

Foreword to the Twenty-Fourth Edition

Asylum Law—Continuing Assault on Rights

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Introduction

Immigration continues to be a hot button issue in this election year, and asylum seekers are increasingly being punished in an effort to combat the border surge narrative.¹ Despite the initial promise of the Biden Administration to restore faith in the asylum system,² the administration has now embraced a “carrot and stick” approach to asylum, attempting to ease entry for some noncitizens while punishing those who do not (or cannot) enter under the recently created lawful pathways.³ At the same time that the administration has taken new measures to “close the border” and speed up some immigration court cases, hundreds of thousands of asylum applications languish in yearslong backlogs, both with U.S. Citizenship and Immigration Services (USCIS)⁴ and with the immigration courts, also known as the Executive Office for Immigration Review (EOIR).⁵

End of Title 42 and Implementation of “Circumvention of Lawful Pathways” Rule

At the time when the Biden Administration took office, there was an order in place largely closing the border to those who entered the United States unlawfully. Purportedly in response to the COVID-19 public health emergency, the Trump Administration began expelling asylum seekers at the border in March 2020 pursuant to an obscure public health law known

¹ Cullen, “Both Democrats and Republicans Embrace Border Politics,” *The New York Times*, June 4, 2024, available at <https://www.nytimes.com/2024/06/04/briefing/arizona-biden-border-politics-india-election.html>.

² White House, Exec. Order No. 14012, “Executive Order on Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans” (Feb. 2, 2021), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-restoring-faith-in-our-legal-immigration-systems-and-strengthening-integration-and-inclusion-efforts-for-new-americans/>.

³ Chishti et al., “Biden at the Three-Year Mark: The Most Active Immigration Presidency Yet Is Mired in Border Crisis Narrative, Migration Policy Institute” (Jan. 19, 2024), available at <https://www.migrationpolicy.org/article/biden-three-immigration-record>.

⁴ “At the end of fiscal year 2023, USCIS had more than 1 million asylum cases pending determination.” U.S. Office of the Inspector General, “USCIS Faces Challenges Meeting Statutory Timelines and Reducing Its Backlog of Affirmative Asylum Claims,” at 1 (July 3, 2024), available at <https://www.oig.dhs.gov/sites/default/files/assets/2024-07/OIG-24-36-Jul24.pdf>.

⁵ The immigration court asylum backlog was also over 1.1 million by the end of December 2023. Syracuse University, TRAC, “Immigration Court Asylum Backlog” (through Dec. 2023), available at <https://trac.syr.edu/phptools/immigration/asylumbl/>.

as Title 42.⁶ Under Title 42, noncitizens apprehended near the border were fingerprinted and then quickly “expelled” to Mexico without the usual bars on return that apply to noncitizens ordered removed by immigration judges or by the Department of Homeland Security (DHS). The Biden Administration left the measure in place until May 11, 2023, when it finally declared an end to the COVID-19 public health emergency.⁷ With the impending termination of Title 42 expulsions, the administration issued regulations, effective May 11, 2023, titled the “Circumvention of Lawful Pathways” (CLP) rule. The regulations are designed to incentivize asylum seekers to use “lawful pathways” to enter the United States while simultaneously imposing “consequences” on those who seek entry at a port of entry without proper documents or who cross the border unlawfully.⁸

Critics have likened the new rule to the asylum bans implemented by the Trump Administration, which were found unlawful by federal courts.⁹ The CLP rule, often referred to as the “asylum ban,” has been in effect for over a year and, as discussed below, has made it substantially more difficult for asylum seekers to pass border fear-based interviews and to prevail at merits hearings. The asylum ban is currently being litigated by asylum rights groups who won before the district court, but the appeal has been placed in abeyance pending settlement negotiations.¹⁰

Asylum Ban: “Lawful Pathways”

Along with the CLP rule, DHS established two new “lawful pathways” which exempt asylum seekers from the rule. The first is an application process for citizens of Cuba, Haiti, Nicaragua, and Venezuela (CHNV) to seek humanitarian parole into the United States from abroad. To qualify for CHNV parole, the noncitizen must (1) be a citizen of one of these four countries, (2) be outside the United States (and not have crossed unlawfully into Mexico after the date when the process was announced for each country), (3) have a valid passport, and (4) have a sponsor lawfully present in the United States who completes Form I-134A, pledging financial support.¹¹ Under this program, the United States may admit up to 30,000 individuals total from these countries per month; however, by May 2023, there were already 1.5 million applicants.¹² In addition to the high demand for parole in the program, many would-be asylum seekers do not have sponsors in the United States¹³ or the money to obtain a passport or airfare to travel here. Furthermore, for asylum seekers who have expressed anti-government opinions in dictatorial regimes, seeking a passport from the home country’s

⁶ American Immigration Council, “A Guide to Title 42 Expulsions at the Border” (May 2022), available at https://www.americanimmigrationcouncil.org/sites/default/files/research/title_42_expulsions_at_the_border.pdf.

⁷ Department of Health and Human Services, “Fact Sheet: End of the COVID-19 Public Health Emergency” (May 9, 2023), available at <https://www.hhs.gov/about/news/2023/05/09/fact-sheet-end-of-the-covid-19-public-health-emergency.html>.

⁸ 88 Fed. Reg. 31314 (May 16, 2023).

⁹ Human Rights First, “Refugee Protection Travesty, Biden Asylum Ban Endangers and Punishes At-Risk Asylum Seekers” (July 12, 2023), available at <https://humanrightsfirst.org/library/refugee-protection-travesty/>.

