

**Before**  
**U.S. Customs and Border Protection**  
**U.S. DEPARTMENT OF HOMELAND SECURITY**  
**Washington, DC**

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Agency Information Collection  
Activities; Revision of an Existing  
Collection of Information; Advance  
Travel Authorization (ATA); OMB  
Control Number 1651-0143, FR Doc.  
FR Doc. 2023-19720

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**COMMENTS OF THE IDENTITY PROJECT**

The Identity Project (IDP)

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November 13, 2023

The Identity Project (IDP) submits these comments in response to the notice and request for comments, “Agency Information Collection Activities; Revision of an Existing Collection of Information; Advance Travel Authorization (ATA)”; OMB Control Number 1651-0143, FR Doc. 2023–19720, 88 *Federal Register* 62810-62812 (September 13, 2023).

By this notice, U.S. Customs and Border Protection (CBP) seeks comments on an information collection request to be submitted by CBP to the Office of Management and Budget (OMB) for review and approval or disapproval in accordance with the Paperwork Reduction Act (PRA). “CBP invites comments from the public on all changes established by previously approved emergency submissions and the new proposed revisions listed in this FRN [Federal Register Notice].” According to this notice, information would be (and, pursuant to emergency authorizations by OMB, is already being) collected from certain non-US citizens, including would-be asylum seekers, through the “CBP One” mobile app and used for an Advance Travel Authorization (ATA) system of travel control through which CBP administratively grants or denies “authorization to travel to the United States... on a case-by-case basis.”

The ongoing and proposed information collection is not necessary for the performance of any lawful function of CBP or any US agency. Because the US has no jurisdiction and CBP has no statutory authority over travel by non-US citizens within or between other countries or their departure from other countries, and because whether or not a non-US citizen has requested or been granted “permission” from CBP has no bearing on their right to leave any other country or to travel within or between other countries by common carrier or otherwise, this collection of information is of no practical utility for any lawful activity of CBP or any US agency.

In its submissions to OMB and in the current *Federal Register* notice, CBP has grossly underestimated the burden of this information collection by failing to consider the costs to asylum seekers and other would-be travelers of being misled by CBP to believe that permission from CBP is required to flee from persecution or to travel within and between other countries, or being denied access to transportation by a common carrier that has been misled by CBP to believe that permission from CBP is required to depart from another country or travel to the US.

And CBP, in its ongoing collection of this information through the CBP One app, is failing to provide the notice required by the PRA and by the emergency approval from OMB.

CBP should immediately cease and desist from this information collection, and from its assertion of authority over departures by asylum seekers and other non-US citizens from other countries and their travel within and between other countries, without any jurisdiction or statutory basis and in contravention of US obligations pursuant to international human rights and aviation treaties.

OMB should disapprove this information collection, if it is submitted by CBP for approval, and should terminate its temporary emergency approval for this information collection.

### **1. About the Identity Project**

The Identity Project (IDP) is an independent not-for-profit civil liberties and human rights project, founded in 2006, which provides advice, assistance, publicity, and legal defense to those who find their rights infringed, or their legitimate activities curtailed, by demands for identification, and builds public awareness about the effects of ID requirements on fundamental rights.

## **2. The US has no jurisdiction, and CBP has no authority, over travel to the US.**

The unstated but implied minor premise behind the Advance Travel Authorization (ATA) system is that the US has jurisdiction and CBP has authority to control “travel to the US”.

But “travel to the US” consists, by definition, of activities *outside* US borders: travel within and between other countries and departures from other countries, including *inter alia* departures from foreign airports and seaports on foreign-registered aircraft and vessels.

CBP provides no basis in this *Federal Register* notice or any of its prior submissions to OMB related to this information collection for any claim of extraterritorial US jurisdiction or CBP authority over such activities on foreign territory by non-US persons, and there is no basis.

We know of no treaty which confers extraterritorial US jurisdiction over, and no statute which grants CBP authority to control, foreign travel or foreign travelers outside US borders, merely on the basis of a claim that they intend at some later point in time to seek entry to the US.

Crucially for asylum seekers, US jurisdiction and CBP authority over travel and travelers are coterminous with US borders and with the entitlement to request asylum in the US. The point at which the US acquires jurisdiction and CBP acquires authority over a traveler is exactly the point at which they reach US territory and become eligible to request asylum in the US.

US jurisdiction and CBP authority begin at the US border, the port of entry, or the limits of US airspace or waters. Once an aircraft enters US airspace, the US has the right to order it to land and, if necessary, to force it to land at the nearest safe landing place in the US. But once an aircraft has landed on US territory, those on board have the right to request asylum in the US.

