REPRESENTING NONCITIZEN YOUTH IN REMOVAL PROCEEDINGS

2nd Edition

June 2021

A Step-by- Step Guide to
Representing Immigrant Youth

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 Trump Administration waged a steady war against immigrants, the judicial independence of immigration judges, and the "dirty…lawyers"[1] that defend immigrants. This manual is our effort to ensure that, despite these 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] The United States Department of Justice, *Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review*, Falls Church, VA, (October 12, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review (last accessed June 1, 2021).

Table of Contents

ACKNOWLEDGMENTS

The 2nd Edition of this manual was drafted by Jacqueline Stabnow and Tania Cohen, Supervising Attorneys at the Safe Passage Project. The manual was edited by Glykeria Teji, with help from Alexandra Rizio, Managing Attorney at Safe Passage Project.

The 1st Edition was drafted 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 to the 1st Edition 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.

ABOUT SAFE PASSAGE PROJECT

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

These young people embark on a long and dangerous journey to the United States seeking safety from gang violence, parental abuse and neglect, sexual assault, poverty, and trauma among others. **In the fiscal year 2019, the federal government reported over 63,000 children travelling alone seeking entry at the United States-Mexico border**.[2] The New York immigration courts, comprised of three court locations, have more than 35,000 juveniles on their dockets.[3]

Immigrants are not entitled to court-appointed legal counsel. As a result, more than half of immigrant children 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.**[4] To many, this means being forced to return to the danger from which they fled. Safe Passage works to correct this injustice by ensuring that youth in removal proceedings receive the highest-quality legal representation through a combination of direct case work and *pro bono* mentorship. Safe Passage Project works with over 50 law firms and almost 600 volunteer attorneys to ensure that no child faces immigration court alone.

[2] U.S. Customs and Border Protection, U*.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2019*, https://www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions (last accessed June 1, 2021).

[3] TRAC Immigration, *Juveniles – Immigration Court Deportation Proceedings*, https://trac.syr.edu/phptools/immigration/juvenile/ (last accessed June 1, 2021).

[4] TRAC Immigration, *Representation for Unaccompanied Children in Immigration Court* (November 25, 2014), https://trac.syr.edu/immigration/reports/371/ (last accessed June 1, 2021).

CHAPTER 1: LEGAL OVERVIEW

Although there are many types of proceedings used by the U.S. Government to challenge the right of a noncitizen[5] to enter or remain in the U.S.,[6] our discussion will focus on proceedings under Section 240 of the Immigration and Nationality Act (INA),[7] also known as removal proceedings.

Removal generally refers to the legal process initiated against 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 listed at INA § 237. Any of these charges may result in the initiation of a removal proceeding against a noncitizen by the U.S. Department of Homeland Security (DHS).

1.1. Immigration Law in a Nutshell

Immigration law provides 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.

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 status, like those of visitors, students or temporary workers generally affords a noncitizen the right to remain in the U.S. for a specific period of time, and for a specific purpose.[8] Immigrant status, on the other hand, is afforded only through Lawful Permanent Residence, and allows a noncitizen the right to live "permanently"[9] in the U.S. Typically, immigrants are admitted in the U.S. permanently based on a close familial relationship (such through petitioning of one's spouse or parents), an employer sponsor, or refugee status.[10] Each status has different eligibility criteria, affords the noncitizen different rights, and imposes strict duties on the noncitizen.

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[5] We use the terms "noncitizen" and "immigrant" interchangeably throughout this manual to refer to individuals who are not nationals or citizens of the United States of America.

[6] *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).

[7] An electronic version of the Immigration and Nationality Act can be found here: https://www.uscis.gov/laws-and-policy/legislation/immigration-and-nationality-act (last accessed June 1, 2021).

[8] *See* INA § 101(a)(15).

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

[10] Ruth Ellen Wasem, Congressional Research Serv., *U.S. Immigration Policy on Permanent Admissions: Summary 2* (Mar. 13, 2012), https://fas.org/sgp/crs/homesec/RL32235.pdf (last accessed June 1, 2021).

Pre April 1, 1997 EXCLUSION/DEPORTATION	Post April 1, 1997 REMOVAL[11]
EXCLUSION Pre-1997, exclusion 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.	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 the "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 the Burden of Proof section of this manual for further discussion.***
DEPORTATION Pre-1997, deportation 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.	

A. How Removal Proceedings Start

As we will discuss in further detail in Chapter 2: Getting Started, removal proceedings against a noncitizen start when DHS serves a noncitizen with a Notice to Appear (NTA) on Form I-862. That notice lists the factual allegations and legal charges under the INA against the noncitizen.[12]

An NTA may be issued by a long list of officers at DHS. In our cases, the NTA is most often issued by Customs and Border Protection (CBP) officers, or officers from Immigration and Customs Enforcement (ICE). After issuing and serving the NTA on the noncitizen, DHS must file the NTA with the Executive Office of Immigration Review (EOIR) to initiate the removal proceeding against the noncitizen.

[11] In the Illegal Immigration Reform and Immigrant Responsibility Act, Congress abolished the distinction between exclusion and deportation procedures, creating a uniform "removal" proceeding. Congress made "admission" the key word, and defined "admission" to mean "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." *See* INA § 240; *see also* 101(a)(13)(B).

[12] *See* INA § 239.

No More INS (!)
The former Immigration and Nationality Service (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 (DHS).[13] 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,[14] affirmative asylum, Special Immigrant Juvenile Status, and naturalization, among others. **Immigration and Customs Enforcement (ICE)** carries out interior immigration enforcement and prosecutorial duties in removal proceedings. All three agencies can issue Notices to Appear, but ICE oversees detaining and prosecuting noncitizens.

DHS has sole authority to issue an NTA, but removal proceedings formally begin only when the NTA is filed with EOIR.[15] If the NTA has not yet been filed with EOIR, ICE has the power to cancel an NTA as "improvidently issued."[16] 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

[13] Dep't of Justice, *About the Office,* http://www.justice.gov/eoir/orginfo.htm (last accessed June 1, 2021).

[14] Some immigrants in removal proceedings can adjust status, with limited exceptions, before USCIS, namely U and T nonimmigrants applying for Lawful Permanent Residence under INA § 245(m) and INA § 245(l) and "arriving aliens." S*ee* INA § 245(m) and INA § 245(l); 8 C.F.R. § 1245.2(a)(ii) ("In the case of an arriving alien who is placed in removal proceedings, the immigration judge does not have jurisdiction to adjudicate any application for adjustment of status filed by the arriving alien.").

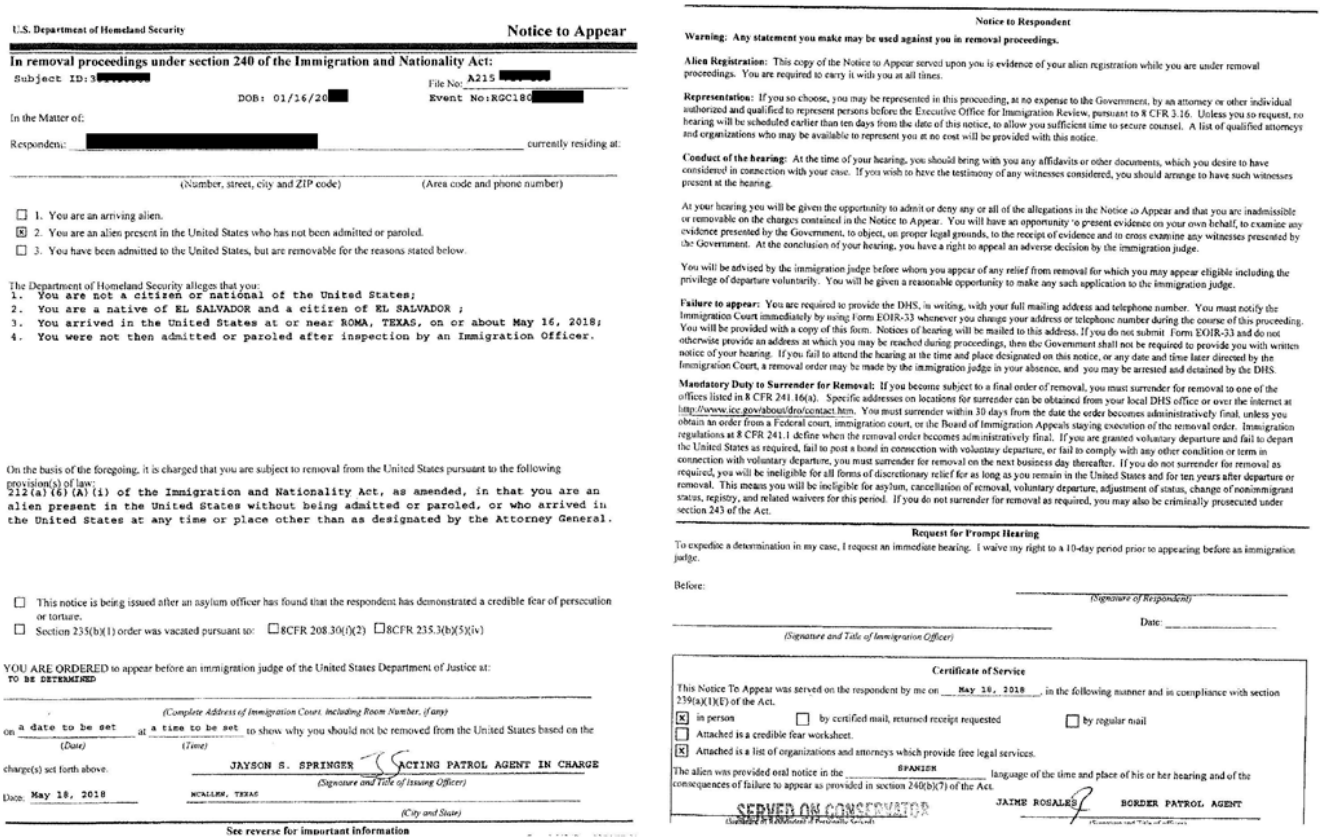
[15] For an exceptional, in-depth discussion of strategies for suppressing evidence and terminating removal proceedings—especially in cases of noncitizen youth, *see* Helen Lawrence, Kristen Jackson, Rex Chen, and Kathleen Glynn, *Strategies For Suppressing Evidence And Terminating Removal Proceedings For Child Clients,* Vera Institute of Justice's Unaccompanied Children Program (March 2015), https://www.uacresources.org/library/item.555488-Strategies_for_Suppressing_Evidence_and_Terminating_Removal_Proceedings_for%20or%20contact%20your%20Safe%20Passage%20Project%20mentor (last accessed June 1, 2021).

[16] *Id*.

vests with the immigration court and proceedings can only be terminated by motion to the immigration court.[17]

As we will discuss in more detail in Chapter 2.2, it is essential to carefully review your client's NTA with your client prior to their first master calendar hearing. Below is a non-comprehensive checklist of items to review with your client regarding their NTA:

- Is your client's name spelled correctly?
- Is your client's date of birth listed correctly?
- Are the allegations against your client accurate? Is the date and place of entry accurate?
- What are the charge(s) leveled against your client?
- How was the NTA served on your client?
- Is the Certificate of Service signed and dated by your client or stamped with "Refused to Sign"?



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: RGC180[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 & Title of Officer)

[17] *Id*; *See also* American Immigration Council & Penn State Practice Advisory, *Notices to Appear: Legal Challenges and Strategies* (Feb. 27, 2019), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/notices_to_appear_practice_advisory.pdf (last accessed June 1, 2021).

B. Parties in Removal Proceedings

The noncitizen issued an NTA is known as the "respondent." In removal proceedings the respondent may be represented by counsel, but at no cost to the government.[18] The interests of the government (the Department of Homeland Security) in removal proceedings are represented by ICE's Office of the Principal Legal Advisor (OPLA) via their Office of Chief Counsel (OCC). The proceedings are heard by an Immigration Judge, an employee of the Executive Office for Immigration Review, which is part of the U.S. Department of Justice (DOJ).[19] Immigration Judges are authorized to determine whether a noncitizen is properly in removal proceedings and subject to removal for violating immigration law, and to determine whether to grant a noncitizen's request for relief from removal (also known as a defense against removal). The Immigration Court provides interpreters for individual hearings. Please see Chapter 4 for a further discussion on in-court interpreters.

Helpful Hints

The New York Immigration Courts can be reached at:	26 Federal Plaza, 12th Fl., Room 1237 New York, NY 10278 Phone: (917) 454-1040 201 Varick Street, 5th Fl., Room 507 New York, NY 10014 Phone: (646) 638-5766 290 Broadway, Suite 2900 New York, NY 10007 Phone: (212) 240-4920

[18] INA § 292.

[19] The fact that EOIR falls under the umbrella of the Department of Homeland Security has raised concerns regarding immigration judges' position and their requirement to be impartial adjudicators. *See e.g.,* New York City Bar, *Report on the Independence of the Immigration Court*, Immigration and Nationality Law Committee Task Force on the Rule of Law Task Force on the Independence of Lawyers and Judges (October 2020), https://s3.amazonaws.com/documents.nycbar.org/files/2020792-IndependentImmigrationCourts.pdf (last accessed June 1, 2021). *See also,* Leonard Birdsong, *Reforming the Immigration Courts of the United States: Why is There No Will to Make It an Article I Court?* Barry Law Review: Vol. 19: Iss. 1, Article 2 (2013).

A list of all Immigration Judges in the New York Immigration Courts can be found at:	For 26 Federal Plaza: https://www.justice.gov/eoir/new-york-federal-plaza-immigration-court For 201 Varick Street: https://www.justice.gov/eoir/new-york-varick-immigration-court For 290 Broadway: https://www.justice.gov/eoir/new-york-broadway-immigration-court
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 ICE window has not been open since June 3, 2019 and in-person filings are not accepted.
Immigration Court Rules are set forth in the Immigration Court Practice Manual, available at:	https://www.justice.gov/eoir/page/file/1084851/download

As of October 1, 2018, Immigration Judges became subject to case completion quotas established by the DOJ. Immigration Judges, as employees of the DOJ, need to complete at least 700 cases per year, have a remand rate of less than 15%, and meet at least half of the additionally outlined benchmarks, to earn a "satisfactory performance" rating.[20] Newly hired immigration judges are also subject to probation for

[20] *See* American Immigration Lawyers Association (AILA), *EOIR Issues Guidance Implementing Immigration Judge Performance Metrics*, AILA Doc. No. 18040301 (April 3, 2018), https://www.aila.org/infonet/eoir-memo-immigration-judge-performance-metrics (last accessed June 1, 2021).

their first two years of employment.21 Advocates are extremely concerned that these quotas undermine judicial independence and erode due process rights for immigrants. This is particularly true when immigration judges face punishment or even dismissal for failing to meet such quotas.[22] To guard against the negative impact of the case completion quotas, advocates should take any necessary measure to ensure that their clients receive a full and fair hearing before the Immigration Judge and to make a full record should appeal be necessary. Building and preserving issues for appeal is of the utmost significance, as denial rates of applications before immigration courts increase and advocacy is required before the Board of Immigration Appeals (BIA).

C. Admission to Practice Before the Immigration Court

Attorneys and fully accredited representatives[23] 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 as a condition to practice before EOIR. The EOIR number must be listed on Form EOIR-28, commonly referred to as Form E-28.[24] Registration is free and relatively straightforward, but can 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 at https://www.justice.gov/eoir/internet-immigration-info.

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[21] Department of Justice, Oversight of the Executive Office of Immigration Review: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., & Int'l Law Comm. on the Judiciary, 110th Cong. 2 (2008) (statement of Kevin A. Ohlson, Dir., Exec. Office for Immigration Review), https://www.justice.gov/sites/default/files/eoir/legacy/2008/09/23/OhlsontestimonyEOIROversight09232008.pdf (last accessed June 1, 2021) [noting two-year probationary period for newly hired immigration judges].

[22] Innovation Law Lab & Southern Poverty Law Center, *The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool* (June 2019), https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf (last accessed June 1, 2021).

[22] Dep't of Justice, *About the Office, supra*.

[23] Federal regulations at 8 C.F.R. § 1292.1(a)(4) allow non-attorney "Accredited Representatives" to represent noncitizens before DHS and 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 at https://www.justice.gov/eoir/recognition-and-accreditation-program (last accessed June 1, 2021).

[24] Form E-28 (available for download at https://www.justice.gov/eoir/list-downloadable-eoir-forms, (last accessed June 1, 2021) is the form on which attorneys enter their appearance before the immigration Court.

After you complete the online form, for which you will need to have your attorney license details available,[25] 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. The issuance of the EOIR identification number can take several days. You should complete both steps of the EOIR registration process well in advance of your first court appearance, to ensure that you receive your EOIR identification prior to your first appearance.

