



DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 208

[CIS No. 2671-20; DHS Docket No. USCIS-2020-0017]

RIN 1615-AC59

Asylum Interview Interpreter Requirement Modification Due to COVID-19

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security (DHS).

ACTION: Temporary final rule.

SUMMARY: This rule temporarily (for 180 days) amends existing Department of Homeland Security (DHS) regulations to provide that asylum applicants who cannot proceed with the interview in English are no longer required to provide interpreters at the asylum interview but rather must ordinarily proceed with DHS-provided telephonic interpreters.

DATES: This rule is effective September 23, 2020, through March 22, 2021.

FOR FURTHER INFORMATION CONTACT: Maureen Dunn, Chief, Humanitarian Affairs Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security, 20 Massachusetts Ave. NW, Suite 1100, Washington, DC 20529-2140; telephone 202-272-8377 (this is not a toll-free number).

Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1-877-889-5627 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

I. Legal Authority to Issue this Rule and other Background

A. Legal Authority

The Secretary of Homeland Security (Secretary) publishes this temporary final rule pursuant to his authorities concerning asylum determinations. The Homeland Security Act of 2002 (HSA), Public Law 107-296, as amended, transferred many functions related to the execution of Federal immigration law to the newly created DHS. The HSA amended the Immigration and Nationality Act (INA or the Act), charging the Secretary “with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens,” INA 103(a)(1), 8 U.S.C. 1103(a)(1), and granted the Secretary the power to take all actions “necessary for carrying out” the immigration laws, including the INA, *id.* 1103(a)(3). The HSA also transferred to DHS responsibility for affirmative asylum applications, i.e., applications for asylum made outside the removal context. *See* 6 U.S.C. 271(b)(3). That authority has been delegated within DHS to U.S. Citizenship and Immigration Services (USCIS). USCIS asylum officers determine, in the first instance, whether an alien’s affirmative asylum application should be granted. *See* 8 CFR 208.4(b), 208.9. With limited exception, the Department of Justice Executive Office for Immigration Review has exclusive authority to adjudicate asylum applications filed by aliens who are in removal proceedings. *See* INA 103(g), 240; 8 U.S.C. 1103(g), 1229a. This broad division of functions and authorities informs the background of this rule.

B. Legal Framework for Asylum

Asylum is a discretionary benefit that generally can be granted to eligible aliens who are physically present or who arrive in the United States, irrespective of their status, subject to the requirements in section 208 of the INA, 8 U.S.C. 1158, and implementing regulations, *see* 8 CFR pts. 208, 1208.

Section 208(d)(5) of the INA, 8 U.S.C. 1158(d)(5), imposes several mandates and procedural requirements for the consideration of asylum applications. Congress also specified that the Attorney General and Secretary of Homeland Security “may provide by regulation for any other conditions or limitations on the consideration of an application for asylum,” so long as those limitations are “not inconsistent with this chapter.” INA 208(d)(5)(B), 8 U.S.C. 1158(d)(5)(B). In sum, the current statutory framework leaves the Attorney General (and, after the HSA, also the Secretary) significant discretion to regulate consideration of asylum applications. USCIS regulations promulgated under this authority set agency procedures for asylum interviews, and require that applicants unable to proceed in English “must provide, at no expense to the Service, a competent interpreter fluent in both English and the applicant's native language or any other language in which the applicant is fluent.” 8 CFR 208.9(g). This requirement means that all asylum applicants who cannot proceed in English must bring an interpreter to their interview, posing a serious health risk in the current climate.

Accordingly, this temporary rule will address the international spread of pandemic Coronavirus Disease 2019 (COVID-19) by seeking to slow the transmission and spread of the disease during asylum interviews before USCIS asylum officers. To that end, this temporary rule will require in certain instances aliens to be interviewed for this discretionary asylum benefit using competent government interpreters.

C. The COVID-19 Pandemic

On January 31, 2020, the Secretary of Health and Human Services declared a public health emergency under section 319 of the Public Health Service Act (42 U.S.C. 247d), in

response to COVID-19.¹ On March 13, 2020, President Trump declared a National Emergency concerning the COVID-19 outbreak to control the spread of the virus in the United States.² The President's proclamation declared that the emergency began in the United States on March 1, 2020.

