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Processing Aliens at the U.S.-Mexico Border: Recent Policy Changes

Since FY2017, a growing share of non-U.S. nationals (aliens) arriving at the U.S.-Mexico border request asylum, some at official U.S. ports of entry and others after entering the country “without inspection” (i.e., illegally) between ports of entry. Under § 208 of the Immigration and Nationality Act (INA), arriving aliens and recent entrants may qualify for asylum, a lawful immigration status, if they have suffered persecution in their country of origin or have a well-founded fear of suffering such persecution upon returning to that country based on enumerated statutory grounds (race, religion, nationality, membership in a particular social group, or political opinion). In FY2019, most of these aliens were nationals of countries other than Mexico, and a majority consisted of either unaccompanied alien children or family units with minors.

The Trump Administration is pursuing several policies that change how these aliens are processed when they arrive without valid entry documents. First, under a practice known as “metering,” aliens may be required to wait in Mexico until there is capacity to process them at a port of entry. Second, the Migrant Protection Protocols (MPP) require some aliens to return to Mexico pending formal removal proceedings. Third, under the third-country transit bar, aliens arriving at the southern border are ineligible for asylum if they traveled through another country without first seeking protection in that country. Although these policies are subject to legal challenge, reviewing courts have so far permitted their implementation.

Background

Aliens apprehended by immigration authorities when attempting to unlawfully enter the United States are typically placed in a streamlined, expedited removal process under INA § 235(b). Under the statute, an alien subject to expedited removal will be removed from the United States without further hearing or review.

However, further administrative review occurs if an alien in expedited removal conveys the intent to seek asylum or otherwise claims a fear of persecution if removed. If, following an interview, the alien shows a credible fear of persecution—meaning a significant possibility that the alien could establish eligibility for asylum or related relief—the alien will be placed in “formal” removal proceedings under INA § 240 in lieu of expedited removal. In addition to having the ability to pursue asylum and related protections, an alien placed in formal removal proceedings under INA § 240 has several procedural rights to which aliens in expedited removal are not entitled. These include the right to seek counsel at his or her own expense in proceedings before an immigration judge (IJ), and the ability to seek

administrative and, possibly, judicial review of an adverse removal decision.

Metering

According to DHS’s Office of Inspector General, since 2016, DHS’s U.S. Customs and Border Protection (CBP)—the agency primarily responsible for deterring unauthorized migration along the border—has limited the number of aliens who may be processed each day at certain ports of entry along the U.S.-Mexico border. Under CBP’s “metering” practice, immigration officers positioned at the international boundary line direct arriving aliens lacking documents (who may be asylum seekers) to return at a later date if CBP determines that there is insufficient space and resources at the U.S. port of entry. A report published by the Strauss Center at the University of Texas at Austin estimates that, as of November 2019, there are approximately 21,000 aliens on wait lists in 11 Mexican cities, a 21% decrease since August. The wait period to present claims at a U.S. port of entry can be weeks or months.

A pending lawsuit in *Al Otro Lado v. McAleenan* challenges the legality of metering by CBP. The plaintiffs argue that the practice violates the INA’s inspection and processing requirements, the constitutional due process rights of arriving aliens, and international law principles. The plaintiffs have also requested a preliminary injunction that would bar metering pending the outcome of the case. A federal district court has allowed the lawsuit to move forward, despite the Department of Justice’s (DOJ’s) claim that some plaintiffs could not legally challenge metering because they were outside the United States when turned away.

MPP

In December 2018, DHS announced the MPP, which allows CBP to require many aliens who arrive at the southern border to wait in Mexico while U.S. immigration courts process their cases. Unlike metering, the MPP applies to aliens who have already been *inspected* by U.S. immigration authorities and placed in removal proceedings. The MPP applies to aliens who arrive at the border without valid entry documents, whether or not at ports of entry. Although such aliens would normally be subject to *expedited* removal, under the MPP, those aliens are returned to Mexico pending *formal* removal proceedings. During these proceedings, they may pursue asylum and related protections.

The MPP does not apply to some categories of aliens, including unaccompanied minors, Mexican nationals, and aliens who demonstrate that it is more likely than not that

they would face persecution or torture in Mexico. CBP does not necessarily ask aliens subject to the MPP whether they fear returning to Mexico, but if an alien expresses such a fear affirmatively, an asylum officer is required to interview the alien to determine whether it is more likely than not that the alien would be persecuted or tortured in Mexico.

