

PRIMER:  
**Immigration  
Enforcement  
Mechanisms  
at the U.S. Border**



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## Introduction

The U.S. southern border has been the subject of a great deal of scrutiny by policy makers, legislators, the federal judiciary, and the media. This primer aims to provide a broad introduction to the enforcement mechanisms employed at the U.S. southern border for practitioners and others seeking to understand them.

The discourse surrounding the southern border has focused on the large numbers of individuals seeking to enter the United States without documentation (either at a port of entry or by evading inspection), often with the intention of seeking asylum.<sup>1</sup> Unfortunately, much of the rhetoric suggests that increased numbers of asylum seekers at the southern border represent a crisis and security threat.<sup>2</sup> While the numbers of arrivals are in fact significant, the context and demographics demonstrate that the arrivals do not represent a security threat but instead form part of a refugee flow that can and must be addressed as such. Yet, border policies have largely focused on blocking access to asylum and exclusion from the United States. It is important for practitioners and the public alike to understand the various border enforcement mechanisms developed in recent years since they impact the legal trajectory for migrants<sup>3</sup> arriving at the southern border, especially asylum seekers.

In Fiscal Year (FY) 2022, the Department of Homeland Security (DHS) reported that Customs and Border Protection (CBP), the agency responsible for enforcement at the U.S. border, had over 2 million encounters

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<sup>1</sup> See, e.g., Rick Jervis, Number of migrants at the U.S.-Mexico border again predicted to smash previous records, USA Today (Aug. 18, 2022), <https://www.usatoday.com/story/news/nation/2022/08/18/number-of-migrants-at-us-mexico-border-cbp/10353337002/>; Santiago Perez, Record Numbers of Migrants Arrested at Southern Border, With Two Million Annual Total in Sight, Wall Street Journal (Aug. 15, 2022), <https://www.wsj.com/articles/illegal-immigration-arrests-hit-record-reasons-for-border-crossings-changing-11660599304>.

<sup>2</sup> CNN, Southwest Border Crisis Leaves Biden Vulnerable on All Sides (March 16, 2021), <https://www.cnn.com/2021/03/16/politics/joe-biden-immigration-border/index.html>; Center for Immigration Studies, Biden Border Policies Breed Crime and Exploitation in Mexico, Fraud Here (March 11, 2021), <https://cis.org/Arthur/Biden-Border-Policies-Breed-Crime-and-Exploitation-Mexico-Fraud-Here>; Office of the Governor of Texas, Press Release: Operation Lone Star Boosts Local Border Security Efforts, Ramps Up Law Enforcement Capabilities (July 8, 2022), <https://gov.texas.gov/news/post/operation-lone-star-boosts-local-border-security-efforts-ramps-up-law-enforcement-capabilities>.

<sup>3</sup> While the Immigration and Nationality Act (INA) and the Code of Federal Regulations refer to noncitizens as “aliens,” this language is recognized as intrinsically offensive and dehumanizing. See INA § 101; 8 U.S.C. § 1101; 8 C.F.R. § 1.2; *Flores v. USCIS*, 718 F.3d 548, 551 n.1 (6th Cir. 2013). The Department of Justice under the Biden Administration has directed staff to cease usage of the terms “alien” and “illegal alien,” opting instead for terms such as “noncitizen” and “migrant.” Terminology, From Jean King, Acting Director, to EOIR (Jul 23, 2021), <https://www.justice.gov/eoir/book/file/1415216/download>. For the purposes of this primer, we will use the latter terminology. Where appropriate, we will also use the term “asylum seekers” to describe those who are seeking protection under U.S. asylum laws, including asylum, withholding of removal or protection under the U.N. Convention Against Torture.

with migrants at or near the U.S.-Mexico border who lacked entry documents.<sup>4</sup> In the preceding year, FY 2021, there were 1,734,686 border encounters.<sup>5</sup> Figure 1, below, demonstrates the number of registered border apprehensions between 2000 and 2022.

The recent numbers of border encounters are far from unprecedented. As shown in the figure below, twenty years ago, in FY 2000, there were 1,676,438 apprehensions.<sup>6</sup> That number significantly underestimates the actual number of border crossers because apprehension rates were much lower at the time. CBP estimates that more than two million individuals crossed the border undetected that same year.<sup>7</sup>

There are other important elements that put the recently reported numbers of border arrivals into context. As noted above, a much greater proportion of arrivals are detected and apprehended now so the reported numbers are unsurprisingly larger than they were several decades ago. In addition, the government statistics now include arrivals at ports of entry, which were not included in prior statistics. Furthermore, restrictions on visa issuance and airline travel<sup>8</sup> to the United States, particularly since 1997, have forced asylum seekers to arrive at the southern border to seek entry by land. The data also suggests that Title 42 expulsions (discussed [below](#)), the recently terminated enforcement mechanism purportedly implemented to control the spread of COVID-19, led to repeat encounters of the same individuals.<sup>9</sup> In other words, the actual

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<sup>4</sup> Southwest Land Border Encounters, Customs and Border Protection, CBP.gov, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>. Encounters include both apprehensions of individuals between ports of entry as well as lawful requests for admission at ports of entry by individuals deemed to be inadmissible to the United States. See Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions Fiscal Year 2022, cbp.gov, <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics>. See Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions Fiscal Year 2022, cbp.gov, <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics>.

<sup>5</sup> *Id.*

<sup>6</sup> U.S. Border Patrol Monthly Apprehensions (FY 2000-FY 2019), cbp.gov, <https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/U.S.%20Border%20Patrol%20Monthly%20Encounters%20%28FY%202000%20-%20FY%202020%29%20%28508%29.pdf>.

<sup>7</sup> Department of Homeland Security Border Security Metrics Report, dhs.gov, (Aug. 5, 2020), [https://www.dhs.gov/sites/default/files/publications/immigration-statistics/BSMR/ndaa\\_border\\_security\\_metrics\\_report\\_fy\\_2019\\_o.pdf.pdf#page=16](https://www.dhs.gov/sites/default/files/publications/immigration-statistics/BSMR/ndaa_border_security_metrics_report_fy_2019_o.pdf.pdf#page=16); see also, Joel Rose, Border Patrol apprehensions hit a record high. But that's only part of the story., NPR, Oct. 23, 2021, <https://www.npr.org/2021/10/23/1048522086/border-patrol-apprehensions-hit-a-record-high-but-thats-only-part-of-the-story>.

<sup>8</sup> See INA § 273; 8 U.S.C. § 1323 imposing fines on carriers, including commercial airlines, who transport individuals without a valid passport and visa to the United States.

<sup>9</sup> See, e.g., CBP Releases September 2022 Monthly Operational Update, CBP.gov, Oct. 21, 2022, <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-september-2022-monthly-operational-update>; see also, Quinn Owen, Title 42 Actually Contributes to Increased Migration Numbers, Data Suggests, ABC News, Dec. 23, 2022, <https://abcnews.go.com/Politics/title-42-contributes-increased-migration-numbers-data-suggests/story?id=95616742>.

numbers of *individuals* arriving at the border are likely much lower than the government-provided statistics on *encounters* and may even represent fewer arrivals than several decades ago.

Importantly, in the 21<sup>st</sup> century, worldwide migration is on the rise, and refugee flows have increased dramatically around the globe.<sup>10</sup> The United States cannot isolate itself from these trends. And given these patterns, large-scale arrivals at the U.S. southern border are to be expected and should be anticipated, planned for, and managed humanely.

The demographics of those arriving at the southern border in recent years belie the security threat rhetoric. Many are asylum-seeking adults, children and families fleeing countries where pervasive human rights abuses are taking place. Of the encounters in 2022, 560,646 were with family members traveling together, 152,057 were unaccompanied migrant children, and 2,963 were migrant children accompanied by an adult.<sup>11</sup> In the last five years significant numbers of migrants arrived from the Northern Triangle—specifically El Salvador, Guatemala and Honduras, which the United States has recognized as an exceptionally dangerous region.<sup>12</sup> Increased numbers of migrants are also arriving from Cuba, Haiti, Nicaragua, and Venezuela,<sup>13</sup> where political and economic instability prevail and the human rights situations are recognized as dire.

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<sup>10</sup> UNHCR, Refugee Data Finder, <https://www.unhcr.org/refugee-statistics/>; UNHCR, Global Trends in Forced Displacement – 2020, at 12 (2021), <https://www.unhcr.org/60b638e37/unhcr-global-trends-2020>.

<sup>11</sup> Southwest Land Border Encounters, cbp.gov, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

<sup>12</sup> U.S. Border Patrol Nationwide Apprehensions by Citizenship and Sector, cbp.gov, <https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/USBORD~3.PDF>; U.S. Strategy for Addressing the Root Causes of Migration in Central America, whitehouse.gov, (July 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Root-Causes-Strategy.pdf>.

<sup>13</sup> U.S. Border Patrol Nationwide Apprehensions by Citizenship and Sector, cbp.gov, <https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/USBORD~3.PDF>.

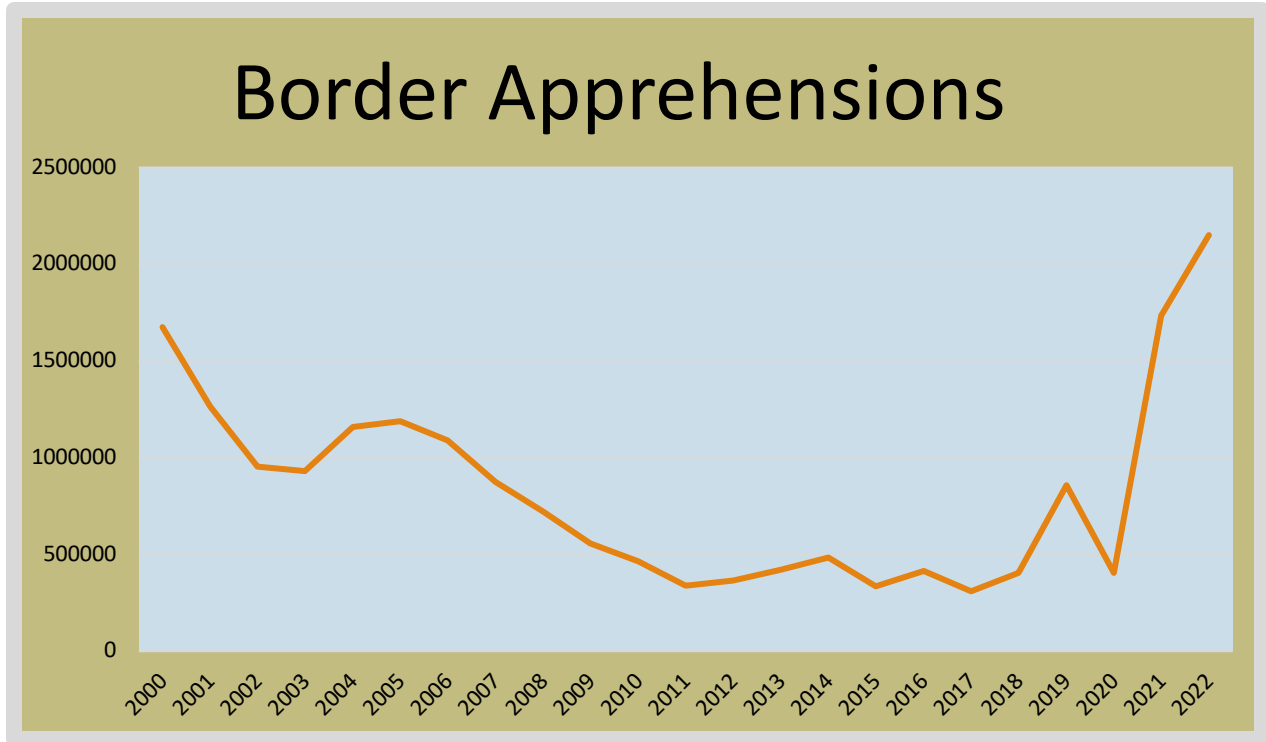


Figure 1<sup>14</sup>

## LAWS AND POLICIES IMPLEMENTED AT THE U.S. BORDER

Border policies have changed many times in recent years. The situation at the border changed significantly in 2023 with the end of Title 42 expulsions (discussed further [below](#)) and the adoption of new restrictive border policies. As of the time of the publication of this primer, access to ports of entry along the southern border is largely limited to individuals who have been able to obtain [CBP One appointments](#) and a small subset of individuals with medical or other vulnerabilities who have benefited from advocacy by local non-governmental organizations.<sup>15</sup> Generally, migrants must seek an appointment at a port of entry through the

<sup>14</sup> U.S. Border Patrol Monthly Apprehensions, <https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/U.S.%20Border%20Patrol%20Monthly%20Encounters%20%28FY%202000%20-%20FY%202020%29%20%28508%29.pdf> (data for 2000 to 2020); Southwest Land Border Encounters, [cbp.gov, https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters](https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters) (data for 2021 and 2022).

<sup>15</sup> As of June 30, 2023, U.S. Customs and Border Protection permitted 1,450 CBP One appointments a day. See: CBP One™ Appointments Increased to 1,450 Per Day, U.S. Customs and Border Protection, <https://www.cbp.gov/newsroom/national-media-release/cbp-one-appointments-increased-1450-day> (last

CBP One application, but only limited appointments are available via the app and there are notable problems with the technology. Meanwhile, Mexican and U.S. authorities often prevent individuals who do not have a CBP One appointment from reaching U.S. ports of entry or turn them back from ports of entry to Mexico. For many migrants, including asylum seekers, an irregular crossing is the only way to reach the United States. However, current border policies, particularly the new Circumvention of Lawful Pathways regulation, create serious negative immigration consequences for those who cross the border between ports of entry.

For those migrants who manage to reach the United States at the southern border, the U.S. government uses one of the following immigration processes: 1) expedited removal with possible credible fear interview; 2) reinstatement of removal with possible reasonable fear interview; or 3) placement in full removal proceedings in Immigration Court under Immigration and Nationality Act (INA) § 240.<sup>16</sup> This primer will describe these mechanisms as well as substantive immigration law and policies that impact the entire immigration process for those arriving at the southern border, including the recently implemented Circumvention of Lawful Pathways regulation (discussed further below).

The primer will then discuss additional proceedings, outside of the immigration context, that are currently impacting migrants at the southern border. These include actions by the state of Texas under Operation Lone Star, and federal criminal prosecutions of migrants for unlawful entry or reentry.

Next, the primer will summarize other border policies from recent years that are no longer in effect. These policies include metering waitlists, the Migrant Protection Protocols (MPP), and Title 42. It is important to gain an understanding of both current and former border policies. Even when policies are terminated, migrants currently in the United States may have been previously subjected to them, which may impact their immigration cases.

Finally, the primer addresses the special proceedings that apply exclusively to unaccompanied children who reach the U.S. southern border.

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accessed: Oct. 11, 2023). Cubans, Haitians, Nicaraguans, and Venezuelans who qualify for processing under the CHNV program are paroled into the United States and may forgo the stringent border enforcement measures at the southern U.S. border and, instead, may fly to the United States. *See: Processes for Cubans, Haitians, Nicaraguans, and Venezuelans*, U.S. Citizenship and Immigration Services, Sept 20, 2023, <https://www.uscis.gov/CHNV>.

