

ILLEGAL REENTRY PRACTICE ADVISORY FOR FEDERAL DEFENDERS

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For more than a decade, immigration cases have comprised a massive portion of the federal criminal docket, with reentry cases alone taking up more than a quarter of all cases.² This Practice Advisory is intended as a resource and a guide for federal defense counsel handling such cases.³

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¹ See About the Authors, *infra* at 68. The authors received feedback from numerous federal defenders, but would specifically wish to thank the Federal Defenders Offices in San Diego and Tucson for their feedback and suggestions.

² See United States Sentencing Commission, Quick Facts: Illegal Reentry Offenses, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY18.pdf (reentry prosecutions account for 26.3% of total reported cases); see also United States Sentencing Commission, Sourcebook of Federal Sentencing Statistics (2014), available at <http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2014/annual-report-2014>. The Transactional Records Access Clearinghouse also provides detailed statistics on immigration prosecutions, available at <http://trac.syr.edu>.

³ The authors are aware of challenges to the constitutionality of § 1326 based on the racial motivations of the bill's authors. Those challenges are beyond the scope of this advisory, though of course a constitutional challenge to the statute would, if successful, undermine any prosecutions under § 1326 and result in numerous clients being released from criminal custody.

The defenses to illegal reentry are few, but relatively complex. Several elements-based defenses exist. In addition, defendants may obtain a dismissal of an illegal reentry indictment if they can challenge their underlying removal order. A collateral challenge may be daunting for some defense attorneys as it requires some familiarity with immigration law and procedure as well as specific factual investigation of the client's immigration record. The defender must know how to get information about the client's removal history from the immigration courts as well as from the Department of Homeland Security, and must be able to spot infirmities in that history that may suggest a potential challenge of a prior removal order.

The advisory provides practical details from an immigration practitioner's perspective about how to identify procedural and substantive errors in a defendant's underlying removal proceeding. Specifically, the advisory provides: (I) a summary of the elements of the offense of illegal reentry and of some elements-based defenses to the illegal reentry offense; (II) an overview of the removal process, different types of removal orders, and practical information on how to obtain immigration records; (III) a detailed discussion of the requirements for challenging an underlying removal order and grounds for such a challenge; (IV) a summary of sentencing issues; (V) a discussion of the possibility of defeating § 1326 charges through reopening at the administrative level; and (VI) a discussion of how to prevent a defendant from being removed upon resolution of the illegal-reentry case.

The advisory is not legal advice; attorneys must advise their clients based on the specific facts and applicable law that pertains to clients' cases, including legal developments that post-date this advisory. The advisory is intended as a starting place for investigation and a guide to help defenders issue-spot possible defenses to illegal reentry and potentially relevant remedies.⁴

The advisory has been prepared by the Defenders Initiative of the National Immigrant Justice Center ("NIJC"). NIJC, a program of Heartland Alliance, is a Chicago-based immigration legal service provider dedicated to ensuring human rights protections and access to justice for all immigrants, refugees, and asylum-seekers through a unique combination of direct services, policy reform, impact litigation, and public education. NIJC's Defenders Initiative offers training and individual case consultation to federal and state criminal defense attorneys on the immigration consequences of criminal convictions. The Defenders Initiative also prepares educational materials that help defenders protect their clients' rights and interests in complex criminal-immigration matters.

⁴ You may contact the Defenders Initiative by phone at (312) 660-1610 or by email at defenders@heartlandalliance.org for individual case consultation or to request a training.

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I. ELEMENTS OF THE ILLEGAL-REENTRY OFFENSE AND SUMMARY OF COMMON DEFENSES

A. Elements of Illegal Reentry

The offense of illegal reentry requires the government to prove beyond a reasonable doubt **three basic elements**:

- (1) that the defendant is an **alien**;
- (2) who was **previously deported** or removed from the United States; and
- (3) who **entered, attempted to enter, or “is at any time found in”** the United States.

8 U.S.C. § 1326(a). An exception exists where the Attorney General consented to the alien’s reapplication for admission before reentry or the alien shows that he was not required to obtain advance consent. 8 U.S.C. § 1326(a)(2)(A)-(B).

B. Elements-Based Defenses

Because prosecutions of the illegal reentry offense are relatively straightforward, very few elements-based defenses are viable. However, those defenses that do exist tend to be somewhat complex.

1. Defenses to “Alienage” Requirement

To prove the element of alienage, the government often submits a certificate of non-existence of record to show that the defendant lacks lawful immigration status in the United States and therefore is an alien. This evidence is testimonial, prepared in anticipation of trial, and should trigger the Confrontation Clause. *See United States v. Martinez-Rios*, 595 F.3d 581, 586 (5th Cir. 2010); *United States v. Orozco-Acosta*, 607 F.3d 1156, 1161 n.3 (9th Cir. 2010); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 322-23 (2009); *but see United States v. Urqhart*, 469 F.3d 745, 748-49 (8th Cir. 2006) (finding certificate non-testimonial); *United States v. Burgos*, 539 F.3d 641, 645 (7th Cir. 2008) (same). A defendant may file a motion *in limine* to exclude such testimony or may object to it at trial. Alternatively, a defendant may argue that the non-existence of immigration records does not actually show that someone is not a U.S. citizen.

Citizenship is, of course, a defense to alienage: a defendant who is a U.S. citizen is not an alien and is not removable. Citizenship is not an affirmative defense (*see, e.g., United States v. Sandoval-Gonzalez*, 642 F.3d 717, 721-24 (9th Cir. 2011) – because alienage is an element of the offense, the government must prove beyond a reasonable doubt that the accused is an alien. *See, e.g., United States v. Cervantes-Nava*, 281 F.3d 501, 504 (5th Cir. 2002). In other

words, the government maintains the burden of proving alienage after the defendant presents evidence of a possible citizenship claim. See, e.g., *In re Winship*, 397 U.S. 358, 364 (1970) (ruling that “the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged”).

A defendant may have derived or acquired citizenship if she had a parent or grandparent who was a U.S. citizen. Citizenship law is quite complex, and oftentimes a client may not be aware that she has acquired or derived citizenship from a parent or grandparent. For these reasons, defense attorneys should research the citizenship laws in effect at the time of an illegal-reentry client’s birth,⁵ do a thorough family history interview with the client, and consult with an immigration attorney if there is any indication of a possible citizenship claim. In the civil removal context, courts have found that birth abroad triggers a presumption of non-citizenship, see, e.g., *Martinez-Madera v. Holder*, 559 F.3d 937, 940 (9th Cir. 2009), but this logic is not applicable in a § 1326 case where the government bears the burden as to each element of the offense, see *United States v. Sandoval-Gonzalez*, 642 F.3d 717, 721-24 (9th Cir. 2011).

That said, where a citizenship defense is raised, the government is likely to file a motion *in limine* to limit or exclude the evidence. See *United States v. Flores-Martinez*, 677 F.3d 699, 702 n.1 (5th Cir. 2012); *United States v. Flores-Villar*, 536 F.3d 990, 994 (9th Cir. 2008). Courts have excluded evidence going to a defense of non-alienage on various grounds. Some circuits exclude evidence raising a citizenship claim as legally irrelevant unless the proffer meets all elements of a citizenship claim. See *United States v. Guerrier*, 428 F.3d 76, 80 (1st Cir. 2005). Other courts have excluded such evidence on grounds that its potential for confusion outweighs its probative value. *United States v. Espinoza-Baza*, 647 F.3d 1182, 1189-91 (9th Cir. 2011) (finding evidence tending to show derivative citizenship minimally probative and “speculative” because it only went to some of the elements necessary to prove citizenship by derivation).

Note: Prior Findings of Alienage

An immigration judge’s finding of alienage in a prior removal hearing does not establish alienage for purposes of the 1326(a) offense, as the administrative hearing requires only clear and convincing evidence and not proof beyond a reasonable doubt. See, e.g., *United States v. Medina*, 236 F.3d 1028, 1031 (9th Cir. 2001).

⁵ The Immigrant Legal Resource Center publishes helpful charts describing acquired and derivative citizenship rules for potential citizens. See <https://www.ilrc.org/acquisition-derivation-quick-reference-charts>.

Similarly, a prior conviction for illegal reentry—which necessarily includes a finding of alienage—does not collaterally estop a defendant from raising a citizenship claim in a new prosecution. This is because courts do not apply offensive collateral estoppel to establish the elements of a criminal prosecution. See *United States v. Smith-Baltiher*, 424 F.3d 913, 920 (9th Cir. 2015) (discussing cases).

In some cases, a noncitizen may have defenses to the alienage element that do not technically demonstrate citizenship. For instance, the Supreme Court has held that the derivative-citizenship statutes discriminate on the basis of gender by making it easier for unmarried U.S. citizen mothers than unmarried U.S. citizen fathers (or married parents) to convey citizenship to a child. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1695-99 (2017). The Supreme Court found that Congress would have wished to remedy that unconstitutionality by restricting citizenship for the children of unmarried mothers, rather than expanding it to include the children of unmarried fathers. *Id.* at 1700-01. But in the context of criminal charges, the Court found that it would be irrelevant what remedy Congress would choose prospectively; dismissal of the charges is required. *Id.* at 1699 (“a defendant convicted under a law classifying on an impermissible basis may assail his conviction without regard to the manner in which the legislature might subsequently cure the infirmity”).

2. Defenses to “Previously Removed” Requirement

With respect to the second element of the offense – a prior removal – the government must prove that the defendant was actually removed. See, e.g., *United States v. Medina*, 236 F.3d 1028, 1031 (9th Cir. 2001). Proof of the validity of the prior order of removal is not required; the government need only show that the defendant was in fact removed. *United States v. Gomez*, 732 F.3d 971 (9th Cir. 2013) (citing *United States v. Alvarado-Delgado*, 98 F.3d 492, 493 (9th Cir. 1996)). Indeed, the Ninth Circuit has rejected an appellant’s argument that his § 1326 conviction was invalid since the government never produced his actual removal order. *United States v. Lopez*, 762 F.3d 852, 857 (9th Cir. 2014). The court held that it was sufficient that the government demonstrated that the defendant had actually been physically removed. *Id.* at 858. Any challenge to the validity of the removal must be raised collaterally by the defendant, as discussed in detail in Section III, below. See, e.g., *Alvarado-Delgado*, 98 F.3d at 493-94.

The government frequently uses a warrant of removal and other documents from the immigration court file to prove the “previously removed” element. Courts have found that the warrant of removal is nontestimonial and is not made in anticipation of litigation, such that it is admissible as a business record. See *United States v. Lorenzo-Lucas*, 775 F.3d 1008, 1010 (8th Cir. 2014); *United States v. Orozco-Acosta*, 607 F.3d 1156, 1163 (9th Cir. 2010); *United States v. Garcia*, 887 F.3d 205, 213 (5th Cir.), cert. denied, 139 S. Ct. 228, 202 L. Ed. 2d 155 (2018); *United States v. Garcia*, 452 F.3d 36, 41-42 (1st Cir. 2006); *United States v.*

Cantellano, 430 F.3d 1142, 1144-46 (11th Cir. 2005); *United States v. Burgos*, 539 F.3d 641, 645 (7th Cir. 2008). Likewise, immigration forms in the immigration file are considered business records not made for purposes of prosecution, and are admissible. *United States v. Phoehn Lang*, 672 F.3d 17, 22 (1st Cir. 2012); *United States v. Valdovinos-Mendez*, 641 F.3d 1031, 1034 (9th Cir. 2011); *United States v. Ballesteros-Selinger*, 454 F.3d 973, 975 (9th Cir. 2007).

A defendant who raises a mistaken-identity defense and convinces the trier of fact that there is a reasonable doubt as to whether the prior order actually applied to him may avoid conviction. A defendant who successfully files a motion to reopen removal proceedings and rescind a prior removal order in immigration court also will avoid conviction, as reopening proceedings will have the effect of rescinding the prior order (see Section III(D)(1), *infra* at 44, Section V, *infra* at 59-60).

Note: Voluntary Departure and Removal

An Immigration Judge's grant of "voluntary departure" under 8 U.S.C. § 1229c is not a removal order, but rather is a form of relief from removal. A prior grant of voluntary departure therefore does not satisfy the "previously removed" requirement of § 1326(a), provided the non-citizen complied with the grant and departed in a timely manner.

3. Defenses to "Entered, Attempted to Enter, or Found-In" Prongs

Courts have found that § 1326 actually contains three distinct offenses: unlawful reentry, attempted unlawful reentry, and being found in the United States. See *United States v. Angeles-Mascote*, 206 F.3d 529, 531 (5th Cir. 2000); *United States v. Martinez-Espinoza*, 299 F.3d 414, 417 (5th Cir. 2002). The distinctions between these distinct crimes is, in a nutshell: (a) entry requires that the noncitizen have physically reentered the country *and* be free of official restraint; (b) attempted reentry occurs when the noncitizen is stopped at the border and does not succeed in actually reentering; and (c) the "found in" prong allows the prosecution to avoid needing to prove how and when the noncitizen came back to the United States. These three distinct crimes each have their distinct defenses.

a. Illegal Reentry

Entering or being found in the United States is a general-intent crime, and a noncitizen's mistaken belief regarding his ability to reenter the United States (e.g., that he is a citizen or that his entry otherwise was legal) is not a defense to a prosecution. See, e.g., *United States v. Rea-Beltran*, 457 F.3d 695, 702 (7th Cir. 2006).⁶

⁶ See also *United States v. Alba*, 38 F. App'x 707, 709 (3d Cir. 2002); *United States v. Carlos-Colmenares*, 253 F.3d 276, 278 (7th Cir. 2001); *United States v. Gutierrez-Gonzalez*, 184 F.3d 1160, 1165 (10th Cir. 1999); *United States v. Gutierrez-Gonzalez*, 184 F.3d 1160, 1165 (10th Cir. 1999);

In order to have “entered” the United States, mere physical entry is not enough. Entry requires both “physical presence in the country” and “freedom from official restraint.” See *United States v. Kavazanjian*, 623 F.2d 730, 736 (1st Cir. 1980); *United States v. Cardenas-Alvarez*, 987 F.2d 1129, 1133 (5th Cir. 1993); *United States v. Aguilar*, 883 F.2d 662, 682 (9th Cir. 1989).

To understand the concept of freedom from official restraint, it helps to understand that the term “entry” had a fixed (if somewhat involved) meaning in immigration law when § 1326 was enacted. Prosecutions under § 1326 effectively incorporate this case law. See *United States v. Pacheco-Medina*, 212 F.3d 1162, 1164 (9th Cir. 2000) (citing *Matter of Pierre*, 14 I. & N. Dec. 467 (BIA 1973)). Immigration law applies a three-part test for an entry, with two alternate ways to satisfy the second prong:

[A]n entry involves (1) a crossing into the territorial limits of the United States, i.e., physical presence; (2)(a) inspection and admission by an immigration officer or (b) actual and intentional evasion of inspection at the nearest inspection point; and (3) freedom from official restraint.,

Matter of Ching and Chen, 19 I. & N. Dec. 203, 205 (1984).

There are several salient points for defenders:

- An individual who is under official restraint at all times during and subsequent to physical entry cannot be deemed to have made a lawful entry, despite physical presence in the United States. See *United States v. Martin-Plascencia*, 532 F.2d 1316

United States v. Ortegon-Uvalde, 179 F.3d 956, 959 (5th Cir. 1999); *United States v. Martus*, 138 F.3d 95, 97 (2d Cir. 1998) (per curiam); *United States v. Peralt-Reyes*, 131 F.3d 956, 957 (11th Cir. 1997) (per curiam); *United States v. Torres-Echavarria*, 129 F.3d 692, 697-98 (2d Cir. 1997), cert. denied, 522 U.S. 1153 (1998); *United States v. Gonzalez-Chavez*, 122 F.3d 15 (8th Cir. 1997); *United States v. Martinez-Morel*, 118 F.3d 710, 713-14 (10th Cir. 1997); *United States v. Henry*, 111 F.3d 111, 113-14 (11th Cir. 1997); *United States v. Soto*, 106 F.3d 1040, 1041 (1st Cir. 1997); *United States v. Trevino-Martinez*, 86 F.3d 65, 69 (5th Cir. 1996); *United States v. Ortiz-Villegas*, 49 F.3d 1435, 1437 (9th Cir. 1995); *United States v. Leon-Leon*, 35 F.3d 1428, 1432-33 (9th Cir. 1994); *United States v. Ayala*, 35 F.3d 423, 426 (9th Cir. 1994); *United States v. Champegnie*, 925 F.2d 54, 55-56 (2d Cir. 1991) (per curiam); *United States v. Espinoza-Leon*, 873 F.2d 743, 746 (4th Cir. 1989); *United States v. Miranda-Enriquez*, 842 F.2d 1211, 1212-13 (10th Cir. 1988); *United States v. Hernandez*, 693 F.2d 996, 1000 (10th Cir. 1982); *United States v. Newton*, 677 F.2d 16, 17 (2d Cir. 1982) (per curiam); *United States v. Hussein*, 675 F.2d 114, 116 (6th Cir. 1982) (per curiam); *Pena-Cabanillas v. United States*, 394 F.2d 785, 789-90 (9th Cir. 1968).

(9th Cir. 1976); *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989)).⁷

- The official-restraint concept includes surveillance; if the noncitizen is always under surveillance, she is not actually free within the U.S. (even if she thinks that she is), and she does not effectuate an entry. *Ex parte Chow Chok*, 161 Fed. 627, 629-30, 632 (N.D.N.Y.), *aff'd* 163 Fed. 1021 (2d Cir. 1908); *Yi Yang v. Maugans*, 68 F.3d 1540, 1549-1550 (3d Cir. 1995); *United States v. Kavazanjian*, 623 F.2d 730, 736-37 (1st Cir. 1980).
- Official restraint need not come from immigration officers; the case law also finds restraint from other sources, particularly other law enforcement officers. See *Edmond v. Nelson*, 575 F.Supp. 532, 535 (E.D. La. 1983) (noncitizens “restrained” by master of rescuing ship, acting pursuant to government regulations); *Matter of Yam*, 16 I & N Dec. 535, 536-37 (BIA 1978) (alien found at border and taken under guard by local police to a medical facility); *Correa v. Thornburgh*, 901 F.2d 1166, 1172 (2d Cir. 1990) (park police).

b. Attempted Illegal Reentry

While there is no divergence among the circuits about the mens rea for illegal reentry, there is disagreement over whether *attempt* to reenter requires specific intent, as do attempt crimes at common law. The First and Ninth Circuits have held that attempted reentry is a specific-intent crime. See, *United States v. De Leon*, 270 F.3d 90 (1st Cir. 2001) (“‘Attempt,’ here as elsewhere, is a specific intent crime in the sense that an ‘attempt to enter’ requires a subjective intent on the part of the defendant to achieve entry into the United States as well as a substantial step toward completing that entry.”); *United States v. Gracidias-Ulibarry*, 231 F.3d 1188, 1195-96 (9th Cir. 2000) (en banc); *United States v. Smith-Baltiher*, 424 F.3d 913, 923 (9th Cir. 2005). Other circuits have held that attempted reentry is a general-intent crime. See *United States v. Rodriguez*, 416 F.3d 123, 125 (2d Cir. 2005); *United States v. Morales-Palacios*, 369 F.3d 442, 445-49 (5th Cir. 2004); *United States v. Peralt-Reyes*, 131 F.3d 956, 957 (11th Cir. 1997). It should be noted that all of these general-intent cases predate *United States v. Resendiz-Ponce*, 549 U.S. 102, 106-07 (2007), which interpreted the § 1326 attempt offense in line with common-law attempt. The Ninth Circuit has suggested that contrary circuit precedent is inconsistent with *Resendiz-Ponce*. See *United States v. Argueta-Rosales*, 819 F.3d 1149, 1160 (9th Cir. 2016). It is unclear whether *Resendiz-Ponce* will spur reconsideration of this question.

Under Ninth Circuit case law, if a defendant mistakenly but reasonably believed that he had

⁷ Courts have applied the same analysis to considering whether a noncitizen is “found in” the United States, finding that “the concept of entry...is embedded in the ‘found in’ offense.” *United States v. Pacheco-Medina*, 212 F.3d 1162, 1166 (9th Cir. 2000); see also *United States Morales-Palacios*, 369 F.3d 442 (5th Cir. 2004).

permission to enter the United States, then he lacked the specific intent to illegally attempt to reenter the United States. See *Smith-Baltiher*, 424 F.3d at 924 (ruling that mistake of fact provides a defense to a crime of specific intent such as attempted reentry, and holding that a defendant who claimed that he mistakenly believed that he was a derivative citizen when he attempted to enter the United States is entitled to present evidence that his belief was reasonable to establish a mistake-of-fact defense). In light of cases like *Rehaif v. United States*, 139 S. Ct. 2191, 2198 (2019), it can at least arguably be presumed that the specific intent *mens rea* applies to all elements of the offense; in which case it would be necessary for the government to prove knowledge of alienage and knowledge of the prior deportation.

The Ninth Circuit has held that official restraint is relevant in attempted illegal reentry cases to determine whether a defendant has the requisite specific intent to reenter free from official restraint. See *United States v. Castillo-Mendez*, 868 F.3d 830, 836. (9th Cir. 2017); see also *United States v. Lombera-Valdovinos*, 429 F.3d 927, 928 (9th Cir. 2005). Unlike “entered” and “found in” cases, whether the noncitizen is *actually* under official restraint is irrelevant. See *Castillo-Mendez*, 868 F.3d at 838. Thus, an individual (such as an asylum-seeker) who attempts to enter the U.S. with the intent of finding Border Patrol cannot be guilty of attempted illegal reentry, even when they were not under constant surveillance at the time of their entry.

c. Being “found in” the United States

There is some circuit disagreement about whether the “found in” prong is a continuing offense. Compare, e.g., *United States v. Portillo-Vega*, 478 F.3d 1194, 1201 (10th Cir. 2007) (concluding that “illegal re-entry after deportation is a continuing offense”); with *United States v. DiSantillo*, 615 F.2d 128, 137 (3d Cir. 1980) (illegal reentry is not a continuing offense; a noncitizen who entered surreptitiously is “found” when his presence is first noted by the immigration authorities). This has implications for statute-of-limitations defenses, and is discussed below in that context.

Courts have generally held that the “found in” prong is not satisfied where the noncitizen presents herself for inspection to immigration inspectors but is not permitted to enter. See *United States v. Angeles-Mascote*, 206 F.3d 529, 530-32 (5th Cir. 2000); *United States v. Canals-Jimenez*, 943 F.2d 1284, 1287 (11th Cir. 1991) (finding the found in prong is “synonymous with ‘discovered in’”); *United States v. Zavala-Mendez*, 411 F.3d 1116, 1119 (9th Cir. 2005). Someone is not “found in” the U.S. by agents when she presents herself to them (although she may be guilty of attempted entry). But a successful entry is another thing; where the noncitizen passes through inspection (by omissions or lies, presumably) she may be charged as being “found in” the United States. See *United States v. Gay*, 7 F.3d 200, 202 (11th Cir. 1993).

The Ninth Circuit has held that to be “found in” the United States, one must be “in” the

United States and thus must have effectuated an entry, including being free of official restraint. See *United States v. Vela-Robles*, 397 F.3d 786 (9th Cir. 2005); *United States v. Hernandez-Herrera*, 273 F.3d 1213 (9th Cir. 2001); *United States v. Ramos-Godinez*, 273 F.3d 820 (9th Cir. 2001); *United States v. Pacheco-Medina*, 212 F.3d 1162 (9th Cir. 2000); *United States v. Martin-Plascencia*, 532 F.2d 1316 (9th Cir. 1976).

4. Lack of Explicit Consent to Reapply

The fourth element of § 1326 is that the noncitizen failed to obtain advance consent to reapply for admission. This is an element of the offense on which the prosecution should bear the burden of proof, but examples from the case law suggests that there is some confusion about this.

Some individuals have argued that because the immigration authorities granted them some form of status in the United States, or allowed them to remain and to work in this country, they had a reasonable belief that they had not violated § 1326; but courts have not allowed this evidence of subjective intent. See *United States v. Leon-Leon*, 35 F.3d 1428, 1433 (9th Cir. 1994) (defendant sought to introduce evidence that he had a green card); *United States v. Ramos-Quirarte*, 935 F.2d 162, 163 (9th Cir. 1991) (per curiam) (defendant had special agricultural worker status); *United States v. Gonzalez-Chavez*, 122 F.3d 15, 18 (8th Cir. 1997) (employment application). Nor have courts found even lawful status to constitute “express” consent to reapply. See *United States v. Anton*, 683 F.2d 1011, 1016 (7th Cir. 1982), overruled by *United States v. Carlos-Colmenares*, 253 F.3d 276 (7th Cir. 2001) (noncitizen did not have express consent to reapply even where he had multiple contacts with immigration authorities and obtained an immigrant visa to return to the United States).

Interestingly, the statute creates an exception to § 1326 liability “with respect to an alien previously denied admission and removed” when the noncitizen can “establish that he was not required to obtain such advance consent under this chapter or any prior Act.” 8 U.S.C. § 1326(b)(2). When § 1326 was enacted as part of the 1952 Immigration and Nationality Act, individuals who were “deported” from the United States were “excludable” from the United States unless they obtained advance “consent to reapply” for admission. 8 U.S.C. § 1182(a)(17) (1952). By contrast, individuals who were “excluded” – *i.e.*, not allowed to enter – only required consent to reapply for a one-year period. 8 U.S.C. § 1182(a)(16) (1952). After that year passed, the original § 1326 would not have imposed criminal liability. The inadmissibility statute continues to impose different rules for consent to reapply. See 8 U.S.C. § 1182(a)(9)(A). Generally, an individual must have advance permission to reapply for five years after an expedited removal order under 8 U.S.C. § 1225(b); for ten years after a removal order issued in regular proceedings under § 1229a; for twenty years after any second or subsequent removal order, and at any time for an individual convicted of an aggravated felony. See 8 U.S.C. § 1182(a)(9)(A)(i), (ii), (iii).

However, several court of appeals decisions (containing little to no analysis) have declined to apply § 1326(b)(2) as written. Those courts reasoned that changes to the admissibility rules could not affect criminal liability absent clear congressional intent to *sub silentio* alter the effect of § 1326. See *United States v. Bernal-Gallegos*, 726 F.2d 187, 188 (5th Cir. 1984); *United States v. Joya-Martinez*, 947 F.2d 1141, 1144 (4th Cir. 1991); *United States v. Romero-Caspeta*, 744 F.3d 405, 408 (6th Cir. 2014). It is unclear whether these courts understood that § 1326 has included the same defense since its enactment, and that there have always been expiration periods on the consent-to-reapply rules. The D.C. Circuit, by contrast, recognized that § 1326(b)(2) appears to create “a complete defense to the § 1326 charge,” though it did not authoritatively resolve the question. See *United States v. Idowu*, 105 F.3d 728, 731–32 (D.C. Cir. 1997).

A related interesting question arises with regard to asylum-seekers. The admissibility rules of 8 U.S.C. § 1182(a)(9)(A) do not function as a bar to eligibility for asylum. Cf. 8 U.S.C. § 1158. It might therefore be argued that a noncitizen who reenters to seek asylum can establish as an affirmative defense that she was not required to obtain the consent of the Attorney General. International law might also support this argument. The 1951 United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951), bars signatory countries from “impos[ing] penalties, on account of their illegal entry or presence, on refugees who . . . enter or are present in their territory without authorization.” Id. Art. 31(1). The United States agreed to apply the Convention when it acceded to the Refugee Protocol in 1968. 19 U.S.T. 6223, 6259–6276, T.I.A.S. No. 6577 (1968). See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987). Many courts find these treaty undertakings to be non-self-executing. *Ramirez-Mejia v. Lynch*, 813 F. 3d 240, 241 (5th Cir. 2016); *Martinez-Cazun v. Sessions*, 856 F.3d 249, 257 n.16 (3d Cir. 2017). But even if a treaty isn’t self-executing, statutes “ought never to be construed to violate the law of nations if any other possible construction remains.” *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 64 (1804). Thus, creative defense counsel could argue that the government cannot prove that a defendant who sought asylum should have—and failed to—obtain advance consent to reenter]

Because most courts have not recognized or understood the § 1326(b)(2) defense at all, there is little case law addressing whether this is an affirmative defense requiring the defendant to bear the burden of proof, or whether it shows a lack of proof.

5. Corpus Delicti Rule

The corpus delicti rule requires that the government have some support for the reliability of a defendant’s confession and some evidence of the offense beyond the mere confession of the defendant. See *Opper v. United States*, 348 U.S. 84, 89 (1954) (citing Wigmore, Evidence (3d ed.) § 2071; *Warszower v. United States*, 312 U.S. 342, 345 n. 2 (1941); *Wong Sun v. United States*, 371 U.S. 471, 489 n. 15 (1963)). The Ninth Circuit has held that in the illegal-

reentry context, “[t]he gravamen of the offense in this case – that is to say the conduct at the core of the offense – is entry.” *United States v. Corona-Garcia*, 210 F.3d 973, 978 (9th Cir. 2000). Thus, the defendant’s presence in court (and his presence in the prison where he was encountered) was found corroborative of the illegal-reentry charge.

The corpus delicti rule may have more teeth in the attempted-illegal-entry context. At least in those circuits where attempted reentry requires an intent to enter illegally, the essence of the offense is more than mere entry, so the corpus delicti rule requires some evidence that the defendant was knowingly attempting to enter unlawfully. See *United States v. Valdez-Novoa*, 780 F. 3d 906, 922-23 (9th Cir. 2014).

Finally, alienage is also an element of § 1326 offenses. Thus, for all three illegal-reentry offenses (entry, attempted entry, and found in), when there is no documentary evidence of alienage, and the only evidence of alienage is the defendant’s own confession, the corpus delicti rule may have potential utility.

