

Immigration Removal Defense Training

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Introduction

- Today we will provide an introduction to immigration removal defense for detained immigrants
- Removal defense implicates a vast and complex (and constantly changing) area of law – we will not be able to cover it all
- Idea is that participants will be able to leave here with the knowledge they need to get started with bond representation

Roadmap

- The different ways immigrants end up in removal proceedings
- Removability basics
- Immigration detention and bond basics
- BREAK
- Challenging removability
- Relief from removal and crime bars to relief
- Hypo for the day (handout)

How Immigrants End Up in Removal Proceedings

Arrest in the interior

- Encounter with ICE/CBP
 - Workplace
 - Home
 - Bus stop, trains, etc.
 - Courthouse
 - Sensitive location
 - Traffic stop or checkpoint
- Referral by or transfer from state/local law enforcement
- Referral by private actors

Arrest in the interior

- If not subject to reinstatement or does not take administrative voluntary departure, then will be placed in INA 240 proceedings
- If subject to reinstatement (i.e., person has a prior removal order), then may be deported very quickly UNLESS
 - Person expresses fear and passes reasonable fear screening → withholding only proceedings, or
 - Can file a motion to reopen ASAP

Arrest at/near the border or port of entry

- Unless you can demonstrate you have lawful basis to enter the U.S., will be placed in expedited removal UNLESS
 - Express fear and pass credible fear screening → asylum hearing before an IJ
- Result is an order of removal without ever seeing an IJ
- Can also apply to persons found within 100 miles of border and entered within 14 days or less

Removability Basics

The charging document a/k/a Notice to Appear

Section 239 of the INA

Service:

- Personal service → usually incident to ICE arrest
- Service by mail → all other scenarios

Allegations, if found or admitted to be true, must be sufficient to sustain charge(s) of removability

Who issues NTAs within DHS?

USCIS
 Adjudications
 Asylum
 Review by ICE OCC
 ICE
 CBP

Brief overview

<https://vimeo.com/214337019>

USCIS Form I-752, Application for Temporary Admission. The form is signed by the applicant and the USCIS official. Red arrows point to the following sections:

- Section 1: Information about the applicant.
- Section 2: Information about the application.
- Section 3: Information about the interview.
- Section 4: Information about the decision.
- Section 5: Information about the appeal.

"Arriving aliens" and "aliens present without admission or parole"

Section 212 – "inadmissibility"

Arriving Aliens: At port of entry (including returning LPRs who committed crimes in past) or recent arrivals (within 14 days) who are encountered near border

Burden is on DHS to provide initial proof of **alienage**

Usually admission by respondent → voluntary???

If they do, then burden shifts to respondent to prove admissibility

Admission/concession by respondent or, if not, contested removal hearing

Should NOT be combined with merits hearing on relief!

"Aliens admitted but removable"

Section 237 – "deportability"

Burden is on DHS, period

If charge is based on criminal conviction, DHS must serve adequate record of conviction

DHS rarely calls witnesses

Common grounds of inadmissibility (Section 212)

Present without admission or parole – 212a6Aii

Not in possession of valid immigrant visa, reentry permit, border crossing card, or other valid entry document – 212a7Aii

Convicted of or admits committing Crime Involving Moral Turpitude (CIMT) – 212a2Aii

Exception for 1 crime committed while under 18, committed and released over 5 years before application for admission

"Petty offense exception": maximum possible penalty 1 year or less and sentence imposed was 6 months or less

Convicted of or admits committing violation of controlled substance law (state, US or foreign) – 212a1Aii

Security grounds ("any unlawful activity") – 212a3Aii → alleged gang membership

Common grounds of deportability (Section 237)

Criminal convictions (esp. CIMTs, crime of violence, and drug-related convictions)

Aggravated felonies – Section 101(f)

- Drug trafficking
- Sexual abuse of a minor

Immigration Detention and Bond Basics

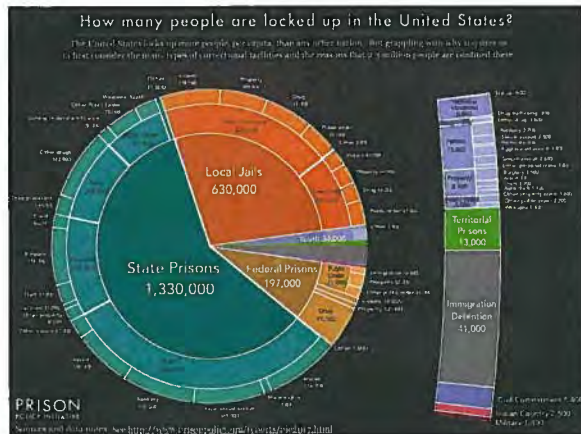
U.S. immigration detention system

ICE detains tens of thousands of individuals on any given day in roughly 250 facilities around the country, at a cost of about \$5 million per day

