Federal Court Issues Permanent Injunction Restoring Asylum Eligibility for Certain Asylum Seekers Turned Back at Ports of Entry (POEs) Before July 16, 2019

Frequently Asked Questions[1]

Originally Issued December 4, 2019
Updated April 28, 2023

This FAQ addresses a class action permanent injunction that may provide **relief to individuals turned away from ports of entry (POEs) at the US-Mexico border before July 16, 2019.** Individuals who were (1) seeking asylum, (2) turned away from POEs and sent to wait in Mexico, and (3) subsequently had the Trump Administration's "2019 Third-Country Transit Ban" applied to them, are now eligible for the opportunity to have their cases reopened and reconsidered *without* application of the 2019 Ban.

This FAQ addresses the applicability of a permanent injunction issued in *Al Otro Lado v. Mayorkas*, as well as practical guidance for providing direct assistance to members of the relevant subclass who may be eligible to seek asylum in the United States again. The subclass is composed of:

(1) non-Mexican citizens who arrived at the U.S.-Mexico border seeking asylum prior to July 16, 2019,

(2) were subjected to metering and therefore unable to be inspected at a port of entry prior to July 16, 2019, and

(3) as a result, became subject to the 2019 Third-Country Transit Ban (described below) in their subsequent removal proceedings (including expedited removal).

---

[1] This FAQ is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. Practitioners are strongly encouraged to conduct independent research to determine if there have been subsequent developments in the law since the last publication date of this FAQ. The authors of this updated advisory are Gianna Borroto, Suchita Mathur, Rebecca Cassler, Neela Chakravartula, and Marissa Hatton. The author of the original practice advisory was Karolina Walters. Please direct questions regarding this advisory to clearinghouse@immcouncil.org.

As described in greater detail below, the U.S. District Court for the Southern District of California ruled that the U.S. government's policy and practice of systematically turning back asylum seekers at POEs violates the Immigration and Nationality Act (INA) and the Due Process Clause. Thereafter, the Court issued a permanent injunction holding that the 2019 Third-Country Transit Ban cannot be applied to certain individuals who were turned back at POEs before the 2019 Ban went into effect on July 16, 2019, entered the United States after that date, and had the 2019 Third-Country Transit Ban applied to their asylum claims. The Court ordered that such cases may be reopened/reconsidered for consideration of asylum without application of the 2019 Third-Country Transit Ban. Under the permanent injunction, eligible subclass members outside the United States may be paroled into the U.S. to pursue their asylum claims. The parties have cross-appealed to the Ninth Circuit; however, as of April 28, 2023, the injunction remains in effect.

Background on Metering, the 2019 Third-Country Asylum Ban, and the *Al Otro Lado* Lawsuit

I. What is Metering?

Metering refers to Customs and Border Protection's (CBP) system of limiting the number of asylum seekers accepted for inspection and processing at U.S. ports of entry. Beginning in 2016, "metered" asylum seekers were not permitted to access POEs at the U.S.-Mexico border by simply walking into the POE like other travelers. Instead, they had to wait in Mexico, and were only able to enter the POE if and when CBP permitted. Before the Title 42 policy[2] was implemented in March 2020, the government used metering to effectively close POEs to almost all asylum seekers unless they first waited on an informal asylum waitlist.[3]

While metering, CBP officers stationed at or near the international border line turned away asylum seekers, generally before they were able to step onto U.S. soil. Sometimes the CBP officers told asylum seekers that they had to wait, or that there was not capacity for them to be processed. Asylum seekers instead had to put their names on waitlists maintained by third parties in Mexico (often shelters or Mexican government officials), and wait, often for weeks or months. Some metered asylum seekers were never ultimately permitted to enter a POE.

A person was subjected to metering for purposes of the *Al Otro Lado* injunction even if they did not step foot on U.S. soil, but were "in the process of arriving in the United States" before July 16, 2019. For example, a person was likely subjected to metering if:

- They approached a land POE on the U.S.-Mexico border and were blocked from crossing the international boundary, **and/or**

---

[2] For background on Title 42 expulsions, *see* Guide to Title 42 Expulsions at the Border, Am. Immigr. Council Fact Sheet (modified May 25, 2022), https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border (last visited April 27, 2023).

