



## The Biden Administration's Asylum Ban

June 20, 2023

The Biden administration published a final rule, Circumvention of Lawful Pathways,<sup>1</sup> otherwise known as Biden's "asylum ban," which severely limits the ability of those fleeing harm or persecution to seek asylum in the United States. Under this rule, asylum seekers who enter the United States without inspection, or via a maritime border, and do not enter the United States through a legal pathway such as with a visa, humanitarian parole, or after scheduling an appointment with Customs and Border Protection (CBP), will not be eligible to pursue asylum in the United States. However, they may be eligible for withholding of removal or protection under the Convention Against Torture (CAT). President Biden's asylum ban will apply in all proceedings: credible fear screenings, affirmative asylum interviews, and in removal proceedings before an immigration judge.

Below are some exceptions to the rule and ways to rebut the presumption of asylum ineligibility. This rule only applies to asylum seekers who entered the United States on or after May 11, 2023. The rule is only intended to be in place for 24 months.

### The Rule does not apply to the following individuals:

1. **Unaccompanied children:** Unaccompanied children (UC) who meet the UC definition at the time of entry will not be subject to the asylum ban. They must be unaccompanied, without documentation to enter the United States, and under 18 years old.
2. **Mexican citizens:** Mexican citizens, as well as those individuals who are stateless and were last habitually residing in Mexico, are exempt.
3. **Parolees and visa holders:** Individuals who have arrived via one of the newly established parole processes for Cubans, Haitians, Nicaraguans, Ukrainians, and Venezuelans are exempt. This also includes anyone else who entered the United States with humanitarian parole or was inspected and admitted using a visa.
4. **Successful CBP One users:** Individuals who present themselves at a Port of Entry to a CBP officer at an appointment pre-scheduled using the CBP One app are exempt. This exception is intended to encourage asylum seekers to use the CBP One app rather than entering without inspection (EWI) or presenting at a port of entry without an appointment.

### These are the exceptions to the Rule:

5. **Asylum seekers who can demonstrate,** by a preponderance of the evidence, that it was **not possible to access or use the CBP One App due to language barriers, illiteracy, significant technical failure, or other ongoing and serious obstacles.** Therefore, asylum seekers who present themselves at the port of entry without a prescheduled appointment will not be eligible

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<sup>1</sup> 88 Federal Register 31314, (May 16, 2023).

for asylum unless they can show they were unable to access or use the app based on one or more of the reasons mentioned above.

6. **Asylum seekers who sought asylum and were denied in another country.** The rule makes explicit that the denial must be on the merits of the case; the asylum claim cannot simply have been abandoned by the asylum seeker.

**Asylum seekers subject to the presumption of asylum ineligibility may be able to rebut it if...**

- **Exceptionally compelling circumstances exist at the time of the entry.** This includes circumstances where a family has the potential to be separated based on the asylum ban. According to the rule, if one member of a family that is traveling together is not subject to the rule or is able to rebut the presumption of asylum ineligibility, then the rule does not apply to anyone in the family while they are in credible fear proceedings. Moreover, principal asylum seekers who are eventually granted withholding of removal or CAT protection and who would have received asylum but for the rule may be granted asylum in order to confer derivative status on family members in proceedings with them or to petition for family members via the I-730 process so their family members can derive asylee status.
- **They face “an acute medical emergency.”** This can include mental health emergencies.
- **They face imminent and extreme threats.** This could be, for example, an imminent and extreme threat to life or safety, including an imminent threat of rape, kidnapping, torture, or murder. LGBTQ or HIV-positive asylum seekers could be considered particularly vulnerable and subject to imminent and extreme threats.
- **They are a victim of a severe form of trafficking.** This definition includes individuals who are trafficked for sex or labor, and the labor definition can include “debt bondage.” Asylum seekers who were smuggled into the United States should be screened to see if they were trafficked.

It is important to counsel clients when they are outside the United States to do their best to gather evidence that demonstrates that the rule does not apply to them or that the presumption of asylum ineligibility can be rebutted. Some examples of evidence are screenshots documenting their inability to schedule a CBP One appointment, medical records/receipts, marriage and birth certificates of family members who could eventually benefit from asylum derivative status, or other documents or pictures.

# Can Marco Win Asylum Under Biden's New Ban?

*A Hypothetical Case*



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**Step 1:** Marco is a single man from Venezuela. He left Caracas after having received threats from the government for his antigovernment activities. Terrified, he fled Venezuela as quickly as he could. He departed for the United States by land with the help of friends and, in some cases, coyotes. **Marco hopes to make an asylum claim in the United States.**



**Step 2:** Marco decided seek protection in the United States and join his brother and cousin in Virginia who recently arrived there. Marco's brother and cousin are undocumented. Marco does not know anyone else in the United States. **The Venezuela parole program is not an option.**



**Step 3:** When he arrived in the border city of Ciudad Juárez, Mexico, Marco fell ill from the journey and had to be hospitalized briefly. He could not pay his medical bills in Juárez, and he was left out on the streets. **Rebuttal of presumption based on an acute medical concern. Can he produce evidence?**



**Step 4:** While homeless in Mexico, Marco's phone and belongings were stolen. Marco met some men at the U.S. border. Some of these men had phones and were downloading the CBP One app, but when they attempted to make an appointment to cross the border, the app crashed. Marco borrowed a phone and tried to make an appointment too. After a few attempts, he gave up. **Exception: CBP One use is not an option.**



**Step 5:** Feeling unwell and with a very high fever, Marco followed the same men and crossed into the U.S. He was apprehended and placed in CBP detention. **Ineligible for asylum based on Entry Without Inspection into the United States.**



**Step 6:** In CBP custody Marco had a credible fear interview. He still was very sick. He was unable to answer many of the asylum officer's (AO) questions on the phone. The AO asked if he faced any imminent threats, an acute medical concern, or was a victim of trafficking. Marco tried to explain that he was sick, but the AO asked for evidence which Marco did not have. After determining that Marco was not eligible for asylum, the AO considered whether Marco was eligible for withholding of removal and protection under the Convention Against Torture. The AO thought Marco was being evasive and denied his credible fear interview in less than 30 min. **Marco is removed from the U.S.**