

Practice Advisory**From Protected Status to Facing Removal:
Possible Options for Populations Losing Temporary Protected Status¹**

July 21, 2026

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I. Introduction

By eliminating federal court jurisdiction to review certain statutory challenges to Temporary Protected Status (TPS) termination decisions, the U.S. Supreme Court's decision in *Mullin v. Doe* allows the Department of Homeland Security (DHS) to end Haitian and Syrian TPS and upend the lives of people who have been living in the United States for years or even decades. The same people whom DHS determined merited protection and stability in the United States and work authorization through which to contribute to the economy now face the prospect of detention and removal. To protect against that unfair fate, practitioners should assess individuals losing TPS for benefits before United States Citizenship and Immigration Services (USCIS), employment-based opportunities in Canada,² defenses from removal in immigration court, and opportunities for freedom should DHS detain them.³

II. USCIS Benefits

People losing TPS protections may be eligible for asylum or family-based or employment-based benefits before USCIS. However, Haitians or Syrians eligible for USCIS benefits should keep apprised of the *Dorcas In'l Inst. of Rhode Island v. United States Citizenship & Immigr. Servs.*⁴ litigation as its outcome will impact their ability to secure an adjudication of any USCIS benefit application.⁵ The case challenges USCIS policy memoranda⁶ issued pursuant to two presidential proclamations⁷ that paused benefits adjudications for nationals of 39 countries, including Haiti and Syria, purportedly addressing “the lack of screening, vetting, and the threat to national security and public safety.”⁸

² Practitioners who are not licensed in Canada should partner with or refer clients to a Canadian immigration attorney.

³ Although this resource discusses Haitians and Syrians specifically, the options discussed in this practice advisory are applicable to other populations losing TPS.

⁴ No. 26-CV-132-JJM-PAS, 2026 WL 1695954 (D.R.I. June 11, 2026) (vacating PM 602-0192, PM 602-0194, and PA 2025-26).

⁵ As of the date of publication, the U.S. District Court for the District of Rhode Island had vacated the challenged USCIS policies, the government appealed to the U.S. Court of Appeals for the First Circuit, and the district court denied the government's motion to stay the vacatur pending appeal, leaving the vacatur in effect while the appeal proceeds, absent further action. No. 26-CV-132-JJM-PAS, 2026 WL 2042424 (D.R.I. July 15, 2026).

⁶ USCIS, Policy Memorandum: Hold and Review of all Pending Asylum Applications and all USCIS Benefit Applications Filed by Aliens from High Risk Countries, PM-602-0192 (Dec. 2, 2025), <https://www.uscis.gov/sites/default/files/document/policy-alerts/PM-602-0192-PendingApplicationsHighRiskCountries-20251202.pdf>; USCIS, Policy Memorandum: Hold and Review of USCIS Benefit Applications Filed by Aliens from Additional High Risk Countries, PM-602-0194 (Jan. 1, 2026), <https://www.uscis.gov/sites/default/files/document/policy-alerts/PM-602-0194-PendingApplicationsAdditionalHighRiskCountries-20260101.pdf>; USCIS, Policy Alert: Impact of INA 212(f) on USCIS' Adjudication of Discretionary Benefits, PA-2025-26 (Nov. 27, 2025), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20251127-Discretion.pdf>.

⁷ Presidential Proclamation 10949, Restricting the Entry of Foreign Nationals To Protect the United States From Foreign Terrorists and Other National Security and Public Safety Threats, 90 Fed. Reg. 24497 (June 4, 2025), and Presidential Proclamation 10998, Restricting and Limiting the Entry of Foreign Nationals To Protect the Security of the United States, 90 Fed. Reg. 59717 (Dec. 16, 2025).

⁸ USCIS, Update on USCIS' Strengthened Screening and Vetting (Mar. 30, 2026), <https://www.uscis.gov/newsroom/alerts/update-on-uscis-strengthened-screening-and-vetting>.

Before filing any benefit applications with USCIS, it is important to know if USCIS has jurisdiction to adjudicate that application. Generally, if a person is in active removal proceedings or has an order of removal, the immigration court and not USCIS has jurisdiction over benefit applications.⁹ However, USCIS has exclusive jurisdiction over certain applications like an I-130, Family Petition for Alien Relative, or an I-485, Application to Register Permanent Residence or Adjust Status, filed by an “arriving alien.”¹⁰ Exclusive jurisdiction means that even if the person is in active removal proceedings or has an order of removal, USCIS and not the immigration court has jurisdiction over the application. USCIS also has initial jurisdiction over certain applications so even if the person is in removal proceedings, USCIS has the authority to adjudicate the application in the first instance.¹¹

A. Affirmative Asylum

For Haitian and Syrians losing TPS who fear returning to their home countries because of past harm or the risk of future persecution, affirmative asylum may provide a potential avenue for protection in the United States, and, if granted, a pathway to lawful permanent residence. Individuals who are not in removal proceedings may pursue asylum affirmatively with USCIS.¹²

To qualify for asylum, the applicant must demonstrate that they meet the statutory definition of a “refugee” by establishing that they have suffered past persecution or a well-founded fear of future persecution on account of at least one of five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion.¹³

1. One-Year Filing Deadline

Generally, an asylum applicant must demonstrate “by clear and convincing evidence that the [asylum] application has been filed within 1 year after the date of the [noncitizen’s] arrival in the

⁹ See 8 CFR § 1003.14(a).

¹⁰ See INA § 204(a) (vesting authority to adjudicate relative visa petitions in the Attorney General); 8 CFR § 208.2 (governing jurisdiction over asylum applications); 8 CFR § 245.2 (governing adjustment of status applications and jurisdiction over certain adjustment applications); 8 CFR § 1245.2 (governing adjustment of status procedures).

¹¹ For example, USCIS has initial jurisdiction over asylum applications filed by those with a prior unaccompanied child determination even if the person is in active removal proceedings or an IJ issues an order of removal. See TVPRA § 235(d)(7)(B), codified at INA § 208(b)(3)(C) (“An asylum officer . . . shall have initial jurisdiction over any asylum application filed by an unaccompanied [noncitizen] child . . .”). See also *Matter of J-A-B- & I-J-V-A-*, 27 I&N Dec. 168, 169 n.2 (BIA 2017); *Matter of M-A-C-O-*, 27 I&N Dec. 477, 479 (BIA 2018) (“[S]ection 208(b)(3)(C) of the Act limits an Immigration Judge’s jurisdiction over an asylum application filed by a UAC. . .”).

¹² Individuals with prior removal, deportation, or exclusion orders require additional analysis because the appropriate procedure depends on the nature of the prior order. Individuals who previously applied for asylum in removal proceedings and received a denial from the immigration court, resulting in an unexecuted removal order, may need to seek reopening of the prior proceedings under INA § 240(c)(7) in order to pursue a new asylum claim or other form of relief. Similarly, individuals subject to reinstatement of removal or expedited removal may first need to establish eligibility for further review through a reasonable fear interview or credible fear interview.

¹³ INA §§ 101(a)(42)(A), 208(b)(1)(A).

United States.”¹⁴ Because many Haitian and Syrian TPS holders have been residing in the United States for over a decade, many may need to establish an exception to the one-year filing deadline (OYFD) in order to pursue asylum. Under the Immigration and Nationality Act (INA), an applicant who files after the OYFD may still be eligible for asylum by establishing an exception based on either: (1) changed circumstances that materially affect eligibility for asylum or (2) extraordinary circumstances relating to the delay in filing.¹⁵ Even where an exception applies, the applicant must demonstrate that the asylum application was filed within a reasonable period of time after the relevant circumstances arose.¹⁶

The OYFD generally runs from an applicant's last arrival in the United States. Because many TPS beneficiaries may have traveled using DHS-authorized travel documents and subsequently returned to the United States, the applicant's most recent entry is the operative date from which the one-year filing period is measured.¹⁷ The termination of TPS does not automatically create an exception to the OYFD. Individuals who delayed seeking asylum because they were protected from removal through TPS may, however, have arguments that their circumstances warrant an exception to the filing deadline.

a) Extraordinary Circumstances

The “extraordinary circumstances” exception to the OYFD applies when an applicant demonstrates that extraordinary circumstances prevented the applicant from filing for asylum within one year of arrival.¹⁸ Unlike the changed circumstances exception, which focuses on developments that materially affect the applicant’s eligibility for asylum, the extraordinary circumstances exception focuses on the reasons the applicant did not file within the one-year period. The regulations provide a non-exhaustive list of circumstances that may qualify as extraordinary circumstances that prevented or excuse the applicant timely, including serious illness or disability, legal disability, ineffective assistance of counsel, maintaining TPS, lawful immigrant or nonimmigrant status, or parole until a reasonable period before filing the asylum application, and other circumstances meeting the regulatory standard.¹⁹ TPS qualifies as an extraordinary circumstance because it provides temporary humanitarian protection that allows individuals to remain lawfully in the United States while awaiting possible improvements in conditions in their home country, making a delay in filing for asylum reasonable.²⁰ As a result, some TPS holders may have delayed pursuing asylum because they had a form of temporary protection and did not face an immediate need to seek asylum protection. However, TPS excuses a late filing only to the extent that it is directly related to the applicant’s failure to meet the OYFD. Thus, where an applicant was granted or maintained TPS during the one-year filing period after arrival, the relevant inquiry is whether the applicant filed for asylum within a

¹⁴ INA § 208(a)(2)(B).

¹⁵ INA § 208(a)(2)(D).

¹⁶ 8 CFR § 208.4(a)(4)–(5).

¹⁷ *Matter of F-P-R-*, 24 I&N Dec. 681, 683–84 (BIA 2008) (holding that the phrase “last arrival” in 8 CFR § 1208.4(a)(2)(ii) means the noncitizen’s most recent arrival in the United States from a trip abroad and concluding that a subsequent entry into the United States restarts the one-year period for filing an asylum application).

¹⁸ 8 CFR § 208.4(a)(5).

¹⁹ 8 CFR § 208.4(a)(5)(i)–(vi).

²⁰ *See* 8 CFR § 244.10(f).

reasonable time period after TPS ended. By contrast, if more than one year elapsed after the applicant's last arrival before the applicant obtained TPS, the subsequent grant of TPS does not, by itself, explain or excuse the earlier failure to file within the OYFD. In that circumstance, the applicant must establish another changed or extraordinary circumstance to account for the untimely filing during that period.

For Haitian and Syrian TPS holders who have relied on TPS for many years, the termination or expiration of TPS may support an extraordinary circumstances exception by explaining why they did not previously pursue asylum. As with all extraordinary exceptions, however, the applicant must establish that maintaining TPS was directly related to the failure to meet the one-year deadline.²¹

b) Changed Circumstances

A changed circumstances exception applies where circumstances arising after the applicant's arrival in the United States materially affect the applicant's eligibility for asylum.²² The regulations identify several categories of changed circumstances, including changes in conditions in the applicant's country of nationality, changes in personal circumstances, changes in applicable U.S. law, and other circumstances that materially affect eligibility for protection.²³

For Haitian and Syrian nationals, changes in country conditions may be relevant where conditions have deteriorated since the individual's arrival in the United States. The changed conditions must relate to a protected characteristic the applicant possesses and must materially affect the applicant's eligibility for asylum; generalized violence or deteriorating country conditions alone are insufficient.²⁴

A changed circumstances argument may also arise from developments specific to the applicant, including changes in the individual's personal circumstances, political activities, religious activities, changes in identity or affiliations, or increased threats to family members or others connected to the applicant in the home country.²⁵

Importantly, an applicant may have multiple reasons for filing after the one-year deadline. The fact that the loss or termination of TPS may be the immediate reason an individual seeks asylum does not necessarily preclude reliance on a changed circumstances exception if other circumstances independently support asylum eligibility and explain the delayed filing.

c) Combination of Changed and Extraordinary Circumstances

An applicant may also rely on more than one exception to the OYFD. Changed circumstances and extraordinary circumstances are not mutually exclusive and may apply together depending on the facts of an individual case. Moreover, one exception may excuse a delay during one period of time, while another exception may apply to a separate period of delay, such that the

²¹ 8 CFR § 208.4(a)(5).

²² 8 CFR § 208.4(a)(4)(i).

²³ 8 CFR § 208.4(a)(4)(i)(A)–(C).

²⁴ See 8 CFR §§ 208.4(a)(4)(i)(A), 208.13(b)(2)(iii).

²⁵ See 8 CFR § 208.4(a)(4)(i)(B).

combined effect of multiple exceptions may justify the applicant's failure to file within one year of arrival.

A TPS holder may argue that extraordinary circumstances explain why the person did not file for asylum while TPS provided protection from removal, while changed circumstances may explain why the applicant's eligibility for asylum arose during the TPS period.. For instance, if an applicant came out as LGBTQ+ while maintaining TPS and that circumstance gave rise to a new basis for asylum eligibility, the applicant may rely on the changed circumstance to explain why asylum was not filed earlier and on maintaining TPS as an extraordinary circumstance that explains the continued delay in filing until TPS ended.

d) Filing Within a "Reasonable Period of Time" After the Exception

Both the changed circumstances and extraordinary circumstances exceptions require an applicant to file the asylum application within a "reasonable period of time" after the relevant circumstance arose or after the circumstance that prevented timely filing ended.²⁶ The regulations do not define what constitutes a "reasonable period of time"; instead, the determination is made on a case-by-case basis based on the totality of the circumstances.²⁷

Although there is no fixed deadline for filing after an exception arises, it is generally advisable to file within approximately six months of the changed or extraordinary circumstance whenever possible.²⁸ A delay beyond six months does not automatically defeat an exception, so the applicant should, nonetheless, be prepared to explain why the timing of the filing was reasonable under the circumstances.

A finding of changed or extraordinary circumstances does not create a new one-year filing period. Rather, the applicant must demonstrate that the asylum application was filed within a reasonable period after the relevant circumstance occurred or no longer prevented timely filing.²⁹

²⁶ 8 CFR §§ 208.4(a)(4)(ii), 208.4(a)(5).

²⁷ USCIS, Asylum Officer Basic Training Course: One-Year Filing Deadline (May 6, 2013), at 22, https://www.uscis.gov/sites/default/files/document/lesson-plans/One_Year_Filing_Deadline_Asylum_Lesson_Plan.pdf.

²⁸ Proposed regulations that were never finalized by DHS would have set six months as a presumptively reasonable period of time with applicants having to explain on a case-by-case basis any time beyond that. 65 Fed. Reg. 76121, 76123-24 (Dec. 6, 2000); *See Wakkary v. Holder*, 558 F.3d 1049, 1057–58 (9th Cir. 2009) (holding that the agency must conduct a fact-specific inquiry into whether a delay of just over six months was reasonable under the circumstances and remanding for that determination).

²⁹ *See Matter of T-M-H- & S-W-C-*, 25 I&N Dec. 193, 194–95 (BIA 2010) (holding that changed circumstances do not automatically provide a one-year extension for filing an asylum application and that whether an application was filed within a reasonable period after changed circumstances must be determined based on the particular circumstances surrounding the delay); *Matter of C-G-T-*, 28 I&N Dec. 740 (BIA 2023) (holding that filing 13 months after HIV diagnosis was not within a reasonable period of time, even if HIV diagnosis would be considered a changed circumstance).

Where an applicant relies on extraordinary circumstances based on maintaining TPS or other lawful protection, the analysis generally focuses on whether the applicant filed within a reasonable period after the protection ended.³⁰

Where an applicant relies on changed circumstances, the relevant timing may depend on the particular circumstance asserted. The analysis may include when country conditions materially changed, when the applicant's personal circumstances developed, or when the applicant became aware that those circumstances increased the risk of persecution upon return.

