REMOVAL PROCEEDINGS

Defending respondents in immigration removal proceedings.

- DHS' Burden to Prove Alienage
- Immigration Court Generally
  - Jurisdiction & Commencement of
- Motions
  - Motions Generally
  - Motion to Continue
  - Motion to Administratively Close
- Legal Burdens & Determinations to be Made
  - Burden of Proof
- ECAS
  - EOIR Courts & Appeals
- ALTERNATIVE OUTCOMES
  - Voluntary Departure
- Termination of Proce

DHS' Burden to Prove Alienage

The full text of *Rosa v. Bondi* **can be found here:**

https://www.ca1.uscourts.gov/sites/ca1/files/opnfiles/24-1240P-01A.pdf

Immigration Court Generally

General information about Immigration Court

Immigration Court Generally

Jurisdiction & Commencement of Proceedings

8 CFR § 1003.14 Jurisdiction and commencement of proceedings

Title 8 Chapter V Subchapter A Part 1003 Subpart C § 1003.14

https://www.ecfr.gov/current/title-8/section-1003.14

§ 1003.14 Jurisdiction and commencement of proceedings.

(a) Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service. The charging document must include a certificate showing service on the opposing party pursuant to § 1003.32 which indicates the Immigration Court in which the charging document is filed. However, no charging document is required to be filed with the Immigration Court to commence bond proceedings pursuant to §§ 1003.19, 1236.1(d) and 1240.2(b) of this chapter.

(b) When an Immigration Judge has jurisdiction over an underlying proceeding, sole jurisdiction over applications for asylum shall lie with the Immigration Judge.

(c) Immigration Judges have jurisdiction to administer the oath of allegiance in administrative naturalization ceremonies conducted by the Service in accordance with § 1337.2(b) of this chapter.

(d) The jurisdiction of, and procedures before, immigration judges in exclusion, deportation and removal, rescission, asylum-only, and any other proceedings shall remain in effect as it was in effect on February 28, 2003, until the regulations in this chapter are further modified by the Attorney General. Where a decision of an officer of the Immigration and Naturalization Service was, before March 1, 2003, appealable to the Board or an immigration judge, or an application denied could be renewed in proceedings before an immigration judge, the same authority and procedures shall be followed until further modified by the Attorney General.

Legal Citations in EOIR

Legal Citations Generally

When filing papers before EOIR, parties should keep in mind that accurate and complete legal citations strengthen the argument made in the submission. This Appendix provides guidelines for frequently cited sources of law. EOIR generally follows A Uniform System of Citation (also known as the “Blue Book”) but diverges from that convention in certain instances. EOIR appreciates but does not require citations that follow the examples used in this Appendix. Note that, for the convenience of filing parties, some of the citation formats in this Appendix are less formal than those used in the published cases of the BIA. Once a source has been cited in full, the objective is brevity without compromising clarity. This Appendix concerns the citation of legal authority. For guidance on citing to the record and other sources, see ICPM, Chapter 3.3(e) (Source Materials), Chapter 4.19(f) (Citation); BIA PM Chapter 3.3(e) (Source Materials), Chapter 4.6(d) (Citation). As a practice, EOIR prefers italics in case names and publication titles, but underlining is an acceptable alternative.

Abbreviations in case names

As a general rule, well-known agency abbreviations (e.g., DHS, INS, FBI, DOJ) may be used in a case name, but without periods. If an agency name includes reference to the "United States," it is acceptable to abbreviate it to "U.S." However, when the "United States" is named as a party in the case, do not abbreviate "United States." For example: *DHS v. Smith* **not** *D.H.S. v. Smith***;** *U.S. Dep't of Justice v. Smith* **not** *United States Department of Justice v. Smith***;** *United States v. Smith* **not** *U.S. v. Smith***.**

Short Form of Case Names

After a case has been cited in full, a shortened form of the name may be used thereafter, with a reference to the specific page number that is cited. For example: *INS v. Phinpathya***, 464 U.S. 183 (1984);** *Phinpathya***, 464 U.S. at 185;** *Matter of Nolasco***, 22 I&N Dec. 632 (BIA 1999);** *Nolasco***, 22 I&N Dec. at 635.**

Citations to a Specific Point

******Citations to a specific point should include the precise page number(s) on which the point appears. For example:** *Matter of Artigas*, **23 I&N Dec. 99, 100 (BIA 2001).**

Citations to a Dissent or Concurrence

Citations to a dissent or concurrence should be indicated in a parenthetical notation. For example: *Matter of Artigas*, **23 I&N Dec. 99, 109-110 (BIA 2001) (dissent).**

Board of Immigration Appeals Decisions

Published Decisions

Precedent decisions by the BIA are binding on the immigration courts, unless modified or overruled by the Attorney General or a federal court. All

precedent BIA decisions are available on the EOIR website. Precedent decisions should be cited in the "I&N Dec." form illustrated below. The citation must identify the adjudicator (BIA, A.G., etc.) and the year of the decision. Note that there are no spaces in "I&N" and that only "Dec." has a period. For example: *Matter of Balsillie***, 20 I&N Dec. 486 (BIA 1992).**

"Matter of" not "In re"

All precedent decisions should be cited as "Matter of." The use of "In re" is disfavored. For example: *Matter of Yanez***, not** *In re Yanez.*

Unpublished Decisions

Citation to non-precedent Board cases by parties not bound by the decision is discouraged. When it is necessary to refer to an unpublished decision, the citation should include the initials of the respondent's full name separated by hyphens, the A-number with all but the last three digits of the number replaced with X's, and a parenthetical containing the abbreviation "BIA" as the adjudicating body, as well as an abbreviation of the month as part of the precise date of the decision. Because the Board uses "Matter of" as a signal for a published or precedent case, do not use "Matter of."

- **For example: John Jonathan Smith, A123-456-789, BIA 12/20/2020 would become J-J-S-, AXXX-XXX-789 (BIA Dec. 20, 2020).**

Unpublished BIA Decisions from the EOIR FOIA Reading Room

Where an unpublished Board decision is obtained from EOIR's FOIA Reading Room, the citation should be placed within a parenthetical containing the assigned Folder Name (also known as Title or File number assigned to Download Folder), the abbreviation "BIA" as the adjudicating body, and an abbreviation of the month as part of the precise date of the decision. As noted above, because the Board uses "Matter of" of as a signal for published or precedent case, do not use "Matter of."

- **For example: Folder Name 1234567, Decision Date 10/2/2023 would become**

> **When citing to an Unpublished BIA decision, a full copy of the unpublished decision should be provided as an attachment to the brief/motion if possible.**

Interim decisions

While the BIA still assigns precedent decisions an interim decision number for administrative reasons, the proper citation is always to the volume and page number of the bound volume – the I&N Decision citation.

While the BIA still assigns precedent decisions an interim decision number for administrative reasons, the proper citation is always to the volume and page number of the bound volume – the I&N Decision citation.

Attorney General Decisions

Precedent decisions by the Attorney General are binding on the immigration court and the BIA and should be cited in accordance with the rules for precedent decisions by the BIA. All precedent decisions by the Attorney General are available on the EOIR website. *Matter of Y-L-*, **23 I&N Dec. 270 (AG 2002).**

Federal and State Courts

Generally

Federal and state court decisions should generally be cited according to the standard legal convention, as set out in the latest edition of *A Uniform System of Citation* **(also known as the "Blue Book"). For example:** *Taylor v. United States*, **495 U.S. 575 (1990);** *Singh v. Holder*, **749 F.3d 622 (7th Cir. 2014);** *Velasquez-Escovar v. Holder*, *F.3d*, **No. 10-73714 (9th Cir. 2014);** *United States v. Madera*, **521 F. Supp. 2d 149 (D. Conn. 2007).**

U.S. Supreme Court

The Supreme Court Reporter citation ("S. Ct.") should be used only when the case has not yet been published in the United States Reports ("U.S.").

Unpublished Cases

Citation to unpublished state and federal court cases is discouraged. When citation to an unpublished decision is necessary, a copy of the decision should be provided, and the citation should include the docket number, court, and precise date. Parties are also encouraged to provide the LexisNexis or Westlaw number. For example: *Bratco v. Mukasey*, **No. 04-726367, 2007 WL 4201263 (9th Cir. Nov. 29, 2007) (unpublished).**

Precedent Cases Not Yet Published

When citing to recent precedent cases that have not yet been published in the Federal Reporter or other print format, parties should provide the docket number, court, and year. Parties are also encouraged to provide the LexisNexis or Westlaw number. For example: *Grullon v. Mukasey*, **__ F.3d __, No. 05-4622, 2007 U.S. App. LEXIS 27325 (2d Cir. 2007).**

DHS Decisions

Precedent decisions by DHS and the former INS should be cited in accordance with the rules for precedent decisions by the BIA.

Citing to the Record (Briefs and Exhibits)

Text from briefs

If referring to text from a brief, the brief should be cited. The citation should state the filing party's identity, the nature of proceedings, the page number, and the date. For example: Respondent's Bond Appeal Brief at 5 (Dec. 12, 2008). For OCAHO, the case caption should be cited, i.e., [Complainant name] v. [Respondent name], the title of the brief, [e.g., Respondent's Motion for Summary Judgment], the page number and the date.

Exhibits

Exhibits designated during a hearing should be cited as they were designated by the immigration judge or ALJ. For example: Exh. 3. Exhibits accompanying a brief should be cited by alphabetic tab or page number. For example: Respondent's Pre-Hearing Brief, Tab A. For OCAHO, exhibits to a brief should be cited by party and alphabetic or numeric tab and page, e.g., Respondent's Exhibit 3 at 5.

Citing to Regulations

General

There are two kinds of publications in the Federal Register: those that are simply informative in nature (such as “notices” of public meetings) and those that are regulatory in nature (referred to as “rules”). There are different types of “rules,” including “proposed,” “interim,” and “final.” The type of rule will determine whether or not (and for how long) the regulatory language contained in that rule will be in effect. Generally speaking, proposed rules are not law and do not have any effect on any case, while interim and final rules do have the force of law and, depending on timing, may affect a given case.

Regulations appear first in the Federal Register (Fed. Reg.) and then in the Code of Federal Regulations (C.F.R.). Once regulations appear in a volume of the C.F.R., do not cite to the Federal Register unless there is a specific reason to do so (discussed below).

Code of Federal Regulations (C.F.R.)

For the Code of Federal Regulations, always identify the volume, the section number, and the year. The year need not be given after the first citation, unless a subsequent citation refers to a regulation published in a different year. Always use periods in the abbreviation “C.F.R.” For example: full - 8 C.F.R. § 1003.1 (2002); short - 8 C.F.R. § 1003.1.

Federal Register (Fed. Reg.)

Citations to regulatory material in the Federal Register should be used only when:

a. the citation is to information that will never appear in the C.F.R., such as a public notice or announcement;

b. the rule contains regulatory language that will be, but is not yet, in the C.F.R.;

c. the citation is to information associated with the rule but that will not appear in the C.F.R. (e.g., a preamble or introduction to a rule); or

d. the rule contains proposed or past language of a regulation that is pertinent in some way to the filing or argument.

The first citation to the Federal Register should always include (i) the volume, (ii) the abbreviated form “Fed. Reg.”, (iii) the page number, (iv) the date, and (v) important identifying information such as “proposed rule,” “interim rule,” “supplementary information,” or the citation where the rule will appear. For example: full - 67 Fed. Reg. 52627 (Aug. 13, 2002) (proposed rule); full - 67 Fed. Reg. 38341 (June 4, 2002) (to be codified at 8 C.F.R. §§ 100, 103, 236, 245a, 274a, and 299); short - 67 Fed. Reg. at 52627-28; 67 Fed. Reg. at 38343.

Since the Federal Register does not use commas in its page numbers, do not use a comma in page numbers. Use abbreviations for the month.

When citing the preamble to a rule, identify it exactly as it is titled in the Federal Register, e.g., 67 Fed. Reg. 54878 (Aug. 26, 2002) (supplementary information).

Statutes and Public Laws

General Guidance

Full Citations

Whenever citing a statute for the first time, be certain to include all the pertinent information, including the name of the statute, its public law number, statutory cite, and a parenthetical identifying where the statute was codified (if applicable), e.g., Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631. The only exception is the Immigration and Nationality Act, which is illustrated below.

