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A Practical Overview of U.S. Immigration Removal Proceedings, Administration Agencies and Respondent's Forms of Relief

Vy Thuan Nguyen

A PRACTICAL OVERVIEW OF U.S. IMMIGRATION REMOVAL PROCEEDINGS, ADMINISTRATIVE AGENCIES AND RESPONDENT'S FORMS OF RELIEF

BY: VY THUAN NGUYEN[1]

TSU THURGOOD MARSHALL SCHOOL OF LAW IMMIGRATION LEGAL CLINIC ANDTHE LL.M. IN IMMIGRATION AND NATURALIZATION LAW DEGREE PROGRAM

I. INTRODUCTION

Since the American Civil War, the U.S. Immigration System has experienced an evolving history which has impacted every ethnic and racial community in our country. It is a system based on the ideal vision and principles of pursuing the "American Dream" allowing an individual the opportunity to seek a pathway to obtain U.S. Citizenship. Our U.S. immigration laws are based on the principles laid out in the Fourteenth Amendment of the U.S. Constitution. The Fourteenth Amendment declares that, "*All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of United States and of the State wherein they reside.*"[2] Furthermore, the Fourteenth Amendment mandates that, "*No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*"[3]

1. I am the Clinical Professor and Director of the Immigration Legal Clinic at Texas Southern University Thurgood Marshall School of Law and an adjunct professor in the LL.M. in Immigration Law Degree Program. I have also been in private practice for thirteen years. My firm, *the Law Offices of Vy T. Nguyen, PLLC*, has three office locations in Houston, Conroe, and Austin, Texas. My areas of practice include immigration law, family law, and criminal defense. I would like to thank the NCCU Law Review and Professor Brenda Gibson for the privileged opportunity to publish my first article with their distinguished journal. I would like to respectfully acknowledge my TMSL mentors: Dean Cassandra Hill, Dean Stephanie Ledesma, Professor Fernando Colon, Professor Ana Otero, and Professor Marcia Johnson for their support of my work at Thurgood Marshall School of Law. I want to express my gratitude to my dedicated law students, my law clerks (Tom Omondi and Renee Taylor) and my research assistants, Priscilla Mendoza and Crescentia Matoyah. I am especially grateful to my best friend *"Mon* Chéri" because of his support and solace during my entire teaching career. This paper is dedicated to my son, Michael, who is the pride and joy of my life and who has chosen to be a lawyer like his mother. A special dedication to my beautiful mother who immigrated to the U.S. from Vietnam in pursuit of the "American Dream" for our family. As a proud Vietnamese-American and the first generation American born in my family, my mother inspired me to become an attorney and to be a strong voice for the underrepresented. My family has taught me hard work and the value of education. My family and mentors taught me courage, perseverance, and resilience which are the attributes that I emulate in my teaching discipline as a law professor and in the practice of law as an immigration attorney.

2. U.S. CONST. amend. XIV, § 1.
3. *Id.*

To fully understand the due process rights laid out in the U.S. Immigration System and its evolution over the decades, it is important to discuss the U.S. immigration laws and the role of U.S. Congress who enacts immigration legislation under the *Immigration and Nationality Act of 1952* or *INA*.[4] Based on my experience and background as a practicing attorney and law professor in the immigration law field, this paper shall provide a practical overview of: the U.S. immigration removal proceedings by describing the administrative structure of interrelated agencies that govern the removal procedures under the INA; the nature of immigration removal proceedings; a respondent's due process rights and the common forms of relief sought by a respondent seeking to remain in the U.S immigration removal proceedings.

The INA promulgates that the legal process of removal proceedings must be conducted in U.S. immigration courts.[5] An alien is any person not a citizen or national of the United States.[6] Any alien admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is present in violation of law laid out in the INA. [7] There has been a rise in deportation and denaturalizing cases involving the U.S. Department of Homeland Security performing investigative operations such as "Operation Janus" and "Operation Second-Look". These investigative operations target the apprehension of non-citizens who are present in the U.S. in violation of the INA. For example, individuals accused of illegally procuring an adjustment of status based on marriage or other fraudulent means have been apprehended for arrest and deportation.[8] DHS, with the effort of the U.S. Attorney's Office, has arrested hundreds of thousands of individuals who "knowingly issues, procures or obtains or applies for or otherwise attempts to procure or obtain naturalization, or citizenship, or a declaration of intention to become a citizen".[9]

Attorneys involved in immigration removal proceedings should be extensively familiar with the immigration court procedures, motion practice, and the roles of interrelated agencies, such as the U.S. Department of Homeland Security and United States Citizenship and Immigration Services. Immigration attorneys should be strongly advised to do extensive research of the applicable areas of state law related to a client's case especially when it involves family law and criminal law that could impact a

4. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified in scattered sections of 8 U.S.C.).

5. 8 U.S.C. § 1229(a).

6. 8 U.S.C. § 1101(a)(3).

7. 8 U.S.C. § 1227(a)(B).

8. 8 U.S.C. § 1451 (2018).

9. 8 U.S.C. § 1425(b) (2018).

respondent's eligibility for relief in immigration court.[10] In terms of criminal law, an attorney should understand the nature of the criminal offense, whether it is considered a federal offense or state offense, and the implications on the respondent's immigration status. For family law topics, an attorney must understand the basis elements of proving a legal marriage when advising a respondent about a form of relief related to a "Petition for Alien Relative". For example, Texas recognizes two types of marriages– formal and common law marriage.[11] Thus, if the parties enter into a formal or common-law marriage and can prove the bonafide elements of their marriage, a "Petition for Alien Relative" can be submitted for review by USCIS.[12] Evidence of marriage fraud will subject the respondent to be removed from the U.S.[13]

The U.S. Supreme Court decision in *Padilla v. Commonwealth of Kentucky* significantly impacted the immigration law field.[14] *Padilla* set the precedent that an attorney, regardless of whether he or she practices immigration law, has an ethical duty to the client to provide effective and competent counsel.[15] In deference to the *Padilla* holding, this paper shall provide practical insight into the removal process involving the U.S. Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS), U.S. Department of Justice (DOJ) and the Executive Office of Immigration Review (EOIR). It will discuss the serious consequences that an alien faces in removal proceedings and certain types of relief that may be sought. This paper will also address the basic ethical issues that immigration attorneys face in the immigration law field and the fiduciary duty owed to the client who is subject to removal proceedings.

II. THE AGENCIES INVOLVED IN IMMIGRATION REMOVAL PROCEEDINGS

U.S. Department of Homeland Security (DHS) represents the U.S. Government in removal proceedings.[16] The U.S. Department of Justice

10. TEX. FAM. CODE ANN. § 2.401 (2019) (discussing informal marriage); 8 U.S.C. § 1101(a)(43) (2018) (defining aggravated felony).

11. TEX. FAM. CODE ANN. § 2.401 (2019).

12. TEX. FAM. CODE ANN. § 2.401(a)(2) (2019). ("In a judicial, administrative, or other proceeding, the marriage of a man and woman may be proved by evidence that the man and woman agreed to be married and after the agreement they lived together in this state as husband and wife and they represented to others that they were married.").

