



**PRACTICE ADVISORY<sup>1</sup>**

**February 20, 2017**

**EXPEDITED REMOVAL: WHAT HAS CHANGED SINCE EXECUTIVE ORDER NO. 13767, BORDER SECURITY AND IMMIGRATION ENFORCEMENT IMPROVEMENTS (ISSUED ON JANUARY 25, 2017)**

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**Expedited Removal Prior to Executive Order 13767**

**1. What is expedited removal, and who does it apply to now?**

Expedited removal is a procedure that allows a Department of Homeland Security (DHS) official to summarily remove a noncitizen without a hearing before an immigration judge or review by the Board of Immigration Appeals (BIA). *See* 8 U.S.C. § 1225(b)(1). Under the Immigration and Nationality Act (INA), any individual who arrives at a port of entry in the United States and who is inadmissible under either 8 U.S.C. § 1182(a)(6)(C) (misrepresentations and false claims to U.S. citizenship) or § 1182(a)(7) (lack of valid entry documents), is subject to expedited removal. 8 U.S.C. § 1225(b)(1)(A)(i).<sup>2</sup> Additionally, the Secretary of DHS has the authority to apply expedited removal to any individual apprehended at a place other than a port of entry, who is inadmissible under either of those grounds, has not been admitted or paroled, and cannot show that he or she has been continuously present in the United States for two or more years. 8 U.S.C. §§ 1225(b)(1)(A)(i), (iii).

To date, DHS has limited its application of expedited removal to noncitizens inadmissible for one of the above-stated grounds who either arrive at a port of entry or are apprehended within 14 days of their arrival and within 100 miles of an international land border. *See* Designating Aliens For Expedited Removal, 69 Fed. Reg. 48877, 48880 (2004).

**2. How does expedited removal differ from removal proceedings before an immigration judge?**

Expedited removal is substantially different from removal proceedings in immigration court conducted under 8 U.S.C. § 1229a. In removal proceedings, an immigration judge hears the case. 8 U.S.C. § 1229a(a)(1). Noncitizens may have an attorney represent them (at their own expense), may apply for relief from removal, and are entitled to substantial due process protections. *See, e.g., Pangilinan v. Holder*, 568 F.3d 708, 709 (9th Cir. 2009) (“[I]mmigration proceedings must conform to the Fifth Amendment’s due process requirement.”). Finally, even if an immigration

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<sup>2</sup> DHS may not charge an individual with any other ground of inadmissibility in expedited removal proceedings; if an officer chooses to include an additional charge, the individual must be placed in removal proceedings before an immigration judge under 8 U.S.C. § 1229a. *See* 8 C.F.R. § 235.3(b)(3).

judge orders an individual removed, that person may appeal the decision, first to the Board of Immigration Appeals (BIA) and then to a federal court of appeals. 8 U.S.C. §§ 1229a(c)(5), 1252.

Expedited removal, as applied by DHS, does not have any of those procedural protections. The DHS officer who is authorized to issue an order of expedited removal operates as prosecutor and judge and often arrests an individual and orders him or her deported on the same day. With limited exceptions, discussed below, the government takes the position that noncitizens subject to expedited removal have no right to an appeal. At least one court has held that certain immigrants in expedited removal proceedings have no right to counsel. *United States v. Peralta-Sanchez*, Nos. 14-50393, 14-50394, \_ F.3d\_, 2017 U.S. App. LEXIS 2165 (9th Cir. Feb. 7, 2017).

### **3. What happens if a person subject to expedited removal has a fear of return?**

Congress included safeguards in the expedited removal statute to ensure that individuals fleeing persecution are not returned to their countries of origin. If, during the expedited removal process before a DHS officer, an individual indicates either an intention to apply for asylum or any fear of return to his or her home country, the officer must refer the individual for an interview with an asylum officer. 8 U.S.C. §§ 1225(b)(1)(A)(ii), (B); 8 C.F.R. § 235.3(b)(4). Significantly, DHS officers are required to read individuals subject to expedited removal a script that informs them of their right to speak to an asylum officer if they express a fear of return. *See* 8 C.F.R. § 235.3(b)(2)(i) (requiring reading of Form I-867A); DHS Form I-867A (including an advisal that individuals who express “fear or . . . concern about being removed from the United States or about being sent home . . . will have the opportunity to speak privately and confidentially to another officer about [their] fear or concern”).

