

# CHAPTER ONE

## An Overview of Relevant Immigration Law & Procedure<sup>1</sup>

### Table of Contents

<b>1.1 KEY CONCEPTS FOR CRIMINAL COURT JUDGES.....</b>	<b>2</b>
A. Removal (Formerly Deportation) Proceedings.....	2
B. Grounds of Deportation .....	2
C. Grounds of Inadmissibility .....	4
D. Direct Appeal of a Conviction Does Not Toll Immigration Consequences.....	5
E. Noncitizens Are Not Entitled to Appointed Counsel in Removal Proceedings .....	6
F. State Classifications of Crimes Irrelevant Under Immigration Law .....	6
G. Whether Immigration Consequences Are “Clear” or “Unclear” Depends upon Individual Factors.....	7
<b>1.2 CATEGORIES OF IMMIGRATION STATUS .....</b>	<b>8</b>
A. United States Citizens (USC) .....	8
B. Lawful Permanent Residents (LPRs).....	9
C. Conditional Residents (CRs) .....	9
D. Asylum and Refugee Status.....	10
E. Temporary Protected Status (TPS) .....	10
F. Nonimmigrant Visa Holders .....	11
G. Crime Victim Survivors - U Visa Holders .....	11
H. Victims of Trafficking - T Visa Holders .....	11
I. Undocumented or Unauthorized Persons .....	11
J. Work Permits.....	12
<b>1.3 OVERVIEW OF THE FEDERAL IMMIGRATION SYSTEM.....</b>	<b>12</b>
A. Department of Homeland Security (DHS) .....	12
B. Department of Health and Human Services .....	14
C. Department of Justice .....	14
D. Federal Courts .....	15
<b>1.4 AVENUES FOR OBTAINING LAWFUL STATUS.....</b>	<b>15</b>
A. Immigration Through Family Members .....	16
B. Employment-Based Immigration.....	17
C. Fear of Persecution .....	18
D. Status as a Survivor of Crime or Human Trafficking.....	19
E. Relief Granted by the Immigration Judge in Removal Proceedings .....	21

---

<sup>1</sup> The work of attorneys Kathy Brady and Angie Junck, nationally recognized experts in the immigration consequences of crimes, contributed to this chapter. Both serve as attorneys with the Immigrant Legal Resource Center in San Francisco, California – [www.ilrc.org](http://www.ilrc.org).

<b>1.5 REMOVAL PROCEEDINGS (ALSO KNOWN AS DEPORTATION PROCEEDINGS)</b> .....	<b>21</b>
A. Types of Removal Proceedings .....	21
B. Expedited Removal Procedures.....	24
C. Immigration Detention.....	28
D. Removal Proceedings Rights.....	31
E. Relief from Removal – Avenues to Remain Lawfully in the U.S .....	32

## **1.1 KEY CONCEPTS FOR CRIMINAL COURT JUDGES**

### **A. Removal (Formerly Deportation) Proceedings**

Included in the significant changes to the immigration laws in 1996<sup>2</sup> was the restructuring of the process for excluding and expelling noncitizens. The previous “exclusion proceedings” and “deportation proceedings” were eliminated and reconstituted under the present scheme known as “removal proceedings.” A person’s “deportation” is now legally and formally known as “removal.” These materials will use both terms to refer to a person’s expulsion from the U.S. However, the term “grounds of deportation” will be used specifically to refer to the actual grounds of deportation outlined below (as distinct from the grounds of inadmissibility (also outlined below).

Removal proceedings are initiated when a noncitizen is alleged to be in violation of one or more of the grounds of deportation or the grounds of inadmissibility. Whether a noncitizen facing removal is subject to the grounds of deportation or the grounds of inadmissibility will depend upon his or her immigration status. The presence of crime-related grounds account for the majority of removal orders entered against noncitizens.<sup>3</sup> While the crime-related grounds of inadmissibility and the crime-related grounds of deportation are similar, they are not identical and their distinctions can have important consequences for noncitizens. See §1.5 for more about the removal process.

### **B. Grounds of Deportation<sup>4</sup>**

The grounds of deportation apply to noncitizens who have been lawfully admitted. A noncitizen deemed to be in violation of one of these grounds will be subject to removal proceedings (and removal, unless they qualify for relief). The crime-related grounds of deportation also apply to bar undocumented persons from obtaining certain forms of discretionary relief from removal.<sup>5</sup>

---

<sup>2</sup> Immigration and Nationality Act under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

<sup>3</sup> See *News Releases*, ICE (Oct. 18, 2011), <http://www.ice.gov/news/releases/1110/111018washingtondc.htm>.

<sup>4</sup> 8 U.S.C. § 1227(a).

<sup>5</sup> See 8 U.S.C. § 1229b(b)(1)(C) (cancellation of removal and adjustment of status for certain nonpermanent residents); 8 U.S.C. § 1229b(b)(2)(A)(iv)(cancellation of removal for battered spouse or child).

In order for a lawfully admitted person to be ordered removed, the government has the burden to prove by clear and convincing evidence that the noncitizen has violated a ground of deportation.<sup>6</sup> Most but not all grounds of deportation require a conviction in order to be triggered. The following are the crime-related grounds of deportation enumerated in the Immigration and Nationality Act (INA) (Title 8 U.S.C.)<sup>7</sup>:

- One crime of moral turpitude committed within five years of admission, with a possible sentence of one year or more;<sup>8</sup>
- Two or more crimes of moral turpitude, not arising out of a single scheme of conduct, committed at any time after admission;<sup>9</sup>
- Conviction for an aggravated felony as defined at 8 U.S.C. § 1101(a)(43);<sup>10</sup>
- Conviction for a crime relating to a controlled substance;<sup>11</sup>
- Known or reasonably believed to be a drug abuser or addict;<sup>12</sup>
- Known or reasonably believed to have participated in alien smuggling;<sup>13</sup>
- Conviction for a firearms offense;<sup>14</sup>
- Conviction for a crime of domestic violence;<sup>15</sup>
- Conviction for a crime of child abuse, neglect, or abandonment;<sup>16</sup>
- A judicial finding of a violation of a domestic violence protection/no contact order (no conviction required);<sup>17</sup>
- False claim to U.S. citizenship;<sup>18</sup>
- Document fraud;<sup>19</sup>
- Illegal voting;<sup>20</sup>
- Other crimes: high speed flight;<sup>21</sup> failure to register as a sex offender;<sup>22</sup> terrorist activity;<sup>23</sup> espionage, treason, or sedition, violation of the Selective Service Act, or illegal travel.<sup>24</sup>

---

<sup>6</sup> 8 U.S.C. § 1229a(c)(3)(A); *Woodby v. INS*, 385 U.S. 276, 286 (1966).

<sup>7</sup> There are numerous other non-criminal grounds of deportation contained in 8 U.S.C. § 1227.

<sup>8</sup> 8 U.S.C. § 1227(a)(2)(A)(i) (emphasis added); *Matter of Ruiz-Lopez*, 25 I&N Dec. 551, at 6 (BIA 2011) (“Possible sentence” refers to the statutory maximum, not to the standard range of sentencing under the state sentencing guidelines). See Chapter Seven for more regarding sentences under immigration law. See §4.2 for more on “crimes involving moral turpitude” under immigration law.

<sup>9</sup> 8 U.S.C. § 1227(a)(2)(A)(ii).

<sup>10</sup> 8 U.S.C. § 1227(a)(2)(A)(iii). See §4.1 for more on “aggravated felonies” under immigration law.

<sup>11</sup> 8 U.S.C. 1227(a)(2)(B)(i). See §4.7 for more on controlled substance violations under immigration law.

<sup>12</sup> 8 U.S.C. 1227(a)(2)(B)(ii).

<sup>13</sup> 8 U.S.C. 1227(a)(1)(E).

<sup>14</sup> 8 U.S.C. § 1227(a)(2)(C).

<sup>15</sup> 8 U.S.C. § 1227(a)(2)(E)(i). See §4.4 for more on domestic violence crimes under immigration law.

<sup>16</sup> *Id.* See §4.5 for more on crimes involving minor victims under immigration law.

<sup>17</sup> 8 U.S.C. § 1227(a)(2)(E)(ii). No conviction required; a judicial finding is sufficient. See §4.4.

<sup>18</sup> 8 U.S.C. § 1227(a)(3)(D).

<sup>19</sup> 8 U.S.C. § 1227(a)(3)(C).

<sup>20</sup> 8 U.S.C. § 1227(a)(6).

<sup>21</sup> 8 U.S.C. § 1227(a)(2)(A)(iv).

<sup>22</sup> 8 U.S.C. § 1227(a)(2)(A)(v).

<sup>23</sup> 8 U.S.C. § 1227(a)(4)(B).

<sup>24</sup> 8 U.S.C. § 1227(a)(2)(D).

## C. Grounds of Inadmissibility<sup>25</sup>

The grounds of inadmissibility are distinct from the grounds of deportation. The grounds of inadmissibility apply to noncitizens in any of the five circumstances described below. If triggered, they will have these consequences.

- Refusal of admission to non-U.S. citizens seeking entry into the U.S., including lawful permanent residents (LPRs) and refugees who depart and are seeking re-admission;<sup>26</sup>
- Bar LPRs from establishing the requisite “good moral character” necessary to become a U.S. citizen;<sup>27</sup>
- Render undocumented persons ineligible to be granted certain forms of discretionary relief by the immigration judge in removal proceedings.<sup>28</sup>
- Prevent undocumented persons married to U.S. citizens (and LPRs), DV survivors and other crime victims from obtaining LPR status;<sup>29</sup>
- In removal proceedings before the immigration judge, grounds of inadmissibility serve as the legal grounds to seek removal against undocumented persons who have never been lawfully admitted to the U.S.<sup>30</sup>

By contrast to removal proceedings charging lawfully admitted noncitizens with removal based upon alleged violations of the grounds of deportation, in removal proceedings against undocumented persons who have never been lawfully admitted (i.e., an “alien present...without being admitted”<sup>31</sup>), the undocumented person bears the burden to show clearly and beyond doubt that he or she is entitled to be lawfully admitted in order to avoid removal.<sup>32</sup> For most, this is not possible, so qualifying for discretionary relief before the immigration judge is their only means of remaining lawfully in the U.S. and avoiding permanent banishment (or long prison sentences if they are removed and illegally reenter).<sup>33</sup>

The following are the crime-related grounds of inadmissibility enumerated in the immigration statute:

- Conviction for, or admission to having committed, a crime of moral turpitude,<sup>34</sup> with an exception for one conviction for a crime that has a maximum sentence of less than one

---

<sup>25</sup> 8 U.S.C. § 1182(a) (lists the grounds of inadmissibility).

<sup>26</sup> 8 U.S.C. § 1101(a)(13)(A); 8 U.S.C. § 1225(a)(1).

<sup>27</sup> 8 U.S.C. § 1101(f), 1427(d).

<sup>28</sup> *See, e.g.*, 8 U.S.C. § 1229b(b).

<sup>29</sup> 8 U.S.C. § 1255(a)(2).

<sup>30</sup> 8 U.S.C. § 1225(a)(1).

<sup>31</sup> 8 U.S.C. § 1182(a)(6)(A)(i).

<sup>32</sup> 8 U.S.C. § 1229a(c)(2).

<sup>33</sup> 8 U.S.C. 1326. *See also* §1.5(B)(6).

<sup>34</sup> 8 U.S.C. § 1182(a)(2)(A)(i)(I)

year and for which the person was actually sentenced to 180 days or less (regardless of time suspended);<sup>35</sup>

- Conviction for, or admission to having committed, a crime relating to a controlled substance;<sup>36</sup>
- Any two criminal convictions with an aggregate sentence of five years or more;<sup>37</sup>
- Known or reasonably believed to have engaged in trafficking of a controlled substance;<sup>38</sup>
- Coming to the U.S. to engage in prostitution or having engaged in prostitution in the ten years prior to admission;<sup>39</sup>
- Known or reasonably believed to have engaged in trafficking in persons;<sup>40</sup>
- Known or reasonably believed to have engaged in money laundering;<sup>41</sup>
- Known or reasonably believed to have come to the US to engage in terrorist activity;<sup>42</sup>
- Known or reasonably believed to have come to the US to engage in various acts of espionage, treason, or sedition;<sup>43</sup>
- Illegal voting.<sup>44</sup>

## D. Direct Appeal of a Conviction Does Not Toll Immigration Consequences

Prior to 2011, convictions on direct appeal of right could not be used as a basis to trigger conviction-based grounds of deportation and inadmissibility.<sup>45</sup> However, in June 2011 in *Planes v. Holder*,<sup>46</sup> the Ninth Circuit held that with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act in 1996<sup>47</sup>, Congress had removed the finality requirement for convictions in the immigration context. Thus, according to *Planes*, Congress eliminated the requirement that the noncitizen be allowed to exhaust appeals of right before immigration consequences of a conviction could attach.<sup>48</sup> Consequently, where a formal judgment of guilt has been entered, a noncitizen will be considered “convicted” under immigration law, regardless of any pending appeals, and the government is permitted to pursue removal based upon the conviction.<sup>49</sup>

---

<sup>35</sup> 8 U.S.C. § 1182(a)(2)(A)(ii)(II); see also §4.2 for more on crimes involving moral turpitude under immigration law and the “petty offense” exception.

