REPRESENTING NONCITIZEN YOUTH IN REMOVAL PROCEEDINGS

A Step-by Step Guide to Representing Immigrant Youth in 2018-2019

Introduction

Although defending immigrant youth facing removal has always been challenging, it has become ever more difficult since January 20, 2017, as, in a never-ending onslaught of Executive Orders, memoranda, certified Attorney General decisions, and other exercises of Executive authority, the present Administration has waged steady war against immigrants in removal proceedings, the judicial independence of immigration judges, and the "dirty…lawyers"[1] that defend immigrants. This manual is our effort to ensure that, despite these ongoing attacks, immigrant youth facing removal are afforded substantive due process in our immigration courts, by ensuring that advocates and *pro bono* attorneys are armed with the requisite knowledge to best defend these young people.

[1] Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review Falls Church, VA, October 12, 2017. *Available at*: https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review

Table of Contents

Acknowledgements

All Materials in this 1st Edition were written and compiled by Carmen Maria Rey, Esq. for the Safe Passage Project. Ongoing guidance and assistance throughout was provided by Gui Stampur and Kathryn Chmielewski.

Key contributors within the Safe Passage Project Team included: Mich Gonzalez, Rex Chen, Alexandra Rizio, Nicole Johnson, Stephanie Gibbs, Tania Cohen, Desiree Hernandez and Samantha Norris.

Other contributors include: Lenni Benson, Rich Leimsider, and Tim Greenberg.

A very special thank you to Heidi Dorow at Borealis Philanthropy for your support and help in bringing this manual to life.

Finally, a special thank you to all practitioners and advocates in the field who participated in our July 6, 2018 Convening of Advocates and Key Legal Services providers at New York Law School, hosted by Mich Gonzalez of Safe Passage Project.

About Safe Passage Project

Safe Passage Project is a highly-focused nonprofit immigration legal services organization. We provide free lawyers to refugee and immigrant children in the NYC-area who face deportation back to life-threatening situations, despite their strong legal claim to stay in the US.

These children embark on a long and dangerous journey to the United States seeking safety from the gang violence, parental abuse and neglect, sexual assault, poverty, and trauma they knew at home. **In 2017, the federal government reported nearly 40,000 children travelling alone seeking entry at the United States-Mexico border** – a number that has held depressingly steady. The New York Immigration Court, one of the busiest immigration courts in the United States, has more than 15,000 juveniles on its docket.

Immigrants are not entitled to court-appointed legal counsel. As a result, more than half of immigrant children must go through immigration proceedings without the aid of a lawyer. **Unable to effectively argue their claim for the legal protections they may qualify for, more than 80% of these children are issued deportation orders.** To many, this means returning to the danger from which they fled.

Chapter 1: Legal Overview

Although there are a variety of hearings used by the U.S. Government to refuse a noncitizen[2] the right to enter or remain in the U.S.,[3] our discussion will focus on hearings under Section 240 of the Immigration and Nationality Act (INA),[4] also known as removal proceedings.

Removal generally refers to the legal process afforded a noncitizen charged by the U.S. as no longer having the right to remain in the U.S., lacking an immigration status, being unable to maintain an immigration status, violating the terms of a status, or otherwise falling under the grounds of inadmissibility listed at INA § 212 or the grounds of deportability at INA § 237. Any of these charges may result in the government's initiating a removal proceeding against a noncitizen.

1.1 Immigration Law in a Nutshell

Immigration law is intended to outline the conditions under which a noncitizen, or "alien" as referred to in the law, may lawfully enter and remain within the borders of the U.S. This complex set of laws was intended to allow the U.S. to weigh economic, societal, and humanitarian interests when determining whether to allow the entry and the temporary or permanent presence of a noncitizen in the U.S.

A noncitizen whose entry or presence is deemed to satisfy the nation's interests is generally granted immigration "status". There are close to a hundred different status types under which a noncitizen may be lawfully present in the U.S. These status types can be broadly categorized as either "nonimmigrant" or "immigrant". Nonimmigrant statuses, like those of students or

[2] We use the terms "noncitizen" and "immigrant" interchangeably throughout this manual.
[3] E.g. Judicial removal, as described at INA § 238(c)(1); administrative removal as described at INA § 238(b)(1) and INA § 238(b)(2); expedited removal as described at INA § 235(b)(1)(A)(i).
[4] An up-to-date electronic version of the Immigration and Nationality Act can be found here: https://www.uscis.gov/laws/immigration-and-nationality-act

temporary workers, generally afford a noncitizen the right to remain in the U.S. for a specific period, for a specific purpose. Immigrant status, on the other hand, is afforded only through Lawful Permanent Residence, and allows a noncitizen the right to live "permanently"[5] in the U.S. Each status has different eligibility criteria, affords the noncitizen different rights, and imposes strict duties on the noncitizen.

For Purposes of Clarity
(*Because this Comes Up When Researching Case Law*)

<table>
<tr><th>Pre-1997

EXCLUSION/DEPORTATION</th><th>Post April 1, 1997

REMOVAL</th></tr>
<tr><td>EXCLUSION

Pre-1997, these proceedings were held against noncitizens to prevent their inspection and authorization by an immigration officer (also known as "admission") and lawful entry into the United States.</td><td rowspan="2">Removal proceedings combine the Exclusion and Deportation proceedings that were previously used against noncitizens. Despite the name change, the legal division between types of proceedings continues to stand, as, in removal proceedings, noncitizens who have never been "admitted" to the U.S. are charged with inadmissibility under INA § 212, and those who were previously admitted, but the U.S. wants to remove, are charged with deportability under INA § 237. Please see "inadmissibility vs. deportability" section below for more detail.

It is important to ensure that your client is properly charged, as the burden of proof shifts according to how your client is charged under the statute. See (generally) the Burden of Proof section of this manual for further discussion.</td></tr>
<tr><td>DEPORTATION

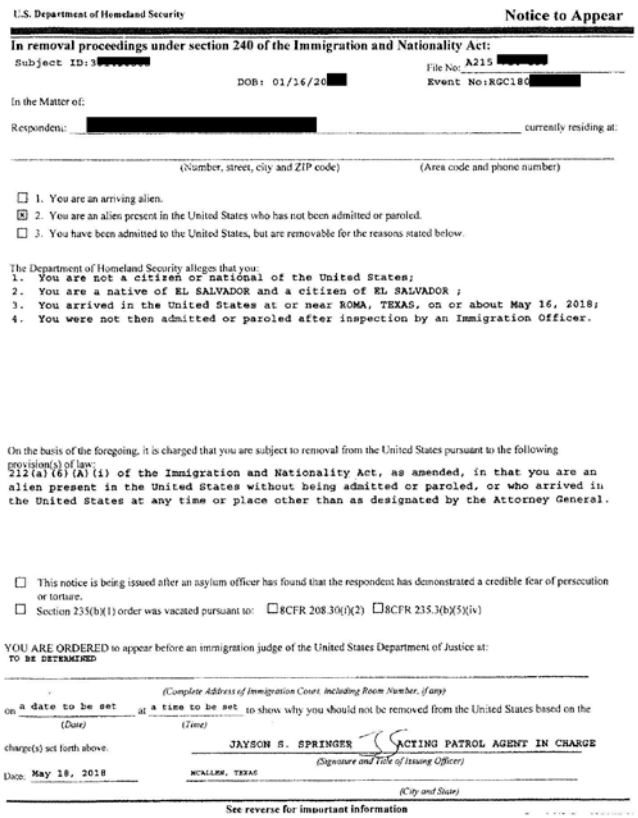
Pre-1997, these proceedings were held against noncitizens who had previously been "admitted" to the U.S. but who the U.S. wanted to force to leave the country.</td></tr>
</table>

[5] "Permanent Residence" is not *actually* permanent. It can be revoked for many reasons, as outlined in INA§237.

A. How Removal Proceedings Start

As we will discuss in further detail in the "Getting Started" portion of this manual, removal proceedings against a noncitizen start when the Department of Homeland Security issues a noncitizen a Notice to Appear (NTA) on Form I-862. That notice lists the charges against a noncitizen, and initiates removal proceedings.[6]

NTAs may be issued by a long list of officers at the Department of Homeland Security. In our cases, they are most often issued by Customs and Border Protection (CBP) officers, or officers from Immigration and Customs Enforcement (ICE).



U.S. Department of Homeland Security

Notice to Appear

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

Subject ID:3[redacted] File No: A215 [redacted]

DOB: 01/16/20[redacted] Event No:RGC18[redacted]

In the Matter of:

Respondent: [redacted] currently residing at:

(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 EL SALVADOR and a citizen of EL SALVADOR ;
3. You arrived in the United States at or near ROMA, TEXAS, on or about May 16, 2018;
4. You were not then admitted or paroled after inspection by an Immigration Officer.

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)(6)(A)(i) of the Immigration and Nationality Act, as amended, in that you are an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

☐ 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:

TO BE DETERMINED

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

on a date to be set (Date) at a time to be set (Time) to show why you should not be removed from the United States based on the charge(s) set forth above.

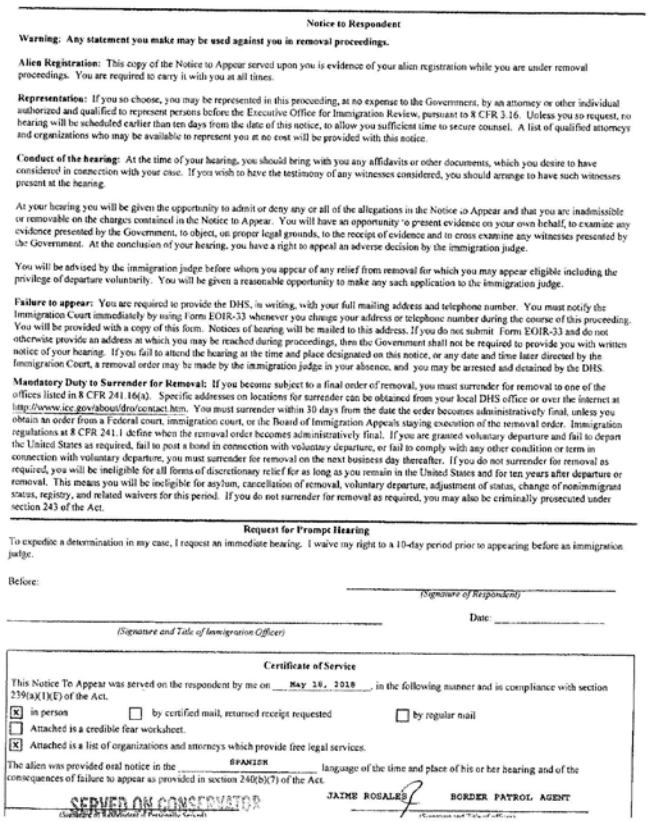
JAYSON S. SPRINGER ACTING PATROL AGENT IN CHARGE

(Signature and Title of Issuing Officer)

Date: May 18, 2018 MCALLEN, TEXAS

(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 3.16. 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 May 18, 2018, in the following manner and in compliance with section 239(a)(1)(E) of the Act.

☒ in person ☐ by certified mail, returned 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.

SERVED ON CONSERVATOR

JAIME ROSALES BORDER PATROL AGENT

(Signature and Title of Officer)

[6] See INA § 239.

No More INS (!)

The former INS no longer exists. On March 1, 2003 its functions were taken over by three new federal agencies within the (also new) Department of Homeland Security. The three new federal agencies are:

Customs and Border Protection (CBP), which handles border inspection and detention.

U.S. Citizenship and Immigration Services (USCIS), which handles adjudications of immigration benefits, including adjudication of petitions for lawful permanent residence for individuals not in removal proceedings,[7] affirmative asylum, Special Immigrant Juvenile Status, and naturalization.

Immigration and Customs Enforcement (ICE), carries out interior immigration enforcement and prosecutorial duties in removal proceedings.

All three agencies can issue Notices to Appear (NTAs), but ICE oversees detaining and prosecuting noncitizens.

B. Parties in Removal Proceedings

The noncitizen issued an NTA is known as the "Respondent". In removal proceedings the noncitizen Respondent may be represented by counsel, but at no cost to the Government.[8] The interests of the U.S. government in Removal Proceedings are represented by ICE's Office of the Principal Legal Advisor via their Office of Chief Counsel (OCC). The proceedings are heard by an Immigration Judge, an employee of the Executive Office for Immigration Review (EOIR), part of the Department of Justice of the United States. Immigration Judges are authorized to determine whether a noncitizen is properly in removal proceedings and subject to removal for violating

[7] With limited exceptions, namely U and T nonimmigrants applying for Lawful Permanent Residence under INA § 245(m) and INA § 245(l), who may adjust status with USCIS despite being in removal proceedings. See INA §§ 245(m) and 245(l).

[8] INA § 292.

immigration law and to determine whether to grant a noncitizen's request for relief from removal (also known as a defense against removal). The Court does provide interpreters.

Helpful Hints

The New York Immigration Court can be reached at:	26 Federal Plaza, 12th Fl., Room 1237 New York, NY 10278 Phone: (917) 454-1040
A list of all Immigration Judges in NY Immigration Court can be found at:	https://www.justice.gov/eoir/eoir-immigration-court-listing#NY
The New York City ICE Office of Chief Counsel can be reached at:	26 Federal Plaza, 11th Fl., Room 1130 New York, NY, 10278 Receptionist: (212) 264-5916; NYC-OCC@ice.dhs.gov (General/Administrative Inquiries) Duty Attorney: (212) 264-8572; Duty-Attorney.NYC-OCC@ice.dhs.gov, (Substantive Legal Inquiries) Please note that the window at which to serve papers on ICE is only open from Monday-Friday, 8:30am to 12:00pm to accept in-person filings.
Immigration Court Rules are listed in The EOIR Practice Manual, available at:	https://www.justice.gov/eoir/page/file/1084851/download

As of October 1, 2018, Immigration Judges will be subject to case completion quotas. Going forward, Immigration Judges, as employees of the U.S. Department of Justice, will need to complete at least 700 cases per year, have a remand rate of less than 15%, and meet at least half of additionally outlined benchmarks, to earn a "satisfactory performance" rating.[9] Advocates are extremely concerned that these quotas will undermine judicial independence and erode due process rights for immigrants. Advocates must guard against any negative impact by ensuring

[9] See EOIR Performance Plan, *available at* AILA.com as AILA Doc. No. 18040301. (Posted 4/3/18)

that their clients are allowed full and fair hearings before the Court, and making a full record in case appeal is necessary.

C. Obtaining Admission to Practice Before the Immigration Court

Attorneys and fully accredited representatives[10] appearing before EOIR must register with eRegistry—which is used to maintain a list of registered attorneys and accredited representatives who practice in immigration courts—and obtain an EOIR Identification number to list on Form EOIR-28, commonly referred to as Form E-28, as a condition to practice before EOIR.[11] Registration is free and relatively straightforward, but can nevertheless take up to a couple of weeks, so it is strongly recommended that you complete this process as soon as possible.

The process an attorney or accredited representative must follow to register with eRegistry is outlined on the EOIR website, here: https://www.justice.gov/eoir/internet-immigration-info.

After you complete the online form, for which you will need to have your attorney license details available,[12] you will need to appear at an approved location, which, in New York, is generally the Immigration Court Clerk's Office service window on the 12th Floor of 26 Federal Plaza, to complete the required identification validation process. This process generally requires that you present a valid, unexpired, government-issued ID to the Clerk. Once you complete this portion of the process, you will be issued an EOIR identification number.

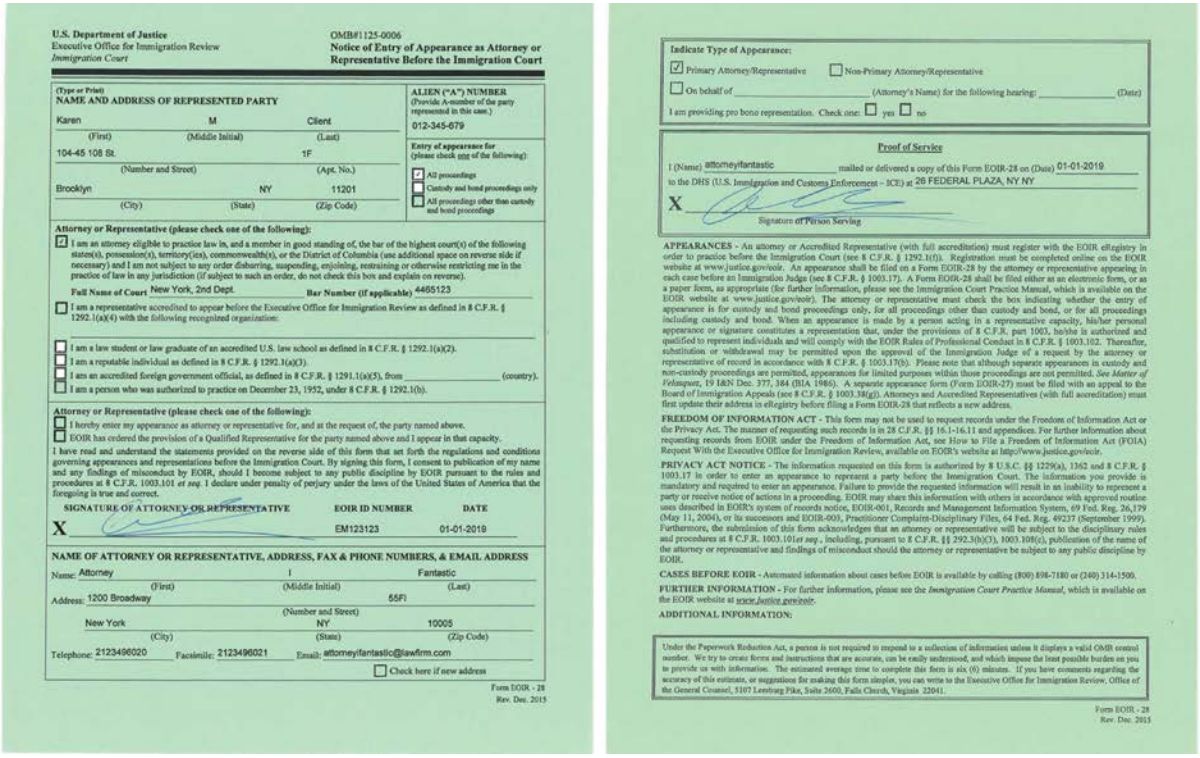
[10]Federal regulations at 8 C.F.R. § 1292.1(a)(4) allow non-attorney "Accredited Representatives" to represent noncitizens before the Department of Homeland Security (DHS) and the Executive Office for Immigration Review (EOIR), which includes the immigration courts and the Board of Immigration Appeals (BIA). These representatives are accredited through the Recognition and Accreditation Program. Accredited Representatives may only provide immigration legal services through Recognized Organizations. Only non-profit, federally tax-exempt entities may apply to be recognized. More information is available here: https://www.justice.gov/eoir/recognition-and-accreditation-program.

[11] Form E-28 (available for download here: https://www.justice.gov/eoir/list-downloadable-eoir-forms) is the form on which you enter your appearance before the immigration Court.

[12] If you are admitted to practice in the State of New York, the information you will need can be accessed from the NYS Unified Court System website here: https://iapps.courts.state.ny.us/attorney/AttorneySearch.

D. Entering Your Appearance before the Immigration Court

Once you have completed the EOIR registration process, you can enter your appearance on a case in accordance with Section 2.1(b) of the EOIR Practice Manual, which outlines immigration court rules and procedures.[13] To do so, you will need to file Form EOIR-28, (on green paper) with the Court. The form can be filed in person at the Immigration Court Clerk window, by mail to your Immigration Court's mailing address,[14] or online through the eRegistry portal once you create an account.



U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court

OMB#1125-0006
Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court

(Type or Print)
NAME AND ADDRESS OF REPRESENTED PARTY

Karen (First) M (Middle Initial) Client (Last)
104-45 108 St. (Number and Street) 1F (Apt. No.)
Brooklyn (City) NY (State) 11201 (Zip Code)

ALIEN ("A") NUMBER (Provide A-number of the party represented in this case.)
012-345-679

Entry of appearance for (please check one of the following):
☑ All proceedings
☐ Custody and bond proceedings only
☐ All proceedings other than custody and bond proceedings

Attorney or Representative (please check one of the following):
☑ I am an attorney eligible to practice law in, and a member in good standing of, the bar of the highest court(s) of the following state(s), possession(s), territory(ies), commonwealth(s), or the District of Columbia (use additional space on reverse side if necessary) and I am not subject to any order disbarring, suspending, enjoining, restraining or otherwise restricting me in the practice of law in any jurisdiction (if subject to such an order, do not check this box and explain on reverse).
Full Name of Court: New York, 2nd Dept. Bar Number (if applicable): 4465123
☐ I am a representative accredited to appear before the Executive Office for Immigration Review as defined in 8 C.F.R. § 1292.1(a)(4) with the following recognized organization:
☐ I am a law student or law graduate of an accredited U.S. law school as defined in 8 C.F.R. § 1292.1(a)(2).
☐ I am a reputable individual as defined in 8 C.F.R. § 1292.1(a)(3).
☐ I am an accredited foreign government official, as defined in 8 C.F.R. § 1291.1(a)(5), from _____ (country).
☐ I am a person who was authorized to practice on December 23, 1952, under 8 C.F.R. § 1292.1(b).

Attorney or Representative (please check one of the following):
☐ I hereby enter my appearance as attorney or representative for, and at the request of, the party named above.
☐ EOIR has ordered the provision of a Qualified Representative for the party named above and I appear in that capacity.
I have read and understand the statements provided on the reverse side of this form that set forth the regulations and conditions governing appearances and representations before the Immigration Court. By signing this form, I consent to publication of my name and any findings of misconduct by EOIR, should I become subject to any public discipline by EOIR pursuant to the rules and procedures at 8 C.F.R. 1003.101 *et seq.* I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

SIGNATURE OF ATTORNEY OR REPRESENTATIVE: X _____ EOIR ID NUMBER: EM123123 DATE: 01-01-2019

NAME OF ATTORNEY OR REPRESENTATIVE, ADDRESS, FAX & PHONE NUMBERS, & EMAIL ADDRESS
Name: Attorney (First) I (Middle Initial) Fantastic (Last)
Address: 1200 Broadway (Number and Street) 55Fl
New York (City) NY (State) 10005 (Zip Code)
Telephone: 2123496020 Facsimile: 2123496021 Email: attorneyifantastic@lawfirm.com
☐ Check here if new address

Form EOIR - 28
Rev. Dec. 2015

Indicate Type of Appearance:
☑ Primary Attorney/Representative ☐ Non-Primary Attorney/Representative
☐ On behalf of _____ (Attorney's Name) for the following hearing: _____ (Date)
I am providing pro bono representation. Check one: ☐ yes ☐ no

Proof of Service
I (Name) attorneyifantastic mailed or delivered a copy of this Form EOIR-28 on (Date) 01-01-2019
to the DHS (U.S. Immigration and Customs Enforcement – ICE) at 26 FEDERAL PLAZA, NY NY
X _____
Signature of Person Serving

APPEARANCES - An attorney or Accredited Representative (with full accreditation) must register with the EOIR eRegistry in order to practice before the Immigration Court (see 8 C.F.R. § 1292.1(f)). Registration must be completed online on the EOIR website at www.justice.gov/eoir. An appearance shall be filed on a Form EOIR-28 by the attorney or representative appearing in each case before an Immigration Judge (see 8 C.F.R. § 1003.17). A Form EOIR-28 shall be filed either as an electronic form, or as a paper form, as appropriate (for further information, please see the Immigration Court Practice Manual, which is available on the EOIR website at www.justice.gov/eoir). The attorney or representative must check the box indicating whether the entry of appearance is for custody and bond proceedings only, for all proceedings other than custody and bond, or for all proceedings including custody and bond. When an appearance is made by a person acting in a representative capacity, his/her personal appearance or signature constitutes a representation that, under the provisions of 8 C.F.R. part 1003, he/she is authorized and qualified to represent individuals and will comply with the EOIR Rules of Professional Conduct in 8 C.F.R. § 1003.102. Thereafter, substitution or withdrawal may be permitted upon the approval of the Immigration Judge of a request by the attorney or representative of record in accordance with 8 C.F.R. § 1003.17(b). Please note that although separate appearances in custody and non-custody proceedings are permitted, appearances for limited purposes within those proceedings are not permitted. *See Matter of Velasquez*, 19 I&N Dec. 377, 384 (BIA 1986). A separate appearance form (Form EOIR-27) must be filed with an appeal to the Board of Immigration Appeals (see 8 C.F.R. § 1003.38(g)). Attorneys and Accredited Representatives (with full accreditation) must first update their address in eRegistry before filing a Form EOIR-28 that reflects a new address.

FREEDOM OF INFORMATION ACT - This form may not be used to request records under the Freedom of Information Act or the Privacy Act. The manner of requesting such records is in 28 C.F.R. §§ 16.1-16.11 and appendices. For further information about requesting records from EOIR under the Freedom of Information Act, see How to File a Freedom of Information Act (FOIA) Request With the Executive Office for Immigration Review, available on EOIR's website at http://www.justice.gov/eoir.

