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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

Dear Acting Director Daniel Delgado and Assistant Director Lauren Alder Reid:

Advocates for Basic Legal Equality, a non-profit law firm in Ohio that represents low-income clients and groups, including immigrants, submits this comment in response to the Department of Homeland Security (DHS) and Department of Justice (DOJ)'s proposed rule published in the Federal Register February 23, 2023. This proposed rule would ban many refugees from asylum protection in the U.S. The proposed rule is an echo of a similar asylum ban promulgated by the Trump administration which was repeatedly struck down as unlawful in federal courts. The courts were correct to strike it down and the Departments have erred in proposing this similar rule.

In the Notice of Proposed Rulemaking, the Departments especially welcome comments answering whether the proposed rule appropriately provides migrants a meaningful and realistic opportunity to seek protection.¹ From analyzing the notice of the proposed rule, listening to other legal organizations, and engaging with our clients, ABLE concludes that this rule fails to provide a meaningful and realistic opportunity for migrants to seek protection. Rather, this rule would foster discrimination and restrict the opportunity to seek relief so harshly it will essentially deny the opportunity.

This comment will focus on issues with CBP One mobile application and the unsatisfactory, misguided rationale given for Departments' proposed rule and its justifications.

I. CBP One

CBP One suffers from inaccessibility, discriminatory issues, and doubtful functionality as use increases. There is also a lack of clarity surrounding what evidence is sufficient for the subjective "preponderance of the evidence" standard.² The issues that CBP One and the standard raise will result in real-world suffering for migrants seeking relief. This is discussed below.

¹ Fed. Reg. Vol. 88, No. 36 at 11708.

² *Id* at 11723.

Inaccessibility

Requiring migrants to use any application to seek relief places a high burden on those migrants. Requiring the use of the app assumes that migrants have a smartphone, have a smartphone that has and holds a charge, have reliable access to Wi-Fi, have well-lit areas to take photos for each log in, can read, can read in the languages available on the app, and are able to navigate the app – which at best, is highly doubtful. These are all assumptions not based in reality for those seeking relief in the United States and are assumptions which hold untrue for the most vulnerable populations among migrants seeking relief.

Discriminatory Issues

There are already reports of people of color, especially those with darker skin tones, being unable to use the CBP One application because it fails to recognize their faces for the required likeness checks.³ This is an issue across many facial recognition technologies as a result of systemic racism.⁴ This rule would require nearly all migrants seeking relief to use an app that has issues recognizing and capturing people of color, meaning the Departments are promoting and would legalize profiling or, more specifically, electronic profiling.

Functionality is Doubtful as Use Increases

The CBP One app already has glitches and is not accessible to those who can manage to use it.⁵ With increased users, there is a likelihood that these glitches will only get worse, creating a higher barrier for migrants seeking relief.

Currently, those who use the application need to get on very early in the morning to make an appointment.⁶ The few who do manage to make an appointment will sometimes have an appointment at a port of entry hundreds of miles from where they currently are.⁷ Requiring these migrants to travel far in one day for an appointment increases their vulnerability. This is especially true because the app currently only schedules appointments for less than ten of thirty ports of entry across the Southwest Border.⁸ Less than 30% availability can not be considered to provide meaningful and realistic opportunities to those who need to use the CBP app to seek relief. If this rule were to go into effect, the vulnerability of those unable to create appointments and forced to continue to wait at the border would increase as well.

The CBP One app already has many functionality issues which increase vulnerability for migrants. It is doubtful that the app is equipped to handle the increase in usage that this rule would create. It is more likely that it will further increase vulnerability of migrants seeking relief.

³ Raul Pinto, *CBP One Is Riddled with Flaws that Make the App Inaccessible to Many Asylum Seekers*, IMMIGRATION IMPACT, Feb. 28, 2023 (<https://immigrationimpact.com/2023/02/28/cbp-one-app-flaws-asylum-seekers/>).

⁴ Faith Karimi, *People of Color Have a New Enemy: Techno-racism*, CNN, May 9, 2021 (<https://www.cnn.com/2021/05/09/us/techno-racism-explainer-trnd/index.html>).

⁵ Pinto, *supra* note 3.

⁶ *Id.*

⁷ Sandra Sanchez, *CBP One App Gives Cash-Strapped Asylum-Seekers Interviews Hundreds of Miles Away*, BORDER REPORT, Jan., 2023 (<https://www.borderreport.com/immigration/cbp-one-app-gives-cash-strapped-asylum-seekers-interviews-hundreds-of-miles-away/>).

⁸ Information from Webinar hosted by Center for Gender and Refugee Studies; GAO, *Land Ports of Entry*, REPORT, Aug., 2019, 6 (<https://www.gao.gov/assets/gao-19-658.pdf>).

Subjective Preponderance of the Evidence Standard

Although the rule includes an exemption for those unable to use the application, the onus is placed on migrants to show the inability to use the app by a preponderance of the evidence.⁹ It is unclear what evidence exactly would exempt a migrant seeking relief from creating an appointment with the application. Beyond the lack of clarity with this standard, it is a subjective standard to be determined by CBP officers. In effect, migrants with the same amount of evidence may pass the standard at one port of entry but fail it at another.

The subjective and unclear standard leaves many questions unanswered and adds to the uncertainty of the futures of migrants seeking relief.

