

## Circumvention of Lawful Pathways | 88 Fed Reg 31314 **Biden Asylum Ban**

Practice Advisory | July 18, 2023

### **BACKGROUND**

On May 16, 2023, the Biden administration published a final rule severely restricting access to asylum: [88 Federal Register 3134, \(May 16, 2023\)](#).

What's behind this rule?

- **Title 42:** In 2020, the Trump administration invoked Title 42 of the U.S. Code (Public Health and Welfare) to restrict entry to the U.S. for certain non-citizens. Title 42 effectively blocked thousands of people from seeking asylum and allowed U.S. officials to deny entry to migrants at the southern border under the auspices of preventing the spread of COVID-19. Despite condemning the policy as inhumane during his campaign, the Biden administration maintained Title 42 after taking office. When the Administration eventually decided to end the policy, the termination was tied up in litigation. Title 42 was ultimately terminated on May 11, 2023, when the administration lifted national COVID-19 emergencies.
- **Now what?** Citing the “anticipation of a potential surge of migration at the southwest border”<sup>1</sup> upon lifting Title 42, DHS and DOJ announced a new proposed rule they are calling “Circumvention of Lawful

---

<sup>1</sup> Circumvention of Lawful Pathways, 88 Fed. Reg. 31314, 31314 (May 16, 2023) (“The Department of Homeland Security (“DHS”) and the Department of Justice (“DOJ”) are issuing a final rule in anticipation of a potential surge of migration at the southwest border (“SWB”) of the United States following the termination of the Centers for Disease Control and Prevention’s (“CDC”) public health Order.”).

Pathways.” The proposed rule severely restricted the availability of asylum for those crossing the southern border between the U.S. and Mexico. The Biden Administration issued the Notice of Proposed Rulemaking with a 30-day comment period, due March 26, 2023. In an unprecedentedly short turnaround, they issued the final rule on May 10, 2023, despite receiving nearly 50,000 comments, which, by law, they needed to have thoughtfully considered before issuing a final rule.

The Biden Asylum Ban significantly restricts asylum access for those who do not follow “lawful pathways” when entering the United States at or through the southern border. **The Advocates reminds attorneys that seeking asylum is a lawful migration pathway** under U.S. and international law, despite the Administration’s characterization. This Ban leaves asylum law in flux and asylum seekers confused and at risk.

*Practice Note: Because so much is unknown about how this Ban will play out, The Advocates encourages practitioners to check in with us and stay alert to updates through email and our website. We anticipate litigation challenging the ban, implementation inconsistencies at the border and interior, and possible congressional action.*

## THE BAN

Biden’s Asylum Ban distinguishes between asylum seekers that enter at or through the southern border through “lawful pathways” and those who do not—disregarding that a lawful entry is *NOT* a prerequisite for asylum under international or U.S. law.

**Sound familiar?** The Biden Administration has aimed to distinguish the policy from its substantially similar counterpart announced under the Trump Administration (dubbed the “Asylum Ban” or “Transit Ban”) which was held to be illegal for violating the INA in 2019.<sup>2</sup> Given the similarities between the two bans, we hope for a similar outcome in litigation surrounding this ban.<sup>3</sup>

## LAWFUL PATHWAYS

The Ban requires most asylum seekers to enter the U.S. using a “lawful pathway” and creates penalties for those who do not. It applies to those

---

<sup>2</sup> O.A. v. Trump, 204 F. Supp. 3d 109, 117 (D.D.C. 2019) (“[A]liens have a statutory right to seek asylum regardless of whether they enter the United States at a designated port of entry, and defendants may not extinguish that statutory right by regulation or proclamation.”).