<sup>36</sup> 8 U.S.C. § 1182(a)(2)(A)(i)(II).

<sup>37</sup> 8 U.S.C. § 1182(a)(2)(B).

<sup>38</sup> 8 U.S.C. § 1182(a)(2)(C).

<sup>39</sup> 8 U.S.C. § 1182(a)(2)(D).

<sup>40</sup> 8 U.S.C. § 1182(a)(2)(H).

<sup>41</sup> 8 U.S.C. § 1182(a)(2)(I).

<sup>42</sup> 8 U.S.C. § 1182(a)(3)(B).

<sup>43</sup> 8 U.S.C. § 1182(a)(3)(A).

<sup>44</sup> 8 U.S.C. § 1182(a)(10)(D).

<sup>45</sup> *Morales-Alvarado v. INS*, 655 F.2d 172, 175 (9th Cir.1981); *accord Grageda v. INS*, 12 F.3d 919, 921 (9th Cir.1993); *Hernandez-Almanza v. INS*, 547 F.2d 100, 103 (9th Cir.1976).

<sup>46</sup> *Planes v. Holder*, 652 F.3d 991 (9th Cir. 2011).

<sup>47</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

<sup>48</sup> *Planes*, 652 F.3d at 995.

<sup>49</sup> See 8 U.S.C. § 1101(a)(48)(A) for the definition of “conviction” in the Immigration and Nationality Act.

## E. Noncitizens Are Not Entitled to Appointed Counsel in Removal Proceedings

Under immigration law, a noncitizen is entitled to be represented by counsel in removal proceedings. However, such legal representation must be “at no expense to the [g]overnment”.<sup>50</sup> Consequently, there is no appointment of counsel for indigent defendants facing removal. See §1.5(D) for more information on the rights that noncitizens do and do not have in removal proceedings.

The ABA’s 2010 assessment of the removal process indicated that in 2008, 57% of noncitizens facing removal did so without counsel. The data showed that 84% of noncitizens who were detained for their removal proceedings were unrepresented.<sup>51</sup> Given the mandatory detention requirements for most noncitizens who are in removal proceedings due to criminal convictions (see §1.5(C)), in such cases information provided by defense counsel in the prior criminal proceedings regarding the immigration consequences that can or will result from their criminal charges will often be the only legal advice they receive regarding the immigration consequences of their criminal case.

## F. State Classifications of Crimes Irrelevant Under Immigration Law

It is a common misperception that state offenses classified “only” as misdemeanors do not trigger immigration consequences such as deportation. The classification of a crime as either a misdemeanor or felony at the state level is irrelevant to the determination of whether a conviction renders a noncitizen deportable or inadmissible under immigration law.

In *Lopez v. Gonzales*, the U.S. Supreme Court held, for example, that a drug conviction that qualified as a felony under state law but as a misdemeanor under the Federal Controlled Substances Act was not an aggravated felony, noting that the immigration consequences of a conviction, a matter of federal law, should not depend on varying state criminal classifications.<sup>52</sup> Likewise, an offense classified as a misdemeanor under state law can, nonetheless, qualify as an “aggravated felony” under immigration law.<sup>53</sup>

**Example:** Prior to the 2011 changes to the statutory maximum sentence for Washington gross misdemeanor sentences, noncitizens convicted of the offense of Theft 3<sup>rd</sup> Degree under R.C.W. 9A.56.050 were routinely sentence to 365 day sentences. Since suspended time is

---

<sup>50</sup> 8 U.S.C. § 1362.

<sup>51</sup> See *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency and Professionalism in the Adjudication of Removal Cases*, The American Bar Association Commission on Immigration, 5-8 (2010), [http://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/coi\\_complete\\_full\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.authcheckdam.pdf) (last visited May 19, 2013) (citing *Improving Efficiency and Promoting Justice in the Immigration System: Lessons from the Legal Orientation Program*, 1 (2008), [http://www.vera.org/download?file=1780/LOP%2Bevaluation\\_May2008\\_final.pdf](http://www.vera.org/download?file=1780/LOP%2Bevaluation_May2008_final.pdf)).

<sup>52</sup> *Lopez v. Gonzales*, 549 US 47, 58, 60, 127 S.Ct. 625 (2006).

<sup>53</sup> See, e.g., *US v. Gonzalez-Tamariz*, 310 F.3d 1168, 1170-71 (9th Cir. 2002) (Nevada misdemeanor battery conviction qualified as an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) (crime of violence) where suspended sentence of 365 days was imposed).

irrelevant under immigration law, these convictions were – and still are – prosecuted by ICE as aggravated felonies under immigration law since such a conviction is classified as “a theft offense for which a sentence one year or more has been imposed.”<sup>54</sup>

## **G. Whether Immigration Consequences Are “Clear” or “Unclear” Depends upon Individual Factors**

Chapter Four outlines various categories of Washington State crimes and the immigration consequences that they can trigger for noncitizen defendants. While that analysis identifies the likelihood that a conviction for specific Washington State crimes would trigger removal, whether conviction for a crime in fact clearly triggers removal will often depend upon the individual factors in a person’s case. Additionally, as outlined in Chapter Five, whether a conviction triggers grounds of deportation or inadmissibility can also depend upon not only the specific crime of conviction, but on the way that the record of conviction documents are developed in the criminal proceedings. Chapter Four outlines the “categorical approach” and the “modified categorical approach” which are the analytical frameworks that determine whether the immigration consequences are “clear” or “unclear” in many cases.

**EXAMPLE:** Theft offenses are generally deemed to be crimes involving moral turpitude (CIMT).<sup>55</sup> However, whether a theft conviction will trigger the CIMT grounds of removal and result in the removal of someone who is an LPR will depend upon when the offense was committed, whether it is a felony or misdemeanor and whether the person has any prior convictions. A third degree theft conviction of an LPR with no priors clearly *will not* trigger the CIMT removal ground regardless of when the offense was committed. A conviction of second degree theft committed within three years of admission by an LPR with no priors clearly *will* trigger the CIMT removal ground. If the second degree theft was committed six years after admission the CIMT ground clearly *will not* be triggered.<sup>56</sup>

**EXAMPLE:** Under the modified categorical analysis, whether an Assault Fourth Degree – Domestic Violence (DV) charge triggers the DV ground of deportation will depend upon whether the plea statement (or other documents used to establish the factual basis for the offense) establishes that it meets the federal definition of a “crime of violence” (COV) under 18 U.S.C. 16(a). A plea statement that indicates that the defendant committed an “offensive touching” cannot be deemed a COV<sup>57</sup> and thus clearly *will not* trigger the DV-related deportation ground. In contrast, a plea statement showing that the defendant committed the offense by use of force (e.g., punching or slapping) will be classified as a COV and *will* clearly trigger the DV-related deportation ground.<sup>58</sup>

---

<sup>54</sup> See 8 U.S.C. 1101(a)(43)(G) (definition of theft offenses that are classified as aggravated felonies).

<sup>55</sup> *Marmolejo-Campos v. Holder*, 558 F.3d 903, 921 (9th Cir. 2009) (citing *In re Lopez-Meza*, 22 I&N Dec. 1188, 1193 (BIA 1999)).

<sup>56</sup> The CIMT-related deportation grounds can be found at 8 U.S.C. § 1227(a)(2)(A)(i) and (ii). See §4.2 for more on CIMTs under immigration law.

<sup>57</sup> *Suazo-Perez v. Mukasey*, 512 F.3d 1222 (9th Cir. 2008).

<sup>58</sup> See §4.4(A) for more on immigration consequences of DV-related convictions.

It is defense counsel's duty to determine the immigration consequences of the convictions facing the defendant and advise and negotiate accordingly.<sup>59</sup> However, it is important for the court to have an awareness of this key concept since different crimes will impact noncitizens differently, depending upon their immigration and criminal history.

## **1.2 CATEGORIES OF IMMIGRATION STATUS**

While common parlance tends to ascribe the term "immigrant" to all persons who are present, but not born, in the United States, there are, in fact, a myriad of possible categories that can define a person's "immigration status" under U.S. law. The following list highlights the main categories for classifying a person's immigration status.

Anyone who is not a U.S. citizen will be subject to the possibility of removal (a.k.a. deportation)<sup>60</sup> if they violate U.S. immigration laws, regardless of whether they have lawful status (such as a green card), how long they have lived in the U.S., or their family and community ties. However, a person's undocumented status alone does not indicate certain removal; undocumented persons may be eligible to pursue a pathway to obtain lawful status, even after being placed in removal proceedings.<sup>61</sup>

The immigration status of persons at risk of removal will determine which specific provisions of immigration law apply (e.g., the grounds of inadmissibility versus the grounds of deportation), the amount of due process afforded, and which, if any, avenues of discretionary relief from removal are available.

### **A. United States Citizens (USC) <sup>62</sup>**

United States Citizens (USCs) cannot be removed (deported) from the U.S. unless they obtained citizenship through fraud or other illegal means, even if they are convicted of serious crimes. USCs may file petitions for their spouses, parents, and children or step-children under 21 to immediately become LPRs.<sup>63</sup>

- **Citizenship at Birth or Through a USC Parent**

A child born in the U.S., its territories and in certain possessions (e.g., Puerto Rico, Guam and the Virgin Islands) becomes a USC at birth, even if the parents are not USCs and/or are undocumented.<sup>64</sup> Generally, a child born outside the U.S., with at least one parent who is a USC

---

<sup>59</sup> *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct 1473, 1483 (2010); *State v. Sandoval*, 249 P.3d 1015, 1019 (2011).

<sup>60</sup> Under immigration law, "removal" and "removal proceedings" are the current terminology used to connote an individual's "deportation" from the U.S.

<sup>61</sup> See §1.5(E).

<sup>62</sup> 8 U.S.C. §1401-88.

<sup>63</sup> 8 U.S.C. § 1151(b)(2)(A)(i).

<sup>64</sup> 8 U.S.C. §§ 1401(a), 1402-07.



at the time of the child's birth, becomes a USC at birth.<sup>65</sup> A child born outside the U.S. may also become a USC when a parent naturalizes or adopts the child under specified conditions.<sup>66</sup>

- **Citizenship Though Naturalization**

Naturalization is the process whereby eligible persons can apply to become USCs. A person must first become a lawful permanent resident (LPR). Generally, an LPR becomes eligible to apply for naturalization once s/he has been a lawful permanent resident for five years. Persons who acquire LPR status based upon marriage to a USC become eligible to apply for naturalization after three years.

## **B. Lawful Permanent Residents (LPRs)<sup>67</sup>**

LPRs, also known as “green card” holders, can live and work legally and indefinitely in the United States. A “green card” is proof of LPR status.<sup>68</sup> The card expires every 10 years and must be reissued, but LPR status does not expire. LPRs can only lose their LPR status if ordered removed by an immigration judge or if they leave the U.S. for a significant period of time and are deemed to have abandoned their status.<sup>69</sup>

If they violate U.S. immigration law, LPRs can be ordered removed at any time, regardless of their length of residence or ties to the U.S. Criminal convictions can, and often do, result in removal and are the primary way that LPRs lose their lawful immigration status. After five years (in some cases, three years), LPRs may apply to become U.S. citizens (“naturalize”) by taking a test and fulfilling other requirements.<sup>70</sup>

There are numerous ways to become an LPR. These avenues to obtaining LPR status are outlined in §1.4. The most common ways are: a) by a petition filed by a USC or LPR family member; b) by first becoming a refugee or being granted asylum; c) by a petition filed by an employer for a person with specialized skills or education; or d) by a grant of “cancellation of removal” (or some other form of relief<sup>71</sup>) by an immigration judge in removal proceedings. A person who is granted LPR status is deemed to have been lawfully admitted, even if the original entry into the U.S. was unlawful.

## **C. Conditional Residents (CRs)<sup>72</sup>**

Noncitizens who apply for lawful permanent resident status (a.k.a. a “green card”) based on marriage to a USC or LPR are granted a two-year “conditional resident” (CR) status if they have been married for less than two years when they obtain their residency status. At the end of the

---

<sup>65</sup> See 8 U.S.C. § 1401(c)-(h).

<sup>66</sup> 8 U.S.C. § 1431.

<sup>67</sup> 8 U.S.C. § 1101(a)(20).

<sup>68</sup> “Green cards” are not green. They are, in fact, white and approximately the size of a driver's license.

<sup>69</sup> 8 U.S.C. § 1101(a)(13)(C)(i),(ii); 8 C.F.R. § 211.1(a)(2).

<sup>70</sup> See 8 U.S.C. §§ 1423, 1427.

