

PRIMER:

Immigration Enforcement Mechanisms at the U.S. Border



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DECEMBER 28, 2022

UPDATED ON:

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Acknowledgements:

Special thanks to COI Senior Legal Advisor Deena Sharuk and Commission Members Denise Gilman and Melissa Crow for their contributions to this Primer.

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

The discourse surrounding the southern border has focused on the large numbers of individuals seeking to enter the United States without documentation (either at a port of entry or by evading inspection), often with the intention of seeking asylum.¹ Unfortunately, the rhetoric has suggested that increased numbers of asylum seekers at the southern border represent a crisis and security threat.² While the numbers of arrivals are in fact significant, the context and demographics demonstrate that the arrivals do not represent a security threat but instead form part of a refugee flow that can and must be addressed as such. Yet, border policies have largely focused on expedited removal practices and exclusion from the United States. It is important for practitioners and the public alike to understand the various border enforcement mechanisms developed in recent years since they impact the legal trajectory for migrants³ arriving at the southern border, especially asylum seekers.

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

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

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

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

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

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

There are other important elements that put the recently reported numbers of border arrivals into context. As noted above, a much greater proportion of arrivals are detected and apprehended now so the reported numbers are unsurprisingly larger than they were several decades ago. In addition, the government statistics now include arrivals at ports of entry, which were not included in prior statistics. Furthermore, restrictions on visa issuance and airline travel⁸ to the United States, particularly since 1997, have forced asylum seekers to arrive at the southern border to seek entry by land. Recent data also suggests that Title 42 expulsions, a more recent enforcement mechanism purportedly implemented to control the spread of COVID-19, led to repeat encounters of the same individuals in the last year.⁹ In other words, the actual numbers of *individuals* arriving at the border are likely much lower than the government-provided statistics on *encounters* and may even represent fewer arrivals than several decades ago. However, with the impending termination of the

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

⁵ *Id.*

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

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

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

⁹ See CBP Announces May 2021 Operational Update, CBP.gov, Jun. 9, 2021, <https://www.cbp.gov/newsroom/national-media-release/cbp-announces-may-2021-operational-update>; see also, Joel Rose, Border Patrol apprehensions hit a record high. But that's only part of the story., NPR, Oct. 23, 2021, <https://www.npr.org/2021/10/23/1048522086/border-patrol-apprehensions-hit-a-record-high-but-thats-only-part-of-the-story>.

Title 42 policy (discussed below), the Department of Homeland Security estimates that, without further policy changes, encounters may rise by 11,000-13,000 a day.¹⁰

Additionally, and importantly, in the 21st century, worldwide migration is on the rise, and refugee flows have increased dramatically around the globe.¹¹ The United States cannot isolate itself from these trends. And given these patterns, large-scale arrivals at the U.S. southern border are to be expected and should be anticipated, planned for, and managed humanely.

The demographics of those arriving at the southern border in recent years belie the security threat rhetoric. Many are asylum-seeking adults, children and families fleeing countries where pervasive human rights abuses are taking place. Of the encounters in 2021, 454,817 were with family members traveling together, 128,846 were unaccompanied migrant children, and 129,065 were migrant children accompanied by an adult.¹² Significant numbers of migrants arrived from the Northern Triangle—specifically El Salvador, Guatemala and Honduras, which the United States has recognized as an exceptionally dangerous region.¹³ Increased numbers of migrants are also arriving from Cuba, Haiti, Nicaragua, and Venezuela,¹⁴ where political and economic instability prevail and the human rights situations are recognized as dire.

¹⁰ Circumvention of Lawful Pathways, 88 FR 11704 (proposed Feb. 23, 2023) (to be codified at 8 CFR 208, 8 CFR 1208).

¹¹ UNHCR, Refugee Data Finder, <https://www.unhcr.org/refugee-statistics/>; UNHCR, Global Trends in Forced Displacement – 2020, at 12 (2021), <https://www.unhcr.org/60b638e37/unhcr-global-trends-2020>.

¹² Southwest Land Border Encounters, cbp.gov, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

¹³ U.S. Border Patrol Nationwide Apprehensions by Citizenship and Sector, cbp.gov, <https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/USBORD~3.PDF>; U.S. Strategy for Addressing the Root Causes of Migration in Central America, whitehouse.gov, (July 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Root-Causes-Strategy.pdf>.

¹⁴ U.S. Border Patrol Nationwide Apprehensions by Citizenship and Sector, cbp.gov, <https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/USBORD~3.PDF>.

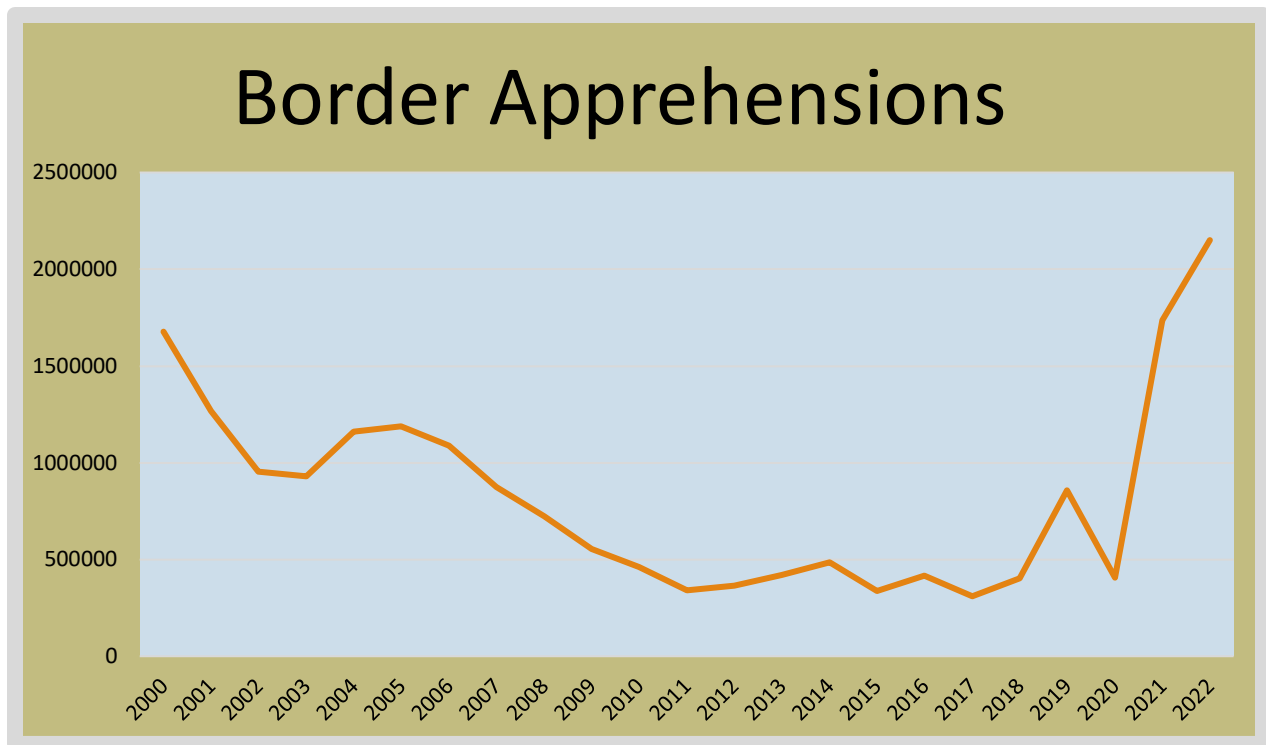


Figure 1¹⁵

LAWS AND POLICIES IMPLEMENTED AT THE U.S. BORDER

As of the time of the publication of this primer, the U.S. government generally processes migrants reaching the southern border of the United States in one of the following ways: 1) expedited removal with possible credible fear interview; 2) reinstatement of removal with possible reasonable fear interview; 3) Title 42

¹⁵ U.S. Border Patrol Monthly Apprehensions, cbp.gov, <https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/U.S.%20Border%20Patrol%20Monthly%20Encounters%20%28FY%202000%20-%20FY%202020%29%20%28508%29.pdf> (data for 2000 to 2020); Southwest Land Border Encounters, cbp.gov, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters> (data for 2021 and 2022).

expulsion¹⁶; or 4) placement in full removal proceedings in Immigration Court under Immigration and Nationality Act (INA) § 240.¹⁷ This primer will describe these four mechanisms.

The primer will then discuss additional proceedings, outside of the immigration context, that are currently impacting migrants at the southern border. These include: 1) actions by the state of Texas under Operation Lone Star; and 2) federal criminal prosecutions of migrants for unlawful entry or reentry.

Next, the primer will summarize other border policies from recent years that are no longer in effect. These policies include: 1) metering; and 2) the Migrant Protection Protocols (MPP).

It is important to gain an understanding of both current and former border policies. Even when policies are terminated, migrants currently in the United States may have been previously subjected to them, which may impact their immigration cases. Furthermore, previous policies could be implemented again in the future.

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

BORDER ENFORCEMENT LAW AND POLICIES CURRENTLY IN PLACE

Expedited Removal and Credible Fear Interviews

Expedited removal is a process by which migrants who arrive at or enter the United States at the border (or who are brought to the U.S. after being interdicted at sea) without authorization can be rapidly removed (deported)¹⁸ without a hearing before an immigration judge.¹⁹ DHS has discretion to employ expedited removal proceedings or not. The statute authorizes, but does not require, DHS to apply expedited removal

¹⁶ As of the date of this primer's publication, Title 42 is in effect. As discussed *infra*, the Title 42 policy is projected to expire on or around May 11, 2023, with the expected termination of the declared public health emergency. See, Brief For the Federal Respondents, *Arizona v. Mayorkas*, No. 22-592 (U.S. Feb. 2023); See also: *Supreme Court won't hear arguments Title 42 case as planned*, Washington Post, (Feb. 16, 2023), https://www.washingtonpost.com/politics/supreme-court-wont-hear-arguments-title-42-case-as-planned/2023/02/16/4d4b3ed6-ae32-11ed-b0ba-gf4244c6e5da_story.html; Adam Liptak, *Biden Officials Tell Supreme Court That Title 42 Case Will Soon Be Moot*, N.Y. Times (Feb. 7, 2023), <https://www.nytimes.com/2023/02/07/us/politics/supreme-court-title-42-pandemic.html>.

