



Frequently Asked Questions: The Biden Administration's Interim Final Rule To Secure the Southern Border

July 2024

On June 3, 2024, President Biden issued a [Presidential Proclamation](#)¹ (“Proclamation”) under sections 212(f) and 215(a) of the Immigration and Nationality Act (INA) that imposes severe restrictions on the entry of noncitizens at the southern border. The Department of Homeland Security (DHS) and the Department of Justice (DOJ) subsequently issued a joint [interim final rule](#)² titled “Securing the Border” (“Rule”) that established limitations on asylum eligibility and significantly altered standards and procedures associated with the expedited removal process. Effective June 5, 2024, the Rule suspends the entry of noncitizens when there is a seven-consecutive calendar-day average of at least 2,500 encounters between ports of entry. Once the Rule is triggered, it will continue until 14 calendar-days after a seven-consecutive calendar-day average of fewer than 1,500 encounters. Notably, apprehensions during the Biden administration have never fallen below this level, so practically speaking, these heightened restrictions will likely remain in effect for the foreseeable future.

What does the Rule do?

The Proclamation and accompanying Rule restrict asylum eligibility for noncitizens who enter the United States outside of ports of entry along the southern border, including southern coastal borders. The Rule creates three key changes to the asylum process:

1. When the Rule is in effect, individuals who enter the United States irregularly along the southern border are ineligible for asylum unless they demonstrate by a preponderance of the evidence that “exceptionally compelling circumstances exist.”
2. DHS officers will no longer ask each noncitizen specific questions whether they have a fear of return and instead will provide general information about the asylum process. DHS will refer a noncitizen for a credible fear interview (CFI) only if the person affirmatively expresses (or “manifests”) a fear of return to their home country, i.e., passes the “shout test.” Thus, DHS will

¹ See President Joseph R. Biden, Proclamation 10773, “Securing the Border,” 89 Fed. Reg. 48487 (June 3, 2024) available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2024/06/04/a-proclamation-on-securing-the-border/>.

² See U.S. Department of Homeland Security; Executive Office for Immigration Review, “Securing the Border,” 89 Fed. Reg. 48710 (June 7, 2024); See also “Implementation Guidance for Noncitizens Described in Presidential Proclamation of June 3, 2024, ‘Securing the Border,’ and Interim Final Rule, ‘Securing the Border,’” ICE Memorandum Guidance Deputy Director and Senior Official Performing the Duties of Director, Patrick J. Lechleitner, June 4, 2024 (hereinafter “ICE Memorandum Guidance”), available at <https://www.aila.org/aila-files/388D788F-87D6-4933-8921-E9A7AB1F6670/24060504.pdf?1717612621>.

not affirmatively ask questions to screen people for fear of persecution, torture, or other vulnerabilities.

3. DHS will continue to screen noncitizens who do not qualify for an exception to the Rule but manage to “manifest” a fear of return for withholding of removal and Convention Against Torture (CAT). DHS, however, will apply a higher legal standard known as the “reasonable probability” standard. This new standard is higher than the “reasonable possibility” standard imposed by the 2023 [Circumvention of Lawful Pathways rule](#) (CLP). The Rule defines reasonable probability of persecution or torture as “substantially more than a reasonable possibility, but somewhat less than more likely than not.” Under this new standard, noncitizens must show almost the same level of proof at the preliminary screening stage as they would for a full hearing before an immigration judge.

Are there any blanket exceptions to the suspension and limitations on entry and asylum restrictions?

The Proclamation carves out blanket exceptions for certain individuals, as detailed below. These individuals are not included in the daily apprehension counts nor subject to the Rule’s asylum restrictions.

The Rule creates a blanket exception for noncitizens who use the U.S. Customs and Border Protection (CBP) mobile app, CBP One, to enter the United States at a port of entry. It is important to note, however, that while the CLP carves out an exception for people who are unable to access or use the CBP One app,³ the Rule does not.⁴ In addition, the Rule exempts U.S. nationals, lawful permanent residents, individuals with valid visas or other valid entry documents, and individuals who present themselves at a port of entry and are thereafter permitted to enter.⁵ The Rule also exempts unaccompanied children and persons determined to be victims of severe trafficking.⁶

Are there any exceptions specific to the Rule’s asylum restrictions if someone does not fall under the blanket exceptions?

