PROPOSED REGULATORY CHANGES IN ASYLUM ELIGIBILITY

(from Federal Register)

The Departments [*U.S. Citizenship and Immigration Services – USCIS; and Executive Office for Immigration Review – EOIR*] now propose to (1) establish additional bars to eligibility for asylum for aliens with certain criminal convictions; (2) clarify the effect of criminal convictions; and (3) remove the regulations regarding reconsideration of discretionary denials of asylum.

The Attorney General possesses general authority under section 103(g)(2) of the INA, 8 U.S.C. 1103(g)(2), to "establish such regulations . . . as the Attorney General determines to be necessary for carrying out this section." *See Tamenut* v. *Mukasey,* 521 F.3d 1000, 1004 (8th Cir. 2008) (en banc) (per curiam) (describing section 1103(g)(2) as "a general grant of regulatory authority"). Similarly, Congress has conferred upon the Secretary the authority to "establish such regulations . . . as he deems necessary for carrying out his authority under the provisions of [the INA]." INA 103(a)(1), (3), 8 U.S.C. 1103(a)(1), (3).

Additionally, the Attorney General and the Secretary have authority to promulgate this proposed rule under sections 208(b)(2)(B)(ii) and (C) of the INA, 8 U.S.C. 1158(b)(2)(B)(ii) and (C). Under section 208(b)(2)(B)(ii), "[t]he Attorney General may designate by regulation offenses that will be considered to be a "particularly serious crime" under INA 208(b)(2)(A)(ii), 8 U.S.C. 1158(b)(2)(A)(ii), or a "serious nonpolitical crime" under INA 208(b)(2)(A)(iii), 8 U.S.C. Start Printed Page 696451158(b)(2)(A)(iii). Under INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C), the Attorney General may "by regulation establish additional limitations and conditions, consistent with [8 U.S.C. 1158], under which an alien shall be ineligible for asylum under" INA 208(b)(1).

A. Additional Limitations on Eligibility for Asylum

The Departments propose to revise 8 CFR 208.13 and 1208.13 by adding paragraphs (c)(6) through (8) to add bars on eligibility for asylum for certain aliens. First, the regulations would add bars on eligibility for asylum for aliens who commit certain offenses in the United States after entering the country. Those bars would apply to aliens who are convicted of (1) a felony under federal or state law; (2) an offense under 8 U.S.C. 1324(a)(1)(A) or 1324(a)(1)(2) (Alien Smuggling or Harboring); (3) an offense under 8 U.S.C. 1326 (Illegal Reentry); (4) a federal, state, tribal, or local crime involving criminal street gang activity; (5) certain federal, state, tribal, or local offenses

concerning the operation of a motor vehicle while under the influence of an intoxicant; (6) a federal, state, tribal, or local domestic violence offense, or who are found by an adjudicator to have engaged in acts of battery or extreme cruelty in a domestic context, even if no conviction resulted; and (7) certain misdemeanors under federal or state law for offenses related to false identification; the unlawful receipt of public benefits from a federal, state, tribal, or local entity; or the possession or trafficking of a controlled substance or controlled-substance paraphernalia. The Departments intend that the criminal ineligibility bars would be limited only to aliens with convictions and—with a narrow exception in the domestic violence context [4]—not based only on criminal conduct for which the alien has not been convicted. In addition, although 8 U.S.C. 1101(a)(43) provides for the application of the aggravated felony definition to offenses in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years, this proposal is not intended to cover such foreign convictions.

ALIENS CONVICTED OF A FELONY UNDER FEDERAL, STATE, TRIBAL, OR LOCAL LAW

The Departments are proposing to implement a new bar on eligibility for asylum for felony convictions. *See* 8 U.S.C. 1158(b)(2)(B)(ii) and (C). Felonies are defined in the proposed rule as crimes designated as felonies by the relevant jurisdiction or crimes punishable by more than one year's imprisonment.

In the first instance, the Attorney General and the Secretary could reasonably exercise their discretion to classify felony offenses as particularly serious crimes for purposes of 8 U.S.C. 1158(b)(2)(B)(ii). Congress defined "particularly serious crimes" in the asylum statute to expressly encompass all aggravated felonies. *See* INA 208(b)(2)(B)(i), 8 U.S.C. 1158(b)(2)(B)(i). At present, the INA defines an aggravated felony by reference to an enumerated list of 21 types of convictions. INA 101(a)(43), 8 U.S.C. 1101(a)(43). But Congress did not limit the definition of particularly serious crimes to aggravated felonies. Rather, Congress expressly authorized the Attorney General to designate additional particularly serious crimes through regulation or by case-by-case adjudication. INA 208(b)(2)(B)(ii), 8 U.S.C. 1158(b)(2)(B)(ii); *Delgado,* 648 F.3d at 1106 ("[t]here is little question that [the asylum] provision permits the Attorney General, by regulation, to make particular crimes categorically particularly serious" (emphasis omitted)); *Gao* v. *Holder,* 595 F.3d 549, 556 (4th Cir. 2010) ("we think that [s]ection 1158(b)(2)(B)(ii) . . . empowers the Attorney General to designate offenses which, like aggravated felonies, will be considered per se particularly serious"). By defining "particularly serious crimes" to include all "aggravated felonies," but then giving the Attorney General the discretion to "designate by regulation offenses that will be considered" a "particularly serious crime," Congress made clear that the bar on asylum eligibility for particularly serious crimes

necessarily includes, but is not limited to, aggravated felonies. *See* INA 208(b)(2)(A)(ii), (B)(ii), 8 U.S.C. 1158(b)(2)(A)(ii), (B)(ii); *Delgado,* 648 F.3d at 1105-06 (explaining that the asylum statute specifies two categories of crimes that are per se particularly serious—aggravated felonies, and those that the Attorney General designates by regulation).

To date, the Attorney General has not used the above-described authority to promulgate regulations identifying additional categories of particularly serious crimes. The Board has engaged in case-by-case adjudication to identify some particularly serious crimes, but this approach imposes significant interpretive difficulties and costs, while producing unpredictable results. The Supreme Court has employed the so-called "categorical" approach, established in *Taylor* v. *United States,* 495 U.S. 575 (1990), and its progeny such as *Mathis* v. *United States,* 136 S. Ct. 2243 (2016), and *Descamps* v. *United States,* 133 S. Ct. 2276 (2013), to determine when an offense constitutes an aggravated felony. Under that approach, courts must compare the elements of the statutory crime for which an alien was convicted with the generic elements of the specified federal aggravated felony. As a general matter, any mismatch between the elements means that the crime of conviction is not an aggravated felony (unless the statute of conviction is divisible and the alien was convicted of a particular offense within the statute that would satisfy the generic definition of the relevant aggravated felony).

Courts, however, have repeatedly expressed frustration with the complexity of applying this approach. *See, e.g., United States* v. *Aguila-Montes de Oca,* 655 F.3d 915, 917 (9th Cir. 2011), *overruled by Descamps,* 570 U.S. 254 ("In the twenty years since *Taylor,* we have struggled to understand the contours of the Supreme Court's framework. Indeed, over the past decade, perhaps no other area of the law has demanded more of our resources."); *see also Quarles* v. *United States,* 139 S. Ct. 1872, 1880 (2019) (Thomas, J., concurring); *Williams* v. *United States,* 927 F.3d 427, 446 (6th Cir. 2019) (Merritt, J., concurring); *Lowe* v. *United States,* 920 F.3d 414, 420 (6th Cir. 2019) (Thapar, J., concurring) ("in the categorical-approach world, we cannot call rape what it is . . . . [I]t is time for Congress to revisit the categorical approach so we do not have to live in a fictional world where we call a violent rape non-violent"); *United States* v. *Evans,* 924 F.3d 21, 31 (2d Cir. 2019) (observing that, although the court may resolve only an actual case or controversy, "the categorical approach paradoxically instructs courts resolving such cases to embark on an intellectual enterprise grounded in the facts of *other* cases not before them, or even *imagined* scenarios"

(emphases in original)); *United States* v. *Chapman,* 866 F.3d 129, 136-39 (3d Cir. 2017) (Jordan, J., concurring); *United States* v. *Faust,* 853 F.3d 39, 60-61 (1st Cir. 2017) (Lynch, J., concurring). Application of the categorical approach has resulted in anomalous Start Printed Page 69646decisions in which aliens convicted of a serious criminal offense have been found not to have been convicted of an aggravated felony. *See, e.g., Harbin* v. *Sessions,* 860 F.3d 58 (2d Cir. 2017) (holding that a New York controlled substance law was not written in a way that allowed it to be used as the basis for establishing that a convicted alien was removable under the INA for drug trafficking); *Larios-Reyes* v. *Lynch,* 843 F.3d 146, 149-50 (4th Cir. 2016) (alien's conviction under Maryland law for sexual abuse of a victim under the age of 14 did not amount to the aggravated felony of "sexual abuse of a minor"). The Board has rectified some anomalies by determining that certain crimes, though not aggravated felonies, are of a sufficiently pernicious nature that they should facially constitute particularly serious crimes that would disqualify aliens from eligibility for asylum or withholding of removal. *See Sopo* v. *U.S. Att'y Gen.,* 739 F. App'x 554, 558 (11th Cir. 2018) (the Board and immigration judges "may focus solely on the elements of the offense" to determine whether an offense is a "particularly serious crime"); *In re N-A-M-,* 24 I&N Dec. 336, 343 (BIA 2007) (explaining that "the proper focus for determining whether a crime is particularly serious is on the nature of the crime," and that its elements alone may be dispositive); *see also, e.g., Ahmetovic* v. *INS,* 62 F.3d 48, 52 (2d Cir. 1995) (upholding the Board's determination that first-degree manslaughter, while not an aggravated felony, is per se "particularly serious" for asylum purposes). Furthermore, the Board has looked at the individual circumstances of a crime to conclude that an even wider range of offenses can be considered particularly serious crimes on an as-applied basis. *See, e.g., Vaskovska* v. *Lynch,* 655 F. App'x 880, 884 (2d Cir. 2016) (the Board did not err in its individualized determination that an alien's conviction for drug possession was a particularly serious crime); *Arbid* v. *Holder,* 700 F.3d 379, 381 (9th Cir. 2012) (the Board did not err in determining that an alien's mail fraud conviction was particularly serious even if not an aggravated felony). Even in the withholding context—where an alien is deemed to have committed a particularly serious crime if he has been convicted of an aggravated felony (or felonies) for which the sentence was an aggregate term of imprisonment of at least 5 years, *see* 8 U.S.C. 1231(b)(3)(B)—courts have routinely concluded that crimes that are not aggravated felonies may be particularly serious. *See, e.g., Valerio-Ramirez* v. *Sessions,* 882 F.3d 289, 291, 296 (1st Cir. 2018) (the Board did not err in determining that an alien's identity theft conviction was particularly serious even though it was not an aggravated

felony); *Hamama* v. *INS,* 78 F.3d 233, 240 (6th Cir. 1996) (the Board had power to declare certain firearm possession crimes "facially" particularly serious without an individualized evaluation of the alien's case, even if such crimes are not always aggravated felonies); *In re N-A-M-,* 24 I&N Dec. at 338-39 (felony menacing is a particularly serious crime based on its elements, though not an aggravated felony).