¹⁰ *East Bay Sanctuary Covenant v. Biden*, 93 F.4th 1130, 1131 (9th Cir. 2024); see also *M.A. v. Mayorkas*, Complaint, (U.S. District Court, District of Columbia), available at https://immigrantjustice.org/sites/default/files/content-type/press-release/documents/2023-06/Complaint_MAvMayorkas_Filed.pdf.

¹¹ USCIS, “Processes for Cubans, Haitians, Nicaraguans, and Venezuelans” (last reviewed/updated July 12, 2023), available at <https://www.uscis.gov/CHNV>.

¹² American Immigration Council, “The Biden Administration’s Humanitarian Parole Program for Cubans, Haitians, Nicaraguans, and Venezuelans: An Overview” (Oct. 31, 2023), available at <https://www.americanimmigrationcouncil.org/research/biden-administrations-humanitarian-parole-program-cubans-haitians-nicaraguans-and->

¹³ Miroff and Slater, “New York City’s Shelter System Stressed by Thousands of Migrants,” *Washington Post*, June 20, 2023, available at <https://www.washingtonpost.com/nation/2023/06/19/new-york-migrants-venezuelans-adams/>. (Noting that most recently arrived Venezuelans in NYC have no family here, differentiating them from earlier immigrant arrivals.)

government may be dangerous or impossible. Still other CHNV citizens who had already left their countries before the rule was announced became ineligible for the parole and potentially subject to the asylum ban as a result.¹⁴

The other “lawful pathway” to seeking asylum is by making an advance appointment to present at a port of entry (POE) using a smartphone app called CBP One.¹⁵ The app is geofenced, meaning that it only works within a certain distance of the U.S.-Mexico border.¹⁶ The Biden Administration has lauded the app as a measure to more efficiently process asylum seekers into the United States by collecting biographical information in advance of their presenting themselves at the border. Many advocates, however, have likened the app to a high-tech version of “metering,” a Trump-era policy requiring asylum seekers to queue up at the border and only allowing a limited number to seek asylum per day.¹⁷

In addition to the legal concerns raised by limiting the number of appointments per day, widespread use of the CBP One app raises further issues.¹⁸ The app requires the use of a smartphone and can only be accessed in three languages—English, Spanish, and Haitian Creole¹⁹—forcing many would-be asylum seekers to find third parties to assist them in navigating the app. This need for outside assistance has opened the door for unscrupulous people in Mexico to financially exploit those in need of CBP One app assistance. While U.S. Customs and Border Protection (CBP) has made some improvements to the app’s functionality and increased daily appointment numbers to 1,450,²⁰ many asylum seekers still try and fail to get appointments through the app, leaving them with the Hobson’s choice of remaining in a dangerous setting in Mexico or crossing unlawfully into the United States, which would likely render them ineligible for asylum under recent regulations.

Asylum Ban: “Consequences”

Under the CLP rule, anyone who enters the United States without making use of a lawful pathway—a visa, CHNV parole, or the CBP One app—is banned from asylum eligibility unless they can show that they qualify for an exception to the rule or that they can rebut the presumption against asylum.²¹ Those banned from asylum can still seek withholding of removal under INA § 241(b)(3) [8 U.S.C.A. § 1231(b)(3)] and protection under the Convention Against Torture (CAT), but those forms of protection are much more limited than asylum and require the applicant to meet a much higher legal standard.

¹⁴ USCIS, “Processes for Cubans, Haitians, Nicaraguans, and Venezuelans” (last reviewed/updated July, 16, 2024), available at <https://www.uscis.gov/CHNV>. Venezuelans must not have left their country before October 19, 2022. For Cubans, Haitians, and Nicaraguans, the cut-off date is January 9, 2023.

¹⁵ 8 C.F.R. §§ 208.33(a)(2)(i)(B), 1208.33(a)(2)(i)(B).

¹⁶ CBP, CBP One™ Mobile Application (last updated June 28, 2024), available at <https://www.cbp.gov/about/mobile-apps-directory/cbpone>.

¹⁷ American Immigration Council, “Challenging Customs and Border Protection’s Unlawful Practice of Turning Away Asylum Seekers,” available at <https://www.americanimmigrationcouncil.org/litigation/challenging-customs-and-border-protections-unlawful-practice-turning-away-asylum-seekers>. Metering was found unlawful by a federal district court in *Al Otro Lado, Inc. v. Wolf*.

¹⁸ National Immigration Project of the National Lawyers Guild (NIPNLG), “Facing an Impossible Choice” (July 24, 2023), available at <https://nipnlg.org/work/resources/facing-impossible-choice>. (Finding many people on the Mexican side of the border unable to access CBP One app appointments and living in dangerous conditions.)

¹⁹ CBP, CBP One™ Mobile Application (last updated June 28, 2024), available at <https://www.cbp.gov/about/mobile-apps-directory/cbpone>.

²⁰ CBP, “CBP One™ Appointments Increased to 1,450 Per Day” (June 30, 2023), available at <https://www.cbp.gov/newsroom/national-media-release/cbp-one-appointments-increased-1450-day>. See also Asencio, Human Rights First, “Trapped, Preyed Upon, and Punished: One Year of the Biden Administration Asylum Ban” (May 7, 2024), available at https://humanrightsfirst.org/wp-content/uploads/2024/05/Asylum-Ban-One-Year-Report_final-formatted_5.13.24.pdf.

²¹ 8 C.F.R. §§ 208.33, 1208.33.

