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Formal Removal Proceedings: An Introduction

The Fifth Amendment's Due Process Clause confers substantive and procedural protections to all persons within the United States, including non-U.S. nationals (aliens) who the federal government seeks to remove from the country. Once an alien has "passed through our gates, even illegally," the Supreme Court has declared, the alien "may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." *Shaughnessy v. Mezei*, 345 U.S. 206 (1953).

Against this backdrop, the Immigration and Nationality Act (INA) and implementing regulations provide a framework for the Department of Homeland Security (DHS) to seek the removal of aliens from the United States. Aliens targeted for removal in the interior of the United States are typically placed in proceedings under INA § 240. These "formal" removal proceedings afford more robust procedural protections than the expedited removal process under INA § 235, which applies to aliens apprehended at or near the border who lack entry documents or have attempted to enter the country surreptitiously.

Formal removal proceedings are conducted before an immigration judge (IJ) within the Executive Office for Immigration Review (EOIR). In these proceedings, the alien has a right to counsel at his own expense, the right to apply for available relief from removal (e.g., asylum), the right to present testimony and evidence on his or her own behalf, and the right to administratively appeal an adverse decision to the Board of Immigration Appeals (BIA). As authorized by statute, the alien may also seek judicial review of a final order of removal.

The process for initiating and conducting formal removal proceedings is primarily governed by INA §§ 239 and 240, implementing regulations found in 8 C.F.R. chapter V, and EOIR's *Immigration Court Practice Manual*.

Commencement of Formal Removal Proceedings

Formal removal proceedings begin with DHS filing a Notice to Appear (NTA) in immigration court. The NTA sets forth the allegations and charges against an alien believed to be subject to removal. The NTA must be served on the alien in person or, if personal service is not practicable, mailed to the alien or the alien's counsel of record. An NTA does not have to specify the time and date of the alien's removal proceedings in order to commence formal removal proceedings, so long as the alien later receives written notice of the hearing. *See e.g.*, *United States v. Cortez*, 930 F.3d 350 (4th Cir. 2019); *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019); *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441 (BIA 2018).

Master Calendar Hearings

An alien will first appear before an IJ at a Master Calendar hearing. There the IJ is required to explain the alien's rights, the charges against the alien, and the nature of the proceedings. If the alien is unrepresented, the IJ must provide a list of free or low-cost legal service providers and give the alien an opportunity to find counsel (unless the alien waives counsel and elects to proceed *pro se*). An interpreter might also be used to facilitate communication in the hearing and other proceedings.

At the first or a subsequent Master Calendar hearing, the alien is required to plead to the allegations and charges in the NTA, either admitting or denying them. The alien may also submit an application for any relief from removal. In the alternative, the alien may request the opportunity to voluntarily depart the United States at his or her own expense in lieu of removal proceedings (unless statutorily barred). If an alien files an application for relief, the IJ must schedule a "merits" hearing. An IJ may also schedule a merits hearing to address any contested issues about the alien's removability.

Bond Hearings

DHS may generally detain an alien during the pendency of removal proceedings. If DHS opts to detain the alien, the alien may request a bond hearing before an IJ. The IJ may order the alien released on bond (in the amount of at least $1,500) or on the alien's own recognizance subject to certain conditions. If the IJ orders the alien detained, the alien may appeal to the BIA. Neither statute nor regulations provide for bond hearings for aliens subject to mandatory detention under the INA (e.g., aliens who have committed certain crimes or engaged in terrorism). DHS has exclusive authority over those aliens' custody status.

Continuances and Change of Venue

An alien may request a continuance of proceedings, including to seek more time to prepare for a merits hearing or to pursue "collateral" relief from removal outside the removal proceedings (e.g., by filing a visa petition with DHS). An IJ generally has considerable discretion whether to grant a continuance. In cases where an alien seeks a continuance to pursue collateral relief, immigration authorities have required consideration, among other factors, of the likelihood that the relief will be granted and will materially affect the outcome of the removal proceedings. *Matter of L-A-B-R-*, 27 I. & N. Dec. 405 (2018).

In some cases an alien may change address while proceedings are pending. The alien may file a motion for change of venue to the immigration court that has jurisdiction over the region where the alien resides. An IJ may grant a change of venue only if DHS is given an

opportunity to respond to the motion and the alien provides a fixed street address where the alien may be reached.

Consequences of Failure to Appear

If an alien receives proper notice but fails to attend a hearing, an IJ is required to order the alien removed *in absentia* if DHS establishes that the alien is removable as charged in the NTA. But the order of removal may be rescinded if the alien (1) files a motion to reopen within 180 days of the order and shows that the failure to appear was because of "exceptional circumstances" (e.g., serious illness); or (2) files a motion to reopen at any time and shows that the alien did not receive notice of the hearing, or that the alien was in custody and could not appear.

