



IMMIGRATION

Arrested Immigrants Are Being ‘Returned to Mexico

Classifying immigrants as “arriving aliens” allows the government to deny them a char



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Illustration: N



Immigration Judge Lee O'Connor of the San Diego immigration court did not mince words when terminating the deportation case of a Salvadoran asylum-seeker placed into the Department of Homeland Security's "Remain in Mexico" program.



"DHS has acted without good faith in subjecting respondent[s] who were encountered at the United States to the program," O'Connor wrote in September. "DHS cannot neglect to follow the law and then subject respondents to a procedure which it could not have pursued if it had followed the law."

But outside of O'Connor's courtroom and a few others in Southern California, that appears to be exactly what's happening. The DHS is placing immigrants who were not arrested at the border—some of whom have spent considerable time inside the United States—into the Remain in Mexico program. That's even though the law DHS says authorizes the program requires the immigrant be "arriving on land."



Immigration and Customs Enforcement referred questions about misclassifying immigrants to its parent agency, DHS, which did not respond to requests for comment. But O'Connor's decision and lawyers for immigrants say the government is manufacturing the facts r

to define people arrested in the interior U.S. as “arriving.” Once the government arrests them, it sends them to Mexico to await hearings in the United States. When they cross the border for those hearings, the argument goes, they become “arriving aliens.”

“It’s a circular argument that the government is making,” says San Diego immigration attorney Bashir Ghazialam. “What led them to go to the border and become ‘arriving aliens’ was that they were illegally returned to Mexico.”

“Remain in Mexico,” officially known as the “Migrant Protection Protocols” or MPP, was announced in late 2018 as a program for asylum-seekers at the border. The program’s implementation memo says it relies on Section 235(b)(2)(C) of the Immigration and Nationality Act, which allows the attorney general to return an applicant for admission if the applicant is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States.”

But “arriving alien” has a legal definition, attorneys say, and people arrested within the United States for not having papers don’t generally meet it. Rather, they are typically “aliens present without admission.” The distinction matters; “arriving aliens” have access to fewer forms of relief in immigration law than “aliens present without admission.” Most crucially, “arriving aliens” are not eligible for a hearing on bond—that is, they have no right to ask a judge to decide whether they should be permitted to pay for their freedom.

* * *

The government has been taking advantage of this crucial difference between “arriving aliens” and “aliens present without admission.” Attorney Patty Ojeda of the American Immigration Association’s Immigrant Justice Project of San Diego says DHS typically argues that these immigrants are not entitled to a bond hearing. She’s been able to convince judges that the “arriving alien” designation was improper for the six clients she’s had in this situation. overall, very few people in MPP are granted bond.

Results have been mixed for attorney Leah Chavarria of the Jewish Family Service of San Diego, which also handles MPP cases. Chavarria says most judges she’s seen will have a bond hearing—but many ultimately agree with the government, denying bond because they don’t have jurisdiction to grant it to an “arriving alien.”

And that’s just in San Diego. University of Texas Law professor Denise Gilman, who represents immigrants directly as the head of her school’s immigration law clinic, says Texas judges

been “completely fine with it.” That’s despite the fact that the government often files charging document saying immigrants are both “arriving aliens” and “aliens present admission,” which—as O’Connor’s ruling points out—are mutually exclusive categories. In other cases, the government reissues documents and changes the designation to “arriving alien” once the immigrant comes to the first hearing.

Even if a judge dismisses these deportations, there’s a big catch: It won’t necessarily mean the government can simply refile the cases, which allows it to send the immigrants to Mexico again. It can also appeal, which permits it to imprison the immigrant until the appeal is decided—a process that typically takes several years.

Ghazialam has clients in both situations. He’s hoping to include some of them in a lawsuit filed by another San Diego immigration lawyer December 12, which they plan to convert to a class action. In *CPG et al. v. Archambeault*, a Guatemalan woman and her minor child were misclassified and put into MPP argue that they are in unlawful detention that violates their statutory and due process rights. An immigration judge terminated their case, but the government nonetheless took them into custody pending an appeal.

“They can be stuck out in Mexico, and be subjected to all kinds of threats and everything until their appeal is still pending,” says Ghazialam, referring to the unchecked violence in Mexico that has led to kidnappings and murders of immigrants awaiting their hearing. “That is how the government succeeds in keeping people out of the country.”

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