¹⁷ In relatively rare instances, migrants who qualify to enter the United States without a visa through the Visa Waiver Program (VWP) arrive to the U.S. by land at the Southern Border. The VWP allows citizens of qualifying countries to travel to the United States for business or tourism for stays of up to 90 days without a visa. Migrants who enter through the VWP and face removal have access to asylum-only removal proceedings. See 8 U.S.C. § 1187(b). The list of Visa Waiver eligible countries can be found here: <https://www.dhs.gov/visa-waiver-program-requirements>.

¹⁸ Removal is the term presently used to discuss deportation. While the terms can be used interchangeably, the use of the terms "deport," "deportability," and "deportation" in immigration law references removal prior to 1997. See Em Puhl, *Overview of the Deportation Process*, Immigrant Legal Resource Center, at FN2 (Dec. 2018) (available at: https://www.ilrc.org/sites/default/files/resources/overview_deport_process-20181221.pdf).

¹⁹ INA § 235(b)(1); 8 U.S.C. § 1225(b)(1); A Primer on Expedited Removal, American Immigration Council, Jul. 2019, https://www.americanimmigrationcouncil.org/sites/default/files/research/primer_on_expedited_removal.pdf; Expedited Removal of Aliens: An Introduction, Congressional Research Service, Mar. 25, 2022, <https://crsreports.congress.gov/product/pdf/IF/IF11357>.

to any individual who is inadmissible and cannot affirmatively demonstrate continuous physical presence in the United States for at least two years.²⁰ Despite the broad authorization, DHS currently applies expedited removal to migrants arriving at a port of entry without valid authorization (including at airports and border bridges) and migrants who have entered the United States without authorization and are encountered within 100 miles of the U.S. border within 14 days after their entry into the United States. Individuals subjected to expedited removal are generally detained and often receive expedited removal orders.²¹ There are very limited protections for individuals in expedited removal. There is no right to counsel,²² no right to a hearing,²³ and extremely limited rights for review of an expedited removal order in federal court.²⁴

If, however, a migrant subject to expedited removal indicates that they intend to apply for asylum or expresses a fear of persecution or torture, the government must refer the individual for a credible fear interview.²⁵ These asylum seekers are generally detained unless, and at least until, they receive a positive credible fear determination. In January of 2023, the Biden Administration announced new border enforcement measures including the expansion of expedited removal, stating “[e]ffective immediately, individuals who attempt to enter the United States without permission, do not have a legal basis to remain, and cannot be expelled pursuant to Title 42 will be increasingly subject to expedited removal to their country of origin and subject to a five-year ban on reentry.”²⁶ In February of 2023, the Biden Administration issued a notice of proposed rulemaking (NPRM) that provided that, among other border policy changes, DHS would generally presume, with limited exceptions, that individuals who did not enter the U.S. lawfully through a parole program, through an appointment scheduled online, or after being denied asylum in a transit country would be ineligible for asylum and would have to rebut that finding through an exceptional circumstance.²⁷

²⁰ INA § 235(b)(1)(A)(iii)(II); 8 U.S.C. § 1225(b)(1)(A)(iii)(II).

²¹ See Fact Sheet: Expedited Removal, National Immigration Forum, <https://immigrationforum.org/article/fact-sheet-expedited-removal/> (last accessed: Dec. 5, 2022); A Primer on Expedited Removal, American Immigration Council, <https://www.americanimmigrationcouncil.org/research/primer-expedited-removal> (last accessed: Dec. 5, 2022); see generally INA § 235(b)(1); 8 U.S.C. § 1225(b)(1).

²² *Barajas-Alvarado v. U.S.A.*, 655 F.3d 1077 (9th Cir. 1998).

²³ INA § 235; 8 U.S.C. § 1225.

²⁴ *Id.*

²⁵ *Id.*, 8 C.F.R. § 208.30.

²⁶ Press Release, White House, FACT SHEET: Biden-Harris Administration Announces New Border Enforcement Actions, (Jan. 5, 2023) (<https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/05/fact-sheet-biden-harris-administration-announces-new-border-enforcement-actions/>); Press Release, Department of Homeland Security, DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes (Jan. 5, 2023) (<https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and>).

²⁷ This policy has yet to be implemented and, at the time of this publication, the comment period has recently closed. See: Circumvention of Lawful Pathways, 88 FR 11704 (proposed Feb. 23, 2023) (to be codified at 8 CFR 208, 8 CFR 1208). Hereinafter this policy will be referred to as the “February 2023 NPRM.” It is discussed further infra and can be found at <https://www.federalregister.gov/documents/2023/02/23/2023-03718/circumvention-of-lawful-pathways>.

Credible Fear Interview (CFI)

A credible fear interview is an evaluation conducted by an asylum officer from U.S. Citizenship and Immigration Services (USCIS), an agency within DHS, to determine whether a migrant has a “credible fear” of persecution if removed to their home country. To establish a credible fear of persecution a migrant must show a significant possibility of qualifying for asylum, withholding of removal, or protection under the Convention Against Torture (CAT).²⁸

The asylum officer must create a written record of their determination, including a summary of material facts provided by the applicant and any additional facts upon which the officer relied.²⁹ Most asylum seekers undergo credible fear interviews while detained, where they may be under emotional distress and not eating or sleeping well. The interviews are often conducted by telephone or video, which may inhibit the asylum seeker’s understanding of the credible fear process and the role of the asylum officer. Most asylum seekers do not have the opportunity to speak to an attorney before the interview.

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

If the asylum officer finds that the asylum seeker does not have a credible fear of persecution, the migrant may request that an immigration judge review the negative credible fear determination, generally in a video hearing.³⁰ This hearing is limited to discussion of the credible fear determination and is often very brief, without any meaningful opportunity for the asylum seeker to supplement testimony or provide additional evidence. The immigration judge can uphold a negative determination or can find that a credible fear has been established. There is generally no transcript of the proceeding before the immigration judge; a simple one-page form order is issued. If the immigration judge upholds a negative credible fear determination, the migrant may be able to seek reconsideration by the asylum office, but the asylum office exercises such authority only in very limited cases.

If both the asylum office and the immigration judge find that an individual does not have a credible fear, the expedited removal order remains in place and will be executed promptly. Migrants removed from the United States under an expedited removal order are prohibited from returning to the United States for five years.³¹ A waiver of this waiting period to return lawfully (if a legal avenue exists) may be available in some instances.³²

²⁸ 8 C.F.R. § 208.30.

²⁹ *Id.*

³⁰ 8 C.F.R. § 1003.42.

³¹ INA § 212(a)(9)(A)(i); 8 U.S.C. § 1182(a)(9)(A)(i).

³² See generally, INA §212(a)(9)(A); 8 U.S.C. § 1182(a)(9)(A).

Merits Adjudication after a Favorable Credible Fear Finding

If the migrant is found to have a credible fear of persecution, either by the asylum officer or the Immigration Court, the expedited removal order is vacated. Subsequently, a Notice to Appear (NTA) is issued, and the individual is placed in INA § 240 removal proceedings in Immigration Court, where they can seek asylum or other forms of protection (discussed further below).³³

ICE may release the asylum seeker from detention after a favorable credible fear determination but is not required to do so. In the past, some individuals with fear-based claims had the right to seek review of an ICE detention decision by the immigration judge. Specifically, those who entered the United States without inspection before apprehension had the right to an Immigration Court custody redetermination hearing while those deemed “arriving aliens” by virtue of having presented at a port of entry were NOT eligible for Immigration Court custody redetermination hearings. The possibility for immigration judge review of ICE detention decisions is now much more limited in most jurisdictions.³⁴ Many asylum seekers remain detained throughout their entire asylum case, which impacts their ability to secure counsel and obtain evidence to support their claims.

PRACTICE TIP: After a favorable credible fear determination, you can always petition ICE for release of a detained client on parole or release on recognizance.³⁵ Check the law in the relevant jurisdiction to determine whether you also have the right to Immigration Court review of the ICE detention decision (including imposition of a monetary bond as a condition of release). You may also want to consider filing a habeas petition in federal court if the detention is unreasonable because of its length or other factors.

Asylum Merits Interview (AMI) Adjudication

In limited cases, the asylum office (rather than the Immigration Court) may adjudicate the merits of an asylum application presented by an individual who arrived at the southern border and passed a credible fear interview in a second interview referred to as the Asylum Merits Interview (AMI). In May of 2022, the Biden Administration issued an interim final rule referring asylum adjudications of certain individuals who pass a credible fear interview to asylum officers.³⁶ These expedited interviews are conducted by asylum officers and mimic affirmative asylum interviews, with notable differences including treating the credible fear interview as the application for asylum.³⁷ The interim final rule applies only to individuals who will be residing in certain geographic locations (e.g. New York) if released from detention prior to their asylum

³³ See 8 C.F.R. § 1239.1; INA § 240(c)(4); 8 C.F.R. § 1240.11.

³⁴ See *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018); *Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959 (2020); *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019).

³⁵ For more information about parole, see *Parole from ICE Detention: An Overview of the Law*, American Immigration Lawyers Ass’n (AILA), (Apr. 15, 2020), available at:

<https://www.aila.org/File/Related/20030201cd.pdf>.

³⁶ 87 Fed. Reg. 18078 (May 31, 2022).

³⁷ *Id.*

adjudication.³⁸ The presumption is that individuals subject to this program will be released from detention. The merits proceedings before the asylum office take place on a very expedited schedule that allows little time to secure counsel or prepare the case. The asylum officers are permitted to grant asylum or refer the matter for full immigration proceedings (discussed further below) before an immigration judge.³⁹

PRACTICE TIP: If your adult client had a CFI in a Texas or San Diego detention facility and then was released to undergo asylum proceedings before an asylum office in another location, they are likely subject to expedited AMI proceedings. If you represent someone in this posture, you will need to act very quickly to prepare the case.

