

## CHANGES TO ASYLUM ELIGIBILITY UNDER THE BIDEN ADMINISTRATION<sup>1</sup>

Change	Previous Border Processing	Circumventing Lawful Pathways	Securing the Border
What is the effective date of the rule?	Various	5/11/23-5/11/25 <sup>2</sup>	6/5/24-until numbers at border meet required reduction <sup>3</sup>
<b>Changes to Credible Fear</b>			
How does an asylum seeker trigger receipt of a Credible Fear Interview (CFI) interview?	CBP questions all entrants about fear of return to home country <sup>4</sup>	CBP questions all entrants about fear of return to home country <sup>5</sup>	Entrant must “manifest” fear of return to be referred by CBP to USCIS for CFI; if entrant does not affirmatively request asylum or show fear, DHS may expeditiously remove them <sup>6</sup>

<sup>1</sup> The author of this chart is Victoria Neilson, Supervising Attorney at the National Immigration Project (NIPNLG). Many thanks to Taylor Levy for her review and helpful suggestions and to Michelle N. Mendez, Director of Legal Resources and Training at NIPNLG for her careful read and edits. Please reach out to the author at [victoria@nipnlg.org](mailto:victoria@nipnlg.org) with questions or if any of the information herein is not accurate. This resource was last updated on October 1, 2024.

<sup>2</sup> 8 CFR §§ 208.33(a)(1)(i); 1208.33(a)(1)(i). Note that the Circumventing Lawful Pathways (CLP) rule applies only after the conclusion of Title 42 and within this timeframe. Since Title 42 did not technically expire until 11:59 pm on May 11, 2023, (*see* Adrienne Vogt et al, *Title 42 Has Expired*, CNN (May 12, 2023) <https://www.cnn.com/us/live-news/title-42-expire-border-immigration-05-11-23/index.html>) the CLP should not apply to those who entered prior to 11:59 pm on that date. *Id.* Note: pursuant to the STB final rule which is scheduled to be issued on October 7, 2024, DHS is accepting comments on whether the CLP should be extended indefinitely, rather than having a sunset provision. <https://www.federalregister.gov/public-inspection/2024-22602/securing-the-border>

<sup>3</sup> The Securing the Border (STB) rule comes into effect when there are more than 2500 encounters per day between Ports of Entry (POEs) in a seven day period. STB remains in effect for 14 days until encounters reduce to below 1500 per day between POEs for a 28-day period. DHS has set up a webpage, *Securing the Border*, <https://www.dhs.gov/immigrationlaws>, which includes a chart that specifies when the Securing the Border Proclamation and Rules are in effect. Note: the final rule released on October 1, 2024, increased the required reduction from seven days to 28 days of consecutive encounters below 1500 between POEs. *See* DHS, Fact Sheet: Joint DHS-DOJ Final Rule Issued to Restrict Asylum Eligibility for Those Who Enter During High Encounters at the Southern Border (Sep. 30, 2024) <https://www.dhs.gov/news/2024/09/30/fact-sheet-joint-dhs-doj-final-rule-issued-restrict-asylum-eligibility-those-who>.

<sup>4</sup> 89 Fed Reg. 48710, 48739 (describing current CFI referral system in context of how STB rule changes current process).

<sup>5</sup> 89 Fed Reg. 48710, 48739 (describing current CFI referral system in context of how STB rule changes current process).

<sup>6</sup> 8 CFR § 235.15(b)(4)(i).

<p><b>What are the triggers for asylum ineligibility during the fear screening? (If asylum ineligibility triggered, USCIS screens for withholding/CAT only)</b></p>	<p>Unless prior removal order reinstated (in which case applicant is given reasonable fear interview),<sup>7</sup> all noncitizens who express fear are supposed to be screened for asylum<sup>8</sup></p>	<p>Unauthorized entry, including entering without inspection between ports of entries (POEs) and presenting at a POE without a visa or pre-authorized parole, and unable to meet exception or rebut presumption<sup>9</sup></p>	<p>Unauthorized entry, including entering without inspection between ports of entries (POEs) and presenting at a POE without a visa or pre-authorized parole, and unable to meet exception<sup>10</sup></p>
<p><b>What is the legal standard applied during fear screening?</b></p>	<p>Significant possibility of being granted asylum, withholding of removal,<sup>11</sup> or CAT protection<sup>12</sup></p>	<p>“Asylum Officers 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.”<sup>13</sup></p>	<p>If no exception to STB restrictions, fear claim analyzed under new, heightened legal standard “Reasonable probability” of winning withholding or CAT. (Defined as “substantially more than a reasonable possibility, but somewhat less than more likely than not, that the” noncitizen would face persecution or torture.)<sup>14</sup></p>

<sup>7</sup> 8 CFR § 208.31.

