

## **Biden's Asylum Ban**

*This FAQ is a preliminary analysis of the May 16, 2023 Asylum Ban rule. We will update the FAQ as more information becomes available. Further, as of the date and time of initial publication, May 16, 2023, the final rule was still not published on the Federal Register website. Therefore we are not including page citations for the preamble to the rule until the rule is published in the Federal Register. We will update this document and repost at the same link in the coming days.<sup>1</sup>*

On May 16, 2023, the Biden administration [published a final rule](#), 88 Federal Register 31314, (May 16, 2023), implementing its own version of the prior administration's asylum ban with an effective date of May 11, 2023. Under the Biden Asylum Ban, there are two tiers of asylum seekers: those who follow "lawful pathways" and those who do not. The former have full access to the U.S. asylum system and the latter are largely foreclosed from protections under U.S. law. The obvious problem with this bifurcated system is that the majority of asylum seekers do not have access to the "lawful pathways" and therefore will not qualify for asylum.

### **"LAWFUL PATHWAYS" AT THE BORDER**

#### **What does the Biden Asylum Ban do?**

In broad terms, the Biden Asylum Ban requires asylum seekers to enter the United States lawfully, with a visa, through humanitarian parole, or through a pre-scheduled appointment with Customs and Border Protection (CBP) using a smart phone application called CBP One.

For anyone who presents at a Port of Entry (POE) at the U.S.-Mexico border without a visa or a pre-scheduled appointment, who enters without inspection (EWI) between POEs, or who is apprehended in contiguous waters, the Asylum Ban will apply, creating a heightened legal standard both to access the U.S. protection system at the border and to obtain asylum in the future.

#### **What does the Biden Administration consider to be "lawful pathways"?**

The Biden Administration's [approach](#) to the end of Title 42 expulsions is to create more "lawful pathways" to enter the United States, while simultaneously creating harsh "consequences" for those who do not use the "lawful pathways."

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<sup>1</sup> The author of this publication is Victoria Neilson, Supervising Attorney at the National Immigration Project, with input by Michelle N. Mendez, Director of Legal Support and Training. Please reach out to the author at [victoria@nipnl.org](mailto:victoria@nipnl.org) with questions or if any of the information herein is not accurate.

The “lawful pathways” include entering the United States through regular channels, such as by coming to the United States with a tourist visa. Additionally, those who enter under recently created parole programs, such as those for [Cubans, Haitians, Nicaraguans, and Venezuelans](#), (CHNV), will not be subject to the Asylum Ban. Finally, as discussed below, asylum seekers in Mexico who pre-schedule an appointment using the CBP One app will not be subject to the Asylum Ban.

## “CONSEQUENCES” FOR THOSE WHO DO NOT USE “LAWFUL PATHWAYS”

### How will the Asylum Ban work?

Individuals who present at a border POE without proper entry documents or who EWI will be subject to the Asylum Ban—they will not be eligible for asylum. For anyone who enters the United States at the border between May 11, 2023 and May 11, 2025, there is a presumption that the Asylum Ban will apply unless they are eligible for an exception to the rule or can rebut the presumption, as discussed in more detail below.

### What are the exceptions to the Asylum Ban?

There are several exceptions to the Asylum Ban. These exceptions include:

**Unaccompanied children**—the rule defines unaccompanied children under 6 USC § 279(g)(2). Under the rule, if the asylum seeker met this definition at the time of entry into the United States, the noncitizen retains an exception to the rule. 8 CFR § 208.33(a)(2)(i).

**Mexican citizens**—or those stateless people whose last habitual residence was in Mexico are not subject to the Asylum Ban because they do not travel through a third country en route to the United States.

**Individuals who enter with parole**—pursuant to a DHS parole approval process. This exception will primarily provide those who use the Cuban, Haitian, Nicaraguan, and Venezuelan parole process with an exception to the rule, but would apply to other parole entrants as well. 8 CFR § 208.33(a)(2)(ii)(A).

**Individuals who present at a Port of Entry with a CBP at a pre-scheduled appointment**—this exception is intended to encourage asylum seekers to use the CBP One app rather than entering EWI or presenting at a port of entry without an appointment. 8 CFR § 208.33(a)(2)(ii)(B).

**Individuals who present at a Port of Entry without a pre-scheduled appointment who can prove an inability to access the CBP One system.** Asylum seekers who present at a POE without a pre-scheduled appointment may qualify for an exception to the Asylum

Ban if they can demonstrate “by a preponderance of the evidence that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle.” 8 CFR § 208.33(a)(2)(ii)(B).