Under the CLP rule, anyone who entered the United States after May 11, 2023, by crossing the U.S.-Mexico border unlawfully or by presenting at a POE without valid entry documents is presumed ineligible for asylum.²² There are exceptions to this rule, including unaccompanied children; Mexican citizens; individuals who enter through CHNV parole; individuals who enter with a CBP One app appointment; individuals who present at a POE without an appointment but can demonstrate that they were unable to use the CBP One app due to difficulties with language, literacy, or technology; and individuals who sought asylum in a third country and were denied on the merits.²³ Advocates have raised particular concerns about the app preventing Indigenous asylum seekers (who often speak rare languages) from accessing asylum, but there is no general exception for Indigenous asylum seekers.²⁴ Furthermore, the rule has no provision that specifically allows noncitizens to approach POEs without a CBP One appointment, and, in practice, it has proven difficult for vulnerable asylum seekers to do so because they are often blocked by Mexican officials.²⁵ Additionally, non-governmental organizations (NGOs) have raised concerns that the exception for those who sought asylum in a third country is essentially meaningless given the underdeveloped asylum systems in countries en route to the United States as well as the lack of safety in those countries.²⁶

Asylum seekers who do not meet an exception to the presumption against asylum can seek to rebut the presumption by showing exceptionally compelling circumstances at the border, such as imminent risk of kidnapping, rape, or death, or by demonstrating that they meet the definition of being a victim of a severe form of trafficking.²⁷

Under the CLP rule, fear interviews are divided into two parts. The first part determines whether the asylum ban applies or whether the applicant has shown an exception or rebutted the presumption.²⁸ The second part addresses the merits of the fear-based claim. If the asylum seeker is subject to the asylum ban, then the asylum officer uses a higher screening threshold—reasonable fear of persecution or torture—rather than the significant possibility of persecution or torture standard that was in use before the promulgation of the rule. Unsurprisingly, since the rule has gone into effect, credible fear passage rates have plunged.²⁹ After a year of the CLP’s implementation, it is clear that these exceptions are interpreted very narrowly, preventing legitimate asylum seekers who cannot meet the heightened stan-

²² 8 C.F.R. §§ 208.33, 1208.33. See also NIPNLG, “Practice Advisory: Biden’s Asylum Ban” (May 15, 2023), available at <https://nipnl.org/work/resources/practice-advisory-bidens-asylum-ban>.

²³ 8 C.F.R. §§ 208.33(a)(2), 1208.33(a)(2).

²⁴ NIPNLG et al., “The ‘Circumvention of Lawful Pathways’ Rule Leaves Indigenous Peoples with No Pathway to Seek Asylum” (June 5, 2023), available at <https://nipnl.org/work/resources/circumvention-lawful-pathways-rule-leaves-indigenous-peoples-no-pathway-seek-asylum>; Osgood, “Indigenous groups say they are left out of US immigration debate,” *Al Jazeera* (July 24, 2023), available at <https://www.aljazeera.com/news/2023/7/24/indigenous-groups-say-they-are-left-out-of-us-immigration-debate>.

²⁵ NIPNLG, “Facing an Impossible Choice” (July 24, 2023), available at <https://nipnl.org/work/resources/facing-impossible-choice>.

²⁶ Center for Gender and Refugee Studies, “Far from Safety: Dangers and Limits to Protection for Asylum Seekers Transiting through Latin America” (Apr. 21, 2023), available at <https://cgrs.uchastings.edu/our-work/publications/far-safety-dangers-and-limits-protection-asylum-seekers-transiting-through>.

²⁷ 8 C.F.R. §§ 208.33(a)(3)(i), 1208.33(a)(3)(i).

²⁸ NIPNLG, “Practice Advisory: Biden’s Asylum Ban,” at 7-8 (May 15, 2023), available at <https://nipnl.org/work/resources/practice-advisory-bidens-asylum-ban>.

²⁹ See Asencio, Human Rights First, “Trapped, Preyed Upon, and Punished: One Year of the Biden Administration Asylum Ban” at 24 (May 7, 2024), available at https://humanrightsfirst.org/wp-content/uploads/2024/05/Asylum-Ban-One-Year-Report_final-formatted_5.13.24.pdf. “People subject to the asylum ban’s higher screening standard are more than three times as likely to fail their screenings and be ordered deported without a chance to apply for asylum compared to those not subject to the ban, according to government data provided in the litigation challenging the ban.”

dard at the border from ever receiving a day in court.³⁰

In addition to the barriers that the rule has erected at the border, it erects further barriers at the asylum merits proceeding. Even for those asylum seekers who are able to pass their fear interview at the border—either by proving an exception, rebutting the presumption, or meeting the higher fear threshold—the decisions made in the credible fear process by asylum officers will be reviewed *de novo* in INA § 240 [8 U.S.C.A. § 1229a] proceedings before an immigration judge.³¹ Thus, for example, if the asylum officer found that an asylum seeker was in imminent risk of kidnapping at the border and therefore rebutted the anti-asylum presumption, the asylum seeker would again need to prove to an immigration judge that he or she was at risk of kidnapping at the border in addition to proving the underlying asylum claim in order to be granted asylum.

Due to backlogs in immigration court, the effects of the CLP on merits adjudications are just beginning to be felt by practitioners, many of whom may have seen the CLP as a “border issue” that would not affect their practices in the U.S. interior. At this point, most cases where the CLP has been applied in immigration court have been those on expedited dockets, such as detained cases and the dedicated docket. Anecdotally, practitioners have reported mixed results. In some cases, neither the Office of the Principal Legal Advisor (OPLA) attorney (DHS’ “prosecutor”) nor the immigration judge seem to be aware of CLP, at least in preliminary master calendar hearings, leaving practitioners with the difficult decision of whether to raise the issue themselves.³² Thus far, the family unity provision which falls under the exceptionally compelling circumstances rebuttal to the CLP—a provision that allows an immigration judge to convert a grant of withholding of removal to a grant of asylum if the noncitizen has a spouse or child(ren) who would be eligible for derivative asylum status but for the asylum ban³³—has been the most straightforward exception to prove. Of course, asylum seekers who do not have these family members cannot benefit from this provision.

