

Daniel Delgado
Acting Director
Border and Immigration Policy
Office of Strategy, Policy, and Plans
U.S. Department of Homeland Security
telephone (202) 447-3459

Lauren Alder Reid
Assistant Director,
Office of Policy, EOIR
U.S. Department of Justice
telephone (703) 305-0289

Submitted electronically via: <https://www.regulations.gov>.

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Re: Comment on the Proposed Rule by the Department of Homeland Security (DHS) and the Executive Office for Immigration Review (EOIR) on Circumvention of Lawful Pathways, CIS No. 2736-22; Docket No: USCIS 2022-0016; A.G. Order No. 5605-2023

Dear Acting Director Daniel Delgado and Assistant Director Lauren Alder Reid;

On behalf of AJC, the global Jewish advocacy organization, and its Jacob Blaustein Institute for the Advancement of Human Rights, we write to express opposition to the Department of Justice's Executive Office for Immigration Review (EOIR) and the Department of Homeland Security's U.S. Citizenship and Immigration Services (USCIS), proposed [regulations](#), "Circumvention of Lawful Pathways, CIS No. 2736-22; Docket No: USCIS 2022-0016; A.G. Order No. 5605-2023" published in the Federal Register on February 23, 2023.

As outlined below, our assessment of the proposed rule is that it contravenes the Refugee Act of 1980 and U.S. obligations under international law, specifically the UN Convention and Protocol relating to the Status of Refugees (the "Refugee Convention") as it would deny access to asylum to people arriving at U.S. ports and borders on the basis of their mode of entry or transit. We are very concerned that it will result in the return by U.S. authorities of many asylum-seekers with legitimate claims for protection to places where they have a well-founded fear of persecution or face a substantial risk of torture, in violation of the duty of *nonrefoulement*.

For the reasons detailed in the comments that follow, AJC urges DHS and EOIR to withdraw the proposed regulations in favor of actions that would ensure that the U.S. fully respects the right to seek asylum and the prohibition of *refoulement*, in line with international obligations that the U.S. voluntarily assumed, and that AJC has long championed.

Felice Gaer
Director, AJC's Jacob Blaustein Institute for the Advancement of Human Rights

Christen Broecker
Deputy Director, AJC's Jacob Blaustein Institute for the Advancement of Human Rights

Dena Shayne,
Senior Associate, AJC's Jacob Blaustein Institute for the Advancement of Human Rights

AJC comments in opposition on Circumvention of Lawful Pathways, CIS No. 2736-22; Docket No: USCIS 2022-0016; A.G. Order No. 5605-2023

Since its founding more than 110 years ago, AJC has advocated for a fair, non-discriminatory, and generous U.S. refugee and immigration policy. We firmly believe that all those who come to the U.S. seeking refuge from the risk of persecution, violence, sexual assault, or even death in their home countries deserve compassion and a fair hearing. While recognizing that governments have a responsibility to ensure the integrity of their borders and protect national security, AJC advocated for the creation of international law in the area of refugee assistance and it has called on the U.S. and other governments to uphold their international human rights and refugee assistance obligations, including by respecting the right to seek asylum and the absolute prohibition of *refoulement* in their domestic law and practice.

The Administration’s motivation for proposing this new rule, as stated in its official text, is to dissuade an expected large number of prospective asylum-seekers from seeking to make claims at the Southwest border following the expiration of Title 42 emergency regulations in May 2023. The Administration asserts that absent the rule, a significant number of such asylum seekers will arrive at the Southwest border and will be able to establish “credible fear” of persecution, thereby becoming eligible for adjudication of their asylum claims.

The proposed rule would create a presumption of asylum ineligibility for individuals who 1) did not apply for and receive a formal denial of protection in another country, if they transited through other countries prior to arriving at a U.S. port of entry; and 2) entered between ports of entry at the southern border or entered at a port of entry without previously scheduling an appointment through the “CBP One” mobile application.

