A Brief Overview of Forms of Relief in Removal Proceedings

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A comprehensive review of relief from removal must first address the parameters of the removal proceeding itself. It is a legal process under Section 240 of the Immigration and Nationality Act (INA) whereby the U.S. government seeks to remove a noncitizen from the United States by establishing removability[1] through a hearing before an immigration judge (IJ).[2] Before a removal proceeding may commence, however, the U.S. Department of Homeland Security (DHS)[3] must by law issue and properly serve a charging document known as a

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***** Updated from the 2020–21 edition of *Navigating the Fundamentals of Immigration Law* (AILA 2020). With the November 2020 election of a new president, an already extensive round of administrative actions has sought to unravel many of the changes wrought by his predecessor. It is incumbent on the reader to be aware of these developments and stay abreast of them by checking the AILA InfoNet Research Library for the latest updates. Although no longer being updated, a collection of early actions can be found here: "Featured Issue: First 100 Days of the Biden Administration," AILA Doc. No. 21011407. *See also,* for the status of many of the previous administration's actions, "Tracking Notable Executive Branch Action During the Trump Administration," AILA Doc. No. 20091615.

[1] There are numerous grounds of inadmissibility and removability. Suffice it to say that all involve the contention by DHS that one has no right to stay in the United States. *See* INA §212(a) for grounds of inadmissibility and INA §237(a) for grounds of removal.

[2] The foreign national has certain legal rights as outlined under INA §240(b).

[3] U.S Department of Homeland Security (DHS) is responsible for enforcing U.S. federal immigration laws, and is authorized to charge (through issuance of a Notice to Appear (NTA)) and prove a noncitizen's removability as well as seek his or her removal. Three agencies within DHS may issue an NTA: (1) U.S. Citizenship and Immigration Services (USCIS); (2) U.S. Customs and Border Protection (CBP); and (3) U.S. Immigration and Customs Enforcement (ICE). A supervisory official has sole authority to issue the NTA. 8 CFR §239.1(a). *See also,* USCIS Memorandum, "Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens [sic]," AILA Doc. No. 11110830. *See*, more recently, USICE, T. Johnson, "Interim Guidance: Civil Immigration Enforcement and Removal Priorities," AILA Doc. No. 21021800. *And*, *see Pereira v. Sessions*, 585 U.S. ___, 138 S. Ct. 2105 (2018) (An NTA served on a respondent that fails to designate the specific time or place of the removal proceeding is not a "notice to appear" under INA §239(a) and, hence, does not trigger the stop-time rule [within the cancellation of removal context]). *See also, Lorenzo Lopez v. Barr*, 925 F.3d 396 (9th Cir. 2019). *See also, Guadalupe v. Attorney General*, 951 F.3d 161 (3rd Cir. 2020) (DHS may not rely on a Notice of Hearing to cure a defective NTA) and, *Banuelos-Galviz v. Barr*, 953 F.3d 1176. (10th Cir. 2020). *See* most recently, *Niz-Chavez v. Garland*, 592 U.S. ___ (2021) (The Supreme Court held the NTA must be a single document consisting of all information about an individual's removal hearing, as specified under §1229(a)(1), in order to be considered sufficient for triggering the IIRIRA's stop-time rule). *Niz-Chavez* raises additional questions about the continued viability of the following related cases in the context of NTAs lacking key information: *Matter of Rosales Vargas and Rosales Rosales*, 27 I&N Dec. 745 (BIA 2020) (NTA lacking Immigration Court address does not deprive the court of subject matter jurisdiction thus compelling termination). *See, also, Matter of Herrera-Vasquez*, 27 I&N Dec. 825 (BIA 2020) (Absence of a checked alien classification box on notice to appear does not, by itself, render it fatally deficient or otherwise preclude an IJ from exercising jurisdiction over removal proceedings, and therefore not a basis to terminate proceedings of an alien who was returned to Mexico under the Migrant Protection Protocols. *Matter of J.J. Rodriguez*, 27 I&N Dec. 762 (BIA 2020).

Notice to Appear (NTA) on the foreign national.[4] A removal proceeding does not officially commence until the NTA is filed with the immigration court having jurisdiction over the individual.[5] A foreign national in removal proceedings is referred to as a "respondent" because he or she must respond to the charge(s) of removability listed in the NTA.

The Executive Office for Immigration Review (EOIR) lies within the U.S. Department of Justice (DOJ) and is responsible for interpreting and implementing the federal immigration laws by conducting immigration court proceedings, appellate review, and other administrative hearings. Three components are involved in this equation. First, the Office of the Chief Immigration Judge (OCIJ) is responsible for coordinating the management and operation of the immigration courts scattered throughout the United States where IJs hear cases. Second, the Board of Immigration Appeals (BIA) reviews decisions made by IJs and district directors of DHS. Third, the Office of the Chief Administrative Hearing Officer (OCAHO) adjudicates cases related to employer sanctions, document fraud, and unfair-immigration–related employment practices.

Two types of hearings are involved in a removal proceeding. The first type, the "master calendar hearing," encompasses initial and subsequent hearings concerned with scheduling, deadlines, and nonsubstantive matters. At a master calendar hearing, the IJ ensures the respondent understands the nature of the proceedings and the charges against him or her. The IJ also ensures the respondent is aware of the availability of pro bono or low-cost legal representation. The respondent pleads to the allegations and informs the court of the forms of relief to be sought.

The second type of hearing, the "individual hearing," entails an examination of the case merits, including substantive legal issues and applications for relief. This may involve legal arguments by either party on substantive motions (*e.g.,* motion to terminate proceedings) or material legal issues (*e.g.,* eligibility for relief sought), as well as testimony by the respondent[6] and other witnesses. In most instances, the IJ issues the final decision during an individual hearing.

The IJ's final decision may be appealed by the respondent and/or DHS to the BIA. The appeal must be filed within 30 days, or else it will be dismissed as untimely.[7] The BIA may dismiss or sustain the appeal, remand the case to the IJ, or refer the case to the attorney general. A published BIA decision binds DHS and IJs

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[4] Formerly known as the order to show cause (OSC), the NTA advises the respondent of the nature of the proceedings, legal authority under which the proceedings are conducted, charges and alleged immigration violations, privilege of being represented by an attorney at no expense to the government, and consequences of failing to appear at the scheduled hearing. INA §239(a).

[5] 8 CFR §1239.1(a).

[6] The hearing of course is premised on the notion that the respondent is competent and able to withstand its rigors. IJs have been given some guidance in ensuring procedural safeguards when there are indicia of incompetency. *Matter of M–A–M*, 25 I&N Dec. 47 (BIA 2011). More recent guidance was issued by the EOIR; *see* "EOIR Publishes "Phase I Guidance" Regarding Protections for Detained, Unrepresented Aliens [sic] Who May Be Mentally Incompetent," AILA Doc. No. 13123160. *See also, Matter of J–R—R–A–*, 26 I&N Dec. 609 (BIA 2015) (If an asylum applicant has competency issues affecting his testimony's reliability, the IJ should generally accept his fear of harm as subjectively genuine); *Matter of J–S–S–*, 26 I&N Dec. 679 (BIA 2015) (Although neither party carries a formal burden of proof to establish mental competency, if there are indicia of incompetency, the IJ should employ the preponderance of the evidence standard to determine the respondent's competency); *Matter of M–J–K–*, 26 I&N Dec. 773 (BIA 2016) (IJ has discretion to select and implement appropriate safeguards in cases involving mental competency, which the BIA may review de novo); *Campos Mejia v. Sessions*, 868 F.3d 1118 (9th Cir. 2017) (IJ erred by failing to determine whether procedural safeguards were required after the respondent displayed signs of mental incompetency). *But see, Diop v. Lynch*, 807 F.3d 70 (4th Cir. 2015) (The court rejected the petitioner's due process argument that the IJ should have continued or administratively closed his removal proceedings to allow him to receive a mental health evaluation). *Also*, *Singh v. Sessions*, 880 F.3d 220 (5th Cir. 2018) (Court denied the petition for review, holding *Matter of J–R–R–A–* did not apply, notwithstanding respondent's PTSD diagnosis). *Similarly*, *Pierre-Paul v. Barr*, 933 F.3d 490 (5th Cir. 2019) (IJ did not violate petitioner's due process rights when she failed to adhere to the procedural safeguards put in place after his competency hearing).

[7] 8 CFR §1003.38(b).

throughout the country unless the attorney general modifies or overrules the decision or a federal court with jurisdiction over a specific circuit (following appeal from the BIA) issues a different decision.[8] A stay of removal is automatic while an appeal is pending before the BIA, but not so in other circumstances.[9]

FORMS OF RELIEF FROM REMOVAL

Many forms of relief are available to a respondent seeking to avoid removal from the United States. However, not all forms of relief are available to all respondents. A number of factors affect eligibility for relief, including manner of entry into the United States, current immigration status, family ties to the United States, length of residence and/or physical presence in the United States, criminal history, and prior immigration law violations.

Stage One—Challenging Removal Through U.S. Citizenship

DHS must prove a respondent's foreign nationality in removal proceedings. It may well turn out the respondent is a U.S. citizen and unaware of this fact, in which case he or she is not subject to removal. As such, foreign nationality should never be conceded without first determining whether the respondent holds U.S. citizenship either on his or her own, or derivatively through a parent. If U.S. citizenship can be proven, the IJ must terminate removal proceedings.

Under the 14th Amendment of the U.S. Constitution, one may obtain citizenship through birth or naturalization in the United States (including territories under its control) or birth outside the United States if one or both parents are U.S. citizens. Transmission of U.S. citizenship to the child by a parent depends on the laws in effect at the time of birth and the parent's period of physical presence in the United States prior to that child's birth.[10]

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[8] Although a case decision has been rendered final by the IJ or the BIA, a respondent may make a motion to reopen or reconsider before the immigration court, 8 CFR §1003.23, or the BIA, 8 CFR §1003.2. *See*, *Centro Legal De La Raza, et al. v. EOIR*, No. 21-cv-00463-SI (N.D. Cal. Mar. 10, 2021) (Nationwide implementation of Trump Administration's EOIR final rule, "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure," 85 Fed. Reg. 81,588 (Dec. 16, 2020), enjoined by district court judge).

[9] A stay of removal prevents DHS from carrying out an order of removal, deportation, or exclusion. An *automatic stay* is granted during the time allowed to file an appeal (unless the right to file an appeal was waived), while an appeal is before the BIA, or while a case is before that body by way of certification. A *discretionary stay* requires the respondent to apply for and be granted such relief in order to avoid removal during the pendency of a federal court appeal or motion to reopen or reconsider before the BIA, DHS, or IJ.

[10] *See Kurzban's Immigration Law Sourcebook* (AILA 17th Ed. 2020), appendix B, for useful charts identifying the various scenarios for transmission of U.S. citizenship to a child. *See also, Matter of Cross*, 26 I&N Dec. 485 (BIA 2015) ("[A] person born abroad to unmarried parents can qualify as a legitimated "child" under section 101(c)(1) of the Act if he or she was born in a country or State that has eliminated all legal distinctions between children based on the marital status of their parents or has a residence or domicile in such a country or State (including a State within the United States), irrespective of whether the country or State has prescribed other legal means of legitimation"). *See, more recently*, the Supreme Court's decision that the gender-based distinction of INA §309(c), requiring a shorter period of parental physical presence in the United States for acquiring citizenship through an unwed citizen mother versus an unwed citizen father of a child born abroad is unconstitutional. *Sessions v. Morales-Santana*, 582 U.S. ___, 137 S. Ct. 1678 (2017). *See also, Roy v. Barr*, 960 F.3d 1175 (9th Cir. 2020) (Court rejected petitioner's argument that second clause of former INA §321(a)(3) discriminates by gender and legitimacy and thus violates U.S. Constitution's guarantee of equal protection).

Pursuant to the Child Citizenship Act of 2000,[11] which modified the INA with a new INA §320, citizenship may be automatically acquired by a biological or adopted child[12] if the following criteria are satisfied:

- At least one parent is a U.S. citizen by birth or naturalization;
- The child is under the age of 18; and
- The child "is residing in the United States in the legal and physical custody of the U.S. citizen parent pursuant to a lawful admission for permanent residence."[13]

This change became effective February 27, 2001, and applies to all children meeting the aforementioned criteria by that date. Children 18 years of age or older on that date were deemed ineligible.

The third provision, requiring a child be admitted for permanent residence in the United States, is met in those cases involving children residing in the legal and physical custody of a U.S. citizen parent stationed and residing abroad as an employee of the U.S. Government or Armed Forces of the United States (or residing with one's spouse who is stationed abroad as an employee of the U.S. Government or Armed Forces).[14]

Stage Two—Lawful Permanent Residence (LPR)

A foreign national in removal proceedings has several options to obtain lawful permanent resident status, either in front of an IJ or, once proceedings are terminated, through USCIS. This section discusses these different options, beginning with adjustment of status.

Adjustment of Status

If DHS establishes that the respondent is a foreign national without U.S. citizenship, the next best relief is adjustment of status to LPR, provided eligibility is established. Adjustment of status is a form of discretionary relief allowing one to adjust his or her immigration status to that of a permanent resident (*i.e.*, "green card" holder) while remaining in the United States. Adjustment of status may be granted by USCIS or, if the foreign national is in removal proceedings, by the IJ. Adjustment of status is identical to consular processing for an immigrant visa in terms of the benefit sought (*i.e.*, permanent residence), but consular processing typically takes place at the U.S.

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[11] Pub. L. No. 106-395, 114 Stat. 1631; INA §320; 8 CFR Part 320.

[12] *See* USCIS Memorandum, "Guidance for Determining if an Adoption is Valid for Immigration and Nationality Act (INA) Purposes," AILA Doc. No. 12120577; USCIS Memorandum, "Guidance on the Implementation of the Intercountry Adoption Universal Accreditation Act of 2012 and the Consolidated Appropriations Act, 2014 in Intercountry Adoption Adjudications," AILA Doc. No.14070360; *see also, Ojo v. Lynch*, 813 F.3d 533 (4th Cir. 2016) ("Put succinctly, the plain meaning of 'adopted' in [INA §101(b)(1)(E)(i)] forecloses the BIA's summary disregard of facially valid *nunc pro tunc* orders relating to adoptions conducted by the various state courts"). *See also,* USCIS Memorandum, "Criteria to Determine Whether the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption ("Hague Adoption Convention") Applies to the Adoption in the United States of a Child from Another Hague Adoption Convention Country," AILA Doc. No. 18011848. Likewise, USCIS webpage, "Adult Adoptees and U.S. Citizenship," for foreign-born adults in the United States who were adopted as children with questions about their U.S. citizenship (*https://www.uscis.gov/adoption/adult-adoptees-and-us-citizenship*).

[13] *But see, Khalid v. Sessions*, 904 F.3d 129 (2nd Cir. 2018) (Court held child's brief separation from parent while in federal pretrial juvenile detention did not terminate physical custody for purposes of derivative citizenship; concluding physical custody need not be actual residency at the moment of naturalization). *See also,* USCIS Policy Alert, "Defining 'Residence' in Statutory Provisions Related to Citizenship," AILA Doc. No. 19082800.

[14] Publ. L. No. 116-133; 134 Stat. 274; INA §320; 8 CFR Part 320.

consulate located in the applicant's home country. There are several statutory provisions providing for adjustment of status through different means with different eligibility requirements.[15]

Adjustment of Status Under INA §245(a)

Adjustment of status under INA §245(a) is the most common form of adjustment of status. Eligibility under this provision requires the applicant to meet several statutory requirements at the time of filing the application. First, one must have been inspected, admitted, or paroled into the United States or have an approved petition for classification as a self-petitioner under the Violence Against Women Act (VAWA), *see* discussion *infra*. Second, the applicant must be eligible to receive an immigrant visa and admissible as an immigrant. In other words, the applicant must not be subject to any of the grounds of inadmissibility under INA §212(a).[16] Third, an immigrant visa must be immediately available both at the time of filing the application and the time of final adjudication. With the exception of "immediate relatives" (spouse,[17] parent, or unmarried child (under age 21)

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[15] *See* ICE Memorandum, J. Morton, "Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions," AILA Doc. No. 10082561; USCIS Memorandum, "Guidance for Coordinating the Adjudication of Applications and Petitions Involving Individuals in Removal Proceedings," AILA Doc. No. 11050264. *See also, Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012) ("The Immigration Judge and the Board may administratively close removal proceedings, even if a party opposes, if it is otherwise appropriate under the circumstances"), and EOIR Memorandum, B. O'Leary, "EOIR Memo on Continuances and Administrative Closure," AILA Doc. No. 13031143. *See as well, Matter of W–Y–U–*, 27 I&N Dec. 17 (BIA 2017) (The BIA further clarified *Matter of Avetisyan* when it held that "the primary consideration for an IJ in evaluating whether to administratively close or recalendar proceedings is whether the party opposing administrative closure has provided a persuasive reason for the case to proceed and be resolved on the merits"). *But, see, Matter of Castro-Tum*, 27 I&N Dec. 271 (AG 2018) (Effectively overruling *Matter of Avetisyan* and *Mater of W–Y–U–-*, the AG ruled that IJs and BIA do not have the authority to administratively close cases, except in those circumstances in which regulations or settlement agreements permit such practice) and *Hernandez-Serrano v. Barr*, No. 20-3175 (6th Cir. Nov. 24, 2020) (IJs and the BIA do not have authority, under 8 CFR §§1003.10 and 1003.1(d), to suspend indefinitely immigration proceedings by administrative closure). *See*, on the other hand, *Zuniga Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019) (IJs and the BIA have authority to administratively close cases under the plain language of 8 CFR §§1003.10(b) and 1003.1(d)(1)(ii); *Meza Morales v. Barr*, 973 F.3d 656 (7th Cir. 2020) (Court rejected argument that administrative closure is not within an IJ's authority to take "any action" appropriate and necessary under 8 CFR §1003.10(b); *Centro Legal De La Raza, et al. v. EOIR*, No. 21-cv-00463-SI (N.D. Cal. Mar. 10, 2021) (Nationwide implementation of Trump Administration's EOIR final rule, "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure," 85 Fed. Reg. 81,588 (Dec. 16, 2020), enjoined by district court judge).

