Federal Court's Preliminary Injunction Restores Asylum Eligibility for Asylum Seekers Turned Back at Ports of Entry Before July 16, 2019

Frequently Asked Questions[1]

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On March 5, 2020, the Ninth Circuit Court of Appeals denied the government's motion for a stay of the district court's order (discussed below) until the appellate court decides the merits of the government's appeal. In doing so, the Ninth Circuit lifted its previously imposed emergency temporary stay of the order. *Al Otro Lado v. Wolf*, --- F.3d --- (9th Cir. Mar. 5, 2020). **At this time, the district court's order is in effect.**

On November 19, 2019, the U.S. District Court for the Southern District of California granted Plaintiffs' motions for provisional class certification and preliminary injunction in *Al Otro Lado, Inc. v. Wolf*, No. 3:17-cv-02366-BAS-KSC (S.D. Cal.). **Under that decision, the government may not rely on the Trump administration's July 16, 2019, asylum ban to deny asylum eligibility to non-Mexican asylum seekers who were "metered" at the U.S.-Mexico border before the ban went into effect.** "Metering" is a process that the U.S. Department of Homeland Security (DHS) uses to limit the number of asylum seekers it accepts for inspection and processing at U.S. ports of entry. Such asylum seekers are forced to wait in Mexico to seek asylum.

In *Al Otro Lado, Inc. v. Wolf*, Plaintiffs challenge the legality of the government's metering policy.[2] The district court previously held that individuals "who may not yet be in the United States, but who [are] in the process of arriving in the United States through a [port of entry,]" including people who are subject to metering at ports of entry, are "arriving in the United

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[2] Plaintiffs also challenge other systemic practices the DHS uses to turn away asylum seekers and deter individuals from seeking asylum in the United States. These practices are not at issue in the motions for preliminary injunction and provisional class certification.

States."[3] Accordingly, the court concluded that various provisions of 8 U.S.C. § 1225 and related regulations, which impose a duty on DHS to inspect applicants for admission and give such individuals a right to access the asylum process, apply to those impacted by metering.[4]

On July 16, 2019, the government instituted a ban on asylum eligibility for all individuals who transited through a third country before reaching the United States at the southern land border (the "Asylum Ban" or "Ban"). The Ban applies to "any alien who enters, attempts to enter, *or arrives in* the United States across the southern land border *on or after* July 16, 2019."[5] The Asylum Ban rendered ineligible for asylum all non-Mexicans who had crossed through Mexico on their way to the border but had not applied for and been denied asylum or other protection in Mexico or another transit country during their journeys.

The Asylum Ban was enjoined by the courts until mid-September 2019, when the Supreme Court allowed it to go into effect pending further judicial review.[6] The government then began applying the Ban to individuals who, *prior to July 16*, had been forced to wait in Mexico to access the U.S. asylum process. Plaintiffs challenged this application of the Ban because asylum seekers metered before the effective date of the Asylum Ban would have had their asylum claims heard under pre-existing law *but for* the metering policy challenged in the *Al Otro Lado* litigation. **On November 19, 2019, the district court held that the Asylum Ban cannot be applied to non-Mexican asylum seekers who were metered before July 16, 2019. Although the government moved for a stay of the district court's order pending appeal, the Ninth Circuit denied this motion on March 5, 2020 and lifted its previously imposed emergency temporary stay of the order. Since then, the district court's order has been in effect.**

The American Immigration Council, the Southern Poverty Law Center, the Center for Constitutional Rights, and Mayer Brown LLP represent the Plaintiffs and class members in *Al Otro Lado, Inc. v. Wolf.*

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3 *Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d 1168, 1200 (S.D. Cal. 2019).

4 *See Al Otro Lado, Inc. v. McAleenan*, 2019 WL 6134601, at *17 (S.D. Cal. 2019).

5 Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,843 (July 16, 2019) (codified at 8 C.F.R. § 208.13(c)(4)) (emphasis added). The Ban is subject to limited exceptions, including for: those who sought and were denied protection in one of the countries through which they traveled before reaching the United States, victims of a "severe form of trafficking in persons," and individuals who traveled only through countries that are not signatories to certain international agreements protecting refugees. *Id.* (internal quotation marks omitted).