COVID-19 is a communicable disease caused by a novel (new) coronavirus, SARS-CoV-2 and appears to spread easily and sustainably within communities.³ The virus is thought to transfer primarily by person-to-person contact through respiratory droplets produced when an infected person coughs or sneezes; it may also transfer through contact with surfaces or objects contaminated with these droplets.⁴ There is also evidence of presymptomatic and asymptomatic transmission, in which an individual infected with COVID-19 is capable of spreading the virus to others before exhibiting symptoms or without ever exhibiting symptoms, respectively.⁵ The ease of transmission presents a risk of a surge in hospitalizations for COVID-19, which would reduce available hospital capacity.

Symptoms include fever, cough, and shortness of breath, and typically appear 2 to 14 days after exposure.⁶ Manifestations of severe disease have included severe pneumonia, acute

¹ HHS, Determination of Public Health Emergency, 85 FR 7316 (Feb. 7, 2020).

² Proclamation 9994 of March 13, 2020, Declaring a National Emergency Concerning the Coronavirus Disease (COVID-19) Outbreak, 85 FR 15337 (Mar. 18, 2020). See also <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (last visited Mar. 25, 2020).

³ CDC, How COVID-19 Spreads (Jun. 16, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

⁴ Id.

⁵ CDC, Public Health Guidance for Community-Related Exposure (Jul. 31, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/php/public-health-recommendations>.

⁶ CDC, Coronavirus Disease 2019 (COVID-19) (Mar. 16, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>.

respiratory distress syndrome, septic shock, and multi-organ failure.⁷ According to the World Health Organization (WHO), approximately 3.4% of reported COVID-19 cases have resulted in death globally.⁸ This mortality rate is higher among older adults or those with compromised immune systems.⁹ Older adults and people who have severe chronic medical conditions such as serious heart conditions and lung disease are also at higher risk for more serious COVID-19 illness.¹⁰

As of July 31, 2020, there were approximately 17,106,007 cases of COVID-19 globally, resulting in approximately 668,910 deaths; approximately 4,405,932 cases have been identified in the United States, with new cases being reported daily, and approximately 150,283 reported deaths due to the disease.¹¹

Unfortunately, there is currently no vaccine against COVID-19. Treatment is currently limited to supportive care to manage symptoms. Hospitalization may be required in severe cases and mechanical respiratory support may be needed in the most severe cases. Testing is available to confirm suspected cases of COVID-19 infection. At present, the time it takes to receive

⁷ CDC, Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19) (Mar. 7, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html>.

⁸ WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 (Mar. 3, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---3-march-2020>.

⁹ CDC, Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19) (Mar. 7, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html>.

¹⁰ CDC, People Who Are at Higher Risk for Severe Illness (Mar. 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/people-at-higher-risk.html>.

¹¹ WHO, Coronavirus disease 2019 (COVID-19) Situation Report – 193 (July 31, 2020), *available at* https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200731-covid-19-sitrep-193.pdf?sfvrsn=42a0221d_2; CDC, Coronavirus Disease 2019 (COVID-19): Cases in U.S. (July 31, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases/updates/cases-in-us.html>.

results varies, based on type of test used, laboratory capacity, and geographic location, among other factors.¹²

Many states and businesses are beginning the initial phases of reopening, yet there are numerous challenges. The CDC has posted guidance for workplaces who plan to reopen, which include: ensuring social distancing, such as installing physical barriers, modifying workspaces, closing communal spaces, staggering shifts, limit travel and modify commuting practices.¹³

II. Purpose of this Temporary Final Rule

In light of the pandemic and to protect its workforce and help mitigate the spread of COVID-19, USCIS temporarily suspended all face-to-face services with the public from March 18, 2020 to June 4, 2020. In an effort to promote safety as USCIS continues to reopen offices to the public for in-person services and resume necessary operations, DHS has determined, for 180 days, to no longer require asylum applicants who are unable to proceed with the interview in English to provide an interpreter. Rather, asylum applicants will ordinarily be required to proceed with government-provided telephonic contract interpreters so long as they speak one of the 47 languages found on the Required Languages for Interpreter Services BPA/GSA Language Schedule (“GSA Schedule”). If the applicant does not speak a language on the GSA Schedule or elects to speak a language that is not on the GSA Schedule, the applicant will be required to bring his or her own interpreter to the interview who is fluent in English and the elected language (not on the GSA schedule).