13. USCIS Form *I-130, Petition for Alien Relative*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, https://www.uscis.gov/i-130 (last visited Mar. 11, 2020); 8 U.S.C. § 1227(a)(1)(G) (2018).

14. Padilla v. Commonwealth of Kentucky, 559 U.S. 356 (2010).

15. *Id.* at 360.

16. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (creating the U.S. Department of Homeland Security and abolishing INS).

(DOJ) oversees the Executive Office for Immigration Review (EOIR).[17] Appointed by the Deputy U.S. Attorney, the Director of EOIR has the power to "set priorities or time frames for the resolution of cases; to direct that the adjudication of certain cases be deferred; to regulate the assignment of adjudicators to cases; and otherwise to manage the docket of matters to be decided by the Board, the immigration judges, the Chief Administrative Hearing Officer, or the administrative law judges."[18] The EOIR has two intra-components.[19] The Office of the Chief Immigration Judge (OCIJ) is responsible for the placement and coordination of immigration judges and oversees their role as administrative law judges. The Board of Immigration Appeals (BIA), is responsible for appeals of immigration judge decisions.[20]

DHS's sub-agency, the Bureau of Citizenship and Immigration Services (USCIS), is tasked with administering our country's naturalization and immigration system and reviews various petitions for immigration services.[21] DHS's other sub-agency, Immigration and Customs Enforcement (ICE) enforces U.S. immigration laws.[22] ICE has the immigration investigation authority to identify and remove foreign nationals who are present in the U.S. illegally and supervises detention and removal programs.[23] Also functioning as DHS' sub-agency, U.S. Customs and Border Protection (CBP) handles our country's border regulations and is tasked with deterring illegal entries by aliens.[24] An alien who enters into the U.S. illegally at the border can surrender to CBP for inspection and parole, after which, that foreign national will be interviewed.[25] This interview is conducted by DHS to determine whether a respondent has established a well-grounded fear of past persecution or future persecution in terms of seeking asylum/refugee relief.[26] DHS conducts a credible fear interview to determine if the respondent can be released on parole pending his or her court hearing before an immigration judge.[27] The INA defines credible fear of persecution as "a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could

17. 8 C.F.R. § 1003.0(a) (2020).
18. 8 C.F.R. § 1003.0(b)(1)(ii) (2020).
19. 8 C.F.R. § 1003.9 (2019); 8 C.F.R. § 1003.1 (2020).
20. 8 C.F.R. § 1003.1 (2020).
21. 6 U.S.C. § 271 (2018).
22. *Who We Are,* U.S. IMMIGRATION AND CUSTOMS ENF'T, http://www.ice.gov/about/index.htm (last visited Mar. 22, 2020).
23. *Id.*
24. *About CBP*, U.S. CUSTOMS AND BORDER PATROL, http://www.cbp.gov/xp/cgov.about/index.htm (last visited Mar. 22, 2020).
25. 8 U.S.C. § 1225 (2018).
26. 8 U.S.C. § 1325 (2018).
27. 8 U.S.C. § 1225.

establish eligibility for asylum."[28] Further, if the alien does not meet the elements for asylum relief, he or she can seek an alternative relief if he or she has a credible fear of torture by demonstrating "a significant possibility that he or she is eligible for withholding of removal or deferral of removal under the Convention Against Torture (CAT) pursuant to 8 C.F.R. § 208.16 or § 208.17."[29]

The U.S. Department of Justice, U.S. Department of Homeland Security, and its sub-agencies are aligned in removal proceedings.[30] The attorneys involved in the removal proceeding must provide a "certificate of service" of all pleadings, motions, briefs and supporting documentation to DHS through its Office of Chief Counsel who serves in the prosecutor role in the removal proceedings.[31] In addition, attorneys must submit copies of the applications, motions, or briefs to the immigration court for purposes of file-stamping as proof of service.[32] Attorneys should be prepared to have copies of proof of service for DHS Office of Chief Counsel, the immigration court, and any applications mailed to USCIS for processing.[33] USCIS has strict deadlines for applications and motions must be filed by the deadline set by the immigration judge.[34] Trial exhibits and witness lists must be submitted to the immigration courts and DHS Office of Chief Counsel with the "certificate of service" to all respective agencies involved in the removal case.[35]

III. STAGES OF A REMOVAL PROCEEDING

"NOTICE TO APPEAR" REQUIREMENT - INITIATION OF A REMOVAL PROCEEDING

Under INA Section 239(a), DHS must issue and personally serve a charging document named as the Notice to Appear (NTA) on the alien who is also referred to as the *respondent* for the purposes of removal proceedings.[36] In *Pereira v. Sessions*, the U.S. Supreme Court concluded that an NTA must contain information regarding the time and place of removal proceedings.[37] The U.S. Supreme Court held that "a notice that does not inform a noncitizen when and where to appear for removal proceedings is not a "notice to appear under Section 1229(a)", therefore,

28. *Id.*
29. 8 C.F.R. § 208(e)(3) (2020); *accord 8 C.F.R.* § 208.16-17 (2020).
30. U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL § 1.2(c)-(e) (2016). 31. *Id.* § 3.2(a).
32. *Id.* § 3.1(a)(iii).
33. *Id.* § 3.2(e).
34. *Id* § 3.1(b).
35. *Id.* § 3.3(c)(i)(C).
36. 8 U.S.C. § 1229(a) (2018).
37. Pereira v. Sessions, 138 S. Ct. 2105, 2109-10 (2018).

does not trigger the stop-time rule."[38] Thus, the NTA must be effectually served by either personal service, registered mail or notice to the foreign national's counsel of record.[39] Upon service, a NTA must clearly include the following information: "(1) The nature of the proceedings against the alien; (2) The legal authority under which the proceedings are conducted; (3) The acts or conduct alleged to be in violation of law; and (4) The charges against the alien and the statutory provisions alleged to have been violated."[40] For removal hearings initiated after April 1, 1997, the *Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)* enacted that only the NTA is required to be served on the respondent as the sole charging document to initiate removal proceedings.[41]

The respondent is required to make an initial appearance in the removal proceeding.[42] After the respondent's first appearance, the respondent must keep his or her current address and phone number updated with the immigration court.[43] Respondent, whether adult or minor, must appear in immigration court and is not afforded the right to a court appointed attorney.[44] Respondent has the right to be represented by competent counsel whether privately retained or through free legal aid.[45] The respondent has the right to examine evidence, cross-examine witnesses, and is entitled to proper notice of all motions and ancillary hearings set by DHS and the immigration court.[46] At the government's expense, a certified translator is made readily available for the respondent at each hearing during a removal proceeding.[47] The immigration court provides notice of court hearings to all interested parties.[48] If a respondent fails to appear before an immigration judge (also referred to as an "IJ) for a specific hearing, he or she may be removed in absentia, regardless of whether he or she is an adult or minor.[49] Once the NTA has been filed with the immigration court with proper jurisdiction and personal service of the NTA has been effectuated on the respondent, the removal proceeding has

38. *Id.* at 2110.