Not all requests for asylum will be granted, of course. The US is not required to admit everyone who steps across the US border or lands at a US airport or seaport. The US can refuse

to admit such an individual and can deport them if their request for asylum is denied, subject to the requirements of humanitarian and human rights treaties and customary international law including the prohibition on *refoulement* (deportation to a place of possible persecution).

But the right to refuse admission on arrival in the US does not equate to extraterritorial US authority to interfere with, control, or require permission for departure from or travel within or between other countries, prior to arrival at a US border or the limits of US territory.

If an individual wants to depart from some other country and travel through or between other countries to the US border or a US port of entry – whether by land, sea, or air, including by common carrier – and then request asylum in the US, at the risk of denial of asylum and deportation, the US has no jurisdiction over their movements until they reach the US.

Neither CBP nor any US agency has the authority to take a single step outside the US to stop a traveler from approaching the US border or to interfere with their movements on foreign soil or in foreign airspace. Any such activity would be an interference with foreign sovereignty just as much as would any attempt by agents of a foreign government to interfere, within US borders, with the right of US citizens to move freely within the US or to leave the US.

In the absence of extraterritorial US jurisdiction over travel to the US from other countries, the ATA system of attempted US government control over such travel is *ultra vires*.

### **3. The right to travel is recognized by international human rights treaties.**

Article 12 of the International Covenant on Civil and Political Rights (ICCPR), a human rights treaty ratified by and binding on the US, recognizes the right to liberty of movement within any country where one is lawfully present, the right leave any country, and the right to

return to one's country. As provided by Paragraph 3 of Article 12 of the ICCPR, and as discussed by the U.N. Human Rights Committee in its General Comment No. 27 on freedom of movement under Article 12, restrictions on the the right to leave any country, including one's own, are permitted by the ICCPR only if those restrictions are specified by law, are necessary (meaning that they are "the least intrusive instrument amongst those which might achieve the desired result") for one of certain specified purposes, and are consistent with the other rights recognized in the ICCPR and "proportionate to the interest to be protected."

Contrary to these requirements of the ICCPR for permissible restrictions on the right to freedom of movement, none of the rules of the ATA system or the criteria for CBP to grant or deny permission to travel to the US are specified by law. No Federal law mentions such a travel permission system or delegates authority for it to CBP. Nor has CBP even attempted to argue that the ATA system is necessary for any of the specific purposes enumerated in Paragraph 3 of Article 12 of the ICCPR, is the least intrusive available mechanism for achieving any such purpose, or is consistent with the other rights recognized by the ICCPR.

In its General Comment No. 27, the U.N. Human Rights Committee has noted that, "A major source of concern is the manifold legal and bureaucratic barriers unnecessarily affecting the full enjoyment of the rights of the individuals to move freely, to leave a country, including their own, and to take up residence.... These rules and practices include, inter alia,... requirement of an invitation from the State of destination." We see no meaningful distinction between a requirement for an "invitation" from the government of the US and a requirement for "permission" from CBP or any other US agency to leave another country and travel to the US.

The US government has argued in litigation that the ICCPR is not “self-effectuating”, that is, that it does not in itself create a cause of action for violations of the rights it recognizes.

But as a treaty ratified by the US, the ICCPR is, according to Article VI of the US Constitution, part of “the supreme law of the land.” Whether or not the ICCPR creates its own cause of action, neither Congress nor any agency of the US government may Constitutionally enact any law or take any action contrary to the obligations it imposes on the US.

All executive departments and agencies, including CBP as a component of the Department of Homeland Security (DHS), have been directed by Executive Order 13107 that they “shall maintain a current awareness of United States international human rights obligations that are relevant to their functions and shall perform such functions so as to respect and implement those obligations fully.” Accordingly, both CBP and OMB *must* consider, in their actions, whether the ATA system is consistent with US obligations pursuant to international human rights treaties, including Article 12 of the ICCPR. It is not, and is therefore unlawful.

#### **4. Lack of permission from CBP is not a basis for denial of transportation to the US by an airline or other common carrier.**

The Airline Deregulation Act at 49 U.S. Code § 40101(c)(2) recognizes and requires the Federal Aviation Administration to consider “the public right of freedom of transit through the navigable airspace.” This provision was made applicable to the DHS by the Aviation and Transportation Security Act of 2001 and the Homeland Security Act of 2002. In addition, numerous bilateral and multilateral aviation treaties to which the US is a party recognize airlines as common carriers and commit the US to require them to operate as common carriers.