¹² CDC, Test for Current Infection (Jul. 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/testing/diagnostic-testing.html>.

¹³ CDC, Reopening Workplaces During the COVID-19 Pandemic, *available at* <https://www.cdc.gov/coronavirus/2019-ncov/community/office-buildings.html>; CDC, Reopening Guidance for Cleaning and Disinfecting Public Spaces, Workplaces, Businesses, Schools, and Homes, <https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html>.

By providing telephonic contract interpreters, the risk of contracting COVID-19 for applicants, attorneys, interpreters, and USCIS employees will be reduced by requiring fewer people to attend asylum interviews in person. In addition, it may alleviate an applicant's challenge in securing an interpreter. USCIS may be able to conduct additional asylum interviews because there will be more physical office space that will not be occupied by interpreters since all parties temporarily sit in separate offices during the interview during the COVID-19 pandemic to mitigate potential exposure. Therefore, currently, one asylum interview can take up to 4 interviewing offices. DHS believes this approach will support the agency in reopening operations to the public for in-person services, while protecting the workforce, stakeholders, and communities to the greatest extent possible.

USCIS contractor-provided telephonic interpreters must be at least 18 years of age and pass a security and background investigation by the USCIS Office of Security and Integrity ("OSI"). They cannot be the applicant's attorney or representative of record; a witness testifying on the applicant's behalf; a representative or employee of the applicant's country of nationality or, if stateless, the applicant's country of last habitual residence; a person who prepares an Application for Asylum and for Withholding of Removal or Refugee/Asylee Petition for a fee, or who works for such a preparer/attorney; or, a person with a close relationship to the applicant as deemed by the Asylum Office, such as a family member. All contract interpreters must be located within the United States and its territories (i.e., Puerto Rico, Guam, etc.). Additionally, under the International Religious Freedom Act of 1998, USCIS must ensure that "persons with potential biases against individuals on the grounds of religion, race, nationality, membership in a particular social group, or political opinion . . . shall not in any manner be used to interpret conversations between aliens and inspection or asylum officers." 22 U.S.C. 6473(a).

Per contractual requirements, the contract interpreters are carefully vetted and tested. They must pass rigorous background checks as well as demonstrate fluency in reading and speaking English as well as the language of interpretation. The Contractor must test and certify the proficiency of each interpreter as part of their quality control plan. USCIS contractors must provide interpreters capable of accurately interpreting the intended meaning of statements made by the asylum officer, applicant, representative, and witnesses during interviews. The Contractor shall provide interpreters who are fluent in reading and speaking English and one or more other languages. The one exception to the English fluency requirement involves the use of relay interpreters in limited circumstances at the Agency's discretion. A relay interpreter is used when an interpreter does not speak both English and the language the applicant speaks. For example, if an applicant is not fluent in one of the 47 languages and brings their own interpreter, the applicant's interpreter may speak only Akatek (Acateco) and Spanish and the contract does not support Akatek. Therefore, a relay interpreter would be needed to translate from Spanish to English. However, even in that case, USCIS requires the Contractor to provide a second (or relay) interpreter who is fluent in English and Spanish.

III. Discussion of Regulatory Change: Addition of 8 CFR 208.9(h)¹⁴

DHS has determined that there are reasonable grounds for regarding potential exposure to COVID-19 as a public health concern and thus sufficient to modify the interpreter requirement

¹⁴ The interpreter interview provisions can be found in two parallel sets of regulations: Regulations under the authority of DHS are contained in 8 CFR part 208; and regulations under the authority of the Department of Justice (DOJ) are contained in 8 CFR part 1208. Each set of regulations contains substantially similar provisions regarding asylum interview processes, and each articulates the interpreter requirement for interviews before an asylum officer. *Compare* 8 CFR 208.9(g), *with* 8 CFR 1208.9(g). This temporary final rule revises only the DHS regulations at 8 CFR 208.9. Notwithstanding the language of the parallel DOJ regulations in 8 CFR 1208.9, as of the effective date of this TFR, the revised language of 8 CFR 208.9(h) is binding on DHS and its adjudications for 180 days. DHS would not be bound by the DOJ regulation at 8 CFR 1208.9(g).

