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IMMIGRATION
NETWORK, INC.



**DEFENDING
VULNERABLE
POPULATIONS**

Orders at the Border

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Agenda

What are the different ways a noncitizen may be subject to a removal order at the border? Is it possible your client has a removal order and doesn't know it? We will discuss:

- 1) The Impact of Removal Orders
- 2) Fact-Gathering
- 3) Border Contacts That Are NOT Removal Orders
- 4) Removal Orders Issued at the Border
- 5) Diagnosing Release Documents
- 6) What is happening at the border now?

	NOT Orders of Removal	Orders of Removal
DHS	<ul style="list-style-type: none"> • Voluntary return • Withdrawal of application for admission at POE • Placement in “Migration Protection Protocols” program • MPP “push backs” • Title 42 expulsions 	<ul style="list-style-type: none"> • Expedited orders of removal, including those issued under PACR/HARP program and pursuant to Asylum Cooperation Agreements (ACAs) • Reinstated prior removal orders
EOIR	<ul style="list-style-type: none"> • Non-MPP removal proceedings pending • MPP removal proceedings pending 	<ul style="list-style-type: none"> • Non-MPP orders of removal, including <i>in absentia</i> orders of removal • MPP orders of removal, including <i>In absentia</i> orders of removal



The Impact of Removal Orders



Why Do Removal Orders Matter?

- Determining a person's immigration history is important because those with a prior removal order
 - Face various barriers to eligibility for and ability to seek immigration benefits
 - Often are at risk of detention and removal without a hearing
 - Often are at risk of facing criminal prosecution

Fact-Gathering



Ask Questions

Develop intake/screening questions to help determine whether there might be a removal order, and what type of further investigation is needed.

Examples:

- Details regarding every entry and attempted entry and every departure
- Was the person apprehended at or near the border?
- Did the person appear before an IJ?
- What documents, if any, does the person have from the encounter?

Hypothetical

Ana, a mother of 3 U.S. citizen children, entered the United States without permission through the Mexico-U.S. border. She remembers that during the week prior to her entry, she made a number of attempts to enter the United States. Each time, she was detained by an immigration officer, fingerprinted, photographed, and returned to Mexico.

- **What questions should we ask? What other steps could we take to determine what happened?**

Questions to Ask

- How many times have you entered the U.S.? What are the approximate dates of each entry? / Have you ever left the U.S. since entering? When did you leave?
- Where did you enter through at the border? Were you trying to hide from immigration officials when you tried to enter? Did you go to immigration officials and ask for permission to enter the U.S.?
- During any of the entries, did you talk to an immigration official? What did the officials say?
- Did you present any documents when attempting to enter? What were they? How did you get these documents?
- What happened after you talked to the official? [placement in a vehicle, detention, etc.]
- Have immigration officials ever forcibly remove you from U.S. territory?
- At any point, did you see a Judge? [describe IJ]



Request Information from the Gov't

- Always seek the A file through FOIA. FBI checks are also a good idea
 - BUT be careful listing certain information on FOIA
- Is/was there a removal proceeding before an IJ or an IJ-issued removal order?
 - Call EOIR Hotline: 1-800-898-7180 (need A number)
- Was there was a border encounter?
 - File CBP FOIA Request
 - File OBIM (US VISIT) FOIA Request



Border Contacts That Are NOT Removal Orders

Voluntary Return

- “Voluntary return is not specifically authorized by regulation or statute and appears to ‘fall somewhere between’ application for admission withdrawn and voluntary departure.” Key Takeaways from the May 27, 2021 AILA DOS Liaison Committee Meeting with DOS (June 10, 2021), AILA Doc. No. 21061098.
- Voluntary return is a “departure without an order of removal.” DHS OIG Report on “CBP’s Streamline and Its Effect on Illegal Border Crossing” (May 15, 2015), AILA Doc. No. 15052934.
- Historically, CBP has issued voluntary return to Mexican nationals.



Withdrawal of Application for Admission at POE

- “Arriving alien” at a designated port of entry, if threatened with removal proceedings, may withdraw their application for admission into the United States in lieu of removal. INA § 235(a)(4)
- An alternative to removal proceedings and expedited removal when the person is not admissible

MPP Placement & MPP “Push Backs”

- CBP's placing of a noncitizen into MPP is not an order of removal
- An MPP “push back” is when CBP returns to Mexico a person who entered without inspection after placement into MPP but prior to receiving an IJ order
- MPP “push backs” led to inflation of the border crossing numbers because one person may be “pushed back” under MPP several times

Title 42 Expulsions

- Title 42 expulsions are expulsions by the U.S. government of persons who have recently been in a country where a communicable disease was present. 42 U.S.C. § 265.
- Title 42 applies to all nationalities; however, only four nationalities may *officially* be returned to Mexico—Mexico, El Salvador, Honduras, and Guatemala.
- Title 42 expulsion flights common for: Haiti, Ecuador, Nicaragua; sometimes Brazil
- Has also led to inflation of the border crossing numbers

Removal Orders Issued at the Border

Expedited Orders of Removal

- The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 created expedited removal
- Allows DHS to remove without a hearing or further review certain noncitizens who have arrived at a U.S. port of entry, or who are apprehended after recently entering the country without inspection, if they lack valid entry documents or tried to procure admission by fraud or misrepresentation. INA § 235(b)(1)
- Those statutorily exempt from expedited removal include:
 - Unaccompanied children
 - People who entered after admission or parole
 - People who have been in the United States for two years or more prior to the encounter



Expedited Removal Fear Process

- An expression of fear to the DHS official should prompt an interview by an Asylum Officer (AO) to assess credible fear. 8 CFR § 235.3(b)(4)
- If a person who is subject to reinstatement of a prior order of removal (or deportation or exclusion) under INA § 241(a)(5) says they are afraid of going back to their country of origin, the AO should conduct a reasonable fear interview. 8 CFR § 208.31(a), (b).

