

Decision

Matter of: U.S. Department of Homeland Security—Availability of Appropriations for Migrant Protection Protocol Hearing Facilities

File: B-331419

Date: July 1, 2021

DIGEST

The U.S. Department of Homeland Security (DHS) established facilities along the southwest border so that individuals enrolled in the Migrant Protection Protocols (MPP) could participate in the video teleconference removal proceedings conducted by the Department of Justice (DOJ), Executive Office for Immigration Review (EOIR). DHS used its FY 2019 operations and support appropriation for the U.S. Immigration and Customs Enforcement (ICE) to establish the facilities even though DOJ had appropriations for EOIR facilities. Because DHS established these facilities to achieve the objectives of MPP, DHS's appropriation was available for this purpose.

DECISION

The Chairwoman of the Subcommittee on Homeland Security requests a decision as to whether the U.S. Department of Homeland Security (DHS) may obligate its appropriated funds for facilities established by DHS to facilitate its Migrant Protection Protocols (MPP).¹ Letter from Representative Lucille Roybal-Allard, Chairwoman, Subcommittee on Homeland Security, House Committee on Appropriations, to Comptroller General, GAO (Sept. 11, 2019) (Request Letter). These facilities, which are intended to effectuate DHS's MPP, also support the work of the Department of Justice's (DOJ) Executive Office for Immigration Review (EOIR). Effective January

¹ MPP is a program through which certain foreign individuals entering or seeking admission to the United States from Mexico may be placed into immigration removal proceedings and returned to Mexico to wait outside the United States for the duration of their proceedings. DHS Response, at 2.

21, 2021, DHS formally discontinued new MPP enrollments.² Nevertheless, questions remain regarding DHS's use of its funds for its facilities because DOJ funds are available for EOIR facilities. Request Letter, at 1. As explained below, DHS's appropriations are available to establish these facilities, which effectuate MPP.

In accordance with our regular practice, we contacted DHS and DOJ to seek factual information and their legal views on this matter. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/products/GAO-06-1064SP; Letter from Assistant General Counsel for Appropriations Law, GAO, to Acting General Counsel, DHS (Mar. 6, 2020); Telephone Conversation with Deputy Associate General Counsel for General Law, DHS, Assistant General Counsel for Appropriations Law, GAO, and Senior Attorney, GAO (June 11, 2021) (June Conversation); E-mail from Assistant General Counsel for Appropriations Law, GAO, to Assistant Attorney General for Administration, DOJ, *Subject: Seeking DOJ confirmation of its legal views for a GAO Appropriations Law decision* (June 11, 2021). DHS and DOJ responded with their explanation of the pertinent facts and legal analysis. Letter from Acting Deputy Associate General Counsel, General Law, DHS, to Assistant General Counsel for Appropriations Law, GAO (Apr. 6, 2020) (DHS Response); E-mail from Assistant General Counsel, DOJ, to Assistant General Counsel for Appropriations Law, GAO, *Subject: Re: Seeking DOJ confirmation of its legal views for a GAO Appropriations Law decision* (June 14, 2021) (DOJ Response).

BACKGROUND

Individuals enrolled in MPP (enrollees) return to the United States to attend removal proceedings conducted by EOIR.³ Acting Executive Associate Director, ICE Memorandum for Field Office Directors, Enforcement and Removal Operations, *Migrant Protection Protocols Guidance* (Feb. 12, 2019), at 2–3, available at, 84 Fed. Reg. 6811 (Feb. 28, 2019) (*MPP Guidance*); DHS Response, at 2; June Conversation. If EOIR determines that an enrollee should attend an in-person removal proceeding, DHS, U.S. Immigration and Customs Enforcement (ICE) transports them to the EOIR court. *MPP Guidance*, at 3; see also DHS Response, at 3, n.7; June Conversation. Alternatively, if EOIR determines that an enrollee should participate in video teleconference removal proceedings, enrollees can

² DHS, *DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program* (Jan. 20, 2021), available at <https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program> (last visited June 8, 2021).

³ EOIR may conduct removal proceedings in several forms, including in-person, by video teleconference, or by telephone. 8 U.S.C. § 1229a(b)(2).

participate in such proceedings at temporary facilities established by DHS.⁴ See DHS Response, at 2–3; Letter from Acting Chief Financial Officer, DHS, to Representative Lucille Roybal-Allard, Chairwoman, Subcommittee on Homeland Security, Committee on Appropriations (July 26, 2019) (DHS Notice), Enclosure 1, at 11. DHS used its FY 2019 lump-sum appropriation for ICE operations and support to pay for these facilities.⁵ Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, div. A, title II, 133 Stat. 13, 18 (Feb. 15, 2019); DHS Response, at 1; DHS Notice, Enclosure 1, at 10, 12. On June 1, 2021, DHS announced the termination of the MPP program.⁶

DISCUSSION

At issue here is whether DHS may use its FY 2019 ICE operations and support appropriation to establish facilities where enrollees in MPP may participate in EOIR’s video teleconference hearings. As explained below, because the primary purpose of the facilities was to help DHS achieve the objectives of MPP, and not to support EOIR’s hearings, the ICE appropriation is available for this purpose.

