ROBERT S. BREWER JR.
United States Attorney
SAMUEL W. BETTWY, SBN 94918
Assistant U. S. Attorney
CAROLINE C. PRIME, SBN 220000
Assistant U. S. Attorney
REBECCA G. CHURCH, SBN 259652
Assistant U. S. Attorney
United States Attorney's Office
880 Front Street, Room 6293
San Diego, CA 92101-8893
619-546-7125/7183/7721 / 7751 (fax)

Attorneys for Respondents

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CRISTIAN DOE, et al., Petitioners,[1] v. KEVIN K. McALEENAN, Acting Secretary of Homeland Security; et. al., Respondents.	Case No. 19cv2119 DMS AGS RESPONSE TO MOTION FOR TRO DATE: November 8, 2019 TIME: 2:30 p.m. CTRM: 13A Hon. Dana M. Sabraw

[1] Although Petitioners have styled their habeas petition a "complaint," there is no complaint, and this Court has no personal jurisdiction over anyone with respect to a complaint. This case was filed only as a habeas corpus petition [ECF No. 1-1], so no summons was issued. Therefore, even if the petition could be deemed a complaint, Petitioners cannot, without a summons, effect service of process. *See* Fed. R. Civ. P. 4(c), 4(i)(1)(A)(i). Respondents do not waive personal jurisdiction or proper venue of a complaint, if any can be found or deemed. Respondents therefore do not respond to any of Petitioners' non-habeas claims and allegations.

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I

INTRODUCTION

Petitioners' motion for a temporary restraining order has been rendered moot. Yesterday, they were afforded an opportunity to meet telephonically with their immigration counsel prior to their non-refoulement interviews, and for their counsel to telephonically attend the interviews, but their counsel rejected both opportunities, demanding an in-person pre-meeting with her clients. Yet, Petitioners never made such a request for relief in this case. [*See* ECF 2-1 at 28:6-8 ("since the MPP non-refoulement interviews are conducted by telephone, it would be a simple matter to connect retained counsel to the conversation telephonically.").] Since they have been afforded the relief they are seeking, their motion for interim relief (as well as this case) has been rendered moot. *See Abdala v. INS*, 488 F.3d 1061, 1063 (9th Cir. 2007) ("At any stage of the proceeding a case becomes moot when 'it no longer present[s] a case or controversy under Article III, § 2 of the Constitution.'") (quoting *Spencer v. Kemna*, 523 U.S. 1, 7 (1998)).

This Court lacks habeas jurisdiction, because Petitioners were not "in custody" for purposes of 28 U.S.C. § 2241 when they filed this action. Their return to Mexico was only briefly delayed to permit a non-refoulement screening, and Petitioners themselves point out that the interview was not incidental to their immigration proceedings. [*See* ECF No. 1, paras. 60, 106 ("The non-refoulement interview … is not part of the removal proceedings themselves.").] Their brief, temporary detention was entirely for the purpose of ensuring their own safety and not "punishment." [*Id*., paras. 181-82.]

This Court lacks subject matter jurisdiction, because Petitioners are asking this Court to make an advisory opinion. They allege only speculative injury. [ECF No. 2-1 at 22:24-27; ECF No. 2-1 at 7:21-23.]

Petitioners have no private right of action to sue for anything arising from the non-refoulement screening process. The process was established to satisfy treaty obligations under the 1951 Convention Relating to the Status of Refugees (1951 Convention) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

Punishment (Convention against Torture), and those treaties are not self-executing.

Under the rule of "non-inquiry," which has been applied to extraditions, there can be no judicial review of the discretionary implementation of the non-refoulement treaty obligations. *See Prasoprat v. Benov*, 421 F.3d 1009, 1016 (9th Cir. 2005).

Petitioners have made APA claims, but the "right to counsel" provision of the APA does not apply in the context of immigration proceedings.

Apart from lack of subject matter jurisdiction, Petitioners have not satisfied the standard for interim relief. They allege only hypothetical harm, and they are unlikely to succeed on their argument that attorneys must be present during the non-refoulement screening process. As applicants for admission, they have limited statutory and constitutional rights. *See United States v. Barajas-Alvarado*, 655 F.3d 1077, 1088 (9th Cir. 2011) ("non-admitted aliens are entitled only to whatever process Congress provides"). Courts have held that applicants for admission have no right to counsel in at least two contexts--expedited removal proceedings and primary and secondary inspections.

II

MIGRANT PROTECTION PROTOCOLS (MPP) PROGRAM

By statute, "an alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port or arrival . . .) shall be deemed . . . an applicant for admission." 8 U.S.C. § 1225(a)(1). "If the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under [8 U.S.C. § 1229a]." 8 U.S.C. § 1225(b)(2)(A); *see Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018).

"In the case of an alien described in [8 U.S.C. § 1225(b)(2)(A)] who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending proceedings under [8 U.S.C. § 1229a]." 8 U.S.C. § 1225(b)(2)(C). It is under this statutory authority that DHS implemented the MPP.

On December 20, 2018, the Secretary of Homeland Security announced the MPP Program and explained that DHS would exercise its contiguous-territory-return authority in section 1225(b)(2)(C) to "return[ ] to Mexico" certain aliens - among those "arriving in or entering the United States from Mexico" "illegally or without proper documentation" - "for the duration of their immigration proceedings." [Exs. 1, 4.] The MPP aims to control unlawful immigration by, among other things, reducing the ability of aliens to remain in the United States during immigration proceedings. [*Id.*] The Secretary made "clear" that she was undertaking the MPP "consistent with all domestic and international legal obligations," and emphasized that, for aliens returned to Mexico, the Mexican government has "commit[ted] to implement essential measures on their side of the border." [*Id.*] DHS began processing aliens under the MPP on January 28, 2019, at the San Ysidro Port of Entry. [Ex. 21.]

The MPP comprises several guidance documents. [Exs. 1-23.] A "Guiding Principles" document lays out the MPP's central features. An immigration officer may return to Mexico "aliens arriving from Mexico who are amenable to" the MPP and "who in an exercise of discretion, the officer determines should be subject to the MPP process." [Ex. 18.] Several categories of aliens "are not amenable to MPP": "[u]naccompanied alien children;" "[c]itizens or nationals of Mexico"; "[a]liens processed for expedited removal"; "[a]liens in special circumstances" (such as returning lawful permanent residents or aliens with known physical or mental health issues); "[a]ny alien who is more likely than not to face persecution or torture in Mexico"; and "[o]ther aliens at the discretion of the Port Director." [*Id.*] The MPP does not require an immigration officer to return any alien to Mexico. Except as specifically provided, the Secretary's guidance does not change "existing policies and procedures for processing an alien under procedures other than MPP," and "[o]fficers, with appropriate supervisory review, retain discretion to process aliens for MPP or under other procedures (e.g., expedited removal), on a case-by-case basis." [*Id.*]

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"If an alien who is potentially amenable to MPP affirmatively states that he or she has a fear of persecution or torture in Mexico, or a fear of return to Mexico, whether before or after they are processed for MPP or other disposition, that alien will be referred to a USCIS asylum officer for screening . . . so that the asylum officer can assess whether it is more likely than not that that the alien will face persecution or torture if returned to Mexico." [*Id.*] "If USCIS assesses that an alien who affirmatively states a fear of return to Mexico is more likely than not to face persecution or torture in Mexico, the alien may not be processed for MPP," meaning that he or she may not be returned to Mexico. [*Id.*]

If an alien is amenable to the MPP, and an immigration officer "determines," "in an exercise of discretion," that alien "should be subject to the MPP process," the alien "will be issued a[ ] Notice to Appear (NTA) and placed into Section 240 [8 U.S.C. § 1229a] removal proceedings. They will then be transferred to await proceedings in Mexico." [*Id.*.]

Other documents elaborate on the MPP's procedures for satisfying the United States' non-refoulement obligations. In a January 25, 2019 memorandum, the Secretary directed that, "in exercising [DHS's] prosecutorial discretion" over whether to "return [an] alien to the contiguous country from which he or she is arriving," officers should act consistent with non-refoulement principles. [Ex. 46.] Thus, an alien should not be "returned to Mexico . . . if the alien would more likely than not be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion" or be "tortured" if "returned pending removal proceedings." [*Id.*] The Secretary also outlined the Government of Mexico's commitments relevant to the MPP. Mexico committed to "authorize the temporary entrance" of third-country nationals who are returned to Mexico pending U.S. immigration proceedings; to "ensure that foreigners who have received their notice to appear have all the rights and freedoms recognized in the Constitution, the international treaties to which Mexico is a party, and its Migration Law"; and to coordinate to allow returned migrants to "have access without interference to information and legal services." [*Id.*]

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USCIS has also issued guidance on satisfying non-refoulement obligations. [*Id.*] When an alien expresses a fear of return to Mexico, the alien will be referred to a USCIS asylum officer to conduct an "MPP assessment interview," "separate and apart from the general public." [*Id.*] The interview aims "to elicit all relevant and useful information bearing on whether the alien would more likely than not face" proscribed persecution or torture "if the alien is returned to Mexico." [*Id.*]

DHS does not provide access to counsel during the assessment, and the process is expressly "non-adversarial." [*Id.*] The USCIS officer should "confirm that the alien has an understanding of the interview process." [*Id.*] The interviewing officer "should take into account" "relevant factors" including "[t]he credibility of any statements made by the alien in support of the alien's claims and such other facts as are known to the officer" (such as information about "the region in which the alien would reside in Mexico") and "[c]ommitments from the Government of Mexico regarding the treatment and protection of aliens returned" to Mexico. [*Id.*] Once the asylum officer makes an assessment, the assessment is "reviewed by a supervisory asylum officer, who may change or concur with the assessment's conclusion." [*Id.*]

