



June 3, 2019

The Honorable Kevin McAleenan
Acting Secretary, Department of Homeland Security
3801 Nebraska Ave. NW
Washington D.C. 20016

Submitted via email Kevin.McAleenan@dhs.gov

RE: Migrant Protection Protocols Curtail Due Process Rights of Asylum Seekers

Dear Acting Secretary McAleenan,

The American Immigration Lawyers Association's (AILA) Asylum and Refugee Liaison Committee ("Committee") is writing to express our grave concerns about the implementation and subsequent expansion of the Migrant Protection Protocols ("MPP"), a policy that requires individuals seeking asylum at our southern border to remain in Mexico while their U.S. removal proceedings are pending. While there are many troubling pieces of the policy, we are particularly concerned that MPP effectively denies asylum seekers' right to be represented by counsel. As immigration attorneys who regularly represent asylum seekers, we are in a unique position to share our observations on how MPP erects insurmountable hurdles to representation and impedes access to a fair day in court.

Harsh Conditions in Mexico Make Legal Services Difficult to Access

To understand the impact of MPP on the right to counsel, it is important to first understand the conditions that affected asylum seekers are subject to in Mexico and how those conditions make it more difficult for them to access the few legal resources that may be available. Asylum seekers subject to MPP must be able to present at ports of entry when they are scheduled for immigration court hearings, which means people are stuck in Mexico's northern border region for months while their cases wind their way through the courts.

While in Mexico, asylum seekers – who are increasingly mothers, children, and families¹– often must stay in shelters or temporary camps set up by overextended local nonprofit organizations. These camps have been unable to keep up with the demand of housing individuals long-term, and the conditions are deteriorating.² When space is full at these shelters and camps, asylum seekers are forced to find alternative housing, even though they may not speak Spanish and often do not have any local family or other ties and may end up sleeping on the streets. Regardless of their housing, asylum seekers stuck in the Mexico may not have regular access to food or clean water and are often exposed to violence. In fact, the

¹ See Migration Policy Institute, *Eight Key U.S. Immigration Policy Issues*, Doris Meissner and Julia Gelatt, May 2019, available at <https://www.migrationpolicy.org/research/eight-key-us-immigration-policy-issues>.

² See Patrick Timmons, *Squalid migrant shantytowns forms in Mexican border city*, May 14, 2019, available at https://www.upi.com/Top_News/World-News/2019/05/14/Squalid-migrant-shantytown-forms-in-Mexican-border-city/5501557701209/.

Dilley Pro Bono Project found that 90.3% of the 500 respondents they surveyed said they did not feel safe in Mexico, and 46% reported that either they or their child had experienced at least one type of harm while in Mexico.³

Without regular access to basic life necessities like food, water, shelter, and safety, asylum seekers often do not have the ability to seek out the few legal services that may be available. They may not have cell phones or regular access to landlines to call organizations to request representation, much less the money to make international calls to organizations in the U.S. They are particularly vulnerable to notaries and other bad actors in the area who prey on these exact vulnerabilities. Additionally, the trauma suffered by these families and the ongoing dangers they face in Mexico would make it even more difficult for survivors to relay their stories clearly and concisely to a legal services provider in a consultation, much less an asylum officer or judge.

Legal Services Providers Able to Represent Asylum Seekers in Mexico Are Scarce at Best

Even if an asylum seeker has the resources to attempt to find legal representation, legal services providers are scarce for the thousands of people subject to MPP.⁴ According to DHS, asylum seekers subject to MPP are “provided with a list of legal services providers in the area which offer services at little or no expense to the migrant.”⁵ This is the same list given to respondents who are located in the U.S. and consists solely of organizations based on the U.S. side of the border near the immigration court where their hearings will take place.⁶ The list is not tailored for asylum seekers marooned in Mexico and contains organizations that are not able to travel to Mexico and conduct consultations or provide legal representation.