D. Entering Your Appearance before the Immigration Court

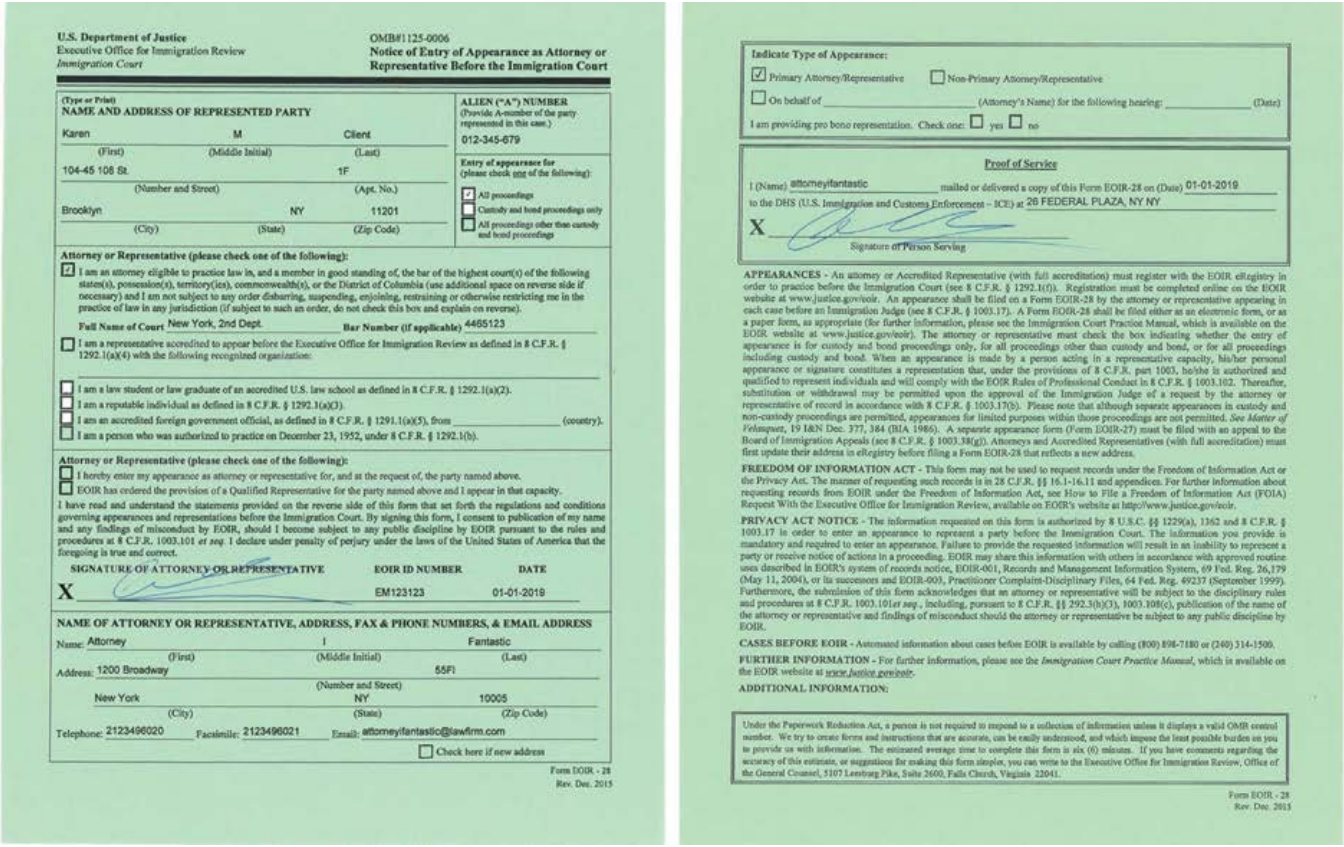
Once you have completed the EOIR registration process, you can enter your appearance in a case in accordance with Section 2.1(b) of the Immigration Court Practice Manual, which outlines immigration court rules and procedures.[26] To do so, you will need to file Form EOIR-28, (on mint green paper, two-hole punched at top) with the Court.[27] The form can be filed in person at the Immigration Court Clerk window or by mail to your Immigration Court's mailing address.[28]

[25] Attorneys admitted to practice in the State of New York can access the information they need through the NYS Unified Court System website at https://iapps.courts.state.ny.us/attorney/AttorneySearch (last accessed June 1, 2021).

[26] The Immigration Court Practice Manual is available at https://www.justice.gov/sites/default/files/pages/attachments/2017/11/02/practicemanual.pdf (last accessed June 1, 2021).

[27] *See* Immigration Court Practice Manual at section 3.3(c)(iii)(viii) (binding)(page 55).

[28] Court addresses and phone numbers can be accessed on the EOIR website at https://www.justice.gov/eoir/eoir-immigration-court-listing (last accessed June 1, 2021).



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 | M | Client
(First) | (Middle Initial) | (Last)
104-45 108 St. | 1F
(Number and Street) | (Apt. No.)
Brooklyn | NY | 11201
(City) | (State) | (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 | EOIR ID NUMBER | DATE
X _____ | EM123123 | 01-01-2019

NAME OF ATTORNEY OR REPRESENTATIVE, ADDRESS, FAX & PHONE NUMBERS, & EMAIL ADDRESS
Name: Attorney | I | Fantastic
(First) | (Middle Initial) | (Last)
Address: 1200 Broadway | 55Fl
(Number and Street)
New York | NY | 10005
(City) | (State) | (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.

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You can download the latest printable version of the E-28 form from the EOIR website at https://www.justice.gov/sites/default/files/pages/attachments/2015/07/24/eoir28.pdf. The E-28 requires your EOIR ID number on it for it to be accepted.

Any document filed with the immigration court, including Form E-28, must first be served on opposing counsel, i.e., the attorney who represents the Department of Homeland Security (often referred to as "ICE Counsel," "Assistant Chief Counsel (ACC)" or "Trial Attorney (TA)"). You may serve the E-28 on the Office of Chief Counsel (OCC) by mail or by hand delivery during a court appearance.[29] It is no longer possible to serve documents at the ICE-OCC window at 26 Federal Plaza.[30] The E-28 includes an internal section to address service entitled "Service on the Office of Chief Counsel." In that section of the form, you should note which method of service you used to serve ICE-OCC.

[29] Addresses for all Offices of Chief Counsel can be found at https://www.ice.gov/contact/legal (last accessed June 1, 2021). Attorneys practicing in New York can also access the AILA New York Chapter, *EOIR Contact Information* at http://www.ailany.org/committee/eoiroplaasylum/ for pertinent contact information (last accessed June 1, 2021).

[30] ICE offers the option to serve them via eService. Safe Passage Project generally does not use this option because it requires us to waive service defects. Please speak to your mentor attorney if you have further questions.

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 (CFR), 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 DOJ website at https://www.justice.gov/eoir/page/file/1084851/download.

The Federal Rules of Evidence do not strictly apply, but are persuasive, so we recommend that you become familiar with the rules.[31]

F. Hearings

Although, as discussed in Chapter 2: Getting Started, in some cases, a respondent may be able to quickly obtain termination of removal proceedings, generally, a respondent in removal proceedings who denies charges of inadmissibility or deportability, or chooses to present defenses to removal, will have several hearings before the Immigration Court.

There are generally two types of hearings for respondents 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 take pleadings (respond to the allegations and charges identified in the NTA), 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.

In most cases, you will attend multiple master calendar hearings. At the first master calendar hearing you will likely plead to the allegations and charges in the Notice to Appear and inform the Immigration Court as to available defenses to removal. At subsequent master calendar hearings, you will likely update the Immigration Court as to the process and timeline of any defenses against removal (such as Special Immigrant Juvenile Status (SIJS), Unaccompanied Children (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 Immigration Court schedule an individual hearing on remaining relief. However, we are seeing a

[31] 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 (last accessed June 1, 2021). Please contact your Safe Passage Project mentor if you cannot access this document and wish to review it.

growing trend in SIJS cases of Immigration Judges pushing to schedule individual hearings before the respondent is able to fully pursue that relief.

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 their application for relief from removal. This hearing generally includes opening and closing statements and direct and cross examination of witnesses. Either at the end of or after the individual hearing the Immigration Judge issues an oral or written decision. If the Immigration Judge decides against the respondent, the Immigration Judge will order the respondent removed from the United States.

Due to the decreased ability of immigration judges to terminate and administratively close cases, in 2017 EOIR created an alternative docket called the Status Docket. It is an alternative to the active docket, which requires the respondent to attend multiple master calendar hearings, where the respondent is seeking immigration relief outside the jurisdiction of the immigration court and once the case for that form of relief advances sufficiently. Once a judge places the case on the status docket, you are required to mail periodic updates to the Court while you await the outcome of the form of relief being sought outside the jurisdiction of the immigration court, and saves you and your client from regular master calendar appearances before the Court. EOIR has issued a practice memorandum on the status docket to clarify which cases can be placed on the status docket. However, in practice, which cases judges place on the status docket varies widely by immigration court location and immigration judge.[32] For further details on the Status Docket, please see Section 4.2 (C).

In addition, immigration judges have discretion to schedule "prehearing conferences" on a case, to narrow issues, obtain stipulations between the parties, exchange information voluntarily, to simplify and organize the proceeding, or identify and/or eliminate issues on the case.[33] However, these conferences are rare and are scheduled at the request of the parties, by oral or written motion.[34]

[32] EOIR, *Use of Status Dockets* (Aug. 16, 2019), https://www.justice.gov/eoir/page/file/1196336/download (last accessed June 1, 2021).

[33] 8 C.F.R. § 1003.21(a).

[34] *See* Executive Office for Immigration Review, *Immigration Court Practice Manual*, Chapter 4, Section 18, https://www.justice.gov/sites/default/files/pages/attachments/2017/11/02/practicemanual.pdf (last accessed June 1, 2021).

G. Special Protections for Noncitizen Youth in Removal[35]

Unmarried noncitizen youth under the age of 18 receive some special protections in immigration court.[36] Immigration 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.[37] Immigration Judges are prevented, by regulation, from accepting pleadings from unrepresented noncitizen youth under the age of 18.[38] Once pleadings are completed, Immigration Judges are also advised to waive the presence of noncitizen youth who are attending school, as long as their attorney, legal representative, legal guardian, near relative, or friend can appear at hearings on their behalf.[39] Immigration 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 Immigration Court as necessary.

1.2. Inadmissibility vs. 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 entering the U.S[40] without inspection.[41] The grounds of inadmissibility are outlined at INA § 212(a), and apply both at the border, when a noncitizen at a port of entry (such as JFK airport or a U.S.-Mexico land crossing) asks to be admitted to the U.S.,[42] and in removal proceedings to noncitizens who were not previously lawfully admitted to the U.S.

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[35] For an in-depth discussion of law and procedures for noncitizen youth in removal proceedings, *see* Thomas, Claire R. and Benson, Lenni B., *Caught in the Web: Immigrant Children in Removal Proceedings* (2016), Impact Center for Public Interest Law. 15, https://digitalcommons.nyls.edu/impact_center/15 (last accessed June 1, 2021).

[36] *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* Mary Beth Keller, *Operating Policies and Procedures Memorandum, Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children*, Executive Office for Immigration Review, December 20, 2017, https://www.justice.gov/eoir/file/oppm17-03/download (last accessed June 1, 2021).

[37] *Id.*

[38] 8 CFR 1240.10(c).

[39] 8 CFR 1240.4.

[40] The relevant entry is the noncitizen's last entry to the U.S. no matter how long ago.

[41] 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.

[42] The grounds of inadmissibility apply at the border even to noncitizens who have previously been granted immigration status, such as certain Lawful Permanent Residents (LPR) who travel abroad. *See* INA § 101(a)(13)(C) (although LPRs will not be considered to be seeking admission at the border when traveling back from an international trip and therefore not subject to the inadmissibility grounds, there are six exceptions that trigger inadmissibility grounds for LPRs at the border); *see also* ILRC, Inadmissibility & Deportability, Chapter 1 (May 2019), https://www.ilrc.org/sites/default/files/sample-pdf/inadmiss_and_deport-5th-2019-ch_01.pdf (last accessed June 1, 2021).

Deportability refers to the bases under which a noncitizen who is in the U.S. after inspection by an immigration officer may be removed from the U.S. The grounds of deportability are listed at INA § 237(a).

Noncitizens in removal proceedings will be charged on their NTA as being either inadmissible or deportable from the U.S.[43] 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. On the other hand, noncitizen youth under 18 are housed in juvenile detention facilities (if they arrived in the U.S. unaccompanied) or family detention facilities (if they arrived in the U.S with their parent or guardian). Our client population encompasses noncitizen youth up to 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."[44]

There are special protections for UACs under U.S. law. Noncitizen youth who are designated UACs cannot be subjected to expedited removal,[45] and must be transferred from CBP custody to that of the Office of Refugee Resettlement (ORR) within 72 hours of their apprehension.[46] They remain in the custody and care of ORR until they can be reunited with a family member or other individual or organization ("sponsor") in the U.S. While the reunification process is ongoing, these noncitizen youth

[43] "Removability" exists where the government proves that an individual violated any of the provisions in two subsections of the federal immigration statute: the grounds of inadmissibility at INA § 212(a) or the grounds of deportability at INA § 237(a) *See* 8 U.S.C. § 1229a(e)(2).

[44] 6 U.S.C. § 279(g).

[45] 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 (last accessed June 1, 2021).

[46] 8 U.S.C. § 1232(b)(3).

are expected to be housed in the "least restrictive" setting that is in their "best interests."[47] Generally, this means that they are housed with licensed care providers and are assigned a social worker.

Removal proceedings in Immigration Court for these noncitizen youth proceed while they are in detention. Upon reunification with a family member or other individual, the government usually automatically files a Motion to Change Venue with the Immigration Court, to transfer the noncitizen youth's immigration case to the correct jurisdiction.[48] In addition, 8 C.F.R. § 236.3 outlines the procedures that the government must follow in detaining and releasing noncitizen youth under the age of 18. You should review these procedures carefully and determine if they were followed in your case (as they are often not). If these procedures were not followed, you may have grounds to move for termination of proceedings against your client. For more information and applicable legal standards for noncitizen youth designated with a UAC classification, including recent legal changes to the permanency of a UAC determination, please see the asylum discussion at Section 4.8(C).

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 within the jurisdiction of ICE. This was reflected in President Trump's executive order in June 2018, to "maintain family unity, including by detaining alien families together where appropriate and consistent with law and available resources."[49] These noncitizen youth can be subjected, along with their family members, to expedited removal. The sole way to vacate an 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.[50] The noncitizen youth in these cases are generally placed in proceedings before the same immigration judge as is the parent.

[47] 8 U.S.C. § 1232(c)(2)(A).

[48] In immigration court, jurisdiction follows the noncitizen's place of residence.

[49] Exec. Order No. 13841, 83 C.F.R. 29435 (2018).

[50] INA § 235.

Documents that Unaccompanied Minors Should Receive Upon Release from ORR

If your client is an unaccompanied minor, you should ask them if they received any documents when they left their shelter run by ORR. Upon release to a guardian, ORR will usually provide them these documents in an envelope:

- I-770 Notice of Rights and Disposition;
- I-862 Notice to Appear;
- List of Legal Service Providers;
- ORR Verification of Release. This document has the UAC's picture on it and may be used as a form of identification;
- *Orantes* advisal, explaining the right to apply for asylum to Salvadoran citizens.

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 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 an NTA in immigration court.

A. Commencement of Removal Proceedings

Many interactions between a noncitizen and U.S. authorities can result in placement in removal proceedings via the issuance of a NTA on Form I-862 and filing of the NTA with EOIR. The great majority of Safe Passage Project clients are placed in removal proceedings after being apprehended by CBP at the U.S.-Mexico border and being issued an NTA. However, there are additional ways that a noncitizen may come to the attention of immigration authorities and be placed into removal proceedings. This includes instances of noncitizens who were 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 their status – and who encounter immigration authorities after the denial of an application for immigration benefits or after interaction with the criminal justice system.[51]

B. Charging Document

Removal proceedings under INA § 240 are initiated by service of an NTA on Form I-862 on the respondent and filing of the NTA with the Immigration Court.[52] For a sample NTA, see page 12. An NTA must include the minimum information required by statute.[53] An NTA that does not include the minimum information is deficient on its face and will allow the respondent to challenge their

[51] 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 a significant departure from prior policy in that it mandates issuance of NTAs to all categories of noncitizens except 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.

[52] INA § 239.

[53] *Id*.

proceedings or ask that the removal proceedings be terminated.[54] As per INA § 239, an NTA must specify at least the following information:[55]

- The nature of the proceedings;
- The legal authority under which the proceedings are conducted;
- The charges against the respondent and the statutory provisions alleged to have been violated;
- Notice that the respondent 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 respondent must immediately provide (or have provided) a written record of an address and telephone number (if any) where they 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.

The NTA issued to 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 a respondent where and when their removal hearing will take place. The Notice of Hearing will include the address of the court and the date and time of the hearing.[56]

[54] 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). *See also Pereira v. Sessions*, 138 S. Ct. 2105 (2018), holding that a Notice to Appear in Immigration Court which does not state the date and time of the hearing is a defective Notice to Appear and does not give the Immigration Court jurisdiction over a case. *Cf. Matter of Bermudez-Cota,* 27 I&N Dec. 441 (BIA 2018), wherein the Board of Immigration Appeals distinguished *Pereira* in holding that a notice to appear that does not specify the time and place of a noncitizen's initial removal hearing but that is followed by a notice of hearing specifying this information at a later date vests an immigration judge with jurisdiction over the removal proceedings. *See also Matter of Mendoza-Hernandez and Matter of Capula-Cortes*, 27 I&N Dec. 520 (BIA 2019), holding that the respondents' continuous physical presence ended when the Immigration Court sent them notices of hearing that specified the time and place of their initial removal hearing, thus severely restricts the holding in *Pereira v. Sessions*.

[55] INA § 239.

[56] 8 C.F.R. § 1003.18(b).

2.2. Challenging Removal Proceedings after a Notice to Appear is Issued

Where the government violates a regulation, policy, or constitutional protection intended to benefit a noncitizen, you may have grounds to move for termination of the case.[57] Below, we outline some bases to argue for termination before the immigration judge prior to pleading to the charges leveled against your client at the first master calendar hearing. Please note that succeeding on a termination motion based on the government violating a policy is increasingly rare. Immigration Judges vary in their willingness to exercise authority to terminate cases (even in the face of legally valid reasons for termination), but advocates should preserve these issues in the record of proceedings in case an appeal becomes necessary. Importantly, in a 2018 decision, Attorney General (AG) Sessions restricts immigration judges' ability to terminate removal proceedings. In *Matter of S-O-G- & F-D-B,* the AG determined that Immigration Judges (IJ) lack authority to terminate cases absent a specifically delineated regulatory authority for them to do so.[58]

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.[59] 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. Please contact your Safe Passage mentor to discuss the possibility of filing for interlocutory appeal from an IJ denial of a motion to terminate.

