. Power Coop., Inc. v. F.E.R.C.*, 924 F.2d 1132, 1136 (D.C. Cir. 1991) (“if an agency erroneously contends that Congress' intent has been clearly expressed and has rested on that ground, we remand to require the agency to consider the question afresh in light of the ambiguity we see.”); see also *Negusie v. Holder*, 555 U.S. 511, 523 (2009).

⁸⁶ *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995).

⁸⁷ Cf., e.g., *Zheng v. Gonzales*, 422 F.3d 98, 120 (3d Cir. 2005) (“Given Congress’s intent as expressed in the language, structure, and legislative history . . . the regulation’s effect . . . does not harmonize with the plain language of the statute, its origin, and purpose.” (citations omitted)).

⁸⁸ 8 U.S.C. § 1159.

contrast, as all of the case examples that follow demonstrate, a grant of withholding of removal or protection under the Convention Against Torture does not allow the noncitizen to apply for permanent lawful status in this country. Indeed, individuals granted withholding of removal or protection under the CAT are subject to a final removal order, and the long-term limbo associated with it.

Case #1: B.B.M.

B.B.M. is a young man from Honduras who was a vocal opponent of the gang violence that has plagued his country.⁸⁹ Mara 18 regularly tried to recruit him, but he resisted because the gang had killed his friends and neighbors. B.B.M. even joined a peaceful community group that was formed to speak out against gang violence in his community. B.B.M. fled to the United States and tried to seek asylum, but was issued an expedited removal order without ever getting a chance to speak to an asylum officer or judge. Fearing for his life, B.B.M. returned to the United States after the expedited order and was eventually granted withholding of removal. He is now protected from deportation, but under the current regulations, he has no access to permanent status in the United States, and no ability to travel abroad.

B. The current rule bars asylum applications from individuals persecuted after a prior removal order.

Under the asylum statute, an individual who is denied asylum once is generally barred from reapplying for asylum.⁹⁰ However, the asylum statute includes exceptions to that rule, most notably an exception where the applicant demonstrates “the existence of changed circumstances which would materially affect the applicant’s eligibility for asylum.”⁹¹ This exception would be clearly met, for instance, if the noncitizen were persecuted following a removal.

Case #2: Y.M.L.

When Y.M.L. was 14 years old, her parents forced her to marry a man 50 years her senior to “cure her” of her sexual orientation in her home country of El Salvador.⁹² She fled to the United States but was apprehended by immigration officers at the border. Although Y.M.L. expressed a fear of return to El Salvador, she was deported without being given an opportunity to seek asylum. Eleven months after her removal, she again fled to the United States because she suffered renewed persecution for being a lesbian. Under the current regulatory scheme, her post-removal persecution in El Salvador cannot be considered as part of an assessment of asylum

⁸⁹ B.B.M., Y.M.L., C.G.G., J.A.B., R.S.C., and G.G.S. are clients of NIJC. In some cases, NIJC represents the individual in his or her immigration proceedings; other cases involve clients represented by NIJC in a complaint to the Department of Homeland Security’s Office of Civil Rights and Civil Liberties (CRCL), *see* 2014 CRCL Complaint *supra* note 7, but represented by other attorneys in their removal proceedings. Relevant documents are on file with the Petitioners.

⁹⁰ 8 U.S.C. § 1158(a)(2)(C).

⁹¹ *Id.* § 1158(a)(2)(D).

⁹² *See* Groundbreaking Federal Court Settlement Gives Asylum Seeker Facing Reinstatement of Removal a Chance to Present her Case in Court, Feb. 4, 2014, *available at* <http://bit.ly/1IZmKc0>. Case documents, including court briefing, are *available at* <http://bit.ly/1xsGXhK>.

eligibility, even though it likely constitutes “changed circumstances which materially affect [asylum] eligibility,” the relevant standard for leave to file successive asylum applications.⁹³

Case #3: C.G.G.

C.G.G. entered the United States in 2003; after being ordered removed *in absentia*, he self-deported in 2005. At the time of that removal order, he had no basis to fear returning to Honduras and had not experienced any harm in that country. When he returned, however, he began doing environmental work, teaching poor communities how to care for and preserve the environment. Because his work threatened powerful logging companies, C.G.G. was targeted for persecution. In February 2014, C.G.G. was stopped by a vehicle and pulled out of his truck. Four men covered his face and took him to another location where he was tortured for three days. He was beaten, shot, and left for dead. When C.G.G. went to report what had happened, he came face to face with one of the officers who had been involved in his torture. Fearing for his life, C.G.G. fled to the United States and was detained at the southern border. C.G.G. eventually won withholding of removal, but was not permitted to apply for asylum because of his prior order. In her decision, the IJ explicitly stated that she would have granted C.G.G. asylum had she been authorized to do so. With the limited status of withholding, C.G.G. is unable to access many health programs or services, and he will never be able to seek permanent status.

Case #4: J.A.B.

