



TESTIMONY OF

Andrew Davidson  
Acting Deputy Director  
U.S. Citizenship and Immigration Services  
U.S. Department of Homeland Security

For a Hearing

BEFORE

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Committee on Homeland Security and Governmental Affairs  
Subcommittee on Government Operations and Border Management

ON

*“After Apprehension: Tracing DHS Responsibilities after Title 42”*

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## **Introduction**

Chair Sinema, Ranking Member Lankford, Members of the Subcommittee, thank you for the opportunity to appear before you today, together with my colleagues from U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE), to discuss how the Department of Homeland Security (DHS) processes noncitizen encounters at the Southwest Border (SWB). My name is Andrew Davidson, and I am the Acting Deputy Director of U.S. Citizenship and Immigration Services (USCIS). My testimony will describe the role of USCIS at the Southwest Border, and particularly how USCIS processes noncitizens in CBP and ICE custody and has operationalized the Circumvention of Lawful Pathways (CLP) rule.

## **Background**

USCIS administers the nation's lawful immigration system, including the adjudication of affirmative asylum claims and applications for refugee status. USCIS employees work shoulder-to-shoulder with their ICE and CBP colleagues—from conducting protection screening interviews at DHS facilities to coordinating on national security and public safety issues. USCIS has a proud history of providing immigration benefits to eligible individuals from all over the world. These benefits support the fundamental values and needs of our nation, be they economic, humanitarian, or otherwise in the public interest. USCIS delivers these benefits while being ever vigilant for those who seek to undermine the integrity of our immigration system—or worse, those who seek to do us harm. USCIS is only able to accomplish its complex and vital mission through the efforts of its thousands of dedicated public servants who each day administer a complex immigration system fairly and professionally.

## **Asylum and Credible Fear Claims**

For more than a decade, the steadily rising influx of migrants across the Southwest Border has resulted in significant increases in apprehensions and the number of noncitizens placed into the expedited removal process. USCIS screens individuals for credible fear in some situations as part of the expedited removal process and plays an important role in ensuring that potential asylees or victims of torture are not improperly returned to their home countries in contravention of our laws and those who are found ineligible are expeditiously removed. Our specially trained asylum officers conduct screening interviews for noncitizens who express a fear of return or otherwise express a fear of persecution or torture or indicate an intention to apply for asylum during the expedited removal process. The screening interview is conducted in order to determine whether the noncitizen has a credible fear of persecution or torture. Noncitizens who meet the credible fear threshold may either have their asylum applications retained by USCIS for an Asylum Merits Interview or may be placed in removal proceedings in immigration court, where they can apply for asylum or other relief or protection. Individuals found not to have a credible fear of persecution or torture may request review of that finding by an immigration judge.

Over the last 10 years, as irregular migration to the Southwest Border has increased, the number of credible fear referrals to USCIS has climbed sharply as well. Approximately 35,000 detained credible fear cases were referred to USCIS in Fiscal Year (FY) 2013; USCIS has seen the number of detained credible fear cases referred more than triple to approximately 107,000 so far in FY 2023 as of August 11, 2023. About 51,000 of those cases have been received since May 12, 2023, after the expiration of the Centers for Disease Control and Prevention's Title 42 public

health order and the return to processing all noncitizens under longstanding Title 8 immigration authorities. USCIS has pursued a number of strategies to address this increased caseload, including:

- Significantly expanding asylum officer staffing from 283 authorized positions in FY 2013 to 1,128 authorized positions in FY 2023;
- Maintaining remote interview and adjudication capability that enables asylum officers to process credible fear cases from any location;
- Bolstering credible fear staffing this fiscal year by providing refresher training on credible fear processing to several hundred USCIS employees who had been previously protection trained, thereby increasing the pool of credible fear-trained personnel;
- Deploying over 340 of these employees from other parts of USCIS to interview the credible fear caseload to supplement our permanent asylum officer corps ; and
- Most recently, cultivating a new volunteer pool of current USCIS employees interested in conducting credible fear screening, 275 of whom are currently engaged in specialized training scheduled to conclude on September 6, 2023, at which time they will join the force of credible fear-trained personnel.