Credible Fear Interview

- Noncitizen bears the burden of proof to establish a credible fear of persecution or torture
- If the AO determines there is a “significant possibility” – as defined at 8 CFR §§ 235(b)(1)(B)(v) and 208.30(e)(3) – that the noncitizen can establish eligibility for asylum or withholding of removal/CAT, DHS must initiate removal proceedings under INA § 240
- The significant possibility standard requires showing a “substantial and realistic possibility of succeeding” before the IJ, but does not require applicant show it is more likely than not to succeed before the IJ

Reasonable Fear Interview

- Non-citizen bears the burden of proof to establish a reasonable fear of persecution or torture
- If the AO determines there is a reasonable possibility that they would be persecuted or tortured in the country of removal. 8 CFR § 208.31(c)
- “The ‘reasonable possibility’ standard is the same [as] . . . ‘well-founded fear’”
- If reasonable fear established, applicant is referred for “withholding-only” proceedings

Reinstatement of Removal

- Allows DHS to simply reuse a prior order of removal where a person was removed and reenters the United States unlawfully. INA § 241(a)(1)(5)
- **How initiated?** Notice of Intent to Reinstate Prior Order of Removal
- **Who issues the order?** CBP or ICE Officer

Review of Negative Fear Decisions

- Negative CFI and RFI decisions by the AO can be reviewed by an immigration judge.
- Negative IJ decisions cannot be appealed to the BIA.
 - For RFI cases, some courts have held that a negative IJ decision can be challenged in a petition for review in the court of appeals. See *Ayala v. Sessions*, 855 F.3d 1012 (9th Cir. 2017); see also *Bonilla v. Sessions*, 891 F.3d 87, 90 (3d Cir. 2018).
 - For CFI cases, the legal correctness of credible fear determinations are not subject to judicial review. *DHS v. Thuraissigiam*, 140 S. Ct. 1959 (2020).
- Request for Reconsideration or Reinterview (RFRs).



Expedited Removal: PACR/HARP

- Prompt Asylum Claim Review (PACR)
 - Guatemalans, Hondurans, Salvadorans
- Humanitarian Asylum Review Process (HARP)
 - Mexicans only
- Goal was to complete the entire credible fear screening process (including IJ review) while in CBP custody for 7-10 days
- Timeline: Piloted October 2019 in El Paso; expanded in December 2019 & Jan/Feb 2020. Stopped when Title 42 announced in March 2020



Expedited Removal: Asylum Cooperation Agreements (ACAs)

- Safe third country agreements with Guatemala, Honduras, and El Salvador that were implemented on December 29, 2020
- Goal was to allow the United States to issue expedited removal orders and remove any individuals who arrive at the border seeking asylum to Guatemala, Honduras, and El Salvador
- Timeline: People only ever physically sent to Guatemala; was then paused because of COVID, and terminated February 6, 2021 by Biden Admin.

IJ *In Absentia* Removal Orders

- An IJ issues an *in absentia* removal order when a respondent does not appear at a scheduled immigration court hearing and DHS “establishes by clear, unequivocal, and convincing evidence” that the respondent had written notice and is removable. INA § 240(b)(5); 8 CFR § 1003.26.
- DHS usually files the NTA with the immigration court having jurisdiction over the location of the apprehension.
- Most people apprehended along the border do not plan to remain in the jurisdiction of the border court.

IJ MPP Orders of Removal

- Under MPP, asylum seekers were sent back to Mexico to await removal proceedings under INA § 240 before an IJ (without first having a CFI)
- Same process as normal proceedings within the United States, but danger in Mexico resulted in significant *in absentia* rates, and many people re-entered the United States undetected.
- DHS's position is that an MPP removal order remains “unexecuted” until the respondent returns to home country, even if physically in Mexico at the time the order becomes final

Diagnosing Release Documents

DHS Documents

- Notice and Order of Expedited Removal (Form I-860)
- **(Border) Notices to Appear (Form I-862)**
- Humanitarian Parole as documented on Form I-94
- Order of Release on Recognizance (Form I-220A)
- Orders of Supervision (Form I-220B)
- ICE Bond (Form I-352)
- **I-385s, Alien Booking Record or Booking Card/Notices to Report (NTR)**
- Information About Credible Fear Interview (Form M-444)
- Notice of Intent/Decision to Reinstate Prior Order (Form I-871)
- Withdrawal of Application for Admission/Consular Notification (Form I-275)



(Border) NTAs

- Myth: NTAs from the border contain “fake dates” because the case is not showing up on the EOIR portal and 1-800 number.
 - These are usually NOT fake dates, they are real dates, picked using the Interagency Scheduling System (ISS)
 - These do not show up in the portal because the NTA is sometimes not filed until the same day as court (though it is sometimes lost)
 - Advocates should not advise to not show up in court

I-385s

- Known historically as the “Alien Booking Record or Booking Card,” but now referred to as Notices to Report (NTR)
- Released at border with I-385 and oral instructions to report to the ICE ERO office near their final destination within 30-60 days
- New Online Scheduler for I-385/NTRs
- Timeline: Began in March 2021

What Is Happening at the Border Now?

NPRM on CFI/RFI and Asylum

- Would create new system where those who pass CFI/RFI receive an “asylum hearing” before AO instead of IJ referral
- CFI notes would become asylum application
- AO could grant asylum, withholding, or CAT
- If denied, “streamlined” IJ review
- Need to request IJ permission to present new evidence or seek relief other than “asylum only”
- Would increase cost of all USCIS applications by 13-26 percent
- Comments due **October 19, 2021**

**Thank you, Taylor!
You are a gift to so
many.**

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