The preamble explains that even asylum seekers who do not speak the languages available on CBP One or who are unable to read or write, may be able to get assistance from third parties in Mexico to access CBP One. It seems from the background information in the preamble that an asylum seeker must demonstrate by a preponderance of the evidence at the border interview stage that they could not use CBP One. Given the many problems asylum seekers have experienced with the CBP One app, it is concerning that DHS has indicated on calls that asylum seekers will face a significant burden in meeting this exception, with one official explaining that Asylum Officers will inquire about the asylum seeker’s efforts to have third parties assist them in seeking pre-scheduled appointments if the asylum seeker is illiterate or does not speak one of the three CBP One languages.

**Asylum sought and denied in another country.** The Asylum Ban does not apply to asylum seekers who applied for asylum and were denied relief in a country en route to the United States. The rule makes explicit that the denial must be on the merits; the asylum claim cannot be abandoned. 8 CFR § 208.33(a)(2)(ii)(C). Given the underdeveloped asylum systems and danger asylum seekers face in many transit countries, it is unlikely that many U.S. asylum seekers will rebut the presumption in this way.

### **What happens to people who use the CBP One app?**

On stakeholder calls, DHS officials have said that most people with CBP One appointments will be processed into the United States with parole that will make them eligible for employment authorization documents (EADs). The regulation itself, however, does not exempt those who enter using CBP One from being placed in expedited removal so this process could change in the future.

### **How can the rebuttable presumption of ineligibility be rebutted under the Asylum Ban?**

There is a rebuttable presumption that asylum seekers who enter the border between May 11, 2023 and May 11, 2025, and do not use “lawful pathways” are ineligible for asylum. 8 CFR § 208.33(a). Asylum seekers who do not meet one of the exceptions discussed above, may still rebut the presumption against asylum if they can demonstrate “exceptionally compelling circumstances.” There are three “per se” exceptionally compelling circumstances, which fall under a broader case-by-case assessment, as well as a catch-all provision.

**Exceptionally compelling circumstances exist at the time of the entry.** The rule lists three “per se” compelling circumstances but leaves open the possibility that other

“exceptionally compelling circumstances” that are not specifically delineated could also rebut the anti-asylum presumption. 8 CFR § 208.33(a)(3)(i). The preamble states that the Departments “emphasize that exceptionally compelling circumstances are not limited to the examples enumerated” but does not give other specific examples.

**Medical emergency.** Asylum seekers who “faced an acute medical emergency” and therefore entered the United States without using a “lawful pathway” can rebut the presumption of ineligibility for asylum. 8 CFR § 208.33(a)(3)(i)(A). The preamble to the rule notes that an “acute medical emergency” can include mental health emergencies. Thus it is critical to screen asylum seekers for the mental health effects of remaining in danger in Mexico. The preamble further explains that health emergencies that are less severe than “acute medical emergency” could potentially qualify as an “exceptionally compelling circumstance” on a case by case basis, but does not explain what other types of health issue might qualify.

**Imminent and extreme threats.** The rule sets forth an exception if the asylum seeker “faced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder.” 8 CFR § 208.33(a)(3)(i)(B). In response to comments in opposition to the high burden of proof for this rebuttal ground, the Departments responded, “threats cannot be speculative, based on generalized concerns about safety, or based on a prior threat that no longer posed an immediate threat at the time of entry.” The preamble to the rule also specifically rejects categorical rebuttals for vulnerable groups such as LGBT or HIV-positive asylum seekers. The Departments also state that credible testimony alone may be sufficient to rebut the presumption against asylum, but it is not clear how imminent the threats must be to meet this standard.

**Severe trafficking victim.** The rule sets forth another rebuttal ground for asylum seekers who “satisfied the definition of ‘victim of a severe form of trafficking in persons’ provided in [8 CFR] § 214.11(a).” 8 CFR § 208.33(a)(3)(i)(C). This is a broad definition which includes individuals who are trafficked for sex or labor, and the labor definition can include “debt bondage.” Practitioners should thus be prepared to screen for indicia of trafficking to rebut the presumption. The rule does not require that the asylum seeker cooperate with law enforcement or seek a T visa, only that they meet the regulatory definition of a severe trafficking victim.

