

# IMMIGRATION STATE OF PLAY POST-TITLE 42



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## UNDERSTANDING TITLE 42

For more than three years, the United States government has used its authority under [the Title 42 public health law](#) to rapidly expel migrants back to Mexico without due process, including those who fled their countries out of fear of persecution or torture. The right to seek asylum is enshrined in both U.S. and international law; but Title 42 allowed the government to effectively suspend that right.

As a result, Title 42 expulsions [forced](#) thousands of vulnerable migrants, unable to return to their countries out of fear of substantial harm, to wait in Mexico for their opportunity to seek asylum in the United States.

Title 42 expired on May 11, 2023 and the United States government returned to processing migrants under Title 8 of the U.S. Code. Under [Title 8](#), immigration officials may place a migrant who has entered or requests to enter the United States without a valid visa into full removal proceedings (otherwise known as 240 proceedings) or expedited removal proceedings. Individuals placed in 240 proceedings are scheduled for a hearing before the Immigration Court, where they can apply for asylum or other forms of immigration relief. Individuals placed in expedited removal proceedings are removed from the United States without further process, unless they state a fear of returning to their home country. In that case, they are referred to the U.S. Asylum Office for a credible fear interview ("CFI"). If the potential asylum seeker establishes that they have a credible fear of returning to their home country, they are removed from the expedited process and placed in 240 proceedings to continue with their asylum claim.

**With Title 42 lifted, individuals present in the United States or seeking entry at a port of entry ("POE") can no longer be immediately expelled back to Mexico.**

In the lead up to the end of Title 42, the Department of Homeland Security announced a slew of [new policies](#) aimed at deterring migrants from travelling to the United States outside of limited "lawful pathways" and restricting access to asylum processes for those who circumvent these identified pathways.

The Biden administration has stated that their post-Title 42 border policy focuses on (1) Deterrence; (2) Enforcement; and (3) Diplomacy.

## DETERRENCE

The centerpiece of the Administration's new border policy is the **Circumvention of Lawful Pathways Final Rule**, otherwise known as the "**Asylum Ban 2.0**", given its similarity to a rule restricting asylum access the Trump Administration issued (which was held unlawful in both [East Bay Sanctuary Covenant v. Barr](#) and [CAIR Coalition v. Trump](#)). **Its aim is to deter individuals from entering the United States outside of a POE, and without a prescheduled appointment to seek admission at one of eight POEs.**

## WHAT DOES THE ASYLUM BAN 2.0 DO?

- Establishes that any individual who enters from Mexico at the southwest land border or adjacent coastal borders without documents sufficient for lawful admission is ineligible to seek asylum.
- The ban applies to people who enter the United States between May 11, 2023, and May 11, 2025 and subsequently seek asylum, regardless of whether they are placed in expedited removal proceedings, full 240 removal proceedings or apply affirmatively after entering undetected. Whether or not an individual is subject to the ban is adjudicated subsequent to an individual's placement in removal proceedings; meaning it cannot be used as a basis to deny an individual entry to the United States.
- The ban does not apply to Mexican nationals, unaccompanied minors or people who entered the United States before May 11, 2023.
- **There are three exceptions to the ban:**
  - An individual presents at the POE with a CBP One appointment OR presents at the POE **without** a CBP One appointment and can demonstrate by a preponderance of the evidence that it was not possible to access or use CBP One due to "language barriers, illiteracy, significant technical failure, or other ongoing and serious obstacles;"
  - An individual applies for parole and receives advanced permission to travel to the United States;
  - An individual applies for asylum or similar relief in a transit country and receives a denial before coming to the United States.
- The presumption of ineligibility can be rebutted by "**exceptionally compelling circumstances,**" including:
  - Acute medical emergency;
  - Imminent and extreme threat to life and safety—requires "imminent threat of rape, kidnapping, torture, or murder;"
  - Being a victim of a severe form of trafficking in persons.
- The asylum ban establishes the use of **CBP One** as the preferred/lawful way to seek asylum at the U.S. border. DHS will provide 1,000 CBP One appointments a day at eight POEs across the U.S./Mexico border.
  - Individuals with a CBP One appointment will most likely be placed in full removal proceedings and paroled into the U.S. pending their removal hearing. They will be able to seek work authorization based on their parole.
  - This is a good process for individuals who are able to get a CBP One appointment; however, the consequences for seeking admission at the POE without an appointment or entering without inspection outweigh this positive advancement.
  - Additionally, the app historically has a lot of technical issues, such as inability for the facial recognition software to register dark skinned individuals. DHS recently **announced changes** to CBP One which addressed many of the issues around access to weak internet connections and time delays.
  - While there is a carve out for individuals who are unable to access the app but still present at a POE, USCIS officials have stated that simply not being technologically literate or not being able to read one of the three languages of the app (English, Spanish, Haitian Creole) is not per se sufficient to establish an exception.
- Individuals who do not have a CBP One appointment will be asked to wait in a separate line until the POE has "capacity" to process them. This could lead to long lines and a potential return to "metering"—another **problematic and illegal practice**.



