The End of Title 42 and the New Transit and Entry Bans

As of midnight on May 11, 2023, the policy known as “Title 42”—which allowed the government to “expel” asylum seekers at the southern border to Mexico with few procedural protections—is no longer in effect. In its place, the government has enacted a new rule, which it calls the “Circumvention of Lawful Pathways” rule, but which is often referred to as an “entry ban” and “transit ban.”

The new rule applies to asylum-seekers who cross the southern border on May 12, 2023 or afterward, and as written will remain in effect through May 11, 2025. Under the rule, non-Mexican asylum seekers crossing or attempting to cross the southern border will generally have their asylum claims automatically denied, unless one of the following conditions or exceptions applies:

1. CBP One: The ban will not apply to anyone who arrives at the border at a scheduled time after making an appointment using the CBP One phone app. Note that CBP One is infamously unreliable, requires the use of a smart phone, and requires users to provide a photograph which is scanned using facial recognition technology that has difficulty identifying people with darker skin tones. CBP One will distribute 1,000 appointments per day through a lottery system.

1. Third-country asylum denial: If an individual applied for asylum in a different country on their way to the United States, and that application was denied, then the ban will not apply to them. Note that many of the countries asylum-seekers will be transiting through do not have functioning asylum systems, and in order for this condition to apply you must apply and await a decision, which must be negative. This means that in order to benefit from this provision of the rule, asylum-seekers may need to wait for extended periods in potentially dangerous countries.
2. Special parolees: Individuals who utilize one of the recently-enacted parole programs will not be subject to the ban. In recent months, the government has put in place special parole programs for Cubans, Haitians, Nicaraguans, and Venezuelans (often referred to as nationals of the “CHNV countries”), as well as Ukrainians. Individuals from these countries who successfully apply to these programs will be permitted to apply for asylum. Note that these programs require applicants to fly to a United States airport, so no one granted parole under these programs would be crossing the southern border in the first place, rendering this part of the new rule largely meaningless.
3. “Exceptionally compelling circumstances”: An exception exists for those who demonstrate an “acute medical emergency,” an “imminent and extreme threat” to their safety, or that they are a “victim of a severe form of [human] trafficking.” This requires something on the level of an “imminent threat of rape, kidnapping, torture, or murder” in Mexico, and the government will not be satisfied by “generalized concerns about safety” or “a prior threat” that is no longer “immediate.” Severe trafficking in this context refers to coerced labor and sex trafficking. It is not clear how someone in the midst of a medical emergency would be in a position to cross the southern border.

1. Impossibility of accessing CBP One: The rule makes an exception for individuals who cannot “access or use the CBP One app due to language barriers, illiteracy, significant technical failure, or other ongoing or serious obstacle.” This is unlikely to include a situation where someone is able to sign in to CBP One but cannot secure one of a limited number of appointment slots (again, 1,000 per day distributed by lottery) despite repeated attempts. This would not be considered a “technical failure” or “serious obstacle” because it simply represents the app functioning as intended. However, there have been some cases where people have approached the border and been permitted to enter after declaring that they have attempted without success to sign up for a CBP One appointment.
2. Family unity exception: There is a somewhat convoluted exception that is not frequently mentioned, and applies to some nuclear family units. In essence, if an individual who would otherwise be barred under the new rule demonstrates that they are potentially eligible for statutory withholding of removal (which is similar to asylum but is generally harder to qualify for and offers fewer benefits), and they are traveling with a spouse or child who is clearly *not* eligible for statutory withholding of removal, then the family member who qualifies for withholding of removal will be allowed to apply for asylum. This exception exists so that those in clear danger of persecution can bring their spouses and children with them, since they would not otherwise be able to provide status to a spouse or children because withholding of removal cannot be obtained through a family member in the same way that asylum can.

The new transit and entry ban will be applied at the “credible fear” border interview stage, so individuals who are barred under the rule will likely receive expedited removal orders and be deported without seeing a judge. Unlike Title 42 “expulsions,” these are true immigration “removals” under Title 8, which means they carry a 5-year ban on readmission. Nationals of the CHNV countries (Cuba, Haiti, Nicaragua, and Venezuela) may be removed to Mexico instead of their countries of origin under an agreement between the United States and Mexican governments, and this agreement may be expanded in future to include individuals of other nationalities.

A lawsuit has already been filed challenging the new transit and entry ban. When the Trump administration attempted to enact similar bans, these were struck down in the courts. You can read more about the lawsuit at the ACLU’s website: [https://www.aclu.org/press-releases/immigrants-rights-advocates-sue-biden-administration-over-new-asylum-ban](about:blank).