The Biden Administration's Proposed Rule on Asylum Bars & Other Measures: Explainer

On May 9, 2024, the Biden administration announced a new proposed rule and other measures by the Department of Homeland Security (DHS) to consider certain eligibility criteria for humanitarian protection earlier in the adjudication process. The proposed rule would provide asylum officers the discretion to make decisions on bars to humanitarian relief around public safety and national security concerns during initial screenings, which take place usually days or weeks after an asylum seeker enters the country. In addition, U.S. Citizenship and Immigration Services (USCIS) issued new guidance to asylum officers on when to consider whether someone could have safely relocated within their home country instead of crossing international borders. This explainer provides an overview of the proposed rule, the new USCIS guidance, and their possible impact on migration at the United States-Mexico border.

Proposed Rule on Asylum Eligibility Bars

The Biden administration unveiled a new proposed rule, "Application of Certain Mandatory Bars in Fear Screenings," that would aim to identify people who do not qualify for humanitarian protection earlier in the process and remove them from the U.S., instead of allowing them to remain stateside while they develop their cases and wait for a final adjudication. In particular, DHS announced that under the proposed rule asylum officers (AOs) with USCIS could apply certain statutory bars to protection related to national security and public safety during initial "credible fear" screenings, as well as during "reasonable fear" screenings for people who do not qualify for asylum but might be eligible for other, lesser forms of protection. These screenings take place during a fast-tracked deportation process known as expedited removal. As described under U.S. law, the bars affected by this Notice of Proposed Rulemaking (NPRM) would target anyone who (or about whom):

- "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;"
- "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;"
- "there are serious reasons for believing… has committed a serious nonpolitical crime outside the United States;"
- "there are reasonable grounds for regarding… as a danger to the security of the United States;" or
- could be implicated under certain terrorist provisions.

An asylum officer's consideration of the bars during the credible fear or reasonable fear process would be discretionary, and the proposed rule posits that asylum officers would "only consider a bar in those cases where there is easily verifiable evidence available to the AO that in their discretion warrants an inquiry into a bar, and the AO is confident that they can consider that bar efficiently at the credible fear stage."

The proposed rule would not allow asylum officers to screen out asylum seekers based on the "firm resettlement bar," which is a disqualifier unrelated to public safety or national security concerns

and instead has to do with whether an applicant has been offered a more permanent legal pathway in another country where they would also be safe. Likewise, it would not change how exceptions to asylum eligibility such as the existence of "safe third country" agreements like the U.S.'s with Canada, time limits, and a history of previous asylum applications are applied.

Notably, the Trump administration also tried to adjudicate mandatory bars to asylum during initial screenings. A court blocked that change, and under the Biden administration, DHS and the Department of Justice later argued that "due process and fairness considerations counsel against applying mandatory bars during the credible fear screening process." DHS acknowledged this apparent policy reversal by the administration in the new NPRM but argued such a shift does not conflict with its prior position given that application of the bars is discretionary and not mandatory under the proposed rule.

When DHS announced its new proposal, officials explained it as a means to quickly remove those who "pose a risk to our national security or public safety." Homeland Security Secretary Alejandro Mayorkas portrayed the policy as "yet another step in our ongoing efforts to ensure the safety of the American public by more quickly identifying and removing those individuals who present a security risk and have no legal basis to remain here."

USCIS Guidance on Internal Relocation

On May 9, officials also announced that USCIS has issued new guidance to asylum officers to analyze whether asylum seekers who express a future fear of persecution could simply relocate to another part of their home country and find safety there. The standard, usually referred to as "internal relocation," will now be applied earlier in the process, during initial credible fear screenings. DHS argues that "internal relocation has always been a part of an analysis of future claims of harm," but the change in guidance "will ensure early identification and removal of individuals who would ultimately be found ineligible for protection."

The new guidance was not immediately shared publicly.

Impact on the Southern Border

The impact of the Biden administration's proposed rule on overall border encounters or deportations is likely to be relatively minor. By DHS's own admission, "the number of migrants who are subject to these bars is small."

