CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

Guidance for Practitioners: Understanding the 2018 Settlement Agreement in the Family Separation Litigation

(Non-Detained and Present in the United States)[1]

Family separation will likely go down in history as one the most barbaric asylum deterrence policies that the U.S. government has ever adopted. Thankfully, a federal court ended the Trump administration's "zero tolerance" family separation policy and ordered the government to reunite and release the families from its custody. Through that federal court litigation, which includes four consolidated class action lawsuits[2] related to the government's policy of family separation, the court approved a Settlement Agreement[3] on Nov. 15, 2018.

Practitioners should read the Notice of Proposed Settlement and Settlement Election Form and the text of the Settlement Agreement, which is accessible here. The Settlement Agreement provides a mechanism by which certain separated parents and children may pursue asylum or other protection in the United States. Below is information on how to determine if your client is a class member, how to determine if your client may receive any benefits from being a class member, and how to request protections under the Settlement Agreement.

[1] Note that some detained or deported individuals may also be class members and qualify for potential relief, but this guidance focuses only on those class members who are not detained and are present in the United States. If you represent a class member who has been deported or is detained and you have questions about the settlement, you may contact class counsel using the contact information contained on the Notice of Proposed Settlement and Settlement Election Form.

[2] The four class action lawsuits are:

- *M.M.M. v. Sessions,* Case No. 3:18-cv-1832-DMS (S.D. Cal.)
- *M.M.M. v. Sessions,* Case No. 1:18-cv-1835-PLF (D.D.C.)
- *Ms. L. v. ICE,* Case No. 3:18-cv-428-DMS (S.D. Cal.)
- *Dora v. Sessions,* Case No. 18-cv-1938 (D.D.C.)

[3] When referring to the Settlement Agreement in these four consolidated cases, this document simply refers to the "Settlement Agreement" or the "Settlement."

1) **Determining if your client is a class member:**

a. Parents:
   - ☐ Adult who entered the United States at or between designated points of entry with their child(ren);
   - ☐ were detained in immigration custody by DHS;
   - ☐ has a child(ren) who was or is separated from them by DHS;
   - ☐ on or after July 1, 2017,[4] the child was housed in ORR custody, ORR foster care, or DHS custody (absent a determination that the parent is unfit or presents a danger to the child); and
   - ☐ has been continuously physically present in United States since June 26, 2018.

b. Children:
   - ☐ Under 18 as of the effective date of agreement (Nov. 15, 2018);
   - ☐ entered the United States at or between designated points of entry with their non-U.S. citizen parent(s);
   - ☐ was or is separated from their parent(s) by DHS;
   - ☐ on or after July 1, 2017, was housed in ORR custody, ORR foster care, or DHS custody; and
   - ☐ has been continuously physically present in United States since June 26, 2018.

2) **Determining if your client may receive any protections from being a class member:**[5]

Note as a threshold matter that whatever the posture of the case, counsel should verify if a Notice to Appear (NTA) was issued and filed with the Executive Office for Immigration Review (EOIR),[6] such that the individual is in removal proceedings under Immigration and Nationality Act (INA) § 240 ("240 proceedings"). Counsel should always check on the EOIR case status to determine if there is a hearing scheduled or if there has been an adjudication of the case.[7]

If the parent and child(ren) are in the same procedural posture, either both in 240 proceedings before EOIR or both affirmatively pursing asylum before U.S. Citizenship and Immigration Services

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[4] The original settlement agreement applied to parents and children who were separated, and on or after June 26, 2018, the child was housed in ORR custody, ORR foster care, or DHS custody. *See* Settlement Agreement. However, on March 8, 2019, the District Court granted an order to modify and expand the class to include those parents and children who entered the United States on or after July 1, 2017. *See Ms. L v. ICE*, 3:18-cv-428, ECF No. 386, Order Granting Plaintiffs' Motion to Modify Class Definition (S.D. Cal. Mar. 8, 2019).

[5] The section below lays out both the posture of many of these family separation cases and provides an explanation of the benefits available, both as a matter of the normally applicable immigration law and as a result of the Settlement Agreement. Where a benefit is based on the Settlement Agreement, a footnote indicates where that benefit is set forth in the Settlement Agreement.

[6] EOIR is the division of the Department of Justice that oversees the immigration courts and Board of Immigration Appeals.

