




**U.S. Immigration  
and Customs  
Enforcement**

February 12, 2019

MEMORANDUM FOR: Executive Associate Directors  
Principal Legal Advisor

FROM: Ronald D. Vitiello   
Deputy Director and  
Senior Official Performing the Duties of the Director

SUBJECT: Implementation of the Migrant Protection Protocols

On January 25, 2019, Secretary Nielsen issued a memorandum entitled *Policy Guidance for Implementation of the Migrant Protection Protocols*, in which she provided guidance for the implementation of the Migrant Protection Protocols (MPP) announced on December 20, 2018, an arrangement between the United States and Mexico to address the migration crisis along our southern border. Pursuant to the Secretary's direction, this memorandum provides guidance to U.S. Immigration and Customs Enforcement (ICE) about its role in the implementation of the MPP.

Section 235(b)(2)(C) of the Immigration and Nationality Act (INA) allows the Department of Homeland Security (DHS), in its discretion, with regard to certain aliens who are "arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, . . . [to] return the alien[s] to that territory pending a proceeding under [INA] section 240." Consistent with the MPP, third-country nationals (i.e., aliens who are not citizens or nationals of Mexico) who are arriving in the United States by land from Mexico may be returned to Mexico pursuant to INA section 235(b)(2)(C) for the duration of their INA section 240 removal proceedings. DHS will not use the INA section 235(b)(2)(C) process in the cases of unaccompanied alien children, aliens placed into the expedited removal (ER) process of INA section 235(b)(1), and other aliens determined, in the exercise of discretion, not to be appropriate for such processing (which may include certain aliens with criminal histories, individuals determined to be of interest to either Mexico or the United States, and lawful permanent residents of the United States).

The direct placement of an alien into INA section 240 removal proceedings (and, in DHS's discretion, returning the alien to Mexico pursuant to INA section 235(b)(2)(C) pending those proceedings) is a separate and distinct process from ER. Processing determinations, including whether to place an alien into ER or INA section 240 proceedings (and, as applicable, to return an alien placed into INA section 240 proceedings to Mexico under INA section 235(b)(2)(C) as

part of MPP), or to apply another processing disposition, will be made by U.S. Customs and Border Protection (CBP), in CBP's enforcement discretion.

MPP implementation began at the San Ysidro port of entry on or about January 28, 2019, and it is intended that MPP implementation will expand eventually across the southern border. In support of MPP, ICE Enforcement and Removal Operations (ERO) will provide appropriate transportation when necessary, for aliens returned to Mexico under the MPP, from the designated port of entry to the court facility for the scheduled removal hearings before an immigration judge and back to the port of entry for return to Mexico by CBP after such hearings. ERO also will be responsible for effectuating removal orders entered against aliens previously processed under INA section 235(b)(2)(C), including post-removal order detention. ICE attorneys will represent DHS in the related removal proceedings pursuant to 6 U.S.C. § 252(c).

As instructed by the Secretary, in exercising prosecutorial discretion concerning the potential return of third-country nationals to Mexico under INA section 235(b)(2)(C), DHS officials should act consistently with the *non-refoulement* principles contained in Article 33 of the 1951 Convention Relating to the Status of Refugees and Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Specifically, a third-country national who affirmatively states a fear of return to Mexico (including while in the United States to attend a removal hearing) should not be involuntarily returned under INA section 235(b)(2)(C) if the alien would more likely than not be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion (unless described in INA section 241(b)(3)(B) as having engaged in certain criminal, persecutory, or terrorist activity), or would more likely than not be tortured, if so returned pending removal proceedings. *Non-refoulement* assessments will be made by U.S. Citizenship and Immigration Services (USCIS) asylum in accordance with guidance issued by the Director of USCIS.

Within ten (10) days after this memorandum, relevant ICE program offices are directed to issue further guidance to ensure that MPP is implemented in accordance with the Secretary's memorandum, this memorandum, and policy guidance and procedures, in accordance with applicable law.

This document provides internal ICE policy guidance, which may be modified, rescinded, or superseded at any time without notice. This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Likewise, no limitations are placed by this guidance on the otherwise lawful enforcement or litigative prerogatives of DHS.

Attachment:

DHS Secretary Memorandum, *Policy Guidance for Implementation of Migrant Protection Protocols*, dated January 25, 2019.