Migrant Center for Human Rights
Protecting the Persecuted

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PRACTICE ADVISORY
ASYLUM BAN APPLICABILITY TO REFUGEES SUBJECTED TO THE U.S. GOVERNMENT'S TURNBACK POLICY

Overview of Issue

Turnback Policy: As early as 2016 the U.S. government began implementing a policy to restrict the flow of asylum seekers by having CBP officers turn back asylum seekers, who were instructed to state reasons such as a lack of capacity to process their claims. *Al Otro Lado v. McAleenan,* Preliminary Injunction, pg. 4. In the spring of 2018 the U.S. government formalized this "Turnback Policy" and expanded it from the San Ysidro POE along the southern border. *Al Otro Lado v. McAleenan,* Preliminary Injunction, pg. 4. The U.S. government began "metering" / counting the number of asylum seekers allowed in each day and created "waitlists" that are maintained by Mexican immigration officials or third parties. As of August 2019 there were approximately 26,000 asylum seekers on waitlists or waiting to get on the lists. *Al Otro Lado v. McAleenan,* Preliminary Injunction, pg. 21.

Asylum Ban: On July 16, 2019 the U.S. government issued a joint interim final rule entitled "Asylum Eligibility and Procedural Modifications", commonly known as the Asylum Ban, which, with limited exceptions, establishes a *per se* rule requiring mandatory denial of asylum applications to all asylum seekers who do not first apply for asylum, and be denied, in at least one country they pass through before arriving in the U.S. 8 C.F.R. 208.13(c)(4).[1]

These two policies intersect with regards to asylum seekers who sought asylum prior to July 16, 2019 and were told to wait in Mexico and who were then only allowed to enter on or after July 16, 2019. By following the U.S. government's established procedures these asylum seekers are effectively now suffering the retroactive application of the Asylum Ban. On November 19, 2019 the District Court for the Southern District of California certified a class of "all non-Mexican asylum-seekers who were unable to make a direct asylum claim at a U.S. POE before July 16,

[1] "Additional limitation on eligibility for asylum. Notwithstanding the provisions of 208.15, any alien who enters, attempts to enter, or arrives in the United States across the southern land border on or after July 16, 2019, after transiting through at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence en route to the United States, shall be found ineligible for asylum unless:

(i) The alien demonstrates that he or she applied for protection from persecution or torture in at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited en route to the Untied States, and the alien received a final judgement denying the alien protection in such country."

2019 because of the Government's metering policy, and who continue to seek access to the U.S. asylum process." *Al Otro Lado v. McAleenan*, Preliminary Injunction, pg. 21.

Scope of Advisory

We will address the application of the Asylum Ban to the class identified in *Al Otro Lado v. McAleenan* at each step of the process. This practice advisory does not address the legality of the Asylum Ban (although attorneys are encouraged to consider arguments against its application to their clients and present such arguments accordingly at all steps of the proceedings). Furthermore, the information contained herein should not be considered as comprehensive, nor as legal advice. All attorneys should independently evaluate the law and options in the best interests of their individual clients. This practice advisory is offered solely as a guide to assist attorneys in considering the different arguments and options which may be available to them. As this is a developing area of litigation, we are also open to suggestions from attorneys both in terms of what's worked for them as well as what has not worked.

Credible Fear Interview, Immigration Judge Review, and Requests for Reconsideration

While some individuals may be directly issued NTAs and released, most class members will be placed in Expedited Removal and go through a Credible Fear Interview. While we encourage attorneys to not concede that this interview is in fact a Reasonable Fear Interview, class members are in effect being held to the more likely than not standard. In other words, instead of only needing to prove about a 10% chance of future persecution under Matter of Acosta they now must prove a greater than 50% chance of persecution to pass. USCIS is using the Credible Fear Interview I-870 and then under "Additional Information/Continuation" stating:

> Alien is barred from asylum pursuant to 8 CFR 208.13(c)(4) and therefore the alien has not established a significant possibility of establishing eligibly for asylum and has receive a negative credible fear of persecution determination. Alien was then screened for potential entitlement to withholding under INA 241 or CAT protection under a "reasonable possibility of persecution" and "reasonable possibility of torture" standard.

Attorneys may wish to submit a short written statement to USCIS before the interview and advise their clients on this likely outcome. Attorneys should consider requesting that the USCIS officer explicitly write in their interview notes that the denial is based on the higher standard and not some other factor if this is the case.