The Mexican government has publicly reaffirmed that "it will authorize the temporary entrance of certain foreign individuals coming from the United States" subject to the MPP "based on current Mexican legislation and the international commitments Mexico has signed." [Ex. 45.] All individuals returned to Mexico under the MPP are allowed to stay "at locations designated for the international transit of individuals and to remain in national territory. This would be a 'stay for humanitarian reasons' and they would be able to enter and leave national territory multiple times" with "due respect ... paid to their human rights." [*Id.*]

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III

STATEMENT OF FACTS

On August 8, 2019, Petitioners were arrested by U.S. Border Patrol and requested asylum. [ECF No. 3-2, Decl. Cristian Doe, ¶ 12; Decl. Diana Doe, ¶ 18.] Their first immigration proceeding took place on September 3, 2019. [Decl. Cristian Doe, ¶¶ 16, 20; Decl. Diana Doe at. ¶¶ 25, 30.] At that hearing, the Immigration Judge (IJ) asked if anyone was afraid to return to Mexico, and Petitioners raised their hands. [Decl. Cristian Doe, ¶ 21; Decl. Diana Doe, ¶ 18.] Petitioners had non-refoulement interviews. [Decl. Cristian Doe, ¶¶ 26-29; Decl. Diana Doe, ¶ 38; ECF No. 1, Pet., ¶¶ 50, 53-54.] They were returned to Mexico the next day. [Decl. Cristian Doe, ¶¶ 2, 30 (explaining they were returned to Mexico the next day); ECF No. 1, Pet., ¶ 57; *but see* Decl. Diana Doe at. ¶ 40 (explaining they were returned to Mexico three days later).]

On September 19, 2019, Petitioners reported to the San Ysidro port of entry and were transported to immigration court for their hearing. [Decl. Diana Doe, ¶ 42.] The IJ asked if anyone was afraid to return to Mexico, but this time Petitioners did not raise their hands. [*Id*.] After their hearing, they were returned to Mexico.

On October 10, 2019, while they were in Mexico, Petitioners were able retain immigration counsel, Ms. Blumberg. [Decl. Cristian Doe, ¶ 34.]

On October 17, 2019, Petitioners reported to the San Ysidro port of entry and were transported to immigration court for their hearing, and they were represented by counsel at the hearing. [Decl. Cristian Doe, ¶¶ 31, 35.] Petitioners did not express a fear of returning to Mexico during that immigration hearing. [Decl. Cristian Doe, ¶ 35.] Petitioners were returned again to Mexico and waited there for their next immigration hearing, which was set for November 5, 2019. [Decl. Cristian Doe, ¶ 36.]

It appears that, in advance of the November 5, 2019 hearing, Petitioners were prepared to express fear of returning to Mexico, which they did at the hearing, through counsel. [Decl. Cristian Doe, ¶ 36; Decl. Diana Doe, ¶ 46.] Ms. Blumberg states in her declaration that she "helped [Petitioners] and their family convey their fear of return to

Mexico to the Immigration Judge" on November 5, 2019. [Decl. Blumberg, ¶¶ 3-4.] Ms. Blumberg explained that she prepared her clients for telephonic communication with her by giving Petitioners her phone number, and she understood that Petitioners planned to call her. [Decl. Blumberg, ¶ 8.]

On November 5, 2019, Petitioners were taken to Chula Vista Border Patrol Station for a non-refoulement interview. [Decl. Couch, ¶ 4.] However, it did not go forward due to this pending litigation. *Id*.

On November 6, 2019, the undersigned agreed with this Court's proposal to postpone the non-refoulement interview until resolution of Petitioners' TRO motion. At a telephonic conference with this Court, the parties discussed the possibility of rendering the TRO motion moot. After the call, arrangements were made for Petitioners' immigration counsel to meet with them telephonically before the interview and to be present for the interview telephonically. [Decl. Couch, ¶ 5.]

CBP and USCIS coordinated to schedule the non-refoulement interview to take place at 4:00 p.m. on November 6, 2019, and planned for Ms. Blumberg's telephonic appearance. [*Id*., ¶ 6.] At approximately 3:15 p.m., two Border Patrol agents escorted Petitioners into an interview room at the station and called Ms. Blumberg to allow her to privately consult with her clients over the telephone before the interview. [*Id*., ¶ 7.] Ms. Blumberg informed Border Patrol that she wanted to speak with Petitioners in person, not over the phone, and the call ended. [*Id*., ¶ 8.] She insisted that the non-refoulement interview could not go forward without an in-person pre-meeting with Petitioners.

After the phone call with Ms. Blumberg, the Border Patrol agents asked Petitioners if they wanted to speak with her and they said that they did. [*Id*., ¶ 9.] At approximately 3:28 p.m., a Border Patrol agent dialed Ms. Blumberg's number, handed the telephone to one of the Petitioners, and left Petitioners alone in the interview room, with the door shut. [*Id*., ¶ 10.] Petitioners exited the interview room at approximately 3:35 p.m. [*Id*.] At Petitioners' counsel's request, the non-refoulement interview scheduled to take place at 4:00 p.m. was cancelled. [*Id*., ¶ 11.]

IV

ARGUMENT

A. MOOTNESS

The TRO motion has been rendered moot, because Petitioners have been afforded the relief they were seeking. In their motion, Petitioners seek a TRO "requiring the government to refrain from denying [Petitioners], who are in the custody of Customs and Border Protection, access to their retained counsel." [ECF No. 2, at 2:2-4.] As set forth above, CBP and USCIS are not preventing such access; they provided opportunities for confidential telephonic consultation and for telephonic appearance at the interviews. Petitioners are adding a new demand, not contained in their motion or their petition, that they be afforded *in-person* pre-meetings in preparation for non-refoulement interviews. [*See* ECF 2-1 at 28:6-8 ("since the MPP non-refoulement interviews are conducted by telephone, it would be a simple matter to connect retained counsel to the conversation telephonically."); ECF No. 1, para. 64 ("CBP does not allow persons in its custody to communicate confidentially by telephone with their counsel."); ECF No. 2-1 at 20 ("The Policy unlawfully deprives Plaintiffs of confidential access to retained counsel while in detention before non-refoulement interviews and the participation of retained counsel during the interviews."); 27:20-21 ("By CBP's own standards, persons in its custody must have at least telephonic access to counsel").]

At any rate, the facts of this case indicate that Petitioner did have in-person access to their counsel in anticipation of the non-refoulement interview when they met with counsel to prepare for their November 5, 2019 IJ hearing.

The TRO motion (as well as the entire case) has therefore been rendered moot. *See Abdala v. INS*, 488 F.3d at 1063 ("At any stage of the proceeding a case becomes moot when 'it no longer present[s] a case or controversy under Article III, § 2 of the Constitution.'") (quoting *Spencer v. Kemna*, 523 U.S. at 7).

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B. NO CASE OR CONTROVERSY

This Court lacks subject matter jurisdiction, because Petitioners are asking this Court to make an advisory opinion. Anyone who invokes the jurisdiction of the federal courts must abide by Article III of the Constitution and both allege and demonstrate an actual case or controversy. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). Federal courts cannot render advisory opinions nor can they decide questions that cannot affect the rights of litigants before them. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). Petitioners cite no actual injury in their petition, apart from the lack of representation at their non-refoulement interviews. There has been no interview, so there is nothing for this Court to review. All of Petitioners' allegations and arguments are hypothetical. [ECF No. 2-1 at 22:24-27.]

C. PETITIONERS NOT "IN CUSTODY" FOR PURPOSES OF 28 U.S.C. § 2241

"Section § 2241 requires the petitioner to be 'in custody' at the time of filing for the federal courts to have jurisdiction over a habeas petition." *Smith v. U.S C.B.P.*, 741 F.3d 1016, 1019 (9th Cir. 2014). *See also Williamson v. Gregoire*, 151 F.3d 1180, 1182 (9th Cir. 1998) ("the 'in custody' requirement is jurisdictional."). Habeas jurisdiction extends to individuals who are subject to conditions that "significantly confine and restrain [their] freedom." *Jones v. Cunningham*, 371 U.S. 236, 240 (1963). Detaining an alien briefly to conduct a non-refoulement interview is not a significant confinement or restraint.

Habeas lies to enforce the right of personal liberty "with a view to determining whether the person restrained of his liberty is detained without authority of law." *Harlan v. McGourin*, 218 U.S. 442, 445 (1910). "Habeas has its boundaries; the writ does not permit us to roam the judicial range in a farfetched effort to grant declaratory or injunctive relief unrelated to the question of custody." *Pierre v. United States*, 525 F.2d 933, 937 (5th Cir. 1976) (concurring opinion). The habeas writ may not be used as "a springboard to adjudicate matters foreign to the question of the legality of custody." *Id*. at 935-36 (citing *Fay v. Noia*, 372 U.S. 391, 430-31 (1963)). *See also United States ex rel. Shaikas v. Shaughnessy*, 115 F. Supp. 165 (S.D.N.Y. 1953) ("The great prerogative writ may be used only to test the legality of a restraint of liberty.").

Petitioners themselves concede that the non-refoulement interview is a separate matter that is not incidental to their removal removal proceedings. [ECF No. 2-1 at 21-22 ("However, non-refoulement interviews under MPP are not removal proceedings… [T]hey merely determine where a person must remain—in Mexico or the United States… *at liberty* or detained.") (emphasis added).

In reality, subject to the outcome of their non-refoulement interviews, Petitioners will be required only to wait in Mexico under the MPP program, and that requirement does not constitute custody for purposes of 28 U.S.C. § 2241. They are "subject to no greater restraint than any other non-citizen living outside American borders." *Miranda v. Reno*, 238 F.3d 1156, 1159 (9th Cir. 2001). *See also Kumarasamy v. Attorney Gen. of U.S.*, 453 F.3d 169, 172 (3d Cir. 2006) (exclusion from the United States does not constitute "custody" for the purposes of 28 U.S.C. § 2241).

