

IMMIGRATION JUSTICE CAMPAIGN

Practice Advisory on Recent Regulatory Changes to Seeking Asylum in the U.S.

January 8, 2025

The asylum landscape is ever-changing, especially in recent years. This document is meant as a Practice Advisory on two recent regulations that impact asylum processing in the U.S., in order to assist Immigration Justice Campaign (IJC) pro bono attorneys with identifying whether their client is eligible to apply for asylum (or must instead seek other eligible immigration relief) and how to apply exceptions and rebuttals to these rules. *IJC pro bono attorneys should read this advisory and complete the requisite legal analysis at the beginning of their representation to identify which forms of relief your client is eligible to seek.*

*This document is not intended as legal advice nor a replacement for reviewing the rules themselves and their current validity.

Securing the Border Final Rule 2024

On September 30, 2024, the Administration published a joint DHS-DOJ Final Rule¹ that codified into law the former Interim Final Rule on “Securing the Border” (STB) that had been issued in June 2024² pursuant to a Presidential Proclamation³. The STB Rule expands on the 2023 Circumvention of Lawful Pathways (CLP) Rule (explained below) and does the following:

- **Creates a categorical exclusion prohibiting individuals from applying for asylum based on border numbers:** When encounters between points of entry (POE) at the Southern U.S. border are 2,500 or more calculated based on a 7-consecutive-day average, it triggers a provision that individuals attempting to enter the U.S. between ports of entry will be ineligible to enter and file for asylum. This rule has essentially been in effect continuously since June 5, 2024.⁴
- Individuals who enter the U.S. between POEs while the exclusion is in effect will only be eligible to file for Withholding of Removal and protection under CAT, and in

¹ <https://www.federalregister.gov/documents/2024/10/07/2024-22602/securing-the-border>.

² <https://www.federalregister.gov/documents/2024/06/07/2024-12435/securing-the-border>.

³ <https://www.whitehouse.gov/briefing-room/presidential-actions/2024/06/04/a-proclamation-on-securing-the-border/>.

⁴ The interim rule went into effect on June 5, 2024, and has since remained in effect due to the number of encounters at POEs. The final rule went into effect on October 1, 2024.

order to qualify for those limited protections, will need to meet a **higher legal standard called “reasonable probability,”** defined to mean substantially more than a “reasonable possibility” of harm upon return to their home country, but somewhat less than “more likely than not.”

- In a change from long-standing previous asylum processing at the border, DHS is no longer required to ask individuals whether they have a fear of return, nor provide them with individualized advisals on asylum; instead, at the border upon entry, the noncitizen **must affirmatively “manifest” their fear** of return due to persecution or torture, or their intention to seek asylum (also referred to as a “shout test”), which may be done through verbal or non-verbal/physical cues.

What does this mean for your client?

If your client entered the U.S. at the Southern Border after June 5, 2024 without prior U.S. government permission to enter, and was not paroled into the U.S. through a special parole process, your client is subject to this rule. Therefore, your client is not eligible to apply for asylum, and will only be eligible to seek Withholding of Removal or CAT protection (still filed on the same Form I-589 application) **unless they can meet narrow exceptions as described below.**

Exceptions to the STB Rule are included for the following individuals:

- Lawful permanent residents or other noncitizens with a valid visa
- Unaccompanied children
- Individuals with a valid visa or U.S. entry document
- Unlike the CLP rule below, there is **NO** exception for Mexican nationals under the STB rule
 - This means that Mexican nationals who entered the U.S. without inspection (by land at or between POEs and without U.S. government issued documentation for approved entry) after June 5, 2024 are subject to the STB rule, and therefore ineligible to apply for asylum unless they can meet another exception on this list.
- Individuals who entered using the CBP One app at a POE*
 - **Unlike the CLP rule, there is no exception under STB for those who were unable to access/use the CBP One app due to language or accessibility barriers*
- **Exceptionally Compelling Circumstances:** Those who can demonstrate by a preponderance of the evidence standard, that “exceptionally compelling

circumstances exist” at the time of entry, either for the applicant, or a family member with whom they traveled to the border. Exceptionally compelling circumstances outlined in the rule include:

- acute medical emergency⁵
- imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder
- meets the definition of a victim of a severe form of trafficking in persons⁶; or
- family unity (see below)

Family Unity Provision⁷

STB (similar to CLP below) includes a provision on family unity for noncitizens in removal proceedings only before the Immigration Court under INA Section 240. In such circumstances, where the principal applicant for asylum is eligible for withholding of removal under INA section 241(b)(3) or protection under CAT, and would be granted asylum but for being ineligible due to manner of entry under STB, and:

- if the principal applicant also has qualifying spouse or children family members physically located ***inside*** the U.S. who ***do not independently*** qualify for relief from removal; or
- if the principal applicant also has qualifying spouse or children family members physically located ***outside*** the U.S. who ***would be eligible to follow-to-join*** the principal applicant in the U.S.,

then they will have met the exceptionally compelling circumstance exception to STB above. However, this provision would only take effect after a complete hearing on the merits has concluded, once an immigration judge has made the determination that an individual has demonstrated eligibility for withholding of removal or CAT protection, and was only ineligible for asylum due to the STB rule. When this occurs, the immigration judge shall grant asylum. This is not a discretionary, but rather a mandatory provision. In light of the mandatory nature of this family unity provision, you should ensure that your written briefing before the court covers any arguments as to family unity, so to preserve this possible exception and subsequent grant of asylum for your client.