<sup>16</sup> In relatively rare instances, migrants who qualify to enter the United States without a visa through the Visa Waiver Program (VWP) arrive in the United States by land at the Southern Border. The VWP allows citizens of qualifying countries to travel to the United States for business or tourism for stays of up to 90 days without a visa. Migrants who enter through the VWP and face removal have access to asylum-only removal proceedings. *See* 8 U.S.C. § 1187(b). The list of Visa Waiver eligible countries can be found here: <https://www.dhs.gov/visa-waiver-program-requirements>.



## IMMIGRATION ENFORCEMENT LAW AND POLICIES CURRENTLY IN PLACE AT THE BORDER

Because of pushbacks at the border for most migrants without travel documents, including asylum seekers, there are currently only two viable ways to enter the United States at the southern border. These are: 1) through an appointment on the CBP One app at a port of entry; or 2) by crossing the border between ports of entry.<sup>17</sup> The new Circumvention of Lawful Pathways rule applies to all recent border arrivals but has a uniquely harsh impact for those who cross the border between ports of entry. In practice, those who enter with a CBP One appointment are generally paroled into the United States and placed into full removal proceedings in Immigration Court where they can apply for asylum or other relief. Those who enter irregularly are typically placed into expedited removal and are generally presumed ineligible for asylum under the Circumvention of Lawful Pathways rule. A smaller number of migrants with prior deportations are placed into reinstatement of removal. The Circumvention of Lawful Pathways rule is discussed below along with the various immigration processing pathways.

### Circumvention of Lawful Pathways

In May of 2023, following the lifting of the Title 42 policy (discussed further below), the Biden Administration enacted a final rule with sweeping measures impacting immigrants who arrive at the U.S. southern border throughout the life of their immigration cases.<sup>18</sup> The rule, titled “Circumvention of Lawful Pathways” and often referred to as an “asylum ban,” provides that DHS will generally presume ineligibility for asylum for certain asylum seekers who arrived at the southern border after May 11, 2023. Specifically, the asylum rule applies to those who did not enter the United States through an appointment scheduled online with the new CBP One application or after being denied asylum in a transit country.<sup>19</sup> The asylum seeker has the burden to

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<sup>17</sup> The ABA South Texas Pro Bono Asylum Representation Project (ProBAR) has observed, in extremely rare instances, individuals with traditional humanitarian parole requests entering the United States via ports of entry without an appointment through CBPOne.

<sup>18</sup> 88 Federal Register 31314; 8 CFR §208; 8 CFR §1003; 8 CFR §1208; *see also*: Fact Sheet: Department of State and Department of Homeland Security Announce Additional Sweeping Measures to Humanely Manage Border through Deterrence, Enforcement, and Diplomacy, dhs.gov, (May 10, 2023) (available at: <https://www.dhs.gov/news/2023/05/10/fact-sheet-additional-sweeping-measures-humanely-manage-border>). *See also*: Christina Asencio and Rebecca Gendelman, *Inhumane and Counterproductive*, Human Rights First (Oct. 12, 2023) available at: <https://humanrightsfirst.org/library/inhumane-and-counterproductive-asylum-ban-inflicts-mounting-harm/>

<sup>19</sup> Cubans, Haitians, Nicaraguans, and Venezuelans (CHNV) who qualify for processing under the CHNV program are paroled into the United States and may forgo the stringent border enforcement measures at the southern U.S. border and, instead, may fly to the United States. *See: Processes for Cubans, Haitians, Nicaraguans, and Venezuelans*, U.S. Citizenship and Immigration Services, Sept 20, 2023, <https://www.uscis.gov/CHNV>. However, the Biden Administration requires CHNV approved individuals to use the CBP One to secure travel authorization before flying to the United States. *See: CBP One™ Mobile Application*, U.S. Customs and Border Protection, Aug. 16, 2023 <https://www.cbp.gov/about/mobile-apps-directory/cbpone>; Furthermore, the Department of Homeland Security has been accused of illegally misleading individuals from the CHNV to “voluntarily” return to Mexico with the promise of access to the U.S. asylum system when many are unlikely to qualify for the CHNV program. *See: M.A. v. Mayorkas*, No. 1:23-cv-01843, (D.D.C., Jun. 23, 2023).

rebut that presumption of ineligibility by demonstrating an exceptional circumstance.<sup>20</sup> The assessment of the applicability of the new rules as well as any rebuttals to a presumption of asylum ineligibility take place initially at a Credible Fear Interview (CFI, discussed further [below](#)). The same issues may be litigated again on the merits in Immigration Court.

With limited exemptions, the rule requires asylum seekers at the southern border to schedule an appointment at a port of entry through the CBP One application and then attend that appointment.<sup>21</sup> However, the CBP One application has generated concerns about accessibility as it requires a cell phone and a strong internet connection. It also raises privacy concerns, given its use of facial recognition technology and GPS location tracking.<sup>22</sup> In addition, it has been flagged that the facial recognition technology disadvantages communities of color, as the system has been found to produce faulty results at higher rates for individuals with darker skin tones.<sup>23</sup>

Importantly, limited appointments are available on the CBP One application, so it is not possible for all asylum seekers to obtain appointments. In effect, the CBP One application has created a new metering scheme (discussed further [below](#)) that limits the number of people who will be processed by U.S. immigration authorities at the border, forcing asylum seekers to choose between waiting in dangerous conditions in Mexico for a chance to present at a port of entry or crossing irregularly with the danger and negative legal consequences that such a crossing brings. The app has also led to instances of family separation as families struggle to find as many appointments as there are family members.<sup>24</sup>

The provision in the Circumvention of Lawful Pathways rule that requires a showing of a denial of asylum in a transit country to maintain asylum eligibility for those who arrive at the U.S. southern border but do not secure a CBP One appointment also raises serious concerns.<sup>25</sup> The rule fails to consider that transit countries

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<sup>20</sup> *Id.*, US: Biden 'Asylum Ban' Endangers Lives at the Border, Human Rights Watch, <https://www.hrw.org/news/2023/05/11/us-biden-asylum-ban-endangers-lives-border> (last accessed: Jun. 27, 2023). *See also*: Biden's Asylum Ban, National Immigration Project, (May 26, 2023) (available at: [https://nipnl.org/sites/default/files/2023-05/2023\\_26May-Asylum-Ban-PA.pdf](https://nipnl.org/sites/default/files/2023-05/2023_26May-Asylum-Ban-PA.pdf)).

<sup>21</sup> 88 Federal Register 31314; 8 CFR §208; 8 CFR §1003; 8 CFR §1208. *See generally*: CBP One (TM) Mobile Application, cbp.gov, <https://www.cbp.gov/about/mobile-apps-directory/cbpone> (last accessed: Oct. 21, 2023). For more information about CBP One *see*: CBP One: An Overview, American Immigration Lawyers Association, (Oct. 21, 2023), (available at: <https://www.americanimmigrationcouncil.org/research/cbp-one-overview?emci=9589d6e6-ce03-ee11-907c-00224832eb73&emdi=ec2e7f0f-dc03-ee11-907c-00224832eb73&ceid=10467753>).

<sup>22</sup> *See: Fact Sheet: CBP One Overview*, American Immigration Council, <https://www.americanimmigrationcouncil.org/research/cbp-one-overview> (last accessed: Feb. 28, 2023).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*, 8 CFR §§ 208.33(a)(2)(ii)(C); 1208.33(a)(2)(ii)(C); *see also*: Biden's Asylum Ban, National Immigration Project, (May 26, 2023) (available at: [https://nipnl.org/sites/default/files/2023-05/2023\\_26May-Asylum-Ban-PA.pdf](https://nipnl.org/sites/default/files/2023-05/2023_26May-Asylum-Ban-PA.pdf)).

may have underdeveloped asylum systems.<sup>26</sup> Additionally, it is unclear what impact an asylum denial in another country may have on the merits of an asylum case in the United States.<sup>27</sup> This requirement is very similar to policies that have already been struck down by the courts, including the Third Country Rule (also referred to as the transit ban) implemented by the Trump administration.<sup>28</sup>

Some asylum seekers are excepted under the Circumvention of Lawful Pathways rule from the requirement that they use the CBP One app to make an appointment at the port of entry or demonstrate an asylum denial in a transit country. These individuals include unaccompanied children,<sup>29</sup> Mexican citizens,<sup>30</sup> and individuals who can prove an inability to access the CBP One system.<sup>31</sup>

To prove an inability to access the CBP One system as an exception to asylum ineligibility, an asylum seeker must show “by a preponderance of the evidence that it was not possible to access or use the DHS scheduling system due to a language barrier, illiteracy, significant technical failure, or ongoing and serious obstacle.”<sup>32</sup> Only individuals who arrive at a U.S. port of entry will qualify for this exception, so asylum seekers who cross the border irregularly will not qualify for an exception even if they attempted repeatedly, but unsuccessfully, to use the app before crossing.<sup>33</sup>

**PRACTICE TIP:** Evidence should be gathered regarding failed efforts to use the CBP One app, such as screenshots of error messages and evidence of repeated attempts to secure an appointment. A

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<sup>26</sup> Biden’s Asylum Ban, National Immigration Project, (May 26, 2023) (available at: [https://nipnlg.org/sites/default/files/2023-05/2023\\_26May-Asylum-Ban-PA.pdf](https://nipnlg.org/sites/default/files/2023-05/2023_26May-Asylum-Ban-PA.pdf)); see also: Letter from Jeremy McKinney, President of the American Immigration Lawyers Association, to President Joseph R. Biden (Jan. 17, 2023) (available at: <https://www.aila.org/advo-media/aila-correspondence/2023/letter-to-president-biden-regarding-the-proposed>); AILA Condemns Biden Administration’s Push to Use “Transit Ban” Against Vulnerable Asylum Seekers, American Immigration Lawyers Association (Feb. 21, 2023) (available at: <https://www.aila.org/advo-media/press-releases/2023/aila-condemns-biden-administrations-push>).

<sup>27</sup> Biden’s Asylum Ban, National Immigration Project, (May 26, 2023) (available at: [https://nipnlg.org/sites/default/files/2023-05/2023\\_26May-Asylum-Ban-PA.pdf](https://nipnlg.org/sites/default/files/2023-05/2023_26May-Asylum-Ban-PA.pdf)).

<sup>28</sup> The Third Country Rule is discussed further *infra*. See: Karen Musalo, *Biden’s Embrace of Trump’s Transit Ban Violates US Legal and Moral Refugee Obligations*, Just Security, (Feb 8, 2023), <https://www.justsecurity.org/84977/bidens-embrace-of-trumps-transit-ban-violates-us-legal-and-moral-refugee-obligations/>.

<sup>29</sup> *Id.*, 8 CFR §§ 208.33(a)(2)(i); 1208.33(a)(2)(i).

<sup>30</sup> See: 88 Federal Register 31314; 8 CFR §208; 8 CFR §1003; 8 CFR §1208. Despite the regulation, there are reports of Mexican citizens who presented at ports of entry without CBP One appointments being turned back. See: Dara Lind, CBP’s Continued ‘Turnbacks’ Are Sending Asylum Seekers Back to Lethal Danger, Immigration Impact, Aug. 10, 2023, <https://immigrationimpact.com/2023/08/10/cbp-turnback-policy-lawsuit-danger/>.

<sup>31</sup> *Id.*

<sup>32</sup> 8 CFR §§ 208.33(a)(2)(ii)(B); 1208.33(a)(2)(ii)(B); see also: Biden’s Asylum Ban, National Immigration Project, (May 26, 2023) (available at: [https://nipnlg.org/sites/default/files/2023-05/2023\\_26May-Asylum-Ban-PA.pdf](https://nipnlg.org/sites/default/files/2023-05/2023_26May-Asylum-Ban-PA.pdf)).

<sup>33</sup> 88 Federal Register 31314; 8 CFR §208; 8 CFR §1003; 8 CFR §1208; see also: Biden’s Asylum Ban, National Immigration Project, (May 26, 2023) (available at: [https://nipnlg.org/sites/default/files/2023-05/2023\\_26May-Asylum-Ban-PA.pdf](https://nipnlg.org/sites/default/files/2023-05/2023_26May-Asylum-Ban-PA.pdf)).

practitioner may need this evidence for a credible fear interview<sup>34</sup> or for a merits hearing (discussed further below) to show that the asylum ban does not apply. The Department of Homeland Security has made clear that asylum seekers face a significant burden in showing an inability to make an appointment through the CBP One app and that asylum officers will inquire about the asylum seeker's efforts to have third parties assist them in seeking appointments through the CBP One app.<sup>35</sup>

Individuals who do not qualify for an exception to the Circumvention of Lawful Pathways rule can seek to rebut the presumption of ineligibility for asylum by demonstrating "exceptionally compelling circumstances" at the time of their entry into the United States.<sup>36</sup> Exceptionally compelling circumstances are assessed on a case-by-case basis.<sup>37</sup> The rule enumerates three examples of per se exceptionally compelling circumstances, but leaves the opportunity for circumstances outside of the three examples to qualify as exceptionally compelling.<sup>38</sup> The three examples of per se exceptionally compelling circumstances are where the "noncitizen, or a member of the noncitizen's family with whom the noncitizen is traveling, (1) faced an acute medical emergency; (2) faced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder; or (3) satisfied the definition of "victim of a severe form of trafficking in persons" provided in 8 CFR 214.11(a)."<sup>39</sup>

**PRACTICE TIP:** A practitioner should seek to gather evidence regarding medical emergencies or situations of danger facing asylum seekers in northern Mexico. For example, if a family was kidnapped in northern Mexico or threatened with kidnapping shortly before crossing the border, the practitioner should attempt to document this situation with witness statements or other evidence. If a child suffered from serious medical conditions while in northern Mexico, the practitioner should try to obtain medical records or testimony regarding the health situation; the medical records might include documentation from the home country establishing an existing health condition that was exacerbated by the journey.

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<sup>34</sup> This evidence may also prove necessary in an appeal of a negative credible fear determination.

<sup>35</sup> See: Biden's Asylum Ban, National Immigration Project, (May 26, 2023) (available at: [https://nipnlq.org/sites/default/files/2023-05/2023\\_26May-Asylum-Ban-PA.pdf](https://nipnlq.org/sites/default/files/2023-05/2023_26May-Asylum-Ban-PA.pdf)).

<sup>36</sup> 88 Federal Register 31314; 8 CFR §208; 8 CFR §1003; 8 CFR §1208; see also: Biden's Asylum Ban, National Immigration Project, (May 26, 2023) (available at: [https://nipnlq.org/sites/default/files/2023-05/2023\\_26May-Asylum-Ban-PA.pdf](https://nipnlq.org/sites/default/files/2023-05/2023_26May-Asylum-Ban-PA.pdf)).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Practice Brief: The Proposed Asylum Transit Ban Creates Access to Asylum in Name Only, American Immigration Lawyers Association, (Feb. 22, 2023) (<https://www.aila.org/advo-media/aila-policy-briefs/practice-alert-the-proposed-asylum-transit-ban>); Alexandra Villarreal, Q&A: What to Know About the Biden Administration's New Asylum Restrictions, National Immigration Forum, May 11, 2023 <https://immigrationforum.org/article/qa-what-to-know-about-the-biden-administrations-new-asylum-restrictions/>.