39. U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL § 3.2(a) (2016). 40.

8 U.S.C. § 1229(a)(1) (2018).

41. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) See: U.S. Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) which repealed 8 CFR §242.1(c) requiring a series of notices to be served on Respondent to initiate a removal proceeding such as the "Order to Show Cause.".

42. 8 U.S.C. § 1229(a)(1) (2018).

43. 8 U.S.C. § 1229(a)(1)(F)(ii) (2018).

44. 8 U.S.C § 1229a(b)(4)(A) (2018).

45. U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL § 2.2(b) (2016). 46.

8 U.S.C. § 1229(a)(b)(4)(B).

47. U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL § 3.3(a) (2016). 48.

Id. § 4.15(c).

49. *Id* § 4.17.

officially commenced.[50] If a respondent fails to appear in immigration court after receiving a proper service of the NTA, the respondent is ineligible for relief for ten (10) years.[51]

A. MASTER CALENDAR HEARING

The "Master Calendar" hearing is the initial court proceeding whereby the IJ, DHS, and the respondent discuss scheduling, motion/application deadlines, attorney preparation time, bond issues, resets, and other ancillary issues.[52] The IJ apprises the respondent of the nature and substance of the removal proceeding and the charges against him or her that is stated in the NTA.[53] The IJ's role is to apprise the respondent of his or her due process rights available and provide an ample opportunity for the respondent to seek legal representation for future court proceedings.[54] At the "Master Calendar" hearing, the respondent is given the opportunity to address and request a formal reading of the charges and allegations in the NTA.[55] The respondent can then take the opportunity to admit or deny the charges and designate or refuse to designate the country of removal.[56] If the respondent respectfully declines to designate a country of removal, the IJ can proceed to assign such country for removability purposes.[57] In addition, the respondent may state the forms of relief before the IJ that are being sought in the next stage of the removal proceeding which is called the "Individual Merits" hearing.[58]

B. INDIVIDUAL MERITS HEARING

The next important stage of the removal proceeding is the "Individual Merits" hearing which functions as the final trial to determine if a respondent shall be removed or be granted relief to remain the U.S.[59] In an "Individual Merits" hearing, the respondent is able to bring forth witnesses and trial exhibits to challenge DHS's contention of removability and any eligible forms of relief.[60] Respondent should seek to challenge the charges in the NTA if there are any defects in the charging document and file a

50. *Id.* § 4.2(a).
51. 8 U.S.C. § 1229a (b)(7) (2018).
52. U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL § 4.5(a) (2016). 53.
Id. § 4.5(e).
54. *Id.*
55. *Id.* § 4.5(i).
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* § 4.16(a).
60. *Id.*

motion to close the case if successful.[61] The IJ issues the final order in an "Individual Merits" hearing.[62]

C. BOARD OF IMMIGRATION APPEALS AND APPEAL PROCESS

The Board of Immigration Appeals (BIA) is responsible for hearing all appeals related to immigration removal proceedings.[63] The respondent or DHS has thirty (30) days to appeal an immigration judge's decision to the Board of Immigration Appeals.[64] Removal is automatically stayed during the pendency of the appeal.[65] Once a BIA decision is rendered, it is published and binding on the U.S. Department of Homeland Security and all immigration judges across the nation.[66] The Board of Immigration Appeals is accountable to the U.S. Attorney General who may also review the BIA's decisions.[67] The BIA consists of three-member panels for complex or novel cases which are held *en banc*.[68]

A respondent may also file a "Motion to Reopen."[69] An immigration judge is authorized to grant a motion to reopen a removal proceeding because of changed circumstances in a request for asylum.[70] A "Motion to Reconsider" is based on errors of law or fact in removal orders.[71]
Administrative appeals are heard by BIA and may be remanded for additional factual hearings.[72] BIA Decisions are based on the record from the removal hearing, briefs and oral arguments.[73] BIA can reverse an immigration judge's findings of fact under the clearly erroneous standard of review.[74]

The U.S. Supreme Court has limited power of review over immigration legislation passed by U.S. Congress.[75] Judicial review is permissible to challenges of constitutionality of immigration procedures other than removal hearings.[76] The standard of judicial review in asylum

61. *Id.* § 4.16(a); *Id.* § 4.16(d).
62. *Id.* § 4.16(g)-(h).
63. *Id.* § 6.1.
64. *Id.* § 6.2(b)
65. *Id.* § 8.2(a).
66. 8 C.F.R. § 1003.1(g)(3) (2019).
67. *Id.* § 1003.1(h).
68. *Id.* § 1003.1(g)(3).
69. 8 U.S.C. § 1229a (b)(7)(A) (2006).
70. 8 U.S.C. § 1229a (c)(7)(C)(ii) (West 2006); 8 C.F.R. § 1003.2 (2003).
71. 8 U.S.C. § 1229a (c)(6) (2006).
72. U.S. DEP'T OF JUSTICE, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL, § 5.8 (2020).
73. *Id.* at 49.
74. *Id.* at 7.
75. Fiallo v. Bell, 430 U.S. 787, 792 (1977).
76. INS v. Chadha, 462 U.S. 919, 937-38 (1983).

cases is discussed in *INS v. Cardoza-Fonseca.*[77] Traditional removal stay factors govern a U.S. Court of Appeals' authority to stay a foreign national's removal pending judicial review as opposed to the more demanding INA standard.[78] Habeas Corpus relief is also available to a foreign national subject to removal on criminal grounds.[79] Under a habeas corpus procedure, a respondent can appeal only from a final order of removal after he or she has exhausted all administrative remedies.[80]

D. RESPONDENT'S CONSTITUTIONAL CHALLENGES IN REMOVAL PROCEEDINGS

Similar to criminal proceedings, immigration removal proceedings require that a respondent be entitled to certain constitutional due process rights such as the proper service of a NTA and afforded a legal opportunity to present his or her argument to seek relief to remain in the U.S.[81] Respondent may be detained, placed on bond or paroled in removal proceedings.[82] Respondent who is detained has the right to file a "Motion for Bond" and must meet the elements to be granted a monetary bond.[83] However, one stark difference between immigration removal proceedings and criminal proceedings is that a respondent is not entitled to a court appointed counsel in immigration removal proceedings.[84] "Immigration proceedings, although not subject to the full range of constitutional protections, must conform to the Fifth Amendment's requirement of due process".[85] In *United States v. Mata-Abundiz,* the Court applied the *Mathis* holding that both civil and criminal interrogations of detained defendants should generally be accompanied by *Miranda* warnings.[86] Furthermore, an immigration officer should only warn a suspect when there is specific probable cause to believe that the individual being questioned is in violation of criminal or civil immigration laws.[87]

In *United States v. Lopez-Garcia,* the Court held that *Miranda* warnings are not required for identity questions where an immigration officer was "simply tasked with facilitating the removal of individuals

77. INS v. Cardoza-Fonseca, 480 U.S. 421, 430-32 (1987). (The § 208(a) reference to "fear" makes the asylum eligibility determination turn to some extent on the alien's subjective mental state, and the fact that the fear must be "well founded" does not transform the standard into a "more likely than not" one.)

