

Joint Analysis of Biden Border Proclamation June 5, 2024

[Proclamation](#) | [IFR](#)

Key Take-Aways:

- The new policy will bar access to asylum for most people arriving between ports of entry when the number of apprehensions reaches a certain level. It imposes additional uncertainties and obstacles to asylum building upon existing restrictive policies already in place. The Rule flouts domestic asylum law and the United States' obligations under the Refugee Convention, and will face immediate legal challenge in the courts.
- Under the new policy, nearly everyone arriving at the southern border is deemed ineligible for asylum during periods of time when the Department of Homeland Security (DHS) has determined there to be an average of more than 2,500 people entering between ports of entry per day over a seven day period. As of June 5, 2024 12:05 am EDT, DHS has [already determined](#) this trigger to have been reached. There are minimal exceptions to this new asylum ban, including people with CBP One appointments (of which 1,400 are granted per day), unaccompanied children, trafficking victims, and people who face life threatening emergencies.
- When the new rule is in place—as it currently is—there will be extremely limited opportunities for people to seek screening for [lesser protections](#) known as “withholding of removal” or protection under the Convention Against Torture. Border officials will no longer ask arriving migrants if they are afraid to return to their country, meaning many people will be quickly deported despite their fear. Those who are determined to have expressed a fear will face newly heightened standards to access these limited protections which are far short of asylum, and do not provide a pathway to lawful residence or the ability to reunify with family members.
- The Biden administration is claiming as its legal basis for this new rule section 212(f) of the Immigration and Nationality Act (INA), the same provision used by former President Trump to enact the Muslim and African Bans and an asylum ban quite similar to this one that was found unlawful by federal courts.

Background

On June 4, 2024, the Biden Administration issued a [Presidential Proclamation](#) with immediate implementation on the border, putting historically restrictive measures in place that will bar access to asylum for most people who enter the United States between ports of entry at the southern border. The Proclamation is accompanied by an [Interim Final Rule](#) (IFR) published in the Federal Register that bypasses the normal notice and comment process for rulemaking by going into immediate effect. The ban went into effect at 12:01 am EDT on June 5, 2024. The new policy serves as an asylum entry ban, shutting off asylum eligibility arbitrarily for people arriving at the border during any period of time when there have been an average of more than 2,500 people encountered between ports of entry over a 7 day period. The ban will remain in place until 14 days after another 7 day period in which the average has fallen below 1,500.

The Proclamation and Rule rely for legal justification on sections 212(f) and 215(a) of the INA. The Rule, however, stands in clear violation of section 208 of the INA, the [federal law](#) that mandates that any person on U.S. soil be permitted to seek asylum regardless of their manner of entry. Section 212(f) has been used by several past presidents and was used by former President Trump when he attempted to enact a [similar ban](#) on asylum for people who sought to enter the United States without inspection, a move federal courts struck down as unlawful.

The rule adds new uncertainties and challenges to an already fraught experience for people arriving at the U.S. southern border to seek asylum. Since May 2023, people arriving at the border have been subject to the Biden administration's Circumvention of Lawful Pathways (CLP) rule (May 2023 asylum ban), which renders people ineligible for asylum (with few exceptions) if they did not secure an appointment on a phone app called CBP One. They are also rushed through fear screenings while in punitive conditions in Customs and Border Protection (CBP) custody, with nearly nonexistent access to legal representation. The Proclamation and the IFR are quite similar to those implemented under the Trump administration that were ruled unlawful by the federal courts.¹ In some key aspects that are outlined below, they are actually more restrictive in barring access to asylum.

The new border closure is already in place and likely to remain so indefinitely based on new “trigger” numbers.