J.A.B. is another individual whose claim for refugee status arose after he was deported from the United States. He first entered the United States from Honduras in approximately 2006. He was detained at the border and quickly removed. He returned to the United States in 2010, but only after enduring significant violence on account of his sexual orientation. In 2009, J.A.B. and his partner had come out about their sexual orientation, and were living together as an openly gay couple. News of their relationship spread through town and eventually reached a local gang leader. This gang leader was known for his violence, especially toward LGBT people in the region, and he vocally espoused homophobic beliefs. In September 2009 J.A.B. and his partner became the direct targets of this gang leader’s violence. The gang leader shot and killed J.A.B.’s partner. J.A.B. himself was nearly killed; he escaped this fate merely because he was behind his partner as they were exiting their home. After this incident, J.A.B. knew that he was next and that no one in the community would protect him, so he fled to the United States. An IJ found J.A.B.’s claim to be credible but denied his application under the the higher burden of proof required for withholding of removal. He has since won a remand from the BIA, and he hopes to receive withholding of removal. But he faces the real possibility of losing his protection case simply because he is obliged to satisfy the heightened withholding standard rather than the more liberal asylum standard. J.A.B. raised his desire to be considered for asylum with the BIA, but the BIA refused to consider the request.

⁹³ 8 U.S.C. § 1158(a)(2)(D).

C. *The current rule prevents genuine refugees from reuniting with family members who remain abroad.*

When an individual is granted asylum, the statute and regulations quite properly recognize that the individual's children and spouse—who may remain in their home country and may be in a position of ongoing danger—should be eligible for derivative asylum status.⁹⁴ By contrast, individuals granted withholding of removal are not entitled to request or obtain derivative protection status for their unmarried children or their spouse.

Case #5: R.S.C.

R.S.C. is an indigenous woman from Guatemala who sought protection in the United States due to repeated persecution on the basis of her ethnicity and gender. R.S.C. was harassed, abused, and raped on four occasions before fleeing her country for the first time. She was ordered removed twice from the United States and suffered additional persecution in Guatemala after each removal. Although R.S.C. filed police reports on two occasions, they were not taken seriously by Guatemalan authorities and she was unable to obtain the protection she needed. R.S.C. first entered the United States around December 2013. R.S.C. spent only 10 days back in Guatemala—during which time she was drugged, raped, and impregnated—before returning to the United States around April 2014. Again, R.S.C. was not given an opportunity to express her fear of return and was deported within days. R.S.C. remained convinced that she would not be safe in Guatemala, and entered the United States with her eight-year-old son in about July 2014, after both she and her son were threatened by armed men who entered their home. She presented herself to border officials and was finally able to express her fear of return and obtain an interview with an asylum officer. R.S.C. was recently granted withholding of removal, but because of her prior removal orders, some of her children remain in Guatemala, unable to benefit from her grant of protection as would be possible if she had been granted asylum.

Moreover, as explained *supra*, even as the regulations prevent a person granted withholding of removal from obtaining derivative status for family members, the law effectively prevents them from traveling abroad to see those family members in a third country.⁹⁵ Thus, even as the noncitizen's family is not authorized to travel legally to this country, the individual granted protection is not authorized to visit them abroad in a third country without abandoning their right to remain in the United States. The rule effectively requires an individual granted protection to choose between the opportunity ever see his or her family again and the ability to remain safe in the United States.

D. *The current rule has the result of potentially separating parents from their children who arrive to the U.S. as a family unit to seek protection.*

In some cases, individuals who return to their home countries following an order of removal confront persecution which forces them to return with their minor children, often because the child also faces persecution him or herself. In those instances, upon seeking protection at the U.S. border, parents and children are detained together. Further, release is often

⁹⁴ See 8 U.S.C. § 1158(b)(3); 8 C.F.R. § 208.21.

⁹⁵ See *supra* at Part IV.B.

not a possibility due to the parent's prior removal order, which means any children accompanying the adult must also be detained. Further, where the parent is precluded from asylum eligibility, but the child is not – the higher burden for withholding of removal means that the parent may lose her claim for protection, but the child may be granted protection. This situation creates a host of problematic consequences, including the prolonged detention of children who should otherwise be released or the potential separation for these children from the only caregiver they know.

Case #6: C.P.I

C.P.I.⁹⁶ is an indigenous Guatemalan woman whose entire family has been persecuted because her father married outside his ethnic group, and for more than two decades she, her parents and her siblings endured serious physical attacks and death threats at the hands of her paternal relatives. At the age of sixteen, C.P.I. married and moved into her husband's parents' home; after witnessing her father-in-law repeatedly abuse her mother-in-law, C.P.I. intervened to stop a beating and then escorted her mother-in-law to the police. After reporting the domestic abuse, C.P.I.'s father-in-law attempted to attack her and threatened to murder her in the middle of the night. C.P.I. fled to the United States, but she was deported without having an opportunity to speak to an asylum officer about her fear of returning to Guatemala. Upon returning to Guatemala, C.P.I. received death threats from multiple sources. C.P.I. again fled to the United States, this time with her 10-month-old son. She was not permitted to apply for asylum, because of her reinstatement order. C.P.I. spent nine months in various detention facilities, growing thinner and thinner as the stress of detention and caring for her breast-feeding infant in jail-like conditions became intolerable. Her hair started falling out. She was exhausted from staying up nights alone crying and caring for her infant son who had become listless. According to a mental health professional, C.P.I.'s prolonged detention extended the "reign of terror" she suffered in her home country, aggravating her PTSD. While parents often recall their child's first steps with joy, C.P.I. felt only despair when her son learned to walk behind chained fences in Artesia and Dilley; to her, a measure of how much of his young life was spent detained. On April 9, 2015, an Immigration Judge finally granted C.P.I. withholding of removal, and her son received asylum based upon the evidence of persecution to his mother. Had C.P.I. not been able to satisfy the high preponderance standard as to the risk of future persecution, it would have been possible for C.P.I. to have been denied relief while her son was found eligible for asylum.