<sup>71</sup> See §1.5(E) of this bench guide.

<sup>72</sup> 8 U.S.C. § 1186a.

two year conditional period, they must file a joint petition with their spouse requesting removal of the conditions and elevation to LPR status. Like LPRs, CRs are issued a “green card” with “CR” stamped on it. Like LPRs, they can live and work legally in the U.S. and can be removed for violating immigration laws, including obtaining deportable criminal convictions.

CRs who are divorced (but married in good faith), who would suffer extreme hardship if removed, or who were abused by their spouses, may file a petition to remove conditions on their own and request a “waiver” of the joint filing requirement.<sup>73</sup>

## **D. Asylum<sup>74</sup> and Refugee Status<sup>75</sup>**

Asylum or refugee status is granted to noncitizens who prove that they have suffered persecution or have a “well-founded fear” of future persecution in their home country based on race, religion, nationality, political opinion or membership in a particular social group. Refugees are noncitizens who applied for and were granted refugee status *before* entering the U.S. Asylees are noncitizens who applied for and were granted asylum *after* entering the U.S.

Asylees and refugees are issued an employment authorization document (EAD) as proof of their lawful status. After one year in asylee or refugee status, these persons are eligible to apply to become LPRs.<sup>76</sup> Like LPRs, asylees and refugees can be removed at any time for violating immigration laws, including being convicted of crimes that trigger grounds of deportation. Convictions that trigger the grounds of inadmissibility will bar them from obtaining LPR status (unless they qualify for limited discretionary waivers).<sup>77</sup>

## **E. Temporary Protected Status (TPS)<sup>78</sup>**

The U.S. may grant Temporary Protected Status for a limited period of time to qualifying persons who would otherwise be undocumented, or at risk of becoming undocumented if they are citizens of a particular country encountering catastrophic events (e.g., ongoing armed conflict, earthquake, flood, other disasters, or other extraordinary and temporary conditions).<sup>79</sup> Citizens of a designated country who apply for and are granted TPS status are issued an employment authorization document (EAD) which permits them to live and work in the U.S. for a designated period of time, usually 18 months, which can be, and often is, extended.

Persons with two misdemeanors or one felony conviction are ineligible to apply for or renew TPS.<sup>80</sup>

---

<sup>73</sup> *Id.*

<sup>74</sup> 8 U.S.C. § 1158.

<sup>75</sup> 8 U.S.C. § 1157. .

<sup>76</sup> 8 U.S.C. § 1159.

<sup>77</sup> 8 U.S.C. §1159(a)(1) and 8 U.S.C.8 C.F.R. §§209.1&2.

<sup>78</sup> 8 U.S.C. § 1254a.

<sup>79</sup> For a list of countries currently designated for TPS, see Temporary Protected Status, U.S. CITIZENSHIP AND IMMIGRATION SERVS., [www.uscis.gov/tps/](http://www.uscis.gov/tps/) (last visited May 19, 2013).

<sup>80</sup> 8 U.S.C. § 1254a(c)(2)(B)(i).

Unlike asylees and refugees, persons granted TPS status are not permitted to apply to become LPRs. Once the designated period of protection ends, these persons must obtain another lawful immigration status, leave the U.S., or face removal.

## **F. Nonimmigrant Visa Holders<sup>81</sup>**

A nonimmigrant visa (NIV) is issued to permit a noncitizen to enter and remain lawfully in the U.S. for a specific purpose and for a limited period of time. There are more than 20 kinds of nonimmigrant visas including visitors for business or pleasure (tourists), foreign students, and temporary workers and trainees and their spouses and children. Most NIV holders are issued stamps in their passports. Nonimmigrant visa holders who violate the terms of their visa, such as a student who drops out of school, a tourist who stays beyond the date on their visa, or anyone who obtains a deportable criminal conviction, become undocumented and subject to removal.

## **G. Crime Victim Survivors - U Visa Holders<sup>82</sup>**

Victims of certain designated crimes (e.g., domestic violence, felonious assault, involuntary servitude and numerous other offenses) can be granted a nonimmigrant “U” visa for three years when requisite officials (usually law enforcement) certify that the applicant has been, is, or is likely to be helpful in any investigation or prosecution of the crime. After three years, U visa grantees can apply for LPR status. Criminal convictions can render the applicant ineligible for U visa status as well as subsequent LPR status. U visa holders are issued EADs.

## **H. Victims of Trafficking - T Visa Holders<sup>83</sup>**

Victims of sex trafficking and labor trafficking can be granted a “T” visa for three years when requisite officials (usually law enforcement) certify that the applicant has complied with any reasonable request for assistance in any investigation or prosecution of the trafficking crime or other crime in which “acts of trafficking are at least one central reason for the commission of that crime.” After three years, T visa grantees can apply for LPR status. Criminal convictions can render the applicant ineligible for T visa as well as subsequent LPR status. T visa holders are issued EADs.

## **I. Undocumented or Unauthorized Persons**

Undocumented or unauthorized persons are individuals who do not presently have lawful immigration status. Being present in the U.S. without lawful immigration status is not a crime unless a person was previously removed and then illegally reentered.<sup>84</sup> Undocumented status puts an individual at risk for the *civil* penalty of removal.

---

<sup>81</sup> 8 U.S.C. § 1101(a)(15).

<sup>82</sup> 8 U.S.C. § 1101(a)(15)(U). See §1.4(D) for additional information regarding U visas.

<sup>83</sup> 8 U.S.C. § 1101(a)(15)(T). See §1.4(D) for more information on T visas.

<sup>84</sup> 8 U.S.C. §§ 1229c(d), 1326.

There are two types of undocumented persons:

- Those who entered the U.S. without being legally admitted via inspection at a designated port of entry or used fraudulent documents to gain admission; and
- Nonimmigrants who entered the U.S. lawfully but whose legal immigration documents have since expired, or otherwise been violated (e.g., a tourist who overstays the time permitted or a student who drops out of school).

Undocumented persons do not have a legal right to work and are subject to being placed in removal proceedings if apprehended by immigration authorities.

## **J. Work Permits<sup>85</sup>**

A work permit, called an Employment Authorization Document (EAD) is not, in itself, a category of lawful immigration status. Work permits are issued by immigration authorities for a variety of reasons, including: a) as proof of some type of lawful status (e.g., TPS or asylum); b) to permit some categories of noncitizens to lawfully work while their application for lawful status is pending; or c) as a benefit to persons who have agreed to act as informants for ICE enforcement officers. EAD documents, regardless of the legal basis for issuance, are generally valid for one year.

## **1.3 OVERVIEW OF THE FEDERAL IMMIGRATION SYSTEM**

The following outline is an overview of the relevant structure and government agencies involved in the administration and enforcement of our immigration laws.

### **A. Department of Homeland Security (DHS)**

- Created by Congress with the Homeland Security Act of 2002.<sup>86</sup>
  - Abolished the Immigration and Naturalization Service (INS);<sup>87</sup>
  - These changes went into effect on March 1, 2003.
- Although there are overlaps in practice, DHS has divided its enforcement and administration of our immigration laws among three of its agencies:
  - Immigration and Customs Enforcement (ICE) - Responsible for immigration enforcement within U.S. borders;
  - Customs and Border Protection (CBP) - Responsible for immigration enforcement and regulation of admissions at U.S. borders and ports of entry; and
  - Citizenship and Immigration Services (USCIS) - Responsible for adjudicating applications for immigration benefits such as lawful permanent residence [green cards], asylum and citizenship.<sup>88</sup>

---

<sup>85</sup> 8 C.F.R. § 274a.12-14.

<sup>86</sup> Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 745 (2002).

<sup>87</sup> Stanley Mailman & Stephen Yale-Loehr, *Immigration Law: Immigration in a Homeland Security Regime*, N.Y. L.J., Dec. 23, 2002, at 3, *reprinted at* 8 BENDER'S IMMIGR. BULL. 1 (2003).

- While Congress expressly stated that the missions of each of these agencies are of equal importance<sup>89</sup>, the ICE and CBP enforcement agencies receive the majority of DHS's immigration-related funding.<sup>90</sup>

### **1. Immigration & Customs Enforcement (ICE)**

- Charged with enforcement of immigration law within the borders (interior) of the U.S.<sup>91</sup>
- Primary responsibility for apprehending noncitizens present in the U.S. in violation of immigration law, initiating removal proceedings against them and effectuating orders of removal.
- Responsible for the detention of all detained noncitizens.
  - More than 32,000 noncitizens are detained under the auspices of ICE custody on any given day in over 350 facilities, most of which are private, contracted facilities or local jails with whom ICE operates intergovernmental service agreements (IGSA) that pay to house them.<sup>92</sup>
- Overseen by DHS headquarters in Washington D.C., ICE operates through a network of 24 field offices throughout the U.S. These field offices deploy ICE agents throughout their jurisdictions, including to state and county jails, to apprehend noncitizens suspected of being in violation of immigration laws.<sup>93</sup>

### **2. Customs and Border Protection (CBP)**

- Responsible for patrolling the U.S. borders and controlling the inspection and admission of persons at the 300+ ports of entry into the U.S.
- CBP defines border areas as territory within 100 miles of U.S. borders.<sup>94</sup> Because of Washington's location as a border state, in practice there is often significant overlap in enforcement activities between ICE and CBP.
- Like ICE, CBP is headquartered under the auspices of DHS in Washington, D.C. and operates through a series of regional and field offices throughout the U.S.

---

<sup>88</sup> See generally Venable, LLP, *Homeland Security Deskbook* §§2.02[3], 9.03, James T. O'Reilly gen. ed. (2004).

<sup>89</sup> 6 U.S.C. § 294(1).

<sup>90</sup> For fiscal year 2012, CBP received 21% of all DHS funding; ICE received 10% for a combined total of nearly \$18 billion. USCIS received \$2.85 billion, more than half of which was generated by application fees. *FY 2012 Budget in Brief: Homeland Security*, available at <http://www.dhs.gov/xlibrary/assets/budget-bib-fy2012.pdf> (last visited Jul. 4, 2012).

<sup>91</sup> See generally Michael J. Wishnie, *Civil Liberties in a New America: State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004).

<sup>92</sup> DETENTION WATCH NETWORK, <http://www.detentionwatchnetwork.org/aboutdetention>.

<sup>93</sup> *Enforcement and Removal Operations*, ICE, <http://www.ice.gov/contact/ero/index.htm> (last visited May 24, 2013).

<sup>94</sup> See 8 C.F.R. § 287.1(a)(2).

### 3. Citizenship and Immigration Services (USCIS or CIS)

- Primary responsibility is to adjudicate applications for immigration benefits such as asylum, lawful permanent residence and citizenship.
- Also maintains all immigration records and documents and is responsible for investigations of immigration fraud.
- In addition to the four regional service centers, which process many applications for immigration benefits (at least at their initial stage), CIS also operates a network of district field offices that conduct interviews of noncitizens seeking immigration benefits.

## B. Department of Health and Human Services

- **Office of Refugee Resettlement (ORR)** – Located in the Department of Health and Human Services, the ORR has two primary immigration responsibilities:
  - Facilitate the resettlement of noncitizens designated abroad as refugees and relocated to the U.S.;
  - Provide care and services to unaccompanied noncitizen youth in immigration custody.

## C. Department of Justice

Under the current structure, the Department of Justice retains involvement in immigration law in two primary ways, through the Executive Office for Immigration Review and the Office of Immigration Litigation, both agencies that operate under its jurisdiction.<sup>95</sup>

### 1. Executive Office for Immigration Review (EOIR)

- The **EOIR** administers the Board of Immigration Appeals (BIA), which sits in Falls Church, VA, and the immigration courts throughout the U.S.
- **Board of Immigration Appeals** – A quasi-judicial body (not an Art. III court) that consists of 15 permanent members; the BIA entertains appeals from decisions of the immigration judges.
- **Immigration Courts** – There are over 260 immigration judges in 59 immigration courts throughout the U.S. Immigration judges are not Article III judges, but quasi-judicial officers, similar to, but technically not, administrative law judges.

---

<sup>95</sup> The Executive Office for Immigration Review fulfills those responsibilities delegated to the “Attorney General” in the Immigration and Nationality Act. *See* 8 U.S.C. § 1103(g).

## 2. Office of Immigration Litigation

- Supervises all civil litigation (e.g., denaturalization proceedings).
- Primary responsibility is to represent the government in immigration litigation before the federal circuit courts.

## D. Federal Courts

- Challenges to removal orders must be made by petition for review to the appropriate circuit court of appeals within 30 days of a final administrative removal order.<sup>96</sup>
- Congress eliminated federal circuit courts' jurisdiction to review questions of fact, discretionary determinations, and cases where removal is based on criminal convictions. However, the courts have made clear that they retain jurisdiction "to determine jurisdiction" and to review the application of facts to law.<sup>97</sup>
- Federal district and circuit courts have jurisdiction over criminal prosecutions involving immigration-related crimes such as illegal entry under 8 U.S.C. § 1325 and illegal reentry under 8 U.S.C. § 1326. These two offenses are the most prosecuted federal crimes in the U.S.<sup>98</sup>

## 1.4 AVENUES FOR OBTAINING LAWFUL STATUS

The legal pathway to obtaining U.S. citizenship (outside of birth or blood ties) requires, in almost all cases, that the person first become an LPR. However, there is no requirement that LPRs then become a U.S. citizen, as they may remain in LPR status permanently under U.S. law.