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

Generally, an NTA must be served upon the noncitizen, or their attorney of record, by written notice in person or by first class mail to the noncitizen's address.[60] 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.[61]

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[57] For sample motions to terminate, *see* Helen Lawrence et. al., *supra* n. 10 or contact your Safe Passage Project mentor.

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

[59] *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).

[60] INA § 239(a)(1)(c).

[61] *See* generally 8 C.F.R. § 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 minor resides; whenever possible, service shall also be made on the near relative, guardian, committee, or friend. If DHS 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 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.[62]

Aside from the specific requirements for service upon minors under 14 years of age, service is generally deemed complete upon mailing.[63] 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 the attorney and not the noncitizen. Improper service of the NTA can be grounds for terminating removal proceedings, but it must be raised as an issue before the Immigration Court immediately (prior to taking pleadings), or the Court will likely deem the issue waived.[64]

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 address provided [to the Court]'"[65] 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 Immigration Court—which is stated on the NTA—then the noncitizen cannot be considered to have received proper notice of the hearing or of the obligation to update the Immigration Court as to any change of address.[66] However, if a noncitizen does not provide an address to the Immigration Court, courts have generally found that they cannot challenge service of the NTA as improperly served by mail.[67]

[62] *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).

[63] INA § 239(a)(1)(c).

[64] *Nolasco v. Holder*, 637 F.3d 159, 162 (2d Cir. 2011).

[65] *Matter of G-Y-R-*, 23 I&N Dec 181 (BIA 2001).

[66] *Id*. at 187-88.

[67] INA § 240(b)(5)(B).

How to Review The NTA

- Read the NTA carefully.
- Does it contain all the required information under INA § 239 and 8 C.F.R. § 239?
- Does it properly identify your client? Correct name and spelling of name? Correct date of birth?
- Was it signed by the right person?
- Are the factual allegations against your client correct? Does it list the correct country of origin? Does it list the correct place and date of entry?
- Can the government sustain the charges against your client? Review INA § 212 or INA § 237, as appropriate.
- Does the factual allegation(s) relate to the alleged ground(s) of removal/inadmissibility?

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 on respondents who are minors under the age of 14	*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 on 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."

B. Does the Court Have Jurisdiction?

In *Pereira v. Sessions* the U.S. Supreme Court held that a Notice to Appear that did not include a time and place of the removal proceeding was insufficient under 8 U.S.C. § 1229(a). As a result, the Court held that a putative notice to appear that does not designate a specific time or place of removal proceedings does not trigger the stop-time rule ending a noncitizen's period of continuous physical presence in the United States, and which, in turn, affects eligibility for the defense of cancellation of removal under INA § 240A(d)(1)(A).[68]

[68] 138 S. Ct. 2105 (2018); CLINIC, *Practice Advisory: Strategies and Consideration in the Wake of Pereira v. Sessions* (Jan. 27, 2020), https://cliniclegal.org/resources/removal-proceedings/practice-advisory-strategies-and-considerations-wake-pereira-v (last accessed June 1, 2021).

The Supreme Court's 2018 decision suggested that the failure of an NTA to establish the specific time and location of removal proceedings failed to meet the statutory definition of an NTA at 8 U.S.C. § 1229(a). Since per 8 C.F.R. § 1003.14(a) the removal proceedings against a noncitizen only start with filing 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 of the proceedings fail to meet the requirements of a NTA, thus failing to establish subject matter jurisdiction over the case. Those judges granted termination of the affected matters before them.

Unfortunately, the BIA then made a series of rulings which narrowed the scope of *Pereira*. In *Bermudez-Cota,* the BIA specified that *Pereira* is only relevant to the stop-time rule in the cancellation of removal context. The BIA thus held that an NTA that does not specify the time and place of a respondent'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.[69] In *Matter of Mendoza-Hernandez*, the BIA held a Notice of Hearing with a time and place listed cures the deficiency in the NTA and triggers the stop-time rule.[70] In *Matter of Rosales*, the BIA specified that the immigration court may retain jurisdiction even if the NTA does not list the hearing address.[71]

The BIA's extended discussion of *Pereira* in *Matter of Mendoza-Hernandez* revealed a large split in the Board's understanding of *Pereira*. While many federal circuit courts have held that a defective NTA does not strip the immigration court of subject matter jurisdiction,[72] the Supreme Court has granted writ of certiorari to hear this issue in *Niz-Chavez v. Barr*. In this case the Court will address "whether, to serve notice in accordance with 8 U.S.C. § 1229(a) and trigger the stop-time rule, the government must serve a specific document that includes all the information identified in Section 1229(a), or whether the government can serve that information over the course of as many documents and as much time as it chooses."[73]

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[69] *Matter of Bermudez Cota*, 27 I&N Dec. 441 (BIA 2018).

[70] 27 I&N Dec. 520, 522 (BIA 2019).

[71] 27 I&N Dec. 745 (BIA 2020).

[72] *See Banegas Gomez v. Barr*, 922 F.3d 101, 112 (2d Cir. 2019) (finding a defective NTA and subsequent cure does not deprive the immigration court of jurisdiction); *Nkomo v. AG*, 930 F.3d 129 (3rd Cir. 2019); *Hernandez-Perez v. Whitaker*, 911 F.3d 305 (2018); *Mauricio-Benitez v. Sessions*, 908 F.3d 144, n.1 (5th Cir. 2018) (limiting *Pereira* to the stop-time rule in cancellation of removal proceedings); *Pontes v. Barr*, 938 F.3d 1 (1st Cir. 2019); *Jimenez-Perez v. U.S. AG*, 2020 U.S. App. LEXIS 17050 (11th Cir. 2020) (immigration court retains jurisdiction even if NTA has no time or place); *Ortiz-Santiago v. Barr*, 924 F.3d 956, 962 (7th Cir. 2019), *reh'g denied* (July 18, 2019); *Aguilar Fermin v. Barr*, 958 F.3d 887 (9th Cir. 2020) (NTA's lacking a time and place with the subsequent possibility of cure does not strip the immigration court of jurisdiction); *Martinez-Perez v. Barr*, 947 F.3d 1273 (10th Cir. 2020) (holding "a failure to comply with [claim processing rules] did not divest the immigration court of jurisdiction."); *But see United States v. Benitez-Dominguez,* 440 F.Supp.3d 202 (E.D.N.Y. 2020) (immigration court lacked jurisdiction where NTA lacked a time and place of removal proceeding).

[73] *Niz-Chavez v. Barr*, 789 Fed. Appx. 523 (6th Cir. 2019), *cert. granted,* 207 L. Ed. 2d 169 (No. 19-863), *see Niz-Chavez v. Barr, SCOTUS* Blog at https://www.scotusblog.com/case-files/cases/niz-chavez-v-garland/ (last accessed June 1, 2021).

The long-term interpretation of *Pereira* and its impact on our clients remains an open question. On June 27, 2018, before the BIA ruled in *Bermudez-Cota*, EOIR provided internal guidance to immigration judges that NTAs filed by DHS that do not specify the time and place of the hearing should be rejected; however, on July 11, 2018, EOIR provided superseding guidance, that even after *Pereira*, EOIR should accept NTAs that do not contain the time and place of the hearing.[74] For now, advocates should consider takings steps to preserve the argument that, under the Supreme Court's reasoning in *Pereira*, the Immigration Court does not have jurisdiction over the proceedings when the NTA is defective and must grant a motion to terminate. Please contact your Safe Passage mentor to discuss strategy and obtain sample motions.

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

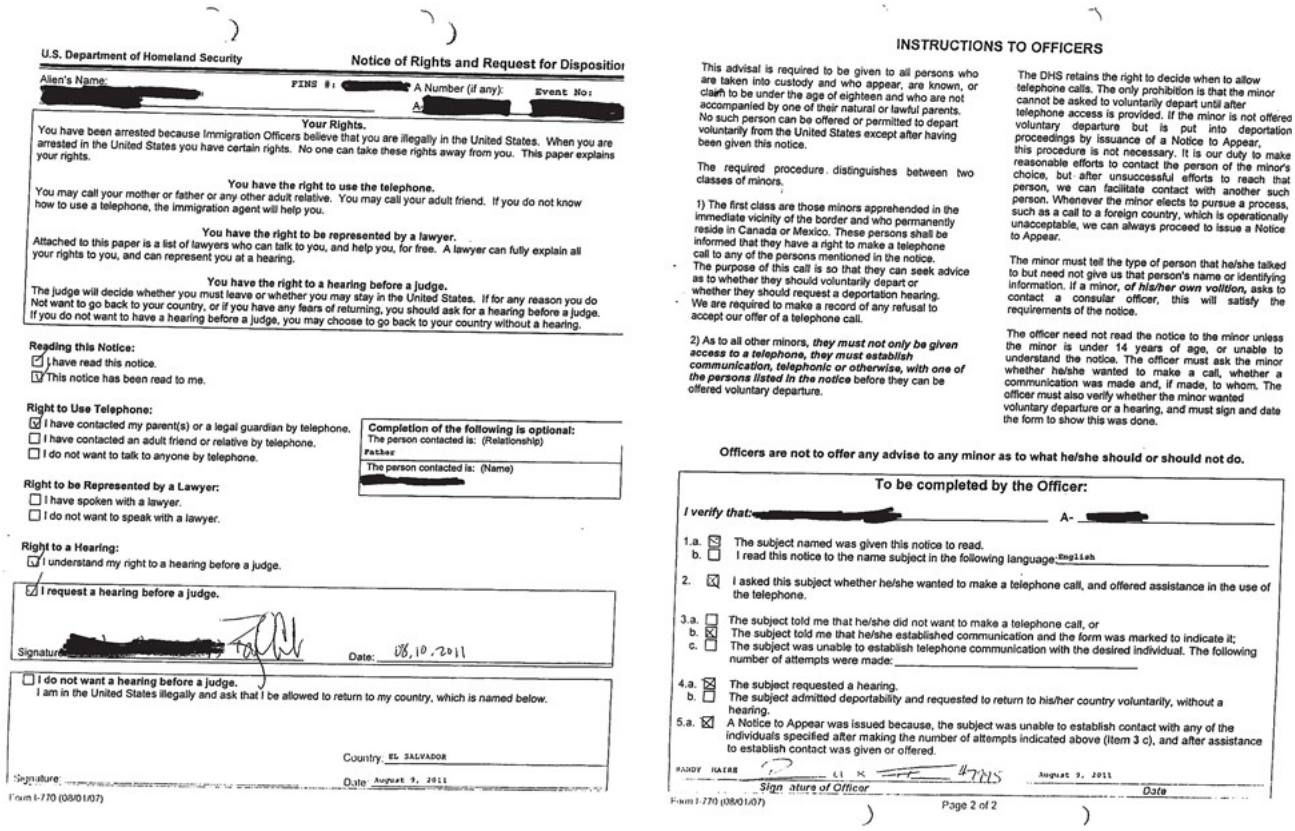
The Form I-770 Notice of Rights and Disposition must be issued by CBP or ICE to any noncitizen juvenile who is apprehended by immigration authorities at the time of apprehension, whether or not the noncitizen youth is apprehended along with a parent or other family member.[75] If the noncitizen is under 14 years of age or unable to understand the notice, the regulations require that Form I-770 be read and explained to the juvenile in a language they understand.[76] A motion to terminate may be warranted in the following situations: (1) if your client was not directly served with Form I-770 (for example, if it was served on the ORR custodian that was detaining the noncitizen youth, or on the noncitizen youth's guardian); (2) if the form was improperly completed such that it did not properly advise the noncitizen youth; (3) if the noncitizen youth was under 14 or unable to understand the form, and officer did not read it to the noncitizen youth in a language the youth understands; or, (4) if the government otherwise violated regulations.[77] Successful motions to terminate based on an I-770 issue are rare, but please contact your Safe Passage mentor if you believe there may be a regulatory violation.

[74] AILA Doc. No. 18091849 (Posted 9/18/18).

[75] CLINIC, *Practice Advisory: Strategies for Suppressing Evidence and Terminating Removal Proceedings for Child Clients* (March 2015), https://helenlawrencelaw.com/2015/03/31/new-practice-advisory-strategies-for-suppressing-evidence-and-terminating-removal-proceedings-for-child-clients (last accessed June 1, 2021).

[76] 8 C.F.R. § 1236.3.

[77] For sample motions to terminate, *see* Helen Lawrence et. al., *supra* n. 10 or contact your Safe Passage Project mentor.



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: 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
Sign ature of Officer Date

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

D. 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 DHS evidence was unlawfully obtained. The Immigration 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.[78] It is rare to win a suppression motion, but it can be an important tool.

Some examples of conduct that may give rise to a suppression motion are unlawful stops and warrantless arrests of noncitizens and questioning by immigration authorities during which the noncitizen was threatened or denied food or drink. 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.[79] Please speak to your Safe Passage Project mentor attorney for more details.

[78] *Id.*

[79] *Id.*

E. 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."[80] Through the powers given to the Secretary, ICE-OCC has the ability to exercise prosecutorial discretion in deciding whether to initiate, terminate, or appeal a decision in removal proceedings without being subject to judicial review. Prior to 2017, ICE-OCC regularly granted prosecutorial discretion to a limited number of cases that met certain criteria.[81] There is no statutory framework outlining ICE-OCC's exercise of prosecutorial discretion, but in the past ICE-OCC published several memoranda explaining its internal guidelines for when the agency would exercise prosecutorial discretion.[82] Although some of those memoranda have since been expressly revoked, nothing technically precludes ICE-OCC from continuing to exercise discretion on a case-by-case basis.

This ongoing authority to exercise discretion was reiterated in an August 2017 memorandum to OCC Attorneys. 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,[83] agreeing termination of proceedings to allow for the adjudication of a benefit application[84] 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."[85] Interestingly, the memorandum moves away from the prior practice of requesting that attorneys submit formal requests for an exercise of prosecutorial discretion. Instead, the memorandum

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[80] 8 U.S.C. § 1103(a) (2013).

[81] *See* TRAC, *Immigration Court Dispositions Drop 9.3 Percent Under Trump* (July 2017), https://trac.syr.edu/immigration/reports/474/?fbclid=IwAR39Bb3kiTNkD9pgTq7AG3j0NocL7IOr45gzq7Wxiyadu_ruJ8bQenQDcG8 (last accessed June 1, 2021).

[82] John Morton, Exercising Prosecutorial Discretion Consistent with the Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf. This memo was further expanded upon by Director Morton the memorandum entitled "Prosecutorial Discretion: Certain Victims, Witnesses and Plaintiffs," also issued on June 17, 2011, and available at https://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf (last accessed June 1, 2021). The latter memorandum 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.

[83] 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), https://www.prisonlegalnews.org/media/publications/ICE_memo_to_Office_of_the_Principal_Legal_Advisor_attorneys_2017.pdf (last accessed June 1, 2021).

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

[85] *Id.* at p. 6.

states that Assistant Chief Counsel are to exercise discretion absent a specific request from respondent's counsel.

In addition, existing ICE guidance advises Assistant Chief Counsel that, in the absence of serious adverse factors, Assistant Chief 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.[86] Despite this guidance, there has been a huge drop in the number of prosecutorial discretion case closures since 2016. During the first five months of 2016, OCC closed an average of 2,400 cases per month through prosecutorial discretion. During the first five months of 2017, OCC closed an average of less than 100 cases monthly.[87] Safe Passage Project has not received prosecutorial discretion on any case since early 2017.

Beginning in January 2021, the Biden Administration proposed legislation and issued a series of executive orders, presidential proclamations and presidential memoranda related to immigration. This includes an executive order entitled *Revision of Civil Immigration Enforcement Policies and Priorities*, which stated that it would "reset the policies and practices for enforcing civil immigration laws," while revoking the former administration's order that prioritized undocumented workers for removal, prohibited so-called Sanctuary Cities from receiving many federal grants, and generally increased immigration enforcement.[88] While it remains to be seen what will happen in practice, the new administration continues to discuss steps toward an immigration reform that will lead to a streamlined immigration system.[89]

Prosecutorial discretion is supposed to be analyzed on case-by-case basis by OCC, but in practice this does not appear to be occurring. It remains to be seen what, if any, change will occur as to prosecutorial discretion requests under the Biden Administration. Please speak with your mentor attorney if you have questions about prosecutorial discretion.

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[86] *Id.*

[87] TRAC, *supra* n. 81.

[88] The White House, *Executive Order on the Revision of Civil Immigration Enforcement Policies and Priorities* (January 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-the-revision-of-civil-immigration-enforcement-policies-and-priorities/ (last accessed June 1, 2021).

[89] *See generally*, The White House Briefing Room, *Biden-Harris Administration Forms Family Reunification Task Force and Issues Executive Orders on Regional Migration and Legal Immigration*, (February 2, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/02/fact-sheet-president-biden-outlines-steps-to-reform-our-immigration-system-by-keeping-families-together-addressing-the-root-causes-of-irregular-migration-and-streamlining-the-legal-immigration-syst/ (last accessed June 1, 2021).

CHAPTER 3: PREHEARING CONCERNS

3.1. Changing Venue

Most motions can be filed either before or during the first master calendar hearing,[90] but it is sometimes 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. When this happens, this move 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 they were 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 the jurisdiction where your client has moved to. A Motion to Change Venue requires that the non-filing party (ICC-OCC) receive notice and have an opportunity to respond.[91] 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 Practice 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 is residing;
- If there has been a change of address, a properly completed alien's change of address form (Form EOIR-33);
- A detailed explanation of the reasons for the request;
- Table of contents;
- Evidence, including documentation of the client's new place of residence; and
- Certificate of service establishing service of a copy of the motion upon ICE-OCC.