Expedited Processes: Border Credible Fear Interviews (CFIs)

In addition to the substantive changes imposed at the border, the Biden Administration has also changed procedures to make it more difficult for asylum seekers to pass their fear screening interviews. Beginning in May 2023, single adult asylum seekers have been held in CBP custody facilities designed for short-term processing, sometimes for weeks, while their fear-based claims are decided.³⁴ Attorneys and accredited representatives have no physical access to the CBP facilities. Instead, CBP has set up phone booths within the facilities where detainees can make outgoing calls, but generally cannot receive incoming calls. With no ability to conduct group “know your rights” presentations, immigration legal service providers have found it virtually impossible to serve these asylum seekers.³⁵

³⁰ *Id.*

³¹ NIPNLG, “Practice Advisory: Biden’s Asylum Ban” at 10 (May 15, 2023), available at <https://nipnl.org/work/resources/practice-advisory-bidens-asylum-ban>.

³² Presumably as more and more cases are subject to the CLP, immigration judges, OPLA, and practitioners will become more familiar with its application and its exceptions. It is probably best practice for counsel to fully address the rule, argue for applicable exceptions, and preserve challenges to the legality of the rule, in immigration court briefing.

³³ NIPNLG, “Practice Advisory: Biden’s Asylum Ban” at 8-9 (May 15, 2023), available at <https://nipnl.org/work/resources/practice-advisory-bidens-asylum-ban>.

³⁴ Alvarez, “Adult migrants are held in border facilities too long amid Biden administration policy changes, sources say,” CNN, July 18, 2023, available at <https://www.cnn.com/2023/07/18/politics/migrants-border-facilities-biden-policies/index.html>.

³⁵ National Immigrant Justice Center (NIJC), “Obstructed Legal Access: June 2023 Update” (June 20, 2023), available at <https://immigrantjustice.org/staff/blog/obstructed-legal-access-june-2023-update#:~:text=As%20of%20June%209%2C%202023,present%20at%20their%20clients'%20CFIs>; see also National

In 2023, the Biden Administration reduced the wait time for conducting CFIs from at least 48 hours to merely 24 hours after an asylum seeker arrives in the United States, further complicating efforts by counsel to provide representation and decreasing the likelihood of passing the fear interview. With the announcement of the “border closure” rule discussed below, asylum seekers may now have as few as four hours between entry into the United States and USCIS conducting a credible fear interview.³⁶ Moreover, for the very few asylum seekers detained at the border who have been able to contact counsel, securing representation at their fear screening has been complicated by the extended hours during which USCIS may conduct CFIs; it is now common for CFIs to occur telephonically outside of business hours, including weekends, when counsel is often unavailable to provide representation.³⁷

While the Biden Administration has kept its promise to not restart family detention, in 2023, it rolled out an alternatives to detention (ATDs) program for families known as “Family Expedited Removal Management” (FERM). Under this program, families are subject to ATDs and potential house arrest while they await their CFIs, which are scheduled at the local asylum office in their destination city. Timelines for this program are compressed, but not as fast as CFIs in detained settings.³⁸

Border Closure Rule

On June 7, 2024, the Biden Administration issued a new interim final rule entitled “Securing the Border” (the “border closure rule”) which went into effect immediately and doubled down on the harsh provisions of the CLP rule, adding further barriers to asylum seekers at the border.³⁹ The motivation behind this new rule appears to be largely political as the announcement of the rule was touted as “closing the border.”⁴⁰ Unlike the CLP rule, which sunsets on May 11, 2025,⁴¹ there is no termination date built into the border closure rule. Instead, the rule includes a complex calculus requiring the “closure” to be in effect based on the average number of border crossers in the previous seven-day period and only allowing the border to “reopen” if the border numbers remain decreased for a 14-day period.⁴² DHS created a webpage that includes a chart indicating when the border closure rule is in effect.⁴³

Immigrant Justice Center, “Obstructed Legal Access: NIJC’s Findings From 3 Weeks Of Telephonic Legal Consultations In CBP Custody” (May 25, 2023), available at <https://immigrantjustice.org/staff/blog/obstructed-legal-access-nijcs-findings-3-weeks-telephonic-legal-consultations-cbp>.

³⁶ Political Asylum Lawyers, “Migrants Now Have Just Four Hours to Prepare for Crucial Asylum Screening Interviews” (June 18, 2023), available at <https://www.youtube.com/watch?v=ghxHTVVC8vM>.

³⁷ Sullivan, “Lawyers Say Helping Asylum Seekers in Border Custody Is Nearly Impossible,” *The New York Times*, July 22, 2023, available at <https://www.nytimes.com/2023/07/22/us/politics/biden-asylum-policies-border.html>.

³⁸ U.S. Immigration and Customs Enforcement (ICE), “ICE Announces New Process for Placing Family Units in Expedited Removal” (May 10, 2023), available at <https://www.ice.gov/news/releases/ice-announces-new-process-placing-family-units-expedited-removal>.

³⁹ See 89 Fed. Reg. 48710 (June 7, 2024).

⁴⁰ Barrón-López et al., “Biden Considers Temporarily Closing Southern Border To Curb Flow Of Migrant Crossings,” *PBS News Hour*, May 28, 2024, available at <https://www.pbs.org/newshour/show/biden-considers-temporarily-closing-southern-border-to-curb-flow-of-migrant-crossings>.

⁴¹ 8 C.F.R. § 1208.33(d)(2). Of course, the future of the rule will likely be determined by politics, including who is president in 2025, and the numbers of border crossers at that time.