<sup>3</sup> See East Bay Covenant Sanctuary v. Biden, 4:18-cv-06810 (N.D. Ca.) (Amended Compl. Filed May 11, 2023); see also *Complaint – East Bay Sanctuary Covenant v. Biden*, ACLU, (May 11, 2023) <https://www.aclu.org/documents/complaint-east-bay-sanctuary-covenant-v-biden>. Additional litigation challenges are described on page 5 of this Practice Advisory under “What to Expect.”

entering at or through the Southern U.S. border or adjacent coastal borders between May 12, 2023, and May 11, 2025. It applies to those who Enter Without Inspection (EWI) *AND* those who present themselves at a Port of Entry (POE). Lawful pathways are specified as a visa, pre-approved parole, or pre-scheduled appointments using the CBP One App. The parole method of entry includes Uniting 4 Ukraine, Operation Allies Welcome (Afghan Parole), CHNV<sup>4</sup> (Process for Cubans, Haitians, Nicaraguans, and Venezuelans), Humanitarian Parole, or other government-designated parole, but does *NOT* include Parole from Immigration Detention or release from ICE/CBP custody – the parole must relate to entry, not to release from custody.<sup>5</sup>

The Biden Asylum Ban imposes two main restrictions:

1. **Entry Ban** for an applicant who enters without inspection (EWI) or presents at a Southern Border POE outside of a “lawful pathway” after May 11, 2023, who is not eligible for an exception or able to rebut the presumption of the ban’s application.
2. **Transit Ban** for an applicant who transited through any country that is party to the Refugee Convention/Protocol<sup>6</sup> and did not apply for and receive a final decision on immigration relief in that country and who is not eligible for an exception or able to rebut the presumption of the ban’s application.

## EXCEPTIONS

For any individual entering EWI or presenting at a Southern Border POE without a lawful pathway after May 11, 2023, there is a presumption that the Ban applies and the individual will not be allowed to seek asylum in the United States. Applicants may be able to rebut this presumption or show eligibility for one of the following exceptions:

- Families
- Unaccompanied Children
- Mexican nationals

---

<sup>4</sup> CHNV Humanitarian Parole is currently being challenged in the Southern District of Texas by 21 states (led by Texas) who allege the CHNV program did not go through required procedures and exceeds statutory parole authority. *Texas v. U.S. Dept. of Homeland Sec.*, 6:23-cv-00007, (S.D. Tex.) (Filed Jan. 24, 2023).

<sup>5</sup> 88 Fed. Reg. 3134 at 31349 (citing 8 CFR 235.3(b)(2)(iii), (b)(4)(ii)).

<sup>6</sup> Forty-four UN members are not party to these agreements including most countries in the Middle East region (Iran, Israel, Egypt, and Yemen **are** signatories) and several countries in South/Southeast Asia (India, Bangladesh, Pakistan, Sri Lanka, Malaysia, and Indonesia **are not** signatories). Guyana is the only non-signatory country in South America, and other non-signatory States include Eritrea, Libya, Mongolia, Cuba, and Uzbekistan. Maja Janmyr, *The 1951 Refugee Convention and Non-Signatory States: Charting a Research Agenda*, 33 Int'l J. Refugee L. 188, 189 (Dec. 3, 2021) <https://academic.oup.com/ijrl/article/33/2/188/6448830>.

- Someone with a final decision denying asylum or other protection<sup>7</sup> from a transit country
- Inability to access CBP One App\*

\* The CBP One App<sup>8</sup> inaccessibility exception is *NOT* available to those who enter EWI—an applicant **MUST** present at a POE and prove by a preponderance of the evidence that they were unable to use the App. Inaccessibility may include a language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacles. Applicants will need to provide documentation of the inaccessibility including, e.g., demonstrating an attempt to find someone to translate or assist in the instance of language barrier or illiteracy or evidence of ongoing technical failures. In the preamble of the rule, DHS indicates its presumption that individuals should be able to find someone in Mexico to assist them with the App if they cannot read or write in one of the App’s four available languages.<sup>9</sup> This assertion evinces the high burden to meet this exception.

## OVERCOMING THE PRESUMPTION

Applicants can also “Overcome the Presumption” of the Ban’s applicability for exceptionally compelling circumstances such as an acute medical emergency, imminent and extreme threats, a victim of severe forms of trafficking, or other non-delineated grounds. This bar is expected to be high

---

<sup>7</sup> The “other protection” category is vague and may be expansive, but we are unclear on its precise meaning. In the Asylum Ban itself and the CFR, the text refers to “seeking asylum or **other protection** in a country through which the alien traveled and received a final decision denying that application. A final decision includes any denial by a foreign government of the applicant’s claim for asylum or **other protection** through one or more of that government’s pathways for that claim. A final decision does not include a determination by a foreign government that the alien abandoned the claim.” (8 CFR 208.33(a)(2)(ii)(C)) (emphasis added). It seems “other protection” may extend to any type of governmental protection or immigration benefit but will likely require clarification as the Ban is adjudicated. It is also unclear whether an individual needs to apply in only one transit country, or in each country of transit on the way to the United States.