Nonetheless, this mix of case-by-case adjudication and per se rules is an inefficient means of identifying categories of offenses that should constitute particularly serious crimes. The Board has only rarely exercised its authority to designate categories of offenses as facially or per se particularly serious, and instead typically looks to a wide and variable range of evidence in making an individualized determination of a crime's seriousness. *See In re N-A-M-,* 24 I&N Dec. at 343-44; *Matter of L-S-,* 22 I&N Dec. 645, 651 (BIA 1999). This case-by-case adjudication means that aliens convicted of the exact same offense can receive different asylum treatment. For certain crimes—*i.e.,* those described in this notice of proposed rulemaking—the Attorney General and the Secretary have determined that the possibility of such inconsistency is not desirable and that a rule-based approach is instead warranted in this specific context.

The proposed rule would eliminate the inefficiencies described above by providing that all felonies would constitute particularly serious crimes. The determination of whether a crime would be a felony for purposes of asylum eligibility would depend on whether the relevant jurisdiction defines the crime as a felony or whether the statute of conviction allows for a sentence of more than one year. Convictions for which sentences are longer tend to be associated with crimes of a more consequential nature. For example, an offender's "criminal history category" for the purposes of sentencing for federal crimes "serves as [a] proxy for the need to protect the public from further crimes of the defendant." *United States* v. *Hayes,* 762 F.3d 1300, 1314 n.8 (11th Cir. 2014); *see also id.* ("In other words, it is a proxy for recidivism."). And the criminal history category, in turn, is "based on the maximum term imposed in previous sentences rather than on other measures, such as whether the conviction was designated a felony or misdemeanor." U.S. Sentencing Guidelines Manual § 4A1.2 cmt. background (U.S. Sentencing Comm'n 2018). This calculation thus reflects a recognition that crimes with the potential for longer sentences

tend to indicate that the offenders who commit such crimes are greater dangers to the community.

In addition, defining a felony to include such offenses would also be consistent with the definition of felonies in other federal statutes. For instance, convictions for crimes that states designated as felonies may serve as predicate "prior felony conviction[s]" under the federal career offender statute. *See United States* v. *Beasley,* 12 F.3d 280, 282-84 (1st Cir. 1993); *United States* v. *Rivera,* 996 F.2d 993, 994-97 (9th Cir. 1993).

Furthermore, defining felonies to include crimes that involve a possible sentence of more than one year in prison would be generally consistent with the way that federal law defines felonies. *See, e.g.,* 5 U.S.C. 7313(b) ("For the purposes of this section, `felony' means any offense for which imprisonment is authorized for a term exceeding one year"); *cf.* U.S.S.G. 2L1.2 cmt. n.2 (" `Felony' means any federal, state, or local offense punishable by imprisonment for a term exceeding one year."). The Model Penal Code and most states likewise define a felony as a crime with a possible sentence in "excess of one year." Model Penal Code § 1.04(2); *see* 1 Wharton's Criminal Law § 19 & n.23 (15th ed.) (surveying state laws). Finally, relying on the possibility of a sentence in excess of one year—rather than on the actual sentence imposed—would be consistent with Board precedents adjudicating whether a crime qualifies as "particularly serious" for purposes of asylum or withholding eligibility. In that context, "the sentence imposed is not a dominant factor in determining whether a conviction is for a particularly serious crime" because the sentence actually imposed often depends on factors such as offender characteristics that "may operate to reduce a sentence but do not diminish the gravity of [the] crime." *In re N-A-M-,* 24 I&N Dec. at 343.

Relying on the possibility of a sentence of over one year to define a felony would capture crimes of a particularly serious nature because the offenders who commit such crimes are—as a general matter—more likely to be dangerous to the community than those offenders whose crimes are punishable by shorter sentences. *See* 8 U.S.C. 1158(b)(2)(A)(ii) (tying the "particularly serious crime" determination to "danger[ousness] to Start Printed Page 69647the community"). In addition, by encompassing all crimes with a sentence of more than one year, regardless of whether the crimes are defined felonies by the relevant jurisdiction, the definition would create greater uniformity by accounting for possible variations in how

different jurisdictions may label the same offense. Such a definition would also avoid anomalies in the asylum context that arise from the definition of "aggravated felonies" under 8 U.S.C. 1101(a)(43), which defines some qualifying offenses with reference to the length of the actual sentence ordered. *See United States* v. *Pacheco,* 225 F.3d 148, 153-54 (2d Cir. 2000) (agreeing that ordinarily the touchstone in the aggravated felony definition's reference to sentences is the actual term of imprisonment imposed). The proposed definition of a felony would also obviate the need for immigration adjudicators and courts to apply the categorical approach with respect to aggravated felonies. This proposal thus would offer a more streamlined and predictable approach to be applied in the asylum context.[5]

In addition to their authority under section 208(b)(2)(B)(ii) of the INA, 8 U.S.C. 1158(b)(2)(B)(ii), the Attorney General and the Secretary further propose relying on their respective authorities under section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C), to make all felony convictions disqualifying for purposes of asylum eligibility. Federal, state, tribal, or local felony convictions already carry a number of serious repercussions over and above the sentence imposed. Felons, including those who are U.S. citizens, may lose certain privileges, including the ability to apply for Government grants and live in public housing. *See Estep* v. *United States,* 327 U.S. 114, 122 & n.13 (1946) (explaining that "[a] felon customarily suffers the loss of substantial rights"); *see also, e.g., Dist. of Columbia* v. *Heller,* 554 U.S. 570, 626-27 (2008) (the Second Amendment does not prohibit laws disallowing the possession of firearms by felons). Treating a felony conviction as disqualifying for purposes of obtaining the discretionary benefit of asylum would be consistent with the disabilities arising from felony convictions in these other contexts and would reflect the serious social cost of such crimes.

The Departments also seek public comment on whether (and, if so, how) to differentiate among crimes designated as felonies and among crimes punishable by more than one year of imprisonment. For example, are there crimes that are currently designated as felonies in one or more relevant jurisdictions in the United States that should not be categorical bars to asylum eligibility? Are there crimes that are currently punishable by more than one year's imprisonment in one or more relevant jurisdictions in the United States that should not be categorical bars to asylum? Should the definition of a felony depend instead on the term of imprisonment that was ordered by the court of jurisdiction? In addition to seeking public

comment on whether the definition of felony in the proposed rule might be over-inclusive, the Departments also seek comment on whether it might be under-inclusive—*i.e.*, are there crimes that would not fall under the definition of felony in the proposed rule, and that do not otherwise constitute categorical bars to asylum eligibility, that should be made categorical bars? In sum, the Departments seek input on how the proposed definition of a felony might be modified. Further, the Departments seek comment on what measures, if any, are necessary to ensure that aliens who are victims of human trafficking, but also have convictions caused by or incident to victimization, are not subject to this bar. For instance, victims of severe forms of human trafficking may nevertheless receive a waiver of criminal grounds for inadmissibility in order to qualify for T nonimmigrant status pursuant to 8 CFR 212.16. *See* INA 101(a)(15)(T), 212(d)(13)(B), 8 U.S.C. 1101(a)(15)(T), 1182(d)(13)(B). Regardless of whether the rule encompasses all felony convictions or some subset of such convictions, the Departments have identified specific types of offenses below that are proposed in this rule as grounds for ineligibility for asylum.

2. FEDERAL CONVICTIONS FOR HARBORING ALIENS

The Attorney General and the Secretary propose to designate all offenses involving the federal crimes of bringing in or harboring certain aliens pursuant to sections 274(a)(1)(A) and (2) of the INA, 8 U.S.C. 1324(a)(1)(A), (2), as particularly serious crimes and, in all events, as discrete bases for ineligibility. *See* INA 208(b)(2)(B)(ii), (C), 8 U.S.C. 1158(b)(2)(B)(ii), (C). To convict a person of harboring an alien under sections 274(a)(1)(A) or (2) of the INA, the Government must establish that the defendant concealed, harbored, shielded from detection, or transported an alien, or attempted to do so. INA 274(a)(1)(A), (2), 8 U.S.C. 1324(a)(1)(A), (2). Penalties differ depending on whether the act was for commercial advantage or financial gain and on whether serious bodily injury or death occurred. INA 274(a)(1)(B), (2)(B), 8 U.S.C. 1324(a)(1)(B), (2)(B). Most of the prohibited acts carry a penalty of possible imprisonment of at least five years, INA 274(a)(1)(B)(i)-(iii), 8 U.S.C. 1324(a)(1)(B)(i)-(iii), and committing those acts in circumstances resulting in the death of another person can be punished by a sentence of death or life imprisonment, INA 274(a)(1)(B)(iv), 8 U.S.C. 1324(a)(1)(B)(iv). The only exception is for certain instances of the offense of bringing or attempting to bring in an alien who lacks official authorization

to enter under section 274(a)(2) of the INA, 8 U.S.C. 1324(a)(2), which carries a possible penalty of imprisonment up to one year, INA 274(a)(2)(A), 8 U.S.C. 274(a)(2)(A). Convictions under section 1324 are often aggravated felonies under section 101(a)(43)(N) of the INA, 8 U.S.C. 1101(a)(43)(N), which defines an aggravated felony as including "an offense described in [INA 274(a)(1)(A) or (2)], except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent." *See Matter of Ruiz-Romero,* 22 I&N Dec. 486, 488, 492-93 (BIA 1999) (holding that an alien convicted of transporting an illegal alien committed an aggravated felony under section 101(a)(43)(N) of the INA and was thus deportable); *see also* *Patel* v. *Ashcroft,* 294 F.3d 465 (3d Cir. 2002) (holding that harboring an alien constitutes an aggravated felony); *Gavilan-Cuate* v. *Yetter,* 276 F.3d 418, 419-20 (8th Cir. 2002) (dismissing an appeal for lack of jurisdiction because the court had already determined on the petitioner's direct appeal that he had been convicted of the aggravated felony of transporting and harboring aliens); *United States* v. *Galindo-Gallegos,* 244 F.3d 728, 733-34 (9th Cir. 2001) (holding that transporting aliens under 8 U.S.C. 1324(a)(1)(A)(ii) is an aggravated felony for purposes of section 101(a)(43)(N) of the INA). Aliens convicted of such aggravated felonies would already be ineligible for asylum under section 208(b)(2)(B)(i) of the INA.

