



JUSTICE ACTION CENTER

Overview of the Biden Administration’s Notice of Proposed Rulemaking on Asylum February 21, 2023

As you may have seen, the Biden administration provided today an [advance copy](#) of a Notice of Proposed Rulemaking (“NPRM”) outlining how it would address migration at the U.S./Mexico border once Title 42 expires. Below are some top-level takeaways from the NPRM, followed by some more detailed bullets on the mechanics of the proposed policy:

Top-level takeaways:

- Fundamentally, the NPRM represents the Biden administration turning its back on this country’s asylum obligations and ending the idea that people should have a right to ask for asylum whenever they reach U.S. soil.
- The NPRM creates a “rebuttable presumption” of asylum ineligibility for individuals if: (1) after the Title 42 public health order is finally terminated, they (2) come to the U.S. (including the border with Mexico) without using an “established process” (such as a parole process or the CBP One application) to enter; after (3) traveling through a third country to get to the United States (unless they applied for humanitarian protection in that country *and* received a final decision denying that application).
 - In other words, the NPRM places conditions on asylum that would apply in both affirmative and defensive asylum applications and during credible fear screenings. To be able to seek asylum, after Title 42 is lifted an individual would have to be able to show that they arrived at the United States in a “lawful, safe, and orderly” fashion – i.e., entered via parole or arrived at a Port of Entry with an appointment through CBP, instead of entering without inspection between Ports of Entry, or arriving at a Port of Entry without having pre-scheduled an appointment through CBP One – *or* sought and were denied asylum in any country through which they traveled to reach the U.S.
- Although the NPRM claims that this “rebuttable presumption” is temporary and will be in place for only two years, recent history shows that “temporary” policies very easily become long-term, if not permanent, policies. Indeed, the NPRM effectively revives Trump-era policies aimed at shirking the country’s asylum obligations and closing the door on vulnerable families seeking the safety of the United States.
- The NPRM relies heavily on the CBP One application as the mechanism by which individuals can enter in a “lawful, safe, and orderly” fashion at a Port of Entry, by requesting and scheduling an available time and location to present and be inspected and processed at certain ports of entry. But we already know that CBP One has numerous flaws and failings, including problems with its facial recognition software, especially for babies or for people with darker skin; software issues

that freeze the app or cause it to time out; and a first-come-first-serve scheduling process that disadvantages families, who must provide more information than single individuals.

Mechanics:

- **Noncitizens (except for unaccompanied children) will be presumed ineligible for asylum if all the following is true:**
 - On or after the day the Title 42 public health Order is terminated,
 - They “entered” the United States in any way (including presenting at a port of entry) without documents authorizing their admission to the country,
 - After traveling through a country that is a signatory to the 1951 Refugee Convention or the 1967 Protocol (which includes all of Central America and virtually all of South America).

- **If presumed ineligible, the noncitizen could try to overcome the presumption by demonstrating “exceptionally compelling circumstances.”**
 - The proposed rule lists three circumstances that are automatically considered to overcome the presumption: at the time of entry, the noncitizen (or their spouse or child with whom they were traveling) faced: (1) an acute medical emergency; (2) faced an imminent and extreme threat to life or safety; or (3) were a victim of a severe form of trafficking in persons (a term of art). [There’s also a complicated exception relating to potential family separation but it’s super in the weeds.] The asylum officer could also consider other circumstances.

- **If the noncitizen cannot overcome the presumption, they’re ineligible for asylum.** They can/will still be considered for protection under the Convention Against Torture (CAT) and the withholding statute, but those require a much higher showing and don’t have the same benefits as asylum.

- **The presumption of ineligibility would *not* apply to noncitizens who:**
 - Are unaccompanied children;
 - Were given authorization to travel to the United States to seek parole;
 - Presented at a port of entry at a prescheduled time and place; or presented at a port of entry w/o a prescheduled time and place if the noncitizen demonstrates that the DHS scheduling system (currently CBP One app) couldn’t be accessed or used; or
 - Sought asylum or “other protection” in a country through which the noncitizen traveled *and* received a final decision denying that application.

- **Sunset provision:** the proposed rule would sunset 24 months after going into effect (although note that its provisions would continue to apply to anyone who did enter the United States during that 24-month period). BUT the proposed rule also says DHS will consider extending or otherwise modifying that timeline.