



**Homeland
Security**

August 13, 2021

MEMORANDUM FOR: Troy A. Miller
Senior Official Performing the Duties of the Commissioner
U.S. Customs and Border Protection

Scott K. Falk
Chief Counsel
U.S. Customs and Border Protection

FROM: Katherine Culliton-González (b)(6)
Officer for Civil Rights and Civil Liberties

Susan Mathias /s/
Assistant General Counsel, Legal Counsel Division
Office of the General Counsel

SUBJECT: Complaint 20-07-CBP-0640¹
Providing Medical Care and Humanitarian Protections to
Undocumented Individuals During the COVID-19 Public Health
Emergency

Purpose

Pursuant to 6 U.S.C. § 345 and 42 U.S.C. § 2000ee-1, this memorandum provides policy recommendations to U.S. Customs and Border Protection (CBP) to better enable CBP to protect and safeguard undocumented individuals who seek to enter or who unlawfully enter the United States during the COVID-19 Public Health Emergency and who are subjected to expulsion under the Centers for Disease Control and Prevention (CDC) public health authority in 42 U.S.C. § 265 (“Title 42”). Specifically, this memorandum provides policy recommendations to CBP regarding (b)(5) medical care and humanitarian protections (b)(5)

(b)(5)

Background and Investigation

On March 26, 2020, the Centers for Disease Control and Prevention (CDC) published in the Federal Register *Notice of Order Under Sections 362 and 365 of the Public Health Service Act*

¹ In addition to this complaint, CRCL Compliance Branch has opened 24 other investigations relating to CBP’s enforcement of the CDC Order under Title 42. Of these, CRCL Compliance will soon be concluding investigations on two additional complaints, one complaint has been retained by the DHS Office of Inspector General, four complaints are awaiting responsive documents from CBP, and 17 complaints are on litigation hold as DHS OGC has identified them as relating to matters currently under litigation..

Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17060 (March 26, 2020) (“Order”). The Order, which the CDC issued on March 20, 2020, “suspended entry” of “covered [noncitizens]” when the Director of the CDC “determines that the existence of a communicable disease in a foreign country or place creates a serious danger of the introduction of such disease into the United States” The Order specifically suspends entry of “covered aliens” who would enter “into a congregate setting in a land Port of Entry (POE) or Border Patrol station at or near the United States borders with Canada and Mexico,” subject to certain exceptions. The Order “requires the movement of all such aliens to the country from which they entered the United States, or their country of origin, or another location as practicable, as rapidly as possible, with as little time spent in congregate settings as practicable under the circumstances.” 85 Fed. Reg. 17067. On August 5, 2021, the CDC published an Order in the Federal Register to replace and supersede the existing Order. The August 5, 2021 Order extends the prior suspended entry of covered noncitizens while extending exceptions for unaccompanied noncitizen children and certain individuals on a case by case basis, and incorporating an additional exception for programs approved by DHS that incorporate appropriate COVID-19 mitigation protocols as recommended by the CDC. *Public Health Reassessment and Order Suspending the Right To Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists*, 86 Fed. Reg. 42828 (August 5, 2021). These orders and related expulsions are pursuant to the CDC’s authority under 42 U.S.C. § 265, *Suspension of entries and imports from designated places to prevent spread of communicable diseases*, in contrast to Title 8 of the U.S. Code, *Aliens and Nationality*, which governs U.S. immigration and naturalization. The particular case that prompted this investigation occurred in April 2020, however, the recommendations that flow from our analysis of treatment of individuals subject to expulsion under the Title 42 CDC Orders remain relevant.

On April 27, 2020, CRCL received correspondence from (b)(6) of the Kino Border Initiative on behalf of a Honduran woman. The woman alleged that U.S. Border Patrol Agents (BPAs) apprehended her and her minor children on April 20, 2020, near Sasabe, Arizona. The woman alleged that she and her minor daughters fled violence in Honduras. The woman alleged that while they were traveling through Mexico en-route to the United States, she was raped, and that as of April 27, 2020, she was eight-months pregnant with the child resulting from that rape. The woman alleged that she began to feel contractions while she was walking in the desert near Sasabe, Arizona, on April 20, 2020. She alleged that on that same date, BPAs detained her and her children around 3 p.m. and took them to a series of small buildings, where they photographed her and her daughters and took their fingerprints. The woman alleged that the BPAs did not ask her whether she claimed fear of returning to Mexico or Honduras at that time. The woman alleged that she told one male agent, who was light-skinned, heavyset, and of medium height, that she was in pain and having contractions, and asked to go to the bathroom. She alleged that the BPAs then put the family in a vehicle and that when they arrived at the Sasabe Port of Entry, she realized they were going to be returned to Mexico. The woman alleged that at this point, she requested medical attention and expressed that she could not return to Mexico or Honduras “because [she] was afraid.” She alleged that the BPA told her, “you can’t come to the U.S. without permission.”

CRCL opened this complaint for investigation and sent a short form information request to CBP on May 11, 2020, to which CBP replied on June 8, 2020. (b)(5)

(b)(5)

Analysis

Medical Screening/Health Interviews

(b)(5)

(b)(5)

(b)(5)

(b)(5)

Claim of Fear

(b)(5)

(b)(5)

(b)(5)

Findings

1. (b)(5)

(b)(5)

- (b)(5)
- 2.
 - 3.
 - 4.

Recommendations

CRCL recommends that CBP undertake the following measures:

1. CBP should record whether “covered aliens,” as defined by the CDC Order, express a claim of fear on the Operation Capió field intake sheet or the Border Patrol Report of Apprehension or Seizure. If an individual expresses a fear that may qualify for an exception under Title 42, CBP should transmit that information to United States Citizenship and Immigration Services (USCIS) to enable USCIS to properly assess the individual’s claim.
2. Written guidance should be issued to the field that CBP should refer to USCIS individuals whom USBP encounters in the United States who are otherwise eligible for processing pursuant to Title 42 but who express fear of (b)(5) torture.
3. CBP should issue formal guidance advising agents to consider emergent medical conditions and particular vulnerabilities (including, but not limited to, increased risks related to sexual orientation, gender identity or age, and significant physical or mental health concerns, including late-term and high-risk pregnancies) on a case-by-case basis, in the totality of the circumstances, when exercising its discretionary authority on exemptions.
4. (b)(5)
5. CBP should assign and provide a case number or other identifying reference number, such as the Event Number or Fingerprint Identification Number (FIN), to all individuals that CBP encounters and processes for expulsion under Title 42, so that all of the information related to the processing of individuals encountered by CBP is consistently preserved in electronic systems of record and can be referenced using that number by individuals seeking records related to the expulsion.

It is CRCL's statutory role to advise department leadership and personnel about civil rights and civil liberties issues, ensuring respect for civil rights and civil liberties in policy decisions and implementation of those decisions. These recommendations are pursuant to that role; we believe they can assist you in completing the Department's mission. We look forward to continuing to work with CBP on these important issues, especially by providing technical assistance, as requested, and reviewing any protocols, musters, and trainings. Please inform us within 60 days whether you concur or non-concur with these recommendations by emailing a response to CRCL Senior Policy (b)(6) at (b)(6). If you concur, please include an action plan outlining how you plan to implement these recommendations.

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