6 *Barr v. E. Bay Sanctuary Covenant*, 588 U.S. ___, 140 S. Ct. 3 (2019).

1. Who is covered by the November 19, 2019, preliminary injunction?

The preliminary injunction covers all members of the following provisionally certified class:

> [A]ll non-Mexican asylum-seekers who were unable to make a direct asylum claim at a U.S. [port of entry] before July 16, 2019, because of the U.S. Government's metering policy, and who continue to seek access to the U.S. asylum process.[7]

The scope of the provisional class definition is not limited geographically. Asylum seekers who were metered at any port of entry along the U.S.-Mexico border before July 16, 2019, are eligible for class membership if they otherwise meet the class definition.[8]

Membership in the provisional class is not limited by whether an asylum seeker physically made it to a port of entry. Plaintiffs' counsel contend that asylum seekers who were discouraged from proceeding to a port of entry because of the metering policy, and instead sought to put their names on waitlists, also "were unable to make a direct asylum claim at a U.S. [port of entry] . . . because of the U.S. Government's metering policy" and are thus class members if they otherwise meet the provisional class definition.[9]

The provisional class definition also is not limited by the potential class member's ultimate manner of entry into the United States. Therefore, individuals who entered the United States between ports of entry after being metered before July 16, 2019, qualify as provisional class members if they otherwise meet the class definition, along with those whom the government ultimately inspects and processes at ports of entry after initially metering them.

Mexican asylum seekers are not included in the provisional class because the Asylum Ban, by its own terms, does not apply to them.

2. What did the district court hold in issuing the November 19, 2019, preliminary injunction?

The district court held that the Asylum Ban cannot be applied to non-Mexican asylum seekers who were metered before July 16, 2019. The court found that "[t]he wording of the Asylum Ban is clear" and it applies only to individuals "who enter, attempt to enter, or arrive in the United

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[7] *Al Otro Lado, Inc.*, 2019 WL 6134601, at *20 (internal quotation marks omitted).

[8] The district court expressly noted that because the scope of injunctive relief "is limited by the class definition," the injunction is not a national injunction. *Al Otro Lado, Inc.*, 2019 WL 6134601, at *19 & n.12 (discussing difference between nationwide injunction and injunction applicable to all class members regardless of their geographic location). But the injunction does apply to provisional class members wherever they currently are located.

[9] The court has not ruled on this issue and it is not currently clear what position the government will take on it.

States *after* July 16, 2019."[10] Based on its prior ruling that asylum seekers are in the process of "arriving in" the United States when they are metered, the court concluded that by its "express terms" the Asylum Ban does not apply to non-Mexican asylum seekers who were metered *before* July 16, 2019.[11]

The court also found that asylum seekers relied on the government's representations that if they complied with the government's metering policy, they would eventually have the opportunity to seek asylum in the United States.[12] The court concluded that it would be "quintessentially inequitable" for the government to now impose additional requirements for asylum eligibility on these individuals—requirements that would not have applied if the asylum seekers had not been subject to metering.[13]

3. What did the district court order in the November 19, 2019, preliminary injunction?

The district court enjoined the government from applying the Asylum Ban to members of the provisionally certified class and ordered that the government "return to the pre-Asylum Ban practices for processing the asylum applications of members of the certified class."[14]

As a result of the preliminary injunction, provisional class members may not be denied asylum solely because they transited through one or more third countries on the way to the United States and failed to seek and be denied asylum or other protection in one such third country. Specifically, provisional class members are entitled to seek asylum based on the law and procedures in place prior to July 16, 2019—the effective date of the Asylum Ban.

4. How does an individual establish class membership?

There is no complete class list or mechanism that automatically establishes class membership. The asylum seeker bears the burden of establishing class membership. However, the court stated that the government could ascertain class membership by "cross-checking" a potential class member's name with the names on the waitlists maintained at the various ports of entry on which the government relies to implement its metering policy.[15] While an individual's inclusion on a list indicating that the individual was added to the list before July 16, 2019, should be sufficient evidence to establish class membership, the fact that an individual's name is *not* on a list should *not* be considered evidence that the individual is not a member of the class, because sometimes asylum seekers are denied access to the lists. The government told class counsel that it has not

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10 *Al Otro Lado, Inc.*, 2019 WL 6134601, at *17 (emphasis added).