for asylum applicants to lower the number of in-person attendees at asylum interviews. DHS will require asylum applicants to proceed with the asylum interview using USCIS's interpreter services for 180 days following publication of this TFR if they are fluent in one of the 47 languages provided.¹⁵ After the 180 days concludes, asylum applicants unable to proceed in English will again be required to provide their own interpreters under 8 CFR 208.9(g). Under the temporary provision, USCIS may be able to provide contract interpreters on demand for approximately 47 different languages¹⁶ listed on the GSA Schedule (see Table A below). This list of languages has also been included in the regulatory text.

Table A: Required Languages for Interpreter Services BPA/GSA Language Schedule

1. Akan
2. Albanian
3. Amharic
4. Arabic
5. Armenian
6. Azerbaijani
7. Bengali
8. Burmese

¹⁵ DHS is not modifying 8 CFR 208.9(g) with this temporary rule; however, the temporary rule is written so that any asylum interviews occurring while the temporary rule is effective will be bound by the requirements at 8 CFR 208.9(h).

¹⁶ According to internal data for asylum interviews scheduled in FY19, 83% of asylum applicants spoke at least one of the 47 languages and only 5% spoke a language not included on this list.

9. Cantonese
10. Creole/Haitian Creole
11. Farsi-Afghani/Dari
12. Farsi-Iranian
13. Foo Chow/Fuzhou
14. French
15. Georgian
16. Gujarati
17. Hindi
18. Hmong
19. Hungarian
20. Indonesia/Bahasa
21. Konjobal
22. Korean
23. Kurdish
24. Lingala
25. Mam
26. Mandarin

27. Nepali
28. Pashto/Pushtu
29. Portuguese
30. Punjabi
31. Quiche/K'iche
32. Romanian
33. Russian
34. Serbian
35. Sinhalese
36. Somali
37. Spanish
38. Swahili
39. Tagalog
40. Tamil
41. Tigrinya
42. Turkish
43. Twi
44. Ukrainian

45. Urdu
46. Uzbek
47. Vietnamese

If an interpreter is necessary to conduct the interview and a contract interpreter who speaks a language on the GSA Schedule is not available at the time of the interview, USCIS will reschedule the interview and attribute the interview delay to USCIS (and not to the applicant) for the purposes of employment authorization under 8 CFR 208.7.

If an applicant is fluent in a language on the GSA Schedule but refuses to proceed with the interview by using a contract interpreter, USCIS will consider this a failure without good cause to comply with 8 CFR 208.9(h)(1), unless the applicant elects to proceed with a language not on the GSA schedule as discussed below. An applicant's refusal to proceed with the interview using the contract interpreter—for example, due to a preference to proceed with one's own interpreter—will not be considered good cause under 8 CFR 208.9(h)(1)(ii) for an interview delay. The purpose of ensuring the contract interpreters are used is to mitigate the spread of COVID-19 and protect the health and safety of USCIS employees and the public, as explained elsewhere in this preamble. The contract interpreters are vetted and will be provided at no cost to the applicant. Accordingly, under these circumstances, the applicant will be considered to have failed to appear for the interview in accordance with 8 CFR 208.10, and the application will be referred or dismissed.

If the applicant does not speak a language on the GSA Schedule or elects to speak a language that is not on the GSA Schedule, the applicant will be required to bring his or her own interpreter to the interview who is fluent in English and the elected language (not on the GSA

schedule). If an applicant is unable to provide an interpreter fluent in English and the elected language is not found on the GSA Schedule, the applicant may provide an interpreter fluent in the elected language and one found on the GSA Schedule. In this situation, USCIS will provide a contract relay interpreter to interpret between the GSA Schedule language and English.

