Department of Homeland Security

Reforming the Immigration System

Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases

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1. Introduction on the Department of Homeland Security

Removal proceedings in the immigration courts under section 240 of the Immigration and Nationality Act ("INA") are the primary means by which the United States government expels inadmissible or deportable noncitizens from the United States. Under certain circumstances, a noncitizen may be removed by officers of the Department of Homeland Security ("DHS") pursuant to streamlined administrative removal procedures. Although noncitizens are subject to other types of removal procedures, this Report examines removal proceedings before immigration courts and the streamlined administrative removal procedures before DHS officers, as well as administrative and judicial review (if any) of determinations made and orders issued in such removal proceedings.

A noncitizen is “removable” if he or she is “inadmissible” pursuant to section 212 or “deportable” under section 237. The government does not routinely inspect noncitizens after their admission into the country to determine whether they are inadmissible or deportable. Therefore, a noncitizen typically can become subject to removal proceedings when he or she: (1) is apprehended for an alleged violation of U.S. immigration law; or (2) applies for certain immigration benefits, and during the course of adjudicating such application, the U.S. government believes he or she is inadmissible or deportable.

Removal proceedings under section 240 do not commence until a written charging document called a Notice to Appear ("NTA") is served on a noncitizen and filed with an immigration court.

DHS serves both an enforcement function, in preventing noncitizens from entering the United States illegally and removing noncitizens who succeed in doing so, and a service function, by providing services or benefits to facilitate entry, residence, employment, and naturalization of legal immigrants. Therefore, DHS personnel typically make the first contact with, and initiate removal proceedings against, noncitizens.

DHS officers decide certain matters related to removal proceedings. These include, among other things, removal of certain noncitizens in expedited proceedings, denial of affirmative asylum applications or applications for lawful permanent residence status, and applications by detained noncitizens to be released on bond. In addition, pursuant to section 239, a DHS officer initiates a removal proceeding in an immigration court by serving an NTA on a noncitizen and filing this NTA with an immigration court. DHS attorneys also represent the U.S. government in these court proceedings.

This Part 1 of the Report describes the decisions and other actions of DHS officers and attorneys that affect removal adjudications, identifies issues and problems at the DHS level with respect to removal proceedings, and recommends reforms to address these issues.

1 In general, pursuant to section 240 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1229a, noncitizens believed to be “inadmissible” (INA § 212, 8 U.S.C. § 1182) or “deportable” (INA §237, 8 U.S.C. § 1227) are afforded an adjudication of their case, in removal proceedings before immigration courts.

2 See infra Sections III.C.2 and III.E.

3 For example: (1) U.S. district court has discretion to enter a removal order at the time of sentencing for a noncitizen who is deportable pursuant to section 237(a)(2)(A) of the INA following a request made by a United States Attorney, with the concurrence of the Department of Homeland Security ("DHS"); and (2) a special removal court consisting of five U.S. district court judges appointed by the Chief Justice of the Supreme Court presides over the removal proceedings of noncitizens alleged to be terrorists deportable under section 237(a)(4)(B) of the INA.

4 Accordingly, all references in this Report to “removal proceedings” are limited in scope to such proceedings.

5 All statutory section references in this Part 1 of the Report are to the INA unless otherwise noted.

6 Noncitizens may be apprehended for alleged immigration violations in a variety of ways, including pursuant to the Criminal Alien Program of Immigration and Customs Enforcement ("ICE"), which identifies removable noncitizens incarcerated in federal, state, and local correctional facilities, with the goal of obtaining removal orders for these noncitizens prior to the completion of their sentences. See infra Section II.C.3.d.


8 See infra Section II.C.

II. Background on the Department of Homeland Security

This Section describes the role of DHS in removal proceedings and how such proceedings are initiated.

A. Basic Terms and Concepts

For purposes of U.S. immigration law, there are five general classes of noncitzens:10

- noncitizens seeking admission to the United States;11
- noncitizens admitted temporarily as non-immigrants;12
- noncitizens admitted as asylees or refugees;13
- undocumented noncitizens;14 and
- noncitizens admitted permanently as immigrants (i.e., lawful permanent residents or “LPRs”).15

Unless entitled to some form of relief from removal, the following groups of noncitizens are removable under the INA: (1) “inadmissible” noncitizens seeking admission to the United States; (2) certain non-immigrants, asylees, and refugees; and (3) undocumented noncitizens. In addition, notwithstanding the fact that LPRs have been admitted into the United States as immigrants and may eventually become U.S. citizens,15 they are “removable” under certain circumstances.16

During removal proceedings pursuant to section 240, a noncitizen may apply for relief from removal. Forms of such relief include (without limitation):

- asylum under section 208;17

10 The term “noncitizen,” as used in this Report, has the same meaning as “alien” under the INA. The INA defines an “alien” as any person who is not a citizen or national of the United States. INA § 101(a)(3), 8 U.S.C. § 1101(a)(3).
11 “Admission” means a noncitizen’s lawful entry into the United States after inspection and authorization by an immigration officer. INA § 101(a)(13), 8 U.S.C. § 1101(a)(13). A noncitizen seeking to gain lawful status in the United States by applying for lawful permanent residency or for an immigrant or non-immigrant visa, whether the person is located inside or outside the United States, is seeking admission for purposes of the INA. INA § 245(a), 8 U.S.C. § 1255(a) (application for the adjustment of status to lawful permanent resident); INA § 222, 8 U.S.C. § 1202 (application for an immigrant or non-immigrant visa at a U.S. consulate).
12 Under U.S. immigration law, non-immigrants are noncitizens admitted into the United States for a designated period of time and for a specific purpose pursuant to a non-immigrant visa. Examples of non-immigrants include tourists, diplomats, noncitizen students and noncitizen workers. The federal government requires that noncitizen applicants for most non-immigrant visas prove that they are not coming to the United States to live permanently. See INA § 214(b), 8 U.S.C. § 1184(b).
13 See infra Section II.C.1.b. Subject to applicable inadmissibility bars, an asylee is entitled to adjust his or her status to a U.S. lawful permanent resident (“LPR”) after being physically present in the United States for one year after his or her asylum grant date. INA § 209(b), 8 U.S.C. § 1159(b). Subject to the applicable inadmissibility bars, a refugee is also entitled to adjust his or her status to LPR after being physically present in the United States for one year after admission as a refugee. INA § 209(a)(1), 8 U.S.C. § 1159(a)(1).
14 “Undocumented” noncitizens (sometimes referred to as “illegal noncitizens” or “out-of-status” noncitizens) are individuals present in the United States without authorization under the INA. Examples include persons who entered the United States without inspection by a CBP officer at a port of entry and noncitizens who have overstayed their non-immigrant visas. A noncitizen may be both “undocumented” and entitled to legalize his or her immigration status. For example, if a noncitizen present in the United States on a temporary specialty occupation work visa is laid off from employment but married to a U.S. citizen, DHS considers this noncitizen to be “out of status” as of the date of termination of his employment, notwithstanding the fact that the person is entitled to adjust to LPR status. See INA §§ 201(b)(2)(A)(i), 245(c), 8 U.S.C. §§ 1151(b)(2)(A)(ii), 1255(c).
15 Except for participants in the Military Accessions Vital to the National Interest pilot program (the “MAVNI program”), U.S. citizenship is available only to noncitizens who are LPRs. INA § 318, 8 U.S.C. § 1429. Pursuant to the MAVNI program, which launched on February 23, 2009 and is scheduled to expire on December 31, 2009, certain noncitizens who enlist in the U.S. military may apply immediately for U.S. citizenship without first obtaining LPR status. See U.S. Army, Today’s Focus: Military Accessions Vital to the National Interest Pilot Recruiting Program, STAND TO!, Mar. 10, 2009, http://www.army.mil/standto/archive/2009/03/10/; see also INA § 329, 8 U.S.C. § 1440; Expedited Naturalization of Aliens and Noncitizen Nationals Serving in an Active-Duty Status During the War on Terrorism, Exec. Order No. 13269, 67 Fed. Reg. 45287 (July 8, 2002).
16 U.S. citizens are not removable under the INA. However, they may be involuntarily expatriated, which causes such individuals to become “noncitizens” under the INA subject to removal proceedings. INA § 349, 8 U.S.C. § 1481 (involuntary expatriation); Vance v. Terrazas, 444 U.S. 252, 266-67 (1980) (holding that the federal government may expatriate a U.S. citizen if it establishes, by a preponderance of the evidence, that a citizen has voluntarily and knowingly renounced or abandoned his or her citizenship). In addition, denaturation or revocation of the citizenship of naturalized U.S. citizens is authorized pursuant to section 340(a), 8 U.S.C. § 1451(a), if “naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation.”
17 See infra Section II.C.1.b.
• withholding of removal under section 241(b)(3); 18
• withholding or deferral of removal under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"); 19
• cancellation of removal under section 240A; 20
• suspension of deportation pursuant to former section 212(c); 21
• adjustment to LPR status under section 245; 22
• adjustment to LPR status by registry under section 249; 23
• voluntary departure under section 240B; 24 and
• naturalization under section 318 of the INA. 25

A noncitizen may eventually seek U.S. citizenship if granted relief from removal on one of the grounds:

18 When a noncitizen applies for asylum in removal proceedings, he or she also applies for withholding of removal under section 241(b)(3). See 8 C.F.R. § 208.16(a). Unlike asylum, which is a discretionary form of relief, withholding of removal is a mandatory protection that an immigration judge must grant if the judge finds that the applicant has a clear probability of persecution in his or her country of origin due to his or her race, religion, nationality, membership in a particular social group, or political opinion. 8 C.F.R. § 208.16(d)(1). A noncitizen generally cannot receive asylum or withholding of removal if he or she, or among other things: (1) persecuted another person on account of the person’s social or political group membership; (2) committed a particularly serious crime, making him or her a threat to the community; or (3) is a danger to the security of the United States. 8 C.F.R. § 208.16(d)(2), (3); In re S.-S., 22 I. & N. Dec. 458 (BIA 1999), reenacted by In re A-G-, 23 I. & N. Dec. 270 (BIA 2002). 19 The United States acceded to CAT in 1994 and enacted legislation in 1998 to execute Article 3 of CAT, which provides, in relevant part, that “[n]o State Party shall expel, return . . . or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” See Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105–277, div. G, subdiv. B, title XXII, § 2242, 112 Stat. 2681–822 (codified at 8 U.S.C. § 1231 note). An applicant for protection under CAT must prove that it is more likely than not that he or she would be tortured if removed to a particular country. Protection under CAT is mandatory if the applicant is eligible. 20 Cancellation of removal is a discretionary remedy available to LPRs and other noncitizens who have maintained at least seven years (in the case of LPRs) or ten years (in the case of other noncitizens) of continuous residence in the United States and satisfied other applicable conditions. If a noncitizen is granted cancellation of removal, his or her status is automatically adjusted to that of a lawful permanent resident. This remedy is not available to noncitizens convicted of aggravated felonies or to non-LPRs convicted of crimes involving moral turpitude. 21 The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214 (“AEDPA”), limited the applicability of relief from removal provided by former section 212(c). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009–346 (“IIRIRA”), repealed section 212(c), effective April 1, 1997, and replaced it with cancellation of removal for LPRs under section 240A. LPRs with criminal convictions obtained by plea agreements predating these statutory changes may apply for relief pursuant to former section 212(c), and some circuit courts have ruled that noncitizens with criminal convictions obtained after trial predating these statutory changes may apply for this form of relief. See INS v. St. Cyr, 535 U.S. 289, 326 (2001). Compare Atkinson v. Attorney General, 479 F.3d 222, 230–31 (3d Cir. 2007) (holding that a noncitizen convicted following a jury trial may apply for a waiver under former section 212(c) because IIRIRA’s repeal of section 212(c) cannot be applied retroactively), with Montenegro v. Ashcroft, 355 F.3d 1035, 1037 (7th Cir. 2004) (holding that St. Cyr does not apply to noncitizens convicted following a trial because they “did not abandon any rights or admit guilt in reliance on continued eligibility for § 212(c) relief”). Similar to cancellation of removal pursuant to section 240A, relief under former section 212(c) is a discretionary waiver available to LPRs with at least seven years of continuous residence in the United States. Conviction for an aggravated felony as to which the noncitizen has served five years in prison is a bar to relief under former section 212(c). 22 A noncitizen who is in removal proceedings may apply to the immigration judge to adjust his or her status to that of an LPR pursuant to section 245. An immigration judge may, in the judge’s discretion, grant such an application if the noncitizen is admissible, the applicable immigrant visa is immediately available, and there are no bars to this relief. See infra Section III.F. 23 This is a discretionary form of relief that may be granted by an immigration judge during removal proceedings. A noncitizen is eligible for this form of relief if he or she: (1) entered the United States prior to January 1, 1972; (2) has continuously resided here since entry; (3) has good moral character; (4) is neither ineligible for citizenship nor inadmissible because of participation in terrorist activities, certain criminal or security grounds, or for noncitizen smuggling; and (5) never participated in Nazi persecutions or genocide. INA § 249, 8 U.S.C. § 1259. 24 This is a discretionary form of relief that may be granted by DHS or an immigration judge only to a noncitizen who has been physically present in the United States for at least one year and is not subject to a mandatory bar (e.g., conviction for an aggravated felony). The advantages of this form of relief are: (1) a noncitizen who departs voluntarily from the United States within the time granted is not barred from reentry; and (2) because a voluntary departure order is not a removal order, such noncitizen is not subject to a reinstatement of removal if he or she returns to the United States unlawfully. The failure to depart under a grant of voluntary departure causes the applicable noncitizen to be ineligible for ten years for: (1) cancellation of removal under section 240A; (2) adjustment of status under section 245; (3) change of non-LPR status under section 248; and (4) registry under section 249. Although voluntary departure is not available to an arriving noncitizen, INA § 240B(a)(4), 8 U.S.C. § 1229c(a)(4), DHS or an immigration judge may allow the person to withdraw his or her admission application under INA § 235(a)(4), 8 U.S.C. § 1225(a)(4). 25 Although section 318, 8 U.S.C. § 1429, prohibits an immigration judge from adjudicating a naturalization application during removal proceedings, the judge may terminate such proceedings to permit a noncitizen to pursue a naturalization application before U.S. Citizenship and Immigration Services (“USCIS”), provided that: (1) the person has established prima facie eligibility for naturalization; and (2) the matter involves exceptionally appealing or humanitarian factors. 8 C.F.R. § 1297.2(f).
listed above, except for withholding of removal under section 241(b)(3), withholding or deferral of removal under CAT, and voluntary departure.

Although the list above includes the most commonly requested forms of relief in removal proceedings, it is not exhaustive. In light of the number and variety of possible forms of relief from removal and the complexity of U.S. immigration law, practitioners uniformly recommend that a noncitizen subject to removal proceedings should seek legal counsel.

Asylum is the most commonly sought and granted form of relief in removal proceedings before immigration courts. Grants of asylum in fiscal years 2004 through 2008 accounted for 39.7% of the relief from removal granted in completed removal proceedings. The next largest type of relief granted in completed removal proceedings is adjustment to LPR status pursuant to section 245, which represented an average of 28.7% of the relief from removal granted in completed removal proceedings annually in fiscal years 2004 through 2008.

B. Structure of the Immigration Function at DHS

DHS is a cabinet-level agency with the stated goals of, among others, preventing terrorist attacks within the United States and reducing the vulnerability of the United States to terrorism. DHS performs the immigration benefit services and immigration enforcement functions of the U.S. government through three components:

- U.S. Citizenship and Immigration Services (“USCIS”);
- Customs and Border Protection (“CBP”); and
- Immigration and Customs Enforcement (“ICE”).

USCIS is responsible for immigration benefit services, including the determination of visa petitions, affirmative asylum applications, applications by individuals not in removal proceedings to adjust their immigration status, and naturalization applications. CBP performs enforcement functions at U.S. borders.

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28 For purposes of this Report, a fiscal year refers to the fiscal year of the federal government, which runs from October 1 to September 30.

29 EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, DEP’T OF JUSTICE, FY 2008 STATISTICAL YEAR BOOK D2, K4 (2009), available at http://www.usdoj.gov/eoir/statpub/fy08sbv.pdf [hereinafter EOIR FY2008 STATISTICAL YEAR BOOK]. EOIR reported that in fiscal years 2004, 2005, 2006, 2007, and 2008, asylum applications were made in 68,120, 66,310, 60,395, 57,868, 55,786, and 46,237 completed removal proceedings, respectively, and represented approximately 76.0%, 75.0%, 70.8%, 72.7%, and 67.8%, respectively, of all completed removal proceedings in which applications for relief were made. Id. at I2, N1.

30 Id. at D2, K3.

31 AUSTIN T. FRAGOMEN & STEVEN C. BELL, IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE 1-19 (2009). DHS was created on January 24, 2003 pursuant to the Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135 (“HSA”), in the wake of the September 11 terrorist attacks. DHS absorbed a myriad of functions related to border and homeland security that had been scattered among 22 federal agencies, including the Immigration and Naturalization Service (“INS”) in which the federal government’s immigration function was housed. Id. at 1-18; NAT’L IMMIGRATION FORUM, BACKGROUNDER: IMMIGRATION UNDER THE DEPARTMENT OF HOMELAND SECURITY 1 (2003), available at http://www.immigrationforum.org/images/uploads/ImmigrationandDHS.pdf. As called for by the HSA, on March 1, 2003, INS was formally abolished and all of its operations were transferred to components of DHS. See FRAGOMEN & BELL, supra, at 1-20.

32 FRAGOMEN & BELL, supra note 31, at 1-19.

33 Immigration enforcement is the regulation of those who violate the INA, including the civil provisions of the INA (e.g., noncitizens who enter without inspection or violate the conditions of their admittance), as well as its criminal provisions (e.g., marriage fraud or noncitizen smuggling). ALISON SISKIN, ET AL., CONGRESSIONAL RESEARCH SERVICE, REPORT RL33351, IMMIGRATION ENFORCEMENT WITHIN THE UNITED STATES CRS-3 (2006) [hereinafter CRS IMMIGRATION ENFORCEMENT].

34 The U.S. Coast Guard also enforces U.S. immigration law by interdicting migrants at sea, most of whom are Cubans or Haitians, and returning them to their country of origin or departure. See U.S. COAST GUARD, ALIEN MIGRANT INTERDICTIO, http://www.uscg.mil/hq/cg5/cg551/amio.asp (last modified Apr. 20, 2009).

and ports of entry. ICE is responsible for immigration enforcement functions in the interior of the United States — investigations, intelligence, detention, and removal. Within ICE, responsibility for investigations and intelligence is vested in ICE’s Office of Investigations (“OI”) and Office of Intelligence, respectively. OI officers housed in ICE address, among other enforcement issues, smuggling and trafficking in noncitizens, benefit fraud, community complaints of illegal immigration, and worksite enforcement. Responsibility for detention and removal is placed in ICE’s Office of Detention and Removal (“DRO”). In addition, DRO officers are tasked with identifying and removing criminal noncitizens and “ICE fugitives” (i.e., noncitizens who have failed to leave the United States after receiving a final order of removal). ICE’s Office of State and Local Coordination is responsible for coordinating immigration enforcement activities with state and local law enforcement agencies.

Each of USCIS, CBP, and ICE plays a significant role in the removal of noncitizens in the U.S. immigration adjudication system:

- First, CBP and ICE officers may order the removal of certain noncitizens, and these removal orders are subject to limited judicial review.
- Second, asylum officers housed in USCIS decide affirmative asylum applications of noncitizens that, if granted, enable them to remain in the United States and to apply to become LPRs and eventually U.S. citizens.
- Third, USCIS, CBP, and ICE officers initiate removal proceedings in immigration courts pursuant to section 240 by serving NTAs on noncitizens believed to be removable (and may grant voluntary departure).
- Fourth, ICE attorneys prosecute removal proceedings in immigration courts pursuant to section 240.
- Finally, ICE officers (and sometimes CBP officers) make decisions regarding the detention of noncitizens and are responsible for the removal of noncitizens subject to a removal order.

In short, DHS personnel (including officers in the field) make important and difficult decisions on a daily basis in connection with the removal of noncitizens. These decisions have material effects on noncitizens and their families.

Each of the three DHS components — USCIS, CBP, and ICE — obtains legal advice and support for these functions from its own legal staff, who are subject


38 See infra Section II.C.3.a.

39 See CRS IMMIGRATION ENFORCEMENT, supra note 33, at CRS-7; see also U.S. Immigration & Customs Enforcement, Office of Investigations – About Us, http://www.ice.gov/investigations/ (last modified Sept. 28, 2009).

40 See infra Section II.C.3.d.

41 See infra Sections I.C.2 and III.E.

42 See infra Section II.C.1.b.

43 See infra Section II.C.

44 See infra Section III.A.2.d.

45 See infra Section III.G.
to oversight by DHS’s Office of the General Counsel.\textsuperscript{48} In addition to providing legal advice and support to other DHS personnel in their respective DHS components, DHS immigration attorneys prepare legal opinions and represent the federal government in immigration-related litigation. ICE attorneys in the Office of the Principal Legal Advisor prosecute removal proceedings in the immigration courts.\textsuperscript{49} USCIS trial attorneys represent USCIS in visa petition proceedings before the Executive Office for Immigration Review,\textsuperscript{50} and CBP attorneys support the Department of Justice (“DOJ”) in civil or criminal judicial actions involving CBP.\textsuperscript{51} ICE and CBP attorneys also participate in immigration-related proceedings in the federal courts.\textsuperscript{52}

The DHS General Counsel reports directly to the DHS Secretary\textsuperscript{53} and serves as the “chief legal officer” of the department.\textsuperscript{54} The office is composed of all lawyers at its headquarters and its operating components.\textsuperscript{55} The General Counsel is ultimately responsible for all legal determinations and for overseeing all DHS attorneys.\textsuperscript{56} In addition, in this role as chief legal officer, the General Counsel serves as DHS’s regulatory policy officer, supervising the rulemaking program of DHS and making sure that all DHS regulatory actions are in compliance with applicable statutes and executive orders.\textsuperscript{57}

Under the Office of the General Counsel are several headquarters divisions, each headed by an associate general counsel. These include an Immigration and Enforcement Division, the chief counsel of USCIS, the Office of the Principal Legal Advisor of ICE (“OPLA”), and the chief counsel of CBP.\textsuperscript{58} These officials report not only to the DHS General Counsel, but also to the heads of their respective DHS components (USCIS,\textsuperscript{59} ICE,\textsuperscript{60} and CBP\textsuperscript{61}).

C. Initiation of Removal Proceedings

Generally, a noncitizen may become subject to removal proceedings if he or she: (1) applies for immigration benefits with USCIS; (2) is inspected by a CBP immigration officer at a port of entry, such as an airport; (3) is apprehended at the border by CBP officers or inside the United States by ICE officers or local law enforcement officers supervised by ICE; or (4) is arrested or incarcerated in the United States and identified as a noncitizen by DHS.

A USCIS, CBP, or ICE officer who believes that an individual is removable may initiate a removal proceeding in an immigration court pursuant to section 240 by serving an NTA on the noncitizen and filing the NTA with such immigration court.\textsuperscript{62}

\textsuperscript{49} See infra Section III.A.2.d.
\textsuperscript{50} U.S. CITIZENSHIP & IMMIGRATION SERVS., ANNUAL REPORT FOR FISCAL YEAR 2008, at 51 (2009), available at http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a5e5b9ac89243ca754360d1a/?vgnextoid=d7632c3e5b79110VgnVCM100004718190aRCRD&vgnextchannel=d7632c3e5b79110VgnVCM100004718190aRCRD.
\textsuperscript{54} HSA § 103(a)(9), 116 Stat. at 2144; 6 U.S.C. § 113(a)(10).
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} U.S. Citizenship & Immigration Servs., USCIS Organizational Chart, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb9591933ee66f1411765436d1a/?vgnextoid=476cf021e599110VgnVCM100004718190aRCRD&vgnextchannel=2af29c77553c90110VgnVCM100004718190aRCRD (last modified Sept. 12, 2009).
\textsuperscript{60} U.S. Immigration & Customs Enforcement, Leadership, http://www.ice.gov/about/leadership/index.htm (last modified Nov. 20, 2009).
\textsuperscript{62} INA § 239, 8 U.S.C. 1229; 8 C.F.R. § 239.1.
Thereafter, any USCIS, CBP, or ICE officer, or any ICE attorney, may move for dismissal of the removal proceeding. The number of removal proceedings received by the immigration courts per fiscal year increased approximately 14% from 249,839 in fiscal year 2004 to 285,178 in fiscal year 2008, which suggests that the number of NTAs issued per fiscal year increased over the same period. Because DHS does not publicly report the number of NTAs issued per fiscal year by its programs, we reviewed publicly reported data on apprehensions of deportable noncitizens by CBP and ICE for fiscal years 2004 through 2008, which are summarized in the following table:

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<tbody>
<tr>
<td>CBP – Border Patrol</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Southwest sector</td>
<td>1,139,282</td>
<td>1,171,428</td>
<td>1,072,018</td>
<td>858,722</td>
<td>705,022</td>
</tr>
<tr>
<td>Percentage of total number of deportable noncitizens apprehended by Border Patrol</td>
<td>98.2%</td>
<td>98.5%</td>
<td>98.4%</td>
<td>97.9%</td>
<td>97.4%</td>
</tr>
<tr>
<td>Other sectors</td>
<td>21,113</td>
<td>17,680</td>
<td>17,118</td>
<td>18,065</td>
<td>18,818</td>
</tr>
<tr>
<td>Total</td>
<td>1,160,395</td>
<td>1,189,108</td>
<td>1,089,136</td>
<td>876,787</td>
<td>723,840</td>
</tr>
<tr>
<td>Percentage of total number of deportable noncitizens apprehended</td>
<td>91.8%</td>
<td>92.1%</td>
<td>90.3%</td>
<td>91.3%</td>
<td>91.4%</td>
</tr>
<tr>
<td>ICE – Office of Investigations (1)(2)</td>
<td>103,837</td>
<td>102,034</td>
<td>101,854</td>
<td>53,562</td>
<td>33,573</td>
</tr>
<tr>
<td>Worksite enforcement (3)</td>
<td>685</td>
<td>1,116</td>
<td>3,667</td>
<td>4,077</td>
<td>5,184</td>
</tr>
<tr>
<td>ICE – Office of Detention and Removal (4)</td>
<td>–</td>
<td>–</td>
<td>15,467</td>
<td>30,407</td>
<td>34,155</td>
</tr>
<tr>
<td>Total</td>
<td>1,264,232</td>
<td>1,291,142</td>
<td>1,206,457</td>
<td>960,756</td>
<td>791,568</td>
</tr>
</tbody>
</table>

(1) The number of apprehensions reported in fiscal year 2008 does not include arrests under ICE’s 287(g) program.
(2) Beginning in fiscal year 2007, the number of apprehensions reported no longer included apprehensions under ICE’s Criminal Alien Program.
(4) Discloses arrests of noncitizens under ICE’s National Fugitive Operations Program. Does not include NTAs issued under ICE’s Criminal Alien Program, which was transferred from ICE’s Office of Investigations to ICE’s Detention and Removal Office in June 2007. See infra Section II.C.3.d.

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63 8 C.F.R. § 239.2(c).
64 EOIR FY2008 STATISTICAL YEAR BOOK, supra note 29, at C3.
Such data are an imperfect proxy for data on the number of NTAs issued because, among other things: (1) such data relate to events rather than individuals; (2) they exclude NTAs issued under ICE’s Criminal Alien Program and 287(g) program, as well as NTAs issued by USCIS; and (3) apprehensions can be disposed of in ways other than by the initiation of removal proceedings by the issuance of NTAs (e.g., expedited removal and administrative removal).

