RESOLVED, That the American Bar Association encourages Congress and the Department of Justice to amend laws and regulations to ensure that noncitizens who have the statutory right to seek judicial review of orders of removal in the circuit courts of appeal are able to exercise that right without relinquishing the benefits or protections granted during their administrative immigration proceedings. Specifically, the Association urges:

(1) that Congress amend 8 U.S.C. §1252(b)(3)(B) and applicable regulations to establish an automatic stay of removal of a final administrative decision of the Board of Immigration Appeals until either (a) the expiration of the thirty-day period for filing a Petition for Review in the Court of Appeals having jurisdiction; or (b) a ruling by the Circuit Court on a motion for a stay of removal pending disposition of the appeal, whichever is earlier; and

(2) that the Department of Justice amend 8 C.F.R. §1240.26(i), which provides for automatic termination of a grant of voluntary departure upon the filing of a petition for review in the Court of Appeals, and to allow that the period of voluntary departure granted by the Board of Immigration Appeals, if any, should be stayed during any period of judicial review and reinstated following the decision of the Circuit Court.
Persons who seek to immigrate to the United States face substantial obstacles and high stakes. Noncitizens typically are not fluent in English, are ethnic or racial minorities in the United States, and lack adequate financial resources. The American system of immigration adjudication is complex and difficult to navigate. The stakes for many noncitizens are high: they face loss of livelihood, permanent separation from U.S. family members, or even persecution or death if deported to their native countries.

The disparity in outcomes of immigration proceedings, depending on whether noncitizens are unrepresented or represented, is striking. In particular, lack of adequate representation diminishes the prospects of fair adjudication for the noncitizen, delays and raises the costs of proceedings, calls into question the fairness of a convoluted and complicated process, and exposes noncitizens to the risk of abuse and exploitation.

Under the umbrella of the Department of Justice, the Board of Immigration Appeals (“BIA” or “Board”) is the administrative body that reviews decisions of immigration judges in removal and deportation cases. Decisions by the Board can be appealed through the federal courts by filing a petition for review with the relevant district court. Access to review of immigration cases by the federal judiciary is essential to ensure consistency, fairness, and due process in the administration of our nation’s immigration system. However, many barriers to obtaining judicial review of immigration decisions remain.

The Antiterrorism and Effective Death Penalty Act (“AEDPA”)
and the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) together have deprived the federal courts of jurisdiction to review removal orders for noncitizens convicted of certain crimes, barred challenges to certain discretionary acts of the Attorney General, restricted all judicial review — to the extent still permitted — to the courts of appeals, and imposed a 30-day deadline for a petitioner to appeal a final removal order to the court of appeals. Filing a petition for review in the court of appeals does not stay a removal order. Additionally in 2005, Congress enacted the REAL ID Act

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that decisively eliminated habeas jurisdiction over removal orders (other than expedited removal orders), but permitted review by the courts of appeals of constitutional claims and questions of law that were previously subject to habeas review.

In the 2010 Reforming the Immigration System report, the Commission on Immigration noted that the 30-day deadline for filing a petition for review of a final removal order with the court of appeals was unduly short, particularly for petitioners in detention or without representation. The 2010 Report recommended that Congress amend the Immigration and Nationality Act to provide for a 60-day period in which to appeal, as is the case for non-immigration appeals against the government.9 The 2010 Report further suggested that the BIA amend its regulations to provide that each final removal order in which the government prevails must clearly state the right to appeal, the applicable circuit court, and the deadline for filing the federal appeal.10 Since the 2010 report, the landscape for judicial review of removal orders has remained mostly unchanged.11 Congress has passed no legislation altering the scope of judicial review or restoring the possibility of courts of appeals remanding to the agency for further fact-finding in appropriate circumstances.

Seeking review of a removal decision has significant implications on a grant of voluntary departure, a form of immigration relief in which a petitioner agrees to leave the U.S. of his own accord, and the enforceability of an alternative removal order. Voluntary departure is automatically terminated if a motion to reopen or motion to reconsider is filed with the Board.12 Voluntary departure also automatically terminates upon the filing of a petition for review before the circuit court of appeals.13

General eligibility requirements for Voluntary Departure. Voluntary departure can be granted at any point during immigration removal proceedings, from the preliminary hearing stage until the conclusion of proceedings.14 The immigration judge has more discretion to grant voluntary departure during the preliminary stages of proceedings. During that period, the immigration judge can allow up to 120 days for an individual in proceedings to depart the country if he makes the request at a preliminary hearing, is not requesting other forms of relief, concedes removability, waives appeal, and has not been convicted of an aggravated felony or engaged in terrorist activity.15 Voluntary departure can also be granted at the end of proceedings, but more restrictions apply in that case.