JBI is seriously concerned that the proposed rule contravenes established U.S. law and is inconsistent with U.S. obligations under international law. The following areas are those in which our concerns with the proposed regulations are most acute:

- It effectively denies the right to seek asylum based on an individual’s manner of entry into the United States, in a manner inconsistent with U.S. law. The rule is plainly intended to deter would-be asylum seekers from attempting to enter the U.S. between ports of entry, but in ways that undercut U.S. domestic law and international obligations aimed at upholding the principle of *non-refoulement*.
- It effectively denies the right to seek asylum based on an individual’s manner of transit to the United States, in a manner inconsistent with U.S. law. The rule is plainly intended to persuade would-be asylum seekers to seek asylum in countries other than the United States, but in ways that undercut U.S. domestic law and international obligations aimed at upholding the principle of *non-refoulement*.
- The agencies have not demonstrated that the policy interests they are seeking to advance through the proposed regulations – primarily to maintain border security and lower encounter rates to conserve already strained resources and increase efficiency – outweigh the risk of harm to asylum-seekers that the proposed regulations will create; nor have they indicated that they considered less harmful alternatives than the proposed measures that could have advanced the same policy interests.

As a result, the likely consequence of the new rule will be that many individuals who subsequently arrive at the Southern border with valid asylum claims will not be able to have them individually considered, as U.S. law requires, and will be compelled to remain in dangerous conditions in Mexico or return to other countries in which they similarly face extreme danger.

1) Asylum-seekers' claims should not be denied on grounds that they entered the country illegally.

The proposed rule contravenes U.S. asylum law, set out in the Refugee Act, which provides that people may apply for asylum regardless of their manner of entry into the United States.¹ Congress's intent in passing the Act was to ensure people that all people arriving at U.S. ports and borders have access to the right to seek asylum.

The proposed rule is also inconsistent with Article 31 of the Refugee Convention, which prohibits imposing improper penalties on asylum seekers based on their irregular entry into the country of refuge.² The UN High Commissioner for Refugees (UNHCR) has explicitly stated that “[n]either the 1951 Convention nor the 1967 Protocol permits parties to condition access to asylum procedures on regular entry.”³

The proposed rule claims not to prohibit people who attempt to enter the U.S. between ports of entry from making asylum claims, but rather to require such individuals to overcome a “rebuttable presumption of ineligibility” in order to do so. However, asylum-seekers can only overcome this presumption if they demonstrate that they satisfy one of several limited exceptions set out in the rule, for example that they are victims of human trafficking.

The effect of the proposed rule will render asylum-seekers who attempt to enter the U.S. between ports of entry wholly ineligible for asylum, and eligible only for lesser forms of protection,⁴ even if they have a “credible fear” of persecution, which U.S. law, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), sets as the threshold that asylum-seekers facing expedited removal proceedings must meet in order to qualify for an individual determination of their claims.

In effectively expelling this category of asylum seekers to Mexico without an individualized determination of their claims, the proposed rule also contravenes U.S. domestic law, informed by U.S. obligations under the Refugee Convention, which indicate that asylum-seekers may be expelled to their country of origin or a third country only following an individual assessment as to whether the third country will grant the asylum seeker access to a fair and efficient refugee status determination procedure; permit them to remain in the third country while the decision is made; and respect the prohibition of *refoulement*. U.S. law also only permits the return of an asylum-seeker to a third country through which he or she has transited if the U.S. has entered into a formalized agreement with that third country, where returning the asylum-seeker would not violate the prohibition of *refoulement*, and where the asylum-seeker would have access to a full and fair determination procedure for asylum claims or for equivalent temporary protection. The U.S. does not currently have such a “safe third country” agreement with Mexico.

¹ 8 U.S.C. 1158.

² Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection, available at <https://www.unhcr.org/3bcfd164.pdf>

³ Brief of the Office of the United Nations High Commissioner for Refugees before the United States Court of Appeals for the Ninth Circuit in the case *East Bay Sanctuary Covenant, et al., v. William P. Barr* (“East Bay Sanctuary (II)”), available at <https://www.refworld.org/topic,50ffbce4120,50ffbce4123,5dcc03354,0,AMICUS,USA.html>.

⁴ These include Withholding of Removal or protection under the Convention Against Torture (CAT).

2) Asylum seekers' claims should not be denied on the grounds that they failed to seek asylum in a third country through which they transited.

