

## **Guidance from EOIR Office of General Counsel, sent Friday, November 22, 2019**

On November 19, 2019, the District Court for the Southern District of California issued the attached order in *Al Otro Lado, Inc. v. McAleenan*, certifying a class of “all non-Mexican asylum-seekers who were unable to make a direct asylum claim at a U.S. POE before July 16, 2019 because of the Government’s metering policy, and who continue to seek access to the U.S. asylum process,” Order at pg. 21, and enjoined application of the Asylum Eligibility and Procedural Modifications Rule (“Rule”) to the class.

OGC has discussed with litigators at OIL the impact of this decision on EOIR. We are in agreement with OIL that while EOIR is not a party to this litigation, EOIR should conform its actions to comply with the order and thus should not apply the Rule to these class members because (1) the Court’s Order finds that any individual who was subject to metering on or before July 16, 2019, made an attempt to enter the United States before the Rule was effective and thus the Rule does not apply to them, and (2) under FRCP 65(d)(2), the order arguably binds EOIR as a participant with DHS in determining asylum eligibility for class members in credible fear review and removal proceedings.

Metering, as alleged by the Plaintiffs, is a DHS practice by which asylum seekers were instructed to wait in Mexico to be processed because the POE was full or at capacity. Individuals were allegedly advised that the POE was unable to accept them for processing at that time. These individuals often then registered on informal waitlists after presenting at a POE in order to be processed at the POE. These waitlists are not maintained by DHS. OGC has been advised that, where these waitlists were maintained, the waitlists were administered differently at each POE by different non-U.S. government entities, such as non-governmental organizations or local or federal Mexican Government entities. There are also allegations that individuals may have been prevented from registering on the lists due to corruption and discrimination by the entities managing the lists. As such, a definitive class list cannot be produced at this time.

Pursuant to the Court’s Order, “individuals could be required to submit proof (either by list or declaration) that he or she is a member of the class in order to get the relief sought.” Order at pg. 28. As such, where the individual may be an *Al Otro Lado* class member, the adjudicator should determine whether the individual approached a POE at the southern border, before July 16, 2019, to seek asylum but was not processed because of DHS’ metering policy. The burden remains on the alien to establish eligibility for asylum.

Please expect additional guidance as the process for identification of the class and implementation of the order develops. In the meantime, please feel free to contact either myself or <redacted name> if you have any questions.