UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

WILMER RAMIRO ENRIQUEZ TURCIOS, individually, and on behalf of ELBA GUERRERO ALVARADO, JOSUE ENRIQUEZ, and JOSE ENRIQUEZ, Plaintiffs,	§	
v.	§	Civil Action No. 1:20-cv-00093
CHAD WOLF, ACTING SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY, *et al.*, Defendants.	§	

ORDER

The following pleadings are before the Court: "Plaintiffs' Emergency Motion for Preliminary Injunction" ("MPI") (Docket No. 6), "Defendants' Response to Plaintiffs' Motion for a Mandatory Preliminary Injunction (Docket No. 13), "Defendants' Supplemental Brief" (Docket No. 31) and "Defendants' Surreply" (Docket No. 37). For the following reasons, Plaintiffs' MPI (Docket No. 6) is **GRANTED**.

I. FACTUAL BACKGROUND

Wilmer Ramiro Enriquez Turcios[1] ("Wilmer") sues individually and on behalf of his spouse, Elba Guerrero Alvarado ("Elba"), and their two minor children, Josue Enriquez, and Jose Enriquez ("children") (collectively "Plaintiffs"). Elba and the children departed Honduras to seek asylum in the U.S. Docket No.1, Exhibit 1. Elba and the children entered the U.S. without inspection near McAllen, Texas. Docket No. 13. After being apprehended by U.S. Customs and Border Patrol agents ("CBP agents"), Elba and the children were placed in removal proceedings under 8 U.S.C. § 1229(a) and processed for return to Mexico under the Migrant Protection Protocol ("MPP").[2] *Id.* Elba told CBP agents she feared being sent to Matamoros, Mexico ("Matamoros"),

[1] Wilmer fled Honduras before Elba and the children. Docket No. 1. He applied for asylum prior to the existence of MPP; he currently resides in the U.S.

[2] In January 2019, the U.S. Department of Homeland Security ("DHS") promulgated the MPP without the standard notice-and-comment rulemaking period. The MPP provides that non-Mexican asylum seekers arriving at the U.S. southern border be "returned to Mexico for the duration of their immigration proceedings, rather than either being detained for expedited or regular removal proceedings or issued notices to appear for regular removal proceedings."

because of its high level of crime and requested to remain in the U.S. *Id.* Elba's request was denied, and she and the children were sent to Matamoros to await their next court hearing. *Id.*

Plaintiffs filed a motion for a preliminary injunction seeking to enjoin Elba and the children's placement in the MPP. Docket No. 6. Plaintiffs request to await the adjudication of their asylum claims in the U.S. *Id.*

II. LEGAL STANDARD

"A plaintiff seeking a preliminary injunction must clearly show (1) a substantial likelihood that he will prevail on the merits, (2) a substantial threat that he will suffer irreparable injury if the injunction is not granted, (3) his threatened injury outweighs the threatened harm to the party whom he seeks to enjoin, and (4) granting the preliminary injunction will not disserve the public interest." *See Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 457 (5th Cir. 2017).

III. DISCUSSION

A. Plaintiffs are likely to succeed on the merits.

Plaintiffs challenge the MPP on several grounds. Plaintiffs argue the MPP does not apply to them, because it is inconsistent with Section 235(b) of the Immigration and Nationality Act ("INA") ("8 U.S.C. § 1225(b)"), and for that reason, they should be allowed to await the adjudication of their asylum claims in the U.S.[3] Docket No. 6. The Court agrees.

The essential feature of the MPP is that non-Mexican asylum seekers who arrive at a port of entry along the U.S.'s southern border must be returned to Mexico to await the adjudication of their asylum application. *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1082 (9th Cir. 2020). Asylum seekers (or "applicants") fall into one of two statutory categories, 8 U.S.C. § 1225(b)(1) ("(b)(1)") or § 1225(b)(2) ("(b)(2)"). Section (b)(2) allows applicants to be removed to Mexico while they await their asylum hearing, but (b)(1) does not provide for removal of applicants to Mexico. § 1225(b)(1) *et seq*. That said, the MPP subjects both (b)(1) and (b)(2) applicants to

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Innovation Law Lab v. Wolf, 951 F.3d 1073, 1077 (9th Cir. 2020) (quoting *Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110, 1114 (N.D. Cal. 2019) (quotation marks omitted)).

