Adjudication by USCIS Asylum Officers:
Explainer

On May 31, 2022, in an attempt to reduce immigration court backlogs, the Biden administration's Department of Homeland Security (DHS) and Department of Justice (DOJ) began implementing a multi-phased plan to allow asylum officers with U.S. Citizenship and Immigration Services (USCIS) to adjudicate certain asylum and other humanitarian relief claims for people at the U.S.-Mexico border. The plan impacted migrants who are subject to expedited removal. Soon after, two legislative efforts, the border security and asylum reform provisions in the Emergency National Security Supplemental Appropriations Act, 2024 and the Dignity Act, proposed using USCIS asylum officers to adjudicate asylum and other protection claims.

This explainer details the Biden administration's rule change and, looking forward, explains other recent proposals to allow USCIS asylum officers to adjudicate asylum requests and other claims for humanitarian protection. As policymakers explore options to address the high number of encounters at the U.S.-Mexico border, it is increasingly likely that having USCIS asylum officers adjudicate asylum claims will be a key part of the conversation.

What Is an Asylum Officer?

An asylum officer is a USCIS employee "trained in refugee and asylum law in the United States and abroad, both in sensitively dealing with sensitive and traumatic experiences that often constitute the basis of asylum claims and in detecting fraudulent claims." Asylum officers are often seen as well suited to handle humanitarian claims because, per USCIS, they are trained to efficiently "conduct interviews with asylum applicants in a non-adversarial and sensitive manner" in ways that elicit and clarify information, "review evidence, research conditions in foreign countries, perform legal analysis, and exercise significant judgment in applying complex immigration laws to a wide variety of factual situations," and, at the end of the process, "make sensitive legal decisions on whether applicants qualify for asylum."

In contrast, immigration judges are housed in the Department of Justice (DOJ) and may not be specialized in humanitarian claims. Immigration judges have jurisdiction over many areas of immigration law, not just humanitarian protection. Further, asylum backlogs in both the affirmative and defensive asylum systems in immigration court (*more on these below*) have prospective asylees waiting up to six years to have their claims decided. This has created a state of legal limbo for many asylum seekers, where many put down roots before their asylum claims are fully adjudicated without knowing whether they will be allowed to stay in the U.S. Some advocates and proponents of USCICS asylum officer adjudications hope the policy could help cut into these backlogs.

Asylum and the Asylum Processing Rule

The Biden administration's rule change, often referred to as the "Asylum Officer Rule" or "Asylum Processing Rule" (APR), but formally named the "Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers," transforms the processing pathways for asylum relief. In general, there are two ways for noncitizens to apply for asylum in the U.S. They are:

1. **Affirmative Asylum**

This is where a noncitizen living in the U.S., regardless of how they arrived and who is not in removal proceedings, files USCIS form I-589 ("Application for Asylum and for Withholding of Removal"). The individual must file within one year of arriving in the U.S., except in very limited exceptions.

The individual's affirmative application is adjudicated by a USCIS asylum officer. If the asylum officer determines the individual is eligible for asylum, the officer approves the application, and asylum is granted. If the asylum officer determines the individual does not qualify for asylum and does not have legal status in the U.S., the officer will issue a Notice to Appear (NTA) and refer the individual to the U.S. Department of Justice's (DOJ) Executive Office for Immigration Review (EOIR), also known as the immigration courts, for a *de novo* hearing of the asylum claim before an immigration judge. At this point, the case has become a defensive asylum case and proceeds as explained below.

2. Defensive Asylum

In the defensive asylum process, a noncitizen applies for asylum, statutory withholding of removal, or relief under the United Nations Convention Against Torture (CAT) as a "defense" to their eventual removal or deportation from the U.S. Individuals are typically placed in removal proceedings in one of three ways:

1. They have been referred for removal proceedings after USCIS denied their asylum application during the affirmative asylum process (*see Affirmative Asylum above*);

2. They are apprehended within the U.S. or at a U.S. port of entry (POE) without proper immigration documents or in violation of their immigration status; or,

3. They are apprehended trying to enter the U.S. without permission, either at or between POEs, and thus are subject to expedited removal, but they advise a CBP or ICE officer at the border that they:

    - intend to seek asylum,
    - fear persecution or torture, ***or,***
    - fear returning to their home country or habitual place of residence; ***and***,

    - they demonstrate through the "Credible Fear" process that they qualify to submit a full application for asylum, withholding of removal, or protection under the Convention Against Torture (CAT).