E. The current rule precludes access to asylum even if a prior denial of asylum was based on prejudicial ineffective assistance of counsel.

Where an individual was previously denied asylum on the merits, the asylum statute not only permits a successive application upon a showing of materially changed circumstances arising in the country of origin, but also upon a showing of extraordinary circumstances.⁹⁷ Extraordinary circumstances, by regulation, may include a showing of prejudicial ineffective assistance of counsel.⁹⁸ However, because the current regulatory scheme treats a reinstatement

⁹⁶ See electronic communication from Benjamin Stein to Claudia Valenzuela, July 23, 2015, electronic communication from Christine Meeuwssen to Claudia Valenzuela, June 17, 2015 (on file with Petitioners).

⁹⁷ 8 U.S.C. §§ 1158(a)(2)(C), (D).

⁹⁸ 8 C.F.R. § 1208.4(a)(5)(iii).

order as constituting a separate bar to asylum eligibility from the bars within the asylum statute, even undisputed ineffective assistance of counsel for someone clearly eligible for asylum does not suffice to permit asylum eligibility.

Case #7: G.G.S.

G.G.S. fled El Salvador after she was targeted on account of her family membership and gender by members of a prominent gang that controlled her town. These gang members repeatedly extorted her father by threatening G.G.S.'s life. G.G.S. was threatened with physical harm. Fearing for her life, G.G.S. fled El Salvador to the United States. G.G.S. was apprehended at the Texas border and subsequently passed a credible fear interview. G.G.S. was subsequently transferred to a facility in Georgia. Her family hired an attorney who, without meeting G.G.S., advised that she could not seek asylum because he erroneously believed she was subject to a removal order. Further, the attorney did not appear for various court hearings and failed to advocate on her behalf at a bond hearing. After the attorney advised G.G.S.'s family, never meeting or speaking with G.G.S. directly, that G.G.S. could not seek asylum, G.G.S. accepted a removal order at a hearing at which her attorney failed to appear. G.G.S. was deported to El Salvador. Upon returning, G.G.S. was again targeted by the local gang members, culminating in a physical altercation that G.G.S. narrowly escaped. G.G.S., feeling she could not remain safe in El Salvador, again found herself forced to flee. Upon arriving in the United States, G.G.S. was apprehended, detained and issued a reinstatement notice. She passed a reasonable fear interview and a judge later granted her withholding of removal. However, because of her prior removal order, issued due to the ineffective assistance of prior counsel, G.G.S. is ineligible to apply for asylum or to petition for her parents, who continue to be targeted by gang members.

F. The need to change the current rule is particularly great because of the potential for error caused by summary removal proceedings, particularly expedited removal under 8 U.S.C. § 1225(b).

In recent years, a large number of individuals have been removed pursuant to summary removal processes. Since 2012, more removal orders have been entered under the expedited removal statute than are entered by the immigration courts; indeed, the number of expedited removal orders more than doubled from 72,911 in 2005 to 193,092 in 2013.⁹⁹ In 2013, expedited removals accounted for 44 percent (up 5 percent from FY 2012) of all removals.¹⁰⁰

Unfortunately, the “quick justice” of the expedited removal process often leads to valid claims for protection going unrecognized. In 2005, the U.S. Commission on International Religious Freedom (USCIRF) documented substantial noncompliance by Customs and Border Protection (CBP) officers in screening noncitizens with potential asylum claims in the expedited

⁹⁹ See U.S. Dep't of Homeland Sec. Office of Immigration Statistics, “Immigration Enforcement Actions: 2013,” *Annual Report Sept. 2014* at 5 (Table 7) [hereinafter “DHS 2013 Annual Report”], available at <http://1.usa.gov/1wMj45G>; cf. U.S. Dep't of Homeland Sec. Office of Immigration Statistics, “Immigration Enforcement Actions: 2005,” *Annual Report November 2006* 5, Table 2 (Nov. 2006), available at <http://1.usa.gov/1n5Ww88>.

¹⁰⁰ See DHS 2013 Annual Report, *supra* note 99, at 1, 5 (Table 7).

removal process.¹⁰¹ These problems were observed at every point in the process. For example, CBP officers frequently failed to read any of the information provided on Form I-867A (which is designed to advise noncitizens of their rights in that process, including the right to seek asylum); in half of the cases, officers failed to read the only paragraph dedicated to the asylum process.¹⁰² Even when noncitizens expressed fear of returning to their homelands, that did not guarantee referrals to the Asylum Office; in one-sixth of these cases, CBP made no referrals and instead ordered individuals removed or permitted them to withdraw the applications for entry.¹⁰³

These systemic shortcomings continue seemingly unabated, as witnessed and documented by other organizations nearly a decade after the USCIRF report.¹⁰⁴ There is no indication that CBP has taken any meaningful remedial action in light of the problems that the USCIRF study identified. In late 2014, Human Rights Watch (HRW) issued a report documenting similar, ongoing, concerns with CBP's screening process.¹⁰⁵ HRW noted that several of the deported Hondurans who were interviewed for the report "provided accounts that, if true, should qualify them for asylum."¹⁰⁶ Upon apprehension at the U.S.-Mexico border, some said they were not informed that asylum was a possibility, and those who tried to seek asylum often were outright discouraged.¹⁰⁷ One young man stated that when he told a Border Patrol officer who dismissed his request for asylum that "he was violating my right to life," the officer responded, "[y]ou don't have rights here."¹⁰⁸ HRW also highlighted the troubling disparity between the percentages of Honduran nationals subjected to expedited removal (81 percent) with the "miniscule" percent of individuals who were referred to the Asylum Office for credible fear

¹⁰¹ See generally UNITED STATES COMM'N ON INT'L RELIGIOUS FREEDOM, *Study on Asylum Seekers in Expedited Removal*, (2005) [hereinafter "USCIRF 2005 Study"], available at <http://bit.ly/XxTG6k> (Vol. I) and <http://bit.ly/1pt6Tmr> (Vol. II). Of particular relevance are the expert reports in volume II. See *id.*, Vol. II at 44 et seq.