Merits Hearing and IJ's Decision

In the merits hearing an alien may present testimony and evidence in support of an application for relief. The IJ may direct the parties to present opening or closing statements. The alien's counsel (or the IJ if the alien is unrepresented) may conduct direct examination of the alien, and DHS counsel conducts cross-examination. The IJ may question the alien and any witnesses.

The IJ then issues an oral or written decision granting or denying the alien's application for relief. The decision must also include a finding as to the alien's removability. If the IJ denies the application, the IJ must issue an order of removal (but the alien may request an opportunity to voluntarily depart at his or her own expense in lieu of removal, unless ineligible). If the IJ grants the alien's application for relief, or otherwise concludes the alien is not removable as charged, the alien will not be subject to removal.

Appeal to the BIA

Both the alien and DHS may appeal an IJ's decision to the BIA. The Notice of Appeal must be filed within 30 days of the IJ's decision. Absent an appeal, the IJ's decision becomes administratively final.

Generally, following the Notice of Appeal, the BIA will order the parties to submit briefs in support of and against the appeal. The BIA may summarily dismiss an appeal, such as when the appealing party fails to specify the reasons for the appeal or submits an untimely appeal. Absent summary dismissal, a single BIA member normally will issue a decision on the merits. The BIA member may affirm the IJ's decision without opinion if the appeal raises no substantial legal or factual issues, or raises issues controlled by legal precedent. Otherwise, the BIA member issues an opinion. But the BIA member may designate the case for a three-member panel decision in some circumstances (e.g., to resolve inconsistent IJ rulings or to create precedent).

Judicial Review of Orders of Removal

If the BIA affirms an IJ's order of removal, that order becomes administratively final. An alien may seek judicial review of a final order of removal by petitioning for review in the judicial circuit in which the immigration court proceedings were completed. The petition must be filed within 30 days of the BIA's decision. But there are limitations to judicial review. For instance, no court may review a final order against an alien found removable based on certain enumerated crimes. Additionally, no court has jurisdiction to review certain discretionary denials of relief. But courts retain jurisdiction to review constitutional claims or questions of law raised in a petition for review.

Motions to Reopen and Reconsider

An alien with a final order of removal may move to reopen proceedings before the BIA. Typically, a motion to reopen seeks relief based on new, previously unavailable evidence. The motion must come with an application for relief and supporting documents. Generally, an alien may file only one motion to reopen, filed within 90 days of the BIA's decision. But exceptions exist, including when the motion is made to apply for asylum based on changed conditions in the alien's country of nationality, or when DHS agrees to join the motion. Some courts have held that the time and/or numerical limitations may be waived ("equitably tolled") in some situations, such as if the alien was defrauded or received ineffective assistance of counsel, if the alien exercised due diligence in filing the motion. *See e.g.*, *Iturribarria v. INS*, 321 F.3d 889 (9th Cir. 2003); *Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000).

An alien subject to a final order of removal may also move to reconsider with the BIA. The motion must be filed within 30 days of the BIA's decision and specify the alleged errors in that decision. The alien generally may file one motion to reconsider. But some courts have held that the time and numerical limitations on motions to reconsider may be equitably tolled (e.g., because of ineffective assistance of counsel). *See e.g.*, *Iturribarria*, 321 F.3d at 897. If the BIA denies a motion to reopen or reconsider, the alien generally may seek judicial review of that decision.

The BIA also may reopen or reconsider a case in which it has rendered a decision on its own motion ("sua sponte"). The decision to reopen or reconsider sua sponte is discretionary and generally not subject to judicial review.

An alien who has not appealed to the BIA may move to reopen or reconsider an order of removal before the IJ (subject to time and numerical limitations). But if the alien already appealed and the BIA issued a decision, the alien must file the motion with the BIA. And if the alien files the motion while an appeal to the BIA is pending, the BIA may treat it as a motion to remand the case to the IJ for further proceedings, and consolidate it with the appeal for decision.

Attorney General (AG) Certification

The AG has ultimate authority over administrating agencies' interpretation and application of federal immigration laws, including in formal removal cases. DOJ regulations require the BIA to certify cases for AG review when (1) the AG directs the BIA to refer a specific case to him for review; (2) either the Chair or a majority of the BIA believes the case should be referred; or (3) the Secretary of DHS or certain authorized DHS officials refer the case to the AG. The AG thus has considerable authority to review BIA decisions and issue superseding rulings.

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