

## Migrants Waiting In Mexico Shielded From Asylum Bar

By **Suzanne Monyak**

*Law360 (November 19, 2019, 8:38 PM EST)* -- The Trump administration can't impose asylum restrictions on migrants who passed through a third country if they had presented themselves at the border before the policy took effect but were forced to wait in Mexico, a California federal judge held on Tuesday.

U.S. District Judge Cynthia Bashant said that asylum-seekers who tried to present an asylum claim at a designated port of entry but were told to wait their turn in Mexico — a practice known as “metering” — should not be barred from winning asylum under recent restrictions if they'd already tried to claim asylum at a port before the restrictions were released.

That policy, issued in a July 16 final rule and temporarily greenlit by the U.S. Supreme Court, strips asylum eligibility from people who crossed through a third country en route to the U.S.-Mexico border unless they first sought protection in Mexico or another country.

“The wording of the asylum ban is clear,” Judge Bashant wrote in her preliminary injunction order. “It is only applicable to aliens who enter, attempt to enter, or arrive in the United States after July 16, 2019.”

The judge also accused the federal government of changing positions, by first telling asylum-seekers that waiting in Mexico is the proper way to present their claims and then turning around and trying to strip them of eligibility.

She called it a “a shift that can be considered, at best, misleading, and at worst, duplicitous.”

And because the Mexican government requires asylum-seekers to claim asylum within 30 days of entering the country, applying the asylum ban to people subject to “metering,” who had followed directions from border agents to wait, would strip them of their rights to seek asylum in both countries, the judge said.

Judge Bashant also agreed to provisionally certify a class of non-Mexican asylum-seekers who were prevented from claiming asylum at a port of entry before July 16, when the restrictions took effect, because of the government's metering practice.

Melissa Crow, an attorney with the Southern Poverty Law Center who is representing the asylum-seekers, said in a Tuesday statement that the ruling “is an important one for the thousands of asylum seekers who followed the ‘rules’ and waited their turn, only to be told they were out of luck once the new ban was announced.”

A spokesperson for the U.S. Department of Justice declined to comment.

According to the advocates behind the suit, there were 26,000 asylum-seekers on a waitlist or waiting to be placed on a waitlist in Mexico border towns as of August 2019.

The initial suit was filed in 2017 by asylum-seekers and a legal services nonprofit accusing U.S. Customs and Border Protection of wrongfully turning away asylum-seekers at the border.

In September, the asylum-seekers asked the court to block the U.S. Department of Homeland Security from applying the third-country asylum bar to those asylum-seekers whose arrivals at an entry port predated the policy in September.

The advocates behind the suit, including the SPLC and American Immigration Council, claimed that DHS had tried to “pull the rug out from underneath law-abiding asylum seekers” who were waiting in Mexico to present their asylum claims at ports of entry by now denying them access to the asylum system.

The federal government, however, has pushed back, contending that it would be “impossible to determine who sought to cross the border prior to July 16, and any process to make such a determination will be riddled with fraudulent claims” because CBP does not keep records of who has been subjected to metering.

But Judge Bashant was not moved, saying the government should be able to cross-check names on the waitlist to determine who entered when. She also noted that the government is “ironically” claiming that its metering system — the very system being challenged in this suit — is subject to fraud and can’t be used to identify class members.

“Surely the government can determine, taking into account the delay in processing asylum claims at each POE, which individuals listed arrived before July 16, 2019, the asylum ban’s effective date,” she wrote.

The asylum-seekers are represented by Matthew H. Marmolejo, Ori Lev and Stephen M. Medlock of Mayer Brown LLP, Melissa Crow, Mary Bauer, Sarah Rich and Rebecca Cassler of the Southern Poverty Law Center, Baher Azmy, Ghita Schwarz and Angelo Guisado of the Center for Constitutional Rights and Karolina Walters of the American Immigration Council.

The federal government is represented by Katherine J. Shinnars of the DOJ’s Office of Immigration Litigation.

The case is *Al Otro Lado Inc. et al. v. McAleenan et al.*, case number 3:17-cv-02366, in the U.S. District Court for the Southern District of California.

--Editing by Jack Karp.