¹⁰² *Id.* at 14, Table 2.1.

¹⁰³ *Id.* at 20, 23.

¹⁰⁴ Reports subsequent to the USCIRF report have also documented problems in the expedited removal system. The American Immigration Council (AIC) published a report in May 2014 that exposed problems in the expedited removal process similar to those experienced by complainants. They included efforts to dissuade people from seeking asylum through tactics such as berating and yelling, threats of lengthy detention and separation from family, failure to document the fears that were expressed, and insistence that individuals did not qualify for asylum. See SARA CAMPOS & JOAN FRIEDLAND, AMERICAN IMMIGRATION COUNCIL, *Mexican and Central American Asylum and Credible Fear Claims: Background and Context*, May 2014, available at <http://bit.ly/1wMI9i2>; see also HRF 2014 Blueprint for Change, *infra*, note 105.

¹⁰⁵ See Human Rights Watch, *You Don't Have Rights Here: U.S. Border Screening and Returns of Central Americans to Risk of Serious Harm*, October 2014 [hereinafter "HRW 2014 Report"] available at <http://bit.ly/1EmsHsq>. HRW interviewed deported Hondurans and documented that many are now living in fear and hiding. See also Human Rights First, *How to Protect Refugees and Prevent Abuse at the Border: Blueprint for U.S. Government Policy*, June 2014, 10-12 [hereinafter "HRF 2014 Blueprint for Change"] available at <http://bit.ly/1pScydh> (The Report notes that the expansion of expedited removal "puts the United States at risk of deporting asylum seekers ... without giving them a meaningful opportunity to apply for asylum." The Report goes on to recommend numerous changes to the screening process that would address this concern.); Brad Wong, *Domestic Violence Survivor Killed By Ex-Boyfriend After Deportation To Mexico, Lawsuit Says*, Huffington Post: Latino Voices, June 19, 2013, available at <http://huff.to/1zfHFPQ> (This article tells the story of a woman who was killed in Mexico by her abusive ex-partner after being deported from the United States.).

¹⁰⁶ *Id.* at 5.

¹⁰⁷ *Id.* at 27.

¹⁰⁸ *Id.* at 9.

interviews (1.9 percent).¹⁰⁹ While the report focused largely on Honduras, HRW noted that this particular finding also applied to Mexico and other countries of Central America.¹¹⁰ As HRW noted, the failure by CBP to properly screen asylum seekers violates both domestic and international law.¹¹¹

In November of 2014, the Petitioners in this rulemaking petition, together with other groups, filed a complaint with the DHS Office of Civil Rights and Civil Liberties (CRCL), highlighting these problems.¹¹² That report contains extensive discussion of the problems experienced by asylum-seekers in the expedited removal process.¹¹³ For instance, the complaint recounted this example:

When KBS first entered the United States in early 2014, he told the CBP officer he was afraid to return to Honduras. The CBP officer did not acknowledge these statements, nor did he refer KBS to the Asylum Office for a credible fear interview. Instead, the CBP officer accused KBS of lying and told KBS that his case would not go to a judge. KBS then told the officer that he was afraid to go back to Honduras because his father beat him constantly. The CBP officer replied that he didn't care, that KBS did not have a right to fight for his case, and that he would be deported back to Honduras. KBS was deported without ever speaking to any asylum officer.

KBS knew he would continue to suffer in Honduras, so he spent only three days in hiding before fleeing a second time. CBP officers again apprehended him at the border, and KBS again told them that he feared returning to Honduras because his father abused him. One CBP officer told him that his prior deportation prevented him from being allowed to apply for asylum. When KBS told the CBP officer that he had also been afraid of returning to Honduras the first time he was detained, the officer said he had bad luck to talk with an officer who did not believe his story. This officer did, however, refer KBS to the Asylum Office for a reasonable fear interview. The asylum officer found KBS's testimony about his experiences in Honduras and his attempts to communicate those experiences on his first entry credible. The asylum officer referred KBS to the court for withholding-only proceedings. KBS is currently detained awaiting a decision on his case.¹¹⁴

The courts have uniformly found that the reinstatement of removal statute may validly be applied to an expedited removal order.¹¹⁵ The problem, as illustrated by the example, is that if a

¹⁰⁹ *Id.* at 21.

¹¹⁰ For Mexico, HRW documented 537,136 apprehensions, with a referral rate to the Asylum Office of less than 1 percent. There were 52,472 apprehensions of Guatemalans, and again less than 1 percent got a credible fear referral. *Id.* at 23.

¹¹¹ *Id.* at 36-40.

¹¹² See 2014 CRCL Complaint *supra*, note 7.

¹¹³ See *id.* at 10-22.

¹¹⁴ See *id.* at 13.