[3] *See* Stephanie Leutert, et al., Metering & COVID-19, Strauss Center & Center for U.S.-Mexican Studies, UC San Diego School of Global Policy & Strategy (April 2020), https://www.strausscenter.org/wp-content/uploads/MeteringCovid-19_042020.pdf (last visited April 27, 2023).

- They registered, placed, or tried to place their name on an asylum waitlist in Mexico after they arrived at a border town near the U.S.-Mexico border.

II. What Does the *Al Otro Lado v. Mayorkas* lawsuit challenge?

In 2017, advocates brought a class action lawsuit challenging CBP's and the U.S. Department of Homeland Security's (DHS) unlawful practice of turning asylum seekers away from ports of entry, including through the use of metering, to deprive asylum seekers access to the U.S. asylum process.[4] The plaintiffs—the organization Al Otro Lado and individual plaintiffs representing a class of similarly situated individuals—allege that CBP and DHS are systematically violating U.S. and international law by denying individuals the opportunity to apply for asylum by depriving them of access to inspection and processing at POEs on the U.S.-Mexico border.

On September 2, 2021, the United States District Court for the Southern District of California found the practice of "turnbacks" at the border to be illegal.[5] On August 5, 2022, the district court issued class-wide declaratory relief on behalf of individuals metered at the U.S.-Mexico border.[6] A subset of the class received permanent injunctive relief on the same day, as explained below, *see infra,* Sec. IV and V, pp. 4-7.[7]

III. What is the 2019 Third-Country Transit Ban?

On July 16, 2019, the government instituted an asylum eligibility bar for individuals who transited through a third country before reaching the United States at the southern land border ("2019 Third-Country Transit Ban" or "2019 Ban").[8] Under the 2019 Ban, non-Mexican citizens were deemed ineligible to seek asylum in the United States if they had not applied for (and been denied) asylum

---

4 *Al Otro Lado, Inc. v. Mayorkas*, 2021 WL 3931890 (S.D. Cal. Sept. 2, 2021).

5 *Id*.

6 *Al Otro Lado, Inc. v. Mayorkas*, 2022 WL 3135914 (S.D. Cal. Aug. 5, 2022).

7 *Al Otro Lado, Inc. v. Mayorkas*, 2022 WL 3142610 (S.D. Cal. Aug. 5, 2022).

8 Litigation over the 2019 Ban has its own complicated procedural history and the Ban is currently not in effect. On June 30, 2020, the District Court for the District of Columbia struck down the Asylum Ban in *CAIR Coalition v. Trump*, 471 F. Supp. 3d 25, 31 (D.D.C. 2020), vacating the rule nationwide.

On December 17, 2020, the government issued a final agency rule on the Asylum Ban, which was scheduled to go into effect on January 19, 2021. The final rule was functionally identical to the previously issued interim final rule on the Asylum Ban, which had been vacated nationwide in *CAIR Coalition* and also previously enjoined by the Ninth Circuit Court of Appeals in *East Bay Sanctuary Covenant v. Barr*, 964 F.3d 832 (9th Cir. 2020). On January 6, 2021, Plaintiffs filed a motion for temporary restraining order to block the application of the final rule in accordance with the *Al Otro Lado* preliminary injunction. The district court granted the TRO on January 18, 2021. *Al Otro Lado v. Gaynor*, 513 F. Supp. 3d 1253 (S.D. Cal. 2021). The final agency rule on the Asylum Ban was preliminarily enjoined on February 16, 2021 in *East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 658 (9th Cir. 2021).

or other protection in a country they transited through before reaching the United States. The Ban applied to most asylum seekers who "enter[ed], attempt[ed] to enter, or arrive[d] in the United States across the southern land border *on or after* July 16, 2019."[9]

IV. How Does the 2019 Third-Country Transit Ban Intersect with *AOL v. Mayorkas*?

The 2019 Third-Country Transit Ban and *AOL v. Mayorkas* became intertwined when the government began applying the 2019 Ban to asylum seekers who had been metered before the 2019 Ban's effective date.