[7] Counsel can check on the EOIR case status by visiting the Immigration Court Information System website and entering the individual's A number or by calling 1-800-898-7180, the automated immigration court information phone system.

(USCIS), then the parent and child(ren) may request to consolidate their cases if deemed strategically appropriate after consulting with an attorney.

- **Most parents who were apprehended and separated from their child(ren) were subject to Expedited Removal (ER). If subject to ER, did the parent have a credible fear interview (CFI)[8] and determination while separated from their child(ren)?**
    - If the parent had a positive CFI determination[9] and
        - If an NTA was issued and filed with EOIR, check on the EOIR case status.
        - If an NTA was issued but not filed with EOIR or if no NTA was issued, the parent can file an I-589 affirmatively with USCIS.[10]
    - If the parent had a negative CFI determination[11] and:
        - If an NTA was issued and filed with EOIR, check on the EOIR case status.
        - If an NTA was issued, but not filed with EOIR, the parent can file an I-589 affirmatively with USCIS.[12]
        - If no NTA was issued (and the ER order was not cancelled), then the parent is eligible under the Settlement Agreement for a new CFI interview with USCIS where USCIS must:
            - Conduct a *de novo* good faith review of CFI finding;
            - conduct interviews with each parent with counsel present (in person or on the phone); and
            - allow submission of new evidence.[13]
                - If the parent receives a positive CFI, then the parent is to be placed in 240 proceedings.[14]
                - If the parent has a negative CFI again after CFI review, USCIS will conduct a CFI for the child(ren).[15]

[8] For more information about ER and the CFI process and determination, see: American Immigration Council, *A Primer on Expedited Removal* (July 2019), and Asylum Seeker Advocacy Project, *Vindicating the Rights of Asylum Seekers at the Border and Beyond: A Guide to Representing Asylum Seekers in Expedited Removal and Reinstatement of Removal Proceedings* (2018, updated April 2019).

[9] A positive CFI determination is either a positive credible fear determination by the asylum office or an IJ vacating a negative credible fear determination.

[10] Settlement Agreement, Para. 1(a).

[11] A negative CFI determination includes a negative credible fear determination by the asylum office that was not challenged or that an IJ affirmed.

[12] Settlement Agreement, Para. 1(a).

[13] *Id.* at Para. 1(d). Note that, "[i]n determining whether any factual inconsistencies between the original interview and the subsequent fact-gathering impact the credibility of the parent, due consideration will be given to the psychological state of the parent at the time of the initial interview." *Id.*

[14] *Id.* at Para. 1(d).

[15] *Id.* at Para. 1(d). "The parent will be permitted to participate in the child(ren)'s credible fear interview and provide testimony on behalf of the child(ren), in addition to any testimony from the child(ren)." *Id.*

        - If child(ren) receives a positive CFI, then the parent and child(ren) are to be placed in 240 proceedings together.[16]
        - If child(ren) receives a negative CFI, then the child(ren) may seek review by an IJ.[17]
    - If the parent did not have a CFI because they allegedly did not express a fear of return and:
        - If an NTA was issued and filed with EOIR, check on the EOIR case status.
        - If an NTA was issued and not filed with EOIR or if the ER order was cancelled, the parent can file an I-589 affirmatively with USCIS.[18]
        - If no NTA was issued and the ER order was not cancelled, and they have a fear of return, the Settlement Agreement does not address this scenario.[19]
    - If the parent did not have a CFI but had expressed a fear of return and:[20]
        - If an NTA was issued and filed with EOIR, check on the EOIR case status.
        - If an NTA was issued and not filed with EOIR, the parent can file an I-589 affirmatively with USCIS.[21]
        - If no NTA was issued and the ER order was not cancelled, the Settlement Agreement does not address this scenario.[22]

- **Some parents who were apprehended and separated from their child(ren) were not subject to ER, but instead were issued an NTA. If issued an NTA, was it filed with EOIR?**
    - If the NTA was issued and filed with EOIR, check on the EOIR case status.
    - If the NTA was issued and not filed with EOIR, the parent can file an I-589 affirmatively with USCIS.