In addition to the blanket exceptions outlined in the section above, individuals not specifically excepted from the Rule and irregularly cross the southern border are ineligible for asylum unless they can show that “exceptionally compelling circumstances exist.”⁷ An individual can demonstrate exceptionally compelling circumstances if they can prove that they or a family member with whom they are traveling

³ See U.S. Citizenship and Immigration Services, Department of Homeland Security; Executive Office for Immigration Review, Department of Justice, “Circumvention of Lawful Pathways,” 88 Fed. Reg. 31314, May 16, 2023, available at <https://www.federalregister.gov/documents/2023/05/16/2023-10146/circumvention-of-lawful-pathways>.

⁴ “Securing the Border,” 89 FR. 48710, 48732. (June 7, 2024).

⁵ See *id.*

⁶ *Id.*

⁷ See “Fact Sheet: Presidential Proclamation to Suspend and Limit Entry and Joint DHS-DOJ Interim Final Rule to Restrict Asylum During High Encounters at the Southern Border,” DHS (Jun. 4, 2024), available at <https://www.dhs.gov/news/2024/06/04/fact-sheet-dhs-continues-strengthen-border-security-reduce-irregular-migration-and>.

are facing an acute medical emergency or an imminent threat to life or safety or that they meet the definition of “victim of a severe form of trafficking in persons” as defined in 8 CFR § 214.11.⁸ Regarding the exception for persons who can demonstrate that they are victims of severe forms of trafficking, the DHS and DOJ acknowledged that trafficking victims are already included in the blanket exception in the Proclamation (and are therefore already exempt from the Rule’s restriction on asylum eligibility), but explained that they decided to retain “victims of severe form of trafficking in persons” as an exceptionally compelling circumstance to avoid confusion and ensure that the exceptions in the Rule mirror the rebuttal circumstances laid out in the CLP.⁹

How does the new rule interact with the Biden administration’s previous asylum rules?

The Rule expands upon the Biden administration’s May 2023 CLP rule¹⁰ and adds further restrictions and hurdles for immigrants to access asylum at the border. The CLP creates a rebuttable presumption of ineligibility for asylum based on how the noncitizen entered the United States and whether they applied for protection in a third country while in transit to the United States. If DHS decides the CLP rule applies to a noncitizen, they are presumptively ineligible for asylum but instead may be eligible for withholding of removal or relief under CAT, which has a higher legal standard and does not allow for derivatives or a pathway to citizenship. In July 2023, a federal judge for the Northern District of California vacated the CLP in *East Bay Sanctuary Covenant v. Biden*, No. 23-16032.¹¹ However, on appeal, the Ninth Circuit ordered that the CLP remain in effect while the appeal is heard. As a result, the CLP rule remains in place today.¹²

While the new Rule includes some exceptions established in the CLP for individuals with certain vulnerabilities, many individuals will still not qualify. The following are key questions highlighting comparisons between the two rules:¹³

- **To whom do both regulations apply?** The CLP is based on a duration of time applicable to noncitizens entering without inspection (EWI) on or after May 11, 2023, and before May 11, 2025, whereas the new Rule has a trigger based on the number of daily encounters.
- **What are the differences between the exceptions to the CLP vs. the new Rule?** While the CLP makes an exception for Mexican nationals and individuals who demonstrate an inability to access or use the CBP One app, the new Rule makes no such exceptions. Both expressly exclude lawful permanent residents, valid visa holders, and unaccompanied children. The CLP also creates an exception for individuals who sought and were denied asylum in a transient country,

⁸ *Id.*

⁹ “Securing the Border,” 89 FR 48710, 48733 n. 172 (June 2, 2024).

