

PRIMER:

Immigration Enforcement Mechanisms at the U.S. Border



AMERICANBARASSOCIATION

Commission on Immigration

1050 Connecticut Avenue, NW, Suite 400
Washington, DC 20036
202-442-3363
www.americanbar.org/immigration

DECEMBER 28, 2022

UPDATED ON:

October 2023

NOTHING CONTAINED HEREIN IS TO BE CONSIDERED AS THE RENDERING OF LEGAL ADVICE FOR SPECIFIC CASES, AND READERS ARE RESPONSIBLE FOR OBTAINING SUCH ADVICE FROM THEIR OWN LEGAL COUNSEL. THESE MATERIALS AND ANY FORMS AND AGREEMENTS HEREIN ARE INTENDED FOR EDUCATIONAL AND INFORMATIONAL PURPOSES ONLY.

THE MATERIALS CONTAINED HEREIN REPRESENT THE OPINIONS OF THE AUTHORS AND EDITORS AND SHOULD NOT BE CONSTRUED TO BE THOSE OF EITHER THE AMERICAN BAR ASSOCIATION OR COMMISSION ON IMMIGRATION UNLESS ADOPTED PURSUANT TO THE BYLAWS OF THE ASSOCIATION.

A list of Commission on Immigration (COI) and Advisory Committee members can be found [here](#).

Acknowledgements:

Special thanks to COI Senior Legal Advisor Deena Sharuk and Commission Members Denise Gilman and Melissa Crow for their contributions to this Primer.

Table of Contents

Introduction	2
LAWS AND POLICIES IMPLEMENTED AT THE U.S. BORDER	5
IMMIGRATION ENFORCEMENT LAW AND POLICIES CURRENTLY IN PLACE AT THE BORDER	7
Circumvention of Lawful Pathways	7
Expedited Removal and Credible Fear Interviews	12
Credible Fear Interview (CFI)	13
Family Expedited Removal Management (FERM)	15
Merits Adjudication after a Favorable Credible Fear Interview	16
Asylum Merits Interview (AMI) Adjudication	17
Reinstatement of Removal and Reasonable Fear Interviews	18
Reasonable Fear Interviews (RFIs)	19
Merits Adjudication after a Favorable Reasonable Fear Determination	19
240 Proceedings and the Family Group Dedicated Docket	20
NON-IMMIGRATION BORDER PROCEEDINGS AND POLICIES	22
Operation Lone Star	22
Prosecutions for Entry or Reentry under 8 USC § 1325 and § 1326	24
PRIOR ENFORCEMENT POLICIES AT THE BORDER	26
Metering	26
Migrant Protection Protocols (MPP)	27
Title 42	29
The Humanitarian Asylum Review Process (HARP) and the Prompt Asylum Claim Review (PACR)	32
The Third Country Asylum Rule	32
Asylum Cooperative Agreements (ACAs)	33
CASES INVOLVING UNACCOMPANIED CHILDREN	35
CONCLUSION	37

Introduction

The U.S. southern border has been the subject of a great deal of scrutiny by policy makers, legislators, the federal judiciary, and the media. This primer aims to provide a broad introduction to the enforcement mechanisms employed at the U.S. southern border for practitioners and others seeking to understand them.

The discourse surrounding the southern border has focused on the large numbers of individuals seeking to enter the United States without documentation (either at a port of entry or by evading inspection), often with the intention of seeking asylum.¹ Unfortunately, much of the rhetoric suggests that increased numbers of asylum seekers at the southern border represent a crisis and security threat.² While the numbers of arrivals are in fact significant, the context and demographics demonstrate that the arrivals do not represent a security threat but instead form part of a refugee flow that can and must be addressed as such. Yet, border policies have largely focused on blocking access to asylum and exclusion from the United States. It is important for practitioners and the public alike to understand the various border enforcement mechanisms developed in recent years since they impact the legal trajectory for migrants³ arriving at the southern border, especially asylum seekers.

In Fiscal Year (FY) 2022, the Department of Homeland Security (DHS) reported that Customs and Border Protection (CBP), the agency responsible for enforcement at the U.S. border, had over 2 million encounters

¹ See, e.g., Rick Jervis, Number of migrants at the U.S.-Mexico border again predicted to smash previous records, USA Today (Aug. 18, 2022), <https://www.usatoday.com/story/news/nation/2022/08/18/number-of-migrants-at-us-mexico-border-cbp/10353337002/>; Santiago Perez, Record Numbers of Migrants Arrested at Southern Border, With Two Million Annual Total in Sight, Wall Street Journal (Aug. 15, 2022), <https://www.wsj.com/articles/illegal-immigration-arrests-hit-record-reasons-for-border-crossings-changing-11660599304>.