Adjudicators may consider a variety of factors in determining whether the filing occurred within a reasonable period of time, including the applicant's education and level of sophistication, the time required to obtain legal assistance, the effects of past persecution or trauma, when the applicant became aware of the changed circumstance, and other relevant facts.³¹

For Haitian and Syrian TPS holders, the termination or expiration of TPS may be relevant to explaining why an individual is seeking asylum at this stage, particularly where TPS previously provided protection from removal and reduced the immediate need to pursue asylum. However, applicants should be prepared to explain both why asylum was not filed earlier and why filing after the loss of TPS occurred within a reasonable period of time under the circumstances of the individual case.

2. Asylum-Related Fees

As of July 4, 2025, the "One Big Beautiful Bill Act" (OBBBA)³² requires asylum applicants to pay two separate fees: (1) an initial asylum application filing fee at the time the asylum application is filed, and (2) an Annual Asylum Fee (AAF) for asylum applications that remain pending for more than one year.³³ The AAF is set at \$102 for Fiscal Year 2026 and will be adjusted each year for inflation.³⁴ There is no waiver available for either fee.

The initial asylum filing fee generally must be submitted with the asylum application when it is filed. USCIS has indicated that an asylum application filed without the required filing fee may be rejected.

Applicants with pending asylum applications that have been pending for more than one year are also subject to the AAF. USCIS has stated it will issue a notice requesting payment, but some applicants have reported learning that the fee was due only after checking their online USCIS

³⁰ See 8 CFR § 208.4(a)(5).

³¹ USCIS, Asylum Officer Basic Training Course: One-Year Filing Deadline, *supra* note 27, at 23.

³² Pub. L. No. 119-21, 139 Stat. 72 (2025).

³³ As of Feb. 5, 2026, these additional asylum fees under Pub. L. 119-21 do not apply to *Ms. L.* Settlement Class members and their Qualifying Additional Family Members (QAFMs) filing Form I-589 as a Principal Applicant, pursuant to a court order issued in *Ms. L. v. ICE*, 18-cv-00428 (S.D. Cal.).

³⁴ The annual asylum fee will increase each year to account for inflation. See USCIS Announces FY 2026 Inflation Increase for Certain Immigration-Related Fees (Nov. 20, 2025), <https://www.uscis.gov/newsroom/alerts/uscis-announces-fy-2026-inflation-increase-for-certain-immigration-related-fees>.

account or the Case Status Online system. Applicants should regularly monitor their USCIS online account and case status for any fee notices.³⁵

USCIS has stated that if the AAF is not paid within 30 days of the notice, it may reject the asylum application, terminate any employment authorization issued based on the pending asylum application, reject pending employment authorization applications based on the asylum application, and, where applicable, initiate removal proceedings after rejecting the asylum application.³⁶ Applicants should retain proof of payment for both the initial filing fee and the AAF.³⁷

B. Family-Based Options

Family-sponsored petitions may provide the basis for seeking Lawful Permanent Resident (LPR) status through either adjustment of status or consular processing for Haitians and Syrians losing TPS. LPRs or United States citizens (USC) may file an I-130, Family Petition for Alien Relative, for certain family members. USCs may petition for their spouses, parents, children, or siblings. LPRs may petition for their spouses, parents, and unmarried children. However, whether the person is able to adjust status in the United States or must leave the United States and complete the process through the U.S. consulate abroad depends on a variety of factors including the family relationship. In either the adjustment of status or consular processing context, filing an I-130, Family Petition for Alien Relative, with USCIS to obtain an immigrant visa is the first step.

1. I-130, Family Petition for a Noncitizen Relative

Generally, the family relationship, the status of the petitioner as an LPR or USC, the age and marital status of the noncitizen, and age of the USC petitioner determine whether an I-130 petition is possible. There are two main categories of family members who qualify to file an I-130 petition for their noncitizen family members: immediate relatives and non-immediate family members. Immediate relatives are USC spouses, parents of USC children who are 21 years of age or older, and unmarried children under 21 years of age of a USC.³⁸ Non-immediate family members fall into four family-sponsored preference categories:³⁹ (1) unmarried sons and daughters of USCs and their derivative children, (2) spouses and unmarried children as well as unmarried sons or daughters of LPRs and their derivative children, (3) married sons and

³⁵ See USCIS's online account login page, <https://myaccount.uscis.gov/sign-in>; USCIS, Case Status Online, <https://egov.uscis.gov/> (input the asylum application receipt number into the field and press the "Check Status" button).

³⁶ DHS Announces Consequences for Unpaid Annual Asylum Fees, Unveils New H.R. 1 Requirements (Apr. 28, 2026), <https://www.uscis.gov/newsroom/alerts/dhs-announces-consequences-for-unpaid-annual-asylum-fees-unveils-new-hr-1-requirements>. Issues related to implementation of the asylum fees—including inability to pay the AAF after the 30-day payment deadline has passed—may be reported to ASAP at litigation@asaptogether.org. ASAP is engaged in ongoing litigation concerning the asylum fees established by the OBBBA.

³⁷ Asylum Seeker Advocacy Project, New Fees, <https://asaptogether.org/en/new-fees/#annual-fee> (last visited July 17, 2026).

³⁸ INA § 201(b)(2)(A)(i).

³⁹ Note that these family preference categories allow for derivatives meaning that the noncitizen and their spouse and child(ren) can benefit from the same I-130 petition. However, although seemingly illogical, immediate relatives do not enjoy derivative benefits meaning that their spouse and child(ren) would need their own I-130.

daughters of USCs along with their derivative spouses and children, and (4) siblings of USCs over 21 years of age, along with their derivative spouses and children.⁴⁰ These family relationships are relevant to the speed at which the noncitizen can obtain the nonimmigrant visa once the I-130 is approved, as well as whether the beneficiary can apply to adjust status or must consular process, as described below.

Haitians and Syrians may have a USC or LPR family member who can file an I-130 on their behalf. While both Haitians and Syrians could have an LPR or USC spouse or parent or a USC sibling, Haitians could also have a USC child who is 21 years or older given the first initial designation TPS date of January 21, 2010. In other words, because Haitian TPS has existed for 26 years, it is possible for Haitian TPS holders to have a USC son or daughter who is 21 years old or older and therefore eligible to file as an immediate relative. Those who qualify as immediate relatives but whose I-130 remains pending as they face an imminent removal order should consider delay litigation pursuant to the Mandamus Act, 28 U.S.C. § 1361, and/or the Administrative Procedure Act, 5 U.S.C. § 706(1).⁴¹

2. Adjustment of Status

Adjustment of status refers to the process of obtaining LPR status in the United States without having to leave to process the permanent residence application. However, the adjustment of status process is not available to everyone. Family-based adjustment of status pursuant to INA § 245(a) benefits those who (1) have an immigrant visa immediately available,⁴² (2) were inspected and admitted or paroled into the United States, (3) are not subject to the bars under INA § 245(c), and (4) merit a favorable exercise of discretion.

Those who are ineligible for adjustment of status must consular process if they have an approved I-130 and have or will have an immigrant visa available in the future. Although consular processing may provide a pathway to future immigration, leaving the United States creates additional practical and legal considerations. These considerations may be particularly significant for nationals of countries where routine U.S. immigrant visa processing is limited or suspended. The U.S. Department of State's (DOS) current guidance generally requires immigrant visa applicants to process their cases through a U.S. embassy or consulate in their country of residence or nationality, if that post is available for immigrant visa processing. For example,

⁴⁰ INA § 201(a)(1).

⁴¹ American Immigration Council and National Immigration Litigation Alliance, *Mandamus and APA Delay Cases: Avoiding Dismissal and Proving the Case* (Feb. 19, 2021), https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/mandamus_actions_avoiding_dismissal.pdf. See, e.g., *Ebrahimi v. Blinken*, 732 F. Supp. 3d 894 (N.D. Ill. 2024) (I-130 delay claim judicially redressable under the APA); *Almadhrhi v. USCIS Tex. Serv. Ctr.*, No. 3:25-CV-1154-D, 2026 WL 531537 (N.D. Tex. Feb. 26, 2026) (dismissing claim with leave to amend pleadings as 11-month delay was not unreasonable per se but held that the court has jurisdiction over mandamus and APA claims); *Ching v. Mayorkas*, 725 F.3d 1149, 1156–57 (9th Cir. 2013) (I-130 approval for immediate relative status is a nondiscretionary decision; substantial private interest implicated when the beneficiary faces imminent removal).

⁴² While this resource focuses on family-sponsored visas, a visa could be available through another source such as an approved I-360, Petition for Amerasian, Widow(er), for Special Immigrant, for Special Immigrant Juveniles, U visas, and T visas. Furthermore, Syrians are also eligible for Diversity Visas.

routine immigrant visa services in Syria remain suspended, and Syrian immigrant visa applicants are generally directed to designated processing posts, including U.S. embassies in Amman or Beirut for certain applicants.⁴³ Similarly, routine immigrant visa appointments at U.S. Embassy Port-au-Prince remain suspended, and Haitian applicants may need to request transfer of their cases to another U.S. embassy or consulate that processes immigrant visas.⁴⁴ DOS also generally limits the use of third-country posts except in limited circumstances.⁴⁵ Rare exceptions may be made for humanitarian or medical emergencies or for foreign policy reasons.⁴⁶ DOS policy does not specifically identify asylum seekers as qualifying for an exception to the general requirement that visa applicants apply at designated consular posts. However, an individual with a pending asylum application who cannot safely return to the country of fear persecution or the dedicated consular post, may seek to invoke humanitarian grounds for third-country processing. Whether a consular post will accept a third-country application on that basis is committed to DOS's discretion, and such exceptions are rare. These challenges underscore the additional benefits of adjustment of status from within the United States. In addition to the disruption and monetary costs associated with leaving the United States to consular process, adjusting status while in the United States avoids triggering penalties associated with a departure.⁴⁷

a) Immigrant Visa Immediately Available

Immediate relatives will receive a visa through an approved I-130 more quickly compared to other family relationships and that visa may allow them to adjust status in the United States if they meet the other requirements of INA § 245(a).

If the family relationship is considered an “immediate relative” relationship, then a visa is immediately available to the noncitizen once USCIS approves the I-130.⁴⁸ In contrast, family members who are not considered “immediate relatives” are subject to an annual quota of visas and a country-specific quota per country that have resulted in long waiting periods after USCIS has approved the I-130.⁴⁹ The visa wait time for family members who are not immediate relatives depends on where they fall in the four family-sponsored preference categories. The

⁴³ U.S. Embassy Damascus, Visas, U.S. Dep’t of State, <https://sy.usembassy.gov/visas/> (last visited July 17, 2026).

⁴⁴ U.S. Dep’t of State, Visa Information for Nationals of Haiti, <https://travel.state.gov/content/travel/en/News/visas-news/visa-information-for-nationals-of-haiti.html> (last visited July 17, 2026).

⁴⁵ U.S. Dep’t of State, Adjudicating Immigrant Visa (IV) Applicants in Their Country of Residence, <https://travel.state.gov/content/travel/en/News/visas-news/adjudicating-iv-applicants-in-their-country-of-residence.html> (last visited July 17, 2026).

⁴⁶ *Id.*

⁴⁷ See INA § 212(a)(9)(B)(i) (providing that the three- and ten-year unlawful presence bars are triggered upon an individual's departure from the United States); INA § 212(a)(9)(A)(i)–(ii) (providing that individuals who have been ordered removed and who thereafter depart the United States may be subject to the five-, ten-, or twenty-year admission bars depending on the circumstances of their removal); INA § 212(a)(9)(C)(i) (providing that certain individuals who depart after accruing more than one year of unlawful presence or after being ordered removed and who subsequently seek to return without admission may be subject to a permanent inadmissibility bar). For additional information regarding when these bars are triggered and how they apply, see National Immigration Project, *Practice Advisory: Understanding and Overcoming Bars to Relief Triggered by a Prior Removal Order* (Feb. 1, 2023), <https://nipnlg.org/work/resources/practice-advisory-understanding-and-overcoming-bars-relief-triggered-prior-removal>.

⁴⁸ INA § 201(b)(2)(A)(i).

⁴⁹ INA § 203(a)–(b); INA § 202(a)(2).

wait-time for these four categories varies and changes each month depending on the demand for visas in each category. DOS determines the number of available visas and reports on visa allocations monthly through its Visa Bulletin.⁵⁰ Ultimately, those with other family relationships must wait for their immigrant visa and would need to monitor the status of their visa through the Visa Bulletin.

The wait time for a visa for those subject to the family-sponsored preference categories makes it unlikely that the person will be able to adjust status in the United States for reasons discussed below. However, it is also possible that a Haitian or Syrian losing their TPS status has an I-130 filed by a USC or LPR family member pending and that the visa number is already current according to the Visa Bulletin. As such, it is important to inquire about this possibility and, if an I-130 is pending, to check the Visa Bulletin.

b) Inspected and Admitted or Paroled into the United States⁵¹

(1) Inspection

An inspection occurs when a U.S. Customs and Border Protection (CBP) official determines that a noncitizen who presents themselves at a port of entry may lawfully enter the United States. After the inspection process, the CBP official has the option to admit or parole the noncitizen.⁵²

(2) Parole

USCIS, CBP, and Immigration and Customs Enforcement (ICE) have parole authority. There are two sources of parole authority—INA § 212(d)(5) and INA § 236(a)(2)(B)—, but only parole pursuant to INA § 212(d)(5) satisfies the “inspected and paroled” requirement of INA § 245(a).⁵³ INA § 212(d)(5) authorizes DHS to grant parole for urgent humanitarian or significant public benefit reasons on a case-by-case basis. Evidence of INA § 212(d)(5) parole includes a parole stamp on an advance parole document, a parole stamp in a passport, or an Arrival/Departure Record (Form I-94) with a parole stamp.⁵⁴

Deferred inspection parole, military parole in place, CBP One, Cuban Haitian Nicaraguan Venezuelan (CHNV) parole and advance parole all stem from DHS’s INA § 212(d)(5) authority and therefore suffice for INA § 245(a) purposes.

⁵⁰ U.S. Dep’t of State, Visa Bulletin, <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html> (last visited July 17, 2026).

⁵¹ If the person was not inspected and admitted or paroled, it is possible to qualify for adjustment of status through another statutory provision. For example, INA § 245(i) excuses the “inspected and admitted or paroled” requirement as well as the INA § 245(c) bars of working in the United States without authorization and failing to continuously maintain lawful status since entry. VAWA beneficiaries are exempt from the “inspected and admitted or paroled” requirement as well as of the INA § 245(c) bars.

⁵² There are other possible outcomes following an inspection, but an admission or parole are the only outcomes that provide a path towards adjustment under INA § 245(a).

⁵³ *Matter of Castillo-Padilla*, 25 I&N Dec. 257 (BIA 2010).

⁵⁴ USCIS Policy Manual, Vol. 7, Pt. B, Ch. 2, Eligibility Requirements, <https://www.uscis.gov/policy-manual/volume-7-part-b-chapter-2> (last visited July 17, 2026).

Given the number of Haitians who entered the United States legally through CHNV⁵⁵ and CBP One,⁵⁶ it is likely that many Haitians will have been inspected and paroled into the United States.

