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Legal Sidebar

The Biden Administration's Proposed Rule on Arriving Aliens Seeking Asylum

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In anticipation of increased migration at the U.S. Southwest border following the termination of a public health order issued in response to the COVID-19 pandemic (known as the Title 42 order), the Department of Homeland Security (DHS) and Department of Justice (DOJ) announced a proposed rule that would, for at least a two-year period, make some aliens ineligible for asylum if they arrive at the Southwest border without valid entry documents after having traveled through another country. The proposed rule bears some resemblance to rules issued by DOJ and DHS during the Trump Administration that were subject to legal challenge and blocked from implementation, but the agencies argue that there are important distinctions that place the proposed rule on stronger legal footing. This Legal Sidebar examines the current statutory framework governing individuals arriving at the border seeking asylum, as well as the proposed rule and prior executive branch policies restricting asylum access. The Sidebar also considers arguments that the proposed rule's asylum limitations may violate international treaty obligations or existing federal statute. The Sidebar concludes with options for Congress.

Background

Statutory Framework Governing Arriving Aliens Seeking Asylum

Under 8 U.S.C. § 1225(b)(1), aliens arriving at designated ports of entry, or who recently entered the United States between ports of entry, without valid documents are subject to expedited removal. However, if an alien placed in expedited removal proceedings indicates either an intent to seek asylum or a fear of returning to a particular country, the alien is referred to an asylum officer for a "credible fear" interview. This initial interview is not intended to fully assess the alien's claims, but to determine whether there is a "significant possibility" the alien could establish eligibility for one of three forms of humanitarian protection: asylum, withholding of removal, or protection under the Convention Against Torture (CAT).

Executive Policies That Impact Asylum Seekers at the Borders

Over the years, executive branch officials have taken actions that made it more difficult for certain arriving aliens to seek asylum in the United States. For instance, under a long-standing 2002 U.S.-Canada

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agreement and its implementing rule, non-Canadian nationals arriving at U.S. land ports of entry from Canada (or who are in transit during removal from Canada) may not pursue asylum and related protections in the United States (subject to certain exceptions). Instead, they must be returned to Canada to seek protection there. (The U.S.-Canada agreement similarly applies to non-U.S. national asylum seekers arriving in Canada from the United States.) In 2022, the United States and Canada agreed to supplement the agreement by extending its provisions to cover aliens entering either country between ports of entry on the northern border (including certain bodies of water) who present their claims within 14 days after such crossing. DHS and DOJ issued a final rule to implement this agreement in 2023.

In 2018 and 2019, during the Trump Administration, DHS and DOJ promulgated rules that made aliens arriving at the Southwest border, who either entered the United States unlawfully between ports of entry or failed to seek protection in other countries through which they traveled, ineligible for asylum. As discussed in other CRS products, these rules faced legal challenges and were blocked from implementation. Additionally, in 2019, DHS entered into "asylum cooperative agreements" with Guatemala, Honduras, and El Salvador that allowed DHS to transfer certain arriving asylum seekers to those countries for consideration of their claims (of these, only the Guatemala agreement was actually implemented). The Biden Administration later suspended the agreements in 2021. In March 2020, in response to the COVD-19 pandemic, the Trump Administration, invoking authority under 42 U.S.C. § 265, directed immigration officials to expel aliens who lacked visas or other "proper travel documents," or who sought to enter the United States unlawfully between ports of entry, to Mexico or their countries of origin. The order has been subject to certain exceptions and limitations. This policy, sometimes called the Title 42 order, was renewed periodically by both the Trump and Biden Administrations, but the Biden Administration announced plans to end the Title 42 order on May 11, 2023.

Upon announcing the end of the Title 42 order, the Biden Administration also announced new border policies designed to "reduce irregular migration" and create "safe, orderly, and humane" processes at the border. For example, DHS established processes for eligible Cuban, Haitian, Nicaraguan, and Venezuelan ("CHNV") nationals to enter and remain in the United States for up to two years through a grant of parole. To qualify under the CHNV parole program, an alien must have a qualifying sponsor in the United States, undergo security and health screening, and meet other eligibility criteria. The number of individuals the United States will accept under the CHNV is 30,000 per month.