11 *Id.*

12 *Al Otro Lado, Inc.*, 2019 WL 6134601, at *19.

13 *Id.*

14 *Al Otro Lado, Inc.*, 2019 WL 6134601, at *20.

15 *Al Otro Lado, Inc.*, 2019 WL 6134601, at *15. The court explained that the government "relied" on these waitlists to "facilitate the [] metering policy." *Id.* Based on this reasoning, the government should have access to these lists.

and does not plan to make efforts to obtain copies of the waitlists. Class counsel, however, are making efforts to obtain relevant portions of the lists and make them available to attorneys for class members.

*****Attorneys for provisional class members may wish to use the contact information provided below to seek information about the status of the waitlist at the following POEs on July 16, 2019, including possible verification of names on the waitlist as of that date.*****

- **San Ysidro POE (Tijuana, Mexico / San Diego, CA): email Al Otro Lado at tjlist@alotrolado.org**

- **Nogales POE (Nogales, Mexico / Nogales, AZ): email Marla Conrad at marlaconrad@gmail.com**

- **El Paso POE (Ciudad Juarez, Mexico/ El Paso, TX): email Taylor Levy at taylorlevylaw@gmail.com**

When requesting information about waitlists, ideally include the following information:

(a) Form G-28;
(b) Proof you are an attorney/Accredited Representative;
(c) Copy of or photo ID of the provisional class member;
(d) Full name of the provisional class member;
(e) Country of origin of the provisional class member;
(f) Date of birth of the provisional class member;
(g) Gender of the provisional class member;
(h) Date or approximate date the provisional class member's name was placed on the waitlist; and
(i) Provisional class member's number on the list

The court stated that, in the alternative, individuals could submit declarations attesting to the facts that qualify them for membership in the provisional class.[16] Although the court did not indicate that any additional corroborating evidence would be necessary to establish class membership, individuals may wish to attach any other relevant documentation, including letters from shelters with dates of arrival, ticket stubs from buses to the border, hotel receipts, affidavits from friends, or other similar evidence. The government told class counsel that it intends to rely on information provided by the asylum seeker and other available information to screen for provisional class members.

[16] *Al Otro Lado, Inc.*, 2019 WL 6134601, at *15.

5. Did the district court's November 19, 2019, order take effect immediately?

Yes. However, press reports indicated that the government did not alert immigration judges (IJs) of the November 19 order until November 22, 2019.[17] Provisional class members whose cases were adjudicated between November 19 and November 22, 2019, and who were denied asylum based on the Asylum Ban, may wish to seek review of that determination. *See infra* Question 6.

In addition, the district court's order was administratively stayed from December 20, 2019 to March 5, 2020, when the Ninth Circuit Court of Appeals denied the government's motion for a stay pending its appeal of the merits of the injunction. The district court's order is currently in effect.

6. What can be done for provisional class members who were subject to the Asylum Ban between September 11 and November 19, 2019, and between December 20, 2019, and March 5, 2020?

Class counsel are actively seeking clarity from the government on the guidance that has been provided on the injunction to agencies and individuals with authority to decide any aspect of an asylum case. In the meantime, below are some suggestions for how provisional class members can proceed depending on the current procedural posture of their asylum cases.

a. Provisional Class Members Who Are Still Waiting in Mexico To Be Inspected and Processed or Are in the United States but Have Not Yet Received a Credible Fear Interview or a Notice to Appear

Provisional class members inspected and/or processed when the district court's order was/is in effect, i.e. between November 19 and December 20, 2019, and after March 5, 2020, should not be subject to the Asylum Ban. Thus, these provisional class members should have had/should receive credible fear determinations based on the merits of their cases. However, asylum officers may seek to screen individuals to determine whether they are members of the provisional class, and class members should be prepared to establish class membership during the credible fear interview. *See supra* Question 4.

b. Provisional Class Members Who Received Negative Credible and Reasonable Fear Determinations based on the Asylum Ban but Have Not Yet Been Ordered Removed