[90] 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.

[91] *See* 8 C.F.R. § 1003.20(b).

Tips and Tricks: Motions to Change Venue

Although the Immigration Court Practice Manual[92] 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.[93] 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.[94]

3.2. Submitting EOIR-28 and EOIR-33 Prior to the First MCH

You should consider filing your EOIR-28, Notice of Entry as Appearance as Attorney, prior to the first master calendar hearing. Although the EOIR-28 can be submitted at your first appearance with your client at a master calendar hearing, if you submit your EOIR-28 when you are retained, you will receive any notices from EOIR related to your client's case, such as hearing notices. In addition, should you have any questions about your client's case—such as a question about their next hearing—you must have an EOIR-28 on file in order for the clerk at EOIR to share information with you. The EOIR-28 must be printed on mint green paper and two-hole punched at top. It must be served on ICE-OCC first and then filed with EOIR. Please note, however, that if your client's NTA has not yet been filed with EOIR, EOIR will not accept your EOIR-28.

If you client has moved and has not yet updated EOIR with their new address, you should promptly file an EOIR-33, Change of Address Form with EOIR. The EOIR-33 must be printed on light blue paper and two-hole punched at top. It must be served on ICE-OCC first and then filed with EOIR. Please note, as

[92] Immigration Court Practice Manual. Available at https://www.justice.gov/eoir/page/file/1084851/download (last accessed June 1, 2021).

[93] *See Matter of Rahman,* 20 I&N Dec. 480 (BIA 1992).

[94] 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.

with the EOIR-28, that if your client's NTA has not yet been filed with EOIR, EOIR will not accept the EOIR-33.

3.3. Gathering Evidence in Support of Your Case

As the Federal Rules of Evidence do not strictly apply in removal proceedings, the immigration judge is charged with considering all evidence that is relevant, probative, material, and not fundamentally unfair.[95] The weight given each piece of evidence is within the discretion of the judge.[96]

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 by the Immigration Judge. When gathering evidence, you should keep in mind that the ICE-OCC 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 ICE-OCC 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[97] they may have encountered. Prior immigration history refers to things such as previous entries to the U.S., previous visa application, and previous removal proceedings. UACs usually do not have prior immigration history, but it is still important to ask your client about their immigration history. You should also plan to view the 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 ICE-OCC, to prepare your client for cross-examination at their individual hearing. Your client may be subject to cross examination with their previous statements.[98]

If your client has ever been arrested or received a summons or ticket, you should obtain copies of all police reports, tickets, and certificates of disposition in their case(s). Even if charges against them were

[95] 8 C.F.R. 1003.41, 8 C.F.R. 1287.69(b).

[96] *Id*.

[97] Read below for a list of agencies and a description of the types of records they have in their possession.

[98] Unaccompanied minors do not receive credible fear interviews as they are not subject to expedited removal. *See* Hillel R. Smith, Cong. Research Serv., LSB10150, at 4, *Immigration Laws Regulating the Admission and Exclusion of Aliens at the Border* (May 19, 2020), https://fas.org/sgp/crs/homesec/LSB10150.pdf (last accessed June 1, 2021).

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

B. Reviewing Your Client's Immigration Court File

It is important to review your client's Immigration Court file in certain circumstances. For example, if your client was previously represented by another attorney before EOIR or appeared *pro se* in Immigration Court and/or submitted any documents with EOIR, you should review your client's Immigration Court file. In addition, if you do not have a copy of your client's Notice to Appear, you should review your client's Immigration Court file.

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

Below is a table which shows 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 and the location of the court:	Call the Immigration hotline and enter your client's Alien number (listed as A# 000-000-000 on immigration documents): **1-800-898-7180.** **You can also enter your client's Alien number in this website for case status information:** https://portal.eoir.justice.gov/InfoSystem/Form?Language=EN
4. Contact the Immigration Judge's clerk	Call the assigned NY immigration court at the phone number listed below from 8:30 a.m.-4:00 p.m. Monday through Friday

	and listen to the prompts to be transferred to the clerk assigned to your judge. 26 Federal Plaza: 917-454-1040 201 Varick Street: 646-638-5766 890 Broadway: 212-240-4900
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 Courts are all located in downtown Manhattan. See Section 1.1B of this manual for the addresses.
7. Go to the Immigration Court Clerk's window	You should go to the clerk's window 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. 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) Request

A noncitizen placed in removal proceedings is entitled to receive a full copy of their A file.[99] In preparation for the case, you may wish to file a Freedom of Information Act (FOIA) request to obtain

[99] *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* (June 12, 2012), https://www.americanimmigrationcouncil.org/practice_advisory/dent-v-holder-and-strategies-obtaining-documents-during-removal-proceedings (last accessed June 1, 2021).

your client's immigration file, including recordings of any prior hearings, from the Immigration Court.[100] 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 Services (USCIS), was in the custody of Customs and Border Protection (CBP), or applied for a visa through the U.S. Department of State (DOS), you should file a FOIA request with each agency (each agency has its **own FOIA request** procedures, as outlined below). FOIA requests can take a substantial period of time and should be filed well in advance of your next hearing.

i. Executive Office for Immigration Review (EOIR) FOIA Request

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.

ii. Customs and Border Protection (CBP) FOIA Request

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 submitting Form G-28 (available here: https://www.uscis.gov/g-28) online at: https://foiaonline.gov/foiaonline/action/public/request.

iii. United States Citizenship and Immigration (USCIS) FOIA Request

A USCIS FOIA is especially helpful when a client has previously submitted applications or petitions to USCIS requesting an immigration benefit or status in the United States. You can request USCIS records by submitting Form G-639 (available at: https://www.uscis.gov/g-639) and Form G-28 (available at: https://www.uscis.gov/g-28) via email, attaching both forms as a PDF to: uscis.foia@uscis.dhs.gov.

[100] For a more in-depth discussion of how to determine which FOIAS to file, you may want to read *A Step by Step Guide To Completing FOIA Requests with DHS* by the ILRC, at https://www.ilrc.org/step-step-guide-completing-foia-requests-dhs (last accessed June 1, 2021).

iv. U.S. Department of State (DOS) FOIA Request

Attorneys should submit a DOS FOIA when a client has previously applied for a visa to enter the United States. In addition to the visa application, the FOIA results should contain statements made by your client during the visa interview at the U.S. consulate abroad. There is no specific form for a DOS FOIA and most requests must be sent via physical mail. The request should include the client's full name, date of birth, alleged country of birth and a description of the records you are seeking.[101]

v. Office of Biometric Identity Management (OBIM) FOIA Request

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 must include an original fingerprint card or the client's A number. Any questions about submitting an OBIM FOIA can be directed to: OBIM-FOIA@ice.dhs.gov. OBIM FOIA requests 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. Documentary evidence is particularly important in asylum cases. Where applicable, you should work with your client to obtain police reports, civil documents, court orders, or newspapers articles, as applicable, that corroborate your client's claim. Additionally, if there are any witnesses to facts you are alleging in the case, you are strongly encouraged to obtain signed and notarized affidavits. It is also important to have official records from your client's home country that establish their identity, custody issues, marriages, divorces, police complaints, and medical records, where relevant.

Given the challenges of obtaining documents from abroad, the identification of necessary or potentially helpful evidence should be done as early as possible to give you enough time to study the document(s) and translate them if necessary. All foreign language documents submitted to the Immigration Court

[101] ILRC, *Department of State FOIA Requests for Personal Records* (August 2019), https://www.ilrc.org/sites/default/files/resources/foia_-_dept_of_state_practice_advisory-0822.pdf (last accessed June 1, 2021).

must be translated into English and accompanied by a certificate of translation.[102] A sample affidavit of translation is available as Exhibit H-1 of the Immigration Court Practice Manual.[103]

The first step is to speak with your client and find out whether any evidence exists and second, whether they have 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

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.[104] That said, if there is specific discovery you would like from ICE-OCC, 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-OCC has easier access to it, plead to the Court at that hearing that it is more time and cost-effective for ICC-OCC to disclose it. Under existing regulations, you, ICE-OCC, or the Immigration Judge may request a subpoena once removal proceedings have begun.[105] 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.[106]

[102] The Immigration Court Practice Manual. Available at https://www.justice.gov/sites/default/files/pages/attachments/2017/11/02/practicemanual.pdf (last accessed June 1, 2021).

[103] *Id*.

[104] *Matter of Magana*, 17 I&N Dec. 111 (BIA 1979).

[105] INA § 240(b)(1); 8 C.F.R. §§ 1003.35(b), 1287.4(a)(2)(ii).

[106] 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 (last accessed June 1, 2021). 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), https://www.justice.gov/sites/default/files/eoir/legacy/2011/10/06/vol5no7cr.pdf (last accessed June 1, 2021).

CHAPTER 4: HEARINGS

4.1. The Master Calendar Hearing

Master calendar hearings are preliminary hearings for pleading and scheduling. Typically, over 50 or more noncitizens will be scheduled to appear before the Immigration Judge ("IJ") at the same date and time on the IJ's master calendar day, and each master calendar hearing will be expected to last just a few minutes. At these hearings, a respondent is asked to answer the allegations and charges against them and advise the Court of any available defenses against removal. Typically, at a first master calendar hearing the Court grants a respondent additional time to prepare those defenses and will give the respondent a new master calendar hearing date. Courts 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.

On November 30, 2020, EOIR issued a memo introducing the "enhanced case flow processing model" for represented respondents.[107] Under the new system master calendar hearings for most represented respondents are eliminated, and, instead, the Court issues a "scheduling order." The Court further requires the respondent to submit pleadings in writing and file applications for relief, after which an individual hearing date will be set. It is our understanding that the new case flow processing model will not apply to unaccompanied minors. Due to these recent changes, please speak to your mentor attorney about case flow processing if your client is not an unaccompanied minor. Please note that as of the date of this manual the immigration courts in New York City remain closed for non-detained master calendar hearings due to the COVID-19 pandemic, and, as a result, we have yet to see how the new case flow processing memo works in practice.

A. Burden of Proof (Generally)

As discussed previously in the Inadmissibility vs. Deportability Section 1.2, 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 present in the U.S. after admission or parole but now deportable under INA § 237.

[107] EOIR, *Enhanced Case Flow Processing in Removal Proceedings* (November 30, 2020), https://www.justice.gov/eoir/page/file/1341121/download (last accessed June 1, 2021).

The question of which party bears the burden in immigration proceedings is a complicated one, and often shifts back and forth between the parties during the proceeding (sometimes multiple times during individual hearings).[108]

For noncitizens like most Safe Passage Project clients, who were never admitted or paroled into the U.S. and are charged with inadmissibility, the initial burden rests with ICE-OCC, who must prove that the noncitizen is an "alien" (not a citizen) to the U.S.[109] ICE usually does this by presenting a document called the I-213, Record of Deportable/Inadmissible Alien. This document is produced by DHS and contains information about the respondent's apprehension and some biographical information, including their alleged country of origin. This information often contains errors and is akin to a police report in criminal proceedings.

If ICE-OCC is able to prove alienage by a "preponderance of the evidence" (using, for example, the noncitizen's prior statements, or copies of foreign documents, such as a birth certificate, 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.[110]

If the respondent is instead charged with deportability, ICE-OCC bears the initial burden of establishing by clear and convincing evidence that the respondent is deportable under INA § 237.[111]

B. Holding ICE to its Burden

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

[108] 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 (last accessed June 1, 2021).

[109] 8 C.F.R. § 1240.8(c).

[110] INA §§ 240(c)(2), 291; 8 C.F.R. § 1240.8(c).

[111] INA § 240(c)(3); 8 C.F.R. § 1240.8(a).

ask that ICE-OCC meet its initial burden of alienage prior to proceeding, to address any charges in the NTA. If ICE-OCC is unable to do so, you should move for an order terminating proceedings.

To hold ICE-OCC to its initial burden, the attorney should deny the factual allegations and the charge/s of removability against their client. The IJ may be confused or upset when you do this because it is somewhat unusual. Explain that ICE has the initial burden to prove alienage. When asked for proof, the ICE attorney will probably offer the I-213 Record of Deportable/Inadmissible Alien. You should ask to receive a copy of this document and time to review it for errors, and to speak to your client about fundamental fairness concerns like coercion. You can object to its admission on these grounds. ICE might object and cite a case called *Matter of Barcenas*, for the "proposition that in the absence of an indication of coercion, duress, or factual error, an I-213 is inherently trustworthy and therefore admissible in removal proceedings."[112] However, *Matter of Barcenas* specifically states that evidence still must be "probative" and "fundamentally fair."[113] This means that you should still object and point out errors in the I-213. The IJ will still likely admit the I-213 over your objection and the burden will then shift to the respondent. Sometimes ICE will have a copy of the respondent's birth certificate or other documents. In that situation, you should follow this same process as challenging the I-213, but it is much more difficult to challenge documents that were officially issued by a foreign government.

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 First Master Calendar Hearing", below, and the following pages for a simple list of to-dos that will help you understand the tasks you should perform in preparation for the hearing.

A. Checklist for First (Master Calendar) Hearing[114]

1. Meet with your client;
2. Register with EOIR to obtain your EOIR ID (see section 1.1 (C));
3. Review NTA and determine how you will respond to the pleadings;
4. Explore defenses against removal/avenues for relief;
5. Advise client of duty to appear;
6. Advise client of duty of advising the Court if their address changes
7. Determine whether there are arguments to challenge the NTA (see sections 2.1 and 2.2);

[112] , American Immigration Lawyers Association, *Challenges and Strategies Beyond Relief* (2014), https://www.aila.org/File/Related/11120750b.pdf (last accessed June 1, 2021).

[113] *Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988) (citing Toro).

[114] In a post-Covid era, some of these procedures are likely to change. For example, once reopened, EOIR might use telephonic appearances as a default. As of this writing, it is unclear whether EOIR will revert to old procedures or develop new ones.

8. Determine if any motions are necessary, draft and file any necessary motions (see sections 3.1 and 4.3);
9. Review the existing file with EOIR if necessary (see section 3.2 (B));
10. Obtain records of any prior immigration or criminal contact if applicable (see section 3.2 (A), (C), (D), and (E));
11. Make arrangements to meet your client on the day of the master calendar hearing;
12. Advise your client of master calendar hearing process, including what to expect at the hearing and what questions your client might have to directly answer.

At a master calendar hearing, the IJ identifies the issues in the case (that your client is being charged with removability), sets filing deadlines, and sets the date for 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 pending before USCIS or other collateral proceeding 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 an order of removal, or if a noncitizen is in lawful status despite the alleged grounds of inadmissibility or removability on the NTA. In such instances, the IJ will issue an oral order and the proceedings will end. Summary disposition at the master calendar stage is rare among Safe Passage Project cases. The more common scenario for Safe Passage Project cases is that you will do pleadings, advise the IJ of where you are in terms of seeking the available forms of relief, and request a continuance to allow you more time to seek such relief.

Master Calendar Hearing Tips

- Call the EOIR hotline at 1-800-898-7180 or use the online Automatic Case Information website at https://portal.eoir.justice.gov/InfoSystem/Form?Language=EN to find out the name of the IJ assigned to your case and the exact time of your hearing.

- If you can, arrange to visit the courtroom to observe one of your IJ's master calendar hearing docket days in advance of appearing at your first one. You may also contact your Safe Passage Project Mentor who can guide you through a mock hearing.

- Make sure that you have 3 copies of your Form EOIR-28, Notice of Entry of Appearance on mint green paper[115] and 3 copies of Form EOIR-33, Change of Address if necessary. Make sure anything you give the court is two-hole punched at the top. The respondent's table often has a two-hole punch available for respondent's counsel to use.

- Upon arriving in the courtroom, enter the courtroom even if the IJ is hearing a case. Quietly go through the wooden gate and check in with the IJ's clerk. Give the clerk your EOIR-28, Entry of Appearance as Attorney, and provide the clerk the last three digits of your client's A 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 IJ's clerk that you are appearing pro bono as some IJs will allow pro bono counsel to jump the line. Otherwise, you should just sit and wait until you are called. You may wish to observe a few master calendar hearings before you check in to get a feel for the questions the IJ asks.

- When the Immigration IJ is ready to hear your case, the IJ will identify your case by calling out the last three digits of your client's A 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 IJ should be referred to as "Your Honor" or "Judge." Unlike in other venues, you should remain seated when addressing the IJ.

- If you need to hand anything to the IJ or want to have a discussion with the IJ 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 IJ's authorization before doing so.

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

B. Consequences of Failing to Appear

You and your client must appear at the initial and all subsequent master calendar hearings, unless you have filed (and been granted) a Motion to Waive Respondent's Presence. If your client fails to appear at

[115] If you have already registered with the EOIR and have your unique EOIR number as explained in previous sections, you will be able to file the Form EOIR-28 online at https://portal.eoir.justice.gov/ (last accessed June 1, 2021) and serve ICE-OCC Counsel at https://eservice.ice.gov/Pages/home.aspx (last accessed June 1, 2021).

a removal hearing, the Court can issue an *in absentia* order removing them from the U.S.[116] If your client appears late (as opposed to not appearing at all), but after the immigration judge 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.[117] Due to the serious consequences of a failure to appear at a master calendar hearing, it is important to notify your client as soon as you receive a hearing date and also remind them periodically about the date.