### **What is the legal standard for rebutting the presumption of ineligibility under the Asylum Ban?**

Since asylum seekers will attempt to rebut the presumption against asylum eligibility during a credible fear interview, the preamble states “at the credible fear stage, AOs [Asylum Officers] will apply the ‘significant possibility’ standard in assessing whether a noncitizen may ultimately rebut the presumption of asylum ineligibility by a preponderance of the evidence during a full merits adjudication.” Nonetheless, the preamble explains that this standard will be applied in the context of the more difficult standard the asylum seeker would have to meet at the merits

hearing. “When it comes to the rebuttable presumption, the AO will determine whether there is a significant possibility that the noncitizen would be able to show at a full hearing by a preponderance of the evidence that the presumption does not apply or that they meet an exception to or can rebut the presumption.”

It is difficult to imagine asylum officers<sup>2</sup> in extremely rushed telephonic fear interviews applying this very nuanced standard correctly. Further, if an asylum seeker passes their credible fear interview, they will still have to meet the higher preponderance of the evidence standard before the immigration judge to demonstrate that they have rebutted the presumption and are eligible for asylum.

### **Are there any special considerations for families who are traveling together?**

Yes, the rule states that if one member of a family that travels together is either not subject to the rule, has met one of the “lawful pathway” exemptions, has met the exception proving that they could not access CBP One, has rebutted the asylum ineligibility presumption by demonstrating emergency circumstances at the border, or has applied for and been denied asylum in a third country, then the rule does not apply to anyone in the family. Thus if any family member qualifies for a lower threshold credible fear interview rather than a reasonable fear interview, the whole family will be processed through a credible fear interview. 8 CFR § 208.33(a)(2)(ii).

The rule cross-references 8 CFR §208.30(c) in defining “family.” That section of the regulations, which was amended through the 2022 Asylum Processing Rule defines family units as a spouse or unmarried child under the age of 21, and directs the asylum officer to interview the family as a unit unless they request not to be interviewed together. It also gives asylum officers discretion to include “other accompanying family members” in the fear interview and include them in the decision for purposes of family unity. It seems that asylum officers could therefore employ the lower credible fear standard for all members of an extended family traveling together if one member is exempted from the Asylum Ban, but since that is a discretionary decision there would likely be no review of an officer’s decision not to do so.

### **How will the fear-based interviews at the border be conducted? ?**

People who do not use one of the “lawful pathways” spelled out in the regulation will be placed in expedited removal and receive a fear interview with an asylum officer if they express a fear of return to their country. This will be a two-tiered interview, first to determine whether they are subject to the Asylum Ban, and, second, whether they meet either the credible fear or reasonable fear standard to qualify to be placed into removal proceedings.

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<sup>2</sup> It is worth noting that on stakeholder calls DHS officials have stated that USCIS officials conducting border-based fear interviews may include USCIS officers who have received credible fear interview training in the past, although they are not currently employed as USCIS Asylum Officers.

Those who meet an exception to the rule or rebut the presumption, will receive a credible fear interview, which applies the “significant possibility” of establishing asylum eligibility standard. Those who do not meet an exception or rebut the presumption of the rule’s applicability will be screened under the elevated “reasonable fear” standard. 8 CFR § 208.33(b) et seq.

Anyone who passes either a credible fear interview or the higher standard reasonable fear interview, will be placed into INA section 240 removal proceedings. The reasonable fear standard has been [interpreted by the asylum office](#) to equal the substantive well-founded fear standard for asylum. In these proceedings, they are eligible to seek any relief to which they may be entitled, but, as described below, they will still be subject to the Asylum Ban. 8 CFR § 208.33(b)(2)(ii).

### **What happens if the Asylum Officer finds no credible or nor reasonable fear at the interview?**

The asylum seeker may seek review of the fear interview denial before an immigration judge, but that review will not be automatic. Instead, the asylum seeker must indicate on a form that they are requesting immigration judge review. 8 CFR § 208.33(b)(2)(iv). For those undergoing screening proceedings on a very fast timetable and with telephonic interviews, it is not clear when asylum seekers will be given paper copies of their fear interview decisions, who will explain to them what part of the form they will need to need to complete to request immigration judge review, and how those forms will reach the immigration court.

### **What happens if the immigration judge upholds the finding of no credible or no reasonable fear?**

There is no appeal of an immigration judge’s decision to uphold a fear interview denial. And the rule eliminates the ability of an asylum seeker to request that the asylum office reconsider its decision. Those who do not pass their fear interview will therefore be removed quickly in most cases.