A growing share of beds in facilities run by private for-profit companies; many others in state/local jails

- ▶ In FY2016, 352,882 individuals passed through the ICE detention system
- ▶ Almost every year from 2007 to 2012, DHS broke the record for confining the highest number of people in immigration detention





Detention authority

INA § 235, 8 U.S.C. § 1225 – detention of “arriving aliens,” i.e., noncitizens entering the United States and certain other noncitizens

INA § 236, 8 U.S.C. § 1226 – detention of immigrants who are arrested or transferred to ICE in the interior and placed into removal proceedings

INA § 241, 8 U.S.C. § 1231 – detention of immigrants during the removal period, i.e., after they have been ordered removed from the country

“[I]mprisonment has become a normal and self-replicating feature of immigration policing.”

– Cesar Cuauhtémoc García Hernández,
Naturalizing Immigration Imprisonment

Mandatory detention

Mandatory detention under INA § 236, 8 U.S.C. § 1226 if

Inadmissible by reason of having committed any offense giving rise to a crime-based ground of inadmissibility under INA § 212(a)(2) (including CIMTs and controlled substance offenses);

Deportable by reason of having a conviction or convictions that give rise to a crime-based ground of deportability under INA § 237(a)(2)(A)(i) (CIMT w/in 5 yrs, if sentenced imposed is 1 yr or more), INA § 237(a)(2)(A)(ii) (multiple CIMTs), INA § 237(a)(2)(A)(iii) (aggravated felony), INA § 237(a)(2)(B) (controlled substance offense), INA § 237(a)(2)(C) (firearms offense) and INA § 237(a)(2)(D) (espionage, treason, etc.); or

Inadmissible or deportable on account of terrorist activities under INA § 212(a)(3)(B) or INA § 237(a)(4)(B)

Detention authority - review

<https://vimeo.com/84047260>

Start at 5:40

Constitutional limits on detention authority

- ▶ In *Zadvydas v. Davis*, SCOTUS found detention beyond an additional 90 days past removal period (6 mos in total) presumptively unreasonable
- ▶ In *Demore v. Kim*, SCOTUS voted 5-4 that mandatory detention did not violate the Due Process Clause
- ▶ *Rodriguez v. Robbins* filed to challenge prolonged detention after 6 mos or more
- ▶ Class includes anyone detained under INA § 235, § 236(a), § 236(c) or § 241 in one of the 4 facilities in C.D.Cal.
Class members spent an average of 404 days in immigration detention.
Ps able to secured procedural protections at the 9th Cir, but ...

Constitutional limits on detention authority

- ▶ In 2016, SCOTUS granted certiorari: *Jennings v. Rodriguez*. What's at stake?
 - ▶ Does Due Process prohibits indefinite detention without an individualized bond hearing?
 - ▶ Enforced through habeas litigation (as in 1st, 3rd and 6th Circuits) vs. bright-line 180-day approach (2nd and 9th Circuits)
 - ▶ Whether there is any constitutional limit to detention under INA § 235
 - ▶ Whether procedural mechanisms created by the CA9 were authorized
- ▶ Case argued on Nov 30, 2016
- ▶ Case to be reargued October 3, 2017

Adelanto Detention Center

Run by GEO

Located in remote San Bernardino County, approximately 90 miles from UCI and east of LA

Recently expanded, now holds 1,800 beds

West facility is larger, more meeting rooms, houses exclusively men

East facility is smaller, may need to wait to use meeting rooms, some women

Hearings are held inside the facility

Orange County Facilities

James A. Musick Facility in Irvine, CA

Theo Lacey Jail in Orange, CA

No contact facilities operated by OC Sheriff's Department

Together, hold up to 838 beds

Hearings are at the LA Immigration Court

Types of immigration bond hearings

▶ INA § 236(a)

▶ *Preap v. Johnson*

▶ INA § 236(c) says government shall take into custody "when the alien is released" from criminal custody – if gap in time, mandatory detention should not apply

▶ *Rodriguez*

▶ II hearing every 180 days detention for all class members

▶ Burden on gov't

▶ *Hernandez*

▶ Immigrants' ability to pay be considered when setting bond amounts

▶ Preliminary injunction stayed, CA9 appeal argued July 11, 2017

Types of immigration bond hearings

- Hypo of the day
- Is Mr. M subject to mandatory detention?