Reinstatement of Removal and Reasonable Fear Interviews⁴⁰

Reinstatement of removal is another accelerated removal process instituted in 1997. It applies to noncitizens who reenter the United States without authorization after having been removed in the past, even if the prior removal (deportation) was under an expedited removal order.⁴¹ Under the INA, if a migrant returns to the United States without permission after previously being removed or departing voluntarily pursuant to an order of removal, the prior order of removal will be reinstated from its original date and is not subject to reopening or review.⁴² DHS serves the migrant (or their attorney of record) with a reinstatement order, and arrangements are made for immediate removal.⁴³ Once DHS reinstates a prior order of removal, the migrant is not eligible for most relief under the INA, including asylum.⁴⁴ The individual is detained pending a determination on the reinstatement of a prior removal order and generally remains detained throughout any subsequent proceedings.⁴⁵ Reinstatement orders may sometimes be challenged through a petition for review by a circuit court.⁴⁶

³⁸ AMIs are limited to individuals who intend to live in the following jurisdictions: Boston, MA; Chicago, IL; Los Angeles, CA; Miami, FL; New Orleans, LA; New York, NY; Newark, NJ; San Francisco, CA; Washington, D.C.; or Chicago. *Id.*, see also FACT SHEET: Implementation of the Credible Fear and Asylum Processing Interim Final Rule, USCIS, <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/fact-sheet-implementation-of-the-credible-fear-and-asylum-processing-interim-final-rule> (last accessed: Dec. 6, 2022).

³⁹ *Id.*

⁴⁰ For more information on navigating reinstatement of removal matters see Reinstatement of Removal, American Immigration Council, May 23, 2019,

https://www.americanimmigrationcouncil.org/practice_advisory/reinstatement-removal.

⁴¹ INA § 241(a)(5); 8 U.S.C. § 1231(a)(5); 8 C.F.R. § 241.8; see also Reinstatement of Removal, American Immigration Council, May 23, 2019,

https://www.americanimmigrationcouncil.org/practice_advisory/reinstatement-removal.

⁴² INA § 241(a)(5); 8 U.S.C. § 1231(a)(5).

⁴³ See 8 C.F.R. §241.8(b), 8 C.F.R. §292.5(a).

⁴⁴ See INA 241(a)(5); 8 U.S.C. §1231(a)(5).

⁴⁵ *Id.*

⁴⁶ See INA § 242(b); 8 U.S.C. § 1252(b); see also, 8 C.F.R. § 241.8(b), 8 C.F.R. §292.5(a). For further information on reinstatement and petitions for review, see Reinstatement of Removal: Practice Advisory, American Immigration Council (2019) available at:

https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/reinstatement_of_removal.pdf

While the INA strips away the right to most relief for individuals subjected to reinstatement of removal, it also provides that an individual may not be returned to a country where they would “more likely than not” face persecution or torture.⁴⁷ As a result, where a migrant subject to a reinstated removal order expresses fear of return to home country, she is entitled to a reasonable fear determination (discussed further below) by an asylum officer in order to evaluate whether she may qualify for protection under the Convention against Torture or for withholding of removal.⁴⁸ Additionally, victims of trafficking and certain serious crimes (i.e. individuals eligible for T or U nonimmigrant status) may qualify for waivers of prior orders of removal.⁴⁹ Reasonable Fear Interviews (RFIs)

The legal standard for establishing a reasonable fear of future persecution is more difficult to meet than the credible fear standard. To establish a reasonable fear, the migrant must demonstrate a “reasonable possibility” that she will be persecuted in the future on account of race, religion, nationality, membership in a particular social group, or political opinion or a reasonable possibility that she will be tortured in the country of removal.⁵⁰ Similar to the credible fear interview, the asylum officer produces a written summary of the facts collected and the final determination. As with credible fear interviews, the circumstances of the interview often make it quite difficult for migrants to tell their stories effectively.

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

Migrants who are removed under a reinstated removal order are subject to a permanent bar to reentry unless they apply for and are granted a waiver more than ten years after the date of their last departure.⁵¹

Merits Adjudication after a Favorable Reasonable Fear Determination

If an individual is found to have a reasonable fear, either by the asylum office or the Immigration Court, the case will be referred to an immigration judge for “withholding-only proceedings.” These are not full removal (INA § 240) proceedings but are conducted in essentially the same way. They will result in a determination as to whether the individual qualifies for Withholding of Removal under INA § 241(b)(3), Withholding of

⁴⁷ See *id.*; 8 C.F.R. § 208.31.

⁴⁸ See 8 C.F.R. § 208.31.

⁴⁹ See INA § 101(a)(15)(T); 8 U.S.C. § 1101(a)(15)(T); INA § 101(a)(15)(U); 8 U.S.C. § 1101(a)(15)(U); INA § 212(d)(13); 8 U.S.C. § 1182(d)(13); INA § 212(d)(14); 8 U.S.C. § 1182(d)(14); INA § 212(a)(9)(A); 8 U.S.C. 1182(a)(8)(A); INA § 212(a)(9)(C)(i)(II); 8 U.S.C. § 1182(a)(9)(C)(i)(II).

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

⁵¹ INA § 212(a)(9)(C); 8 U.S.C. § 1182(a)(9)(C). Note that this inadmissibility ground applies only to persons who reentered or attempted to reenter after April 1, 1997. See Reinstatement of Removal, American Immigration Council, May 23, 2019, https://www.americanimmigrationcouncil.org/practice_advisory/reinstatement-removal.

Removal under the Convention Against Torture (CAT), or Deferral of Removal under CAT. To establish eligibility for these forms of relief, the migrant must demonstrate that it is “more likely than not” that she will experience persecution on account of a protected ground or torture under CAT. This is a higher standard than the well-founded fear of persecution required for asylum.

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

During withholding-only proceedings, after a favorable reasonable fear interview, ICE has the authority to release a migrant on an order of supervision or parole. However, ICE often refuses to do so, meaning that many migrants are detained for the duration of their withholding-only hearings in immigration court, which may take several months. The Supreme Court has held that migrants in this posture have no right to Immigration Court review of ICE’s detention decision.⁵² It is possible to file a federal habeas corpus petition to challenge the constitutionality of prolonged detention during withholding-only proceedings in appropriate cases.

Title 42⁵³

In 2020, the U.S. government adopted a new border policy under Title 42 of the Public Health Services Act, which has been construed to permit expulsions or turning back of migrants, purportedly for the purpose of protecting public health.⁵⁴ This policy has been referred to as “Title 42.” Under Title 42, which was implemented in March 2020, migrants entering the United States without inspection or seeking entry to the United States at a port of entry at the southern border have been expelled approximately two million times—regardless of their eligibility for protection in the United States. These expulsions began after the Department of Health and Human Services issued an emergency regulation, purportedly to implement an aspect of the public health laws found at Section 265 of Title 42 of the United States Code, which provides for prohibiting the entry of individuals who pose a serious danger of introducing a communicable disease

⁵² *Johnson v. Guzman-Chavez*, 142 S. Ct. 1827 (2022).

⁵³ For more information on Title 42, See Title 42: Overview and Impact, Justice For Immigrants, May 2021, available at: <https://justiceforimmigrants.org/wp-content/uploads/2021/05/Title-42-Overview-and-Impact.pdf>; Practice Pointer: Title 42 and Asylum Processing at the Southern Border, American Immigration Lawyers Association, Oct. 2022, available at: <https://www.aila.org/advo-media/aila-practice-pointers-and-alerts/practice-pointer-title-42-and-asylum-processing>.

⁵⁴ See Control of Communicable Diseases; Foreign Quarantine: Suspension of the Right to Introduce and Prohibition of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 56,424 (Oct. 13, 2020); Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17,060, 17,061 (Mar. 20, 2020). “Turning back” refers to turning migrants back to Mexico and away from a port of entry.

into the United States.⁵⁵ From the beginning, public health officials and scientists asserted that there was not a strong public health rationale for the rule, but the Title 42 policy has now been in place for more than two years.⁵⁶

Under the Title 42 policy, migrants who approach a port of entry at the southern border or cross into the United States without inspection may be turned back or expelled without any access to the U.S. asylum process regardless of their eligibility for protection in the United States. Those expelled under Title 42 may be detained for a period of hours or days at the border before being returned to their home countries, where they may face persecution, or to Mexico if the government of Mexico agrees to accept them. They do not receive a removal order and are not inadmissible under the INA as a result of the expulsion. Customs and Border Protection may exempt any individual from expulsion under Title 42 based on a formal request or on their own initiative, but there is no mechanism to ensure accountability over exemption decisions.

The American Immigration Council reports that:

Migrants facing Title 42 expulsion are usually driven by bus to the nearest port of entry and told to walk back to Mexico, often without their luggage and other belongings.

Since late January 2021, the Mexican state of Tamaulipas (which borders South Texas) has barred CBP from expelling families with children under the age of seven. In response, CBP has carried out “lateral” transfers by plane or bus to other locations along the border such as El Paso where Mexican authorities will allow the agency to expel families with young children.⁵⁷

In September 2021, more than 7,000 Haitians were expelled back to Haiti despite seeking asylum after crossing the border near Del Rio, Texas.⁵⁸

Litigation and policy choices by the Biden Administration have yielded some limits to Title 42 but turn backs and expulsions continue to take place. In July of 2021, the CDC ordered that Title 42 cannot be applied to unaccompanied migrant children.⁵⁹ In March of 2022, a court of appeals ruled that the government could not remove families to a country where they would face persecution on account of their race, religion, nationality, membership in a particular social group, or political opinion or to a country where they would be tortured.⁶⁰ As a result, where a family member affirmatively claims fear, screening interviews are required.

⁵⁵ See American Immigration Council’s Fact Sheet: A Guide to Title 42 Expulsions at the Border. Available at: <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border>.

⁵⁶ *Id.*

⁵⁷ See American Immigration Council’s Fact Sheet: A Guide to Title 42 Expulsions at the Border, available at: <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border>.

⁵⁸ *Id.*

⁵⁹ See Centers for Disease Control and Prevention, “Public Health determination Regarding an Exception for Unaccompanied Noncitizen Children From the Order Suspending the Right to Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists,” July 16, 2021, <https://www.cdc.gov/coronavirus/2019-ncov/more/pdf/NoticeUnaccompaniedChildren.pdf>; see also *P.J.E.S. v. Mayorkas*, Case No. 20-5357 (DC Cir. 2022).

