

# The Biden Administration's Proposed Regulation on Asylum Bars: An Analysis

On May 9, 2024, the Department of Homeland Security announced a Notice of Proposed Rulemaking, published [here](#), which would allow asylum officers to reject a subset of asylum seekers earlier in the process based on several factors that are currently considered only once an asylum seeker has a full hearing before an immigration judge.

Like the Biden administration's 2023 [Circumvention of Lawful Pathways regulation](#), this proposed regulation puts more weight on initial screening interviews conducted by an asylum officer after a person has been taken into custody by an immigration official. The proposal would make the interviews harder for some asylum seekers to pass (and thus be given a full hearing). This "credible fear" screening is already an opaque step in the asylum process, in which asylum seekers have essentially no access to lawyers or the ability to present evidence.<sup>1</sup> At the same time, given the limited number of asylum officers available to carry out credible fear interviews, relatively few people who cross the U.S./Mexico border are currently being subjected to screening interviews instead of simply receiving notices to appear before an immigration judge.<sup>2</sup>

As a result, this regulation would increase the risks of erroneous denials of asylum seekers, while making the asylum process more inefficient and inconsistent. While it would likely apply to a relatively small population of asylum seekers, the proposed regulation would represent a step in the wrong direction.

## **What the Proposed Regulation Would Do**

The proposed regulation affects the screening interviews that asylum seekers are entitled to if the government is trying to deport them without a hearing (a process known as "expedited removal").<sup>3</sup> This interview is supposed to determine how likely it is that the asylum seeker will ultimately be found eligible for protection in the U.S. by an immigration judge, based on the persecution or torture they suffered or would suffer in their home country.

The standard the asylum seeker must meet in order to pass the interview and get a full hearing of their case depends on the circumstances. Officially, there are two types of

screening interviews: a “credible fear interview” for people who would be eligible for asylum, and a “reasonable fear interview” for people who would be ineligible for asylum under U.S. law but might be eligible for lesser forms of protection that do not provide a path to permanent residency and citizenship but do allow someone to stay in the country.<sup>4</sup> Under a 2023 regulation, most asylum seekers who enter the U.S. between ports of entry are subject to a higher standard in their credible fear interviews.<sup>5</sup> The proposed regulation affects each of these processes.

Under current law, there are several potential “bars” to asylum (triggers that make someone ineligible) that an asylum officer does not consider in the screening interview when deciding whether a person passes or fails. Instead, if a person passes the interview, it is the job of the immigration judge to consider whether these bars apply. The newly proposed regulation allows the asylum officer to consider some of these bars in their screening interviews. The asylum officer does not *have* to consider the bars when making a decision; it is left up to their discretion.

These are the bars that could now be considered in the screening interview:

- Whether the applicant engaged in persecution of other people (the “persecutor bar”)
- Whether the applicant has been previously convicted of a particularly serious crime
- Whether the applicant committed a serious crime outside the United States (whether or not they have been convicted)
- Whether the applicant poses a threat to the national security of the United States
- Whether the applicant triggers one of the “terrorism-related grounds of admissibility,” such as providing material support to a terrorist organization

If the asylum officer chooses to consider these bars and believes that one or more applies, the burden of proof is on the asylum seeker to prove otherwise.

### **Potential Impact on Asylum seekers**

The bars that can now be considered during screening interviews are some of the most opaque and complex in immigration law, itself an opaque and complex area of law. Questions such as whether the applicant engaged in persecution, or in material support of a terrorist organization, have decades of case law attached to them. Lawyers and advocates have [long raised concerns about these bars](#), which can be applied in an unfair and arbitrary fashion and are often based on evidence obtained from foreign governments

which immigration officials in the United States cannot independently verify and may be inaccurate.<sup>6</sup>

In the context of a screening interview, in which an asylum seeker almost never has a lawyer present (and usually has not been able to consult with a lawyer at all) and almost never has the ability to present evidence (since they are still in custody after crossing the U.S./Mexico border), these questions become all the harder to answer with confidence.