Accordingly, on May 14, 2009, we submitted to DHS a written request for the number of NTAs issued by DHS for each of the past five fiscal years, including the number of NTAs issued by each of USCIS, CBP, and ICE and by each of their respective programs and operations. On November 18, 2009, we received from DHS the requested data, which are included in the table below:

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<tbody>
<tr>
<td><strong>USCIS</strong></td>
<td></td>
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<tr>
<td><strong>Asylum</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of NTAs issued (1)(2)</td>
<td>Not available</td>
<td>Not available</td>
<td>32,008</td>
<td>39,364</td>
<td>30,212</td>
<td>23,696(3)</td>
</tr>
<tr>
<td>Number of affirmative asylum cases referred to immigration courts (4)</td>
<td>39,259</td>
<td>35,869</td>
<td>37,020</td>
<td>40,126</td>
<td>33,392</td>
<td>Not available</td>
</tr>
<tr>
<td><strong>Affirmative asylum cases referred to immigration courts, less asylum-issued NTAs</strong> (5)</td>
<td>Not available</td>
<td>Not available</td>
<td>5,012</td>
<td>762</td>
<td>3,180</td>
<td>Not available</td>
</tr>
<tr>
<td><strong>Domestic Operations – Number of NTAs issued (1)(6)</strong></td>
<td>Not available</td>
<td>Not available</td>
<td>Not available</td>
<td>Not available</td>
<td>22,947</td>
<td>29,489(3)</td>
</tr>
<tr>
<td><strong>Number of NTAs issued by USCIS (1)(2)</strong></td>
<td>39,259</td>
<td>35,869</td>
<td>32,008</td>
<td>39,364</td>
<td>53,159</td>
<td>53,185(3)</td>
</tr>
<tr>
<td>Percentage of total number of NTAs issued (7)</td>
<td>25.5%</td>
<td>13.4%</td>
<td>15.0%</td>
<td>16.1%</td>
<td>18.3%</td>
<td>24.0%</td>
</tr>
<tr>
<td><strong>CBP (1)</strong></td>
<td></td>
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</tr>
<tr>
<td><strong>Office of Field Operations – Number of NTAs issued (8)</strong></td>
<td>20,267</td>
<td>22,811</td>
<td>24,148</td>
<td>24,864</td>
<td>22,368</td>
<td>Not available</td>
</tr>
<tr>
<td><strong>Office of the Border Patrol – Number of NTAs issued (9)</strong></td>
<td>94,140</td>
<td>166,969</td>
<td>92,360</td>
<td>43,350</td>
<td>36,184</td>
<td>Not available</td>
</tr>
<tr>
<td><strong>Number of NTAs issued by CBP (1)</strong></td>
<td>114,407</td>
<td>189,780</td>
<td>116,508</td>
<td>68,214</td>
<td>58,552</td>
<td>Not available</td>
</tr>
<tr>
<td>Percentage of total number of NTAs issued (7)</td>
<td>74.5%</td>
<td>70.4%</td>
<td>54.5%</td>
<td>27.9%</td>
<td>20.1%</td>
<td>Not available</td>
</tr>
</tbody>
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Continued on page 1-13

66 See DHS 2008 ENFORCEMENT ACTIONS, supra note 65, at 2-3.
### ICE (10)

#### Office of Detention and Removal

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</thead>
<tbody>
<tr>
<td>Fugitive Operations – Number of NTAs issued (11)</td>
<td>Not provided</td>
<td>1,779</td>
<td>4,145</td>
<td>8,885</td>
<td>5,971</td>
<td>5,903</td>
</tr>
<tr>
<td>Criminal Alien Program – Number of NTAs issued (11)(12)</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>74,008</td>
<td>123,670</td>
<td>113,367</td>
</tr>
<tr>
<td>Percentage of NTAs issued by ICE</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>54.2%</td>
<td>68.9%</td>
<td>67.4%</td>
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</table>

#### Office of Investigations – Number of NTAs issued (11)(13)

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</thead>
<tbody>
<tr>
<td>Office of Investigations – Number of NTAs issued (11)(13)</td>
<td>Not provided</td>
<td>42,236</td>
<td>55,427</td>
<td>38,512</td>
<td>26,466</td>
<td>16,775</td>
</tr>
<tr>
<td>Office of State and Local Coordination – 287(g) program – Number of NTAs issued</td>
<td>Not provided</td>
<td>–</td>
<td>5,799</td>
<td>15,187</td>
<td>23,429</td>
<td>32,254</td>
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#### Number of NTAs issued by ICE (10)

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<tbody>
<tr>
<td>Number of NTAs issued by ICE (10)</td>
<td>Not available</td>
<td>44,015</td>
<td>65,371</td>
<td>136,592</td>
<td>179,536</td>
<td>168,299</td>
</tr>
<tr>
<td>Percentage of total number of NTAs issued (7)</td>
<td>Not available</td>
<td>16.3%</td>
<td>30.6%</td>
<td>55.9%</td>
<td>61.7%</td>
<td>76.0%</td>
</tr>
</tbody>
</table>

#### Number of charging documents issued against noncitizens in U.S. prisons (14)

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<tbody>
<tr>
<td>Number of charging documents issued against noncitizens in U.S. prisons (14)</td>
<td>Not available</td>
<td>Not available</td>
<td>67,850</td>
<td>164,296</td>
<td>221,085</td>
<td>Not available</td>
</tr>
<tr>
<td>Percentage of total number of NTAs, adjusted (15)</td>
<td>Not available</td>
<td>Not available</td>
<td>31.4%</td>
<td>60.4%</td>
<td>66.4%</td>
<td>Not available</td>
</tr>
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</table>

#### All DHS Components

<table>
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</thead>
<tbody>
<tr>
<td>Number of NTAs issued (16)</td>
<td>153,666</td>
<td>269,664</td>
<td>213,887</td>
<td>244,170</td>
<td>291,217</td>
<td>221,484</td>
</tr>
<tr>
<td>Number of NTAs issued, adjusted (17)</td>
<td>153,166</td>
<td>269,664</td>
<td>216,366</td>
<td>271,874</td>
<td>332,796</td>
<td>221,484</td>
</tr>
</tbody>
</table>

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2. Excludes NTAs issued in connection with credible fear interviews and denials of applications for relief under the Nicaraguan Adjustment and Central American Relief Act (“NACARA”). In the OIS Data, the numbers of NTAs issued by USCIS’s Asylum Division for fiscal years 2004 and 2005 were reportedly not available.

3. For the stub period from October 1, 2008 to August 31, 2009.


Continued on page 1-14
Continued from page 1-13

(5) Represents the difference between the number of affirmative asylum cases referred to the immigration courts in the applicable fiscal year reported by EOIR in its FY 2008 Statistical Year Book and the number of NTAs issued by USCIS’s Asylum Division in such fiscal year reported in the OIS Data. These differences may arise from the lag in time between a DHS officer issuing an NTA and the filing of such NTA with the applicable immigration court.

(6) USCIS’s Domestic Operations Directorate (“DOD”) manages the processing and adjudication of benefit applications submitted to USCIS (other than asylum applications and other benefit applications that are the responsibility of USCIS’s Refugee, Asylum and International Operations Directorate). See U.S. CITIZENSHIP & IMMIGRATION SERVICES, ANNUAL REPORT FOR FISCAL YEAR 2008 56, 64 (2009).

In the OIS Data, it was reported that USCIS did not collect the number of NTAs issued by DOD for any of fiscal years 2005, 2006, and 2007. The number of NTAs issued annually by DOD, however, prior to fiscal year 2007 is unlikely to have been significant. In 2007, the USCIS Ombudsman noted that the number of NTAs issued by USCIS had increased over the years and that USCIS issued 6,969, 10,008, and 13,350 NTAs for the 12-month periods ended March 2005, March 2006, and March 2007, respectively. U.S. CITIZENSHIP & IMMIGRATION SERVICES OMBUDSMAN, 2007 ANNUAL REPORT TO CONGRESS 96 (June 11, 2007), available at http://www.dhs.gov/xlibrary/assets/CISOMB_Annual_Report_2007.pdf.

(7) Represents the percentage resulting from the division of the total number of NTAs issued by the applicable DHS component in the applicable fiscal year by the total number of NTAs issued by all DHS components. The calculation of the total number of NTAs issued by all DHS components in any fiscal year is described below in note (16).


(10) Data provided by the Office of Policy, Immigration and Customs Enforcement, in November 2009 (on file with the American Bar Association Commission on Immigration) (the “ICE Data”).

(11) The ICE Data with respect to the Office of Detention and Removal – Fugitive Operations, the Office of Detention and Removal – Criminal Alien Program and the Office of Investigations reportedly represent data from a “snap shot” of the data in the respective ICE Law Enforcement System (“LES”) at the time the ICE Data were compiled, and the data within LES may be modified at any time by authorized ICE personnel, which could result in a change in the data reported.

(12) The ICE Data for ICE’s Criminal Alien Program (“CAP”) are subject to the following: (i) guidelines to effectively track statistics for CAP-related NTAs issued did not exist for ICE’s Office of Detention and Removal prior to 2007; (ii) CAP can only currently run data for fiscal years 2008 and 2009 to determine the number of NTAs issued pursuant to CAP; and (iii) the CAP-related NTA data were obtained by filtering the total number of NTAs in the CAP apprehension report for each fiscal year to provide only NTAs issued pursuant to CAP. Because CAP began in June of 2007, ICE officers did not issue NTAs pursuant to CAP in fiscal years 2005 and 2006, and the number of NTAs issued in fiscal year 2007 under CAP covers the period from June 2007 to September 30, 2007.

(13) Includes NTAs issued in connection with ICE’s worksite enforcement.


(15) Represents the percentage resulting from the division of the total number of NTAs issued by the applicable DHS component in the applicable fiscal year by the total number of NTAs issued by all DHS components, adjusted. The calculation of the total number of NTAs issued by all DHS components, adjusted in any fiscal year is described below in note (17).

(16) The total number of NTAs issued by all DHS components in any fiscal year equals the sum of: (i) the number of NTAs issued by USCIS reported in the OIS Data; (ii) because the number of NTAs issued by USCIS’s Asylum Division in each of fiscal years 2004 and 2005 is not included in the OIS Data (see note (2) above), only for fiscal years 2004 and 2005, the number of affirmative asylum cases referred to the immigration courts in such fiscal year (see note (4) above); (iii) the number of NTAs issued by CBP reported in the OIS Data; and (iv) the number of NTAs issued by ICE reported in the ICE Data.

(17) The total number of NTAs issued by all DHS components, adjusted, in any fiscal year is calculated in accordance with note (16) above, and adjusted to include the number of charging documents issued against noncitizens in U.S. prisons, in place of the number of NTAs issued by ICE reported in the ICE Data, for each of fiscal years 2006, 2007, and 2008. See note (14) above.
Continued from page 1-12

Based in part on the data set forth above, we observed the following trends in the issuance of NTAs:

- **Increase in the number of NTAs issued by USCIS Service Centers.** The number of NTAs issued by the USCIS Domestic Operations Directorate increased since the issuance of a USCIS policy memorandum in 2006. In fiscal year 2006, the number of NTAs issued by USCIS’s Asylum Division and Domestic Operations Directorate represented approximately 15.0% of the NTAs issued by DHS; in fiscal year 2008, they represented approximately 18.3% of the NTAs issued by DHS.

- **Significant decrease in the number of NTAs issued by CBP’s Border Patrol.** While the number of apprehensions by CBP’s Border Patrol declined approximately 38.1% from 1,139,282 in fiscal year 2004 to 705,022 in fiscal year 2008, the number of NTAs issued by CBP’s Border Patrol declined approximately 61.6% from 94,140 in fiscal year 2004 to 36,184 in fiscal year 2008. In fiscal year 2006, NTAs issued by CBP’s Border Patrol and Office of Field Operations represented approximately 54.5% of the NTAs issued by DHS; in fiscal year 2008, they represented approximately 20.1% of the NTAs issued by DHS.

- **Significant growth in the number of NTAs issued by ICE.** The number of NTAs issued by ICE nearly quadrupled, from 44,015 in fiscal year 2005 to 168,299 in fiscal year 2008.

- **Change in the component that issued the largest number of NTAs in a fiscal year.** In fiscal year 2006, CBP issued approximately 54.5% of the NTAs issued by DHS, and ICE issued approximately 30.6% of the NTAs issued by DHS. In fiscal year 2008, however, ICE issued approximately 61.7% of the NTAs issued by DHS, and CBP issued approximately 20.1% of the NTAs issued by DHS.

1. Removal Proceedings Initiated by USCIS Officers
   a. Credible Fear Determinations by USCIS Asylum Officers

   If, during the course of an expedited removal inspection, an arriving noncitizen expresses an intent to apply for asylum or has a fear of persecution or torture if he or she is returned to his or her country of origin, DHS must refer the person to an asylum officer for a “credible fear” interview, which is intended to establish whether the person has a credible fear of persecution if removed to that country. Detention of the applicant by ICE is required pending the credible fear interview. USCIS requires a wait of at least 48 hours after the applicant arrives at the detention center before conducting a credible fear interview, so that the applicant may recover from travel and contact an attorney or other advisor. The 48-hour period may be waived by the applicant. Although an applicant does not have a right to legal representation during a credible fear interview, he or she is allowed to have an

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67 The numbers of NTAs, and the percentages related to such data, set forth in the following bullet points and later in this Section of the Report are derived from the OIS Data and the ICE Data summarized in the table above. Consequently, such numbers and percentages are subject to the exclusions, limitations, and qualifications described in the notes to the table above.

68 See infra Section II.C.1.c.


70 See discussion of expedited removal in infra Section III.E.


72 See id.

73 Id.
An asylum officer’s credible fear determination involves both an assessment of whether the applicant’s story, if true, would render the person eligible for asylum, and a judgment of whether the applicant is credible. During the interview, the noncitizen must establish that there is a significant possibility that he or she could establish in a full hearing before an immigration judge that he or she has been persecuted or has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion if returned to his or her country. The standard of proof is lower than the “well-founded” fear of persecution standard required ultimately to obtain asylum. Given the lower screening standard, asylum officers are supposed to draw “all reasonable inferences in favor” of, and afford the “benefit of the doubt” to, the noncitizen.

If an asylum officer finds that an applicant has a credible fear of persecution, then an NTA will be issued placing the person in removal proceedings before an immigration judge, which puts the asylum seeker on a “defensive path” through the asylum application process. If the asylum officer does not find a credible fear of persecution or torture, the noncitizen may request review of the conclusion by an immigration judge. If no review is requested or the immigration judge concurs with the asylum officer’s assessment, the noncitizen will be removed by an expedited removal order. If the immigration judge determines that there is a credible fear of persecution, the judge will vacate the removal order and place the noncitizen in removal proceedings under section 240.

The number of credible fear determinations reviewed by immigration judges increased significantly from 42 in fiscal year 2003 to 824 in fiscal year 2007, but then decreased by 14.8% from fiscal year 2007 to fiscal year 2008.

b. Affirmative Asylum Determinations by USCIS Asylum Officers

A noncitizen may seek asylum in the United States not only defensively, in response to the government’s attempt to remove the person from the country, but also affirmatively, by filing an application for asylum to USCIS outside the context of a removal proceeding. Any noncitizen may apply for asylum affirmatively, as long as he or she has not been apprehended by DHS and put into removal proceedings. Accordingly, an affirmative asylum applicant may include, for example, “an individual who maintains a valid non-immigrant visa (e.g., a tourist or student visa) or a person who either overstayed a visa or entered the United States without being formally processed by an immigration official.”

If a noncitizen applies for asylum affirmatively, a USCIS asylum officer will schedule and conduct an interview to elicit information necessary to determine the applicant’s eligibility for asylum status. The applicant may be represented by an attorney, a BIA-accredited representative, a law student or non-admitted law school graduate, or a reputable attorney or other person of his or her choice present.

An asylum officer’s credible fear determination involves both an assessment of whether the applicant’s story, if true, would render the person eligible for asylum, and a judgment of whether the applicant is credible. During the interview, the noncitizen must establish that there is a significant possibility that he or she could establish in a full hearing before an immigration judge that he or she has been persecuted or has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion if returned to his or her country. The standard of proof is lower than the “well-founded” fear of persecution standard required ultimately to obtain asylum. Given the lower screening standard, asylum officers are supposed to draw “all reasonable inferences in favor” of, and afford the “benefit of the doubt” to, the noncitizen.

If an asylum officer finds that an applicant has a credible fear of persecution, then an NTA will be issued placing the person in removal proceedings before an immigration judge, which puts the asylum seeker on a “defensive path” through the asylum application process. If the asylum officer does not find a credible fear of persecution or torture, the noncitizen may request review of the conclusion by an immigration judge. If no review is requested or the immigration judge concurs with the asylum officer’s assessment, the noncitizen will be removed by an expedited removal order. If the immigration judge determines that there is a credible fear of persecution, the judge will vacate the removal order and place the noncitizen in removal proceedings under section 240.

The number of credible fear determinations reviewed by immigration judges increased significantly from 42 in fiscal year 2003 to 824 in fiscal year 2007, but then decreased by 14.8% from fiscal year 2007 to fiscal year 2008.

b. Affirmative Asylum Determinations by USCIS Asylum Officers

A noncitizen may seek asylum in the United States not only defensively, in response to the government’s attempt to remove the person from the country, but also affirmatively, by filing an application for asylum to USCIS outside the context of a removal proceeding. Any noncitizen may apply for asylum affirmatively, as long as he or she has not been apprehended by DHS and put into removal proceedings. Accordingly, an affirmative asylum applicant may include, for example, “an individual who maintains a valid non-immigrant visa (e.g., a tourist or student visa) or a person who either overstayed a visa or entered the United States without being formally processed by an immigration official.”

If a noncitizen applies for asylum affirmatively, a USCIS asylum officer will schedule and conduct an interview to elicit information necessary to determine the applicant’s eligibility for asylum status. The applicant may be represented by an attorney, a BIA-accredited representative, a law student or non-admitted law school graduate, or a reputable...
layperson who meets certain criteria. No affirmative asylum applicant has a right to be represented by an attorney or other representative at the government’s expense. A representative may assist in the preparation of the asylum application and may also be present during the interview with the asylum officer. There is no separate representative for the government. Notwithstanding the presence of a representative for the asylum applicant, the interview with the asylum officer is non-adversarial. Affirmative asylum applicants are rarely detained while their applications are being adjudicated.

Asylum officers make well-founded fear determinations based upon the application form, any accompanying affidavit, the information received during the interview, the credibility of the claim, and other potential information related to the specific case (e.g., information about country conditions). If the asylum officer approves the application and the noncitizen passes the identification and background checks, asylum is granted. If the asylum officer does not grant the asylum claim of a person who appears to be removable at the time the decision is issued, the asylum officer must issue an NTA and refer the applicant to an immigration judge in EOIR, who will consider the application de novo in an adversarial, formal removal proceeding.

The number of affirmative asylum cases referred to immigration courts from 2004 to 2008 ranged from a high of 40,126 in fiscal year 2007 to a low of 33,392 in fiscal year 2008. USCIS’s Asylum Division issued 39,364 NTAs in fiscal year 2007 but only 23,696 in the period from October 1, 2008 to August 31, 2009.

c. Other USCIS Determinations

Officers in USCIS’s Domestic Operations Directorate ("DOD") handle applications for immigration benefits submitted by noncitizens, including applications for employment authorization, travel documents, lawful permanent residency, and citizenship. For these purposes, USCIS officers often are required to conduct background checks, including fingerprint and name checks of law enforcement databases, which may reveal grounds for removal. When this happens, a USCIS officer will refer the case to ICE to initiate removal proceedings or issue an NTA.

Prior to 2006, DOD officers did not often issue, serve, and file NTAs in connection with their review of benefit applications. Following the issuance of a

84 8 C.F.R. § 292.1.
86 8 C.F.R. § 240.67(b)(2).
87 Id. § 240.67(b)(1).
89 U.S. IMMIGRATION POLICY ON ASYLUM SEEKERS, supra note 77, at CRS-7. As with determinations made by asylum officers in the credible fear interviews (see supra Section II.C.1.a), the asylum officer’s determination involves both an objective assessment as to whether the applicant qualifies for asylum protection under U.S. law and a subjective assessment of the applicant’s credibility.
90 Id. at CRS-9.
91 Id.
92 EOIR FY2008 STATISTICAL YEAR BOOK, supra note 29, at 11.
93 Data provided by the Office of Immigration Statistics, U.S. Department of Homeland Security, in November 2009 (on file with the American Bar Association Commission on Immigration). In addition to issuing NTAs when referring affirmative asylum claims to the immigration courts, asylum officers have prosecutorial discretion to issue NTAs under other circumstances, including issuing NTAs against an affirmative asylum applicant’s dependent who is believed to be removable. See generally ASYLUM DIVISION, REFUGEE, ASYLUM, & INT’L OPERATIONS DIRECTORATE, U.S. CITIZENSHIP & IMMIGRATION SERVS., AFFIRMATIVE ASYLUM PROCEDURES MANUAL (2007), available at http://www.uscis.gov/files/nativedocuments/AffrmAsyManFNL.pdf.
number of memoranda and guidelines,98 the number of NTAs issued by DOD officers nearly doubled in two years, from 6,969 for the 12-month period ended March 2005 to 13,350 for the 12 months ending March 2007.99 From October 1, 2008 to August 31, 2009, USCIS DOD officers issued 29,489 NTAs,100 which represented 55.4% of the NTAs issued by USCIS in that period.101 Prior to that, the majority of NTAs issued by USCIS were issued by the Asylum Division.

Decisions regarding the issuance of NTAs are made by USCIS personnel (other than asylum officers) on the basis of policies and procedures that became effective on October 1, 2006.102 Under these policies, USCIS officers must refer certain types of cases to ICE, which will decide whether to issue an NTA. These cases are divided into three categories: (1) national security cases; (2) egregious public safety cases (e.g., where an applicant has been arrested for murdering a minor); and (3) other criminal cases.103

In some cases, issuance of an NTA is prescribed by regulation.104 Where USCIS suspects that an application is fraudulent, the applicant’s case is referred to ICE.105 If ICE declines the case, USCIS will investigate and, if it finds fraud, will issue an NTA.106 In all other cases, USCIS managers have discretion in deciding whether to issue an NTA.107 Standard procedures provide that “if an applicant is removable and there are no means of relief available (e.g., voluntary departure, reinstatement, or eligibility for another status), then an NTA should normally be prepared.”108 Legal counsel is available to review all NTAs, but such review is not required.109 Deviations from these procedures must be approved by the Director of Service Center Operations or by the Director of Field Operations.110

2. Removal Proceedings Initiated by CBP Officers

CBP officers are authorized to issue NTAs and are responsible for the apprehension of individuals at ports of entry and the U.S. border. At ports of entry, CBP officers inspect individuals seeking admission to the United States. During such inspection, certain noncitizens are subject to expedited removal (see Section III.E below). If an examining CBP officer determines that “grounds of inadmissibility” other than fraud, willful misrepresentation, or lack of proper documents are applicable and wishes to remove the noncitizen on that basis, then the person shall be detained and an NTA shall be issued.111 For fiscal years 2004 through 2008, the number of NTAs issued by CBP officers at ports of entry ranged from a high of 24,864 in...
fiscal year 2007 to a low of 20,267 in fiscal year 2004.\textsuperscript{112}

If a CBP officer at a port of entry is unable to make an immediate decision about admissibility and has reason to believe the person may be able to overcome a finding of inadmissibility by presenting additional evidence or upon further review of the case, the CBP officer may parole the person and refer inspection to a CBP deferred inspection office.\textsuperscript{113} If the paroled noncitizen fails to appear for his or her deferred inspection interview, then the CBP officer will issue an NTA.\textsuperscript{114}

An NTA also is issued if, during a deferred inspection interview, the CBP officer determines that the paroled noncitizen is inadmissible. If the individual requests, and if a supervising officer deems it appropriate, he or she may be allowed to have a lawyer present at the deferred inspection interview, but the role of the lawyer is limited to that of an observer and consultant.

For enforcement at the border, the federal government has funded nearly 11,000 new CBP Border Patrol agents and constructed close to 100 miles of new border fencing since 2001.\textsuperscript{115} Agents who intercept undocumented noncitizens at or near border crossings had frequently released them with NTAs for further proceedings — the so-called “catch and release” approach.\textsuperscript{116} However, in 2005, Congress funded the Strategic Border Initiative (“SBI”), a key element of which is the elimination of catch and release, with the goal of removing “every single illegal entrant amenable to removal — no exceptions.”\textsuperscript{117} Subsequently, the number of NTAs issued by CBP’s Border Patrol decreased significantly from 166,969 in fiscal year 2005 to 36,184 in fiscal year 2008.\textsuperscript{118} But, the number of criminal prosecutions of immigration matters more than doubled over the same period from 37,884 in fiscal year 2004 to 79,431 in fiscal year 2008.\textsuperscript{119}

3. Removal Proceedings Initiated by ICE Officers

In addition to cases referred to them by USCIS, ICE officers typically encounter two types of individuals who may be subject to removal. The first category is noncitizens who are the target of an investigation, e.g., the subject of a fugitive operation designed to locate and remove noncitizens who have ignored prior removal orders. When ICE officers encounter noncitizens believed to be fugitives, criminals, or other investigation targets, their discretion is limited by policies and procedures governing the handling of targeted noncitizens.\textsuperscript{120}

The second category is noncitizens who are not the target of an investigation but who are encountered by officers through the course of an operation or other activities.\textsuperscript{121} In these cases, ICE officers have discretion to apprehend a noncitizen and transport the person to an ICE facility to initiate the removal process, to schedule an appointment for the noncitizen to report at an ICE facility at a later date, or to issue an NTA by mail.\textsuperscript{122}

The primary goal of many ICE officers is to initiate

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\bibitem{113}8 C.F.R. § 235.2(b). To defer inspection, a CBP officer must obtain the approval of the District Director, Deputy District Director, Assistant District Director of Inspections, or Assistant District Director of Examinations. Johnny N. Williams, Executive Assoc. Comm’r, Office of Field Operations, Immigration & Naturalization Serv., Memorandum, Deferred Inspection Policy 2 (May 18, 2002).
\bibitem{114}Memorandum from Johnny N. Williams, supra note 113, at 2.
\bibitem{115}Office of Mgmt. & Budget, Budget of the United States Government for Fiscal Year 2009, at 72 (2008).
\bibitem{116}Pursuant to the “catch and release” approach, in fiscal year 2005, CBP apprehended about 160,000 non-Mexican noncitizens along the southwest border, with approximately 120,000 of them released from custody, issued NTAs and instructed to appear at immigration court at a later date. Michael Chertoff, Sec’y, U.S. Dep’t of Homeland Sec., Remarks at the Houston Forum (Nov. 2, 2005), available at http://www.dhs.gov/xnews/speeches/speech_0261.shtm.
\bibitem{119}See supra note 69.
\bibitem{121}Id. at 6.
\bibitem{122}Id.; see also 8 C.F.R. § 239.1.
\end{thebibliography}
removal proceedings for any noncitizen encountered who may be subject to removal. However, universal enforcement is neither feasible nor desirable. Accordingly, ICE officers exercise discretion in the performance of their duties, particularly at the early stages of the enforcement process (e.g., the investigative, initial encounter, and apprehension stages). ICE guidance instructs officers to consider a number of factors, such as humanitarian issues, flight risk, availability of detention space, and whether the noncitizen is a threat to the community.

At the charging phase, ICE officers have discretion to pursue formal removal proceedings before an immigration judge or permit the noncitizen to depart the country voluntarily. The extent to which discretion is exercised in favor of voluntary departure or the issuance of an NTA varies widely across field offices.

A noncitizen who accepts the option to depart voluntarily must admit his or her entry was illegal and waive the right to an immigration hearing. This option is only available to noncitizens from contiguous countries (i.e., Canada and Mexico), and those accepting it are escorted to the point of departure.

**a. Worksite Enforcement**

The number of individuals arrested through worksite enforcement efforts, which had been increasing gradually between fiscal year 2002 and fiscal year 2005, skyrocketed during the next three fiscal years. In fiscal year 2002, there were 25 criminal arrests and 485 administrative arrests resulting from worksite enforcement efforts. Those numbers climbed to 176 criminal arrests and 1,116 administrative arrests in fiscal year 2005 and 1,103 criminal arrests and 5,184 administrative arrests in fiscal year 2008. According to ICE, it had developed a “comprehensive worksite enforcement strategy that promotes national security, protects critical infrastructure and ensures fair labor standards.”

However, worksite enforcement decisions remained primarily directed at immigration violations rather than terrorist or national security concerns.

In April 2009, DHS Secretary Napolitano issued new guidelines for ICE’s worksite enforcement activities, reflecting a shift in focus from the arrest of noncitizen employees believed to be removable to the criminal prosecution of employers who knowingly hire noncitizens not permitted to work in the United States. These guidelines acknowledge the necessity of effectively allocating DHS’s extensive but finite enforcement resources and assert that worksite enforcement efforts focused on employers will target more effectively a root cause of illegal immigration — the prospect for employment in the United States. The guidelines provide that absent exigent circumstances, ICE officers should obtain indictments, criminal arrest or search warrants, or a commitment

123 GAO IMMIGRATION ENFORCEMENT REPORT, supra note 120 at 12.
124 See generally Memorandum from Doris Meissner, Comm’r, Immigration & Naturalization Servs., to Regional Dirs., District Dirs., Chief Patrol Agents, & Regional & Dist. Counsel, Exercising Prosecutorial Discretion (Nov. 17, 2000).
125 GAO IMMIGRATION ENFORCEMENT REPORT, supra note 120, at 2-3.
126 Id. at 15.
127 Id. at 14-15.
128 CRS IMMIGRATION ENFORCEMENT, supra note 33, at CRS-12 n.55.
129 Id. at CRS-12.
131 Id. Of the 1,103 criminal arrests, 135 were owners, managers, supervisors, or human resources employees facing charges including harboring or knowingly hiring illegal noncitizens. The remaining individuals faced charges including aggravated identity theft and Social Security fraud. The 5,184 administrative arrests were for immigration violations.
133 From 2004 through 2006, a claim of terrorism was made against only 12 (0.0015%) out of 814,073 individuals against whom DHS filed charges, and charges relating to national security were made against only 114 (0.014%). TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, SYRACUSE UNIVERSITY, IMMIGRATION ENFORCEMENT: THE RHETORIC, THE REALITY (2007), available at http://trac.syr.edu/immigration/reports/178/.
134 Fact Sheet, U.S. Immigration & Customs Enforcement, supra note 130.
from a U.S. Attorney’s Office to prosecute the targeted employer, before arresting employees for civil immigration violations at a worksite. Nonetheless, the guidelines provide that ICE will continue to arrest and process for removal any noncitizen believed to be removable who is encountered in the course of a worksite enforcement action because “the administrative arrest of the illegal workforce under ICE’s existing immigration authorities continues to be an integral aspect of the overall ICE worksite enforcement strategy.”

