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DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 208

[Docket No: USCIS 2020–0013]

RIN 1615–AC57

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Part 1208

[A.G. Order No. 5283–2021]

RIN 1125–AB08

Security Bars and Processing; Delay of Effective Date

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security; Executive Office for Immigration Review, Department of Justice.

ACTION: Interim final rule with request for comments.

SUMMARY: On December 23, 2020, the Department of Homeland Security (''DHS'') and the Department of Justice (''DOJ'') (collectively, ''the Departments'') published a final rule (''Security Bars rule''), to clarify that the ''danger to the security of the United States'' standard in the statutory bar to eligibility for asylum and withholding of removal encompasses certain emergency public health concerns and to make certain other changes. That rule was scheduled to take effect on January 22, 2021, but, as of January 21, 2021, the Departments delayed the rule's effective date for 60 days to March 22, 2021. The Departments subsequently further extended and delayed the rule's effective date to December 31, 2021. In this rule, the Departments are further extending and delaying the effective date of the Security Bars rule until December 31, 2022. The Departments are soliciting comments both on the extension until December 31, 2022, and whether the effective date of the Security Bars rule should be extended beyond that date.

DATES: *Effective date:* As of December 28, 2021, the effective date of the final rule published December 23, 2020, at 85 FR 84160, which was delayed January 25, 2021, at 86 FR 6847, and March 22, 2021, at 86 FR 15069, is further delayed until December 31, 2022.

Submission of public comments: Comments must be submitted on or before February 28, 2022.

ADDRESSES: You may submit comments on this rule, identified by DHS Docket No. USCIS 2020–0013, through the Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the website instructions for submitting comments. Comments submitted in a manner other than the one listed above, including emails or letters sent to the Departments' officials, will not be considered comments on the rule and may not receive a response from the Departments. Please note that the Departments cannot accept any comments that are hand-delivered or couriered. In addition, the Departments cannot accept comments contained on any form of digital media storage devices, such as CDs/DVDs and USB drives. The Departments are not accepting mailed comments at this time. If you cannot submit your comment by using *http://www.regulations.gov,* please contact Samantha Deshommes, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, by telephone at (240) 721–3000 (not a toll-free call) for alternate instructions.

FOR FURTHER INFORMATION CONTACT:

For USCIS: Rená Cutlip-Mason, Chief, Division of Humanitarian Affairs, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 5900 Capital Gateway Drive, Camp Springs, MD 20588–0009; telephone (240) 721–3000 (not a toll-free call).

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

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to submit comments on this action to further extend and delay the effective date of the Security Bars rule by submitting relevant written data, views, or arguments. To provide the most assistance to the Departments, comments should reference a specific portion of the rule; explain the reason for any recommendation; and include data, information, or authority that supports the recommended course of action. Comments must be submitted in English, or an English translation must be provided. Comments submitted in a manner other than those listed above, including emails or letters sent to the Departments' officials, will not be considered comments on the rule and may not receive a response from the Departments.

Instructions: If you submit a comment, you must include the agency name and the DHS Docket No. USCIS 2020–0013 for this rulemaking. All submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary public comment submission you make to the Departments. The Departments may withhold information provided in comments from public viewing that they determine may impact the privacy of an individual or is offensive. For additional information, please read the Privacy and Security Notice available at *http://www.regulations.gov*.

Docket: For access to the docket and to read background documents or comments received, go to *http://www.regulations.gov,* referencing DHS Docket No. USCIS 2020–0013. You may also sign up for email alerts on the online docket to be notified when comments are posted or a final rule is published.

II. Background and Basis for Delay of Effective Date

A. Background

On December 23, 2020, the Departments published the Security Bars rule to amend existing regulations to clarify that in certain circumstances

there are ''reasonable grounds for regarding [an] alien as a danger to the security of the United States'' or ''reasonable grounds to believe that [an] alien is a danger to the security of the United States'' based on emergency public health concerns generated by a communicable disease, making the noncitizen ineligible to be granted asylum in the United States under section 208 of the Immigration and Nationality Act (''INA'' or ''the Act''), 8 U.S.C. 1158, or the protection of withholding of removal under the Act or subsequent regulations (because of the threat of torture). *Security Bars and Processing,* 85 FR 84160 (Dec. 23, 2020). The rule was scheduled to take effect on January 22, 2021.

