



CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

Practice Advisory

Updated: Firm Resettlement Considerations in the Wake of the “Migrant Protection Protocols” Wind-Down¹

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I. Introduction

The Trump administration imposed unprecedented procedural barriers to asylum seekers at the U.S.-Mexico border. During much of the administration, U.S. Customs and Border Protection (CBP) made it impossible for asylum seekers to access the U.S. immigration system. Former Department of Homeland Security (DHS) Secretary Kirstjen Nielsen claimed before Congress that the agency was at “capacity” to process so many fear claims at once.² In response, CBP introduced a “metering” system whereby asylum seekers who presented themselves at U.S. ports of entry were forced to wait months or longer for DHS to allow them to enter to process their fear-based claims.³

¹ Copyright 2021, The Catholic Legal Immigration Network, Inc. (CLINIC). CLINIC intends for this practice advisory to assist lawyers and fully accredited representatives. This practice advisory does not constitute legal advice, nor is it a substitute for independent analysis of the law applicable in the practitioner’s jurisdiction. This practice advisory is an update to a prior version issued in 2019. Victoria Neilson, Defending Vulnerable Populations Managing Attorney, authored the updated this practice advisory with invaluable contributions from Michelle N. Mendez, Defending Vulnerable Populations Director and attorneys at Instituto para las Mujeres en la Migración (IMUMI) in Mexico. The authors of the 2019 advisory were: Victoria Neilson, Ann Garcia, Defending Vulnerable Populations Staff Attorney, Reena Arya, and Lolita Brayman. Michelle N. Mendez and Rebecca Scholtz, Defending Vulnerable Populations Senior Attorney also contributed to the 2019 version of this advisory.

² David Bier, CATO Institute, *Data Counters U.S. Claim on Asylum Processing* (Feb. 7, 2019), [cato.org/publications/commentary/data-counters-us-claim-asylum-processing](https://www.cato.org/publications/commentary/data-counters-us-claim-asylum-processing).

³ See DHS, Office of Inspector General, *CBP Has Taken Steps to Limit Processing of Undocumented Aliens at Ports of Entry*, at 5 (Oct. 27, 2020), [humanrightsfirst.org/sites/default/files/OIG-21-02-Oct20.pdf](https://www.humanrightsfirst.org/sites/default/files/OIG-21-02-Oct20.pdf). The report euphemistically refers to metering as “Queue Management,” and states “Queue Management has become standard practice, with all Southwest Border ports implementing limit lines.” The report also highlights DHS’s public urging of asylum seekers to present themselves at ports of entry rather than crossing the border without inspection, while simultaneously, intentionally reassigning officers at ports of entry to limit capacity to process asylum seekers. *Id.* at 7-8. While metering *per se* is not currently happening at the border, very few asylum seekers are able to access the U.S. protection system because of Title 42 expulsions.

Making matters worse, on Jan. 25, 2019, DHS began implementing the so-called “Migrant Protection Protocols” (MPP) policy,⁴ whereby asylum seekers had to wait in Mexico while applying for asylum before a U.S. immigration court, a process that often stretched over a year and that resulted in thousands of asylum seekers being stranded in dangerous regions in Mexico.⁵ The Ninth Circuit Court of Appeals upheld a district court decision enjoining MPP as violating the Immigration and Nationality Act (INA).⁶ The U.S. Supreme Court subsequently vacated the injunction as moot following the Biden Administration’s termination of MPP.⁷ The Biden administration fulfilled a campaign promise to immediately halt the use of MPP,⁸ and starting in March 2021, has worked in coordination with the United Nations High Commissioner on Human Rights (UNHCR) to allow a limited number of MPP asylum seekers into the United States per day.⁹ On June 1, 2021, DHS officially terminated the MPP program.¹⁰ On June 23, 2021, DHS and UNHCR began Phase 2 of the MPP wind-down which allows those who were ordered removed *in absentia* and those whose cases were terminated by immigration judges because DHS issued defective Notices to Appear, to register and proceed with their cases.¹¹

The Trump administration also sought to limit asylum eligibility to those traveling to the U.S. Mexican border by issuing an interim rule dubbed Asylum Ban 2.0. This interim rule, published on July 16, 2019, prevented any asylum seeker who had traveled through a third country en route to the United States from being eligible for asylum unless they had first applied for and been denied protection in a third country prior to arrival in the United States.¹² While this rule has been litigated extensively and is

⁴ Press Release, DHS, Migrant Protection Protocols (Jan. 24, 2019), dhs.gov/news/2019/01/24/migrant-protection-protocols.

⁵ “In reality, this policy is about denying—not providing—protection to refugees, and is not a ‘protocol,’ but an attempt to circumvent the Protocol Relating to the Status of Refugees and the laws passed by Congress.” Human Rights First, *A Sordid Scheme: The Trump Administration’s Illegal Return of Asylum Seekers to Mexico* (Mar. 2019), humanrightsfirst.org/sites/default/files/A_Sordid_Scheme.pdf.

⁶ *Innovation L. Lab v. Wolf*, 951 F.3d 1073, 1095 (9th Cir.), cert. granted, 141 S. Ct. 617, 208 L. Ed. 2d 227 (2020). The Trump administration appealed the decision to the Supreme Court and the Biden administration moved to hold briefing in abeyance; that motion was granted by the Supreme Court. *Mayorkas v. Innovation L. Lab*, No. 19-1212, 2021 WL 357256, at *1 (U.S. Feb. 3, 2021).

⁷ *Mayorkas, Sec. of Homeland, et al. v. Innovation Law Lab, et al.*, No. 19-1212, 2021 WL 2520313 (U.S. June 21, 2021).

⁸ At the same time President Biden has taken steps to end MPP, his administration has continued the use of the Trump administration’s policy of Title 42 expulsions, that is sending asylum seekers who have crossed the border back to Mexico, purportedly to limit the potential spread of the COVID pandemic. See Melita Seibel, Human Rights First, *Title 42: The Cruel Trump Policy Continuing Under Biden* (Mar. 31, 2021), humanrightsfirst.org/blog/title-42-cruel-trump-policy-continuing-under-biden.

⁹ UNHCR, UN agencies begin processing at Matamoros, Feb. 24, 2021, unhcr.org/en-us/news/press/2021/2/6035b7db4/un-agencies-begin-processing-matamoros.html.

¹⁰ Memorandum from Alejandro N. Mayorkas, DHS Secretary, Termination of the Migrant Protection Protocols Program (June 1, 2021) dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf.

¹¹ DHS, *Migrant Protection Protocols* (Last Published Date June 24, 2021), dhs.gov/migrant-protection-protocols.

¹² 84 Fed. Reg. 33829 (Jul. 7, 2019).

currently enjoined,¹³ the ban was in effect from Sept. 11, 2019 through June 30, 2020.¹⁴ During that nine-month period, asylum seekers stranded in Mexico may have felt that they had no choice but to apply for asylum there because absent such an application they were categorically denied from asylum eligibility in the United States. Additionally, those subject to the Asylum Ban had to meet the more onerous Reasonable Fear Interview standard to even qualify for a hearing before an immigration judge rather than being removed under expedited removal.¹⁵

In addition to MPP, asylum seekers have also been returned to Mexico through Title 42 expulsions. Beginning in March 2020, the Trump administration used the emerging COVID pandemic to justify still further restrictions on access to the U.S. asylum system. Pursuant to Section 265 of U.S. Code Title 42, the Department of Health and Human Services (HHS) issued an emergency regulation allowing CBP to prohibit the entry of anyone who may carry a communicable disease into the United States.¹⁶ In September 2020, HHS issued the same mandate as a final rule.¹⁷ Unfortunately, the Biden administration has continued the use of Title 42 expulsions, leading to thousands of asylum seekers being denied entry or being summarily expelled from U.S. soil into Mexico.¹⁸ Although unaccompanied children are now exempted from Title 42 expulsions, most asylum seekers at the border still face expulsion, despite efforts from advocates urging the Biden administration to reverse course.¹⁹ DHS Secretary Alejandro Mayorkas has stated, “We are not saying don’t come, we are saying don’t come now because we will be able to deliver a safe and orderly process to them as quickly as possible.”²⁰

¹³ See ACLU, *East Bay V. Barr*, [aclu.org/cases/east-bay-v-barr](https://www.aclu.org/cases/east-bay-v-barr); see also, National Immigrant Justice Center, *A Timeline of The Trump Administration’s Efforts To End Asylum*, immigrantjustice.org/issues/asylum-seekers-refugees. On December 17, 2020, in the waning days of the Trump administration, DHS and DOJ issued a final rule purporting to respond to comments submitted to their July 16, 2019 interim final rule. 85 Fed. Reg. 82260. That rule was also enjoined by the *East Bay V. Barr* court [aclu.org/legal-document/pi-order](https://www.aclu.org/legal-document/pi-order).

¹⁴ Andrew Craycroft and Nithya Nathan-Pineau, Immigrant Legal Resource Center, *The Asylum Transit Ban After CAIR Coalition v. Trump Obtaining Relief in Asylum Transit Ban Cases*, (Oct. 2020), ilrc.org/sites/default/files/resources/asylum_transit_ban_after_cair_v_trump_10.2020.pdf.

¹⁵ *Id.* at 4.

¹⁶ Centers for Disease Control and Prevention, Department of Health and Human Services, “Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes,” 85 Fed. Reg. 16,559 (March 24, 2020), [federalregister.gov/documents/2020/03/24/2020-06238/control-ofcommunicable-diseases-foreign-quarantine-suspension-of-introduction-of-persons-into](https://www.federalregister.gov/documents/2020/03/24/2020-06238/control-ofcommunicable-diseases-foreign-quarantine-suspension-of-introduction-of-persons-into).

¹⁷ Department of Health and Human Services, “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,” September 11, 2020, [federalregister.gov/documents/2020/09/11/2020-20036/control-ofcommunicable-diseases-foreign-quarantine-suspension-of-the-right-to-introduce-and](https://www.federalregister.gov/documents/2020/09/11/2020-20036/control-ofcommunicable-diseases-foreign-quarantine-suspension-of-the-right-to-introduce-and).

¹⁸ American Immigration Council, *A Guide to Title 42 Expulsions at the Border* at 3 (March 2021), [americanimmigrationcouncil.org/sites/default/files/research/title_42_expulsions_at_the_border.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/title_42_expulsions_at_the_border.pdf).

¹⁹ See Human Rights First, Letter to President Biden on Reported Title 42 Expulsion Policy Extension (June 30, 2021), [humanrightsfirst.org/resource/letter-president-biden-reported-title-42-expulsion-policy-extension](https://www.humanrightsfirst.org/resource/letter-president-biden-reported-title-42-expulsion-policy-extension).

²⁰ Priscilla Alvarez & Geneva Sands, “Families separated at the border could be reunited in US, Homeland Security secretary says,” CNN (March 1, 2020), [cnn.com/2021/03/01/politics/family-separation/index.html](https://www.cnn.com/2021/03/01/politics/family-separation/index.html).

With the current wind-down of MPP, and the likely end of Title 42 expulsions once the COVID pandemic has been further contained, U.S. immigration officials will be adjudicating cases for thousands of asylum seekers who were forced by the U.S. government to remain in Mexico for extended periods of time. Practitioners should therefore consider and prepare for potential DHS firm resettlement arguments against asylum seekers who were forced to remain in Mexico before ultimately gaining access to the U.S. asylum system. Section II of this practice advisory gives a brief overview of the firm resettlement bar to asylum protection. Section III discusses the legal status of U.S. asylum seekers in Mexico, including some available pathways to permanent relief there. Section IV describes the regulatory exceptions to the firm resettlement bar. Section V explores practical tips for practitioners to present arguments against the application of the firm resettlement bar to asylum seekers stranded in Mexico. Section VI discusses how asylum eligibility for dual nationals. And Section VII briefly describes the application of the firm Resettlement Bar and Dual Nationality Issues in the Context of Applications for Temporary Protected Status.