Short Citations

The use of short citations is encouraged, but only after the full citation has been used.

b. Special Rule for the INA - Given the regularity with which the Immigration and Nationality Act is cited before EOIR, there is generally no need to

provide the Public Law Number, the Stat. citation, or U.S.C. citation. EOIR will presume INA citations refer to the current language of the INA unless the year is provided. full - section xxx of the Immigration and Nationality Act; short - INA § xxx.

State Statutes

State statutes should be cited as provided in A Uniform System of Citation (also known as the "Blue Book").

Sections of Law

Full citations are often lengthy, and filing parties are sometimes uncertain where to put the section number in the citation. For the sake of simplicity, use the word "section" and give the section number in front of the full citation to the statute. Once a full citation has been given, use the short citation form with a section symbol "§." This practice applies whether the citation is used in a sentence or after it. For example: The definition of the term "alien" in section 101(a)(3) of the Immigration and Nationality Act applies to persons who are not citizens or nationals of the United States. The term "national of the United States" is expressly defined in INA § 101(a)(22), but the term "citizen" is more complex. See INA §§ 301-309, 316, 320.

U.S. Code (U.S.C.)

Citations to the United States Code, always identify the volume, the section number, and the year. The year need not be given after the first citation, unless a subsequent citation refers to a section published in a different year.

Always use periods in the abbreviation “U.S.C.” For example: full - 18 U.S.C. § 16 (2006); short - 18 U.S.C. § 16.

Frequently Cited Statutes

ADAA

Full: Section xxx of Anti-Drug Abuse Act of 1988 (ADAA), Pub. L. No. 100-690, 102 Stat. 4181

Short: ADAA § xxx

AEDPA

Full: Section xxx of Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214

Short: AEDPA § xxx

CCA

Full: Section xxx of Child Citizenship Act of 2000 (CCA), Pub. L. No. 106-395, 114 Stat. 1631

Short: CCA § xxx

CPSA

Full: Section xxx of Adam Walsh Child Protection Act and Safety Act of 2006 (CPSA or Adam Walsh Act), Pub. L. No. 109-248, 120 Stat. 587.

Short: CPSA § xxx

Short: Adam Walsh Act § xxx

CSPA

Full: section xxx of Child Status Protection of 2002 (CSPA), Pub. L. No. 107-208, 116 Stat. 927

Short: CSPA § xxx

IIRIRA

Full: section xxx of Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Division C of Pub. L. No. 104-208, 110 Stat. 3009-546

Short: IIRIRA § xxx

IMFA

Full: section xxx of Immigration Marriage Fraud Amendments of 1986 (IMFA), Pub. L. No. 99-639, 100 Stat. 3537

Short: IMFA § xxx

IMMACT90

Full: section xxx of Immigration Act of 1990 (IMMACT90), Pub. L. No. 101-649, 104 Stat. 4978

Short: IMMACT90 § xxx

INTCA

Full: section xxx of Immigration and Nationality Technical Corrections Act of 1994 (INTCA), Pub. L. No. 103.416, 108 Stat. 4305, amended by Pub. L. No.

105-38, 111 Stat. 1115 (1997)

Short: INTCA § xxx

IRCA

Full: section xxx of Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359

Short: IRCA § xxx

IRFA

Full: section xxx of International Religious Freedom Act of 1988 (IRFA), Pub. L. No. 105-292, 112 Stat. 2787

Short: IRFA § xxx

LIFE

Full: section xxx of Legal Immigration and Family Equity Act (LIFE), Pub. L. No. 106-553, 114 Stat. 2762 (2002), amended by Pub. L. No. 106-554, 114 Stat. 2763 (2000)

Short: LIFE Act § xxx

MTINA

Full: section xxx of Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Pub. L. No. 102-232, 105 Stat. 1733

Short: MTINA § xxx

NACARA

Full: section xxx of Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, tit. II, 111 Stat. 2193 (1997), amended by Pub. L. No. 105-139, 111 Stat. 2644 (1997)

Short: NACARA § xxx

TVPRA

Full: section xxx of William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008), Pub. L. No. 110-457, 122 Stat. 5044

Short: TVPRA § xxx

USA PATRIOT

Full: section xxx of Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT), Pub. L. No. 107-56, 115 Stat. 272

Short: USA PATRIOT Act § xxx

VAWA

Full: section xxx of Violence Against Women and Department of Justice Reauthorization Act of 2013 (VAWA 2013), Pub. L. No. 113-4, 127 Stat. 54

Short: VAWA (2013) § xxx

Treaties and International Materials

Commonly Cited Treaties and International Materials

CAT

Full: Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988)

Short: Convention Against Torture, art. 3

UNHCR Handbook

Full: Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* **(Geneva 1992)**

Short: UNHCR Handbook ¶ xxx

or

UNHCR Handbook para.

U.N. Protocol on Refugees

Full: Article xxx of the United Nation's Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223

Short: U.N. Refugee Protocol, art. xxx

Publications and Communications by Government Agencies

General Guidance

In immigration proceedings, parties cite to a wide variety of administrative agency publications and communications, and there is no one format that fits all such documents. For that reason, parties should use common sense when citing agency documents and err on the side of more information, rather than less. If the document may be difficult for EOIR to locate, include a copy of the document with your filing. If a document is posted on the Internet, identify the website where the document can be found or include a copy of the document with a legible Internet website.

EOIR Practice Manuals

EOIR's practice manuals, including the Immigration Court Practice Manual, BIA Practice Manual, and OCAHO Practice Manual are not legal authorities. However, if there is reason to cite them, the preferred form is to identify the specific provision by manual, chapter, and section along with the date at the bottom of the page on which the cited section appears. For example:

Full: Immigration Court Practice Manual, Chapter 3.1(a) (DATE)

Short: ICPM, Chap. 3.1(a)

Forms

Forms should first be cited according to their full name and number. A short citation form may be used thereafter. See Appendix D: Forms for a list of common immigration forms. For example:

Full: Notice of Appeal from a Decision of an Immigration Judge (Form EOIR-26)

Short: Notice of Appeal or Form EOIR-26

If a form does not have a name, use the form number as the citation.

Country Reports

State Department country reports appear both as compilations in Congressional committee prints and as separate reports and profiles. Citations to country reports should always contain the publication date and the specific page numbers (if available). Provide an internet address when available. The first citation to any country report should contain all identifying information, and a short citation form may be used thereafter. For example:

Full: **Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State,** *Nigeria 2017 Human Rights Report* **(Apr. 2018)**, *available at* **https://www.state.gov/documents/organization/277277.pdf**

Short: *2017 Nigeria Human Rights Report*

Full: **Committees on Foreign Relations and International Relations, 104th Cong., 1st Sess.,** *Country Reports on Human Rights Practices for 1994* **xxx (Joint Comm Print 1995)**

Short: *1994 Country Reports* **at page xxx**

Full: **Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State,** *The Philippines – Profile of Asylum Claims and Country Conditions* **xxx (June 1995)**

Short: *1995 Philippines Profile* **at page xxx**

Visa Bulletin

Citations to the State Department's Visa Bulletin should include the volume, number, month, and year of the specific issue being cited. For example:

Full: **U.S. Dep't of State Visa Bulletin, Vol. VIII, No. 55 (March 2003)**

Short: **Visa Bulletin (March 2003)**

Foreign Affairs Manual

Citations to the State Department's Foreign Affairs Manual should include the section number, and if applicable, the note number. For example:

Full: Vol. 9, Foreign Affairs Manual § 41.81 note 9.1

Short: 9 FAM 41.81

Religious Freedom Reports

The International Religious Freedom Act of 1998 (IRFA) mandates that the Department of State issue an Annual Report on International Religious Freedom (State Department Report). IRFA further authorizes immigration judges to use the State Department Report as a resource in asylum adjudications. The State Department Report should be cited as follows:

Full: Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, *Annual Report on International Religious Freedom* **(Sept. 2007)**

Short: *2007 Religious Freedom Report* **at page xxx**

IRFA also mandates the issuance of an Annual Report by the United States Commission on International Religious Freedom (USCIRF Report). The USCIRF is a government body that is independent of the executive branch. Citations to the USCIRF Report should be distinguishable from citations to the Department of State report:

Full: United States Commission on International Religious Freedom, *Annual Report of the United States Commission on International Religious Freedom***, xxx (May**

2007)

Short: 2007 USCIRF Annual Report at page xxx

Internal Documents

A citation to an internal government document, such as a memo or cable, should contain as much identifying information as possible. Be sure to include any identifying heading (e.g., the "re" line in a memo) and the precise date of the document being cited. Include a copy of the document with the filing or indicate where it has been reprinted publicly. For example:

Full: Memorandum from Donald Neufeld, Acting Assoc. Dir. of Domestic Operations, USCIS, to Field Leadership, re: Applicability of Section 245(k) to Certain Employment-Based Adjustment of Status Applications filed under Section 245(a) of the Immigration and Nationality Act, at x (July 14, 2008*), available at* http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives 1998-2008/2008/245(k)_14jul08.pdf

Short: Neufeld Memo (July 2008)

Commonly Cited Commercial Publications

General Guidance

(i) No universal citation form - In immigration proceedings, parties cite to a wide variety of commercial texts and publications. If a document is difficult to locate, parties should include a copy of the document with filings (or a website for it) and make clear reference to that document in the filing.

(ii) No endorsements or disparagements - The specific publications listed below are frequently cited in filings before the BIA. Their inclusion in this guidance is not an endorsement of the publication, nor is omission from this guidance a disparagement of any other publication.

(iii) Use of quotation marks, italics or underlining, and first initials - For purposes of appeals, motions, briefs, and other filings, EOIR recommends using a single format for all publications – quotation marks around any article title (whether in a book, law review, or periodical), italics or underlining for the name of any publication (whether a book, treatise, or periodical), and reference to authors' last names only (use of first initials is appropriate where multiple authors share the same last name).

(iv) Shortened names - Many publications have long titles. It is acceptable to use a shortened form of the title after the full title has been used. Use a short form that clearly refers to the full citation. Always use page and/or section numbers, whether the publication is cited in full or in shortened form.

(v) Articles in books - Articles in books should identify the author (by last name only), title of the article, and the publication that contains that article (including the editor and year). For example:

Full: Massimino, "Relief from Deportation Under Article 3 of the United Nations Convention Against Torture," in 2 *1997-98 Immigration & Nationality Law Handbook* **467 (American Immigration Lawyers Association, ed., 1997)**

Short: Massimino at 469

(vi) Bender's Immigration Bulletin - Bender's Immigration Bulletin should be cited by author (last name only), article, volume, publication, month, and year. For example:

Full: Sullivan, "When Representations Cross the Line," 1 *Bender's Immigration Bulletin* **(Oct. 1996)**

Short: Sullivan at 3

(vii) Immigration Briefings - This publication should be cited by author (last name only), article, volume, publication, month, and year. For example:

Full: Elliot, "Relief From Deportation: Part I, "88-8 *Immigration Briefings* **(Aug. 1988)**

Short: Elliot at 18

(viii) Immigration Law and Procedure - Citations to treatises require particular attention to detail because their pagination is often complex. The first citation to this treatise must be in full and contain the volume number, the section number, the page number, the edition, and year. For example:

Full: 2 Gordon, Mailman & Yale-Loehr, *Immigration Law and Procedure* **§ 51.01(1)(a), at 51-3 (rev. ed. 1997)**

Short: 2 *Immigration Law and Procedure* **§ 51.01(1)(a), at 51-3**

(ix) Interpreter Releases - Citations to this publication should indicate volume, title, page, number(s), and precise date. Provide a parenthetical explanation for the citation when appropriate. For example:

Full: 75 *Interpreter Releases* **275-76 (Feb. 23, 1998) (regarding INS guidelines on when to consent to reopening of proceedings)**

Short: 75 *Interpreter Releases* **at 276**

(x) Law reviews - Law review articles should identify the author (by last name) and the title of the article, followed by the volume, name, page number(s), and year of the publication. For example:

Full: Hurwitz, "Motions Practice Before the Board of Immigration Appeals," 20 San Diego L. Rev. 79 (1982)

Short: Hurwitz, 20 San Diego L. Rev. at 80

Immigration Court

ECAS: https://case-access.eoir.justice.gov/casedetails

Automated Case Status System: https://acis.eoir.justice.gov/en/

Automated Case Status Phone: 1-800-898-7180

Applications for Relief

Applications for Relief from Removal

ASYLUM (defensive)

REGULATIONS

8 CFR §1208.4 Filing the application

8 CFR § 1208.4(a)(4) Changed Circumstances

(i) The term “changed circumstances” in section 208(a)(2)(D) of the Act shall refer to circumstances materially affecting the applicant's eligibility for asylum. They may include, but are not limited to:

(A) Changes in conditions in the applicant's country of nationality or, if the applicant is stateless, country of last habitual residence;

(B) Changes in the applicant's circumstances that materially affect the applicant's eligibility for asylum, including changes in applicable U.S. law and activities the applicant becomes involved in outside the country of feared persecution that place the applicant at risk; or

(C) In the case of an alien who had previously been included as a dependent in another alien's pending asylum application, the loss of the spousal or

parent-child relationship to the principal applicant through marriage, divorce, death, or attainment of age 21.