Consequently, for most foreign-born persons who seek to make their lives in the U.S., obtaining LPR status is either the initial prize on their way to U.S. citizenship or the end goal in itself. Of the estimated 38 million foreign-born individuals living in the U.S., more than two-thirds (71%) of them have already become U.S. citizens or LPRs<sup>99</sup>. The remaining 11 million undocumented individuals often lack a legal pathway to do so, or the knowledge and legal support to navigate the expensive labyrinth of required immigration laws and paperwork to become an LPR.

---

<sup>96</sup> With passage of the REAL ID Act of 2005, Congress eliminated the jurisdiction, including habeas jurisdiction under 28 U.S.C. § 2241 and the constitution, of federal district courts to entertain challenges to removal orders. Pub. L. No. 109-13, Div. B Tit. I § 106, 119 Stat. 302 (2005). Habeas and other forms of jurisdiction remain available to challenge other alleged immigration law violations, including detention (where not related to removal).

<sup>97</sup> *Daas v. Holder*, 620 F.3d 1050, 1053 (9th Cir. 2010).

<sup>98</sup> See *Illegal Reentry Becomes Top Criminal Charge*, TRAC REPORTS (June 10, 2011), available at <http://trac.syr.edu/immigration/reports/251/>.

<sup>99</sup> See WILLIAM A. KANDEL, CONG. RESEARCH SERV., R41592, U.S. FOREIGN-BORN POPULATION: SELECTED TRENDS AND CHARACTERISTICS (2011), available at <http://www.hsdl.org/?view&did=11486>.

The primary pathways for a noncitizen to obtain lawful status can be divided into the following categories.

## **A. Immigration Through Family Members**

Family-based immigration is one of the primary forms through which noncitizens obtain lawful immigration status in the U.S.<sup>100</sup> U.S. citizens (USCs) and LPRs are entitled to petition for LPR status for certain family members - primarily spouses, parents and children (including step-children) under 21 years of age. Simply marrying a USC does not confer any lawful immigration status on an undocumented spouse or stepchildren. All family members must go through the application process and prove, *inter alia*, that they are admissible to the U.S. (or qualify for a waiver of inadmissibility) and be issued proper documentation.

Spouses, parents and children (under 21) of U.S. citizens are deemed “immediate relatives” under immigration law and are entitled to have their USC family member “immediately” file a petition for their lawful status.<sup>101</sup> All other qualifying familial relationships are subject to quotas allocated by Congress on an annual basis. Consequently, the wait time for many families to obtain the lawful status necessary to live together lawfully in the U.S. is often lengthy. These are the other qualifying familial relationships that entitle a U.S. citizen or LPR to petition for lawful status for their family members:

- Adult children (over 21) of U.S. citizens;
- Spouses, children (under 21), and unmarried adult children of LPRs;
- Brothers and sisters of U.S. citizens.<sup>102</sup>

Obtaining status through a family member is a two-step process where the USC or LPR family member first files a petition to USCIS establishing the validity of the relationship (e.g., spouse, parent, child or sibling). Once approved, the noncitizen seeking lawful status must then file an application for lawful admission to the U.S. To be approved, they must prove that they do not trigger any grounds of inadmissibility under U.S. law. Criminal convictions are one of the primary categories of inadmissibility grounds.

Some noncitizens already present in the U.S. are entitled to remain here while they apply for lawful status. This process is called “Adjustment of Status” as the person’s immigration status is adjusted to that of an LPR. Other noncitizens are required to return to their home country to obtain an “immigrant visa” from a U.S. consulate there, by which they can legally re-enter the U.S. and be designated LPRs. This process is known as Consular Processing.<sup>103</sup>

---

<sup>100</sup> See RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL32235, U.S. POLICY ON PERMANENT ADMISSIONS (2009), available at <http://www.hsdl.org/?view&did=34466>.

<sup>101</sup> Note that many U.S. citizens who acquired citizenship through the naturalization process will seek to petition for their family members through this process.

<sup>102</sup> 8 U.S.C. § 1153.

<sup>103</sup> Once a person is granted an immigrant visa and lawfully enters the U.S., she is automatically deemed a lawful permanent resident (LPR) and will be issued a green card.



Although the birth of a child in the U.S. will make the child a U.S. citizen, it does not confer any lawful immigration status on the parents. The child is not entitled to petition for lawful status for its parents until reaching the age of 21. Similarly, marriage to a U.S. citizen does not automatically grant lawful status to the noncitizen spouse. It simply provides a legal avenue by which the spouse can then apply for lawful immigration status pursuant to the process described above.

## **B. Employment-Based Immigration**

Obtaining lawful immigration status based on employment is divided into two categories.

### **1. Temporary Work Visas<sup>104</sup>**

A noncitizen who wishes to come to the U.S. legally and be authorized temporarily for work must qualify for and be issued, by a U.S. Consulate abroad, an employment-related non-immigrant visa based on the purpose of the travel and the type of work. There are annual numerical limitations on the number of these visas issued (less than 200,000 are issued annually). There are 11 categories of employment-related nonimmigrant visas. The majority, however, are issued for these following four categories:

- **H-1B - Persons in Specialty Occupation** which requires the theoretical and practical application of a body of highly specialized knowledge requiring completion of a specific course of higher education;
- **H-2A - Seasonal Agricultural Workers** from designated countries;
- **H-2B - Temporary or Seasonal Nonagricultural Workers** from designated countries; and
- **L - Intracompany Transferees** of U.S. based companies in a managerial, executive, or specialized knowledge capacity.

### **2. Obtaining Lawful Permanent Residence Through Employment<sup>105</sup>**

Approximately 140,000 employment-based immigrant visas<sup>106</sup> are made available annually to qualified applicants. Noncitizens who do not qualify for one of these categories will only be authorized to work legally in the U.S. if they qualify for a temporary work visa or have some other path to obtaining lawful status outlined here.

---

<sup>104</sup> Information in this section was adapted from the website of the U.S. Department of State. *See Temporary Worker Visas*, TRAVEL.STATE.GOV, [http://travel.state.gov/visa/temp/types/types\\_1271.html](http://travel.state.gov/visa/temp/types/types_1271.html) (last visited July 3, 2012).

<sup>105</sup> Information in this section was adapted from the website of the U.S. Department of State. *See Employment-Based Immigrant Visas*, TRAVEL.STATE.GOV, [http://travel.state.gov/visa/immigrants/types/types\\_1323.html#overview](http://travel.state.gov/visa/immigrants/types/types_1323.html#overview) (last visited July 3, 2012).

<sup>106</sup> Once a person is granted an immigrant visa and lawfully enters the U.S., she or he is automatically deemed a lawful permanent resident (LPR) and will be issued a green card.

To be considered for an immigrant visa under one of the employment-based categories *infra*, the applicant's prospective employer or agent must first obtain a labor certification approval notice from the Department of Labor. The employer must then file a petition with USCIS for the appropriate employment-based preference category. The applicant (and qualifying family members) must establish that they do not trigger grounds of inadmissibility.

Employment-based immigrant visas are divided into the following five preference categories. Certain spouses and children may accompany employment-based immigrants. The vast majority of these visas are issued to persons within the first two categories.

- **Priority Workers** - There are four sub-groups within this category:
  - **Persons with extraordinary ability** in the sciences, arts, education, business, or athletics.
  - **Outstanding professors and researchers** with at least three years' experience in teaching or research, who are recognized internationally;
  - **Multinational managers or executives** who have been employed for at least one of the three preceding years by the overseas affiliate, parent, subsidiary, or branch of the U.S. employer;
  - **Professionals Holding Advanced Degrees and Persons of Exceptional Ability;**
- **Skilled Workers, Professionals, and Unskilled Workers (Other Workers)**
- **Certain Special Immigrants** - There are many subgroups within this category. However, there are only a fraction of employment visas given out under it.
- **Employment Fifth Preference (E5): Immigrant Investors** - To qualify as an Immigrant Investor, a foreign citizen must invest between U.S. \$500,000 and \$1,000,000 in a commercial enterprise in the U.S which creates at least 10 new full-time jobs for U.S. citizens or LPRs.

---

## C. Fear of Persecution

U.S. law provides two primary pathways for persons fleeing persecution to be granted lawful status in the U.S. Both pathways require the person to establish that they have a well-founded fear of future persecution in their home country, or have suffered past persecution, on account of race, religion, nationality, political opinion, or membership in a particular social group.

- **Refugee Status**<sup>107</sup> – Refugees are persons who have made the requisite showing of a well-founded fear of persecution by applying abroad to a U.S. Consulate. If granted refugee status, the person will be permitted to legally enter the U.S. and be resettled here as a refugee. The number of allocated refugee visas for the fiscal year 2012 was 76,000.<sup>108</sup>

---

<sup>107</sup> 8 U.S.C. § 1157.

<sup>108</sup> U.S. DEPT. OF STATE, PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2012: REPORT TO THE CONGRESS, available at <http://www.state.gov/documents/organization/181378.pdf> (last visited May 15, 2013).

- **Asylum Status**<sup>109</sup> – Asylees are persons who enter the U.S. first (either legally or illegally) and then seek the protection of the U.S. A noncitizen may apply for asylum affirmatively to USCIS, or defensively before an immigration judge after being placed in immigration proceedings. Asylum applications must be made *within one year of arrival in the U.S.*, unless there are changed circumstances in the applicant’s home country or extraordinary circumstances related to the delay in filing. There are no limits on the number of asylum grants each year; however, significant legal hurdles ensure that the annual number is less than 10,000.

Convictions designated as “particularly serious crimes” will render an applicant statutorily ineligible to be granted refugee or asylee status.<sup>110</sup> After one year in refugee or asylee status, an individual is entitled to apply to “adjust his status” to become an LPR. A conviction of a “violent or dangerous” crime will make a refugee or asylee ineligible to be granted LPR status (and will usually subject them to removal proceedings).<sup>111</sup>

## **D. Status as a Survivor of Crime or Human Trafficking**

### **1. U Visas – Victim/Witness to a Crime**<sup>112</sup>

A “U” visa is an avenue to lawful status available to certain crime victims who possess information about criminal activity that would be useful in the investigation and prosecution of the crime.<sup>113</sup> If the victim is a child under the age of 16, then the parent, guardian or next of kin of the child victim may possess the information and indicate the willingness to be helpful.<sup>114</sup> The U visa is available to immigrants who have suffered “substantial physical or mental abuse as a result of having been a victim” of one of the following forms of criminal activity that occurred in the United States:

Rape, torture, trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, female genital mutilation, hostage holding, peonage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion,

---

<sup>109</sup> 8 U.S.C. § 1158.

<sup>110</sup> 8 U.S.C. § 1158(b)(2)(A)(ii).

<sup>111</sup> See *Matter of Jean*, 23 I&N Dec. 373, 383 (A.G. 2002); 8 C.F.R. § 212.7(d).

<sup>112</sup> 8 U.S.C. § 1101(a)(15)(U). More resources on the U visa are available at: [www.dhs.gov/files/resources/u-visa-law-enforcement-guide.shtm](http://www.dhs.gov/files/resources/u-visa-law-enforcement-guide.shtm); [www.asistaonline.org](http://www.asistaonline.org); [www.ilrc.org/uvisa.php](http://www.ilrc.org/uvisa.php); and [www.nationalimmigrationproject.org](http://www.nationalimmigrationproject.org).

<sup>113</sup> The U visa was added to the immigration statute as a part of the Violence Against Women Act of 2000, Pub. L. No. 106-386, Div. B, Tit. 5, § 1513, 114 Stat. 1491 (2000). Regulations implementing the U visa were issued in 2007 at New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53014-01 (Sept. 17, 2007) (codified at 8 C.F.R. pts. 103, 212, 214, 248, 274a and 299).

<sup>114</sup>The spouse or child (or, where the principal applicant is a child, the spouse, child, parent or unmarried sibling under 18 years of age) of a principal applicant for a U visa may apply for a derivative U visa. In order to qualify, the spouse, child, parent or sibling must show the qualifying family relationship. Parents and siblings will also need to show the age of the principal applicant at the time of application for U status. 8 U.S.C. § 1101(a)(15)(U)(ii).

manslaughter, murder, felonious assault, witness tampering, obstruction of justice, perjury, or attempt, conspiracy or solicitation to commit one of these offenses.