78. Nken v. Holder, 556 U.S. 418, 433-34 (2009).

79. INS v. St. Cyr, 533 U.S. 289, 313-14 (2001).

80. 8 U.S.C. § 1252(d) (2018).

81. U.S. CONST., amend. XIV, § 1.

82. 8 U.S.C. § 1226(b) (2020).

83. *See* U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL § 9.3 (2016). 84. Matter of E-R-M-F- & A-S-M, 25 I. & N. Dec. 580 (BIA 2011).

85. Salgado-Diaz v. Gonzales, 395 F. 3d 1158, 1162 (9th Cir. 2002).

86. United States v. Mata-Abundiz, 717 F.2d 1277, 1280 (9th Cir. 1983).

87. *Id.*

illegally present in the country" and that an immigration officer had no basis to believe that a suspect would be prosecuted for the offense or would admit to illegal reentry.[88] In *United States v. Rodriguez*, the Court held that *Miranda* warnings did not apply during an immigration officer's questions about place of birth where the interview "was conducted solely for the purpose of determining whether Rodriguez would be subject to administrative deportation after his release."[89] In *United States v. Salgado*, the Court held that *Miranda* warnings are not required before an immigration officer's routine questions about place of birth and citizenship because the interview "was solely for the administrative purpose of determining whether Salgado was deportable when he got out of jail" where there was no evidence the officer intended to bring criminal charges and the immigrant was not in jail for an offense related to immigration laws.[90]

Further details of a respondent's rights in removal proceedings will be discussed in this paper. A respondent cannot challenge a removal as a violation of the ex post facto clause because it is not a criminal penalty.[91] Moreover, denial of bail in removal proceedings is not unconstitutional.[92] It is important to note that the U.S. Supreme Court rejected a due process challenge to mandatory detention in *Demore v. Kim*.[93] Removal does not violate double jeopardy.[94] A removal proceeding does not constitute as cruel and unusual punishment.[95] Removal proceedings must strictly follow the due process of law and precedent set by the U.S. Supreme Court.[96] "Due process always requires, at a minimum notice and an opportunity to respond."[97] Given the seriousness of deportation as a result of pleading guilty to a crime, an attorney must advise clients when a criminal plea bears a risk of deportation, especially a charge or offense involving drug trafficking, human trafficking, domestic violence/terroristic threat, or firearms.[98] Respondent should be advised by his or her attorney that the burden of proof of removability is placed on the DHS which must be proven by clear and convincing evidence.[99]

88. United States v. Lopez-Garcia, 565 F.3d 1306, 1317 (11th Cir. 2009).
89. United States v. Rodriguez, 356 F.3d 254, 259 (2d. Cir. 2004).
90. United States v. Salgado, 292 F.3d 1169, 1172 (9th Cir. 2002).
91. Eastern Enterprises v. Apfel, 524 U.S. 498, 538 (1998).
92. Carlson v. Landon, 342 U.S. 524, 544 (1952).
93. Demore v. Kim, 538 U.S. 510, 532-33 (2003).
94. U.S. v. Ramirez-Aguilar, 455 F.2d 486, 487 (9th Cir. 1972).
95. Fong Yue Ting v. U.S., 149 U.S. 698, 731 (1893).
96. Kaoru Yamataya v. Fisher, 189 U.S. 86, 100 (1903).
97. United States v. Raya-Vaca, 771 F. 3d 1195, 1204 (9th Cir. 2014).
98. Padilla v. Kentucky, 559 U.S. 356, 387-88 (2010).
99. 8 U.S.C. § 1229(a) (2018).

E. DHS AND RESPONDENT'S BURDEN OF PROOF DURING REMOVAL PROCEEDINGS

DHS must make a prima facie showing of removability when issuing an NTA.[100] DHS has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted into the United States, the alien is deportable.[101] No decision on deportability shall be valid unless it is based upon reasonable, substantial and probative evidence."[102] Immigration removal proceedings are deemed as civil proceedings, not as criminal proceedings in nature, thus any relevant or hearsay evidence may be admitted.[103] DHS bears the burden of proving by clear and convincing evidence that the respondent who has been lawfully admitted to the U.S. is removable under the INA.[104] The respondent is entitled to DHS' production of his or her visa and other entry documents pertaining to his or her entry and not considered as confidential by the Attorney General.[105] This burden and presumption is applicable to any charge of deportability which brings into question the time, place, and manner of entry.[106] In deportation proceedings, there is no presumption of citizenship.[107] A person born abroad is presumed to be an alien until he or she shows otherwise to DHS.[108] In applications for relief from deportation, the burden of proof is on the respondent to show eligibility for the relief sought.[109]

Once alienage is established, the burden is on the respondent to show the time, place, and manner of entry.[110] "If this burden of proof is not sustained, the respondent is presumed to be present in the U.S. in violation of the law."[111] This provision becomes operative only after the government has established by prima facie evidence that the respondent is an "alien."[112] The burden then shifts to the respondent to prove, by clear and convincing

100. 8 U.S.C. § 1229(a).

101. *Id.*

102. *Id.*

103. Navarrette-Navarrette v. Landon, 223 F.2d 234, 237 (9th Cir. 1955) (stating that "it is well settled that administrative tribunals, are not bound by the strict rules of evidence, which apply in judicial proceedings. Under these less stringent rules, administrative tribunals may receive evidence, which a court would regard as legally insufficient without vitiating the proceedings.").

104. 8 U.S.C. § 1229(a).

105. *Id.*

106. *See* Matter of Benitez, 19 I. & N. Dec. 173, 173 (BIA 1984).

107. INS v. Lopez-Mendoza, 468 U.S. 1032, 1043 (1984); *see also* United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 154 (1923).

108. Murphy v. INS, 54 F.3d 605, 608-09 (9th Cir. 1995; *see also* Corona-Palomera v. INS, 661 F.2d 814, 818 (9th Cir. 1981).

109. S-Y-G-, 24 I. & N. Dec. 247, 251-52 (BIA 2007); *see also* Jean, 23 I. & N. Dec. 373, 386 (BIA 2002).

110. 8 U.S.C. § 1361 (2018).