C. Affirmative Defenses

There are several affirmative defenses to the entry / attempted entry / found-in offenses under § 1326:

1. Justification Defenses – Duress and Necessity

Several circuits have held that a noncitizen may defend against illegal reentry by showing that his reentry was under duress or necessity. See, e.g., *United States v. Portillo-Vega*, 478 F.3d 1194, 1197 (10th Cir. 2007) (considering duress defense in illegal-reentry case); *United States v. Al-Rekabi*, 454 F.3d 1113, 1122 (10th Cir. 2006) (considering necessity defense in illegal reentry case); *United States v. Leal-Cruz*, 431 F.3d 667, 670 (9th Cir. 2005); (holding that defendant has burden of proving duress defense in illegal-reentry case); *United States v. Dicks*, 338 F. 3d 1256, 1258 (11th Cir. 2003) (per curiam) (assuming without deciding that necessity is an available defense to illegal reentry in the 11th Circuit). For duress, the defendant must establish that he “was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law.” *United States v. Bailey*, 444 U.S. 394, 409 (1980). “[I]f there was a reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm, the defense[] will fail.” *Id.* at 410 (internal quotation omitted). For the necessity defense, defendants also must establish a direct, causal relationship between the unlawful conduct and the avoidance of harm. See, e.g., *United States v. Perdomo-Espana*, 522 F.3d 983, 987-88 (9th Cir. 2008); *United States v. Al-Rekabi*, 454 F.3d 1113, 1122 (10th Cir. 2006); *United States v. Arellano-Rivera*, 244 F.3d 1119, 1125-26 (9th Cir. 2001); *United States v. Singleton*, 902 F.2d 471, 472-73 (6th Cir. 1990); *United States v. Crittendon*, 883 F.2d 326, 330 (4th Cir. 1989); *United States v. Ramirez-Chavez*, Slip

Copy, 2013 WL 3581959, at *3-4 (W.D. Tex. Jul. 2, 2013); *United States v. Crown*, 2000 WL 709003, at *2 (S.D.N.Y. May 31, 2000). In circuits in which illegal reentry is considered a continuing offense (see “Statute of Limitations,” below), establishing a justification defense requires that the defendant justify his continued offensive conduct after the alleged duress lost its coercive force. See *United States v. Portillo-Vega*; 478 F.3d 1194, 1201 (10th Cir. 2007) (holding that, in view of continuing nature of illegal-reentry offense, duress defense failed where defendant showed “on-going failure” to request assistance from authorities to seek protection from harm); *United States v. Polanco-Gomez*, 841 F.2d 235, 238 (8th Cir. 1988) (holding that defendant could not establish duress when he failed to show threat of immediate harm from government troops or anti-government rebels in El Salvador and failed to show lack of legal alternative since he could have applied for political asylum prior to his arrest); *United States v. Grainger*, 239 F. App’x 188, 191 (6th Cir. Aug. 9, 2007) (holding that defendant did face threat of imminent harm in home country but (1) had legal alternatives to unlawful reentry, including lawful residence in a safe third country and ability to request permission to reenter U.S., (2) failed to establish causal relationship since he had lived safely in Canada after fleeing home country but before coming to the United States, and (3) had failed to take any steps to discontinue his unlawful presence during the two years after his reentry). At trial, a defendant must prove each element of the justification defense by a preponderance of the evidence. See *Dixon v. United States*, 548 U.S. 1, 17 (2006).

a. Fear of persecution or torture

If a defendant fears persecution or torture in his home country, he may be able to raise a duress defense, but, future harm may not be enough; the threat must be present, imminent, and impending. See, e.g., *United States v. Bonilla-Siciliano*, 643 F.3d 589, 591 (8th Cir. 2001) (generalized fear of harm from government of El Salvador and gang members insufficient to establish imminent harm, and legal alternative available where defendant had option of going to country other than U.S.); *Ramirez-Chavez*, 2013 WL 3581959, at *3-4 (finding that defendant failed to establish duress because his captors “were not in hot pursuit” when he fled country after being detained, beaten, and threatened with extortion by smugglers); *United States v. Flores-Vasquez*, 279 F. App’x 312, 313 (5th Cir. May 23, 2008) (per curiam) (holding that threat of murder by gang members in Honduras did not constitute imminent harm for purposes of establishing duress defense).

b. Necessary medical treatment

Medical treatment also has been raised as justification but typically fails as defense. See, e.g., *United States v. Perdomo-Espana*, 522 F.3d 983, 987-88 (9th Cir. 2008) (holding that defendant was not entitled to jury instruction on necessity defense where expert concluded that defendant’s diabetes was not an immediately dire medical condition, that legal alternatives were available because clinics were available in home country, and that there

was no causal relationship between his conduct and the harm to be avoided because his surreptitious manner of reentry thwarted the speedy receipt of medical treatment); *United States v. Dicks*, 338 F.3d 1256, 1258 (11th Cir. 2003) (per curiam) (holding that defendant who claimed necessity in reentering to seek experimental AIDS treatment had legal alternative in form of being able to petition the Attorney General for reentry); *United States v. Diaz-Diaz*, 198 F.3d 251 (8th Cir. 1999) (per curiam) (unpublished) (affirming district court's denial of defendant's proposed jury instruction on necessity based on allegations that he could not obtain AIDS medication in Mexico); *United States v. Crown*, 2000 WL 709003, at *2-3 (S.D.N.Y. May 31, 2000) (finding that defendant who sought necessity defense based on AIDS illness had reasonable legal alternatives, including option of applying to A.G. for permission to reenter and option of traveling to a country other than U.S. to seek treatment).

2. Involuntary Return

The Seventh Circuit has held that illegal reentry is not a strict-liability crime and suggested that involuntary return (such as being hijacked or kidnapped) would not constitute punishable conduct. See *United States v. Carlos-Colmenares*, 253 F.3d 276, 279 (7th Cir. 2001).

3. Statute-of-Limitations Defenses

The defendant also may raise a statute-of-limitations defense. The general five-year limitations period for non-capital offenses under 18 U.S.C. § 3282(a) applies to § 1326 offenses. See, e.g., *United States v. Are*, 498 F.3d 460, 461 (7th Cir. 2007) (applying the five-year limitations period set forth in § 3282(a) in an illegal-reentry case). Accordingly, an illegal-reentry indictment or information must be filed within five years of the date on which the offense is “complete.” See generally *Toussie v. United States*, 397 U.S. 112, 115 (1970).

When the government charges a defendant with illegal reentry for having entered or attempted to enter the United States, the date of completion of the offense is the date of entry or attempted entry. However, for noncitizens who the government alleges have been “found in” the United States, determining the date on which the five-year clock stops is less straightforward. A previously removed noncitizen commits the offense of being “found in” the United States if he enters by way of a surreptitious border crossing or “enters through a recognized port by means of specious documentation that conceals the illegality of his presence.” *United States v. Acevedo*, 229 F.3d 350, 355 (2d Cir. 2000) (Sotomayor, J.) (internal quotations omitted); see also *United States v. Gordon*, 513 F.3d 659, 663 (7th Cir. 2008) (same).

The circuits are split on whether illegal reentry is considered a continuing offense when the noncitizen has been “found in” the United States. Compare *United States v. Estrada-Quijas*, 183 F.3d 758, 761–62 (8th Cir. 1999) (holding that “the offense of illegal reentry is an ongoing offense that ends only when an offender is discovered”); *United States v. Santana-Castellano*, 74 F.3d 593, 598 (5th Cir. 1996) (holding that the “found in” offense is a continuing one that is complete when a previously removed noncitizen’s “physical presence is discovered and noted by the immigration authorities, and the knowledge of the illegality of his presence, through the exercise of diligence typical of law enforcement authorities, can reasonably be attributed to the immigration authorities”); *United States v. Portillo-Vega*, 478 F.3d 1194, 1201 (10th Cir. 2007) (concluding that “illegal re-entry after deportation is a continuing offense”); with *United States v. DiSantillo*, 615 F.2d 128, 137 (3d Cir. 1980) (ruling that illegal reentry is not a continuing offense and that a noncitizen who entered surreptitiously is “found” when his presence is first noted by the immigration authorities); but see *United States v. Lennon*, 372 F.3d 535, 541 n. 8 (3d Cir. 2004) (holding that although the Third Circuit in *DiSantillo* ruled, on the facts of that case, that the “found in” offense was not a continuing crime, “[s]ince that time, numerous other courts have taken positions that are, to varying degrees, to the contrary” and suggesting that “[p]erhaps this should cause a re-examination of our holding in *DiSantillo*” (citing cases)).

Several circuits have at least left open the possibility that constructive knowledge is sufficient to trigger the statute of limitations, such that the clock begins to run on the date when federal officers knew or “with the exercise of diligence typical of law enforcement authorities, could have discovered the illegality of [the defendant’s] presence.” *United States v. Rivera-Ventura*, 72 F.3d 277, 281–82 (2d Cir. 1995) (finding that the statute of limitations began to run when INS agents arrested defendant shortly after he surreptitiously crossed the border and commenced deportation proceedings against him); accord *United States v. Clarke*, 312 F.3d 1343, 1347-48 (11th Cir. 2002) (per curiam) (holding that defendant’s fingerprinting by state police should have alerted INS, using diligence, to his illegal presence); *United States v. Bencomo-Castillo*, 176 F.3d, 1300, 1304 (10th Cir. 1999); *United States v. Santana-Castellano*, 74 F.3d 593, 598 (5th Cir. 1996) (holding that where immigration authorities did not note defendant’s physical presence at the time of his reentry, no awareness of defendant’s presence could reasonably be attributed to them until an INS agent interviewed defendant while he was in state criminal custody and admitted to the agent that he had been deported previously); *United States v. Gomez*, 38 F.3d 1031, 1037 (8th Cir. 1994) (stating that “[w]here the government is in possession of all necessary information and means, we see no reason why, consistent with the rule of lenity, the ‘discovery rule’ governing the accrual of a cause of action for the purpose of commencing the statute of limitations should not apply,” and holding that the limitations period began to run when defendant filed an immigration application that included falsified biographical data but also a set of fingerprints that should have alerted them to his unlawful reentry); *United States v. Lennon*, 372 F.3d 535, 541 (3d Cir. 2004) (holding that “illegal re-entry begins, for statute of limitations purposes, when the alien presents himself non-

surreptitiously (i.e. using his own name) at an open point of entry even though immigration personnel failed to react.”); *United States v. Vargas*, 408 F. App’x 676, 680 (4th Cir. Jan. 25, 2011) (per curiam) (holding that even if a constructive knowledge theory were applied, it would not benefit the defendant because the defendant concealed identifying information in an immigration form that he submitted such that he “prevented immigration authorities from discovering that the defendant had entered after a previous deportation”) (internal emphasis and citations omitted).

While the Ninth Circuit has not decided whether to apply a constructive-knowledge theory, the court has rejected such arguments when a defendant has reentered via deceit, such as by presenting an invalid immigration document. See *United States v. Zamudio*, 787 F.3d 961 (9th Cir. 2015).

The Seventh Circuit alone has held that the offense is complete only when the government has actual notice of the noncitizen’s unlawful presence in the United States and/or arrests the noncitizen. See *Are*, 498 F.3d at 467. In *Are*, the court held that “[c]onstructive knowledge – the date on which the government ‘should have known’ of the deportee’s presence here – should not start the five-year clock.” *Id.* at 463-64. The court stated that instead the limitations clock began to run either when immigration authorities learned of the defendant’s presence and ascertained his identity and status as a prior deportee or when they arrested him, both of which dates were within the five-year limitations period. *Id.* at 467; see also *Gordon*, 513 F.3d at 665 (upholding the rule in *Are* and holding that the clock began to run on the date the defendant entered state criminal custody, notwithstanding the fact that immigration authorities would have known of his entry by way of an invalid green card more than five years earlier had they followed standard procedures); *United States v. Franco*, 2011 WL 2746648, at *10-11 (N.D. Ill. Jul. 13, 2011) (holding that “found in at any time” means the limitations clock stops running the *first* time the government has actual notice, and finding that the government had actual notice at least as of the date that immigration officials placed a worksheet in defendant’s A-file that identified him as being in state custody, making his arrest for illegal reentry more than five years later outside the limitations period).

4. Venue Objections

Venue objections are waived if they are not raised in a timely manner. If they are not waived, the government bears the burden to show, by a preponderance of the evidence, that venue is proper. See *United States v. Taylor*, 828 F.2d 630, 633 (10th Cir. 1987) (en banc); *United States v. Turner*, 586 F.2d 395, 397 (5th Cir. 1978).

Venue over an illegal-reentry or attempted-reentry case are relatively straightforward (venue is proper in the place of the entry or attempted entry). Venue defenses may arise, however, in “found in” case. In those circuits that consider the “found in” prong to be a continuing

offense, it might follow that venue would be proper in any of the districts in which the defendant was found. See *United States v. Orona-Ibarra*, 831 F.3d 867, 873 (7th Cir. 2016); see also *United States v. Ruelas-Arreguin*, 219 F.3d 1056, 1062 (9th Cir. 2000). When a noncitizen is found and apprehended, and then transported to a different district, venue is improper in the new district. *Id.* at 874-77; but see *United States v. Moran-Garcia*, 966 F.3d 966, 969 (9th Cir. 2020) (dismissing for lack of venue but permitting retrial).

The government sometimes argues for venue based on 8 U.S.C. § 1329 (providing that “notwithstanding any other law, such prosecutions or suits may be instituted at any place in the United States at which the violation may occur or at which the person charged with a violation under section 1325 or 1326 of this title may be apprehended”). But the Constitution imposes venue rules for criminal prosecutions, so courts have “decline[d] to read section 1329 to provide for venue in a district other than where the crime of being ‘found in’ the United States was committed.” *United States v. Hernandez*, 189 F.3d 785, 792 (9th Cir. 1999).

II. UNDERSTANDING REMOVABILITY, RELIEF FROM REMOVAL, AND TYPES OF REMOVAL PROCEEDINGS

In order to successfully challenge a prior removal order in an illegal-reentry case, it is imperative to understand the procedural and substantive rules governing removal. Defenders who understand the rules governing removability, relief, and types of proceedings will be better able to issue-spot for purposes of mounting a challenge to a prior removal order.

This section is intended as a brief overview of these rules. It begins by discussing the most significant substantive rules governing removability and the most common defenses available in removal proceedings. It then describes the various types of removal proceedings. It explains which grounds of removability trigger which types of removal proceedings. And it explains which types of proceedings permit or preclude certain types of relief. This section finishes by discussing avenues for obtaining information about your client’s removal history.

A. Overview of Some Common Criminal Grounds of Removal and Some Common Forms of Relief from Removal

Any noncitizen, including a lawful permanent resident (“LPR”), is subject to removal if she violates U.S. immigration laws. The Immigration and Nationality Act (“INA”) includes a number of grounds of removal. The grounds are divided into “inadmissibility” grounds for noncitizens who have not been “admitted” into the United States, see generally 8 U.S.C. § 1182(a), and “removability” grounds for people who have been “admitted,” see generally 8 U.S.C. § 1227(a). A noncitizen who the government alleges has violated any of these

grounds will be placed in removal proceedings before an Immigration Judge (“IJ”) or in summary removal proceedings where a Department of Homeland Security (“DHS”) official may issue a removal order.

Competent investigation of a § 1326 case requires examination of whether the defendant actually was removable as charged (e.g., for a noncitizen removed on the basis of a prior offense, whether that offense indeed was a removable offense). In addition, defenders must assess whether the noncitizen was eligible for any form of relief from removal at the time of her removal proceeding, and if so, whether the noncitizen properly was advised of that eligibility by the IJ. A number of excellent resources exist for defenders seeking information about the criminal grounds of removal and forms of relief available.⁸ NIJC attorneys are also available to help defenders determine whether a noncitizen was properly removable, and if so whether a noncitizen was improperly denied the opportunity to seek relief. The following provides only a brief overview of some of the more common removable offenses and types of relief so that defenders can familiarize themselves with the applicable rules and terms.

1. Non-Exhaustive List of Criminal Grounds of Removal

While criminal grounds of removability are less common than non-criminal removability grounds, individuals with prior criminal convictions are often targeted for criminal prosecution under § 1326. Since defenders are more likely to encounter these grounds, they are discussed first.

- Aggravated felony: A noncitizen who has been convicted of a so-called “aggravated felony” is subject to removal, with very few forms of relief from removal available. See 8 U.S.C. §§ 1227(a)(2)(A)(iii); 1101(a)(43). Immigration law provides a laundry list of offenses categorized as aggravated felonies. See 8 U.S.C. § 1101(a)(43)(A)-(U). It includes crimes such as murder; rape; drug trafficking; firearms trafficking and certain firearms possession offenses; sexual abuse of a minor; money laundering, fraud or tax evasion involving more than \$10,000; theft or burglary with a sentence imposed of a year or more; crimes of violence (as defined by 18 U.S.C. § 16) with a sentence of a year or more; perjury or obstruction of justice with a sentence of a year

⁸ See, for example, National Immigrant Justice Center, *Defending Noncitizens in Today’s Harsh Environment: Considerations for Undocumented Persons, Asylum Seekers, and Legal Permanent Residents* (2020), <https://fd.org/program-materials/defending-noncitizens-todays-harsh-environment-considerations-undocumented-persons>; Norton Tooby’s page of free resources, <https://nortontoooby.com/resources/free>; Immigrant Legal Resource Center’s crim-imm resources, <https://www.ilrc.org/crimes>; Immigrant Defense Project’s charts and checklists, <https://www.immigrantdefenseproject.org/category/charts-checklists/>.

or more; alien smuggling; and others.⁹

Individuals convicted of an aggravated felony have very few options for relief from removal. Some exceptions exist for those who have a fear of persecution or torture in their home country, who have been the victim of a violent crime or human trafficking in the United States, or who have cooperated with law enforcement in the investigation or prosecution of crimes. In limited circumstances, certain individuals may also still be able to adjust status (discussed below) despite an aggravated felony.

That said, many offenses are charged as aggravated felonies when they do not actually qualify as such. The Supreme Court has issued nearly a dozen decisions regarding the aggravated-felony definition, with noncitizens prevailing in most. *See, e.g., Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) (limiting the “crime of violence” definition by striking 18 U.S.C. § 16(b)); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017) (limiting the application of “sexual abuse of a minor” to certain statutory rape offenses); *Luna-Torres v. Lynch*, 136 S. Ct. 1619 (2016) (finding that state firearms offenses lacking interstate-commerce element still qualify as aggravated felonies); *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013) (finding that state statutes punishing social sharing of marijuana are not aggravated felonies); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010) (rejecting the government’s argument that second or subsequent drug possession convictions are aggravated felonies); *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (narrowing the crime-of-violence definition to exclude negligent conduct).¹⁰ Thus, any aggravated-felony ground of removal should be carefully assessed to determine whether a viable defense may exist.

A § 1326 defendant who was erroneously removed from the country on the basis of an improper aggravated-felony ground may have defenses to the reentry charges. This is true even when cases clarifying the application of the categorical approach to certain state statutes were issued after the removal.¹¹ Former LPRs who – absent an

⁹ For all sentence-based aggravated felonies, it is the sentence imposed by the judge, not the time actually served, that makes the offense an aggravated felony. *See* 8 U.S.C. § 1101(a)(48)(B). Thus, a suspended sentence of a year or more will make such an offense an aggravated felony.

¹⁰ Many courts have deferred to agency interpretation of the aggravated felony definition, though courts more recently have come to question the propriety of that deference given the definition’s effect on the criminal code. *See Valenzuela Gallardo v. Barr*, ___ F.3d ___, 2020 WL 4519085, at *6 (9th Cir. Aug. 6, 2020) (citing cases).

¹¹ The categorical / modified categorical analysis generally applies to determining whether a prior offense is categorically an aggravated felony. *See Taylor v. United States*, 495 U.S. 575 (1990); *Shepard v. United States*, 544 U.S. 13 (2004); *see also Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013) (affirming

erroneous aggravated-felony charge – were either not removable as charged or who would have been eligible for discretionary relief will be especially well positioned to establish prejudice. *See infra* Section III(D)(1), *infra* at 49.

- Crime involving moral turpitude (“CIMT”): A noncitizen with a prior CIMT may be removable. *See* 8 U.S.C. §§ 1182(a)(2)(A)(i)(I); 1227(a)(2)(A)(i), (ii). Unlike aggravated felonies, there is no statutory definition of CIMTs; rather, they are defined by constantly evolving case law. As a general rule, crimes involving an intent to defraud or steal, and crimes involving intent to cause bodily harm or injury to a person or property, are considered CIMTs.
- Controlled-substance offenses: Virtually all controlled substance offenses, including simple possession and paraphernalia offenses, are grounds for removal. 8 U.S.C. §§ 1182(a)(2)(A)(i)(ii); 1127(a)(2)(B). A small exception exists for individuals subject to removability grounds only: a single misdemeanor simple possession of 30 grams or less of marijuana will not make them removable under 8 U.S.C. § 1127(a)(2)(B). However, such an offense *will* still make an individual inadmissible. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(ii). Simple possession offenses *may* allow more avenues of relief from removal for certain noncitizens, particularly lawful permanent residents, than drug-trafficking offenses, which are considered aggravated felonies under 8 U.S.C. § 1101(a)(43)(B). Just about all controlled substance offenses, including simple possession offenses, will eliminate most forms of relief (though not voluntary departure) for individuals who are not lawful permanent residents.

When a defendant has a past controlled-substance conviction, careful review of the record of conviction and the criminal statute is needed. Under the categorical approach, some state statutes are divisible, while others are not. *Rendon v. Barr*, 952 F.3d 963, 968 (8th Cir. 2020) (Minnesota, divisible); *Guillen v. U.S. Att’y Gen.*, 910 F.3d 1174, 1176 (11th Cir. 2018) (Florida, divisible); *Raja v. Sessions*, 900 F.3d 823, 829 (6th Cir. 2018) (Pennsylvania, divisible); *Martinez v. Sessions*, 893 F.3d 1067, 1073 (8th Cir. 2018) (Missouri, divisible); *United States v. Martinez-Lopez*, 864 F.3d 1034, 1037 (9th Cir. 2017) (en banc) (California, divisible); but see *Najera-Rodriguez v. Barr*, 926 F.3d 343, 347 (7th Cir. 2019) (Illinois statute indivisible by substance); *Harbin v. Sessions*, 860 F.3d 58, 68 (2d Cir. 2017) (New York statute indivisible by substance). When a state controlled-substances statute is indivisible, then the defender should thoroughly examine the state statute’s list of controlled substances to determine if it is broader than the lists included in the federal controlled-substances statute at issue. If the state statute is both indivisible and overbroad, then noncitizen – if otherwise lawfully present in the U.S. – may not be removable

application of *Taylor/Shepard* approach in removal proceedings); *Mathis v. United States*, 136 S. Ct. 2243, 2251-52 (2016); *Decamps v. United States*, 570 U.S. 254, 267 (2013).

at all. See generally *Mathis v. United States*, 136 S. Ct. 2243, 2251-52 (2016) (discussing divisibility and the modified categorical approach); *Decamps v. United States*, 570 U.S. 254, 267 (2013) (same).

- Firearms offenses: Many offenses related to firearms (along with firearms-trafficking offenses) are considered aggravated felonies under 8 U.S.C. § 1101(a)(43)(C), (E). Those that are not aggravated felonies may still qualify as removable offenses under 8 U.S.C. § 1227(a)(2)(C). As with controlled-substance offenses, some state firearms offenses are overbroad because the state’s definition of “firearm” exceeds the federal definition. Most commonly, courts have found state firearms statutes overbroad where they punish offenses involving air rifles or antique firearms, neither of which are illegal under the federal definition. See *United States v. Aguilera-Rios*, 769 F.3d 626 (9th Cir.2014) (antique firearms), *Medina-Lara v. Holder*, 771 F.3d 1106, 1115 (9th Cir. 2014) (same); *Gordon v. Barr*, No. 19-1539, 2020 WL 3815526, at *5 (4th Cir. July 8, 2020) (same); *Williams v. Barr*, 960 F.3d 68, 77 (2d Cir. 2020) (same); *Rodriguez-Contreras v. Sessions*, 873 F.3d 579, 581 (7th Cir. 2017) (air rifles).
- Prostitution and commercialized vice: Convictions for prostitution-related offenses (depending on when they were committed in relation to when the individual sought admission to the United States) as well as non-prostitution-related commercialized vice offenses may lead to removal. See 8 U.S.C. § 1182(a)(2)(D). Note that prostitution may also be charged as a CIMT. See, e.g., *Rohit v. Holder*, 670 F.3d 1085 (9th Cir. 2012).
- Domestic violence, stalking, and child abuse: DV offenses, violations of protection orders, stalking, and crimes of child abuse, neglect, or abandonment are removable offenses. See 8 U.S.C. § 1227(a)(2)(E). To constitute a crime of DV, the offense must meet the “crime of violence” definition at 18 U.S.C. § 16. Note that the Board of Immigration Appeals defines child abuse very broadly. *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503, 512 (B.I.A. 2008). The Board’s approach has triggered a circuit split, with some circuits deferring to the Board and others disagreeing. Compare *Ibarra v. Holder*, 736 F.3d 903, 918 n.20 (10th Cir. 2013) (rejecting Board approach), with *Matthews v. Barr*, 927 F.3d 606, 637 (2d Cir. 2019) (deferring to Board); *Martinez-Cedillo v. Sessions*, 896 F.3d 979, 994 (9th Cir. 2018) (deferring to Board), *vacated sub nom. Martinez-Cedillo v. Barr*, 923 F.3d 1162 (9th Cir. 2019).

1. Non-Criminal Grounds of Removability

In some cases, an individual need not be convicted of a crime to become inadmissible or removable (and, thus, potentially subject to a removal order) for an act they have committed. Examples of such grounds are:

- Present without admission / entry without inspection: A noncitizen who entered without authorization is “present without admission” under 8 U.S.C. § 1182(a)(6)(A). This is the most common ground of removability.
- False claims to United States citizenship: Noncitizens are inadmissible under 8 U.S.C. § 1182(a)(6)(C)(ii) and removable under 8 U.S.C. § 1227(a)(3)(D) when they have falsely claimed to be United States citizens, regardless of whether they have been prosecuted for their conduct.
- Alien smuggling: Noncitizens are inadmissible under 8 U.S.C. § 1182(a)(6)(E) and removable under 8 U.S.C. § 1227(a)(1)(E) if they have encouraged, induced, assisted, abetted, or aided any other noncitizen to enter or to try to enter the United States in violation of law, aside from their spouse, parent, son, or daughter. Note that this civil “alien smuggling” ground is broader than the alien-smuggling aggravated felony under 8 U.S.C. § 1101(a)(43), which only includes offenses criminalized under alien-smuggling statute, 8 U.S.C. § 1324(a). Noncitizens need not have a criminal, alien-smuggling conviction under § 1324 to trigger this civil ground. Additionally, a misdemeanor conviction for aiding and abetting an illegal entry in violation of 8 U.S.C. § 1325 may be used to support this charge.
- “Reason to believe” controlled-substance trafficking: In addition to the ground of removability for convictions relating to controlled substances, noncitizens are inadmissible under 8 U.S.C. § 1182(a)(2)(C) if DHS or the Attorney General has a “reason to believe” that they are or have been an illicit trafficker in a controlled substance or have aided in the commission of drug trafficking, or are an immediate family member who benefitted from it. The “reason to believe” standard is equivalent to probable cause in the criminal context and does not require a conviction.
- Marriage fraud: Noncitizens are removable under 8 U.S.C. § 1227(a)(1)(G) when they have engaged in marriage fraud, *i.e.*, when they have entered into a marriage with a U.S. citizen or LPR solely in order to obtain an immigrant visa, regardless of whether they have been prosecuted for this conduct.

2. Some Common Forms of Relief from Removal

- Voluntary departure: Voluntary departure is a discretionary form of relief that allows a noncitizen who is otherwise removable to leave the country at his own expense within a designated amount of time in order to avoid a final order of removal. 8 U.S.C. § 1229c. Though often confused, it is important to note that voluntary departure is not a type of removal; it is a form of *relief from removal*. Voluntary departure may facilitate future lawful reentry. Unlawful return after a

voluntary departure cannot form the basis of an illegal reentry charge under 8 U.S.C. § 1326, though the individual may still be charged with unlawful entry under 8 U.S.C. § 1325.

There are two types of voluntary departure. Pre-hearing voluntary departure (sometimes called “pre-conclusion voluntary departure”) has fewer requirements but requires the applicant to waive appeal and agree to promptly depart. *See* 8 U.S.C. § 1229c(a); 8 C.F.R. § 240.25. The second type allows an individual to seek voluntary departure at the conclusion of removal proceedings. It is more difficult to obtain post-conclusion voluntary departure (*see* 8 U.S.C. § 1229c(b); 8 C.F.R. 240.11(b)). (Note that voluntary departure requirements were different under pre-1996 law.) An individual who is granted voluntary departure but fails to depart within the designated time will have their voluntary departure converted into an order of removal by operation of law.

- Fear of persecution or torture in home country: Individuals who fear harm in their home country may be eligible for certain forms of protection-based relief. Asylum is a discretionary form of relief available to individuals who fear persecution based on their race, religion, nationality, political opinion, or membership in a particular social group. Aggravated felonies, along with “particularly serious crimes,”¹² are a bar to asylum. *See* 8 U.S.C. § 1158. Withholding of removal is a mandatory form of relief granted to individuals who can show that it is more likely than not that they will be persecuted based on their race, religion, nationality, political opinion, or membership in a particular social group. The only automatic bars to withholding are particularly serious crimes or aggravated felonies for which a sentence of five years or more was imposed. *See* 8 U.S.C. § 1231(b)(3). Relief under the Convention Against Torture (“CAT”) is a mandatory form of relief available to individuals who can show that it is more likely than not that they will be tortured by or at the acquiescence of the government of their home country. There are two types of CAT protection: withholding of removal and deferral of removal. Withholding of removal under CAT has the same criminal bars as withholding of removal under § 1231(b)(3). There are no criminal bars to deferral of removal under CAT.

¹² In determining whether a crime is particularly serious, an immigration judge will look at (1) the nature of the crime; (2) the circumstances surrounding the crime; (3) the length of the sentence imposed; and (4) whether the crime indicates dangerousness to the community. *See Matter of S-S*, 22 I. & N. Dec. 3374 (BIA 1999); *Matter of Frentescu*, 19 I. & N. Dec. 244 (BIA 1982). The categorical approach does not apply in the analysis of particularly serious crimes, and the court is free to engage in fact-finding. *Matter of N-A-M*, 24 I. & N. Dec. 336 (BIA 2007). The Board of Immigration Appeals has held that a crime need not be an aggravated felony to be considered a particularly serious crime. *See Matter of M-H*, 26 I. & N. Dec. 46 (BIA 2012).

Note: New bars to asylum and protection

A series of recently promulgated regulations have sought to bar asylum and/or other protection to noncitizens apprehended along the southern border. Some of these regulations are currently enjoined.

Asylum ban 1.0.: The government sought to bar asylum for anyone who entered the United States illegally, *i.e.*, anywhere but at a port of entry. See Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934, 55,939 (Nov. 9, 2018). Courts have enjoined this regulation as of the date of publication of this advisory. *E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1102 (N.D. Cal. 2018); *Trump v. E. Bay Sanctuary Covenant*, 139 S. Ct. 782 (U.S. Dec. 21, 2018); *O.A. v. Trump*, 404 F. Supp. 3d 109 (D.D.C. 2019).

Asylum ban 2.0 (the transit ban): This rule precludes someone from seeking asylum if they have transited through a third country and have not sought asylum in that country. See Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33829 (July 16, 2019). A preliminary injunction enjoining the regulation was stayed, see *Barr v. E. Bay Sanctuary Covenant*, 140 S. Ct. 3 (2019), but a separate A.P.A. ruling vacated the rule based on denial of notice and comment rulemaking. *Capital Area Immigrants' Rights Coal. v. Trump*, 2020 WL 3542481, at *23 (D.D.C. June 30, 2020).

Migration Policy Protocols (MPP): The MPP does not bar asylum, it requires individuals to wait in Mexico for a hearing on their claim. See Memorandum, Kirstjen M. Nielsen, Sec'y, U.S. Dep't of Homeland Security, Policy Guidance for Implementation of the Migrant Protection Protocols (Jan. 25, 2019), available at https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf. Courts enjoined the regulation, but the injunction has been stayed and the rule is in effect as of the date of this advisory's publication. *Wolf v. Innovation Law Lab*, 140 S. Ct. 1564 (2020).

Safe Third Country regulations: New regulations and implementing agreements allow the United States to deny asylum and other protection to someone if a third country will accept them and adjudicate their protection claim. 84 Fed. Reg. 63,994 (Nov. 19, 2019). These regulations are being challenged in court, but no injunction has yet issued.