⁶⁰ *Huisha Huisha v. Mayorkas*, 27 F.4th 718 (D.C. Cir. 2022).

However, these subsequent screenings have been inadequate and are not uniformly conducted across the border; many families (and countless single adults) continue to be expelled without an opportunity to express fear.

In May of 2022, the Biden Administration sought to terminate the Title 42 policy, but the termination announcement was met with litigation and an injunction from a district court in Louisiana.⁶¹ Then, in November of 2022, the District Court for the District of Columbia struck down the Title 42 expulsion policy after finding that it violated the Administrative Procedure Act (APA).⁶² At the request of the parties, the court reluctantly stayed its decision for five weeks to December 21, 2022.⁶³ On December 7, 2022, the Department of Homeland Security gave notice that it will appeal the decision.⁶⁴ In the interim, the Biden administration released an update on their efforts to increase enforcement at the Southwest Border in the wake of the Title 42 policy's vacatur.⁶⁵ In its six-pillar plan, the administration indicated that it will rely on Title 8, including expedited removal, to remove migrants without a lawful pathway to remain in the United States.⁶⁶ Following the intervention of 19 Republican attorneys general, the U.S. Supreme Court granted an emergency stay that left Title 42 in place until further notice.⁶⁷ The Supreme Court then set oral arguments in the case for March 2023, with a final decision in the case expected in June. In February of 2023, Department of Justice (DOJ) attorneys filed a brief on behalf of the federal government arguing that the matter of the Title 42 policy is likely to become moot when the declared public health emergency (the basis of the Title 42 policy) expires in May of 2023.⁶⁸ That same month, the Supreme Court removed the oral argument on the matter of Title 42 policy from its calendar.⁶⁹ The Title 42 policy remains in effect at present, although advocates expect the policy to terminate in May of 2023, assuming that CDC withdraws the emergency declaration at that time.⁷⁰

⁶¹ *Arizona v. CDC*, 6:22-CV-00885-RRS-CBW (W.D. La. Apr. 27, 2022).

⁶² *Huisha Huisha v. Mayorkas*, No. 21-100 (EGS) (D.D.C. Nov. 15, 2022).

⁶³ *Id.*

⁶⁴ Defendant's Notice Regarding Decision to Appeal the Court's November 15, 2022 Order and November 22, 2022 Final Judgement, *Huisha Huisha v. Mayorkas*, No. 21-100 (EGS) (D.D.C. Nov. 7, 2022), ECF No. 179.

⁶⁵ Update on Southwest Border Security and Preparedness Ahead of Court-Ordered Lifting of Title 42, Dep't of Homeland Security, (Dec. 13, 2022), available at: <https://www.dhs.gov/publication/update-southwest-border-security-and-preparedness-ahead-court-ordered-lifting-title-42>.

⁶⁶ *Id.*

⁶⁷ *Arizona, et al. v. Mayorkas*, 598 U. S. ____ (2022), available at https://www.supremecourt.gov/opinions/22pdf/22a544_n758.pdf.

⁶⁸ *See Brief For the Federal Respondents, Arizona v. Mayorkas*, No. 22-592 (U.S. Feb. 2023).

⁶⁹ *Supreme Court won't hear arguments Title 42 case as planned*, Washington Post, (Feb. 16, 2023), https://www.washingtonpost.com/politics/supreme-court-wont-hear-arguments-title-42-case-as-planned/2023/02/16/4d4b3ed6-ae32-11ed-boba-gf4244c6e5da_story.html

⁷⁰ Brad Dress, *Supreme Court Orders Title 42 Border Restrictions to Remain in Place*, THE HILL, Dec. 27, 2022, available at <https://thehill.com/regulation/court-battles/3789885-supreme-court-orders-title-42-border-restrictions-to-remain-in-place/?email=985fo89aa2c0463972a74556fbbdd201706049d2&email=937f7758c95b8a4965a75c6bf469064d&e>

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

240 Proceedings and the Family Group Dedicated Docket⁷¹

While the government has an array of tools to subject migrants at the southern border to rapid removal proceedings, as described in this section, it may instead choose to place such migrants into full removal proceedings before the Immigration Court under INA § 240. In addition, those individuals who are initially subjected to expedited removal but pass a credible fear interview are placed into INA § 240 removal proceedings before the Immigration Court. Finally, unaccompanied children (UACs) must be placed directly into INA § 240 removal proceedings as they cannot be subjected to expedited removal.⁷²

Other materials describe INA § 240 removal proceedings in greater detail.⁷³ This primer simply notes that INA § 240 removal proceedings offer some procedural protections to migrants, including the right to counsel (although not at government expense),⁷⁴ the right to apply for relief from removal through an application for asylum or other relief, the right to present testimony and evidence, and the right to appeal an adverse decision to the Board of Immigration Appeals (BIA).⁷⁵ Certain rulings from the BIA can be appealed by filing a petition for review to the proper federal circuit court.⁷⁶

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

mailto=7063ae6c8751f3f160f9dd1dca67a9738976ec47880b5778167765c925fbd7e5&utm_source=Sailthru&utm_medium=email&utm_campaign=12.27.22%20SR%20Title%2042%20Supreme%20Court; *Explainer: The Legal Impact of Ending the COVID-19 Health Emergency on Title 42*, National Immigration Forum, Feb. 18, 2023, available at: <https://immigrationforum.org/article/explainer-the-legal-impact-of-ending-the-covid-health-emergencys-on-title-42/>.

⁷¹ The Department of Justice's Immigration Court Practice Manual offers detailed procedural requirements for immigration court hearings. It is available at: <https://www.justice.gov/eoir/eoir-policy-manual/7/2>.

⁷² 8 U.S.C. § 1232(a)(5)(D).

⁷³ See e.g., Hilel R. Smith, Cong. Rsch. Serv., IF11536, *Formal Removal Proceedings: An Introduction* (2021); *Resources on Removal Proceedings*, Clinic Legal, <https://cliniclegal.org/resources/removal-proceedings> (Last Accessed: Dec. 7, 2022).

⁷⁴ INA § 292; 8 U.S.C. § 1362. This limiting language ("at no expense to the government") is widely held to not prohibit government-funded counsel, rather, it merely relates to an individual's ability to claim an entitlement or right to appointed counsel. See, *Achieving America's Immigration Promise: ABA Recommendations to Advance Justice, Fairness, and Efficiency*, ABA Commission on Immigration (2021) available at: https://www.americanbar.org/content/dam/aba/administrative/immigration/achieving_americas_immigration_promise.pdf.

⁷⁵ INA § 240, 8 U.S.C. § 1229a.

⁷⁶ INA § 242, 8 U.S.C. § 1252.

from returning lawfully for ten years.⁷⁷ A waiver of this period of inadmissibility may be available to return lawfully (if a legal avenue exists) in some instances.

Even for those migrants who are placed in full INA § 240 removal proceedings after reaching the southern border, there are certain expedited mechanisms that may apply. The Family Group Dedicated Docket is one such accelerated proceeding.⁷⁸

In a purported attempt to more efficiently adjudicate cases of families who arrive between ports of entry at the southern border, the Biden Administration announced an independent immigration court docket called the “Family Group Dedicated Docket” in May of 2021.⁷⁹ The stated goal is to adjudicate certain immigration cases involving families within 300 days of the initial Master Calendar hearing, which is a significantly shorter time period than the four-and-a-half year average waiting time for cases in traditional § 240 proceedings.⁸⁰ For a family group to be placed on the dedicated docket, they must have been apprehended between ports of entry on the southern border on or after May 28, 2021; placed into removal proceedings; and enrolled into Alternatives to Detention (ATD)⁸¹ by ICE.⁸² The case must also be proceeding in one of the selected cities where dedicated dockets have been established, namely: Boston, Massachusetts; Detroit Michigan; El Paso, Texas; Los Angeles, California; Miami, Florida; Newark, New Jersey; New York, New York; San Diego, California; San Francisco, California; Denver, Colorado; and Seattle, Washington.

The dedicated docket system has resulted in removal orders for many families appearing on these accelerated dockets. The Transactional Records Access Clearinghouse (TRAC), an immigration data-tracking organization housed at Syracuse University, reported that from May 2021 to December 2021, over 72,000 asylum-seeking families were assigned to the dedicated docket.⁸³ During that same period 11,225 were

⁷⁷ INA § 212(a)(9)(A)(ii); 8 U.S.C. § 1182(a)(9)(A)(ii).

⁷⁸ For further information on representing families on the dedicated docket, See Family Group Dedicated Docket Pro Bono Manual, American Bar Association Commission on Immigration, Apr. 2022, https://www.americanbar.org/content/dam/aba/administrative/immigration/pro_bono/aba-dedicated-docket-pro-bono-manual-april.pdf; Asylum 101 for Families in the Dedicated Docket, American Bar Association Commission on Immigration, Mar. 16, 2022, <https://www.youtube.com/watch?v=2rCw4dN1gLo>.

⁷⁹ DHS and DOJ Announce Dedicated Docket Process for More Efficient Immigration Hearings, Dept. of Justice, May 28, 2021, <https://www.justice.gov/opa/pr/dhs-and-doj-announce-dedicated-docket-process-more-efficient-immigration-hearings>.

⁸⁰ *Id.*; The Biden Administration’s Dedicated Docket: Inside Los Angeles’ Accelerated Court Hearings for Families Seeking Asylum, UCLA Center for Immigration Law and Policy, May 2022, https://law.ucla.edu/sites/default/files/PDFs/Center_for_Immigration_Law_and_Policy/Dedicated_Docket_in_LA_Report_FINAL_05.22.pdf.

⁸¹ ICE’s Alternatives to Detention (or ATD) program imposes certain conditions on those released from detention, including ankle monitors, telephonic monitoring, check-in meetings at ICE offices, and/or home visits. See ICE, Detention Management (Feb. 18, 2022) <https://www.ice.gov/detain/detention-management>.

⁸² DHS and DOJ Announce Dedicated Docket Process for More Efficient Immigration Hearings, Dept. of Justice, May 28, 2021, <https://www.justice.gov/opa/pr/dhs-and-doj-announce-dedicated-docket-process-more-efficient-immigration-hearings>.