¹¹⁵ See, e.g., *Garcia de Rincon v. DHS*, 539 F.3d 1133, 1138-39 (9th Cir. 2008); *Lorenzo v. Mukasey*, 508 F.3d 1278, 1282 (10th Cir. 2007); *Ochoa-Carrillo v. Gonzales*, 437 F.3d 842, 846 (8th Cir. 2006); *Gomez-Chavez v. Perryman*, 308 F.3d 796, 801 (7th Cir. 2002).

valid protection claim was missed during the initial expedited removal process, the regulatory bar to asylum for individuals subject to reinstatement prevents the subsequent vindication of that claim. Given the volume of removal orders in border regions, the expedited removal process may appear a rational way to try to adjudicate cases. But the effect of removing protections is that the likelihood of mistakes increases. In such a circumstance, mechanisms should exist to remedy the earlier mistakes; yet the current reinstatement procedure only exacerbates the consequences of any prior error.

VII. COMMENTS ON SPECIFICS OF THE PROPOSAL

This Petition suggests regulatory changes to allow individuals subject to reinstatement of removal to apply for asylum as well as withholding of removal and protection under the CAT. Notwithstanding the Petitioners' concerns with the agency's reinstatement process generally,¹¹⁶ this Petition assumes that the government would wish to maintain that process largely unaltered, including the use of a gatekeeping procedure before affording a noncitizen a hearing on a protection claim. Petitioners therefore suggest only narrow regulatory changes that would allow immigration judges to consider and grant asylum in this context, and would make corresponding changes to the asylum officer gatekeeper interview by moving from a reasonable fear standard to a credible fear standard. This would allow individuals subject to reinstatement orders who pass a credible fear interview to be placed into asylum-only proceedings¹¹⁷ before an immigration judge.

Appendix A includes the proposed alterations to the current regulations.

First, a slight change would be required in 8 C.F.R. § 241.8 and 8 C.F.R. § 1241.8, to account for eligibility for all protection-based claims rather than withholding-only. Second, a change would be required in 8 C.F.R. §§ 208.2 and 1208.2, because individuals with reinstatement orders under 8 U.S.C. § 1231(a)(5) would be placed in asylum-only hearings before the immigration judge, rather than withholding-and-CAT-only hearings. Third, alterations would be required in 8 C.F.R. §§ 208.30 and 1208.30, to treat individuals with reinstatement orders in the same manner as stowaways, i.e., eligible to be considered only for asylum and protection-based relief. Finally, 8 C.F.R. §§ 208.31 and 1208.31 would need to be amended to reflect that reasonable fear interviews would occur only for individuals ordered removed under 8 U.S.C. § 1228(b) (as having been convicted of an aggravated felony), and not individuals amenable to reinstatement of removal.

¹¹⁶ Cf. *Morales-Izquierdo*, 486 F.3d at 490-98 (permitting non-immigration judge reinstatement order); *De Sandoval v. U.S. Att'y Gen.*, 440 F.3d 1276, 1283 (11th Cir. 2006) (same); *Ochoa-Carrillo*, 437 F.3d at 846 (8th Cir. 2006) (same); *Lattab v. Ashcroft*, 384 F.3d 8, 20 (1st Cir. 2004) (same).

¹¹⁷ In this discussion, we use "asylum-only" as shorthand for proceedings wherein the noncitizen is limited to seeking asylum, withholding, and protection under the Convention Against Torture. 8 C.F.R. § 1208.2(c)(1). We use "withholding-only" proceedings as shorthand for proceedings wherein the noncitizen may only seek withholding of removal and protection under the Convention Against Torture. 8 C.F.R. § 1208.2(c)(2).

The proposed regulatory changes would not disturb provisions specifying that individuals subject to § 1228(b) removal may only apply for withholding of removal, as individuals properly subject to § 1228(b) orders face an absolute bar to asylum due to their prior convictions.¹¹⁸

In this regard, Petitioners note that some individuals reentering without permission following a removal order would be barred from asylum for reasons unrelated to the reinstatement order. Some individuals might have been convicted of an aggravated felony, which is treated as a particularly serious crime barring asylum relief.¹¹⁹ Others may have failed to file for asylum within one year of entering the United States.¹²⁰ Petitioners do not view either possibility as problematic for the proposed regulatory changes. An individual who was granted a hearing before an immigration judge would not become asylum-eligible simply by being placed in asylum-only proceedings. The normal asylum eligibility rules would continue to apply to the case, and those rules do bar some individuals from being considered for, or from being granted, asylum. In other words, the existing asylum process would address the circumstance of any individuals precluded from asylum eligibility.

As noted at the outset, Petitioners believe that changes are required in both the regulations pertaining to DHS and those pertaining to the Executive Office for Immigration Review. Petitioners have suggested joint rulemaking as an effective means of promulgating appropriate regulations. Coordination between the agencies would be required in any event, to ensure consistent and appropriate regulations.

VIII. CONCLUSION

As detailed above, the current regulations precluding asylum eligibility for individuals previously ordered removed are untenable. Accordingly, the Petitioners ask DHS and DOJ to promulgate regulations that permit asylum consideration for otherwise eligible individuals subject to orders of reinstatement of removal. The regulatory changes contained in Appendix A would remove inconsistencies between the asylum statute and agency regulations, would better conform the regulations to congressional intent, and would ensure the United States' compliance with international obligations.

Respectfully Submitted,

Charles Roth
Director of Litigation
NATIONAL IMMIGRANT JUSTICE CENTER
208 South LaSalle Street, Suite 1300
Chicago, IL 60604
(312) 660-1613 (T)
(312) 660-1505 (F)

¹¹⁸ See 8 U.S.C. § 1158(b)(2).

