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The Proposed Asylum Transit Ban Creates Access to Asylum in Name Only

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Yesterday, the Biden administration released a notice of proposed rulemaking intended to encourage the use of pathways other than the lawful access to asylum at our southern border. This proposed rule would apply only to asylum seekers who, after Title 42 ends and in the two-year-period after the rule goes into effect, enter at the southwest border without proper documentation and traveled through a country that is a signatory to the 1951 Refugee Convention or its 1967 Protocol. It creates a “rebuttable presumption” that a person is **ineligible** for asylum unless: the individual is granted parole prior to arrival, presented themselves at a port of entry through a pre-scheduled time and place, or sought asylum or other protection in a country they traveled through and received a final denial.¹

AILA acknowledges the very real challenges that the Biden administration faces at the southern border in light of changing regional migration patterns and finite resources. The efforts described within this proposed rule to expand refugee processing and short-term work visas² are greatly needed and will help alleviate pressures at the southern border. We also appreciate that this regulation explicitly does not apply to unaccompanied children, that the administration recognizes the need for prompt employment authorization for parolees,³ and that the regulation rescinds the enjoined Trump-era asylum transit bans. AILA has [proposed solutions](#) for how migration in southern border region can be managed more effectively while still ensuring a fair and humane system.

The proposed rule will severely restrict access to asylum and violate U.S. asylum law, which requires that meaningful access to asylum be made available even to people who arrive by irregular means. The alleged safeguards of the rebuttable presumptions are insufficient given the complexity of navigating them and the lack of counsel that is common at the credible fear stage. Additionally, the proposed regulation relies heavily upon CBP’s internet-based scheduling system, CBP One, to provide a way for an asylum applicant to schedule a time to enter at port of entry. CBP One is severely flawed and currently blocks asylum seekers from obtaining review of their asylum request.

Hinging access to asylum on the CBP One application will deny access to asylum at the southern border to asylum seekers. While we recognize the need behind the CBP One application to manage border flows, the roll out of this application demonstrates that this program is years from the role this regulation places on it. Attorneys report entire shelters that house asylum seekers in Mexico unable to access CBP One appointments because the application cannot function without access to reliable internet. Users regularly report that the app freezes and stays frozen and that getting an appointment is reduced to luck and the strength of the Wi-Fi access.⁴ Finally, the CBP One application does not consistently recognize black faces, making it difficult for people to pass a mandatory “liveness” test required to

¹ Circumvention of Lawful Pathways (unpublished proposed rule accessed Feb. 21, 2023), Federal Register, <https://www.federalregister.gov/public-inspection/2023-03718/circumvention-of-lawful-pathways>, at 145-146 (hereafter “Proposed Rule”).

² Proposed Rule at 45-47.

³ Proposed Rule at 11-12.

⁴ “U.S. Border Protection app causes tech headaches for asylum seekers,” Marketplace Tech, Feb. 1, 2023, <https://www.marketplace.org/shows/marketplace-tech/u-s-border-protection-app-causes-tech-headaches-for-asylum-seekers/>.

schedule an appointment.⁵ Mandating use of this application to access asylum at our southern border reinforces existing racial disparities within our asylum system, which is a step in the wrong direction.⁶

While the regulation includes safe guards that will allow a person who manages to access a port of entry by means other than CBP One “to demonstrate by a preponderance of the evidence that it was not possible to access or use the CBP One app due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle,” arguing the “preponderance of evidence” is yet another complex barrier to being able to access asylum.⁷ The CBP One application itself has the potential as an important tool to manage the southern border, but CBP has not yet addressed these important concerns and is not ready to be relied upon for access to the life-saving asylum process.

The exceptions to the “rebuttable presumption” will be impossible to navigate for *pro se* asylum seekers. This proposed rule creates a complex system to bypass the rebuttable presumption, which includes demonstrating by the “preponderance of the evidence” that “exceptionally compelling circumstances exist.”⁸ The proposed rule specifically lists acute medical emergency, imminent and extreme threat to life or safety (such as rape, kidnapping, torture, or murder), and satisfying the legal definition of a “victim of a severe form of tracking in persons.”⁹

Navigating this added layer to our already complex asylum system will be particularly problematic given the application of the rebuttable presumption to the credible fear interview stage. Under this proposed rule, the asylum officer determines whether the asylum seeker has rebutted this presumption. If they have not, they receive a negative fear determination for their asylum claim. The asylum officer will then determine whether the asylum seeker established a higher “reasonable possibility” of persecution or torture. They will likely navigate this rebuttable presumption alone, as asylum seekers very rarely have attorney representation at this stage. This is demonstrated in the data of the new asylum processing rule, where only 1% of credible fear cases have attorney representation.¹⁰

The Biden administration faces a very real challenge at the southern border. This region is where the most vulnerable asylum seekers arrive, including those who do not have access to a plane ticket to fly to the United States through the newly established parole programs. However, the proposed regulation is not the answer to these challenges. This proposed regulation adds unnecessary complexity to the asylum process that will become insurmountable barriers to asylum, especially to those who do not have legal counsel.

⁵ Melissa del Bosque, “Facial recognition bias frustrates Black asylum applicants to US, advocates say,” *Guardian*, Feb. 8, 2023, <https://www.theguardian.com/us-news/2023/feb/08/us-immigration-cbp-one-app-facial-recognition-bias>

⁶ University of Maine School of Law, “Report: Noston Asylum Office violates rights of asylum seekers,” Mar. 23, 2022, <https://mainelaw.maine.edu/news/report-boston-asylum-office-violates-rights-of-asylum-seekers/>.

⁷ Proposed Rule at 48-49.

⁸ Proposed Rule at 146.

⁹ Proposed Rule at 146.

¹⁰ Department of Homeland Security, “Asylum Processing Rule Cohort Report – October 2022,” Jan. 6, 2023, <https://www.dhs.gov/immigration-statistics/special-reports/asylum-processing-rule-report>. (Tab: Credible Fear Claims, “Final or Most Recent Credible Fear Outcome by Attorney Representation.” The available data demonstrates that 27 cases have attorney representation out of 3,179 cases completed under this pilot program.)