National Immigration Litigation Alliance
Immigrant justice through the courts

Practice Advisory[1]

Everything Expedited Removal
April 20, 2023

Introduction

Enacted in 1997, expedited removal is the name for the summary removal process applied to persons whom immigration border officers determine are inadmissible for allegedly having false or improper documentation. Expedited removal proceedings have resulted in hundreds of thousands of removals since 1997. The process lacks procedural safeguards and, thus, is rife with errors, resulting in widespread violations of individuals' legal rights.

Section I of this advisory addresses the basics of expedited removal law, including to whom the statute does and does not apply, what immigration officers must do when issuing expedited removal orders, and the law governing detention. **Section II** details the credible fear process, including what happens procedurally when an individual establishes or fails to establish a credible fear. **Section III** covers the preclusion of judicial review but also addresses potential alternative options for challenging expedited removal orders, including reopening under 8 C.F.R. § 103.5(a), cancellation by operation of law or in the exercise of discretion, and the state of the law regarding collateral challenges to expedited removal orders in reinstatement cases. **Section IV** covers the administrative and limited habeas review available to individuals who claim status as a U.S. citizen, lawful permanent resident, refugee, or asylee. **Section V** provides a brief overview of the Trump administration's effort to expand the use of expedited removal to the interior and the rescission of the expansion.

I. Expedited Removal Basics

A. Governing Law

Expedited removal is a procedure under which low-level immigration officers from the U.S. Customs and Border Protection (CBP), a component agency of the Department of Homeland Security (DHS), order the summary deportation of individuals from the United States. 8 U.S.C. § 1225(b)(1). Unless the person articulates a fear of return to their country of origin or an intention to seek asylum, expedited removal is generally carried out without access to an immigration judge (IJ) or any procedural protections available in immigration court proceedings.

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The regulations governing expedited removal and associated procedures include 8 C.F.R. §§ 235.3 (expedited removal), 208.30 (credible fear determinations), 1208.30 (same), 1003.42 (review of credible fear determinations).

The detention of individuals in expedited removal proceedings is governed by 8 U.S.C. § 1225(b)(1)(B)(ii) and (iii)(IV) and 8 C.F.R. § 235.3(b)(2)(iii). After initial apprehension and custody of an individual subject to expedited removal, usually by CBP, detention responsibility shifts to U.S. Immigrations and Customs Enforcement (ICE). Section 1225(b)(1)(B)(ii) provides for detention while a credible fear claim is pending. Section 1225(b)(1)(B)(iii)(IV) provides for mandatory detention of individuals who have not established a credible fear.

In *Jennings v. Rodriguez*, the Supreme Court held that individuals in expedited removal who demonstrate a credible fear are not statutorily eligible for bond hearings. 138 S. Ct. 830, 841-46 (2018). Although there is ongoing litigation asserting a due process right to a bond hearing,[2] at present, DHS will only release noncitizens who have established a credible fear on parole. *See* 8 U.S.C. § 1182(d)(5)(A); 8 C.F.R. § 235.3(b)(2)(iii); *see also* ICE, Directive No. 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 9, 2009)..

B. Who Is Subject to Expedited Removal

Under 8 U.S.C. § 1225(b)(1)(A)(i), DHS may subject to expedited removal a noncitizen arriving in the United States at a port of entry who is inadmissible under 8 U.S.C. § 1182(a)(6)(C) or (a)(7). Section 1182(a)(6)(C) provides for inadmissibility due to false claims to U.S. citizenship or seeking an immigration benefit by fraud or misrepresentation of material facts. Section 1182(a)(7) provides for inadmissibility due to lack of proper entry documentation.

Additionally, the statute provides that the DHS Secretary[3] may designate application to other individuals who have "not been admitted or paroled into the United States," if they have "not affirmatively shown, to the satisfaction of an immigration officer, that [they have] been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility." 8 U.S.C. § 1225(b)(1)(A) (iii)(II). Currently, the DHS Secretary has designated that expedited removal applies to individuals who are apprehended within 100 miles of a land border and are unable to demonstrate that they have been continuously present in the United States for 14 days. *See* Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877, 48879 (Aug. 11, 2004).[4]

Thus, currently, an individual may be subject to expedited removal if they are inadmissible under 8 U.S.C. § 1182(a)(6)(C) or (a)(7) and they arrive at a port of entry, they are apprehended within 100 miles

[2] *See Padilla v. ICE*, No. 2:18-cv-00928-MJP (W.D. Wash.). For current information about the status of the case, see the impact litigation page of NILA's website.