⁵ Anecdotal examples include: chronic illnesses, asthma, scoliosis, kidney failure needing urgent dialysis, mental health emergencies, and a formal medical diagnosis is not required.

⁶ As defined at 8 CFR § 214.11, “severe form of trafficking in persons” means sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act is under the age of 18 years; or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

⁷ 8 CFR § 1208.35(c).

At Which Points in the Immigration Process is the STB Rule Applied?

STB will apply in the following contexts and ***is assessed anew at each stage***⁸:

- During both detained and non-detained Credible Fear Interviews (CFIs) for those in expedited removal;
- during an immigration judge’s review of a negative CFI;
- in INA 240 removal proceedings for those who pass their CFI or are not subject to expedited removal; and
- in the affirmative asylum context.⁹

What does this mean for your client?

Even if your client had a CFI upon entry at the border/in detention, whether the asylum officer found your client to have met any exception to this rule or not, your client will have to address any possible exceptions again during any further proceedings in the defensive or affirmative context.

Note that the STB rule can apply to individuals even if the CLP rule below does not apply to them.

Circumvention of Lawful Pathways Asylum Rule 2023

The Circumvention of Lawful Pathways (CLP) asylum final rule went into effect on May 11, 2023.¹⁰ This rule is meant to be in effect for 24 months from May 2023 to May 2025. The CLP created a rebuttable presumption of ***ineligibility*** for asylum based on how a noncitizen entered the U.S. and whether they applied for protection in transit on their way to the U.S. If this rule is found to apply to a noncitizen, then they become ineligible to seek asylum, but are still eligible to apply for Withholding of Removal or protection under the Convention Against Torture (CAT).

Who Does the Rule Apply to?

CLP applies to any noncitizen who¹¹:

- Entered the U.S. by land at the U.S.-Mexico border (or in adjacent coastal waters);

⁸ 8 CFR § 1208.35(b).

⁹ This is possible when the noncitizen enters the U.S. in the manner described above but is not apprehended upon entry, or not served with a Notice to Appear, and their case proceeds before the asylum office affirmatively rather than in removal proceedings before an immigration judge.

¹⁰ The validity of this regulation is still being litigated in federal courts, but during the appeals process, the rule remains in effect.

¹¹ 8 CFR § 208.33(a)(1).

- Without inspection or authorization (meaning without a visa, or U.S. issued lawful entry document) between 11:59 p.m. ET on May 11, 2023 and May 11, 2025¹²; **and**
- Who, on their journey to the U.S., traveled through a third country¹³ other than their country of origin, citizenship, nationality, or last habitual residence.

Exceptions to the Rule – CLP Does Not Apply to the Following Individuals¹⁴

This rule does not apply to the following noncitizens, and therefore does not create a presumption of asylum ineligibility, allowing these individuals to still file applications for asylum if otherwise eligible:

- Unaccompanied children at the time of entry¹⁵
- Mexican nationals
- Noncitizens or a member of their family with whom they were traveling to the U.S., who:
 - sought and were denied asylum (by a final decision) in a third country through which they traveled;
 - were authorized to travel to the U.S. to seek parole, pursuant to a DHS-approved parole process;
 - used the CBP One phone application to register for and enter through an appointment with CBP at a port of entry; or
 - presented at a port of entry without an appointment **and** can demonstrate by a preponderance of the evidence that it was not possible to access or use CBP One (for example, due to language barriers, illiteracy, significant technical failure, or other ongoing and serious obstacle).

When the Rule Applies, Rebuttals to the Presumption of Asylum Ineligibility

Applicants for asylum who are subject to CLP can rebut the presumption of ineligibility by showing, by a preponderance of the evidence, that “exceptionally compelling circumstances exist” at the time of entry for either the applicant themselves, or a family member with whom they are traveling.¹⁶ The CLP rule provides the same non-exhaustive examples of exceptionally compelling circumstances as the STB rule above:

¹² Whether a noncitizen/applicant for asylum is subject to CLP is based on their date of entry, and not on the date of their asylum filing, and adjudicators will continue to apply CLP to applicants who entered during the 24-month time frame even if adjudicating their cases after May 2025.

¹³ The transit country must also be a party to the 1951 Convention or 1967 Protocol on the Status of Refugees (including Colombia, Panama, Costa Rica, Nicaragua, Honduras, Guatemala, Belize, and Mexico).

¹⁴ 8 CFR § 208.33(a)(2).

¹⁵ Children under the age of 18, with no lawful immigration status, who entered the U.S. alone, without accompaniment by a parent or guardian, at the time of entry. Generally, the UCs (unaccompanied minors) are designated as such by DHS upon entry.

¹⁶ 8 CFR § 208.33(a)(3).

acute medical emergency; imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder; meets the definition of a victim of a severe form of trafficking in persons; or family unity.

