



Biden’s Asylum Processing Rule—Three Months in, What Practitioners Need to Know¹

What is the Asylum Processing Rule?

The Asylum Processing Rule² is a significant regulatory change under the Biden administration that allows Asylum Officers to conduct Asylum Merits Interviews of certain asylum seekers who have passed credible fear interviews rather than having those cases referred directly to the immigration court. The Rule was issued as an Interim Final Rule and took effect on May 31, 2022.

How many people have been processed under the Asylum Processing Rule to date?

The Department of Homeland Security (DHS) released its first [Asylum Processing Rule Cohort Report](#) on September 1, 2022. According to the Report, through August 22, a total of 1,395 people had been processed under the Rule. Despite the extremely accelerated timeframes under the Rule, only 85 people processed since the Rule’s start date have received merits’ decisions on their asylum applications. Of these decisions, 24 were granted asylum, 52 were referred to immigration court, and 9 were administratively closed. Administratively closed cases include cases that were wrongly processed under the Asylum Processing Rule, as well as “no shows” who are referred to court under normal Immigration and Nationality Act (INA) §240 procedures. These cases are just beginning to get referred to immigration court and there is not yet public data from the Executive Office for Immigration Review (EOIR) on these cases.³

¹ This resource was created by Victoria Neilson, Supervising Attorney at NIPNLG. She would like to thank Joan Fernandez, Temple University, Beasley School of Law, J.D. anticipated 2024, for his assistance.

² Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078, 18226 (March 29, 2022) (amending 8 C.F.R. §§ 208, 212, 235, 1003, 1208, 1235, 1240).

³ We are interested in hearing your experiences in immigration court for cases processed under this rule. Please email victoria@nipnlg.org to share your experiences with the new streamlined proceedings.

How do the grant rates under the Asylum Processing Rule compare to Asylum Office grant rates generally?

While the number of decisions under the Asylum Processing Rule is very low at this point, the grant rate on cases completed stands at 28 percent. This grant rate is almost the same as the current affirmative asylum grant rate under traditional affirmative filings, which stands at 27 percent according to the most recently released [Asylum Division Quarterly Statistics Report - FY2022 Q1](#) which covers the period from October 1, 2021-December 31, 2021.

Why do asylum practitioners need to know about the Asylum Processing Rule?

The Asylum Processing Rule is the most significant change to asylum adjudication procedures since Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA). It is critical that practitioners learn how to recognize cases that are being processed under these new procedures, and develop procedures to provide representation under the extremely accelerated timelines required by the Rule.

How does the Asylum Processing Rule change existing procedures?

Following the passage of IIRAIRA, noncitizens who present at a port of entry without a visa or who are apprehended within 100 miles of the border and 14 days of arrival in the United States can be served with an expedited order of removal. If the noncitizen expresses a fear of return to their country, an Asylum Officer conducts a Credible Fear Interview (CFI). Prior to the implementation of the Asylum Processing Rule (and in cases where the new rule is not applied), an asylum seeker who passes a CFI would be served with a Notice to Appear (NTA) initiating removal proceedings under INA §240.

By way of contrast, asylum seekers whose cases are adjudicated under the Asylum Processing Rule, and who pass their CFI will have their case heard initially by the Asylum Office in an Asylum Merits Interview (AMI).⁴ Furthermore, asylum seekers who are processed under the new rule will not submit an I-589 application; instead the notes from the CFI will be considered as the asylum application and forwarded to the Asylum Office as the basis for the AMI.⁵

How is the Asylum Processing Rule being applied now?

The Asylum Processing Rule is being phased in slowly.⁶ As of September 2022, it is only being applied to single adults who have been detained at the Pearsall detention facility or the Houston contract facility in Texas **and** who indicate that their destination city is Boston, New

⁴ 8 C.F.R. § 208.9; Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, hereinafter (Asylum Processing Rule), 87 Fed. Reg. at 18216-17.

⁵ 8 C.F.R. § 208.3(a)(2), 87 Fed. Reg. at 18216.

⁶ DHS has recently [released data](#) on how the Rule has been applied during its first three months, showing that just under 1,400 people who have received CFIs have been potentially subject to the Rule, and among those people, 76 have received an AMI merits determination with 24 granted and 52 denied for a 32 percent grant rate.

York, Newark, Miami, Chicago, San Francisco, or Los Angeles, which are all cities that have Asylum Offices and immigration court help desks. DHS officials have stated at stakeholder meetings that it will gradually increase the scope of the Rule, but it has not indicated any timeline for expanding its use.

Will all asylum seekers apprehended at or near the border eventually be subject to the Asylum Processing Rule?