As a common carrier required to respect “the public right of freedom of transit through the navigable airspace,” an airline operating to, from, or within the US has a legal duty to transport any would-be passenger willing to pay the fare and comply with the rules of that fare and the general conditions of carriage in the airline’s published tariff.

Neither US law nor any treaty to which the US is a party requires passengers to obtain permission from the US government to travel by airline or other common carrier, or authorizes an airline or other common carrier to deny passage to an otherwise-qualified passenger on the grounds that they have not obtained permission from the US government for their journey.

On the contrary, for an airline to deny transportation to an otherwise-qualified passenger on such grounds would constitute a violation of the airline’s duty as a common carrier. And for a US government agency to allow, much less to encourage, an airline to deny transportation to an otherwise-qualified passenger on such grounds would constitute a violation of the agency’s statutory duty to recognize “the public right of freedom of transit through the navigable airspace” and a violation of US obligations pursuant to international aviation and human rights treaties.

Article 13 of the Chicago Convention on Civil Aviation provides that entry requirements of a state party apply only “upon entrance into or departure from, or while within the territory of that State”. US entry requirements can have no legal bearing on departures from *other* countries.

Since whether or not an individual has obtained permission from CBP to travel to the US has no bearing whatsoever on the duty of an airline or other common carrier to transport that individual to the US, neither the ATA system, the CBP One app, nor this collection of information has any practical utility for any lawful agency function. Accordingly, this collection of information must be disapproved by OMB, and should be discontinued by CBP.



**5. CBP has omitted many of the burdens imposed by the ATA system and its implementation, including disproportionate burdens on asylum seekers.**

CBP has purported to provide an economic impact analysis, pursuant to the Paperwork Reduction Act (PRA), of the burden imposed on the public by the ATA information collection.

But CBP has omitted many of the most serious burdens imposed by the ATA system and its implementation, including disproportionate and sometimes fatal burdens on asylum seekers.

**(a) The ATA system is intended to obstruct travel to the US by individuals who have not obtained permission from CBP through the CBP One app.**

As discussed above, permission from CBP is not required in order to depart from another country or travel to the US. Neither CBP nor the US government has jurisdiction or authority to enforce such a permission requirement for departure from any other country or travel to the US.

Travelers, including asylum seekers, are therefore entitled by international treaties and US law to ignore the ATA permission system and the CBP One app and travel to the US, by common carrier or otherwise, without CBP permission and without interference by the US.

One could therefore argue that, since travelers are entitled to ignore this CBP permission system and information collection, without any adverse impact on their right to travel to the US, the system should have no adverse impact on them.

But presumably CBP does not intend this permission-to-travel system to be a meaningless exercise. If that were CBP's intent, OMB would be required to disapprove this information collection as being of no practical utility. Presumably, CBP intends the ATA system,

including this information collection, to have some effect. It is therefore necessary for us, and for OMB, to consider what that effect is intended and is likely to be, and what burdens it imposes.

The most reasonable inference from CBP's description of the ATA system is that CBP *intends* both travelers including asylum seekers and carriers including airlines to act as though CBP permission through the CBP One app is required for travel to the US. CBP appears to intend to mislead asylum seekers who are unable to obtain permission from CBP into believing that they are not allowed to travel to the US. And CBP appears to intend to mislead airlines and other common carriers into believing that they are entitled or required to refuse passage to asylum seekers who have not obtained permission from CBP to travel to the US.

This in turn will lead individuals either to (1) remain in places where they are subject to persecution, or (2) attempt to travel to the US by means other than (and much more dangerous than) airline or other common carrier. Either of these choices can have deadly consequences.<sup>1</sup>

Accordingly, we consider below – without conceding that permission from CBP is or can be required for travel to the US by common carrier or otherwise – the adverse consequences if asylum seekers or common carriers treat permission from CBP as required for travel to the US.

**(b) Many asylum seekers are unable to use the CBP One app, often for reasons related to their persecution and eligibility for asylum.**

In order to use the CBP One app to request permission from CBP to travel to the US, an individual must be literate in one of the languages in which the app is offered and must have a

1. An additional unstated goal of the ATA system is likely to be that by misleading asylum seekers into not traveling to the US, or misleading airlines and other carriers into unlawfully refusing to transport them, the US government can effectively but silently and invisibly frustrate the right to asylum, without any official denial of asylum. Given that each time a person obtains asylum from persecution, that is a triumph for human rights, any deliberate effort to interfere with the right to asylum is morally reprehensible and an affront to human rights.

valid passport, a smartphone, Internet connectivity from that smartphone, the ability to download and install the CBP One app from that smartphone over that connection, and the ability to access CBP servers over that connection without using a virtual private network (VPN).