By its own terms, the 2019 Ban only applied to persons who attempted to enter or arrived in the United States *after* July 16, 2019. But the government began applying the 2019 Ban to deny asylum eligibility to noncitizens who were metered *before* July 16, 2019, i.e., persons who "attempted to enter" the United States at a port of entry before that date but were told to wait and were therefore unable to enter the United States until after the 2019 Transit Ban went into effect. These individuals were only subject to the 2019 Ban *because* they had been turned back at the border or told to put their name on a waiting list, directed to wait in Mexico, and not permitted to enter the United States until on or after July 16, 2019, when the Ban was implemented. Left without recourse, the *Al Otro Lado v. Mayorkas* plaintiffs challenged the government's application of the Transit Ban to metered individuals.[10]

V. What is the *AOL* Permanent Injunction?

The *AOL* Permanent Injunction prevents the government from applying the 2019 Third-Country Transit Ban to non-Mexican citizens who were subject to the government's metering policy before July 16, 2019. The provisions of the Permanent Injunction are the result of a complex procedural history. The district court first granted a preliminary injunction in 2019.[11] It then clarified that preliminary injunction in its 2021 Clarification Order.[12] Finally, in 2022, the district court modified the preliminary injunction as clarified in 2021 and converted it into a permanent injunction.[13] The relevant changes at each stage are summarized here:

- ***2019-2020: Provisional class certification, preliminary injunction, and appeal***: As is relevant here, on November 19, 2019, the district court certified **the following provisional class ("the PI class"[14]):**

> [A]ll non-Mexican noncitizens who sought unsuccessfully to make a direct asylum claim at a U.S. POE before July 16, 2019, [and] were instead required to wait in

---

9 *Al Otro Lado v. McAleenan*, 423 F. Supp. 3d 848, 857 (S.D. Cal. 2019).

10 *Id. at 858.*

11 *Id.*

12 *Al Otro Lado v. Wolf*, 497 F. Supp. 3d 914 (S.D. Cal. 2020).

13 *Al Otro Lado, Inc. v. Mayorkas*, 2022 WL 3142610 (S.D. Cal. Aug. 5, 2022).

14 The Court issued both a preliminary and permanent injunction, applicable to the same class. For purposes of this FAQ, the "PI Class" refers to both.

Mexico due to the U.S. Government's metering policy, and who continue to seek access to the U.S. asylum process.[15]

The government appealed this order to the Ninth Circuit, which granted an administrative stay of the district court's order, temporarily preventing the preliminary injunction from going into effect between December 20, 2019 and March 5, 2020.[16]

- ***2020-2021: Clarification Order and Appeal:*** On October 30, 2020, while the appeal was pending, the district court issued a Clarification Order that further elucidated the meaning of the preliminary injunction. In relevant part, the Clarification Order confirmed that:

  (1) the Executive Office for Immigration Review (EOIR) is bound by the terms of the preliminary injunction;

  (2) DHS and EOIR must take affirmative steps to reopen or reconsider past determinations that potential class members were ineligible for asylum based on the Transit Ban. This includes identifying affected class members.

  (3) The government must inform identified class members in proceedings or in DHS custody about the preliminary injunction and of their potential class membership; and

  (4) The government must make all reasonable efforts to identify class members and share class member information with plaintiffs.[17]

  The government appealed the Clarification Order in December 2020.[18]

- ***2021 Partial Summary Judgment*:** On September 2, 2021, the district court partially granted summary judgment for Plaintiffs, holding that the government violated its statutory duties under 8 U.S.C. § 1158(a)(1) and § 1225, as well as its due process obligations, by turning back asylum seekers at POEs without inspecting and processing them.[19]

---

15 *Al Otro Lado,* 423 F. Supp. 3d at 878. Originally, the preliminary injunction applied to the version of the Third-Country Transit Ban codified in an interim final rule. *See id.* at 859-60. A final rule took its place in January 2021. The District Court subsequently extended the preliminary injunction to the version of the Ban codified in the final rule. *Al Otro Lado*, 513 F. Supp. 3d at 1258, 1262; *Al Otro Lado v. Pekoske*, No. 3:17-cv-02366-BAS-KSC (S.D. Cal. Feb. 1, 2021) (ECF No. 676) (Order Granting Joint Mot. To Convert TRO to Prelim. Inj.).