The Proclamation and Rule took effect at 12:01 am EDT June 5, 2024, and the policy's restrictions are [already in place](#) per DHS. Specifically, this border policy is triggered by a 7 consecutive calendar day average of 2,500 encounters or more between ports of entry. The asylum ban will not be lifted until 14 calendar days after there is a 7 consecutive calendar day average of less than 1,500 encounters. This means that when the trigger has been met—as is currently the case—no one who arrives at the southern border is permitted to seek asylum unless they meet one of the few exceptions delineated in the Rule.

Since 2000, the daily average of people arriving at the border have surpassed 2,500 [37 percent of the time](#); and with the added requirement that the border suspension remains in effect until 14 days after a 7-straight-day average of less than 1,500 encounters, it is very unlikely that access to asylum between ports of entry will be restored for some time.

The new Rule ends access to asylum for most who arrive at the southern border during a period of closure, contrary to asylum law.

During a period of time when the trigger has been met (as is the case today), most people arriving at the southern border will be completely ineligible to seek asylum no matter the gravity of the harm they fled. This new border policy provides for only narrow exceptions or “exceptionally compelling circumstances,” including: people who use CBP One to enter at a port of entry, unaccompanied children, trafficking victims, and people facing imminent harm or death.

¹ [Proclamation 9822 of November 9, 2018](#) (“Addressing Mass Migration Through the Southern Border of the United States”) and accompanying [IFR](#) (“Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims”).

The Rule defines exceptionally compelling circumstances in the same manner it was defined by the Rule that implemented the Biden administration's first asylum ban, known formally as the CLP regulation. That definition includes acute medical emergencies, imminent and extreme threat to life or safety (kidnapping, torture, or murder), and being a victim of trafficking. These exceptions have been [narrowly](#) and rarely applied over the past year. According to DHS data, only 13 percent of people who had the first asylum ban applied to them were even considered for asylum and then passed the preliminary screening – that is far lower than the current rate at which asylum seekers are granted asylum after a full hearing before an immigration judge.

Unlike the prior Title 42 expulsions, those ordered removed under this new ban will be subject to at least a five-year bar to reentry and potential criminal prosecution – even though many will never even be screened for a fear of return to the countries they fled.

Implements a “shout test” requiring noncitizens to “manifest” a fear of removal, without being asked, in order to be referred for a credible fear interview.

During a period of border closure, there will still be a mechanism for individuals to seek screening for limited and temporary forms of protection from deportation known as “withholding of removal” and protection under the Convention Against Torture (CAT). However, the new Rule eliminates the existing obligation on DHS officials to ask questions of any encountered migrant about their fear of return and instead puts in place a deficient “shout test” as the only protection against *refoulement*. Under this test, people will only be screened for protection if they affirmatively request a fear screening or make physically apparent that they are afraid to return to their country of origin.

This test is an *additional* obstacle that makes it hard for someone seeking safety to even be screened for protection; it has nothing to do with the merit of the claims and will prevent people with strong claims from being identified. Research has [consistently demonstrated](#) that when “questions are not asked, people who express fear are not referred for credible fear screenings.” [Lessons](#) from Title 42 and the requirement that asylum seekers “manifest fear” demonstrate that asylum seekers are erroneously returned when required to use a “shout test” such as the one laid out in this new policy.

The new Rule raises the legal standard in initial screenings for people seeking asylum who are subject to the new closure or the existing asylum ban.

This Rule creates a new, higher initial screening standard of “reasonable **probability**” for migrants who are deemed ineligible for asylum, express a fear of return, and are considered for lesser forms of protection (withholding of removal and CAT protections). This new standard is higher than the current standard in regulations and the standard set by the existing asylum ban, and will be applied to people found ineligible for asylum under either the new closure or the existing asylum ban. The Rule defines reasonable probability as: “substantially more than a reasonable possibility, but somewhat less than more likely than not, that the” noncitizen would face persecution or torture. For context, the standard for withholding of removal, a form of

protection that is determined following a full court hearing, before an immigration judge, and with access to counsel, is “more likely than not.”