The proposed rule would broaden this bar so that first-time offenders who engage in illegal smuggling or harboring Start Printed Page 69648to aid certain family members, in violation of section 1324(a)(1)(A) or (2), are deemed to have committed particularly serious crimes. The *mens rea* required for a section 1324 conviction under subsection (a)(1)(A) is "knowing," and under (a)(2) is "knowing or in reckless disregard," meaning such a conviction displays a serious disregard for U.S. immigration law. In all events, conviction of a smuggling offense under section 1324(a)(1)(A) or (2) should also be disqualifying under section 1158(b)(2)(C), which gives the Attorney General and the Secretary additional discretion to identify grounds for ineligibility. Even first-time alien smuggling offenses involving immediate family members display a serious disregard for U.S. immigration law and pose a potential hazard to smuggled family members, which often include a vulnerable child or spouse. *See Arizona* v. *United States,* 567 U.S. 387, 396 (noting the "danger" posed by "alien smugglers or aliens who commit a serious crime"); *United States* v. *Miguel,* 368 F.3d 1150, 1157 (9th Cir. 2004), *overruled on other grounds by United States* v. *Gasca-*

Ruiz, 852 F.3d 1167 (9th Cir. 2017) (noting that "young children [are] more susceptible to the criminal conduct because they [do] not fully appreciate the danger involved in illegal smuggling").

3. FEDERAL CONVICTIONS FOR ILLEGAL REENTRY

The Attorney General and the Secretary further propose to exercise their authority under sections 208(b)(2)(B)(ii) and 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(B)(ii) and (C), to designate a conviction for the federal crime of illegal reentry pursuant to section 276 of the INA, 8 U.S.C. 1326, as precluding asylum eligibility.

Under section 1326(a), aliens who were previously removed and reenter the United States are subject to fines and to a term of imprisonment of two years or less. 8 U.S.C. 1326(a). Section 1326(b) prescribes significantly higher penalties for certain removed aliens who reenter, such as aliens who were removed after being convicted for aggravated felonies and then reenter. 8 U.S.C. 1326(b) (authorizing sentences of imprisonment up to 20 years as possible penalties).

Some convictions under section 1326 already qualify as aggravated felonies under section 101(a)(43)(O) of the INA, 8 U.S.C. 1101(a)(43)(O), which defines an aggravated felony as including "an offense described in section . . . 1326 . . . committed by an alien who was previously deported on the basis of a conviction for an [aggravated felony]." Aliens who commit such offenses are thus already ineligible for asylum under section 208(b)(2)(B)(i) of the INA, 8 U.S.C. 1158(b)(2)(B)(i).

The proposed rule would broaden this bar so that all aliens convicted of illegal reentry under section 1326 would be considered to have committed an offense that disqualifies them from asylum eligibility. It would also harmonize the treatment of most aliens who have illegally reentered the United States after being removed, as such aliens who have a prior order of removal reinstated are already precluded from asylum eligibility. Section 1326 makes clear that all offenses relating to illegal reentry are quite serious; even the most basic illegal reentry offense is punishable by fine and by up to two years' imprisonment. 8 U.S.C. 1326(a). Illegal reentry also reflects a willingness to repeatedly disregard the immigration laws despite alternative means of presenting a claim of persecution. An alien seeking protection, even one who has previously been removed from the United States, may present himself or herself at a port of entry without illegally reentering the United States. An alien who chooses instead to again enter illegally has repeatedly chosen to flout immigration laws, and such

recidivism suggests that the offense should be treated more severely. The fact that the alien has *repeatedly* engaged in criminal conduct suggests a tendency to engage in such conduct in the future, thus warranting a conclusion that the alien poses a danger to the community that makes the alien's crime particularly serious. *See* Mariel Alper et al., 2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014) 17 (2018) ("Overall, excluding probation and parole violations, 82.4% of prisoners released in 30 states in 2005 were arrested within 9 years."); U.S. Sentencing Comm'n, The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders 14 (2017) ("Overall, an offender's total criminal history score is a strong predictor of recidivism. Rearrest rates range from a low of 30.2 percent of offenders with zero criminal history points to a high of 85.7 percent for offenders with 15 or more criminal history points. Each additional criminal history point is generally associated with a greater likelihood of recidivism."); Nick Tilley, Analyzing and Responding to Repeat Offending 11 (2013) ("Once criminal careers are established and offenders are processed by the criminal justice system, recidivism rates become very high: Up to two-thirds of those who are incarcerated will reoffend within a few years.").

Moreover, Congress, as noted above, has already designated certain crimes related to illegal reentry as aggravated felonies. *See* 8 U.S.C. 1101(a)(43)(O). This designation reflects a congressional decision that aliens who commit these crimes are dangers to the community, *see* 8 U.S.C. 1158(b)(2)(A)(ii) (tying the "particularly serious crime" determination to "danger[ousness] to the community"), so aliens who commit similar crimes related to reentry are also likely be dangers to the community. Further, 63% of those convicted of illegal reentry had a prior criminal history, again suggesting that the offenders who commit these crimes pose an ongoing danger to others. *See* U.S. Sentencing Comm'n, Quick Facts: Illegal Reentry Offenses 1 (2019), *https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY18.pdf*.

As a separate basis for this aspect of the proposed rule, the Attorney General and the Secretary propose making illegal reentry a ground for ineligibility under section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C). A regulation providing for the mandatory ineligibility for asylum based on convictions for illegal reentry of removed aliens, *see* INA 276, 8 U.S.C. 1326, would bear a close relationship to the statutory bar on applying for asylum when a previous order of removal is reinstated, *see* INA 241(a)(5), 8 U.S.C.

1231(a)(5). An alien subject to reinstatement of a prior removal order is not eligible to apply for any relief from removal, but may seek protection such as statutory withholding of removal and protection pursuant to the CAT regulations. *See, e.g., Cazun,* 856 F.3d at 254. The statutory bar on applying for asylum and other forms of relief when an order of removal is reinstated has been upheld by every circuit to consider the question. *See Garcia* v. *Sessions,* 873 F.3d 553, 557 (7th Cir. 2017), *cert. denied,* 138 S. Ct. 2648 (2018); *R-S-C,* 869 F.3d at 1189; *Mejia,* 866 F.3d at 587; *Garcia,* 856 F.3d at 30; *Cazun,* 856 F.3d at 260; *Perez-Guzman* v. *Lynch,* 835 F.3d 1066, 1082 (9th Cir. 2016); *Jimenez-Morales* v. *U.S. Att'y Gen.,* 821 F.3d 1307, 1310 (11th Cir. 2016); *Ramirez-Mejia* v. *Lynch,* 794 F.3d 485, 489-90 (5th Cir. 2015); *Herrera-Molina* v. *Holder,* 597 F.3d 128, 137-38 (2d Cir. 2010). That bar reflects legislators' apparent concerns that aliens who re-cross the border illegally after having been removed once should not be rewarded with benefits that the United States is not obliged to offer them. *See R-S-C,* 869 F.3d at 1179 & Start Printed Page 69649n.2; H.R. Rep. No. 104-469, pt. 1, at 155 (1996) ("[T]he ability to cross into the United States over and over with no consequences undermines the credibility of our efforts to secure the border."); H.R. Rep. No. 104-469, pt. 1, 113 ("One seemingly intractable problem is repeat border-crossings.").

The existing statutory bar for reinstated removal orders and the proposed bar for aliens convicted of illegal reentry after being previously removed are not coterminous because not all persons with a conviction under section 276 of the INA, 8 U.S.C. 1326, have orders of removal reinstated. *See Lara-Aguilar* v. *Sessions,* 889 F.3d 134, 144 (4th Cir. 2018) (reinstatement of a prior removal order is neither automatic nor obligatory). Furthermore, not all persons with reinstated removal orders have been convicted under section 276 of the INA, 8 U.S.C 1326. However, the Departments believe that similar policy considerations support the barring of aliens convicted of illegal reentry under section 276 of the INA, 8 U.S.C. 1326, from eligibility for asylum.

Furthermore, although this proposed bar would render ineligible for asylum an alien whose threat of persecution arose after the initial removal and illegal reentry, such an alien could still seek other forms of protection, such as statutory withholding of removal and withholding or deferral of removal under the regulations implementing the CAT. The proposed rule is consistent, therefore, with U.S. treaty obligations under the Refugee

Protocol (which incorporates Articles 2 through 34 of the Refugee Convention) and the CAT. U.S. asylum law implements Article 34 of the Refugee Convention, concerning assimilation of refugees, which is precatory and not mandatory. *See Cardoza-Fonseca,* 480 U.S. at 441. In accordance with the non-mandatory nature of Article 34, the asylum statute, INA 208, 8 U.S.C. 1158, was drawn to be discretionary; it does not require asylum to be granted to all refugees. *Id.* For the reasons outlined above, limitations like the ones proposed here do not violate Article 34. *See Garcia,* 856 F.3d at 42; *R-S-C,* 869 F.3d at 1188; *Mejia,* 866 F.3d at 588; *Cazun* , 856 F.3d at 257 & n.16; *Ramirez-Mejia,* 813 F.3d at 241. In contrast, the United States' non-refoulement obligations under Article 33(1) of the Refugee Convention and Article 3 of the CAT are mandatory to the extent provided by domestic law. They are implemented by statutory withholding of removal, a mandatory provision, and withholding or deferral of removal under the CAT regulations. Because the new limitations adopted here do not affect the availability of statutory withholding of removal, INA 241(b)(3)(A), 8 U.S.C. 1231(b)(3)(A), or protection under the regulations implementing the CAT, 8 CFR 1208.16(c) through 1208.18, the rule does not affect U.S. compliance with its obligations under Article 33(1) of the Refugee Convention or Article 3 of the CAT. *See R-S-C,* 869 F.3d at 1188 n.11; *Cazun,* 856 F.3d at 257; *Ramirez-Mejia,* 813 F.3d at 241.