### **Can the asylum seeker request reconsideration from the asylum office?**

No. One of the many harmful changes in this rule is that there is no ability for asylum seekers to request that the asylum office to reconsider its negative fear decision. 8 CFR § 208.33(b)(2)(v)(C). While the rule allows for the possibility that United States Citizenship and Immigration Services (USCIS) can reconsider its negative decision on its own, neither the asylum seeker, nor their representative can make such a request. As a practical matter, it is difficult to envision when USCIS would conduct its own Request for Reconsideration (RFR) about the deficiency in the interview without prompting from the asylum seeker. Thus asylum seekers whose negative fear finding is upheld by an immigration judge will be removed quickly in most cases.

The preamble acknowledges that those who are not “subject to the presumption” are not barred from seeking an RFR by the Asylum Office within seven days of the immigration judge

affirmance of the denial pursuant to 8 CFR § 208.30(g)(1)(i). It is not clear whether that means that individuals who meet an exception to the Asylum Ban rule, such as asylum seekers who proved they were unable to use CBP One to make an appointment because of a language barrier, illiteracy, or a technological issue, would be able to request an RFR under the rule.

## **THE EFFECT OF THE RULE ON MERITS' ADJUDICATIONS**

### **How will the rule apply in affirmative asylum adjudications?**

The Asylum Ban will be applied to anyone who enters at the southern border without using “lawful pathways” between May 11, 2023 and May 11, 2025. 8 CFR § 208.13(f) and subsequently applies for asylum before the Asylum Office. Thus, asylum seekers who enter EWI during this time period, and are not apprehended, will still be subject to the Asylum Ban at the time of an affirmative asylum interview. 8 CFR § 208.33(c) et seq. Asylum seekers who entered prior to May 11, 2023 will therefore have to prove when they entered, not only for one year filing deadline purposes, but also to demonstrate that they are not subject to the Asylum Ban. As with the fear-based border interview, affirmative asylum interviews will go through two tiers, first determining whether an exception applies or whether the applicant has rebutted the anti-asylum presumption, before conducting an interview on the merits.

Notably, the rule states that asylum seekers continue to be subject to the rule based on their date and manner of entry if they are “not covered by an exception in paragraph (a)(2) of this section, regardless of when the application is filed and adjudicated.” It is therefore not clear whether asylum seekers who are found to be covered by the exception of inability to access CBP One and who presented at a POE will need to prove again that they do not fall under the rule.

Presumably those who are subject to the Asylum Ban and ineligible for asylum would be referred to immigration court without an interview on the merits since Asylum Officers cannot grant withholding of removal or CAT protection, but the rule does not explain the exact procedure the Asylum Office will use.

### **How will the rule apply to defensive adjudications?**

Anyone who entered between May 11, 2023 and May 11, 2025 will have to address the Asylum Ban rule before the immigration judge at their merits hearing, even if they were found to have rebutted the presumption at the border. 8 CFR § 1208.33(d). Those who can demonstrate that they have entered through “lawful pathways” as defined above, or are Mexican citizens, or entered as unaccompanied children, will have an exception to the Asylum Ban. These exceptions should be relatively straightforward to prove. The other exceptions and rebuttal facts are more complicated.

Representatives from the Executive Office for Immigration Review (EOIR) have stated on stakeholder calls that determinations made by USCIS asylum officers during fear-based interviews are not binding on immigration judges and immigration judges will review all aspects

of the claim for relief de novo. Thus, if an asylum seeker successfully rebutted the presumption of asylum eligibility by, for example, proving that they faced an imminent risk of harm in Mexico, it appears that they will have to prove again before the immigration judge that they have rebutted that presumption.

Notably, the rule states that asylum seekers continue to be subject to the rule based on their date and manner of entry if they are “not covered by an exception in paragraph (a)(2) of this section, regardless of when the application is filed and adjudicated.” It is therefore not clear whether asylum seekers who are found to be covered by the exception of inability to access CBP One and who presented at a POE will need to prove again that they do not fall under the rule. However, on stakeholder calls EOIR has tentatively stated that all aspects of the claim must be proven again in court and that no findings by asylum officers are binding on immigration judges.