Notwithstanding the effect, if any, these new guidelines will have on ICE’s worksite enforcement activities, ICE officers will continue to be pressed to choose how to apply enforcement resources in worksite raids. Although there are agency priorities guiding enforcement decisions (e.g., criminal violators and employers at critical infrastructure and national security worksites), ICE officers have some discretion to select enforcement targets and to issue NTAs to initiate removal proceedings against noncitizens encountered in the course of worksite raids.

b. National Fugitive Operations Program

The National Fugitive Operations Program (“NFOP”) was initiated by ICE in 2003 for the purpose of locating, arresting, and removing “ICE fugitives” from the United States. An “ICE fugitive” is a noncitizen who has failed to leave the country pursuant to a final order of removal, deportation, or exclusion, or who has failed to report to a Detention and Removal Officer after receiving notice to do so. There were only eight Fugitive Operations Teams (“FOTs”) in fiscal year 2003 but 104 by August 2009.

Limited resources require NFOP to prioritize the fugitives on which to focus its resources. According to ICE, its Fugitive Operations Teams prioritize removing fugitive noncitizens deemed to pose a threat to national security or community safety, such as members of transnational street gangs, child sex offenders, and noncitizens with prior convictions for violent crimes. Apprehensions by ICE’s Fugitive Operations Teams, however, have not been consistent with these priorities:

- 73% of the individuals apprehended by FOTs from 2003 through February 2008 had no criminal conviction;
- fugitive noncitizens with criminal convictions represented a declining percentage of total apprehensions by FOTs: 32% in fiscal year 2003, 17% in fiscal year 2006, and 9% in fiscal year 2007; and
- “collateral arrests,” or arrests of non-fugitive, undocumented noncitizens, increased over the years and represented 40% of total apprehensions by FOTs in fiscal year 2007.

In addition to the growth in arrests by ICE’s

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136 Id. at 2, 4.
137 Id. at 1, 4.
140 Id. at 2, 4.
c. Apprehension by Local Agencies under 287(g) Program

Section 287(g) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”) authorizes the Secretary of DHS to enter into agreements with state and local law enforcement agencies to enforce U.S. immigration laws. ICE created the 287(g) program as a component of the program entitled Agreements of Cooperation in Communities to Enhance Safety and Security (“ACCESS”), which began in August 2007 and was created for the purpose of ensuring constant, coordinated, effective, and efficient communication and teamwork between federal and local law enforcement.144

ICE’s Office of State and Local Coordination is responsible for the 287(g) program, which acts as a “force multiplier” by authorizing local law enforcement officers, who have received appropriate training, to participate in immigration enforcement efforts under the supervision of ICE officers. As of December 10, 2009, 66 state or local law enforcement agencies are participants in the 287(g) program pursuant to Memoranda of Agreement signed with ICE, and one state agency is party to a Memorandum of Agreement in principle, pending receipt of local approval.145

There have been significant criticisms of the 287(g) program, including by the U.S. Government Accountability Office (“GAO”).146 Some organizations have urged the termination of the 287(g) program.147 Notwithstanding ICE’s articulated immigration enforcement priorities with respect to criminal noncitizens, some local law enforcement participants in the 287(g) program have used their 287(g) authority to process for removal noncitizens for

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142 Data provided by the Office of Policy, Immigration and Customs Enforcement, in November 2009 (on file with the American Bar Association Commission on Immigration).
143 See generally ICE FISCAL YEAR 2008 ANNUAL REPORT, supra note 37, at 3; data provided by the Office of Policy, Immigration and Customs Enforcement, supra note 142.
146 See GAO 287(G) PROGRAM, supra note 144, at 4-6 (reporting that ICE did not have sufficient controls to ensure that 287(g) program participants were implementing the 287(g) program objectives of addressing serious criminal activity committed by removable noncitizens).
147 For example, on August 25, 2009, 521 local and national organizations, including the American Civil Liberties Union, the American Immigration Lawyers Association, and the National Immigration Law Center, sent a letter to President Obama urging the termination of the 287(g) program. Letter from Marielena Hincapié, Executive Dir., Nat’l Immigration Law Ctr., to Barack Obama, President of the United States (Aug. 25, 2009).
minor offenses,¹⁴⁸ and certain local law enforcement participants have been accused of using racial profiling in their immigration enforcement activities.¹⁴⁹ In addition, some organizations, including the Police Foundation, the International Association of Chiefs of Police, and the Major Cities Chiefs Association, believe that deputizing local law enforcement officers to enforce federal immigration law undermines public safety, diverts scarce resources, and increases fear in communities.¹⁵⁰

In light of the findings and recommendations in the GAO’s January 2009 report, ICE has taken steps to communicate to 287(g) program participants the objectives of the 287(g) program and otherwise strengthen ICE’s oversight over the 287(g) program.¹⁵¹ At the same time, DHS and ICE affirmed that ICE’s enforcement priorities were the identification and removal of criminal noncitizens and that the 287(g) program “is an essential component of DHS’ [sic] comprehensive immigration enforcement strategy.”¹⁵²

Since fiscal year 2006, the number of NTAs issued under the 287(g) program increased from 5,799 in fiscal year 2006 to 32,254 in fiscal year 2009.¹⁵³ Prior to fiscal year 2009, the number of NTAs issued under the 287(g) program in a fiscal year was less than the number of NTAs issued by ICE’s Office of Investigations (which is responsible for worksite enforcement actions); in fiscal year 2009, the number of NTAs issued under the 287(g) program (i.e., 32,254) was almost twice the number of NTAs issued by ICE’s Office of Investigations (i.e., 16,775). Combined with the reforms and expansion of the 287(g) program implemented in 2009,¹⁵⁴ this suggests that notwithstanding criticisms of the 287(g) program, it will play a larger role in DHS’s immigration enforcement strategy.

d. Criminal Alien Program and Secure Communities

Two other components of ACCESS focus on identifying, processing, and removing criminal noncitizens in federal, state, and local prisons and jails: (1) the Criminal Alien Program (“CAP”); and (2) Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens (“Secure Communities”).

CAP began in June 2007 when ICE’s Office of Detention and Removal (“DRO”) assumed complete responsibility and oversight for two predecessor programs known as the Institutional Removal Program and the Alien Criminal Apprehension Program.¹⁵⁵ CAP seeks to prevent noncitizens incarcerated in federal, state, and local prisons and jails from being released into the general public by identifying them and securing a final order of removal, when possible, before their sentences are completed.¹⁵⁶ Generally, local law

¹⁴⁸ GAO 287( g) PROGRAM, supra note 144, at 11 (reporting that four of the 29 participating agencies told the GAO that they used their 287(g) authority to process for removal noncitizens stopped by officers for minor violations, such as speeding, carrying an open container, or urinating in public).

¹⁴⁹ The American Civil Liberties Union argues that an examination of data collected in states in which the collection of racial profiling data is required suggests that a significant percentage of individuals stopped by 287(g)-deputized officers are Latino and stopped and arrested for traffic or other minor offenses. In particular, the American Civil Liberties Union cited a study of arrest data in Tennessee that found the arrest rates in Davidson County for Latino defendants driving without a license more than doubled after the 287(g) program was implemented in that county. Examining 287(g): The Role of State and Local Law Enforcement in Immigration Law: Hearing Before the H. Comm. on Homeland Security 111th Cong. 5 (2009) (written statement of the Am. Civil Liberties Union), available at http://www.aclu.org/files/images/asset_upload_file717_39062.pdf.

¹⁵⁰ Letter from Marielena Hincapé, supra note 147, at 1.


¹⁵² Id.

¹⁵³ Data provided by the Office of Policy, Immigration and Customs Enforcement, supra note 142.


enforcement agencies notify ICE of foreign-born\textsuperscript{157} detainees in their custody based on information obtained from the booking process, and DRO officers assigned under CAP to the applicable facilities interview selected inmates, place detainers\textsuperscript{158} on those inmates believed to be removable, and issue NTAs to those inmates.\textsuperscript{159}

In March 2008, ICE reported that pursuant to CAP, it screened 100\% of Tier 1 and Tier 2 facilities;\textsuperscript{160} 100\% of all federal and state facilities, but only ten percent of the local jails throughout the United States, which make up the vast majority of the Tier 3 and Tier 4 facilities.\textsuperscript{161} Although CAP does not cover all federal, state, and local facilities, the number of NTAs issued by ICE officers under CAP is significant. The number of NTAs issued under CAP in each of fiscal years 2007, 2008, and 2009 was 74,008, 123,670, and 113,367, respectively, and represented 54.2\%, 68.9\%, and 67.4\%, respectively, of the aggregate number of NTAs issued by ICE in the applicable fiscal year.\textsuperscript{162}

ICE announced in March 2008 that it expected to expand its coverage of local facilities nationwide in a cost-effective manner by “[l]everaging integration technology that shares law enforcement data between federal, state, and local law enforcement agencies” through Secure Communities.\textsuperscript{163} Like CAP, Secure Communities aims to identify criminal noncitizens and prioritize their removal based on the threat posed to the community.\textsuperscript{164} Rather than relying on local law enforcement agencies and DRO officers to identify foreign-born individuals incarcerated in federal, state, and local prisons and jails, however, Secure Communities relies on law enforcement agencies’ typical booking processes (i.e., submission of an arrestee’s fingerprints through Federal Bureau of Investigation’s databases) and uses biometric identification technologies to identify incarcerated foreign-born individuals and to automatically notify ICE of matches found.\textsuperscript{165}

ICE reported that biometric identification under Secure Communities is available in 81 jurisdictions in nine states\textsuperscript{166} as of August 31, 2009 and that it expects to achieve nationwide coverage by 2013.\textsuperscript{167} Deploying biometric identification technologies to local jails and booking locations nationwide is expected to increase dramatically the number of noncitizens subject to removal proceedings and ICE custody.\textsuperscript{168} Currently,
ICE is prioritizing roll-out of the biometric identification technologies under Secure Communities to local law enforcement authorities in jurisdictions where ICE’s analysis has determined criminal noncitizens are most likely to reside. In addition, ICE has stated that Secure Communities is focused:

first and foremost on the most dangerous criminal aliens currently charged with, or previously convicted of, the most serious criminal offenses[,] ... including, crimes involving national security, homicide, kidnapping, assault, robbery, sex offenses, and narcotics violations carrying sentences of more than one year.

In light of Secure Communities’ apparent goal of screening all individuals arrested and booked at all federal, state, and local facilities in the United States, it is unclear, however, what procedures, if any, will be implemented to ensure that Secure Communities’ priorities are implemented.

III. Issues Relating to the Department of Homeland Security

A. DHS Policies and Procedures Increase Case Load Burdens in the Removal Adjudication System

An enormous expansion of immigration enforcement activity and resources has not been matched by a commensurate increase in resources for the adjudication of immigration cases. As a result, the adjudication system has been overwhelmed by the increasing caseload. As set forth in detail in Part 2 of this Report, the immigration courts are especially overburdened, leaving immigration judges with little time to spend on individual cases, many of which require complex determinations of fact and law. The burgeoning caseload has also resulted in “burnout” of immigration judges and their staff members. While this imbalance between judges and cases is in part a function of insufficient funding and staffing for the immigration courts, some DHS policies and practices contribute to the burden.

1. Case Load Burdens and Use of Resources

Since IIRIRA became effective, the number of noncitizens removed from the United States has increased from 69,680 in fiscal year 1996 to 356,739 in fiscal year 2008 — a more than 400% increase. The number of cases commenced in the immigration courts to expel noncitizens grew more than 20% from 231,502 combined pre-IIRIRA deportation and exclusion proceedings in fiscal year 1996 to 285,178 removal proceedings in fiscal year 2008. The number of NTAs issued by DHS grew from 213,887 in fiscal year 2006 to 291,217 in fiscal year 2008.

The Office of the Principal Legal Advisor within ICE (“OPLA”) has exclusive authority to prosecute all removal proceedings. In fiscal year 2008, OPLA completed a total of 126,050 matters in the immigration courts, including 94,072 removal proceedings, 10,495 bond proceedings, and 21,483 motions to reopen or reconsider.

ICE trial attorneys face the following challenges in effectively managing the caseload of removal proceedings:

- As of the end of 2005, there were only 600 or so attorneys to handle the enormous and ever-increasing caseload. As a result, in 2005, ICE trial...
attorneys had approximately 20 minutes on average to prepare a case. Today, ICE has more than 900 attorneys and obtained approval to employ 916 attorneys, including 735 trial attorneys, in fiscal year 2009. This increase in legal staffing, however, does not appear to have eased the caseload burden.

- OPLA cases come from CBP, USCIS, and ICE, because all three components of DHS are authorized to issue NTAs. Therefore, OPLA attorneys cannot easily consult with the immigration agent or border patrol officer prior to exercising prosecutorial discretion, since the officer who issued the NTA might be in a different agency, building, or city.

- OPLA attorneys have been called upon with increasing frequency to help Assistant U.S. Attorneys with cases in the federal appellate courts when DOJ’s Office of Immigration Litigation has become overwhelmed by the sudden and dramatic growth in appeals.

An important reason for the increasing caseload for the immigration courts and OPLA attorneys is the increasing focus on apprehending and removing all criminal noncitizens, which has coincided with the increase in the number of NTAs issued by ICE, as described in Section II.C above. In light of the planned expansion of ICE’s ability to screen each arrestee’s immigration status to all federal, state, and local facilities in the United States by 2013 pursuant to ICE’s Secure Communities initiative, and a possible expansion of such screening to other phases of the enforcement process, the caseload burden on the immigration courts (and OPLA attorneys) may very well increase further in the future. In fact, Stewart Baker, former DHS Assistant Secretary for Policy, noted that the surge in removal actions arising from the Secure Communities initiative will require more prosecutors, immigration judges, detention beds, and other resources.

Another reason for the increasing caseload for the immigration courts and OPLA attorneys is the increase in the number of NTAs issued by officers in USCIS’s Domestic Operations Directorate.

2. Insufficient Use of Prosecutorial Discretion

DHS officers in ICE, CBP, and USCIS have considerable discretion with respect to removal proceedings against noncitizens in a variety of circumstances. In particular, they have discretion not to initiate proceedings at all; to concede eligibility for relief after receipt of an application; to stop litigating a case after key facts develop to make removal unlikely (such as the serious illness of the respondent or a family member); to offer deferred action or a stay of removal early in the process; and not to file an appeal in certain types of cases (such as CAT relief).

The decision to serve an NTA on a noncitizen thus is an exercise of prosecutorial discretion. DHS policy is that “[a]s a general matter, [officers] may decline to prosecute a legally sufficient immigration case if the Federal immigration enforcement interest that would be served by prosecution is not substantial.” DHS attorneys are able to exercise great discretion with regard to the issues, and even the cases, that will be litigated. Given limited judicial resources at all levels (immigration judges, BIA, courts

181 182 See supra Section II.C.3.d.
184 See supra Sections II.C and II.C.1.c.
185 Fact Sheet, Executive Office for Immigration Review, U.S. Dep’t of Justice, Type of Immigration Court Proceedings and Removal Hearing Process 1-2 (July 28, 2004). The decision to initiate removal proceedings is not subject to judicial review by any court. See INA § 242(g), 8 U.S.C. § 1252(g); Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 487 (1999). Prosecutorial discretion is the authority of a law enforcement agency to decide whether to enforce, or not to enforce, the law against an individual.
186 Memorandum from Doris Meissner, supra note 124, at 5.
of appeals), unnecessary removal proceedings or unnecessary litigation of legal and factual issues is particularly costly to the system.

As discussed below, the discretion of DHS officers not to initiate proceedings and DHS attorneys’ discretion not to litigate issues does not appear to be exercised sufficiently to avoid unnecessary burdens on the removal adjudication system. This appears to be due in part to a lack of training and guidelines for DHS officers and attorneys, as well as the lack of tolerance for mistakes in judgment made in exercising discretion.

a. Immigration and Customs Enforcement Officers

ICE officers’ decisions are guided by operation manuals, guidance from supervisors, and training. A 2007 GAO report concluded that ICE lacked comprehensive guidance for the exercise of officer discretion, particularly in determining whether to detain noncitizens with humanitarian circumstances or those who are not primary targets of ICE investigations. In addition, ICE did not have an effective mechanism to ensure that officers are informed of legal developments that may affect decision making.

In the context of increasing worksite enforcement, ICE officers have reported that their decisions to initiate removal actions are influenced by considerations of detention space and other resource availability factors. Without clear institutional guidance, there is a persistent danger that ICE officers will exercise their discretion inconsistently, resulting in unfairness to individual noncitizens, overburdening of the detention and adjudication system, and/or inappropriate release of certain detainees.

b. Customs and Border Protection Officers

At CBP, there has been some improvement in training in recent years, as in 2007 the agency reportedly offered 37 courses and instituted national guidelines for a 12-week on-the-job training program for new officers at land ports of entry. However, according to a 2007 GAO report, staffing shortfalls have forced managers at seven ports of entry to choose between performing port operations and providing the requisite training. Moreover, CBP did not measure the extent to which it provided training to all who needed it and whether new officers demonstrated proficiency in required skills.

Nearly 60% of non-supervisory staff have stated they are not satisfied with how CBP assesses their training needs, the extent to which supervisors support employee development, or the degree to which supervisors provide constructive feedback on how to improve.

c. USCIS Officers in the Domestic Operations Directorate

As described in Section II.C.1.c, officers in USCIS’s Domestic Operations Directorate (“DOD”), who handle immigration benefit applications, initiate removal proceedings by issuing, serving, and filing NTAs in connection with their review of benefit applications, and DOD officers make decisions regarding the issuance of NTAs on the basis of policies and procedures set forth in a memorandum dated July 11, 2006 from Michael L. Aytes, Associate Director for Domestic Operations.

In this memorandum, Associate Director Aytes noted that there is an element of prosecutorial discretion to be exercised by DOD officers in issuing NTAs and that many cases will contain “special
circumstances that are not addressed by this memorandum.” Accordingly, USCIS attorneys are available to review all NTAs to be issued by DOD officers. In addition, approval through appropriate channels is required before any DOD officer may deviate from the procedures set forth in this memorandum.197

USCIS recently established a nine-week BASIC training program, which includes a new hire orientation, classroom instruction, and an on-site, hands-on practicum. The learning objectives of this BASIC training program are:

- to build immigration expertise, foster a culture that honors public service, emphasize the significance of national security and public safety, underscore the human consequence involved in every USCIS decision, and cultivate the highest standards of professionalism and ethical conduct.198

In January 2008, the first group of students attended the BASIC training program, and more than 1,500 newly hired DOD officers participated in the BASIC training program in 2008.199

d. DHS Trial Attorneys

On October 24, 2005, DHS Principal Legal Advisor William J. Howard issued a memorandum directing all OPLA attorneys to apply principles of prosecutorial discretion in order to ensure that the Office’s limited resources were used as judiciously as possible.200 While acknowledging that OPLA attorneys lacked authority to cancel NTAs, the memorandum instructed OPLA attorneys to:

- attempt to discourage issuance of NTAs where there are other options available such as administrative removal, crewman removal, expedited removal or reinstatement, clear eligibility for an immigration benefit that can be obtained outside of immigration court, or where the desired result is other than a removal order.201

For cases in which an NTA has been issued but not yet filed with the immigration court, the memorandum directs OPLA attorneys to attempt to resolve the matter without filing the NTA. For cases where an NTA has been filed, the memorandum suggests that OPLA attorneys consider dismissing the proceedings without prejudice,202 and also identifies ways in which OPLA attorneys might resolve a case, including not opposing relief, waiving appeal, making agreements to narrow the issues, or stipulating to the admissibility of evidence.203

For cases in which a court hearing has been held, the memorandum directs OPLA attorneys to exercise their prosecutorial discretion with regard to post-hearing actions, guided by the interests of judicial economy and fairness.204 Finally, the memorandum states that even after a final order of removal, OPLA attorneys retain the discretion to determine if the proper course of action requires reopening the proceeding in order to terminate the NTA.205

Many believe that, despite internal policies requiring the exercise of prosecutorial discretion where appropriate, many DHS attorneys do not exercise prosecutorial discretion to promote efficiency or fairness in removal proceedings. A recent study concluded that “many interviewees believe that [DHS] Trial Attorneys

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195 Id. at 1-2, 7.
196 Id.
197 Id.
199 Id.
200 Memorandum from William J. Howard, supra note 178, at 3.
201 Id.
202 Id. at 5 (citing 8 C.F.R. §§ 239.2(c), 1239.2(c)).
203 Id.
204 Id. at 6-7. For example, the memorandum urged OPLA attorneys to consider whether to appeal, what issues to appeal, and how to respond to a noncitizen’s appeal.
205 Id. at 8.
invariably seek the worst outcome possible for the immigrant and unnecessarily drag out cases by litigating every issue, thereby undermining both the legitimacy and efficiency of Immigration Courts.206 Some of our interviewees expressed similar views. For example, Jennifer Kim, a practitioner in New York City, described a DHS attorney who privately acknowledged that Ms. Kim’s client had a good asylum case but insisted on opposing the applicant’s claim before the immigration court. In addition, this DHS attorney refused to stipulate to any facts with respect to this claim.207 A decision to refrain from any favorable exercise of prosecutorial discretion represents an inefficient use of the immigration adjudication system’s resources and a failure to promote the interests of justice.

Some, however, disagree that DHS attorneys fail to exercise prosecutorial discretion when warranted. For example, Judge Bruce J. Einhorn, an immigration judge who retired in 2007, told us that, in his experience, DHS attorneys consistently stipulate to facts supporting adverse parties when appropriate, and that many DHS immigration attorneys are former clerks of immigration judges and therefore understand the importance of promoting fairness and efficiency in the adjudicatory process.208

While the precise extent of this problem can be debated, taking steps to encourage further the exercise of such prosecutorial discretion by DHS attorneys could certainly benefit the entire removal adjudication system.

B. Coordination Problems within DHS Lead to Inconsistent Positions

In the course of performing their respective immigration duties, USCIS, CBP, and ICE apply interrelated immigration laws and provisions.209 Continuing statutory changes and unsettled issues of immigration law heighten the need for consistent legal positions within DHS. However, different DHS components have at times adopted inconsistent legal positions, generating confusion and additional, unnecessary litigation.

Inconsistency is illustrated in the determination of asylum issues, which are relevant to a significant portion of removal proceedings. USCIS, ICE, and CBP are all involved to some degree in asylum claims arising in expedited removal proceedings, but the immigration enforcement policies (and the actions of ICE trial attorneys, ICE officers, and CBP officers) are separated from oversight by officials who have a better understanding of our country’s legal commitments in the treatment of refugees.210 For example, some asylum seekers, who have been ruled by U.S. immigration courts to be “refugees” entitled to withholding of their removal, have been subjected to electronic monitoring under ICE’s alternatives to detention programs instead of being released from detention without additional supervision.211 Such electronic monitoring of refugees may be inconsistent with our nation’s treaty obligations.212


207 Interview with Jennifer Kim.

208 Telephone Interview with Bruce J. Einhorn; see also The Hard Line on Immigration: An NYU Law Roundtable Discussion, 19 THE LAW SCHOOL 25 (2009), available at http://www.law.nyu.edu/ecm_dh3/groups/public/@nyu_law_website__publications__law_school_magazine/documents/documents/ecm_pro_062821.pdf (citing comments of Philip J. Costa, Deputy Chief Counsel, ICE, that he gets “frustrated when [he] hear[s] attorneys say that ICE does not exercise prosecutorial discretion, because [he] know[s] firsthand that it does so every day”).

209 For example, USCIS applies inadmissibility grounds pursuant to the INA in evaluating applications for adjustment. Similarly, CBP applies such inadmissibility grounds in admissions decisions, and ICE applies such grounds in considering deportation charges based on the individual being inadmissible at the time of entry.


212 In 1968, the United States acceded to the 1967 Protocol Relating to the Status of Refugees and became bound by the provisions of such Protocol and the 1951 Convention Relating to the Status of Refugees. Article 31 of the 1951 Convention Relating to the Status of Refugees provides that restrictions on the movement of refugees shall be limited only to those that are necessary, and in the view of the Executive Committee of the United Nations High Commissioner for Refugees, detention may be resorted to only: (1) to verify identity; (2) to determine the elements on which the claim for refugee status or asylum are based; (3) in cases where asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the state in which they intend to claim asylum; and (4) to protect national security or public order.
Another example of inconsistent application of immigration law by DHS components is in the handling of cases involving “material support” allegedly provided by noncitizens to “terrorist organizations,” which causes such noncitizens to be inadmissible.\footnote{213} It has been broadly acknowledged that this terrorism-related bar applies to noncitizens who are neither terrorists nor pose any threat to the public safety, and Congress addressed this concern in 2005 and 2007 by granting broad waiver authority to the DHS Secretary and the Secretary of State, in consultation with the Attorney General.\footnote{214} While DHS, the State Department, and the Attorney General continue to work on implementing this waiver authority, noncitizens to whom the terrorism-related bar is applicable but who are potentially eligible for waivers are making immigration benefit applications and being placed in removal proceedings. To address this problem, USCIS implemented a policy of placing benefit applications on hold pending waiver implementation.\footnote{215} ICE, however, does not have such a policy. Accordingly, the applications of noncitizens who are potentially eligible for waivers that have not yet been implemented are being placed on hold by USCIS, while identically situated noncitizens in removal proceedings are not being considered for waivers at all,\footnote{216} and some ICE trial attorneys have actively opposed adjourning or administratively closing such noncitizens’ cases.\footnote{217}

C. Removal on the Ground of an Aggravated Felony Conviction Has Expanded to Include Minor Crimes, Burdened the Adjudication System, and Deprived Many Noncitizens of Access to Court Review

Section 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), provides that a person is removable if he or she has been convicted of an “aggravated felony,” and section 101(a)(43), 8 U.S.C. § 1101(a)(43), sets forth the definition of aggravated felony. The scope of this ground for removal has broadened dramatically since 1990 and especially since 1996. Moreover, noncitizens who are subject to this provision can be removed through a streamlined administrative procedure without recourse to the immigration courts if they are not LPRs. The combination of these developments has given rise to two sets of issues for the removal adjudication system: (1) additional burdens on the system created by sweeping in persons convicted of relatively minor crimes; and (2) the potential denial of fairness or due process for those subject to the administrative removal regime.

1. Expanded Ground for Removal for an Aggravated Felony Conviction

The term “aggravated felony” was first added to the INA as a ground for deportation in the Anti-Drug Abuse Act of 1988.\footnote{218} This covered a narrow list of crimes, including “murder, any drug trafficking crime . . . , or any attempt or conspiracy to commit any such act.”\footnote{219}
The Immigration Act of 1990 added to the list of aggravated felonies lesser drug crimes and crimes of violence with terms of imprisonment of five years or more. It also made persons imprisoned for more than five years for aggravated felonies ineligible for a waiver of deportation (which previously had been available under section 212(c)), suspension of deportation, voluntary departure, asylum, and withholding of deportation.

In the Immigration and Nationality Technical Corrections Act of 1994, the definition of “aggravated felony” was expanded still further, to include additional, less-serious crimes, including fraud, burglary, and theft.

Pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Congress substantially broadened the aggravated felony provisions to include:

- Committing RICO offenses for which a sentence of five years or more might be imposed;
- Owning, controlling, managing, or supervising a prostitution business, regardless of the actual sentence imposed;
- Noncitizen-smuggling for which a sentence of five years or more was imposed;
- Altering a passport or other instrument in violation of 18 U.S.C. § 1543, where a term of imprisonment of 18 months or more was imposed;
- Failing to appear for service of a sentence, if the underlying offense was punishable by imprisonment for a term of five years or more;
- Engaging in commercial bribery, counterfeiting, forgery, or trafficking in vehicle identification numbers, for which a sentence of five years may be imposed;
- Committing an offense relating to obstruction of justice, perjury, subornation of perjury, bribery of a witness for which a sentence of five years may be imposed; and
- Failing to appear on charges carrying a sentence of up to two years of imprisonment.

AEDPA also eliminated section 212(c) relief for LPRs removable on the ground of aggravated felony convictions, barring an immigration court from considering the hardship caused by deportation, such as family ties, length of residence, rehabilitation, service in the armed forces, history of employment, community service, and hardship to family members caused by deportation.