(ii) The applicant shall file an asylum application within a reasonable period given those "changed circumstances." If the applicant can establish that he or she did not become aware of the changed circumstances until after they occurred, such delayed awareness shall be taken into account in determining what constitutes a "reasonable period."

8 CFR § 1208.13 Establishing asylum eligibility.

8 CFR §1208.16 Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

8 CFR §1208.17 Deferral of removal under the Convention Against Torture.

ASYLUM GENERALLY

1. Asylum Generally
2. Affirmative Asylum Process
3. Defensive Asylum Process
    1. Eligibility for Asylum
    2. Bars to Asylum
    3. Inadmissibility and Exceptions

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SEE ALSO

ASYLUM

Asylum can be either and affirmative application or a form of defensive relief in removal proceedings so it sort of a hybrid category.

What Is Asylum?

Asylum is a protection grantable to foreign nationals already in the United States or arriving at the border who meet the international law definition of a "refugee." The United Nations 1951 Convention and 1967 Protocol define a refugee as a person who is unable or unwilling to return to their home country, and cannot obtain protection in that country, due to past persecution or a well-founded fear of being persecuted in the future "on account of race, religion, nationality, membership in a particular social group, or political opinion." Congress incorporated this definition into U.S. immigration law in the Refugee Act of 1980. Asylum is technically a "discretionary" status, meaning that some individuals can be denied asylum even if they meet the definition of a refugee. For those individuals, a backstop form of protection known as "withholding of removal" may be available to protect them from harm if necessary.

As a signatory to the 1967 Protocol, and through U.S. immigration law, the United States has legal obligations to provide protection to those who

qualify as refugees. The Refugee Act established two paths to obtain refugee status—either from abroad as a resettled refugee or in the United States as an asylum seeker.

Affirmative Asylum

When a noncitizen applies for asylum *before* they are in removal proceedings

Defensive Asylum

When a non-citizen is already in removal proceedings when they apply for asylum.

ASYLUM PROCESSING RULE

Since May 31, 2022, some individuals entering the United States are being processed under an interim final rule. These individuals are first put in expedited removal and if they express fear of persecution or torture, are given a credible fear interview, a process that initiates a defensive asylum claim. However, rather than having their case sent directly to an immigration judge, people processed under this rule are referred to an asylum officer for a non-adversarial Asylum Merits Interview between 21-45 days after the credible fear determination. This interview mirrors that of an affirmative asylum claim. An asylum officer can then either grant asylum or deny asylum. If denied, the case is referred to an immigration judge. Additionally, a person who is denied asylum by an asylum officer is also assessed at the

time for eligibility for withholding of removal and protection under the Convention Against Torture—another feature of defensive asylum processes. Since May 31, 2022, certain individuals entering the United States undergo processing based on an interim final rule. Initially, they are placed in expedited removal. If they express fear of persecution or torture, they receive a credible fear interview, which initiates a defensive asylum claim. Instead of directly sending their case to an immigration judge, individuals processed under this rule are referred to an asylum officer for a non-adversarial Asylum Merits Interview within 21-45 days after the credible fear determination. This interview resembles an affirmative asylum claim. The asylum officer can either grant or deny asylum. If denied, the case proceeds to an immigration judge. Additionally, a person denied asylum by an asylum officer is also evaluated for eligibility for withholding of removal and protection under the Convention Against Torture—a key aspect of defensive asylum procedures.

Asylum is a form of protection granted to foreign nationals already in the United States or arriving at the border. To qualify, they must meet the international law definition of a 'refugee.' According to the United Nations 1951 Convention and the 1967 Protocol, a refugee is someone who cannot or will not return to their home country due to past persecution or a well-founded fear of future persecution based on factors such as race, religion, nationality, membership in a particular social group, or political opinion. The U.S. incorporated this definition into its immigration law through the Refugee Act of 1980. Asylum status is technically 'discretionary,' meaning that even if an individual meets the refugee definition, they may still be denied asylum. In such cases, an alternative form of protection called 'withholding of removal' may be available to safeguard them from harm.

The United States, as a signatory to the 1967 Protocol, has legal obligations to protect those who qualify as refugees. The Refugee Act provides two paths

to obtain refugee status: either from abroad as a resettled refugee or within the United States as an asylum seeker

ONE-YEAR FILING DEADLINE

An individual generally must apply for asylum within one year of their most recent arrival in the United States. In 2018, a federal district court found that DHS is obligated to notify asylum seekers of this deadline in a class-action lawsuit that challenged the government's failure to provide asylum seekers adequate notice of the one-year deadline and a uniform procedure for filing timely applications.

Asylum seekers in the affirmative and defensive processes face many obstacles to meeting the one-year deadline. Some individuals face traumatic repercussions from their time in detention or journeying to the United States and may never know that a deadline exists. Even those who are aware of the deadline encounter systemic barriers, such as lengthy backlogs, that can make it impossible to file their application in a timely manner. In many cases, missing the one-year deadline is the sole reason the government denies an asylum application. Under the expedited asylum process, a person who passes a credible fear interview is considered to have applied for asylum, which means that the one-year filing deadline is automatically satisfied.

PROVING ASYLUM

For asylum applicants, INA § 208 (b)(1)(B)(ii) specifies, “The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee.”

Demeanor and Credibility

The INA directs that an IJ in assessing credibility should consider the “totality of the circumstances” and “all relevant factors,” including:

the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant’s or witness’s account, the consistency between the applicant’s or witness’s written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim, or any other relevant factor.

The REAL ID Act states for asylum applicants that a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant’s or witness’s account, the consistency between the applicant’s or witness’s written and oral statements (whenever made and whether or not under oath, and

considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record. *See* **INA § 208(b)(1)(B)(iii).**

INA § 240(c)(4)(C). *See also Matter of J-Y-C-***, 24 I&N Dec. 260, 266 (BIA 2007) (holding that the IJ properly considered the totality of the circumstances in finding that the applicant lacked credibility based on his demeanor, implausible testimony, lack of corroboration, and inconsistent statements).**

Respondent Has Burden to Explain Inconsistencies

In *Matter of Y-I-M-***, 28 27 I&N Dec. 724, 725 (BIA 2019), the BIA held that "if inconsistencies in the record are obvious or have previously been identified" by DHS or the IJ, the IJ is not required to give the respondent a specific opportunity to explain them.**

"Credible" and "Reasonable" Fear Interviews

Fear interviews are part of the expedited removal process. When a person is put into the expedited removal process, if they express a fear of returning to their home country or request to seek asylum, they are first screened to see

if they could establish that they have a fear of persecution or torture. Generally speaking, there are two “levels” of fear interviews, most commonly referred to as “credible fear” and “reasonable fear.” A person is said to have a “credible fear” if they can demonstrate a “significant possibility” that they will be able to establish eligibility for asylum or withholding of removal under the Immigration and Nationality Act or withholding of removal or deferral of removal under the Convention Against Torture. A person establishing a “reasonable fear” of persecution or torture has to demonstrate a higher likelihood that they would be eligible for relief from removal.

The fear screening process has been periodically altered by new rules issued by various presidential administrations. Those rules are also often the subject of litigation, making the exact process an individual is subjected to (including the standard of proof needed to establish a “credible” fear) subject to regular change. Additionally, many of the rules are applied only to a subset of individuals, often seemingly at random, due to changing logistical, diplomatic, or humanitarian factors. Therefore, the credible and reasonable fear interview process may be applied differently to different people depending on things such as when they arrived at the border, where they arrived, what country they arrived from, whether they entered at a port of entry or between ports of entry, and other considerations.

At the credible or reasonable fear interview, if an individual is found by the asylum officer to have met the standard applied to them, they are then referred to proceedings where they can submit an application for asylum or other similar protections. Usually, this is done via a referral to an immigration court, where a person is put in removal proceedings initiated with a Notice to Appear. Some pilot programs such as that created by the Asylum Processing Rule created an alternative venue, where people would have their full asylum cases reviewed by an asylum officer rather than an immigration judge, on a significantly truncated timeline. If the asylum officer

determines the person did not establish either credible or reasonable fear, their expedited removal order stays in place. Before removal, the individual may request review of the fear determination by an immigration judge. If the immigration judge overturns a negative fear finding, the individual is treated as if they passed their fear interview and is placed in further removal proceedings through which the individual can seek protection from removal, including asylum. If the immigration judge upholds the negative finding by the asylum officer, the individual will be removed from the United States.

- [illegible]

Applications for Relief

Form 42A, Cancellation of Removal for Permanent Residents

42A CANCELLATION OF REMOVAL

Practice Advisory

Helpful practice advisory with information about eligibility requirements.

https://www.ilrc.org/sites/default/files/resources/relief_cancellation_removal_lpr_11.2020.pdf

INA § 240(A)(a)

INA § 240A (8 USC § 1229b)- Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien–

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents (1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien–

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(2) Special rule for battered spouse or child

(A) Authority

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien demonstrates that–

(i)(I) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a United States citizen (or is the parent of a child of a United States citizen and the child has been battered or subjected to

extreme cruelty by such citizen parent);

(II) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a lawful permanent resident (or is the parent of a child of an alien who is or was a lawful permanent resident and the child has been battered or subjected to extreme cruelty by such permanent resident parent); or

(III) the alien has been battered or subjected to extreme cruelty by a United States citizen or lawful permanent resident whom the alien intended to marry, but whose marriage is not legitimate because of that United States citizen's or lawful permanent resident's bigamy;

(ii) the alien has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application, and the issuance of a charging document for removal proceedings shall not toll the 3-year period of continuous physical presence in the United States;

(iii) the alien has been a person of good moral character during such period, subject to the provisions of subparagraph (C);

(iv) the alien is not inadmissible under paragraph (2) or (3) of section 1182(a) of this title, is not deportable under paragraphs (1)(G) or (2) through (4) of section 1227(a) of this title, subject to paragraph (5), and has not been convicted of an aggravated felony; and

(v) the removal would result in extreme hardship to the alien, the alien's child, or the alien's parent.

(B) Physical presence

Notwithstanding subsection (d)(2) of this section, for purposes of subparagraph (A)(ii) or for purposes of section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), an alien shall not be considered to have failed to maintain continuous physical presence by reason of an absence if the alien demonstrates a connection between the

absence and the battering or extreme cruelty perpetrated against the alien. No absence or portion of an absence connected to the battering or extreme cruelty shall count toward the 90-day or 180-day limits established in subsection (d)(2) of this section. If any absence or aggregate absences exceed 180 days, the absences or portions of the absences will not be considered to break the period of continuous presence. Any such period of time excluded from the 180-day limit shall be excluded in computing the time during which the alien has been physically present for purposes of the 3-year requirement set forth in this subparagraph, subparagraph (A)(ii), and section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

(C) Good moral character

Notwithstanding section 1101(f) of this title, an act or conviction that does not bar the Attorney General from granting relief under this paragraph by reason of subparagraph (A)(iv) shall not bar the Attorney General from finding the alien to be of good moral character under subparagraph (A)(iii) or section 1254(a)(3) of this title (as in effect before the Title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), if the Attorney General finds that the act or conviction was connected to the alien's having been battered or subjected to extreme cruelty and determines that a waiver is otherwise warranted.

(D) Credible evidence considered

In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

(3) Recordation of date

With respect to aliens who the Attorney General adjusts to the status of an alien lawfully admitted for permanent residence under paragraph (1) or (2),

the Attorney General shall record the alien's lawful admission for permanent residence as of the date of the Attorney General's cancellation of removal under paragraph (1) or (2).