<sup>8</sup> Problems with the app have been extensively documented with migrants reporting connectivity issues, app crashes, and failure of the photo software to accept images of people of color, particularly Haitians and others of African descent. Joel Rose, *Migrants are Frustrated with the Border App, Even After Its Latest Overhaul*, NPR (May 12, 2023, 9:08 PM) <https://www.npr.org/2023/05/12/1175948642/migrants-are-frustrated-with-the-asylum-claim-app-even-after-the-latest-overhaul>; Government Documents Reveal Information about the Development of the CBP One App, Am. Imm. Council, (Feb. 28, 2023) <https://www.americanimmigrationcouncil.org/foia/government-documents-reveal-information-about-development-cbp-one-app> (“[R]eports have surfaced that people of color . . . particularly Haitian nationals, are having issues with submission of their photo.”); Kate Morrissey, *Asylum Seekers in Tijuana Are Scrambling Through Mobile App Error Messages for Few Appointments into the U.S.*, San Diego Union-Trib., (Jan. 22, 2023, 6:00 AM) [https://www.sandiegouniontribune.com/news/immigration/story/2023-01-22/cbp-one-app-asylum-tijuana?fbclid=IwAR2DumhqadYHUNf7CUE\\_LjUwU3rkZr\\_rwTQSD8Y-lyU29aaxlOgDbmvq4M](https://www.sandiegouniontribune.com/news/immigration/story/2023-01-22/cbp-one-app-asylum-tijuana?fbclid=IwAR2DumhqadYHUNf7CUE_LjUwU3rkZr_rwTQSD8Y-lyU29aaxlOgDbmvq4M).

<sup>9</sup> E.g., 88 Fed. Reg. 31314 at 31406 (“The Departments note, however, that individuals may seek assistance, including translation assistance, in using the app.”).

and fraught with the inconsistencies often employed by Customs and Border Protection (CBP) officials, exacerbated by the short turnaround and complexity of this new rule.

Asylum seekers who enter at the southern border after May 11, 2023, without a lawful pathway, who do not qualify for an exception and cannot overcome presumption, are barred from asylum. They remain eligible for Withholding of Removal and protection under the Convention Against Torture.

## IMPLEMENTATION

**At the border**, entrants who do not enter using a “lawful pathway” will be placed in expedited removal and, if they express a fear of return, will receive a two-part fear interview. The officer will first determine whether the entrant is subject to the Ban. Those who meet an exception or rebut the anti-asylum presumption will then receive a credible fear interview, at which they must show a “significant possibility” of establishing asylum eligibility.<sup>10</sup> Those who do not meet an exception or rebut the presumption will be barred from asylum and will instead be screened under the elevated “reasonable fear” standard. Anyone who passes either a credible or reasonable fear interview will be placed into INA § 240 removal proceedings and permitted to present their claim for protection.

**In Asylum Offices**, this implementation will affect everyone, even if the Ban does not apply to them. Asylum interviews are already on pause or are severely limited here in Minnesota, as asylum officials are sent to assist with adjudication at the border.

When filing for asylum in the wake of this Ban, an applicant must show their entry date to (1) meet the one-year filing deadline and (2) prove that the Ban does not apply (i.e., entry on or before May 11, 2023). The asylum office inquiry is also then a two-tier process of first determining whether, *AT THE TIME OF ENTRY*, the Ban applied, an exception was available, or the applicant could rebut the anti-asylum presumption. Even if an asylum seeker was determined at the POE to be covered by an exception, they may need to prove again that the exception applies.<sup>11</sup> It is likely that those who cannot qualify for an exception or rebut the presumption will be referred to court since Asylum Officers cannot grant Withholding or CAT protection. If the Ban

---

<sup>10</sup> 88 Fed. Reg. 3134 at 31390.