Moreover, in rejecting any argument that the Refugee Convention and Refugee Protocol require that the U.S. must grant asylum to anyone who qualifies as a “refugee,” the Departments note that the Refugee Convention and Refugee Protocol are not self-executing. Rather, Congress implemented relevant U.S. obligations under the Refugee Protocol through the Refugee Act. *Matter of D-J-,* 23 I&N Dec. 572, 584 n.8 (A.G. 2003). The Refugee Act made asylum discretionary, meaning that Congress did not consider it obligatory to grant asylum to every refugee who qualifies. Public Law 96-212, sec. 208(a), 94 Stat. 102. Moreover, as noted earlier in footnote 3, courts have rejected arguments that other provisions of the Refugee Convention require every refugee to receive asylum. Courts have held, in the context of upholding the bar on eligibility for asylum in reinstatement proceedings under section 241(a)(5) of the INA, 8 U.S.C. 1231(a)(5), that limiting the ability to apply for asylum does not constitute a prohibited “penalty” under Article 31(1) of the Refugee Convention. *Mejia,* 866 F.3d at 588; *Cazun,* 856 F.3d at 257 n.16. Courts have also rejected the argument that Article 28 of the Refugee Convention, governing issuance of

international travel documents for refugees "lawfully staying" in a country's territory, mandates that every person who might qualify for withholding must also be granted asylum. *Garcia,* 856 F.3d at 42; *R-S-C,* 869 F.3d at 1188. Thus, the Attorney General may render aliens ineligible for asylum if they enter illegally and are then convicted of unlawfully entering the country, and still remain faithful to U.S. obligations under the Refugee Protocol.

4. FEDERAL, STATE, TRIBAL, OR LOCAL CONVICTIONS FOR OFFENSES INVOLVING CRIMINAL STREET GANGS

The Departments are proposing to bar from asylum all those who are convicted of a crime involving criminal street gangs, regardless of whether that crime qualifies as a felony or as a misdemeanor. One approach the Attorney General and the Secretary are considering is to exercise their discretionary authority under sections 208(b)(2)(B)(ii) and (C) of the INA, 8 U.S.C. 1158(b)(2)(B)(ii) and (C), to exclude individuals convicted of federal, state, tribal, or local crimes committed in support, promotion, or furtherance of a criminal street gang as that term is defined in the convicting jurisdiction or under 18 U.S.C. 521(a). Specifically, the proposed rule would cover individuals convicted of federal, state, tribal, or local crimes in cases in which the adjudicator knows or has reason to believe the crime was committed in furtherance of criminal street gang activity.[6] The "reason to believe" standard is used elsewhere in the INA, *see* 8 U.S.C. 1182(a)(2)(C), and would allow for consideration of all reliable evidence, including any penalty enhancements, to determine whether the crime was committed for or related to criminal gang activities, *see Garces* v. *U.S. Att'y Gen.,* 611 F.3d 1337, 1350 (11th Cir. 2010); *Matter of Rico,* 16 I&N Dec. 181, 185-86 (BIA 1977). In addition, the Departments have concluded that it is appropriate to allow the adjudicator to determine whether a crime was in fact committed "in furtherance" of gang-related activity. The states, as noted above, have enacted numerous laws that address gang-related crimes, but they have not enacted a uniform definition of what constitutes activity taken "in furtherance" of a gang-related crime. It thus appropriately falls to immigration judges in the first instance to determine whether a person committed the type of crime that warrants withholding of the benefit of legal presence in our communities. Moreover, to the extent that allowing the adjudicator to undertake such an inquiry might raise concerns about inconsistent application of the proposed bar, the Departments note that the Board is capable of Start Printed Page 69650ensuring a uniform approach to the gang-related crimes inquiry. *See,*

e.g., 8 CFR 1003.1(e)(6)(i) (allowing for referral of cases to a three-member panel of the Board "to settle inconsistencies among the rulings of different immigration judges").

Some of the relevant criminal street gang-related offenses may already constitute aggravated felonies, such that aliens convicted of such offenses would already be ineligible for asylum. The most common criminal street gang crimes "are street-level drug trafficking, assault, threats and intimidation, robbery, and large-scale drug trafficking." National Gang Intelligence Center, 2015 National Gang Report 12 (2015). Many convictions for such offenses could qualify as aggravated felonies. *See, e.g.*, 8 U.S.C. 1101(a)(43)(B) (defining drug trafficking crimes as aggravated felonies); *id.* 1101(a)(43)(F) (defining crimes of violence punishable by at least one year in prison as aggravated felonies).

Regardless, criminal street gang-related offenses—whether felonies or misdemeanors—could reasonably be designated as "particularly serious crimes" pursuant to 8 U.S.C. 1158(b)(2)(B)(ii). All criminal street gang-related offenses appear to be particularly serious because they are strong indicators of recidivism and ongoing, organized criminality within a community, thus implying that aliens who commit such crimes are likely to pose an ongoing danger to that community. For example, research suggests that criminal street gang members are responsible for 48 percent of violent crime in most U.S. jurisdictions. *See* National Gang Intelligence Center, National Gang Threat Assessment 15 (2011). Criminal street gang members are also more likely than nonmembers to be involved in selling drugs. *See* Dana Peterson, et al., *Gang Membership and Violent Victimization* 21 Just. Q. 793, 798 (2004). And the Federal Bureau of Investigation reports that more than 96 criminal street gangs conduct cross-border crimes such as cross-border drug trafficking. National Gang Intelligence Center, 2015 National Gang Report 9-10 (2015); *see also* J.C. Barnes et al., *Estimating the Effect of Gang Membership on Nonviolent and Violent Delinquency: A Counterfactual Analysis,* 36 Aggressive Behav. 437, 438 (2010) (studying the link between gang membership and crime, and reporting that gang members account for 86 percent of all "serious delinquent acts"). In light of this well-documented link between gang membership and a range of crimes, the Departments believe that aliens who enter the United States and proceed to be convicted of crimes involving criminal street gang-related activity should be deemed to have committed particularly serious crimes that render them ineligible for asylum.

Further, some of the crimes in which gangs frequently engage—such as drug trafficking—are similar to the kinds of crimes that Congress has already classified as aggravated felonies. *See, e.g.,* 8 U.S.C. 1101(a)(43)(B) (defining aggravated felonies to include "illicit trafficking in a controlled substance"). This classification reflects a congressional determination that such crimes pose a danger to the community, *see* 8 U.S.C. 1158(b)(2)(A)(ii), (b)(2)(B)(i), such that aliens involved in similar, gang-related crimes are also likely to pose a danger to the community. Indeed, the perpetrators of crimes that further gang activity are, by the very nature of the acts they commit, displaying a disregard for basic societal structures in preference of criminal activities that place other members of the community—even other gang members—in danger. Existing law in some cases thus already treats gang-related offenders more harshly than other offenders, *see, e.g.,* U.S. Sentencing Guidelines Manual § 5K2.18 (U.S. Sentencing Comm'n 2018) (allowing for upward departures "to enhance the sentences of defendants who participate in groups, clubs, organizations, or associations that use violence to further their ends"), thereby confirming that these offenders are more likely to be dangerous to the community.

Moreover, even if 8 U.S.C. 1158(b)(2)(B)(ii) did not authorize the proposed bar, the Attorney General and the Secretary would propose designating criminal gang-related offenses as disqualifying under 8 U.S.C. 1158(b)(2)(C). Criminal gangs of all types—including local, regional, or national street gangs; outlaw motorcycle gangs; and prison gangs—are a significant threat to the security and safety of the American public. *See, e.g.,* National Gang Intelligence Center, 2015 National Gang Report 8 (2015) (explaining that "each gang type poses a unique threat to the nation"). Transnational organized crime has also expanded in size, scope, and impact over the past several years.[7] In Executive Order 13773, Enforcing Federal Law With Respect to Transnational Criminal Organizations and Preventing International Trafficking, 82 FR 10691 (Feb. 9, 2017), the President emphasized the scourge of transnational criminal organizations and directed federal agencies to "pursue and support additional efforts to prevent the operational success of transnational criminal organizations and subsidiary organizations within and beyond the United States." Aliens involved in gang-related criminal activity accordingly represent a threat to the safety and security of the United States, and barring aliens convicted of such activity from receiving the discretionary benefit of asylum is "consistent with" the asylum statute's current provisions specifying that aliens posing such a threat are not eligible for asylum. *See* 8 U.S.C. 1158(b)(2)(A)(ii), (iv).

Finally, the Departments solicit public comments on:

(1) What should be considered a sufficient link between an alien's underlying conviction and the gang-related activity in order to trigger the application of the proposed bar; and

(2) any other regulatory approaches to defining the type of gang-related activities that should render aliens ineligible for asylum.