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9 2010 Report 4-21–4-22.
10 2010 Report 4-21.
12 8 C.F.R. § 1240.26(b)(3)(iii).
13 8 C.F.R. § 1240.26(i).
14 IMMIGRATION & NATIONALITY ACT §240B(a) [hereinafter I.N.A.]; INA § 240B(b).
15 8 C.F.R. § 1240.26(b)(1).
The immigration judge can allow up to 60 days for an individual in proceedings to depart. However, the individual in proceedings also must have been in the U.S. for a year or more prior to the start of proceedings, must be able to show good moral character for a minimum of 5 years prior to the request, cannot be convicted of an aggravated felony or engaged in terrorist activity, provide proof of financial ability and intent to leave the country, and post a voluntary departure bond within 5 days of the voluntary departure grant. Failure to leave the country after a grant of voluntary departure has severe penalties, such as ineligibility for many forms of relief for a period of 10 years and civil fines ranging from $1,000 to $5,000.

In practical terms, in order to exercise the right to appeal before the circuit court, the petitioner must file (and be granted) a stay of removal; otherwise, a removal order would take effect during the pendency of his appeal and he could be deported from the U.S. The criteria for the grant of a stay of removal request is for the petitioner to show that there is a likelihood of success on the merits of the appeal, he will suffer irreparable harm if the stay is not approved, harm to the petitioner is greater than harm to the other party if the stay is not granted, and approval of the stay would serve the public interest. As noted above, any grant of voluntary departure is terminated once federal review is requested, but a stay of voluntary departure would aid petitioners in the review process.

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16 8 C.F.R. § 1240.26(c).
17 8 C.F.R. § 1240.26(c)(1).
18 8 C.F.R. § 1240.26(c)(3).
20 In the Ninth and Second Circuits there is an exception to the general circuit court practice regarding stay of removal motions. In these circuits, the filing of a stay motion temporarily stays removal until the motion is adjudicated. The Ninth Circuit has held that the filing of a stay motion automatically confers a temporary stay by operation of law. Deleon v. INS, 115 F.3d 643, 644 (9th Cir. 1997); see also 9th Cir. General Order 6.4(c)(1). In the Second Circuit, the court entered into an informal “forbearance” agreement with the Department of Homeland Security. The Department has agreed to delay effectuating the removal of an alien while his or her petition for review is pending with the court, if the petition is accompanied by a motion for a stay of removal. See Persaud v. Holder, No. 10-6506, 2011 WL 5326465, at *1 (W.D.N.Y. Nov. 3, 2011). In other circuits, however, Immigration and Customs Enforcement (“ICE”) may remove the petitioner immediately. For individuals who are detained, particularly noncitizens from Mexico and Central America, removal can occur within days or even hours of the issuance of a removal order. See T. Realmuto, J. Chicco, N. Morawetz & B. Werlin, Seeking a Judicial Stay of Removal in the Court of Appeals: Standard, Implications of ICE’s Return Policy and the OSG’s Misrepresentation to the Supreme Court, and Sample Stay Motion (May 25, 2012). https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/fed/2012_May_judicial-stay-remov.pdf.

21 Once an order of deportation or removal from the Board of Immigration Appeals (“BIA”) becomes administratively final, it is immediately enforceable, absent a stay from the court of appeals. An order of removal becomes final: (1) upon the BIA’s dismissal of the noncitizen’s appeal; (2) if the case is certified to the Board or Attorney General, upon the date of the subsequent decision ordering removal; or (3) upon overstay of the voluntary departure period granted or reinstated by the Board or the Attorney General. 8 C.F.R. § 1241.1(a), (d), (f).

to know that they still have the option to leave the U.S. on their own if ultimately unsuccessful on appeal without the cloud of a removal order. The current regulation discourages individuals from exercising their due process rights; instead, if a non-citizen decides to exercise the right to judicial review, he must face the consequences of a removal order.

Immigration cases continue to make up a significant proportion of the federal courts of appeals’ civil docket nationwide (10% in 2017).\textsuperscript{23} Nonetheless, the percentage of BIA decisions appealed has seen a steady decline from 28.7% of all BIA cases completed at its apex in 2006 to 16% in 2016.\textsuperscript{24} Efforts to expand access to counsel have also increased, but there is still no systemic, guaranteed right to access to counsel in immigration proceedings, nor is there the necessary framework for ensuring that existing programs are administered consistently and fairly across all parts of the country. As enforcement actions increase, this vital component of ensuring due process in immigration matters is ever more crucial.

While a noncitizen is legally entitled to pursue a petition for review of the BIA’s decision from abroad, once a noncitizen has been involuntarily removed to his or her home country, the right to pursue an appeal is often moot for all practical purposes. This is because it will be virtually impossible for the petitioner to obtain counsel or file the petition for review pro se from abroad. Moreover, for those whose case involves a threat of persecution or torture, there is no adequate remedy if they have been deported, tortured or killed by the time the circuit court issues a ruling. These concerns highlight the need for a process that balances the right of a noncitizen to appeal in a way that is meaningful against the government’s legitimate interest in finality of litigation and why access to a stay of removal and stay of voluntary departure after filing a federal appeal are critical for due process in immigration cases.

Respectfully submitted,

Wendy S. Wayne
Chair, Commission on Immigration
August 2019

\textsuperscript{23} See 2019 Report at UD 4-9, Table 4-1.