Shortly before the Circumvention of Lawful Pathways took effect, litigation was initiated to challenge the rule, but that litigation has not halted implementation of the rule.<sup>40</sup> On May 11, 2023, various immigrants' rights advocates filed a lawsuit seeking injunctive and declaratory relief in the Northern District of California. The plaintiffs in the case, *East Bay Sanctuary Covenant v. Biden*, argued that the Circumvention of Lawful Pathways rule was arbitrary and capricious and violative of the rulemaking procedures under the Administrative Procedure Act and furthermore violated the Immigration and Nationality Act (INA) which guarantees that any immigrant arriving at the border or physically present in the United States may apply for asylum.<sup>41</sup> On July 25, 2023, the district court granted summary judgment for the Plaintiffs and ordered that the Circumvention of Lawful Pathways regulation be vacated.<sup>42</sup> The Biden Administration appealed the decision to the Ninth Circuit.<sup>43</sup> A stay was granted on August 3, 2023, and the Circumvention of Lawful Pathways remains in effect as the litigation continues.<sup>44</sup>

Additionally, in June of 2023 another lawsuit was filed by immigrants' rights advocates in the District of Columbia, arguing that the Circumvention of Lawful Pathways rule contradicts the INA's guarantee of access to asylum and imposes an impermissibly high burden for asylum seekers subjected to the bar who undergo credible fear interviews in expedited removal proceedings (discussed [below](#)).<sup>45</sup> In July of 2023, immigrants' rights groups and a group of asylum seekers filed a putative class action lawsuit challenging CBP's use of CBP One appointments as the exclusive avenue to seek asylum at ports of entry along the southern border.<sup>46</sup> In October of 2023 a preliminary injunction against the policy of turning away asylum seekers without CBP One appointments was denied citing a Supreme Court ruling that it lacked the authority to issue the injunction.<sup>47</sup>

On the other side, in May of 2023, nineteen states filed two lawsuits arguing that the exceptions to the Circumvention of Lawful Pathways asylum ban, specifically the opportunity to seek asylum after booking an

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<sup>40</sup> See: Amended and Supplemental Complaint For Declaratory and Injunctive Relief, *East Bay Sanctuary Covenant v. Biden*, No. 18-cv-06810-JST, (N.D. Cal. May 11, 2023); Complaint for Declaratory and Injunctive Relief, *M.A. v. Mayorkas*, No. 1:23-cv-01843, (D.D.C., Jun. 23, 2023); see also: Press Release, American Civil Liberties Union, Immigrants' Rights Advocates Sue Biden Administration Over New Asylum Ban (May 11, 2023) (available at: <https://www.aclu.org/press-releases/immigrants-rights-advocates-sue-biden-administration-over-new-asylum-ban>).

<sup>41</sup> Amended and Supplemental Complaint For Declaratory and Injunctive Relief, *East Bay Sanctuary Covenant v. Biden*, No. 18-cv-06810-JST, (N.D. Cal. May 11, 2023).

<sup>42</sup> *East Bay Sanctuary Covenant v. Biden*, No. 18-CV-06810-JST (N.D. Cal., July 25, 2023).

<sup>43</sup> See: *East Bay Sanctuary Covenant v. Biden*, No. 23-16032 (9<sup>th</sup> Cir. Aug. 3, 2023).

<sup>44</sup> *Id.*

<sup>45</sup> Complaint for Declaratory and Injunctive Relief, *M.A. v. Mayorkas*, No. 1:23-cv-01843, (D.D.C., Jun. 23, 2023).

<sup>46</sup> The case asserts violation of the APA, constitution, and a claim under the Accardi doctrine. *Al Otro Lado v. Mayorkas*, No. 3:23-cv-01367-AGS-BLM (S.D. Cal. Jul. 27, 2023).

<sup>47</sup> *Al Otro Lado v. Mayorkas*, No. 3:23-cv-01367-AGS-BLM (S.D. Cal. Jul. 27, 2023).

appointment on the CBP One app, exceeded the government's authority.<sup>48</sup> The various legal challenges are ongoing.

### Expedited Removal and Credible Fear Interviews

Expedited removal is a process by which migrants who arrive at or enter the United States at the border without authorization (or who are brought to the United States after being interdicted at sea) can be rapidly removed (deported)<sup>49</sup> without a full hearing before an immigration judge.<sup>50</sup> DHS has discretion whether to employ expedited removal proceedings. The statute authorizes, but does not require, DHS to apply expedited removal to any individual who is inadmissible and cannot affirmatively demonstrate continuous physical presence in the United States for at least two years.<sup>51</sup> Despite the broad authorization, DHS currently applies expedited removal to migrants arriving at a port of entry without valid authorization (including at airports and border bridges) and migrants who have entered the United States without authorization and are encountered within 100 miles of the U.S. border within 14 days of their entry into the United States. Individuals subjected to expedited removal are generally detained and often receive expedited removal orders even if they subsequently are able to access the asylum process.<sup>52</sup>

There are very limited protections for individuals in expedited removal. There is no right to counsel,<sup>53</sup> no right to a hearing,<sup>54</sup> and extremely limited rights for review of an expedited removal order in federal court.<sup>55</sup> If, however, a migrant subject to expedited removal indicates that they intend to apply for asylum or expresses a fear of persecution or torture, the government must refer the individual for a credible fear interview.<sup>56</sup> These asylum seekers are generally detained unless, and at least until, they receive a positive credible fear determination. In January of 2023, the Biden Administration announced new border enforcement measures including the expansion of expedited removal, stating "[e]ffective immediately,

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<sup>48</sup> *Indiana v. Mayorkas*, No. 1:23-cv-00106-CRH (D.N.D. May 31, 2023); *Texas v. Mayorkas*, No. 2:23-cv-00024 (W.D.T.X. May 23, 2023).

<sup>49</sup> Removal is the term presently used to discuss deportation. While the terms can be used interchangeably, the use of the terms "deport," "deportability," and "deportation" in immigration law references removal prior to 1997. See Em Puhl, *Overview of the Deportation Process*, Immigrant Legal Resource Center, at FN2 (Dec. 2018) (available at: [https://www.ilrc.org/sites/default/files/resources/overview\\_deport\\_process-20181221.pdf](https://www.ilrc.org/sites/default/files/resources/overview_deport_process-20181221.pdf)).

<sup>50</sup> INA § 235(b)(1); 8 U.S.C. § 1225(b)(1); A Primer on Expedited Removal, American Immigration Council, Jul. 2019, [https://www.americanimmigrationcouncil.org/sites/default/files/research/primer\\_on\\_expedited\\_removal.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/primer_on_expedited_removal.pdf); Expedited Removal of Aliens: An Introduction, Congressional Research Service, Mar. 25, 2022, <https://crsreports.congress.gov/product/pdf/IF/IF11357>.

<sup>51</sup> INA § 235(b)(1)(A)(iii)(II); 8 U.S.C. § 1225(b)(1)(A)(iii)(II).

<sup>52</sup> See Fact Sheet: Expedited Removal, National Immigration Forum, <https://immigrationforum.org/article/fact-sheet-expedited-removal/> (last accessed: Dec. 5, 2022); A Primer on Expedited Removal, American Immigration Council, <https://www.americanimmigrationcouncil.org/research/primer-expedited-removal> (last accessed: Dec. 5, 2022); see generally INA § 235(b)(1); 8 U.S.C. § 1225(b)(1).

<sup>53</sup> *Barajas-Alvarado v. U.S.A.*, 655 F.3d 1077 (9th Cir. 1998).

<sup>54</sup> INA § 235; 8 U.S.C. § 1225.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*, 8 C.F.R. § 208.30.

individuals who attempt to enter the United States without permission, do not have a legal basis to remain, and cannot be expelled pursuant to Title 42 will be increasingly subject to expedited removal to their country of origin and subject to a five-year ban on reentry.”<sup>57</sup>

The immigration authorities may choose not to place individuals into expedited removal, even where they fit within the category of individuals who may be subjected to expedited removal. In these cases, the authorities generally release the individual at the border and place them in full removal proceedings where they have a chance to seek asylum at a later date.<sup>58</sup> One policy allowing for release at the border for later initiation of removal proceedings was blocked as a result of litigation, but the general authority to forego expedited removal and release still exists.<sup>59</sup> In May of 2023, the state of Florida filed for and won a temporary restraining order against the Biden Administration’s “Policy on Parole with Conditions in Limited Circumstances Prior to the Issuance of a Charging Document (Parole with Conditions).”<sup>60</sup> Individuals paroled into the United States under this policy were required to schedule an appointment with ICE in their destination location and would receive service of a Notice to Appear (NTA), placing them into full removal proceedings, by mail.<sup>61</sup> This litigation remains ongoing.

### Credible Fear Interview (CFI)

A credible fear interview is an evaluation conducted by an asylum officer from U.S. Citizenship and Immigration Services (USCIS), an agency within DHS, to determine whether a migrant has a “credible fear” of persecution if removed to their home country. Historically, to establish a credible fear of persecution a migrant must show a significant possibility of qualifying for asylum, withholding of removal, or protection under the Convention Against Torture (CAT).<sup>62</sup> Under the new Circumvention of Lawful Pathways rule, the standard has become a “reasonable possibility” of qualifying for asylum, withholding of removal, or protection under CAT and there is also an inquiry during the credible fear interview into the applicability of any exceptions to the asylum ban (e.g., an inability to use the CBP One application) and into any possibility

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<sup>57</sup> Press Release, White House, FACT SHEET: Biden-Harris Administration Announces New Border Enforcement Actions, (Jan. 5, 2023) (<https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/05/fact-sheet-biden-harris-administration-announces-new-border-enforcement-actions/>); Press Release, Department of Homeland Security, DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes (Jan. 5, 2023) (). *See also*: FAQs on the 5-Year Bar on Re-Entry and the Asylum Ban Final Rule, Center for Gender and Refugee Studies, available at: <https://cgrs.uclawsf.edu/access-tal>

<sup>58</sup> *See generally*: INA §240.

<sup>59</sup> *See*: *Florida v. Mayorkas*, No. 3:23-CV-09962-TKW-ZCB, (N.D. FL, May 11, 2023); *Florida v. USA (FL Detention II)*, No. 23-11528 (11<sup>th</sup> Cir, June 6, 2023); *see also*: Memorandum re: the Policy on Parole with Conditions in Limited Circumstances Prior to the Issuance of a Charging Document (Parole with Conditions) from Raul Ortiz, Chief of US Border Patrol, to All Chief Patrol Agents (May 10, 2023) (available at: <https://www.aila.org/infonet/cbp-issues-memo-on-policy-on-parole-with-condition>).

<sup>60</sup> *Id.*

<sup>61</sup> Memorandum re: the Policy on Parole with Conditions in Limited Circumstances Prior to the Issuance of a Charging Document (Parole with Conditions) from Raul Ortiz, Chief of US Border Patrol, to All Chief Patrol Agents (May 10, 2023) (available at: <https://www.aila.org/infonet/cbp-issues-memo-on-policy-on-parole-with-condition>).

<sup>62</sup> 8 C.F.R. § 208.30.

of rebuttal of the presumption of asylum ineligibility (e.g. an acute medical emergency or imminent danger).<sup>63</sup>

The asylum officer must create a written record of their determination, including a summary of material facts provided by the applicant and any additional facts upon which the officer relied.<sup>64</sup> Most asylum seekers undergo credible fear interviews while detained, where they may be under emotional distress and not eating or sleeping well. The interviews are often conducted by telephone or video, which may inhibit the asylum seeker's understanding of the credible fear process and the role of the asylum officer. Most asylum seekers do not have the opportunity to speak to an attorney before the interview.

As of the time of this update, many CFIs occur by telephone within 24 hours after an asylum seeker enters the United States, while they are still in Customs and Border Protection custody. Criticisms of the process include a lack of access to counsel; a lack of access to information about the process and time to prepare; a lack of availability of pen and paper to write down critical information about the process; and a lack of access to food, showers and healthcare preceding the interview. Adult partners or spouses may also experience challenges requesting consolidated interviews, requiring separate interviews by each partner and often resulting in different decisions by asylum officers. Despite these conditions, the CFIs are reportedly more probing than before because of the ineligibility factors put in place by the Circumvention of Lawful Pathways rule.<sup>65</sup>

**PRACTICE TIP:** If your client went through a credible fear interview, they should receive a copy of the CFI summary. You should be able to obtain a copy of the summary and determination by filing a Freedom of Information Act (FOIA) request with USCIS. You should ask the client how they were feeling and how they were treated during the interview. Immigration and Customs Enforcement (ICE) attorneys often use information from the credible fear interview to impeach asylum seekers during their merits hearings in Immigration Court.

If the asylum officer finds that the asylum seeker does not have a credible fear of persecution, the migrant may request that an immigration judge review the negative credible fear determination, generally in a video hearing.<sup>66</sup> This hearing is limited to discussion of the credible fear determination and is often very brief, without any meaningful opportunity for the asylum seeker to supplement testimony or provide additional evidence. The immigration judge can uphold a negative determination or can find that a credible fear has

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<sup>63</sup> Circumvention of Lawful Pathways, 88 Fed. Reg. 31,314 (May 16, 2023).

<sup>64</sup> *Id.*

<sup>65</sup> *See generally*: Obstructed Legal Access: NIJC's Findings From 3 Weeks of Telephonic Legal Consultations In CBP Custody, National Immigrant Justice Center, May 25, 2023, available at: <https://immigrantjustice.org/staff/blog/obstructed-legal-access-nijcs-findings-3-weeks-telephonic-legal-consultations-cbp>; Refugee Protection Travesty, Human Rights First, Jul., 2023, available at: [https://humanrightsfirst.org/wp-content/uploads/2023/07/Refugee-Protection-Travesty\\_Asylum-Ban-Report\\_July-2023-1.pdf](https://humanrightsfirst.org/wp-content/uploads/2023/07/Refugee-Protection-Travesty_Asylum-Ban-Report_July-2023-1.pdf).

<sup>66</sup> 8 C.F.R. § 1003.42.



been established. There is generally no transcript of the proceeding before the immigration judge; a simple one-page form order is issued. If the immigration judge upholds a negative credible fear determination, the migrant may be able to seek reconsideration by the asylum office, but the asylum office exercises such authority only in very limited cases.