- Cancellation of removal: Cancellation of removal is a discretionary form of relief available to noncitizens who meet certain requirements, including length of residency and lack of certain prior offenses. The two most common types of cancellation of removal are cancellation for LPRs and cancellation for non-LPRs. *See* 8 U.S.C. § 1229b(a), (b)(1).
 - LPR cancellation allows certain deportable lawful permanent residents to retain their LPR status and avoid removal. To qualify, an LPR must have had LPR status for at least five years and must have resided in the United States continuously for at least seven years following a lawful admission and (to simplify slightly) before commission of the first offense that renders them inadmissible or deportable. Aggravated felonies are a bar to LPR cancellation. *See* 8 U.S.C. § 1229b(a).
 - Non-LPR cancellation allows certain non-permanent residents to remain in the United States and obtain LPR status. The applicant must demonstrate that they have resided in the United States for at least ten years and that their citizen or LPR spouse, parent, or child would suffer “exceptional and extremely unusual hardship” if they were deported. Any offense that makes an individual inadmissible under 8 U.S.C. § 1182(a)(2) or deportable under 8 U.S.C. § 1227(a)(2) will bar eligibility. Moreover, an individual who has served 180 days or more in jail, in the aggregate, for *any* offenses, is not eligible for this form of cancellation. *See* 8 U.S.C. § 1229b(b), *see also* 8 U.S.C. § 1101(f).

- Former § 212(c) relief: Former § 212(c) of the Immigration & Nationality Act allowed certain noncitizens who were placed in deportation proceedings because of a prior criminal offense to seek a waiver of that offense, thus avoiding deportation, if they met certain requirements pertaining to length of residency and criminal history. Section 212(c) relief was a discretionary form of relief. It was restricted by the Antiterrorism and Effective Death Penalty Act (“AEDPA”) in 1996 and subsequently repealed by the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), which went into effect in 1997. The Supreme Court in *INS v. St. Cyr* ruled that § 212(c) relief remained available to individuals with pre-1996 convictions who were placed in removal proceedings after that date. 533 U.S. 289 (2001). For some time, the agency only considered individuals who had pleaded guilty to their pre-1996 offense to be eligible for § 212(c) relief, not those who took their case to trial, but it corrected that view in 2014. *Matter of Abdelghany*, 26 I. & N. Dec. 254 (BIA 2014) (finding eligibility regardless of whether noncitizen went to trial).

- Adjustment of status: A noncitizen may be able to seek lawful status within the United States through a relative (parent, spouse or child) or employer. Complicated rules govern who may seek legal status in the United States. 8 U.S.C. § 1255.

Adjustment commonly involves a noncitizen who lawfully entered the United States and is not “inadmissible” to the country; but some inadmissibility grounds may be waived and individuals who entered without inspection before 2001 may be able to adjust while paying a \$1,000 penalty fee if they were the beneficiary of an old visa petition. See 8 U.S.C. § 1255(i). Some refugees and asylees facing removal may also seek adjustment of status, under rules that apply only to refugees and asylees. See 8 U.S.C. § 1159.

- Section 212(h) waiver: A § 212(h) waiver forgives certain criminal grounds of inadmissibility for individuals applying for LPR status (“adjustment”) who have immediate family members who will suffer extreme hardship if they are removed, or whose crime occurred more than 15 years prior to their application. Section 212(h) waives CIMTs (except murder or torture), multiple criminal convictions with aggregate sentences over 5 years, prostitution, and a single simple possession of 30 grams or less of marijuana (no other drug crime can be waived). It is a discretionary form of relief. Aggravated felonies are a bar to the § 212(h) waiver for some classes of individuals. The aggravated-felony bar does not apply to non-permanent residents. It also does not apply to lawful permanent residents who obtained lawful permanent residence within the United States rather than through consular processing abroad. See *Matter of JHJ*, 26 I. & N. Dec. 563 (BIA 2015). Note that for many years prior to *JHJ*, the Board interpreted the statute more restrictively. If a noncitizen was misled into accepting removal based on unavailability of this waiver, it may support a § 1326(d) argument in some circuits.
- Crime victims:
 - U Visa: Individuals who have been the victim of domestic violence or specified violent crimes in the United States and who can obtain a certification from a law-enforcement official affirming that they assisted in the investigation and/or prosecution of the crime may be eligible for a U Visa. Almost any crime can in theory be waived for U visa applicants; however, it is a discretionary form of relief, and the U.S. Citizen and Immigration Service (“USCIS”), which adjudicates U visa applications, will take criminal history into account in adjudicating a U visa application. In the Seventh and Eleventh Circuits, U visa applicants who are in removal proceedings can seek to waive grounds of inadmissibility before the IJ, as well as before USCIS. See *L.D.G. v. Holder*, 744 F.3d 1022, 1030 (7th Cir. 2014); *Meridor v. U.S. Attorney Gen.*, 891 F.3d 1302, 1307 (11th Cir. 2018). If you identify your client as a victim of criminal activity, advise your client to talk with an immigration attorney to assess whether she or he may be eligible for relief.

- VAWA: Survivors of domestic abuse may obtain relief from removal under the Violence Against Women Act (VAWA), a discretionary form of relief. They also may seek a waiver for crimes triggering removal when the offense is related to the abuse. If you identify your client as a victim of domestic violence, advise your client to talk with an immigration attorney to assess whether she or he may be eligible for relief.
 - T Visa: Victims of human trafficking may be eligible for a discretionary visa known as the T Visa. If you identify your client as a victim of human trafficking, advise your client to talk with an immigration attorney to assess whether she or he may be eligible for relief.
 - Special Immigrant Juvenile Status: SIJS is a relief available to children who have been abused, abandoned, or neglected, and whose best interests are to remain in the United States. It may apply even if the child has only been abused or abandoned by one parent.
- Temporary Protected Status (TPS): In response to war or national disaster, the DHS Secretary may grant TPS to nationals of a particular country. To receive TPS, a national or resident of that country must be continuously present in the United States except for departures on advance parole. Once TPS is granted for a country, it is often renewed repeatedly; each renewal is only one or one-and-a-half years. TPS is barred for noncitizens convicted of one felony or two misdemeanors, though the regulations define those offenses in slightly more favorable terms than other parts of immigration law. 8 C.F.R. § 244.1.
 - DACA: Deferred Action for Childhood Arrivals (DACA) is a unique pseudo-relief whose legality has been hotly contested, but which remains available to some people. See *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1903 (2020). *Deferred Action* is a form of prosecutorial discretion: “To ameliorate a harsh and unjust outcome, the INS may decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation.... A case may be selected for deferred action treatment at any stage of the administrative process. Approval of deferred action status means that, for the humanitarian reasons described below, no action will thereafter be taken to proceed against an apparently deportable alien.” *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999) (citing 6 C. Gordon, S. Mailman, & S. Yale-Loehr, *Immigration Law and Procedure* § 72.03 [2][h] (1998)). DACA is a unique application of deferred-action principles to individuals who entered the United States as children, allowing them to obtain work authorization and conferring a sort of lawful presence. *Regents*, 140 S. Ct. at 1902. A DACA applicant must show that they::
 - Were under the age of 31 as of June 15, 2012;
 - Came to the United States before reaching their 16th birthday;

- Have continuously resided in the United States since June 15, 2007, up to the present time;
- Were physically present in the United States on June 15, 2012, and at the time of making their request for consideration of deferred action with USCIS;
- Had no lawful status on June 15, 2012;
- Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and
- Have not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.

B. Previous Forms of Relief

The forms of relief available in immigration court have not remained static. This section is intended to address some forms of relief that are no longer available. These previous forms of relief may be relevant when, for example, an illegal-reentry defendant seeks to challenge an old removal order on the ground that they were eligible for such relief.

- Registry: This relief is still in the statute, but it is functionally obsolete because Congress has not altered the registry date for several decades. It requires having lived continuously in the United States since January 1, 1972.
- Suspension of deportation: For proceedings initiated before April 1, 1997, noncitizens were placed into deportation proceedings. Old Suspension of Deportation required a showing of seven years continuous residence, good moral character, no disqualifying offense, and extreme hardship to oneself or a relative. This relief was highly discretionary.
- Ten-year suspension of deportation: This relief was available to a noncitizen who became deportable on criminal grounds but could show ten years without any further offenses. It required a showing of extraordinary and extremely unusual hardship.
- NACARA cancellation of removal. In 1997, to ameliorate the effects of the harsh immigration reforms of 1996, Congress passed country-specific relief for individuals from El Salvador, Guatemala, and Eastern Europe.
- Legalization: The “Amnesty” or “Legalization” rules allowed noncitizens continuously present since January 1, 1982 to first become lawful temporary

residents, and then lawful permanent residents. The legalization program was thought to be susceptible to fraud, and triggered multiple class-action lawsuits. It should be noted that strict confidentiality provisions apply to Legalization applications. A separate but related program was for Special Agricultural Workers (SAW). SAW applicants could have entered later than 1982, but required affidavits from farmers or contractors attesting to agricultural labor.

- Judicial recommendation against deportation (JRAD): Prior to 1990, Congress allowed a state court judge in a criminal case to make a recommendation that INS not take any deportation action against a noncitizen. This recommendation was actually a binding command. A JRAD precluded removal on those ground of the convictions.

C. Removal Hearings

In most circumstances, the removal process commences when the Immigration Customs Enforcement (“ICE”) branch of the Department of Homeland Security issues a Notice to Appear (“NTA”) to a noncitizen.¹³ With certain exceptions (described below in Section II.B.2, Summary Removal Orders), noncitizens who have been issued an NTA are placed in removal proceedings before an immigration judge in the immigration court system, pursuant to 8 U.S.C. § 1229a. Noncitizens generally receive one or more “master calendar hearings” (scheduling or preliminary hearings) and, if they apply for relief, a “merits hearing” (also known as an individual hearing). At either type of hearing, the IJ may issue a removal order, find the noncitizen not removable and terminate proceedings, or find the noncitizen removable but grant some form of immigration relief that allows the noncitizen to depart voluntarily (voluntary departure) or remain in the United States (e.g., cancellation of removal, asylum, adjustment of status). If the noncitizen has sought relief before the U.S. Citizenship and Immigration Service (“USCIS”) and USCIS grants that relief, the IJ may terminate proceedings due to the noncitizen now being in lawful status (e.g., when an individual has applied for and been granted a U visa).

Removal proceedings begin with the filing of a Notice to Appear in the immigration court. 8 U.S.C. § 1003.14(a). By statute, an NTA is supposed to include the time and place of the

¹³ Prior to 1996, the removal process typically commenced with an “order to show cause” issued by the former Immigration and Naturalization Service (“INS”) and resulted in either an “order of deportation” or an “order of exclusion.” Defenders whose § 1326 clients have old immigration cases may therefore see “orders to show cause” instead of “notices to appear,” and “orders of deportation/exclusion” instead of “orders of removal,” in their clients’ records. Note that any pre-1996 orders of deportation and exclusion also are subject to challenge in a § 1326 case. For the sake of simplicity, this practice advisory refers simply to all removal/deportation/exclusion orders as “orders of removal.”

first scheduled hearing. See 8 U.S.C. § 1229. Although the Supreme Court has indicated that an NTA lacking this information does not count as an NTA, most courts have held that the omission is not of jurisdictional significance and may be forfeited by the noncitizen or cured by the government in a later document. See *Pereira v. Sessions*, 138 S. Ct. 2105 (2018); see *Ortiz-Santiago v. Barr*, 924 F.3d 956, 963 (7th Cir. 2019); *Goncalves Pontes v. Barr*, 938 F.3d 1, 5 (1st Cir. 2019) (collecting cases).

IJs are required by regulation to comply with the following procedures during a removal hearing:

- Advise the noncitizen of his right to counsel;
- Advise the noncitizen of the availability of free legal service providers;
- Ascertain whether the noncitizen has received a list of such providers;
- Advise the noncitizen that he has a right to present evidence, examine and object to the government's evidence, and cross-examine the government's witnesses;
- Read and explain the factual allegations and charges in the NTA, and enter the NTA as an exhibit in the record;
- Give the noncitizen the opportunity to designate a country of removal in the event that he ultimately is removed;
- For pro se noncitizens, develop the record, including identifying all forms of relief the non-citizen is apparently eligible for and providing them a reasonable opportunity to apply;¹⁴
- Issue an oral or written decision, including a discussion of the evidence and findings as to removability;
- Notify the noncitizen of the decision in the noncitizen's presence, in the event of an oral decision, or by mail, in the event of a written decision; and
- Advise the noncitizen of his right to appeal the removal order.

8 C.F.R. §§ 1240.10, 1240.11, 1240.13.

At the conclusion of removal proceedings, if the government has met its burden and the noncitizen has not been granted relief, an IJ may issue one of the following:

¹⁴ Note that the scope of the obligation to develop the record is subject to dispute, and does not necessarily require IJs to inform non-citizens of relief options that they have no reasonable way of knowing might apply. Compare *C.J.L.G. v. Barr*, 923 F.3d 622 (9th Cir. 2019) (en banc) (the duty to advise a non-citizen of the apparent eligibility for relief is “triggered whenever the facts before the IJ raise a reasonable possibility that the petitioner may be eligible for relief”) with *United States v. Moriel-Luna*, 585 F.3d 1191, 1198 (9th Cir. 2009) (noting that when a noncitizen told the IJ he was single, the IJ was not required to advise a pro se noncitizen that if he married his girlfriend he would be eligible to adjust status.)

- Order of Removal: An IJ issues a removal order at the conclusion of a removal proceeding under 8 U.S.C. § 1229a, after concluding that the noncitizen is removable and does not qualify for any form of relief.
- Order of Removal In Absentia: If the noncitizen does not appear for a removal hearing, the IJ may enter an order of removal *in absentia*. *In absentia* orders present unique opportunities for due-process challenges in the § 1326 context, as discussed *infra* in Section III(D)(1) *infra* at 44, Section V, *infra* at 59-60

D. Summary Removal Proceedings

Summary removal proceedings occur when DHS, through its immigration officers, issues a removal order to noncitizens without a hearing before an IJ. They occur in several scenarios:

- Final Administrative Removal Order (“FARO”): Any noncitizen who is not a lawful permanent resident and who has been convicted of an “aggravated felony” (as defined under 8 U.S.C. § 1101(a)(43)) is subject to the FARO process. These removal orders are issued by ICE removal officers without the noncitizen ever appearing before an IJ. 8 U.S.C. § 1228b. ICE must issue such individuals a Notice of Intent to Issue a FARO (Form I-851) that advises them of the following:
 - Factual allegations and legal charges of removability;
 - Right to representation;
 - Right to request withholding of removal to a particular country if she fears persecution or torture in that country;
 - Right to inspect the evidence and rebut the charges within 10 days of service of the Form I-851 (or 13 days, if served by mail);
 - Right to designate a country of removal; and
 - Available free legal service programs in the area.

8 C.F.R. § 1238.1(b). (Administrative Removal or FARO proceedings are not to be confused with expedited removal orders under 8 U.S.C. § 1225(b), which do not require an aggravated felony finding and are an entirely distinct from of removal.) An immigration officer must provide written translation of the Notice or explain its contents in a language the alien understands. *Id.* (Failure to provide translation can undercut the validity of any waivers and excuse any failure to exhaust remedies. *United States v. Lopez-Collazo*, 824 F.3d 453, 459 (4th Cir. 2016).)

An example of a FARO charging document is included in the Appendix.

If the noncitizen expresses a fear of persecution or torture in her home country, the ICE officer must refer her case to an asylum officer to conduct a Reasonable Fear

Interview. See 8 C.F.R. § 1238.1(f)(e); see also 8 C.F.R. § 1208.31. A reasonable fear is defined as “a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that he or she would be tortured in the country of removal.” 8 C.F.R. § 1208.31(c). If the asylum officer finds a reasonable fear, then the noncitizen is placed into “withholding-only” proceedings before an IJ, where the noncitizen can only seek withholding of removal or protection under the Convention Against Torture. 8 C.F.R. § 1208.2(c)(2). If the asylum officer rules against the noncitizen, the noncitizen may request IJ review of that negative determination. 8 C.F.R. § 1208.31(g). If an adverse reasonable fear finding is upheld, the noncitizen is subject to removal without further administrative appeal. 8 C.F.R. § 1208.31(g)(1).

Note: FAROs and Substantive Defenses to Ground of Removal

FAROs require that an immigration officer make a finding that a noncitizen has an aggravated-felony conviction. In theory, a noncitizen may challenge the immigration officer’s aggravated-felony allegation. However, the immigration officer is not required to inform the noncitizen of this procedural right, and neither the notice of intent form (Form I-851) nor the reinstatement-of-removal form (Form I-871) explains this possibility. Further, if the immigration officer disagrees, the only recourse is by filing a Petition for Review from the removal order within 30 days of its entry. 8 U.S.C. § 1228(b)(3). Thus, noncitizens are not given notice of this potential defense to the FARO. A defendant in an illegal reentry case who asserts that the underlying offense is not actually an aggravated felony might argue that any failure to exhaust be excused given the lack of notice. The circuits are divided on whether the form’s silence as to this administrative-right excuses a noncitizen from raising the legal argument that the offense was not an aggravated felony, for purposes of civil challenges to the removal order. Compare *Valdiviez-Hernandez v. Holder*, 739 F.3d 184 (5th Cir. 2013) (no exhaustion of legal arguments required), *Etienne v. Lynch*, 813 F.3d 135, 142 (4th Cir. 2015) (same) with *Malu v. U.S. Atty. Gen.*, 764 F.3d 1282, 1288 (11th Cir. 2014) (refusing to address legal arguments where pro se noncitizen had failed to make legal arguments against aggravated felony allegation).

- Expedited removal order: The statute also authorizes “expedited removal” against anyone who has been continuously present for less than two years. 8 U.S.C. § 1225(b). The full extent of statutory expedited removal powers has not been employed by the agency. From 1997 to 2004, the regulations subjected only “arriving aliens” – noncitizens apprehended at a port of entry – to expedited removal. 8 C.F.R. 235.3(b)(1)(ii). In 2004, expedited removal was expanded to

include not only arriving aliens but also noncitizens apprehended within 100 miles of the border and within 14 days of their arrival. See Notice Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877, 48880-81 (Aug. 11, 2004).

In 2019, DHS decided to apply expedited removal nationwide, to the full extent of its statutory authority, i.e., people anywhere in the country who cannot convince an immigration official that they have been continually present in the United States for two years. See Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409, 35,409 (July 23, 2019). That expansion was enjoined by a district court; but the injunction was overturned on appeal. See *Make the Road New York v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020).

An expedited removal order is issued on Form I-860, which may be issued by an ICE officer or a Customs and Border Protection (“CBP”) officer. 8 U.S.C. § 1225(b). In these circumstances, the issuing officer is required to:

- Create a record of the facts of the case;
- Advise the noncitizen of the charges against him, using an interpreter if necessary;
- Obtain a sworn statement by the noncitizen regarding his identity, alienage, and inadmissibility;
- Provide the noncitizen with an opportunity to respond to the charges against him;
- Provide a referral to an asylum officer for a Credible Fear Interview if the noncitizen expresses a fear of persecution or torture if returned to his home country;
- Verify the status of a noncitizen who claims to be a lawful permanent resident, refugee, asylee, or U.S. citizen; and
- Obtain review of the expedited removal order by a supervising officer.

8 C.F.R. § 1235.3(b).

Noncitizens amenable to expedited removal orders have few options to avoid such an order. One exception is for those who fear returning to their native country. When a noncitizen in expedited removal proceedings expresses a fear of returning to her homeland, the statute does not automatically grant a removal hearing or allow the noncitizen to seek asylum. Instead, the statute created a “credible fear” procedure whereby Asylum Officers assess whether the noncitizen has a “significant possibility” of winning asylum. 8 U.S.C. § 1225(b)(1)(B)(v). If the noncitizen is found not to have a credible fear of return, there is a limited review by an

Immigration Judge, but no further appeal is permitted.¹⁵ It should be noted that the recent bars to asylum also affect credible fear determinations; since the credible fear process assesses whether someone has a significant possibility of winning asylum, if it becomes impossible to obtain asylum USCIS may find that the noncitizen cannot satisfy the credible fear standard).

Another option for individuals facing expedited removal may be to withdraw the application for admission. 8 C.F.R. § 235.4. This is purely in the discretion of immigration officials but may be argued as grounds for a challenge to the removal order if the noncitizen was not considered for or advised of the possibility of that relief. See *United States v. Raya-Vaca*, 771 F.3d 1195, 1205 (9th Cir. 2014); *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1090 (9th Cir. 2011) (citing to Inspector's Field Manual).

The expedited-removal statute purports to bar challenges to expedited removal orders in the § 1326 context. 8 U.S.C. § 1225(b)(1)(D). This provision has been found unconstitutional by the three circuits to consider the question. See *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1081-88 (9th Cir. 2011); *United States v. Villarreal Silva*, 931 F.3d 330, 334-38 (4th Cir. 2019); *United States v. Gonzalez-Fierro*, 949 F.3d 512, 525 (10th Cir. 2020).

- Reinstatement of removal: Individuals who illegally reenter after a prior removal order are subject to having the prior order “reinstated” by an ICE removal officer, without seeing an IJ. When ICE makes findings that a noncitizen has illegally reentered after a prior removal order, “the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.” 8 U.S.C. § 1231(a)(5).

Some indictments have alleged the reinstatement order and date to satisfy the “previously removed” element of § 1326. But courts have held that reinstatement orders themselves cannot satisfy this element; rather, it is the underlying removal order on which the reinstatement order is based that must be established. See *United States v. Charleswell*, 456 F.3d 347 (3d Cir. 2006); *United States v. Arias-Ordonez*, 597 F.3d 972, 981 (9th Cir. 2010). Otherwise, a fundamentally unfair removal order could be insulated from review “simply by deleting it from the indictment,” leaving the reinstatement order in its place. *Charleswell*, 456 F.3d at 352. Thus, to the extent that a prior reinstatement order is charged, defenders should look behind it

¹⁵ For more information on the credible fear process, see NIJC’s Practice Advisory: Protection-Based Relief from Removal, available at https://www.fd.org/system/files/criminal_defense_topics/common_offenses/immigration_and_offenses_involving_non-citizens/practice-advisory-protection-based-relief-from-removal.pdf.

to the underlying removal order, to assess whether that earlier order was fundamentally unfair.

- Visa Waiver Program removal orders: Nationals from specified countries may enter the United States as a visitor or tourist for 90 days, without obtaining a visa, through the Visa Waiver Program (“VWP”). The VWP requires visitors to waive their right “to contest, other than on the basis of an application for asylum, any action for” removal. 8 U.S.C. § 1187(b)(2). It is only available to nationals of (usually prosperous) countries who generally do not overstay their visas. Noncitizens who obtain false passports (for instance, to escape persecution) from VWP countries are also issued VWP removal orders. Some circuits permit judicial review over whether the VWP waiver was knowingly and voluntarily entered into. See *Nose v. Attorney Gen. of United States*, 993 F.2d 75, 78–79 (5th Cir. 1993); *Bayo v. Napolitano*, 593 F.3d 495, 504 (7th Cir. 2010) (en banc). VWP entrants may seek to “adjust status” through a U.S. citizen “immediate relative” (generally a spouse). 8 U.S.C. § 1255(c)(4). The Ninth Circuit has held that if a noncitizen marries a citizen and applies for adjustment of status before overstaying the period of admission, “the alien is entitled to the procedural guarantees of the adjustment of status regime ..., and is no longer subject to the Visa Waiver Program's no-contest clause.” *Freeman v. Gonzales*, 444 F.3d 1031, 1033–34 (9th Cir. 2006).

E. Stipulated Removal Orders

In some cases, a noncitizen may stipulate to removability and receive a stipulated order of removal. A stipulated removal order is entered by an IJ, but it bypasses the normal removal-hearing requirements. Thus, while it is considered part of the traditional (i.e., non-summary) removal process, it lacks the procedural safeguards provided during removal hearings. See 8 U.S.C. § 1229a(d). The stipulation must include an admission to the factual allegations of the NTA and concession of removability, designation of country of removal, statement that the alien is not applying for any relief from removal, statement that the alien understands the consequences of the stipulation, and statement that the alien waives appeal. 8 C.F.R. § 1003.25.¹⁶

¹⁶ For more information about the stipulated-removal program, see the National Immigration Law Center’s excellent 2011 report, “Deportation Without Due Process,” available at <http://www.nilc.org/2011sept8dwn.html>. The stipulated-removal process varies from region to region. The Ninth Circuit in *United States v. Ramos* described a typical group stipulated-removal process for Mexican immigrants at the Eloy Detention Center in Eloy, Arizona:

After detainees are selected for participation in the stipulated removal program, deportation officers typically prepare an NTA and a Stipulated Removal form for each individual. Deportation officers then gather detainees selected for the program for a group presentation. There, an immigration enforcement agent explains in Spanish that a detainee

The following process is required in cases where the alien stipulates to removal:

- If the noncitizen is unrepresented, the IJ must determine that her waiver of a hearing is voluntary, knowing, and intelligent;
- The stipulated request must be signed by the noncitizen and her counsel, if any;
- An IJ enters the order of removal to which the noncitizen stipulated

8 C.F.R. § 1003.25. Because the noncitizen does not appear before the IJ, the IJ bases her decision on the paper record before him only. The Ninth Circuit strongly criticized agency stipulated removal practice, so strongly that some prosecutors no longer rely on them in charging illegal reentry. *United States v. Ramos*, 623 F.3d 672, 678 (9th Cir. 2010)

E. Motions to Reopen, Administrative Appeals and Judicial Review of Removal Orders

The importance of—and restrictions on—seeking reconsideration of immigration orders during the pendency of a criminal illegal-reentry case are discussed with some nuance below, in Section V. This section provides a cursory overview of the administrative- and judicial-review process.

In general, a motion to reopen the removal order may be filed if the noncitizen seeks to present new evidence. See *Matter of Cerna*, 20 I. & N. Dec. 399 (BIA 1991). Ordinarily, a noncitizen has 90 days from entry of the order of removal to file a motion to reopen. 8 U.S.C. § 1229a(c)(7)(C); 8 C.F.R. § 1003.23(b)(1). If the noncitizen received an *in absentia* removal order, she may file a motion to rescind the removal order, within 180 days, by

has two options: first, to accept stipulated removal, or second, to appear before an IJ, where the detainee may ask to remain legally in the United States or seek voluntary departure. The agent also advises the group that under the stipulated removal program, a detainee can be removed that very day; whereas it could take anywhere from two to three weeks or longer to appear before an IJ if the detainee chooses not to sign the form. The agent then reads the text of the Stipulated Removal form aloud in Spanish, and concludes the presentation. Next, DHS deportation officers meet individually with each detainee to determine whether he or she wants to sign the Stipulated Removal form. Deportation officers do not review the detainee's A-file at any time before or during the individual meeting. No transcriber, interpreter, or attorney is present during the detainee's individual meeting with the deportation officer.

623 F.3d 672, 678 (9th Cir. 2010) (holding that waiver of counsel and waiver of appeal during stipulated removal process were not considered and intelligent because *pro se* noncitizen did not receive competent translation and government failed to prove adequate advisement of consequences of waiver, but affirming denial of motion to dismiss indictment because defendant was ineligible for any form of relief from removal).

showing that her failure to appear was due to exceptional circumstances. See 8 U.S.C. § 1229a(b)(5)(C); 8 C.F.R. § 1003.23(b)(4)(ii). Several circuit court decisions have reversed refusals to reopen proceedings due to exceptional circumstances. See, e.g., *Kaweesa v. Gonzales*, 450 F.3d 62, 70 (1st Cir. 2006) (requiring the BIA to reopen proceedings when the petitioner innocently mistook the date of her hearing); *Lo v. Ashcroft*, 341 F.3d 934, 939 (9th Cir. 2003) (requiring reopening because of counsel’s ineffective assistance); *Barseghian v. INS*, 14 F. App’x 806, 807-09 (9th Cir. Jul. 2, 2001) (requiring reopening due to petitioner’s innocent misunderstanding of hearing date); *Romero-Morales v. INS*, 25 F.3d 125, 131 (2d Cir. 1994) (vacating denial of motion to reopen due to IJ’s failure to examine the particulars of the case).

It should not be too lightly assumed that the exceptional circumstances standard applies. Courts distinguish between noncitizens who entirely fail to attend their hearings and individuals who merely arrive late, particularly where the immigration judge is still on the bench. See *Alarcon-Chavez v. Gonzales*, 403 F.3d 343 (5th Cir. 2005); *Cabrera-Perez v. Gonzales*, 456 F.3d 109, 115 (3d Cir. 2006); *Jerezano v. INS.*, 169 F.3d 613, 615 (9th Cir. 1999); *Nazarova v. INS*, 171 F.3d 478, 485 (7th Cir. 1999) (requiring reopening when the petitioner’s late arrival was caused by her translator). Courts reason that someone arriving late did not “fail to attend,” the hearing, so that there is no need to meet the “exceptional circumstances” standard that would otherwise be applicable to these motions Cf. 8 U.S.C. § 1229a(b)(5)(C)(i).

Alternately, there is no deadline for a motion to rescind alleging that the noncitizen was ordered removed *in absentia* but did not receive notice of the hearing. 8 U.S.C. § 1229a(b)(5)(C), (c)(7)(C); 8 C.F.R. § 1003.23(b)(1), (4)(ii). (Note, however, that the noncitizen has a duty to provide an address to the immigration courts, 8 U.S.C. § 1229(a)(1)(F), and a duty to correct any errors and record any changes. 8 C.F.R. § 1003.15(d)(1).).

There is no filing deadline for a motion filed jointly with DHS. 8 C.F.R. 1003.23(b)(4)(iv). Further, IJs and the Board have authority to sua sponte reopen removal proceedings at any time. 8 C.F.R. §§ 1003.2(a), 1003.23(b)(1). Note, however, that the Board finds itself unable to grant sua sponte reopening after the noncitizen has been physically removed. See *Matter of Armendarez-Mendez*, 24 I. & N. Dec. 646 (BIA 2008); *Zhang v. Holder*, 617 F.3d 650, 652 (2d Cir. 2010) (upholding Board rule).

A noncitizen also may file a motion to reconsider the IJ’s decision. Unlike a motion to reopen, which focuses on new *facts*, a motion to reconsider argues that the agency misapprehended the record or committed errors of law. See *Matter of Ramos*, 23 I. & N. Dec. 336, 338 (BIA 2002) It must be filed within 30 days of the IJ’s decision. 8 U.S.C. § 1229a(c)(6).

A noncitizen may appeal an IJ's removal order and decision denying relief to the BIA. The noncitizen must file a notice of appeal of a removal order within 30 days of the IJ's decision in his or her case. A noncitizen also may appeal an IJ's denial of a motion to reopen or reconsider to the BIA within 30 days of the IJ's decision in her case. 8 C.F.R. § 1003.38(b).

If the BIA denies the noncitizen's appeal, he or she may file a motion to reconsider the BIA's affirmance of the IJ order. 8 C.F.R. § 1003.2(b). A motion to reconsider must be filed within 30 days of the BIA's decision. *Id.*

A petition for review of a final removal order affirmed by the BIA or of the BIA's denial of a motion to reopen or reconsider must be filed in the federal court of appeals within 30 days of the decision date. 8 U.S.C. § 1252(b)(1).