II. The Firm Resettlement Bar Under U.S. Asylum Law

The firm resettlement bar has been part of U.S. refugee law since the 1940s.²¹ In 1971, the U.S. Supreme Court found that although firm resettlement was not a statutory bar, it was relevant to a noncitizen's refugee status and was "one of the factors which the [INS] must take into account to determine whether a refugee seeks asylum in this country as a consequence of his flight to avoid persecution."²² The Refugee Act of 1980 made firm resettlement a statutory bar to refugee status, but not to asylum.²³ In 1990, the Attorney General amended the regulations and extended the firm resettlement bar to asylum cases.²⁴ Congress codified firm resettlement as a statutory bar to asylum by passing the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996.²⁵ As a result, under INA § 208(b)(A)(vi), an applicant is ineligible for asylum if they were "firmly resettled in another country prior to arriving in the United States."

²¹ USCIS, Firm Resettlement Training Module (Feb. 21, 2012), uscis.gov/sites/default/files/files/nativedocuments/Firm_Resettlement_LP_RAIO.pdf [hereinafter "USCIS Firm Resettlement Training Module"]. Asylum Office lesson plans are used to train asylum officers and can be cited in briefs to the asylum office. These materials are written by USCIS and are not binding on immigration judges. However, they can be cited as persuasive authority. See *Singh v. Holder*, 649 F.3d 1161, 1169 n.14 (9th Cir. 2011) (McKeown, J., concurring) (noting the asylum office training module's interpretation on a one-year filing deadline issue); *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1094 (9th Cir. 2013) (concurring opinion citing to asylum office lesson plan on nexus and the five protected characteristics). Under the Trump administration, USCIS reduced its overall asylum officer training course. It also removed many of the Asylum Officer training modules from the website, making it difficult to determine which training modules are currently in use, and how much weight the training modules are given, even by asylum officers. Nonetheless, the training modules continue to be instructive in considering how USCIS may interpret relevant law.

²² *Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 56 (1971).

²³ INA § 207(c)(1).

²⁴ See 8 CFR § 1208.15. See *supra* note 26 regarding finding the regulation that is currently in effect.

²⁵ For a detailed history of the firm resettlement bar see *Matter of A-G-G-*, 25 I&N Dec. 486, 489-94 (BIA 2011).

Currently the regulations regarding firm resettlement read as follows:

An alien is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement unless he or she establishes [an exception].²⁶

As the USCIS Asylum Office Lesson Plan on Firm Resettlement explains, asylum seekers are potentially subject to the firm resettlement bar if there has been: 1) entry into a third country 2) an offer or receipt of 3) permanent status.²⁷ USCIS applies this three-part test to determine whether an asylum seeker is subject to the firm resettlement bar.

A. Four Step Framework

The leading Board of Immigration Appeals (BIA or Board) case to address firm resettlement is *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011). In this case, Mauritanian soldiers arrested and detained the respondent based on his black Wolof ethnicity. Thereafter, the Mauritanian government forcibly deported the respondent to Senegal. While in Senegal, the respondent married a Senegalese citizen with whom he had two children. He resided in Senegal for eight years without problems before coming to the United States and seeking asylum.²⁸

The immigration judge (IJ) found that the respondent had suffered past persecution in Mauritania based on his race and ethnicity and granted asylum.²⁹ DHS appealed arguing that he had firmly resettled in Senegal.³⁰ The BIA found that the respondent's marriage to a Senegalese citizen and registry with the Senegalese government was indirect evidence of his ability to remain there permanently; the respondent's failure to apply for residence was not relevant to the firm resettlement analysis.³¹ However, because there were conflicting documents in the record as to whether a female

²⁶ 8 CFR § 1208.15. Note, on December 11, 2020 DHS and the Department of Justice (DOJ) promulgated regulations with the intention of radically restricting access to asylum, both substantively and procedurally. Under the new rule, the firm resettlement bar is greatly expanded, including not only situations where the asylum seeker received an offer of permanent status, but also situations where the asylum seeker received temporary, indefinitely renewable status (including asylum), or could have applied for such status. The rule specifically exempts those in Mexico who were subjected to metering or MPP from being considered firmly resettled. This rule, along with the rest of the "Death to Asylum" rule, has been enjoined by *Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, No. 20-CV-09253-JD, 2021 WL 75756, at *7 (N.D. Cal. Jan. 8, 2021). Nonetheless, the official government code of federal regulations website [ecfr.gov/cgi-bin/text-idx?SID=8f721c99a0dc80faa0c42edcf7dd8811&mc=true&node=pt8.1.1208&rgn=div5#se8.1.1208_115](https://www.ecfr.gov/cgi-bin/text-idx?SID=8f721c99a0dc80faa0c42edcf7dd8811&mc=true&node=pt8.1.1208&rgn=div5#se8.1.1208_115) still lists the promulgated rule, which has been enjoined. The prior rule, promulgated in 2000, which is currently in effect, can be accessed here [govinfo.gov/content/pkg/CFR-2020-title8-vol1/pdf/CFR-2020-title8-vol1-sec1208-15.pdf](https://www.govinfo.gov/content/pkg/CFR-2020-title8-vol1/pdf/CFR-2020-title8-vol1-sec1208-15.pdf).

²⁷ See USCIS Firm Resettlement Training Module, *supra* note 21, at 12–18.

²⁸ *Matter of A-G-G-*, 25 I&N Dec. at 487.

²⁹ *Id.* at 486.

³⁰ *Id.* at 487.

³¹ *Id.* at 504.

Senegalese citizen could sponsor her male spouse for permanent residence, the BIA remanded for further fact-finding.³²

In *Matter of A-G-G-*, the BIA examined how different U.S. courts of appeals analyzed firm resettlement and established a four-step framework to evaluate whether the bar applies. This analysis focuses exclusively on the existence of an offer of permanent status, or the legal mechanism for such an offer,³³ and allows the adjudicator to consider direct and indirect evidence to determine whether the applicant has firmly resettled.

The four-step analysis laid out in *Matter of A-G-G-* is as follows:³⁴

Step 1: DHS bears the burden of presenting *prima facie* evidence of an offer of permanent status.³⁵ The asylum applicant does not necessarily have to accept the offer; the key inquiry is whether permanent status was available. If DHS cannot make this showing, the inquiry ends there.³⁶

Step 2: If DHS establishes an offer of firm resettlement, the asylum applicant has an opportunity to rebut the evidence by showing by a preponderance of the evidence that they did not receive an offer of firm resettlement or that they do not qualify for the status. This rebuttal can include presenting evidence as to how the law is actually applied and whether the asylum seeker would benefit from the law in the third country.³⁷

Step 3: The adjudicator considers the totality of the evidence presented by both parties to determine whether the asylum applicant has rebutted DHS's evidence of an offer of firm resettlement.³⁸

³² *Id.*

³³ See USCIS Firm Resettlement Training Module, *supra* note 21, at 13 (“The existence of a legal mechanism to obtain permanent status in the third country may be sufficient evidence to establish an offer of firm resettlement, and is not contingent on whether the applicant applies for the status.”).

³⁴ For an in-depth discussion of the four-step analysis, see USCIS Firm Resettlement Training Module, *supra* note 21, at 22–26.

³⁵ Although the burden of proof is on DHS, in a footnote the *Matter of A-G-G-* decision points out that “[p]rima facie evidence of an offer of firm resettlement may already be a part of the record of proceedings as testimony or other documentary evidence.” 25 I&N Dec. at 502 n.17. Practitioners should therefore be aware that the asylum seeker’s own responses on Form I-589 or testimony at the hearing may suffice for DHS to meet its burden. See *Firmansjah v. Gonzales*, 424 F.3d 598, 602–03 (7th Cir. 2005) (the court made a firm resettlement finding partially based on petitioner’s answers in the Form I-589). But see *Haghighatpour v. Holder*, 446 F. App’x 27, 30–31 (9th Cir. 2011) (unpublished), *as amended on denial of reh’g* (Oct. 27, 2011) (finding the asylum seeker’s admission that he had lawful residency in Germany, which he later contradicted, was not sufficient to invoke the firm resettlement bar absent any further evidence on the issue from DHS). There will be an opportunity to rebut DHS’s contention that this testimony is evidence of an offer.

³⁶ *Matter of A-G-G-*, 25 I&N Dec. at 501–03.

³⁷ *Id.* at 503.

³⁸ *Id.*

Step 4: If there is a finding of firm resettlement, the burden then shifts to the asylum applicant to establish by a preponderance of the evidence that an exception to the firm resettlement bar applies.³⁹ The two exceptions, discussed in sections IV and V below, are that the asylum seeker has no significant ties in the alleged country of firm resettlement, or that they were forced to live under restrictive conditions.

Since *Matter of A-G-G-*, the BIA, IJs, and asylum officers have largely followed the framework laid out in the decision.

Then, nine years later, in 2020, the BIA issued another precedential decision on firm resettlement, *Matter of K-S-E-*,⁴⁰ reiterating the *A-G-G-* analysis. Mr. K-S-E- was a Haitian national who resided in Brazil prior to seeking asylum in the United States.⁴¹ DHS presented evidence that Brazil had offered him permanent residence by showing that his name specifically, was on a list of people offered permanent status, but Mr. K-S-E- testified that he had not “gone to pick up registry yet” in spite of being aware of the offer of status.⁴² Finding that the respondent merely had to perform a series of “ministerial acts” to qualify for permanent status in Brazil, the BIA upheld the IJ’s finding that DHS had submitted prima facie evidence of firm resettlement.⁴³ Although the respondent testified that the offer of residence in Brazil was only good for five years, and was contingent upon his ongoing employment there, the BIA concurred with the IJ’s finding that Mr. K-S-E-’s belief that he would not be employed after five years was impermissibly “speculative.”⁴⁴

In analyzing whether Mr. K-S-E- had rebutted the evidence provided by DHS, the BIA found that, “[f]or purposes of determining whether an alien is subject to the firm resettlement bar to asylum, a viable and available offer to apply for permanent residence in a country of refuge is not negated by the alien’s unwillingness or reluctance to satisfy the terms for acceptance.”⁴⁵ The BIA thus reiterated that the concept behind firm resettlement is not that the asylum seeker actually has another country to which he can return, but rather that he does not merit asylum in the United States for having failed to take advantage of possible resettlement elsewhere. In general, if an asylum seeker is found to have firmly resettled and is ordered removed by the immigration court, the United States will remove the asylum seeker to the country in which they were resettled.⁴⁶

³⁹ *Id.*; see also 8 CFR § 1208.15(a)–(b).

⁴⁰ *Matter of K-S-E-*, 27 I&N Dec. 818 (BIA 2020).

⁴¹ *Matter of K-S-E-*, 27 I&N at 818.

⁴² *Id.* at 818-19.

⁴³ *Id.* at 819.

⁴⁴ *Id.* at 820.

⁴⁵ *Id.* at 821.

⁴⁶ *Arrey v. Barr*, 916 F.3d 1149, 1160 (9th Cir. 2019) (“In most of our published decisions affirming application of the firm resettlement rule, the applicant has been ordered to return to the country where he or she was permanently resettled.”).