[3] Although the statute refers to the Attorney General, this reference is deemed to refer to the applicable DHS official. *See* 6 U.S.C. § 557.

[4] The DHS Secretary also designated application to a limited group of individuals arriving *by sea* without admission or parole who are apprehended within two years of entry as subject to expedited removal. Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68924 (Nov. 13, 2002).

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of a land border and within 14 days of entry or arrive in the United States by sea.

C. Who Is Not Subject to Expedited Removal

The following groups of individuals are not subject to expedited removal:

- Individuals who (1) are *not* arriving at a port of entry, (2) who were *not* apprehended within 100 miles of a land border and 14 days of entry, *and* (3) who did *not* arrive by sea and were *not* apprehended within two years of entry. *See* Section I.B.

- Individuals charged with any ground of removability or inadmissibility other than 8 U.S.C. § 1182(a)(6)(C) or (a)(7). 8 C.F.R. § 235.3(b)(3) (noting that DHS must refer for immigration court proceedings any individuals against whom it "wishes to pursue such additional grounds of inadmissibility").

- Children under 18 who meet the statutory definition of unaccompanied children (UC). 8 U.S.C. § 1232(a)(2)(A)-(B), (a)(5)(D); 6 U.S.C. § 279(g)(2) (UC definition).

- Individuals who arrive by air at a port of entry and are citizens of countries in the Western Hemisphere without full diplomatic relations with the United States. 8 U.S.C. § 1225(b)(1)(F).

- Applicants for admission under the Visa Waiver Program under 8 U.S.C. § 1187. 8 C.F.R. § 235.3(b)(10).

- U.S. citizens, lawful permanent residents, refugees, or asylees who have not had such status terminated. *See* 8 U.S.C. § 1225(b)(1)(C); 8 C.F.R. § 235.3(b)(5). Note that these individuals may initially be subject to expedited removal but are entitled to limited administrative and federal court review. *See* Section IV.

Furthermore, CBP may permit an individual applying for admission "at any time . . . to withdraw the application for admission and depart immediately from the United States" in lieu of issuing an expedited removal order. 8 U.S.C. § 1225(a)(4); 8 C.F.R. § 235.4.

To determine whether a client is, or has been, subject to expedited removal, NILA recommends filing Freedom of Information Act requests with U.S. Citizenship and Immigration Services (for the entire contents of the client's A-File),[5] CBP (for any/all documentation regarding border apprehensions), and the Office of Biometrics Identity Management (OBIM).

D. Expedited Removal Process

When subjecting an individual to expedited removal, CBP officers are obligated to:

- Provide interpretative assistance as needed;
- Create a Record of Sworn Statement;

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[5] For information on filing A-File FOIA requests, see *Nightingale v. USCIS* and FOIR Requests for Immigration Case Files (A-Files) (April 2023) on the practice advisory page of NILA's website.

- Read the individual all information on Form I-867A, which includes an advisal that individuals who fear removal will have the opportunity to speak to an immigration officer about their fear;
- Read back the Record of Sworn Statement to the individual and obtain their signature on the form and any corrections to the form;
- Advise the individual of the charges against them and give an opportunity to respond;
- Obtain supervisory review and concurrence; and
- Serve the individual with the expedited removal order.

See 8 C.F.R. § 235.3(b)(2), (b)(7). If the individual expresses a fear of return to their country of origin or a desire to apply for asylum, they must be referred for an interview with an asylum officer regarding that fear. *See* 8 U.S.C. § 1225(b)(1)(B); 8 C.F.R. § 235.3(b)(4); *see also* Section II. CBP must follow a separate process for individuals who claims to be U.S. citizens, lawful permanent residents, refugees, or asylees. *See* 8 U.S.C. § 1225(b)(1)(C); 8 C.F.R. § 235.3(b)(5); *see also* Section IV.

Importantly, CBP has discretion to elect not to issue an expedited removal order and instead to permit an individual to withdraw their application for admission, *see* 8 U.S.C. § 1225(a)(4); 8 C.F.R. § 235.4, or to issue a Notice to Appear (NTA) and place the individual in removal proceedings before an IJ. *See* Section III.D.

After following the regulatory procedures, and absent credible fear or claim status review proceedings, the DHS officer "shall order the [individual] removed from the United States without further hearing or review." *See* 8 U.S.C. § 1225(b)(1)(A)(i); *see also* 8 C.F.R. § 235.3(b)(8).