D. NO PRIVATE RIGHT OF ACTION

As explained in the MPP guidelines, the non-refoulement screening was established to satisfy treaty obligations under Article 33 of the 1951 Convention and Article 3 of the Convention Against Torture. [Ex. 11.] Those treaties are not self-executing, however, so Petitioners do not have a private right of action to sue for any claim arising from that process. As the Second Circuit noted:

> [P]etitioners argue that under the United Nations Protocol Relating to the Status of Refugees ("Protocol"), Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6557, and the [Convention against Torture (CAT)], Dec. 10, 1984, S. Treaty Doc. No. 100–20 (1988), the agency has an obligation to ensure that aliens will not be returned to a country in which they are likely to face persecution or torture… But neither the Protocol nor the CAT are self-executing treaties. *See Pierre v. Gonzales*, 502 F.3d 109, 119 (2d Cir. 2007) (CAT); . . . *Singh v. Ashcroft*, 398 F.3d 396, 404 n. 3 (6th Cir. 2005) (CAT); *Auguste v. Ridge*, 395 F.3d 123, 132 (3d Cir. 2005) (same); *cf. Medellin v. Texas*, 552U.S. 491, 128 S.Ct. 1346, 1365, 170 L.Ed.2d 190 (2008) (CAT). They therefore do not create private rights that petitioners can enforce in this court beyond those contained in their implementing statutes and regulations…

Yuen Jin v. Mukasey, 538 F.3d 143, 159 (2d Cir. 2008).

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And as one district court recently summarized:

> The [1951 Convention], adopted July 28, 1951, art. 26, 19 U.S.T. 6259, 657619 U.S.T. 6259, 6576, 189 U.N.T.S. 150, 172 ("Refugee Convention") likewise does not create a private right of action. *United States v. Casaran–Rivas*, 311 Fed. Appx. 269, 272 (11th Cir. 2009) (unpublished) ("[A]rgument that the indictment violated the refugee Convention and CAT Treaty is without merit, as the Refuge[e] Convention and CAT Treaty are not self-executing, or subject to relevant legislation, and, therefore, do not confer upon aliens a private right of action to allege a violation of their terms."); *Reyes–Sanchez v. Ashcroft*, 261 F. Supp. 2d 276, 288–89 (S.D.N.Y. 2003) ("Because the Refugee Convention is not self-executing, it does not create individual rights.").

Abbas v. United States, No. 10-CV-0141S, 2014 WL 3858398, at *4 (W.D.N.Y. Aug. 1, 2014).

E. NO JUDICIAL REVIEW OF IMPLEMENTATION OF INTERNATIONAL NON-REFOULEMENT OBLIGATIONS

Apart from lack of custody, lack of standing, and lack of private right of action, there can be no judicial review of the discretionary implementation of the non-refoulement treaty obligations. The rule of "non-inquiry" provides that courts must refrain from second-guessing the Executive Branch's determination "whether extradition should be denied on humanitarian grounds or on account of the treatment that the fugitive is likely to receive upon his return to the requesting state." *Prasoprat v. Benov*, 421 F.3d 1009, 1016 (9th Cir. 2005). The doctrine stems from a need to respect "separation of powers" and thus courts lack the authority to "inquir[e] into the substance" of return determinations. *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 957 (9th Cir. 2012). The foreign policy implications were noted by the Ninth Circuit in *Innovation Law Lab v. McAleenan*, 924 F.3d 503 (9th Cir. 2019) ("We are hesitant to disturb this compromise amid ongoing diplomatic negotiations between the United States and Mexico because, as we have explained, the preliminary injunction (at least in its present form) is unlikely to be sustained on appeal. Finally, the public interest favors the 'efficient administration of the immigration laws at the border.'") (quoting *East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1255 (9th Cir. 2018) (quoting *Landon v. Plasencia*, 459 U.S. 21, 34 (1982))).

Thus, courts are limited to simply evaluating whether the applicable procedures were followed in arriving at return determinations and, if they were, "the court's inquiry shall have reached its end." *Id.* In this case, Petitioners do not allege that there is any basis to believe that DHS will deviate from the procedures that apply to non-refoulement interviews. The Supreme Court has made clear that the rule of non-inquiry is not limited to the extradition context. *See Munaf v. Geren*, 553 U.S. 674, 700-01 (2008) (dismissing habeas petition alleging that "transfer to Iraqi custody is likely to result in torture" because "it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments"); *see also id.* at 702 ("[T]he political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is."). *See also* Foreign Affairs Reform and Restructuring Act (FARRA) § 2242(a), (d), 112 Stat. 2681–822 ("nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the [CAT]" except "as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act.").

F. APA DOES NOT APPLY

Two of Petitioners' claims are for violations of the Administrative Procedures Act (APA). [ECF No. 1, paras, 161-72.] The APA does not apply, however, because the non-refoulement screening is part of the MPP program which is authorized under the Immigration and Nationality Act (INA), specifically 8 U.S.C. § 1225(b)(2)(C) (Treatment of Aliens Arriving from Contiguous Territory). The Supreme Court has ruled that the APA's default right to counsel provision does not apply in immigration proceedings. "Congress intended the provisions of the [INA] ... to supplant the APA in immigration proceedings." *Ardestani v. I.N.S.*, 502 U.S. 129, 133 (1991).

Thus, in "immigration proceedings," it is settled that "the APA" does not "displace the INA," *id.*, in large measure because the INA explicitly "deviat[es] from the" APA. *Id.* at 133-34; *Marcello v. Bonds*, 349 U.S. 302, 309 (1955) ("[W]hen in this very

particularized adaptation there was a departure from the [APA] ... surely it was the intention of the Congress to have the deviation apply and not the general model."). Although the non-refoulement screening is separate from Petitioners' removal proceeding, *Ardestani* and *Marcello* emphasize that the displacement of the APA is not circumscribed to removal proceedings, but rather all "immigration proceedings." *Ardestani*, 502 U.S. at 133.

Apart from the inapplicability of the APA, Petitioners claim that the non-refoulement screening procedures regarding presence of counsel are "arbitrary and capricious." *See, e.g.*, ECF No. 2-1 at 22:26 ("The Policy violates the APA because it is final agency action in violation of statute and arbitrary and capricious").] There is no habeas review over discretionary decisions and factual determinations. *See, e.g., Singh v. Ashcroft*, 351 F.3d 435, 439 (9th Cir. 2003) ("The scope of habeas jurisdiction under 28 U.S.C. § 2241 is limited to claims that allege constitutional or statutory error in the removal process.").

V

THE TRO

A. STANDARD

In general, the showing required for a temporary restraining order is the same as that required for a preliminary injunction. *See Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839 (9th Cir. 2001). To prevail on a motion for a temporary restraining order, a petitioner must "establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). *See Nken v. Holder*, 556 U.S. 418, 426 (2009). Plaintiffs must demonstrate a "substantial case for relief on the merits." *Leiva-Perez v. Holder*, 640 F.3d 962, 967-68 (9th Cir. 2011). When "a plaintiff has failed to show the likelihood of success on the merits, we need not consider the remaining three [*Winter* factors]." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015).

The final two factors required for preliminary injunctive relief—balancing of the harm to the opposing party and the public interest—merge when the Government is the opposing party. *See Nken*, 556 U.S. at 435. The Supreme Court has specifically acknowledged that "[f]ew interests can be more compelling than a nation's need to ensure its own security." *Wayte v. United States*, 470 U.S. 598, 611 (1985). *See also United States v. Brignoni-Ponce*, 422 U.S. 873, 878-79 (1975); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977); *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1220-21 (D.C. Cir. 1981). *See also Maharaj v. Ashcroft*, 295 F.3d 963, 966 (9th Cir. 2002) (movant seeking injunctive relief "must show either (1) a probability of success on the merits and the possibility of irreparable harm, or (2) that serious legal questions are raised and the balance of hardships tips sharply in the moving party's favor.") (quoting *Andreiu v. Ashcroft*, 253 F.3d 477, 483 (9th Cir. 2001)).

Apart from jurisdictional considerations set forth above, interim relief should be denied, because there has been no constitutional or statutory violation, and Petitioners cite only hypothetical harm.

B. NO LIKELIHOOD OF SUCCESS

As Petitioners point out, the closest analog to the non-refoulement screening process is the credible fear determination, although a credible fear determination concerns permanently returning an alien to his or her home country, whereas a non-refoulement screening concerns a temporary return to a contiguous territory.

In addition, the credible fear determination process provides only that the alien "may consult with a person or persons of the alien's choosing prior to the interview or any review thereof." 8 U.S.C. § 1225(b)(1)(B)(iv). The regulations provide that the consultant "may be present at the interview and may be permitted, in the discretion of the asylum officer, to present a statement at the end of the interview." 8 C.F.R. § 208.30(d)(4).

If the asylum officer determines that the alien does not have a credible fear of persecution, the asylum applicant may request *de novo* review of the finding by an IJ. *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(III); 8 C.F.R. § 1003.42(d). In the course of such review, the

IJ may interview the applicant, s*ee* 8 U.S.C. § 1225(b)(1)(B)(iii)(III) and the IJ has discretion whether to allow the consultant to be present during the interview. *See* U.S. Dep't of Justice, Immigration Court Practice Manual, p. 125, https://www.justice.gov/eoir/page/file/1084851/download.

By contrast, there are no provisions regarding consultants and counsel in connection with non-refoulement screening, and it would be illogical for aliens in the screening process to be given greater access than aliens in the credible fear determination process.

More generally, Petitioners are applicants for admission and therefore have limited statutory and constitutional rights. *See* 8 U.S.C. § 1225(a)(1) (aliens treated as applicants for admission); § 1225(b)(2)(C) ("Treatment of aliens arriving from contiguous territory"). Although Petitioners have been placed in removal proceedings before an Immigration Judge, pursuant to 8 U.S.C. § 1225(b)(2)(C), their non-refoulement is not incidental to their immigration proceedings. [ECF No. 1, paras. 60, 106 ("The non-refoulement interview … is not part of the removal proceedings themselves.").]