5. CONVICTIONS FOR OFFENSES INVOLVING DRIVING WHILE INTOXICATED OR IMPAIRED

The Attorney General and Secretary further propose that, pursuant to their authorities under 8 U.S.C. 1158(b)(2)(B)(ii) and (C), aliens convicted under federal, state, tribal, or local law of certain offenses involving driving while intoxicated or impaired (also known as driving under the influence ("DUI")) should be ineligible for asylum. Specifically, aliens should be ineligible for asylum if they are convicted under federal, state, tribal, or local law of a second or subsequent offense of driving while intoxicated or impaired, or for a single such offense resulting in death or serious bodily injury. Whether a conviction involves driving while intoxicated or impaired would depend on the definition that the jurisdiction of conviction gives those terms. Such convictions would be disqualifying regardless of whether they constituted felonies or misdemeanors in the jurisdiction of conviction. An alien convicted of DUI may remain eligible for asylum under current law, even when it is an alien's second or subsequent such conviction or when the DUI offense results in death or serious injury. Not all DUI offenses constitute aggravated felonies within the meaning of section 101(a)(43) of the INA, 8 U.S.C. 1101(a)(43), and thus these offenses may not automatically constitute "particularly serious crimes" for purposes of 8 U.S.C. 1158(b)(2)(B)(i). Start Printed Page 69651 *Cf. Leocal* v. *Ashcroft,* 543 U.S. 1, 13 (2004) (noting that DUI offenses in states whose relevant statutes "do not require any mental state" are not aggravated felony crimes of violence). However, the Board in the withholding of removal context has concluded that a number of DUI-related offenses involving death or serious injury constitute particularly serious crimes, and courts have upheld those determinations. *See, e.g., Avendano-Hernandez* v. *Lynch,* 800 F.3d 1072, 1076, 1076-78 (9th Cir. 2015) (affirming the Board's determination that a felony DUI conviction involving injury to another was a particularly serious crime for purposes of withholding of removal given the inherently dangerous nature of the offense, even though the alien was sentenced to less than one year's imprisonment); *Anaya-Ortiz* v. *Holder,* 594 F.3d 673, 675, 679-80 (9th

Cir. 2010) (the Board applied the correct standard to conclude that an alien's actions in crashing “into a house while driving drunk . . . [and] caus[ing] part of the house's sheetrock wall to collapse on an elderly woman who lived inside” constituted a particularly serious crime); *Ursu* v. *INS,* 20 F. App'x 702, 705 (9th Cir. 2001) (upholding the Board's conclusion that a specific DUI offense was a particularly serious crime for withholding purposes because the alien “caused the death of another human being” while severely impaired). These holdings indicate that DUI offenses often have grave consequences, thus supporting a conclusion that they can reasonably be considered “particularly serious” for purposes of asylum eligibility. DUI laws exist, in part, to protect unknowing persons who are transiting through their communities from the dangerous persons who choose to willingly disregard common knowledge that their criminal acts endanger others.

As noted above, however, existing law does not clearly or categorically limit asylum eligibility for aliens convicted of serious DUI offenses, including those resulting in death or serious bodily injury. Establishing such a bar would be consistent with the Attorney General and the Secretary's statutory authority to designate by regulation “particularly serious crimes” that constitute a danger to the community and, thus, render aliens ineligible for asylum. INA 208(b)(2)(A)(ii), (B)(ii), 8 U.S.C. 1158(b)(2)(A)(ii), (B)(ii); *Delgado,* 648 F.3d at 1105-06; *Gao,* 595 F.3d at 555-56; *see also Matter of Carballe,* 19 I&N Dec. 357, 360 (BIA 1986) (an alien convicted of a particularly serious crime constitutes a danger to the community of the United States). The Fifth Circuit has noted that “the very nature of the crime of [driving while intoxicated] presents a `serious risk of physical injury' to others.” *United States* v. *DeSantiago-Gonzalez,* 207 F.3d 261, 264 (5th Cir. 2000). These decisions in the withholding context underscore that DUI offenses involving serious bodily harm or death are routinely deemed “particularly serious crimes” in that context, and section 101(h)(3) of the INA, 8 U.S.C. 1101(h)(3), classifies driving under the influence as a “serious criminal offense” for purposes of the ground of inadmissibility at section 1182(a)(2)(E). Classifying DUI offenses that involve serious bodily harm or death as particularly serious crimes as a categorical matter would be reasonable given that all such offenses by definition involve a serious danger to the community. Likewise, categorically classifying repeat DUI offenses as particularly serious crimes would be a reasonable exercise of the Attorney General and the Secretary's discretion to designate particularly serious

crimes because repeat offenders have already exhibited disregard for the safety of others as well as a likelihood of continuing to engage in extremely dangerous conduct.

Even if some of the proposed DUI-related bars could not be characterized as "particularly serious crimes" for purposes of section 1158(b)(2)(B)(ii), such bars would be within the Attorney General and the Secretary's authority to establish under 8 U.S.C. 1158(b)(2)(C). As the Supreme Court has recognized, "[d]runk driving is an extremely dangerous crime" as a general matter. *Begay* v. *United States,* 553 U.S. 137, 141 (2008), *abrogated on other grounds by Johnson* v. *United States,* 135 S. Ct. 2551 (2015). It takes "a grisly toll on the Nation's roads, claiming thousands of lives, injuring many more victims, and inflicting billions of dollars in property damage every year." *Birchfield* v. *North Dakota,* 136 S. Ct. 2160, 2166 (2016); *see also Marmolejo-Campos* v. *Holder,* 558 F.3d 903, 913 (9th Cir. 2009) (noting that "the dangers of drunk driving are well established"). Furthermore, federal courts have upheld the Board's determination that even if a particular DUI-related offense does not qualify as a "particularly serious crime," such a conviction warrants a discretionary denial of asylum. *See, e.g., Kouljinski* v. *Keisler,* 505 F.3d 534, 543 (6th Cir. 2007) (holding that, regardless of whether driving under the influence of alcohol is a "particularly serious crime," the immigration judge "did not abuse his discretion in this case by basing his discretionary denial of asylum on [the petitioner's] three drunk-driving convictions"). These cases are consistent with the notion that the Attorney General and Secretary could, in their discretion, identify a subset of DUI convictions reflecting particularly dangerous conduct as grounds to deny eligibility for asylum.

6. DOMESTIC ASSAULT OR BATTERY, STALKING, OR CHILD ABUSE

Relying on the authority under section 208(b)(2)(B)(ii) of the INA, the proposed regulation would also render aliens convicted of federal, state, tribal, or local offenses involving conduct amounting to domestic assault or battery, stalking, or child abuse in the domestic context ineligible for asylum, irrespective of whether those offenses qualify as felonies or misdemeanors. Relying solely on the Attorney General and the Secretary's authority under section 208(b)(2)(C) of the INA, the regulation would also render ineligible aliens who engaged in acts of battery and extreme cruelty in a domestic context in the United States, regardless of whether such conduct resulted in a criminal conviction. Notably, the asylum statute already contemplates that individuals who engage in certain harmful behavior will be

ineligible, regardless of whether that behavior resulted in a conviction. 8 U.S.C. 1158(b)(2)(A)(i), (iii)-(v). Finally, the proposed regulation would except from the ineligibility bar aliens who have been battered or subjected to extreme cruelty and who were not the primary perpetrators of violence in their relationships.

Some of the offenses described above may already render an alien ineligible for asylum, to the extent that a particular conviction qualifies as an aggravated felony. For instance, aggravated felonies encompass "murder, rape, or sexual abuse of a minor," 8 U.S.C. 1101(a)(43)(A), as well as any "crime of violence . . . for which the term of imprisonment [is] at least one year," *id.* 1101(a)(43)(F). Convictions for such offenses automatically constitute "particularly serious crimes" for purposes of 8 U.S.C. 1158(b)(2)(A)(ii). *See* 8 U.S.C. 1158(b)(2)(B)(i). But, as noted, due to the application of the categorical approach, many state convictions that involve sexual abuse or domestic violence-related offenses may not qualify as aggravated felonies. *E.g., Larios-Reyes,* 843 F.3d at 149-50 (alien's conviction under Maryland law for sexual abuse of a victim under the age of 14 did not amount to the aggravated felony of "sexual abuse of a minor"); *Ortega-Mendez* v. *Gonzales,* 450 F.3d Start Printed Page 696521010, 1021 (9th Cir. 2006) (holding that a conviction for battery under California Penal Code section 242 is not a "crime of violence" within the meaning of 18 U.S.C. 16(a) and thus is not a "crime of domestic violence" within the meaning of 8 U.S.C. 1227(a)(2)(E)(i)); *Tokatly* v. *Ashcroft,* 371 F.3d 613, 624 (9th Cir. 2004) ("Applying *Taylor,* a court may not look beyond the record of conviction to determine whether an alien's crime was one of `violence,' or whether the violence was `domestic' within the meaning of the provision.").

The Board has routinely deemed some of the identified domestic violence offenses as particularly serious crimes, and many of those decisions have been upheld on appeal. *See Pervez* v. *Holder,* 546 F. App'x 157, 159 (4th Cir. 2013) (attempted indecent liberties with a child constituted a particularly serious crime even where "no child was actually harmed"); *Lara-Perez* v. *Holder,* 517 F. App'x 255 (5th Cir. 2013) (lewd and lascivious acts with a child constituted particularly serious crime); *Uzoka* v. *Att'y Gen.,* 489 F. App'x 595 (3d Cir. 2012) (endangering welfare of a child constituted a particularly serious crime); *Sosa* v. *Holder,* 457 F. App'x 691 (9th Cir. 2011) (willful infliction of corporal injury on a spouse or cohabitant constituted a particularly serious crime); *Hernandez-*

Vasquez v. *Holder,* 430 F. App'x 448 (6th Cir. 2011) (child endangerment constituted a particularly serious crime); *Matter of Singh,* 25 I&N Dec. 670, 670 (BIA 2012) (stalking offense constituted a crime of violence). But the Board's case-by-case assessment of each domestic violence conviction does not cover all of the offenses identified above, and it would not cover domestic violence that does not result in a conviction, as the proposed rule would.

The Attorney General and the Secretary propose classifying domestic violence convictions as particularly serious crimes under section 208(b)(2)(B)(ii) of the INA, 8 U.S.C. 1158(b)(2)(B)(ii), because violent conduct, or conduct creating a substantial risk of violence against the person, generally constitutes a particularly serious offense rendering an alien ineligible for asylum or withholding of removal. *Matter of E-A-,* 26 I&N Dec. 1, 9 n.3 (BIA 2012) (a "serious" crime involves "a substantial risk of violence and harm to persons"); *Matter of Frentescu,* 18 I&N Dec. 244, 247 (BIA 1982) ("Crimes against persons are more likely to be categorized as `particularly serious crimes.' ").

