

A New ICE Policy As Trump Is About To Leave Office Could Make It Harder For Immigrant Children To Get Asylum

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Rodrigo Abd / AP

Children observe the movements of the US Border Patrol agents from Mexico.

Immigrant children could have a harder time obtaining asylum in the US under a new policy issued by Immigration and Customs Enforcement in the waning days of an administration that has spent the past four years restricting access at the nation's southern border.

According to internal documents obtained by BuzzFeed News, the policy directive was issued by former acting agency leader Tony Pham, who left ICE on Dec. 31, and comes just weeks before the inauguration of President-elect Joe Biden, who is expected to rescind many of the restrictive immigration policies put in place under President Donald Trump.

Trump officials have long complained that unaccompanied minors and their families abuse the immigration system through "loopholes" that allow them to remain in the US after crossing the border to seek asylum. The Trump administration has responded by issuing

controversial policies, including arresting undocumented people who come forward to care for immigrants in government shelters.

The memo issued by Pham appears to be a continuation of that effort. ICE officials declined to comment on the matter.

Beginning Dec. 29, ICE officers were told that they must review whether an immigrant child is still “unaccompanied” each time they encounter the minor, according to a copy of the email and memo sent by Pham. The officers were told to evaluate all available information in determining whether the child should still be classified as unaccompanied, including whether they have since turned 18 and if there is an “available” guardian in the US who can care for them or is already doing so.

The memo indicates that the evaluation by ICE officers can come at any time, including when an officer is reviewing immigration court records of a child, and if it’s determined that an immigrant is no longer unaccompanied, they will move to change their status.

Such a change could lead to making some children ineligible to have their asylum claims initially heard and processed by an asylum officer at United States Citizenship and Immigration Services (USCIS). Unaccompanied immigrant children in removal proceedings get an opportunity to present their claims to USCIS first and, if denied, get another opportunity in immigration court.

“If implemented aggressively, this policy could significantly decrease the number of children who ultimately receive asylum in the United States,” said Sarah Pierce, an analyst at the Migration Policy Institute. “They are really putting the onus on ICE officers to do everything they can as frequently as they can to remove these designations.”

The process stems from the Trafficking Victims Protection Reauthorization Act of 2008, signed by then-president George W. Bush, which made it so USCIS was the first body to hear and determine asylum claims made by children who arrived in the country without a guardian — a law meant to place unaccompanied minors, who sometimes do not have legal representation, in a less adversarial setting than adults who have their asylum claims adjudicated only in immigration court if placed into removal proceedings.

The change in settings can be the difference in whether a child is able to obtain asylum.

“I think it is incredibly damaging to a child’s ability to have a fair opportunity,” said Jennifer Podkul, vice president for advocacy at Kids in Need of Defense. “It is absolutely consistent with how the administration has treated kids, denying them the protections that are due.”

Asylum officers have a mandate to offer humanitarian protection to those fleeing dangerous situations, while immigration judges aim to be neutral arbiters of cases, experts said. The officers are trained in how to do nonadversarial interviews, while in immigration court, an attorney from the Department of Homeland Security can cross-examine the children.

The policy could also expose minors to potential arrest by officers who can target a family for an enforcement action if the child is no longer determined to be unaccompanied. Such minors can only be detained in government shelters overseen by a different agency.

In 2019, USCIS instituted a policy that forced asylum officers to determine whether an immigrant who applied for asylum was an unaccompanied child at the time of filing, meaning anyone older than 18 at the time of filing could not apply.

The policy was later partially blocked by a federal judge.