UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
401 WEST A STREET, SUITE #800
SAN DIEGO, CA 92101

Law Offices of Bashir Ghazialam
Ghazialam, Bashir
P.O. Box 928167
San Diego, CA 92192

In the matter of [redacted] DATE: Sep 19, 2019

__ Unable to forward - No address provided.

X Attached is a copy of the decision of the Immigration Judge. This decision is final unless an appeal is filed with the Board of Immigration Appeals within 30 calendar days of the date of the mailing of this written decision. See the enclosed forms and instructions for properly preparing your appeal. Your notice of appeal, attached documents, and fee or fee waiver request must be mailed to: Board of Immigration Appeals
Office of the Clerk
5107 Leesburg Pike, Suite 2000
Falls Church, VA 22041

__ Attached is a copy of the decision of the immigration judge as the result of your Failure to Appear at your scheduled deportation or removal hearing. This decision is final unless a Motion to Reopen is filed in accordance with Section 242b(c)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1252b(c)(3) in deportation proceedings or section 240(b)(5)(C), 8 U.S.C. § 1229a(b)(5)(C) in removal proceedings. If you file a motion to reopen, your motion must be filed with this court:
IMMIGRATION COURT
401 WEST A STREET, SUITE #800
SAN DIEGO, CA 92101

__ Attached is a copy of the decision of the immigration judge relating to a Reasonable Fear Review. This is a final order. Pursuant to 8 C.F.R. § 1208.31(g)(1), no administrative appeal is available. However, you may file a petition for review within 30 days with the appropriate Circuit Court of Appeals to appeal this decision pursuant to 8 U.S.C. § 1252; INA §242.

__ Attached is a copy of the decision of the immigration judge relating to a Credible Fear Review. This is a final order. No appeal is available.

X Other: METHOD OF SERVICE: THE DECISION OF THE IMMIGRATION JUDGE WAS UPLOADED TO THE ELECTRONIC RECORD OF PROCEEDINGS (EROP).

J. GAHAN
COURT CLERK
IMMIGRATION COURT FF

cc: MUBARAKI, MONICA, ASSISTANT CHIEF COUNSEL
880 FRONT STREET, ROOM #2246
SAN DIEGO, CA, 921010000

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SAN DIEGO, CALIFORNIA

File No. [redacted]

Date: September 17, 2019

IN REMOVAL PROCEEDINGS

IN THE MATTER OF

[redacted]

Respondents.

CHARGE(S): Section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act – Immigrant not in possession of a valid immigrant visa or equivalent document.

ON BEHALF OF RESPONDENT:
Bashir Ghazaialam
Attorney at Law
Law Offices of Bashir Ghazaialam
P.O. Box 928167
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ON BEHALF OF DHS:
Monica Mubaraki
Assistant Chief Counsel
Department of Homeland Security
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DECISION OF THE IMMIGRATION JUDGE

I.
INTRODUCTION AND PROCEDURAL SUMMARY

Respondent, [redacted] (respondent), is a 34-year old female, native and citizen of Honduras. Respondents [redacted] and [redacted] (the minor respondents), are her minor child. On May 10, 2019, the United States Department of Homeland Security (DHS) issued Notices to Appear (NTAs) commencing removal proceedings against respondents under section 240 of the Immigration and Nationality Act (INA). The NTAs were served on respondents by personal delivery on May 10, 2019. The evidence shows, and DHS concedes, that respondents were apprehended by DHS within the United States. However, after apprehending respondents inside the United States, DHS returned them to Mexico to await their removal proceedings in Mexico, allegedly under authority of INA § 235(b)(2)(C) (hereinafter the MPP program). DHS filed the NTAs with the immigration court in San Diego.

The NTAs in this case did not initially allege whether respondents were (1) an arriving alien, (2) aliens present in the United States without admission, or (3) aliens who have been admitted but are removable for specified reasons. Instead, at the hearing on July 30, 2019, DHS filed Form I-261, Additional Charges of Inadmissibility/Deportability, alleging that respondents were arriving aliens. However, DHS also inconsistently alleged that on about May 9, 2019, respondents illegally entered the United States near Otay Mesa, California and were not then admitted or paroled after inspection by an immigration officer. As discussed below, respondents cannot be both arriving aliens and aliens present without admission or parole. These are mutually exclusive categories.

