Policy Brief: "Remain in Mexico" Plan Restricts Due Process, Puts Asylum Seekers Lives at Risk

Updated February 1, 2019
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On January 24, 2019, the Department of Homeland Security (DHS) announced that it would begin implementing "Remain in Mexico," a new procedure which will force people arriving at the U.S. southern border who are fleeing violence and persecution in their home countries to remain in Mexico pending an asylum hearing before a U.S. immigration judge. DHS first announced the plan, which it calls the "Migrant Protection Protocols" (MPP), on December 20, 2018.

This policy brief explains how Remain in Mexico dramatically alters processing of asylum claims at the U.S. southern border and makes it far more difficult for asylum seekers to receive a fair and meaningful review of their claims as required under both U.S. and international law. The policy brief also presents solutions that address the humanitarian situation in Central America and improve the processing and treatment of migrants arriving at our border.

Overview of DHS Plans to Implement Remain in Mexico

Under Remain in Mexico, asylum seekers subject to the policy will be processed by DHS and then sent back to Mexico, where they will remain while their removal proceedings are pending. According to Customs and Border Protection (CBP) guidance, the policy will not apply to certain groups of people, including unaccompanied minors; citizens or nationals of Mexico; individuals processed for expedited removal; and anyone who is more likely than not to face persecution or torture in Mexico. According to U.S. Citizenship and Immigration Services (USCIS) guidance, the person must first affirmatively state to a CBP officer that they are afraid to return to Mexico before a USCIS officer will assess whether he or she is more likely than not to face persecution or torture in Mexico. Additionally, CBP will not allow attorneys to be present when individuals are being screened for fear of persecution or torture in Mexico.

These hurdles make it highly likely that individuals who have valid asylum claims will nonetheless be returned to Mexico and forced to wait for their U.S. immigration court hearing. The U.S. government has not disclosed any information about where or how people will live in Mexico while waiting for what could be months or years. Few logistical details have been released explaining how people will be able to attend their immigration court hearings in the U.S. The Remain in Mexico policy became effective on January 28, 2019 at the San Ysidro port of entry, but CBP plans to expand it to other ports "in the near future." It is remarkable that DHS intends to implement such sweeping changes to asylum processing merely by the issuance of memoranda, and without promulgating any regulations or providing the opportunity for public input through a notice and comment process.

AILA Doc. No. 18122112. (Posted 2/1/19)

Remain in Mexico Will Have Devastating Implications for Asylum Seekers

Remain in Mexico Imposes an Exceptionally Stringent Procedure for Asylum

In the guidance released on January 28, 2019, USCIS indicated that an individual will be returned to Mexico to wait for their immigration court proceedings unless the person demonstrates he or she is "more likely than not" to be persecuted on account of a protected ground or tortured if returned to Mexico. This new procedure is significantly more stringent than the expedited removal procedure CBP has applied to asylum seekers arriving at the border. Under Remain in Mexico, individuals must first *affirmatively* state to the CBP officer they have a fear of being returned to Mexico before they will be screened by a USCIS officer. This requirement shifts the burden of expressing their fears to asylum seekers who are not likely to know that they must state a fear of persecution in Mexico to a uniformed CBP officer. Asylum seekers are frequently uncomfortable stating their fears to a CBP officer in what are often intimidating, adversarial interactions. In comparison, the expedited removal process puts the responsibility on the CBP officer to ask whether the individual has a fear of being returned.

The Remain in Mexico policy also applies a higher screening standard than the standard applied in the expedited removal process. Remain in Mexico requires the asylum seeker to show he or she is "more likely than not" to be persecuted or tortured if returned to Mexico. By contrast, expedited removal requires the person to demonstrate a "significant possibility" of being granted asylum by an immigration judge. Congress set the "significant possibility" standard as a lower threshold because the Credible Fear Interview (CFI) functions as a preliminary screening to determine whether the person is entitled to review by an immigration judge.

Remain in Mexico imposes a legal threshold for its initial fear screening that is not only higher than the credible fear standard but also higher than what is required to prove asylum at the full merits hearing conducted by an immigration judge. The January 28 USCIS guidance explicitly states that Remain in Mexico's "more likely than not" standard was drawn from the Convention Against Torture (CAT)[1] standard which has been interpreted as requiring a higher than 50 percent chance of the harm feared.[2] That standard is substantially higher than what is necessary to qualify for asylum, which requires the individual to demonstrate a "well-founded fear" of persecution. The Supreme Court has noted that even a 10 percent chance of persecution translates into a "well-founded fear."[3]

Finally, the Remain in Mexico policy requires USCIS officers to consider whether the individual could reside in another region of Mexico to avoid the persecution or torture he or she fears. Presumably, USCIS officers will still apply Remain in Mexico to an individual who fears persecution or torture in Mexico if the officer concludes there is another location in Mexico where that person could live safely. Forcing already displaced individuals to continuously move regions within Mexico imposes yet another unfair obstacle to this class of asylum seekers. Many individuals will not have the resources or the ability to build a temporary life in unknown part of a foreign country. It is also unclear how DHS and the Executive Office for Immigration Review (EOIR) would be able to track and contact individuals who are sent to another region in Mexico, much less transport them into the U.S. for their removal proceedings.