Even if all of the proposed domestic violence offenses would not qualify as particularly serious crimes, convictions for such offenses—as well as engaging in conduct involving domestic violence that does not result in a conviction—should be a basis for ineligibility for asylum under section 208(b)(2)(C) of the INA. Domestic violence is particularly reprehensible because the perpetrator takes advantage of an "especially vulnerable" victim. *Carrillo* v. *Holder,* 781 F.3d 1155, 1159 (9th Cir. 2015). Congress enacted grounds for removability for domestic violence offenses because "[w]hen someone is an alien and has already shown a predisposition toward violence against women and children, we should get rid of them the first time." *See* 142 Cong. Rec. S4058-02, S4059 (daily ed. Apr. 24, 1996) (statement of Senator Dole on his amendment adding grounds for removability under subsection (E) to 8 U.S.C. 1227(a)(2)). Congress included stalking within the same statutory provision as domestic violence offenses that make an alien subject to removal because it is a "vicious act:" "Of all the women killed in the United States by husbands or boyfriends, 90 percent were stalked before being murdered." *Id.* In addition, "[s]talking behavior often leads to violence which may result in the serious injury or death of stalking victims." *Id.* Congress also included child abuse within the same statutory provision as domestic violence offenses, noting that child abuse includes a range of serious maltreatment, such as negligence, physical abuse, sexual abuse, emotional abuse, and medical

negligence. *See id.* (statement of Senator Coverdale). "[American] society will not tolerate crimes against women and children." *Id.* (statement of Senator Dole on his amendment to add subsection (E) to 8 U.S.C. 1227(a)(2)). The same rationale should render aliens who commit domestic violence in the United States ineligible for the discretionary benefit of asylum. Denying asylum eligibility to an alien who has engaged in domestic violence accords with the aim of "send[ing] a message that we will protect our citizens against [domestic] assaults" committed by aliens. *Id.*

The portions of the proposed regulation that require a conviction would permit the adjudicator to assess all reliable evidence in order to determine whether that conviction amounts to a domestic violence offense. In limited circumstances, a similar type of analysis already occurs in the removal context. Although the ground of removability at 8 U.S.C. 1227(a)(2)(E)(ii)—which applies to individuals who violate certain portions of a protective order—does not require a criminal conviction, it does require a judicial order. *See Garcia-Hernandez* v. *Boente,* 847 F.3d 869, 872 (7th Cir. 2017) ("The text of [8 U.S.C. 1227(a)(2)](E)(ii) does not depend on a criminal conviction but on what a court `determines' about the alien's conduct."). That ground of removability requires the immigration judge to consider "the probative and reliable evidence regarding what a State court has determined about the alien's violation [of a protective order]." *Matter of Medina-Jimenez,* 27 I&N Dec. 399, 401 (BIA 2018). And, under 8 U.S.C. 1227(a)(2)(E)(i), which requires a conviction, the immigration judge may still apply a circumstance-specific approach to determine whether the "domestic relationship component" of that removability ground is met. *Hernandez-Zavala* v. *Lynch,* 806 F.3d 259, 266-67 (4th Cir. 2015); *Matter of Estrada,* 26 I&N Dec. 749, 752-53 (BIA 2016) ("[T]he circumstance-specific approach is properly applied in analyzing the domestic nature of a conviction to determine if it is for a crime of domestic violence."). Because some states may not have separate offenses for the different types of conduct recognized in federal law as domestic violence offenses, relying on such a factual inquiry would "clos[e] the . . . loopholes" where aliens might otherwise escape the immigration consequences due to the vagaries of states' laws. 142 Cong. Rec. S4058-02, S4059 (statement of Senator Dole).

For similar reasons, the portions of the proposed rule at 8 CFR 208.13(c)(6)(vii) and 1208.13(c)(6)(vii), which would not require a conviction to trigger ineligibility, allow the

adjudicator to consider what conduct the alien engaged in to determine if the conduct amounts to a covered act of battery or extreme cruelty. There is precedent for such a conduct-specific inquiry in the asylum statute, *see* INA 208(b)(2)(A)(i), 8 U.S.C. 1158(b)(2)(A)(i), as well as in the removability context, *see* INA 237(a)(1)(E), 8 U.S.C. 1227(a)(1)(E); *see also Meng* v. *Holder,* 770 F.3d 1071, 1076 (2d Cir. 2014) (reviewing the record evidence to determine whether it supported the agency's finding that the applicant's conduct triggered section 1158(b)(2)(A)(i)'s persecutor bar); *Santiago-Rodriguez* v. *Holder,* 657 F.3d 820, 829 (9th Cir. 2011) (explaining that a factual admission may be sufficient to satisfy the Government's burden of demonstrating removability under section 1227(a)(1)(E)(i)). Moreover, this conduct-specific inquiry is materially similar to the inquiry already undertaken in situations in which an Start Printed Page 69653alien seeks to obtain immigration benefits based on domestic violence actions that do not necessarily result in a conviction. *See, e.g.,* 8 U.S.C. 1229b(b)(2)(A); 8 CFR 204.2(c)(1)(i)(E), (c)(1)(vi), (c)(2)(iv), (e)(1)(i)(E), (e)(1)(vi), and (e)(2)(iv).

Finally, the proposed regulation would exempt from the ineligibility bar aliens who have been battered or subjected to extreme cruelty and who were not the primary perpetrators of violence in their relationships. These aliens are generally described in section 237(a)(7)(A) of the INA, 8 U.S.C. 1227(a)(7)(A), which provides a waiver of the domestic violence and stalking removability ground when it is determined that the alien (1) was acting in self-defense; (2) was found to have violated a protection order intended to protect the alien; or (3) committed, was arrested for, was convicted of, or pled guilty to committing a crime that did not result in serious bodily injury and where there was a connection between the crime and the alien's having been battered or subjected to extreme cruelty. Although section 237(a)(7)(A) of the INA, 8 U.S.C. 1227(a)(7)(A), excepts such aliens from removability only if they are granted a discretionary waiver, the proposed rule would except all aliens who satisfy the above criteria from the proposed asylum bar. Asylum officers or immigration judges could thus make factual determinations regarding whether an alien fit into this category, making the exception more administrable and uniform in the asylum context. The Departments believe that this exception would provide important protections for domestic violence victims.

7. CONVICTIONS FOR CERTAIN MISDEMEANOR OFFENSES

The proposed regulation would also make certain misdemeanor offenses bars to asylum based on the authority to create new grounds for ineligibility in section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C). Other provisions of the INA render aliens ineligible for other benefits based on convictions for certain misdemeanors. *See, e.g.*, INA 244(c)(2)(B)(i), 8 U.S.C. 1254a(c)(2)(B)(i) (barring aliens from eligibility for temporary protected status if they have been convicted of two or more misdemeanors in the United States). The proposed rule would designate offenses involving the use of fraudulent documents, the receipt of public benefits under false pretenses, or the possession or trafficking of drugs as disqualifying for purposes of asylum, even if such offenses are misdemeanors rather than felonies. The proposed regulation would define a misdemeanor in this context as a crime defined as a misdemeanor by the jurisdiction of conviction, or that involves a potential penalty of one year or less in prison. Convictions for such misdemeanor offenses should be disqualifying because these offenses inherently undermine public safety or Government integrity.

The Departments also seek public comment on whether (and, if so, how) to differentiate among misdemeanor convictions that should warrant designation as grounds for ineligibility for asylum. Are there any additional misdemeanor convictions that should be bars to asylum eligibility? Conversely, should any of the below proposed misdemeanor bars be eliminated?

A. FRAUDULENT DOCUMENT OFFENSES

The Departments propose to make aliens ineligible for asylum when they are convicted of a federal, state, tribal, or local misdemeanor for the possession or use, without lawful authority, of an identification document, authentication feature, or false identification document as defined in 18 U.S.C. 1028(d). Aliens convicted of falsifying passports or other identity documents where the term of imprisonment is at least a year are already ineligible for asylum (unless the conduct was a first-time offense for purposes of aiding a specified family member) because such conduct constitutes an aggravated felony under 8 U.S.C. 1101(a)(43)(P). Other felonies relating to fraudulent document offenses would be encompassed within the proposed eligibility bar for felony convictions.

The Attorney General and the Secretary believe that fraudulent document offenses pose such a significant affront to government integrity that even misdemeanor fraudulent document

offenses should disqualify aliens from eligibility for asylum. Proper identity documentation is critical in the immigration context. *See Noriega-Perez* v. *United States,* 179 F.3d 1166, 1173-74 (9th Cir. 1999). Furthermore, as Congress acknowledged when it passed the REAL ID Act of 2005, Public Law 109-13, preserving the integrity of identity documents is critical for general national security and public safety reasons. The United States has taken concrete steps to protect all Government-issued identification documents by making the process to obtain identification documents more rigorous. *See, e.g.,* H.R. Rep. No. 109-72, at 179 (2005) (Conf. Rep.) (explaining that the REAL ID Act was passed in part to "correct the chronic weakness among many of the states in the verification of identity" for the purpose of issuing Government identification documents).
The use of fraudulent documents, especially involving the appropriation of someone else's identity, so strongly undermines government integrity that it would be inappropriate to allow an individual convicted of such an offense to obtain the discretionary benefit of asylum.

Despite the concerns articulated above, the proposed rule would provide an exception for the bar to asylum based on convictions for use or misuse of identification documents if the alien can show that the document was presented before boarding a common carrier for the purpose of coming to the United States, that the document relates to the alien's eligibility to enter the United States, that the alien used the document to depart a country in which the alien has claimed a fear of persecution, and that the alien claimed a fear of persecution without delay upon presenting himself or herself to an immigration officer upon arrival at a United States port of entry. This exception is consistent with distinctions regarding certain document-related offenses made in *Matter of Pula,* 19 I&N Dec. at 474-75, existing statutes, *see* INA 274C(a)(6) and (d)(7), 8 U.S.C. 1324c(a)(6) and (d)(7), and existing regulations, *see* 8 CFR 270.2(j) and 1270.2(j); *see also Matter of Kasinga,* 21 I&N Dec. 357, 368 (BIA 1996) (use of fraudulent passport to come to the United States was not a significant adverse factor where, upon arrival, applicant told the immigration inspector the truth). Other than this exception, aliens seeking to enter, remain, obtain employment, or obtain benefits and services who are convicted of using false or fraudulent documents should not be eligible for asylum.

