CHAPTER ONE
REMOVAL PROCEEDINGS

Overview of Removal Proceedings

Introduction to Basic Concepts

A removal proceeding is an immigration court hearing to determine whether a noncitizen will be removed from the United States. Any person in the United States who is not a citizen of the country may be removed if she or he falls within one of the grounds of inadmissibility or deportability contained in the Immigration and Nationality Act (INA).1 Even a legal permanent resident (LPR) may lose his or her residency status and be removed from the United States if he or she violates certain immigration law provisions.

- *E.g.*, Luca entered the United States with a tourist visa and has remained beyond her authorized stay. Luca may be placed in removal proceedings because she has violated her tourist status. Luca's sister Marie, an LPR, was recently convicted of misdemeanor possession of drug paraphernalia. She may be placed in removal proceedings for having been convicted of a law relating to a controlled substance.

The term *removal proceedings* applies to all immigration court cases commenced on or after April 1, 1997. Before this date, immigration court hearings were called *deportation hearings* or *exclusion hearings*, depending on whether the individual in proceedings was charged with violating a ground of deportability or a ground of inadmissibility. This distinction is discussed in more detail below.

It is important to understand the agencies involved and terminology used in removal proceedings. Under the Homeland Security Act of 2002,2 the Immigration and Naturalization Service (legacy INS) ceased to exist on March 1, 2003. Its functions were taken over by three new agencies, each a part of the Department of Homeland Security (DHS):

- *U.S. Citizenship and Immigration Services (USCIS),* which performs all immigration service functions, such as adjudication of visa petitions, naturalization petitions, and affirmative asylum applications;
- *U.S. Customs and Border Protection (CBP***)**, which performs all border inspection functions;
- *U.S. Immigration and Customs Enforcement (ICE),* which carries out interior enforcement responsibilities. While all three agencies can issue Notices to Appear (NTAs), ICE is in charge of prosecuting individuals in removal proceedings.

The Immigration court is under the Executive Office for Immigration Review (EOIR), which is an agency within the U.S. Department of Justice. The *prosecuting* attorney from the government is a trial attorney for the assistant chief counsel of ICE. Your client is the

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1 Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101 *et seq.*).

2 Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002).

respondent in removal proceedings. Under immigration law, all persons who are not citizens or nationals of the United States are termed "aliens."3

Congressional Power to Deport

Although the U.S. Constitution does not specifically authorize the deportation of persons found to be in the United States without required permission or documentation, the Supreme Court has determined this authority to be inherent in the federal government's sovereign power.4 Moreover, congressional power over matters of admission and deportation has been held to be plenary—that is, absolute or unqualified.5 Federal control over U.S. immigration policy and law is so complete, in fact, that the states are excluded from taking any independent actions in this area.

Courts have found that Congress has absolute authority concerning the grounds of removal, and have determined that judicial scrutiny of Congress' determinations in this area is inappropriate because of the political issues involved. Rarely, if ever, has Congress been held to have exceeded its authority in establishing substantive grounds for removing individuals from the United States. However, congressional legislation establishing procedures for the deportation of removable individuals must comport with due process under the Fifth Amendment of the Constitution. The concept of due process means procedures that ensure fairness to all people under the law.

Changes in the Law Impacting on Removal Proceedings

The grounds of deportability and inadmissibility, and the forms of relief from removal that may be available, were substantially revised by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA).6 IIRAIRA added new grounds of inadmissibility and deportability, and narrowed many forms of relief from removal, making many more noncitizens subject to expulsion. IIRAIRA also modified the application of the grounds of deportability. Prior to IIRAIRA, the factor that determined whether an individual was subject to the grounds of deportability, as opposed to the grounds of inadmissibility, was whether the individual had made an entry into the United States. After the changes enacted by IIRAIRA, the key question became whether the individual was lawfully admitted into the United States. Foreign nationals who seek admission at the border or a port of entry are subject to the grounds of inadmissibility rather than the grounds of deportability. Similarly, foreign nationals who are apprehended inside the United States, and who were not lawfully admitted to the country, are deemed to be applicants for admission subject to the grounds of inadmissibility rather than the grounds of deportability. The grounds of deportability may be applied only to foreign nationals who were admitted lawfully to the United States.

As a result of the 1996 changes, the general rule now is that the new provisions regarding removal proceedings do not apply to individuals who are in deportation or exclusion proceedings that commenced prior to April 1, 1997. The provisions of the prior law apply in

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3 INA §101(a)(3).

4 *Fong Yue Ting v. U.S.*, 149 U.S. 698 (1893).

5 *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

6 Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

such proceedings, unless the Attorney General (AG) takes further action to bring these individuals under the new rules.7

Though not as sweeping as the changes brought by IIRAIRA, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act),8 the REAL ID Act of 2005,9 and the Violence Against Women and Department of Justice Reauthorization Act of 200510 also changed some parts of the law impacting removal proceedings.

How People Get Placed Into Removal Proceedings

While anyone in the United States in violation of an immigration law is vulnerable to being placed in removal proceedings, some of the most common ways that DHS identifies and places individuals believed to be in the United States unlawfully are:

- Picking up a person from jail or prison after an arrest or after the individual has completed his or her sentence
- Placing someone in proceedings who has unsuccessfully applied for some type of immigration benefit
- Arresting a person at or near a border point just after she or he has entered
- Transferring people from local jails who were arrested by state and local law enforcement through immigration enforcement programs such as Secure Communities or 287(g) agreements
- Community or workplace enforcement actions (raids)

Enforcement Priorities

In 2011, ICE and USCIS issued memos establishing DHS enforcement priorities in light of limited resources and the need to "enhance national security, public safety, and the integrity of the immigration system."[11] Although USCIS is not designated as an enforcement branch of DHS, it is authorized to issue the document commencing removal proceedings, the Notice to Appear (NTA), and its memo reflects DHS enforcement concerns. Together these memos set forth a framework for identifying the types of cases to be the focus of enforcement efforts and the circumstances where removal proceedings would be initiated. The memos reflected the agency's recognition that it was not possible to remove every undocumented person in the United States and that a tiered system of enforcement priorities was required.

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7 IIRAIRA §309(c)(2).

8 Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001).

9 Pub. L. No. 109-13, 119 Stat. 231, Division B (May 11, 2005).

10 Pub. L. No. 109-162, 119 Stat. 2960 (Jan. 5, 2006).

11 USCIS Policy Memo, "Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens" (November 7, 2011). http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf.

The March 2, 2011 ICE memo by Director John Morton outlined ICE's enforcement priorities that included those who:[12]

- Pose a danger to national security or a risk to public safety;
- Are subject to a final order of removal and abscond, fail to depart, or intentionally obstruct immigration controls; or
- Entered the U.S. recently without authorization.

In June 2011, ICE issued two additional memos [13] related to the exercise of prosecutorial discretion that expanded earlier ICE guidance with more detail on "high" and "low" enforcement priorities.

The November 7, 2011 USCIS memo stated that removal proceedings would be instituted in cases where individuals have been:

- Found to have committed immigration fraud;
- Investigated for, arrested or convicted of an egregious public safety offense;
- Involved in activities deemed a national security concern; and
- Determined to be in a category of cases such as termination of conditional permanent residency or refugee status where the immigration statute requires the commencement of removal proceedings.

Nonetheless, the enforcement priorities detailed in the ICE and USCIS 2011 memos do not reflect all of the ways in which noncitizens are placed in removal proceedings. Some of the common situations that result in the initiation of removal proceedings include case scenarios described below:

- Juana, from Mexico, entered the U.S. on July 1, 2008 without inspection. She does not have a drivers license but drives to her job every day. Juana was stopped by a police officer for a broken tail light and when it was discovered she did not have a drivers license, she was arrested by the police. Under the Secure Communities program, ICE learned of her state arrest, issued a detainer, and transferred her to ICE custody.
- Paulo, from Argentina, entered the United States on a student visa in 2000 but dropped out of school after 1 year. He lives in an apartment with a friend who has an outstanding order of removal. ICE came to Paulo's apartment looking for

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[12] ICE Memo, Director John Morton, "Civil Immigration Enforcement: Priorities for the Apprehension, Removal and Detention of Aliens" (March 2, 2011). http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf

[13] ICE Memo, Director John Morton, "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens" (June 17, 2011); ICE Memo, Director John Morton, " Prosecutorial Discretion Regarding Certain Victims, Witnesses, and Plaintiffs" (June 17, 2011) http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

Paulo's roommate, asked Paulo's immigration status, arrested him and placed him in removal proceedings.

- Georgette, from Ireland, is an LPR who is about to complete her three-year prison term for selling cocaine. She receives notice from ICE that they have placed a detainer on her. Instead of being released at the end of her term, she will be transferred to ICE custody and placed in removal proceedings.
- Ali, from Egypt, applied for adjustment of status. At the interiew, the U.S. Citizenship and Immigration Services (USCIS) office learns that Ali did not disclose that he had several convictions for petty theft. He is placed in removal proceedings.
- Marco, from Honduras, crossed the border into Texas without documents and met up with a smuggler, who agreed to drive him to Florida. A few miles from the border, their car was stopped by border patrol and Marco was placed in proceedings.
- Carlos, from El Salvador, applied for NACARA. When his application was denied, he was placed in removal proceedings.
- Rina, from India, an LPR since 1990, was convicted in 2001 of one count of retail theft. While she had returned from trips abroad several times without incident since this conviction, on her last return she was detained by CBP and placed in removal proceedings.
- Marisol, a B2 visa overstay, boarded a Greyhound bus in Miami on her way back to her home in Georgia. As the bus was leaving, armed border patrol agents got on the bus, blocked the aisles and demanded to see proof of immigration status from everyone on the bus. Feeling she had no choice but to answer the agents questions, Marisol admitted that her B2 visa had expired, and she was taken into custody and placed in proceedings.

Inadmissibility or Deportability—Which Concept Applies?

The grounds of *inadmissibility*, formerly called the grounds of exclusion, are contained in INA §212(a). These are the reasons why an individual can be refused admission to the United States or removed from the United States after entering without inspection by an immigration officer. These grounds apply at the border and in removal proceedings for persons who have never been lawfully admitted to the United States. Establishing admissibility is also a requirement for many immigration applications, such as adjustment of status, and relevant for good moral character in naturalization.

The grounds of *deportability* are listed in INA §237(a). These grounds apply to individuals who are in the United States after inspection by an immigration officer.

A person who is placed in removal proceedings will be charged as being either inadmissible under INA §212(a) or deportable under INA §237(a). As noted above, one of the most important amendments made by IIRAIRA in 1996 was the change related to whom these two sets of grounds could apply.