"To establish a due process violation, a plaintiff must show that he has a protected property interest under the Due Process Clause and that he was deprived of the property without receiving the process that he was constitutionally due." *Levine v. City of Alameda*, 525 F.3d 903, 905 (9th Cir. 2008); *see also Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972) ("[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the [Due Process Clause's] protection of liberty and property.").

Longstanding Supreme Court precedent distinguishes among aliens who have been lawfully admitted; those who are physically present in the United States; and those who have never entered and have yet to form a connection to the country, with the third category having the most limited constitutional procedural due process rights. *See United States v. Verdugo–Urquidez*, 494 U.S. 259, 270-71 (1990) (collecting cases); *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application"); *Chew v. Colding*, 344

U.S. 590, 596 n.5 (1953); *cf. Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) (describing sliding scale and distinguishing between unlawful presence, lawful presence, and lawful presence accompanied by other ties to the United States like "preliminary declaration of intention to become a citizen").

It is well-settled that "aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *Verdugo–Urquidez*, 494 U.S. at 270. An arriving alien, however, does not have a substantive due process right to admission into the United States. *See Briseno v. INS*, 192 F.3d 1320, 1323 (9th Cir. 1999) (finding no substantive due process violation because aliens have no presumptive entitlement to residence in the United States). Aliens identified at the border—even if they are subsequently paroled into the territorial United States during the resolution of their claims for admission—are not entitled to any process other than that provided by statute. *See United States v. Barajas-Alvarado*, 655 F.3d 1077, 1088 (9th Cir. 2011) ("non-admitted aliens are entitled only to whatever process Congress provides"); *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("an alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'"); *Rodriguez v. Robbins*, 715 F.3d 1127, 1140 (9th Cir. 2013) ("*Mezei* established what is known as the entry fiction, which provides that although aliens seeking admission into the United States may physically be allowed within its borders pending a determination of admissibility, such aliens are legally considered to be detained at the border and hence as never having effected entry into this country... Noncitizens who are outside United States territories enjoy very limited protections under the United States Constitution."); *Alvarez-Garcia v. Ashcroft*, 378 F.3d 1094, 1097, 1098 (9th Cir. 2004).

There is therefore no right to counsel for applicants for admission in expedited removal proceedings. *See United States v. Peralta-Sanchez*, 847 F.3d 1124 (9th Cir. 2017) (finding that an arriving alien lacks the right to counsel during expedited removal proceedings); *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1088 (9th Cir. 2011)

("[There is] no legal basis for [the] claim that non-admitted aliens who have not entered the United States have a right to representation ... [in] expedited removal proceedings.").

There is also no right to counsel during primary or secondary inspection of applicants for admission at the ports of entry.

> Nothing in this paragraph shall be construed to provide any applicant for admission in either primary or secondary inspection the right to representation, unless the applicant for admission has become the focus of a criminal investigation and has been taken into custody.

8 C.F.R. § 292.5. *See Gonzaga-Ortega v. Holder*, 736 F.3d 795, 804 (9th Cir. 2013) ("Because Gonzaga was properly deemed an 'applicant for admission' . . . , we conclude that 8 C.F.R. § 292.5(b) did not entitle him to counsel during primary or secondary inspection."); *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1088 (9th Cir. 2011) ("Barajas–Alvarado himself identifies no legal basis for his claim that non-admitted aliens who have not entered the United States have a right to representation, and we are aware of no applicable statute or regulation indicating that such aliens have any such right. The cases cited by *Barajas–Alvarado* involve aliens in the more formal removal proceedings, where the regulations provide a right of counsel, as compared to expedited removal proceedings, where they do not.")).

Petitioners argue that the so-called "entry fiction doctrine" does not apply because, they assert, they "were initially apprehended inside the United States, not at the port of entry, making the entry fiction entirely inapplicable to them." [ECF No. 2-1 at 20:24-26.] The circumstances they describe are precisely what the entry fiction doctrine addresses, however. Though physically in the United States, they were not inspected and admitted at a port of entry, and are assimilated to the status of unadmitted aliens at a port of entry at the border. *See, e.g., Rodriguez*, 715 F.3d at 1140; *Cancino Castellar v. McAleenan*, 388 F. Supp. 3d 1218, 1245 (S.D. Cal. 2019) ("Petitioners resist application of the entry fiction on the ground that Gonzalez does not challenge the validity of the procedures to admit or exclude him. Petitioners' argument runs contrary to the entry fiction itself. Although the fiction is regarded as narrow, it is not as narrow as Plaintiff-Petitioners posit.").

C. HYPOTHETICAL HARM

As discussed above, Petitioners' assertions are purely speculative, and they are seeking an advisory opinion from this Court. Furthermore, the Ninth Circuit recently stated in its *Innovation Law Lab* decision:

> The plaintiffs fear substantial injury upon return to Mexico, but the likelihood of harm is reduced somewhat by the Mexican government's commitment to honor its international-law obligations and to grant humanitarian status and work permits to individuals returned under the MPP.

924 F.3d at 510.

VI

CONCLUSION

This Court should therefore deny Petitioners' motion for emergency relief as well as their habeas petition. Their motion for interim relief, as well as their petition, has been rendered moot, they were not "in custody" for purposes of 28 U.S.C. § 2241 when they commenced this case, they are asking for an advisory opinion, they have no private right of action, discretionary implementation of treaty obligations is non-reviewable, Petitioner are no likely to succeed on the merits, and they have alleged only hypothetical harm.

DATED: November 7, 2019

Respectfully submitted,

ROBERT S. BREWER, JR.
United States Attorney

s/ Samuel W. Bettwy
SAMUEL W. BETTWY
Assistant U.S. Attorney

s/ Caroline C. Prime
CAROLINE C. PRIME
Assistant U. S. Attorney

s/ Rebecca G. Church
REBECCA G. CHURCH
Assistant U. S. Attorney

Attorneys for Respondents

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CRISTIAN DOE, et al., Petitioners v. KEVIN K. McALEENAN, Acting Secretary of Homeland Security; et. al., Respondents.	Case No. 19cv2119 DMS AGS **EXHIBITS**

U.S. Department of
Homeland Security

Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration

Release Date: December 20, 2018

Announces Migration Protection Protocols

WASHINGTON – Today, Secretary of Homeland Security Kirstjen M. Nielsen announced historic action to confront the illegal immigration crisis facing the United States. Effective immediately, the United States will begin the process of invoking Section 235(b)(2)(C) of the Immigration and Nationality Act. Under the Migration Protection Protocols (MPP), individuals arriving in or entering the United States from Mexico—illegally or without proper documentation—may be returned to Mexico for the duration of their immigration proceedings.

"Today we are announcing historic measures to bring the illegal immigration crisis under control," said Secretary Nielsen. "We will confront this crisis head on, uphold the rule of law, and strengthen our humanitarian commitments. Aliens trying to game the system to get into our country illegally will no longer be able to disappear into the United States, where many skip their court dates. Instead, they will wait for an immigration court decision while they are in Mexico. 'Catch and release' will be replaced with 'catch and return.' In doing so, we will reduce illegal migration by removing one of the key incentives that encourages people from taking the dangerous journey to the United States in the first place. This will also allow us to focus more attention on those who are actually fleeing persecution.

"Let me be clear: we will undertake these steps consistent with all domestic and international legal obligations, including our humanitarian commitments. We have notified the Mexican government of our intended actions. In response, Mexico has made an independent determination that they will commit to implement essential measures on their side of the border. We expect affected migrants will receive humanitarian visas to stay on Mexican soil, the ability to apply for work, and other protections while they await a U.S. legal determination."

Background

Illegal aliens have exploited asylum loopholes at an alarming rate. Over the last five years, DHS has seen a 2000 percent increase in aliens claiming credible fear (the first step to asylum), as many know it will give them an opportunity to stay in our country, even if they do not actually have a valid claim to asylum. As a result, the United States has an overwhelming asylum backlog of more than 786,000 pending cases. Last year alone the number of asylum claims soared 67 percent compared to the previous year. Most of these claims are not meritorious—in fact *nine out of ten asylum claims are not granted by a federal immigration judge*. However, by the time a judge has ordered them removed from the United States, many have vanished.

Process

- Aliens trying to enter the U.S. to claim asylum will no longer be released into our country, where they often disappear before a court can determine their claim's merits.
- Instead, those aliens will be processed by DHS and given a "Notice to Appear" for their immigration court hearing.
- While they wait in Mexico, the Mexican government has made its own determination to provide such individuals humanitarian visas, work authorization, and other protections. Aliens will have access to immigration attorneys and to the U.S. for their court hearings.
- Aliens whose claims are upheld by U.S. judges will be allowed into the U.S. Those without valid claims will be deported to their home countries.

Anticipated Benefits

- As we implement, illegal immigration and false asylum claims are expected to decline.
- Aliens will not be able to disappear into U.S. before court decision.
- More attention can be focused on more quickly assisting legitimate asylum-seekers, as fraudsters are disincentivized from making the journey.
- Precious border security personnel and resources will be freed up to focus on protecting our territory and clearing the massive asylum backlog.
- Vulnerable populations will get the protection they need while they await a determination in Mexico.

Topics: Border Security (/topics/border-security), Immigration and Customs Enforcement (/topics/immigration-enforcement), Secretary of Homeland Security (/topics/secretary-homeland-security)

Keywords: Border Security (/keywords/border-security), Immigration Enforcement (/keywords/immigration-enforcement), Southwest Border (/keywords/southwest-border)

Last Published Date: December 20, 2018

U.S. Department of
Homeland Security

Migrant Protection Protocols

Release Date: January 24, 2019

"We have implemented an unprecedented action that will address the urgent humanitarian and security crisis at the Southern border. This humanitarian approach will help to end the exploitation of our generous immigration laws. The Migrant Protection Protocols represent a methodical commonsense approach, exercising long-standing statutory authority to help address the crisis at our Southern border." – Secretary of Homeland Security Kirstjen M. Nielsen

What Are the Migrant Protection Protocols?