<sup>8</sup> Note: on May 13, 2024, DHS published a proposed rule which would allow Asylum Officers to screen for certain criminal and security bars during border fear interviews. 89 Fed. Reg. 41347 (May 13, 2024). As of September 10, 2024 that rule has not been finalized.

<sup>9</sup> 8 CFR §§ 208.33(a)(1); 1208.33(a)(1).

<sup>10</sup> 8 CFR §§ 208.35(a)(1); 1208.35(a)(1).

<sup>11</sup> 8 CFR § 208.30(e)(2).

<sup>12</sup> 8 CFR § 208.30(e)(3).

<sup>13</sup> 8 CFR § 1208.33(b)(2)(i).

<sup>14</sup> 8 CFR § 208.35(b) et seq.; 8 CFR § 1208.35(b)(2).

<b>Exemptions/Rebuttals</b>			
<b>How are unaccompanied children<sup>15</sup> treated?</b>	Exempt from expedited removal <sup>16</sup>	Exception to CLP restrictions; <sup>17</sup> exempt from expedited removal <sup>18</sup>	Exempt from STB restrictions; <sup>19</sup> exempt from expedited removal <sup>20</sup>
<b>How are Mexican citizens treated?</b>	N/A not treated differently from other nationalities	Exempted from CLP restrictions <sup>21</sup>	Subject to STB restrictions <sup>22</sup>
<b>What is the effect of applying for and being denied asylum in a third country on the merits?</b>	N/A no restriction on asylum eligibility at CFI	Exception to CLP restrictions <sup>23</sup>	No exception; subject to STB restrictions <sup>24</sup>
<b>What is the effect of entering with CBP One App appointment or other pre-scheduled CBP appointment?</b>	N/A no restriction on asylum eligibility at CFI	Exception to CLP restrictions <sup>25</sup>	Exception to STB restrictions <sup>26</sup>
<b>What is the effect of entering with pre-approved parole?</b>	N/A no restriction on asylum eligibility at CFI	Exception to CLP restrictions <sup>27</sup>	May meet exception to STB restrictions <sup>28</sup>

<sup>15</sup> 6 USC §279(g)(2). For general information about right of unaccompanied children to pursue asylum affirmatively, *see* NIPNLG, *J.O.P. v DHS* webpage (last updated Sep. 5, 2024) <https://nipnlg.org/work/litigation/jop-v-dhs>.

<sup>16</sup> 8 USC §1232.

<sup>17</sup> 8 CFR §§ 208.33(a)(2)(ii); 1208.33(a)(2)(ii).

<sup>18</sup> 8 USC §1232.

<sup>19</sup> Presidential Proclamation on Securing the Border § 3(b)(iii) (June 4, 2024) <https://www.whitehouse.gov/briefing-room/presidential-actions/2024/06/04/a-proclamation-on-securing-the-border/>.

<sup>20</sup> 8 USC §1232.

<sup>21</sup> 8 CFR §§ 208.33(a)(1)(iii); 1208.33(a)(1)(iii). CLP only applies to those who travel through a third country en route to the United States, so the CLP does not apply to Mexicans seeking asylum at the U.S.-Mexican border.

<sup>22</sup> 89 Fed Reg. 48710, 48738.

<sup>23</sup> 8 CFR §§ 208.33(a)(2)(ii)(C); 1208.33(a)(2)(ii)(C).

<sup>24</sup> 89 Fed Reg. 48710, 48739.

<sup>25</sup> 8 CFR §§ 208.33(a)(2)(ii)(B); 1208.33(a)(2)(ii)(B).

<sup>26</sup> Presidential Proclamation on Securing the Border § 3(b)(v)(D) (June 4, 2024) <https://www.whitehouse.gov/briefing-room/presidential-actions/2024/06/04/a-proclamation-on-securing-the-border/>.

<sup>27</sup> 8 CFR §§ 208.33(a)(2)(ii)(A); 1208.33(a)(2)(ii)(A).

<sup>28</sup> Presidential Proclamation on Securing the Border § 3(b)(v)(D) (June 4, 2024) <https://www.whitehouse.gov/briefing-room/presidential-actions/2024/06/04/a-proclamation-on-securing-the-border/>.

