was served was, in fact, the alien named in the notice.

[62 FR 10365, Mar. 6, 1997, as amended at 64 FR 8494, Feb. 19, 1999; 67 FR 39258, June 7, 2002. Duplicated from §238.1 at 68 FR 9838, Feb. 28, 2003, as amended at 68 FR 10355, Mar. 3, 2003]

# PART 1239—INITIATION OF REMOVAL PROCEEDINGS

Sec.
1239.1 Notice to appear.
1239.2 Cancellation of notice to appear.
1239.3 Effect of filing notice to appear.

AUTHORITY: 8 U.S.C. 1103, 1221, 1229.

SOURCE: 62 FR 10366, Mar. 6, 1997, unless otherwise noted. Duplicated from part 239 at 68 FR 9838, Feb. 28, 2003.

EDITORIAL NOTE: Nomenclature changes to part 1239 appear at 68 FR 9846, Feb. 28, 2003, and at 68 FR 10355, Mar. 3, 2003.

## §1239.1 Notice to appear.

(a) *Commencement.* Every removal proceeding conducted under section 240 of the Act (8 U.S.C. 1229a) to determine the deportability or inadmissibility of an alien is commenced by the filing of a notice to appear with the immigration court. For provisions relating to the issuance of a notice to appear by an immigration officer, or supervisor thereof, see 8 CFR 239.1(a).

(b) *Service of notice to appear.* Service of the notice to appear shall be in accordance with section 239 of the Act.

[62 FR 10366, Mar. 6, 1997, as amended at 67 FR 39258, June 7, 2002; 69 FR 44907, July 28, 2004]

## §1239.2 Cancellation of notice to appear.

(a) *Prior to commencement of proceedings.* For provisions relating to the authority of an immigration officer to cancel a notice to appear prior to the vesting of jurisdiction with the immigration judge, see 8 CFR 239.2(a) and (b).

(b) *Ordering termination or dismissal.* After commencement of proceedings, an immigration judge or Board member shall have authority to resolve or dispose of a case through an order of dismissal or an order of termination. An immigration judge or Board member may enter an order of dismissal in cases where DHS moves for dismissal pursuant to paragraph (c) of this section. A motion to dismiss removal proceedings for a reason other than those authorized by paragraph (c) of this section shall be deemed a motion to terminate and adjudicated pursuant to 8 CFR 1003.1(m), pertaining to cases before the Board, or 8 CFR 1003.18(d), pertaining to cases before the immigration court, as applicable.

(c) *Motion to dismiss.* After commencement of proceedings pursuant to 8 CFR 1003.14, government counsel or an officer enumerated in 8 CFR 239.1(a) may move for dismissal of the matter on the grounds set out under 8 CFR 239.2(a). Dismissal of the matter shall be without prejudice to the alien or the Department of Homeland Security.

(d) *Motion for remand.* After commencement of the hearing, government counsel or an officer enumerated in 8 CFR 239.1(a) may move for remand of the matter to the Department of Homeland Security on the ground that the foreign relations of the United States are involved and require further consideration. Remand of the matter shall be without prejudice to the alien or the Department of Homeland Security.

(e) *Warrant of arrest.* When a notice to appear is canceled or proceedings are terminated under this section any outstanding warrant of arrest is canceled.

(f) [Reserved]

[62 FR 10366, Mar. 6, 1997. Duplicated from part 239 at 68 FR 9838, Feb. 28, 2003, as amended at 69 FR 44907, July 28, 2004; 89 FR 46794, May 29, 2024]

## §1239.3 Effect of filing notice to appear.

The filing of a notice to appear shall have no effect in determining periods of unlawful presence as defined in section 212(a)(9)(B) of the Act.

# PART 1240—PROCEEDINGS TO DETERMINE REMOVABILITY OF NONCITIZENS IN THE UNITED STATES

## Subpart A—Removal Proceedings

Sec.
1240.1 Immigration judges.
1240.2 DHS counsel.

AUTHORITY: 8 U.S.C. 1103, 1158, 1182, 1186a, 1186b, 1225, 1226, 1227, 1228, 1229a, 1229b, 1229c, 1252 note, 1361, 1362; secs. 202 and 203, Pub. L. 105–100 (111 Stat. 2160, 2193); sec. 902, Pub. L. 105–277 (112 Stat. 2681).

SOURCE: 62 FR 10367, Mar. 6, 1997, unless otherwise noted. Redesignated in part and duplicated in part from part 240 at 68 FR 9838, 9840, Feb. 28, 2003.

EDITORIAL NOTE: Nomenclature changes to part 1240 appear at 68 FR 9846, Feb. 28, 2003, and at 68 FR 10355, Mar. 3, 2003.

## Subpart A—Removal Proceedings

### § 1240.1 Immigration judges.

(a) *Authority.* (1) In any removal proceeding pursuant to section 240 of the Act, the immigration judge shall have the authority to:

(i) Determine removability pursuant to section 240(a)(1) of the Act; to make decisions, including orders of removal as provided by section 240(c)(1)(A) of the Act;

(ii) To determine applications under sections 208, 212(a)(2)(F), 212(a)(6)(F)(ii), 212(a)(9)(B)(v), 212(d)(11), 212(d)(12), 212(g), 212(h), 212(i), 212(k), 237(a)(1)(E)(iii), 237(a)(1)(H), 237(a)(3)(C)(ii), 240A(a) and (b), 240B, 245, and 249 of the Act, section 202 of Pub. L. 105–100, section 902 of Pub. L. 105–277, and former section 212(c) of the Act (as it existed prior to April 1, 1997);

(iii) To order withholding of removal pursuant to section 241(b)(3) of the Act and pursuant to the Convention Against Torture; and

(iv) To take any other action consistent with applicable law and regulations as may be appropriate.

(2) An immigration judge may certify his or her decision in any case under section 240 of the Act to the Board of Immigration Appeals when it involves an unusually complex or novel question of law or fact. Nothing contained in this part shall be construed to diminish the authority conferred on immigration judges under sections 101(b)(4) and 103 of the Act.

(b) *Withdrawal and substitution of immigration judges.* The immigration judge assigned to conduct the hearing shall at any time withdraw if he or she deems himself or herself disqualified. If an immigration judge becomes unavailable to complete his or her duties, another immigration judge may be assigned to complete the case. The new immigration judge shall familiarize himself or herself with the record in the case and shall state for the record that he or she has done so.

(c) *Conduct of hearing.* The immigration judge shall receive and consider material and relevant evidence, rule upon objections, and otherwise regulate the course of the hearing.

(d) *Withdrawal of application for admission.* An immigration judge may allow only an arriving alien to withdraw an application for admission. Once the issue of inadmissibility has been resolved, permission to withdraw an application for admission should ordinarily be granted only with the concurrence of the Service. An immigration judge shall not allow an alien to withdraw an application for admission unless the alien, in addition to demonstrating that he or she possesses both the intent and the means to depart immediately from the United States, establishes that factors directly relating to the issue of inadmissibility indicate that the granting of the withdrawal would be in the interest of justice. During the pendency of an appeal from the order of removal, permission to withdraw an application for admission must be obtained from the immigration judge or the Board.

[62 FR 10367, Mar. 6, 1997; 62 FR 15363, Apr. 1, 1997, as amended at 63 FR 27829, May 21, 1998; 64 FR 8495, Feb. 19, 1999; 64 FR 25766, May 12, 1999; 69 FR 57835, Sept. 28, 2004; 72 FR 53678, Sept. 20, 2007]

### § 1240.2 DHS Counsel.

(a) *Authority.* DHS counsel shall present on behalf of the government evidence material to the issues of deportability or inadmissibility and any other issues that may require disposition by the immigration judge. The duties of the DHS counsel include, but are not limited to, the presentation of evidence and the interrogation, examination, and cross-examination of the respondent or other witnesses. Nothing contained in this subpart diminishes the authority of an immigration judge to conduct proceedings under this part. The DHS counsel is authorized to appeal from a decision of the immigration judge pursuant to §1003.38 of this chapter and to move for reopening or reconsideration pursuant to §1003.23 of this chapter.

(b) *Assignment.* In a removal proceeding, DHS shall assign an attorney to each case within the provisions of §1240.10(d), and to each case in which an unrepresented respondent is incompetent or is under 18 years of age, and is not accompanied by a guardian, relative, or friend. In a case in which the removal proceeding would result in an order of removal, DHS shall assign an attorney to each case in which a respondent's nationality is in issue. A DHS counsel shall be assigned in every case in which the Commissioner approves the submission of non-record information under §1240.11(a)(3). In his or her discretion, whenever he or she deems such assignment necessary or advantageous, the General Counsel may assign a DHS counsel to any other case at any stage of the proceeding.

[62 FR 10367, Mar. 6, 1997. 68 FR 9838, 9840, Feb. 28, 2003, as amended at 86 FR 70724, Dec. 13, 2021]

### §1240.3 Representation by counsel.

The respondent may be represented at the hearing by an attorney or other representative qualified under 8 CFR part 1292.

### §1240.4 Incompetent respondents.

When it is impracticable for the respondent to be present at the hearing because of mental incompetency, the attorney, legal representative, legal guardian, near relative, or friend who was served with a copy of the notice to appear shall be permitted to appear on behalf of the respondent. If such a person cannot reasonably be found or fails or refuses to appear, the custodian of the respondent shall be requested to appear on behalf of the respondent.

### §1240.5 Interpreter.

Any person acting as an interpreter in a hearing before an immigration judge under this part shall be sworn to interpret and translate accurately, unless the interpreter is an employee of the United States Government, in which event no such oath shall be required.

### §1240.6 Postponement and adjournment of hearing.

After the commencement of the hearing, the immigration judge may grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the Department of Homeland Security, provided that nothing in this section shall authorize an adjournment that causes the adjudication of an asylum application to exceed 180 days in the absence of exceptional circumstances, consistent with section 208(d)(5)(A)(iii) of the Act and §1003.10(b) of this chapter.

[85 FR 81751, Dec. 16, 2020]

### §1240.7 Evidence in removal proceedings under section 240 of the Act.

(a) *Use of prior statements.* The immigration judge may receive in evidence any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial.

(b) *Testimony.* Testimony of witnesses appearing at the hearing shall be under oath or affirmation administered by the immigration judge.

(c) *Depositions.* The immigration judge may order the taking of depositions pursuant to §1003.35 of this chapter.

### §1240.8 Burdens of proof in removal proceedings.

(a) *Deportable aliens.* A respondent charged with deportability shall be found to be removable if the Service proves by clear and convincing evidence that the respondent is deportable as charged.

(b) *Arriving aliens.* In proceedings commenced upon a respondent's arrival in the United States or after the revocation or expiration of parole, the respondent must prove that he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged.

(c) *Aliens present in the United States without being admitted or paroled.* In the case of a respondent charged as being in the United States without being admitted or paroled, the Service must

first establish the alienage of the respondent. Once alienage has been established, unless the respondent demonstrates by clear and convincing evidence that he or she is lawfully in the United States pursuant to a prior admission, the respondent must prove that he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged.

(d) *Relief from removal.* The respondent shall have the burden of establishing that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion. If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

### § 1240.9 Contents of record.

The hearing before the immigration judge, including the testimony, exhibits, applications, proffers, and requests, the immigration judge's decision, and all written orders, motions, appeals, briefs, and other papers filed in the proceedings shall constitute the record in the case. The hearing shall be recorded verbatim except for statements made off the record with the permission of the immigration judge. In his or her discretion, the immigration judge may exclude from the record any arguments made in connection with motions, applications, requests, or objections, but in such event the person affected may submit a brief.

### § 1240.10 Hearing.

(a) *Opening.* In a removal proceeding, the immigration judge shall:

(1) Advise the respondent of his or her right to representation, at no expense to the government, by counsel of his or her own choice authorized to practice in the proceedings and require the respondent to state then and there whether he or she desires representation;

(2) Advise the respondent of the availability of pro bono legal services for the immigration court location at which the hearing will take place, and ascertain that the respondent has received a list of such pro bono legal service providers.

(3) Ascertain that the respondent has received a copy of appeal rights.

(4) Advise the respondent that he or she will have a reasonable opportunity to examine and object to the evidence against him or her, to present evidence in his or her own behalf and to cross-examine witnesses presented by the government (but the respondent shall not be entitled to examine such national security information as the government may proffer in opposition to the respondent's admission to the United States or to an application by the respondent for discretionary relief);

(5) Place the respondent under oath;

(6) Read the factual allegations and the charges in the notice to appear to the respondent and explain them in non-technical language; and

(7) Enter the notice to appear as an exhibit in the Record of Proceeding.

(b) *Public access to hearings.* Removal hearings shall be open to the public, except that the immigration judge may, in his or her discretion, close proceedings as provided in § 1003.27 of this chapter.

(c) *Pleading by respondent.* The immigration judge shall require the respondent to plead to the notice to appear by stating whether he or she admits or denies the factual allegations and his or her removability under the charges contained therein. If the respondent admits the factual allegations and admits his or her removability under the charges and the immigration judge is satisfied that no issues of law or fact remain, the immigration judge may determine that removability as charged has been established by the admissions of the respondent. The immigration judge shall not accept an admission of removability from an unrepresented respondent who is incompetent or under the age of 18 and is not accompanied by an attorney or legal representative, a near relative, legal guardian, or friend; nor from an officer of an institution in which a respondent is an inmate or patient. When, pursuant to this paragraph, the immigration judge does not accept an admission of removability, he or she shall direct a hearing on the issues.

(d) *Issues of removability.* When removability is not determined under the provisions of paragraph (c) of this section, the immigration judge shall request the assignment of DHS counsel, and shall receive evidence as to any unresolved issues, except that no further evidence need be received as to any facts admitted during the pleading. The alien shall provide a court certified copy of a Judicial Recommendation Against Deportation (JRAD) to the immigration judge when such recommendation will be the basis of denying any charge(s) brought by DHS in the proceedings against the alien. No JRAD is effective against a charge of deportability under former section 241(a)(11) of the Act or if the JRAD was granted on or after November 29, 1990.

(e) *Additional charges in removal hearings.* At any time during the proceeding, additional or substituted charges of inadmissibility and/or deportability and/or factual allegations may be lodged by DHS in writing. The alien in removal proceedings shall be served with a copy of these additional charges and allegations. The immigration judge shall read the additional factual allegations and charges to the alien and explain them to him or her. The immigration judge shall advise the alien, if he or she is not represented by counsel, that the alien may be so represented, and that he or she may be given a reasonable continuance to respond to the additional factual allegations and charges. Thereafter, the provision of §1240.6(b) relating to pleading shall apply to the additional factual allegations and charges.

(f) *Country of removal.* With respect to an arriving alien covered by section 241(b)(1) of the Act, the country, or countries in the alternative, to which the alien may be removed will be determined pursuant to section 241(b)(1) of the Act. In any other case, the immigration judge shall notify the respondent that if he or she is finally ordered removed, the country of removal will in the first instance be the country designated by the respondent, except as otherwise provided under section 241(b)(2) of the Act, and shall afford him or her an opportunity then and there to make such designation. The immigration judge shall also identify for the record a country, or countries in the alternative, to which the alien's removal may be made pursuant to section 241(b)(2) of the Act if the country of the alien's designation will not accept him or her into its territory, or fails to furnish timely notice of acceptance, or if the alien declines to designate a country. In considering alternative countries of removal, acceptance or the existence of a functioning government is not required with respect to an alternative country described in section 241(b)(1)(C)(i)–(iii) of the Act or a removal country described in section 241(b)(2)(E)(i)–(iv) of the Act. *See* 8 CFR 241.15.

[62 FR 10367, Mar. 6, 1997. Redesignated in part and duplicated in part from part 240 at 68 FR 9838, 9840, Feb. 28, 2003, as amended at 70 FR 674, Jan. 5, 2005; 80 FR 59513, Oct. 1, 2015; 86 FR 70724, Dec. 13, 2021]

### § 1240.11 Ancillary matters, applications.

(a) *Creation of the status of an alien lawfully admitted for permanent residence.* (1) In a removal proceeding, an alien may apply to the immigration judge for cancellation of removal under section 240A of the Act, adjustment of status under section 1 of the Act of November 2, 1966 (as modified by section 606 of Pub. L. 104–208), section 101 or 104 of the Act of October 28, 1977, section 202 of Pub. L. 105–100, or section 902 of Pub. L. 105–277, or for the creation of a record of lawful admission for permanent residence under section 249 of the Act. The application shall be subject to the requirements of §1240.20, and 8 CFR parts 1245 and 1249. The approval of any application made to the immigration judge under section 245 of the Act by an alien spouse (as defined in section 216(g)(1) of the Act) or by an alien entrepreneur (as defined in section 216A(f)(1) of the Act) shall result in the alien's obtaining the status of lawful permanent resident on a conditional basis in accordance with the provisions of section 216 or 216A of the Act, whichever is applicable. However, the Petition to Remove the Conditions on Residence required by section 216(c) of the Act, or the Petition by Entrepreneur to Remove Conditions required by section 216A(c) of the Act shall be made to the

director in accordance with 8 CFR part 1216.