DHS also announced greater and "enhanced" use of expedited removal for inadmissible aliens at the Southwest border. For example, after the termination of the Title 42 order, DHS has indicated that, for single adults placed in expedited removal proceedings, credible fear interviews will take place while the alien is in DHS custody. The agency has also stated that it is "increasing its holding capacity," scheduling credible fear interviews within 24 hours, and increasing the number of removal flights per week.

Additionally, DHS announced a "new mechanism" in which aliens of any nationality who are located in Central or Northern Mexico, and who are seeking to enter the United States, may schedule appointments for inspection at U.S. ports of entry along the Southwest border using "CBP One," a mobile application. DHS further announced a new rule that would make some aliens who fail to utilize "established pathways to lawful migration" and seek protection in a country through which they traveled ineligible for asylum. On February 23, 2023, DHS and DOJ issued a *Federal Register* notice of the proposed rule.

The Proposed Asylum Rule

Under the proposed rule, aliens entering the United States at the Southwest land border without valid documents (whether at a port of entry or between ports of entry) after traveling through a country on the way to the United States (other than their country of citizenship, nationality, or if stateless, last habitual residence) would be subject to a "rebuttable presumption" that they are ineligible for asylum unless they

(or a member of the alien's family with whom the alien is traveling) meet one of the following exceptions:

1. they were authorized to travel to the United States under a DHS-approved parole process (e.g., the CHNV parole program);
2. they presented themselves for inspection at a port of entry at a prescheduled time and place through use of the CBP One App; or arrived at a port of entry without a prescheduled time and place, but can show that the mechanism for scheduling was not possible to access or use; or
3. they applied for asylum or other protection in a country through which they had traveled and received a final decision denying that application.

The rule would provide that the presumption is rebutted if an alien shows that, at the time of entry, "exceptionally compelling circumstances" warrant an exception to the rule. These circumstances include cases where the alien (or a member of the alien's family with whom the alien is traveling) has an acute medical emergency; faces an "imminent and extreme threat to life or safety" (e.g., imminent threat of rape, kidnapping, torture, or murder, but not generalized threats of violence); or meets the definition of "victim of a severe form of trafficking in persons" as defined in federal regulations. The presumption would also be rebutted in other exceptionally compelling circumstances as determined by immigration officials in their discretion, including to avoid family separation. Additionally, unaccompanied children would not be subject to the presumption.

The presumption would apply to all asylum adjudications (affirmative and defensive) as well as during credible fear screenings. However, following those credible fear interviews, aliens found ineligible for asylum due to the presumption may be able to pursue withholding of removal and CAT protection during their removal proceedings if they establish a "reasonable possibility" of persecution or torture if they are returned to their home country.

Applicability to Credible Fear Screenings

The rule would require asylum officers (AOs) conducting credible fear screenings to determine whether an asylum seeker is subject to the presumption. If the alien is either not subject to or has rebutted the presumption, the AO would follow the standard credible fear screening procedures already in place and consider the alien's potential eligibility for asylum, withholding of removal, and CAT protection under the "significant possibility" standard. Generally, if the asylum officer concludes that an alien has a credible fear of persecution or torture, the alien is placed in formal removal proceedings before an immigration judge (IJ) and may apply for asylum, withholding of removal, or CAT protection in those proceedings.

If, under the proposed rule, the alien is subject to the presumption of asylum ineligibility and fails to provide a sufficient rebuttal, the AO would issue a negative credible fear finding based on the alien's asylum ineligibility and then determine whether the alien has shown a "reasonable possibility" of persecution or torture (a higher standard than the "significant possibility" standard) in order to assess potential eligibility for withholding of removal and CAT protection.

If the alien shows a reasonable possibility of persecution or torture, the alien would be placed in formal removal proceedings before an IJ. During those proceedings, the alien would be able to apply for asylum, withholding of removal, and CAT protection, and the IJ would be able to review the applicability of the presumption to the alien's asylum application.

If the AO finds that the alien has not shown a reasonable possibility of persecution or torture, the alien would have an opportunity to request an IJ's review of the AO's negative credible fear finding, including whether the alien is covered by or has rebutted the presumption. Depending on the outcome of the IJ's review, the case would either be returned to DHS for the alien's removal; or the alien might be transferred

to formal removal proceedings for consideration of asylum, withholding, or CAT protection, including review of whether the alien is barred from asylum under the proposed rule.