16 *Al Otro Lado,* 497 F. Supp. 3d at 927-28.

17 *Id.* at 935. Plaintiffs have provided Defendants with copies of certain metering lists to aid in the identification of class members. As of April 28, 2023, the government has access to metering lists from San Ysidro, CA/Tijuana; Calexico, CA/Mexicali; El Paso, TX/Ciudad Juarez; and Presidio, TX/Ojinaga.

18 *AOL v. Wolf*, No. 20-56287 Dkt. Entry No. 7, Defendants' Motion to Stay Lower Court Action (9th Cir.) (Dec. 11, 2020).

19 *Al Otro Lado*, 2021 WL 3931890 at *23.

- ***2022 Remedies Opinion and Court Order Converting Preliminary Injunction to Permanent Injunction*:** On August 5, 2022, the district court issued a remedies opinion[20] and separately modified its preliminary injunction as clarified in 2020 and granted Plaintiffs' request to convert that preliminary injunction into a permanent injunction. Among other things, the Court specified in its order that Defendants must assist in enforcement efforts by:

    - (1) identifying potential class members by reviewing Forms I-213 (which documents a recollection of a border official's conversation with a migrant) for inclusion on a "Master List" of potential class members,

    - (2) informing identified PI class members in administrative proceedings before USCIS or EOIR, or in DHS custody, of their class membership,

    - (3) expanding the temporal scope for EOIR adjudicators' *sua sponte* review of records of proceeding ("ROP Review") for individuals identified from the Master List to include final orders of removal issued up until July 31, 2020; and

    - (4) considering any evidence of metering during the pre-Ban time period in DHS' records prior to making a class member determination.[21]

- ***2022 Dismissal of the Government's Appeals of the Preliminary Injunction and Clarification Order*:** On September 20, 2022, in light of the district court's August 5, 2022 orders, the Ninth Circuit dismissed as moot the government's appeals of the preliminary injunction and clarification orders.[22]

In October 2022, Defendants appealed the district court's permanent injunction to the Ninth Circuit. That appeal is pending, and as of April 28, 2023, the district court's permanent injunction remains in effect.

---

[20] In its remedies opinion, in light of the Supreme Court's decision in *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057 (2022), the district court found that it was precluded from issuing a class-wide injunction prohibiting turnbacks at POEs. The district court explained, "[i]n essence, *Aleman Gonzalez* holds that [8 U.S.C.] § 1252(f)(1) prohibits lower courts from issuing class-wide injunctions that 'require officials to take actions that (in the Government's view) are not required' by certain removal statutes, including § 1225, or 'to refrain from actions that (again in the Government's view) are allowed' by those same provisions." *Al Otro Lado*, 2022 WL 3135914 at *1 (citing *Aleman Gonzalez*, 142 S. Ct. at 2065).

[21] *Al Otro Lado*, 2022 WL 3142610 at **12–21.

[22] *AOL v. Wolf,* No. 19-56417, Dkt. Entry No. 135 (9th Cir. Sept. 20, 2022) (dismissing appeal as moot); *AOL v. Wolf,* No. 20-56287, Dkt. Entry No. 94 (9th Cir. Sept. 20, 2022) (same).

As a result of the injunction, individuals who meet the PI class definition and who had the 2019 Third-Country Transit Ban[23] applied to their cases cannot be denied asylum solely because of the 2019 Ban. Specifically, PI class members to whom the 2019 Transit Ban was applied are potentially entitled to seek reopening of their cases and seek asylum based on the law and procedures in place prior to July 16, 2019—the effective date of the 2019 Ban. Defendants have developed a set of procedures for implementation of the permanent injunction and have started implementing them. Defendants have not made those procedures available to the public. This practice advisory summarizes key elements of those procedures.