B. PUBLIC BENEFITS OFFENSES

Many aliens are legally entitled to receive certain categories of federal public benefits. 8 U.S.C. 1611, 1641. The unlawful receipt of public benefits, however, burdens taxpayers and drains a system intended to assist lawful beneficiaries. The inherently pernicious nature of such conduct has previously led the Government to prioritize enforcement of the immigration laws against such offenders, *see* Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13768, 82 FR 8799 (Jan. 25, 2017), and this pernicious conduct warrants the use of the Attorney General and the Secretary's authority to bar convicted individuals Start Printed Page 69654from receiving the discretionary benefit of asylum.[8]

C. CONTROLLED SUBSTANCES OFFENSES

Relying on the authority in section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C), the Departments propose to make aliens ineligible for asylum when they are convicted of a federal, state, tribal, or local misdemeanor involving controlled-substances offenses. Specifically, the Departments propose that a conviction for possession or trafficking of a controlled substance or controlled-substance paraphernalia, other than a single offense involving possession for one's own use of 30 grams or less of marijuana, should disqualify an alien from eligibility for asylum.

Aliens who violate controlled substance laws may be removable, *see* INA 212(a)(2)(A)(i)(II), 237(a)(2)(B)(i), 8 U.S.C. 1182(a)(2)(A)(i)(II), 1227(a)(2)(B)(i), and they would already be barred from receiving asylum to the extent a controlled-substance offense constitutes an aggravated felony, *see* INA 208(b)(2)(B)(i), 8 U.S.C. 1158(b)(2)(B)(i); *see also* INA 101(a)(43)(B), 8 U.S.C. 1101(a)(43)(B); *United States* v. *Valdivia-Flores,* 876 F.3d 1201, 1206-07 (9th Cir. 2017) (controlled-substances offenses are aggravated felonies under the INA if they meet the definition of trafficking or involve state analogues to federal trafficking offenses). Furthermore, in cases that the courts of appeals have often upheld, the Board has concluded that various controlled-substances offenses can constitute particularly serious crimes even if they do not rise to the level of aggravated felonies. *See, e.g., Herrera-Davila* v. *Sessions,* 725 F. App'x 589, 590 (9th Cir. 2018) (the Board and immigration judge did not err in determining that an immigrant's conviction for drug possession constituted a particularly serious crime for both asylum and withholding of

removal); *Vaskovska* v. *Lynch,* 655 F. App'x 880, 884 (2d Cir. 2016) (the Board did not err in determining that an alien's conviction for drug possession was "a particularly serious crime rendering her ineligible for asylum and withholding of removal"); *Bertrand* v. *Holder,* 448 F. App'x 744, 745 (9th Cir. 2011) (the Board did not err in determining that an alien's conviction for selling cannabis constituted a particularly serious crime for purposes of both asylum and withholding of removal). Additionally, drug paraphernalia possession can include certain equipment associated with the use, manufacture, packaging, or sale of illegal drugs. *See, e.g.,* 21 U.S.C. 863(d). Under the proposed eligibility bar for felonies, all felony convictions relating to controlled substances would become a basis for ineligibility for asylum.

The Departments further propose to implement a new bar for asylum to include convictions for misdemeanors involving the trafficking or possession of controlled substances. Both possessors and traffickers of controlled substances pose a direct threat to the public health and safety interests of the United States, and they should not be entitled to the benefit of asylum. The harmful effects of controlled substance offenses have been recognized consistently by policymakers and courts. "[F]ar more people die from the misuse of opioids in the United States each year than from road traffic accidents or violence." United Nations Office on Drugs and Crime, World Drug Report: Executive Summary, Conclusions, and Policy Implications 10 (2017). As Attorney General Ashcroft previously recognized in an immigration opinion, "[t]he harmful effect to society from drug offenses has consistently been recognized by Congress in the clear distinctions and disparate statutory treatment it has drawn between drug offenses and other crimes." *Matter of Y-L-,* 23 I&N Dec. 270, 275 (A.G. 2002). He concluded that the "unfortunate situation" of drug abuse and related crime "has reached epidemic proportions and . . . tears the very fabric of American society." *Id.* The federal courts have agreed that drug offenses are serious, and have noted that "immigration laws clearly reflect strong congressional policy against lenient treatment of drug offenders." *Ayala-Chavez* v. *U.S. INS,* 944 F.2d 638 (9th Cir. 1991) (quoting *Blackwood* v. *INS,* 803 F.2d 1165, 1167 (11th Cir. 1988)); *see also Hazzard* v. *INS,* 951 F.2d 435, 438 (1st Cir. 1991); *cf. Mason* v. *Brooks,* 862 F.2d 190, 194 (9th Cir. 1988) ("Congress has forcefully expressed our national policy against persons who

possess controlled substances by enacting laws . . . to exclude them from the United States if they are aliens.").

For these reasons, the proposed bar on asylum eligibility is consistent with the INA's current treatment of controlled-substance offenses. Nevertheless, the Departments also propose a limited exception to the proposed bar for convictions involving a single offense involving possession for one's own use of 30 grams or less of marijuana. That exception would be consistent with an existing exception in the removability context: One who is convicted of a single offense of simple possession of marijuana is not automatically removable under the INA. *See* INA 237(a)(2)(B)(i), 8 U.S.C. 1227(a)(2)(B)(i). An alien with the same conviction would be inadmissible, but has a statutory right to request a waiver, which the Attorney General or the Secretary may grant in his or her discretion. *See* INA 212(a)(2)(A)(i)(II), (h), 8 U.S.C. 1182(a)(2)(A)(i)(II), (h); 8 CFR 212.7(d) and 1212.7(d); *see also* INA 103(a), 8 U.S.C. 1103(a).

The Departments seek public comment on how to differentiate among controlled substance offenses. Are there offenses that are currently designated as a controlled substance offense in one or more relevant jurisdictions in the United States that should not be categorical bars to asylum eligibility? In addition to seeking public comment on whether this proposed definition is over-inclusive, the Departments seek comment on whether it might be under-inclusive: Are there crimes that would not fall under this definition that should be made categorical bars?

B. Clarifying the Effect of Criminal Convictions

The proposed regulations governing ineligibility for asylum would also set forth criteria for determining whether a vacated, expunged, or modified conviction or sentence should be recognized for purposes of determining whether an alien is eligible for asylum. The proposed rule would apply the same set of principles to federal, state, tribal, or local convictions that are relevant to the eligibility bars described above. The rule would not apply to convictions that exist prior to the effective date of the proposed regulation. For convictions or sentences imposed thereafter, the proposed rule would provide that (1) vacated or expunged convictions, or modified convictions or sentences, remain valid for purposes of ascertaining eligibility for asylum if courts took such action for rehabilitative or immigration purposes;

(2) an immigration judge or other adjudicator may look to evidence other than the order itself to determine whether the order was issued for rehabilitative or immigration purposes; (3) the alien bears the burden of establishing that the vacatur, expungement, or sentence modification was not for rehabilitative or immigration purposes; (4) the alien must further establish that the court had jurisdiction and authority to alter the relevant order; Start Printed Page 69655and (5) there exists a rebuttable presumption against the effectiveness, for immigration purposes, of the order vacating, expunging, or modifying a conviction or sentence if either (i) the order was entered after the initiation of any removal proceeding; or (ii) the alien moved for the order more than one year after the date of the original order of conviction or sentencing. The rule would thus ensure that aliens do not have their convictions vacated or modified for purported rehabilitative purposes that are, in fact, for immigration purposes.

The authority of the Attorney General and the Secretary to promulgate this proposed rule derives from sections 208(b)(2)(B)(ii) and (C) of the INA, 8 U.S.C. 1158(b)(2)(B)(ii) and (C). Prescribing the effect to be given to vacated, expunged, or modified convictions or sentences is an ancillary aspect of prescribing which criminal convictions should constitute "particularly serious crimes" for purposes of asylum ineligibility, as well as prescribing additional limitations or conditions on asylum eligibility. Additionally, the Attorney General possesses general authority under section 103(g)(2) of the INA, 8 U.S.C. 1103(g)(2), to "establish such regulations . . . as the Attorney General determines to be necessary for carrying out this section." *See Tamenut,* 521 F.3d at 1004 (describing section 1103(g)(2) as "a general grant of regulatory authority").[9] Similarly, Congress has conferred upon the Secretary the authority to "establish such regulations . . . as he deems necessary for carrying out his authority under the provisions of [the INA]." INA 103(a)(1), (3), 8 U.S.C. 1103(a)(1), (3).

First, regarding the immigration effect of expungements, vacaturs, or sentence modifications, the rule would codify the principle set forth in *Matter of Thomas and Thompson,* 27 I&N Dec. 674 (A.G. 2019), that, if the underlying reason for the vacatur, expungement, or modification was for "rehabilitation or immigration hardship," the conviction remains effective for immigration purposes. *Id.* at 680; *see also id.* (distinguishing between convictions vacated on the basis of a procedural or substantive

defect in the underlying proceeding and those vacated because of post-conviction events, such as rehabilitation or immigration hardships); *Matter of Pickering,* 23 I&N Dec. 621 (BIA 2003) (finding that a conviction remains valid for immigration purposes if the conviction is vacated for reasons unrelated to the merits of the underlying criminal proceedings), *rev'd on other grounds by Pickering* v. *Gonzales,* 465 F.3d 263, 267-70 (6th Cir. 2006).

Courts of appeals have repeatedly accepted this principle. The Second Circuit deemed it "reasonable" for the Board to conclude in *Pickering* that convictions vacated for rehabilitative reasons are still effective for purposes of immigration consequences. *Saleh* v. *Gonzales,* 495 F.3d 17, 24 (2d Cir. 2007). That interpretation is "entirely consistent with Congress's intent in enacting the 1996 amendments to broaden the definition of conviction and advances the two purposes earlier identified by the Board: It focuses on the original attachment of guilt (which only a vacatur based on some procedural or substantive defect would call into question) and imposes uniformity on the enforcement of immigration laws." *Id.; see also Pinho* v. *Gonzales,* 432 F.3d 193, 215 (3d Cir. 2005) (applying *Pickering* to conclude that a conviction was vacated "based on a defect in the underlying criminal proceedings," not for rehabilitative or immigration purposes); *cf. Dickerson* v. *New Banner Inst., Inc.,* 460 U.S. 103, 120 (1983) (accepting that Congress need not "be bound by post-conviction state actions . . . that vary widely from State to State and that provide less than positive assurance that the person in question no longer poses an unacceptable risk of dangerousness").