On June 9, 2021, following a petition for review by Mr. K-S-E, the Department of Justice (DOJ) agreed to vacate and remand the decision to the BIA.⁴⁷ As a result, practitioners should argue that *Matter of K-S-E* is not binding precedent. However, the decision remains on the DOJ BIA Precedents Decision Listing page,⁴⁸ so practitioners should be prepared for DHS to continue to argue that that the case is good law, and should be prepared both to argue that it should not be considered precedential and that, even if it is, where supported by the facts, it can be distinguished

B. The Firm Resettlement Analysis—Evidentiary Considerations

1. Direct vs. Indirect Evidence of Offer

There has been some conflict among the U.S. courts of appeals in analyzing the firm resettlement bar, with some taking a “direct offer” approach and others taking a “totality of the circumstances” approach. Both approaches provide for the consideration of direct and indirect evidence of an offer of permanent resident status, citizenship, or some other type of permanent resettlement.⁴⁹ *Matter of A-G-G*, and *Matter of K-S-E*, through its reliance on the earlier case, reconcile the prior conflict in the circuits and creates a four step analysis; however, practitioners should still research case law specific to their jurisdictions.⁵⁰

To meet its initial evidentiary burden, DHS is required to introduce direct evidence of an offer of permanent status. This direct evidence may include proof of “refugee status, a passport, a travel document, or other evidence indicative of permanent residence.”⁵¹ In an unpublished decision, the BIA remanded a case where the IJ did not follow the *A-G-G* burden-shifting scheme.⁵² In another unpublished decision the BIA remanded the case where DHS failed to provide initial evidence that

⁴⁷ *K[...].S[...]. v. Garland*, 20-71316, (9th Cir. June 9, 2021). (“The decision of the BIA currently under review (*Matter of K-S-E*, 27 I&N Dec. 818 (BIA 2020)) is vacated. This matter is remanded to the BIA for further consideration of the determinations that petitioner had firmly resettled in Brazil, and that petitioner failed to establish that the Haitian government was unable or unwilling to control the individuals he fears.”). On file with the author.

⁴⁸ The Ninth Circuit similarly granted a motion to vacate and remand in *Matter of E-R-A-L*. See CLINIC, *Practice Alert: Ninth Circuit Vacates Matter of E-R-A-L* (Dec. 21, 2020), [cliniclegal.org/resources/asylum-and-refugee-law/practice-alert-ninth-circuit-vacates-matter-e-r-l](https://www.cliniclegal.org/resources/asylum-and-refugee-law/practice-alert-ninth-circuit-vacates-matter-e-r-l). Following the *E-R-A-L* vacatur and remand, DOJ has taken the position in an 11th Circuit petition for review that the 9th Circuit vacatur did not affect the precedential value of the BIA decision, arguing that a circuit remand “that is neither published nor precedential in this Court, did not overrule *Matter of E-R-A-L*; rather, it vacated the removal order in that case and remanded the case for further proceedings.”

⁴⁹ *Matter of A-G-G*, 25 I&N Dec. at 495.

⁵⁰ For example, in *Hanna v. Holder*, 740 F.3d 379, 394 (6th Cir. 2014), the U.S. Court of Appeals for the Sixth Circuit noted that it had not expressly adopted the four-step framework in *Matter of A-G-G*, but then went on to apply the BIA’s *A-G-G* framework and find that the petitioner had firmly resettled in Canada prior to seeking asylum in the United States.

⁵¹ *Matter of A-G-G*, 25 I&N Dec. at 501–02. See also *Matter of K-S-E*, 27 I&N Dec. at 819, in which, “DHS provided a translation of a joint communique from the Brazilian Ministry of Justice and the Ministry of Labor and Social Security authorizing a humanitarian program for permanent residence and explaining a description of the legal process for accepting an offer of permanent residence.”

⁵² See *Matter of A-Y-G*-, AXXX XXX 689 (BIA Feb. 27, 2020) (unpublished), [scribd.com/document/452101236/A-Y-G-AXXX-XXX-689-BIA-Feb-27-2020?secret_password=wCeUSagRrouk7oeo3JSe](https://www.scribd.com/document/452101236/A-Y-G-AXXX-XXX-689-BIA-Feb-27-2020?secret_password=wCeUSagRrouk7oeo3JSe).

the Eritrean asylum seeker had been given an offer of permanent status by either Sudan or Israel, even though the applicant testified for applying for some form of legal status in each country.⁵³

If direct evidence is unavailable, DHS may use indirect evidence if it has a “sufficient level of clarity and force” to establish that the asylum applicant is able to permanently reside in the country of resettlement.⁵⁴ *Matter of A-G-G-* sets forth the following list⁵⁵ of potential forms of indirect evidence that the government may offer:

- immigration laws or refugee process of the country of proposed resettlement⁵⁶
- length of the [asylum seeker’s] stay in a third country⁵⁷
- [asylum seeker’s] intent to settle in the country⁵⁸
- family ties and business or property connections⁵⁹
- extent of social and economic ties developed by the [asylum seeker] in the country⁶⁰

⁵³ See *Matter of M-G-*, AXXX XXX 029 (BIA Oct. 30, 2018) (unpublished), [scribd.com/document/393703663/M-G-AXXX-XXX-029-BIA-Oct-30-2018?secret_password=VH0OcG381vgbQ74qRgUO](https://www.scribd.com/document/393703663/M-G-AXXX-XXX-029-BIA-Oct-30-2018?secret_password=VH0OcG381vgbQ74qRgUO). See also *Matter of H-N-*, AXXX XXX 840 (BIA Dec. 9, 2016)(unpublished), [scribd.com/document/504145221/H-N-AXXX-XXX-840-BIA-Dec-9-2016?secret_password=fsZfO8yMaJbCsn32eoqE](https://www.scribd.com/document/504145221/H-N-AXXX-XXX-840-BIA-Dec-9-2016?secret_password=fsZfO8yMaJbCsn32eoqE) (upholding asylum grant where DHS submitted evidence of temporary residence via a passport stamp but the IJ correctly found that renewable, temporary visa in the United Arab Emirates did not meet the regulatory requirement that the applicant have an offer of permanent residence).

⁵⁴ *Matter of A-G-G-*, at 502.

⁵⁵ *Id.*

⁵⁶ See *Elzour v. Ashcroft*, 378 F.3d 1143, 1152 (10th Cir. 2004) (finding that the four years respondent spent in Canada was not enough to show firm resettlement when his application for asylum there and marriage-based petition were both denied but remanding for BIA to consider whether the fact that respondent was able to apply for asylum, and failed to appear at his asylum hearing, was sufficient to show an offer of permanent status).

⁵⁷ See *Sall v. Gonzales*, 437 F.3d 229, 235 (2d Cir. 2006) (finding that the passage of four years alone was not sufficient to prove firm resettlement and the “the IJ should consider the totality of the circumstances, including whether Sall intended to settle in Senegal when he arrived there, whether he has family ties there, whether he has business or property connections that connote permanence, and whether he enjoyed the legal rights—such as the right to work and to enter and leave the country at will—that permanently settled persons can expect to have”); *Camposeco-Montejo v. Ashcroft*, 384 F.3d 814 (9th Cir. 2004) (concluding that even though Guatemalan spent 16 years in Mexico before seeking asylum in the United States, he was not subject to firm resettlement bar because he did not have an offer of permanent residence and he was subject to restrictive conditions while residing there).

⁵⁸ See *Abdille v. Ashcroft*, 242 F.3d 477, 487 (3rd Cir. 2000) (finding that if DHS cannot obtain direct evidence of an offer of firm resettlement, “the IJ or BIA may find it necessary to rely on non-offer-based factors, such as the length of an alien’s stay in a third country, the alien’s intent to remain in the country, and the extent of the social and economic ties developed by the alien, as circumstantial evidence of the existence of a government-issued offer”).

⁵⁹ See *Ali v. Reno*, 237 F.3d 591 (6th Cir. 2001) (finding that the respondent had firmly resettled in Denmark where she had an offer of refugee status, lived there for six months with her family, and used her Danish passport to travel internationally).

⁶⁰ *Hanna v. Holder*, 740 F.3d 379 (6th Cir. 2014) (concluding that Hanna was firmly resettled in Canada even though he was a minor when he lived there because he and his family had landed immigrant status [lawful permanent residence], his family had started a business there, he attended middle school in Canada, and he and his family had traveled in and out of Canada).

- receipt of government benefits or assistance, such as assistance for rent, food, and transportation,⁶¹ and
- whether the [asylum seeker] had legal rights normally given to people who have some official status, such as the right to work and enter and exit the country.⁶²

It is worth noting that a class-based offer of permanent residence may be sufficient to trigger the firm resettlement bar so long as the asylum seeker has entered the country that makes the offer.⁶³ The “mere possibility that an individual might receive permanent refuge through a third country’s asylum procedures, however, is not enough to constitute an offer of permanent resettlement.”⁶⁴

2. *Fraudulently Procured Documents*

The BIA has concluded that possession of fraudulently procured documents, such as residency permits or visas, can form the basis of a valid offer of firm resettlement. For example in *Matter of D-X- & Y-Z*,⁶⁵ the BIA held that the Chinese respondent who had a facially valid permanent residency document in Belize, had been given an offer of firm resettlement even though the document had been fraudulently obtained. The BIA found that asylum seekers “who have obtained an immigration status by fraud should not be permitted to disavow that status in order to establish eligibility for another type of relief.”⁶⁶ The BIA also found it significant that the respondent had left Belize and voluntarily returned using her residence document which demonstrated that the Belizean government recognized her documents as facially valid.⁶⁷

C. Applications Not Affected by the Firm Resettlement Bar

1. *Asylum Seekers Who Have Not Entered the Country with the Offer of Resettlement*

Under 8 CFR § 1208.15, an asylum seeker is “considered to be firmly resettled if, prior to arrival in the United States, they *entered into another country with, or while in that country* received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement. . .” (emphases added). This requirement is expounded upon by the Asylum Office Lesson Plan on Firm Resettlement, which states, “An offer or receipt of a permanent status alone, without a physical entry into the third

⁶¹ *Mussie v. INS*, 172 F.3d 329, 330–31 (4th Cir. 1999) (finding that an Ethiopian citizen had firmly resettled in Germany where she had received refugee status, “government-paid language schooling . . . government assistance for transportation, rent, and food” and also “held a job, paid taxes, and rented her own apartment”).

⁶² *Id.*

⁶³ See USCIS Firm Resettlement Training Module, *supra* note 21, at 14.

⁶⁴ *Id.* (citing *Elzour v. Ashcroft*, 378 F.3d 1143, 1152 (10th Cir. 2004)).

⁶⁵ *Matter of D-X- & Y-Z*, 25 I&N Dec. 664 (BIA 2012).

⁶⁶ *Id.* at 666.

⁶⁷ *Id.* at 665. See also *Salazar v. Ashcroft*, 359 F.3d 45 (1st Cir. 2004) (upholding denial of asylum claim by Peruvian who had fraudulently obtained a Venezuelan resident stamp in his passport that he used to obtain a visa to the United States and to travel to and from Venezuela).

country while that status is available, would not meet the first element of the firm resettlement bar.”⁶⁸ While this issue may not arise often in the context of asylum seekers forced to remain in Mexico, it is an important element to remember if an asylum seeker has an offer or legal mechanism to obtain an offer of permanent residence in another country that they have not entered.