## ENFORCEMENT

The Biden Administration plans to rely heavily on expedited removal to swiftly return ineligible individuals to their countries of origin. Individuals who are placed in expedited removal that express a fear of return to their country of origin must be referred to the Asylum Office for adjudication of a credible fear of return. The Administration has announced various policies to increase the speed at which they can deport individuals, including:

- The Asylum Ban 2.0 states that an individual in expedited removal who is subject to the ban is ineligible for asylum, and therefore, will have their claims assessed based upon their eligibility for Withholding of Removal or relief under the Convention Against Torture (“CAT”). Under the rule, individuals subject to the ban will subsequently have their claims for Withholding of Removal or relief under CAT assessed under a “reasonable possibility” standard and not the statutorily required “significant possibility” standard.
  - While it remains to be seen how exceptions to the rule will be applied, it is believed that the new rule will exclude a majority of applicants from passing the credible fear stage. By way of comparison, according to [USCIS statistics](#) from April 2022 to April 2023, 64% of all credible fear cases (in which the significant possibility standard applies) were granted, whereas only 34% of reasonable fear cases (in which the reasonable possibility standard applies) were granted.
- DHS has begun conducting credible fear interviews in CBP custody. CFI interviews were previously held only in ICE custody or in non-detained settings. Attorneys are not allowed to enter CBP facilities; and CBP facilities are notoriously crowded, cold, and brightly lit 24 hours a day—a harsh setting which makes it difficult for individuals to focus on their legal case. There are numerous issues with conducting CFIs in CBP custody, including extreme difficulty in accessing counsel.
  - DHS has also announced that it will limit the minimum amount of time an individual has to consult with an attorney prior to their CFI from 48 to 24 hours after receiving notice of their interview—leaving even less time to consult with an attorney.
  - CFIs in CBP custody are also being held 7 days a week again limiting the ability to access counsel.
- DHS also announced that it has come to an [agreement with Mexico](#) to deport individuals from Cuba, Haiti, Venezuela and Nicaragua to Mexico. This raises a lot of questions, including a question about what immigration protections these individuals will have once deported to Mexico.
- DHS has also stated it will [increase federal criminal prosecutions](#) for individuals who illegally re-enter the United States after previously having been removed.
  - This is especially concerning for individuals from Cuba, Haiti, Venezuela and Nicaragua who may have previously been returned to Mexico under Title 42 and do not understand that a deportation to Mexico carry serious consequences that a T42 expulsion did not.



Some new measures look beyond the processing issues at the Southern border and are aimed at addressing mass migration in the Western Hemisphere, including:

- The creation of two regional processing centers in Colombia and Guatemala, which would help identify candidates for the U.S. refugee resettlement program and other options outside of migration to the United States.
  - While these processing centers have yet to be stood up, the concept of allowing foreign nationals to seek refugee status or protections in other countries from a third location (not the country they have fled out of safety concerns, and not along the U.S. border) could have a positive impact on both managing migration flows and providing safer options for asylum seekers in need.
- An increase in the number of refugees the United States plans to accept from the Western Hemisphere.
  - The Administration intends to welcome up to 20,000 refugees from the Western Hemisphere, more than triple the amount accepted in FY 2022. Individuals admitted as refugees are not required to undergo further immigration processing in the United States and are eligible for free social services by the Office of Refugee Resettlement.
- An expansion of the [Family Reunification Parole](#) process to eligible family members from El Salvador, Guatemala, Honduras and Colombia.
  - The Family Reunification Parole process currently exists for certain Haitians and Cubans and allows individuals with already approved family petitions from those countries to enter the United States under parole while their family-based visa is pending.
  - This is a welcome policy announcement but will impact a small number of individuals and also does not account for the realities of individuals from these countries who must flee out of safety concerns.
- Continuation of its parole process for [Nicaraguans, Cubans, Haitians, and Venezuelans \(NCHV\)](#), which allows certain individuals in the United States with legal status to sponsor individuals from these four countries to live and work in the United States for two years.
  - This is a good policy change for some individuals, especially those seeking better economic opportunities in the short term, but it does not address individuals who must flee their countries out of fear of persecution and are unable to wait for this parole process.
  - This process also does not allow for children not accompanied by a parent or legal guardian to apply and does not apply for individuals who previously entered the U.S. without permission or who were interdicted on the high seas attempting to reach the Florida coast and turned back by US immigration officials.

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