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IN FOCUS

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The Secure the Border Act (H.R. 2): Asylum-Related Reforms

On May 11, 2023, the House passed the Secure the Border Act of 2023 (H.R. 2). The bill would, among other things, make significant changes to federal immigration laws with respect to border security, asylum, and detention. On September 14, 2023, a companion bill was introduced in the Senate (S. 2824). This In Focus examines H.R. 2, focusing specifically on provisions governing asylum, applicants for admission, and parole.

Statutory Background

Asylum

Under 8 U.S.C. § 1158, any alien who is physically present or arriving in the United States (whether or not at a U.S. port of entry) may apply for asylum, regardless of the alien's status. To qualify for asylum, an applicant must show past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Applicants for Admission and Parole

A separate statute, 8 U.S.C. § 1225(b), covers applicants for admission. Under § 1225(b)(1), the Department of Homeland Security (DHS) may place an alien encountered at or near the border who is inadmissible for lack of valid entry documents in expedited removal proceedings. If, after being placed in proceedings, the alien indicates an intent to seek asylum and shows a "credible fear of persecution," the alien is typically placed in formal removal proceedings before an immigration judge for consideration of the alien's applications for asylum and related protections.

Section 1225(b) generally requires applicants for admission who are either placed in expedited proceedings or placed directly in formal removal proceedings under § 1225(b)(2) to be detained. DHS has authority to release some aliens from custody, including under § 1182(d)(5)(A), which authorizes parole of applicants for admission into the United States temporarily "on a case-by-case basis for urgent humanitarian reasons or significant public benefit."

In addition, § 1225(b)(2)(C) authorizes DHS to return an alien arriving by land from a foreign contiguous territory (e.g., Mexico) to that territory pending the outcome of formal removal proceedings. This return authority applies only to arriving aliens placed directly in formal removal proceedings under § 1225(b)(2).

The Secure the Border Act

The House-passed Secure the Border Act would change current laws governing who may apply for or qualify for asylum, and it would limit the ability of arriving aliens to be released from custody into the United States pending the outcome of their removal proceedings.

Asylum

Section 101 of H.R. 2, Division B, would expand the classes of aliens who are ineligible to pursue asylum. Currently, under § 1158(a)(2), these ineligible aliens include those who fail to file their applications within one year of arrival in the United States (subject to exceptions); those who previously applied for asylum; and those who may be removed under a "bilateral or multilateral agreement" to a "safe third country" to seek asylum.

Section 101 would amend the statute to make an alien ineligible to apply for asylum if DHS determines the alien can be removed to a "safe third country" whether or not there is a formal agreement with that country. Section 101 would also make an alien ineligible to pursue asylum if the alien entered, attempted to enter, or arrived in the United States after transiting through at least one third country (other than the alien's country of citizenship, nationality, or last habitual residence). This "transit bar" would be subject to exceptions, including if the alien had applied for protection in at least one third country and had been denied, or if the alien was a victim of human trafficking.

For aliens placed in expedited removal proceedings, Section 102 would change the "credible fear of persecution" standard. Currently, a "credible fear of persecution" is statutorily defined as "a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum." Section 102 would define credible fear of persecution as a showing that "the alien more likely than not could establish eligibility for asylum under [8 U.S.C. § 1158], and it is more likely than not that the statements made by, and on behalf of, the alien in support of the alien's claim are true."

Section 103 would require an alien to either be physically present in the United States *or* to have arrived at a U.S. port of entry in order to apply for asylum. Section 1158(a)(1) currently allows any alien arriving in the United States to pursue asylum regardless of manner of entry.

Section 104 would expand the categories of aliens who may not be granted asylum. Under § 1158(b)(2), these categories currently include, among others, those who have persecuted others, have been convicted of a "particularly serious crime," have engaged in terrorist-related activities, or were firmly resettled in another country before arriving in the United States. The statute does not define a "particularly serious crime," but provides that "an alien who has been

convicted of an aggravated felony [as defined in 8 U.S.C. § 1101(a)(43)] shall be considered to have been convicted of a particularly serious crime."

Section 104 would add new categories of aliens barred from asylum, including, among others, aliens convicted of any felony; misdemeanors related to false identification documents, unlawful receipt of a federal public benefit, or possession or trafficking of a controlled substance; offenses related to criminal street gang activity; domestic violence-related crimes; and DUI-related offenses. Section 104 would also specify factors that may be considered in determining whether an alien's criminal conviction constitutes a "particularly serious crime," and would provide that a felony or aggravated felony conviction is considered a particularly serious crime.