One should, at the same time, consider other options while awaiting a decision from USCIS on an application or petition. These include a motion for continuance per guidelines established by *Matter of L–A–B–R–*, 27 I&N Dec. 405 (AG 2018). Keep in mind, however, *Matter of Mayen*, 27 I&N Dec. 755 (BIA 2020) (Prima facie eligibility for relief and whether it will affect the outcome of proceedings are not necessarily dispositive in a request for a continuance). A motion to move the case to the IJ's status check docket may also be appropriate. *See* EOIR Memorandum, J. R. McHenry III, "Use of Status Dockets," AILA Doc. No. 19081900. Or, consider even a motion to terminate proceedings, in the appropriate circumstance. Stay aware, however, of the restrictions laid down under *Matter of S–O–G– & F–D–B–*, 27 I&N Dec. 462 (AG 2018) (Removal proceedings may only be dismissed or terminated under circumstances identified in the regulations (8 CFR §1239.2(c) and (f)) or where DHS fails to sustain charges of removability). *See also,* ICE Memorandum, A. Loiacono and K. Padilla, "OPLA Guidance: *Matter of Castro-Tum*, 27 l&N Dec. 271 (A.G. 2018)," AILA Doc. No. 18072074. While pondering these options, consider the recent change in administrations and evolving removal priorities as witnessed by USICE, T. Johnson, "Interim Guidance: Civil Immigration Enforcement and Removal Priorities," AILA Doc. No. 21021800.

[16] *See* INA §212(a) for grounds of inadmissibility, which include certain types of criminal convictions, failure to appear for a removal proceeding, entry into the U.S. without inspection, and failure to depart the U.S. under a grant of voluntary departure.

[17] A widow(er) of a U.S. citizen may qualify as an immediate relative and does not need to show a marriage of at least two years when the citizen died. INA §201(b)(2)(A)(i). *See* USCIS Memorandum, D. Neufeld, "Additional Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children (Revised)," AILA Doc. No. 09121430. *See generally* USCIS

of a U.S. citizen), all individuals are placed in immigrant classes ("preference" categories) to await the availability of a visa number based on their "priority date." The priority date is determined by the filing date of the petition associated with the family-based immigrant categories or the petition/application associated with the employment-based categories. The Department of State (DOS) allocates visas for each category according to certain visa quotas and publishes a monthly *Visa Bulletin* on its website.[18] /[19]

Additionally, the applicant must not fall under INA §245(c), which bars certain persons from adjustment if they:

- Entered as a noncitizen crewman;
- Except for employment-based applicants falling under INA §245(k), immediate relatives, or special immigrants described in §§101(a)(27)(H), (I), (J), or (K), engaged in unlawful employment, in unlawful status on the date of filing the application, or otherwise failed to maintain status continuously since entry into the United States;
- Admitted in transit without a visa under INA §212(d)(4)(C);
- Entered as a visa waiver entrant, except for immediate relatives;[20]
- Admitted as an S visa nonimmigrant;
- Deportable for terrorist-related activities under INA §237(a)(4)(B);

Memorandum, "Approval of Petitions and Applications after the Death of a Qualifying Relative under New Section 204(*l*) of the Immigration and Nationality Act," AILA Doc. No. 11011061; "USCIS Presentation on Approval of Petitions after the Death of a Qualifying Relative," AILA Doc. No. 13012453. *See also,* USCIS Memorandum, "Approval of a Spousal Immediate Relative Visa Petition under [INA §204(*l*)] After the Death of a U.S. Citizen Petitioner," AILA Doc. No. 15113004.

[18] *See https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html*.

[19] Some foreign nationals with an approved relative petition filed by an immediate relative may be ineligible for adjustment of status on account of unlawful presence in the United States, and must apply for an immigrant visa through a U.S. consulate abroad. The problem occurs with their departure from the United States, which subjects them to a three– or 10-year bar from reentry. In an effort to shorten the period of separation for such families, individuals filing on or after March 4, 2013, may apply to USCIS for, and await a positive decision on a "provisional unlawful presence waiver" (also known as an I-601A waiver) before departing the United States for consular processing. For those in removal proceedings and, notwithstanding *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018), it is still advisable to seek a motion to administratively close the case pending resolution of the waiver, arguing that *Castro-Tum* is without merit, especially in light of recent litigation on the matter. *See, e.g., Zuniga Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019); *Meza Morales v. Barr*, 973 F.3d 656 (7th Cir. 2020); *Hernandez-Serrano v. Barr*, No. 20-3175 (6th Cir. Nov. 24, 2020). If the I-601A waiver is approved while the case is administratively closed, one may then file a new motion to terminate proceedings, and depart once that motion has been granted, or, alternatively, make a motion to recalendar the case for the purpose of obtaining voluntary departure. 78 Fed. Reg. 536 (Jan. 3, 2013). *See also,* USCIS Field Guidance, "Guidance Pertaining to Applicants for Provisional Unlawful Presence Waivers," AILA Doc. No. 14012455. In addition, the class of individuals eligible for the provisional waiver has been expanded to include spouses or children of U.S. citizens or LPRs. At the same time, individuals with final orders of removal may pursue the I-601A provisional waiver, provided they have applied for, and USCIS has approved, an Application for Permission to Reapply for Admission into the United States After Deportation or Removal, Form I-212. 81 Fed. Reg. 50244 (July 29, 2016). *See also,* USCIS Questions and Answers, "Provisional Waiver Engagement," AILA Doc. No. 16090630. *See as well,* USCIS Legal Resources, "Unlawful Presence and Bars to Admissibility," AILA Doc. No. 18081001, for more on unlawful presence in general as well as changes with respect to F, J, and M nonimmigrants. For further developments on unlawful presence and F, J, and M nonimmigrants, *see* the permanent nationwide, injunction imposed by *Guilford College, et al. v. Wolf, et al.*, No. 1:18-cv-00891-LCB-JEP (M.D.N.C. Feb. 6, 2020). (Government withdrew its appeal and court granted government's motion to voluntarily dismiss on August 3, 2020).

[20] S*ee* USCIS Memorandum, "USCIS Memo on Adjudication of Adjustment Applications for Individuals Admitted to the U.S. Under the VWP," AILA Doc. No. 13111840. *But see Riera-Riera v. Lynch*, No. 13-73062 (9th Cir. Nov. 28, 2016) (A noncitizen fraudulently entering the United States under the VWP is subject to the VWP's limitations, including waiving any challenge to deportation other than asylum). *See generally*, Sept. 16, 2017 DOS Cable regarding new 90-day rule, AILA Doc. No. 17100431. S*ee however*, USCIS Policy Manual (Vol. 8, Part J, Ch. 3, (A)(3), "Adjudicating Inadmissibility," finding DOS 90-day rule is not binding on USCIS, while advising officers to continue to "evaluate cases for possible fraud indicators."

- Sought adjustment of status under INA §203(b) (employment-based) and not in lawful nonimmigrant status; or
- Employed while an unauthorized foreign national under INA §274A(h)(3) without permanent residence or work authorization, or otherwise violated the terms of a nonimmigrant visa.

Adjustment of Status Under INA §245(i)

A person may adjust status to permanent residence under INA §245(i) notwithstanding the ineligibility grounds of entry without inspection and the aforementioned §245(c) grounds, provided he or she is the beneficiary of an approvable immigrant visa petition or labor certification application filed on or before April 30, 2001. Additionally, if the underlying petition or labor certification was filed after January 14, 1998, but before April 30, 2001, the applicant must also prove his or her physical presence in the United States on December 21, 2000, the effective date of the LIFE Act Amendments of 2000,[21] which revived the §245(i) benefit. A petition or application filed before January 14, 1998, does not require a showing of physical presence.[22]

Adjustment of Status Under INA §245(k)

An applicant pursuing adjustment of status based on an approved employment-based petition may not be ineligible for adjustment of status on account of unlawful status (*e.g.*, unauthorized employment, falling out of status, or otherwise violating the terms of his or her stay) if the total period of unlawful status does not exceed 180 days. According to USCIS, §245(k) may extend only to the first adjustment of status application and not subsequent applications.[23]

Adjustment of Status Under INA §249—Registry

Registry is another form of relief available to one seeking permanent residence. An application is usually made with USCIS and, if denied, renewed before the IJ. Certain criteria are required for establishing eligibility:

- Entry into the United States prior to January 1, 1972;
- Continuous residence in the United States since that time;
- Good moral character;
- Eligible for citizenship but for the five-year permanent residence requirement, and not inadmissible for participation in terrorist activities, certain criminal and security grounds, or noncitizen smuggling; and
- No participation in Nazi persecution or genocide.[24]

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[21] Pub. L. No. 106-554, 114 Stat. 2762. *See also*, "AILA Practice Alert: 30/60 Day Rule Eliminated from FAM Provisions on 'Misrepresentation'," AILA Doc. No. 17092204.

[22] *See also,* USCIS Memorandum, W. Yates, "USCIS Guidance Memo on 245(i)," AILA Doc. No. 05031468; "Section 245(i)," AILA Doc. No. 18032330.

[23] *See* USCIS Memorandum, D. Neufeld, "Applicability of Section 245(k) to Certain Employment-Based Adjustment of Status Applications Filed Under Section 245(a) of the Immigration and Nationality Act," AILA Doc. No. 08073061. *For further clarification, see Ma v. Sessions*, 907 F.3d 1191 (9th Cir. 2018). (Grant of employment authorization under 8 C.F.R. §274a.12(b)(20) does not fall within one of the 8 CFR §1245.1(d)(1) categories of lawful status eligible for 180-day exception under INA §245(k). The petitioner failed to maintain his lawful status). *But see*, 12/16/2019 unpublished IJ decision, *Matter of* – (An employment-based adjustment of status application for a Nepali Temporary Protected Status (TPS) beneficiary with more than 180 days of unauthorized employment prior to a grant of TPS followed by an initial 2015 grant of TPS constituted an "admission." Given that the applicant had less than 180 days of unauthorized employment since that last admission, the IJ held INA §245(k) waived the INA §245(c) bars to adjustment of status. AILA Doc. No. 20010603.

[24] INA §249.

Cancellation of Removal

Cancellation of removal is a form of discretionary relief sought while in removal proceedings whereby one may obtain permanent resident status or be allowed to retain existing permanent residence.

Non-LPR Cancellation of Removal [25]

This form of relief is available to those placed in removal proceedings on or after April 1, 1997.[26] Eligibility criteria for this form of relief are:

- Continuous residence in the United States for at least 10 years (prior to service of the NTA);[27]
- Good moral character during the 10-year period preceding final resolution of the application;
- No convictions for offenses under INA §§212(a)(2), 237(a)(2), or 237(a)(3);[28] and
- Demonstration that removal would result in "exceptional and extremely unusual hardship"[29] to one's U.S. citizen or LPR spouse, parent, or child.

Only 4,000 grants of cancellation of removal are allowed each year.[30]

LPR Cancellation of Removal [31]

This form of relief has the following criteria:

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[25] *See* INA §240A(b); 8 CFR §1240.20.

[26] Suspension of deportation is the form of relief available to those placed in deportation proceedings *before* April 1, 1997. (former INA §244). One must show seven years' continuous physical presence in the United States prior to issuance of the OSC, good moral character, no convictions for certain crimes, and a showing of "extreme hardship" to the applicant and/or his or her U.S. citizen or LPR spouse, parent, or child. Individuals deportable on criminal or other grounds (per former INA §§241(a)(2)–(4) (*e.g.*, crimes of moral turpitude, controlled substances, aggravated felonies, firearms, espionage, sabotage, treason, falsification of documents, document fraud, or security threats) were required to meet more stringent criteria: 10 years of physical presence following commission of the crime and a showing of "exceptional and extremely unusual hardship" to the applicant and/or his or her U.S. citizen or LPR spouse, parent, or child.

[27] However, an NTA served on a respondent that fails to designate the specific time or place of the removal proceeding is not a "notice to appear" under INA §239(a) and, hence, does not trigger the stop-time rule. *Pereira v. Sessions*, 585 U.S. ____, 138 S. Ct. 2105 (2018). *See also, Lorenzo Lopez v. Barr*, 925 F.3d 396 (9th Cir. 2019). *See also*, *Guadalupe v. Attorney General*, 951 F.3d 161 (3rd Cir. 2020). (The Department of Homeland Security may not rely on a Notice of Hearing to cure a defective NTA) and, *Banuelos-Galviz v. Barr*, 953 F.3d 1176 (10th Cir. 2020). *See* most recently, *Niz-Chavez v. Garland*, 592 U.S. ___ (2021) (The Supreme Court held a notice to appear (NTA) must be a single document consisting of all information about an individual's removal hearing, as specified under §1229(a)(1), in order to be considered sufficient for triggering the IIRAIRA's stop-time rule). Commission of certain offenses under INA §212(a)(2) that render one inadmissible under §212(a)(2) or removable under §§237(a)(2) or (a)(4), will also stop the clock. INA §240A(d)(1). *Niz-Chavez* raises additional questions about the continued viability of the following related cases in the context of NTAs lacking key information: *Matter of Rosales Vargas and Rosales Rosales*, 27 I&N Dec. 745 (BIA 2020) (NTA lacking Immigration Court address does not deprive the court of subject matter jurisdiction thus compelling termination). *See, also, Matter of Herrera-Vasquez*, 27 I&N Dec. 825 (BIA 2020) (Absence of a checked alien classification box on notice to appear does not, by itself, render it fatally deficient or otherwise preclude an IJ from exercising jurisdiction over removal proceedings, and therefore not a basis to terminate proceedings of an alien who was returned to Mexico under the Migrant Protection Protocols. *Matter of J.J. Rodriguez*, 27 I&N Dec. 762 (BIA 2020).

[28] *Pereida v. Wilkinson*, 592 U.S. ___ (2020). (Under the INA, burden is on applicants seeking cancellation of removal to prove they have not been convicted of a crime disqualifying them from said relief).

[29] *Matter of J–J–G–*, 27 I&N Dec. 808 (BIA 2020). Applicant needs to establish that the qualifying relative has a serious medical condition and, if accompanying the applicant to the country of removal, adequate medical care for the condition is not reasonably available in that country.

[30] INA §240A(e). *See also*, EOIR's "Procedures Due to the Cap on Non-LPR Cancellation," AILA Doc. No. 18082137.

[31] *See* INA §240A(a); 8 CFR §1240.20.

- Lawful permanent resident status for at least five years;
- Continuous residence in the United States for at least seven years after having been lawfully admitted (prior to issuance of the NTA);[32] and
- No conviction for an aggravated felony.[33]

NACARA Relief

This form of relief provides permanent resident status to certain nationalities through legislation passed in 1997 (Nicaraguan Adjustment and Central American Relief Act (NACARA)[34]) and 2000 (Victims of Trafficking and Violence Protection Act of 2000 (VTVPA)[35]).

Section 203 of NACARA applies to certain Guatemalans, Salvadorans, and nationals of former Soviet bloc countries who entered the United States on or before certain specified dates and filed applications for political asylum or registered for benefits under the settlement agreement in the class action lawsuit, *American Baptist Churches (ABC) v. Thornburgh.*[36] After passage of VTVPA in October 2000, NACARA §203 relief was expanded to include family members and certain individuals who had been battered or subjected to extreme cruelty by an LPR, U.S. citizen, or NACARA §203 beneficiary.

Section 203 of NACARA allows eligible individuals to apply for suspension of deportation or cancellation of removal under the standards in place before the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA)[37] went into effect. If placed in deportation proceedings before April 1, 1997, and still in those proceedings, one may apply for suspension of deportation. Otherwise, one must apply for special rule cancellation, described below.