\textsuperscript{24} Compare 2010 Report at 4-24, Table 4-1 with 2019 Report at UD 4-9, Table 4-1.
GENERAL INFORMATION FORM

Submitting Entity: Commission on Immigration

Submitted By: Wendy S. Wayne

1. **Summary of Resolution(s).** The Resolution encourages Congress to amend 8 U.S.C. §1252(b)(3)(B) to allow for automatic stay of the execution of a removal order when a petition for review is filed with the Circuit Courts of Appeals. Additionally, the Department of Justice is encouraged to amend 8 C.F.R. §1240.26(i) to allow for the granted period of voluntary departure to be stayed during the review period by the federal court.

2. **Approval by Submitting Entity.** The resolution content was discussed and approved by Commission Members between April 22 and April 26. Previously, Members were also active in preparing a Report from which the recommendations for the resolution originate, *2019 Update: Reforming the Immigration System*. The Update Report was released in March 2019 after 3 years of research and development.

3. **Has this or a similar resolution been submitted to the House or Board previously?** No

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?**

   **06M107C:** urges an administrative agency structure that will provide all non-citizens with due process of law in the processing of their immigration applications and petitions, and in the conduct of their hearings or appeals, by all officials with responsibility for implementing U.S. immigration laws. Such due process in removal proceedings should include proceedings like those governed by the Administrative Procedure Act, in person and on the record, with notice and opportunity to be heard, and a decision that includes findings of facts and conclusions of law; availability of full, fair, and meaningful review in the federal courts where deportation or removal from the United States is at stake; and the restoration of discretion to immigration judges when deciding on the availability of certain forms of relief from removal.

   **83M119:** Oppose legislation to limit availability and scope of judicial review of administrative decisions regarding reopening and reconsideration of exclusion or deportation proceedings or asylum determinations on constitutional and statutory writs of *habeas corpus*. Oppose legislation to limit to less than 60 days the time within which petitions for review must be filed.

   **10M114D:** To restore the U.S. Court of Appeals’ authority to review discretionary decisions of the Attorney General under the abuse of discretion standard in effect prior
to 1996 legislation. Such legislation should provide that courts apply a presumption in favor of judicial review and specifically reject attempts by the Attorney General to label additional actions as discretionary and insulate them from review.

The proposed policy would compliment and support existing policy.

5. **If this is a late report, what urgency exists which requires action at this meeting of the House?** n/a

6. **Status of Legislation.** (If applicable) n/a

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** The Commission plans to coordinate with the ABA Governmental Affairs Office to advocate with relevant contacts within Congress, the Department of Homeland Security, the Department of Justice, and other stakeholders to bring awareness of this policy and effect legislative change or updated procedures that reflect due process and fairness in the immigration adjudication system.

8. **Cost to the Association.** (Both direct and indirect costs) Adoption of the resolution will not result in expenditures for the ABA.

9. **Disclosure of Interest.** (If applicable) No known conflict of interest exists.

10. **Referrals.**

    Center on Children and the Law  
    Commission on Hispanic Rights and Responsibilities  
    Section of Civil Rights and Social Justice  
    Section of Criminal Law  
    Section of International Law  
    Standing Committee on Pro Bono and Public Service  
    Working Group on Unaccompanied Minor Immigrants

11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

    Meredith A. Linsky  
    Director, Commission on Immigration  
    1050 Connecticut Ave NW, Suite 400  
    Washington, DC 20036  
    Tel: 202-662-1006
12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

Mary Ryan  
Unaccompanied Minor Immigrant Working Group Liaison  
Commission on Immigration  
155 Seaport Blvd.  
Boston, MA 02210  
Tel: 619-439-2212  
E-mail: mryan@nutter.com
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   Access to review of immigration cases by the federal judiciary is essential to ensure consistency, fairness, and due process in the administration of our nation’s immigration system. However, barriers to obtaining judicial review remain. A petition seeking review must be filed—and the circuit court must grant—a separate motion for stay of removal. Without such motion and approval, the removal order will become final and the petitioner could be removed from the U.S. during the pendency of the appeal. Additionally, voluntary departure is terminated upon filing a petition for review, which may deter individuals from exercising their right to seek judicial review.

2. **Summary of the Issue that the Resolution Addresses**

   Once an order of deportation or removal from the Board of Immigration Appeals becomes administratively final, it is immediately enforceable, absent a stay from the court of appeals; there is no automatic stay of removal during the pendency of the appeal and ICE may remove the petitioner immediately. While a noncitizen is legally entitled to pursue a petition for review from abroad, once a noncitizen has been involuntarily removed to his or her home country, the right to pursue an appeal is often moot for practical purposes. The automatic termination of voluntary departure and the absence of an automatic stay of removal or deportation upon the filing of a petition for review with the circuit court are part of the statutory barriers that prevent meaningful judicial review of immigration decisions. This is critical for those whose case involves a threat of persecution or torture; there is no adequate remedy if they have been deported, tortured, or killed by the time the circuit court issues a ruling.

3. **Please Explain How the Proposed Policy Position Will Address the Issue**

   The recommendations would provide balance for the right of a noncitizen to appeal in a way that is meaningful against the government’s legitimate interest in the finality of litigation.

4. **Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified**

   There are no minority views of which we are aware.