Probably not. Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) have broad discretion about whether to put noncitizens into expedited removal or whether to process them into the United States with or without serving an NTA on them. Nothing in the new rule will require DHS to process asylum seekers under this rule.

Furthermore, noncitizens who are under the age of 18 on the date the NTA is issued (unless they are placed in proceedings with an adult family member) and noncitizens exhibiting indicia of mental incompetency are exempt from the Asylum Processing Rule because DHS determined that the streamlined timelines the not procedurally fair for these vulnerable populations.⁷

What are the timelines under the Asylum Processing Rule?

The Asylum Processing Rule requires adjudication of cases within an extremely accelerated timeframe. Once an asylum seeker passes their CFI, the AMI must be scheduled within 21-45 days after service of the positive CFI finding.⁸ The asylum seeker can make amendments to the asylum “application,” (that is the CFI notes) and submit evidence but must make the submission at least 7 days before the scheduled AMI.⁹ This submission must be made 10 days prior to the AMI if it is mailed, though late submissions may be considered for good cause.¹⁰ Continuances before the Asylum Office are generally disfavored, and cannot push the AMI past 60 days after the positive CFI decision unless there are “exigent circumstances.”¹¹ On a stakeholder call, DHS stated that it did not consider lack of counsel to be “exigent circumstances.” As discussed below, the immigration court timelines are equally accelerated.

What if the asylum seeker fails to appear for the AMI?

If the asylum seeker does not appear at the Asylum Office for their AMI, the case will be taken out of the Asylum Processing Rule and referred to immigration court.¹² That means that the noncitizen will have to file an I-589 with the court in order to pursue asylum, withholding,

⁷ 8 C.F.R. §§ 1240.17(k)(1), (k)(7), 87 Fed. Reg. at 18226.

⁸ 8 C.F.R. § 208.9(a)(1), 87 Fed. Reg. at 18216.

⁹ 8 C.F.R. § 208.4(b)(2), 87 Fed. Reg. at 18216.

¹⁰ Asylum Processing Rule, 87 Fed. Reg. at 18216.

¹¹ 8 C.F.R. § 208.9(a)(1), Asylum Processing Rule, 87 Fed. Reg. at 18216.

¹² USCIS, “Asylum Merits Interview with USCIS: Processing After a Positive Credible Fear Determination,” Last updated May 31, 2022, <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/asylum-merits-interview-with-uscis-processing-after-a-positive-credible-fear-determination>.

and/or CAT protection; the CFI notes will not form the basis of the protection claim.¹³ It is not clear from the regulations whether the noncitizen will still be subject to the expedited Asylum Processing Rule timeline in court, although footnote 9 of the [Asylum Processing Rule Cohort Report](#) states that “no shows” result “in referrals to EOIR under standard INA 240 proceedings.”

What happens at the AMI?

Under this rule, Asylum Officers will use the CFI notes as the asylum application and conduct an AMI.¹⁴ While asylum seekers have a right to counsel at the interview, the regulations state that counsel can ask follow up questions, can make a closing statement, and that the Asylum Officer can limit counsel’s role.¹⁵ Thus, as in regular affirmative asylum applications, it appears that counsel’s role at the interview will be more limited than counsel’s role in court. Furthermore, the Asylum Office will provide the interpreter in most cases,¹⁶ and AMIs will be recorded and, if further proceedings are necessary, transcribed.¹⁷

How is the Asylum Officers’ role different in AMIs from regular affirmative interviews?

The biggest change is that the Asylum Officer can hear a merits case at all after an asylum seeker has been placed in expedited removal.¹⁸ Additionally, under the Rule, Asylum Officers will adjudicate the applicant’s application for withholding of removal and protection under the Convention against Torture (CAT) as well as the asylum application, if the Asylum Officer does not grant asylum.¹⁹

How are dependents treated in AMIs?

Dependents (meaning a spouse and/or minor child(ren)) can be included in the principal applicant’s AMI if they were included in the principal’s CFI, or if they are already independently in the AMI process.²⁰ For the latter scenario, the asylum seeker must contact the asylum office to have the cases joined.²¹ Any dependent must attend the asylum interview.²² If the Asylum Officer does not grant the principal’s asylum case, the Asylum Officer will conduct an individualized analysis of whether the dependents have a “significant possibility” of prevailing on asylum, withholding or CAT.²³

¹³ *Id.*

¹⁴ 8 C.F.R. § 208.3(a)(2), 87 Fed. Reg. at 18216.

¹⁵ 8 C.F.R. § 208.9(d)(1), 87 Fed. Reg. at 18217.