NACARA Statutory Requirements

Eligibility for NACARA §203 relief is based on certain criteria. First, there must be no aggravated felony conviction. Second, one must fit into one of the following categories:

- A Guatemalan national who:
  - — First entered the United States on or before October 1, 1990 (*ABC* class member);
  - — Registered for *ABC* benefits on or before December 31, 1991;[38] and

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[32] Commission of certain offenses under INA §212(a)(2) that render one inadmissible under §212(a)(2) or removable under §§237(a)(2) or (a)(4), will also stop the clock. INA §240A(d)(1). *See also, Barton v. Barr*, 590 U.S.____ (2020) (Commission of an offense included in the inadmissibility grounds contained within INA §212(a)(2) stops the clock even for an LPR who cannot be charged as removable under that inadmissibility ground). *See also*, *Rendon v. Att'y Gen*., 972 F.3d 1252 (11th Cir. 2020) (BIA erred in retroactively applying stop-time rule to pre-IIRAIRA conviction).

[33] Relief under former INA §212(c) is the form of relief available to permanent residents placed in proceedings before AEDPA (Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214) went into effect on April 24, 1996. *See* 8 CFR §§212.3(g), 1212.3(g). Those individuals placed in proceedings on or after April 24, 1996, are still eligible to apply for §212(c) relief if their conviction was obtained through a plea agreement and they would have been eligible for such relief notwithstanding the conviction. *INS v. St. Cyr*, 533 U.S. 289, 324 (2001). This applies to plea agreements made before April 24, 1996 (even if entered afterwards). 8 C.F.R. §1003.44. It also applies to persons who committed an aggravated felony and served five years if the plea agreement was entered before November 29, 1990. 8 CFR §1212.3(f)(4)(ii).

[34] Pub. L. No. 105-100, tit. II, 111 Stat. 2160, 2193–201 (1997).

[35] Pub. L. No. 106-386, 114 Stat. 1464.

[36] 760 F. Supp. 796 (N.D. Cal. 1991).

[37] Pub. L. No. 104-208, div. C, 110 Stat. 3009, 3009-546 to 3009-724.

[38] Guatemalans may overcome the ABC registration requirement by demonstrating that they filed an affirmative asylum application between December 19, 1990, and December 31, 1991. *See* USCIS Memorandum, J. Langlois, "Making ABC Registration Determinations, *Chaly-Garcia v. U.S.*, 508 F.3d 1201 (9th Cir. 2007)," AILA Doc. No. 08090264.

— Was not apprehended "at the time of entry" after December 19, 1990.

- A Salvadoran national who:
  — First entered the United States on or before September 19, 1990 (*ABC* class member);
  — Registered for *ABC* benefits on or before October 31, 1991 (either directly or by applying for temporary protected status);[39] and
  — Was not apprehended "at the time of entry" after December 19, 1990.
- A Guatemalan or Salvadoran who first applied for asylum on or before April 1, 1990; or
- An individual who:
  — Entered the United States on or before December 31, 1990;
  — Applied for asylum on or before December 31, 1991; and
  — At the time of filing the application, was a national of one of the former Soviet bloc countries; *i.e.*, the Soviet Union, Russia, any republic of the former Soviet Union, Albania, Bulgaria, Czechoslovakia, East Germany, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Yugoslavia, or any state of the former Yugoslavia.

NACARA §203 Suspension of Deportation or Special Rule Cancellation

This form of relief requires a showing of:

- Seven years continuous physical presence in the United States (the NTA/OSC does not "stop the clock" on physical presence);[40]
- Good moral character during those seven years; and
- Deportation or removal would result in "extreme hardship" to the respondent or his or her U.S. citizen or LPR spouse, child, or parent.

This is comparable to the previously discussed form of relief, suspension of deportation, but for the presumed "extreme hardship" for Salvadorans and Guatemalans and the special provisions for battered spouses and children. There is no 4,000 limit on annual grants, as is the case with regular cancellation of removal.[41]

Another version of NACARA §203 relief (comparable to the aforementioned 10-year suspension of deportation) is for those individuals who have committed certain crimes involving, for example, moral turpitude or narcotics. To qualify for relief, one must show 10 years of good moral character from the date of conviction as well as "exceptional and extremely unusual hardship." This form of relief may be requested only before the IJ, whereas the seven-year version may be heard by either USCIS or the IJ.[42]

NACARA §203 relief is also available to individuals who:

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[39] Salvadorans may overcome the ABC registration requirement by demonstrating that they filed an affirmative asylum application between December 19, 1990, and October 31, 1991. *See id.*

[40] Asylum officers must calculate the seven-year continuous physical presence and good moral character period from the date the Form I-881 was filed, not adjudicated, in the Eighth and Ninth Circuits. *See* USCIS Memorandum, J. Lafferty, "Changes to the ABC/NACARA Procedures Manual and to the Suspension of Deportation and Special Rule Cancellation of Removal under NACARA Lesson Plan Affecting the Adjudication of Special Rule Cancellation of Removal within the Jurisdiction of the Eighth and Ninth Circuit Courts of Appeals," AILA Doc. No. 15051111.

[41] 8 CFR §1240.66(b).

[42] 8 CFR §1240.66(c). *See also, Matter of Castro-Lopez*, 26 I&N Dec. 693, 694 (BIA 2015) ("[I]n calculating continuous physical presence for special rule cancellation of removal under circumstances such as those presented in this case, the alien's most recent ground of removal controls"*)*; *Campos-Hernandez v. Sessions*, 889 F3d 564 (9th Cir. 2018) (BIA correctly interpreted the physical presence requirement to run from petitioner's most recent disqualifying conviction, rather than the earliest, and so held him ineligible for NACARA cancellation of removal).

- Were served an Order to Show Cause (OSC) or placed in deportation proceedings before April 1, 1997, and applied for suspension of deportation under the law then in place. They are eligible to pursue suspension of deportation relief if battered or subjected to extreme cruelty by a U.S. citizen or LPR spouse or parent, or if the parent of a child battered or subjected to extreme cruelty by a U.S. citizen or LPR parent.
- Are the spouse or child of a NACARA-eligible national and the spouse, child, or child of the spouse has been battered or subjected to extreme cruelty by the NACARA-eligible national. Furthermore, the qualifying relationship must have existed at the time the NACARA-eligible individual received a decision on his or her application for suspension of deportation or cancellation of removal, or at the time he or she filed the application, registered for *ABC* benefits, applied for temporary protected status (TPS), or applied for political asylum.

Eligibility for this form of relief requires a showing of the following:

- Three years physical presence in the United States before filing the application;
- Good moral character during those three years; and
- Deportation or removal would result in "extreme hardship" to the respondent or his or her U.S. citizen or LPR spouse, child, or parent.

VAWA Adjustment of Status and Cancellation of Removal

Under the 1994 Violence Against Women Act (VAWA 1994)[43], the Victims of Trafficking and Violence Protection Act of 2000 (VAWA 2000), the Violence Against Women and DOJ Reauthorization Act of 2005 (VAWA 2005),[44] and the Violence Against Women Reauthorization Act of 2013,[45] certain individuals may self-petition for lawful permanent residence status before USCIS or apply for cancellation of removal before the immigration court.

VAWA Adjustment of Status[46]

This form of relief is available to the following individuals:

- Individuals battered by their U.S. citizen or LPR spouses. An unmarried child under the age of 21 who has not filed his or her own self-petition may be included in the parent's petition as a derivative beneficiary. That child may proceed with the parent's petition in the event the parent dies during the petition process.
- Unmarried children under the age of 21 who have been abused by a U.S. citizen or LPR parent. A child abused by a U.S. citizen or LPR parent may also file after the age of 21 and before the age of 25 if he or she can prove the filing delay was due to the abuse.
- Parents of a U.S. citizen who have been abused by that U.S. citizen son or daughter.
- Parents of a child abused by a U.S. citizen or LPR parent.

Self-petitioning spouses must meet certain criteria before adjusting their status to lawful permanent residence:

- Legally married to the U.S. citizen or LPR abuser. A self-petition may be filed in marriages ended by death of the abusive spouse or legal termination of the marriage (if related to the abuse) provided it is filed within the two-year period following termination of the marriage or, alternatively, within two years of the date the abuser lost LPR status or renounced U.S. citizenship due to an incident of domestic violence;

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[43] Pub. L. No. 103-322, §§40701–03, 108 Stat. 1796, 1953–55.

[44] Pub. L. No. 109-162, §§801–34, 119 Stat. 2960, 3053–77.

[45] Pub. L. No. 113-4, §§801–10, 127 Stat. 54, 110–18.

[46] 8 CFR §§204.2(c), (e); INA §204(a)(1).

- Intended spouses are eligible even if the marriage was not valid because the abusive spouse had engaged in bigamy, so long as the self-petitioner believed the marriage to be valid.
- Resided with the abusive spouse;
- The abuse must have taken place in the United States unless the abusive spouse is an employee of the U.S. government or a member of the U.S. uniformed services;
- Battered or subjected to extreme cruelty during the marriage or be the parent of a child battered or subjected to extreme cruelty by the U.S. citizen or LPR spouse during the marriage;
- Of good moral character; and
- Entered into the marriage in good faith and not solely for the purpose of obtaining immigration benefits.

As previously mentioned, children may self-petition for VAWA adjustment. They must show that they qualify as a child of the U.S. citizen or LPR parent. Any credible evidence proving the relationship will be considered during review of the petition. They must also show they resided with the abusive parent and a person of good moral character.

Likewise, abused parents must show:

- The abusive U.S. citizen child is at least 21 years of age at the time of filing the self-petition;
- Subjected to battery or extreme cruelty at the hands of the U.S. citizen child;
- Resided with the abusive child; and
- Of good moral character.

The VAWA self-petitioner may use any credible evidence to prove eligibility for the benefit.[47]

If the self-petition is approved, one may apply for permanent residence. If the batterer is a U.S. citizen, the application may be filed immediately. If the batterer is an LPR, the VAWA beneficiary is placed on the preference list and given deferred action and employment authorization until such time as his or her priority date becomes current.

VAWA Special Rule Cancellation of Removal

This is a discretionary form of relief granted by an IJ to spouses, children, or parents of an abused child who have been battered or subjected to extreme cruelty by a U.S. citizen or LPR.[48] Also eligible for this form of relief are intending spouses of a U.S. citizen or LPR who have been abused by that spouse, to whom they believed they were lawfully married, but the marriage was not, in fact, valid because of the abusive spouse's bigamy. The individual must demonstrate the following:

- Physical presence in the United States of not less than three years immediately preceding the filing of the application while issuance of the NTA does not toll the period of continuous physical presence;
- Good moral character during the three-year period, until a decision is made by the immigration judge;
- Not inadmissible under INA §§212(a)(2) or (3) or removable under INA §§237(a)(1)(G) or 237(a)(2), (3), or (4), unless a domestic violence waiver is granted, and the individual has not been convicted of an aggravated felony;[49] and

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[47] 8 CFR §204.2(c)(2).

[48] *Matter of L–L–P–*, 28 I&N Dec. 241 (BIA 2021) (Applicant for special rule cancellation based on spousal abuse must demonstrate the abuser was a lawful spouse and possessed either U.S. citizenship or lawful permanent resident status at the time abuse occurred).

[49] *See Garcia-Mendez v. Lynch*, 788 F.3d 1058 (9th Cir. 2015) (One's status as a special rule cancellation applicant does not render one eligible for a §212(h) waiver of inadmissibility nor does it define one as a "self-petitioner" under the Violence Against Women Act). *See also, Arevalo v. U.S. Attorney General*, 872 F.3d 1184 (11th Cir. 2017); *Da Silva v. Attorney General*, 948 F.3d 629 (3rd Cir. 2020) (Petitioner's convictions for assaulting her husband's mistress were held to be connected to the extreme

- Extreme hardship to the respondent, respondent's child, or respondent's parent.[50]

VAWA and Nonimmigrant

Although VAWA relief applies to certain family members of U.S. citizen or LPR abusers, employment authorization is available to abused spouses of certain nonimmigrants admitted under INA §101(a)(15)(A), (E)(iii), (G), or (H).[51]

T and U Visa Relief

The VTVPA established T and U nonimmigrant visas for victims of trafficking and other specified crimes, who provide assistance to those investigating criminal activity. Both visas may ultimately lead to permanent resident status. The purpose of the VTVPA is to "combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims." [52]

T Nonimmigrant Visa [53/54/ 55]

The purpose of the T nonimmigrant visa is to provide trafficking victims a legal avenue for remaining in the United States while assisting in the investigation and prosecution of traffickers.[56] An application for a T nonimmigrant visa is filed with USCIS. Eligibility requires a showing of the following:

- One is a victim of a "severe form of trafficking";
- Physical presence in the United States or at a port of entry due to trafficking;
- Compliance with any reasonable requests for assistance in investigating or prosecuting trafficking; and
- Extreme hardship involving unusual and severe harm if removed from the United States.[57]

There are 5,000 T nonimmigrant visas available on an annual basis.[58] Duration of T status is typically four years[59] and T status allows for employment authorization. A respondent in removal proceedings qualifying for

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cruelty she suffered at the hands of her husband); *Jaimes-Cardenas v. Barr*, 973 F.3d 940 (9th Cir. 2020) (Domestic violence waiver is available for convictions involving crimes of violence and stalking (or violation of a domestic violence OFP, but not drug possession).

[50] INA §240A(b)(2).

[51] USCIS Policy Memorandum, "Eligibility for Employment Authorization for Battered Spouses of Certain Nonimmigrants," AILA Doc. No. 16031014.

[52] Pub. L. No. 106-386, 114 Stat. 1464 (2000). *See also*, Congressional Research Service, "Immigration Relief for Victims of Trafficking," AILA Doc. No. 20102932.

[53] 8 CFR §214.11.

[54] Derivative status may also be given to certain family members of the principal T nonimmigrant. USCIS Memorandum, "New T Nonimmigrant Derivative Category and T and U Nonimmigrant Adjustment of Status for Applicants from the Commonwealth of the Northern Mariana Islands," AILA Doc. No. 15062363. *See also*, USCIS Memorandum, "Extension of Status for T and U Nonimmigrants (Corrected and Reissued)," AILA Doc. No. 16110431.

[55] *See also*, 81 Fed. Reg. 92266 (Dec. 19, 2016) for recent refinements of the T nonimmigrant visa; New York Anti-Trafficking Network, *T Visa Manual: Identification and Legal Advocacy for Trafficking Survivors* (4th Ed. 2018), AILA Doc. No. 18030832.

[56] USCIS Ombudsman, "Improving the Process for Victims of Human Trafficking and Certain Criminal Activity: The T and U Visa," AILA Doc. No. 09012973.

[57] INA §101(a)(15)(T).

[58] INA §214(o).

[59] 8 CFR §214.11(p)(1).

the T visa should move for termination of proceedings, administrative closure,[60] continuance,[61] or, in the alternative, placement of the case on the status check docket during the pendency of the application with USCIS.[62]

T Visa Adjustment of Status[63]

In December 2008, USCIS issued adjustment of status regulations for T visa holders.[64] Eligibility for T adjustment requires a showing of the following:

- Lawful admission to the United States as a T nonimmigrant and continued T status at the time of filing the application for adjustment;
- Continuous presence in the United States of at least three years since admission as a T nonimmigrant or continuous presence during the investigation or prosecution;
- Admissible at the time of adjustment of status or otherwise received a waiver from USCIS for any applicable ground of inadmissibility;
- Good moral character since first being lawfully admitted as a T-1 nonimmigrant and until USCIS completes adjudication of the application for adjustment of status; and
- Continued compliance with any reasonable request for assistance in an ongoing investigation or prosecution of acts of trafficking, or extreme hardship upon removal from the United States.

An eligible respondent should seek adjustment of status before USCIS by moving to terminate removal proceedings or, proceed before the immigration court.

U Nonimmigrant Visa[65]

The purpose of the U visa is to provide investigators and prosecutors assistance in pursuing those who commit crimes of domestic violence, sexual assault, and trafficking of foreign nationals while also protecting the victims of those crimes.[66] To qualify, the U visa applicant must:[67]

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[60] *Zuniga Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019); *Meza Morales v. Barr*, 973 F.3d 656 (7th Cir. 2020) (Rejected argument that administrative closure is not within an IJ's authority to take "any action" appropriate and necessary under 8 CFR §1003.10(b)).

[61] Be cognizant, however, of *Matter of Mayen*, 27 I&N Dec. 755 (BIA 2020).

[62] 8 CFR §214.11(d)(8). *See also*, USICE, J. Morton, "Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs," AILA Doc. No. 11061731; USICE, T. Johnson, "Interim Guidance: Civil Immigration Enforcement and Removal Priorities," AILA Doc. No. 21021800.

[63] 8 CFR §245.23; INA §245(l).

[64] 73 Fed. Reg. 75540 (Dec. 12, 2008). *See also*, USCIS Memorandum, "William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008: Changes to T and U Nonimmigrant Status and Adjustment of Status Provisions; Revisions to the *Adjudicator's Field Manual* (AFM) Chapters 23.5 and 39 (AFM Update AD 10-38)," AILA Doc. No. 10072930.

[65] 8 CFR §214.14. INA §245(m). *See also*, USCIS Memorandum, "Extension of Status for T and U Nonimmigrants (Corrected and Reissued)," AILA Doc. No. 16110431. For special consideration of respondents who are victims or witnesses of crimes, *see* ICE Memorandum, "ICE Memo on Prosecutorial Discretion Regarding Certain Victims, Witnesses, and Plaintiffs," AILA Doc. No. 11061731. Pursuant to VAWA (2013), the U visa applicant's unmarried children under the age of 21 retain their derivative beneficiary status provided the application was filed before they turned 21. (Pub. L. No. 113-4, §§801–810, 127 Stat. 54, 110–118).