(3) Admission

“Admission” and “admitted” are defined as the lawful entry of a noncitizen into the United States after inspection and authorization by an immigration officer.⁵⁷ For example, an entry into the United States through a port of entry on a nonimmigrant visa qualifies as an admission. Admissions are commonly proven by an Arrival/Departure Record (Form I-94) or an admission stamp in a passport, but other types of evidence may also suffice.⁵⁸ A procedurally proper admission suffices to satisfy the inspected and admitted requirement for adjustment of status.⁵⁹ While TPS approval itself is not an admission for purposes of adjustment under INA § 245(a),⁶⁰ a TPS holder’s departure and return pursuant to DHS-authorized travel may qualify as an “inspection and admission.” The TPS holder is “inspected and admitted” following DHS-authorized travel “even if the TPS beneficiary was present without admission or parole when initially granted TPS.”⁶¹

INA § 244(f)(3) gives TPS holders the ability to seek permission to travel. Historically, when the government has granted a TPS holder permission to travel, it has documented its consent by granting Advance Parole under 8 CFR § 244.15 or, since July 1, 2022, issuing Form I-512T, Authorization for Travel by a Noncitizen to the United States, and deeming the entry upon return as an “inspection and admission.” The changes to the government’s documentation of TPS-based travel on July 1, 2022 and interpretation of the effects of authorized travel by TPS holders were prompted by the rescission of *Matter of Z-R-Z-C*.⁶² and an analysis of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA).⁶³ However, for cases arising out of the jurisdiction of the U.S. Court of Appeals for the Fifth Circuit, USCIS must treat all government-authorized entries regardless of the date by TPS holders as an “inspection and admission” pursuant to *Duarte v. Mayorkas*, 27 F.4th 1044 (5th Cir. 2022). For cases arising outside of the Fifth Circuit, USCIS’s interpretation depends on the date that the TPS holder returned to the United States on government authorized travel and a case-by-case analysis.

Outside of the Fifth Circuit, a TPS holder who entered the United States on or after July 1, 2022 following authorized travel abroad are “inspected and admitted” for purposes of INA § 245(a)

⁵⁵ Yael Schacher, *Setting the Record Straight on CHNV*, Refugees Int’l (Mar. 28, 2025), <https://www.refugeesinternational.org/perspectives-and-commentaries/setting-the-record-straight-on-chnv/>.

⁵⁶ American Immigration Council, *CBP One: An Overview* (Mar. 24, 2025), <https://www.americanimmigrationcouncil.org/fact-sheet/cbp-one-overview/>.

⁵⁷ INA § 101(a)(13)(A).

⁵⁸ USCIS Policy Manual, *supra* note 54.

⁵⁹ See *Matter of Quilantan*, 25 I&N Dec. 285, 290 (BIA 2010); *Matter of Areguillin*, 17 I&N Dec. 308 (BIA 1980).

⁶⁰ See *Sanchez v. Mayorkas*, 593 U.S. 409 (2021).

⁶¹ USCIS Policy Manual, Vol. 7, Pt. B, Ch. 2, n.80, Eligibility Requirements, <https://www.uscis.gov/policy-manual/volume-7-part-b-chapter-2#footnote-80> (last visited July 17, 2026).

⁶² *Matter of Z-R-Z-C*, Adopted Decision 2020-02 (AAO Aug. 20, 2020).

⁶³ USCIS, Policy Memorandum: Rescission of *Matter of Z-R-Z-C* as an Adopted Decision; Agency Interpretation of Authorized Travel by TPS Beneficiaries, PM-602-0188 (July 1, 2022), <https://www.uscis.gov/sites/default/files/document/memos/PM-602-0188-RescissionofMatterofZ-R-Z-C-.pdf>.

provided the TPS holder complied with the terms of the consent to travel.⁶⁴ For TPS holders who entered the United States prior to July 1, 2022 on advance parole pursuant to 8 CFR §244.15, USCIS determines on a case-by-case basis whether the TPS holder was paroled or otherwise permitted to enter after TPS-authorized travel should be treated as “inspected and admitted.” USCIS makes this determination by applying a four-part inquiry. If the past travel does not meet all four requirements, USCIS applies the policy that was in effect at the time of departure. If the past travel does meet each of these requirements, USCIS will consider retroactively applying the current guidance to an adjustment application. To determine whether to apply the current guidance retroactively, USCIS will use a five-factor test that derives from *Retail, Wholesale and Department Store Union AFL-CIO v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972). According to the USCIS Policy Manual, “USCIS expects that, under the *Retail Union* test, retroactive application of the current policy is appropriate in most adjustment of status applications and favorable to the applicants.”⁶⁵

c) Not subject to the bars under INA § 245(c)

The bars under INA § 245(c), which govern family-based application by non-immediate relatives, render an adjustment applicant ineligible to adjust status under INA § 245(a). While there are eight subparts to INA § 245(c),⁶⁶ INA § 245(c)(2) and INA § 245(c)(8) render many adjustment applicants ineligible:

- If the applicant is in an unlawful immigration status on the date of filing the adjustment application.⁶⁷
- If, “other than through no fault of [their] own or for technical reasons,”⁶⁸ the applicant failed to continuously maintain a lawful status since entry into the United States or violated the terms of their nonimmigrant status. Lawful status means LPR status (includes lawful temporary residents and conditional permanent residents), refugee status, asylee status, those lawfully present in the Commonwealth of the Northern Mariana Islands between November 28, 2009 and November 27, 2011 based on a valid, unexpired, and lawfully obtained period of stay that was CNMI-authorized prior to November 28, 2009 that remains valid on the date of adjustment application, parole status, and TPS status.
- If the applicant continues in or accepts unauthorized employment prior to filing an application for adjustment of status or they have ever engaged in unauthorized employment, whether before or after filing an adjustment application.

⁶⁴ This is consistent with the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Pub. L. 102-232 (December 12, 1991).

⁶⁵ USCIS Policy Manual, *supra* note 54.

⁶⁶ The remaining bars apply to crewmen, those admitted in transit without a visa, those admitted as a nonimmigrant without a visa under a Visa Waiver Program, those admitted to the United States as an informant of terrorist or criminal activity (S nonimmigrant), those engaged in terrorist activity, and conditional permanent residents.

⁶⁷ Filing an application for an immigration benefit or having a pending benefit application generally does not place an applicant in a lawful immigration status, though it can prevent the accrual of unlawful presence. *See* USCIS Policy Manual, Vol. 7, Pt. B, Ch. 3(A), Unlawful Immigration Status at Time of Filing, <https://www.uscis.gov/policy-manual/volume-7-part-b-chapter-3> (last visited July 17, 2026).

⁶⁸ 8 CFR § 245.1(d)(2).

However, these bars do not apply to immediate relatives.⁶⁹ This means that immediate relatives are eligible to adjust status even if they lack lawful status on the date that they file their application, violated the terms of their nonimmigrant visa, or worked without authorization. In contrast, those who are not immediate relatives will have to prove that these bars do not apply to them.

With regard to continuously maintaining lawful status, because TPS status is considered maintaining lawful nonimmigrant status for adjustment purposes,⁷⁰ the relevant time period for assessing this bar is the date of entry into the United States and the date that USCIS approved the TPS.⁷¹ However, if the TPS holder applied for TPS after the initial registration period and during a subsequent extension of the initial registration pursuant to 8 CFR § 244.2(f)(2), they are considered to have maintained lawful status from the date they filed the application provided that USCIS approved their application.⁷² If any unlawful status has accrued, the fact that USCIS approved TPS does not excuse or cure any prior lapses or violations of lawful immigration status. For example, if a Syrian national entered the United States on a B-1/B-2 visa and was admitted until July 1, 2012, and filed for TPS on September 1, 2012, during Syria's initial TPS registration period, the applicant would have accrued approximately two months of unlawful status between July 1, 2012 and September 1, 2012. If USCIS approved the TPS application, the applicant would be considered to have maintained lawful status beginning on September 1, 2012, the date of the TPS filing. The approval, however, would not cure the lapse in lawful status that occurred before the TPS filing date.

While INA § 245(c) will not impact Haitians and Syrians who are immediate relatives, Haitians and Syrians subject to the family-sponsored preference categories will have to assess if at any point since entering the United States they ever failed to maintain lawful status, ever engaged in unauthorized employment or, if they entered on a nonimmigrant visa, violated the terms of their nonimmigrant visa. They will also need to prove that on the date of filing the adjustment application they are in lawful immigration status. It is generally difficult for non-immediate relatives to prove that INA § 245(c) does not bar them from adjustment of status, but some Haitians and Syrians who were inspected and admitted⁷³ may be able to prove that they maintained lawful status continuously since they entered the United States and therefore may be able to apply for adjustment of status while their TPS remains valid or while they are still in another lawful status. For example, Haitians and Syrians who entered on nonimmigrant visas and were in valid nonimmigrant visa status when they obtained TPS status, would not have failed to maintain lawful status. Haitians who entered on CHNV parole and were in valid parole status

⁶⁹ INA § 245(c).

⁷⁰ 8 CFR § 244.10(f)(2)(iv).

⁷¹ Filing a TPS application does not put an applicant in a lawful immigration status. However, “the period of authorized stay begins on the date a prima facie application for TPS is filed, provided the application is ultimately approved. If the application is approved, the period of authorized stay continues until TPS status is terminated.” See USCIS Adjudicator’s Field Manual, Chapter 40.9.2. Authorized stay calculations are relevant to assessing unlawful presence, see INA § 212(a)(9)(B) and INA § 212(a)(9)(C), which is triggered by a departure and therefore applies in the consular processing context. See also Immigrant Legal Resource Center, *I-601A Provisional Waiver: Process, Updates, and Pitfalls* (June 27, 2019), <https://www.ilrc.org/resources/i-601a-provisional-waiver-process-updates-and-pitfalls-avoid>.

⁷² 8 CFR § 244.10(f)(2)(v).

⁷³ Note that those who entered without inspection will have some period of unlawful status.

when they obtained TPS status, would not have failed to maintain lawful status. Furthermore, because Haitians were able to obtain work authorization pursuant to CHNV, it is also possible that Haitians who entered on CHNV never engaged in unauthorized employment.

d) Discretion

Ultimately, adjustment of status under INA § 245(a) is discretionary.⁷⁴ This means that the applicant bears the burden of demonstrating that they merit a favorable exercise of discretion, even if they otherwise meet the statutory and regulatory requirements for adjustment of status. In making this determination, USCIS considers the totality of the circumstances and weighs all relevant favorable and adverse factors.⁷⁵

Historically, adjustment applicants were not required to make a special showing of favorable equities absent significant adverse factors.⁷⁶ However, USCIS has most recently emphasized the discretionary nature of adjustment of status under INA § 245(a), characterizing it as an “extraordinary act” of administrative grace.⁷⁷ Under this guidance, USCIS may consider the circumstance surrounding an applicant’s decision to pursue adjustment of status rather than the immigrant visa process through a U.S. consulate abroad.⁷⁸ Where an applicant was admitted or paroled into the United States and could have pursued consular processing, USCIS may consider factors such as whether any circumstances prevented the applicant from pursuing consular processing, whether the applicant continues to have family or other ties in their country of origin, and why the applicant remained in the United States after the expiration of their authorized period of stay.⁷⁹ Although these considerations do not create a separate statutory bar to adjustment of status, they may be weighed as part of USCIS’s discretionary determination under the totality of the circumstances.

Favorable factors may include, but are not limited to:

- Family ties to the United States and the closeness of those relationships
- Length of lawful residence in the United States, including the age at which residence began
- Hardship to the applicant or family members if adjustment is denied
- History of employment, tax compliance, and financial responsibility
- Property ownership, business interests, or other evidence of economic ties to the United States
- U.S. military service

⁷⁴ See *Matter of Arai*, 13 I&N Dec. 494 (BIA 1970); *Matter of Ortiz-Prieto*, 11 I&N Dec. 317 (BIA 1965).

⁷⁵ USCIS Policy Manual, Vol. 1, Pt. E, Ch. 8, Discretionary Analysis, <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8> (last visited July 17, 2026).

⁷⁶ *Matter of Arai*, 13 I&N at 496.

⁷⁷ USCIS, Policy Memorandum: Adjustment of Status is a Matter of Discretion and Administrative Grace, and an Extraordinary Relief That Permits Applicants to Dispense with the Ordinary Consular Visa Process, PM-602-0199 (May 21, 2026), <https://www.uscis.gov/sites/default/files/document/memos/PM-602-0199-AdjustmentOfStatusAndDiscretion-20260521.pdf>; see also National Immigration Project, What’s Going On with Adjustment of Status? (June 17, 2026), <https://nipnlg.org/work/resources/whats-going-adjustment-status>.

⁷⁸ USCIS, PM-602-0199, *supra* note 77, at 5.

⁷⁹ *Id.*

- Community involvement or volunteer work
- Rehabilitation following prior misconduct, where applicable, and
- Other humanitarian or equitable considerations.

Conversely, adverse factors may include:

- Criminal history in the United States or abroad, including arrests, convictions, juvenile delinquency findings,⁸⁰ or other evidence of criminal conduct, with consideration given to the nature, seriousness, and recency
- Violations of immigration laws, including unlawful entry, failure to maintain lawful status, unauthorized employment, or conduct inconsistent with a prior immigration status⁸¹
- Outstanding unexecuted administratively final removal, deportation, or exclusion orders;
- Marriage entered into primarily to circumvent the immigration laws⁸²
- Previous instances of fraud or false testimony in dealings with USCIS or any government agency
- Conduct following admission as a nonimmigrant that was inconsistent with the terms of admission or contrary to representations made to immigration or consular officers
- Relevant country-specific circumstances affecting vetting or screening concerns⁸³, and
- Public safety or national security concerns.

C. Employment-Based Visas Adjustment of Status

It may be possible for some Haitians and Syrians losing TPS to seek adjustment of status through the employment process. Just like family-based adjustment of status pursuant to INA § 245(a), seeking employment-based adjustment of status benefits those who (1) have an immigrant visa immediately available, (2) were inspected and admitted or paroled into the United States, (3) are not subject to the bars under INA § 245(c), and 4) merit a favorable exercise of discretion. However, there are significant differences between the family-based process and the employment-based process. The main differences between the two processes are the manner in which an immigrant visa is obtained and INA § 245(k), which provides important exemptions to the bars under INA § 245(c), that apply to employment-based adjustment only.

⁸⁰ Juvenile delinquency findings generally do not constitute “convictions” for immigration purposes because juvenile proceedings are civil, rather than criminal, in nature. *See Matter of Devison*, 22 I&N Dec. 1362, 1365–66 (BIA 2000) (holding that a juvenile delinquency adjudication is not a conviction under INA § 101(a)(48)(A)). Nevertheless, USCIS may consider juvenile delinquency findings as part of the discretionary analysis when determining whether an applicant merits a favorable exercise of discretion. *See* USCIS Policy Manual, Vol. 7, Pt. A, Ch. 10, Legal Analysis and Use of Discretion, <https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-10> (last visited July 17, 2026).

⁸¹ Although immediate relatives are not subject to certain INA § 245(c) bars, USCIS may nonetheless consider unauthorized employment and failure to maintain lawful status as part of its discretionary analysis.

⁸² Although INA § 204(c) bars the approval of an immigrant visa for marriage fraud, it is included here because USCIS expressly lists marriage fraud as a negative discretionary factor. *See* USCIS Policy Manual, Vol. 1, Pt. E, Ch. 8, Discretionary Analysis, <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8> (last visited July 17, 2026).

⁸³ *See* Presidential Proclamation 10949, Restricting The Entry of Foreign Nationals to Protect the United States from Foreign Terrorists and Other National Security and Public Safety Threats, 90 Fed. Reg. 24497 (June 4, 2025).

1. Immigrant Visa Immediately Available

In the employment context, an I-140, Immigrant Petition for Alien Worker, is the vehicle for obtaining an immigrant visa. Either an employer or the worker can file an I-140 depending on the worker's professional skills and qualifications. There are three⁸⁴ categories for measuring professional skills and qualifications:

- First preference (EB-1) – priority workers including those with extraordinary ability in the sciences, arts, education, business, or athletics; outstanding professors and researchers; or certain multinational managers and executives.
- Second preference (EB-2) – workers who are members of the professions holding advanced degrees or who have exceptional ability (including requests for national interest waivers).
- Third preference (EB-3) – skilled workers, professionals, or other workers.