At the point when asylum seekers subject to Remain in Mexico have arrived at the border and have little understanding of asylum law or any time to prepare their legal case, DHS will impose a new and exceptionally stringent process that is comparable to or even higher than the legal standard required at a full merits hearing before an immigration judge. The consequences of failing the initial Remain in Mexico screening are severe: forced return to an unpredictable location in Mexico where living conditions are likely to be difficult and still dangerous; and enormous, likely insurmountable, barriers to a fair asylum hearing before an immigration judge.

Remain in Mexico Bars Asylum Seekers Access to Legal Counsel

The Remain in Mexico process will block nearly all access to legal counsel. First, DHS will deny access to counsel when they appear for the assessment before the USCIS officer. The January 28 USCIS guidance states that USCIS officers can conduct the fear assessment by phone, video, or in person. Invoking 8 C.F.R. § 292.5, the USCIS guidance states that it "is currently unable to provide access to counsel during the assessment given the limited capacity and resources at ports-of-entry and Border Patrol stations as well as the need for the orderly and efficient processing of individuals." Given that DHS has broadened the purpose of primary and secondary inspections with this policy change, it is unacceptable to deny access to counsel during these screenings. Remain in Mexico also blocks any appeal or reconsideration of USCIS's assessment.

Second, individuals returned to Mexico will encounter substantial barriers to legal representation while they await their hearing before the immigration judge. There are few attorneys and non-profit legal service providers in Mexico who represent individuals before U.S. immigration courts. People waiting in Mexico will have a difficult time trying to find an attorney located in the U.S. If they do retain a U.S.-based attorney, they will face substantial costs and logistical hurdles trying to prepare for hearings remotely. In practice, this will mean that a traumatized, newly arrived individual will have to navigate the complex legal and factual basis for their claim in a language that they likely do not understand, with no legal advice or access to legal counsel.

Whether someone is represented by counsel is the most important factor in determining success in obtaining a grant of asylum. Studies have found that unrepresented asylum seekers in the United States face profound challenges in navigating complex immigration laws, obtaining documents critical to substantiating their claims, and obtaining relief. In fact, nondetained individuals who are represented are "nearly five times more likely" to win relief than their unrepresented counterparts. The obstacles faced by unrepresented asylum seekers marooned in Mexico will prove even more prohibitive.

Immigration Court Access and Notice Will Be Chaotic and Unreliable

On December 20, the Mexican government indicated that the United States instituted the Remain in Mexico plan unilaterally and that the countries had not reached an agreement. As of January 31, neither government had provided information as to where and how asylum seekers will be able to live in Mexico while they wait for their immigration court hearing.

In particular, DHS has provided bare guidance on how individuals will be able to attend their immigration hearings or what will happen if individuals are not able to attend their hearings. DHS has stated that individuals who are subject to Remain in Mexico will be issued a Notice to Appear (NTA) for their immigration court hearing and will be returned to Mexico. When their initial hearing date arrives, they will be "allowed to the enter the United States and attend [their] hearings." CBP guidance states that individuals at the port-of-entry will receive a specific immigration court hearing date and time at the time the NTA is issued, and that ports of entry will coordinate with ICE to establish transfer of custody and transportation from the point of the entry to the hearing.

Glaringly absent is any information as to how DHS will ensure that people have adequate and timely notice of their hearings, especially in cases when the initial hearing date is subsequently cancelled or changed. Even within the U.S., EOIR has experienced significant challenges with providing proper notice. Current EOIR notice procedures rely entirely on the individual maintaining up-to-date addresses which EOIR uses to mail notice of hearings. EOIR does not provide personal service of hearings. EOIR has failed to provide proper notice for hearing for individuals residing in the U.S. It will be even more complicated and difficult for individuals waiting in Mexico. As of January 31, 2019, EOIR had not

provided information on how it will provide notice when people subject to Remain in Mexico change addresses or contact information. Moreover, it is unclear how CBP will be able to provide individuals with a timely hearing date when the immigration courts currently have a backlog of over 800,000 cases. The Remain in Mexico policy will cause confusion as unrepresented individuals try to navigate and interpret complex legal documents given to them by CBP agents, including Notices to Appear and hearing notices.