Respondents appeared for a hearing on September 9, 2019, with counsel and were granted a continuance for attorney preparation. The court reset the case to September 17, 2019. Respondents moved to terminate removal proceedings on the ground that they are not arriving aliens and were therefore not properly subjected to the MPP program. The court concludes that DHS has not proven its fundamental allegation that respondents are arriving aliens and that DHS has not acted properly in subjecting aliens who were apprehended *within the United States* to the MPP program. Indeed, the *vast majority* of respondents subjected to the MPP program involve cases where DHS has compelled – without authorization of law – aliens who were present within the United States and were not arriving aliens to return to Mexico to await their removal proceeding. It appears that over 90 percent of the MPP cases involve aliens were not properly subject to INA § 235(b)(2)(C). The court finds that termination is the appropriate action.

II.
DISCUSION

A. Only *Arriving Aliens* May be Required to Await Removal Proceedings in Mexico.

The statute provides that only aliens who are *arriving* in the United States from a foreign contiguous country may be returned to that country pending removal proceedings. INA § 235(b)(2)(C) ("In the case of an alien . . . *who is arriving* on land . . . from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 240.") (emphasis added). Thus, the question becomes whether an alien who is present without admission may be treated as an arriving alien and, if so, under what circumstances. The text of section 235(b)(2)(C) illustrates that Congress may have believed that an alien may be considered to be "arriving" in the United States even though the alien does not present himself or herself for inspection at a designated port of entry. This may be inferred from the parenthetical in section 235(b)(2)(C) which indicates that an alien could be required to wait in a foreign contiguous country regardless of whether or not the alien was encountered "at a designated port of arrival." INA § 235(b)(2)(C).

Prior to the current 1996 version of the INA, the BIA employed a highly fact specific approach for determining when an alien who was present in the United States could be subjected to exclusion proceedings (i.e., the equivalent of an "arriving alien"). However, under the current version of the INA, the Attorney General has defined the term "arriving alien" narrowly by regulation. The regulations define an "arriving alien" as follows:

> The term *arriving alien* means an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport.

8 C.F.R. § 1001.1(q) (emphasis in original). DHS has adopted a similar definition. 8 C.F.R. § 1.2. Thus, the regulations provide for a bright line test for determining whether a person is an arriving alien, rather than a highly fact-specific approach. *Compare Matter of Pierre*, 14 I. & N. Dec. 467 (BIA 1973) (setting out situations whereby an alien who was present in the United States could be subjected to exclusion proceedings); *see also Matter of Phelisna*, 18 I. & N. Dec. 272 (BIA 1982); *Matter of Z-*, 20 I. & N. Dec. 707 (BIA 1993); *United States v. Martin-Plascencia*, 532 F.2d 1316 (9th Cir. 1976). Under the current definition, an alien present in the United States without admission is not an arriving alien since the alien did not attempt to come into the United States at a port-of-entry.

The regulations implementing INA § 235(b)(2)(C) also make clear that only *arriving aliens* may be required to await their removal proceeding in Mexico. The regulations provide, "In its discretion, the Service may require any alien who appears inadmissible *and who arrives at a land border port-of-entry* from Canada or Mexico, to remain in that country while awaiting a removal hearing." 8 C.F.R. § 235.3(d) (emphasis added); *see also* 8 C.F.R. § 1235.3(d). Thus, the regulations implementing section 235(b)(2)(C) further show that only arriving aliens at a port-of-entry may be subjected to the MPP program.

B. Aliens Who Entered the U.S. Illegally or Who are Present Without Admission or Parole are not *Arriving Aliens*.

An analysis of other provisions of law also illustrates that aliens present without admission are not arriving aliens, and therefore may not be subjected to the MPP program. The law treats aliens who are present in the United States without admission as distinct from arriving aliens. Aliens seeking admission consist of two groups: (1) aliens present without admission and (2) arriving aliens. *See* INA § 235(a)(1) (indicating that applicants for admission constitute aliens who have not been admitted *and* aliens who arrive in the United States). This clearly shows that Congress distinguished between aliens present without admission and "arriving aliens." All arriving aliens are applicants for admission, but not all applicants for admission are arriving aliens. Applicants for admission also include aliens present without inspection. While any alien who has not been "admitted" to the United States is subject to the grounds of inadmissibility under INA § 212, they are not *arriving aliens* since they were apprehended within the United States after entering illegally. An "arriving alien" is similar to an alien who was previously subject to exclusion proceedings.