**Law Enforcement Certification Required.** No charges need to be filed, nor a conviction obtained, in order to receive the certification. However, in order to qualify for a U visa, an applicant must obtain law enforcement certification (Form I-918 Supplement B) that he or she has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of the alleged criminal activity.<sup>115</sup> By statute the certification can come from a Federal, State or local law enforcement official, prosecutor, judge or other authority investigating or prosecuting the criminal activity.<sup>116</sup> No agency is required to do a certification. Certification must be submitted as part of the U visa application. USCIS has discretion to decide whether to grant a U visa. Congress imposed a numerical limit permitting no more than 10,000 U visas to be granted annually.

**Disqualifying Criminal Convictions.** U visa applicants must prove that they are entitled to be admitted to the U.S. (i.e., do not trigger any grounds of inadmissibility). All grounds of inadmissibility are waivable except the national security grounds.<sup>117</sup> However, in the case of U visa applicants inadmissible on criminal grounds, the interim regulations state that discretionary waivers for those convicted of “violent and dangerous crimes” will only be granted “in extraordinary circumstances,”<sup>118</sup> and that waiver denials are both revocable<sup>119</sup> and administratively unappealable.<sup>120</sup>

**Path to Lawful Permanent Resident Status.** Individuals granted U visas may apply for permanent residency after three years. Permanent residency will be granted for humanitarian, family unity or public interest purposes. The applicant must have maintained continuous presence in the U.S. during that time, and must not have unreasonably refused to participate in any investigation or prosecution related to the crime that was the basis for the U visa application.<sup>121</sup>

## 2. T Visas – Trafficking Victims

An applicant for a T visa must be a victim of “a severe form of trafficking in persons,” who is in the U.S. as a result of the trafficking, and who would suffer “extreme hardship involving unusual and severe harm” if removed from the United States. Severe trafficking includes sex trafficking of persons under 18 years of age, or recruiting or obtaining persons for labor or services through the use of force, fraud, or coercion “for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”<sup>122</sup> A T visa applicant who is 18 years old or older

---

<sup>115</sup> See 8 U.S.C. § 1101(a)(15)(U)(i)(III).

<sup>116</sup> See 8 U.S.C. § 1184(p).

<sup>117</sup> 8 U.S.C. § 1182(d)(14).

<sup>118</sup> 8 C.F.R. § 212.17(b)(2); *cf. Matter of Jean 23 I&N Dec. at 383 (A.G. 2002)*; 8 C.F.R. § 212.7(d) (“exceptional and extremely unusual hardship” can be an “extraordinary circumstance”).

<sup>119</sup> 8 C.F.R. § 212.17(c).

<sup>120</sup> 8 C.F.R. § 212.17(b)(3).

<sup>121</sup> 8 U.S.C. § 1255(m)(1).

<sup>122</sup> “Severe forms of trafficking in persons” is defined at 22 U.S.C. § 7102(8).

must also show compliance with any reasonable law enforcement agency request for assistance in the investigation or prosecution of the acts of trafficking. Individuals granted T visas may adjust to LPR status three years later. Only 5,000 nonimmigrant T visas and 5,000 adjustments to permanent residency based on T visas may be granted each year.

Like U visa applicants, individuals applying for a T visa must prove that they are entitled to be admitted to the U.S. All grounds of inadmissibility except national security grounds, including criminal acts and convictions, can be waived as long as the activities to be waived, including criminal acts, were caused by or incident to the trafficking victimization, in addition to any other waiver for which they are eligible.<sup>123</sup> Regulations, however, impose a high standard for waiver of some criminal convictions and, where not related to the trafficking, only “exceptional” cases will be granted waivers.<sup>124</sup>

## **E. Relief Granted by the Immigration Judge in Removal Proceedings**

Most noncitizens placed in proceedings before an immigration judge (IJ) for the first time will be entitled to pursue any avenues they may legally have to request “relief from removal” from the IJ. Relief, if granted, will permit them to remain lawfully in the U.S. This includes avenues for LPRs, refugees and asylees to keep their lawful status, despite having incurred convictions that trigger their removal. It also includes renewing some applications for lawful status pursuant to one of the categories described in §1.2 that were denied by USCIS.<sup>125</sup> Eligible undocumented persons are also entitled to file initial applications for relief (e.g., cancellation of removal for certain undocumented persons). See §1.5(E) for an outline summary of avenues to obtain lawful status that may be granted by an IJ in removal proceedings.

## **1.5 REMOVAL PROCEEDINGS (A.K.A. DEPORTATION PROCEEDINGS)**

### **A. Types of Removal Proceedings**

Once a person is taken into immigration custody, ICE or CBP must decide within 72 hours how they are going to handle the person’s case and whether the person will be detained or released. This will involve either initiating formal removal proceedings before an IJ or moving forward with one of the other types of removal or criminal proceedings outlined here. Removal Proceedings for detained noncitizens in Washington State are held at the Northwest Detention

---

<sup>123</sup> 8 U.S.C. § 1182(d)(13).

<sup>124</sup> 8 C.F.R. § 212.16(b)(2).

<sup>125</sup> In most circumstances, when USCIS denies applications for lawful status pursuant to one of the categories outlined here, they refer the case to ICE for issuance of a Notice to Appear. USCIS will also take into immediate custody during interviews in connection with applications for lawful status, individuals whom it believes are subject to removal and mandatory detention. For example, a LPR who applies for U.S. citizenship but is denied and placed into removal proceedings due to a prior misdemeanor theft 3<sup>rd</sup> degree conviction where a sentence of 365 days was imposed (regardless of suspended time).

Center in Tacoma. Noncitizens who are not detained will attend their removal proceedings at the Immigration Court in downtown Seattle.<sup>126</sup>

Additionally, noncitizens who are detained at the Washington State Department of Corrections (DOC) and placed in removal proceedings before an IJ may have their removal proceedings conducted while in DOC custody. As part of ICE's Criminal Alien Program, formerly known as the Institutional Removal Program, removal proceedings are conducted by an IJ who either travels to a designated DOC facility or appears by video teleconference. If the IJ issues a final order of removal, the individual will be removed immediately upon completion of his criminal sentence without entering ICE custody. This program has been drastically reduced since most DOC inmates have convictions that qualify as aggravated felonies under immigration law and, thus, do not qualify for hearings before an immigration judge unless they are lawful permanent residents (LPRs).<sup>127</sup> LPRs are issued expedited removal orders.<sup>128</sup>

## 1. Proceedings Before an Immigration Judge<sup>129</sup>

**Issuance of Notice to Appear.** ICE and CBP initiate removal proceedings against noncitizens by issuing a charging document called a Notice to Appear ("NTA", Form I-862)<sup>130</sup> containing allegations of fact and alleging statutory grounds of removal based upon alleged violations of immigration law, e.g., present in the U.S. without lawful admission.<sup>131</sup> The NTA is filed with the immigration court, although there are no time restrictions on when this must occur. Noncitizens can be detained for weeks, sometimes months, before the NTA is filed with the Immigration Court. Regardless of when the NTA is filed with the immigration court, a noncitizen not subject to mandatory detention can request a custody redetermination hearing with the immigration court.<sup>132</sup>

**Master Calendar Hearing.**<sup>133</sup> At the Master Calendar hearing, the IJ will request a plea from the noncitizen indicating whether they admit or deny the factual allegations in the NTA and whether they contest or concede to their removal pursuant to the charged removal grounds in the NTA. The IJ must inform the noncitizen of any avenues to seek relief from removal that they appear to be entitled to pursue. If the person contests facts that require an evidentiary hearing, or if the person wishes to pursue an application for relief from removal, the IJ will set the case to the Individual Calendar for a hearing. If the noncitizen admits factual allegations, does not contest the legal charges of removal and does not qualify for any relief from removal, the IJ will enter an order of removal at the Master Calendar hearing.

---

<sup>126</sup> The Seattle Immigration Court is located at 1000 Second Avenue, Suite 2500.

<sup>127</sup> See generally *Fact Sheet: Criminal Alien Program*, ICE (Mar. 29, 2011), available at <http://www.ice.gov/news/library/factsheets/cap.htm> (last visited May 15, 2013); Fentress Inc, *Institutional Removal Program: National Workload Study* (2009), available at <http://www.cis.org/articles/2009/fentress-report.pdf> (last visited May 15, 2013).

<sup>128</sup> See § 1.5(B) (1).

<sup>129</sup> Removal proceedings before an immigration judge are governed by 8 U.S.C. § 1229a and 8 C.F.R. § 1003.

<sup>130</sup> 8 C.F.R. §§ 1003.13, 1003.14.

<sup>131</sup> 8 U.S.C. § 1229.

<sup>132</sup> See § 1.5(C) for more on immigration detention.

<sup>133</sup> See GENERALLY THE OFFICE OF THE CHIEF IMMIGRATION JUDGE, IMMIGRATION COURT PRACTICE MANUAL, at 64 (2008), available at <http://www.justice.gov/eoir/vll/OCIJPracManual/Chap%204.pdf> (last visited May 15, 2013).

The IJ may grant continuances for good cause, e.g., to permit the noncitizen time to obtain legal counsel or await resolution of other legal issues, such as application for a U visa, that bear on removal. The IJ may also order the parties to submit legal briefing where the noncitizen's argument against removal is a pure question of law (e.g., whether their conviction for a particular crime is an aggravated felony).

**Individual Calendar Hearings.**<sup>134</sup> If a noncitizen is contesting removal on the grounds charged and requires an evidentiary hearing, or is applying for relief from removal (such as asylum or LPR cancellation of removal) the IJ will set the case for an individual calendar hearing. The Federal Rules of Evidence are not controlling, but serve as guiding principles. The noncitizen may present evidence and witnesses and the ICE attorney can question any witnesses as well as the noncitizen. During the proceedings, the IJ administers oaths, receives evidence, and can conduct examination and cross-examination of the noncitizen and any witnesses.<sup>135</sup> The proceedings may take place in person; in the absence of the noncitizen when agreed to by the parties; or through video or telephonic conference.<sup>136</sup> A complete record is kept of all testimony and evidence produced at the proceeding.<sup>137</sup> In most cases, the IJ issues an oral decision at the end of the Individual Calendar hearing as to whether the noncitizen is subject to removal as charged and granting or denying any applications for relief from removal.<sup>138</sup>

**Failure to Appear.** If a noncitizen fails to appear at the proceeding, removal may be ordered *in absentia* if clear and convincing evidence establishes that written notice was provided and that the noncitizen is removable.<sup>139</sup> Such an order will result in the noncitizen being barred from lawful reentry for a period of five years.

**Appeals.** A noncitizen has the right to file, within 30 days following entry of the order, a notice of appeal of the IJ's decision to the Board of Immigration Appeals (BIA).<sup>140</sup> Once the BIA enters its decision, the case becomes administratively final. Subject to statutory limitations, decisions of the BIA may be appealed within 30 days to the federal circuit court of appeals having jurisdiction over the place where the IJ's order was entered. Congress has imposed significant limitations on the types of immigration cases the federal courts may hear, as well as on the scope of their review.<sup>141</sup> Despite these restrictions, immigration-related cases account for almost half of all cases before the Ninth Circuit Court of Appeals.<sup>142</sup>

**Lawful Permanent Residents.** Only an immigration judge can issue a removal order against an LPR. Consequently, all LPRs facing removal will be placed in formal removal proceedings before an IJ.

---

<sup>134</sup> See generally *id.* at 75.

<sup>135</sup> 8 U.S.C. § 1229a(b)(1).

<sup>136</sup> 8 U.S.C. § 1229a(b)(2)(A).

<sup>137</sup> 8 U.S.C. § 1229a(b)(4)(C).

<sup>138</sup> 8 U.S.C. § 1229a(c)(1)(A).

<sup>139</sup> 8 U.S.C. § 1229a(b)(5).

<sup>140</sup> See §1.3(C).

<sup>141</sup> See 8 U.S.C. § 1252.

<sup>142</sup> See S. Moore and A. M. Simmons, *Immigrant Pleas Crushing Federal Appellate Courts*, L.A. TIMES, May 2, 2005, available at <http://articles.latimes.com/2005/may/02/local/me-backlog2>.