(2) In conjunction with any application for creation of status of an alien lawfully admitted for permanent residence made to an immigration judge, if the alien is inadmissible under any provision of section 212(a) of the Act, and believes that he or she meets the eligibility requirements for a waiver of the ground of inadmissibility, he or she may apply to the immigration judge for such waiver. The immigration judge shall inform the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter and shall afford the alien an opportunity to make application during the hearing, in accordance with the provisions of §1240.8(d). In a relevant case, the immigration judge may adjudicate the sufficiency of an Affidavit of Support Under Section 213A (Form I–864), executed on behalf of an applicant for admission or for adjustment of status, in accordance with the provisions of section 213A of the Act and 8 CFR part 213a.

(3) In exercising discretionary power when considering an application for status as a permanent resident under this chapter, the immigration judge may consider and base the decision on information not contained in the record and not made available for inspection by the alien, provided the Commissioner has determined that such information is relevant and is classified under the applicable Executive Order as requiring protection from unauthorized disclosure in the interest of national security. Whenever the immigration judge believes that he or she can do so while safeguarding both the information and its source, the immigration judge should inform the alien of the general nature of the information in order that the alien may have an opportunity to offer opposing evidence. A decision based in whole or in part on such classified information shall state that the information is material to the decision.

(b) *Voluntary departure.* The alien may apply to the immigration judge for voluntary departure in lieu of removal pursuant to section 240B of the Act and subpart C of this part. The immigration judge shall advise the alien of the consequences of filing a post-decision motion to reopen or reconsider prior to the expiration of the time specified by the immigration judge for the alien to depart voluntarily.

(c) *Applications for asylum and withholding of removal.* (1) If the alien expresses fear of persecution or harm upon return to any of the countries to which the alien might be removed pursuant to §1240.10(f), and the alien has not previously filed an application for asylum or withholding of removal that has been referred to the immigration judge by an asylum officer in accordance with §1208.14 of this chapter, the immigration judge shall:

(i) Advise the alien that he or she may apply for asylum in the United States or withholding of removal to those countries;

(ii) Make available the appropriate application forms; and

(iii) Advise the alien of the privilege of being represented by counsel at no expense to the government and of the consequences, pursuant to section 208(d)(6) of the Act, of knowingly filing a frivolous application for asylum. The immigration judge shall provide to the alien a list of persons who have indicated their availability to represent aliens in asylum proceedings on a *pro bono* basis.

(2) An application for asylum or withholding of removal must be filed with the Immigration Court, pursuant to §1208.4(b) of this chapter. Upon receipt of an application, the Immigration Court may forward a copy to the Department of State pursuant to §1208.11 of this chapter and shall calendar the case for a hearing. The reply, if any, from the Department of State, unless classified under an applicable Executive Order, shall be given to both the alien and to DHS counsel and shall be included in the record.

(3) Applications for asylum and withholding of removal so filed will be decided by the immigration judge pursuant to the requirements and standards established in 8 CFR part 1208 of this chapter after an evidentiary hearing to resolve factual issues in dispute. An evidentiary hearing extending beyond issues related to the basis for a mandatory denial of the application pursuant to §1208.14 or §1208.16 of this chapter is

not necessary once the immigration judge has determined that such a denial is required.

(i) Evidentiary hearings on applications for asylum or withholding of removal will be open to the public unless the alien expressly requests that the hearing be closed pursuant to §3.27 of this chapter. The immigration judge shall inquire whether the alien requests such closure.

(ii) Nothing in this section is intended to limit the authority of the immigration judge to properly control the scope of any evidentiary hearing.

(iii) During the removal hearing, the alien shall be examined under oath on his or her application and may present evidence and witnesses in his or her own behalf. The alien has the burden of establishing that he or she is a refugee as defined in section 101(a)(42) of the Act pursuant to the standards set forth in §1208.13 of this chapter.

(iv) DHS counsel may call witnesses and present evidence for the record, including information classified under the applicable Executive Order, provided the immigration judge or the Board has determined that such information is relevant to the hearing. When the immigration judge receives such classified information, he or she shall inform the alien. The agency that provides the classified information to the immigration judge may provide an unclassified summary of the information for release to the alien, whenever it determines it can do so consistently with safeguarding both the classified nature of the information and its sources. The summary should be as detailed as possible, in order that the alien may have an opportunity to offer opposing evidence. A decision based in whole or in part on such classified information shall state whether such information is material to the decision.

(4) The decision of an immigration judge to grant or deny asylum or withholding of removal shall be communicated to the alien and to the DHS counsel. An adverse decision shall state why asylum or withholding of removal was denied.

(d) *Application for relief under sections 237(a)(1)(H) and 237(a)(1)(E)(iii) of the Act.* The respondent may apply to the immigration judge for relief from removal under sections 237(a)(1)(H) and 237(a)(1)(E)(iii) of the Act.

(e) *General.* An application under this section shall be made only during the hearing and shall not be held to constitute a concession of alienage or deportability in any case in which the respondent does not admit his or her alienage or deportability. However, nothing in this section shall prohibit DHS from using information supplied in an application for asylum or withholding of deportation or removal submitted to DHS on or after January 4, 1995, as the basis for issuance of a charging document or to establish alienage or deportability in a case referred to an immigration judge under §1208.14(b) of this chapter. The alien shall have the burden of establishing that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion. Nothing contained in this section is intended to foreclose the respondent from applying for any benefit or privilege that he or she believes himself or herself eligible to receive in proceedings under this part. Nothing in this section is intended to limit the Attorney General's authority to remove an alien to any country permitted by section 241(b) of the Act.

(f) *Fees.* The alien shall not be required to pay a fee on more than one application within paragraphs (a) and (c) of this section, provided that the minimum fee imposed when more than one application is made shall be determined by the cost of the application with the highest fee. When a motion to reopen or reconsider is made concurrently with an application for relief seeking one of the immigration benefits set forth in paragraphs (a) and (c) of this section, only the fee set forth in §1103.7(b)(1) of this chapter for the motion must accompany the motion and application for relief. If such a motion is granted, the appropriate fee for the application for relief, if any, set forth in §1103.7(b)(4) of this chapter, must be paid within the time specified in order to complete the application.

(g) *U.S.-Canada safe third country agreement, which includes the Additional Protocol of 2022.* (1) The immigration judge has authority to apply section

208(a)(2)(A) of the Act, relating to a determination that an alien may be removed to Canada pursuant to the 2002 U.S.-Canada Agreement (''Agreement''), in the case of an alien who is subject to the terms of the Agreement, which includes the Additional Protocol of 2022, and is placed in proceedings pursuant to section 240 of the Act. In an appropriate case, the immigration judge shall determine whether under that Agreement, which includes the Additional Protocol of 2022, the alien should be returned to Canada, or whether the alien should be permitted to pursue asylum or other protection in the United States.

(2) An alien described in paragraph (g)(1) of this section is ineligible to apply for asylum, pursuant to section 208(a)(2)(A) of the Act, unless the immigration judge determines, by preponderance of the evidence, that:

(i) The Agreement, which includes the Additional Protocol of 2022, does not apply to the alien or does not preclude the alien from applying for asylum in the United States; or

(ii) The alien qualifies for an exception to the Agreement, which includes the Additional Protocol of 2022, as set forth in paragraph (g)(3) of this section.

(3) The immigration judge shall apply the applicable regulations in deciding whether the alien qualifies for any exception under the Agreement, which includes the Additional Protocol of 2022, that would permit the United States to exercise authority over the alien's asylum claim. The exceptions under the Agreement, which includes the Additional Protocol of 2022, are codified at 8 CFR 208.30(e)(6)(iii). The immigration judge shall not review, consider, or decide any issues pertaining to any discretionary determination on whether the alien should be permitted to pursue an asylum claim in the United States notwithstanding the general terms of the Agreement, which includes the Additional Protocol of 2022, as such discretionary public interest determinations are reserved to DHS. However, an alien in removal proceedings who is otherwise ineligible to apply for asylum under the Agreement, which includes the Additional Protocol of 2022, may apply for asylum if DHS files a written notice in the proceedings before the immigration judge that it has decided in the public interest to allow the alien to pursue claims for asylum or withholding of removal.

(4) An alien who is found to be ineligible to apply for asylum under section 208(a)(2)(A) of the Act is ineligible to apply for withholding of removal pursuant to section 241(b)(3) of the Act and the Convention Against Torture. However, the alien may apply for any other relief from removal for which the alien may be eligible. If an alien who is subject to the Agreement, which includes the Additional Protocol of 2022, and section 208(a)(2)(A) of the Act is ordered removed, the alien shall be ordered removed to Canada, in which the alien will be able to pursue his or her claims for asylum or protection against persecution or torture under the laws of Canada.

(h) *Other asylum cooperative agreements.* (1) The immigration judge has authority to apply section 208(a)(2)(A) of the Act, relating to a determination that an alien may be removed to a third country pursuant to a bilateral or multilateral agreement—other than the 2002 U.S.-Canada Agreement, which includes the Additional Protocol of 2022—in the case of an alien who is subject to the terms of the relevant agreement and is placed in proceedings pursuant to section 240 of the Act. In an appropriate case, the immigration judge shall determine whether under the relevant agreement the alien should be removed to the third country, or whether the alien should be permitted to pursue asylum or other protection claims in the United States. If more than one agreement applies to the alien and the alien is ordered removed, the immigration judge shall enter alternate orders of removal to each relevant country.

(2) An alien described in paragraph (h)(1) of this section is ineligible to apply for asylum pursuant to section 208(a)(2)(A) of the Act, or for withholding of removal or CAT protection in the United States, unless the immigration judge determines, by a preponderance of the evidence, that:

(i) The relevant agreement does not apply to the alien or does not preclude

the alien from applying for asylum in the United States;

(ii) The alien qualifies for an exception to the relevant agreement as set forth in paragraph (h)(3) of this section and the FEDERAL REGISTER document specifying the exceptions particular to the relevant agreement; or

(iii) The alien has demonstrated that it is more likely than not that he or she would be persecuted on account of a protected ground or tortured in the third country.

(3) The immigration judge shall apply the applicable regulations in deciding whether an alien described in paragraph (h)(1) of this section qualifies for an exception under the relevant agreement that would permit the United States to exercise authority over the alien's asylum claim. The exceptions for agreements with countries other than Canada are further explained by the applicable published FEDERAL REGISTER document setting out each Agreement and its exceptions. The immigration judge shall not review, consider, or decide any issues pertaining to any discretionary determination on whether an alien described in paragraph (h)(1) of this section should be allowed to pursue an application for asylum in the United States notwithstanding the general terms of an agreement, as section 208(a)(2)(A) of the Act reserves to the Secretary or his delegates the determination whether it is in the public interest for the alien to receive asylum in the United States. However, an alien in removal proceedings who is otherwise ineligible to apply for asylum under an agreement may apply for asylum if DHS files a written notice in the proceedings before the immigration judge that DHS has decided in the public interest that the alien may pursue an application for asylum or withholding of removal in the United States.

(4) If the immigration judge determines that an alien described in paragraph (h)(1) of this section is subject to the terms of agreements formed pursuant to section 208(a)(2)(A) of the Act, and that the alien has failed to demonstrate that it is more likely than not that the alien would be persecuted on account of a protected ground or tortured in those third countries, then the alien is ineligible to apply for withholding of removal pursuant to section 241(b)(3) of the Act and the Convention Against Torture notwithstanding any other provision in this chapter. However, the alien may apply for any other relief from removal for which the alien may be eligible. If an alien who is subject to section 208(a)(2)(A) of the Act is ordered removed, the alien shall be ordered removed to the relevant third country in which the alien will be able to pursue his or her claims for asylum or protection against persecution or torture under the laws of that country.

[62 FR 10367, Mar. 6, 1997, as amended at 62 FR 45150, Aug. 26, 1997; 63 FR 27829, May 21, 1998; 64 FR 25766, May 12, 1999; 69 FR 69497, Nov. 29, 2004; 71 FR 35757, June 21, 2006; 73 FR 76937, Dec. 18, 2008; 78 FR 19080, Mar. 29, 2013; 84 FR 64010, Nov. 19, 2019; 85 FR 82794, Dec. 18, 2020; 86 FR 70724, Dec. 13, 2021; 88 FR 18240, Mar. 28, 2023]

### § 1240.12 Decision of the immigration judge.

(a) *Contents.* The decision of the immigration judge may be oral or written. The decision of the immigration judge shall include a finding as to inadmissibility or deportability. The formal enumeration of findings is not required. The decision shall also contain reasons for granting or denying the request. The decision shall be concluded with the order of the immigration judge.

(b) *Summary decision.* Notwithstanding the provisions of paragraph (a) of this section, in any case where inadmissibility or deportability is determined on the pleadings pursuant to §1240.10(b) and the respondent does not make an application under §1240.11, the alien is statutorily ineligible for relief, or the respondent applies for voluntary departure only and the immigration judge grants the application, the immigration judge may enter a summary decision or, if voluntary departure is granted, a summary decision with an alternate order of removal.

(c) *Order of the immigration judge.* The order of the immigration judge shall direct the respondent's removal from the United States, or the termination

of the proceedings, or other such disposition of the case as may be appropriate. The immigration judge is authorized to issue orders in the alternative or in combination as he or she may deem necessary.

(d) *Removal.* When a respondent is ordered removed from the United States, the immigration judge shall identify a country, or countries in the alternative, to which the alien's removal may in the first instance be made, pursuant to the provisions of section 241(b) of the Act. In the event that the Department of Homeland Security is unable to remove the alien to the specified or alternative country or countries, the order of the immigration judge does not limit the authority of the Department of Homeland Security to remove the alien to any other country as permitted by section 241(b) of the Act.

[62 FR 10367, Mar. 6, 1997. Redesignated in part and duplicated in part from part 240 at 68 FR 9838, 9840, Feb. 28, 2003; 70 FR 674, Jan. 5, 2005]

### § 1240.13 Notice of decision.

(a) *Written decision.* A written decision shall be served upon the respondent and the DHS counsel, together with the notice referred to in § 1003.3 of this chapter. Service by mail is complete upon mailing.

(b) *Oral decision.* An oral decision shall be stated by the immigration judge in the presence of the respondent and the DHS counsel, if any, at the conclusion of the hearing. A copy of the summary written order shall be furnished at the request of the respondent or the DHS counsel.

(c) *Summary decision.* When the immigration judge renders a summary decision as provided in § 1240.12(b), he or she shall serve a copy thereof upon the respondent and the DHS counsel at the conclusion of the hearing.

(d) *Decision to remove.* If the immigration judge decides that the respondent is removable and orders the respondent to be removed, the immigration judge shall advise the respondent of such decision, and of the consequences for failure to depart under the order of removal, including civil and criminal penalties described at sections 274D and 243 of the Act. Unless appeal from the decision is waived, the respondent shall be furnished with Form EOIR–26, Notice of Appeal, and advised of the provisions of § 1240.15.

[62 FR 10367, Mar. 6, 1997. Redesignated in part and duplicated in part from part 240 at 68 FR 9838, 9840, Feb. 28, 2003, as amended at 86 FR 70724, Dec. 13, 2021]

### § 1240.14 Finality of order.

The order of the immigration judge shall become final in accordance with § 1003.39 of this chapter.

### § 1240.15 Appeals.

Pursuant to 8 CFR part 1003, an appeal shall lie from a decision of an immigration judge to the Board of Immigration Appeals, except that no appeal shall lie from an order of removal entered in absentia. The procedures regarding the filing of a Form EOIR 26, Notice of Appeal, fees, and briefs are set forth in §§ 1003.3, 1003.31, and 1003.38 of this chapter. An appeal shall be filed within 30 calendar days after the mailing of a written decision, the stating of an oral decision, or the service of a summary decision. The filing date is defined as the date of receipt of the Notice of Appeal by the Board of Immigration Appeals. The reasons for the appeal shall be stated in the Notice of Appeal in accordance with the provisions of § 1003.3(b) of this chapter. Failure to do so may constitute a ground for dismissal of the appeal by the Board pursuant to § 1003.1(d)(2) of this chapter.

[62 FR 10367, Mar. 6, 1997, as amended at 66 FR 6446, Jan. 22, 2001]

### § 1240.16 Application of new procedures or termination of proceedings in old proceedings pursuant to section 309(c) of Public Law 104–208.

