Legal Sidebar

The Biden Administration's Final Rule on Arriving Aliens Seeking Asylum (Part One)

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The Department of Homeland Security (DHS) and Department of Justice (DOJ) issued a final rule in May 2023 that would, for at least a two-year period, make some aliens ineligible for asylum if they arrive at "the southwest land border or adjacent coastal borders" without valid entry documents after having traveled through another country. The rule was issued in anticipation of increased migration at the U.S. Southwest border following the termination of a public health order (known as the Title 42 order) issued in response to the COVID-19 pandemic. The promulgation of the rule has raised questions as to whether its asylum limitations violate international treaties and federal statutory requirements. In one case, plaintiffs argued that the 2023 rule resembles rules issued by DOJ and DHS during the Trump Administration that were successfully challenged in courts and blocked from implementation. The agencies have argued that there are important distinctions between the rules that place the 2023 rule on stronger legal footing. In the ongoing litigation, a federal district court vacated the rule, determining that it violated the Administrative Procedure Act. The Ninth Circuit stayed that decision pending adjudication of the government's appeal. As a result, the rule remains in effect. This Legal Sidebar, which examines the statutory framework governing individuals arriving at the border seeking asylum, as well as the final rule and prior executive branch policies restricting asylum access, is the first in a two-part series discussing the 2023 rule. The second Sidebar, focused on the rule's legal considerations, pending litigation, and options for Congress, is available here.

Background

Statutory Framework Governing Arriving Aliens Seeking Asylum

Under 8 U.S.C. § 1225(b)(1), aliens arriving at designated ports of entry, or who recently entered the United States between ports of entry, without valid documents are subject to expedited removal. However, if an alien placed in expedited removal proceedings indicates either an intent to seek asylum or a fear of returning to a particular country, the alien is referred to an asylum officer for a "credible fear" interview. This initial interview is not intended to fully assess the alien's claims, but to determine whether there is a "significant possibility" the alien could establish eligibility for one of three forms of humanitarian protection: asylum, withholding of removal, or protection under the Convention Against Torture (CAT).

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Executive Policies That Impact Asylum Seekers at the Borders

Over the years, executive branch officials have taken actions that made it more difficult for certain arriving aliens to seek asylum in the United States. For instance, under a long-standing 2002 U.S.-Canada agreement and its implementing rule, non-Canadian nationals arriving at U.S. land ports of entry from Canada (or who are in transit during removal from Canada) may not pursue asylum and related protections in the United States (subject to certain exceptions). Instead, they must be returned to Canada to seek protection there. (The U.S.-Canada agreement similarly applies to non-U.S. national asylum seekers arriving in Canada from the United States.) In 2022, the United States and Canada agreed to supplement the agreement by extending its provisions to cover aliens entering either country between ports of entry on the northern border (including certain bodies of water) who present their claims within 14 days after such crossing. DHS and DOJ issued a final rule to implement this agreement in 2023.

In 2018 and 2019, during the Trump Administration, DHS and DOJ promulgated rules (now rescinded) that made aliens arriving at the Southwest border, who either entered the United States unlawfully between ports of entry or failed to seek protection in other countries through which they traveled, ineligible for asylum. As discussed in other CRS products, these rules faced legal challenges and were blocked from implementation. Additionally, in 2019, DHS entered into "asylum cooperative agreements" with Guatemala, Honduras, and El Salvador that allowed DHS to transfer certain arriving asylum seekers to those countries for consideration of their claims (of these, only the Guatemala agreement was actually implemented). The Biden Administration later suspended the agreements in 2021. In March 2020, in response to the COVD-19 pandemic, the Trump Administration, invoking authority under 42 U.S.C. § 265, directed immigration officials to expel aliens who lacked visas or other "proper travel documents," or who sought to enter the United States unlawfully between ports of entry, to Mexico or their countries of origin. This policy, sometimes called the Title 42 order, was renewed periodically by both the Trump and Biden Administrations, but the Biden Administration ended the Title 42 order on May 11, 2023.

Upon announcing the end of the Title 42 order, the Biden Administration announced new border policies designed to "reduce irregular migration" and create "safe, orderly, and humane" processes at the border. For example, DHS established processes for eligible Cuban, Haitian, Nicaraguan, and Venezuelan ("CHNV") nationals to enter and remain in the United States for up to two years through a grant of parole. To qualify under the CHNV parole program, an alien must have a qualifying sponsor in the United States, undergo security and health screening, and meet other eligibility criteria. The number of individuals the United States will accept under the CHNV is 30,000 per month.

DHS also announced greater and "enhanced" use of expedited removal for inadmissible aliens at the Southwest border. For example, after the termination of the Title 42 order, DHS indicated that, for single adults placed in expedited removal proceedings, credible fear interviews will take place while the alien is in DHS custody. The agency also stated that it is "increasing its holding capacity," scheduling credible fear interviews within 24 hours, and increasing the number of removal flights per week.