¹⁰ See “Fact Sheet: Circumvention of Lawful Pathways Final Rule,” DHS Fact Sheet, Released May 11, 2023, available at <https://www.dhs.gov/news/2023/05/11/fact-sheet-circumvention-lawful-pathways-final-rule>.

¹¹ *E. Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025 (N.D. Cal. 2023), appeal held in abeyance, 93 F.4th 1130 (9th Cir. 2024).

¹² *E. Bay Sanctuary Covenant v. Biden*, 93 F.4th 1130 (9th Cir. 2024).

¹³ See “Practice Alert: Changes to Asylum Law under ‘Securing the Border’ and the ‘Circumvention of Lawful Pathways’ Regulations,” AILA Practice Alert, Updated June 5, 2024, <https://www.aila.org/library/practice-alert-changes-to-asylum-law-under-securing-the-border-and-the-circumvention-of-lawful-pathways-regulations>.

whereas the new Rule adds an additional threshold exception for those who can demonstrate exceptionally compelling circumstances for entry.

- **Is there still a rebuttable presumption of asylum ineligibility?** While the CLP creates a rebuttable presumption of asylum ineligibility, albeit with a few narrow exceptions, the new Rule incorporates no rebuttable presumption. Instead, it expressly lists the exceptions in the rule.
- **What are the different legal standards for the CFI under each rule?** While the new Rule creates a new “reasonable probability” standard, the CLP applies a “reasonable *possibility*” standard, making the person only eligible for withholding or CAT.
- **Under which circumstances do the CLP and the new Rule apply?** The CLP applies during expedited removal proceedings and the adjudication of asylum applications filed affirmatively with the Asylum Office or filed in immigration court proceedings as a defense to removal. Asylum officers and Immigration Judges adjudicate the application of the CLP’s presumption of asylum ineligibility and exceptions. Once the Rule is triggered, it applies to noncitizens apprehended by DHS and those applying for asylum affirmatively. However, unlike the CLP, in effect CBP will apply the rule at the border to determine whether a noncitizen is exempt from the suspension of entry under an exceptional circumstance.
- **How does the Family Unity Provision apply under both rules?** The CLP created a family unity provision where if the principal asylum seeker is granted withholding of removal or CAT protection and their dependents (spouse or minor children) would have qualified for derivative asylum but for the application of the CLP, the principal asylum seeker and their family members can be granted asylum. Under this provision, the presumption against asylum is rebutted under the catch-all “exceptionally compelling circumstance” ground. Likewise, if the asylum seeker is granted withholding or CAT protection and would have qualified for asylum but for the rule, they can also rebut the presumption. In that situation, the immigration judge can grant asylum if the asylum seeker has dependent family members abroad who could enter the United States to follow to join the applicant as described in INA § 208(b)(3)(A) with an approved I-730. 8 CFR § 1208.33(c). The new Rule incorporates this provision from the CLP and applies it to both EOIR and DHS so that asylum officers can apply the family unity provision during an asylum merits interview.¹⁴

Recent statistics¹⁵ suggest that border apprehensions will frequently average at least 2,500 encounters between ports of entry over a seven-day period, thus triggering the new Rule. This means that, until at least May 11, 2025, when the CLP expires, both rules will most likely remain in place simultaneously. Even if the CLP does not apply to a noncitizen during this time, the new Rule will continue to apply

¹⁴ For more information on the Asylum Merits Interview, please refer to, “Asylum Merits Interview with USCIS: Processing After a Positive Credible Fear Determination,” USCIS, Last Reviewed/Updated May 31, 2022, available at <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/asylum-merits-interview-with-uscis-processing-after-a-positive-credible-fear-determination>.

¹⁵ See “Border Oversight, Monitoring Conduct and Accountability in U.S. Border Law Enforcement,” Washington Office on Latin America (WOLA), June 4, 2024, available at <https://borderoversight.org/2024/06/04/june-4-2024/>; <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

thereby imposing more stringent standards for asylum seekers to overcome to enter the United States and apply for asylum.

What will the Rule look like at the border?