Where a case is denied for this reason, attorneys may also wish to submit a brief to the Immigration Court as soon as the case is filed with the court (hearings must take place within 7 days of filing so diligence in calling the court's toll-free 800-898-7180 number or direct line will be necessary).

If the interview result is positive – or is denied at the IJ review – the attorney may want to consider a Request for Reconsideration on this one issue to preserve the record but as this should be evaluated by the Immigration Court de novo this may not be necessary (however, please note that it is unclear if Immigration Judges will claim that the case was referred to them for withholding only proceedings and that they do not have jurisdiction to consider the matter; at least locally we find that judges will look to the legal question of what type of proceedings are possible before them if the individual is placed in withholding only proceedings on other grounds). The Administrative Procedures Act "compel[s] agency action unlawfully withheld." 5 U.S.C. 706(1).

Responding to the Allegations in the Notice to Appear (NTA)

Attorneys are encouraged to not admit to any allegation that has their client entering at a date later than that they first attempted to access the asylum process in the U.S. This will apply to those who physically cross the border and are turned back. Therefore you should be able to argue that there is "clear evidence [the allegation] is factually incorrect". (We are aware that DHS has not been listing the actual initial entry date on NTAs for those placed in the MPP Remain in Mexico program so attorneys should make sure to check with their client about this.)

Those who did not cross the border but put their name on a waitlist arguably did not "enter" the U.S. at this time. However, while you may not object to the entry date on the NTA, this should not bar your client from eligibility for asylum as asylum is not dependent on a physical entry date but rather on the date your client "arrives in the U.S." 8 USC 1158(a)(1) states applicants for asylum include "[a]ny alien who is physically present in the United States *or* who arrives in the United States" (emphasis added). The *Al Otro Lado v. McAleenan* court found that "the plain language and legislative histories of these statutes supported the conclusion that the statute applies to asylum seekers in the *process of arriving*" (emphasis added).

If pleading have already been taken attorneys should consider filing a motion to amend the pleadings (see attached sample motion). There may be a *Lozada* ineffective assistance of counsel issue to consider here depending on when the attorney became aware of the problem with the NTA (including the applicable law, considering the attorney's duty to be informed on the potential applicability / lack of applicability of relevant statutory and regulatory provisions); if the attorney was aware of the problem with the NTA before pleadings were taken the client will likely need to prove "egregious circumstances" to be able to withdraw the pleading. *Matter of Velasquez* (BIA 1986). Egregious circumstances will likely be easier to prove in a case where pleading were taken while the client was *pro se*.

Where the individual is pro se at the time, it may be possible to argue that the IJ has the statutory and/or regulatory obligation to make sure that all forms of relief are explored for the individual,

including all arguments as to why a form of relief may or may not be available to that individual. From this obligation one can argue that the IJ should reject / deny the erroneous allegation.

Cases to consider:

> *Matter of Velasquez*, (BIA 1986) (finding a "strong presumption" of an attorney concession of deportability in a motion to change venue absent "egregious circumstances"). Circumstances may be more egregious for an unrepresented refugee.
>
> Negative cases to distinguish:
> *Lima v. Holder*, 758 F.3d 72 (1st Cir. 2014)
> *Ahmed v. Holder*, 765 F.3d 96 (1st Cir. 2014)
>
> Other:
> *Hakopian v. Mukasey*, 551 F.3d 843, 846 (9th Cir. 2008)
> *Cinapian v. Holder*, 567 F.3d 1067 (9th Cir. 2009)

Note that many IJs will take oral amendments to the NTA. However, it may be possible to argue that the NTA is improper as submitted and that removal proceedings should therefore be terminated until/if ICE decides to issue a factually accurate NTA. Please also consider the that you, ICE, or the IJ may want a continuance for briefing on this issue. At the end of the day, the NTA will likely be accepted by the court and charge will likely be sustained, so it may or may not be in your client's best interest to request a continuance / delay proceedings if he is detained.

Briefing before the Immigration Judge

We recommend briefing this issue as soon as possible. Please see the sample language included at the end of this Practice Advisory.

Motions to Reconsider

Where a case has already been denied by the Immigration Judge without briefing on this matter, attorneys may want to file a Motion for Reconsideration within 30 days of the order (or if on appeal a Motion to Remand to the BIA for consideration of the Motion to Reconsider whit the motion attached). If the 30 days have elapsed consider sua sponte options and working with DHS (unlikely in the present context) or doing a self-Lozada.