II. Credible Fear Process

A. Governing Law

Individuals in expedited removal proceedings who express a fear of return to their country of origin or a desire to apply for asylum and related protections must have the opportunity to seek protection through a process known as a credible fear interview, which can include review before an IJ. *See generally* 8 U.S.C. § 1225(b)(1)(B); 8 C.F.R. §§ 235.3(b)(4), 208.30, 1003.42, 1208.30.

As addressed above, by reading Form I-867A, CBP officers must advise noncitizens of their rights, including the right to an interview with an asylum officer if they have a fear of persecution or intention to apply for asylum. *See* 8 C.F.R. § 235.3(b)(2)(i). The officer must record in a sworn statement that the person has a fear or intention to seek protection. 8 C.F.R. § 235.3(b)(4). The officer then must refer the individual for a credible fear interview before an asylum officer. 8 U.S.C. § 1225(b)(1)(A)(ii); 8 C.F.R. § 235.3(b)(4)(i). In so doing, the officer must "provide information" about the credible fear interview process to individuals who "may be eligible" for them. 8 U.S.C. § 1225(b)(1)(B)(iv); 8 C.F.R. § 235.3(b)(4)(i). An individual subject to the credible fear process must have the opportunity to consult with "a person or persons of [their] choosing prior to the interview," so long as it occurs at no expense to the government and without causing unreasonable delay. *Id.*

To date, asylum officers generally have conducted credible fear interviews while the individual is in ICE custody. As of this advisory's date, NILA understands that USCIS asylum officers have begun

conducting credible fear interviews telephonically for individuals in CBP custody. Initially, the interviews are occurring in El Paso and Laredo, Texas, Yuma, Arizona, and San Diego, California, but more widespread implementation of the initiative is expected.

During the credible fear interview, the asylum officer must "elicit all relevant and useful information bearing on whether the [noncitizen] can establish a credible fear of persecution or torture," by determining whether there is "a significant possibility," taking into account credibility and other known facts, of establishing asylum or withholding of removal eligibility. 8 U.S.C. § 1225(b)(1)(B)(v); 8 C.F.R. § 208.30(d), (e)(2).[6] Additional requirements of credible fear interviews are set forth at 8 C.F.R. § 208.30.

In March 2022, DHS implemented an interim final rule which provided an additional method through which DHS can process asylum claims by individuals subject to expedited removal, which went into effect on May 30, 2022. *See* Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078 (Mar. 29, 2022) (hereinafter, 2022 Asylum Processing Rule). While, as of April 2023, this rule has only been implemented in a limited set of locations, only to single adult applicants, and only under certain conditions,[7] it confers discretion on USCIS asylum officers to elect to conduct asylum merits interviews for individuals who receive positive credible fear determinations, rather than referring them to removal proceedings before an IJ. In these cases, a positive credible fear interview will be treated as an asylum application to USCIS, and an asylum officer in another location will subsequently conduct an asylum interview within 21 to 45 days. *See, e.g.*, 8 C.F.R. §§ 208.2(a)(1)(ii), 208.9(a)(1). If the asylum office does not grant the application, the individual's case will be referred to an immigration court for proceedings on an expedited schedule as prescribed by the 2022 Asylum Processing Rule. 8 C.F.R. §§ 208.14(c)(1), 1208.17(b), (f), (h).[8] This is true even if the asylum officer determines that the applicant is eligible for withholding or CAT protection. 8 C.F.R. § 208.16(a).

In mid-April 2023, however, the Biden Administration stated that it would be pausing implementation of the 2022 Asylum Rule due to the end of Title 42.[9]

B. Negative Credible Fear Determinations

If an individual receives a negative credible fear determination, the asylum officer must make a record of the determination, and the individual must have the opportunity to obtain review of the negative credible fear determination from an IJ no later than 7 days after the asylum officer's determination. 8 U.S.C. § 1225(b)(1)(B)(iii); 8 C.F.R. §§ 208.30(g)(1), 1208.30(g)(2). The regulations governing IJ

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[6] A well-founded fear of persecution is a 10% chance of persecution. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431-32 (1987). A significant possibility of persecution is less than a 10% chance.

[7] USCIS, Fact Sheet: Implementation of the Credible Fear and Asylum Processing Interim Final Rule (last updated Dec. 2, 2023).

[8] For more information about the new rule, see American Immigration Lawyers Association, *Featured Issue: Asylum and Credible Fear Interim Final Rule*, AILA Doc. No. 22071302 (updated Apr. 13, 2023); National Immigration Project of the National Lawyers Guild, *Biden's Asylum Processing Rule—Three Months in, What Practitioners Need to Know* (Sept. 2022).