PRIVACY ACT NOTICE - The information requested on this form is authorized by 8 U.S.C. §§ 1229(a), 1362 and 8 C.F.R. § 1003.17 in order to enter an appearance to represent a party before the Immigration Court. The information you provide is mandatory and required to enter an appearance. Failure to provide the requested information will result in an inability to represent a party or receive notice of actions in a proceeding. EOIR may share this information with others in accordance with approved routine uses described in EOIR's system of records notice, EOIR-001, Records and Management Information System, 69 Fed. Reg. 26,179 (May 11, 2004), or its successors and EOIR-003, Practitioner Complaint-Disciplinary Files, 64 Fed. Reg. 49237 (September 1999). Furthermore, the submission of this form acknowledges that an attorney or representative will be subject to the disciplinary rules and procedures at 8 C.F.R. 1003.101*et seq.*, including, pursuant to 8 C.F.R. §§ 292.3(h)(3), 1003.108(c), publication of the name of the attorney or representative and findings of misconduct should the attorney or representative be subject to any public discipline by EOIR.

CASES BEFORE EOIR - Automated information about cases before EOIR is available by calling (800) 898-7180 or (240) 314-1500.

FURTHER INFORMATION - For further information, please see the *Immigration Court Practice Manual*, which is available on the EOIR website at www.justice.gov/eoir.

ADDITIONAL INFORMATION:

Under the Paperwork Reduction Act, a person is not required to respond to a collection of information unless it displays a valid OMB control number. We try to create forms and instructions that are accurate, can be easily understood, and which impose the least possible burden on you to provide us with information. The estimated average time to complete this form is six (6) minutes. If you have comments regarding the accuracy of this estimate, or suggestions for making this form simpler, you can write to the Executive Office for Immigration Review, Office of the General Counsel, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041.

Form EOIR - 28
Rev. Dec. 2015

You can download the latest printable version of the E-28 form from the EOIR website here: https://www.justice.gov/sites/default/files/pages/attachments/2015/07/24/eoir28.pdf. Please

[13]The EOIR Practice Manual is available at: https://www.justice.gov/sites/default/files/pages/attachments/2017/11/02/practicemanual.pdf.

[14] Court addresses and phone numbers can be accessed on the EOIR website here: https://www.justice.gov/eoir/eoir-immigration-court-listing.

double-hole punch it, in compliance with the requirements of the EOIR Practice Manual,[15] prior to serving it on the Court.

Any document served on the Court, including Form E-28, must also be served on opposing counsel. You may serve the Office of Chief Counsel in person (at the ICE Office of Chief Counsel window on the 11th Floor, Room 1130, of 26 Federal Plaza), or by mail.[16] The E-28 includes an internal section to address service entitled "Service on the Officer of Chief Counsel." In that section of the form you should note which method of service you have used to serve opposing counsel. Also, please note that you must include your EOIR ID Number on the form for it to be accepted.

E. Law and Procedure

In removal proceedings, the Immigration Judge applies U.S. immigration law, as contained in the Immigration and Nationality Act (statute), The Code of Federal Regulations, Agency Decisions, Agency Memoranda, and Administrative and Judicial Decisions.

Procedure in U.S. Immigration Courts—from pagination rules to the wording of motions and orders—is outlined in the Immigration Court Practice Manual, available through the Department of Justice website at:

http://www.justice.gov/eoir/vll/OCIMMIGRATIONJUDGEPracManual/ocImmigrationJudge_page1.htm.

The Federal Rules of Evidence do not strictly apply, but are persuasive, and so we recommend that you become familiar with the rules.[17]

[15] See EOIR Practice Manual at section 3.3(c)(iii)(viii) (binding)(page 55).
[16] Addresses for all Office of Chief Counsel can be found here: https://www.ice.gov/contact/legal
[17] For a detailed analysis of how the rules of evidence can be analogized to apply in Immigration Court, see Steinhauser, Karen, *The Intersection of The Rules of Evidence, Trial Advocacy and Immigration Court*, American Immigration Lawyers Association Immigration at the Crossroads: An Interdisciplinary Practicum (Fall 2011 CLE Ed.), AILA Publications, http://agora.aila.org.

F. Hearings

Although, as discussed in the "Getting Started" portion of this manual, in some cases, a noncitizen Respondent may be able to obtain termination of removal proceedings, generally, Respondents in removal proceedings who charges of inadmissibility or deportability, or choose to present defenses to removal, will have several hearings before the Immigration Court.

There are generally two types of hearings in Immigration Court: (1) the "master calendar hearing" and (2) the "individual" or "merits hearing." The master calendar hearing is an initial or preliminary hearing before an Immigration Judge. The purpose of a master calendar hearing is to identify any relief from removal, set timelines for the submission of evidence, and to (generally) agree to the manner and format of the remainder of the case.

The individual hearing, also known as the merits hearing, is an evidentiary hearing in which the parties resolve the disputed issues identified at the master calendar hearing and where the Respondent presents evidence and arguments in favor of her application for relief from removal. This hearing generally includes opening and closing statements and direct and cross examination of witnesses. It is after the individual hearing that the Judge issues either an oral or written decision. If the Immigration Judge decides against the Respondent, they will be ordered removed from the United States.

Practice Tip: Status Docket

In most cases, you will attend multiple master calendar hearings. First to plead to the Notice to Appear and inform the Court as to available defenses to removal, and later to update the Court as to the process and timeline of any defenses against removal (like SIJS/UAC Asylum/U & T Nonimmigrant Status and VAWA Relief) where jurisdiction does not primarily rest with the Immigration Court. Generally, only once those forms of potential relief are exhausted will the Court schedule an individual hearing on remaining relief.	The Status Docket has recently arisen as an alternative to repeat master calendar hearings. Once you have initiated a defense against removal that is outside of the Court's jurisdiction, you may want to offer proof of having done so to the Court and ask to be placed on the Status Docket. This allows you to mail periodic updates to the Court while you await the outcome of those cases, and saves you and your client from routine appearances before the Court. *For further details on the Status Docket, please see Section 4.2 (C) at page 49.*

In addition, judges have discretion to schedule "prehearing conferences" on a case to narrow issues, obtain stipulations between the parties, exchange information voluntarily, or to otherwise simplify and organize the proceeding, or identify or eliminate issues on the case.[18] Generally, these are rescheduled at the request of the parties, via oral or written motion.[19]

G. Special Protections for Noncitizen Youth in Removal[20]

Unmarried noncitizen youth under the age of 18 do receive some special protections in immigration court.[21] Judges are supposed to employ "age appropriate procedures", including allowing questions to be phrased in "age-appropriate language and tone" and engaging in a competence analysis.[22] Immigration Judges are prevented, by regulation, from accepting pleadings from unrepresented noncitizen youth under the age of 18.[23] Once pleadings are completed, Judges are also advised to waive the presence of noncitizen youth respondents who are attending school, as long as their attorney, legal representative, legal guardian, near relative, or friend can appear at hearings on their behalf.[24] Judges will routinely request that attorneys establish that school-age noncitizen youth are enrolled in school, so it is important that you establish your client's school enrollment, and obtain evidence of continued enrollment to provide to the Court as necessary.

---

[18] 8 C.F.R. § 1003.21(a).

[19] *See* Executive Office for Immigration Review Practice Manual, Chapter 4, Section 18. Available at: https://www.justice.gov/sites/default/files/pages/attachments/2017/11/02/practicemanual.pdf.

[20] For an in-depth discussion of law and procedures for noncitizen youth in removal proceedings, see: M. Aryah Somers, *Noncitizen Youth In Immigration Proceedings: Noncitizen Youth Capacities And Mental Competency In Immigration Law And Policy*, May 2015. Available at: https://cliniclegal.org/sites/default/files/children_in_immigration_proceedings_-_child_capacities_and_mental_competency_in_immigration_law_and_policy.pdf (*last accessed* October 1, 2018).

[21] *See* INA § 240(b)(3) "…If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien." *See also Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children*, Mary Beth Keller, Executive Office for Immigration Review Operating Policies and Procedures Memorandum, December 20, 2017.

[22] *Id.*

[23] 8 CFR 1240.10(c).

[24] 8 CFR 1240.4.

1.2 Inadmissibility v. Deportability

Inadmissibility refers to the basis under which a noncitizen may be denied admission to the U.S. or be denied the possibility of staying in the U.S. after they have entered[25] without inspection to the U.S.[26] The grounds of inadmissibility are outlined at INA § 212(a), and apply both at the border, when a noncitizen at a port-of-entry (like JFK airport) asks to be admitted to the U.S.,[27] and in removal proceedings to noncitizens who were not previously lawfully admitted to the U.S. In addition, with some exceptions, these grounds apply to noncitizens who are seeking to obtain an immigration status as a defense against removal.

Deportability—or better said, the grounds that outline deportability, are listed in INA § 237(a). These grounds apply to noncitizens who are in the U.S. after inspection by an immigration officer.

Noncitizens in removal proceedings will be charged on their Notice to Appear (NTA) as being either inadmissible or removable from the U.S. It is important that you confirm that your client is properly charged as inadmissible or deportable on their NTA because it will affect the burden of proof in their removal proceedings, and their available defenses to removal.

1.3 Considerations for Youth Who Were Previously Detained

For purposes of detention, CBP and ICE differentiate between noncitizen youth under 18, and noncitizen youth between the ages of 18-21. Once they turn 18, noncitizen youth are deemed adults and housed in adult detention facilities, while noncitizen youth under 18 are housed in juvenile detention facilities or family detention facilities, depending on whether they arrived in

[25] The relevant entry is the noncitizen's last entry to the U.S. no matter how long ago.
[26] Entry without inspection (EWI) is a term of art in immigration law that broadly defines a noncitizen who entered the geographical confines of the U.S. without undergoing the process of inspection or parole (and so entered the country without a visa issued at a consular post abroad or inspection at an authorized port of entry). What constitutes an EWI entry to the country differs by Circuit.
[27] The grounds of inadmissibility apply at the border even to noncitizens who have previously been granted immigration status, even to certain Lawful Permanent Residents who travel abroad for short periods of time. *See* INA § 101(a)(13)(C).

the U.S. unaccompanied or with their parent or guardian. Our client population encompasses noncitizen youth up until the age of 21.

An "unaccompanied alien child" (UAC) is one who "(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom—(i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody." [28]

There are special protections for unaccompanied children under U.S. law. Noncitizen youth under the age of 18 who arrive in the U.S. unaccompanied cannot be subjected to expedited removal,[29] and must be transferred from CBP custody to that of the Office of Refugee Resettlement (ORR) within 72 hours of being apprehended.[30] They remain in the custody and care of ORR until they can be reunited with family members or other individuals or organizations while their court proceedings proceed. While the reunification process is ongoing, these noncitizen youth are expected to be housed in the "least restrictive" setting that is in their "best interests". Generally, this means that they are housed with licensed care providers and are assigned a social worker. Removal proceedings for these noncitizen youth proceed while they are in detention, and Motions to Change Venue must be filed with the Immigration Court upon reunification to transfer any immigration case to the correct jurisdiction.[31] For more information and applicable legal standards for noncitizen youth granted a UAC classification, including recent legal changes to the permanency of a UAC determination, please see asylum discussion at Section 4.8 (C), starting at page 80.

Noncitizen youth under the age of 18 who arrive in the U.S. with their parent or guardian can be detained in "family" detention facilities. These noncitizen youth can be subjected, along with

[28] 6 U.S.C. § 279(g).
[29] Expedited removal is defined at INA § 235(b)(1) and creates legal authority for immigration officers to order the summary removal of noncitizens apprehended within a certain distance of the border, and within a certain period of entry to the U.S. For a close examination of expedited removal, please refer to the American Immigration Council's "Primer on Expedited Removal" available at: https://www.americanimmigrationcouncil.org/research/primer-expedited-removal.
[30] 8 U.S.C. § 1232(b)(3).
[31] In immigration court, jurisdiction follows the noncitizen's place of residence.

their family members, to expedited removal. The sole way for them to vacate that expedited removal order is to express a fear of return to their home country and pass a credible fear interview. Once that happens, the expedited removal order is vacated, and the family is placed in INA § 240 removal proceedings.[32] The noncitizen youth in these cases are generally placed in proceedings before the same judge as the parent and will have to contend with any prior statements made to immigration authorities.

[32] INA § 235.

Chapter 2: Getting Started

2.1 Is Your Client Properly in Removal Proceedings?

In a climate of increased immigration enforcement, in which reports of constitutional violations by immigration authorities abound, it is more important than ever that advocates begin their analysis of a case in removal by first determining whether their client is properly in removal proceedings—can ICE bear its burden to prove alienage or the charges of removability being alleged against the noncitizen? Was the noncitizen detained (or evidence against them obtained) in violation of law? Was the noncitizen properly served with a Notice to Appear (NTA)? All these questions must be considered when determining whether to even concede that your client has been properly issued a Notice to Appear in immigration court.

A. Commencement of Removal Proceedings

Many of a noncitizen's interactions with U.S. authorities can result in his or her being placed in removal proceedings via the issuance of a Notice to Appear on Form I-862. The great majority of Safe Passage Project clients are placed in removal proceedings after being apprehended by CBP at the U.S. border and being issued a Notice to Appear, but there are additional ways that a noncitizen may come to the attention of immigration authorities and be placed into removal proceedings, including when a noncitizen who was never admitted into the U.S., or whose immigration status has expired (either because their lawful term of stay in the U.S. has expired or because U.S. immigration authorities believe that the noncitizen has violated the terms of his or her status), comes into contact with immigration authorities after the denial of an application for immigration benefits.[33]

[33] On June 28, 2018, USCIS issued a policy memorandum entitled: *Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens*, PM-602-0050.1. This memorandum outlines procedures under which USCIS will issue NTAs to noncitizens who have been denied immigration benefits. It is revolutionary in that it mandates issuance of NTAs to all categories of noncitizens except

B. Charging Documents

As mentioned previously, removal proceedings under INA § 240 are initiated by service of a NTA on Form I-862.[34] For a sample NTA, see page 9. NTAs must include the minimum information required by statute.[35] An NTA that does not include the minimum information is deficient on its face and will allow an individual to challenge his or her removal proceedings or ask that the removal proceedings be terminated.[36] As per INA § 239, an NTA must specify at least the following information:[37]

- The nature of the proceedings;
- The legal authority under which the proceedings are conducted;
- The charges against the individual and the statutory provisions alleged to have been violated;
- Notice that an individual may be represented by counsel, at no cost to the government;
- A list of persons available to provide pro bono representation in proceedings;
- The requirement that the individual must immediately provide (or have provided) a written record of an address and telephone number (if any) where he or she may be contacted during removal proceedings;
- The requirement that any change in address or telephone number be immediately submitted and the consequences of failing to provide notice of the change; and the consequences of the failure, except under exceptional circumstances, to appear at the hearing.

for DACA applicants and is likely to result in increased numbers of juveniles placed in removal proceedings after denials of affirmative applications for immigration relief.

[34] INA § 239.

[35] *Id*.

[36] If the NTA filed with the immigration court does not contain all this information, it does not meet the requirements for the initiation of removal proceedings under INA § 239(a)(1).

[37] INA § 239.

NOTE: The NTA issued your client may be facially defective and create grounds for termination of the case. For an in-depth discussion of these issues, please see Section 2.2.

C. Notice of Hearing

A Notice of Hearing is issued by the Immigration Court to notify an individual where their removal hearing will take place. The Notice of Hearing will include the address of the court and the time of the hearing.[38] Failure to provide the time and place of removal proceedings against a noncitizen allows for a due process challenge to the noncitizen's removal.[39]

2.2 Challenging Removal Proceedings after a Notice to Appear is Issued

The Department of Homeland Security Immigration Customs Enforcement ("ICE") has sole authority to issue a Notice to Appear ("NTA"), but removal proceedings formally begin only when the NTA is filed with the Executive Office of Immigration Review (EOIR).[40] ICE has the power to cancel an NTA as "improvidently issued" if the NTA has not been filed with EOIR.[41] You can request that an NTA be cancelled by contacting the ICE Office of Chief Counsel with jurisdiction over the NTA. However, once an NTA is filed with EOIR, jurisdiction vests in immigration court and proceedings can only be terminated by motion to the court.[42]

Although removal proceedings are initiated by service of a notice to appear on the Immigration Court,[43] you may still want to argue that removal proceedings were improperly or illegally initiated and should be terminated by the Immigration Judge. Despite the different ways your

[38] 8 C.F.R. § 1003.18(b).
[39] *See Pereira v. Sessions*, __ U.S. __, 138 S. Ct. 2105 (2018), finding that an NTA that lacks a time and date of hearing does not meet the legal prerequisites of an NTA under INA § 239(a); *See also Matter of Bermudez-Cota* 27 I&N Dec. 441 (BIA 2018) (arguing that a later-served notice of hearing can fix an inadequate NTA).
[40] 8 CFR § 239.1.
[41] 8 CFR § 239.2(a).
[42] See Matter of G-N-C-, 22 I &N 281 (BIA 1998).
[43] Supra at 39.

client may have arrived at his or her removal hearing, the proceedings are procedurally similar for all noncitizens. Moreover, all noncitizens face the same consequence for failure to appear at a removal hearing: the issuance of a court order removing them from the U.S.[44]

Below, we outline some common bases to argue for termination of the case prior to even pleading to the charges leveled against your client at the first master calendar hearing. Please note that although Immigration Judges vary in their willingness to exercise authority to terminate cases (even in the face of legally valid reasons for termination), advocates should aim to preserve these issues in the record of proceedings in case an appeal becomes necessary. One recent factor that deeply affects Judges' willingness to terminate removal cases is the recent AG decision in *Matter of S-O-G- & F-D-B,* 27 I&N Dec. 462 (A.G. 2018), in which the AG determined that Immigration Judges lacked authority to terminate cases absent a specifically delineated regulatory authority for them to do so.

Matter of S-O-G- & F-D-B 27 I&N Dec. 462 (A.G. 2018)

In this case, the Attorney General, in a directed decision, maintained that IJs only have authority to dismiss or terminate immigration proceedings when specifically authorized by regulation.[45] Otherwise, according to the AG, the IJ must allow for removal proceedings to continue if the charges in the NTA can be sustained. Despite its broad language, this recent Attorney General decision does not seem to abrogate any existing precedent and its holding may not survive appeal. Attorneys are advised to preserve arguments for termination on the record, confer with ICE counsel and ask them to join motions for termination, and contact Safe Passage mentors to discuss the possibility of filing for interlocutory appeal from an IJ decision not to terminate.

[44] INA § 240(a)(5).
[45] See 8 CFR §§ 1239.2(c); 1239.2(f) (allowing IJs to terminate proceedings where naturalization proceedings are pending and where there are humanitarian factors present).

A. Was Your Client Properly Served with the Required Documents?

In certain cases in which the government violates a constitutional protection, regulation or policy intended to benefit a noncitizen, you may have grounds to move for termination of the case. For an exceptional in-depth discussion of strategies for suppressing evidence and terminating removal proceedings—especially in cases of noncitizen youth, *see* Helen Lawrence, Kristen Jackson, Rex Chen, and Kathleen Glynn, *Strategies for Suppressing Evidence and Terminating Removal Proceedings For Noncitizen Youth Clients*, Vera Institute of Justice's Unaccompanied Children Program, March 2015.[46]

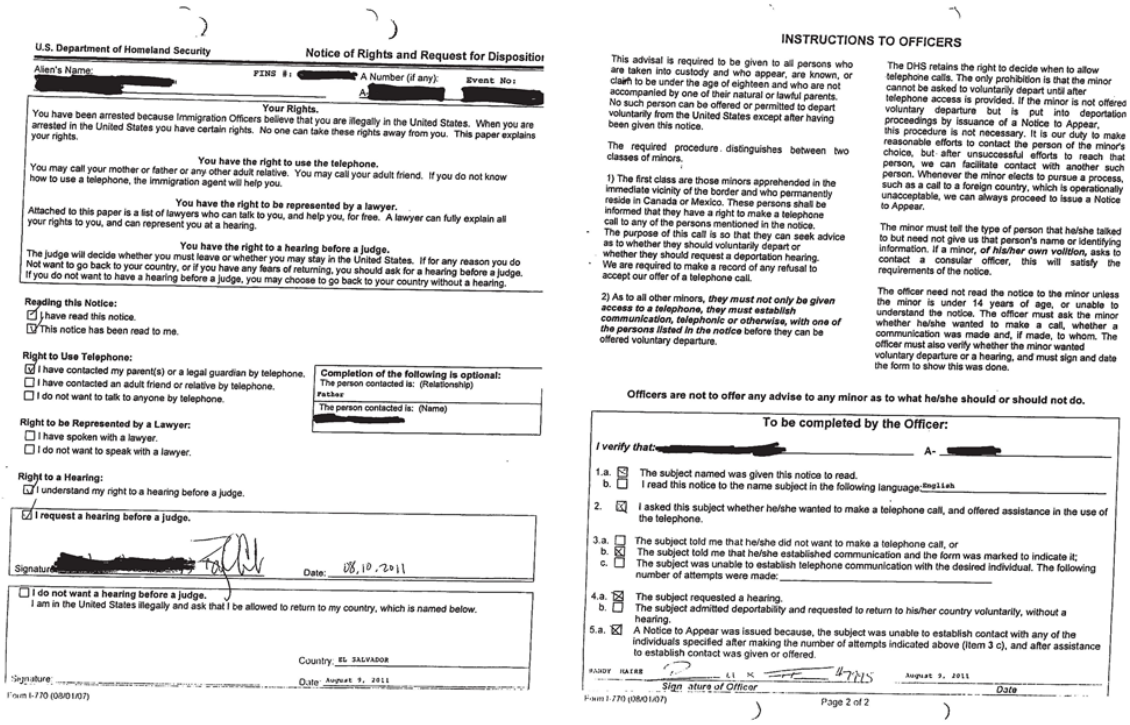
8 CFR § 236.3 outlines the procedures that the government must follow in detaining and releasing juveniles under the age of 18. You should review these procedures carefully and determine if they were followed (as they are often not). If these procedures were not followed, you may also have grounds to move for termination of proceedings against your client.

B. Was Your Client Served with Form I-770?

The Form I-770 Notice of Rights and Disposition is to be issued by CBP or ICE to any noncitizen juvenile who is apprehended by immigration authorities at the time of apprehension, whether or not the noncitizen youth is apprehended along with a parent or other family member.[47] If the noncitizen is under 14 years of age or unable to understand the notice, the regulations require that it be read and explained to the juvenile in a language he or she understands.[48] If your client was not directly served with Form I-770 (if it was served on the Office of Refugee Resettlement that was detaining the noncitizen youth, or on the noncitizen youth's guardian), or if the form was improperly completed such that it did not properly advise the noncitizen youth, or if the noncitizen youth was under 14 or unable to understand the form, and officers did not read it to

[46] Available at: https://cliniclegal.org/sites/default/files/strategies_for_supressing_evidence_and_terminating_removal_proceedings_for_child_clients_with_appendices.pdf.
[47] 8 CFR § 1236.3.
[48] *Id.*

the noncitizen youth, or if the government otherwise violated regulations, please contact your Safe Passage mentor, as a motion to terminate on these grounds may be warranted.[49]



U.S. Department of Homeland Security — Notice of Rights and Request for Disposition

Alien's Name: [redacted] FINS #: [redacted] A Number (if any): A- [redacted] Event No: [redacted]

Your Rights.

You have been arrested because Immigration Officers believe that you are illegally in the United States. When you are arrested in the United States you have certain rights. No one can take these rights away from you. This paper explains your rights.

You have the right to use the telephone.

You may call your mother or father or any other adult relative. You may call your adult friend. If you do not know how to use a telephone, the immigration agent will help you.

You have the right to be represented by a lawyer.

Attached to this paper is a list of lawyers who can talk to you, and help you, for free. A lawyer can fully explain all your rights to you, and can represent you at a hearing.

You have the right to a hearing before a judge.

The judge will decide whether you must leave or whether you may stay in the United States. If for any reason you do Not want to go back to your country, or if you have any fears of returning, you should ask for a hearing before a judge. If you do not want to have a hearing before a judge, you may choose to go back to your country without a hearing.

Reading this Notice:
☑ I have read this notice.
☑ This notice has been read to me.

Right to Use Telephone:
☑ I have contacted my parent(s) or a legal guardian by telephone.
☐ I have contacted an adult friend or relative by telephone.
☐ I do not want to talk to anyone by telephone.

Completion of the following is optional:
The person contacted is: (Relationship) Father
The person contacted is: (Name) [redacted]

Right to be Represented by a Lawyer:
☐ I have spoken with a lawyer.
☐ I do not want to speak with a lawyer.

Right to a Hearing:
☑ I understand my right to a hearing before a judge.
☑ I request a hearing before a judge.
Signature: [redacted] Date: 08.10.2011

☐ I do not want a hearing before a judge.
I am in the United States illegally and ask that I be allowed to return to my country, which is named below.
Country: EL SALVADOR
Signature: [redacted] Date: August 9, 2011

Form I-770 (08/01/07)

INSTRUCTIONS TO OFFICERS

This advisal is required to be given to all persons who are taken into custody and who appear, are known, or claim to be under the age of eighteen and who are not accompanied by one of their natural or lawful parents. No such person can be offered or permitted to depart voluntarily from the United States except after having been given this notice.

The required procedure distinguishes between two classes of minors.