If both the asylum office and the immigration judge find that an individual does not have a credible fear, the expedited removal order remains in place and will be executed promptly. Migrants removed from the United States under an expedited removal order are prohibited from returning to the United States for five years.<sup>67</sup> A waiver of this waiting period to return lawfully (if a legal avenue exists) may be available in some instances.<sup>68</sup>

In recent years, the CFI process has been made more complicated by various policies. As noted above, the CFI process now includes consideration of ineligibility grounds imposed by the Circumvention of Lawful Pathways rule. Also, in *M.A. v. Mayorkas* (discussed above), the plaintiffs assert that the Biden Administration has created a "Non-Asylum Officer Policy" which may allow for CFIs to be conducted by individuals who are not USCIS Asylum Officers.<sup>69</sup> Furthermore, the cases the Biden Administration's reduction of the minimum time period individuals have to attempt to telephonically consult with an attorney to 24 hours after receiving notice of the credible fear process.<sup>70</sup>

### Family Expedited Removal Management (FERM)

A new expedited removal and CFI policy, known as the Family Expedited Removal Management (FERM) program, was announced in May of 2023. FERM applies to certain families apprehended at the border who are placed in expedited removal but referred for a credible fear interview after they express a fear of persecution or torture.<sup>71</sup> Under the new process, the family will not be detained, but the head of household will be fitted with an ankle monitor, will be required to download and regularly report on the SmartLINK phone app, and will be required to attend check-ins with ICE and the private contractors implementing the monitoring program.<sup>72</sup> FERM applies only to families who are from countries to which ICE maintains regular

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<sup>67</sup> INA § 212(a)(9)(A)(i); 8 U.S.C. § 1182(a)(9)(A)(i).

<sup>68</sup> See generally, INA § 212(a)(9)(A); 8 U.S.C. § 1182(a)(9)(A).

<sup>69</sup> Complaint for Declaratory and Injunctive Relief, *M.A. v. Mayorkas*, No. 1:23-cv-01843, (D.D.C., Jun. 23, 2023).

<sup>70</sup> See generally: Questions and Answers: Credible Fear Screening, USCIS, Sept. 12, 2023

<https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-credible-fear-screening>.

<sup>71</sup> ICE announces new process for placing family units in expedited removal, ICE.gov, May 11, 2023, available at: <https://www.ice.gov/news/releases/ice-announces-new-process-placing-family-units-expedited-removal>. See generally: FERM Has Come to Houston, Houston Immigration Legal Services Collaborative, Aug. 14, 2023, <https://www.houstonimmigration.org/ferm-has-come-to-houston/>; Cindy S. Woods, The Family Expedited Removal Management Program (FERM): A Three-Month Assessment Highlighting the Need for a More Family-Centered Approach (Sept. 7, 2023), available at: <https://aijustice.org/ferm-report/>

<sup>72</sup> *Id.*; See generally: Alternatives to Detention Frequently Asked Questions, U.S. Immigration and Customs Enforcement, <https://www.ice.gov/atd-faq> (last accessed: Oct. 21, 2023).

removal flights and who plan to reside in or near one of the designated FERM-destination cities.<sup>73</sup> Families who receive a final negative credible fear determination will generally be removed from the United States within 30 days.<sup>74</sup> The rapid timeline of the FERM program has made it almost impossible for families to find counsel in advance of their credible fear interviews and has made it challenging for families to attend all of the necessary appointments. As a result, families in FERM may be deported quite quickly.

### Merits Adjudication after a Favorable Credible Fear Interview

If an asylum seeker is found to have a credible fear of persecution, either by the asylum officer or the Immigration Court, the expedited removal order is vacated. Subsequently, a Notice to Appear (NTA) is issued, and the individual is placed in INA § 240 removal proceedings in Immigration Court, where they can seek asylum or other forms of protection (discussed further below).<sup>75</sup> The Circumvention of Lawful Pathways rule will still apply during the merits adjudication for asylum seekers who entered after May 11, 2023.

If the asylum seeker is detained, ICE may offer release after a favorable credible fear determination but is not required to do so. In the past, some individuals with fear-based claims had the right to seek review of an ICE detention decision by the immigration judge. Specifically, those who entered the United States without inspection<sup>76</sup> before apprehension had the right to an Immigration Court custody redetermination hearing while those deemed “arriving aliens”<sup>77</sup> by virtue of having presented at a port of entry were NOT eligible for Immigration Court custody redetermination hearings.<sup>78</sup> The possibility for immigration judge review of ICE detention decisions is now much more limited in most jurisdictions.<sup>79</sup> Many asylum seekers remain detained

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<sup>73</sup> FERM Initially included four destination cities (Baltimore, Chicago, Newark, and Washington D.C.) but new cities continue to be added. At the time of this publication, over 28 cities were designated as FERM destination cities, and more are expected to be added. See: Policy Brief: ICE’s Family Expedited Removal Management (FERM) Program Puts Families at Risk, National Immigrant Justice Center, Aug. 13, 2023, available at: <https://immigrantjustice.org/research-items/policy-brief-ices-family-expedited-removal-management-ferm-program-puts-families>; See also: *Id.*; Aadhithi Padmanabhan, *The Border Comes to Baltimore*, Baltimore Sun, May 22, 2023, <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-ice-ferm-baltimore-20230522-ekb22bwaxnes5ffaunhgogluqga-story.html>.

<sup>74</sup> ICE announces new process for placing family units in expedited removal, ICE.gov, May 11, 2023, available at: <https://www.ice.gov/news/releases/ice-announces-new-process-placing-family-units-expedited-removal>.

<sup>75</sup> See 8 C.F.R. § 1239.1; INA § 240(c)(4); 8 C.F.R. § 1240.11.

<sup>76</sup> Individuals who enter without inspection (EWI) enter the U.S. without permission and between designated ports of entry.

<sup>77</sup> “Arriving aliens” are defined as applicants for admission to the United States coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport. 8 CFR § 1.2

<sup>78</sup> Those individuals were, however, eligible for parole by ICE. See: Parole of Arriving Aliens Found to Have Credible Fear of Persecution or Torture, U.S. Immigration and Customs Enforcement, Aug. 8, 2023, [https://www.ice.gov/factsheets/credible-fear#:~:text=Under%20the%20new%20policy%2C%20noncitizens,Operations%20\(ERO\)%20for%20parole](https://www.ice.gov/factsheets/credible-fear#:~:text=Under%20the%20new%20policy%2C%20noncitizens,Operations%20(ERO)%20for%20parole).

<sup>79</sup> See *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018); *Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959 (2020); *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019).

throughout their entire asylum case, which impacts their ability to secure counsel and obtain evidence to support their claims.

**PRACTICE TIP:** After a favorable credible fear determination, you can always petition ICE for release of a detained client on parole or release on recognizance.<sup>80</sup> Check the law in the relevant jurisdiction to determine whether you also have the right to Immigration Court review of the ICE detention decision (including imposition of a monetary bond as a condition of release). You may also want to consider filing a habeas petition in federal court if the detention is unreasonable because of its length or other factors.

For families subjected to the FERM program, the ankle monitor will generally be removed from the head of household after a favorable credible fear interview. However, reporting requirements and use of the SmartLINK app may still be required.

### Asylum Merits Interview (AMI) Adjudication

Beginning in May 2022, a new interim regulation provided that the asylum office (rather than the Immigration Court) may in some cases adjudicate the merits of an asylum application presented by an individual who arrived at the southern border and passed a credible fear interview. Under this regulation, the merits adjudication by the asylum office takes place through a second interview referred to as the Asylum Merits Interview (AMI); and the credible fear interview is treated as the formal asylum application for the adjudication.<sup>81</sup> The merits interview mimics the affirmative asylum interviews available to those who were never apprehended at the border.<sup>82</sup> The process applies only to individuals who intend to reside in certain geographic locations (e.g. New York) upon release from detention prior to their asylum adjudication.<sup>83</sup> The presumption is that individuals subject to this program will be released from detention. The merits proceedings before the asylum office take place on a very expedited schedule that allows little time to secure counsel or prepare the case. The asylum officers are permitted to grant asylum or refer the matter for full immigration proceedings (discussed further [below](#)) before an immigration judge.<sup>84</sup>

**PRACTICE TIP:** If your adult client had a CFI in a Texas or San Diego detention facility and then was released to undergo asylum proceedings before an asylum office in another location, they are likely

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<sup>80</sup> For more information about parole, see Parole from ICE Detention: An Overview of the Law, American Immigration Lawyers Ass'n (AILA), (Apr. 15, 2020), available at: <https://www.aila.org/File/Related/20030201cd.pdf>.

<sup>81</sup> 87 Fed. Reg. 18078 (May 31, 2022).

<sup>82</sup> *Id.*

<sup>83</sup> AMIs are limited to individuals who intend to live in the following jurisdictions: Boston, MA; Chicago, IL; Los Angeles, CA; Miami, FL; New Orleans, LA; New York, NY; Newark, NJ; San Francisco, CA; Washington, D.C.; or Chicago. *Id.*, see also FACT SHEET: Implementation of the Credible Fear and Asylum Processing Interim Final Rule, USCIS, <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/fact-sheet-implementation-of-the-credible-fear-and-asylum-processing-interim-final-rule> (last accessed: Oct. 21, 2023).

<sup>84</sup> *Id.*

subject to expedited AMI proceedings. If you represent someone in this posture, you will need to act very quickly to prepare the case.

### Reinstatement of Removal and Reasonable Fear Interviews<sup>85</sup>

Reinstatement of removal is another accelerated removal process instituted in 1997. It applies to noncitizens who reenter the United States without authorization after having been removed in the past, even if the prior removal (deportation) was under an expedited removal order.<sup>86</sup> Under the INA, if a migrant returns to the United States without permission after previously being removed or departing voluntarily pursuant to an order of removal, the prior order of removal will be reinstated from its original date and is not subject to reopening or review.<sup>87</sup> DHS serves the migrant (or their attorney of record) with a reinstatement order, and arrangements are made for immediate removal.<sup>88</sup> Once DHS reinstates a prior order of removal, the migrant is not eligible for most relief under the INA, including asylum.<sup>89</sup> The individual is detained pending a determination on the reinstatement of a prior removal order and generally remains detained throughout any subsequent proceedings.<sup>90</sup> Reinstatement orders may sometimes be challenged through a petition for review by a circuit court.<sup>91</sup>

While the INA strips away the right to most relief for individuals subject to reinstatement of removal, it also provides that an individual may not be returned to a country where they would “more likely than not” face persecution or torture.<sup>92</sup> As a result, where a migrant subject to a reinstated removal order expresses fear of return to home country, she is entitled to a reasonable fear determination (discussed further below) by an asylum officer in order to evaluate whether she may qualify for protection under the Convention against Torture or for withholding of removal.<sup>93</sup> Additionally, victims of trafficking and certain serious crimes (i.e. individuals eligible for T or U nonimmigrant status) may qualify for waivers of prior orders of removal.<sup>94</sup>

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<sup>85</sup> For more information on navigating reinstatement of removal matters see Reinstatement of Removal, American Immigration Council, May 23, 2019,

[https://www.americanimmigrationcouncil.org/practice\\_advisory/reinstatement-removal](https://www.americanimmigrationcouncil.org/practice_advisory/reinstatement-removal).

<sup>86</sup> INA § 241(a)(5); 8 U.S.C. § 1231(a)(5); 8 C.F.R. § 241.8; *see also* Reinstatement of Removal, American Immigration Council, May 23, 2019,

[https://www.americanimmigrationcouncil.org/practice\\_advisory/reinstatement-removal](https://www.americanimmigrationcouncil.org/practice_advisory/reinstatement-removal).

<sup>87</sup> INA § 241(a)(5); 8 U.S.C. § 1231(a)(5).

<sup>88</sup> *See* 8 C.F.R. §241.8(b), 8 C.F.R. §292.5(a).

<sup>89</sup> *See* INA § 241(a)(5); 8 U.S.C. §1231(a)(5).

<sup>90</sup> *Id.*

<sup>91</sup> *See* INA § 242(b); 8 U.S.C. § 1252(b); *see also*, 8 C.F.R. § 241.8(b), 8 C.F.R. §292.5(a). For further information, *see* Reinstatement of Removal: Practice Advisory, American Immigration Council (2019),

[https://www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/reinstatement\\_of\\_removal.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/reinstatement_of_removal.pdf)

<sup>92</sup> *See id.*; 8 C.F.R. § 208.31.

<sup>93</sup> *See* 8 C.F.R. § 208.31.

<sup>94</sup> *See* INA § 101(a)(15)(T); 8 U.S.C. § 1101(a)(15)(T); INA § 101(a)(15)(U); 8 U.S.C. § 1101(a)(15)(U); INA § 212(d)(13); 8 U.S.C. § 1182(d)(13); INA § 212(d)(14); 8 U.S.C. § 1182(d)(14); INA § 212(a)(9)(A); 8 U.S.C. 1182(a)(8)(A); INA § 212(a)(9)(C)(i)(II); 8 U.S.C. § 1182(a)(9)(C)(i)(II).

### Reasonable Fear Interviews (RFIs)

To establish a reasonable fear of persecution or torture, the migrant must demonstrate a “reasonable possibility” that she will be persecuted in the future on account of race, religion, nationality, membership in a particular social group, or political opinion or a reasonable possibility that she will be tortured in the country of removal.<sup>95</sup> Similar to the credible fear interview, the asylum officer produces a written summary of the facts collected and the final determination. As with credible fear interviews, the circumstances of the interview often make it quite difficult for migrants to tell their stories effectively.

If the asylum officer finds that the migrant does not have a reasonable fear, the migrant may request that the Immigration Court review the decision in a very limited hearing that generally takes place by video. If the immigration judge agrees with the asylum officer’s negative reasonable fear determination, removal will generally take place quite quickly. It may be possible to ask the asylum office to reconsider a negative reasonable fear determination, but the asylum office exercises its authority to reconsider in only a limited number of cases.

Migrants who are removed under a reinstated removal order are subject to a permanent bar to reentry unless they apply for and are granted a waiver more than ten years after the date of their last departure.<sup>96</sup>

### Merits Adjudication after a Favorable Reasonable Fear Determination

If an individual is found to have a reasonable fear, either by the asylum office or the Immigration Court, the case will be referred to an immigration judge for “withholding-only proceedings.” These are not full removal (INA § 240) proceedings but are conducted in essentially the same way. They will result in a determination as to whether the individual qualifies for withholding of removal under INA § 241(b)(3), withholding of removal under the Convention Against Torture (CAT), or deferral of removal under CAT. To establish eligibility for these forms of relief, the migrant must demonstrate that it is “more likely than not” that she will experience persecution on account of a protected ground or torture under CAT. This is a higher standard than the well-founded fear of persecution required for asylum.

**PRACTICE TIP:** As with the credible fear transcript and decision, you should always try to obtain a copy of the RFI documentation (through a FOIA request, if necessary), as it may be used to undermine your client’s credibility. Additionally, note that your client should not be placed in reinstatement of removal proceedings if they were previously deported but returned to the United States to seek asylum at a port of entry (for example through a CBP One app appointment) and did not make a second unauthorized entry.

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<sup>95</sup> 8 C.F.R. § 1208.31(c). Note that “reasonable possibility” is the same standard used for establishing a “well-founded fear” in a full asylum claim under INA § 208, 8 U.S.C. § 1158.

<sup>96</sup> INA § 212(a)(9)(C); 8 U.S.C. § 1182(a)(9)(C). Note that this inadmissibility ground applies only to persons who reentered or attempted to reenter after April 1, 1997. See Reinstatement of Removal, American Immigration Council, May 23, 2019, [https://www.americanimmigrationcouncil.org/practice\\_advisory/reinstatement-removal](https://www.americanimmigrationcouncil.org/practice_advisory/reinstatement-removal).