On January 20, 2021, the White House Chief of Staff issued a memorandum asking agencies to consider delaying, consistent with applicable law, the effective dates of any rules that had been published and not yet gone into effect, for the purpose of allowing the President's appointees and designees to review questions of fact, law, and policy raised by those regulations. *See* Memorandum for the Heads of Executive Departments and Agencies from Ronald A. Klain, Assistant to the President and Chief of Staff, *Re: Regulatory Freeze Pending Review* (Jan. 20, 2021), *available at* 86 FR 7424 (Jan. 28, 2021). As of January 21, 2021, the Departments delayed the effective date of the Security Bars rule to March 22, 2021, and then further delayed the effective date of the Security Bars rule to December 31, 2021, consistent with that memorandum and a preliminary injunction in place with respect to a related rule, as discussed below. *See* Security Bars and Processing; Delay of Effective Date, 86 FR 6847 (Jan. 25, 2021); Security Bars and Processing; Delay of Effective Date, 86 FR 15069 (Mar. 22, 2021).

B. Reason for Delay

As stated in the *Security Bars and Processing; Delay of Effective Date* interim final rule (''March Security Bars Delay IFR'') published on March 22, 2021, the Departments had good cause to delay the Security Bars rule's effective date further without advance notice and comment because implementation of the Security Bars rule was infeasible due to a preliminary injunction against a related rule. *See* 86 FR at 15070. Specifically, the Security Bars rule relies on revisions to the Departments' regulations previously made on December 11, 2020, by a separate joint rule, *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review* (''Global Asylum final rule'').[1] The Global Asylum final rule was scheduled to become effective before the Security Bars rule. However, on January 8, 2021, 14 days prior to the effective date of the Security Bars rule, in the case of *Pangea Legal Services* v. *Department of Homeland Security* (''*Pangea II*''), a district court preliminarily enjoined the Departments ''from implementing, enforcing, or applying the [Global Asylum final] rule . . . or any related policies or procedures.'' [2] The preliminary injunction remains in place. Thus, implementation of the Security Bars rule continues to be infeasible.

Specifically, the Security Bars rule relies upon the regulatory framework that was established in the Global Asylum final rule in applying bars to asylum eligibility and withholding of removal during credible fear screenings.[3] On July 9, 2020, the Departments published a Notice of Proposed Rulemaking for the Security Bars rule (''Security Bars NPRM''), which proposed regulatory text instructing adjudicators to apply the security bars to asylum eligibility and withholding of removal during credible fear screenings.[4] This proposal would have modified the then-existing regulatory framework instructing that evidence that the individual is, or may be, subject to a bar to asylum eligibility or withholding of removal, including the ''danger to the security of the United States'' bars underlying the Security Bars rule, does not have an impact on a credible fear determination.[5] The Security Bars NPRM justified this modification as necessary to allow DHS to quickly remove individuals covered by the security bars to asylum eligibility and withholding of removal, rather than sending potentially barred individuals to full removal proceedings pursuant to section 240 of the INA, 8 U.S.C. 1229a (''section 240 removal proceedings''), for consideration of further relief or protection from removal before an immigration judge, which can take months or even years.[6] The Security Bars NPRM further explained that applying the security bars during credible fear screenings was necessary to reduce health and safety dangers to both the public at large and DHS officials.[7]

On December 11, 2020, while the Departments were reviewing the comments submitted in response to the Security Bars NPRM, the Global Asylum final rule was published.[8] The Global Asylum final rule changed the general practice described above to apply all bars to asylum eligibility and withholding of removal during credible fear screenings.[9] Most relevant, the Global Asylum final rule changed the then-existing regulatory framework described above, in which evidence of a bar to asylum eligibility or withholding of removal does not have any impact on a credible fear determination (even though the bars would be part of the ultimate adjudication of asylum eligibility or withholding of removal before the Executive Office of Immigration Review), to a framework that instead required asylum officers to apply all of the bars to asylum eligibility or withholding of removal during credible fear screenings.[10]