These categories are instructive for several reasons. First, they determine who can self-petition and who needs an employer to petition for the worker. Workers who have extraordinary ability (EB-1A) or are eligible for a National Interest Waiver (EB-2) can self-petition for LPR status without a sponsoring employer while the remaining employment categories require an employer to sponsor the process and petition for the worker. Second, the workers' category and their country of origin dictates how quickly they can obtain an immigrant visa and thus when they can file the I-485.⁸⁵ Here too, DOS determines the number of available visas⁸⁶ and reports on visa allocations on a monthly basis through its Visa Bulletin. For the categories that are current, the worker can file an I-485 concurrently with an I-140 if an immigrant visa number is immediately available, but if a category is backlogged, then the worker would file the I-140 first and then wait for the priority date to become current before filing the I-485. Third, the categories establish who must engage in the permanent labor certification process with the U.S. Department of Labor (DOL) commonly known as Program Electronic Review Management (PERM).

While EB-1 applicants may submit an I-140 without any prerequisites other than eligibility for the category itself, the EB-3 and most of the EB-2⁸⁷ employment-based categories generally require an important precondition.⁸⁸ These two categories require PERM, obtaining a labor certification from DOL, before being able to proceed with an I-140.⁸⁹ A labor certification, filed

⁸⁴ Although the Visa Bulletin includes two more categories, the fourth preference category is for certain special immigrants like those pursuant Special Immigrant Juvenile Status and the fifth preference category is for investors who create or preserve jobs for U.S. workers.

⁸⁵ Visa Bulletin, *supra* note 50.

⁸⁶ Each of the three categories is allotted 28.6 percent of the worldwide employment-based preference level visas, plus any numbers not used by the other categories. A country-specific quota per country also applies here leading to frequent oversubscription for workers from China, Mexico, India, and the Philippines in some categories.

⁸⁷ Those eligible for a "National Interest Waiver" under EB-2 for those with advanced degrees and those of exceptional ability. USCIS Policy Manual, Vol. 6, Pt. F, Ch. 5, Advanced Degree or Exceptional Ability, <https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5> (last visited July 17, 2026).

⁸⁸ The name derives from the "permanent labor certification system" adopted on March 28, 2005.

⁸⁹ USCIS, Permanent Workers, <https://www.uscis.gov/working-in-the-united-states/permanent-workers> (last visited July 17, 2026).

on Form ETA-9089 after a mandatory test of the labor market has been performed,⁹⁰ establishes that there are not enough workers in the United States able, willing, qualified, and available to do the work the noncitizen applicant is to perform at the place where the noncitizen applicant plans to work, and that the employment of the non-citizen applicant will not adversely affect wages and working conditions of workers in the United States similarly employed.⁹¹ Once obtained, a labor certification is valid for 180 days.⁹² Therefore, it is crucial to pursue the labor certification, when required, and, once obtained, to file the labor certification together with the I-140 together before the labor certification expires.

Because the PERM process of obtaining a labor certification can take up to two (2) years, it is important to know that DOL has predetermined that certain professions lack sufficient U.S. workers who are able, willing, qualified, and available referred to as Schedule A occupations and has identified shepherders as exempt from PERM. The Schedule A occupations include:

- Group I – physical therapists and professional nurses (EB-3); and
- Group II – immigrants of exceptional ability in the sciences or arts, including college and university teachers, and immigrants of exceptional ability in the performing arts (EB-2)

The employer for workers within these two groups would apply for Schedule A designation by submitting an uncertified application for a labor certification to USCIS in conjunction with an I-140. USCIS will review the uncertified application for a labor certification to assess whether the employment is a Schedule A occupation, the job at issue is a full-time permanent position, the employer is offering the beneficiary at least the prevailing wage, the employer provided notice of the position(s) it seeks to fill to the employer's bargaining representative, if applicable, or its employees, and the worker meets the specific USCIS eligibility requirements. Bypassing the PERM labor certification process with DOL saves a significant amount of time and money. However, obtaining Schedule A designation simply means that the USCIS has already determined there are not sufficient United States workers who are able, willing, qualified, and available for the occupations listed on Schedule A and the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of foreign nationals in Schedule A occupations.⁹³ This does not automatically mean, however, that the worker is eligible for the requested immigrant visa classification.⁹⁴ USCIS will ultimately determine if the worker is eligible for the requested immigrant visa classification when it adjudicates the I-485.

Haitians and Syrians losing TPS who were inspected and admitted or paroled into the United States may have professional skills and qualifications that make them eligible for employment-based adjustment of status opportunities. Because the EB-1 and EB-2 categories are current and neither Haiti nor Syria are oversubscribed, Haitians and Syrians who qualify under EB-1 and

⁹⁰ 20 CFR § 656.17(e).

⁹¹ USCIS, *supra* note 87.

⁹² USCIS Policy Manual, Vol. 6, Pt. E, Ch. 6, Permanent Labor Certification, <https://www.uscis.gov/policy-manual/volume-6-part-e-chapter-6> (last visited July 17, 2026).

⁹³ 20 CFR § 656.5.

⁹⁴ USCIS Policy Manual, Vol. 6, Pt. E, Ch. 7, Schedule A Designation Petitions, <https://www.uscis.gov/policy-manual/volume-6-part-e-chapter-7> (last visited July 17, 2026).

EB-2 can file an I-140 and an I-485 concurrently and would not face any nonimmigrant visa delays. Those in the EB-1 category would have the fastest path to an employment-based adjustment because, in addition to the EB-1 category being current, they can self-petition and do not need to undergo the PERM labor certification process. However, those in the EB-2 category will be subject to the PERM labor certification process unless their proposed employment is eligible for a “National Interest Waiver” or falls under Schedule A. Those subject to the PERM labor certification process can expect to wait approximately two years, which takes them outside of INA § 245(k) exemptions, discussed below, and forces them to face the INA § 245(c) bars.

Haitians in particular may have the requisite criteria for Schedule A given that they comprise about 1 percent of the entire American health care workforce, “with heavy representation as nursing assistants, home health aides, and personal care aides.”⁹⁵ Haitians and Syrians who fall under EB-3 will face the longest employment-based adjustment process because of (1) the PERM labor certification process within DOL, and (2) once DOL issues the labor certification, the I-140 application process within USCIS, and (3) once USCIS approves the I-140, the visa backlog for this category. As a result, the INA § 245(c) bars will likely impact those eligible under EB-3 even in light of INA § 245(k), discussed below.

2. Not subject to the bars under INA § 245(c)

The bars under INA § 245(c) apply to adjustment applicants proceeding under INA § 245(a) whether based on a family-based petition or an employment-based petition. However, INA § 245(k) exempts certain employment-based adjustment applicants from the INA § 245(c)(2), INA § 245(c)(7), and INA § 245(c)(8) adjustment bars. In other words, an employment-based adjustment applicant who has failed to maintain a lawful status, engaged in unauthorized employment, or violated the terms and conditions of their admission for an aggregate following the applicant’s most recent lawful admission may be able to benefit from INA § 245(k). However, there is a significant limitation to the benefits of the INA § 245(k) exemptions and that limitation is time-based.

To be eligible for the INA § 245(k) exemptions, the adjustment applicant must not have committed any of the INA §§ 245(c)(2), (c)(7), or (c)(8) violations for more than an aggregate of 180 days since the adjustment applicant’s most recent lawful admission. If the adjustment applicant failed to continuously maintain a lawful immigration status, engaged in unauthorized employment; or violated the terms of the applicant’s nonimmigrant status for more than 180 days since their most recent lawful admission, they will be subject to the INA § 245(c) bars and will not be eligible to adjust status. Instead, they would be limited to consular processing and would be subject to unlawful presence bars as well as any other applicable departure-based bars. The calculation for the number of days for failing to maintain lawful Status, violating the terms of nonimmigrant status, and unauthorized employment depends on relevant events. For example, for failing to maintain lawful status and violating the terms of nonimmigrant status, the counting starts when the applicant’s immigration status expired, their immigration status was revoked or rescinded; or they violated their immigration status, which depends on the specific requirements

⁹⁵ Beatrice Dain & Jeanne Batalova, *Haitian Immigrants in the United States*, Migration Policy Inst. (Nov. 8, 2023), <https://www.migrationpolicy.org/article/haitian-immigrants-united-states-2022>.

of each immigration status. If any period of unlawful status was the result of a “technical violation” or a circumstance that was not the fault of the applicant, that period should not count toward the 180-day limit.⁹⁶ The counting ends when the applicant properly files an adjustment application or obtains lawful immigration status.⁹⁷ For calculating unauthorized employment, the counting starts when the applicant engages in unauthorized work⁹⁸ and stops when the applicant stops working without authorization, USCIS approves the applicant’s employment authorization document (EAD), or USCIS approves the applicant’s adjustment application.

Haitians and Syrians who were inspected and admitted may be able to benefit from INA § 245(k). For example, a person who entered on a B1/B2 visa and, while they were still in B1/B2 status, obtained TPS, they would have maintained lawful immigration status and would not need to rely on INA § 245(k). However, if the person worked without authorization before USCIS approved their TPS-based EAD, they would have engaged in unauthorized employment and would need to rely on INA § 245(k). But if the unauthorized employment calculation exceeds the 180-days allowed by INA § 245(k), this provision will not benefit the person.

While Haitians and Syrians who entered the United States on parole do not qualify under INA § 245(k) because parole is not an admission, as discussed above, if the person entered on CHNV or CBP and thereafter engaged in TPS-based authorized travel, they would have a lawful admission required by INA § 245(k). Because CHNV for Haitians and CBP One both commenced in January 2023, any subsequent TPS-based authorized travel necessarily occurred after July 1, 2022, the date that USCIS rescinded *Matter of Z-R-Z-C-* and began interpreting government-authorized travel by TPS holders as an “inspection and admission.” Even if the TPS holder had any INA §§ 245(c)(2), (c)(7), or (c)(8) violations prior to TPS-based authorized travel, only the failure to maintain lawful status, engagement in unauthorized employment, or violations of the terms and conditions of their admission that occurred after the lawful admission would count toward the INA § 245(k) 180-day limitation. If, once back in the United States following an “inspection and admission,” the person continued to have TPS and worked with authorization pursuant to TPS, it is unlikely that the person had any INA §§ 245(c)(2), (c)(7), or (c)(8) violations. If the person does have any INA §§ 245(c)(2), (c)(7), or (c)(8) violations, as long as the person did not violate those provisions for over 180 days in the aggregate, INA § 245(k) will benefit them. Therefore, for Haitians and Syrians who traveled with DHS’s permission after initially entering on parole and had any INA §§ 245(c)(2), (c)(7), or (c)(8) violations following that lawful admission should assess if INA § 245(k) allows them to pursue employment-based path to adjustment of status, assuming that they meet the other requirements.

⁹⁶ USCIS Policy Manual, Vol. 1, Pt. H, Ch. 2, Emergencies or Unforeseen Circumstances-Related Flexibilities, § A(1), Nonimmigrants Present in the United States, <https://www.uscis.gov/policy-manual/volume-1-part-h-chapter-2#S-A-1> (last visited July 17, 2026).

⁹⁷ It also ends when the person departs the United States, which is relevant if the person plans to consular process.

⁹⁸ Even if the applicant worked without authorization for a couple of hours in one day, USCIS interprets that as a full day of unauthorized work. USCIS Policy Manual, Vol. 7, Pt. B, Ch. 8, n.11, Inapplicability of Bars to Adjustment (Unauthorized Employment), <https://www.uscis.gov/policy-manual/volume-7-part-b-chapter-8#footnotelink-11> (last visited July 17, 2026).

III. Canadian Economic Class Immigration Programs⁹⁹

Canada offers employment-based immigration programs¹⁰⁰ that may benefit Haitians and Syrians losing TPS. Each year the Canadian government identifies specific categories of skills and occupations that meet the country's identified economic goals and approves qualified foreign nationals for permanent residence based on those categories. The current categories of skills and occupations are:

1. French-language proficiency
2. Healthcare and social services occupations
3. Science, Technology, Engineering and Math (STEM) occupations
4. Trade occupations
5. Education occupations
6. Transport occupations
7. Physicians with Canadian work experience
8. Senior managers with Canadian work experience
9. Researchers with Canadian work experience, and
10. Skilled military recruits¹⁰¹

The Canadian government chooses foreign nationals for permanent residence through the Express Entry Program. Express Entry benefits potential permanent residents who fall into three categories two of which are viable options for Haitians and Syrians with work experience outside of Canada:¹⁰²

⁹⁹ People losing TPS protection may be considering seeking asylum in Canada. However, due to the Safe Third Country Agreement between Canada and the United States, asylum seekers are required to seek protection in the first safe country of the two in which they arrive. As a result, individuals coming from the United States generally cannot make an asylum claim at a Canadian land port of entry unless they qualify for an exception. There are four exceptions to this agreement: the family member exception, the unaccompanied minors exception, the document holder exceptions, and the public interest exception. For more on this Agreement and the exceptions, refer to Immigration, Refugees & Citizenship Canada, Canada–U.S. Safe Third Country Agreement, Gov't of Can., <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/safe-third-country-agreement.html> (last visited July 17, 2026).

¹⁰⁰ Canada also offers other immigration programs focused on a specific location. One is the Rural Community Immigration Pilot, which requires that the person receive a job offer in one of the ten priority categories of skills and occupations selected by the Canadian government discussed in this section in one of 14 rural communities. Immigration, Refugees & Citizenship Canada, *Rural Community Immigration Pilot*, <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/rural-franco-pilots/rural-immigration.html> (last modified Apr. 30, 2026). The other is the Francophone Community Immigration Pilot, which is similar to the Rural Community Immigration Pilot, but requires the person work and settle in one of six rural remote Francophone-minority communities. Immigration, Refugees & Citizenship Canada, *Francophone Community Immigration Pilot*, <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/rural-franco-pilots/franco-immigration.html> (last modified Apr. 30, 2026). Note that Quebec offers its own immigration programs for skilled workers. Gouvernement du Québec, *Immigration Programs for Skilled Workers*, <https://www.quebec.ca/en/immigration/permanent/skilled-workers> (last updated Jan. 13, 2026).

¹⁰¹ Immigration, Refugees & Citizenship Canada, *Express Entry: Category-Based Selection*, <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/rounds-invitations/category-based-selection.html> (last visited July 17, 2026).

¹⁰² The Canadian Experience Class is not a viable option unless the person has Canadian work experience.

- Federal Skilled Trades Program¹⁰³ for skilled workers who want to become permanent residents based on being qualified in a skilled trade such as construction, transportation, manufacturing and industrial trades, natural resources and agriculture, and cooks and chefs requiring specialized knowledge and hands-on work.¹⁰⁴
- Federal Skilled Worker Program for skilled workers who have foreign work experience as managers, supervisors, or a position that requires a university degree, a college diploma, or apprenticeship training and want to become permanent residents in Canada outside of the province of Quebec¹⁰⁵

The Federal Skilled Trades Program benefiting those in the skilled trades has very specific requirements. The applicant must present skilled work experience in specific categories in the National Occupational Classification (NOC).¹⁰⁶ The applicant must show that they have had at least two years of full-time, paid work experience (or 3,120 hours total) in a skilled trade that they were qualified to practice within the five years preceding the application. Because these categories require specialized knowledge and hands on work, it is likely that the applicant had to complete an apprenticeship as part of the qualifications to practice that trade. The applicant needs to present a certificate of qualification that confirms that they are qualified to work in the proposed skill trade in Canada. Each Canadian province and territory has its own certificate of qualification requirements and certification process, but if the trade is not regulated by a province or territory, it may be federally regulated. Whichever entity regulates the relevant trade will issue the certificate of qualification once the applicant passed the certification. If no Canadian entity issues a certificate of qualification in the trade, the applicant must prove that they have a valid job offer in the trade from a Canadian employer. Additionally, the applicant must take an approved language test in English or French and acquire a minimum score of four in writing, reading, listening, and speaking. There is no formal education requirement for the Federal Skilled Trades Program.

