September 3, 2021 (temporary update) - This Policy Memorandum may be affected by the recent decision in Texas, et. al v. Biden, et. al, 21-cv-067-Z (NDTX). Please seek clarification regarding relevant points before application to a particular case.

OOD
PM 21-26

Effective: June 24, 2021

To: All Immigration Court and Board of Immigration Appeals Personnel
From: Jean King, Acting Director
Date: June 24, 2021

JEAN KING Digitally signed by JEAN KING Date: 2021.06.24 10:09:54 -04'00'

MIGRANT PROTECTION PROTOCOLS AND MOTIONS TO REOPEN

PURPOSE:	Provides information regarding the adjudication of motions to reopen in Migrant Protection Protocols cases
OWNER:	Office of the Director
AUTHORITY:	8 C.F.R. § 1003.0(b)
CANCELLATION:	None.

I. Former Migrant Protection Protocols

In January 2019, the Department of Homeland Security (DHS) implemented the Migrant Protection Protocols (MPP), which required certain individuals to wait in Mexico while awaiting adjudication by the Executive Office for Immigration Review (EOIR). *See* INA § 235(b)(2)(C) (authorizing the return of certain noncitizens to a contiguous territory pending removal proceedings under INA § 240); U.S. Dep't of Homeland Security, Migrant Protection Protocols (Jan. 24, 2019), https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols; *see also Matter of J.J. Rodriguez*, 27 I&N Dec. 762, 763–64 (BIA 2020) (describing the MPP). Since the MPP's implementation, there have been concerns over whether the protocols are consistent with the fair and efficient adjudication of immigration cases. *See, e.g.*, Exec. Order No. 14010, 86 Fed. Reg. 8267 (Feb. 2, 2021) (ordering DHS to promptly review and determine whether to terminate or modify the MPP and to consider a phased strategy for the safe and orderly entry into the United States of those individuals who have been subjected to MPP for further processing of their asylum claims).

Effective January 21, 2021, DHS suspended new enrollments in the MPP program. U.S. Dep't of Homeland Security, *DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program* (Jan. 20, 2021), https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program. DHS subsequently announced a plan to process into the United States certain individuals who had been returned to Mexico under the MPP and who have pending cases before EOIR. *See* U.S. Dep't of Homeland Security, *DHS Announces Process to Address Individuals in Mexico with Active MPP Cases* (Feb. 11, 2021), https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp-cases.

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On June 1, 2021, the DHS Secretary issued a memorandum terminating the MPP. *See* Memorandum from Alejandro N. Mayorkas, Secretary, DHS, to Troy A. Miller, Acting Commissioner, U.S. Customs and Border Protection, et al., *Termination of the Migrant Protection Protocols Program* (June 1, 2021) (Termination Memorandum), https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf. Secretary Mayorkas wrote, "MPP had mixed effectiveness in achieving several of its central goals and [] experienced significant challenges." *Id.* at 3. He further noted, "[A]ny benefits of maintaining or now modifying MPP are far outweighed by the benefits of terminating the program. Furthermore, termination is most consistent with the Administration's broader policy objectives and the [DHS's] operational needs." *Id.* at 6.

II. Motions to Reopen

Many respondents placed in the MPP for their removal proceedings were ultimately ordered removed *in absentia*. *See* INA § 240(b)(5)(A) (setting out the consequences for failure to appear for a scheduled removal hearing); *see also Matter of J.J. Rodriguez*, 27 I&N Dec. at 762 (instructing immigration judges on when the to enter *in absentia* removal orders for noncitizens in the MPP). Orders of removal *in absentia* were relatively common in MPP cases due to circumstances, some of which may have been outside of an individual respondent's control, that resulted in the respondents failing to appear at designated ports of entry to be transported to their hearings. In his memorandum terminating the MPP, Secretary Mayorkas wrote, "The focus on speed was not always matched with sufficient efforts to ensure that conditions in Mexico enabled migrants to attend their immigration proceedings." Termination Memorandum, at 4.

Many respondents placed in the MPP who were ordered removed by an immigration judge have filed motions to reopen their cases, and many of these motions have been filed jointly with the DHS. *See* INA 240(c)(7) (setting out the allowances for motions to reopen in removal proceedings); 8 C.F.R. § 1003.23 (same). EOIR anticipates that more such motions will be filed over time.[1]

When adjudicating motions to reopen filed by respondents who were in the MPP, immigration judges and appellate immigration judges must decide each case based on the facts presented in that case. The adjudicator, however, should be aware of the concerns the DHS Secretary expressed about the MPP and the following well-established principles that apply generally to the adjudication of motions to reopen.

First, immigration judges and the Board of Immigration Appeals (BIA) are authorized to reopen cases in a wide variety of circumstances, including circumstances presenting fairness concerns. *See generally* 8 C.F.R. §§ 1003.2, 1003.23; *Matter of Yewondwosen*, 21 I&N Dec. 1025, 1027 (BIA 1997) (stating that the "Board has the ability to reopen or remand proceedings when appropriate, such as for good cause, fairness, or reasons of administrative economy"). Although there is a "strong public interest in bringing litigation to a close . . . promptly," immigration judges

[1] Although motions to reopen following an in absentia order of removal are particularly common for respondents who were in the MPP, such respondents may file motions to reopen for a wide range of reasons in the same manner as all respondents in removal proceedings under INA § 240.

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and the BIA must also take into account whether the parties were provided, "a fair opportunity to develop and present their respective cases." *See INS v. Abudu*, 485 U.S. 94, 107 (1988).

Further, where a respondent and the DHS jointly file a motion to reopen, the parties' agreement should generally be honored and the motion granted, even if the motion is time-barred or number-barred. *See* 8 C.F.R. § 1003.23(b)(4)(iv) (stating that "[t]he time and numerical limitations [for motions to reopen] shall not apply to a motion to reopen agreed upon by both parties and jointly filed"); *Matter of Yewondwosen*, 21 I&N Dec. at 1026 (stating the parties' "agreement on an issue or proper course of action should, in most instances, be determinative").

Finally, immigration judges and the BIA have the authority to reopen cases *sua sponte*. *See* 8 C.F.R. §§ 1003.2(a), 1003.23(b)(1) (2020).[2] However, *sua sponte* reopening is appropriate only in cases presenting "truly exceptional situations." *Matter of G-D-*, 22 I&N Dec. 1132, 1134 (BIA 1999).

Nothing in this memorandum replaces the independent judgment and discretion of appellate immigration judges and immigration judges. 8 C.F.R. §§ 1003.1(d)(1)(ii), 1003.10(b). Further, this memorandum does not mandate a particular outcome in any particular case or determination as part of a case.

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[2] The final rule that limited this sua sponte authority has been enjoined and is not in effect. *See Centro De La Raza v. EOIR*, 21-cv-463 (N.D. Cal.); *Cath. Legal Immigr. Network, Inc. v. EOIR*, 21-cv-94 (D. D.C.).

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