2. Credible Fear and Reasonable Fear Applicants

Asylum officers do not consider the firm resettlement bar during credible fear interviews.⁶⁹ However, the asylum officer will still inquire about potential bars to asylum and make note of them. According to the USCIS Credible Fear Lesson Plan:

Even though the bars to asylum do not apply to the credible fear determination, the interviewing officer must elicit and make note of all information relevant to whether or not a bar to asylum or withholding applies. The IJ is responsible for finally adjudicating whether or not the applicant is barred from receiving asylum or withholding of removal.⁷⁰

Thus practitioners who are preparing asylum seekers for credible fear interviews should advise them that they may be questioned about the time they have spent in Mexico or any other country, and whether they have applied for or been offered any legal status. While the asylum seeker’s answer would not result in a negative credible fear determination, it will become a part of the case file and may become an issue if the asylum seeker passes the credible fear interview and has a full hearing before the IJ. Therefore, practitioners should explain to asylum seekers why the asylum officer may ask these questions during a credible fear interview so that the asylum seeker has the opportunity to explain why they did not remain in Mexico.

Those seeking protection who are barred from asylum undergo a reasonable fear interview to assess potential eligibility for withholding of removal and Convention Against Torture (CAT) protection rather than a credible fear interview.⁷¹ The firm resettlement bar also is not applied during reasonable fear interviews. As discussed below, individuals who are only eligible for withholding of removal and CAT protection are not subject to the firm resettlement bar, so this bar is not an issue during reasonable fear interviews.

⁶⁸ See USCIS Firm Resettlement Training Module, *supra* note 21, at 12; see also *Haile v. Gonzales*, 421 F.3d 493, 497 (7th Cir. 2005) (holding that an Ethiopian asylum seeker could not be considered firmly resettled in Eritrea in spite of having an Eritrean passport because he had never entered Eritrea).

⁶⁹ USCIS, Credible Fear of Persecution and Torture Determinations, Lesson Plan, at 44 (Feb. 13, 2017), AILA Doc. No. 17022435, aila.org/infonet. Note, USCIS issued updated CFI guidance that attempted to require bars to asylum, including the firm resettlement bar, to be applied during the CFI process. That updated guidance was enjoined in *Kiakombua v. Wolf*, 498 F. Supp. 3d 1 (D.D.C. 2020), leaving the 2017 lesson plan in place. The government has filed a notice of appeal of that decision, but it is not clear whether it will actually pursue the appeal.

⁷⁰ USCIS, Credible Fear of Persecution and Torture Determinations, Lesson Plan, at 44 (Feb. 13, 2017), AILA Doc. No. 17022435, aila.org/infonet

⁷¹ 8 CFR § 1208.31.

3. *Withholding of Removal and Protection Under the Convention Against Torture*

There is no firm resettlement bar to withholding of removal under INA § 241(b)(3) or to protection under CAT.⁷² Thus, if the respondent⁷³ succeeds in proving that it is more likely than not that they will face persecution or torture in their country of origin, but is subject to the firm resettlement bar, the respondent cannot win asylum but may win withholding or CAT protection. Withholding and CAT protections prevent DHS from removing the respondent to the country where they fear persecution or torture, as determined by the IJ. However, withholding and CAT provide less protection than asylum because the IJ enters a removal order⁷⁴ and DHS can remove the respondent to any country other than the country of feared persecution or torture. DHS could remove the respondent to a country in which they have been offered permanent status as long as that country will accept them.⁷⁵ Therefore, while firm resettlement is not a bar to these forms of relief, a significant likelihood exists that DHS would seek to remove the respondent to the country of resettlement.

4. *Derivatives of Asylees or Refugees*

Finally, the firm resettlement bar does not apply to derivative asylees or refugees. A refugee or asylee can file an I-730 Refugee/Asylee Relative Petition for a spouse or unmarried child without regard to where that relative resides or what legal status they have there.⁷⁶ Practitioners should be aware, however, that if the beneficiary has removal order and re-entered without inspection, they are at risk of having the removal order reinstated following the submission of an I-730 by the petitioner.⁷⁷

III. Legal Status of U.S. Asylum Seekers in Mexico

Temporary Status in Mexico

When the Trump administration announced its MPP policy, DHS's guidance stated that Mexico:

⁷² *Id.*; see also *Siong v. INS*, 376 F.3d 1030 (9th Cir. 2004).

⁷³ The term "respondent" is used in this section rather than "applicant" since withholding and CAT protections are only available in removal proceedings, unlike asylum which may be sought affirmatively or defensively.

⁷⁴ INA § 241(b)(3)(B); *Matter of I-S- & C-S-*, 24 I&N Dec. 432, 433 (BIA 2008) ("It is axiomatic that in order to withhold removal there must first be an order of removal that can be withheld.").

⁷⁵ 8 CFR § 1208.16(f) ("Nothing in this section or § 1208.17 shall prevent the Service from removing an alien to a third country other than the country to which removal has been withheld or deferred.").

⁷⁶ See USCIS Firm Resettlement Training Module, *supra* note 21, at 27 (citing 8 CFR § 208.21(a), which lists grounds of ineligibility for asylum under INA § 208(b)(2)(A), but specifically excludes the firm resettlement ground of ineligibility).

⁷⁷ See USCIS, 1-730 Guidance & Updates for the Regions, at question 7 (Mar. 2019, updated: Dec. 2019), AILA Doc. No. 20090204. Pursuant to this memo, USCIS officers must contact ICE Enforcement and Removal Operations about any I-730 beneficiary who has entered without inspection after being issued a removal order. ICE then determines whether or not to reinstate the removal order. If ICE chooses not to reinstate, the adjudication of the I-730 can continue; if ICE decides to reinstate the removal order, USCIS must deny the I-730.

will allow foreigners who have received a notice to appear to request admission into Mexican territory for humanitarian reasons at locations designated for the international transit of individuals and to remain in national territory. This would be a “stay for humanitarian reasons” and they would be able to enter and leave national territory multiple times.⁷⁸

In the early days of MPP, it appeared that the Mexican government would offer temporary humanitarian visas to U.S. asylum seekers stranded in Mexico. One news source reported that, as of January 29, 2019, 12,000 individuals had applied for humanitarian visas, which allowed recipients to work and move freely within Mexico, but Mexico had granted only 1,210.⁷⁹ Once the Trump administration announced MPP, the Mexican government stated it would be closing its humanitarian visa program “shortly” because the number of migrants could overwhelm the Mexican immigration system.⁸⁰ According to another news source, Mexico stopped offering the humanitarian visas in early February 2019.⁸¹ According to practitioners in Mexico, however, the government has resumed issuing these visas, which may be required for those hoping to seek asylum in the United States to be able to travel through Mexico.

DHS further stated that asylum seekers returned to Mexico “will also have the opportunity to apply for a work permit for paid employment, which will allow them to meet their basic needs.”⁸² Ultimately, however, Mexico did not broadly offer “humanitarian” visas to those subject to MPP. Instead, most people subject to MPP were given a Forma Migratoria Multiple (FMM) when CBP returned them to Mexico after court dates. The FMM is similar to the U.S. I-94 form and permitted the MPP asylum seeker to remain in Mexico only until the date of the next U.S. court hearing and did not give the asylum seeker permission to work. Thus this temporary permission to be physically present in Mexico should not trigger the firm resettlement bar.

Family-Based Immigration in Mexico

As the length of time those subject to MPP stretched from weeks, to months, to more than a year, some U.S. asylum seekers formed family ties in Mexico. Mexican law provides for citizenship at birth through *jus soli* or *jus sanguinis*, meaning that any child born on Mexican soil is a Mexican citizen at

⁷⁸ Memorandum from Kirstjen M. Nielsen, Secretary, DHS, Policy Guidance for Implementation of the Migrant Protection Protocols, at 3 (Jan. 25, 2019), dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf.

⁷⁹ Sarah Kinoshian, *Mexico Plans to Shut Its “Too Successful” Humanitarian Visa Program*, PITTSBURGH POST-GAZETTE, Jan. 29, 2019, post-gazette.com/news/world/2019/01/28/Mexico-humanitarian-visas-program-Central-American-migrants-asylum-seekers/stories/201901010747.

⁸⁰ *Id.*

⁸¹ *México Culmina Entrega de Visas Humanitarias a Migrantes Centroamericanos*, EL HERALDO, Feb. 12, 2019, elheraldo.hn/minisitios/hondurenosel mundo/1258584-471/m%C3%A9xico-culmina-entrega-de-visas-humanitarias-a-migrantes-centroamericanos.

⁸² *Id.*

birth; additionally children born abroad to Mexican parents may acquire citizenship at birth.⁸³ Thus some families waiting for the ability to seek asylum in the United States have Mexican citizen children because the baby was born on Mexican soil.

Other U.S. asylum seekers may have married Mexican citizens or entered into Mexican common law marriages. Under Mexican law, a foreign national who marries or lives in a common law marriage, including sharing a child in common, with a Mexican citizen or permanent resident, or who has a Mexican child, can seek permanent legal status on that basis.⁸⁴ The process for seeking permanent residence based on a family relationship is not automatic and the noncitizen must undergo an administrative application process and pay a series of fees.⁸⁵ Marriage-based applicants for permanent residence must sign an affidavit under penalty of being fined that the marriage is bona fide and undergo an interview with an immigration official.⁸⁶ While family unity applications for family members abroad generally require a showing of economic solvency by the Mexican petitioners, applications on behalf of foreign nationals present in Mexico do not generally have to demonstrate economic solvency.⁸⁷ However, practitioners in Mexico report that in spite of what the law says, some applicants have been denied permanent residence based on economic solvency even when the applicant is in Mexico. Furthermore, practitioners report that applicants who lack lawful status in Mexico must pay a fine for being in the country without lawful status, and the application may be denied based on the inability to pay the fine.

In 2020 the Mexican government issued family-based lawful permanent resident cards as follows for citizens of countries that were frequently subject to MPP: Venezuela 3,274; Cuba 2,927;

⁸³ See U.S. Department of State, 2020 Country Reports on Human Rights Practices—Mexico, at 27 (Mar. 30, 2021), [state.gov/reports/2020-country-reports-on-human-rights-practices/mexico/](https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/mexico/).

⁸⁴ Reglamento de la Ley de Migración, diputados.gob.mx/LeyesBiblio/regley/Reg_LMigra.pdf. See also Instituto Nacional de Migración, Cambio a residente permanente por vínculo familiar, gob.mx/tramites/ficha/cambio-a-residente-permanente-por-vinculo-familiar/INM822. Additionally, minor (under 18 and unmarried) siblings of Mexican citizens or permanent residents can seek permanent residence as can minor children of Mexican citizens or residents. *Id.* For a summary in English from an unofficial source, see Mexperience, Applications for Residency from Within Mexico (Apr. 6, 2020), mexperience.com/applications-for-residency-from-within-mexico/.

⁸⁵ See Instituto Nacional de Migración, Cambio a residente permanente por vínculo familiar, gob.mx/tramites/ficha/cambio-a-residente-permanente-por-vinculo-familiar/INM822.

⁸⁶ See Ley de Migración Artículo 150 Federal de México, “Se impondrá multa de cien a quinientos días de salario mínimo general vigente en el Distrito Federal al mexicano que contraiga matrimonio con extranjero sólo con el objeto de que éste último pueda radicar en el país, acogiéndose a los beneficios que esta Ley establece para estos casos. Igual sanción se impondrá al extranjero que contraiga matrimonio con mexicano en los términos del párrafo anterior.”) leyes-mx.com/ley_de_migracion/150.htm. Information regarding marriage-based interviews was shared with CLINIC by colleagues practicing in Mexico.