In expedited-removal proceedings, the noncitizen is not entitled to an appeal of the expedited-removal order to the BIA. 8 C.F.R. § 1235.3(b)(2)(ii). Similarly, FAROs cannot be appealed to the BIA; instead, the noncitizen may file a petition for review to the court of appeals within 30 days of the order. *See* 8 U.S.C. §§ 1228(b)(3); 1252.

F. Obtaining Immigration Documents and Files

It is critical in an illegal-reentry case to obtain as much information as possible about your client's immigration history. Defenders should try to obtain the following:

- A-file: Much of the defendant's history is contained in an Alien File, also known as an A-file, the file created by ICE that contains historical data and documentation pertaining to an individual noncitizen. The A-file is identified by the Alien Registration Number, also known as the **A-Number**, which is an eight- or nine-digit number assigned to each noncitizen by ICE at the time the A-file is created.

Tip: Documents to Look for in the A-file

Defenders should obtain a complete set of removal documents, including the Form I-862 Notice to Appear (the immigration charging document), the removal order or summary thereof (note that the official removal order is generally entered orally, the document is technically a summary of the order entered), and the Warrant of Removal (which verifies that the noncitizen was physically removed). It is also important to obtain from the A-File any documents relating to any immigration status your client used to have – including applications for visas, lawful permanent resident status, or naturalization – that may bear on

whether the prior removal was proper.¹⁷

- Immigration Court file, tapes, and transcripts: Other information that may be essential to a collateral challenge are the immigration court file and any tapes or transcripts of removal hearings (maintained by the Department of Justice's Executive Office for Immigration Review ("EOIR"), which includes the immigration court as well as the Board of Immigration Appeals). Note that a transcript is not produced unless there is an appeal to the Board of Immigration Appeals. A copy of the tape or digital audio recording (DAR) can be obtained by making a request to the Immigration Court where the case was heard.
- CBP files: CBP files will include any prior expedited-removal orders, which often are not included in the noncitizen's A-File.

Defenders may use the following tools to obtain the above information:

- Ask the AUSA to order the A-file from ICE and send it to you as part of discovery / Rule 16 disclosures. The defender should request *all* documents in her client's A-file or, in districts where the practice is to view the A-file at the U.S. Attorney's Office, request to see the actual physical A-file (as opposed to copies of select pages within the file) and then order select pages through discovery.
- A defense attorney may want to submit a FOIA request to ICE, CBP, USCIS, EOIR, or other agencies when she is appointed or retained, in the event that discovery is incomplete, or where the files of a relative may be relevant to the case. Although FOIA requests may take up to a year, they can be expedited if the defendant is currently in removal proceedings. For a client simultaneously in removal and criminal proceedings, defenders can file a so-called "Track Three FOIA," to which DHS typically responds more quickly. See Appendix, Sample Track Three FOIA, *infra* at A12. Benefits application records from USCIS may be omitted from the A file due to multiple A numbers or for other reasons. If they are relevant to the case (for instance, when there is a claim that the noncitizen had legal status or that removal was stayed pending adjudication of an application), a separate records request may be needed. The State Department's National Visa Center may have records of issuance of a visa, a grant of a waiver, or other documents; but those records may have to be

¹⁷ Defenders also should obtain all prior criminal records to explore whether their client was properly charged with removability and/or whether they could have sought prior relief from removal, as discussed more fully below.

requested through discovery, since they are generally held to be immune from FOIA requests.

- Finally, some documents may be available online or telephonically. For instance, the defender can obtain basic information about any prior removal hearings and BIA appeals by calling the general EOIR automated information phone system (see inset below). EOIR is updating its data systems and claims that its new portal will allow greater access to actual documents online. At time of printing, the portal was present in some jurisdictions but not all.

USCIS also has an online status check system. However, this system will not contain information regarding certain sensitive applications, like asylum, U visas, T Visas, and SIJS petitions.

Tip: Immigration Court Hotline and Individual Court Contact Information

So long as the defender has her client's A-number, she can obtain **basic information about pending or prior court proceedings** by calling the toll-free automated EOIR hotline at 1-800-898-7180 or visiting <https://portal.eoir.justice.gov/InfoSystem>. Defenders should note that this information only refers to the noncitizen's most recent removal case. In addition, people granted protection under CAT will appear to have an order of removal on the hotline system, as entry of a removal order is required to grant CAT protection. **A copy of the immigration court record as well as recordings of any prior hearings** may be requested from the immigration court that entered the removal order. Contact information for different immigration courts is available at <http://www.justice.gov/eoir/sibpages/ICadr.htm>.

III. CHALLENGES TO PRIOR REMOVAL ORDERS

A. Overview of § 1326(d)

Section 1326(a) provides that a prior removal order (called a “deportation” or “exclusion” order before 1996) is a condition precedent to illegal reentry. But the government can rely on a prior removal order as an element of the offense only if the proceedings giving rise to the removal order comported with principles of due process. *See, e.g., United States v. Roque-Espinoza*, 338 F.3d 724, 727 (7th Cir. 2003). A presumption of regularity attaches to the final order of removal. *See United States v. Arevalo-Tavares*, 210 F.3d 1198, 1200 (10th Cir. 2000) (per curiam). But the Supreme Court has held that a defendant may collaterally attack the prior removal order upon which the illegal reentry is based by establishing that the defendant was denied due process in the underlying removal proceedings. *See United States v. Mendoza-Lopez*, 481 U.S. 828, 837 (1987) (ruling that “where a determination made

in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be some meaningful review of the administrative proceeding”).

The defendants in *Mendoza-Lopez* were deported after a mass deportation hearing during which they purportedly waived their rights to apply for a form of immigration relief known as suspension of deportation and to appeal the denial of that relief. 481 U.S. at 840. After returning to the United States, the defendants were arrested and charged with violating § 1326. *Id.* at 831. The Court found that the IJ failed to adequately explain the defendants’ right to suspension of deportation or their right to appeal. *Id.* at 840. The Court held that because the IJ “permitted waivers of the right to appeal that were not the result of considered judgments by [defendants], and failed to advise [defendants] properly of their eligibility to apply for suspension of deportation . . . the violation of [defendants’] rights . . . amounted to a complete deprivation of judicial review.” *Id.* at 841. The Court held that the government could not rely on the prior deportation order as proof of the prior-removal-order element under § 1326 without permitting some review: “where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be some meaningful review of the administrative proceeding.” *Id.* at 837-38. Because the IJ waiver precluded review of the fundamentally unfair deportation proceedings, *id.* at 840, the Court required that the indictments be dismissed. *Id.* at 843.

In response to *Mendoza-Lopez*, Congress amended 8 U.S.C. § 1326 to provide a limited opportunity to challenge a prior deportation in an illegal reentry prosecution. The statute is in some ways narrower than what *Mendoza-Lopez* provided. See *United States v. Sosa*, 387 F.3d 131, 136 (2d Cir. 2004).

As amended, § 1326(d) sets forth **three requirements for challenging a prior removal order**:

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) of this section or subsection (b) of this section unless the alien demonstrates that-

- (1) the alien **exhausted any administrative remedies** that may have been available to seek relief against the order;
- (2) the deportation proceedings at which the order was issued improperly **deprived the alien of the opportunity for judicial review**; and
- (3) the entry of the **order was fundamentally unfair**.

8 U.S.C. § 1326(d).

A collateral challenge may be effectuated by filing a motion to dismiss the indictment pre-trial. The defendant bears the burden of proving the three requirements set forth in § 1326(d) to sustain the challenge. *See, e.g., United States v. Martinez-Amaya*, 67 F.3d 678, 681 (8th Cir. 1995). Even when the government is unable to produce the tape or transcript of a removal hearing, the presumption of regularity attaches, so the burden remains on the defendant and does not shift back to the government to show that defendant was not deprived of a fundamental right during the proceeding. *See United States v. Arevalo-Tavares*, 210 F.3d 1198, 1200 (10th Cir. 2000) (per curiam).

A defendant must satisfy all three prongs to prevail in a challenge to the removal order. *See United States v. Torres*, 383 F.3d 92, 98-99 (3d Cir. 2004); *United States v. Wilson*, 316 F.3d 506, 509 (4th Cir. 2003), *abrogated on other grounds by Lopez v. Gonzales*, 549 U.S. 47 (2006); *United States v. Zelaya*, 293 F.3d 1294, 1297 (11th Cir. 2002); *United States v. Fernandez-Antonia*, 278 F.3d 150, 157 (2d Cir. 2002). However, some prongs may be presumed or excused; for instance, an invalid appeal waiver may excuse a failure to exhaust administrative remedies by appealing. *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1045 (9th Cir. 2012); *United States v. Sosa*, 387 F.3d 131, 136-38 (2d Cir. 2004); *United States v. Lopez-Collazo*, 824 F.3d 453, 459 (4th Cir. 2016).

If a defendant succeeds in meeting the requirements of § 1326(d), the indictment against him must be dismissed. *See Wong v. Ashcroft*, 369 F. Supp. 2d 483, 487 (S.D.N.Y. 2005) (stating that “Section 1326(d)...contemplates a motion to dismiss the indictment, and most § 1326(d) cases involve a motion to dismiss the indictment while the criminal case is pending or on appeal from the grant or denial of such a motion”) (citing cases).

B. Exhaustion of Administrative Remedies

Some courts find that a defendant may meet the exhaustion requirement of § 1326(d) by showing that he filed a motion to reopen, appealed the removal order to the Board of Immigration Appeals (“BIA”), and/or pursued all other administrative remedies available to him. *See, e.g., United States v. Arita-Campos*, 607 F.3d 487, 491-92 (7th Cir. 2010); *see also United States v. Perez*, 330 F.3d 97, 100-01 (2d Cir. 2003) (holding that an appeal of a motion to reopen removal proceedings satisfies the exhaustion requirement for due-process claims even when no appeal of the removal order was taken); *but see United States v. Cordova-Soto*, 804 F.3d 714, 724 (5th Cir. 2015) (holding that late-filed motion to reopen was insufficient to exhaust remedies). In general, failure to seek administrative remedies will result in a failure of the collateral challenge. *See United States v. Hinojosa-Perez*, 206 F.3d 832, 836 (9th Cir. 2000); *but see United States v. Arias-Ordonez*, 597 F.3d 972 (9th Cir. 2010).

Tip: Waiver of Right to Appeal Must Comport with Due Process

Waiver of the right to an administrative appeal must comport with due process. See *United States v. Sosa*, 387 F.3d 131, 136 (2d Cir. 2004) (reasoning that because the Court in *Mendoza-Lopez* held that collateral review was constitutionally required even though defendants in that case had not exhausted administrative remedies, and because § 1326(d) was meant to codify the principle announced in *Mendoza-Lopez*, failure to exhaust will bar a challenge to the removal order “only where an alien’s waiver of administrative review was knowing and intelligent); *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1049-50 (9th Cir. 2004) (holding that a noncitizen who is not advised of his right to appeal cannot make a considered and intelligent waiver and thus is not subject to the exhaustion requirement under § 1326(d)); *United States v. Muro-Inclan*, 249 F.3d 1180, 1183 (9th Cir. 2001).

Ineffective assistance of counsel may be grounds for excusing the exhaustion requirement. See *United States v. Cerna*, 603 F.3d 32, 42 (2d Cir. 2010); see also *United States v. Boliero*, 923 F. Supp. 2d 319, 328-29 (D. Mass. 2013) (excusing failure to exhaust where defendant never received notice of the removal order for purposes of filing a direct appeal and received ineffective assistance of counsel in filing a motion to reopen).

At least in some circuits, an **IJ’s failure to accurately advise** the noncitizen of his eligibility for discretionary relief may excuse a waiver of appeal. See *United States v. Copeland*, 376 F.3d 61, 70 (2d Cir. 2004); *United States v. Leon-Paz*, 340 F.3d 1003, 1005 (9th Cir. 2003) (holding that IJ’s erroneous determination that noncitizen’s offense was an aggravated felony barred him from seeking relief from removal and invalidated his waiver of appeal).

An **IJ’s failure to advise** the noncitizen of his right to appeal is also grounds for excusing the exhaustion requirement. *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1045 (9th Cir. 2012); *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1048-50 (9th Cir. 2004).

Tip: Swift Removal Before Window to Appeal Closes

A noncitizen’s rapid removal after entry of removal order may prevent his or her pursuit of administrative remedies, giving rise to due-process concerns and excusing his or her failure to exhaust administrative remedies. See *Chacon-Corral v. Weber*, 259 F. Supp. 2d 1151, 1163 (D. Colo. 2003) (noting due-process concerns where the noncitizen “was deported fewer than 48 hours after the order was issued in violation of his right to a 72-hour delay, ostensibly to allow him a final opportunity to seek the advice of counsel and pursue administrative remedies”); *U.S. v. Arias-Ordonez*, 597 F.3d 972, 977 (9th Cir. 2010) (rapid removal combined with misinformation deprived noncitizen of right to appeal); but see *United States v. Hinojosa-Perez*, 206 F.3d 832 (9th Cir. 2000) (finding 8 days sufficient time to seek administrative remedies).

C. Deprivation of Opportunity for Judicial Review

Section 1326(d)(2) requires a defendant to show that he or she was deprived of the opportunity to seek judicial review of the removal order. See *United States v. Santiago-Ochoa*, 447 F.3d 1015, 1019 (7th Cir. 2006) (citing *Roque-Espinoza*, 338 F.3d at 729). The type of judicial review available to a noncitizen depends on when the underlying removal order was issued. Before 2005, noncitizens could seek habeas-corpus review of removal orders. See, e.g., *Ruiz-Martinez v. Mukasey*, 516 F.3d 102, 116 (2d Cir. 2008) (citing *Kolkevich v. Att’y Gen.*, 501 F.3d 323, 334 (3d Cir. 2007)); see also *INS v. St. Cyr*, 533 U.S. 289 (2001). With the passage of the REAL ID Act in 2005, Congress eliminated habeas review and provided that “a petition for review filed with the appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter.” 8 U.S.C. § 1252(a)(5). A petition for review (“PFR”) must be filed within thirty days of the final order of removal. 8 U.S.C. § 1252(b)(1).

Defenders should argue that § 1326(d)(2) requires proof only of a “realistic availability” of opportunity for judicial review. Then-Judge Sotomayor wrote for the Second Circuit that the opportunity for judicial review must be “realistically available.” *United States v. Lopez*, 445 F.3d 90, 96 (2d Cir. 2006) (quoting *United States v. Copeland*, 376 F.3d 61, 68 (2d Cir. 2004); accord *United States v. Proa-Tovar*, 975 F.2d 592, 594 (9th Cir. 1992) (en banc), *superseded on other grounds by* 975 F.2d 592 (9th Cir. 1992) (en banc) (citing cases). For example, when “defects in the administrative proceeding otherwise foreclosed judicial review,” such review may not be realistically available. *Id.*

An IJ and/or BIA’s affirmative misstatement that a noncitizen is not eligible for any relief from removal may “function[] as a deterrent to seeking relief” such that the noncitizen “was denied a realistic opportunity for judicial review within the meaning of § 1326(d)(2).” *United States v. Lopez*, 445 F.3d 90, 99-100 (2d Cir. 2006). An IJ’s failure to advise on apparent avenues of relief from removal also may be found to deprive noncitizens of a meaningful opportunity for judicial review. See *United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000) (ruling that a noncitizen who was not made aware that he has a right to seek relief from removal has no meaningful opportunity to appeal the fact that he was not advised of that right, and thus was denied due process and a meaningful opportunity for judicial review) (citing *United States v. Arce-Hernandez*, 163 F.3d 559, 563 (9th Cir. 1998)); *United States v. Pallares-Galan*, 359 F.3d 1088, 1098 (9th Cir. 2004); *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1050 (9th Cir. 2004); *United States v. Andrade-Partida*, 110 F. Supp. 2d 1260, 1271 (N.D. Cal. 2000) (finding that the IJ’s failure to advise of § 212(c) relief deprived the noncitizen of judicial review). Similarly, when an IJ informs a noncitizen that he is eligible for relief but that the IJ would deny that relief if the noncitizen applied for it, courts have held that the noncitizen was not afforded a “genuine opportunity to apply” for that relief. See *United States v. Melendez-Castro*, 671 F.3d 950, 954 (9th Cir. 2012).

Finally, as with the administrative-exhaustion prong, the opportunity to seek judicial review will be deemed excused when a noncitizen was removed swiftly after the removal order was entered. The availability of judicial review “will still be deemed to have been denied where the interval between entry of the final deportation order and the physical deportation is too brief to afford a realistic possibility of filing” a petition before the federal courts. *United States v. Copeland*, 376 F.3d 61, 68 (2d Cir. 2004) (finding that defendant did not have a realistic possibility of seeking judicial review where defendant was uncounseled and had little practical chance of finding a lawyer or of learning about a complex form of relief from removal and filing a habeas petition pro se “[i]n the less than one month period after entry of his final deportation order and his deportation”).

D. Fundamental Unfairness

The third requirement for challenges under § 1326(d)—that entry of the removal order was fundamentally unfair—is often the most important, and it may inform the other two requirements. An underlying removal order is ‘fundamentally unfair’ if (1) a due process violation occurred in the underlying deportation proceeding and (2) the defendant suffered prejudice as a result of the procedural error. See *United States v. Garcia-Martinez*, 228 F.3d 956, 960 (9th Cir. 2000).

1. Due Process

Noncitizens are entitled to due process in their removal proceedings. See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). Thus, the fundamental-unfairness inquiry must assess the procedures used to remove an immigrant. See *United States v. Hernandez-Rodriguez*, 170 F. Supp. 2d 700, 703-04 (N.D. Tex. 2001) (citing *United States v. Lopez-Vasquez*, 227 F.3d 476, 484 (5th Cir. 2000)).

As explained in Section II(C), *supra* at 27-28, the statute and regulations set forth a number of substantive and procedural requirements of the removal process, violations of which may cause a failure of due process.

The following is a non-exhaustive list of some common types of due-process errors that occur when *in absentia* removal orders are entered, during removal proceedings before an IJ, and during non-IJ removal proceedings.

Whenever you see that your client received an *in absentia* removal order, be sure to explore the reasons for the failure to attend. Those reasons will inform any arguments the noncitizen may have for why the order was improper or should be rescinded.

- Lack of notice of hearing: Notice of hearing must be served personally if possible, or else by regular mail to the immigrant or immigrant’s attorney. 8 U.S.C. § 1229(a); 8 C.F.R. § 103.5(a)(c). A noncitizen who failed to appear for his hearing because he did not receive notice may file a motion before the immigration court to rescind the order and reopen removal proceedings at any time. 8 C.F.R. § 1003.23(b)(4)(ii); *see also Peralto-Cabrera v. Gonzales*, 501 F.3d 837, 843 (7th Cir. 2007) (stating that “the issue of whether an alien received notice of his deportation hearing implicates notions of due process”) (citation omitted); *Ba v. Holder*, 561 F.3d 604, 606 (6th Cir. 2009) (reversing and remanding denial of motion to reopen and rescind in absentia order based on improper service); *Llanos-Fernandez v. Mukasey*, 535 F.3d 79, 83 (2d Cir. 2008) (per curiam) (same). A defendant who failed to receive proper notice may attack the *in absentia* order in an illegal reentry proceeding. *See United States v. Sanchez-Sanchez*, 1998 WL 425451, at *1 (9th Cir. Jul. 20, 1998) (unpublished). Note, however, that a defendant claiming that a prior *in absentia* order was entered without notice must satisfy the administrative exhaustion requirement under § 1326(d)(2) by filing a motion to rescind the order once he learns of the order. *See United States v. Zelaya*, 293 F.3d 1294, 1297 (11th Cir. 2002); *United States v. Arita-Campos*, 607 F.3d 487, 492 (7th Cir. 2010).

Tip: In Absentia Removal Orders

While an improper *in absentia* removal order might establish a due-process violation for purposes of the § 1326(d)(3) fundamental-unfairness requirement, the noncitizen may also need to try to move to rescind the *in absentia* order to satisfy the § 1326(d)(1) administrative-exhaustion prong. *See infra* Section V. To satisfy the exhaustion requirement, pair up with immigration attorney to determine how and where (and whether) a motion to rescind the *in absentia* order should be filed. NIJC has successfully partnered with federal defenders to defeat illegal-reentry cases based on an improperly issued *in absentia* order. *See* “These Lives Matter: Collaboration and Success in a Joint Federal Defender-Immigration Case,” available at <https://immigrantjustice.org/staff/blog/collaboration-and-success-joint-federal-defender-immigration-case#>.

- Lack of interpretation or translation: Courts have held that the “right of a person facing deportation to participate meaningfully in the deportation proceedings by having them competently translated into a language he or she can understand is fundamental.” *Hartooni v. INS*, 21 F.3d 336, 340 (9th Cir. 1994) (citations omitted); *see also United States v. Leon-Leon*, 35 F.3d 1428, 1431 (9th Cir. 1994) (holding that IJ’s failure to provide translation of crucial inquiries at the deportation hearing deprived noncitizen of the reasonable

opportunity to show why he should not be deported); *Sterkaj v. Gonzales*, 439 F.3d 273, 279 (6th Cir. 2006); *Marincas v. Lewis*, 92 F.3d 195, 204 (3d Cir. 1996); *Nazarova v. INS*, 171 F.3d 478, 484 (7th Cir. 1999); *Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir. 1984). An IJ's question to counsel in English, without translation, regarding noncitizen's desire to appeal may render the noncitizen's waiver of appeal invalid. See *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1049 (9th Cir. 2004) (noting that "[i]t is of no significance to the due process inquiry that Ubaldo-Figueroa's counsel was asked if he wanted to appeal Ubaldo-Figueroa's removal order. The due process inquiry focuses on whether Ubaldo-Figueroa personally made a 'considered and intelligent' waiver of his appeal") (emphasis original) (citations omitted)). Without a proper translation, the waiver may be invalid, and this in turn may excuse a failure to exhaust. *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1045 (9th Cir. 2012); *United States v. Sosa*, 387 F.3d 131, 136-38 (2d Cir. 2004); *United States v. Lopez-Collazo*, 824 F.3d 453, 459 (4th Cir. 2016).

- Denial of right to contact consulate: Detained noncitizens in removal proceedings have a right of consular access, *i.e.*, a right to communicate with their consulate. See 8 C.F.R. § 236.1(e). The Ninth Circuit has held that a violation of this right "is a ground for attacking the validity of the deportation if the violation prejudiced the defendant." *United States v. Hernandez-Rojas*, 617 F.2d 533, 535 (9th Cir. 1980).
- Failure to advise of right to appeal: An IJ's failure to inform the noncitizen of his right to appeal renders the proceeding constitutionally defective. See *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1049 n.8 (9th Cir. 2004); *United States v. Espinoza-Farlo*, 34 F.3d 469, 471 (7th Cir. 1994); see also 8 U.S.C. § 1252(b)(2); 8 C.F.R. § 240.42.

Tip: Failure to Advise and Exemption from Exhaustion Requirement

The Ninth Circuit has held that IJ failure to advise on eligibility for relief and of right to appeal may exempt the defendant from the exhaustion requirement in § 1326(d)(1). See *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1049-50 (9th Cir. 2004).

By the same token, a noncitizen's waiver of appeal may be invalid if the IJ failed to advise of eligibility for relief from removal or if it was based on an IJ's erroneous determination that the noncitizen is ineligible for relief from removal. See, *e.g.*, *United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000) (finding due process violation where *pro se* noncitizen's waiver of right to appeal deportation order was not considered and intelligent because IJ failed to inform him of

- Mass silent waivers: In some cases, IJs may preside over mass removal hearings. During mass hearings, the IJ must explain noncitizens' rights, ensure that each noncitizen understands his rights, and ask each noncitizen individually whether he wants to waive his rights, e.g., to appeal. See, e.g., *United States v. Lopez-Vasquez*, 1 F.3d 751, 755 (9th Cir. 1992) (quoting *Barker v. Wingo*, 407 U.S. 514, 525 (1972)); *Chacon-Corral v. Weber*, 259 F. Supp. 2d 1151 (D. Col. 2003) (suggesting that group hearings generally offend due process). An IJ conducting a group removal hearing must do more than inform and explain substantive and procedural rights to noncitizens as a group; individual inquiry as to whether the noncitizens want to waive their rights is required. See *United States v. Zarate-Martinez*, 133 F.3d 1193, 1197-98 (9th Cir. 1998) (holding that waiver of right to appeal was insufficient where IJ asked noncitizens as a group whether they understood that they had a right to appeal and then asked any noncitizen who wished to “fight its [sic] case” to raise their hand); *United States v. Ahumada-Aguilar*, 295 F.3d 943, 947 (9th Cir. 2002) (waiver of right to counsel during group hearing invalid without individual inquiry) see also *Chacon-Corral v. Weber*, 259 F. Supp. 2d 1151, 1161-63 (D. Colo. 2003); cf. *Richardson v. United States*, 558 F.3d 216, 220-21 (3d Cir. 2009) (distinguishing *Lopez-Vasquez* and finding waiver of right to appeal valid where it was written, individually signed, and expressly acknowledged the required understanding). If you discover that your client's removal hearing was conducted *en masse*, check the hearing tapes or transcripts to determine whether any waivers made were valid. See below, Section XXX to learn how to obtain the tapes or transcripts.
- Denial of right to counsel: Noncitizens do not have a Sixth Amendment right to counsel, but they do have a right to counsel at their own expense under the Fifth Amendment. See, e.g., *Leslie v. Att’y Gen.*, 611 F.3d 171, 180 (3d Cir. 2010); *Brown v. Ashcroft*, 360 F.3d 346, 352 n.5 (2d Cir. 2004); *Baltazar-Alcazar v. INS*, 386 F.3d 940, 944 (9th Cir. 2004). The agency has promulgated regulations to protect this fundamental right. 8 C.F.R. § 1240.10(a) (providing that an IJ must advise noncitizens of their right to counsel and “require the respondent to state then and there whether he or she desires representation”); see *Leslie*, 611 F.3d at 180-82 (holding that the regulation “was manifestly designed to protect an alien's fundamental statutory and constitutional right to counsel at a removal hearing”). A denial of the right to counsel constitutes a regulatory violation that may make a removal proceeding fundamentally unfair. See, *id.* at 181-82 (holding that “[t]he IJ's failure to apprise Leslie of the availability of free legal services, as required under the regulations, renders invalid the subsequently entered removal order, without regard to Leslie's ability to demonstrate substantial prejudice); see also *United States v. Ahumada-Auilar*,

295 F.3d 943, 947-48 (9th Cir. 2002) (stating that silent waiver of counsel during group advisal at mass hearing does not satisfy regulatory requirement that a noncitizen state whether he wants counsel, and thus waiver is not knowing and valid); *see also United States v. Ramos*, 623 F.3d 672, 683-84 (9th Cir. 2010) (holding that waiver of right to counsel not knowing and voluntary but that defendant was not prejudiced by error); *United States v. Campos-Asencio*, 822 F.2d 506, 510 (5th Cir. 1987) (recognizing that deprivation of right to counsel may amount to a denial of due process and remanding to determine if defendant was deprived of right).

Tip: Pro Se Noncitizens and Validity of Waivers

More than half of noncitizens, and as many as 90% of detained noncitizens, appear *pro se* in their removal proceedings. See “Outline of Study of Immigration Removal Adjudication, Draft,” Administrative Conference of the United States, at 1, Apr. 22, 2011, available at <http://www.acus.gov/sites/default/files/documents/Short-Outline-ACUS-Immigration-Adjudication-Project.pdf>. Check to make sure that your client was informed that he had a right to representation at no expense to the government, was provided with a list of free immigration legal service providers in the area, and, if he waived his right to counsel, that such waiver was valid. See 8 C.F.R. § 1240.10(1)-(3).

Tip: Stipulated Orders and Waiver of Rights

The Ninth Circuit has criticized the stipulated-removal process in terms of validity of noncitizens’ waivers of rights. In *United States v. Ramos*, 623 F.3d 672 (9th Cir. 2010), the court found that a noncitizen’s waiver of his right to counsel and to appeal before signing a stipulated order was not made intelligently, knowingly, or voluntarily when the immigration officer advising the noncitizen of his eligibility for relief spoke only minimal Spanish. *Id.* at, 681-82. The court in *Ramos* reasoned that “navigating the labyrinth of our immigration laws” is difficult for *pro se* noncitizens even when their rights are explained to them by IJs, who are intimately familiar with immigration laws, and that advisals by an immigration official lack the procedural safeguards necessary to ensure valid waivers. *Id.*

The Ninth Circuit held that it violated due process for an IJ to fail to make an express finding regarding the waiver of rights in a stipulated removal order. *United States v. Gomez*, 757 F.3d 885, 893 (9th Cir. 2014). But other courts have held that IJs may permissibly make implicit waiver findings. *United States v. Cordova-Soto*, 804 F.3d 714, 722 (5th Cir. 2015).

- Ineffective assistance of counsel: Some courts have held that ineffective assistance of counsel in a removal proceeding violates due process where the proceeding was so fundamentally unfair that the noncitizen was prevented from reasonably presenting his case. See *United States v. Cerna*, 603 F.3d 32, 42 (2d Cir. 2010); *Hernandez v. Reno* 238 F.3d 50, 55 (1st Cir. 2001) (holding that “incompetence in some situations may make the proceeding fundamentally unfair and give rise to a Fifth Amendment due process objection”); *Castaneda-Suarez v. INS*, 993 F.2d 142, 144 (7th Cir. 1993) (holding that “counsel at a deportation hearing may be so ineffective as to have impinged upon the fundamental fairness of the hearing in violation of the fifth amendment due process clause”); *Magallanes-Damian v. INS*, 783 F.2d 931, 933 (9th Cir. 1986). Other circuits find that a noncitizen has no constitutional entitlement to effective assistance, particularly when the removal proceedings involve discretionary relief; but the agency has adopted rules for addressing ineffective assistance, and all circuits enforce the agency’s own ineffective assistance rules as agency rules. See *Matter of Lozada*, 19 I. & N. Dec. 637, 693 (BIA 1988) (agency rules); *Mai v. Gonzales*, 473 F.3d 162, 165 (5th Cir. 2006) (questioning the constitutional basis for an ineffective assistance of counsel claim in removal proceedings); *Obleshchenko v. Ashcroft*, 392 F.3d 970, 971-72 (8th Cir. 2004) (reserving the issue but noting that there are “serious doubts” about whether ineffective assistance of counsel affects Fifth Amendment rights); *Stroe v. INS*, 256 F.3d 498, 503-04 (7th Cir. 2001) (holding that there is no due-process right to effective assistance of counsel in removal proceedings). In most circuits, a *Strickland*-type prejudice analysis applies. See *Cerna*, 603 F.3d at 43 (holding that “[i]n order to establish fundamental unfairness..., [the defendant] must establish ‘1) that competent counsel would have acted otherwise, and 2) that he was prejudiced by his counsel’s performance.’”) (quoting *United States v. Perez*, 330 F.3d 97, 101 (2d Cir. 2003)).
- Not removable as charged: Most circuits appear to apply statutory case law retroactively to assess whether a defendant was erroneously charged with and found to be removable, on the theory that intervening case law defines what the law has always meant. See, e.g., *United States v. Camacho-Lopez*, 450 F.3d 928, 930 (9th Cir. 2006); *United States v. Aguilera-Rios*, 769 F.3d 626, 631 (9th Cir. 2014). But even so, numerous circuits reject these attacks on removal on the basis of waiver or forfeiture. See *United States v. Gil-Lopez*, 825 F.3d 819, 820 (7th Cir. 2016) (refusing to consider argument that offense was not an aggravated felony because defendant signed appeal waiver and did not exhaust remedies); *United States v. Villanueva-Diaz*, 634 F.3d 844, 851–52 (5th Cir. 2011) (although intervening decision made the conviction not a removable offense, the “deportation proceedings were not ‘fundamentally unfair’ ”); *United States v. Rodriguez*, 420 F.3d 831, 834 (8th Cir. 2005) (finding that “[a] subsequent

change in the law does not render [the defendant's] waiver of his right to appeal 'not considered or intelligent' "); *United States v. Rivera-Nevarez*, 418 F.3d 1104, 1105-06 (10th Cir. 2005) (agreeing that later-decided statutory interpretation cases were "fully retroactive," but holding that the defendant still could not show he was deprived of opportunity for judicial review under § 1326(d)(2), so the IJ's legal error concerning removability was harmless).