The Migrant Protection Protocols (MPP) are a U.S. Government action whereby certain foreign individuals entering or seeking admission to the U.S. from Mexico – illegally or without proper documentation – may be returned to Mexico and wait outside of the U.S. for the duration of their immigration proceedings, where Mexico will provide them with all appropriate humanitarian protections for the duration of their stay.

Why is DHS Instituting MPP?

The U.S. is facing a security and humanitarian crisis on the Southern border. The Department of Homeland Security (DHS) is using all appropriate resources and authorities to address the crisis and execute our missions to secure the borders, enforce immigration and customs laws, facilitate legal trade and travel, counter traffickers, smugglers and transnational criminal organizations, and interdict drugs and illegal contraband.

MPP will help restore a safe and orderly immigration process, decrease the number of those taking advantage of the immigration system, and the ability of smugglers and traffickers to prey on vulnerable populations, and reduce threats to life, national security, and public safety, while ensuring that vulnerable populations receive the protections they need.

Historically, illegal aliens to the U.S. were predominantly single adult males from Mexico who were generally removed within 48 hours if they had no legal right to stay; now over 60% are family units and unaccompanied children and 60% are non-Mexican. In FY17, CBP apprehended 94,285 family units from Honduras, Guatemala, and El Salvador (Northern Triangle) at the Southern border. Of those, 99% remain in the country today.

Misguided court decisions and outdated laws have made it easier for illegal aliens to enter and remain in the U.S. if they are adults who arrive with children, unaccompanied alien children, or individuals who fraudulently claim asylum. As a result, DHS continues to see huge numbers of illegal migrants and a dramatic shift in the demographics of aliens traveling to the border, both in terms of nationality and type of aliens- from a demographic who could be quickly removed when they had no legal right to stay to one that cannot be detained and timely removed.

In October, November, and December of 2018, DHS encountered an average of 2,000 illegal and inadmissible aliens a day at the Southern border. While not an all-time high in terms of overall numbers, record increases in particular types of migrants, such as family units, travelling to the border who require significantly more resources to detain and remove (when our courts and laws even allow that), have overwhelmed the U.S. immigration system, leading to a "system" that enables smugglers and traffickers to flourish and often leaves aliens in limbo for years. This has been a prime cause of our near-800,000 case backlog in immigration courts and delivers no consequences to aliens who have entered illegally.

Smugglers and traffickers are also using outdated laws to entice migrants to undertake the dangerous journey north where on the route migrants report high rates of abuse, violence, and sexual assault. Human smugglers and traffickers exploit migrants and seek to turn human misery into profit. Transnational

criminal organizations and gangs are also deliberately exploiting the situation to bring drugs, violence, and illicit goods into American communities. The activities of these smugglers, traffickers, gangs and criminals endanger the security of the U.S., as well as partner nations in the region.

The situation has had severe impacts on U.S. border security and immigration operations. The dramatic increase in illegal migration, including unprecedented number of families and fraudulent asylum claims is making it harder for the U.S. to devote appropriate resources to individuals who are legitimately fleeing persecution. In fact, approximately 9 out of 10 asylum claims from Northern Triangle countries are ultimately found non-meritorious by federal immigration judges. Because of the court backlog and the impact of outdated laws and misguided court decisions, many of these individuals have disappeared into the country before a judge denies their claim and simply become fugitives.

The MPP will provide a safer and more orderly process that will discourage individuals from attempting illegal entry and making false claims to stay in the U.S., and allow more resources to be dedicated to individuals who legitimately qualify for asylum.

What Gives DHS the Authority to Implement MPP?

Section 235 of the Immigration and Nationality Act (INA) addresses the inspection of aliens seeking to be admitted into the U.S. and provides specific procedures regarding the treatment of those not clearly entitled to admission, including those who apply for asylum. Section 235(b)(2)(C) provides that "in the case of an alien . . . who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the U.S.," the Secretary of Homeland Security "may return the alien to that territory pending a [removal] proceeding under § 240" of the INA." The U.S. has notified the Government of Mexico that it is implementing these procedures under U.S. law.

Who is Subject to MPP?

With certain exceptions, MPP applies to aliens arriving in the U.S. [illegible] from Mexico (including those apprehended along the border) who are not clearly

admissible and who are placed in removal proceedings under INA § 240. This includes aliens who claim a fear of return to Mexico at any point during apprehension, processing, or such proceedings, but who have been assessed not to be more likely than not to face persecution or torture in Mexico. Unaccompanied alien children and aliens in expedited removal proceedings will not be subject to MPP. Other individuals from vulnerable populations may be excluded on a case-by-case basis.

How Will MPP Work Operationally?

Certain aliens attempting to enter the U.S. illegally or without documentation, including those who claim asylum, will no longer be released into the country, where they often fail to file an asylum application and/or disappear before an immigration judge can determine the merits of any claim. Instead, these aliens will be given a "Notice to Appear" for their immigration court hearing and will be returned to Mexico until their hearing date.

While aliens await their hearings in Mexico, the Mexican government has made its own determination to provide such individuals the ability to stay in Mexico, under applicable protection based on the type of status given to them.

Aliens who need to return to the U.S. to attend their immigration court hearings will be allowed to enter and attend those hearings. Aliens whose claims are found meritorious by an immigration judge will be allowed to remain in the U.S. Those determined to be without valid claims will be removed from the U.S. to their country of nationality or citizenship.

DHS is working closely with the U.S. Department of Justice's Executive Office for Immigration Review to streamline the process and conclude removal proceedings as expeditiously as possible.

Will Migrants in MPP Have Access to Counsel?

Consistent with the law, aliens in removal proceedings can use counsel of their choosing at no expense to the U.S. Government. Aliens subject to MPP will be

afforded the same right and provided with a list of legal services providers in the area which offer services at little or no expense to the migrant.

What Are the Anticipated Benefits of MPP?

Every month, tens of thousands of individuals arrive unlawfully at the Southern Border. MPP will reduce the number of aliens taking advantage of U.S. law and discourage false asylum claims. Aliens will not be permitted to disappear into the U.S. before a court issues a final decision on whether they will be admitted and provided protection under U.S. law. Instead, they will await a determination in Mexico and receive appropriate humanitarian protections there. This will allow DHS to more effectively assist legitimate asylum-seekers and individuals fleeing persecution, as migrants with non-meritorious or even fraudulent claims will no longer have an incentive for making the journey. Moreover, MPP will reduce the extraordinary strain on our border security and immigration system, freeing up personnel and resources to better protect our sovereignty and the rule of law by restoring integrity to the American immigration system.

Additional Information

- Secretary Nielsen Implementation Memo (/publication/policy-guidance-implementation-migrant-protection-protocols) (January 25, 2019, PDF)

Topics: Border Security (/topics/border-security), Immigration and Customs Enforcement (/topics/immigration-enforcement)

Keywords: Border Security (/keywords/border-security), Immigration Enforcement (/keywords/immigration-enforcement), Southwest Border (/keywords/southwest-border)

Last Published Date: January 29, 2019

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

January 25, 2019

ACTION

MEMORANDUM FOR: L. Francis Cissna
Director
U.S. Citizenship and Immigration Services

Kevin K. McAleenan
Commissioner
U.S. Customs and Border Protection

Ronald D. Vitiello
Deputy Director and Senior Official Performing the Duties of Director
U.S. Immigration and Customs Enforcement

FROM: Kirstjen M. Nielsen
Secretary

SUBJECT: Policy Guidance for Implementation of the Migrant Protection Protocols

On December 20, 2018, I announced that the Department of Homeland Security (DHS), consistent with the Migrant Protection Protocols (MPP), will begin implementation of Section 235(b)(2)(C) of the Immigration and Nationality Act (INA) on a large-scale basis to address the migration crisis along our southern border. In 1996, Congress added Section 235(b)(2)(C) to the INA. This statutory authority allows the Secretary of Homeland Security to return certain applicants for admission to the contiguous country from which they are arriving on land (whether or not at a designated port of entry) pending removal proceedings under Section 240 of the INA. Consistent with the MPP, citizens and nationals of countries other than Mexico ("third-country nationals") arriving in the United States by land from Mexico—illegally or without proper documentation—may be returned to Mexico pursuant to Section 235(b)(2)(C) for the duration of their Section 240 removal proceedings.

Section 235(b)(2)(C) and the MPP

The United States issued the following statement on December 20, 2018, regarding implementation of the Migrant Protection Protocols:

> [T]he United States will begin the process of implementing Section 235(b)(2)(C) . . . with respect to non-Mexican nationals who may be arriving on land (whether or not at a designated port of entry) seeking to enter the United States from Mexico illegally or without proper documentation. Such implementation will be done consistent with applicable domestic and international legal obligations. Individuals subject to this action may return to the United States as necessary and appropriate to attend their immigration court proceedings.
>
> The United States understands that, according to the Mexican law of migration, the Government of Mexico will afford such individuals all legal and procedural protection[s] provided for under applicable domestic and international law. That includes applicable international human rights law and obligations as a party to the 1951 Convention relating to the Status of Refugees (and its 1967 Protocol) and the Convention Against Torture.
>
> The United States further recognizes that Mexico is implementing its own, sovereign, migrant protection protocols providing humanitarian support for and humanitarian visas to migrants.
>
> The United States proposes a joint effort with the Government of Mexico to develop a comprehensive regional plan in consultation with foreign partners to address irregular migration, smuggling, and trafficking with the goal of promoting human rights, economic development, and security.[1]

The Government of Mexico, in response, issued a statement on December 20, 2018. That statement provides, in part, as follows:

> 1. For humanitarian reasons, [the Government of Mexico] will authorize the temporary entrance of certain foreign individuals coming from the United States who entered that country at a port of entry or who were detained between ports of entry, have been interviewed by U.S. immigration authorities, and have received a notice to appear before an immigration judge. This is based on current Mexican legislation and the international commitments Mexico has signed, such as the Convention Relating to the Status of Refugees, its Protocol, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, among others.