Eligibility for *AOL* PI Relief

(see below for additional explanation of items in this chart)

You **ARE** potentially eligible for relief IF **ALL** of these apply to you:	You **ARE NOT** eligible for relief IF **ANY** of these apply to you:
• Are **not** a citizen or national of Mexico	• **Are** a Mexican citizen or national
• Were subject to "metering" **before** July 16, 2019	• Were **not** physically present at or near the U.S.-Mexico border before July 16, 2019 • Were **not** subjected to "metering"
• After being subjected to metering, you entered the U.S. **on or after** July 16, 2019	• Most recently entered the United States **before** July 16, 2019
• You claimed fear, sought asylum, or intended to seek asylum, but you were deemed ineligible for asylum based on the 2019 Third-Country Transit Ban	• Have **already been granted asylum** in the U.S. • You were not granted asylum, but the Third-Country Transit Ban was **not** a reason for that decision
• You would still like to pursue asylum in the U.S., regardless of your current location	• You do **not** wish to pursue a claim for asylum in the U.S.

[23] The scope of the permanent injunction applies to individuals who meet the PI class requirements and who had the 2019 Third-Country Transit Ban applied to them prior to the district's court's December 19, 2019 preliminary injunction, or when that order was temporarily stayed by the Ninth Circuit. This advisory does not address the possible impact of a similar third-country transit ban like that proposed but not yet implemented by the Biden administration.

1. **Does the ultimate manner of entry on or after July 16, 2019 make a difference in determining eligibility for relief under the AOL PI?**

No. The AOL PI provides potential relief to people regardless of whether they ultimately entered the United States through a POE or entered without inspection.

2. **What does it mean to have been deemed ineligible for asylum based on the 2019 Third-Country Transit Ban?**

- In expedited removal:[24]
  - A person received a negative credible fear determination from an asylum officer due to application of the Third-Country Transit Ban, resulting in an expedited removal order.
  - A person received a negative credible fear determination, resulting in an expedited removal order. They underwent IJ review of the negative credible fear determination and the IJ applied the Third-Country Transit Ban
- In INA § 240 removal proceedings (including MPP):
  - A person was denied asylum in removal proceedings in immigration court because the person was deemed ineligible for asylum under the Third-Country Transit Ban (even if there were also potential alternative bases for denial of asylum in the record, and even if a different type of relief was granted), and there was no appeal
  - An immigration judge's decision in removal proceedings was appealed, and the Board of Immigration Appeals deemed the person ineligible for asylum under the Third-Country Transit Ban, even if there were also potential alternative bases for denial of asylum in the record, and even if a different type of relief was granted
  - A person planned to submit an asylum application but did not do so because an immigration judge told them that they were not eligible for asylum under the Third-Country Transit Ban

3. **Does it matter when a person was deemed ineligible for asylum based on the Third-Country Transit Ban?**

No. The *AOL* PI provides potential relief to people regardless of when the person was deemed ineligible for asylum under the Third-Country Transit Ban. This includes:

- Cases where the 2019 Ban was applied before the district court issued its preliminary injunction (*i.e.*, between July 16, 2019 and November 19, 2019)[25]

---

[24] In some cases, a person may have had the Third-Country Transit Ban applied resulting in a negative credible fear finding due to ineligibility under the Ban for asylum, but then been found by the Asylum Officer to have met the reasonable fear standard for withholding and protection under the Convention against Torture. Such individuals were placed in regular removal proceedings, and in some instances applied for asylum despite the earlier negative credible fear finding based on the Ban. In such cases, eligibility for relief under the *AOL* PI will depend on whether the Ban was applied in removal proceedings, leading to a denial of asylum.

[25] *Al Otro Lado,* 497 F. Supp. 3d at 924-927.

- Cases where the Ban was applied during the Ninth Circuit's administrative stay of the preliminary injunction (*i.e.*, between December 20, 2019 and March 5, 2020)[26]
- Cases where the Ban was applied at any other time[27]

4. Does a person need to be in the U.S. to be eligible for relief under the AOL PI?

No. The *AOL* PI provides potential relief to people if they are located inside or outside the country, and regardless of whether they were ultimately ordered removed, or actually removed, from the United States after they were deemed ineligible for asylum under the Third-Country Transit Ban.