In this case, DHS did not submit evidence to meet its burden of proving that that respondents presented themselves at a port-of-entry and sought admission to the U.S. when they were encountered by DHS. To the contrary, the evidence shows that respondents entered the United States without being admitted and were detained by DHS *within the United States*. The

government then required the respondents to return to Mexico to await their removal proceedings in Mexico, allegedly under authority of INA § 235(b)(2)(C). Indeed, DHS alleged that respondent entered the United States illegally and was present in the United States without admission after inspection by an immigration officer. The evidence further shows that DHS determined to subject respondent to the MPP program *before* they were returned to Mexico without authorization. *See* Form I-213. Proceedings under INA § 235(b)(2)(C) were improperly commenced by DHS because respondents were improperly required to return to Mexico. Respondents were not arriving aliens, and therefore not subject to the MPP program.

DHS has not pointed to authority which would allow it to simply return to Mexico aliens who were present in the United States without admission and subject them to the MPP program. DHS may return *arriving aliens* to Mexico pending their removal hearing. INA § 235(b)(2)(C). DHS may detain aliens who are present without admission pending removal proceedings. It may subject aliens who are present without admission who recently entered the United States to expedited removal. It may reinstate a removal order against an alien who was previously removed and returns to the U.S. illegally. It may offer voluntary departure to aliens who are present without admission. But there is no statutory authority which allows DHS agents simply to return to Mexico a person who is present in the United States without admission absent an order from an immigration judge or one of the above provisions being applicable. There is no statutory authority which permits DHS agents to return a person who is present in the U.S. without admission to Mexico to await removal proceedings in Mexico. According to the plain language of the statute and regulations, *the MPP program may only be employed against arriving aliens*, not aliens who are present without admission.

C. Termination of Removal Proceedings is Appropriate when DHS Improperly Returns non-Arriving Aliens to Mexico Because the Government's Violation of Law Substantially Prejudices the Aliens' Rights are Protected by Law.

The court finds that DHS has not acted properly in this case by subjecting respondents to the MPP program since they were apprehended within the United States after having illegally entered the country. The court finds that termination is the appropriate remedy. The case has been fundamentally flawed by DHS' treatment of respondents as arriving aliens. The court has no authority to remedy the fact that respondents have been improperly subjected to the MPP program by means other than termination. The court cannot order DHS to bring the respondents back to the United States and restore them to the status they had prior to their improper return to Mexico, particularly since DHS did not even bother to secure an adequate address from respondents.[1] It is DHS' role to decide how to charge aliens it believes are removable. It is the

[1] DHS did not provide an actual address for respondents. The address provided by DHS in this case, and in virtually all MPP cases, merely lists the respondents' address as *domicilio conocido*, Tijuana, Baja California, Mexico or *domicilio conocido*, Mexicali, Baja California, Mexico. This is the only "address" obtained by DHS in the vastly overwhelming majority of MPP cases. The address is completely inadequate. The term *domicilio conocido* translates as "known domicile." It is used as a mailing address where the recipient lives in a small village where the postal worker also knows where everyone lives. However, in cities the size of Tijuana and Mexicali there is no reasonable possibility that correspondence sent to respondents at *domicilio conocido* will actually be received by respondents, particularly since respondents are not Mexican and have no prior residence in Mexico.

court's role to determine whether the charges are proper. If the charges are not proper, the remedy is termination.

Moreover, respondents would be deprived of significant rights if the proceedings went forward and respondents were treated as arriving aliens. Although litigants in removal proceedings have not typically focused on the initial section of the NTA which alleges whether the respondent is (1) an arriving alien, (2) an alien present without admission or (3) an alien who has been admitted but is removable, as with exclusion proceedings of old, these distinctions lead to greatly different rights for respondents and are critical to the outcome of the case. The law distinguishes between aliens present without admission and arriving aliens in many respects. As noted, arriving aliens may be subjected to INA § 235(b)(2)(C) and be required to await removal proceedings in the foreign contiguous territory. While this program is entirely legal *when applied correctly to arriving aliens*, it imposes significant hardships on the aliens and certainly prejudices in numerous ways the rights of aliens who were present without admission, such as the ability to find an attorney willing to represent them and the ability to obtain evidence in support of their claims.

