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March 27, 2023

Alejandro N. Mayorkas
Secretary
U.S. Department of Homeland Security

The Honorable Merrick B. Garland
Attorney General of the United States
U.S. Department of Justice

Re: Agency/Docket Numbers: CIS No. 2736-22; Docket No: USCIS 2022-0016; A.G.
Order No. 5605-2023: Circumvention of Lawful Pathways

Dear Secretary Mayorkas and Mr. Attorney General:

The U.S. Committee for Refugees and Immigrants (USCRI) respectfully submits these comments in response to the notice of proposed rulemaking (NPRM) entitled "Circumvention of Lawful Pathways" by the Department of Homeland Security (DHS) and the Executive Office for Immigration Review (EOIR) initially published on February 23, 2023. Drawing on experience from its Mexico field office and other programs across the United States and Latin America, USCRI appreciates the opportunity to submit comments regarding the NPRM in the period during which comments are open.

USCRI, established in 1911, is a nongovernmental, not-for-profit international organization dedicated to addressing the needs and rights of refugees, immigrants, unaccompanied children, asylum seekers and asylees, returnees, human trafficking survivors, and other vulnerable populations. Since 2020, USCRI has operated a legal services program in Tijuana, Mexico, aimed at assisting vulnerable populations of migrants and asylum seekers in the city.

USCRI Mexico staff represents pro bono cases before Mexican authorities for asylum in Mexico; visits shelters and other locations with considerable migrant populations to give "Know Your Rights" presentations to migrants so that they are aware of their legal options should they remain in Mexico or attempt to seek asylum in the United States; and promotes safe and orderly migration between Mexico and the United States. Other activities have included conducting intake and collaboration in inputting data on the CBP (Customs and Border Protection) One App for Title 42 exemptions, providing additional support to shelters, and conducting capacity building sessions for government agencies and law enforcement at the municipal and state levels.

Since 2011, USCRI has served foreign national adult and minor survivors of human trafficking through the Trafficking Victim Assistance Program (TVAP), funded by the Office on Trafficking in Persons (OTIP) at the U.S. Department of Health and Human Services. In 2022, USCRI was awarded the grant for the newly created Aspire: Child Trafficking Victim Assistance Demonstration Program to better address the needs of foreign national minors and child survivors of trafficking.

Under the NPRM, individuals who present themselves at the southern land border will be presumed ineligible for asylum unless they 1) were granted prior permission to come to the United States via a DHS-approved parole process, 2) were able to make an appointment to present themselves at the border using the smartphone app, CBP One, or 3) previously sought asylum in a country or countries through which they traveled and were denied.

USCRI recognizes the importance of establishing new pathways to the United States in the larger U.S. immigration policy context. Additionally, USCRI acknowledges that the NPRM establishes exceptions for families if a family member they are traveling with meets at least one of the following three criteria: 1) they were authorized to travel to the United States via a parole process; 2) they used the CBP One app to schedule an appointment or they show that it was not possible for them to use the CBP One app to schedule an appointment; or 3) they applied and were denied asylum in a third country enroute to the United States. USCRI appreciates that unaccompanied children are exempt from this rule. However, new pathways should not take the place of processes established in the 1967 Protocol and then codified in the Refugee Act of 1980 that allow any persons arriving at the U.S. border the right to seek asylum, regardless of their status or manner of entry. USCRI provides the following comments on the proposed rule regarding the CBP One app, the third country requirement, the expanded use of expedited removal, and the proposed timeline:

Concerns regarding the CBP One app and making asylum access contingent on access to technology

All asylum seekers arriving at ports who are subject to the new transit grounds of ineligibility will be ineligible for asylum unless they made an advance appointment to present at the port of entry using the CBP One app. The NPRM ties the ability to seek asylum at the southern border to an asylum seeker's ability to properly access and use a mobile app to schedule an appointment at a port of entry.