<sup>11</sup> This stipulation is confusing as most people entering at POE's receive Notices to Appear in Immigration Court and would not go through the Asylum Office, but despite the rarity of the circumstance, it seems to have been contemplated in the promulgation of the rule.

does not apply, the applicant proceeds to an interview on the merits of their asylum claim.

**In the Immigration Court**, anyone who entered between May 12, 2023, and May 11, 2025, will have to address the applicability of the Ban before the immigration judge at their merits hearing, even if they were found to have met an exception or rebutted the presumption at the border. The respondent must show their entry date to (1) meet the one-year filing deadline and (2) prove that the Ban does not apply (i.e., entry on or before May 11, 2023). The inquiry in the asylum office is also a two-tier process of first determining if, **at the time of entry**, the Ban applied, an exception was available, or the applicant could rebut the anti-asylum presumption. Any entry in the 2023-2025 window triggers a court inquiry into the Ban. This review is supposedly conducted de novo, but Judges are encouraged to reach the same decision as the Asylum Officer.

The respondent will then proceed to a merits hearing, either for asylum if the Ban does not apply, or for Withholding of Removal or protection under the Convention Against Torture if it does. Because the asylum seekers are placed in INA § 240 proceedings, they are not foreclosed from pursuing other relief available to them (such as adjustment of status).

*PRACTICE NOTE: The regulation is illegal and its illegality may be worth including in your briefs and advocacy in front of asylum adjudicators. Nevertheless, practitioners should acknowledge the Ban and address its applicability to each client's case.*

## WHAT TO EXPECT

- Confusion and inconsistencies from CBP/USCIS/EOIR adjudication and implementation
- Delays in other processes: Asylum capacity surged to the border and officers relocated in response means a delay in asylum interviews and decisions here in Minnesota.
- Possible increased access to work permits: for those able to obtain parole as a lawful pathway, they will likely be eligible for work permits immediately and will not need to wait until they are eligible for c(8) work permits incident to the filing of their asylum application.
- Litigation
  - The ACLU, Center for Gender and Refugee Studies and National Immigrant Justice Center have filed two cases challenging the Ban:
    - [E. Bay Sanctuary Covenant v. Biden](#), 4:18-cv-06810, (N.D. Cal.) (filed to challenge the Trump Administration's Asylum

Ban and then amended to include claims against the Biden Asylum Ban for its requirements that asylum seekers enter at POE's and apply for asylum in transit countries). Currently there is no injunction as a motion for summary judgement was filed on June 5, 2023, with a decision expected in mid-July.

- [M.A. v Mayorkas](#), 1:23-cv-01843, (D.D.C.) (complementing the ongoing *East Bay Case* and challenging the expedited removal process and higher standard applied during the initial interview).
- Anti-immigrant groups have also challenged the legality of Biden's policies on various grounds, including exceeding parole authority and encouraging "illegal" immigration which could restrict the availability of "lawful pathways" of entry
  - [State of Texas v. Dep't of Homeland Security](#), 6:23-cv-7, (S. Dist. Tx.) (challenging CHNV).
  - [State of Florida v. Mayorkas](#), 3:23cv9962-TKW-ZCB (N. Dist. Fl.) (challenging parole policies).
  - [State of Texas v. Mayorkas](#), No. 2:23-cv-00024 (W. Dist. Tx.) (challenging legality of CBP One app for encouraging "illegal immigration").
  - [Indiana v. Mayorkas](#), No. 23-cv-00106, (D.N.D) (challenging the Biden Asylum Ban for making it "easier to illegally immigrate into the United States" and referring to the ban as the "Circumvention Rule").
- The District Court of the District of Columbia previously enjoined USCIS from allowing CBP officers to conduct CFIs, holding asylum seekers would face irreparable harm because of CBP officers' lack of training. [A.B.-B. v. Morgan](#), 548 F. Supp. 3d 209 (D.D.C. 2020).
- Practitioners should be aware of the potential for future filings and monitor developments in the current litigation.
- Ongoing congressional efforts to entrench asylum bars have been rebuffed but the attempts continue
  - If passed, Sen. Cornyn's Congressional Review Act filing would use nuanced power in Congress to issue a joint resolution that overrules the regulation. Once a rule is repealed, the CRA prohibits reissuing any "substantially similar" rule which could potentially bar any future regulations on asylum or changes to the pre-May 2023 rules.

