

EPI comment on DHS and EOIR's proposed "Circumvention of Lawful Pathways" asylum rule

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Re: Comment on the Proposed Rule by the Department of Homeland Security (DHS) and the Executive Office for Immigration Review (EOIR) on Circumvention of Lawful Pathways, CIS No. 2736-22; Docket No: USCIS 2022-0016; A.G. Order No. 5605-2023; 88 Fed. Reg. 11704

Dear Acting Director Delgado and Assistant Director Reid;

The Economic Policy Institute submits the following written comments on the proposed rule from the Department of Homeland Security (DHS) and Department of Justice (DOJ), published in the Federal Register on February 23, 2023, on "Circumvention of Lawful Pathways." We **oppose** the proposed rule and recommend that the administration rescind it and refocus its efforts and resources on improving the asylum system and ensuring that processes and adjudications are fair and humane, recognizing that there is a dire humanitarian need that is a direct result of the current conditions and realities in the hemisphere and across the globe.

Introduction and about EPI:

The Economic Policy Institute (EPI) is a nonprofit, nonpartisan think tank established in 1986 to include the needs of low- and middle-income workers in economic policy discussions. EPI conducts research and analysis on the economic status of working America, proposes policies that protect and improve economic conditions and raise labor standards for low- and middle-income workers—regardless of immigration status—and assesses policies with respect to how well they further those goals.

EPI has voiced support in the past for allowing asylum-seekers to quickly be able to access work authorization after arriving in the United States and has researched, written, and commented extensively on the U.S. system for labor migration, including in particular the H-2A and H-2B visa programs which are referenced in the proposed rule as “labor pathways” that may be available to asylum-seekers. EPI has published extensively on the H-2A and H-2B programs and provided expert testimony about the programs to both the U.S. Senate and House of Representatives, highlighting their numerous flaws and the urgent need to better protect migrant workers employed in all U.S. temporary work visa programs.

The proposed rule is inconsistent with U.S. and international law, thus the administration should rescind it and fully respect and uphold the right to request asylum.

The proposed rule would erode protections for people seeking safety in the United States by imposing a “rebuttable presumption of ineligibility for asylum” for individuals who did not apply for and receive a formal denial of protection in a transit country and for those who entered between ports of entry at the southern border or entered at a port of entry without a previously scheduled appointment through the CBP One mobile application, subject to extremely limited exceptions.¹ In effect, this rebuttable presumption would operate as an asylum “transit ban,” endangering people fleeing violence and persecution.

Such transit bans would ban many asylum-seekers from protections they would otherwise be eligible for in the United States, and appears to be an updated version of similar asylum and transit bans promulgated by the Trump administration that were repeatedly struck down by federal courts for violating U.S. law.² The proposed rule contravenes U.S. law governing asylum access, expedited removal procedures, and prohibitions on the return of refugees to countries where they could be persecuted and tortured.

Congress passed the Refugee Act of 1980 to codify the United States’ obligations under the Refugee Convention and Protocol. The Act, at 8 U.S.C. §1158 stipulates that people may apply for asylum regardless of manner of entry into the United States. It also delineates limited exceptions where an asylum seeker may be denied asylum based on travel through another country, but these restrictions only apply where an individual was “firmly resettled” in another country or if the United States has a formal “safe third country”

agreement with a country where refugees and asylum-seekers would be safe from persecution and have access to fair asylum procedures. The statute prohibits the administration from issuing restrictions on asylum that are inconsistent with these provisions. In addition, 8 U.S.C. §1231 codifies the prohibition against returning refugees and asylum-seekers to countries where they face persecution. The proposed rule, which conditions access to asylum on manner of entry and transit, would result in the return of asylum-seekers and refugees to danger and unequivocally contravenes these provisions of U.S. law as well.

In 1996, Congress created the expedited removal process through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Under this process, asylum seekers placed in expedited removal who establish a credible fear of persecution **must be referred** for full asylum adjudications. The proposed rule attempts to unlawfully circumvent the credible fear screening standard established by Congress, which was intended to be a low screening threshold. The government is required to refer asylum seekers in expedited removal for full asylum adjudications if they can show a “significant possibility” that they could establish asylum eligibility in a full hearing. The proposed rule attempts to eviscerate this standard by first requiring asylum seekers to prove to an asylum officer by a preponderance of evidence that they can rebut the presumption of asylum ineligibility, and then requiring those who cannot overcome the presumption to meet a higher fear standard before being permitted to seek protection. This provision is also inconsistent with U.S. law.

Asylum transit bans like the one in the proposed rule also violate international treaty obligations, which uphold the principle of non-refoulement and generally prohibit the imposition of penalties based on manner of entry into the country of refuge.³ The United Nations Refugee Agency (UNHCR) repeatedly condemned attempts to impose such bans.⁴ The ban created by the proposed rule would also violate the U.S. government’s obligations under international human rights law—including Article 14 of the Universal Declaration of Human Rights, which guarantees that “everyone has the right to seek and to enjoy in other countries asylum from persecution.”⁵

Instead of pursuing the asylum bans in the proposed rule, the administration should instead uphold refugee and asylum law for all who are eligible to apply under U.S. and international law—without penalties based on manner of arrival or usage of a smartphone app—and allocate resources toward ensuring fair and humane asylum processing and adjudications.

