June 5, 2020

The Honorable Chad F. Wolf
Acting Secretary
U.S. Department of Homeland Security
Washington, D.C. 20528

RE: DHS’ Failure to Initiate Section 240 Removal Proceedings for Unaccompanied Children Previously Subject to the Migrant Protection Protocols

Dear Acting Secretary Wolf:

I write on behalf of the American Bar Association (ABA) to express our concern regarding the Department of Homeland Security’s (DHS) failure to initiate removal proceedings pursuant to section 240 of the Immigration and Nationality Act (INA) for unaccompanied children (UAC) who were previously in proceedings under the Migrant Protection Protocols, or Remain in Mexico policy (MPP). The plain language of the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) requires DHS to place all UAC it seeks to remove in section 240 proceedings; however, DHS instead has been removing these children without affording them the full rights conferred by Congress in the TVPRA.

The ABA is the largest voluntary association of lawyers and legal professionals in the world. The ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, and works to build public understanding around the world of the importance of the rule of law. Through its Commission on Immigration, the ABA provides continuing legal education and develops and assists in the operation of pro bono legal representation programs along the southwest border.

Under MPP, Customs and Border Protection (CBP) officials return nationals from non-contiguous countries back to Mexico after they seek to enter the United States unlawfully or without proper documentation. Individuals processed under MPP are issued a Notice to Appear (NTA) in an immigration court in the United States at a future date and returned to Mexico until that time. While UAC are not supposed to be placed in MPP, families with children are subject to the policy.

The ABA previously has called on DHS to rescind MPP because the implementation of the policy has prevented asylum seekers from accessing a full and fair adjudication that comports with traditional notions of due process. First, because asylum seekers are forced to remain in

Mexico for the duration of their proceedings, they do not have meaningful access to counsel to advise them regarding their legal rights and obligations. In fact, only 6% of MPP participants have been represented by counsel. Second, MPP proceedings do not contain sufficient due process protections, due to defects in the provision of notice, the lack of simultaneous interpretation, and the use of videoconferencing technology rather than in-person appearances for many such hearings. This lack of fundamental fairness is reflected in the low numbers of MPP participants who have been granted relief – only 0.8%. Finally, while individuals subjected to MPP wait for their hearings, they are forced to fend for themselves in Mexican border cities, which are notoriously dangerous.

Numerous press outlets have reported on asylum-seeking MPP parents who have made the difficult choice to send their children to the United States alone, in fear for their health and safety if they were to remain in Mexico. When CBP encounters these children, officers process them as UAC and transfer them to the custody of the Department of Health and Human Services, Office of Refugee Resettlement (ORR). The ABA operates the South Texas Pro Bono Asylum Representation Project (ProBAR), which is the largest provider of legal services to UAC in the country. ProBAR has encountered more than 100 UAC in ORR shelters who were previously in MPP. In some cases, the UAC report parents have disappeared or they have been abandoned and had little choice but to seek protection in the United States.

The TVPRA requires that UAC from non-contiguous countries who DHS seeks to remove be placed in removal proceedings, and have access to counsel (to the greatest extent practicable). These are just some of the many protections enshrined in the TVPRA to take into account the “specialized needs” of UAC. However, DHS is sending UAC with prior MPP removal orders back to their home countries without providing them with the process guaranteed by the TVPRA.

2 TRAC Immigration, “Details on Remain in Mexico (MPP) Deportation Proceedings”, https://trac.syr.edu/phptools/immigration/mpp/ (last visited May 22, 2020) (showing that, through March 2020, 3,993 of 64,934 MPP cases had legal representation).
3 Id. (showing that, through March 2020, only 517 of 64,934 MPP cases were granted relief).
6 A UAC is someone who has not attained 18 years of age; has no lawful immigration status in the United States; and has no parent or legal guardian in the United States, or no parent or legal guardian in the United States is available to provide care and physical custody. 6 U.S.C. § 279(g); see 8 U.S.C. § 1232(b)(3) (requiring that any federal agency that encounters a UAC to transfer the child to the custody of HHS within 72 hours).
7 8 USC § 1232(a)(5)(D).
8 Id. § 1232(d)(8) (providing that “[a]pplications for asylum and other forms of relief from removal in which [a UAC] is the principal applicant shall be governed by regulations which take into account the specialized needs of [UAC] and which address both procedural and substantive aspects of handling [UAC’s] cases”).
In fact, DHS recently removed two ProBAR UAC clients with MPP orders, without placing them in section 240 proceedings. More ProBAR UAC clients are in imminent danger of removal because of prior orders from MPP proceedings.

UAC are exempt from MPP precisely because they are particularly vulnerable and should not be required to navigate dangerous Mexican border cities and immigration courts alone. DHS is now removing these children to their home countries based on orders from proceedings that are inherently unfair, without giving them an individualized hearing in full section 240 proceedings, as Congress mandated through the TVPRA. We urge you to reconsider this policy and to comply with the TVPRA by initiating section 240 proceedings for all UAC, including those who were previously in MPP.

Thank you for considering our views. If you or your staff have any questions or would like additional information, please contact Kristi Gaines in our Governmental Affairs Office at 202-662-1763 or kristi.gaines@americanbar.org.

Sincerely,

Judy Perry Martinez
President