IJ bond hearing

Flight risk – judge will consider

- whether detainee has lived in one place for an extended period of time;
- whether the detainee has a fixed address/place to live if released;
- employment history, including ability to secure stable employment if released;
- length of residency in US;
- family ties (including to USCs or those with status) and other ties to the community;
- history of showing up/cooperating with authorities/complying with court orders; and
- removal case merits

IJ bond hearing

Danger – judge will consider

- nature of criminal history;
- length of time since last conviction;
- any alleged gang affiliation;
- evidence of rehabilitation, including ability to accept responsibility and express remorse; and
- post-release plan (treatment, services, support network, etc.)

IJ bond hearing

Procedural considerations

- Who bears the burden?
- Removal case – stage
- Limited scope representation
- Think broadly and creatively about potential relief

Hypo of the day

- Brainstorm fact investigation/strategy for Mr. M

Challenging Removability

Initial phase of proceedings

1st Master Calendar Q: IJ will ask, is Respondent ready to plead?

- Respondent should have been served NTA
- If no fact investigation yet, then say NO and ask for "continuance for attorney prep"
- Advantages to pleading early vs. disadvantages

Can IJ resolve charge of removability within master calendar setting?

- IJ may have 20-30 cases set for master calendar
- Will witnesses be called by either side?
- If won't be quick, IJ will likely reset to merits hearing

Contesting removability

Pros:

- If successful, IJ will terminate proceedings
- Raising issue early will prevent waiver

Cons:

- If successful, IJ will terminate proceedings – i.e., no relief from the IJ?
- If unsuccessful, will draw out removal proceedings further and require more attorney and client resources

Is there a proper basis for the allegations?

Egregious violation of 4th Amendment or violation of 5th Amendment Due Process guarantee → motion to suppress?

Erroneous allegations?

Adequate evidentiary basis for charges?

Review the I-213 Record of Inadmissible/Deportable Alien

Was the NTA properly served?

Did respondent actually receive it?

If not, why not?

If served by mail, what address was used? When/how did ICE get it?

Is the respondent categorized correctly?

"Arriving alien" vs. "present without admission or parole"

Which section should properly apply, Section 212 or 237?

- Keep the burden of proof in mind

- Respondent may only be eligible for some forms of relief under one section rather than the other

For Section 237 proceedings, can DHS prove its case?

I-213

- Unreliable hearsay?

- Source of information disclosed? Available for cross-examination?

- Supposed admissions by client?

Criminal records

- Complete, accurate

- Strictly limited to Record of Conviction (but watch out for DHS introduction of other records for impeachment on cross)

Brief overview of categorical approach

<https://www.youtube.com/watch?v=eDA-wVledT0>

Very complicated and ever-changing analysis

Need TIME and COMPLETE record of conviction to assess

Police reports are NOT part of the record of conviction unless defense attorney stipulated to as factual basis of plea

Relief from removal and crime bars to relief

Common Forms of Relief from Removal

Presented in Immigration Court	Pursued through USCIS
<ul style="list-style-type: none"> • LPR Cancellation of Removal • Non-LPR Cancellation of Removal • VAWA Cancellation of Removal • Asylum, Withholding of Removal, Convention Against Torture • Specific Waivers for Specific Grounds • Voluntary Departure 	<ul style="list-style-type: none"> • U/T visa • VAWA • Special Immigrant Juvenile Status • Family Petition • TPS • [DACA]

Crime Bars to Relief (Amongst Other Bars)

Relief	Crime Bars
LPR Cancellation of Removal	Any "aggravated felony" (ever); any conviction falling w/in removability grounds during 1 st 7 years of LPR status
Non-LPR Cancellation	Any conviction falling w/in removability grounds; criminal record or conduct affecting good moral character (during 10 yr period)
Asylum	"Particularly serious crimes"; crimes that might trigger nat'l security concerns
Withholding of Removal	"Particularly serious crimes" If sentence 5+ years; serious nonpolitical crimes abroad

Above chart is NOT exhaustive, not exclusive. Most forms of relief from removal include crime-based disqualifications, each with distinct differences and modes of analysis.