This "Credible Fear" process exists, generally, to provide at least some due process to individuals who claim to fear returning to their country of origin while still efficiently filtering out claims that clearly do not meet the standard for asylum or other humanitarian relief without bogging down the immigration courts. For those in expedited removal, the "Credible Fear" process involves passing a preliminary interview held before a USCIS asylum officer to generally show they have a "significant possibility" of being granted the asylum relief they seek. However, this legal standard is subjective and subject to frequent change, having at times been raised for certain groups of noncitizens in recent presidential administrations. To obtain asylum, the individual must demonstrate to the asylum officer (or immigration judge) that he or she has a "credible fear" of persecution based on his or her race, religion, nationality, membership in a particular social group, or political opinion.

Migrants subject to expedited removal may seek asylum because it provides an opportunity to stay in the U.S. and potentially receive humanitarian protection. Some migrants seeking a better economic situation may apply out of a good-faith belief that economic hardship is a valid basis upon which to seek asylum, only to find out the law does not support their case. In October of 2023, the Government Accountability Office (GAO) published a report finding that the asylum backlog "has more than tripled since the start of 2017" and now is more than 2 million cases long.

Under U.S. immigration law, some individuals who do not qualify for asylum may nevertheless qualify for relief from removal under statutory withholding of removal (INA §241(b)(3)) or other relief through the Convention Against Torture (CAT). These forms of protection are based on the idea that the U.S. will not return an individual to a country where he or she is "more likely than not" to be harmed based on his or her race, religion, nationality, membership in a particular social group, or political opinion or where they will be tortured. Yet individuals who apply for these forms of protection must meet a higher legal burden and receive fewer benefits if they qualify for relief than individuals granted asylum.

What Does the Asylum Processing Rule Do?

The Biden administration's asylum processing rule creates a new processing pathway for the adjudication of asylum claims. Just as before, when asylum seekers present themselves at the border or are placed in expedited removal after being apprehended by U.S. Customs and Border Protection (CBP) at a port of entry (POE) or between POEs, they may "indicate an intention to apply for asylum, express a fear of persecution or torture, or express a fear of return to [their] country," triggering their entry to the "credible fear" process. Upon passing their initial interview, however, certain individuals under the new rule are referred to meet with an asylum officer in a non-adversarial interview, called an Asylum Merits Interview (AMI), instead of going before an immigration judge for full removal proceedings.

Under this process, individuals must meet the same legal burden for asylum, withholding of removal, or CAT relief as they would in immigration court, but they will present their case to a USCIS asylum officer. Immigration and Customs Enforcement (ICE) will not have a lawyer present as they do in immigration court, although the applicant is still permitted legal representation. Currently, access to this new process is limited to a small number of families (involved in a process called Family Expedited Removal Management (FERM)) who "express an intent to reside in or near one of the destination cities (*see below*) where AMIs take place during phased implementation, and [whom ICE] determines appropriate to release."

The new process starts once USCIS notifies qualifying individuals of their placement into the Asylum Merits Interview (AMI) process by serving them with notice of their positive "credible fear" determination. This document constitutes their asylum, statutory withholding, and/or CAT application, with the receipt date as the filing date. The AMI then occurs between 21 and 45 days after notice of the positive determination.

While migrants wait for their Asylum Merits Interview (AMI), some families or individuals may be placed "as necessary" in alternatives to detention. Applicants have seven days before the AMI if submitting in-person or 10 days before it if submitting by mail to provide further evidence on behalf of their case before their adjudication. Then, at the AMI, the asylum officer determines whether the individuals and families qualify for asylum.

If the asylum officer determines that the applicant qualifies for asylum, they grant the individual asylum. If the asylum officer finds the individual does not qualify for asylum, they submit a

recommendation of denial of asylum to the Executive Office for Immigration Review (EOIR) for "streamlined removal proceedings" before an immigration judge. The case then goes to immigration court.