⁸³ Unrepresented Families Seeking Asylum on “Dedicated Docket” Ordered Deported by Immigration Courts, TRAC Jan. 13, 2022, <https://trac.syr.edu/immigration/reports/674/>.

marked as completed, but only thirteen of those cases resulted in a grant of asylum or another form of removal relief.⁸⁴ A 2022 UCLA study of the Dedicated Docket in Los Angeles raised several “due process” deficiencies in the dedicated docket, including lack of access to counsel in hearings with shorter periods for preparation and a high percentage of removal orders based on respondents’ failure to appear.⁸⁵ Access to asylum is likely to be further frustrated for families on the dedicated docket if the February 2023 NPRM becomes codified given its restrictions on asylum for individuals who crossed the U.S. border without passing through a port of entry.

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

Non-immigration Proceedings and Policies

Operation Lone Star

Layered on top of the federal government laws, policies, and procedures operating at the U.S. southern border, the state of Texas has adopted practices that impact migrants reaching the Texas/Mexico border region. These practices are part of an initiative by Texas Governor Greg Abbott known as Operation Lone Star.⁸⁶ Operation Lone Star encompasses several policies that attempt to punish and deter migrants in Texas.

First, under Operation Lone Star, state and local officials criminally prosecute recently-arrived migrants encountered near the border. These migrants are generally prosecuted on misdemeanor criminal trespassing charges. They are held in state prisons during the proceedings which take place in the state criminal justice system, although apart from other criminal proceedings. Once released from the state facilities, whether because of a conviction and completion of sentence, dismissal of the criminal charges, or payment of bond, they are turned over to federal immigration authorities. The federal immigration authorities then process the migrants much like they process any other migrant whom they encounter at the border—for example, by placing them into INA § 240 proceedings or expelling them under Title 42.

PRACTICE TIP: If your client was charged in the Texas criminal justice system upon arrival in the United States, you should determine whether there are ongoing criminal proceedings still pending.

⁸⁴ *Id.*

⁸⁵ The Biden Administration’s Dedicated Docket: Inside Los Angeles’ Accelerated Court Hearings for Families Seeking Asylum, UCLA Center for Immigration Law and Policy, May 2022, [https://law.ucla.edu/sites/default/files/PDFs/Center for Immigration Law and Policy/Dedicated Docket in LA Report FINAL 05.22.pdf](https://law.ucla.edu/sites/default/files/PDFs/Center%20for%20Immigration%20Law%20and%20Policy/Dedicated%20Docket%20in%20LA%20Report%20FINAL%2005.22.pdf).

⁸⁶ Governor Greg Abbott, Executive Order GA-41 (July 7, 2022), <https://gov.texas.gov/uploads/files/press/EO-GA-41.pdf>; Governor Greg Abbott, Proclamation (May 31, 2021), available at: [https://gov.texas.gov/uploads/files/press/DISASTER border security IMAGE 05-31-2021.pdf](https://gov.texas.gov/uploads/files/press/DISASTER%20border%20security%20IMAGE%2005-31-2021.pdf).

If so, a warrant may issue against your client if they do not attend hearings and other proceedings in the state of Texas.

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

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

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

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

Two federal laws criminalize noncitizens' entry into the United States or attempts to enter without authorization. The misdemeanor offense of "Improper Entry by Alien," also frequently referred to as "illegal entry," is contained at section 275 of the INA and codified at 8 USC § 1325. The felony offense of "Reentry of Removed Alien," also referred to as "illegal reentry," is contained at section 276 of the INA and codified at 8 USC § 1326. In Fiscal Year 2019, immigration-related crimes were the most common federal arrest offenses; 57% of federal prosecutions involved "an immigration offense as the most serious arrest offense,"⁸⁷ and 66% of federal arrests occurred in "the five federal judicial districts along the U.S.-Mexico border."⁸⁸

The misdemeanor improper entry statute criminalizes three different methods of unlawful entry: entry or attempted entry "at a time or place other than as designated by immigration officers;" entry by "elud[ing] examination or inspection by immigration officers;" and entry or attempted entry "by a willfully false or misleading representation or the willful concealment of a material fact."⁸⁹ The maximum sentence for a first conviction under the statute is six months, and any subsequent conviction could result in a sentence of up to

⁸⁷ U.S. Dep't. of Justice, Bureau of Justice Statistics, *Federal Justice Statistics, 2019* (October 2021), at 1, available at: <https://bjs.ojp.gov/content/pub/pdf/fjs19.pdf> (last visited October 27, 2022).

⁸⁸ *Id.*

⁸⁹ INA § 275(a); 8 U.S.C. § 1325(a).

2 years in prison.⁹⁰ A conviction for the misdemeanor offense of improper entry does not have any independent immigration consequences—the conviction does not correspond to a specific criminal ground of inadmissibility or removability (deportability)—but the facts necessary to sustain a conviction could establish inadmissibility.⁹¹

The felony offense of illegal reentry focuses not on *how* a noncitizen enters the United States but instead on the noncitizen’s immigration history. Only a noncitizen who “has been denied admission, excluded, deported or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding” can be prosecuted for illegal reentry.⁹² The reentry statute criminalizes entry, attempted entry, or a noncitizen’s being “found in” the United States without consent from the Attorney General to reapply for admission.⁹³ The maximum sentence for a violation of the illegal reentry statute is two years’ imprisonment,⁹⁴ but that maximum is increased to 10 years if the defendant previously has been convicted of a felony; a noncitizen “whose removal was subsequent to a conviction for commission of an aggravated felony” faces a maximum sentence of 20 years in prison.⁹⁵ Unlike the misdemeanor offense, a conviction under 8 U.S.C. § 1326 constitutes an independent criminal ground of removability for an aggravated felony if the noncitizen “was previously deported on the basis of a conviction for [an aggravated felony].”⁹⁶

In 2018, then-Attorney General Jeff Sessions announced a “zero-tolerance policy” at the U.S.-Mexico border,⁹⁷ under which every arrest for unlawful entry was to be referred for federal criminal prosecution. The policy, by design,⁹⁸ caused the 2018 family separation crisis,⁹⁹ as children cannot be held in criminal custody with their parents or guardians. The dramatic increase in criminal prosecutions of migrants, including asylum seekers, led to the expansion of a Department of Justice program known as Operation Streamline, which had been used since 2005 at various times in every border state except California, and which was

⁹⁰ *Id.*

⁹¹ For example, a conviction for a violation of 8 U.S.C. § 1325(a)(3) would also prove inadmissibility under INA § 212(a)(6)(C), 8 U.S.C. § 1325(a)(6)(C) because fraud or willful misrepresentation is an element of the offense.

⁹² INA § 276(a)(1); 8 U.S.C. § 1326(a)(1).

⁹³ INA § 276(a)(2); 8 U.S.C. § 1326(a)(2).

⁹⁴ *Id.*

⁹⁵ INA § 276(b); 8 U.S.C. § 1326(b).

⁹⁶ INA § 101(a)(43)(O); 8 U.S.C. § 1101(a)(43)(O). It is unsettled whether a conviction under § 1326 would still qualify as an aggravated felony if the prior aggravated felony conviction were vacated or if the statute of conviction were no longer considered an aggravated felony.

⁹⁷ Press Release, U.S. Dep’t. of Justice, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (April 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>.

⁹⁸ *See id.*; *see also*, Melissa del Bosque, “The El Paso Experiment: A Public Defender’s Lonely Fight Against Family Separation,” *The Intercept* (Nov. 1, 2020) available at: <https://theintercept.com/2020/11/01/el-paso-family-separation-border-patrol/>.

⁹⁹ Richard Gonzales, “Sessions Says ‘Zero Tolerance’ for Illegal Border Crossers, Vows to Divide Families,” NPR (May 7, 2018), available at: <https://www.npr.org/sections/thetwo-way/2018/05/07/60922537/sessions-says-zero-tolerance-for-illegal-border-crossers-vows-to-divide-families>.

implemented in the Southern District of California in 2018.¹⁰⁰ Operation Streamline involves the expedited prosecution of unlawful entry offenses, primarily misdemeanor unlawful entry, and therefore most Operation Streamline cases are heard by federal magistrate judges. The volume of cases “requires nearly all judges to combine the initial appearance, arraignment, plea, and sentencing into one hearing.”¹⁰¹ However, the Ninth Circuit Court of Appeals concluded in 2009 that one court’s practice of taking guilty pleas en masse violated federal law.¹⁰²

The nature of Operation Streamline prosecutions makes them confusing to migrants and asylum seekers who are subjected to this expedited criminal program. Many Streamline defendants do not understand that they were represented by lawyers,¹⁰³ or that they were convicted of crimes, and it is common for noncitizens with unlawful entry or reentry convictions to believe that they were appearing in front of immigration judges instead of federal magistrate or district court judges.

PRACTICE TIP: A client’s federal RAP sheet is a helpful place to begin an investigation into any possible prosecutions or convictions for unlawful entry or reentry. Because arrest for these charges results in expedited removal or reinstatement of removal nearly 100 percent of the time, it is also a good opportunity to identify dates and locations for potential FOIA requests to US Citizenship and Immigration Services, Customs and Border Protection or the DHS Office of Biometric Identity Management (OBIM). A RAP sheet can be collected by submitting a standard FBI fingerprint form (FD-1164). A review of the criminal case documents, which should be available¹⁰⁴ will also reveal the name of the defense attorney who represented a client in the criminal case. Federal public defenders and Criminal Justice Act (CJA) appointed attorneys can be great resources to learn more about a client and to obtain information about both the client’s criminal case and any related immigration history (e.g., records from prior removal proceedings).

PRIOR ENFORCEMENT POLICIES AT THE BORDER

Metering

Since at least 2016, CBP has unlawfully turned back many migrants approaching U.S. ports of entry at the southern border (for example, on the bridge between Matamoros, Tamaulipas, Mexico, and Brownsville, Texas) to seek asylum and prevented them from entering the United States. Instead, they were turned back to Mexico to await processing by CBP. In 2018, the U.S. government formalized this metering policy that CBP justified by claiming that it could process only a limited number of asylum seekers each day. Long wait

¹⁰⁰ Stan Alarcon, “California Starts Streamlining Prosecution For People Who Cross Border Illegally,” *All Things Considered*, NPR (July 13, 2018), available at: <https://www.npr.org/2018/07/13/628907270/california-starts-streamlining-prosecution-for-people-who-cross-border-illegally>.

