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New interim asylum rules a mixed blessing

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The Biden Administration is issuing a new rule that will change the US asylum system to allow asylum officers instead of Immigration Court judges to adjudicate the claims of immigrants who are seeking asylum at the border.

The purpose of the rule is to decrease the backlog of asylum cases that are currently pending in Immigration Court, and to shorten the time between when an immigrant crosses the border and when the immigrant receives a ruling on his future status in the United States.

Under the current procedure, an immigrant who arrives at the border and asks for asylum will be placed in removal proceedings before an immigration judge with the Executive Office for Immigration Review,

("EOIR"), which is a part of the Department of Justice. The immigrant may apply for asylum with that immigration judge. However, it is taking applicants several years to have their asylum cases heard before an immigration judge because of the significant backlog in the immigration courts. In the meantime, many applicants have to "remain in Mexico" regardless of their country of origin, pending adjudication of their claim.

Under the new rule, immigrants at the border will not be placed in removal proceedings and have their asylum application heard by an immigration judge. Rather, they will be placed in a process known as "expedited removal" to have their cases heard more quickly. They will have their case heard within several months of their arrival by an asylum officer. Asylum officers are part of the Asylum Division of U.S. Citizenship and Immigration Services (USCIS) in the Department of Homeland Security. If an asylum officer grants asylum to the immigrant, the immigrant can remain in the United States. However, if the immigrant's asylum claim is rejected, the case will proceed to an immigration judge who must decide within 90 days whether or not the immigrant will be allowed to remain in the United States. The rule will not apply to unaccompanied minors. Advocates of the new policy point to the fact that asylum seekers will not be kept in limbo for years at a time, while awaiting a final status determination. Officials from the U.S. Citizenship and Immigration Office ("USCIS") said the process would be rolled out slowly. Under the proposed rule, the agency estimated it would need to hire 800 new employees and spend \$180 million to be able to handle 75,000 cases annually. DHS Secretary Alejandro Mayorkas said in a statement, "Through this rule, we are building a more functional and sensible asylum system to ensure that individuals who are eligible will receive protection more swiftly, while those who are not eligible will be rapidly removed."

By having asylum officers adjudicate claims instead of immigration judges, officials in the Department of Homeland Security hope cases will be resolved in months rather than years. There are currently 1.3 million pending cases in Immigration Courts. Nearly half (619,837) are asylum claims. Officials from the USCIS and EOIR, where asylum cases are handled, spoke to reporters on the condition of anonymity and said that the process would be rolled out slowly. They did not answer questions about where it would begin or how many migrants would be involved.

However, the rule has potential drawbacks and may significantly undermine asylum applicants' due process rights. A "rocket-docket" style adjudication can potentially prevent asylum seekers from obtaining adequate legal representation; interviewing witnesses; receiving declarations, and from having enough time to gather sufficient evidence to establish a "credible fear of persecution." According to 8 CFR §208.30, "An individual will be found to have a credible fear of persecution if he or she establishes that there is a "significant possibility" that he or she could establish in a full hearing before an immigration judge that he or she has been persecuted or has a well-founded fear of persecution or harm on account of his or her race, religion, nationality, membership in a particular social group, or political opinion if returned to his or her country."

Establishing asylum is a tough burden for many applicants. First, they have to articulate that members of the government of their home country have persecuted them. It cannot be an attenuated or general fear or anxiety, but must be specific. Second, they have to be perceived as being credible. The immigration judge has to review the witness' testimony and the evidence presented and make a determination on the veracity of the immigrant's asylum claim. Lawyers prepare their clients and write extensive briefs to back up their client's claims. Third, the asylum Seeker must compile evidence from outside sources such as the State Department, Amnesty International and other reputable organizations to establish that there has been a pervasive persecution of the applicant's particular group in that country. These are all aspects of a case that an attorney works diligently with their client to establish. (Under the current rule, applicants will have to establish a credible fear right away at the border to an asylum officer.) Furthermore, the rule will grant an enormous amount of discretion to an asylum officer who will be making a decision regarding the credibility of an asylum applicant's claim, rather than an immigration judge in a hearing in Immigration Court.

The new policy is scheduled to take effect on May 28, 2022. It will also take some time to train enough asylum officers to hear asylum cases, and to set up a system in place to process asylum cases through asylum officers. While proponents of the rule point to efficient resolution, the new system may prevent asylum applicants from utilizing legal resources to vigorously advocate on their behalf.