Those applying for the Federal Skilled Worker Program are chosen based on education, work experience, language skills, age, and adaptability using a point system. A score of 67 points or higher will qualify the person for the Federal Skilled Worker Program. It is possible to receive a

¹⁰³ Note that this is the same program as the Provincial Nominee Program (PNP).

¹⁰⁴ Qualifying skill trades include those listed as 72 (excluding Sub-Major Group 726), 73, 82, 83, 92, or 93 (excluding Sub-Major Group 932), Minor Group 6320, and Unit Group 62200 in the National Occupational Classification (NOC), see the following for more information: Immigration, Refugees and Citizenship Canada, *Federal Skilled Trades Program*, <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/who-can-apply/federal-skilled-trades.html> (last visited July 19, 2026).

¹⁰⁵ Note that this is essentially the Provincial Nominee Program (PNP). One can apply for the PNP through Express Entry (~6 month processing time) or the non-Express Entry process (~13-month processing time). There is also a Quebec-selected skilled workers program that requires more rigorous eligibility criteria including a Quebec Selection Certificate (Certificat de sélection du Québec) from the Government of Quebec.

¹⁰⁶ Qualifying skill trades are those listed in the NOC as 72 (excluding Sub-Major Group 726), 73, 82, 83, 92, or 93 (excluding Sub-Major Group 932), Minor Group 6320, and Unit Group 62200. The NOC is available at Immigration, Refugees & Citizenship Canada, *Find your National Occupational Classification (NOC)*, <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/find-national-occupation-code.html> (last visited July 20, 2026).

maximum of 25 points based on education level with an Associate Degree garnering 19 points.¹⁰⁷ Skilled work experience of six years or more equals 15 points, the maximum in this category. An applicant can get up to 28 points if they have knowledge of both English and French, the two official languages of Canada.¹⁰⁸ A test measuring writing, reading, listening, and speaking proves the required language aptitude.¹⁰⁹ Applicants who are within the 18-35 age group can obtain 12 points, the maximum number of points available in this category. However, the number of available points in the age factor decreases for applicants over 35 as their age increases. Additional points are available if the applicant has relatives who hold certain Canadian immigration statuses or if the applicant's spouse has English or French language knowledge and a higher level of education. Although an applicant can get up to 10 points for having employment in Canada, having a job offer in Canada is not required.

Once the applicant reaches 67 points and proves that they meet the other eligibility requirements, the Canadian government invites them to create a profile that will allow them to be assessed and considered for permanent residence. A person's chances of being selected improve if they present any of the categories of skills and occupations that meet Canada's identified economic goals. If the Federal Skilled Worker Program applicant is selected, the person must settle in the province or territory that nominated them for permanent residency. This means that the person must live in that particular province or territory.

There are additional requirements for both the Federal Skilled Trades Program and the Federal Skilled Worker Program beyond the criteria discussed above. Significantly, the applicant must have valid status in the country where they currently live, which includes seeking asylum, and must provide proof of this valid status. Furthermore, the applicant must maintain valid status not only when they file the application, but throughout the processing period, which is usually approximately six months. In other words, the applicant must have an asylum application pending on the date of filing the Express Entry Program application and when the Canadian government approves the applicant for Express Entry. The applicant must prove to the Canadian government that if selected, they have enough money to settle in Canada, which is determined based on the number of family members joining them. The applicant must also prove that they are admissible to Canada,¹¹⁰ which includes proving that they do not have serious criminality. Serious criminality includes driving while impaired by alcohol or drugs, including cannabis.¹¹¹

¹⁰⁷ Immigration, Refugees & Citizenship Canada, Educational Credential Assessment, Gov't of Can., <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/documents/education-assessment.html> (last visited July 17, 2026).

¹⁰⁸ Immigration, Refugees & Citizenship Canada, Express Entry: Federal Skilled Worker Program, Gov't of Can., <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/who-can-apply/federal-skilled-workers.html> (last visited July 17, 2026).

¹⁰⁹ Immigration, Refugees & Citizenship Canada, Express Entry: Language Test Results, Gov't of Can., <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/documents/language-test.html> (last visited July 17, 2026).

¹¹⁰ Immigration, Refugees & Citizenship Canada, Find Out If You're Inadmissible, Gov't of Can., <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/inadmissibility.html> (last visited July 17, 2026).

¹¹¹ Immigration, Refugees & Citizenship Canada, New Impaired Driving and Marijuana-Related Penalties Could Affect Immigration Status for Permanent and Temporary Residents, Gov't of Can., <https://www.canada.ca/en/immigration-refugees-citizenship/news/notices/impaired-driving-cannabis-penalties-affect-immigration-status.html> (last visited July 17, 2026).

Given the termination of TPS, Haitians and Syrians may qualify for an Express Entry Program but for the requirement that they hold a valid status in the United States during the entire adjudication process. However, Haitians and Syrians who lost TPS benefits but have an asylum application pending can establish valid status based on their pending asylum application if the asylum application remains pending throughout the Express Entry Program adjudication process. Alternatively, the applicant could return to their country of origin or obtain valid status in a third country while they await the Express Entry Program processing in Canada. Assuming the Express Entry Program applicant meets this threshold requirement, it is worth assessing the following remaining eligibility criteria.

Haitian and Syrians with enough English and/or French aptitude and qualifying skilled trade experience in construction, transportation, manufacturing and industrial trades, natural resources and agriculture, or cooks and chefs in the past five years may be able to benefit from the Federal Skilled Trades Program. This is especially true if they are willing to reside in and obtain a certificate of qualification in their trade from a Canadian province where their skills are in high demand. For example, the construction trades are in high demand in Ontario and British Columbia.¹¹² Meanwhile, cooks are in high demand in eight Canadian provinces, but seeking a certificate of qualification in Prince Edward Island, the province with the fewest people and therefore least competition, may be easier than seeking one from Ontario, the most densely populated province where there is more competition. Meanwhile, truck drivers are needed throughout Canada¹¹³ and many noncitizens, including TPS holders, in the United States were banned from the profession in March of 2026 through regulation.¹¹⁴ Haitian and Syrians losing TPS who work as truck drivers could consider pursuing this profession in Canada.¹¹⁵

Haitians may be well positioned for the Express Entry Program. Many Haitians speak French in addition to Haitian Creole or at least have enough of a foundation in French to be able to test well on the French language test. It is estimated that approximately a quarter of Haitians with TPS have a Bachelor's Degree.¹¹⁶ Haitians who test well on the French exam, are aged 18-35, earned at least an Associate's Degree, and have six or more years of skilled work experience will have the best chances of obtaining the required 67 points; without including other possible points, this combination can earn a maximum of 74 points.

If they meet the 67-point threshold allowing them to be considered for permanent residency, having French language proficiency and skilled work experience in healthcare and social services, the top two categories that the Canadian government has identified to meet the

¹¹² Employment & Social Development Canada, *Discover Careers in the Skilled Trades*, Gov't of Can., <https://www.canada.ca/en/employment-social-development/campaigns/skilled-trades.html> (last visited July 17, 2026).

¹¹³ Northwest Tank Lines, *Are Truck Drivers Still in Demand in Canada?*, <https://www.northwesttanklines.com/is-truck-driver-in-demand-in-canada/> (last visited July 17, 2026).

¹¹⁴ Harold Meyerson, *Then They Came for the Immigrant Truckers*, *The Am. Prospect* (Mar. 23, 2026), <https://prospect.org/2026/03/23/immigrant-truckers-commercial-drivers-licenses-trump/>.

¹¹⁵ Jollette Joseph, *More and More Haitians Are Becoming Truck Drivers in the USA*, *AyiboPost* (Aug. 2, 2022), <https://ayibopost.com/more-and-more-haitians-are-becoming-truck-drivers-in-the-usa/>.

¹¹⁶ Beatrice Dain & Jeanne Batalova, *Haitian Immigrants in the United States*, *Migration Policy Inst.* (Nov. 8, 2023), <https://www.migrationpolicy.org/article/haitian-immigrants-united-states-2022>.

country's identified economic goals, improves their chances of being selected for permanent residency. Of the 330,000 Haitian losing TPS protections it is estimated that 13,000 work as nursing assistants and another 8,000 serve 12,000 children and aging people.¹¹⁷ These job skills and occupations are aligned with the top three occupations in health care and social assistance that are most in demand in Canada.¹¹⁸

1. Home support workers, caregivers and related occupation
2. Nurse aides, orderlies and patient service associates
3. Social and community service workers

Therefore, it may be worthwhile for Haitians, especially those with work experience in healthcare and social services, to consider Canada's Express Entry Program.¹¹⁹

IV. Immigration Court Relief and Procedural Options

People losing TPS protections who are not already in removal proceedings may be placed in removal proceedings through the issuance of a Notice to Appear (NTA). An NTA is the charging document that DHS files with the immigration court to initiate removal proceedings and that generally identifies the factual allegations and charges of removability against the individual.¹²⁰ Practitioners must take care to plead to the NTA with the client's input and in a manner that advances the client's interests.¹²¹ Indeed, the pleading is the first step of the client's removal defense strategy and sets the stage for forthcoming legal arguments and relief.

A. Active Removal Proceedings

Once an individual is placed in removal proceedings, they may seek relief or protection available before the immigration judge (IJ). Unlike applications filed with USCIS, relief sought in immigration court is generally pursued defensively as a response to DHS's attempt to remove the individual. Depending on the individual's circumstances, potential options may include asylum, withholding of removal, protection under the Convention Against Torture (CAT), non-LPR cancellation of removal under INA § 240A(b), adjustment of status, and voluntary departure.

¹¹⁷ Al Jazeera, *Will the End of TPS for Haitians Mean a Caregiving Crisis in U.S.?* (July 2, 2026), <https://www.aljazeera.com/news/2026/7/2/will-the-end-of-tps-for-haitians-mean-a-caregiving-crisis-in-us>.

¹¹⁸ Employment & Social Development Canada, *Discover Which Industries Are Trending*, Gov't of Can., <https://www.jobbank.gc.ca/career-planning/resources/in-demand-sectors> (last visited July 17, 2026).

¹¹⁹ The Caregivers Programs is also another possibility. This program is available to people wishing to work temporarily as a home childcare provider or home support worker in Quebec for an employer who has a positive labor market impact assessment. However, in addition to allowing only temporary residence in Canada, these applications face an approximate 80-month adjudication timeline.

¹²⁰ INA § 239(a)(1).

¹²¹ See National Immigration Project, *Pleading to Protect: Holding Immigration Judges to Their Obligations to Respondents* (May 29, 2026), <https://nipnlg.org/work/resources/pleading-protect-holding-immigration-judges-their-obligations-respondents>.

1. Defensive Asylum, Withholding of Removal, and CAT

Individuals in removal proceedings may seek asylum as a defense to removal. The eligibility requirements for asylum are the same whether an individual applies affirmatively with USCIS or defensively before the immigration court. As discussed above, an asylum applicant must establish that they meet the statutory definition of a “refugee” by demonstrating that they have suffered past persecution or have a well-founded fear of persecution on account of one of the five protected characteristics.¹²² The OYFD and asylum-related fee requirements discussed above also apply to asylum applications filed in removal proceedings.¹²³

For individuals who are unable to overcome the OYFD, withholding of removal or CAT protection may provide an alternative form of protection from removal if the applicant can meet the higher evidentiary standards.

Withholding of removal requires an applicant to demonstrate that it is more likely than not that their life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion.¹²⁴ This standard is higher than the well-founded fear standard applicable to asylum.¹²⁵

CAT protection requires an applicant to demonstrate that it is more likely than not that they would be tortured if removed to the proposed country of removal.¹²⁶ Unlike asylum and withholding of removal, CAT protection does not require the applicant to establish that the feared harm is connected to a protected ground.

Withholding of removal and CAT protection do not provide a pathway to lawful permanent residence or provide derivative protection to spouses or children. Where multiple members of a family unit face risks upon return, it is crucial to evaluate whether each family member has an independent basis for filing an application for protection. Further, withholding of removal and CAT protection generally prevents removal only to a country where the applicant is likely to face torture and does not prevent DHS from seeking removal to a third country where removal would not violate the CAT regulations.

a) Avoiding Pretermission

Individuals seeking asylum, withholding of removal, or protection under CAT in immigration court should be aware of recent developments regarding the pretermission of Form I-589 applications based on alleged deficiencies in the application. In *Matter of C-A-R-R-*, 29 I&N Dec. 13 (BIA 2025), the BIA addressed deficiencies in asylum applications and the consequences of failing to cure an application that an IJ determines is incomplete. The decision indicates that an IJ is not required to adjudicate the merits of an incomplete Form I-589 and may

¹²² INA § 101(a)(42); INA § 208(b)(1).

¹²³ Asylum Seeker Advocacy Project, *New Fees*, <https://asaptogether.org/en/new-fees/#court-annual-fee> (last visited July 17, 2026).

¹²⁴ INA § 241(b)(3).

¹²⁵ *INS v. Cardozo-Fonseca*, 480 U.S. 421, 425 (1987).

¹²⁶ 8 CFR § 1208.16(c).

deem the application waived or abandoned where the applicant fails to cure deficiencies after being given the opportunity to do so. However, the decision provides limited guidance regarding what specific deficiencies render an application incomplete. A Form I-589 may be deemed incomplete if it does not include a response to each substantive question on the form, is unsigned, or is not accompanied by the required supporting material specified in 8 CFR § 1208.3(a) and the Form I-589 instructions.¹²⁷

To reduce the risk of pretermission, practitioners should carefully review all asylum applications filed in immigration court to ensure that each question on the Form I-589 is answered specifically and completely. Applicants should avoid leaving questions blank, unless they clearly do not apply, such as questions about a spouse for an unmarried applicant, or providing vague responses that fail to identify the factual and legal basis for the claim. Where the claim is based on past persecution, threats, or other harm, the Form I-589 should include sufficient information regarding what occurred, when it occurred, who caused the harm, and why the applicant believes the harm occurred. Additional pages or supplements should be used where necessary to provide complete responses.

Practitioners should also ensure that asylum applications include all required supporting documentation identified in the Form I-589 instructions, including identity documents, immigration documents, and documentation regarding derivative family members where applicable.¹²⁸ Because some IJs may not provide an opportunity to correct deficiencies before premitting an application, applications should be prepared with the expectation that the IJ may evaluate the sufficiency of the written filing before reaching the merits of the claim. If additional information is necessary, practitioners should consider supplementing the application while carefully evaluating whether the supplemental information merely clarifies the existing claim or introduces a new basis for relief.¹²⁹

Separate from the procedural completeness addressed in *Matter of C-A-R-R-*, practitioners should be aware that the BIA has also authorized pretermission where an application is deemed to be substantively insufficient to establish eligibility for relief. In *Matter of H-A-A-V-*, 29 I&N Dec. 233 (BIA 2025), the BIA held that an IJ may pretermite an application for asylum, withholding of removal, and protection under CAT without a full evidentiary hearing where the factual allegation underlying the claim, viewed in the light most favorable to applicant, do not establish *prima facie* eligibility for relief.

However, *Matter of H-A-A-V-* does not define the precise parameters of the “*prima facie* eligibility” standard or identify the amount of factual detail required to survive pretermission. The risk of pretermission under *Matter of H-A-A-V-* is therefore more difficult to address than the risk of pretermission under *Matter of C-A-R-R-*. Whether an application establishes a *prima facie* claim may depend heavily on how an individual IJ evaluates the factual allegations and

¹²⁷ *Matter of C-A-R-R-*, 29 I&N at 15.

¹²⁸ USCIS, Instructions for Application for Asylum and for Withholding of Removal (Form I-589), U.S. Dep’t of Homeland Sec. (Jan. 20, 2025), <https://www.uscis.gov/sites/default/files/document/forms/i-589instr.pdf>.