On December 23, 2020, the Security Bars rule was published. In this final rule, the Departments revised the text from the Security Bars NPRM to explicitly rely on the intervening changes made by the Global Asylum final rule.[11] As a result, the regulatory text of significant portions of the Security Bars rule relies upon and repeats broader regulatory text established by the Global Asylum final rule, such as applying bars to asylum eligibility and withholding of removal during credible fear screenings.[12] The Security Bars rule assumed that the Global Asylum final rule would be in effect, and, therefore, the Security Bars rule did not make additional changes to the credible fear framework.[13]

[1] *See* 85 FR 80274 (Dec. 11, 2020).

[2] *Pangea Legal Servs.* v. *U.S. Dep't of Homeland Sec.,* 512 F. Supp. 3d 966, 977 (N.D. Cal. 2021). By issuing this rule to further extend and delay the effective date of the Security Bars rule, the Departments are not indicating a position on the outcome thus far in *Pangea II.*

[3] *See, e.g.,* 85 FR at 84176 (''As noted, the [Security Bars] final rule is not, as the NPRM proposed, modifying the regulatory framework to apply the danger to the security of the United States bars at the credible fear stage because, in the interim between the NPRM and the final rule, the [Global Asylum final rule] did so for all of the bars to eligibility for asylum and withholding of removal.''); *id.* at 84189 (describing changes made in the Security Bars rule ''to certain regulatory provisions not addressed in the proposed rule as necessitated by the intervening promulgation of the [Global Asylum final] Rule'').

[4] *Security Bars and Processing,* 85 FR 41201, 41216–18 (July 9, 2020).

[5] *See id.* at 41207.

[6] *Id.* at 41210–12.

[7] *Id.* at 41210.

[8] 85 FR 80274 (Dec. 11, 2020).

[9] *Id.* at 80391.

[10] *Id.*

[11] 85 FR at 84174–77.

[12] *See, e.g., id.* at 84194–98 (revising 8 CFR 208.30, 235.6, 1208.30, and 1235.6, among other provisions); *accord* 85 FR at 80390–80401 (same).

[13] *See* 85 FR at 84175 (''The Departments note that the final rule is not, as the NPRM proposed, modifying the regulatory framework to apply the danger to the security of the United States bars at

As a result of the interplay between the two rules, implementation of the Security Bars rule would risk violating the injunction against the application, implementation, or enforcement of the Global Asylum final rule and any related policies or procedures. Effective implementation of the Security Bars rule relies on the application of the asylum and withholding of removal bars to eligibility at the credible fear screening stage, as established by the Global Asylum final rule.[14] Accordingly, implementing the Security Bars rule—and effectively reinserting or relying upon regulatory provisions that the *Pangea II* court has enjoined—may potentially violate the court's injunction. In other words, the court's injunction in *Pangea II* makes it impermissible under the current regulatory framework to apply the bars to asylum eligibility and withholding of removal outlined in the Security Bars rule to noncitizens in the credible fear screening process. Given these circumstances, the Departments believe that the Security Bars rule, which could not be implemented as designed, would not necessarily provide the framework for achieving its intended goals.

Accordingly, the Departments are further extending and delaying the effective date of the Security Bars rule until December 31, 2022, because of the aforementioned litigation. If the injunction against implementation of the Global Asylum final rule is lifted before December 31, 2022, the Departments can revise the effective date of the Security Bars rule as needed to account for this change. Similarly, if the injunction remains in effect on that date, the Departments may delay the effective date of the Security Bars rule further. The Departments have chosen this time-limited delay, rather than an indefinite delay, due to the preliminary nature of the injunction.