5. How can a PI class member get access to the relief ordered in the permanent injunction?

a. PI Class Members Who Received Negative Credible Fear Determinations based on the 2019 Third-Country Transit Ban but Have Not Yet Been Removed

Individuals who received credible fear interviews and were denied asylum eligibility based on application of the 2019 Third-Country Transit Ban should have been screened for other forms of protection—withholding of removal and relief under the Convention Against Torture—in a reasonable fear interview.[28] In the event that a PI class member received a negative credible fear determination because of the Ban, then also received a negative reasonable fear determination, and has yet to be removed from the United States, U.S. Citizenship and Immigration Services (USCIS) should schedule them for a PI class member screening interview pursuant to the *Al Otro Lado* permanent injunction.[29]

USCIS is in the process of scheduling class member screening interviews for potential PI class members who received an expedited removal order after application of the Ban and remain in the U.S. There is no complete list of PI class members. Please contact class counsel if you believe that you or your client may be eligible for a PI class member screening interview, but you have not yet

---

[26] *Id.* at 927-28.

[27] For example, the district court entered its preliminary injunction on November 19, 2019. However, press reports indicated that the government did not alert immigration judges of the November 19 PI until November 22, 2019. *See* 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 (last visited Apr. 27, 2023). The Third-Country Transit Ban may also have been erroneously applied to a PI class member's asylum claim even after the Ban was vacated on June 30, 2020. *See Al Otro Lado*, 2022 WL 3142610 at **18-19.

[28] *See* Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,843-44 (July 16, 2019) (codified at 8 C.F.R. 208.30(e)(5)(iii)).

[29] *See* 8 C.F.R. § 1208.30(g)(2)(iv)(A). For more information on RFIs, *see* Guide to Credible and Reasonable Fear Proceedings, Immigr. Justice Campaign, https://immigrationjustice.us/get-trained/credible-and-reasonable-fear/preparing-clients-for-credible-fear-interviews/guide-cfi-proceedings/ (last visited Apr. 27, 2023).

received an interview notice. Individuals are encouraged to maintain an updated address with USCIS to ensure that they do not miss any relevant correspondence, as the interview notices state that failure to attend could result in apprehension and removal.

Class member screening interviews are conducted by an asylum officer. The asylum seeker bears the burden of establishing PI class membership. Although the court did not indicate that any additional corroborating evidence is necessary to establish PI class membership, individuals may wish to submit supporting documentation before the interview, such as:

- Proof that they put their name on a waitlist in Mexico before July 16, 2019, such as a photo of their name on a waitlist[30]
- A letter from a shelter in Mexico with their date of arrival
- Ticket stubs from buses to the U.S./Mexico border
- Hotel or other receipts from Mexico
- A declaration from the individual, family, friends, or others who can speak to the individual's attempt to enter the U.S. before July 16, 2019 to seek asylum

Supporting evidence should be emailed, faxed, or mailed to the asylum office at least 10 days before the interview. If the asylum officer determines that the person is more likely than not a PI class member, they will receive a new CFI.[31] The new CFI typically takes place immediately after the class member screening interview, but individuals may request to schedule the CFI on a later date.

b. PI Class Members with Unexecuted Orders of Removal

In the cases of PI class members with final orders of removal issued by an IJ or the Board of Immigration Appeals, practitioners may move to reopen the removal proceedings.[32] The government has issued specific instructions on how to file such a motion[33] and has agreed to adjudicate template motions to reopen for eligible individuals.[34] The instructions suggest that PI

---

[30] The district court directed the government to 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. *Al Otro Lado*, 423 F.Supp.3d at 874. The fact that an individual's name is *not* on a waitlist should *not* be considered evidence that the individual is not a PI class member because some asylum seekers were denied access to the lists. In the alternative, individuals may submit declarations attesting to the facts that qualify them for membership in the PI class. *Id*.

[31] In cases where the asylum officer did not apply the 2019 Third-Country Transit Ban during the person's original CFI, but the IJ applied the Ban during review of a negative CFI, the person would receive new IJ review of their negative CFI.

[32] EOIR reviewed Records of Proceedings and *sua sponte* reopened proceedings for some PI class members whose asylum claims were denied in § 240 proceedings because of the Third-Country Transit Ban.