The law prior to 1996 relied on the concept of entry to determine who would be subject to grounds of deportation and who would be subject to the grounds of exclusion. An entry meant a physical crossing into the territorial limits of the United States, but not necessarily a legal entry with inspection by an immigration officer. Due to the 1996 changes, however, the

law now discards entry and instead requires that an individual have been lawfully admitted to be subject to the grounds of deportation. Otherwise, an individual is subject to the grounds of inadmissibility. An admission is an entry to the United States that is lawful, after inspection by an immigration officer.14 This often places persons who entered the United States without inspection or admission at a disadvantage. Under current law, even if a person who entered without inspection or admission has lived in the United States for years, they are considered to be seeking admission, and thus, are subject to the grounds of inadmissibility.

- *E.g.*, Susan came to the United States on a B-2 visa in 2003 and remained longer than her authorized stay. She is now married to a U.S. Citizen. If Susan is arrested by ICE she will be charged with a ground of deportability because she is in the United States unlawfully after an inspection and admission by an Immigration officer. However, if Susan applies for adjustment of status based on her marriage to a U.S. Citizen as a defense to removal, she will also be looked at under the grounds of inadmissibility and she will have to prove that she is admissible.
- *E.g.*, Lorena entered the United States by sneaking across the border in October 1995. Even though she has now lived in the United States for ten years, if she is placed in removal proceedings, Lorena will be charged with a ground of inadmissibility because she was never inspected by an immigration officer when she first entered the United States.

Under IIRAIRA, there is, in addition, a special rule regarding admission for LPRs who are returning to their home in the United States. Such returning LPRs are not regarded as seeking admission (and therefore are not required to establish admissibility under the INA §212(a) inadmissibility grounds) unless the person:

- Has abandoned or relinquished his or her LPR status;
- Has been absent from the United States for a continuous period of more than 180 days;
- Has engaged in illegal activity after leaving the United States;
- Has departed from the United States while under legal process seeking his or her removal;
- Has committed a criminal inadmissibility ground, unless he or she has obtained a waiver or relief from removal under INA §240A(a) (Cancellation of Removal Part A); or
- Is attempting to enter at a time or place other than as designated by immigration officers, or has not been admitted to the United States after inspection and authorization by an immigration officer.15

A returning LPR who falls within one of the above-listed categories is subject to being placed in removal proceedings and charged with a ground of inadmissibility, even if the LPR wouldn't have been subject to removal proceedings if she or he hadn't left the country. However, the Supreme Court limited the retroactive application of INA §101(a)(13)(C) in the case of an LPR returning from a brief trip abroad whose pre-IIRAIRA criminal conviction would have had no effect under the law in effect before 1996.[16]

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14 INA §101(a)(13)(A).

15 INA §101(a)(13)(C).

16 *Vartelas v. Holder*, 132 S. Ct. 1479 (2012).

- Tom has been an LPR since 1992. In 1998, Tom was convicted of the fraudulent use of a credit card involving $150 and received a two-year probation term that he satisfactorily completed. Even though Tom is not deportable for this offense, he is likely inadmissible for the same crime. If Tom travels outside the United States, even just to see his family for a few weeks, he will be treated as an individual seeking admission to the United States, and he may be detained and placed in removal proceedings upon his return to the United States.
- Tom has been an LPR since 1992. In 1995, Tom was convicted of the fraudulent use of a credit card involving $150 and received a two-year probation term that he satisfactorily completed. Tom traveled to London for two weeks in 2006 to visit family members. Tom is not deportable for this offense, and he will not be subject to the grounds of inadmissibility because his pre-IIRAIRA criminal conviction will not subject him to the application of INA §101(a)(13)(C).

Commencement of Removal Proceedings in Immigration Court

Charging Documents

Notice to Appear

Removal proceedings under INA §240 are initiated by a charging document called a Notice to Appear (NTA).[17] The NTA must specify the following:

- The nature of the proceedings against the person;
- The legal authority for the proceedings;
- The acts or conduct that allegedly violate the law;
- The formal charges and the statutory provisions allegedly violated;
- The person's right to representation, including time to secure counsel, and a list of available pro bono counsel;
- The requirement that the person charged provide, in writing, his or her address and telephone number (if any), and changes of same so that the government can contact the person, and the consequences of failing to do so, including the consequences of failing to appear at the hearing; and
- The time and place of the hearing and the consequences of failing to appear, including the entry of a removal order in absentia.18

The NTA need only be in English, and need only give 10 days notice of the hearing. The person against whom the NTA is issued is called the respondent—the person who must respond to the charges. By regulation, proceedings commence when the NTA is filed in court, and not when the NTA is served on the individual.19 A sample NTA is attached as Appendix 1 to this Chapter.

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[17] 8 CFR §1003.13.

18 INA §239(a); 8 CFR §§1003.15 (b), (c).

19 8 CFR §1003.14.

Order to Show Cause

The Order to Show Cause (OSC) is the document used in cases commenced before April 1, 1997, charging an individual with being deportable. The OSC requires that:

- Notice be given of the charges and of the time and place of the hearing at least 14 days before the hearing date;
- Notice be written in Spanish and in English;
- The respondent be advised of the consequences of failure to appear; and
- The respondent be advised of address change requirements.20

A sample OSC is attached as Appendix 2 to this chapter.

Form I-122

Form I-122 was the document used to commence *exclusion proceedings*, the name for the pre-April 1, 1997 immigration court proceedings charging an individual with being inadmissible to the United States. A sample I-122 is attached as Appendix 3 to this chapter.

Proper Service

Notice to Appear

Under 8 CFR §1003.13, the NTA shall be served on the respondent in person; or if personal service is not practicable, the NTA shall be served by regular mail to the individual or his or her counsel of record. If the respondent does not receive the NTA and the notice of hearing it contained, and for this reason was never notified of the initiation of proceedings and the change of address requirements, then the immigration judge (IJ) may not enter an in absentia order.21

Order to Show Cause

For the OSC, service must be by personal service or certified mail to the respondent or to his or her counsel of record.22

Notice of Address Change

The law requires that the respondent inform the immigration court of any address change on Form EOIR-33 within five days.23 It is critical to educate clients regarding this requirement to avoid the severe consequences of in absentia deportation/removal orders.

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20 8 CFR §1003.15.

21 *Matter of G–Y–R*, 23 I&N Dec. 181 (BIA 2001).

22 8 CFR §1003.13.

23 8 CFR §1003.15(d).

Burden of Proof in Removal Proceedings

An individual in removal proceedings will be charged as either as an arriving alien, an alien present in the United States who has not been admitted or paroled, or an alien who has been admitted but is deportable.

Arriving aliens bear the burden of proving, beyond a doubt, that they are entitled to be admitted and that under INA §212 they are not inadmissible.[24] There is an exception to this for returning LPRs. The Supreme Court has held that returning LPRs are entitled to have the government bear the burden of proof in establishing their inadmissibility.[25]

If an individual is charged with being in the United States without admission or parole, ICE must first establish the person's alienage.[26] Once alienage is established, unless the respondent demonstrates by clear and convincing evidence that he or she is lawfully in the United States pursuant to a prior admission, the respondent must prove that he or she is beyond a doubt entitled to be admitted to the United States and is not inadmissible under INA §212 as charged.[27]

If the individual is charged with deportability, ICE has the burden of establishing by clear and convincing evidence that the respondent is deportable under INA §237.[28] This standard is lower than the "beyond a reasonable doubt" standard used in a criminal proceedings, but higher than the "preponderance of the evidence" standard used in civil proceedings. In deportation proceedings, commenced prior to April 1, 1997, ICE is required to prove that the alien is deportable by "clear, convincing, and unequivocal evidence."[29]

Where ICE has the burden of proof, it is important that representatives hold them to it. In removal proceedings, this is initially done by denying the charge(s) and corresponding ground(s) of removability set out in the NTA. If ICE does not meet its burden of proof, the representative should move to terminate the proceedings.

- *E.g.*, Hang, an LPR from Korea, is charged with being deportable for a conviction for embezzlement, which ICE is calling a crime of moral turpitude. At the hearing, ICE has the burden of proving that the conviction occurred, and that the crime as defined by the statute is a crime of moral turpitude. It is not Hang's burden to show that the crime is not a crime of moral turpitude.

In all applications for relief from removal, the burden of proof is upon the individual.[30]

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24 INA §§240(c)(2), 291; 8 CFR §1240.8(b).

25 *Landon v. Plasencia*, 459 U.S. 21 (1982); *see also Khodagholian v. Ashcroft*, 335 F.3d 1003 (9th Cir. 2003);, and *Matter of Huang*, 19 I&N Dec. 749 (BIA 1988) ("When an applicant has a colorable claim to returning resident status … the INS has the burden of proving he is not eligible for admission to the United States").

26 8 CFR §1240.8(c).

27 INA §§240(c)(2), 291; 8 CFR §1240.8(c).

28 INA §240(c)(3); 8 CFR §1240.8(a).

29 *Woodby v. INS*, 385 U.S. 276 (1966).

30 8 CFR §1240.8(d).

Rights in Proceedings

Representation by Counsel

Respondents in proceedings have a statutory right to be represented by counsel at their own expense.31 Unless a respondent has waived the right to counsel, the Immigration Judge must provide a reasonable and realistic opportunity to seek, speak with and retain counsel.[32] Although individuals in removal proceedings do not have a Sixth Amendment right to counsel, respondents' Fifth Amendment right to a full and fair hearing includes the right to competent representation. The IJ must grant a reasonable and realistic period of time to provide a fair opportunity for an individual to seek, speak with, and retain counsel.[33] Respondents may claim and establish such counsel was ineffective under the criteria specified in *Matter of Lozada*[34] and move to reopen removal proceedings.[35] The BIA has held that ICE is not required to inform an individual arrested without a warrant of the right to counsel until formal proceedings are instituted by the filing of an NTA.[36] The right to counsel is very limited in expedited removal proceedings—the law only allows consultation with counsel that is deemed not to delay the process.

By regulation, respondents may be represented in court by attorneys, law students, and law graduates who meet certain requirements specified in the regulations.[37] Respondents also may be represented by accredited representatives who have received full accreditation by the Board of Immigration Appeals (BIA).38 The requirements for obtaining accredited representative status are found at 8 CFR §292.2. An attorney or representative in an immigration court proceeding must file a Notice of Appearance on Form EOIR-28 with the immigration court and serve a copy on ICE.39

Legal Services

Respondents in proceedings also have a right to be given a list of available legal services, and these lists are to be updated quarterly.40 But note that in removal proceedings, unlike in criminal cases, counsel is not appointed for an individual who cannot find free services and cannot pay for private counsel. Respondents can find out about free legal services in their area on the immigration court website at *www.usdoj.gov/eoir*.