Tip: Checking Whether a Prior Offense Properly Was Found to be a Criminal Ground of Removal

Case law regarding what offenses constitute aggravated felonies or CIMTs constantly is constantly evolving. It is not uncommon for a noncitizen to be removed for a prior offense, only to have the Supreme Court later hold that the offense does not constitute a removable offense (see, e.g., *Lopez v. Gonzales*, 127 S. Ct. 625 (2006) (clarifying that a state felony simple possession offense is not an aggravated felony for immigration purposes)) or rule that the BIA applied the wrong analysis for determining whether that type of offense is an aggravated felony (see, e.g., *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013)). Consequently, you may encounter noncitizens who were removed on the basis of a criminal offense that may not be a removable offense.

Scrutinize closely whether an alleged prior criminal ground of removal actually was a removable offense. The categorical / modified categorical analysis generally applies to determining whether a prior offense is categorically an aggravated felony. See *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013) (affirming application of categorical approach in removal proceedings).

Examine what record evidence the IJ considered in determining whether a prior offense made your client removable in his removal hearing and assess whether the IJ properly applied the categorical approach. Always check the Notice to Appear (Form I-862) in the A-File to determine the grounds of the immigrant's alleged removability and, in the case of a criminal ground, check to see if the alleged prior offense in fact is a removable one (i.e., an aggravated felony, crime involving moral turpitude ("CIMT"), or other removable offense). Check the relevant provision of the INA and research federal and Board of Immigration Appeals case law at the time of the removal proceeding (not at the time the prior offense was committed) to determine whether the prior conviction was defined an aggravated felony or CIMT, or whether the definition was being challenged in courts of appeal at time of removal proceeding.

IJ errors appear to have been especially common in the mid- to late-1990s. Congress overhauled the Immigration and Nationality Act (INA) with the

enactments of AEDPA and IIRIRA in 1996, resulting in major change in immigration laws between April 24, 1996, and April 1, 1997. During the months and years that followed, procedural errors and misinterpretations of the law were rife. If your client's removal order was issued during this period of time, there is a good chance that an error occurred at the hearing, and if you can show prejudice, too, you may be able to challenge the underlying removal order.

Note that if your client had counsel during his or her removal proceedings and the issue of removability was making its way to the Supreme Court at the time of his removal, an ineffective assistance of counsel claim may be made out for a failure to appeal the issue. *United States v. Lopez-Chavez*, 757 F.3d 1033, 1043 (9th Cir. 2014).

If the noncitizen waived his or her right to appeal at the time of the removal order, check to make sure that the waiver comported with due process. See "Tip - Waiver of Right to Appeal Must Comport with Due Process," Section III.B, *supra* at 40-41.

- Failure to advise of eligibility for relief: IJ failure to inform the immigrant of eligibility for relief from removal and failure to allow the immigrant to apply for such relief has been found to constitute a due process violation in the Second and Ninth Circuits. See *United States v. Calderon*, 391 F.3d 370 (2d Cir. 2004) (holding that failure to advise an eligible noncitizen of the possibility of former INA § 212(c) relief invalidated waiver of appeal even though BIA believed such relief was barred statutorily and the Supreme Court had not yet issued decision on the issue); *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1049-50 (9th Cir. 2004) (same); *United States v. Pallares-Galan*, 359 F.3d 1088, 1096-98 (9th Cir. 2004) (ruling that noncitizen's waiver of appeal was not considered and intelligent when IJ failed to inform noncitizen of eligibility for relief from removal because IJ mistakenly believed noncitizen had been convicted of an aggravated felony); *United States v. Raya-Vaca*, 771 F.3d 1195, 1205 (9th Cir. 2014) (failure to advise of possibility of withdrawing application for admission, entering expedited removal order instead).

Other circuits disagree, reasoning that is no liberty interest in discretionary relief. See *United States v. Soto-Mateo*, 799 F.3d 117, 123 (1st Cir. 2015) *United States v. Santiago-Ochoa*, 447 F.3d 1015, 1020 (7th Cir. 2006); *Bonhometre v. Gonzales*, 414 F.3d 442, 448 n.9 (3d Cir. 2005); *United States v. Aguirre-Tello*, 353 F.3d 1199, 1205 (10th Cir. 2004) (en banc); *United States v. Lopez-Ortiz*, 313 F.3d 225, 231 (5th Cir. 2002). But finding that there is no obligation to advise of relief does not necessarily mean that no due-process violation occurred; for instance, a violation of procedural protections may be a due-process violation

even where it implicated discretionary relief. See *United States v. Charleswell*, 456 F.3d 347, 360 (3d Cir. 2006).

Note: Circuit Split on Denial of Opportunity to Seek Discretionary Relief

A defendant making a due-process challenge to a prior removal order must assert a liberty interest to maintain the due process claim. The Supreme Court has held that asserting a protected interest in a process itself, in the absence of any substantive interest, is not a cognizable due-process claim. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 280, n.2 (1998); *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983).

Several circuit courts have interpreted this principle to mean that a noncitizen's right to due process does not extend to proceedings that provide only discretionary relief. See, e.g., *Delgado v. Holder*, 674 F.3d 759, 765 (7th Cir. 2012); *Alvarez-Acosta v. United States Att'y Gen.*, 524 F.3d 1191, 1197 (11th Cir. 2008); *Rivera v. Mukasey*, 508 F.3d 1271, 1276 n.4 (9th Cir. 2007); *Naeem v. Gonzales*, 469 F.3d 33, 38-39 (1st Cir. 2007); *Garcia-Mateo v. Keisler*, 503 F.3d 698, 700 (8th Cir. 2007); *Patel v. Gonzales*, 470 F.3d 216, 220 (6th Cir. 2006) (holding that "the failure to be granted discretionary relief...does not amount to a deprivation of liberty interest"); *Altamirano-Lopez v. Gonzales*, 435 F.3d 547, 550-51 (5th Cir. 2006) (per curiam); *United States v. Torres*, 383 F.3d 92, 104-05 (3d Cir. 2004) (ruling that noncitizens do not have a due process interest in being considered for discretionary relief); *Assaad v. Ashcroft*, 378 F.3d 471, 475-76 (5th Cir. 2004) (per curiam); *Tovar-Landin v. Ashcroft*, 361 F.3d 1164, 1167 (9th Cir. 2004) ("[A]liens have no fundamental right to discretionary relief from removal for purposes of due process and equal protection.... Because there is no constitutionally protected liberty interest in the discretionary privilege of voluntary departure, the due process claim fails."); *Smith v. Ashcroft*, 295 F.3d 425, 430 (4th Cir. 2002); *Aguilera v. Kirkpatrick*, 241 F.3d 1286, 1293 (10th Cir. 2001).

Other circuits disagree. The Second and Ninth Circuits have squarely held that procedural defects that prevent an immigrant from having an opportunity to seek discretionary relief can be fundamentally unfair within the meaning of Section 1326(d)(3). See *United States v. Copeland*, 376 F.3d 61, 71 (2d Cir. 2004); *United States v. Perez*, 330 F.3d 97, 104 (2d Cir. 2003); *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1050-51 (9th Cir. 2004). The court in *Copeland* stated that, "[a]n error in a ruling by a lower tribunal is generally not deemed fundamental when a remedy was available on appeal but no appeal was taken. However, a ruling by an IJ that misleads an immigrant into believing that no relief exists falls into a different category because of the special duties of an IJ to

aliens.” *Copeland*, 376 F.3d at 71 (citations omitted). The court reasoned that there is a “distinction between a right to seek relief and the right to that relief itself, although often the concepts overlap as a practical matter.... The issue, therefore, is not whether [a form of] relief is constitutionally mandated, but whether a denial of an established right to be informed of the possibility of such relief can, if prejudicial, be a fundamental procedural error. We believe that it can.” *Id.* at 72. Some Sixth Circuit case law has also suggested that when an immigrant has been denied a full and fair hearing on his application for discretionary relief, the defendant may make out a due process violation. See *Abdillahi v. Holder*, 690 F.3d 467, 472-73 (6th Cir. 2012).

- Affirmative misleading by immigration officials: “Collateral review is not limited to procedural irregularities. For example, ‘there is a violation of due process when the government affirmatively misleads an alien as to the relief available to him.’” See *United States v. Guzman-Garfias*, 2010 WL 5093938, at *4 (D. Ariz. Dec. 8, 2010) (holding that providing “confusing” and “affirmatively misleading” forms to immigrants charged with document fraud deprived recipients of their due process rights) (quoting *Walters v. Reno*, 145 F.3d 1032, 1043 (9th Cir. 1998)).

Liberty Interests and Common Forms of Discretionary Relief

- Motion to reopen immigration proceedings: 8 U.S.C. § 1229a(c)(7)(C); see *Hot v. Att’y Gen.*, 373 F. App’x 193, 196 (3d Cir. Apr. 12, 2010) (per curiam) (holding that petitioners “do not have a cognizable due process claim because there is no liberty interest at stake in a motion to reopen immigration proceedings, a discretionary form of relief) (citing *Altamirano-Lopez v. Gonzales*, 435 F.3d 547, 550-51 (5th Cir. 2006) (per curiam));
- Adjustment of status: 8 U.S.C. § 1255; see *Jamieson v. Gonzales*, 424 F.3d 765, 768 (8th Cir. 2005) (“[a]ssuming, without deciding, that [petitioner] has a general right to effective counsel at a deportation hearing, [he] still does not have a right in this specific case. Because [he] is seeking the discretionary relief of adjustment of status, there is no constitutionally-protected liberty interest at stake”);
- Voluntary departure: 8 U.S.C. § 1229c; see *Shtyllaku v. Gonzales*, 252 F. App’x 16 (6th Cir. Oct. 18, 2007) (“Because there is no constitutionally protected liberty interest in the discretionary privilege of voluntary departure, the due process claim fails.”) (quoting *Tovar-Landin v. Ashcroft*, 361 F.3d 1164, 1167 (9th Cir. 2004)); see also *Jupiter v. Ashcroft*, 396 F.3d 487, 492 (1st Cir. 2005) (finding no property interest for due process purposes in view of discretionary nature of voluntary departure); *Huicochea-Gomez v. INS*, 237 F.3d 696, 700 (6th Cir. 2001) (finding no liberty interest

- in failure to grant discretionary relief like voluntary departure);
- Asylum: 8 U.S.C. § 1158 *see Qiang Wang v. Att’y Gen.*, 395 F. App’x 670, 672-73 (11th Cir. Sep. 15, 2010) (per curiam) (holding that asylum is a form of discretionary relief and that a failure to received discretionary relief does not amount to a deprivation of a liberty interest, but stating that the Fifth Amendment entitles aliens to due process of law in deportation proceedings and that “Congress and the executive have created, at a minimum, a constitutionally protected right to petition our government for asylum”) (internal quotations and citations omitted); *Gojcaj v. Gonzales*, 175 F. App’x 720, 726 (6th Cir. Apr. 14, 2006) (per curiam) (holding no deprivation of liberty interest for failure to grant discretionary relief of full hearing on petitioner’s own asylum application, where petitioner was accorded full due process as a derivative beneficiary under her mother’s asylum application).
 - Cancellation of removal: 8 U.S.C. § 1229b; *see Lagunas-Salgado v. Holder*, 584 F.3d 707, 712-13 (7th Cir. 2009) (holding that petitioner did not have requisite liberty interest to succeed on due process claims “because the relief [he] sought – cancellation of removal and a waiver of inadmissibility – was purely discretionary”); *Etchu-Njang v. Gonzales*, 403 F.3d 577, 585 (8th Cir. 2005) (same);
 - Suspension of deportation (eliminated by IIRIRA): *See Neri v. Gonzales*, 229 F. App’x 508, 508 (9th Cir. Apr. 24, 2007) (holding that because petitioner “has no substantive due process right to discretionary relief from removal or deportation,” defendant’s contention that IIRIRA’s elimination of suspension of deportation relief violated his constitutional rights fails);
 - Former Section 212(c) relief: *See United States v. Perez*, 330 F.3d 97, 102, 104 (2d Cir. 2003) (noting discretionary nature of § 212(c) relief and holding that petitioner “had shown that he had been deprived of effective assistance of counsel (*i.e.*, that a fundamental procedural error had occurred) and that prejudice had resulted because he was eligible for § 212(c) relief and could have made a strong showing in support of such relief. Accordingly, he has satisfied the ‘fundamental unfairness’ requirement”); *Smith v. Ashcroft*, 295 F.3d 425, 429 (4th Cir. 2002) (holding that petitioner could not advance a due process claim “because he has no property or liberty interest in the ‘right’ to discretionary section 212(c) relief”);
 - Continuance of removal proceedings . 8 C.F.R. § 1003.29; *see Alvarez-Acosta v. Att’y Gen.*, 524 F.3d 1191, 1197 (11th Cir. 2008) (rejecting argument that noncitizen was deprived of due process when he was denied a continuance of removal proceedings so that he could pursue adjustment of status, because both forms of relief are discretionary and “as such, he was deprived of no liberty interest...and he presents no substantial constitutional claim”) (internal citations omitted).

2. Prejudice

Although *Mendoza-Lopez* did not expressly require a prejudice showing to attack a prior removal order on due process grounds, a number of courts have interpreted the decision as “anticipat[ing]” a prejudice step “for determining whether a defendant can successfully prevent his deportation from being used as a basis for a section 1326 conviction.” See *United States v. Espinoza-Farlo*, 34 F.3d 469, 471 (7th Cir. 1994) (citing cases); see also *United States v. Proa-Tovar*, 975 F.2d 592, 595 (9th Cir. 1992) (en banc) (citing cases).

- “Reasonable likelihood” standard in the 1st, 2d, 3d, 4th, 5th, 8th, and 10th Circuits: The majority of circuits apply a “reasonable likelihood” standard to the prejudice requirement. See *United States v. Aguirre-Tello*, 353 F.3d 1199, 1208 (10th Cir. 2004) (agreeing with a majority of the circuits that “the standard to apply in a case like [defendant’s] is whether there is a reasonable likelihood that [defendant] would have obtained relief from deportation” but for the due-process errors complained of); *United States v. Copeland*, 376 F.3d 61, 73 (2d Cir. 2004); *United States v. Benitez-Villafuerte*, 186 F.3d 651, 658–59 (5th Cir. 1999); *United States v. Wilson*, 316 F.3d 506, 511 (4th Cir. 2003), *abrogated on other grounds by Lopez v. Gonzales*, 549 U.S. 47 (2006); *United States v. Loaisiga*, 104 F.3d 484, 487 (1st Cir. 1997); *United States v. Perez-Ponce*, 62 F.3d 1120, 1122 (8th Cir. 1995); *United States v. Fellows*, 50 F. App’x 82, 85 (3d Cir. 2002).
- “Plausible ground” standard in the 9th Circuit: To satisfy a showing of prejudice in the Ninth Circuit, an “alien does not have to show that he actually would have been granted relief. Instead, he must only show that he had a ‘plausible’ ground for relief from deportation.” See *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1050 (9th Cir. 2004) (quoting *United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000)); *United States v. Muro-Inclan*, 249 F.3d 1180, 1184 (9th Cir. 2001). Showing plausibility “requires more than establishing a mere ‘possibility.’” *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1089 (9th Cir. 2011); *United States v. Valdez-Novoa*, 780 F.3d 906, 914 (9th Cir. 2015). As to relief eligibility, plausibility requires both statutory eligibility and that an adjudicator might plausibly have adjudicated favorably given positive and negative factors. See *United States v. Valdez-Novoa*, 780 F.3d 906, 916-17 (9th Cir. 2015). Eligibility for relief is assessed as of the removal order, not under current law. See *United States v. Gomez*, 757 F.3d 885, 900 n. 12 (9th Cir. 2014). Note, however, that negative BIA case law does not preclude eligibility for relief where the circuit has not yet spoken. See *United States v. Lopez-Chavez*, 757 F.3d 1033, 1044 (9th Cir. 2014).
- *Per se* prejudice when not removable: In the Ninth Circuit, an individual

necessarily demonstrates prejudice where she had legal status and, under the legal rules in effect at present time, is not removable. See *United States v. Martinez*, 786 F.3d 1227, 1230 (9th Cir. 2015) (“Where [LPR’s] prior removal order is premised [only] on the commission of an aggravated felony, a defendant who shows that the crime of which he was previously convicted was not, in fact, an aggravated felony, has established both that his due process rights were violated and that he suffered prejudice as a result.”) (citing *United States v. Camacho-Lopez*, 450 F.3d 928, 930 (9th Cir. 2006)); but see *United States v. Martinez-Hernandez*, 932 F. 3d 1198 (9th Cir. 2019) (no prejudice where defendant was aggravated felon under a different prong of the aggravated felony definition).

- Prejudice satisfied when a non-aggravated felon was removed under the aggravated-felony removal statute: The Ninth Circuit has similarly held that an individual whose offense does not qualify as an aggravated felony necessarily satisfies the prejudice prong when she was removed under § 1228(b), a removal procedure only applicable for aggravated-felony offenses. See *United States v. Valdivia-Flores*, 876 F.3d 1201, 1206, 1210 (9th Cir. 2017) (no prejudice showing required for undocumented individual improperly removed under the aggravated-felony removal provision).
- Prior improper loss of LPR status: The Ninth Circuit has held that a noncitizen shows prejudice when he is removed for lack of proper entry documents because of a prior improper loss of LPR status. See *United States v. Ochoa-Oregel*, 904 F.3d 682, 685-86 (9th Cir. 2018).

Tip: No Prejudice If Not Eligible for Lawful Immigration Status

Be sure to consult with an immigration lawyer to investigate whether, at the time the underlying removal order was issued, your client was a lawful permanent resident (LPR), eligible to become an LPR, or eligible for some other type of lawful immigration status (including acquired or derivative citizenship). If your client was not eligible for any type of immigration status, it will be extremely difficult to establish that your client was prejudiced by any defect in the removal process. See, e.g., *United States v. Espinoza-Farlo*, 34 F.3d 469, 471-72 (7th Cir. 1994) (holding that mentally retarded *pro se* immigrant who was not properly advised of his right to appeal could not show prejudice because he lacked status at the time of his hearing and was ineligible for any form of relief from removal due to an aggravated felony conviction).

IV. SENTENCING

National Immigrant Justice Center
Illegal Reentry Practice Advisory for Federal Defenders

The statutory maximum for illegal reentry is two years, with the following exceptions:

- If the defendant was removed after three or more misdemeanor convictions involving drugs, crimes against the person, or both, or after a felony conviction (other than an aggravated felony), then the statutory maximum is 10 years;
- If the defendant was removed after a conviction for commission of an aggravated felony, the statutory maximum is 20 years.

See 8 U.S.C. § 1326(b).

The U.S. Sentencing Guidelines Section 2L1.2 includes enhancements for prior convictions, which increase based on the length of sentence. U.S.S.G. §§ 2L1.2(b)(2), (3). The current guidelines read as follows:

(a) Base Offense Level: 8

(b) Specific Offense Characteristics

- (1) (Apply the Greater) If the defendant committed the instant offense after sustaining—
 - (A) a conviction for a felony that is an illegal reentry offense, increase by 4 levels; or
 - (B) two or more convictions for misdemeanors under 8 U.S.C. § 1325(a), increase by 2 levels.
- (2) (Apply the Greatest) If, before the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct that, at any time, resulted in—
 - (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by 10 levels;
 - (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by 8 levels;
 - (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by 6 levels;
 - (D) a conviction for any other felony offense (other than an illegal reentry offense), increase by 4 levels; or
 - (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 2 levels.
- (3) (Apply the Greatest) If, after the defendant was ordered deported or ordered removed from the United States for the first time, the

defendant engaged in criminal conduct that, at any time, resulted in—

- (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by **10** levels;
- (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by **8** levels;
- (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by **6** levels;
- (D) a conviction for any other felony offense (other than an illegal reentry offense), increase by **4** levels; or
- (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by **2** levels.

The government has the burden of proving by a preponderance of the evidence that the defendant’s prior conviction qualifies for the sentencing enhancement. *See United States v. Forrest*, 611 F.3d 908, 913 (8th Cir. 2010). The categorical-approach analysis applies in determining whether a prior offense subjects the defendant to a sentencing enhancement. *See Taylor v. United States*, 495 U.S. 575 (1990); *Shepard v. United States*, 544 U.S. 13 (2004). Defenders should obtain all prior criminal records to make sure that the proper sentencing is applied under the categorical analysis.

In some cases, counsel may be unable to challenge all removal orders, but may be able to attack the removal orders that post-date the felony or aggravated felony. This would not likely affect the sentencing guidelines, which treat criminal activity the same whether it predates or postdates the removal. *Cf. U.S.S.G. §§ 2L1.2(b)(2), (3)*. However, a successful collateral attack on the removal that post-dates the conviction could affect the maximum sentence permissible under the statute. *See United States v. Rojas-Pedroza*, 716 F.3d 1253, 1259-62 (9th Cir. 2013) (“the government cannot prove the § 1326(b) charge if . . . successfully challenges [the only removal that occurred after this date]”).

V. DEFEATING THE ILLEGAL-REENTRY CHARGE BY MOVING TO REOPEN REMOVAL PROCEEDINGS AND RESCIND THE UNDERLYING REMOVAL ORDER IN IMMIGRATION COURT

If you have an illegal-reentry client whose underlying removal order is faulty, you may ask whether it is possible to reopen immigration proceedings to rescind that order. Doing so would not only help your client avoid reinstatement of removal, but would also nullify the basis for his or her criminal charge. Unfortunately, strict filing deadlines to reopening removal proceedings curtail noncitizens' ability to rescind prior removal orders, even when they have a strong claim that the prior order was faulty. A motion to reopen generally is due 90 days after the removal order, a deadline that has already passed in most reentry cases.. Moreover, provisions of the reinstatement-of-removal statute have been interpreted by several circuits as constraining the authority to reopen proceedings after an illegal reentry. There are, however, some exceptions. This section provides a brief overview of motion-to-reopen filing deadlines, the exceptions to those deadlines, and when and how to defeat criminal liability in an illegal-reentry case through reopening the immigration proceedings.

A. Filing Deadline and Exceptions

In general, a noncitizen removed within the past 90 days has a statutory right to seek reopening.¹⁸ 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.23. There are six exceptions to the strict filing deadline:

- A motion to reopen an *in absentia* removal order based on lack of notice of the hearing may be filed at any time, *see* 8 U.S.C. § 1229a(b)(5)(C)(ii);
- A motion to reopen an *in absentia* removal order based on exceptional circumstances may be filed within 180 days, *see* 8 U.S.C. § 1229a(b)(5)(C)(i);
- The noncitizen may at any time request that the immigration judge reopen proceedings *sua sponte*. 8 C.F.R. § 1003.23(b)(1). Note that under Board precedent, *sua sponte* reopening “is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship.” *Matter of J-J*, 21 I&N Dec. 976, 984 (BIA 1997).
- The noncitizen may file a joint stipulated motion to reopen (i.e., jointly with the government) at any time. 8 C.F.R. § 1003.23(b)(4)(iv).
- The noncitizen may seek to reopen proceedings to pursue asylum or protection

¹⁸ Note that even if a noncitizen files a motion to reopen, she may be physically removed while the motion is pending, unless the motion seeks to reopen an *in absentia* order based on no notice. If the motion is granted and the case is reopened, she may be permitted return from abroad to appear for a new removal hearing on the original charges. However, she will face substantial delays and barriers to being permitted by DHS to reenter the United States to attend the hearing.

relief, “based on **changed country conditions** arising in the country of nationality, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding.” 8 C.F.R. § 1003.23(b)(4)(i); 8 U.S.C. § 1229a(c)(7)(C)(ii); and

- A noncitizen may argue that the 90-day deadline was equitably tolled based on some extraordinary circumstance (e.g., ineffective assistance of immigration counsel), and that she exercised due diligence.¹⁹

B. The Reinstatement Statute’s Bar to Filing Motions to Reopen and Exceptions to that Bar.

The problem is that once a removal order has been reinstated, the reinstatement statute appears to bar motions to reopen the underlying order. See 8 U.S.C. § 1231(a)(5); see also *Rodriguez-Saragosa v. Sessions*, 904 F.3d 349, 354 (5th Cir. 2018); *Cordova-Soto v. Holder*, 732 F.3d 789, 793 (7th Cir. 2013) (“[Section] 1231(a)(5) bars reopening of a removal order that has been reinstated after the alien’s illegal return to the United States.”); *Cuenca v. Barr*, 956 F.3d 1079, 1084 (9th Cir. 2020).²⁰ The scenario is common: once a person with an underlying removal order is reapprehended by immigration officials, the officials will typically file a Notice of Intent to Reinstatement the prior removal order, as described in Section III(C), *supra* at 32. And, courts have held, once the final reinstatement of removal order issues, the person may not file a motion to reopen and rescind the underlying removal order on which it is based.

Arguably when reinstatement proceedings have not yet reached finality (such as during withholding-only proceedings), the bar to reopening is not yet triggered. The authors are unaware of cases specifically considering this argument.

¹⁹ See *Lugo-Resendez v. Lynch*, 831 F.3d 337 (5th Cir. 2016) (holding that motion-to-reopen deadline can be equitably tolled); *Kuusk v. Holder*, 732 F.3d 302 (4th Cir. 2013) (same); *Avila-Santoyo v. Att’y Gen.*, 713 F.3d 1357, 1363-64 (11th Cir. 2013) (per curiam) (same); *Hernandez-Moran v. Gonzales*, 408 F.3d 496, 499-500 (8th Cir. 2005) (same); *Borges v. Gonzales*, 402 F.3d 398, 406 (3d Cir. 2005) (same); *Harchenko v. INS*, 379 F.3d 405, 410 (6th Cir. 2004) (same); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002) (same); *Socop-Gonzales v. INS*, 272 F.3d 1176, 1193 (9th Cir. 2001) (en banc) (same); *Iavorski v. INS*, 232 F.3d 124, 130 (2d Cir. 2000) (same). Equitable-tolling decisions are reviewed for legal error. *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1072 (2020).

²⁰The Ninth Circuit’s holding in *Cuenca* seems to contravene its reasoning in upholding the reinstatement process, where it found that reinstatement “does not offend due process because reinstatement of a prior order does not change the alien’s rights or remedies.... The reinstatement order ...creates no new obstacles to attacking the validity of the removal order, see, e.g., INA § 240(b)(5)(C)(ii), 8 U.S.C. § 1229a(b)(5)(C)(ii) (allowing reopening of a removal order based on lack of notice).” *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 497-98 (9th Cir. 2007) (en banc).

Importantly, the reinstatement statute does not preclude motions to rescind *in absentia* removal orders for lack of notice, since the immigration statute specifically permits them to be filed “at any time.” *Miller v. Sessions*, 889 F.3d 998, 1002-03 (9th Cir. 2018) (“an individual placed in reinstatement proceedings under § 1231(a)(5) cannot as a general rule challenge the validity of the prior removal order in the reinstatement proceeding itself. But she retains the right, conferred by § 1229a(b)(5)(C)(ii), to seek rescission of a removal order entered in absentia, based on lack of notice, by filing a motion to reopen ‘at any time.’”). Thus, even if immigration officials have issued a final reinstatement order issued against a person, that person may still file a motion to reopen when the underlying removal order was issued *in absentia* and he or she never had notice of the removal hearing. However, motions based on other grounds, ineffective assistance of counsel or equitable tolling arguments, may be barred.

Tip: If Your Client’s Original Removal Order Has Not Yet Been Reinstated

It is rare to encounter a § 1326 prosecution where a reinstatement order has not yet been initiated. In such a rare case, counsel is advised to promptly investigate whether your client may have grounds to reopen the removal proceedings, since a later reinstatement order may bar reopening. The normal filing deadlines will apply, so one common challenge would be trying to find a way around those deadlines.

Because time is of the essence in these cases, you should advise your client to contact an immigration attorney as soon as possible. Free legal service are insufficient to meet the needs of all noncitizens, but a list of those providers is here:

<http://www.justice.gov/eoir/probono/states.htm>

The reinstatement issue is discussed in fuller detail in Section VI, below.

C. Ineffective Assistance of Counsel Grounds for Reopening

Ineffective assistance of counsel (“IAC”) may serve as a basis for equitable tolling of the 90-day filing deadline of a motion to reopen when the noncitizen establishes that she exercised due diligence. *See, e.g., Mahmood v. Gonzales*, 427 F.3d 248, 251-52 (3d Cir. 2005). Further, IAC may constitute an exceptional circumstance that excuses a noncitizen’s failure to appear and allows filing of a motion to reopen an *in absentia* removal order within 180 days. *See Matter of Grijalva-Barrera*, 21 I. & N. Dec. 472, 473-74 (BIA 1996).

To establish an IAC claim, the noncitizen must satisfy the criteria set forth in *Matter of Lozada*, 19 I. & N. Dec. 637, 693 (BIA 1988): “(1) submit an affidavit establishing that she had an agreement with counsel to represent her and detailing its terms; (2) present evidence that she has given notice to her counsel of the ineffectiveness claim and an opportunity to respond to the allegations, and include any response she has received; and (3) if the attorney

violated his ethical or legal obligations, show that she has filed a complaint with the governing disciplinary authorities or explain why she has not done so.” Satisfaction of these three requirements is required to obtain reopening based on IAC. See, e.g., *Jiang v. Holder*, 639 F.3d 751, 755 (citing *Matter of Lozada*, 19 I. & N. Dec. at 639). In the Ninth Circuit, substantial compliance with *Lozada* may be sufficient, such as when the facts are clear and undisputed on the record. See *Escobar-Grijalva v. INS*, 206 F.3d 1331 (9th Cir. 2000).

