

THE BIDEN ADMINISTRATION'S PROPOSED THIRD-COUNTRY TRANSIT BAN FOR ASYLUM SEEKERS

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What is the proposed rule?

The Department of Homeland Security (DHS) and Department of Justice (DOJ) published a [Notice of Proposed Rulemaking](#) on February 23, 2023, entitled “Circumvention of Legal Pathways”. If implemented, the rule would place significant restrictions on the right to seek asylum at the U.S.-Mexico border. Under the proposed rule, non-Mexicans who enter the United States between ports of entry or who present themselves at a port of entry (POE) without a previously scheduled appointment will be presumptively ineligible for asylum unless they applied for and were denied protection in a country they traveled through on their way to the United States, subject to certain exceptions. This has been referred to as a “third-country transit ban.” The rule is designed to be in place for 24 months after its effective date, following the lifting of Title 42.

Since the March 2020 implementation of Title 42, most individual adults encountered at the U.S.-Mexico border have been returned to Mexico or their countries of origin, rather than being processed under Title 8 authorities. Once Title 42 is terminated, normal processing under Title 8 will resume. The Administration plans to concurrently expand the use of the CBP One mobile application to allow noncitizens to schedule an appointment for processing at a POE in response to the lifting of Title 42. The CBP One application is currently used to allow certain noncitizens to schedule appointments at a POE and to provide additional information for processing in conjunction with programs created for certain nationalities.

Why has the rule been proposed?

The Administration cites concerns over a potential increase in migrants seeking to cross the U.S.-Mexico border following the anticipated lifting of Title 42 as the impetus for implementing this temporary regulation. DHS and DOJ link the existence of the [Cuban, Haitian, Nicaraguan, and Venezuelan parole process](#) to a corresponding drop in encounters at the border. However, they further state that the decrease is not significant enough to improve their capacity to handle the projected influx. A similar rule issued by the Trump Administration in 2019 was subject to numerous legal challenges and ultimately [struck down](#).

Are there any exceptions?

The rule makes the right to seek asylum conditioned upon being denied asylum in a country the individual traveled through on his or her way to the United States. This presumption of ineligibility is rebuttable if a noncitizen:

- Received prior authorization to present at the border pursuant to a DHS-approved parole process;
- Presented at a port of entry at the scheduled time or is able to demonstrate that it was not possible to use the CBP One application;

- Received a final denial decision for asylum in a transit country (or a member of the noncitizen’s family did);
- Suffered an “acute medical emergency; faced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder; or satisfied the definition of ‘victim of a severe form of trafficking in persons’ provided in 8 CFR 214.11” (or a member of the noncitizen’s family did);
- Reports other exceptional circumstances; or
- Is an unaccompanied child.

To rebut the presumption of asylum ineligibility on the basis of a technical CBP One application failure or because of an imminent threat, the asylum seeker must demonstrate a preponderance of evidence. This places a significant burden on vulnerable asylum seekers who in many cases will not have access to counsel.

When will the rule take effect?

The effective date is proposed as the same day Title 42 ends, currently expected to be May 11, 2023. The proposed rule is undergoing a 30-day public comment period. Comments may be submitted until March 27, 2023, at [Regulations.gov](https://www.regulations.gov). All unique comments must be reviewed. It is likely that the rule will be subject to litigation, which could further delay, if not permanently halt, its implementation.

What is the USCCB’s position?

The U.S. Catholic bishops have called on leaders and all people of good will to see in vulnerable asylum seekers more than numbers encountered at the border or noncitizens to be processed but persons created in the image and likeness of God. The chairman of the U.S. Conference of Catholic Bishops’ (USCCB) Committee on Migration, Bishop Mark Seitz of El Paso, urged leaders to recognize the grave human cost of restricting asylum in a [statement](#) denouncing the proposed rule. The USCCB submitted [comments](#) in opposition to the Trump Administration’s similar attempts to implement such a policy in 2019. The chairman of the USCCB’s Committee on Migration at the time [called](#) for the policy’s rescission, which was also [condemned](#) by the president of the USCCB.