

# EXPEDITED REMOVAL

June 13, 2017

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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

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## 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).

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## 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

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## 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 ...

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## 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))

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## 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)(II)).
    - Executive Order, *Border Security and Immigration Enforcement Improvements* (1/25/17);
  - Notice of any expansion will be published.
    - John Kelly, *Implementing the President's Border Security and Immigration Enforcement Improvements Policies* (Feb. 20, 2017).

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## ER does not apply to:

- Unaccompanied children who meet the definition
  - See 6 U.S.C. § 278(g)(2) (UC definition); 8 U.S.C. §§ 1232(a)(2)(A)&(B), 1232(a)(5)(D).
- 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)

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## 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).

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## 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.

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## 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));
  - Request re-interview (Michael A. Benson, Executive Assoc. Commissioner for Field Operations, Immigration & Naturalization Service, Memorandum, Expedited Removal: Additional Policy Guidance (Dec. 30, 1997)).

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## 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.

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## Strategies for positive CF findings

- 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.

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## 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.
  - 8 C.F.R. §§ 214.14(c)(5)(i) & (f)(6).

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## Request for a stay and/or PD

- Could ask DHS to stay deportation pending:
  - motion for reconsideration w/AO or IJ
  - request for re-interview
  - USCIS adjudication of U visa petition;
  - pending adjudication of 103.5 motion
  - opportunity to show individual not subject to ER (for instance, if an unaccompanied child).
- Could ask for PD in the form of:
  - allowing person to withdraw an application for admission; or
  - Issuing an NTA

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## 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/](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>).

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## 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](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).

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## 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 w/draw admission, show why discretion merited and/or why person would be eligible for a visa but for the ER order.

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## 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)(II)** (right to CFI record and analysis of negative CFI determination)

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## 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)(i)).
  - 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.

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### 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.

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### 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))
- *Kabenga v. Holder*, No. 14-CV-9084, 76 F. Supp. 3d 480 (S.D.N.Y. Jan. 2, 2015) and 2015 U.S. Dist. LEXIS 20361 (S.D.N.Y. Feb. 19, 2015).

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### 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 Dep't of Homeland Sec.*, 835 F.3d 422 (3d Cir. 2016) (cert. denied)
- If questions, contact ACLU IRP.

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## RESOURCES

- Expedited Removal: What Has Changed Since Executive Order No. 13767, Border Security and Immigration Enforcement Improvements (Feb. 20, 2017)

- [https://www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/final\\_expedited\\_removal\\_advisory\\_updated\\_2-21-17.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/final_expedited_removal_advisory_updated_2-21-17.pdf)

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## QUESTIONS

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