[33] Litigation Notices, *Al Otro Lado v. Mayorkas*, Case No. 17-02366 (S.D. Cal.), The United States Department of Justice, Executive office for Immigration Review, https://www.justice.gov/eoir/litigation-notices.

[34] Although the instructions and templates were created at the time the preliminary injunction was in place, they remain applicable and usable under the permanent injunction.

class members seeking reopening submit as much information as possible to establish eligibility for asylum along with the motion.[35] These templates for reopening at the immigration court that issued the removal order,[36] or the BIA if an order was appealed,[37] can be used if an individual:

1. Is a PI class member, *see supra* Eligibility for AOL PI Relief, p. 7;
2. Received a final order denying their asylum application; and
3. Had the 2019 Third-Country Transit Ban applied to their case as a basis for denial of their asylum claim.

Plaintiffs have created template accompanying materials that should be submitted with the government's template motion, whether to the IJ or BIA.[38]

There is no filing fee required for a motion to reopen filed pursuant to the *AOL* PI. Additionally, these motions are exempt from the INA's time and numerical limitations on motions to reopen. However, if a class member previously filed an *AOL* motion to reopen and was denied reopening, subsequent motions may be deemed time or numerically barred.[39]

If a PI 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, if granted, seeking consideration of the asylum application in the first instance. In either case, practitioners should consider filing a motion to stay removal while the motion to reopen or remand is pending.[40] If the removal of a PI class member is imminent, practitioners may consider contacting class counsel at meteringclass@splcenter.org and informally reaching out to U.S. Immigration and Customs Enforcement (ICE) officers with information about the *Al Otro Lado* order and evidence of class membership to try to prevent the removal.

If the IJ or the BIA finds reopening to be required, PI class members or their representatives will receive a notice that the case was reopened. However, the IJ or BIA may also contemporaneously issue a decision on the case, granting or denying asylum. If a decision is issued denying asylum, the applicant has the right to appeal the asylum denial to the BIA and/or

---

[35] *Al Otro Lado v. Mayorkas* Lawsuit: Template Materials In Support of Preliminary Injunction Relief, American Immigration Council, https://www.americanimmigrationcouncil.org/content/metering (last visited Apr. 27, 2023).

[36] Instructions on How to File a Motion to Reopen Your Immigration Case Under the Preliminary Injunction in *Al Otro Lado v. Mayorkas* [Immigration Court]; Exec. Off. Immigr. Rev., https://www.justice.gov/eoir/page/file/1511886/download (last visited Apr. 27, 2023).

[37] Instructions on How to File a Motion to Reopen Your Immigration Case Under the Preliminary Injunction in *Al Otro Lado v. Mayorkas* [BIA]; Exec. Off. Immigr. Rev., https://www.justice.gov/eoir/page/file/1511881/download (last visited Apr. 27, 2023).

[38] *Al Otro Lado v. Mayorkas,* Template Materials, *supra* n.35.

[39] *See* Instructions on How to Filed a Motion to Reopen [Immigration Court], *supra* n.36.

[40] For more information on motions to reopen generally, see Trina Realmuto & Kristin Macleod-Ball, *The Basics of Motions to Reopen EOIR-Issued Removal Orders*, Am. Immgr. Council (Apr. 25, 2022), https://www.americanimmigrationcouncil.org/practice_advisory/basics-motions-reopen-eoir-issued-removal-orders.

the relevant Court of Appeals. In this situation, EOIR would issue a new removal order on the date of the asylum denial; thus, any subsequent motions to reopen or reconsider the newly-issued removal order would not be impacted by the previously-filed AOL motion. If the case is reopened and re-calendared before the immigration court or remanded to the IJ by the BIA, the class member may have to appear in immigration court at a future hearing.[41]

c. PI class members who have been removed from the U.S.

Under the permanent injunction, PI class members, *see supra* Eligibility for AOL PI Relief, p. 7, who have been removed from the U.S., pursuant to either an expedited removal order or a final removal order issued after full removal proceedings are potentially eligible to return to the U.S. to pursue their asylum claims.