² CNN, Southwest Border Crisis Leaves Biden Vulnerable on All Sides (March 16, 2021), <https://www.cnn.com/2021/03/16/politics/joe-biden-immigration-border/index.html>; Center for Immigration Studies, Biden Border Policies Breed Crime and Exploitation in Mexico, Fraud Here (March 11, 2021), <https://cis.org/Arthur/Biden-Border-Policies-Breed-Crime-and-Exploitation-Mexico-Fraud-Here>; Office of the Governor of Texas, Press Release: Operation Lone Star Boosts Local Border Security Efforts, Ramps Up Law Enforcement Capabilities (July 8, 2022), <https://gov.texas.gov/news/post/operation-lone-star-boosts-local-border-security-efforts-ramps-up-law-enforcement-capabilities>.

³ While the Immigration and Nationality Act (INA) and the Code of Federal Regulations refer to noncitizens as “aliens,” this language is recognized as intrinsically offensive and dehumanizing. See INA § 101; 8 U.S.C. § 1101; 8 C.F.R. § 1.2; *Flores v. USCIS*, 718 F.3d 548, 551 n.1 (6th Cir. 2013). The Department of Justice under the Biden Administration has directed staff to cease usage of the terms “alien” and “illegal alien,” opting instead for terms such as “noncitizen” and “migrant.” Terminology, From Jean King, Acting Director, to EOIR (Jul 23, 2021), <https://www.justice.gov/eoir/book/file/1415216/download>. For the purposes of this primer, we will use the latter terminology. Where appropriate, we will also use the term “asylum seekers” to describe those who are seeking protection under U.S. asylum laws, including asylum, withholding of removal or protection under the U.N. Convention Against Torture.

with migrants at or near the U.S.-Mexico border who lacked entry documents.⁴ In the preceding year, FY 2021, there were 1,734,686 border encounters.⁵ Figure 1, below, demonstrates the number of registered border apprehensions between 2000 and 2022.

The recent numbers of border encounters are far from unprecedented. As shown in the figure below, twenty years ago, in FY 2000, there were 1,676,438 apprehensions.⁶ That number significantly underestimates the actual number of border crossers because apprehension rates were much lower at the time. CBP estimates that more than two million individuals crossed the border undetected that same year.⁷

There are other important elements that put the recently reported numbers of border arrivals into context. As noted above, a much greater proportion of arrivals are detected and apprehended now so the reported numbers are unsurprisingly larger than they were several decades ago. In addition, the government statistics now include arrivals at ports of entry, which were not included in prior statistics. Furthermore, restrictions on visa issuance and airline travel⁸ to the United States, particularly since 1997, have forced asylum seekers to arrive at the southern border to seek entry by land. The data also suggests that Title 42 expulsions (discussed [below](#)), the recently terminated enforcement mechanism purportedly implemented to control the spread of COVID-19, led to repeat encounters of the same individuals.⁹ In other words, the actual

⁴ Southwest Land Border Encounters, Customs and Border Protection, CBP.gov, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>. Encounters include both apprehensions of individuals between ports of entry as well as lawful requests for admission at ports of entry by individuals deemed to be inadmissible to the United States. See Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions Fiscal Year 2022, cbp.gov, <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics>. See Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions Fiscal Year 2022, cbp.gov, <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics>.

⁵ *Id.*

⁶ U.S. Border Patrol Monthly Apprehensions (FY 2000-FY 2019), cbp.gov, <https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/U.S.%20Border%20Patrol%20Monthly%20Encounters%20%28FY%202000%20-%20FY%202020%29%20%28508%29.pdf>.

⁷ Department of Homeland Security Border Security Metrics Report, dhs.gov, (Aug. 5, 2020), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/BSMR/ndaa_border_security_metrics_report_fy_2019_o.pdf#page=16; see also, Joel Rose, Border Patrol apprehensions hit a record high. But that's only part of the story., NPR, Oct. 23, 2021, <https://www.npr.org/2021/10/23/1048522086/border-patrol-apprehensions-hit-a-record-high-but-thats-only-part-of-the-story>.

⁸ See INA § 273; 8 U.S.C. § 1323 imposing fines on carriers, including commercial airlines, who transport individuals without a valid passport and visa to the United States.

⁹ See, e.g., CBP Releases September 2022 Monthly Operational Update, CBP.gov, Oct. 21, 2022, <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-september-2022-monthly-operational-update>; see also, Quinn Owen, Title 42 Actually Contributes to Increased Migration Numbers, Data Suggests, ABC News, Dec. 23, 2022, <https://abcnews.go.com/Politics/title-42-contributes-increased-migration-numbers-data-suggests/story?id=95616742>.

Also available as part of the eCourse

[Hooked on CLE: March 2024](#)

First appeared as part of the conference materials for the
47th Annual Conference on Immigration and Nationality Law session
"Humanitarian Relief & Border Issues"