



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

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

via email

February 23, 2024

Re: Actions to Ensure an Orderly, Safe, and Humane Border

Dear President Biden:

On behalf of the American Immigration Lawyers Association (AILA), we urge you to take action to manage migration at the U.S. southern border in an orderly and effective manner while also ensuring a fair and humane process for people arriving at our borders.

Since you have taken office, the world has continued to experience unprecedented increases in refugee flows that have resulted in historic numbers of asylum seekers and other migrants coming to the U.S. southern border. Your administration, led by Secretary of Homeland Security Alejandro Mayorkas, has already taken significant steps to manage the situation, marshalling existing inter-agency resources while having to deal with a Congress that is unwilling or unable to provide the tools and resources needed to address the challenges at the border.

We are deeply troubled by reports indicating the administration plans to implement a national border expulsion authority and raise the legal standard for credible fear interviews. Restricting access at the border has been tried before under Remain in Mexico, Title 42, and through other bans that relied upon Immigration and Nationality Act 212(f) (8 USC §1182(f)). These bans were not effective at improving order and security in the border region. In fact, they created dangerous humanitarian situations, with thousands of people, including children and families, left stranded and vulnerable to targeting by cartels and smugglers.

While the details matter, AILA would oppose plans if crafted in a way that would violate United States and international asylum law and send people eligible for legal protection back into life-threatening conditions. First, an expulsion authority that also blocks access to asylum exceeds the President's authority to suspend entry or impose restrictions under 8 USC §1182(f) and is a violation of asylum law under existing case law.¹ The administration should be wary of overreaching its authority as the president's power to "suspend the entry" of migrants does not override the statutory right under 8 U.S.C. §1158(a)(1) to meaningful access to asylum whether at or between ports of entry.²

Second, even if an expulsion authority carves out exceptions for torture and other humanitarian protections, DHS will likely summarily expel people at the border without adequate screening because it lacks adequate personnel and other resources to do so properly. Third, with respect to raising the legal standard for asylum, it is already exceptionally difficult for migrants who have limited command of English to understand complex U.S. laws and be able to demonstrate they qualify for asylum without the assistance of counsel. The current low asylum grant rates must be understood through the lens of a system that is fundamentally unfair. Without counsel and while detained, asylum seekers face a legal process that is stacked against them.

The way forward requires new solutions that must incorporate an all-of-government approach that is backed by a major increase in funding across all immigration agencies. The greatest hurdle the administration faces is the lack of adequate funding, which we recognize results from the inability of Congress to pass regular or emergency spending bills. AILA continues to vigorously advocate for Congress to approve funding that would increase resources for DHS, State Department, Justice Department, and other agencies to be able to meet the demands of this moment.³ Without sufficient appropriations from Congress, implementing an effective border management plan will be extremely difficult, if not impossible. Announcing a border plan, however well-conceived, without available funds will compound the confusion of our border processing. The administration should also use any authorities available that enable it to draw upon or transfer existing resources. These funds should be directed to:

- maximally increasing the capacity at ports of entry to process people and vehicular traffic;
- increasing law enforcement targeted at the smuggling of Fentanyl and other narcotics, firearms, and people;
- adding asylum officers;
- providing cities with the resources to support arrivals;
- providing legal representation to those who cannot afford counsel;
- expanding legal pathways that reduce arrivals at the border; and
- providing support and foreign assistance to enable regional partners to improve the screening and protection of migrants and to address the root causes of migration.

So long as Congress fails to appropriate more funding, the options you have for managing the border will be fewer and more limited. However, we believe there are options available in the United States that would enhance processing times, provide access to legal representation and access to emergency funding. A U.S.-based approach would not subject migrants to unsafe and inhumane conditions in Mexico. By improving inter-agency operations, the administration can more rapidly screen people, determine if they are eligible for legal relief, and after a fair process, humanely remove those who are not eligible. More efficient procedures could streamline the review of asylum cases while still ensuring adequate court review to prevent errors.

In addition to funding, Congress bears the ultimate responsibility for reforming the immigration system to advance the nation's interests. The failure for more than three decades by Congress to update our immigration laws now leaves the administration faced with a task that is narrowly focused on the border when in fact the system can only be fixed by also reforming visa numbers

and legalizing the status of dreamers and other people who are undocumented or in a temporary status.

As the bar association of more than 16,000 practicing attorneys and legal scholars, AILA stands ready to offer its expertise as your administration identifies solutions to tackle this challenge. We appreciate your urgent consideration of these recommendations and are available to discuss them with your staff. If you should have any questions, please contact Greg Chen at gchen@aila.org.

Sincerely,



Benjamin Johnson
Executive Director



Farshad Owji
President

cc: Alejandro Mayorkas, Secretary Homeland Security

¹ *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 909 F.3d 1219 (9th Cir. 2018).

² The Ninth Circuit found that the President's Proclamation (combined with the rule) to prevent people from applying for asylum in the United States is "inconsistent" with 8 U.S.C. §1158(a)(1). *Id* at 771. The court stresses that the "technical differences" between eligibility and granting asylum are "of no consequence" to an asylum seeker - the effect is the same, "the right to apply a dead letter." *Id* at 772.

³ Letter from AILA to the Leaders of the House and Senate re American Immigration Lawyers Association and American Immigration Council Joint Recommendations on FY 2024 Appropriations and Continuing Resolution, (Sept. 22, 2023), <https://www.aila.org/library/letter-to-congress-with-recommendations-on-fy2024>.