¹²⁹ See National Immigration Project, *Distinguishing Matter of M-A-F- in the Pretermission Context* (May 22, 2026), <https://nirpnl.org/work/resources/practice-advisory-distinguishing-matter-m-f-pretermission-context>.

legal theory presented, as well as the evolving BIA precedent that continues to redefine and narrow the boundaries of asylum relief.

Practitioners should prepare the I-589 with the expectation that an IJ may evaluate the application without additional testimony or factual development. The Form I-589 should clearly identify the factual and legal basis for each form of requested relief by describing the harm suffered or feared, the individuals or entities responsible for the harm, the circumstances surrounding the harm, and how those facts satisfy the legal requirements for protection, including, nexus to a protected ground, the formulation of a particular social group, the government's inability or unwillingness to control the persecutor, the reasonableness of internal relocation, and the severity of the harm.

Practitioners should also review recent published and unpublished BIA decisions involving similar claims when preparing or supplementing an application. These decisions can help identify the factual circumstances the BIA has considered relevant to eligibility and assist practitioners in distinguishing their clients' claims from cases in which the BIA has found the alleged harm or factual allegations insufficient. A strong Form I-589 should not merely describe what happened to the applicant; it should clearly present the facts necessary to support eligibility for asylum, withholding of removal, or CAT protection.

For a more detailed discussion on *Matter of C-A-R-R-*, *Matter of H-A-A-V-*, EOIR's Prepermission Memo, the limits of prepermission authority, and strategies for avoiding and responding to potential prepermission, see National Immigration Project, *Fighting for a Day in Court: Understanding and Responding to Prepermission of Asylum Applications* (July 25, 2026), <https://nipnlg.org/work/resources/fighting-day-court-understanding-and-responding-prepermission-asylum-applications>.

2. Non-LPR Cancellation of Removal

Under INA § 240A(b), an applicant for non-LPR cancellation of removal must establish that they: (1) have been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of the application; (2) have been a person of good moral character during that period; (3) have not been convicted of certain offenses under the INA; and (4) demonstrate that removal would result in exceptional and extremely unusual hardship to the applicant's U.S. citizen or lawful permanent resident spouse, parent, or child.

To measure the ten years of continuous physical presence, IJs apply the stop-time rule. The stop-time rule terminates the accrual of continuous physical presence upon service of a statutory compliant notice to appear under INA § 239(a), or the commission of certain criminal offenses.¹³⁰ Since two misdemeanors render a person ineligible for TPS, it is unlikely that a Haitian or Syrian who had TPS until DHS terminated the TPS designations had a criminal history that would have stopped the continuous physical presence clock. However, it is much more likely that the NTA stop-time rule may apply to Haitians or Syrians losing TPS because DHS previously served them with an NTA. Indeed, for many Haitian and Syrian TPS holders,

¹³⁰ INA § 240A(d)(1).

the continuous physical presence requirement may be a significant issue because many have resided in the United States for more than ten years but may not have accumulated the required period before DHS initiated removal proceedings.

The Supreme Court has held that an NTA must comply with the statutory requirements of INA § 239(a)(1) to trigger the stop-time rule. In *Pereira v. Sessions*, 585 U.S. 198 (2018), the Court held that an NTA that does not contain the time and place of the initial hearing does not trigger the stop-time rule. The Supreme Court subsequently clarified in *Niz-Chavez v. Garland*, 593 U.S. 155 (2021), that the stop-time rule is triggered only by a single document containing all of the information required by INA § 239(a)(1), rather than by a combination of an incomplete NTA and a later hearing notice.

The Board of Immigration Appeals (Board or BIA) addressed a related issue in *Matter of Chen*, 28 I&N Dec. 676 (BIA 2023). There, the Board held that the stop-time rule is not triggered by the entry of a final order of removal. Rather, the stop-time rule is triggered only by service of a statutorily compliant NTA or the commission of a qualifying criminal offense, consistent with the statutory language interpreted by *Niz-Chavez*. *Matter of Chen* is particularly relevant for individuals who have already received a final order of removal, but whose accrual of continuous physical presence was not stopped by a statutorily compliant NTA. For example, individuals who received a deficient NTA and a final order of removal before accruing ten years of physical presence may nevertheless satisfy the continuous physical presence requirement if the final order itself did not trigger the stop-time provision.

3. Voluntary Departure

Voluntary departure may be an option for individuals who are unable to obtain relief from removal but may have a viable pathway to immigrate to the United States through consular processing in the future. Unlike a removal order, voluntary departure allows an individual to depart the United States without the immigration consequences associated with a formal order of removal, although it does not eliminate all inadmissibility concerns or provide an independent pathway to lawful return.

Although DHS has used terms such as “self-deportation” to describe certain efforts encouraging individuals to leave the United States, including through initiatives such as CBP Home, “self-deportation” is not a specific immigration procedure or form or relief under the INA. Individuals may depart the United States through different mechanisms, including voluntary departure under INA § 240B, each of which carries distinct legal consequences.¹³¹ CBP Home provides a mechanism for individuals to notify DHS of their intent to depart and may facilitate departure, but participation in CBP Home does not itself constitute a grant of voluntary departure.

There are two forms of voluntary departure under INA § 240B: pre-conclusion voluntary departure and post-conclusion voluntary departure.

¹³¹ National Immigration Project, *What Am I Signing When I Sign My Deportation?* (May 6, 2026), <https://nipnlg.org/work/resources/what-am-i-signing-when-i-sign-my-deportation>.

Pre-conclusion voluntary departure is available before the conclusion of removal proceedings in lieu of removal proceedings or prior to the completion of such proceedings.¹³² To qualify, the individual must not be deportable under INA § 237(a)(2)(A)(iii) or INA § 237(a)(4)(B), relating to certain aggravated felonies and national security-related grounds.¹³³ A grant of pre-conclusion voluntary departure may not exceed 120 days.¹³⁴

Post-conclusion voluntary departure is available at the conclusion of removal proceedings pursuant to INA § 240B(b). To grant post-conclusion voluntary departure, the IJ must enter voluntary departure in lieu of removal and find that the individual: (1) has been physically present in the United States for at least one year immediately preceding service of the notice to appear; (2) has been a person of good moral character for at least five years immediately preceding the application for voluntary departure; (3) is not deportable under INA § 237(a)(2)(A)(iii) or INA § 237(a)(4); and (4) has established by clear and convincing evidence the means and intent to depart the United States.¹³⁵

An individual granted post-conclusion voluntary departure must depart the United States within the period provided by the IJ, not exceeding 60 days.¹³⁶ The individual must also comply with any conditions imposed by the IJ, including posting a voluntary departure bond of at least \$500 within five business days of the order granting voluntary departure.¹³⁷ If the individual appeals, the individual must timely provide proof that the required bond was posted in order for the voluntary departure period to be reinstated in the BIA's final order.¹³⁸ Failure to timely depart may result in the voluntary departure order automatically converting into a removal order and may subject the individual to additional penalties.¹³⁹

Preserving post-conclusion voluntary departure allows an individual to continue pursuing available relief or challenging the IJ's decision while maintaining the option to depart voluntarily if relief is unavailable. Voluntary departure may be beneficial for individuals who may pursue future immigration benefits through consular processing. The decision to pursue voluntary departure should account for any immigration consequences that may arise from departure, including applicable inadmissibility grounds.¹⁴⁰

Voluntary departure does not waive inadmissibility grounds that may apply after departure. In particular, individuals who accrued more than one year of unlawful presence in the United States may still be subject to the ten-year unlawful presence bar upon departure.¹⁴¹ However, time spent

¹³² INA § 240B(a).

¹³³ See INA § 240B(a)(1).

¹³⁴ See INA § 240B(a)(2).

¹³⁵ See INA § 240B(b)(1).

¹³⁶ See 8 CFR § 1240.26(i).

¹³⁷ See 8 CFR § 1240.26(c)(3)(i), (4).

¹³⁸ See 8 CFR § 1240.26(c)(3)(ii).

¹³⁹ See INA § 240B(d); 8 CFR § 1240.26(e).

¹⁴⁰ See National Immigration Project, *Practice Advisory: Understanding and Overcoming Bars to Relief Triggered by a Prior Removal Order* (Feb. 1, 2023), <https://nipnlg.org/work/resources/practice-advisory-understanding-and-overcoming-bars-relief-triggered-prior-removal>.

¹⁴¹ For individuals who trigger the ten-year unlawful presence bar under INA § 212(a)(9)(B)(i)(II), an available waiver may be a possibility if they are eligible to apply for one. A waiver under INA § 212(a)(9)(B)(v), requires a

in TPS does not constitute unlawful presence for purposes of INA § 212(a)(9)(B), and unlawful presence generally does not accrue during periods in which an individual is authorized to remain in the United States.¹⁴² Likewise, individuals do not accrue unlawful presence while they are under the age of 18.¹⁴³

Individuals should also consider whether they had a bona fide asylum application pending during any period after their authorized stay ended. A period during which a bona fide asylum application is pending generally is not counted toward unlawful presence, provided that the applicant did not engage in unauthorized employment during that period.¹⁴⁴

Unlawful presence also does not accrue during the period of authorized voluntary departure granted by DHS or the IJ because the individual remains within a period of stay authorized by the government.¹⁴⁵ Therefore, an individual who has not already accrued more than one year of unlawful presence before receiving voluntary departure may be able to depart without triggering the ten-year unlawful presence bar, depending on the specific facts of the case.

For individuals seeking post-conclusion voluntary departure, the stop-time analysis under INA § 240A(d)(1) may also be relevant. As discussed above, the stop-time provision is triggered upon service of a NTA that satisfies the requirements of INA § 239(a). The same analysis may apply when evaluating the physical presence requirement for post-conclusion voluntary departure. A deficient NTA that does not satisfy the statutory requirements of INA § 239(a), including the required time and place information, does not trigger the applicable stop-time provision for voluntary departure purposes.¹⁴⁶

B. Appealing to the Board of Immigration Appeals

If the IJ issues an order of removal, timely appealing the decision to the BIA within 30 calendar days of the IJ's decision is advantageous for several reasons.¹⁴⁷ First, appealing triggers a stay of removal while the appeal is pending.¹⁴⁸ How long the appeal remains pending depends in large part on whether the person is detained; detained cases receive expedited adjudication. Second,

showing of extreme hardship to a qualifying relative, defined as a U.S. citizen or lawful permanent resident spouse or parent. Individuals who do not have a qualifying relative for purposes of the waiver may need to wait until the ten-year period has elapsed before seeking admission, assuming no other inadmissibility grounds apply.

¹⁴² See INA § 212(a)(9)(B)(ii).

¹⁴³ See INA § 212(a)(9)(B)(iii)(I).

¹⁴⁴ See INA § 212(a)(9)(B)(iii)(II).

¹⁴⁵ See INA § 212(a)(9)(B)(ii).

¹⁴⁶ See *Posos-Sanchez v. Garland*, 3 F.4th 1176, 1185 (9th Cir. 2021) (holding that postconclusion voluntary departure statute's "physical-presence periods ends only once a noncitizen receives a single document containing the information required by [INA § 239(a)]"); see also *Gregorio-Osorio v. Garland*, 27 F.4th 372 (5th Cir. 2022) (remanding at government's request for BIA to consider if voluntary departure stop-time rule is governed by *Niz-Chavez*).

¹⁴⁷ The 30-day period starts to run from the IJ's decision. This 30-day deadline applies to non-detained and detained cases alike with Chapter 3.5(c) of the BIA Practice Manual noting that "[a]n appeal is not timely filed simply because it is deposited in the detention facility's internal mail system or is given to facility staff to mail prior to the deadline." Although the BIA has held that the appeal deadline is subject to equitable tolling, see *Matter of Morales-Morales*, 28 I&N Dec. 714 (BIA 2023), it is unlikely that the current BIA would accept this argument.

¹⁴⁸ 8 CFR § 1003.6(a).

appealing the decision prevents the order from becoming a final order of removal, which means that DHS may not lawfully remove the person and, should DHS detain the person, INA § 236(a) discretionary detention authority would apply. For people with unripe relief pending with USCIS, this is particularly helpful as a pending appeal may allow the relief to ripen. If the BIA denies the appeal, which is called a “dismissal,” the order of removal becomes final.¹⁴⁹ At this point, the person may pursue a Petition for Review and, because no stay of removal remains in place, a Stay of Removal with the relevant U.S. court of appeals.¹⁵⁰ Third, appealing puts the case on the path towards obtaining judicial review by a U.S. court of appeals, even if the BIA is a required speedbump, and judicial review may be the first time that the person faces a neutral adjudicator and receives due process. Fourth, appealing preserves the person’s ability to file a motion to remand should the opportunity arise.¹⁵¹

The BIA Notice of Appeal filing the requires 1) paying a \$1030 filing fee¹⁵² or obtaining a waiver of the filing fee, 2) filing Form EOIR 26, Notice of Appeal from a Decision of an Immigration Judge, and 3) if an attorney assisted with the filing¹⁵³ or is representing the person on the appeal,¹⁵⁴ the relevant EOIR counsel form. The \$1030 filing fee is paid through the online EOIR Payment Portal using bank account information or a credit or debit card. Once paid, EOIR will issue a receipt to include with the filing. If seeking a fee waiver, it is important to distinguish the case from *Matter of Garcia Martinez*, 29 I&N Dec. 169 (BIA 2025), especially in cases represented by private counsel.¹⁵⁵ If the BIA denies the fee waiver, a regulation requires the BIA to provide 15 days to re-file the rejected appeal with the fee or a new fee waiver request, and the applicable appeal filing deadline is tolled during the 15-day cure period.¹⁵⁶ The fee receipt or the fee waiver request will accompany the EOIR 26. The EOIR 26 should identify the grounds for the appeal to avoid a summary dismissal from the BIA and ensure the proof of service is complete to avoid a rejection. The date that DHS initiated¹⁵⁷ removal proceedings determines if the Notice of Appeal filing is submitted online or as a hard copy via mail or in person in Falls Church, Virginia. Those represented by counsel can file online through the EOIR Courts & Appeals System (ECAS) and pro se people can file online through the Respondent Access

¹⁴⁹ 8 CFR § 1241.1(a).

¹⁵⁰ American Immigration Council & National Immigration Project, *Stays of Removal* (Mar. 13, 2026), <https://ninpnl.org/sites/default/files/2025-01/stays-of-removal-advisory.pdf>.

¹⁵¹ See *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992).

¹⁵² The “One Big Beautiful Bill Act,” Pub. L. No. 119-21, raised immigration-related fees considerably, including the fee for appeals to the BIA. Each fee amount is subject to an annual adjustment to cover inflation starting in fiscal year 2026 so it is important to confirm the filing fee.

¹⁵³ EOIR, Notice of Entry of Limited Appearance for Document Assistance Before the Board of Immigration Appeals (Form EOIR-60), U.S. Dep’t of Just., <https://www.justice.gov/eoir/eoir-forms>.

¹⁵⁴ EOIR, Notice of Entry of Appearance as Attorney or Representative Before the Board of Immigration Appeals (Form EOIR-27), U.S. Dep’t of Just., <https://www.justice.gov/eoir/eoir-forms>.

¹⁵⁵ Although EOIR previously issued Policy Memorandum 25-36 instructing adjudicators to “be mindful of potential fraud or misrepresentations on fee waiver applications, particularly from [noncitizens] who have employment authorization and have lived in the United States for many years,” EOIR subsequently rescinded it and no longer appears on their list of EOIR Policy Memoranda available at <https://www.justice.gov/eoir/policy-manual-eoir/part-V/memoranda/pm>.

¹⁵⁶ See 8 CFR § 1003.8(a)(3).

¹⁵⁷ DHS initiates removal proceedings by filing an NTA in immigration court. See INA § 240(a)(1); 8 CFR § 1003.14(a).