But many individuals who might qualify for asylum if they could reach the US lack one or more of these prerequisites. Some of those most likely to qualify for asylum – individuals and members of the most persecuted groups – are least likely to have all of these prerequisites.

Repressive governments often deliberately deprive members of persecuted communities of educational resources and opportunities, making them more likely to be illiterate. Persecution is often based on linguistic identity, so qualified asylum seekers may be more likely to speak or read indigenous or minority languages in which the CBP One app is not offered.

Repressive government often refuse, revoke, or confiscate passports of persecuted individuals or members of persecuted groups. Lack of a passport may be evidence of persecution and, as such, evidence in support of a valid claim for asylum on arrival in the US.

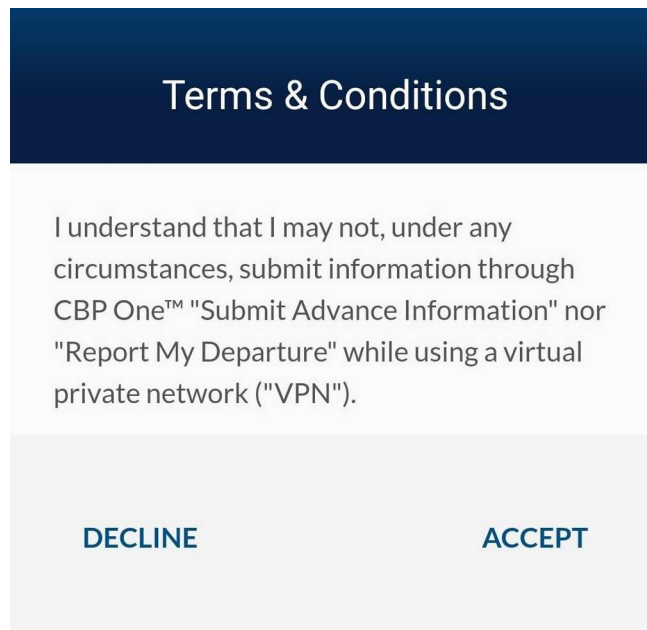
A smartphone is valuable, fragile, and vulnerable to water damage. If an asylum seeker has a smartphone, it is likely to be one of their most valuable possessions but also one of those most likely to be stolen, lost, damaged, or sold or bartered for more immediate necessities.

Internet connectivity is often worse, or entirely unavailable, in regions populated by persecuted groups. And even where Internet connectivity infrastructure exists, repressive governments may selectively interfere with or entirely block Internet access in places and/or at times of heightened anti-government activity and/or government crackdowns and repression.<sup>2</sup>

2. For a global overview of government restrictions on Internet access, see “Kashmir Registers Highest Number of Internet Restrictions Globally”, Bilal Hussain, Voice Of America, February 11, 2023, <<https://www.voanews.com/a/kashmir-registers-highest-number-of-internet-restrictions-globally-/6958516.html>>. For a case study of one such region, see “India’s Internet Siege”, Jammu Kashmir Coalition of Civil Society (JKCCS), August 2020, <<https://jkccs.info/report-kashmirs-internet-siege/>>.

The CBP One app is available for download only through the Google Play Store or the Apple App Store. But access to the Google Play Store is blocked from Internet connections in China, while only apps approved by the government of China – which has not approved the CBP One app – are included in the version of the Apple App Store accessible from China.

A virtual private network (VPN) could be used, in some circumstances, to circumvent Internet censorship to download the CBP One app and access CBP servers. A VPN could also be used by a persecuted individual to hide from a repressive government and its surveillance of Internet usage the fact that they had downloaded or used the CBP One app, which the government might use to identify their plans to flee, target them for additional repression, or prevent them from fleeing to a place of refuge where they might obtain asylum.



But as the screenshot of the CBP One app above shows, CBP prohibits the use of a VPN to submit information through the CBP One app. This policy enhances the ability of repressive

governments to identify and track persecuted individuals seeking to flee, and forces persecuted asylum seekers to risk greater persecution in order to seek permission to flee to the US.

CBP has failed to include in its analysis of the ATA system any of the consequences to those who are unable to use the CBP One app or whose use of the app causes them to be targeted for greater persecution or prevented from fleeing from a place of persecution to a place of refuge.