The asylum officer will also consider an applicant's eligibility for statutory withholding or CAT relief and make a recommendation on these claims to the immigration judge. In the case where an asylum officer determines that an applicant does not qualify for asylum but *does* qualify for statutory withholding or CAT relief, the asylum case must still proceed to immigration court (this is because, under current law, only an immigration judge can issue a final decision on statutory withholding and CAT claims). Then, if the immigration judge determines that the applicant does not qualify for asylum, the asylum officer's positive determination on the statutory withholding or CAT claim automatically takes effect "unless DHS presents additional evidence before EOIR showing the principal applicant is not eligible for such relief or protection."

Once a case ultimately reaches immigration court, the immigration judge reviews the case *de novo,* meaning the judge reviews the full application independently and gives no deference to the asylum officer's opinion – unless the asylum officer issued a positive determination involving withholding of removal or CAT relief. The immigration judge may grant asylum, withholding of removal, or CAT relief. If the immigration judge denies all these claims, the applicant is entitled to appeal the case to the Board of Immigration Appeals (BIA), the appellate arm of EOIR. The BIA may grant asylum, remand the case for further proceedings in accordance with their opinion, or affirm the immigration judge's denial of relief.

Further, in the case of family units applying for asylum—where one family member constitutes the principal applicant, and the person's dependents apply as derivatives of the principal applicant—the asylum officer also considers whether any member of the family apart from the principal applicant has any independent basis to qualify for asylum. If any one of them does, even though the principal applicant did not, he or she is granted asylum independent of the principal applicant.

Who Is Affected?

In the first phase of the program, starting in June of 2022, asylum officers began holding asylum merits interviews (AMIs) for individual adult noncitizens subject to expedited removal who expressed a desire to live in or near select cities across the country, had already passed an initial credible fear interview, and for whom Immigration and Customs Enforcement (ICE) had determined pre-hearing release was appropriate. As of October 2023, when the latest phase of the rule went into effect, the nine cities where USCIS asylum officers can hold AMIs to decide asylum claims are:

1. Annandale, VA/Washington, D.C.
2. Boston, MA.
3. Chicago, IL.
4. Los Angeles, CA.
5. Miami, FL.
6. New Orleans, LA.
7. New York, NY.
8. Newark, NJ.
9. San Francisco, CA.

As mentioned above, in the latest phase, starting in October of 2023, USCIS began placing certain non-detained family units in FERM in AMIs adjudicated by USCIS instead of in immigration court. New referrals to the program will now come primarily, if not exclusively, from the FERM program.

Data from the Asylum Processing Rule

Public data related to the asylum processing rule is limited. The latest data show that fewer than 6,000 cases had been adjudicated under the rule as of September 2023. However, as the American Association of Immigration Lawyers (AILA) noted, this is at least in part because the Biden administration closed the Asylum Processing Rule (APR) program in advance of the ending of Title 42 in May of 2023. The administration restarted the program, using the APR to process asylum claims, in October 2023, but no data are available as of April 19, 2024, for this latest chapter of the implementation. As of September 2023, USCIS has 760 of 1,028 funded asylum officer positions filled, which equals 74 percent.

Legislative Efforts: Adjudication by USCIS Asylum Officers

Recently, two legislative proposals have called for allowing U.S. Citizenship and Immigration Services (USCIS) asylum officers to process asylum claims at the U.S.-Mexico border. Similar to the Biden administration's asylum processing rule, these proposals envision an asylum process in which USCIS asylum officers help expedite the adjudication of humanitarian protection claims. This section will briefly summarize these two proposals and compare them to the Biden administration's rule.

The Dignity Act

The Dignity Act (H.R. 3599), a bipartisan immigration reform bill introduced by Rep. Maria Elvira Salazar (R-Florida) and co-sponsored by Rep. Veronica Escobar (D-Texas), aims to strengthen border security, provide undocumented individuals with an opportunity to obtain legal status if they meet certain requirements, and update aspects of the U.S. immigration system, including asylum processing at the southern border.