The Department of Homeland Security notes that relatively few people are flagged in screening interviews, as currently conducted, for potentially triggering one of these bars: two to four percent of credible fear interviews were flagged each fiscal year since 2020, and 14 to 20 percent of reasonable fear interviews were flagged during that period. If the regulation goes into effect and asylum officers are empowered to consider these bars and pursue lines of questioning during the interview to determine whether they could apply, it is possible that rate would increase—and could include erroneous denials of deserving claimants.

The Biden administration's proposal implies that there is an easily identifiable population of people who officials know will be ineligible for asylum but are forced to pass through screening interviews anyway. However, because of the opacity of the screening interview process and the discretion given to asylum officers, it is impossible to verify this. While the guidance given to asylum officers once the regulation is finalized will be essential in determining how the new policy is applied, its effects will necessarily be opaque and unaccountable to the public.

### **Potential Impact on the Border**

The Department of Homeland Security presents this regulation as a relatively small and discrete change which would not affect very many screening interviews. However, with elected officials of both parties pressuring the Biden administration to take more aggressively hawkish action on the U.S./Mexico border, it is important to understand this in the context of overall border numbers.

Over the first six months of fiscal year 2024, asylum officers [issued decisions](#) in 115,900 screening interviews (107,001 decisions in credible fear interviews, and 8,899 in reasonable fear interviews). Over that same time period, 671,389 people were [released from Border Patrol custody](#) with notices to appear in immigration court—which is what happens either after someone *passes* a screening interview, or when the government does

not put them through the credible fear process at all (often due to resource limitations). Furthermore, most of the people who received screening interviews were *not* released from Border Patrol custody, but were instead transferred to ICE to be interviewed. In other words, for every person subjected to a screening interview, several more were released without one. During periods when more people are crossing into the U.S., such as in December 2023, that gap is even wider since the number of asylum officers remains fixed.

When the U.S. government adds additional components to a screening interview, it decreases the possibility that someone will pass, but it also forces the asylum officer to take longer conducting and adjudicating the interview. DHS acknowledges this in its Federal Register notice; by allowing asylum officers discretion about whether to consider the bars, it says, it preserves “operational flexibility” so that interviews can be conducted more quickly when needed. However, this, like the 2023 regulation, may decrease the number of interviews officers can conduct on the margin.

Improving the consistency, efficiency, and fairness of the asylum system requires seeking to ensure that all asylum seekers go through the same process after entering the U.S.—or at least that two people with identical asylum claims will not experience different outcomes merely based on the government’s resource constraints. This proposed regulation could exacerbate the existing inequities in asylum processing, inequities which serve neither asylum seekers nor the U.S. government’s need to manage the border.

## Endnotes

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<sup>1</sup> American Immigration Council, “Asylum in the United States,” last modified January 15, 2024, <https://www.americanimmigrationcouncil.org/research/asylum-united-states>.

<sup>2</sup> See U.S. Customs and Border Protection, “Custody and Transfer Statistics,” last accessed May 10, 2024, <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>.

<sup>3</sup> American Immigration Council, “A Primer on Expedited Removal,” last modified December 12, 2023, <https://www.americanimmigrationcouncil.org/research/primer-expedited-removal>.

<sup>4</sup> American Immigration Council, “The Difference Between Asylum and Withholding of Removal,” October 6, 2020, <https://www.americanimmigrationcouncil.org/research/asylum-withholding-of-removal>.

<sup>5</sup> U.S. Citizenship and Immigration Services & Executive Office for Immigration Review, “Circumvention of Lawful Pathways,” 88 Fed. Reg. 31314 (May 16, 2023), <https://www.federalregister.gov/documents/2023/05/16/2023-10146/circumvention-of-lawful-pathways>.

<sup>6</sup> Human Rights First, “Denial and Delay: The Impact of the Immigration Law’s ‘Terrorism Bars’ on Asylum Seekers and Refugees in the United States,” November 2009, <https://humanrightsfirst.org/wp-content/uploads/2022/12/HRF-Denial-and-Delay-Terrorism-Bars-2009.pdf>.