Asylum at the Southern Border

Margaret Cargioli

Managing Attorney, Immigrant Defenders Law Center (IMMDEF)
Current Status of the Asylum and Asylum Seekers Act at the Southern Border

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Recent History: U.S. Border Policies

- The Trump Administration made sweeping changes to border policies.

- Metering
  - Implemented by Barack Obama. Enrollment on metering lists ended in March 2019 in TJ and soon thereafter along the border.
  - About 16k still on metering lists.
  - A recent federal court ruling found metering unlawful. (Al Otro Lado, Inc. v Wolf)

- Asylum Cooperative Agreements (ACA)- Agreements with El Salvador, Guatemala & Honduras
  - At least 158 Salvadorans & Hondurans sent to Guatemala
  - Biden ended ACA through Executive Order

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Recent History: U.S. Border Policies

- Family Separation-Zero Tolerance Policy. Biden has created a Task Force.

- Prompt Asylum Case Review (PACR)- ended by the Biden Administration. Applied to Central American migrants and Brazilians. Held in Customs and Border Protection facilities for Credible Fear Interview without access to counsel. Ended by Biden through Executive Order.

TITLE 42- Expulsions

- Since March 2020, citing the COVID-19 pandemic, the U.S. government closed the border to asylum seekers pursuant to Title 42.

- Section 265 of U.S. Code Title 42 permits the Director of the CDC to “prohibit … the introduction” into the United States of individuals when the director believes that “there is serious danger of the introduction of [a communicable] disease into the United States.”

- Individuals are returned to Mexico (via ports of entry and lateral flights) or returned to their country of origin (direct flights).

- On July 16, 2021, the CDC issued an order confirming the exception for unaccompanied noncitizen children from the order suspending the right to introduce certain persons into the U.S.

- Over 1 million expulsions. Per CBP, “persons subject to the order will not be held in congregate areas for processing and instead will immediately be expelled to their country of last transit. In the event a person cannot be returned to the country of last transit, CBP works with interagency partners to secure expulsion to the person’s country of origin and hold the person for the shortest amount of time possible.” [Link](https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics)

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TITLE 42- Expulsions

◦ Litigation:
  ◦ In September 2021, a court stayed a federal injunction that had blocked the use of Title 42 against migrant families. *Huisba v. Mayorkas*

  ◦ Judge Sullivan ruled the statute does not grant the CDC the power to expel migrants:
    “As Plaintiffs point, Section 265 simply contains no mention of the word "expel"—or any synonyms thereof—within its text…. The lack of express terms within the statute is significant: even "broad rulemaking power must be exercised within the bounds set by Congress," *Merck & Co. v. U.S. Dep't of Health & Human Servs.*, 385 F. Supp. 3d 81, 92, 94 (D.D.C. 2019), aff'd, 962 F.3d 531 (D.C. Cir. 2020)… Indeed, particularly where the statute in question regards such a "severe 'penalty!'" as deportation, *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010)…. the [Supreme Court] Court is loathe to recognize an implied power of forced removal from the country, see *Util. Air Reg. Grp.*, 573 U.S. at 324 ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"). Rather, as this Court explained in *P.J.E.S. v. Wolf*, 502 F. Supp. 3d 492, 512 (D.D.C. 2020), "when Congress wants to grant the power to expel individuals out of the United States, it does so plainly." *P.J.E.S.*, 502 F. Supp. 3d at 512…”

  ◦ The government was granted a stay. **Title 42 remains in effect**

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Exemptions to Title 42

◦ Humanitarian Parole
  ◦ Filed with Customs and Border Protection. INA 212(d)(5)- a noncitizen can be paroled into the U.S. for urgent humanitarian reason.

◦ Title 42 Exemption Request
  ◦ Filed with Customs and Border Protection. Persons of law enforcement, public safety, humanitarian or public health concern should not be removed under Title 42.

◦ Screening for eligibility under the Convention Against Torture
  ◦ Persons must affirmatively inform CBP of past torture or fear of torture
  ◦ high standard; must show that there is a substantial likelihood that they would be tortured if returned to their country of origin.
  ◦ Very few have passed the CAT screening and are placed into Title 8 to be able to seek asylum in the U.S.

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Credible Fear Interview Results under the Convention Against Torture Act

Identification Number: [Redacted]
Last Name: [Redacted]
Interview Date: 04/01/2020

You were interviewed by a DHS asylum officer to determine whether it is more likely than not that you will be tortured in Brazil. The assessment made by the DHS asylum officer, indicated below, will be considered by DHS in determining whether you may be sent to Brazil. DHS will provide you with additional information regarding how you will be processed.

☐ You established it is more likely than not that you will be tortured in Brazil.
☒ You did not establish it is more likely than not that you will be tortured in Brazil.

42 U.S.C. § 265
Convention Against Torture
Assessment Notice

First Name: [Redacted]
Determination Date: 04/01/2020

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What is Humanitarian Parole at the Border?

Humanitarian Parole is a legal process where the border office approves the entry of persons for reasons of "humanitarian urgency or in the public interest" on a case-by-case basis pursuant to INA 212(d)(5).

- CBP has the power to grant or deny. The decision cannot be appealed.
- Current approvals for people with exceptionally vulnerable cases (e.g., child with serious and urgent medical condition).
- Granted in very low numbers. The process is almost impossible to do without an attorney.
Border Entry for Visa-Holders (Title 19)

- As of March 2020, the U.S. gov’t restricted non-essential travel or non-U.S. citizens or lawful permanent residents through land ports of entry

- On November 9, 2021, the U.S. government amended Title 19 regulations to allow travelers with visas who are fully vaccinated to enter the U.S. through Mexican or Canadian land ports of entry for non-essential reasons (e.g., tourism).