1) The first class are those minors apprehended in the immediate vicinity of the border and who permanently reside in Canada or Mexico. These persons shall be informed that they have a right to make a telephone call to any of the persons mentioned in the notice. The purpose of this call is so that they can seek advice as to whether they should voluntarily depart or whether they should request a deportation hearing. We are required to make a record of any refusal to accept our offer of a telephone call.

2) As to all other minors, ***they must not only be given access to a telephone, they must establish communication, telephonic or otherwise, with one of the persons listed in the notice*** before they can be offered voluntary departure.

The DHS retains the right to decide when to allow telephone calls. The only prohibition is that the minor cannot be asked to voluntarily depart until after telephone access is provided. If the minor is not offered voluntary departure but is put into deportation proceedings by issuance of a Notice to Appear, this procedure is not necessary. It is our duty to make reasonable efforts to contact the person of the minor's choice, but after unsuccessful efforts to reach that person, we can facilitate contact with another such person. Whenever the minor elects to pursue a process, such as a call to a foreign country, which is operationally unacceptable, we can always proceed to issue a Notice to Appear.

The minor must tell the type of person that he/she talked to but need not give us that person's name or identifying information. If a minor, ***of his/her own volition***, asks to contact a consular officer, this will satisfy the requirements of the notice.

The officer need not read the notice to the minor unless the minor is under 14 years of age, or unable to understand the notice. The officer must ask the minor whether he/she wanted to make a call, whether a communication was made and, if made, to whom. The officer must also verify whether the minor wanted voluntary departure or a hearing, and must sign and date the form to show this was done.

Officers are not to offer any advise to any minor as to what he/she should or should not do.

To be completed by the Officer:

I verify that: [redacted] A- [redacted]

1.a. ☒ The subject named was given this notice to read.
b. ☐ I read this notice to the name subject in the following language: English

2. ☒ I asked this subject whether he/she wanted to make a telephone call, and offered assistance in the use of the telephone.

3.a. ☐ The subject told me that he/she did not want to make a telephone call, or
b. ☒ The subject told me that he/she established communication and the form was marked to indicate it;
c. ☐ The subject was unable to establish telephone communication with the desired individual. The following number of attempts were made: _____

4.a. ☒ The subject requested a hearing.
b. ☐ The subject admitted deportability and requested to return to his/her country voluntarily, without a hearing.

5.a. ☒ A Notice to Appear was issued because, the subject was unable to establish contact with any of the individuals specified after making the number of attempts indicated above (Item 3 c), and after assistance to establish contact was given or offered.

RANDY HAIRE [redacted] August 9, 2011
Signature of Officer Date

Form I-770 (08/01/07) Page 2 of 2

C. Was Your Client Properly Served with A Notice to Appear (NTA)?

Generally, an NTA must be served upon the noncitizen, or his or her attorney of record, by written notice in person or by first class mail to the noncitizen's address.[50] But in cases in which DHS is serving an NTA on a noncitizen youth under the age of 14, it must comply with the NTA service requirements applicable to noncitizen youth.[51]

---

49 For sample motions to terminate, see Helen Lawrence, Kristen Jackson, Rex Chen, and Kathleen Glynn, *Strategies For Suppressing Evidence And Terminating Removal Proceedings For Child Clients, Vera Institute of Justice's Unaccompanied Children Program,* March 2015, Available at: https://cliniclegal.org/sites/default/files/strategies_for_supressing_evidence_and_terminating_removal_proceedings_for_child_clients_with_appendices.pdf or contact your Safe Passage Project mentor.

50 INA § 239(a)(1)(c).

51 See generally 8 CFR § 103.8(c)(2)(ii).

Service of NTA on Minors

In the case of a minor under 14 years of age, service ***shall*** be made upon the person with whom the incompetent or the minor resides; whenever possible, service shall also be made on the near relative, guardian, committee, or friend. If the government serves the NTA while the noncitizen youth is in federal custody, it should effectuate service on the head of the facility where the noncitizen youth is being detained. Once the noncitizen youth is released, the person to whom the noncitizen youth is released should be served instead. If the noncitizen youth's parent is physically in the U.S., the parent must also be served.[52]

We will discuss service requirements in more detail below, but aside from the specific requirements of service upon minors, service is generally deemed complete upon mailing.[53] If the noncitizen is represented by an attorney, and that attorney has already entered an appearance, service is proper if the NTA is sent to or received by the attorney and not the noncitizen. Improper service, particularly where the NTA is concerned, can be grounds for terminating removal proceedings, but must be raised as an issue before the Immigration Court immediately, or the Court will likely deem the issue abandoned.[54]

An NTA may generally include the time and place of the hearing or may state that the hearing is "to be set." Where an NTA does not initially provide the time and date of the removal hearing and states that the information will be forthcoming, the mailing of a subsequent Notice of Hearing together will satisfy the requirements of service under INA § 239(a)(1).[55]

If an individual is "served" with an NTA by mail but does not actually receive the notice, "sufficiency of service will depend on whether there is 'proof of attempted delivery to the last

[52] *See Matter of Amaya*, 21 I&N Dec. 583, 584-85 (BIA 1996) and *Matter of Mejia-Andino*, 23 I&N Dec. 533, 536 (BIA 2002).
[53] INA § 239(a)(1)(c).
[54] *Nolasco v. Holder*, 637 F.3d 159, 162 (2d Cir. 2011)
[55] *Guamanrrigra v. Holder*, 670 F.3d 404 (2nd Cir. 2012); 8 C.F.R. § 1003.18.

address provided [to the Court]'"[56] indicating where the individual may be reached during proceedings, as required by statute. If a noncitizen is not apprised of the requirements to provide such an address and to update it with the Court—which is stated on the NTA—then the individual cannot be considered to have received proper notice of the hearing or of the obligation to update the Court as to any change of address.[57] However, if an individual does not provide an address to the Court, courts have generally found that he or she cannot challenge service of the NTA as improperly served by mail.[58]

How to Review The NTA

- Read the NTA carefully
- Does it contain all of the required information under INA § 239 and 8 CFR § 239?
- Does it properly identify your client?
- Was it signed by the right person?
- Are the factual allegations against your client correct?
- Can the government sustain the charges against your client? (review INA § 212 or INA § 237, as appropriate)
- Does the factual allegation relate to the alleged ground of removal/inadmissibility?

[56] *Matter of G-Y-R-*, 23 I&N Dec 181 (BIA 2001).
[57] Id. at 187-88.
[58] INA § 240(b)(5)(B).

Service of Process Case Law Is Voluminous, But Here Are Some Cases to Help You Issue-Spot:

There is a presumption of proper service when an NTA is served by regular mail	*Matter of M-R-A-,* 24 I&N Dec. 665, 675-76 (BIA 2008) "[T]he respondent's notice was sent by regular mail. We therefore employ a weaker presumption, which we have determined is applicable in cases where notice is sent by regular mail. . . An Immigration Judge must carefully examine the specific facts and evidence provided in each case to determine whether a Notice to Appear or Notice of Hearing sent to a respondent by regular mail was properly addressed and mailed according to normal office procedures. The Immigration Judge must then determine, on a case-by-case basis, whether the respondent has presented sufficient evidence to overcome the weaker presumption of delivery that applies when service has been made by regular mail."
The NTA does not have to be in the Respondent's native language	*Lopes v. Gonzales*, 468 F.3d 81, 85 (2d. Cir. 2006) "[W]e reject Silva's claim that the notices to appear were defective because they did not advise him in his native Portuguese that an in absentia order could be entered against him if he failed to appear. The relevant statute does not require that notice be provided in any particular language."
Service of Respondents who are minors	*Nolasco v. Holder,* 637 F.3d 159, 162 (2d Cir. 2011) "Although the statute [INA] is silent with respect to service on minors, corresponding regulations state that when effecting service on a minor (i.e., an alien under 14 years of age), "service shall be made upon the person with whom ... the minor resides," and "whenever possible, service shall also be made on the near relative, guardian, committee, or friend."" ". . . Petitioner's parents were aware she had been placed in removal proceedings. . . [W]here it is clear that the minor alien received such notice, she has no due process claim, regardless of any technical defect in the manner in which the NTA has been served. 637 F.3d at 163-64. *In re Mejia–Andino, 23 I&N Dec. 533, 536 (BIA 2002)).* " '[T]he purpose of requiring service of a notice to appear on the person with whom a minor respondent resides [is] to direct service of the charging document upon the person ... most likely to be responsible for ensuring that an alien appears before the Immigration Court at the scheduled time.' "
Service of Respondents who lack competence	*Matter of E-S-I-,* 26 I&N Dec. 136, 142 (BIA 2013) "[F]or all respondents who lack mental competency--whether detained or not--service shall also be made, whenever possible, on the near relative, guardian, committee, or friend. 8 C.F.R. § 103.8(c)(2)(ii)."

Waiving improper service	*Nolasco v. Holder,* 637 F.3d 159, 162 (2d Cir. 2011) "[B]ecause Petitioner conceded her removability as charged before the immigration court and did not raise the issue of improper service in those proceedings . . . she has arguably waived any claim that the agency lacked jurisdiction based on any defect in service of the NTA." *Qureshi v. Gonzales*, 442 F.3d 985, 990 (7th Cir.2006) "Because Qureshi failed to object to the admission of the NTA, conceded his removability, and pleaded to the charge in the NTA, all before claiming that the certificate of service was defective, he has waived his challenge to the IMMIGRATION JUDGE's jurisdiction over the removal proceedings."

D. Does the Court Have Jurisdiction?

On June 21, 2018, the Supreme Court held in *Pereira v. Sessions* 585 U. S. ____ (2018) that a notice to appear (NTA) that fails to designate the time or place of the noncitizen's removal proceedings is not a "notice to appear under 8 U.S.C. §1229(a)," and thus does not trigger the stop-time rule for purposes of establishing eligibility for a defense against removal called "cancellation of removal".

The Court's decision suggested that the failure of an NTA to establish the specific time and location of proceedings failed to meet the statutory definition of an NTA at 8 U.S.C. § 1229(a). As, per 8 C.F.R. § 1003.14(a), the removal proceedings against a noncitizen only start with service of an NTA upon the Immigration Court, in the months following the decision, some immigration judges applied Pereira to hold that NTAs that fail to identify the hearing time and place where the hearing against the noncitizen fail to meet the requirements of a notice to appear and so fail to give the immigration court subject matter jurisdiction over the case. Those judges granted termination of the affected matters before them. Some Federal Courts have since followed suit.[59]

To date, the Executive Office for Immigration Review has not published any public policy guidance specifying how immigration courts should interpret or apply *Pereira*, but on August 31, 2018, the Board of Immigration Appeals issued a decision in *Matter of Bermudez-Cota*, 27 I&N Dec. 441,

[59] See *U.S. v. Pedroza Rocha*, W.D. Tex. 2018.

which held for the first time that an NTA that does not specify the time and place of an individual's initial removal hearing can meet the requirements 8 U.S.C. § 1229(a) **if combined** with a properly served later hearing notice identifying that information.

The long-term interpretation of both cases is an open question, and so, when clients were not originally served with a Notice to Appear that specifically stated the time or the location of the proceedings against them, advocates should take all possible steps to preserve the argument that, under the Supreme Court's reasoning in Pereira, the Immigration Court does not have jurisdiction over the proceedings and must grant a motion to terminate. Please contact your Safe Passage mentor to discuss strategy and obtain sample motions.

E. Violations of Constitutional Protections as Grounds for Termination

Evidence that led to the initiation of removal proceedings (along with other evidence in removal proceedings) can be suppressed if the noncitizen can make a prima facie case via a Motion to Suppress that the Department of Homeland Security's (DHS) evidence was unlawfully obtained. The Court may schedule a suppression hearing, at which the burden will be upon the Respondent to establish the illegality of DHS conduct. If the Respondent does so, the burden then shifts to DHS to justify how they obtained the evidence. If DHS cannot do so, the evidence will be suppressed.[60]

Evidence can be excluded where there were "…egregious violations of the Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained" or where there is "good reason to believe that Fourth Amendment violations…were widespread."[61] A Fourth Amendment violation does not, by itself,

[60] *See* Helen Lawrence, Kristen Jackson, Rex Chen, and Kathleen Glynn, Strategies for Suppressing Evidence and Terminating Removal Proceedings For Child Clients, Vera Institute of Justice's Unaccompanied Children Program, March 2015 Available at: https://cliniclegal.org/sites/default/files/strategies_for_supressing_evidence_and_terminating_removal_proceedings_for_child_clients_with_appendices.pdf.

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

justify use of the exclusionary rule in civil deportation proceedings.[62] Fourth Amendment-based challenges will favor the exclusion of evidence only when there is an egregious violation that is fundamentally unfair, or the violation undermines the reliability of the evidence in dispute.[63] Unlawful stops and warrantless arrests of a noncitizen should be closely examined to determine if there are grounds for arguing a Fourth Amendment violation.

The due process clause of the Fifth Amendment mandates fair removal hearings and that evidence be used in a fundamentally fair manner.[64] Evidence obtained in violation of that Due Process Clause is suppressible.[65] Statements that were coerced must be excluded.[66] If your client was questioned by immigration authorities, examine closely whether she was threatened, denied food or drink, or whether she was questioned under unduly harsh circumstances.

Evidence obtained in violation of Federal regulations may also be suppressed if (1) the regulation that was violated is meant to serve "a purpose or benefit to the alien" and (2) the violation "prejudiced interests of the alien which were protected by the regulation". To demonstrate prejudice, the Respondent must demonstrate that the outcome of the case would be different if the regulatory provision had not been violated. Prejudice is presumed where (1) compliance with the federal regulation is mandated by the Constitution or (2) a procedural framework designed to ensure fair processing of an action affecting an individual is created, but not followed by an agency. The conditions present at interrogations of noncitizens and the conditions of detention and arrests, especially those without a warrant, may involve a violation of federal regulations. For an in-depth discussion of motions to suppress, *see* Helen Lawrence, Kristen Jackson, Rex Chen, and Kathleen Glynn, *Strategies For Suppressing Evidence And Terminating Removal Proceedings For Noncitizen Youth Clients,* Vera Institute of Justice's Unaccompanied

[62] *Id*. at 1039.

[63] *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 234 (2d Cir.2006).

[64] *Bridges v. Wixon*, 326 U.S. 135, 154 (1945); *Matter of Toro*, 17 I&N Dec. 340, 343 (BIA 1980).

[65] *Matter of Sandoval,* 17 I&N Dec. 70, 83 n. 23 (BIA 1979) (citing *Tashnizi v. INS*, 585 F. 2D 781 (5th Cir. 1978).

[66] *Matter of Garcia*, 17 I&N Dec. 319, 321 (BIA 1980).

Children Program, March 2015.[67] Or contact your Safe Passage Project mentor, who can connect you directly with Rex Chen, one of the authors, who works at Safe Passage.

F. Arguing for Termination under Prosecutorial Discretion

The Secretary of Homeland Security is charged with the administration and enforcement of all U.S. immigration laws, which includes the power to create regulations "necessary for carrying out his authority."[68] Through the powers given to the Secretary, ICE OCC may exercise prosecutorial discretion in deciding whether to initiate, terminate, or appeal a decision in removal proceedings without being subject to judicial review. There is no statutory framework outlining ICE OCC's exercise of prosecutorial discretion, but ICE OCC had in past years published several memoranda explaining its internal guidelines for when the agency would exercise prosecutorial discretion.[69] Although some of those memoranda have been since expressly revoked, nothing precludes ICE from continuing to exercise discretion on a case-by-case basis. This ongoing authority to exercise discretion was reiterated in a recent memorandum to Office of Chief Counsel Attorneys.[70] In that memorandum, ICE's Principal Legal Advisor reiterated that Assistant Chief Counsel have ongoing authority (albeit limited) to exercise prosecutorial discretion, including by not filing an issued NTA with an Immigration Court,[71] agreeing to

[67] Available at: https://cliniclegal.org/sites/default/files/strategies_for_supressing_evidence_and_terminating_removal_proceedings_for_child_clients_with_appendices.pdf

[68] 8 U.S.C. § 1103(a) (2013).

[69] John Morton "*Exercising Prosecutorial Discretion Consistent with the Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*," This memo was further expanded upon by Director Morton in a memorandum entitled "Prosecutorial Discretion: Certain Victims, Witnesses and Plaintiffs," also issued on June 17, 2011, that specifically states that it is "against ICE policy to initiate removal proceedings against individuals known to be the immediate victim or witness to a crime."
Additionally, on November 17, 2011, Principal Legal Advisor, Peter S. Vincent, issued a memorandum entitled "Case-by-Case Review of Incoming and Certain Pending Cases," available at http://www.ice.gov/doclib/foia/prosecutorial-discretion/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf, to address cases before the EOIR.

[70] Memorandum from Tracy Short, U.S. Immigration and Customs Enforcement Principal Legal Advisor*, Guidance to OPLA Attorneys Regarding the Implementation of the President's Executive Orders and the Secretary's Directives on Immigration Enforcement.*" (August 15, 2017). Available at AILA.com as AILA doc. 18100807.

[71] *Id.* at p.4.

termination of proceedings to allow for the adjudication of a benefit application[72] or to address "extraordinary" humanitarian factors such as a noncitizen's "significant mental health issues that make further litigation of a case before EOIR untenable." [73]

In addition, Existing ICE guidance advises Assistant Chief Counsel that, in the absence of serious adverse factors, Counsel should exercise prosecutorial discretion in cases involving victims of domestic violence, human trafficking, or other serious crimes, and witnesses involved in pending criminal investigations or prosecutions.[74]

Interestingly, the August 15, 2017 memorandum moves away from the prior practice of requesting that attorneys submit formal requests for an exercise of prosecutorial discretion. Instead, the memorandum states that Assistant Chief Counsel are to exercise discretion absent a specific request from Respondent's counsel. Despite this guidance, it remains good practice that, if Counsel believes that an exercise of prosecutorial discretion is warranted in the case, the request be made in writing, be specific, and contain all relevant supporting evidence.

[72] *Id.* at p. 6.
[73] *Id.*
[74] Memorandum from John Morton, Dir., ICE, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (June 17, 2011); Memorandum from Peter. S. Vincent, Principal Legal Advisor, ICE, *Guidance Regarding U Nonimmigrant Status (U visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal* (Sept. 25, 2009). These memoranda also advise a positive exercise of discretion in favor of plaintiffs in non-frivolous lawsuits regarding civil rights or liberties violations and individuals engaging in a protected activity related to civil or other rights.

Chapter 3: Prehearing Concerns

3.1 Changing Venue

Most motions can be filed either before the first master calendar hearing or after,[75] but it is often the case—given the long delays between the issuance of an NTA and the first calendar hearing—that clients move between jurisdictions before the first master calendar hearing, which necessitates the filing of a Motion to Change Venue because appropriate venue in Immigration Courts is generally governed by the Respondent's place of residence.

It is possible that your client was placed in removal proceedings in a different jurisdiction. If so, unless the Immigration Judge originally assigned to the case has already granted a Motion to Change Venue, your client must appear at the removal hearing where he or she was scheduled to do so, with or without counsel. A change of venue can only be obtained by filing a motion with the Immigration Court presiding over the proceedings; you cannot file the motion in your jurisdiction. A Motion to Change Venue requires that the non-filing party receive notice and have an opportunity to respond. See 8 C.F.R. § 1003.20(b). The motion must include the following:

- Cover page;
- The date and time of the next scheduled hearing;
- Written pleadings, signed by your client, and including the affirmation of rights and waivers as required by the immigration court manual;
- A designation or refusal to designate a country of removal;
- If requesting relief from removal, a description of the basis for eligibility;
- The address and telephone number of the location at which respondent will be residing if the motion is granted;

[75] There are several motions that can be made orally to the Court, but we generally recommend that less-experienced practitioners make all motions in writing to better formulate and preserve arguments for appeal.

- If there has been a change of address, a properly completed alien's change of address form (Form EOIR-33/ic);
- A detailed explanation of the reasons for the request;
- Table of contents;
- Evidence;
- Certificate of service establishing service of a copy of the motion upon ICE OCC.

Tips and Tricks: Motions to Change Venue

Although the EOIR practice manual[76] advises that motions can be timely filed up to 15 days prior to a hearing, we strongly recommend that you file a Motion to Change Venue as soon as possible, to make it possible to timely file additional motions to waive appearance or appear telephonically if the Motion for Change of Venue is denied. If the Court fails to grant a change of venue or alternate motions, both the client and representative will be expected to appear in person at the scheduled hearing. Failure to appear may result in an *in absentia* removal order.

The Immigration Judge may grant the motion if the moving party demonstrates that there is good cause for the change after conducting a relevant factor-balancing test.[77] Factors include:

- Administrative convenience;
- Expeditious treatment of the case;
- Location of witnesses, if any;
- Cost of transportation of witnesses or evidence;
- Reason for not obtaining counsel elsewhere.[78]

[76] Available at: https://www.justice.gov/eoir/page/file/1084851/download.
[77] See *Matter of Rahman,* 20 I&N Dec. 480 (BIA 1992).
[78] Make sure to note if you are providing *pro bono* counsel, and the difficulties Respondent is likely to encounter attempting to secure *pro bono* counsel elsewhere.

3.2 Gathering Evidence in Support of Your Case

As the Federal Rules of Evidence do not strictly apply in removal proceedings, the Court is charged with considering all evidence that is relevant, probative, material, and not fundamentally unfair.[79] The weight given each piece of evidence is within the discretion of the judge.[80]

Evidence presented in pre-hearing filings and at the individual hearing should be designed to establish the facts of your claim for termination, if applicable, or your client's eligibility for the relief they are seeking and should weigh toward a favorable exercise of discretion in your client's favor by the Immigration Judge. When gathering evidence, you should keep in mind that the government will also be building a case against your client. Hence, it is not only important to gather evidence in support of your client's case, but also to dedicate time to gathering as much evidence as possible to refute any negative evidence the government may have against your client. To that end, the following sections will walk you through the most common processes available to obtain evidence on your client's behalf.

A. Special Considerations in Obtaining Evidence

If your client has a prior immigration history, you must fully examine the government records by requesting your client's file from every immigration-related agency[81] they may have encountered. You should also plan to view the immigration file in your client's case directly from the Immigration Court. This is particularly important if your client has previously been subject to a credible fear interview or other immigration interview, as you will need to know what evidence is available to the government to prepare your client for cross-examination at trial (your client may be subject to cross examination with their previously provided statements). If your client has ever been arrested, you should ensure that you obtain all copies of police reports and certificates of disposition in their cases, as, once again, even if charges against them were

[79] 8 C.F.R. 1003.41, 8 C.F.R. 1287.69(b).
[80] *Id*.
[81] Read below for a list of agencies and a description of the types of records they have in their possession.

dismissed, the government may well subject them to cross-examination based on the information contained in those records.

B. Reviewing Your Client's Immigration Court File

Processes for planning to view your client's Immigration Court file differ somewhat by Immigration Court. As most Safe Passage cases are in the NYC Immigration Court, we will only address the process for reviewing your client's immigration file in the NYC Immigration Court.

Please see the table on the following page for the easiest way to arrange a viewing of your client's Immigration Court file.

Reviewing an Immigration Court file in NYC EOIR

What to do	How to do it
1. Make sure that you are registered to practice before EOIR	Review section A.5 in the "Getting Started" section of this manual.
2. Make sure you are listed as the attorney of record for the matter in the Immigration Court	Review section A.6 in the "Getting Started" section of this manual.
3. Find out who the Immigration Judge assigned to your case is	Call the Immigration hotline and enter your client's Alien number (listed as A# 000-000-000 on immigration documents): **1-800-898-7180.**
4. Get a hold of the Immigration Judge's clerk	Call the NY immigration court at **917-454-1040** from 8:30 a.m.-4:00 p.m. and listen to the prompts to be transferred to the clerk assigned to your judge.
5. Comply with the requirements that the clerk outlines for production of the file for review. The clerk will call you when the file is ready for review	Generally, the clerks ask that you write to the Immigration Judge and attach an E-28 (review section A.6 for details). Make sure that you note any exigent circumstances for it to be made available immediately, as otherwise it will generally be available in about a week.
6. Once you receive confirmation that the file is ready, go to the immigration court to review it	The Immigration Court is located in downtown Manhattan at: 26 Federal Plaza, 12th Floor, Room 1237 New York, NY 10278. You should go to the clerk's window in Room 1237 and let them know that you are there to review a file. They will escort you into the clerk's office, where there are two small tables for your use. Please bring a copy of the letter you mailed the immigration judge and your E-28 just in case (the clerk will need the Client's name and A number to locate the file and confirm that you are the attorney of record and authorized to access it.
7. Go to the Immigration Court Clerk window at room 1237 of 26 Federal Plaza and let them know you are there to review the file. They will escort you into the back, and you will be able to review your client's file.	Review your client's file, identify what documents you want copied, and complete a form asking for pages from the file (up to 25) to be reproduced and either mailed to you or made available for pickup at the Clerk's window.

C. Freedom of Information Act (FOIA) Requests

A noncitizen placed in removal proceedings is entitled to receive a full copy of their Alien file.[82] In preparation for the case, you may wish to file a Freedom of Information Act (FOIA) to obtain your client's immigration file, including recordings of any prior hearings, from the Immigration Court.[83] You have the right to review the file prior to pleading to any charges on the NTA.