⁸⁷ Applications on behalf of family members who are outside of Mexico are adjudicated pursuant to Trámite 5 and 7 of the Mexican immigration law, whereas those filed on behalf of family members who are already in Mexico are adjudicated pursuant to Trámite 8. See Lineamientos Generales para la expedición de visas que emiten las secretarías de Gobernación y de Relaciones Exteriores, dof.gob.mx/nota_detalle.php?codigo=5363603&fecha=10/10/2014.

Guatemala 1,572; Honduras 1,405; El Salvador 810; Haiti 719.⁸⁸ By way of contrast, in 2018, before the start of MPP, family-based permanent resident cards for these countries broke down as follows: Venezuela 2,627; Honduras 2,202; Guatemala 2,035; Cuba 1,470; El Salvador 1,309; and Haiti 168.⁸⁹ Thus, while there was an uptick in issuance of family-based lawful permanent resident cards from Honduras, Guatemala, and El Salvador, the number of family-based lawful permanent resident cards actually decreased following the start of MPP for those from Venezuela, Cuba, and Haiti.

Applications for Asylum and Complementary Protection in Mexico

Another Trump era policy designed to prevent asylum seekers from prevailing on their claims was “Asylum Ban 2.0.”⁹⁰ Under this rule, an asylum seeker in the United States would be denied asylum and instead only potentially be eligible for the lesser forms of relief of withholding of removal and protection under CAT unless they had applied for and been rejected for asylum in one of the countries en route to the United States.⁹¹ As a result of this harsh rule,⁹² and the indefinite time that those in MPP were forced to remain in Mexico, some Central Americans and others subject to MPP applied for refugee status in Mexico.

As in the United States, an asylum seeker in Mexico must show that they “[a]re afraid of being persecuted for reasons of race, religion, nationality, gender, membership of a particular social group, or political opinion”⁹³ but some aspects of the Mexican refugee law are more expansive than those in the United States.⁹⁴ Refugee applicants in Mexico must generally apply within 30 days of

⁸⁸ Gobierno de Mexico Boletines Estadísticos, Boletín anual, 2020, at 103, politicamigratoria.gob.mx/work/models/PoliticaMigratoria/CEM/Estadisticas/Boletines_Estadisticos/2020/Boletin_2020.pdf. Note, while Haitian citizens were not subjected to MPP, statistics concerning Haitians are included here because many Haitians have been stranded in Mexico through metering and Title 42 expulsions.

⁸⁹ Gobierno de México Boletines Estadísticos, Boletín anual, 2018, at 103, politicamigratoria.gob.mx/work/models/PoliticaMigratoria/CEM/Estadisticas/Boletines_Estadisticos/2018/Boletin_2018.pdf.

⁹⁰ See 85 Fed. Reg. 82260 (Dec. 17, 2020) and 84 Fed. Reg. 33829 (July 16, 2019).

⁹¹ See 8 CFR 1208.3 (c) (4), currently vacated, pending appeal, pursuant to *Cap. Area Immigrants’ Rts. Coal. v. Trump*, 471 F. Supp. 3d 25, 60 (D.D.C. 2020).

⁹² In addition to withholding and CAT being less stable forms of relief in the United States, the evidentiary burden in seeking withholding and CAT is also substantially higher, with the applicant having to prove that it is more likely than not they would suffer persecution or torture if returned to their country of feared persecution.

⁹³ UNHCR, *Who Is Considered a Refugee?*, *Help Mexico*, help.unhcr.org/mexico/en/quien-es-una-persona-refugiada/.

⁹⁴ The criteria for granting refugee status in Mexico are more expansive than in the United States. According to UNHCR, facts that may support refugee status can include: “Extortion, harassment, intimidation, physical or sexual violence from gangs or armed groups: For refusing to cooperate or become a member; For refusing to pay war taxes or their dues; For refusing to become partners of people related to criminal groups; For being witnesses to a crime committed by these group.” *Id.* See also asylum access, *Mexican Asylum System for U.S. Immigration Lawyers FAQ* (Nov. 2019), asylumaccess.org/wp-content/uploads/2019/11/Mexican-Asylum-FAQ-for-US-Immigration-Lawyers.pdf [hereinafter “asylum access, Mexican Asylum System”].

arrival in the country and are supposed to have their application adjudicated within 45 days.⁹⁵ However, the Mexican adjudication agency, Comisión Mexicana de Ayuda a Refugiados (COMAR), has been overwhelmed and even before the COVID pandemic, regularly took well over six months to adjudicate cases.⁹⁶ If an applicant is granted refugee status, they can reside permanently in Mexico with the right to health care, employment, and to apply for naturalization after four years.⁹⁷ Additionally, family members who are in Mexico with the applicant may be granted derivative refugee status, and Mexican refugees may apply for family members outside the country to join them in Mexico.⁹⁸

Those who seek refugee status in Mexico simultaneously apply for complementary protection, a related form of protection that provides status to those who do not meet the refugee definition but cannot return to their country of origin because they would face torture, cruel, inhuman or degrading treatment, or death there.⁹⁹ Complementary protection allows for permanent residence for the grantee but does not provide for family reunification or a clear path to naturalization for the grantee.¹⁰⁰ Given its lesser benefits than asylum, complementary protection is somewhat analogous to withholding of removal in the United States, but it is not the same both because the grantee is not simultaneously ordered removed and because the legal standard is broader than the asylum standard. A foreign national who is granted complementary protection status in Mexico, loses that status automatically if they apply for refugee status in another country.¹⁰¹

⁹⁵ Inicio Comisión Mexicana de Ayuda a Refugiados (COMAR), *Procedimiento para ser Reconocido como Refugiado en México*, gob.mx/comar/acciones-y-programas/procedimiento-para-ser-reconocido-como-refugiado-en-mexico.

⁹⁶ See asylum access, Mexican Asylum System, *supra* note 94 at 4.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ UNHCR, *UNHCR Welcomes New Refugee Law in Mexico*, (Jan. 28, 2011) unhcr.org/en-us/news/briefing/2011/1/4d42bdf19/unhcr-welcomes-new-refugee-law-mexico.html. (“Mexico will grant complementary protection for people not considered as refugees but whose life has been threatened or could be at risk of torture, ill treatment, or other forms of cruel inhuman treatment.”). See also asylum access, Mexican Asylum System, *supra* note 94 at 9.

¹⁰⁰ See asylum access, Mexican Asylum System, *supra* note 94 at 9. See *Reglamento De La Ley Sobre Refugiados Y Protección Complementaria* (Feb. 21, 2012) gob.mx/cms/uploads/attachment/file/211032/19_Reglamento_de_la_Ley_sobre_Refugiados_y_Proteccion_Complementaria.pdf. (“Artículo 16.- El Instituto tendrá las siguientes atribuciones: . . . Expedir el documento migratorio que acredite a los extranjeros que reciban protección complementaria la residencia permanente en los Estados Unidos Mexicanos;”).

¹⁰¹ *Reglamento De La Ley Sobre Refugiados Y Protección Complementaria* (Feb. 21, 2012) gob.mx/cms/uploads/attachment/file/211032/19_Reglamento_de_la_Ley_sobre_Refugiados_y_Proteccion_Complementaria.pdf. (“Artículo 57 . . . En caso de que un refugiado o un extranjero que reciba protección complementaria, solicite la protección de otro país, se entenderá que renuncia a la protección que se le otorgó en los Estados Unidos Mexicanos.”) gob.mx/cms/uploads/attachment/file/211032/19_Reglamento_de_la_Ley_sobre_Refugiados_y_Proteccion_Complementaria.pdf. Note, in an unpublished BIA decision, *Matter of S-L-E-L*, (BIA Apr. 7, 2020) (unpublished) <file:///C:/Users/vneilson/Downloads/462824307-S-L-E-L-AXXX-XXX-505-BIA-April-7-2020.pdf>, the BIA remanded a case in which the IJ had found the respondent firmly resettled because he had received complementary

Since the inception of MPP, the grant rates for those seeking asylum and complementary protection in Mexico have increased dramatically. In 2018, 25 percent of Honduran applicants received refugee status and 39 percent received complementary protection.¹⁰² By 2019, those figures jumped to 76 percent receiving refugee status and 6 percent receiving complementary protection, for a total of 82 percent receiving humanitarian protection.¹⁰³ In 2021, the top five countries for grants of refugee or complementary protection status were: Honduras (5,091 refugee grants; 0 complementary protection grants); Venezuela (1,113 refugee grants; 0 complementary protection grants); El Salvador (1,108 refugee grants; 0 complementary protection grants); Cuba (922 refugee grants; 2 complementary protection grants); and Haiti (564 refugee grants; 357 complementary protection grants).¹⁰⁴

Predictably, the number of grants of lawful permanent residence cards based on humanitarian grounds also rose, breaking down as follows in 2020: 6,181 from Honduras, 5,882 from Venezuela, 2,631 from El Salvador, 1,279 from Cuba, 638 from Guatemala, and 615 from Haiti.¹⁰⁵ In 2018, before the start of MPP, the breakdown of humanitarian-based lawful permanent residence was: 2,900 from Venezuela, 1,432 from El Salvador, 1,102 from Honduras, 131 from Guatemala, 10 from Cuba, and 10 from Haiti.¹⁰⁶

U.S. asylum seekers who obtained lawful permanent status in Mexico, either through humanitarian routes or through family-based petitions will face a likely firm resettlement bar. Even those who did not apply for permanent residence may face arguments by DHS that they had an offer of permanent residence if they have an immediate family member who is a Mexican citizen or permanent resident.¹⁰⁷ If DHS makes a prima facie showing of an offer of permanent residence, the burden will shift to the asylum seeker to demonstrate that there was no offer or that they meet an exception to the firm resettlement bar.

protection in Mexico. The remand was based on the IJ's reliance on a law review article that was not part of the record, however, and did not reach the merits of whether or not the receipt of complementary protection is sufficiently permanent to bar the respondent as having been firmly resettled.

¹⁰² COMAR, Statistics (May 2021), gob.mx/cms/uploads/attachment/file/643919/CIERRE_Mayo-2021_1-Junio-2021.pdf.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 103.

¹⁰⁶ Gobierno de México Boletines Estadísticos, Boletín anual, 2018, at 103, politicamigratoria.gob.mx/work/models/PoliticaMigratoria/CEM/Estadisticas/Boletines_Estadisticos/2018/Boletin_2018.pdf.

¹⁰⁷ See USCIS Firm Resettlement Training Module, *supra* note 21, at 13. ("The existence of a legal mechanism to obtain permanent status in the third country may be sufficient evidence to establish an offer of firm resettlement, and is not contingent on whether the applicant applies for the status. You should give an applicant the opportunity to explain why he or she would not qualify for or be granted the permanent status." [Internal citations omitted].)

IV. Exceptions to the Firm Resettlement Bar

Even if DHS can demonstrate that an asylum seeker is subject to the firm resettlement bar, the asylum seeker may still prevail on their application if they meet an exception to the bar. The two exceptions to the firm resettlement bar are:

- *No Significant Ties*. Under 8 CFR § 1208.15(a), if an asylum seeker's entry into that country was a necessary consequence of their flight from persecution, they remained in that country only as long as was necessary to arrange onward travel, and they did not establish significant ties in that country;¹⁰⁸ or
- *Restrictive Conditions*. Under 8 CFR § 1208.15(b), if the conditions of the asylum seeker's residence in that country were so substantially and consciously restricted by the authority of the country of refuge that they were not in fact resettled.