(4) Children of battered aliens and parents of battered alien children

(A) In general

The Attorney General shall grant parole under section 1182(d)(5) of this title to any alien who is a–

(i) child of an alien granted relief under section 1229b(b)(2) or 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996); or

(ii) parent of a child alien granted relief under section 1229b(b)(2) or 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

(B) Duration of parole

The grant of parole shall extend from the time of the grant of relief under subsection (b)(2) of this section or section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) to the time the application for adjustment of status filed by aliens covered under this paragraph has been finally adjudicated. Applications for adjustment of status filed by aliens covered under this paragraph shall be treated as if the applicants were VAWA self-petitioners. Failure by the alien granted relief under subsection (b)(2) of this section or section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) to exercise due diligence in filing a visa petition on behalf of an alien described in clause (i) or (ii) may result in revocation of parole.

(5) Application of domestic violence waiver authority

The authority provided under section 1227(a)(7) of this title may apply under paragraphs (1)(B), (1)(C), and (2)(A)(iv) in a cancellation of removal and adjustment of status proceeding.

(6) Relatives of trafficking victims

(A) In general

Upon written request by a law enforcement official, the Secretary of Homeland Security may parole under section 1182(d)(5) of this title any alien who is a relative of an alien granted continued presence under section 7105(c)(3)(A) of Title 22, if the relative–

(i) was, on the date on which law enforcement applied for such continued presence–

(I) in the case of an alien granted continued presence who is under 21 years of age, the spouse, child, parent, or unmarried sibling under 18 years of age, of the alien; or

(II) in the case of an alien granted continued presence who is 21 years of age or older, the spouse or child of the alien; or

(ii) is a parent or sibling of the alien who the requesting law enforcement official, in consultation with the Secretary of Homeland Security, as appropriate, determines to be in present danger of retaliation as a result of the alien's escape from the severe form of trafficking or cooperation with law enforcement, irrespective of age.

(B) Duration of parole

(i) In general

The Secretary may extend the parole granted under subparagraph (A) until the final adjudication of the application filed by the principal alien under section 1101(a)(15)(T)(ii) of this title.

(ii) Other limits on duration

If an application described in clause (i) is not filed, the parole granted under subparagraph (A) may extend until the later of–

(I) the date on which the principal alien's authority to remain in the United States under section 7105(c)(3)(A) of this title is terminated; or

(II) the date on which a civil action filed by the principal alien under section 1595 of Title 18, is concluded.

(iii) Due diligence

Failure by the principal alien to exercise due diligence in filing a visa petition on behalf of an alien described in clause (i) or (ii) of subparagraph (A), or in pursuing the civil action described in clause (ii)(II) (as determined by the Secretary of Homeland Security in consultation with the Attorney General), may result in revocation of parole.

(C) Other limitations

A relative may not be granted parole under this paragraph if–

(i) the Secretary of Homeland Security or the Attorney General has reason to believe that the relative was knowingly complicit in the trafficking of an alien permitted to remain in the United States under section 7105(c)(3)(A) of Title 22; or

(ii) the relative is an alien described in paragraph (2) or (3) of section 1182(a) of this title or paragraph (2) or (4) of section 1227(a) of this title.

(c) Aliens ineligible for relief The provisions of subsections (a) and (b)(1) of this section shall not apply to any of the following aliens:

(1) An alien who entered the United States as a crewman subsequent to June 30, 1964.

(2) An alien who was admitted to the United States as a nonimmigrant exchange alien as defined in section 1101(a)(15)(J) of this title, or has acquired the status of such a nonimmigrant exchange alien after admission, in order to receive graduate medical education or training, regardless of whether or not the alien is subject to or has fulfilled the two-year foreign residence requirement of section 1182(e) of this title.

(3) An alien who–

(A) was admitted to the United States as a nonimmigrant exchange alien as defined in section 1101(a)(15)(J) of this title or has acquired the status of such a nonimmigrant exchange alien after admission other than to receive graduate medical education or training,

(B) is subject to the two-year foreign residence requirement of section 1182(e) of this title, and

(C) has not fulfilled that requirement or received a waiver thereof.

(4) An alien who is inadmissible under section 1182(a)(3) of this title or deportable under section 1227(a)(4) of this title.

(5) An alien who is described in section 1231(b)(3)(B)(i) of this title.

(6) An alien whose removal has previously been cancelled under this section or whose deportation was suspended under section 1254(a) of this title or who has been granted relief under section 1182(c) of this title, as such sections were in effect before September 30, 1996.

(d) Special rules relating to continuous residence or physical presence (1) Termination of continuous period

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2) of this section, when the alien is served a notice to appear under section 1229(a) of this title, or (B) when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

(2) Treatment of certain breaks in presence

An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) of this section if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

(3) Continuity not required because of honorable service in Armed Forces and presence upon entry into service

The requirements of continuous residence or continuous physical presence in the United States under subsections (a) and (b) of this section shall not apply to an alien who–

(A) has served for a minimum period of 24 months in an active-duty status in the Armed Forces of the United States and, if separated from such service, was separated under honorable conditions, and

(B) at the time of the alien's enlistment or induction was in the United States.

(e) Annual limitation (1) Aggregate limitation

Subject to paragraphs (2) and (3), the Attorney General may not cancel the removal and adjust the status under this section, nor suspend the deportation and adjust the status under section 1254(a) of this title (as in effect before September 30, 1996), of a total of more than 4,000 aliens in any fiscal year. The previous sentence shall apply regardless of when an alien applied for such cancellation and adjustment, or such suspension and adjustment, and whether such an alien had previously applied for suspension of deportation under such section 1254(a) of this title. The numerical limitation under this paragraph shall apply to the aggregate number of decisions in any fiscal year to cancel the removal (and adjust the status) of an alien, or suspend the deportation (and adjust the status) of an alien, under this section or such section 1254(a) of this title.

(2) Fiscal year 1997

For fiscal year 1997, paragraph (1) shall only apply to decisions to cancel the removal of an alien, or suspend the deportation of an alien, made after April 1, 1997. Notwithstanding any other provision of law, the Attorney General may cancel the removal or suspend the deportation, in addition to the normal allotment for fiscal year 1998, of a number of aliens equal to 4,000 less the number of such cancellations of removal and suspensions of

deportation granted in fiscal year 1997 after April 1, 1997.

(3) Exception for certain aliens

Paragraph (1) shall not apply to the following:

(A) Aliens described in section 309(c)(5)(C)(i) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (as amended by the Nicaraguan Adjustment and Central American Relief Act).

(B) Aliens in deportation proceedings prior to April 1, 1997, who applied for suspension of deportation under section 1254(a)(3) of this title (as in effect before September 30, 1996).

THREE MAIN REQUIREMENTS **The Applicant has been a permanent resident for at least five years. The applicant has spent at least seven continuous years living in the U.S. after having been lawfully admitted The applicant has not been convicted of an aggravated felony**

You can apply for LPR Cancellation of Removal under INA § 240(A)(a) if…

A. You obtained LPR status lawfully (not through fraud)

You must not have become an LPR through fraud or mistake. You must not come within certain categories, including persecutors and terrorists.

B. You have not been convicted of an aggravated felony.

The immigration statute designates certain types of crimes as "aggravated felonies." If the person was convicted of an aggravated felony at any time, it is a bar to LPR cancellation of removal.

If the aggravated felony does not involve drugs, check to see if the person might be eligible for relief under INA § 212(h).6 If the aggravated felony conviction occurred in the 1990's or earlier, check for eligibility for a waiver under INA § 212(c), discussed below. For other options, see the ILRC Relief Toolkit at www.ilrc.org/chart.

C. You have been an LPR for at least five years.

The applicant must have "been an alien lawfully admitted for permanent residence for not less than 5 years." INA § 240A(a)(1). The five years of LPR status includes time spent as a conditional permanent resident. Children cannot use their parent's time, for either the five-year LPR or seven-year continuous residence requirement.

The accrual of five years of LPR status is not subject to the "stop-time" rule set out at INA § 240A(d)(1), discussed below.9 The five years as an LPR continue to accrue through the removal proceedings until there is an administrative denial (meaning throughout the BIA appeal, if there is one).

Example: **Maritza was admitted on a border crossing card in 2009, fell out of status, and then adjusted to lawful permanent resident status in 2014. She was convicted of an alleged deportable offense and served with a Notice to Appear in 2017. She was not eligible for LPR cancellation because she lacked the five years as an LPR (although she did have the seven years since admission in any status, discussed below). In removal proceedings, she contested deportability, lost, and appealed her case to the BIA. In 2019, while the appeal was still pending, she reached the five years of LPR status. The BIA agreed to her request to remand the case to the immigration judge to enable her to apply for LPR cancellation.**

D. You have accrued seven years of continuous residence in the United States since admission in any status.

The applicant must have "resided in the United States continuously for 7 years after having been admitted in any status." INA § 240A(a)(2). As discussed below, a complex "stop-time" provision governs when the seven years cease to accrue based on commission of certain offenses, under INA § 240A(d)(1)(B).

The Stop Time Rule

1. **Clock Starts With ANY Admission**
2. **Clock Stops With Issuance of NTA or Commission of §212(a)(2) or INA §237(a)(2) or §237(a)(4)**

Which kinds of offenses stop the clock?

According to Barton, the clock stops as of the day that the person committed an offense that ultimately resulted in them being rendered inadmissible under (described in) INA § 212(a)(2). This includes:

1. **A conviction of, or qualifying admission of committing, a single CIMT, unless it comes within the petty offense or youthful offender exceptions. If the first CIMT comes within one of those exceptions, the second CIMT will stop the clock. See discussion, below.**
2. **A conviction of, or qualifying admission of committing, a controlled substance offense. This includes a conviction or simply an admission of possessing any amount of marijuana, even if this was permitted under state law.22 While the deportation ground has a statutory exception for possessing 30 grams or less of marijuana, the inadmissibility does not.**
3. **Conv**

The Petty Offense and Youthful Offender Exceptions

The petty offense exception to the CIMT inadmissibility ground applies if the person committed just one CIMT, the potential sentence was one year or less, and any sentence imposed was six months or less. A CIMT that comes within the petty offense exception is not "referred to" in § 212(a)(2) and does not stop the clock on the seven years. Matter of Garcia, 25 I&N Dec. 332 (BIA 2010). This is true even if the conviction made the person deportable.

The youthful offender exception to the CIMT inadmissibility ground applies if the person committed just one CIMT; they did this while under the age of 18 but they were convicted as an adult; and the conviction or release from resulting imprisonment occurred at least five years before the current application.

This has the same immigration benefits as the petty offense exception. If a person comes within one of these exceptions, but later is convicted of or admits committing a second CIMT, the clock stops on the date of commission of the second CIMT. *Matter of Deando-Roma,* **23 I&N Dec. 597 (BIA 2003).**

Example: Fiona was admitted to the United States as a permanent resident in 2009.

In 2013 she was convicted of a CIMT that has a potential sentence of one year. She was sentenced to 10 days in jail. This conviction makes Fiona deportable, because she was convicted of a CIMT with a potential sentence of one year that she committed within 5 years of her admission. It comes within the petty offense exception to the inadmissibility ground.

In 2018, Fiona committed and was convicted of a second CIMT. Did Fiona accrue the seven years residence since admission required for LPR cancellation? Yes. The seven years started with her admission in 2009. The

2013 conviction did not stop the clock because it came within the petty offense exception and thus was not "referred to" in INA § 212(a)(2). *See Matter of Garcia*. **Her second CIMT conviction did stop the clock, as of the date she committed that offense in 2018. See Matter of Deando-Roma. But by 2018, she had accrued more than the seven years of residence she needed since 2009.**

Conviction for Possessing Any Amount of Marijuana

One or more convictions that arise from a single incident involving possession of 30 grams or less of marijuana for personal use is not a deportable offense, but it is an offense described in § 212(a)(2). A conviction or a qualifying admission of conduct will stop the clock.

Example: LPR Laura was admitted to the United States in 2009, and was convicted of possessing 20 grams of marijuana in 2013. She was convicted of a deportable crime of child abuse in 2019 and placed in removal proceedings. She is applying for LPR cancellation. Does she have the required seven years?

No. The 2013 conviction did not make her deportable, because the deportation ground has an exception for a single incident involving possession of 30 grams or less of marijuana for personal use. However, the inadmissibility grounds at § 212(a)(2) do not have that exception, so the conviction rendered her inadmissible and her clock stopped as of the day she committed the offense. She needs to consider post-conviction relief.