Upon referral, the asylum officer will conduct a “credible fear interview,” which is designed “to elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture.” 8 C.F.R. § 208.30(d). An individual will be determined to have a credible fear of persecution if there is a “significant possibility,” taking into account the credibility of his or her statements and any other facts known to the asylum officer, that the individual can establish eligibility for asylum under 8 U.S.C. § 1158 or for withholding of removal under 8 U.S.C. § 1231(b)(3). 8 C.F.R. § 208.30(e)(2).

If the asylum officer determines that the individual satisfies the credible fear standard, the applicant is taken out of the expedited removal process, is served with a Notice to Appear, and is placed in removal proceedings before an immigration judge under 8 U.S.C. § 1229a where he or she can pursue an asylum application and any other form of relief for which he or she is eligible. 8 C.F.R. § 208.30(f); *see also* 8 U.S.C. § 1225(b)(1)(B)(ii).

If the asylum officer makes a negative credible fear determination, the officer must provide a written record of the determination. Upon request, the individual must be provided with prompt review of the determination by an immigration judge. 8 U.S.C. §§ 1225(b)(1)(B)(iii)(II)-(III); *see also* 8 C.F.R. §§ 208.30(g)(1), 1003.42, 1208.30. If the immigration judge determines that the individual has a credible fear of persecution, the expedited removal order will be vacated and DHS will institute removal proceedings under 8 U.S.C. § 1229a. 8 C.F.R. § 1003.42(f).

If the immigration judge determines that the individual does *not* have a credible fear, the case will be remanded to DHS to execute the expedited removal order. *Id.* Upon request by the individual, an asylum officer may reconsider a negative credible fear determination after notifying the immigration judge. *See* 8 C.F.R. § 1208.30(g)(2)(iv)(A). Alternatively, an asylum officer may grant the individual a second interview where the individual “has made a reasonable claim that compelling new information concerning the case exists and should be considered.” Michael A. Benson, Executive Assoc. Commissioner for Field Operations, Immigration & Naturalization Service, Memorandum, *Expedited Removal: Additional Policy Guidance* (Dec. 30, 1997) (AILA Doc. No. 98021090).

#### **4. In what situations, and how, can someone *directly* challenge an expedited removal order in federal court?**

Under the government’s construction of the applicable statutory provisions, federal court review of expedited removal orders is extremely limited.

The INA bars courts of appeals from reviewing expedited removal orders on petitions for review. *See* 8 U.S.C. §§ 1252(a)(2)(A), (e); *see also* *Shunaula v. Holder*, 732 F.3d 143 (2d Cir. 2013); *Khan v. Holder*, 608 F.3d 325 (7th Cir. 2010); *Brumme v. INS*, 275 F.3d 443 (5th Cir. 2001).

The INA provides for habeas review of expedited removal orders, but purportedly limits the scope of review to the following determinations: (1) whether the petitioner is a noncitizen (i.e., whether the person has a citizenship claim); (2) whether the petitioner was ordered removed under § 1225(b)(1) (the expedited removal provision); and (3) whether the petitioner can prove by a preponderance of the evidence (i.e., 50.1%) that he or she (a) is an LPR; (b) has been admitted as a refugee; or (b) has been granted asylum, and that such status has not been terminated. 8 U.S.C. §§ 1252(e)(2)(A)-(C). Title 8 U.S.C. § 1252(e)(5) further defines the scope of this inquiry; it provides that review is limited to the existence of the order and whether it relates to the petitioner and further precludes review of actual inadmissibility or eligibility for relief from removal.