Motions to Reopen

These motions may be applicable if there is a change in the law. It is important that all attorneys keep a list of their clients affected by this issue and maintain active contact information in case there is any change in the law. There may exist equitable tolling options for the 90 day post-final order filing deadline, courts can accept these motions *sua sponte*, and there is no filing deadline if DHS agrees to the motion. We encourage attorneys not to rely on the possibility of a motion to reopen and exhaust other possible avenues to preserve the issue. Nevertheless there may be good faith arguments as to such avenues being closed and therefore moot and a violation of the attorney's duties of candor to the court, etc.

Appeals before the Board of Immigration Appeals

We recommend preserving this issue with the BIA. Note that the information on Motions to Reconsider and Reopen explained above would be equally applicable here.

Federal Court Litigation outside EOIR

Beyond taking this issue to the circuit courts of appeals, district court litigation may be considered. Evaluation of this issue is outside the scope of this advisory. Nothing in 1252 precludes judicial review of regulations implementing asylum eligibility requirements under 8 U.S.C. 1158. Preliminary Injunction, pg. 12. It is "presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Nken v. Holder*, 556 U.S. 418, 430 (2009).

Considerations for Detained Clients

In some detention facilities ICE is denying release to anyone who passes a Credible Fear Interview and is "barred" from asylum under the Asylum Ban, absent exceptional circumstances which may include pregnancy or serious medical concerns. ICE is treating these cases as reinstatement of removal cases (there are arguments that detention should not be mandatory for this group of individuals which should be explored by counsel). IJ's are not making the same interpretation. Therefore, for those who Entered Without Inspection, they will be able to request a bond hearing before an IJ. For Arriving Aliens, however, they may be facing *de facto* mandatory detention, absent any flight risk or danger to the community.

Conclusion, Additional Resources, and Contact Information

E-mail: Sara Ramey at sara.ramey@migrantcenter.org

SAMPLE MOTION TO AMEND PLEADINGS

Honorable Immigration Judge,

By and through undersigned *pro bono* counsel, Mr. S. respectfully requests that you allow him to amend his pleadings, which were taken while he was unrepresented by counsel. In the Notice to Appear dated XX, ICE alleges that Mr. S. entered the United States on XX. However, Mr. S., according to statute, entered on XX. He was subsequently returned to Mexico under the government's Turnback Policy as explained below. However, this does not affect his date of entry.

Sincerely,

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Sara Ramey

The July 16, 2019 Joint Final Rule Attempting to Limit Asylum Eligibility Based on Travel History is Unconstitutional and Contrary to the INA, APA, and International Law (Including the Protocol Relating to the Status of Refugees)

Mr. S. is Eligible for Asylum because He Entered the U.S. Asylum Process Prior to July 16, 2019

The INA states that applicants for asylum include "[a]ny alien who is physically present in the United States or who arrives in the United States." 8 U.S.C. 1158(a)(1). The plane language of the statute clearly differentiates between being physically present and arriving in the U.S. – in other words, it is not necessary to be physically present in the U.S. to be in the process of arriving in the U.S. and thus be eligible for asylum. This is confirmed by the government's policies and regulations and rules. For example, the government in January 2019 instituted the Migration Protection Protocols (MPP), a process through which an asylum seeker "arrives" in the U.S. but is then returned to Mexico to await case processing. At no point has the government alleged that asylum seekers placed in the MPP program are not eligible for asylum under this program, and in fact has scheduled thousands of these cases for asylum hearings.

Similarly, the government's Turnback Policy, started in California in 2016, uses a system of "metering" by which the government decides a number of asylum seekers allowed to enter the U.S. each day and assigns numbers and/or places them on "waitlists" that are maintained by Mexican immigration officials or third parties.[2] This is an established U.S. government policy for asylum case processing. The "Mexican Government's National Institute of Migration, maintains a formalized list of asylum seekers, communicates with CBP regarding POE capacity, and transports

[2] "[W]hen a port is allegedly at capacity, asylum seekers are informed that access to the POE 'is not immediately available' and that they will be permitted to enter' once there is sufficient space and resources to process them'." *Al Otro Lado v. McAleenan*, Preliminary Injunction, pg. 27.

asylum-seekers from the top of the list to CBP." *Al Otro Lado v. McAleenan*, Preliminary Injunction, pg. 28.[3] For the government to say this is not a U.S. government processing system would be disingenuous. In fact, there is a CBP Metering Guidance Memorandum. *Al Otro Lado v. McAleenan*, Preliminary Injunction, pg. 27. As such, there is clearly not only a pattern or practice, but an overarching policy, of denying expeditious asylum claim processing to those at the border. This final agency action is therefore reviewable under 706(2) of the Administrative Procedures Act (APA).