[9] Hamed Aleaziz, *Signature Biden Asylum Reform Policy Is Now on Hold*, L.A. Times (Apr. 12, 2023).

review of a credible fear determination are set forth in 8 C.F.R. § 1003.42.

If, following the credible fear determination review, the IJ reverses the asylum officer's finding and determines that the individual has a credible fear, the IJ must vacate the expedited removal order. At that point, DHS may decide either to allow the IJ to refer the case back to the asylum officer for full consideration of the individual's asylum claim on an expedited schedule or to commence removal proceedings before the IJ under 8 U.S.C. § 1229a. *See* 8 C.F.R. § 1208.30(g)(2)(iv)(B); *see also* Section II.A.

If the IJ affirms the asylum officer's negative credible fear determination, the case is remanded for execution of the removal order. 8 C.F.R. § 1208.30(g)(2)(iv)(A). There is no right to appeal the IJ's decision to the Board of Immigration Appeals, but the Attorney General may instruct an IJ to refer a case to him. 8 C.F.R. § 1003.42(f)(2), (3).

Individuals who receive a negative credible fear determination from the IJ may request, one time, reconsideration of the credible fear determination from USCIS, within 7 days of the IJ decision and before deportation. *See* 8 C.F.R. §§ 208.30(g)(1)(i), 1208.30(g)(2)(iv)(A). Furthermore, an asylum officer may, upon request, grant a second credible fear interview upon a reasonable claim that there is new, compelling information available. *See* Michael A. Benson, Executive Assoc. Commissioner for Field Operations, Immigration & Naturalization Service, Memorandum, Expedited Removal: Additional Policy Guidance (Dec. 30, 1997) (AILA Doc. No. 98021090).

C. Positive Credible Fear Determinations

If an individual receives a positive credible fear determination by an asylum officer, the regulation provides that USCIS "has complete discretion" either to issue an NTA placing the person in removal proceedings before an IJ under 8 U.S.C. § 1229a or to elect to retain jurisdiction over the case for full consideration of the individual's asylum claim on an expedited schedule. *See* 8 C.F.R. §§ 208.30(f), 208.9; *see also* 8 U.S.C. § 1225(b)(1)(B)(ii). However, USCIS is currently only able to exercise discretion to retain jurisdiction over the case in areas where DHS and DOJ are piloting the 2022 Asylum Processing Rule. *See* Section II.A.

III. Reopening, Cancelling, and Challenging Expedited Removal Orders

A. *Thuraissigiam* and the Lack of Judicial Review

When Congress enacted the expedited removal statute, it also enacted provisions barring judicial review over credible fear determinations and expedited removal orders. *See* 8 U.S.C. § 1252(a)(2)(A) (review relating to section 1225(b)(1)).[10] The only exceptions are for individuals who claim status as a U.S. citizen, lawful permanent resident, refugee, or asylee or for challenges to the validity of the system. *See* U.S.C. § 1252(e)(2), (3); *see also* Section IV.

In *DHS v. Thuraissigiam*, 140 S. Ct. 1959 (2020), the Supreme Court addressed the lack of availability

[10] *See, e.g.*, *Shunaula v. Holder*, 732 F.3d 143 (2d Cir. 2013); *Brumme v. INS*, 275 F.3d 443 (5th Cir. 2001); *Khan v. Holder*, 608 F.3d 325 (7th Cir. 2010); *Garcia de Rincon v. DHS*, 539 F.3d 1133, 1142 (9th Cir. 2008).

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of judicial review. That case involved a noncitizen who was apprehended immediately after physically entering the country who then filed a habeas petition alleging flaws in his credible fear proceeding. The noncitizen sought as a remedy a "new opportunity to apply for asylum" and "the opportunity to remain lawfully in the United States." 140 S. Ct. at 1968, 1971. The Court held that neither the INA, the Suspension Clause, nor the Due Process Clause afforded the noncitizen a right to judicial review. As to due process, the Court held that a noncitizen "in respondent's position," i.e., a recent entrant who received a negative credible fear determination, "has only those rights regarding admission that Congress has provided by statute." *Id.* at 1983.

Thus, except as discussed in Section IV, federal courts lack jurisdiction to review challenges to individual expedited removal orders and credible fear determinations.