¹⁰¹ Joanna Lydgate, “Assembly-Line Justice: A Review of Operation Streamline,” *California Law Review* 98, no. 2 (2010), 486.

¹⁰² *Id.* n.23 (citing *United States v. Roblero-Solis*, 588 F.3d 692 (9th Cir. 2009)).

¹⁰³ Ted Robbins, “Border Patrol Program Raises Due Process Concerns,” *Morning Edition*, NPR (Sept. 13, 2010), available at: <https://www.npr.org/2010/09/13/129780261/border-patrol-program-raises-due-process-concerns>.

¹⁰⁴ Public Access to Court Electronic Records, PACER Case Locator, <https://pcl.uscourts.gov/pcl/index.xhtml?faces-redirect=true>.

lists developed for individuals waiting in Mexico to seek asylum in the United States. Migrants often waited for months or years in the hope of having the opportunity to access the U.S. asylum process. In 2017, immigrants' rights advocates filed a class action lawsuit, *Al Otro Lado v. Mayorkas*, against the government arguing that the metering policy was unlawful under the INA, the Administrative Procedures Act (APA), the due process clause of the Fifth Amendment, and the doctrine of non-refoulement.¹⁰⁵

Starting in March 2020, with the adoption of the Title 42 policy, the employment of metering waned given that U.S. authorities could simply return migrants to Mexico.¹⁰⁶ In September of 2021, the Federal District Court in the Southern District of California found the Metering policy unlawful as a violation of the APA and the Fifth Amendment's Due Process clause.¹⁰⁷ In November of 2021, CBP rescinded the metering policy.¹⁰⁸ Due to metering, some asylum seekers currently in the United States initially had to wait for many months in Mexico, which may impact certain elements of their asylum claims. For example, some gave birth while waiting in Mexico, creating the possibility of legal status in Mexico, which may complicate a claim for asylum.

In October of 2020, CBP launched a mobile application called CBP One.¹⁰⁹ Among its capabilities, CBP One was designed for individuals who travel to the U.S. by land to submit traveler information to CBP ahead of their arrival at a port of entry and also permits individuals to seek exemptions from Title 42.¹¹⁰ Subsequently, Cubans, Haitians, Nicaraguans, and Venezuelans were also permitted to use CBP One from their home countries in order to submit biometric information to CBP as part of the process to apply for travel authorization and obtain parole through special programs for those nationalities.¹¹¹ The application has generated concerns about accessibility because it requires a cell phone and a strong internet connection. It also raises privacy concerns, given its use of facial recognition technology and GPS location tracking.¹¹² In addition, critics note that the facial recognition technology disadvantages communities of color, as the

¹⁰⁵ *Al Otro Lado v. Mayorkas*, No. 17-cv-02366-BAS-KSC, (S.D. Cal., Sept. 2, 2021).

¹⁰⁶ Congressional Research Service, CRS LSB10295, The Department of Homeland Security's "Metering" Policy: Legal Issues (2022).

¹⁰⁷ *Al Otro Lado v. Mayorkas*, No. 17-cv-02366-BAS-KSC, (S.D. Cal., Sept. 2, 2021).

¹⁰⁸ Memorandum from Troy A. Miller, Acting Commissioner of U.S. Customs and Border Protection regarding Guidance for Management and Processing of Undocumented Noncitizens at Southwest Border Land Ports of Entry to William A. Ferrara, Executive Assistant Commissioner of the Office of Field Operations (Nov. 1, 2021) available at: <https://www.cbp.gov/sites/default/files/assets/documents/2021-Nov/CBP-mgmt-processing-non-citizens-sw-b-lpoes-signed-Memo-11.1.2021-508.pdf>.

¹⁰⁹ CBP One (TM) Mobile Application, cbp.gov, <https://www.cbp.gov/about/mobile-apps-directory/cbpone> (last accessed: Feb. 28, 2023).

¹¹⁰ *Id.* See also: *Fact Sheet: CBP One Overview*, American Immigration Council, <https://www.americanimmigrationcouncil.org/research/cbp-one-overview> (last accessed: Feb. 28, 2023).

¹¹¹ Government Documents Reveal Information about the Development of the CBP One App, American Immigration Council, <https://www.americanimmigrationcouncil.org/FOIA/government-documents-reveal-information-about-development-cbp-one-app> (Feb. 28, 2023); <https://www.cbp.gov/about/mobile-apps-directory/cbpone>.

¹¹² See: *Fact Sheet: CBP One Overview*, American Immigration Council, <https://www.americanimmigrationcouncil.org/research/cbp-one-overview> (last accessed: Feb. 28, 2023).

system has been found to produce faulty results at higher rates for individuals with darker skin tones.¹¹³ In January of 2023, CBP One became available to asylum seekers from Cuba, Haiti, Nicaragua, and Venezuela to schedule appointments to request asylum at the U.S. - Mexico border.¹¹⁴ The roll-out of CBP One for asylum seekers traveling by land has been marred by limited appointment availability, technical glitches, and the struggle for families to find as many appointments as there are family members, raising the prospect of new family separations at the border.¹¹⁵ The February 2023 NPRM seeks to expand implementation of CBP One to “allow an increasing number of migrants who may wish to claim asylum to request an available time and location to present and be inspected and processed at certain ports of entry...”¹¹⁶ Under the new rule, individuals who arrive at a port of entry with an appointment through CBP One will not be presumed ineligible for asylum.¹¹⁷ The lack of transparency surrounding any expansion of the use of CBP One and the availability of alternative avenues to seek asylum raises concerns that the application itself could become a new form of metering at ports of entry along the southern border.

Migrant Protection Protocols¹¹⁸

The Migrant Protection Protocols (MPP) or “Remain in Mexico” policy was implemented by the Trump Administration in January 2019. Under MPP, border officials placed asylum seekers in INA § 240 proceedings but returned them to Mexico to await their U.S. court hearings.¹¹⁹ The hearings took place at specially erected tent courts located within CBP facilities in Laredo and Brownsville, Texas, and in Immigration Courts near the border in San Diego, California and El Paso, Texas. Between January 2019 and December 2020, more than 70,000 people were returned to precarious circumstances in Mexico to await court hearings under MPP. In March 2020, all pending hearings were suspended due to the COVID-19 pandemic, leaving those individuals subject to MPP in limbo with regard to their asylum cases and facing insecurity and danger in Mexico.¹²⁰

¹¹³ *Id.*

¹¹⁴ *Struggling with US asylum app, migrant families split at the border*, Reuters.com, (Feb. 27, 2023), <https://www.reuters.com/article/usa-immigration-mexico/struggling-with-us-asylum-app-migrant-families-split-at-border-idINL1N354308>; Government Documents Reveal Information about the Development of the CBP One App, American Immigration Council, <https://www.americanimmigrationcouncil.org/FOIA/government-documents-reveal-information-about-development-cbp-one-app> (Feb. 28, 2023); <https://www.cbp.gov/about/mobile-apps-directory/cbpone>.

¹¹⁵ *Id.*

¹¹⁶ *See* Circumvention of Lawful Pathways, 88 FR 11704 (proposed Feb. 23, 2023) (to be codified at 8 CFR 208, 8 CFR 1208).

¹¹⁷ *Id.*

¹¹⁸ For more information on the Migrant Protection Protocols, see *What is the Migrant Protection Protocols “Remain in Mexico” Program?*, American Bar Association ProBAR South Texas Pro Bono Asylum Representation Project, <https://www.americanbar.org/content/dam/aba/administrative/immigration/probar-mpp-infographic.pdf>.

¹¹⁹ *See* Center for Migration Studies, *The Migrant Protection Protocols: Policy History and Latest Updates*, Available at: <https://cmsny.org/mpp-briefing-graphic/>.

¹²⁰ *Id.*

Initially, the Biden Administration allowed asylum seekers subjected to MPP to enter the United States only if they still had active cases in the Immigration Courts. Later, the government's wind-down of MPP was expanded to include individuals whose MPP cases had been terminated or resulted in *in absentia* removal orders. Then, on June 1, 2021, the Secretary of Homeland Security, under the Biden Administration, issued a memorandum terminating MPP.¹²¹ In June of 2021, the Biden Administration began phasing out MPP, albeit with complications.¹²²

The termination of MPP was the subject of extensive litigation in *Texas v. Biden*, which blocked the implementation of the June 1, 2021, memo.¹²³ For several months in late 2021 and the first half of 2022, new individuals were enrolled into MPP, and MPP hearings moved forward in the border Immigration Courts.

On October 29, 2021, the Secretary of Homeland Security again terminated MPP by a memorandum which was slated to be implemented "as soon as practicable after issuance of a final judicial decision to vacate the *Texas* injunction."¹²⁴ In June of 2022, the U.S. Supreme Court reversed the injunction that had blocked the termination of MPP. The Court also suggested that the October 29, 2021 Memorandum was a lawful agency action.¹²⁵ Despite the reversal of the injunction, the Supreme Court remanded the case to the District Court for further analysis on whether the rescission memorandum ending MPP was a violation of the Administrative Procedures Act.¹²⁶ On December 15, 2022, the U.S. District Court for the Northern District of Texas granted a stay of the October 29 Memorandum and decision to terminate.¹²⁷ The decision restores the prior Nielsen Memo establishing MPP,¹²⁸ but nothing in the Nielsen memo requires anyone to be placed in

¹²¹ See Memorandum from Secretary of Homeland Security Alejandro Mayorkas on Termination of the Migrant Protection Protocols (Jun. 1, 2021) (available at: https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf); See also: DHS, Court Ordered Reimplementation of the Migrant Protection Protocols, <https://www.dhs.gov/migrant-protection-protocols>.

¹²² Featured Issue: Migrant Protection Protocols (MPP), American Immigration Lawyers Association, Aug 11, 2022, <https://www.aila.org/advo-media/issues/all/port-courts>.