## **PRACTICE TIPS FOR ADVOCATES' PRO BONO ATTORNEYS:**

**Be thorough when gathering evidence about entry to the U.S.** Proof of your client's entry date and the applicable lawful pathway, exception, or



presumption rebuttal will be key to asylum office adjudications and court proceedings, even if they already proved it at the border. FOIA requests to CBP may reveal helpful information and there may be litigation options for those improperly processed by CBP. Ask about other attempts to enter the U.S. or obtain lawful pathways (such as failed attempts to use the CBP One App) if a client entered EWI and look for medical issues, trafficking, or other exceptional circumstances. Investigate and save this evidence as quickly as possible, as gathering it will become increasingly difficult over time.

**Investigate the full journey** from the client's country of origin or last permanent residence. Document attempts to apply for asylum in another country, if any, as well as why they could not (e.g., not safe for them in that country either). Identify potential factors that would meet the acute medical need, human trafficking or other serious harms exceptions.

**Ask about the family.** Only one person in a family needs to meet an exception or overcome the presumption for the entire family to avoid the Asylum Ban's application.<sup>12</sup> Clients who otherwise would be subject to the Ban may be able to rebut the presumption if they can show exceptionally compelling circumstances to pursue I-730 (or pursue derivative applications) based on family unity issues. That is, because status cannot be derived from a grant of Withholding of Removal or Protection under CAT, the immigration judge may find that your client met an exceptionally compelling circumstance if you can show that, but for the Ban, your client would be granted asylum and would be able to petition for family members as well.

**Screen for other relief.** Don't forget to look for possible T visa cases for clients who were trafficked into or within the U.S., as well as clients who have been victims of serious crimes that may qualify for U visas. Check for parole and whether clients may be eligible for work permits outside of their asylum application.

**Prepare for confusion and inconsistencies.** This ban is illegal and will continue to cause confusion as it is applied and adjudicated, requiring practitioners to navigate the current system and prepare for future changes. Practitioners should monitor litigation for ongoing developments and look for updates from AHR. AHR will be counseling clients on whether it is beneficial to apply for asylum in affirmative proceedings if they are likely to be subject to the Ban. Document as much evidence as possible for future litigation that may arise for those who were improperly processed by CBP, unable to use CBP One, barred or expelled under the new rule, etc. (particularly if the rule is held to be illegal). Your client may qualify later even if

---

<sup>12</sup> 8 CFR §§ 208.33(a)(2)(ii); 1208.33(a)(2)(ii).



they currently don't qualify for asylum, so build your case. You should also build your CAT and withholding claims while continuing to note the illegality of the Asylum Ban in filings.

### **ADDITIONAL RESOURCES**

- Final Reg: <https://www.govinfo.gov/content/pkg/FR-2023-05-16/pdf/2023-10146.pdf>
- AIC Process Steps: <https://immigrationimpact.com/2023/05/11/15-steps-how-to-seek-asylum/>
- NIC Q&A: <https://immigrationforum.org/article/qa-what-to-know-about-the-biden-administrations-new-asylum-restrictions/>
- Rapid Analysis from WWD: <https://docs.google.com/document/d/18ZVKziohm1aFYCcalvsvCcVUZkJI19eyj4FkR-iq0rs/edit>
- NLG National Immigration Project Practice Advisory: [https://nipnl.org/sites/default/files/2023-05/2023\\_26May-Asylum-Ban-PA.pdf](https://nipnl.org/sites/default/files/2023-05/2023_26May-Asylum-Ban-PA.pdf)
- The Advocates for Human Rights Comment in Opposition to the Proposed Rule (March 2023): <https://www.regulations.gov/comment/USCIS-2022-0016-12319>

As the implications of this decision continue to unfold, the following organizations will likely be developing in-depth practice advisories for practitioners:

- American Immigration Lawyers Association (member-only access): <http://www.aila.org/issues/issue.aspx?docid=35513>
- American Immigration Council: <https://www.americanimmigrationcouncil.org/>

Volunteer attorneys currently representing pro bono clients through the Advocates for Human Rights who are impacted by this issue should discuss the potential implications of this decision on their case. Please contact your consulting attorney or our staff for further information.

**Updated June 26, 2023**