B. Motions to Reopen/Reconsider Expedited Removal Orders Under 8 C.F.R. § 103.5

The regulation at 8 C.F.R. § 103.5(a) authorizes an "affected party" to seek reopening or reconsideration of a proceeding, decision, or action of "the Service." In 2015, the first two successful motions to reopen expedited removal orders pursuant to 8 C.F.R. § 103.5(a) were granted. NILA staff has long trained on the use of these motions and mentored attorneys, including by reviewing draft motions.[11]

In its otherwise-terrible 2020 decision in *Thuraissigiam*, the Supreme Court noted:

> Department officials and immigration judges may reopen cases or reconsider decisions, *see* 8 C.F.R. §§ 103.5(a)(1), (5), and 1003.23(b)(1), and the Executive always has discretion not to remove, *see* [*Reno v. American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 483-484 (1999)].

140 S. Ct. at 1983 n.28. The Court's endorsement of 8 C.F.R. § 103.5(a) as a vehicle to seek reopening or reconsideration of an expedited removal order provides a viable basis to argue that CBP is obligated to review and adjudicate these motions.

Notwithstanding footnote 28 in *Thuraissigiam*, CBP continues to only acknowledge its authority to vacate expedited removal orders as an exercise of discretion, even when the vacatur is prompted by the filing of a motion to reopen/reconsider pursuant to 8 C.F.R. § 103.5. Moreover, CBP's grant rate appears to be low. Therefore, NILA recommends managing client expectations prior to charging and accepting fees from clients to file these motions.

NILA recommends filing motions to reopen or reconsider expedited removal orders with CBP when there is a legal error in the expedited removal proceeding. Absent a legal error(s), it is more appropriate to make a request for prosecutorial discretion to vacate the order and initiate removal proceedings under 8 U.S.C. § 1229a. *See* Section III.D. Furthermore, there is no point in filing such a motion to ask CBP to overturn a negative credible fear determination since those determinations are made by asylum

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[11] NILA provides sample cover letters, motions, reopening decisions, and individualized assistance on motions to reopen or reconsider expedited removal orders to members. For information about membership, see the strategic assistance page of NILA's website.

officers and IJs, not CBP officers.[12] Rather, a request to the asylum office for a new credible fear interview or a motion to reconsider a negative credible fear determination to the IJ are more appropriate options, respectively. *See* 8 C.F.R. §§ 208.30(g)(1)(i), 1208.30(g)(2)(iv)(A); *Thuraissigiam*, 140 S. Ct. at 1983 n.28; *see also* Section II.B.

The motion must "[a]ddressed to the official having jurisdiction" and be "[s]ubmitted to the office maintaining the record upon which the unfavorable decision was made for forwarding to the official having jurisdiction." 8 C.F.R. § 103.5(a)(1)(iii)(D), (E). Jurisdiction to adjudicate the motion resides with "the official who made the latest decision in the proceeding;" however, if "the affected party moves to a new jurisdiction," jurisdiction transfers to "the official over such a proceeding in the new geographical location." 8 C.F.R. § 103.5(a)(1)(ii). In practice, however, because CBP does not recognize the applicability of the regulation to expedited removal proceedings, it has told practitioners who file these motions with the CBP office in the place of their client's residence to re-file with the CBP office that issued the expedited removal order.

The regulatory deadline for filing a motion to reopen or motion to reconsider is 30 days. 8 C.F.R. § 103.5(a)(1). However, the motion to reopen deadline "may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner." *Id*. Note that this standard is lower than the standard to equitably toll a filing deadline. Therefore, it is advisable to argue that motions to reopen filed after the 30-day deadline meet the regulatory standard, not the higher equitable tolling standard.[13] Critically, however, CBP does not acknowledge that the regulation applies and, thus, to NILA's knowledge, has *not* denied any motions to reopen or reconsider expedited removal orders for being untimely.

The regulations require a motion to reopen or reconsider filing to include the following: Form I-290B, a brief (legal argument), a filing fee, and a statement attesting to whether the decision has been or is subject to any judicial proceedings (if so, the movant must provide additional details). 8 C.F.R. § 103.5(a)(1)(iii)(A)-(C). NILA recommends also including a cover letter, as well as an exhibit list and exhibits in support of the motion (such as immigration paperwork and client declarations).

Immigration filing fees are generally received by USCIS or EOIR, as those entities have the capacity to receive and process them. NILA recommends noting in the cover letter that counsel does not believe that a filing fee is required but that counsel will promptly pay any such fee if CBP believes it is required. If fee waiver documentation is available, it can be included with the motion as well.