There are also few, if any, Mexican legal services providers or Mexican-licensed private attorneys who are well-versed in U.S. asylum law and also licensed to practice in the U.S. – both necessities to responsibly represent asylum seekers in hearings that take place in U.S. courts. Conversely, there are very few, if any, U.S.-licensed attorneys living in Mexico and also authorized to practice law in Mexico. Whether lawyers who are physically in Mexico but only licensed in the U.S. can advise or represent asylum seekers who are physically in Mexico is a murky question, governed at least in part by each Mexican state’s law and what constitutes the unauthorized practice of law in Mexico. Given that the laws and regulations in both Mexico and the U.S. that govern the practice of law for U.S. lawyers in Mexico are unsettled, a U.S. immigration lawyer who is not licensed to practice law in Mexico may rightly feel uncomfortable representing asylum seekers subject to MPP without more clarity. Additionally, the few attorneys who have attempted work with individuals subject to MPP have expressed concern with issues that have arisen, such as [interrogations, arrests, and travel restrictions](#) leveled against them.⁷

Lastly, it is incredibly difficult for attorneys to represent asylum seekers subject to MPP [due to the time and costs](#) involved with representing someone outside of the country. Representing asylum seekers involves a unique attorney-client relationship that requires face-to-face communication to build the trust of someone who has experienced trauma and suffered from psychological distress. Frequent travel to

³ See *id.*

⁴ As of May 20, 2019, DHS has subjected at least 6,748 people to MPP, a number that is growing every day. See Trump ramps up returns of asylum seekers to Mexico, available at <https://fingfx.thomsonreuters.com/gfx/editorcharts/USA-IMMIGRATION-ASYLUM/0H001PBW36BD/index.html>.

⁵ <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>

⁶ See Exhibit B.

⁷ See also *Women’s Refugee Commission, Chaos, Confusion, and Danger: The Remain in Mexico Program in El Paso*, available at <https://www.womensrefugeecommission.org/images/zdocs/ElPaso-Report.pdf>.

Mexico for U.S.-based attorneys is often either not possible or unsustainable due to travel costs, disruption to the rest of their practice, and professional and ethical duties to other clients in the United States. The result is that most attorneys simply cannot represent asylum seekers subject to MPP.

MPP Impedes Communications Between Asylum Seekers and Their Attorneys

If an asylum seeker subject to MPP is able to find an attorney in the U.S. who can represent them, the mere fact that the asylum seeker is located in Mexico with so few resources means that the effectiveness of that representation could be compromised. Competent and ethical representation of an asylum seeker is an involved and lengthy process that requires constant communication between the client and the attorney. See attached Exhibit A, which provides a sample step-by-step description of the steps that may be necessary for asylum representation. The Model Code of Professional Responsibility requires that attorneys reasonably communicate with⁸ and zealously represent⁹ their clients. Taking our collective experience into account, our Committee estimates that representing an asylum seeker in immigration court conservatively takes between 40-80 hours of work, with an estimated 35 hours of face-to-face communication with the client.¹⁰ By marooning asylum seekers in Mexico, the MPP makes it significantly more difficult for attorneys to communicate with their clients: face-to-face meetings are expensive and thus either rare or impossible; video conferencing is rare, as is the internet speeds needed to support it; a client may not have regular access to a phone, and if they are able to find one, do not have space where they can have a confidential conversation; and international phone calls are expensive and phone coverage can be spotty.¹¹

Representing asylum seekers involves a unique attorney-client relationship. One of the most critical aspects of representing an individual in asylum proceedings is being able to build trust between the client and the attorney. Most asylum seekers have experienced severe traumas and suffer from some form of psychological distress, making face-to-face communication essential for building trust. This type of relationship is necessary for clients to feel comfortable disclosing sensitive information and traumatic details to the attorney. Such specific, detailed information is required for asylum officers and judges to find an individual credible and ultimately grant relief. Again, frequent travel to Mexico for U.S.-based attorneys to have these face-to-face conversations is often either not possible or unsustainable, which means the ability of attorneys to build trust – much less prepare a case – will be compromised. Given these circumstances, U.S. attorneys may choose not to take on cases subject to MPP out of legitimate concerns about being able to fulfill their ethical duties of competence.