Family Unity Provision¹⁷

In addition to the rebuttals above, CLP includes a provision on family unity for noncitizens in removal proceedings only before the Immigration Court under INA 240. The family unity provision for the CLP rule is found at 8 CFR § 1208.33(c) and is essentially the same as that under the STB rule above.

At Which Points in the Immigration Process is the CLP Rule Applied?

CLP applies in the same contexts as the STB rule above and ***is assessed anew at each stage.***¹⁸

Next Steps for IJC Pro Bono Attorneys: Ask your client the following questions¹⁹ to identify whether they are subject to the STB or CLP limitations on asylum eligibility and which exceptions or rebuttals may be available to them. Once identified, include relevant briefing in your pre-hearing statements at the individual hearing stage, or earlier as ordered by an immigration judge.

- When did your client enter the U.S.? (Before or after June 5, 2024 for STB? Before or after May 12, 2023 for CLP?)²⁰
- If your client is applying for asylum affirmatively before the USCIS Asylum Office (and is not in removal proceedings before the Immigration Court), ask your client when they entered the U.S., and assess what evidence can be provided to document their entry date.
- If you identify that STB/CLP applies to your client, then screen for any exceptions (or rebuttable presumptions) by asking:
 - How old was your client at the time of entry to the US? If under 18 years old, did they travel to U.S. alone, or with a parent/guardian? Ask if they were sent

¹⁷ 8 CFR § 1208.33(c).

¹⁸ 8 CFR § 208.33(b)-(c).

¹⁹ AILA Practice Alert: Regulatory Changes Due to the Asylum Transit Ban, AILA Doc. No. 23051501, May 24, 2023; Center for Gender and Refugee Studies Practice Advisory: Arguing Against the Circumvention of Lawful Pathways Rule, March 2024.

²⁰ If your client's Notice to Appear (NTA) in removal proceedings says that they entered the U.S. "on or about June 5, 2024," or "on or about May 12, 2023" (or your client tells you they entered on June 5, 2024 or May 12, 2023), ask your client questions surrounding their specific time of entry, particularly, when they arrived in line to cross the border, even if they were not formally processed by CBP prior to May 12, 2023 or June 5, 2024. If your client can document that they were actually on U.S. soil prior to the effective dates of the rules, you may have arguments to show that STB and/or CLP does not apply to them.

to a shelter with other children (run by the Office of Refugee Resettlement – Spanish-speaking children sometimes refer to these as “casa hogar.”)

- Did your client apply for any type of permanent status in any country through which they transited, while on their way to the U.S.? If yes, what kind of status did they seek, and what was the outcome of those applications?
- Did your client have a valid entry document/visa with which they entered the U.S.? Were they paroled into the U.S.? How long is their parole validity for? One year or two? Do they have documentation to evidence parole?
- If your client entered through a port of entry:
 - Did they use the CBP One app to secure an appointment with immigration officials at the border?
 - If they did not use CBP One app, ask why not:
 - Did they know about the app? If so, did they try to use it? What happened? How many attempts did they make to use CBP One?
 - Did they experience any language barriers in using it? Is their first language an indigenous language or another language that the CBP One application is not available in (currently just English, Spanish, and Haitian Creole)?²¹
 - What efforts did they make to secure assistance from someone else to use the app?
 - Was the applicant physically in an area where obtaining assistance with the app was reasonably and safely available?²²
 - Did previous trauma exposure, or traumatic circumstances at the time of attempt, limit the client’s ability to seek assistance from unknown individuals?²³
 - Did they experience technical challenges in trying to access the app?²⁴
- Does your client have a chronic illness? What kind?
- Was your client experiencing any medical challenges at the time of entry or at the time of attempting entry? What kinds?

²¹ Recall that language concerns with using the CBP One app will only be relevant as exceptions to the CLP rule.

²² Center for Gender and Refugee Studies Practice Advisory: Arguing Against the Circumvention of Lawful Pathways Rule, March 2024.

²³ *Id.*

²⁴ Recall that accessibility/technology concerns with using the CBP One app will only be relevant as exceptions to the CLP rule.

- Was your client in need of medical care to save their life, or for a grave medical need, for which care was not available in Mexico?
- Was your client fleeing a life-threatening situation that arose in transit to the U.S.?
- Was your client the victim of kidnapping, attempted kidnapping, rape, sexual assault, or other physical harm in transit to the U.S.? People who identify as LGBTQ+ or who are HIV positive should have those identities factored when assessing the extremity and imminency of any threat experienced.
- Was your client forced to provide sexual or other labor or services in exchange for something of value (housing, food, clothing, money, etc.), while in transit to the U.S.?
- ***For the Family Unity Provision, ask:***
 - Does your client have a spouse or children under age 21 who are within the U.S.? If yes, seek to understand if those family members have independent bases to seek asylum, Withholding of Removal, or protection under CAT.
 - Does your client have a spouse or children under age 21 who are outside the U.S.?

* * *

As always, please reach out to your IJC mentor should you wish to further discuss how the above rules may impact your client's case, or join us for weekly office hours on Tuesday or Thursday afternoons.