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31 INA §§239(a)(1)(E), 240(b)(4)(A).

[32] *Matter of C-B*, 25 I&N Dec. 888, 889 (BIA 2012).

[33] *Matter of C-B-*, 25 I&N Dec. 888 (BIA 2012).

[34] *Matter of Lozada* 19 I. & N. Dec. 637, 639 (B.I.A.1988).

[35] *In re Compean*, 25 I. & N. Dec 1, 2 (A.G.2009) (Compean II). In *Compean II*, the Attorney General directed the Acting Director of the Executive Office for Immigration Review to "initiate rulemaking procedures as soon as practicable to evaluate the Lozada framework and to determine what modifications should be proposed for public consideration." Id. The Attorney General also directed BIA judges to apply the *Lozada* standards to all motions to reopen until new procedures are established. Id. at 3.

[36] *Matter of E-R-M-R-& A-S-M-*, 25 I&N Dec. 580 (BIA 2011).

[37] 8 C.F.R. § 1292.1.

38 *Id.*

39 8 CFR §1003.17(a).

40 8 CFR §1003.61.

Contacting Consulates

8 CFR §1236.1(e) provides that a detained foreign national must be notified that she or he may communicate with the consul or diplomatic officer of the country of his or her nationality, where the country is on the treaty list. This right is also based on Article 36 of the Vienna Convention on Consular Relations.41 In addition, ICE must immediately notify diplomatic officers of the countries listed in the regulation, whenever a national from a designated country is detained in removal proceedings.

Translation

Due process requires that a respondent be afforded competent translation services if he or she does not speak English.[42] The regulations refer to the use of interpreters in removal proceedings and the Immigration Court Practice Manual provides that Immigration Court will arrange for an interpreter both during the individual calendar hearing and the master calendar hearing.[43] This does not, however, give respondents the right to translation of documents at the expense of the government.

Right to Examine Evidence

Under INA §240(b)(4)(B), an individual in proceedings shall have a reasonable opportunity to examine the evidence against him or her, to present evidence on his or her own behalf, and to cross-examine government witnesses. The IJ's failure to admit proffered evidence may result in a due process violation.[44]

Right to Be Advised of Eligibility for Relief

The regulations provide that the IJ "shall inform the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter and shall afford the alien an opportunity to make application during the hearing.[45] The IJ's advisal of the right to apply for relief must be a meaningful advisal. For example, in *United States v. Melendez-Castro*, the IJ initially informed the petitioner that he was eligible for voluntary departure, but " almost in the same breath... told him that he would not get the relief if he applied for it because he had a criminal record."[46] The court concluded that this information did not constitute a meaningful advisal.

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41 21 U.S.T. 77, 100–1; 596 U.N.T.S. 261.

[42] *He v. Ashcroft*, 328 F.3d 593, 598 (9th Cir. 2003).

[43] 8 CFR §§ 1003.22, 1240.5; Immigration Court Practice Manual, Chapter 4, available at http://www.justice.gov/eoir/vll/OCIJPracManual/Chap%204.pdf.

[44] *Zolotukhin v. Gonzales*, 417 F.3d 1073, 1076 (9th Cir. 2005); *Kerciku v. INS*, 314 F.3d 913, 918 (7th Cir. 2003).

[45] 8 CFR §1240.11(a)(2); *see also Bui v. INS*, 76 F.3d 268, 270-71 (9th Cir. 1996).

[46] *United States v. Melendez-Castro*, 671 F.3d 950, 954 (9th Cir. 2012).

Right to Due Process

The Fifth Amendment guarantees individuals in removal proceedings the right to due process and the opportunity for a full and fair hearing.47 However, an individual also must demonstrate prejudice to prevail on a due process challenge.48 Prejudice may be demonstrated where the violation potentially affected the outcome of the proceedings.[49] For example, one court found that there was prejudice where the government failed to disclose DHS forensic reports in advance of the hearing or make the reports' author available for cross-examination.[50]

Evidence also can be excluded or suppressed on due process grounds in removal proceedings if its use is not fundamentally fair.51 For example, evidence gained from an illegal search or seizure that was so egregious that it amounted to a violation of the due process clause of the Fifth Amendment can be suppressed.52 Evidence that was obtained through an egregious violation of the Fourth Amendment also may be suppressed.53 Moreover, evidence can be suppressed if it is gained in violation of an agency's own regulations.54

Special Rules for Juveniles

Special provisions apply where the individual in proceedings is under age 18. Pursuant to 8 CFR §1240.10(c), the IJ should not accept an admission of removability from an unrepresented juvenile individual who is not accompanied by a relative, friend or guardian. When the IJ does not accept an admission under this provision, a hearing must be scheduled to determine the matters at issue. The regulations also require that if the alien is a minor under 14 years of age, "service shall be made upon the person with whom the . . .minor resides; whenever possible, service shall also be made on the near relative, guardian, committee, or friend."[55] Unfortunately, the BIA held that the regulation does not require that service of an NTA be made to a near relative, guardian, committee or friend if the child is between the age of 14 and 18.[56]

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47 Wong Yang Sung v. McGrath, 339 U.S. 33 (1950); *Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1999); *Matter of M–D–*, 23 I&N Dec. 540 (BIA 2002), *citing Landon v. Plasencia*, 459 U.S. 21 (1982).

48 *See, e.g., Singh v. Gonzales*, 432 F. 3d 533 (3d Cir. 2006); *Arellano-Garcia v. Gonzales*, 429 F.3d 1183 (8th Cir. 2005); *Rodriguez Galicia v. Gonzales*, 422 F.3d 529 (7th Cir. 2005).

[49] *Cruz Rendon v. Holder*, 603 F.3d 1104, 1109 (9th Cir. 2010).

[50] *Cinapian v. Holder*, 567 F.3d 1067, 1075-76 (9th Cir. 2009).

51 *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980).

52 *Id.*

53 *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

54 *Matter of Garcia*, 17 I&N 325 (BIA 1980).

[55] 8 C.F.R. § 103.5a(c)(2)(ii); see also 8 C.F.R. § 236.2(a).

[56] *Matter of Cubor*, 25 I&N Dec. 470, 473 (BIA 2011); *Lopez-Dubon v. Holder*, 609 F.3d 642, 646 (5th Cir. 2010), *Llapa-Sinchi v. Mukasey*, 520 F.3d 897, 899 (8th Cir. 2008); *But see Flores-Chavez v. Ashcroft*, 362 F.3d 1150,1157-62 (9th Cir. 2004) (holding the regulations contained differing definitions of a "minor" and a "juvenile" in this context were illogical and could raise serious due process concerns).

Special Rules for the Mentally Incompetent

The immigration statute and the regulations provide special procedures for hearings involving individuals who are mentally incompetent.[57] As in the case of a juvenile, the IJ should not accept an admissions without the presence of a relative, friend or guardian. When it is impracticable for the respondent to be present at the hearing, the attorney, legal representative or guardian, near relative, or friend who was served with a copy of the Notice to Appear is permitted to appear on behalf of the respondent**.**[58] The BIA also acknowledged the special problems facing mentally incompetent individuals in removal proceedings and established a framework for analyzing cases in which issues of mental competency are raised.[59]

Pre-Hearing Procedures

Bond

Upon issuance of an NTA, a foreign national may be kept in custody, released under a bond of a minimum of $1,500, or released on conditional parole into the community.60

Ineligible for Bond: Persons Subject to Mandatory Detention

Foreign nationals with certain types of criminal histories are subject to "mandatory detention," which means they cannot be released pending removal proceedings, even if they are permanent residents. Pursuant to INA §236(c)(1), the following persons are subject to mandatory detention:

- Those who are inadmissible by reason of having committed any offense covered in INA §212(a)(2) (the criminal inadmissibility grounds).
- Those who are deportable by reason of having committed any offense covered in INA §237(a)(2)(A)(ii) (multiple crimes of moral turpitude), 237(a)(2)(A)(iii) (aggravated felonies), 237(a)(2)(B) (controlled substances), 237(a)(2)(C) (certain firearms offenses), or 237(a)(2)(D) (miscellaneous espionage and sabotage crimes).
- Those who are deportable under INA §237(a)(2)(A)(i) (one crime involving moral turpitude) if the individual was sentenced to a term of imprisonment of at least one year.
- Those who are inadmissible under INA §212(a)(3)(B) (terrorist activities) or deportable under INA §237(a)(4)(B) (terrorist activities). After the passage of the Real ID Act of 2005,61 which expanded the definitions of "engaged in terrorist activity" and "terrorist organization," as well as the ground of deportability at INA §237(a)(4)(B), more individuals are potentially subject to removal, and thus, mandatory detention under these grounds.

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[57] INA § 240 (b)(3); 8 CFR §1240.10(c).

[58] C.F.R. §§ 1240.4, 1240.43.

[59] *Matter of M-A-M,* 25 I&N Dec. 474 (BIA 2011).

60 INA §236(a).

61 Real ID Act of 2005, *supra* note 9.

Individuals who fall under these mandatory detention provisions must be taken into detention when released from their criminal sentence on parole, supervised release, or probation.62 In *Matter of Kotliar*,63 the BIA decided that an individual may be subject to mandatory detention for charges that are not listed on the NTA. However, mandatory detention only applies to those who were last released from criminal custody after October 8, 1998.64

In *Matter of West*,65 the BIA held that "released from" means released from actual physical restraint. Many ICE offices and IJs read dicta in *Matter of West* to mean that a release from the physical restraint of an arrest after October 8, 1998, is sufficient to trigger mandatory detention, even if the individual was never again in any physical custody for that offense but was instead, for example, sentenced to a period of probation. Moreover, in *Matter of Rojas*,66 the BIA held that an individual is subject to mandatory detention even if DHS does not immediately detain him or her upon release from criminal custody.67

The BIA overruled its previous decision in *Matter of Saysana* and found that the mandatory detention rules do not apply to someone who was released from criminal custody prior to October 8, 1998, yet was detained again on an unrelated matter or a non-mandatory detention offense after October 8, 1998.68

The U.S. Supreme Court, in *Demore v. Kim*,69 held by a 5–4 vote that the mandatory detention provisions are constitutional, even as applied to LPRs. However the decision authorized mandatory detention only for the "limited period of [the alien's] removal proceedings."[70] Challenges to mandatory detention continue to be filed, many of which have been successful.[71] The 9th Circuit decision, *Casas-Castrillon v. Dep't of Homeland Sec*., concluded that mandatory detention under INA §236(c) was intended to apply for only a limited time and ended when the BIA affirmed the order of removal.[72] In November 2012, a class-action lawsuit challenging mandatory detention was filed in New Jersey.[73]

Moreover, persons subject to mandatory detention may still be released if the AG decides that release from custody is necessary to provide protection to a witness or potential witness, a person cooperating with an investigation into a major criminal activity, or an immediate family member of such a person. Before any release takes place, however, the AG must also

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62 INA §236(c)(1).