111. *Id.*

112. 8 C.F.R. § 1240.8 (2020).

evidence, that the respondent is entitled to eligible relief to remain in the U.S and not be subject to removal.[113] Contrastingly, in revocation or expiration of parole cases, the respondent must prove beyond a doubt that he or she is entitled to be admitted.[114] In an "Individual Merits" hearing, the immigration judge must determine if there is a finding of removability based on the arguments of respective counsel and evidence before the immigration court and then must either order the respondent to be removed, close the proceeding administratively, or grant the respondent's requested relief to remain in the U.S.[115]

F. DUTIES OF THE IMMIGRATION JUDGE IN REMOVAL PROCEEDINGS

Immigration judges are considered to be agents of the Executive Office for Immigration Review (EOIR) which is the subagency of the U.S. Department of Justice.[116] The U.S. Attorney General oversees the Department of Justice (DOJ) and has the authority to select the immigration judges for presiding benches.[117] In a removal proceeding, an immigration judge oversees the stages of the removal proceedings which are referred to as the "Master Calendar" and "Individual Merits" hearings.[118]

The immigration court has expansive power within its jurisdiction to address certain matters over a respondent's case such as the authority to provide a respondent the opportunity to have the Court conduct a formal reading of the alleged charges stated within the NTA. [119] The NTA is the charging document that describes the following information: the nature of the proceedings; the legal authority under which the proceedings are conducted; the acts or conduct alleged to be in violation of the law; the charge(s) against the alien and the statutory provision(s) alleged to have been violated.[120] The immigration judge must allow the respondent the right to designate a country of removal or designate the country of removal if the respondent respectfully declines to designate a country of removal.[121] If a respondent requests to file an application based on eligible relief, the application and all supporting documents must be filed with the immigration court to be reviewed in the removal proceedings.[122]

113. 8 U.S.C. § 1229a(c)(2) (2018).
114. 8 C.F.R. § 1240.8(b) (2020).
115. 8 U.S.C. § 1229a(c)(1)(A)(2020).
116. 8 C.F.R. §1003.10 (2020).
117. *Id.*
118. *Id.*
119. 8 C.F.R. § 1003.13-.14 (2020).
120. 8 C.F.R. § 1003.15 (2020).
121. 8 C.F.R. § 1240.10(f) (2020).
122. *See* 8 C.F.R. § 1003.31(a) (2020).

IV. RESPONDENT'S FORMS OF RELIEF IN REMOVAL PROCEEDINGS

This section of the paper will discuss examples of factors that may affect a respondent's eligibility for relief, such as the point of entry into the U.S., current immigration status, length of physical presence in the U.S., and any criminal background that could preclude certain forms of relief for the respondent.[123] A common form of relief is the *"Application for Cancellation of Removal"* which can be sought by a respondent who is a "Legal Permanent Resident" (LPR) or a "Non-Legal Permanent Resident" requesting to continue his or her permanent resident status.[124]

Through an *"Application for Cancellation of Removal"* for a Legal Permanent Resident, a respondent can be eligible for relief if respondent has been a LPR for at least five (5) years, has had continuous residence in the U.S. for at least seven (7) years after having been lawfully admitted prior to the service of the NTA, and no conviction for an aggravated felony.[125] Through an INA §212(c) Waiver, a respondent can also be eligible for discretionary relief if he or she has been a LPR for seven (7) years, has had physical presence and residence in U.S. during that timeframe and who pled guilty to crimes before April 1, 1997.[126]

An *"Application for Cancellation of Removal"* for a Non-Legal Permanent Resident has a different set of requirements.[127] A Non-Legal Permanent Resident must have had (1) continuous U.S. residence for ten (10) years prior to the filing of the NTA; (2) good moral character for the preceding ten year period prior to filing; (3) no particular convictions under the INA and (4) prove that it would be an exception and extreme hardship on the respondent's family, specifically a spouse, parent or child.[128] The respondent's spouse, parent or child must also be a U.S. Citizen or a Legal Permanent Resident.[129]

Respondent can qualify for an adjustment of status if he or she has been "inspected and admitted or paroled" into the United States by DHS.[130]

123. *See* 8 U.S.C. § 1229b (2020).

124. *See Id.* § 1229b(b).

125. *See Id.* § 1229b(a).

126. 8 U.S.C. § 1182(c) (repealed 1996) (*See* INS v. St. Cyr, the U.S. Supreme Court held that a §212(c) waiver remains available in removal proceedings to a LPR who was eligible for the waiver at the time of his guilty plea entered before its repeal. INS v. St. Cyr, 533 U.S. 289, 326 (2001).).

127. *See* EXECUTIVE OFF. OF IMMIGRATION REV., U.S. DEP'T OF JUSTICE, APPLICATION FOR CANCELLATION OF REMOVAL FOR CERTAIN PERMANENT RESIDENTS (2015) (also known as Form EOIR-42B).

128. 8 U.S.C. § 1229b(b)(1) (2020).

129. *Id.*

130. *See* Immigration and Nationality Act of 1952, Pub. L. 82-414, 66 Stat. 163, 217 (June 27, 1952). (INA 245(a) made adjustment available only to an alien who "was lawfully admitted . . . as a bona fide nonimmigrant and who is continuing to maintain that status.").

An alien who presents himself or herself for inspection and authorization by an immigration officer is deemed to have been lawfully admitted into the U.S. and eligible for an adjustment of status.[131] Parole may also be granted to the respondent on humanitarian grounds.[132] For example, parole status was automatically granted to the Mariel Boat refugees from Cuba during 1980's.[133] Thus, Cuban Nationals are able to apply for an adjustment of status for legal permanent residence under the Cuban Adjustment Act or CAA.[134] For Post-Removal Detention, if ICE is unable to remove a foreign national within ninety (90) days from entry into the U.S., it may grant an "Order for Supervised Release" for an indefinite period.[135]

In *Padilla v. the Commonwealth of Kentucky*, the U.S. Supreme Court held that "a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences."[136] The U.S. Supreme Court further held that a deportation proceeding is a "particularly severe penalty" and that although deportation is civil rather than criminal, it has been closely connected to the criminal process for nearly a century.[137]

In 1994, U.S. Congress enacted the "*Violence Against Women Act*" (VAWA) and allows an individual to apply for a cancellation of removal if there is evidence of physical abuse.[138] Under VAWA, the following abused individuals can apply for a cancellation of removal if he or she is classified as: (1) a spouse abused by a U.S. Citizen or Legal Permanent Resident spouse; (2) a parent abused by his or her own U.S. Citizen son or daughter; (3) a parent of a child abused by a U.S. Citizen or Legal Permanent Resident parent or (4) children unmarried and under the age of twenty-one can be a derivative beneficiary of the applicant.[139]

Moreover, the battered applicant must have had continuous presence in the U.S. for at least three (3) years preceding the filing for cancellation of removal, demonstrate good moral character for that three (3) year period,

131. Graciela Quilantan, 25 I. & N. Dec. 285, 293 (BIA 2010), (The Court concluded, " that the respondent made a lawful entry into the United States after inspection and authorization by an immigration officer within the meaning of section 101(a)(13)(A) of the Act and that she is not removable under section 212(a)(6)(A)(i). Furthermore, because the respondent was thus "admitted" to the United States, she is eligible for adjustment of status under section 245(a) of the Act.").

132. 8 U.S.C. § 1182(d)(5)(A) (2018).

133. Cuban Refugees Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (1966).

134. *Id.*

135. 8 U.S.C. § 1231(a)(3) (2019); *See also* Zadvydas v. Davis, 533 U.S. 678 (2001).