[3] Because the Court finds the MPP does not apply to Plaintiffs under their INA claims, the Court declines to consider Plaintiffs' other claims. Plaintiffs also allege: (1) their removal to Mexico violates the Government's non-refoulment duties under Art. III of the U.N.H.C.R.; 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 208.16; (2) the MPP was implemented in violation of the Administrative Procedure Act's notice and comment period; (3) the MPP is arbitrary, capricious, and unlawful; (4) the MPP violates Plaintiffs' Fifth Amendment due process rights; and (5) the MPP violates Plaintiffs' Fifth Amendment rights to equal protection under the law. Docket Nos. 1 and 6.

removal to Mexico. In summary, because section (b)(1) does not provide for removal to Mexico, and Plaintiffs are (b)(1) applicants, they were improperly removed to Mexico.

The relevant text of § 1225 states:

8 U.S.C. § 1225 (b)(1)

(b) Inspection of applicants for admission
(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled
(ii) Claims for asylum
If an immigration officer determines that an alien ... is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B).
...
(B) Asylum interviews
...
(ii) Referral of certain aliens
If the [asylum] officer determines at the time of the interview that an alien has a credible fear of persecution ..., the alien shall be detained for further consideration of the application for asylum.

8 U.S.C. § 1225 (b)(2)

(2) Inspection of other aliens
(A) In general
Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.
(B) Exception
Subparagraph (A) shall not apply to an alien —
(i) who is a crewman
(ii) to whom paragraph (1) applies, or
(iii) who is a stowaway.
(C) Treatment of aliens arriving from contiguous territory
In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

i. The Supreme Court found sections (b)(1) and (b)(2) distinct.

The Supreme Court distinguished (b)(1) and (b)(2) applicants, finding they fall into two separate categories:

> [A]pplicants for admission fall into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2). Section 1225(b)(1) applies to aliens initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation. ... Section 1225(b)(2) is broader. It serves as a catchall provision that applies to all applicants for admission **not covered by § 1225(b)(1).**

Jennings v. Rodriguez, —— U.S. ——, 138 S. Ct. 830, 837, 200 L.Ed.2d 122 (2018) (emphasis added) (citations omitted). Defendants ("Government") maintain DHS, in its discretion, may apply the procedures specified in (b)(2) to a (b)(1) applicant. Relying on the Supreme Court's language in *Jennings*, this Court holds the relevant statutes are not ambiguous, and further that the Government's position contradicts the statute's text.[4]

ii. Sections (b)(1) and (b)(2) describe two distinct categories of applicants and two distinct procedures for removal.

Under 8 U.S.C. § 1225, there are two distinct categories of alien applicants for admission, (b)(1) applicants and (b)(2) applicants. § 1225(a). Applicants described in (b)(1) can be inadmissible to the U.S. for presenting fraudulent travel documents (§ 1182(a)(6)(C)) or not having travel documents (§ 1182(a)(7)). Applicants described in (b)(2) are in a separate category; they are "other aliens" (§ 1225(b)(2) (heading) "to whom paragraph [(b)](1)" does not apply. § 1225(b)(2)(B)(ii). Applicants under (b)(2) include aliens with "a communicable disease of public health significance" or who are "drug abuser[s] or addict[s]" (§ 1182(a)(1)(A)(i), (iv)); aliens who have "committed ... a crime involving moral turpitude" or who have "violat[ed] ... any law or regulation ... relating to a controlled substance" (§ 1182(a)(2)(A)(i)); aliens who "seek to enter the United States ... to violate any law of the United States relating to espionage or sabotage," or who have "engaged in a terrorist activity" (§ 1182(a)(3)(A), (B)); aliens who are "likely ... to become a public charge" (§ 1182(a)(4)(A)); and aliens who are alien "smugglers" (§ 1182(a)(6)(E)).