63 *Matter of Kotliar*, 24 I&N Dec. 124 (BIA 2007).

64 *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999).

65 *Matter of West*, 22 I&N Dec. 1405 (BIA 2000).

66 *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001).

67 *But see Zabadi v. Chertoff*, No. C 05-03335 WHA, 2005 WL 3157377 (N.D. Cal Nov. 22, 2005) (unpublished), *Quezada-Bucios v. Ridge*, 317 F. Supp. 2d 1221 (W. D. Wash. 2004).

68 *Matter of Garcia Arreola*, 25 I&N Dec. 267 (BIA 2010) overruling *Matter of Saysana*, 24 I&N Dec. 602 (BIA 2008).

69 *Demore v. Kim*, 538 U.S. 510 (2003).

[70] *Id.* at 530.

[71] *Valdez v. Terry*, 874 F. Supp. 2d 1262 (D. N.M. 2012); *Khodr v. Adduci*, 697 F. Supp. 2d 774 (E.D. Mich. 2010); *Tijani v. Willis*, 430 F. 3d 1241 (9th Cir. 2005), *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003), *Parlak v. Baker*, 374 F. Supp. 2d 551 (E.D. Mich. 2005).

[72] *Casas-Castrillon v. Dep't of Homeland Sec*., 535 F.3d 942, 949 (9th Cir. 2008).

[73] *Gayle v. Napolitano*, 2013 U.S. Dist. LEXIS 36273 (D.N.J. Mar. 15, 2013).

decide that persons subject to mandatory detention will not pose a danger to the safety of other persons or property and are likely to appear for any scheduled proceeding.74

Joseph Hearings

While the IJ does not have jurisdiction to release foreign nationals subject to mandatory detention, the IJ does retain jurisdiction to determine whether the person is, in fact, properly included in the mandatory detention provisions.75 Individuals who think that they have been improperly characterized as subject to mandatory detention should request a "Joseph Hearing" before the IJ; the name for this hearing derives from the BIA's decision in *Matter of Joseph*.76 To succeed at a Joseph Hearing, the individual must demonstrate to the IJ that it is substantially unlikely that the charge of removability triggering mandatory detention will be upheld. If the judge decides that the respondent is not properly classified as a mandatory detainee, the judge will hold a bond hearing immediately.[77]

Ineligible for Bond—Arriving Aliens

The IJ also does not have jurisdiction to consider release from detention for "arriving aliens" in removal proceedings. Arriving aliens are those applicants for admission who are either trying to enter the United States at a port of entry or are interdicted at sea and brought to the United States.78 As mentioned above, LPRs returning from a trip abroad can be deemed to be making an admission and placed in proceedings as arriving aliens if they fit within one of the exceptions listed in INA §101(a)(13)(C), which includes those who have committed an offense identified in INA §212(a)(2), the criminal inadmissibility grounds, subject to the retroactivity restrictions of *Vartelas v. Holder*, described above.

Unlike the IJ, ICE does have the authority to release those characterized as arriving aliens on parole, under 8 CFR §212.5. However, parole is discretionary and parole practices vary greatly from district to district.

In certain circumstances, an individual may be able to mount a challenge to his or her designation as an arriving alien. Since DHS bears the burden of proving by clear and convincing evidence that the returning LPR fits into one of the exceptions listed in INA §101(a)(13)(C)[79], it may be possible to argue that the government has not meet its burden. In other instances, an individual might have reason to argue that he or she is not subject to §101(a)(13)(C) because the activity alleged does not meet the "illegal activity" requirement of §101(a)(13)(C).80

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74 INA §236(c)(2).

75 8 CFR §1003.19(h)(2)(ii); *see also Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999).

76 *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999).

[77] *Matter of Davey*, 26 I&N Dec. 37 (BIA 2012).

78 8 CFR §1.1(q).

[79] *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011).

80 *Matter of Guzman Martinez*, 25 I&N Dec. 845 (BIA 2012).

Eligible for Bond

Other foreign nationals in custody and subject to INA §240 proceedings, besides arriving aliens and those subject to mandatory detention, may request custody redetermination hearings (bond hearings) before the IJ. Pursuant to the BIA's decision in *Matter of X-K-*,81 this also includes individuals, other than arriving aliens, who were initially placed in expedited removal but who subsequently expressed a fear of persecution or torture in their home country, passed credible fear interviews and were placed in INA §240 removal proceedings. For example, people who are in expedited removal because they have been in the United States less than 14 days and are caught within 100 miles of a land border are eligible for bond under *Matter of X-K-*82 once they have passed a credible fear interview.

Bond Hearings

Custody redetermination hearings are governed by 8 CFR §1003.19 and §1236.1. A foreign national in custody may request a bond hearing even if DHS has not yet filed the NTA with the immigration court.83

Bond redetermination hearings are separate from and form no part of removal proceedings.84 No transcript is prepared during the bond hearing and the IJ cannot consider evidence presented in the bond removal proceedings or his own notes for purposes of determining removability or relief from removal.[85]

In the past, when deciding on an appropriate bond, the IJ was limited to considering whether the individual posed a danger to the community and whether the individual posed a flight risk. In *Matter of D-J-*,86 however, the AG concluded that in cases where individuals are attempting to enter the United States illegally, IJs and the BIA now must also consider national security interests whenever the government offers evidence from executive branch sources (with relevant expertise) establishing that significant national security interests are implicated.

In *Matter of Guerra*,87 the BIA reiterated that IJs have broad discretion in deciding which factors to consider in bond redetermination hearings. In this case, the BIA upheld an IJ's decision to deny bond to a foreign national who had been charged but not yet convicted in a controlled substance trafficking scheme, based on a finding that the individual posed a danger to the community.88

The BIA found that the conditions placed on a respondent, an electronic monitoring device, is a term of release and not custody.[89] In *Matter of Aguilar-Aquino*, the BIA found because the respondent was not in custody and did not request a bond redetermination

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81 *Matter of X–K–*, 23 I&N Dec. 731 (BIA 2005).

82 *Id.*

83 8 CFR §1003.19.

84 8 CFR §1003.19(d).

[85] *Joseph v. Holder*, 600 F.3d 1235, 1240-43 (9th Cir. 2010).

86 *Matter of D–J–*, 23 I&N Dec. 572 (AG 2003)

87 *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006).

88 *Id.*

[89] *Matter of Aguilar-Aquino*, 24 I&N Dec. 747 (BIA 2009).

hearing within 7 days after he was released, the IJ lacked jurisdiction to redetermine the terms of the release.

Note that bond hearings are scheduled quickly, and there will be little time to prepare. However, a well-documented case will allow the IJ to understand and adjudicate the positive equities in the case. Specific factors to be considered in a bond redetermination hearing include:

- Family ties;
- Ties to the community;
- Employment history;
- Criminal record;
- The manner of entry and length of time in the United States;
- Membership in community organizations;
- Likelihood of obtaining permanent residency; and
- Any other discretionary factors.90

As mentioned above, national security interests now also may be considered in certain cases.91 Helpful bond documentation includes:

- Letters from family members and evidence of their USC or LPR status;
- Letters from community members and organizations, such as churches and service organizations; letters of recommendation from current and past employers;
- Documentation of good behavior, work record, program and counseling participation while incarcerated, if applicable;
- Payment of taxes and child support;
- A showing of eligibility for relief; and
- Any other evidence showing that the applicant is deserving of a favorable exercise of discretion.

The respondent may have only one bond hearing before the IJ. A request for a second bond hearing must be made in writing, and will only be considered if the respondent demonstrates that his circumstances have changed materially since the prior bond hearing.92

Pre-Hearing Motions

The rules governing pre-hearing motions are found in the regulations, at 8 CFR §1003.12–1003.41, and in the Immigration Court Practice Manual.[93] A proposed order, and any relevant evidence, including an affidavit or declaration, should accompany the motion. If not already on file, the representative must and a Notice of Entry of Appearance (Form EOIR-28). In

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90 *See Matter of Patel*, 15 I&N Dec. 666 (BIA 1976); *Matter of Daryoush*, 18 I&N Dec. 352 (BIA 1982).

91 *Matter of D–J–*, 23 I&N Dec. 572 (AG 2003).

92 8 CFR §1003.19(e).

[93] Immigration Court Practice Manual, available at http://www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm

many cases, counsel should consult with the Office of Chief Counsel (OCC), or the ICE assistant district counsel assigned to the case to see if ICE will agree not to oppose the motion. If they so agree, this should be indicated in the motion. (*e.g.*, "The ICE Assistant District Counsel has advised undersigned counsel that ICE does not oppose an order granting this motion."). Always be sure to include a certificate of service with any motion or filing, showing that a copy has been sent to the ICE District Counsel.

Advocates must comply with the timing requirements for filing of any motions. For example, any motion must be filed 15 days in advance of the hearing if requesting a ruling prior to the hearing.94 If it is not possible to meet this deadline, advocates must submit a motion to accept an untimely filing that includes evidence explaining the reasons for untimely filing (*e.g.*, affidavit of counsel). If a motion is untimely, it is denied.95

The following is a non-exhaustive list of motions that may be filed in removal proceedings:96

- *Motions to continue the hearing date.* These should be filed in writing as far in advance of the hearing as possible, and should provide a very good reason for the continuance.97 The regulations state that the IJ may grant a continuance for "good cause." In *Matter of Hashimi,*[98] the BIA set forth factors to be considered in determining whether to continue a case awaiting adjudication of a family-based visa petition. In *Matter of Rajah,*[99] the BIA expanded those factors in the case of an employment-based visa petition awaiting adjudication. In *Matter of Sanchez Sosa,*[100] the BIA articulated the factors to be considered in deciding whether to grant a continuance to an individual awaiting the adjudication of a U nonimmigrant visa petition. If a respondent requests a continuance in order to retain counsel, the IJ's failure to grant a continuance may implicate the respondent's right to counsel.[101]
- *Motions for extension of time* to submit documents, memoranda, or applications. These should be filed only when absolutely necessary, and should provide a very good reason for granting the extension. This reason must be detailed in evidence (e.g., affidavit of counsel).102 The rules regarding motions to accept untimely filings are at chapter 3.1(d)(iii) of the Immigration Court Practice Manual.
- *Motions to change venue*. A basis for this motion might be that the respondent and witnesses live far from the scheduled site of the removal proceedings. If possible, the motion should indicate that the individual is represented in the new jurisdiction, and should include as an attachment an EOIR 28 notice of appearance

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94 Immigration Court Practice Manual, ch. 5.2(c), 3.1(b).