¹⁶ 8 C.F.R. § 208.9(g), 87 Fed. Reg. at 18217.

¹⁷ 8 C.F.R. § 208.9(f)(2), 87 Fed. Reg. at 18217.

¹⁸ 8 C.F.R. § 208.2(a)(ii), 87 Fed. Reg. at 18215.

¹⁹ 8 C.F.R. § 208.9(b), 87 Fed. Reg. at 18216-17.

²⁰ 8 C.F.R. § 208.3(a)(2), 87 Fed. Reg. at 18216.

²¹ USCIS, “Asylum Merits Interview with USCIS: Processing After a Positive Credible Fear Determination,” Last updated May 31, 2022, <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/asylum-merits-interview-with-uscis-processing-after-a-positive-credible-fear-determination>.

²² *Id.*

²³ 8 C.F.R. § 208.9(b), 87 Fed. Reg. at 18217.

What happens after the AMI?

If the asylum seeker wins, then they will receive an approval from the Asylum Office which, absent exigent circumstances, must be issued within 60 days of the CFI decision.²⁴ If the asylum seeker does not win asylum, the case will be referred to immigration court for further “streamlined” proceedings.²⁵ If the asylum seeker does not win asylum, the Asylum Officer will also make a decision on whether the applicant is eligible for withholding of removal or CAT protection.²⁶ The Asylum Officer decision and a transcript of the proceedings will be forwarded to the court.

What are the timelines in immigration court?

The timeline in immigration court is extremely accelerated, faster than the current, problematic [Dedicated Dockets](#), or prior expedited [Family Unit \(FAMU\) dockets](#). The first master calendar hearing must be scheduled within 30-35 days after service of the NTA, at which the asylum seeker will be advised of the nature of removal proceedings, the right to counsel, and will be served with the record of proceedings before the Asylum Office.²⁷ Then a case status conference must be scheduled within 30-35 days after the initial master calendar hearing.²⁸ It is possible to request continuances for additional case status conferences, but these must generally be in 10-day increments.²⁹ If after the status conference, the immigration judge (IJ) determines that a merits hearing is necessary, it must be scheduled within 60-65 days of the master calendar hearing.³⁰ The judge should issue an oral decision on the day of the individual hearing wherever practicable, and if unable to issue an oral decision on that day, must issue a decision no later than 45 days after the individual hearing.³¹

What does a full asylum case timeline look like under the Asylum Processing Rule?

- Ms. X crosses the border on June 20.
- She receives a positive CFI result on July 1.
- Her AMI is scheduled for July 30 (which falls within the required 21-45 days)
 - Ms. X must submit edits to the CFI notes and supplemental evidence by July 20 if mailing it.
- Ms. X does not win at the Asylum Office and is served with an NTA on August 15.
- Ms. X has her first master calendar hearing on September 15 at which she receives the transcript of her AMI and all evidence on which the Asylum Officer relied.

²⁴ 8 C.F.R. § 208.9(b), 87 Fed. Reg. at 18217.

²⁵ 8 C.F.R. § 208.14(c)(1), 87 Fed. Reg. at 18218.

²⁶ 8 C.F.R. § 208.16(a), 87 Fed. Reg. at 18218.

²⁷ 8 C.F.R. §§ 1240.17(b)-(c), 87 Fed. Reg. at 18223.

²⁸ 8 C.F.R. § 1240.17(f)(1), 87 Fed. Reg. at 18222-24.

²⁹ 8 C.F.R. §§ 1240.17(h)(2)(ii), (h)(4), 87 Fed. Reg. at 18225-26.

³⁰ 8 C.F.R. § 1240.17(f)(2), 87 Fed. Reg. at 18224.

³¹ 8 C.F.R. § 1240.17(f)(5), 87 Fed. Reg. at 18225.

- Ms. X. is scheduled for a status conference on October 15 at which she will take pleadings and discuss whether there are issues in the case that can be narrowed. DHS will decide whether to participate in the case.
- Ms. X’s individual hearing is scheduled for November 15 (within 60 days of first master hearing).
- The IJ was unable to issue an oral decision on the day of the individual hearing, so issues a written decision by December 15 (within the 45-day limit after the merits hearing).

What if the asylum seeker fails to appear in immigration court?

If the asylum seeker does not appear in immigration court, the IJ will issue an *in absentia* removal order.³² However, if the Asylum Officer determined that the noncitizen is eligible for withholding of removal or CAT protection, the IJ will enter an order granting that protection along with issuance of the removal order, unless DHS introduces new derogatory evidence that was not available before the Asylum Office.³³

What happens at the case status conference?