D. The Delicate Matter of Timing: When to Move to Rescind the Underlying Removal Order and Reopen Proceedings In Relation to the Illegal Reentry Cases

When to file a motion to rescind/reopen removal proceedings in relation to filing a motion to dismiss the indictment in an illegal reentry case is a delicate and complex matter. On the one hand, if, after a noncitizen has been indicted for illegal reentry, he files a motion to rescind/reopen before the immigration court and the motion is granted, the federal indictment must be dismissed for failure to satisfy the “previously removed” requirement, and it is not necessary even to make a collateral challenge to the indictment under § 1326(d). For certain types of challenges – e.g., challenges to *in absentia* orders or challenges based on ineffective assistance of counsel – it may be advisable to seek a continuance in the illegal-reentry case and work with an immigration attorney to file a motion to rescind/reopen in immigration court.²¹ Indeed, foregoing filing a motion to reopen and instead filing a § 1326(d) motion in these circumstances could lead to denial of the motion for failure to exhaust administrative remedies. See *United States v. Meraz-Vargas*, 35 F. Supp. 2d 1272 (D. Kan. 1998) (finding failure to exhaust precluded challenge based on IAC because defendant did not first present IAC claim to BIA); but see *United States v. Johnson*, 2000 WL 620324, at *8 n.11 (D. Conn. May 1, 2000) (holding that “where the [ineffective assistance] claim did not ripen until after the administrative appeal, the court has relaxed the exhaustion rule”) (citing *Rabiu v. INS*, 41 F.3d 879, 881-82 (2d Cir. 1994)); *United States v. Dorsett*, 308 F. Supp. 2d 537, 544 n.10 (D.V.I. 2003) (stating that it would be “absurd to find that Dorsett did not exhaust administrative remedies or pursue every available . . . avenue of judicial review by not filing an ineffective assistance claim with the BIA” when record reflected that defendant learned of lawyers’ errors only after he was deported, reentered, and arrested for illegal reentry and “properly and timely raised the ineffective assistance of his immigration counsel at the first opportunity in this collateral attack”).

²¹ These types of cases are rare. However, NIJC has successfully worked with defenders to rescind old removal orders, allowing the defenders to dismiss an illegal reentry indictment, in several cases. For one example, see “These Lives Matter: Collaboration and Success in a Joint Federal Defender-Immigration Case,” available at <http://immigrantjustice.org/staff/blog/these-lives-matter-collaboration-and-success-joint-federal-defender-immigration-case#.UlgoZSRQ0Zw>.

On the other hand, because of strict filing deadlines and procedural hurdles, establishing jurisdiction for filing a motion to rescind/reopen can be exceedingly difficult if not impossible. For this reason, a noncitizen may be best served by first challenging a faulty removal order by filing a § 1326(d) motion in the illegal-reentry case, and then arguing to the immigration officers (and on appeal as necessary) that the removal order should not be reinstated because it was found by a federal judge to be faulty. (See *infra* Section VI.D). In any event, NIJC advises close collaboration between defenders and immigration attorneys to develop a two-pronged strategy in the criminal and immigration cases to ensure legal protection for clients.

VI. CHALLENGING REMOVAL AFTER THE § 1326 CHARGE IS DISMISSED

Let's say you've gotten your client's § 1326 charge dismissed or gotten him acquitted. Congratulations! Now what? For many noncitizens, beating an illegal-reentry charge doesn't necessarily mean victory. Noncitizens who have a prior order of removal entered against them are subject to automatic reinstatement of that removal order, *even though* a federal judge may have found the underlying removal order invalid under § 1326(d).

Challenging the reinstatement of a faulty prior removal order, even for an experienced attorney, is not unlike disentangling the Gordian knot. And, because the reinstatement process typically begins during a § 1326 prosecution and moves very quickly, it is often too late for an immigration attorney to contest the reinstatement once the illegal-reentry case has resolved and the client is facing imminent removal. Therefore, federal defense attorneys often are in the best position to advise noncitizens on the reinstatement process and potential avenues for timely challenge.

A. Reinstatement of Removal

The INA provides that a non-citizen who reenters the United States without permission after previously being removed is subject to reinstatement of the original order, such that she is automatically removed again under the original order.²² 8 U.S.C. § 1231(a)(5). The

²² Individuals applying for adjustment of status who are covered by certain class action lawsuits, as well as certain Nicaraguans, Cubans, Salvadorans, Guatemalans, and Eastern Europeans eligible for a form of relief called NACARA, and Haitian applicants for adjustment of status under the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA) are exempt from being subject to a reinstatement order. See Legal Immigration Family Equity Act (LIFE Act), §§ 1104(g), 1505(a)(1), 1505(c), 1505(b)(1). In addition, individuals who applied for relief or took steps toward adjustment of status prior to 1997 may not be subject to reinstatement. See *Arevalo v. Ashcroft*, 344 F.3d 1, 15 (1st Cir. 2003); *Faiz-Mohammed v. Ashcroft*, 395 F.3d 799, 810 (7th Cir. 2005); *Sermiento-Cisneros v. Ashcroft*, 381 F.3d 1277, 1284-85 (11th Cir. 2004); *Valdez-Sanchez v. Gonzales*, 485 F.3d 1084, 1089-90 (10th Cir. 2007); *Duran Gonzales v. DHS*, 508 F.3d 1227, 1242 n.14 (9th Cir. 2007).

reinstatement order is issued by a DHS immigration officer without a hearing before an immigration judge, and is not subject to being reopened or reviewed by the immigration court or federal courts. *Id.* Certain procedural requirements adhere: the prior order can only be reinstated if the immigration officer (1) obtains the prior order; (2) confirms that the individual is the same person who was previously removed; (3) confirms that the individual unlawfully reentered; and (4) provides written notice of the reinstatement to allow the individual an opportunity to respond. 8 C.F.R. § 241.8(a), (b).

After DHS determines that a noncitizen is subject to reinstatement, an immigration officer will complete the top portion of the Form I-871, the Notice of Intent to Reinstatement, which includes the factual allegations against the noncitizen. The form states that the noncitizen does not have a right to a hearing before an IJ but can contest the factual allegations in an oral or written statement to the officer. 8 C.F.R. § 241.8(a)(3). The noncitizen will be asked to sign the notice. If no statement is made or the officer determines that any statement made does not warrant reconsideration of the notice, the officer will complete the bottom portion of the Form I-871 entitled “Decision, Order and Officer’s Certification,” which is the actual reinstatement order. The date of completion of the Form I-871 is the effective date of the reinstatement.

Many individuals are issued a notice of intent to reinstate the prior removal order before being charged under § 1326. And a federal judge’s dismissal of the indictment based on a finding that the underlying removal order violated due process does **not** vacate the removal order itself. That removal order is still valid, and so still subject to reinstatement. Consequently, an individual who has been issued a notice of intent to reinstate the prior removal order is likely to be transferred to ICE custody and summarily removed upon resolution of the § 1326 case, even if his underlying removal order was successfully collaterally attacked, unless he can challenge the reinstatement order.

B. Challenges to the Reinstatement Order

There are a handful of ways to challenge a reinstatement order during the reinstatement proceeding itself:

- Fear of persecution or torture: The regulations provide that a noncitizen who has a fear of persecution or torture in her home country but who is subject to a reinstatement order may seek withholding of removal or relief under the Convention Against Torture (but not asylum). 8 C.F.R. §§ 241.8(a), (e); 208.31. To seek withholding during the reinstatement process, the person must request a “**reasonable fear interview**.” See *supra* at II(C) (explaining the RFI process). She then will be interviewed by an asylum officer. If the officer determines that she has a reasonable fear of persecution or torture, she will be placed in removal proceedings to seek withholding or CAT before an IJ, instead of being

automatically reinstated and removed. If the officer determines that she does not have a reasonable fear, the noncitizen may ask an IJ to review that determination. Should the IJ affirm the asylum officer's decision, the noncitizen will be subject to reinstatement. The IJ's decision is not appealable. Should the IJ find that the noncitizen has a reasonable fear, the noncitizen will be placed in removal proceedings, where she can apply for withholding or CAT relief.

Tip: Advising a Client Who Feels Persecution to Request a Reasonable Fear Interview

If you believe that your client fears persecution or torture in her home country, advise her to request a reasonable fear interview from DHS as soon as possible to avoid reinstatement of her prior removal order. The Form I-871 has a check-box for individuals who fear return to their home country. Marking the check-box triggers the reasonable fear interview. Advise your client to mark this check-box and contact an immigration attorney to discuss the protection-based claim.

- Citizenship claim: An individual subject to reinstatement who claims that he has derived or acquired U.S. citizenship may be able to seek federal court review. See *Batista v. Ashcroft*, 270 F.3d 8, 12 (1st Cir. 2001).
- Mistaken identity and other elements-based defenses to reinstatement: Regulations require DHS to prove that the individual allegedly subject to reinstatement is the same individual who was previously ordered removed. 8 C.F.R. § 241.8(a), (b). A noncitizen who can show that he is not the same person as identified in the underlying removal order (*i.e.*, same name but different person) is not subject to reinstatement. Similarly, if the individual can argue that he was not subject to a prior removal order, he may be able to challenge the reinstatement. See, *e.g.*, *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 495-96 (9th Cir. 2007) (*en banc*).

Tip: Advising a Client Who Has Grounds to Challenge the Reinstatement

Time is of the essence since removal in the reinstatement context happens rapidly and the window to challenge the reinstatement window is quite short. You will need to ascertain whether your client has already received a reinstatement notice, which is likely the case if your client was in ICE custody prior to prosecution. If your client did not previously receive a reinstatement notice and is now in ICE custody, tell her to be on the lookout for the "Notice of Intent to Reinstatement" and to tell you as soon as she receives it from a DHS officer. If your client has a citizenship claim, alleges mistaken identity, has a visa immediately available, or has a fear of return, advise her to tell a DHS officer and to contact an immigration attorney immediately.

C. Federal Court Review in the Reinstatement Context

Federal courts of appeals have jurisdiction to consider petitions for review of reinstatement orders. 8 U.S.C. § 1252(b)(1). A noncitizen has 30 days from the date the reinstatement order is final to file a petition for review in the court of appeals. *Id.* If he has not yet been physically removed, he can file a stay of removal with the petition for review. Review is limited to a factual assessment of the elements of reinstatement: (1) alienage, (2) prior removal, and (3) illegal reentry. See, e.g., *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 495-96 (9th Cir. 2007) (en banc). Note that all courts to consider the question have held that the reinstatement order is not administratively final until withholding-only proceedings are complete; for such individuals, the 30 days runs from the final decision in withholding-only proceedings or the final adverse reasonable fear determination. See *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 957-59 (9th Cir. 2012); *Ponce-Osorio v. Johnson*, 824 F.3d 502, 505-06 (5th Cir. 2016) (per curiam); *Luna-Garcia v. Holder*, 777 F.3d 1182, 1183-85 (10th Cir. 2015)

To date, most courts have held that various provisions of the INA bar review of the removal order upon which a reinstatement is based. Section 1231(a)(5) of Title 8 of the U.S. Code provides that:

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

8 U.S.C. § 1231(a)(5). Those courts that have considered the issue have held that appeal of a reinstatement order cannot be used to challenge the underlying removal order, since § 1231(a)(5) bars the reopening of a reinstated removal order. See *Cordova-Soto v. Holder*, 732 F.3d 789, 793 (7th Cir. 2013) (interpreting § 1231(a)(5) to permanently bar petitioner from reopening underlying stipulated removal order after it had been reinstated despite allegations of due process errors during stipulation and eligibility for relief from removal at time of proceeding); *Zambrano-Reyes v. Holder*, 725 F.3d 744, 751-52 (7th Cir. 2013) (holding that BIA properly denied motion to reopen reinstated removal proceedings based on intervening Supreme Court authority making movant eligible for § 212(c) relief because of (1) regulatory bar to 212(c) relief for noncitizens who returned unlawfully after prior deportation under 8 C.F.R. § 1003.44(k)(2) and (2) statutory bar to reopening removal proceedings after reinstatement under § 1231(a)(5)); but see *Garcia de Rincon v. DHS*, 539 F.3d 1133, 1138 (9th Cir. 2008) (holding that § 1231(a)(5) bars relitigation on the merits of a reinstated removal order except where constitutional claims or questions of law arise and “the petitioner can demonstrate a gross miscarriage of justice in the [original removal] proceedings”) (internal quotation marks omitted). Further, several circuits have held that

even if § 1252(a)(2)(D) would grant jurisdiction to consider challenges to the underlying removal order, the 30-day window for filing a petition for review of a removal order does not recommence upon reinstatement of removal order; effectively making most claims time-barred. See *Verde-Rodriguez v. Att’y Gen*, 734 F.3d 198, 201 (3d Cir. 2013); *Cordova-Soto v. Holder*, 659 F.3d 1029 (10th Cir. 2011); *Luna-Garcia De Garcia v. Barr*, 921 F.3d 559, 565 (5th Cir. 2019). The Ninth Circuit disagrees, finding that the 30-day limit runs from the date of the reinstatement order. See *Vega-Anguiano v. Barr*, 942 F.3d 945, 946 (9th Cir. 2019).

These jurisdictional bars to reviewing the underlying removal order in the reinstatement context are particularly troubling in cases where a district judge has dismissed an illegal-reentry indictment based on a finding that the underlying removal order was infirm. Nevertheless, the trend in cases examining the issue suggests that the only avenues for challenging reinstated removal orders are (1) timely motions to reopen and (2) advocacy with DHS. Given that most illegal-reentry defendants are likely to be outside the narrow motion-to-reopen deadlines, advocacy may be the last best resort. A Ninth Circuit case may give more force to such advocacy. In *Villa-Anguiano v. Holder*, the court suggested that DHS must apply stricter scrutiny in the reinstatement process in cases where a noncitizen successfully challenged a prior removal order in a § 1326 case. 727 F.3d 873 (9th Cir. 2013). There, the district judge granted the § 1326(d) motion to dismiss on the ground that the defendant’s right to counsel had been violated during his removal proceedings and that he had been prejudiced by the violation because he would have been eligible for § 212(c) relief from removal barring his lawyer’s deficient performance. *Id.* at 876. One day after the district court dismissed the indictment, DHS reinstated the individual’s prior removal order and physically removed him. *Id.* at 877. A petition for review of the reinstatement followed. *Id.* The Ninth Circuit ruled:

when, as a result of such scrutiny, a district court finds constitutional infirmities in the prior removal proceedings that invalidate the prior removal for purposes of criminal prosecution, the agency cannot simply rely on a pre-prosecution determination to reinstate the prior removal order. Instead the agency must—as it may well ordinarily do—(1) provide the alien with an opportunity *after* the criminal prosecution is dismissed to make a written or oral statement addressing the expedited reinstatement determination in light of the facts found and the legal conclusions reached in the course of the criminal case; and (2) independently reassess whether to rely on the order issued in the prior proceedings as the basis for deportation or instead to instigate full removal proceedings.

Id. at 880 (emphasis original).

D. Administrative Advocacy to Avoid Reinstatement Based on Successful § 1326 Challenge in District Court

As *Villa-Anguiano* suggests, the best avenue for avoiding removal for a client with strong grounds for attacking a prior removal order but who is barred from filing a motion to reopen in immigration court may be to first challenge the underlying removal order by filing a § 1326(d) motion in the illegal reentry case. Advise your client not to sign a notice of intent to reinstate while the § 1326(d) motion is pending. Then, if the motion is granted and the district court dismisses the indictment, advise your client to contest the reinstated order and contact an immigration attorney right away to contemplate rigorous administrative advocacy, including urging DHS to independently reassess the reinstatement order. *Villa-Anguiano*, 727 F.3d at 880.

VII. CONCLUSION

The steep increase in the number of illegal reentry prosecutions, severe consequences for those charged with illegal reentry (in terms of criminal and immigration penalties), and constantly evolving immigration case law, make illegal-reentry defense one of the most complex, interesting, and challenging areas of criminal law. Defenders are often best positioned to help clients mired in both the criminal and immigration systems. This practice advisory is one tool in that effort. Defenders also can turn to NIJC's Defenders Initiative for the latest legal developments, litigation support on illegal-reentry cases, or to discuss this advisory. You can contact the Defenders Initiative at (312) 660-1610 or <mailto:defenders@heartlandalliance.org>.

ABOUT THE AUTHORS

Sarah Rose Weinman was a Baker & McKenzie Equal Justice Works Fellow at the National Immigrant Justice Center from 2011 to 2013. Part of her work included the first edition of this manual. After leaving NIJC, she worked at the Federal Defenders in San Diego from 2013 to 2020. She is currently an assistant federal defender in Minnesota.

Hena Mansori worked at NIJC from 2008 to 2020, as a staff attorney, supervising attorney, and then the managing attorney for NIJC's Adult Detention and Defenders Initiative programs. She is now the Attorney Supervisor of the newly-created Immigration Unit at the Cook County Public Defender, where she oversees the provision of legal advice about immigration consequences of crimes.

Charles Roth is the Director of Appellate Litigation at the National Immigrant Justice Center. He has litigated over 100 published decisions at the Courts of Appeals, and has filed various amicus and party briefs at the Supreme Court, including for Petitioner in *Chaidez v. United States*, 568 U.S. 342 (2013). He is also the update editor for the U.S. CITIZENSHIP AND NATURALIZATION HANDBOOK (Thomson West).

APPENDIX

In removal proceedings under section 240 of the Immigration and Nationality Act:

Subject ID :

FIN #:

File No: A

DOB:

Event No:

In the Matter of:

Respondent: _____ currently residing at:

IN DHS ICE CUSTODY 161 WEST CONGRESS PARKWAY, CHICAGO ILLINOIS 60603

(312) 347-2400

(Number, street, city and ZIP code)

(Area code and phone number)

- 1. You are an arriving alien.
- 2. You are an alien present in the United States who has not been admitted or paroled.
- 3. You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that you:

1. You are not a citizen or national of the United States;
2. You are a native of _____ and a citizen of _____;
3. You were admitted to the United States at _____ on or about _____ 2009 as a LAWFUL PERMANENT RESIDENT;
4. You were, on _____, convicted in the _____ Court at _____ for the offense of MAKING A MATERIAL FALSE STATEMENT, committed on or about _____ in violation of 18 U.S.C. 1001(a)(2)
5. For that offense, a sentence of one year or longer may be imposed.
6. You were sentenced to a total term of _____

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

See Continuation Page Made a Part Hereof

- This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.
- Section 235(b)(1) order was vacated pursuant to: 8CFR 208.30(f)(2) 8CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at: OFFICE OF THE IMMIGRATION JUDGE 525 W. Van Buren St. Chicago ILLINOIS US 60607

(Complete Address of Immigration Court, including Room Number, if any)

on a date to be set at a time to be set to show why you should not be removed from the United States based on the

(Date)

(Time)

charge(s) set forth above.

SUPERVISORY DEPORTATION OFFICER

(Signature and Title of Issuing Officer)

Date: _____

(City and State)

See reverse for important information

Form I-862 (Rev. 08/01/07)

Notice to Respondent

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 3.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice, to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents, which you desire to have considered in connection with your case. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or removable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the immigration judge.

You will be advised by the immigration judge before whom you appear of any relief from removal for which you may appear eligible including the privilege of departure voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the DHS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the DHS.

Mandatory Duty to Surrender for Removal: If you become subject to a final order of removal, you must surrender for removal to one of the offices listed in 8 CFR 241.16(a). Specific addresses on locations for surrender can be obtained from your local DHS office or over the internet at http://www.ice.gov/about/dro/contact.htm. You must surrender within 30 days from the date the order becomes administratively final, unless you obtain an order from a Federal court, immigration court, or the Board of Immigration Appeals staying execution of the removal order. Immigration regulations at 8 CFR 241.1 define when the removal order becomes administratively final. If you are granted voluntary departure and fail to depart the United States as required, fail to post a bond in connection with voluntary departure, or fail to comply with any other condition or term in connection with voluntary departure, you must surrender for removal on the next business day thereafter. If you do not surrender for removal as required, you will be ineligible for all forms of discretionary relief for as long as you remain in the United States and for ten years after departure or removal. This means you will be ineligible for asylum, cancellation of removal, voluntary departure, adjustment of status, change of nonimmigrant status, registry, and related waivers for this period. If you do not surrender for removal as required, you may also be criminally prosecuted under section 243 of the Act.

Request for Prompt Hearing

To expedite a determination in my case, I request an immediate hearing. I waive my right to a 10-day period prior to appearing before an immigration judge.

Before:

(Signature of Respondent)

Date:

(Signature and Title of Immigration Officer)

Certificate of Service

This Notice To Appear was served on the respondent by me on [redacted], in the following manner and in compliance with section 239(a)(1)(F) of the Act.

[X] in person [] by certified mail, returned receipt requested [] by regular mail

[] Attached is a credible fear worksheet.

[] Attached is a list of organization and attorneys which provide free legal services.

The alien was provided oral notice in the ENGLISH language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

(Signature of Respondent if Personally Served)

IEA (Signature and Title of officer)

Alien's Name [REDACTED]	File Number A [REDACTED]	Date [REDACTED]
Event [REDACTED]		
ON THE BASIS OF THE FOREGOING, IT IS CHARGED THAT YOU ARE SUBJECT TO REMOVAL FROM THE UNITED STATES PURSUANT TO THE FOLLOWING PROVISION(S) OF LAW:		
----- Section 237(a)(2)(A)(i) of the Immigration and Nationality Act, as amended, in that you have been convicted of a crime involving moral turpitude committed within five years after admission for which a sentence of one year or longer may be imposed.		
Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (Act), as amended, in that, at any time after admission, you have been convicted of an aggravated felony as defined in section 101(a)(43)(B) of the Act, an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year.		
Signature [REDACTED]	Title SUPERVISORY DEPORTATION OFFICER	

Warrant of Removal/Deportation

File No: A

Date: _____

To any officer of the United States Immigration and Naturalization Service:

(Full name of alien)

who entered the United States at or near _____ on or about _____
(Place of entry) (Date of entry)

is subject to removal/deportation from the United States, based upon a final order by:

- an immigration judge in exclusion, deportation, or removal proceedings
- a district director or a district director's designated official
- the Board of Immigration Appeals
- a United States District or Magistrate Court Judge

and pursuant to the following provisions of the Immigration and Nationality Act:

Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United States and by his or her direction, command you to take into custody and remove from the United States the above-named alien, pursuant to law, at the expense of:

THE APPROPRIATION, "SALARIES AND EXPENSES, U.S. IMMIGRATION AND NATURALIZATION SERVICE, 2009," INCLUDING THE EXPENSES OF AN ATTENDANT, IF NECESSARY.

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT
DETENTION AND REMOVAL OPERATIONS
2901 METRO DRIVE, SUITE 100
BLOOMINGTON, MN 55425

[Signature]
(Signature of INS official)

Scott R. Baniecke
Field Office Director
(Title of INS official)

Bloomington ota
(Date and office Location)

ST. PAUL, MINN. 55101

DIR CHICAGO

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
CHICAGO, ILLINOIS

IN THE MATTER OF:)
)
) IN REMOVAL PROCEEDINGS
 AKA: Respondent) FILE NO. A/
)
)

CHARGES: Section(s) 237 (a) (2) (A) (iii) and 237 (a) (2) (A) (ii) of the Immigration and Nationality Act and Section 237 (a) (2) (B) (1)

RELIEF APPLICATION: None

ON BEHALF OF RESPONDENT: *Pro Se* ON BEHALF OF SERVICE/DHS Assistant District Counsel

DECISION AND ORDER OF THE IMMIGRATION JUDGE

Pursuant to the Notice to Appear issued on 10/28/2005, the respondent is charged with being removable as indicated above. The respondent has submitted a statement wherein he/she waives a personal hearing before the Immigration Judge, and admits the truthfulness of the allegations and the charges contained in the Notice to Appear. The respondent concedes that he/she is ineligible for or has made no application for relief from removal proceedings which would allow him/her to remain in the United States, but instead requests issuance of an order by this Court for his/her removal to the country of MEXICO. The Immigration and Naturalization Service concurs with the request.

A stipulated order shall constitute a conclusive determination of the alien's removability from the United States. Based upon the respondent's admissions, the charges of removal are sustained by evidence that is clear and convincing. Appeal has been waived by the parties.

Accordingly, the following Order shall be entered
ORDER: IT IS HEREBY ORDERED that the respondent be REMOVED from the United States to MEXICO on the charges contained in the Notice to Appear.

Date / 
Immigration Judge

Notice of Intent to Issue a Final Administrative Removal Order

In removal proceedings under section 238(b) of the Immigration and Nationality Act

FIN # [redacted]

Event Nr

File Number #

To:

Address: ICE / DETENTION AND REMOVAL 2901 METRO DRIVE, SUITE 100 BLOOMINGTON MN UNITED STATES 55425

(Number, Street, City, State and ZIP Code)

Telephone: (952) 853-2550

(Area Code and Phone Number)

Pursuant to section 238(b) of the Immigration and Nationality Act (Act) as amended, 8 U.S.C. 1228(b), the Department of Homeland Security (Department) has determined that you are amenable to administrative removal proceedings. The determination is based on the following allegations:

1. You are not a citizen or national of the United States.
2. You are a native of [redacted] and a citizen of [redacted]
3. You entered the United States (at)(near) [redacted] on or about [redacted]
4. At that time you entered without inspection or parole
5. You are not lawfully admitted for permanent residence.
6. You were, on [redacted], convicted in the [redacted] Court in Willmar, MN for the offense of Assault-4th Degree-On a Peace Officer in violation of MN State Statute 609.2231, Subdivision 1 for which the term of imprisonment imposed was one year and one day.

Charge:

You are deportable under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. 1227(a)(2)(A)(ii), as amended, because you have been convicted of an aggravated felony as defined in section 101(a)(43)(F) of the Act, 8 U.S.C. 1101(a)(43)(F)

Based upon section 238(b) of the Act, 8 U.S.C. 1228(b), the Department is serving upon you this NOTICE OF INTENT TO ISSUE A FINAL ADMINISTRATIVE REMOVAL ORDER ("Notice of Intent") without a hearing before an Immigration Judge.

Your Rights and Responsibilities:

You may be represented (at no expense to the United States government) by counsel, authorized to practice in this proceeding. If you wish legal advice and cannot afford it, you may contact legal counsel from the list of available free legal services provided to you.

You must respond to the above charges in writing to the Department address provided on the other side of this form within 10 calendar days of service of this notice (or 13 calendar days if service is by mail). The Department must RECEIVE your response within that time period.

In your response you may: request, for good cause, an extension of time; rebut the charges stated above (with supporting evidence); request an opportunity to review the government's evidence; admit deportability; designate the country to which you choose to be removed in the event that a final order of removal is issued (which designation the Department will honor only to the extent permitted under section 241 of the Act, 8 U.S.C. 1231); and/or, if you fear persecution in any specific country or countries on account of race, religion, nationality, membership in a particular social group, or political opinion or, if you fear torture in any specific country or countries, you may request withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), or withholding/deferral of removal under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention Against Torture). A grant of withholding or deferral of removal would prohibit your return to a country or countries where you would be persecuted or tortured, but would not prevent your removal to a safe third country.

You have the right to remain in the United States for 14 calendar days so that you may file a petition for review of this order to the appropriate U.S. Circuit Court of Appeals as provided for in section 242 of the Act, 8 U.S.C. 1252. You may waive your right to remain in the United States for this 14-day period. If you do not file a petition for review within this 14-day period, you will still be allowed to file a petition from outside of the United States so long as that petition is filed with the appropriate U.S. Circuit Court of Appeals within 30 calendar days of the date of your final order of removal.

DARRELL WOODS - SDOO

(Signature and Title of Issuing Officer)

D. Woods

Bloomington, MN

(City and State of Issuance)

(Date and Time)

Form I-851 (Rev. 08/01/07)

Certificate of Service

I served this Notice of Intent. I have determined that the person served with this document is the individual named on the other side of the form.

JIM CHUNG - Immigration Enforcement Agent
(Signature and Title of Officer)

In person
(Date and Manner of Service)

I explained and/or served this Notice of Intent to the alien in the English language.

(Name of Interpreter)
Location/Employer: Bloomington, MN

(Signature of Interpreter)

I Acknowledge that I Have Received this Notice of Intent to Issue a Final Administrative Removal Order.

(Signature of Respondent)

(Date and Time)

The alien refused to acknowledge receipt of this document.

Signature and Title of Officer: IEA

(Date and Time)

I Wish to Contest and/or to Request Withholding of Removal

I contest my deportability because: (Attach any supporting documentation)

- I am a citizen or national of the United States.
I am a lawful permanent resident of the United States.
I was not convicted of the criminal offense described in allegation number 6 above.
I am attaching documents in support of my rebuttal and request for further review.

I request withholding or deferral of removal to [Name of Country or Countries]:

- Under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), because I fear persecution on account of my race, religion, nationality, membership in a particular social group, or political opinion in that country or those countries.
Under the Convention Against Torture, because I fear torture in that country or those countries.

(Signature of Respondent)

(Printed Name of Respondent)

(Date and Time)

I Do Not Wish to Contest and/or to Request Withholding of Removal

I admit the allegations and charge in this Notice of Intent. I admit that I am deportable and acknowledge that I am not eligible for any form of relief from removal. I waive my right to rebut and contest the above charges. I do not wish to request withholding or deferral of removal. I wish to be removed to

I understand that I have the right to remain in the United States for 14 calendar days in order to apply for judicial review. I do not wish this opportunity. I waive this right.

(Signature of Respondent)

(Printed Name of Respondent)

(Date and Time)

(Signature of Witness)

(Printed Name of Witness)

(Date and Time)

RETURN THIS FORM TO:
Department Of Homeland Security

US ICR

2901 Metro Dr. Suite 100

Bloomington, MN 55425

ATTENTION:

The Department office at the above address must RECEIVE your response within 10 calendar days from the date of service of this Notice of intent (13 calendar days if service is by mail).

Form I-851 (Rev. 08/01/07)

Final Administrative Removal Order

In removal proceedings under section 238(b) of the Immigration and Nationality Act

Event No: _____

FIN _____

File Number _____

Date _____

To: _____

Address: ICE / DETENTION AND REMOVAL 2901 METRO DRIVE, SUITE 100 BLOOMINGTON MN UNITED STATES 55425

(Number, Street, City, State and ZIP Code)

Telephone: (952) 853-2550

(Area Code and Phone Number)

ORDER

Based upon the allegations set forth in the Notice of Intent to Issue a Final Administrative Removal Order and evidence contained in the administrative record, I, the undersigned Deciding Officer of the Department of Homeland Security, make the following findings of fact and conclusions of law. I find that you are not a citizen or national of the United States and that you are not lawfully admitted for permanent residence. I further find that you have a final conviction for an aggravated felony as defined in section 101(a)(43)(F) of the Immigration and Nationality Act (Act) as amended, 8 U.S.C. 1101(a)(43)(F), and are ineligible for any relief from removal that the Secretary of Homeland Security, may grant in an exercise of discretion. I further find that the administrative record established by clear, convincing, and unequivocal evidence that you are deportable as an alien convicted of an aggravated felony pursuant to section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. 1227(a)(2)(A)(iii). By the power and authority vested in the Secretary of Homeland Security, and in me as the Secretary's delegate under the laws of the United States, I find you deportable as charged and order that you be removed from the United States to:

or to any alternate country prescribed in section 241 of the Act.

I WAIVE PFR

JEFFREY FIELD

(Signature of Authorized Official)

AFOD

(Title of Official)

I RESERVE PFR

(Date and Office Location)

Bloomington, MN

Certificate of Service

I served this FINAL ADMINISTRATIVE REMOVAL ORDER upon the above named individual.