## 2. Voluntary Departure Orders

A noncitizen apprehended by ICE may be permitted to depart the U.S. voluntarily. After posting a bond, the person has up to 120 days to settle affairs in the U.S., prior to leaving at the person's own expense.<sup>143</sup> Voluntary departure can be granted either by an immigration judge after initiation of removal proceedings or administratively by ICE without initiating removal proceedings.<sup>144</sup> Voluntary departure requires a noncitizen to concede removability, but does not pose a bar to seeking lawful readmission to the U.S. at a later time.<sup>145</sup> If a noncitizen fails to depart after being awarded voluntary departure by an immigration judge, the voluntary departure order automatically becomes an order of removal and triggers a ten-year bar to any form of immigration relief and the possibility of a civil penalty.<sup>146</sup>

Administrative grants of voluntary departure were once a long-standing and primary focus of ICE enforcement efforts. However, with the 1996 changes to the immigration law and the expanded immigration enforcement efforts since that time, such grants have become increasingly rare. ICE now relies primarily on the other removal procedures outlined here.<sup>147</sup>

## B. Expedited Removal Procedures

### 1. Expedited Removal of Aggravated Felons

Expedited removal of aggravated felons, also known as administrative removal, refers to the procedure through which ICE may on its own enter an unreviewable order for removal of a noncitizen *without a hearing before an immigration judge* if the noncitizen is not a lawful permanent resident or a conditional permanent resident and has been convicted of a crime classified as an aggravated felony.<sup>148</sup> No relief from removal exists once a noncitizen's case has been determined to meet the criteria for administrative removal.<sup>149</sup>

While a noncitizen in administrative removal is not entitled to a hearing before an immigration judge, noncitizens are entitled to notice of the charges against them, an opportunity to inspect the evidence against them, an opportunity to rebut the charges and access to an attorney at his or her own expense. If a noncitizen responds to the charges in writing and contests his removal on the charges, ICE will decide whether to issue a final administrative order

---

<sup>143</sup> 8 U.S.C. § 1229c.

<sup>144</sup> Once a common practice, ICE grants of administrative voluntary departure are now an infrequent occurrence.

<sup>145</sup> Cf. 8 U.S.C. § 1182(a)(9)(A)(i),(ii) (an individual who has previously been ordered removed is barred from legal reentry for at least five years).

<sup>146</sup> 8 USC § 1229c(d).

<sup>147</sup> See J. E. Marot and C. Pierce, *Voluntary Departure or Removal: Is there Any Difference?*, IMMIGRATION INFORMATION VISA LAW GUIDE, available at [www.cpvisa.com/voluntarydep.html](http://www.cpvisa.com/voluntarydep.html) (last visited July 3, 2012).

<sup>148</sup> 8 U.S.C. § 1228(b).

<sup>149</sup> *Id.* Note that noncitizens who can prove that they will be tortured by the government in their home country are entitled to request relief pursuant to the Convention Against Torture. See 8 C.F.R. §208.16-18. Even where they are able to meet the significant evidentiary threshold, a grant of CAT relief does not confer lawful status.



of removal or place the noncitizen in removal proceedings before an IJ through the issuance of a NTA.<sup>150</sup>

Most noncitizens who are not permanent residents and who are sentenced to more than one year to be served through the Washington State DOC will be processed for expedited removal pursuant to these provisions. Noncitizens who are issued a final order of removal and who have not been convicted of a violent crime or sex offense will be processed for “early release for deportation.”<sup>151</sup>

## 2. Expedited Removal Orders at U.S. Borders

Expedited removal is a process under which a noncitizen who is deemed to be an “applicant for admission”<sup>152</sup> to the U.S. and is suspected of having no documentation, or fraudulent documentation, can be removed from the U.S. without any hearing before an immigration judge or other review unless the noncitizen indicates a fear of persecution and an intention to apply for asylum.<sup>153</sup> Noncitizens subject to expedited removal must be detained until they are removed and may only be released due to medical emergency, if necessary for law enforcement purposes, or if they express intent to seek asylum and pass a “credible fear” review before an immigration judge. Noncitizens who have been expeditiously removed are barred from lawfully returning to the U.S. for five years.<sup>154</sup>

Although primarily used at border crossings and ports of entry, expedited removal procedures may be applied by the Department of Homeland Security, through ICE and CBP, to *any* noncitizen found in the U.S. whether or not encountered at border crossings, who cannot show that they have been lawfully admitted and continuously present for two years. Since 2006, DHS has exercised this authority in part to expand expedited removal to noncitizens who are present without being admitted, are encountered by an immigration officer within 100 air miles of the U.S. international land or sea border, and have not established to the satisfaction of an immigration officer that they have been physically present in the U.S. continuously for the 14-day period immediately preceding the date of encounter.<sup>155</sup>

## 3. Reinstatement of Removal Orders

ICE (or CBP) will reinstate, without a hearing before an immigration judge or other review, any final order of removal (or prior deportation) against a noncitizen who is apprehended and has illegally reentered the U.S. after having been removed (or previously deported), or who re-

---

<sup>150</sup> 8 U.S.C. § 1228(b)(4).

<sup>151</sup> See §7.9 for more information on early release for deportation.

<sup>152</sup> Any noncitizen present in the U.S. without having been admitted at a port of entry is considered an applicant for admission. 8 U.S.C. § 1225(a)(1).

<sup>153</sup> 8 U.S.C. § 1225(b)(1)(A)(i).

<sup>154</sup> 8 U.S.C. § 1182(a)(9)(i).

<sup>155</sup> *Notice: Designating Aliens for Expedited Removal*, 69 Fed. Reg. 48877 - 01 (Aug. 11, 2004); *DHS Streamlines Removal Process Along Entire U.S. Border*, U.S. DEP'T. OF HOMELAND SEC. (Jan. 30, 2006), available at <http://www.aila.org/content/default.aspx?docid=18404> (last visited May 15, 2013).

enters after having departed voluntarily under a final order of removal.<sup>156</sup> The previous order is reinstated from its original date and is not subject to being reopened or reviewed; the noncitizen is not permitted to apply for any form of relief.<sup>157</sup> DHS must, however, ask such noncitizens whether they fear persecution or torture if removed from the U.S.<sup>158</sup> Where that is the case, the noncitizen will be interviewed to determine whether he or she may qualify for asylum or relief under the Convention Against Torture.<sup>159</sup>

#### 4. Stipulated Orders of Removal

A detained noncitizen who has been served with an NTA and placed in formal removal proceedings before an IJ may concede that he is subject to removal as charged and elect to sign a stipulated order of removal agreeing to be removed without a hearing before an IJ.<sup>160</sup> The IJ, in the absence of the parties, then enters a final order of removal against the noncitizen without a hearing based on review of the stipulated order, the charging document, and any supporting documents.<sup>161</sup> Individuals ordered removed pursuant to this process are barred from lawfully reentering the U.S. for at least ten years and permanently if the order was based upon a conviction for a crime classified as an aggravated felony.<sup>162</sup>

Due process concerns<sup>163</sup> raised by immigration judges and advocates, as well a recent decision from the Ninth Circuit Court of Appeals,<sup>164</sup> have resulted in a significant reduction in ICE's use of stipulated removal orders for cases in Washington State since 2010.<sup>165</sup>

#### 5. Referral for Federal Criminal Prosecution

Although not a specific removal procedure, the past decade has seen a dramatic rise in referrals by ICE and CBP of apprehended noncitizens for federal criminal prosecution.

**Prosecution for Illegal Entry – 8 U.S.C. § 1325.** Although unlawful presence is a civil law violation, not a crime, illegally entering the U.S. is a crime. However, long-standing legal precedent has construed this to be a crime that occurs only at the time of entry and does not

---

<sup>156</sup> 8 U.S.C. § 1231(a)(5); 8 C.F.R. § 241.8.

<sup>157</sup> *Id.*

<sup>158</sup> 8 C.F.R. § 241.8(a)(3)(e).

<sup>159</sup> 8 C.F.R. § 208.31.

<sup>160</sup> 8 U.S.C. § 1229a(d); 8 C.F.R. § 1003.25(b). By signing a stipulated order of removal, a noncitizen waives his or her rights to be represented by counsel, to appear before an immigration judge, to contest his or her removability from the U.S., to apply for any relief from removal, and to appeal the final order of removal.

<sup>161</sup> 8 C.F.R. § 1003.25(b).

<sup>162</sup> 8 U.S.C. § 1182(a)(9)(A)(ii).

<sup>163</sup> J.Koh, J.Srikantiah, K. Tumlin, *Deportation Without Due Process*, STANFORD UNIV. (2011), [http://www.stanford.edu/group/irc/Deportation\\_Without\\_Due\\_Process\\_2011.pdf](http://www.stanford.edu/group/irc/Deportation_Without_Due_Process_2011.pdf). According to data obtained through a Freedom of Information Act (FOIA) request, ICE uses the stipulated removal program primarily on noncitizens in immigration detention who lack lawyers and are facing deportation due to minor immigration violations.

<sup>164</sup> *United States v. Ramos*, 623 F.3d 672, 680-84 (9th Cir. 2010).

<sup>165</sup> Daniel Gonzales, *Immigration officials back away from deportation program*, THE ARIZONA REPUBLIC (Nov. 6, 2011) available at <http://www.azcentral.com/arizonarepublic/news/articles/2011/11/06/20111106immigration-arizona-deportation-program.html>.

continue.<sup>166</sup> Since it is not a continuing violation, noncitizens can only be prosecuted for illegal entry if apprehended at the time of entry.

**Prosecution for Illegal Reentry after Deportation – 8 U.S.C. § 1326.** Unlike 8 U.S.C. § 1325, a noncitizen who has illegally reentered the U.S. after having previously been removed can be subject to criminal prosecution at any time that they are “found in” the U.S. Consequently ICE and CBP have the option to refer any apprehended noncitizen with a prior order of removal for federal criminal prosecution. Noncitizens convicted of this crime will face sentence enhancements if they have prior criminal convictions, which can add between 2-20 years onto their prison time, after which they will be again removed.<sup>167</sup>

**Operation Streamline**, a program implemented in 2005, requires filing federal criminal charges for every person who crosses the border illegally.<sup>168</sup>

Those who are caught making a first entry are prosecuted for misdemeanors punishable by up to six months in prison, and those who reenter after removal may be prosecuted for felonies punishable by up to 20 years in prison.<sup>169</sup> Although individuals referred by ICE or CBP are transferred to federal criminal custody and have all the rights of criminal defendants, under this fast-track program, a federal criminal case with prison and removal consequences is typically resolved in 2 days or less.<sup>170</sup> Once released from federal prison, the noncitizen will be transferred back to ICE or CBP custody for removal.

As a result of Operation Streamline, immigration violations for illegal entry and illegal reentry are currently the most prosecuted federal crimes.<sup>171</sup> Latinos comprise more than half of the federal prison population, although they comprise only 16.3% of the general population.<sup>172</sup>

---

<sup>166</sup> *United States v. Rincon-Jiminez*, 595 F.2d 1192, 1194 (9th Cir. 1979); *United States v. Pruitt*, 719 F.2d 975, 978 (9th Cir. 1983).

<sup>167</sup> See U.S.S.G. §§ 4B1.1, 4B1.2, 2L1.2.

<sup>168</sup> See generally, J. Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, THE CHIEF JUSTICE EARL WARREN INSTITUTE ON RACE, ETHNICITY & DIVERSITY, UNIVERSITY OF CALIFORNIA, BERKELEY LAW SCHOOL (2009) [http://www.law.berkeley.edu/files/Operation\\_Streamline\\_Policy\\_Brief.pdf](http://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf); S. Moore, *Push on Immigration Crimes is Said to Shift Focus*, N.Y. TIMES (Jan. 12, 2009), available at <http://www.nytimes.com/2009/01/12/us/12prosecute.html?pagewanted=all>; S. Hsu, *Immigration Prosecutions Hit New High*, THE WASHINGTON POST (Jun. 2, 2008), available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/01/AR2008060102192.html>.

<sup>169</sup> *Operation Streamline Fact Sheet*, NATIONAL IMMIGRATION FORUM (Jul. 21, 2009) available at <http://www.immigrationforum.org/images/uploads/OperationStreamlineFactsheet.pdf>.

<sup>170</sup> *Amended Written Statement of Heather E. Williams*, OVERSIGHT HEARING ON THE EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS BEFORE THE H. SUBCOMM. OF COMMERCIAL AND ADMINISTRATIVE LAW, at 4 (2008), available at <http://judiciary.house.gov/hearings/pdf/Williams080625.pdf>.

<sup>171</sup> See *Immigration Convictions for December 2011*, TRAC IMMIGRATION (2011), <http://trac.syr.edu/trac/reports/bulletins/immigration/monthlydec11/gui/>.

<sup>172</sup> G. Burke, *Hispanics New Majority Sentenced to Federal Prisons*, ASSOCIATED PRESS (Sept. 6, 2011), available at <http://cnsnews.com/news/article/hispanics-new-majority-sentenced-federal-prison>.

## C. Immigration Detention

Immigration detention is one of the most controversial issues in immigration law. As a result of the government's expanded use of immigration detention as a key component of its immigration enforcement strategy, thousands of immigrants are detained for prolonged periods of time<sup>173</sup> pending hearing and resolution in the immigration and federal courts. On an average day, ICE detains over 33,000 non-citizens in over 250 federal detention facilities and local jails across the country.<sup>174</sup> This represents a more than threefold increase in the immigration detention population in the past decade.<sup>175</sup> The immigration detention system is the largest detention system in the country<sup>176</sup> and more than \$5.5 million is spent on detaining noncitizens in removal proceedings daily.

