



CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

Practice Advisory

Asylum Seekers Stranded in Mexico Because of the Trump Administration's Restrictive Policies: Firm Resettlement Considerations¹

April 24, 2019

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I. Introduction

For months, U.S. Customs and Border Protection (CBP) has been shutting its doors to asylum seekers who present themselves at ports of entry along the U.S.-Mexico border. Former Department of Homeland Security (DHS) Secretary Kirstjen Nielsen testified that the agency is at “capacity” to process so many fear claims at once.² In response, CBP introduced a “metering” system whereby asylum seekers who present themselves at U.S. ports of entry are forced to wait weeks or longer for DHS to allow them to enter to process their fear-based claims. Without access to asylum protections in the United States, and scared to return to their country of origin, asylum seekers remain stranded indefinitely in Mexico as they await their “turn” to access the U.S. asylum system. An informal list maintained by asylum seekers themselves and enforced by Mexican officials, dictates the order of CBP processing for an asylum seeker’s “turn” at admission into the United States.³ Even when it is the asylum seeker’s “turn” to request asylum, his or her time in Mexico does not necessarily end.

On January 25, 2019, DHS began implementing the so-called “Migrant Protection Protocols” (MPP) policy,⁴ whereby asylum seekers must wait in Mexico while they apply for asylum before a U.S. immigration court, a process that could take over a year. This policy is also known as the “Remain in Mexico” policy as that is both the aim and the result of the new policy.⁵ Under Remain in Mexico, when an asylum seeker presents himself or herself at an affected port of entry, CBP issues a Notice to Appear, placing the asylum seeker into removal proceedings under section 240 of the Immigration and Nationality Act (INA) with a future hearing date.⁶ The asylum seeker is then transported back to Mexico by Immigration and Customs Enforcement (ICE) and must then present himself or herself to CBP on the day of the hearing for ICE to transport the asylum seeker to the immigration court.⁷ If the immigration court case is “ongoing,” following the court appearance, ICE “will transport the alien back to the POE [port of entry] and

² David Bier, CATO Institute, *Data Counters U.S. Claim on Asylum Processing* (Feb. 7, 2019), <https://www.cato.org/publications/commentary/data-counters-us-claim-asylum-processing>.

³ See Lolita Brayman, CLINIC, *Crossing the Line: On-the-Ground Report on the Humanitarian Crisis in Tijuana*, (Jan. 28, 2019), <https://cliniclegal.org/resources/crossing-line-ground-report-humanitarian-crisis-tijuana>.

⁴ Press Release, DHS, Migrant Protection Protocols (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>.

⁵ “In reality, this policy is about denying—not providing—protection to refugees, and is not a ‘protocol,’ but an attempt to circumvent the Protocol Relating to the Status of Refugees and the laws passed by Congress.” Human Rights First, *A Sordid Scheme: The Trump Administration’s Illegal Return of Asylum Seekers to Mexico* (Mar. 2019), https://www.humanrightsfirst.org/sites/default/files/A_Sordid_Scheme.pdf.

⁶ CBP, Migrant Protection Protocols Guiding Principles (Jan. 28, 2019), <https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf> (hereinafter “MPP Guiding Principles”).

⁷ *Id.*

CBP officers will escort the alien to the United States/Mexico limit line.”⁸ As of March 12, 2019, the U.S. government reported having returned 240 asylum seekers to Mexico.⁹

Advocates have filed litigation challenging the legality of Remain in Mexico as applied to asylum seekers—and on April 8, 2019 a federal district court judge in California issued a preliminary injunction that temporarily halts the Remain in Mexico policy.¹⁰ The injunction applies to the named plaintiffs and prospectively to anyone who would be subject to Remain in Mexico, however for the hundreds of asylum seekers already subject to the policy, the injunction does not appear to give relief. The government has appealed the decision and the Ninth Circuit has temporarily stayed the injunction, allowing asylum seekers to be returned to Mexico.¹¹ Regardless of the final outcome of that case, metering at the border continues and has resulted in thousands of individuals seeking asylum under U.S. law (“U.S. asylum seekers”) stranded on the Mexican side of the border.¹² Practitioners should therefore consider and prepare for potential DHS firm resettlement arguments against asylum seekers who are forced to remain in Mexico before ultimately gaining access to the U.S. asylum system. Section II of this practice advisory gives a brief overview of the firm resettlement bar to asylum protection. Section III discusses exceptions to the firm resettlement bar. Section IV reviews the known facts about the legal status of U.S. asylum seekers who are forced to remain in Mexico by U.S. immigration policies. Section V examines arguments as to why such asylum seekers are not “firmly resettled” in Mexico.

II. The Firm Resettlement Bar Under U.S. Asylum Law

The firm resettlement bar has been part of U.S. refugee law since the 1940s.¹³ In 1971, the U.S. Supreme Court found that although firm resettlement was not a statutory bar, it was relevant to a

⁸ *Id.*

⁹ Geneva Sands & Priscilla Alvarez, *Homeland Security Expands Program of Returning Migrants to Mexico to Await Hearings*, CNN, Mar. 12, 2019, <https://www.cnn.com/2019/03/12/politics/remain-in-mexico-expands/index.html>.

¹⁰ *Innovation Law Lab v. Nielsen*, No. 3:19-CV-00807-RS, --- F. Supp. 3d ---, 2019 WL 1516783 (N.D. Cal. Apr. 8, 2019), <https://assets.documentcloud.org/documents/5798893/4-8-19-Innovation-Law-Lab-Order.pdf>, appeal docketed, No. 19-15716 (Apr. 10, 2019). For more information about the case see ACLU, *Innovation Law Lab v. Nielsen*, <https://www.aclu.org/cases/innovation-law-lab-v-nielsen> (last visited Apr. 17, 2019). Practitioners are advised to visit this webpage to determine the current status of the litigation.