During withholding-only proceedings, after a favorable reasonable fear interview, ICE has the authority to release a migrant on an order of supervision or parole. However, ICE often refuses to do so, meaning that many migrants are detained for the duration of their withholding-only hearings in immigration court, which may take several months. The Supreme Court has held that migrants in this posture have no right to Immigration Court review of ICE’s detention decision.<sup>97</sup> It is possible to file a federal habeas corpus petition to challenge the constitutionality of prolonged detention during withholding-only proceedings in appropriate cases.

### 240 Proceedings and the Family Group Dedicated Docket

While the government has an array of tools to subject migrants at the southern border to rapid removal proceedings, it may instead choose to place such migrants into full removal proceedings before the Immigration Court under INA § 240. In general, migrants who make a CBP One appointment and present at the border are placed in full removal proceedings under INA § 240. In addition, those individuals who are initially subjected to expedited removal but pass a credible fear interview are placed into INA § 240 removal proceedings before the Immigration Court. Finally, unaccompanied children (UACs) must be placed directly into INA § 240 removal proceedings as they cannot be subjected to expedited removal.<sup>98</sup>

Other materials describe INA § 240 removal proceedings in greater detail.<sup>99</sup> This primer simply notes that INA § 240 removal proceedings offer some procedural protections to migrants, including the right to counsel (although not at government expense),<sup>100</sup> the right to apply for relief from removal through an application for asylum or other relief, the right to present testimony and evidence, and the right to appeal an adverse decision to the Board of Immigration Appeals (BIA).<sup>101</sup> Certain rulings from the BIA can be appealed by filing a petition for review to the proper federal circuit court.<sup>102</sup>

At the conclusion of a removal proceeding, a migrant may be granted relief from removal such as asylum and be allowed to remain in the United States with legal status. A migrant may also be ordered removed. Migrants who depart from the United States after receiving a removal order under INA § 240 are prohibited

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<sup>97</sup> *Johnson v. Guzman-Chavez*, 142 S. Ct. 1827 (2022).

<sup>98</sup> 8 U.S.C. § 1232(a)(5)(D).

<sup>99</sup> See e.g., Hilel R. Smith, Cong. Rsch. Serv., IF11536, Formal Removal Proceedings: An Introduction (2021); Resources on Removal Proceedings, Clinic Legal, <https://cliniclegal.org/resources/removal-proceedings> (Last Accessed: Dec. 7, 2022); Immigration Court Practice Manual, Dep’t of Justice, <https://www.justice.gov/eoir/reference-materials/ic> (last accessed: Oct 27, 2023).

<sup>100</sup> INA § 292; 8 U.S.C. § 1362. This limiting language (“at no expense to the government”) is widely held to not prohibit government-funded counsel, rather, it merely relates to an individual’s ability to claim an entitlement or right to appointed counsel. See, Achieving America’s Immigration Promise: ABA Recommendations to Advance Justice, Fairness, and Efficiency, ABA Commission on Immigration (2021) available at: [https://www.americanbar.org/content/dam/aba/administrative/immigration/achieving\\_americas\\_immigration\\_promise.pdf](https://www.americanbar.org/content/dam/aba/administrative/immigration/achieving_americas_immigration_promise.pdf).

<sup>101</sup> INA § 240, 8 U.S.C. § 1229a.

<sup>102</sup> INA § 242, 8 U.S.C. § 1252.

from returning lawfully for ten years.<sup>103</sup> A waiver of this period of inadmissibility may be available to return lawfully (if a legal avenue exists) in some instances.

Even for those migrants who are placed in full INA § 240 removal proceedings after reaching the southern border, there are certain expedited mechanisms that may apply.<sup>104</sup> In a purported attempt to more efficiently adjudicate cases of families who arrive between ports of entry at the southern border, the Biden Administration announced an independent immigration court docket called the “Family Group Dedicated Docket” in May of 2021.<sup>105</sup> The stated goal is to adjudicate certain immigration cases involving families within 300 days of the initial Master Calendar hearing, which is a significantly shorter time period than the four-and-a-half year average waiting time for cases in traditional § 240 proceedings.<sup>106</sup> For a family group to be placed on the dedicated docket, they must have been apprehended between ports of entry on the southern border on or after May 28, 2021; placed into removal proceedings; and enrolled into Alternatives to Detention (ATD)<sup>107</sup> by ICE.<sup>108</sup> The case must also be proceeding in one of the selected cities where dedicated dockets have been established, namely: Boston, Massachusetts; Detroit, Michigan; El Paso, Texas; Los Angeles, California; Miami, Florida; Newark, New Jersey; New York, New York; San Diego, California; San Francisco, California; Denver, Colorado; and Seattle, Washington.

The dedicated docket system has resulted in removal orders for many families appearing on these accelerated dockets. The Transactional Records Access Clearinghouse (TRAC), an immigration data-tracking organization housed at Syracuse University, reported that from the end of 2022, over 110,000 cases had

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<sup>103</sup> INA § 212(a)(9)(A)(ii); 8 U.S.C. § 1182(a)(9)(A)(ii).

<sup>104</sup> For further information on representing families on the dedicated docket, See Family Group Dedicated Docket Pro Bono Manual, American Bar Association Commission on Immigration, Nov. 2022, [https://www.americanbar.org/content/dam/aba/administrative/immigration/pro\\_bono/pro-bono-manual-nov.pdf](https://www.americanbar.org/content/dam/aba/administrative/immigration/pro_bono/pro-bono-manual-nov.pdf). Asylum 101 for Families in the Dedicated Docket, American Bar Association Commission on Immigration, Mar. 16, 2022, <https://www.youtube.com/watch?v=2rCw4dN19Lo>.

<sup>105</sup> DHS and DOJ Announce Dedicated Docket Process for More Efficient Immigration Hearings, Dept. of Justice, May 28, 2021, <https://www.justice.gov/opa/pr/dhs-and-doj-announce-dedicated-docket-process-more-efficient-immigration-hearings>.

<sup>106</sup> *Id.*; The Biden Administration’s Dedicated Docket: Inside Los Angeles’ Accelerated Court Hearings for Families Seeking Asylum, UCLA Center for Immigration Law and Policy, May 2022, [https://law.ucla.edu/sites/default/files/PDFs/Center for Immigration Law and Policy/Dedicated Docket in LA Report FINAL 05.22.pdf](https://law.ucla.edu/sites/default/files/PDFs/Center%20for%20Immigration%20Law%20and%20Policy/Dedicated%20Docket%20in%20LA%20Report%20FINAL%2005.22.pdf).

<sup>107</sup> ICE’s Alternatives to Detention (or ATD) program imposes certain conditions on those released from detention, including ankle monitors, telephonic monitoring, check-in meetings at ICE offices, and/or home visits. See ICE, Detention Management (Feb. 18, 2022), <https://www.ice.gov/detain/detention-management>.

<sup>108</sup> DHS and DOJ Announce Dedicated Docket Process for More Efficient Immigration Hearings, Dept. of Justice, May 28, 2021, <https://www.justice.gov/opa/pr/dhs-and-doj-announce-dedicated-docket-process-more-efficient-immigration-hearings>.

been assigned to the Dedicated docket.<sup>109</sup> During that same period 11,225 were marked as completed, but only thirteen of those cases resulted in a grant of asylum or another form of removal relief.<sup>110</sup> A 2022 UCLA study of the Dedicated Docket in Los Angeles raised several “due process” deficiencies in the dedicated docket, including lack of access to counsel in hearings with shorter periods for preparation and a high percentage of removal orders based on respondents’ failure to appear.<sup>111</sup> Access to asylum is further frustrated for families on the dedicated docket by the Circumvention of Lawful Pathways rule given its restrictions on asylum for individuals who crossed the U.S. border without passing through a port of entry after making a CBP One appointment.

**PRACTICE TIP:** If you practice in one of the designated docket cities, you should always check to see whether a particular family case has been placed on the dedicated docket. If you are working with a dedicated docket case, you will need to move quickly to prepare the case or seek to have it removed from the special docket.

## NON-IMMIGRATION BORDER PROCEEDINGS AND POLICIES

### Operation Lone Star

Layered on top of the federal government’s laws, policies, and procedures operating at the U.S. southern border, the state of Texas has adopted practices that impact migrants reaching the Texas/Mexico border region. These practices are part of an initiative by Texas Governor Greg Abbott known as Operation Lone Star.<sup>112</sup> Operation Lone Star encompasses several policies that attempt to punish and deter migrants in Texas.

First, under Operation Lone Star, state and local officials may criminally prosecute recently-arrived migrants encountered near the border. These migrants are generally prosecuted on misdemeanor criminal trespassing charges. They are held in converted state prisons during the proceedings which take place in the state criminal justice system, although apart from other criminal proceedings.<sup>113</sup> Once released from the state facilities, whether because of a conviction and completion of sentence, dismissal of the criminal

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<sup>109</sup> Unrepresented Families Seeking Asylum on “Dedicated Docket” Ordered Deported by Immigration Courts, TRAC Jan. 13, 2022, <https://trac.syr.edu/immigration/reports/674/>. A National Assessment of the Biden Administration’s Dedicated Docket Initiative, TRAC Dec. 6, 2022, <https://trac.syr.edu/reports/704/#:~:text=The%20Immigration%20Court's%20Dedicated%20Docket,been%20assigned%20to%20this%20initiative.>

<sup>110</sup> *Id.*

<sup>111</sup> The Biden Administration’s Dedicated Docket: Inside Los Angeles’ Accelerated Court Hearings for Families Seeking Asylum, UCLA Center for Immigration Law and Policy, May 2022, [https://law.ucla.edu/sites/default/files/PDFs/Center for Immigration Law and Policy/Dedicated Docket in LA Report FINAL 05.22.pdf](https://law.ucla.edu/sites/default/files/PDFs/Center%20for%20Immigration%20Law%20and%20Policy/Dedicated%20Docket%20in%20LA%20Report%20FINAL%2005.22.pdf).

<sup>112</sup> Governor Greg Abbott, Executive Order GA-41 (July 7, 2022), <https://gov.texas.gov/uploads/files/press/EO-GA-41.pdf>; Governor Greg Abbott, Proclamation (May 31, 2021), available at: [https://gov.texas.gov/uploads/files/press/DISASTER border security IMAGE 05-31-2021.pdf](https://gov.texas.gov/uploads/files/press/DISASTER%20border%20security%20IMAGE%2005-31-2021.pdf).

<sup>113</sup> Indigent Defense Program, Operation Lone Star Indigent Defense, <https://www.olsdefense.org/indigent-defense-program> (last accessed: Oct. 21, 2023).



charges, or payment of bond, they are turned over to federal immigration authorities. The federal immigration authorities then process the migrants much like they process any other migrant whom they encounter at the border—for example, by placing them into INA § 240 proceedings or expedited removal.

**PRACTICE TIP:** If your client was charged in the Texas criminal justice system upon arrival in the United States, you should determine whether there are ongoing criminal proceedings still pending. If a client fails to appear at a hearing, a warrant may be issued against your client if they do not attend hearings and other proceedings in the state of Texas. In addition, your client may have been previously represented by an attorney appointed by the Lubbock Private Defenders Office. This office coordinates and oversees the defense representation of indigent individuals charged under Operation Lone Star. More information can be found at [www.olsdefense.org](http://www.olsdefense.org).

Second, under Operation Lone Star, some migrants encountered by Texas authorities within the state of Texas may be transported back to the border and handed over to Customs and Border Protection officials. CBP then decides whether to process them for expedited removal or place them in INA § 240 proceedings.

Third, beginning in 2022, the state of Texas began to fund and provide for the busing of certain migrants to Chicago, Washington, D.C., New York, Denver and Los Angeles. These migrants have been processed by CBP and released to live within the United States during ongoing immigration proceedings under INA § 240 (regular removal proceedings). They are then bused to locations in other parts of the country regardless of where CBP expected them to be residing. Arizona and Florida have also engaged in similar transports of migrants to other states.

**PRACTICE TIP:** If your client was subjected to busing under Operation Lone Star, you will need to determine what address your client has on file with DHS and with the Immigration Court. If the address is different from the location where they are residing after being bused out of state, then you will need to file address change forms promptly with DHS and the Immigration Court. You should also verify where any ICE check-ins are scheduled to take place and where the Notice to Appear has been filed or is intended to be filed. You may need to seek a change of venue for the proceedings and request a transfer of ICE reporting requirements.

Additionally, in July of 2023, the State of Texas installed a “marine barrier” on the Rio Grande River.<sup>114</sup> The floating barrier is comprised of large orange buoys tethered to the riverbed.<sup>115</sup> The move has raised grave

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<sup>114</sup> See: Press Release, Office of the Texas Governor Greg Abbott, Operation Lone Star Boosts Border Response With New Marine Barriers (Jul 14, 2023) (available at: <https://gov.texas.gov/news/post/operation-lone-star-boosts-border-response-with-new-marine-barriers>).

<sup>115</sup> *Id.*; Nick Miroff, Texas to install floating barriers in Rio Grande to block migrants, Washington Post, June 8, 2023, <https://www.washingtonpost.com/nation/2023/06/08/texas-rio-grande-barriers-migrants/>; Rosa Flores and Dave Alsup, Texas deploys floating barrier in Rio Grande River to deter migrant crossings at US-Mexico border, CNN, Aug. 3, 2023, <https://edition.cnn.com/2023/07/07/us/texas-marine-floating-barrier-migrants/index.html>.

concerns about the already high drowning risks to migrants and U.S. agents conducting water rescues.<sup>116</sup> On July 24, 2023, the Department of Justice sued the Texas Governor, asserting that the construction of the barrier was a violation of the Rivers and Harbors Act.<sup>117</sup> On September 6, 2023, the federal district court in the Western District of Texas prohibited the construction of the barrier and ordered dismantling of the current structure at the state's expense.<sup>118</sup> Governor Abbott and the State of Texas appealed the decision to the Fifth Circuit and were granted a stay of the court's decision, allowing the barrier to remain as the case continues.<sup>119</sup>

### Prosecutions for Entry or Reentry under 8 USC § 1325 and § 1326

Two federal laws criminalize noncitizens' entry into the United States or attempts to enter without authorization. The misdemeanor offense of "Improper Entry by Alien," also frequently referred to as "illegal entry," is contained at section 275 of the INA and codified at 8 USC § 1325. The felony offense of "Reentry of Removed Alien," also referred to as "illegal reentry," is contained at section 276 of the INA and codified at 8 USC § 1326. In Fiscal Year 2023, 20,127 cases were initiated against migrants on the grounds of illegal entry or illegal reentry.<sup>120</sup>

The misdemeanor improper entry statute criminalizes three different methods of unlawful entry: entry or attempted entry "at a time or place other than as designated by immigration officers;" entry by "elud[ing] examination or inspection by immigration officers;" and entry or attempted entry "by a willfully false or misleading representation or the willful concealment of a material fact."<sup>121</sup> The maximum sentence for a first conviction under the statute is six months, and any subsequent conviction could result in a sentence of up to

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<sup>116</sup> Nick Miroff, Texas to install floating barriers in Rio Grande to block migrants, Washington Post, June 8, 2023, <https://www.washingtonpost.com/nation/2023/06/08/texas-rio-grande-barriers-migrants/>; Rosa Flores and Dave Alsup, Texas deploys floating barrier in Rio Grande River to deter migrant crossings at US-Mexico border, CNN, Aug. 3, 2023, <https://edition.cnn.com/2023/07/07/us/texas-marine-floating-barrier-migrants/index.html>; Aaron Reichlin-Melnick, Fifth Circuit Allows Texas to Keep Its Controversial 'Buoy Berrier' in Place for Now, Immigration Impact, Sept. 14, 2023 <https://immigrationimpact.com/2023/09/14/fifth-circuit-ruling-buoy-barrier-texas/?emci=89d78dc5-fb53-ee11-9937-00224832e811&emdi=968b977e-6255-ee11-9937-00224832e811&ceid=10467753>. Rosa Flores and Dave Alsup, Texas deploys floating barrier in Rio Grande River to deter migrant crossings at US-Mexico border, CNN, Aug. 3, 2023, <https://edition.cnn.com/2023/07/07/us/texas-marine-floating-barrier-migrants/index.html>; Aaron Reichlin-Melnick, Fifth Circuit Allows Texas to Keep Its Controversial 'Buoy Berrier' in Place for Now, Immigration Impact, Sept. 14, 2023 <https://immigrationimpact.com/2023/09/14/fifth-circuit-ruling-buoy-barrier-texas/?emci=89d78dc5-fb53-ee11-9937-00224832e811&emdi=968b977e-6255-ee11-9937-00224832e811&ceid=10467753>.