Immigration detention often creates a burden on families, many of whom are U.S. citizens or otherwise residing lawfully within the U.S. Noncitizens are often faced with the choice of prolonged immigration detention if they exercise their rights to challenge their removal or seek relief from removal, or forfeit any legal challenge and accept removal and banishment from the U.S. Eighty-four percent of such detainees will face this choice without legal representation.<sup>177</sup>

Noncitizens in Washington are detained at the Northwest Detention Center (NWDC) in Tacoma. NWDC has a current capacity of approximately 1,539 beds.<sup>178</sup>

### 1. Mandatory Detention During the Removal Process

Most noncitizens facing removal charges based on criminal convictions will be subject to mandatory detention for the duration of their removal proceedings, including any appeals. They will not be granted a custody determination hearing before an IJ to determine whether they present a flight risk or a danger to the community.

---

<sup>173</sup> *Id.*; *supra* note 62-63. For information regarding conditions at the Northwest Detention Center in Tacoma, contact the Seattle University School of Law International Human Rights Clinic or see ONEAMERICA, *Voices from Detention: A Report on Human Rights Violations at the Northwest Detention Center* (2008), [www.weareoneamerica.org/sites/default/files/OneAmerica\\_Detention\\_Report.pdf](http://www.weareoneamerica.org/sites/default/files/OneAmerica_Detention_Report.pdf) (last visited May 15, 2013).

<sup>174</sup> For an interactive map of ICE detention facilities and contract facilities throughout the U.S., see *The Detention Map*, DETENTION WATCH NETWORK, [www.detentionwatchnetwork.org/dwnmap](http://www.detentionwatchnetwork.org/dwnmap) (last visited May 15, 2013).

<sup>175</sup> A. Siskin, Cong. Research Serv., RL 32369, IMMIGRATION-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES (2010) available at <http://www.ilw.com/immigrationdaily/news/2010,0518-crs.pdf>; see also NATIONAL IMMIGRATION FORUM, *The Math of Immigration Detention: Runaway Costs for Immigration Detention Do Not Add Up to Sensible Policies* (2011), available at <http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf>; *Immigration Detention*, AMERICAN CIVIL LIBERTIES UNION, available at <http://www.aclu.org/immigrants-rights/detention> (last visited Jul. 5, 2012).

<sup>176</sup> D. Schriro, *Immigration Detention Overview and Recommendations*, DEPARTMENT OF HOMELAND SECURITY, at 2 (2009), available at <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>.

<sup>177</sup> O. Byrne, Z. Cheng, N. Siulc and A. Son, *Improving Efficiency and Promoting Justice in the Immigration System: Lessons from the Legal Orientation Program*, VERA INSTITUTE OF JUSTICE (2008), available at <http://www.vera.org/download?file=1780/LOP%2BEvaluation>.

<sup>178</sup> See *Office of Detention Oversight Compliance Inspection: Enforcement and Removal Operations Seattle Field Office, Northwest Detention Center, Tacoma, Washington*, DEPARTMENT OF HOMELAND SECURITY (2012), available at [www.ice.gov/doclib/foia/odo-compliance-inspections/2012northwest-detention-center-tacoma-wa-jan10-12.pdf](http://www.ice.gov/doclib/foia/odo-compliance-inspections/2012northwest-detention-center-tacoma-wa-jan10-12.pdf).

Under the mandatory detention provisions of the immigration statute,<sup>179</sup> immigration authorities must “take into custody,” and thereafter not release, a noncitizen during the course of removal proceedings if the noncitizen falls within either of the following categories:

- A noncitizen who is charged as inadmissible under the following grounds:
  - Convictions for crimes involving moral turpitude;
  - Drug convictions, or for whom there is reason to believe involvement in the illicit trafficking of drugs;
  - Engaged in prostitution;
  - Involvement in human trafficking, money laundering or terrorist activities.<sup>180</sup>
  
- A noncitizen who is charged with any of the following grounds of deportation:
  - Conviction of one crime of moral turpitude committed within five years of last entry if a sentence of one year or more of imprisonment was imposed;
  - Convictions for two crimes of moral turpitude;
  - Conviction for an aggravated felony;
  - Conviction for a controlled substance offense;
  - Conviction for a firearms offense;
  - Conviction for miscellaneous crimes (sabotage, espionage);
  - Determined to be a drug abuser or drug addict (no conviction required);
  - Suspected of abuse/addiction or terrorist activities (no conviction required).<sup>181</sup>

Notably, a person who is charged with grounds of deportation for a crime of domestic violence, stalking, child abuse and/or neglect, or one crime involving moral turpitude within five years of admission with a sentence of less than one year (regardless of time suspended) will not be subject to mandatory detention.<sup>182</sup>

**Stays of Removal Orders Pending Petitions for Review to the Ninth Circuit Court of Appeals.** Noncitizens whose appeals are denied by the Board of Immigration Appeals have an administratively final order of removal. They are then entitled to challenge the removal order by filing a petition for review with the Ninth Circuit Court of Appeals and requesting a stay of the removal order.<sup>183</sup> Where a stay of the removal order is granted in connection with a petition for

---

<sup>179</sup> 8 U.S.C. § 1226(c).

<sup>180</sup> 8 U.S.C. § 1226(c)(1)(A), (D).

<sup>181</sup> 8 U.S.C. § 1226(c)(1)(B), (C).

<sup>182</sup> See 8 U.S.C. § 1226(c).

<sup>183</sup> In order to be granted a stay of removal, the court considers (1) whether the stay applicant has made a strong showing that she is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

review, the Ninth Circuit has held that the mandatory detention statute no longer applies and the noncitizen is entitled to a custody determination hearing before an immigration judge.<sup>184</sup>

## 2. Discretionary Detention During the Removal Process

Persons not subject to mandatory detention who are not arriving aliens<sup>185</sup> and do not already have final orders of removal are eligible to be considered for release from detention during their removal proceedings unless they are a threat to national security or a flight risk.<sup>186</sup> In a bond hearing, the burden is on the noncitizen to show to the satisfaction of the IJ that he or she is not a flight risk, not a danger to the community and merits release on bond.<sup>187</sup> Although ICE has the authority to release a noncitizen on an Order of Recognizance, imposition of a bond is the standard practice.

Immigration bond amounts must be a minimum of \$1,500 and the full amount must be paid in cash.<sup>188</sup> Bond amounts are usually much higher than this minimum and often exceed \$5,000 for noncitizens with no criminal history and often start at \$10,000 for noncitizens with convictions. The noncitizen may ask for a bond re-determination hearing before an IJ, who has wide discretion to decrease the bond amount or not.<sup>189</sup>

## 3. Noncitizens with Final Removal Orders Who Cannot Be Removed

Once a final administrative order of removal is issued, the IJ is divested of jurisdiction to grant a bond.<sup>190</sup> Immigration authorities are required to detain noncitizens subject to a final order of removal during a 90-day “removal period.”<sup>191</sup> The 90-day post removal detention period may be extended by a second 90-day period. After that, the U.S. Supreme Court held that noncitizens who can show that there is “no significant likelihood of removal in the reasonably foreseeable future” must be released.<sup>192</sup>

Thus, many persons who have final orders of removal still find themselves in detention after months of waiting to be removed. Various reasons may exist for the delay, including the

---

<sup>184</sup> *Singh v. Holder*, 638 F.3d 1196, 1204 (9th Cir. 2011); *Diouf v. Holder*, 634 F.3d 1081, 1086 (9th Cir. 2011); *Casas-Castrillon v. DHS*, 535 F.3d 942, 947 (9th Cir. 2008); see also *Prieto-Romero v. Clark*, 534 F.3d 1053, 1066 (9th Cir. 2008).

<sup>185</sup> “Arriving aliens” are persons apprehended at the border or encountered within 100 miles of the border who cannot prove they have been physically present in the U.S. for at least 14 days.

<sup>186</sup> *Matter of Patel*, 15 I&N Dec. 666 (BIA 1976).

<sup>187</sup> See *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006) (permitting judge to deny bond where no conviction existed but criminal charges were pending).

<sup>188</sup> See generally 8 C.F.R. § 236.1(c)(2)-(c)(8); 8 C.F.R. § 1003.19(a)-(i).

<sup>189</sup> 8 C.F.R. § 236.1(d).

<sup>190</sup> The appropriate forum to challenge custody after a final order is federal district court through a petition for writ of habeas corpus. See § C(2), *infra*.

<sup>191</sup> 8 U.S.C. § 1231(a)(1).

<sup>192</sup> *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001); see also *Nadarajah v. Gonzales*, 443 F.3d 1069, 1078 (9th Cir. 2006). In *Zadvydas*, the Court noted that “for detention to remain reasonable, as the period of prior post-relief confinement grows, what counts as the ‘reasonably foreseeable future’ conversely would have to shrink.” *Zadvydas*, 533 U.S. at 701.

following: some countries, e.g., Cuba, Vietnam,<sup>193</sup> Laos, and Iran, have no diplomatic relations with the U.S. and do not repatriate deportees; some countries, such as Somalia, have no functioning government; some countries have ceased to exist; some persons are stateless, e.g., Palestinians and native Germans with no blood lineage; and some countries are notoriously slow to issue travel documents, e.g., Cambodia, India, Jamaica, Afghanistan. Depending upon whether removal is reasonably foreseeable, the person may be able to obtain release from custody despite having been actually ordered removed from the United States.

## D. Removal Proceeding Rights

The legal rights to which a person is entitled in the removal process vary depending upon which type of removal procedures are applied, as well as numerous other circumstances, such as how the person entered the U.S., whether there has been a previous removal, or whether there has been a conviction of an “aggravated felony” under immigration law. What follows is a brief overview of the basic rights that people do, and do not, have in removal proceedings.

### 1. Right to Counsel (But Not to Appointed Counsel)

Every person in removal proceedings, regardless of the type of removal proceeding, is entitled under the Constitution to be represented by an attorney. However, unlike criminal proceedings, **there is no right to appointed counsel for indigent respondents.**<sup>194</sup> Eighty-four percent of detained noncitizens are not represented by an attorney during removal proceedings and appear *pro se*.<sup>195</sup>

### 2. Right to Remain Silent in Removal Proceedings

Every person has the right to remain silent when being questioned by immigration officials or during removal proceedings.<sup>196</sup> However, unlike criminal proceedings, the government is not required to inform a person that they have this right (i.e., no *Miranda* warnings are required).<sup>197</sup> Remaining silent regarding questioning related to alienage issues, e.g., place of birth, can be an important right for a noncitizen to exercise since the government must establish the person’s alienage in order to place them in removal proceedings. In most cases in which the government

---

<sup>193</sup> The current agreement between the U.S. and Vietnam allows for the repatriation (or deportation) of Vietnamese citizens who entered the United States on or after July 12, 1995 (but not before that date).

<sup>194</sup> 8 U.S.C. § 1362.

<sup>195</sup> Among non-detained individuals, those who are represented have a 74% success rate in securing relief from removal compared to a 13% success rate for *pro se* litigants. With respect to detained noncitizens, the success rate falls to 18% percent for those with counsel and just 3% for unrepresented individuals. Steering Comm. of the N.Y. Immigrant Representation Study Report, *Assessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings in New York Immigrant Representation Study Report: Part 1*, 33 CARDOZO L. REV. 357, 363–64 (2011).

<sup>196</sup> See *Kastigar v. United States*, 406 U.S. 441, 444 (1972) (privilege against self-incrimination may be invoked “in any proceedings, civil or criminal, administrative or judicial, investigatory or adjudicatory.”)

<sup>197</sup> See *United States v. Solano-Godines*, 120 F.3d 957, 960 (9th Cir. 1997). This remains true despite the reality that disclosure of alienage information (e.g., foreign birth) exposes a noncitizen to the possibility of criminal prosecution. See *United States v. Salgado*, 292 F.3d 1169, 1174 (9th Cir. 2002).

has no record of the person, the requisite proof of alienage is obtained by admissions the noncitizen makes under questioning.

### **3. Right to a Hearing Before an Immigration Judge**

As described in §1.5(A), not all noncitizens are entitled to a hearing before an immigration judge (IJ). Persons deemed to be “arriving aliens”<sup>198</sup> and noncitizens who are not LPRs and who have been convicted of crimes classified as “aggravated felonies” under immigration law will be subject to “expedited removal” and will not get a hearing before an IJ. Moreover, noncitizens who have previously been ordered removed will not get a hearing before an IJ; immigration officials will simply “reinstate” the prior removal order.

### **4. Right to Appeal Removal Orders<sup>199</sup>**

Both the respondent and the government have the right to appeal decisions issued by the IJ to the Board of Immigration Appeals (BIA) within 30 days. The BIA is an administrative appellate body located in Virginia and it reviews and decides all the appeals taken from immigration judges throughout the U.S.<sup>200</sup> Most removal decisions issued pursuant to the other removal procedures outlined at §1.5(A) are subject to very limited administrative or judicial review processes, if at all.