136. Padilla v. Kentucky, 559 U.S. 356, 369 (2010).

137. *Id.*

138. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of 18, 22, 27, 34, and 42 U.S.C.) VAWA is still effective under the "*Violence Against Women Reauthorization Act of 2019*". 139. 8 U.S.C. § 1229b(2)(A)(i) (2008).

have no evidence of any admissibility or removability grounds under INA Section 212 and 237, have no aggravated felony convictions, and prove there would be an extreme hardship to respondent and her children or parents whom must be U.S. Citizens or Legal Permanent Residents.[140]

Other forms of relief available to a respondent who is a victim of abuse or sex trafficking are the "*U Visa*" and "*T Visa*"[141] To apply for a "T Visa", a respondent must demonstrate that he or she is a victim of a severe form of trafficking, prove physical and continuous presence in the U.S., comply with trafficking investigations and prosecutions, and show circumstances of extreme hardship involving unusual and severe harm if removed from the United States.[142] It is imperative that an attorney is familiar with the evidentiary standard applied in the evaluation of such relief and any credible evidence presented to USCIS and IJ's.

Family-based immigration relief may be applied through a "Petition for Alien Relative" also referred to as the USCIS Form I-130.[143] A respondent who did not enter the country legally but is an immediate relative of a U.S. Citizen or Legal Permanent Resident can apply as a beneficiary through a "Petition for Alien Relative."[144] The U.S. Citizen or Legal Permanent Resident must respectively show proof of a valid green card (Form I-551), a U.S. birth certificate, or a Certificate of Naturalization to be eligible to submit a "Petition for Alien Relative" on behalf of a respondent.[145] The "Petition for Alien Relative" with all supporting exhibits must be filed with USCIS for processing.[146] Practicing attorneys must submit the relevant documents that establish the bonafide relationship between the petitioner and beneficiary.[147]

For a spouse beneficiary, it is prudent for practicing attorneys to be familiar with states that recognize common-law marriages. For example in Texas, the petitioner and beneficiary may prove a common-law marriage by establishing three elements under the Texas Family Code: (1)that the parties held out to the community at large that the parties are spouses; (2) there is a present agreement for the parties to be spouses by written evidence or through their actions and (3) that the parties cohabitated as

140. 8 U.S.C. § 1229b(2)(A) (2018).

141. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 144 Stat. 1464 (codified as amended in scattered sections 18, 22, 27, 34, and 42U.S.C.). 142. 8 C.F.R. § 214.11(b) (2017).

143. USCIS Form *I-130, Petition for Alien Relatives*, U.S. CITIZENSHIP AND IMMIGR SERVICES, https://www.uscis.gov/i-130 (last visited Mar. 11, 2020).

144. 8 C.F.R. § 204.1(a) (2019).

145. 8 C.F.R. § 204.2(a)(2) (2019).

146. *I-130, Petition for Alien Relatives*, U.S. CITIZENSHIP AND IMMIGR SERVICES, https://www.uscis.gov/i-130 (last visited Mar. 11, 2020).

147. *Adjudicator's Field Manual 21.3 Petition for a Spouse*, U.S. CITIZENSHIP AND IMMIGR SERVICES, https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-3429/0-0-0-4407.html.

spouses.[148] Appellate cases in Texas have established that parties can prove the element of "holding out" as spouses by producing a filed tax returns, real estate documents or insurance policies as supporting evidence of a common law marriage.[149] It is very crucial for practicing attorneys to extensively interview the parties to avoid any suspicion related to a "sham marriage" between the parties and any evidence proving that the marriage was sought solely for immigration purposes prior to procuring an adjustment of status and naturalization. The elements of a spousal relationship must be clearly established by thoroughly examining all pertinent evidence that the petitioner and beneficiary provide, such as their marriage license, property agreements, life insurance policies listing each other as respective beneficiaries, etc. These pertinent documents should be readily available by the parties at the outset of the completion of the "Petition for Alien Relative".[150] If the petition for the spousal beneficiary is granted, he or she will be given a conditional green card.[151] If divorce is filed within two years of the spousal beneficiary being granted Legal Permanent Resident (LPR) status, there is a legal presumption that the marriage between the parties was a sham marriage.[152]

A "Request for Evidence" Letter (RFE) may be issued by the U.S. Citizenship and Immigration Services for additional supporting documents proving the existence of a good-faith marriage.[153] Thus, it is important to note that a sham marriage has been defined by the BIA as a marriage which may comply with all the formal requirements of the law but which the parties entered into with no intent, or 'good faith', to live together and which is designed solely to circumvent the immigrations laws, thus, sham marriages are not recognized for immigration purposes.[154]

In a "Petition for Alien Relative", the petitioner bears the burden of proving that the beneficiary is entitled to legal status in the U.S.[155] For a child beneficiary, petitioner must provide a valid birth certificate that lists him or her as a biological parent, step-parent or adoptive parent of that child.[156] For a parent beneficiary, petitioner must show his or her own birth certificate that lists that beneficiary as a natural parent, adoptive parent or

148. TEX. FAM. CODE ANN. §2.401(a)(2) (2005). (" In a judicial, administrative, or other proceeding, the marriage of a man and woman may be proved by evidence that the man and woman agreed to be married and after the agreement they lived together in this state as husband and wife and they represented to others that they were married.").

149. *See* Nguyen v. Nguyen, 355 S.W.3d 82, 85, 88-89 (Tex. App. 2011).

150. 8 C.F.R. § 216.4(a) (2009).

151. 8 C.F.R § 216.2(a) (2019).

152. 8 C.F.R. § 216.3(b) (2019).

153. *21.3 Petition for a Spouse*, U.S. CITIZENSHIP AND IMMIGR SERVICES, https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-3429/0-0-0-4407.html.

154. Patel , 19 I. & N. Dec. 774, 783-84 (BIA 1988).

155. Brantigan, 11 I. & N. Dec. 493 (BIA 1966).

156. 8 C.F.R. § 204.2(a)(3)-(5) (2019).

as a step-parent through marriage to the child's legal parent.[157] In addition to providing evidence to establish the bonafide relationship between petitioner and beneficiary, an eligible petitioner must have an income of at least 125 percent of the federal poverty level and must execute a valid affidavit of support for that beneficiary.[158] The benefits conferred by an approved "Petition for Alien Relative" will enable the respondent to apply for an adjustment of status.[159]

Respondent seeking discretionary relief for an "Application for Asylum, Withholding of Removal and Convention against Torture" must be physically present in the U.S. and prove a credible well-founded fear of persecution based on (1) race; (2) religion; (3) nationality; (4) political opinion; or (5) membership in a particular social group (PSG).[160] In addition, a respondent must be unable or unwilling to return to respondent's country of nationality.[161] If proven, respondent has created a presumption that he or she has a well-founded fear of "future persecution."[162] In addition, there is a required one (1) year filing deadline from the time of point of entry into the U.S.[163] Moreover, the immigration judge must receive the copy of the filed asylum application and all supporting documentation.[164] Once the asylum application is reviewed by the immigration judge, DHS can rebut the presumption by a preponderance of the evidence that the country in question has substantially changed and that the respondent no longer has a well-founded fear of persecution.[165] The applicant must meet all the requisite qualifications for refugee status to be granted an asylum status, however, asylum does not guarantee Legal Permanent Resident (LPR) status.[166]

A respondent should seek a "Withholding of Removal" relief if he or she is: (1) ineligible for asylum grounds for failure to not file an asylum within the one-year deadline without "changed" or "extraordinary" circumstances and (2) has aggravated felony conviction or extensive criminal history.[167] Respondent must show that he or she is fleeing from his or her country of nationality based on race, religion, nationality or

157. 8 C.F.R. § 204.2(a)(5) (2019).