The case status conference is a newly created process in immigration court. Pursuant to the Asylum Processing Rule, the asylum seeker will enter pleadings, potentially contest the charges, and state whether they are seeking any other relief.³⁴ The ICE Office of the Principal Legal Advisor (OPLA) attorney will state on the record whether it intends to participate in the case or whether it intends to rest on the record.³⁵ It will also state its position on each of respondent’s claims.³⁶

Can the court grant continuances?

The IJ can grant continuances for “good cause” but generally continuances are not to exceed 10 days.³⁷ The individual hearing must be scheduled within 135 days of the master calendar hearing unless the noncitizen can show that a statutory or constitutional violation would occur without longer continuances.³⁸

Can the noncitizen’s case be taken out of the streamlined process?

There are some circumstances under which the case can be removed from the streamlined processing. These include: if the noncitizen was under 18 when the NTA was served (unless their case is joined in court with an adult family member); if the noncitizen exhibits indicia of

³² 8 C.F.R. § 1240.17(d), 87 Fed. Reg. at 18223.

³³ 8 C.F.R. § 1240.17(i)(2), 87 Fed. Reg. at 18226.

³⁴ 8 C.F.R. § 1240.17(f)(2)(i), 87 Fed. Reg. at 18224.

³⁵ 8 C.F.R. § 1240.17(f)(2)(ii), 87 Fed. Reg. at 18224.

³⁶ 8 C.F.R. § 1240.17(f)(2)(ii)(B)(1), 87 Fed. Reg. at 18224.

³⁷ 8 C.F.R. § 1240.17(h)(2), 87 Fed. Reg. at 18225.

³⁸ 8 C.F.R. § 1240.17(h)(2)(ii), 87 Fed. Reg. at 18225.

incompetency; if the noncitizen is prima facie eligible for a form of relief other than or in addition to asylum, withholding, CAT protection, or voluntary departure; if the noncitizen has produced prima facie evidence that they are not removable as charged and the IJ determines that they cannot address that issue simultaneously with the merits determination on asylum, withholding, and CAT protection; if the IJ finds the noncitizen removable to a country or countries other than the one of claimed fear and the noncitizen also claims fear in the third country or countries; or if the case has been reopened or remanded.³⁹

What role does the Asylum Office transcript play in the hearing?

While the Asylum Processing Rule states that a noncitizen who is not granted asylum by the Asylum Office is placed in full INA 240 proceedings, it also refers to these proceedings as “streamlined.” The IJ can decide the case on the record if neither side indicates that it intends to call witnesses and DHS waives cross examination.⁴⁰ The IJ can also decide the case without testimony if DHS waives cross and the IJ can grant the case without testimony.⁴¹ It also appears that the production of the Asylum Office record is intended to aid in streamlining the proceedings by providing a basis for the parties and the judge to narrow the contested issues in the case.

What does the IJ do if the Asylum Office granted withholding or CAT but denied asylum?

If the asylum officer determined the applicant is eligible for withholding of removal or CAT protection, DHS cannot contest that decision before the immigration judge unless there is new derogatory evidence that was not available before the Asylum Office.⁴² If the respondent does not contest the asylum denial, the IJ will issue a removal order and enter a decision granting withholding and/or CAT protection.⁴³ If the respondent pursues their claim for asylum before the IJ and asylum is again denied, the IJ will enter a decision implementing the Asylum Office decision on withholding and/or CAT, unless DHS introduces new derogatory evidence that was not available before the Asylum Office, which the IJ would then consider.⁴⁴ If DHS has new derogatory evidence, it must give the respondent 10-30 days’ notice to respond.⁴⁵

Can the respondent appeal if their application is denied?

Yes, the respondent’s case is heard in INA § 240 proceedings and the respondent can appeal the IJ’s decision to the Board of Immigration Appeals and if necessary to the federal court of appeals.

³⁹ 8 C.F.R. § 1240.17(k), 87 Fed. Reg. at 18226.

⁴⁰ 8 C.F.R. § 1240.17(f)(4)(i), 87 Fed. Reg. at 18225.

⁴¹ 8 C.F.R. § 1240.17(f)(4)(ii), 87 Fed. Reg. at 18225.

⁴² 8 C.F.R. § 1240.17(i)(2), 87 Fed. Reg. at 18226.

⁴³ Asylum Processing Rule preamble, 87 Fed. Reg. at 18226.

⁴⁴ *Id.*

⁴⁵ 8 C.F.R. § 1240.17(f)(5), 87 Fed. Reg. at 18225.

