

COVID-19: Restrictions on Noncitizen Travel

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In response to the Coronavirus Disease 2019 (COVID-19) pandemic, the executive branch has invoked statutory powers conferred by Congress to impose special restrictions on the entry into the United States of non-U.S. nationals (referred to as “[aliens](#)” in governing statutes and regulations; some [jurists](#) and [policymakers](#) use the term “noncitizens” instead). These special restrictions break into two general categories: those that apply to aliens seeking entry with visas or other valid travel documents, and those that apply to aliens encountered near the border without valid travel documents (referred to here as “undocumented migrants” to distinguish them from aliens encountered in the interior of the United States who lack valid entry documents). Neither category of restrictions applies to U.S. citizens or lawful permanent residents (LPRs).

This Legal Sidebar summarizes these restrictions and recent related developments. Aside from the restrictions on alien entry discussed here, the Centers for Disease Control and Prevention (CDC) imposes predeparture [COVID-19-related testing requirements](#) on air travelers entering the United States, including U.S. citizens and LPRs. In addition, the CDC has established [vaccination requirements](#) for applicants for refugee status and some visas.

Snapshot of COVID-Related Restrictions on Alien Entry

Travelers Seeking Entry with Visas or Other Valid Documents

- Vaccination is required for nonimmigrant air travelers, with some exceptions.
- Vaccination is required for most noncitizens traveling by land or ferry for nonessential purposes; starting in January 2022, this requirement will extend to most aliens traveling for essential purposes as well.

Undocumented Migrants Encountered Near the Border (at or between ports of entry)

- Title 42 policy authorizes rapid expulsion without asylum screening (not applicable to unaccompanied children).

Restrictions on Arriving Aliens with Valid Documents

In response to the global spread of COVID-19, the White House has [implemented](#) a number of entry restrictions on arriving aliens with valid documents. Although entry restrictions during the COVID-19 pandemic have largely differed based on arrival method—air travel as opposed to crossing into the United States at land border ports of entry (POEs) and ferry terminals—the White House made efforts in October of 2021 to harmonize entry requirements. These efforts generally require vaccination against COVID-19

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for all inbound noncitizens with valid documents regardless of the country of departure, the travel method, and location of arrival. Under the updated policies, vaccination is the essential COVID-19-related requirement for most noncitizen travelers with valid documents.

Restrictions on Noncitizen Air Travel from Abroad

To combat the spread of COVID-19, President Biden issued “[A Proclamation on Advancing the Safe Resumption of Global Travel During the COVID-19 Pandemic](#)” on October 25, 2021. Effective November 8, 2021, this proclamation revokes and replaces a [series](#) of [earlier](#) presidential proclamations that generally restricted noncitizen travel from 33 countries (including China, Iran, countries in the Schengen Area, the United Kingdom, Ireland, Brazil, and South Africa) during much of the COVID-19 pandemic. Instead of targeting noncitizens traveling from specific countries, the new proclamation generally suspends the entry of unvaccinated [nonimmigrant](#) air travelers, with certain exemptions. (The proclamation does not apply to LPRs or immigrants; instead, these groups are subject to the same testing requirements as U.S. citizens.) To be considered “vaccinated” for purposes of the new proclamation, nonimmigrants must be [fully vaccinated with a vaccine approved or authorized](#) by U.S. regulators or listed for emergency use by the World Health Organization. According to the CDC, a person is [considered fully vaccinated](#) either two weeks after the second dose in a two-dose series (e.g., Moderna or Pfizer two-dose series) or two weeks after a single-dose vaccine (e.g., Johnson & Johnson single-dose vaccine).