Additionally, if your client has previously filed for an immigration benefit with the United States Citizenship and Immigration Service (USCIS) or was in the custody of Customs and Border Protection (CBP), you should file a FOIA with each agency (each agency has its **own FOIA request** procedures, as outlined below). FOIA requests can take a substantial period and should be filed well in advance of your next hearing.

i. Executive Office for Immigration Review (EOIR) FOIA

A FOIA request to EOIR is submitted on a Department of Justice Certification of Identity form. The form should include as much information as possible about your client and must be signed by your client. The form allows for the file to be released to another person, so you may have the file sent to your address rather than your client's address. The request may be filed electronically with EOIR at their email address: EOIR.FOIARequests@usdoj.gov Detailed instructions can be found here: https://www.justice.gov/eoir/foia-facts.

[82] *Dent v. Holder,* 627 F.3d 365 (9th Cir. 2010), finding that the INA requires the government to turn over copies of a Respondent's A file. For a detailed look at how to obtain copies of a Respondent's file pursuant to Dent, see American Immigration Council, *Dent V. Holder and Strategies For Obtaining Documents From The Government During Removal Proceedings* available at: https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/dent_practice_advisory_6-8-12.pdf.

[83] For a more in-depth discussion of how to determine which FOIAS to file, you may want to read: https://www.ilrc.org/sites/default/files/resources/foiaa-step_by_step-20171117.pdf.

ii. Customs and Border Protection (CBP) FOIA

A CBP FOIA is especially helpful when a client has been detained at the border or an airport. During such an encounter, clients are interviewed by CBP officers and it is important to have copies of any statements your client may have made to authorities. You can request CBP records by having your client complete DHS form G-639 (available at: https://www.uscis.gov/g-639) and an Entry of Appearance on Form G-28 (available here: https://www.uscis.gov/g-28) and submit a request for a CBP FOIA online at: https://foiaonline.gov/foiaonline/action/public/request.

iii. United States Citizenship and Immigration (USCIS) FOIA

A USCIS FOIA is especially helpful when a client has previously submitted applications or petitions to immigration requesting immigration status in the United States. Requests for FOIA filed with USCIS should be submitted to the Agency by having your client complete DHS Form G-639 (available at: https://www.uscis.gov/g-639) and an Entry of Appearance on Form G-28 (available at: https://www.uscis.gov/g-28) and submit a request via email, attaching both forms as a PDF to: uscis.foia@uscis.dhs.gov.

iv. Office of Biometric Identity Management (OBIM) FOIA

It is helpful to submit an OBIM FOIA when a client has had multiple entries or attempted entries to the U.S., as it returns a list of all past interactions with U.S. Customs and Border Protection Officials. OBIM requests can most easily be submitted electronically through the DHS Online Request Form: https://www.dhs.gov/dhs-foia-privacy-act-request-submission-form.

For identification purposes, they should include an original fingerprint card or the client's Alien number. Any questions about submitting an OBIM FOIA can be directed to: OBIM-FOIA@ice.dhs.gov. OBIM FOIAs have been known to take a long time to be returned, but once submitted, you can check the status of a request by checking the request number here: https://www.dhs.gov/foia-status.

D. Documents from Your Client's Country of Origin

You should consider whether documentary evidence from your client's country of origin would help the case. Particularly in asylum cases or cases involving domestic violence in the home country, you should work with your client to obtain documented evidence such as police reports, civil documents, court orders, or newspapers articles that corroborate your client's claim. Additionally, if there are any potential witnesses to facts you are alleging in the case, you are strongly encouraged to obtain signed and notarized affidavits. Given the challenges of obtaining documents from abroad, the identification of potentially helpful (or otherwise necessary) evidence should be done as early as possible to give you enough time to study the document and translate it if necessary. All foreign language documents submitted to the Immigration Court should be translated to English and accompanied by a certificate of translation.[84] A sample affidavit of translation is available as Exhibit H-1 of the Executive Office of Immigration Review Practice Manual.[85]

It is also important to have official records from your client's home country that establish her identity, custody issues, marriages, divorces, police complaints, and medical records where relevant. The first step is to speak with your client and find out whether any evidence exists and second, whether she has any family members or other persons who could assist in obtaining the necessary records. In some countries, these records may not exist or be easily accessible.

For more country-specific information and what documents are readily available from each country and the methods for obtaining them, please visit the U.S. Department of State Visa Reciprocity and Civil Documents by Country page at:

https://travel.state.gov/content/travel/en/us-visas/Visa-Reciprocity-and-Civil-Documents-by-Country.html

[84] *See* 8 C.F.R. §§ 1003.33, 1003.23(b)(1)(i).
[85] https://www.justice.gov/sites/default/files/pages/attachments/2017/11/02/practicemanual.pdf.

E. Discovery in Immigration Court

The Federal Rules of Civil Procedure do not apply in removal proceedings and there is no requirement that requests for discovery be honored.[86] That said, if there is specific discovery you would like, it is appropriate to request a pretrial conference to narrow issues, stipulate to facts, and review a list of proposed evidence, proposed witnesses and proffered testimony. If you need specific evidence and ICE Office of Chief Counsel (OCC) has easier access to it, plead to the Court at that hearing that it is more time- and cost-effective for OCC to disclose it. Under existing regulations, you, ICE OCC, or the Immigration Judge may request a subpoena once removal proceedings have begun.[87] Subpoenas may also be issued *sua sponte* by the Court. To apply for a subpoena, you must show (1) necessity, (2) diligence (in attempting to obtain the evidence by other means) and (3) failure to secure evidence.[88]

[86] *Matter of Magana*, 17 I&N Dec. 111 (BIA 1979).
[87] INA § 240(b)(1); 8 C.F.R. §§ 1003.35(b), 1287.4(a)(2)(ii).
[88] Your motion to the court requesting the subpoena must 1) state what will be proved by the witnesses or documentary evidence, and 2) affirmatively establish that counsel has made a diligent effort, without success, to produce said witness or documentary evidence. For a sample subpoena, see Sample N-1 of the EOIR Practice Manual, available at: https://www.justice.gov/sites/default/files/pages/attachments/2017/11/02/practicemanual.pdf.
If the Immigration Judge is satisfied that the witness will otherwise be unavailable and that the evidence is essential, the Judge should issue a subpoena. The refusal to issue a subpoena by an Immigration Judge may be reversible error, so make sure to preserve the record. Although rarer in practice, Immigration Judges have authority to order depositions taken for the testimony of essential witnesses who are not reasonably available for the hearing. They can exercise that authority *either sua sponte* or at the request of either party. For a detailed description of how-tos regarding subpoenas in immigration court, please see: Andrea Saenz, *Subpoenas in Immigration Court*, Immigration Law Advisor Vol. 5, Number 7, August 2011. *Available at*: https://www.justice.gov/sites/default/files/eoir/legacy/2011/10/06/vol5no7cr.pdf.

Chapter 4: Hearings

4.1 The Master Calendar Hearing

Unless you have filed for (and been granted) a Motion to Waive Your Client's Presence, you and your client must appear at the initial master calendar hearing because your client is the Respondent in the removal proceedings. If your client fails to appear at a removal hearing, the Court will issue an order removing them from the U.S. If the client appears late (as opposed to not appearing), after the IJ issues a removal order, it is important that you notify the Court and immediately ask that the IJ return to the bench to hear the case.[89]

Master calendar hearings are preliminary hearings for pleading and scheduling. At these hearings, a Respondent is asked to answer the charges against them and advise the Court of any available defenses against removal. Many Courts also require that the respondent file with the Court (or offer evidence of having filed with USCIS) their application(s) for relief from removal before scheduling a date for an individual hearing or considering moving the case to the status docket. Typically, over 50 or more noncitizens will be scheduled to appear before the immigration judge at the same date and time on the judge's master calendar day, and each master calendar hearing will be expected to last just a few minutes.

A. Burden of Proof (Generally)

As discussed above in the Inadmissibility vs. Deportability section, Respondents in removal proceedings will generally either be classified as present in the U.S. without admission or parole and charged as "inadmissible" under INA § 212 or as being present in the U.S. after admission or parole but now being deportable under INA § 237.

[89] Courts have been found to exceed their authority when they order a Respondent removed in absentia when the Respondent is merely late to arrive to their hearing. *See Perez, et al v. Mukasey*, 516 F.3d 770 (9th Cir. 2008); *Abu Hasirah v. U.S. Dep't of Homeland Sec.*, 478 F.3d 474, 478 (2d Cir. 2007); *Cabrera-Perez v. Gonzales*, 456 F.3d 109, 116-17 (3d Cir. 2006); *Alarcon-Chavez v. Gonzales*, 403 F.3d 343, 346 (5th Cir. 2005).

The question of which party bears the burden in immigration proceedings is a complicated one, and often shifts back and forth between parties during the proceeding (sometimes multiple times during individual hearings).[90]

For noncitizens like the majority of Safe Passage clients, who were never admitted or paroled into the U.S. and are charged with inadmissibility, the initial burden rests with ICE Chief Counsel, who must prove that the noncitizen is an "alien" (not a citizen) to the U.S.[91]

If ICE is able to do so by a preponderance of the evidence (using, for example, the noncitizen's prior statements, or copies of foreign documents to establish their allegations), the burden then shifts to the Respondent to prove by "clear and convincing" evidence that either: (1) they were lawfully admitted to the U.S.; or (2) that they are clearly and beyond a doubt entitled to be admitted to the United States and not inadmissible under INA § 212 as charged.[92]

If the Respondent is instead charged with deportability, ICE Office of Chief Counsel bears the initial burden of establishing by clear and convincing evidence that the Respondent is deportable under INA § 237.[93]

B. Holding ICE to its Burden

As you will notice when you watch other practitioners conduct master calendar hearings, it is common for attorneys and advocates at master calendar hearings to not require ICE to meet its initial burden of demonstrating alienage. Instead, attorneys admit the factual allegations against their client contained in the NTA, concede the charge/s of removability against the Respondent, decline to designate a country of removal, and move directly to presenting their defenses against

[90] Hearings addressing eligibility for asylum are a classic example—the asylum regulations at 8 C.F.R. § 208 shift the burden from the Respondent to the Government, and back to the Respondent throughout the course of an asylum merits hearing. For an in-depth discussion of the shifting burden of proof in immigration proceedings, see Immigration Law Advisor, Vol. 8. No. 8, October 2014 *available at*: https://www.justice.gov/sites/default/files/eoir/legacy/2014/11/05/vol8no8_edit3.pdf.
[91] 8 C.F.R. § 1240.8(c).
[92] INA §§ 240(c)(2), 291; 8 C.F.R. § 1240.8(c).
[93] INA § 240(c)(3); 8 C.F.R. § 1240.8(a).

removal. Although this is common practice, and although there may be cases where the practice is warranted (such as those in which you have already filed with USCIS for immigration relief, so you know that ICE can sustain charges of removability), in most cases, attorneys and advocates should ask that ICE meet its initial burden of alienage prior to proceeding to address any charges in the NTA. If ICE is unable to do so, you should move for an order terminating proceedings.

4.2 Preparing for a Master Calendar Hearing

You should begin preparation for the master calendar hearing as soon as possible. Review the "Checklist (for Master Calendar) Hearing", below, and the following pages for a simple list of to-dos that will help you get a grasp of the tasks you should perform in preparation for the hearing.

A. Checklist for First (Master Calendar) Hearing

1. Meet with your client
2. Review NTA
3. Explain potential strategies
4. Explore defenses against removal/ avenues for relief
5. Advise client of duty to appear
6. Advise client of duty of changing address with Court
7. Determine if any motions are necessary
8. Determine whether there are arguments to challenge the NTA (see sections 2.1 and 2.2)
9. Draft and file any necessary motions (see sections 3.1 and 4.3)
10. Register with EOIR (see section 1.1 (C))
11. Review the existing file with EOIR (see section 3.2 (B))
12. Obtain records of any prior immigration or criminal contact (see section 3.2 (A), (C), (D), and (E))
13. Draft your pleadings (even if you will deliver them orally)
14. Make arrangements to meet your client on the day of the master calendar hearing
15. Advise your client of process

Master Calendar Hearing Tips

Call the EOIR hotline at: 1-800-898-7180 to find out the name of the Judge assigned to your case and the exact time of your hearing.

If you can, arrange to visit the courtroom to witness one of your judge's master calendar hearings in advance of appearing at your first one. If that isn't possible, you may want to contact your Safe Passage Mentor, as they have access to videos of mock master calendar hearings that may be helpful for you.

Arrange to meet your client outside of 26 Federal Plaza (one popular location is the Dunkin Donuts at Broadway) and walk through security, into 26 Federal Plaza, and up to the courtroom together, as the courtrooms are often quite difficult to locate, and phone service is very poor within 26 Federal Plaza.

If you don't know the courtroom number for your assigned judge, you will be able to find it on the wall listing of hearings posted daily outside of Room 1237 (the EOIR Clerk's office) on the 12th Floor and 14th Floor of 26 Federal Plaza.

Make sure that you have 3 copies of your entry of appearance on form E-28[94] (on green paper) and two of a change of address form (EOIR-33 on blue paper) if necessary to serve to the Court and ICE.

Upon arriving in the Courtroom, check in with the judge's clerk. Give the clerk your Entry of Appearance as Attorney or representative on Form EOIR-28, and provide the clerk the last three digits of your client's Alien Number.

Your case will generally be called in the order you check in. If you don't want to wait, it is worth mentioning to the Judge's clerk that you are appearing *pro bono* as some Judges will allow *pro bono* counsel to jump the line.

When the Immigration Judge is ready to hear your case, the Judge will identify your case by calling out the last three digits of your client's Alien Number. You and your client will sit at counsel's table (generally on the right-hand side of the courtroom in the NY immigration courts).

The Immigration Judge should be referred to as "Your Honor" or "Judge __." Unlike in other venues, you may remain seated when addressing the Immigration Court.

If you need to hand anything to the Court or want to have a discussion with the Court and opposing counsel that is off the record and private from the rest of the individuals in the Courtroom, ask to approach the bench and await the Judge's authorization before doing so.

The Judge will likely ask you to wait to be given a copy of his decision/next hearing date. You can pick it up from the clerk or the Judge directly—they will give you two copies. Remember to hand one of the copies to ICE counsel before you leave the courtroom.

[94] An original for the Court, and two copies: one for ICE, and one for your records.

At a master calendar hearing, the Immigration Judge identifies the issues in the case (that your client is being charged with removability), sets filing deadlines, and sets the date for the merits hearing (AKA the individual hearing). Sometimes it is necessary to have more than one master calendar hearing: for example, if a noncitizen needs time to secure counsel, or to await adjudication of an immigration application that might have a bearing on the removal proceedings.

Some cases can receive summary disposition at the master calendar stage: for example, if ICE does not prevail in establishing alienage, or removability, if a noncitizen requests and is granted voluntary departure, or if removability is clearly shown, the noncitizen has no available relief and accepts removal, or if a noncitizen is in lawful status despite the alleged grounds of inadmissibility or removability on the NTA. In such instances, the Immigration Judge will issue an oral order and the proceedings will end.

B. Consequences of Failing to Appear

It is very important that your client attend all hearings set by the Immigration Court. Unless their presence has been waived by the Court, failure to attend any hearing (unless the client's presence is waived) can have repercussions beyond the removal proceedings, including the issuance of an *in absentia* removal order.[95]

The Immigration Judge will order your client "removed *in absentia*" after failing to attend a hearing, if OCC "establishes by clear, unequivocal, and convincing evidence that" your client received proper notice of the hearing.[96]

If your client was properly served and failed to appear, he will be ordered removed *in absentia*,[97] and become ineligible to apply for re-entry to the United States for a period of five years after

[95] INA § 240(b)(7).
[96] INA § 240(b)(5)(A).

[97] *See* INA § 239.

entry of the order of removal or their physical departure from the United States.[98] Additionally, your client will be ineligible for certain forms of relief from removal, including cancellation of removal, voluntary departure and adjustment of status of nonimmigrant to that of person admitted for permanent residence, among others, for a period of 10 years after the entry of the order of removal.[99]

If your client is ordered removed *in absentia*, the *in absentia* order of removal may only be rescinded by filing a Motion to Reopen; grounds for which are quite limited.[100]

Tips and Tricks: When Your Client Has More Than One Defense Against Removal

It is common for your client to be eligible for multiple defenses against removal. For example, your client may both have a viable claim for asylum, for Special Juvenile Status, and for U Nonimmigrant Status.[101] An analysis of eligibility for relief should be made prior to the master calendar hearing, with the goal of identifying all viable defenses against removal at the master calendar hearing. Failure to identify and preserve a viable form of relief may constitute ineffective assistance of counsel.

At the end of the master calendar, the Immigration Judge will issue warnings about failing to appear at the next hearing (or ask if you waive that reading—if so, you are charged with reading those warnings to your client) and set a date for the next hearing. If your case is scheduled for a merits ("individual") hearing, the Immigration Judge will set the deadlines for submitting applications, exhibits and witness lists. It is uncommon that a Judge fails to do so on a case for a non-detained Respondent, but, if the Judge fails to do so, you can rely on the default call-up date: 15 days prior to the hearing.[102] If your client's relief from removal involves background and

[98] INA § 240(b)(7).
[99] *Id.*
[100] 8 C.F.R. § 1003.23 (b)(1); 8 C.F.R. § 1003.23 (b)(4)(ii); 8 C.F.R. § 1003.23 (b)(4)(iv).

[101] Check the "Relief" section of this manual for further details. See Section 4.8, starting at page 75.
[102] *See* Immigration Court Practice Manual Section 3.1(b), available at: https://www.justice.gov/sites/default/files/pages/attachments/2017/11/02/practicemanual.pdf.

security investigations, your client will receive biometrics instructions (DHS may provide them at the hearing).

If your client is scheduled for another master calendar hearing, the judge may want an update of the status of your case depending on the type of relief being sought. If you received the second master calendar hearing to submit proof of a filed application at the second master calendar hearing, you should bring three copies of the filed application and receipt notices to the hearing. After submitting your application or informing the court of the status of your case, you may ask the court to administratively close the case until you have a decision.

C. Postponing Individual Hearings: Continuances, Administrative Closure and the Status Docket

Depending on whether your client's defense to removal requires an application filed with the Immigration Court or USCIS, the judge can either give you a deadline to file in Court, an adjournment to allow an application to be filed with USCIS, or, in some limited cases, administratively close the case, or place the case on the status docket.

If the application will be filed with the Court, the judge may give you an adjournment to prepare the filing and formally file in Court or simply set your case for an individual hearing and tell you that the application, exhibits, and if applicable, witness lists, will be due by a certain date before the individual hearing. You can always file any documents well in advance of the hearing, following the guidelines of the Immigration Court Practice Manual [103]and serving a copy on OCC.

If you prefer to postpone or avoid an individual hearing, either because your client is incompetent to aid in their defense, cannot comfortably testify in Court, needs to resolve other court proceedings prior to being able to proceed to a merits hearing, or because a backlog in adjudications means that they will be waiting years for relief, your options are limited, and have only become more so since January 2017.

[103] *Id.*

It is sometimes necessary to delay a hearing to best represent a client's interests—if, for example, you cannot proceed at a hearing without additional evidence, or you are awaiting a decision on a pending application for an immigration benefit outside the jurisdiction of the Court without which you cannot present a defense, or you are awaiting a decision on a collateral case (like a Family Court case) that must be resolved prior to your being able to present a defense against removal. Historically, continuances, which can be requested orally or via a written motion in immigration court, were granted liberally. The controlling regulations are 8 C.F.R. § 1003.29 which permits Immigration Judges to continue a hearing for "good cause" shown, and 8 C.F.R. § 1240.6, which permits Immigration Judges to grant a "reasonable adjournment at his or her own instance" or for good cause shown by a requesting party.

The immigration courts have issued several decisions over the years in which they interpret the "good cause" required to obtain a continuance.[104] Although this precedent has not yet been overturned, continuances have become more difficult to obtain since July 31, 2017, when the Department of Justice began issuing a series of memoranda advising immigration judges against generously granting continuances.[105]

This push against the liberal grant of continuances culminated on August 16, 2018, when the Attorney General issued a decision in *Matter of L-A-B-R-*, 27 I&N Dec. 405, 406 (A.G. 2018), in which he defined "good cause" as a substantive requirement that must be met for the Court to grant a continuance. In his decision, the Attorney General, who compared continuances to "an illegitimate form of de-facto relief from removal"[106] outlined a "multi-factor" balancing test that immigration courts must apply to the facts to determine under which circumstances a litigant

[104] See *Matter of Hashmi*, 24 I&N Dec. 785, 790-91 (BIA 2009), *Matter of Rajah*, 25 I&N Dec. 127, 135-36

(BIA 2009), *Matter of Sanchez Sosa*, 25 I&N Dec. 807, 812-13, (BIA 2012).

[105] EOIR Operating Policies and Procedures Memorandum 17-01: Continuances (July 31, 2017); EOIR Case Priorities and Immigration Court Performance Measures (January 17, 2018)

[106] *Matter of L-A-B-R-*, 411.

can demonstrate "good cause" to obtain a continuance. The test[107] requires an immigration Judge to weigh: 1) the likelihood that the respondent will receive the collateral relief sought; 2) whether the relief will materially affect the outcome of the removal proceedings; 3) the respondent's diligence in seeking collateral relief; 4) DHS's position on the motion; 5) administrative efficiency;[108] 6) the length of continuance requested; 7) the number of hearings held and continuances granted previously; and 8) the timing of the continuance motion.

The requesting party bears the burden of proof in establishing good cause. Importantly, not all factors in the test are to be afforded equal weight. The first two factors (the likelihood that the Respondent will receive the collateral relief sought, and whether the relief will materially affect the outcome of the removal proceedings) are of the utmost importance. Only if the two initial prongs are met, should the judge then weigh the other elements. L-A-B-R- also specifies that Immigration Judges must read or write a decision to continue into the record of proceedings, and that an Immigration Judge decision that does not specifically address the requisite grounds and explain the reasons for the judge's decision will leave the decision open to being vacated by the BIA.[109]

In light of *L-A-B-R-,* the question of whether the Respondent will receive the collateral relief sought (and for which he/she requires a continuance) is a primary consideration for the Immigration Judge. Consequently, Respondents seeking a continuance in order to obtain a decision on a collateral form of immigration relief over which the Immigration Judge does not have discretion (like SIJS. UAC asylum, a VAWA Self-petition, or U or T nonimmigrant status) should make sure to attach a copy of the application to any request for a continuance. This will

[107] The test seems to envision that continuances would only be requested by Respondents despite ICE routinely requesting continuances. Although thoughtfully responding (or choosing to not respond, as it may be in your client's interest) is outside of the scope of this manual, please consult with your mentor if that issue arises, as determining the best strategy to proceed may have substantial consequences for your client. For example, if a Respondent requests a continuance on an asylum case, the "asylum clock" stops, but that is not the case if the continuance is requested by ICE.

[108] Administrative efficiency cannot be the "sole" consideration for a judge to deny a continuance but is a valid consideration for the Court. It is unclear how much weight judges may attribute to it given recent case completion quotas that have gone into effect as of October 1, 2018. http://www.abajournal.com/images/main_images/03-30-2018_EOIR_-_PWP_Element_3_new.pdf.

[109] *Matter of L-A-B-R-*, 419.

allow the Immigration Judge to more effectively determine the likelihood of success on the application.

In many cases, the need for a continuance arises from a failure by USCIS to timely adjudicate a petition, or a lack of available visa numbers. In those cases, it is important that the Respondent argue that any delay is not caused by Respondent or his counsel, but, rather, that the delay is attributable to the government, and so should not be weighed against the Respondent.[110]

Also, since the Immigration Judges must weigh whether the Respondent has exercised due diligence in seeking relief, it is important to apply for any collateral relief on a timely basis. Lastly, because judges must now issue a detailed oral or written decision, it is likely best to request continuances in writing via a detailed motion that addresses each of the elements in turn, attaches relevant evidence, and allows a Judge to easily adopt your reasoning in deciding to grant a continuance. For a sample motion to continue, please contact your Safe Passage mentor.

The Board of Immigration Appeals had previously described administrative closure as a procedural tool used to temporarily remove a case from an Immigration Judge's active calendar to await an action or event that is relevant to immigration proceedings but is outside the control of the parties or the court and may not occur for a significant or undetermined period of time.[111] Despite a long practice of Administrative Closure in the immigration courts, on May 17, 2018, the Attorney General issued a decision in *Matter of Castro-Tum*, 27 I&N Dec. 271, in which he found that Immigration Judges lack the authority to suspend immigration proceedings through a grant of Administrative Closure, except where specifically afforded that authority under the Code of

[110] See *Matter of Sanchez Sosa*, 25 I&N Dec. at 814 (citing to *Matter of Hashmi*, 24 I&N Dec. 785). See also *Malilia v. Holder*, 632 F.3d 598, 606 (9th Cir. 2011) (delays in the USCIS approval process are no reason to deny an otherwise reasonable continuance request); see also *Rajah v. Mukasey*, 544F.3d 449, 456 (2d Cir. 2008) (in which the Courts express concern, in relation to a labor certification, that "[g]iven the delays endemic in almost every stage of acquiring any visa, it is imperative that the agency connect the notion of "sufficient time" with the practicalities of the labor certification and immigration process as well as with the intentions of Congress."