[66] 72 Fed. Reg. 53014 (Sept. 17, 2007).

[67] INA §101(a)(15)(U). *See Matter of Sanchez Sosa*, 25 I&N Dec. 807 (BIA 2012). *See also, Matter of Khan*, 26 I&N Dec. 797 (BIA 2016) (IJs do not have power to waive a foreign national's inadmissibility during proceedings seeking a U visa); *Man v. Barr*, 940 F.3d 1354 (9th Cir. 2019). *But see Baez-Sanchez v. Sessions*, 872 F.3d 854 (7th Cir. 2017) (Remand to BIA to

- Show substantial suffering as a result of physical or mental abuse arising from certain criminal activities;
- Possess information about the criminal activity;
- Have been, or is being, or is likely to be helpful to federal, state, or local authorities in the investigation or prosecution of the qualifying criminal activity; and
- Show that the criminal activity violated the laws of the United States or occurred in the United States or U.S. territories.

There are 10,000 U nonimmigrant visas available on an annual basis.[68] This status usually lasts for four years unless there are exceptional circumstances.[69] Employment authorization is available to U visa holders. A respondent in removal proceedings should move for termination of proceedings, administrative closure[70], continuance[71], or placement of the case on the status check docket if one has filed or about to file for U visa status with USCIS.[72]

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consider whether IJs have authority to waive inadmissibility under INA §212(d)(3)(A)(ii) and thus halt removal for the time being while the foreign national pursues a U visa)*; Meridor v. U.S. Attorney General*, 891 F.3d 1302 (11th Cir. 2018) (Court found BIA erred when concluding IJs cannot have concurrent jurisdiction over a waiver of inadmissibility for U visa applicants); *Baez-Sanchez v. Barr*, 947 F.3d 1033 (7th Cir. 2020). (While acknowledging the Attorney General retains the power to grant waivers of inadmissibility, the 7th Circuit held immigration judges may exercise such power on the Attorney General's behalf). *See also*, ICE Memorandum, P. Vincent, "Guidance Regarding U Nonimmigrant Status (U Visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal," AILA Doc. No. 17092100. On October 26, 2017, AILA's ICE Liaison Committee was informed that while the Vincent Memorandum remains in effect, it (ICE ERO) will, if it encounters an out-of-status individual with an outstanding order of removal who provides proof that a U visa is pending, will seek a prima facie determination of the U visa application from USCIS. If USCIS is unable to issue a prima facie finding within five days as contemplated in the Vincent memo, ICE ERO will process the removal order and proceed with deportation. More recently, ICE has issued Directive 11005.2: "Stay of Removal Requests and Removal Proceedings Involving U Nonimmigrant Status (U Visa Petitioners)" that no longer requires a prima facie determination from USCIS before enforcing a removal order but now need only consider the totality of the circumstances when reviewing a stay request. ICE Fact Sheet, "Revision of Stay of Removal Request Reviews for U Visa Petitioners," AILA Doc. No. 19080531.

[68] 8 CFR §214.14(d).

[69] 8 CFR §214.14(g).

[70] *See, Zuniga Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019); *Meza Morales v. Barr*, 973 F.3d 656 (7th Cir. 2020) (Rejected argument that administrative closure is not within an IJ's authority to take "any action" appropriate and necessary under 8 CFR §1003.10(b)); *Centro Legal De La Raza, et al. v. EOIR*, No. 21-cv-00463-SI (N.D. Cal. Mar. 10, 2021). (Nationwide implementation of Trump Administration's EOIR final rule, "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure," 85 Fed. Reg. 81,588 (Dec. 16, 2020), enjoined by district court judge).

[71] *Caballero-Martinez v. Barr*, 920 F.3d 543 (8th Circ. 2019) (Court remanded for clarification of the BIA's rationale for denying the motion to reopen when petitioner had submitted a U visa receipt, suggesting, per *Matter of Sanchez-Sosa*, that a completed application should halt the removal process for the time-being). *See also, Granados Benitez v. Wilkinson*, No. 20-1541 (1st Cir. Jan. 28, 2021) (BIA abused its discretion when it denied motion to reopen and remand to IJ following USCIS placement of petitioner on U visa waiting list. It furthermore failed to analyze whether petitioner made a prima facie case warranting a continuance under the standard established by *Matter of Sanchez Sosa*, 25 I&N Dec. 807 (BIA 2012)). Be cognizant, however, of *Matter of Mayen*, 27 I&N Dec. 755 (BIA 2020).

[72] 8 CFR §214.14(c). *See also*, USICE, D. Venturella, "Guidance: Adjudicating Stay Requests Filed by U Nonimmigrant Status (V-visa) Applicants," AILA Doc. No. 10050768; USICE, J. Morton, "Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs," AILA Doc. No. 11061731. *See also*, while pondering these options, the recent change in administrations and evolving removal priorities as witnessed by USICE, T. Johnson, "Interim Guidance: Civil Immigration Enforcement and Removal Priorities," AILA Doc. No. 21021800.

U Visa Adjustment of Status[73]

Eligibility for U visa adjustment is based on the following requirements:

- Lawful admission to the United States as a U nonimmigrant and continuation of that status;
- Continuous physical presence in the United States for at least three years since obtaining U nonimmigrant visa status;
- No unreasonable refusals to provide assistance to the authorities in their federal, state, or local investigation or prosecution; and
- Establishes to the satisfaction of the Secretary that presence in the United States is justified on humanitarian grounds, to ensure family unity, or in the public interest.

A respondent who is eligible to adjust status as a U visa holder should seek termination of removal proceedings in order to pursue that relief before USCIS.[74]

Special Immigrant Juvenile (SIJ)[75]

Special immigrant juvenile status is a form of relief accorded a child found by a state court, authorized to make decisions about children and their care, to have been abused, neglected, or abandoned by one or both of his/her parents and deemed dependent on the court. Custody of the child may be held by an agency, department of the state, or an individual/entity appointed by the court after it determines that family reunification with one or both parents is not viable, and it is not in the child's best interest to return to the country of nationality or last habitual residence.[76] A child may file for special immigrant juvenile relief if:

- Under the age of 21 at the time of filing[77];
- Unmarried and remains so throughout the process;

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[73] 8 CFR §245.24. *See also,* USCIS Memorandum, "William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008: Changes to T and U Nonimmigrant Status and Adjustment of Status Provisions; Revisions to the AFM Chapters 23.5 and 39 (AFM Update AD 10-38)," AILA Doc. No. 10072930; USCIS Memorandum, "Violence Against Women Reauthorization Act of 2013: Changes to U Nonimmigrant Status and Adjustment of Status Provisions," (including addition of new crimes (fraud in foreign labor contracting and stalking) and age-out protections, among others), AILA Doc. No. 15062231.

[74] Another option available to persons in removal proceedings is the S visa. The S-1 visa is available to a person in possession of critical information concerning a criminal organization or enterprise, who is willing to supply or has supplied information to federal or state law enforcement authorities or courts, and whose presence in the United States is essential to the success of an authorized criminal investigation or prosecution. The S-2 visa is available to a person in possession of critical information concerning a terrorist organization, enterprise, or operation, who is willing to supply or has supplied information to federal law enforcement authorities or courts, will be placed in or has been placed in danger as a result of providing such information, and is eligible to receive a reward under 22 USC §2708(a). INA §101(a)(15)(S). S-1 and S-2 visa holders may adjust to LPR status if not inadmissible and the information provided to authorities has substantially contributed to the success of the investigation. S-2 visa holders must also have received a DOS reward. INA §245(j); 8 CFR §§245.11, 1245.11.

[75] 8 CFR §204.11; INA §101(a)(27)(J).

[76] *See also,* USCIS Memorandum, W. Yates, "USCIS Issues Guidance on Special Immigrant Juvenile Petitions," AILA Doc. No. 04062168; USCIS Memorandum, D. Neufeld and P. Chang, "Neufeld and Chang Memo on SIJ Provisions of TVPRA Act," AILA Doc. No. 09041670; USCIS Fact Sheet, "Special Immigrant Juvenile Status: Information for Juvenile Courts," AILA Doc. No. 14060248.

[77] *See Moreno Galvez, et al. v. Cuccinelli, et al.,* 387 F. Supp. 3d 1208 (W.D. Wash. 2019) (Court granted a preliminary injunction in a class action lawsuit filed by immigrants in Washington state challenging USCIS policy denying SIJ status to youths filing petitions after they turn 18). (The court later granted plaintiffs' motion for summary judgment and a permanent injunction while ordering USCIS to adjudicate the SIJ petitions within 180 days) (*Moreno Galvez, et al. v. Cuccinelli, et al.,* No. C19-0321RSL (W.D. Wash. Oct. 5, 2020)). *See also, R.F.M., et al. v. Nielsen, et al.,* No. 1:18-cv-05068-JGK (S.D.N.Y. Apr. 18, 2019) (Court ordered USCIS to adjudicate SIJ petitions for people between the ages of 18 and 21) and *R.F.M. et al. v. Nielsen, et al.,* No. 1:18-cv-05068-JGK (S.D.N.Y. May 31, 2019) (Final declaratory and injunctive relief granted to class members).

- A state court order deeming the child a dependent on the court, as discussed above, has been issued;[78] and
- The child is physically present in the United States;

The petition must be filed with and adjudicated by USCIS and may be accompanied by an application for permanent residence if the child is not in removal proceedings and a visa is available.[79] If the child is in removal proceedings, a request for termination of proceedings, administrative closure,[80] or a continuance, in the alternative, should be made to allow for USCIS processing of the petition.[81] Assuming a favorable decision on the petition has been made, a request to recalendar the case for an individual hearing or termination of proceedings should be made in order to pursue adjustment of status to permanent residence.

Issues of inadmissibility may arise when the child pursues adjustment of status. In many cases, the child is exempt from those grounds of inadmissibility.[82] And, in others, a waiver may be available.[83] However, there are certain grounds that are nonwaivable.[84] Those grounds involve certain crimes relating to moral turpitude and controlled substances as well as national security, Nazi persecution, genocide, and acts of torture.[85]

Stage Three—Asylum, Withholding of Removal, and Convention Against Torture (CAT)

For individuals ineligible for adjustment of status who fear persecution or torture upon return to their home countries, relief through asylum, withholding of removal, and/or the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment[86] may be available. Each form of relief is confidential[87] and has different requirements and burdens of proof.

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[78] For matters having to do with expiration of state courts' dependency orders at the time of filing for SIJ classification or SIJ-based applications for adjustment of status, *see Perez-Olano* Settlement Agreement. USCIS Memorandum, "Updated Implementation of the Special Immigrant Juvenile *Perez-Olano* Settlement Agreement," AILA Doc. No. 15062666. *See also, Budhathoki v. Nielsen*, 898 F.3d 504 (5th Cir. 2018) (Court upheld USCIS' finding that a state court child support order for individuals over the age of 18, although valid, is not comparable to the "care and custody" ruling needed for one to qualify as a "dependent" under federal SIJ guidelines).

[79] In recent years, the visa limits have been reached in the EB-4 (SIJS) category for the countries of El Salvador, Honduras, Guatemala, and Mexico.

[80] *See, Zuniga Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019); *Meza Morales v. Barr*, 973 F.3d 656 (7th Cir. 2020) (Rejected argument that administrative closure is not within an IJ's authority to take "any action" appropriate and necessary under 8 CFR §1003.10(b)); *Centro Legal De La Raza, et al. v. EOIR*, No. 21-cv-00463-SI (N.D. Cal. Mar. 10, 2021) (Nationwide implementation of Trump Administration's EOIR final rule, "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure," 85 Fed. Reg. 81,588 (Dec. 16, 2020), enjoined by district court judge).

[81] In some circumstances, consent from the Department of Health and Human Services (HHS) may be required if the child is in its custody.

[82] INA §245(h)(2)(A).

[83] INA §245(h)(2)(B).

[84] INA §§212(a)(2)(A), (2)(B), (2)(C), (3)(A), (3)(B), (3)(C), and (3)(E).

[85] For a concise exposition on many of the issues surrounding special immigrant juvenile status, *see Leslie H. v. Superior Court of Orange County*, DL042745 (Cal. App. 2014). *See also,* USCIS Policy Alert, "Special Immigrant Juvenile Classification and Special Immigrant-Based Adjustment of Status," AILA Doc. No. 16102603*;* USCIS Policy Alert, "USCIS Special Immigrant Juvenile Classification," AILA Doc. No. 19111932.

[86] Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

[87] USCIS Asylum Division Fact Sheet, "Federal Regulation Protecting the Confidentiality of Asylum Applicants," AILA Doc. No. 12122844.

Asylum[88]

Asylum is available to those in removal proceedings regardless of manner of entry, including those who entered without inspection (EWI).[89] It is a form of discretionary relief available to one who is physically present in the United States (or at a land border or port of entry who has established a "credible fear" of return to his or her country of nationality) who qualifies as a "refugee." [90] That means one who is unable or unwilling to return to his or her country of nationality because of "past persecution" or a "well-founded fear of persecution" on account of race, religion, nationality, political opinion, or membership in a particular social group.[91]

Persecution

Persecution has been defined as the "threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive." [92] This may or may not involve physical harm, but must encompass more than mere harassment. Typically, asylum seekers must be "unable or unwilling" to avail themselves of the protection afforded by their own government, or the government must be either unable or unwilling to provide protection to that individual.[93]

Establishing a well-founded fear of persecution requires one to demonstrate that "a reasonable person in his circumstances would fear persecution." [94] This may mean a showing of as little as a 10 percent chance of future persecution.[95] One must demonstrate that a well-founded fear of persecution encompasses both a subjective

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[88] For an in-depth treatment of claims for asylum, see the latest edition of *AILA's Asylum Primer*, authored by Dree K. Collopy. For a review of federal court and BIA cases and the evolution of asylum law, *see* "Asylum Cases by Topic" on AILA InfoNet, *https://www.aila.org/advo-media/issues/asylum-cases-by-topic*.

[89] *See*, for developments in asylum and the southern border under the Biden Administration, AILA, "Featured Issue: Migrant Protection Protocols (MPP)," AILA Doc. No. 19091660; AILA, "Featured Issue: Border Processing and Asylum, AILA Doc. No. 19032731.

[90] INA §101(a)(42). In 2019, the Trump Administration issued an interim final rule that imposed a mandatory bar on asylum eligibility for those who passed through a third country, and entered or attempted to enter the United States across the southern border without first applying for protection in one of those third countries through which they passed. 84 Fed. Reg. 33829 (July 16, 2019). On Sept. 11, 2019, the U.S. Supreme Court issued an order staying the district court's injunction preventing the government from implementing the rule, thus allowing its implementation while the case wended its way through the courts. (*Barr, et al. v. East Bay Sanctuary Covenant, et al*., 588 U.S. ___(2019. *See also, Al Otro Lado, Inc. v. McAleenan*, 423 F. Supp. 3d 848 (S.D. Cal. 2019). (The court blocked the government from applying the asylum ban to the provisional class, "all non-Mexican asylum seekers who were unable to make a direct asylum claim at a U.S. [port of entry (POE)] before July 16, 2019, because of the U.S. Government's metering policy, and who continue to seek access to the U.S. asylum process"). On Feb. 16, 2021, a preliminary injunction was issued that barred implementation of the Third Country Transit Ban final rule. (*East Bay Sanctuary Covenant, et al., v. Barr, et al.*, No. 4:19-cv-04073-JST (N.D. Cal. Feb 16, 2021). *See also*, DOS Press Statement, "Suspending and Terminating the Asylum Cooperative Agreements with the Governments of El Salvador, Guatemala, and Honduras," AILA Doc. No. 21020801. For more about asylum and the southern border, especially the government's program, Migrant Protection Protocols (MPP), and its termination on Jan. 20, 2021 as well as processing of those currently enrolled in MPP and more, *see* AILA, "Featured Issue: Migrant Protection Protocols (MPP)," AILA Doc. No. 19091660; AILA, "Featured Issue: Border Processing and Asylum," AILA Doc. No. 1903273.

[91] Country conditions materials comprise a key component of any asylum application. EOIR now provides a Country Pages Section in its Virtual Law Library devoted to an extensive, but not exhaustive, collection of country conditions materials: *https://www.justice.gov/eoir/country-conditions-research*.

[92] *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985).

[93] *Matter of A–B–*, 28 I&N Dec. 199 (A.G. 2021) (The "complete helplessness" language used in *Matter of A–B–* [27 I&N Dec. 316 (A.G. 2018)] is consistent with the longstanding "unable or unwilling" standard, as the two are interchangeable formulations).

[94] *Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987).