USCRI Mexico reports many instances where asylum seekers do not have the necessary equipment, reliable internet connectivity, or digital literacy to access the app. Requiring access to technology to secure asylum access fails to account for gaps in technology, language access, and economic resources between groups of migrants attempting to use the app while fleeing harm. In fact, USCRI Mexico reports that Russian individuals, who generally arrive in Tijuana with more economic means, have better access to the app, while poor, indigenous, rural individuals from Honduras and Haiti, for example, cannot access it. Those unable to access the app are forced to stay in overcrowded shelters, which service providers report often induce stress, depression, anxiety, and other mental health concerns.

Requiring asylum seekers to use the CBP One app will separate more families and perpetuate the conditions that cause minors to come to the United States unaccompanied. USCRI Mexico reports that families are already being separated, as those unable to secure CBP One app appointments as a family unit have made the difficult decision to send their children across the border alone. Additionally, USCRI

Mexico spoke with parents who stayed behind with children to allow their partner the ability to secure an appointment via the app.

USCRI warns that expanding the use of the app will also act as a pull factor for asylum seekers to come to Mexico for a chance to schedule an appointment. As a management tool, CBP One does not provide adequate access to humanitarian protection. Access to asylum and technology should not be fighting against each other.

Concerns regarding the third country requirement

USCRI acknowledges that the United States is facing significant challenges associated with increased, ongoing arrivals of asylum seekers amongst mixed and onward movements within the Latin America. However, USCRI warns that the proposed rule will not address the root of the issues but will merely shift the challenges onto Mexico's southern border.

Concerns regarding Expedited Removal

Individuals who cannot establish a valid claim to protection under the standards set out in the proposed rule will be subject to expedited removal under Title 8 authority. Under the proposed rule, an asylum seeker in expedited removal who receives a negative credible fear determination would not have access to the necessary safeguards to ensure due process.

The NPRM would change existing regulations to deny asylum seekers immigration court review of negative credible fear determinations unless they affirmatively request review. Requiring asylum seekers to affirmatively request review of negative credible fear determinations creates an additional hurdle, as the vast majority are unrepresented during the credible fear process while they navigate an already convoluted process that carries potentially deadly consequences if unable to seek review of a wrongful negative credible fear determination. Due to language or other barriers, asylum seekers may not understand the requirement to affirmatively request immigration court review.

In the NPRM, asylum seekers who cannot establish a valid claim to protection will not have the ability to submit requests to the U.S. Citizenship and Immigration Services (USCIS) to reconsider erroneous negative credible fear determinations. This provision would prevent many asylum seekers wrongly found to be barred under the rule from subsequently presenting evidence to USCIS that they should have been exempted or qualified for an exception, which would especially harm unrepresented asylum seekers rushed through the credible fear process without any meaningful opportunity to present their claim.

Enhancing expedited removal

USCRI acknowledges that the rule outlines several circumstances where asylum seekers who are found ineligible can rebut the asylum ineligibility by demonstrating that they, or a family member they are traveling with, 1) faced an acute medical emergency; 2) faced an extreme and imminent threat to their life or safety; or 3) were a victim of a severe form of trafficking. However, asylum seekers must prove this in expedited removal proceedings, which are often inadequate to present a valid asylum claim. Specifically, this is not an adequate exception or protection for survivors of human trafficking. USCRI warns that asylum officers face retraumatizing survivors by attempting to uncover history of victimization before establishing rapport, which is not possible in expedited removal proceedings. As a result, survivors of human trafficking may be returned to their trafficker or be forced into another life-threatening situation.

Concerns regarding the proposed timeline

The proposed rule is intended to be a temporary measure, which will go into effect for 24 months after the end of the federal declaration of a public health emergency for COVID-19, which is set to expire in May 2023. USCRI warns that the temporary nature of the proposed rule may not be so temporary. As evidenced by the prolongation of the rescission of the Migrant Protection Protocols (MPP) and the lifting of the Title 42 order in the courts, rules of this nature have been difficult to end in addition to having long-lasting impacts and unintended consequences.

USCRI thanks DHS and DOJ for the opportunity to submit comments regarding this proposed rule and looks forward to continuing dialogue about our remarks.

Sincerely,

A handwritten signature in black ink, appearing to read "Eskinder Negash". The signature is fluid and cursive, with the first name being more prominent.

Eskinder Negash
President and CEO