Admitting a CIMT or Drug Offense – Including “Legal” Marijuana – on the Stand or Elsewhere

Even if there is no conviction, a qualifying admission that one committed certain controlled substance offenses (including possession of marijuana) can render the person “admissible” under § 212(a)(2) and stop the clock. In Barton, the Supreme Court abrogated Nguyen v. Sessions, 901 F.3d 1093 (9th Cir. 2018) and held that simply admitting commission of an inadmissible drug offense stopped the seven-year clock.

ICE may try to elicit this admission from your client at the hearing or before. A qualifying admission of a CIMT also will stop the clock, unless it comes within the petty offense exception. Example: Leon was admitted to the United States as an LPR in 2009. He committed and was convicted of CIMT offenses in 2018 and 2019. He was placed in removal proceedings and applied for LPR cancellation. At his cancellation hearing, the ICE attorney asked if he ever had tried marijuana. Leon admitted that he had used it a few times in Colorado in 2015, after it became legal. Does Leon have the required seven years?

ICE will assert that he does not. Although using marijuana was permitted under Colorado law, possessing marijuana is a federal offense. ICE will assert that because Leon has admitted committing a federal drug crime, he is rendered inadmissible under INA § 212(a)(2), and his seven-year clock has stopped as of the date of the admitted conduct in 2014. Because at that time he had only accrued five years since admission, Leon is no longer eligible to

apply for cancellation.

Convictions from Before September 30, 1996 (or April 1, 1997) May Not Stop the Clock

In the Ninth Circuit, conviction of an offense before September 30, 1996 (the enactment date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 or IIRIRA34) does not stop the seven-year clock if the person was eligible for relief under INA § 212(c) as of April 1, 1997 (the enactment date of IIRIRA). See Sinotes-Cruz v. Gonzalez, 468 F.3d 1190, 1203 (9th Cir. 2006).35 The Sinotes-Cruz requirement of being "eligible" for relief as of April 1, 1997 should mean that the person had a conviction that qualified for INA § 212(c) relief, not that the person already had accrued the seven years required for INA § 212(c). See also Valencia-Alvarez v. Gonzales, 469 F.3d 1319, 1329 (9th Cir. 2006) (the clock did stop because the person never was eligible for relief under INA § 212(c)).

Courts are split on this issue: the BIA and some courts rule against any limit to stopping the clock based on IIRIRA, while the Fourth and Seventh Circuit provide a limit but under somewhat different standards

Motions

Motions in EOIR, Immigration Court.

Motions Generally

Motions to Reopen & Motions to Reconsider are NOT included in this motions section since those are motions that are filed after a final decision. Motions to Reopen and Reconsider are included in the Appeals & Post Order Relief section, which seemed more appropriate.

(h) Visa Petitions - If a motion is based on an application for adjustment of status and there is an underlying visa petition that has been approved, a copy of the visa petition and the approval notice should accompany the motion. When a petition is subject to visa availability, evidence that a visa is immediately available should also accompany the motion (e.g., a copy of the State Department's Visa Bulletin reflecting that the priority date is "current").

If a motion is based on adjustment of status and the underlying visa petition has not yet been adjudicated, a copy of that visa petition, all supporting documents, and the filing receipt (Form I-797) should accompany the motion.

Parties should note that, in certain instances, an approved visa petition is required for motions based on adjustment of status. See, e.g., *Matter of H-A-***, 22 I&N Dec. 728 (BIA 1999), modified by** *Matter of Velarde***, 23 I&N Dec. 253 (BIA 2002).**

Filing fees for visa petitions are not paid to the Immigration Court and should not accompany the motion. The filing fee for a visa petition is submitted to DHS when the petition is filed with DHS.

OPPOSITION TO MOTIONS

General Opposition to a Motion

Matter of Lamus, **25 I&N Dec. 61, 65 (BIA 2009) (concluding that a party's opposition to a motion to reopen, "in and of itself, should [not] be dispositive of the motion without regard to the merit of that opposition");** *Matter of Hashmi,* **24 I&N Dec. 785, 791 (BIA 2009) (noting that the DHS's "unsupported opposition" to a continuance "does not carry much weight").**

The Board in *Matter of Avetisyan,* **determined for the first time that Immigration Judges and the Board have the authority to administratively close a case when appropriate, even if a party opposes it. Matter of Avetisyan, 25 I&N Dec. 688, 690-694 (BIA 2012).** *Matter of Avetisyan* **does not list court resources as a factor to consider in evaluating whether administrative closure is appropriate. In a similar context, we held that "[c]ompliance with . . . case completion goals . . . is not a proper factor in deciding a continuance request."** *Matter of Hashmi*, **24 I&N Dec. at 793–94.**

Matter of C-B-, **25 I&N Dec. 888, 890 (BIA 2012) (noting that docket efficiency does not override an alien's "invocation of procedural rights and privileges").**

Respondent's Right to Oppose Administrative Closure

To the extent that the Immigration Judge concluded that this matter does not present an "actual case[] in dispute," we do not agree. An alien in removal proceedings has a right to seek asylum and related relief from persecution. See Matter of E-F-H-L-, 26 I&N Dec. 319, 321–23 (BIA 2014) (holding that an alien in removal proceedings generally has a right to a full evidentiary hearing on applications for relief from persecution); 8 C.F.R. § 1240.11(c)(3) (2016). Therefore, assuming that his application was properly filed and that he is eligible for the relief sought, the respondent has a right to a hearing on the merits of his claim. If his application is successful, he may be eligible for lawful status in the United States, while administrative

closure provides him no legal status. This is not a case where an alien has filed for asylum with no intent to proceed on the application to a resolution.

Motion to Continue

REGULATIONS

Two regulations authorize continuances in removal cases: 8 C.F.R. § 1003.29, which permits IJs to continue a hearing for good cause shown, and 8 C.F.R. § 1240.6, which permits IJs to grant a "reasonable adjournment at his or her own instance" or for good cause shown by a requesting party. Though the regulations do not provide guidance as to what factors constitute "good cause" for a continuance, the BIA has laid out specific factors that an IJ must consider in evaluating whether "good cause" exists where the respondent is pursuing collateral relief.

CASE LAW

Matter of L-A-B-R-, 27 I&N Dec. 405 (A.G. 2018)

Matter of Hashmi, 24 I&N Dec. 785, 790-91 (BIA 2009) (family-based petition)

Matter of Rajah, 25 I&N Dec. 127, 135-36 (BIA 2009) (an employment petition)

Matter of Sanchez Sosa, 25 I&N Dec. 807, 812-13 (BIA 2012) (U visa petition)

Practice Advisory for Matter of L-A-B-R

https://www.cliniclegal.org/resources/removal-proceedings/practice-advisory-matter-l-b-r-27-dec-405-ag-2018

Motion for Continuance Practice Advisory

***Matter of L-A-B-R-* and continuances to pursue collateral matters On August 16, 2018, Attorney General Sessions issued a decision in *Matter of L-A-B-R-*, a case addressing when "good cause" exists to grant a continuance for a respondent to pursue a collateral proceeding. The decision does not overturn previous case law establishing a multifactor test for determining "good cause," but cautions against "unjustified continuances," describing them as a "significant and recurring problem" and the L-A-B-R- decision as necessary guidance to protect against "abuse" of continuances. *L-A-B-R* emphasizes the holding in *Matter of Hashmi,* that an immigration judge should rely primarily on two factors in making a good cause determination:**

1) the likelihood the respondent will receive the collateral relief sought, and

2) whether the relief will materially affect the outcome of the removal proceedings.

Other factors to be considered in a decision to grant or deny a motion for continuance include:

1) the respondent's diligence in seeking collateral relief;

2) DHS's position on the motion;

3) administrative efficiency;

4) the length of continuance requested;

5) the number of hearings held and continuances granted previously; and

6) the timing of the continuance motion. Though the immigration judge must use discretion in balancing the relevant factors supporting a continuance grant, *L-A-B-R* states that due diligence may be absent when the respondent intends to pursue collateral relief at a future date or "appears to have unreasonably delayed filing for collateral relief" until just prior to a hearing. If there was a diligent good faith effort to proceed, however, the respondent will meet this prong. In addition, under L-A-B-R- DHS' decision to consent, oppose or fail to take a position on a continuance motion should not be dispositive. Citing the 2017 EOIR memo, L-A-B-R emphasizes efficiency in the good cause analysis. Immigration judges' interpretation of this part of the decision will be critical in how *L-A-B-R*.

8 CFR 1003.18

Motions

Motion to Administratively Close

Quick Summary

The Attorney General overruled *Matter of Castro-Tum* **in** *Matter of Cruz-Valdez* **in 2021. Although** *Matter of Cruz-Valdez* **did not, in and of itself, establish a new administrative closure scheme, it restored the Board's earlier decisions in** *Matter of Avetisyan* **and** *Matter of W-Y-U-* **to the status of binding precedents and instructed immigration judges to apply the administrative closure rules from those cases.** *Matter of Avetisyan* **and** *Matter of W-Y-U-* **are detailed below.**

Admin Closure Factors

In sum the Board instructed immigration judges to consider the following factors in deciding whether to grant administrative closure in a given case:

1. *the reason it is sought*
2. *the basis for any opposition* <- *The most important factor under the test*
3. *the likelihood*

BIA Precedent and the Rules Have Been in Flux

Matter of W-Y-U- **provided specific guidance to immigration judges on adjudicating motions for administrative closure where one party (most often the government) objects. In such cases, immigration judges should consider whether the opposing party provided a persuasive reason to proceed to resolving the removal proceedings on the merits.**

Because *Matter of S-O-G- & F-D-B-* **closely followed** *Matter of Castro-Tum***, it was placed on shaky ground by the decision to overrule the latter. Moreover, one could argue it was effectively, if not expressly, abrogated by the direction in** *Matter of Cruz-Valdez* **to follow** *Matter of Avetisyan* **and** *Matter of W-Y-U* **with regard to motions to administratively close proceedings. It would be difficult to say the least to try to reconcile** *Matter of S-O-G- & F-D-B-* **with** *Avetisyan* **and** *W-Y-U-***.**

In *Matter of Coronado Acevedo***, Attorney General Garland made what was arguably implicitly clear in** *Matter of Cruz Valdez* **explicit and overruled** *Matter of S-O-G- & F-D-B-***. While** *Matter of S-O-G- & F-D-B-* **is not identical to** *Matter of Castro-Tum***, the Attorney General explained that its analysis followed directly from the central premises of the latter.**

J-A-A-G A-L-M-D-

(1) The primary consideration for an Immigration Judge in evaluating whether to administratively close or recalendar proceedings is whether the party opposing administrative closure has provided a persuasive reason for the case to proceed and be resolved on the merits. Matter of Avetisyan, 25 I&N Dec. 688 (BIA 2012), clarified.

> **(2) In considering administrative closure, an Immigration Judge cannot review whether an alien falls within the enforcement priorities of the Department of Homeland Security, which has exclusive jurisdiction over matters of prosecutorial discretion.**

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BIA's

Full Decision at https://www.justice.gov/eoir/page/file/958526/dl

While Matter of Avetisyan provides a list of factors to be considered, we now clarify that decision and hold that the primary consideration

for an Immigration Judge in determining whether to administratively close or recalendar proceedings is whether the party opposing administrative closure has provided a persuasive reason for the case to proceed and be resolved on the merits.

Admin Closure, a Tool for Immigration Court.

Practice Advisory

Related Articles

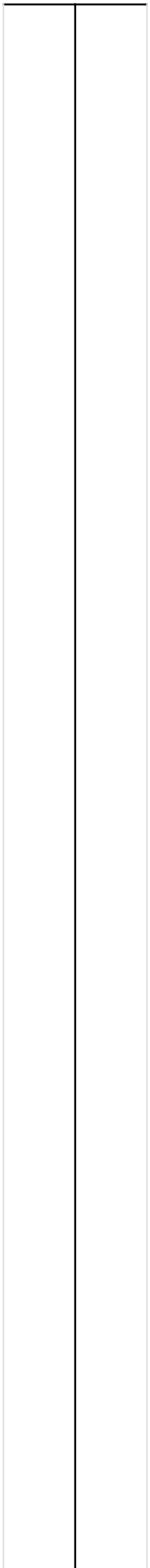
AG Eliminates Precedent Restricting Administrative Closure

On November 17, 2022, U.S. Attorney General Merrick Garland published an immigration precedent decision in the *Matter of Coronado Acevedo,* **28 I&N Dec. 648 (A.G. 2022) [PDF version]. The Attorney General overruled a prior Attorney General precedent,** *Matter of S-O-G- & F-D-B-,* **27 I&N Dec. 462 (A.G. 2018) [PDF version], which had been published by former Attorney General Jeff Sessions in 2018.** *Matter of S-O-G- & F-D-B-* **limited the circumstances in which an immigration judge could dismiss or terminate removal proceedings through administrative closure. This decision generally disfavored alien respondents by precluding immigration judges from dismissing proceedings to allow them to obtain status or other forms of relief without departing or being removed from the United States.** *Matter of Coronado Acevedo* **is generally favorable to aliens in proceedings insofar as it returns the understanding of the immigration judge's authority to dismiss proceedings to what it was before the Attorney General decision in** *Matter of S-O-G- & F-D-B-* **and** *Matter of Castro-Tum***, 27 I&N Dec. 271 (A.G. 2018) [PDF version], the latter of which was previously vacated by Attorney General Garland in** *Matter of Cruz-Valdez***, 27 I&N Dec. 271 (A.G. 2018) [PDF version].**

Motion to Terminate

Motion to Terminate

Motion for Severance



Motions

Motion to Withdraw

Motion to Withdraw as Attorney of Record

A motion to withdraw as counsel must comply with Matter of Rosales (BIA 1988).