On June 4, 2020, certain USCIS field offices and asylum offices resumed non-emergency face-to-face services to the public while enacting precautions to prevent the spread of COVID-19 in reopened facilities. USCIS is following a phased approach to reopening in accordance with the Administration's "Guidelines for Opening Up America Again,"¹⁷ based on the advice of public health experts, in order to meet its mission in administering the nation's immigration system, while also instituting safety protocols. While USCIS continued to perform duties that did not involve in-person interviews while in-person services were temporarily suspended to mitigate the spread of COVID-19, many immigration benefits, including asylum applications, usually require in-person services and timely immigration adjudications are important. Since USCIS re-opened to the public to resume interviews on June 4, 2020, USCIS has allowed the applicant-provided interpreter to sit separately in another office. However, USCIS only permitted this because it is the current regulatory requirement, which this temporary final rule will amend in order to reduce the risk of exposure.

In drafting this temporary rule, USCIS considered continuing to allow interpreters to attend the interview in person but sit separately, or to provide interpretation by video or telephone could be another means of maintaining recommended social distancing. While requiring an applicant-provided interpreter to sit separately in another office allows for

¹⁷ The White House and Centers for Disease Control and Prevention, *Guidelines Opening Up America Again*, <https://www.whitehouse.gov/openingamerica/>.

appropriate social distancing from the applicant, attorney and interviewing officer during the interview, it could create more risk for the asylum office staff because interpreters often participate in many asylum interviews or other interviews with USCIS in a single day, which could heighten the risk of contracting or spreading the illness in the waiting room or other common areas. Further, allowing an applicant's interpreter to appear by telephone or video could adversely affect the applicant, USCIS, and the public. USCIS recognizes that allowing an applicant's interpreter to appear by telephone or video may support the goals of social distancing; however, USCIS has not allowed applicant-provided interpreters to appear telephonically at affirmative asylum interviews in the past. This is because USCIS is unable to confirm the interpreter's identity and assure that the individual meets the minimum requirements to be an interpreter under the applicable regulation and policy. In addition, USCIS is unable to properly ensure that the interpreter is protecting the confidentiality of the asylum applicant and not recording the interview, which could encourage and support asylum fraud and damage legitimate asylum seekers and the lawful asylum system. Thus, USCIS finds that providing a professional contract interpreter is a better option for the applicant, USCIS, and the public.

The government-provided contract interpreters will not put applicants at a disadvantage or adversely affect applicants. The contract interpreters are carefully vetted and tested. They must pass rigorous background checks as well as meet a high standard of competency. Additionally, serving as interpreters during asylum interviews would not be a novel or new function for contract interpreters to perform, nor would utilizing them in this limited and emergency circumstance cause additional costs to USCIS or the public. USCIS has an existing contract to provide telephonic interpretation and monitoring in interviews for all of its case types. While not required by regulation for asylum interviews, USCIS has provided monitors for many

years as a matter of policy except when the applicant spoke English, the contract vendor did not cover the language, or a monitor was unavailable at the time of the call. Since the cost of monitoring and interpretation are identical under the contract, the implementation of this change is projected to be cost neutral or negligible as USCIS is already paying for these services and the contract is already budgeted for. The contract interpreters already regularly serve as interpreters for screening interviews in expedited removal and other contexts and act as interpreter monitors or occasionally serve as the primary interpreter during affirmative asylum interviews, so they are familiar with the operational realities of asylum interviews and the role of an interpreter during those interviews. USCIS also has internal procedural safeguards in place. For example, in situations where the applicant or asylum officer believes that the contract interpreter abuses their role, appears biased or prejudicial against the applicant, appears to be breaching confidentiality or otherwise are not conducting themselves professionally, the interview may be stopped so that the officer may obtain another contract interpreter. The problems with the contract interpreter may also be reported to the Contractor for appropriate action.

The use of contract interpreters will increase the efficiency of the asylum interviews as interviews would not need to be rescheduled due to failure to appear (because the applicant did not bring a proper interpreter) or interpreter incompetence, and USCIS-provided interpretation is likely to be faster and more efficient when the applicant-provided interpreter is not a professional. Interviews will less likely need to be rescheduled due to sickness of an interpreter and will ensure the safety of USCIS employees and asylum applicants and mitigate the spread of the disease. In addition, government-funded interpretation will eliminate pre-interview inefficiencies, such as screening out ineligible interpreters, and will eliminate time spent on examining whether an interpreter misinterpreted any material aspects of the asylum interview or

committed fraud or acted improperly because of the strict vetting and testing requirements for contract interpreters.