⁴² “If at any time after such a factual determination the Secretary makes a factual determination that there has been a 7-consecutive-calendar-day average of 2,500 encounters or more, the suspension and limitation on entry will apply at 12:01 a.m. eastern time on the next calendar day (or will continue to apply, if the 14- calendar-day period has yet to elapse) until 14 days after the Secretary makes another factual determination that there has been a 7-consecutive-calendar-day average of less than 1,500 encounters or the President revokes the Proclamation, at which time its application will be discontinued once again.” 89 Fed. Reg. at 48715.

⁴³ DHS, “Securing the Border, Presidential Proclamation and Rule,” available at (last updated July 24, 2024),

The border closure rule does not only affect entries at the border; like the CLP rule, the prohibitions that it creates on asylum will apply to all merits adjudications for noncitizens who enter during a period of “border closure.” Noncitizens who enter without inspection must therefore prove with certainty their date of entry and research whether the border was “closed” on that date to argue for eligibility for asylum versus lesser forms of protection. Moreover, in the unlikely event that numbers fall low enough for the border closure rule to be suspended, asylum seekers will still be subject to the CLP rule as long as that regulation remains in effect.

While much of the border closure rule duplicates the CLP rule, the border closure rule eliminates three important exceptions to the CLP rule, making it even more difficult for some noncitizens to access the asylum system. First, citizens of Mexico are not exempt from the border closure rule. As a result, Mexican asylum seekers are expected to wait in Mexico to obtain a CBP One appointment even though that is the country where they fear harm. While Mexican citizens, like all other asylum seekers, may be able to rebut the presumption of asylum ineligibility if they can demonstrate exceptionally compelling circumstances that forced them to enter unlawfully, that rebuttal ground has been very narrowly interpreted in the CLP context.

The border closure rule also eliminates the exception under the CLP rule for those who present at a port of entry and can prove that they were unable to access CBP One due to language or technology barriers. Similarly, while the CLP rule grants an exception to the rule for those who sought asylum in a transit country and were denied on the merits, the border closure rule does not include this exception. The interim final rule does not explain why DHS included these exceptions in the CLP rule but not in the border closure rule, published a year later.⁴⁴

Finally, reversing longstanding border policies, border patrol officials who apprehend noncitizens at the border are no longer required to ask noncitizens if they have a fear of returning to their home country. Instead, noncitizens must affirmatively “manifest” their fear to the agent who arrests them.⁴⁵ Studies have shown that when asylum seekers are required to “manifest” fear rather than being asked about their fear, they are far less likely to receive a fear screening.⁴⁶ Advocates report, among other issues, that asylum seekers have been denied CFIs, have been unable to meet the higher legal standard at threshold fear screenings, and have experienced lengthy detentions awaiting their screenings.⁴⁷

Implementing Asylum Bars at the Border

In yet another move to restrict border admissions, on May 13, 2024, DHS issued a proposed rule which would allow asylum officers conducting border fear screenings to apply

available at <https://www.dhs.gov/immigrationlaws>.

⁴⁴ It is unlikely that many asylum seekers benefited from either of these exceptions. It is generally difficult, if not impossible, for asylum seekers who do not have CBP One appointments to approach ports of entry, making the first exception largely meaningless. Similarly, it is unlikely that many asylum seekers attempting to reach the United States apply for asylum in countries closer to their country of feared harm, especially given the less developed asylum systems in many of these countries.

⁴⁵ 8 C.F.R. § 235.15(b)(4)(A).

⁴⁶ Center for Gender & Refugee Studies (CGRS), “‘Manifesting’ Fear at the Border: Lessons from Title 42 Expulsions, Policy Memo” at 2 (Jan. 30, 2024), available at <https://cgrs.uclawsf.edu/our-work/publications/%E2%80%9Cmanifesting%E2%80%9D-fear-border-lessons-title-42-expulsions>.

⁴⁷ National Immigrant Justice Center et al., “Six-Week Report: Implementation of the Biden Administration’s June 2024 ‘Securing the Border’ Asylum Ban” (July 2024), available at https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2024-07/Six-Week-Report-Biden-2024-Asylum-Ban_FINAL.pdf.

bars during those initial screenings.⁴⁸ The final rule has not yet been published as this introduction goes to press, but the proposed rule would allow asylum officers to find asylum seekers ineligible for asylum based on a determination that they might fall under the persecutor bar, criminal bars, or security or terrorism bars.⁴⁹ If the asylum officer finds that one of those bars is likely to apply, the officer would continue to screen the noncitizen but under a higher standard, determining whether or not the noncitizen can meet a higher burden of showing a credible fear of torture.⁵⁰ The application of these bars in asylum proceedings is very complicated, and individuals who have just crossed the border, and likely have limited or no access to documents that could support their case, are at an extreme disadvantage in trying to disprove the applicability of these bars.⁵¹ At the same time when DHS published this proposed rule, it announced that asylum officers had been issued new guidance whereby officers could find asylum seekers ineligible for asylum during border fear screenings if the officer determined that the applicant could safely relocate internally;⁵² that guidance has not been made public. The United Nations High Commissioner for Refugees (UNHCR) has been critical of implementing bars during compressed border screenings.⁵³

Expedited Merits Adjudication Processes

In addition to the accelerated timelines and curtailed rights at border interviews, the Biden Administration has also created several accelerated merits adjudication systems: dedicated dockets, recent arrival dockets, and the asylum processing rule.