The burden of proof is on the asylum seeker to demonstrate that one of these exceptions applies.¹⁰⁹ The potential application of these two exceptions to asylum seekers forced to remain in Mexico is discussed below.

V. Practical Tips in Addressing the Firm Resettlement Bar as Applied to U.S. Asylum Seekers Stranded in Mexico

Most U.S. asylum seekers who have travelled through and/or been returned to Mexico have not received a pathway to permanent residence, so the firm resettlement bar should not apply to them. Nevertheless, with more asylum seekers who have been stranded for long periods of time being allowed into the United States, some advocates are fearful that DHS may raise the issue in U.S. asylum cases. CLINIC therefore offers the following practical tips to fight potential DHS arguments that these asylum seekers have firmly resettled in Mexico.

A. Arguments that the Firm Resettlement Bar Should Not Apply

The fact that an asylum seeker has spent time in a third country, even a significant amount of time, does not mean that they have "firmly resettled" in that country under the regulatory definition. Before considering possible exceptions to the bar, practitioners should construct arguments that the bar should not apply.

¹⁰⁸ See, e.g., *Ramos Lara v. Lynch*, 833 F.3d 556, 560 (5th Cir. 2016) (finding Bolivian asylum seeker did not remain in Mexico only "as long as was necessary to arrange onward travel" when she resided in Mexico for five years, working as a school teacher and had previously entered the United States without seeking asylum).

¹⁰⁹ *Matter of A-G-G-*, 25 I&N Dec. at 503 ("[T]he burden then shifts to the alien pursuant to 8 C.F.R. §§ 1208.15(a) and (b) to establish that an exception to firm resettlement applies by a preponderance of the evidence.").

1. *Make DHS meet its burden of proof.*

Practitioners should hold DHS to its initial evidentiary. Under *Matter of A-G-G* the initial burden of proof is on DHS to show that an offer of firm resettlement has been made.¹¹⁰ Unlike in *Matter of K-S-E-*, there has not been a widespread offer of permanent status to asylum seekers who have been forced to remain in Mexico. Do not concede that there has been any firm resettlement—hold DHS to its evidentiary burden.¹¹¹ Even if DHS proffers evidence of firm resettlement, carefully examine it to be sure it is admissible and probative.¹¹²

2. *Refute any “indirect evidence” offered by DHS.*

Even if DHS attempts to offer evidence showing that the asylum seeker has been in Mexico for several months or longer, length of time in a third country alone is not sufficient to demonstrate that the individual has received an offer of permanent residence.¹¹³ The legal standard is the permanence of the offer; remind DHS and the adjudicator that being forced to remain in a third country without an offer of permanent status is not proof of firm resettlement.¹¹⁴

If the U.S. asylum seeker married a Mexican citizen or permanent resident, or has a child who is a Mexican citizen or permanent resident, it is possible that DHS could offer evidence about Mexican laws that allow for family-based immigration in Mexico as indirect proof of an “offer” of permanent residence.¹¹⁵ If DHS offers such proof into evidence, the burden would shift to the asylum seeker to prove that there was a reason they were unable to apply for lawful permanent residence in Mexico. Although having a Mexican family member provides a pathway for a noncitizen to apply for permanent residence in Mexico, the application could still be denied if the family cannot prove existence of the relationship.

¹¹⁰ The application for asylum, Form I-589, does include the following question on page 7, “Have you, your spouse, your child(ren), or other family members, such as your parents or siblings, ever applied for or received any lawful status in any country other than the one from which you are now claiming asylum?” uscis.gov/sites/default/files/document/forms/i-589.pdf. The asylum seeker must answer this question truthfully or could risk a finding of frivolousness for concealing a material fact.

¹¹¹ See *Matter of A-G-G*, 25 I&N Dec. 486, 501 (BIA 2011). The Form I-589 application for asylum at page 7 requires an asylum seeker to explain whether they have traveled through or resided in any country before entering the United States as well as to answer whether the asylum seeker or family members have applied for or received any lawful status in a third country. The asylum seeker must answer these questions honestly, but should not provide more evidence about any status offered in Mexico than is necessary to answer the question completely.

¹¹² See *Jianping Ye v. Lynch*, 650 F. App’x 385 (9th Cir. 2016) (unpublished) (implying that the petitioner had a right to contest validity of third country identity card that DHS offered into evidence but waived that objection).

¹¹³ USCIS Firm Resettlement Training Module, *supra* note 21, at 15.

¹¹⁴ *Maharaj v. Gonzales*, 450 F.3d 961 (9th Cir. 2006) (remanding because, even though family had resided in Canada for four years, it was not clear whether they had an offer of permanent status).

¹¹⁵ While the asylum seeker will need to list their family members on their asylum application, the burden is on DHS to demonstrate a pathway to permanent residence in Mexico, not on the asylum seeker.

Additionally, noncitizens who are in Mexico without lawful status have to pay a fine to apply for family-based residence and could be denied status if they cannot pay the fine.¹¹⁶

Possible reasons that a family-based visa application could be denied include the end of the familial relationship, inability to prove the existence of the relationship, or inability of the foreign family member to pay fines if they have been in Mexico without lawful status.¹¹⁷ Given that many asylum seekers in Mexico fled on short notice, they might also be unable to submit the required documents in support of an immigration application or pay the application fee.¹¹⁸

3. *Argue that there has been no offer of permanent residence.*

Under *Matter of A-G-G* the key factor is whether an offer of permanent residence has been made. Even if a U.S. asylum seeker has obtained a humanitarian visa, so long as that visa is temporary, it does not meet the standard for an offer of permanent residence.¹¹⁹ There must be an actual offer or clear legal mechanism to obtain an offer of permanent status. “[A] mere possibility that an alien might receive permanent refuge through a third country’s asylum procedures is not enough to constitute an offer of permanent resettlement.”¹²⁰ Remember that termination of the residency or offer does not undercut a finding of firm resettlement.¹²¹ However, practitioners can argue that if the status was terminated, then it was not actually *permanent*.¹²²

¹¹⁶ This information comes from practitioners in Mexico.

¹¹⁷ See *supra* note 87, and surrounding text.

¹¹⁸ The fee for a permanent residence application is MX \$5,379.00 or USD \$269.67. Instituto Nacional de Migración, Cambio a residente permanente por vínculo familiar, gob.mx/tramites/ficha/cambio-a-residente-permanente-por-vinculo-familiar/INM822.

¹¹⁹ See *Kahesay v. Garland*, No. 18-72050, 2021 WL 1027095, at * 1 (9th Cir. Mar. 17, 2021) (unpublished) (Finding Eritrean asylum seeker who traveled “utilizing an Italian travel document ... with refugee status in Italy” was not firmly resettled there because she would have had to renew the refugee status every two years); *Ali v. Reno*, 237 F.3d 591 (6th Cir. 2001) (finding that refugee status and receipt of a Danish passport showed permanent status to invoke firm resettlement bar).

¹²⁰ *Elzour v. Ashcroft*, 378 F.3d 1143, 1152 (10th Cir. 2004).

¹²¹ *Tchitchui v. Holder*, 657 F.3d 132 (2nd Cir. 2011) (finding that the expiration of Cameroonian’s Guatemalan permanent residency “is not relevant to the question of whether he is eligible [for asylum] in the United States”).

¹²² See *Bonilla v. Mukasey*, 539 F.3d 72 (1st Cir. 2008) (remanding for BIA to determine whether an expired resident document was sufficient to demonstrate offer of permanent residence); *Abdille v. Ashcroft*, 242 F.3d 477 (3rd Cir. 2000) (remanding case because it was error to conclude that a renewable two year grant of asylum was sufficiently permanent to invoke firm resettlement bar).

4. *Argue that individuals seeking asylum in the United States applied for asylum in Mexico because of unlawful changes in U.S. asylum law.*

There are numerous cases stating that if an individual has applied for and received asylum in a third country, they are considered resettled in that country.¹²³ Even if an individual applied for asylum and abandoned the application before it was adjudicated, they may be considered firmly resettled.¹²⁴

Under Asylum Ban 2.0, an individual seeking asylum in the United States could not succeed, and was less likely to even pass a fear screening at the U.S.-Mexico border,¹²⁵ unless they applied for asylum in Mexico or another country en route to the United States and were denied protection. Out of desperation, asylum seekers may have sought asylum in Mexico believing that they otherwise could not obtain asylum in the United States. In *E. Bay Sanctuary Covenant v. Garland*,¹²⁶ the Ninth Circuit analyzed Asylum Ban 2.0 and found that while the law was superficially similar to a Safe Third Country Agreement, it lacked the procedural protections of such an agreement because to comply with section 208(a)(2)(A) of the INA, there would have to be a formal agreement between the two countries, and the other country would have to have “a ‘full and fair’ procedure for applying for asylum in that country.”¹²⁷ The Ninth Circuit went on to find that the Asylum Ban also was not authorized under the firm resettlement bar section of the INA, section 208(b)(2)(A)(vi). The Ninth Circuit explained:

The firm-resettlement bar denies asylum to aliens who have either truly resettled in a third country, or have received an actual offer of firm resettlement in a country where they have ties and will be provided appropriate status. Aliens subject to the Rule cannot conceivably be

¹²³ See *Ruv v. Barr*, 809 F. App'x 408, 409 (9th Cir. 2020) (unpublished) (finding Russian who had received asylum in Mexico to be barred from asylum in the United States, even though he “experienced sporadic harassment, violence, and unpleasantness in Mexico”); *Nahrvani v. Gonzales*, 399 F.3d 1148, 1154 (9th Cir. 2005) (upholding denial of asylum to Iranian who had firmly resettled in Germany); *Mussie v. U.S. I.N.S.*, 172 F.3d 329, 332 (4th Cir. 1999) (upholding denial of asylum to Ethiopian asylum seeker who had been granted asylum in Germany, lived there for six years, and was granted a German travel document).

¹²⁴ In *Maharaj v. Gonzales*, 450 F.3d 961, 977 (9th Cir. 2006) (*en banc*), the 9th Circuit determined that a Fijian man who had applied for asylum in Canada was not automatically subject to the firm resettlement bar as a result, finding, instead, that DHS had the “burden of adducing evidence that indicates the significance Canada attaches to the process in which Maharaj was engaged, and to the progress of his application.” The 9th Circuit further found that “an alien may have an ‘offer’ if the alien is entitled to permanent resettlement and all that remains in the process is for the alien to complete some ministerial act. The firm resettlement bar may apply if, instead of completing the process and accepting the offer of permanent resettlement to which the alien is entitled, the alien chooses to walk away.” *Id.*

¹²⁵ Asylum seekers subjected to the Third Country Transit Ban were given reasonable fear interviews (RFIs) rather than credible fear interviews at the border. Unlike CFIs, which require that the applicant demonstrate a “significant possibility” of succeeding on an application for asylum, to pass an RFI, an applicant must demonstrate a “reasonable possibility” that they would face persecution or torture. USCIS interprets this standard as the same as the well-founded fear standard in asylum cases. See USCIS, Reasonable Fear of Persecution and Torture Determinations, Lesson Plan, at 11 (Feb. 24, 2017), AILA Doc. No. 17022436.

¹²⁶ *E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962, 978 (9th Cir. 2020).