Only a small percentage of the people crossing the U.S.-Mexico border would likely have the proposed rule or the initial guidance applied to them, as most migrants and asylum seekers today do not go through the expedited removal process. U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE), USCIS, and the Department of Justice's Executive Office for Immigration Review (EOIR) do not have the resources to conduct initial screenings for every individual who arrives at the U.S.-Mexico border. Data from the first six months of fiscal year (FY) 2024 illustrate this point: asylum officers made determinations in around 116,000 screening interviews, while roughly 671,000 individuals were released from Border Patrol custody with notices to appear in immigration court to go through full removal proceedings, often years down the line.

Moreover, the NPRM includes historical data looking at cases where potential public safety or national security bars to protection were flagged – but not applied – by asylum officers during

these initial screenings. For this fiscal year through April 23, asylum officers only flagged a public safety or national security bar in about 2.5% (or 733) of the 29,751 credible fear cases that moved forward. That rate was relatively consistent with fiscal years 2023, 2022, and 2021 (the rate was slightly elevated, at 4%, for FY 2020). That said, flags around potential bars have been exponentially more likely during reasonable fear screenings than during credible fear screenings in recent years (in 10% of 1,430 positive reasonable fear cases this fiscal year through April 23, and 20% in FY 2023).

In this context, it is unlikely that applying the proposed rule to asylum and other protection screenings would meaningfully increase the number of people who are removed from the U.S. or affect the number of people arriving at the U.S.'s southern border. Depending on implementation, USCIS's revised guidance on internal relocation assessments during initial screenings could have more of an impact, as it might apply to far more individuals who are placed in expedited removal.

Yet, given resource constraints, the proposed rule would likely continue a trend within U.S. border policy: effectively two distinct pathways to safety, with different consequences. Most asylum seekers can live and work legally in the U.S. while they develop their cases and await their full immigration proceedings, usually in front of an immigration judge. By contrast, a subset of asylum seekers are subject to expedited removal, with ever increasing restrictions applied to them within a matter of days and limited to no ability to obtain counsel. This bifurcated asylum adjudicatory system makes it so that some asylum seekers often enjoy far more access to due process than others do.

At the same time, some experts have raised concerns that these complex determinations around national security, public safety, and internal relocation could inefficiently elongate USCIS's initial screenings. Those interviews often take many hours, and further queries into people's experiences could place additional pressure on USCIS's already overburdened asylum officers. DHS and the Department of Justice separately acknowledged this potential outcome in previous rulemaking, when they wrote that "[r]equiring asylum officers to broadly apply the mandatory bars at credible fear screening would increase credible fear interview and decision times because asylum officers would be expected to devote time to eliciting testimony, conducting analysis, and making decisions about all applicable bars."

The NPRM also raised questions about EOIR's role in the expedited removal process. Often, migrants go through these fast-tracked deportations without coming before an immigration judge. However, because return to persecution or torture is a human rights violation, people who receive a negative credible or reasonable fear determination from an asylum officer have the right to request a review of their negative determination by an immigration judge. The Department of Justice and EOIR did not join DHS's proposed rule, leading some experts to wonder whether immigration judges will also be applying the public safety and national security bars during their reviews – and if not, how these two different agency standards would work together in practice.

Impact on Asylum Seekers

Some advocates raised concerns that the proposed rule and revised USCIS guidance could box out eligible asylum seekers from protection without access to proper due process. In regard to the public safety and national security bars, legal service providers have pointed out potential consequences that may impact domestic violence survivors, people forced into committing crimes

(such as trafficking victims), asylum seekers wrongly accused of crimes as part of their persecution, and individuals escaping countries controlled by terrorist organizations.

The new USCIS guidance has also raised questions for advocates and experts about its potential to return people to danger, given the complexity around internal relocation. These determinations often rely on information from reports or expert testimony on country conditions, an asylum seekers' own evidence, and careful representation by an attorney. Those resources and information may not be available during the initial screening process when these criteria will now be applied.

Conclusion

The Biden administration's latest policies during initial screenings – particularly its proposed rule – are likely to have only a minor impact on the overall number of people crossing the U.S.-Mexico border or being quickly deported after expedited processing. As DHS suggests, officials may catch a number of people who might pose national security or public safety risks earlier on, mitigating some pressure on ICE detention and the immigration court system. However, these bars are often complex and difficult to apply, requiring careful implementation. If the Biden administration moves forward with the proposed rule and revised USCIS guidance, DHS must ensure they be implemented with care.