95 Immigration Court Practice Manual, ch. 3.1(d)(ii).

96 A list of motions and the corresponding section discussing such motions is at Immigration Court Practice Manual, ch. 5.10.

97 Immigration Court Practice Manual, ch. 5.10(a).

98 *Matter of Hashimi*,24 I&N 785 (BIA 2009).

99 *Matter of Rajah,*25 I&N 127 (BIA 2009).

100 *Matter of Sanchez Sosa,*25 I&N Dec. 807 (BIA 2012).

101 *Montes-Lopez v. Holder*, 694 F.3d 1085, 1089 (9th Cir. 2012); *Gjeci v. Gonzales*, 451 F.3d 416 (7th Cir. 2006).

102 Immigration Court Practice Manual, ch. 3.1(c)(iv).

from the new counsel. It is necessary to give a detailed explanation of the reasons for the request.103 The regulations regarding motions to change venue are found at 8 CFR §1003.20. The Immigration Court Practice Manual, effective July 1, 2008, requires that the Respondent admit or deny the factual and legal allegations in the NTA.104 A respondent or his or her representative should not concede removability unless it is absolutely certain that a respondent is in fact removable, because this concession will govern the respondent's case and may affect greatly the outcome of the case and the relief available.

- *Motions to terminate the proceedings*. A motion to terminate may be appropriate in several types of situations, and certainly when the allegations of the NTA do not support the charge of removability. For example, if the charge is deportability because of conviction for a crime of moral turpitude occurring within five years of admission, and the crime was actually committed more than five years after admission, or the statute under which the client was convicted does not reflect a crime involving moral turpitude, the advocate should file a motion to terminate. A motion to terminate also might be appropriate when the NTA does not clearly state the charges of removability, so that the respondent cannot tell with what he or she is being charged. This would be the case if the respondent is charged with conviction of an aggravated felony, but the NTA fails to specify which of the aggravated felony definitions under INA §101(a)(43) is at issue.
- *Motion to suppress evidence*. A motion to suppress evidence may be appropriate to exclude evidence of the respondent's alienage from the removal proceeding where DHS obtained such evidence in violation of the 4th and 5th Amendment of the U.S. Constitution and in violation of the agency's regulations. In *INS v. Lopez-Mendoza*,[105]the U.S. Supreme Court held that motions to suppress evidence in immigration proceedings should only be granted in cases where there is an "egregious violation" of the 4th Amendment. The BIA, while restricted from considering constitutional violations, held that evidence obtained in violation of the agency regulations could be suppressed if the violated regulation was promulgated for the benefit of noncitizens and the violation prejudiced the interests of the respondent that were protected by the regulation.[106]
- *Motion to administratively close proceedings.* Administrative closure is a procedural mechanism to temporarily stop removal proceedings by removing the case from the immigration judge's or BIA's calendar. The case is administratively closed to allow an event outside the control of the parties to occur --- even if the event does not take place for many years. In *Matter of Avetisyan,[107]* the BIA held that immigration judges and the BIA may administratively close removal proceedings, even if one of the parties objects. (*See* Chapter 5 for a discussion of the factors to be considered in administratively closing a case under *Matter of Avetisyan,*)

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103 Immigration Court Practice Manual, ch. 5.10(c).

104 *Id.*

[105] *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

[106] *Matter of Garcia-Flores*, 17 I&N Dec. 325, 327 (BIA 1980).

[107] *Matter of Avetisyan*, 25 I&N 688 (BIA 2012).

- *Motions for deposition* of a witness or for issuance of a subpoena or subpoena duces tecum.108 The regulations give the IJ authority to order depositions of witnesses who are not "reasonably available" at the time and place of the hearing and whose testimony is essential.109 The regulations also give the IJ authority to issue subpoenas requiring the attendance of witnesses and subpoenas duces tecum, ordering the production of books, papers, and other documentary evidence. In an application for a subpoena or subpoena duces tecum, the applicant must state in writing or at the proceeding what he or she expects to prove by the witnesses or documentary evidence, and show affirmatively that he or she has made diligent effort without success to produce the same.110 This opportunity to request subpoenas and depositions is an invaluable aid to presenting an effective case before the immigration court, and advocates should take advantage of it whenever needed. Getting the IJ to issue a subpoena duces tecum for documents can be especially important given the long delays in getting documents in response to Freedom of Information Act (FOIA) requests, discussed below.
- *Motion for a pre-hearing conference*. The regulations provide for pre-hearing conferences, which can be held to narrow issues, obtain stipulations between the parties, exchange information voluntarily, and otherwise simplify and organize the proceedings.111

Discovery Through Freedom of Information Act and Criminal Record Checks

There is no provision in the statute or regulations for discovery as it is generally understood in civil and criminal proceedings. In *Dent v. Holder*, the 9th Circuit Court of Appeals held that INA § 240(c)(2)(B) requires the government to provide routinely "A" files and other documents not considered confidential to respondents in removal proceedings without a Freedom of Information Act (FOIA) request.[112] Some ICE OCC attorneys allow the respondent's counsel to view documents in their files, or provide information concerning documents and evidence in their possession. Advocates, especially those practicing in the 9th Circuit, should request documents in the government's possession under *Dent.*

The provisions for requesting that the IJ order depositions and grant subpoenas, described above, are aids to produce evidence in court, not to discover what evidence is available. However, the most reliable, albeit problematic, method of discovery in immigration proceedings is through a FOIA request.

Under the FOIA statute, the government is mandated to provide a copy of the respondent's documents within 22 days of the request.[113] Unfortunately, it often takes many months to get a response to a FOIA request. A 1992 national class action settlement agreement, the *Mayock Settlement Agreement,*[114] states that government agencies will

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108 Immigration Court Practice Manual, ch. 4.20.

109 8 CFR §1003.35 (a).

110 8 CFR §1003.35(b).

111 8 CFR §1003.21(a); Immigration Court Practice Manual, ch. 4.18.

[112] *Dent v. Holder, supra.* at 374-75.

[113] 5 U.S.C. § 552(a)(6)(A)(i).

[114] *Mayock v. Nelson*, 938 F.2d 1006 (9th Cir. 1991*); Mayock v. INS*,714 F. Supp. 1558 (N.D. Cal. 1989);

expedite a FOIA request if the requestor shows exceptional need or urgency, such as potential infringements on due process rights. The settlement continues to govern the processing of these FOIA cases.[115]

USCIS uses a 3-tier system to process FOIA requests. Track One is for simple requests, Track Two is for complex inquiries that need additional time for searching and review and Track Three, the "fast track", is for respondents in removal proceedings. 116 In order to place a FOIA request on this fast track, it is necessary to submit an NTA or Notice of Hearing in Removal Proceedings with the FOIA request. Respondents who already have been ordered removed or deported, but who are attempting to reopen their cases, cannot benefit from this fast track FOIA processing. Representatives should submit an E-28 with the FOIA request, Form G-639, and the NTA or Notice of Hearing.

To clarify, there is only one alien file, or A-file number, per noncitizen. That file could be in the possession of USCIS, ICE or CBP. However, within that single file there could be documents controlled by and in the possession of the different sub-agencies.. Also, some noncitizens do not have an A-file, but only receipt files. However, all foreign nationals in proceedings will have an A-file. Because of the various sub-agencies that maintain A-files, it may be useful to submit FOIA requests to multiple locations. The various locations to request A-files are:

For almost all USCIS records, FOIA requests should be sent to:

National Records Center FOIA Division
P.O. Box 648010
Lees Summit, MO 64064-8010

Or, by overnight delivery, send to:

National Records Center FOIA Division
150 Space Center Loop, Suite 300
Lees Summit, MO 64064

Or, via facsimile, send to:

National Records Center FOIA Division at Fax: 816-350-5785, and then place a copy with an original signature in the mail to the P.O. Box address listed above.

Practitioners have reported in the past that it takes between six and twelve months to get requested records back from the NRC. USCIS instituted a processing-time report for FOIA requests and maintains that the processing times for the Tracks 1-3 range between 26 and 97 days. For fast-track Track 3 FOIA requests for respondents in removal proceedings, practitioners report receiving records back in approximately three months. Each DHS immigration sub-agency has its own email inquiry address available on the agency's website.[117]

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[115] *Hajro v. USCIS*, 832 F. Supp 2d 1095 (N.D. Cal. 2012).

116 72 Fed. Reg. 9017–18 (Feb. 28, 2007).

[117] USCIS website on FOIA: http://www.uscis.gov/USCIS-ES/FOIA%20FAQs.pdf; ICE website on FOIA: http://www.ice.gov/foia/submitting_request.htm; CBP website on FOIA: http://www.cbp.gov/xp/cgov/admin/fl/foia/foia_requests/foia_contacts.xml

For ICE records, requests should be sent to the addresses below. It is advisable to check the website for USCIS, ICE, and CBP prior to sending the FOIA request to ensure that the addresses have not changed.[118]

FOIA Office
U.S. Immigration and Customs Enforcement
Freedom of Information Act Office
500 12th Street, S.W., Stop 5009
Washington, D.C. 20536-5009
Fax Number: (202) 732-4265

For FOIA requests for documents controlled by CBP, send the form to:

U.S. Customs and Border Protection
Office Diversity and Civil Rights
Freedom of Information Act (FOIA) Division
90 K Street NE, 9th Floor
Washington DC 20229-1181
Fax Number: (202) 325-0230

For EOIR records, the FOIA request for documents is sent to:

Office of the General Counsel
FOIA Request
U.S. Department of Justice, Executive Office for Immigration Review
5107 Leesburg Pike, Suite 1903
Falls Church, VA 22041
Phone: (703) 605-1297

FOIA requests are processed on a first come first serve basis. Note that it is *not* necessary to make a FOIA request on the G-639 form, and it may be advisable to make your request in a letter where you do not wish to respond to particular questions on the form.

