

§ 1003.42 Review of credible fear of persecution, reasonable possibility of persecution, and reasonable possibility of torture determinations.

(a) Referral. Jurisdiction for an immigration judge to review a negative fear determination by an asylum officer pursuant to section 235(b)(1)(B) of the Act shall commence with the filing by DHS of the Notice of Referral to Immigration Judge. DHS shall also file with the notice of referral a copy of the written record of determination as defined in section 235(b)(1)(B)(iii)(II) of the Act, including a copy of the alien's written request for review, if any.

(b) Record of proceeding. The Immigration Court shall create a Record of Proceeding for a review of a negative fear determination. This record shall not be merged with any later proceeding involving the same alien.

(c) Procedures and evidence. The Immigration Judge may receive into evidence any oral or written statement which is material and relevant to any issue in the review. The testimony of the alien shall be under oath or affirmation administered by the Immigration Judge. If an interpreter is necessary, one will be provided by the Immigration Court. The Immigration Judge shall determine whether the review shall be in person, or through telephonic or video connection (where available). The alien may consult with a person or persons of the alien's choosing prior to the review.

(d) Standard of review.

<Text of subsection (d)(1) effective until Dec. 31, 2021, as delayed by [86 FR 6847](#); [86 FR 15069](#).>

(1) The immigration judge shall make a de novo determination as to whether there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim, whether the alien is subject to any mandatory bars to applying for asylum or being eligible for asylum under section 208(a)(2)(B)-(D) and (b)(2) of the Act, including any bars established by regulation under section 208(b)(2)(C) of the Act, and such other facts as are known to the immigration judge, that the alien could establish his or her ability to apply for or be granted asylum under section 208 of the Act. The immigration judge shall make a de novo determination as to whether there is a reasonable possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim, whether the alien is subject to any mandatory bars to eligibility for withholding of removal under section 241(b)(3)(B) of the Act, and such other facts as are known to the immigration judge, that the alien would be persecuted on account of his or her race, religion, nationality, membership in a particular social group, or political opinion in the country of removal, consistent with the criteria in [8 CFR 1208.16\(b\)](#). The immigration judge shall also make a de novo determination as to whether there is a reasonable possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the immigration judge, that the alien

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would be tortured in the country of removal, consistent with the criteria in [8 CFR 1208.16\(c\)](#), [8 CFR 1208.17](#), and [8 CFR 1208.18](#).

<Text of subsection (d)(1) effective Dec. 31, 2021, as delayed by [86 FR 6847](#); [86 FR 15069](#).>

(1) The immigration judge shall make a de novo determination as to whether there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim, whether the alien is subject to any mandatory bars to applying for asylum or being eligible for asylum under section 208(a)(2)(B)-(D) and (b)(2) of the Act, including any bars established by regulation under section 208(b)(2)(C) of the Act, and such other facts as are known to the immigration judge, that the alien could establish his or her ability to apply for or be granted asylum under section 208 of the Act. The immigration judge shall make a de novo determination as to whether there is a reasonable possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim, whether the alien is subject to any mandatory bars to eligibility for withholding of removal under section 241(b)(3)(B) of the Act, and such other facts as are known to the immigration judge, that the alien would be persecuted on account of his or her race, religion, nationality, membership in a particular social group, or political opinion in the country of removal, consistent with the criteria in [8 CFR 1208.16\(b\)](#). The immigration judge shall also make de novo determinations as to whether there is a reasonable possibility that the alien would be tortured in the country of removal and whether it is more likely than not that the alien would be tortured in the country of removal, in both instances taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the immigration judge, consistent with the criteria in [8 CFR 1208.16\(c\)](#), [8 CFR 1208.17](#), and [8 CFR 1208.18](#).

(2) If the alien is determined to be an alien described in [8 CFR 208.13\(c\)\(3\)](#) or [8 CFR 1208.13\(c\)\(3\)](#) and is determined to lack a reasonable possibility of persecution or torture under [8 CFR 208.30\(e\)\(5\)\(ii\)](#), the Immigration Judge shall first review de novo the determination that the alien is described in [8 CFR 208.13\(c\)\(3\)](#) or [8 CFR 1208.13\(c\)\(3\)](#) prior to any further review of the asylum officer's negative fear determination.