### **What burden of proof will immigration judges apply to the Asylum Ban in immigration court?**

Although those who enter the United States outside of “lawful pathways” and make it through the border fear screening will be placed into regular INA §240 proceedings, they will again bear the burden of proving before the immigration judge that the Asylum Ban does not apply to them. For those who must rebut the presumption against asylum, the standard of proof is a “preponderance of the evidence.” 8 CFR § 1208.33(a)(3).

Thus, an asylum seeker who, for example, qualified for a credible fear interview rather than a reasonable fear interview because they demonstrated to an asylum officer that they were a victim of a severe form of human trafficking or that they were at imminent risk of torture or kidnapping, will have to again prove that this rebuttal ground existed at the time of entry before the immigration judge, and will have to prove the existence of the compelling circumstance using a higher standard of proof than the well-founded fear standard they would need to meet to qualify for asylum. A preponderance of the evidence has been equated with the “more likely than not” or “greater than fifty percent” standard; asylum seekers must only meet a “ten percent” percent likelihood of harm to prevail under the well-founded fear standard.

### **What happens in court if the asylum seeker cannot demonstrate an exception to the rule and cannot rebut the presumption against asylum eligibility?**

If the asylum seeker is subject to the rule and cannot demonstrate an exception or rebut the presumption against asylum, then they cannot receive asylum. The immigration judge can evaluate their claim for statutory withholding of removal, and protection under the Convention against Torture, but cannot grant asylum. 8 CFR § 1208.33(b)(4). Notably, asylum seekers subject to the rule are placed into INA § 240 proceedings, so if they are eligible for some other form of relief before the immigration judge, such as adjustment of status, they are not foreclosed by the rule from pursuing that other relief. 8 CFR § 208.33(b)(2)(v)(B).

### **What happens to family units where one or more family member does not qualify for relief?**



The rule includes a family unity provision whereby if the principal asylum seeker is granted withholding of removal or CAT protection and the asylum seeker's immediate relatives (spouse or minor children) would have qualified for derivative asylum but for the application of the Asylum Ban, then the principal asylum seeker and the family members can be granted asylum. Under this provision the presumption against asylum is rebutted under the catch-all "exceptionally compelling circumstance" rebuttal ground. Likewise, if the asylum seeker is granted withholding or CAT protection and would have qualified for asylum, but for the rule, they can also rebut the presumption and the immigration judge can grant asylum if the asylum seeker has immediate relatives abroad who could come to the United States pursuant to follow to join benefits with an I-730. 8 CFR § 1208.33(c).

The wording of the rule states more specifically that if the family members in removal proceedings are not themselves eligible for asylum or other protections then the principal can receive asylum instead of withholding or CAT. Oddly, that section of the rule means that family members who have no independent fear could win asylum under the rule (because they are not eligible for other protection), whereas those who are able to independently meet the more likely than not standard for withholding of removal or CAT protection would be foreclosed from asylum.

### **Are there any other family protections?**

Additionally, if a noncitizen was under the age of 18, entered the United States between May 11, 2023 and May 11, 2025, and files for asylum after May 11, 2025 as a principal asylum seeker, the Asylum Ban will not apply to them. 8 CFR § 1208.33(d)(2). This section of the rule apparently recognizes the unfairness of holding a child responsible for their parents' mode of entry into the United States.

## **LEGAL CHALLENGES TO THE RULE**

### **Is the rule facing legal challenges?**

The rule is already facing multiple challenges in court. The ACLU, CGRS, and NIJC have amended their complaint in [East Bay Covenant Sanctuary v. Biden](#), 4:18-cv-06810-JST (N. Distr. Ca.) to include claims that the rule is unlawful. They have not yet moved for injunctive relief in this case.

There have also been two challenges by anti-immigrant groups, *State of Florida v. Mayorkas*, 3:23cv9962-TKW-ZCB (N. Dist. Fl.) filed in Florida, and [State of Texas v. Department of Homeland Security](#), 6:23-cv-7, (S. Dist. Tx.) filed in Texas by Stephen Miller's organization America First Legal, both of which allege that the parole program the Biden administration is using is unlawful. Judge Wetherell granted an injunction in the Florida case preventing DHS from releasing most asylum seekers on parole, which the Department of Justice has appealed. It is not clear how this ruling will affect the implementation of the rule. Since DHS has stated that most asylum seekers who enter the United States using "lawful pathways" will be paroled in at

the border, a ruling that prohibits the use of parole could undermine the Biden Administration's border plan since there is not sufficient detention for everyone seeking to access the U.S. asylum system.