The Attorney General shall have the sole discretion to apply the provisions of section 309(c) of Public Law 104–208, which provides for the application of new removal procedures to certain cases in exclusion or deportation proceedings and for the termination of certain cases in exclusion or deportation proceedings and initiation of new removal proceedings. The Attorney General's application of the provisions of section 309(c) shall become effective upon publication of a notice in the

FEDERAL REGISTER. However, if the Attorney General determines, in the exercise of his or her discretion, that the delay caused by publication would adversely affect the interests of the United States or the effective enforcement of the immigration laws, the Attorney General's application shall become effective immediately upon issuance, and shall be published in the FEDERAL REGISTER as soon as practicable thereafter.

### § 1240.17 Removal proceedings where the respondent has a credible fear of persecution or torture.

(a) *Scope.* This section applies in cases referred to the immigration court under 8 CFR 208.14(c)(1) where the respondent has been found to have a credible fear of persecution or torture, and U.S. Citizenship and Immigration Services (USCIS) subsequently adjudicated but did not grant the respondent's application for asylum under section 208 of the Act; or the respondent was included in a spouse's or parent's application under 8 CFR 208.2(a)(1)(ii) that USCIS subsequently adjudicated but did not grant under section 208 of the Act. Except as otherwise provided in this section, removal proceedings for such respondents shall be governed by the same rules and procedures that apply to proceedings conducted under this subpart. In all cases, such proceedings shall be conducted in accordance with section 208 of the Act. Should any part of the USCIS process governing cases covered by 8 CFR 208.2(a)(1)(ii) be enjoined or vacated, the Executive Office for Immigration Review (EOIR) shall have the discretion to adjudicate any case referred to EOIR under 8 CFR 208.14(c)(1) using the rules and procedures that apply to proceedings conducted under this subpart without regard to this section.

(b) *Commencement of proceedings.* Removal proceedings conducted under this section shall commence when DHS files a Notice to Appear (NTA) pursuant to 8 CFR part 1239 and schedules the master calendar hearing to take place 30 days after the date the NTA is served or, if a hearing cannot be held on that date, on the next available date no later than 35 days after the date of service. Where the NTA is served by mail, the date of service shall be construed as the date the NTA is mailed. The DHS component issuing the NTA shall also identify for the respondent and the immigration court that the case is subject to the provisions of this section. DHS shall personally serve the NTA on the respondent whenever practicable and by mail when personal service is not effectuated, and shall inform the respondent of the right to be represented by counsel.

(c) *Service of the record.* No later than the date of the master calendar hearing, DHS shall serve on the respondent and on the immigration court where the NTA is filed the record initiating proceedings as defined in this paragraph (c). The record initiating proceedings shall include the record of proceedings for the asylum merits interview, as outlined in 8 CFR 208.9(f), the Form I–213, Record of Deportable/Inadmissible Alien, pertaining to the respondent, and the asylum officer's written decision issued pursuant to 8 CFR 208.19. If service is not effectuated as provided in this paragraph (c), the schedule of proceedings pursuant to paragraph (f) of this section shall be delayed until service is effectuated.

(d) *Failure to appear.* An immigration judge shall issue an in absentia removal order where the respondent fails to appear at the master calendar hearing scheduled under paragraph (b) of this section, or at a later status conference or hearing under this section, if the requirements under section 240(b)(5) of the Act and §1003.26 of this chapter are met, unless the immigration judge waives the respondent's presence under §1003.25(a) of this chapter. If the asylum officer determined the respondent eligible for withholding of removal under the Act or withholding or deferral of removal under the Convention Against Torture, the immigration judge shall give effect to the protection for which the asylum officer determined the respondent eligible, unless DHS makes a prima facie showing, through evidence that specifically pertains to the respondent and was not in the record of proceedings for the USCIS asylum merits interview, that the respondent is not eligible for such protection(s). Where DHS makes such a showing at the master calendar

hearing or status conference, the immigration judge shall allow the respondent a reasonable opportunity of at least 10, but no more than 30, days to respond before issuing an order.

(e) *Form of application.* In removal proceedings under this section, the written record of the positive credible fear determination issued in accordance with 8 CFR 208.30(f) satisfies the respondent's filing requirement for the application for asylum, withholding of removal under the Act, and withholding or deferral of removal under the Convention Against Torture. The record of the proceedings for the hearing before the asylum officer, as outlined in 8 CFR 208.9(f), and the asylum officer's decision, together with any amendment, correction, or supplementation made before the immigration judge as described in §1208.3(a)(2) of this chapter, shall be admitted as evidence and considered by the immigration judge, in addition to any further documentation and testimony provided by the parties under the procedures in this section.

(f) *Schedule of proceedings*—(1) *Master calendar hearing.* At the master calendar hearing, the immigration judge shall perform the functions required by §1240.10(a), including advising the respondent of the right to be represented, at no expense to the Government, by counsel of the respondent's own choice. In addition, the immigration judge shall advise the respondent as to the nature of removal proceedings under this section, including: That the respondent has pending applications for asylum, withholding of removal under the Act and withholding or deferral of removal under the Convention Against Torture, as appropriate; that the respondent has the right to present evidence in support of the applications; that the respondent has the right to call witnesses and to testify at any merits hearing; and that the respondent must comply with the deadlines that govern the submission of evidence. Except where the respondent is ordered removed in absentia, at the conclusion of the master calendar hearing, the immigration judge shall schedule a status conference 30 days after the master calendar hearing or, if a status conference cannot be held on that date, on the next available date no later than 35 days after the master calendar hearing. The immigration judge shall inform the respondent of the requirements for the status conference. The adjournment of the case until the status conference shall not constitute a continuance for the purposes of paragraph (h)(2) of this section.

(2) *Status conference.* The purpose of the status conference shall be to take pleadings, identify and narrow the issues, determine whether the case can be decided on the documentary record, and, if necessary, ready the case for a merits hearing. At the status conference, the immigration judge shall advise the respondent that: The respondent has the right to present evidence in support of the applications; the respondent has the right to call witnesses and to testify at any merits hearing; and the respondent must comply with the deadlines that govern the submission of evidence. Based on the parties' representations at the status conference and an independent evaluation of the record, the immigration judge shall decide whether further proceedings are warranted or whether the case will be decided on the documentary record in accordance with paragraph (f)(4) of this section. If the immigration judge determines that further proceedings are warranted, the immigration judge shall schedule the merits hearing to take place 60 days after the master calendar hearing or, if the merits hearing cannot be held on that date, on the next available date no later than 65 days after the master calendar hearing. The immigration judge may schedule additional status conferences prior to the merits hearing if the immigration judge determines that such conferences are warranted and would contribute to the efficient resolution of the case.

(i) *The respondent.* At the status conference, the respondent shall plead to the NTA under §1240.10(c), and indicate orally or in writing whether the respondent intends to seek any protection(s) for which the asylum officer did not find the respondent eligible.

(A)(*1*) If the respondent indicates that the respondent intends to contest removal or seek any protection(s) for

which the asylum officer did not determine the respondent eligible, the respondent shall, either orally or in writing:

(*i*) Indicate whether the respondent intends to testify before the immigration court;

(*ii*) Identify any witnesses the respondent intends to call in support of the applications at the merits hearing;

(*iii*) Provide any additional documentation in support of the applications;

(*iv*) Describe any alleged errors or omissions in the asylum officer's decision or the record of proceedings before the asylum officer;

(*v*) Articulate or confirm any additional bases for asylum and related protection, whether or not they were presented to or developed before the asylum officer; and

(*vi*) State any additional requested forms of relief or protection.

(*2*) If the respondent is unrepresented, the respondent shall not be required to provide items set forth in paragraphs (f)(2)(i)(A)(*1*)(*iv*), (*v*), and (*vi*) of this section.

(B) If the respondent indicates that the respondent does not intend to contest removal or seek any protection(s) for which the asylum officer did not find the respondent eligible, the immigration judge shall order the respondent removed, and no further proceedings shall be held by the immigration judge. If the asylum officer determined the respondent eligible for withholding of removal under the Act or withholding or deferral of removal under the Convention Against Torture, the immigration judge shall give effect to the protection(s) for which the asylum officer determined the respondent eligible, unless DHS makes a prima facie showing, through evidence that specifically pertains to the respondent and was not in the record of proceedings for the USCIS asylum merits interview, that the respondent is not eligible for such protection(s).

(ii) *DHS.* (A) At the status conference, DHS shall indicate orally or in writing whether it intends to:

(*1*) Rest on the record;

(*2*) Waive cross examination of the respondent;

*(3)* Otherwise participate in the case; or

(*4*) Waive appeal if the immigration judge decides that the respondent's application should be granted.

(B) If DHS indicates that it will participate in the case, it shall, either orally or in writing at the status conference, or in a written submission pursuant to paragraph (f)(3)(i) of this section:

(*1*) State its position on each of the respondent's claimed grounds for asylum or related protection;

(*2*) State which elements of the respondent's claim for asylum or related protection it is contesting and which facts it is disputing, if any, and provide an explanation of its position;

(*3*) Identify any witnesses it intends to call at any merits hearing;

(*4*) Provide any additional non-rebuttal or non-impeachment evidence; and

(*5*) State whether the appropriate identity, law enforcement, or security investigations or examinations required by section 208(d)(5)(A)(i) of the Act and §1003.47 of this chapter have been completed.

(C) Any position DHS expresses pursuant to paragraph (f)(2)(ii)(A) of this section may be retracted, orally or in writing, prior to the issuance of the immigration judge's decision, if DHS seeks consideration of evidence pursuant to the standard laid out in paragraph (g)(2) of this section. Where the immigration judge holds a merits hearing or hearings, any position DHS expressed pursuant to paragraph (f)(2)(ii)(A) may only be retracted prior to the final hearing; if no such hearing is held, the retraction must take place prior to the immigration judge's decision.

(3) *Written submissions.* (i) If DHS intends to participate in the case, DHS shall file a written statement that provides any information required under paragraph (f)(2)(ii) of this section that DHS did not provide at the status conference, as well as any other relevant information or argument in response to the respondent's submissions. DHS's written statement, if any, shall be filed no later than 15 days prior to the scheduled merits hearing or, if the immigration judge determines that no such hearing is warranted, no later

than 15 days following the status conference. Where DHS intends to participate in the case but does not timely provide its position as required under paragraph (f)(2)(ii) of this section, either at the status conference or in its written statement, to one or more of the respondent's claimed grounds for asylum or related protection, including which arguments raised by the respondent it is disputing and which facts it is contesting, the immigration judge shall have authority to deem those arguments or claims unopposed; provided, however, that DHS may respond at the merits hearing to any arguments or claimed bases for asylum first advanced by the respondent after the status conference.

(ii) The respondent may submit a filing no later than 5 days prior to the scheduled merits hearing or, if the immigration judge determines that no such hearing is warranted, no later than 25 days following the status conference, that supplements the respondent's oral statement or written submission under paragraph (f)(2)(i) of this section. In the respondent's supplemental filing, if any, the respondent shall reply to any statement submitted by DHS, identify any additional witnesses, and provide any additional documentation in support of respondent's applications.

(4) *Merits hearings.* (i) If DHS has indicated that it waives cross examination and neither the respondent nor DHS has requested to present testimony under the pre-hearing procedures in paragraph (f)(2) and (3) of this section, the immigration judge shall decide the case on the documentary record, without holding a merits hearing, unless the immigration judge, after consideration of the record, determines that a merits hearing is necessary to fulfill the immigration judge's duty to fully develop the record.

(ii) If the respondent has timely requested to present testimony and DHS has indicated that it waives cross examination and does not intend to present testimony or produce evidence, and the immigration judge concludes, consistent with the immigration judge's duty to fully develop the record, that the respondent's application can be granted without further testimony, the immigration judge shall grant the application without holding a merits hearing.

(iii) In all other situations, the immigration judge shall proceed as follows:

(A) If the immigration judge determines that proceedings can be completed at the merits hearing scheduled under paragraph (f)(1) of this section, the immigration judge shall hold the scheduled merits hearing, at which the immigration judge shall swear the respondent to the truth and accuracy of any information or statements submitted pursuant to paragraphs (f)(2) and (3) of this section, hear all live testimony requested by the parties, consider the parties' submissions, and, whenever practicable, issue an oral decision in the case.

(B) If the immigration judge determines that proceedings cannot be completed at the merits hearing scheduled under paragraph (f)(1) of this section, the immigration judge may conduct a portion of the scheduled hearing, hold a status conference in lieu of the scheduled hearing, and take any other steps the immigration judge deems necessary and efficient to expeditiously resolve the case. The immigration judge shall schedule any and all subsequent merits hearings to occur no later than 30 days after the initial merits hearing.

(5) *Decision.* Whenever practicable, the immigration judge shall issue an oral decision on the date of the final merits hearing or, if the immigration judge determines that no merits hearing is warranted, no more than 30 days after the status conference. The immigration judge may not, however, issue a decision in a case where DHS has made a prima facie showing, through evidence that specifically pertains to the respondent and was not in the record of proceedings for the USCIS asylum merits interview, that the respondent is not eligible for withholding of removal or protection under the Convention Against Torture unless the respondent was first provided a reasonable opportunity of at least 10, but no more than 30, days to respond to the evidence submitted by DHS. Where issuance of an oral decision on the date specified under the first sentence of this paragraph (f)(5) is not practicable,

the immigration judge shall issue an oral or written decision as soon as practicable, and in no case more than 45 days after the date specified under the first sentence of this paragraph (f)(5).

(g) *Consideration of evidence and testimony.* (1) The immigration judge shall exclude documentary evidence or witness testimony only if it is not relevant or probative; if its use is fundamentally unfair; or if the documentary evidence is not submitted or the testimony is not requested by the applicable deadline, absent a timely request for a continuance or filing extension that is granted.

(2) The immigration judge may consider documentary evidence or witness testimony submitted after the applicable deadline, taking into account any timely requests for continuances or filing extensions that are granted, but before the immigration judge has issued a decision, only if the evidence could not reasonably have been obtained and presented before the applicable deadline through the exercise of due diligence or if the exclusion of such evidence would violate a statute or the Constitution. The admission of such evidence shall not automatically entitle either party to a continuance or filing extension; such a continuance or extension is governed by paragraph (h) of this section.

(h) *Continuances, adjournments, and filing extensions*—(1) *In general.* For cases governed by this section, an immigration judge may grant a continuance of a hearing date or extension of a filing deadline only as set forth in this paragraph (h).

(2) *Respondent-requested continuances and filings extensions.* (i) The immigration judge may, for good cause shown, grant the respondent continuances and extend the respondent's filing deadlines. Each such continuance or extension shall not exceed 10 calendar days, unless the immigration judge determines that a longer period is more efficient. The immigration judge may not grant the respondent continuances or extensions for good cause that cause a merits hearing to occur more than 90 days after the master calendar hearing.

(ii) The immigration judge may grant the respondent continuances or extensions that cause a merits hearing to occur more than 90 days after the master calendar hearing only if the respondent demonstrates that the continuance or extension is necessary to ensure a fair proceeding and the need for the continuance or extension exists despite the respondent's exercise of due diligence. The length of any such continuance or extension shall be limited to the time necessary to ensure a fair proceeding. The immigration judge may not grant the respondent continuances or extensions pursuant to this paragraph (h)(2)(ii) that cause a merits hearing to occur more than 135 days after the master calendar hearing.

(iii) The immigration judge may grant the respondent continuances or extensions notwithstanding the requirements of paragraphs (h)(2)(i) and (ii) of this section if the respondent demonstrates that failure to grant the continuance or extension would be contrary to statute or the Constitution.

(iv) In calculating the delay to a merits hearing for purposes of applying paragraphs (h)(2)(i) and (ii) of this section, the immigration judge shall exclude any continuances, hearing delays, or filing extensions issued pursuant to paragraphs (h)(3) and (4) of this section.

(3) *DHS-requested continuances and filings extensions.* The immigration judge may, based on significant Government need, grant DHS continuances and extend DHS's filing deadlines. Significant Government need may include, but is not limited to, confirming domestic or foreign law-enforcement interest in the respondent, conducting forensic analysis of documents submitted in support of a relief application or other fraud-related investigations, and securing criminal history information, translations of foreign language documents, witness testimony or affidavits, or evidence suggesting that the respondent is described in sections 208(a)(2)(A)(C), 208(b)(2), or 241(b)(3)(B) of the Act or has filed a frivolous asylum application as defined in 8 CFR 208.20.

(4) *Continuances, adjournments, and filing extensions due to exigent circumstances.* The immigration judge may continue a status conference or a hearing, or extend a filing deadline, and a status conference or a hearing

set forth in this section may be adjourned, where necessary due to exigent circumstances, such as the unavailability of an immigration judge, the respondent, or either party's counsel assigned to the case due to illness; or the closure of the immigration court or a relevant DHS office. Any such continuance, extension, or adjournment shall be limited to the shortest period feasible and shall not be counted against the time limits set forth in paragraphs (h)(2)(i) and (ii) of this section. A new finding of exigent circumstances must be made to justify any and every subsequent continuance, extension, or adjournment under this paragraph (h)(4).