Without the opportunity to travel to Mexico and consult with their clients, attorneys may be forced to wait until moments before a scheduled immigration court hearing to meet them face-to-face for the first time. Gathering facts with asylum seekers usually involves hours of interviews over the course of weeks. Clients often speak languages other than English, and additional time and resources are required for interpretation services. Given these factors, it is extremely difficult for asylum seekers to relay their story in a full and comprehensible fashion, especially in initial meetings. Waiting until hours – in many

⁸ Rule 1.4, Communications (2018), In American Bar Association, Center for Professional Responsibility, Model Rules of Professional Conduct, retrieved from https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/

⁹ Preamble(2018), In American Bar Association, Center for Professional Responsibility, Model Rules of Professional Conduct, retrieved from https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/

¹⁰ These averages are the result of a survey completed between March 11, 2019 to March 15, 2019 of the members of this Committee, who, collectively, have represented thousands of asylum seekers.

¹¹ Timmons, *supra* Note 2.

circumstances, minutes – before a scheduled immigration court hearing to have direct contact with the client is not enough time for an attorney to build the type of trust discussed above and elicit the necessary details. Additionally, there are practical obstacles to building a case in the moments before court – attorneys and clients do not have access to a private room where they can discuss the case confidentially, or even the ability to use a computer and printer to ensure any last minute information is included in court filings.

MPP Must Be Halted Given These Barriers to Counsel

For the above-stated reasons, we respectfully request MPP be halted and that asylum seekers be processed in the United States. If you require any additional information, please contact Dree Collopy, Chair of the Asylum and Refugee Liaison Committee at dcollopy@benachcollopy.com or Leidy Perez-Davis, Policy Counsel at the American Immigration Lawyers Association at LPerez-Davis@aila.org.

Sincerely,

The American Immigration Lawyers Association's Asylum and Refugee Liaison Committee

EXHIBIT A: STEPS IN ASYLUM REPRESENTATION

**Italicized segments indicate steps that require frequent and uncomplicated communication, and which are often necessary to do with the client in-person.*

1. *Initial consultation with client to gather the facts of the case.* This is a critical part of asylum representation as it sets the stage for the entire case. It is incumbent upon an attorney to gather all relevant facts for the case. This is best done in-person to determine credibility, monitor the client's emotional well-being when relaying traumatic events, assess when to prod the client more or to leave the questioning to rest, and build trust so that the client will reveal all relevant information.
2. Initial research to determine if NTA is proper and to assess what forms of relief the client is eligible to pursue.
3. *Meet with client to discuss case strategy and next steps.* In order to do this, the attorney must be able to ascertain if the client understands the process.
4. Prepare, review, and file Freedom of Information Act Request.
5. Attend initial Master Calendar Hearing.
6. *Meet with the client to obtain information for his/her sworn declaration.* This usually involves hours of meetings over the course of a few weeks given the level of detail that sworn declarations require.
7. *Draft and review sworn declaration with the client.* This involves an enormous amount of dialogue between the client and attorney to assure that the facts are correct and comprehensive. Typically, there are at least 2-3 follow-up meetings with the client after the initial interview meeting in order to gain the client's trust and obtain all the detailed information necessary for the sworn declaration.
8. *Finalize declaration.* Review each line with the client, have the client sign the declaration. This is an important piece of the representation as the finalized declaration will serve as the basis for the asylum case, and line-by-line review is necessary to ensure that the information is true, accurate, and correct to the best of the client's knowledge.
9. *Develop and draft detailed list of documentary evidence needed to support the application for relief.* Obtaining supporting documents can require a long discussion with the client about what supporting documents may be available and how to obtain them.
10. *Develop potential witness list.* This involves meeting with the client to understand what witnesses may be available to testify on their behalf.
11. Research country conditions and legal precedent.
12. Secure an expert witness and provide them with relevant case information. Follow up with the expert frequently to finalize the written report.
13. *Meet with each witness to obtain information for his/her declaration.* If family members are outside of the United States, communication can be difficult and at times, impossible.
14. *Meet with each witness to review and finalize sworn declaration.* They attorney must often obtain more details and answer follow-up questions, as well as ultimately review each declaration line-by-line with each witness before having them sign.
15. *Frequent follow up with client* to continue collecting identified documentary evidence.
16. *Draft application forms.* Form I-589, Application for asylum and for withholding of removal is a 12-page, substantive form requiring detailed information such as every place the client has resided, where they have gone to school, and the names and locations of their immediate family members.
17. *Have client review the asylum application.* The application must be reviewed line-by-line. The client often has difficulty understanding the technical questions presented. Careful review is critical to ensure the accuracy of the form.