158. 8 C.F.R. § 1183a(a)(1)(A) (2009).

159. *I-485, Application to Register Permanent Residence or Adjust Status*, U.S. CITIZENSHIP AND IMMIGR SERVICES, https://www.uscis.gov/i-485(lsat visited Mar. 20, 2020). 160. Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987) (To qualify for asylum, respondent must prove these elements laid out in Board of Immigration Appeals (BIA) Case). 161. 8 U.S.C. § 1101(a)(42)(A) (2019); 8 U.S.C. § 1158(b)(1)(a)-(b)(i) (2019). 162. U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL § 10.5 (2016). 163. 8 U.S.C. § 1158(d) (2008).

164. 8 C.F.R. § 1208.4 (2019).

165. INS v. Cardoza Fonseca, 480 U.S. 421, 425 (1987).

166. 8 U.S.C. §1101(42)(A) (2014).

167. 8 U.S.C.A. § 1158(a)(2)(D) (West 2009); 8 U.S.C.A. § 1158(B)(1) (West 2009).

membership in a social group or political opinion.[168] Respondent has a higher burden of proof in contrast to an asylum application and a clear probability of persecution must be established before an immigration judge.[169]

Under Article 3 of the Convention Against Torture (CAT), a respondent must demonstrate that he or she is fleeing the country based on substantial grounds that he or she will "more likely than not" be tortured if ordered to return to that country.[170] Torture is defined as "severe pain or suffering (physical or mental) that is inflicted by or at the instigation of or with the consent or acquiescence of a public official, or other person acting in an official capacity" and as an "extreme form of cruel and inhumane punishment that does not extend to lesser forms of cruel, inhumane or degrading treatment or punishment."[171] Article 3 of the Convention Against Torture (CAT) also provides a form of mandatory relief that allows an immigration judge to refrain from ordering the expulsion, return, or extradition of the respondent to a country where there are "substantial grounds for believing that he would be in danger of being subjected to torture."[172]

Under the *Immigration Nationality Act of 1990*, Temporary Protective Status (TPS) was created by U.S. Congress and provides a discretionary form of relief for foreign nationals.[173] In an immigration removal proceeding, a respondent must show a continuous physical presence and residence in the U.S., that he or she is not subject to any bars to TPS, such as convictions for aggravated felonies or more than two misdemeanors, terroristic activity, engaging in persecution, and that respondent submitted a timely application for TPS benefits.[174] TPS provides freedom from removal, gives eligibility to apply for an Employment Authorization Document to legally work in the U.S. and confers lawful nonimmigrant status; however, there is no eligibility for Legal Permanent Resident (LPR)" status.[175] For example, respondents who are foreign nationals from certain countries may be eligible for relief under the *Nicaraguan Adjustment and Central American Relief Act (NACARA)* enacted in 1997.[176] Foreign nationals who have entered into the U.S. before December 31,

168. 8 C.F.R. § 208.16(b) (2004).

169. 8 C.F.R. § 208.16(b)(2) (2004).

170. 8 C.F.R. § 208.17(d)(3) (1999).

171. G.A. Res. 39/46, Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Dec. 10, 1984).

172. Najjar v. Ashcroft 257 F. 3d 1262, 1303 (11th Cir. 2001).

173. 8 U.S.C. § 1254a (2019).

174. 8 U.S.C.A. § 1254a(2)-(B)(i)(ii) (West 1995).

175. Arrabally & Yerrabelly, 25 I. & N. Dec. 771 (BIA 2012).

176. Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, § 203, 111 Stat. 2160, 2197 (1997).

1991 from certain Former Soviet Bloc Eastern countries including, but not limited to, Russia, Latvia, Lithuania, East Germany, and Yugoslavia are eligible relief under NACARA.[177] TPS relief is also available to foreign nationals of countries facing civil upheaval and natural disasters such as in Haiti and Cuba.[178]

If eligible for "Voluntary Departure (VD)" as a form of relief, the immigration judge must first give the respondent the fair opportunity to accept the granting of the VD if he or she can post the bond amount and meet all of the other conditions set by the immigration court.[179] The immigration judge must further advise the respondent of the civil penalty amount and the ten year bar of any eligible relief if the respondent fails to voluntarily depart the U.S. as ordered.[180]

Voluntary Departure has different requisites and implications depending on the timing of the application at a "Master Calendar" hearing" or an "Individual Merits" hearing.[181] If the request for Voluntary Departure is filed prior to a "Master Calendar" hearing, respondent must waive all forms of relief and concede to allegations of removability.[182] In addition, the respondent must have no aggravated felony convictions and pose no security risk, have good moral character, and demonstrate the financial ability to depart the U.S.[183] If granted by the immigration judge, the respondent has up to one hundred twenty (120) days to voluntarily leave the country.[184] One benefit of being granted a Voluntary Departure is that it allows the respondent the dignity to leave the U.S. without the stigma of a

177. *Id.*

178. See 8 U.S.C. § 1254a (2019). ("If the Attorney General finds that there is an ongoing armed conflict within the state and, due to such conflict, requiring the return of aliens who are nationals of that state to that state (or to the part of the state) would pose a serious threat to their personal safety" or "there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected, the foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state, and the foreign state officially has requested designation under this subparagraph; or the Attorney General finds that there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety, unless the Attorney General finds that permitting the aliens to remain temporarily in the United States is contrary to the national interest of the United States.").

179. 8 C.F.R. § 1240.26(c)(3)(i) –(iii) (2019).

180. 8 U.S.C. § 1229d (2018) ("shall be subject to a civil penalty of not less than $1,000 and not more than $5,000; and shall be ineligible, for a period of 10 years, to receive any further relief under this section and sections 1229b, 1255, 1258, and 1259 of this title.").

181. 8 U.S.C. § 1229c(d) (2018) ("shall be subject to a civil penalty of not less than $1,000, and not more than $5,000; and shall be ineligible, for a period of 10 years, to receive any further relief under this section and sections 1229b, 1255, 1258 and 1259 of this title."). 182. *Id.; See also* Arguelles, 21 I. & N. Dec. 811, 815 (BIA 1999)

183. 8 CFR § 1240.26 (2019).