Remain in Mexico exposes returned asylum seekers to severe risk of harm and even death

In late December 2018, the Mexican government stated that the Remain in Mexico plan was a unilateral move by the U.S. government but noted that it would "give protection to individuals that would be affected by the U.S. decision." The Mexican government has announced that it will provide temporary humanitarian visas to a certain number of individuals processed under the Remain in Mexico plan. No other details have been released by either the U.S. or Mexican government explaining where individuals sent back to Mexico will live or how they will be housed.

Individuals forced to stay in Mexico will endure potentially dangerous conditions for lengthy periods of time. Asylum seekers in Mexico face ongoing threats of murder, sexual assault, kidnapping, and other harm. On December 19th, 2018, it was reported that two Honduran minors who had reached Tijuana as part of the "migrant caravan" were killed while transiting to a different shelter. In addition, Mexican authorities regularly deport asylum seekers to their home countries despite legitimate claims of persecution. Although the Mexican government has stated that it will provide at least some returned individuals with temporary immigration status, there is no guarantee that they will not be sent home to their persecutors before their hearing dates.

Meaningful Solutions Exist, But Are Being Ignored

Instead of Remain in Mexico, the administration should pursue meaningful solutions to address ongoing asylum seeker outflows while ensuring full and fair access to humanitarian protection.

Solution #1: *Restore policies facilitating the release of asylum seekers pending their immigration court asylum hearings, including the expansion of successful alternative to detention programs.*

Remain in Mexico and other administration policies are premised on the concern that asylum seekers who pass credible fear screenings often fail to subsequently appear at their immigration court hearings. Ensuring high court appearance rates can be accomplished, however without resorting to measures that deprive asylum seekers of due process and a meaningful chance to seek asylum. Alternatives to detention, including release on recognizance, parole, monitoring and case management methods have achieved extremely high appearance rates. In June 2017, the Trump Administration terminated the "Family Case Management Program," a highly successful alternative to detention for family units that received positive credible fear determinations. Among other benefits, the program helped families navigate the U.S. immigration system and obtain counsel, while ensuring their appearance in court. The program yielded a 99 percent appearance rate at check-in meetings with ICE and at immigration court hearings. The program also saved taxpayer dollars: keeping a single family member in a family detention facility costs $319.37 a day, while the Family Case Management Program cost only $36 per day for an entire family. The Administration should revive the Family Case Management program and expand other successful alternatives to detention.

Solution #2: *Meaningfully tackle root causes of Central American asylum seeker outflows.*

The Trump Administration, together with Congress, must also step up efforts to address the root causes of Central America's humanitarian crisis and the resulting asylum seeker outflows. In its FY 2018 budget request, the Administration proposed slashing foreign assistance to Latin America and the Caribbean by 36% over the prior year. The administration's budget request for FY 2019, meanwhile, would cut aid to Central America by 29% over FY 2018 budget estimates. A reduction in foreign assistance to Central America would prove profoundly counterproductive, worsening the in-country conditions that give rise to caravans in the first place. Instead, the administration should commit to providing El Salvador, Honduras, and Guatemala with substantial foreign assistance to combat violence, strengthen the rule-of-law, and support anti-corruption initiatives.

Solution #3: *Build up refugee programs in the region rather than tear them down.*

Robust refugee processing is an essential component of any strategy to address Central America's humanitarian crisis. In its absence, persecuted individuals may feel they have no option but to make dangerous treks north in pursuit of asylum. Yet in 2017, the Administration eliminated the Central American Minors Refugee and Parole (CAM) program, which allowed vulnerable children and families to relocate to safety without a perilous journey. Moreover, in FY 2018, the Administration admitted only 826 refugees from El Salvador, Honduras, and Guatemala and in the first month of FY 2019, a mere 28 refugees from those three countries were admitted—setting a pace for just 336 admissions for the full year. Instead of dismantling pathways for refugees, the Administration should bolster them, by substantially elevating annual refugee admissions, restoring and strengthening CAM, and expanding other regional refugee programs, including the July 2016 Protection Transfer Agreement (PTA), which allows certain Central American refugees to undergo refugee processing in Costa Rica before being relocated to safety in countries such as the United States, Canada, Australia, and Uruguay.

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[1] See USCIS memorandum at p.2: "Article 33 of the 1951 Convention and Article 3 of the CAT require that the individual demonstrate that he or she is "more likely than not" to face persecution on account of a protected ground or torture, respectively. That is the same standard used for withholding of removal and CAT protection determinations." (citations omitted)

[2] *INS v. Stevic*, 467 U.S. 407 (1984); *In re M-B-A* (BIA 2002).

[3] See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). See also, *AILA Policy Brief: The Asylum Ban Flouts U.S. Law and Endangers the Lives of Asylum Seekers*, available at https://aila.org/infonet/aila-policy-brief-the-asylum-ban-flouts-us-law.