(i) *Decision.* (1) Where the asylum officer did not grant asylum and did not determine that the respondent was eligible for withholding of removal under the Act or for withholding or deferral of removal under the Convention Against Torture based on the record before USCIS, the immigration judge shall adjudicate, de novo, the respondent's applications for asylum and, if necessary, for withholding of removal under the Act, and withholding or deferral of removal under the Convention Against Torture.

(2) Except as provided in paragraph (f)(2)(i)(B) of this section, where the asylum officer did not grant asylum but determined the respondent eligible for withholding of removal under the Act, or for withholding or deferral of removal under the Convention Against Torture, the immigration judge shall adjudicate, de novo, the respondent's application for asylum. If the immigration judge subsequently denies asylum and enters a removal order, the immigration judge shall give effect to the protection(s) for which the asylum officer determined the applicant eligible, unless DHS has demonstrated, through evidence or testimony that specifically pertains to the respondent and was not in the record of proceedings for the USCIS asylum merits interview, that the respondent is not eligible for such protection(s). The immigration judge shall also grant any additional protection(s) for which the immigration judge finds the applicant eligible. DHS shall not be permitted to appeal to the Board the grant of any protection(s) for which the asylum officer determined the respondent eligible, except to argue that the immigration judge should have denied the application(s) based on the evidence allowed under this paragraph (i)(2).

(3) Where the respondent has requested voluntary departure in the alternative to, or in lieu of, asylum and related protection, the immigration judge shall adjudicate this application where necessary.

(j) *Changes of venue.* Where an immigration judge grants a motion to change venue under §1003.20 of this chapter, the schedule of proceedings pursuant to paragraph (f) of this section commences again with the master calendar hearing at the court to which venue has been changed.

(k) *Exceptions.* The provisions in paragraphs (f) through (h) of this section shall not apply in any of the following circumstances:

(1) The respondent was under the age of 18 on the date the NTA was issued, except where the respondent is in removal proceedings with one or more adult family members.

(2) The respondent has produced evidence of prima facie eligibility for relief or protection other than asylum, withholding of removal under the Act, withholding or deferral of removal under the Convention Against Torture, or voluntary departure, and the respondent is seeking to apply for, or has applied for, such relief or protection.

(3) The respondent has produced evidence that supports a prima facie showing that the respondent is not subject to removal as charged (including under any additional or substitute charges of removal brought by DHS pursuant to §1240.10(e)), and the immigration judge determines, under §1240.10(d), that the issue of whether the respondent is subject to removal cannot be resolved simultaneously with the adjudication of the respondent's applications for asylum, withholding of removal under the Act, or withholding or deferral of removal under the Convention Against Torture.

(4) The immigration judge, pursuant to §1240.10(f), finds the respondent subject to removal to a country other than the country or countries in which the

respondent claimed a fear of persecution, torture, or both before the asylum officer and the respondent claims a fear of persecution, torture, or both in that alternative country or countries.

(5) The case has been reopened or remanded following the immigration judge's order.

(6) The respondent has exhibited indicia of mental incompetency.

(l) *Termination of protection.* Nothing in this section shall preclude DHS from seeking termination of asylum, withholding of removal under the Act, or withholding or deferral of removal under the Convention Against Torture pursuant to 8 CFR 208.17(d) and 208.24(f).

[87 FR 18223, Mar. 29, 2022]

**§§ 1240.18–1240.19 [Reserved]**

## Subpart B—Cancellation of Removal

### § 1240.20 Cancellation of removal and adjustment of status under section 240A of the Act.

(a) *Jurisdiction.* An application for the exercise of discretion under section 240A of the Act shall be submitted on Form EOIR–42, Application for Cancellation of Removal, to the Immigration Court having administrative control over the Record of Proceeding of the underlying removal proceeding under section 240 of the Act. The application must be accompanied by payment of the filing fee as set forth in §1103.7(b) of this chapter or a request for a fee waiver.

(b) *Filing the application.* The application may be filed only with the Immigration Court after jurisdiction has vested pursuant to §1003.14 of this chapter.

(c) For cases raised under section 240A(b)(2) of the Act, extreme hardship shall be determined as set forth in §1240.58 of this part.

[62 FR 10367, Mar. 6, 1997, as amended at 64 FR 27875, May 21, 1999; 85 FR 82794, Dec. 18, 2020]

### § 1240.21 Suspension of deportation and adjustment of status under section 244(a) of the Act (as in effect before April 1, 1997) and cancellation of removal and adjustment of status under section 240A(b) of the Act for certain nonpermanent residents.

(a) *Applicability of annual cap on suspension of deportation or cancellation of removal.* (1) As used in this section, the term *cap* means the numerical limitation of 4,000 grants of suspension of deportation or cancellation of removal in any fiscal year (except fiscal year 1998, which has a limitation of 8,000 grants) pursuant to section 240A(e) of the Act.

(2) The provisions of this section apply to grants of suspension of deportation pursuant to section 244(a) of the Act (as in effect before April 1, 1997) or cancellation of removal pursuant to section 240A(b) of the Act that are subject to a numerical limitation in section 240A(e) of the Act for any fiscal year. This section does not apply to grants of suspension of deportation or cancellation of removal to aliens described in section 309(c)(5)(C)(i) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), as amended by section 203(a)(1) of the Nicaraguan Adjustment and Central American Relief Act (NACARA), or aliens in deportation proceedings prior to April 1, 1997, who apply for suspension of deportation pursuant to section 244(a)(3) of the Act (as in effect prior to April 1, 1997). The Immigration Court and the Board shall no longer issue conditional grants of suspension of deportation or cancellation of removal as provided in 8 CFR 240.21 (as in effect prior to September 30, 1998).

(b) [Reserved]

(c) *Grants of suspension of deportation or cancellation of removal in fiscal years subsequent to fiscal year 1998.* On and after October 1, 1998, the Immigration Court and the Board may grant applications for suspension of deportation and adjustment of status under section 244(a) of the Act (as in effect prior to April 1, 1997) or cancellation of removal and adjustment of status under section 240A(b) of the Act that meet the statutory requirements for such relief and warrant a favorable exercise of discretion until the annual numerical limitation has been reached in that fiscal

year. The awarding of such relief shall be determined according to the date the order granting such relief becomes final as defined in §§1003.1(d)(7) and 1003.39 of this chapter.

(1) *Applicability of the annual limitation*. When grants are no longer available in a fiscal year, further decisions to grant such relief must be reserved until such time as a grant becomes available under the annual limitation in a subsequent fiscal year.

(2) *Aliens applying for additional forms of relief*. Whether or not the cap has been reached, the Immigration Court or the Board shall adjudicate concurrently all other forms of relief for which the alien has applied. Applications for suspension of deportation or cancellation of removal shall be denied in the exercise of discretion if the alien is granted asylum or adjustment of status, including pursuant to section 202 of NACARA, while the suspension of deportation or cancellation of removal application is pending. Where an appeal of a decision granting asylum or adjustment is sustained by the Board, a decision to deny as a matter of discretion an application for suspension of deportation or cancellation of removal on this basis shall be reconsidered.

[63 FR 52138, Sept. 30, 1998, as amended at 66 FR 6446, Jan. 22, 2001; 82 FR 57339, Dec. 5, 2017]

**§§ 1240.22–1240.24 [Reserved]**

## Subpart C—Voluntary Departure

### § 1240.26 Voluntary departure—authority of the Executive Office for Immigration Review.

(a) *Eligibility: general*. A noncitizen previously granted voluntary departure under section 240B of the Act, including by DHS under §240.25, and who fails to depart voluntarily within the time specified, shall thereafter be ineligible, for a period of ten years, for voluntary departure or for relief under sections 240A, 245, 248, and 249 of the Act.

(b) *Prior to completion of removal proceedings*—(1) *Grant by the immigration judge*. (i) A noncitizen may be granted voluntary departure by an immigration judge pursuant to section 240B(a) of the Act only if the noncitizen:

(A) Makes such request prior to or at the master calendar hearing at which the case is initially calendared for a merits hearing;

(B) Makes no additional requests for relief (or if such requests have been made, such requests are withdrawn prior to any grant of voluntary departure pursuant to this section);

(C) Concedes removability;

(D) Waives appeal of all issues; and

(E) Has not been convicted of a crime described in section 101(a)(43) of the Act and is not deportable under section 237(a)(4).

(ii) The judge may not grant voluntary departure under section 240B(a) of the Act beyond 30 days after the master calendar hearing at which the case is initially calendared for a merits hearing, except pursuant to a stipulation under paragraph (b)(2) of this section.

(2) *Stipulation*. At any time prior to the completion of removal proceedings, the DHS counsel may stipulate to a grant of voluntary departure under section 240B(a) of the Act.

(3) *Conditions*. (i) The judge may impose such conditions as he or she deems necessary to ensure the noncitizen's timely departure from the United States, including the posting of a voluntary departure bond to be canceled upon proof that the noncitizen has departed the United States within the time specified. The alien shall be required to present to DHS, for inspection and photocopying, the noncitizen's passport or other travel documentation sufficient to assure lawful entry into the country to which the noncitizen is departing, unless:

(A) A travel document is not necessary to return to the noncitizen's native country or to which country the noncitizen is departing; or

(B) The document is already in the possession of DHS.

(ii) DHS may hold the passport or documentation for sufficient time to investigate its authenticity. If such documentation is not immediately available to the noncitizen, but the immigration judge is satisfied that the noncitizen is making diligent efforts to secure it, voluntary departure may be granted for a period not to exceed 120 days, subject to the condition that the

noncitizen within 60 days must secure such documentation and present it to DHS. DHS in its discretion may extend the period within which the noncitizen must provide such documentation. If the documentation is not presented within the 60-day period or any extension thereof, the voluntary departure order shall vacate automatically and the alternate order of removal will take effect, as if in effect on the date of issuance of the immigration judge order.

(iii) If the noncitizen files a post-decision motion to reopen or reconsider during the period allowed for voluntary departure, the grant of voluntary departure shall be terminated automatically, and the alternate order of removal will take effect immediately. The penalties for failure to depart voluntarily under section 240B(d) of the Act shall not apply if the noncitizen has filed a post-decision motion to reopen or reconsider during the period allowed for voluntary departure. Upon the granting of voluntary departure, the immigration judge shall advise the noncitizen of the provisions of this paragraph (b)(3)(iii).

(iv) The automatic termination of a grant of voluntary departure and the effectiveness of the alternative order of removal shall not affect, in any way, the date that the order of the immigration judge or the Board became administratively final, as determined under the provisions of the applicable regulations in this chapter.

(c) *At the conclusion of the removal proceedings*—(1) *Required findings.* An immigration judge may grant voluntary departure at the conclusion of the removal proceedings under section 240B(b) of the Act, if he or she finds that:

(i) The alien has been physically present in the United States for period of at least one year preceding the date the Notice to Appear was served under section 239(a) of the Act;

(ii) The alien is, and has been, a person of good moral character for at least five years immediately preceding the application;

(iii) The alien has not been convicted of a crime described in section 101(a)(43) of the Act and is not deportable under section 237(a)(4); and

(iv) The alien has established by clear and convincing evidence that the noncitizen has the means to depart the United States and has the intention to do so.

(2) *Travel documentation.* Except as otherwise provided in paragraph (b)(3) of this section, the clear and convincing evidence of the means to depart shall include in all cases presentation by the noncitizen of a passport or other travel documentation sufficient to assure lawful entry into the country to which the noncitizen is departing. DHS shall have full opportunity to inspect and photocopy the documentation, and to challenge its authenticity or sufficiency before voluntary departure is granted.

(3) *Conditions.* The immigration judge may impose such conditions as he or she deems necessary to ensure the noncitizen's timely departure from the United States. The immigration judge shall advise the noncitizen of the conditions set forth in this paragraph (c)(3)(i)–(iii). If the immigration judge imposes conditions beyond those specifically enumerated below, the immigration judge shall advise the noncitizen of such conditions before granting voluntary departure. Upon the conditions being set forth, the noncitizen shall be provided the opportunity to accept the grant of voluntary departure or decline voluntary departure if he or she is unwilling to accept the amount of the bond or other conditions. In all cases under section 240B(b) of the Act:

(i) The alien shall be required to post a voluntary departure bond, in an amount necessary to ensure that the noncitizen departs within the time specified, but in no case less than $500. Before granting voluntary departure, the immigration judge shall advise the noncitizen of the specific amount of the bond to be set and the duty to post the bond with the ICE Field Office Director within 5 business days of the immigration judge's order granting voluntary departure.

(ii) A noncitizen who has been granted voluntary departure shall, within 30 days of filing of an appeal with the Board, submit sufficient proof of having posted the required voluntary departure bond. If the noncitizen does not

provide timely proof to the Board that the required voluntary departure bond has been posted with DHS, the Board will not reinstate the period of voluntary departure in its final order.

(iii) Upon granting voluntary departure, the immigration judge shall advise the noncitizen that if the noncitizen files a post-order motion to reopen or reconsider during the period allowed for voluntary departure, the grant of voluntary departure shall terminate automatically and the alternate order of removal will take effect immediately.

(iv) The automatic termination of an order of voluntary departure and the effectiveness of the alternative order of removal shall not impact, in any way, the date that the order of the immigration judge or the Board became administratively final, as determined under the provisions of the applicable regulations in this chapter.

(v) If, after posting the voluntary departure bond the noncitizen satisfies the condition of the bond by departing the United States prior to the expiration of the period granted for voluntary departure, the noncitizen may apply to the ICE Field Office Director for the bond to be canceled, upon submission of proof of the noncitizen's timely departure by such methods as the ICE Field Office Director may prescribe.

(vi) The voluntary departure bond may be canceled by such methods as the ICE Field Office Director may prescribe if the noncitizen is subsequently successful in overturning or remanding the immigration judge's decision regarding removability.

(4) *Provisions relating to bond.* The voluntary departure bond shall be posted with the ICE Field Office Director within 5 business days of the immigration judge's order granting voluntary departure, and the ICE Field Office Director may, at the ICE Field Office Director's discretion, hold the noncitizen in custody until the bond is posted. Because the purpose of the voluntary departure bond is to ensure that the noncitizen does depart from the United States, as promised, the failure to post the bond, when required, within 5 business days may be considered in evaluating whether the noncitizen should be detained based on risk of flight, and also may be considered as a negative discretionary factor with respect to any discretionary form of relief. The noncitizen's failure to post the required voluntary departure bond within the time required does not terminate the noncitizen's obligation to depart within the period allowed or exempt the noncitizen from the consequences for failure to depart voluntarily during the period allowed. However, if the noncitizen had waived appeal of the immigration judge's decision, the noncitizen's failure to post the required voluntary departure bond within the period allowed means that the alternate order of removal takes effect immediately pursuant to 8 CFR 1241.1(f), except that a noncitizen granted the privilege of voluntary departure under 8 CFR 1240.26(c) will not be deemed to have departed under an order of removal if the noncitizen:

(i) Departs the United States no later than 25 days following the failure to post bond;

(ii) Provides to DHS such evidence of the noncitizen's departure as the ICE Field Office Director may require; and

(iii) Provides evidence DHS deems sufficient that he or she remains outside of the United States.

(d) *Alternate order of removal.* Upon granting a request made for voluntary departure either prior to the completion of proceedings or at the conclusion of proceedings, the immigration judge shall also enter an alternate order or removal.

(e) *Periods of time.* If voluntary departure is granted prior to the completion of removal proceedings, the immigration judge may grant a period not to exceed 120 days. If voluntary departure is granted at the conclusion of proceedings, the immigration judge may grant a period not to exceed 60 days.

(1) *Motion to reopen or reconsider filed during the voluntary departure period.* The filing of a motion to reopen or reconsider prior to the expiration of the period allowed for voluntary departure has the effect of automatically terminating the grant of voluntary departure, and accordingly does not toll, stay, or extend the period allowed for voluntary departure under this section. See paragraphs (b)(3)(iii) and (c)(3)(ii)

of this section. If the noncitizen files a post-order motion to reopen or reconsider during the period allowed for voluntary departure, the penalties for failure to depart voluntarily under section 240B(d) of the Act shall not apply. The Board shall advise the noncitizen of the condition provided in this paragraph in writing if it reinstates the immigration judge's grant of voluntary departure.

(2) *Motion to reopen or reconsider filed after the expiration of the period allowed for voluntary departure.* The filing of a motion to reopen or a motion to reconsider after the time allowed for voluntary departure has already expired does not in any way impact the period of time allowed for voluntary departure under this section. The granting of a motion to reopen or reconsider that was filed after the penalties under section 240B(d) of the Act had already taken effect, as a consequence of the noncitizen's prior failure voluntarily to depart within the time allowed, does not have the effect of vitiating or vacating those penalties, except as provided in section 240B(d)(2) of the Act.