The government takes the position that the federal courts lack jurisdiction to review most challenges to expedited removal orders. However, these restrictions arguably would not preclude habeas review of, for example, expedited removal orders against individuals who claim that they have been present in the United States for more than 14 days or were located more than 100 miles from the border, and, therefore, are not properly “ordered removed under § 1225(b)(1)” as DHS currently applies it. Additionally, there are ongoing challenges to the government’s interpretation, asserting that if the statute is construed to restrict review of challenges to expedited removal, it would violate the Constitution. *See, e.g., Castro v. U.S. Dep’t of Homeland Sec.*, 835 F.3d 422 (3d Cir. 2016) (discussed further below).

If a petitioner prevails, the habeas court can order the government to provide the individual with a removal hearing before an immigration judge under 8 U.S.C. § 1229a. *See* 8 U.S.C. § 1252(e)(4).

Litigation concerning the scope of habeas review under this provision is minimal. In *Smith v. U.S. Customs and Border Protection*, 741 F.3d 1016 (9th Cir. 2014), a Canadian citizen sought

habeas review under 8 U.S.C. § 1252(e)(2)(B) from outside the United States. He argued that Customs and Border Protection (CBP) lacked authority to issue him an expedited removal order. He asserted that Canadian nonimmigrants could not be subject to expedited removal proceedings, because the relevant documentation requirements are waived for Canadian nonimmigrants. On appeal, the Ninth Circuit “assum[ed], without deciding, that there is no [physical] custody requirement under § 1252(e)(2)(B),” but affirmed the order. 741 F.3d at 1020. The Court reasoned that the documentation requirements are only waived for Canadians who have established that they are “nonimmigrants” and that “Smith failed to defeat the presumption that he should have been classified as an intending immigrant.” *Id.* at 1021. Therefore, the Court held that Smith was “‘ordered removed’ under § 1225,” and rejected his claim on the merits.<sup>3</sup> *Id.* at 1022. *See also id.* at 1022 n.6 (“Because we are reviewing Smith’s petition under § 1252(e)(2), we need not reach the question whether and under what circumstances a petitioner who establishes none of the permissible bases under § 1252(e)(2) might still have claims under the Suspension Clause . . .”).

In *Castro v. U.S. Dep’t of Homeland Sec.*, 835 F.3d 422 (3d Cir. 2016), twenty-eight families sought review of their expedited removal orders based on negative credible fear determinations. They asserted that the expedited removal statute had to be construed to provide for such review, and that otherwise, the Suspension Clause would be violated. The Third Circuit rejected the availability of habeas corpus review under § 1252(e)(2)(B). 835 F.3d at 429-34. The court also found that because they were seeking initial admission to the United States, the petitioners were unable to invoke habeas review under the Suspension Clause, even though they had entered the country before CBP apprehended them. *Id.* at 444-49. On December 22, 2016, the petitioners filed a petition for writ of certiorari to the Supreme Court (Case No. 16-812). The government’s response is due March 13, 2017.

In a third case, a district court held that a petitioner with a bona fide claim that his lawful permanent resident status had not been lawfully terminated at the time he was subject to expedited removal was entitled to a stay of removal and an immigration court hearing. *See Kabenga v. Holder*, 76 F. Supp. 3d 480 (S.D.N.Y. 2015) (jurisdictional decision); No. 14-cv-9084, 2015 U.S. Dist. LEXIS 20361 (S.D.N.Y. Feb. 19, 2015) (merits decision). That case is on appeal, and proceedings currently are held in abeyance. *Kabenga v. Lynch*, No. 15-1367 (2d Cir.).

Finally, although the INA provides for systemic challenges to the validity of determinations under § 1225(b) and implementation of the expedited removal system, such review is subject to the statute’s accompanying venue, deadline, and scope of review provisions. *See* 8 U.S.C. § 1252(e)(3). Venue is only permissible in the U.S. District Court for the District of Columbia. 8 U.S.C. § 1252(e)(3)(A). The district court is limited to reviewing: (1) the constitutionality of § 1225(b) or any implementing regulation; or (2) whether any regulation or written policy is inconsistent with certain sections of the INA or is otherwise unlawful. 8 U.S.C. § 1252(e)(3)(A).

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<sup>3</sup> Smith also raised a second argument, that even assuming expedited removal could be applied to him, he was not inadmissible; the Ninth Circuit held that it lacked jurisdiction over the second argument because 8 U.S.C. § 1252(e)(5) expressly prohibited review of whether one was “actually inadmissible.” *Id.* at 1021–22, & n.4.