The current standard for asylum seekers who have the current asylum ban applied to them—similar to the standard for people subject to administrative removal or reinstatement of removal who express a fear—is a reasonable **possibility** of persecution or torture for the purposes of withholding of removal or CAT. Prior to May 2023 and for any individuals where the asylum ban did not apply, the legal standard was a significant possibility that the individual could establish an asylum claim.

This means that over the course of just the past year, the legal standard for asylum seekers at the southern border has become much more difficult for those fleeing harm to meet. Further, forcing asylum officers and immigration judges to apply three distinct legal standards based on manner of entry and application of conflicting asylum bans is likely to lead to legal errors and places further strains on an already overburdened system. Immigration advocates trying to explain what asylum seekers must prove during very short pre-interview consultations, will likely find it impossible to explain these complex rules and legal standards.

This Rule layers new asylum restrictions on the existing asylum ban announced last year, in addition to restrictive practices that force people through asylum screenings in CBP custody.

The May 2023 implementation of the Biden administration CLP rule, referred to as the “asylum ban,” restricted asylum eligibility at the southern border almost exclusively to those granted prior permission to come to the United States via CBP One. Only a few months later, the administration implemented a new version of another Trump-era policy that forces people seeking safety through rushed screening interviews [while in CBP custody](#), and with [extremely limited access](#) to legal advice or representation.

The May 2023 asylum ban remains in place even while the new border closure is layered on top of it. Although many people barred from asylum under the new rule would already be barred under the previous rule, there are some differences in the categories of people excepted and the procedural application of the two rules. The overlapping but contradictory application of the two rules will likely cause extreme confusion among adjudicators, counsel, and asylum seekers.

For instance, the May 2023 asylum ban provides an exception to the rule’s asylum ineligibility for people who transited through a third country en route to the United States, sought and were denied asylum in that third country. The new Rule does not provide this exception. Similarly, the May 2023 rule created an exception for people who attempt to seek asylum at a port of entry without a CBP One appointment because they cannot use the CBP One app scheduling system, such as due to illiteracy, a language barrier (as the CBP One app is only available in three languages), technical failures, or other grounds. This new rule contains no such exception and will disproportionately harm Indigenous people and other rare language speakers, along with people seeking asylum who are illiterate and/or have limited means to afford a smartphone.

There are additional key differences between the May 2023 asylum ban and the new Rule. The new Rule applies to people of all nationalities arriving at the southern border, including Mexican nationals who were excluded from the May 2023 asylum ban. Additionally, the new Rule has no temporal limitation, whereas the May 2023 asylum ban is limited in its application to people entering the United States between May 11, 2023 and May 11, 2025.

The legal basis for the new policy, Section 212(f) of the INA, cannot override asylum law.

The Presidential Proclamation invokes Section 212(f) of the Immigration and Nationality Act (INA), which provides authority to suspend the entry of migrants when the President finds their entry would be detrimental to the interests of the United States. However, section 208 of the INA (the federal asylum law) guarantees access to asylum for anyone physically present in the United States regardless of their manner of entry. Democratic and Republican presidents have applied 212(f) but typically in more selective and limited ways. President Trump invoked 212(f) to implement several restrictions on entries to the United States, including for the Muslim Ban, and to suspend unauthorized entries at the southern border. President Biden revoked both of these policies, and two federal courts found the first entry ban unlawful.

Turning away those seeking safety is not the answer.

This new Rule, like other enforcement-only policies and policies that push people across the border, will not effectively restore order at the border. Instead such policies have been shown to incentivize organized criminal networks and place migrants in grave harm while waiting for an elusive opportunity to seek safety. Policy [solutions](#) exist to address these challenges in a humane, orderly and rights-respecting manner; communities stand ready to work with the administration to begin to adopt them.

Contributing Organizations:

American Civil Liberties Union • American Immigration Lawyers Association • Human Rights First • National Immigrant Justice Center • National Immigration Project • Women's Refugee Commission