Counsel must file a motion with the Court providing:

1. **Evidence that counsel attempted to contact the Respondent at their last known address with the following information: Date, time, and place, of scheduled hearing.**
2. **Evidence that counsel attempted to contact the Respondent at their last known address**

If those requirements are not met then the motion to draw may only be *conditionally granted.*

Matter of Rosales, Interim Decision #3064 (BIA 1988)

A-27188547 | Decided by Board April .21, 1988

(1) Where an attorney asks to withdraw from representation of an alien, his request for withdrawal should include evidence that he attempted to advise

his client, at his last known address, of the date, time, and place of the scheduled hearing, and he should also provide the immigration judge with the alien's last known address, assuming it is more current than any address previously provided to the immigration judge.

(2) Unless these requirements are met, counsel's withdrawal should be only conditionally granted, that is, granted for all purposes except receipt of service of documents.

PROCEDURAL

Notice to Appear

Pleadings

Motion Practice

Objections

Timely Objections

Time-Barred Relief or Motions

Claim-Processing Rule

PROCEDURAL

Service on ICE

In the Matter of: **Respondent's Name** **Respondent** **In Removal Proceedings**	**File No.: A245-450-965**

_____

_____

[Name of Person Who Uploaded]

PROCEDURAL

Notice to Appear (NTA)

The commencing of removal proceedings is the Department of Homeland Security's issuance of a Notice to Appear, which lays out the factual allegations and the charges being made against the respondent. It must be signed by a DHS official and contain a time and date for the hearing.

PROCEDURAL

Objection to a Noncompliant NTA

The Board has held in *Matter of Fernandes*, 28 I&N Dec. 605, 610–11 (BIA 2022), that an objection to a noncompliant notice to appear will generally be considered timely if raised *prior to the close of pleadings.* That decision was not a change in law, and thus Matter of Fernandes applies retroactively.

Our guidance in Matter of Fernandes as to the timeliness of the claim-processing rule objection to a noncompliant notice to appear applies retroactively. The respondents did not object to the missing information in their notices to appear before the close of pleadings and have not otherwise demonstrated that their objection should be considered timely. Thus, they have forfeited their objection. We will sustain DHS' appeal, vacate the Immigration Judge's decision, and remand for further proceedings

Claim-Processing Rule

PROCEDURAL

Remedy for Putative NTA

The Board of Immigration Appeals has determined that Homeland Security can “cure” a defective Notice to Appear (NTA) by moving the Immigration Judge to make written amendments to the NTA by adding the date and time of a future hearing.

The full text of *Matter of R-T-P-* **can be found here:**

https://www.justice.gov/d9/2024-09/4079.pdf

Legal Burdens & Determinations to be Made

Burden of Proof

APPENDIX

Section 101 of the REAL ID Act of 2005, PL 109–13, 119 Stat. 231, 302–06 (boldface added to section and subsection headings):

SEC. 101. PREVENTING TERRORISTS FROM OBTAINING RELIEF FROM REMOVAL.

“(B) BURDEN OF PROOF.—

“(i) IN GENERAL.—The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 101(a)(42)(A). To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

“(ii) SUSTAINING BURDEN.—The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not

have the evidence and cannot reasonably obtain the evidence.

“(iii) CREDIBILITY DETERMINATION.—Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.”.

(b) EXCEPTIONS TO ELIGIBILITY FOR ASYLUM.—Section 208(b)(2)(A)(v) of the Immigration and Nationality Act (8 U.S.C. 1158(b)(2)(A)(v)) is amended—(1) by striking “inadmissible under” each place such term appears and inserting “described in”; and (2) by striking “removable under”.

(c) WITHHOLDING OF REMOVAL.—Section 241(b)(3) of the Immigration and Nationality Act (8 U.S.C. 1231(b)(3)) is amended by adding at the end the following:

“(C) SUSTAINING BURDEN OF PROOF; CREDIBILITY DETERMINATIONS.—In determining whether an alien has demonstrated that the alien's life or freedom would be threatened for a reason described in subparagraph (A), the trier of fact shall determine whether the alien has sustained the alien's

burden of proof, and shall make credibility determinations, in the manner described in clauses (ii) and (iii) of section 208(b)(1)(B).”.

(d) OTHER REQUESTS FOR RELIEF FROM REMOVAL.—Section 240(c) of the Immigration and Nationality Act (8 U.S.C. 1230(c)) is amended—(1) by redesignating paragraphs (4), (5), and (6) as paragraphs (5), (6), and (7), respectively; and (2) by inserting after paragraph (3) the following:

“(4) APPLICATIONS FOR RELIEF FROM REMOVAL.—

(A) IN GENERAL.—An alien applying for relief or protection from removal has the burden of proof to establish that the alien—

“(i) satisfies the applicable eligibility requirements; and

“(ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.

(B) SUSTAINING BURDEN.—The applicant must comply with the applicable requirements to submit information or documentation in support of the applicant's application for relief or protection as provided by law or by regulation or in the instructions for the application form. In evaluating the testimony of the applicant or other witness in support of the application, the immigration judge will determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's burden of proof. In determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record. Where the immigration judge determines that the applicant should provide evidence which corroborates otherwise credible testimony, such evidence must be provided unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence.

(C) CREDIBILITY DETERMINATION.—Considering the totality of the circumstances, and all relevant factors, the immigration judge may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.".

(e) STANDARD OF REVIEW FOR ORDERS OF REMOVAL.—Section 242(b)(4) of the Immigration and Nationality Act (8 U.S.C. 1252(b)(4)) is amended by adding at the end, after subparagraph (D), the following:"No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 208(b)(1)(B), 240(c)(4)(B), or 241(b)(3)(C), unless the court finds, pursuant to section 242(b)(4)(B), that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.".

(f) CLARIFICATION OF DISCRETION.—Section 242(a)(2)(B) of the Immigration and Nationality Act (8 U.S.C. 1252(a)(2)(B)) is amended—

(1) by inserting "or the Secretary of Homeland Security" after "Attorney General" each place such term appears; and

(2) in the matter preceding clause (i), by inserting”and regardless of whether the judgment, decision, or action is made in removal proceedings,” after “other provision of law,”.

(g) REMOVAL OF CAPS.—

(1) ASYLEES.—Section 209 of the Immigration and Nationality Act (8 U.S.C. 1159) is amended—

(A) in subsection (a)(1)—(i) by striking “Service” and inserting “Department of Homeland Security”; and

(ii) by striking “Attorney General” each place such term appears and inserting “Secretary of Homeland Security or the Attorney General”;

(B) in subsection (b)—(i) by striking “Not more” and all that follows through “asylum who—“ and inserting “The Secretary of Homeland Security or the Attorney General, in the Secretary's or the Attorney General's discretion and under such regulations as the Secretary or the Attorney General may prescribe, may adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum who—“; and

(ii) in the matter following paragraph (5), by striking “Attorney General” and inserting “Secretary of Homeland Security or the Attorney General”; and

(C) in subsection (c), by striking “Attorney General” and inserting “Secretary of Homeland Security or the Attorney General”.

(2) PERSONS RESISTING COERCIVE POPULATION CONTROL METHODS.—Section 207(a) of the Immigration and Nationality Act (8 U .S.C. 1157(a)) is amended by striking paragraph (5).

(h) EFFECTIVE DATES.—

(1) The amendments made by paragraphs (1) and (2) of subsection (a) shall take effect as if enacted on March 1, 2003.

(2) The amendments made by subsections (a)(3), (b), (c), and (d) shall take effect on the date of the enactment of this division and shall apply to applications for asylum, withholding, or other relief from removal made on or after such date.

(3) The amendment made by subsection (e) shall take effect on the date of the enactment of this division and shall apply to all cases in which the final administrative removal order is or was issued before, on, or after such date.

(4) The amendments made by subsection (f) shall take effect on the date of the enactment of this division and shall apply to all cases pending before any court on or after such date.

(5) The amendments made by subsection (g) shall take effect on the date of the enactment of this division.

(i) REPEAL.—Section 5403 of the Intelligence Reform and Terrorism Prevention Act of 2004 (Public Law 108–458) is repealed.

ECAS

The EOIR Courts & Appeals System (ECAS)

ECAS

EOIR Courts & Appeals System (ECAS)

The EOIR Courts & Appeals System (ECAS) is part of an overarching information technology modernization effort at EOIR. ECAS was first introduced in July 2018 to phase out paper filing and processing, and to retain all records and case-related documents in electronic format. Now fully implemented at all immigration courts and adjudication centers and the Board of Immigration Appeals (BIA), ECAS supports the full life cycle of an immigration case including: electronic filing of court and appeals documents, processing and receiving filings, maintaining electronic Records of Proceedings (ROPs), preparing case information, conducting a hearing, and adjudicating appeals, while providing cost and time savings for all parties.

ECAS is composed of multiple applications dedicated to different stakeholders, including:

- **ECAS Case Portal for attorneys and accredited representatives.ECAS Payment Portal**

GUIDELINES FOR UPLOADING

DOCUMENTS

https://case-access.eoir.justice.gov/assets

2. An electronic file document must be 25 megabytes (MB) or less. Documents larger than 25MB must be split into multiple files and uploaded separately. If a submission includes multiple files, each document name should be numbered indicating the part and order of the submission (e.g., Johnson_Brief_Part1, Johnson_Brief_Part2).
   Separate submissions cannot be combined into a single file (i.e., do not combine submissions for different document types from the dropdown into one uploaded file). For example, if a user wants to file an asylum application, a supporting brief, and country conditions documentation, the user should separately file: (1) the application; (2) then the brief; and (3) then the country conditions evidence.

Case Portal Download Guidelines

2. To view and download individual documents within an eROP, the user must select the relevant eROP in the left hand pane of the Portal. All documents in that eROP will then be displayed for viewing and downloading on the right hand pane under "All Documents."

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ECAS Outage Log

For technical support, email ECAS.techsupport@usdoj.gov or call 1-877-388-3842 Monday through Friday, except federal holidays, from 6 a.m. – 8 p.m. Eastern Time.

ALTERNATIVE OUTCOMES

Possible alternative outcomes in removal proceedings (not a removal order or approval of application for relief). This chapter includes:

1. **voluntary departure;administrative closure;prosecutorial discretion**

ALTERNATIVE OUTCOMES

Voluntary Departure

WARNING: Overstaying a voluntary departure period brings severe, unwaivable consequences.

See Practice Advisory on Voluntary Departure.

8 CFR § 1240.26 - Voluntary Departure

§ 1240.26 Voluntary departure—authority of the Executive Office for

Immigration Review.

(a) General Eligibility

(a) *Eligibility: general.* **A noncitizen previously granted voluntary departure under section 240B of the Act, including by DHS under § 240.25, and who fails to depart voluntarily within the time specified, shall thereafter be ineligible, for a period of ten years, for voluntary departure or for relief under sections 240A, 245, 248, and 249 of the Act.**

(b) Prior to completion of removal proceedings

(b) *Prior to completion of removal proceedings*—**(1)** *Grant by the immigration judge.*

(i) A noncitizen may be granted voluntary departure by an immigration judge pursuant to section 240B(a) of the Act only if the noncitizen:

(A) Makes such request prior to or at the master calendar hearing at which the case is initially calendared for a merits hearing;

(B) Makes no additional requests for relief (or if such requests have been made, such requests are withdrawn prior to any grant of voluntary departure pursuant to this section);

(C) Concedes removability;

(D) Waives appeal of all issues; and

(E) Has not been convicted of a crime described in section 101(a)(43) of the Act and is not deportable under section 237(a)(4).