This provision will be subject to a temporal limitation of 180 days unless it is further extended and it applies to all asylum interviews across the nation. USCIS has determined that 180 days is appropriate given that (1) the pandemic is ongoing; (2) there is much that is unknown about the transmissibility, severity, and other features associated with COVID-19; and (3) mitigation is especially important before a vaccine or drug is developed and becomes widely available. Prior to the expiration of this temporary rule, DHS will evaluate the public health concerns and resource allocation, to determine whether to extend the temporal limitation. If necessary, DHS would publish any such extension via a rulemaking in the *Federal Register*.

IV. Regulatory Requirements

A. Administrative Procedure Act (APA)

DHS is issuing this rule as a temporary final rule pursuant to the APA's "good cause" exception. 5 U.S.C. 553(b)(B). Agencies may forgo notice-and-comment rulemaking and a delayed effective date while this rulemaking is published in the **Federal Register** because the APA provides an exception from those requirements 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); *see* 5 U.S.C. 553(d)(3).

The good cause exception for forgoing notice-and-comment rulemaking "excuses notice and comment in emergency situations, or where delay could result in serious harm." *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004). Although the good cause exception is "narrowly construed and only reluctantly countenanced," *Tenn. Gas Pipeline Co. v. FERC*, 969 F.2d 1141,

1144 (D.C. Cir 1992), DHS has appropriately invoked the exception in this case, for the reasons set forth below. Additionally, on multiple occasions, agencies have relied on this exception to promulgate both communicable disease-related¹⁸ and immigration-related¹⁹ interim rules.

As discussed earlier in this preamble, on January 31, 2020, the Secretary of Health and Human Services declared a public health emergency under section 319 of the Public Health Service Act in response to COVID-19.²⁰ On March 13, 2020, President Trump declared a National Emergency concerning the COVID-19 outbreak, dated back to March 1, 2020, to control the spread of the virus in the United States.²¹ As of July 31, 2020, there were approximately 17,106,007 cases of COVID-19 globally, resulting in approximately 668,910 deaths; approximately 4,405,932 cases have been identified in the United States, with new cases being reported daily, and approximately 150,283 deaths due to the disease.²² Currently, there is no vaccine against COVID-19. Treatment is currently limited to supportive care to manage

¹⁸ HHS Control of Communicable Diseases; Foreign Quarantine, 85 FR 7874 (Feb. 12, 2020) (interim final rule to enable the CDC “to require airlines to collect, and provide to CDC, certain data regarding passengers and crew arriving from foreign countries for the purposes of health education, treatment, prophylaxis, or other appropriate public health interventions, including travel restrictions”); Control of Communicable Diseases; Restrictions on African Rodents, Prairie Dogs, and Certain Other Animals, 68 FR 62353 (Nov. 4, 2003) (interim final rule to modify restrictions to “prevent the spread of monkeypox, a communicable disease, in the United States.”).

¹⁹ *See, e.g.*, Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act, as Amended, 81 FR 5906, 5907 (Feb. 4, 2016) (interim rule citing good cause to immediately require a passport and visa from certain H2-A Caribbean agricultural workers to avoid “an increase in applications for admission in bad faith by persons who would otherwise have been denied visas and are seeking to avoid the visa requirement and consular screening process during the period between the publication of a proposed and a final rule”); Suspending the 30-Day and Annual Interview Requirements From the Special Registration Process for Certain Nonimmigrants, 68 FR 67578, 67581 (Dec. 2, 2003) (interim rule claiming the good cause exception for suspending certain automatic registration requirements for nonimmigrants because “without [the] regulation approximately 82,532 aliens would be subject to 30-day or annual re-registration interviews” over a six-month period).

²⁰ HHS, Determination of Public Health Emergency.

²¹ Proclamation 9994 (Mar. 13, 2020).

²² WHO, Coronavirus disease 2019 (COVID-19) Situation Report – 193 (July 31, 2020), *available at* https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200731-covid-19-sitrep-193.pdf?sfvrsn=42a0221d_2; CDC, Coronavirus Disease 2019 (COVID-19): Cases in U.S. (July 31, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

symptoms. Hospitalization may be required in severe cases and mechanical respiratory support may be needed in the most severe cases.