- This does not apply to asylum seekers.

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Migrant Protection Protocols (MPP)  
“Remain in Mexico”.

◦ In January 2019, President Trump implemented “MPP 1.0.”

◦ Certain persons entering the U.S. from any Mexican border were returned to Mexico while pursuing their asylum application in U.S. immigration court. Applied to all Spanish-speaking countries and Brazil but does not include Mexico.

◦ In January 2021, President Biden halted new enrollment.

◦ In February 2021, the government began the “MPP wind down” by processing persons with active MPP cases into the U.S. Thereafter, people in MPP with terminated cases and orders of removal in absentia had the opportunity to enter through the same process and reopen immigration proceedings.
In June 2021, DHS issued a memo that terminated MPP.

In August 2021, a district court determined that the memo was not issued in compliance with the Administrative Procedure Act and ordered DHS to “enforce and implement MPP in good faith.” (*Texas v. Biden*)

Winddown process stopped

On October 29, 2021, DHS issued a new termination memo. It will not be implemented until there is a final judicial decision to vacate the *Texas* injunction.

In December 2021, the government announced that MPP (“MPP 2.0”) will restart. It restarted on December 6, 2021, in El Paso. The other borders will start soon after.
Who is subject to the MPP program?

- At the U.S.-Mexico border. MPP 2.0 will take place in San Diego, Calexico, Nogales, El Paso, Eagle Pass, Laredo, and Brownsville ports of entry. Here they will be placed in MPP and returned to Mexico.

- Applies to people with nationality of any country in the Western Hemisphere, except Mexicans

- Customs and Border Protection (C.B.P.) will enroll certain people who are detected within 96 hours of entering without inspection into the United States.

- People who enter without inspection near the San Ysidro and Calexico ports of entry, and are placed in MPP, will have their proceedings in the San Diego Immigration Court.

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Who is not subject to MPP?

People who do not qualify or should not be placed on MPP:

• Unaccompanied children
• Permanent residents of the United States
• Non-citizens with advance parole or in parole status
• Non-citizens with criminal history
• Non-citizens of law enforcement interest to the U.S. or Mexico governments
• People with certain vulnerabilities, such as:
  • Known medical or mental health condition (including disability or pregnancy-related condition)
  • People with certain difficulties given their advanced age
  • People with increased risk of harm in Mexico due to sexual orientation or gender identity
"Non-Refoulement"

Individuals who are subject to MPP but are afraid to return to Mexico may have an interview to consider whether they cannot be returned to Mexico.

1. CBP officers will ask the person they are considering for MPP if he or she is afraid to return to Mexico.

2. The individual will be referred to the U.S. Citizenship and Immigration Services (U.S.C.I.S.) for a non-Refoulement interview. U.S.C.I.S. is present by phone.

3. Individuals will have 24 hours to consult with a legal representative prior to the fear interview, unless they do not want to wait this time. The 24-hour period will take place in DHS facilities.

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4. The U.S. government is to provide MPP Respondents with legal resource packets, the ability to use telephonic or virtual means to communicate with an attorney in a confidential setting, and translation services if necessary.

5. Individuals may retain a legal representative to participate telephonically in the non-Refoulement interview, so long as it does not unreasonably delay the process.

6. Standard-“reasonable possibility“ of persecution due to a protected ground (race, religion, nationality, membership in a particular social group or political opinion) or may be subjected to torture in Mexico.

7. Individuals can express their fear of returning to Mexico at a Port of Entry to CBP or the DHS attorney during the court hearing.
Access to Legal Representation

◦ CBP will provide information from the Department of State on where to find safe and confidential spaces in Mexico to contact a U.S. attorney by phone or video.

◦ MPP Respondents should have access to telephones (and when possible, video connection) for free calls while in DHS custody, including the 24-hour period prior to their non-Refoulement interview.

◦ In court, MPP Respondents will be able to meet with counsel, in a confidential setting, prior to the start of their hearings.

◦ Counsel can be present, either in-person or by video, during MPP court hearings.
Access to Interpretation

◦ All persons should receive MPP material in their primary language.

◦ If documentation is not available in a person’s primary language, CBP will use an interpreter to explain the process

◦ Many people from the Western Hemisphere speak indigenous languages
MPP Litigation

◦ On 12/13/21, Court of Appeals for the 5th Circuit upheld the federal court ruling on the restart of MPP. *State of Texas v. Biden.*
  ◦ “We therefore hold that DHS has violated not only the APA but also Congress’s statutory commands in § 1225.”

◦ *Innovation Law Lab v. Mayorkas* - remanded to the 9th Circuit

◦ *Immigrant Defenders Law Center v. Mayorkas* - access to counsel challenge. Pending before the Ninth Circuit

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MPP Documents

Before being returned to Mexico to await their next hearing, individuals must receive the following documents:

◦ Notice to Appear
◦ Information about their next appointment - date, time, and location
◦ Legal resource packets
◦ Result of the non-Refoulement interview, if there is one.

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It is unclear who will be placed in MPP or removed under Title 42. With the reinstatement of MPP, while Title 42 is still in place, the government will have the option of removing anyone who enters without inspection under Title 42 or placing them in MPP. Those not subject to Title 42 can either be placed into MPP or Expedited Removal.

We do not know what will happen to asylum seekers who were in the MPP 1.0 program and are still in Mexico or returned to their country of origin.

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References

- MPP Re-Implementation Guidance: https://www.dhs.gov/publication/mpp-policy-guidance

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Questions
IMMDEF (Immigrant Defenders Law Center)

- Email: MCargioli@immdef.org
- Twitter: @ImmDef
- Instagram: immdef_lawcenter
- Facebook: Immigrant Defenders Law Center