<b>What is the effect of presenting at Port of Entry and proving by a preponderance of the evidence the applicant’s inability to use CBP One because of language, literacy, or technology barriers?</b>	N/A no restriction on asylum eligibility at CFI	Exception to CLP restrictions <sup>29</sup>	No exception; subject to STB restrictions <sup>30</sup>
<b>What is the effect of facing an acute medical emergency that necessitated border crossing?</b>	N/A no restriction on asylum eligibility at CFI	May rebut the presumption of asylum ineligibility <sup>31</sup>	May meet exception to STB restrictions <sup>32</sup>
<b>What is the effect of imminent and extreme threats, such as of rape, kidnapping, torture, or murder that necessitated border crossing?</b>	N/A no restriction on asylum eligibility at CFI	May rebut the presumption of asylum ineligibility <sup>33</sup>	May meet exception to STB restrictions <sup>34</sup>
<b>How are severe trafficking victims treated?<sup>35</sup></b>	N/A no restriction on asylum eligibility at CFI	May rebut the presumption of asylum ineligibility <sup>36</sup>	May meet exception to STB restrictions <sup>37</sup>
<b>How are other exceptionally compelling circumstances that are not delineated above treated?</b>	N/A no restriction on asylum eligibility at CFI	May rebut the presumption of asylum ineligibility <sup>38</sup>	May meet exception to STB restrictions <sup>39</sup>

<sup>29</sup> 8 CFR §§ 208.33(a)(2)(i)(B); 1208.33(a)(2)(i)(B).

<sup>30</sup> 89 Fed Reg. 48710, 48739.

<sup>31</sup> 8 CFR §§ 208.33(a)(3)(i)(A); 1208.33(a)(3)(i)(A).

<sup>32</sup> 8 CFR §§ 208.35(a)(2)(i)(A); 1208.35(a)(2)(i)(A).

<sup>33</sup> 8 CFR §§ 208.33(a)(3)(i)(B); 1208.33(a)(3)(i)(B).

<sup>34</sup> 8 CFR §§ 208.35(a)(2)(i)(B); 1208.35(a)(2)(i)(B).

<sup>35</sup> This rebuttal ground does not require that the asylum seeker apply for a T visa or report activity to law enforcement, only that they have been the subject of sex or labor trafficking at some point—not only while they were waiting in Mexico, but at any point in the past.

<sup>36</sup> 8 CFR §§ 208.33(a)(3)(i)(C); 1208.33(a)(3)(i)(C).

<sup>37</sup> 8 CFR §§ 208.35(a)(2)(i)(C); 1208.35(a)(2)(i)(C).

<sup>38</sup> 8 CFR §§ 208.33(a)(3)(ii); 1208.33(a)(3)(ii).

<sup>39</sup> 8 CFR § 208.35(a)(2)(ii) (implied that since the three sections above “necessarily” establish compelling circumstances, that there are other compelling circumstances which could be established, but not explicitly stated).

<b>What is the special family processing during fear screening?</b>	N/A no restriction on asylum eligibility at CFI	If one member of family traveling together meets exception/rebuttal, entire family is screened using regular, “significant possibility” CFI fear standard <sup>40</sup>	If one member of family traveling together meets exception, entire family may be given an exception to STB restrictions <sup>41</sup>
<b>What is the asylum Officer screening process?</b>	N/A no restriction on asylum eligibility at CFI; noncitizens who express fear are given CFI	Screen for exemptions/rebuttals, if none then applicant must meet higher “reasonable possibility” standard; <sup>42</sup> if applicant meets either CFI or RFI standard, placed into 240 proceedings	Screen for exceptions, if none then applicant must meet newly created, higher “reasonable probability” standard; <sup>43</sup> if applicant meets applicable fear standard, placed in 240 proceedings or referred for asylum merits interview <sup>44</sup>
<b>How is IJ review triggered?</b>	Asylum Office asks if asylum seeker wants IJ review after negative CFI, and must complete form memorializing asylum seeker’s decision <sup>45</sup>	Applicant must request IJ review (asylum officer not required to ask and complete form) <sup>46</sup>	Applicant must request IJ review (asylum officer not required to ask and complete form) <sup>47</sup>

<sup>40</sup> 8 CFR §§ 208.33(a)(3)(i); 1208.33(a)(3)(i).

<sup>41</sup> 8 CFR §§ 208.35(a)(2)(i); 1208.35(a)(2)(i).

<sup>42</sup> 8 CFR §§ 208.33(b)(2)(ii); 1208.33(b)(2)(ii).

<sup>43</sup> 8 CFR §§ 208.35(b)(2)(i)-(iii); 1208.35(b)(4).

<sup>44</sup> 8 CFR § 208.35(b) et seq.

<sup>45</sup> 8 CFR § 208.30(g)(1).