## **E. Relief from Removal – Avenues to Remain Lawfully in the U.S.**

Although significantly restricted by the 1996 Immigration Reform and Immigrant Responsibility Act legislation,<sup>201</sup> important avenues remain for many noncitizens to be granted “relief from removal” in proceedings before an immigration judge. Such a grant permits a noncitizen to remain permanently in the U.S., with lawful immigration status. Consequently, the fact that a defendant in criminal custody has an immigration hold request (also known as an ICE detainer) that will result in his transfer into ICE custody upon release is not determinative of whether or not the defendant will, in fact, be removed.

When placed in removal proceedings before an IJ, the IJ is required to inform the noncitizen of avenues of relief that he or she may be entitled to pursue, such as cancellation of removal or asylum.<sup>202</sup> The avenues of relief available to noncitizens will generally be determined by whether the person already has lawful status or the person is undocumented and seeking to obtain lawful status.

---

<sup>198</sup> “Arriving aliens” are classified as persons apprehended at the border or encountered within 100 miles of the border who cannot prove they have been physically present in the U.S. for at least 14 days.

<sup>199</sup> 8 C.F.R. § 1003.38

<sup>200</sup> See §1.3(C) for more information about the BIA.

<sup>201</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

<sup>202</sup> See 8 C.F.R. § 1240.11(a); *Matter of Cordova*, 22 I&N Dec. 966, 970 n.4 (BIA 1999) (IJ must notify respondent of all relief available for which respondent has “apparent eligibility”).



Criminal convictions are the primary reason that persons with lawful status are subjected to removal proceedings and are removed. In addition to triggering grounds of removal, criminal convictions can also render noncitizens, lawfully present and undocumented, ineligible for avenues of relief that they would otherwise be entitled to pursue. As the U.S. Supreme Court has recognized, resolving criminal charges in a way that preserves eligibility to pursue available options for relief from removal may be a paramount concern of a noncitizen defendant.<sup>203</sup>

**EXAMPLE:** An LPR who has continuously resided in the U.S. for seven years is entitled to request a discretionary waiver, known as an LPR Cancellation, from an IJ. A discretionary waiver permits the LPR to keep his LPR status and remain lawfully in the U.S. as an LPR, despite his criminal conviction, such as residential burglary with a 9-month sentence. However, the LPR becomes ineligible to request this waiver if his conviction is classified as an aggravated felony under immigration law, such as residential burglary with a 14 month sentence.

**EXAMPLE:** An undocumented noncitizen who is a survivor of domestic violence is entitled to apply for LPR status in removal proceedings before an IJ if married to, or the parent of a U.S. citizen or LPR. This avenue of immigration relief is known as VAWA Cancellation. Criminal convictions, even for misdemeanor offenses such as theft 3<sup>rd</sup> degree, can render her ineligible to pursue this avenue of relief from removal.

- **Granting Relief from Removal is Discretionary on the Part of Immigration Officials**

With few exceptions, the avenues for obtaining or keeping lawful immigration status and relief from removal for persons placed in removal proceedings are discretionary. This means that even though the noncitizen establishes that she is statutorily eligible to request a particular form of relief, she must also convince the immigration judge (or in some instances ICE agents or USCIS examiners) that she warrants a favorable exercise of discretion. In cases involving any criminal history, this will generally require rehabilitation, proof of compliance with any conditions imposed by the criminal court, and proof that recidivism is highly unlikely.

- **Outline of Avenues to Keep or Obtain Lawful Immigration Status**

An overview of all of the avenues of relief from removal is beyond the scope of this publication. However, to provide state court judges with a glimpse of possible outcomes from a noncitizen's removal proceedings, the outline below highlights the primary avenues of relief that can be available to a noncitizen facing removal. Many of these avenues of relief fall under one of the categories outlined in §1.2. Some of these avenues are available for qualified persons "affirmatively" (not in removal proceedings); other avenues are only available "defensively" (before the immigration judge once removal proceedings have been initiated). The chart that follows highlights the impact that criminal convictions can have on a noncitizen's eligibility to pursue one of these avenues to remain lawfully in the U.S.

---

<sup>203</sup> *Padilla v. Kentucky*, 130 U.S. 1473, 1483 (2011); *I.N.S. v. St. Cyr*, 533 U.S. 289, 322-23 (2001).

- **Avenues for Relief from Removal to KEEP Lawful Immigration Status**
  - Relief from Removal for Lawful Permanent Residents
    1. LPR Cancellation;
    2. Former 212(c) Waivers;
    3. “Re”-Adjustment of Status Through U.S. Citizen or LPR Family Member;
    4. 212(h) Waivers;
    5. Fear of Persecution or Torture (Asylum, Withholding, Torture Convention).
  - Relief from Removal for Persons in Asylum or Refugee Status
    1. Adjustment of Status;
    2. Withholding of Removal and Relief Under the Convention Against Torture;
    3. 212(h) waiver for asylees.
  - The Waiver of DV Deportation Ground (only) for certain DV Survivors
- **Avenues for Relief from Removal for Undocumented Persons to Obtain Lawful Immigration Status**
  - Obtaining Lawful Status Through a Family Member
    1. Adjustment of Status & Consular Processing
      - 212(h) Waivers
    2. VAWA Self-Petitioning for DV Survivors
  - Cancellation of Removal for Undocumented Persons
    1. Ten-Year Cancellation
    2. VAWA Cancellation
  - Relief Based On Fear of Persecution or Torture
    1. Asylum
    2. Withholding of Removal
    3. Convention Against Torture Relief
    4. Adjustment of Status for Asylees and Refugees
  - Temporary Protected Status
  - Relief for Victims of Trafficking – T VISA
  - Relief for Victims of Crime – U VISA
  - Relief for Abused, Abandoned, Neglected Juveniles
  - Voluntary Departure

<b>RELIEF</b>	<b>IMPACT OF AGGRAVATED FELONY CONVICTION</b>	<b>IMPACT OF CONVICTION FOR A DEPORTABLE OR INADMISSIBLE CRIME</b>	<b>OTHER REQUIREMENTS</b>
<p><b>LPR CANCELLATION</b></p> <p>For Long-Time Lawful Permanent Residents</p> <p>INA § 240A(a), 8 USC § 1129b(a)</p>	AUTOMATIC BAR	NOT A BAR	7 YRS OF LAWFUL RESIDENCE SINCE “ADMISSION” IN ANY STATUS.
<p><b>§ 212(h) INADMISSIBILITY WAIVER</b> for persons applying or reapplying for LPR status;</p> <p>INA § 212(h), 8 USC § 1182(h)</p>	AGG FELONY CONVICTION BAR FOR CERTAIN LPRs who seek to “re-adjust” to LPRs but were originally admitted at the border as LPRs, not those who adjusted status to LPR.	<p>Waives inadmissibility for: Moral Turpitude, Prostitution, Possession of 30 Grams Marijuana, 2 Convictions With Total 5 Yrs Imposed</p> <p>In some contexts waives deport charges based on these convictions</p>	<p><i>IF LPR BAR APPLIES:</i> Must have acquired 7 years lawful continuous status before removal proceedings initiated.</p> <p>Very tough standard for discretionary grant of § 212(h) if a “dangerous or violent” offense.</p>
<p><b>ADJUSTMENT or RE-ADJUSTMENT OF STATUS TO LPR</b> Based on family or employment visa</p> <p>INA § 245(a), (i) 8 USC § 1255(a), (i)</p>	<p>Not a per se bar, because no agg felony inadmissibility ground;</p> <p>but see agg felony bar to § 212(h) for certain LPR’s</p>	Must not be inadmissible, or if inadmissible must qualify for a waiver	Must have and approved petition from qualifying family member or employer, but see 7 yr requirement for § 212(h) for LPR’s
<p><b>UNDOCUMENTED CANCELLATION</b></p> <p>INA § 240A(b)(1) 8 USC § 1229b(b)(1)</p>	AUTOMATIC BAR	BARRED by conviction of offense that triggers grounds of deportation or inadmissibility	Must have ten years physical presence and good moral character immediately before filing; show extraordinary hardship to USC or LPR relative.
<p><b>ASYLUM</b> Based on fear of persecution</p> <p>INA § 208 8 USC § 1154</p>	AUTOMATIC BAR if agg felony conviction	BARRED by “particularly serious crime;”	Must show likelihood of persecution; Must apply within one year of reaching U.S., unless changed or exigent circumstances

<b>RELIEF</b>	<b>IMPACT OF AGGRAVATED FELONY CONFICTION</b>	<b>IMPACT OF CONFICTION FOR A DEPORTABLE OR INADMISSIBLE CRIME</b>	<b>OTHER REQUIREMENTS</b>
<p><b>ADJUST to LPR for ASYLEE OR REFUGEE</b></p> <p>Waiver at INA § 209(c), 8 USC § 1159(c)</p>	<p>Not a per se bar, because no agg felony ground of inadmissibility</p>	<p>Waives any inadmissibility ground except “reason to believe” trafficking,</p>	<p>Can apply within one year of admission as refugee or grant of asylee status</p> <p>Tough standard to get discretionary grant if convicted of a “dangerous or violent crime”</p>
<p><b>WITHHOLDING</b> Based on fear of persecution</p> <p>INA § 241(b)(3), 8 USC § 1231(b)(3)</p>	<p>NO AGG FELONY BAR UNLESS five year sentence imposed for one or more AF’s</p>	<p>Barred by conviction of “particularly serious crime,” includes almost any drug trafficking</p>	<p>Must show clear probability of persecution;</p> <p>No time requirement regarding application</p>
<p><b>CONVENTION AGAINST TORTURE</b></p>	<p>AGG FELONY NOT A BAR</p>	<p>OTHER GROUNDS NOT A BAR</p>	<p>Must how likely to be tortured by gov’t or groups it will not control;</p> <p>No time requirements regarding application</p>
<p><b>TEMPORARY PROTECTED STATUS (TPS)</b></p> <p>INA § 244A, 8 USC § 1254a</p>	<p>AGG FELONY is not technically a bar, but see next section</p>	<p>INADMISSIBLE; or convicted of two misdos or one felony or a particularly serious crime.</p>	<p>Must be national of a country declared TPS, and have been present in U.S. and registered for TPS as of specific dates. Go to <a href="http://www.uscis.gov">www.uscis.gov</a> to see list current list of TPS countries</p>
<p><b>VOLUNTARY DEPARTURE</b></p> <p>INA § 240B(a)(1) 8 USC 1229c(a)(1)</p>	<p>AGG FELONY IS A BAR (but question whether AF conviction shd bar an EWI applicant for pre-hearing voluntary departure)</p>	<p>No other bars to <i>pre-hearing</i> voluntary departure</p> <p>Post-removal hearing VD requires 5 yrs good moral character</p>	<p>Post-removal hearing voluntary departure requires one year presence in U.S. and five years good moral character</p>
<p><b>NATURALIZATION</b> (Affirmative or with Request to Terminate Removal Proceedings)</p>	<p>AGG FELONY AUTOMATIC BAR to showing good moral character (GMC) unless conviction is prior to 11/29/90</p>	<p>DEPORTABLE applicants may be referred to removal proceedings</p>	<p>Certain period (e.g., three or five years) of good moral character; GMC bars include crime-related ground of inadmissibility</p>

RELIEF	IMPACT OF AGGRAVATED FELONY CONFICTION	IMPACT OF CONFICTION FOR A DEPORTABLE OR INADMISSIBLE CRIME	OTHER REQUIREMENTS
<p><b>DEFENDANT MAY BE A U.S. CITIZEN ALREADY</b></p> <p><b>Derived or acquired citizenship</b></p>	<p>If either of the following apply, defendant may have become a U.S. citizen automatically, without knowing it.</p> <p>1. At the time of her birth, did she have a parent or grandparent who was a U.S. citizen? OR</p> <p>2. Did the following two events happen, in either order, before her 18<sup>th</sup> birthday? She became an LPR, and a parent with custody of her naturalized to U.S. citizenship</p>		
<p><b>VAWA Cancellation</b></p>	<p>VAWA is for victims of abuse by a US citizen or LPR spouse or parent. VAWA cancellation is barred if inadmissible or deportable for crimes; also need 3 yrs good moral character.</p>		
<p><b>VAWA Self-Petition</b></p>	<p>Good moral character is required 3 years prior to application. Section 212(h) waiver can cure bar to GMC where offense is related to abuse. Adjustment requires admissibility or waiver to cure inadmissibility.</p>		
<p><b>Special Immigrant Juvenile</b></p>	<p>Minor in delinquency or dependency proceedings whom court won't return to parents due to abuse, neglect, or abandonment can apply to adjust to LPR. Adjustment requires admissibility; some waivers available, but none for "reason to believe" trafficking.</p>		
<p><b>T Visa</b></p>	<p>Victim/witness of "severe alien trafficking" (but not if person also becomes trafficker). For T Visas, all convictions, including aggravated felonies, are potentially waivable.</p>		
<p><b>U Visa</b></p>	<p>Victim/witness of certain types of crime (assault, DV-type offenses, etc). For U Visas, all convictions, including aggravated felonies, are potentially waivable.</p>		