[95] *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

component (fear) and an objective component (reasonable possibility of persecution). A well-founded fear of persecution requires a showing of the following:

- The applicant possesses a belief or characteristic a persecutor seeks to overcome by means of punishment;
- The persecutor is aware, or could become aware, that the applicant possesses this belief or characteristic;
- The persecutor has the capability of punishing the applicant; and
- The persecutor has the inclination to punish the applicant.[96]

A showing of past persecution creates a presumption that one has established a well-founded fear of future persecution.[97] DHS may rebut the presumption by showing:[98]

- By the "preponderance of the evidence" that conditions in the country of persecution have changed to such an extent that the applicant no longer has a well-founded fear of persecution;[99] or
- A move to another part of the country may allow the applicant to avoid persecution and it would be reasonable to expect him or her to do so.[100/101]

Statutory Grounds of Persecution

The claimed persecution must be based on one of five statutory grounds (race, religion, nationality, political opinion, or membership in a particular social group).[102] The first ground of persecution, race, is best understood to include all kinds of ethnic groups commonly referred to as "races." Frequently, the term will be used to encompass membership in a specific social group of common descent forming a minority within a larger population.[103]

The second ground of persecution, religion, may assume such forms as prohibition of membership in a religious community, prohibition of worship in private or in public, prohibition of religious instruction, or

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[96] *Matter of Mogharrabi*, 19 I&N Dec. 439, 441 (BIA 1987).

[97] *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989).

[98] 8 CFR §§208.13(b)(1)(i)(A), (B); 1208.13(b)(1)(i)(A), (B).

[99] *Quiroz Parada v. Sessions*, 902 F.3d 901 (9th Cir. 2018) (Court held the harm suffered by petitioner and his family established past persecution on account of protected grounds. Furthermore, the government's reliance on outdated country conditions failed to rebut a presumption of future persecution). *But see, Barr v. Singh*, 920 F.3d 255 (5th Cir. 2019) (substantial evidence supported the Board's determination that DHS had rebutted the presumption of future persecution by showing a change in circumstances through cross-examination of the petitioner alone without presenting any evidence of its own).

[100] *Singh v. Sessions,* 898 F.3d 518 (5th Cir. 2018). (Court remanded case, holding that DHS failed to provide any evidence that the petitioner could safely relocate within India, notwithstanding the success of others similarly situated. By all accounts, DHS failed to meet its burden of proof); *Singh v. Whitaker*, 914 F.3d 654 (9th Cir. 2019) (Court found BIA erred by not conducting a sufficiently individualized relocation analysis – failing to consider petitioner's safety if he continued to express his political opinion in relocated area and simply assuming he could stop his expression to avoid harm). *Juan Antonio v. Barr*, 959 F.3d 778 (6th Cir. 2020) (Contention that Guatemalan petitioner could reasonably relocate to another part of Guatemala is unsupported, especially in light of evidence demonstrating violence towards Mayan indigenous women is pervasive throughout Guatemala and not limited to any specific region).

[101] However, one may still obtain asylum if he or she is able to provide compelling reasons for being unable or unwilling to return to the country arising out of the severity of the past persecution (8 C.F.R. §§208.13(b)(1)(iii)(A), 1208.13(b)(1)(iii)(A); *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989)); or establish a reasonable possibility that he or she may suffer "other serious harm" upon removal to that country (8 CFR §§208.13(b)(1)(iii)(B); 1208.13(b)(1)(iii)(B)). "Other serious harm" may not necessarily be inflicted on account of one or more of the five enumerated grounds, but rather "so serious that it equals the severity of persecution." (*Matter of L–S–*, 25 I&N Dec. 705 (BIA 2012).

[102] *INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

[103] *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* at ¶68.

serious measures of discrimination imposed on persons because they practice their religion or belong to a particular religious community.[104]

The third ground of persecution, nationality, need not be understood solely as citizenship but also membership in an ethnic or linguistic group, which may occasionally overlap with the term "race."[105]

The fourth ground of persecution, membership in a particular social group, is typically composed of persons with "similar background, habits, or social status." A claim under this ground may overlap with others based on race, religion, or nationality.[106] Members of a particular social group must share a "common immutable characteristic."[107] Examples of particular social groups include those based on class or ethnic background, age, gender, sexual orientation, or family ties, among others.[108]

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[104] *Id.* at ¶72.

[105] *Id.* at ¶74.

[106] *Id.* at ¶77.

[107] *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985).

[108] *See Matter of W–G–R–*, 26 I&N Dec. 208 (BIA 2014) and *Matter of M–E–V–G–*, 26 I&N Dec. 227 (BIA 2014) for clarification of the meaning of "social visibility," now "social distinction," and elements for establishing particular social group; *Matter of A–R–C–G–*, 26 I&N Dec. 388 (BIA 2014) ("married women in Guatemala who are unable to leave their relationship"). *See also, Pena-Paniagua v. Barr*, 957 F.3d 88 (1st Cir. 2020). (No categorical rule precluding asylum or withholding of removal applicants from establishing membership in a particular social group defined in material part as women "unable to leave" a domestic relationship); *Diaz-Reynoso v. Barr*, 968 F.3d 1070 (9th Cir. 2020) (BIA misapplied *Matter of A-B-*, as well as past precedent, when it concluded petitioner's proposed social group, "indigenous women in Guatemala who are unable to leave their relationship" was not cognizable as a particular social group). *But see, Vega-Ayala v. Lynch*, 833 F.3d 34 (1st Cir. 2016) (proposed social group, "Salvadoran women in intimate relationships with partners who view them as property," failed to show any shared immutable characteristics or social distinction). *See also, Perez-Rabanales v. Sessions*, 881 F.3d 61 (1st Cir. 2018). (The petitioner's proffered social group, "Guatemalan women who try to escape systemic and severe violence but who are unable to receive official protection," was insufficiently particular, potentially encompassing all women in Guatemala, while, at the same time, failing the social distinctiveness requirement); *S.E.R.L., et al., v. U.S. Attorney General*, 894 F.3d 535 (3rd Cir. 2018) (Court denied petition for review, accepting IJ/BIA's determination that "immediate family members of Honduran women unable to leave a domestic relationship" is not a legally cognizable group). *See also, Matter of A–B–*, 27 I&N Dec. 316 (A.G. 2018) (In a case referred to himself, Attorney General Sessions overruled *Matter of A–R–C–G–*, 26 I&N Dec. 338 (BIA 2014) [which recognized domestic violence as a possible basis for an asylum claim], and narrowed the criteria for demonstrating social group membership); *Amaya-De Sicaran v. Barr*, 979 F.3d 210 (4th Cir. 2020) (Petitioner's proposed social group, "married El Salvadoran women in a controlling and abusive domestic relationship", violated the anti-circularity requirement reaffirmed in the Attorney General's ruling in *Matter of A–B–*). *But see, Alvarez-Lagos v. Barr*, 927 F.3d 236 (4th Cir. 2019) (Court vacated denial of petitioner's asylum and withholding of removal claims, remanding for consideration of the nexus between persecution and proposed protected statuses (*i.e.*, membership in the particular social group, "unmarried mothers living under the control of gangs in Honduras," and imputed political opinion). *See also, Hernandez-Chacon v. Barr*, 948 F.3d 94 (2nd Cir. 2020) (BIA erred by failing to adequately consider petitioner's claim she would be persecuted on account of her political opinion, *i.e.*, resistance to the norm of female subordination to male dominance that pervades El Salvador). *Grace et al., v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018). (Court permanently blocked the expedited removal of immigrants seeking asylum based on flight from domestic or gang violence without first allowing credible review of their claims as dictated by current immigration law) and Guidance issued by EOIR (AILA Doc. No. 19011502) and USCIS (AILA Doc. No. 19011505) in its wake. In the related family membership context, *see Matter of L–E–A–*, 27 I&N Dec. 581 (A.G. 2019) (Any "particular social group," must (1) be composed of members sharing a common immutable characteristic; (2) defined with particularity; and (3) socially distinct within the society in question. While acknowledging that certain clans or subclans may qualify as "particular social groups" under these criteria, Attorney General Barr asserted that "most nuclear families are not inherently socially distinct" and therefore do not qualify).

The fifth ground of persecution, political opinion, applies to one's political views, either actual or imputed by the persecutor to the applicant.[109] The imputed political opinion need not reflect the applicant's actual opinion. The critical factor is that the persecutor imposes the opinion onto the applicant.

Ineligibility for Asylum

Not all individuals contemplating asylum are eligible to apply for this form of relief. Certain individuals are statutorily barred:

- Persecutors of others (*i.e.*, ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion);[110]
- Persons firmly resettled in another country prior to coming to the United States;[111]
- Persons who previously filed for and were denied asylum, unless they can demonstrate "changed circumstances" materially affecting their eligibility for asylum;[112]
- Persons failing to file for asylum within one year of entry unless they are able to show "changed or extraordinary circumstances" that led to the late filing;[113]
- Persons convicted of an aggravated felony;[114]
- Persons convicted of a "particularly serious crime";[115]
- Persons presenting a danger to the security of the United States;[116]
- Persons who committed a serious nonpolitical crime;[117]
- Persons removable to a safe third country by way of a bilateral or multilateral agreement;[118] and
- Persons engaging in terrorist-related activity[119] or providing material support to terrorist groups.[120]

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[109] *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* at ¶80.

[110] INA §208(b)(2)(A)(i).

[111] 8 CFR §§208.15; 1208.15. *See also*, USCIS Training Module, "Firm Resettlement," AILA Doc. No. 19022034.

[112] INA §208(a)(2)(C); 8 CFR §§208.4(a)(3), 1208.4(a)(3).

[113] INA §208(a)(2)(D); 8 CFR §§208.4, 1208.4. *See also*, James McHenry, EOIR Policy Memorandum, "Guidelines for the Implementation of the Settlement Agreement in *Mendez Rojas v. Wolf*," AILA Doc. No. 20110541.

[114] INA §208(b)(2)(B)(i).

[115] INA §208(b)(2)(A)(ii).

[116] INA §208(b)(2)(A)(iv).

[117] INA §208(b)(2)(A)(iii).

[118] INA §208(a)(2)(A).

[119] *See* USCIS Ombudsman's Second Annual Conference, "Terrorism-Related Grounds of Inadmissibility," AILA Doc. No. 12103143; 77 Fed. Reg. 49821 (Aug. 17, 2012); USCIS Memorandum, "Revised Guidance for Processing Asylum Cases Involving Terrorism-Related Inadmissibility Grounds and Amendment to the Hold Policy for Such Cases," AILA Doc. No. 16101135; USCIS Training Materials, "Terrorism-Related Inadmissibility Grounds (TRIG)," AILA Doc. No. 17121239; USCIS Memorandum, "Revised Guidance for Processing Cases Subject to Terrorism-Related Inadmissibility Grounds and Rescission of the Prior Hold Policy for Such Cases," AILA Doc. No. 17103131.

[120] INA §208(b)(2)(A)(v). *Sesay v. U.S. Att'y Gen.*, 787 F.3d 215 (3rd Cir. 2015). *But see*, USCIS Memorandum, "Implementation of New Exemption Under INA Section 212(d)(3)(B)(i) for the Provision of Material Support in the Form of Medical Care," AILA Doc. No. 11112862. For further clarification on "insignificant material support" and "limited material support," *see* 79 Fed. Reg. 6913, 6914 (Feb. 5, 2014); USCIS Memorandum, "Implementation of the Discretionary Exemption Authority Under [INA §212(d)(3)(B)(i)] for the Provision of Certain Limited Material Support," AILA Doc. No. 15051960; USCIS Memorandum, "Implementation of the Discretionary Exemption Authority Under [INA §212(d)(3)(B)(i)] for the Provision of Insignificant Material Support," AILA Doc. No. 15051961. *See also, Matter of M-H-Z-*, 26 I&N Dec. 757 (BIA

Certain benefits accrue to one granted asylum. An asylee is eligible to apply for permanent residence after holding such status for one year. An asylee may also file petitions for immediate family members (spouse and unmarried children under the age of 21) to provide them derivative asylee status. Finally, an asylee may apply for a travel document for travel abroad and reentry into the United States without issue.

Affirmative Asylum vs. Defensive Asylum

Two tracks are available to one seeking asylum.[121] The first, known as the affirmative asylum process, involves filing an application with the DHS Office of Asylum. The asylum applicant is interviewed by an asylum officer, with a decision issued shortly thereafter. If the applicant qualifies, he or she will be granted asylum. If the applicant fails in that regard, the application will either be denied (if the applicant remains in valid nonimmigrant or other lawful status), or referred to an IJ (if the applicant holds no lawful status). The IJ will then review the asylum case *de novo*.

The second track, the defensive asylum process, involves a respondent in removal proceedings who makes a first-time asylum application before the IJ. If the asylum application is approved, the applicant avoids removal and is given asylee status in the United States. If the application is denied, the IJ orders the respondent's removal, while still leaving open the option of an appeal to the BIA.[122]

2016) (no duress exception to material support bar); *Hernandez v. Sessions*, 884 F.3d 107 (2nd Cir. 2018). (Court joined several other circuits in holding that "material support bar" in INA §212(a)(3)(B)(iv)(VI) does not exempt individuals acting under duress); *Matter of A–C–M–*, 27 I&N Dec. 303 (BIA 2018). (BIA remanded record after finding respondent afforded material support to guerillas in El Salvador in 1990 by way of the forced labor she provided in the form of cooking, cleaning, and washing of their clothes); *Matter of Negusie*, 27 I&N Dec. 347 (BIA 2018) (BIA found applicant had not established he was under duress when assisting in the persecution of prisoners under his guard in an Eritrean prison camp. At the same time, BIA set forth a standard for evaluating claims under the duress exception); *Rayamajhi v. Whitaker*, 912 F.3d 1241 (9th Cir. 2019) (Court held *Annachamy* foreclosed duress argument, and, thus, not a colorable claim for jurisdiction over otherwise unreviewable determination. At the same time, it held plain text of the material support bar unambiguously contained no exception for *de minimis* funds); *Matter of Negusie*, 28 I&N Dec. 120 (A.G. 2020) (There is no exception for duress or coercion in the persecution bar to eligibility for asylum and withholding of removal).

[121] EOIR Fact Sheet, "Asylum and Withholding of Removal Relief, Convention Against Torture Protections," AILA Doc. No. 09012635; EOIR Fact Sheet, "Executive Office for Immigration Review: An Agency Guide," AILA Doc. No. 18010369.

[122] Applications by unaccompanied foreign national children are processed in a different manner. *See* USCIS Memorandum, J. Langlois, "Implementation of Statutory Change Providing USCIS with Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children," AILA Doc. No. 09042230; INA §208(b)(3)(C); USCIS Memorandum, T. Kim, "Updated Procedures for Determination of Initial Jurisdiction Over Asylum Applications Filed by Unaccompanied Alien Children," AILA Doc. No. 13082667; USCIS Memorandum, T. Kim, "Updated Service Center Operations Procedures for Accepting Forms I-589 Filed by Unaccompanied Alien Children," AILA Doc. No. 13080847. Special consideration is also given those with issues associated with mental incompetence. *See* "EOIR Publishes "Phase I Guidance" Regarding Protections for Detained, Unrepresented Aliens Who May Be Mentally Incompetent," AILA Doc. No. 13123160. *See also,* EOIR Memorandum, M. Keller, "Case Processing Priorities," AILA Doc. No. 17020136. On February 20, 2017, the Trump administration issued a memorandum calling for additional guidelines for the processing of asylum applications by "unaccompanied alien children": specifically, verification that the children, after an initial determination that they are "unaccompanied alien children," do in fact "continue to fall within the statutory definition when being considered for the legal protections afforded to such children as they go through the removal process." The memorandum also declared that individuals (including parents and other family members seeking family reunification in the United States or the children's escape from intolerable conditions in the home country) involved in the smuggling or trafficking of said children into the United States shall be subject to the proper enforcement of the immigration laws, be that placement in removal proceedings if the person is removable or criminal prosecution. DHS Memorandum, J. Kelly, "Implementing the President's Border Security and Immigration Enforcement Improvements Policies," AILA Doc. No. 17021831. *See also,* USCIS Guidance on Unaccompanied Alien [sic] Children, AILA Doc. No. 17051706; EOIR Memorandum, "Legal Opinion re: EOIR's Authority to Interpret the term Unaccompanied Alien [sic] Child for Purposes of Applying Certain Provisions of TVPR," AILA Doc. No. 17100201;

Asylum at the Port of Entry—Expedited Removal Process[123]

Although asylum is available to those residing within the borders of the United States, individuals arriving at a U.S. port of entry without valid entry documents may also pursue this relief. These individuals are detained

EOIR Memorandum, "Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien [sic] Children," AILA Doc. No. 17122032. *See also,* ICE handbook for handling minors encountered by DHS, "Juvenile and Family Residential Management Unit Field Office Juvenile Coordinator Handbook," AILA Doc. No. 18042630. For discussion of current developments in *Flores v. Reno* Settlement Agreement on Minors in Immigration Custody, *see* AILA Doc. No. 14111359; *Flores v. Rosen, et al.,* No. 19-56326 (9th Cir. Dec. 29, 2020) (Court affirmed the district court's order denying the government's motion to terminate the *Flores* Settlement Agreement). *See also, Matter of M–A–C–O–*, 27 I&N Dec. 477 (BIA 2018) (BIA held an immigration judge, rather than USCIS, has initial jurisdiction over an asylum application filed by a respondent previously determined to be an unaccompanied child who turned 18 before filing the application); *Garcia v. Barr*, 960 F.3d 893 (6th Cir. 2020) (Court held the IJ properly exercised jurisdiction over the case of petitioner who entered the United States just 8 days under the age of 18 and thus found to be an unaccompanied child at the time of entry). *See* USCIS Memorandum, J. Lafferty, "Updated Procedures for Asylum Applications filed by Unaccompanied Alien [sic] Children," AILA Doc. No. 19060771, for more on jurisdictional issues and modification of the Kim 5/28/2013 Memorandum. On August 2, 2019, the U.S. District Court for the District Court of Maryland issued a temporary restraining order halting implementation of the Lafferty Memorandum, thus ensuring continued reliance on the Kim Memorandum. (*J.O.P. et al. v. Department of Homeland Security, et al*., 409 F. Supp. 3d 367 (D. Md. 2019)). *See*, for more recent developments, "District Court Grants Class Certification and Amends Preliminary Injunction in Unaccompanied Children Litigation," AILA Doc. No. 20122321.