Based on previous and current trends in border apprehensions, the reality is that the Rule's limited application during "emergency border circumstances" is neither limited nor restricted to an emergency. According to data collected by the Washington Office on Latin America, the Rule's "emergency border circumstances," once triggered, would have applied during 58 percent of the time so far in this century (172 of 296 months).¹⁶ Absent an influx of funding from Congress, which is unlikely to occur this year, the Biden administration will face challenges with existing infrastructure, resources, and personnel to carry out these actions universally across the entire southern border and maritime borders. For instance, advocates have seen in practice that DHS lacks sufficient resources to implement the processes outlined in the CLP rule effectively. Some people subject to the CLP are released into the United States and placed into INA § 240 removal proceedings without undergoing initial screening by an asylum officer as stipulated under the rule. Some people subject to the CLP are released into the United States and placed into INA § 240 removal proceedings without undergoing initial screening by an asylum officer as stipulated

Similar practices are foreseeable under the new Rule, given the lack of funding and resources. Several news outlets are reporting after interviewing migrants arriving at the border that many are unaware of the new rule or are receiving incorrect information from human traffickers and smugglers.¹⁷ For example, many asylum seekers to whom the Rule applies will not understand that they must affirmatively express a fear of returning to their home country to a DHS official to be screened for withholding and CAT protection. Otherwise, their arrest may result in their swift deportation to countries where they fear persecution and/or torture.

Immigration practitioners are also uncertain as to how the Rule will be implemented, both during processing at the border and during adjudication of asylum applications. For instance, although the Rule applies to noncitizens who enter the United States EWI and later seek asylum affirmatively, the asylum officer will be tasked with determining if the noncitizen entered the country while the rule was triggered. This determination can be difficult when there is often little proof of the EWI entry other than the noncitizen's testimony. Immigration practitioners must also carefully screen prospective asylum clients who entered EWI to determine if the Rule was triggered during their entry and if the CLP rule applies.

¹⁶ See "The Futility of 'Shutting Down Asylum' by Executive Action at the U.S.-Mexico Border," Adam Isacson, WOLA, June 4, 2024, available at <https://www.wola.org/analysis/futility-of-shutting-down-asylum-by-executive-action-us-mexico-border/>.

¹⁷ See "How the California border changed after Biden's order limiting asylum," Andrea Castillo, Los Angeles Times, July 3, 2024, available at <https://www.latimes.com/politics/story/2024-07-03/how-the-california-border-changed-after-bidens-order-limiting-asylum>.

Additionally, although DHS and DOJ assert that the implementation of the Rule should not result in family separation,¹⁸ advocates believe that separations will inevitably occur.¹⁹ For example, when the Biden administration exempted unaccompanied minors from Title 42 expulsions, and CBP officers had broad discretion to decide how to process any other individuals, CBP agents routinely expelled some members of a family group pursuant to Title 42 and released others into the United States or detained them in long-term ICE custody.²⁰

It is also unclear how DHS officers will determine which noncitizens are victims of a severe form of trafficking, which would qualify them for the blanket exception to the Rule. Many victims of trafficking, for multiple reasons and under varying circumstances, do not realize they are victims of trafficking until once inside the United States. Those who do realize they are victims might not notify DHS upon apprehension (which often results in further trauma). The Rule is unclear how DHS officers will properly detect trafficking victims or if such factors will be based on the same criteria as that of the rebuttal circumstances of the CLP. Under the CLP, individuals can rebut the presumption of asylum ineligibility if they demonstrate by a preponderance of the evidence that “exceptionally compelling circumstances” exist in their case because they are a victim of human trafficking.²¹ In practice, trafficking victims are unlikely to benefit from the exception to the suspension of entry and asylum restrictions if they must first indicate that they are trafficking victims and then prove it by a preponderance of the evidence.

Are there any current legal challenges to the rule?