That same year, IIRIRA reduced the sentence required for defining many of the listed crimes as an “aggravated felony” from five years to one year and reduced the monetary threshold for convictions for fraud, deceit, and tax evasion. In addition, IIRIRA provided for the retroactive application of the aggravated felony definition, as modified by IIRIRA. Thus, a pre-1988 conviction of a crime that was not a basis for removal at the time of conviction but falls within the current definition of an aggravated felony is grounds for removal.

Finally, IIRIRA stripped all judicial review of orders of removal arising from aggravated felony removal.

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221 The statute defined “crime of violence” as an “offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another” or one that “involves a substantial risk that physical force against the person or property of another may be used in the course of committing an offense.” 18 U.S.C. § 16.
224 IIRIRA § 321(a), 110 Stat. at 3009-627-28.
225 IIRIRA § 321(b), 110 Stat. at 3009-628 (amending the definition of aggravated felony in INA § 101(a)(43), 8 U.S.C. § 1101(a)(43), to add at the end of such definition “notwithstanding any other provision of law (including any effective date), the [aggravated felony] term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph.”).
226 Although section 7344(b) of the Anti-Drug Abuse Act of 1988 provided that the aggravated felony deportation ground at INA § 241(a)(4)(B), 8 U.S.C. § 1251(a)(4)(B) (1988), only applied to noncitizens convicted on or after the date of its enactment (i.e., November 1, 1988), section 602 of the Immigration Act of 1990 has been interpreted as superseding the effective date restriction set forth in section 7344(b) of the Anti-Drug Abuse Act of 1988. See Gelman v. Ashcroft, 372 F.3d 495 (2d Cir. 2004); Lettman v. Reno, 207 F.3d 1368 (11th Cir. 2000); Lewis v. INS, 194 F.3d 539 (4th Cir. 1999); In re Truong, 22 I. & N. Dec. 1090 (BIA 1999).
convictions, and drastically altered the consequences of an aggravated felony conviction (which are described in Section III.C.1.a below).

In many cases, courts called upon to construe the aggravated felony provisions are led by the broad statutory language to seemingly nonsensical results. For example, in United States v. Vacheco, a long-term permanent resident who had entered the United States legally as a six-year-old child was convicted, before IIRIRA was passed, of three misdemeanor offenses in Rhode Island state court, resulting in three different suspended one-year sentences. State misdemeanor offenses are not felonies, much less “aggravated felonies.” The Second Circuit expressed “misgivings” that Congress, in its zeal to deter deportable noncitizens from re-entering this country, has “improvidently, if not inadvertently, broken the historic line of division between felonies and misdemeanors,” but still held that these misdemeanor convictions were “aggravated felonies” as defined under the INA. In other cases, the Courts of Appeals have affirmed the expansive reach of the term “aggravated felony,” while expressing reservations about the irrational results.

In litigation, DHS and DOJ have sought to expand the sweep of “aggravated felony” even beyond the already broad definition written into the statute. In some instances, courts have rejected such expanded interpretations. For example, the Supreme Court has held that a state court conviction of driving under the influence of alcohol and causing serious bodily injury was not a “crime of violence” under federal criminal law. The Court also held that a conviction of a state criminal offense is not a “felony punishable under the Controlled Substance Act” and cannot be considered an aggravated felony conviction unless it involves conduct that would be a felony under federal law. In other instances, the circuit courts have split on whether to accept DOJ’s reading of the term “aggravated felony,” such as on the question whether multiple state court convictions for simple possession of marijuana amount to an aggravated felony conviction under a theory of recidivism.

### a. Consequences of an Aggravated Felony Conviction

Because Congress considers aggravated felonies to be “the most serious criminal offenses” covered by U.S. immigration laws, noncitizens who are removed on the ground of aggravated felony convictions are subject to consequences that are more severe than if they were removed on a different basis. These include:

- **Mandatory detention** during removal proceedings based on his or her aggravated felony conviction;
- **Ineligibility for relief from removal**, including cancellation of removal, voluntary departure, and asylum.

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228 253 F.3d 148 (2d Cir. 2000).

229 Id. at 153 (quoting United States v. Graham, 169 F.3d 787, 787 (3d Cir. 1999)).

230 For example, in United States v. Graham, 169 F.3d 787 (3d Cir. 1999), the Third Circuit, describing the aggravated felony provisions as “carelessly drafted,” nonetheless affirmed an aggravated felony designation for a defendant convicted of the misdemeanor crime of petty larceny. Id. at 793. Similarly, in 2001, the Eleventh Circuit upheld an aggravated felony designation based on a conviction for a misdemeanor shoplifting crime, but noted the law was “breaking the time-honored line between felonies and misdemeanors.” United States v. Christopher, 239 F.3d 1191, 1194 (11th Cir. 2001).


233 Compare Alsol v. Mukasey, 548 F.3d 207 (2d Cir. 2008); Rashid v. Mukasey, 531 F.3d 438 (6th Cir. 2008); Berhe v. Gonzales, 464 F.3d 74 (1st Cir. 2006); Steele v. Blackman, 236 F.3d 130 (3d Cir. 2001), with United States v. Cepeda-Rios, 530 F.3d 333 (5th Cir. 2008) (per curiam) (following United States v. Sanchez-Villalobos, 412 F.3d 572 (5th Cir. 2005)); United States v. Phmeco-Diaz, 506 F.3d 545 (7th Cir. 2007), rehg denied, 513 F.3d 776 (7th Cir. 2008) (per curiam); Fernandez v. Mukasey, 544 F.3d 862 (7th Cir. 2008). The Supreme Court recently granted certiorari to consider the issue of whether a second misdemeanor drug possession conviction is an aggravated felony. Carachuri-Rosendo v. Holder, 2009 WL 2058154 (Dec. 14, 2009) (No. 09-60).


236 INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3) (cancellation of removal); INA § 240A(b)(1)(C), 8 U.S.C. § 1229(c)(1)(C) (voluntary departure); and INA § 208(a)(2)(A)(ii), B(i), 8 U.S.C. § 1158(b)(2)(A)(ii), (B)(ii) (asylum). In addition, a person convicted of an aggravated felony who has been sentenced to an aggregate term of imprisonment of at least five years is ineligible for withholding of removal under section 241(b)(3).
• **Lifetime bar to reentry into the United States,**237
• **Bar to naturalization,** since a person convicted of an aggravated felony cannot satisfy the good moral character requirement for becoming a citizen, even if he or she served honorably in the armed forces during wartime;238
• **Ineligibility for relief under the Violence Against Women Act ("VAWA"),**239 and
• **Administrative removal of non-LPRs.**

**b. Problems Arising from Expansion of Removal on the Ground of an Aggravated Felony Conviction**

The expansion of the aggravated felony conviction ground for removal discussed above is a source of significant burdens on the removal adjudication system in at least four ways. First, removal proceedings brought on aggravated felony grounds have increased greatly since enactment of the aggravated felony provisions in 1988. The number of such removal orders more than doubled from 10,303 in 1992 to 26,074 in 2005. From mid-1997 to May 2006, removal proceedings on the ground of aggravated felony charges were initiated against 156,713 noncitizens in immigration courts.240 In the 12-month period that ended September 30, 2007, ICE placed 164,000 noncitizens with criminal convictions in removal proceedings, a sharp increase from the 64,000 the year before.241

Second, there is a significant amount of litigation in the immigration adjudication system,242 including appeals to the federal courts, related to removal orders issued on the ground of aggravated felony convictions.243 This litigation likely stems from a number of factors, including the harsh consequences of

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238 See, e.g., INA § 101(f)(8), 8 U.S.C. § 1101(f)(8); Boatswain v. Gonzales, 414 F.3d 413, 414 (2d Cir. 2005) (holding that an aggravated felony conviction precludes the finding of “good moral character” necessary for naturalization not only under 8 U.S.C. § 1427, the general naturalization statute, but also under 8 U.S.C. § 1440, a statute that eases naturalization requirements for certain U.S. veterans).
239 Under VAWA, abused spouses and their children or abused children and their parents may petition for LPR status without the cooperation of their respective abusers (who are U.S. citizens or LPRs). INA § 204(a)(1)(A)-(B), 8 U.S.C. § 1154(a)(1)(A)-(B). A VAWA applicant, however, is required to demonstrate good moral character, which is precluded by the aggravated felony conviction. INA § 204(a)(1)(A)-(B), 8 U.S.C. § 1154(a)(1)(A)-(B); 8 C.F.R. §§ 204.2(c)(1)(i)(F), (c)(1)(vii) (“A self-petitioner will be found to lack good moral character if he or she is a person described in section 101(f),” which includes a person “who at any time has been convicted of an aggravated felony.”).
242 There has been a surge in appellate litigation related to removal proceedings since the enactment of IIRIRA in 1996, which, among other things, broadened the aggravated felony ground for removal and curtailed the availability of discretionary relief. See John R.B. Palmer, Stephen W.Yale-Loehr & Elizabeth Cronin, Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review, 20 GEO. IMMIG. L.J. 1 (2005); John R.B. Palmer, The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis, 51 N.Y.L. SCH. L. REV. 13 (2006). The Department of Justice reported that in the seven years prior to April 1, 1997, an average of 12,043 cases were appealed each year by noncitizens from the administrative level to the Board of Immigration Appeals, as compared to an average of 22,629 cases appealed each year in the seven years after April 1, 1997. HUMAN RIGHTS WATCH, FORCED APART: FAMILIES SEPARATED AND IMMIGRANTS HARMED BY UNITED STATES DEPORTATION POLICY 28 (2007), available at http://www.hrw.org/sites/default/files/reports/us0707_web.pdf.
a removal order based on an aggravated felony conviction, but a probable key factor is the broad and vague definition of “aggravated felony” in the INA.244

Third, the mandatory detention requirement imposes significant costs on the immigration adjudication system and adversely affects the ability of such noncitizens to defend themselves from removal.245

Fourth, the bar on any discretionary relief or consideration of equities for LPRs removable on the ground of aggravated felony convictions, combined with the significant expansion in the number of offenses, including minor offenses, that qualify as aggravated felonies, has resulted in the automatic removal of thousands of LPRs with extensive ties to the United States, and the attendant family and societal disruption. According to the Transaction Research Access Clearinghouse at Syracuse University, the individuals charged from 2002 through 2006 as removable on the ground of aggravated felony convictions were persons who had resided in the United States for an average of 15 years. The longest stay in the country before being charged was 54 years. In addition, 45% of these individuals reported that they spoke English.246 These data suggest that most of those placed in removal proceedings on the ground of aggravated felony convictions have strong connections with the United States and spouses and children who are often either U.S. citizens or LPRs.247

When a noncitizen is removed on the ground of an aggravated felony conviction and has family members who are U.S. citizens or LPRs, either those U.S. citizen or LPR family members are effectively deported or they elect to remain in the United States, often resulting in the permanent division of the family and the loss of a breadwinner for the family.248

2. Administrative Removal Procedures for Non-Lawful Permanent Residents Alleged to be Removable on the Ground of Aggravated Felony Convictions

If DHS reasonably believes that a noncitizen is removable on the ground of an aggravated felony conviction, it may issue a removal order.

Footnote 243 continued from page 1-33

2009); Ata v. Holder, 2009 WL 3525739 (5th Cir. 2009); Hamilton v. Holder, 584 F.3d 1284, 2009 WL 3430121 (10th Cir. 2009); Krupic v. Holder, 2009 WL 3416211 (2nd Cir. 2009); Esmaii v. Holder, 2009 WL 3345768 (5th Cir. 2009); Lucero-Carrera v. Holder, 2009 WL 3287541 (10th Cir. 2009); Mosqueda-Masiel v. Holder, 2009 WL 3270926 (5th Cir. 2009); Aguilera-Turcios v. Holder, 582 F.3d 1093 (9th Cir. 2009). As a result of litigation among the circuit courts regarding the aggravated felony provisions of the INA, splits developed, and the Supreme Court has resolved four such splits in the last five years. See, e.g., Nijhawan v. Mukasey, 129 S. Ct. 2294, 2303 (2009) (permitting immigration judges to look beyond the record of conviction and consider a noncitizen’s sentencing stipulation and restitution order to determine whether a fraud or deceit conviction meets the necessary monetary threshold to be an aggravated felony); Gonzales v. Dueñas-Alvarez, 549 U.S. 183, 188-89 (2007) (finding that a state law conviction of aiding or abetting a theft falls within the scope of the generic definition of a theft offense and is, therefore, an aggravated felony); Lopez v. Gonzales, 549 U.S. 47, 60 (2006) (holding that a state drug possession conviction that is a misdemeanor under federal law is not an aggravated felony conviction); Lecoral v. Ashcroft, 543 U.S. 1, 11-12 (2004) (finding that a drunken driving conviction is not an aggravated felony conviction). The Supreme Court recently granted certiorari to consider the issue of whether a second misdemeanor drug possession conviction is an aggravated felony. Carachuri-Rosendo v. Holder, 2009 WL 2058154 (Dec. 14, 2009) (No. 09-60).

244 See Lenni B. Benson, Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts, 51 N.Y.L. Sch. L. Rev. 37, 50-51 (2006) (noting that attorneys are now more likely to advise their clients to contest removability on the ground of an aggravated felony conviction given the severe consequences of conceding this allegation and the lack of discretionary relief and contrasting this with the past practice of many immigration attorneys of advising clients to concede removability and instead seek discretionary relief from removal).

245 See infra Section III.G.

246 TRAC AGGRAVATED FELON DATA, supra note 240. These data and calculations were derived from data provided by EOIR for 156,713 noncitizens in removal proceedings on the ground of aggravated felony convictions. Entry or removal charge dates were missing on 24,525 of these individuals; accordingly, they are not included in the relevant calculations.

247 Human Rights Watch estimated that at least 1.6 million family members have been separated from the 672,593 noncitizens so removed since 1997 and that approximately 540,000 of these family members were U.S. citizens. HUMAN RIGHTS WATCH, supra note 242, at 44. The Pew Hispanic Center reported that in 2008 there were approximately 8.8 million people in the United States in mixed-status families with at least one unauthorized noncitizen parent and one U.S. born child, representing 35% of the nation’s unauthorized noncitizens and their family members. JEFFREY S. PASSEL & D’VERA COHN, PEW HISPANIC CENTER, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 8 (2009), available at http://pewhispanic.org/files/reports/107.pdf.

248 The reasons for remaining in the United States under these circumstances include: (1) to avoid disrupting the lives of minor children, who often do not speak any language other than English and consider themselves to be Americans; (2) to educate minor children in the United States, which offers expanded educational opportunities; (3) to avoid economic deprivation for minor children; and (4) to ensure the physical safety of minor children. See DORSEY & WHITNEY LLP, SEVERING A LIFELINE: THE NEGLECT OF CITIZEN CHILDREN IN AMERICA’S IMMIGRATION ENFORCEMENT POLICY 5-6 (2009), available at http://www.dorsey.com/files/upload/DorseyProBono_SeveringLifeline_web.pdf.
conviction and this person: (1) is not a lawful permanent resident; or (2) is a conditional permanent resident at the time the removal process begins, then DHS may use a streamlined administrative procedure to remove such noncitizen without a hearing before an immigration judge.

This administrative removal process begins when a DHS officer serves a Notice of Intent to Issue a Final Administrative Deportation Order (“Notice of Intent”) on a noncitizen charged as being removable on the ground of an aggravated felony conviction. Service of a Notice of Intent can occur after the noncitizen has been released from prison or during incarceration in the United States for the criminal conviction. The Notice of Intent functions as the charging document and includes allegations of fact and conclusions of law.

Upon receiving the Notice of Intent, the noncitizen may request to review the supporting evidence and, after reviewing the evidence, has ten days to rebut the charges. At this stage, a noncitizen may be represented by a lawyer, but counsel will not be provided by the government. After ten days have elapsed, a Deciding Service Officer — essentially any DHS officer other than the one who issued the Notice of Intent — will review the Notice of Intent, the supporting evidence, and any rebuttal provided by the noncitizen, and may then:

- issue a final administrative removal order;
- request additional evidence to resolve a material issue of fact; or
- terminate the administrative proceeding and issue an NTA to initiate removal proceedings in immigration court in cases where it becomes clear that administrative removal procedures are inappropriate.

If the Deciding Service Officer issues a final administrative removal order, then DHS will not execute the order until at least 14 days have elapsed to permit the noncitizen an opportunity to apply for judicial review pursuant to section 242 (unless this requirement is waived by the noncitizen). Such judicial review, however, is very limited. For most purposes, IIRIRA deprived the federal courts of jurisdiction to review a final administrative removal order if the noncitizen is removable on the ground of an aggravated felony conviction, although a court may review the threshold question of whether the person has been convicted of an offense that deprives the court of jurisdiction.

For this reason and because the entire administrative removal process is closed to the public, one cannot assess systematically the quality of these adjudications, including whether the Deciding Service Officers’ determinations and orders are consistent with applicable law, which is complicated and evolving. The percentage of aggravated felony removal orders handled by the streamlined administrative removal procedures, rather than the immigration courts, increased from 43% in 2002 to 55% in 2006. This trend signals a shift toward a removal system in

249 A conditional permanent resident (“CPR”) is a noncitizen granted temporary permanent resident status on the basis of a marriage with a U.S. citizen or LPR less than two years before the interview with USCIS or the U.S. consulate, as applicable. A CPR may be the spouse of a U.S. citizen or LPR or may be the child of such a spouse. A CPR is eligible to become an LPR after two years have elapsed, but if the CPR fails to timely file a petition to remove the conditions to his or her CPR status, then CPR status will be lost. INA § 216, 8 U.S.C. § 1186a.

250 DHS is not required to use the streamlined administrative removal procedure and may serve an NTA on the noncitizen and initiate removal proceedings on the same grounds in the immigration court. In some circumstances, it may be possible to persuade a DHS officer to issue an NTA, rather than use the streamlined administrative removal procedures, when the legal issues are expected to be difficult.

251 INA § 238(b), 8 U.S.C. § 1228(b).

252 8 C.F.R. § 238.1.

253 Id.

254 Id.

255 INA § 238(b)(3), 8 U.S.C. § 1228(b)(3); 8 C.F.R. § 238.1(f).


257 See, e.g., Bovkun v. Ashcroft, 283 F.3d 166, 167-68 (3d Cir. 2002) (“[W]e may properly review the threshold question whether a petitioner has been convicted of an offense that deprives us of jurisdiction.”). The courts also retain jurisdiction where an appeal from an administrative removal order is based on constitutional claims, such as a lack of procedural due process. See, e.g., Graham v. Mukasey, 519 F.3d 546, 549 (6th Cir. 2008) (addressing claims of denial of procedural due process in the decision to issue an administrative order of removal based on petitioner’s aggravated felony conviction for mail fraud).

258 TRAC AGGRAVATED FELON PROCEDURES, supra note 240.
which DHS is responsible for all steps in the process, from apprehension and detention to issuing the order and deporting the individual.\footnote{Id.}

This shift raises a number of concerns. First, the authority granted DHS to interpret and enforce the removal provisions for non-LPRs charged with removal on the ground of aggravated felony convictions is very broad. Without judicial review, there is no external check to ensure that DHS has correctly applied the law. And, in view of the positions taken by DOJ and DHS in recent litigation,\footnote{The Supreme Court rejected the government’s interpretation of the meaning of “aggravated felony” in the immigration context in certain cases in which the government’s interpretations differ significantly from the common meanings of aggravated felony terms. See Lopez v. Gonzales, 549 U.S. 47, 56 (2006) (“But we do not normally speak or write the Government’s way.”); Leocal v. Ashcroft, 543 U.S. 1, 11 (2004) (“[W]e cannot forget that we ultimately are determining the meaning of the term “crime of violence.””). In addition, noncitizens have successfully challenged the Government’s application of the aggravated felony removal provisions. See, e.g., Nguyen v. Holder, 571 F.3d 524, 530–31 (6th Cir. 2009) (finding that auto theft in violation of California law is not an aggravated felony because it does not, by its nature, involve a “substantial risk” that physical force against the person or property of another may be used in the course of committing the offense and therefore does not constitute a “crime of violence”); Martinez v. Mukasey, 551 F.3d 113, 120 (2d Cir. 2008) (holding that the sale of marijuana in the fourth degree in violation of New York law is not a drug trafficking aggravated felony because the offense punishes non-remuneration distribution of as little as two grams of marijuana); Alsol v. Mukasey, 548 F.3d 207, 217 (2d Cir. 2008) (explaining that a subsequent conviction under New York State law for simple possession is not an aggravated felony because “the fact of recidivism must be reflected in the conviction the government seeks to classify as an aggravated felony, not merely in petitioner’s underlying conduct”); Evanov v. Attorney General, 550 F.3d 284, 289–90 (3d Cir. 2008) (holding that a conviction for marijuana possession with intent to deliver under Pennsylvania law is not necessarily an aggravated felony because the statute punishes distribution of a small amount of marijuana without remuneration, which is neither a federal felony, nor a drug trafficking offense, following Steele v. Blackman, 236 F.3d 130, 137 (3d Cir. 2001); Rashid v. Mukasey, 531 F.3d 438, 448 (6th Cir. 2008) (finding that a Michigan conviction of possession of a controlled substance, where the defendant has a prior conviction for the same offense, is not an aggravated felony); Jimenez–Gonzalez v. Mukasey, 548 F.3d 557 (7th Cir. 2008) (holding that the reckless shooting of a firearm into an inhabited dwelling in violation of Indiana statute is not an aggravated felony crime of violence because recklessness is insufficient mens rea); LaGuere v. Mukasey, 526 F.3d 1037, 1039 (7th Cir. 2008) (per curiam) (rejecting DHS’s argument that the court should go beyond the elements of the offense to determine whether a state conviction constituted an aggravated felony crime of violence); Salazar–Luviano v. Mukasey, 551 F.3d 857, 863 (9th Cir. 2008) (explaining that aiding escape from custody under 18 U.S.C. § 751 is not an aggravated felony as “obstruction of justice” because the offense does not contain all of the elements of any of the federal offenses in the BIA’s own definition of obstruction of justice); Penuliar v. Mukasey, 528 F.3d 603 (9th Cir. 2008) (finding that a felony conviction for driving a vehicle with wanton disregard while fleing a police officer in violation of California law, where intent was provable by having three prior traffic violations, is not an aggravated felony crime of violence); Mandujano–Real v. Mukasey, 526 F.3d 585, 590–91 (9th Cir. 2008) (holding that identity theft that does not deprive anyone of ownership is not aggravated felony “theft”); Tostado v. Carlson, 481 F.3d 1012, 1015 (8th Cir. 2007) (finding that convictions for the unlawful possession of cocaine and cannabis under Illinois law are not aggravated felonies); Jordison v. Gonzalez, 501 F.3d 1134 (9th Cir. 2007) (stating that a conviction for “recklessly set[ting] fire to . . . a structure or forest land” in violation of California law is not an aggravated felony crime of violence because it does not necessarily involve violence or potential violence against any other person or his or her property).} the delegation of authority to identify noncitizens who are removable on the ground of aggravated felony convictions and for whom administrative removal procedures are appropriate and then to decide their cases — all without review or oversight by the courts — is too great a delegation.

In addition, non-attorney DHS officers are not competent to adjudicate the multiple, complex legal issues that may be involved in determining whether a particular conviction constitutes an aggravated felony. It is widely acknowledged that whether a criminal offense is an aggravated felony can be, relative to other legal questions, an extremely complex and volatile area of law.\footnote{For a recent review of some of the complexities involved in analyzing deportation based on criminal convictions in general, see Rebecca Sharpless, Toward a True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law, 62 U. Miami L. Rev. 979 (2008). Due in part to these complexities, whether a criminal offense constitutes an aggravated felony is a heavily litigated issue in the federal court system, and the courts of appeals issue dozens of decisions each year on this topic, which often conflict. See supra note 243 and note 260.} To adjudicate competently a removal case on the ground of an aggravated felony conviction, an adjudicator must:

\begin{itemize}
\item maintain an up-to-date understanding of the law of the governing circuit court and BIA;
\item apply this law, often by analogy, to the elements of a particular criminal statute;
\item apply the analytical and evidentiary rules set out in the categorical approach, as it is interpreted by the governing circuit court and BIA, which itself involves multiple legal determinations; and
\item correctly analyze the criminal court documents in the individual’s criminal record.
\end{itemize}

Therefore, an administrative removal procedure that authorizes non-attorney DHS officers to adjudicate highly complex and difficult issues of law, without any judicial or administrative review, raises due process concerns, which are especially troubling because the
stakes to non-LPRs and their U.S. citizen and LPR family members are quite high and because many misdemeanors are charged as aggravated felonies.

Second, an administrative removal procedure fails to inspire confidence in the fairness of our removal adjudication system, which is a necessary condition to noncitizens’ submission to, and general compliance with, our immigration adjudication system.

Third, providing one type of proceeding for lawful permanent residents (in the immigration courts) and a different type of proceeding for other noncitizens (through an administrative process) cannot be justified on the basis that LPRs are more closely connected to the United States by family ties. Although LPRs against whom removal proceedings are initiated on the ground of alleged aggravated felony convictions are likely to be long-time residents of the United States who have close family members who are U.S. citizens or LPRs, this is also likely to be the case for non-LPRs against whom removal proceedings are initiated on the ground of alleged aggravated felony convictions.

Finally, the ten-day period allowed to rebut a Notice of Intent makes it difficult to present an effective rebuttal, given that noncitizens with convictions for aggravated felonies are subject to mandatory detention and are often held in facilities where obtaining access to a lawyer, or court records to demonstrate that a conviction is not that of an aggravated felony, is difficult, if not impossible.

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262 As the Supreme Court has noted, LPRs “like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society.” See In re Griffiths, 413 U.S. 717, 722 (1973). The Supreme Court has further noted that “once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.” Landon v. Plasencia, 459 U.S. 21, 32 (1982). Therefore, the basis for treating LPRs differently from non-LPRs under our immigration law is a belief that LPRs have stronger ties to the United States through both employment and family relationships and rejecting an Equal Protection challenge to disparate treatment of LPRs and non-LPRs with respect to waivers under section 212(h)).

263 See supra Section III.C.1.b.

264 See infra Section III.G.

265 INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i). However, if the noncitizen is an LPR who was provided LPR status under INA § 245(j), 8 U.S.C. § 1255(j), then he or she is removable if he or she has been convicted within ten years (rather than five years) after the date of admission. Section 245(j) provides for the adjustment to LPR status of noncitizens admitted into the United States to provide the federal government with critical information on criminal or terrorist organizations.


267 See Nina Bernstein, When a Metrocard Led Far Out of Town, N.Y. TIMES, Oct. 11, 2004, available at http://www.nytimes.com/2004/10/11/nyregion/11deport.html (reporting that a long-term LPR was detained and placed in removal proceedings based on his multiple convictions for turnstile jumping which were alleged to be crimes involving moral turpitude).

268 See, e.g., Hyder v. Keisler, 506 F.3d 388, 392–93 (5th Cir. 2007) (discussing a split between the Fifth Circuit and Ninth Circuit over whether a conviction for misusing a Social Security number constitutes a crime involving moral turpitude).

269 See supra note 247.

Thus, the number of removal proceedings in the immigration courts in which noncitizens were charged as being removable on the grounds of convictions for crimes involving moral turpitude grew approximately 21.6% from 10,866 in fiscal year 1996 to 13,210 in fiscal year 2006. This growth may, in part, be attributable to the expansion in the applicability of the deportation ground of a conviction of a crime involving moral turpitude effected by AEDPA, as described in Section III.D.1 below.

1. Expanded Scope of Removal on the Ground of a Conviction of a Crime Involving Moral Turpitude

Prior to the enactment of AEDPA in 1996, an LPR could be found deportable based upon a single conviction of a crime involving moral turpitude only if a sentence of at least a year was actually imposed. As a result of this change, some minor crimes and misdemeanors fell within the definition of crimes involving moral turpitude, and noncitizens (including long-term LPRs) who had been convicted of such minor crimes — even before the enactment of AEDPA in 1996 — became subject to removal if removal proceedings were initiated against them after April 24, 1996 (i.e., AEDPA’s enactment date).

For the following reasons, it is a misuse of the limited adjudicatory resources available for removal proceedings to bring removal proceedings against an LPR based on a conviction of a single minor offense, such as misdemeanor shoplifting, where no sentence was imposed:

- In some cases, the LPR will be eligible for a waiver of the minor offense, which will likely be granted after a hearing on the merits.
- In other cases, the LPR may be barred from applying for any discretionary relief for technical reasons, and he or she will engage in extended litigation to defend against removal.
- If an LPR is removed, his or her removal will be with all the attendant societal disruption described in Section III.C.1.b above.