BLOOMINGTON, MN

(Date, Time, Place and Manner of Service)

IN PERSON

JIM CHEUNG

Immigration Enforcement Agent

(Signature and Title of Officer)

Form I-851A (Rev. 08/01/07)

Notice of Intent/Decision to Reinstate Prior Order

File No. [redacted]
Event No: [redacted]
Date: [redacted]

FIN #

Name: [redacted]

In accordance with section 241(a)(5) of the Immigration and Nationality Act (Act) and 8 CFR 241.8, you are hereby notified that the Secretary of Homeland Security intends to reinstate the order of Removal entered against you. This intent is based on the following determinations:

1. You are an alien subject to a prior order of deportation / exclusion / removal entered on [redacted] at [redacted]

(Location)

2. You have been identified as an alien who:

[x] was removed on [redacted] pursuant to an order of deportation / exclusion / removal

(Date)

[] departed voluntarily on [redacted] pursuant to an order of deportation / exclusion / removal on or after the date on which such order took effect (i.e., who self-deported).

(Date)

3. You illegally reentered the United States on or about 1/1 at or near Unknown

(Date)

(Location)

In accordance with Section 241(a)(5) of the Act, you are removable as an alien who has illegally reentered the United States after having been previously removed or departed voluntarily while under an order of exclusion, deportation or removal and are therefore subject to removal by reinstatement of the prior order. You may contest this determination by making a written or oral statement to an immigration officer. You do not have a right to a hearing before an immigration judge.

The facts that formed the basis of this determination, and the existence of a right to make a written or oral statement contesting this determination, were communicated to the alien in the Spanish English language.

KARL TIMMONS
(Printed or typed name of official)

[Signature of Karl Timmons]
(Signature of officer)

Deportation Officer
(Title of officer)

Acknowledgment and Response

I [x] do [] do not wish to make a statement contesting this determination

(Date)

(Signature of Alien)

Decision, Order, and Officer's Certification

Having reviewed all available evidence, the administrative file and any statements made or submitted in rebuttal, I have determined that the above-named alien is subject to removal through reinstatement of the prior order, in accordance with section 241(a)(5) of the Act.

(Date)

(Location)

[Signature of Jeffrey Artman]
(Signature of authorized deciding official)

JEFFREY ARTMAN
(Printed or typed name of official)

EDDO
(Title)

May 6, 2012

National Record Center (NRC)
FOIA/PA Office
P. O. Box 648010
Lee's Summit, MO 64064-8010

RE: CLIENT NAME, A-NUMBER

FREEDOM OF INFORMATION ACT REQUEST:
"NOTICE TO APPEAR" THIRD PROCESSING TRACK; PLEASE EXPEDITE

Dear FOIA Officer:

This is a request pursuant to the Freedom of Information Act ("FOIA"), 5 USC Section 552, *et seq.* I am writing to request all written materials pertaining to Mr. CLIENT's immigration file the **special FOIA Processing Track for individuals appearing before an Immigration Judge**. Enclosed please find completed Form G-639. Please also find enclosed a copy of Mr. CLIENT's Notice to Appear and a copy of his hearing notice for his April 4, 2012 individual hearing.

USCIS has established a third processing track, the **"Notice to Appear" track**, which will allow for accelerated access to the A-File for those individuals who have been served with a charging document and have been scheduled for a hearing before an immigration judge as a result.

Thank you for your prompt attention to this request.

Sincerely,

/enclosures



Instructions for Freedom of Information/Privacy Act Request

Department of Homeland Security
U.S. Citizenship and Immigration Services

USCIS
Form G-639
OMB No. 1615-0102
Expires 06/30/2022

What Is the Purpose of Form G-639?

Use Form G-639 to obtain access to U. S. Citizenship and Immigration Services (USCIS) records as allowed by the Freedom of Information Act (FOIA) at 5 U.S.C. 552 and the Privacy Act of 1974 (PA) at 5 U.S.C. 552a.

With certain exceptions, FOIA provides access to Federal agency records. PA allows U.S. citizens or lawful permanent residents to:

1. Request access to information pertaining to themselves in Federal agency records; and
2. Correct or amend their records.

PA also prohibits disclosure of any person's records without his or her written consent, except under certain circumstances as prescribed by PA.

When May I Use Form G-639?

You may use Form G-639 to obtain access to USCIS records. You may also use this request to allow to another individual to access USCIS records pertaining to you.

Do not use Form G-639 for the following requests.

1. **Status Inquires.** Contact the USCIS office where the application or petition was filed or visit <https://egov.uscis.gov> to check your case status online. You may also reach out to the USCIS Contact Center at www.uscis.gov/contactcenter for help. The USCIS Contact Center provides information in English and Spanish. For TTY (deaf or hard of hearing) call: **1-800-767-1833**.
2. **Consular Notification of a Visa Petition Approval.** Use Form I-824, Application for Action on an Approved Application or Petition, to request consular notification of visa petition approval.
3. **Return of Original Documents.** Use Form G-884, Request for the Return of Original Documents, to request the return of original documents.
4. **Naturalization Records Before September 27, 1906.** Contact the clerk of court where the naturalization occurred to request naturalization records before September 27, 1906.
5. **USCIS Manifest Arrivals Before December 1982.** Contact the National Archives at <https://www.archives.gov/contact> to request information on USCIS manifest arrivals before December 1982.
6. **Proof of Status for Non-Immigration Benefits.** Contact the Federal agency responsible for the benefit (for example, Social Security benefit, Selective Service requirement) to obtain proof of status.

NOTE: Form G-639 is not required to make a FOIA/PA request. However, you must make **all** FOIA/PA requests in writing and in accordance with the applicable statutory and regulatory requirements under the FOIA and PA. For information about filing an electronic FOIA/PA request, please visit the USCIS FOIA website at www.uscis.gov/foia.

General Instructions

USCIS provides forms free of charge through the USCIS website. To view, print, or fill out our forms, you should use the latest version of Adobe Reader, which you can download for free at <http://get.adobe.com/reader/>. If you do not have internet access, you may call the USCIS National Customer Service Center at **1-800-375-5283** and asked that we mail a form to you. For TTY (deaf or hard of hearing) call: **1-800-767-1833**.

How To Fill Out Form G-639

1. Type or print legibly in black ink.
2. If you need extra space to complete any item within this request, use the space provided in **Part 6. Additional Information** or attach a separate sheet of paper. Type or print the Subject of Record's name and Alien Registration Number (A-Number) (if any) at the top of each sheet; indicate the **Page Number, Part Number, and Item Number** to which your answer refers; and sign and date each sheet.
3. Answer all questions fully and accurately. If a question does not apply to you (for example, if you have never been married and the question asks, "Provide the name of your current spouse"), type or print "N/A" unless otherwise directed. If your answer to a question which requires a numeric response is zero or none (for example, "How many children do you have" or "How many times have you departed the United States"), type or print "None" unless otherwise directed.

Specific Instructions

Form G-639 is divided into six parts. The following information will help you complete the request.

Providing the information requested on Form G-639 is voluntary. However, failure to provide complete and specific information may delay processing of your request or create an inability for USCIS to locate the records or information requested.

Part 1. Type of Request

Item Numbers 1.a. - 1.b. Select **only one** box in **Part 1.** that describes the type of records you are requesting.

NOTE: If you are filing this request on behalf of another individual, select the response as it would apply to that individual.

Part 2. Requestor Information

Item Number 1. Indicate whether you are the Subject of Record. If you answer "No," indicating you are requesting access to another individual's records, complete **Part 2.** If you answer "Yes," indicating you are requesting access to your own records, skip **Part 2.** and proceed to **Part 3. Description of Records Requested.**

Item Numbers 2.a. - 3.c. Representative Role to the Subject of Record. Select the appropriate box to indicate your representative role to the Subject of the Record:

1. An attorney eligible to practice law in, and a member of good standing of, the bar of the highest courts of a state, possession, territory, commonwealth, or District of Columbia;
2. An accredited representative of a qualified religious, charitable, social service, or similar organization established in the United States, so recognized by the Department of Justice, Board of Immigration Appeals, in accordance with 8 CFR 292.2.; or
3. A family member or caretaker.

Proof of Parentage. If a parent is filing on behalf of a minor child, then he or she must submit proof of parentage. Proof of parentage may be in the form of a birth certificate, adoption decree, or similar document naming the requester as the legal parent. If a guardian is filing on behalf of his or her ward, he or she must submit proof of guardianship. The signature of the parent/guardian must be notarized or signed under penalty of perjury (6 CFR section 5.21(e)). Proof of parentage may be submitted under **Part 6. Additional Information.**

Select the appropriate box to provide further information regarding your representative role to the subject of the record.

Item Numbers 4.a. - 4.c. Requestor's Full Name. Provide your full legal name in the spaces provided.

Item Numbers 5.a. - 5.i. Requestor's Mailing Address. List your complete mailing address in the spaces provided. You may list a valid residence, APO, "In Care Of Name," or commercial address in the United States. You may list a Post Office address (PO Box) if that is how you receive your mail. If your mail is sent to someone other than yourself, include an "In Care Of Name" as part of your mailing address. If your mailing address is in a U.S. territory and it contains an urbanization name, list the urbanization name in the "In Care Of Name" space provided.

Item Numbers 6. - 8. Requestor's Contact Information. Provide your daytime telephone number, mobile telephone number (if any), and email address (if any).

Item Numbers 9.a. - 9.b. Requestor's Certification. Sign and date the request. A stamped or typewritten name in place of a signature is not acceptable.

Part 3. Description of Records Requested

You are not required to respond to every item in **Part 3**. However, failure to provide complete and specific information may delay processing of your request or prevent USCIS from locating the records or information requested.

Item Number 1. Purpose. State the purpose of your request. This optional information, if provided, may assist USCIS in locating the records you seek.

Item Numbers 2.a. - 2.c. Full Name of the Subject of Record. Provide the full legal name of the Subject of Record in the spaces provided.

Item Numbers 3.a. - 4.c. Other Names Used by the Subject of Record. Provide other names the Subject of Record has used since birth, including any nicknames, aliases, and maiden name (if applicable). If you need extra space to complete this section, use the space provided in **Part 6. Additional Information**.

Item Numbers 5.a. - 5.c. Full Name of the Subject of Record at Time of Entry into the United States. If his or her name has changed since he or she entered the United States, provide the full name he or she used at the time of entry into the United States.

Item Numbers 6.a. - 6.b. Form I-94, Arrival-Departure Record. If U.S. Customs and Border Protection (CBP) or USCIS issued him or her a Form I-94, Arrival-Departure Record, provide his or her Form I-94 number and date that his or her authorized period of stay expires or expired (as shown on your Form I-94). The Form I-94 number also is known as the Departure Number on some versions of Form I-94.

NOTE: If he or she was admitted to the United States by CBP at an airport or seaport after April 30, 2013, CBP may have issued him or her an electronic Form I-94 instead of a paper Form I-94. You may visit the CBP website at www.cbp.gov/i94 to obtain a paper version of an electronic Form I-94. CBP **does not** charge a fee for this service. Some travelers admitted to the United States at a land border, airport, or seaport after April 30, 2013, with a passport or travel document, who were issued a paper Form I-94 by CBP, may also be able to obtain a replacement Form I-94 from the CBP website without charge. If you cannot obtain his or her Form I-94 from the CBP website, you may obtain it by filing Form I-102, Application for Replacement/Initial Nonimmigrant Arrival-Departure Record, with USCIS. USCIS does charge a fee for this service. See the USCIS website at www.uscis.gov/I-102 for more information.

Passport and Travel Document Numbers. If he or she used a passport or travel document to travel to the United States, enter either the passport or travel document information in the appropriate space on the request, even if the passport or travel document is currently expired.

Item Number 7. Alien Registration Number (A-Number) (if any). An Alien Registration Number, otherwise known as an "A-Number," is typically issued to persons who apply for, or are granted, certain immigration benefits. In addition to USCIS, CBP, U.S. Immigration and Customs Enforcement (ICE), Executive Office for Immigration Review (EOIR), and the U.S. Department of State (DOS) may also issue an A-Number to certain aliens. If he or she was issued an A-Number, type or print it in the spaces provided. If he or she does not have an A-Number, or if he or she does not remember it, leave this space blank.

Item Number 8. USCIS Online Account Number (if any). If he or she has previously filed an application or petition using the USCIS online filing system (previously called USCIS Electronic Immigration System (USCIS ELIS)), provide the USCIS Online Account Number he or she was issued by the system. He or she can find his or her USCIS Online Account Number by logging in to his or her account and going to the profile page. If he or she previously filed certain applications or petitions on a paper form through a USCIS Lockbox facility, he or she may have received a USCIS Online Account Access Notice issuing him or her a USCIS Online Account Number. He or she may find his or her USCIS Online Account Number at the top of the notice. The USCIS Online Account Number is not the same as an A-Number. If he or she was issued a USCIS Online Account Number, enter it in the space provided.

Item Number 9. Application or Petition Receipt Number. Provide the USCIS receipt number that corresponds to any application or petition he or she previously filed with USCIS.

Item Numbers 10.a. - 13. Information About Family Members that May Appear on Requested Records. Provide the family member's full name and his or her relationship to the Subject of Record for any individual that may appear on the requested records (for example, a spouse or children). If you need extra space to complete this section, use the space provided in **Part 6. Additional Information**.

Item Numbers 14.a. - 15.d. Parents' Names for the Subject of Record. Provide the full names of his or her father and mother in the spaces provided. If applicable, include his or her mother's maiden name.

Item Number 16. Describe the records you are seeking. If you need additional space, use the space provided in **Part 6. Additional Information**.

Part 4. Verification of Identity and Subject of Record Consent

If you are the Subject of Record and requesting records about yourself, you must verify your identity by providing the information requested in addition to **Item Numbers 1.a. - 4.i**. You must also sign your request and have your signature notarized **OR** submitted under penalty of perjury in **Item Number 8.a. or 8.b**.

If you are NOT the Subject of Record but are requesting records on behalf of that individual, you must still provide a statement from the individual verifying his or her identity and certifying the individual's agreement that USCIS may release his or her records to you. Again, you may fulfill these requirements by completing **Item Numbers 1.a. - 4.i** and having the individual complete **Item Numbers 8.a. or 8.b**.

If the Subject of Record is deceased, select **Item Number 8.c** and attach appropriate proof of death, such as an obituary or a death certificate with your request.

NOTE: If your request is **NOT** on behalf of the individual whose records you seek, you may use the space provided in **Part 6. Additional Information** to provide additional information you want USCIS to consider in processing your request. You should also attach any documentation in support of your request. For example, if you believe disclosure of the Subject of Record's information would further a public interest recognizable under FOIA, you may use **Part 6** to explain the public interest and attach any documentation in support of your position.

Item Numbers 1.a. - 1.c. Full Name of the Subject of Record. Provide the full legal name of the Subject of Record in the spaces provided. If you are completing this request using a computer, this information will automatically appear based on your responses in **Part 3., Item Numbers 2.a. - 2.c**.

Item Number 2. Date of Birth. Provide the date of birth (mm/dd/yyyy) of the subject of record.

Item Number 3. Country of Birth. Provide the country of birth of the subject of record.

Item Numbers 4.a. - 4.i. Mailing Address for the Subject of Record. Provide the current address of the Subject of Record in the spaces provided. You may list a valid residence, APO, "In Care Of Name," or commercial address in the U.S. You may list a Post Office address (PO Box) if that is how the Subject of Record receives mail. If the mail is sent to someone other than the Subject of Record, include an "In Care Of Name" as part of the mailing address. If the mailing address is in a U.S. territory and it contains an urbanization name, list the urbanization name in the "In Care Of Name" space provided.

Item Numbers 5. - 7. Contact Information for the Subject of Record. Provide the daytime telephone number, mobile telephone number (if any), and email address (if any) for the Subject of Record. Providing this information is optional.

Item Numbers 8.a. - 8.c. Signature and Notarized Affidavit or Declaration of the Subject of Record. Select **only one** box. The Subject of Record **MUST** provide a signature in **Item Number 6.a. OR Item Number 6.b.**, regardless if you submit this request for yourself or on behalf of another individual. If the Subject of Record is deceased, select **Item Number 6.c.** and attach proof of death.

NOTE: Appropriate consent from the Subject of Record is established by submitting Form G-639 with required information and signatures or an authorizing letter with verification of identity for the Subject of Record. You may also use U.S. Department of Justice (DOJ) Form 361, Certification of Identity, to verify identity for the Subject of Record. Form DOJ-361 is available at www.justice.gov/oip/forms/cert_ind.pdf. If you are a parent or legal guardian submitting Form G-639 on behalf of a child or other individual, you must also establish your own identity as the child's or other individual's parent or legal guardian.

Part 5. Processing Information

Item Number 1. Select the box next to any of the circumstances that apply to your request. USCIS may consider your request for expedited processing if any of these circumstances apply.

Item Number 2. If you have a pending Immigration Court hearing, submit a copy of one of the following documents with your Form G-639: I-862, Notice to Appear; Form I-122, Order to Show Cause; Form I-863, Note of Referral to Immigration Judge, or a written notice of continuation of a future scheduled hearing before the immigration judge.

Part 6. Additional Information

Item Numbers 1.a. - 7.d. If you need extra space to provide any additional information within this request, use the space provided in **Part 6. Additional Information**. If you need more space than what is provided in **Part 6.**, you may make copies of **Part 6.** to complete and file with your request, or attach a separate sheet of paper. Type or print the Subject of Record's name and A-Number (if any) at the top of each sheet; indicate the **Page Number, Part Number, and Item Number** to which your answer refers; and sign and date each sheet.

We recommend that you print or save a copy of your completed request to review in the future and for your records.

What Is the Filing Fee?

There is no filing fee for Form G-639.

Processing Fees

Please do not send any fees payment at the time of your request. After receiving your FOIA request, USCIS will contact you if any fees are required.

Except for commercial requestors, the first 100 pages of reproduction and the first two hours of search time are provided without charge. Thereafter, requests processed under FOIA/PA may incur fees of 10 cents per page for duplication. Other costs for searches and duplication are charged at the actual direct cost.

Fees are charged if the combined costs for searches, duplication, and/or review is more than \$14, and by submitting Form G-639, you as the requestor agree to pay for fees up to \$25. If total anticipated fees are more than \$250, or you have failed to pay for fees in the past, USCIS may request an advance deposit. Also, USCIS will not process any Form G-639 until the requestor pays all unpaid fees from any of their prior requests.

NOTE: The processing fees are not refundable, regardless of any action USCIS takes on this request. **DO NOT MAIL CASH.** You must submit all fees in the exact amounts.

Payments by Check or Money Order

Use the following guidelines when you prepare your check or money order for the Form G-639 processing fees:

1. The check or money order must be drawn on a bank or other financial institution located in the United States and must be payable in U.S. currency; **and**
2. Make the check or money order payable to **Treasury of the United States**.

Notice to Those Paying by Check. If you send USCIS a check, we will convert it into an electronic funds transfer (EFT). This means we will copy your check and use the account information on it to electronically debit your account for the amount of the check. The debit from your account will usually take 24 hours and your bank will show it on your regular account statement.

You will not receive your original check back. We will destroy your original check, but will keep a copy of it. If USCIS cannot process the EFT for technical reasons, you authorize us to process the copy in place of your original check. If your check is returned as unpayable, we will re-submit the payment to the financial institution one time. If the check is returned as unpayable a second time, we will reject your Form G-639 and charge you a returned check fee.

Where To File?

Please see our website at www.uscis.gov/G-639 or visit the USCIS Contact Center at www.uscis.gov/contactcenter for the most current information about where to file this request. The USCIS Contact Center provides information in English and Spanish. For TTY (deaf or hard of hearing) call: **1-800-767-1833**.

Processing Information

Requests for More Information. We may request that you provide more information or evidence to support your request.

Decision. The decision on Form G-639 involves a determination of whether you have provided the information required for USCIS to process your records access request. USCIS will notify you of the decision in writing.

USCIS Forms and Information

You can get USCIS forms and immigration-related information on the USCIS Internet website at www.uscis.gov. You may order USCIS forms by calling the USCIS Contact Center at **1-800-375-5283**. The USCIS Contact Center provides information in English and Spanish. For TTY (deaf or hard of hearing) call: **1-800-767-1833**

DHS Privacy Notice

AUTHORITIES: The information requested on this form, and the associated evidence, is collected under the Freedom of Information Act (FOIA), 5 U.S.C. Section 552, and the Privacy Act of 1974 (PA), 5 U.S.C. Section 552a, together with the Department of Homeland Security implementing regulations found in volume 6 of the Code of Federal Regulations (CFR).

PURPOSE: The primary purpose for providing the requested information on this form is to request access to information under the FOIA and/or PA. DHS uses the information you provide to grant or deny the information request you are seeking.

DISCLOSURE: The information you provide is voluntary. However, failure to provide the requested information, and any requested evidence, may delay access to information or result in denial of your information request.

ROUTINE USES: DHS may share the information you provide on this form and any additional requested evidence with other Federal, state, local, and foreign government agencies and authorized organizations. DHS follows approved routine uses described in the associated published system of records notices [DHS/ALL-001 DHS FOIA and Privacy Act Record System and DHS/ALL-037 E-Authentication Records System of Records] and the published privacy impact assessments [DHS/USCIS/PIA-077 FOIA Immigration Records System (FIRST) and DHS/ALL/PIA-038 FOIA/PA Information Processing System], which you can find at www.dhs.gov/privacy. DHS may also share this information, as appropriate, for law enforcement purposes or in the interest of national security.

Paperwork Reduction Act

An agency may not conduct or sponsor an information collection, and a person is not required to respond to a collection of information, unless it displays a currently valid Office of Management and Budget (OMB) control number. The public reporting burden for this collection of information is estimated at 40 minutes per response, including the time for reviewing instructions, gathering the required documentation and information, completing the request, preparing statements, attaching necessary documentation, and submitting the request. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: U.S. Citizenship and Immigration Services, Regulatory Coordination Division, Office of Policy and Strategy, 20 Massachusetts Ave NW, Washington, DC 20529-2140; OMB No. 1615-0102. **Do not mail your completed Form G-639 to this address.**



Freedom of Information/Privacy Act Request

Department of Homeland Security
U.S. Citizenship and Immigration Services

USCIS
Form G-639
OMB No. 1615-0102
Expires 06/30/2022

NOTE: Use of this form is optional. USCIS accepts any written request, regardless of format, provided that the request complies with the applicable requirements under the FOIA and the Privacy Act. However, using this form can help ensure we have the appropriate information to handle your request.

▶ **START HERE - Type or print in black ink.**

Part 1. Type of Request

Select **only one** box.

NOTE: If you are filing this request on behalf of another individual, respond as it would apply to that individual.

- 1.a. Freedom of Information Act (FOIA)/Privacy Act (PA)
- 1.b. Amendment of Record (PA only)

Part 2. Requestor Information

1. Are you the Subject of Record for this request?
 Yes No

If you answered "Yes" to **Item Number 1.**, skip to **Part 3.** If you answered "No" to **Item Number 1.**, provide the information requested in **Part 2., Item Numbers 2.a. - 3.c.**

Representative Role to the Subject of Record

Select your representative role to the Subject of the Record.

- 2.a. An Attorney
- 2.b. An Accredited Representative of a Qualified Organization
- 2.c. A Family Member

Select the appropriate box to provide further information regarding your representative role to the Subject of the Record.

- 3.a. I am requesting information on behalf of my child or a minor I have guardianship over.
- 3.b. I am requesting information on behalf of someone who is deceased.
- 3.c. I am requesting information on behalf of someone for whom I have power of attorney.

Requestor's Full Name

- 4.a. Family Name (Last Name)
- 4.b. Given Name (First Name)
- 4.c. Middle Name

Requestor's Mailing Address [\(USPS ZIP Code Lookup\)](#)

- 5.a. In Care Of Name (if any)
- 5.b. Street Number and Name
- 5.c. Apt. Ste. Flr.
- 5.d. City or Town
- 5.e. State 5 f. ZIP Code
- 5.g. Province
- 5.h. Postal Code
- 5.i. Country

Requestor's Contact Information

- 6. Requestor's Daytime Telephone Number
- 7. Requestor's Mobile Telephone Number (if any)
- 8. Requestor's Email Address (if any)

Requestor's Certification

By my signature, I consent to pay all costs incurred for search, duplication, and review of documents up to \$25. (See the **What Is the Filing Fee** section in the Form G-639 Instructions for more information.)

- 9.a. Requestor's Signature
➡
- 9.b. Date of Signature (mm/dd/yyyy)

Part 3. Description of Records Requested

While you are not required to respond to every **Item Number** in **Part 3.**, failure to provide complete and specific information may delay processing of your request or prevent U.S. Citizenship and Immigration Services (USCIS) from locating the records or information requested.

1. State the purpose of your request.

NOTE: This field is optional. However, providing this information may assist USCIS in locating the records and information needed to respond to your request.

Full Name of the Subject of Record

- 2.a. Family Name (Last Name)
- 2.b. Given Name (First Name)
- 2.c. Middle Name

Other Names Used by the Subject of Record (if any)

Provide all other names the Subject of Record has ever used, including aliases, maiden name, and nicknames. If you need extra space to complete this section, use the space provided in **Part 6. Additional Information.**

- 3.a. Family Name (Last Name)
- 3.b. Given Name (First Name)
- 3.c. Middle Name
- 4.a. Family Name (Last Name)
- 4.b. Given Name (First Name)
- 4.c. Middle Name

Full Name of the Subject of Record at Time of Entry into the United States

- 5.a. Family Name (Last Name)
- 5.b. Given Name (First Name)
- 5.c. Middle Name

Other Information About the Subject of Record

- 6.a. Form I-94 Arrival-Departure Record Number
▶
- 6.b. Passport or Travel Document Number
7. Alien Registration Number (A-Number) (if any)
▶ A-
8. USCIS Online Account Number (if any)
▶
9. Application or Petition Receipt Number
▶

Information About Family Members that May Appear on Requested Records

For example, provide the requested information about a spouse or children. If you need extra space to complete this section, use the space provided in **Part 6. Additional Information.**

Family Member 1

- 10.a. Family Name (Last Name)
- 10.b. Given Name (First Name)
- 10.c. Middle Name
11. Relationship

Family Member 2

- 12.a. Family Name (Last Name)
- 12.b. Given Name (First Name)
- 12.c. Middle Name
13. Relationship

Parents' Names for the Subject of Record

Father

- 14.a. Family Name (Last Name)
- 14.b. Given Name (First Name)
- 14.c. Middle Name

Part 3. Description of Records Requested
(continued)

Mother

15.a. Family Name (Last Name)

15.b. Given Name (First Name)

15.c. Middle Name

15.d. Maiden Name (if applicable)

16. Describe the records you are seeking. If you need additional space, use the space provided in **Part 6. Additional Information.**

Part 4. Verification of Identity and Subject of Record Consent

Provide the information requested in **Item Numbers 1.a. - 7.** In addition, the Subject of Record **MUST** sign in **Item Numbers 8.a. - 8.c.**

Full Name of the Subject of Record

1.a. Family Name (Last Name)

1.b. Given Name (First Name)

1.c. Middle Name

Other Information for the Subject of Record

2. Date of Birth (mm/dd/yyyy)

3. Country of Birth

Mailing Address for the Subject of Record

4.a. In Care Of Name (if any)

4.b. Street Number and Name

4.c. Apt. Ste. Flr.

4.d. City or Town

4.e. State 4 f. ZIP Code

4.g. Province

4 h. Postal Code

4 i. Country

Contact Information for the Subject of Record

NOTE: Providing this information is optional.

5. Daytime Telephone Number

6. Mobile Telephone Number (if any)

7. Email Address (if any)

Part 4. Verification of Identity and Subject of Record Consent (continued)

Signature of the Subject of Record

Select **only one** box.

NOTE: The Subject of Record **MUST** provide a signature in **Item Number 8.a. OR Item Number 8.b.** If the Subject of Record is deceased, select **Item Number 8.c.** and attach an obituary, death certificate, or other proof of death.

8.a. **Notarized Affidavit of Identity**

IMPORTANT: Do **NOT** sign and date below until the notary public provides instructions to you.

By my signature, I consent to USCIS releasing the requested records to the requestor (if applicable) named in **Part 2.** If filing this request on my own behalf, I also consent to pay all costs incurred for search, duplication, and review of documents up to **\$25.** (See the **What Is the Filing Fee** section in the Form G-639 Instructions for more information.)

Signature of Subject of Record

Date of Signature (mm/dd/yyyy)

Subscribed and sworn to before me on this _____
day of _____ in the year _____.

Daytime Telephone Number _____

Signature of Notary

My Commission Expires on (mm/dd/yyyy)

8.b. **Declaration Under Penalty of Perjury**

By my signature, I consent to USCIS releasing the requested records to the requestor (if applicable) named in **Part 2.** If filing this request on my own behalf, I also consent to pay all costs incurred for search, duplication, and review of documents up to **\$25.** (See the **What Is the Filing Fee** section in the Form G-639 Instructions for more information.)

I certify, swear, or affirm, under penalty of perjury under the laws of the United States of America, that the information in this request is complete, true, and correct.

Signature of Subject of Record

Date of Signature (mm/dd/yyyy)

8.c. **Deceased Subject of Record**

Part 5. Processing Information

1. Indicate if any of these circumstances apply to your request (Select all that apply).

Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of the individual.

An urgency to inform the public about an actual or alleged Federal government activity, if made by a person primarily engaged in disseminating information.

The loss of substantial due process rights.

A matter of widespread and exceptional media interest in which there exists possible questions about the government's integrity which affects public confidence.

Submit a certified, detailed statement regarding the basis for your request with your Form G-639.

2. Do you have a pending Immigration Court hearing date?
 Yes No

If you answered "Yes" to **Item Number 2.**, submit a copy of one of the following documents with your Form G-639: I-862, Notice to Appear; Form I-122, Order to Show Cause; Form I-863, Note of Referral to Immigration Judge, or submit a written notice of continuation of a future scheduled hearing before the immigration judge.

DETERMINATION OF INADMISSIBILITY

Event Number : [REDACTED] File No: [REDACTED]

SIGMA Event: [REDACTED] Date: August 29, 2019

In the Matter of: [REDACTED]

Pursuant to section 235(b)(1) of the Immigration and Nationality Act (Act), (8 U.S.C. 1225(b)(1)), the Department of Homeland Security has determined that you are inadmissible to the United States under section(s) 212(a) [] (6)(C)(i); [] (6)(C)(ii); [X] (7)(A)(i)(I); [] (7)(A)(i)(II); [] (7)(B)(i)(I); and/or [] (7)(B)(i)(II) of the Act, as amended, and therefore are subject to removal, in that:

- 1) You are ineligible for admission to the United States because at the time of your application for admission to the United States you were not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Immigration and Nationality Act, and/or at the time of your application for admission, you were not in possession of a valid unexpired passport, or other suitable travel document, or document of identity and nationality. To wit: your intentions are to live in the United States without valid documentation required by the INA due to fear of returning back to your native country.

... (CONTINUED ON I-831)

AIDA TREVINO
CBP OFFICER
Name and title of immigration officer (Print)

[Handwritten Signature]
Signature of immigration officer

ORDER OF REMOVAL
UNDER SECTION 235(b)(1) OF THE ACT

Based upon the determination set forth above and evidence presented during inspection or examination pursuant to section 235 of the Act, and by the authority contained in section 235(b)(1) of the Act, you are found to be inadmissible as charged and ordered removed from the United States.

