AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Policy Brief: Analysis of Proclamation and Interim Final Rule on "Securing the Border"
June 5, 2024

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On June 4, 2024, President Biden signed "A Proclamation on Securing the Border," (Proclamation) and the Administration issued an Interim Final Rule, "Securing the Border" (IFR), relying in part on the authority in INA 212(f). Based on a review of the language of the Interim Final Rule, it is our judgment that this new policy will effectively bar access to asylum for nearly all people seeking protection at our border. The complex and extensive restrictions imposed by this policy constitute a severe erosion of due process and the asylum protections guaranteed by U.S. law. At the same time the federal government lacks the necessary resources to put in place effective screening procedures to ensure a fair and orderly process. Based on previous court rulings, this policy should be enjoined as a violation of the statutory right to seek asylum.

The Biden Administration faces an exceptionally challenging situation at the U.S. southern border driven by the unprecedented high levels of migration worldwide. That problem is compounded by the continued failure by Congress to reform immigration laws or to properly resource federal agencies to manage the border more effectively. In the face of congressional inaction, executive action is likely the only recourse. However, this proclamation will violate current law and fundamental principles of due process and will do little to solve the challenges we face at the southern border.

The border can be managed in an orderly, efficient, and fair manner. Effective migration management requires solutions that address not only the border but the entire immigration system. The Administration should continue developing legal pathways and coordinating with country governments to give people alternatives to journeying to the U.S. southern border. Congress should provide more visas for families and businesses to meet the country's needs. Finally, in absence of congressional action, the President should protect people who have been living in and contributing to the country for years but have no way to apply for legal status. They are integral to American communities and help the country thrive. See AILA's recommendations.

What the new border policy does:

- **Predicates access to asylum on border numbers.** This policy has a trigger, which means it goes into effect when there is a seven-consecutive calendar-day average of 2,500 encounters or more between ports of entry. It will continue until 14 calendar days after there is a seven consecutive calendar day average of less than 1,500 encounters between ports of entry.
    - The bar will be in effect most of the time, beginning immediately. Since February 2021, daily migrant encounters have exceeded these numbers every day. Historically, the threshold to restore access was met just 42 percent of the time.

- **Categorically excludes people apprehended between ports of entry from being eligible for asylum unless they qualify for narrow exceptions.**[1] They will only be able to apply for the more limited humanitarian protections described below.

- **Sets a new, higher legal standard known as reasonable probability** for people to qualify for the more limited legal protection: withholding of removal and Convention Against Torture (CAT).
    - Under this new standard, people will need to show almost the same level of proof at the preliminary screening stage as they would for a full hearing before an immigration judge. Congress intended the preliminary screening stage to be a lower legal standard. Now they will need to meet a high standard with far less time to prepare and without legal counsel.

- **People must affirmatively ask for protection by "manifesting" fear. Almost no one will get screened for protection under the manifest rule.** The Department of Homeland Security (DHS) will not affirmatively ask questions to screen people for persecution, torture or other vulnerabilities.
    - This rule ignores the research that has demonstrated that people do not get referred for credible fear screenings when DHS officers do not affirmatively ask about fear. The Center for Gender Refugee Studies interviewed 97 families deported during Title 42. Among those interviewed, not a single family was given a fear screening by DHS even though about three quarters expressed fear. Those families were erroneously returned to Mexico.
    - In the past, CBP personnel have been found to have falsified information and directly intimidated migrants to discourage them from seeking humanitarian protection. CBP prohibits immigration attorneys and monitoring organizations from entering CBP custody thus shielding this process from public scrutiny.
    - The IFR states that "general notice" will be given of this option. ICE has been instructed to post notice in ICE facilities. This is wholly inadequate as most migrants will not understand that they need to manifest a fear from notices posted on facility walls.

- **The rule provides a mere four hours for an asylum seeker to consult an attorney before the initial fear screening, effectively eliminating access to legal representation.**
    - To expect a person to be able to find and consult with an attorney within four hours is completely out of touch with the reality people face when they cross the border as well as the glaring gap in legal representation.
    - Currently, DHS provides 24 hours to consult with counsel which is completely insufficient given the extraordinary barriers this population faces: including detention in remote areas, restriction on in person consultations in CBP custody, and the impractically fast timeline.
    - Only one percent of people are represented by an attorney during their CFI process.[2]

- **The rule expands upon the May 2023 Circumvention of Lawful Pathways rule which severely compromises access to asylum.**

- In the first 5 months after CLP was implemented, only 13 percent of people were screened in and found eligible for asylum.[3] In other words, CLP eliminated the vast majority of people from consideration for asylum at the preliminary screening stage. By comparison, the CLP figure is far lower than the grant rate for asylum in full court before immigration judges. In fiscal year 2023, 55 percent of people who received a positive CFI and had their case adjudicated by the immigration court were granted asylum.[4] A preliminary screening should not impose a more stringent standard than the full merits standard applied in court.

- **The new rule incorporates some exceptions established in the CLP rule for people with vulnerabilities, but many individuals will not be able to qualify.** Those who are facing acute medical emergencies or threats to their lives will likely face logistical challenges in securing a CBP immigration personnel's approval if they meet an exception under the rule. Notably, there is not an exception for individuals who could not access the CBP One application due to language barriers or technical issues. Current guidance issued to CBP has not been made publicly available as part of the Administration's public statements or releases.

Background on the CLP rule

In May 2023, the administration issued the Circumvention of Lawful Pathways regulation (CLP), also known as the asylum transit ban. The CLP was enjoined by a federal court and is still being litigated before the 9th Circuit—during the appeal it remains in effect. The CLP created a rebuttable presumption of ineligibility for asylum based on how the noncitizen entered the United States and whether they applied for protection in transit. If the CLP is found to apply, they **are no longer eligible for asylum** and are only eligible for withholding of removal or CAT, which has a higher legal standard and does not allow for derivatives or a path to citizenship.

Related Resources

- Policy Brief: Presidential Authority to Block or Expel Migrants
- Policy Brief: Solutions for the Border and America's Immigration System

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[1] The new rule does not apply to these individuals: 1) Lawful permanent residents or other noncitizens with a valid visa; 2) Unaccompanied children; 3) People demonstrating exceptionally compelling circumstances, such as an acute medical emergency; imminent and extreme threat to life or safety (rape, kidnapping, torture, or murder); or a victim of a severe form of trafficking; 4) people who use the CBP One application at a port of entry. There is no exception for Mexican nationals or those who cannot access or use CBP One due to language or accessibility concerns.

[2] This number refers to data available to asylum merits interviews, which is the only data available on legal representations at the CFI stage.

[3] M. A. v. MAYORKAS, 1:23-cv-01843, (D.D.C. Oct 27, 2023) ECF No. 53, at 8-9. Total CFIs for this time period are 57,000. Of this number, 7,600 either rebutted the presumption or established an exception to the rule and established credible fear.

[4] Government numbers often factor in cases where no asylum application was ever filed (for example, if government notices were sent to an erroneous address and the noncitizen never received important information), the application was abandoned, not adjudicated, withdrawn, or administratively closed, or "other." Factoring in grants versus denials, the number is 55 percent. Executive Office for Immigration Review, "Adjudication Statistics: Asylum Decisions in Cases Originating with a Credible Fear Claim," Jan. 18, 2024, https://www.justice.gov/eoir/media/1344831/dl?inline.