¹¹ Tammy Kupperman, *Appeals Court Puts Hold on Order Blocking Policy That Forces Some Asylum Seekers to Remain in Mexico*, CNN, Apr. 12, 2019, <https://www.cnn.com/2019/04/12/politics/trump-administration-asylum-seekers-mexico/index.html>.

¹² Daniella Silva, *Trapped in Tijuana: Migrants Face a Long, Dangerous Wait to Claim Asylum*, NBC NEWS, Mar. 18, 2019, <https://www.nbcnews.com/news/latino/trapped-tijuana-migrants-face-long-dangerous-wait-claim-asylum-n981721>.

¹³ USCIS, Firm Resettlement Training Module (Feb. 21, 2012), https://www.uscis.gov/sites/default/files/files/nativedocuments/Firm_Resettlement_LP_RAIO.pdf (hereinafter “USCIS Firm Resettlement Training Module”). Asylum Office lesson plans are used to train asylum officers and can be cited in briefs to the asylum office. These materials are written by USCIS and are not binding on immigration judges. However, they can be cited as persuasive authority. See *Singh v. Holder*, 649 F.3d 1161, 1169 n.14 (9th Cir. 2011) (McKeown, J., concurring) (noting the asylum office training module’s interpretation on a one year filing deadline issue); *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1094 (9th Cir. 2013) (concurring opinion citing to asylum office lesson plan on nexus and the five protected characteristics).

noncitizen's refugee status and was "one of the factors which the [INS] must take into account to determine whether a refugee seeks asylum in this country as a consequence of his flight to avoid persecution."¹⁴ The Refugee Act of 1980 made firm resettlement a statutory bar to refugee status, but not to asylum.¹⁵ In 1990, the Attorney General amended the regulations and extended the firm resettlement bar to asylum cases.¹⁶ Congress codified firm resettlement as a statutory bar to asylum by passing the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996.¹⁷ As a result, under INA § 208(b)(A)(vi), an applicant is ineligible for asylum if he or she was "firmly resettled in another country prior to arriving in the United States." As the USCIS Asylum Office Lesson Plan on Firm Resettlement explains, asylum seekers are potentially subject to the firm resettlement bar if there has been: 1) entry into a third country 2) an offer or receipt of 3) permanent status.¹⁸ USCIS applies this three-part test to determine whether an asylum seeker is subject to the firm resettlement bar.

A. *Matter of A-G-G* Framework

The leading Board of Immigration Appeals (BIA) case to address firm resettlement is *Matter of A-G-G*-, 25 I&N Dec. 486 (BIA 2011). In this case, Mauritanian soldiers arrested and detained the respondent based on his black Wolof ethnicity. Thereafter, the Mauritanian government forcibly deported the respondent to Senegal. While in Senegal, the respondent married a Senegalese citizen with whom he had two children. He resided in Senegal for eight years without problems before coming to the United States and seeking asylum.¹⁹

The immigration judge (IJ) found that the respondent had suffered past persecution based on his race and ethnicity and granted asylum.²⁰ DHS appealed arguing that he had firmly resettled in Senegal.²¹ The BIA found that the respondent's marriage to a Senegalese citizen and registry with the Senegalese government was indirect evidence of his ability to remain there permanently; the respondent's failure to apply for residence was not relevant to the firm resettlement analysis.²² However, because there were conflicting documents in the record as to whether a female Senegalese citizen could sponsor her male spouse for permanent residence, the BIA remanded for further fact-finding.²³

In *Matter of A-G-G*-, the BIA examined how different U.S. courts of appeal analyzed firm resettlement and established a four-step framework to evaluate whether the bar applies. This analysis focuses exclusively on the existence of an offer, or legal mechanism to an offer,²⁴ of

¹⁴ *Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 56 (1971).

¹⁵ INA § 207(c)(1).

¹⁶ See 8 CFR § 1208.15.

¹⁷ For a detailed history of the firm resettlement bar see *Matter of A-G-G*-, 25 I&N Dec. 486, 489-94 (BIA 2011).

¹⁸ See USCIS Firm Resettlement Training Module, *supra* note 13, at 12-18.

¹⁹ *Matter of A-G-G*-, 25 I&N Dec. at 487.

²⁰ *Id.* at 486.

²¹ *Id.* at 487.

²² *Id.* at 504.

²³ *Id.*

²⁴ See USCIS Firm Resettlement Training Module, *supra* note 13, at 13 ("The existence of a legal mechanism to obtain permanent status in the third country may be sufficient evidence to establish an offer of firm resettlement, and is not contingent on whether the applicant applies for the status.").

permanent status and allows for consideration of direct and indirect evidence to determine whether the applicant has firmly resettled.

The four-step analysis laid out in *Matter of A-G-G-* is as follows:²⁵

Step 1: DHS bears the burden of presenting *prima facie* evidence of an offer of permanent status.²⁶ The asylum applicant does not necessarily have to accept the offer; the key inquiry is whether permanent status was available. If DHS cannot make this showing, the inquiry ends there.²⁷

Step 2: If DHS establishes an offer of firm resettlement, the asylum applicant has an opportunity to rebut the evidence by showing by a preponderance of the evidence that he or she did not receive an offer of firm resettlement or that he or she does not qualify for the status. This rebuttal can include presenting evidence as to how the law is actually applied and whether the asylum seeker would benefit from the law in the third country.²⁸

Step 3: The adjudicator considers the totality of the evidence presented by both parties to determine whether the asylum applicant has rebutted DHS's evidence of an offer of firm resettlement.²⁹

Step 4: If there is a finding of firm resettlement, the burden then shifts to the asylum applicant to establish by a preponderance of the evidence that an exception to the firm resettlement bar applies.³⁰

Since *Matter of A-G-G-*, the BIA, IJs, and asylum officers have largely followed the framework laid out in the decision. There has been some conflict among the U.S. courts of appeal with some taking a “direct offer” approach and others taking a “totality of the circumstances” approach. Both approaches provide for the consideration of direct and indirect evidence of an offer of permanent resident status, citizenship, or some other type of permanent resettlement.³¹ *Matter of*

²⁵ For an in-depth discussion of the four-step analysis, see USCIS Firm Resettlement Training Module, *supra* note 13, at 22–26.