Bottom line: MUST analyze eligibility in light of criminal record, but DO NOT make assumptions either way regarding eligibility for relief

Cancellation of Removal for LPRs

Statutory eligibility:

- (1) LPR status 5 years
- (2) 7 years continuous residence (broken by commission of certain offenses that lead to convictions)
- (3) No "aggravated felony" convictions, ever

Must be statutorily eligible *and* merit favorable exercise of discretion

LPR Cancellation of Removal

Discretionary aspect: balance positive and negative equities.

- Seriousness of criminal record
- Family and community ties
- Employment and property ownership
- Length of residence in US
- Rehabilitation and remorse

Result: one-time defense to removal. LPR status retained ("green card returned").

Non-LPR Cancellation of Removal

For persons who are NOT LPRs (undocumented)

Requirements:

- (1) 10 years physical presence
- (2) good moral character
- (3) showing of **exceptional and extremely unusual hardship** to USC/LPR parent, spouse or child.
- (4) not barred by prior convictions that fall within crime-based grounds of inadmissibility/deportability (including but not limited to aggravated felonies)

Result: Obtain LPR status (green card)!

VAWA Cancellation of Removal

Requirements:

- Battery or extreme cruelty by US citizen or LPR spouse, parent or child
- 3+ years physical presence
- Good moral character
- Not inadmissible due to certain convictions, including but not limited to aggravated felonies
- Extreme hardship to respondent, child or parent

Result: Obtain LPR status

Asylum

For persons afraid to return home due to past persecution or well-founded fear of future persecution

Harm must be severe or intense enough that it is considered "persecution". Economic harm/lack of familiarity with country not enough.

No way the person can return and be safe:

- No safe living alternatives in their home country
- No protection by authorities

Asylum

"Nexus Requirement" – the person is being harmed for one of these specific reasons:

1. Nationality
2. Race
3. Religion
4. Political opinion (ideas, opinions about their rights)
5. Membership in a social group. Requires immutability, social distinction, and particularity.

Bars to Asylum

One year bar – generally must apply within one year of arrival to US, unless can show “exceptional circumstances” or “changed circumstances”

Terrorist and persecutor bars

Criminal bars – conviction for “particularly serious crime”

Firm resettlement - has been firmly resettled in another country prior to arrival in US

Removal to safe third country

Withholding of Removal/Convention Against Torture (CAT)

Withholding and CAT relief used in removal proceedings and are generally available if a person is not eligible for asylum

- Crime bars to withholding of removal exist

Similar analysis, although must show greater likelihood of persecution

But: a promise not to deport to country of persecution *only*. No right to lawful permanent residence, no right to sponsor family members.

Family-Based Petitions

Family Relationship	Rough waiting time, if apply today
“Immediate Relatives”: <ul style="list-style-type: none"> • Spouses of US Citizens (USCs) • Parents of USC children 21+ yrs old • Children (under 21, unmarried) of USC parents 	No wait (other than bureaucratic processing time)
(1) Children (unmarried, 21+) of USCs	7yrs for most, 12yrs for Philippines, 22 yrs for Mexico
(2A) Spouses and Children (under 21, unmarried) of LPRs	2 years
(2B) Children (21+, unmarried) of LPRs	7yrs for most, 21 yrs for Philippines, 22 yrs for Mexico
(3) Children (21+, married) of USCs	12 yrs for most, about 23 yrs for Philippines & Mexico
(4) Siblings of USCs (21+)	Approx 14 yrs for most, 15 yrs for India, 20 yrs for Mexico, 27 yrs for Philippines

The problem w/many family petitions

In many cases, even having a valid family relationship will **not** actually allow a person to easily adjust! The short answer: persons who **entered without inspection** cannot automatically adjust status (i.e., obtain a green card from within the US). They have to consular process (leave the country). But if they leave, they may be barred from re-entering for 3 or 10 years.

Solution #1? Under INA 245(i), if the visa petition was filed on **April 30, 2001 or earlier**, may adjust

Solution #2? Did they **really enter without inspection**? (Or on a non-immigrant visa? Riskier, but with inspection even if invalid?)

Solution #3? For **immediate relatives only**, do they have a USC/LPR parent or spouse w/**extreme hardship**? (I-601A waiver). Note: Trump Admin may eliminate this option.