Our ability to process credible fear claims in a timely manner saves valuable DHS detention resources and enables the entire expedited removal process to operate more efficiently. USCIS remains strongly committed to supporting the government-wide response to the migration flows on the Southwest Border, including ensuring those who seek protection are provided the opportunity to have those protection claims heard.

At the same time, USCIS remains committed to detecting and deterring immigration fraud, including within asylum and humanitarian benefits. The Fraud Detection and National Security Directorate (FDNS) has embedded teams at each of the 11 asylum offices. These local teams conduct pre-interview screening, provide onsite consultation to asylum officers interviewing applicants, analyze trends and large-scale fraud schemes, and serve as local liaisons to interagency law enforcement partners. Many local FDNS teams also include an intelligence research professional to monitor trends and conduct specialized analysis. USCIS continues to lead an interagency asylum fraud working group with partners from ICE's Homeland Security Investigations, CBP, Department of Justice, and Department of State. In recent years, USCIS has supported multiple successful criminal prosecutions and convictions involving asylum fraud, further demonstrating the Department's commitment to ensuring the overall integrity of the immigration system.

### **Post-Title 42 Order Processing**

Over the past few months, DHS has implemented new measures to humanely manage the Southwest Border by enforcing our immigration laws while expanding safe, orderly, and lawful immigration pathways. This comprehensive approach was outlined in the DHS six pillar plan issued in [April 2022](#), and updated in [December 2022](#) and most recently in [May 2023](#). One of the enforcement measures implemented to support these pillars is the enhanced use of expedited removal. To ensure that expedited removal – including the credible fear process – is carried out fairly, efficiently, and quickly, USCIS worked with ICE and CBP to digitize parts of the credible fear processes and reallocated staffing resources so that hundreds of additional personnel were

available to process credible fear interviews. Additionally, certain noncitizen populations are now processed for expedited removal while they are in CBP or ICE facilities within days or just a few weeks after they were encountered. Through these measures, DHS is able to provide relief more quickly to those who are eligible and remove those who are not. Through these measures, DHS is able to provide relief more quickly to those who are eligible and remove those who are not.

The credible fear screening interview and standard is the same whether the noncitizen is in CBP or ICE custody. If the noncitizen receives a positive credible fear determination, they are issued a Notice to Appear (NTA) in immigration court for removal proceedings. Alternatively, under the Credible Fear and Asylum Processing Interim Final Rule, USCIS also has the option of retaining certain noncitizens' application for asylum and scheduling the noncitizen for a second interview, known as an Asylum Merits Interview, to determine whether the noncitizen is eligible for asylum. If the credible fear determination is negative, the noncitizen may request review of the decision by an immigration judge. If the noncitizen does not elect to have their determination reviewed or if the immigration judge affirms the asylum officer's decision, the noncitizen is subject to expedited removal and ultimately removed. If the immigration judge vacates the asylum officer's decision, the noncitizen may proceed either before USCIS or in removal proceedings before an immigration judge with their asylum application. If an NTA is issued and the noncitizen is placed in removal proceedings, the immigration court will make the final determination on the noncitizen's eligibility for asylum, withholding of removal, or other relief.

Certain nationalities, in this case nationals from Cuba, Haiti, Nicaragua, and Venezuela (CHNV), who are referred to USCIS for a credible fear interview while in Border Patrol custody are informed of legal pathways available to nationals of CHNV countries who are outside of the United States and meet certain eligibility requirements. These potentially eligible noncitizens are then asked if they would like to voluntarily withdraw their application for admission and return to Mexico in order to retain their ability to apply for these parole processes. If the noncitizen states they would like to withdraw their application for admission, the asylum officer stops the interview, administratively closes the case, and informs CBP of the noncitizen's request. If the noncitizen decides to not withdraw their application for admission, the asylum officer continues with the credible fear screening.

### **Processing under the Circumvention of Lawful Pathways Rule**

On May 12, 2023, the Circumvention of Lawful Pathways (CLP) rule took effect. This rule encourages migrants to use lawful, safe, and orderly processes and pathways to enter the United States and imposes a rebuttable presumption of ineligibility for asylum on certain noncitizens who fail to do so. The presumption applies to noncitizens who arrive at the Southwest land border and adjacent coastal borders, meaning any coastal border at or near the U.S.-Mexico border reached by an individual after traveling from Mexico and circumventing the U.S.-Mexico land border. Noncitizens who entered the United States on or before 11:59 p.m. Eastern Time on May 11, 2023, are not subject to the CLP rule. Mexican citizens and nationals as well as stateless habitual residents of Mexico also are not subject to the CLP rule, as the rule requires travel through a third country for the presumption of ineligibility to apply.