DHS has concluded that the good cause exceptions in 5 U.S.C. 553(b)(B) and (d)(3) apply to this rule. Delaying implementation of this rule until the conclusion of notice-and-comment procedures and the 30-day delayed effective date would be impracticable and contrary to the public interest due to the need to resume agency operations and associated risk to asylum office staff, as well as the public, with the spread of COVID-19.

As of July 31, 2020, USCIS had 370,948 asylum applications, on behalf of 589,187 aliens, pending final adjudication. Over 94% of these pending applications are awaiting an interview by an asylum officer. The USCIS backlog will continue to increase unless USCIS can safely and efficiently conduct asylum interviews.

Since resuming agency operations under the current regulatory requirements, asylum applicants unable to proceed in English must provide their own interpreters. This means that the interpreter currently accompanies the applicant to and within the USCIS facility, thereby increasing the risk of contracting and/or transferring COVID-19 to themselves or others while entering the space and observing the usual security screening protocols, as well as while accessing space throughout the facility during the appointment such as, information counters, waiting rooms, restrooms, and/or private interview offices. Interpreters who accompany asylum applicants to asylum offices often work as professional interpreters providing a variety of in-person interpreting services and as such have regular in-person exposure to a wide range of individuals as a matter of course. Accordingly, they are at a greater risk of being exposed to COVID-19. Whereas, under the TFR, the USCIS-provided interpreters would appear telephonically, minimizing the spread and exposure to COVID-19. The longer the effective date

of this regulatory change is delayed, the longer USCIS will have to continue to potentially expose our workforce, applicants and attorneys to risk at USCIS facilities - potentially negatively impacting the health of employees, stakeholders and the public health of the United States in general.

As discussed elsewhere in this rule, COVID-19 is contagious, and symptoms may not be present until up to 14 days after exposure, and USCIS currently has over 353,000 applicants awaiting an asylum interview. Although USCIS has protocols in place to insulate against the risk of spread, requiring an interpreter to accompany every asylum applicant who cannot proceed in English has the potential to raise the number of individuals impacted and possibly exposed to the disease. Additionally, applicants and applicant-provided interpreters may contract or transmit the disease if and when they come into contact with others through, for example, transit to the USCIS facility. Notably, unlike the applicant themselves, interpreters are often repeat visitors to the asylum office, some appearing multiple times per week and even handling more than one case per day. As such, the repeated trips to the office and the likelihood that multiple appointments will increase the risk of spread within an asylum office because an interpreter may have contact with several employees over the course of multiple visits within a short period of time. These factors pose a serious risk to local communities and the operational posture of USCIS, and are why under the TFR, USCIS would only allow an applicant-provided interpreter to physically attend the interview if the applicant does not speak one of the 47 languages provided by USCIS provided contract interpreters.

DHS recognizes that some applicants may prefer to use their own interpreters, but for the reason stated above and elsewhere in this preamble, it has determined that the benefits of this rule outweigh the potential preference of some applicants. This temporary final rule is

promulgated as a response to COVID-19. It is temporary, limited in application to only those asylum applicants who cannot proceed with the interview in English, and narrowly tailored to mitigate the spread of COVID-19. To delay such a measure could cause serious and far-reaching public safety and health effects.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). A regulatory flexibility analysis is not required when a rule is exempt from notice-and-comment rulemaking.

C. Unfunded Mandates Reform Act of 1995

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

D. Congressional Review Act

This temporary final rule is not a major rule as defined by section 804 of the Congressional Review Act. 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.

E. Executive Order 12866 Executive Order 13563

Executive Orders (E.O.) 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This rule is designated a significant regulatory action under E.O. 12866. Accordingly, the Office of Management and Budget (OMB) has reviewed this regulation. DHS, however, is proceeding under the emergency provision of Executive Order 12866 Section 6(a)(3)(D) based on the need to move expeditiously during the current public health emergency.

This TFR will help asylum applicants proceed with their interviews in a safe manner, while protecting agency staff. This rule is not expected to result in any additional costs to the applicant or to the government. As previously explained, the contract interpreters will be provided at no cost to the applicant. USCIS already has an existing contract to provide telephonic interpretation and monitoring in interviews for all of its case types. USCIS has provided monitors for many years. Almost all interviews that utilize a USCIS provided interpreter after this rulemaking would have had a contracted monitor under the status quo. As the cost of monitoring and interpretation are identical under the contract and monitors will no longer be needed for these interviews, the implementation of this rule is projected to be cost neutral or negligible as USCIS is already paying for these services even without this rule.