C. Future Rulemaking To Modify or Rescind Security Bars Rule

The Departments are reviewing and reconsidering the Security Bars rule in light of the Administration's policies of ensuring the safe and orderly reception and processing of asylum seekers consistent with public health and safety, strengthening the asylum system, and removing barriers that impede access to immigration benefits, with the additional context of the complex relationship between the Global Asylum final rule and the Security Bars rule, and the court's injunction in *Pangea II*.[15] The Departments are reevaluating whether the Security Bars rule provides the most appropriate and effective framework for achieving its goals of mitigating the spread of communicable diseases, including COVID–19, among certain noncitizens in the credible fear screening process, as well as DHS personnel and the public. The Departments plan to publish a separate NPRM to solicit public comments on whether to modify or rescind the Security Bars rule.[16]

In the March Security Bars Delay IFR, the Departments explained that they were considering amending or rescinding the Security Bars rule and noted that they may extend the delay in its effective date beyond December 31, 2021, if the injunction remained in effect at the time. 86 FR at 15071. The Departments sought public comments on whether the Security Bars rule should be revised or revoked and information on alternative approaches that may achieve the best public health outcome consistent with the Administration's immigration policy goals.[17] The Departments received 66 comments in response to the March Security Bars Delay IFR, which the Departments would address in any separate future rulemaking to modify or rescind the Security Bars rule.

The Departments recognize that the COVID–19 public health emergency is highly dynamic and continues to pose health and safety risks for noncitizens held in congregate settings, particularly at holding and detention facilities, agency personnel, and the public.[18] As the COVID–19 public health emergency has continued to evolve, the Departments continue to reconsider and reevaluate how best to mitigate the spread of COVID–19 and which actions are most appropriate in accordance with their legal authorities.

III. Request for Comment on Further Delay of the Effective Date of the Security Bars Rule

The Departments continue to welcome data, views, and information regarding the effective date of the Security Bars rule. The Departments also are soliciting comments on whether the effective date should be extended beyond December 31, 2022, if the *Pangea II* injunction is still in effect or if other intervening events occur.

IV. Regulatory Requirements

A. Administrative Procedure Act

Under the Administrative Procedure Act (''APA''), agencies are not required to engage in pre-promulgation notice-and-comment under 5 U.S.C. 553(b) and (c) when an agency ''for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' 5 U.S.C. 553(b)(B). As stated above, the Departments have determined that the good cause exception applies to this rule because implementation of the Security Bars rule has not been—and continues to not be—feasible due to a preliminary injunction against a related rule. As explained above, the Security Bars rule's reliance upon—and interplay with—the Global Asylum final rule means that implementation of the Security Bars rule would risk violating the *Pangea II* injunction. The preliminary injunction remains in place. It is therefore impractical and unnecessary for the Departments to provide notice and an opportunity to comment, because any comments received cannot and will not affect the injunction underlying the need for delay. *See EME Homer City Generation, L.P.* v. *E.P.A.,* 795 F.3d 118, 134–35

the credible fear stage. In the interim between the NPRM and the final rule, the Global Asylum final rule did so for bars to eligibility for asylum and withholding of removal.'').

[14] As the Departments explained in the Security Bars rule, the intervening Global Asylum final rule made changes to the credible fear screening framework to provide that noncitizens receiving positive credible fear determinations be placed in asylum-and-withholding only proceedings, rather than section 240 removal proceedings. *See* 85 FR at 84188. The Security Bars rule relied upon this change made in the Global Asylum final rule to provide that noncitizens who receive positive credible fear determinations under the Security Bars rule will be placed in such asylum-and-withholding only proceedings rather than section 240 removal proceedings, unless they are removed to third countries. *See id.* The Security Bars rule also assumes that the Departments are using the reasonable possibility of persecution or torture standards for withholding of removal claims in the credible fear screening context, which is also a change that was made in the Global Asylum final rule. *See id.* at 84188, 84191.

[15] *See, e.g.,* Executive Order 14010 of February 2, 2021, *Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border,* 86 FR 8267 (Feb. 5, 2021); Executive Order 14012 of February 2, 2021, *Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans,* 86 FR 8277 (Feb. 5, 2021).

[16] *See* Executive Office of the President, Office of Management and Budget, Office of Information and Regulatory Affairs, *Spring 2021 Unified Agenda of Regulatory and Deregulatory Actions, Bars to Asylum Eligibility and Procedures, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=1615-AC69* (last visited Dec. 14, 2021).