How the Dignity Act is similar to the Asylum Processing Rule (APR):

The Dignity Act would:

- Adjudicate most asylum claims made at the border via an USCIS asylum officer. The bill requires USCIS to hire 500 new asylum officers to help with this task.
    - Currently, USCIS lacks the capacity to adjudicate most claims through the Biden asylum processing rule (APR), but the USCIS fact sheet on the asylum processing rule (APR) says, "Implementation… will grow as USCIS builds operational capacity over time." As noted previously, USCIS has funding for 1,028 asylum officer positions, but only 760 are currently filled.
- Refer certain complex or uncertain cases to immigration judges**.**
    - As explained above, the APR refers cases that do not pass their initial asylum merits interview to immigration court. While the APR likely refers more cases to

immigration court, both systems rely on immigration judges to some degree to continue to conclusively adjudicate some of the asylum caseload.

How the Dignity Act is different from the Biden Asylum Processing Rule (APR):

Though both the Dignity Act and the asylum processing rule (APR) seek to shorten the asylum adjudication process via USCIS asylum officer adjudications, the timelines for each look a little different.

- The Dignity Act would adjudicate almost all claims within 60 days, and the process would essentially be broken into two periods:
  - **Initial Screening (First 15 Days).** Under the bill, migrants would receive a 72-hour rest period. After that, officials would provide an initial screening within 15 days, including conducting criminal background checks, analyzing biometric data, verifying identification, conducting medical assessments, screening for human trafficking victims, and performing an initial credible fear interview.
  - **Secondary Screening and Asylum Determination (Days 15 to 60).** Within 45 days of passing the initial credible fear interview (those who do not pass are removed with very limited exceptions), an asylum officer would review the individual's asylum claim and make a final determination. As mentioned above, in certain complex or uncertain cases, asylum officers may also refer cases to immigration court.
- Under the Biden asylum processing rule, eligible cases proceed to an asylum merits interview within 45 days. Upon a positive determination, the process concludes. Upon a negative determination by an asylum officer, a recommendation for denial is sent to an immigration judge for "streamlined removal proceedings," where according to reports "the immigration court is expected to resolve the case within two to four months."

Detention

One large difference between the Dignity Act's process and the asylum processing rule (APR) is that the Dignity Act would prevent the release of most individuals from custody while they wait for a final determination on their asylum claim. Currently, the APR only applies to certain "individuals…whom ICE determined that it was appropriate to release" and indicated an "intent to reside in or near one of the destination cities where AMIs take place during phased implementation." As a result, individuals under the APR are released with alternatives to detention.

The Dignity Act would also significantly overhaul the immigration detention system along the southern border. The bill would create five humanitarian campuses (HCs) managed by U.S. Customs and Border Protection (CBP) along the southern border. Migrants would be held in these facilities. Asylum officers would conduct asylum interviews and make final determinations on these campuses.

Funding Requests

A major obstacle for the Biden administration's asylum processing rule (APR) is that funding for setting up a new asylum adjudication process is limited to the amounts already appropriated by Congress in normal year-round appropriations. Therefore, it is hard to scale up the implementation of the program without supplemental funding from Congress. Surprisingly, it appears the Dignity Act would not authorize specific funding specific to the implementation of its asylum process reforms, including to hire the 500 additional USCIS asylum officers. Instead, it would authorize more than $35 billion in spending, much of which would affect the new humanitarian relief process. For instance:

- $25 billion to create "an impenetrable border infrastructure system."
- $10 billion to improve infrastructure at POEs and create new POEs.
- Establishment of an "Immigration Infrastructure Fund," which would be funded by the income of individuals granted work authorization in the U.S. This would fund the hiring of over 50,000 new CBP personnel.

Border Security and Asylum Reform in the Emergency National Security Supplemental Appropriations Act, 2024

After Republican lawmakers insisted that any subsequent military assistance for Ukraine be tied to border security, Sens. James Lankford (R-Oklahoma), Krysten Sinema (I-Arizona), and Chris Murphy (D-Connecticut) led negotiations on a bipartisan bill to address increasing demands for significant border, asylum, parole, and other immigration-related reforms. After much anticipation, the bill failed to move forward after former President Donald Trump expressed his disapproval of the legislation. Significantly, the bill contained a provision to transform the U.S. asylum system, relying heavily upon adjudication by U.S. Citizenship and Immigration Services (USCIS) asylum officers.