Scope and Duration

The proposed rule is subject to a 30-day comment period ending on March 27, 2023. It would apply to asylum applications filed by aliens seeking to enter the United States without authorization at the Southwest land border on or after the date of termination of the Title 42 order and before a specified sunset date 24 months from the rule's effective date. After the sunset date, the rule would continue to apply to covered aliens during formal removal proceedings. DHS and DOJ would review the rule before its scheduled termination date and decide whether to modify, extend, or maintain the sunset date.

Legal Considerations

Some Members of Congress and immigration advocacy groups have argued that the proposed rule violates international treaty and federal statute because it would render certain arriving aliens ineligible for asylum. This section explores each of those arguments in turn.

International Treaty Obligations

The United States is a party to the 1967 United Nations Protocol Relating to the Status of Refugees (Refugee Protocol). The Refugee Protocol incorporates Articles 2 through 34 of the 1951 U.N. Convention Relating to the Status of Refugees (Refugee Convention). Under Article 33 of the Refugee Convention, member states may not "expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened" because of a protected ground (i.e., race, religion, nationality, membership in a particular social group, or political opinion).

Some have argued that the proposed rule would violate an individual's right to seek asylum under Article 33's "non-refoulement" provision. However, the extent to which the Refugee Protocol's provisions are legally binding under U.S. law depend upon whether it is a self-executing or non-self-executing treaty. A "self-executing" treaty is considered to have the force of U.S. domestic law without the need for Congress to pass implementing legislation. A non-"self-executing" treaty, though, is not directly enforceable in U.S. courts. Federal courts have held that the Refugee Protocol is not self-executing for domestic law purposes. For that reason, the Refugee Protocol, in itself, creates no judicially enforceable rights or duties beyond those granted by implementing legislation.

Moreover, as DHS and DOJ discussed in their *Federal Register* notice, Congress has implemented the "non-refoulement" obligations under Article 33 of the Refugee Convention through legislation, codified at 8 U.S.C. § 1231(b)(3). That statute concerns *withholding of removal*, a mandatory form of protection unlike asylum, which is a discretionary form of relief. Under the proposed rule, aliens ineligible for asylum can still pursue withholding of removal as well as CAT protection, consistent with Article 33 and the U.N. Convention Against Torture. The Supreme Court previously explained this distinction, noting that, while withholding of removal corresponds to Article 33, asylum is based on Article 34 of the Refugee Convention, which only requires contracting states to "facilitate the assimilation and naturalization of refugees." The Court construed Article 34 as a discretionary provision that "does not require the implementing authority actually to grant asylum to all those who are eligible." Because the Refugee Protocol recognizes parties' broad discretion over asylum, there are reasonable grounds to believe the proposed rule would not violate U.S. treaty obligations.

Federal Statute Governing Asylum

Although it likely does not conflict with treaty obligations, there might be questions over whether the proposed rule conflicts with existing federal statute. A provision governing asylum, 8 U.S.C. § 1158(a)(1), provides that "[a]ny alien who is physically present in the United States *or who arrives in the United States* (*whether or not at a designated port of arrival* . . .), *irrespective of such alien's status*, may apply for asylum" (emphasis added). Another provision, 8 U.S.C. § 1158(a)(2), however, bars certain aliens from applying for asylum. Those excepted from applying for asylum include aliens that can be removed to a "safe third country" under an agreement where they have a "full and fair opportunity" to seek asylum, those who failed to demonstrate that their application was filed within one year of their arrival, and those who failed to establish that they have not previously applied for asylum.

A separate provision, 8 U.S.C. § 1158(b)(1)(A), grants the Secretary of Homeland Security or the Attorney General the authority to "grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by" DHS or DOJ if it is determined that such alien is a refugee. Those ineligible for asylum include aliens who have engaged in the persecution of others; aliens convicted of certain crimes; aliens regarded as a danger to the security of the United States; or aliens who have firmly resettled in another country prior to their arrival in the United States. Under 8 U.S.C. § 1158(b)(2)(C), the Attorney General or the Secretary of Homeland Security has authority to promulgate regulations "establish[ing] additional limitations and conditions, *consistent with* [8 U.S.C. § 1158], under which an alien shall be ineligible for asylum" (emphasis added). Section 1158(d)(5)(B) also allows the Attorney General to promulgate regulations "for any other conditions or limitations on the consideration of an application for asylum not inconsistent with" the Immigration and Nationality Act.