The proposed rule also effectively conditions access to asylum on asylum seekers' manner of transit to the United States, in contravention of 8 U.S.C. 1158, which indicates that asylum seekers may only be denied asylum based on travel through another country where an individual was "firmly resettled" in another country (defined to mean the person was eligible for or received permanent legal status in that country) or if the U.S. has a formal "safe third country" agreement with a country that ensures respect for the principle of non-refoulement and access to fair asylum procedures. The statute prohibits restrictions on access to asylum that are inconsistent with these provisions.

In contrast, the proposed rule effectively forces people who will be unable to promptly obtain appointments using the "CPB One" app to either remain in danger of persecution or seek refuge in countries like El Salvador, Guatemala, Honduras, and Mexico, which do not meet the standards of the Refugee Convention and have not explicitly agreed to respect the principle of non-refoulement.

As above, the proposed rule claims not to prohibit people who attempt to enter the U.S. after having transited through a third country without having sought and failed to obtain asylum in that country and without having secured an appointment on the "CPB One" app from making asylum claims, but rather to require such individuals to overcome a "rebuttable presumption of ineligibility" in order to do so. As before, however, asylum-seekers can only overcome this presumption if they demonstrate that they satisfy one of several limited exceptions set out in the rule, for example that they are victims of human trafficking.

As above, the effect of the proposed rule will render many asylum seekers who have transited through a third country and arrive at a U.S. port of entry wholly ineligible for asylum, and eligible only for lesser forms of protection,⁵ even if they have a "credible fear" of persecution, and will effectively expel this category of asylum seekers to Mexico without an individualized determination of their claims, and in the absence of a "safe third country" agreement between the U.S. and Mexico, in violation of U.S. domestic law and international obligations. The CBP One app is not an adequate avenue for asylum access. The app offers a limited number of appointments per day, which reportedly fill up within minutes, turning asylum into a lottery. It is also beset with deficiencies that are particularly prohibitive and make using the app, thereby gaining access to the asylum procedure inaccessible to the most vulnerable asylum seekers.

3) The U.S. government has not considered reasonable less harmful alternatives to the current regulation and should pursue a human border policy that advances the same interests.

While the government may have a legitimate concern that it lacks the capacity to address the substantial number of asylum seekers it anticipates will approach the southern border upon the expiration of the Title 42 emergency regulations, and would pass a "credible fear" test, the response outlined in the proposed rule contravenes existing law and will give rise to a substantial risk of harm to asylum seekers. There are various alternatives to the proposed rule that would address the concern humanely and that would not be inconsistent with existing U.S. law. These include:

- Providing additional aid to the region and promoting democratic values and good governance with an eye towards creating meaningful reforms, particularly in areas that drive irregular migration such as corruption and lack of opportunity;
- Expanding and creating new legal pathways for immigration for people at particular risk of violence in countries facing particularly acute challenges;

⁵ These include Withholding of Removal or protection under the Convention Against Torture (CAT).

- Acting to help the immigration court system function more efficiently and effectively while respecting the due process rights of asylum-seekers, including by significantly increasing the number of asylum officers available to rapidly process claims, including in locations throughout the Western Hemisphere;
- Creating and supporting substantial communication and planning between federal, state and local governments, and civil society, so that those arriving migrants in need of additional support can be matched with destinations with capacity to provide services if the U.S. is unable to do so;
- Funding and support civil society organizations, including social and legal service providers, capable of assisting asylum-seekers;
- Increasing funding for asylum processing and humanitarian needs.

Conclusion

AJC is deeply concerned that the proposed regulations would effectively deny many people fleeing for their lives and livelihoods their right to seek asylum and would put them at risk of being returned or expelled to countries where they face a substantial risk of persecution, torture, or other serious harm, as well as separate families. We urge the Administration to reconsider the proposed rule and instead promote a humane and non-discriminatory border policy that respects the principle of *non-refoulement* and grant access to asylum procedures regardless of asylum-seekers' manner of entry or transit, in line with international legal obligations that the U.S. has freely assumed, and that AJC has long championed as reflecting our core values.