The IJ will order your client "removed *in absentia*" after failing to attend a hearing, if ICE-OCC "establishes by clear, unequivocal, and convincing evidence that" your client received proper notice of the hearing and the IJ sustains the charges against the client.[118]

If your client was properly served and failed to appear, they will be ordered removed *in absentia*,[119] and become ineligible to apply for re-entry to the United States for a period of five years after entry of the order of removal or their physical departure from the United States.[120] 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 a person admitted for permanent residence, among others, for a period of 10 years after the entry of the order of removal.[121]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.[122]

At the end of the master calendar hearing, the IJ 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. The IJ will also set a date for the next hearing. If your case is scheduled for an individual hearing, the IJ will set the deadlines for submitting applications, exhibits and witness lists. Make sure to write down those deadlines. It is uncommon that a IJ fails to set so-called "call-up dates" for the submission of applications, exhibits, and witness lists for non-detained respondent, but, if the IJ fails to do so, you should rely on the default call-up date as provided in the Immigration Court Practice Manual, which is

[116] INA § 240(b)(7).

[117] 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).

[118] INA § 240(b)(5)(A).

[119] S*ee* INA § 239.

[120] INA § 240(b)(7).

[121] *Id*.

[122] 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).

30 days prior to the hearing.[123] If your client's relief from removal involves background and 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 IJ will want an update of the status of your case at the next master calendar hearing. If the IJ ordered you to file certain documents before the next master calendar hearing, you should bring proof of a filed application or petition to the next master calendar hearing. Please speak to your Safe Passage Project mentor attorney about what type of proof to submit. After informing the court of the status of your case, you may ask the court to place the case on the status docket, seek a continuance, or ask for the case to be set for an individual hearing depending on the posture of your case. See section 4.2 (C) of this manual for a discussion of the status docket.

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 IJ can either give you a deadline to file the application with the Court or an adjournment to allow an application to be filed with USCIS. If your client is eligible for SIJS, the IJ may also grant you an adjournment to pursue SIJS through the family court process. There is also the possibility - in some limited cases - that the IJ will place the case on the status docket.

If the application will be filed with the Court, the IJ 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. If your client's case has been referred back to court from the asylum office, the IJ will likely set the case for an individual hearing.

There are many reasons why it may be in your client's interest to postpone or avoid an individual hearing. For Safe Passage Project clients, it is often preferable to postpone or avoid an individual hearing to allow time to proceed with collateral proceedings or to allow time for the client's "priority date" to become current, as discussed below. Other reasons may include because your client is incompetent to aid in their defense or cannot comfortably testify in Court. The options to postpone or avoid an individual hearing are limited, and, at present, the only way to do this are by requesting a continuance or placement on the status docket.

i. Continuances

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 IJs to continue

[123] *See* Immigration Court Practice Manual Section 3.1(b)(1)(B), *Delivery and Receipt*, available at: https://www.justice.gov/eoir/eoir-policy-manual/ii/3/1 (last accessed June 1, 2021).

a hearing for "good cause" shown, and 8 C.F.R. § 1240.6, which permits IJs to grant a "reasonable adjournment at his or her own instance" or for good cause shown by a requesting party.

The BIA has issued several decisions over the years in which they interpret the "good cause" required to obtain a continuance.[124] 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 IJs against generously granting continuances.[125]

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-*, in which he defined "good cause" as a substantive requirement that must be met for the IJ to grant a continuance. In his decision, the Attorney General, who compared continuances to "an illegitimate form of de-facto relief from removal"[126] outlined a "multi-factor" balancing test that immigration courts must apply to the facts, to determine whether "good cause" has been demonstrated. The factors outlined in the decision are: 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;[127] 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 IJ then weigh the other elements. *L-A-B-R-* also specifies that IJs must read or write a decision to continue into the record of proceedings, and that an IJ decision that does not specifically address the requisite grounds and explain the reasons for the IJ's decision will leave the decision open to being vacated by the BIA.[128]

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[124] *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).

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

[126] 27 I&N Dec. 405, 411 (A.G. 2018).

[127] Administrative efficiency cannot be the "sole" consideration for a IJ to deny a continuance but is a valid consideration for the Court. It is unclear how much weight IJs may attribute to it given recent case completion quotas that have gone into effect as of October 1, 2018. *See* Executive Office of Immigration Review, U.S. Dep't of Justice, *Memorandum from EOIR Director re: Immigration Judge Performance Metrics*, March 30, 2018), https://www.abajournal.com/images/main_images/from_Asso_Press_-_03-30-2018_McHenry_-_IJ_Performance_Metrics_.pdf (last accessed June 1, 2021).

[128] Matter of L-A-B-R-, at 419.

In light of *L-A-B-R-*, the question of whether the respondent will receive the collateral relief sought (and for which they require a continuance) is a primary consideration for the IJ. Consequently, respondents seeking a continuance to obtain a decision on a collateral form of immigration relief over which the IJ does not have jurisdiction (like SIJS, UAC asylum, a VAWA Self-petition, or U or T nonimmigrant status) should present facts to show prima facie eligibility for relief. If there is a USCIS receipt for the application or a summons for the next family court appearance, you should attach that to the motion.

In many cases, the need for a continuance arises from lengthy USCIS processing times, 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.[129]

Also, since the IJ 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. Any motion for a continuance should differentiate your client's case from the noncitizen in *Matter of Mayen*.[130] In that case, the BIA affirmed the denial of a continuance for a U Nonimmigrant Status applicant because the respondent had waited until one month before his IH to file his application and further considered the uncertainty of when a "U visa" would be available.

Lastly, because IJs must now issue a detailed oral or written decision, it is best practice to request continuances in writing via a detailed motion that addresses each of the elements in turn, attaches relevant evidence, and allows an IJ to easily adopt your reasoning in deciding to grant a continuance. For a sample Motion to Continue, please contact your Safe Passage Project mentor.

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[129] *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."

[130] 27 I&N Dec. 755 (BIA 2020).

Priority Dates and the Visa Bulletin

One circumstance in which practitioners often need to ask for a continuance is when their client's priority date is not current. Every month, the U.S. Department of State publishes the Visa Bulletin which tells applicants when they will be eligible to apply for immigrant visas. For our SIJ clients, the Visa Bulletin generally explains when they will be able to apply for lawful permanent residency. Special Immigrants fall under the employment-based preference category four (EB4). If you have a client who is applying for or who has been granted SIJ status, you should refer to the Visa Bulletin and look at the EB4 category. If your client is from a country that has a "C" listed in the chart ("C" for current), then the client can immediately file for both SIJ and lawful permanent residency. If the client is not from one of those countries that has a "C" listed and is instead from a country with a date listed, that means that the client cannot simultaneously apply for SIJ and lawful permanent residency, unless their priority date is before the date listed. Rather, the client will need to first apply for SIJS. Once you file for SIJ, USCIS will give the client a "priority date," which reflects when the I-360 petition was by received USCIS. For example, if you have a client with an approved SIJS petition from El Salvador whose priority date is February 15, 2020, you must look at the EB4 category in the Visa Bulletin and the date listed for noncitizens from El Salvador, Honduras, and Guatemala. For March 2021 Visa Bulletin that date is June 1, 2018, which means that only those applicants with priority dates before June 1, 2018 may apply for lawful permanent residency. Because your client's priority date is February 15, 2020, they are unable to apply at this time.

ii. Administrative Closure

The Board of Immigration Appeals previously described administrative closure as a procedural tool used to temporarily remove a case from an IJ'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.[131] 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 IJs lack the authority to suspend immigration proceedings through a grant of Administrative Closure, except where specifically afforded that authority under the Code of Federal Regulations or a settlement agreement. The number of respondents now eligible for

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

Administrative Closure is exceedingly limited.[132] Due to *Matter of Castro-Tum*, administrative closure is generally not available in the Second Circuit. However, the Fourth Circuit and the Seventh Circuit have rejected *Matter of Castro-Tum* and administrative closure is available in those circuits.[133]

Considering the general unavailability of administrative closure in the Second Circuit, 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 years-long backlogs in visa numbers for certain SIJS applicants for Adjustment of Status or applicants for U Nonimmigrant Status.

iii. Status Docket

Practitioners in need of long continuances should consider making a motion to place the case on the status docket. Placing the case on the status docket will allow the case to move off the IJ's active calendar and allow respondent's counsel to update the Immigration Court as to the status of the collateral proceeding in writing, usually 30 or 60 days before the next status docket update date, until such time as the collateral matter is resolved without wasting valuable Immigration Court resources.[134] On August 16, 2019, EOIR issued a memo entitled "Use of Status Docket" to clarify when IJs should place cases on the status docket.[135] It states that IJs should only place cases on the status docket when 1) there is binding authority that the court must wait while USCIS is adjudicating a petition or application, 2) there is law or policy that requires the IJ to reserve a decision or 3) a federal court order has established a deadline for the case. This guidance is unclear and in practice differs widely, so you should speak to your Safe Passage Project mentor attorney about whether your case might be eligible for the status docket.

[132] 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.

[133] *Meza Morales v. Barr*, 963 F.3d 629 (7th Cir. 2020); *see also Zuniga Romero v. Barr*, 927 F.3d 282 (4th Cir. 2019).

[134] Please note that if no update is received, the client may be ordered removed *in absentia*, so it is extremely important to ensure timely updating of cases on the status docket.

[135] EOIR, *Use of Status Dockets* (August 16, 2019), https://www.justice.gov/eoir/page/file/1196336/download (last accessed June 1, 2021).

4.3. How to Properly File with the Court and Service on ICE Counsel

A. Service of Papers on ICE-OCC

All documents filed with the court must first be served on ICE Office of Chief Counsel (ICE-OCC). 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 to serve on ICE-OCC and one copy for yourself, which you will need to have time-stamped by the court clerk). Make sure your filing includes a Proof of Service.[136]

Before filing your documents with the court, you need to serve them on ICE-OCC by mail as ICE-OCC no longer has an in-person filing window. Be sure to complete and sign the certificate/proof of service. Note that for non-detained hearings venued at 26 Federal Plaza, 290 Broadway, and 201 Varick Street, the ICE-OCC mailing location is 26 Federal Plaza, 11th Floor, Room 11-30, New York, NY 10278.

There is an option to serve documents on ICE-OCC electronically via eService. Safe Passage Project, however, generally does not recommend serving documents on ICE electronically because of the rights you must waive to use their e-filing service and other logistical considerations. Please speak to your Safe Passage Project mentor attorney for more information.

B. Filing of Papers with the Immigration Court

Once you serve the documents on ICE-OCC by mail, you can either physically take your file copy and the court's original copy to the Immigration Court clerk or file by mail.[137] You must file with the court that has jurisdiction over your client's case. For example, if your client is in proceedings in New York City, you will need to know if the court at 201 Varick Street, 290 Broadway, or 26 Federal Plaza has jurisdiction. The NTA or Notice of Hearing will indicate the court presiding over your client's case. If you file in person, the Court clerk should stamp and keep the original filing to include in the court file and stamp your file copy so that you have evidence of filing.

Please note that at the time of publication of this manual, certain documents can be filed with the Immigration Court by email due to the COVID-19 pandemic. Please reach out to your Safe Passage Project mentor attorney to discuss if this is still and option and whether it is an option in your specific case.

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[136] For a sample proof of service, *see* Immigration Court Practice Manual, Exhibit G-1 https://www.justice.gov/sites/default/files/pages/attachments/2017/11/02/practicemanual.pdf (last accessed June 1, 2021).

[137] A list of immigration Court addresses is available here: https://www.justice.gov/eoir/eoir-immigration-court-listing (last accessed June 1, 2021).

C. An Extra Note on Service of and Filing of Papers by Mail

When serving and filing by mail, you should submit the filing via FedEx or UPS to ensure delivery and the ability to track the package.[138] You should mail one copy of the filing to ICE-OCC. Next, you should mail the original filing to the court, along with an original certificate/proof of service certifying that ICC-OCC has been served with a copy. You should also include an additional copy of the filing labeled "file copy" in the envelope to the Court, along with a self-addressed, pre-paid envelope. The Court will keep the original for its records, and stamp and return the additional "file copy" to you so that you have evidence that the court has received the filing.

For court and ICE-OCC addresses and opening hours, please see the chart in section 1.1 of this manual.

4.4. Conferencing Cases

Pre-hearing conferences in advance of an individual hearing are rare but may be scheduled at the discretion of the IJ. A conference may be held to narrow issues, to obtain stipulations between the parties, to exchange information voluntarily, and otherwise to simplify and organize the proceeding.[139]

Pre-hearing conferences may be requested by either party or initiated by the IJ. 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 Immigration Court Practice Manual.[140]

If the Court refuses to schedule a conference, you should still attempt to discuss the case with opposing counsel in advance of the hearing to narrow issues for trial. Please be aware that the ICE Assistant Chief Counsel (ICE-OCC) often receives the case file the day before the hearing, so be prepared for last-minute conversations!

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

[139] 8 C.F.R § 1003.21.

[140] Immigration Court Practice Manual. Available at: https://www.justice.gov/eoir/page/file/1084851/download (last accessed June 1, 2021).

Tips and Tricks: Talking to ICE Chief Counsel

If your client's case is venued at the Immigration Court at 26 Federal Plaza, 290 Broadway, or 201 Varick Street (non-detained cases only), 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 via email. The trick to finding out who is assigned to your case is to email the ICE-OCC duty attorney at Duty-Attorney.NYC-OCC@ice.dhs.gov. You should provide your client's name, A number, the name of the assigned IJ, and ask them which attorney will be assigned to the case. Make sure to ask them 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 opposing counsel prior to your next hearing. They may not know who will be assigned to the case if you contact ICE-OCC more than two weeks before the next hearing. You can also call (212) 264-5916 and ask to speak to the duty attorney, but they are more responsive through email.

4.5. Individual Hearing

The individual hearing is your and your client's opportunity to establish your client's eligibility for the relief they are seeking before the immigration court. The individual hearing is a trial. You will submit a brief of all the legal issues and evidence in advance of the hearing. You will present witnesses and conduct direct examinations. Expert testimony may be necessary for your client's claim. ICE-OCC will cross-examine your witnesses and may attack your client's credibility. You should be prepared to give a short closing statement. At the conclusion of the hearing the IJ usually issues a decision and your client will either receive a grant of relief or a removal order. In some cases, however, the IJ will issue a written decision, which you will receive at a later date by mail.

A. Call-up Dates and What to Submit

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 is usually set by the IJ at the master calendar hearing at which the individual hearing is scheduled and is usually 30 days before the individual hearing date but may be earlier depending on the requirements of the specific IJ. If the IJ does not set a call-up date, the default call-up date pursuant to the Immigration Court Practice Manual is 30 days in advance of the hearing.[141] 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 IJ may be disinclined to admit "late filed" evidence into the record.

[141] Delivery and Receipt, EOIR, Department of Justice. Available at https://www.justice.gov/eoir/eoir-policy-manual/ii/3/1 (last accessed June 1, 2021).

Your submission will depend on your client's case, but will generally include the following:

1. A legal brief summarizing your client's case and eligibility for relief, generally titled a "Pre-Hearing Statement";
2. A detailed table of contents describing the evidence you are submitting in support of your client's claim for relief;
3. Evidence to support your client's eligibility for relief and to refute any ICE-OCC arguments (this usually includes your client's affidavit);
4. Witness list with resumes of experts and/or affidavits of lay witnesses;
5. Criminal history chart (if applicable); and
6. Any pre-hearing motions such as a Motion for Telephonic Testimony.

It is crucial to speak to your client about any arrests, convictions, or traffic violations well in advance of submitting documents for the individual hearing. Even minor issues might make them inadmissible, thereby preventing them from obtaining lawful permanent residence, or weigh in favor of a negative exercise of discretion. ICE-OCC will be able to see your client's records through the background check, so it is essential that you are aware of any interactions your client might have had with law enforcement well in advance. Please speak to your Safe Passage Project mentor attorney about how to address possible criminal issues, such as building up positive equities or seeking a waiver of inadmissibility, if available.

B. The Role of Experts

Expert evidence, in the form of reports and/or oral testimony, can be immensely helpful to your client's case. Experts are able to confirm your client's mental state, corroborate your client's testimony, detail country conditions in asylum and other cases, and even explain why your client may have difficulty reliably testifying about past events.[142] Further, experts are permitted to base their opinion on hearsay evidence and do not have to have personal knowledge of the facts underlying their opinion.[143]

The regulations provide that IJs may consider "any oral or written statement that is material and relevant to any issue in the case."[144] 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

[142] 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.

[143] *Aguilar Ramos v. Holder*, 594 F.3d 701, 706 n.7 (9th Cir. 2010).

[144] 8 C.F.R. § 1240.7(a).

in issue."[145] 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."[146]

Although the Federal Rules of Evidence do not strictly apply in immigration hearings, you should still be familiar with them and strive to meet their requirements when submitting expert evidence for consideration to the court, as doing so will limit ICE-OCC's possible objections to their admission. 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 must also ensure that your expert's written statement is accompanied by their curriculum vitae or resume to support your argument that they are an expert.

Under the Federal Rules of Evidence, 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.[147] 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."[148]

To qualify your expert, you must establish a witness as an expert by: (1) knowledge[149], (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 in the form of an opinion.[150]

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[145] *See* Fed. Rules of Evidence at 702.

[146] *United States v. Duncan*, 42 F.3d 97, 101 (2d Cir. 1994).

[147] *See* Fed. Rules of Evidence at 702.

[148] *Id*.

[149] 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 (9th Cir. 2002).

[150] 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.

Although IJs 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 respondent was prevented from reasonably presenting their case.[151]

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.[152] That said, if there is specific discovery you would like, request a pretrial conference[153] 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-OCC has easier access to it, plead to the court at that conference that it is more time- and cost-effective for ICE-OCC to disclose it. Make sure that you are not requesting items that are specifically excluded from discovery by regulations and/or statute. Pre-trial conferences and discovery requests are rare in removal proceedings.