¹²⁷ *Id.*

regarded as firmly resettled in Mexico. They do not intend to settle in Mexico. They have been there only for the time necessary to reach our border and apply for asylum. Nor have they received an offer of resettlement. Even if they were to receive such an offer, they have no ties to Mexico. The Supreme Court has long recognized that the firm-resettlement bar does not bar aliens who have merely traveled through third countries, since “many refugees make their escape to freedom from persecution in successive stages and come to this country only after stops along the way.” *Rosenberg*, 402 U.S. at 57 n.6, 91 S.Ct. 1312.¹²⁸

Practitioners could cite the language from this decision to argue that even individuals who applied for and received asylum in Mexico should not be considered firmly resettled there, because they only made the application as a result of a U.S. law which was found to be unlawful. This argument would be strongest for individuals who sought asylum in Mexico between Sept. 11, 2019 and June 30, 2020¹²⁹ when the third country transit ban was in effect.

For those who applied for asylum before or after Asylum Ban 2.0 was in effect, it will be more difficult to demonstrate that the actions of the U.S. government forced them to seek asylum in Mexico. Practitioners should consider arguing that the asylum seeker only applied for asylum in Mexico because they were forced to remain there indefinitely pursuant to MPP, an unprecedented program that has been found unlawful by multiple federal courts.¹³⁰ If that argument is unsuccessful, they can argue one or both of the two exceptions to firm resettlement.

B. Avoid Potential Pitfalls

While the regulations require DHS to meet its initial burden, once it has done so, the burden shifts to the asylum seeker to prove that they have not firmly resettled. There are several areas of firm resettlement doctrine that are very unforgiving towards asylum seekers.

1. *Facially valid documents, even if obtained fraudulently, may be sufficient for DHS to meet its burden of demonstrating firm resettlement.*

Practitioners should carefully question asylum seekers about any documents they obtained in Mexico. As discussed above, U.S. resettlement law is quite harsh regarding fraudulently obtained documents,

¹²⁸ *Id.*

¹²⁹ Andrew Craycroft and Nithya Nathan-Pineau, Immigrant Legal Resource Center, *The Asylum Transit Ban After Cair Coalition v. Trump Obtaining Relief in Asylum Transit Ban Cases*, (Oct. 2020), ilrc.org/sites/default/files/resources/asylum_transit_ban_after_cair_v_trump_10.2020.pdf.

¹³⁰ See *Innovation L. Lab v. Wolf*, 951 F.3d 1073, 1095 (9th Cir.) (finding MPP to be unlawful), cert. granted, 141 S. Ct. 617, 208 L. Ed. 2d 227 (2020). The Trump administration appealed the decision to the Supreme Court. The Biden administration dropped the appeal and the Supreme Court granted a motion by DOJ to vacate the Ninth Circuit decision as moot. *Mayorkas, Sec. Of Homeland, et al. v. Innovation Law Lab, et al.*, No. 19-1212, 2021 WL 2520313 (U.S. June 21, 2021); see also *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832 (9th Cir. 2020) (finding third country transit ban to be unlawful).

so even if an asylum seeker is in possession of a “facially valid” document that was fraudulently obtained, if the document evinces permanent status, they may be considered firmly resettled.¹³¹

2. *Misrepresentation by the asylum seeker about time spent in a third country may lead to a denial and a frivolous application finding.*

If the adjudicator finds that an asylum seeker’s misrepresentation about the time they spent in a third country cut off a line of questioning that could be material to the firm resettlement bar, the application may then be denied “regardless of what the outcome of such [a firm resettlement] inquiry would have been.”¹³² It is therefore critical that the asylum seeker be honest about the amount of time they actually spent in a third country.

3. *A parent’s firm resettlement bar will generally be attributed to a minor child.*

If an adjudicator finds that a parent has firmly resettled that determination will be applied to the child as well.¹³³

4. *If an adjudicator found a firm resettlement bar, that bar will be applied if the asylum seeker later files a motion to reopen based on changed country conditions in the country of feared harm.*

Even if in the future—following a denial of asylum—country conditions have changed in the country of feared harm to a degree that the asylum seeker might be able to prevail on a motion to reopen, if the adjudicator already made a finding of firm resettlement, the asylum seeker will likely not prevail on a motion to reopen unless they can show that they meet one of the exceptions to firm resettlement, such as restrictive conditions in the country of resettlement.¹³⁴

¹³¹ See *Matumona v. Barr*, 945 F.3d 1294, 1302 (10th Cir. 2019) (upholding BIA’s finding that asylum seeker from the Democratic Republic of Congo was firmly resettled in Angola because he was able to obtain an Angolan passport, even though he did so through a fraudulent adoption);

Su Hwa She v. Holder, 629 F.3d 958 (9th Cir. 2010); *Matter of D-X- & Y-Z-*, 25 I&N 664 (BIA 2012).

¹³² *Mohamed v. Barr*, 785 F. App’x 399, 400 (9th Cir. 2019) (unpublished).

¹³³ *Vang v. I.N.S.*, 146 F.3d 1114, 1116–17 (9th Cir. 1998) (“we look to whether the minor’s parents have firmly resettled in a foreign country before coming to the United States, and then derivatively attribute the parents’ status to the minor.”). Practitioners may wish to argue that it is fundamentally unfair that a parent’s residence can be imputed to a child in this context—when it hurts the child’s ability to seek asylum in the United States—but not in the analogous context of an application for non-lawful permanent resident cancellation of removal where a parent’s physical presence cannot be imputed to a child. See *Saucedo-Arevalo v. Holder*, 636 F.3d 532 (9th Cir. 2011).

¹³⁴ *Rahman v. Barr*, 829 F. App’x 284, 285 (9th Cir. 2020) (unpublished) (denying motion to reopen where judge had previously found that asylum seeker was firmly resettled in Sweden).

C. Argue the Exceptions to Firm Resettlement.

Even those who did receive an offer of permanent status in Mexico, may be able to demonstrate an exception to the firm resettlement bar. The two exceptions to the firm resettlement bar recognize that restrictive conditions may exist in the country offering a permanent status and that the asylum seeker may have no significant ties to the country offering permanent status. In other words, the quality and actual permanency of their life in that country matter in the firm resettlement assessment. Therefore, an offer of permanent status from Mexico would not automatically mean the asylum seeker has firmly resettled, but it does mean that practitioners should be prepared to argue an exception to the firm resettlement bar.

1. *Argue the asylum seeker has “no significant ties” to the third country*

Practitioners should explore whether the asylum seeker meets the “no significant ties” exception under the regulations. This would require showing that: “his or her entry into that country was a necessary consequence of his or her flight from persecution, that he or she remained in that country only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that country.”¹³⁵

It should be relatively easy to meet the first prong of this exception. Most asylum seekers stranded in Mexico are there because entry into that country was a necessary consequence of their flight from persecution. Since many asylum seekers are unable to obtain visas to enter the United States or Canada, getting to the U.S.-Mexico border is often the only option to seek asylum in the United States.

The second prong requires asylum seekers to show that they remained in Mexico only as long as was necessary to travel onward to the United States. For asylum seekers who are now entering the United States at the earliest possible date under the MPP wind-down, or who are entering as soon as the U.S. government allows them to following metering and Title 42 expulsions, they again, will have strong arguments that they only remained in Mexico as long as was necessary.¹³⁶ Under relevant case law, the length of time alone that the asylum seeker spent in the third country is not dispositive to whether they only stayed in the country as long as was necessary. For those who remained in Mexico for a lengthy period of time, the argument that it was the U.S. government’s own policies that prevented them from continuing their travel into the United States should be particularly compelling.

Asylum seekers may have the most difficulty overcoming the third prong—that they have not established significant ties in Mexico. Once the asylum seeker raises a “no significant ties” exception

¹³⁵ 8 CFR § 1208.15(a).

¹³⁶ Significantly, length of time in the third country does not, in and of itself, require a finding of “significant ties.” *Gwangsu Yun v. Lynch*, 633 F. App’x 29, 30 (2d Cir. 2016) (unpublished) (finding no “significant ties” for North Korean asylum seeker based on length of stay in South Korea alone “unless there is substantial evidence that two years was longer than ‘necessary to arrange onward travel’”).

to firm resettlement, the adjudicator will consider many of the same types of evidence that they considered in evaluating indirect evidence DHS may have introduced that the third country made an offer of firm resettlement. This evidence can include: length of stay, ability to work, and conditions of residing in the third country.¹³⁷ While some asylum seekers may have spent a substantial amount of time in Mexico as a result of MPP, practitioners should first argue that length of time alone does not mean that the asylum seeker established significant ties. Nonetheless some asylum seeker will have obtained jobs and possibly permanent housing during their substantial stay in Mexico.

Asylum seekers may argue that MPP presents a unique situation in that the U.S. government itself forced them to remain in Mexico as a pre-condition to seeking asylum in the United States. The length of time the asylum seeker had to stay in Mexico equaled the length of time until the next hearing date that a U.S. immigration judge established. If asylum seekers found work or housing during that waiting period, it was only to sustain themselves during this U.S.-imposed waiting period. Practitioners can argue that this situation of forced exile in a third country while awaiting a potentially permanent resettlement opportunity in the United States, is analogous to individuals stranded in refugee camps, awaiting permanent status abroad. In *Camposeco-Montejo v. Ashcroft*,¹³⁸ the Ninth Circuit held that an indigenous Guatemalan who resided for 16 years in a Mexican refugee camp near the Guatemalan border had not been firmly resettled in Mexico. The Ninth Circuit found that, in spite of the length of his residence in the camp, he “was restricted by the Mexican government to the municipality in which his refugee camp was located. He was not allowed to attend Mexican schools and was threatened with repatriation to Guatemala.”¹³⁹ The Ninth Circuit has also held that even applying required legal presumptions:

‘does not mean that as soon as a person has come to rest at a country other than the country of danger, he cannot get asylum in the United States.’ . . . Such narrow interpretation of the firm resettlement bar would limit asylum to refugees from nations contiguous to the United States or to those wealthy enough to afford to fly here in search of refuge. The international obligation our nation agreed to share when we enacted the Refugee Convention into law knows no such limits. [internal citations omitted].¹⁴⁰

Similarly, the United States cannot comply with international law if it creates the very conditions that it then holds against those seeking asylum in the United States.

¹³⁷ See *Tchitchui v. Holder*, 657 F.3d at 137. (“Tchitchui had ongoing business activities, could work and travel at will, and had permanent residency status. These circumstances demonstrate that Tchitchui established significant ties to Guatemala, a country that afforded him a safe haven from his persecution in Cameroon.”); see also *Desta v. Ashcroft*, 329 F.3d 1179 (10th Cir. 2003) (finding an Ethiopian asylum seeker had formed significant ties in Canada because he was offered landed immigrant status [lawful permanent residence] in Canada where his wife was granted asylum, had a son there, and lived in Canada for 18 months before seeking asylum in the United States).

¹³⁸ *Camposeco-Montejo v. Ashcroft*, 384 F.3d 814, (9th Cir. 2004). See also *Mengstu v. Holder*, 560 F.3d 1055, 1060 (9th Cir. 2009) (finding that Ethiopian asylum seeker's two-year stay in a Sudanese refugee camp did not amount to firm resettlement in that country).

¹³⁹ *Camposeco-Montejo v. Ashcroft*, 384 F.3d at 820.

¹⁴⁰ *Ali v. Ashcroft*, 394 F.3d 780, 790 (9th Cir. 2005).