<sup>117</sup> Complaint, *U.S.A. v. Abbott*, No. 1:23-cv-00853 (W.D.T.X. Jul 24, 2023), Available at:

<https://s3.documentcloud.org/documents/23885825/usvabbottborderbuoyscomp072423.pdf>.

<sup>118</sup> *U.S.A. v. Abbott*, No. 1:23-CV-853-DAE, (W.D.T.X., Sep. 6, 2023).

<sup>119</sup> Unpublished Order, *U.S.A. v. Abbot*, No. 1:23-CV-00853-DAE, (5<sup>th</sup> Cir., Sep 7., 2023) (available at:

<https://storage.courtlistener.com/recap/gov.uscourts.txwd.1172749163/gov.uscourts.txwd.1172749163.53.o.pdf>).

<sup>120</sup> Prosecuting Immigration Crimes Report (PICR), Offices of the United States Attorneys, Dep't of Justice, Oct. 10, 2023, <https://www.justice.gov/usao/resources/PICReport>.

<sup>121</sup> INA § 275(a); 8 U.S.C. § 1325(a).

2 years in prison.<sup>122</sup> A conviction for the misdemeanor offense of improper entry does not have any independent immigration consequences—the conviction does not correspond to a specific criminal ground of inadmissibility or removability (deportability)—but the facts necessary to sustain a conviction could establish inadmissibility.<sup>123</sup>

The felony offense of illegal reentry focuses not on *how* a noncitizen enters the United States but instead on the noncitizen’s immigration history. Only a noncitizen who “has been denied admission, excluded, deported or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding” can be prosecuted for illegal reentry.<sup>124</sup> The reentry statute criminalizes entry, attempted entry, or a noncitizen’s being “found in” the United States without consent from the Attorney General to reapply for admission.<sup>125</sup> The maximum sentence for a violation of the illegal reentry statute is two years’ imprisonment,<sup>126</sup> but that maximum is increased to 10 years if the defendant previously has been convicted of a felony; a noncitizen “whose removal was subsequent to a conviction for commission of an aggravated felony” faces a maximum sentence of 20 years in prison.<sup>127</sup> Unlike the misdemeanor offense, a conviction under 8 U.S.C. § 1326 constitutes an independent criminal ground of removability for an aggravated felony if the noncitizen “was previously deported on the basis of a conviction for [an aggravated felony].”<sup>128</sup>

In 2018, then-Attorney General Jeff Sessions announced a “zero-tolerance policy” at the U.S.-Mexico border,<sup>129</sup> under which every arrest for unlawful entry was to be referred for federal criminal prosecution. The policy, by design,<sup>130</sup> caused the 2018 family separation crisis,<sup>131</sup> as children cannot be held in criminal custody with their parents or guardians. The dramatic increase in criminal prosecutions of migrants, including asylum seekers, led to the expansion of a Department of Justice program known as Operation Streamline, which had been used since 2005 at various times in every border state except California, and

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<sup>122</sup> *Id.*

<sup>123</sup> For example, a conviction for a violation of 8 U.S.C. § 1325(a)(3) would also prove inadmissibility under INA § 212(a)(6)(C), 8 U.S.C. § 1325(a)(6)(C) because fraud or willful misrepresentation is an element of the offense.

<sup>124</sup> INA § 276(a)(1); 8 U.S.C. § 1326(a)(1).

<sup>125</sup> INA § 276(a)(2); 8 U.S.C. § 1326(a)(2).

<sup>126</sup> *Id.*

<sup>127</sup> INA § 276(b); 8 U.S.C. § 1326(b).

<sup>128</sup> INA § 101(a)(43)(O); 8 U.S.C. § 1101(a)(43)(O). It is unsettled whether a conviction under § 1326 would still qualify as an aggravated felony if the prior aggravated felony conviction were vacated or if the statute of conviction were no longer considered an aggravated felony.

<sup>129</sup> Press Release, U.S. Dep’t. of Justice, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (April 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>.

<sup>130</sup> *See id.*; *see also*, Melissa del Bosque, “The El Paso Experiment: A Public Defender’s Lonely Fight Against Family Separation,” *The Intercept* (Nov. 1, 2020) available at: <https://theintercept.com/2020/11/01/el-paso-family-separation-border-patrol/>.

<sup>131</sup> Richard Gonzales, “Sessions Says ‘Zero Tolerance’ for Illegal Border Crossers, Vows to Divide Families,” NPR (May 7, 2018), available at: <https://www.npr.org/sections/thetwo-way/2018/05/07/609225537/sessions-says-zero-tolerance-for-illegal-border-crossers-vows-to-divide-families>.

which was implemented in the Southern District of California in 2018.<sup>132</sup> Operation Streamline involves the expedited prosecution of unlawful entry offenses, primarily misdemeanor unlawful entry, and therefore most Operation Streamline cases are heard by federal magistrate judges. The volume of cases “requires nearly all judges to combine the initial appearance, arraignment, plea, and sentencing into one hearing.”<sup>133</sup> However, the Ninth Circuit Court of Appeals concluded in 2009 that one court’s practice of taking guilty pleas en masse violated federal law.<sup>134</sup>

The nature of Operation Streamline prosecutions makes them confusing to migrants and asylum seekers who are subjected to this expedited criminal program. Many Streamline defendants do not understand that they were represented by lawyers,<sup>135</sup> or that they were convicted of crimes, and it is common for noncitizens with unlawful entry or reentry convictions to believe that they were appearing in front of immigration judges instead of federal magistrate or district court judges.

**PRACTICE TIP:** A client’s federal RAP sheet is a helpful place to begin an investigation into any possible prosecutions or convictions for unlawful entry or reentry. Because arrest for these charges results in expedited removal or reinstatement of removal nearly 100 percent of the time, it is also a good opportunity to identify dates and locations for potential FOIA requests to US Citizenship and Immigration Services, Customs and Border Protection or the DHS Office of Biometric Identity Management (OBIM). A RAP sheet can be collected by submitting a standard FBI fingerprint form (FD-1164). A review of the criminal case documents, which should be available,<sup>136</sup> will also reveal the name of the defense attorney who represented a client in the criminal case. Federal public defenders and Criminal Justice Act (CJA) appointed attorneys can be great resources to learn more about a client and to obtain information about both the client’s criminal case and any related immigration history (e.g., records from prior removal proceedings).

## PRIOR ENFORCEMENT POLICIES AT THE BORDER

### Metering

Since at least 2016, CBP has unlawfully turned back many migrants approaching U.S. ports of entry at the southern border (for example, on the bridge between Matamoros, Tamaulipas, Mexico, and Brownsville, Texas) to seek asylum and prevented them from entering the United States. Instead, they were turned back to Mexico, allegedly based on CBP’s lack of capacity to process them. Before the adoption of the CBP One

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<sup>132</sup> Stan Alarcon, “California Starts Streamlining Prosecution For People Who Cross Border Illegally,” *All Things Considered*, NPR (July 13, 2018), available at: <https://www.npr.org/2018/07/13/628907270/california-starts-streamlining-prosecution-for-people-who-cross-border-illegally>.

<sup>133</sup> Joanna Lydgate, “Assembly-Line Justice: A Review of Operation Streamline,” *California Law Review* 98, no. 2 (2010), 486.

<sup>134</sup> *Id.* n.23 (citing *United States v. Roblero-Solis*, 588 F.3d 692 (9th Cir. 2009)).

<sup>135</sup> Ted Robbins, “Border Patrol Program Raises Due Process Concerns,” *Morning Edition*, NPR (Sept. 13, 2010), available at: <https://www.npr.org/2010/09/13/129780261/border-patrol-program-raises-due-process-concerns>.

<sup>136</sup> Public Access to Court Electronic Records, PACER Case Locator, <https://pcl.uscourts.gov/pcl/index.xhtml?faces-redirect=true>.

appointment process, long informal wait lists developed for individuals waiting in Mexico to seek asylum in the United States. Migrants often waited for months or years in the hope of having the opportunity to access the U.S. asylum process. In 2017, immigrants' rights advocates filed a class action lawsuit, *Al Otro Lado v. Mayorkas*, against the government arguing that the “turnback” policy, including metering, was unlawful under the INA, the Administrative Procedure Act (APA), the due process clause of the Fifth Amendment, and the doctrine of non-refoulement.<sup>137</sup>

Starting in March 2020, with the adoption of the Title 42 policy, the employment of metering waned given that U.S. authorities could simply expel migrants to Mexico without processing them for asylum.<sup>138</sup> Then, in September of 2021, the U.S. District Court for the Southern District of California found that turnbacks at ports of entry are unlawful because they violate Defendants’ statutory duties to inspect and process asylum seekers as well as the Fifth Amendment.<sup>139</sup> In November of 2021, CBP rescinded the metering policy.<sup>140</sup>

Since then, the implementation and required use of the CBP One App has been criticized as a digital form of metering. Because only limited appointments are available each day, migrants who decide to enter the United States at a port of entry must often wait for weeks, months, or indefinitely to obtain a CBP One appointment.

### Migrant Protection Protocols (MPP)<sup>141</sup>

The Migrant Protection Protocols (MPP) or “Remain in Mexico” policy was implemented by the Trump Administration in January 2019. Under MPP, border officials placed asylum seekers in INA § 240 proceedings but returned them to Mexico to await their hearings in the United States.<sup>142</sup> The hearings took place at specially erected tent courts located within CBP facilities in Laredo and Brownsville, Texas, and in Immigration Courts near the border in San Diego, California and El Paso, Texas. Between January 2019 and December 2020, more than 70,000 people were returned to precarious circumstances in Mexico to await court hearings under MPP. In March 2020, all pending hearings were suspended due to the COVID-19

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<sup>137</sup> *Al Otro Lado v. Mayorkas*, No. 17-cv-02366-BAS-KSC, (S.D. Cal., Sept. 2, 2021).

<sup>138</sup> Congressional Research Service, CRS LSB10295, The Department of Homeland Security’s “Metering” Policy: Legal Issues (2022).

<sup>139</sup> *Al Otro Lado v. Mayorkas*, No. 17-cv-02366-BAS-KSC, (S.D. Cal., Sept. 2, 2021).

<sup>140</sup> Memorandum from Troy A. Miller, Acting Commissioner of U.S. Customs and Border Protection regarding Guidance for Management and Processing of Undocumented Noncitizens at Southwest Border Land Ports of Entry to William A. Ferrara, Executive Assistant Commissioner of the Office of Field Operations (Nov. 1, 2021) available at: <https://www.cbp.gov/sites/default/files/assets/documents/2021-Nov/CBP-mgmt-processing-non-citizens-sw-b-lpoes-signed-Memo-11.1.2021-508.pdf>.

<sup>141</sup> For more information on the Migrant Protection Protocols, see What is the Migrant Protection Protocols “Remain in Mexico” Program?, American Bar Association ProBAR South Texas Pro Bono Asylum Representation Project, <https://www.americanbar.org/content/dam/aba/administrative/immigration/probar-mpp-infographic.pdf>.

<sup>142</sup> See Center for Migration Studies, The Migrant Protection Protocols: Policy History and Latest Updates, Available at: <https://cmsny.org/mpp-briefing-graphic/>.

pandemic, leaving those individuals subject to MPP in limbo regarding their asylum cases and facing insecurity and danger in Mexico.<sup>143</sup>

The Biden Administration terminated MPP on June 1, 2021, and began to allow some asylum seekers subjected to MPP to enter the United States.<sup>144</sup> However, litigation in the *Texas v. Biden* case blocked the termination of the program.<sup>145</sup> For several months in late 2021 the process to bring persons subjected to MPP into the United States was halted. Beginning in December, 2021, *new* individuals were enrolled into MPP, and MPP hearings moved forward in the border Immigration Courts.<sup>146</sup>

On October 29, 2021, the Secretary of Homeland Security again terminated MPP by a memorandum which was slated to be implemented “as soon as practicable after issuance of a final judicial decision to vacate the *Texas* injunction.”<sup>147</sup> In June of 2022, the U.S. Supreme Court reversed the injunction that had blocked the termination of MPP. The Court also suggested that the October 29, 2021 Memorandum was a lawful agency action.<sup>148</sup> Despite the reversal of the injunction, the Supreme Court remanded the case for further analysis of whether the rescission memorandum ending MPP violated the Administrative Procedure Act.<sup>149</sup> On December 15, 2022, the U.S. District Court for the Northern District of Texas vacated the October 29 Memorandum and impeded the government’s decision to terminate MPP.<sup>150</sup> The decision restored the prior government memorandum establishing MPP (referred to as the Nielsen Memo),<sup>151</sup> but nothing in the Nielsen memo requires anyone to be placed in MPP; it simply presents the protocols as an option for DHS to

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<sup>143</sup> *Id.*

<sup>144</sup> See Memorandum from Secretary of Homeland Security Alejandro Mayorkas on Termination of the Migrant Protection Protocols (Jun. 1, 2021) (available at: [https://www.dhs.gov/sites/default/files/publications/21\\_0601\\_termination\\_of\\_mpp\\_program.pdf](https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf)); See also: DHS, Court Ordered Reimplementation of the Migrant Protection Protocols, <https://www.dhs.gov/migrant-protection-protocols>.

<sup>145</sup> *Texas v. Biden*, No. 2:21-cv-067, 2021 WL 3603341 (N.D. Tex. Aug. 13, 2021).