[1] Letter from Chargé d'Affaires John S. Creamer to Sr. Jesús Seade, Subsecretaria para América del Norte, Secretaría de Relaciones Exteriores (Dec. 20, 2018).

2. It will allow foreigners who have received a notice to appear to request admission into Mexican territory for humanitarian reasons at locations designated for the international transit of individuals and to remain in national territory. This would be a "stay for humanitarian reasons" and they would be able to enter and leave national territory multiple times.

3. It will ensure that foreigners who have received their notice to appear have all the rights and freedoms recognized in the Constitution, the international treaties to which Mexico is a party, and its Migration Law. They will be entitled to equal treatment with no discrimination whatsoever and due respect will be paid to their human rights. They will also have the opportunity to apply for a work permit for paid employment, which will allow them to meet their basic needs.

4. It will ensure that the measures taken by each government are coordinated at a technical and operational level in order to put mechanisms in place that allow migrants who have receive[d] a notice to appear before a U.S. immigration judge have access without interference to information and legal services, and to prevent fraud and abuse.[2]

Prosecutorial Discretion and *Non-Refoulement* in the Context of the MPP

In exercising their prosecutorial discretion regarding whether to place an alien arriving by land from Mexico in Section 240 removal proceedings (rather than another applicable proceeding pursuant to the INA), and, if doing so, whether to return the alien to the contiguous country from which he or she is arriving pursuant to Section 235(b)(2)(C), DHS officials should act consistent with the *non-refoulement* principles contained in Article 33 of the 1951 Convention Relating to the Status of Refugees[3] (1951 Convention) and Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[4] Specifically, a third-country national should not be involuntarily returned to Mexico pursuant to Section 235(b)(2)(C) of the INA if the alien would more likely than not be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion (unless such alien has engaged in criminal, persecutory, or terrorist activity described in Section 241(b)(3)(B) of the

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[2] Secretaría de Relaciones Exteriores, *Position of Mexico on the Decision of the U.S. Government to Invoke Section 235(b)(2)(C) of its Immigration and Nationality Act* (Dec. 20, 2018).

[3] The United States is not a party to the 1951 Convention but is a party to the 1967 Protocol Relating to the Status of Refugees, which incorporates Articles 2 to 34 of the 1951 Convention. Article 33 of the 1951 Convention provides that: "[n]o Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

[4] Article 3 of the CAT states, "No State Party shall expel, return ('*refouler*') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." *See also* Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, Div. G, Title XXII, § 2242(a) (8 U.S.C. § 1231 note) ("It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.").

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INA), or would more likely than not be tortured, if so returned pending removal proceedings. The United States expects that the Government of Mexico will comply with the commitments articulated in its statement of December 20, 2018.

U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, and U.S. Immigration and Customs Enforcement will issue appropriate internal procedural guidance to carry out the policy set forth in this memorandum.[5]

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

[5] A DHS immigration officer, when processing an alien for Section 235(b)(2)(C), should refer to USCIS an alien who has expressed a fear of return to Mexico for a *non-refoulement* assessment by an asylum offi

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
Washington, DC 20529

U.S. Citizenship and Immigration Services

January 28, 2019 **PM-602-0169**

Policy Memorandum

SUBJECT: **Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols**

Purpose

This memorandum provides guidance to immigration officers in U.S. Citizenship and Immigration Services (USCIS) regarding the implementation of the Migrant Protection Protocols (MPP), including supporting the exercise of prosecutorial discretion by U.S. Customs and Border Protection (CBP). This memorandum follows the Secretary of Homeland Security's January 25, 2019, memorandum, *Policy Guidance for Implementation of the Migrant Protection Protocols.*

Background

Section 235(b)(2)(C) of the Immigration and Nationality Act (INA) provides that aliens arriving by land from a foreign contiguous territory (i.e., Mexico or Canada)—whether or not at a designated port of entry—generally may be returned, as a matter of enforcement discretion, to the territory from which they are arriving pending a removal proceeding under Section 240 of the INA.

On December 20, 2018, Secretary of Homeland Security Kirstjen M. Nielsen announced that the Department of Homeland Security (DHS) will begin the process of implementing Section 235(b)(2)(C) of the INA on a large scale. That statutory provision allows for the return of certain aliens to a contiguous territory pending Section 240 removal proceedings before an immigration judge. Under the MPP, aliens who are nationals and citizens of countries other than Mexico (third-country nationals) arriving in the United States by land from Mexico—illegally or without proper documentation—may be returned to Mexico for the duration of their immigration proceedings as a matter of prosecutorial discretion. *Accord* 8 C.F.R. § 235.3(d).

In her January 25, 2019, memorandum, Secretary Nielsen issued general policy guidance concerning DHS's implementation of Section 235(b)(2)(C) at the southern border consistent with the MPP. Memorandum from Kirstjen M. Nielsen, Secretary of Homeland Security, *Policy*

Guidance for Implementation of the Migrant Protection Protocols (Jan. 25, 2019) (Jan. 25, 2019, Memorandum). The Secretary advised that such authority should be implemented consistent with the *non-refoulement* principles contained in Article 33 of the 1951 Convention Relating to the Status of Refugees (1951 Convention)—as incorporated in the 1967 Protocol Relating to the Status of Refugees[1]—and Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[2]

The Secretary specifically advised that, consistent with those principles, "a third-country national should not be involuntarily returned to Mexico pursuant to Section 235(b)(2)(C) of the INA if the alien would more likely than not be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion (unless such alien has engaged in criminal, persecutory, or terrorist activity described in Section 241(b)(3)(B) of the INA), or would more likely than not be tortured, if so returned pending removal proceedings." Jan. 25, 2019, Memorandum at 3-4. Article 33 of the 1951 Convention and Article 3 of the CAT require that the individual demonstrate that he or she is "more likely than not" to face persecution on account of a protected ground or torture, respectively.[3] That is the same standard used for withholding of removal and CAT protection determinations. *See* 8 C.F.R. § 208.16(b)(2), (c)(2); Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8480 (1999).

At the same time, under the MPP, the United States "understands that, according to the Mexican law of migration, the Government of Mexico will afford such individuals all legal and procedural protection[s] provided for under applicable domestic and international law," including the 1951 Convention and the CAT. Letter from Chargé d'Affaires John S. Creamer to Sr. Jesús Seade, Subsecretaría para América del Norte, Secretaría de Relaciones Exteriores (Dec. 20, 2018). Further, "[t]he United States expects that the Government of Mexico will comply with the commitments articulated in its statement of December 20, 2018."[4]

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[1] The United States is not a party to the 1951 Convention Relating to the Status of Refugees but is a party to the 1967 Protocol Relating to the Status of Refugees, which incorporates Articles 2 to 34 of the 1951 Convention. Article 33 of the 1951 Convention provides that: "[n]o Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

[2] Article 3 of the CAT states, "No State Party shall expel, return ('*refouler*') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." *See also* Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, Div. G, Title XXII, § 2242(a) (8 U.S.C. § 1231 note) ("It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.").

[3] *See INS v. Stevic*, 467 U.S. 407, 429-30 (1984); *Auguste v. Ridge*, 395 F.3d 123, 132-33 (3d Cir. 2005); *Pierre v. Gonzales*, 502 F.3d 109, 115 (2d Cir. 2007); *see also* Senate Resolution of Advice and Consent to Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Treaty Doc. No. 100-20, II(2), *available at* https://www.congress.gov/treaty-document/100th-congress/20/resolution-text; Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8480 (1999).

[4] Jan. 25, 2019, Memorandum at 4.

The Secretary also advised that, where an alien affirmatively states a concern that he or she may face a risk of persecution on account of a protected ground or torture upon return to Mexico, CBP should refer the alien to USCIS, which will conduct an assessment to determine whether it is more likely than not that the alien will be subject to persecution or torture if returned to Mexico. The Secretary directed USCIS to issue appropriate internal procedural guidance to carry out this policy. That guidance is explained below.

Guidance

Upon a referral by a DHS immigration officer of an alien who could potentially be amenable to the MPP, the USCIS asylum officer should interview the alien to assess whether it is more likely than not that the alien would be persecuted in Mexico on account of his or her race, religion, nationality, membership in a particular social group, or political opinion (unless such alien has engaged in criminal, persecutory, or terrorist activity described in Section 241(b)(3)(B) of the INA),[5] or that the alien would be tortured in Mexico. The process or procedures described in INA Sections 208, 235(b)(1), (3), and 241(b)(3) and their implementing regulations, as well as those in the CAT regulations, do not apply to the MPP assessments.

A. Interview

Upon receipt of such a referral, the USCIS officer should conduct the MPP assessment interview in a non-adversarial manner, separate and apart from the general public. The purpose of the interview is to elicit all relevant and useful information bearing on whether the alien would more likely than not face persecution on account of a protected ground, or torture, if the alien is returned to Mexico pending the conclusion of the alien's Section 240 immigration proceedings.