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

Federal Regulations or a settlement agreement. The number of Respondents now eligible for Administrative Closure is exceedingly limited.[112]

Administrative Closure

Despite *Castro-Tum*, you may nevertheless choose to request administrative closure, and be denied, in order to seek Circuit Court review. If you choose to do so, please consult with your mentor in the drafting of the request, as arguments to be made in such a motion are outside of the scope of this manual.

Considering the general unavailability of administrative closure, and the pressure on the Courts to adjudicate cases promptly, which serves as a negative factor against long continuances, practitioners may have difficulty obtaining sufficiently long continuances to address the year-long backlogs in visa numbers for certain SIJS applicants for Adjustment of Status or applicants for U Nonimmigrant Status. Consequently, practitioners in need of long continuances should consider making a motion to place the case on the status docket.[113] Placing the case on the status docket will allow the case to move off the Immigration Judge's calendar and allow Respondent's counsel to update the Immigration Court as to the status of the parallel proceeding in writing 60 days before the next status docket update date until such time as the collateral matter is resolved without wasting valuable Immigration Court resources.[114]

---

[112] The list of individuals who can now benefit from administrative closure is limited to (inter alia): (a) Individuals eligible for T Nonimmigrant Status. See 8 C.F.R. § 1214.2(a).21(b) Spouses and children of lawful permanent residents eligible for a V visa. See 8 C.F.R. § 1214.3.(c) 3. Certain nationals of Vietnam, Cambodia, and Laos eligible for adjustment of status under Section 586 of Public Law No. 106-429. See 8 C.F.R. § 1245.21(c). (d) Certain nationals of Guatemala and El Salvador covered by the settlement agreement in American Baptist Churches v. Thornburgh, 760 F. Supp. 796, 805-06 (N.D. Cal.1991). See 8 C.F.R. §§ 1240.62(b)(1)(i), (2)(iii) and 1240.70(f)-(h). (e) Certain nationals of Nicaragua and Cuba eligible for adjustment of status under Section 202 of the Nicaraguan Adjustment and Central American Relief Act (NACARA). See 8 C.F.R. § 1245.13(d)(3)(i). (f) Certain nationals of Haiti eligible for adjustment of status under the Haitian Refugee Immigrant Fairness Act of 1998 (HRIFA). See 8 C.F.R. § 1245.15(p)(4)(i). (g) Class members covered by the settlement in Barahona-Gomez v. Ashcroft, 243 F.Supp. 2d 1029, 1035-36 (N.D. Cal. 2002), which includes certain individuals who applied for suspension of deportation in the Ninth Circuit in the 1990s.

[113] To date, status dockets are not yet available in all Immigration Courts but are available in the NYC Immigration Court.

[114] Please note that if no update is received, the case will be placed back on the active docket, so it is very important to ensure timely updating of cases on the status docket.

4.3 Motions in Proceedings

Motions can be filed throughout the pendency of a removal case, even before the first master calendar hearing. Depending on the circumstances of your client's case, you may wish to file a motion to change venue, waive your or your client's presence and appear telephonically, or to terminate proceedings based on approved status or due process violations.

After your client is scheduled for his or her master calendar or individual hearing, it is important to keep track of any applicable filing deadlines and biometrics. Deadlines may differ according to whether your client's second appearance is another master calendar hearing or their individual hearing.

A. Motion to Continue

As discussed in further detail in Section 4.2(C) of this manual, Motions to Continue provide a limited method through which to postpone hearing dates. The motion should set forth in detail the reasons for the request and, if appropriate, be supported by evidence.[115] It should also include the date and time of the hearing, as well as preferred dates that the party is available to re-schedule the hearing, which the Court will take into consideration, but need not abide by.

A written Motion to Continue must include the following:

- Cover page
- The date and time of the next scheduled hearing;
- A detailed explanation of the reasons for the request;
- Table of contents;
- Evidence of reasons for continuance request;
- Certificate of service for proof of submitting a copy of the motion to ICE OCC.

Please contact your Safe Passage mentor for a sample.

115 See EOIR Practice Manual at Chapter 5.2(e) (Evidence) *available at:* https://www.justice.gov/sites/default/files/pages/attachments/2017/11/02/practicemanual.pdf.

The filing of a motion to continue does not excuse the appearance of an alien or representative at any scheduled hearing. Therefore, until the motion is granted, you and your client must both appear at any scheduled hearing (or risk an *in absentia* order of removal).

Steps to Success on a Motion to Continue

Given the recent decision in *Matter of L-A-B-R-,* 27 I&N Dec. 405, 406 (A.G. 2018), which creates a "multi-factor" balancing test that immigration courts must apply to the facts to determine under which circumstances a litigant can demonstrate "good cause" to obtain a continuance, the question of whether the Respondent will receive the collateral relief sought (and for which he/she requires a continuance) is a primary consideration for the Immigration Judge.

The test requires an immigration Judge to weigh:
The likelihood that the respondent will receive the collateral relief sought;
Whether the relief will materially affect the outcome of the removal proceedings;
The respondent's diligence in seeking collateral relief;
DHS's position on the motion;
Administrative efficiency;
The length of continuance requested;
The number of hearings held and continuances granted previously; and
The timing of the continuance motion.
Not all factors in the test are afforded equal weight; the first two factors (the likelihood that the respondent will receive the collateral relief sought, and whether the relief will materially affect the outcome of the removal proceedings) are of the utmost importance. In fact, the Immigration Judge should only move to weigh additional elements if the two initial prongs are met.

Consequently, Respondents should, if they are seeking a continuance in order to obtain a decision on a collateral form of immigration relief over which the Immigration Judge does not have discretion (like SIJS, UAC asylum, a VAWA Self-petition, or U or T nonimmigrant status), make sure to attach a copy of the application to any request for a continuance. This will allow the Immigration Judge to more effectively determine the likelihood of success on the application.
In many cases, the need for a continuance arises from a failure by USCIS to timely adjudicate a petition, or a lack of available visa numbers. In those cases, it is important that the Respondent argue that any delay is not caused by Respondent or his counsel, but, rather, that the delay is attributable to the government, and so should not be weighed against the respondent.[116]
Also, since the Immigration Judges must weigh whether the Respondent has exercised due diligence in seeking relief, it is important to apply for any collateral relief on a timely basis.
Lastly, because judges must now issue a detailed oral or written decision, it is likely best to request continuances in writing via a detailed motion that addresses each of the elements in turn, attaches relevant evidence, and allows a Judge to easily adopt your reasoning in deciding to grant a continuance.

[116] See *Matter of Sanchez Sosa*, 25 I&N Dec. at 814 (citing to *Matter of Hashmi*, 24 I&N Dec. 785). See also *Malilia v. Holder*, 632 F.3d 598, 606 (9th Cir. 2011) (delays in the USCIS approval process are no reason to deny an otherwise reasonable continuance request); see also *Rajah v. Mukasey*, 544.
F.3d 449, 456 (2d Cir. 2008) (in which the Courts express concern, in relation to a labor certification, that "[g]iven the delays endemic in almost every stage of acquiring any visa, it is imperative that the agency connect the notion of "sufficient time" with the practicalities of the labor certification and immigration process as well as with the intentions of Congress."

B. Motion to Change Venue

It is possible that your client was placed in removal proceedings in a different jurisdiction or will move during proceedings and be required to change venue. A change of venue can only be obtained by filing a motion with the Immigration Court presiding over the proceedings; you cannot file the motion in your jurisdiction. Please see "Prehearing Concerns" at Chapter 3, page 34 of this manual for further detail on the applicable rules surrounding motions to Change Venue.

C. Motion to Terminate

A motion to terminate proceedings is a request to the Court to end all removal proceedings pending against your client. The motion may be submitted in writing or requested orally in Immigration Court. As with all filings with the court, ICE OCC must be served a copy of the motion. The motion needs to state the reason why you are seeking termination (i.e. your client's lawful status) and must include copies of the approved lawful status.

If, prior to your client's next hearing, he or she receives a favorable decision on an application for relief and is now in lawful status, you should file a Motion to Terminate Proceedings with the Immigration Court.

A written Motion to Terminate Proceedings must include the following:

- Cover page;
- The date and time of the next scheduled hearing;
- A detailed explanation of the reasons for the request;
- Table of contents;
- Evidence of acquired lawful status;
- Certificate of service for proof of submitting a copy of the motion to ICE OCC.

Please contact your Safe Passage mentor for a sample.

D. Motion for Telephonic Appearance

You can request to be allowed to appear at a hearing telephonically by filing a Motion to Appear Telephonically.[117] It is often good to file this motion (in the alternative), when filing a Motion to Change Venue. The Motion to Appear Telephonically must state the reasons for the request and the specific time and date of the hearing. You must also include your telephone number.

Please note that a granted Motion for Telephonic Appearance does not waive your client's presence,[118] and it does not extend to any future hearings.[119] If you wish to appear telephonically at a second hearing, you will have to submit a new motion requesting the right to do so.

The Motion for Telephonic Appearance must include the following:

- Cover page;
- Date and time of the scheduled calendar hearing;
- A detailed explanation of the reasons for the request;
- Table of contents;
- Evidence;
- Certificate of service establishing service of a copy of the motion upon ICE OCC.

Please contact your Safe Passage mentor for a sample.

E. Motion for Telephonic Testimony

Witnesses may testify by telephone at the Immigration Judge's discretion. If you want to request that a witness be allowed to testify by telephone at the individual calendar hearing, submit a written motion by the call-up date (or later, if due to an emergency).

[117] *See* Immigration Court Practice Manual, Ch. 4.15(n).
[118] *See* Immigration Court Practice Manual, Ch. 4.15(n)(i).
[119] *See* Immigration Court Practice Manual, Ch. 4.15(n)(v).

A written motion to request telephonic testimony should be filed with a:

- Cover page labeled with the name of the motion;
- Date and time of the scheduled hearing at which you would like to submit telephonic testimony;
- A detailed explanation of the reasons for the request (why the witness cannot appear in person before the Court);
- The Witnesses' Telephone number;
- The location from which the witness will testify;
- Certificate of service establishing service of a copy of the motion upon ICE OCC.

A witness appearing by telephone must be available to testify at any time during the course of the individual calendar hearing and may not testify by cell phone unless specifically allowed by the Court. Also, if your witness it outside the U.S., you should bring a pre-paid telephone card to the Immigration Court to pay for the call.[120]

Please contact your Safe Passage mentor for a sample.

F. Motion to Waive Respondent's Presence

You may also file a Motion to Waive Respondent's Presence for good cause shown.[121] A Motion to Waive Respondent's Presence must state the date and time of the scheduled hearing and the reasons for the request. If you client's presence is waived, you must still appear before the court[122] either in person or telephonically (if you have requested and been granted telephonic appearance).

A Motion to Waive Respondent's Presence must include the following:

[120] See Section 4.7(F) of this manual for tips on how to successfully introduce telephonic testimony from witnesses abroad.
[121] *See* 8 C.F.R. § 1003.25 (a).
[122] *See Immigration Court Practice Manual, ch 4.15(m)(ii).*

- Cover page;
- Date and time of the scheduled master calendar hearing;
- A detailed explanation of the reasons for the request;
- Table of contents;
- Evidence;
- Certificate of service establishing service of a copy of the motion upon ICE OCC.

Please contact your Safe Passage mentor for a sample.

4.4 Timing of Motions

Any motion submitted to the court prior to the Master Calendar hearing must be filed at least **15 calendar days** before the hearing.[123] However, it is best to file as early as possible to allow the Immigration and Customs Enforcement Office of Chief Counsel ("ICE OCC") plenty of time to respond. Delays caused by external forces will not be considered by the Court to determine if you timely filed a motion; you are expected to anticipate any delay that may arise.[124] (Note: For clients who are in immigration detention, filing deadlines are different and beyond the scope of this manual. All motions filed with the court must also be served on ICE OCC.

Given the time-sensitive nature of immigration proceedings and the possibility that you may be retained close to the date of a scheduled hearing, you should consider filing some of the motions below with the Court at the same time.

All motions submitted to the court must follow the instructions set forth in the Immigration Court Practice Manual.[125]

[123] *See* Immigration Court Practice Manual, Ch. 3.1(b)(i).
[124] *See* Immigration Court Practice Manual, Ch 3.1(c)(iii).

[125] Available at:https://www.justice.gov/eoir/page/file/1084851/download

4.5 How to Properly Serve the Court and ICE Counsel

A. Service of Papers in Person

All documents served on the Court must also be served on ICE Office of Chief Counsel. After preparing your court filing, make sure you have an original and two (2) copies of the filing. (The original signed filing for the court, one copy for Immigration and Customs Enforcement Office of Chief Counsel and one copy for yourself, which you will need to have time-stamped).

Make sure your filing includes a Certificate (or proof) of Service. [126]

You must file with the actual court that has jurisdiction over your client's case. For example, if you client is in proceedings in New York City, you will need to know if the court at Varick Street or 26 Federal Plaza has jurisdiction. The NTA or Notice of Hearing will indicate the court presiding over your client's case. Once you know which court to file in, take your filing to the Office of Chief Counsel responsible for that Court to deliver a copy.[127] The officer at the window will stamp his copy, your copy, and the original to be filed with the Court. He will keep OCC's copy, and return the second copy and the Court's original to you.

Once you file with OCC, take your copy and the court's copy to the Immigration Court clerk.[128] The Court clerk should stamp and keep the original filing to include in the Court file, and stamp you copy so that you have evidence of filing.

B. Service of Papers by Mail

When serving by mail, you should submit the filing via FedEx or UPS to ensure delivery.[129] The original filing will again be submitted to the Court, along with an original certificate of service

---

[126] For a sample proof of service, see EOIR Practice Manual, Exhibit G-1 https://www.justice.gov/sites/default/files/pages/attachments/2017/11/02/practicemanual.pdf.

[127] A listing of addresses for Chief Counsel's Office is available here: https://www.ice.gov/contact/legal.

[128] A list of immigration Court addresses is available here: https://www.justice.gov/eoir/eoir-immigration-court-listing.

[129] Note that the court may not accept delayed filing if the delay was caused by your method of mailing.

certifying that OCC has been served with a copy and a copy of the filing to the Court, along with a self-addressed, stamped envelope. The Court will keep the original for its records, and stamp and return your copy to you so that you have evidence of the filing's being received by the Court. The second copy of the filing you submit to the Court should be mailed to OCC.

For Court and ICE Chief Counsel addresses and opening hours, please see chart on page 11.

4.6 Conferencing Cases

Pre-hearing conferences may be scheduled at the discretion of the Immigration Judge. A conference may be held to narrow issues, to obtain stipulations between the parties, to exchange information voluntarily, obtain stipulations, and otherwise to simplify and organize the proceeding.[130] In cases with criminal issues, or those requiring argument to establish eligibility for relief, requesting that the Court schedule a pre-hearing conference is highly advisable.

Pre-hearing conferences may be requested by a party or initiated by the Immigration Judge. A party's request for a pre-hearing conference may be made orally or by written motion. If in writing, the motion should comply with the requirements outlined in the EOIR Practice Manual.[131]

If the Court refuses to schedule a conference, you may nevertheless wish to discuss the case with opposing counsel in advance of the hearing to narrow issues for trial. Please be aware that ICE Assistant Chief Counsel often receive the case file the day before the hearing, so be prepared for last-minute conversations!

[130] 8 C.F.R § 1003.21.
[131] Available at: https://www.justice.gov/eoir/page/file/1084851/download

Tips and Tricks: Talking to ICE Chief Counsel

If your client's case is venued at the Immigration Court at 26 Federal Plaza, opposing counsel will be the Office of Chief Counsel for New York City. Their offices are on the 11th Fl. of 26 Federal Plaza, but they are easiest to connect with by phone. The trick to finding out who is assigned to your hearing is to call: (212) 264-5916, no more than 2 weeks before your next hearing, armed with your client's name, alien number, and the name of the assigned judge, and ask to speak to the duty attorney. Once you connect with the duty attorney, ask them who will be assigned to argue the case, and to provide you with that attorney's name, phone number and email address. This will give you the highest possibility of being able to meaningfully connect with the appropriate opposing counsel prior to your next hearing.

4.7 Individual Hearing

The Court will consider all evidence that is relevant, probative and material and not fundamentally unfair, but the importance of the admitted evidence is the weight assigned to it by the Immigration Judge.[132]

Evidence presented in pre-hearing filings and at the individual hearing should be designed to establish your client's eligibility for the relief they are seeking and should weigh toward a favorable grant of discretion. Please note that any evidence not submitted to the Court prior to the Immigration Judge's order will not be considered on appeal.

When gathering evidence, you should keep in mind that the government will also be building a case against your client. Hence, it is not only important to gather evidence in support of your client's case, but also to dedicate time to gathering as much evidence as possible to refute any negative evidence the government may have against your client.

[132] 8 C.F.R. § 1003.41, 8 C.F.R. 1287.6(b).

If your client has a prior immigration history, you must fully examine the government records by requesting your client's file from every immigration-related agency she may have come in contact with (please refer to earlier sections that address how to request and obtain government records). Additionally, work with your client to secure any records from her country and from any interactions with law enforcement in the United States and her home country.[133]

A. Call-up Dates

The call-up date is the date by which all motions for the individual hearing (motions for telephonic appearance, etc.) witness lists, and supporting documentation, along with any applications for relief from removal on which you are proceeding before the Court must be submitted to the court prior to an individual hearing. This date should be set by the immigration judge at the "Master Calendar" hearing and is usually approximately 30 days before the individual hearing date. It is good practice to set up multiple calendar reminders counting down the deadline to the call-up date, as, if you miss it, the Immigration Judge may be disinclined to admit "late filed" evidence into the record.

B. The Role of Experts

Expert evidence, in the form of reports and/or oral testimony, can be immensely helpful to your case. Experts are able to confirm your client's mental state, corroborate your client's testimony, detail country conditions in asylum cases, and even explain why your client may have difficulty reliably testifying about past events.[134] Further, experts are permitted to base their opinion on

[133] See manual sections on how to submit FBI and FOIA requests at Section 3.2.

[134] For an in-depth discussion of how post-traumatic stress affects an individual's ability to recount events, please see Landy F. Sparr and J. Douglas Bremner, *Post-traumatic Stress Disorder and Memory, Prescient Medicolegal Testimony at the International War Crimes Tribunal*? Journal of the American Academy of Psychiatry and the Law Online March 2005, 33 (1) 71-78.

hearsay evidence and do not have to have personal knowledge of the facts underlying their opinion.[135]

The regulations provide that Immigration Judges may consider "any oral or written statement that is material and relevant to any issue in the case."[136] Expert witnesses are those witnesses "with scientific, technical, or other specialized knowledge" who can "assist the trier of fact to understand the evidence or to determine a fact in issue."[137] Because they can provide conclusions and inferences drawn from facts that lay persons are not qualified to make, courts have recognized that "their testimony can be extremely valuable and probative."[138]

Although the Federal Rules of Evidence don't *strictly* apply in immigration hearings, you should be familiar with them and strive to meet their requirements when submitting expert evidence for consideration to the Court, as doing so will limit the Government's possible objections to its being admitted. You should both present expert evidence in writing to the Court by the call-up date, and make the expert witness available for cross-examination, either in person or by telephone (if granted the right to present telephonic testimony by the IJ pursuant to your filing a Motion for Telephonic Testimony). You should also ensure that your expert's written statement is accompanied by their *curriculum vitae* or resume, so as to support your arguing for their recognition as experts.

Under the Federal rules, there are three basic requirements for admission or exclusion of expert evidence: (1) the relevance of the expert testimony, (2) the qualification of the expert witness, and (3) the reliability of the expert opinion.[139] Relevance is relatively easy to establish, as you merely have to show that the evidence you are proffering has "any tendency to make the existence of any fact that is of consequence . . . more probable or less probable." [140]

---

[135] *Aguilar Ramos v. Holder,* 594 F.3d 701, 706 n.7 (9th Cir. 2010).
[136] 8 C.F.R. § 1240.7(a).
[137] *See* Fed. Rules of Evidence at 702.
[138] *United States v. Duncan*, 42 F.3d 97,101 (2d Cir. 1994).
[139] *See* Fed. Rules of Evidence at 702.
[140] *Id.*

To qualify your expert, you must establish a witness as an expert by: (1) knowledge[141], (2) skill, (3) experience, (4) training, or (5) education. It is good practice to always start their written statement and oral testimony by establishing that your expert merits designation as such under these five factors. Further, you should ensure that your expert's written statement addresses what they will be testifying about, as well as that: (1) their testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. This will ensure that the Court will find that your expert is able to testify may testify thereto in the form of an opinion.[142]

Although Immigration Judges have broad discretion in conducting hearings, refusal to allow expert evidence may constitute a due process violation if, as a result, the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.[143]

C. Depositions and Subpoenas

The Federal Rules of Civil Procedure do not apply in removal proceedings and there is no requirement that requests for discovery be honored.[144] That said, if there is specific discovery you would like, request a pretrial conference[145] to narrow issues, stipulate to facts, and review a list of proposed evidence, proposed witnesses and proffered testimony. If you need specific evidence and ICE Office of Chief Counsel (OCC) has easier access to it, plead to the Court at that hearing that it is more time- and cost-effective for OCC to disclose it. Make sure that you are not requesting items that are specifically excluded from discovery by regulations and/or statute.

[141] The expert must have greater knowledge than a lay person on the subject matter and must possess the necessary expertise in his or her field. *See United States v. Finley*, 301 F.3d 1000.
[142] An opinion may include reasonable inferences that the expert draws from the available facts and data. See Fed. R. Evid. 703 The facts or data they rely on need not be admissible in evidence, and an expert may assume the truth of the facts or data in order to render an opinion. See Fed. R. Evid.703, 705.1.
[143] *Lin v. Holder*, 565 F.3d 971, 979 (6th Cir. 2009).
[144] *Matter of Magana*, 17 I&N Dec. 111 (BIA 1979).
[145] 8 C.F.R. §§ 1003.21.

Under existing regulations, you, or ICE OCC, or the Immigration Judge may request a subpoena once removal proceedings have begun. Subpoenas may also be issued *sua sponte* by the Court. To apply for a subpoena, you must show (1) necessity, (2) diligence (in attempting to obtain the evidence by other means) and (3) failure to secure evidence.[146]

Your motion to the court requesting the subpoena must 1) state what will be proved by the witnesses or documentary evidence, and 2) affirmatively establish that counsel has made a diligent effort, without success, to produce said witness or documentary evidence.[147] If the Judge is satisfied that the witness will otherwise be unavailable and that the evidence is essential, the Judge should issue a subpoena.[148]

The refusal to issue a subpoena by an Immigration Judge may be reversible error, so make sure to preserve the record.

Immigration Judges may also issue depositions taken for the testimony of essential witnesses who are not reasonably available for the hearing either *sua sponte* or at the request of either party.[149]

D. Evidence

The admission of evidence, including hearsay, is favored so long as the evidence is relevant and fundamentally fair.[150] The Federal Rules of Evidence are not binding in Immigration Court but can provide guidance when determining the admissibility of evidence. You may raise objections based on the Federal Rules. Always ensure that any objections made are made on the record, because if they are made off the record the issue cannot be raised on appeal.

---

[146] 8 C.F.R. §§ 1003.35(b)(1)-(2), 1287.4(a)(2)(ii)(A)-(B).

[147] 8 C.F.R. §§ 1003.35(b)(2).

[148] *Kaur v. I.N.S.,* 237 F. 3d 1098, 1100, opinion amended on denial of rehearing, 249 F. 3d 830 (9th Cir. 2001); 8 C.F.R. §§ 1003.35(b)(3), 1287.4(a)(2)(ii)(C).

[149] 8 C.F.R. § 1003.35(a).

[150] *Bridges v. Wixon*, 326 U.S. 135, 154 (1945); Matter of Toro, 17 I&N Dec. 340, 343 (BIA 1980).

The Immigration Judge will set deadlines for the submission of evidence prior to the individual hearing. You must abide by the deadlines or risk losing the opportunity to introduce evidence. Evidence should be properly marked pursuant to the requirements at Chapter 3 of the Immigration Court Practice Manual.[151]

Submission of Evidence should include:

- Cover page and caption;
- Table of contents with page numbers identified (All documents, should be paginated by consecutive numbers placed at the bottom center or bottom right hand corner of each page);
- Each exhibit should be designated a letter for identification;
- Each exhibit should have a corresponding alphabetic tab, commencing to the right side of the pages;
- Certificate of Service on ICE OCC.

E. Witnesses

Your client and any witnesses presented will be questioned by you, the ICE OCC attorney and possibly the Immigration Judge. You must ensure that you present evidence demonstrating all elements of the relief you are seeking before the court. You may present fact and expert witnesses, and witnesses may testify by telephone if necessary.

Your client's testimony is central to your case, especially in cases where your client does not have much corroborating evidence to support their claims. All cases filed on or after May 11, 2005, are subject to the REAL ID Act of 2005, which governs the determination of credibility of a witness in Immigration Court. Credibility is determined by a totality of the circumstances, and the judge may make a determination based on the witness' demeanor, candor, responsiveness, plausibility

[151] See EOIR Practice Manual Sec. 3.3, available at: https://www.justice.gov/eoir/page/file/1079686/download.

of the account given, consistency of the testimony, and consistency as compared with other evidence, among various other factors.