The proposed rule will incentivize family separation, increasing risks for migrant children which include labor exploitation, debt bondage, and human trafficking.

Like Title 42 and other policies that block, ban, and deny asylum to refugees, the proposed rule will further incentivize family separations at the border. The administration’s

insistence on use of the CBP One app and denial of access to asylum for people who cannot schedule appointments through the app has already forced families to separate. Some families unable to secure appointments together as a family unit have made the devastating choice to send their children across the border alone to protect them from harm in Mexican border regions.

Any policies that separate children from their families generate a host of other serious consequences, as recent reporting on the resurgence of child labor abuses in workplaces across the country has brought into the public spotlight,⁶ a problem that has been exacerbated by state legislatures attempting to water down child labor laws, as well as the lack of staffing and funding for enforcement by the U.S. Department of Labor (DOL).⁷

Recent DOL cases and media reports make clear that unaccompanied migrant youth left in limbo by a broken U.S. immigration system have become particularly vulnerable to exploitation by employers and networks of labor brokers and staffing agencies who recruit workers on their behalf. Asylum policies that have encouraged families to separate—which the proposed rule will continue and even worsen—as well as the asylum claims and immigration court backlogs, have also played a role in creating this situation. Nearly 130,000 unaccompanied migrant children arrived at the U.S. border in 2022 alone, many fleeing poverty and violence.⁸ Many are eligible for asylum protection but have ended up among the 1.6 million people caught up in a record-high backlog of asylum claims awaiting processing or hearing dates, with claims taking years to adjudicate.⁹ In the meantime, many unaccompanied minors are sent to live with relatives or other sponsors, and as recent reporting has shown, there appears to be a lack of sufficient oversight by the Department of Health and Human Services (HHS) when it comes to ensuring child migrants are safe after their sponsors have taken custody of them.¹⁰

Both youth and adults awaiting asylum claims processing are ineligible for work permits for many months and cannot access social safety net programs,¹¹ leaving them impoverished and desperate to accept work of any kind to pay for necessities like food and rent, as well as repay debts to sponsors or help support family members in their countries of origin. Until federal agencies address the asylum backlog and the downstream issues it creates, young migrant children will continue to be a pool of potential workers whom employers may exploit, knowing they have no other viable options, and they will be vulnerable as well to traffickers, and to falling into debt bondage.

Thus, DHS should not pursue policies like the proposed rule that could expand the population of vulnerable young people entering our communities without support when there is such a clear risk of them being preyed upon and victimized. To their credit, DOL and HHS have activated a taskforce to root out child labor,¹² and we hope that DHS and all other relevant agencies will cooperate and work in alignment with them to support that critical objective.

The administration should halt its efforts to channel and misdirect asylum-seekers into

indentured worker programs like the H-2A and H-2B visa programs.

The administration's reference to the H-2A and H-2B visa programs—two of the main temporary work visa programs that U.S. employers use to fill low-wage jobs—in the proposed rule's section on "Labor Pathways," is troubling for a number of reasons.

First, the notion that "many migrants encountered at the SWB are seeking employment opportunities and often hoping to provide for their families via remittances," while it may be technically true, it in no way precludes the possibility that those same migrants may be in need of protection and eligible for asylum. Many migratory flows today are mixed flows,¹³ which the proposed rule seems to allude to, but it is also true that the same person can flee a dangerous situation for multiple reasons, and thus the fact that a migrant arriving at the Southwest border wants to eventually work to provide for their family does not mean that they are not a bona fide asylum seeker in need of protection. Such migrants deserve to have their claims heard and fully adjudicated and should be afforded full due process and appropriate screening. In addition, adjudicators should consider that asylum seekers often arrive with pressing economic needs due to the circumstances they are fleeing and the arduous journeys they have undertaken.

Second, we believe the administration is misguided in when it touts its efforts in the proposed rule to expand two of the most exploitative and troubled U.S. work visa programs—H-2A and H-2B—in part to facilitate employer recruitment of migrants from countries in Central America where respect for the rule of law may be suspect at best, some of whom may already be or may soon become asylum seekers. As has been documented in numerous investigative news reports, reports from advocacy groups, litigation, congressional testimony, and government audit reports, the H-2A and H-2B program are deeply flawed and in desperate need of reform.¹⁴

Temporary work visa programs are an instrument ultimately used to deliver migrant workers to employers, but without having to afford them equal rights, dignity, or the opportunity to integrate and participate in political life. While such programs may serve as important pathways for migrants to come to the United States, the numerous programmatic flaws that undermine labor standards and leave migrant workers vulnerable to abuses—and even human trafficking—clearly demonstrate a need for dramatic improvements. Migrant workers in temporary work visa programs have limited rights and face challenges including illegal recruitment fees and debt bondage, lower wages, employment that ties them to a single employer, lack of protections in the workplace, family separation, and no path to permanent residence or citizenship.