¹²³ *Texas v. Biden*, No. 2:21-cv-067, 2021 WL 3603341 (N.D. Tex. Aug. 13, 2021).

¹²⁴ See Memorandum from Secretary of Homeland Security Alejandro Mayorkas on Termination of the Migrant Protection Protocols (Oct. 29, 2021) (available at: https://www.dhs.gov/sites/default/files/2022-01/21_1029_mpp_termination-memo.pdf); See also: DHS, Court Ordered Reimplementation of the Migrant Protection Protocols, available at: <https://www.dhs.gov/migrant-protection-protocols>.

¹²⁵ *Biden v. Texas*, 142 S. Ct. 2528 (2022).

¹²⁶ *Id.*

¹²⁷ See *Texas v. Biden*, Case No. 2:21-CV-067-Z (N.D. Tex. 2022). See also Daniel Wiessner, *Biden's Bid to End "Remain in Mexico" Immigration Policy Blocked by Judge*, REUTERS, Dec. 16, 2022, available at <https://www.reuters.com/legal/government/bidens-bid-end-remain-mexico-immigration-policy-blocked-by-judge-2022-12-16/>

¹²⁸ The Nielsen Memorandum is available at: https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf.

MPP and simply presents the protocols as an option for DHS to use at their discretion.¹²⁹ The case remains ongoing.¹³⁰

It is worth noting that multiple challenges persist for asylum seekers who were placed in the initial version of MPP. Some are still waiting in Mexico and have not been processed into the United States to pursue their § 240 proceedings. Also, numerous asylum seekers received *in absentia* removal orders during MPP because they could not attend their hearings in the border courts for reasons ranging from physical danger to lack of meaningful notice. Others entered the United States while their MPP cases were still pending but have had difficulty transferring their cases to regular dockets within the United States. Others received negative decisions on their asylum claims in MPP proceedings that lacked minimal due process guarantees.¹³¹

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

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

In October of 2019, DHS piloted and later broadly rolled out the Humanitarian Asylum Review Process (HARP) and the Prompt Asylum Claim Review (PACR).¹³² These nearly identical processes sought to further accelerate the expedited removal process such that it would be complete in only five to seven days.¹³³ Among the mechanisms employed to effectuate such rapid processing, migrants were held in temporary CBP facilities (as opposed to ICE detention centers) and had only one day to consult with counsel prior to a CFI.¹³⁴ In response to litigation by advocates and migrants charging that, among other deficiencies, HARP

¹²⁹ *Id.* In February of 2023, the Mexican government released a statement that it opposed a possible restart of the Remain in Mexico policy. See Kylie Madry, *Mexico Opposes restart of U.S. 'Remain in Mexico' immigration policy*, Reuters (Feb. 6, 2023) <https://www.reuters.com/world/americas/mexico-rejects-possible-remain-mexico-revamp-plan-2023-02-07/>.

¹³⁰ The Biden Administration has since appealed the case to the Fifth Circuit Court of Appeals. to See: Notice of Appeal, *Texas v. Biden*, Case No. 2:21-CV-067-Z (N.D. Tex. 2022); *Biden v. Texas*, No. 23-10143 (5th Cir. 2023).

¹³¹ See *Immigrant Defenders Law Center v. Mayorkas*, No. 2:20-cv-09893 (C.D. Cal. R., Oct. 2020); See generally: *Immigrant Defenders Law Center V. Mayorkas*, Center for Gender and Refugee Studies, <https://cgrs.uchastings.edu/our-work/immigrant-defenders-law-center-v-mayorkas>.

¹³² See Memorandum on Prioritization of Removal Pathways from US CBP Acting Commissioner Mark Morgan to Acting Secretary of DHS Kevin K. McAleenan, 2019 (available at: https://www.dhs.gov/sites/default/files/publications/migrant_protection_protocols_01.pdf). See also, *Las Americas Immigrant Advocacy Center v. Chad Wolf*, 507 F.Supp.3d 1 (D.D.C. 2020).

¹³³ The only substantive distinction between PACR and HARP is that HARP applies to Mexican citizens whereas PACR applies to migrants who are not Mexicans. Unaccompanied Children were not subject to PACR or HARP. *Id.*

¹³⁴ *Id.*

and PACR effectively deny asylum seekers access to counsel while holding them in substandard facilities, the District Court for the District of Columbia held that HARP and PACR did not violate federal law or the constitutional rights of the migrants subject to these programs.¹³⁵ The case, *Las Americas Immigrant Advocacy Center v. Wolf*, was appealed in 2020, but stayed when, in February of 2021, the Biden Administration, through executive order, ceased implementation of HARP and PACR.¹³⁶ It is important to note that while HARP and PACR are not presently being implemented, the programs have not, to date, been rescinded. This means that HARP and PACR can be reimplemented at any time in the future.

The Third Country Asylum Rule¹³⁷

In July of 2019 the Trump Administration's DHS and DOJ issued an interim final rule barring migrants from seeking asylum in the United States if they did not seek protection from a third country in their journey to the U.S.¹³⁸ The Third Country Asylum rule, also referred to as the Transit Ban, listed only two exceptions: (1) cases where the migrant was trafficked or (2) if the migrant received a final order denying protection in at least one country through which they transited.¹³⁹ The rule effectively denied asylum access to any non-Mexican migrants who sought entry to the United States via the southern border. The same month that it was published, the transit ban faced multiple challenges yielding years tug-of-war of injunctions.¹⁴⁰ Despite these challenges, the transit ban was in effect from September of 2019 through June of 2020, leading to

¹³⁵ See *Las Americas Immigrant Advocacy Center v. Chad Wolf*, 507 F.Supp.3d 1 (D.D.C. 2020). See also: *Las Americas Immigrant Advocacy Center V. Wolf – Challenging Denial of Immigrants' Access to Counsel*, ACLU District of Columbia, <https://www.acludc.org/en/cases/las-americas-immigrant-advocacy-center-v-wolf-challenging-denial-immigrants-access-counsel> (last accessed: Dec. 3, 2022).

¹³⁶ Exec. Order No. 14010, 86 FR 8267 (Feb. 2, 2021); *Las Americas Immigrant Advocacy Center V. Wolf – Challenging Denial of Immigrants' Access to Counsel*, ACLU District of Columbia, <https://www.acludc.org/en/cases/las-americas-immigrant-advocacy-center-v-wolf-challenging-denial-immigrants-access-counsel> (last accessed: Dec. 3, 2022).

¹³⁷ For more information on the Third Country Asylum Rule see *Asylum Ban Part 2: Third Country Transit Regulations FAQs*, Clinic Legal, <https://cliniclegal.org/resources/asylum-and-refugee-law/asylum-ban-part-2-third-country-transit-regulations-faqs> (last accessed: Dec. 12, 2022); *Third Country (Transit) Asylum Rule: What You Need to Know*, Penn State Law Center for Immigrants' Rights Clinic, (Oct., 2020) (available at: <https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/Third%20Country%20Asylum%20Rule%20Updated%2010-8-20.pdf>); *The Asylum Transit Ban After CAIR Coalition v. Trump*, Immigrant Legal Resource Center, https://www.ilrc.org/sites/default/files/resources/asylum_transit_ban_after_cair_v_trump_10.2020.pdf (last accessed: Dec. 12, 2022).

¹³⁸ *Asylum Eligibility and Procedural Modifications*, 84 FR 33829 (Jul. 16, 2019) (Interim Final Rule); *Asylum Eligibility and Procedural Modifications*, 85 FR 82260 (Dec. 17, 2020) (Final Rule).

¹³⁹ *Id.*

¹⁴⁰ *E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1102 (N.D. Cal. 2018); *E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922 (ND Cal. 2019); *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1028 (9th Cir. 2019); *E. Bay Sanctuary Covenant v. Barr*, 391 F. Supp. 3d 974 (N.D. Cal. 2019) *Capital Area Immigrants' Rights (CAIR) Coalition v. Trump*, No. 19-2117 (D.D.C. Jun. 30, 2020); *Barr v. E. Bay Sanctuary Covenant*, 588 U.S. ___, 139 S. Ct. 782, (2019), *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020); *E. Bay Sanctuary Covenant v. Barr*, (N.D. Cal. 2021)

thousands of denials of applications for asylum.¹⁴¹ Ultimately, the transit ban was deemed unlawful by two courts for violating the Administrative Procedures Act (APA).¹⁴² While the Trump administration's transit ban has been vacated and repeatedly enjoined, there are concerns that because it was never assessed on its merits as a rule, there is a risk that the current or future administrations may seek to reimplement a transit ban.¹⁴³ In fact, the February 2023 NPRM would impose a rebuttable presumption of asylum ineligibility for individuals who did not first seek and get denied protection in at least one third country in through which they traveled en route to the United States.¹⁴⁴

Asylum Cooperative Agreements (ACAs)

From July to October of 2019 the Trump Administration signed onto agreements with Guatemala, Honduras, and El Salvador referred to as Asylum Cooperative Agreements (ACAs).¹⁴⁵ ACAs, also referred to as "safe third country agreements," are agreements intended to limit the use of the signatory countries' asylum systems by limiting asylum seekers' access to only one of the asylum systems.¹⁴⁶ As a result of these agreements, a substantial subset of asylum-seekers who came to the U.S. southern border could be removed to Guatemala, Honduras, or El Salvador, to seek asylum in those countries, meanwhile being permanently denied access to the U.S. asylum process.¹⁴⁷ In November of 2019, the Executive Office for Immigration Review (EOIR) and USCIS issued an interim final rule to implement the three ACAs.¹⁴⁸ The ACAs applied to asylum-seekers who came from El Salvador, Guatemala, and Honduras (also referred to as the

¹⁴¹ See *The Asylum Transit Ban After CAIR Coalition v. Trump*, Immigrant Legal Resource Center, https://www.ilrc.org/sites/default/files/resources/asylum_transit_ban_after_cair_v_trump_10.2020.pdf (last accessed: Dec. 12, 2022).

¹⁴² *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020); *Capital Area Immigrants' Rights (CAIR) Coalition v. Trump*, No. 19-2117 (D.D.C. Jun. 30, 2020).