<sup>46</sup> 8 CFR § 1208.33(b)(2)(v) (“Only if the alien requests such review by so indicating on the Record of Negative Fear shall the asylum officer serve the alien with a Notice of Referral to Immigration Judge.”) *See also* 8 CFR §1208.33(b)(1).

<sup>47</sup> 8 CFR § 208.35(b)(2)(iv).

<b>When can an asylum seeker file a Request for Reconsideration (RFR) of the denied CFI with the Asylum Office?</b>	No limitation on RFR until 5/31/22; <sup>48</sup> with implementation of Asylum Processing Rule, RFR time reduced to 7 days after affirmance of CFI denial, and only one RFR request <sup>49</sup>	Eliminated in cases where the rule applies, (e.g. no exception or rebuttal) otherwise subject to 7-day rule; USCIS retains ability to conduct sua sponte RFR but applicant cannot request it <sup>50</sup>	Eliminated in cases where the rule applies, (e.g. no exception or rebuttal) otherwise subject to 7-day rule; USCIS retains ability to conduct sua sponte RFR but applicant cannot request it <sup>51</sup>
<b>Changes to Immigration Court Merits Hearing</b>			
<b>How are the exceptions or rebuttals applied at merits hearings?</b>	N/A—manner of entry does not affect asylum eligibility	Any exception or rebuttal must be proven de novo before the IJ; <sup>52</sup> if AO found rule applied during CFI, applicant can still qualify for asylum if they can prove exception/rebuttal. Likewise, AO finding of exception/rebuttal is not binding on IJ	Any exemption must be proven de novo before the IJ; <sup>53</sup> if AO found rule applied during CFI, applicant can still qualify for asylum if they can prove exemption. Likewise, AO finding of exemption is not binding on IJ

<sup>48</sup> 8 CFR § 1208.30(g)(2)(iv)(A).

<sup>49</sup> 8 CFR § 208.30(g)(1)(i).

<sup>50</sup> 8 CFR § 208.33(b)(2)(v)(C). Note the specific application of the rule spelled out above is based on anecdotal information, and is not specified in the regulations themselves. Advocates to continue to request RFRs and in very limited circumstances USCIS may grant them, particularly if the request is not framed as an RFR, but rather as a request for a discretionary NTA or a request for a reinterview.

<sup>51</sup> 8 CFR § 208.35(b)(2)(v)(B). Note the specific application of the rule spelled out above is based on anecdotal information, and is not specified in the regulations themselves. Advocates to continue to request RFRs and in very limited circumstances USCIS may grant them, particularly if the request is not framed as an RFR, but rather as a request for a discretionary NTA or a request for a reinterview.

<sup>52</sup> 8 CFR §§ 208.33(a)(1); §1208.33(a)(1). The regulations only state the presumption against asylum ineligibility. DHS officials have stated on stakeholder calls that, as with any CFI determination, the asylum officer’s screening decision is not binding on the merits adjudicator.

<sup>53</sup> 8 CFR §§ 208.35(a)(2) et seq.; 1208.35(a)(2) et seq.

<p><b>What legal standard is applied at merits hearings if there is no exception/rebuttal for asylum ineligibility?</b></p>	<p>N/A—manner of entry does not affect asylum eligibility</p>	<p>If IJ finds no exception/rebuttal, applicant may only qualify for INA §241(b)(3) withholding of removal or CAT protection;<sup>54</sup> must meet higher “more likely than not” future fear/torture legal standard</p>	<p>If IJ finds no exception, applicant may only qualify for INA §241(b)(3) withholding of removal or CAT protection;<sup>55</sup> must meet higher “more likely than not” future fear/torture legal standard</p>
<p><b>What is the Family Unity provision and how does it affect asylum eligibility?</b></p>	<p>N/A—manner of entry does not affect asylum eligibility.</p> <p>No general provision that allows IJ to convert withholding/CAT grant to asylum grant based on family unity<sup>56</sup></p>	<p>If applicant wins withholding or CAT and has family member who would otherwise qualify for derivative asylum in the U.S. (who do not independently qualify for protection) or family members abroad<sup>57</sup> who would otherwise qualify for follow to join benefits, “the presumption shall be deemed rebutted as an exceptionally compelling circumstance” and the IJ will convert withholding/CAT grant to asylum<sup>58</sup></p>	<p>If applicant wins withholding or CAT and has family member who would otherwise qualify for derivative asylum in the U.S. (who do not independently qualify for protection) or family members abroad<sup>59</sup> who would otherwise qualify for follow to join benefits the noncitizen “shall be deemed to have established exceptionally compelling circumstances and the IJ will convert withholding/CAT grant to asylum<sup>60</sup></p>

<sup>54</sup> 8 CFR §§ 208.33(a)(1); 1208.33(a)(1); 1208.33 (b)(4).