(ii) The judge may not grant voluntary departure under section 240B(a) of the Act beyond 30 days after the master calendar hearing at which the case is initially calendared for a merits hearing, except pursuant to a stipulation under paragraph (b)(2) of this section.

(2) *Stipulation.* **At any time prior to the completion of removal proceedings, the DHS counsel may stipulate to a grant of voluntary departure under section 240B(a) of the Act.**

(3) *Conditions.*

(i) The judge may impose such conditions as he or she deems necessary to ensure the noncitizen's timely departure from the United States, including the posting of a voluntary departure bond to be canceled upon proof that the noncitizen has departed the United States within the time specified. The alien shall be required to present to DHS, for inspection and photocopying, the noncitizen's passport or other travel documentation sufficient to assure lawful entry into the country to which the noncitizen is departing, unless:

(A) A travel document is not necessary to return to the noncitizen's native country or to which country the noncitizen is departing; or

(B) The document is already in the possession of DHS.

(ii) DHS may hold the passport or documentation for sufficient time to investigate its authenticity. If such documentation is not immediately available to the noncitizen, but the immigration judge is satisfied that the noncitizen is making diligent efforts to secure it, voluntary departure may be granted for a period not to exceed 120 days, subject to the condition that the noncitizen within 60 days must secure such documentation and present it to DHS. DHS in its discretion may extend the period within which the noncitizen must provide such documentation. If the documentation is not

presented within the 60-day period or any extension thereof, the voluntary departure order shall vacate automatically and the alternate order of removal will take effect, as if in effect on the date of issuance of the immigration judge order.

(iii) If the noncitizen files a post-decision motion to reopen or reconsider during the period allowed for voluntary departure, the grant of voluntary departure shall be terminated automatically, and the alternate order of removal will take effect immediately. The penalties for failure to depart voluntarily under section 240B(d) of the Act shall not apply if the noncitizen has filed a post-decision motion to reopen or reconsider during the period allowed for voluntary departure. Upon the granting of voluntary departure, the immigration judge shall advise the noncitizen of the provisions of this paragraph (b)(3)(iii).

(iv) The automatic termination of a grant of voluntary departure and the effectiveness of the alternative order of removal shall not affect, in any way, the date that the order of the immigration judge or the Board became administratively final, as determined under the provisions of the applicable regulations in this chapter.

(c) At the conclusion of the removal proceedings

(c) *At the conclusion of the removal proceedings*—**(1)** *Required findings.* **An immigration judge may grant voluntary departure at the conclusion of the removal proceedings under section 240B(b) of the Act, if he or she finds that:**

(i) The alien has been physically present in the United States for period of at least one year preceding the date the Notice to Appear was served under section 239(a) of the Act;

(ii) The alien is, and has been, a person of good moral character for at least five years immediately preceding the application;

(iii) The alien has not been convicted of a crime described in section 101(a)(43) of the Act and is not deportable under section 237(a)(4); and

(iv) The alien has established by clear and convincing evidence that the noncitizen has the means to depart the United States and has the intention to do so.

(2) *Travel documentation.* **Except as otherwise provided in paragraph (b)(3) of this section, the clear and convincing evidence of the means to depart shall include in all cases presentation by the noncitizen of a passport or other travel documentation sufficient to assure lawful entry into the country to which the noncitizen is departing. DHS shall have full opportunity to inspect and photocopy the documentation, and to challenge its authenticity or sufficiency before voluntary departure is granted.**

(3) *Conditions.* **The immigration judge may impose such conditions as he or she deems necessary to ensure the noncitizen's timely departure from the United States. The immigration judge shall advise the noncitizen of the conditions set forth in this paragraph (c)(3)(i)-(iii). If the immigration judge imposes conditions beyond those specifically enumerated below, the immigration judge shall advise the noncitizen of such conditions before granting voluntary departure. Upon the conditions being set forth, the noncitizen shall be provided the opportunity to accept the grant of voluntary departure or decline voluntary departure if he or she is unwilling to accept the amount of the bond or other conditions. In all cases under section 240B(b) of the Act:**

(i) The alien shall be required to post a voluntary departure bond, in an amount necessary to ensure that the noncitizen departs within the time specified, but in no case less than $500. Before granting voluntary departure, the immigration judge shall advise the noncitizen of the specific amount of the bond to be set and the duty to post the bond with the ICE Field Office Director within 5 business days of the immigration judge's order granting voluntary departure.

(ii) A noncitizen who has been granted voluntary departure shall, within 30 days of filing of an appeal with the Board, submit sufficient proof of having posted the required voluntary departure bond. If the noncitizen does not provide timely proof to the Board that the required voluntary departure bond has been posted with DHS, the Board will not reinstate the period of voluntary departure in its final order.

(iii) Upon granting voluntary departure, the immigration judge shall advise the noncitizen that if the noncitizen files a post-order motion to reopen or reconsider during the period allowed for voluntary departure, the grant of voluntary departure shall terminate automatically and the alternate order of removal will take effect immediately.

(iv) The automatic termination of an order of voluntary departure and the effectiveness of the alternative order of removal shall not impact, in any way, the date that the order of the immigration judge or the Board became administratively final, as determined under the provisions of the applicable regulations in this chapter.

(v) If, after posting the voluntary departure bond the noncitizen satisfies the condition of the bond by departing the United States prior to the expiration of the period granted for voluntary departure, the noncitizen may apply to the ICE Field Office Director for the bond to be canceled, upon submission of

proof of the noncitizen's timely departure by such methods as the ICE Field Office Director may prescribe.

(vi) The voluntary departure bond may be canceled by such methods as the ICE Field Office Director may prescribe if the noncitizen is subsequently successful in overturning or remanding the immigration judge's decision regarding removability.

Provisions Relating to Bond

(4) *Provisions relating to bond.* **The voluntary departure bond shall be posted with the ICE Field Office Director within 5 business days of the immigration judge's order granting voluntary departure, and the ICE Field Office Director may, at the ICE Field Office Director's discretion, hold the noncitizen in custody until the bond is posted. Because the purpose of the voluntary departure bond is to ensure that the noncitizen does depart from the United States, as promised, the failure to post the bond, when required, within 5 business days may be considered in evaluating whether the noncitizen should be detained based on risk of flight, and also may be considered as a negative discretionary factor with respect to any discretionary form of relief. The noncitizen's failure to post the required voluntary departure bond within the time required does not terminate the noncitizen's obligation to depart within the period allowed or exempt the noncitizen from the consequences for failure to depart voluntarily during the period allowed. However, if the noncitizen had waived appeal of the immigration judge's decision, the noncitizen's failure to post the required voluntary departure bond within the period allowed means that the alternate order of removal takes effect immediately pursuant to 8 CFR 1241.1(f), except that a noncitizen granted the privilege of voluntary departure under 8 CFR 1240.26(c) will not be deemed to have departed under an order of removal if the noncitizen:**

(i) Departs the United States no later than 25 days following the failure to post bond;

(ii) Provides to DHS such evidence of the noncitizen's departure as the ICE Field Office Director may require; and

(iii) Provides evidence DHS deems sufficient that he or she remains outside of the United States.

Alternate Order of Removal

(d) *Alternate order of removal.* **Upon granting a request made for voluntary departure either prior to the completion of proceedings or at the conclusion of proceedings, the immigration judge shall also enter an alternate order or removal.**

AMOUNT OF TIME

(e) *Periods of time.* **If voluntary departure is granted prior to the completion of removal proceedings, the immigration judge may grant a period not to exceed 120 days. If voluntary departure is granted at the conclusion of proceedings, the immigration judge may grant a period not to exceed 60 days.**

If granted *PRIOR* *TO COMPLETION OF PROCEEDINGS* the Judge may grant a period of up to 120 days.

If granted *AFTER* *COMPLETION OF PROCEEDINGS* then the Judge cannot grant a period any longer than *60 days*.

Effects of Motion to Reopen/Reconsider or Appeal

(1) *Motion to reopen or reconsider filed during the voluntary departure period.* **The filing of a motion to reopen or reconsider prior to the expiration of the period allowed for voluntary departure has the effect of automatically terminating the grant of voluntary departure, and accordingly does not toll, stay, or extend the period allowed for voluntary departure under this section. See paragraphs (b)(3)(iii) and (c)(3)(ii) of this section. If the noncitizen files a post-order motion to reopen or reconsider during the period allowed for voluntary departure, the penalties for failure to depart voluntarily under section 240B(d) of the Act shall not apply. The Board shall advise the noncitizen of the condition provided in this paragraph in writing if it reinstates the immigration judge's grant of voluntary departure.**

(2) *Motion to reopen or reconsider filed after the expiration of the period allowed for voluntary departure.* **The filing of a motion to reopen or a motion to reconsider after the time allowed for voluntary departure has already expired does not in any way impact the period of time allowed for voluntary departure under this section. The granting of a motion to reopen or reconsider that was filed after the penalties under section 240B(d) of the Act had already taken effect, as a consequence of the noncitizen's prior failure voluntarily to depart within the time allowed, does not have the effect of vitiating or vacating those penalties, except as provided in section 240B(d)(2) of the Act.**

(f) *Extension of time to depart.* **Authority to extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is only within the jurisdiction of the district director, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the**

Office of Juvenile Affairs. An immigration judge or the Board may reinstate voluntary departure in a removal proceeding that has been reopened for a purpose other than solely making an application for voluntarily departure if reopening was granted prior to the expiration of the original period of voluntary departure. In no event can the total period of time, including any extension, exceed 120 days or 60 days as set forth in section 240B of the Act . The filing of a motion to reopen or reconsider does not toll, stay, or extend the period allowed for voluntary departure. The filing of a petition for review has the effect of automatically terminating the grant of voluntary departure, and accordingly also does not toll, stay, or extend the period allowed for voluntary departure.

(g) *Administrative Appeals.* **No appeal shall lie regarding the length of a period of voluntary departure (as distinguished from issues of whether to grant voluntary departure).**

(h) *Reinstatement of voluntary departure.* **An immigration judge or the Board may reinstate voluntary departure in a removal proceeding that has been reopened for a purpose other than solely making application for voluntary departure, if reopening was granted prior to the expiration of the original period of voluntary departure. In no event can the total period of time, including any extension, exceed 120 days or 60 days as set forth in section 240B of the Act and paragraph (a) of this section.**

(i) *Effect of filing a petition for review.* **If, prior to departing the United States, the noncitizen files a petition for review pursuant to section 242 of the Act (8 U.S.C. 1252) or any other judicial challenge to the administratively final order, any grant of voluntary departure shall terminate automatically upon the filing of the petition or other judicial challenge and the alternate order of removal entered pursuant to paragraph (d) of this section shall immediately take effect, except that a noncitizen granted the privilege of voluntary**

departure under 8 CFR 1240.26(c) will not be deemed to have departed under an order of removal if the noncitizen departs the United States no later than 30 days following the filing of a petition for review, provides to DHS such evidence of the noncitizen's departure as the ICE Field Office Director may require, and provides evidence DHS deems sufficient that he or she remains outside of the United States. The Board shall advise the noncitizen of the condition provided in this paragraph in writing if it reinstates the immigration judge's grant of voluntary departure. The automatic termination of a grant of voluntary departure and the effectiveness of the alternative order of removal shall not affect, in any way, the date that the order of the immigration judge or the Board became administratively final, as determined under the provisions of the applicable regulations in this chapter. Since the grant of voluntary departure is terminated by the filing of the petition for review, the noncitizen will be subject to the alternate order of removal, but the penalties for failure to depart voluntarily under section 240B(d) of the Act shall not apply to a noncitizen who files a petition for review, and who remains in the United States while the petition for review is pending.

(j) [Reserved]

BIA's ABILITY TO GRANT VD

(k) *Authority of the Board to grant voluntary departure in the first instance.* **The following procedures apply to any request for voluntary departure reviewed by the Board:**

(1) If the Board finds that an immigration judge incorrectly denied a noncitizen's request for voluntary departure or failed to provide appropriate advisals, the Board may consider the noncitizen's request for voluntary

departure de novo and, if warranted, may enter its own order of voluntary departure with an alternate order of removal.