However, if there are any inconsistencies in the testimony, the Immigration Judge must allow an opportunity for the witness to clarify before making a ruling on the witness' credibility. Rulings on credibility must be supported by the record of the case and are subject to limited review on appeal.

During ICE OCC's case-in-chief, your client will also have a right to cross-examine their witnesses and evidence. Often OCC puts on no case, relying solely on cross-examination.

Respondent's counsel must provide a witness list to the Court prior to a merits hearing. The Immigration Judge will set deadlines prior to the individual hearing to submit your witness list. The witness list, listing both expert and non-expert witnesses, including Respondent, should include a summary of what the witness will testify to at trial, the estimated length of testimony, and, if applicable, the witnesses' alien registration number and the language in which they will testify. You should aim to also provide an affidavit, or, in the case of expert witnesses, a report and curriculum vitae or resume, to the court by the requisite call-up date.

It is generally best to over-include potential witnesses on your list. Your list must include the name of all the witnesses; this should include all potential witnesses even if you think some may not be called. If a witness is not on the list, he or she will not be allowed to testify at trial. Inclusion does not bind you to having to offer them for testimony and cross/examination, but it does allow you negotiating room to, in negotiations with ICE, concede to not offer a particular witness so long as ICE concedes to the admissibility and reliability of the witnesses' written testimony as submitted to the Court.

Remember that if your witness is unavailable to appear in person to testify on the date of the hearing, you must file a Motion for Telephonic Appearance to obtain the opportunity for them to testify remotely.

If a witness is outside of the United States, ICE will often object to their telephonic testimony, arguing that it is impossible to corroborate their identity.

Tips for Effectively Providing Testimony from Witnesses Outside of the U.S.

1. Speak to immigration practitioners well ahead of time to discover your assigned Judge's practices vis-à-vis foreign testimony. Some Judges refuse to admit it, relying instead on the witnesses' written evidence.

2. If you decide to proceed with offering the witness' oral testimony, make sure to bring an international calling card with you to Court with enough time on it for you to conduct direct and for ICE to conduct cross-examination.

3. If it is a witness that is of great corroborative importance, you may want to file a separate motion requesting admission of testimony by witness outside of the U.S., arguing that the EOIR practice manual does not specifically address this issue, and so the Federal Rules of Civil Procedure should be deemed advisory. Rule 28(b)(1) of the Federal Rules of Civil Procedure provides for the taking of a deposition in a foreign country "(A) under an applicable treaty; (B) under a letter of request, whether or not captioned a 'letter rogatory'; (C) on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination; or (D) before a person commissioned by the court to administer any necessary oath and take testimony." So that, if you either have your client testify telephonically before an attorney licensed in the country where testimony is being offered, or before an individual in the U.S. embassy in the country where the testimony is being offered, the testimony should be fully admissible in immigration court.

i. Noncitizen Youth as Witnesses

As addressed in detail earlier in this manual, the Court is expected to treat noncitizen youth Respondents with sensitivity.[152] For example, in order to help them feel at ease, Juveniles are

[152] *See* EOIR *Operating Policies and Procedures Memorandum 17-03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children*, December 20, 2017*;* Department of Homeland Security's *Guidelines for Children Asylum Claims* (1998) and the *Guidelines for Immigration Court Cases Involving Unaccompanied Children* (2004). See also United Nations High Commissioner for Refugees's ("UNHCR") Guidelines on Policies and Procedures in Dealing with Unaccompanied Minors Seeking Asylum (1997).

encouraged, under the supervision of court personnel, to explore an empty courtroom, sit in all locations, and practice answering simple questions before the hearing. Immigration Judges are also expected to make reasonable modifications to the courtroom for juveniles. These may include permitting juveniles to testify outside the witness stand next to a trusted adult or friend.

EOIR tasks immigration judges with determining that a noncitizen youth is competent to testify. Amongst other considerations (like the presence of mental illness)[153] the Judge must determine whether the noncitizen youth is of sufficient mental capacity to understand the oath and to give sworn testimony. EOIR guidance allows the judge to modify the oath to account for the noncitizen youth's mental capacity, and specifically advises them to tell noncitizen youth witnesses that it is all right for them to say, "I don't know" if that is the correct answer, and to request that a question be asked another way if the noncitizen youth does not understand it. Immigration Judges should also explain to the noncitizen youth witness that he or she should not feel at fault if an objection is raised to a question.[154] In addition, Judges are expected to employ "noncitizen youth-sensitive" questioning and use a sensitive tone (and mandate that the parties do the same) when juveniles are witnesses.

Although federal laws in other contexts recognize that traumatized noncitizen youth should be offered special protections,[155] generally, you can raise the issue of incompetence at any point in the proceedings. Once Judges determine that a noncitizen youth is competent to testify, the judge can consider what weight to offer the noncitizen youth's testimony while taking into account that noncitizen youth may not be able to present testimony with the same "degree of precision" as adults.[156]

---

[153] If you suspect mental illness, please contact your Safe Passage mentor, as there are specific procedures that apply in those cases and are outside the scope of this manual.

[154] See EOIR Operating Policies and Procedures Memorandum 17-03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children, December 20, 2017.

[155] *See* 18 U.S. Code § 3509.

[156] See EOIR Operating Policies and Procedures Memorandum 17-03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children, December 20, 2017.

Tip Sheet: Noncitizen Youth Witnesses

1. Review the EOIR Operating Policies and Procedures Memorandum 17-03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children, December 20, 2017 in detail to ensure that you are familiar with the rules governing IJ behavior in these cases.
2. Be careful when preparing your client to testify. Noncitizen youth want to please and may inadvertently change their testimony to please you. Ask open-ended questions that do not suggest an appropriate answer.
3. If you think that your client's competence is an issue, ensure that you preserve the objection on the record.

Because noncitizen youth may provide vague, speculative, or non-specific testimony, it is important to ensure that you corroborate the noncitizen youth's claims as much as possible, as the Court could otherwise claim that the noncitizen youth was unable to meet their burden of proof.[157]

If your noncitizen youth witness is deemed incompetent, the IJ "should, as a safeguard, generally accept that the applicant believes what he has presented, even though his account may not be believable to others or otherwise sufficient to support the claim",[158] and allow you to proceed to prove your client's claim through other witnesses and additional testimony.

[157] *See Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998) (finding that general testimony may be insufficient to meet the burden of proof).

[158] *See Matter of J-R-R-A-*, 26 I & N Dec. 609 (BIA 2015) (holding that when applicant is deemed incompetent or is unable "to provide testimony in a coherent, linear manner" due to "mental illness or serious cognitive disability," and resulting in "symptoms that affect his ability to provide testimony in a coherent, linear manner," then "the factors that would otherwise point to a lack of honesty in a witness—including inconsistencies . . . —may be reflective of a mental illness or disability, rather than an attempt to deceive the Immigration Judge." *Id.* at 611. Accordingly, "where a mental health concern may be affecting the reliability of the applicant's testimony, the Immigration Judge

G. Checklists for Individual Hearing

As Soon as Possible:

1. Gather all possible evidence in support of your case
2. File any motions for fee waivers
3. File any necessary forms with USCIS
4. File request for an interpreter with the Court if one was not set at master calendar hearing
5. Make sure all foreign language documents being submitted to Court are translated into English and accompanied by an affidavit of translation

No later than Court-Imposed call-up date (default is at least 15 days before hearing):

1. Submit evidence;
2. Submit witness lists;
3. File Motions for telephonic appearance of witnesses (if necessary);
4. Ensure that biometrics are current;

Before the Hearing:

1. Ensure that your client's address and telephone number are updated with the Court if there has been a change since their last master calendar hearing;
2. Prepare your client's testimony (in front of other witnesses if possible);
3. Prepare testimony of other witnesses (in front of your client if possible);
4. Make sure to address any discrepancy in testimony that may affect the credibility of your client;
5. Ensure that your client knows the time and place of the individual hearing.

should, as a safeguard, generally accept that the applicant believes what he has presented, even though his account may not be believable to others or otherwise sufficient to support the claim." *Id.* at 612.

Standard Checklist of Objections to Documentation Provided by ICE

For evidence to be admissible, it must be material and relevant to the issue, must be reliable and its admission must be fundamentally fair.

Objections:

- Asylum office interview notes/summary report – incomplete or irrelevant; not subject to cross examination
- Lack of opportunity for cross examination of affiant
- Incomplete document or report
- Untimely filing of evidence
- Lack of compliance with immigration court rules
- Unavailability of original document for inspection
- Lack of authentication of documents

Remember that since the rules of evidence don't strictly apply, these objections are unlikely to result in the Judge refusing admission of documents. Rather, if the IJ sustains your objections, they are likely to state, on the record, that they will take the issue into consideration vis-a-vis the weight they give the specific piece of evidence.

H. Briefing

Unless the Immigration Judge specifically requests briefing on an aspect of the case, or your case presents a novel issue of law, briefing the whole of the claim is generally frowned upon, as it may not add much substance to the Judge's understanding of the claim. You may nevertheless ask the Immigration Judge if they wish to have any aspect of the case briefed after the individual hearing in lieu of a written closing statement (which it is also possible to request).

I. Closing Statements

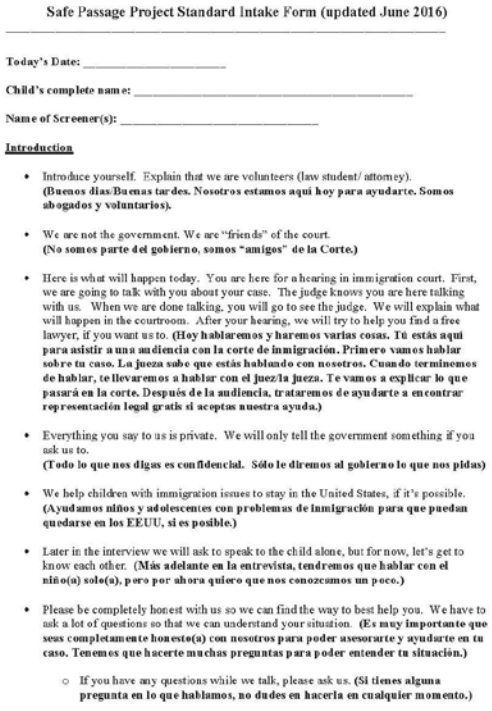
You should be prepared to give opening statements and closing statements. "Denial of the opportunity to present opening statements or closing arguments at a deportation proceeding may constitute a due process violation."[159]

4.8 Some Common Defenses to Removal

There are myriad defenses to removal, below, we attempt to provide a brief guideline to those that are most common in cases for noncitizen youth in removal proceedings.

A. Screening for Defenses against Removal

Although Safe Passage Project will have carefully screened your client's matter prior to placing it with you, it is important that you periodically speak with your client to determine whether anything has occurred that may affect their eligibility for immigration relief. Below, we include a copy of Safe Passage's intake form so that you can use it as a guideline to developing questions for your client:



Safe Passage Project Standard Intake Form (updated June 2016)

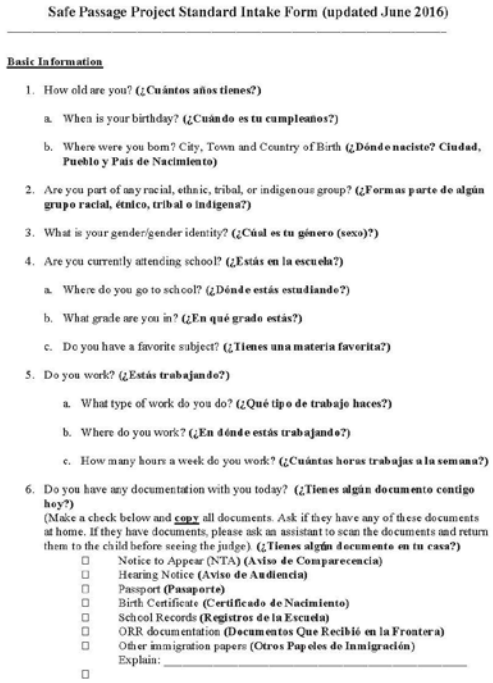
Today's Date: _____

Child's complete name: _____

Name of Screener(s): _____

Introduction

- Introduce yourself. Explain that we are volunteers (law student/ attorney). **(Buenos días/Buenas tardes. Nosotros estamos aquí hoy para ayudarte. Somos abogados y voluntarios).**
- We are not the government. We are "friends" of the court. **(No somos parte del gobierno, somos "amigos" de la Corte.)**
- Here is what will happen today. You are here for a hearing in immigration court. First, we are going to talk with you about your case. The judge knows you are here talking with us. When we are done talking, you will go to see the judge. We will explain what will happen in the courtroom. After your hearing, we will try to help you find a free lawyer, if you want us to. **(Hoy hablaremos y haremos varias cosas. Tú estás aquí para asistir a una audiencia con la corte de inmigración. Primero vamos hablar sobre tu caso. La jueza sabe que estás hablando con nosotros. Cuando terminemos de hablar, te llevaremos a hablar con el juez/la jueza. Te vamos a explicar lo que pasará en la corte. Después de la audiencia, trataremos de ayudarte a encontrar representación legal gratis si aceptas nuestra ayuda.)**
- Everything you say to us is private. We will only tell the government something if you ask us to. **(Todo lo que nos digas es confidencial. Sólo le diremos al gobierno lo que nos pidas)**
- We help children with immigration issues to stay in the United States, if it's possible. **(Ayudamos niños y adolescentes con problemas de inmigración para que puedan quedarse en los EEUU, si es posible.)**
- Later in the interview we will ask to speak to the child alone, but for now, let's get to know each other. **(Más adelante en la entrevista, tendremos que hablar con el niño(a) solo(a), pero por ahora quiero que nos conozcamos un poco.)**
- Please be completely honest with us so we can find the way to best help you. We have to ask a lot of questions so that we can understand your situation. **(Es muy importante que seas completamente honesto(a) con nosotros para poder asesorarte y ayudarte en tu caso. Tenemos que hacerte muchas preguntas para poder entender tu situación.)**
  - If you have any questions while we talk, please ask us. **(Si tienes alguna pregunta en lo que hablamos, no dudes en hacerla en cualquier momento.)**



Safe Passage Project Standard Intake Form (updated June 2016)

Basic Information

1. How old are you? **(¿Cuántos años tienes?)**
   a. When is your birthday? **(¿Cuándo es tu cumpleaños?)**
   b. Where were you born? City, Town and Country of Birth **(¿Dónde naciste? Ciudad, Pueblo y País de Nacimiento)**
2. Are you part of any racial, ethnic, tribal, or indigenous group? **(¿Formas parte de algún grupo racial, étnico, tribal o indígena?)**
3. What is your gender/gender identity? **(¿Cúal es tu género (sexo)?)**
4. Are you currently attending school? **(¿Estás en la escuela?)**
   a. Where do you go to school? **(¿Dónde estás estudiando?)**
   b. What grade are you in? **(¿En qué grado estás?)**
   c. Do you have a favorite subject? **(¿Tienes una materia favorita?)**
5. Do you work? **(¿Estás trabajando?)**
   a. What type of work do you do? **(¿Qué tipo de trabajo haces?)**
   b. Where do you work? **(¿En dónde estás trabajando?)**
   c. How many hours a week do you work? **(¿Cuántas horas trabajas a la semana?)**
6. Do you have any documentation with you today? **(¿Tienes algún documento contigo hoy?)**
   (Make a check below and **copy** all documents. Ask if they have any of these documents at home. If they have documents, please ask an assistant to scan the documents and return them to the child before seeing the judge). **(¿Tienes algún documento en tu casa?)**
   - ☐ Notice to Appear (NTA) **(Aviso de Comparecencia)**
   - ☐ Hearing Notice **(Aviso de Audiencia)**
   - ☐ Passport **(Passporte)**
   - ☐ Birth Certificate **(Certificado de Nacimiento)**
   - ☐ School Records **(Registros de la Escuela)**
   - ☐ ORR documentation **(Documentos Que Recibió en la Frontera)**
   - ☐ Other immigration papers **(Otros Papeles de Inmigración)**
     Explain: _____
   - ☐

[159] *Gilaj v. Gonzales*, 408 F.3d 275 (6th Cir. 2005).

For the complete intake form, please contact your Safe Passage mentor.

B. Special Immigrant Juvenile Status[160]

Special Immigrant Juvenile Status (SIJS) is a defense to removal that protects noncitizen youth by coordinating a state court dependency and planning process with immigration petitions. Congress initially created this special protection for noncitizen youth in state foster care, and later expanded the program to protect other noncitizen youth who have benefited from state law protections such as guardianship, adoption, or custody.[161] This federal law allows noncitizen juveniles under the age of 21 who have been abused, neglected, or abandoned by one or both parents to obtain lawful permanent residence in the U.S.

SIJS: In Short

The SIJS application process has three steps: (1) the juvenile must obtain a family court order that meets the requisite legal requirements; (2) the juvenile must file Form I-360 to apply for SIJS to federal immigration authorities and await a current priority date; (3) the juvenile must apply for adjustment of status in the United States.

The primary goal of the SIJS process is to provide immigration protection and long-term permanence to juveniles who have received certain state law protections. Congress created a special path to adjustment of status—a term of art meaning that a person may convert her status from temporary or undocumented to permanent resident within the United States. When a person is granted adjustment of status, he or she becomes a lawful permanent resident ("LPR"), commonly known as a "green card holder." The central statute that governs this adjustment of status process is INA § 245(a):

[160] Safe Passage Project has a very detailed SIJS manual at your disposal. Please contact your Safe Passage mentor for a copy. This section of the present manual was created in great part by referring to that document.

[161] This is not meant as an exhaustive list—in NYS, practitioners have been successful obtaining orders during order of Protection and Divorce proceedings.

i. Eligibility

Qualifying juveniles, which the statute refers to as unaccompanied children[162] must meet the criteria codified at Immigration and Nationality Act § 101(a)(27)(J)[163] in that:

1. The applicant must be under 21 years old;
2. The applicant must be unmarried;
3. The applicant must be declared dependent upon a juvenile court. In general, this means that a state juvenile court like a Family Court has taken jurisdiction over a petition addressing the needs of the applicant;
4. A state juvenile court has found that reunification with one or both of the applicant's parents is no longer a viable option due to abuse, abandonment, neglect or a similar basis under state law; AND
5. It is not in the best interests of the noncitizen juvenile to return to their country of nationality or last habitual residence.

Phase 1: Family Court: obtain court orders

First, the noncitizen youth must engage in a proceeding in the state juvenile court in the county where she resides. In New York, this court is most commonly the Family Court. In Family Court, the noncitizen youth requests that a judge appoint a guardian or custodian for her. This underlying guardianship or custody petition provides the Court with the jurisdiction necessary to simultaneously issue a "Special Findings Order" that declares the noncitizen youth's factual eligibility for SIJS (they are under 21, unmarried, etc.). Most often, clients request the Special Findings Order through a motion that accompanies, or is filed shortly after, the guardianship or custody petition.

Although guardianship and custody are the most common ways for the Family Court to obtain jurisdiction over a noncitizen youth, it is also possible to bring a motion requesting a Special Findings Order in the course of other proceedings, including adoption, Article 10 Proceeding (wherein the state petitions to remove noncitizen youth from a parent's household), a

[162] To date, the applicable definition of "noncitizen child" remains under the age of 21 and unmarried.

[163] SIJS regulations are out of date as of June 2017. Revised regulations were proposed in 2011 but remain pending

permanency hearing for children in foster care ("Destitute Child " proceedings), or a Person in Need of Supervision (PINS) proceeding. Supreme Court can also issue a Special Findings Order in the course of a divorce proceeding dealing with noncitizen youth custody. Regardless of the means to jurisdiction, receipt of a Special Findings Order signed by a state court judge or judicial referee is a prerequisite to applying for SIJS status.

Phase 2: U.S. Citizenship and Immigration Services (USCIS): File I-360, Petition for Special Immigrant Juvenile Status

After receiving the Special Findings Order from the Family Court Judge or referee, the noncitizen youth may then apply for SIJS via filing form I-360, Petition for Special Immigrant Juvenile Status, with U.S. Citizenship and Immigration Services (USCIS). USCIS has sole jurisdiction over this petition, so you must file it with USCIS even if your client is in immigration proceedings and so otherwise within the jurisdiction of the immigration court.

Note about SIJS Visa Backlog

Only a certain number of SIJS adjustments (filed on Form I-485) are available each year. The statute takes the total number of cases and divides the allocation equally by country: each country gets a maximum of just under 700 SIJS adjustments per year. Mexico, Guatemala, Honduras, or El Salvador are currently the countries with the highest numbers of SIJS applicants, and for the past several years, all of the SIJS numbers available to citizens of those countries have been distributed. For this reason, there is essentially a "waiting list" for SIJS for applicants from those countries. As described in more detail below, an applicant cannot adjust status to that of permanent resident unless there is a visa available for them to do so. If no visa is available, a Noncitizen youth cannot file an I-485, Application to Adjust Status, and will have to wait until her priority date, as dictated by the State Department's Visa Bulletin,[164] is current. As of the publication of this Manual (November 2017), the State Department's Visa Bulletin indicates that SIJS visas are available for applicants from Honduras, Guatemala and El Salvador who filed their I-360, Petitions for Special Immigrant Juvenile Status on or before February 15, 2016.

[164] Available at: https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html

Phase 3: Executive Office of Immigration Review (EOIR): Motion to Terminate / Place on Status Docket

Once a noncitizen youth has filed the I-360 Petition and USCIS has approved it, counsel should attempt to make a Motion to Terminate Removal Proceedings with the Immigration Court to allow the noncitizen youth to file for adjustment of Status before USCIS. If removal proceedings are terminated, the noncitizen youth can file an Application for Adjustment of Status before USCIS. If the Immigration Judge refuses to grant termination, counsel should prepare to file for Adjustment of Status before the immigration court.

Phase 4: USCIS: I-485 Application to Adjust Status

Once your client's priority date is current, and assuming they are eligible to adjust status,[165] you should file an I-485, Application to Adjust Status, with USCIS or the Immigration Court on their behalf. Form I-485, Application to Adjust Status, is where your client applies for full legal permanent resident status (i.e. their "green card"). In addition to a variety of forms and supporting documentation that must be filed by mail, this step may require an in-person interview before a USCIS officer or a hearing before the Immigration Judge. The Safe Passage project manual, which you can obtain by contacting your mentor, provides greater detail about preparing the I-485, Application to Adjust Status, how to file to obtain a fee waiver, the documentation required for filing, preparation for the interview or hearing, and the interview before USCIS or hearing before the Immigration Judge.

Phase 5: RFEs, NOIDs and NOIRs Trends and How to Address Them

Since early 2017, USCIS has begun to issue Requests for Evidence (RFEs) in SIJS I-360 Applications that undermine a juvenile's right to obtain protection under the SIJS statute, even after they have obtained a State Judicial Special Findings Order that specifically addresses each statutory requirement for SIJS.

[165] Review grounds of inadmissibility at INA § 212.

Specifically, many of these RFE's attacked the jurisdiction of NYS courts over juveniles between the ages of 18 and 21.[166] Despite this being a settled issue of law in NYS, these RFEs argued that NYS courts lacked jurisdiction over that population of juveniles. If you receive such an RFE, please contact your Safe Passage mentor for a sample brief in response. Also, you should note that in *J.L., M.V.B., M.D.G.B., and J.B.A., v. LEE FRANCIS CISSNA,* Case No. 18-cv-04914-NC, a case brought before the U.S. District Court for the Northern District of California, the plaintiffs, noncitizen youth who had applied for SIJS between the ages of 18 and 21 pursuant to a finding of dependency made by a California court, and had been denied because of this shift in adjudication, won an injunction preventing USCIS from denying their I-360 petitions on this basis.

C. Asylum

Under U.S. immigration law, any person fleeing persecution who arrives at our borders, or is already in the United States, may seek asylum.[167] While this premise is simple, the process an asylum-seeker must navigate in order to obtain such protection is incredibly complex.

In order to qualify for asylum, an applicant must prove that she meets the definition of a refugee, that she is statutorily eligible to apply for asylum, and that she should be granted asylum as a matter of discretion.[168]

Most juveniles with whom Safe Passage works are national of countries in the Northern Triangle of Central America, which includes Guatemala, Honduras, and El Salvador. This area is one of the most dangerous in the world, with rates of homicide and gender-based and sexual violence that rival those of active war zones. The rise of violence is in great part linked to international criminal organizations that have grown increasingly powerful and use violent means to control the areas

[166] USCIS acknowledged in a public statement that it had started to deny SIJ applications in connection with new guidance issued in February 2018.See Ted Heeson, Morning Shift: Travel ban at SCOTUS, POLITICO (April 25, 2018), available at https://www.politico.com/newsletters/morningshift/2018/04/25/travel-ban-at-scotus-182935

[167] INA § 208(a)(1).

[168] INA §§ 101(a)(42)(A); 208(b)(1)(B)(i).

in which they operate.[169] This has led a huge number of young people to flee the area and seek protection in the United States.[170]

International and U.S. asylum law recognize that noncitizen youth are at greater risk of suffering abuse, persecution, and torture and thus need greater protection.[171] In light of this awareness, noncitizen youth are afforded several additional safeguards when they are apprehended at the U.S.