2. 2008 Revision of the Categorical Approach to Determining Whether a Criminal Conviction is of a Crime Involving Moral Turpitude

Under the categorical approach, an adjudicator determines whether a noncitizen’s criminal conviction is for a crime involving moral turpitude for purposes of removal as follows:

- first, the adjudicator looks to the applicable criminal statute to determine whether the conduct necessary to violate this criminal statute is a crime involving moral turpitude; and
- second, if the statute is “divisible” (i.e., criminalizes different acts, some of which are crimes involving moral turpitude and others of which are not), then the adjudicator may inquire into the individual’s record of conviction for the purpose of determining the applicable subpart of the statute under which such individual’s conviction falls.

In short, the adjudicator’s review under the categorical approach is limited to the applicable criminal statute and the individual’s record of conviction, and inquiry into the particular acts of such individual is prohibited.

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271 See INA § 241(a)(2)(A)(i), 8 U.S.C. § 1251(a)(2)(A)(i) (1994) (“[A]n alien who is convicted of a crime involving moral turpitude . . . and either is sentenced to confinement or is confined therefor in a prison or correctional institution for one year or longer, is deportable.”).
273 For purposes of this Report, references to “categorical approach” include the “modified categorical approach,” which refers to the second part of the categorical approach in which a review of an individual’s record of conviction is permitted.
For almost 100 years, courts and the BIA have employed the categorical approach to determine whether a prior conviction was of a crime involving moral turpitude. This approach combines concerns for adjudicatory efficiency — by avoiding testimony of witnesses and other evidence to “re-try” the criminal case — and for fairness and predictability. Moreover, the categorical approach is consistent with the INA’s statutory language, which provides that a noncitizen is inadmissible if he or she is “convicted” of a crime involving moral turpitude.277

In November 2008, in In re Silva-Trevino, former Attorney General Mukasey modified the traditional categorical approach by requiring an adjudicator to:

(1) look first to the statute of conviction under the categorical inquiry set forth in this opinion and recently applied by the Supreme Court in Duenas-Alvarez; (2) if the categorical inquiry does not resolve the question, look to the alien’s record of conviction, including documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript; and (3) if the record of conviction does not resolve the inquiry, consider any additional evidence the adjudicator determines is necessary or appropriate to resolve accurately the moral turpitude question.278

In short, Silva-Trevino instructs the immigration judge, under certain circumstances, to look beyond the record of conviction and review extrinsic evidence to make this determination.

Since November 2008, there have been reports of ICE trial attorneys submitting requests in removal proceedings for a hearing on the charge of conviction of a crime involving moral turpitude.279 In addition, holding evidentiary hearings during removal proceedings regarding the facts underlying a noncitizen’s criminal conviction in accordance with Silva-Trevino will add to the burdens of immigration courts and potentially cause delay in a significant number of immigration court proceedings.280 Silva-Trevino has also created uncertainty as to the immigration consequences of criminal convictions,281 which may result in increased unwillingness by defendants and their legal counsel to dispose of criminal cases by pleas and uncertainty and disruption in the criminal justice system.

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276 See, e.g., Gonzales v. Duenas-Alvarez, 549 U.S. 183, 185-86 (2007); Jean-Louis v. Att’y Gen., 582 F.3d 462, 465-66 (3d Cir. 2009); Wala v. Mukasey, 511 F.3d 102, 107-108 (2d Cir. 2007); Vaksanovic v. United States AG, 439 F.3d 1308, 1311 (11th Cir. 2006); Recio-Prado v. Gonzales, 456 F.3d 819, 821 (8th Cir. 2006); Jaadan v. Gonzales, 211 Fed. Appx. 422, 426-27 (6th Cir. 2006); Cuevas-Gaspar v. Gonzales, 430 F.3d 1013, 1017-1020 (9th Cir. 2005); Bejarano-Urrutia v. Gonzales, 413 F.3d 444, 450 (4th Cir. 2005); Smalley v. Ashcroft, 354 F.3d 332, 336 (5th Cir. 2003); Magsoudi v. INS, 181 F.3d 8, 14 (1st Cir. 1999); Matter of S–, 2 I&N Dec. 353, 357 (BIA 1945). Of all the circuit courts, only the Seventh Circuit has also created uncertainty as to the immigration consequences of criminal convictions, which may result in increased unwillingness by defendants and their legal counsel to dispose of criminal cases by pleas and uncertainty and disruption in the criminal justice system.
277 When the U.S. Congress uses the term “convicted” in INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i), rather than “committed” or a similar word, then removability on the ground of a crime involving moral turpitude is premised not on an individual’s actions or conduct but on whether he or she has been convicted of such a crime. See In re Velazquez-Herrera, 24 I. & N. Dec. 503, 513 (BIA 2008) (“For nearly a century, the Federal circuit courts of appeals have held that where a ground of deportability is premised on the existence of a ‘conviction’ for a particular type of crime, the focus of the immigration authorities must be on the crime of which the alien was convicted, to the exclusion of any other criminal or morally reprehensible acts he may have committed.” (emphasis in original)).
278 In re Silva-Trevino, 24 I. & N. Dec. 687, 704 (AG 2008). Pursuant to the “realistic probability” test, immigration judges are instructed to determine whether there is a “realistic probability” — and not merely a “theoretical possibility” — that the statute would be applied to reach conduct that does not involve moral turpitude. See Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007) (adopting the “realistic probability” test in the context of an aggravated felony conviction).
280 See supra Section III.D, which sets forth the number of removal proceedings in the immigration courts in which noncitizens were charged as being removable on the grounds of convictions for crimes involving moral turpitude in each of the fiscal years 1996 through 2006.
E. Expanded Use of Expedited Removal

Proceedings Has Deprived Many Noncitizens of Access to the Immigration Courts

Prior to April 1, 1997, if the admissibility of a noncitizen could not be verified by immigration officials, the person was entitled to a determination of his or her eligibility at a hearing before an immigration judge. The noncitizen had the right to counsel, the right to examine witnesses at the hearing, and the right to appeal an adverse determination by the immigration judge. With the enactment of IIRIRA in 1996, the INA was amended to authorize DHS immigration officials — rather than immigration judges — to order the removal of certain noncitizens apprehended at ports of entry using streamlined administrative procedures known as “expedited removal.” In addition, IIRIRA gave the Attorney General discretion to apply these procedures to any noncitizen who entered the United States without inspection and was present in the United States for less than two years.

Under this authority, a CBP officer may order the removal of a noncitizen who lacks proper documentation or has committed fraud or willful misrepresentation of facts to gain admission to the United States. After obtaining concurrence from his or her supervisor, the CBP officer shall issue an expedited removal order without any further hearing or review, unless the individual indicates either an intention to apply for asylum or a fear of persecution or claims to be a U.S. citizen or to have been previously admitted as a LPR, refugee, or asylee.

With limited exceptions, expedited removal orders are not subject to review by immigration judges, the BIA, or any federal court. Collateral review is available in habeas corpus proceedings, but the review is limited to whether the petitioner is a noncitizen, was ordered expeditiously removed, or was previously granted LPR, refugee, or asylee status.

Persons subject to expedited removal orders must be detained by DHS until removed and may only be released due to medical emergency or for law enforcement purposes. Persons who have been expeditiously removed are banned from returning to the United States for five years.

The concept of expedited removal was first proposed in 1986 legislation in response to the “Mariel boatlift” — the mass migration of nearly 200,000 Cubans and

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283 8 U.S.C. §§ 1362 (right to counsel), 1229a(b)(4) (right to counsel and examine witnesses), and 1105a(b) (right to collateral review of exclusion order) (1994). 8 U.S.C. § 1226(b) and 8 C.F.R. § 3.1(b)(1) (right to appeal to the BIA) (1994).
286 CBP inspectors are responsible for enforcement of applicable law at ports of entry. United States Border Patrol agents, who are part of CBP, are charged with inspections between ports of entry and have no official authority at ports of entry. BLAS NÚÑEZ-NETO, CONGRESSIONAL RESEARCH SERVICE, REPORT RL2562, BORDER SECURITY: THE ROLE OF THE U.S. BORDER PATROL CRS-1 (2008). For purposes of this Report, we use the terms “CBP officer,” “CBP inspector,” and “CBP agent” interchangeably to mean CBP inspectors at ports of entry and Border Patrol agents, as applicable.
287 The expedited removal provisions apply to noncitizens determined to be inadmissible under section 212(a)(6)(C), 8 U.S.C. § 1182(a)(6)(C) (fraud or willful misrepresentation), or section 212(a)(7), 8 U.S.C. § 1182(a)(7) (lack of proper documents). 8 C.F.R. § 235.5(b)(1). In addition, all noncitizens must satisfy CBP inspectors upon entry to the United States that they are not ineligible for admission under one of the other “grounds for inadmissibility” of INA § 2122(a), 8 U.S.C. § 1182(a). These include health-related grounds, criminal history, national security and terrorist concerns, becoming a public charge, seeking to work without proper labor certification, illegal entry and immigration law violations, ineligibility for citizenship, and noncitizens previously removed. See ALISON SISKIN, CONGRESSIONAL RESEARCH SERVICE, REPORT RL33109, IMMIGRATION POLICY ON EXPEDITED REMOVAL OF NONCITIZENS, CRS-1, n. 2 (2006) [hereinafter CRS IMMIGRATION POLICY ON EXPEDITED REMOVAL OF NONCITIZENS], available at http://assets.opencrs.com/rpts/RL33109_20060515.pdf. If an examining CBP officer determines that other “grounds of inadmissibility” under section 212(a) of the INA are applicable and wishes to remove the noncitizen on that basis, then an NTA will be issued, and the person must be detained. See INA § 235(b)(2), 8 U.S.C. 1225(b)(2); 8 C.F.R. 235.3(b)(3).
288 8 C.F.R. § 235.3(b)(2), (7).
290 If an immigration officer is unable to verify an individual’s claimed status as a U.S. citizen, LPR, refugee, or asylee, then the officer shall issue an expedited removal order and refer the individual to an immigration judge for review of such order. 8 C.F.R. § 235.3(b)(5)(i).
Haitians to the United States over the course of just a few months — but was deleted from that legislation before enactment.\(^\text{295}\) Seven years later, President Clinton revived the idea in the Expedited Exclusion and Alien Smuggling Enhanced Penalties Act of 1993, in order “to target [] perceived abuses of the asylum process by restricting the hearing, review, and appeal process for aliens at the port of entry,” but that legislation failed to pass.\(^\text{296}\) Next, in 1995, the House of Representatives passed a bill which included provisions providing for expedited removal, but those provisions were eliminated by the Senate.\(^\text{297}\) Ultimately, Congress established expedited removal in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.\(^\text{298}\)

In enacting expedited removal, Congress made clear its intent to increase efficiency and public safety by providing for the immediate deportation of “noncitizens who indisputably have no authorization to be admitted to the United States,” while still ensuring that those individuals who may be persecuted in their home countries will receive a “prompt assessment” of their asylum claims.\(^\text{299}\) Its proponents have maintained that it furthers these objectives. For example, DHS has claimed that expedited removal “enhance[s] national security and public safety by facilitating prompt immigration determinations, enabling DHS to deal more effectively with the large volume of persons seeking illegal entry, and [to] ensure removal from the country of those not granted relief, while at the same time protecting the rights of the individuals affected.”\(^\text{300}\)

### 1. Expanded Use of Expedited Removal

The following table demonstrates the increased reliance by DHS in recent years on streamlined, expedited removal proceedings, rather than removal proceedings in immigration court, to remove noncitizens:

As indicated in the table below:

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Number of Removals (1)</th>
<th>Number of Expedited Removals (2)</th>
<th>Percentage of Removals Represented by Expedited Removals</th>
<th>Number of Removal Proceedings Received by Immigration Courts (3)</th>
<th>Ratio of Number of Expedited Removals to Number of Removal Proceedings Received by Immigration Courts</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004</td>
<td>240,665</td>
<td>51,014</td>
<td>21.2%</td>
<td>249,839</td>
<td>20.4%</td>
</tr>
<tr>
<td>2005</td>
<td>246,432</td>
<td>87,888</td>
<td>35.7%</td>
<td>325,027</td>
<td>27.0%</td>
</tr>
<tr>
<td>2006</td>
<td>280,974</td>
<td>110,663</td>
<td>39.4%</td>
<td>302,869</td>
<td>36.5%</td>
</tr>
<tr>
<td>2007</td>
<td>319,382</td>
<td>106,196</td>
<td>33.3%</td>
<td>272,848</td>
<td>38.9%</td>
</tr>
<tr>
<td>2008</td>
<td>358,886</td>
<td>113,462</td>
<td>31.6%</td>
<td>285,178</td>
<td>39.8%</td>
</tr>
</tbody>
</table>


\(^\text{(2)}\) Total number of noncitizens removed from the United States based on expedited removal orders. Id.


\(^{296}\) Id.

\(^{297}\) Id. at CRS-4.

\(^{298}\) Id.


• the number of noncitizens removed from the United States under expedited removal orders increased by approximately 122.4% between fiscal year 2004 and fiscal year 2008;
• the percentage of total removals represented by expedited removals increased from approximately 21.2% in fiscal year 2004 to approximately 39.4% in fiscal year 2006 and then declined to approximately 31.6% in fiscal year 2008; and
• the ratio of expedited removals to the number of removal proceedings received by the immigration courts increased from approximately 20.4% in fiscal year 2004 to approximately 39.8% in fiscal year 2008.

2. Expedited Removal at Ports of Entry

There are two phases in the CBP inspection process at ports of entry: a primary inspection and a secondary inspection.301 During primary inspection, a CBP officer inspects a noncitizen’s identity and travel documents, such as passports, visas, or permanent residency cards.302 Noncitizens are also questioned about their travel purposes and intentions in the United States, including the “applicant’s intended length of stay and whether the applicant intends to remain permanently.”303 Generally, most persons quickly pass this stage and are allowed to enter the United States.304

If the CBP officer conducting the primary inspection believes that an individual is ineligible for admission, the officer will send that individual to a second CBP officer for “secondary” screening and inspection.305 During the secondary inspection, which usually lasts about an hour, the CBP inspector may review any document the noncitizen is carrying, although a passenger that arrives by sea or air at a port of entry is not permitted to retrieve documents from checked luggage.306 The noncitizen may not seek assistance from a lawyer or any friends or family.307

The secondary CBP inspector is required to create a sworn statement, using Forms I-867A and B, that summarizes the facts of the case and statements made by the noncitizen.308 Form I-867A also sets forth a statement that the CBP inspector is required to read (or have read) to the noncitizen. The inspector is required to ask the noncitizen the questions contained on Form I-867B and record the noncitizen’s responses there.309 CBP officials are required to ask a series of questions to identify anyone who may be afraid to return to their country of origin.310

302 Id.
303 Id. (quoting INA § 235(a)(5), 8 U.S.C. § 1225(a)(5)(2005)).
304 Id.
305 Id.
306 Id. at 173.
307 Id. Federal regulations that provide for the right to representation explicitly preclude this right in primary and secondary inspections, unless the applicant has become the focus of a criminal investigation and has been taken into custody. See 8 C.F.R. § 292.5(b).
308 8 C.F.R. § 1235.3(b)(2)(i).
309 Id.
Following the conclusion of this interview, the CBP inspector is required to confirm the accuracy of the record of the statements made during the interview on Form I-867B with the noncitizen, who is required to sign a statement attesting to the accuracy of the statements. This confirmation is needed for those referred for a credible fear interview because the statements in Form I-867B may be introduced as evidence during subsequent proceedings.

At the end of secondary inspection, the CBP officer may:

- allow the noncitizen to enter the country,
- deny admission and issue an expedited removal order,
- send the noncitizen to a credible fear interview if the person expresses an intent to apply for asylum or a fear of persecution or torture if returned to his or her country of origin, or
- deny admission and issue an NTA to initiate removal proceedings.

In limited cases, the CBP officer may allow the individual to withdraw his or her application for admission before the secondary inspector has denied admission and ordered removal. In such case, he or she will still be removed, but will avoid a record of an order of expedited removal, which would invoke a five-year ban on admission to the United States.

Noncitizens at ports of entry who are subject to expedited removal orders can be removed to the country from which they attempted to enter — often on the next available flight and in a matter of hours. However, a noncitizen subject to an expedited removal order will generally be removed to a nation designated by him or her, but the federal government may disregard this designation under certain circumstances and remove such noncitizen to the country of which he or she is a subject, national, or citizen (unless this country’s government is unwilling to accept such noncitizen or does not inform the federal government within some reasonable period of time whether it will accept such noncitizen).

Determining the destination country and effecting this removal, however, can be difficult. The length of time it may take to effect such removal order may be significant. As of 2005, noncitizens apprehended within the United States and subject to an expedited removal order were detained for an average of 32 days prior to their removal.

3. Expedited Removal within the Interior of the United States

Initially, DOJ announced in 1997 that expedited removal proceedings would be applied only to “arriving aliens” at ports of entry because applying these procedures to noncitizens already present in the United States would involve more complex

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311 8 C.F.R. § 1235.3(b)(2)(i).
312 See supra Section II.C.1.a.
313 See supra Section II.C.1.a.
314 If an examining CBP officer determines that “grounds of inadmissibility” under INA § 212(a), 8 U.S.C. § 1182(a), other than fraud, willful misrepresentation or lack of proper documents, are applicable and wishes to remove the noncitizen on that basis, then the noncitizen shall be detained and an NTA shall be issued. See INA § 235(b)(2), 8 U.S.C. 1225(b)(2); 8 C.F.R. 235.3(b)(3).
315 See 8 C.F.R. § 235.4.
316 See supra note 301, at 173 n.27.
317 If an expedited removal order is issued at an air or sea port of entry, the airline or sea carrier is required to take the inadmissible person back on board or have another aircraft or vessel operated by the same company return the noncitizen to the country of departure. CRS IMMIGRATION POLICY ON EXPEDITED REMOVAL OF ALIENS, supra note 287, at CRS-6 (citing INA § 241(c), (d)).
318 INA § 241(b)(2), 8 U.S.C. § 1231(b)(2). A noncitizen may only designate a foreign territory contiguous to the United States, or an island adjacent to such a foreign territory of the United States, if he or she is a native, citizen, subject, or national of, or has resided in, that designated territory or island. INA § 241(b)(2)(B), 8 U.S.C. § 1231(b)(2)(B).
determinations of fact and would be more difficult to manage. However, pursuant to a public notice dated November 13, 2002, a public notice dated August 11, 2004, and certain press releases, DHS expanded the application of expedited removal proceedings to: (1) noncitizens who arrived by sea and are not admitted or paroled; and (2) noncitizens who are present in the United States without being admitted or paroled, are apprehended within 100 air miles of the U.S. border, and have not established to the satisfaction of a DHS immigration officer that they have been physically present in the United States continuously for the 14-day period immediately preceding the date of apprehension.

The regulations for expedited removal proceedings at ports of entry also apply to such proceedings for noncitizens apprehended within the United States, although there are a few differences. When a CBP officer apprehends an individual within the interior of the United States, the officer will interview the person to determine whether he or she has a legal right to be in the country. The individual has the burden of demonstrating to the satisfaction of the CBP agent that he or she has been in the United States continuously for 14 days or longer prior to the date of apprehension. If the noncitizen cannot meet this burden, he or she may be subject to an expedited removal order.

4. Problems in the Implementation of Expedited Removal

The current expedited removal scheme arose from an attempt by Congress to address a swelling caseload in the immigration courts by committing solely to the discretion of DHS officers removal adjudications for “noncitizens who indisputably have no authorization to be admitted to the United States.” However, whether a noncitizen has “no authorization to be admitted” and whether that fact is “indisputable” are central questions in removal adjudications. Congress has effectively allowed DHS to determine not only whether certain noncitizens will be removed but also who will make that decision and whether it can be reviewed.

It is difficult to gauge the fairness of any particular expedited removal proceeding because persons in secondary inspection are not permitted to seek assistance from an attorney or friends or family and a removal order issued by an inspecting officer generally is not subject to judicial review. However, a number of studies of expedited removal describe significant problems. For example, in 2005, the United States Commission on International Religious Freedom (“USCIRF”) concluded:

[W]hen procedures are followed, appropriate referrals [for Credible Fear interviews] are

321 In November 2002, INS expanded the application of expedited removal proceedings to noncitizens arriving by sea who were neither admitted nor paroled. 67 Fed. Reg. 68924 (Nov. 13, 2002).
324 In this context, “parole” means the temporary permission granted to a noncitizen to enter and be present in the United States. Parole does not constitute formal admission into the United States, and parolees are required to leave when the parole expires, or if eligible, to be admitted in a lawful status. CRS IMMIGRATION POLICY ON EXPEDITED REMOVAL OF ALIENS, supra note 287, at CRS-2 n.11 (citing 67 Fed. Reg. 68923 (Nov. 13, 2002)).
326 BLAS NUÑEZ-NEITO, ET AL., supra note 319, at CRS-8.
329 See Pistone & Hoeffner, supra note 301, at 173.
more likely to be made. However, there was frequent failure on the part of CBP officers to provide required information to noncitizens during the Secondary Inspection interview and occasional failures to refer eligible noncitizens for Credible Fear interviews when they expressed a fear of returning to their home countries. In addition, researchers noted a number of inconsistencies between their observations and the official records prepared by the investigating officers (A-files). Finally, on a handful of occasions, researchers observed overt attempts by CBP officers to coerce noncitizens to retract their fear claim and withdraw their applications for admission.331

In a number of instances when immigration inspectors failed to refer persons who expressed a fear of return to their country of origin to a secondary inspector, the inspector indicated on a sworn statement that the applicant had claimed no fear of return.332 USCIRF also reported cases in which CBP officers told noncitizens about the negative consequences of pursuing asylum claims in the United States.333

In addition, the United Nations High Commissioner for Refugees in 2003 conducted a confidential study of conduct by immigration inspectors and found that many had negative views of asylum seekers, intimidated them and treated them with derision, routinely handcuffed and restrained them, failed to provide them interpreters, improperly notified consular officials from the country of origin of the asylum-seeker’s presence, concluded that persons expressing a credible fear of persecution were not entitled to asylum, and encouraged asylum seekers not to pursue their claims.334

These problems may stem from the fact that CBP officers are required to pursue two goals that are, in some respects, contradictory: (1) ensuring that inadmissible noncitizens are not permitted to enter the United States; and (2) ensuring that noncitizens fleeing persecution, including torture, are offered the opportunity to seek protection in accordance with U.S. laws and treaty obligations although such noncitizens would otherwise be inadmissible. The problems are also exacerbated by possibly conflicting guidelines335 and the limited review of expedited removal orders, which are subject only to a supervisor’s approval.336

The USCIRF study raises concerns about the effectiveness of the supervisory review. In particular, supervisors have been observed on occasion accepting incomplete sworn statements to mandatory inspection questions, failing to review the inspection officer’s removal order, allowing unauthorized officers

331 Allen Keller et al., Evaluation of Credible Fear Referral in Expedited Removal at Ports of Entry in the United States 3, in U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, VOLUME II: EXPERT REPORTS (2005). This study found, among other things, that: (1) in roughly half of all cases observed, officers did not read the obligatory paragraph informing noncitizens that U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country; (2) in approximately 5% of the cases observed, CBP officers did not specifically inquire about fear of returning to their respective countries; (3) one in six noncitizens who expressed a fear of return during secondary inspection were placed in expedited removal or allowed to withdraw their application for admission; and (4) in ten cases (representing approximately 2.3% of all cases observed), noncitizens expressed fear during interviews with the researchers but did not mention any fear to the interviewing officer when asked, and all these individuals declined when asked if they wanted to alert the CBP officer of their fear. Id. at 20, 28-29.


333 These cases were not included in the reported numbers of deliberate coercive actions by CBP officers, but these actions discourage noncitizens from making valid claims. For example, two noncitizens were told by CBP officers that, because they entered illegally, they might not have a chance to present their cases, and five were told they would be held in detention for three weeks or more. Three of the five were told that detention would last at least one month. Keller et al., supra note 331, at 24.


335 See 8 C.F.R. § 235.3(b)(4) (providing that any noncitizen who expresses a fear must be referred for a credible fear interview). But see Keller et al., supra note 331, at 29 (reporting that “the Inspectors’ Field Manual instructs that the case should not be referred if “the noncitizen asserts a fear or concern which is clearly unrelated to an intention to seek asylum or a fear of persecution”).

336 8 C.F.R. § 235.4(b)(7).
to conduct the supervisory review, relying on inadequate telephonic review of records, and confusing the standard to be applied when applicants express fear in their secondary inspection interviews. Similarly, USCIRF found that noncitizens’ sworn statements were often inaccurate and usually unverifiable due to inadequate quality control procedures for secondary inspection that rely on immigration inspectors’ “self reporting.”

F. Issues Relating to Adjustments to Lawful Permanent Resident Status

Generally, a noncitizen is eligible for lawful permanent resident status if he or she: (1) is a family member of a U.S. citizen or LPR, or has certain job skills and is the beneficiary of an approved employment-based visa petition filed for his or her benefit.

A noncitizen in removal proceedings, who is otherwise eligible to become an LPR pursuant to section 203, may be ineligible to adjust to LPR status pursuant to section 245(a) if he or she:

- was not admitted and inspected by an immigration officer;
- engaged in unauthorized employment in the United States at any time (with some exceptions, including when the noncitizen is an immediate relative of a U.S. citizen); or
- is or has been “out of status” at any time since his or her admission into the United States (except when the noncitizen is an immediate relative of a U.S. citizen).

In light of these restrictions, many noncitizens in removal proceedings are likely not eligible to adjust to LPR status pursuant to section 245(a). Section 245(i) sets forth an alternative means of adjusting to LPR status when noncitizens are ineligible under section 245(a), but very few currently meet the eligibility conditions of section 245(i). In addition, USCIS has taken the position that if the three-year, ten-year, or permanent bar to admission is applicable, then a noncitizen is not eligible to adjust his or her status pursuant to section 245(i). (See Section III.F.1 below.)

If a noncitizen present in the United States is not eligible to adjust status pursuant to section 245(a) or 245(i), then he or she must “consular process” an immigrant visa application to attain legal immigration status in the United States. Consular processing requires, among other things, that the noncitizen leave the United States (usually returning to the country of nationality or last residence) and attend an immigrant visa appointment at a U.S. consulate abroad. Consular processing, however, is discouraged by the bars to re-entry discussed below.