The legal brief (in the form of a motion) should be written for CBP officers, not lawyers. The requirements for both motions to reopen and reconsider are set forth in 8 C.F.R. § 103.5(a)(2) and (3) and practitioners are advised to review those regulations before drafting. Although the motion should identify the statutes, regulations, or agency policies that were violated and support those allegations with both documentary evidence and any supporting case law, it should not be too lengthy or overly legalistic. As with all legal writing, the most successful motions have been ones in which the CBP

[12] In fact, current regulations expressly state that "[t]he provisions of 8 C.F.R. § 103.5 shall not apply to credible fear determinations." 8 C.F.R. § 208.30(g)(1)(i).

[13] In the alternative, the motion to reopen could assert that the higher tolling standard is met for the same reasons the regulatory standard is met. The motion to reconsider deadline does not include a regulatory exception so including an equitable tolling claim in those motions may be helpful.

officer reading the motion can quickly identify the alleged violations and remedy sought.

With respect to the remedy, most motions will seek vacatur of the expedited removal order and either issuance of an NTA placing the person in removal proceedings before an IJ (if the person is in the country) or retroactive withdrawal of the application for admission (if the person is abroad). If the person is in the country, it is highly *unlikely* that CBP would simply vacate an expedited removal order without keeping the person in the removal system. When requesting placement in removal proceedings before an IJ, it may be advisable to demonstrate that the movant is prima facie eligible for some form of relief in those proceedings.

C. Cancelling an Expedited Removal Orders Through Approval of a U Visa Petition

By regulation, approval of a petition for U visa nonimmigrant status will "deem[] canceled by operation of law" any removal order issued by DHS either to the petitioner or a qualifying family member. 8 C.F.R. § 214.14(c)(5)(i) (petitioner), (f)(6) (qualifying family member). Since expedited removal orders are removal orders issued by DHS, they can be canceled through the approval of a U visa petition. The cancellation takes effect on the date USCIS approves a Form I-918 for a petitioner or Form I-918A, Supplement A for a qualifying family member. *Id*.

D. Cancelling an Expedited Removal Order in the Exercise of Discretion

Individuals subject to expedited removal may seek prosecutorial discretion from DHS. Regardless of ongoing litigation regarding specific prosecutorial discretion policies and priorities, DHS maintains its authority to exercise its inherent prosecutorial discretion on a case-by-case basis in order to properly allocate limited government resources and seek a fair outcome in proceedings. *See, e.g.*, ICE, Prosecutorial Discretion and the ICE Office of the Principal Legal Advisor, (updated Sept. 12, 2022).

Because CBP has discretion to elect not to issue an expedited removal order and instead to permit an individual to withdraw their application for admission, *see* 8 U.S.C. § 1225(a)(4); 8 C.F.R. § 235.4, or to issue a NTA placing them in removal proceedings before an IJ, practitioners seeking prosecutorial discretion may wish to seek those forms of relief in their prosecutorial discretion requests.

Note that the exercise of prosecutorial discretion to issue an NTA that does not charge the individual as an "arriving alien" may render a detained person eligible for release on bond pursuant to 8 U.S.C. § 1226(a). In *Judulang v. Holder*, the Supreme Court held that the BIA must consider "germane" factors and "the purposes and concerns of the immigration laws" before adopting a rule that categorically precludes eligibility for immigration relief. 565 U.S. 42, 55, 64 (2011). In so holding, the Court expressed concern with an immigration officer's authority to predetermine eligibility of relief through their charging decisions. *Id*. at 56, 58-61, 64. Likewise here, a prosecutorial discretion request asking to vacate an expedited removal order and to issue an NTA that would allow the client to seek release on bond should urge consideration of the noncitizen's equities and the purpose of the INA.

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E. Challenging Expedited Removal Orders Reinstated Under 8 U.S.C. § 1231(a)(5)

If an individual is deported or departs voluntarily under an expedited removal order, then unlawfully reenters the United States, the prior expedited removal order can be reinstated. Reinstatement is another summary removal procedure conducted by DHS (usually ICE). *See* 8 U.S.C. § 1231(a)(5); 8 C.F.R. § 241.8. Individuals subject to reinstatement may challenge such orders and adverse determinations of fear-based claims in the appropriate federal circuit court through a petition for review.[14] In some jurisdictions, judicial review may encompass some review of the prior removal order that has been reinstated.[15]

Critically, however, circuit court law regarding the timing for filing a petition for review of reinstatement orders and fear-based claims is currently in flux.[16]

However, even where collateral review of the prior order is permitted, some courts have held that such review is nevertheless barred if the prior order is an expedited removal order due to the jurisdictional bars to federal court review of expedited removal orders. *See, e.g.*, *Lorenzo v. Mukasey*, 508 F.3d 1278, 1281 (10th Cir. 2007); *de Rincon v. Dep't of Homeland Security*, 539 F.3d 1133, 1138-39 (9th Cir. 2008); *see also* Section III.A.