Any such action must be filed “no later than 60 days after the challenged [regulation or written policy] is first implemented.” 8 U.S.C. § 1252(e)(3)(B). Past systemic challenges under this provision have not been successful. *See AILA v. Reno*, 199 F.3d 1352 (D.C. Cir. 2000). Due to the complexities of such challenges and the stakes involved, attorneys are encouraged to contact the organizational authors of this advisory before contemplating any such action. Please send an email to [kristin@nipnlg.org](mailto:kristin@nipnlg.org).

**5. In what situations, and how, can someone indirectly challenge an expedited removal order in federal court?**

Expedited removal orders can serve as an underlying factual predicate in both civil prosecutions for reinstatement of removal under 8 U.S.C. § 1231(a)(5) and criminal prosecutions for illegal reentry after removal under 8 U.S.C. § 1326.

In the civil reinstatement context, thus far, courts of appeals have concluded that they lack jurisdiction to review collateral challenges to expedited removal orders. *See, e.g., de Rincon v. DHS*, 539 F.3d 1133, 1138-39 (9th Cir. 2008); *Lorenzo v. Mukasey*, 508 F.3d 1278, 1281 (10th Cir. 2007).

In the criminal context, at least one circuit has held that the government cannot use an expedited removal order as the predicate offense to a § 1326 charge where the defendant demonstrated a violation of his due process rights in the expedited removal process that prejudiced him. *United States v. Raya-Vaca*, 771 F.3d 1195, 1205-06, 1210-11 (9th Cir. 2014) (holding that immigration officer’s failure to advise the defendant of the charge of removability and to permit him to review the sworn statement prepared by the officer violated his due process rights to notice and an opportunity to respond); *but see Peralta-Sanchez*, 2017 U.S. App. LEXIS 2165 (upholding § 1326 conviction and finding that defendant had no Fifth Amendment right to a lawyer in expedited removal proceedings and that he was not prejudiced by DHS’s failure to inform him of the possibility of withdrawing his application for admission). A rehearing petition is planned in *Peralta-Sanchez*.

**6. Is there a way to ask the issuing agency to reconsider or reopen an expedited removal order?**

Yes, expedited removal orders are covered by 8 C.F.R. § 103.5, which governs motions to reopen or reconsider DHS decisions.<sup>4</sup> Some courts of appeals have addressed the availability of 8

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<sup>4</sup> The regulation provides:

- “A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.” 8 C.F.R. § 103.5(a)(2).
- “A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy.” 8 C.F.R. § 103.5(a)(2).
- There is a 30-day deadline to file a motion to reopen or reconsider; the deadline for reopening “may be excused in the discretion of the Service where it is demonstrated that

C.F.R. § 103.5 to reopen or reconsider DHS-issued orders.<sup>5</sup> Any motion to reopen (based on new evidence) or reconsider (based on an incorrect application of law or policy) should be filed with the DHS office that issued the expedited removal order.

It is advisable to include a cover letter, Form I-290B, Form G-28, and a well-written motion supported by documentation. Whether a filing fee is required is unclear; however, counsel may wish to include either a request for a fee waiver and/or indicate that the fee will be paid upon request. The motion should explain both why DHS should vacate the expedited removal order on legal or equitable grounds and why the person subject to the order is eligible for and/or deserving of the requested relief. For example, if the motion seeks cancellation of the expedited removal order to allow the person to withdraw his or her application for admission (*see* 8 U.S.C. § 1225(a)(4)), the motion should evaluate each factor a CBP officer would consider in deciding such a request. *See Raya-Vaca*, 771 F.3d at 1206-07 (discussing factors). If the motion seeks cancellation of the expedited removal order and issuance of a Notice to Appear, the motion should demonstrate what relief is available to the person in removal proceedings before an immigration judge.