**(c) Denial of passage by common carrier often has fatal consequences.**

If airlines or other common carriers refuse to transport them, or if they believe that airlines or common carriers will refuse to transport them, asylum seekers either remain in places where they are subject to persecution or resort to other, more dangerous, means of transport.<sup>3</sup>

The willingness of asylum seekers to travel by any available means, no matter how dangerous they know the journey will be – crossing land borders through the desert on foot, or crossing seas in overloaded small boats – is a measure of their persecution and their desperation to flee from a place of persecution to a place of potential refuge.<sup>4</sup>

At best, this sort of travel is arduous and many times more expensive than travel by scheduled airline or by other common carrier. At worst, it entails substantial risk of death.<sup>5</sup>

What dollar value should be placed on denying the opportunity to seek asylum to a persecuted individual? How much would you pay to escape from a lifetime of persecution?

3. See the submission of the Identity Project to the Office of the United Nations High Commissioner for Human Rights regarding U.N. General Assembly Resolution A/RES/76/172 on the protection of migrants, May 12, 2023, <<https://papersplease.org/wp/wp-content/uploads/2023/05/IDP-OHCHR-12MAY2023.pdf>>.
4. See the Identity Project, “Asylum Requires Traveling to a Border”, March 29, 2022, <<https://papersplease.org/wp/2022/03/29/asylum-requires-traveling-to-a-border/>>.
5. On the consequences and costs of denial of passage by airlines, see the comments to CBP of the Identity Project, Government Information Watch, Restore The Fourth (RT4), Privacy Times, and the Electronic Privacy Information Center (EPIC) in response to the Notice of Proposed Rulemaking, “Advance Passenger Information System: Electronic Validation of Travel Documents”, Docket Number USCBP-2023-0002, April 3, 2023, <<https://papersplease.org/wp/wp-content/uploads/2023/04/IDP-APIS-comments-3APR2023.pdf>>.

What dollar value should be placed on each life lost in the desert or at sea by a persecuted individual driven to risk their life to seek refuge in the US from persecution abroad?

If CBP succeeds in its apparent intent to induce individuals not to try to travel to the US, and to induce airlines and other common carriers not to transport them without permission from CBP that they are unable to obtain, individuals who could have afforded an airline ticket to travel safely to the US and who might have been able to obtain asylum once they arrived in the US will be denied access to asylum. Some will be trapped in a lifetime of persecution or subjected to retaliation and greater persecution for seeking to flee. Other will die trying to reach the US.

These consequences and costs must be considered in evaluating this proposal.

**6. CBP has failed to provide individuals from whom ATA information is collected through the CBP One app with a proper PRA notice.**

CBP has obtained temporary emergency PRA approval from OMB for the collection of ATA information through the CBP One app under OMB Control Number 1651-0143.

However, as the screenshot below shows, the current version of the CBP One app, downloaded from the Google Play Store on November 12, 2023, gives a different OMB Control Number, 1651-0140, for the information collected through the app:

## Terms & Conditions

Paperwork Reduction Act Statement: An agency may not conduct or sponsor an information collection and a person is not required to respond to this information unless it displays a current valid OMB control number and an expiration date. The control number for this collection is 1651-0140. The expiration date for this collection is 05/31/2026. The estimated average time to complete this collection is 16 minutes. If you have any comments regarding the burden estimate you can write to U.S. Customs and Border Protection, Office of Regulations and Rulings, 90K Street, NE., Washington DC 20002.

**DECLINE**

**ACCEPT**

OMB Control Number 1651-0140 does not pertain to, and is not a valid OMB Control Number for, the collection of ATA information. Individuals seeking information about OMB Control Number 1651-0140 will not find any information about the ATA travel permission system or any of the supporting information needed to provide informed comments about it. And any comments submitted in response to this incorrect notice would go to the wrong docket.

Pursuant to the PRA, 44 USC § 3512, and implementing regulations at 5 CFR § 1320.6, in the absence of a valid PRA notice including a valid OMB Control Number individuals have the right to ignore the CBP One app and the ATA information collection. And the PRA provides a complete bar to the imposition of any form of penalty or sanction, at any time, for not responding to such an information collection.

CBP's Advance Travel Authorization (ATA) system of extrajudicial prior restraint of travel is misguided and unlawful, at best useless and on occasion fatal, in its impact on some of the most vulnerable and qualified asylum seekers. We urge CBP to abandon the ATA system and the collection of ATA information through the CBP One app, and we urge OMB to disapprove this collection of information and to terminate its emergency approval for it.

Respectfully submitted,

**The Identity Project (IDP)**

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\_\_\_\_\_/s/\_\_\_\_

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