IV. Review Process for Individuals Subject to Expedited Removal Who Claim Status as a Lawful Permanent Resident, Refugee, Asylee or U.S. Citizen

Notwithstanding the broad reach of the expedited removal statute, Congress carved out the availability of "prompt" administrative review for individuals subject to expedited removal orders who claim, "under oath" or "under penalty of perjury under [28 U.S.C. § 1746]" after having been duly warned of the penalties for making false claims, to "have been lawfully admitted for permanent residence, to have been admitted as a refugee under [8 U.S.C. § 1157], or to have been granted asylum under [8 U.S.C. § 1158]." 8 U.S.C. § 1225(b)(1)(C). In addition, persons who claim U.S. citizenship are entitled to administrative review. 8 C.F.R. §§ 235.3(b)(5)(i), 1235.3(b)(5)(i). Congress also provided for limited habeas review for these individuals. 8 U.S.C. § 1252(e)(2).

Immigration officers must attempt to verify any claim to lawful permanent resident, refugee, asylee, or U.S. citizenship status. 8 C.F.R. §§ 235.3(b)(5)(i), 1235.3(b)(5)(i). This effort must include a check of

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[14] *See, e.g.*, *Arevalo v. Ashcroft*, 344 F.3d 1, 9 (1st Cir. 2003); *Garcia-Villeda v. Mukasey*, 531 F.3d 141, 144 (2d Cir. 2008); *Avila-Macias v. Ashcroft*, 328 F.3d 108, 110 (3d Cir. 2003); *VelasquezGabriel v. Crocetti*, 263 F.3d 102, 105 (4th Cir. 2001); *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292, 295 (5th Cir. 2002); *Warner v. Ashcroft*, 381 F.3d 534, 536 (6th Cir. 2004); *Gomez-Chavez v. Perryman*, 308 F.3d 796, 800 (7th Cir. 2002); *Briones-Sanchez v. Heinauer*, 319 F.3d 324, 326 (8th Cir. 2003); *Chay Ixcot v. Holder*, 646 F.3d 1202, 1206 (9th Cir. 2011); *Duran-Hernandez v. Ashcroft*, 348 F.3d 1158, 1162 n.3 (10th Cir. 2003); *Sarmiento-Cisneros v. U.S. Att'y Gen.*, 381 F.3d 1277, 1278 (11th Cir. 2004).

[15] *See, e.g.*, *Vega-Anguiano v. Barr*, 982 F.3d 542 (9th Cir. 2019); *Debeato v. Att'y Gen.*, 505 F.3d 231, 234-35, 237 (3d Cir. 2007); *Villegas de la Paz v. Holder*, 614 F.3d 650, 610 (6th Cir. 2010).

[16] For more information, see National Immigration Litigation Alliance, Practice Alert: *Bhaktibhai-Patel v. Garland and Judicial Review of Reasonable Fear and Withholding Only Proceedings* (May 2022) on the practice advisory page of NILA's website.

"all available" Service database systems "and any other means available to the officer." *Id*.

A. Verified Claims: Officer Options

If the officer can verify the status claim and the relevant status has not been terminated, the officer cannot issue an expedited removal order. 8 C.F.R. §§ 235.3(b)(5)(ii), 1235.3(b)(5)(ii) (LPRs); 8 C.F.R. §§ 235.3(b)(5)(iii), 1235.3(b)(5)(iii) (refugees and asylees); 8 C.F.R. §§ 235.3(b)(5)(iv), 1235.3(b)(5)(iv) (U.S. citizens).

With respect to LPR claimants, the officer has three options: (1) treat the person as an applicant for admission pursuant to 8 U.S.C. § 1101(a)(13)(C) and, if necessary, grant a waiver of the documentation requirement pursuant to 8 U.S.C. § 1181(b) and 8 C.FR. §§ 211.1(b)(3); (2) defer the individual's inspection, usually to an ICE office, to present their documentation; or (3) if the individual appears to be inadmissible, initiate removal proceedings before an IJ. 8 C.F.R. §§ 235.3(b)(5)(ii), 1235.3(b)(5)(ii).