<sup>146</sup> 5,000 Asylum-Seekers Added to the Migrant Protection Protocols 2.0, Few are Granted Asylum, TRAC Immigration, Jun. 14, 2022, <https://trac.syr.edu/immigration/reports/686/>.

<sup>147</sup> See Memorandum from Secretary of Homeland Security Alejandro Mayorkas on Termination of the Migrant Protection Protocols (Oct. 29, 2021) (available at: [https://www.dhs.gov/sites/default/files/2022-01/21\\_1029\\_mpp\\_termination-memo.pdf](https://www.dhs.gov/sites/default/files/2022-01/21_1029_mpp_termination-memo.pdf)); See also: DHS, Court Ordered Reimplementation of the Migrant Protection Protocols, available at: <https://www.dhs.gov/migrant-protection-protocols>.

<sup>148</sup> *Biden v. Texas*, 142 S. Ct. 2528 (2022).

<sup>149</sup> *Id.*

<sup>150</sup> See *Texas v. Biden*, Case No. 2:21-CV-067-Z (N.D. Tex. 2022). See also Daniel Wiessner, *Biden's Bid to End "Remain in Mexico" Immigration Policy Blocked by Judge*, REUTERS, Dec. 16, 2022, available at <https://www.reuters.com/legal/government/bidens-bid-end-remain-mexico-immigration-policy-blocked-by-judge-2022-12-16/>.

<sup>151</sup> The Nielsen Memorandum is available at: [https://www.dhs.gov/sites/default/files/publications/19\\_0129\\_OPA\\_migrant-protection-protocols-policy-guidance.pdf](https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf).

use at their discretion.<sup>152</sup> Currently, no enrollments into MPP are taking place, and no MPP hearings are being held. The litigation on the MPP policy and its termination remains ongoing.<sup>153</sup>

Multiple challenges persist for asylum seekers who were placed in the initial version of MPP. Some may still be waiting in Mexico and have not been processed into the United States to pursue their § 240 proceedings. Many others received *in absentia* removal orders during MPP because they could not attend their hearings in the border courts for reasons ranging from physical danger to lack of meaningful notice. Still others entered the United States while their MPP cases were still pending but have had difficulty transferring their cases to regular dockets within the United States. And many received negative decisions on their asylum claims in MPP proceedings that lacked minimal due process guarantees.<sup>154</sup>

**PRACTICE TIP:** If your client was returned to Mexico but was also placed in INA § 240 proceedings, you will need to assess the procedural status of the case very carefully. You may need to file a motion to reopen the proceedings or a change of venue. When possible, it is recommended that you reach out to ICE ahead of filing the motion to reopen to offer opposing counsel the opportunity to join the motion. A joint motion to reopen will increase the likelihood of a grant from the court. If ICE is reluctant to join a motion to reopen, you can submit the motion independently.<sup>155</sup>

## Title 42<sup>156</sup>

In March of 2020, the U.S. government adopted an unprecedented border policy under Title 42 of the Public Health Services Act, which was construed to permit expulsions and turnbacks of migrants, purportedly for

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<sup>152</sup> *Id.* In February of 2023, the Mexican government released a statement that it opposed a possible restart of the Remain in Mexico policy. See Kylie Madry, *Mexico Opposes restart of U.S. 'Remain in Mexico' immigration policy*, Reuters (Feb. 6, 2023), <https://www.reuters.com/world/americas/mexico-rejects-possible-remain-mexico-revamp-plan-2023-02-07/>.

<sup>153</sup> The Biden Administration has since appealed the case to the Fifth Circuit Court of Appeals. See: Notice of Appeal, *Texas v. Biden*, Case No. 2:21-CV-067-Z (N.D. Tex. 2022); *Biden v. Texas*, No. 23-10143 (5<sup>th</sup> Cir. 2023).

<sup>154</sup> See *Immigrant Defenders Law Center v. Mayorkas*, No. 2:20-cv-09893 (C.D. Cal. R., Oct. 2020); See generally: *Immigrant Defenders Law Center V. Mayorkas*, Center for Gender and Refugee Studies, <https://cgrrs.uclawsf.edu/our-work/litigation/immigrant-defenders-law-center-v-mayorkas>.

<sup>155</sup> For further information on reopening a case for a client impacted by MPP, see: Practice Advisory: Motions to Reopen Migrant Protection Protocols Removal Orders, National Immigration Project and Center for Gender & Refugee Studies, Aug. 18, 2023 (available at: <https://ninpilg.org/work/resources/practice-advisory-motions-reopen-migrant-protection-protocols-removal-orders>).

<sup>156</sup> For more information on Title 42, See Title 42: Overview and Impact, Justice For Immigrants, May 2021, available at: <https://justiceforimmigrants.org/wp-content/uploads/2021/05/Title-42-Overview-and-Impact.pdf>; Practice Pointer: Title 42 and Asylum Processing at the Southern Border, American Immigration Lawyers Association, Oct. 2022, available at: <https://www.aila.org/advo-media/aila-practice-pointers-and-alerts/practice-pointer-title-42-and-asylum-processing>.

the purpose of protecting public health during the COVID-19 pandemic.<sup>157</sup> Under Title 42, migrants entering the United States without inspection or seeking entry to the United States at a port of entry at the southern border were expelled or turned back without any asylum or other immigration processing. Under the policy, migrants were expelled approximately two point eight million times—regardless of their eligibility for protection in the United States.<sup>158</sup> The policy relied on Section 265 of Title 42 of the United States Code, which provides for prohibiting the entry of individuals who pose a serious danger of introducing a communicable disease into the United States.<sup>159</sup> From the beginning, public health officials and scientists asserted that there was not a strong public health rationale for the rule, but the Title 42 policy remained in place for more than three years.<sup>160</sup>

Those expelled under Title 42 could be detained for a period of hours or days at the border before being returned to their home countries, where they could face persecution, or to Mexico if the government of Mexico agreed to accept them. They did not receive removal orders and were not inadmissible under the INA as a result of the expulsion. Customs and Border Protection could exempt any individual from expulsion under Title 42 based on a formal request or on their own initiative, but there was no mechanism to ensure accountability over exemption decisions.

Title 42 did not end when the Biden Administration took office. Litigation and policy choices by the Biden Administration limited Title 42 but turn backs and expulsions continued to take place. In July of 2021, the CDC ordered that Title 42 could not be applied to unaccompanied migrant children.<sup>161</sup> In March of 2022, a court of appeals ruled that the government could not remove families to a country where they would face persecution on account of their race, religion, nationality, membership in a particular social group, or political opinion or to a country where they would be tortured.<sup>162</sup> As a result, where a family member affirmatively claimed fear, screening interviews were required. However, these subsequent screenings were

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<sup>157</sup> See Control of Communicable Diseases; Foreign Quarantine: Suspension of the Right to Introduce and Prohibition of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 56,424 (Oct. 13, 2020); Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17,060, 17,061 (Mar. 20, 2020). “Turning back” refers to turning migrants back to Mexico and away from a port of entry.

<sup>158</sup> Muzaffar Chishti and Kathleen Bush-Joseph, *U.S. Border Asylum Policy Enters New Territory Post-Title 42*, Migration Policy Institute, (May 25, 2023), <https://www.migrationpolicy.org/article/border-after-title-42?eType=EmailBlastContent&eld=9e623523-df68-406d-b631-947cc1e56f2a>.

<sup>159</sup> See American Immigration Council’s Fact Sheet: A Guide to Title 42 Expulsions at the Border. Available at: <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border>.

<sup>160</sup> *Id.*

<sup>161</sup> See: Public Health Determination Regarding an Exception for Unaccompanied Noncitizen Children From the Order Suspending the Right To Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists, 86 Fed. Reg. 38717 (Jul. 22, 2021); see also: *P.J.E.S. v. Mayorkas*, Case No. 20-5357 (DC Cir. 2022).

<sup>162</sup> *Huisha Huisha v. Mayorkas*, 27 F.4th 718 (D.C. Cir. 2022).



often inadequate and were not uniformly conducted across the border; many families (and countless single adults) continued to be expelled or turned back without an opportunity to express fear.

In May of 2022, the Biden Administration sought to terminate the Title 42 policy, but the termination announcement was met with litigation and an injunction from a district court in Louisiana.<sup>163</sup> Then, in November of 2022, the U.S. District Court for the District of Columbia struck down the Title 42 expulsion policy after finding that it violated the Administrative Procedure Act (APA).<sup>164</sup> More specifically, the court found that the policy was arbitrary and lacked reasoning because the Centers for Disease Control and Prevention (CDC) did not adequately justify the policy, nor had it offered sufficient evidence that the policy was necessary.<sup>165</sup> That decision was stayed, and the Biden Administration appealed it.<sup>166</sup> The Title 42 policy was terminated on May 11, 2023.<sup>167</sup>

**PRACTICE TIP:** If you have a client who was returned to Mexico one or more times during the pandemic before finally making it into the United States, they may have been subjected to Title 42. The prior turnbacks or expulsions should have no meaningful impact on their current immigration case and do not make them inadmissible to the United States.

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<sup>163</sup> *Arizona v. CDC*, 6:22-CV-00885-RRS-CBW (W.D. La. Apr. 27, 2022).

<sup>164</sup> *Huisha Huisha v. Mayorkas*, No. 21-100 (EGS) (D.D.C. Nov. 15, 2022).

<sup>165</sup> *Id.*

<sup>166</sup> Defendant's Notice Regarding Decision to Appeal the Court's November 15, 2022 Order and November 22, 2022 Final Judgement, *Huisha Huisha v. Mayorkas*, No. 21-100 (EGS) (D.D.C. Nov. 7, 2022), ECF No. 179. *Arizona, et al. v. Mayorkas*, 598 U. S. \_\_\_\_ (2022), available at [https://www.supremecourt.gov/opinions/22pdf/22a544\\_n758.pdf](https://www.supremecourt.gov/opinions/22pdf/22a544_n758.pdf).

<sup>167</sup> See: *End of the Federal COVID-10 Public Health Emergency (PHE) Declaration*, CDC.gov, <https://www.cdc.gov/coronavirus/2019-ncov/your-health/end-of-phe.html> (last accessed: Jun. 26, 2023); Migration and Borders: Expanding Lawful Pathways + Enhanced Enforcement, dhs.gov, <https://www.dhs.gov/immigrationlaws#:~:text=When%20the%20CDC's%20Title%2042,a%20legal%20basis%20to%20stay>. (last accessed: June 26, 2023); see also: Brad Dress, *Supreme Court Orders Title 42 Border Restrictions to Remain in Place*, THE HILL, Dec. 27, 2022, available at [https://thehill.com/regulation/court-battles/3789885-supreme-court-orders-title-42-border-restrictions-to-remain-in-place/?email=985fo89aa2c0463972a74556fbbdd201706049d2&email=937f7758c95b8a4965a75c6bf469064d&mailb=7063ae6c8751f3f160f9dd1dca67a9738976ec47880b5778167765c925fbd7e5&utm\\_source=Sailthru&utm\\_medium=email&utm\\_campaign=12.27.22%20SR%20Title%2042%20Supreme%20Court](https://thehill.com/regulation/court-battles/3789885-supreme-court-orders-title-42-border-restrictions-to-remain-in-place/?email=985fo89aa2c0463972a74556fbbdd201706049d2&email=937f7758c95b8a4965a75c6bf469064d&mailb=7063ae6c8751f3f160f9dd1dca67a9738976ec47880b5778167765c925fbd7e5&utm_source=Sailthru&utm_medium=email&utm_campaign=12.27.22%20SR%20Title%2042%20Supreme%20Court); *Explainer: The Legal Impact of Ending the COVID-19 Health Emergency on Title 42*, National Immigration Forum, Feb. 18, 2023, available at: <https://immigrationforum.org/article/explainer-the-legal-impact-of-ending-the-covid-health-emergencys-on-title-42/>.

## The Humanitarian Asylum Review Process (HARP) and the Prompt Asylum Claim Review (PACR)

In October of 2019, DHS piloted and later broadly rolled out the Humanitarian Asylum Review Process (HARP) and the Prompt Asylum Claim Review (PACR).<sup>168</sup> These nearly identical processes sought to further accelerate the expedited removal process such that it would be completed in only five to seven days.<sup>169</sup> Among the mechanisms employed to effectuate such rapid processing, migrants were held in temporary CBP facilities (as opposed to ICE detention centers) and had only one day to try to consult with counsel prior to a CFI.<sup>170</sup> In response to litigation by advocates and migrants charging that, among other deficiencies, HARP and PACR effectively deny asylum seekers access to counsel while holding them in substandard facilities, the U.S. District Court for the District of Columbia held that HARP and PACR did not violate federal law or the constitutional rights of the migrants subject to these programs.<sup>171</sup> The case, *Las Americas Immigrant Advocacy Center v. Wolf*, was appealed in 2020. The proceedings were stayed when, in February of 2021, the Biden Administration ceased implementation of HARP and PACR through an executive order.<sup>172</sup> It is important to note that while HARP and PACR are not presently being implemented, the programs have not, to date, been rescinded. This means that HARP and PACR can be reimplemented at any time in the future, and the Biden Administration's effort to bring CFIs back to CBP facilities, discussed above, has been viewed as a renewal of the HARP and PACR policies.

## The Third Country Asylum Rule<sup>173</sup>

In July of 2019 the Trump Administration's DHS and DOJ issued an interim final rule making migrants ineligible for asylum in the United States if they did not seek protection in a third country through which

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<sup>168</sup> See Memorandum on Prioritization of Removal Pathways from US CBP Acting Commissioner Mark Morgan to Acting Secretary of DHS Kevin K. McAleenan, 2019 (available at:

[https://www.dhs.gov/sites/default/files/publications/migrant\\_protection\\_protocols\\_01.pdf](https://www.dhs.gov/sites/default/files/publications/migrant_protection_protocols_01.pdf)). See also, *Las Americas Immigrant Advocacy Center v. Chad Wolf*, 507 F.Supp.3d 1 (D.D.C. 2020).

<sup>169</sup> The only substantive distinction between PACR and HARP is that HARP applies to Mexican citizens whereas PACR applies to migrants who are not Mexicans. Unaccompanied Children were not subject to PACR or HARP. *Id.*<sup>170</sup>

<sup>171</sup> See *Las Americas Immigrant Advocacy Center v. Chad Wolf*, 507 F.Supp.3d 1 (D.D.C. 2020). See also: *Las Americas Immigrant Advocacy Center V. Wolf – Challenging Denial of Immigrants' Access to Counsel*, ACLU District of Columbia, <https://www.acludc.org/en/cases/las-americas-immigrant-advocacy-center-v-wolf-challenging-denial-immigrants-access-counsel> (last accessed: Dec. 3, 2022).

<sup>172</sup> Exec. Order No. 14010, 86 FR 8267 (Feb. 2, 2021); *Las Americas Immigrant Advocacy Center V. Wolf – Challenging Denial of Immigrants' Access to Counsel*, ACLU District of Columbia, <https://www.acludc.org/en/cases/las-americas-immigrant-advocacy-center-v-wolf-challenging-denial-immigrants-access-counsel> (last accessed: Dec. 3, 2022).