(f) *Extension of time to depart.* Authority to extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is only within the jurisdiction of the district director, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs. An immigration judge or the Board may reinstate voluntary departure in a removal proceeding that has been reopened for a purpose other than solely making an application for voluntarily departure if reopening was granted prior to the expiration of the original period of voluntary departure. In no event can the total period of time, including any extension, exceed 120 days or 60 days as set forth in section 240B of the Act. The filing of a motion to reopen or reconsider does not toll, stay, or extend the period allowed for voluntary departure. The filing of a petition for review has the effect of automatically terminating the grant of voluntary departure, and accordingly also does not toll, stay, or extend the period allowed for voluntary departure.

(g) *Administrative Appeals.* No appeal shall lie regarding the length of a period of voluntary departure (as distinguished from issues of whether to grant voluntary departure).

(h) *Reinstatement of voluntary departure.* An immigration judge or the Board may reinstate voluntary departure in a removal proceeding that has been reopened for a purpose other than solely making application for voluntary departure, if reopening was granted prior to the expiration of the original period of voluntary departure. In no event can the total period of time, including any extension, exceed 120 days or 60 days as set forth in section 240B of the Act and paragraph (a) of this section.

(i) *Effect of filing a petition for review.* If, prior to departing the United States, the noncitizen files a petition for review pursuant to section 242 of the Act (8 U.S.C. 1252) or any other judicial challenge to the administratively final order, any grant of voluntary departure shall terminate automatically upon the filing of the petition or other judicial challenge and the alternate order of removal entered pursuant to paragraph (d) of this section shall immediately take effect, except that a noncitizen granted the privilege of voluntary departure under 8 CFR 1240.26(c) will not be deemed to have departed under an order of removal if the noncitizen departs the United States no later than 30 days following the filing of a petition for review, provides to DHS such evidence of the noncitizen's departure as the ICE Field Office Director may require, and provides evidence DHS deems sufficient that he or she remains outside of the United States. The Board shall advise the noncitizen of the condition provided in this paragraph in writing if it reinstates the immigration judge's grant of voluntary departure. The automatic termination of a grant of voluntary departure and the effectiveness of the alternative order of removal shall not affect, in any way, the date that the order of the immigration judge or the Board became administratively final, as determined under the provisions of the applicable regulations in this chapter. Since the grant of voluntary departure is terminated by the filing of the petition for review, the noncitizen will

be subject to the alternate order of removal, but the penalties for failure to depart voluntarily under section 240B(d) of the Act shall not apply to a noncitizen who files a petition for review, and who remains in the United States while the petition for review is pending.

(j) [Reserved]

(k) *Authority of the Board to grant voluntary departure in the first instance.* The following procedures apply to any request for voluntary departure reviewed by the Board:

(1) If the Board finds that an immigration judge incorrectly denied a noncitizen's request for voluntary departure or failed to provide appropriate advisals, the Board may consider the noncitizen's request for voluntary departure de novo and, if warranted, may enter its own order of voluntary departure with an alternate order of removal.

(2) In cases in which a noncitizen has appealed an immigration judge's decision or in which DHS and the noncitizen have both appealed an immigration judge's decision, the Board shall not grant voluntary departure under section 240B(a) of the Act unless:

(i) The alien requested voluntary departure under that section before the immigration judge, the immigration judge denied the request, and the noncitizen timely appealed;

(ii) The noncitizen's notice of appeal specified that the noncitizen is appealing the immigration judge's denial of voluntary departure and identified the specific factual and legal findings that the noncitizen is challenging;

(iii) The Board finds that the immigration judge's decision was in error; and

(iv) The Board finds that the noncitizen meets all applicable statutory and regulatory criteria for voluntary departure under that section.

(3) In cases in which DHS has appealed an immigration judge's decision, the Board shall not grant voluntary departure under section 240B(b) of the Act unless:

(i) The alien requested voluntary departure under that section before the immigration judge and provided evidence or a proffer of evidence in support of the noncitizen's request;

(ii) The immigration judge either granted the request or did not rule on it; and,

(iii) The Board finds that the noncitizen meets all applicable statutory and regulatory criteria for voluntary departure under that section.

(4) The Board may impose such conditions as it deems necessary to ensure the noncitizen's timely departure from the United States, if supported by the record on appeal and within the scope of the Board's authority on appeal. Unless otherwise indicated in this section, the Board shall advise the noncitizen in writing of the conditions set by the Board, consistent with the conditions set forth in paragraphs (b) through (e), (h), and (i) of this section (other than paragraph (c)(3)(ii) of this section), except that the Board shall advise the noncitizen of the duty to post the bond with the ICE Field Office Director within 30 business days of the Board's order granting voluntary departure. If documentation sufficient to assure lawful entry into the country to which the noncitizen is departing is not contained in the record, but the noncitizen continues to assert a request for voluntary departure under section 240B of the Act and the Board finds that the noncitizen is otherwise eligible for voluntary departure under the Act, the Board may grant voluntary departure for a period not to exceed 120 days, subject to the condition that the noncitizen within 60 days must secure such documentation and present it to DHS and the Board. If the Board imposes conditions beyond those specifically enumerated, the Board shall advise the noncitizen in writing of such conditions. The noncitizen may accept or decline the grant of voluntary departure and may manifest a declination either by written notice to the Board, by failing to timely post any required bond, or by otherwise failing to comply with the Board's order. The grant of voluntary departure shall automatically terminate upon a filing by the noncitizen of a motion to reopen or reconsider the Board's decision, or by filing a timely petition for review of the Board's decision. The noncitizen may decline voluntary departure when unwilling to accept the amount of the bond or other conditions.

(l) *Penalty for failure to depart.* There shall be a rebuttable presumption that the civil penalty for failure to depart, pursuant to section 240B(d)(1)(A) of the Act, shall be set at $3,000 unless the immigration judge or the Board specifically orders a higher or lower amount at the time of granting voluntary departure within the permissible range allowed by law. The immigration judge or the Board shall advise the noncitizen of the amount of this civil penalty at the time of granting voluntary departure.

[62 FR 10367, Mar. 6, 1997, as amended at 67 FR 39258, June 7, 2002; 73 FR 76937, Dec. 18, 2008; 85 FR 81655, Dec. 16, 2020; 86 FR 70724, Dec. 13, 2021; 89 FR 46795, May 29, 2024]

### §§ 1240.27–1240.29 [Reserved]

## Subpart D—Exclusion of Aliens (for Proceedings Commenced Prior to April 1, 1997)

### § 1240.30 Proceedings prior to April 1, 1997.

Subpart D of 8 CFR part 240 applies to exclusion proceedings commenced prior to April 1, 1997, pursuant to the former section 236 of the Act. An exclusion proceeding is commenced by the filing of Form I–122 with the Immigration Court, and an alien is considered to be in exclusion proceedings only upon such filing. All references to the Act contained in this subpart are references to the Act in effect prior to April 1, 1997.

### § 1240.31 Authority of immigration judges.

In determining cases referred for further inquiry as provided in section 235 of the Act, immigration judges shall have the powers and authority conferred upon them by the Act and this chapter, including the adjudication of applications for adjustment of status pursuant to section 202 of Pub. L. 105–100, or section 902 of Pub. L. 105–277. Subject to any specific limitation prescribed by the Act and this chapter, immigration judges shall also exercise the discretion and authority conferred upon the Attorney General by the Act as is appropriate and necessary for the disposition of such cases.

[62 FR 10367, Mar. 6, 1997, as amended at 63 FR 27829, May 21, 1998; 64 FR 25766, May 12, 1999]

### § 1240.32 Hearing.

(a) *Opening.* Exclusion hearings shall be closed to the public, unless the alien at his or her own instance requests that the public, including the press, be permitted to attend; in that event, the hearing shall be open, provided that the alien states for the record that he or she is waiving the requirement in section 236 of the Act that the inquiry shall be kept separate and apart from the public. When the hearing is to be open, depending upon physical facilities, reasonable limitation may be placed upon the number in attendance at any one time, with priority being given to the press over the general public. The immigration judge shall ascertain whether the applicant for admission is the person to whom Form I–122 was previously delivered by the examining immigration officer as provided in 8 CFR part 1235; enter a copy of such form in evidence as an exhibit in the case; inform the applicant of the nature and purpose of the hearing; advise him or her of the privilege of being represented by an attorney of his or her own choice at no expense to the Government; advise him or her of the availability of pro bono legal services for the immigration court location at which the hearing will take place, and ascertain that he or she has received a list of such pro bono legal service providers; and request him or her to ascertain then and there whether he or she desires representation; advise him or her that he or she will have a reasonable opportunity to present evidence in his or her own behalf, to examine and object to evidence against him or her, and to cross-examine witnesses presented by the Government; and place the applicant under oath.

(b) *Procedure.* The immigration judge shall receive and adduce material and relevant evidence, rule upon objections, and otherwise regulate the course of the hearing.

(c) *Attorney for DHS.* DHS shall assign an attorney to each case in which an applicant's nationality is in issue and

may assign an attorney to any case in which such assignment is deemed necessary or advantageous. The duties of the DHS include, but are not limited to, the presentation of evidence and the interrogation, examination, and cross-examination of the applicant and other witnesses. Nothing contained in this section diminishes the authority of an immigration judge to conduct proceedings under this part.

(d) *Depositions.* The procedures specified in §1240.48(e) shall apply.

(e) *Record.* The hearing before the immigration judge, including the testimony, exhibits, applications, proffers, and requests, the immigration judge's decision, and all written orders, motions, appeals, and other papers filed in the proceeding shall constitute the record in the case. The hearing shall be recorded verbatim except for statements made off the record with the permission of the immigration judge.

[62 FR 10367, Mar. 6, 1997, as amended at 80 FR 59513, Oct. 1, 2015; 86 FR 70724, Dec. 13, 2021]

### §1240.33 Applications for asylum or withholding of deportation.

(a) If the alien expresses fear of persecution or harm upon return to his or her country of origin or to a country to which the alien may be deported after a determination of excludability from the United States pursuant to this subpart, and the alien has not been referred to the immigration judge by an asylum officer in accordance with §1208.14(b) of this chapter, the immigration judge shall:

(1) Advise the alien that he or she may apply for asylum in the United States or withholding of deportation to that other country; and

(2) Make available the appropriate application forms.

(b) An application for asylum or withholding of deportation must be filed with the Immigration Court, pursuant to §1208.4(b) of this chapter. Upon receipt of an application, the Immigration Court may forward a copy to the Department of State pursuant to §1208.11 of this chapter and shall calendar the case for a hearing. The reply, if any, from the Department of State, unless classified under an applicable Executive Order, shall be given to both the applicant and to DHS counsel and shall be included in the record.

(c) Applications for asylum or withholding of deportation so filed will be decided by the immigration judge pursuant to the requirements and standards established in 8 CFR part 1208 after an evidentiary hearing that is necessary to resolve material factual issues in dispute. An evidentiary hearing extending beyond issues related to the basis for a mandatory denial of the application pursuant to §1208.13(c) of this chapter is not necessary once the immigration judge has determined that such denial is required.

(1) Evidentiary hearings on applications for asylum or withholding of deportation will be closed to the public unless the applicant expressly requests that it be open pursuant to §1236.3 of this chapter.

(2) Nothing in this section is intended to limit the authority of the immigration judge properly to control the scope of any evidentiary hearing.

(3) During the exclusion hearing, the applicant shall be examined under oath on his or her application and may present evidence and witnesses on his or her own behalf. The applicant has the burden of establishing that he or she is a refugee as defined in section 101(a)(42) of the Act pursuant to the standard set forth in §1208.13 of this chapter.

(4) The DHS counsel for the government may call witnesses and present evidence for the record, including information classified under the applicable Executive Order, provided the immigration judge or the Board has determined that such information is relevant to the hearing. The applicant shall be informed when the immigration judge receives such classified information. The agency that provides the classified information to the immigration judge may provide an unclassified summary of the information for release to the applicant whenever it determines it can do so consistently with safeguarding both the classified nature of the information and its source. The summary should be as detailed as possible, in order that the applicant may have an opportunity to offer opposing evidence. A decision based in whole or in part on such classified information

shall state that such information is material to the decision.

(d) The decision of an immigration judge to grant or deny asylum or withholding of deportation shall be communicated to the applicant and to the DHS counsel for the government. An adverse decision will state why asylum or withholding of deportation was denied.

[62 FR 10367, Mar. 6, 1997, as amended at 78 FR 19080, Mar. 29, 2013; 86 FR 70724, Dec. 13, 2021]

### § 1240.34 Renewal of application for adjustment of status under section 245 of the Act.

An adjustment application by an alien paroled under section 212(d)(5) of the Act, which has been denied by the district director, may be renewed in exclusion proceedings under section 236 of the Act (as in effect prior to April 1, 1997) before an immigration judge under the following two conditions: first, the denied application must have been properly filed subsequent to the applicant's earlier inspection and admission to the United States; and second, the applicant's later absence from and return to the United States must have been under the terms of an advance parole authorization on Form I–512 granted to permit the applicant's absence and return to pursue the previously filed adjustment application. In a relevant case, the immigration judge may adjudicate the sufficiency of an Affidavit of Support Under Section 213A (Form I–864), executed on behalf of an applicant for admission or for adjustment of status, in accordance with the provisions of section 213A of the Act and 8 CFR part 213a.

[62 FR 10367, Mar. 6, 1997. Redesignated in part and duplicated in part from part 240 at 68 FR 9838, 9840, Feb. 28, 2003, as amended at 71 FR 35757, June 21, 2006]

### § 1240.35 Decision of the immigration judge; notice to the applicant.

(a) *Decision.* The immigration judge shall inform the applicant of his or her decision in accordance with § 1003.37 of this chapter.

(b) *Advice to alien ordered excluded.* An alien ordered excluded shall be furnished with Form I–296, Notice to Alien Ordered Excluded by Immigration Judge, at the time of an oral decision by the immigration judge or upon service of a written decision.

(c) *Holders of refugee travel documents.* Aliens who are the holders of valid unexpired refugee travel documents may be ordered excluded only if they are found to be inadmissible under section 212(a)(2), 212(a)(3), or 212(a)(6)(E) of the Act, and it is determined that on the basis of the acts for which they are inadmissible there are compelling reasons of national security or public order for their exclusion. If the immigration judge finds that the alien is inadmissible but determines that there are no compelling reasons of national security or public order for exclusion, the immigration judge shall remand the case to the district director for parole.

### § 1240.36 Finality of order.

The decision of the immigration judge shall become final in accordance with § 1003.37 of this chapter.

### § 1240.37 Appeals.

Except for temporary exclusions under section 235(c) of the Act, an appeal from a decision of an Immigration Judge under this part may be taken by either party pursuant to § 1003.38 of this chapter.

### § 1240.38 Fingerprinting of excluded aliens.

Every alien 14 years of age or older who is excluded from admission to the United States by an immigration judge shall be fingerprinted, unless during the preceding year he or she has been fingerprinted at an American consular office.

**§ 1240.39 [Reserved]**

## Subpart E—Proceedings To Determine Deportability of Aliens in the United States: Hearing and Appeal (for Proceedings Commenced Prior to April 1, 1997)

### § 1240.40 Proceedings commenced prior to April 1, 1997.

Subpart E of 8 CFR part 1240 applies only to deportation proceedings commenced prior to April 1, 1997. A deportation proceeding is commenced by the filing of Form I–221 (Order to Show Cause) with the Immigration Court, and an alien is considered to be in deportation proceedings only upon such filing, except in the case of an alien admitted to the United States under the provisions of section 217 of the Act. All references to the Act contained in this subpart pertain to the Act as in effect prior to April 1, 1997.

### § 1240.41 Immigration judges.

(a) *Authority.* In any proceeding conducted under this part the immigration judge shall have the authority to determine deportability and to make decisions, including orders of deportation, as provided by section 242(b) and 242B of the Act; to reinstate orders of deportation as provided by section 242(f) of the Act; to determine applications under sections 208, 212(k), 241(a)(1)(E)(iii), 241(a)(1)(H), 244, 245 and 249 of the Act, section 202 of Pub. L. 105–100, and section 902 of Pub. L. 105–277; to determine the country to which an alien's deportation will be directed in accordance with section 243(a) of the Act; to order temporary withholding of deportation pursuant to section 243(h) of the Act; and to take any other action consistent with applicable law and regulations as may be appropriate. An immigration judge may certify his or her decision in any case to the Board of Immigration Appeals when it involves an unusually complex or novel question of law or fact. Nothing contained in this part shall be construed to diminish the authority conferred on immigration judges under section 103 of the Act.