In addition to the FOIA request, advocates also should obtain criminal record checks from the Federal Bureau of Investigation (FBI) and from any state in which the client has resided or in which the client has been arrested. Information about requesting a criminal record check from the FBI is found in Appendix 5 of this chapter.

Pre-Hearing Statement

Under 8 CFR §1003.21, an IJ may require the parties to file a pre-hearing statement, containing such items as:

- A statement of the facts to which the parties have stipulated;
- A list of proposed witnesses and a summary of their anticipated testimony;
- A list of exhibits, with copies attached, and the purpose of their introduction; and
- A statement of unresolved issues.

All statements and evidence must be submitted at least 15 days prior to the scheduled individual hearing for non-detained respondents.119

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[118] *Id.*

119 Immigration Court Practice Manual, ch 3.1(b)(ii).

Master Calendar Hearings and Individual Hearings

Master Calendar Hearing

Master calendar hearings are preliminary hearings for pleading and scheduling, where a respondent answers the charges against him or her and may file his or her application for relief from removal. At the conclusion of the master calendar hearing, the IJ will set a trial date for the hearing on the application for relief. Typically, several foreign nationals will be scheduled to appear before the IJ at the same date and time on the judge's master calendar call, and each case will be expected to last just minutes.

It is a fairly common practice at master calendar hearings before the immigration court for advocates and their clients to admit the factual allegations contained in the NTA, concede the charge(s) of removability against the respondent, and concentrate their energies on the next stage of the removal proceedings (*i.e.*, the applications for relief from removal). However, *advocates should think very carefully before admitting allegations and conceding removability*. Once the respondent has admitted the allegations and conceded removability, that concession will follow the respondent through all levels of case appeal and review -- it is almost impossible to undo these statements. There may be cases where an admission and concession is still in order (*e.g.*, if the advocate is certain that ICE can bear its burden of proof, and there is a strong case for relief from removal).

Denying the allegations and charges in an NTA is not lying to the immigration court. Rather, it is a means of putting ICE to its burden of proof when a client is charged with deportability. For example, if the ground of inadmissibility or removal is related to a criminal conviction, the government should produce a certified copy of the record of conviction. If a foreign national or his representative admits the allegations and concedes deportability when pleading to the NTA, ICE likely will not have to fulfill any burden it may have had. Indeed, under 8 CFR §1240.10, an IJ can determine that removability has been established if, during pleading to the NTA, the respondent admits the allegation and concedes removability, so long as the IJ is satisfied that no issues of law or fact remain. Even when a client is charged with inadmissibility and it is the client's burden to show that he or she is admissible**,** charges should be denied when there is any colorable argument that the client is, in fact, not inadmissible as charged, and all arguments against the charges should be made on the record.

In addition to denying the allegations and the charges of deportability or inadmissibility, advocates should scrutinize the NTA and any evidence offered by ICE, and make all appropriate arguments against the charges and objections against proffered evidence.

In some situations, the case may be concluded at the master calendar hearing without further hearings. For example, when a person is planning to admit the charges in the NTA, and is just seeking permission to depart the United States voluntarily within a certain period of time, the judge typically will rule on that request at the master calendar hearing. A foreign national attending the master calendar hearing without counsel can request a continuance to have time to seek counsel.

Individual Hearing

The individual hearing, also known as the merits or regular calendar hearing, is typically scheduled for a block of time long enough to consider the respondent's case in detail. A case may be set for an entire morning or afternoon, and additional individual hearings may be scheduled if the hearing isn't completed in that time period.

At the individual hearing, the IJ will consider evidence relating to the matter at issue, which may include challenges to the charges in the NTA, or a request for relief from removal. The different forms of relief from removal are discussed in several chapters of this manual, and each form of relief has separate eligibility requirements defined by statute and regulation. A foreign national in proceedings is not limited to applying for one form of relief, and may request all remedies for which he or she may be eligible. Note that the IJ cannot consider relief from removal until making a finding on the charge of inadmissibility or deportability. If the IJ finds that the charge of inadmissibility or deportability has not been established, the case will be terminated, and the issue of relief from removal will not be reached.

Evidence presented at a removal hearing typically consists of applications and supporting documents filed in advance of the hearing. The testimony of witnesses, usually including the respondent, also is presented. If the respondent or a witness will be testifying in a language other than English, the court will provide an interpreter. If the respondent's counsel does not speak and understand the language in which the respondent or witness will be testifying, it is helpful to bring along someone who can let counsel know if there is a problem with the translation; it is not uncommon for advocates to object to incorrect translations by the court appointed interpreters.

Court proceedings are recorded on a tape-recorder, and if an appeal of the judge's decision is filed, the proceedings will be transcribed. If a case already has commenced when counsel is retained to represent a respondent, he or she can ask the court to listen to the tape of the proceedings to learn what has happened in court to date.

Note that the law allows removal proceedings to go forward by video or telephonic conference. Consent of the respondent is needed to proceed by telephone. The respondent must be advised of his or her alternative right to proceed in person or through videoconference.120

The respondent must submit required biometrics by the deadline established by the IJ. EOIR regulatory changes in 2005 mandated certain security checks before the grant of any relief from removal.121 The courts require that a respondent mail copies of the application for relief, proof of application fee payment, and payment for biometrics to a designated USCIS service center address in Mesquite, TX. After a receipt is produced, the respondent is supposed to be scheduled for a fingerprint appointment at an Application Support Center.122 The EOIR regulations allow for dismissal of cases where applicants are deemed to have failed to provide in a timely manner the needed biometrics and biographical information. Note that ICE is responsible for competing biometrics for detained respondents.

In Absentia Orders

Respondents who have received the required notices under INA §239(a)(1) or (2) and do not attend an INA §240 proceeding will be ordered removed in absentia, if ICE establishes by clear, convincing, and unequivocal evidence that written notice was provided and that the

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120 8 CFR §1003.25(c).

121 70 Fed. Reg. 4743 (Jan. 31, 2005).

122 The instructions distributed by the courts are *published on* AILA InfoNet at Doc. No. 05040472 (*posted* Apr. 4, 2005).

foreign national is removable.123 A foreign national may be removed in absentia even absent the INA §239(a)(1) or (2) written notices, however, if the foreign national has failed to provide ICE with his or her address as required under INA §239(a)(l)(F).124

The BIA has held that if ICE elects to serve the NTA with its required warnings to the last address it has for the respondent, this service constitutes the required §239(a) notice if the respondent actually received the notice or can be charged with receiving the notice. The respondent can be charged with receiving the notice if it is sent to the correct address, but fails to reach the respondent through some failure in the internal workings of the household. If the respondent actually received or can be charged with receiving the notice, then in absentia proceedings may be held.125

If the respondent did not actually receive the NTA and the notice of hearing it contains, and cannot be charged with having received the notice, then the respondent cannot be on notice of either removal proceedings or the address obligations particular to removal proceedings. In this case, the entry of an in absentia order is precluded.126 The government in *Matter of G–Y–R–* had argued that the INA §265(a) requirement of notification to the AG of address changes meant that an NTA sent to the last address provided by the foreign national supports an in absentia removal order. The BIA did not agree, noting that an in absentia removal order is not one of the penalties imposed for failure to comply with that registration requirement.127 If the respondent who fails to appear for a hearing, however, does not argue that the notice was sent to the incorrect address or that the postal service did not deliver it, service of the NTA to the last address provided is sufficient to satisfy the INA §239(a) notice requirements.128

In *Matter of M–R–A–*,129 the BIA held that a respondent did not receive proper notice of his hearing. The BIA held that because notices of hearing need not be sent by certified mail, there was a weak presumption of delivery of the notice, which the respondent overcame. The BIA distinguished their holding in *Matter of Grijalva*130 and *Matter of M–D–*131; these cases were decided when all notices of hearings were required to be sent by certified mail, which created a stronger presumption of delivery. In contrast, the BIA in *Matter of M–R–A–* 132 held that a respondent can rebut the weaker presumption of delivery by regular mail by presenting evidence demonstrating that the notice was not received. Similarly, proof that mailing address has remained unchanged, that neither the respondent nor a responsible party working or residing at the address refused service, and that there was non-delivery or

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123 INA §240(b)(5).

124 INA §240(b)(5)(B).

125 *Matter of G–Y–R–*, 23 I&N Dec. 181 (BIA 2001); *Matter of M–D–*, 23 I&N Dec. 540 (BIA 2002).

126 *Matter of G-Y-R-*, 23 I&N Dec. 181 (BIA 2001). (NTA sent to address given by respondent in a change of address form that was several years old and predated removal proceedings).

127 *Id*.

128 *Matter of M-D-*, 23 I&N Dec. 540 (BIA 2002). (NTA sent by certified mail, which was not claimed by respondent; no argument that address was incorrect or that postal service did not notify him that he had a certified letter).

129 *Matter of M-R-A-*, 24 I&N Dec. 665 (BIA 2008).

130 *Matter of Grijalva*, 21 I&N Dec. 27 (BIA 1995).

131 *Matter of M-D-*, *supra* note 128.

132 *Matter of M-R-A-*, *supra* note 129.

improper delivery by the Postal Service may overcome the presumption of notice.[133] The evidence that could be submitted to prove non-deliver could include:

- Respondent's affidavit;
- Affidavits from family members or others knowledgeable about the facts relevant to whether notice was received;
- Respondent's actions upon learning of the in absentia order and whether due diligence was exercised to redress the situation;
- Any prior affirmative application for relief, indicating that respondent had an incentive to appear;
- Any prior application for relief filed with the immigration court or prima facie evidence of eligibility for such relief;
- Respondent's previous attendance at immigration court hearings, if applicable; and
- Any other circumstances or evidence indicating possible nonreceipt of notice.

The strong presumption of effective service of the notice of the hearing

Individuals ordered removed in absentia, other than because of exceptional circumstances or a notice error, are ineligible for various forms of relief—voluntary departure; cancellation of removal; registry; and adjustment or change of status—for a period of 10 years after the date of the final removal order.

If the respondent has departed the United States after the institution of removal proceedings, the IJ cannot terminate proceedings unless the government cannot sustain the charges in the NTA or there is some other legal or factual basis to reason to terminate the case.[134] Instead, the IJ must order the respondent removed *in absentia.* For that reason, it is important to withdraw other requests for relief and request voluntary departure or termination *before* your client departs the United States.