The combination of the inaccessibility, discriminatory, and functionality issues CBP One possesses and the subjective, unclear standard of exemption, the proposed rule places an unreasonable burden on migrants.

II. Departments' Proposed Rule Contradicts Current Law and Contains Flawed Rationale.

The Departments' proposed rule contradicts statutory law, case law, and the L.A. Declaration. The justifications given for the proposed rule—reducing human trafficking, migration to the Southwest Border, and overcrowding—would not be cured by or would be made worse by the proposed rule. Further, the rationale given for how the rule would satisfy its justifications is contradictory, inconsistent, or misplaced. These issues are discussed further below.

The Proposed Rule is Contradictory to Law and Agreements

The L.A. Declaration

The Departments write that the proposed rule satisfies the imperatives of the L.A. Declaration. Specifically mentioned is a goal established by the L.A. Declaration of “collectively ‘expand[ing] access to regular pathways for migrants and refugees.’”¹⁰ The notice continues to explain how other countries party to the agreement are striding towards this goal; meanwhile the proposed rule does not stride towards this goal – it runs the other way, eager to restrict access to migrants and refugees.

The United States' reiterated a will in the first paragraph of the L.A. Declaration to “create the conditions for safe, orderly, humane, and regular migration” is not found in this proposed rule.¹¹ Instead, as explained throughout this comment, this proposed rule will exaggerate unsafe conditions, create disorderly processes in the immigration systems of the United States and other countries party to the L.A. Declaration, and inhumanely impair access to relief.

Statutory and Case Law

Section 208(a)(1) of the INA provides that any immigrant “who is physically present in or arrives in the United States (whether or not at a designated port of arrival ...), irrespective of such alien’s status may apply for asylum.”¹² The Departments ignore the plain meaning of this provision,

⁹ Fed. Reg., *supra* note 1, at 11723.

¹⁰ *Id.* at 11720.

¹¹ Los Angeles Declaration on Migration and Protection, June 10, 2022 (<https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/los-angeles-declaration-on-migration-and-protection/>).

¹² INA § 208(a)(1).

proposing that noncitizens can be ineligible for asylum based on manner of entry.¹³ Statutory provisions following INA 208(a)(1) lay the grounds for ineligibility, including safe-third-country, the one year time limit, and previous asylum applications.¹⁴ None of these exceptions relate to travel or manner of entry, making this proposed rule unprecedented by ignoring the plain meaning of the statute.

The only precedent for this proposed rule is previous versions that were found to be unlawful and were then subjected to injunctions. For similar reasons, such as the lack of a meaningful opportunity to seek relief due to inaccessibility of the CBP One App and the condition for some migrants to apply for asylum in a third country, this proposed rule is unlawful and likely to be subject to an injunction as well.¹⁵

Unsatisfactory Rationale for Justifications.

The justifications for the rule—reducing human trafficking, concern for overcrowding, and to deter migration to the Southwest Border—would be left uncured or worsened under this rule. Each justification is discussed further below.

Reducing Human Trafficking

Although the notice contains concern for human trafficking, the rule would not lessen its threat but instead provide more opportunities for trafficking to occur.

Inconsistently and contradictorily, much of the notice speaks to how dangerous transit countries are because of human trafficking and other crime, yet seeks to encourage vulnerable people to apply for asylum in those countries.¹⁶ The alternative to applying for asylum in a transit country is to use the CBP One app which, as discussed supra, is unreliable and will force those seeking relief to wait for even longer at the border, effectively making them sitting ducks - easy targets for human traffickers. The rule would render already vulnerable migrants even more vulnerable to human trafficking.

Overcrowding

Overcrowding would only be made worse by this rule. Because more people will be forced to wait at the border trying to make an appointment on an inaccessible, faulty application overcrowding will only increase at the border. It would also increase in detention centers as this barrier will funnel more and more immigrants into removal proceedings.¹⁷

Migration to Southwest Border

The notice proposes to curb the concern for increased migration to the Southwest Border by increasing barriers to migrants seeking relief. At the same time, the proposed rule dismantles its own logic. Past attempts to decrease migration flows to the Southwest Border – such as the Venezuela

¹³ Fed. Reg., *supra* note 1, at 11741.

¹⁴ INA § 208 (a)(2).

¹⁵ *East Bay Sanctuary v. Barr*, CN 19-cv-04073-JST.

¹⁶ Fed. Reg., *supra* note 1 at 11714.

¹⁷ *Id.* at 11726.

process – have been followed by a high number, by historical standards, of migrants heading north.¹⁸ Additional barriers will not deter people seeking relief from traveling to the border.

Walls, increased border security, and the perils of traveling to the border do not deter migrants; neither will this punitive policy.

In response to the Departments' inquiry as to whether the proposed rule appropriately provides migrants a meaningful and realistic opportunity to seek protection, ABLE concludes that it does not and instead categorically restricts those most in need of relief from seeking such relief. The restriction is so severe that it will serve as a predetermined denial of relief.

ABLE encourages the Departments to provide migrants a meaningful and realistic opportunity to seek protection by expanding accessibility and inclusivity while disinvesting from punitive measures taken against migrants.

Sincerely,

s/ Gwen Short

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¹⁸ *Id.* at 11712.