Email from Asylum Officer to USCIS Management, After August 8, 2019 Meeting with Management Concerning the Officer's Refusal to Participate in the Migrant Protection Protocols (Remain in Mexico) Program

After careful consideration and moral contemplation, I have decided that I cannot conduct Migrant Protection Protocol interviews or otherwise participate in the MPP program. Following the various meetings with Supervisory Asylum Officers last Thursday, August 8, 2019, and possible continued disciplinary action, I am memorializing my objections in writing.

As an Asylum Officer, I have sworn to defend the constitution and faithfully discharge the duties of my office, including the fair administration of our immigration laws. The MPP is illegal. The program exists without statutory authority under the INA, violates normal rulemaking procedures under the APA, and violates international law. The program's execution impairs the fair implementation of our laws and runs directly counter to the values of RAIO. I respectfully decline any further participation in the program.

First, there is no statutory authority for the MPP, and the program violates US immigration law. I recognize that as an Asylum Officer I am not in a position of authority to declare the MPP illegal for RAIO. However, as an attorney trained in immigration and administrative law and well versed in statutory analysis, I have concluded that DHS does not have the authority to implement the MPP. I further note that, even when staying the injunction, no judge has made a final ruling that the MPP is legal. Implementation of a program for which there is no legal authority violates my oath to office.

The legal question at issue is whether the two provisions governing inspection for applications for admissions-expedited removal under INA§ 235(b)(l) and "other aliens" un INA§ 235(b)(2)- are mutually exclusive or if CBP can proceed under section (b)(2) even when an applicant falls within the requirements of expedited removal.[1] The administration has claimed legal authority to implement the MPP pursuant to INA§ 235(b)(2)(C), which allows for the return to a contiguous territory of an alien who is subject to admission and inspection procedures under (b)(2). However, section 235(b)(2)(B) provides explicit exceptions to individuals subject to section 235(b)(2) and specifically states that (b)(2) does not apply to aliens subject to inspection under (b)(l). Similarly, section (b)(l) provides an explicit exception for individuals who would otherwise be subject to expedited removal, and references this exception multiple times while describing expedited removal proceedings. INA§ 235(b)(l)(F); see also, INA§ 235(b)(l)(A)(i), (ii). The exclusion language under each provision makes clear that Congress considered and specifically determined who would be excepted from inspection under each provision. Individuals subject to inspection under (b)(l) are not subject to provisions of (b)(2). The separation of the two processes for admission, 235(b)(l) and (b)(2), has been recognized by both the Supreme Court and the Attorney General. Jennings v. Rodriguez, 138 S. Ct. 830,837 (2018); Matter of M-S-, 27 I&N Dec. 509, 510 (BIA April 16, 2019).

[1] Individuals are subject to expedited removal only if they are removable under INA §§ 212(a)(6)(C) or 212(a)(7).

Furthermore, despite the poor use of language in Judge O'Scannlain's opinion, whether an applicant for admission is subject to inspection under (b)(l) and (b)(2) is not discretionary. The statutory language of whether an applicant is inspected pursuant to expedited removal is clearly prescriptive. If an immigration officer determines that an individual is removable under INA§§ 212(a)(6)(C) or 212(a)(7) "the officer shall order the alien removed" pursuant to expedited removal proceedings. INA§§ 235(b)(l)(A)(i) (emphasis added). The mandatory nature of expedited removal has not been disputed since its inception and conforms with the congressional intent of deterring undocumented migrations. Additionally, once an applicant expresses an intent to apply for asylum or a fear of persecution "the officer shall refer the alien for an interview by an asylum officer" for credible fear screenings. INA§§ 235(b)(l)(A)(ii) (emphasis added). In other words, individuals who apply for admission in the United States who are removable under INA§§ 212(a)(6)(C) or 212(a)(7) must be placed in expedited removal and must be given a credible fear interview if they request asylum or claim a fear of persecution. The MPP violates the INA because it improperly employs processes under section (b)(2) to remove individuals who must be inspected and processed under expedited removal and credible fear.

Second, even if statutory authority exists, the Asylum Office has not had proper jurisdiction to conduct the interviews. For any asylum office to have jurisdiction to conduct an MPP interview, the applicant must have already been placed in removal proceedings under INA § 240 proceedings. Section 235(b)(2) provides that if an immigration official determines that (1) an applicant for admission "is not clearly and beyond a doubt entitled to be admitted, [(2)] the alien shall be detained for a proceeding under section 240; .. . [and (3)] the Attorney General may return the alien to that [contiguous] territory pending a proceeding under section 240. INA § 235(b)(2) (emphasis added). However, 240 proceedings are not initiated until an NTA is properly served on the applicant and the immigration court. Without a properly served NTA-that is, having been read the allegations, charges, and warnings on the back of the NTA, and subsequently signed by the applicant and served on the court-the Asylum Office does not have jurisdiction to conduct the interviews. A statement in the text of the 1-213 does confer jurisdiction. To my knowledge, no applicant interviewed by our office has received an NTA prior to the interview.