See also, P.J.E.S. v. Wolf, et al., No. 1:20-cv-02245-EGS-GMH (D.D.C. Nov. 18, 2020) (Motions for class certification and a preliminary injunction granted by the district court, thus blocking the Trump administration's "Title 42" order restricting immigration at the border under the Public Health Service Act when applied to unaccompanied children); *P.J.E.S., et al. v. Pekoske, et al*., No. 20-5357 (D.C. Cir. 2021) (On January 29, 2021, the court ordered a stay of the district court's order enjoining government from expelling unaccompanied children from the southern border without procedural protections); Center for Disease Control and Prevention and Department of Health and Human Services, "Notice of Temporary Exception From Expulsion of Unaccompanied Noncitizen Children Pending Forthcoming Public Health Determination," 86 Fed. Reg. 9942 (Feb. 17, 2021)).

[123] INA §235(b). *See,* DHS Memorandum, J. Kelly, "Implementing the President's Border Security and Immigration Enforcement Improvements Policies," AILA Doc. No. 17021831. For an overview of the expedited removal process, *see* Congressional Research Service, "Expedited Removal of Aliens: Legal Framework," AILA Doc. No. 19101101. *See* more recently, the Trump administration's effort to halt entry of all asylum seekers at the border through the Center for Disease Control's Title 42 authority while battling the COVID-19 pandemic: Center for Disease Control and Prevention and Department of Health and Human Services, "Order Suspending the Right To Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists," 85 Fed Reg 65806 (Oct. 13, 2020). An exception, under the Biden administration, more recently provided for unaccompanied children: Center for Disease Control and Prevention and Department of Health and Human Services, "Notice of Temporary Exception From Expulsion of Unaccompanied Noncitizen Children Pending Forthcoming Public Health Determination," 86 Fed. Reg. 9942 (Feb. 17, 2021). *See also,* DHS, "Statement by Homeland Security Secretary Alejandro N. Mayorkas Regarding the Situation at the Southwest Border," AILA Doc. No. 21031633. For a current and comprehensive overview of expedited removal, credible fear, and more, *see* Congressional Research Service, "The Law of Asylum Procedure at the Border: Statutes and Agency Implementation," AILA Doc. No. 21041432.

and placed in expedited removal proceedings.[124] The expedited removal process allows DHS inspectors to remove certain individuals from the United States without placing them in removal proceedings.[125]

An individual who arrives at a U.S. port of entry and expresses a fear of persecution or torture will receive a "credible fear" interview with a USCIS asylum officer. If the asylum officer finds no credible fear of persecution or torture, the individual may then request review by an IJ. Review must be carried out within 24 hours, if possible, but no later than seven days after the initial determination by the asylum officer. Review is restricted solely to whether the individual has a credible fear of persecution or torture. If, on the other hand, the asylum officer finds that the individual has a credible fear, the case is referred to an IJ, who hears the individual's applications for political asylum, withholding of removal under INA §241(b)(3), and/or CAT relief.[126 / 127]

An individual previously removed from the United States who later appears at a U.S. port of entry expressing a fear of persecution or torture may be granted a "reasonable fear" interview with a USCIS asylum officer. If the officer finds no reasonable fear of persecution or torture, the individual may then request a review by an IJ. Review must take place within 10 days (unless there are exceptional circumstances) and is restricted solely to the question of whether the individual has a "reasonable fear" of persecution or torture.[128]

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[124] More recently, *see* the Trump administration's efforts to channel entry of Central Americans (and others) seeking asylum to ports of entry along the southern border while deeming those found to have entered unlawfully ineligible for such relief. (Although, the latter group will be allowed to pursue the relief of withholding of removal or relief under the Convention Against Torture). Presidential Proclamation 9822, "Addressing Mass Migration Through the Southern Border of the United States," 83 Fed. Reg. 57661 (Nov. 15, 2018) and DHS/DOJ interim final rule, 83 Fed. Reg. 55934 (Nov. 9, 2018); *East Bay Sanctuary Covenant, et al. v. Trump, et al*., 354 F. Supp. 3d 1094 (N.D. Cal. 2018) (Preliminary injunction barring government from taking any further action along the southern border for an extended period of time); *Donald J. Trump, President of the United States, et al., v. East Bay Sanctuary Covenant, et al*., 139 S. Ct. 782 (Mem) (2018) (On Dec. 21, 2018, the U.S. Supreme Court denied the government's request for a stay of the plaintiffs' preliminary injunction); *East Bay Sanctuary Covenant, et al. v. Trump, et al.*, 950 F.3d 1242 (9th Cir. 2020) (Court affirmed preliminary injunction halting enforcement of a rule and presidential proclamation denying asylum eligibility to those crossing into the United States along the southern border of Mexico between designated ports of entry).

[125] For a challenge to the expedited removal process, *see*, *Thuraissigiam v. DHS*, 917 F.3d 1097 (9th Cir. 2019) (Court remanded district court dismissal of petitioner's habeas petition (for lack of subject matter jurisdiction) challenging the expedited removal process on the grounds that 8 USC §1252(e)(2) violates the Suspension Clause). On June 25, 2020, the U.S. Supreme Court reversed and remanded the case to the Ninth Circuit, finding 8 USC §1252(e)(2) does not violate the Suspension Clause or Due Process Clause under the U.S Constitution. (*DHS, et al. v. Thuraissigiam,* 591 U.S. ___(2020).

[126] INA §§235(b)(1)(A)(ii), (B).

[127] Those who have been found to have a credible fear of persecution or torture, who establish their identities, and who pose no flight risk nor danger to the community automatically are considered for parole from detention. *See* "Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture," AILA Doc. No. 09121760. *See also,* DHS Memorandum, J. Kelly, "Implementing the President's Border Security and Immigration Enforcement Improvements Policies," AILA Doc. No. 17021831. *See also, Padilla, et al. v. ICE*, et al., 953 F.3d 1134 (9th Cir. 2020). (District court did not abuse its discretion when it granted a preliminary injunction ordering the U.S. government to provide bond hearings to a class of noncitizens detained after entering the United States and found to have a "credible fear" of persecution). *But, see*, U.S. Supreme Court's Jan. 11, 2021, grant of writ of certiorari while vacating the Ninth Circuit's *Padilla* decision, remanding case for further consideration in view of *DHS, et al. v. Thuraissigiam*, 591 U.S. ___(2020). *See also* "Resources Related to Case Challenging Credible Fear Interview and Bond Hearing Delays (*Padilla v. ICE*)," AILA Doc. No. 18062734. For a current and comprehensive overview of expedited removal, credible fear, and more, *see* Congressional Research Service, "The Law of Asylum Procedure at the Border: Statutes and Agency Implementation," AILA Doc. No. *21041432.*

[128] *Matter of J–C–H–F–*, 27 I&N Dec. 211 (BIA 2018) (An assessment of an applicant's credibility should encompass a consideration of the totality of the circumstances).

If, on the other hand, the asylum officer finds a reasonable fear, the case is referred to an IJ for "withholding only" proceedings. That is, the IJ is charged only with determining eligibility for withholding of removal under INA §241(b)(3) or protection under CAT.[129]

Withholding of Removal [130]

Withholding of removal under INA §243(b)(3) is a mandatory form of relief available only by application to the immigration court. It is available to one fleeing persecution from his or her country of nationality and is based on the same grounds as that for political asylum (*i.e.*, race, religion, nationality, membership in a social group, or political opinion), except it requires a higher burden of proof than that of asylum. An applicant for withholding of removal must show a "clear probability" of persecution in order to be granted withholding of removal. In other words, it is "more likely than not" (*i.e.*, a greater than 50 percent chance) that one will be persecuted by the government or a group the government cannot or will not control.

A grant of withholding of removal is less desirable than a grant of asylum for several reasons. First, although one is guaranteed safe haven from the country of claimed persecution, the IJ must issue an order of removal that provides DHS the option to seek removal to a third country at a later time if and when it becomes available.[131] Second, a grant of withholding of removal does not serve as the basis for a future application for permanent residence. While employment authorization is available, one granted withholding of removal may

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[129] *See* INA §241(a)(5); 8 CFR §§ 208.31 and 241.8. *See also, Ramirez-Mejia v. Lynch*, 794 F.3d 485 (5th Cir. 2015) (A foreign national illegally reentering the country after removal is ineligible for asylum). *But see, Perez-Guzman v. Lynch*, 835 F.3d 1066 (9th Cir. 2016) (Although found to be ineligible for asylum with a reinstated removal order, remand was ordered for the BIA to reconsider the petitioner's applications for withholding of removal and protection under CAT in view of intervening circuit precedent in *Henriquez-Rivas v. Holder*, 707 F.3d. 1081 (9th Cir. 2013) and *Madrigal v. Holder*, 716 F.3d 499 (9th Cir. 2013); *Lara-Aguilar v. Sessions*, 889 F.3d 134 (4th Cir. 2018). (Court denied the petition for review, holding an individual subject to a reinstated order of removal may not apply for asylum, even when the factual basis for asylum claim did not exist prior to the original removal); *Padilla Cuenca v. Barr*, 941 F.3d 1213 (9th Cir. 2019) (While INA §241(a)(5) allows an immigration officer to reinstate a prior removal order, (s)he is unambiguously and permanently barred from reopening the prior removal order for the purpose of an asylum application).

[130] *See* 8 CFR §§208.16(b); 1208.16(b). *See also, Pangea Legal Services, et al. v. DHS, et al.*, No. 3:20-cv-07721-SI (N.D. Cal. Nov. 19, 2020) (Nationwide injunction issued against final rule, "Procedures for Asylum and Bars to Asylum Eligibility" (85 Fed. Reg. 67,202 (Oct. 21, 2020), set to go into effect on 11/20/2020); *Pangea Legal Services, et al. v. DHS, et al.*, No. 3:20-cv-09253-JD (N.D. Cal. Jan. 8, 2021) (Preliminary injunction issued against final rule, "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review" (85 Fed. Reg. 80,274 (Dec. 11, 2020), set to go into effect on 1/11/2021); *National Immigrant Justice Center et al., v. Executive Office for Immigration Review, et al.*, No. 1:21-cv-00056-RBW (D.D.C. Jan. 14, 2021) (Temporary restraining order and preliminary injunction against implementation of final rule, "Procedures for Asylum and Withholding of Removal" (85 Fed. Reg. 81,698 (Dec. 16, 2020), set to go into effect on 1/15/2021). *See as well*, Departments of Homeland Security and Justice, "Security Bars and Processing; Delay of Effective Date." 86 Fed. Reg. 15,069 (Mar. 22, 2021) (Effective date of the final rule, "Security Bars and Processing," (85 Fed. Reg. 84,160 (Dec. 23, 2020), delayed until 12/31/2021, originally scheduled to go into effect on 3/22/2021. At the same time, public comment sought as to whether final rule should be revised or revoked).

[131] *See* notwithstanding, *Matter of A–S–M–*, 28 I&N Dec. 282 (BIA 2021) (An applicant may seek withholding of removal from a country in withholding-only proceedings, even if that country is different from the country of removal that was initially designated in the reinstated removal order on which the withholding-only proceedings are based).

not travel outside the United States.[132] Moreover, a person granted withholding of removal may not petition for derivative status to be given to immediate family members.[133]

Withholding of removal should be pursued by those ineligible for asylum on grounds such as: (1) they missed the one-year filing deadline without "changed" or "extraordinary" circumstances to explain the delay; (2) they were convicted of an aggravated felony; or (3) certain negative factors exist (*e.g.*, a lengthy criminal history) that make a discretionary grant of asylum unlikely.

As with asylum, there are certain acts barring one from eligibility. Persons engaged in the persecution of others are ineligible for withholding of removal, as are those convicted of a "particularly serious crime."[134]

Relief Under the United Nations Convention Against Torture

Under Article 3 of the CAT, a person may not be returned to a country where there are substantial grounds to believe that he or she will be tortured. In other words, it must be "more likely than not" that he or she will be tortured.[135]

Torture is defined as severe pain or suffering (physical or mental) that is intentionally inflicted "by or at the instigation of or with the consent or acquiescence of a public official, or other person acting in an official capacity." [136] It is an "extreme form of cruel and inhuman punishment [that] does not extend to lesser forms of cruel, inhuman, or degrading treatment or punishment." [137]

Two types of CAT relief are available to an applicant, both of which must be pursued before the IJ. The first, withholding of removal, is a form of relief barring one from removal to the claimed country of torture. Withholding under CAT may be terminated only if the case is reopened and DHS shows that the person need no longer fear torture. Withholding under CAT is similar to withholding under INA §241(b)(3), except that the applicant need not show eligibility under one of the five statutory grounds of persecution.[138]

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[132] Travel outside the United States is extremely unlikely without first being granted advance parole. Moreover, it is doubtful that advance parole would be given to someone granted withholding of removal, nor would it be advisable to leave the country even with a grant of advance parole.

[133] *But see,* 8 CFR §1208.16(e), applicable when there has been a denial of political asylum solely in the exercise of discretion, thereby precluding admission of one's spouse and children. In such a circumstance, political asylum could be reconsidered by the IJ while reviewing the reasons for the denial and alternatives available to the applicant, such as reunification in a third country.

[134] *Matter of Negusie*, 28 I&N Dec. 120 (A.G. 2020) (There is no exception for duress or coercion in the persecution bar to eligibility for asylum and withholding of removal).

[135] Incorporated into law by INA §241. *See also, Nasrallah v. Barr*, 590 U.S. ___ (2020) (Judicial review of factual challenges to a CAT order is not precluded by 8 U.S.C. §§1252(a)(2)(C) and (D) since it is distinct from a final order of removal and has no impact on that order of removal).

[136] 8 CFR §§208.18(a)(1); 1208.18(a)(1). *See also, Matter of O–F–A–S–*, 27 I&N Dec. 709, 713 (BIA 2019) ("(T)orturous conduct committed by a public official who is acting "in an official capacity," that is, "under color of law" is covered by the Convention Against Torture, but such conduct by an official who is not acting in an official capacity, also known as a "rogue official," is not covered by the Convention") (Vacated and remanded for BIA to clarify proper approach for determining when public officials, committing torturous acts, are 'acting in an official capacity' and 'under color of law.' (*Matter of O–F–A–S–*, 28 I&N Dec. 35 (A.G. 2020)); *Matter of R–A–F–*, 27 I&N Dec. 778, 780-81 (A.G. 2020) (Torture must "be specifically intended to inflict severe physical or mental pain or suffering" and not simply a "negligent act." Furthermore, the alleged torturer must be shown to be motivated by such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind.").

[137] *Matter of J–E–*, 23 I&N Dec. 291 (BIA 2002); 8 CFR §208.18.

[138] 8 CFR §§208.16(c), 1208.16(c).

Deferral of removal is the second form of CAT relief. It is available to one likely to be tortured but ineligible for CAT withholding of removal given a past history as a persecutor, terrorist, or conviction for a "particularly serious crime." To terminate one's deferral of removal status, DHS may file a request to schedule a hearing before an IJ rather than make a formal motion to reopen the case.[139]

As with withholding of removal under INA §241(b)(3), a grant of CAT relief does not lead to eligibility for permanent residence, permit travel outside the United States, or allow one to petition for immediate family members. It does, however, provide for employment authorization.[140]

Stage Four—When All Else Fails

Temporary Protected Status (TPS)[141]

Temporary protected status is a form of safe haven relief given by the secretary of homeland security to nationals of designated countries who are unable to return to their home country on account of ongoing armed conflict, environmental disaster, or other extraordinary and temporary conditions. The secretary determines the duration of such status as well as the availability of extending relief.