[16] *Id.* at Para. 2.
[17] *Id.* at Para. 1(f).
[18] *Id.* at Para. 1(a).
[19] Arguably the parent can file an I-589 affirmatively with USCIS. If USCIS rejects the affirmative I-589 due to the ER order, then counsel may argue that USCIS should conduct a CFI. If USCIS will not conduct a CFI, then counsel might consider filing a motion to reopen the expedited removal order. Please feel free to reach out to CLINIC to discuss the possible options and strategy considerations at this email address: rep.reunitedfamilies@cliniclegal.org.
[20] If the person expressed a fear of return, they should have either received a CFI interview or been placed in 240 proceedings. They should not have been issued an ER order.
[21] Settlement Agreement, Para. 1(a).
[22] Arguably the parent can file an I-589 affirmatively with USCIS. If USCIS rejects the affirmative I-589 due to the ER order, then counsel may argue that USCIS should conduct a CFI. If USCIS will not conduct a CFI, then counsel might consider filing a motion to reopen the expedited removal order. Please feel free to reach out to CLINIC to discuss the possible options and strategy considerations.

- **Some parents who were apprehended and separated from their child(ren) were subject to reinstatement of removal. If the parent was subject to reinstatement of removal, did the parent have a reasonable fear interview (RFI) and determination while separated from their child(ren)?**[23]
    - If the parent had a positive RFI, check if they were placed in withholding-only proceedings.
    - If the parent had no RFI interview and has a fear of return, they can (in consultation with an attorney) determine whether and when to request an RFI.
    - If the parent had a negative RFI, and was subsequently released, the parent can challenge the negative RFI under existing law and subject to statutory time periods.[24]

- **Children who were apprehended and separated from their parents were treated as unaccompanied minors.**
    - If the child(ren) was issued an NTA, verify whether it was filed with EOIR.
        - If the NTA was filed with EOIR, check on the EOIR case status.
            - A child in proceeding who wishes to file a Form I-589 may be eligible to file as an unaccompanied child (UC) with USCIS even if they have since been reunified with a parent or have turned 18 pursuant to the Order Granting Preliminary Injunction in *J.O.P. v. DHS*, 8:19-cv-01944 (D. Md. Oct. 15, 2020). The preliminary injunction requires that USCIS follow the 2013 Kim Memorandum in determining its initial asylum jurisdiction over UCs. On December 21, 2020, the district court judge in *J.O.P.* certified a nationwide class in that case and expanded the preliminary injunction to prohibit ICE attorneys from taking positions contrary to the injunction in immigration court.[25]
                - Note there is some tension between the *J.O.P.* injunction and the *M.M.M./Ms. L/ Dora* Settlement Agreement, paragraph 1(a), which reads:
                    - "*M.M.M.* agreed class members who have not been reunified with their parent(s) as of the effective date of this agreement will be afforded existing procedures for unaccompanied alien children pursuant to

[23]For more information about reinstatement of removal and the RFI process and determination, see: American Immigration Council and National Immigration Project, *Reinstatement of Removal Practice Advisory* (May 23, 2019); Asylum Seeker Advocacy Project, *Vindicating the Rights of Asylum Seekers at the Border and Beyond: A Guide to Representing Asylum Seekers in Expedited Removal and Reinstatement of Removal Proceedings* (2018, updated April 2019).

[24] Settlement Agreement, n.2.

[25] USCIS has recently updated its website to provide more information about the litigation. *See* USCIS, J.O.P. v. U.S. Dept. of Homeland Security, et. al., Information. For additional information on this litigation, visit CLINIC, *J.O.P. v. DHS: Class-Action Lawsuit Seeks Protection for Asylum Seekers Who Arrived as Unaccompanied Children*.

governing statutes and regulations, including but not limited to Section 240 removal proceedings, unless and until they are reunified with a parent, in which case the procedures described below will apply."

- One reading of this provision is that if the parent is pursuing one of the procedures described below paragraph 1(a), which includes obtaining a *de novo* good faith review of a prior negative CFI finding, the child may not be considered a UC pursuant to the language in the *M.M.M./Ms. L/ Dora* Settlement Agreement.
- If the parent is <u>not</u> pursuing any of the procedures described below paragraph 1(a), then there is an argument that the child in proceedings could file the Form I-589 as a UC pursuant to *J.O.P.*, if the child and counsel believe that is the best strategy for the case. Counsel should disclose the procedural posture of the case if filing the I-589 with USCIS for a now reunified child who is in proceedings. How USCIS will evaluate whether they have jurisdiction in these circumstances is unsettled.