<sup>55</sup> 8 CFR § 1208.35(a).

<sup>56</sup> Pursuant to 8 CFR § 1208.16(e), if an immigration judge grants withholding of removal but denies asylum solely as a matter of discretion and the asylum seeker has a spouse or minor child abroad who would be eligible to follow to join if the respondent had won asylum, then the immigration judge shall reconsider the discretionary denial of the asylum grant.

<sup>57</sup> Pursuant to 8 CFR § 208.21, an asylee’s spouse or child, who was under the age of 21 and unmarried at the time the I-589 was filed, is eligible for derivative or follow to join benefits.

<sup>58</sup> 8 CFR § 1208.33(c). Note: since this provision is specific to removal proceedings only, there is not a parallel citation in the DHS regulations found at 8 CFR § 208.33.

<sup>59</sup> Pursuant to 8 CFR § 208.21, an asylee’s spouse or child, who was under the age of 21 and unmarried at the time the I-589 was filed, is eligible for derivative or follow to join benefits.

<sup>60</sup> 8 CFR § 1208.35(c). Note that the STB adds a provision for Asylum Officers to consider this exception in Asylum Merits Interviews at 8 CFR § 208.35(c). Unlike the EOIR regulations which say an IJ “shall” consider exceptional circumstances to have been established, the parallel USCIS regulations says “the asylum officer *may* deem the principal applicant to have established exceptionally compelling circumstances.” [Emphasis added.]

<b>Changes to Affirmative Asylum</b>			
<b>How is the rule applied to asylum seekers who entered EWI undetected during the period of applicability and seek asylum affirmatively?</b>	N/A—manner of entry does not affect asylum eligibility	CLP fully applies at asylum interview; <sup>61</sup> applicant must prove exception/rebuttal or be referred to court to adjudicate withholding/CAT	STB fully applies at asylum interview; <sup>62</sup> applicant must prove exception/rebuttal or be referred to court to adjudicate withholding/CAT
<b>How is the rule applied to asylum seekers who are referred for Asylum Merits Interview (AMI) pursuant to Asylum Processing Rule<sup>63</sup></b>	N/A—manner of entry does not affect asylum eligibility	CLP fully applies at asylum interview; <sup>64</sup> applicant must prove exception/rebuttal or be referred to court to adjudicate withholding/CAT; only asylum seekers who rebut the presumption/meet an exception to CLP at the border may be referred for an AMI, others are placed into 240 proceedings before EOIR <sup>65</sup>	STB fully applies at asylum interview; regulations authorize asylum officers who hear AMIs to recommend approval of withholding/CAT prior to referral to IJ for final adjudication; <sup>66</sup> family unity provision for asylum seekers who meet the legal standard for withholding/CAT is discretionary, asylum officers may implement family unity provision at their discretion <sup>67</sup>

<sup>61</sup> 8 CFR §§ 208.33(c); 1208.33(d).

<sup>62</sup> 8 CFR §208.35(d); 8 CFR §1208.35(d).

<sup>63</sup> Beginning on May 31, 2022, USCIS began processing some asylum cases pursuant to its Asylum Processing Rule, which allows USCIS asylum officers to hear Asylum Merits Interviews after the noncitizen passes their credible fear interview. See National Immigration Project, *Biden's Asylum Processing Rule—Three Months in, What Practitioners Need to Know* (Sep. 7, 2022) <https://nippnl.org/work/resources/bidens-asylum-processing-rule-three-months-what-practitioners-need-know>. The rule was initially rolled out slowly and has been largely paused following the end of Title 42.

<sup>64</sup> 8 CFR §§1208.33(c-d).

<sup>65</sup> 89 Fed. Reg. 48733, “In the Circumvention of Lawful Pathways rule, the Departments included a family unity provision in EOIR’s regulations but not DHS’s. The Departments did so because they decided at that time that those who an AO concludes are subject to the Lawful Pathways presumption and who are not able to establish an exception or rebut the presumption during a credible fear screening may not be placed into the asylum merits interview process and may instead only be issued an NTA and placed into section 240 removal proceedings. See 88 FR at 11725–26; 88 FR at 31336–37.”

<sup>66</sup> 8 CFR §208.35(b)(2)(ii).

<sup>67</sup> 89 Fed. Reg. 48733, “the Departments have allowed for an asylum merits interview process at the discretion of USCIS that includes USCIS discretion to apply a parallel family unity provision. See 8 CFR 208.35(c).”