(2) In cases in which a noncitizen has appealed an immigration judge's decision or in which DHS and the noncitizen have both appealed an immigration judge's decision, the Board shall not grant voluntary departure under section 240B(a) of the Act unless:

(i) The alien requested voluntary departure under that section before the immigration judge, the immigration judge denied the request, and the noncitizen timely appealed;

(ii) The noncitizen's notice of appeal specified that the noncitizen is appealing the immigration judge's denial of voluntary departure and identified the specific factual and legal findings that the noncitizen is challenging;

(iii) The Board finds that the immigration judge's decision was in error; and

(iv) The Board finds that the noncitizen meets all applicable statutory and regulatory criteria for voluntary departure under that section.

(3) In cases in which DHS has appealed an immigration judge's decision, the Board shall not grant voluntary departure under section 240B(b) of the Act unless:

(i) The alien requested voluntary departure under that section before the immigration judge and provided evidence or a proffer of evidence in support of the noncitizen's request;

(ii) The immigration judge either granted the request or did not rule on it; and,

(iii) The Board finds that the noncitizen meets all applicable statutory and regulatory criteria for voluntary departure under that section.

(4) The Board may impose such conditions as it deems necessary to ensure the noncitizen's timely departure from the United States, if supported by the record on appeal and within the scope of the Board's authority on appeal. Unless otherwise indicated in this section, the Board shall advise the noncitizen in writing of the conditions set by the Board, consistent with the conditions set forth in paragraphs (b) through (e), (h), and (i) of this section (other than paragraph (c)(3)(ii) of this section), except that the Board shall advise the noncitizen of the duty to post the bond with the ICE Field Office Director within 30 business days of the Board's order granting voluntary departure. If documentation sufficient to assure lawful entry into the country to which the noncitizen is departing is not contained in the record, but the noncitizen continues to assert a request for voluntary departure under section 240B of the Act and the Board finds that the noncitizen is otherwise eligible for voluntary departure under the Act, the Board may grant voluntary departure for a period not to exceed 120 days, subject to the condition that the noncitizen within 60 days must secure such documentation and present it to DHS and the Board. If the Board imposes conditions beyond those specifically enumerated, the Board shall advise the noncitizen in writing of such conditions. The noncitizen may accept or decline the grant of voluntary departure and may manifest a declination either by written notice to the Board, by failing to timely post any required bond, or by otherwise failing to comply with the Board's order. The grant of voluntary departure shall automatically terminate upon a filing by the noncitizen of a motion to reopen or reconsider the Board's decision, or by filing a timely petition for review of the Board's decision. The noncitizen may decline voluntary departure when unwilling to accept the amount of the bond or other conditions.

a rebuttable presumption that the civil penalty for failure to depart, pursuant to section 240B(d)(1)(A) of the Act, shall be set at $3,000

Penalty for Failure to Depart After Taking Voluntary Departure

(l) *Penalty for failure to depart.* **There shall be a rebuttable presumption that the civil penalty for failure to depart, pursuant to section 240B(d)(1)(A) of the Act, shall be set at $3,000 unless the immigration judge or the Board specifically orders a higher or lower amount at the time of granting voluntary departure within the permissible range allowed by law. The immigration judge or the Board shall advise the noncitizen of the amount of this civil penalty at the time of granting voluntary departure.**

[62 FR 10367, Mar. 6, 1997, as amended at 67 FR 39258, June 7, 2002; 73 FR 76937, Dec. 18, 2008; 85 FR 81655, Dec. 16, 2020; 86 FR 70724, Dec. 13, 2021; 89 FR 46795, May 29, 2024]

Consequences of Not Departing After VD

Any respondent who is granted voluntary departure is subject to civil penalties if he or she "fails voluntarily to depart the United States within the time period specified…." *See* **INA § 240B(d). The respondent may be subject to a monetary fine of up to $5,000 and will be barred for ten years from**

being granted cancellation of removal, adjustment of status, change of status, registry, and voluntary departure. *See* **INA § 240B(d).**

There is a rebuttable presumption that the penalty for failure to depart shall be set at $3,000 under 8 C.F.R. § 1240.26(j).

8 CFR 240

Subpart C—Voluntary Departure

§ 240.25 Voluntary departure—authority of the Service.

(a) *Authorized officers.* **The authority contained in section 240B(a) of the Act to permit aliens to depart voluntarily from the United States may be exercised in lieu of being subject to proceedings under section 240 of the Act by district directors, assistant district directors for investigations, assistant district directors for examinations, officers in charge, chief patrol agents, the Deputy Executive Associate Director for Enforcement and Removal Operations, the Director of the Office of Juvenile Affairs, service center directors, and assistant service center directors for examinations.**

(b) *Conditions.* **The Service may attach to the granting of voluntary departure any conditions it deems necessary to ensure the alien's timely departure from the United States, including the posting of a bond, continued detention pending departure, and removal under safeguards. The alien shall be required to present to the Service, for inspection and photocopying, his or her passport or other travel documentation sufficient to assure lawful entry**

into the country to which the alien is departing. The Service may hold the passport or documentation for sufficient time to investigate its authenticity. A voluntary departure order permitting an alien to depart voluntarily shall inform the alien of the penalties under section 240B(d) of the Act.

(c) *Decision.* **The authorized officer, in his or her discretion, shall specify the period of time permitted for voluntary departure, and may grant extensions thereof, except that the total period allowed, including any extensions, shall not exceed 120 days. Every decision regarding voluntary departure shall be communicated in writing on Form I-210, Notice of Action—Voluntary Departure. Voluntary departure may not be granted unless the alien requests such voluntary departure and agrees to its terms and conditions.**

(d) *Application.* **Any alien who believes himself or herself to be eligible for voluntary departure under this section may apply therefor at any office of the Service. After the commencement of removal proceedings, the application may be communicated through the Service counsel. If the Service agrees to voluntary departure after proceedings have commenced, it may either:**

> **(1) Join in a motion to terminate the proceedings, and if the proceedings are terminated, grant voluntary departure; or**
>
> **(2) Join in a motion asking the immigration judge to permit voluntary departure in accordance with § 240.26.**

(e) *Appeals.* **An appeal shall not lie from a denial of an application for voluntary departure under this section, but the denial shall be without prejudice to the alien's right to apply to the immigration judge for voluntary departure in accordance with § 240.26 or for relief from removal under any provision of law.**

(f) *Revocation.* **If, subsequent to the granting of an application for voluntary departure under this section, it is ascertained that the application should not have been granted, that grant may be revoked without advance notice by any officer authorized to grant voluntary departure under § 240.25(a). Such revocation shall be communicated in writing, citing the statutory basis for revocation. No appeal shall lie from revocation.**

Can the Departure Period be Extended?

Only DHS has jurisdiction to extend a final order of voluntary departure. A request to extend the departure period should be addressed to the District Director, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs and may extend the period up to "120 days or 60 days as set forth in section 240B of the Act." *See* **8 C.F.R. § 1240.57.**

If a respondent is given 120 days then there is no way to extend it any further.

Proof of Posting Bond on Appeal

See Matter of A-M-, **23 I&N Dec. at 744. Pursuant to voluntary departure rules that went into effect on January 20, 2009, a voluntary departure applicant is required to provide the BIA with proof of having posted the voluntary departure bond within 30 days of filing the notice of appeal.** *See* **8 C.F.R. § 1240.26(c)(3)(ii). If the person does not provide proof, the BIA will not**

reinstate the voluntary departure order following an unsuccessful appeal. *See Matter of Velasco*, **25 I&N Dec. 143 (BIA 2009) (holding that the requirement in 8 C.F.R. § 1240.26(c)(3)(ii) applies to all voluntary departure orders entered after January 20, 2009). Individuals who decide that they do not want voluntary departure should not provide proof of payment, thus indicating their intent to withdraw their request for voluntary departure.**

Failure to Post Bond Within Five Business Days. If an individual fails to post the required voluntary departure bond within five business days, an alternate order of removal goes into effect. For respondents who waived appeal, failure to post the bond within five days automatically triggers the alternate order of removal, as well as the consequences of failure to depart. However, respondents who fail to post the voluntary departure bond within five days may still avoid these consequences if they (1) depart within twenty-five days of the failure to post bond (2) provide evidence to DHS that they departed within the appropriate time, and (3) provide evidence that they remain outside of the United States.

Involuntary Failure to Depart

Prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the consequences of failing to depart did not apply to any respondent whose failure to depart was because of "exceptional circumstances." This language was removed in IIRIRA and replaced with the language in INA § 240B(d) that attached penalties where a respondent "voluntarily fails to depart." In *Matter of Zmijewska*, **24 I&N Dec. 87 (BIA 2007), the BIA first interpreted this new language, and found that it created a new "voluntariness" exception.**

Where a respondent “through no fault of his or her own, is unaware of the voluntary departure order or is physically unable to depart” the consequences do not apply. The BIA “emphasize[d] that the ‘voluntariness' exception is not a substitute for the repealed ‘exceptional circumstances' exception” but a “much narrower” one.

However, in other cases, where the BIA has determined a level of responsibility lies with respondent for failing to depart, the BIA has denied access to the “voluntariness” exception. Thus, even where a respondent failed to depart because he was indicted during the voluntary departure period and was ordered not to depart the country, his failure to depart was deemed “voluntary” because “his inability to timely depart stemmed from his own criminal conduct….” Similarly, the BIA found a failure to depart “voluntary” where a SIJS-eligible respondent failed to depart because his father told him “not to depart because the respondent's mother abandoned him in Guatemala and he was the respondent's sole support.”

For respondents citing ineffective assistance of counsel to support a claim that the failure to depart was involuntary, the BIA has required that respondents adhere to the requirements for claiming ineffective assistance of counsel laid out in *Matter of Lozada*, **19 I&N Dec. 637 (BIA 1998)**

ALTERNATIVE OUTCOMES

Reinstatement of Removal

Reinstatement of Removal

If an alien is found to have reentered the United States illegally after having been previously removed or having left under a grant of voluntary departure under a removal order, the alien may be subject to reinstatement of removal. Reinstatement of removal is a procedure where the Department of Homeland Security (DHS) reviews the previous removal order, and in its discretion, reinstates that prior removal order. Aliens ultimately subject to reinstatement of removal will not have the opportunity to have the reinstatement reviewed by an immigration judge. Where DHS is considering reinstatement of removal, an alien, depending on the facts of his or her situation, may have limited avenues to seek relief from reinstatement of removal.

Rules and Regulations for Reinstatement of Removal

Section 241(a)(5) of the Immigration and Nationality Act (INA) provides only that where the Attorney General finds that an alien has committed an illegal reentry into the United States after having previously been removed or been granted and left pursuant to a grant of voluntary departure, the prior order of removal shall be reinstated and is not subject to reopening or review. The statute continues to add that the alien may not apply for any form of relief, and shall be removed pursuant to the reinstated removal order.

Regulations found in 8 C.F.R. 241.8 list the three factors that the immigration officer should ascertain in order to establish whether an alien should be subject to reinstatement of removal:

1. Whether the alien has been subject to a prior order of removal;
2. Verification of the alien's identity to confirm whether the alien in question is the alien was subject to a prior order of removal;
3. Whether the alien entered the United States unlawfully.

Withholding Only Proceedings

An alien subject to reinstatement of removal may seek withholding of removal and a claim based upon the Convention Against Torture (CAT) by attempting to demonstrate that he or she would face a high likelihood of torture upon removal. The alien may attest to having a fear of persecution if he or she is returned to home country. In this scenario, the alien will be granted a credible fear interview with an asylum officer. *See* **8 C.F.R. §§ 208.31, 241,8(d).**

If the asylum officer determines that the alien does not have a credible fear of persecution or torture, the alien may obtain review from an immigration judge. However, it is important to note that asylum may be barred if the alien is subject to a mandatory bar to applying or being granted asylum. The alien may lodge a constitutional or legal challenge against the original removal proceeding.

Case Law

Delgado v. Mukasey, **516 F.3d 65, 67 (2d Cir. 2008)**

Ponta-Garcia v. Att'y Gen. of the U.S., **557 F.3d 158, 161-64 (3d Cir. 2009)**

Herrera-Molina v. Holder, **597 F.3d 128, 138-40 (2d Cir. 2010)**

Debato v. Att'y Gen. of the U.S., **505 F.3d 231 (3d Cir. 2007)**

Termination of Proceedings

-> . /. See also Motion to Terminate.