



U.S. Department of Homeland Security

Fact Sheet: Circumvention of Lawful Pathways Final Rule

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As part of the Biden-Harris Administration's work to prepare for the end of the Centers for Disease Control and Prevention's Title 42 public health Order, which will expire after May 11, 2023, and to return to processing all noncitizens under Title 8 immigration authorities, the Department of Homeland Security (DHS) and the Department of Justice have issued a final rule to incentivize the use of lawful pathways. The final rule is designed to address the current and anticipated surge in migration throughout the hemisphere and further discourage irregular migration by: encouraging migrants to use lawful, safe, and orderly processes for entering the United States and other partner nations; imposing conditions on asylum eligibility for those who fail to do so; and supporting the swift return of migrants who do not have valid protection claims.

As a complement to this final rule, DHS has taken significant steps to expand safe and orderly pathways for migrants to lawfully enter the United States. This includes: establishing country-specific and other available processes to seek parole for urgent humanitarian reasons or significant public benefit; expanding opportunities to enter for seasonal employment; putting in place a mechanism for migrants to schedule a time and place to arrive in a safe, orderly, and lawful manner at ports of entry via use of the CBP One mobile app; and expanding refugee processing in the Western Hemisphere.

Overview

Under the final rule, noncitizens who cross the southwest land border or adjacent coastal borders without authorization after traveling through another country, and without having (1) availed themselves of an existing lawful process, (2) presented at a port of entry at a pre-scheduled time using the CBP One app, or (3) been denied asylum in a third country through which they traveled, are presumed ineligible for asylum unless they meet certain limited exceptions. Noncitizens can rebut this presumption based on exceptionally compelling circumstances detailed below. Noncitizens in expedited removal who are subject to and do not rebut the rebuttable presumption would be screened for whether there is a reasonable possibility they will face persecution or torture in the designated country of removal. The rebuttable presumption may apply to migrants of any nationality who enter the United States at the southwest land border or adjacent coastal borders without authorization after traveling through at least one other country, but would not apply to unaccompanied minors. The rebuttable presumption is also time-limited, to address the urgent need to respond to and prevent the influx of migrants expected following the lifting of the Title 42 public health Order in the absence of a such a rule. It would apply only to those who enter the United States during the 24 month period after the rule's effective date.

Exceptions

Noncitizens who cross the southwest land border or adjacent coastal borders of the United States without authorization after traveling through a third country will be presumed ineligible for asylum unless they, or a member of their family with whom they are traveling, meet one of three exceptions:

- They were provided authorization to travel to the United States pursuant to a DHS-approved parole process;
- They used the CBP One app to schedule a time and place to present at a port of entry, or they presented at a port of entry without using the CBP One app and established that it was not possible to access or use the CBP One app due to a language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle; or
- They applied for and were denied asylum in a third country en route to the United States.

Unaccompanied children are exempted from the rebuttable presumption.

Rebutting the Presumption

Noncitizens can rebut the presumption of asylum ineligibility in exceptionally compelling circumstances, including if they demonstrate that, at the time of their unauthorized entry, they or a member of their family with whom they were traveling:

- Faced an acute medical emergency;
- Faced an extreme and imminent threat to their life or safety, such as an imminent threat of rape, kidnapping, torture, or murder; or
- Were a victim of a severe form of trafficking, as defined in 8 CFR § 214.11.

Process

Pursuant to the Immigration and Nationality Act, noncitizens who attempt to enter the United States without authorization and cannot establish a legal basis to remain in the United States may be subject to expedited removal. The rebuttable presumption established by the final rule would be evaluated by an asylum officer as part of the credible fear interview, subject to review by an immigration judge.

- If an asylum officer determines that the noncitizen is not subject to, is excepted from, or has rebutted the presumption of asylum ineligibility, the asylum officer's credible fear determination would follow existing procedures, including the screening for eligibility for asylum, withholding of removal, and Convention Against Torture (CAT) protection under a significant possibility standard.
- If an asylum officer determines that the noncitizen is subject to and has not made a sufficient showing of being excepted from or rebutting the presumption, the asylum officer's screening would be limited to determining whether the noncitizen has demonstrated a reasonable possibility of persecution or torture in the designated country of removal. If a reasonable possibility of persecution or torture is established, the noncitizen will be issued a notice to appear for removal proceedings before an immigration judge.

For noncitizens, the rebuttable presumption will apply in expedited removal proceedings, as well as to asylum applications affirmatively filed with the Asylum Office or filed in immigration court proceedings as a defense to removal.

To avoid separating members of a family traveling together, the final rule establishes that if one family member is exempted from or rebuts the presumption, all family members will be similarly treated.

Consequences

Noncitizens who are subject to the rebuttable presumption, do not rebut the presumption, and do not establish a reasonable fear of persecution or torture in the country of removal will be promptly removed.

Those ordered removed will be subject to at least a five-year bar to reentry and potential criminal prosecution if they subsequently re-enter without authorization. Those ordered removed also will be ineligible for the parole processes available to nationals of Cuba, Haiti, Nicaragua, and Venezuela.

Rescission of the Transit Ban and Entry Ban

The Departments are also rescinding the Trump-era transit ban and entry ban, which – unlike this new final rule – imposed categorical bars on eligibility for asylum and thus conflict with the approach taken in this final rule.

Time-limited

The final rule is an emergency measure that is intended to respond to the elevated levels of encounters expected after the lifting of the Title 42 Order. As such, it is designed to be temporary in duration, applying to those who enter the United States at the southwest land border and adjacent coastal borders during the 24-month period following the rule's effective date and subsequent to the lifting of the Title 42 order. The rule's presumption will continue to apply to these noncitizens after the end of that 24-month period.

Changes from Notice of Proposed Rulemaking

The final rule incorporates a small number of changes from the proposed rule that are responsive to comments received. These changes do not alter the purpose or structure of the rule. The changes from the proposed rule are:

- The final rule includes an exception to the general provision that the presumption of asylum ineligibility continues to apply to covered noncitizens after the end of the 24-month period of applicability: noncitizens who entered the United States as children under the age of 18 and subsequently apply for asylum as a principal applicant after the end of the 24-month period will not be subject to the presumption.
- The NPRM proposed that the rule would apply to those who enter the United States at the U.S.-Mexico land border. The final rule provides that the rule applies to those who enter the United States from Mexico at the U.S.-Mexico land border or at coastal borders near that land border, consistent with the geographic scope of the Title 42 public health Order.
- The NPRM proposed that a noncitizen in removal proceedings who is found eligible for withholding of removal, would have been eligible for asylum but for the rule's condition on asylum eligibility, and who have family members with them in removal proceedings would be able to rebut the presumption of asylum ineligibility, thereby allowing their spouse and/or children to obtain asylum as derivative beneficiaries. The final rule extends that provision so that it applies equally to noncitizens with family members outside the United States who could follow to join as derivative beneficiaries.

The final rule also includes a few other clarifications and non-substantive changes.

Topics

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