337 See Pistone & Hoeffner, supra note 301, at 184-93 (discussing each supervisory failure).
339 There are five categories of noncitizens who qualify for LPR status based on family relationships: (1) an immediate relative of a U.S. citizen (i.e., a spouse, unmarried minor child, or parent of a U.S. citizen who is at least 21 years of age, and certain widows and widowers); (2) a citizen’s unmarried child who is 21 years of age or older; (3) spouses and unmarried children of LPRs; (4) married children of U.S. citizens; and (5) siblings of U.S. citizens who are at least 21 years of age. INA §§ 201(b)(2)(A)(i), 203(a), 8 U.S.C. §§ 1151(b)(2)(A)(i), 1153(a).
340 INA § 203(b), 8 U.S.C. § 1153(b) (employment-based immigrant visas). A noncitizen may otherwise be qualified for immigrant status under special provisions of the INA, such as the diversity visa lottery. INA § 203(c), 8 U.S.C. § 1153(c). In addition, refugees and asylees physically present in the United States for at least one year are eligible for adjustment to LPR status. 8 C.F.R. § 209.1-2.
341 INA § 245(a), 8 U.S.C. § 1255.
342 A noncitizen is eligible to adjust to LPR status pursuant to section 245(i) of the INA, 8 U.S.C. § 1255(i), if he or she pays a penalty fee of $1,000 and meets one of the following conditions:
- is the beneficiary of an immigrant visa petition filed with the Immigration and Naturalization Service (INS) on or before January 13, 1988;
- is the beneficiary of an immigrant visa petition filed with INS after January 14, 1998 but on or before April 30, 2001, and was in the United States on December 21, 2000;
- is the beneficiary of a labor certification filed with the Department of Labor on or before January 13, 1988; or
- is the beneficiary of a labor certification filed with the Department of Labor after January 14, 2008 but on or before April 30, 2001, and was in the United States on December 21, 2000.
In addition, such noncitizen’s spouse and children are eligible to adjust to LPR status under section 245(i) of the INA, 8 U.S.C. § 1255(i), as derivative beneficiaries.
343 22 C.F.R. §§ 42.61(a), 42.62.
1. Bars on Admission

IIRIRA added (effective as of April 1, 1997) a three-year bar, a ten-year bar, and a permanent bar on admission to the United States for noncitizens with certain immigration status violations:

- **Three-Year Bar.** If a noncitizen: (1) was unlawfully present in the United States for longer than 180 days but less than one year (beginning on or after April 1, 1997) during any single stay in the United States; and (2) voluntarily departed prior to the commencement of removal proceedings, then he or she is inadmissible for three years after the date of his or her departure. 344

- **Ten-Year Bar.** If a noncitizen was unlawfully present for at least one year (beginning on or after April 1, 1997) during any single stay in the United States, then he or she is inadmissible for ten years after his or her departure. 345

- **Permanent Bar.** If a noncitizen: (1) was unlawfully present for more than one year in the aggregate (beginning on or after April 1, 1997), whether accrued during any single stay or multiple stays in the United States, or was ordered excluded, removed or deported (whether before, on or after April 1, 1997); and (2) subsequently enters or attempts to enter the United States without being lawfully admitted, he or she is permanently barred from admission to the United States. 347

If a noncitizen is not able to adjust status pursuant to section 245(a) or 245(i) and the three- or ten-year bar on admission is applicable, then in order to legalize his or her status, this noncitizen must leave the United States and consular process his or her immigrant visa petition and either: (1) apply for a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) by filing a Form I-601 Application for Waiver of Grounds of Inadmissibility at the U.S. Consulate considering his or her immigrant visa petition; 346 or (2) wait abroad for the three or ten years to run. If the waiver is not granted by DHS, then this noncitizen remains subject to the three- or ten-year bar, even if he or she obtains an immigrant visa from a U.S. Consulate before the expiration of such three- or ten-year period. Although no waiver to inadmissibility under the permanent bar is available to noncitizens (other than VAWA self-

344 For purposes of all three bars, a noncitizen is “unlawfully present” in the United States if he or she: (1) is present in the United States after the expiration of a period of stay authorized by DHS; or (2) is present in the United States without being admitted or paroled. INA § 212(a)(9)(B)(i), 8 U.S.C. § 1182(a)(9)(B)(i). For policy reasons, USCIS has determined that even if a noncitizen is actually present in the United States with certain unlawful immigration status, he or she does not accrue unlawful presence for purposes of these bars on admission in some circumstances; for example, during the pendency of a properly filed adjustment of status application, even if the noncitizen does not have legal status in the United States during such time. Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Operations Directorate, U.S. Citizenship & Immigration Servs., et al., Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(C)(ii), and 8 C.F.R. § 212.2. In addition, waivers from such permanent bar are available to certain noncitizens; for example, pursuant to section 212(a)(9)(B)(ii), 8 U.S.C. § 1182(a)(9)(B)(ii). 345 For purposes of all three bars, a noncitizen is “unlawfully present” in the United States if he or she: (1) is present in the United States after his or her departure. 346

345 INA § 212(a)(9)(B)(i)(I), 8 U.S.C. § 1182(a)(9)(B)(i)(I). 346 INA § 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II). 347 INA § 212(a)(9)(C), 8 U.S.C. § 1182(a)(9)(C). However, if such a noncitizen has remained outside of the United States for at least ten years, then he or she may apply for consent from DHS to reapply for admission pursuant to section 212(a)(9)(C)(ii) of the INA, 8 U.S.C. § 1182(a)(9)(C)(ii), and 8 C.F.R. § 212.2. In addition, waivers from such permanent bar are available to certain noncitizens; for example, pursuant to INA § 212(a)(9)(C)(iii), 8 U.S.C. § 1182(a)(9)(C)(iii), an approved VAWA self-petitioner is eligible for a waiver if there is a connection between the abuse suffered by this person and her removal, departure from the United States, and subsequent re-entry (or attempted re-entry). References to “permanent bar” in this Section III.F.1 and in Section IV.C.1, infra, do not include the permanent bar from reentry into the United States to which noncitizens removed on the ground of aggravated felony convictions are subject. Compare INA § 212(a)(9)(C)(iii), 8 U.S.C. § 1182(a)(9)(C)(iii), with 212(a)(9)(A)(i), 8 U.S.C. § 1182(a)(9)(A)(i). 348 A noncitizen who is married to, or the child of, a U.S. citizen or an LPR is eligible for a discretionary waiver from the three-/ten-year bar if he or she can establish that his or her being barred from admission into the United States would result in an “extreme hardship” to his or her U.S. citizen or LPR spouse or parent. See INA § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v). When a consular officer determines that a noncitizen is admissible but for the three- or ten-year bar, then the consular officer informs the noncitizen of the application procedures and will forward the filed Form I-601 Application for Waiver of Grounds of Inadmissibility and related fee to USCIS for adjudication. See 22 C.F.R. § 40.92(c); 8 C.F.R. § 212.7(a)(1). If extreme hardship to a qualifying relative is established, then the USCIS officer adjudicating the application will consider whether, as a matter of discretion, the application should be approved or denied. See U.S. CITIZENSHIP & IMMIGRATION SERVS., IMMIGRANT WAIVERS: PROCEDURES FOR ADJUDICATION OF FORM I-601 FOR OVERSEAS ADJUDICATION OFFICERS 51-52 (2009), available at http://www.uscis.gov/files/article/i601_immigrant_waivers_8jun09.pdf. Denials of waiver applications may be appealed to USCIS’s Administrative Appeals Office, which will review the decision de novo and consider any additional information submitted. Id. at 55, 58.
petitioners), noncitizens subject to the permanent bar may apply for consent to reapply for admission. Thus, although some relief is possible, these bars on admission discourage noncitizens from consular processing their immigrant visa petition and encourage undocumented noncitizens who may otherwise be eligible to legalize their status to remain in the United States as undocumented noncitizens.

The combined effects of the restrictions are: (1) to support year-to-year growth in the number of undocumented noncitizens in the United States, which is a significant pool of noncitizens subject to removal; (2) to limit the availability during removal proceedings of a form of relief for which a significant number of noncitizens would otherwise be eligible; and (3) to deprive ICE trial attorneys of the ability to resolve removal cases for a significant number of noncitizens through plea bargaining.

2. Service of Notices to Appear on Persons Eligible for Lawful Permanent Resident Status

On July 11, 2006, Michael L. Aytes, Associate Director for Domestic Operations of USCIS, issued a memorandum informing USCIS offices that on and after October 1, 2006, upon the completion of the denial of an application or petition, an NTA should “normally” be prepared as part of the denial if the applicant is removable and there are no means of relief available. The memorandum notes that “deciding whether a person is removable and whether an NTA should be issued is an integral part of the adjudication of an application or petition.” This represents a shift in prior USCIS policy established in September 2003 under which the issuance of NTAs by USCIS Service Centers was focused on:

- cases in which a noncitizens’s violation of the INA or other law constituted a threat to public safety or national security;
- instances where fraud schemes had been detected; and
- certain applications for temporary protected status where the basis for the denial or withdrawal constituted a ground of deportability or excludability.

While this policy shift did not eliminate the exercise of prosecutorial discretion, practitioners have reported instances in which USCIS has served NTAs on noncitizens who are out of status but eligible to adjust to LPR status pursuant to section 245. For example, in January and February 2009, the Texas Service Center reportedly issued NTAs to out-of-status noncitizen beneficiaries following the approval of employment-based immigrant visa petitions (Form I-140) filed for their benefit. The new policy also can reach noncitizens eligible to adjust to LPR status pursuant to section 245(i) who have not yet filed to adjust their status or who were unable to adjust their status because of backlogs associated with the relevant employment-based immigrant visa preference category.

In March 2009, USCIS said it was not changing its 2001 policy not to use the filing of an immigrant petition, application for labor certification, or application to adjust...
status as the sole ground to initiate removal proceedings against an eligible out-of-status applicant. 356 USCIS noted, however, that its Service Centers have discretion to issue NTAs when a beneficiary is not maintaining status and would not rescind NTAs served on these beneficiaries of approved employment-based immigration visa (Form I-140) petitions. 357

There are at least three problems associated with USCIS serving NTAs on noncitizens eligible to adjust to LPR status. First, it contributes to the overburdening of the removal adjudication system. Second, the immigration judge presiding over the noncitizen’s removal proceeding might not adjourn the case to a date when the applicable immigrant visa is available. 358 The failure to obtain a continuance could result in a removal order being issued against a noncitizen who was eligible for relief from removal, except for a matter of timing. Third, using the adjudication of any benefit application to identify and initiate removal proceedings against noncitizens generally discourages noncitizens from applying for immigration benefits to which they are entitled.

G. Increased Use of Detention Raises Both Efficiency and Fairness Issues

The INA provides DHS with broad authority to detain noncitizens while awaiting a determination of whether they should be removed from the United States and requires that certain categories of noncitizens, including those subject to expedited removal and those who are in removal proceedings, must be detained by DHS. No bond is available to noncitizens who must be detained. 359

The legal framework governing detention determinations differs depending on whether the noncitizen is seeking admission to the United States, has been placed in removal proceedings, or is subject to a removal order. For each of these circumstances, the Director of ICE’s Office of Detention and Removal (“DRO”) exercises substantial discretion to decide the following four issues:

- whether a noncitizen will be detained, unless such noncitizen is subject to mandatory detention under our immigration laws;
- where the person will be detained;
- whether a noncitizen, having been detained, will be paroled; and
- whether a noncitizen will be enrolled in one of ICE’s alternatives to detention programs.

However, the exercise of DRO’s discretionary authority to detain a noncitizen not subject to mandatory detention is guided by detention priorities based on factors such as danger to the community and national security concerns. 360 Noncitizens have the legal right to challenge their detention. Custody and bond determinations can be reviewed by an immigration judge at any time before the removal order becomes final, except in certain cases. 361 The noncitizen may appeal the

356 AILA Infonet Doc. No. 09032460 (posted March 24, 2009). See also Memorandum from Michael A. Pearson, Executive Assoc. Comm’r, Office of Field Operations, U.S. Citizenship & Immigration Servs., to Regional Dirs., Guidance on Initiation of Removal Proceedings and Section 245(i) of the Immigration and Nationality Act 2 (Apr. 27, 2001) (noting that the exercise of prosecutorial discretion embodied in the 2001 policy would “ensure that individuals eligible for the benefits of section 245(i) of the INA, and relatives or employers eligible to file immigrant petitions or labor certifications on their behalf, will not be deterred from initiating the process to legalize their status through fear that their filing will be used to identify and remove them.”).

357 See AILA Infonet Doc. No. 09032460 (posted March 24, 2009).

358 Immigration judges may grant motions for continuances for good cause shown, but “good cause” is not defined in the regulations. 8 C.F.R. § 1003.29; see also 8 C.F.R. § 1240.6. There is a presumption that an immigration judge should favorably exercise his or her discretion where a prima facie approvable visa petition and adjustment application have been submitted in the course of removal proceedings, but immigration judges are not required to grant continuances in every case where there is a pending visa petition. In re Hashmi, 24 I. & N. Dec. 785, 790 (BIA 2009).


361 Siskin, supra note 359, at CRS-12. The following custody determinations are not subject to re-determination by an immigration judge: (1) noncitizens in exclusion proceedings; (2) arriving noncitizens; (3) noncitizens deportable as security threats; (4) criminal noncitizens; and (5) noncitizens in pre-IIRIRA deportation proceedings who have been convicted of aggravated felonies. Id. at CRS-12, n.60.
The rapid growth in the number of detainees has increased significantly. Even where detention is not mandatory, DHS has used that funding to increase the number of detention beds, and the number of people detained by DHS has grown significantly.

As discussed in detail below, the increasing use of detention by DHS and DHS’s current detention policies and practices raise a number of concerns and problems:

- The rapid growth in the number of detainees has led DHS to house them in facilities over which DHS lacks control or supervision and, in some cases, under inhumane conditions, and ICE is not able to track on a real-time basis the location of all detainees;
- The mandatory detention provisions of the INA force DHS to detain many noncitizens who do not pose flight risks or threats to national security, public safety, or other persons, and may result in a decreased ability to detain noncitizens who are not subject to mandatory detention but do pose such risks;
- Even where detention is not mandatory, DHS detains noncitizens in situations where detention is not necessary; and
- Detainees are often housed far from friends and family and have difficulty obtaining effective legal representation; in addition, detention impairs the ability of noncitizens subject to removal proceedings to defend themselves, particularly if they are detained in locations far from key witnesses and evidence.

1. Rapid Growth in Use of Detention

The number of persons detained annually by DHS has grown rapidly since the enactment of IIRIRA in 1996 and DRO’s announcement in 2003 that its goal was 100% removal of all “removable aliens” by 2012. The average daily population of detained noncitizens was 100% removal of all “removable aliens” by 2012.

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362 Id. at CRS-12.


increased from 9,011 in fiscal year 1996 to 31,345 in fiscal year 2008. The number of noncitizens detained over the course of a year increased from approximately 209,000 in fiscal year 2001 to 378,582 in fiscal year 2008. It is estimated that by the end of fiscal year 2009, DHS will have detained approximately 380,000 noncitizens. As a result of this rapid growth in ICE’s detainee population, ICE currently operates the largest detention and supervised release program in the United States.

Meanwhile, the average length of stay for detainees declined from 36.9 days in fiscal year 2007 to 30.49 days in fiscal year 2008. These averages were calculated on the basis of the time in ICE custody for all detainees released during the applicable fiscal year and reflects the high volume of short-term detainees. According to ICE, 25% of its detained population is released within one day of admission, 38% within one week, 71% in less than one month, and 95% within four months, and less than one percent of all detainees is kept for one year or more.

As the population of detained noncitizens and turnover have increased, the burden and challenges of housing and managing an extremely diverse population in accordance with humane standards and applicable laws have also grown. To meet the financial burden of housing this growing population of detained noncitizens, the annual budget for DRO’s custody operations has increased significantly. The annual budget for DRO’s custody operations in fiscal year 2005 was approximately $0.86 billion, as compared to an annual budget of approximately $1.77 billion in fiscal year 2010.

In light of the rapid growth in the detainee population, ICE has increasingly relied upon private contractors and local facilities to house its detainee population, and this has reduced ICE’s ability to supervise and impose its own controls upon the conditions of detention. For example, ICE houses approximately 50% of its detainee population in approximately 240 non-dedicated or shared-use county jails operating under intergovernmental service agreements, and a majority of these intergovernmental service agreements do not require compliance with ICE’s national detention standards. Thus, recent problems in the conditions and management of the immigration detention system are, in part, a direct consequence of DHS’s aggressive enforcement and

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367 Siskin, supra note 359, at CRS-12.
370 DHS 2008 ENFORCEMENT ACTIONS, supra note 65, at 3.
371 See Schriro, supra note 365, at 6.
372 Id. at 2.
373 Fact Sheet, U.S. Immigration & Customs Enforcement, supra note 368.
375 Schriro, supra note 365, at 6.
376 See id. at 5-6.
379 Only 13% of detainees are held in ICE-owned facilities, which are operated by private contractors. All others are held in local or state facilities pursuant to intergovernmental agency service agreements, facilities owned by private contractors, or other facilities (such as Bureau of Prison facilities). Fact Sheet, U.S. Immigration & Customs Enforcement, supra note 368; see also Schriro, supra note 365, at 10.
381 Schriro, supra note 365, at 9.
detention policies that cannot fully be supported by current detention facilities and procedures.

In response to current detention conditions and problems, ICE announced in August 2009 and October 2009 a number of reforms to the immigration detention system intended to improve custodial conditions and medical care of detainees (including special populations such as women, families, and detainees who have medical issues or are mentally ill), fiscal prudence, and ICE’s oversight of the immigration detention system. More specifically, these reforms are intended to create a “truly civil detention system” and include the following measures, among others:

- **Planning a civil detention system to meet ICE’s needs.** ICE established an Office of Detention Policy and Planning staffed with experts to plan and design a civil detention system tailored to ICE’s needs.

- **Ensuring detained noncitizens are housed in appropriate facilities.** ICE will devise and develop a risk assessment and custody classification to enable ICE to determine placement of detainees to appropriate facilities. In addition, ICE has begun market research in using converted hotels, nursing homes, and other residential facilities as immigration detention facilities for non-criminal, non-violent detainees.

- **Improving oversight over detention facilities.** ICE hopes to improve its oversight over local jails, state prisons and private facilities by: (1) hiring and training ICE detention managers to staff on site at 23 facilities, which collectively house more than 40% of detainees; (2) enabling routine and random inspections of detention facilities to be conducted more frequently by ICE employees independent of the DRO; (3) standardizing the provisions of the intergovernmental service agreements pursuant to which noncitizens are detained in state and local jails; (4) centralizing oversight over such agreements; and (5) aggressively monitoring and enforcing performance in compliance with such agreements, including pursuing remedies for poor performance such as termination.

- **Reviewing and improving ICE’s detention standards.** By the end of fiscal year 2010, ICE intends to review and revise its detention standards to reflect the conditions appropriate for various immigration detainee populations.

- **Enabling legal representatives, friends, and others to locate detainees online.** ICE is accelerating efforts to provide an online locator system for attorneys, family members, and others to locate detainees.

- **Advancing the more effective use of ICE’s alternatives to detention program.** As described in Section III.G.3 below, ICE intends to expand use of its alternatives to detention programs.

2. Mandatory Detention

The mandatory detention provisions of the INA require the detention of large numbers of people, including individuals convicted of certain criminal offenses, national security risks, arriving asylum seekers who lack proper documentation until they can demonstrate a credible fear of persecution, persons subject to expedited removal, arriving noncitizens who appear inadmissible, and persons under final orders of removal for a limited period of time. These provisions have led DHS to arrest and detain petty offenders who pose neither threats to national security, public safety, or other persons nor flight risks, such as owners of successful small businesses or those with minor children who are U.S. citizens, and have contributed significantly to the rapid growth in the number of detainees in ICE’s custody since 1996. In addition, DHS’s Office of Inspector General noted in 2006 that they precluded DHS from making practical decisions about the best use of limited detention space and could even limit DHS’s ability in the future to


385 Fact Sheet, U.S. Dep’t of Homeland Sec., supra note 383.

386 SISKIN, supra note 359, at CRS-7.
detrain noncitizens who were not subject to mandatory detention but posed potential national security or public safety risks.387

The mandatory detention provisions also force individuals with valid asylum claims who enter the country without valid entry documents — who have already suffered persecution and detention in their home countries — to suffer again through immediate and sometimes prolonged detention here.

Commentators have argued that DHS interprets the mandatory detention provisions as broadly as possible to require detention of noncitizens whose detention might be disputable as a matter of law. For example, although the mandatory detention provisions of section 236(c) only apply to noncitizens released from custody after the effective date of the statute (i.e., October 9, 1998), and the district courts have consistently interpreted these provisions to mean that the “release from custody” must be from a criminal sentence based on the removable offense,388 ICE has interpreted these provisions to mean that the release from any custody — even if unrelated to the removable offense — after October 9, 1998 triggers mandatory detention and has detained noncitizens released from custody for the removable offense well before October 9, 1998.389

3. Alternatives to Detention

Detention is not the only means by which a noncitizen’s appearance during removal proceedings can be ensured. Some nonprofit organizations have operated alternatives to detention programs that succeeded in ensuring the attendance of noncitizens at immigration proceedings.390 For example, the Vera Institute of Justice’s Appearance Assistance Program (“AAP”), which operated from February 1997 to March 2000, achieved excellent results in this regard. The AAP required participants to report regularly in person and by telephone and provided to participants information about consequences of failures to comply with U.S. immigration laws, reminders of immigration court dates, and referrals to legal and other services.391 The Vera Institute of Justice reported that 127 “criminal aliens,” who would have been subject to mandatory detention had they been apprehended after October 8, 1998, participated in the AAP, and that this particular group had a 94% appearance rate in immigration court hearings.392

The use of alternatives to detention alone may not, however, be as effective in ensuring compliance with removal orders as in ensuring attendance at hearings prior to the issuance of a final removal order. Although the Vera Institute of Justice reported that 69% of AAP intensive participants393 complied with their final orders, most of this compliance was due to people being allowed to stay in the United States. The findings with respect to AAP participants ordered to leave the United States were not conclusive because most of them, at the time of the Vera Institute of Justice’s study, were still appealing their cases or had not yet been issued notices to surrender.394 The Vera Institute of Justice also reported that about half of the AAP participants granted voluntary departure did not depart, which was equivalent to similar noncitizens on bond.395

388 See Garcia v. Shanahan, 615 F.Supp.2d 175, 180 (S.D.N.Y. 2009) (“Like every district court that has considered the question at bar, this Court now concludes that the petitioner is not subject to mandatory detention under Section 1226(c), because he was released from prison for the removable offense well prior to the effective date of the mandatory detention rule.”).
389 Id. at 180–183 & n.2 (describing a number of successful challenges in the federal courts to ICE’s application of mandatory detention provisions under these circumstances).
393 The Vera Institute of Justice designed, implemented, and evaluated the AAP. The AAP provided supervision at two levels: intensive and regular. Intensive AAP participants were required to report regularly to supervision officers in person or by telephone, and AAP staff monitored the intensive participants’ whereabouts. Regular AAP participants, however, were not required to report regularly to AAP staff.
394 Id. at 5–6.
395 Id. at 6.
Accordingly, the Vera Institute of Justice noted that caution should be exercised in using an alternative to detention program to enforce removal orders and suggested that intense supervision under an alternative to detention program, combined with detention, could be used for noncitizens required to depart the United States. For example, a noncitizen could be detained when ordered removed and then if such noncitizen appeals his case, and depending on the results of a flight risk assessment, released to supervision under an appropriate alternative to detention program, subject to re-detention for violations of the program’s rules.

The DRO currently operates three programs that are “alternatives to detention” for detainees whose detention is not required under the mandatory detention provisions.

- **Intensive Supervision Appearance Program (“ISAP”).** ISAP, which began in 2004, is provided by a third party contractor to ICE and is the most restrictive of the alternatives to detention programs. ISAP closely supervises participating noncitizens with electronic monitoring via radio frequency, global positioning systems, and telephone reporting requirements, in addition to unannounced home visits, curfew checks, and employment verification. ISAP can accommodate 6,000 participants daily and is available to noncitizens who live within a 50 to 85 mile radius of an ICE field office.

- **Enhanced Supervision/Reporting (“ESR”) program.** ESR, which started in December 2007, is similar to ISAP, except that the supervision is not as extensive. ESR can accommodate 7,000 noncitizens per day and is available to noncitizens who live within a 50 to 85 mile radius of an ICE field office.

- **Electronic Monitoring (“EM”) program.** EM, which also began in December 2007, is operated by ICE and is the least restrictive alternative to detention program. EM is available to noncitizens residing in locations in which ISAP and ESR are not available, and they are subject to both electronic monitoring using radio frequency, telephone, or global positioning systems technologies. EM has a capacity to serve 5,000 participants daily.

Although ICE noted that it does not collect the necessary data to assess the effectiveness of its alternatives to detention programs, based on the data available, ICE reported the following results for its alternatives to detention programs:

<table>
<thead>
<tr>
<th>ALTERNATIVE TO DETENTION PROGRAM</th>
<th>APPEARANCE RATE (1)</th>
<th>PERCENTAGE RATE ABSCONDED (2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>ISAP</td>
<td>87%</td>
<td>9.5%</td>
</tr>
<tr>
<td>ESR</td>
<td>96%</td>
<td>1.5%</td>
</tr>
<tr>
<td>EM</td>
<td>93%</td>
<td>5.0%</td>
</tr>
</tbody>
</table>

(1) The percentage of program participants who appeared for their removal proceedings.

(2) The percentage of program participants who absconded from the program and were not apprehended by ICE.

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396 Id. at 9.
397 The Vera Institute of Justice observed that several factors increased the likelihood of compliance with hearing requirements, including having community and family ties in the United States and being represented by counsel. Id. at 7.
398 Id. at 6, 9.
400 See Kerwin & Lin, supra note 374, at 31 (citing letter dated July 2, 2009 from Dr. Schriro to Donald Kerwin).
401 See Fact Sheet, U.S. Immigration & Customs Enforcement, supra note 399.
In addition to being effective in ensuring appearances at removal proceedings, the costs of ICE’s alternatives to detention programs are less than the costs of detention. Although ICE has acknowledged that it does not collect “complete and accurate information” to assess the cost of its alternatives to detention programs, ICE estimates that these programs cost much less than “hard” detention.402

ICE’s alternatives to detention programs are not intended for noncitizens required by statute to be detained.403 However, in light of the restrictions imposed on participants’ liberty by electronic monitoring devices used in ICE’s alternatives to detention program, these programs may be better characterized as less restrictive forms of civil custody or “alternative forms of detention.”404 Moreover, because ICE’s alternatives to detention programs are currently made available only to noncitizens for whom detention is not mandatory and who have demonstrated that they are neither flight risks nor dangers to the community,405 noncitizens who actually may be eligible for release — or at the very least, for parole or bond — are enrolled in ICE’s alternative to detention programs.406 This has led some observers to criticize the application of overly restrictive conditions of supervision on participants in ICE’s alternatives to detention407 and to assert that ICE appears to use its alternatives to detention programs as “alternatives to release.”408

If DHS were to determine that ICE’s current alternatives to detention programs constituted custody for purposes of the INA, it could extend these programs to mandatory detainees who do not pose a danger to the community or a national security risk and for whom the risk of flight, within the parameters of the programs, is minimal, and this could result in significant savings to the federal government.409

In August 2009 and October 2009, ICE announced comprehensive reforms to the immigration detention system, including its alternatives to detention programs.410 Among these reforms, ICE is reportedly:

- Developing and implementing a more refined risk assessment classification tool to ensure all eligible candidates are placed in ICE’s alternatives to detention programs and the appropriate level of supervision is administered;

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402 See Kerwin & Lin, supra note 347, at 31 (citing letter dated July 2, 2009 from Dr. Schriro to Donald Kerwin). ICE estimated that the direct program costs, not including ICE staff time, for ISAP, ESR, and EM are $14.42 per day, $8.52 per day, and between 30 cents and $5 per day, respectively. Id. at 32 (citing letter dated July 2, 2009 from Dr. Schriro to Donald Kerwin). This compares favorably to an average cost of “hard detention” of $141 per person per day calculated by Associated Press reporter Michelle Roberts. Michelle Roberts, AP Impact: Immigrants Face Detention, Few Rights, Associated Press, Mar. 16, 2009, available at http://abcnews.go.com/US/wireStory?id=7087875.

403 See Fact Sheet, U.S. Immigration & Customs Enforcement, supra note 399.


405 See Am. Immigration Lawyers Ass’n, supra note 404.

406 See id.; Catholic Legal Immigration Network, supra note 404.

407 See Schriro, supra note 365, at 20; Amnesty Int’l, Jailed Without Justice: Immigration Detention in the USA 28 (2009); Am. Immigration Lawyers Ass’n, supra note 404.

408 See Human Rights First, supra note 211, at 66. Human Rights First reports that ICE has, in some cases, briefly detained asylum seekers who have applied for asylum affirmatively — essentially for the purpose of placing them into its alternatives to detention programs. Id. at 66-67.

409 See Kerwin & Lin, supra note 374, at 31-32; Doris Meissner & Donald Kerwin, Migration Policy Inst., DHS and Immigration: Taking Stock and Correcting Course 55 (2009) [hereinafter Correcting Course].

Developing a plan to be submitted to the U.S. Congress in the fall of 2009 to implement an alternative to detention program nationwide; and

Updating training and policies and procedures for ICE’s alternatives to detention programs. 411

4. DHS Parole and Bond Policies

Noncitizens who are not subject to mandatory detention may be detained, paroled, or released on bond or their own recognizance. 412

a. Parole

Arriving individuals who appear to the inspecting officer to be inadmissible 413 and detainees in expedited removal proceedings who establish a credible fear of persecution or torture may be paroled, on a case-by-case basis, for “‘urgent humanitarian reasons’ or ‘significant public benefit,’ provided the noncitizen presents neither a security risk nor a risk of absconding.” 414 There are five categories of noncitizens who may meet the parole standards: (1) those with serious medical conditions making detention inappropriate; (2) pregnant women; (3) juveniles; (4) witnesses in judicial, legislative, or administrative proceedings in the United States; and (5) noncitizens for whom continued detention is not in the public interest. 415 A grant of parole may be made by a wide range of ICE officials at various levels of the immigration system, 416 is an exercise of discretion by the Secretary of DHS, and is not reviewable by the courts. 417

In a change in ICE’s prior parole guidelines, ICE issued a directive on November 6, 2007 providing that parole should be granted in only “limited circumstances,” 418 rather than to those “who meet the credible fear standard, can establish identity and community ties, and are not subject to any possible bars to asylum involving violence or misconduct.” 419 The November 2007 directive states that ICE policy is to remove all noncitizens with final orders of removal, that continued custody of noncitizens who pose a flight risk is the most effective way of ensuring their appearance, and that consideration of parole shall proceed in a two-step process. The first step is a “threshold assessment of whether the alien’s parole request and any supporting documents establish: (1) the alien’s identity; (2) that he or she does not pose a risk of flight; and (3) that he or she is not a danger to the community.” The second step is an assessment of whether the noncitizen has established that he or she meets one of the five categorical parole standards set forth in 8 C.F.R. § 212.5(b). 420

Since the November 2007 directive, DHS appeared to have taken a “hard” line against granting parole. 421 The more limited availability of parole under the November 2007 directive has increased the demands on the detention system and made removal adjudications less fair and efficient because detention often impairs the ability of asylum applicants to defend themselves from removal.