Mr. S., in reasonable reliance on the government's policy, added his name to this waitlist on in XX on XX 2019, understanding that he was following U.S. law and the proper procedure for filing a claim for asylum in the U.S.[4] His belief is not unusual: "Many understood this to be a necessary and sufficient way to legally seek asylum in the United States." Preliminary Injunction, pg. 6. That the government subsequently decided to make an about face and retroactively attempt to deny Mr. S. asylum – by listing the Asylum Ban as a potential bar to asylum at his USCIS credible fear interview[5] – because Mr. S., due to government policy, was not expeditiously allowed into the U.S. when he first sought to file his claim for asylum, does not divest this court of jurisdiction to hear his claim for asylum.[6] To the contrary, it is an Immigration Judge's duty to interpret the provisions of the INA and related statutes, regulations and policies.

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[3] The case is now titled *Al Otro Lado v. Wolf*. We use the title referenced on the court documents for clarity.

[4] The government argues that, under the Asylum Ban, asylum seekers like Mr. S. "must first seek asylum in Mexico before they will be permitted to make a claim for asylum in the United States" while "based on representations of the Government, these individuals have not done so because they believed that the process to receive an asylum hearing in the United States required only that they place themselves on the waitlist" and are, in many cases, now ineligible in Mexico because they have fallen outside Mexico's 30-day application period. *Al Otro Lado v. McAleenan,* Preliminary Injunction, pg. 6, 33. The good cause waiver of this time limitation "generally require[s] the legal expertise of an attorney" as it is "often decided on legal formalities". *Al Otro Lado v. McAleenan,* Preliminary Injunction, pg. 7.

[5] Similarly, in pending federal court litigation, the government "intends to construe the fact that the asylum seekers were waiting in Mexico on or after July 16, 2019 as a failure to arrive in the United States before that date. *Al Otro Lado v. McAleenan*, Preliminary Injunction, pg. 33.

[6] The Administrative Procedures Act "compel[s] agency action unlawfully withheld." 5 U.S.C. 706(1).

8 U.S.C. 1158(b)(1)(A) states that asylum may be granted to an applicant "who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section." By putting his name on the government's asylum waitlist, Mr. S. was applying for asylum in accordance with the requirements and procedures of the government. Furthermore, the District Court found that the plain language and legislative histories of 8 U.S.C. 1158(a)(1) and 1225(b)(1)(A)(ii) (requiring an immigration officer to refer for an asylum interview certain individuals who are "arriving in the United States") supports the conclusion that the statute applies to asylum seekers in the process of arriving. It is worth noting that the terms "arrives" and "arriving" are used, not "arrived", which textually indicates an action that is still in the process of being undertaken. Attempting to file an asylum claim through the U.S. government's established process is certainly the first step in "arriving" in the U.S. After all, "the textual limitations upon a law's scope are no less a part of its purpose." *Rapanos v. United States*, 547, U.S. 715, 752 (2006). It is "presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Nken v. Holder*, 556 U.S. 418, 430 (2009).

In fact, the plane language of the joint final rule "Asylum Eligibility and Procedural Modifications" published on July 16, 2019 similarly does not support the government's position; instead, the government's position "contradicts the plain text of their own regulation". Preliminary Injunction, pg. 32. The July 16 rule states that asylum will be limited for "any alien who enters, attempts to enter, or arrives in the United States across the southern land border on or after July 16, 2019". It does *not* say that asylum will be denied to those who attempt to enter or arrive before this date, like Mr. S. There is *nothing* included indicating any retroactive application of this rule. As the District Court stated:

> "The Government could have enacted the Asylum Ban without specifying a time period, and thus imposed it on those subject to the metering procedures of the Turnback Policy. It could have also enacted the Asylum Ban with language specifying that it would be effective retroactively to those metered at the border before the date the regulation was adopted." Preliminary Injunction, pg. 31.

The government did neither. To the contrary, it is quite clear that the July 16 rule applies prospectively. In certifying a class of "all non-Mexican asylum-seekers who were unable to make a direct asylum claim at a U.S. POE before July 16, 2019 because of the Government's metering policy, and who continue to seek access to the U.S. asylum process" the District Court found that the government's position of retroactively applying the July 16 rule "is quintessentially inequitable" *Al Otro Lado v. McAleenan*, Preliminary Injunction, pg. 34. In granting a nationwide preliminary injunction the District Court furthermore found that the plaintiffs were "likely to succeed on the merits" and that the "balance of equities" and "public interest" leaned in their favor. *Al Otro Lado v. McAleenan*, Preliminary Injunction, pg. 29-30.[7]

In order to prove one's participation in the Turnback Policy, the District Court suggested that either the government or the respondent provide a copy of the list, or a declaration from the respondent. *Al Otro Lado v. McAleenan*, Preliminary Injunction, pg. 28. In the present case, this will take the form of in-court sworn testimony.