[Exemptions](#) to the new proclamation include arrival from countries with low vaccine availability, participation in certain clinical trials for COVID-19 vaccination, when vaccination would go against medical advice, and humanitarian or emergency reasons. In addition to vaccination status, noncitizen travelers must agree to abide by generally applicable [health precautions established by the CDC](#), potentially including predeparture testing and masking during flight. The CDC also generally recommends, but does not require, a second test and self-quarantine or self-isolation after arrival. Unvaccinated noncitizen travelers allowed to enter under an exemption must agree to become fully vaccinated within 60 days (this requirement does not apply, for example, to noncitizens who are present in the United States for a brief duration). Noncitizen children under the age of 18 are also exempt from the vaccination requirement. The [proclamation](#) includes an exception for noncitizens for whom, given their age, requiring vaccination would be inappropriate as determined by the CDC. The CDC has [determined](#) that children under the age of 18 meet the criteria for an exception under the proclamation.

For statutory authority to restrict the entry of unvaccinated noncitizen travelers, the proclamation relies primarily on [Section 212\(f\)](#) of the INA. Section 212(f) [authorizes](#) the President to suspend the entry of, or place restrictions on the entry of, any alien or class of aliens, regardless of immigration status. The Supreme Court has interpreted this delegation of authority [broadly](#), and it is likely sufficient for the President to restrict the entry of unvaccinated nonimmigrants. Other statutory provisions already [impose vaccination requirements](#) on certain aliens seeking immigrant visas or seeking adjustment of status to permanent residence in the United States (with various exceptions, including when a vaccination is not medically advised).

Restrictions on Noncitizen Travel Over Land Borders

The executive branch has recently taken action to replace COVID-19-related restrictions on nonessential travel over land borders into the United States with a general vaccination requirement for noncitizens with valid documents who seek to enter by land.

In March of 2020, U.S., Canadian, and Mexican officials [mutually determined](#) that nonessential travel between the United States and its respective contiguous countries posed additional risk of the transmission and spread of COVID-19. As such, U.S. Customs and Border Protection (CBP), a component of the Department of Homeland Security (DHS), issued two identical orders ([one](#) applying to

U.S.-Mexico travel and the [other](#) applying to U.S.-Canada travel) that restricted nonessential inbound travel at land POEs from Canada and Mexico into the United States. CBP issued these orders under a provision of the Tariff Act of 1930, codified at [19 U.S.C. § 1318](#).

The two orders, put into effect on March 20, 2020, “suspend normal operations and process” at land POEs, except for “essential travel.” “Essential travel” includes (1) travel for medical purposes; (2) travel to attend educational institutions; (3) travel to work (e.g., individuals who work in agriculture who must travel between the United States and Canada); (4) travel for emergency response and public health purposes (e.g., responses to COVID-19); (5) lawful cross-border trade (e.g., commercial truck drivers); (6) official government or diplomatic travel; (7) members of armed forces returning to the United States; and (8) military-related travel or operations. The rules specify that “essential travel” does not include travel for tourism purposes, such as sightseeing, recreation, gambling, or attending cultural events. The two orders also contain broad exceptions for U.S. citizens, LPRs, and members of the military. The restrictions are temporary and were originally scheduled to remain in effect until [April 20, 2020](#), but have since been [extended](#) throughout the COVID-19 pandemic. (Canada now [permits](#) travelers to enter Canada if they qualify as fully vaccinated travelers regardless of citizenship, and Mexico [appears to permit](#) all noncitizen travelers to enter Mexico regardless of vaccination status.)

In October of 2021, DHS announced a change in policy on nonessential travel at land POEs and ferry terminals. The change appears to synchronize entry restrictions at land POEs and ferry terminals with the travel restrictions discussed above. This new approach consists of two stages. First, [effective November 8, 2021](#), noncitizen travelers arriving at land POEs and ferry terminals with valid documents may enter the United States for nonessential travel, such as tourism, if they are fully vaccinated against COVID-19, with certain exemptions (U.S. citizens, LPRs, and those traveling for essential reasons are [exempt](#)). A noncitizen traveler must provide proof of vaccination against COVID-19 and verbally attest to their reason for travel and vaccination status. In the second stage, starting in January of 2022, all noncitizen travelers seeking to enter the United States via land POEs or ferry terminals with valid documents—whether for essential or nonessential travel—[must be fully vaccinated against COVID-19](#) and provide proof of vaccination (DHS has stated that [children under the age of 18](#) are excepted from this vaccination requirement).