(b) *Withdrawal and substitution of immigration judges.* The immigration judge assigned to conduct the hearing shall at any time withdraw if he or she deems himself or herself disqualified. If an immigration judge becomes unavailable to complete his or her duties within a reasonable time, or if at any time the respondent consents to a substitution, another immigration judge may be assigned to complete the case. The new immigration judge shall familiarize himself or herself with the record in the case and shall state for the record that he or she has done so.

[62 FR 10367, Mar. 6, 1997, as amended at 63 FR 27829, May 21, 1998; 63 FR 39121, July 21, 1998; 64 FR 25767, May 12, 1999]

### § 1240.42 Representation by counsel.

The respondent may be represented at the hearing by an attorney or other representative qualified under 8 CFR part 1292.

### § 1240.43 Incompetent respondents.

When it is impracticable for the respondent to be present at the hearing because of mental incompetency, the guardian, near relative, or friend who was served with a copy of the order to show cause shall be permitted to appear on behalf of the respondent. If such a person cannot reasonably be found or fails or refuses to appear, the custodian of the respondent shall be requested to appear on behalf of the respondent.

### § 1240.44 Interpreter.

Any person acting as interpreter in a hearing before an immigration judge under this part shall be sworn to interpret and translate accurately, unless the interpreter is an employee of the United States Government, in which event no such oath shall be required.

### § 1240.45 Postponement and adjournment of hearing.

After the commencement of the hearing, the immigration judge may grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the Service.

### § 1240.46 Evidence.

(a) *Sufficiency.* A determination of deportability shall not be valid unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true.

(b) *Use of prior statements.* The immigration judge may receive in evidence any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial.

(c) *Testimony.* Testimony of witnesses appearing at the hearing shall be under oath or affirmation administered by the immigration judge.

(d) *Depositions.* The immigration judge may order the taking of depositions pursuant to §1003.35 of this chapter.

### § 1240.47 Contents of record.

The hearing before the immigration judge, including the testimony, exhibits, applications, proffers, and requests, the immigration judge's decision, and all written orders, motions, appeals, briefs, and other papers filed in the proceedings shall constitute the record in the case. The hearing shall be recorded verbatim except for statements made off the record with the permission of the immigration judge. In his or her discretion, the immigration judge may exclude from the record any arguments made in connection with motions, applications, requests, or objections, but in such event the person affected may submit a brief.

### § 1240.48 Hearing.

(a) *Opening.* The immigration judge shall advise the respondent of his or her right to representation, at no expense to the Government, by counsel of his or her own choice authorized to practice in the proceedings and require him or her to state then and there whether he or she desires representation; advise the respondent of the availability of pro bono legal services for the immigration court location at which the hearing will take place; ascertain that the respondent has received a list of such pro bono legal service providers, and a copy of Form I–618, Written Notice of Appeal Rights; advise the respondent that he or she will have a reasonable opportunity to examine and object to the evidence against him or her, to present evidence in his or her own behalf and to cross-examine witnesses presented by the Government; place the respondent under oath; read the factual allegations and the charges in the order to show cause to the respondent and explain them in nontechnical language, and enter the order to show cause as an exhibit in the record. Deportation hearings shall be open to the public, except that the immigration judge may, in his or her discretion and for the purpose of protecting witnesses, respondents, or the public interest, direct that the general public or particular individuals shall be excluded from the hearing in any specific case. Depending upon physical facilities, reasonable limitation may be placed upon the number in attendance at any one time, with priority being given to the press over the general public.

(b) *Pleading by respondent.* The immigration judge shall require the respondent to plead to the order to show cause by stating whether he or she admits or denies the factual allegations and his or her deportability under the charges contained therein. If the respondent admits the factual allegations and admits his or her deportability under the charges and the immigration judge is satisfied that no issues of law or fact remain, the immigration judge may determine that deportability as charged has been established by the admissions of the respondent. The immigration judge shall not accept an admission of deportability from an unrepresented respondent who is incompetent or under age 16 and is not accompanied by a guardian, relative, or friend; nor from an officer of an institution in which a respondent is an inmate or patient. When, pursuant to this paragraph, the immigration judge may not accept an admission of deportability, he or she shall direct a hearing on the issues.

(c) *Issues of deportability.* When deportability is not determined under the provisions of paragraph (b) of this section, the immigration judge shall request the assignment of a DHS counsel, and shall receive evidence as to any unresolved issues, except that no further

evidence need be received as to any facts admitted during the pleading. The respondent shall provide a court certified copy of a Judicial Recommendation Against Deportation (JRAD) to the immigration judge when such recommendation will be the basis of denying any charge(s) brought by DHS in the proceedings against the respondent. No JRAD is effective against a charge of deportability under section 241(a)(11) of the Act or if the JRAD was granted on or after November 29, 1990.

(d) *Additional charges.* The Service may at any time during a hearing lodge additional charges of deportability, including factual allegations, against the respondent. Copies of the additional factual allegations and charges shall be submitted in writing for service on the respondent and entry as an exhibit in the record. The immigration judge shall read the additional factual allegations and charges to the respondent and explain them to him or her. The immigration judge shall advise the respondent if he or she is not represented by counsel that he or she may be so represented and also that he or she may have a reasonable time within which to meet the additional factual allegations and charges. The respondent shall be required to state then and there whether he or she desires a continuance for either of these reasons. Thereafter, the provisions of paragraph (b) of this section shall apply to the additional factual allegations and lodged charges.

[62 FR 10367, Mar. 6, 1997, as amended at 80 FR 59513, Oct. 1, 2015; 86 FR 70724, Dec. 13, 2021]

### § 1240.49 Ancillary matters, applications.

(a) *Creation of the status of an alien lawfully admitted for permanent residence.* The respondent may apply to the immigration judge for suspension of deportation under section 244(a) of the Act; for adjustment of status under section 245 of the Act, or under section 1 of the Act of November 2, 1966, or under section 101 or 104 of the Act of October 28, 1977; or for the creation of a record of lawful admission for permanent residence under section 249 of the Act. The application shall be subject to the requirements of 8 CFR parts 1240, 1245, and 1249. The approval of any application made to the immigration judge under section 245 of the Act by an alien spouse (as defined in section 216(g)(1) of the Act) or by an alien entrepreneur (as defined in section 216A(f)(1) of the Act), shall result in the alien's obtaining the status of lawful permanent resident on a conditional basis in accordance with the provisions of section 216 or 216A of the Act, whichever is applicable. However, the Petition to Remove the Conditions on Residence required by section 216(c) of the Act or the Petition by Entrepreneur to Remove Conditions required by section 216A(c) of the Act shall be made to the director in accordance with 8 CFR part 1216. In conjunction with any application for creation of status of an alien lawfully admitted for permanent residence made to an immigration judge, if the respondent is inadmissible under any provision of section 212(a) of the Act and believes that he or she meets the eligibility requirements for a waiver of the ground of inadmissibility, he or she may apply to the immigration judge for such waiver. The immigration judge shall inform the respondent of his or her apparent eligibility to apply for any of the benefits enumerated in this paragraph and shall afford the respondent an opportunity to make application therefor during the hearing. In a relevant case, the immigration judge may adjudicate the sufficiency of an Affidavit of Support Under Section 213A (Form I–864), executed on behalf of an applicant for admission or for adjustment of status, in accordance with the provisions of section 213A of the Act and 8 CFR part 213a. In exercising discretionary power when considering an application under this paragraph, the immigration judge may consider and base the decision on information not contained in the record and not made available for inspection by the respondent, provided the Commissioner has determined that such information is relevant and is classified under the applicable Executive Order as requiring protection from unauthorized disclosure in the interest of national security. Whenever the immigration judge believes that he or she can do so while safeguarding both the information and its source, the immigration judge

should inform the respondent of the general nature of the information in order that the respondent may have an opportunity to offer opposing evidence. A decision based in whole or in part on such classified information shall state that the information is material to the decision.

(b) *Voluntary departure.* The respondent may apply to the immigration judge for voluntary departure in lieu of deportation pursuant to section 244(e) of the Act and §1240.56.

(c) *Applications for asylum or withholding of deportation.* (1) The immigration judge shall notify the respondent that if he or she is finally ordered deported, his or her deportation will in the first instance be directed pursuant to section 243(a) of the Act to the country designated by the respondent and shall afford him or her an opportunity then and there to make such designation. The immigration judge shall then specify and state for the record the country, or countries in the alternative, to which respondent's deportation will be directed pursuant to section 243(a) of the Act if the country of his or her designation will not accept him or her into its territory, or fails to furnish timely notice of acceptance, or if the respondent declines to designate a country.

(2) If the alien expresses fear of persecution or harm upon return to any of the countries to which the alien might be deported pursuant to paragraph (c)(1) of this section, and the alien has not previously filed an application for asylum or withholding of deportation that has been referred to the immigration judge by an asylum officer in accordance with §1208.14(b) of this chapter, the immigration judge shall:

(i) Advise the alien that he or she may apply for asylum in the United States or withholding of deportation to those countries; and

(ii) Make available the appropriate application forms.

(3) An application for asylum or withholding of deportation must be filed with the Immigration Court, pursuant to §1208.4(b) of this chapter. Upon receipt of an application, the Immigration Court may forward a copy to the Department of State pursuant to §1208.11 of this chapter and shall calendar the case for a hearing. The reply, if any, of the Department of State, unless classified under an applicable Executive Order, shall be given to both the applicant and to DHS counsel and shall be included in the record.

(4) Applications for asylum or withholding of deportation so filed will be decided by the immigration judge pursuant to the requirements and standards established in 8 CFR part 1208 after an evidentiary hearing that is necessary to resolve factual issues in dispute. An evidentiary hearing extending beyond issues related to the basis for a mandatory denial of the application pursuant to §1208.13 or §1208.16 of this chapter is not necessary once the immigration judge has determined that such a denial is required.

(i) Evidentiary hearings on applications for asylum or withholding of deportation will be open to the public unless the applicant expressly requests that it be closed.

(ii) Nothing in this section is intended to limit the authority of the immigration judge properly to control the scope of any evidentiary hearing.

(iii) During the deportation hearing, the applicant shall be examined under oath on his or her application and may present evidence and witnesses in his or her own behalf. The applicant has the burden of establishing that he or she is a refugee as defined in section 101(a)(42) of the Act pursuant to the standard set forth in §1208.13 of this chapter.

(iv) The DHS counsel for the government may call witnesses and present evidence for the record, including information classified under the applicable Executive Order, provided the immigration judge or the Board has determined that such information is relevant to the hearing. When the immigration judge receives such classified information he or she shall inform the applicant. The agency that provides the classified information to the immigration judge may provide an unclassified summary of the information for release to the applicant, whenever it determines it can do so consistently with safeguarding both the classified nature of the information and its

source. The summary should be as detailed as possible, in order that the applicant may have an opportunity to offer opposing evidence. A decision based in whole or in part on such classified information shall state whether such information is material to the decision.

(5) The decision of an immigration judge to grant or deny asylum or withholding of deportation shall be communicated to the applicant and to the DHS counsel for the government. An adverse decision will state why asylum or withholding of deportation was denied.

(d) *Application for relief under sections 241(a)(1)(H) and 241(a)(1)(E)(iii) of the Act.* The respondent may apply to the immigration judge for relief from deportation under sections 241(a)(1)(H) and 241(a)(1)(E)(iii) of the Act.

(e) *General.* An application under this section shall be made only during the hearing and shall not be held to constitute a concession of alienage or deportability in any case in which the respondent does not admit his alienage or deportability. However, nothing in this section shall prohibit DHS from using information supplied in an application for asylum or withholding of deportation submitted to an asylum officer pursuant to §1208.2 of this chapter on or after January 4, 1995, as the basis for issuance of an order to show cause or a notice to appear to establish alienage or deportability in a case referred to an immigration judge under §1208.14(b) of this chapter. The respondent shall have the burden of establishing that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion. The respondent shall not be required to pay a fee on more than one application within paragraphs (a) and (c) of this section, provided that the minimum fee imposed when more than one application is made shall be determined by the cost of the application with the highest fee. Nothing contained in this section is intended to foreclose the respondent from applying for any benefit or privilege which he or she believes himself or herself eligible to receive in proceedings under this part.

[62 FR 10367, Mar. 6, 1997. Redesignated in part and duplicated in part from part 240 at 68 FR 9838, 9840, Feb. 28, 2003, as amended at 71 FR 35757, June 21, 2006; 78 FR 19080, Mar. 29, 2013; 86 FR 70724, Dec. 13, 2021]

### § 1240.50 Decision of the immigration judge.

(a) *Contents.* The decision of the immigration judge may be oral or written. Except when deportability is determined on the pleadings pursuant to §1240.48(b), the decision of the immigration judge shall include a finding as to deportability. The formal enumeration of findings is not required. The decision shall also contain the reasons for granting or denying the request. The decision shall be concluded with the order of the immigration judge.

(b) *Summary decision.* Notwithstanding the provisions of paragraph (a) of this section, in any case where deportability is determined on the pleadings pursuant to §1240.48(b) and the respondent does not make an application under §1240.49, or the respondent applies for voluntary departure only and the immigration judge grants the application, the immigration judge may enter a summary decision on Form EOIR–7, Summary Order of Deportation, if deportation is ordered, or on Form EOIR–6, Summary Order of Voluntary Departure, if voluntary departure is granted with an alternate order of deportation.

(c) *Order of the immigration judge.* The order of the immigration judge shall direct the respondent's deportation, or the termination of the proceedings, or such other disposition of the case as may be appropriate. When deportation is ordered, the immigration judge shall specify the country, or countries in the alternate, to which respondent's deportation shall be directed. The immigration judge is authorized to issue orders in the alternative or in combination as he or she may deem necessary.

### § 1240.51 Notice of decision.

(a) *Written decision.* A written decision shall be served upon the respondent and the DHS counsel, together with the notice referred to in §1003.3 of this

chapter. Service by mail is complete upon mailing.

(b) *Oral decision.* An oral decision shall be stated by the immigration judge in the presence of the respondent and the trail attorney, if any, at the conclusion of the hearing. Unless appeal from the decision is waived, the respondent shall be furnished with Form EOIR–26, Notice of Appeal, and advised of the provisions of §1240.53. A printed copy of the oral decision shall be furnished at the request of the respondent or the DHS counsel.

(c) *Summary decision.* When the immigration judge renders a summary decision as provided in §1240.51(b), he or she shall serve a copy thereof upon the respondent at the conclusion of the hearing. Unless appeal from the decision is waived, the respondent shall be furnished with Form EOIR–26, Notice of Appeal, and advised of the provisions of §1240.54.

[62 FR 10367, Mar. 6, 1997. Redesignated in part and duplicated in part from part 240 at 68 FR 9838, 9840, Feb. 28, 2003, as amended at 86 FR 70725, Dec. 13, 2021]

### §1240.52 Finality of order.

The decision of the immigration judge shall become final in accordance with §1003.39 of this chapter.

### §1240.53 Appeals.

(a) *Appeal to the Board.* Pursuant to 8 CFR part 1003, an appeal shall lie from a decision of an immigration judge to the Board, except that no appeal shall lie from an order of deportation entered in absentia. The procedures regarding the filing of a Form EOIR–26, Notice of Appeal, fees, and briefs are set forth in §§1003.3, 1003.31, and 1003.38 of this chapter. An appeal shall be filed within 30 calendar days after the mailing or electronic notification of a written decision, the stating of an oral decision, or the service of a summary decision. The filing date is defined as the date of receipt of the Notice of Appeal by the Board. The reasons for the appeal shall be stated in the Form EOIR–26, Notice of Appeal, in accordance with the provisions of §1003.3(b) of this chapter. Failure to do so may constitute a ground for dismissal of the appeal by the Board pursuant to §1003.1(d)(2) of this chapter.

(b) *Prohibited appeals; legalization or applications.* An alien respondent defined in §245a.2(c)(6) or (7) of this chapter who fails to file an application for adjustment of status to that of a temporary resident within the prescribed period(s), and who is thereafter found to be deportable by decision of an immigration judge, shall not be permitted to appeal the finding of deportability based solely on refusal by the immigration judge to entertain such an application in deportation proceedings.

[62 FR 10367, Mar. 6, 1997, as amended at 66 FR 6446, Jan. 22, 2001; 86 FR 70725, Dec. 13, 2021]

### §1240.54 [Reserved]

## Subpart F—Suspension of Deportation and Voluntary Departure (for Proceedings Commenced Prior to April 1, 1997)

### §1240.55 Proceedings commenced prior to April 1, 1997.

Subpart F of 8 CFR part 1240 applies to deportation proceedings commenced prior to April 1, 1997. A deportation proceeding is commenced by the filing of Form I–221 (Order to Show Cause) with the Immigration Court, and an alien is considered to be in deportation proceedings only upon such filing, except in the case of an alien admitted to the United States under the provisions of section 217 of the Act. All references to the Act contained in this subpart are references to the Act in effect prior to April 1, 1997.

