EXPEDITED REMOVAL

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Panelists

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What is Expedited Removal (ER)?

- Summary removal order issued by DHS
  - No hearing or right to see a judge
  - No ability to collect and submit evidence to contest whether person subject to ER
  - No evidentiary findings
  - No opportunity for relief from removal except for asylum
  - No opportunity for administrative or judicial review
Governing provisions:

● Expedited removal process: INA § 235(b); 8 C.F.R. § 235.

● Credible fear process: INA § 235(b)(1)(B); 8 C.F.R. §§ 208.30/1208.30; 1003.42

● Claim status review proceedings: INA § 235(b)(1)(C); 8 C.F.R. §§ 235.3(b)(5)/1235.3(b)(5); Matter of Lujan-Quintana, 25 I&N Dec. 53 (BIA 2009).

Why ER is terrible for clients

● Applied by CBP officers in unlawful, coerced and rushed fashion
  • No notice of charges
  • No attorney access
  • Failure to ask about fear or refer for credible fear interviews
  • Fabrication of evidence
  • No interpreters
  • Individuals forced to sign forms they do not understand
  • Individuals threatened with family separation or long detention

Who is subject to ER?

● Applies to two categories of persons:
  • Those arriving at a port of entry (INA § 235(b)(1)(A)(i)); or
  • Those who:
    • have not been admitted or paroled;
    • have been in the U.S. for less than 14 days;
    • were apprehended at or within 100 miles of a land border (INA § 235(b)(1)(A)(i)); 69 Fed. Reg. 48877, 48880 (2004));

AND ...
Who is subject to ER?

- Applies only if DHS determines the person is subject to 1 of 2 possible inadmissibility charges:
  - INA § 212(a)(6)(C) (misrepresentations and false claims to U.S. citizenship); or
  - INA § 212(a)(7) (lack of valid entry documents)

- If any other inadmissibility ground is charged, person must be placed in § 240 proceedings (8 C.F.R. § 235.3(b)(3))

Possible future expansion

- ER could be expanded to noncitizens
  - apprehended anywhere in the U.S.
  - who cannot demonstrate two years’ continuous presence (INA § 235(b)(1)(A)(iii)(I)).
  - Executive Order, Border Security and Immigration Enforcement Improvements (1/25/17);
  - Notice of any expansion will be published.

ER does not apply to:

- Unaccompanied children who meet the definition
- Applicants for admission under the visa waiver program
  - 8 C.F.R. § 235.3(b)(1)
- U.S. citizens, LPRs, asylees and refugees
  - INA § 235(b)(1)(C)
The ER process

- DHS can either issue ER order or in agency's discretion and "at any time," DHS may permit person to withdraw application for admission (INA § 235(a)(4)).
- 3 procedural tracks:
  - Claim status review for those claiming U.S. citizen, LPR, asylee, refugee status
  - Credible fear interview if fear expressed
  - All others, ER order issued after interview and supervisor's sign off (Forms I-876A and I-876B).

Credible fear process

- If fear of return expressed, referral to asylum officer (AO) for credible fear (CF) interview is mandatory:
  - If AO finds CF, no ER order & person put in 240 removal proceedings;
- If AO finds no CF, limited IJ review;
  - IJ can receive evidence and review is de novo - 8 C.F.R. §§ 1003.42(c), (d)
  - If the IJ finds CF (reverses AO), no ER order and § 240 proceedings instead;
  - If the IJ finds no CF (affirms AO), no appeal to the BIA.

Strategies for positive CF findings

- Where person has a fear, goal is to get positive CF determination:
- Steps to take at AO level:
  - Prepare for and attend the CF interview;
  - Ask AO to reconsider negative CF determination (8 C.F.R. § 1208.30(g)(2)(iv)(A));
Strategies for positive CF findings

- Steps at IJ review level:
  - Prepare client for, and try to participate in, IJ review;
  - File motion to reconsider/reopen negative IJ decision (8 C.F.R. § 1208.30(g)(2)(iv)(A)) and ask for a stay.

- Other possible steps:
  - File motion to reopen with CBP under 8 C.F.R. § 103.5 motion (more on these later)
  - If client denied CF based on changes to the CF standard, contact ACLU IRP.