²⁶ Although the burden of proof is on DHS, in a footnote the *Matter of A-G-G-* decision points out that “[p]rima facie evidence of an offer of firm resettlement may already be a part of the record of proceedings as testimony or other documentary evidence.” 25 I&N Dec. at 502 n.17. Practitioners should therefore be aware that the asylum seeker’s own responses on Form I-589 or testimony at the hearing may suffice for DHS to meet its burden. See *Firmansjah v. Gonzales*, 424 F.3d 598, 602–03 (7th Cir. 2005) (the court made a firm resettlement finding partially based on petitioner’s answers in the Form I-589). But see *Haghighatpour v. Holder*, 446 F. App’x 27, 30–31 (9th Cir. 2011) (unpublished), *as amended on denial of reh’g* (Oct. 27, 2011) (finding the asylum seeker’s admission that he had lawful residency in Germany, which he later contradicted, was not sufficient to invoke the firm resettlement bar absent any further evidence on the issue from DHS). There will be an opportunity to rebut DHS’s contention that this testimony is evidence of an offer.

²⁷ *Matter of A-G-G-*, 25 I&N Dec. at 501–03.

²⁸ *Id.* at 503.

²⁹ *Id.*

³⁰ *Id.*; see also 8 CFR § 1208.15(a)–(b).

³¹ *Matter of A-G-G-*, 25 I&N Dec. at 495.

A-G-G- reconciles the prior conflict in the circuits and creates a four step analysis; however, practitioners should still research case law specific to their jurisdictions.³²

B. The Firm Resettlement Analysis — Evidentiary Considerations

1. Direct vs. Indirect Evidence of Offer

To meet its initial evidentiary burden, DHS is required to introduce direct evidence of an offer of permanent status. This direct evidence may include proof of “refugee status, a passport, a travel document, or other evidence indicative of permanent residence.”³³

If direct evidence is unavailable, DHS may use indirect evidence if it has a “sufficient level of clarity and force” to establish that the asylum applicant is able to permanently reside in the country of resettlement.³⁴ *Matter of A-G-G-* sets forth the following list³⁵ of potential forms of indirect evidence that the government may offer:

- immigration laws or refugee process of the country of proposed resettlement³⁶
- length of the [asylum seeker’s] stay in a third country³⁷
- [asylum seeker’s] intent to settle in the country³⁸
- family ties and business or property connections³⁹
- extent of social and economic ties developed by the [asylum seeker] in the country⁴⁰

³² For example, in *Hanna v. Holder*, 740 F.3d 379, 394 (6th Cir. 2014), the U.S. Court of Appeals for the Sixth Circuit noted that it had not expressly adopted the four-step framework in *Matter of A-G-G-*, but then went on to apply the BIA’s A-G-G- framework and find that the petitioner had firmly resettled in Canada prior to seeking asylum in the United States.

³³ *Matter of A-G-G-*, 25 I&N Dec. at 501–02.

³⁴ *Id.* at 502.

³⁵ *Id.*

³⁶ See *Elzour v. Ashcroft*, 378 F.3d 1143, 1152 (10th Cir. 2004) (finding that the four years respondent spent in Canada was not enough to show firm resettlement when his application for asylum there and marriage-based petition were both denied but remanding for BIA to consider whether the fact that respondent was able to apply for asylum, and failed to appear at his asylum hearing, was sufficient to show an offer of permanent status).

³⁷ See *Sall v. Gonzales*, 437 F.3d 229, 235 (2d Cir. 2006) (finding that the passage of four years alone was not sufficient to prove firm resettlement and the “the IJ should consider the totality of the circumstances, including whether Sall intended to settle in Senegal when he arrived there, whether he has family ties there, whether he has business or property connections that connote permanence, and whether he enjoyed the legal rights—such as the right to work and to enter and leave the country at will—that permanently settled persons can expect to have”); *Camposeco-Montejo v. Ashcroft*, 384 F.3d 814 (9th Cir. 2004) (concluding that even though Guatemalan spent 16 years in Mexico before seeking asylum in the United States, he was not subject to firm resettlement bar because he did not have an offer of permanent residence and he was subject to restrictive conditions while residing there).

³⁸ See *Abdille v. Ashcroft*, 242 F.3d 477, 487 (3rd Cir. 2000) (finding that if DHS cannot obtain direct evidence of an offer of firm resettlement, “the IJ or BIA may find it necessary to rely on non-offer-based factors, such as the length of an alien’s stay in a third country, the alien’s intent to remain in the country, and the extent of the social and economic ties developed by the alien, as circumstantial evidence of the existence of a government-issued offer”).

³⁹ See *Ali v. Reno*, 237 F.3d 591 (6th Cir. 2001) (finding that the respondent had firmly resettled in Denmark where she had an offer of refugee status, lived there for six months with her family, and used her Danish passport to travel internationally).