Expedited Processes: Dedicated Dockets

The dedicated docket was established in May 2021 purportedly so that the cases of families do not “languish in a multi-year backlog.”⁵⁴ The dedicated docket is similar to the “adults with children” docket⁵⁵ under the Obama Administration and the family unit docket⁵⁶ under the Trump Administration with each process aiming to expeditiously resolve asylum cases for recently arrived families. The dedicated docket sets a goal of having the immigration judge issue a decision within 300 days of the initial master calendar hearing.⁵⁷ The dedicated docket has been criticized for prioritizing speed over fairness. One report on the Los Angeles court’s dedicated docket found that 70.1% of asylum seekers on the docket lacked counsel, and that

⁴⁸ See 89 Fed. Reg. 41347 (May 13, 2024).

⁴⁹ See proposed 8 C.F.R. § 208.30 at 89 Fed. Reg. at 41360.

⁵⁰ 89 Fed. Reg. at 41355.

⁵¹ If the asylum officer finds a bar is potentially triggered, the asylum seeker must “demonstrate a significant possibility that the noncitizen would be able to prove by a preponderance of the evidence that the given bar would not apply.” 89 Fed. Reg. at 41355.

⁵² DHS, “DHS Announces Proposed Rule and Other Measures to Enhance Security, Streamline Asylum Processing” (May 9, 2024), available at <https://www.dhs.gov/news/2024/05/09/dhs-announces-proposed-rule-and-other-measures-enhance-security-streamline-asylum>.

⁵³ UNHCR, “Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees” (Sept. 4, 2003), available at <https://www.unhcr.org/us/media/guidelines-international-protection-no-5-application-exclusion-clauses-article-1f-1951>.

⁵⁴ Department of Justice, “Press Release: DHS and DOJ Announce Dedicated Docket Process for More Efficient Immigration Hearings” (May 28, 2021), available at <https://www.justice.gov/opa/pr/dhs-and-doj-announce-dedicated-docket-process-more-efficient-immigration-hearings>.

⁵⁵ EOIR, “Executive Office for Immigration Review to Revise Docketing Practices Relating to Certain Priority Cases” (Feb. 4, 2016), available at <https://www.justice.gov/eoir/RevisedDocketingPractices02042016>.

⁵⁶ EOIR, “Tracking and Expedition of ‘Family Unit’ Cases” (Nov. 16, 2018), available at <https://www.justice.gov/eoir/page/file/1112036/download>.

⁵⁷ Department of Justice, “Press Release: DHS and DOJ Announce Dedicated Docket Process for More Efficient Immigration Hearings” (May 28, 2021), available at <https://www.justice.gov/opa/pr/dhs-and-doj-announce-dedicated-docket-process-more-efficient-immigration-hearings>.

99.1% of noncitizens on the docket were ordered removed.⁵⁸ Similarly, a report on the Boston court’s dedicated docket found that only 4.2% of cases resulted in an asylum grant with every noncitizen who was granted relief having representation at some point in their case. Overall, 49% of asylum seekers on the docket never had representation in their cases.⁵⁹ Anecdotally, practitioners have reported that, given the strains on the immigration court system, judges are unable to meet the strict dedicated docket deadlines, and these cases are themselves becoming increasingly backlogged.

Expedited Processes: Recent Arrivals Docket

In the May 2024 announcement about the border closure rule, the Biden Administration also announced a new expedited docket called the recent arrivals docket. Its purpose is to “more quickly resolve a portion of immigration cases for migrants who attempt to cross between ports of entry at the Southern border in violation of our immigration laws.”⁶⁰ This docket is for single adults with cases in Atlanta, Boston, Chicago, Los Angeles, and New York City with the goal of completing cases within 180 days—just over half the time that dedicated docket judges are given to complete cases.⁶¹ It is too early to understand the effect of this new docket, but, historically, the faster the adjudication timeline, the more difficult it has been for noncitizens to find counsel and for counsel to adequately prepare the case.⁶²

Expedited Processes: Asylum Processing Rule

Beginning on May 31, 2022, some asylum seekers put through expedited removal at the border have had their cases adjudicated pursuant to the asylum processing rule (APR), which was finalized on that date.⁶³ Under the APR, asylum seekers who pass their CFI at the border have their initial merits adjudication before the Asylum Office rather than being issued a notice to appear initiating removal proceedings. Also, instead of filing an I-589 form to seek asylum, the notes from the CFI become the asylum application in these cases without a need for the asylum seeker to complete an I-589 application form.⁶⁴

Despite some positive aspects of the rule, advocates have expressed alarm at the extremely accelerated timeline of APR cases.⁶⁵ Under the rule, asylum merits interviews (AMIs) must be

⁵⁸ UCLA Center for Immigration Law and Policy, “The Biden Administration’s Dedicated Dockets: Inside Los Angeles’ Accelerated Court Hearings for Families Seeking Asylum” at 1 (May 25, 2022), available at <https://law.ucla.edu/news/new-report-finds-children-ordered-deported-families-without-lawyers-and-other-gross-miscarriages-justice-biden-administrations-dedicated-docket>.

⁵⁹ Harvard Immigration and Refugee Immigration Clinical Program et al., “Denial of Justice: The Biden Administration’s Dedicated Docket in the Boston Immigration Court” (June 2023), available at http://harvardimmigrationclinic.org/files/2023/06/Dedicated-Docket-Report_FINAL.pdf.

⁶⁰ The White House, “Fact Sheet: President Biden Announces New Actions to Secure the Border” (June 4, 2024), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2024/06/04/fact-sheet-president-biden-announces-new-actions-to-secure-the-border/#:~:text=The%20Department%20of%20Justice%20and,violation%20of%20our%20immigration%20laws>.

⁶¹ DHS, “DHS and DOJ Announce ‘Recent Arrivals’ Docket Process for More Efficient Immigration Hearings” (May 16, 2024), available at <https://www.dhs.gov/news/2024/05/16/dhs-and-doj-announce-recent-arrivals-docket-process-more-efficient-immigration>.