Because of these drastic consequences of a failure to appear, counsel must emphasize to each client that he or she must keep USCIS, ICE, the immigration court, the BIA (if the case is on appeal), and counsel apprised of his or her current address. If a client is in removal proceedings before the IJ, notices of change of address should be submitted to the immigration court on Form EOIR-33/IC. If the matter is on appeal, notices of change of address should be submitted to the BIA on Form EOIR-33/BIA via certified mail, return receipt requested. In each case, a copy must be sent to ICE district counsel.

In certain limited circumstances, an in absentia order may be reopened. The requirements for filing a motion to reopen an in absentia order are discussed in more detail in Chapter 12 of this manual.

Immigration Judge Decision/Appeals

At the conclusion of the case, the IJ will issue an order determining the respondent's alleged inadmissibility or deportability, and deciding on any requested relief from removal. The order may be in summary form, where the IJ just checks off boxes and fills in blank spaces to

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[133] *Arrieta v. INS*, 117 F.3d 429, 431 (9th Cir. 1997).

[134] *Matter of Sanchez-Herbert*, 26 I&N Dec. 43, 45 (BIA 2012).

indicate what order was made (A sample summary order form is attached at Appendix 6 to this chapter). In cases where the IJ believes there may be an appeal on his or her order, the judge will prepare a more detailed narrative decision, giving the reasoning for the decision. The decision may be read at the hearing, or the hearing may be adjourned after the presentation of evidence, giving time for the IJ to prepare a written decision.

Either side may appeal the IJ decision to the BIA within 30 days of the decision.135 To protect the right to appeal, the respondent must tell the judge that he or she is reserving appeal. The appeal form and fee, or the fee waiver request, must then be *received* by the BIA within the 30-day period, or it will be rejected as untimely.136 If no appeal is taken, the decision of the IJ is final.

Appeal procedures are discussed in more detail in chapter 12 of this manual.

Consequences of Being in Removal Proceedings

Jurisdiction

Jurisdiction is the concept describing who has authority to decide a matter. When an individual has a case pending in immigration court, the IJ has jurisdiction over that individual's case until he or she departs the United States[137], and the individual is not eligible to apply for most forms of immigration benefits before the USCIS. In addition, EOIR retains jurisdiction to review the case of an individual who has been unlawfully removed from the United States during the pendency of a direct appeal of a deportation order.[138]

- *E.g.*, Jill never attended her immigration court hearing and the judge ordered her removed *in absentia*. Jill, who never departed the United States, is now married to a USC and wants to apply for adjustment of status. Jill cannot file her application with the local USCIS office because the IJ still has jurisdiction over her case. Jill can apply only for adjustment of status if she is eligible to file a motion to reopen her case in immigration court.

Penalties for Noncompliance with Court Orders

There are harsh consequences for failure to attend an immigration court hearing or comply with an order of departure. As mentioned above, a foreign national ordered removed *in absentia* is barred for 10 years from most forms of relief from removal and from adjustment of status, if the foreign national's failure to appear was not due to exceptional circumstances and the foreign national was given oral notice of the time and place of the hearing and the consequences of failure to appear.139 In addition, a foreign national who fails to attend a hearing without reasonable cause is inadmissible for five years after his or her subsequent departure or removal.140 Further, for those foreign nationals granted time to voluntarily depart the United States and who fail to leave within the time specified, there is a civil

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135 8 CFR §1003.3.

136 8 CFR §§1003.38(b), 1240.15.

137 8 CFR § 1003.4.

138 *Matter of Diaz-Garcia*, 25 I&N Dec. 794 (BIA 2012).

139 INA §240(b)(7).

140 INA §212(a)(6)(B).

penalty of $1,000 to $5,000 that may be imposed, and the foreign national also is ineligible for most forms of relief from removal, including adjustment of status, for a 10-year period.141 Voluntary departure is discussed in more detail in Chapter 10 of this manual.

Putting the Pieces Together: Anatomy of a Removal Hearing

Based on the stages of the removal hearing described above, here is a sample case scenario to illustrate how a case might proceed:

Laura entered the United States with a tourist visa in 2002, and remained longer than her authorized stay. She married a U.S. citizen in December 2010. In January 2011, Laura was driving without a license, when a policeman pulled her over for a broken taillight. Through the Secure Communities program, Laura was transferred to immigration custody. Laura was served with an NTA and held in custody on a bond of $5,000, which neither she nor her husband could afford to pay. Two weeks later, Laura finally had a bond hearing, at which her husband testified. Laura also presented proof of her steady employment, her volunteer work at a local community center, and her joint ownership of a home she just purchased with her husband. Laura was released on a bond of $1,500, which her husband paid.

Laura received a hearing notice setting her case for a master calendar hearing in June 2011. Meanwhile, Laura hired a lawyer, who assisted Laura's husband in filing a visa petition for Laura. At the master calendar hearing, Laura's counsel admitted the charges in the NTA, and conceded that Laura was deportable as charged. The lawyer explained to the judge that a visa petition was pending and that Laura would be eligible to adjust status once the petition was approved. The IJ granted a three-month continuance.

At the next master calendar hearing in September, Laura's counsel sought another continuance because the visa petition was still not approved. The IJ reset the case for another master calendar hearing in six months, advising counsel that there would be no further continuances.

The visa petition filed for Laura was approved in January 2012. When Laura attended the third master calendar hearing in her case in March 2012, her lawyer advised the court that they were now ready to be scheduled for an individual calendar hearing. The judge set a hearing date in March 2013, and advised Laura's counsel about the EOIR biometrics procedures and deadlines for submitting the adjustment application and supporting documents.

Prior to the hearing and in accordance with the deadlines set by the IJ, Laura's counsel submitted the original adjustment application with all supporting documents to the immigration court, along with proof that Laura had paid all application fees and completed the biometrics process.

At the hearing in March, Laura appeared in court with her husband, and they each testified briefly about Laura's eligibility to adjust status. After a 30-minute hearing, the IJ granted the adjustment of status application, and both sides waived appeal. The decision of the IJ became final at the hearing.

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141 INA §240B(d).

Types of Removal Orders

Most of this manual addresses the removal orders issued by an IJ in removal proceedings under INA §240. However, it is important to know that there are some circumstances where someone other than an IJ can issue a removal order. These situations are described below.

– *Expedited Removal Under INA §235(b)*

Certain arriving aliens who are determined by CBP or ICE to be inadmissible under INA §212(a)(6)(C) (fraud or willful misrepresentation of material fact) or INA §212(a)(7) (lack of valid entry documents) are subject to abbreviated removal procedures, called "expedited removal," under INA §235(b).

The scope of expedited removal has been expanded significantly since it was created in 1996 as a component of IIRAIRA,142 with the most recent expansion announced in September 2005. In sum, there now are three general groups of foreign nationals who are subject to expedited removal:

- Those arriving at ports of entry seeking admission to or transit through the United States;
- Those interdicted at sea and brought to the United States, including foreign nationals paroled under such arrival; and
- Those encountered within 100 miles of the U.S./Mexican or U.S./Canadian border who cannot establish that they have been continuously present in the United States for 14 days or longer.

While the announcement that those encountered within 100 miles of the borders may be subject to expedited removal came in August 2004, this policy previously was only implemented in a few specified border patrol sectors. However, in September 2005, DHS announced that all southwest border patrol sectors would now subject all foreign nationals "other than Mexicans" apprehended within 100 miles of the southwest border within 14 days of arrival to expedited removal.

Expedited removal applies only to foreign nationals in the three listed categories above who are determined to be inadmissible under INA §212(a)(6)(C) (false documents) or (7) (no valid documents). If CBP or ICE charges the arriving alien with inadmissibility under any other inadmissibility ground, even if coupled with INA §212(a)(6)(C) or (7), the individual must be placed in regular INA §240 removal proceedings.143

- *E.g.*, Roberto, from Argentina, arrived in the United States with a passport and tourist visa that did not belong to him; he substituted his photo in a friend's passport. At the airport, Roberto admitted that the passport he used was not his, and he did not express a fear of returning to Argentina. Roberto will be subject to expedited removal because he is inadmissible under INA §212(a)(6)(C).

If a foreign national subject to expedited removal indicates a wish to apply for asylum or expresses a fear of persecution, he or she must be referred to an asylum officer for an interview. Consultation with counsel is allowed only if it will not unduly delay the process.

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142 IIRAIRA, *supra* note 6.

143 8 CFR §235.3(b)(3).

The asylum officer must keep a written record of the "credible fear" interview.144 A foreign national found to have a credible fear will be placed in full §240 removal proceedings. In those proceedings, if found inadmissible by the IJ, the respondent may apply for asylum as a form of relief from removal. The respondent also may apply for any other form of relief from removal for which he or she may be eligible.

The term *credible fear* is defined as "a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under Section 208."145 It is important to note that a *credible fear of persecution* is a lower standard than that required for an actual grant of asylum. For a grant of asylum, the applicant must show that he or she has experienced past persecution, or that he or she has a well-founded fear of persecution in the future. The *well-founded* fear standard has been determined to mean that a reasonable person in the applicant's position would fear persecution.

If the asylum officer finds that the foreign national does not have a credible fear of persecution, the foreign national may request that the IJ review the asylum officer's decision. The IJ may review the asylum officer's decision either in person or telephonically, within seven days, and the foreign national must be detained during the review. If the IJ determines that the foreign national does have a well-founded fear of persecution, then that person is placed in regular INA §240 removal proceedings.

There is no other administrative review of CBP's decision that an arriving alien is inadmissible, except for foreign nationals who claim to be LPRs or USCs, or those who have been admitted as refugees or granted asylum.146

A sample summary removal order is found at Appendix 7 to this chapter. For a more thorough discussion of expedited removal see "Immigration Policy on Expedited Removal of Aliens."147

Administrative Removal Orders Under INA §238(b)

No formal removal hearing is required for an individual charged with deportability as an aggravated felon under INA §237(a)(2)(A)(iii) who was not an LPR when proceedings were commenced against him or her. The individual must be given reasonable notice of the charges, may be represented by counsel at no expense to the government, and must have a reasonable opportunity to inspect the evidence and rebut the charges.148 The immigration officer conducting the proceedings must keep a record of the proceedings and cannot be the same person who instituted the charges. The AG may not execute an order of removal under this section until 14 days after the issuance of the order, unless the individual waives this delay. The purpose of this delay in execution is to allow the individual to apply for judicial review under INA §242. An individual subject to administrative removal is not eligible for any discretionary relief from removal, but may seek withholding of removal or relief under the Convention Against Torture.149

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144 INA §235(b)(1)(B)(II).