⁴⁰ *Hanna v. Holder*, 740 F.3d 379 (6th Cir. 2014) (concluding that Hanna was firmly resettled in Canada even though he was a minor when he lived there because he and his family had landed immigrant status [lawful

- receipt of government benefits or assistance, such as assistance for rent, food, and transportation,⁴¹ and
- whether the [asylum seeker] had legal rights normally given to people who have some official status, such as the right to work and enter and exit the country.⁴²

It is worth noting that a class-based offer of permanent residence may be sufficient to trigger the firm resettlement bar so long as the asylum seeker has entered the country that makes the offer.⁴³ The “mere possibility that an individual might receive permanent refuge through a third country’s asylum procedures, however, is not enough to constitute an offer of permanent resettlement.”⁴⁴

2. *Fraudulent and Fraudulently Procured Documents*

The BIA has concluded that possession of fake documents such as residency permits or visas can form the basis of a valid offer of firm resettlement. For example in *Matter of D-X- & Y-Z-*, 25 I&N Dec. 664 (BIA 2012), the BIA held that the Chinese respondent who had a facially valid permanent residency document in Belize, had been given an offer of firm resettlement even though the document had been fraudulently obtained. The BIA found that asylum seekers “who have obtained an immigration status by fraud should not be permitted to disavow that status in order to establish eligibility for another type of relief.”⁴⁵ The BIA also found it significant that the respondent had left Belize and voluntarily returned using her residence document which demonstrated that the Belizean government recognized her documents as facially valid.⁴⁶

C. Applications Not Affected by the Firm Resettlement Bar

1. *Asylum Seekers Who Have Not Entered the Country with the Offer of Resettlement*

Under 8 CFR § 1208.15, an asylum seeker is “considered to be firmly resettled if, prior to arrival in the United States, he or she *entered into another country* with, or *while in that country* received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement. . .” (emphases added). This requirement is expounded upon by the Asylum Office Lesson Plan on Firm Resettlement, which states, “An offer or receipt of a permanent status alone, without a physical entry into the third country while that status is available, would not

permanent residence], his family had started a business there, he attended middle school in Canada, and he and his family had traveled in and out of Canada).

⁴¹ *Mussie v. INS*, 172 F.3d 329, 330–31 (4th Cir. 1999) (finding that an Ethiopian citizen had firmly resettled in Germany where she had received refugee status, “government-paid language schooling . . . government assistance for transportation, rent, and food” and also “held a job, paid taxes, and rented her own apartment”).

⁴² *Id.*

⁴³ See USCIS Firm Resettlement Training Module, *supra* note 13, at 14.

⁴⁴ *Id.* (citing *Elzour v. Ashcroft*, 378 F.3d 1143, 1152 (10th Cir. 2004)).

⁴⁵ 25 I&N Dec. at 666.

⁴⁶ See also *Salazar v. Ashcroft*, 359 F.3d 45 (1st Cir. 2004) (upholding denial of asylum claim by Peruvian who had fraudulently obtained a Venezuelan resident stamp in his passport that he used to obtain a visa to the United States and to travel to and from Venezuela).

meet the first element of the firm resettlement bar.”⁴⁷ While this issue may not arise often in the context of asylum seekers forced to remain in Mexico, it is an important element to remember if an asylum seeker has an offer or legal mechanism to obtain an offer of permanent residence in another country that he or she has not entered.

2. *Credible Fear and Reasonable Fear Applicants*

Asylum officers do not consider the firm resettlement bar during credible fear interviews.⁴⁸ However, the asylum officer will still inquire about potential bars to asylum and make note of them. According to the USCIS Credible Fear Lesson Plan:

Even though the bars to asylum do not apply to the credible fear determination, the interviewing officer must elicit and make note of all information relevant to whether or not a bar to asylum or withholding applies. The IJ is responsible for finally adjudicating whether or not the applicant is barred from receiving asylum or withholding of removal.⁴⁹

Thus practitioners who are preparing asylum seekers for credible fear interviews should advise them that they may be questioned about the time they have spent in Mexico or any other country, and whether they have applied for or been offered any legal status. While the asylum seeker’s answer would not result in a negative credible fear determination, it will become a part of the case file and may become an issue before the IJ. Therefore, it is prudent to discuss firm resettlement with an asylum seeker before the credible fear interview.

Similar to credible fear interviews, mandatory bars do not apply in reasonable fear interviews. As discussed below, individuals who are only eligible for withholding of removal and CAT protection are not subject to the firm resettlement bar. Since reasonable fear interviews are only conducted for individuals who are only potentially eligible for those forms of relief, there is no need to screen in reasonable fear interviews for potential firm resettlement.

3. *Withholding of Removal and Protection Under the Convention Against Torture*

There is no firm resettlement bar to withholding of removal under INA § 241(b)(3) or to protection under the Convention Against Torture (CAT).⁵⁰ Thus, if the respondent⁵¹ succeeds in proving that it is more likely than not that he or she faces persecution or torture in his or her country of origin, but is subject to the firm resettlement bar, the respondent cannot win asylum but may win withholding or CAT protection. Withholding and CAT protections prevent DHS from removing the respondent to the country where he or she fears persecution or torture, as determined by the IJ. However, withholding and CAT provide less protection than asylum

⁴⁷ See USCIS Firm Resettlement Training Module, *supra* note 13, at 12; see also *Haile v. Gonzales*, 421 F.3d 493, 497 (7th Cir. 2005) (holding that an Ethiopian asylum seeker could not be considered firmly resettled in Eritrea in spite of having an Eritrean passport because he had never entered Eritrea).

⁴⁸ USCIS, Credible Fear of Persecution and Torture Determinations, Lesson Plan, at 44 (Feb. 13, 2017), AILA Doc. No. 17022435, www.aila.org/infonet.

