



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

The Honorable Joseph R. Biden
President of the United States
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

January 17, 2023

Re: Forthcoming Notice of Proposed Rulemaking on an Asylum Transit Ban

Dear President Biden:

On behalf of the American Immigration Lawyers Association (AILA), we write to express grave concerns over your administration's plan to issue a new asylum transit ban. We urge you to reconsider and reverse course on this decision.

You have long-championed America's commitment to asylum protection and, during your presidential campaign, spoke out against your predecessor's policies declaring that "[t]he challenges we face will not be solved by a constitutionally dubious 'national emergency' to build a wall, by separating families, or by denying asylum to people fleeing persecution and violence."¹ Since taking office, your administration has implemented urgently needed reforms to address the migration situation at the U.S. southern border. Most recently, AILA [welcomed your expansion of legal pathways](#) for Cuban, Haitian, Nicaraguan and Venezuelan nationals using your congressionally established parole authority.

After more than 75 years working with immigrants and refugees, AILA remains confident that smart solutions, like your parole program, can be implemented to effectively manage changing migration patterns while upholding U.S. law and ensuring protection for asylum seekers. Recently AILA published a policy paper offering solutions on "[What Does a Secure Border Look Like?](#)" Accordingly, we were deeply disappointed by the announcement of plans for a transit ban and your decision to expand the use of Title 42, which has absolutely no basis in medical or health science and severely undermines U.S. obligations under international refugee law.

Based on preliminary information, your administration's plan to render asylum seekers ineligible for asylum if they traveled through another country constitutes an impermissible and potentially deadly asylum ban. Under U.S. law, any alien who is physically present in the United States or who arrives in the United States "may apply for asylum."² This is true regardless of whether their entry is at a designated port of entry or what status the asylum seeker holds.³ Federal law permits only very limited circumstances when the United States can limit this right to access to asylum.

One such circumstance, the safe third country exception, cannot apply without a significant improvement in the conditions of countries throughout the region. Among other factors, this exception requires that the safe third country be one where the asylum seeker would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection and that the asylum seeker will not have their life or freedom threatened on account of a protected ground.⁴ At this time,

AILA National Office

1331 G Street NW, Suite 300, Washington, DC 20005
Phone: 202.507.7600, Fax: 202.783.7853, www.aila.org

conditions in Mexico, Guatemala, Honduras and El Salvador remain highly dangerous and their asylum systems fall short of providing a fair and meaningful review of asylum claims. For example, the most recent Department of State Country Reports on Human Rights Practices for Mexico documents reports of the “targeting and victimization of migrants by criminal groups and in some cases by police, immigration officers, and customs officials, including at land borders and airports.”⁵

Further, our members report cases in which asylum seekers remained fearful in Mexico and Central America. For example, a Guatemalan domestic violence victim feared that her abusive partner could still reach them in Mexico. In other case, a transgender woman remained at grave risk of danger in the countries she passed through until she arrived in the United States. Both of these individuals fled persecution and were ultimately granted asylum in the United States, and they both had valid reasons why they could not remain in their transit countries. A transit ban would likely have prevented them from obtaining the legal protection they desperately needed and ultimately received under U.S. law.

The Department of Homeland Security announcement of the transit ban states that a “rebuttable presumption of asylum ineligibility” will apply under the transit ban unless an individual can meet as yet unspecified exceptions.⁶ We are concerned that any exceptions built into the proposed transit ban rule will not be legally or practically sufficient to ensure adequate and meaningful access to the adults, families and children requesting protection in the United States. Notably, the prior administration’s attempts to ignore the plain language of the statute and create distinctions within eligibility consistently failed.⁷ Moreover, framing the presumption as rebuttable will further complicate the asylum process for both the asylum seeker and the asylum officer, and make fair adjudications next to impossible within the expedited timeframes.⁸ Only asylum seekers represented by counsel will be able to understand this highly technical legal concept – those too poor to afford counsel or unable to obtain counsel will undoubtedly be barred under the transit ban. With significant and growing backlogs throughout, our existing asylum system cannot handle this additional and completely unnecessary complexity.⁹

Finally, even if withholding of removal and Convention Against Torture (CAT) claims continue to be an option for these asylum seekers, for people granted these forms of legal relief, a transit ban would functionally separate families. Neither withholding of removal nor CAT offer family sponsorship, forcing asylum seekers to choose between their spouses and children and the safest possible country from their persecutors. Since taking office, your administration has admirably acted to end your predecessor’s family separation policy and has reunified hundreds of separated families. It would be contrary to these important aims for you to force an unfair “Hobson’s choice” on families resulting in additional separations.