¹⁴³ See e.g., Eileen Sullivan and Michael D. Shear, *Biden Administration Considers Migrant Restrictions Similar to Trump Policies*, N. Y. Times, Dec. 1, 2022, <https://www.nytimes.com/2022/12/01/us/politics/biden-immigration-asylum-restrictions.html?login=smartlock&auth=login-smartlock>.

¹⁴⁴ See *Circumvention of Lawful Pathways*, 88 FR 11704 (proposed Feb. 23, 2023) (to be codified at 8 CFR 208, 8 CFR 1208).

¹⁴⁵ Fact Sheet: DHS Agreements with Guatemala, Honduras, and El Salvador, Dep't of Homeland Security, https://www.dhs.gov/sites/default/files/publications/19_1028_opa_factsheet-northern-central-america-agreements_v2.pdf (last accessed: Dec. 12, 2022); "Asylum Cooperative Agreements" Fact Sheet, Kids in Need of Defense (KIND), <https://supportkind.org/wp-content/uploads/2019/11/ACAs-and-N.-Triangle-Factsheet-FINAL.pdf> (last accessed: Dec. 12, 2022). Prior to 2019, the U.S. had only entered into one Safe Third Country Agreement, and it was with Canada. See *Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*, Can.-U.S., Dec. 5, 2002, CTS 2004/2.

¹⁴⁶ Morgan Kaplan, *The Biden Administration Suspends Asylum Agreements with the Northern Triangle*, Columbia Journal of Transnational Law Bulletin, <https://www.jtl.columbia.edu/bulletin-blog/the-biden-administration-suspends-asylum-agreements-with-the-northern-triangle> (Feb, 2021). See generally, 8 U.S.C. § 1158(a)(2)(A); INA § 208(a)(2)(A) describing "Safe Third Countries."

¹⁴⁷ *Id.*

¹⁴⁸ *Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act*, 84 FR 63994 (Nov. 19, 2019); *US – Guatemala Asylum Cooperation Agreement (ACA) Threshold Screening: Guidance for Asylum Officers and Asylum Office Staff*, USCIS, (Nov. 19, 2019) available at: <https://fingfx.thomsonreuters.com/gfx/mkt/12/8962/8874/ACA%20Guatemala.pdf>.

“northern triangle” countries).¹⁴⁹ The asylum-seekers could not be returned to their home countries, but would be returned to one of the two other northern triangle countries, unless they qualified for one of three exceptions that the individual: (1) is an unaccompanied minor, (2) can establish that they are more likely than not to face persecution on account of a protected ground or will face torture in the designated northern triangle country, or (3) qualifies for a public interest exception in the discretion of the USCIS director.¹⁵⁰ In January of 2020, immigration advocates filed suit against the federal government arguing, among multiple challenges, that the implementation of the ACAs was arbitrary and capricious under the APA and violated the asylum statute’s safe third country rule, which required that a receiving nation must be equipped to provide asylum seekers access to full and fair procedures for determining their claims to asylum.¹⁵¹ The ACAs were only implemented from November of 2019 through March of 2020, an outcome of the Covid-19 pandemic; however, in that time as many as 945 asylum seekers were transferred from the US to Guatemala.¹⁵² None were granted asylum there.¹⁵³ In February of 2021, the Biden Administration suspended and initiated the process to terminate the ACAs with Guatemala, Honduras, and El Salvador.¹⁵⁴ While the ACAs with the northern triangle countries have been terminated, the current or future administrations remain able to negotiate and implement new ACAs in the future.

CASES INVOLVING UNACCOMPANIED CHILDREN¹⁵⁵

Unaccompanied children who reach the U.S. southern border receive a limited set of additional protections as compared with those provided to their adult counterparts. Unaccompanied minors, or unaccompanied migrant children, are children under the age of 18 who enter the United States without lawful status and without a parent or legal guardian who can provide care.¹⁵⁶

After apprehension at or near the border, unaccompanied children who do not voluntarily return to their home country are transferred to the custody of the Department of Health and Human Services’ (DHHS) Office for Refugee Resettlement (ORR).¹⁵⁷ ORR must seek to transfer children to the custody of sponsors

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ See Plaintiffs’ Complaint for Declaratory and Injunctive Relief, *U.T. v. Barr*, No. 1:20-cv-00116, (D.D.C, Jan. 15, 2020) available at: https://cgrs.uchastings.edu/sites/default/files/complaint_filed_stamped_u.t._v._barr.pdf

¹⁵² Menendez Publishes New Report Documenting Cruelty, Coercion, and Legal Contortions in Trump Administration’s Asylum Agreements, Senate Foreign Relations Committee, <https://www.foreign.senate.gov/press/dem/release/menendez-publishes-new-report-documenting-cruelty-coercion-and-legal-contortions-in-trump-administrations-asylum-agreements> (Jan. 18, 2021).

¹⁵³ *Id.*

¹⁵⁴ Exec. Order No. 14010.

¹⁵⁵ For further resources on children in removal proceedings, see, Representing Children and Families in Immigration Matters, the American Bar Association’s Commission on Immigration, Mar. 2022, <https://www.youtube.com/watch?v=b53Y7HmMXjY>; Children’s Immigration Law Academy (CILA) Pro Bono Guide: Working with Children and Youth in Immigration Cases, Children’s Immigration Law Academy, American Bar Association’s Commission on Immigration, Sept. 2021, <https://cilacademy.org/wp-content/uploads/2021/10/2021-CILA-Pro-Bono-Guide.pdf>.

¹⁵⁶ 6 U.S.C. § 279(g)(2).

¹⁵⁷ 6 U.S.C. § 279.

after assessing the child’s relationship to the sponsor and ensuring that the child does not present a substantial risk of flight or danger.¹⁵⁸ Mexican children at the border are frequently quickly returned to Mexico, although agents must first screen them for trafficking and/or fear of return.¹⁵⁹

Unaccompanied minors can only be placed in § 240 removal proceedings and are entitled to the rights all migrants have in § 240 proceedings.¹⁶⁰ They are not subject to expedited removal.¹⁶¹ Unaccompanied minors were also not subject to MPP and now are not subject to Title 42.¹⁶² Still, application of both MPP and Title 42 affected unaccompanied minors and often led to family separation. Children who arrived at the U.S. border with parents or legal guardians were often placed in MPP. Due to precarious conditions in Mexico, children sometimes subsequently sought to enter the United States alone.¹⁶³ Other children arrived at the U.S. border with family members other than parents or legal guardians. Those family members were often placed in MPP and returned to Mexico, while the children were processed as unaccompanied minors and placed in ORR care. Families not placed in MPP were often expelled under Title 42. Children sometimes subsequently entered on their own, also leading to family separation.¹⁶⁴ Children previously placed in MPP who subsequently reentered the U.S. unaccompanied were not always afforded protections as unaccompanied minors. Some were not placed in § 240 removal proceedings, as required by the Trafficking Victims Protection Reauthorization Act (TVPRA). DHS’ obligation to initiate § 240 proceedings for these minors is currently the subject of federal litigation, including a suit in which the ABA’s South Texas Pro Bono Asylum Representation Project (ProBAR) is a co-plaintiff.¹⁶⁵ With respect to Title 42, before the practice of expelling unaccompanied minors was blocked in court and later formally halted by the Biden administration, it was used to turn away or expel nearly 16,000 unaccompanied minors.¹⁶⁶

¹⁵⁸ 8 U.S.C. § 1232.

¹⁵⁹ 8 U.S.C. § 1232(a)(2)(A).

¹⁶⁰ 8 U.S.C. § 1232(a)(5)(D).

¹⁶¹ *Id.*; see also: Memorandum from Michael John Garcia and Kate M. Manuel to Multiple Congressional Requesters, “Unaccompanied Alien Children: Current Law Governing Removal From the United States and Selected Legislative Proposals,” July 30, 2014, p. 3; William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008. 8 U.S.C. § 1232 (a)(5)(D).

¹⁶² See U.S. Customs and Border Protection, “MPP Guiding Principles,” Jan 28, 2019, <https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf>.

¹⁶³ Kids in Need of Defense, “Forced Apart: How the ‘Remain in Mexico’ Policy Places Children in Danger and Separates Families,” Feb. 24, 2020, <https://supportkind.org/wp-content/uploads/2020/02/MPP-KIND-2.24updated-003.pdf>.

¹⁶⁴ Physicians for Human Rights, Neither Safety Nor Health, How Title 42 Expulsions Harm Health and Violate Rights, July 2021 at p. 6, <https://phr.org/wp-content/uploads/2021/07/PHR-Report-United-States-Title-42-Asylum-Expulsions-July-2021.pdf>.

¹⁶⁵ See American Bar Association, “ABA joins lawsuit to help persecuted immigrant children,” Feb. 12, 2021, <https://www.americanbar.org/news/abanews/aba-news-archives/2021/02/aba-joins-lawsuit-to-help-persecuted-immigrant-children/>; *Immigrant Defs. L. Ctr. v. U.S. Dep’t of Homeland Sec.*, No. CV2100395FMORAOX (C.D. Cal.).

¹⁶⁶ See American Immigration Council, “A Guide to Title 42 Expulsions at the Border,” May 25, 2022, <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border>.

The two most common forms of relief sought by unaccompanied minors in removal proceedings are Special Immigrant Juvenile Status (SIJS) and asylum. Unaccompanied children must have a state court order with specific findings related to abuse, abandonment or neglect and their best interest to then petition USCIS for SIJS. Once the petition is approved and the child's priority date is current (which could take many years), the child can seek to adjust their status to that of a lawful permanent resident. Advocacy efforts, including those by the ABA, resulted in USCIS providing deferred action and employment authorization for youth in the SIJS visa backlog.¹⁶⁷

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

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

CONCLUSION

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

¹⁶⁷ See American Bar Association (ABA) House of Delegates Resolution 21M103A (adopted Feb. 2021); Letter from ABA President Patricia Lee Refo to Secretary of Homeland Security Alejandro Mayorkas (Apr. 8, 2021) (available at: https://www.uscis.gov/sites/default/files/document/foia/Special_Immigrant_Juvenile_SIJ_-_Refo.pdf).