⁴⁹ *Id.*

⁵⁰ *Id.*; see also *Siong v. INS*, 376 F.3d 1030 (9th Cir. 2004).

⁵¹ The term “respondent” is used in this section rather than “applicant” since withholding and CAT protections are only available in removal proceedings, unlike asylum which may be sought affirmatively or defensively.

because the IJ enters a removal order⁵² and DHS can remove the respondent to any country other than the country of feared persecution or torture. DHS could remove the respondent to a country in which he or she has been offered permanent status as long as that country will accept him or her.⁵³ Therefore, while firm resettlement is not a bar to these forms of relief, a significant likelihood exists that DHS would seek to remove the respondent to the country of resettlement.

4. Derivatives of Asylees or Refugees

Finally, the firm resettlement bar does not apply to derivative asylees or refugees. A refugee or asylee can file an I-730 Refugee/Asylee Relative Petition for a spouse or unmarried child without regard to where that relative resides or what legal status he or she has there.⁵⁴

III. Exceptions to the Firm Resettlement Bar

Even if DHS can demonstrate that an asylum seeker is subject to the firm resettlement bar, the asylum seeker may still prevail on his or her application if he or she meets an exception to the bar. The two exceptions to the firm resettlement bar are:

- *No Significant Ties.* Under 8 CFR § 1208.15(a), if an asylum seeker's entry into that country was a necessary consequence of his or her flight from persecution, he or she remained in that country only as long as was necessary to arrange onward travel, and he or she did not establish significant ties in that country;⁵⁵ or
- *Restrictive Conditions.* Under 8 CFR § 1208.15(b), if the conditions of the asylum seeker's residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled.

The burden of proof is on the asylum seeker to demonstrate that one of these exceptions applies.⁵⁶ These two exceptions are discussed in section V below in the context of asylum seekers forced to remain in Mexico.

IV. Legal Status of U.S. Asylum Seekers in Mexico

There have been varying news reports discussing the number of Central American asylum seekers currently stranded in Mexico as well as varying reports about what their legal status is in Mexico. One news source reported that, as of January 29, 2019, 12,000 individuals had applied

⁵² INA § 241(b)(3)(B); *Matter of I-S- & C-S-*, 24 I&N Dec. 432, 433 (BIA 2008) ("It is axiomatic that in order to withhold removal there must first be an order of removal that can be withheld.").

⁵³ 8 CFR § 1208.16(f) ("Nothing in this section or § 1208.17 shall prevent the Service from removing an alien to a third country other than the country to which removal has been withheld or deferred.").

⁵⁴ See USCIS Firm Resettlement Training Module, *supra* note 13, at 27 (citing 8 CFR § 208.21(a), which lists grounds of ineligibility for asylum under INA § 208(b)(2)(A), but specifically excludes the firm resettlement ground of ineligibility).

⁵⁵ See, e.g., *Ramos Lara v. Lynch*, 833 F.3d 556, 560 (5th Cir. 2016) (finding Bolivian asylum seeker did not remain in Mexico only "as long as was necessary to arrange onward travel" when she resided in Mexico for five years, working as a school teacher and had previously entered the United States without seeking asylum).

⁵⁶ *Matter of A-G-G-*, 25 I&N Dec. at 503 ("[T]he burden then shifts to the alien pursuant to 8 C.F.R. §§ 1208.15(a) and (b) to establish that an exception to firm resettlement applies by a preponderance of the evidence.").

for humanitarian visas, which allow recipients to work and move freely within Mexico, but Mexico had granted only 1,210.⁵⁷ Within days after the Trump administration announced the Remain in Mexico policy, the Mexican government stated it would be closing its humanitarian visa program “shortly” because the number of migrants could overwhelm the Mexican immigration system.⁵⁸ According to another news source, Mexico stopped offering the humanitarian visas in early February.⁵⁹ However, the situation in Mexico is subject to change at any time. Practitioners should fully explore with any potential client, what type of visa, if any, he or she was offered while in Mexico. When the Trump administration announced its Remain in Mexico policy, DHS’s guidance stated that Mexico:

will allow foreigners who have received a notice to appear to request admission into Mexican territory for humanitarian reasons at locations designated for the international transit of individuals and to remain in national territory. This would be a “stay for humanitarian reasons” and they would be able to enter and leave national territory multiple times.⁶⁰

DHS further stated that asylum seekers returned to Mexico “will also have the opportunity to apply for a work permit for paid employment, which will allow them to meet their basic needs.”⁶¹ It is not clear whether this “humanitarian” stay is the so-called “humanitarian visa” that Mexico has reportedly stopped issuing, or whether Mexico has a specific policy in place with the United States to give those subject to Remain in Mexico some form of status while they await resolution of their U.S. asylum cases.

While Mexico appears to be allowing U.S. asylum seekers returned through the Remain in Mexico policy to re-enter Mexico, it is not clear what immigration status, if any, they receive upon return.⁶² The ACLU reported on one asylum seeker who initially received a permit to stay in Mexico legally for one year, but when he presented himself at the U.S. border to attend immigration court under Remain in Mexico, the Mexican migration service took his visa.⁶³ When DHS returned the asylum seeker to Mexico under the Remain in Mexico protocol, he did not get back his identification card. Instead, he received a piece of paper allowing him to remain in Mexico, but this paper made clear that he did not have permission to work. There has not been

⁵⁷ Sarah Kinoshian, *Mexico Plans to Shut Its “Too Successful” Humanitarian Visa Program*, PITTSBURGH POST-GAZETTE, Jan. 29, 2019, <https://www.post-gazette.com/news/world/2019/01/28/Mexico-humanitarian-visas-program-Central-American-migrants-asylum-seekers/stories/201901010747>.