Vacatur or cancellation

- An ER order is vacated when a person establishes a credible fear of persecution. If vacated, full 240 (IJ) removal hearing.
  - 8 C.F.R. §§ 235.6; 208.30(f); Immigration Court Practice Manual Ch. 7.7(d)(ii)(B).
- Orders of exclusion, deportation, or removal issued by DHS will be “deemed canceled by operation of law” when USCIS approves a petition for U nonimmigrant status.
Requests for a stay and/or PD

● Strong equities and thick filings improve chances.

● Consult other resources:
  • Sample stay of deportation request, ICE Form I-246, prior Morton Memo re: victim protections and civil rights litigants (http://www.asistahelp.org/en/access_the_clearinghouse/working_with_survivors_at_risk_of_removal);
  • Guidelines for stay support letters (http://nationalimmigrationproject.org/practice.html).

Motions under 8 C.F.R. § 103.5

● Regulation authorizes reconsideration or reopening of Service decisions by an “affected party.” Should file within 30 days unless can show that delay was reasonable and beyond the person’s control.
  • Formal motion - samples on NIPNLG website, http://nationalimmigrationproject.org/ourLit/motions_dhs_removal.html;
  • Include cover letter, Form I-290B, and Form G-28;
  • Attach exhibits (e.g., decs., evidence of relief eligibility, prior 103.5 grants).
Motions under 8 C.F.R. § 103.5

● The motion should:
  • Make a legal argument why CBP should reconsider/reopen the ER order:
    • E.g., not subject to ER, statute/regulation/constitutional right violated.
  • Make a prima facie showing for the relief requested:
    • If seeking NTA, show eligibility for relief in proceedings;
    • If seeking request to withdraw admission, show why discretion merited and/or why person would be eligible for a visa but for the ER order.

Commonly violated provisions:

● 8 C.F.R. § 235.3(b)(4) (requiring a CF referral and preparation of a record and sworn statement);
● 8 C.F.R. § 235.3(b)(2)(i) (requiring “supervisory concurrence” before serving ER order);
● 8 C.F.R. § 235.3(b)(7) (requiring supervisory review and approval and mandating review of claims and evidence of lawful admission or parole);
● 8 C.F.R. § 235.30(d)(5) (right to interpreter at CFI);
● 8 C.F.R. § 292.5(b) (right to counsel where the applicant for admission is the focus of a criminal investigation and is in custody);
● INA § 235(b)(1)(B)(iv); 8 C.F.R. § 235.30(d)(4) (right to consult someone prior to CFI);
● INA § 235(b)(1)(B)(iii)(d) (right to CFI record and analysis of negative CFI determination)

Review of status claims

● Where there is a claim to USC, LPR, asylee or refugee status:
  • DHS “shall” attempt to verify the claim (8 C.F.R. § 235.3(b)(5)(iii)).
  • If verified, no ER
  • If not verified, DHS must:
    • advise of the penalties of perjury;
    • place the person under oath;
    • take a written declaration/statement;
    • issue an ER order, and
    • refer the case to an IJ for claim status review.
Claim status review by IJ

- IJ must review status claim and whether person’s status was (lawfully) terminated by final administrative action:
  - If IJ finds for person, ER order vacated but DHS may initiate § 240 proceedings (unless USC);
  - If IJ finds against person, ER order affirmed, no BIA appeal (habeas review).
- **Matter of Lujan-Quintana**, 25 I&N Dec. 53 (BIA 2009): BIA held it lacked jurisdiction over DHS appeal of IJ finding that person a USC.

Limited habeas review of ER orders

- Review under INA § 242(e)(2)
- Statute provides for review of these claims:
  - citizenship;
  - not ordered removed under INA § 235(b)(1); and
  - petitioner is an LPR, refugee, or asylee (status not terminated)
- If prevail, judge only can order a § 240 removal hearing (INA § 242(e)(4))

Limited habeas review of ER orders

- Gov’t position is that courts lack jurisdiction over most challenges to ER orders, so getting review is uphill battle
- **Castro v. United States Dept of Homeland Sec.**, 835 F.3d 422 (3d Cir. 2016) (cert. denied)
- If questions, contact ACLU IRP.
RESOURCES


QUESTIONS