145 INA §235(b)(1)(B)(v).

146 INA §235(b)(1)(C).

147 "Immigration Policy on Expedited Removal of Aliens," CRS Report for Congress (updated Jan. 24, 2007), *available* at *http://www.ilw.com/immigdaily/news/2007,0402-crs.pdf.*

148 8 CFR §§238.1(b)(2), (c).

149 INA §238(b)(5); 8 CFR §208.31. *See also* U.N. Convention against Torture and Other Cruel, Inhuman

- *E.g.*, Leonardo, from Italy, entered the United States on a tourist visa several years ago and never left. Last year, he was convicted of delivery of cocaine and sentenced to a two-year prison term. Leonardo's offense will be considered an aggravated felony by ICE. Because Leonardo is not an LPR, he is subject to an administrative removal order, without an opportunity to appear before an IJ.

A sample administrative removal order is included in this chapter at Appendix 8.

Judicial Removal Order Under INA §238(c)

U.S. district court judges have the authority to enter judicial orders of removal when sentencing an individual who is deportable. The U.S. attorney must request that such an order be entered, DHS must concur, and the court must choose to exercise this jurisdiction. The U.S. attorney must file with the court and serve on the defendant a notice of intent to request judicial removal prior to commencement of trial or entry of guilty plea. At least 30 days before sentencing, the U.S. attorney must file a charge containing factual allegations regarding alienage and crimes that make the individual deportable under INA §§237(a)(2)(A) and 238(c)(2)(B). The U.S. Attorney may enter into a plea agreement in which the individual waives the right to notice and hearing, and agrees to the entry of a judicial order of removal as a condition of the plea agreement, probation, or supervised release.

There are certain procedural safeguards for foreign nationals under this section. These include a reasonable opportunity to examine the evidence against him or her, present evidence of his or her own, and cross-examine government witnesses. The court may consider only evidence that would be admissible in a regular removal hearing under INA §240. The court may also consider relief from removal.

Reinstatement of Removal, INA §241(a)(5)

Under INA §241(a)(5), ICE has the authority to reinstate automatically a prior removal order against an individual who left the United States following a final order of removal and later reentered the United States illegally. This is known as reinstatement of removal. Based on this provision, if ICE finds an individual has reentered the United States illegally after having departed under an order of removal, the prior order is "reinstated" from its original date and the individual is not eligible for most forms of relief; the individual then is removed under the prior order. Note that an individual subject to reinstatement of removal is not barred from seeking adjustment of status under the Haitian Refugee and Immigrant Fairness Act,150 or under §203 of the Nicaraguan Adjustment and Central American Relief Act,151 withholding of removal, or relief under the Convention Against Torture.152

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or Degrading Treatment or Punishment (CAT), Dec. 10, 1984, *opened for signature* Feb. 4, 1985, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987), *reprinted in* 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984), *modified* 24 I.L.M. 535 (1985).

150 Haitian Refugee and Immigrant Fairness Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 9div. A, title IX.

151 Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2160, 2193.

152 8 CFR §241.8(d), (e); 8 CFR §208.31. *See also* CAT, *supra* note 149.

USCIS has interpreted this provision broadly to include (a) unlawful reentries after deportation or exclusion orders, not just orders of removal; and (b) unlawful entries prior to April 1, 1997, the effective date of this provision. This means, for example, that a person who was deported in 1990 and then reentered the United States without authorization in 1992 would face reinstatement if ICE became aware of his or her presence.

- *E.g.*, Dinah was ordered removed from the United States in May 1999. She later reentered the United States without inspection and married a USC, who filed a visa petition on her behalf in June 2000. If Dinah applies for adjustment of status, she may be arrested by ICE and processed for reinstatement of her prior removal order.

In the last few years, this area of the law has been in a state of flux, with significant splits between the circuit courts on various points. The U.S. Supreme Court, in *Fernandez-Vargas v. Gonzales,*153 resolved one of the more significant splits, regarding the retroactive application of INA §241(a)(5). Unfortunately, the Supreme Court held that INA §241(a)(5) can be applied to foreign nationals who last reentered the United States prior to April 1, 1997, and took no affirmative steps to obtain lawful status before that date. This decision effectively overturned decisions in the Ninth Circuit, in *Castro-Cruz v. INS,*154 and the Sixth Circuit, in *Bejjani v. INS*.155 However, the Supreme Court decision left several open issues, including whether INA §241(a)(5) can be applied to foreign nationals who last reentered the United States prior to April 1, 1997, and did take affirmative steps to obtain lawful status before that date. For example, the Seventh Circuit, prior to the Supreme Court's decision, had held that INA §241(a)(5) could not apply to someone who reentered before April 1, 1997, and also applied for relief before that date.156 However, in *Duran Gonzales v. DHS*[157] the Ninth Circuit overruled its previous decision and determined that individuals who had been removed or deported did not qualify for adjustment of status (under INA § 245(i)) along with an accompanying I-212 waiver.

Note that other circuit courts have held that the filing of an adjustment of status application with a waiver does not protect someone from reinstatement.158

For an excellent review of the remaining issues and arguments after *Fernandez-Vargas v. Gonzales*, see the American Immigration Law Foundation's Practice Advisory entitled "Reinstatement of Removal."159

Practice Tips for Non-Court Advocates

Many immigration advocates work in offices at great distances from immigration court, and don't have the financial or legal resources to do immigration court advocacy. For those that can do court advocacy, several chapters in this manual describe in more detail challenges

153 *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006).

154 *Castro-Cruz v. INS*, 239 F.3d 1037 (9th Cir. 2001).

155 *Bejjani v. INS*, 271 F. 3d 670 (6th Cir. 2001).

156 *Faiz-Mohammed v. Ashcroft*, 395 F. 3d 799 (7th Cir. 2005).

157 *Duran Gonzales v. DHS*, 508 F.3d 1227 (9th Cir. 2007).

158 *See, e.g., Delgado v. Mukasey*, 516 F.3d 65 (2d Cir. 2008); *Lino v. Gonzales*, 467 F.3d 1077 (7th Cir. 2006).

159 "Reinstatement of Removal," updated April 23, 2008, at http://www.legalactioncenter.org/litigation/challenge-dhs-refusal-follow-perez-gonzalez-decision-duran-gonzalez-v-dhs.

and defenses to removal proceedings, and requirements for various types of relief from removal. But even those advocates that don't do direct court representation can play a critical role in helping the individual who is or was in removal proceedings prepare for a pending case, or understand how a prior case now impacts on his or her status. Some practical steps that all immigration advocates can take are listed below:

- *Confirm the date, place and time of the hearing for all clients who have received an NTA.* You can do this by calling the EOIR information phone line at (800) 898-7180. When you call this number and punch in the foreign national's 9-digit case number that appears on the NTA and begins with the letter A, you can retrieve information listing the date, place and time of the next scheduled hearing in the case, and any decision information, if a decision was already rendered. (If your client's A-number has only 8 digits, press "0" before the 8 digits). This is particularly important if the client you are counseling has moved without informing the court of his or her new address. A new court date may have been set without the client knowing about the changed or new date; checking on the date may help avoid an in absentia court order.
- *Remind your client to advise the court of any change of address within 5 days of moving.* This will help protect the client from the consequences of an in absentia removal order.
- *Counsel the client on the consequences of missing the court date.* In other types of court hearings that your client may have experienced, the consequences of missing a court date are not necessarily drastic, and cases are routinely reopened. This is not true for immigration court, and a client's simple confusion about the date or time of a scheduled hearing for which proper notice was received will not be an adequate basis for getting an in absentia removal order reopened. For this reason, it is very important to emphasize to a client the importance of arriving to court at the time designated for the hearing and of planning enough time to travel.
- *Review the allegations in the charging document and note if any facts are incorrect.* It is not unusual for ICE to misstate facts on the NTA, and this may have bearing on your client's removability as an inadmissible or deportable individual, and on his or her eligibility for relief. For example, the NTA may inaccurately describe a criminal conviction, or the list an incorrect entry date. Your client needs to know that these matters should be brought to the attention of the IJ, either through counsel, or by the respondent, if she or he will not be represented in court.
- *Assist client in obtaining records as necessary.* You may be able to help a client who is still seeking counsel for court representation, or who is going to represent himself or herself in court, by assisting the individual in securing records that may help contest inadmissibility or deportability charges, or that may help document eligibility for relief. For example, you may file a FOIA request to enable an individual in proceedings to get a copy of his or her immigration record; help an individual secure a copy of a court record of conviction; or help secure documents relating to community ties, family relationships, employment, and other issues that can support an application for bond reduction or for relief from removal.
- *Advise client about how to dress for court.* There is not one way to dress for immigration court, but a client should be encouraged to wear his or her more

formal or conservative apparel. A person in removal proceedings who dresses very casually (*e.g.*, in jeans or shorts and a tee shirt) may risk the disfavor of the judge, who may interpret that apparel as not taking the experience seriously.

- *Where a client has a pending criminal charge, make sure the criminal defense counsel contacts an immigration counsel who can give advice on immigration consequences of crimes.* In many instances, criminal convictions have serious immigration consequences that may either create independent grounds of inadmissibility or deportability, or preclude a client from qualifying for an immigration benefit. Many criminal lawyers are unaware of these issues and may recommend an outcome on a criminal charge that may seem advantageous in terms of the criminal consequences (*e.g.*, probation instead of a jail term), but still have disastrous results in terms of immigration law. You can significantly help a client with pending criminal charges by counseling him or her to make sure that the criminal attorney is aware of immigration issues or consults with an immigration advocate who can assess these issues and appropriately advise the client.
- *Refer the client to an accredited representative or attorney who can provide in-court representation, or advise the client to seek a continuance while looking for court counsel.* Your client will be best served by having representation in court to respond to the charges and pursue any appropriate applications for relief from removal. You can assist your client in identifying legal services programs in the area that offer free or low-cost representation by attorneys or accredited representatives, or by referring your client to private attorneys. Many private attorneys are willing to have payment plans with clients to help make services more affordable.
- *Counsel the client on the consequences of noncompliance with an immigration court order.* As detailed above, failure to attend an immigration court hearing, or to comply with an order of voluntary departure, can have serious repercussions on future eligibility for relief. It is important for clients to understand that they may be disqualified from future immigration opportunities if they miss court or overstay an order of voluntary departure. Clients who do have voluntary departure orders should be counseled to report to ICE before they depart the United States, in order to obtain a travel document to turn in to the U.S. Consulate in their home countries (which, in turn, is forwarded back to ICE as proof of the departure of the individual). Otherwise, ICE may not believe that a person subject to a voluntary departure order in fact complied with the order.