Solution #4: Parole in place (PIP), for family members of US military

Solution #5: TPS or DACA holders who previously traveled on advance parole

U Visa

Elements:

- Victim of certain criminal activity (see statute)
- Helpful in law enforcement investigation or prosecution (requires certification from law enforcement agency)
- Substantial physical or mental harm
- Criminal activity violated laws of United States or occurred in United States
- Not inadmissible

*Statutory cap of 10,000 per year → waiting list

*Derivative status available for certain family members (spouses, parents, children, siblings depending on ages)

U Visa Waivers of Inadmissibility

Compared to other forms of immigration relief, U visas typically have a much more **generous waiver** of "red flags" (grounds of inadmissibility) that often prevent people from being approved for other forms of immigration relief

Unclear how Trump Administration will continue to adjudicate

T Visas

Temporary visa for a victim of human trafficking ("HT") who complied with reasonable law enforcement agency requests in the investigation or prosecution of the crime

Designed to encourage victim cooperation in the prosecution of traffickers & to help trafficking victims rebuild their lives

Derivative status for spouse, children, unmarried siblings under 18 years

T Visa Requirements

1. Victim of "Severe form of Human Trafficking" (federally defined)
2. Physically present in the US, American Samoa, or Northern Marianas **due to trafficking**
3. Comply with law enforcement in the investigation or prosecution *Exception – Physically or psychologically traumatized or under 18 no cooperation required*
4. Would suffer extreme hardship if removed from US
5. Victim has not committed a trafficking offense

Violence Against Women Act (VAWA)

For spouses or children of USCs and LPRs

Allows the individual to pursue family-based petitioning without the assistance of the abusive LPR or USC spouse/parent

Requirements

- Legal, good faith marriage (or parent-child relationship) to USC or LPR
- Battery or extreme cruelty
- Joint residence
- Good moral character

Result: For VAWA petition only, deferred action. If adjust status, green card (but must not be inadmissible)

Special Immigrant Juvenile Status (SIJS)

- For undocumented **youth**
- Eligibility:
 - Child is under jurisdiction of a juvenile or court OR has been legally committed to custody of a state agency, department, entity or individual by such court
 - Court has found (a) that child cannot be reunified with one or both parents because of abuse, neglect, abandonment or a similar basis, AND (b) that it would not be in the child's best interest to be return to their home country.
 - Requires state court to sign the initial order, then apply for SIJS to federal immigration agency

Temporary Protected Status

For countries with natural disaster, war, etc. & designated by President

See list of countries and dates for application/registration

Work permit and safety from deportation – similar to deferred action

In limited situations, adjustment of status possibility

Criminal bars: if felony or two misdemeanors

Deferred Action for Childhood Arrivals (DACA)

Created June 2012 by Obama – *administrative relief*

Requirements:

- Arrived in U.S. before age 16
- Continuously resided in US from June 15, 2007
- Physically present in U.S. on and since June 15, 2012
- Entered without inspection, or lost valid immigration status, before June 15, 2012
- Have graduated or are in school (or honorably discharged from military
- No convictions for (a) felony, (b) "significant misdemeanor," or (c) 3 "non-significant misdemeanors"
- Under age 31 as of June 15, 2012

Rare case of unknown US citizenship

Sometimes, a person is a U.S. citizen without knowing it. Pretty rare, but it does happen.

General rule: Look for parents (including adoptive parents) or grandparents who naturalized when the child was under 18, or children born abroad to a U.S. citizen parent

Anyone **born in the U.S.** is a US citizen

No criminal bars

Specific waivers for specific grounds

Sometimes, the ground of removability alleged in the NTA has a waiver specific to it. Requires further research.

Example:

- 212(h) waiver for certain convictions, but not controlled substance convictions other than simple possession of 30 grams or less of marijuana

- 212(d)(11) waiver for alien smuggling, but only for smuggling of spouse, parent son or daughter

No standalone waiver for 212(a)(6)(A)(i) (presence w/out admission or parole) exists

Voluntary Departure

Forms of relief, often sought in the alternative

Noncitizen must still return home, but does not face legal consequences of removal order

Requirements (INA sec. 240B(b))

- Physical presence of 1 yr prior to NTA issuance
- 5 years "good moral character"
- Not aggravated felon or security risk
- Has means and intent to depart from US

After Immigration Court...

Either party may appeal a decision of the Immigration Judge to the Board of Immigration Appeals (BIA)

If noncitizen loses before BIA, can appeal only certain types of issues to the federal circuit court of appeal (e.g., 9th circuit)

Additional resources

- Immigrant Legal Resource Center website and manuals
- Kurzban's Immigration Law Sourcebook
- Gordon, Mailman & Yale-Loehr, Immigration Law and Procedure
- Practice manuals (American Immigration Council, National Immigration Project, etc.)
- Relevant regulations and agency policy

Questions?