Significantly, some CBP offices may initially take the position that they lack authority to reconsider or reopen an expedited removal order. For this reason, attorneys strongly are advised to attach examples of CBP decisions vacating expedited removal orders in response to such motions. Two examples are available at [http://nipnl.org/ourLit/motions\\_dhs\\_removal.html](http://nipnl.org/ourLit/motions_dhs_removal.html) and others are available upon request. Please contact [trina@nipnl.org](mailto:trina@nipnl.org).

Lastly, DHS has discretion to elect between issuing an expedited removal order, allowing withdrawal of an application for admission pursuant to 8 U.S.C. § 1225(a)(4), or issuing a Notice to Appear and placing the individual in removal proceedings before an immigration judge. Counsel always can request that DHS exercise its prosecutorial discretion to either allow withdrawal of an application for admission or issue a Notice to Appear.

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the delay was reasonable and was beyond the control of the applicant or petitioner.” 8 C.F.R. § 103.5(a)(1)(i).

Notably, the regulation’s language expressly excludes certain matters that fall outside its general grant of authority, but expedited removal orders are not among these exclusions. *See* 8 C.F.R. § 103.5(a)(1)(i).

<sup>5</sup> *Perez-Garcia v. Lynch*, 829 F.3d 937 (8th Cir. 2016) (exercising jurisdiction to review denial of motion to reopen reinstatement order); *Escoto-Castillo v. Holder*, 658 F.3d 864, 866 (8th Cir. 2011) (accepting government’s argument that motion under 8 C.F.R. § 103.5 is an administrative remedy that must be exhausted in order to challenge an administrative removal order under 8 U.S.C. § 1228(b)); *Evers v. Mukasey*, 288 F. App’x 441, 441 (9th Cir. 2008) (unpublished) (same); *but see Aguilar-Aguilar v. Napolitano*, 700 F.3d 1238, 1242 n.3 (10th Cir. 2012) (suggesting 8 C.F.R. § 103.5 is limited to benefit request denials); *Tapia-Lemos v. Holder*, 696 F.3d 687 (7th Cir. 2012) (holding court of appeals lacked jurisdiction to review denial of a motion to reopen a reinstatement order that “duplicated” claims put forth in other filings).

## **Expanded Expedited Removal**

### **7. What does Section 11(c) of Executive Order 13767 say?**

The Executive Order instructs the Secretary of Homeland Security to apply expedited removal to the fullest extent of the law. *See* Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8793 (2017). Section 11(c) of the Executive Order states in full:

Pursuant to section 235(b)(1)(A)(iii)(I) of the INA, the Secretary shall take appropriate action to apply, in his sole and unreviewable discretion, the provisions of section 235(b)(1)(A)(i) and (ii) of the INA to the aliens designated under section 235(b)(1)(A)(iii)(II).

*Id.* at 8796.

### **8. Has the Executive Order changed who is eligible for expedited removal? How?**

The Executive Order instructs the Secretary of DHS to take action to implement the expansion. As of the date of this advisory, DHS has not yet implemented any expansion of expedited removal. In a February 20, 2017 memorandum, DHS Secretary John Kelly stated that he would publish a notice in the Federal Register designating who would be subject to expedited removal. John Kelly, Implement the President's Border Security and Immigration Enforcement Improvements Policies (Feb. 20, 2017).<sup>6</sup> This memorandum did not specify when the Federal Register notice would be published or the extent to which it would expand expedited removal; rather, Kelly stated that the notice might, “to the extent [he] determine[s] is appropriate, depart from the limitations set forth in the designation currently in force.” *Id.*

Following issuance of the Executive Order, DHS has continued to issue expedited removal orders against individuals allegedly apprehended at ports of entry, or within two weeks of entry into the United States and within 100 air miles of an international land border.

Counsel who are aware or become aware of *any* individual subject to expedited removal who 1) entered without inspection (EWI) more than 14 days before he or she was arrested, and/or 2) was arrested more than [100 miles from the border](#) are urged to contact [kristin@nipnl.org](mailto:kristin@nipnl.org) immediately.