Although TPS recipients may remain in the United States and apply for employment authorization, they are ineligible for permanent residence on the basis of that status alone.[142] Once TPS has expired, one reverts to the immigration status held prior to the grant of TPS, unless that status has since expired or been terminated. If out of status, the individual will be placed in removal proceedings. If an individual is in removal proceedings at the time TPS is issued, he or she may seek administrative closure or a continuance for the duration of TPS.[143]

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[139] 8 CFR §§208.17, 1208.17. *See Khouzam v. Att'y Gen.*, 549 F.3d 235, 240 (3rd Cir. 2008) (Deferral of removal case in which the court found the government's failure to provide the appellant an opportunity to review or rebut the Egyptian government's assurances that it would not torture him was a due process violation); *Matter of C–C–I–*, 26 I&N Dec. 375 (BIA 2014) (IJ not estopped from reevaluating respondent's credibility when comparing his testimony at the time of being granted deferral of removal to that offered at the time of his hearing for termination of that status).

[140] EOIR Fact Sheet, "Asylum and Withholding of Removal Relief, Convention Against Torture Protections," AILA Doc. No. 09012635; EOIR Fact Sheet, "Executive Office for Immigration Review: An Agency Guide," AILA Doc. No. 18010369.

[141] *See* INA §244; 8 C.F.R. Parts 244, 1244. *See also*, AILA Client Flyer: "Temporary Protected Status," AILA Doc. No. 21021830.

[142] They may, however, be eligible for relief on the basis of some other avenue such as family-based immigration. Typically, unlawful entry into the United States does not allow for adjustment of status and permanent residence must be sought through consular processing. *See Serrano v. U.S. Attorney General*, 655 F3d 1260 (11th Cir. 2011). *See also*, USCIS Policy Memorandum, "*Matter of H–G–G–*, Adopted Decision 2019-01 (AAO July 31, 2019)," AILA Doc. No. 19080180. In some circuits, however, a grant of temporary protected status is considered an "admission" for adjustment of status purposes, making one eligible to process within the United States without leaving the country. *See Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013); *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017); *Velasquez, et al. v. Barr, et al*., Nos. 19-1148, 19-2130 (8th Cir. Oct. 27, 2020); *Matter of Padilla Rodriguez*, 28 I&N Dec. 164 (BIA 2020) (Respondent with valid TPS will be considered an "admission" for purposes of adjustment of status only within the United States Courts of Appeals for the Sixth, Eighth, and Ninth Circuits. *See* others, however, finding TPS does not constitute an admission for adjustment of status purposes: *Solorzano v. Mayorkas*, No. 19-50220 (5th Cir. Feb. 3, 2021); *Sanchez, et al. v. Wolf, et al.*, No. 10-1311 (3rd Cir. July 22, 2020) (On Jan. 8, 2021, the Supreme Court granted the petition for writ of certiorari). For TPS recipients (with initial EWI entry) returning to the United States on advance parole, there is no inspection and admission or parole and thus no eligibility for adjustment of status. USCIS Policy Memorandum, "*Matter of Z-R-Z-C-*, Adopted Decision 2020-02 (AAO Aug. 20, 2020)," AILA Doc. No. 20083135. *But see, Michel v. Mayorkas*, 4:20-cv-10885-IT (D. Mass. Mar. 2, 2021).

[143] *See Matter of Figueroa*, 25 I&N Dec. 596 (BIA 2011) (When an application for TPS that has been denied by USCIS is renewed in removal proceedings, the IJ may consider any material and relevant evidence, regardless of whether the evidence was previously considered in proceedings before USCIS.); *Matter of Echeverria*, 25 I&N Dec. 512, 519 (BIA 2011) (A foreign national seeking TPS as a derivative spouse must be from the foreign state designated for TPS eligibility.); and *Matter of D–A–C–*, 27 I&N Dec. 575 (BIA 2019) (IJs have authority to deny applications for TPS in the exercise of their discretion).

To be eligible for TPS, one must show the following:

- Continuous physical presence and residence in the United States as specified by each TPS designation;
- The applicant is not subject to one of the criminal, security-related, or other bars to TPS; and
- The applicant submitted a timely application for TPS benefits.

By the same token, there are certain factors making one ineligible for this form of relief:

- Having been convicted of a felony or two or more misdemeanors for crimes committed in the U.S.;
- Engaging in persecution, or otherwise being barred from asylum; or
- Being subject to one of several criminal-related or terrorism-related grounds of inadmissibility for which a waiver is unavailable.[144]

Deferred Enforced Departure (DED)

Deferred enforced departure is a temporary form of relief granted to nationals of certain countries by the president as an exercise of his or her constitutional power to conduct foreign relations. DED was first used in 1990 to help Chinese students in the United States following events in Tiananmen Square, and has been used a limited number of times since. Although DED provides a temporary stay of removal and employment authorization, it does not provide eligibility for permanent residence. If in removal proceedings and eligible for DED, one should ask the IJ to administratively close or continue the case for the duration of DED.[145] [146]

Voluntary Departure[147]

Voluntary departure is a form of discretionary relief allowing the respondent to depart the United States at his or her own expense. It is preferable to an IJ's removal order, which may bar reentry for several years and also subject one to criminal and civil penalties upon reentering the United States without prior authorization. A grant of voluntary departure allows one to avoid a bar from legal reentry to the United States at some point in the future.

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[144] For more about ineligibility, *see* INA §244(c)(2); 8 C.F.R. §§244.1–244.4, 1244.1–1244.4.

[145] USCIS "should agree to administratively close removal proceedings" when respondents provide evidence of prima facie eligibility for deferred enforced departure. INS Memorandum, D. Carpenter, "Administrative Closure When Alien is Prima Facie Eligible for TPS or DED," AILA Doc. No. 02040338. *But see, Matter of Castro-Tum*, 27 I&N Dec. 187 (AG 2018) (AG ruled that IJs and BIA do not have the authority to administratively close cases, except in those circumstances in which regulations or settlement agreements permit such practice) and *Hernandez-Serrano v. Barr*, No. 20-3175 (6th Cir. Nov. 24, 2020) (IJs and the BIA do not have authority, under 8 CFR §§1003.10 and 1003.1(d), to suspend indefinitely immigration proceedings by administrative closure). *But see, Zuniga Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019) (IJs and the BIA have authority to administratively close cases under the plain language of 8 CFR §§1003.10(b) and 1003.1(d)(1)(ii); *Meza Morales v. Barr*, 973 F.3d 656 (7th Cir. 2020) (Rejected argument that administrative closure is not within an IJ's authority to take "any action" appropriate and necessary under 8 CFR §1003.10(b); *Centro Legal De La Raza, et al. v. EOIR*, No. 21-cv-00463-SI (N.D. Cal. Mar. 10, 2021) (Nationwide implementation of Trump Administration's EOIR final rule, "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure," 85 Fed. Reg. 81,588 (Dec. 16, 2020), enjoined by district court judge). A motion to move the case to the IJ's status check docket may also be appropriate. *See* EOIR Memorandum, J. R. McHenry III, "Use of Status Dockets," AILA Doc. No. 19081900.

[146] On a related note, for special relief accorded Liberians, *see* Section 7611 (Liberian Relief Immigration Fairness) of the National Defense Authorization Act for Fiscal Year 2020. More about its implementation can be found at: *https://www.uscis.gov/green-card/green-card-eligibility/liberian-refugee-immigration-fairness*. *See also,* AILA Client Flyer: "The Liberian Refugee Immigration Fairness Program," AILA Doc. No. 20101434; EOIR Policy Memorandum, "Management of Cases related to Section 7611 of the National Defense Authorization Act for Fiscal Year 2020," AILA Doc. No. 20011400.

[147] *See* 8 CFR §1240.26.

There are different forms of voluntary departure available to a respondent at different stages in the removal hearing process. Voluntary departure is first available if made prior to or at the master calendar hearing. An applicant for voluntary departure at this stage of proceedings must:

- Waive or withdraw all forms of relief;
- Concede removability;
- Have no conviction involving an aggravated felony nor present a security risk; and
- Demonstrate the financial ability to depart the United States.

If the criteria are met, the IJ will grant the respondent up to 120 days to voluntarily depart the country.

A grant of voluntary departure at the conclusion of removal proceedings requires one to demonstrate:

- One-year physical presence in the United States prior to the date at which the NTA was issued;[148]
- Financial ability to depart the United States in a timely manner;
- Payment of a bond of at least $500 within five calendar days of the IJ's decision; and
- Possession of a valid, unexpired passport or some other travel document.

If the requirements are met, the IJ may grant up to 60 days to voluntarily depart the country.[149]

Failure to voluntarily depart within the time granted by the IJ will make one ineligible, for a period of 10 years, to receive any relief under §§240A, 245, 248, and 249 of the Act and subject to a civil penalty of not less than $1,000 and not more than $5,000.[150]/[151]

Administrative Closure[152]

Administrative closure is a temporary cessation of the removal hearing by the IJ pending resolution of some matter, typically a pending petition before USCIS (*e.g.*, I-130, I-140, or I-360). Because the immigration court lacks jurisdiction over such petitions, USCIS is given time to process the matter. If the petition is approved, the respondent will be eligible to apply for permanent resident status before the IJ. Administrative closure is distinct from "termination of proceedings." The latter involves the permanent cessation of removal proceedings against the respondent when DHS no longer seeks his or her removal from the United States.[153]

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[148] *Matter of Viera-Garcia* and *Ordonez-Viera*, 28 I&N Dec. 223 (BIA 2021) (NTA failing to specify time and place of initial removal hearing, is perfected by a subsequent NTA containing such information, thus ending accrual of physical presence for the purpose of voluntary departure).

[149] *See Camick v. Sessions*, 891 F.3d 1101 (8th Cir. 2018) (Discussion of pre– and post-conclusion voluntary departure).

[150] INA §240B(d)(1).

[151] USCIS Policy Memorandum, "*Matter of L–S–M–*, Adopted Decision 2016-03 (AAO Feb. 23, 2016)," AILA Doc. No. 16051734. (Although there is an exception to civil penalties for failing to comply with a voluntary departure order for victims of domestic violence or related abuse, none is available to U-1 nonimmigrant victims of a crime). *See also*, *Centro Legal De La Raza, et al. v. EOIR*, No. 21-cv-00463-SI (N.D. Cal. Mar. 10, 2021) (Nationwide implementation of Trump Administration's EOIR final rule, "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure," 85 Fed. Reg. 81,588 (Dec. 16, 2020), enjoined by district court judge).

[152] ICE Memorandum, J. Morton, "Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions," AILA Doc. No. 10082561. *See also*, DHS Memorandum, J. Johnson, "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants," AILA Doc. No. 14112004.

[153] *But see Matter of Castro-Tum*, 27 I&N Dec. 271 (AG 2018) (Effectively overruling *Matter of Avetisyan* and *Mater of W–Y–U–*, the AG ruled that IJs and BIA do not have the authority to administratively close cases, except in those circumstances in which regulations or settlement agreements permit such practice) and *Hernandez-Serrano v. Barr*, No. 20-3175 (6th Cir. Nov.

Procedurally, a motion to administratively close a case is made with the IJ who has the authority to close a proceeding in spite of the opposition of a party "if it is otherwise appropriate to do so under the circumstances." [154]

Private Bill

A private bill is an action of last resort when no other relief is available to one seeking to avoid removal. It entails convincing a member of Congress to sponsor a bill providing one with permanent resident status. If successful, one must then obtain passage of the bill in both houses of Congress and the president's signature. Although rare, private bills are occasionally passed, especially if the respondent presents compelling factors.[155]

Estoppel

Under estoppel, the respondent seeks to stop removal by arguing that, but for misconduct by the U.S. government, he or she would not be subject to removal. This is a difficult form of relief to obtain. One needs to show "affirmative misconduct" by the U.S. government. Acts of inattention, failure to act, or neglect are

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24, 2020) (IJs and the BIA do not have authority, under 8 CFR §§1003.10 and 1003.1(d), to suspend indefinitely immigration proceedings by administrative closure). *But see, Zuniga Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019) (IJs and the BIA have authority to administratively close cases under the plain language of 8 C.F.R. §§1003.10(b) and 1003.1(d)(1)(ii); *Meza Morales v. Barr*, 973 F.3d 656 (7th Cir. 2020) (Rejected argument that administrative closure is not within an IJ's authority to take "any action" appropriate and necessary under 8 CFR §1003.10(b); *Centro Legal De La Raza, et al. v. EOIR*, No. 21-cv-00463-SI (N.D. Cal. Mar. 10, 2021) (Nationwide implementation of Trump Administration's EOIR final rule, "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure," 85 Fed. Reg. 81,588 (Dec. 16, 2020), enjoined by district court judge). Notwithstanding these developments, one should consider other options, beyond administrative closure, while awaiting a decision from USCIS on an application or petition. These include a motion for continuance per guidelines established by *Matter of L–A–B–R–*, 27 I&N Dec. 405 (AG 2018). Keep in mind, however, *Matter of Mayen*, 27 I&N Dec. 755 (BIA 2020) (Prima facie eligibility for relief and whether it will affect the outcome of proceedings are not necessarily dispositive in a request for a continuance). A motion to move the case to the IJ's status check docket may also be appropriate. *See* EOIR Memorandum, J. R. McHenry III, "Use of Status Dockets," AILA Doc. No. 19081900. A motion to terminate proceedings may also be applicable in the appropriate circumstance. Stay cognizant of the restrictions laid down under *Matter of S–O–G– & F–D–B–*, 27 I&N Dec. 462 (AG 2018) (Removal proceedings may only be dismissed or terminated under circumstances identified in the regulations (8 CFR §1239.2(c) and (f)) or where DHS fails to sustain charges of removability). *See also,* ICE Memorandum, A. Loiacono and K. Padilla, "OPLA Guidance: Matter of Castro-Tum, 27 l&N Dec. 271 (A.G. 2018)," AILA Doc. No. 18072074.

[154] *Matter of Avetisyan*, 25 I&N Dec. 688, 694 (BIA 2012); *Matter of W–Y–U–*, 27 I&N Dec. 17 (BIA 2017) *See also,* EOIR Memorandum, B. O'Leary, "EOIR Memo on Continuances and Administrative Closure," AILA Doc. No. 13031143. *But see, Matter of Castro-Tum*, 27 I&N Dec. 271 (AG 2018) (Effectively overruling *Matter of Avetisyan* and *Mater of W–Y–U–*, the AG ruled that IJs and BIA do not have the authority to administratively close cases, except in those circumstances in which regulations or settlement agreements permit such practice) and *Hernandez-Serrano v. Barr*, No. 20-3175 (6th Cir. Nov. 24, 2020) (IJs and the BIA do not have authority, under 8 CFR §§1003.10 and 1003.1(d), to suspend indefinitely immigration proceedings by administrative closure). *But see, Zuniga Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019) (IJs and the BIA have authority to administratively close cases under the plain language of 8 CFR §§1003.10(b) and 1003.1(d)(1)(ii); *Meza Morales v. Barr*, 973 F.3d 656 (7th Cir. 2020) (Rejected argument that administrative closure is not within an IJ's authority to take "any action" appropriate and necessary under 8 CFR §1003.10(b); *Centro Legal De La Raza, et al. v. EOIR*, No. 21-cv-00463-SI (N.D. Cal. Mar. 10, 2021) (Nationwide implementation of Trump Administration's EOIR final rule, "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure," 85 Fed. Reg. 81,588 (Dec. 16, 2020), enjoined by district court judge).

[155] *See* A. Gallagher, *AILA's Focus on Private Bills and Pardons in Immigration* (AILA 2008 Ed.). *See also,* ICE Policy Directive, "Stays of Removal and Private Immigration Bills," AILA Doc. No. 18021237.

insufficient proof of "affirmative misconduct." Nor should this form of equitable relief override public policy considerations as established by acts of Congress.[156]

Deferred Action and Deferred Action for Childhood Arrivals (DACA)

Deferred action is a discretionary form of relief given after a recommendation by the DHS district director and approval by the regional commissioner. A grant of deferred action allows one to temporarily remain in the United States and avoid removal to the country of nationality. IJs do not have authority to grant deferred action. This relief does not in itself provide entitlement to any benefits. Rather it is a form of administrative grace designating one's case as low priority for immediate removal.

Factors for consideration in a request for deferred action include:

- Likelihood of removal;
- Presence of sympathetic factors;
- Likelihood that a large amount of adverse publicity will be generated because of those sympathetic factors;
- The person's continued presence is desired by law enforcement for an ongoing investigation or review; and
- Whether the individual is a member of a class of deportable noncitizens whose removal has been given high enforcement priority.[157]

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[156] *INS v. Hibi*, 414 U.S. 5 (1973); *INS v. Pangilinan*, 486 U.S. 875 (1988). *But see, Salgado-Diaz v. Ashcroft*, 395 F.3d 1158, 1165–68 (9th Cir. 2005) (Government estopped from declaring fraudulent reentry as a basis for removal if the respondent can prove legacy INS improperly deported him while his hearing was pending); *Poole v Mukasey*, 522 F.3d 259, 264–66 (2d Cir. 2008) (Naturalization by petitioner's mother some nine months after his 18th birthday may not necessarily bar citizenship if the government delayed his mother's case more than two years without explanation); *Keathley v. Holder*, 696 F.3d 644 (7th Cir. 2012) (Petitioner argued she did not violate 18 U.S.C. §611 because state officials led her to believe she was eligible to vote. Remanded to IJ for further factfinding); *Islam v. DHS*, 136 F.Supp. 1088 (N.D. Cal. 2015) ("Because no exceptions to the doctrine of collateral estoppel apply here, the USCIS's decision to deny Islam's application for adjustment of status was arbitrary, capricious, and contrary to law"); *Fitzpatrick v. Sessions*, 847 F.3d 913 (7th Cir. 2017) (The petitioner failed to accurately disclose her lack of citizenship when she applied for a driver's license and no official at the DMV told her that noncitizens could vote); *Chernosky v. Sessions*, 897 F.3d 923 (8th Cir. 2018) (Notwithstanding the fact that government officials registered the petitioner to vote, no entrapment-by-estoppel since she also had to sign a roster at the polling place at the time of voting, certifying that she was a U.S. citizen).