2. Argue the asylum seeker has faced “restrictive conditions” in the third country

Even if the asylum seeker has established significant ties in the third country or has obtained permanent status there, they can still be granted asylum in the United States if they can prove that they were subject to restrictive conditions there. The asylum applicant has to establish that “the conditions of his/her residence in that country were so substantially and consciously restricted by the authority of the country of refuge that they were not in fact resettled.”¹⁴¹ Restrictive conditions factors can be based on the type of housing and employment made available, country conditions, and the extent to which the applicant could own property, travel (the right of entry or reentry), and access education.¹⁴² If the government withholds an individual’s travel documents or cannot ensure that an individual receives benefits, these constraints may be considered restrictive conditions.¹⁴³ The restrictions the asylum seeker faces in the country of resettlement need not be as severe as the harm that or feared harm that caused the asylum seeker to flee their home country.

Restrictive conditions can also include persecution or discrimination by the formal government of the third country against the rights of noncitizen residents including refugees. As with a persecution analysis, if the asylum seeker experienced harm from private actors in the country of resettlement, they may be able to meet the restrictive conditions exception if the government was unable or unwilling to prevent the private actor harm.¹⁴⁴ A “finding of past persecution which would support an asylum claim is sufficient, but not necessary, to show a lack of firm resettlement.”¹⁴⁵ To be considered firmly resettled, the asylum seeker must “by definition no longer [be] subject to persecution.”¹⁴⁶ Fear caused by restrictive conditions in the country of residence shows that the asylum applicant has not firmly settled.¹⁴⁷

¹⁴¹ 8 CFR § 1208.15(b). See *supra* note 26 regarding finding the regulation that is currently in effect.

¹⁴² *Id.*

¹⁴³ See *Arrey v. Barr*, 916 F.3d 1149, 1160 (9th Cir. 2019) (remanding to BIA where Board had denied asylum for a Cameroonian woman who had received an offer of refugee status in South Africa but had not adequately considered the restrictive conditions she faced there).

¹⁴⁴ *Aden v. Wilkinson*, 989 F.3d 1073, 1082 (9th Cir. 2021) (finding Somali who had been granted refugee status in South Africa was not barred from asylum where he suffered private actor persecution in South Africa based on his status as a Somali immigrant); *Arrey v. Barr*, 916 F.3d 1149, 1160 (9th Cir. 2019) (remanding to BIA where Board had denied asylum for a Cameroonian woman who had received an offer of refugee status in South Africa but where the Board had not adequately considered the restrictive conditions she faced there).

¹⁴⁵ *Jarbanda v. Barr*, 817 F. App’x 332, 335 (9th Cir. 2020) (unpublished) (finding threats and extortion by gang members and police officers in Guatemala evidenced restrictive conditions in that country for Syrian asylum seeker).

¹⁴⁶ *Yang v. INS*, 79 F.3d 932, 939 (9th Cir. 1996); see also *Siong v. INS*, 376 F.3d 1030, 1040 (9th Cir. 2004) (“Because of the evidence that Siong may not have ‘found a haven from persecution’ in France, . . . Siong also has established at least a plausible claim that he is not firmly resettled in France.” (internal citation omitted)).

¹⁴⁷ See USCIS Firm Resettlement Training Module, *supra* note 21, at 20; see also 8 CFR § 1208.15(b).

Mexico remains very dangerous for asylum seekers.¹⁴⁸ While the Mexican government has created a federal agency within its attorney general's office to investigate abuse against migrants, only 1 percent of crimes against migrants end in conviction.¹⁴⁹ In 2020 Doctors without Borders found that 80 percent of those subjected to MPP had experienced violence in Mexico.¹⁵⁰ According to Amnesty International, around 20,000 migrants are kidnapped each year and extorted for ransom by various cartels and criminal organizations.¹⁵¹ In addition to kidnapping, female migrants face a 6 in 10 chance of being raped.¹⁵² Central Americans forced to remain in Mexico due to metering or returned to Mexico by the U.S. government have faced particularly dangerous conditions.¹⁵³ In addition to fearing non-state actors, Central American asylum seekers have reported harassment by Mexican police.¹⁵⁴ High rates of corruption and government acquiescence to the violence have created significant challenges for the Mexican government.¹⁵⁵ In a report by Physicians for Human Rights, the group found that most asylum seekers subject to MPP experienced harm while waiting in Mexico with 58 out of 95 receiving threats, including threats of violence.¹⁵⁶

The U.S. government has acknowledged the violence in Mexico and the U.S. State Department currently has travel warnings posted for all six Mexican states that border the United States. Tamaulipas has been given the strongest warning, "Do Not Travel," while four more states—Chihuahua, Coahuila, Nuevo Leon, and Sonora—have been given the second strongest warning,

¹⁴⁸ See *E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 944–45 (N.D. Cal.), *order reinstated*, 391 F. Supp. 3d 974 (N.D. Cal. 2019), *aff'd*, 964 F.3d 832 (9th Cir. 2020), and *aff'd*, 964 F.3d 832 (9th Cir. 2020) ("the administrative record demonstrates abundantly why Mexico is not a safe option for many refugees, despite its party status to all three agreements.").

¹⁴⁹ Jay Root, *Migrants Seeking Safe Harbor in the U.S. Must First Survive Shootouts and Shakedowns in Mexico*, THE TEXAS TRIBUNE, Oct. 17, 2018, texastribune.org/2018/10/17/immigrants-trump-mexico-border-asylum-violence [hereinafter "Root, Safe Harbor"].

¹⁵⁰ David Agren, *Remain in Mexico: 80% of migrants in Trump policy are victims of violence*, THE GUARDIAN, Jan. 29, 2020, theguardian.com/us-news/2020/jan/29/migrants-mexico-trump-policy-victims-of-violence. See also, Amnesty International, *Overlooked, Under-Protected: Mexico's Deadly Refoulement of Central Americans Seeking Asylum* (2018), [amnestyusa.org/wp-content/uploads/2018/01/AMR4176022018-ENGLISH-05.pdf](https://www.amnestyusa.org/wp-content/uploads/2018/01/AMR4176022018-ENGLISH-05.pdf).

¹⁵¹ Salil Shetty, Amnesty International, *Most Dangerous Journey: What Central American Migrants Face When They Try to Cross the Border*, [amnestyusa.org/most-dangerous-journey-what-central-american-migrants-face-when-they-try-to-cross-the-border/](https://www.amnestyusa.org/most-dangerous-journey-what-central-american-migrants-face-when-they-try-to-cross-the-border/) (last visited Apr. 17, 2019).

¹⁵² *Id.*; see also Steve Dudley, Migration Policy Institute, *Transnational Crime in Mexico and Central America: Its Evolution and Role in International Migration* (Nov. 2012), [migrationpolicy.org/research/RMSG-CentAm-transnational-crime](https://www.migrationpolicy.org/research/RMSG-CentAm-transnational-crime).

¹⁵³ *Id.*; Root, Safe Harbor, *supra* note 149.

¹⁵⁴ Dara Lind, "Remain in Mexico": Trump's Quietly Expanding Crackdown on Asylum Seekers, Explained, VOX, Mar. 22, 2019, [vox.com/2019/3/5/18244995/migrant-protection-protocols-border-asylum-trump-mexico](https://www.vox.com/2019/3/5/18244995/migrant-protection-protocols-border-asylum-trump-mexico).

¹⁵⁵ See Root, Safe Harbor, *supra* note 149; International Crisis Group, *Mexico's New President Squares Up to High Hopes for Peace* (Dec. 30, 2018), [refworld.org/docid/5c07a0774.html](https://www.refworld.org/docid/5c07a0774.html) (noting the challenges faced by the new Mexican president with the extreme violence in the country).

¹⁵⁶ Physicians for Human Rights, *Forced into Danger, Human Rights Violations Resulting from the U.S. Migrant Protection Protocols*, at 8 (Jan. 2021), reliefweb.int/sites/reliefweb.int/files/resources/PHR-Report-Forced-into-Danger_Human-Rights-Violations-and-MPP-January-2021.pdf.

“Reconsider Travel.” Baja has been given a level two warning, “Exercise Increased Caution.”¹⁵⁷ Thus, if the firm resettlement bar is found to apply to an asylum seeker who was forced to remain in Mexico, the practitioners should fully explore the conditions under which they lived in Mexico. While background country conditions lend support to a finding of restrictive conditions based on the anti-immigrant violence in Mexico and the government’s acquiescence or inability to control it,¹⁵⁸ the application of the firm resettlement bar and its exceptions is always conducted on a case-by-case basis.

VI. Dual Nationals and Asylum

The analysis of dual citizenship is different from the analysis of firm resettlement, but practitioners (and adjudicators) may confuse the two issues, so this section will briefly address the effect of dual citizenship on applications for asylum. An asylum seeker who is a citizen of more than one country, can generally only prevail on an application for asylum if they can show a fear of persecution in both countries. *Matter of B-R-*.¹⁵⁹ In *Matter of B-R-*, the applicant sought asylum from Venezuela based on having been persecuted as a journalist by the Chavez government.¹⁶⁰ DHS submitted evidence that Mr. B-R-’s father was a citizen of Spain and that as a result Mr. B-R- was a dual citizen of Spain.¹⁶¹ The immigration judge found that Mr. B-R- was a citizen of Spain, and Mr. B-R- argued that he could still qualify for asylum because he was not barred by any “‘safe third country agreement’ ” with Spain nor had he “‘firmly resettled there.’”¹⁶² Nonetheless, the immigration judge held, and the BIA affirmed, that he was “not a ‘refugee’ as contemplated by the Act, because he is a citizen or national of a country to which he does not fear returning.”¹⁶³ The BIA went on to find, “Once nationality is established, it is the alien’s burden to demonstrate that the alternative country of nationality will not offer him protection.”¹⁶⁴ Thus the Board found that unless a dual citizen could prove that the other country would not take him back or that he also feared persecution in the country of dual citizenship, his application for asylum would be denied.¹⁶⁵

While it is not clear from the factual section of this decision, it does not appear that Mr. B-R- had ever resided in Spain, nor did the BIA seem to require a residence in the third country, or even a prior entry, in order to deny asylum based on dual citizenship. Rather, the analysis is that if the U.S. asylum seeker can safely avail themselves of the protections of another country in which they are a citizen, they should do so. On the other hand, if the asylum seeker could demonstrate that they would face

¹⁵⁷ U.S. Dep’t of State, Mexico Travel Advisory (Sep. 8, 2020),

travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html.

¹⁵⁸ Inter-American Commission on Human Rights, *The Human Rights Situation in Mexico* (Dec. 31, 2015), refworld.org/docid/583ed735a2.html.

¹⁵⁹ *Matter of B-R-*, 26 I&N Dec. 119 (BIA 2013).

¹⁶⁰ *Id.* at 119.

¹⁶¹ *Id.* at 120.

¹⁶² *Id.*

¹⁶³ *Id.* at 121.

¹⁶⁴ *Id.* at 122.

¹⁶⁵ *Id.*

persecution in both countries of citizenship, then they would have to present evidence of well-founded fear of persecution in both countries.¹⁶⁶

VII. Conclusion

It is difficult to predict with accuracy whether DHS will argue that asylum seekers who were forced by the U.S. government to remain in Mexico for extended periods of time, should be subject to the firm resettlement bar. However, practitioners should understand the firm resettlement bar and be prepared to construct legal arguments that the bar should not apply, and, that if it does apply, the asylum seeker may meet an exception. And even if DHS does not make aggressive firm resettlement bar arguments, it is possible that under a future, anti-immigrant administration DHS will. Thus, it is critical that practitioners create a strong record why the bar should not apply.

¹⁶⁶ *Id.*