For our purposes, the three most important of these safeguards, "unaccompanied alien child" designation, USCIS Asylum Office filing, and the One-year Bar Exemption are discussed below and are addressed in even greater detail in the Safe Passage asylum manual available for your reference from your Safe Passage mentor.

i. Eligibility

Asylum is an affirmative defense to removal that is meant to protect those who are within the borders of the United States and have suffered past persecution or fear return to their home countries because they may face persecution there.[172]

A grant of asylum allows a person to work, terminate removal proceedings, and apply to adjust her immigration status to that of a lawful permanent resident (LPR) after one year as an asylee.[173]

---

[169] See Council on Foreign Relations: https://www.cfr.org/backgrounder/central-americas-violent-northern-triangle (last visited 10/28/2018).

[170] See SONIA NAVARRO, ENRIQUE'S JOURNEY (2007) (a detailed account of how unaccompanied noncitizen youth travel from the Northern Triangle to the United States).

[171] See UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE.

STATUS (2011), http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf (hereinafter UNHCR HANDBOOK); USCIS ASYLUM DIVISION, ASYLUM OFFICE BASIC TRAINING COURSE GUIDELINES FOR NONCITIZEN YOUTH ASYLUM CLAIMS (2009), Asylum Officer Basic Training Course – Guideline for Child Asylum Claims (hereinafter AOBTC GUIDELINES).

[172] See INA § 208.

[173] USCIS, BENEFITS AND RESPONSIBILITIES OF ASYLEES (2018), https://www.uscis.gov/humanitarian/refugees-asylum/asylum/benefits-and-responsibilities-asylees.

A grant of asylum also allows the person to access certain public benefits and petition for derivative status for her spouse and unmarried noncitizen youth under the age of 21.[174] Upon becoming a United States citizen the person may also be able to sponsor parents to come to the United States.

Pursuant to INA § 208, to obtain asylum protection, a person must:

- Meet the definition of a refugee under INA § 101(a)(42)(A);
- Prove that she is statutorily eligible to apply for asylum; and
- Demonstrate that she should be granted asylum as a matter of discretion

While simply stated, the process of establishing the above can be very complicated. Under INA § 101(a)(42)(A), we find it useful to break this definition into the following checklist of essential elements to address as you prepare your client's asylum claim:

Definition of a Refugee

Any person who is
  - Outside any country of such person's nationality, or
  - In the case of a person having no nationality, is outside any country in which such person last habitually resided, and
- **Who is**
  - Unable or unwilling to return to, and
  - Unable or unwilling to avail himself or herself of the protection of that country,
- **Because of**
  - Persecution or
  - A well-founded fear of persecution
- **By the government or a person or group the government is unable or unwilling to control**
- **On account of** (AKA as a result of the applicant's…)
- **A protected basis:**
  - Race
  - Religion
  - Nationality
  - Membership in a particular social group
  - Political opinion.

[174] *Id.*

To prove that your client is statutorily eligible to receive asylum, your client must also prove that they:

- Cannot be removed to a safe third country (does not apply to unaccompanied minors)
- Filed within one-year of entering the United States (does not apply to unaccompanied minors)
- Did not previously receive an asylum denial
- Has not "ordered, incited, assisted or otherwise participated" in the persecution of others
- Has not been convicted of a "particularly serious crime" in the United States
- No reason to believe that she has committed a serious non-political crime outside of the United States
- No reasonable ground for regarding her as a danger to the security of the United States
- Does not meet the definition of a terrorist, has not participated in terrorist activity, and has not given material support to a terrorist organization
- Was not firmly resettled in another country before arriving in the United States.[175]

In general, adults must file for asylum within one year of their arrival into the United States or be barred from seeking asylum.[176] Noncitizen youth designated as Unaccompanied Noncitizen minors are not subjected to this one-year filing deadline. However, we strongly suggest preparing and filing a UC's asylum application as soon as possible. Similarly, if a UC has already turned 18 years of age, we recommend filing their asylum application as soon as possible, and within a reasonable period (generally under 6 months of their turning 18).[177]

[175] INA §§ 208(a)(2); 208(b)(2).

[176] INA § 208(a)(2)(B).

[177] INA § 208(a)(2)(E). But see Matter of M-A-C-O-27 I&N Dec. 477 (BIA 2018) determining that immigration judges have primary jurisdiction over cases of former UACs who have lost their UAC designation after turning 18.

IMPORTANT!

If there is concern that your client may lose her UAC designation, for example she is turning 18 years old, is reunited with a parent, or the government has indicated they plan to rescind the designation, make sure to contact your Safe Passage mentor attorney. It may be best to make a defensive filing at immigration court in order to lock in a filing within one year of entry. We will work with you on this process if together we determine it might be best for your client.

If a noncitizen youth has not been designated as a UAC by the government then they may still be subject to the one-year filing deadline. However, you should be able to argue that they qualify for the changed or extraordinary circumstances exceptions to the one-year filing bar.[178] There is voluminous substantive case law on point, and you should review the Safe Passage asylum manual for specific guidance and contact your Safe Passage mentor attorney to discuss the specific facts of your case**.**

ii. How to Craft a Winning Social Group Post Matter Of A-B-

On June 11, 2018, Attorney General Sessions issued a precedential decision in *Matter of A-B-,* 27 I&N Dec. 316 (A.G. 2018). His decision overruled *Matter of A-R-C-G-*, 26 I&N Dec.
338 (BIA 2014), which had held that certain categories of domestic violence survivors could receive asylum protection. The Attorney General's decision in *A-B-* caused consternation throughout the immigration community because, at first glance, it gave the impression that it would preclude all asylum claims, like domestic violence and gang-related claims, based on harm perpetrated by non-state actors.
When the decision is read carefully though, it becomes clear that most of the Attorney General's attempts to limit access to asylum via *A-B-*are in dicta, and that the decision does not affect other

[178] INA § 208(a)(2).

existing Board of Immigration Appeals and Circuit Court precedent outlining eligibility for asylum in the U.S. Ultimately, *A-B-* simply found that: (1) the social group outlined in *A-R-C-G* ("married women in Guatemala who are unable to leave their relationship"), which had previously found to meet the BIA's social group requirements, had been improperly formulated and could not survive analysis in the facts presented by A-R-C-G-; and that (2): the social group posited in A-B- (""El Salvadorian women who are unable to leave their domestic relationships where they have children in common,") would also be unlikely to survive analysis.[179]

Unfortunately, although only dicta, the Attorney General's statements in A-B- remain problematic because at least some judges and asylum officers may look at these statements as offering justification for improperly denying cases.

The dicta in the A-B- decision is problematic on multiple fronts, not merely in the way it interprets social groups,[180] but also, for example, in the way it reinterprets the law with regard to persecution by victims of harm by non-state actors.[181]

A "particular social group" was first defined by the BIA in *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985). There, the BIA found that membership in a particular social group must be based on either an innate characteristic that members of the group cannot change (like sexual orientation or gender), or on a characteristic that members of the group should not be required to change because "it is fundamental to their individual identities or consciences" (like gender identity).

In 2008, the BIA issued two precedential decisions that expanded the requirements for social group membership. In *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008) and *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008), the BIA added two new requirements: particularity and social distinction, to

[179] The AG remanded the case for a new social group analysis.
[180] "[g]enerally, claims . . . pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." A-B-, 27 I&N Dec. at 320.
[181] Only in "exceptional circumstances" may victims of harm by non-state actors establish asylum claims; where a persecutor is a non-state actor, the asylum seeker must establish that the persecutor's actions "can be attributed" to the government. A-B-, 27 I&N Dec. 316 at 317.

the PSG test. No longer did a social group have to be just based on an immutable characteristic, now it also had to be "particularly defined" and "socially visible". The decisions were somewhat circular in their reasoning, but the BIA deemed that "particularity" meant that a group had to be defined in a sufficiently distinct manner, so that the group would be recognized, in the society in question, as a discrete class of persons.[182] The social group couldn't be "too amorphous . . . to create a benchmark for determining group membership."[183] Social visibility, on the other hand, meant that the social group's shared immutable characteristic "should generally be recognizable by others in the community."[184]

Then, in February 2014, the BIA issued two additional decisions, *Matter of ME-V-G-,* 26 I&N Dec. 227 (BIA 2014)3 and *Matter of W-G-R-*, 26 I&N Dec. 20 (BIA 2014). In M-E-V-G-, the BIA clarified that they did not intend that the requirement of social visibility they had created in 2008 to be interpreted as *literal* visibility, but rather to have it require that the PSG be recognized within its community as a distinct entity (and so renamed it "social distinction").[185]

*A-B-*merely reiterates existing law regarding particular social group analysis. The decision restates that fact-finders must analyze social groups on a case-by case basis and that any particular social group claimed by an asylum-seeker must be articulated before the Judge at trial, because new social group formulations delineated on appeal cannot generally be considered by the Board of Immigration Appeals.[186]

That said, to the extent possible, attorneys should:

1. Carefully craft their social groups to the fullest extent possible via characteristics that have been previously recognized as immutable or fundamental, such as age (or childhood,

[182] *S-E-G-,* 25 I&N Dec. at 584.
[183] *Id.*
[184] *Id.*
[185] 26 I&N Dec. at 240-41.
[186] *Matter of W-Y-C- & H-O-B-,* 27 I&N Dec. 189 (BIA 2018).

or youth);[187] gender + (nationality and other characteristics);[188] or shared past experience. [189] (Please note that these are not the only characteristics that have been found to be immutable-family, marital status/status in a relationship, refusal to conform to cultural norms, family relationships, lack of family protection, past employment or occupation, having been a witness, past abuse, ownership of land, and disability have all also been recognized as social groups).[190] For further analysis of social group formulation, please see Safe Passage Project's Asylum Manual, or contact your Safe Passage mentor.

2. Ensure that they do not define their particular social group by the harm suffered by their client (one way to think of this is to consider that your social group explains why the client was persecuted or fears persecution)

Attorneys should also try to take the following steps to protect their clients and preserve issues for appeal:

1. Be prepared to highlight in your record that the holding of A-B- is limited only to overturning *Matter of A-R-C-G* and does not extend to invalidating any other social group designations.[191]
2. Be prepared to highlight in your record that the viability of a particular social group should be considered on a case-by-case basis.[192]

---

[187] See *Lukwago v. Ashcroft*, 329 F.3d 157 (3d Cir. 2003) ("former child soldiers"); *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013) ("young Albanian women").

[188] See *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996) (recognizing "gender plus" may be a cognizable particular social group-in that case women from a particular tribe who had not been subjected to female genital mutilation and opposed the practice); *Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2011) (Jordanian women who had been accused of being immoral and at risk of honor killing), *Fatin v. INS*, 12 F.3d 1233 (3rd Cir. 1993) (Iranian women "feminists" who opposed certain gender-related laws could constitute a particular social group; *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007) (recognizing Somali females as a PSG).

[189] *Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009) (former Salvadoran youth gang members); *Martinez v. Holder,* 740 F.3d 902 (4th Cir. 2014) (former gang membership)(but see *Claros Cantarero v. Holder*, 734 F.3d 82 (1st Cir. 2013) (former gang members is not a valid Particular Social Group) and *Matter of W-G-R-,* 26 I. & N. a208, 221 (BIA 2014) (same); *Ngengwe v. Mukasey,* 543 F.3d 1029 (8th Cir. 2008) ("Cameroonian widows"); *Gomez Zuluaga v. Att'y Gen*., 527 F.3d 330 (3d Cir. 2008) (Colombian women who escaped involuntary servitude after being abducted and confined by a guerrilla group"); *Lukwago v. Ashcroft*, 329 F.3d 157 (3d Cir. 2003) (former child soldiers who have escaped).

[190] For an in-depth analysis of how to craft social groups in children's cases, please see Center for Gender and Refugee Status, *Children's Asylum Practice Advisory*, March 2015 available at: https://cgrs.uchastings.edu/sites/default/files/CGRS_Child_Asylum_Advisory_3-31-2015_FINAL.pdf.

[191] For a close analysis of the historical background of A-B- (explaining the limited holding of the case and how it interrelates to the case's history) please see: National Immigration Justice Center, *Asylum Practice Advisory: Applying for Asylum After Matter of A-B: Matter of A-B- Changes the Complexion of Claims Involving Non-state Actors, but Asylum Fundamentals Remain Strong and Intact* (June 2018) Available at: https://www.immigrantjustice.org/sites/default/files/content-type/resource/documents/2018-06/Matter%20of%20A-B-%20Practice%20Advisory%20-%20Final%20-%206.21.18.pdf.

[192] See *Matter of Acosta*, 19 I.& N. Dec. at 233; *Matter of M-E-V-G-*, 26 I. & N. Dec. at 251, and Matter of A-B- itself.

3. Ensure that you submit a strong record, including substantive country conditions evidence and expert statements, as necessary, to establish your client's particular social group (especially the particularity and social distinction requirements).

iii. UAC/UC Asylum

Most of the noncitizen youth that Safe Passage works with have been classified by the U.S. government as "unaccompanied alien children" (UACs or UCs), a legal designation given to them upon their apprehension at the border.[193] To be considered a UC at the time of apprehension, a Noncitizen youth must:[194]

1. Be under the age of 18;
2. Have no lawful immigration status in the United States; and
3. Have neither a parent nor a legal guardian available to provide them with care or physical custody.

Under prior policy, once a noncitizen youth had been designated a UC, they continued to be a UC throughout her immigration removal proceedings, even if the noncitizen youth reunited with a parent or has an adult appointed as her legal guardian.[195] UC designation protected noncitizen youth by granting them a way to bypass the removal hearing process. Normally, the immigration court has exclusive jurisdiction over asylum applications for anyone in removal proceedings. UCs are an exception to this rule, and initial jurisdiction over a UC's asylum application is vested in the Asylum Office. A UC filing for asylum will have an asylum interview, and if UC is not successful at the A.O., the asylum application will be referred back to the immigration court, and the UC will proceed to request asylum before the immigration court at an individual hearing."

---

[193] We prefer the acronym UC for while the term "alien" is part of the statute, it is very difficult for a young person to understand why his or her attorney is using the word, "alien." In recent years the ICE attorneys and judges have also switched to the term UC.

[194] See Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457, 122 Stat. 5044; MINOR NONCITIZEN YOUTH APPLYING FOR ASYLUM BY THEMSELVES (last visited July 2017). https://www.uscis.gov/humanitarian/refugees-asylum/asylum/minor-noncitizenchildrenapplying-asylum-themselves.

[195] See "Q&A: UPDATED PROCEDURES FOR DETERMINATION OF INITIAL JURISDICTION OVER ASYLUM APPLICATIONS FILED BY UNACCOMPANIED ALIEN NONCITIZEN YOUTH," https://www.uscis.gov/humanitarian/refugees-asylum/asylum/minor-noncitizen children- applying-asylum-themselves.

UAC/UC Updates

In September 2017, the Chief Counsel for EOIR issued a legal opinion determining that immigration judges have the authority in some instances to determine whether or not a Noncitizen youth is still a UC and thus still eligible for certain protections under the statute.[196]
On October 16, 2018, the Board of Immigration Appeals issued a decision in Matter of M-A-C-O[197], in which, for the first time, they found that UCs age out of designation, so that if the noncitizen youth applied for asylum after they turned 18 years old, UC benefits do not attach, and original jurisdiction over their claim lays with the immigration judge, as opposed to the asylum office. The decision does not discuss UACs that turn 18 after they file the I-589.

As the changing government policies create insecurity in the UC definition, it is important to not rely too heavily on the benefits noncitizen youth obtain by being UCs, to work diligently to prepare and file all application for relief as expeditiously as possible, and to ensure that, if possible, any asylum application for a UC is filed prior to their turning 18.

D. Special Rule Cancellation of Removal (also known as VAWA Cancellation)

Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents, Special Rule for Battered Spouse or Noncitizen youth,[198] commonly known as VAWA Cancellation, is a defense against removal that allows certain noncitizen victims of domestic violence who are in removal proceedings to become lawful permanent residents.

i. Eligibility

[196] See Jean King, *EOIR General Counsel, Legal Opinion re: EOTR's Authority to Interpret the term Unaccompanied Alien Child for Purposes of Applying Certain Provisions of TVPRA*, September 19, 2017. Available at: https://cliniclegal.org/sites/default/files/resources/King-9-19-17-UAC-TVPRA.pdf.
[197] *Matter of M-A-C-O-*, 27 I&N Dec. 477 (BIA 2018).
[198] INA § 240A(b)(2).

Special Rule Cancellation of Removal is available to battered spouses and noncitizen youth subjected to battery or extreme cruelty. It provides a defense against removal to a noncitizen who was physically present in the U.S. for a continuous period of three years immediately preceding the date of the filing of their application requesting cancellation. An applicant for Special Rule Cancellation must meet six basic requirements.[199]

1. The applicant must have a qualifying current or past relationship with an abusive U.S. citizen or lawful permanent resident. This is defined[200] as being the:

- **Current or former noncitizen youth (or son or daughter) of an abusive current or former U.S. citizen; or the**
- **Current or former noncitizen youth (or son or daughter) of an abusive current or former lawful permanent resident; or the**
- Current or former spouse of an abusive current or former U.S. citizen; or the
- Parent of a noncitizen youth who was abused by a current or former U.S. citizen; or the
- Current or former spouse of an abusive current or former lawful permanent resident; or the
- Parent of a noncitizen youth who was abused by a current or former lawful permanent resident; or the
- Noncitizen domestic violence victim who believed him- or herself to currently or formerly be married to a current or former U.S. citizen or lawful permanent resident, but who was never legally married because of that U.S. citizen or lawful Permanent Resident's bigamy.

[199] For a more in-depth look at the requirements of special rule cancellation of removal, see Immigrant Legal Resource Center, Non-LPR Cancellation of Removal, an Overview of Eligibility for Immigration Practitioners, available at: https://www.ilrc.org/sites/default/files/resources/non_lpr_cancel_remov-20180606.pdf

[200] See INA § 240A(b)(2)(A)(i)(I) through INA § 240A(b)(2)(A)(ii).

2. The VAWA cancellation applicant, or, in certain cases, the noncitizen youth that he or she has in common with the abuser, must have suffered battery or extreme cruelty at the hands of the abuser.[201]

3. The VAWA cancellation applicant must be able to establish their physical presence in the United States for at least three years on the date of application, but unlike in other types of cancellation of removal, in VAWA Cancellation cases, the issuance of the Notice to Appear does not stop the noncitizen's accrual of physical presence in the United States.[202]

4. The noncitizen seeking VAWA cancellation must establish that such noncitizen, the noncitizen's parent or the noncitizen's noncitizen youth would suffer extreme hardship if deported. [203]

5. VAWA cancellation applicants must also establish good moral character as defined in INA § 101(f) for a period of three years.[204]

6. Lastly, an applicant for VAWA cancellation cannot be "inadmissible" under paragraph (2) or (3) of INA § 212(a) and cannot be "deportable" under paragraphs (1)(G) or (2) through (4) of § 237(a), and cannot have been convicted of a crime deemed to be an aggravated felony. There are exceptions for cases in which convictions are related to crimes related to the domestic violence suffered by the applicant.[205]

E. U Nonimmigrant Status

U Nonimmigrant Status, commonly known as a "U visa" grants lawful status to victims of certain crimes who have cooperated with law enforcement in the investigation or prosecution

[201] INA § 240A(b)(2)(A).
[202] INA § 240A(b)(2)(A)(ii)
[203] INA § 240A(b)(2)(A)(v).
[204] INA § 240A(b)(2)(A)(iii).
[205] INA §§ 240A(b)(5); 237(a)(7).

of the crime committed against them and have suffered substantial physical and mental abuse because of that crime.

To qualify, your client must have been:

1. **A victim** of any of the following qualifying crimes that either occurred in the United States or were in violation of Federal, State, or local criminal law:

> rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting (as defined in section 1351 of title 18, United States Code); or attempt, conspiracy, or solicitation to commit any of the above-mentioned crimes.

2. **Who cooperated** with law enforcement in the investigation or prosecution of the crime(s) committed against her;

3. **Your client must** also **have suffered substantial physical and mental harm** as a result of the crime; and

4. **Your client must obtain a signed Form I-918 Supplement B**—U Nonimmigrant Status Certification signed by the law enforcement agency that investigated or prosecuted the crime committed against her; and

5. **Your client must also demonstrate the she is not inadmissible under INA § 212;** but if she cannot do so, **your client can request a waiver of most applicable grounds of inadmissibility.**

F. T Nonimmigrant Status

T Nonimmigrant Status was created to protect noncitizen victims of human trafficking. It is generally granted for four years and allows the noncitizen victim and certain derivative family

members to live and work in the United States.[206] To qualify, your client must establish to USCIS Vermont Service Center, which has sole jurisdiction over these cases that:

- Your client is or was a victim of severe trafficking in persons, as defined by the Victims of Trafficking and Violence Protection Act of 2000 (TVPA). Severe trafficking in persons includes "the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.[207]
- That they are in the United States, "on account of" the trafficking to which they were subjected.[208]
- That they (unless under the age of 18) be willing to assist with an investigation into the trafficking or comply with any reasonable request from a law enforcement agency for assistance in the investigation or prosecution of human trafficking.[209]
- That they would suffer extreme hardship if removed from the United States; and
- That they are admissible to the United States.[210]

Because the Department of Homeland Security, via the United States Citizenship and Immigration Service (USCIS), has sole jurisdiction to adjudicate a Petition for T Nonimmigrant Status.[211] Hence,

[206] See generally INA § 101(a)(15)(T)(ii)(I).

[207] Applicants for T Nonimmigrant Status may establish that they are victims of a severe form of trafficking in persons through one of three ways: (1) by submitting a Law Enforcement Agency (LEA) endorsement; (2) by demonstrating that they have previously been granted continued presence, or (3) by submitting sufficient credible secondary evidence, describing the nature and scope of any force, fraud, or coercion used against them (unless the applicant is a victim of sex trafficking under the age of 18).) Unlike applicants for U Nonimmigrant Status, applicants for T Nonimmigrant Status *are not required* to submit a certificate signed by law enforcement with their application.

[208] Please note that this does not require them to have been trafficked into the U.S.—rather, the statute requires a demonstration that the noncitizen's trafficking plays a role in their having remained in the United States (perhaps because of trauma/shame/or risk in the country of origin).

[209] The statute requires that the applicant be willing to assist not that the noncitizen have actually assisted—hence, correspondence with law enforcement establishing that the noncitizen was willing to aid in an investigation, even if never required to, will suffice to meet this prong.

[210] If your client is not admissible, you may cure this inadmissibility by applying for a waiver on USCIS Form I-192.

[211] INA § 101(a)(15)(T)(i). 8 CFR § 214.11(d)(8) and (d)(9).

a noncitizen in removal proceedings, and even one with a final order of removal must file any application for T Nonimmigrant Status with USCIS.

A noncitizen in removal proceedings who is applying for T Nonimmigrant status may ask for a continuance or may ask the Office of Chief Counsel (OCC) to join in a motion for administrative closure, pending the adjudication of the T Nonimmigrant status application.[212] If T Nonimmigrant status is granted, any previously issued final removal order is "deemed cancelled by operation of law as of the date of approval."[213]

G. Self-Petition Under the Violence against Women Act

Violence Against Women Act (VAWA) self-petitions can be filed on behalf of parents, children (normally defined as under 21 years of age and unmarried), or spouses of U.S. citizens (USCs) and spouses or children of lawful permanent residents (LPRs) who have been battered or subjected to extreme cruelty by their USC or LPR family member (Immigration and Nationality Act (INA) § 204(a)(1)(A) (iii), (iv), or (vii) and § 204 (a)(1)(B)(ii) or (iii)). In the following sections, we will focus on the eligibility requirements for children.

A VAWA self-petition is intended to allow a self-petitioner to request status independently of his or her abusive USC or LPR family member. With only very limited exceptions, immigration authorities cannot disclose information about self-petitioners[214] and cannot make determinations of a self-petitioner's inadmissibility or deportability by relying solely on information provided to immigration authorities by the abusive USC or LPR or the abuser's family members.[215]

Jurisdiction over VAWA self-petitions, including those filed by self-petitioners in removal proceedings and those for self-petitioners filing from outside of the United States, lies with the

[212] 8 CFR § 214.11(d)(8).

[213] 8 CFR § 214.11(d)(9).

[214] 8 USC §1367(a)(2).

[215] 8 USC §1367(a)(1).

Vermont Service Center (VSC) of the U.S. Citizenship and Immigration Service (USCIS). Consequently, even if the applicant is in removal proceedings, all VAWA Self-Petition filings must be made to USCIS at the VSC.

Upon filing of a VAWA self-petition that meets eligibility requirements, a self-petitioner will be issued a *prima facie* notice[216] that makes them eligible to receive certain public benefits as "qualified aliens,"[217] and, as self-petitioners are specifically exempt from the public charge ground of inadmissibility, relying on public assistance will not affect their eligibility to obtain lawful permanent residence.[218]

Approved VAWA self-petitioners and their derivatives (if present in the United States) are eligible for employment authorization[219] and are generally issued "deferred action."[220] An approved VAWA self-petition is also a basis for filing for adjustment of status under INA § 245(a) and for obtaining a waiver of certain bars to adjustment of status (AOS) present in INA § 245(c).