The CLP rule provides exceptions for a noncitizen from the presumption of asylum ineligibility and allows the noncitizen to rebut the presumption of asylum ineligibility by demonstrating

exceptionally compelling circumstances. The rule specifically excepts unaccompanied children from the presumption of ineligibility for asylum. When a noncitizen attends their credible fear interview with USCIS, the asylum officer will assess whether the noncitizen is subject to the CLP rule and, if so, whether an exception applies, or the presumption of asylum ineligibility can be rebutted.

Specifically, if the noncitizen is not subject to the rule or if an exception applies, USCIS will continue with a credible fear screening, applying the significant possibility standard. If a noncitizen is subject to the rule and an exception does not apply, they are presumed ineligible for asylum. The noncitizen then has an opportunity to rebut this presumption of asylum ineligibility, based on exceptionally compelling circumstances. If they rebut the presumption of ineligibility for asylum under the CLP rule, the asylum officer will conduct the credible fear interview using the significant possibility standard, which includes an exploration of whether the applicant has a credible fear of persecution or torture for all countries of nationality and all designated countries of removal prior to the issuance of a credible fear determination.

If the noncitizen is unable to establish an exception or rebut the presumption of ineligibility for asylum, their fear claim is assessed using the reasonable possibility standard, which requires a higher standard of proof. The reasonable possibility standard includes screening the noncitizen for fear of persecution or torture in the designated country or countries of removal, if any are listed, to determine whether they would be eligible for statutory withholding of removal or protection under the regulations implementing U.S. obligations under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. If no designated countries of removal are listed, then the noncitizen is screened for their country of citizenship or nationality. The designation of a country of removal is made by our DHS colleagues in CBP or ICE and provided to USCIS at the time of the referral.

The Circumvention of Lawful Pathways rule applies to noncitizens who arrive at the Southwest land border and adjacent coastal borders, meaning any coastal border at or near the U.S.-Mexico border reached by an individual after traveling from Mexico and circumventing the U.S.-Mexico land border. As noted above, noncitizens are not subject to the CLP rule if the noncitizen 1) entered the United States on or before May 11, 2023, 11:59 P.M. Eastern Time; 2) did not enter the United States from Mexico across the Southwest land border or adjacent coastal border; or 3) is a Mexican citizen, national, or stateless individual who last habitually resided in Mexico, because the rule requires travel through a third country. During implementation of the CLP rule, 37,075 of the 51,224 credible fear cases USCIS completed between May 12, 2023, and August 11, 2023, have been subject to the rule. Of those subject to the rule:

- In 1,071 cases an exception to the CLP rule was established, resulting in 815 cases (76.1%) receiving a positive determination at the significant possibility standard, 248 cases (23.2%) receiving a negative determination at the significant possibility standard, and 8 cases (0.8%) were administratively closed.
- In 4,292 cases the presumption of ineligibility for asylum was rebutted, resulting in 3,698 cases (86.2%) receiving a positive determination at the significant possibility standard, 577 cases (13.4%) receiving a negative determination at the significant possibility standard, and 17 cases (0.4%) were administratively closed.
- In 31,712 cases the presumption of ineligibility for asylum under the CLP rule was applied, resulting in 16,635 cases (52.5%) receiving a positive determination at the

reasonable possibility standard, 14,937 (47.1%) receiving a negative determination at the reasonable possibility standard, and 140 (0.4%) were administratively closed.

On August 3, 2023, the U.S. Court of Appeals for the Ninth Circuit issued a stay of the U.S. District Court for the Northern District of California's order in *East Bay Sanctuary Covenant v. Biden*, No. 18-cv-06810 (N.D. Cal.), vacating the CLP rule. At this time, while the stay remains in place, DHS continues to apply the CLP rule.

### **Conclusion**

USCIS will continue to respond to the rising number of credible fear referrals by ensuring DHS follows the laws written by Congress – swiftly processing noncitizens so they may either seek relief before an immigration judge or be expeditiously removed. Thank you for the opportunity to testify. I look forward to answering your questions.