### §1240.56 Application.

Notwithstanding any other provision of this chapter, an alien who is deportable because of a conviction on or after November 18, 1988, for an aggravated felony as defined in section 101(a)(43) of the Act, shall not be eligible for voluntary departure as prescribed in 8 CFR part 1240 and section 244 of the Act. Pursuant to subpart F of this part and section 244 of the Act, an immigration judge may authorize the suspension of an alien's deportation; or, if the alien establishes that he or she is willing and has the immediate means with which to depart promptly from the

United States, an immigration judge may authorize the alien to depart voluntarily from the United States in lieu of deportation within such time as may be specified by the immigration judge when first authorizing voluntary departure, and under such conditions as the district director shall direct. An application for suspension of deportation shall be made on Form EOIR–40.

### § 1240.57 Extension of time to depart.

Authority to reinstate or extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is within the sole jurisdiction of the district director, except that an immigration judge or the Board may reinstate voluntary departure in a deportation proceeding that has been reopened for a purpose other than solely making an application for voluntary departure. A request by an alien for reinstatement or an extension of time within which to depart voluntarily shall be filed with the district director having jurisdiction over the alien's place of residence. Written notice of the district director's decision shall be served upon the alien and no appeal may be taken therefrom.

### § 1240.58 Extreme hardship.

(a) To be eligible for suspension of deportation under former section 244(a)(1) of the Act, as in effect prior to April 1, 1997, the alien must meet the requirements set forth in the Act, which include a showing that deportation would result in extreme hardship to the alien or to the alien's spouse, parent, or child, who is a citizen of the United States, or an alien lawfully admitted for permanent residence. Extreme hardship is evaluated on a case-by-case basis, taking into account the particular facts and circumstances of each case. Applicants are encouraged to cite and document all applicable factors in their applications, as the presence or absence of any one factor may not be determinative in evaluating extreme hardship. Adjudicators should weigh all relevant factors presented and consider them in light of the totality of the circumstances, but are not required to offer an independent analysis of each listed factor when rendering a decision. Evidence of an extended stay in the United States without fear of deportation and with the benefit of work authorization, when present in a particular case, shall be considered relevant to the determination of whether deportation will result in extreme hardship.

(b) To establish extreme hardship, an applicant must demonstrate that deportation would result in a degree of hardship beyond that typically associated with deportation. Factors that may be considered in evaluating whether deportation would result in extreme hardship to the alien or to the alien's qualified relative include, but are not limited to, the following:

(1) The age of the alien, both at the time of entry to the United States and at the time of application for suspension of deportation;

(2) The age, number, and immigration status of the alien's children and their ability to speak the native language and to adjust to life in the country of return;

(3) The health condition of the alien or the alien's children, spouse, or parents and the availability of any required medical treatment in the country to which the alien would be returned;

(4) The alien's ability to obtain employment in the country to which the alien would be returned;

(5) The length of residence in the United States;

(6) The existence of other family members who are or will be legally residing in the United States;

(7) The financial impact of the alien's departure;

(8) The impact of a disruption of educational opportunities;

(9) The psychological impact of the alien's deportation;

(10) The current political and economic conditions in the country to which the alien would be returned;

(11) Family and other ties to the country to which the alien would be returned;

(12) Contributions to and ties to a community in the United States, including the degree of integration into society;

(13) Immigration history, including authorized residence in the United States; and

(14) The availability of other means of adjusting to permanent resident status.

(c) For cases raised under section 244(a)(3) of the Act, the following factors should be considered in addition to, or in lieu of, the factors listed in paragraph (b) of this section.

(1) The nature and extent of the physical or psychological consequences of abuse;

(2) The impact of loss of access to the United States courts and criminal justice system (including, but not limited to, the ability to obtain and enforce orders of protection, criminal investigations and prosecutions, and family law proceedings or court orders regarding child support, maintenance, child custody, and visitation);

(3) The likelihood that the batterer's family, friends, or others acting on behalf of the batterer in the home country would physically or psychologically harm the applicant or the applicant's child(ren);

(4) The applicant's needs and/or needs of the applicant's child(ren) for social, medical, mental health or other supportive services for victims of domestic violence that are unavailable or not reasonably accessible in the home country;

(5) The existence of laws and social practices in the home country that punish the applicant or the applicant's child(ren) because they have been victims of domestic violence or have taken steps to leave an abusive household; and

(6) The abuser's ability to travel to the home country and the ability and willingness of authorities in the home country to protect the applicant and/or the applicant's children from future abuse.

(d) Nothing in §1240.58 shall be construed as creating any right, interest, or entitlement that is legally enforceable by or on behalf of any party against the United States or its agencies, officers, or any other person.

[64 FR 27875, May 21, 1999]

## Subpart G—Civil Penalties for Failure to Depart [Reserved]

## Subpart H—Applications for Suspension of Deportation or Special Rule Cancellation of Removal Under Section 203 of Pub. L. 105–100

SOURCE: 64 FR 27876, May 21, 1999, unless otherwise noted.

### § 1240.60 Definitions.

As used in this subpart the term:

*ABC* means *American Baptist Churches* v. *Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991).

*ABC class member* refers to:

(1) Any Guatemalan national who first entered the United States on or before October 1, 1990; and

(2) Any Salvadoran national who first entered the United States on or before September 19, 1990.

*Asylum application pending adjudication by the Service* means any asylum application for which the Service has not served the applicant with a final decision or which has not been referred to the Immigration Court.

*Filed an application for asylum* means the proper filing of a principal asylum application or filing a derivative asylum application by being properly included as a dependent spouse or child in an asylum application pursuant to the regulations and procedures in effect at the time of filing the principal or derivative asylum application.

*IIRIRA* means the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Pub. L. 104–208 (110 Stat. 3009–625).

*NACARA* means the Nicaraguan Adjustment and Central American Relief Act (NACARA), enacted as title II of Pub. L. 105–100 (111 Stat. 2160, 2193), as amended by the Technical Corrections to the Nicaraguan Adjustment and Central American Relief Act, Pub. L. 105–139 (111 Stat. 2644).

*Registered ABC class member* means an ABC class member who:

(1) In the case of an *ABC* class member who is a national of El Salvador, properly submitted an ABC registration form to the Service on or before October 31, 1991, or applied for temporary protected status on or before October 31, 1991; or

(2) In the case of an *ABC* class member who is a national of Guatemala, properly submitted an *ABC* registration form to the Service on or before December 31, 1991.

**§ 1240.61 Applicability.**

(a) Except as provided in paragraph (b) of this section, this subpart H applies to the following aliens:

(1) A registered *ABC* class member who has not been apprehended at the time of entry after December 19, 1990;

(2) A Guatemalan or Salvadoran national who filed an application for asylum with the Service on or before April 1, 1990, either by filing an application with the Service or filing the application with the Immigration Court and serving a copy of that application on the Service.

(3) An alien who entered the United States on or before December 31, 1990, filed an application for asylum on or before December 31, 1991, and, at the time of filing the application, was a national of the Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia;

(4) An alien who is the spouse or child of an individual described in paragraph (a)(1), (a)(2), or (a)(3) of this section at the time a decision is made to suspend the deportation, or cancel the removal, of the individual described in paragraph (a)(1), (a)(2), or (a)(3) of this section;

(5) An alien who is:

(i) The unmarried son or unmarried daughter of an individual described in paragraph (a)(1), (a)(2), or (a)(3) of this section and is 21 years of age or older at the time a decision is made to suspend the deportation, or cancel the removal, of the parent described in paragraph (a)(1), (a)(2), or (a)(3) of this section; and

(ii) Entered the United States on or before October 1, 1990.

(b) This subpart H does not apply to any alien who has been convicted at any time of an aggravated felony, as defined in section 101(a)(43) of the Act.

**§ 1240.62 Jurisdiction.**

(a) *Office of International Affairs.* Except as provided in paragraph (b) of this section, the Office of International Affairs shall have initial jurisdiction to grant or refer to the Immigration Court or Board an application for suspension of deportation or special rule cancellation of removal filed by an alien described in § 1240.61, provided:

(1) In the case of a national of El Salvador described in § 1240.61(a)(1), the alien filed a complete asylum application on or before January 31, 1996 (with an administrative grace period extending to February 16, 1996), or otherwise met the asylum application filing deadline pursuant to the *ABC* settlement agreement, and the application is still pending adjudication by the Service;

(2) In the case of a national of Guatemala described in § 1240.61(a)(1), the alien filed a complete asylum application on or before January 3, 1995, or otherwise met the asylum application filing deadline pursuant to the *ABC* settlement agreement, and the application is still pending adjudication by the Service;

(3) In the case of an individual described in § 1240.61(a)(2) or (3), the individual's asylum application is pending adjudication by the Service;

(4) In the case of an individual described in § 1240.61(a)(4) or (5), the individual's parent or spouse has an application pending with the Service under this subpart H or has been granted relief by the Service under this subpart.

(b) *Immigration Court.* The Immigration Court shall have exclusive jurisdiction over an application for suspension of deportation or special rule cancellation of removal filed pursuant to section 309(f)(1)(A) or (B) of IIRIRA, as amended by NACARA, by an alien who has been served Form I–221, Order to Show Cause, or Form I–862, Notice to Appear, after a copy of the charging document has been filed with the Immigration Court, unless the alien is covered by one of the following exceptions:

(1) *Certain ABC class members.* (i) The alien is a registered *ABC* class member for whom proceedings before the Immigration Court or the Board have been administratively closed or continued (including those aliens who had final

orders of deportation or removal who have filed and been granted a motion to reopen as required under 8 CFR 1003.43);

(ii) The alien is eligible for benefits of the *ABC* settlement agreement and has not had a *de novo* asylum adjudication pursuant to the settlement agreement; and

(iii) The alien has not moved for and been granted a motion to recalendar proceedings before the Immigration Court or the Board to request suspension of deportation.

(2) *Spouses, children, unmarried sons, and unmarried daughters.* (i) The alien is described in §1240.61(a) (4) or (5);

(ii) The alien's spouse or parent is described in §1240.61(a)(1), (a)(2), or (a)(3) and has a Form I–881 pending with the Service; and

(iii) The alien's proceedings before the Immigration Court have been administratively closed, or the alien's proceedings before the Board have been continued, to permit the alien to file an application for suspension of deportation or special rule cancellation of removal with the Service.

### §1240.63 Application process.

(a) *Form and fees.* Except as provided in paragraph (b) of this section, the application must be made on a Form I–881, Application for Suspension of Deportation or Special Rule Cancellation of Removal (pursuant to section 203 of Public Law 105–100 (NACARA)), and filed in accordance with the instructions for that form. An applicant who submitted to EOIR a completed Form EOIR–40, Application for Suspension of Deportation, before the effective date of the Form I–881 may apply with the Service by submitting the completed Form EOIR–40 attached to a completed first page of the Form I–881. Each application must be filed with the filing and fingerprint fees as provided in §1103.7(b)(1) of this chapter, or a request for fee waiver, as provided in §1103.7(c) of this chapter. The fact that an applicant has also applied for asylum does not exempt the applicant from the fingerprinting fees associated with the Form I–881.

(b) *Applications filed with EOIR.* If jurisdiction rests with the Immigration Court under §260.62(b), the application must be made on the Form I–881, if filed subsequent to June 21, 1999. The application form, along with any supporting documents, must be filed with the Immigration Court and served on the Service's district counsel in accordance with the instructions on or accompanying the form. Applications for suspension of deportation or special rule cancellation of removal filed prior to June 21, 1999 shall be filed on Form EOIR–40.

(c) *Applications filed with the Service.* If jurisdiction rests with the Service under §1240.62(a), the Form I–881 and supporting documents must be filed at the appropriate Service Center in accordance with the instructions on or accompanying the form.

(d) *Conditions and consequences of filing.* Applications filed under this section shall be filed under the following conditions and shall have the following consequences:

(1) The information provided in the application may be used as a basis for the initiation of removal proceedings, or to satisfy any burden of proof in exclusion, deportation, or removal proceedings;

(2) The applicant and anyone other than a spouse, parent, son, or daughter of the applicant who assists the applicant in preparing the application must sign the application under penalty of perjury. The applicant's signature establishes a presumption that the applicant is aware of the contents of the application. A person other than a relative specified in this paragraph who assists the applicant in preparing the application also must provide his or her full mailing address;

(3) An application that does not include a response to each of the questions contained in the application, is unsigned, or is unaccompanied by the required materials specified in the instructions to the application is incomplete and shall be returned by mail to the applicant within 30 days of receipt of the application by the Service; and

(4) Knowing placement of false information on the application may subject the person supplying that information to criminal penalties under title 18 of the United States Code and to civil penalties under section 274C of the Act.

**§ 1240.64 Eligibility—general.**

(a) *Burden and standard of proof.* The burden of proof is on the applicant to establish by a preponderance of the evidence that he or she is eligible for suspension of deportation or special rule cancellation of removal and that discretion should be exercised to grant relief.

(b) *Calculation of continuous physical presence and certain breaks in presence.* For purposes of calculating continuous physical presence under this section, section 309(c)(5)(A) of IIRIRA and section 240A(d)(1) of the Act shall not apply to persons described in § 1240.61. For purposes of this subpart H, a single absence of 90 days or less or absences which in the aggregate total no more than 180 days shall be considered brief.

(1) For applications for suspension of deportation made under former section 244 of the Act, as in effect prior to April 1, 1997, the burden of proof is on the applicant to establish that any breaks in continuous physical presence were brief, casual, and innocent and did not meaningfully interrupt the period of continuous physical presence in the United States. For purposes of evaluating whether an absence is brief, single absences in excess of 90 days, or absences that total more than 180 days in the aggregate will be evaluated on a case-by-case basis. An applicant must establish that any absence from the United States was casual and innocent and did not meaningfully interrupt the period of continuous physical presence.

(2) For applications for special rule cancellation of removal made under section 309(f)(1) of IIRIRA, as amended by NACARA, the applicant shall be considered to have failed to maintain continuous physical presence in the United States if he or she has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days. The applicant must establish that any period of absence less than 90 days was casual and innocent and did not meaningfully interrupt the period of continuous physical presence in the United States.

(3) For all applications made under this subpart, a period of continuous physical presence is terminated whenever an alien is removed from the United States under an order issued pursuant to any provision of the Act or the alien has voluntarily departed under the threat of deportation or when the departure is made for purposes of committing an unlawful act.

(4) The requirements of continuous physical presence in the United States under this subpart shall not apply to an alien who:

(i) Has served for a minimum period of 24 months in an active-duty status in the Armed Forces of the United States and, if separated from such service, was separated under honorable conditions, and

(ii) At the time of the alien's enlistment or induction, was in the United States.

(c) *Factors relevant to extreme hardship.* Except as described in paragraph (d) of this section, extreme hardship shall be determined as set forth in § 1240.58.

(d) *Rebuttable presumption of extreme hardship for certain classes of aliens*—(1) *Presumption of extreme hardship.* An applicant described in paragraphs (a)(1) or (a)(2) of § 1240.61 who has submitted a completed Form I–881 or Form EOIR–40 to either the Service or the Immigration Court, in accordance with § 1240.63, shall be presumed to have established that deportation or removal from the United States would result in extreme hardship to the applicant or to his or her spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(2) *Rebuttal of presumption.* A presumption of extreme hardship as described in paragraph (d)(1) of this section shall be rebutted if the evidence in the record establishes that it is more likely than not that neither the applicant nor a qualified relative would suffer extreme hardship if the applicant were deported or removed from the United States. In making such a determination, the adjudicator shall consider relevant factors, including those listed in § 1240.58.

(3) *Burden of proof.* In those cases where a presumption of extreme hardship applies, the burden of proof shall be on the Service to establish that it is more likely than not that neither the applicant nor a qualified relative would

suffer extreme hardship if the applicant were deported or removed from the United States.

(4) *Effect of rebuttal.* (i) A determination that it is more likely than not that neither the applicant nor a qualified relative would suffer extreme hardship if the applicant were deported or removed from the United States shall be grounds for referral to the Immigration Court or dismissal of an application submitted initially to the Service. The applicant is entitled to a *de novo* adjudication and will again be considered to have a presumption of extreme hardship before the Immigration Court.

(ii) If the Immigration Court determines that extreme hardship will not result from deportation or removal from the United States, the application will be denied.

[64 FR 27876, May 21, 1999; 64 FR 33386, June 23, 1999]

### § 1240.65 Eligibility for suspension of deportation.

(a) *Applicable statutory provisions.* To establish eligibility for suspension of deportation under this section, the applicant must be an individual described in §1240.61; must establish that he or she is eligible under former section 244 of the Act, as in effect prior to April 1, 1997; must not be subject to any bars to eligibility in former section 242B(e) of the Act, as in effect prior to April 1, 1997, or any other provisions of law; and must not have been convicted of an aggravated felony or be an alien described in former section 241(a)(4)(D) of the Act, as in effect prior to April 1, 1997 (relating to Nazi persecution and genocide).