With respect to refugee and asylee claimants, the officer has two options: (1) accept an application for a refugee travel document in accordance with 8 C.F.R. § 223.2(b)(2)(ii) and readmit the person as a refugee or asylee in accordance with 8 C.F.R. § 223.3(d)(2)(i); or (2) initiate removal proceedings before an IJ. 8 C.F.R. §§ 235.3(b)(5)(iii), 1235.3(b)(5)(iii).

B. Unverified Claims: Administrative and Federal Court Review

If the officer cannot verify the status claim, the individual "will be advised of the penalties for perjury" and, either under oath or by sworn declaration under 28 U.S.C. § 1746, will make a written statement in their native language and handwriting attesting that the claim is "true and correct." 8 C.F.R. §§ 235.3(b)(5)(i), 1235.3(b)(5)(i). The immigration officer must then issue an expedited removal order and refer the person to an IJ for claim status review proceedings. *Id*.

Individuals in claim status review proceedings "shall be detained;" however, parole is available. 8 C.F.R. §§ 235.3(b)(5)(i), 1235.3(b)(5)(i) (permitting parole where the agency determines that it is "required to meet a medical emergency or is necessary for a legitimate law enforcement objective.").

In claim status review proceedings, the IJ is tasked with review of the expedited removal order. 8 C.F.R. §§ 235.3(b)(5)(iv), 1235.3(b)(5)(iv), 235.6(a)(2)(ii), 1235.6(a)(2)(ii). If the IJ makes a negative determination on the status claim (i.e., finds that the person has never been admitted as an LPR or refugee, has never been granted asylum, and is not a citizen), the expedited removal order is affirmed, and DHS may deport the person. 8 C.F.R. §§ 235.3(b)(5)(iv), 1235.3(b)(5)(iv). If the IJ determines that the person "was once so admitted as a lawful permanent resident or as a refugee, or was granted asylum status, or is a U.S. citizen, and such status has not been terminated by final administrative action," the IJ must "terminate proceedings and vacate the expedited removal order." *Id*. Except for persons determined to be U.S. citizens, the agency may elect to initiate removal proceedings under 8 U.S.C. § 1229a in which the IJ may consider "any waivers, exceptions, or requests for relief for which the [noncitizen] is eligible." *Id*.

Whether the IJ makes a negative or positive status determination, no appeal of the IJ's decision to the Board of Immigration Appeals is available. 8 C.F.R. §§ 235.3(b)(5)(iv), 1235.3(b)(5)(iv); *Matter of*

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Lujan-Quintana, 25 I. & N. Dec. 53 (BIA 2009) (holding that the BIA lacked jurisdiction over DHS' appeal of an IJ's determination that claimant is a U.S. citizen).

However, as noted above, Congress provided for judicial review of negative claim status determinations through a habeas action. Under 8 U.S.C. § 1252(e)(2), a federal district court may review whether the petitioner: (1) is a noncitizen, (2) was ordered removed under 8 U.S.C. § 1225(b)(1), or (3) "can prove, by a preponderance of the evidence, that the petitioner is [an LPR, refugee, or asylee]" and that such status has not been terminated. If the court finds in favor of the petitioner on either of the latter two grounds, the only relief the court can order is placement in removal proceedings under 8 U.S.C. § 1229a. 8 U.S.C. § 1252(e)(4)(B).

V. Prior Expansion of Expedited Removal and Subsequent Revocation

During the Trump Administration, the Acting DHS Secretary sought to vastly expand the scope of expedited removal, issuing a rule that designated additional categories of noncitizens for expedited removal: (1) noncitizens "who did not arrive by sea, who are encountered anywhere in the United States more than 100 air miles from a U.S. international land border, and who have been continuously present in the United States for less than two years;" and (2) noncitizens "who did not arrive by sea, who are encountered within 100 air miles from a U.S. international land border, and who have been continuously present in the United States for at least 14 days but for less than two years." Notice Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409-01, 35409 (July 23, 2019). This expansion was subject to challenge by litigation. *See Make the Road New York v. McAleenan*, 405 F. Supp. 3d 1 (Sept. 27, 2019) *vacated sub nom. Make the Road New York v. Wolf*, 962 F.3d 612, 618 (D.C. Cir. 2020).

In March 2022, while litigation challenging the rule was still ongoing, DHS rescinded the designation that expanded the scope of expedited removal. Rescission of the Notice of July 23, 2019, Designating Aliens for Expedited Removal, 87 Fed. Reg. 16022 (March 21, 2022). The rescission became effective on March 21, 2022, *see id.*, returning the application of expedited removal to its scope before the expansion. *See* Section I.B.

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