[17] *See* 86 FR at 15069, 15071.

[18] *See Public Health Reassessment and Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists,* 86 FR 42828, 42830, 42833, 42835–36 (Aug. 5, 2021).

(D.C. Cir. 2015) (explaining that the good cause exception applied because ''commentators could not have said anything during a notice and comment period that would have changed'' the agency's response to a judicial decision). The Departments notified the public in March that ''if the injunction remains in effect on December 31, [2021,] the Departments may delay the effective date of the Security Bars rule further.'' 86 FR at 15071.[19]

B. Executive Order 12866 and Executive Order 13563

Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review) direct agencies to assess the costs, benefits, and transfers of available alternatives, and, if regulation is necessary, to select regulatory approaches that maximize net benefits, including potential economic, environmental, public health and safety effects, distributive impacts, and equity. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Pursuant to Executive Order 12866, the Office of Information and Regulatory Affairs of the Office of Management and Budget determined that this rule is ''significant'' under Executive Order 12866 and has reviewed this regulation.

C. Regulatory Flexibility Act

The Departments have reviewed this rule in accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* and have determined that this rule to further delay the effective date of the Security Bars rule (85 FR 84160) will not have a significant economic impact on a substantial number of small entities. Neither the Security Bars rule, nor this rule to delay its effective date, regulate ''small entities'' as that term is defined in 5 U.S.C. 601(6). Only individuals, rather than entities, are eligible to apply for asylum and related forms of relief, and only individuals are placed in immigration proceedings.

[19] In response to the March Security Bars Delay IFR, the Departments received one comment objecting to a further delay. The commenter asserted that implementation was needed to mitigate the risk of the potential spread of deadly communicable diseases by noncitizens from countries where the disease was prevalent. As noted, however, agencies have been enjoined from applying bars to asylum eligibility and withholding of removal when making a credible fear determination.

D. Unfunded Mandates Reform Act of 1995

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

E. Congressional Review Act

This rule is not a major rule as defined by section 804 of the Congressional Review Act (''CRA''). 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign based enterprises in domestic and export markets. The Departments have complied with the CRA's reporting requirements and have sent this rule to Congress and to the Comptroller General as required by 5 U.S.C. 801(a)(1).

F. Executive Order 13132 (Federalism)

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, the Departments believe that this rule will not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

G. Executive Order 12988 (Civil Justice Reform)

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

H. Paperwork Reduction Act

This rule does not create new, or revisions to existing, ''collection[s] of information'' as that term is defined under the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320.

I. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

This rule does not have ''tribal implications'' because it does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Accordingly, Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments) requires no further agency action or analysis.

Alejandro N. Mayorkas,

Secretary, U.S. Department of Homeland Security.

Dated: December 18, 2021.

Merrick B. Garland,

Attorney General, Department of Justice.

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BILLING CODE 4410–30–P; 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 251 and 258

U.S. Customs and Border Protection

19 CFR Part 4

[Docket No. USCBP–2021–0046; CBP Dec. No. 21–19]

RIN 1651–AB18

Automation of CBP Form I–418 for Vessels

AGENCY: U.S. Customs and Border Protection, DHS.

ACTION: Interim final rule; solicitation of comments.

SUMMARY: This rule amends the regulations in title 8 and title 19 of the Code of Federal Regulations (CFR) regarding the submission of U.S. Customs and Border Protection (CBP) Form I–418, Passenger List—Crew List (Form I–418) in paper form. Currently, the master or agent of every commercial vessel arriving in the United States, with limited exceptions, must submit Form I–418, along with certain information regarding longshore work, in paper form to CBP at the port where immigration inspection is performed. Most commercial vessel operators are also required to submit a paper Form I–418 to CBP at the final U.S. port prior to departing for a foreign place. DHS is modifying the applicable regulations to provide for the electronic submission of Form I–418. Under this rule, vessel operators will be required to electronically submit the data elements on Form I–418 to CBP through an electronic data interchange system (EDI) approved by CBP in lieu of submitting a paper form. This will streamline vessel arrival and departure processes by providing for the electronic submission of the information collected