We urge you and your administration to halt this proposed regulation. Every additional legal barrier to those seeking asylum pushes the country further from the nation’s foundational values that have welcomed those seeking refuge. In overwhelming numbers, Americans continue to support the nation’s commitment to asylum and humanitarian protection.¹⁰ Local communities across the country, such as Chicago, Martha’s Vineyard, and Washington D.C., have strived to welcome asylum seekers and migrants even under difficult circumstances. We ask you to embrace this vision and ensure asylum access is maintained at the nation’s borders and stand ready to work with your administration in the development of a system that is safe, orderly, and humane.

Sincerely,

Jeremy McKinney
President

Benjamin Johnson
Executive Director

AILA National Office

1331 G Street NW, Suite 300, Washington, DC 20005
Phone: 202.507.7600, Fax: 202.783.7853, www.aila.org

Cc:

Susan Rice, Director, Domestic Policy Council
Betsy Lawrence, Deputy Assistant to the President, Domestic Policy Council

Alejandro Mayorkas, Secretary, Department of Homeland Security
Blas Nunez-Neto, Acting Assistant Secretary, Department of Homeland Security
Royce Murray, Senior Counselor, Department of Homeland Security
Charanya Krishnaswami, Counselor, Department of Homeland Security

Merrick Garland, Attorney General
Lisa Monaco, Deputy Attorney General
Lucas Guttentag, Senior Counselor to the Deputy Attorney General
Margy O’Herron, Senior Counselor to the Deputy Attorney General
Vanita Gupta, Associate Attorney General
Paul Wolfson, Deputy Associate Attorney General

¹ “The Biden Plan for Securing Our Values as a Nation of Immigrants,” <https://joebiden.com/immigration/> (last visited Jan. 17, 2023).

² 8 U.S.C. § 1158(a)(1).

³ *Id.*

⁴ 8 U.S.C. § 1158(a)(2)(A).

⁵ Department of State, “2021 Country Reports on Human Rights Practices: Mexico,” <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/mexico/> (last visited Jan. 17, 2023).

⁶ Department of Homeland Security, “DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes” (Jan. 5, 2023), <https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and>.

⁷ For example, in *O.A. v. Trump*, the administration argued that the “the instruction that aliens ‘may apply’ for asylum regardless of whether they entered at a port of entry does not require that an alien must be eligible for or be able to ‘receive’ asylum.” 404 F.Supp.3d 109, 148 (D.D.C. 2019). In finding the rule inconsistent with the statute, the court quipped, “[a]s a matter of common usage, no one would draw a meaningful distinction, for example, between a rule providing that children may not apply for a driver’s license and one providing that children are not eligible to receive a driver’s license. Both locutions mean the same thing.” *Id.*

⁸ American Immigration Lawyers Association, “Featured Issue: Ensuring Legal Representation for People Facing Removal” (May 16, 2022), <https://www.aila.org/advo-media/issues/featured-issue-ensuring-legal-representation>.

⁹ TRAC Immigration, “A Sober Assessment of the Growing U.S. Asylum Backlog” (Dec. 22, 2022), <https://trac.syr.edu/reports/705/>.

¹⁰ Hart Research Associates, “Voters Support Allowing Refugees at the Southern Border to Apply for Asylum,” May 24, 2022, <https://static1.squarespace.com/static/5b500d885cfd79411583109a/t/628facc60e3d2c3bd265343d/1653583046934/Public+Memo+-+T42.pdf>.

AILA National Office

1331 G Street NW, Suite 300, Washington, DC 20005
Phone: 202.507.7600, Fax: 202.783.7853, www.aila.org