For all the reasons stated above, the government is improperly construing the Asylum Ban to apply to asylum seekers who attempted to enter or arrived at the POE before July 16, 2019 and who began the asylum process per the government's established requirements and procedures. The

[7] The Ninth Circuit subsequently stayed the preliminary injunction pending full briefing and argument on the injunction arguing that the stay was required to preserve the *status quo*, but not otherwise commenting on the District Court's analysis. The *status quo* refers to the legally relevant relationship *between the parties* before the controversy arose which is arguable the relationship before July 16, 2019: "When the Government seeks to revise a policy, it is affirmatively changing the status quo, and any injunction order that the new policy not take effect is a prohibitory injunction." *Al Otro Lado v. McAleenan*, Preliminary Injunction, pg. 30 (internal citations omitted).

fact remains that Mr. S. wanted to apply for asylum at a U.S. POE before July 16, 2019 and yet was required to "wait his turn" pursuant to the government's policy. He did exactly what the government told him to do. We therefore respectfully request that this Court not allow the government to deny asylum to Mr. S. on this basis as doing so is nowhere authorized by statute or regulation and both statute and regulation require the opposite – that the asylum system remain open to him.

The Government's Turnback Policy is Contrary to the INA, APA, and Due Process Clause of the Fifth Amendment

But for the government's illegal Turnback policy, Mr. S. would have been able to make a timely application for asylum and his eligibility for asylum would not be in dispute. The Turnback Policy is currently the subject of litigation. *Al Otro Lado v. McAleenan*, Preliminary Injunction, pg 20 Similar to the legal justification for the poisonous tree doctrine, the government cannot violate an individual's rights and then use that violation as justification for further action detrimental to the individual. As the District Court's class designation arguably requires that asylum seekers "continue to seek access to the asylum process" we are hereby raising all the relevant arguments as to why the Turnback Policy is illegal under the INA, the APA, and the Due Process Clause of the Fifth Amendment and the duty of non-refoulement under international law.

Under the INA, asylum should be considered for any applicant "who is physically present in the United States or who arrives in the United States", 8 U.S.C. 1158(a)(1), and "who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section." 8 U.S.C. 1158(b)(1)(A). Those requirements and procedures cannot be unreasonable, either by not having justifiable government purpose and/or by creating onerous obligations that are not clearly tied to achieving a legitimate

government objective. The government's purported interest in creating waitlists is that there is not enough case processing capacity: "[W]hen a port is allegedly at capacity, asylum seekers are informed that access to the POE 'is not immediately available' and that they will be permitted to enter' once there is sufficient space and resources to process them'." *Al Otro Lado v. McAleenan*, Preliminary Injunction, pg. 27. However, the government has presented no evidence that there was no processing capacity at the time Mr. S. attempted to enter the U.S. (and has not shown that capacity is a problem in any circumstance). Under the APA any government policy must be open for notice and comment and based on a legitimate government interest, reasonably tailored to that interest. It is the government's responsibility to provide justification for any new policy being implemented. The government's widespread pattern and practice of denying asylum seekers access to asylum case processing at POEs is unlawful for failing to comply with these legal requirements.

Furthermore, nowhere in our laws does it say that we can deny asylum to someone because we are too busy. Yes, applicants can be asked to wait their turn if this is a reasonable amount of time, but once someone has sought asylum in the U.S., the government cannot abdicate responsibility for their well-being, forcing them to wait in a country where they face persecution and/or torture. The U.S. has a duty of *non-refoulement* under international law, as seen in the Protocol Relating to the Status of Refugees, the U.N. Convention Relating to the Status of Refugees, both to which the U.S. is a party, and other international treaties, conventions and declarations. This norm is so widespread and well-established that it constitutes a *jus cogens* norm of international law.

The government's Turnback Policy imposes unreasonably delays on an asylum seeker's ability to receive protection - the Due Process Clause of the Fifth Amendment establishes that justice delayed is justice denied - , places them in harm's way in Mexico, and serves no government

interest, legitimate or otherwise. It is therefore unlawful and cannot be applied to the instant matter to deny Mr. S. asylum.

Respectfully submitted,

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Sara Ramey