Both (b)(1) and (b)(2) applicants are subject to distinct removal proceedings under 8 U.S.C. § 1229a. *See* 8 C.F.R. § 208.30(f). A (b)(2) applicant may be "return[ed]" to a "territory

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[4] The Government also relies on a recent decision where the BIA found, "for aliens who are eligible for expedited removal under § 1225(b)(1), DHS retains discretion to place them in expedited removal or full removal proceedings." *Matter of M-D-C-V-*, 28 I. & N. Dec. at 22. n.6 (citing *Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 523 (BIA 2011)). The Government alleges this Court is bound by the BIA's decision through *Chevron* deference. Docket No. 31. Yet in the Fifth Circuit, BIA decisions are entitled to *Chevron* deference only when the decision is interpreting an ambiguous statute. *Rodriguez-Avalos v. Holder*, 788 F.3d 444, 449 (5th Cir. 2015). This Court will not afford *Chevron* deference to a statute that is not ambiguous.

contiguous to the United States" pending their regular removal proceeding. *See* § 1225(b)(2)(C). The Court notes there is no comparable "return" procedure specified in (b)(1). The statutory question posed by the MPP is whether a (b)(1) applicant may be "returned" to a contiguous territory under (b)(2)(C). *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1084 (9th Cir. 2020). A plain reading of the statute confirms a (b)(1) applicant should not be "returned" outside the U.S.

Section (b)(1) contains no language that a (b)(1) applicant is subject to the "return" procedure set forth in (b)(2)(C). Likewise, Section (b)(2) contains no language addressing a (b)(1) applicant's "return" under § 1225(b)(2)(C). Section (b)(1) applicants are mentioned only once in (b)(2), in subparagraph (B)(ii); that subparagraph specifies that subparagraph (A)—which automatically entitles (b)(2) applicants to removal proceedings—does not apply to (b)(1) applicants. The return-to-a-contiguous-territory provision of (b)(2)(C) is thus available for only (b)(2) applicants. Being an applicant in removal proceedings *does not change the applicant's underlying category*. *Innovation Law Lab*, 951 F.3d 1073, 1084 (emphasis added). The statute's language does not explicitly provide for nor does its construction suggest a (b)(1) applicant becomes a (b)(2) applicant, or vice versa, by being placed in removal proceedings. *Id.*

iii. Plaintiffs' claims are not barred by the Administrative Procedure Act ("APA").

The Government also contends Plaintiffs' claims are barred by the APA because Plaintiffs are challenging a discretionary decision by DHS (to return Plaintiffs to Mexico for the rest of their removal proceedings), and therefore the challenge is not reviewable. *See* Docket No. 31 at 7-9. The Government relies on 8 U.S.C. § 1252(a)(2)(B)(ii), which provides a reviewing court cannot review any discretionary decision taken by an agency. *Id.* at 8-9.

That said, an APA claim challenging the expansion and implementation of the MPP to individuals is reviewable by the district courts. *See Nora v. Wolf*, 2020 WL 3469670, at *7 (D.D.C., 2020) (citing to *Safari Club Int'l v. Jewell*, 842 F.3d 1280, 1287 (D.C. Cir. 2016) (differentiating between a discrete agency action and the broader ongoing policy underlying that action); *Cruz v. Dep't of Homeland Sec.*, 2019 WL 8139805, at *3 (D.D.C., 2019) (finding that "the Court has jurisdiction to consider this claim because it concerns the legality of the [MPP] program itself rather than the substance of the Attorney General's discretionary choices," and the Court also has jurisdiction over plaintiffs' due process and equal protection claims); *Innovation Law Lab v. Nielsen*, 366 F.Supp.3d 1110, 1118 (N.D. Cal., 2019) (finding that the threshold question of whether applying the MPP violates the APA is justiciable and 8 U.S.C. § 1252(a) does not bar judicial

review). For these reasons, the Government's claim that § 1252(a)(2)(B)(ii) precludes judicial review is erroneous. Thus, Plaintiffs have satisfied the first element required for an injunction.