F. Executive Order 13132 (Federalism)

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

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

G. Executive Order 12988 (Civil Justice Reform)

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

H. Paperwork Reduction Act

This rule does not propose 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. As this is a temporary final rule and would only span 180 days, USCIS does not anticipate a need to update the Form I-589, Application for Asylum and for Withholding of Removal, despite the existing language on the Instructions regarding interpreters, because it will be primarily rescheduling interviews that were cancelled due to COVID. USCIS will post updates on its I-589 website, <https://www.uscis.gov/i-589>, and other asylum and relevant web pages regarding the new interview requirements in this regulation, as well as provide personal notice to applicants via the interview notices issued to applicants prior to their interview.

I. Signature

The Acting Secretary of Homeland Security, Chad F. Wolf, having reviewed and approved this document, is delegating the authority to electronically sign this document to Ian Brekke, Deputy General Counsel for DHS, for purposes of publication in the Federal Register.

List of Subjects in 8 CFR Part 208

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

Accordingly, for the reasons set forth in the preamble, the Secretary of Homeland Security amends 8 CFR part 208 as follows:

PART 208 – PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

1. The authority citation for part 208 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Public Law 110-229; 8 CFR part 2.

2. Section 208.9 is amended by adding paragraph (h) to read as follows:

208.9 Procedure for interview before an asylum officer.

* * * * *

(h) Asylum Applicant Interpreters for asylum interviews conducted between September 23, 2020, through March 22, 2021.

(1) Asylum applicants unable to proceed with the interview in English must use USCIS's telephonic interpreter services, so long as the applicant is fluent in one of the following languages: Akan, Albanian, Amharic, Arabic, Armenian, Azerbaijani, Bengali, Burmese, Cantonese, Creole/Haitian Creole, Farsi-Afghani/Dari, Farsi-Iranian, Foo Chow/Fuzhou, French, Georgian, Gujarati, Hindi, Hmong, Hungarian, Indonesia/Bahasa, Konjobal, Korean, Kurdish, Lingala, Mam, Mandarin, Nepali, Pashto/Pushtu, Portuguese, Punjabi, Quiche/K'iche, Romanian, Russian, Serbian, Sinhalese, Somali, Spanish, Swahili, Tagalog, Tamil, Tigrinya, Turkish, Twi, Ukrainian, Urdu, Uzbek, or Vietnamese.

(i) If a USCIS interpreter is unavailable at the time of the interview, USCIS will reschedule the interview and attribute the interview delay to USCIS for the purposes of employment authorization pursuant to 8 CFR 208.7.

(ii) Except as provided in paragraph (h)(1)(iii) of this section, if an applicant is fluent in a language listed in this paragraph (h)(1) but refuses to proceed with the USCIS interpreter in order to use his or her own interpreter, USCIS will consider this a failure without good cause to comply with this paragraph (h)(1). The applicant will be considered to have failed to appear for the interview for the purposes of 8 CFR 208.10.

(iii) If the applicant elects to proceed in a language that is not listed in this paragraph (h)(1), the applicant must provide a competent interpreter fluent in both English and the applicant's native language or any other language in which the applicant is fluent. If an applicant is unable to provide an interpreter fluent in English and the elected language not listed in this paragraph (h)(1), the applicant may provide an interpreter fluent in the elected language and one found in this paragraph (h)(1). USCIS will provide a relay interpreter to interpret between the language listed in this paragraph (h)(1) and English. The interpreter must be at least 18 years of age. Neither the applicant's attorney or representative of record, a witness testifying on the applicant's behalf, nor a representative or employee of the applicant's country of nationality, or if stateless, country of last habitual residence, may serve as the applicant's interpreter. Failure without good cause to comply with this paragraph may be considered a failure to appear for the interview for purposes of 8 CFR 208.10.

(2) [Reserved]

Approved:

Ian Brekke,
Deputy General Counsel,
U.S. Department of Homeland Security.

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