Under existing regulations, you or ICE-OCC may request a subpoena once removal proceedings have begun. Subpoenas may also be issued *sua sponte* by the IJ. 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.[154] It is highly unusual for either party or the IJ to request a subpoena in immigration court.

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.[155] If the IJ is satisfied that the witness will otherwise be unavailable and that the evidence is essential, the IJ should issue a subpoena.[156]

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

In extremely rare cases, IJs may order 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.[157]

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[151] *Lin v. Holder*, 565 F.3d 971(6th Cir. 2009).

[152] *Matter of Magana*, 17 I&N Dec. 111 (BIA 1979).

[153] 8 C.F.R. §§ 1003.21.

[154] 8 C.F.R. §§ 1003.35(b)(1)-(2), 1287.4(a)(2)(ii)(A)-(B).

[155] 8 C.F.R. §§ 1003.35(b)(2).

[156] *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).

[157] 8 C.F.R. § 1003.35(a).

D. Evidence

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 IJ.[158]

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 exercise of discretion. Please note that any evidence not submitted to the Court prior to the IJ's order will not be considered on appeal.

When gathering evidence, you should keep in mind that ICE-OCC 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 ICE-OCC may have against your client.

If your client has a prior immigration history, well in advance of your client's individual hearing, you must fully examine the government records by requesting your client's file from every immigration-related agency they 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 their home country and from any interactions with law enforcement in the United States and their home country.[159]

The admission of evidence, including hearsay, is favored so long as the evidence is relevant and fundamentally fair.[160] The Federal Rules of Evidence are not binding in Immigration Court but can provide guidance when determining the admissibility of evidence. You may also raise objections based on the Federal Rules of Evidence. Always ensure that any objections you make are made on the record, because if they are made off the record the issue cannot be raised on appeal. Evidence should be properly marked pursuant to the requirements at Chapter 3 of the Immigration Court Practice Manual.[161]

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);

[158] 8 C.F.R. § 1003.41, 8 C.F.R. § 1287.6(b).

[159] *See* section 3.2 of this manual on how to submit FBI and FOIA requests at Section 3.2.

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

[161] *See* Immigration Court Practice Manual Sec. 3.3, *available at*: https://www.justice.gov/eoir/eoir-policy-manual/3/3 (last accessed June 1, 2021).

- 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;
- Proof of Service on ICE-OCC.

You may submit evidence separately in the above format, or it may be included as exhibits to your brief (pre-hearing statement).

Standard Checklist of Objections to Documentation Provided by ICE-OCC

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 Federal Rules of Evidence do not strictly apply, these objections are unlikely to result in the IJ 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.

E. Witnesses

Your client and any witnesses presented will be questioned by you, the ICE-OCC attorney and possibly the IJ. You must ensure that you present evidence establishing 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 the IJ grants a Motion for Telephonic Appearance.

Your client's testimony is central to your case, especially in cases where your client does not have much or any 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.[162] Credibility is determined by a totality of the circumstances, and the IJ may make a determination based on the witness' demeanor, candor, responsiveness, plausibility 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 IJ must allow an opportunity for the witness to clarify the inconsistencies 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 ICC-OCC puts on no case, relying solely on cross-examination of your client and witnesses.

Respondent's counsel must provide a witness list to the court by the call-up date before an individual hearing. The witness list, listing both expert and non-expert witnesses, including the respondent, should include a summary of what the witness will testify to at the individual hearing, the estimated length of testimony, and, if applicable, the witnesses' A number and the language in which they will testify. You must also provide the court with an affidavit for each lay witness and a curriculum vitae or resume for each expert witness by the requisite call-up date.

It is generally best to over-include potential witnesses on your list. Your list should include all potential witnesses even if you think some may not be called. If a witness is not on the list, they will not be allowed to testify at the hearing. Inclusion does not bind you to offering them for testimony and cross-examination, but it does allow you room to negotiate with ICE-OCC. For example, you might concede not offer a particular witness so long as ICE-OCC concedes to the admissibility and reliability of the witnesses' written testimony in their affidavit.

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 Testimony by the call-up date, to have the opportunity for them to testify remotely.

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

[162] PUBLIC LAW 109–13—MAY 11, 2005.

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

- Speak to immigration practitioners well ahead of time to discover your assigned IJ's practices with regard to foreign testimony. Some IJs refuse to admit it and rely instead on the witnesses' written evidence.
- 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 a direct examination and for ICE-OCC to conduct cross-examination.
- If it is a witness that is of great corroborative importance, you may want to file a separate motion requesting admission of testimony by a witness outside of the U.S. You may want to argue that the Immigration Court 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." This would allow you to either have your witness testify telephonically before an attorney licensed in the country where testimony is being offered, or before an individual at the U.S. embassy in the country where the testimony is being offered, and 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.[163] IJs are also expected to make reasonable modifications to the courtroom for juveniles. These modifications may include permitting juveniles to testify outside the witness stand next to a trusted adult or friend.

EOIR tasks immigration IJs with determining that a noncitizen youth is competent to testify. Amongst other considerations (like the presence of mental illness),[164] the IJ must determine whether the noncitizen youth is of sufficient mental capacity to understand the oath and to give sworn testimony.

[163] *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' ("UNHCR") *Guidelines on Policies and Procedures in Dealing with Unaccompanied Minors Seeking Asylum* (1997).

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

EOIR guidance allows the IJ to modify the oath to account for the noncitizen youth's mental capacity, and it specifically advises IJs 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. IJs should also explain to the noncitizen youth witness that they should not feel at fault if an attorney raises an objection to a question.[165] In addition, IJs 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.

If you suspect that your client has competency issues, you should raise this issue as soon as possible. Once the IJ determines that a noncitizen youth is competent to testify, the IJ 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.[166]

Tip Sheet: Noncitizen Youth Witnesses

- 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.
- Be careful when preparing your client to testify. Noncitizen youth may be eager to please you and may inadvertently change their testimony. Ask open-ended questions that do not suggest an appropriate answer.
- If you think that your client's competence is an issue, ensure that you preserve the objection on the record and raise it with the court as soon as possible.

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, otherwise the court could claim that the noncitizen youth was unable to meet their burden of proof.[167]

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

[165] *See* EOIR *Operating Policies and Procedures Memorandum 17-03: Guidelines for Immigration Court Cases Involving Juveniles*, Including Unaccompanied Alien Children, December 20, 2017, https://www.justice.gov/eoir/file/oppm17-03/download (last accessed June 1, 2021).

[166] *Id.*

[167] *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).

others or otherwise sufficient to support the claim,"[168] and allow you to proceed to prove your client's claim through other witnesses and additional testimony.

F. Briefing

In your pre-hearing brief, you should brief all the key aspects and elements of your claim and include relevant case law. The brief should also include a summarized statement of the facts based on your client's affidavit. If your case is an asylum case based on particular social group, be sure to list all the particular social groups your client may belong to in the brief and fully analyze the most relevant ones. There is a 25-page limit for briefs submitted to immigration court.[169]

G. Closing Statements

You should be prepared to give very short opening and closing statements. "Denial of the opportunity to present opening statements or closing arguments at a deportation proceeding may constitute a due process violation."[170] At the conclusion of the individual hearing, you may also ask the IJ if they wish to have any aspect of the case briefed in writing in lieu of an oral closing statement. You must make this request before the IJ issues a decision.

H. 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 if necessary to "fee-in" the application with USCIS following the defensive filing instructions;
(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

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[168] *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 IJ." *Id*. at 611. Accordingly, "where a mental health concern may be affecting the reliability of the applicant's testimony, the Immigration 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." *Id*. at 612.

[169] Immigration Court Practice Manual, Chapter 4.19(b).

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

No later than Court-Imposed Call-Up Date (default is at least 30 days before hearing):

(1) Submit the legal brief summarizing your client's case and eligibility for relief;
(2) Submit evidence to support your client's eligibility for relief and to refute any ICE-OCC arguments (this usually includes your client's affidavit);
(3) Submit the witness list with resumes of experts and/or affidavits of lay witnesses;
(4) Submit a criminal history chart (if applicable);
(5) File any pre-hearing motions such as a Motion for Telephonic Testimony;
(6) Ensure that your client has attended their biometrics appointments. If your client did not recently attend a biometrics appointment, but did so in the past, please reach out to your Safe Passage Project mentor for the current procedure on how to request that biometrics be rerun.

Before the Hearing:

(1) File a Change of Address form for your client if their address or telephone number has changed since their last master calendar hearing;
(2) Prepare a draft of your direct questions for your witnesses' testimony. Have this draft reviewed by your mentor attorney;
(3) Conduct at least one mock hearing with your client. Enlist a colleague to play the IJ and the ICE-OCC attorney;
(4) Prepare testimony of other witnesses and practice with them as well;
(5) Make sure to address any discrepancy in testimony that may affect the credibility of your client;
(6) Ensure that your client and other witnesses know the time and place of the individual hearing and make a plan for where to meet your client on the day of the hearing. Also make a plan for what form of transportation they will use to attend the hearing (subway, taxi, Uber, etc.);
(7) Prepare a very short closing statement;
(8) Gather originals of any documents in a folder in case ICE-OCC or the IJ ask to inspect them;
(9) Bring a calling card if you will need it for telephonic witnesses;
(10) Prepare a trial binder with copies of all the previous court submissions as well as any relevant statutes, regulations and case law you may wish to refer to during the hearing.

4.6. The Interplay between Common Defenses to Removal for Youth and Removal Proceedings

While there are many different types of defenses to removal, below we discuss the main types of relief that Safe Passage Project clients seek and the interplay of that relief with removal proceedings.

A. Special Immigrant Juvenile Status and Removal Proceedings[171]

Special Immigrant Juvenile Status (SIJS) is an affirmative immigration benefit that is available to unmarried noncitizen youth under the age of 21 who are dependent on a juvenile court in the U.S., who have been abused, neglected, or abandoned by one or both parents, and whose best interest would not be served by returning to their home country. SIJS is a path to obtaining lawful permanent residence in the U.S.

The process to obtain SIJS includes a family court proceeding and the filing of a Form I-360, Petition for SIJS with USCIS. Once the so-called "priority date," explained below, for the noncitizen youth's I-360 petition is "current," the youth may then apply to adjust their status to that of lawful permanent resident under INA § 245(a).

Only a certain number of adjustment of status applications based on SIJS may be approved each year. The statute takes the total number of so-called "visa numbers" permitted by law and divides the allocation equally by country: each country is allotted a maximum of just under 700 SIJS adjustments per year. Guatemala, Honduras, and El Salvador are currently the countries with the highest numbers of SIJS applicants, and for the past several years, all of the SIJS visa numbers available to citizens of those countries have been distributed. For this reason, there is essentially a "waiting list" to apply to adjust status for SIJS applicants from those countries.

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 their priority date is current, as dictated by the U.S. Department of State's Visa Bulletin. The Department of State's Visa Bulletin is available at: https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html. As of the publication of this Manual (June 2021), the Department of State's Visa Bulletin indicates that visas are available for SIJS applicants from Honduras, Guatemala and El Salvador who filed their I-360, Petitions for Special Immigrant Juvenile Status before November 1, 2018. The priority date of the I-360 petition refers to the

[171] Safe Passage Project has a detailed manual dedicated to explaining Special Immigrant Juvenile Status. Please contact your Safe Passage Project mentor for a copy.

date that the petition was received by USCIS, and it will be printed on the USCIS receipt notice for the I-360 petition.

i. Navigating removal proceedings with a pending I-360, Petition for SIJS or an approved I-360, Petition for SIJS with no current priority date

For noncitizen youth in removal proceedings with either a pending I-360, Petition for SIJS or an approved I-360, Petition for SIJS but no current priority date, the goal is to avoid a final removal hearing until they are able to apply to adjust status. At present, practitioners may seek to place their client's case on the status docket or to seek a lengthy continuance. Please reach out to your Safe Passage Project mentor for up-to-date information and sample motions.

ii. Navigating removal proceedings with an approved I-360, Petition for SIJS and a current priority date

Once the noncitizen youth's I-360, Petition for SIJS has been approved by USCIS and their I-360 priority date is current, they are able to apply to adjust status, if otherwise eligible. Although USCIS has exclusive jurisdiction over the I-360, Petition for SIJS, the question of who has jurisdiction over the I-485, Application to Adjust Status is not as straightforward. For noncitizen youth who are not in removal proceedings, USCIS always has jurisdiction over the I-485 Application based on SIJS. However, for the majority of noncitizen youth in removal proceedings, it is instead EOIR that has jurisdiction over their I-485, Application to Adjust Status.[172] One exception is for noncitizen youth in removal proceedings who entered the U.S. as "arriving aliens." USCIS has jurisdiction over I-485, Application to Adjust Status for "arriving aliens."[173] Noncitizen youth who attempted entry through a port of entry without inspection, i.e., they were not admitted or paroled are usually charged as "arriving aliens" on their NTA. Please check your client's NTA to see if they have been charged as an "arriving alien."

If a noncitizen youth in removal proceedings has a current priority date and wishes for their application to adjust status to be adjudicated by USCIS instead of the immigration court, they can seek to have their removal proceedings terminated by the immigration court, through a Motion to Terminate. If removal proceedings are terminated, USCIS then has jurisdiction over their adjustment of status application and the noncitizen youth can file an I-485, Application to Adjust Status with USCIS. If the IJ refuses to grant termination, the noncitizen youth will need to file for adjustment of status with the immigration court and prepare for an individual hearing on their adjustment application.

[172] *See* 8 C.F.R. § 1245.2(a)(1)(i) ("In the case of any alien who has been placed in deportation proceedings or in removal proceedings (other than as an arriving alien), the immigration IJ hearing the proceeding has exclusive jurisdiction to adjudicate any application for adjustment of status the alien may file."

[173] *See* 8 C.F.R. § 1245.2(a)(1)(ii) ("In the case of an arriving alien who is placed in removal proceedings, the IJ does not have jurisdiction to adjudicate any application for adjustment of status filed by the arriving alien.").

iii. Adjudication of the I-485, Application to Adjust Status Before the Immigration Court

If the noncitizen youth wishes to move forward with adjudication of their I-485, Application to Adjust Status before the immigration court, or if the Motion to Terminate is denied by the IJ, the next step will be to schedule an individual hearing and prepare the required forms and documentation in advance of the hearing and by the scheduled call-up of date.

The original I-485, Application to Adjust Status must be served on ICE-OCC and filed with the immigration court. A copy of the I-485, Application to Adjust Status, along with the filing fee or a fee waiver order from the IJ, must also be filed with USCIS in order to obtain a biometrics appointment so that background checks can be completed before the individual hearing. Please carefully review the Pre-Order Filing Instructions, which explain which documents must be filed with USCIS. The Pre-Order Filing Instructions can be found here: https://www.uscis.gov/sites/default/files/document/legal-docs/Pre%20Order%20Instructions%20EOIR.pdf.

In addition to the I-485, Application to Adjust Status, your will also submit documentation supporting your client's eligibility to adjust status and supporting a favorable exercise of discretion. The I-485, Application to Adjust Status, pre-hearing brief/statement and the supporting documentation must be submitted by the call-up date set by the IJ. You will also submit a witness list, explaining who will testify at the individual hearing, and a criminal history chart, if applicable.

It is crucial to speak to your client about any arrests, convictions, or traffic violations well in advance of the individual hearing. Even minor issues might make them inadmissible, thereby preventing them from obtaining lawful permanent resident status, or weigh in favor of a negative exercise of discretion. ICE-OCC will be able to see your client's records through the background check; it is therefore essential that you are aware of any interactions with law enforcement well in advance. Please speak to your Safe Passage Project mentor attorney about how to address possible criminal issues, such as building up positive equities or seeking a waiver of inadmissibility, if available.

The noncitizen youth will also be required to attend a medical examination by a USCIS certified civil surgeon and submit a Form I-693, Report of Medical Examination and Vaccination Record, in a sealed envelope on the day of the individual hearing.[174]

At the individual hearing, you will appear with your client before the IJ and ICE-OCC. You should expect to conduct a short direct examination of your client. ICE-OCC will likely conduct a cross-examination of your client and the IJ may also ask your clients questions. You should be prepared to make a short closing statement, especially if there are any contesting issues in your case. At the end of

[174] You can find a list of the civil surgeons closest to your client's location at https://my.uscis.gov/findadoctor (last accessed June 1, 2021).

the hearing, the IJ will likely issue an oral decision. If your client is granted adjustment of status, follow the Post-Order Instructions to obtain your client's Lawful Permanent Resident Card. The Post-Order Instructions can be found here: https://www.uscis.gov/sites/default/files/document/guides/PostOrderInstructions.pdf.

B. SIJ Adjustment Individual Hearing Documents to Submit to the Court

1. Original I-485 Application to Adjust Status
2. Pre-Hearing Statement/Brief
3. Supporting evidence, including:
    a. ORR Verification of Release Form (if applicable)
    b. Birth Certificate with English translation
    c. Copy of passport (if applicable)
    d. I-360 Approval Notice
    e. I-485 receipt
    f. Certificates of disposition (if applicable)
    g. Proof of payment of any traffic tickets (if applicable)
    h. Documents that go to a favorable exercise of discretion such as:
        i. proof of school enrollment
        ii. diplomas
        iii. letters of support from teachers, religious leaders, other community members
        iv. awards
        v. IRS tax transcripts
        vi. Affidavits attesting to the respondent's good moral character
        vii. I-693, medical examination from a USCIS certified civil surgeon in a sealed envelope
4. Witness List
5. Criminal history chart (if applicable)

C. Asylum for Youth in Removal Proceedings

Under U.S. immigration law, any person fleeing persecution who arrives at our borders, or is already in the United States, may seek asylum.[175] While this premise is simple, the process an asylum-seeker must navigate in order to obtain such protection is incredibly complex.

[175] INA § 208(a)(1).