⁵⁸ *Id.*

⁵⁹ *Mexico Culmina Entrega de Visas Humanitarias a Migrantes Centroamericanos*, EL HERALDO, Feb. 12, 2019, <https://www.elheraldo.hn/minisitios/hondurenosenelmundo/1258584-471/m%C3%A9xico-culmina-entrega-de-visas-humanitarias-a-migrantes-centroamericanos>.

⁶⁰ Memorandum from Kirstjen M. Nielsen, Secretary, DHS, Policy Guidance for Implementation of the Migrant Protection Protocols, at 3 (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf.

⁶¹ *Id.*

⁶² The authors have on file a Forma Migratoria Multiple (FMM) issued by the National Institute of Migration which the Mexican government gave to a U.S. asylum seeker who was subjected to Remain in Mexico. The length of stay permitted in Mexico coincides exactly with the number of days until the asylum seeker’s next U.S. immigration court date.

⁶³ Amrit Cheng, ACLU, *Trump’s New Policy Is Stranding Asylum Seekers in Mexico* (Mar. 21, 2019), <https://www.aclu.org/issues/immigrants-rights/trumps-new-policy-stranding-asylum-seekers-mexico>.

reporting that Mexico is broadly offering any kind of permanent status to U.S. asylum seekers who are forcibly stranded there, although the situation in Mexico is very fluid and practitioners should fully explore with potential clients any visa they may have been offered in Mexico.

V. Arguments Against the Application of the Firm Resettlement Bar to U.S. Asylum Seekers Stranded in Mexico

As discussed above, as long as U.S. asylum seekers who travel through and/or are returned to Mexico do not receive a pathway to permanent residence, the firm resettlement bar should not apply to them. Nevertheless, some advocates are fearful that DHS may raise the issue in U.S. asylum cases. CLINIC therefore offers the following practical tips to fight potential DHS arguments that these asylum seekers have firmly resettled in Mexico.

- *Make DHS meet its burden of proof.* Under *Matter of A-G-G-* the initial burden of proof is on DHS to show that an offer of firm resettlement has been made. It is likely that DHS, like the immigration advocacy community, does not have any reliable information about what type of visa, if any, is being offered to U.S. asylum seekers forced to remain in Mexico. Do not concede that there has been any firm resettlement—hold DHS to its evidentiary burden.⁶⁴ Even if DHS proffers evidence of firm resettlement, carefully examine it to be sure it is admissible and probative.⁶⁵
- *Refute any “indirect evidence” offered by DHS.* Even if DHS attempts to offer evidence showing that the asylum seeker has been in Mexico for several months or longer, length of time in a third country alone is not sufficient to demonstrate that the individual has received an offer of permanent residence.⁶⁶ The legal standard is the permanence of the offer; remind DHS and the adjudicator that being forced to remain in a third country without an offer of permanent status is not proof of firm resettlement.⁶⁷
- *Argue that there has been no offer of permanent residence.* Under *Matter of A-G-G-* the key factor is whether an offer of permanent residence has been made. Even if a U.S. asylum seeker has obtained a humanitarian visa, so long as that visa is temporary, it does not meet the standard for an offer of permanent residence.⁶⁸ As discussed above, there must be an actual offer or clear legal mechanism to obtain an offer of permanent status. “[A] mere possibility that an alien might receive permanent

⁶⁴ See *Matter of A-G-G-*, 25 I&N Dec. 486, 501 (BIA 2011). The Form I-589 application for asylum at page 7 requires an asylum seeker to explain whether he or she has traveled through or resided in any country before entering the United States as well as to answer whether the asylum seeker or family members have applied for or received any lawful status in a third country. The asylum seeker must answer these questions honestly, but should not provide more evidence about any status offered in Mexico than is necessary to answer the question completely.

⁶⁵ See *Jianping Ye v. Lynch*, 650 F. App’x 385 (9th Cir. 2016) (unpublished) (implying that the petitioner had a right to contest validity of third country identity card that DHS offered into evidence but waived that objection).

⁶⁶ USCIS Firm Resettlement Training Module, *supra* note 13, at 15.

⁶⁷ *Maharaj v. Gonzales*, 450 F.3d 961 (9th Cir. 2006) (remanding because, even though family had resided in Canada for four years, it was not clear whether they had an offer of permanent status).

⁶⁸ See *Ali v. Reno*, 237 F.3d 591 (6th Cir. 2001) (finding that refugee status and receipt of a Danish passport showed permanent status to invoke firm resettlement bar).

refuge through a third country's asylum procedures is not enough to constitute an offer of permanent resettlement.”⁶⁹ Remember that termination of the residency or offer does not undercut a finding of firm resettlement.⁷⁰ However, practitioners can argue that if the status was terminated, then it was not actually permanent.⁷¹

- *Remember that even facially valid yet fraudulently obtained documents may be sufficient for a claim of firm resettlement.* Practitioners should carefully question asylum seekers about any documents they obtained in Mexico. As discussed above, U.S. resettlement law is quite harsh regarding fraudulently obtained documents, so even if an asylum seeker is in possession of a “facially valid” document that was fraudulently obtained, if the document evinces permanent status, he or she may be considered firmly resettled.⁷²
- *Argue the exceptions to firm resettlement.* There is no indication that Mexico intends to broadly offer permanent status to asylum seekers stranded there. However, if Mexico were to offer permanent status to stranded asylum seekers, the firm resettlement inquiry would not end there. The firm resettlement bar includes two exceptions that practitioners should consider and analyze. These two exceptions recognize that restrictive conditions may exist in the country offering a permanent status and that the asylum seeker may have no significant ties to the country offering permanent status. In other words, the quality and actual permanency of their life in that country matter in the firm resettlement assessment. Therefore, an offer of permanent status from Mexico would not automatically mean the asylum seeker has firmly resettled.
 - *No Significant Ties*—Practitioners should explore whether the asylum seeker meets the “no significant ties” exception under 8 CFR § 1208.15(a). This would require showing that: (1) entry into Mexico was a necessary consequence of flight from persecution in that crossing Mexico is a geographic necessity for those traveling by land to get from Central America to the United States; (2) the asylum seeker only remained in Mexico as long as was necessary to arrange travel to the United States, (practitioners could point out that the Trump administration is responsible for the length of time the asylum seeker spends in Mexico as a result of its border metering and forcible returns); and (3) the asylum seeker did not establish significant ties in Mexico.⁷³ The latter is a fact-specific inquiry and the adjudicator will consider