As noted, an asylum applicant must show past or a well-founded fear of future persecution on account of a protected ground. Section 104 would specify cases in which an alien would fail to meet that burden, including for example claims based on personal animus or retribution, disapproval or resistance to gangs, or being targeted for financial gain.

Under § 1158(d)(2), DHS may grant work authorization to asylum applicants, and regulations allow renewal of work authorization pending consideration of asylum (including any appeals). Section 105 would limit any grant, renewal, or extension of work authorization to a six-month period, and require termination immediately or shortly after a final decision denying asylum. Currently, if asylum is denied, work authorization generally does not terminate until its scheduled expiration date. Section 105 would also bar any alien who is ineligible for asylum or who entered or attempted entry outside a U.S. port of entry from receiving work authorization. There is no such bar under current law.

Section 107 would clarify the meaning of "political opinion" and "particular social group" for purposes of deciding whether an asylum applicant has shown persecution on account of a protected ground. This clarification would amend the existing statute, which does not define these terms, leaving it to the governing administrative agency and the courts to interpret their proper meaning.

Section 107 also addresses discretionary determinations. Currently, an alien who shows eligibility for asylum on the merits must still establish that he or she merits a favorable exercise of discretion. Section 107 would disallow a finding that an alien merits a favorable discretion in certain cases (e.g., when the alien accrued more than a year of unlawful presence in the United States, or failed to timely file required income tax returns).

Section 108 would clarify when an alien has been firmly resettled in another country before coming to the United States, thus barring asylum. For example, the alien would be considered to have been firmly resettled if the alien had a "non-permanent but indefinitely renewable" legal immigration status; the alien could have applied for and obtained an immigration status; or the alien had voluntarily resided in the country for one year or more without experiencing persecution or torture. Currently, regulations provide that an alien is considered to be firmly resettled if the alien received an offer of permanent resident status, citizenship, or some other type of permanent resettlement from another country.

Section 109 would clarify whether an asylum application is frivolous. Under § 1158(d)(6), an alien who knowingly files a frivolous asylum application is permanently barred from receiving immigration benefits. The current governing regulations provide that an application is frivolous only "if any of its material elements is deliberately fabricated." Section 109 would make an application frivolous if "it is so insufficient in substance that it is clear that the applicant knowingly filed the application solely or in part to delay removal from the United States" or to seek other benefits and relief from removal; or if "any of the material elements [of the application] are knowingly fabricated."

Applicants for Admission and Parole

Section 201 would amend § 1225(b) by stating that applicants for admission who are placed in expedited or formal removal proceedings may be released from custody only if they are granted parole as "expressly authorized" under the proposed amendments to § 1182(d)(5)(A) (discussed below), or if they are returned to a contiguous territory pending the outcome of their cases. This section would authorize DHS to return to a contiguous territory any alien arriving on land from that territory pending the outcome of removal proceedings.

Section 201 would also authorize DHS to prohibit (in whole or in part) the entry of certain aliens (e.g., aliens who lack valid entry documents) for a period of time if it is deemed necessary to achieve "operational control" of the border.

Section 701 would clarify DHS's authority to parole applicants for admission under § 1182(d)(5)(A). Through regulations, the agency has interpreted its authority to grant parole on a "case-by-case basis for urgent humanitarian reasons or significant public benefit" broadly, including allowing release if "continued detention is not in the public interest" and the alien is not a security or flight risk. Section 701 would more narrowly define "humanitarian reasons," such as where the alien has a medical emergency or close relative in the United States whose death is imminent, and "significant public benefit" to include, among other things, where the alien has assisted U.S. law enforcement. Section 701 would also authorize the granting of parole to certain designated categories, such as spouses or children of members of the armed forces who are beneficiaries of approved visa petitions and certain Cuban nationals who are beneficiaries of approved visa petitions.

Section 701 would define "case-by-case basis" consideration as reviewing the facts in each individual case, and clarify that parole may not be granted based on a person's membership in a defined class. Section 701 would limit the duration of parole to no more than one year, with generally only one extension permitted. Currently, parole typically ends when the authorized parole period (usually one or two years) expires or the parolee leaves the United States, but DHS may renew the period of parole.

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