On June 12, 2024, the American Civil Liberties Union (ACLU), along with several other immigrants’ rights organizations, filed a federal lawsuit in the U.S. District Court in Washington, D.C., against the Biden administration on behalf of two Texas-based organizations, Las Americas Immigrant Advocacy Center and the Refugee and Immigrant Center for Education and Legal Services.²² The lawsuit alleges that the Rule and accompanying Implementation Guidance (“Guidance”)²³ violate the INA because they are inconsistent with INA § 208(a)(1), which permits migrants to apply for asylum “whether or not” they enter at a port of entry. Thus, the plain statutory text precludes the President and the Executive Branch from barring noncitizens from asylum based on their manner of entry into the United States.

The lawsuit also alleges that the Rule imposes new, unlawful restrictions governing how arriving noncitizens are screened. Specifically, it argues that the Rule’s implementation of a higher legal standard of “reasonable probability” to qualify for withholding or CAT will effectively lead to the

¹⁸ “Securing the Border,” 89 FR. 48710, 48733. (June 7, 2024).

¹⁹ See “Deportations under Biden’s asylum ban reach 500 a day in Arizona,” Associated Press, June 14, 2024, available at <https://www.12news.com/article/news/regional/the-border/some-mexican-shelters-see-crowding-south-of-the-border-bidens-asylum-ban-takes-hold/75-aeaeb110-1394-4fa1-b47c-1bd433599bbd>.

²⁰ See “Cruel Indifference: Family Separation at the U.S.-Mexico Border Before and After Zero Tolerance,” University of California, Los Angeles Immigrants’ Rights Policy Clinic (June 2024), available at https://law.ucla.edu/sites/default/files/PDFs/Center_for_Immigration_Law_and_Policy/Cruel_Indifference.pdf

²¹ See 8 CFR 208.33(a)(3)(i)(A)-(C), (ii).

²² See *Las Americas Immigrant Advocacy Center v. U.S. Department of Homeland Security*, 1:24-cv-01702, (D.D.C.), available at <https://assets.aclu.org/live/uploads/2024/06/2024.06.12.0001-COMPLAINT.pdf>. Please visit the ACLU’s website to review the status of the litigation and sign up to receive email notifications:

<https://www.aclu.org/cases/las-americas-immigrant-advocacy-center-v-u-s-department-of-homeland-security>.

²³ See *supra* ICE Memorandum Guidance, available at <https://www.aila.org/aila-files/388D788F-87D6-4933-8921-E9A7AB1F6670/24060504.pdf?1717612621>.

return of many victims of torture and persecution to dangerous conditions and runs counter to Congress's intent for a lower legal threshold at the preliminary screening stage.

Lastly, the lawsuit alleges that both the Rule and Guidance are contrary to the law under the Administrative Procedure Act (APA). First, the lawsuit alleges the Attorney General and Secretary of Homeland Security failed to publish the Rule and Guidance 30 days before their effective date. 5 USC § 553(d). Further, by allowing a mere four hours for an asylum seeker to consult an attorney before the initial fear screening, the implementing Guidance violates the asylum statute and implementing regulations that require meaningful access to a consultation and time to prepare for the credible fear interview. INA §235(b)(1)(B)(iv); 8 C.F.R. §235.3(b)(4)(i). Thus, the lawsuit alleges that the Guidance violates the APA's mandate that courts "shall . . . hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 USC § 706(2)(A).

What can we expect from future litigation against the rule?

The ACLU lawsuit seeks complete vacatur of the Rule and Guidance and a declaratory judgment finding the Rule and Guidance contrary to law, arbitrary, capricious, and procedurally invalid. While the lawsuit does not seek an emergency injunction at this point, it is the first legal test of the legality of the Biden administration's sweeping attempts to limit the number of asylum seekers crossing the southern border.

Several immigrant rights groups and organizations, including [CLINIC](#), have submitted comments in response to the new Rule requesting the DHS and DOJ to publish a notice in the Federal Register withdrawing the Rule. CLINIC argued that placing more asylum restrictions on individuals fleeing their home countries is not a long-term solution that will halt irregular crossings but will only contribute to the chaos and confusion at the border.