On December 16, 2009, ICE issued a revised parole policy to be effective January 4, 2010. Pursuant to the revised parole policy, all noncitizens who arrive at a

411 See Fact Sheet, U.S. Immigration & Customs Enforcement, supra note 399; Fact Sheet, Ice Detention Reform, supra note 383.

412 SISKIN, supra note 359, at CRS-1.

413 8 C.F.R. § 235.3(c).

414 Id. §§ 212.5(b), 235.3(b), 235.3(c).

415 Id. § 212.5(b).

416 The authority to grant parole may be exercised by “the Assistant Commissioner, Office of Field Operations; Director, Detention and Removal; directors of field operations; port directors; special agents in charge; deputy special agents in charge; associate special agents in charge; assistant special agents in charge; resident agents in charge; field office directors; deputy field office directors; chief patrol agents; district directors for services; and those other officials as may be designated in writing.” Id. § 212.5(a).

417 INA § 236(e), 8 U.S.C. § 1226(e). Pursuant to HSA §§ 102(a), 441, 1512(d), and 1517; 116 Stat. at 2142-43, 2192, 2310, and 2311; 6 U.S.C. §§ 112, 251, 552(d), and 557; and 8 C.F.R. § 2.1, the Attorney General’s authority under INA § 236(e), 8 U.S.C. § 1226(e), was transferred to the DHS Secretary, and references to the Attorney General in the statute are deemed to refer to the DHS Secretary.

418 U.S. Immigration & Customs Enforcement, Parole of Arriving Aliens Found to Have a “Credible Fear” of Persecution or Torture 2 (Nov. 6, 2007).


420 U.S. Immigration & Customs Enforcement, Parole of Arriving Aliens Found to Have a “Credible Fear” of Persecution or Torture 3–4, 5–8 (Nov. 6, 2007).

421 See, e.g., Interview with Nancy Morawetz, Professor of Clinical Law, New York University School of Law.
port of entry and are found by a USCIS asylum officer or an immigration judge to have a credible fear of persecution or torture will automatically be considered for parole. In addition, this revised parole policy explains that the “public interest is served by paroling arriving aliens found to have a credible fear who establish their identities, pose neither a flight risk nor a danger to the community, and for whom no additional factors weigh against their release.” It remains to be seen whether ICE will effectively implement this revised parole policy.

b. Release on Bond

As long as a detained noncitizen is not subject to mandatory detention due to criminal or terrorist activity specified in the INA, he or she may be released on bond (of a minimum of $1,500) or on his or her own recognizance. ICE officers have discretion, when making an initial bond determination, to determine whether a detainee will be released, and if so, upon what conditions.

In order to be released on bond, a noncitizen “must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding.” Subject to certain exceptions, after the bond determination by ICE, the noncitizen may apply for bond redetermination by an immigration judge at any time until a removal order becomes final.

The BIA has ruled that a bond applicant must demonstrate that it is “substantially unlikely” that DHS can establish that he is subject to mandatory detention. If an immigration judge determines that a bond applicant is not properly subject to mandatory detention but does not reach the merits of the removal decision, DHS can nonetheless continue to detain the person pending appeal of that ruling.

5. Location and Transfers of Detainees

ICE has full discretion to choose the place of a noncitizen’s detention. ICE also exercises complete discretion to transfer detainees within the immigration detention system at any point. Since fiscal year 1999, the proportion of detainees who have been transferred by ICE has increased significantly. In fiscal year 1999, 19.6% of detainees were transferred from one detention facility to another, compared to 52.4% during the first six months of fiscal year 2008. In addition, in fiscal year 1999, 5.6% of detainees were subject to multiple transfers, compared to 24% during the first six months of fiscal year 2008. Most transferred detainees are sent from facilities in the eastern, western, and northern

424 8 C.F.R. §§ 236.1(c)(8), 1236.1(c)(8).
425 An immigration judge is prohibited from reviewing ICE’s bond determinations for the following people: those considered to be “arriving aliens” under 8 C.F.R. § 1.1(g); those “described in” the terrorism and security related ground of deportability, INA § 237(a)(4), 8 U.S.C. § 1227(a)(4); those subject to mandatory detention under INA § 236(c)(1), 8 U.S.C. § 1226(c)(1); those in exclusion proceedings; and those with final administrative orders of removal under INA § 242(a)(2), 8 U.S.C. § 1252(a)(2).
427 Id. at 8, 12.
429 Id.
of remote detention centers in the United States. 343

DHS is generally required by federal regulations to
determine within 48 hours of a noncitizen’s arrest
whether to detain a noncitizen or release him or her on
bond or recognizance and whether to issue an NTA. 341
However, ICE is not required to file an NTA with an
immigration court within a specified time after it has
been served and frequently does not file an NTA with
an immigration court until the noncitizen has been
moved to the detention facility in which he or she is
expected to remain during the pendency of his or her
removal proceedings. 342 If the noncitizen is moved to a
facility outside of his or her state of residence and ICE
files the NTA with the local immigration court where
the detention facility is located, then this local court has
jurisdiction over the removal proceeding. 343 This is
problematic for at least four reasons:

• First, approximately 70% of detainees are housed
  in local or state facilities, 344 which are typically
  located in rural areas where it is more difficult for
detainees, particularly indigent detainees who
depend on pro bono attorneys, to obtain legal
representation.

• Second, if a noncitizen is represented by a lawyer, the
lawyer may be located in the client’s state of
residence and not necessarily where the noncitizen
has been transferred. Such physical separation
makes it difficult, if not impossible, to hold in-person
meetings between the noncitizen and his or her legal
counsel. 345 Even arranging telephone conversations
can be difficult for detained noncitizens. 346

• Third, if a noncitizen is detained in a location in
which the controlling law of the applicable circuit
court is different from that in his or her original
residence, he or she may be seriously disadvantaged
in removal proceedings, particularly if he or she had
previously received and acted in accordance with
legal advice based on the controlling law of the
circuit court of his or her original residence. 347
Although a noncitizen may attempt to change venue
back to an immigration court in his or her state of
residence, immigration judges rarely grant such
requests opposed by ICE trial attorneys. 348

• Fourth, noncitizens have been transferred to
locations far from their states of residence and
thus away from key witnesses and evidence, which
seriously impairs their ability to defend themselves from removal.\footnote{See \textit{id.}, supra note 432, at 70 (“Transferring detainees away from key witnesses and evidence effectively denies them an opportunity to present a defense against removal, which is a violation of their human rights.”). For additional specific examples of how transfers impair detainees’ abilities to defend themselves in their removal proceedings, see \textit{id.}, supra note 432, at 66-71.}

In addition, for a number of reasons, it is often quite difficult for legal counsel, family, and friends of any detainee to determine with certainty where such detainee is located. First, ICE has complete discretion with respect to the initial placement of detainees and subsequent transfers. Second, ICE has a limited ability to locate detainees once they have been placed in detention, in large part because of failures to update the detention tracking system in a timely and accurate manner.\footnote{ICE has required that its system-wide tracking system for detainees be updated within 24 hours of detaining, transferring, or removing a noncitizen, to provide accurate snapshots in time of ICE’s detainee population. However, the Office of Inspector General of the Department of Homeland Security reported that the results of its audit found that ICE staff at the five detention facilities tested did not consistently update ICE’s tracking system properly or timely. In some cases, the tracking system was not updated to reflect the removal of detainees. \textit{OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT’S TRACKING AND TRANSFERS OF DETAINEES 3-5 (2009), available at} http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_09-41_Mar09.pdf; \textit{see SCHRIRO, supra note 365, at 18 (reporting that many detention facilities do not have computer entry screens for ICE’s record system, that the recording of detention book-ins and book-outs in ICE’s record system frequently occurs after the actual events, and improvements to this system could better ensure the accuracy of the count as well as timeliness.).}} Third, ICE staff routinely fail to provide notices required by ICE’s National Detention Standard for Detainee Transfer with the name, address, and telephone number of the facility to which such detainee is being transferred immediately prior to the transfer, as well as notice of such transfer to such detainee’s representative of record, if any.\footnote{ICE has acknowledged and taken steps to address these problems and has committed to expediting efforts to provide an online detainee-locator system for lawyers, relatives and others.\footnote{\textit{See Fact Sheet, Ice Detention Reform, supra note 383.}} Finally, ICE’s unfettered discretion to transfer persons between detention facilities has raised a perception of unfairness.\footnote{\textit{See, e.g., AM. CIVIL LIBERTIES UNION OF MASS., DETENTION AND DEPORTATION IN THE AGE OF ICE: IMMIGRANTS AND HUMAN RIGHTS IN MASSACHUSETTS 6 (2008), available at} http://www.aclum.org/ice/documents/aczu_ice_detention_report.pdf.} For example, advocacy groups argue that ICE officials routinely transfer detainees who have been outspoken or have complained about the conditions of their detention.\footnote{\textit{See, e.g., HUMAN RIGHTS WATCH, supra note 432, at 36-37 & n.64 (noting that its report does not conclude that there is an intentional ICE policy of transferring detainees to the Fifth Circuit, which is known for legal precedent hostile to the rights of immigrants, but that it appears that there was a significant inflow of detainees from other jurisdictions to at least one of the three states within the jurisdiction of the Fifth Circuit).}} In addition, some believe that detainees are being transferred to jurisdictions in which the applicable case law is hostile to immigrants’ rights.\footnote{\textit{See infra Part 2, Section III.A.1.}}

IV. Recommendations Relating to the Department of Homeland Security

A. Reduce Burdens and Increase Efficiency in the Removal Adjudication System

As discussed above in Section III.A.1, one of the major problems making it extremely difficult for the removal adjudication system to process and decide cases efficiently and fairly is the increasing number of cases entering the system and the lack of sufficient resources to handle these cases.\footnote{\textit{See SCHRIRO, supra note 365, at 6.}} In order to alleviate this burden, we recommend actions not only to increase the resources available but also actions, consistent with existing enforcement priorities, to decrease the number of people being put into the system.

\footnotetext[439]{See \textit{id.}, supra note 432, at 70 (“Transferring detainees away from key witnesses and evidence effectively denies them an opportunity to present a defense against removal, which is a violation of their human rights.”). For additional specific examples of how transfers impair detainees’ abilities to defend themselves in their removal proceedings, see \textit{id.}, supra note 432, at 66-71.}

\footnotetext[440]{ICE has required that its system-wide tracking system for detainees be updated within 24 hours of detaining, transferring, or removing a noncitizen, to provide accurate snapshots in time of ICE’s detainee population. However, the Office of Inspector General of the Department of Homeland Security reported that the results of its audit found that ICE staff at the five detention facilities tested did not consistently update ICE’s tracking system properly or timely. In some cases, the tracking system was not updated to reflect the removal of detainees. \textit{OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT’S TRACKING AND TRANSFERS OF DETAINEES 3-5 (2009), available at} http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_09-41_Mar09.pdf; \textit{see SCHRIRO, supra note 365, at 18 (reporting that many detention facilities do not have computer entry screens for ICE’s record system, that the recording of detention book-ins and book-outs in ICE’s record system frequently occurs after the actual events, and improvements to this system could better ensure the accuracy of the count as well as timeliness.).}}

\footnotetext[441]{\textit{See \textit{OFFICE OF INSPECTOR GEN., supra at 6}.}}

\footnotetext[442]{\textit{See \textit{Fact Sheet, Ice Detention Reform, supra note 383.}}}

\footnotetext[443]{ICE has claimed that the frequency of detainee transfers is partly related to its arrangements with state and local jails under intergovernmental service agreements, which permit such jails to require ICE to transfer detainees upon request, and Human Rights Watch’s analysis of detainee transfer data confirms that the majority of detainee transfers originate from local prisons and jails operating under intergovernmental service agreements with ICE. \textit{See HUMAN RIGHTS WATCH, supra note 432, at 21; see also SCHRIRO, supra note 365, at 6 (“Although the majority of arrestees are placed in facilities in the field office where they are arrested, significant detention shortages exist in California and the Mid-Atlantic and Northeast states. When this occurs, arrestees are transferred to areas where there are surplus beds.”).}}


\footnotetext[445]{\textit{See, e.g., HUMAN RIGHTS WATCH, supra note 432, at 36-37 & n.64 (noting that its report does not conclude that there is an intentional ICE policy of transferring detainees to the Fifth Circuit, which is known for legal precedent hostile to the rights of immigrants, but that it appears that there was a significant inflow of detainees from other jurisdictions to at least one of the three states within the jurisdiction of the Fifth Circuit).}}
1. Increase the Use of Prosecutorial Discretion to Reduce Unnecessary Removal Proceedings and Litigation

If DHS officers and attorneys increase their use of prosecutorial discretion to weed out unnecessary cases or issues, the burden on the removal adjudication system could be lessened significantly. DHS would issue fewer NTAs, resulting in fewer cases in the system and fewer detainees. The number of issues adjudicated in immigration courts likely would decline as well.

a. DHS Officer Prosecutorial Discretion

Training, guidance, support, and encouragement are required to ensure that DHS officers properly exercise prosecutorial discretion. We recommend:

- Communicating to all DHS personnel the view of the DHS Secretary and other senior officials that the appropriate exercise of prosecutorial discretion is not only authorized by law but encouraged;
- Updating existing policies and procedures to make clear that DHS officers and other personnel are expected to exercise prosecutorial discretion to refrain from serving NTAs on persons believed to be prima facie eligible for relief from removal and developing clearer guidelines (with specific examples of situations in which exercises of prosecutorial discretion are expected) to assist DHS officers and other personnel in appropriate exercises of prosecutorial discretion;
- Mandating periodic training on these policies, guidelines, and procedures for DHS officers and other personnel, including senior officials;
- Making DHS attorneys available to consult with and address specific questions from DHS officers and other DHS personnel regarding prosecutorial discretion; and
- Developing metrics to evaluate each DHS officer’s compliance with the policies, guidelines, and procedures and rewarding compliance appropriately.

b. DHS Attorney Prosecutorial Discretion

The following steps should be taken to ensure the proper exercise of discretion by ICE and USCIS attorneys (to the extent such steps are not already in progress):

- Each agency should adopt guidelines encouraging the use of prosecutorial discretion in appropriate instances, while precluding such prosecutorial discretion in other circumstances. These guidelines should account for important concerns, such as fairness and efficiency. They should clarify that the mission of DHS attorneys is to promote justice rather than to defeat immigrants’ claims in every case. These guidelines should direct DHS attorneys to exercise prosecutorial discretion under at least three circumstances:
  - DHS attorneys should exercise prosecutorial discretion when, in their professional judgment, the courts are unlikely to sustain a position taken by a DHS officer.
  - DHS officers and attorneys alike should use discretion when a proceeding may be rendered moot by other events. For example, when a noncitizen is subject to removal but will almost certainly obtain a visa soon after being deported, the most efficient course may be to forego removal proceedings.
  - DHS attorneys should be willing to stipulate to facts favorable to the noncitizen when appropriate and should advocate for reasonable positions taken by DHS officers in each case, rather than reflexively adopting an adversarial stance.
- When agency management engages in performance reviews of ICE and USCIS attorneys, they should rely on factors other than the number of removal orders obtained, such as success rates in the cases they do bring and professionalism.
- In the ongoing training provided to their attorneys, ICE and USCIS should emphasize the importance of exercising prosecutorial discretion when doing so would be in the interest of justice or efficiency.
- The central legal offices of ICE and USCIS should continually monitor the extent to which the regional legal offices exercise prosecutorial discretion and ensure that they are consistently promoting efficiency while staying within appropriate boundaries.
2. Give DHS Attorneys Greater Control over the Initiation of Removal Proceedings

As described in Section II.C above, Notices to Appear are issued in a variety of agency contexts by CBP, USCIS, and ICE and are subject to substantial discretion, often exercised by employees at varying levels of seniority and experience. Apart from NTAs required by regulation, there appears to be no consistent policy guidance outlining factors to be considered in exercising discretion in the issuance of NTAs. Consequently, discretion is exercised with disparate results.

We recommend that in DHS local offices with sufficient attorney resources the approval of a DHS lawyer be required for the issuance of all discretionary NTAs, and that the DHS lawyer’s approval be granted on a case-by-case basis. This should help produce more consistent outcomes and would help to ensure that decisions about the issuance of NTAs would take into account developments in the applicable law. To the extent this approach may contribute to delays in decision making, exceptions could be provided in time-sensitive circumstances, such as cases where detainers need to be issued for noncitizens incarcerated for aggravated felonies.

We recognize, however, that ICE attorneys in larger local offices are currently overwhelmed by their caseloads in immigration proceedings and, therefore, are not in a position to take on the additional burden of screening NTAs. Such screening, therefore, should be undertaken on a pilot basis in smaller offices that have sufficient resources. The results there should be monitored carefully and evaluated to determine the need for and feasibility of extending the system to other offices and the additional resources needed for such extension.

3. To the Extent Possible, Assign Cases to Individual DHS Trial Attorneys

One barrier to the effective exercise of prosecutorial discretion and the efficient handling of cases by DHS trial attorneys is the current practice of assigning attorneys on a hearing-by-hearing basis in removal proceedings at the immigration courts. The result is that several attorneys may have to become familiar with the same case, with no single attorney having overall responsibility for the case.

We recommend that, to the extent possible, DHS assign one DHS trial attorney to each removal proceeding. This would permit that attorney to become familiar with the facts and circumstances of the removal cases assigned to him or her, give the attorney a sense of ownership over those cases, and provide a single contact person to facilitate negotiations and stipulations with opposing counsel. This practice would facilitate the exercise of prosecutorial discretion in a manner consistent with DHS policies.

4. Allow Asylum Officers to Approve Defensive Asylum Claims

The current asylum process distinguishes between the treatment of affirmative asylum claims and defensive asylum claims. Applicants with affirmative claims have the opportunity to present their claims to asylum officers in non-adversarial proceedings, while defensive claims must be adjudicated in the immigration court. Such treatment of defensive claims adds to the substantial workload of immigration courts and ICE attorneys.

In some instances at least, this distinction is somewhat arbitrary. For example, a person who has successfully entered the country illegally, or a person who has entered legally but whose status has since expired, can apply for asylum affirmatively, while a person who is caught entering the country illegally, or a person who expresses an interest in applying for asylum while entering legally, will be treated as a defensive applicant.

a. Asylum Claims Made in Expedited Removal Cases

One way to reduce the caseload burden on immigration courts is to allow asylum officers to adjudicate asylum claims raised as a defense to expedited removal in order to determine whether there is a valid asylum claim. The United States Commission on International Religious Freedom (“USCIRF”) has suggested that substantial efficiencies could be created and certain unfair effects ameliorated by allowing asylum officers to adjudicate asylum claims at the credible fear stage. As USCIRF noted:

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447 See supra Section II.C.1.b.
Allowing asylum officers to grant asylum at this [the credible fear determination] stage would reduce demands on detention beds, EOIR resources, trial attorney time, and reduce the time the bona fide asylum seeker spends in detention.448

The asylum officer would be authorized either to grant asylum if warranted or otherwise refer the claim to the immigration court as part of removal proceedings. In the latter case, the asylum officer's narrowing of the issues relating to asylum could serve to focus the immigration court's inquiry.

This reform could have a substantial impact on the immigration courts' workload. In fiscal years 2000 through 2003, more than 90% of persons referred by CBP immigration officers to the Asylum Division for credible fear interviews were found to have a credible fear of persecution.449 Consequently, some 5,000 defensive asylum claims were added to the workload of the immigration courts.450 The immigration courts granted relief, in the form of either asylum or withholding or deferral of removal under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in 28% of these proceedings — or to some 1,400 applicants — in fiscal years 2000 through 2004.451 If the Asylum Division had retained and adjudicated these asylum claims after the credible fear interview, many if not most of these 1,400 meritorious asylum applications likely would have been granted and never reached the immigration courts.

It is also possible that some of the defensive asylum claims denied by the Asylum Division would be withdrawn or abandoned by the applicants after they were referred to the immigration courts. Approximately 48% of defensive asylum claims completed in the immigration courts in fiscal years 2001 through 2005 were not adjudicated on the merits because they were withdrawn, abandoned, or received an alternative resolution.452 This “non-adjudication” rate for defensive asylum claims completed in the immigration courts has not changed significantly since fiscal year 2005; approximately 49.1% of defensive asylum claims completed in the immigration courts in fiscal years 2006 through 2008 were not adjudicated on the merits because they were withdrawn, abandoned, or received an alternative resolution.453 Available data suggest that applicants with affirmative asylum claims who are unsuccessful in the Asylum Division are more likely to withdraw or abandon their claims (or receive an alternative resolution) in the immigration courts than persons pressing their defensive asylum claims for the first time in immigration court.454 It seems reasonable to assume that if asylum officers also adjudicate defensive asylum claims, a greater percentage of these defensive applicants are likely to withdraw or abandon their claims in the immigration courts.

A number of other considerations support allowing asylum officers to adjudicate defensive asylum claims:

• First, in the expedited removal context, if the asylum officer who handles the credible fear interview also adjudicates the asylum claim, then that person is already familiar with both the factual and legal background of a given case from the credible fear interview. Allowing the same officer to review the asylum claim prevents duplication of work.

448 EXPEDITED REMOVAL PART I, supra note 338, at 66.
449 Id. at 33. However, in late 2008, the DHS Assistant Secretary for Policy, Stewart Baker, told USCIRF that the “screen-in rate” dropped to 63% in 2006 and 60% in 2007. Letter from Stewart Baker, Assistant Sec’y for Policy, Dep’t of Homeland Sec., to Felice D. Gaer, Chair, U.S. Comm’n on Int’l Religious Freedom (Nov. 28, 2008).
450 This estimate represents 90% of the 5,376 noncitizens who were referred to the Asylum Division for credible fear proceedings in fiscal year 2003. EXPEDITED REMOVAL PART I, supra note 338, at 32.
454 TRAC ASYLUM PROCESS, supra note 452.
Second, it is possible that the initial orientation and interview of applicants in the credible fear screening process could be streamlined — perhaps by combining the orientation with the interview.

Third, this proposal should be viewed favorably by various stakeholders in the asylum process. ICE attorneys and immigration courts should value the reduction of their caseload. ICE attorneys would have fewer instances where they were put in the position of opposing meritorious asylum claims. Meritorious asylum applicants should value the opportunity initially to present their claims in a non-adversarial environment, where they are examined by specialists invested in the asylum process.

Since the total number of affirmative asylum applications processed by the Asylum Division has declined during the past decade, assuming the number of asylum officers in the Asylum Division remains fairly constant in the future, the increased workload involved in allowing asylum officers to adjudicated defensive asylum claims would likely be manageable. A number of objections to, and concerns regarding, the USCIRF proposal have been raised:

- If the credible fear and asylum determinations are combined and/or their sequence accelerated to reduce detention times, applicants may have insufficient time and resources to complete the asylum application, to prepare for the asylum interview, to consult with an attorney or representative, and to obtain documentation to support their claims.
- This combined process may increase the detention time for some asylum applicants who could meet the credible fear standard, but are at the time unable to demonstrate eligibility for asylum.
- Asylum applicants would also have to establish their identity and pass security checks before they could be granted asylum, which would increase their time in detention.
- Accelerated adjudication of an asylum applicant’s claim could produce a record of the applicant’s testimony that has not benefited from the additional time to prepare the case and consult with counsel that would be provided for in a separate procedure. A record of the testimony created in the course of such a procedure may have consequences for the applicant in later removal proceedings when the case is not approved by the asylum officer in the accelerated process.

Despite these objections and concerns, if the goal is to streamline the adjudication of asylum claims in the immigration system as a whole, then the proposal deserves serious consideration.

b. Defensive Asylum Claims Made in Removal Proceedings in the Immigration Courts

It may also be possible to divert to the Asylum Division the adjudication of defensive asylum claims arising in removal proceedings in the immigration courts. This new process would require referring the claim to the Asylum Division and then having it referred back to the immigration court if the asylum officer did not grant the claim. Although this new process would be more unwieldy than the proposed combination of credible fear and asylum determinations in the expedited removal context recommended in Section IV.A.4.a above, it would

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455 According to the GAO, the total caseload of the Asylum Division declined from approximately 450,000 cases in 2002 to 83,000 cases in 2007. Caseload is defined as “pending and new receipts for asylum, credible and reasonable fear, and NACARA cases.” U.S. GOV’T ACCOUNTABILITY OFFICE, U.S. ASYLUM SYSTEM: AGENCIES HAVE TAKEN ACTIONS TO HELP ENSURE QUALITY IN THE ASYLUM ADJUDICATION PROCESS, BUT CHALLENGES REMAIN 62 (2008), available at http://www.gao.gov/new.items/d08935.pdf.

456 However, there has been a decline in the number of available asylum officers since fiscal year 2002. During fiscal years 2002 through 2007, the number of available asylum officers ranged from a high of 232 in fiscal year 2003 to a low of 199 in fiscal year 2005, and the Asylum Division of USCIS reported that 163 asylum officers would be available in fiscal year 2008. Id. at 150.

457 Interview with Susan Raufer, Ethan Taubes & Lauren Vitiello, Asylum Div., U.S. Citizenship & Immigration Servs.

458 Letter from Stewart Baker, supra note 449.

459 Id.

460 Id.

reduce the number of matters ultimately adjudicated by the immigration courts and the burden on DHS trial attorneys more significantly than would implementing the first proposal alone. 462

In fiscal year 2008, 14,067 defensive asylum cases were received by the immigration courts. 463 Approximately 3,128 of these cases were referred by asylum officers following credible fear determinations. 464 Accordingly, approximately 11,000 cases were applications made defensively after removal proceedings were initiated in the immigration courts. 465 If these approximately 11,000 defensive asylum cases had been reviewed by asylum officers, and the asylum officers had granted asylum with respect to these cases at the immigration courts’ grant rate of 36% for defensive asylum cases in fiscal year 2008, 466 then approximately 4,000 asylum claims would have been disposed of by the Asylum Division and would not have required adjudication by the immigration courts.

c. Authority Required to Implement Recommendations

The current requirement of referring asylum claims arising during the expedited removal process to immigration courts following a positive credible fear determination could be changed without legislative action. 467 Altering the procedure to require asylum officers to adjudicate defensive asylum claims made in removal proceedings in the immigration courts, however, would require Congressional action. Recent legislation provides an opportunity for the Asylum Division and other stakeholders to evaluate the practicability of the latter reform before a legislative solution is proposed.

In connection with the enactment of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (“TVPRA”), USCIS announced in March 2009 that it is responsible for the initial adjudication of applications for asylum from “unaccompanied alien children” who are in removal proceedings in immigration courts and have not previously filed affirmative asylum applications with USCIS. 468 Prior to the effectiveness of the applicable provisions of TVPRA on March 23, 2009, such children would have been required to file for asylum in immigration court. Under the TVPRA, these unaccompanied children, who have been issued NTAs, must file their initial asylum applications with USCIS. 469

5. Cease Issuing Notices to Appear to Noncitizens Prima Facie Eligible to Adjust to Lawful Permanent Resident Status

As described in Section III.F.2 above, USCIS has issued NTAs to out-of-status noncitizens despite their eligibility to adjust to LPR status — even following the approval of employment-based immigrant visa petitions filed for their benefit. Permitting DHS to issue NTAs under such circumstances is an inefficient use of adjudicatory resources and unfair to such noncitizens. Accordingly, we recommend that DHS implement a policy of not issuing NTAs, to the extent possible, to noncitizens who may be out of status but are prima facie eligible to adjust to LPR status.

462 A possible means of diverting defensive asylum claims to the Asylum Division is pursuant to procedures similar to those recently announced by USCIS in connection with the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044. See infra Section IV.A.4.c and note 468.

463 EOIR FY2008 STATISTICAL YEAR BOOK, supra note 29, at 11.

464 See HUMAN RIGHTS FIRST, supra note 211, at 85 n.2 (reporting 3,128 individuals for fiscal year 2008 were found to have credible fear of persecution based on statistics provided by USCIS).

465 This figure was calculated by deducting the number of individuals reported to have been found to have a credible fear of persecution for fiscal year 2008 (see supra note 464) from the number of defensive asylum claims received by the immigration courts in fiscal year 2008 (see supra note 463) and rounding the resulting figure to the nearest thousand.

466 EOIR FY2008 STATISTICAL YEAR BOOK, supra note 29, at K3.

467 See INA § 235(b)(1)(B)(ii), 8 U.S.C. § 1225(b)(1)(B)(ii) (“If the officer determines at the time of the interview that an alien has a credible fear of persecution . . . , the alien shall be detained for further consideration of the application for asylum.”). Requiring asylum officers to adjudicate asylum claims raised in expedited removal proceedings would require, however, some amendment to the regulations related to expedited removal proceedings, such as 8 C.F.R. §§ 208.30(f) and 235.6(a)(1)(ii). See also EXPEDITED REMOVAL: PART I, supra note 338, at 66.