When can an asylum seeker subject to the Asylum Processing Rule apply for an employment authorization document (EAD)?

Under the Asylum Processing Rule, the Asylum Office and immigration court are required to complete their adjudication of the asylum application within 180 days of the positive CFI.⁴⁶ Since the INA does not permit an asylum seeker to receive an asylum pending EAD until 180 days after filing for asylum, an asylum seeker generally will not be able to obtain an asylum-pending EAD if they are processed under this rule.

What are the changes that the Asylum Processing Rule makes to the credible fear process?

The Asylum Processing Rule restores the “significant possibility standard” of winning asylum, withholding, or CAT as the standard asylum officers should use in making CFI determinations.⁴⁷ It also prohibits Asylum Officers from considering asylum bars in adjudicating CFIs,⁴⁸ thereby superseding part of the “Death to Asylum Rule” that was published in December 2020.⁴⁹ The Asylum Processing Rule also codifies a requirement that only USCIS officers can perform CFIs and Reasonable Fear Interviews,⁵⁰ apparently to prevent the possibility of CBP officers performing these interviews.

While the Asylum Processing Rule preserves the right to seek USCIS reconsideration of a negative CFI that has been upheld by an IJ, it limits this Request for Reconsideration (RFR) to a single RFR that must be submitted within seven days of the IJ affirmance of the CFI denial.⁵¹

Note: these changes to the CFI process apply to everyone who is put into expedited removal, not just those who are processed through the new AMI and streamlined court procedures.⁵²

What are the changes that the Asylum Processing Rule makes to parole standards?

The Asylum Processing Rule also changes criteria for parole for those who go through expedited removal. The Rule clarifies that those who are subject to expedited removal and detained while awaiting a CFI or following a positive CFI may be paroled but may not be released on bond.⁵³ Criteria that DHS can use in making parole decisions under the Rule include that the detainee: has a serious medical condition; is a juvenile; is pregnant; falls under certain witness categories;

⁴⁶ Asylum Processing Rule preamble, 87 Fed. Reg. 18143; and generally new regulations.

⁴⁷ 8 C.F.R. §§ 208.30(e)(2)-(3), 87 Fed. Reg. at 18219.

⁴⁸ 8 C.F.R. § 208.30(e)(5)(i), 87 Fed. Reg. at 18219.

⁴⁹ Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. 81698, 18751 (December 16, 2020).

⁵⁰ 8 C.F.R. § 208.30(b), 87 Fed. Reg. 18218.

⁵¹ 8 C.F.R. § 208.30(g)(1)(i), 87 Fed. Reg. at 18219. RFRs are discretionary in general; it is not clear, following the implementation of this rule whether USCIS will consider RFRs in compelling circumstances if they are submitted beyond the seven days. Given the challenges in communicating with detained asylum seekers, this seven day deadline has severely curtailed the ability for advocates to provide representation on RFRs.

⁵² 8 C.F.R. § 208.30(b), 87 Fed. Reg. at 18218.

⁵³ 8 C.F.R. § 235.3(b)(4)(ii), 87 Fed. Reg. at 18220.

or their detention is “not in public interest.”⁵⁴ The rule states that preserving detention bed space for higher priority detainees may be a ground to find that an asylum seeker’s detention is not in the public interest.⁵⁵

Note: these changes to the parole criteria apply to everyone who is put into expedited removal, not just those who are processed through the new AMI and streamlined court procedures.

Is there litigation challenging the Asylum Processing Rule?

There are currently two lawsuits pending by anti-immigrant states and organizations challenging the Asylum Processing Rule.⁵⁶ Both cases are moving on a relatively slow track and neither case has resulted in an injunction.

How do I get more information about the Asylum Processing Rule?

The Asylum Processing Rule is complex, and this FAQ only summarizes some of the main points. Practitioners should read the text of the rule itself at [87 Fed. Reg. 18078](#). USCIS also has a [webpage with information](#) about the Asylum Processing Rule. EOIR Director David Neal has issued [DM 22-08](#) describing EOIR processes under the Asylum Processing Rule. [CLINIC issued a resource](#) on the new rule in June. And [AILA has created a webpage](#) on the rule for its members.

⁵⁴ 8 C.F.R. 212.5(b), 87 Fed. Reg. at 18220.

⁵⁵ Asylum Processing Rule Preamble, 87 Fed. Reg. at 18125.

⁵⁶ *Texas v. Mayorkas*, 2:22-CV-094-Z 2022 WL 2652963 (N.D.Tex. July 8, 2022); *Arizona v. Garland*, 66-CV-01130 (W.D. La April 28, 2022).