184. *Id.*

deportation classification for purposes of immigration status.[185] Thus, a Voluntary Departure allows the foreign national to return back to the U.S. without being subject to a ten (10) year bar of re-entry.[186] If the request for Voluntary Departure is filed at the conclusion of the "Individual Merits" hearing, respondent must have had continuous presence in the U.S. for one (1) year, must have financial resources to depart the U.S., and obtain a bond of $500.00 within five (5) days of the immigration judge decision along with possession of travel documents to leave the U.S. by the court ordered deadline.[187] If granted by the immigration judge, the respondent has up to sixty (60) days to depart the U.S.[188] A respondent must strictly comply with the conditions in the Voluntary Departure Order.[189] It is important to note that a foreign national is ineligible for this relief if the respondent is inadmissible or removable on national security grounds, failed to leave pursuant to the Voluntary Departure Order, or the respondent failed to appear at the removal hearing and is ordered to be removed in *absentia.*[190]

V. CONCLUSION

The purpose of this article is to provide a practical overview of the U.S. Immigration System and the removal process involving the interrelated agencies that significantly impact a respondent's eligibility for relief to remain in the U.S. In summation, a respondent in a removal proceeding has certain due process rights under the Fifth Amendment and Fourteenth Amendment of the U.S. Constitution.[191] A respondent is entitled to adequate notice of the removal proceedings and afforded a fair opportunity to defend against the U.S. Government's charges of removability and seek eligible relief to legally remain in the United States.[192] DHS, USCIS, and the immigration courts are the interrelated agencies that significantly impact a respondent's eligibility for relief to remain in the U.S.[193] Immigration law is a specialized area of practice that requires an attorney to display one of the most zealous representations of basic human rights and the passionate belief that all individuals, regardless

185. 8 U.S.C. § 1229c (2018).
186. 8 U.S.C. § 1229c(b)(1)-(2) (2018).
187. 8 C.F.R. § 1240.26(c)(i)(2)(i).
188. 8 U.S.C. § 1229c(2)(a).
189. 8 C.F.R. § 240.25 (2018).
190. 8 C.F.R. § 1240.26(c)(1)-(4) (2018).
191. Kim Ho Ma v. Ashcroft, 257 F.3d 1095, 1109 (9th Cir. 2001).
192. Salgado-Diaz v. Gonzales, 395 F.3d 1158, 1162 (9th Cir. 2005) (as amended); *see also* Vilchez v. Holder, 682 F.3d 1195, 1199 (9th Cir. 2012); United Sates v. Reyes-Bonilla, 671 F.3d 1036, 1045 (9th Cir. 2012),; Pangilinan v. Holder, 568 F.3d 708, 709 (9th Cir. 2009) .
193. *Executive Office of Immigration Review*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/eoir (last visited Mar. 20, 2020).

of their non-citizenship background, are entitled to certain due process under the U.S. Constitution. Thus, to provide effective counsel to a client in removal proceedings, it is important that an attorney be strictly disciplined in grasping and paying attention to the constant evolution of immigration laws that affect foreign nationals in our current time.

The current nature of our U.S. Immigration System is influenced by our presidential administration and the U.S. Department of Homeland Security. The Board of Immigration Appeals (BIA) also plays a part in the evolving nature of the U.S Immigration System. Federal Judges from Circuit Court of Appeals, particularly out of the Ninth Circuit Court of Appeals, have struck down all or portions of current Executive Orders which are aimed at restricting relief for aliens, particularly DACA and asylum claims for foreign nationals. [194] Practicing attorneys should continue to stay informed of current news, Executive Orders, BIA Decisions, federal case law, federal legislation and all other immigration regulations that affect a respondent's eligibility for relief in removal proceedings.

Practicing attorneys should be familiar with the *Executive Office of Immigration Review's Immigration Court Practice Manual* that references all the necessary rules of pleadings, process of service, and court procedures related to the immigration removal proceedings.[195] The court manual provides immigration attorneys with a step-by-step guide of the procedures and pleadings involved in removal proceedings. The basic ethical issues in every immigration case must always be in the forethought of an attorney's mind when he or she is retained or consulted by a respondent.[196] Under *Padilla*, an attorney has a fiduciary duty to his or her client to provide competent advice related to the client's risk of deportation if he or she plead to a criminal charge.[197]

In an effort to fulfill his or her fiduciary duty to the client, it would be prudent for an attorney to diligently research all the necessary resources, including seeking co-counsel with an extensive experience in immigration law that can assist in advising the client of the likely outcome in an immigration removal proceeding. Furthermore, it is important to understand that immigration judges expect attorneys appearing before the Court to display diligence and competence in practicing immigration law and demonstrate a reverence for the strict filing deadlines along with

194. The Latest: Courts Ruling Disrupts Migrant Family's Hearing, US NEWS, (Feb. 28, 2020, 4:58 pm), https://www.usnews.com/news/politics/articles/2020-02-28/the-latest-confusion in-immigration-courts-after-ruling.

195. U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL (2016).

196. Padilla v. Kentucky, 559 U.S. 356, 369 (2010)

197. *Id.*

knowledge of the applicable forms of relief that can be sought for the client.[198]

Pro-bono organizations such as *Catholic Charities, Kids-In-Need-of Defense (KIND), RAICES, YMCA* and the network of legal clinics like *Thurgood Marshall School of Law Immigration Legal Clinic* provide free legal services to individuals in need of representation in removal proceedings.[199] Practicing attorneys working with these pro-bono organizations have gained vast experience in removal proceedings. It is inspiring to see the determination and zealous representation that has been demonstrated by immigration attorneys across the country who continue to fight and provide strong free legal representation for individuals seeking to remain in the U.S. These passionate attorneys guide their clients through the immigration removal process while informing their clients of their rights and eligibility for certain relief.

As the Clinical Professor and Director of the Immigration Legal Clinic at Thurgood Marshall School of Law, I am deeply grateful for the extensive experience that I have gained and applied as a practicing attorney in the immigration law field. With this gained experience, I have been able to effectively supervise and train our dedicated law students at the Thurgood Marshall School of Law Immigration Legal Clinic, teach courses in the LL.M in Immigration and Naturalization Law Program and assist in the TMSL Immigration Externship Program. This overall experience has been the most rewarding journey in my teaching career as a law professor and in the growth of my immigration law practice. Observing my students apply the learned nuances in our legal clinic cases and carry these practical experiences forward as the new generation of immigration attorneys has been a blessing and fills me with immense pride. As a law professor, practicing attorney, and a daughter of a Vietnamese immigrant who came to the U.S. after the Vietnam War, it is my ultimate goal to continue to teach and inspire law students to become destined immigration attorneys to be strong voices for individuals who seek to obtain legal status in our great country and to ultimately achieve the "American Dream".

198. U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL § 1 (2016). 199. *National Immigration Legal Service Directory*, IMMIGR. ADVOC. NETWORK, https://www.immigrationadvocates.org/nonprofit/legaldirectory/search?state=TX (last visited Mar. 20, 2020).