<sup>173</sup> For more information on the Third Country Asylum Rule see Asylum Ban Part 2: Third Country Transit Regulations FAQs, Clinic Legal, <https://cliniclegal.org/resources/asylum-and-refugee-law/asylum-ban-part-2-third-country-transit-regulations-faqs> (last accessed: Dec. 12, 2022); Third Country (Transit) Asylum Rule: What You Need to Know, Penn State Law Center for Immigrants' Rights Clinic, (Oct., 2020) (available at: <https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/Third%20Country%20Asylum%20R>

they transited on their journey to the United States.<sup>174</sup> The Third Country Asylum rule, also referred to as the Transit Ban, listed only two exceptions: (1) cases where the migrant was trafficked or (2) if the migrant received a final order denying protection in at least one country through which they transited.<sup>175</sup> The rule effectively denied asylum access to virtually all non-Mexican migrants who sought entry to the United States via the southern border. The same month that it was published, the transit ban faced multiple challenges yielding a years-long tug-of-war of injunctions.<sup>176</sup> Despite these challenges, the transit ban was in effect from September of 2019 through June of 2020, leading to thousands of denials of applications for asylum.<sup>177</sup> Ultimately, the transit ban was deemed unlawful by two courts for violating the Administrative Procedures Act (APA).<sup>178</sup> Among one of the grounds, one court found the rule arbitrary and capricious because it relies on the availability of other pathways for migration to the United States.<sup>179</sup> As discussed above, the Circumvention of Lawful Pathways policy is similar to the Trump transit ban, because it imposes a rebuttable presumption of asylum ineligibility for individuals without travel documents and without an appointment via the CBP One app unless they sought and were denied protection in at least one third country through which they transited.<sup>180</sup>

### Asylum Cooperative Agreements (ACAs)

From July to October of 2019 the Trump Administration signed agreements with Guatemala, Honduras, and El Salvador referred to as Asylum Cooperative Agreements (ACAs).<sup>181</sup> The ACAs, also referred to as “safe

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[ule%20Updated%2010-8-20.pdf](#)); The Asylum Transit Ban After CAIR Coalition v. Trump, Immigrant Legal Resource Center, [https://www.ilrc.org/sites/default/files/resources/asylum\\_transit\\_ban\\_after\\_cair\\_v\\_trump\\_10.2020.pdf](https://www.ilrc.org/sites/default/files/resources/asylum_transit_ban_after_cair_v_trump_10.2020.pdf) (last accessed: Dec. 12, 2022).

<sup>174</sup> Asylum Eligibility and Procedural Modifications, 84 FR 33829 (Jul. 16, 2019) (Interim Final Rule); Asylum Eligibility and Procedural Modifications, 85 FR 82260 (Dec. 17, 2020) (Final Rule).

<sup>175</sup> *Id.*

<sup>176</sup> *E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1102 (N.D. Cal. 2018); *E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922 (ND Cal. 2019); *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1028 (9th Cir. 2019); *E. Bay Sanctuary Covenant v. Barr*, 391 F. Supp. 3d 974 (N.D. Cal. 2019) *Capital Area Immigrants’ Rights (CAIR) Coalition v. Trump*, No. 19-2117 (D.D.C. Jun. 30, 2020); *Barr v. E. Bay Sanctuary Covenant*, 588 U.S. \_\_\_, 139 S. Ct. 782, (2019), *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9<sup>th</sup> Cir. 2020); *E. Bay Sanctuary Covenant v. Barr*, (N.D. Cal. 2021)

<sup>177</sup> See The Asylum Transit Ban After CAIR Coalition v. Trump, Immigrant Legal Resource Center, [https://www.ilrc.org/sites/default/files/resources/asylum\\_transit\\_ban\\_after\\_cair\\_v\\_trump\\_10.2020.pdf](https://www.ilrc.org/sites/default/files/resources/asylum_transit_ban_after_cair_v_trump_10.2020.pdf) (last accessed: Dec. 12, 2022).

<sup>178</sup> *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9<sup>th</sup> Cir. 2020); *Capital Area Immigrants’ Rights (CAIR) Coalition v. Trump*, No. 19-2117 (D.D.C. Jun. 30, 2020).

<sup>179</sup> *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9<sup>th</sup> Cir. 2020).

<sup>180</sup> See Circumvention of Lawful Pathways, 88 FR 11704 (proposed Feb. 23, 2023) (to be codified at 8 CFR 208, 8 CFR 1208).

<sup>181</sup> Fact Sheet: DHS Agreements with Guatemala, Honduras, and El Salvador, Dep’t of Homeland Security, [https://www.dhs.gov/sites/default/files/publications/19\\_1028\\_opa\\_factsheet-northern-central-america-agreements\\_v2.pdf](https://www.dhs.gov/sites/default/files/publications/19_1028_opa_factsheet-northern-central-america-agreements_v2.pdf) (last accessed: Dec. 12, 2022); “Asylum Cooperative Agreements” Fact Sheet, Kids in Need of

third country agreements,” meant that asylum-seekers who came to the U.S. southern border could be removed to Guatemala, Honduras, or El Salvador to seek asylum in those countries rather than in the United States.<sup>182</sup> In November of 2019, the Executive Office for Immigration Review (EOIR) and USCIS issued an interim final rule to implement the three ACAs.<sup>183</sup> The ACAs applied to asylum seekers who came from El Salvador, Guatemala, and Honduras (also called the “northern triangle” countries).<sup>184</sup> The asylum-seekers could not be returned to their home countries, but would be returned to one of the two other northern triangle countries, unless they qualified for one of three exceptions that the individual: (1) is an unaccompanied minor, (2) can establish that they are more likely than not to face persecution on account of a protected ground or will face torture in the designated northern triangle country, or (3) qualifies for a public interest exception in the discretion of the USCIS director.<sup>185</sup> In January of 2020, immigration advocates filed suit against the federal government arguing, among multiple challenges, that the implementation of the ACAs was arbitrary and capricious under the APA and violated the asylum statute’s safe third country provision, which requires that a receiving nation must be equipped to provide asylum seekers access to full and fair procedures for determining their claims to asylum.<sup>186</sup>

The ACAs were only in place from November of 2019 through March of 2020, an outcome of the Covid-19 pandemic; however, during that time, as many as 945 asylum seekers were transferred from the US to Guatemala.<sup>187</sup> None were granted asylum in Guatemala.<sup>188</sup>

The Biden Administration terminated the ACAs with Guatemala, Honduras, and El Salvador.<sup>189</sup> However, the U.S. government may be able to negotiate and implement new ACAs in the future.

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Defense (KIND), <https://supportkind.org/wp-content/uploads/2019/11/ACAs-and-N.-Triangle-Factsheet-FINAL.pdf> (last accessed: Dec. 12, 2022). Prior to 2019, the United States had only entered into one Safe Third Country Agreement, and it was with Canada. See Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, Can.-U.S., Dec. 5, 2002, CTS 2004/2.

<sup>182</sup> *Id.*

<sup>183</sup> Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 FR 63994 (Nov. 19, 2019); US – Guatemala Asylum Cooperation Agreement (ACA) Threshold Screening: Guidance for Asylum Officers and Asylum Office Staff, USCIS, (Nov. 19, 2019) available at: <https://fingfx.thomsonreuters.com/gfx/mkt/12/8962/8874/ACA%20Guatemala.pdf>.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> See Plaintiffs’ Complaint for Declaratory and Injunctive Relief, *U.T. v. Barr*, No. 1:20-cv-00116, (D.D.C, Jan. 15, 2020) available at: [https://cgrs.uchastings.edu/sites/default/files/complaint filed stamped u.t. v. barr.pdf](https://cgrs.uchastings.edu/sites/default/files/complaint%20filed%20stamped%20u.t.%20v.%20barr.pdf).

<sup>187</sup> Menendez Publishes New Report Documenting Cruelty, Coercion, and Legal Contortions in Trump Administration’s Asylum Agreements, Senate Foreign Relations Committee, <https://www.foreign.senate.gov/press/dem/release/menendez-publishes-new-report-documenting-cruelty-coercion-and-legal-contortions-in-trump-administrations-asylum-agreements> (Jan. 18, 2021).

<sup>188</sup> *Id.*

<sup>189</sup> Exec. Order No. 14010.

## CASES INVOLVING UNACCOMPANIED CHILDREN<sup>190</sup>

Unaccompanied children who reach the U.S. southern border receive a limited set of additional protections as compared with those provided to their adult counterparts. Unaccompanied children, also referred to as unaccompanied minors or unaccompanied migrant children, are children under the age of 18 who enter the United States without lawful status and without a parent or legal guardian who can provide care.<sup>191</sup>

After apprehension at or near the border, unaccompanied children who do not voluntarily return to their home country are transferred to the custody of the Department of Health and Human Services' (DHHS) Office for Refugee Resettlement (ORR).<sup>192</sup> ORR must seek to transfer children to the custody of sponsors as promptly as possible after assessing the child's relationship to the sponsor and ensuring that the child does not present a substantial risk of flight or danger.<sup>193</sup> Mexican children at the border are frequently quickly returned to Mexico, although by law agents must first screen them for trafficking and/or fear of return.<sup>194</sup>

Unaccompanied children have the right to apply for asylum affirmatively before the USCIS Asylum Office even after they have been placed in removal proceedings under INA § 240. Unaccompanied children may then simultaneously have a pending asylum application before USCIS and a pending removal proceeding in Immigration Court. It may become necessary to seek continuances of the removal proceeding to allow for adjudication of the asylum application by the Asylum Office since the removal proceeding may move more quickly than the affirmative asylum adjudication.

Unaccompanied children cannot be placed in expedited removal and are entitled to the rights all migrants have in § 240 proceedings.<sup>195</sup> Unaccompanied children were not subject to MPP and eventually were excluded from the Title 42 policy.<sup>196</sup> Still, application of both MPP and Title 42 affected unaccompanied children and often led to family separation. Children who arrived at the U.S. border with parents or legal guardians were often placed in MPP. Due to precarious conditions in Mexico, children sometimes

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<sup>190</sup> For further resources on children in removal proceedings, *see*, Representing Children and Families in Immigration Matters, the American Bar Association's Commission on Immigration, Mar. 2022, <https://www.youtube.com/watch?v=b53Y7HmMXjY>; Children's Immigration Law Academy (CILA) Pro Bono Guide: Working with Children and Youth in Immigration Cases, Children's Immigration Law Academy, American Bar Association's Commission on Immigration, Sept. 2021, <https://cilacademy.org/wp-content/uploads/2021/10/2021-CILA-Pro-Bono-Guide.pdf>.

<sup>191</sup> 6 U.S.C. § 279(g)(2).

<sup>192</sup> 6 U.S.C. § 279.

<sup>193</sup> 8 U.S.C. § 1232.

<sup>194</sup> 8 U.S.C. § 1232(a)(2)(A).

<sup>195</sup> 8 U.S.C. § 1232(a)(5)(D).

<sup>196</sup> *See* U.S. Customs and Border Protection, "MPP Guiding Principles," Jan 28, 2019, <https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf>.

subsequently sought to enter the United States alone.<sup>197</sup> Other children arrived at the U.S. border with family members other than parents or legal guardians. Those family members were often placed in MPP and returned to Mexico, while the children were processed as unaccompanied children and placed in ORR care. For families expelled under Title 42, children sometimes subsequently entered on their own, also leading to family separation.<sup>198</sup>

Further complications arose for children previously placed in MPP with their parents who subsequently reentered the United States unaccompanied. These children were not always afforded protection as unaccompanied children. Some were not placed in § 240 removal proceedings, as required by the Trafficking Victims Protection Reauthorization Act (TVPRA). DHS' obligation to initiate § 240 proceedings for these children is currently the subject of federal litigation, including a suit in which the ABA's South Texas Pro Bono Asylum Representation Project (ProBAR) is a co-plaintiff.<sup>199</sup> The two most common forms of relief sought by unaccompanied children in removal proceedings are Special Immigrant Juvenile Status (SIJS) and asylum. Unaccompanied children must have a state court order with specific findings related to abuse, abandonment or neglect and their best interest to then petition USCIS for SIJS. Once the petition is approved and the child's priority date is current (which could take months or years), the child can seek to adjust their status to that of a lawful permanent resident. Advocacy efforts, including those by the ABA, resulted in USCIS providing deferred action and employment authorization for youth in the SIJS visa backlog.<sup>200</sup>

**PRACTICE TIP:** If your unaccompanied child client was previously returned to Mexico under MPP, you will need to assess the procedural status of the case very carefully. The child may have a prior removal order from the MPP proceedings, whether *in absentia* or after a final hearing on the merits. If you are working with an unaccompanied child who was previously expelled under Title 42, the expulsion does not constitute a removal order and should not affect their ability to pursue relief. Pursuant to the TVPRA, the unaccompanied child should be placed in § 240 proceedings.

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<sup>197</sup> Kids in Need of Defense, "Forced Apart: How the 'Remain in Mexico' Policy Places Children in Danger and Separates Families," Feb. 24, 2020, <https://supportkind.org/wp-content/uploads/2020/02/MPP-KIND-2.24updated-003.pdf>.

<sup>198</sup> Physicians for Human Rights, Neither Safety Nor Health, How Title 42 Expulsions Harm Health and Violate Rights, July 2021 at p. 6, <https://phr.org/wp-content/uploads/2021/07/PHR-Report-United-States-Title-42-Asylum-Expulsions-July-2021.pdf>.

<sup>199</sup> See American Bar Association, "ABA joins lawsuit to help persecuted immigrant children," Feb. 12, 2021, <https://www.americanbar.org/news/abanews/aba-news-archives/2021/02/aba-joins-lawsuit-to-help-persecuted-immigrant-children/>; *Immigrant Defs. L. Ctr. v. U.S. Dep't of Homeland Sec.*, No. CV2100395FMORAOX (C.D. Cal.).

<sup>200</sup> See American Bar Association (ABA) House of Delegates Resolution 21M103A (adopted Feb. 2021); Letter from ABA President Patricia Lee Refo to Secretary of Homeland Security Alejandro Mayorkas (Apr. 8, 2021) (available at: [https://www.uscis.gov/sites/default/files/document/foia/Special\\_Immigrant\\_Juvenile\\_SIJ\\_-\\_Refo.pdf](https://www.uscis.gov/sites/default/files/document/foia/Special_Immigrant_Juvenile_SIJ_-_Refo.pdf)); see generally: Department of State Changes to Interpretation of Law Impacts Youth Approved for SIJS, ABA Children's Immigration Law Academy, <https://cilacademy.org/2023/03/28/department-of-state-changes-to-interpretation-of-law-impacts-youth-approved-for-sijs/> (last accessed: Oct. 23, 2023).

## CONCLUSION

Border enforcement mechanisms continue to be the subject of policy reform, judicial scrutiny, and legislative debate. Some elements remain permanent fixtures while others are dynamic and in a constant state of change. For additional resources on these and other changes in immigration enforcement, please visit the American Bar Association's Commission on Immigration Publications page at:

[https://www.americanbar.org/groups/public\\_interest/immigration/publications/](https://www.americanbar.org/groups/public_interest/immigration/publications/).