PI class members who were expeditiously removed after the 2019 Third-Country Transit Ban was applied during their CFI should contact class counsel if they are interested in returning to the United States to pursue their asylum claims. Under a new government-created process, eligible PI class members can submit an email to a USCIS email box[42] to request a PI class member screening determination. Individuals should include any relevant evidence of PI class membership with their screening request. *See supra* Question 5.a., p. 10 for full list.

If USCIS finds that a person is more likely than not a PI class member, that person will be eligible to apply for advance parole (Form I-131) to return to the U.S. to pursue asylum under the permanent injunction. USCIS will inform the individual of their class membership determination via email and, if eligible, send instructions for submitting an advance parole application.

PI class members who were removed after an IJ or the BIA denied their asylum application based on the 2019 Third-Country Transit Ban must first submit an AOL motion to reopen[43] with the corresponding immigration court or the BIA, depending on the posture of their case. *See supra* Question 7.b. PI Class Members with Unexecuted Orders of Removal, p. 10. If the AOL motion to reopen is granted and the case is re-calendared before the immigration court or remanded from the BIA to the IJ, the class member may be eligible to apply for advance parole (Form I-131) to return to the U.S. pursuant to the permanent injunction. Once in the U.S., their reopened removal proceedings would proceed as usual.

Please contact class counsel or fill out this survey if you believe you or your client may be eligible to return to the U.S. to pursue asylum as a PI class member.

---

41 *See* Instructions on How to File a Motion to Reopen [Immigration Court], *supra* n.36.

42 Practitioners and PI class members may contact class counsel at meteringclass@splcenter.org to request the USCIS email address and to obtain additional information about the class member screening and parole processes.

43 *See* Instructions on How to File a Motion to Reopen [Immigration Court], *supra* n.36; Instructions on How to File a Motion to Reopen [BIA], *supra* n.37.

d. Individuals Who Were Metered and Who Are Still Waiting in Mexico To Be Inspected and Processed

Unfortunately, asylum seekers who were unlawfully metered but whose subsequent removal proceedings were not impacted by the 2019 Third-Court Transit Ban are not covered by the permanent injunction. In August 2022, the district court granted only declaratory relief for asylum seekers who were or will be metered but do not meet the requirements for relief under the PI. The Court entered a declaration that turning back asylum seekers constitutes an unlawful withholding of Defendants' mandatory ministerial inspection and referral duties under 8 U.S.C. §§ 1158 and 1225 in violation of both the Administrative Procedure Act ("APA") and the Fifth Amendment Due Process Clause.[44]

Previously, the district court had granted Plaintiffs' motion for summary judgment on their APA and due process claims, finding that CBP's policy of turning back asylum seekers violated DHS' mandatory duties to inspect and process asylum seekers who present themselves at ports of entry. Before the court could issue an order detailing the remedies required to cure these violations, however, the Supreme Court issued its decision in *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057 (2022). The district court subsequently determined that *Aleman Gonzalez* precluded the entry of a permanent class-wide injunction compelling CBP to inspect and process such asylum seekers.[45]

Nonetheless, the district court noted that asylum seekers subject to metering could bring individual suits based on the declaratory judgment entered in *Al Otro Lado v. Mayorkas* and seek injunctive relief. [46] While this option will be impractical for most, it remains a possibility for asylum seekers turned away after presenting themselves at POEs.

6. What is likely to happen next?

The parties cross-appealed certain aspects of the district court's order in November 2022. Briefing on the appeal is ongoing and will likely be completed in spring of 2023. The permanent injunction remains in effect pending appeal.

The American Immigration Council, the Southern Poverty Law Center, the Center for Gender & Refugee Studies, the Center for Constitutional Rights, Mayer Brown LLP, and Vinson & Elkins LLP represent the Plaintiffs and class members in *Al Otro Lado, Inc. v. Mayorkas.*

*****We will continue to update this FAQ as we learn more about the government's implementation of the district court's permanent injunction order and as the appellate litigation progresses.*****

44 *Al Otro Lado*, 2022 WL 3135914, at *2.
45 *Id.* at *13.
46 *Id.* at *11.