B. Plaintiffs will be irreparably harmed if an injunction is not granted.

Plaintiffs will be irreparably harmed if an injunction is not granted. The family is separated. Wilmer, the father, awaits adjudication in the U.S. Elba and the children are in Matamoros, Tamaulipas, Mexico. The U.S. Department of State ("DOS") issued a Level 4 travel warning for the state of Tamaulipas.[5] DOS warns armed criminal groups patrol Tamaulipas, often acting illegally without repercussions from law enforcement. *Id.* The criminal activity includes gun battles, murder, armed robbery, carjacking, kidnapping, forced disappearances, extortion, and sexual assault.[6] U.S. government employees are instructed to travel to Tamaulipas only in the limited areas between the U.S. consulates and ports of entry.[7] In addition, U.S. government employees are forbidden from using freeways to travel between cities in Tamaulipas.

Plaintiffs allege the following: Elba and the children are living in a shelter in Matamoros. Docket No. 6. Drug cartel members fired weapons near the shelter, which prompted Mexican national police to intervene, causing a shootout. *Id.* Elba and her children also live in unsanitary conditions hazardous to their health. The shelter houses 150 adults and children. *Id.* There is one restroom, which males and females share, and the facility is crowded, making it impossible to practice safe social distancing during the ongoing coronavirus ("COVID-19") pandemic. *Id.* There are no tests for COVID-19 available, and no one at the shelter is being provided with gloves or masks to prevent spreading the disease. *Id.* The shelter is infested with rats. *Id.* Besides being separated from Wilmer, Elba and the children are at risk of becoming seriously ill or being injured by Cartel violence. Plaintiffs have satisfied the second element required for an injunction.

C. The balance of equities weighs in favor of Plaintiffs.

Balancing equities involves determining whether the "substantial injury [to Plaintiffs] outweighs the threatened harm to the party whom [the Plaintiffs] seek to enjoin…" *See Tex. Med.*

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[5] U.S. Department of State – Department of Consular Affairs, https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html#:~:text=Tamaulipas%20state%20%E2%80%93%20Do%20Not%20Travel&text=Organized%20crime%20activity%20%E2%80%93%20including%20gun,border%20and%20in%20Ciudad%20Victoria. The Level 4 designation has been given to countries such as Syria and Afghanistan. (*See* https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/afghanistanadvisory. html).

[6] OSAC, *Mexico 2019 Crime and Safety Report: Matamoros* (Apr. 2, 2019), https://www.osac.gov/Content/Report/03b73ba8-0cd3-4772-bc97-15f4aebfc985.

[7] Department of State, *Mexico Travel Advisory* (Dec. 17, 2019), travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html.

Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 574 (5th Cir. 2012) (brackets and citations omitted).

The Government will not be harmed by allowing Elba and the children to join Wilmer and enter the U.S. for the pendency of their asylum claim adjudications. Plaintiffs are not a threat to national security. Because, the equities weigh in favor of Plaintiffs, they have satisfied the third element required for an injunction.

D. The public interest weighs in favor of granting an injunction.

The public interest is served when the U.S. immigration law is applied properly (as explained above) and when families await their asylum adjudication together. There is no consistent rationale why Elba and the children cannot join Wilmer in the U.S. Plaintiffs thus meet the fourth and final prong for injunctive relief.

IV. CONCLUSION

Because all four elements of the preliminary injunction were met, Plaintiffs' MPI (Docket No. 6) is **GRANTED**. The Court holds Plaintiffs are (b)(1) applicants and not subject to the MPP. Thus, Plaintiffs may await the adjudication of their asylum claims in the U.S.

Signed on this 16th day of October, 2020.

Rolando Olvera
United States District Judge