⁶⁹ *Elzour v. Ashcroft*, 378 F.3d 1143, 1152 (10th Cir. 2004).

⁷⁰ *Tchitchui v. Holder*, 657 F.3d 132 (2nd Cir. 2011) (finding that the expiration of Cameroonian's Guatemalan permanent residency “is not relevant to the question of whether he is eligible in the United States”).

⁷¹ See *Bonilla v. Mukasey*, 539 F.3d 72 (1st Cir. 2008) (remanding for BIA to determine whether an expired resident document was sufficient to demonstrate offer of permanent residence); *Abdille v. Ashcroft*, 242 F.3d 477 (3rd Cir. 2000) (remanding case because it was error to conclude that a renewable two year grant of asylum was sufficiently permanent to invoke firm resettlement bar).

⁷² See *Su Hwa She v. Holder*, 629 F.3d 958 (9th Cir. 2010); *Matter of D-X- & Y-Z-*, 25 I&N 664 (BIA 2012).

⁷³ Note that while “no significant ties” is an exception that the asylum seeker can raise after DHS meets its burden of showing firm resettlement, many of the considerations for determining whether this exception exists—length of stay, ability to work, and conditions of residing in the third country—are the same as the “indirect evidence” that DHS may introduce to demonstrate an indirect offer of resettlement. See *Tchitchui v. Holder*, 657 F.3d at 137.

length of stay and conditions of stay, within the context of whether the asylum seeker only stayed as long as necessary to arrange onward travel.⁷⁴

- *Restrictive Conditions*—The asylum applicant has to establish that “the conditions of his/her residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled.”⁷⁵ Restrictive conditions factors can be based on the type of housing and employment made available, country conditions, and the extent to which the applicant could own property, travel (the right of entry or reentry), and access education.⁷⁶ Restrictive conditions can also include persecution or discrimination by the formal government of the third country against the rights of noncitizen residents including refugees. If the government withholds an individual’s travel documents or cannot ensure that an individual receives benefits, these constraints may be considered restrictive conditions.⁷⁷ While general continuing fear of returning to one’s country is not enough to show a lack of firm resettlement, fear caused by restrictive conditions in the country of residence shows that the asylum applicant has not firmly settled.⁷⁸ To be considered firmly resettled, the asylum seeker must “by definition no longer [be] subject to persecution.”⁷⁹

Mexico remains very dangerous for asylum seekers. While the Mexican government has created a new federal agency within its attorney general’s office to investigate abuse against migrants, only 1 percent of crimes against migrants end in conviction.⁸⁰ Human rights organizations have documented Mexico’s failure to provide Central American asylum seekers protections

(“Tchitchui had ongoing business activities, could work and travel at will, and had permanent residency status. These circumstances demonstrate that Tchitchui established significant ties to Guatemala, a country that afforded him a safe haven from his persecution in Cameroon.”); *see also* *Desta v. Ashcroft*, 329 F.3d 1179 (10th Cir. 2003) (finding an Ethiopian asylum seeker had formed significant ties in Canada because he was offered landed immigrant status [lawful permanent residence] in Canada where his wife was granted asylum, had a son there, and lived in Canada for 18 months before seeking asylum in the United States).

⁷⁴ Significantly, length of time in the third country does not, in and of itself, require a finding of “significant ties.” *Gwangsu Yun v. Lynch*, 633 F. App’x 29, 30 (2d Cir. 2016) (unpublished) (finding no “significant ties” for North Korean asylum seeker based on length of stay in South Korea alone “unless there is substantial evidence that two years was longer than ‘necessary to arrange onward travel’”).

⁷⁵ 8 CFR § 1208.15(b).

⁷⁶ *Id.*

⁷⁷ *See Arrey v. Barr*, 916 F.3d 1149, 1160 (9th Cir. 2019) (remanding to BIA where Board had denied asylum for a Cameroonian woman who had received an offer of refugee status in South Africa but had not adequately considered the restrictive conditions she faced there).

⁷⁸ *See* USCIS Firm Resettlement Training Module, *supra* note 13, at 20; *see also* 8 CFR § 1208.15(b).

⁷⁹ *Yang v. INS*, 79 F.3d 932, 939 (9th Cir.1996); *see also* *Siong v. INS*, 376 F.3d 1030, 1040 (9th Cir. 2004) (“Because of the evidence that Siong may not have ‘found a haven from persecution’ in France, . . . Siong also has established at least a plausible claim that he is not firmly resettled in France.” (internal citation omitted)).