Appropriations are available only for authorized purposes. 31 U.S.C. § 1301(a). When an appropriation does not specifically enumerate all the items for which it is available, we apply a three-part test, known as the necessary expense rule, to determine whether the appropriation is available for a particular expense. See, e.g., B-330984, May 27, 2020; B-330862, Sept. 5, 2019. Pursuant to the necessary expense rule, an appropriation is available for a particular purpose if the obligation or expenditure (1) bears a logical relationship to the appropriation charged, (2) is not otherwise prohibited by law, and (3) is not otherwise provided for. B-332530, Feb. 18, 2021. With regard to step 2, we are unaware of any statutory provision that specifically prohibits the use of ICE’s appropriations for these facilities. Accordingly, at issue here are steps 1 and 3.

⁴ DHS attorneys and EOIR immigration judges appear remotely by video teleconference. DHS Response, at 2.

⁵ DHS notes that EOIR furnishes the video teleconference equipment for the facilities. DHS Response, at 2; see also 8 C.F.R. § 1003.28 (according to EOIR, “[t]he only recording equipment permitted in the proceeding will be the equipment used by the Immigration Judge to create the official record”).

⁶ Secretary, DHS Memorandum for Acting Commissioner, U.S. Customs and Border Protection; Acting Director, ICE; Acting Director, U.S. Citizenship and Immigration Services, *Termination of the Migrant Protection Protocols Program* (June 1, 2021), available at https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf (last visited June 14, 2021) (Termination Memo).

To determine whether a reasonable, logical relationship exists between the appropriation and the expense, the starting point is the text of the appropriation. See, e.g., B-330984, May 27, 2020; B-330776, Sept. 5, 2019. For FY 2019, Congress provided DHS with a lump-sum appropriation “[f]or necessary expenses of [ICE] for operations and support.” Pub. L. No. 116-6, 133 Stat. at 18. This appropriation included a line-item appropriation for “enforcement, detention, and removal operations.” *Id.* Congress also authorized DHS to use the ICE operations and support appropriation “for minor procurement, construction, and improvements.”⁷ Pub. L. No. 116-6, div. A, title V, § 529, 133 Stat. at 42.

Congress did not define or limit the scope or type of “removal operations” funded by the appropriation. Where Congress does not specifically prescribe the activities to be funded by an appropriation, an agency has reasonable discretion to determine how to carry out the objects of its appropriation. B-306748, July 6, 2006. We apply that principle here. DHS established these facilities to achieve the objectives of MPP and to facilitate removal operations. Thus, DHS’s ICE operations and support appropriation is available for these facilities.

We need not ask whether we would have exercised DHS’s discretion in the same manner, but rather whether DHS’s expenditure of its appropriation falls within its “legitimate range of discretion.” B-223608, Dec. 19, 1988. In our view, DHS established a sufficient connection between the facilities and the purpose of its FY 2019 ICE operations and support appropriation such that this appropriation is available to establish these facilities.

Next we consider whether another appropriation was more specifically available for the establishment of the facilities. Under step three of the necessary expense rule, an appropriation is not available for an expense where the expense is covered by another more specific appropriation, even where the more specific appropriation is made to a different agency. See *generally* B-330984, May 27, 2020; B-330862, Sept. 5, 2019.

DOJ received appropriations for EOIR facilities. For FY 2019, EOIR received an appropriation “[f]or expenses necessary for the administration of immigration-related activities of [EOIR].” Pub. L. No. 116-6, 133 Stat. at 102. The nonbinding joint statement accompanying this appropriation stated that the appropriators agreed to fund “534 [Immigration Judge] teams, including associated space and technology requirements.” 165 Cong. Rec. H1809 (daily ed. Feb. 13, 2019); see *also* B-329739, Dec. 19, 2018. In addition, EOIR received a supplemental appropriation for “immigration judge courtroom space.” Emergency Supplemental Appropriations for Humanitarian Assistance and Security at the Southern Border Act, 2019, Pub. L. No. 116-26, 133 Stat. 1018 (July 1, 2019).

⁷ Congress defined “minor” as “end items with a unit cost of \$250,000 or less for personal property, and \$2,000,000 or less for real property.” Pub. L. No. 116-6, 133 Stat. at 42.

The primary purpose of establishing the facilities here was to achieve the objectives of MPP. EOIR's appropriations are not available for that purpose. It was also DOJ's view that EOIR appropriations are not available to establish these facilities. See DOJ Response. Since DOJ's EOIR appropriations are not available to establish the facilities at issue, DOJ does not have a more specifically available appropriation for this purpose. Accordingly, DHS may use its ICE operations and support appropriation to establish these facilities.⁸

CONCLUSION

DHS established the facilities to achieve the objectives of MPP. Therefore, DHS's FY 2019 ICE operations and support appropriation is available for these facilities.



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⁸ We do not address here what items of cost, or any applicable limits on such costs, ICE may consider to be part of the establishment of the facilities at issue. Moreover, we note that ICE may not pay for any item for which there is an absolute statutory prohibition, although we are not aware of ICE paying for such an item here.