

Pro Bono Briefing: New Asylum Ban and Expanded Expedited Removal



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July 24, 2019



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Today's Agenda

- Review the Interim Final Rule that effectively bans asylum, with very few exceptions
- Update on litigation challenging the ban
- Identify practice pointers and strategies for your asylum cases
- Review the notice of expanded expedited removal
- Update on litigation challenging the expansion
- Identify practice pointers and critical information for you and Tahirih clients
- Questions

Overview of the new asylum ban rule

- Effectively applies to all those who “enter or arrive in the United States” across the **southern** border after July 16, 2019, after traveling through one or more countries in which they’re not citizens or lawful residents, **unless**:
 - They are Mexican citizens/lawful residents; or
 - They applied for, and were denied, asylum in every country through which they passed en route to the US; or
 - They are victims of severe forms of trafficking (within the meaning applicable in T visa context); or
 - The countries through which they transited are not parties to the Refugee Convention or CAT.
- There is **no exception** for either non-Central Americans or unaccompanied minors.

Overview of the new asylum ban rule

- Changes credible fear interviews for those who enter through the southern border.
 - If someone can't show that they meet an exception to the rule, the asylum officer must enter negative credible fear determination.
 - The interview then becomes a reasonable fear interview for withholding of removal/CAT relief.
 - Much higher standard
 - Placed in removal proceeding if they satisfy that standard, otherwise removed to home country.

Implications of the rule

- Effectively cuts off asylum eligibility for anyone who
 - is not a Mexican national/resident
 - cannot afford to fly into the US
 - cannot survive a journey by boat
- Anyone who patiently waited in Mexico under the metering policy is now ineligible for asylum.
- Government is also arguing that the policy also applies to all those who previously entered the US and were then returned to Mexico under MPP (“Remain in Mexico”).

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Litigation challenging the rule

- Two challenges
 - East Bay Sanctuary Covenant v. Barr, N.D. Cal. No. 19-4073, filed by the ACLU on behalf of various organizations in the Northern District of California
 - Before Judge Tigar, with TRO hearing today.
 - **UPDATE: Judge Tigar issued a preliminary injunction on July 24 after this briefing was recorded.**
 - CAIR Coalition v. Trump, D.D.C. No. 19-2117, filed by Hogan Lovells in the District of D.C. on behalf of CAIR Coalition and RAICES
 - Before Judge Kelly, who denied a TRO in a decision this morning.

Litigation challenging the rule

- Main arguments against the policy:
 - The rule violates the Immigration and Nationality Act, which contains a general rule allowing individuals apply for asylum and sets out much narrower situations rendering individuals ineligible for asylum
 - As applied to unaccompanied children, the rule violates the Trafficking Victims Protection Reauthorization Act
 - The rule was improperly issued without notice and comment and therefore violates the APA

Practice Pointers and Case Strategy

- Continue to apply for asylum to preserve eligibility in light of ongoing litigation
- Incorporate the litigation arguments in your briefing and arguments
 - The rule violates the INA
 - If applicable, the rule violates the TVPRA
 - The rule violates the APA
- Talk to your clients to clarify forward-facing applicability
- Notify Tahirih of what you are seeing in your case(s) or colleagues' cases

Overview of expanded expedited removal

- Expedited removal is the power of low-level immigration officers to remove (deport) a person without that person having the opportunity to go before an immigration judge
- Since 2004, has been applied to those in the US for less than 14 days and encountered less than 100 miles from a border
- Effective yesterday, the notice expands expedited removal authority over any non-citizen and non-permanent resident who
 - Has not been lawfully admitted or paroled, **and**
 - Has not been present in U.S. continuously for two years or more, **and**
 - Is encountered anywhere in the U.S.

Overview of expanded expedited removal

- A few exceptions
 - If they express fear of removal to home country, they must be referred for a credible fear interview.
 - If they pass, they are referred to immigration court for defensive asylum
 - If they do not pass, they can request a redetermination hearing before judge
 - If they prove to an immigration officer that they've been present for 2+ years
 - Burden is on the immigrant
 - Unaccompanied children are exempted
 - Officers have *discretion* to issue a Notice to Appear in immigration court instead of executing an expedited removal

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Litigation challenging the expansion

- As of now, there is no litigation challenging the notice, but the ACLU and AIC have said they will file a challenge

Practice Pointers and Strategies

- If your client is not already in removal proceedings and has been present in the U.S. for more than 2 years, they should collect documentation of that continuous presence
 - Avoid items that document alienage or lack of lawful immigration status
 - Whether to carry them or have them in a safe place is a personal choice.
 - May not be time to get them if arrested by ICE
 - Documents presented to ICE could be used against them in removal proceedings or potentially criminal proceedings
 - There is a risk of losing those documents to ICE
- If present less than two years, collect humanitarian interest evidence.
- Review know-your-rights and family preparedness information with your clients.

Practice Pointers and Strategies

- Screen clients for fear of return and where applicable, prepare for credible fear interview.
 - Pro Bono Network training forthcoming
- Prepare a letter for your client to carry that includes your name and contact information, and advises, *as applicable*:
 - They are represented and request to speak to their attorney
 - They have been present in the U.S. for more than two years
 - They have a fear of return to their home country and request a credible fear interview

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How You Can Help

- Co-counseling all types of cases
- Supporting work on border
- Litigation matters

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Questions?

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A recording of this briefing will be posted on Tahirih's Pro Bono E-Library at www.tahirih.org