469 The TVPRA also provides an opportunity for any unaccompanied child, who did not previously file for asylum with USCIS and who has a pending claim on appeal to the BIA or in federal court, to have his or her asylum claim heard and adjudicated by a USCIS asylum officer in a non-adversarial setting. Id.
B. Implement Mechanisms to Coordinate Immigration Positions and Policies among the Various Components of DHS

As discussed in Section III.B above, DHS’s enforcement and application of immigration law have been inconsistent and confusing. This is unfair to those affected, limits the ability of DHS to take a leadership role on immigration policies, and decreases confidence and trust in the immigration adjudication system.

The structure of the immigration functions in DHS makes coordination and consistency in this area challenging. The immigration service and enforcement functions are divided among three co-equal components in DHS, each of which is headed by a Presidential appointee reporting directly to the Secretary of DHS through the Deputy Secretary. The DHS Assistant Secretary for Policy and the General Counsel of DHS play important roles in immigration matters. Each of USCIS, CBP, and ICE has its own policy office reporting directly to the head of such component, while each has its own general counsel, who reports directly to the General Counsel of DHS.

Important cross-cutting issues should be addressed in a coordinated and consistent manner. However, the only persons in DHS with the authority to resolve these disputes are the Secretary and the Deputy Secretary, who are managing an enormous agency with multiple components, of which USCIS, CBP, and ICE are only a part. Moreover, as the Migration Policy Institute observed, this lack of a “robust department-level mechanism” will be a particularly acute problem if immigration reform legislation is enacted.470

We recommend, therefore, that DHS create a position to oversee and coordinate all aspects of DHS immigration policies and procedures. This position should have sufficient resources and authority: (1) to ensure coordination among USCIS, CBP, and ICE; (2) to develop and advance its own agenda and goals with respect to immigration policies; and (3) to play a more significant role in developing immigration policies and informing public opinion on these issues. Others have advocated this approach. For example, the Migration Policy Institute recently recommended the appointment of a Senior Assistant to the Secretary and Deputy Secretary of DHS to channel policy debates, resolve issues, and provide leadership in developing and implementing overall immigration policies and procedures.471

C. Amend Unfair Laws that Burden the Removal Adjudication System

While this Report has focused on the procedures for removing noncitizens from the United States, we also have identified some substantive provisions of immigration law that are not only unfair to noncitizens but also burden the immigration adjudication system. These include: (1) restrictions on the ability of noncitizens to adjust to LPR status, coupled with the bars on admission; (2) the law authorizing removal of noncitizens convicted of aggravated felonies; and (3) the law authorizing removal of noncitizens convicted of crimes involving moral turpitude.

1. Permit All Noncitizens who are Eligible to Become Lawful Permanent Residents to Adjust Their Status in the United States or Eliminate Bars to Reentry

As described in Section III.F.1 above, a combination of the restrictions on the availability to noncitizens of the adjustment of status procedures under section 245 and the three-year, ten-year, and permanent bars on admission promotes the continued growth in the number of undocumented noncitizens in the United States and limits the availability of a remedy during removal proceedings for which a significant number of noncitizens would otherwise be eligible. If the adjustment of status procedures were made more widely available to undocumented noncitizens, it would transfer most of the burden of adjudicating LPR applications from the immigration courts to USCIS officers, who have extensive experience with such applications.472

470 See CORRECTING COURSE, supra note 409, at 93.

471 Id. at 94-95; see also EXPEDITED REMOVAL PART I, supra note 338, at 65-66 (recommending that the Office of the DHS Secretary delegate to one person the authority to coordinate the activities of CBP, ICE, and the Office of Asylum relating to asylum seekers and refugees); HUMAN RIGHTS FIRST, HOW TO REPAIR THE U.S. ASYLUM SYSTEM: BLUEPRINT FOR THE NEXT ADMINISTRATION 4 (2008) (noting that Human Rights First has urged DHS’s senior leadership since 2003 to “create effective structures to ensure coordination, attention and commitment to the protection of refugees and asylum seekers.”).

472 USCIS has funded its benefit adjudications through the collection of application fees and relies primarily on these fees to cover its operations. See U.S. GOV’T ACCOUNTABILITY OFFICE, IMMIGRATION APPLICATION FEES: COSTING METHODOLOGY IMPROVEMENTS WOULD PROVIDE MORE RELIABLE BASIS FOR SETTING FEES 8-9 (2009), available at http://www.gao.gov/new.items/d0970.pdf.
Alternatively, repeal of the three-year, ten-year, and permanent bars to reentry would also reduce the number of “out-of-status” noncitizens by encouraging those who are able to become LPRs to legalize their status. Although these bars were intended to deter noncitizens from remaining in the United States without legal status, they actually encourage them to remain in the country because leaving, even if to become an LPR via consular processing, would trigger the applicable bar to reentry.473

2. Revise the Definition of Aggravated Felony and Repeal Retroactive Application of the Aggravated Felony Provisions

As described in Section III.C.1 above, the definition of “aggravated felony” has progressively expanded since 1988 and currently is so broad that DHS has initiated removal proceedings against persons convicted of misdemeanors and other minor crimes that are not consistent with any common understanding of the term “aggravated felony.”474 This has contributed to a sharp increase in appeals of removal orders based on aggravated felony convictions and thus has added to the burdens of the removal adjudication system. The fact that 55% of those removed in 2006 on the ground of aggravated felony convictions were processed through administrative removal475 with no court review makes the need for revision of the aggravated felony provisions particularly acute.

We recommend that Congress amend the definition of “aggravated felony” in the INA to be consistent with the common understanding of the term: a serious felony. Currently, several categories of offenses are aggravated felonies based upon a sentence imposed of one year, even if the sentence is entirely suspended. Other categories of offenses are classed as aggravated felonies without the requirement that any sentence at all was imposed. As discussed above in Section III.C.1, the effect of these provisions is that misdemeanor convictions routinely are classed as “aggravated felonies.” Accordingly, we recommend that Congress add to the current definition of aggravated felony a threshold requirement that any such conviction must be of a felony and that a term of imprisonment of “more than one year” must be imposed (excluding any suspended sentence). This threshold requirement will eliminate the inclusion of misdemeanor convictions as “aggravated felonies” under the INA and ensure that only noncitizens who actually are convicted of a felony, with the minimum felony sentence imposed, bear the extreme immigration consequences attached to an aggravated felony conviction. Even this adjustment may leave other minor offenses classified as aggravated felonies, however, if they carry an “indeterminate” sentence, which may be considered a sentence of more than a year.

The addition of this bright-line threshold requirement would accomplish three goals:

- It would restore some consistency between the term Congress used in the statute and the offenses included in the term, so that long-time LPRs with U.S. citizen and LPR family members and extensive ties to the United States will not be automatically removed based upon a minor conviction.
- It would significantly reduce the strain on the immigration adjudication system that is brought by prosecuting a large number of minor offenders as aggravated felons, and the flood of litigation brought by sympathetic petitioners to the federal Courts of Appeals on this issue.
- It would lend greater credibility to the system of administrative removal of persons convicted of aggravated felonies, in which a non-attorney DHS officer is called upon to decide whether a particular conviction is of an aggravated felony, because a non-attorney officer can determine whether a conviction is of a felony and whether the required sentence has been imposed.


474 See Anthony Lewis, Abroad at Home; ‘Measure of Justice,’ N.Y. TIMES, July 15, 2000, at A13 (reporting a number of cases in Georgia in which persons were subject to removal orders as aggravated felons although they had committed minor offenses, including pulling another person’s hair, writing $100 worth of bad checks, shoplifting a $39 item, and accidentally shoplifting a child’s dress that the individual was trying to exchange).

475 See supra Section III.C.2.
The retroactive application of the aggravated felony provisions also burdens the system, is unfair, and results in the removal of noncitizens with longstanding ties to the United States and the disruption of their families. We therefore recommend that such retroactive application be eliminated.


a. Require the Imposition of a Sentence of One Year or More for Removal on the Ground of a Single Conviction of a Crime Involving Moral Turpitude or Require a Potential Sentence of More than One Year

As described in Section III.D.1 above, it is a misuse of limited resources and unnecessarily burdensome to bring removal proceedings against an LPR based on a conviction of a single minor offense, such as misdemeanor shoplifting, where no sentence was imposed. Accordingly, we recommend that Congress amend the INA to require that a single conviction of a crime involving moral turpitude is a basis for deportability only if a sentence of more than one year is imposed. In the alternative, we recommend that Congress at least require that the offense carry a potential sentence of “more than one year,” rather than the current “one year or longer.” Although this is a difference of only one day, it will eliminate the single no-jail misdemeanor conviction from causing an LPR to become deportable under this section of the INA.

b. Reinstatethe Application of the Categorical Approach to Moral Turpitude Determinations

In re Silva-Trevino, 24 I&N Dec. 687 (AG 2008), seeks to impose an authoritative administrative rejection of the categorical approach to determining whether a criminal conviction is of a crime involving moral turpitude in the immigration context. Although the amount of deference that will be accorded to Silva-Trevino by the circuit courts remains to be seen, Silva-Trevino will potentially cause protracted hearings and delay in a significant number of immigration court proceedings and increase the difficulty of managing the immigration courts’ caseloads. In addition, Silva-Trevino has created uncertainty as to the immigration consequences of criminal convictions, which may result in increased unwillingness by defendants and their legal counsel to dispose of criminal cases by pleas and uncertainty and disruption in the criminal justice system.

For the reasons set forth in Section III.D.2 above, we recommend that Attorney General Holder withdraw Silva-Trevino, which was issued by former Attorney General Mukasey, and reinstate the categorical approach in removal and other immigration proceedings to determine whether a past conviction is for a crime involving moral turpitude.

D. Reform Administrative and Expedited Removal Proceedings

As discussed in Sections III.C.2 and III.E.4 above, the administrative removal of noncitizens convicted of aggravated felonies and the expedited removal of persons apprehended at the border or within the interior of the United States produce removal decisions made by DHS officers that are not open to public scrutiny and are subject to very limited judicial review. Although efficiency is an important goal for the immigration adjudication system, it should be balanced with the goal of ensuring due process for noncitizens. As currently implemented, administrative removal of non-LPRs on the ground of aggravated felony convictions and expedited removal of persons apprehended at the border or within the United States fail to sufficiently ensure due process for noncitizens and, consequently, decrease noncitizens’ confidence and trust in the immigration adjudication system.

The limited review of administrative and expedited removal decisions, and the opacity of administrative and expedited removal procedures, are troubling because the decisions produced by them have significant consequences. For example, noncitizens who removed on the ground of aggravated felony convictions pursuant to administrative removal procedures are permanently barred from returning to the United States for any reason. In addition, a noncitizen with a valid nonimmigrant visa, such as a tourist or business person, may be erroneously removed
and barred from reentry for five years after his or her removal, with no recourse to correct the error. Finally, a noncitizen in expedited removal proceedings who faces persecution or torture upon repatriation has no recourse if he or she is erroneously ordered removed.

The ABA has taken the position that Congress should enact legislation to restore authority to conduct removal proceedings solely by immigration judges and that such proceedings should include the right to have a decision that is based on a record and subject to meaningful administrative and judicial review.\(^{477}\) The rationale for this policy was recently stated as follows:

All of these systems [including expedited removal and administrative removal], although they address serious problems in the immigration enforcement system, implicate due process concerns. They expressly exclude the oversight of an impartial adjudicator; they are radically accelerated; they are largely insulated from public scrutiny and judicial review. The continuation and expansion of such hidden systems of administrative procedure violate many of the most fundamental norms of due process.\(^{478}\)

In furtherance of this ABA position, we recommend that Congress amend the INA to curtail the use of such proceedings for certain noncitizens and to provide a complementary avenue for judicial review.

1. Prohibit Use of Administrative Removal Proceedings to Remove Minors, the Mentally Ill, Noncitizens who Claim a Fear of Persecution or Torture, and Noncitizens with Significant U.S. Ties

Currently, DHS is authorized to initiate administrative removal proceedings on the ground of an aggravated felony conviction against any noncitizen who is not an LPR,\(^{479}\) but must issue an NTA if the person is an LPR. As noted in Section III.C.2 above, this disparate treatment of LPRs and other noncitizens cannot be justified. However, if such treatment is continued, then we recommend that the following groups of non-LPRs with aggravated felony convictions be removed only by orders issued by the immigration courts.

**Unaccompanied minors and the mentally ill.** Minors and the mentally ill are particularly “vulnerable” and “may lack the capacity to make informed decisions on even the most basic matters impacting their cases. . . . In fact, they may not be able even to understand the nature of, much less be able to meaningfully participate in, their immigration proceedings.”\(^{480}\) Accordingly, they require the full due process and procedures available in removal proceedings before the immigration courts.

**Non-LPRs claiming a fear of persecution or torture.** A noncitizen who fears persecution or torture upon return to his or her country of origin, even if he or she is removable on the ground of an aggravated felony conviction, may be eligible for withholding of removal under section 241(b)(3) or withholding or deferral of removal under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Moreover, if he or she has not been convicted of an aggravated felony, then such noncitizen may be eligible for asylum. In any event, non-LPRs who claim a fear of persecution or torture upon return to their countries also require the additional procedural protections available in immigration court proceedings.

**Non-LPRs with significant ties to the United States.** A non-LPR who can demonstrate that he or she is married to a U.S. citizen or LPR, has minor children who are U.S. citizens or LPRs, or has served in the U.S. military should not be treated differently from an LPR and, therefore, should be entitled to an immigration court proceeding.


\(^{478}\) **ENSURING FAIRNESS**, supra note 477, at 7.

\(^{479}\) **ENSURING FAIRNESS**, supra note 477, at 7.

\(^{479}\) INA § 238(b), 8 U.S.C. § 1228(b).

\(^{480}\) **ENSURING FAIRNESS**, supra note 477, at 2.
2. Limit Application of Expedited Removal Proceedings to Certain Types of Individuals

Similar concerns are raised by the greatly expanded use of expedited removal proceedings. As discussed in Section III.E above, expedited removal may be applied broadly to any noncitizen who has entered the United States without inspection and cannot show that he or she has been continuously present here for two years. Although the initial application of expedited removal procedures was limited to noncitizens at ports of entry, its use has greatly expanded to include noncitizens apprehended in the interior of the country. Expedited removal orders generally are not subject to review by the immigration courts and the BIA, and judicial review through habeas corpus proceedings is limited to very few types of issues (for example, whether the noncitizen is a citizen or a LPR, refugee, or asylee).

As discussed further below, we recommend that section 235 of the INA and the applicable regulations be amended to limit the application of expedited removal proceedings to individuals meeting all the following criteria: (1) they seek entry into the United States at a port of entry or are observed by a DHS officer crossing a border illegally at the time of their apprehension; (2) they are not unaccompanied minors; and (3) they are not mentally ill.

a. No Application of Expedited Removal Proceedings to Persons within the Interior of the United States

We recommend that section 235 of the INA and the applicable regulations be amended to limit the application of expedited removal proceedings to an individual who either: (1) seeks entry into the United States at a port of entry; or (2) is observed by a DHS officer crossing a border illegally at the time of his or her apprehension. Expedited removal should not apply to noncitizens who are in the interior of the United States because they are entitled to the procedural due process rights set out by the Supreme Court in *Yamataya v. Fisher.* Moreover, in the original notice setting out the original expedited removal procedure limited to ports of entry implemented in 1997, DOJ acknowledged that “application of the expedited removal provisions to aliens already in the United States will involve more complex determinations of fact and will be more difficult to manage.”

b. No Application of Expedited Removal Proceedings to Unaccompanied Minors or the Mentally Ill

Concerns about unaccompanied minors and the mentally ill, as noted above in discussing the application of administrative removal procedures to non-LPRs alleged to be removable on the ground of aggravated felony convictions, apply in the expedited removal context as well. Unaccompanied minors are not generally placed into expedited removal other than in certain limited circumstances, and any expedited removal order is required to be reviewed and approved by the District Director or Deputy District Director, in addition to the approvals normally required for expedited removal orders. There is no administrative or judicial review to ensure that these procedures are followed. Moreover, similar protections have not been provided to other groups that face many of the same challenges as unaccompanied minors, particularly the mentally ill.

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481 *Yamataya v. Fisher*, 189 U.S. 86 (1903), the Supreme Court held that a noncitizen who has entered the country, even illegally, must not be deported “without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States.” *Id.* at 101 (non-citizen alleged that she was denied due process when immigration officer determined she was likely to be a “public charge” and therefore deportable); see also *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958) (articulating the “entry fiction” doctrine).


483 *See DETENTION AND REMOVAL OFFICER’S FIELD MANUAL, APPENDIX 11-4: JUVENILE PROTOCOL MANUAL* 6 (2003), *available at* http://www.ice.gov/doclib/foia/dro_policy_memos/juvenileprotocolmanual2006.pdf; *Memorandum from Office of Programs, U.S. Immigration & Naturalization Serv., Unaccompanied Minors Subject to Expedited Removal* 3 (Aug. 21, 1997), *available at* http://www.refugees.org/uploadedFiles/Participate/National_Center/Resource_Library/UM%20subject%20to%20ER%2008.97_Virtue_Memo.pdf; see also *Chad C. Haddal, CONGRESSIONAL RESEARCH SERVICE, REPORT RL33896, UNACCOMPANIED ALIEN CHILDREN: POLICIES AND ISSUES* 6-7 (2007), *available at* http://trac.syr.edu/immigration/library/IP1642.pdf. The limited circumstances under which a DHS officer may decide to place an unaccompanied minor in expedited removal include situations where “the minor: [ ] has, in the presence of an INS officer, engaged in criminal activity that would qualify as an aggravated felony if committed by an adult; [ ] has been convicted or adjudicated delinquent of an aggravated felony within the United States or another country, and the inspecting officer has confirmation of that order; or [ ] has previously been formally removed, excluded, or deported from the United States.” Memorandum from Office of Programs, U.S. Immigration & Naturalization Serv., *supra.*
3. Limit Expedited Removal Solely to Persons with Improper or Missing Documentation

Under the INA, a CBP officer may remove certain noncitizens without hearing or further review if the officer determines that they are inadmissible because they lack proper documentation\(^484\) or have committed fraud or a willful misrepresentation of facts to gain admission,\(^485\) unless they indicate an intention to apply for asylum or express a fear of persecution. Although CBP officers are unquestionably able during the inspection process at ports of entry to determine whether an individual lacks proper documentation, they are not as well situated to ascertain whether an individual with facially valid documents is committing fraud or making a willful misrepresentation to gain entry into the United States.\(^486\) These are questions that warrant proceedings before an impartial adjudicator in which a more fulsome fact-finding process is followed.

In light of the severe consequences of an expedited removal order and the limited judicial review of such orders, we recommend that section 235(b)(1)(A)(i) be amended, or that DHS take appropriate regulatory action, to provide that CBP officers may order the removal of a noncitizen solely on the basis of a determination that he or she lacks proper documentation. If a CBP officer believes that an individual with a facially valid document, such as a business visa or H-2A visa, is inadmissible because he or she is committing fraud or making a willful misrepresentation, then an NTA should be issued to place this individual in removal proceedings before the immigration court.

4. Improve Supervision of Inspection Process at Ports of Entry and Border Patrol Stations and Make Any Recording of Interviews of Noncitizens during the Inspection Process Available to Such Noncitizens and Their Representatives

Several steps should be taken to improve the quality control of CBP officers' contact with noncitizens at ports of entry and border patrol stations. First, DHS should expand the use of videotaping systems, which are in place at Houston International Airport and Atlanta International Airport, to all major ports of entry and border patrol stations. Regular review of these videotapes by DHS supervisors and managers and retention of the tapes would better enable DHS to deter CBP officers from pressuring noncitizens into withdrawing their asylum claims, protect the officers from erroneous allegations of improper conduct, and allow for the review and refinement of policies, procedures, and training for officers. In addition, we recommend that testers be used by CBP from time to time to verify that CBP officers implement proper procedures.\(^487\) Finally, we recommend that a copy of any videotape or other recording of the interview of a noncitizen during expedited removal proceedings be made available to such noncitizen and his or her representative for use in his or her defense from removal.\(^488\)

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486 For example, in May 2008, a CBP officer refused entry to Domenico Salerno, a 35-year-old Italian lawyer who was attempting to visit his fiancée, based on an erroneous determination that Mr. Salerno was attempting to gain employment in the United States, and refused to allow him to return to Italy based on an erroneous belief that he had requested asylum. Nina Bernstein, *Italian’s Detention Illustrates Dangers Foreign Visitors Face*, N.Y. TIMES, May 14, 2008, available at http://www.nytimes.com/2008/05/14/us/14visa.html.
487 These proposals are recommended by USCIRF. *EXPEDITED REMOVAL: PART I*, supra note 338, at 74; see also Schoenholtz, supra note 334, at 334 (recommending similar measures).
488 In many cases, immigration judges and DHS trial attorneys use the Form I-876B produced by the inspecting CBP officer during expedited removal proceedings to impeach a noncitizen’s credibility. See Jastram & Hartsough, supra note 74, at 68-70. A videotape or other recording of the applicable inspection interview is likely to produce a more accurate transcription of such interview than will the Form I-876B. Therefore, such videotape or other recording could be used to refute any attempted impeachment of the noncitizen’s testimony based on the Form I-867B.
5. Expand Judicial Review of Administrative and Expedited Removal Orders

a. Administrative Removal Orders on the Ground of Aggravated Felony Convictions

An administrative removal order on the ground of a conviction of an aggravated felony is now subject to very limited judicial review, \(^{489}\) while a similar removal order issued by an immigration court is subject to review by the BIA and the federal courts to the same extent as other removal orders issued by immigration courts.

If DHS officers continue to have the power to remove non-LPRs on the ground of aggravated felony convictions, then for the reasons discussed in Part III.C.2 above, we recommend that the immigration courts be empowered and authorized to review DHS determinations that the conviction was for an aggravated felony and that the person is not a minor, is not mentally ill, does not fear persecution or torture upon return to his or her country of origin, and does not have significant ties to the United States.

b. Expedited Removal Orders

Expedited removal orders also are not subject to review by the immigration courts and the BIA. Judicial review is available only in habeas corpus proceedings and is limited there to whether the petitioner is a noncitizen, was ordered expeditiously removed, or was previously granted LPR, refugee, or asylee status. \(^{490}\) We recommend that this review be expanded to allow a court to consider whether the petitioner was properly subject to expedited removal and to review challenges to adverse credible fear determinations.

E. Improve Efficiency and Fairness by Revising Detention Policies

The stated purpose of detention of a noncitizen in a removal proceeding is to ensure that this noncitizen appears for his or her removal proceeding. However, since the expansion of the mandatory detention provisions in 1996, an enormous and growing system of immigration detention has emerged, which is costly, extremely difficult to manage, and overburdened. As discussed in Section III.G above, in recent years, DHS has expanded the reach of its detention policies to sweep in greater numbers of noncitizens and has restricted the availability of parole and viable alternatives to detention, despite evidence that such alternatives are effective and more economical means of ensuring most noncitizens’ appearance in removal proceedings. In addition, as discussed in Section III.G.5 above, DHS’s exercise of discretion with regard to detainees’ locations has adversely affected the removal adjudication system.

The current mandatory detention provisions are too broad and require the government to spend resources inefficiently. They should, therefore, be eliminated or narrowed to target persons who are clearly flight risks or pose a threat to national security, public safety, or other persons. If such statutory changes are not adopted, we recommend that DHS implement policies with the purpose of avoiding detention of persons who are not subject to mandatory detention, are not flight risks, and do not pose a threat to national security, public safety, or other persons.

1. When Possible, Exercise Discretion to Refrain from Detaining Persons Not Subject to Mandatory Detention

Advocates and commentators have suggested that DHS’s policy on detention appears simply to be to detain the maximum number of noncitizens, with release allowed only in exceptional circumstances and that a culture of detention appears to have pervaded DHS. \(^{491}\)

We are not aware of any written policy that sets forth a “default” DHS policy of detaining all noncitizens, and those interviewed did not believe there was one, but there appears to be a “tone” favoring detention at DHS, especially for those individuals with prior criminal arrests. \(^{492}\) In addition, there is risk inherent when a DHS officer declines to

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\(^{489}\) The federal courts have jurisdiction to review the threshold question depriving the court of jurisdiction (e.g., whether a petitioner has been convicted of an offense that is an “aggravated felony”), and the federal courts also retain jurisdiction where an appeal is based on constitutional claims, such a lack of procedural due process. See supra Section III.C.2; see also infra Part 4.

\(^{490}\) INA § 242(e)(2), 8 U.S.C. § 1252(e)(2). See supra Section III.E.

\(^{491}\) See, e.g., Interview with Nancy Morawetz, supra note 421.

\(^{492}\) See, e.g., id.
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detain a noncitizen; if this noncitizen were to commit any crime or to abscond following his or her release, the DHS officer may suffer criticism and some negative career and other consequences. In sum, exercising discretion to refrain from detaining noncitizens is risky for individual DHS officers, while detaining them is the “standard” procedure.

DHS should “reset” its policies to allow — and to encourage — officers to exercise discretion not to detain noncitizens in the immigration system. Such changes would require forceful communication of standards to guide their discretion, as well as firm supervision by regional and lower-level administrators.

2. Improve and Expand Alternatives to Detention and Use Them Only for Persons who Would Otherwise Be Detained

As originally presented to (and funded by) Congress, the alternatives to detention program was built upon models developed by nonprofit organizations that gave detainees a way to leave detention while ensuring their appearance at immigration proceedings and, for those awaiting removal, discouraging them from absconding. The program provided a cost-effective means of reducing detention and detention costs. Although ICE’s current alternatives to detention programs retain some features of the nonprofit model, they resemble custody in many respects. In addition, ICE has limited participation in these programs and appears to have used them to supervise individuals who may be eligible for release — or at the very least, for parole or bond.493

We recommend that ICE re-evaluate its current alternatives to detention programs to develop new programs that, like the Vera Institute of Justice’s AAP, provide referrals to social and legal service agencies to encourage participants to appear at their immigration court hearings and are more supervisory, and less custodial, in nature. Such an alternative to detention program, however, may not be appropriate for a noncitizen required to depart the United States pursuant to a final removal order. For such persons, we recommend that other alternatives to detention programs, which combine more intense supervision and risk of re-detention for violating rules, be developed. To use all of such alternatives to detention programs most effectively, ICE should develop criteria for determining eligibility for participation in any of these programs and the appropriate level of supervision for each participant. For example, electronic monitoring would more appropriately be used to supervise individuals who would otherwise be detained by ICE. In addition, we recommend that DHS determine whether ICE’s current alternatives to detention programs constitute custody for purposes of the INA; if so, ICE could extend such programs to mandatory detainees who do not pose a danger to the community or a national security risk and for whom the risk of flight, within the parameters of the programs, is minimal. This could result in significant savings to the federal government.494

We recognize that DHS and ICE have announced new initiatives as part of the comprehensive immigration detention reforms, including new initiatives for the reform of ICE’s alternatives to detention programs,495 which we applaud. These new initiatives promise an expansion in the use of alternatives to detention by ICE that we hope will be consistent with our recommendations.

3. Expand the Use of Parole to Reduce the Detained Population of Asylum Seekers

We recommend that DHS should grant parole where asylum seekers have established their identities, community ties, lack of flight risk, and the absence of any threat to national security, public safety, or other persons. In addition, parole determinations should be conducted as a matter of course for asylum seekers who have completed the credible fear screening.496

We acknowledge that ICE will change its parole policy, effective as of January 4, 2010, in a manner consistent with these recommendations.497

493 See supra Section III.G.3.
494 See KERWIN & LIN, supra note 374, at 31; CORRECTING COURSE, supra note 409, at 55-56.
495 See Press Release, Immigration Detention Reform Initiatives, supra note 365. For a brief description of the proposed reforms to ICE’s alternatives to detention programs, see supra Section III.G.3.
497 See supra Section III.G.4.a.
ICE Assistant Secretary John Morton, pursuant to this revised policy, “ICE will generally release from detention arriving asylum seekers who have a credible fear of persecution or torture if certain criteria are met,” and such criteria include establishing their identities, posing neither flight risks nor dangers to the community, and having no additional factors that weight against their release. We welcome the change ICE is making to its parole policy, but it remains to be seen whether the application of this revised parole policy by ICE will be consistent with our recommendations.

4. Increase Controls on the Location and Transfers of Detainees

Currently, noncitizens who have been apprehended by DHS are often detained in remote facilities located outside of their state of residence and where they have limited access to family members, counsel, and other necessary resources. DHS should adopt regulations and policies to avoid such dislocations whenever possible.

In addition, we urge ICE to take steps to improve its compliance with ICE’s National Detention Standard for Detainee Transfers. Finally, we recommend that DHS upgrade its data systems and improve its processes to permit better tracking of detainees within the detention system.


499 See supra Section III.G.5.

500 We recognize that ICE has announced that it is accelerating the development of an online locator system for attorneys, family members, and others. See Fact Sheet, Ice Detention Reform, supra note 383. The successful implementation of an accurate online locator system by ICE would address the concern raised in Section III.G.5 above that detainees’ legal counsel, family, and friends are often unable to determine where such detainees are located, which impairs their ability to assist the detainees in defending against removal.