(b) *General rule.* To establish eligibility for suspension of deportation under former section 244(a)(1) of the Act, as in effect prior to April 1, 1997, an alien must be deportable under any law of the United States, except the provisions specified in paragraph (c) of this section, and must establish:

(1) The alien has been physically present in the United States for a continuous period of not less than 7 years immediately preceding the date the application was filed;

(2) During all of such period the alien was and is a person of good moral character; and

(3) The alien's deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(c) *Aliens deportable on criminal or certain other grounds.* To establish eligibility for suspension of deportation under former section 244(a)(2) of the Act, as in effect prior to April 1, 1997, an alien who is deportable under former section 241(a) (2), (3), or (4) of the Act, as in effect prior to April 1, 1997 (relating to criminal activity, document fraud, failure to register, and security threats), must establish that:

(1) The alien has been physically present in the United States for a continuous period of not less than 10 years immediately following the commission of an act, or the assumption of a status constituting a ground for deportation;

(2) The alien has been and is a person of good moral character during all of such period; and

(3) The alien's deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien, or to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(d) *Battered spouses and children.* To establish eligibility for suspension of deportation under former section 244(a)(3) of the Act, as in effect prior to April 1, 1997, an alien must be deportable under any law of the United States, except under former section 241(a)(1)(G) of the Act, as in effect prior to April 1, 1997 (relating to marriage fraud), and except under the provisions specified in paragraph (c) of this section, and must establish that:

(1) The alien has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date the application was filed;

(2) The alien has been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a United States citizen or lawful

permanent resident (or is the parent of a child of a United States citizen or lawful permanent resident and the child has been battered or subjected to extreme cruelty in the United States by such citizen or permanent resident parent); and

(3) During all of such time in the United States the alien was and is a person of good moral character; and

(4) The alien's deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or the alien's parent or child.

### § 1240.66 Eligibility for special rule cancellation of removal.

(a) *Applicable statutory provisions.* To establish eligibility for special rule cancellation of removal, the applicant must show he or she is eligible under section 309(f)(1) of IIRIRA, as amended by section 203 of NACARA. The applicant must be described in §1240.61, must be inadmissible or deportable, must not be subject to any bars to eligibility in sections 240(b)(7), 240A(c), or 240B(d) of the Act, or any other provisions of law, and must not have been convicted of an aggravated felony or be an alien described in section 241(b)(3)(B)(I) of the Act (relating to persecution of others).

(b) *General rule.* To establish eligibility for special rule cancellation of removal under section 309(f)(1)(A) of IIRIRA, as amended by section 203 of NACARA, the alien must establish that:

(1) The alien is not inadmissible under section 212(a)(2) or (3) or deportable under section 237(a)(2), (3) or (4) of the Act (relating to criminal activity, document fraud, failure to register, and security threats);

(2) The alien has been physically present in the United States for a continuous period of 7 years immediately preceding the date the application was filed;

(3) The alien has been a person of good moral character during the required period of continuous physical presence; and

(4) The alien's removal from the United States would result in extreme hardship to the alien, or to the alien's spouse, parent or child who is a United States citizen or an alien lawfully admitted for permanent residence.

(c) *Aliens inadmissible or deportable on criminal or certain other grounds.* To establish eligibility for special rule cancellation of removal under section 309(f)(1)(B) of IIRIRA, as amended by section 203 of NACARA, the alien must be described in §1240.61 and establish that:

(1) The alien is inadmissible under section 212(a)(2) of the Act (relating to criminal activity), or deportable under paragraphs (a)(2) (other than section 237(a)(2)(A)(iii), relating to aggravated felony convictions), or (a)(3) of section 237 of the Act (relating to criminal activity, document fraud, and failure to register);

(2) The alien has been physically present in the United States for a continuous period of not less than 10 years immediately following the commission of an act, or the assumption of a status constituting a ground for removal;

(3) The alien has been a person of good moral character during the required period of continuous physical presence; and

(4) The alien's removal from the United States would result in exceptional and extremely unusual hardship to the alien or to the alien's spouse, parent, or child, who is a United States citizen or an alien lawfully admitted for permanent residence.

### § 1240.67 Procedure for interview before an asylum officer.

(a) *Fingerprinting requirements.* The Service will notify each applicant 14 years of age or older to appear for an interview only after the applicant has complied with fingerprinting requirements pursuant to §103.2(e) of 8 CFR chapter I, and the Service has received a definitive response from the FBI that a full criminal background check has been completed. A definitive response that a full criminal background check on an applicant has been completed includes:

(1) Confirmation from the FBI that an applicant does not have an administrative or criminal record;

(2) Confirmation from the FBI that an applicant has an administrative or a criminal record; or

(3) Confirmation from the FBI that two properly prepared fingerprint cards (Form FD–258) have been determined unclassifiable for the purpose of conducting a criminal background check and have been rejected.

(b) *Interview.* (1) The asylum officer shall conduct the interview in a nonadversarial manner and, except at the request of the applicant, separate and apart from the general public. The purpose of the interview shall be to elicit all relevant and useful information bearing on the applicant's eligibility for suspension of deportation or special rule cancellation of removal. If the applicant has an asylum application pending with the Service, the asylum officer may also elicit information relating to the application for asylum in accordance with §1208.9 of this chapter. At the time of the interview, the applicant must provide complete information regarding the applicant's identity, including name, date and place of birth, and nationality, and may be required to register this identity electronically or through any other means designated by the Attorney General.

(2) The applicant may have counsel or a representative present, may present witnesses, and may submit affidavits of witnesses and other evidence.

(3) An applicant unable to proceed with the interview in English must provide, at no expense to the Service, a competent interpreter fluent in both English and a language in which the applicant is fluent. The interpreter must be at least 18 years of age. The following individuals may not serve as the applicant's interpreter: the applicant's attorney or representative of record; a witness testifying on the applicant's behalf; or, if the applicant also has an asylum application pending with the Service, a representative or employee of the applicant's country of nationality, or, if stateless, country of last habitual residence. Failure without good cause to comply with this paragraph may be considered a failure to appear for the interview for purposes of §1240.68.

(4) The asylum officer shall have authority to administer oaths, verify the identity of the applicant (including through the use of electronic means), verify the identity of any interpreter, present and receive evidence, and question the applicant and any witnesses.

(5) Upon completion of the interview, the applicant or the applicant's representative shall have an opportunity to make a statement or comment on the evidence presented. The asylum officer may, in the officer's discretion, limit the length of such statement or comment and may require its submission in writing. Upon completion of the interview, and except as otherwise provided by the asylum officer, the applicant shall be informed of the requirement to appear in person to receive and to acknowledge receipt of the decision and any other accompanying material at a time and place designated by the asylum officer.

(6) The asylum officer shall consider evidence submitted by the applicant with the application, as well as any evidence submitted by the applicant before or at the interview. As a matter of discretion, the asylum officer may grant the applicant a brief extension of time following an interview, during which the applicant may submit additional evidence.

### §1240.68 Failure to appear at an interview before an asylum officer or failure to follow requirements for fingerprinting.

(a) Failure to appear for a scheduled interview without prior authorization may result in dismissal of the application or waiver of the right to an adjudication by an asylum officer. A written request to reschedule will be granted if it is an initial request and is received by the Asylum Office at least 2 days before the scheduled interview date. All other requests to reschedule the interview, including those submitted after the interview date, will be granted only if the applicant has a reasonable excuse for not appearing, and the excuse was received by the Asylum Office in writing within a reasonable time after the scheduled interview date.

(b) Failure to comply with fingerprint processing requirements without reasonable excuse may result in dismissal of the application or waiver of the right to an adjudication by an asylum officer.

(c) Failure to appear shall be excused if the notice of the interview or fingerprint appointment was not mailed to the applicant's current address and such address had been provided to the Office of International Affairs by the applicant prior to the date of mailing in accordance with section 265 of the Act and Service regulations, unless the asylum officer determines that the applicant received reasonable notice of the interview or fingerprinting appointment.

### § 1240.69 Reliance on information compiled by other sources.

In determining whether an applicant is eligible for suspension of deportation or special rule cancellation of removal, the asylum officer may rely on material described in § 1208.12 of this chapter. Nothing in this subpart shall be construed to entitle the applicant to conduct discovery directed toward records, officers, agents, or employees of the Service, the Department of Justice, or the Department of State.

### § 1240.70 Decision by the Service.

(a) *Service of decision.* Unless the asylum officer has granted the application for suspension of deportation or special rule cancellation of removal at the time of the interview or as otherwise provided by an Asylum Office, the applicant will be required to return to the Asylum Office to receive service of the decision on the applicant's application. If the applicant does not speak English fluently, the applicant shall bring an interpreter when returning to the office to receive service of the decision.

(b) *Grant of suspension of deportation.* An asylum officer may grant suspension of deportation to an applicant eligible to apply for this relief with the Service who qualifies for suspension of deportation under former section 244(a)(1) of the Act, as in effect prior to April 1, 1997, who is not an alien described in former section 241(a)(4)(D) of the Act, as in effect prior to April 1, 1997, and who admits deportability under any law of the United States, excluding former section 241(a)(2), (3), or (4) of the Act, as in effect prior to April 1, 1997. If the Service has made a preliminary decision to grant the applicant suspension of deportation under this subpart, the applicant shall be notified of that decision and will be asked to sign an admission of deportability or inadmissibility. The applicant must sign the admission before the Service may grant the relief sought. If suspension of deportation is granted, the Service shall adjust the status of the alien to lawful permanent resident, effective as of the date that suspension of deportation is granted.

(c) *Grant of cancellation of removal.* An asylum officer may grant cancellation of removal to an applicant who is eligible to apply for this relief with the Service, and who qualifies for cancellation of removal under section 309(f)(1)(A) of IIRIRA, as amended by section 203 of NACARA, and who admits deportability under section 237(a), excluding paragraphs (2), (3), and (4), of the Act, or inadmissibility under section 212(a), excluding paragraphs (2) or (3), of the Act. If the Service has made a preliminary decision to grant the applicant cancellation of removal under this subpart, the applicant shall be notified of that decision and asked to sign an admission of deportability or inadmissibility. The applicant must sign the concession before the Service may grant the relief sought. If the Service grants cancellation of removal, the Service shall adjust the status of the alien to lawful permanent resident, effective as of the date that cancellation of removal is granted.

(d) *Referral of the application.* Except as provided in paragraphs (e) and (f) of this section, and unless the applicant is granted asylum or is in lawful immigrant or non-immigrant status, an asylum officer shall refer the application for suspension of deportation or special rule cancellation of removal to the Immigration Court for adjudication in deportation or removal proceedings, and will provide the applicant with written notice of the statutory or regulatory basis for the referral, if:

(1) The applicant is not clearly eligible for suspension of deportation under former section 244(a)(1) of the Act as in effect prior to April 1, 1997, or for cancellation of removal under section 309(f)(1)(A) of IIRIRA, as amended by NACARA;

(2) The applicant does not appear to merit relief as a matter of discretion;

(3) The applicant appears to be eligible for suspension of deportation or special rule cancellation of removal under this subpart, but does not admit deportability or inadmissibility; or

(4) The applicant failed to appear for a scheduled interview with an asylum officer or failed to comply with fingerprinting processing requirements and such failure was not excused by the Service, unless the application is dismissed.

(e) *Dismissal of the application.* An asylum officer shall dismiss without prejudice an application for suspension of deportation or special rule cancellation of removal submitted by an applicant who has been granted asylum, or who is in lawful immigrant or non-immigrant status. An asylum officer may also dismiss an application for failure to appear, pursuant to §1240.68. The asylum officer will provide the applicant written notice of the statutory or regulatory basis for the dismissal.

(f) *Special provisions for certain ABC class members whose proceedings before EOIR were administratively closed or continued.* The following provisions shall apply with respect to an *ABC* class member who was in proceedings before the Immigration Court or the Board, and those proceedings were closed or continued pursuant to the *ABC* settlement agreement:

(1) *Suspension of deportation or asylum granted.* If an asylum officer grants asylum or suspension of deportation, the previous proceedings before the Immigration Court or Board shall be terminated as a matter of law on the date relief is granted.

(2) *Asylum denied and application for suspension of deportation not approved.* If an asylum officer denies asylum and does not grant the applicant suspension of deportation, the Service shall move to recalendar proceedings before the Immigration Court or resume proceedings before the Board, whichever is appropriate. The Service shall refer to the Immigration Court or the Board the application for suspension of deportation. In the case where jurisdiction rests with the Board, an application for suspension of deportation that is referred to the Board will be remanded to the Immigration Court for adjudication.

(g) *Special provisions for dependents whose proceedings before EOIR were administratively closed or continued.* If an asylum officer grants suspension of deportation or special rule cancellation of removal to an applicant described in §1240.61(a)(4) or (a)(5), whose proceedings before EOIR were administratively closed or continued, those proceedings shall terminate as of the date the relief is granted. If suspension of deportation or special rule cancellation of removal is not granted, the Service shall move to recalendar proceedings before the Immigration Court or resume proceedings before the Board, whichever is appropriate. The Service shall refer to the Immigration Court or the Board the application for suspension of deportation or special rule cancellation of removal. In the case where jurisdiction rests with the Board, an application for suspension of deportation or special rule cancellation of removal that is referred to the Board will be remanded to the Immigration Court for adjudication.

(h) *Special provisions for applicants who depart the United States and return under a grant of advance parole while in deportation proceedings.* Notwithstanding paragraphs (f) and (g) of this section, for purposes of adjudicating an application for suspension of deportation or special rule cancellation of removal under this subpart, if an applicant departs and returns to the United States pursuant to a grant of advance parole while in deportation proceedings, including deportation proceedings administratively closed or continued pursuant to the *ABC* settlement agreement, the deportation proceedings will be considered terminated as of the date of applicant's departure from the United States. A decision on the NACARA application shall be issued in accordance with paragraph (a), and paragraphs (c) through (e) of this section.

# PART 1241—APPREHENSION AND DETENTION OF ALIENS ORDERED REMOVED

## Subpart A—Post-hearing Detention and Removal



## Subpart B—Deportation of Excluded Aliens (for Hearings Commenced Prior to April 1, 1997)



## Subpart C—Deportation of Aliens in the United States (for Hearings Commenced Prior to April 1, 1997)



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SOURCE: 62 FR 10378, Mar. 6, 1997, unless otherwise noted. Duplicated from part 241 at 68 FR 9840, Feb. 28, 2003.

EDITORIAL NOTE: Nomenclature changes to part 1241 appear at 68 FR 9846, Feb. 28, 2003, and 68 FR 10357, Mar. 5, 2003.

## Subpart A—Post-hearing Detention and Removal

### § 1241.1 Final order of removal.

An order of removal made by the immigration judge at the conclusion of proceedings under section 240 of the Act shall become final:

(a) Upon dismissal of an appeal by the Board of Immigration Appeals;

(b) Upon waiver of appeal by the respondent;

(c) Upon expiration of the time allotted for an appeal if the respondent does not file an appeal within that time;

(d) If certified to the Board or Attorney General, upon the date of the subsequent decision ordering removal;

(e) If an immigration judge orders an alien removed in the alien's absence, immediately upon entry of such order; or

(f) If an immigration judge issues an alternate order of removal in connection with a grant of voluntary departure, upon overstay of the voluntary departure period, or upon the failure to post a required voluntary departure bond within 5 business days. If the respondent has filed a timely appeal with the Board, the order shall become final upon an order of removal by the Board or the Attorney General, or upon overstay of the voluntary departure period granted or reinstated by the Board or the Attorney General.

[62 FR 10378, Mar. 6, 1997, as amended at 73 FR 76938, Dec. 18, 2008]

### § 1241.2 Warrant of removal; detention of aliens during removal period.

For the regulations of the Department of Homeland Security with respect to the detention and removal of aliens who are subject to a final order of removal, see 8 CFR part 241.

[70 FR 674, Jan. 5, 2005]

### §§ 1241.3–1241.5 [Reserved]

### § 1241.6 Administrative stay of removal.

(a) An alien under a final order of deportation or removal may seek a stay of deportation or removal from the Department of Homeland Security as provided in 8 CFR 241.6.

(b) A denial of a stay by the Department of Homeland Security shall not preclude an immigration judge or the Board from granting a stay in connection with a previously filed motion to reopen or a motion to reconsider as provided in 8 CFR part 1003.

(c) The Service shall take all reasonable steps to comply with a stay granted by an immigration judge or the Board. However, such a stay shall cease to have effect if granted (or communicated) after the alien has been placed aboard an aircraft or other conveyance