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By: Pretima Persaud¹

Introduction

The Circumvention of Lawful Pathways is a rule jointly issued by the Department of Homeland Security (DHS) and the Department of Justice (DOJ) in May of 2023.² This blog post will review the rule's main features, its stated purposes, and some of its potential outcomes. This post argues that this rule creates another obstacle for asylum seekers looking to enter the United States (U.S.) at the Southwest Border. Although the agencies believe this rule will help control the large volume of migrants at the border, it may actually endanger asylum seekers by leading to their mass deportation.

The Rule and Its Purpose

Effective for two years, the Circumvention of Lawful Pathways regulation affects “certain noncitizens who fail to avail themselves of the range of lawful, safe, and orderly means for entering the United States.”³ For noncitizens who traveled to the U.S. without documents for lawful entry and who did not seek asylum in a country through which they traveled, the rule imposes a rebuttable presumption of asylum ineligibility.⁴ Noncitizens can raise three grounds to rebut the presumption by establishing that, at the time of entry, they or a member of their family with whom they are traveling (1) faced an acute medical emergency; (2) faced an imminent and extreme threat to their life or safety; or (3) were a “victim of a severe form of trafficking in persons.”⁵ Additionally, if individuals can show that “they were provided appropriate authorization to travel to the United States to seek parole,” the presumption does not apply.⁶

The DHS and DOJ have identified several purposes behind the new rule. They believe this rule will help to remedy extreme overcrowding at southwest border facilities and assist in efficiently processing asylum seekers entering the U.S.⁷ The agencies anticipate that this measure will reduce the number of immigrants who enter the U.S. unlawfully, thereby reducing “reliance by migrants on dangerous human smuggling networks.”⁸

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² Although this rule was struck down, the Biden Administration has appealed, and the Ninth Circuit has kept it in place pending the appeal process. See *Featured Issue: Border Processing and Asylum*, AM. IMMIGR. LAWS. ASS'N (Dec. 18, 2023), <https://www.aila.org/library/featured-issue-border-processing-and-asylum>.

³ Circumvention of Lawful Pathways, 88 Fed. Reg. 31314, 31314 (May 11, 2023) (codified at 8 C.F.R. pts. 208, 1003, 1208).

⁴ 8 C.F.R. § 208.33(a)(1) (2023).

⁵ 8 C.F.R. § 208.33(a)(3) (2023).

⁶ 8 C.F.R. § 208.33(a)(2)(ii)(A) (2023).

⁷ Circumvention of Lawful Pathways, *supra* note 3, at 31314.

⁸ *Id.*

Potential Results

The rule adds additional restrictions, making protection harder to procure. It forces refugees to utilize a lawful means of entry. Additionally, refugees are expected to first apply for protection in the countries through which they transit. But this is not always possible for someone who needs protection and has no other option of arriving at the U.S. other than journeying through these transit countries. If there was a safer alternative, many would not flee to the U.S. for safety to begin with. Thus, this rule could result in mass removal of asylum seekers who fled to the U.S. for security, forcing them to return to unsafe transit countries.⁹

Additionally, the rule fails to consider a plethora of other reasons for seeking refuge in the U.S. versus another country. It will “illegally punish and ban refugees fleeing political, religious, race-based, gender-based, anti-LGBTQ+, and other persecution.”¹⁰ This will force asylum seekers to seek protection in unsafe countries where they may still face persecution, disproportionately harming Black, Brown, and Indigenous asylum seekers.¹¹

The majority of the refugees seeking entry are escaping persecution from countries including Colombia, Cuba, Ecuador, Haiti, Nicaragua, Mexico, and Peru.¹² Consequently, this rule will create nationality-based preferences for refugees. By only allowing foreign nationals that have a route of passage conforming to the rule’s guidelines, the U.S. will be denying protection to many who are fleeing Central America and other parts of the world that even the U.S. deems unsafe.¹³ These nationals will then most likely be deported to their home countries, who might refuse to accept them. Although this rule is intended to reduce the exploitation of migrants and human smuggling, it will ultimately contribute to human smuggling networks.

Conclusion

This rule demonstrates the U.S.’s intention to maintain dominant control over their screening processes and deter mass amounts of future migration. This rule not only creates additional obstacles for asylum seekers entering the U.S. but also acts as a deterrence to the land of the free. The DHS and DOJ should amend this rule to modify entry requirements in the near future.

⁹ *Human Rights First Comment on Department of Homeland Security & Department of Justice “Circumvention of Lawful Pathways,”* HUMAN RIGHTS FIRST, at 27 (Mar. 28, 2023) (full comment), <https://humanrightsfirst.org/library/human-rights-first-comment-on-circumvention-of-lawful-pathways/> (noting that refugees are often attacked by Mexican cartels and authorities due to their migration status or other characteristics, including gender, sexual orientation, or race).

¹⁰ *Id.*

¹¹ *Id.* (“Black asylum seekers and migrants face pervasive anti-Black violence, harassment, and discrimination, including widespread abuse by Mexican authorities.”) (citing *There is a Target on Us – The Impact of Anti-Black Racism on African Migrants at Mexico’s Southern Border*, BLACK ALL. FOR JUST IMMIGR. (2021), <https://baji.org/wp-content/uploads/2021/01/The-Impact-of-Anti-Black-Racism-on-African-Migrants-at-Mexico.pdf>).

¹² *Circumvention of Lawful Pathways*, *supra* note 3, at 31314.

¹³ *See, e.g.*, U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., Country Reports on Human Rights Practices: Haiti (2022) (highlighting significant human rights issues relating to the “poor treatment of defendants during criminal trials,” sometimes going an entire day without food or water); U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., Country Reports on Human Rights Practices: Mexico (2022) (highlighting human rights issues relating to sexual abuse and torture).