[157] Legacy INS *Operations Instruction* 242.1(a)(22). For evolving policy on prosecutorial discretion, *see also*, INS Memorandum, D. Meissner, "INS Memo On Prosecutorial Discretion," AILA Doc. No. 00112702; ICE Memorandum, W. Howard, "ICE Prosecutorial Discretion Memo," AILA Doc. No. 06050511; ICE Memorandum, J. Myers, "Prosecutorial and Custody Discretion for Nursing Mothers," AILA Doc. No. 07111263; ICE Memorandum, J. Morton, "ICE Civil Enforcement Priorities Memorandum," AILA Doc. No. 10062989; ICE Memorandum, J. Morton, "ICE Memo on Guidance for Removal Proceedings Involving Aliens with Pending or Approved Applications or Petitions," AILA Doc. No. 10082561; ICE Memorandum, J. Morton, "ICE Memo on Prosecutorial Discretion Regarding Certain Victims, Witnesses, and Plaintiffs," AILA Doc. No. 11061731; DHS Memorandum, J. Johnson, "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants," AILA Doc. No. 14112004. *But see*, DHS Memorandum, J. Kelly, "Enforcement of the Immigration Laws to Serve the National Interest," AILA Doc. No. 17021830. "With the exception of the June 15, 2012, memorandum entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," and the November 20, 2014, memorandum entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents," all existing conflicting directives, memoranda, or field guidance regarding the enforcement of our immigration laws and priorities for removal are hereby immediately rescinded—to the extent of the conflict—including, but not limited to, the November 20, 2014, memoranda entitled "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants," and "Secure Communities." More specifically, DHS should prioritize removal of foreign nationals who "(1) have been convicted of any criminal offense; (2) have been charged with any criminal offense that has not

On June 15, 2012, Secretary of Homeland Security Janet Napolitano announced that individuals who entered the United States as children and met certain guidelines could request deferred action for a period of two years, subject to renewal, and then apply for employment authorization.[158]

Key eligibility requirements for deferred action for childhood arrivals are that the individual:

- Was under the age of 31 as of June 15, 2012;
- Came to the United States before reaching the age of 16;
- Has continuously resided in the United States since June 15, 2007, up to the present time;
- Was physically present in the United States on June 15, 2012, and at the time of making the request for consideration of deferred action with USCIS;
- Entered without inspection before June 15, 2012, or lawful immigration status expired as of June 15, 2012;
- Is currently in school, has graduated or obtained a certificate of completion from high school, has obtained a general education development (GED) certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and
- Has not been convicted of a felony, significant misdemeanor, three or more other misdemeanors, and does not otherwise pose a threat to national security or public safety**.**

A respondent should, if eligible, seek to terminate, administratively close, continue, or move case to the status check docket if before the IJ in order to pursue [renewal of] relief afforded by deferred action for childhood arrivals.[159]

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been resolved; (3) have committed acts which constitute a chargeable criminal offense; (4) have engaged in fraud or willful misrepresentation in connection with any official matter before a governmental agency; (5) have abused any program related to receipt of public benefits; (6) are subject to a final order of removal but have not complied with their legal obligation to depart the United States; or (7) in the judgment of an immigration officer, otherwise pose a risk to public safety or national security." At the same time, the Kelly memo notes, "The exercise of prosecutorial discretion with regard to any alien who is subject to arrest, criminal prosecution, or removal in accordance with law shall be made on a case-by-case basis in consultation with the head of the field office component, where appropriate, of CBP, ICE, or USCIS that initiated or will initiate the enforcement action, regardless of which entity actually files any applicable charging documents: CBP Chief Patrol Agent, CBP Director of Field Operations, ICE Field Office Director, ICE Special Agent-in-Charge, or the USCIS Field Office Director, Asylum Officer Director or Service Center Director.… Except as specifically provided in this memorandum, prosecutorial discretion shall not be exercised in a manner that exempts or excludes a specified class or category of aliens [*sic*] from enforcement of the immigration laws."). *But see*, DHS Memorandum, J. Kelly, "Rescission of November 20, 2014 Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA")," AILA Doc. No. 17061900; DHS Memorandum, E. Duke, "Rescission of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," AILA Doc. No. 17090532. *See also*, ICE, Memorandum, T. Short, "Guidance to OPLA Attorneys Regarding the Implementation of the President's Executive Orders and the Secretary's Directives on Immigration Enforcement," AILA Doc. No. 18100807. *See*, more recently, new priorities established under the Biden Administration: DHS Memorandum, D. Pekoske, "Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities," AILA Doc. No. 21012136, and USICE, T. Johnson, "Interim Guidance: Civil Immigration Enforcement and Removal Priorities," AILA Doc. No. 21021800.

[158] DHS Memorandum, J. Napolitano, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," AILA Doc. No. 12061544*;* USCIS FAQ, "Deferred Action for Childhood Arrivals," AILA Doc. No. 12080365; AILA Client Flyer, "Deferred Action for Childhood Arrivals (DACA)," AILA Doc. No. 21031835.

[159] The preceding Trump administration sought to eliminate the Obama-era Memoranda concerning Deferred Action for Parents of Americans and Lawful Permanent residents as well as Deferred Action for Childhood Arrivals. *See* DHS, Memorandum, J. Kelly, "Rescission of November 20, 2014 Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)," AILA Doc. No. 17061900; DHS Memorandum, E. Duke, "Rescission of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the

Stage Five—Trying to Return to the United States

Not all efforts at obtaining relief are successful and one must go home. What next if one wants to return to the United States? There may be a number of avenues available depending on one's situation but one to seriously consider is the §212(d)(3) waiver. The waiver is available to those seeking to overcome any number of inadmissibility grounds by means of entry on a nonimmigrant visa. Although difficult to obtain, the waiver is possible given U.S. interests in furthering our immigration policy by "supporting freedom of travel, exchange of ideas, and humanitarian considerations while at the same time ensuring, through appropriate screening, that our national welfare and security are being safeguarded."[160] With the exception of inadmissibility grounds having to do with immigrant intent, terrorism, national security, Nazi persecution, and invalid passport or visa,[161] this waiver can effectively overcome all others. Convictions for crimes of moral turpitude and drug offenses come quickly to mind. Typically, the §212(d)(3) waiver request will accompany the application for the nonimmigrant visa at a U.S. consulate and outline the reasons for granting the waiver as the consular officer considers the waiver recommendation:

- Recency and seriousness of the activity or condition causing the inadmissibility;

United States as Children," AILA Doc. No. 17090532. Following that, both the U.S. District Court for the Northern District of California and the U.S. District Court for the Eastern District of New York weighed in on January 9, 2018, and February 13, 2018, respectively, with orders specifically ordering the government to maintain the DACA program as it existed prior to issuance of the E. Duke September 15, 2017, rescission memo with some limitations, specifically allowing, for the time being, existing DACA recipients to continue applying for renewal of their status. *Regents of University of California, et al. v. U.S. Department of Homeland Security, et al*., No. 3:17-CV-05211-WHA (N.D. Cal. Jan. 9, 2018); *Batalla Vidal v. Nielsen,* 279 F. Supp. 3d (E.D.N.Y. 2018). *See also,* USCIS Announcement, "February 2018 Preliminary Injunction on Deferred Action for Childhood Arrivals," AILA Doc. No. 18021503. On January 18, 2018, the government asked the U.S. Supreme Court to take up its appeal of the California U.S. District Court's January 9, 2018 decision in a petition for certiorari before judgment. On February 26, 2018, the U.S. Supreme Court declined to do so, for now. On March 5, 2018, the U.S. District Court for the District of Maryland declined to enjoin the government's rescission of the DACA program, finding it had the authority to take such action. The court noted, however, it would not allow the government to rely on DACA-provided information to "track and remove" DACA recipients." *Casa de Maryland, et al. v. DHS, et al.*, 284 F. Supp. 3d 758 (D. Md. 2018). On April 24, 2018, the U.S. District Court for the District of Columbia vacated the government's rescission of DACA and ordered it to accept both renewal or new applications for such relief if, in the next 90 days, it fails to better explain its reasons for cancelling it. *National Association for the Advancement of Colored People, et al. v. Trump, et al.*, 298 F. Supp. 3d 209 (D.D.C. 2018). On August 17, 2018, the U.S. District Court for the District of Columbia issued an order staying in part its April 24, 2018 order relating to new DACA applications and advance parole applications while keeping in place its order as it relates to DACA renewal applications. *National Association for the Advancement of Colored People, et al. v. Trump, et al.*, 321 F. Supp. 3d 143 (D.D.C. 2018). On August 31, 2018, the U.S. District Court for the Southern District of Texas denied a May 1, 2018 request to issue a preliminary injunction suspending the processing of DACA renewal applications. *Texas, et al., v. Nielsen, et al*., No. 1:18-cv-00068 (S.D. Tex. Aug. 31, 2018). On June 28, 2019, the U.S. Supreme Court consolidated and granted certiorari in a number of cases disputing the current administration's termination of DACA. *DHS, et al. v. Regents of University of California, et al*., No. 18-587; *Trump, et al., v. National Association for the Advancement of Colored People, et al*., No. 18-588; and *McAleenan, et al., v. Vidal, et al.*, No. 18-589. On June 18, 2020, the Supreme Court issued a decision blocking the government from terminating DACA, finding DHS' action violated the APA as arbitrary and capricious agency action and remanded the case for further consideration. (*DHS, et al. v. University of California, et al.*, 591 U.S. ___, 140 S. Ct. 1891 (2020). On December 4, 2020, the U.S. District Court for the Eastern District of New York issued an order directing DHS to fully reinstate the DACA program (i.e., that it [DHS] accept both initial and renewal DACA applications, issue work permits for two years, and accept advance parole requests by DACA recipients. (*Batalla Vidal, et al. v. Wolf, et al*., No. 1:16-cv-04756-NGG-VMS (E.D.N.Y. Dec. 4, 2020). On January 20, 2021, President Biden issued a Presidential Memorandum, "Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA)," directing the Secretary of Homeland Security to "take all actions he deems appropriate consistent with applicable law, to preserve and fortify DACA." 86 Fed. Reg. 7053-54 (Jan. 25, 2021). For ongoing developments in DACA litigation, *see* "Practice Alert: President Biden Protects DACA," AILA Doc. No. 18011035.

[160] 9 FAM 40.301 N1.

[161] INA §214(b); §212(a)(3)(A)(i)(I), (ii), (iii); §212(a)(3)(C), (E); §212(a)(7)(B).

- Potential harm to the U.S.;
- Potential benefit or detriment to the U.S.;
- Reason for travel to the United States.[162]

If the consular officer decides to recommend the waiver, the case is sent to DHS for a final decision. If approved, one may return to the United States on the nonimmigrant visa. [163]

CONCLUSION

This article has sought to provide a broad overview of the removal process and forms of possible relief. Its intent has not been one to give detailed guidance on how to handle specific cases. Rather, its hope is the reader may see that questions are key to understanding any respondent's particular circumstances. Questions, questions, and yet more questions help elucidate the best approach to any respondent's case and untie those troublesome knots. A bit of persistence helps as well.

SUGGESTED RESOURCES

- I. Kurzban, *Kurzban's Immigration Law Sourcebook* (AILA 17th Ed. 2020)
- R. Pauw, *Litigating Immigration Cases in Federal Court* (AILA 5th Ed. 2020)
- R. Sharma-Crawford et al. (eds.), *AILA's Immigration Litigation Toolbox* (AILA 6th Ed. 2019)
- E. Quinn, *Defending Immigrants in Immigration Court* (ILRC 3rd Ed. 2020)
- CLINIC, *Representing Clients in Immigration Court* (AILA 5th Ed. 2018)
- S. Redzic (Ed.), *The Waivers Book: Advanced Issues in Immigration Law Practice* (AILA 3rd Ed. 2019)
- C. Wheeler et al., *Provisional Waivers: A Practitioner's Guide* (AILA 3rd Ed. 2020)
- Immigrant Legal Resource Center, *Essentials of Asylum Law* (ILRC 5th Ed. 2020)
- D. Anker, *Law of Asylum in the United States* (Thomson Reuters 2021 Ed.)
- D. Collopy, *AILA's Asylum Primer: A Practical Guide to U.S. Asylum Law and Procedure* (AILA 8th Ed. 2019)
- U.N. High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (UHHCR 2019)
- USCIS, *Affirmative Asylum Procedures Manual* (AAPM) (*May 2016) (https://www.uscis.gov/sites/default/files/document/guides/AAPM-2016.pdf)*
- USCIS, Asylum Division Training Programs (*https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/asylum-division-training-programs*)
- M. Kramer, *Immigration Consequences of Criminal Activity* (AILA 8th Ed. 2019)

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[162] *Matter of Hranka*, 16 I&N Dec. 491 (BIA 1978). 9 FAM 40.301 N4. Clearly, documentation addressing the conviction, reason for travel to the United States, and discussion of the *Hranka* factors will be critical for the recommendation. *See also, Matter of Fueyo*, 20 I&N Dec. 84 (BIA 1989) (§212(d)(3) waiver may not be used *nunc pro tunc* in a removal proceeding). *See also, Matter of Khan*, 26 I&N Dec. 797 (BIA 2016) (IJs have no authority to adjudicate a waiver of inadmissibility under INA §212(d)(3)(A)(ii) by petitioners for U nonimmigrant visa status). *But see, Baez-Sanchez v. Sessions*, 872 F.3d 854 (7th Cir. 2017) (Remand to BIA to consider whether IJs have authority to waive inadmissibility under INA §212(d)(3)(A)(ii) and thus halt removal for the time being while the foreign national pursues a U visa); *Meridor v. U.S. Attorney General*, 891 F.3d 1302 (11th Cir. 2018) (Court found the BIA erred when concluding IJs cannot have concurrent jurisdiction over a waiver of inadmissibility for U visa applicants); *Man v. Barr*, 940 F.3d 1354 (9th Cir. 2019) (IJ lacks authority to grant a noncitizen in removal proceedings a U visa waiver of inadmissibility under INA §212(d)(3)(A)(ii) when the noncitizen already entered the United States).

[163] To gain a sense of the relief afforded by the §212(d)(3) waiver, *see* "USCIS Chart on Waivers and Relief from Inadmissibility," AILA Doc. No. 15082635.

- Immigrant Legal Resource Center, *The U Visa: Obtaining Status for Immigrant Victims of Crime* (ILRC 6th Ed. 2019)
- DHS, *U Visa Law Enforcement Resource Guide* (DHS 2019)
- Immigrant Legal Resource Center, T Visas: A Critical Immigration Option for Survivors of Human Trafficking (ILRC 2019)
- S. Seltzer et al., *T Visa Manual: Identification and Legal Advocacy for Trafficking Survivors* (New York Anti-Trafficking Network 4th Ed. 2018)
- Immigrant Legal Resource Center, *The VAWA Manual: Immigration Relief for Abused Immigrants.* (ILRC 8th Ed. 2020)
- Immigrant Legal Resource Center, *Special Immigrant Juvenile Status and Other Immigration Options for Children and Youth* (ILRC 5th Ed. 2018)
- Immigrant Legal Resource Center, *DACA: The Essential Legal Guide* (ILRC 3rd Ed. 2016)
- A. M. Gallagher, *AILA's Focus on Private Bills and Pardons in Immigration* (AILA 2008 Ed.)
- AILA.org (*https://www.aila.org)*
- AILALink (*https://ailalink.aila.org/login.html)*
- American Immigration Council (*https://www.americanimmigrationcouncil.org)*
- EOIR, Board of Immigration Appeals Practice Manual (*https://www.justice.gov/eoir/page/file/1284741/download*)
- EOIR, Immigration Court Practice Manual (*https://www.justice.gov/eoir/page/file/1258536/download*)
- EOIR (Country Conditions Research Page) (*https://www.justice.gov/eoir/country-conditions-research*)
- USCIS Policy Manual (*https://www.uscis.gov/policy-manual)*
- EOIR (*https://www.justice.gov/eoir)*
- U.S. Immigration and Customs Enforcement (*https://www.ice.gov)*
- U.S. Customs and Border Protection (*https://www.cbp.gov)*
- USCIS (*https://www.uscis.gov)*
- DHS (*https://www.dhs.gov)*
- DOS (*https://www.state.gov)* (Consular Affairs: *https://travel.state.gov/content/travel/en/about-us.html)*