The law makes other important distinctions between aliens who are present without admission and aliens who are "arriving" in the United States. Under the pre-1997 system of exclusion and deportation proceedings, aliens subject to exclusion proceedings were entitled to much fewer rights than aliens subject to deportation proceedings. While the distinction between deportation and exclusion proceedings has been eliminated and both types of cases have been wrapped into removal proceedings, the law continues to provide aliens previously subject to exclusion proceedings, i.e., arriving aliens, with fewer rights than aliens who are present without admission. As noted, arriving aliens are similar to aliens formerly subject to exclusion proceedings.[2] Aliens present without admission are similar to aliens who were subject to prior deportation proceedings.[3]

As discussed, arriving aliens are generally subject to greater obstacles than aliens who are present without admission. For example, an arriving alien faces the burden of proving that he or she "is clearly and beyond doubt entitled to be admitted." INA § 240(c)(2)(A). On the other hand, an alien who is present without admission faces a lesser of standard of proof. *See* INA § 240(c)(2)(B). Also, arriving aliens are not entitled to a bond hearing before an immigration judge. *See* 8 C.F.R. §§ 1003.19(h)(2)(i)(B) and 1236.1(c)(11).

Another difference is that an arriving alien may not seek adjustment of status unless the alien has been paroled, and then only with U.S. Citizenship and Immigration Services (USCIS)

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[2] The standard has changed slightly from whether the alien "entered" the United States to whether the alien is at a port of entry seeking to come into the United States.

[3] Again, the standard has changed slightly from whether the alien "entered" the United States to whether the alien was admitted to the United States following inspection. The primary difference is that previously aliens who entered without inspection were subject to the grounds of deportation whereas under the current scheme aliens who are present without admission are subject to the grounds of inadmissibility.

and not an immigration judge.[4] Also, arriving aliens are not eligible for voluntary departure. They are subject to an order of removal unless DHS agrees to allow withdrawal of the application for admission or unless they are able to meet the high requirements for the immigration judge to allow withdrawal of the application for admission over DHS' objection. *See* 8 C.F.R. § 1240.1(d); *Matter of Gutierrez*, 19 I. & N. Dec. 562 (BIA 1988). On the other hand, aliens present without admission would at least be able to seek voluntary departure prior to the conclusion of removal proceedings and thereby avoid a removal order, which could prejudice their ability to obtain permanent residence in the future. *See* INA § 212(a)(9)(A)(i).

The law also subjects "arriving aliens" who are removed to different periods of inadmissibility than aliens who have been removed for other reasons. *Compare* INA § 212(a)(9)(A)(i) (inadmissibility for arriving aliens previously removed) *with* (ii) (inadmissibility for other aliens ordered removed).

Similarly, in this case, one of the respondents is a minor child. By returning respondents to Mexico, DHS has prevented the minor child from potentially seeking Special Immigrant Juvenile status. If the minor respondent had not been sent outside the United States without authorization, and if the facts justified, the child potentially could seek appropriate findings and orders which are foundational for seeking Special Immigrant Juvenile status from a state court in the United States. However, by returning the minor child and the child's potential guardian parent to Mexico without authorization, DHS deprived a state court in the United States of jurisdiction over the child and thus precluded a Special Immigrant Juvenile petition. Again, improperly subjecting respondents to the MPP program could deprive them of substantial rights which would be available if respondent had not been returned to Mexico without authority.

The court finds that termination is the appropriate remedy in these cases given that respondents are not "arriving aliens." As discussed, the statutory scheme clearly shows that Congress intended to provide aliens present in the United States without admission with significant additional rights and benefits over "arriving aliens," just as it provided aliens who have been admitted with significant additional rights and benefits over aliens who are present without admission. The court finds that by improperly treating respondents as arriving aliens and subjecting them to the MPP program, DHS has not just prejudiced the rights and benefits they enjoy as an aliens present without admission, but in fact deprived respondents of those rights and benefits. Termination is the appropriate action. *See Matter of Hernandez*, 21 I. & N. Dec. 224, 226 (BIA 1996) (A violation of a regulatory requirement invalidates a proceeding when the regulation provided a benefit to the respondent, and the violation prejudiced the respondent's interest which was to be protected by that regulation.).