The updated travel restrictions placed on inbound noncitizens at land border POEs and ferry terminals appear compatible with the Tariff Act, which gives CBP wide latitude to limit services at POEs in response to a declared emergency or a “specific threat to human life or national interests,” as well as “any other action that may be necessary” to respond directly to those threats and emergencies.

Title 42: Restriction on Asylum Screenings

In response to the COVID-19 pandemic, the CDC has instituted a [policy](#) that allows immigration officials to expel undocumented migrants—that is, aliens who do not have visas or other “[proper travel documents](#)” or who seek to enter the United States unlawfully between POEs—to Mexico or their countries of origin without granting them the measure of access to the asylum system that is normally available under the INA. This policy is often called the “Title 42” policy because it purports to derive statutory authority from a public health provision of Title 42 of the *U.S. Code* (specifically, [42 U.S.C. § 265](#)). Although the CDC created the Title 42 policy, DHS is [responsible for implementing](#) it. The policy does not apply to unaccompanied alien children (UACs). It applies only to undocumented migrants encountered “[at or near](#)” the border, not to aliens in the interior of the United States. CDC reevaluates the policy “[at least every 60 days](#)” and most recently reaffirmed it on [October 2, 2021](#).

The Title 42 policy works by allowing DHS to eliminate the [asylum screening procedures](#) that would be available under the Immigration and Nationality Act (INA) to undocumented migrants encountered at the border. Under the INA, undocumented migrants are inadmissible to the United States but nonetheless may

initiate claims for asylum or related protections from persecution or torture. To evaluate such claims, the INA [requires](#) DHS to conduct screening interviews for asylum seekers (e.g., “credible fear” interviews) or refer the asylum seekers directly to proceedings in immigration court where they may pursue their claims. At the outset of such procedures, CBP typically holds asylum seekers in short-term custody in its facilities near the border. The Title 42 policy alters this standard INA framework by authorizing CBP to “expel” migrants from the United States without granting them access to any screening procedures. The CDC maintains that the policy is a necessary measure to avoid outbreaks of COVID-19 in the CBP facilities where undocumented migrants are typically held following apprehension. The policy has [exceptions](#), including the following: (1) as mentioned above, it does not apply to UACs; and (2) it has a catch-all exception for migrants who CBP officers “determine, with approval of a supervisor, should be excepted [from the policy] based on the totality of the circumstances.”

How the Title 42 policy works in practice is not always clear. Although CBP has expelled [more than a million](#) migrants under the policy since March 2020, it continues to process [many migrants](#) under the INA instead. The CDC maintains that eligible noncitizens are expelled under Title 42 “[where possible](#),” but it notes that restrictions imposed by foreign governments sometimes hamper Title 42 procedures. (Specifically, according to the CDC, Mexico generally allows CBP to expel only nationals of Mexico or the Northern Triangle countries across the southern border, and along some parts of the border Mexico will not accept non-Mexican families with children under 7.) The CDC also emphasizes that DHS has general discretion to make case-by-case exceptions. The CDC expects the case-by-case exceptions to become a step toward resumption of normal border operations—a point that emphasizes how CBP’s exercise of broad discretion is a central feature of current operations at the border. Finally, CBP [reportedly](#) recognizes an exception to the Title 42 policy for migrants who make an affirmative and “reasonably believable” assertion that they fear torture in the country to which they would be expelled, but the CDC order does not mention such an exception.

There is ongoing litigation over the lawfulness of the Title 42 policy. A federal district court [has held twice](#) that the policy is likely illegal and issued preliminary injunctions barring the government from expelling UACs and family units under it while litigation continues. The U.S. Court of Appeals for the D.C. Circuit [stayed](#) both of those injunctions on appeal, although the Biden Administration has taken [administrative action](#) to continue excepting UACs from expulsion under the Title 42 policy. The Biden Administration does not except family units from Title 42. Instead, it [continues to apply](#) the policy to expel some families encountered at the border without asylum screening, although it processes most family units under the INA.

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