

# Presidential Proclamation on Unlawful Border Crossers and Asylum

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On November 9, 2018, President Donald Trump issued a presidential proclamation to immediately suspend the entry of foreign nationals (aliens) who cross into the United States at the U.S.-Mexico border without inspection. The pronouncement further references that those who enter in contravention of the suspension will be ineligible for asylum under an interim final rule issued jointly by the Departments of Homeland Security and Justice on that same date. The proclamation and the rule are being challenged in federal court.

In the words of the proclamation, its issuance was prompted by the anticipated arrival at the U.S. Southwest border of “a substantial number of aliens primarily from Central America who appear to have no lawful basis for admission.” According to the proclamation, such migration “has precipitated a crisis and undermines the integrity of our borders” and requires “immediate action to protect the national interest, and to maintain the effectiveness of the asylum system.” The need to conduct foreign affairs effectively is another reason offered for the proclamation.

Citing both constitutional and statutory authority, the President finds that the entry of aliens at the Southwest border without inspection “would be detrimental to the interests of the United States, and that their entry should be subject to certain restrictions, limitations, and exceptions.” The proclamation indicates that its entry suspension and limitation provisions will expire 90 days after its issuance date or on the date that the United States and Mexico reach a bilateral safe third country agreement that allows for the removal of asylum seekers to Mexico, whichever is earlier.

Under the interim final rule, as noted, aliens who cross the U.S.-Mexico border unlawfully between ports of entry will be ineligible for asylum. By contrast, aliens without visas or other proper documentation who present themselves at a U.S. port of entry at the Southwest border will continue to be able to pursue asylum.

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In general, under Section 208(a) of the Immigration and Nationality Act (INA), an alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of entry) may apply for asylum, regardless of his or her immigration status. At the same time, INA §208(b)(2) enumerates grounds of ineligibility for asylum, such as an applicant's firm resettlement in another country prior to his or her U.S. arrival, and authorizes the executive branch to establish additional ineligibilities consistent with Section 208.

In order to be granted asylum, an alien must show, among other requirements, that he or she meets the definition of a refugee in INA §101(a)(42); that is, that he or she is unable or unwilling to return to his or her home country because of past persecution or a well-founded fear of future persecution based on one of five protected grounds (race, religion, nationality, membership in a particular social group, or political opinion). After one year of physical presence in the United States, an alien granted asylum (an asylee) may become a U.S. lawful permanent resident (LPR), provided he or she is otherwise eligible.

Under the proclamation and the rule, aliens who enter the United States at the Southwest border without inspection will continue to be eligible for consideration for forms of protection from removal other than asylum—namely, withholding of removal (INA §241(b)(3)) and protections under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The interim final rule addresses eligibility for asylum and screening procedures for these aliens.

There are key differences between asylum on the one hand and withholding of removal and protections under the CAT on the other. These latter forms of protection have a higher standard of proof than asylum. The threshold for an asylum applicant to be considered to have a well-founded fear of future persecution is that “there is a reasonable possibility of suffering [persecution based on one of the five protected grounds] if he or she were to return to that country.” The comparable standard applicable to an applicant for withholding of removal under INA §241(b)(3) is “it is more likely than not that he or she would be persecuted on [one of the protected grounds].” Similarly, the standard for withholding of removal or deferral of removal under the CAT is “it is more likely than not that he or she would be tortured if removed to the proposed country of removal.” Withholding of removal under INA §241(b)(3) and protections under the CAT also differ from asylum in that they do not provide a pathway to LPR status.

The proclamation directs the Secretary of State, the Attorney General, and the Secretary of Homeland Security to submit a recommendation jointly to the President about whether to extend or renew the suspension and limitations on entry within 90 days.

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