⁶² Innovation Law Lab and Southern Poverty Law Center, “The Attorney General’s Judges How The U.S. Immigration Courts Became A Deportation Tool” (June 2019), available at https://innovationlawlab.org/media/COM_PolicyReport_The-Attorney-Generals-Judges_FINAL.pdf.

⁶³ See NIPNLG, “Biden’s Asylum Processing Rule—Three Months in, What Practitioners Need to Know” (last updated Feb. 13, 2023), available at <https://nipnlg.org/work/resources/bidens-asylum-processing-rule-three-months-what-practitioners-need-know>.

⁶⁴ Id.

⁶⁵ Id.

scheduled within 21-45 days after the positive CFI.⁶⁶ If the case is referred to immigration court, it must be adjudicated on an extremely accelerated timeline with required status conference check-ins, maximum continuance times of 10 days, and a requirement that the entire adjudication process—from positive CFI to immigration judge decision—be completed within 180 days.⁶⁷

Since the end of Title 42 in May 2023, USCIS has largely paused implementation of the APR because most asylum officers have had to prioritize border fear screenings. Currently, the only asylum seekers being given AMIs are some families processed through FERM who pass their CFIs.⁶⁸ It is unclear when, if ever, the AMI process will be fully implemented.

Affirmative Asylum Backlogs

One result of the increased use of expedited removal at the border has been that the vast majority of asylum officers are required to spend most or all of their time conducting fear screenings rather than affirmative asylum interviews. The only affirmative cases which are regularly being scheduled for interviews are those subject to litigation. The first priority for asylum offices to schedule at present is for Afghan asylum seekers who entered the United States under the Operation Allies Welcome (OAW) program. Pursuant to litigation challenging lengthy delays in adjudicating these cases,⁶⁹ asylum offices must now schedule Afghans who entered under OAW for interviews within 45 days of submitting their applications and must issue a decision within 150 days of the filing.⁷⁰ These cases should wind down within the next year, but it is unclear whether asylum officers assigned to OAW cases will resume regularly scheduling affirmative asylum interviews or will be required to conduct CFIs.

As many asylum seekers and their counsel become frustrated with the years-long delays in affirmative adjudications, they are increasingly turning to federal court mandamus actions to force the asylum offices to schedule affirmative interviews. In response, USCIS often schedules the interview rather than fighting the district court litigation.

Asylum Offices also have procedures in place whereby asylum seekers can write to the specific director of the Asylum Office with jurisdiction over their case and ask that the case be expedited.⁷¹ Asylum Office representatives have explained in stakeholder meetings that they are most likely to grant these requests when they are protection-related, for example, if there is a family member who remains in harm's way abroad or if there is a serious medical issue for the asylum seeker. Asylum Office representatives have also stated that they generally will not grant such requests based on the general anxiety caused by remaining indefinitely in limbo.

⁶⁶ 8 C.F.R. § 208.9(a)(1).

⁶⁷ NIPNLG, “Biden’s Asylum Processing Rule—Three Months in, What Practitioners Need to Know” (last updated Feb. 21, 2023), available at <https://nipnl.org/work/resources/bidens-asylum-processing-rule-three-months-what-practitioners-need-know>.

⁶⁸ Office of Homeland Security Statistics, “Asylum Processing Rule Cohort Reports” (last updated Apr. 18, 2024), available at <https://ohss.dhs.gov/topics/immigration/refugees-and-asylees/asylum-cohort#:~:text=Beginning%20in%20mid%20October%202023,one%20of%20the%20AMI%20cities>. From October 2023 through December 2023, only 110 people (including dependents) were given AMIs.

⁶⁹ NIJC, *Ahmed et al. v. DHS et al.* (Sept. 11, 2023), available at https://immigrantjustice.org/court_cases/ahmed-et-al-v-dhs-et-al.

⁷⁰ USCIS, “Afghan Operation Allies Welcome (OAW) Parolee Asylum-Related Frequently Asked Questions” (last updated Oct. 19, 2023), available at <https://www.uscis.gov/humanitarian/information-for-afghan-nationals/afghan-operation-allies-welcome-oaw-parolee-asylum-related-frequently-asked-questions>; see also USCIS, “Information for Afghan Nationals” (last updated June 23, 2024), available at <https://www.uscis.gov/humanitarian/information-for-afghan-nationals>.

⁷¹ USCIS, Affirmative Asylum Procedures Manual at 93 (posted Aug. 2023), available at <https://www.uscis.gov/sites/default/files/document/foia/AffirmativeAsylumProceduresManual.pdf>.

Prosecutorial Discretion

The OPLA, the “prosecutors” for U.S. Immigration and Customs Enforcement (ICE) in immigration court, have continued to follow the prosecutorial discretion memo issued by OPLA chief Kerry Doyle, often aggressively seeking to dismiss removal proceedings against asylum seekers whom they deem to be low priorities for removal.⁷² While the OPLA has stated that it can use a broad range of prosecutorial discretion actions, including not filing a notice to appear, stipulating to relief, narrowing legal issues, agreeing to dismissal, administrative closure, or continuances, as a practical matter, the OPLA has been most open to dismissing cases, in some cases moving to dismiss unilaterally.