(3) If the alien is determined to be an alien described in [8 CFR 208.13\(c\)\(4\)](#) or [8 CFR 1208.13\(c\)\(4\)](#) and is determined to lack a reasonable possibility of persecution or torture under [8 CFR 208.30\(e\)\(5\)\(iii\)](#), the immigration judge shall first review de novo the determination that the alien is described in [8 CFR 208.13\(c\)\(4\)](#) or [8 CFR 1208.13\(c\)\(4\)](#) prior to any further review of the asylum officer's negative fear determination.

(e) Timing. The immigration judge shall conclude the review to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date the

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supervisory asylum officer has approved the asylum officer's negative credible fear determination issued on the Record of Negative Credible Fear Finding and Request for Review.

(f) Decision.

(1) The decision of the immigration judge shall be rendered in accordance with the provisions of [8 CFR 1208.30\(g\)\(2\)](#). In reviewing the negative fear determination by DHS, the immigration judge shall apply relevant precedent issued by the Board of Immigration Appeals, the Attorney General, the Federal circuit court of appeals having jurisdiction over the immigration court where the Request for Review is filed, and the Supreme Court.

(2) No appeal shall lie from a review of a negative fear determination made by an Immigration Judge, but the Attorney General, in the Attorney General's sole and unreviewable discretion, may direct that the Immigration Judge refer a case for the Attorney General's review following the Immigration Judge's review of a negative fear determination.

(3) In any case the Attorney General decides, the Attorney General's decision shall be stated in writing and shall be transmitted to the Board for transmittal and service as provided in [8 CFR 1003.1\(f\)](#). Such decision by the Attorney General may be designated as precedent as provided in [8 CFR 1003.1\(g\)](#).

(g) Custody. An immigration judge shall have no authority to review an alien's custody status in the course of a review of a negative fear determination made by DHS.

(h) Asylum cooperative agreement—

(1) Arriving alien. An immigration judge has no jurisdiction to review a determination by an asylum officer that an arriving alien is not eligible to apply for asylum pursuant to the 2002 U.S.–Canada Agreement formed under section 208(a)(2)(A) of the Act and should be returned to Canada to pursue his or her claims for asylum or other protection under the laws of Canada. See [8 CFR 208.30\(e\)\(6\)](#). However, in any case where an asylum officer has found that an arriving alien qualifies for an exception to that Agreement, an immigration judge does have jurisdiction to review a negative fear finding made thereafter by the asylum officer as provided in this section.

(2) Aliens in transit. An immigration judge has no jurisdiction to review any determination by DHS that an alien being removed from Canada in transit through the United States should be returned to Canada to pursue asylum claims under Canadian law, under the terms of the 2002 U.S.–Canada Agreement.

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(3) Applicants for admission. An immigration judge has no jurisdiction to review a determination by an asylum officer that an alien is not eligible to apply for asylum pursuant to a bilateral or multilateral agreement with a third country under section 208(a)(2)(A) of the Act and should be removed to the third country to pursue his or her claims for asylum or other protection under the laws of that country. See [8 CFR 208.30\(e\)\(7\)](#). However, if the asylum officer has determined that the alien may not or should not be removed to a third country under section 208(a)(2)(A) of the Act and subsequently makes a negative fear determination, an immigration judge has jurisdiction to review the negative fear finding as provided in this section.

(4) Aliens in transit through the United States from countries other than Canada. An immigration judge has no jurisdiction to review any determination by DHS that an alien being removed from a receiving country in transit through the United States should be returned to pursue asylum claims under the receiving country's law, under the terms of the applicable cooperative agreement. See [8 CFR 208.30\(e\)\(7\)](#).

(i) Severability. The provisions of part 1003 are separate and severable from one another. In the event that any provision in part 1003 is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.