The officer should conduct the assessment in person, via video teleconference, or telephonically. At the time of the interview, the USCIS officer should verify that the alien understands that he or she may be subject to return to Mexico under Section 235(b)(2)(C) pending his or her immigration proceedings. The officer should also confirm that the alien has an understanding of the interview process. In addition, provided the MPP assessments are part of either primary or secondary inspection, DHS is currently unable to provide access to counsel during the assessments given the limited capacity and resources at ports-of-entry and Border Patrol stations as well as the need for the orderly and efficient processing of individuals.[6]

In conducting the interview, the USCIS officer should take into account the following and other such relevant factors as:

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[5] The disqualifying grounds for *non-refoulement* vis-à-vis the 1951 Convention and 1967 Protocol are reflected in Section 241(b)(3)(B) of the INA. However, the reference to Section 241(b)(3)(B) should not be construed to suggest that Section 241(b)(3)(B) applies to MPP.
[6] *See* 8 C.F.R. § 292.5(b).

1. The credibility of any statements made by the alien in support of the alien's claim(s) and such other facts as are known to the officer. That includes whether any alleged harm (i.e., the alleged persecution or torture) could occur in the region in which the alien would reside in Mexico, pending their removal proceedings, or whether residing in another region of Mexico to which the alien would have reasonable access could mitigate against the alleged harm;

2. Commitments from the Government of Mexico regarding the treatment and protection of aliens returned under Section 235(b)(2)(C) (including those set forth in the Government of Mexico's statement of December 20, 2018),[7] the expectation of the United States Government that the Government of Mexico will comply with such commitments,[8] and reliable assessments of current country conditions in Mexico (especially those provided by DHS and the U.S. Department of State); and

3. Whether the alien has engaged in criminal, persecutory, or terrorist activity described in Section 241(b)(3)(B) of the INA.

B. Assessment

Once a USCIS officer assesses whether the alien, if returned to Mexico, would be more likely than not persecuted in Mexico on account of a protected ground (or has engaged in criminal, persecutory, or terrorist activity described in Section 241(b)(3)(B) of the INA), or would be more likely than not tortured in Mexico, the assessment shall be reviewed by a supervisory asylum officer, who may change or concur with the assessment's conclusion. DHS staff should inform the alien of the outcome of the final assessment. USCIS should then provide its assessment to CBP for purposes of exercising prosecutorial discretion in connection with one or more of the decisions as to whether to place the alien in expedited removal or to issue a Notice to Appear for the purpose of placement directly into Section 240 removal proceedings, and if the latter, whether to return the alien to Mexico pending the conclusion of Section 240 proceedings under Section 235(b)(2)(C) pursuant to the MPP, and, when appropriate, to U.S. Immigration and Customs Enforcement for purposes of making discretionary custody determinations for aliens who are subject to detention and may be taken into custody pending removal proceedings.

If an officer makes a positive MPP assessment (i.e., that an alien is more likely than not either to be persecuted in Mexico on account of a protected ground and has not engaged in criminal, persecutory, or terrorist activity described in Section 241(b)(3)(B) of the INA, or to be tortured in Mexico), USCIS is *not* granting withholding of removal or protection from removal under the CAT regulations. Nor shall there be further administrative review, reopening, or reconsideration of the assessment by USCIS. The purpose of the assessment is simply to assess whether the alien meets one of the eligibility criteria under the MPP, pursuant to Section 235(b)(2)(C).

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[7] Secretaria de Relaciones Exteriores, *Position of Mexico on the Decision of the U.S. Government to Invoke Section 235(b)(2)(C) of its Immigration and Nationality Act* (Dec. 20, 2018); *see* Jan. 25, 2019, Memorandum at 2-3.

[8] *See* Jan. 25, 2019, Memorandum at 4.

Disclaimer

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Likewise, no limitations are placed by this guidance on the otherwise lawful enforcement or litigation prerogatives of DHS.

Contact Information

Questions relating to this memorandum must be directed through the appropriate channels to the Asylum Division Headquarters point of contact.

MPP Guiding Principles

Date: January 28, 2019

Topic: Guiding Principles for Migrant Protection Protocols

HQ POC/Office: Enforcement Programs Division

- Effective January 28, 2019, in accordance with the Commissioner's Memorandum of January 28, 2019, the Office of Field Operations, San Diego Field Office, will, consistent with its existing discretion and authorities, begin to implement Section 235(b)(2)(C) of the Immigration and Nationality Act (INA) through the Migrant Protection Protocols (MPP).
    - To implement the MPP, aliens arriving from Mexico who are amenable to the process (see below), and who in an exercise of discretion the officer determines should be subject to the MPP process, will be issued an Notice to Appear (NTA) and placed into Section 240 removal proceedings. They will then be transferred to await proceedings in Mexico.

- Aliens in the following categories are not amenable to MPP:
    - Unaccompanied alien children,
    - Citizens or nationals of Mexico,
    - Aliens processed for expedited removal,
    - Aliens in special circumstances:
        - Returning LPRs seeking admission (subject to INA section 212)
        - Aliens with an advance parole document or in parole status
        - Known physical/mental health issues
        - Criminals/history of violence
        - Government of Mexico or USG interest,
    - Any alien who is more likely than not to face persecution or torture in Mexico, or
    - Other aliens at the discretion of the Port Director

- Nothing in this guidance changes existing policies and procedures for processing an alien under procedures other than MPP, except as specifically provided. Thus, for instance, the processing of aliens for expedited removal is unchanged. Once an alien has been processed for expedited removal, including the supervisor approval, the alien may not be processed for MPP.
- Officers, with appropriate supervisory review, retain discretion to process aliens for MPP or under other procedures (e.g., expedited removal), on a case-by-case basis. Adverse factors precluding placement in the MPP process include, but are not limited to, factors such as prior removal, criminal history, it is more likely than not that the alien will face persecution or torture in Mexico, and permanent bars to readmission.
- If an alien who is potentially amenable to MPP affirmatively states that he or she has a fear of persecution or torture in Mexico, or a fear of return to Mexico, whether before or after they are processed for MPP or other disposition, that alien will be referred to a USCIS asylum officer for screening following the affirmative statement of fear of persecution or

torture in, or return to, Mexico, so that the asylum officer can assess whether it is more likely than not that the alien will face persecution or torture if returned to Mexico.

- If USCIS assesses that an alien who affirmatively states a fear of return to Mexico is more likely than not to face persecution or torture in Mexico, the alien may not be processed for MPP. Officers retain all existing discretion to process (or re-process) the alien for any other available disposition, including expedited removal, NTA, waivers, or parole.
- Aliens at the POE who are processed for MPP will receive a specific immigration court hearing date and time. Every effort will be made to schedule similar MPP alien populations (e.g. single adult males, single adult females, family units) for the same hearing dates.
- OFO and USBP will be sharing court dates using only one existing Immigration Scheduling System (ISS) queue.
- Any alien who is subject to MPP will be documented in the appropriate system of records, SIGMA, and the proper code will be added.
- POEs will provide aliens subject to MPP a tear sheet containing information about the process, as well as a list of free or low-cost legal service providers.
- Aliens who return to the POE for their scheduled hearing and affirmatively state a fear of return to Mexico will be referred to USCIS for screening prior to any return to Mexico. If USCIS assesses that such an alien is more likely than not to face persecution or torture in Mexico, CBP Officers should coordinate with ICE Enforcement and Removal Operations (ERO) to determine whether the alien may be maintained in custody or paroled, or if another disposition is appropriate. Such an alien may not be subject to expedited removal, however, and may not be returned to Mexico to await further proceedings.

Hearing date and processing

- POEs will establish scheduling for the arrival of aliens returning for their hearing to permit efficient transportation, according to applicable policy.
- Returning aliens who arrive at the POEs for proceedings will be biometrically identified, screened to ensure they have requisite documents, and turned over to ICE ERO.
- POEs will coordinate with ICE ERO to establish transfer of custody and expeditious transportation from the POE to the hearing. ERO is responsible for the transportation of aliens between the POE and court location, as well as the handling of the alien during all court proceedings.
- If the alien receives a final order of removal from an immigration judge, the alien will be processed in accordance with ERO operations.
- If the alien's INA section 240 removal proceedings are ongoing ERO will transport the alien back to the POE and CBP officers will escort the alien to the United States/Mexico limit line.

Enforcement and Removal Operations
U.S. Department of Homeland Security
500 12th Street, SW
Washington, D.C. 20536

U.S. Immigration and Customs Enforcement

February 12, 2019

MEMORANDUM FOR: Field Office Directors
Enforcement and Removal Operations

FROM: Nathalie R. Asher
Acting Executive Associate Director

SUBJECT: Migrant Protection Protocols Guidance

Purpose

This memorandum provides operational guidance to impacted Enforcement and Removal Operations (ERO) field offices to ensure that the Migrant Protection Protocols (MPP) are implemented in accordance with applicable law, the Secretary's January 25, 2019, memorandum, *Policy Guidance for Implementation of the Migrant Protection Protocols*, Acting Director Vitiello's February 12, 2019, memorandum of the same title, and other applicable policies and procedures.

Background

On January 25, 2019, Secretary Nielsen issued a memorandum entitled *Policy Guidance for Implementation of the Migrant Protection Protocols*, in which she provided guidance for the implementation of the MPP, an arrangement between the United States and Mexico to address the migration crisis along our southern border announced on December 20, 2018. Thereafter, on February 12, 2019, Deputy Director and Senior Official Performing the Duties of the Director Vitiello issued U.S. Immigration and Customs Enforcement (ICE) Policy Memorandum 11088.1, *Implementation of the Migrant Protection Protocols*, announcing that operational implementation of MPP began at the San Ysidro port of entry on or about January 28, 2019, and directing that ICE program offices issue further guidance to ensure that the MPP is implemented in accordance with the Secretary's memorandum, applicable law, and policy guidance and procedures.

Discussion

Under section 235(b)(2)(C) of the Immigration and Nationality Act (INA), the U.S. Department of Homeland Security (DHS) may, in its discretion, with regard to certain applicants for admission who are "arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States. . . . return the alien[s] to that territory pending a proceeding under [INA section] 240."

return the alien to Mexico pending removal proceedings pursuant to section 235(b)(2)(C) of the INA, as detailed in ICE Policy Memorandum 11088.1. Aliens processed under the MPP will be issued a Notice to Appear (NTA) by CBP and returned by CBP to Mexico to await their removal proceedings.