¹¹⁹ *Id.* §1158(b)(2)(B)(i).

¹²⁰ *Id.* § 1158(a)(2)(B).

APPENDIX A
PROPOSED AMENDMENTS TO CURRENT REGULATIONS

The pages that follow include proposed amendments to current regulations that would address the concerns identified above. Additions are included in bold and underlined.

Modified Regulations Include:

8 C.F.R. § 241.8 Reinstatement of removal orders

2. 8 C.F.R. § 1241.8 Reinstatement of removal orders

3. 8 C.F.R. § 208.2 Jurisdiction

4. 8 C.F.R. § 1208.2 Jurisdiction

5. 8 C.F.R. § 208.30 Jurisdiction

6. 8 C.F.R. § 1208.30 Jurisdiction

7. 8 C.F.R. § 208.31 Reasonable fear of persecution or torture determinations involving aliens ordered removed under section 238(b) of the Act ~~and aliens whose removal is reinstated under section 241(a)(5) of the Act.~~

8. 8 C.F.R. § 1208.31 Reasonable fear of persecution or torture determinations involving aliens ordered removed under section 238(b) of the Act ~~and aliens whose removal is reinstated under section 241(a)(5) of the Act.~~

TITLE 8 ALIENS AND NATIONALITY
CHAPTER I DEPARTMENT OF HOMELAND SECURITY (IMMIGRATION AND
 NATURALIZATION)
SUBCHAPTER B IMMIGRATION REGULATIONS
PART 241 APPREHENSION AND DETENTION OF ALIENS ORDERED
 REMOVED
SUBPART A POST-HEARING DETENTION AND REMOVAL

§ 241.8 Reinstatement of removal orders.

(e) Exception for **protection claims** ~~withholding of removal~~. If an alien whose prior order of removal has been reinstated under this section expresses a fear of returning to the country designated in that order, the alien shall be immediately referred to an asylum officer for an interview to determine whether the alien has a **credible** ~~reasonable~~ fear of persecution or torture pursuant to § **208.30** ~~208.31~~ of this chapter.

TITLE 8 ALIENS AND NATIONALITY
CHAPTER V EXECUTIVE OFFICE FOR IMMIGRATION REVIEW,
 DEPARTMENT OF JUSTICE
SUBCHAPTER B IMMIGRATION REGULATIONS
PART 1241 APPREHENSION AND DETENTION OF ALIENS ORDERED
 REMOVED
SUBPART A POST-HEARING DETENTION AND REMOVAL

§ 1241.8 Reinstatement of removal orders

(e) Exception for **protection claims** ~~withholding of removal~~. If an alien whose prior order of removal has been reinstated under this section expresses a fear of returning to the country designated in that order, the alien shall be immediately referred to an asylum officer for an interview to determine whether the alien has a **credible** ~~reasonable~~ fear of persecution or torture pursuant to § **1208.30** ~~1208.31~~ of this chapter.

TITLE 8 ALIENS AND NATIONALITY
CHAPTER I DEPARTMENT OF HOMELAND SECURITY (IMMIGRATION AND
 NATURALIZATION)
SUBCHAPTER B IMMIGRATION REGULATIONS
PART 208 PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL
SUBPART A ASYLUM AND WITHHOLDING OF REMOVAL

§ 208.2 Jurisdiction.

(b) *Jurisdiction of Immigration Court in general.* Immigration judges shall have exclusive jurisdiction over asylum applications filed by an alien who has been served a Form I-221, Order to Show Cause; Form I-122, Notice to Applicant for Admission Detained for a Hearing before an Immigration Judge; or Form I-862, Notice to Appear, after the charging document has been filed with the Immigration Court. Immigration judges shall also have jurisdiction over any asylum applications filed prior to April 1, 1997, by alien crewmembers who have remained in the United States longer than authorized, by applicants for admission under the Visa Waiver Pilot Program, ~~and~~ by aliens who have been admitted to the United States under the Visa Waiver Pilot Program, **and by an alien who is the subject of a reinstated removal order pursuant to section 241(a)(5) of the Act.** Immigration judges shall also have the authority to review reasonable fear determinations referred to the Immigration Court under § 208.31, and credible fear determinations referred to the Immigration Court under § 208.30.

(c) *Certain aliens not entitled to proceedings under section 240 of the Act—*

(1) *Asylum applications and withholding of removal applications only.* After Form I-863, Notice of Referral to Immigration Judge, has been filed with the Immigration Court, an immigration judge shall have exclusive jurisdiction over any asylum application filed on or after April 1, 1997, by:

(vii) An alien who is an applicant for admission to Guam or the Commonwealth of the Northern Mariana Islands pursuant to the Guam-CNMI Visa Waiver Program under section 212(l) of the Act, except that if such an alien is an applicant for admission to the Commonwealth of the Northern Mariana Islands, then he or she shall not be eligible for asylum prior to January 1, 2015; ~~or~~

(viii) An alien who was admitted to Guam or the Commonwealth of the Northern Mariana Islands pursuant to the Guam-CNMI Visa Waiver Program under section 212(l) of the Act and has remained longer than authorized or has otherwise violated his or her immigration status, except that if such an alien was admitted to the Commonwealth of the Northern Mariana Islands, then he or she shall not be eligible for asylum in the Commonwealth of the Northern Mariana Islands prior to January 1, 2015; **or**

(ix) An alien who is the subject of an order of reinstatement of removal order pursuant to section 241(a)(5) of the Act.