Portal.¹⁵⁸ If DHS filed the NTA on or after February 11, 2022, the Notice of Appeal must be filed on ECAS or the Respondent Access Portal.¹⁵⁹ If DHS filed the NTA before February 11, 2022, a hard copy of the filing is required as is service to the relevant DHS Office of Chief Counsel.¹⁶⁰ The BIA must receive the Notice of Appeal filing within 30 days of the IJ's decision or it will be ruled untimely. Rectifying an untimely appeal requires filing a motion to reopen with the IJ, moving the IJ to reissue the decision to restart the 30-day appeal clock, or requesting that the BIA equitably toll the appeal deadline.¹⁶¹ Today's EOIR adjudicators do not inspire confidence in any of these options so it is imperative to appeal timely. Because the initial TPS designation date for both Syrian and Haitian TPS predates February 11, 2022, it is likely that DHS initiated removal proceedings against many Haitians and Syrians prior to February 11, 2022 thereby requiring their counsel, if any, to engage with a hard copy Notice of Appeal filing process replete with potential pitfalls and the challenges of correcting those pitfalls.

After filing the Notice of Appeal, the next step is to await the briefing schedule from the BIA. If the person is detained, the BIA could send the briefing schedule within a couple of months. If the person is not detained, it could take the BIA months to send the briefing schedule. Either way, it is important to regularly check ECAS or the Respondent Access Portal, or keep the BIA apprised of a secure mailing address so as to not miss the briefing schedule and the opportunity to file a brief.¹⁶² Once the brief is filed, it will take the BIA some time¹⁶³ to decide the appeal based on the briefing. In many cases, DHS fails to file a brief, but the BIA usually does not hold that omission against DHS and still resolves the case in favor of the government.

If while the appeal is pending, the person becomes eligible for a new form of relief from removal or new material evidence becomes available strengthening the relief that is currently on appeal, consider filing a motion to remand. A motion to remand asks the BIA to send the case back to the IJ to consider relief from removal based on material and previously unavailable evidence.¹⁶⁴ Motions to remand are adjudicated under the same standards as motions to reopen,¹⁶⁵ but motions to remand are not subject to strict deadlines and number limitations and do not require a filing fee.¹⁶⁶ The "deadline" for a motion to remand is to file it before the BIA issues a decision on the appeal. However, it is impossible to know when the BIA is preparing to issue a decision so it is a high-risk guessing game that counsels toward not procrastinating on the motion to remand. If the BIA decides the appeal before a motion to remand is filed, a motion to reopen will be the remaining option to get new material evidence before the BIA.

¹⁵⁸ EOIR, Respondent Access Portal, U.S. Dep't of Just., <https://www.justice.gov/eoir/respondentaccess> (last visited July 17, 2026). Setting up the Respondent Access Portal may take several weeks so if an unrepresented respondent does not already have this account established, will likely need to file the Notice of Appeal on paper.

¹⁵⁹ EOIR, EOIR Courts & Appeals System (ECAS) – Online Filing, U.S. Dep't of Just., <https://www.justice.gov/eoir/ECAS> (last visited July 17, 2026).

¹⁶⁰ 8 CFR § 1003.3(g).

¹⁶¹ See *Matter of Morales-Morales*, 28 I&N Dec. 714 (BIA 2023).

¹⁶² Failure to submit a brief after indicating that one will be filed may result in the summary affirmance of the decision below. 8 CFR § 1003.1(d)(2)(i)(E).

¹⁶³ The timing of the BIA's decision can vary depending on the circumstances of the case, the complexity of the issues presented, and the BIA's current processing priorities.

¹⁶⁴ *Id.*

¹⁶⁵ See *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992); *Matter of Ige*, 20 I&N Dec. 880, 884 (BIA 1994).

¹⁶⁶ See 8 CFR § 1003.23 (Immigration Court); 8 CFR § 1003.2 (BIA).

C. Addressing Immigration Judge-Issued Orders of Removal

Many Haitian and Syrians losing TPS may have received an order of removal from an IJ in the past. An IJ order of removal is prejudicial for many reasons including that it deprives the person of a forum for seeking many types of relief for which they may be eligible.¹⁶⁷ For example, if a person is now adjustment eligible but has an IJ order of removal, USCIS will lack jurisdiction over the I-485, unless the person is an “arriving alien,” because the immigration court has jurisdiction. Filing an I-485 with USCIS in this scenario will lead to USCIS rejecting the I-485 on jurisdictional grounds. However, the person cannot pursue adjustment of status before the immigration court because the doors to this forum shut when it issued a removal order. The only way to get the immigration court to consider the I-485 is by asking it to reopen the prior removal order. The same process applies where the person appealed the denial of relief to the BIA and the BIA dismissed the appeal. In that circumstance, the person must seek reopening of the proceedings before the BIA rather than the immigration court.¹⁶⁸

Haitian and Syrians who traveled on TPS-based I-512T or advance parole after receiving a removal order from an IJ may think that they executed the order when they traveled outside of the United States, but this is incorrect. While the general rule is that travel on advance parole executes the removal order,¹⁶⁹ USCIS interprets section 304(c) of the Miscellaneous and Technical Immigration and Naturalization of 1991 as providing an exception to this rule. That provision states that a person authorized “to travel abroad temporarily and who returns to the United States in accordance with such authorization... shall be inspected and admitted *in the same immigration status* the [noncitizen] had at the time of departure” (emphasis added).¹⁷⁰ Therefore, according to USCIS, “[I]n the case of a TPS beneficiary with an outstanding final removal order, travel abroad does not execute the removal order if the beneficiary received prior authorization to travel under INA § 244(f)(3) and DHS admitted the beneficiary into TPS under MTINA upon return to the United States.”¹⁷¹ Because TPS-authorized travel does not execute a prior removal order, jurisdiction remains with the immigration court rather than shifting to USCIS. This means that rather than being able to directly file the I-485 with USCIS, the next required step is to seek reopening of the removal proceedings with the immigration court that issued the order. Without reopening the removal proceedings, the person has no forum for seeking adjustment of status.

Several reopening vehicles exist. Some are creatures of statute and others are regulatory products. Statutory reopening vehicles are stronger than regulatory ones, but generally have strict deadlines and are limited to one motion to reopen by right. Because a person may file only one motion to reopen proceedings per removal order, it is crucial to file the best motion to reopen that includes all viable reopening arguments out of the following:

¹⁶⁷ However, if USCIS has sole jurisdiction over the form of relief, such as in the case of U visas or VAWA self-petitions, a person may seek those benefits before USCIS notwithstanding an IJ removal order.

¹⁶⁸ EOIR, Part VII - Appendices, Appx H - Filing Motions

<https://www.justice.gov/eoir/policy-manual-eoir/part-VII/appendices/h> (last visited July 19, 2026).

¹⁶⁹ INA § 101(g).

¹⁷⁰ PL 102-232, 105 Stat. 1733, § 304(c).

¹⁷¹ USCIS Policy Manual, Vol. 7, Pt. A, Ch. 3, n.18, Filing Instructions, <https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-3#footnote-18> (last visited July 19, 2026).

- INA § 240(c)(7)(B): Reopening based on a new determination based on newly discovered facts or a change in the noncitizen's circumstances since the time of their last hearing in immigration court at which they were present.
 - Filing Deadline: 90 days from the final removal order
- INA § 240(c)(7)(C)(ii): Reopening to apply for asylum, withholding of removal, and protection under the Convention against Torture based on changed country conditions in the noncitizen's country of origin.
 - Filing Deadline: None. While there is no motion to reopen filing deadline for this statutory reopening ground, practitioners should file the motion to reopen before the country conditions change again in a manner that eliminates or undermines the proposed changed country conditions argument.
- INA § 240(c)(7)(C)(iv): Reopening based on Violence Against Women Act (VAWA) eligibility.¹⁷²
 - Filing Deadline: within one year of the final removal order, but this one-year deadline may be waived in extraordinary circumstances or situations of "extreme hardship to the [noncitizen's] child."¹⁷³
- INA § 240(b)(5)(C): Rescission and reopening of an in absentia order where the noncitizen failed to appear at a hearing in immigration court because: (1) they did not receive proper notice of the hearing; (2) they were in federal or state custody and the failure to appear was not their fault; or (3) exceptional circumstances¹⁷⁴ caused their failure to appear.
 - Filing Deadlines:
 - (1) None for a motion to rescind and reopen based on no notice.
 - (2) None for a motion to rescind and reopen based on the person being in federal or state custody and lack of fault for failing to appear.
 - (3) 180 days for a motion to rescind and reopen based on exceptional circumstances for failing to appear.
- 8 CFR § 1003.23(b)(4)(iv) (IJ) / 8 CFR § 1003.2(c)(3)(iii) (BIA): When a motion to reopen is "agreed upon by all parties and jointly filed," there is an exception to the time and numerical limitations. While asking DHS to join the motion to reopen seems obvious, it is unlikely that the DHS will join a motion given this administration's choice to forego exercising prosecutorial discretion and make everyone an enforcement priority. However, there are settlement agreements that require DHS to join a motion to reopen.
 - CARECEN Settlement Agreement:¹⁷⁵ This challenge to the 2019 policy that interpreted MTINA as preventing the execution of a removal order for those with removal orders who engaged in TPS-authorized travel led to DHS generally agreeing to establish a clear prosecutorial discretion avenue for joint motions to

¹⁷² INA § 240(c)(7)(C)(iv)(I) states that the limitation on deadlines for filing motions to reopen shall not apply "if the basis for the motion is to apply for relief under clause (iii) or (iv) of section 204(a)(1)(A), clause (ii) or (iii) of section 204(a)(1)(B) [VAWA self-petitioners, except for parents subject to battery or extreme cruelty by U.S. citizen sons or daughters], section 240A(b)(2) [VAWA cancellation], or section 244(a)(3) (as in effect on March 31, 1997) [VAWA suspension]."

¹⁷³ INA § 240(c)(7)(C)(iv).

¹⁷⁴ INA § 240(b)(5)(C)(i).

¹⁷⁵ No. 1:20-CV-02363 (D.D.C. filed Aug. 26, 2020).

reopen and dismiss.¹⁷⁶ An approved joint motion to reopen and dismiss restored jurisdiction with USCIS. The settlement agreement sunset on January 19, 2025, so DHS is no longer agreeing to join motions to reopen and dismiss through this settlement agreement. If a joint motion to reopen and dismiss request was submitted to DHS prior to January 19, 2025, the National Immigration Project and Democracy Forward are interested to learn about these cases as well as cases in which an EOIR adjudicator denied the joint motion to reopen and dismiss.¹⁷⁷

- *Calderon Settlement Agreement*:¹⁷⁸ This class action settlement agreement requires DHS to generally agree to joint motions to reopen and dismiss for spouses of U.S. citizens who currently reside or are detained in New England.¹⁷⁹ The location of the immigration court that issued the order is not relevant to class membership. The class member's request must: (1) identify the noncitizen as a *Calderon* class member; (2) be filed with the ICE OPLA field location with jurisdiction over the class member's removal order; (3) comply with the standard procedures of the ICE OPLA field location where it is filed, such as completing a background check or standardized form; and (4) show that, if the class member's removal proceedings are dismissed, they would be eligible for either consular processing or adjustment of status.¹⁸⁰ This settlement agreement sunsets on January 16, 2027.
- 8 CFR § 1003.23(b)(4)(ii) (IJ) / 8 CFR § 1003.2(a) (BIA): IJs and BIA have sua sponte authority to reopen at any time a case in which that agency has made a decision, with no time or numerical limitations. The BIA has issued a few decisions, including recently, discussing the standard and parameters of sua sponte reopening. These cases instruct EOIR adjudicators to reserve sua sponte reopening for "exceptional situations" in the totality of the circumstances and that sua sponte authority "is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship."¹⁸¹ Recently, the BIA has sought to define factual scenarios that alone do not constitute "exceptional situations" and in *Matter of Yadav*, 29 I&N Dec. 438 (BIA 2026), held that a valid marriage to a USC entered into after a removal order does not constitute an exceptional situation warranting sua sponte reopening of removal proceedings. Therefore, it is important to factually distinguish a case seeking sua sponte reopening from *Matter of Yadav* and arguing that the totality of the circumstances do present an exceptional situation worthy of the IJ's sua sponte reopening authority.

¹⁷⁶ National Immigration Project, *Practice Alert: CARECEN Agreement Sunsets on January 19, 2025* (July 31, 2024),

<https://nipnlg.org/work/resources/practice-alert-carecen-agreement-sunsets-january-19-2025>.

¹⁷⁷ Please email Michelle N. Méndez at michelle@nipnlg.org.

¹⁷⁸ No. 18-CV-10225-MLW, 2025 WL 220511, at *1 (D. Mass. Jan. 16, 2025).

¹⁷⁹ Massachusetts, Rhode Island, Connecticut, Vermont, New Hampshire, or Maine.

¹⁸⁰ ACLU Massachusetts, *Calderon Settlement*, <https://www.aclum.org/calderon-settlement/>.

¹⁸¹ *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997); *see also Matter of Yewondwosen*, 21 I&N Dec. 1025, 1027 (BIA 1997) (noting that the BIA "has the ability to reopen or remand proceedings when appropriate, such as for good cause, fairness, or reasons of administrative economy, and that technical deficiencies alone would not preclude such action").

While the strict statutory reopening deadlines make it difficult to file a timely motion to reopen, it is possible to raise an equitable tolling argument.¹⁸² The common law principle of equitable tolling functions as an extension of the filing deadline.¹⁸³ To obtain equitable tolling of a deadline, an individual must demonstrate that “(1) . . . he has been pursuing his rights diligently, and (2) . . . some extraordinary circumstance stood in his way” to prevent timely filing.¹⁸⁴ In the motion to reopen context, the equitable tolling doctrine therefore renders an otherwise untimely motion as timely in extraordinary circumstances where the individual has shown diligence in filing the motion.¹⁸⁵ U.S. court of appeals and the BIA have recognized that equitable tolling is warranted where ineffective assistance of counsel,¹⁸⁶ fraud,¹⁸⁷ government interference,¹⁸⁸ a due process violation at the prior removal hearing,¹⁸⁹ an unrecognized medical condition,¹⁹⁰ severe mental health issues or lack of mental competence¹⁹¹ and ineffective assistance of counsel¹⁹² are

¹⁸² *Holland v. Florida*, 560 U.S. 631, 645–4 (2010) (quoting *Young v. United States*, 535 U.S. 43, 49 (2002) (internal quotations omitted)).

¹⁸³ See, e.g., *Lozano v. Montoya Alvarez*, 572 U.S. 1, 9–11 (2014) (concluding that equitable tolling did not apply to the Hague Convention).

¹⁸⁴ *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); accord *Holland v. Florida*, 560 U.S. 631 (2010).

¹⁸⁵ See, e.g., *Lugo-Resendez v. Lynch*, 831 F.3d 337, 344 (5th Cir. 2016); *Kuusk v. Holder*, 732 F.3d 302, 305 (4th Cir. 2013); *Avila-Santoyo v. U.S. Att’y Gen.*, 713 F.3d 1357, 1364 (11th Cir. 2013) (per curiam); *Alzaarir v. Att’y Gen.*, 639 F.3d 86, 90 (3d Cir. 2011) (per curiam); *Barry v. Mukasey*, 524 F.3d 721, 724 (6th Cir. 2008); *Gaberov v. Mukasey*, 516 F.3d 590, 594–97 (7th Cir. 2008); *Hernandez-Moran v. Gonzales*, 408 F.3d 496, 499–500 (8th Cir. 2005); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1193 (9th Cir. 2001); *Javorski v. INS*, 232 F.3d 124, 127 (2d Cir. 2000); see also *Mata v. Lynch*, 576 U.S. 143, 149 n.3 (2015) (leaving open the possibility that the deadline can be equitably tolled).