How the Senate bill is similar to the Biden Asylum Processing Rule (APR):

The border security and asylum reform provisions in the Emergency National Security Supplemental Appropriations Act, 2024 would:

- Adjudicate most asylum claims made at the border via an USCIS asylum officer. The bill provides $3.995 billion in discretionary funding for USCIS to support 4,338 asylum officers to help with this task – a significant increase from the current 760 asylum officer positions currently filled at USCIS.
    - Unlike most current USCIS funding, this funding is to be appropriated by Congress and not dependent on the USCIS Immigration Fee Examination Account (IFEA).
- The bill would strengthen reliance on Alternatives to Detention (ATDs). Neither the asylum processing rule (APR) nor the Senate bill provide for the detention of applicants for humanitarian protection. Instead, under both, most prospective applicants would be placed with alternatives to detention (ATDs) instead of being housed in humanitarian centers or otherwise physically detained in detention centers or jails.

How the Senate bill is different from the Biden Asylum Processing Rule (APR):

Though both the Senate bill and the asylum processing rule (APR) seek to shorten the asylum adjudication process via USCIS asylum officer adjudications, the timelines for each are significantly different.

- The Senate bill's timeline for humanitarian protection claims, including asylum, statutory withholding, and CAT protection, would take up to 180 days (six months). The process includes:

    - **A Protection Determination Interview**. Migrants who arrive at the U.S. border and request humanitarian protection must have a ***protection determination interview*** with a USCIS asylum officer within 90 days. This *protection determination interview* applies a heightened "credible fear" process. The interview can be in-person or through technology appropriate for protection determination. If DHS fails to provide a *protection determination interview* within the 90-day timeframe, the individual will automatically be referred to a *protection merits interview*.

        a. **Positive Determination.** Asylum seekers who receive a positive protection determination are immediately eligible for work authorization and are referred to a *protection merits interview*.

        b. **Negative Determination.** Asylum seekers who receive a negative determination are ordered removed from the U.S. with limited rights to an appeal.

    - **Protection Merits Interview.** Asylum seekers who receive a positive protection determination or do not receive a screening within the original 90-day timeframe must have a ***protection merits interview*** with an asylum officer. This part of the process, referred to as ***protection merits removal proceedings***, would fall under a new section (Sec. 240D) within the INA. These secondary proceedings must conclude within 90 days of initiation (i.e. being referred to a *protections merit interview*), but the interview cannot take place earlier than 30 days from the moment DHS notifies an asylum seeker of the upcoming interview.

        a. **Positive Determination.** An asylum officer determines the applicant meets the criteria for a positive merits decision and approves the application for asylum, withholding of removal, or protection under CAT.

        b. **Negative Determination.** An asylum officer denies the application and orders the removal of the individual from the U.S. The individual will receive a written notice of the decision. There is limited right to appeal.

    - **Limitations on Appellate Process:** Under this bill, at the *Protection Determination Interview* (heightened "credible fear" process) stage, asylum seekers may request reconsideration before an asylum officer or *de novo* administrative review before a Protection Appellate Board (a new body created by this bill). If the Protection Appellate Board upholds a negative determination, the individual must be removed from the U.S. without additional review.

    - **Heightened Asylum Standard:** The Senate bill proposed raising the standard for the credible fear process. Under current law (most of the time), an applicant for

asylum, statutory withholding, or CAT protection must show at the credible fear stage that they have a "substantial possibility" of obtaining relief. This bill would raise that standard to require an applicant to show a "reasonable probability" of obtaining relief. A common way of understanding this legal standard is to view it as "more likely than not" or "51%." While it is difficult to say the effect this heightened legal standard will have in practice, it is expected to be a higher bar than the current standard.

Funding Requests

As mentioned above, the Senate bill appropriated funds specifically to reform the humanitarian relief system. This funding includes approximately $18.3 billion in supplemental funding for the Department of Homeland Security (DHS) and $2.3 billion for newly arrived refugees. The funds are broken down as follows:

- **$7.6 billion in supplemental funding for Immigration and Customs Enforcement (ICE)**, including: $3.2 billion for additional immigration detention capacity; and $2.55 billion for transportation costs, including additional removal flights; among other provisions.

- **$6.766 billion in funding for U.S. Customs and Border Protection (CBP)**, including: $3.88 billion for operational costs to manage and enhance border security; and $723 million for additional Border Patrol agents and Office of Field Operations (OFO) officers, among other provisions.