Aliens returned to Mexico under the MPP pursuant to section 235(b)(2)(C) of the INA will be required to report to a designated POE on their scheduled hearing dates and will be paroled into the United States by CBP for purposes of their hearings. As further explained in the next section, CBP will then transfer the aliens to ERO custody for transportation to designated Executive Office for Immigration Review (EOIR) court locations for their hearings.

If the alien is granted relief or protection from removal by the immigration judge or is ordered removed from the United States, and appeal is not reserved by either party, the alien will be processed in accordance with standard procedures applicable to final order cases. If the immigration judge continues proceedings or enters an order upon which either party reserves appeal, ERO will transport the alien back to the POE, whereupon CBP officers will take custody of the alien to return the alien to Mexico to await further proceedings.

MPP implementation began at the San Ysidro port of entry (POE) on or about January 28, 2019, and it is intended that MPP implementation will expand to additional locations along the southern border. This memorandum provides general procedural guidance applicable to ERO personnel in the implementation of the MPP. Field Office Directors should each assign a lead POC for MPP issues arising within their AORs and issue local operational guidance applicable to their individual areas of responsibility as the MPP is phased in.

Hearing Transportation and Custody

Before returning an alien to Mexico under the MPP to await his or her removal proceedings, CBP will provide the alien instructions explaining when and to which POE to report to attend his or her hearing. On the day of the hearing, an alien returned to Mexico under the MPP will arrive at the POE at the time designated—generally, a time sufficient to allow for CBP processing, pre-hearing consultation with counsel (if applicable), and timely appearance at hearings. Once CBP conducts POE processing (including verification of identity and a brief medical screening), for hearings set at immigration courts located in the interior of the United States, CBP will parole the alien into ICE's custody under INA section 212(d)(5)(A), and ERO will maintain physical custody of the alien during transportation of the alien from the POE to the designated immigration court location, making appropriate use of contract support and complying with applicable requirements concerning the transportation of aliens.

In cases in which ICE performs that transportation function between the POE and an inland immigration court, the alien is detained in ICE custody as an arriving alien.[1] ERO should coordinate locally with CBP officials at POEs where the MPP has been implemented, so that the

[1] Aliens participating in the MPP who CBP initially encounters at a POE are "arriving aliens" within the meaning of 8 C.F.R. §§ 1.2 and 1001.1(q) (defining "arriving alien" to include "an applicant for admission coming ... into the United States at a port-of-entry"). Moreover, on their hearing dates before an immigration judge, aliens who CBP initially encountered *between* the POEs will come *to* a POE to attend their hearings, placing them within the "arriving alien" definition, as well.

daily volume of MPP cases can be monitored and any transportation needs may be properly met. ERO should also coordinate locally with EOIR concerning security arrangements at the immigration court location. While EOIR is responsible for security inside the courtroom, and ERO should generally defer to immigration judges' wishes concerning their presence in the courtroom, DHS is ultimately responsible for maintaining custody of the alien. If an alien is ordered released by an immigration judge, ERO should coordinate closely with the ICE Office of the Principal Legal Advisor (OPLA) regarding how to proceed with the case. After an alien's removal hearing is over, ERO will transport him or her back to the POE for return to Mexico or to retrieve property, as applicable. If the alien has received a final grant of relief or an administratively final order of removal, ERO will coordinate with CBP and make appropriate custody determinations.

Access to Counsel

Section 240(b)(4)(A) of the INA provides that an alien in removal proceedings before an immigration judge "shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings." Similarly, section 292 provides that "[i]n any removal proceedings . . . the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel . . . as he shall choose." Accordingly, in order to facilitate access to counsel for aliens subject to return to Mexico under the MPP who will be transported to their immigration court hearings by ERO, ERO will depart from the POE with the alien at a time sufficient to ensure arrival at the immigration court not later than one hour before his or her scheduled hearing time in order to afford the alien the opportunity to meet in-person with his or her legal representative.

Non-Refoulement Considerations

In accordance with Secretary Nielsen's January 25, 2019, memorandum, DHS should implement the MPP consistent with the *non-refoulement* principles contained in Article 33 of the 1951 Convention Relating to the Status of Refugees (1951 Convention) and Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Specifically, an alien should not be involuntarily returned to Mexico under the MPP if the alien would more likely than not be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion (unless such alien has engaged in criminal, persecutory, or terrorist activity described in section 241(b)(3)(B) of the INA), or would more likely than not be tortured, if so returned pending removal proceedings.

If an alien subject to the MPP affirmatively states to an ERO officer that he or she has a fear of persecution or torture *in Mexico*, or a fear of return *to Mexico*, at any point while in ERO custody, ERO will notify CBP of the alien's affirmative statement so that CBP officials at the POE may refer the alien to a U.S. Citizenship and Immigration Services (USCIS) asylum officer for screening before any return to Mexico to assess whether it is more likely than not that the alien will face persecution or torture if returned to Mexico in accordance with guidance issued by the Director of USCIS.

If USCIS assesses that such an alien is more likely than not to face persecution or torture in Mexico, ERO will determine whether the alien may be maintained in custody or paroled, or if another disposition is appropriate. Such an alien may not be subject to expedited removal; however, and may not be returned to Mexico to await further proceedings.[2]

Recordkeeping and Reporting

MPP aliens booked in and out of ICE custody must be appropriately documented in the Enforce Alien Detention Module (EADM) and monitored per a final Form I-216, *Record of Person and Property Transfer*. For MPP aliens booked into ICE custody, the comment "out to court pursuant to MPP," must be added to the comments section of EADM.

EADM records for MPP aliens booked out of ICE custody will need to reflect the appropriate court dispositions. Comments in EADM should reflect "MPP, Returned to the POE for Future Hearing;" "MPP, Granted Relief, Released from Custody;" "MPP, Claimed Fear of Mexico, returned to the POE;" or "MPP, Ordered Removed," or similar comments indicating an MPP disposition as appropriate.

Disclaimers

Except as specifically provided in relation to the MPP, existing policies and procedures for processing and removing aliens remain unchanged. That applies to record-keeping responsibilities as well as removal authority and responsibility. The MPP does not change ERO's removal operations, and removable aliens will be processed in accordance with standard practices and procedures.

This document is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Likewise, this guidance places no limitations on the otherwise lawful enforcement or litigative prerogatives of DHS.

[2] In MPP cases where an immigration judge grants withholding or deferral of removal *to Mexico* and appeal is reserved, ERO should confer with OPLA about appropriate next steps prior to any return under INA section 235(b)(2)(C).

ROBERT S. BREWER JR.
United States Attorney
SAMUEL W. BETTWY, SBN 94918
Assistant U. S. Attorney
REBECCA G. CHURCH, SBN 259652
Assistant U. S. Attorney
United States Attorney's Office
880 Front Street, Room 6293
San Diego, CA 92101-8893
619-546-7125/7721 / 7751 (fax)

Attorneys for Respondents

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CRISTIAN DOE, et al.,

Petitioners,

v.

KEVIN K. McALEENAN, Acting Secretary of Homeland Security; et. al.,

Respondents.

Case No. 19cv2119 DMS AGS

DECLARATION OF CHRISTIAN A. COUCH

I, Christian A. Couch, do hereby declare:

1. I am employed by U.S. Customs and Border Protection (CBP), U.S. Border Patrol, in Chula Vista, California, as a Supervisory Border Patrol Agent. I have held this position since February 2018.

2. I am currently assigned to the Chula Vista Border Patrol Station and my responsibilities include overseeing operations including alien processing and managing the hold rooms where aliens are being detained at the Station. I am familiar with the Migrant Protection Protocols program.

3. I make this declaration based upon my own personal knowledge, consultation with other Border Patrol agents, and review of official documents and records maintained by CBP.

4. On November 5, 2019, Petitioners were brought to the Chula Vista Border Patrol Station for a non-refoulement interview with a U.S. Citizenship and Immigration Services (USCIS) asylum officer. However, Border Patrol was instructed by CBP counsel not to go forward with a non-refoulement interview until further notice because of pending litigation.

5. On November 6, 2019, Border Patrol was instructed by CBP counsel to allow Petitioners to privately consult with their attorney prior to their non-refoulement interview and to allow Petitioners' attorney to telephonically participate in the interview.

6. CBP and USCIS scheduled the non-refoulement interview to take place at 4:00 p.m. on November 6, 2019.

7. At approximately 3:15 p.m., two Border Patrol agents escorted Petitioners into an interview room at the station. One agent called Petitioners' attorney, Stephanie Blumberg. The agent informed Ms. Blumberg that a non-refoulement interview for her clients had been scheduled for 4:00 p.m. She was also informed that she could privately consult with her clients over the telephone before the interview.

8. Ms. Blumberg informed the agent that she wanted to speak with her clients in person, not over the phone.

9. After the phone call with Ms. Blumberg ended, the Border Patrol agents asked Petitioners if they wanted to speak with Ms. Blumberg and they said that they did.

10. At approximately 3:28 p.m., a Border Patrol agent dialed Ms. Blumberg's number, handed the telephone to one of the petitioners and left Petitioners alone in the interview room, with the door shut. Petitioners exited the interview room at approximately 3:35 p.m.

11. After these attempts to allow Petitioners an opportunity to consult with their attorney, Border Patrol canceled the 4:00 p.m. non-refoulement interview at the direction of CBP counsel.

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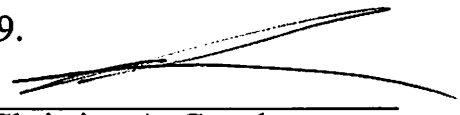
I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Executed this 7th day of November 2019.



Christian A. Couch
Supervisory Border Patrol Agent
Chula Vista, California