Third, the MPP violates our country's obligation under the 1967 Protocol. By ratifying the Protocol, the United States, among other things, agreed to not discriminate against refugees on the basis of their race, religion, or nationality, and to not penalize refugees for their undocumented entry into the country. However, the MPP both discriminates and penalizes. Implementation of the MPP is clearly designed to further this administration's racist agenda of keeping Hispanic and Latino populations from entering the United States. This is evident in the arbitrary nature of the order, in that it only applies to the southern border. It is also clear from the half-hazard implementation that appears to target populations from specific Central American countries even though a much broader range of international migrants cross the southern border. It is also demonstrated by the exempting from MPP interviews certain populations from those countries who have a high likelihood of receiving a positive finding.

Furthermore, the implementation is calculated to prevent individuals from receiving any type of protection or immigration benefits in the future. As such, it is a punitive measure intended to punish individuals who attempt to request protection in the United States. There is no clearly established policy and system for notifying applicants of changes to hearing dates and times, or for the applicants to provide change of addresses to the courts and Border Patrol. Without a highly functional notice system, the administration has ensured that a high number of applicants will miss their court dates. In such cases, immigration judges are required to order the applicant removed in absentia, thereby barring them from entering the United States for 5 to 10 years, subjecting them to reinstated orders of removal if the applicant again seeks protection in the United States, and thereby preventing them from applying from asylum.

Fifth, even if the Asylum Office did have statutory authority and proper jurisdictions for these interviews, participation in the MPP as it currently functions would still violate our oath to office. As Asylum Officers, we have sworn to "well and faithfully discharge the duties of the office." SF 61. Those duties include "proper administration of our immigration laws." See, USCIS/RAIO Mission and Core Values, available on the ECN. However, current USCIS policy governing MPP implementation is preventing us from complying with our sworn duty to properly administer the laws governing asylum. Individuals subject to MPP are almost certainly members of a particular social group consisting of"non-Mexican migrants traveling through Mexico " or some alternatively phrased variant. Such a group shares an immutable past experience, is particular, and the evidence suggests is socially distinct in Mexico. However, CIS policy regarding which social groups are considered cognizable, and the constraint on individual analysis, prohibits officers rom analyzing whether such a group is cognizable and if an MPP applicant would be persecuted in Mexico for their membership in such a group. These arbitrarily imposed restrictions on factual and legal analysis prevent us, as officers from faithfully discharging the duties of our office.

Sixth, while purporting to comply with international law, in fact the MPP practically ensures violation of our international obligation of non-refoulment. Assuming that the statue does delegate DHS authority to conduct MPP-type interviews, we have no implementing regulations. The current system is ad hoc and has not been subject to notice and comment making or any type ofreview. The regulatory process is critical to ensure that proceedings such as the MPP does not commit the numerous legal violations already noted. The current process places on the applicants the highest burden of proof in civil proceedings in the lowest quality hearing available. This is a legal standard not previously implemented by the Asylum Office and reserved for an Immigration Judge in a full hearing.[2] However, we are conducting the interviews telephonically, often with poor telephone connections, while at the same time denying applicants any time to rest, gather evidence, present witnesses, and, most egregious of all, denying them access to legal representation. The description of the MPP read at the beginning of the interview does not even explain what a "protected ground" is or what the applicant is required to prove. The ad hoc

[2] Additionally, anecdotal evidence reported by officers relating their experience with the MPP indicates that the level of proof found necessary by supervisors to sign a positive finding is in fact much higher than a preponderance of the evidence.

implementation, lack of regulations, denial of basic rights in all other immigration proceedings, and high legal standard all but ensure that an applicant is unable to meet his or her burden. Participating in such a clearly biased system further violates our oath of office.

Finally, even if all the above were remedied, the process is still morally objectionable and contrary to the RAIO mission of protection. The Asylum Office would still be complicit in returning individuals to an unsafe and unreasonable situation. One where we would likely find internal relocation unavailable were it the applicant's home country, and in fact regularly do make that determination for Mexican applicants. RAIO research recently reported the high levels of violence and crime specifically targeting migrant communities in Mexico, returned from the MPP. See RAIO Research Unit, News Summary Bulletin July 2019. Additionally, it is unreasonable to make individuals, often without financial resources and caring for small children, to wait an indefinite period of time without employment. The unreasonableness of such a requirement is why the law mandates u the application clock and issuance of employment documents if the US government cannot process a request for protection in a timely manner. Assurances by the Mexican government that persons returned to Mexico under the MPP would receive work permits and protection were a key reason that the injunction was stayed. Innovation Law Lab v. McAleenan, No. 19-15716, 924, F. 3d 503 (9th Cir. 2019). However, the Mexican government has not fulfilled its promise of providing work permits and protection. See RAIO Research Unit, News Summary Bulletin July 2019. While other immigration processes may result in returning someone to a place where they face true risk of harm because they do not qualify for protection or an immigration benefit, such instances occur only after the applicant has received substantially more due process. Even then, those individuals are returned to their countries of nationality, not an arbitrary third country to which they likely have no ties. The MPP is substantively and morally distinct from other aspects of our work.

For the foregoing reasons I have respectfully declined to participate in the MPP.