In the asylum context, temporary work visa programs as a solution make little sense, given the lack of a permanent pathway to remain in the United States. H-2A jobs are certified on average for about six months and H-2B jobs are certified on average for just under eight months. This means that persons who fled their countries of origin will be forced to return to home for between four to six months per year, on average, if they manage to return to the United States in either visa program in subsequent years. If they do not get recruited

for a job the following year, then they would have to return to their country of origin permanently. This would put those migrants in danger by returning them to the dangerous situations they already fled. And for some, returning home to where they were persecuted, but now with U.S. dollars in their bank accounts, could make them even bigger targets for gangs and criminals.

And finally, while we appreciate the acknowledgment in the section noting that temporary labor migration pathways are “not a substitute for asylum,” it was troubling read the proposed rule at the same time highlighting how DHS, USAID, and the State Department have redoubled their efforts to expand access to H-2A and H-2B in the region by expediting work visa processing for employers, “to the point at which these consular sections can process them in two business days.” Investing federal resources to speed up work visa processing for employers in seasonal industries like crop farming, landscaping, seafood processing, and hospitality, to the point where they can be processed in two days—while migrants seeking protection from harm are facing extensive wait times in dangerous border regions where they and their families face serious risks to their health and safety, often for many months at a time—creates a stark contrast and raises serious questions about the Biden administration’s priorities for the immigration system.

Thank you for considering our opposition to the proposed rule and these additional comments.

Best regards,

Daniel Costa

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Economic Policy Institute

Notes

1. These narrow, difficult-to-meet exceptions include applicants with DHS-authorized travel; people who applied for and were denied asylum in a country through which they traveled on their way to the United States; unaccompanied children; and people who use the CBP One mobile application to make an appointment and successfully present themselves at a port of entry for that appointment.
2. See for example, *East Bay Sanctuary Covenant et al. v Barr et al.*, Case 4:19-cv-04073-JST (February 16, 2021); *Capital Area Immigrants’ Rights Coal. v. Trump*, 471 F. Supp. 3d 25, (D.D.C. 2020); and *East Bay Sanctuary Covenant et al. v. Trump et al.*, No. 18-17274 and 18-17436 (February 28, 2020)
3. United Nations High Commissioner for Refugees, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, accessed March 27, 2023.
4. See for example, United Nations High Commissioner for Refugees, *Brief of The Office of The United Nations High Commissioner for Refugees as Amicus Curiae in Support of Plaintiffs & Affirmance*, United States Court of Appeals for the District of Columbia Circuit, No. 19-5272

(August 13, 2020).

5. Universal Declaration of Human Rights, Art. 14.
6. See for example, Hannah Dreier and Kristen Luce, “[Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S.](#),” *NY Times*, February 25, 2023; Laura Strickler and Julia Ainsley, “[Federal officials say more than 100 children worked in dangerous jobs for slaughterhouse cleaning firm](#),” *NBC News*, February 17, 2023; and NY Times Editorial Board, “[The Dangerous Race to Put More Children to Work](#),” *NY Times*, March 24, 2023.
7. Jenifer Sherer and Nina Mast, *[Child labor laws are under attack in states across the country: Amid increasing child labor violations, lawmakers must act to strengthen standards](#)*, Economic Policy Institute, March 14, 2023.
8. Hannah Dreier, and Kristen Luce “[Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S.](#),” *NY Times*, February 25, 2023.
9. Transaction Records Clearinghouse, *[A Sober Assessment of the Growing U.S. Asylum Backlog](#)*, December 22, 2022.
10. Hannah Dreier, and Kristen Luce “[Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S.](#),” *NY Times*, February 25, 2023.
11. Essey Workie, Lillie Hinkle, and Stephanie Heredia, *[The Missing Link Connecting Eligible Asylees and Asylum Seekers with Benefits and Services](#)*, Migration Policy Institute, July 2022.
12. U.S. Department of Health and Human Services, “[Departments of Labor and Health and Human Services Announce New Efforts to Combat Exploitative Child Labor](#),” Press Release, HHS Press Office, February 27, 2023.
13. For a definition and discussion of mixed migration or mixed flows, see for example, Nicholas Van Hear, “[Mixed Migration: Policy Challenges](#),” The Migration Observatory at the University of Oxford, March 24, 2011; and Mixed Migration Center, About MMC page, under “[What is Mixed Migration](#),” last accessed March 27, 2023.
14. For more discussion and extensive citations of other sources, see Daniel Costa, *[Temporary work visa programs and the need for reform: A briefing on program frameworks, policy issues and fixes, and the impact of COVID-19](#)*, Economic Policy Institute, February 3, 2021.