To qualify for asylum, an applicant must prove that they meet the definition of a refugee, are statutorily eligible to apply for asylum, and should be granted asylum as a matter of discretion.[176]

Most juveniles with whom Safe Passage Project works are nationals 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 in which they operate.[177] This has led a huge number of young people to flee their home countries and seek protection in the United States.[178]

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.[179] In practice, however, there are few additional safeguards for noncitizen youth in the asylum process.

For our purposes, the most important of these safeguards is the "unaccompanied alien child" (UAC) designation, discussed in detail below. If your client was designated as a UAC upon entry in the U.S., then they also qualify for two other safeguards: USCIS Asylum Office filing and the One-year Bar Exemption. These safeguards are discussed below and are addressed in even greater detail in the Safe Passage Project asylum manual.

i. Eligibility for Asylum in General

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.[180]

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

[177] *See* Council on Foreign Relations, *Central America's Turbulent Northern Triangle*, https://www.cfr.org/backgrounder/central-americas-turbulent-northern-triangle (last accessed June 1, 2021).

[178] *See* Sonia Navarro, *Enrique's Journey*, Random House LLC (2007), a detailed account of how unaccompanied noncitizen youth travel from the Northern Triangle to the United States.

[179] *See* United Nations High Commissioner for Refugees (UNHCR), *Handbook on Procedures And Criteria For Determining Refugee Status* and Guidelines on International Protection (Reissued Feb. 2019), https://www.unhcr.org/en-us/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html (hereinafter UNHCR Handbook) (last accessed June 1, 2021); 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).

[180] *See* INA § 208.

A grant of asylum allows a person to work, terminate removal proceedings, and apply to adjust their immigration status to that of a lawful permanent resident (LPR) after one year as an asylee.[181] A grant of asylum also allows the person to access certain public benefits and petition for derivative status for their spouse and their unmarried noncitizen youth under the age of 21.[182]

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. 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:

Any person who is:
- Outside any country of such person's nationality, or
- In the case of 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 themselves 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 (as a result of the applicant's) protected characteristic:
- Race
- Religion
- Nationality
- Member on a particular social group
- Political opinion.

[181] USCIS, *Benefits and Responsibilities of Asylees* (2018), https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/benefits-and-responsibilities-of-asylees (last accessed June 1, 2021).

[182] *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 (this requirement does not apply to UACs)
- They filed their asylum application within one-year of entering the United States (this requirement does not apply to UACs)
- They did not previously receive an asylum denial
- They have not "ordered, incited, assisted or otherwise participated" in the persecution of others
- They have not been convicted of a "particularly serious crime" in the United States
- There is no reason to believe that they have committed a serious non-political crime outside of the United States
- There is no reasonable ground for regarding them as a danger to the security of the United States
- They do not meet the definition of a terrorist, have not participated in terrorist activity, and have not given material support to a terrorist organization
- They did not firmly resettle in another country before arriving in the United States.[183]

ii. UAC Asylum

Most of the noncitizen youth that are Safe Passage Project clients with have been classified by the U.S. government as "unaccompanied alien children" (UAC), a legal designation given to them upon their apprehension at the border.[184] To be designated a UAC at the time of apprehension, a noncitizen youth must:

- Be under the age of 18;
- Have no lawful immigration status in the United States; and
- Have neither a parent nor a legal guardian available to provide them with care or physical custody in the United States.[185]

Young people who entered the United States after the age of 18 or entered with a parent will not be designated as UACs.

[183] INA §§ 208(a)(2); 208(b)(2).

[184] We prefer the acronym UAC for, while the term "alien" is part of the statute, it is very difficult for a young person to understand why their attorney is using the word, "alien." In recent years the ICE attorneys and judges have also switched to the acronym UAC and the term "unaccompanied minor."

[185] *See* Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457, 122 Stat. 5044; USCIS, *Minor Noncitizen Youth Applying for Asylum By Themselves*, https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/minor-children-applying-for-asylum-by-themselves (last accessed June 1, 2021).

Under prior policy, once a noncitizen youth had been designated a UAC, they continued to be a UAC throughout their immigration removal proceedings and USCIS adjudication, even if the noncitizen youth turned 18 years old, reunited with a parent, or had an adult appointed as their legal guardian.[186]

While some of the general asylum requirements do not apply to UACs,[187] for a UAC to receive asylum, they must prove that they meet the definition of a refugee, that they are statutorily eligible to apply for asylum, and that they should be granted asylum as a matter of discretion.[188]

a. UAC Asylum and Jurisdiction

One of the primary safeguards for UACs is that USCIS has initial jurisdiction over UAC asylum applications, regardless of whether the noncitizen youth is in removal proceedings.[189] This means that you will submit the I-589 asylum application directly to USCIS according to the instructions,[190] and your client will first have an interview at a USCIS asylum office, to determine if they are eligible for asylum. The asylum office may then either grant your client asylum or "refer" their case to the immigration court, who will then hear your client's asylum application *de novo* during an individual hearing in immigration court. This safeguard is significant because it allows UACs the opportunity to first present their claim in a non-adversarial setting (the asylum office) before an adjudicator (the asylum officer) trained in child-sensitive interviewing techniques. It also allows UACs to opportunities to present their claim: once at the USCIS asylum office and again during an individual hearing in immigration court if they are not successful at the asylum office.

At the same time as your client is applying for asylum before USCIS, their removal proceedings will likely be moving forward. Your job at your client's master calendar hearings is to inform the court about your progress before the asylum office. Once the I-589 asylum application has been filed with USCIS and you have the receipt, you should submit a Motion to Place the Case on the Status Docket, which the IJ should grant pursuant to the most recent EOIR memo regarding the status docket.[191] If your client is

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[186] *See* USCIS, *Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children* ("2013 memorandum"), available at https://www.uscis.gov/sites/default/files/document/memos/determ-juris-asylum-app-file-unaccompanied-alien-children.pdf (last accessed June 1, 2021).

[187] *See* UNHCR Handbook; *see also* AOBTC GUIDELINES, *supra*, note 82.

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

[189] TVPRA § 235(d)(7)(B), *codified* at 8 U.S.C. § 1158(b)(3)(C), INA § 208(b)(3)(C).

[190] The UAC asylum filing instruction sheet is available at https://www.safepassageproject.org/wp-content/uploads/2014/02/UAC.Instruction.Sheet_.as-of-2014.pdf (last accessed June 1, 2021); also, refer to the Safe Passage Project Asylum Manual for more information.

[191] EOIR, *Use of Status Dockets* (August 16, 2019), https://www.justice.gov/eoir/page/file/1196336/download (last accessed June 1, 2021).

granted asylum by the asylum office, you should then submit a Motion to Terminate your client's removal proceedings. An approval from the asylum office is a final decision.

Please note that if your client was not designated as a UAC and is in removal proceedings, they are subject to the same rules as adults in removal proceedings seeking asylum and the immigration court has exclusive jurisdiction over their asylum application. This means that non-UAC youth must submit their I-589 application for asylum directly to the immigration court and proceed to an individual hearing.

The Lafferty Memo[192] and *J.O.P. v. DHS*[193]

In May 2019, USCIS issued a new memo known as the "Lafferty Memo," which said that the immigration court has initial jurisdiction over an asylum application unless the applicant can prove to USCIS' satisfaction that they met the UAC definition *at the time* they filed the asylum application. Under the previous policy from 2013, known as the "Kim Memo," USCIS was required to take jurisdiction over the application even if there was evidence that the applicant turned 18 or reunified with a parent or legal guardian after the UAC determination was made.

In response to the "Lafferty Memo," four UAC asylum seekers filed a lawsuit in the U.S. District Court for the District of Maryland, *J.O.P. v. DHS*, challenging the Lafferty Memo and arguing that it violated the TVPRA, Due Process Clause, and the Administrative Procedures Act. There is now a nationwide preliminary injunction against the Lafferty Memo and USCIS must follow the original 2013 policy. At the time of publication of this manual, the case is ongoing.

b. The One Year Deadline

In general, applicants must file for asylum within one year of their arrival into the United States or be barred from seeking asylum.[194] Even if they have not yet had a master calendar hearing, they must file the asylum application with the immigration court prior to their one-year deadline.[195]

Noncitizen youth designated as UACs are not subject to this one-year filing deadline. However, we strongly suggest preparing and filing a UAC's asylum application with USCIS as soon as possible.

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[192] USCIS, *Updated Procedures for Asylum Applications Filed by Unaccompanied Alien Children* (May 31, 2019), https://www.uscis.gov/sites/default/files/document/memos/Memo_-_Updated_Procedures_for_I-589s_Filed_by_UACs_5-31-2019.pdf (last accessed June 1, 2021).

[193] No. 19 01944 (D. Md. filed July 1, 2019). *See* CLINIC Legal, *Fact Sheet: Immigration Court Considerations for Unaccompanied Children Who File for Asylum with USCIS While in Removal Proceedings, in Light of J.O.P. v. DHS, No. 19-01944 (D. Md. filed July 1, 2019)*, https://cliniclegal.org/resources/asylum-and-refugee-law/fact-sheet-immigration-court-considerations-unaccompanied-children (last accessed June 1, 2021).

[194] INA § 208(a)(2)(B).

[195] Refer to the Safe Passage Project Asylum Manual and your mentor attorney for more information.

Similarly, if a UAC has already turned 18 years of age, we recommend filing their asylum application with USCIS as soon as possible and within a reasonable period (generally under 6 months of their turning 18).[196]

Filing a Non-UAC Asylum Application with the Court (A Defensive Filing)

- Submit the completed original I-589 to the immigration court.
- There is no filing fee for the asylum application.
- Unless otherwise instructed, you do not need to submit all of your supporting documentation with your initial submission.
- Pay attention to the judge's instructions because they may have specific requirements.
- After serving a copy on ICE-OCC and filing with the immigration court, you will also need to mail the first three pages of the application and your G-28 to the Nebraska Service Center according to the defensive filing instructions at https://www.uscis.gov/sites/default/files/document/forms/PreOrderInstr.pdf. This will generate a receipt notice and a biometrics appointment notice.

c. UAC De-Designation

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 UAC and thus still eligible for certain protections under the statute.[197]

On October 16, 2018, the Board of Immigration Appeals issued a decision in *Matter of M-A- C-O*, 27 I&N Dec. 477 (BIA 2018), in which, for the first time, they found that UACs age out of the designation. According to *M-A-C-O*, if the UAC applied for asylum after they turned 18 years old, the UAC benefits do not attach, and the immigration judge may take original jurisdiction over the asylum application, as opposed to the asylum office. The decision does not discuss UACs that turn 18 after they file the I-589.

Since the preliminary injunction in the *J.O.P. v. D.H.S.* litigation, which addresses a USCIS policy memo, has no effect on *Matter of M-A-C-O*, and as the changing government policies create insecurity about the stability of the UAC designation, it is important to work diligently to prepare and file all

[196] 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.

[197] *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* (Sept. 19, 2017), available at: https://cliniclegal.org/file-download/download/public/752 (last accessed June 1, 2021).

application for relief as expeditiously as possible. Equally important is to ensure that, if possible, any asylum application for a UAC is filed prior to their turning 18.

IMPORTANT!

If there is concern that your client may lose their UAC designation (for example they are turning 18 years old or the government has indicated they plan to rescind the designation), make sure to contact your Safe Passage Project mentor attorney immediately.

iii. Pretermitting Asylum Claims

Under federal regulation 8 C.F.R. § 1208.13, IJ's have the ability to "pretermit" or essentially dismiss an asylum application if the applicant does not establish *prima facie* eligibility for asylum, withholding of removal, or protection under the Convention Against Torture. The IJ can do this *sua sponte* based on the record or on a motion from ICE-OCC. The IJ does not have to hold a hearing before pretermitting the application, but they must consider any response to the motion to pretermit.[198]

Often, the most difficult element of an asylum claim to prove is the protected ground, especially where the protected ground is your client's membership in a particular social group. Because of this, some IJs ask respondents to file a summary of their claim along with a brief explanation of any applicable particular social groups when the respondent files the I-589 or the individual hearing is scheduled. There is a risk that the judge may pretermit your client's claim if the IJ or ICE-OCC does not think that you have established *prima facie* eligibility. It is important to work with your Safe Passage Project mentor attorney to craft your client's claim. If you are asked to submit a summary in advance of the individual hearing, it is crucial to remind the court in your summary that all claims made before and at the individual hearing, prior to its completion, are eligible to be considered on appeal.[199]

iv. Tips for Individual Asylum Hearings

If your client was not designated a UAC or if your UAC client's case was referred back to the immigration court from the asylum office, they will have a final individual asylum hearing in court. Please refer to Section 4.7 of this manual, as all of the information on individual hearings is applicable to asylum individual hearings.

Your submission will depend on your client's case, but will generally include the following:

[198] 8 CFR § 1208.13.

[199] *See Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189 (BIA 2018).

1. An updated I-589, asylum application, if needed. By the time the individual hearing occurs it may be many months or years after you first submitted the I-589. You may want to submit an updated I-589 application before the individual hearing.
2. Legal brief summarizing your client's case and eligibility for relief, this should include a thorough analysis of the proffered protected grounds, including all applicable particular social group arguments. You must articulate all particular social group claimed by an asylum-seeker at trial because new social group formulations delineated on appeal cannot generally be considered by the Board of Immigration Appeals.[200]
3. Evidence to support your client's eligibility for relief and to refute any ICE-OCC arguments (at a minimum this should include your client's affidavit and may also include expert affidavits (such as a psychological evaluation or country conditions' expert affidavit), records from home country (such as police reports or medical records), and any other corroborating evidence.
4. Country conditions evidence with relevant selections highlighted
5. Witness list with resumes of experts and/or affidavits of lay witnesses
6. Criminal history chart (if applicable)
7. Any pre-hearing motions such as a Motion for Telephonic Testimony

If your client's case was referred from the asylum office, then ICE-OCC should already have a copy of the submission you made to the asylum office and may provide a copy to the court. The court may also ask you to file the I-589 with the court even if ICE-OCC already has it from the asylum office. It is important to note that ICE-OCC will usually have access to the asylum officer's notes and will attempt to use them to cross-examine your client. You can object based on their relevance because the officer is not available for cross-examination, but the IJ will often admit this evidence.

USCIS is not able to grant withholding of removal or relief under the Convention Against Torture, but the IJ is able to grant that relief at an individual hearing. Please refer to the Safe Passage Project Asylum Manual and speak to your Safe Passage Project mentor attorney prior to your client's individual hearing about the differences between these forms of relief and a grant of asylum.

D. U Nonimmigrant Status

U Nonimmigrant Status, commonly known as a "U visa" grants lawful status to victims of certain crimes that took place in the U.S. and who have cooperated with law enforcement in the investigation or prosecution 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 someone who:

[200] *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189 (BIA 2018).

1. Was 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:
2. 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.

3. Cooperated with law enforcement in the investigation or prosecution of the crime(s) committed against them;

4. Suffered substantial physical and mental harm as a result of the crime; and

5. Obtained 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

6. Can demonstrate that they are not inadmissible under INA § 212; but if they cannot do so, they can request a waiver of most applicable grounds of inadmissibility.

USCIS has exclusive jurisdiction over the U Nonimmigrant Status petition. Accordingly, even if your client is in removal proceedings, the U Nonimmigrant Status petition will be submitted to and adjudicated by USCIS. At the time you submit the U Nonimmigrant Status Petition to USCIS, you may also want to submit derivative applications for qualifying relatives. Please speak to you Safe Passage Project mentor attorney for more details.

Currently, there is an estimated 5 year processing time for U Nonimmigrant Status petitions to receive conditional approval and it may be up to 15 years to receive final approval.[201] The reason there is such a long wait is because Congress only allocates 10,000 "U visas" per year and more than 10,000 people a year have applied for the last decade.[202] Previously, upon filing of the USCIS U Nonimmigrant Status petition receipt to the IJ, the case would be administratively closed. Now that administrative closure is no longer available, an IJ may order a respondent with a pending U Nonimmigrant Status petition removed due to the extraordinarily long wait time. Therefore, if you represent a client eligible for U nonimmigrant status or with a pending petition, you will need to seek continuances or placement on the status docket while the petition is pending.

[201] USCIS, Check Case Processing Times, https://egov.uscis.gov/processing-times/ (last accessed June 1, 2021).

[202] TVPA; P.L. 106-386, as amended; *see also* Congressional Research Service, *Immigration Relief for Trafficking Victims* (Oct. 28, 2020), https://fas.org/sgp/crs/homesec/R46584.pdf (last accessed June 1, 2021).

Unfortunately, in January 2020, the BIA issued a decision that makes it more difficult to obtain a continuance in U nonimmigrant status cases. In *Matter of Mayen*, the BIA held that the IJ did not "clearly err" when the IJ ordered a U nonimmigrant status applicant removed, who was prima facie eligible for the status because of "secondary factors."[203] Those factors included the fact that the respondent had waited 10 years to apply for U Nonimmigrant Status, was in immigration detention, and it was unclear how long he would have to wait for U Nonimmigrant Status approval. When seeking a continuance for your client it is important to distinguish your case from these facts.[204]

Once your client's U Nonimmigrant Status petition is approved by USCIS, you should seek to terminate removal proceedings before the IJ. After 3 years, those with U Nonimmigrant Status may apply for lawful permanent residency, if they meet all of the requirements.

In the event that your client is ordered removed due to the long wait time, your client may be able to consular process from abroad and return to the United States as a U Nonimmigrant Status recipient. This is partially due to the fact that a noncitizen can receive U Nonimmigrant Status despite a removal order.[205] If your client has a removal order and is still in the United States when the U status is approved, you will need to submit a Motion to Reopen to the immigration court and terminate proceedings to vacate the removal order.