(2) *Withholding of removal applications only.* After Form I-863, Notice of Referral to Immigration Judge, has been filed with the Immigration Court, an immigration judge shall have exclusive jurisdiction over any application for withholding of removal filed by:

~~(i) An alien who is the subject of a reinstated removal order pursuant to section 241(a)(5) of the Act; or~~

~~(ii) An~~ alien who has been issued an administrative removal order pursuant to section 238 of the Act as an alien convicted of committing an aggravated felony.

TITLE 8 ALIENS AND NATIONALITY
CHAPTER V EXECUTIVE OFFICE FOR IMMIGRATION REVIEW,
 DEPARTMENT OF JUSTICE
SUBCHAPTER B IMMIGRATION REGULATIONS
PART 1208 PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL
SUBPART A ASYLUM AND WITHHOLDING OF REMOVAL

§ 1208.2 Jurisdiction.

(b) *Jurisdiction of Immigration Court in general.* Immigration judges shall have exclusive jurisdiction over asylum applications filed by an alien who has been served a Form I-221, Order to Show Cause; Form I-122, Notice to Applicant for Admission Detained for a Hearing before an Immigration Judge; or Form I-862, Notice to Appear, after the charging document has been filed with the Immigration Court. Immigration judges shall also have jurisdiction over any asylum applications filed prior to April 1, 1997, by alien crewmembers who have remained in the United States longer than authorized, by applicants for admission under the Visa Waiver Pilot Program, ~~and~~ by aliens who have been admitted to the United States under the Visa Waiver Pilot Program, **and by an alien who is the subject of a reinstated removal order pursuant to section 241(a)(5) of the Act.** Immigration judges shall also have the authority to review reasonable fear determinations referred to the Immigration Court under § 208.31, and credible fear determinations referred to the Immigration Court under § 208.30.

(c) *Certain aliens not entitled to proceedings under section 240 of the Act—* (1) *Asylum applications and withholding of removal applications only.* After Form I-863, Notice of Referral to Immigration Judge, has been filed with the Immigration Court, an immigration judge shall have exclusive jurisdiction over any asylum application filed on or after April 1, 1997, by:

(vii) An alien who is an applicant for admission to Guam or the Commonwealth of the Northern Mariana Islands pursuant to the Guam-CNMI Visa Waiver Program under section 212(l) of the Act, except that if such an alien is an applicant for admission to the Commonwealth of the Northern Mariana Islands, then he or she shall not be eligible for asylum prior to January 1, 2015; ~~or~~

(viii) An alien who was admitted to Guam or the Commonwealth of the Northern Mariana Islands pursuant to the Guam-CNMI Visa Waiver Program under section 212(l) of the Act and has remained longer than authorized or has otherwise violated his or her immigration status, except that if such an alien was admitted to the Commonwealth of the Northern Mariana Islands, then he or she shall not be eligible for asylum in the Commonwealth of the Northern Mariana Islands prior to January 1, 2015; **or**

(ix) An alien who is the subject of an order of reinstatement of removal pursuant to section 241(a)(5) of the Act.

(2) *Withholding of removal applications only.* After Form I-863, Notice of Referral to Immigration Judge, has been filed with the Immigration Court, an immigration judge shall have exclusive jurisdiction over any application for withholding of removal filed by:

~~(i) An alien who is the subject of a reinstated removal order pursuant to section 241(a)(5) of the Act; or~~

~~(ii) An an alien who has been issued an administrative removal order pursuant to section 238 of the Act as an alien convicted of committing an aggravated felony.~~

TITLE 8 ALIENS AND NATIONALITY
CHAPTER I DEPARTMENT OF HOMELAND SECURITY (IMMIGRATION AND
 NATURALIZATION)
SUBCHAPTER B IMMIGRATION REGULATIONS
PART § 208 PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL
SUBPART B CREDIBLE FEAR OF PERSECUTION

§ 208.30 Jurisdiction.

(e) Determination.

(5) Except as provided in paragraph (e)(6) of this section, if an alien is able to establish a credible fear of persecution or torture but appears to be subject to one or more of the mandatory bars to applying for, or being granted, asylum contained in section 208(a)(2) and 208(b)(2) of the Act, or to withholding of removal contained in section 241(b)(3)(B) of the Act, the Department of Homeland Security shall nonetheless place the alien in proceedings under section 240 of the Act for full consideration of the alien's claim, if the alien is not a stowaway. If the alien is a stowaway **or is the subject of an order of reinstatement of removal pursuant to section 241(a)(5) of the Act**, the Department shall place the alien in proceedings for consideration of the alien's claim pursuant to 8 CFR 208.2(c)(3).

(f) Procedures for a positive credible fear finding. If an alien, other than an alien stowaway **or the subject of an order of reinstatement of removal pursuant to section 241(a)(5) of the Act**, is found to have a credible fear of persecution or torture, the asylum officer will so inform the alien and issue a Form I-862, Notice to Appear, for full consideration of the asylum and withholding of removal claim in proceedings under section 240 of the Act. If an alien stowaway **or the subject of an order of reinstatement of removal pursuant to section 241(a)(5) of the Act** is found to have a credible fear of persecution or torture, the asylum officer will so inform the alien and issue a Form I-863, Notice of Referral to Immigration Judge, for full consideration of the asylum claim, or the withholding of removal claim, in proceedings under § 208.2(c). Parole of the alien may be considered only in accordance with section 212(d)(5) of the Act and § 212.5 of this chapter.

(g) Procedures for a negative credible fear finding.