Individuals who received credible fear interviews and were denied asylum eligibility based on application of the Asylum Ban should have been screened for other forms of protection—

[17] Dara Lind, *The Trump Administration Was Ordered to Let These Migrants Seek Asylum. It Didn't Tell the Judges Hearing Their Cases*, ProPublica (Nov. 22, 2019 2:26 PM EST), https://www.propublica.org/article/the-trump-administration-was-ordered-to-let-these-migrants-seek-asylum-it-didnt-tell-the-judges-hearing-their-cases.

withholding of removal and relief under the Convention Against Torture—in a reasonable fear interview.[18] In the event that the examining officer found that such an individual did not meet the reasonable fear standard and the individual still has the opportunity for IJ review of that determination, the individual should seek such review and be prepared to establish that she is a member of the *Al Otro Lado* provisional class.[19] If the IJ reverses the negative credible fear determination, DHS will likely initiate removal proceedings under INA § 240, in which the individual could seek asylum and any other available relief.[20] *But see infra* Question 6(c).

In addition to IJ review, in the event that a provisional class member received both a negative credible fear determination and a negative reasonable fear determination, the provisional class member may consider submitting a request for reconsideration or re-interview (RFR) to U.S. Citizenship and Immigration Services (USCIS) to trigger review pursuant to the *Al Otro Lado* order.[21]

c. Provisional Class Members with Pending Removal Proceedings under INA § 240

Class members placed in regular removal proceedings under INA § 240 who are (a) in the United States (whether detained or not) or (b) subject to the Migrant Protection Protocols (MPP) and forced to wait in Mexico for their next hearing in immigration court, should be eligible to have their asylum applications considered on the merits in the normal course of removal proceedings. Class members in this situation may consider preparing a declaration in support of *Al Otro Lado* provisional class membership to submit to the IJ at the next scheduled hearing or, alternatively, to accompany the I-589 when filed.

However, internal agency materials are inconsistent about whether an IJ may consider an asylum application filed by a person with a positive reasonable fear determination but a negative credible fear determination due to the Asylum Ban.[22] Such individuals can argue that the *Al Otro Lado*

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18 *See* 84 Fed. Reg. at 33,843-44 (codified at 8 C.F.R. 208.30(e)(5)(iii)).

19 *See* 84 Fed. Reg. at 33,844 (codified at 8 C.F.R. § 1003.42(d)(3)).

20 *Id.*

21 *See* 8 C.F.R. § 1208.30(g)(2)(iv)(A). For more information on RFRs, see https://immigrationjustice.us/get-trained/credible-and-reasonable-fear/getting-started-overview-of-credible-reasonable-fear-process/vindicating-rights-asylum/.

22 *Compare* 84 Fed. Reg. 33,838 ("An alien subject to the third-country-transit asylum eligibility bar who clears the reasonable-fear screening standard will be placed in section 240 proceedings, just as an alien who clears the credible-fear standard will be. In those proceedings, the alien will also have an opportunity to raise whether the alien was correctly identified as subject to the third-country-transit ineligibility bar to asylum, as well as other claims. If an immigration judge determines that the alien was incorrectly identified as subject to the third-country-transit bar, the alien will be able to apply for asylum.") *with id.* at 33,843-44 (codified at 8 C.F.R. § 208.30(e)(5)(iii)) ("If the alien is found to be an alien described as ineligible for asylum in § 208.13(c)(4), then the asylum officer shall enter a negative credible fear

order requires that asylum applications be considered in this circumstance, regardless of any agency materials to the contrary, and that internal EOIR guidance issued in the days after the district court's order is consistent with this position.[23]

d. Provisional Class Members with Orders of Removal

The language and reasoning of the court's order indicate that it encompasses provisional class members who received final orders of removal prior to November 19, 2019 and between December 20, 2019, and March 5, 2020. Specifically, the court relied upon the plain language of the Asylum Ban in determining that the Ban cannot be applied to non-Mexican asylum seekers who were metered before July 16, 2019, and found that equity required that the court preserve class members' opportunity to secure relief for the challenge to the metering policy through the *Al Otro Lado* litigation.[24]