### **9. Who is at risk of being subjected to expanded expedited removal?**

The full scope of any expansion of expedited removal will not be clear until notice of the expansion is published in the Federal Register. Should the Secretary expand expedited removal to the full extent provided by statute, immigration officers would be authorized to use it against any noncitizen apprehended anywhere in the United States who is inadmissible under either 8 U.S.C. § 1182(a)(6)(C) or § 1182(a)(7) and who entered without inspection less than two years

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<sup>6</sup> Available at [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf) .



prior to the date of the expedited removal proceedings. Because of the likelihood of an overzealous and flawed application of expedited removal, it is possible that even noncitizens who have been present for more than two years will risk being subject to expedited removal.

#### **10. Is expanded expedited removal likely to violate noncitizens' due process rights?**

Even in its existing form, the expedited removal process raises serious due process concerns. As Judge Pregerson recently explained, in expedited removal cases:

[T]he deportation process can begin and end with a CBP officer untrained in the law. . . . There is no hearing, no neutral decision-maker, no evidentiary findings, and no opportunity for administrative or judicial review. This lack of procedural safeguards in expedited removal proceedings creates a substantial risk that noncitizens subjected to expedited removal will suffer an erroneous removal.

*Peralta-Sanchez*, 2017 U.S. App. LEXIS 2165, at \*42 (Pregerson, J., dissenting) (footnotes omitted); *but see* Questions 4-6 *supra* (outlining limited options that do exist to challenge expedited removal orders). In reality, CBP officers fail to provide some people even the minimal procedural protections included in the expedited removal process. *See, e.g., Raya-Vaca*, 771 F.3d at 1204-06 (holding that CBP officer violated due process rights in expedited removal proceedings by failing to provide notice of charges against noncitizen or opportunity to respond).

The risks are especially great for people trapped in the expedited removal process who fear persecution in their countries of origin. Although CBP officers are required to refer people with a fear of return to asylum officers—and to inform people subject to expedited removal of the protections to which they are entitled if they fear return, *see* Question 3, *supra*—practitioners and organizations report that officers regularly fail to do so. *See, e.g., ACLU, American Exile: Rapid Deportations that Bypass the Courtroom*, 32-40 (Dec. 2014) (describing asylum seekers who were required to sign forms in languages they do not understand, were interviewed without interpreters, were not asked about their fear of return, and/or were not allowed to speak to asylum officers); American Immigration Council, *Mexican and Central American Asylum and Credible Fear Claims: Background and Context*, 9-10 (May 2014) (noting that “advocates complained that clients were harassed, threatened with separation from their families or long detentions, or told that their fears did not amount to asylum claims”). The expedited removal system also ensnares people with a legal right to remain in the United States—such as U.S. citizens and lawful permanent residents—who are unable to explain their immigration status or citizenship claims before they are rushed or coerced through the deportation process, including people with serious mental disabilities. *See, e.g., American Exile* at 44-58.

If DHS expands the scope of individuals subject to expedited removal, these ongoing problems similarly will increase. Under expedited removal as outlined in Section 11(c) of the Executive Order, DHS would apply the process to a greater number of individuals, potentially including both U.S. citizens and noncitizens with substantial ties to the United States.<sup>7</sup> Even assuming that

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<sup>7</sup> For example, Sharon McKnight, a U.S. citizen who has cognitive disabilities, was unlawfully deported to Jamaica through expedited removal in 2000 after immigration officers believed her passport was fraudulent. In 2008, Mark Lyttle, a U.S. citizen who has bipolar

DHS officers give individuals they apprehend an opportunity to prove how long they have been in the United States, it will be difficult for people to provide proof of up to two years’—rather than two weeks’—presence.

**11. After someone is arrested by DHS, how can she show that she must receive an immigration court hearing, rather than be subject to expedited removal?**

It is too early to know how DHS will implement an expansion of expedited removal. As noted above, DHS has discretion to elect between issuing an expedited removal order, allowing withdrawal of an application for admission pursuant to 8 U.S.C. § 1225(a)(4), or issuing a Notice to Appear and placing the individual in removal proceedings before an immigration judge. Requesting that DHS exercise its prosecutorial discretion to either allow withdrawal of an application for admission or issue a Notice to Appear is advisable.

