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EXPERT INSIGHT | Center for Homeland Security & Immigration

EXAMINING THE ASYLUM FRAUD LOOPHOLE

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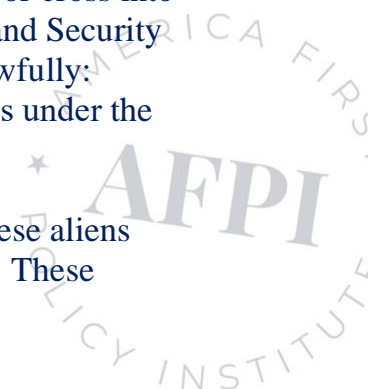
TOPLINE POINTS

- ★ By law, illegal aliens apprehended at the border are to be promptly returned through a process called expedited removal.
- ★ However, migrants are able to circumvent this process by simply claiming they intend to seek asylum in the U.S., regardless of the merits of the claim.
- ★ Until this loophole is closed, human smugglers and traffickers will continue to exploit it, knowing that migrants will be processed out of custody and released into American communities.

The approximately 5 million illegal aliens apprehended by U.S. Customs and Border Protection during the Biden Administration utilized similar strategies to achieve their goal of being released into American communities. Under the Immigration and Nationality Act (INA), aliens who are “encountered” by Border Patrol agents between the ports of entry or who present themselves at a port of entry without a visa are inadmissible, meaning they have no right to be admitted into the U.S. However, most of them are able to exploit a legal loophole and Biden Administration policies to be allowed into American communities.

According to [section 235](#) of the INA, all aliens who show up at the border, whether or not they appear at a port of entry, are considered applicants for admission. Aliens do not have a right to be admitted into the U.S. just because they appear at a port of entry or cross into the U.S. between ports of entry. Section 235 gives the Department of Homeland Security (DHS) two options for processing aliens attempting to enter the country unlawfully: expedited removal under section 235(b)(1) or “standard” removal proceedings under the authorities of section 235(b)(2) and section 240.

Expedited removal is intended to be a streamlined deportation tool where these aliens are promptly removed without having to appear before an immigration judge. These



decisions are unreviewable and are meant to impose immediate consequences on illegal aliens without adding unnecessary burdens on DHS and the Department of Justice. On the other hand, **standard removal** proceedings occur under the authority of section 235(b)(2) and [section 240](#) of the INA, with an immigration judge determining the inadmissibility or removability of the alien. In these more formal proceedings, the U.S. is represented by attorneys from U.S. Immigration and Customs Enforcement (ICE) who offer evidence on behalf of the government and contest the claims of the alien seeking to block his or her removal.

Credible Fear: The Expedited Removal Loophole

The expedited removal process has one notable flaw that aliens often use to block his or her quick removal. This is the provision in section 235(b)(1)(A)(i) that allows them to indicate “an intention to apply for asylum” or “a fear of persecution.” Aliens who make these claims are then referred to a U.S. Citizenship and Immigration Services asylum officer for a “credible fear” screening, which is the first step in the asylum process for illegal aliens apprehended at the border.

Importantly, policymakers should recognize that the credible fear threshold is incredibly low. An alien can establish “credible fear” by demonstrating “a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum.” In practice, simply uttering the words “credible fear” or “asylum” tend to be sufficient to establish this threshold. Approximately [81%](#) pass this low bar, but, as explained below, very few meet the higher standard for asylum.

Importantly, asylum is a form of discretionary relief, which means that an alien is not entitled to it. Aliens who pass the credible fear screening still must demonstrate they meet the definition of “refugee” under [section 101\(a\)\(42\)](#) and have the DHS Secretary or Attorney General exercise his discretion to grant them asylum, which essentially blocks their removal. Section 208(b)(2)(A) limits the classes of aliens eligible to obtain humanitarian relief even if they meet the statutory definition of “refugee.” Additionally, in Section 208(b)(2)(C), Congress delegated to the executive branch the authority to impose additional limits or conditions on asylum eligibility.