For similar reasons, the rule would provide that court orders *modifying* criminal sentences for rehabilitative purposes should also have no effect on the alien's eligibility for asylum. *See Matter of Thomas and Thompson,* 27 I&N Dec. at 680 (explaining that "the *Pickering* test should apply to state-court orders that modify, clarify, or otherwise alter the term of imprisonment or sentence associated with a state-court conviction").

Second, to avoid gamesmanship and manipulation in the drafting of orders vacating a conviction or modifying a criminal sentence, the proposed regulations would allow an adjudicator to look beyond the face of the order to determine whether it was issued for rehabilitative or immigration purposes and to determine whether the other requirements of proposed 8 CFR 208.13(c)(7)(v) and 1208.13(c)(7)(v) have been met, notwithstanding the putative basis of the order on its face. This rule is largely consistent with existing

precedent. *See Rodriguez* v. *U.S. Att'y Gen.,* 844 F.3d 392, 396-97 (3d Cir. 2016) (applying this approach and looking to court records absent a clear explanation for the basis of the order in the order itself); *see also Cruz* v. *Att'y Gen.,* 452 F.3d 240, 244, 248 (3d Cir. 2006) (holding that the Board could reasonably determine that a conviction was vacated to avoid immigration consequences where a state prosecutor's letter stipulating the terms of a settlement agreement explicitly stated that the petitioner's scheduled deportation was a reason for the state's support for vacating the conviction).

Third, the proposed rule would clarify that the alien bears the burden of establishing that the vacatur, expungement, or sentence modification was not for rehabilitative or immigration purposes. Therefore, if the record is inconclusive based on a standard of preponderance of the evidence, the order should not be given effect for immigration purposes. The burden of proof is on the alien because the INA places the overall burden to establish asylum eligibility on the alien. *See* INA 208(b)(1)(B)(i), 8 U.S.C. 1158(b)(1)(B)(i); *Marikasi* v. *Lynch,* 840 F.3d 281, 287 (6th Cir. 2016). Where there is evidence that "one or more of the grounds for mandatory denial of the application for relief may apply," the applicant bears the burden of establishing that the bar at issue does not apply. 8 CFR 1240.8(d). Consistent with this principle, in an analogous context, the Eighth Circuit has held that, because the INA places the burden of proof on the alien to establish eligibility for cancellation of removal, a form of discretionary relief, the alien bears the burden to prove that he has no disqualifying convictions, including the burden to show that the vacatur of any disqualifying conviction was not for rehabilitative purposes. *Andrade-Zamora* v. *Lynch,* 814 F.3d 945, 949 (8th Cir. 2016).[10] This allocation of the Start Printed Page 69656 burden of proof makes sense because, as the Board and federal courts have noted, an alien is in the "best position" to present evidence on the issue. *Id.* at 950. The alien "was a direct party to the criminal proceeding leading to the vacation of his conviction and is therefore in the best position to know why the conviction was vacated and to offer evidence related to the record of conviction." *Matter of Chavez-Martinez,* 24 I&N Dec. 272, 274 (BIA 2007); *see also Rumierz* v. *Gonzales,* 456 F.3d 31, 39 (1st Cir. 2006) (outlining several other reasons that placing the burden on the alien is rational, such as similar burden allocations in the context of criminal law and habeas petitions).

Fourth, the rule would provide that the alien must establish that the court issuing an order vacating or expunging a conviction or modifying a sentence had jurisdiction and authority to do so. This requirement would be consistent with Board precedent, which provides that facially valid orders can be disregarded based on a lack of jurisdiction. *See, e.g., Matter of F-*, 8 I&N Dec. 251 (BIA 1959) ("[T]he presumption of regularity and of jurisdiction [of a state court order] may be overcome by extrinsic evidence or by the record itself."); *cf. Adam* v. *Saenger,* 303 U.S. 59, 62 (1938) ("If it appears on its face to be a record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself. . . . But in a suit upon the judgment of another state the jurisdiction of the court which rendered it is open to judicial inquiry . . . and when the matter of fact or law on which jurisdiction depends was not litigated in the original suit it is a matter to be adjudicated in the suit founded upon the judgment." (citations omitted)). In short, an order purporting to vacate, expunge, or otherwise modify a conviction or sentence is inoperative for purposes of immigration law if the state court lacked jurisdiction over the subject matter or the parties to the action. Jurisdictional defects in court orders might arise in a number of ways. For example, in *United States* v. *Garza-Mendez,* 735 F.3d 1284 (11th Cir. 2013), a criminal sentencing case, the Eleventh Circuit refused to recognize a clarification order issued by a state judge after the sentencing judge had ordered the defendant to serve 12 months of confinement. The Eleventh Circuit rejected the "subjective, interpretive clarification order," noting that it was obtained from a different judge, long after entry of the original sentence, for the purpose of preventing enhancement of the defendant's sentence for unlawful reentry in federal court. *Id.* at 1289; *cf. Herrera* v. *U.S. Att'y Gen.,* 811 F.3d 1298, 1299-1301 (11th Cir. 2016) (affirming a Board decision declining to give effect to orders clarifying that defendants were never sentenced to terms of confinement when the original sentencing orders clearly stated to the contrary). A jurisdictional defect could also arise where state law limits the court's authority to grant post-conviction relief in certain ways, such as by imposing a time limitation. *See Matter of Estrada,* 26 I&N Dec. at 756 (noting that section 17-10-1(f) of the Georgia Code Annotated imposes strict time limits with respect to a sentencing court's ability to change or "modify" a sentence).

Finally, the proposed rule creates a rebuttable presumption that the order vacating or expunging the conviction or modifying the sentence was issued for immigration purposes if either (1) the order was entered after the initiation of any proceeding to remove the alien from the United States; or (2) the alien moved for the order more than one year after the date of the original order of conviction or sentencing.

Precedents establish that the timing of such a process is relevant to whether the resulting order should be recognized for immigration purposes. The initiation of such a process after removal proceedings have commenced naturally raises an inference that the resulting order was issued for immigration or rehabilitative purposes. For instance, in *Andrade-Zamora,* the Eighth Circuit refused to credit a state court's vacatur of a conviction when the vacatur occurred two weeks after the Government commenced removal proceedings based on the conviction, and where the state court also modified the alien's sentence for a different conviction in an apparent attempt to fit the conviction within an exception to a criminal ground of removability. 814 F.3d at 949. The court affirmed the Board's refusal to recognize the vacatur and modification, reasoning: “The timing and effect of the order . . . raise an inference the state court did not vacate the conviction on a substantive or procedural ground, but rather to avoid the immigration consequences of the conviction.” *Id.* at 949-50. Further, the rule would create a rebuttable presumption providing that if more than a year has passed between the original conviction and the alien's effort to seek a subsequent vacatur or expungement of a conviction, or the modification of sentence, the immigration adjudicator should weigh that fact against recognizing the vacatur or modification. It is reasonable to conclude that an alien who has a meritorious challenge to a criminal conviction based on a procedural or substantive defect is more likely to seek post-conviction relief sooner than an alien who is seeking relief on rehabilitative grounds, and who might delay such a challenge until DHS commences immigration proceedings or attempts to remove the alien. *See Rumierz,* 456 F.3d at 38 (affirming the Board's refusal to recognize a vacatur and the Board's reasoning that “Rumierz could easily have sought to vacate the January 1994 Vermont conviction and have presented the vacated conviction to the [Board] in the six years before the [Board's] 2000 order”). This rule promotes finality in immigration

proceedings by encouraging an alien to act diligently if there is a legitimate basis to challenge a conviction or sentence.

C. Reconsiderations of Discretionary Denials of Asylum

The proposed rule would remove the automatic review of a discretionary denial of an alien's asylum application by removing and reserving paragraph (e) in 8 CFR 208.16 and 1208.16. The present regulation provides that the denial of asylum shall be reconsidered in the event that an applicant is denied asylum solely in the exercise of discretion, and the applicant is subsequently granted withholding of deportation or removal under this section, thereby effectively precluding admission of the applicant's spouse or minor children following to join him or her. Factors to be considered include the reasons for the denial and reasonable alternatives available to the applicant such as reunification with his or her spouse or minor children in a third country. This provision, however, has proved confusing, inefficient, and unnecessary.

The courts of appeals have expressed ongoing confusion related to this provision. For example, the regulation states that when an asylum application is denied in the exercise of discretion, but withholding of removal is granted, "the denial of asylum shall be reconsidered," but the regulation does not say who shall reconsider the denial, when the reconsideration shall occur, or how the reconsideration is to be initiated. *See Shantu* v. *Lynch,* 654 F. App'x 608, 613-14 (4th Cir. 2016) (discussing these ambiguities); *see also Start Printed Page 69657Huang* v. *INS,* 436 F.3d 89, 93 (2d Cir. 2006). These ambiguities have not been "definitively resolved," *Shantu,* 654 F. App'x at 614, and continued litigation on these questions would be an ongoing burden for applicants, the immigration system, and courts.

Further, mandating that the decision maker reevaluate the very issue just decided is an inefficient practice that, in the view of the Departments, grants insufficient deference to the original fact finding and exercise of discretion. The regulation also appears unnecessary given that other regulations provide multiple avenues to challenge or otherwise seek to change a discretionary denial of asylum coupled with a grant of withholding of removal.[11] First, an immigration judge may reconsider that decision upon his or her own motion. 8 CFR 1003.23(b)(1). Second, the alien may file a motion to reconsider. *Id.* Third, the alien may also appeal the decision to the Board. 8 CFR 1003.38. The existence of at least

three alternative processes for altering a discretionary denial of asylum obviates the need for a mandatory fourth. Moreover, the objective of facilitating family reunification, *see Huang,* 436 F.3d at 93 (describing 8 CFR 1208.16(e) as "manifestly a law designed to further family reunification"), can be fulfilled even in the absence of the existing reconsideration provision because the immigration judge (or other decision maker) already considers these factors when making a discretionary decision in the first instance, *see Fisenko* v. *Lynch,* 826 F.3d 287, 292 (6th Cir. 2016) (stating that "a `crucial factor in weighing asylum as a discretionary matter' is family reunification" (internal quotation marks and citation omitted)).