



## ***Third Country (Transit) Asylum Rule: What You Need to Know***

*Updated October 8, 2020*

### **What is the new policy?**

On July 16, 2019, the Department of Homeland Security (DHS) and Department of Justice (DOJ) issued an [interim final rule](#) affecting asylum seekers at the southern border of the United States. This policy adds a bar to asylum for all individuals who enter or attempt to enter across the southern border, if they did not seek protection from a third country while en route to the United States. The rule was added to the regulatory framework that governs asylum seekers at the border and eligibility for asylum.

### **What is the current status of enforcement of the interim final rule?**

Currently, the interim final rule cannot be enforced because it has been vacated. The federal district court for the District of Columbia [vacated](#) the rule on June 30, 2020, because it did not satisfy any exception to the Administrative Procedure Act (APA) notice and comment rulemaking process. That decision was appealed on August 31, 2020.

### **What is the scope of the interim final rule?**

The effective date of the rule was July 16, 2019 and invoked by asylum officers in DHS and immigration judges in DOJ. The rule does not impact two related forms of relief known as withholding of removal and protection under the Convention Against Torture. These forms of relief are narrower and without the same benefits of asylum protection.

### **What legal authority is the administration relying upon to issue the interim final rule?**

The interim final rule points to sections in the immigration statute known as the Immigration and Nationality Act (INA). Two of these sections are summarized below.

- [INA § 208\(d\)\(5\)\(B\)](#) states that “[t]he Attorney General may provide by regulation for any other conditions or limitations on the consideration of an application for asylum not inconsistent with this Act.”
- [INA § 208\(b\)\(2\)\(C\)](#) states that the “Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).”

### **Has the administration invoked these immigration statutory sections before?**

Yes. In November 2018, DOJ and DHS issued a [joint interim final rule](#) to limit asylum to those who arrive at a place other than a port of entry and in doing so, invoked various sections of the

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immigration statute, including those outlined above. That rule was successfully challenged in the courts.

### **What are the legal concerns with the interim final rule?**

There are several concerns, including that the interim final rule violates the immigration statute and other laws. While the interim final rule identifies some sections of the immigration statute, these sections cannot be read in isolation to the statute as a whole, nor can it conflict with the U.S. Constitution, statutes and other laws. To illustrate, Congress has set a framework for asylum seekers who pass through another country before arriving in the United States through doctrines known as “firm resettlement” and “safe third country.” The interim rule exceeds this framework and in doing so may violate the INA. Further, [INA § 208](#) states that any person physically present in the United States, regardless of *how* or where they entered is eligible to apply for asylum. The section states in part, “Any alien . . . who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) irrespective of such alien's status, may apply for asylum . . .” (emphasis added)

### **What is an “Interim Final Rule”?**

An [Interim Final Rule](#) becomes effective immediately upon publication in the *Federal Register* and is an exception to the general rule that public notice and comment must take place before the effective date of a regulation. DOJ and DHS have concluded that a “good cause” exception exists to publish this asylum regulation as an interim final rule because “this rule is essential to avoid a surge of aliens.” Alternatively, the Departments have invoked the “foreign affairs exception” tying the flow of noncitizens to the southern border to national security and foreign policy interests of the United States. Written comments can be submitted by the public for a period of thirty days from the date of publication.

### **Has the interim final rule been challenged in court?**

Yes. [One lawsuit](#) was filed by the ACLU, Southern Poverty Law Center, and the Center for Constitutional Rights in the federal district court for Northern California, arguing that the rule violates the Immigration and Nationality Act and the Administrative Procedure Act. Judge Tigar [issued a nationwide injunction](#) to block enforcement of the interim final rule throughout the country. The litigation history is complicated. On August 16, 2019 the Ninth Circuit, on appeal, [narrowed the scope of this ruling to California and Arizona but permitted the district court to consider additional evidence](#). On September 9, Judge Tigar again [expanded the scope of his ruling to the entire country](#), citing additional evidence warranting blocked enforcement of the interim final rule nationwide and administrability issues if enforcement were only blocked in certain states. On September 10, the very next day, the Ninth Circuit again [temporarily stayed Judge Tigar’s second nationwide injunction](#) and sought additional information from both parties. The administration filed an [emergency application to the Supreme Court](#) on August 26, 2019 – before Judge Tigar’s second nationwide injunction based on additional evidence – seeking a stay of Judge

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Tigar’s first ruling. On September 11, 2019, the Supreme Court issued a “stay” on both nationwide injunctions issued by Judge Tigar and in doing so reinstated the [interim final rule](#) in full while this litigation is pending. On July 6, 2020, the Ninth Circuit unanimously [upheld](#) the first nationwide injunction ordered by Judge Tigar in July 2019. [The panel found that the rule exceeded power that Congress had delegated to the agencies under the Immigration and Nationality Act \(INA\), and that the agencies' explanation for the rule failed to show the deliberation required by the APA.](#) Despite this victory, the Supreme Court’s stay remains in place.

A [second lawsuit](#) was filed in the federal district court for the District of Columbia on behalf of the CAIR Coalition and RAICES, arguing that the rule violates these same statutes as well as the Trafficking Victims Protection Reauthorization Act. The relief sought by the plaintiffs is a temporary restraining order followed by a preliminary injunction. On July 24, 2019, the federal district court for the District of Columbia rejected the argument for a temporary restraining order and permitted enforcement of the interim final rule. The interim final rule was revisited by the federal district court in the District of Columbia on June 30, 2020. The court [vacated](#) the rule for failure to follow the notice and comment rulemaking process required by the APA. The administration filed an appeal with the Court of Appeals for the District of Columbia Circuit on August 31, 2020.

**Is this the first time the Supreme Court has allowed a new immigration policy to take effect before a decision has been made on the merits in the courts?**

No. On December 4, 2017, the Supreme Court [permitted the administration to enforce President Trump’s September 24 proclamation](#) banning nationals from several countries from entering the United States before the courts were able to reach a decision on the merits. The Supreme Court ultimately [upheld the travel ban indefinitely](#) when it made a decision on the merits on June 26, 2018.

**Where can I find more resources?**

See the [Penn State Law Center for Immigrants’ Rights Clinic](#) website for updates on this and other immigration policies. Also visit:

- [Department of Homeland Security](#)
- [American Immigration Lawyers Association](#)
- [American Immigration Council](#)
- [Human Rights First](#)

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