VAWA self-petitioners whose qualifying relationship is to a USC are eligible to file for AOS concurrently with their VAWA self-petition,[221] while self-petitioners whose qualifying relationship is to an LPR must have a current priority date to be eligible to file for AOS. USCIS will

---

[216] Jacquelyn A. Bednarz, "Field Guidance Re: Prima Facie Review of Form I-360 when filed by a Self-Petitioning Battered Spouse/Child ," U.S. Department of Justice, Immigration and Naturalization Service (Mar. 27, 1998).

[217] National Immigration Law Center, "Guide to Immigrant Eligibility for Federal Programs." (updated 2011).

[218] INA § 212(a)(4)(C)(i)(III).

[219] INA § 204 (a)(1)(K).

[220] INA § 204 (a)(1)(D); William R. Yates, "Extension of Validity Period for Notices of Prima Facie Case Issued in Connection with a Form 1-360 Filed by a self-petitioning Battered Spouse/Noncitizen Child," U.S. Department of Homeland Security, U. S. Citizenship and Immigration Services, (Apr. 8, 2004). For a detailed analysis of the elements weighted by USCIS in their determination of whether to grant deferred action, please see Spencer Cantrell and Leslye Orloff, "Deferred Action for VAWA Self-Petitioners, Nov. 17, 2014," *available at* http://library.niwap.org/wp-content/uploads/2015/IMM-Tkit-DeferredActionVAWAselfPetitioners-11.17.14.pdf. Please note that USCIS has recently stopped issuing deferred action notices to applicants in removal proceedings. This issue may be ripe for litigation, as it contravenes one of the central purposes of VAWA: to create stability for victims of domestic violence seeking to leave abusive relationships and formalize their immigration status.

[221] This is of course made more difficult if the applicant is in removal proceedings, as, absent proceedings being terminated, jurisdiction over the self-petition remains with the immigration court. For instructions on how to file for adjustment of status in proceedings, see page two of the following USCIS instructions: www. https://www.uscis.gov/sites/default/files/files/article/PreOrderInstr.pdf.

issue self-petitioners a priority date with the approval of the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant.[222]

Individuals may self-petition under VAWA, even if they are in removal proceedings or have been issued a prior order of removal. A self-petition (to be filed, pending or approved) can also be a basis for a motion to reopen a previous removal order issued under INA 240.[223]

i. Elements of VAWA Self-Petition

In adjudicating VAWA self-petition cases, USCIS "shall" consider all credible evidence.[224] Internal and external consistency of evidence is one of the most important ways that USCIS officers determine the credibility of evidence, so attorneys should exercise the utmost care to ensure that evidence submitted in support of a self-petition does not include inconsistent information.

The elements that the self-petitioner must establish depend on his or her qualifying relationship (as, for example, a noncitizen youth) to the abusive USC or LPR, but generally include a qualifying relationship to a USC or LPR, the status of the USC or LPR, joint residence with the USC or LPR, abuse by the USC or LPR, and the good moral character of the self-petitioner.

The central piece of evidence in a VAWA self-petition is the self-petitioner's affidavit, in which he or she will describe the circumstances of his or her relationship with the abuser, their period of joint residence, and the battery or extreme cruelty the self-petitioner feels he or she suffered at the hands of the abuser. It is important that this affidavit be in the self-petitioner's voice and carefully describe how his or her experiences meet each of the requisite elements.

[222] 8 CFR 204.2(h)(2).
[223] INA § 240(7)(c)(iv); 8 CFR § 1003.2(c)(2).
[224] INA § 204(a)(1)(J). 8 CFR §§ 103.2(b)(2)(iii) and 204.1(f)(1).

ii. Qualifying Relationship as Child of USC or LPR

To obtain classification as a VAWA self-petitioner, children of USCs and LPRs must establish the relationship to the USC or LPR parent. Generally, "children" must be under 21 and unmarried[225] and the self-petition must be filed before the noncitizen youth turns 21. Although all eligibility requirements must be met prior to a noncitizen youth self-petitioner's turning 21,[226] if a noncitizen youth self-petitioner remains unmarried, files the VAWA self-petition when he or she is between the ages of 21 and 25, and can demonstrate that the abuse was "at least one central reason for the filing delay," the government will treat his or her late filed petition as filed by a "noncitizen youth."[227]

Step-children fall under the definition of "noncitizen youth," if the qualifying stepchild youth/parent relationship was entered into before the noncitizen youth turned 18 years of age.[228] Noncitizen children of former LPRs or USCs whose abusive parent lost status in the previous two years for a reason related to domestic violence are also eligible for classification as self-petitioners.[229]

Additionally, a self-petitioning noncitizen youth must establish as part of their VAWA Self-Petition that he or she lived with the USC or LPR parent, that the USC or LPR subjected the self-petitioner to abuse, and, if the noncitizen youth is 14 years of age or older, that the noncitizen youth is a person of good moral character.

[225] INA § 101(b)(1).
[226] USCIS *Adjudicator's Field Manual*, Ch. 21.14.
[227] INA § 204 (a)(1)(D)(v).
[228] INA § 101(b)(1)(B).
[229] INA § 204(a)(1)(A)(iv); INA § 204(a)(1)(B)(iii).

The following chart outlines the requisite elements:

Qualifying Relationship	**Age**	**Abuser's Status**	**Proof of Abuser s Status**	**Joint Residence with Abuser**	**Abuse**	**Self-Petitioner's Good Moral Character**
Biological noncitizen youth or step children*	Under 21 and unmarried	Current USC or LPR or Former USC or LPR Who Lost Status in Previous 2 Years in Connection to Domestic Violence	Yes	Yes	Yes (but if the relationship was created through a marriage, the abuse need not have occurred during the marriage, the abuse need not have been during the marriage)	Yes (if 14 or over)
Biological Noncitizen or stepchild youth* ***note that a stepchild need not establish the good faith of the marriage that created the relationship.**	Between 21 & 25 and unmarried (domestic violence one central reason for delay in filing)					

iii. Abuser's USC or LPR Status

Self-petitioners must submit evidence of the abuser's USC or LPR status to USCIS. If the self-petitioner is unable to do so, then he or she may request that USCIS attempt to verify the abuser's status from government records.[230]

Primary evidence of the abuser's status includes copies of the abuser's naturalization records, abuser's LPR cards, and/or immigrant visa. If unable to provide such evidence, the self-petitioner should provide USCIS whatever information about the abuser in the self-petitioner's possession that may help USCIS verify the abuser's status, including copies of the abuser's state-issued identity documents, Social Security number, and alien registration number. If none of those documents are available, then the self-petitioner should provide abuser's place and date of birth and legal name, or any other available information, and formally request that USCIS attempt to verify the abuser's status from government records.[231]

iv. Joint Residence with Abuser

The self-petitioner must establish that he or she lived with the abuser. To do so, he or she should describe that joint residence in his or her affidavit. Primary evidence of the joint residence or cohabitation may include copies of leases or mortgage statements naming both parties.

When such evidence is unavailable, find academic, medical, or social services records confirming that the self-petitioner and abuser lived at the same address for some period of time, no matter how small. Evidence, such as junk mail, pay stubs, or bills that arrived addressed to the self-petitioner or abuser at the joint address at or near the same time, may suffice, as well as copies of birth or marriage records that list the joint address. When all else fails, affidavits from neighbors, teachers, friends, family, or other respected community members confirming that they knew the parties to have lived together may suffice to establish the parties' joint residence.

[230] 8 CFR § 103.2(b)(17)(ii).
[231] 8 CFR § 103.2(b)(17)(ii).

Please note that the joint residence need not have occurred in the United States to meet statutory requirements.

v. Qualifying Abuse

A self-petitioner must establish that the abuser has subjected the self-petitioner to physical battery or to extreme cruelty. To be able to identify and help a self-petitioner describe domestic violence, a pattern of behavior that is used by one partner or family member to gain or maintain power over another,[232] attorneys should become familiar with the behaviors that are commonly recognized as such. To help a self-petitioner identify the myriad ways he or she may have been abused by the USC or LPR, it is recommended that the attorney review the "Immigrant Power and Control Wheel"[233] with the self-petitioner.

Battery may include smacking, kicking, or punching, as well as shoving, pushing, hair-pulling, pinching, smacking, biting, and raping. Extreme cruelty is more nebulous. It is meant to encompass "nonphysical aspects" of domestic violence,[234] and is a subjective standard. Hence, it is of the utmost importance that the self-petitioner's affidavit describe the abuser's behavior towards the self-petitioner and how it both fits into the power and control dynamic of domestic violence and rises to the level of extreme cruelty.

If evidence of the domestic violence—such as police or court records, noncitizen youth service investigation records, orders of protection, photographs of injuries or records of medical treatment exist—then they should be submitted as evidence. Records of a self-petitioner's accessing services for victims, such as shelters or emotional support services, can also be helpful,

[232] *See* U.S. Department of Justice, Office on Violence Against Women, "Domestic Violence" *available at* https://www.justice.gov/ovw/domestic-violence (for a brief overview on the characteristics of domestic violence).
[233] *See* youth-specific power and control wheel for an outline of child-specific abusive behaviors: http://www.childmatters.org.nz/file/Diploma-Readings/Block-2/Family-Violence/6.1-children-s-domestic-abuse-wheel.pdf.
[234] *Hernandez v. Ashcroft*, 345 F.3d 824, 839 (9th Cir. 2003).

as can statements from social workers or mental health professionals that have assessed the self-petitioner and believe him or her to be a victim of domestic violence.

In many cases, the private nature of domestic violence ensures that there are few, if any, records of the abuse perpetrated by the USC or LPR upon the victim. In those cases, the attorney may wish to submit detailed affidavits from friends, family, or community members that knew or suspected that the self-petitioner was a victim of domestic violence.

Please note that exposing a child to witnessing abuse or extreme cruelty perpetrated against another family member is undoubtedly perpetrating abuse against the child. Also, because extreme cruelty is fundamentally subjective, the adjudicator must take the age of the noncitizen youth at the time he or she suffered abuse into account when making a finding that the abuser's behavior rises to the requisite level of harm.

vi. Good Moral Character of Self-Petitioner

Lastly, self-petitioners 14 years of age or over must establish good moral character[235] as defined at INA § 101(f). To do so, the self-petitioner must submit police records or criminal background checks from every place he or she has resided during the three years before filing the self-petition, even if some of those years were lived abroad. These records are submitted to demonstrate the self-petitioner's lack of a criminal record. If the self-petitioner has lived in multiple states during the previous three years, you may instead wish to submit the results of a Federal Bureau of Investigation background check.[236] Instructions on how to obtain foreign background checks can be found on the Department of State's Visa Reciprocity page for each

[235] INA § 204(a)(1)(A)(iii)(II)(bb); INA § 204(a)(1)(A)(iv); INA § 204(a)(1)(B)(ii)(II)(bb); INA § 204(a)(1)(B)(iii); INA § 204(a)(1)(A)(vii)(II); INA § 204(a)(1)(C).

[236] U.S. Department of Justice, Federal Bureau of Investigation, "Criminal History Summary Checks," *available at* https://www.fbi.gov/services/cjis/identity-history-summary-checks.

foreign country.[237] Certain convictions may be excused if the act or conviction "was connected to the alien's having been battered or subjected to extreme cruelty."[238]

[237] U.S. Department of State, U.S. Visa: Reciprocity and Civil Documents by Country, *available at* https://travel.state.gov/content/travel/en/us-visas/Visa-Reciprocity-and-Civil-Documents-by-Country.html.
[238] INA § 204(a)(1)(C); *See also* USCIS Memorandum, W. Yates, "Determinations of Good Moral Character in VAWA-Based Self-Petitions" (Jan. 19, 2005), AILA Doc. No. 05012561.

Chapter 5: Post-Decision

5.1 Post-Decision Motions and Appeals

At the end of the case, the Immigration Judge will issue either an oral or a written decision and a final order. Both parties have the right to reserve appeal at the time the decision is issued and appeal the Immigration Judge's decision to the Board of Immigration Appeals (BIA). Alternatively, you can file a Motion to Reconsider or a Motion to Reopen with the Immigration Judge instead of filing an appeal with the BIA. Each option has different requirements, fees and timelines, so it is important that you not only read the general outline of these below, but also that you connect with your Safe Passage mentor immediately.

A. Motion to Reopen

Motions to Reopen ask the Court to reopen proceedings after the Immigration Judge has rendered a decision because there are new facts or evidence that have arisen in the case. A Motion to Reopen must state the new facts to be proven at a reopening hearing if the motion is granted and must be supported by affidavits or other evidentiary material. Any new evidence offered should be material and demonstrate that it was not available, and could not have been discovered or presented, at an earlier stage in the proceedings prior to the Immigration Judge's decision. The motion must also be accompanied by satisfaction of the requisite fee.[239]

In general, motions to reopen are subject to timing limitations.[240] But for limited exceptions, Motions to Reopen by the Respondent must be filed within 90 days of the Immigration Judge's final order.[241] DHS is not subject to a filing deadline and can file a Motion to Reopen at any time.

[239] For an up-to-date listing of fees, please see: 8 CFR § 1103.7.
[240] INA § 240(c)(7)(C)(iv)(i) in general; § 240 (c)(7)(C)(iii) (in absentia orders).
[241] As per INA § 240(c)(7)(C)(iii) and § 240 (b)(5)(C), motions to reopen removal orders entered in absentia can be filed up to 180 days after the entry of the order upon the Respondent's showing that her failure to appear was due to exceptional circumstances.

Motions to Reopen may be filed jointly with DHS, or by request to DHS if the Respondent's filing deadline has passed.

Additionally, there are special statutory provisions for Battered Spouses, Children, and Parents,[242] which specify that a Motion to Reopen in VAWA self-petition or VAWA Cancellation cases may be filed up to a year after the entry of a final order of removal. These special provisions further state that, in these cases, a judge will have discretion to waive the time limitation even when a prior removal order is more than one year old upon a showing by the Respondent of "extraordinary circumstances" or "extreme hardship to the alien's noncitizen youth".

A complete Motion to Reopen should contain (in the following order):

1. Form EOIR-28;
2. Cover page for motion;
3. Satisfaction of the requisite fee, shown through: (a) fee receipt (stapled to the motion or application), if applicable, or (b) a motion for a fee waiver;
4. Motion to Reopen;
5. Copy of the Immigration Judge's decision;
6. Motion brief, if applicable;
7. Copy of any applications for relief filed after the Immigration Judge's decision, if applicable;
8. Supporting documentation, if any, with index of evidence;
9. Form EOIR-33/IC, Alien's Change of Address Form, even if client's address has not changed;
10. Proposed order for Immigration Judge to sign; and
11. Proof of service upon DHS.

[242] 149 INA § 240(c)(7)(C)(iv).

B. Motion to Reconsider

Motions to Reconsider identify either an error in the law or facts[243] as applied in the Immigration Judge's decision or a change in the law that affects the Immigration Judge's decision. Motions to Reconsider can only be based on the existing record and cannot introduce new facts or evidence. These motions must be filed within 30 days of the Immigration Judge's final order. The motion must be made in writing, following the rules in the Immigration Court Practice Manual,[244] and must include satisfaction of the requisite fee. If the Motion to Reconsider is denied, you cannot thereafter file another Motion to Reconsider the previously denied motion.

A complete Motion to Reconsider should contain (in the following order):

1. Form EOIR-28;
2. Cover page for motion;
3. Satisfaction of the requisite fee, shown through:
    a. Fee receipt (stapled to the motion or application), if applicable, or
    b. A motion for a fee waiver;
4. Motion to Reconsider;
5. Copy of the Immigration Judge's decision;
6. Motion brief, if applicable;
7. Supporting documentation, if any, with index of evidence;
8. Form EOIR-33/IC, Alien's Change of Address Form, even if client's address has not changed;
9. Proposed order for Immigration Judge to sign; and
10. Proof of service upon DHS.

[243] INA § 240 (c)(6).
[244] https://www.justice.gov/sites/default/files/pages/attachments/2017/11/02/practicemanual.pdf.

C. Appeals Filed with the Board of Immigration Appeals

If the Immigration Judge renders a decision unfavorable to your client, you must reserve your right to appeal or it will be deemed waived. In order to reserve your right to appeal, you must file Form EOIR-26, Notice of Appeal, along with satisfaction of the requisite fee, with the BIA within 30 calendar days of the Immigration Judge's decision. Please note that—as with nearly all immigration matters—the mailbox rule does not apply, so an appeal is deemed filed only upon receipt by the BIA—not upon mailing. Once the appeal is filed, jurisdiction vests in the BIA and the Immigration Court no longer has jurisdiction over the case. Appeals are heard by the BIA which is headquartered in Virginia. For detailed instructions on how to file a BIA appeal, you should refer to the BIA Practice Manual available at:
https://www.justice.gov/eoir/page/file/1103051/download

Alternatively, your client can expressly waive the right to appeal, or allow for the time for appeal to lapse. If an appeal is waived, then the Immigration Judge's decision becomes final through the issuance of a final order.

Chapter 6: General Guidance for Success

6.1 Your Role as Counsel for a Young Person

In the course of representing your client, you may struggle with defining your role, especially if your client is very young and unable to clearly state how they would like to proceed on their immigration case. This issue presents often when representing noncitizen children, and may be complex to navigate, so it is important that you understand the applicable ethics rules. You should also, of course, consider reaching out to your Safe Passage mentor for a more in-depth discussion.

The Federal Professional Conduct for Practitioners ("FPCP") establishes a code of ethics for attorneys practicing immigration law and imposes on the attorney an affirmative ethical obligation to communicate with and follow the directions of their client. Pursuant to these regulations, an attorney is required to "abide by a client's decisions concerning the objectives of representation" and must "consult with the client as to the means by which they are to be pursued."[245]

But what if your client is very young or otherwise seems unable to fully understand the legal process? In that case, the central consideration is: when is a minor, like your client, legally capable of directing his or her representation? There is no simple answer. The law does not outline a specific age at which a minor client achieves the capacity to engage a lawyer and direct his or her own representation. Instead, the Courts generally look to assess noncitizen youth's capacity[246] to establish whether the noncitizen youth meets the requisite standard to act independently to

[245] 8 C.F.R. § 1003.102(p).

[246] Legal capacity is the attribute of a person who can acquire new rights, or transfer rights, or assume duties, according to the mere dictates of his own will, as manifested in juristic acts, without any restraint or hindrance arising from his status or legal condition. Ability; qualification; legal power or right. Applied in this sense to the attribute of persons (natural or artificial) growing out of their status or juristic condition, which enables them to perform civil acts; as capacity to hold lands, capacity to devise, etc. *Burgett v. Barrick*, 25 Kan. 530; *Sargent v. Burgett,* 90 Ga. Ill, 22 S. E. COT. Blacks law Dictionary, 2nd. Ed.

direct the outcome and strategy of their case. Generally, the factors relevant to assessing capacity make clear that competence is contextual and incremental and can be intermittent.

If a client's capacity to make adequately considered decisions in connection with representation is diminished, whether because of minority, mental impairment or for some other reason, ethics rules maintain that the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client because even a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting their well-being. Noncitizen children as young as four or five years of age may be able to demonstrate capacity to direct at least some of their representation (by saying, for example, that they want to stay here with their parent, and not return to the home country to stay with their aunt).

A. Determining Capacity

It may be obvious that a noncitizen youth has diminished capacity (e.g., the noncitizen youth is too young to make informed and voluntary legal decisions, is nonverbal, or has a severe disability). The noncitizen youth's capacity is not always clear though, and in those circumstances an attorney may need additional guidance to establish their client's capacity.

The ABA[247] has set out a test that lawyers can use to determine a client's capacity. Factors to consider include:

1. The client's ability to articulate the reasoning leading to a decision;
2. The variability of client's state of mind and his/her ability to appreciate the consequences of a decision;
3. The substantive fairness of the client's decision;
4. The consistency of the client's decisions with the known long-term commitments and values of the client.

[247] Model Rule 1.14, Comment 6. ABA Model Rule 1.14 governs a lawyer's relationship with a client with diminished capacity, whether resulting from minority, disability, or otherwise. Under this Rule, an attorney is ethically obligated to follow the directions of a minor client who can effectively direct his or her own representation. Model Rule 1.14, Comment 1 further explains that the obligation to maintain a regular relationship with a noncitizen child client "implies that the lawyer should continue to treat the client with attention and respect, attempt to communicate and regarded as having opinions that are entitled to weight in legal proceedings concerning their custody."

More specifically, The ABA Commission on Immigration sets out factors for use in assessing the competence of an unaccompanied immigrant noncitizen youth[248]:

> 1.Their ability to make decisions including: the ability to understand information relevant to the specific definitions at issue; the ability to appreciate one's situation with respect to the legal decisions to be made; the ability to think rationally about alternative courses of action; and the ability to express a choice among alternatives.
> 2. Legal ability, including functional abilities, understanding of the legal process, the ability to assist his Attorney in support of his claim, and the ability to participate in the hearing.
> 3. Intellectual, social and emotional development, considering such factors as age, interest, interaction with peers, psychosocial judgment, and cognitive maturity.

If you are uncertain about your client's capacity, please call your Safe Passage mentor to discuss the situation before deciding how to proceed. Your mentor will aid you in carefully considering the factors above and determining whether intervention is necessary to protect the client's interests. If, however, you reasonably believe that your client is competent, Model Rule 1.14 requires the attorney to abide by her client's wishes and directions, even if they are opposed by, for example, the client's parent or guardian.[249]

6.2 Understanding Trauma

As attorneys who have dedicated their careers to representing noncitizen children against removal, we know that this is some of the most rewarding work an attorney can do. But that

[248] For an in-depth reading of these rules and discussion please see *American Immigration Lawyers Practice Advisory: Representing Noncitizen Children in Immigration Proceedings*, AILA 2016.

[249] ABA Model Rule 2.1 calls upon an attorney to provide independent advice should the attorney disagree with the client's wishes, but ultimately, the client directs the representation, and the attorney's loyalty must lie with her client. In interactions with unrepresented members of the client's family, the attorney must comply with Model Rule 4.3 by making clear that she does not represent them and may be obligated to take actions on behalf of her minor client that are adverse to the family's interests or desires.

does not mean that the work does not pose challenges, both in the courtroom, and in working with clients who have often been subjected to horrific abuse.

A. Trauma Exposure and Its Effects on Your Client

There are multiple resources that address the very significant role that trauma plays on the human brain. We will not recreate them here other than to say that trauma exposure can significantly interfere with the way children's brains assess threat, which in turn can affect how they respond to stress. The negative impact of trauma exposure is particularly relevant for noncitizen children who have undergone the trauma of migration and have been exposed to neglect or abuse.

Trauma not only affects the way that your client may remember events relevant to their case,[250] but also how they relate to you and the legal system. Trauma, and the distrust it creates in others, or the desire to avoid discussing matters related to it, may account for your client's failure to come to appointments, to come to court on time, to discuss particular events in their past, etc.

We highly recommend that you adopt a trauma-informed approach to lawyering when working with your client. This will require you to consider the role trauma exposure may play in a client's behaviors, including missing appointments, and even exhibiting hostility, apathy, or defiance. It will also require that you counter those signs of trauma by—in your interactions with your client—providing structure, predictability, and opportunities for the client to exert control over decisions in their case to the degree that it is possible for them to do so. Please contact your Safe Passage Mentor for further discussion. You may also want to review the following literature and presentations:

[250] Trauma has a deep effect on memory. For a detailed discussion, see Paskey, Stephen, *Telling Refugee Stories: Trauma, Credibility and the Adversarial Adjudication of Claims for Asylum*, Santa Clara Law Review, Number 3 Article 1, Volume 56, June 2016.

1. https://www.americanbar.org/groups/young_lawyers/events_cle/trauma-informed_legal_representation/ (MP3 from the ABA addressing approaches to becoming a trauma-informed lawyer for children)
2. Talia Kraemer and Eliza Patten, *Establishing a Trauma-Informed Lawyer-Client Relationship (Part One*), ABA Noncitizen youth Law Practice, No. 10, Volume 33, October 2014. Available at: https://www.lsc-sf.org/wp-content/uploads/2015/10/Article_Establishing-a-Trauma-Informed-Lawyer-Client-Relationship.pdf

B. Trauma Exposure and Its Effects on You

Lastly, please do not forget that exposure to your client's trauma may also deeply impact you. Vicarious trauma[251] is the "emotional residue" of exposure to stories of trauma and to being witness to the pain, fear, and terror that trauma survivors have endured, and it is not uncommon.

Symptoms of vicarious trauma may include:

- Difficulty falling asleep and/or staying asleep
- Dreaming about their clients/their clients' trauma experiences
- Dealing with intrusive thoughts of clients with severe trauma histories
- Losing sleep over clients
- Being worried that they are not doing enough for their client

We ask that you please be aware of your mental state as you undertake this incredibly important work, and if you encounter any of these symptoms, please contact your Safe Passage mentor to discuss.

[251] For a detailed description of vicarious trauma, please see: http://www.joyfulheartfoundation.org/learn/vicarious-trauma.

Conclusion

As evidenced by the constant stream of ever-more-complex immigration-related judicial decisions, agency memoranda and changing regulations, we have every expectation that Immigration law will continue to grow ever-more complex. We hope that the foregoing manual and referenced resources will help to guide you as you work on holding the Department of Homeland Security accountable to their burden of proof, and work to ensure that immigrants facing removal are offered fundamental due process in our immigration courts.