Federal Court Enjoins New Criminal Bars to Asylum: *Pangea Legal Services v. DHS* Litigation Update & FAQs

December 3, 2020

On November 19, 2020, in *Pangea Legal Services v. DHS*, U.S. District Judge Susan Illston issued a temporary restraining order (TRO) enjoining a final rule that set out numerous new criminal bars to asylum eligibility. No. 3:20-cv-07721, 2020 WL 6802474 (N.D. Cal. Nov. 19, 2020). That final rule, issued by the Department of Homeland Security (DHS) and Department of Justice (DOJ), sought to create broad bars to asylum based on certain low-level offenses including, in some cases, mere allegations of conduct. On November 24, 2020, the district court converted the TRO into a preliminary injunction (PI), ordering that the rule be enjoined while the lawsuit is pending. *Id.*, ECF No. 74 (N.D. Cal. Nov. 24, 2020).

This document provides an overview of the enjoined regulations and recent developments in the *Pangea v. DHS* litigation.

Background: DHS & DOJ Promulgate New Restrictions on Asylum Eligibility

On October 21, 2020, DOJ and DHS issued a final rule[1] adding numerous restrictions to asylum eligibility. The final rule amends 8 C.F.R. §§ 208.13(c)(6) and 1208.13(c)(6) to add new categorical bars to asylum eligibility that apply to applications filed on or after November 20, 2020.[2] Under these provisions,[3] an individual would be ineligible for asylum if any of the following were applicable:

- On or after November 20, 2020, the applicant is **convicted** of:
    - A harboring offense under 8 U.S.C. § 1324 or illegal reentry under § 1326;
    - A crime that the adjudicator knows or has reason to believe was committed in support, promotion, or furtherance of activity of a "criminal street gang";

[1] Procedures for Asylum and Bars to Asylum Eligibility, 85 Fed. Reg. 67202 (Oct. 21, 2020).

[2] As written, the rule only applies to asylum applications filed on or after November 20, 2020. If an individual filed their application before November 20, 2020, no subsequent convictions—or acts, in the case of the domestic violence conduct ground—would have triggered the rule. Additionally, the bars were to be triggered only by convictions or acts of domestic violence that occur on or after November 20, 2020. Therefore, no conviction or allegation of conduct dated before November 20 would have triggered the rule even if an individual were to submit their application after that date.

[3] 85 Fed. Reg. at 67258-67260 (amending 8 C.F.R. §§ 208.13(c)(6)(i)-(vi), 1208.13(c)(6)(i)-(vi)).

- A DUI offense that resulted in serious bodily injury or death of another person;
- Any second or subsequent DUI offense, regardless of injury caused[4];
- A crime that involves conduct amounting to a crime of stalking; child abuse, neglect, or abandonment; or domestic assault or battery;
- Any felony;
- A misdemeanor involving possession or use of identity documents without lawful authority;
- A misdemeanor involving unlawful receipt of public benefits; or
- A misdemeanor involving possession or trafficking of a controlled substance, other than a single marijuana possession offense of 30 grams or less.

- The adjudicator **knows or has reason to believe** that the applicant, on or after November 20, 2020, engaged in acts of battery or extreme cruelty in a domestic relationship, even if there is no resulting conviction.[5]

The rule also sets out definitions that apply to the above bars.[6] Under the rule, any order vacating, modifying, or clarifying a conviction or sentence would be presumed to have no effect for purposes of the new criminal bars—meaning that the vacated conviction or sentence still stands for immigration purposes—if (i) the vacatur or modification order was entered after the initiation of removal proceedings, or (ii) the noncitizen moved for the order more than one year after the original conviction or sentencing.[7] If one of these circumstances were to apply, the asylum applicant would have the burden to rebut the presumption by establishing that the vacatur or modification was not based on rehabilitative reasons or for purposes of ameliorating immigration consequences.[8]

Lastly, the rule would restrict the availability of asylum by removing 8 C.F.R. §§ 208.16(e) and 1208.16(e), which require automatic reconsideration where an applicant is denied asylum solely for discretionary reasons and is granted withholding of removal.[9]

***Pangea Legal Services v. DHS*: Challenging the New Rule**

On November 2, 2020, four immigrant rights organizations—Pangea Legal Services, Dolores Street Community Services, Catholic Legal Immigration Network, Inc., and Capital Area Immigrants' Rights Coalition—filed a challenge to the new rule in the U.S. District Court for the

[4] Any such conviction after November 20, 2020, would constitute a bar under the rule, even if the first DUI conviction occurred before that date.

[5] 85 Fed. Reg. at 67258, 67260 (amending 8 C.F.R. §§ 208.13(c)(6)(vii), 1208.13(c)(6)(vii)).