18. Prepare cover letter and filing to submit to the immigration court.
19. Obtain receipt notice and *advise client*.
20. Obtain biometrics notice and *advise client*.
21. *Keep client apprised of case developments*. This continues throughout the proceedings.
22. Translate foreign language documents into English.
23. Draft various motions and briefs throughout the proceeding and review all documentation to ensure complete accuracy. Submit them timely to the court and serve ICE counsel.
24. Review and analyze any exhibits filed by ICE counsel and prepare any applicable objections to ICE's documentary evidence.
25. Draft direct examinations for client and each witness.
26. Draft potential cross-examination questions for client and each witness.
27. *Meet with client and each witness to prepare them for their testimony*. Again, it is critical for the attorney to see the demeanor of the asylum applicant to ascertain their level of understanding and to be able to communicate effectively. The attorney generally also explains what to expect at the hearing. Typically, at least 2 preparatory meetings with the client take place prior to an individual hearing.
28. Prepare list of preliminary issues, talking points, potential objections, and closing argument to submit to court.
29. Contact ICE Office of Chief Counsel to discuss the case and dispose of any agreed-upon issues.
30. Represent the client at the individual hearing.

EXHIBIT B: MIGRANT PROTECTION PROTOCOL
INITIAL PROCESSING INFORMATION

Migrant Protection Protocols

Initial Processing Information

- You have been identified for processing under the Migrant Protection Protocols and have been issued a Form I-862 Notice to Appear (NTA) for proceedings before an immigration court where you may apply for all forms of relief available under the Immigration and Nationality Act. Pursuant to U.S. law, including section 240 of the Immigration and Nationality Act and implementing regulations, an immigration judge will determine whether you are removable from the United States, and if you are, whether you are eligible for relief or protection from removal. While you will be able to pursue such relief or protection under the same terms and conditions as any alien in section 240 proceedings, pursuant to U.S. law, you will be returned to Mexico and may not attempt to enter the United States until you return to the appropriate port of entry on the date of your hearing before an immigration judge.
- The NTA provides the date and time of your first hearing before an immigration judge in the United States at the court identified on your NTA. On the date of your hearing, you must report to the SYS PED WEST POE port of entry, located at EL CHAPPARAL, at the date and time listed below. If your case cannot be completed in one hearing, the immigration court will provide you with a Notice of Hearing in Removal Proceedings, indicating the date and time for any subsequent hearings.
 - You may call the immigration court at 1-800-898-7180 to obtain case status information 24 hours a day, 7 days a week. If you are calling from outside of the United States, you should dial 001-880-898-7180.
- You should arrive at the port of entry listed above at [REDACTED] a.m./p.m. on [REDACTED] to ensure that you have time to be processed, transported to your hearing and meet with attorney or accredited representative (if you arrange to be represented during your removal proceedings). The U.S. Government will provide transportation for you from the designated port of entry to the court on the day of your hearing. If you fail to arrive at the appropriate date and time, you may be ordered removed in absentia.
 - When you arrive at the designated port of entry for your hearing, you should bring your NTA or Notice of Hearing in Removal Proceedings and any available government-issued identification and/or travel documents.
 - When you arrive at the designated port of entry for your hearing, you should bring any minor children or other family members who arrived with you to the United States and received an NTA for the same date and time.
- You have the statutory privilege of being represented by an attorney or accredited representative of your choosing who is authorized to practice before the immigration courts of the United States, at no expense to the U.S. Government.
 - You have been provided with a List of Legal Service Providers, which has information on low cost or free legal service providers practicing near the immigration court where your hearing(s) will take place.
 - A list of legal service providers is also available on the Executive Office for Immigration Review website at <https://www.justice.gov/eoir/list-pro-bono-legal-service-providers>.
- If you choose to be represented, you may consult with counsel at no expense to the U.S. Government through any available mechanism, including the following, as applicable:
 - You may consult with your counsel by telephone, email, video conference, or any other remote communication method of your choosing.
 - You may arrange to consult with your counsel in person at a location in Mexico of your choosing.
 - On the day of your immigration hearing, you may arrange to meet with your counsel in-person, in the United States, at your assigned court facility, prior to that hearing.

[REDACTED]
[REDACTED]
January 10, 2019