(1) If an alien is found not to have a credible fear of persecution or torture, the asylum officer shall provide the alien with a written notice of decision and inquire whether the alien wishes to have an immigration judge review the negative decision, using Form I-869, Record of Negative

Credible Fear Finding and Request for Review by Immigration Judge. The alien shall indicate whether he or she desires such review on Form I-869. A refusal by the alien to make such indication shall be considered a request for review.

(ii) If the alien is not a stowaway **or the subject of a reinstated removal order pursuant to section 241(a)(5) of the Act** and does not request a review by an immigration judge, the officer shall order the alien removed and issue a Form I-860, Notice and Order of Expedited Removal, after review by a supervisory asylum officer.

(iii) If the alien is a stowaway **or the subject of a reinstated removal order pursuant to section 241(a)(5) of the Act** and the alien does not request a review by an immigration judge, the asylum officer shall refer the alien to the district director for completion of removal proceedings in accordance with sections 235(a)(2) **or 241(a)(5)** of the Act.

TITLE 8 ALIENS AND NATIONALITY
CHAPTER V EXECUTIVE OFFICE FOR IMMIGRATION REVIEW,
 DEPARTMENT OF JUSTICE
SUBCHAPTER B IMMIGRATION REGULATIONS
PART 1208 PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL
SUBPART B CREDIBLE FEAR OF PERSECUTION

§ 1208.30 Jurisdiction.

(g) Procedures for a negative credible fear finding.

(2) Review by immigration judge of a negative credible fear finding.

(iv) Upon review of the asylum officer's negative credible fear determination:

(B) If the immigration judge finds that the alien, other than an alien stowaway **or the subject of a reinstated removal order pursuant to section 241(a)(5) of the Act**, possesses a credible fear of persecution or torture, the immigration judge shall vacate the order of the asylum officer issued on Form I-860 and the Service may commence removal proceedings under section 240 of the Act, during which time the alien may file an application for asylum and withholding of removal in accordance with §1208.4(b)(3)(i) .

(C) If the immigration judge finds that an alien stowaway **or the subject of a reinstated removal order pursuant to section 241(a)(5) of the Act** possesses a credible fear of persecution or torture, the alien shall be allowed to file an application for asylum and withholding of removal before the immigration judge in accordance with §1208.4(b)(3)(iii) . The immigration judge shall decide the application as provided in that section. Such decision may be appealed by either the **alien stowaway** or the Service to the Board of Immigration Appeals. If a denial of the application for asylum and for withholding of removal becomes final, the alien shall be removed from the United States in accordance with section 235(a)(2) of the Act **or section 241(a)(5) of the Act, respectively**. If an approval of the application for asylum or for withholding of removal becomes final, the Service shall terminate removal proceedings under section 235(a)(2) of the Act **or section 241(a)(5) of the Act, as appropriate**.

TITLE 8 ALIENS AND NATIONALITY
CHAPTER I DEPARTMENT OF HOMELAND SECURITY (IMMIGRATION AND
 NATURALIZATION)
SUBCHAPTER B IMMIGRATION REGULATIONS
PART 208 PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL
SUBPART B CREDIBLE FEAR OF PERSECUTION

8 C.F.R § 208.31 Reasonable fear of persecution or torture determinations involving aliens ordered removed under section 238(b) of the Act ~~and aliens whose removal is reinstated under section 241(a)(5) of the Act.~~

(a) Jurisdiction. This section shall apply to any alien ordered removed under section 238(b) of the Act ~~or whose deportation, exclusion, or removal order is reinstated under section 241(a)(5) of the Act~~ who, in the course of the administrative removal ~~or reinstatement~~ process, expresses a fear of returning to the country of removal. USCIS has exclusive jurisdiction to make reasonable fear determinations, and EOIR has exclusive jurisdiction to review such determinations.

(b) Initiation of reasonable fear determination process. Upon issuance of a Final Administrative Removal Order under § 238.1 of this chapter, ~~or notice under § 241.8(b) of this chapter that an alien is subject to removal,~~ an alien described in paragraph (a) of this section shall be referred to an asylum officer for a reasonable fear determination. In the absence of exceptional circumstances, this determination will be conducted within 10 days of the referral.

TITLE 8 ALIENS AND NATIONALITY
CHAPTER V EXECUTIVE OFFICE OF IMMIGRATION REVIEW, DEPARTMENT
 OF JUSTICE
SUBCHAPTER B IMMIGRATION REGULATIONS
PART 1208 PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL
SUBPART B CREDIBLE FEAR OF PERSECUTION

§ 1208.31 Reasonable fear of persecution or torture determinations involving aliens ordered removed under section 238(b) of the Act ~~and aliens whose removal is reinstated under section 241(a)(5) of the Act.~~

(a) Jurisdiction. This section shall apply to any alien ordered removed under section 238(b) of the Act or whose deportation, exclusion, ~~or removal order is reinstated under section 241(a)(5) of the Act~~ who, in the course of the administrative removal or reinstatement process, expresses a fear of returning to the country of removal. The Service has exclusive jurisdiction to make reasonable fear determinations, and EOIR has exclusive jurisdiction to review such determinations.

(b) Initiation of reasonable fear determination process. Upon issuance of a Final Administrative Removal Order under § 238.1 of this chapter, ~~or notice under § 1241.8(b) of this chapter that an alien is subject to removal,~~ an alien described in paragraph (a) of this section shall be referred to an asylum officer for a reasonable fear determination. In the absence of exceptional circumstances, this determination will be conducted within 10 days of the referral.