DHS contends that respondents are arriving aliens because after they were unlawfully returned to Mexico, they subsequently presented themselves at the border on the day of their

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[4] Indeed, Cubans who enter the United States without inspection and are improperly returned to Mexico will be prevented from obtaining eligibility for adjustment of status under the Cuban Adjustment Act since the unauthorized application of the MPP program to them will preclude them from establishing one year of presence in the United States. This court alone has seen several Cubans who have been improperly subjected to the MPP program after being apprehended *within the United States*. While respondents in this case are not alleged to be Cubans, the fact that section 235(b)(2)(C) is being applied to Cubans underscores the serious prejudice which can result from its unauthorized application.

initial master calendar hearing and were paroled into the country for the hearing. This argument is disingenuous. The evidence shows that DHS decided to subject respondents to the MPP program when they were apprehended within the United States, before they were returned to Mexico. They were manifestly not arriving aliens at that time. In fact, DHS was well aware that respondents were not arriving aliens at the time. This is demonstrated by the fact that DHS did not check any of the initial boxes in the NTA alleging whether the alien is (1) arriving in the United States; (2) present without admission, or (3) admitted but subject to removal for specified reasons. This shows that DHS was well aware that respondents could not be alleged to be arriving aliens but decided to send them to Mexico so that it could later cynically allege that they were arriving aliens when they presented themselves at the port of entry for their removal hearing. This shows that DHS has acted without good faith in subjecting respondent who were encountered inside the United States to the MPP program.

Respondents were not given a choice about whether they were to be returned to Mexico extrajudicially and without any legal authorization. If the court were not able to take appropriate action to terminate this case, DHS officials would be free to improperly remove an alien from the U.S. without legal authority and subject the alien to inappropriate and prejudicial procedures notwithstanding the existence of clear statutory and regulatory standards governing when an alien may be required to await removal proceedings in Mexico. In other words, 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. We are a country governed by Law. While there may be significant abuse of the immigration system by aliens, the government cannot counter that abuse by violating the law itself. If the court were not able to terminate, it would perpetuate the wholescale violations of law occurring in this case. Proceeding with a case in which respondents were improperly and cynically alleged to be arriving aliens could significantly impair their rights on numerous issues which arise in a removal proceeding, such as in terms of their burden of proof, whether they may seek voluntary departure, whether they are eligible for a bond hearing, and the length of time they would be inadmissible if ordered removed.

The court has no authority to dictate to DHS which type of proceedings it may place aliens in. For example, in this case, DHS had the prosecutorial discretion to subject respondent to an expedited removal order. In appropriate cases it has the authority to reinstate a previous order of removal when an alien returns illegally to the United States. It may detain respondents pending removal proceedings or release respondents on bond or recognizance pending removal proceedings. However, DHS cannot subject respondents who were not arriving aliens to the MPP program. If DHS wishes to proceed with such a case regardless of the lack of authority to do so, termination is the appropriate remedy, just as previously termination was the appropriate remedy when the former Immigration and Naturalization Service incorrectly placed an alien in exclusion proceedings.

D. Termination of Removal Proceedings is Appropriate Because DHS has not Sustained its Allegations that Respondents are *Arriving Aliens*.

Also, since respondents are not properly "arriving aliens," the court finds that DHS cannot sustain the charge that they are arriving aliens and thus subject to proceedings under INA § 235(b)(2)(C). In this case, DHS did not initially allege in the NTA whether respondents were

(1) arriving aliens, (2) aliens present in the United States without admission, or (3) aliens who had been admitted but were removable for specified reasons. DHS then lodged additional charges in which it alleged that respondents are arriving aliens. The court finds that DHS has not established that respondents are arriving aliens.

Consistent with the significantly different rights and benefits provided to aliens who are subject to removal proceedings, the first section of the NTA requires DHS to charge the respondent with being either (1) an arriving alien, (2) an alien present in the United States who has not been admitted or paroled, or (3) an alien who has been admitted to the United States, but is removable for the reasons specified. The court finds that this portion of the NTA is an integral aspect of a removal proceeding and that it makes the key allegations against aliens seeking admission (i.e., arriving aliens and aliens present without admission) since the category into which the alien falls leads to significantly different burdens of proof and rights. For example, if an alien is charged with being present without admission, but actually shows that he or she was admitted, DHS cannot sustain a charge based on the alien being present without inspection and must either change the charges against the alien or the proceedings will be terminated.