As of November 2019, the MPP is in effect in 6 Border Patrol sectors, and more than 57,000 aliens have returned to Mexico to wait for their immigration hearings under this program.

DHS contends that its authority to implement the MPP stems from INA § 235(b)(2)(C), which provides that DHS may return aliens arriving in the United States by land from a contiguous country (i.e., Mexico or Canada) to that country pending formal removal proceedings. INA § 235(b)(2)(B), however, exempts certain classes of aliens from DHS's return authority, including aliens subject to expedited removal. Because most aliens arriving in the United States without valid documents are subject to expedited removal, they generally would not be covered by INA § 235(b)(2)(C)'s return authority.

In April 2019, a federal district court in *Innovation Law Lab v. McAleenan* issued a preliminary injunction barring DHS from implementing the MPP pending the outcome of the case. The court determined that DHS's return authority under INA § 235(b)(2)(C) does not extend to aliens who are subject to expedited removal, and that, even if DHS had that authority, the agency failed to provide enough protections for aliens who potentially face harm in Mexico.

In May 2019, a motions panel of the U.S. Court of Appeals for the Ninth Circuit granted an emergency stay of the injunction. The court reasoned that INA § 235(b)(2)(C)'s return authority covers aliens whom DHS opts to place in formal removal proceedings notwithstanding their eligibility for expedited removal. The Ninth Circuit heard oral argument in the government's appeal of the injunction. A decision by the court will likely be issued soon. But at least for now DHS may continue to implement the MPP.

Third Country Transit Asylum Bar

In July 2019, DHS and DOJ jointly promulgated an interim final rule (IFR) that makes an alien who enters or attempts to enter the United States along the U.S.-Mexico border ineligible for asylum if he or she failed to apply for protection in at least one third country through which the alien transited en route to the United States (other than the alien's country of citizenship, nationality, or last lawful habitual residence). The asylum bar does not apply if (1) the alien applied for and was denied protection from persecution in at least one of the third countries; (2) the alien was a "victim of a severe form of trafficking in persons" (as defined in DHS regulations); or (3) the alien transited only through countries that are not parties to the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, or the Convention Against Torture (CAT).

The IFR results in a "bifurcated screening process" for aliens subject to expedited removal who seek asylum. If,

during the credible fear screening, the alien is found to be subject to the IFR, an asylum officer is required to make a negative credible fear determination. But the asylum officer must also consider whether the alien has a "reasonable fear," a stricter test that considers whether the alien has shown a reasonable possibility that he or she would suffer persecution. If the alien has a reasonable fear, the alien is to be placed in formal removal proceedings for consideration of withholding of removal and CAT protection—two other forms of protection that have higher standards of proof than asylum. The alien may also request an IJ's review of whether he or she is subject to the IFR, and whether the alien has a reasonable fear enabling pursuit of withholding of removal or CAT protection.

The IFR has been subject to legal challenge, and a federal district court in *East Bay Sanctuary Covenant v. Barr* issued a preliminary injunction against the IFR pending the litigation. The court determined that the IFR conflicts with the INA's asylum eligibility standards because it undermines two INA provisions that already limit eligibility based on third-country considerations: (1) the firm resettlement provision, under which an alien is barred from asylum if he or she was "firmly resettled in another country prior to arriving in the United States"; and (2) the safe third country agreement provision, which renders ineligible for asylum aliens who can be removed, pursuant to a bilateral agreement, to a country where they may seek protection.

In September 2019, however, the Supreme Court granted the Trump Administration a stay of the injunction, allowing DHS to implement the IFR pending the legal challenge. The stay will remain in place until the Supreme Court resolves any appeal in the ongoing proceedings in the federal district court and the Ninth Circuit. Thus, given the Court's ruling, the Trump Administration may apply the IFR to limit asylum eligibility for aliens who reach the U.S.-Mexico border through third countries.

Considerations for Congress

The central question raised by recent executive policies regarding processing at the U.S.-Mexico border is whether the policies are consistent with governing immigration statutes. There is little dispute that Congress itself has the power to establish these or similar policies legislatively or, conversely, to end the policies legislatively. For example, the Secure and Protect Act of 2019 (S. 1494) would require persons from certain countries to apply for refugee protections abroad and render them ineligible for asylum in the United States. Conversely, the Strategic and Humane Southern Border Migrant Response Act (H.R. 3731) would end both MPP and metering; and the Asylum Seeker Protection Act (H.R. 2662) would prohibit the use of funds "to implement or enforce" the MPP. Congress may consider these and other legislative options to address the treatment of aliens at the U.S.-Mexico border.

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