E. 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 and certain derivative family members to live and work in the United States.[206] The USCIS Vermont Service Center has sole jurisdiction over these petitions. To qualify, your client must establish that they:

- were 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,

[203] 27 I&N Dec. 755 (BIA 2020).

[204] Sarah Bronstein,Rebecca Scholtz, *Seeking U Nonimmigrant Status While in Removal Proceedings: New Challenges from the BIA,* CLINIC Legal (Feb. 27, 2020), https://cliniclegal.org/resources/appeals/seeking-u-nonimmigrant-status-while-removal-proceedings-new-challenges-bia (last accessed June 1, 2021).

[205] *See* Congressional Research Service, *Immigration Relief for Trafficking Victims* (Oct. 28, 2020), https://fas.org/sgp/crs/homesec/R46584.pdf (last accessed June 1, 2021).

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

through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery."[207]

- are in the United States, "on account of" the trafficking to which they were subjected.[208]
- are 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. This requirement does not apply if the noncitizen is under the age of 18.[209]
- would suffer extreme hardship if removed from the United States; and
- are admissible to the United States.[210]

USCIS has sole jurisdiction to adjudicate a Petition for T Nonimmigrant Status, whether or not the noncitizen is in removal proceedings.[211] Hence, a noncitizen in removal proceedings, and even one with a final order of removal, must file any application for T Nonimmigrant Status with USCIS. At the time you submit the T Nonimmigrant Status Petition to USCIS, you may also want to submit derivative applications for qualifying relatives. Please speak to you Safe Passage Project mentor attorney or more details.

A noncitizen in removal proceedings who is applying for T Nonimmigrant Status may seek a continuance, placement of the case on the status docket, or ask ICE-OCC to join in a motion for administrative closure or even termination pending the adjudication of the T Nonimmigrant status application.[212] In fact, where a noncitizen is pursuing T Nonimmigrant Status is one of the few situations in which the regulations expressly provide authority for the IJ to administratively close or terminate

[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 in the investigation or prosecution. 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 apply for a waiver of the inadmissibility ground(s) by filing a Form I-192.

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

[212] 8 CFR § 214.11(d)(8).

proceedings upon a joint motion.[213] There is an annual limit of 5,000 "T visas" but the limit has not been reached during the last 10 years.[214] However, there is currently a wait time of 1.5 to 2.5 years for approval.[215]

After a petition for T Nonimmigrant Status is submitted, USCIS will make an initial determination if the application is "bona fide" and then a subsequent *de novo* determination as to whether it will approve or deny the petition. If USCIS determines the application is "bona fide," such decision will automatically stay the execution of any final order of removal. If T Nonimmigrant Status is granted, any final removal order issued by DHS (such as an expedited removal order) is "deemed cancelled by operation of law as of the date of approval."[216] However, where a final removal order was issued by an immigration IJ or the BIA, the noncitizen must seek to cancel the order by filing a Motion to Reopen and terminate proceedings.[217]

After 3 years, a person with T Nonimmigrant Status can apply for lawful permanent residency if they meet all the requirements.

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

It is common for a respondent to be eligible for multiple defenses against removal. For example, your client may both have a viable claim for asylum, for Special Immigrant Juvenile Status, and for U Nonimmigrant Status. An analysis of eligibility for relief should be made prior to the first 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.

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[213] *See* 8 C.F.R. § 214.11(d)(1)(i) ("In its discretion, DHS may agree to the alien's request to file with the IJ or the Board a joint motion to administratively close or terminate proceedings without prejudice, whichever is appropriate, while an application for T nonimmigrant status is adjudicated by USCIS."); *see also* 8 C.F.R.§ 1214.2(a) ("Individuals who believe they are victims of severe forms of trafficking in persons and who are in pending immigration proceedings must inform the Service if they intend to apply for T nonimmigrant status under this section. With the concurrence of Service counsel, a victim of a severe form of trafficking in persons in proceedings before an immigration judge or the Board of Immigration Appeals may request that the proceedings be administratively closed (or that a motion to reopen or motion to reconsider be indefinitely continued) in order to allow the alien to pursue an application for T nonimmigrant status with the Service. If the alien appears eligible for T nonimmigrant status, the immigration judge or the Board, whichever has jurisdiction, may grant such a request to administratively close the proceeding or continue a motion to reopen or motion to reconsider indefinitely.").

[214] INA § 214 (o)(2-3); 8 U.S.C. § 1184 (o)(2-3); *see also* Congressional Research Service, *Immigration Relief for Trafficking Victims* (Oct. 28, 2020), https://fas.org/sgp/crs/homesec/R46584.pdf (last accessed June 1, 2021).

[215] See USCIS, Check Case Processing Times, https://egov.uscis.gov/processing-times/ (last accessed June 1, 2021).

[216] 8 CFR § 214.11(d)(9)(j).

[217] 8 CFR § 214.11(d)(9)(ii).

CHAPTER 5: POST-DECISION CONSIDERATIONS

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 an order. Both parties have the right to reserve appeal at the time the decision is issued and to appeal the immigration judge's decision to the Board of Immigration Appeals (BIA). Alternatively, both parties 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; thus, it is important that you not only read the general outline of these options below, but also that you connect with your Safe Passage Project mentor immediately to discuss the best strategy in your case if the decision is unfavorable to your client.

A. Motion to Reopen

A motion to reopen asks 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 must 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 required fee.[218]

In general, motions to reopen are subject to time and number limits.[219] But for limited exceptions, a motion to reopen must be filed within 90 days of the immigration judge's final order,[220] and a party is permitted only one motion to reopen.[221]

Exceptions to the time and number limits include the following:

- Changed circumstances: A motion to reopen based on changed circumstances may be available if the requested relief was asylum, withholding of removal, or protection under the Convention Against Torture and there are new facts that constitute changed circumstances.[222]

[218] For an up-to-date listing of fees, *see* 8 C.F.R. § 1103.7.

[219] INA § 240(c)(7)(C)(iv)(i) (in general); INA § 240 (c)(7)(C)(iii) (*in absentia* removal orders).

[220] 8 C.F.R. § 1003.23(b)(1).

[221] *Id*.

[222] *See* 8 C.F.R. § 1003.23(b).

- *In absentia* proceedings: A motion to reopen a removal order entered *in absentia* is subject to special rules. Please see the section below.
- Joint motions: A motion to reopen jointly filed by the respondent and DHS are not limited in time or number.[223]
- DHS motions: DHS is not subject to the time and number limits.[224]
- Battered spouses, children, and parents: There are special statutory provisions for certain motions to reopen filed by battered spouses, children, and parents.[225]

A motion to reopen should contain (in the following order):[226]

1. Cover page labeled "MOTION TO REOPEN";
2. Form EOIR-28;
3. Satisfaction of the requisite fee, if applicable, shown through: (a) fee receipt (stapled to the motion)[227], or (b) a motion for a fee waiver;
4. Copy of the immigration judge's decision;
5. Memorandum of law in support of the motion;
6. Copy of any applications for relief filed after the immigration judge's decision, 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 in triplicate for immigration judge to sign; and
10. Proof of service upon DHS.

B. Motion to Reopen in Absentia Removal Order

A motion requesting that an *in absentia* order be rescinded, and removal proceedings be reopened, is appropriate where the respondent did not appear at their scheduled hearing and, as a result, they were ordered removed at that hearing in their absence. The motion asks the immigration judge to consider the reasons that the respondent did not appear at their scheduled hearing. Safe Passage Project often represents youth who have been ordered removed *in absentia*. If your client has an *in absentia* removal order, please consult with your Safe Passage Project mentor immediately.[228]

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[223] *See* 8 C.F.R. § 1003.23(b)(4)(iv).

[224] *See* 8 C.F.R. § 1003.23(b)(1).

[225] *See* INA § 240(c)(7)(C)(iv).

[226] *See* Immigration Court Practice Manual, Chapter 5.7.

[227] Please speak to your Safe Passage Project mentor for the most up to date information on how to pay the fee.

[228] You may also wish to consult, American immigration Council , *Rescinding an In Absentia Order of Removal* (March 31, 2010) https://www.americanimmigrationcouncil.org/practice_advisory/rescinding-absentia-order-removal (last accessed June 1, 2021).

In general, a motion to reopen an *in absentia* removal order must be based on one or more of the following:[229]

- Failure to appear due to exceptional circumstances; [230]
- Failure to appear due to not receiving proper notice of the hearing;[231]
- Failure to appear because the respondent was in federal or state custody;[232]
- An immigration judge's *sua sponte* authority to reopen.[233]

A motion to reopen an *in absentia* removal order is subject to both time and number limits.

- A motion to reopen based on exceptional circumstances must be filed within 180 days after the *in absentia* order.[234]
- A motion to reopen based on the respondent not having received proper notice of the hearing or the respondent having been in federal or state custody may be filed at any time.[235]
- A respondent is permitted to file only one motion to reopen an *in absentia* removal order regardless of the basis for the motion.[236]

A motion to reopen an *in absentia* removal order may require a filing fee. Please consult 8 C.F.R. 1003.24(b)(2) for a list of the instances when a fee is not required.

A motion to reopen an *in absentia* order should contain (in the following order):[237]

1. Cover page labeled "MOTION TO REOPEN AN IN ABSENTIA ORDER";
2. Form EOIR-28;
3. Satisfaction of the requisite fee, if applicable, shown through: (a) fee receipt (stapled to the motion), or (b) a motion for a fee waiver;
4. Copy of the immigration judge's decision;
5. Memorandum of law in support of the motion;

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[229] See INA § 240(b)(5)(C), 8 C.F.R. § 1003.23(b)(4)(ii).

[230] INA § 240(b)(5)(C)(i); *see* INA § 240(e)(1) for the definition of "exceptional circumstances".

[231] *See* INA § 240(b)(5)(C)(ii).

[232] *See* INA § 240(b)(5)(C)(ii).

[233] *See* 8 C.F.R. § 1003.23(b)(1)

[234] *Id*.; 8 C.F.R. § 1003.23(b)(4)(ii).

[235] *Id*.

[236] 8 C.F.R. § 1003.23(b)(4)(ii).

[237] *See* Immigration Court Practice Manual, Chapter 5.9.

6. Copy of any applications for relief filed after the immigration judge's decision or USCIS receipts or approval notices, 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 in triplicate for immigration judge to sign; and
10. Proof of service upon DHS.

C. Motion to Reconsider

A motion to reconsider identifies either an error in the law or facts as applied in the immigration judge's decision or a change in the law that affects the immigration judge's decision.[238] A motion to reconsider can only be based on the existing record and cannot introduce new facts or evidence. The motion must state in detail the errors of fact or with appropriate citations. If the motion is based upon a change in the law, copies of that law should be provided.

A motion to reconsider filed by the respondent must be filed within 30 days of the immigration judge's final order.[239] Only one motion to reconsider may be filed by a respondent.[240] DHS is not subject to the time or number limits.[241]

A motion to reconsider should contain (in the following order):[242]

1. Cover page labeled "MOTION TO RECONSIDER"
2. Form EOIR-28;
3. Satisfaction of the requisite fee, if applicable, shown through: (a) fee receipt (stapled to the motion), or (b) a motion for a fee waiver;
4. Copy of the immigration judge's decision;
5. Memorandum of law in support of the motion;
6. Supporting documentation, if any, with index of evidence;
7. Form EOIR-33/IC, Alien's Change of Address Form, even if client's address has not changed;
8. Proposed order in triplicate for immigration judge to sign; and
9. Proof of service upon DHS.

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[238] INA § 240 (c)(6).

[239] 8 C.F.R. § 1003.23(b)(1).

[240] *See* 8 C.F.R. § 1003.23(b)(1).

[241] *Id*.

[242] Immigration Court Practice Manual, Chapter 5.8.

D. Appeals Filed with the Board of Immigration Appeals

At the end of a case, the Immigration Judge will issue either an oral or a written decision and an order. Both parties have the right to reserve appeal at the time the decision is issued and then to appeal the immigration judge's decision to the BIA. If the decision is issued orally, you must orally reserve your right to appeal at the hearing or it will be deemed waived. Within 30 calendar days of the immigration judge's decision, you must submit Form EOIR-26, Notice of Appeal, to the BIA, along with the requisite filing fee or a motion for a fee waiver.

Please note that 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 with the BIA and the Immigration Court no longer has jurisdiction over the case. After filing the Form EOIR-26, you should expect to receive a receipt notice from the BIA as well as the record of proceedings and a briefing schedule for your and DHS' appeal briefs.

For detailed instructions on the BIA appeal process, please refer to the Board of Immigration Appeals Practice Manual: https://www.justice.gov/eoir/eoir-policy-manual/iii. Please also consult with your Safe Passage Project mentor.

Alternatively, your client can expressly waive the right to appeal, or allow for the time for appeal to lapse. If an appeal is waived or the time for the appeal lapses, then the immigration judge's order becomes final.

CHAPTER 6: GENERAL GUIDANCE ON REPRESENTING YOUTH

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 in 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 Project mentor for a more in-depth discussion.

Despite the young age of your client, it is important to remember that as with any other client, it is essential to provide your client with all relevant information about their case, explain available options for immigration relief, abide by your client's wishes regarding how to proceed, and keep your client informed about any and all material developments in their case.

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."[243]

6.2. Determining Capacity

But what if your client is very young or otherwise seems unable to fully understand the legal process? In that case, the central question is as follows: When is a minor legally capable of directing their representation? There is no simple answer. The law does not outline a specific age at which a minor achieves the capacity to engage a lawyer and direct their own representation. Instead, courts generally assess noncitizen youths' "capacity,"[244] to establish whether the noncitizen youth meets the requisite standard to act independently and/or direct the outcome and strategy of their case. Generally, the factors relevant to assessing capacity make clear that capacity is contextual and incremental and can be intermittent.

[243] 8 C.F.R. § 1003.102(p).

[244] 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. 526 (1881); *Sargent v. Burgett,* 90 Ga. Ill, 22 S. E. COT. Blacks law Dictionary, 2nd. Ed.

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-attorney relationship 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 in the United States with their parent or caregiver, and not return to their home country).

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). Capacity is not always clear, however, and in those circumstances, an attorney may need additional guidance to establish their client's capacity.

The ABA[245] 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 their ability to appreciate the consequences of a decision;
3. The substantive fairness of the client's decision; and
4. The consistency of the client's decisions with the known long-term commitments and values of the client.

More specifically, the ABA Commission on Immigration sets out factors for use in assessing the competence of an unaccompanied immigrant noncitizen youth[246]:

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.

[245] 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."

[246] For an in-depth reading of these rules and discussion please see American Immigration Lawyers Association, *Ethical Issues in Representing Children in Immigration Proceedings* (January 29, 2015), https://www.aila.org/practice/ethics/ethics-resources/2012-2015/ethical-issues-representing-children (last accessed June 1, 2021).

2. Legal ability, including functional abilities, understanding of the legal process, the ability to assist their attorney in support of their 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 reach out to your Safe Passage Project 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 their client's wishes and directions, even if they are opposed by, for example, the client's parent or guardian.[247]

6.3. Understanding Trauma

Given that most of Safe Passage Project's clients are eligible for a humanitarian form of relief, your client likely will have suffered some form of trauma. It is important to understand how trauma exposure may affect your client and how you may be affected by the retelling of that trauma by your client in the course of your representation.

A. Trauma Exposure and Its Effects on Your Client

The significant role that trauma plays on the human brain is well-documented. Trauma exposure can significantly interfere with the way children and adolescents' brains assess threat, which, in turn, can affect how they respond to stress, and how they record memories.

Trauma not only affects the way that your client may remember events relevant to their case,[248] 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, for example, your client missing appointments with you, coming to court on time, or difficulty discussing particular events in their past.

At Safe Passage Project, we seek to employ a trauma-informed approach to lawyering. This approach requires you to consider the role trauma exposure may play in a client's behaviors and memory. It will

[247] 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.

[248] 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.

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 Project mentor for further resources on how to implement a trauma-informed approach to lawyering.[249]

B. Trauma Exposure and Its Effects on You

Exposure to your client's trauma may also deeply impact you. Vicarious (or secondary) trauma[250] 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.

6.4. Working with Low-Income Youth

In addition to the challenges that Safe Passage Project clients face in their immigration case, most Safe Passage Project clients are also confronting other challenges in their day-to-day lives in New York. The majority of our clients have recently arrived in the United States and may be living with family or friends they have never met or have not seen in a long time. It is common for our clients to experience housing and food insecurity. Our clients also struggle with difficulty accessing health insurance and health care, language barriers, racism and discrimination.

It is essential that you keep in mind the issues that your client may be facing on a day-to-day basis, especially if you encounter any issues with your client's responsiveness, such as not returning calls and coming late to or missing appointments. Please also keep in mind that your role is to provide legal

[249] For more information, see, Public Interest Pro Bono Association, Working with Survivors of Abuse: A Trauma Informed Approach, https://www.probono.net/ny/library/item.746013-Working_with_Survivors_of_Abuse_A_Trauma_Informed_Approach (last accessed June 1, 2021).

[250] For a detailed description of vicarious trauma, please see, Joyful Heart Foundation, *Vicarious Trauma*, at https://www.joyfulheartfoundation.org/learn/vicarious-trauma (last accessed June 1, 2021).

advice and representation. If your client is in need of social services, please reach out to your Safe Passage Project mentor, who can connect with our Social Work team.

Please contact your Safe Passage Project mentor for further resources.[251]

6.5. Conclusion

As evidenced by the constant stream of 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 this guide and the referenced resources will help guide you in your work representing noncitizen youth in removal proceedings.

[251] See also, Public Interest Pro Bono Association, *Troubleshooting Pro Bono Relationships with Low-Income Clients* at http://pipba.org/resources/ (last accessed June 1, 2021).