In the case of provisional class members with final orders of removal, practitioners may move to reopen the removal proceedings.[25] If a provisional class member was ordered removed by an IJ and the matter is still on appeal before the BIA or a federal court of appeals, practitioners may consider seeking remand to supplement the record with evidence of class membership and seek consideration of the asylum application in the first instance. In either case, practitioners should

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determination with respect to the alien's application for asylum. The Department shall nonetheless place the alien in proceedings under section 240 of the Act for consideration of the alien's claim for withholding of removal under section 241(b)(3) of the Act, or for withholding or deferral of removal under the Convention Against Torture, if the alien establishes, respectively, a reasonable fear of persecution or torture. The scope of review shall be limited to a determination of whether the alien is eligible for withholding or deferral of removal, accordingly.").

[23] The U.S. Department of Justice reportedly provided guidance to immigration judges regarding implementation of the *Al Otro Lado* order on November 22, 2019. Dara Lind (@DLind), Twitter, (Nov. 27, 2019, 9:37 A.M.), https://twitter.com/DLind/status/1199698671656415233?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Etweet. The guidance states that "EOIR should conform its actions to comply with the order and thus should not apply the [Asylum Ban] to . . . class members," and further explains that "under FRCP 65(d)(2), the order arguably binds EOIR as a participant with DHS in determining asylum eligibility for class members in credible fear review and removal proceedings." *See* https://docs.google.com/document/d/1bDAyXybvhVsTiu9n2JLfAOj94DdPQw3SKDwY7JaqJs0/edit.

[24] *Al Otro Lado, Inc.*, 2019 WL 6134601 at *17, 19.

[25] For more information about post-departure motions, see *Departure Bar to Motions to Reopen and Reconsider: Legal Overview and Related Issues* (Nov. 20, 2013), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/departure_bar_to_motions_to_reopen_and_reconsider_11-20-13_fin.pdf.

consider filing a motion to stay removal while the motion to reopen or remand is pending.[26] If the removal of a provisional class member is imminent, practitioners may consider informally reaching out to U.S. Immigration and Customs Enforcement (ICE) officers with information about the *Al Otro Lado* order and evidence of provisional class membership to try to prevent the removal.

In the case of provisional class members with executed expedited removal orders, practitioners may want to consider the possibility of humanitarian parole to permit a credible fear interview and/or other review of the provisional class member's asylum claim. *See* 8 U.S.C. § 1182(d)(5)(A); 8 C.F.R. § 212.5. DHS guidance indicates that parole requests on behalf of noncitizens with final orders of removal should be directed to ICE, regardless of whether the affected individual is inside or outside the United States.[27] However, in an abundance of caution, attorneys may want to address such requests jointly to ICE, CBP (which screens individuals at U.S. ports of entry), and USCIS (which conducts credible fear interviews).

*****Provisional class members who erroneously were subject to the Asylum Ban are encouraged to alert class counsel by completing this form.*****

7. What is likely to happen next?

On December 4, 2019, the government appealed the district court's order to the Ninth Circuit Court of Appeals. On December 20, 2019, the Ninth Circuit granted the government's motion for an emergency temporary stay of the district court's order until the appellate court decided the government's motion for a stay pending appeal. On March 5, 2020, the Ninth Circuit denied the government's motion for a stay pending appeal and lifted its previously imposed emergency stay of the district court's order.[28] At this time, the district court's order is in effect.

*****We will continue to update this FAQ as we learn more about the government's implementation of the court's November 19, 2019, order and the government's appeal.*****

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[26] For more information on motions to reopen, see *The Basics of Motions to Reopen EOIR-Issued Removal Orders* (Feb. 7, 2018), https://www.americanimmigrationcouncil.org/practice_advisory/basics-motions-reopen-eoir-issued-removal-orders.

[27] *See* Memorandum of Agreement Between USCIS, ICE and CBP, *available at* https://www.ice.gov/doclib/foia/reports/parole-authority-moa-9-08.pdf.

[28] *Al Otro Lado v. Wolf*, --- F.3d --- (9th Cir. Mar. 5, 2020), *available at* http://cdn.ca9.uscourts.gov/datastore/general/2020/03/05/19-56417%20-%20Order.pdf.