Previously, reviewing courts considered whether the Trump Administration's 2018 rule that barred aliens from asylum if they unlawfully entered the United States, as well as the 2019 rule barring aliens from asylum if they failed to seek protection in a third country through which they traveled, conflicted with 8 U.S.C. § 1158. DHS and DOJ argued that they promulgated both rules as "additional limitations and conditions" on asylum under 8 U.S.C. § 1158(b)(2)(C). Both the Ninth Circuit and the U.S. District Court for the District of Columbia held that the 2018 rule was not "consistent with" 8 U.S.C. § 1158(a)(1) because that statute permits aliens to seek asylum regardless of their manner of entry. The Ninth Circuit also held that the 2019 rule conflicted with 8 U.S.C. § 1158's provisions that limit asylum eligibility based on third-country considerations only if there is a safe third country agreement or firm resettlement. In another case, the D.C. district court determined that the 2019 rule was unlawful because DHS and DOJ failed to comply with certain procedural requirements under the Administrative Procedure Act.

In support of the proposed 2023 rule, DHS and DOJ contend they have statutory authority to impose "additional limitations and conditions on the granting of asylum" pursuant to 8 U.S.C. § 1158(b)(2)(C), and authority to establish certain procedures for consideration of asylum applications, under 8 U.S.C. § 1158(d)(5)(B). Opponents argue that the proposed rule is similar to the Trump Administration's 2018 and 2019 rules that were struck down by the courts. DHS and DOJ argue, however, that the 2023 rule is distinguishable because it is more limited in its application and does not categorically bar asylum. Unlike the previous rules, the agencies contend, an alien's manner of entry or travel through a third country would not be dispositive factors in determining asylum eligibility, and the rule creates a "rebuttable presumption" of ineligibility that can be overcome. The agencies also argue that any regulatory limits on asylum based on a failure to seek protection in a third country do not have to be based on the same criteria specified in 8 U.S.C. § 1158's safe-third-country and firm-resettlement provisions (8 U.S.C. § 1158(a)(2)(A), (b)(2)(A)(iv)), and that they may supplement those existing provisions with additional or alternative conditions on asylum eligibility. Furthermore, the agencies assert that the proposed rule would be consistent with 8 U.S.C. § 1158(a)(1) because that statute requires only that an alien be permitted to "apply" for asylum, but does not require that an alien is entitled to *receive* asylum.

Some advocacy groups have vowed to legally challenge the proposed asylum rule if it becomes final. Thus, courts will likely consider whether the rule's asylum limitations are "consistent with" 8 U.S.C. § 1158 and whether the rule suffers from the same legal deficiencies identified in the 2018 and 2019 rules.

Legislative Options

The proposed rule raises questions about whether immigration authorities may deny asylum based on an applicant's failure to seek protections in a third country or to pursue "lawful pathways" to enter the United States. In the past, reviewing courts have construed 8 U.S.C. § 1158(a)(1) as prohibiting asylum denials based on manner of entry into the United States or based on third-country considerations, except in statutorily specified situations. While courts may consider, in view of this precedent, whether the proposed rule's asylum limitations are lawful, the proposed rule more broadly raises questions about the extent to which the executive branch, in general, can limit the ability to seek asylum through regulations.

There has been some legislation introduced in the 118th Congress concerning whether aliens traveling through third countries on the way to the United States may pursue asylum. For instance, the Secure Border Act of 2023 (H.R. 2) and the Asylum Abuse Reduction Act (S. 348, H.R. 469) would make aliens who traveled through one or more third countries ineligible for asylum if they failed to apply for protections in one of those countries unless they were subject to a "severe form of human trafficking." The Secure Border Act would also allow aliens to pursue asylum only if they arrive at a U.S. port of entry. Another bill, the Stop the Cartels Act (H.R. 597), would make aliens ineligible for asylum if they are nationals or habitual residents of a country in Central America that has a "refugee application and processing center" designated by the Secretary of State.

Alternatively, Congress could clarify the type of "additional limitations and conditions" in 8 U.S.C. § 1158(b)(2)(C) that the executive branch may impose on arriving asylum seekers, as well as clarify what "other conditions or limitations on the consideration of an application for asylum" under 8 U.S.C. § 1158(d)(5)(B) are statutorily consistent with the other provisions in § 1158.

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