    - If the NTA was not filed with EOIR, the child(ren) can file an I-589 affirmatively with USCIS.

- If the child(ren) was not issued an NTA and was not placed in ER proceedings, the child can file an I-589 affirmatively with USCIS.
- If, upon reunification, the child(ren) was placed in ER proceedings, and previously or currently expresses a fear of persecution or torture, they may request a CFI.
    - In the case of a parent and child(ren) who are both in ER proceedings, if either the parent or the child(ren) establishes a credible fear of persecution or torture, USCIS will issue NTAs to both the parent and child(ren) and place the family in 240 proceedings.[26]
    - If both the parent and child(ren) have a negative credible fear finding, the child(ren) may seek review of their negative CFI before the Immigration Judge.[27]

[26] Settlement Agreement, Para. 2.
[27] *Id.* at Para. 1(f).

3) How to request benefits under the Settlement procedurally:
    a. Complete the Settlement Election Form (available in both English and Spanish).
        i. The form must list the parent and their child(ren).
        ii. Note that a separate form must be completed for the parent and each child.[28]
            1. If the class member is a parent, the parent and attorney (if they have one) must sign the form.
            2. If the class member is a child(ren), and the child(ren) lacks capacity or is under age 14, the form must be signed by the child(ren)'s parent or legal representative.
    b. Submit that Settlement Election Form to the appropriate class counsel.[29]
        i. Note that there is no time limit for filing this Settlement Election Form.
            1. Before filing, consider whether you are prepared to pursue whatever benefit you are seeking under the Settlement.
            2. Note that in individual cases there may be other timing considerations.
        ii. Once the Settlement Election Form is filed, class counsel will share that with government counsel through a designated ICE mailbox. This should start the process for the appropriate procedures under the Settlement Agreement.
            1. At the same time, the attorney can also affirmatively reach out to USCIS to request the appropriate remedy under the Settlement Agreement. The attorney should submit a cover letter that states what benefit they are seeking and specifies the applicable paragraph of the Settlement Agreement, and attach the Settlement Agreement and a copy of the signed Settlement Election Form.
    c. Proceed with the appropriate filing for the relief or remedy you are seeking with USCIS.
        i. If you are seeking a *de novo* review of the CFI, which includes a new interview and opportunity to present new evidence, with the asylum office, email the local asylum office directly to make such a request pursuant to the Settlement and attach the Settlement Agreement and a copy of the signed Settlement Election Form.
            1. There is no designated time frame for when the new CFI interview will be scheduled.

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[28] The Settlement Agreement does not address whether both the parent and child(ren) must file the Settlement Election Form, however sometimes the government is taking the position that the forms should be submitted for both parent and child(ren). However, if only the parent and not the child(ren) is seeking a benefit pursuant to the Settlement Agreement, then just the parent may elect to file a Settlement Election Form.

[29] The email addresses for the proposed class counsel are as follows:

- Parent class (parents in the United States): parentsasylumclass@eversheds-sutherland.com
- Child class: MMMSettlementQuestions@hoganlovells.com
- Removed parents: familyseparation@aclu.org

See Notice of Proposed Settlement and Settlement Election Form.

2. If you get no response from the local asylum office in a reasonable time and want an interview to be scheduled more promptly, contact the appropriate class counsel by email with an explanation of the procedural posture of the case so they can elevate the issue.

ii. If you are filing an affirmative I-589 that you believe USCIS should have jurisdiction over pursuant to the Settlement, include a reference to the Settlement in the cover letter and attach the Settlement Agreement and a copy of the signed Settlement Election Form. Consider also enclosing a brightly colored paper that says "Attention Supervisor: I-589 Filed Affirmatively Pursuant to *M.M.M./Ms. L/ Dora* Settlement."

iii. If you filed an affirmative I-589 that is rejected for lack of jurisdiction by USCIS and you believe the rejection is improper under the Settlement, file a response with the local asylum office directly challenging the rejection under the Settlement and attach the Settlement Agreement and a copy of the signed Settlement Election Form.

1. If you get no response from the local asylum office in a reasonable time, contact the appropriate class counsel by email with an explanation of the procedural posture of the case so they can elevate the issue.[30]

[30] *See infra* note 28.