⁸⁰ Jay Root, *Migrants Seeking Safe Harbor in the U.S. Must First Survive Shootouts and Shakedowns in Mexico*, THE TEXAS TRIBUNE, Oct. 17, 2018, <https://www.texastribune.org/2018/10/17/immigrants-trump-mexico-border-asylum-violence>.

under international law.⁸¹ According to Amnesty International, around 20,000 migrants are kidnapped each year and extorted for ransom by various cartels and criminal organizations.⁸² In addition to kidnapping, female migrants face a 6 in 10 chance of being raped.⁸³ Central Americans forced to remain in Mexico due to metering or returned to Mexico by the U.S. government have faced particularly dangerous conditions.⁸⁴ In addition to fearing non-state actors, Central American asylum seekers have reported harassment by Mexican police.⁸⁵ High rates of corruption and government acquiescence to the violence have created significant challenges for the Mexican government.⁸⁶

The U.S. government has acknowledged the violence in Mexico and the U.S. State Department currently has travel warnings posted for all six Mexican states that border the United States. Tamaulipas has been given the strongest warning, Do Not Travel, while four more states—Chihuahua, Coahuila, Nuevo Leon, and Sonora—have been given the second strongest warning, Reconsider Travel. Baja has been given a level two warning, Exercise Increased Caution.⁸⁷ Thus, if the firm resettlement bar is found to apply to an asylum seeker who was forced to remain in Mexico, background country conditions support a finding of restrictive conditions based on the anti-immigrant violence in Mexico and the government's acquiescence or inability to control it.⁸⁸

VI. Conclusion

It is difficult to predict with accuracy whether DHS will argue that asylum seekers stranded in Mexico should be subject to the firm resettlement bar. The situation on the ground for U.S. asylum seekers in Mexico changes often, and practitioners should perform their own research and analysis regarding each potential client's case. Moreover, the Remain in Mexico policy is

⁸¹ Amnesty International, *Overlooked, Under-Protected: Mexico's Deadly Refoulement of Central Americans Seeking Asylum* (2018), <https://www.amnestyusa.org/wp-content/uploads/2018/01/AMR4176022018-ENGLISH-05.pdf>.

⁸² Salil Shetty, Amnesty International, *Most Dangerous Journey: What Central American Migrants Face When They Try to Cross the Border*, <https://www.amnestyusa.org/most-dangerous-journey-what-central-american-migrants-face-when-they-try-to-cross-the-border/> (last visited Apr. 17, 2019).

⁸³ *Id.*; see also Steve Dudley, Migration Policy Institute, *Transnational Crime in Mexico and Central America: Its Evolution and Role in International Migration* (Nov. 2012), <https://www.migrationpolicy.org/research/RMSG-CentAm-transnational-crime>.

⁸⁴ *Id.*; Root, *supra* note 80.

⁸⁵ Dara Lind, "Remain in Mexico": Trump's Quietly Expanding Crackdown on Asylum Seekers, Explained, VOX, Mar. 22, 2019, <https://www.vox.com/2019/3/5/18244995/migrant-protection-protocols-border-asylum-trump-mexico>.

⁸⁶ See Root, *supra* note 80; International Crisis Group, *Mexico's New President Squares Up to High Hopes for Peace* (Dec. 30, 2018), <https://www.refworld.org/docid/5c07a0774.html> (noting the challenges faced by the new Mexican president with the extreme violence in the country).

⁸⁷ U.S. Dep't of State, Mexico Travel Advisory (Nov. 15, 2018), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html>.

⁸⁸ Inter-American Commission on Human Rights, *The Human Rights Situation in Mexico* (Dec. 31, 2015), <https://www.refworld.org/docid/583ed735a2.html>.

currently subject to federal litigation and the U.S. District Court for the Northern District of California recently issued a preliminary injunction bringing to a halt the implementation and expansion of the Remain in Mexico policy.⁸⁹ It is clear, however, that the Trump administration seeks to erect obstacles to those who wish to exercise their lawful rights to seek asylum in the United States. These obstacles are part of the invisible wall that the Trump administration continues to build.

⁸⁹ *Innovation Law Lab v. Nielsen*, No. 3:19-CV-00807-RS (N.D. Cal. Apr. 8, 2019), <https://assets.documentcloud.org/documents/5798893/4-8-19-Innovation-Law-Lab-Order.pdf>. For more information about the case, see ACLU, *Innovation Law Lab v. Nielsen*, <https://www.aclu.org/cases/innovation-law-lab-v-nielsen> (last visited Apr. 17, 2019).



The Catholic Legal Immigration Network, or CLINIC, advocates for humane and just immigration policy. Its network of nonprofit immigration programs—371 organizations in 49 states and the District of Columbia—is the largest in the nation.

Building on the foundation of [CLINIC's BIA Pro Bono Project](#), CLINIC launched the Defending Vulnerable Populations (DVP) Program in response to growing anti-immigrant sentiment and policy measures that hurt immigrants. DVP's primary objective is to increase the number of fully accredited representatives and attorneys who are qualified to represent immigrants in immigration court proceedings. To accomplish this, DVP conducts court skills trainings for both nonprofit agency staff (accredited representatives and attorneys) and pro bono attorneys; develops practice materials to assist legal representatives; advocates against repressive policy changes; and expands public awareness on issues faced by vulnerable immigrants. By increasing access to competent, affordable representation, the program's initiatives focus on protecting the most vulnerable immigrants—those at immediate risk of deportation.

DVP offers a variety of written resources including timely practice advisories and guides on removal defense strategies, amicus briefs before the BIA and U.S. courts of appeal, pro se materials to empower the immigrant community, and reports. Examples of these include a series of practice advisories specific to DACA recipients, a practice advisory on strategies and considerations in light of the Supreme Court's decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), a guide on how to obtain a client's release from immigration detention, amicus briefs on the "serious nonpolitical crime" bar to asylum as it relates to youth and on the definition of a minor for purposes of the asylum one-year filing deadline, an article in Spanish and English on how to get back one's immigration bond money, and a report entitled "Denied a Day in Court: In Absentia Removals and Families Fleeing Persecution."

These resources and others are available on the [DVP webpage](#).