Furthermore, the INA provides that an individual may be subject to expedited removal only if she or he “has not affirmatively shown, to the satisfaction of an immigration officer, that [she or he] has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility.” 8 U.S.C. § 1225(b)(1)(A)(iii)(II); *see also* 8 C.F.R. § 235.3(b)(1)(ii). Therefore, DHS officers are obligated to put an individual into immigration court proceedings, rather than expedited removal, if that person provides proof that she or he has been present in the United States for two years (or a lesser amount of time depending upon the scope of any expansion of expedited removal).<sup>8</sup> However, there are pros and cons to carrying documents demonstrating length of residency. *See* Question 12, *infra*.

**12. Once expedited removal is expanded, should people who have lived in the United States for sufficient time such that they should not be subject to expedited removal carry proof of presence?**

Unfortunately, there is no correct answer to this question. Consequently, whether to carry documents proving length of presence will be an individual choice that each person will need to make. Below are some pros and cons of carrying documents.

The advantage of carrying documents proving presence is straightforward: it may convince a DHS officer to place someone potentially subject to expedited removal into removal proceedings before an immigration judge instead. Individuals who can make this showing seemingly have a strong incentive to carry such documents. Of course, given the ongoing problems with the existing expedited removal process, *see* Question 10, *supra*, there is no guarantee that DHS officers will treat all those individuals who carry proof as having “shown, to the satisfaction of an immigration officer” that they have been present in the United States for sufficient time such that they should not be subject to expedited removal. In addition, to the extent that people

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disorder and developmental disabilities, similarly was deported to Mexico unlawfully. *American Exile* at 49.

<sup>8</sup> As discussed *supra* at Question 4, an individual who was present in the United States for sufficient time such that he or she should not be subject to 8 U.S.C. § 1225(b)(1) arguably could seek habeas review if DHS nonetheless issues an expedited removal order.

regularly carry and provide documentation to DHS, this may create an implicit heightened standard that *all* people should provide such documentation.

Moreover, there are potential disadvantages to carrying documents, including:

- To the extent that the documents may contain proof of the individual's alienage or lack of lawful immigration status, DHS could then use that proof against the individual, or others mentioned in the documents, in removal proceedings (or, potentially, criminal proceedings).
- Even if the documents do not contain such proof on their face, immigration officials may treat individuals who choose to carry such documents as implicitly conceding their undocumented status, regardless of whether it is lawful to do so.
- Depending on their content, documents turned over to DHS that contain proof that an individual worked without authorization potentially could be used in criminal prosecutions against the employer or even the individual if, for example, the documents contained proof that he or she used a false social security number.
- To the extent that individuals carry the original versions of documents proving their length of presence, they risk losing those documents, including to DHS officers who may fail to return them.

**13. If a person chooses to carry documents establishing proof of presence in the United States, what types of documents should they carry?**

In other contexts, to prove length of residency and/or presence in the United States, DHS and the immigration courts previously have relied upon photocopies of documents from individuals' schools, places of work, churches, and banks, among others. However, at this time, DHS has not indicated what types of documents the agency would consider sufficient to establish length of presence or whether providing photocopies of documents that establish presence would be acceptable.

**14. In what situations, and how, can someone challenge an expanded expedited removal order?**

The same avenues that currently exist for a federal court or administrative review of an expedited removal order in an individual case will continue to exist following any expansion of expedited removal, including for individuals subjected to expedited removal despite being present in the United States for sufficient time that they should not fall within the scope of any expansion. These are discussed above in Questions 4-6.

As noted in Question 4, *supra*, the INA also provides for review over a systemic challenge to the validity of determinations under § 1225(b) and the implementation of the expedited removal system. 8 U.S.C. § 1252(e)(3). In particular, there are statutory restrictions on where such a challenge can be brought, when it can be brought, and what the court can review. *Id.*

The ACLU Immigrants' Rights Project, the National Immigration Project of the National Lawyers Guild, and the American Immigration Council are now investigating the expansion of

expedited removal. If you learn of an individual being subjected to expedited removal who either 1) entered without inspection more than 14 days before he or she was arrested, and/or 2) was arrested more than [100 miles from the border](#), please contact [kristin@nipnlg.org](mailto:kristin@nipnlg.org) immediately.