Increased Use of the Credible Fear Loophole

The exploitation of the credible fear loophole is a relatively new phenomenon. Between 1996, when expedited removal was added to U.S. immigration laws, and Fiscal Year (FY) 2010, only [5%](#) of aliens apprehended at the border claimed asylum or a fear of persecution. The 95% who did not make these claims were quickly returned to their home countries, which demonstrated the way Congress intended the expedited removal process



to function. However, the situation changed dramatically in FY 2010 after the Obama Administration issued a policy to parole out of custody and into American communities aliens who made credible fear claims notwithstanding the INA's mandate that aliens in expedited removal must be detained throughout the proceedings (See INA section 235(b)(1)(B)(iii)(IV)). As a result of this policy change, the number of these claims exploded to 15% of the aliens apprehended at the border in FY 2013 (the beginning of the Obama Administration's second term) and reached 39% in FY 2016 (the end of the Obama Administration).

The credible fear standard, which is lower than the standard for obtaining asylum, combined with the release from detention, created an invitation for asylum fraud that smugglers and traffickers were eager to exploit. Many people looking to come to the U.S. for jobs, who are known as economic migrants, were coached to say "asylum" or "credible fear" to block their prompt removal no matter how dubious their claims for asylum were. Approximately 81% pass the lower credible fear screening and are then placed in "standard" removal proceedings, where the merits of the asylum claim are then considered by an immigration judge.

Due to the non-detention policies of the Obama and Biden Administrations, most of these illegal aliens are released into American communities. Predictably, the volume of aliens exploiting this loophole overwhelmed the immigration court system, pushing hearings multiple years down the road.

A notable percentage of these illegal aliens failed to appear at their immigration court proceedings and were ordered removed in absentia. In total, only around 15% of illegal aliens who claim asylum or credible fear at the border end up being granted asylum protections.

Combating Asylum Fraud

Already facing an immigration court backlog with hundreds of thousands of cases, the Trump Administration implemented a multi-pronged strategy to combat asylum fraud and disrupt the trafficking networks. Adherence to INA's mandatory detention requirement (Section 235(b)(1)(B)(iii)(IV)) was not possible due to the volume of illegal aliens who were exploiting the loophole created by the Obama Administration's release policy, but the Trump Administration relied on authority found in section 235(b)(2)(C) to require these aliens to wait in Mexico until their immigration court dates. The policy, which is known as the Migrant Protection Protocols or Remain in Mexico, was highly effective at combating asylum fraud because it denied aliens the ability to be released into American communities.



Economic migrants or others with meritless asylum claims were discouraged by the prospect of having to wait in Mexico for years, and many abandoned their claims in order to be returned home. The Remain in Mexico policy sent a clear message that the asylum loophole was closed and that these migrants should not bother paying the cartels to be smuggled or trafficked to the southern border.

The Biden Administration's refusal to continue these policies and decision to revert to the mass release of illegal aliens apprehended at the southern border reopened the credible fear loophole. Predictably, this decision has spurred the historic humanitarian crisis over the past two years and generated billions of dollars for the cartels' human smuggling operations.

Securing the border and ending human trafficking requires reforming the asylum system. Through executive branch authority, the Biden Administration could make inroads today by reinstating the Remain in Mexico policy and reissuing the Trump Administration's asylum regulations that tightened the standards. Congress also needs to pass legislation that raises the credible fear screening standard and create new authority for the DHS Secretary to expel illegal aliens apprehended at the southern border immediately.

Recap of the Asylum Fraud Loophole

Step 1: Migrants claim asylum or credible fear at the border.

Step 2: More than 80% of illegal aliens pass this low credible fear screening.

Step 3: These illegal aliens are released into American communities.

Step 4: Many of these illegal aliens never show up to immigration court, and only 15% who claim asylum or credible fear at the border are granted asylum.

Step 5: None of the aliens denied asylum are deported under the Biden Administration's non-enforcement policies.

Step 6: Smugglers and traffickers point to the previous success of economic migrants being allowed into the U.S. to fuel the next wave of asylum fraud.