[6] 85 Fed. Reg. at 67259, 67260 (specifying that 8 C.F.R. §§ 208.13(c)(7) and 1208.13(c)(7) apply "[f]or purposes of paragraph (c)(6) of this section"). The rule's definitions and presumption regarding vacated or modified convictions or sentences would not have applied to particularly serious crimes or any other references to a "conviction" in the asylum statute or elsewhere in the INA. But note that agency case law still requires that a vacatur or modification of a conviction or sentence must be based on a procedural, substantive, or constitutional defect—and not solely for rehabilitative or immigration reasons—in order to have effect for immigration purposes. *Matter of Pickering*, 23 I. & N. Dec. 621, 624 (BIA 2003); *Matter of Thomas and Thompson*, 27 I. & N. Dec. 674 (A.G. 2019).

[7] 85 Fed. Reg. at 67259, 67260 (amending 8 C.F.R. §§ 208.13(c)(8), 1208.13(c)(8)).

[8] 85 Fed. Reg. at 67259, 67260 (8 C.F.R. §§ 208.13(c)(7)(B), 1208.13(c)(7)(B)); *see also supra* note 6.

[9] 85 Fed. Reg. at 67259, 67260 (rescinding and reserving 8 C.F.R. §§ 208.16 and 1208.16).

Northern District of California. The National Immigration Project of the National Lawyers Guild (NIPNLG), the Harvard Immigration and Refugee Clinical Program (HIRC), the Immigrant Defense Project (IDP), and the law firm of Sidley Austin LLP represent the four organizational plaintiffs. The plaintiffs also moved for a TRO, requesting that the district court enjoin the new rule before its effective date, November 20, 2020.

On November 19, 2020, District Judge Susan Illston granted the plaintiffs' TRO motion, issuing a nationwide injunction to halt the implementation of the new rule. The district court found that the plaintiffs were likely to succeed on the merits of their substantive challenges to the rule. Among other things, the court found that the new rule is likely contrary to the asylum statute and in excess of the authority that Congress conferred in INA § 208(b)(2)(C), which authorizes the Attorney General to promulgate regulations to "establish additional limitations and conditions" to asylum eligibility that are "consistent with" the asylum statute. 2020 WL 6802474, at *14. The court went on to find that because the new categorical bars were likely invalid, the presumption regarding vacated or modified convictions or sentences was similarly invalid. *Id.* at *15. The court also found that the plaintiffs are likely to succeed on their claims that the rule is arbitrary and capricious, *id.* at *16-19, and that the notice and comment period was insufficient, rendering the rule procedurally invalid, *id.* at *19-22. The court then reserved ruling on the plaintiffs' remaining argument that the rule violated the Regulatory Flexibility Act. *Id.* at *23-24.

In addition, the district court found that plaintiffs established the remaining TRO factors—irreparable harm, public interest, and favorable balance of equities—and concluded that a nationwide injunction was warranted. The TRO went into effect on November 19, 2020, and prevented DHS and DOJ from implementing or enforcing the rule.

On November 24, 2020, the district court converted the TRO into a Preliminary Injunction (PI), against DHS and DOJ. Under the PI, the agencies are prohibited from implementing or enforcing the rule nationwide while the lawsuit is pending.

FREQUENTLY ASKED QUESTIONS

1. What is the impact of the preliminary injunction?

The PI prevents DHS and DOJ from implementing or enforcing any portion of the rule. While the injunction is in effect, neither agency is permitted to apply any of the new criminal bars in adjudicating asylum applications.

2. Does the PI impact any asylum applications filed before November 20, 2020?

No. The new criminal bars, as well as the provisions dealing with vacated or modified convictions or sentences, would have applied only to asylum applications filed on or after November 20, 2020. Neither the final rule nor the PI in *Pangea Legal Services v. DHS* impacts any applications that were filed before that date.

3. **Does the PI impact any asylum applications filed after November 20, 2020, where the applicant was *previously* convicted of an offense described in the final rule?**

No. The rule would have applied only to convictions (or acts, in the case of the domestic violence conduct ground) that are dated on or after November 20, 2020. Neither the final rule nor the PI in *Pangea Legal Services v. DHS* impacts any conviction or allegation of conduct dated before November 20, 2020, even if the asylum application is filed on or after that date.

4. **What is likely to happen next in *Pangea Legal Services v. DHS*?**

Defendants may file an appeal of the PI order to the Ninth Circuit Court of Appeals and may also ask the Ninth Circuit to stay the district court's decision. Defendants have until January 25, 2021, but may file their appeal sooner. If that happens, and if the Ninth Circuit grants the government's request to stay the PI, the rule will be implemented.

However, if Defendants do not appeal or if the Ninth Circuit denies their request to stay the PI, the district court's order will remain in effect.

5. **If the PI is reversed or stayed, would the rule apply to any asylum applications that are filed while the injunction is in effect?**

At the moment, the answer to this question remains uncertain. As of the date of this fact sheet, Defendants have not appealed or requested a stay of the PI. We do not know if the court vacating or staying the PI would order that the effective date of November 20, 2020 (as set forth in the rule) be postponed. The *Pangea* team will share updated information on this and other issues as the case progresses.