Name and title of immigration officer (Print)

Signature of immigration officer

Name and title of supervisor (Print)

Signature of supervisor, if available

[] Check here if supervisory concurrence was obtained by telephone or other means (no supervisor on duty).

CERTIFICATE OF SERVICE

I personally served the original of this notice upon the above-named person on [] (Date)

Signature of immigration officer

Alien's Name [REDACTED]	File Number [REDACTED] SIGMA Event: [REDACTED]	Date August 29, 2019
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ON THE BASIS OF THE FOREGOING, IT IS CHARGED THAT YOU ARE SUBJECT TO REMOVAL FROM THE UNITED STATES PURSUANT TO THE FOLLOWING PROVISION(S) OF LAW:

=====

212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (Act), as amended, as an immigrant who, at the time of application for admission, is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality as required under the regulations issued by the Attorney General under section 211(a) of the Act.

Signature <i>Aida Trevino</i> AIDA TREVINO	Title CBP OFFICER
--	----------------------

Name [REDACTED] C/O ICE ERO 101 Ida B. Wells Dr., 4 th FLR Chicago, IL 60605	Date
	A-File
	Country of Citizenship
Place and Manner of Arrival At Chicago, IL (IA) POE; Air	Date of Arrival

To immigration judge:

- 1. The above-named alien has been found inadmissible to the United States and ordered removed pursuant to section 235(b)(1) of the Immigration and Nationality Act (Act). A copy of the removal order is attached. The alien has requested asylum and/or protection under the Convention against Torture and the matter has been reviewed by an asylum officer who has concluded the alien **does not** have a credible fear of persecution or torture. The alien has requested a review of that determination in accordance with section 235(b)(1)(B)(iii)(III) of the Act and 8 CFR § 208.30(g).
- 2. The above-named alien arrived in the United States as a stowaway and has been ordered removed pursuant to section 235(a)(2) of the Act. The alien has requested asylum and/or withholding of removal under the Convention against Torture and the matter has been reviewed by an asylum officer who has concluded the alien does not have a credible fear of persecution or torture. The alien has requested a review of that determination in accordance with section 235(b)(1)(B)(iii)(III) of the Act.
- 3. The above-named alien arrived in the United States in the manner described below and has requested asylum and/or withholding of removal under the Convention against Torture. The matter is referred for a determination in accordance with 8 CFR § 208.2(c). Arrival category (check one):

<input type="checkbox"/> Crewmember/applicant	<input type="checkbox"/> Crewmember/refused	<input type="checkbox"/> Crewmember/landed
<input type="checkbox"/> Crewmember/violator	<input type="checkbox"/> VWP/applicant	<input type="checkbox"/> VWP/violator
<input type="checkbox"/> 35(c) order	<input type="checkbox"/> S-visa nonimmigrant	<input type="checkbox"/> Stowaway: credible fear determination attached
- 4. The above-named alien has been ordered removed by an immigration officer pursuant to section 235(b)(1) of the Act. A copy of the removal order is attached. In accordance with section 235(b)(1)(C) of the Act, the matter is referred for review of that order. The above-named alien claims to be (check one):

<input type="checkbox"/> a United States citizen	<input type="checkbox"/> a lawful permanent resident alien
<input type="checkbox"/> an alien granted refugee status under section 207 of the Act	<input type="checkbox"/> an alien granted asylum under section 208 of the Act.
- 5. The above-named alien has been ordered removed pursuant to section 238(b) of the Act, or the Department of Homeland Security (DHS) has reinstated a prior exclusion, deportation, or removal order of the above-named alien pursuant to section 241(a)(5) of the Act. A copy of the removal order and, if applicable, the notice of reinstatement, are attached. The alien has expressed fear of persecution or torture and the claim has been reviewed by an asylum officer who has concluded the alien **does not** have a reasonable fear of persecution or torture. The alien has requested a review of that determination in accordance with 8 CFR §§ 208.31(f) and (g).
- 6. The above-named alien has been ordered removed pursuant to section 238(b) of the Act, or the DHS has reinstated a prior exclusion, deportation, or removal order of the above-named alien pursuant to section 241(a)(5) of the Act. A copy of the removal order and, if applicable, the notice of reinstatement, are attached. The alien has expressed fear of persecution or torture and the claim has been reviewed by an asylum officer who has concluded the alien **has** a reasonable fear of persecution or torture. The matter has been referred for a determination in accordance with 8 CFR § 208.31(e).
- 7. The Secretary of Homeland Security has determined that the release from custody of the above-named alien who is under a final order of removal would pose a special danger to the public according to the standards set in 8 CFR § 241.14(f)(1). The DHS has therefore invoked procedures to continue the alien's detention even though there is no significant likelihood that the alien will be removed from the United States in the reasonably foreseeable future. The matter is referred to the immigration judge for a review of this determination in accordance with 8 CFR § 241.14(g).

NOTICE TO APPLICANT

You are ordered to report for a hearing before an immigration judge for the reasons stated above. Your hearing is scheduled on

TBD at TBD You are to appear at
(Date) (Time)

USDOJ/EOIR, 536 South Clark St, Suite 340, Chicago, IL 60605

(Complete office address)

- X You may be represented in this proceeding, at no expense to the government, by an attorney or other individual authorized and qualified to represent persons before an Immigration Court.
X You may consult with a person or persons of your own choosing prior to your appearance in Immigration Court.
X Attached is a list of recognized organizations and attorneys that provide free legal service.

[Signature] Supervisory Asylum Officer
(Signature and title of immigration officer)

CERTIFICATE OF SERVICE

- X The contents of this notice were read and explained to the applicant in the PORTUGUESE language.
X The original of this notice was delivered to the above-named applicant by the undersigned on [] and the alien has been advised of communication privileges pursuant to 8 CFR 236.1(e). Delivery was made
X in person [] by certified mail, return receipt # [] requested [] by regular mail

[Signature] (IA)
(Signature and title of immigration officer)

Attachments to copy presented to immigration judge:

- [] Passport [] Form I-860
[] Visa [X] Form I-865
[] Form I-94 [] Form I-898
[] Forensic document analysis [] Asylum Officer's reasonable fear determination worksheet (I-899)
[] Fingerprints and photographs [X] Asylum officer's credible fear determination worksheet (I-870)
[] EOIR-33
[] FOR 8 CFR 241.14(f) CASES ONLY: Written statement including summary of the basis for the Secretary's determination to continue the alien in detention, and description of the evidence relied on in finding the alien specially dangerous (with supporting documents attached).
[] FOR 8 CFR 241.14(f) CASES ONLY: Written notice advising the alien of initiation of proceedings and informing alien of procedures governing the Reasonable Cause Hearing at 8 CFR 241.14(h).
[] Other (specify):

Record of Negative Credible Fear Finding and Request For Review by Immigration Judge

Alien File Number:

██████████

I. To be explained to the alien by the asylum officer:

U.S. Citizenship and Immigration Services (USCIS) has determined that you do not have a credible fear of persecution or torture pursuant to 8 CFR 208.30 for the following reason(s):

- A. You have not established a credible fear of persecution in your country of nationality, country of last habitual residence, or a country to which you have been ordered removed because:
- You have not indicated that you were harmed in the past and you have not expressed fear of future harm.
 - There is no significant possibility that you could establish in a full hearing that the harm you experienced and/or the harm you fear is on account of your race, religion, nationality, political opinion, or membership in a particular social group.
 - You have not indicated that you were harmed in the past, and there is no significant possibility that you could establish in a full hearing that the harm you fear is well founded.
 - There is no significant possibility that you could establish in a full hearing that the harm you experienced or fear was/is sufficiently serious to amount to persecution.
 - There is no significant possibility that you could establish in a full hearing that the entity that harmed you or would harm you was/is an agent of the government or an entity the government was/is unable or unwilling to control.

AND

- You have not established a credible fear of torture in a country to which you have been ordered removed because you have not established that there is a significant possibility that:
- You would suffer severe physical or mental pain or suffering.
 - The harm you fear would be specifically intended to inflict severe physical or mental pain or suffering.
 - The harm you fear would be inflicted by or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity.
 - The harm you fear would be inflicted while you are in the custody or physical control of the offender.
 - The harm you fear would not arise only from, would not be inherent in, and would not be incidental to, lawful sanctions.
- B. Considering the totality of the circumstances and all relevant factors, you have not established that your testimony is credible.

Therefore, you are ordered removed from the United States. You may request that an Immigration Judge review this decision.

If you request that an Immigration Judge review this decision, you will remain in detention until an Immigration Judge reviews your case. That review could occur as long as 7 days after you receive this decision.

If you do not request that an Immigration Judge review the decision, you may be removed from the United States immediately.

2. To be completed by the alien:

- Yes, I request Immigration Judge review** of the decision that I do not have a credible fear of persecution or torture.
- No, I do not request Immigration Judge review** of the decision that I do not have a credible fear of persecution or torture.

Applicant's Last Name/ Family Name (Print) Applicant's First Name (Print) Applicant's Signature

Asylum Officer's Last Name (Print) Asylum Officer's First Name (Print) Date

The contents of this form were read and explained to the applicant in the _____ language

Interpreter used:
By telephone (list interpreter service /ID number used _____).

In person (I, _____, certify that I am fluent in both the _____ and English languages. I interpreted the above information completely and accurately to the alien.)

Interpreter's Signature Date

DEPARTMENT OF HOMELAND SECURITY
U.S. Immigration and Customs Enforcement

VISA WAIVER PROGRAM (VWP)
FINAL ADMINISTRATIVE REMOVAL ORDER

File Number: [REDACTED]

Alien's Name: [REDACTED]

VISA WAIVER PROGRAM VIOLATOR

Based upon the allegations set forth in the Notice of Intent and evidence contained in the administrative record, I, the undersigned Deciding Official of the Department of Homeland Security (DHS), make the following determinations:

1. You are not a citizen or national of the United States;
2. You were admitted to the United States as a nonimmigrant visitor on [REDACTED] at NEW YORK, NY pursuant to Section 217 of the Immigration and Nationality Act under the Visa Waiver Program after executing Form I-94W, Nonimmigrant Visa Waiver Arrival/Departure Document or the Electronic System of Travel Authorization (ESTA), either of which explained to you the conditions of admission under the Visa Waiver Program and that you waived any right to contest, other than on the basis of an application for asylum, any action for your removal; and
3. The administrative record establishes by clear and convincing evidence that you are removable.

By the power and authority vested in the Secretary of Homeland Security, and in me as the Secretary's delegate under the laws of the United States, I find you removable as charged and order that you be removed from the United States.

You are hereby ordered removed to: [REDACTED] . This order is final and not subject to administrative appeal.
(Country)

You have limited judicial appeal rights. DHS will proceed with your removal from the United States unless a court order is issued to stay your removal or an application for asylum, withholding or deferral of removal is pending before the Department of Justice, Executive Office for Immigration Review.

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Secretary of Homeland Security under the laws of the United States and by his or her direction, command any DHS Officer with authority to enforce United States immigration law to take into custody and remove from the United States, the above-named alien.

[REDACTED]
(Printed Name, Title, and Signature of Deciding Official)

[REDACTED]
(City and State)

[REDACTED]
(Date)

Certificate of Service

I personally served this Final Administrative Removal Order on the alien. I have determined that the person served with this document is the individual named on this form. I explained this Final Administrative Removal Order to the alien in the English language, and confirmed that he/she understood it, without the need of an interpreter; OR via an interpreter,

[REDACTED]
(Name/Title/ID/Company).

[REDACTED]
(Printed Name, Signature and Title of Officer)

[REDACTED]
(Date)

I acknowledge that I have received a copy of this Final Administrative Removal Order.

[REDACTED]
(Alien's Signature)

[REDACTED]
(Date)

Alien refused to acknowledge receipt of this document (Witness signature required if alien refuses to sign).

[REDACTED]
(Printed Name, Signature and Title of Witness)

[REDACTED]
(Date)

DEPARTMENT OF HOMELAND SECURITY
U.S. Immigration and Customs Enforcement

VISA WAIVER PROGRAM (VWP)
NOTICE OF INTENT TO ISSUE A FINAL ADMINISTRATIVE REMOVAL ORDER

File Number: [REDACTED]

Alien's Name: [REDACTED]

The Department of Homeland Security (DHS) has determined that you entered the United States pursuant to Section 217 of the Immigration and Nationality Act (INA or the Act). Accordingly, you signed and agreed to the conditions stated on Form I-94W, Nonimmigrant Visa Waiver Arrival/Departure Document or the Electronic System of Travel Authorization (ESTA), either of which explained to you the conditions of admission under the Visa Waiver Program. As a condition of your admission into the United States under the Visa Waiver Program, you agreed to waive your right to contest any removal action, other than on the basis of an application for asylum.

DHS alleges that:

1. You are not a citizen and national of the United States.
2. You are a native of [REDACTED] and a citizen of [REDACTED].
3. You were admitted to the United States at John F. Kennedy airport on or about November [REDACTED].
4. You remained in the United States beyond 90 days [REDACTED] without authorization from the Immigration and Naturalization Service or its successor DHS.
5. You have waived your rights to contest any action for removal, except to apply for asylum, having been admitted under Section 217 of the Act.

Based on the information above, you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 217(a)(1) of the Immigration and Nationality Act (Act), as amended, your period of admission during the program as a nonimmigrant visitor was not to exceed 90 days.

Therefore, DHS is serving you this Notice of Intent to Issue a Final Administrative Removal Order ("Notice of Intent"). You are not entitled to a hearing before an Immigration Judge regarding your removability.

[REDACTED]
(City and State)

[REDACTED]
(Date)

[REDACTED]
(Printed Name)

[REDACTED]
(Title)

[REDACTED]
(Signature of Issuing Officer)

If you wish to contest any of the above factual allegations or your removability, you will be granted 48 hours from the time of service of this notice to do so. You may request, for good cause, an extension of time to rebut the charges stated above, to obtain supporting evidence, or to consult an attorney. If you fear persecution in your country of nationality, citizenship, or last residence on account of race, religion, nationality, membership in a particular social group, or political opinion you may apply for asylum under section 208 of the Act or withholding of removal under section 241(b)(3) of the Act. If you fear torture in your country of nationality, citizenship, or last residence, you may apply for withholding or deferral of removal under regulations implementing U.S. obligations under Article 3 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention Against Torture). A grant of withholding or deferral of removal would prohibit your return to a country or countries where you are more likely than not to be persecuted or tortured, but would not prevent your removal to other countries. If you fail to respond to these charges within the required timeframe, you will be ordered removed from the United States to your country of nationality, citizenship, or last residence. In the event DHS cannot remove you to one of the aforementioned countries, attempts will be made to remove you to a country in accordance with section 241(b)(2)(E) of the Act. You do not have any administrative appeal rights once the removal order has been issued by the deciding official. Subject to DHS's discretion, you may be detained pending your removal.

Certificate of Service

I personally served this Notice of Intent on the alien. I have determined that the person served with this document is the individual named on this form. I explained this Notice of Intent to the alien in the English language, and confirmed that he / she understood it,

without the need of an interpreter; OR

via an interpreter,

(Name/Title/ID/Company)

(Printed Name and Title of Officer)

(Signature of Officer)

(Date/Time)

I acknowledge that I have received this Notice of Intent

(Alien's Signature)

(Date)

Alien refused to acknowledge receipt of this document (witness signature required if alien refuses to sign).

(Printed Name and Title of Witness)

(Signature of Witness)

(Date/Time)

I do not wish to contest the allegations and charge(s) contained in the Notice of Intent

I admit the allegations and charge(s) in this Notice of Intent. I do not wish to request Asylum, Withholding or Deferral of Removal. I wish to be removed from the United States to my country of nationality, citizenship, or last residence.

I admit the allegations and charge(s) in this Notice of Intent. However, I wish to request Asylum, Withholding or Deferral of Removal as notated below.

OR

I Wish to Contest Removability

I contest the allegations and charge(s) in this Notice of Intent: (Attach any supporting documentation)

I am a citizen or national of the United States.

I am a lawful permanent resident of the United States.

I have been granted refugee or asylee status in the United States, or withholding or deferral of removal.

I did not last enter the United States pursuant to the Visa Waiver Program.

I am in compliance with the terms of my admission and was admissible at the time of entry.

I am a citizen of _____ and eligible for Temporary Protected Status in accordance with Section 244 of the Act.

Other _____

AND / OR

I Wish to Request Asylum, Withholding or Deferral of Removal

I request asylum, withholding or deferral of removal to _____ (Name(s) of Country or Countries):

Under Sections 208 or 241(b)(3) of the Act, because I fear persecution on account of my race, religion, nationality, membership in a particular social group, or political opinion in that country or those countries.

Under the regulations implementing U.S. obligations under Article 3 of the Convention Against Torture, because I fear torture in that country or those countries.

(Alien's Signature)

(Date)

The alien was provided a copy of this Notice of Intent. After having provided the alien with a 48-hour period to respond (if applicable) to these allegations and charge(s), the alien has (check all boxes that apply):

Admitted the allegations and charge(s).

Contested the allegations.

Not made any claim for relief from removal.

Made a request for asylum, withholding, or deferral of removal (Form I-863 Notice of Referral to Immigration Judge issued).

Failed or refused to respond to the allegations.

(Printed Name and Title of Officer)

(Signature of Officer)

(Date/Time)

In removal proceedings under section 240 of the Immigration and Nationality Act:

Subject ID: 183684473

SIOMA NUMBER: 88888488

Date: 10/23/2019

File No: [REDACTED]
Event No: LAR1907000247

In the Matter of: [REDACTED]

Respondent: [REDACTED]

Currently residing at:

[REDACTED]

(Number, street, city and ZIP code)

(Area code and phone number)

- 1. You are an arriving alien.
- 2. You are an alien present in the United States who has not been admitted or paroled.
- 3. You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that you:

- 1. You are not a citizen or national of the United States;
- 2. You are a native of Venezuela and a citizen of Venezuela;
- 3. You applied for admission to enter the United States at the port of Entry in Laredo, Texas on or about July 9, 2019 as an immigrant;
- 4. You are an immigrant not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Immigration and Nationality Act.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

See Continuation Page Made a Part Hereof

- This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.
- Section 235(b)(1) order was vacated pursuant to: 8CFR 208.30(f)(2) 8CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:
800 DOLORES STREET-SUITE 300 San Antonio TEXAS US 78207

(Complete Address of Immigration Court, including Room Number, if any)

on September 19, 2019, at 08:30 A.M. to show why you should not be removed from the United States based on the

charge(s) set forth above:

HECTOR GONZALEZ

(Signature and Title of Issuing Officer)

CBP OFF

Date: July 10, 2019

LAREDO, TX

(City and State)

See reverse for important information

Notice to Respondent

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 3.14. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice, to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents, which you desire to have considered in connection with your case. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or removable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the immigration judge.

You will be advised by the immigration judge before whom you appear of any relief from removal for which you may appear eligible including the privilege of departure voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

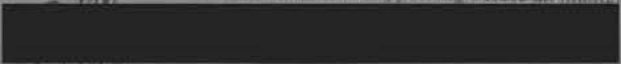
Failure to appear: You are required to provide the DHS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the DHS.

Mandatory Duty to Surrender for Removal: If you become subject to a final order of removal, you must surrender for removal to one of the offices listed in 8 CFR 241.16(a). Specific addresses or locations for surrender can be obtained from your local DHS office or over the internet at <http://www.ice.gov/about/dro/contact.htm>. You must surrender within 30 days from the date the order becomes administratively final, unless you obtain an order from a Federal court, immigration court, or the Board of Immigration Appeals staying execution of the removal order. Immigration regulations at 8 CFR 241.1 define when the removal order becomes administratively final. If you are granted voluntary departure and fail to depart the United States as required, fail to post a bond in connection with voluntary departure, or fail to comply with any other condition or term in connection with voluntary departure, you must surrender for removal on the next business day thereafter. If you do not surrender for removal as required, you will be ineligible for all forms of discretionary relief for as long as you remain in the United States and for ten years after departure or removal. This means you will be ineligible for asylum, cancellation of removal, voluntary departure, adjustment of status, change of nonimmigrant status, registry, and related waivers for this period. If you do not surrender for removal as required, you may also be criminally prosecuted under section 243 of the Act.

Request for Prompt Hearing

To expedite a determination in my case, I request an immediate hearing. I waive my right to a 10-day period prior to appearing before an immigration judge.


HECTOR GONZALEZ


(Signature of Respondent)

Before: Customs & Border Protection Officer

Date: July 10, 2019

(Signature and Title of Officer)

Certificate of Service

This Notice to Appear was served on the respondent by me on July 10, 2019 in the following manner and in compliance with section 239(a)(1)(F) of the Act.


in person by certified mail, return receipt requested by regular mail

Attached is a credible fear worksheet.

Attached is a list of organizations and attorneys which provide free legal services.

The alien was provided oral notice in the Spanish language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.


(Signature of Respondent if Personally Served)


HECTOR GONZALEZ
Customs & Border Protection Officer
(Signature and Title of Officer)

Form I-862 (Rev. 08-01-07)

Alien's Name [REDACTED]	File Number [REDACTED]	Date July 10, 2019
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ON THE BASIS OF THE FOREGOING, IT IS CHARGED THAT YOU ARE SUBJECT TO REMOVAL FROM THE UNITED STATES PURSUANT TO THE FOLLOWING PROVISION(S) OF LAW:

212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (Act), as amended, as an immigrant who, at the time of application for admission, is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality as required under the regulations issued by the Attorney General under section 211(a) of the Act.

Signature 	Title CAF OFFICER
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Migrant Protection Protocols

A [REDACTED]

Initial Processing Information

- You have been identified for processing under the Migrant Protection Protocols and have been issued a Form I-862 Notice to Appear (NTA) for proceedings before an immigration court where you may apply for all forms of relief available under the Immigration and Nationality Act. Pursuant to U.S. law, including section 240 of the Immigration and Nationality Act and implementing regulations, an immigration judge will determine whether you are removable from the United States, and if you are, whether you are eligible for relief or protection from removal. While you will be able to pursue such relief or protection under the same terms and conditions as any alien in section 240 proceedings, pursuant to U.S. law, you will be returned to Mexico and may not attempt to enter the United States until you return to the appropriate port of entry on the date of your hearing before an immigration judge.
- The NTA provides the date and time of your first hearing before an immigration judge in the United States. The court identified on your NTA is the official court location for filing purposes. On the date of your hearing, you must report to the Laredo, TX port of entry, at the date and time listed below. Your hearing will take place by teleconference in an immigration hearing facility located at the port of entry. If your case cannot be completed in one hearing, the immigration court will provide you with a Notice of Hearing in Removal Proceedings, indicating the date and time for any subsequent hearings.
 - You may call the immigration court at 1-800-898-7180 to obtain case status information 24 hours a day, 7 days a week. If you are calling from outside of the United States, you should dial 001-880-898-7180.
- You should arrive at the port of entry listed above at 04:30 a.m./p.m. on [REDACTED] to ensure that you have time to be processed and meet with attorney or accredited representative (if you arrange to be represented during your removal proceedings). If you fail to arrive at the appropriate date and time, you may be ordered removed in absentia.
 - When you arrive at the designated port of entry for your hearing, you should bring your NTA or Notice of Hearing in Removal Proceedings and any available government-issued identification and/or travel documents.
 - When you arrive at the designated port of entry for your hearing, you should bring any minor children or other family members who arrived with you to the United States and received an NTA for the same date and time.
- You have the statutory privilege of being represented by an attorney or accredited representative of your choosing who is authorized to practice before the immigration courts of the United States, at no expense to the U.S. Government.
 - You have been provided with a List of Legal Service Providers, which has information on low cost or free legal service providers practicing near the immigration court where your hearing(s) will take place.
 - A list of legal service providers is also available on the Executive Office for Immigration Review website at <https://www.justice.gov/eoir/list-pro-bono-legal-service-providers>.
- If you choose to be represented, you may consult with counsel at no expense to the U.S. Government through any available mechanism, including the following, as applicable:
 - You may consult with your counsel by telephone, email, video conference, or any other remote communication method of your choosing.
 - You may arrange to consult with your counsel in person at a location in Mexico of your choosing.
 - On the day of your immigration hearing, you may arrange to meet with your counsel in-person, in the United States, in your assigned immigration hearing facility located at the port of entry, prior to that hearing.

Signature [REDACTED]

National Immigrant Justice Center

Illegal Reentry Practice Advisory for Federal Defenders

Protocolos de Protección del Migrante
Información de Procesamiento Inicial

A [REDACTED]

- Usted ha sido identificado para procesamiento bajo los Protocolos de Protección del Migrante y se le ha expedido un Formulario I-862, Citatorio (NTA, por sus siglas en inglés), para procedimientos ante una corte de inmigración, donde podrá solicitar todas las formas de alivio de inmigración disponibles bajo la Ley de Inmigración y Nacionalidad. Cumpliendo con las leyes de los Estados Unidos, incluso la sección 240 de la Ley de Inmigración y Nacionalidad y la implementación de regulaciones, un juez de inmigración determinará si usted es sujeto a remoción de los Estados Unidos, y en caso de serlo, si es elegible o no a alivio o protección de remoción. Aunque usted podrá buscar ese alivio o protección bajo los mismos términos y condiciones de cualquier extranjero, en los procedimientos de la sección 240, de acuerdo a las leyes de los Estados Unidos, usted será devuelto a México y no podrá intentar entrar a los Estados Unidos hasta que regrese al puerto de entrada apropiado en la fecha de su audiencia ante un juez de inmigración.
- La NTA, proporciona la fecha y hora de su primera audiencia ante un juez de inmigración en los Estados Unidos. El tribunal identificado en su NTA es la ubicación oficial de la corte para propósitos de presentación. En la fecha de su audiencia, usted debe presentarse al puerto de entrada Laredo, TX, en la fecha y hora listada más abajo. Su audiencia se llevará a cabo por teleconferencia en un centro de audiencias de inmigración ubicado en el puerto de entrada. Si su caso no puede completarse en una sola audiencia, la corte de inmigración le proveerá una Notificación de Audiencia en Procedimientos de Remoción, que indica la fecha y hora de cualquier audiencia subsecuente.
 - Usted puede llamar a la corte de inmigración al teléfono 1-800-898-7180 para obtener información de su caso las 24 horas al día, los 7 días de la semana. Si está llamando desde fuera de Estados Unidos, usted debe marcar 001-880-898-7180.
- Usted debe llegar al puerto de entrada listado arriba a las 09:30 (a.m.) /p.m. el [REDACTED], para asegurarse de tener tiempo para ser procesado y para que pueda reunirse con su abogado o representante acreditado (si usted hace arreglos para ser representado durante sus procedimientos de remoción). Si usted falla en llegar en la fecha y hora apropiadas, podría ordenarse su remoción en ausencia.
 - Al llegar al puerto de entrada designado para su audiencia, debe traer consigo la NTA o Notificación de Audiencia en Procesos de Remoción, así como cualquier identificación emitida por el gobierno y/o documentos de viaje.
 - Al llegar al puerto de entrada designado para su audiencia, debe traer cualquier menor o otro familiar que haya entrado a los Estados Unidos con usted y que recibieron una NTA para la misma fecha y hora.
- Usted tiene el privilegio legal de ser representado por un abogado o representante acreditado de su elección, que esté acreditado para ejercer la práctica de inmigración ante una corte de inmigración de los Estados Unidos, sin cargo al gobierno estadounidense.
 - A usted se le proporcionó anteriormente un Listado de Proveedores de Servicios Legales, la cual contiene información acerca de servicios de bajo costo o gratuitos de parte de los proveedores legales que practican cerca de la corte de inmigración donde su audiencia(s) tendrá lugar.
 - Un listado de los proveedores de servicios legales también está disponible en el sitio web de la Oficina Ejecutiva para la Revisión de Inmigración en <https://www.justice.gov/eoir/list-pro-bono-legal-serviceproviders>
- Si usted elige ser representado, puede consultar con un consejero sin cargo al Gobierno de los Estados Unidos por medio de cualquier mecanismo que incluyen los siguientes, si aplica:
 - Usted puede consultar con su consejero por teléfono, correo electrónico, videoconferencia o cualquier otro método de comunicación remota de su elección.
 - Usted puede hacer arreglos para consultar con su consejero en persona en una localidad de su elección en México.
 - El día de su audiencia de inmigración, usted puede hacer arreglos para reunirse con su abogado en persona, en los Estados Unidos, en su centro de audiencia de inmigración asignado ubicado en el puerto de entrada, antes de esa audiencia.

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National Immigrant Justice Center

Illegal Reentry Practice Advisory for Federal Defenders

Purpose of This Notice.

The purpose of this notice is to explain what rights you have and what may happen to you as a result of statements you make. It is important that you understand your rights and what will happen. **Please read this notice carefully.**

You have received this notice because the Department of Homeland Security (DHS) believes that you may be required to seek protection in Canada instead of the United States. You have indicated an intention to apply for asylum or a fear of persecution, torture or return to your country. You will be interviewed by a specially-trained asylum officer from the U.S. Citizenship and Immigration Services (USCIS) to determine if you must be returned to Canada to seek protection, based on an agreement between Canada and the United States. There are some exceptions to the agreement. The asylum officer will question you to see whether you qualify for one of those exceptions.

You may qualify for an exception if you are a Canadian citizen or, if you are stateless and habitually reside in Canada. You may qualify for an exception if you hold a validly issued U.S. visa or if no visa is required for you to enter the United States. You may also qualify for an exception if you have a spouse, parent, legal guardian, sibling, son, daughter, grandparent, grandchild, aunt, uncle, niece or nephew who holds lawful status (other than visitor) in the United States, or is at least 18 years old and has a pending asylum application in the United States. Finally, you may be allowed to seek asylum in the United States if it is determined that it is in the public interest to allow you to do so.

If you qualify for one of these exceptions, the same officer may determine if you have a "credible fear of persecution" or a "credible fear of torture," a process that will be explained to you in detail shortly. However, if you are not required to have a visa and qualify for an exception, U.S. law requires the officer to refer you to an immigration judge, who will make a determination in your case.

Your Rights During Threshold Screening.

- You have the right to wait 48 hours after arrival at a detention center before your interview. You also have the right to waive this waiting period if you would like to have the interview sooner.
- You may consult with a person or persons of your choosing, at no expense to the U.S. Government.
- You have the right to an interpreter provided by the U.S. Government.

Consequences of Failure to Establish That You Qualify for an Exception to the Agreement.

If you cannot qualify for an exception, you will be returned to Canada to seek protection there. Upon removal from the United States, you may be barred from reentry for a period of five years or longer.

Interpreter Certification.

I, _____ (name of interpreter) certify that I am fluent in both the _____ and English languages, that I interpreted the above information from English to _____ completely and accurately and that the recipient appeared to have understood my interpretation.

(Date)

(Signature of interpreter)

Alien Acknowledgement of Receipt of Notice of Interview.

I acknowledge that I have been given notice concerning my interview. I understand that I may consult with a person or persons of my choosing prior to the interview as long as it does not unreasonably delay the process and is at no expense to the government.

(Date)

(Signature of person being referred)