A review of the NTA as well as the Act also shows that the top portion of the NTA provides the key allegations against aliens seeking admission. The INA only requires that the NTA allege the acts or conduct alleged to be in violation of law. INA § 239(a)(1)(C). A review of the NTA shows that specific factual allegations against an alien are only required when the alien is charged with having been admitted. For these types of cases, the NTA alleges, "You have been admitted to the United States, *but are removable for the reasons stated below*." (Emphasis added.) Thus, the middle portion of the NTA with specific factual allegations only is required for aliens who have been admitted, but are removable under INA § 237.

In cases where the alien has been admitted, the government bears the burden of proof, INA § 240(c)(3), and thus must make specific allegations which show the alien is removable. However, with respect to aliens who are arriving in the United States, or aliens who are present without admission, the check boxes provide sufficient notice to the alien under the requirements of INA § 239 and general rules of federal notice pleading. The charging document in prior exclusion proceedings did not contain any greater specificity. By alleging an individual is an "alien" who is "arriving" in the United States or is an "alien" who is present without admission or parole, DHS has adequately alleged inadmissibility. It has specified the acts or conduct alleged to be in violation of law. An arriving alien then must prove that he or she "is clearly and beyond doubt entitled to be admitted." Thus, once shown that a respondent is an "alien" and is "arriving" in the U.S., the respondent bears the burden of proving that he or she is not subject to the grounds of inadmissibility in INA § 212.

Similarly, an alien who is present without admission must prove that he or she was lawfully admitted. Since the alien bears the burden of showing time, place and manner of entry, again, the government is not required to make specific allegations regarding the date and manner of entry beyond the allegation that the alien is present without admission. The allegation that the respondent is an "alien" who is "present without having been admitted" is sufficient to show the acts or conduct which render the alien inadmissible. The fact that DHS has historically made specific factual allegations against aliens subject to section 212 does not mean that the practice is

legally required. The key allegations of the NTA against aliens seeking admission (i.e., arriving aliens and aliens present without admission), is the top portion with the check boxes. The portion providing for more detailed factual allegations was designed for use against aliens who have been admitted but are subject to the grounds of deportation and is superfluous with respect to aliens seeking admission.

In this case, if DHS wishes to proceed on a theory that the respondents are subject to the MPP program, it must factually prove that they are arriving aliens. It has not done so. In fact, DHS has not submitted any evidence to show that respondents are aliens, much less to show that they arrived at a port-of-entry and sought admission into the United States. Rather, the evidence shows that respondents actually entered the United States before being apprehended by DHS and returned to Mexico extrajudicially. Consequently, the court finds that DHS has failed to establish that respondents are "arriving aliens" and therefore has not sustained the charges against the respondents. The proceedings must be terminated. *See Matter of S-O-G- & F-D-B-*, 27 I. & N. Dec. 462 (Att'y Gen. 2018). If DHS proceeds on an arriving alien charge regardless of the lack of authority to do so, termination is the appropriate remedy, just as termination was the appropriate remedy when the former Immigration and Naturalization Service incorrectly placed an alien in exclusion proceedings. *See, e.g.*, *Matter of Z-*, 20 I. & N. Dec. 707, 714 (BIA 1993) (upholding immigration judge's termination of exclusion proceedings where respondents demonstrated that they had entered the U.S.); *see also Margulis v. Holder*, 725 F.3d 785 (7th Cir. 2013) (finding that removal proceedings must be terminated when the alien in fact was an "arriving alien" but was incorrectly charged with having been admitted).

The court cannot equitably remedy DHS' actions by ordering DHS to allow respondents enter the United States and be placed in the status they held before they were subjected to the MPP program. On the other hand, as noted, if the court proceeded with the case as charged by DHS, significant questions would arise regarding the respondents' rights and burdens. For these reasons, the court finds that DHS inappropriately subjected respondents to the MPP program since they were not arriving aliens and that termination is the appropriate action. However, DHS cannot simultaneously charge respondents with being arriving aliens and aliens present without admission, the court only declines to sustain the charge before it and terminates proceedings without prejudice with respect to other possible charges.

Accordingly, the court will issue the following order.

ORDER

IT IS HEREBY ORDERED that removal proceedings be terminated without prejudice.

DATED: September 17, 2019.

Lee A. O'Connor
Immigration Judge

RE: [redacted]

File: [redacted]

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: ELECTRONIC SERVICE(EROP) (E) PERSONAL SERVICE (P)

TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [E] ALIEN's ATT/REP [E] DHS

DATE: 09/19/2019 BY: COURT STAFF J. GAHAN

Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

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