Additionally, DHS announced a "new mechanism" in which aliens of any nationality who are located in Central or Northern Mexico, and who are seeking to enter the United States, may schedule appointments for inspection at U.S. ports of entry along the Southwest border using "CBP One," a mobile application. DHS further announced a proposed rule that would make some aliens who fail to utilize "established pathways to lawful migration" and seek protection in a country through which they traveled ineligible for asylum. Following a notice-and-comment period that ended on March 27, 2023, DHS and DOJ, on May 10, 2023, finalized the rule, and it was effective as of May 11, 2023.

The Final Asylum Rule

Under the final rule, aliens entering the United States from Mexico at "the southwest land border or adjacent coastal borders" (described as "any coastal border at or near the U.S.-Mexico border") without valid documents after traveling through a country on the way to the United States (other than country of citizenship, nationality, or if stateless, last habitual residence) are subject to a "rebuttable presumption" that they are ineligible for asylum unless they (or a member of their family with whom they are traveling) meet one of the following exceptions:

1. they were authorized to travel to the United States under a DHS-approved parole process (e.g., the CHNV parole program);
2. they arrived for inspection at a port of entry at a prescheduled time and place through use of the CBP One App; or arrived at a port of entry without a prescheduled time and place, but can show that it was not possible to access or use the app due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle; or
3. they applied for asylum or other protection in a country through which they had traveled and received a final decision denying that application (but not including a determination by the foreign government that the alien abandoned the claim).

The presumption is rebutted if an alien shows, by a preponderance of the evidence, that, at the time of entry, "exceptionally compelling circumstances" warrant an exception to the rule. These circumstances include cases where the alien (or a member of the alien's family with whom the alien is traveling) faced an "acute medical emergency"; faced an "imminent and extreme threat to life or safety" (e.g., imminent threat of rape, kidnapping, torture, or murder, but not general threats of violence); or met the definition of "victim of a severe form of trafficking in persons" as defined in federal regulations. The presumption is also rebutted in other exceptionally compelling circumstances as determined by immigration officials, including if an alien in removal proceedings has an accompanying (or following to join) spouse or child, and is eligible for withholding of removal or CAT protection and would be granted asylum but for the presumption. Additionally, unaccompanied children are not subject to the presumption.

The presumption applies to all asylum adjudications (affirmative and defensive) as well as during credible fear screenings. However, following credible fear interviews, aliens found ineligible for asylum due to the presumption may be able to pursue withholding of removal and CAT protection during their removal proceedings if they establish a "reasonable possibility" of persecution or torture if they are returned to their home country.

Applicability to Credible Fear Screenings

The rule requires asylum officers (AOs) conducting credible fear screenings to determine whether an asylum seeker is subject to the presumption. If the alien is either not subject to or has rebutted the presumption, the AO would follow the standard credible fear screening procedures already in place and consider the alien's potential eligibility for asylum, withholding of removal, and CAT protection under the "significant possibility" standard. Generally, if the AO concludes that an alien has a credible fear of persecution or torture, the alien is placed in formal removal proceedings before an immigration judge (IJ) and may apply for asylum, withholding of removal, or CAT protection in those proceedings.

If the alien is subject to the presumption of asylum ineligibility and fails to provide a sufficient rebuttal, the AO would issue a negative credible fear finding based on the alien's asylum ineligibility and then determine whether the alien has shown a "reasonable possibility" of persecution or torture (a higher standard than the "significant possibility" standard) in order to assess potential eligibility for withholding of removal and CAT protection.

If the alien shows a reasonable possibility of persecution or torture, the alien would be placed in formal removal proceedings before an IJ. During those proceedings, the alien would be able to apply for asylum, withholding of removal, and CAT protection, and the IJ would be able to review the applicability of the presumption to the alien's asylum application.

If the AO finds that the alien has not shown a reasonable possibility of persecution or torture, the alien is to have an opportunity to request an IJ's review of the AO's negative credible fear finding, including whether the alien is covered by or has rebutted the presumption. Depending on the outcome of the IJ's review, the case would either be returned to DHS for the alien's removal; or the alien might be transferred to formal removal proceedings for consideration of asylum, withholding, or CAT protection, including review of whether the alien is barred from asylum.

Scope and Duration

The rule's presumption of asylum ineligibility applies to aliens entering the United States, without authorization, from Mexico "at the southwest land border or adjacent coastal borders" (1) between May 11, 2023, and May 11, 2025; (2) subsequent to the termination of the Title 42 order; and (3) after travel through a country (other than country of citizenship, nationality, or if stateless, last habitual residence) that is a party to the 1951 U.N. Convention Relating to the Status of Refugees (Refugee Convention) or the 1967 United Nations Protocol Relating to the Status of Refugees (Refugee Protocol). DHS and DOJ have requested comments on whether, and the extent to which, the rule should also apply to aliens who arrive anywhere in the United States by sea.

After May 11, 2025, the rule is to continue to apply to covered aliens during their formal removal proceedings and in any subsequent asylum applications (but not applications filed after May 11, 2025, by covered aliens who entered the United States as minors and who apply for asylum as principal applicants). DHS and DOJ say they intend to review the rule before its scheduled termination date and decide whether to modify, extend, or maintain the scheduled sunset date.

Author Information

Hillel R. Smith
Legislative Attorney

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