- **$3.995 billion in supplemental funding for U.S. Citizenship and Immigration Services (USCIS)**, including: $3.383 billion to support 4,338 USCIS asylum officers and other personnel and associated costs; and $148 million to create a new asylum appeals board process.

- **$440 million for the Department of Justice (DOJ)** to hire additional immigration judge teams.

Key Recommendations: Moving Forward

This section contemplates policy considerations and changes that would be needed to effectively implement U.S. Citizenship and Immigration Services (USCIS) asylum officer adjudications as the main route for resolving asylum and other humanitarian claims at the U.S. borders.

- **Sufficient Personnel Funding.** To effectively make USCIS asylum officers the main conduit for processing asylum, Withholding of Removal, and Convention Against Torture (CAT) claims, USCIS will likely need to hire a significant number of new asylum officers. For instance, the Senate bill provided almost $4 billion in part to support 4,338 asylum officers. For its part, the Dignity Act requires USCIS to hire 500 new asylum officers. In addition, Congress will need to invest in more immigration judge teams to help resolve the current court backlog and prepare for a potential appeals process under asylum officer adjudications. Congress must invest sufficient resources to ensure USCIS and the Department of Justice (DOJ) can hire the appropriate number of personnel and have the right infrastructure to efficiently process individuals under an asylum officer adjudication process.

- **Increase Capacity at Ports of Entry (POEs).** Modernizing and increasing the capacity to process noncitizens at POEs is an important part of creating a more efficient and humanitarian relief system at the U.S. border. For example, the Dignity Act authorizes $10 billion over fiscal years (FYs) 2024 to 2028, or $2 billion each year, for improvements, including the construction of new ports or modernization and expansion of current ports as needed. This idea would not only help facilitate trade, but also help manage the situation at the U.S. southern border. POEs can serve a more orderly channel for migrants to make claims for humanitarian protection, as opposed to entering unlawfully between ports. To do so, it is important to ensure that border officials at POEs have the capacity and support system to process migrants requesting humanitarian protection. Mobile applications, such as CBP One, can continue to be used to help schedule appointments and manage daily capacity limits in an orderly manner.

- **Transition Period: Building Up to a New System.** With a two-million-case backlog in immigration courts and high encounter numbers at the U.S. southern border, it will likely take time to transition into a new adjudication process. This cannot happen overnight. Congress must provide a transition period for USCIS to start building its capacity to process asylum and other humanitarian claims at the U.S. border. One idea is to require USCIS at the beginning to start processing a certain percentage of cases via asylum officer adjudication, eventually building up to 100 percent of cases by a certain date designated by Congress or the administration.

- **Lawful Alternatives to Come to the U.S.** While implementing asylum officer adjudication presents promising prospects for improving the efficiency and quality of asylum adjudications, many migrants with desires to form a better life and contribute to U.S. society will not be eligible to obtain asylum. Thus, while improving the humanitarian relief system is very important, any solution that fails to contemplate further legal pathways for noncitizens to come to the U.S. will be an incomplete answer to the global migration challenges we face and our country's workforce shortages. Evidence indicates that individuals will come to the U.S. through legal pathways if there is an option to do so. Congress must consider implementing a new worker visa or reforming existing programs to permit individuals to come to the U.S. to work, particularly in key industries across America facing acute workforce shortages, such as hospitality, construction, and agriculture.

Conclusion

Allowing U.S. Citizenship and Immigration Services (USCIS) asylum officers to adjudicate most asylum claims at the U.S. border is likely to be a key part of the conversation moving forward. The Biden administration and several legislative proposals have indicated that asylum officer adjudication is part of the solution to the high levels of encounters at the border. This proposal can be beneficial for two main reasons. First, adjudication via USCIS asylum officers may be less traumatic to applicants for humanitarian relief and treat them more humanely overall. Second, current asylum backlogs are untenably long, and this policy change promises to shorten asylum processing time by providing decisions in a timely manner. The U.S.' current system for processing humanitarian relief claims is unsustainable, likely harming people involved, including those who are requesting humanitarian protection. With some thoughtful adjustments, asylum officer adjudication remains a viable option for creating a secure and orderly system to process asylum and other humanitarian claims, while maintaining America's commitment to humanitarian protections.

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