Having removal proceedings dismissed en masse has led to many questions for practitioners and their clients about how, logistically, to refile their cases affirmatively with USCIS and how substantively certain issues will be treated by the Asylum Offices. Finally, on October 13, 2023, USCIS issued guidance explaining how to refile and clarifying that the date when the noncitizen filed for asylum with the immigration court will be preserved as the filing date by USCIS.⁷³ The preservation of the filing date is critical for several issues, including meeting the one-year filing deadline; starting the clock for employment authorization eligibility; and preserving the age of dependents who would otherwise age out as they become adults.⁷⁴ For some asylum seekers, having “two bites at the apple” by being able to have an asylum interview prior to possible removal proceedings is very important. Likewise, many asylum seekers prefer the non-adversarial nature of USCIS interviews. Nonetheless, there are important considerations for practitioners who accept dismissal of proceedings given the years-long backlog at the Asylum Office and immigration courts and the possibility of evidence getting stale, memories fading, and governing law changing over the course of time.⁷⁵

Other Regulations

While the Biden Administration has created entirely new processes for adjudicating asylum cases, it has failed to issue regulations that President Biden ordered in his first days in office. Pursuant to an executive order issued on February 1, 2021, DHS and the Department of Justice (DOJ) were supposed to issue regulations by October 29, 2021, to address the issue of particular social group (PSG) in asylum law.⁷⁶ It has become unfortunately clear that the administration does not intend to issue these regulations during this term.

⁷² Doyle, “Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion” (Apr. 3, 2022), available at https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf. See also ICE, “Prosecutorial Discretion and the ICE Office of the Principal Legal Advisor” (last updated May 15, 2024), available at <https://www.ice.gov/about-ice/opla/prosecutorial-discretion>.

⁷³ USCIS, “USCIS Issues New Instructions for Filing Asylum Applications with USCIS After EOIR Dismissal or Termination of Removal Proceedings” (Oct. 13, 2013), available at <https://www.uscis.gov/newsroom/alerts/uscis-issues-new-instructions-for-filing-asylum-applications-with-uscis-after-eoir-dismissal-or-termination-of-removal-proceedings>.

⁷⁴ NIPNLG, “USCIS Issues Guidance on Refiled I-589s Following EOIR Dismissal or Termination—FAQs” (updated Feb. 13, 2024), available at <https://nipnlg.org/work/resources/uscis-issues-guidance-refiled-i-589s-following-eoir-dismissal-or-termination-faqs>.

⁷⁵ See NIPNLG, “Practice Advisory: Advocating for Prosecutorial Discretion Under the Biden Administration’s Prosecutorial Discretion Guidance” at 15-18 (Sept. 15, 2023), available at <https://nipnlg.org/work/resources/practice-advisory-advocating-prosecutorial-discretion-under-biden-administrations>.

⁷⁶ White House, Exec. Order No. 14010, “Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border” (Feb. 2, 2021), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-orderly>.

In addition to the significance of the rules themselves, the asylum decisions issued by Attorney General Merrick Garland—*Matter of A-B- III*,⁷⁷ *Matter of L-E-A- III*,⁷⁸ and *Matter of A-C-C-A- II*,⁷⁹—vacating the worst Trump-era Attorney General rulings, are all grounded in Garland’s understanding that rulemaking was underway and that these issues should be decided via that process. If the Biden Administration does not finalize its rulemaking on these issues, it would be very easy for a future Attorney General in an anti-immigrant administration to set aside Garland’s decisions and revert to the Trump-era precedent, which significantly curtailed asylum eligibility.

There are also multiple Trump-era rules that were enjoined by federal courts in which the litigation has been held in abeyance since the election, pending forthcoming rulemaking. These rules include the so-called “death to asylum” rule,⁸⁰ criminal bars rule,⁸¹ and asylum procedural rules.⁸² It is also becoming clear that these regulations will not be rescinded before the end of this presidential term, raising the possibility that the cases will again be litigated during the next presidential administration and may ultimately go into effect.

Practitioners should be aware that, if they are accessing the immigration code of federal regulations online on government websites, or websites that pull text from the government websites, the text of the enjoined regulations will be on those websites with no flags that the regulations are enjoined. As a result of the extensive changes to regulatory asylum definitions followed by extensive litigation, it is extremely challenging for practitioners (and adjudicators) to understand which version of the regulations are currently in effect.⁸³

Conclusion

Unfortunately, as “the border” continues to dominate the conversation about immigration, and as asylum is increasingly tied to border politics, there have been numerous changes in the law affecting asylum seekers that make it more difficult to access protection. Whatever the results of 2024’s presidential election, asylum practitioners should expect ongoing changes to the law and procedures—potentially radical changes—and must stay informed to practice in this area.

⁷⁷ *Matter of A-B-*, 28 I. & N. Dec. 307, 2021 WL 2476742 (U.S. Att’y Gen. 2021) (*Matter of A-B- III*).

⁷⁸ *Matter of L-E-A-*, 28 I. & N. Dec. 304, 2021 WL 2476744 (U.S. Att’y Gen. 2021) (*Matter of L-E-A- III*).

⁷⁹ *Matter of A-C-A-A-*, 28 I. & N. Dec. 351, 2021 WL 3186384 (U.S. Att’y Gen. 2021) (*Matter of A-C-A-A- II*).

⁸⁰ 85 Fed. Reg. 80274 (Dec. 11, 2020).

⁸¹ 85 Fed. Reg. 67202 (Oct. 21, 2020).

⁸² 85 Fed. Reg. 81698 (Dec. 16, 2020).

⁸³ Neilson, “The Death to Asylum Regulations Continue to Harm Asylum Seekers Even Though They Are Enjoined,” AILA Think Immigration (Dec. 9, 2022), available at <https://thinkimmigration.org/blog/2022/12/09/the-death-to-asylum-regulations-continue-to-harm-asylum-seekers-even-though-they-are-enjoined/>. This “Cheat Sheet” created by the Department of Justice is helpful in navigating the regulations online. NIPNLG, “Enjoined Asylum Regulations ‘Cheat Sheet’ ” (last updated May 8, 2023), available at <https://nipnl.org/work/resources/enjoined-asylum-regulations-cheat-sheet>.