¹⁸⁶ See, e.g., *Avagyan v. Holder*, 646 F.3d 672, 682 (9th Cir. 2011) (tolling warranted in recognition of fact that “many, many immigrants fall victim to incompetent or fraudulent counsel” preventing timely or adequate filing); *Mezo v. Holder*, 615 F.3d 616 (6th Cir. 2010) (remanding for further fact-finding); *Zhao v. INS*, 452 F.3d 154, 160 (2d Cir. 2006); *Jose Leonardo Ramirez-Perez*, 029-277-936 (BIA Feb. 4, 2020) (unpublished), https://www.scribd.com/document/447702704/Jose-Leonardo-Ramirez-Perez-A029-277-936-BIA-Feb-4-2020?secret_password=w8606EutpaFHLLeUxLzUb.

¹⁸⁷ See, e.g., *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999).

¹⁸⁸ E.g., *Gaberov v. Mukasey*, 516 F.3d 590, 594 (7th Cir. 2008) (allegations that BIA never sent notice of its decision and petitioner relied on assurances from DHS officers); cf. *Lawrence v. Lynch*, 826 F.3d 198, 203 (4th Cir. 2016) (noting that “[g]overnment’s wrongful conduct” could be grounds for equitable tolling); *Luna v. Holder*, 637 F.3d 85, 99 (2d Cir. 2011) (noting that “governmental interference” could be a ground for equitable tolling).

¹⁸⁹ See *Valdovinos-Lopez v. Att’y Gen.*, 628 F. App’x 817 (3d Cir. 2015) (unpublished) (remanding to BIA to consider equitable tolling argument); *J-B-M*, AXXX-XXX-853 (BIA Apr. 19, 2018) (unpublished), https://www.scribd.com/document/380076359/J-B-M-AXXX-XXX-853-BIA-April-19-2018?secret_password=V5rdsbWdS9z5Nymkj0PS (equitably tolls filing deadline where the respondent was ordered removed in 2007 during a hearing conducted in language he did not speak and he pursued his rights diligently after learning of Fifth Circuit decisions allowing the filing deadline to be tolled).

¹⁹⁰ *A-A-B*, AXXX-XXX-292 (BIA Jan. 22, 2018) (unpublished), https://www.scribd.com/document/371995244/A-A-B-AXXX-XXX292-BIA-Jan-22-2018?secret_password=y4ZG4qLktsQJs4TmFxpV.

¹⁹¹ See, e.g., *Rajwayi v. Sessions*, 692 F. App’x 815 (9th Cir. 2017) (unpublished) (remanding for consideration of equitable tolling based on argument that petitioner could “not credibly testify during her immigration proceedings because she suffered from severe mental conditions”); *Miguel Aguilar-Elias*, 041-765-696 (BIA May 15, 2019) (unpublished), https://www.scribd.com/document/414381698/Miguel-Aguilar-Elias-A041-765-696-BIA-May-15-2019?secret_password=mhTvHwypAs3Ymo2CMmIN.

¹⁹² *Saakian v. INS*, 252 F.3d 21, 24–25 (1st Cir. 2001); *Paucar v. Garland*, 84 F.4th 71, 80–83 (2d Cir. 2023); *Saint Ford v. Att’y Gen.*, 51 F.4th 90, 95–96 (3d Cir. 2022); *Figeroa v. INS*, 886 F.2d 76, 78 (4th Cir. 1989); *Mai v. Gonzales*, 473 F.3d 162, 165–67 (5th Cir. 2006); *Kada v. Barr*, 946 F.3d 960, 964–65 (6th Cir. 2020); *Habib v. Lynch*, 787 F.3d 826, 831 (7th Cir. 2015); *Ortiz-Puentes v. Holder*, 662 F.3d 481, 484 (8th Cir. 2011); *Maravilla*

present. Motions to reopen arguing equitable tolling require robust documentary evidence and, when arguing ineffective assistance of counsel, must comply with the *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), substantive and procedural requirements. Note that outside of the Fifth Circuit,¹⁹³ equitable tolling also applies to the one motion to reopen limitation and therefore may benefit individuals who already unsuccessfully used their one motion to reopen.¹⁹⁴ Ineffective assistance of counsel on the first motion to reopen is a common basis for seeking equitable tolling of the number bar.¹⁹⁵

TPS holders may also argue that their having TPS constitutes an extraordinary circumstance warranting equitable tolling. The regulations, in the context of the OYFD, recognize that an individual's maintenance of lawful status, including temporary forms of protection such as TPS, may constitute an extraordinary circumstance that excuses otherwise applicable filing deadlines. That same rationale underlying this OYFD exception—that individuals should not be forced to prematurely apply for asylum while relying on a valid form of government-authorized protection—should apply equally to TPS holders seeking to reopen removal proceedings. Those losing TPS could argue that they reasonably relied on TPS, which the INA expressly includes and protects eligible individuals with removal orders. Accordingly, a TPS recipient may argue that their TPS status constituted an extraordinary circumstance that justified delaying the filing of a motion to reopen, particularly where the individual diligently pursued relief after TPS protection became unavailable. However, TPS holders should not rely solely on their TPS status for equitable tolling. Instead, they should identify and present all applicable extraordinary circumstances that prevented timely filing and provide evidence covering the entire period following the entry of the removal order. Importantly, the existence of an extraordinary circumstance alone is insufficient; TPS holders must also establish reasonable diligence in pursuing their rights during the period for which equitable tolling is sought.

Strategically, it is best to present both statutory and a regulatory sua sponte reopening arguments because, even though the sua sponte argument is unlikely to prevail with today's EOIR adjudicators, this vehicle allows the motion to reopen to present facts that humanize the person that are otherwise irrelevant to statutory reopening elements. And, if the statutory reopening basis carries a filing deadline, but that deadline has passed, the motion to reopen should include the best equitable tolling argument since the person technically has one shot at reopening the removal order.

Maravilla v. Ashcroft, 381 F.3d 855, 858 (9th Cir. 2004); *Osei v. INS*, 305 F.3d 1205, 1208–09 (10th Cir. 2002); *Sow v. U.S. Att'y Gen.*, 949 F.3d 1312, 1318 (11th Cir. 2020).

¹⁹³ *Garcia Morin v. Bondi*, 152 F.4th 626 (5th Cir. 2025) (holding that the statutory numerical bar is not subject to equitable tolling). See also *Matter of B-S-H-*, 29 I&N Dec. 313 (BIA 2025) (holding that the numerical bar cannot be waived by the statutory provision under INA § 240(c)(7)(C)(iv)(III) (VAWA reopening provision)); *Djie v. Garland*, 39 F.4th 280, 282 (5th Cir. 2022) (holding regulation providing exception to number bar is invalid because it contradicts INA § 240(c)(7)(C)(ii), changed country conditions reopening basis).

¹⁹⁴ *Saakian*, 252 F.3d at 24–25; *Paucar*, 84 F.4th at 80–83; *Saint Ford*, 51 F.4th at 95–96; *Figeroa*, 886 F.2d at 78; *Mai*, 473 F.3d at 165–67; *Kada*, 946 F.3d at 964–65; *Habib*, 787 F.3d at 831; *Ortiz-Puentes*, 662 F.3d at 484; *Maravilla Maravilla*, 381 F.3d at 858; *Osei*, 305 F.3d at 1208–09; *Sow*, 949 F.3d at 1318.

¹⁹⁵ See, e.g., *Iavorski v. INS*, 232 F.3d 124, 134 (2d Cir. 2000); *Luntungan v. Atty. Gen. of U.S.*, 449 F.3d 551 (3rd Cir. 2006); *Iturribarria v. INS*, 321 F.3d 889, 897–99 (9th Cir. 2003).

V. Liberty from Detention

People who have received TPS are explicitly protected from civil immigration detention by the INA.¹⁹⁶ The termination of TPS does not itself create a basis for the government to detain a prior TPS holder. However, the loss of TPS does mean that DHS may now detain individuals who were previously protected from immigration detention under the ordinary detention provisions of the INA.

If a person who has lost TPS is detained, their ability to seek release from custody depends on (1) which legal authority authorizes their detention and (2) the facts of their case. It may also depend on where in the country they are detained, because different courts are interpreting immigration detention laws differently.

A. Entering Immigration Custody

When a noncitizen is detained by ICE, there are typically two stages. First, they are subject to arrest by ICE. Second, ICE applies a custody authority to justify their ongoing detention.

1. ICE Arrest Authority

ICE has the authority to arrest individuals with or without a warrant, but there is a strong preference that immigration arrests be based on warrants.¹⁹⁷ An administrative warrant, issued on a Form I-200, authorizes ICE to take an individual into immigration custody.¹⁹⁸ Unlike a valid judicial warrant, because an administrative warrant is issued by an ICE officer – not by a federal judge or magistrate– it does **not** give ICE the authority to enter a home or private areas of a business or building.¹⁹⁹

ICE may also arrest an individual without a warrant if an officer has (1) probable cause to believe the individual is committing an immigration violation, AND (2) probable cause that the individual is a flight risk who “is likely to escape before a warrant can be obtained.”²⁰⁰ Over the past year, ICE has engaged in a widespread practice of unlawful warrantless arrests, which has been found illegal by many different courts.²⁰¹

In many states, state and local law enforcement officers cooperate closely with immigration officials under official or unofficial agreements. Some agencies have been deputized to conduct immigration arrests in the course of their other law enforcement duties, for example pursuant to

¹⁹⁶ INA § 244(d)(4), 8 U.S.C. § 1254a(d)(4).

¹⁹⁷ See *Arizona v. United States*, 567 U.S. 387, 407–08 (2012).

¹⁹⁸ 8 CFR § 236.1(b); see, e.g., U.S. Dep’t of Homeland Security, I-200 Sample, https://www.ice.gov/sites/default/files/documents/Document/2017/I-200_SAMPLE.PDF (last visited July 20, 2026).

¹⁹⁹ See National Immigration Law Center, *Warrants & Subpoenas: What to Look Out for and How to Respond* (Jan. 28, 2025), <https://www.nilc.org/resources/warrants-and-subpoenas-facts/>.

²⁰⁰ INA § 287(a)(2), 8 U.S.C. § 1357(a)(2).

²⁰¹ See, e.g., *Escobar Molina v. U.S. Dep’t of Homeland Sec.*, 811 F. Supp. 3d 1 (D.D.C. 2025); *Ramirez Ovando v. Noem*, 810 F. Supp. 3d 1209 (D. Colo. 2025); *M-J-M-A- v. Hermosillo*, 822 F. Supp. 3d 1147 (D. Or. 2026); *United Farm Workers v. Noem*, 785 F. Supp. 3d 672 (E.D. Cal. 2025).

287(g) agreements.²⁰² Many agencies also have informal agreements to inform ICE when a noncitizen has been subject to a criminal or even traffic arrest. Even if the criminal or traffic charges are dropped, the law enforcement agency may continue to detain the individual on an ICE detainer, or “ICE hold”, that authorizes them to detain the person for an additional 48 hours to allow ICE to exercise their custody authority.²⁰³ Although these detainers should not last longer than 48 hours, in practice some local law enforcement agencies have held individuals longer in order to facilitate their detention by ICE.²⁰⁴

After an arrest occurs, ICE must lawfully exercise their immigration custody authority in order to continue to detain a person. If a person has been subject to a warrantless arrest, ICE must make this additional custody determination within 48 hours of the initial arrest.²⁰⁵

2. ICE Detention Authority

In broad terms, there are four main forms of immigration custody authorized under the INA: discretionary pre-order detention under INA § 236(a), mandatory detention for certain criminal grounds under INA § 236(c), mandatory detention for individuals treated as seeking admission under INA § 235, and post-order detention under INA § 241.

a. Discretionary Detention Under INA § 236(a)

INA § 236(a), 8 U.S.C. § 1226(a)²⁰⁶ authorizes the government to detain noncitizens who are placed in standard removal proceedings under INA § 240, 8 U.S.C. § 1229a before an IJ.²⁰⁷ Another way to look at INA § 236(a) detention authority is that if a person does not have a final removal order and entered the United States on a visa or through another form of admission²⁰⁸, they are generally subject to INA § 236(a), 8 U.S.C. § 1226(a), unless they have committed or been convicted of a crime that triggers mandatory detention under INA § 236(c), 8 U.S.C. § 1226(c). Individuals under INA § 236(a), 8 U.S.C. § 1226(a) detention are generally entitled to an individualized custody determination at the outset of their detention, which should be memorialized on a Form I-286 “Notice of Custody Determination.”²⁰⁹ The custody decision

²⁰² INA § 287(g), 8 U.S.C. § 1357(g); *see also* ICE, *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, <https://www.ice.gov/identify-and-arrest/287g> (last updated July 17, 2026).

²⁰³ *See* American Immigration Council, *Immigration Detainers: An Overview* (May 28, 2026), <https://www.americanimmigrationcouncil.org/fact-sheet/immigration-detainers-overview/>.

²⁰⁴ *Id.*

²⁰⁵ 8 CFR § 287.3(d).

²⁰⁶ Although this advisory initially cites provisions of the INA, the remainder of the advisory cites the corresponding provisions of the United States Code (8 U.S.C.). Federal courts, including in habeas corpus proceedings, typically cite the codified provisions of Title 8 rather than the INA section numbers. Accordingly, this advisory uses the 8 U.S.C. citations throughout for consistency with federal court practice.

²⁰⁷ *See* INA § 240(a), 8 U.S.C. § 1229a.

²⁰⁸ For decades, DHS understood that INA § 236, 8 U.S.C. § 1226 governed detention of individuals already present in the United States, while INA § 235, 8 U.S.C. § 1225 applied to noncitizens seeking admission at the border. Although DHS and the BIA recently asserted that all individuals who entered without inspection are subject to mandatory detention under INA § 235(b)(2)(A), 8 U.S.C. § 1225(b)(2)(A), numerous district and circuit courts have rejected that interpretation as inconsistent with the INA. This issue is discussed further *infra* at p. 47.

²⁰⁹ *See* ICE, Bond Mgmt. Handbook, Doc. ERO 11301.1, at 3 (Aug. 19, 2014) (explaining that custody determination under § 1226(a) should be memorialized on a Form I-286 Notice of Custody Determination and only

should be based on the government’s determination that the noncitizen is either a flight risk (not likely to attend their immigration proceedings) or a danger to the community.²¹⁰ If DHS detains the individual, they are then entitled to a custody re-determination (bond) hearing before an IJ.²¹¹ Discretionary detention under INA § 236(a), 8 U.S.C. § 1226(a) is the “default” form of immigration custody.²¹²

b. Mandatory Detention Under INA § 236(c)

INA § 236(c), 8 U.S.C. § 1226(c) requires DHS to detain certain noncitizens in removal proceedings who have been arrested, charged with, or convicted of certain crimes.²¹³ To detain an individual in this category, the government does not need to make an individual assessment of flight risk or danger – it is enough that the noncitizen falls into a covered category based on their criminal record. Depending where the noncitizen is detained, they may be able to seek a bond hearing after being detained for a prolonged period of time, but they do not have an immediate right to ask for a bond hearing before an IJ.²¹⁴

c. Mandatory Detention Under INA § 235

INA § 235, 8 U.S.C. § 1225 authorizes mandatory detention of noncitizens who are subject to expedited removal processes,²¹⁵ in addition to other recent arrivals who are deemed to be “seeking admission” to the United States.²¹⁶ The mandatory detention scheme described in 8 U.S.C. § 1225 applies “at the Nation’s borders and ports of entry.”²¹⁷ However, the government has sought to apply this mandatory detention provision to any noncitizens present in the United States who did not enter the country with inspection by immigration officials.²¹⁸

If a person has entered the United States without inspection or another form of lawful admission, unless there is a precedential circuit court case with jurisdiction over the petition, the government

then may a noncitizen seek “IJ redetermination”), available at https://www.ice.gov/doclib/foia/dro_policy_memos/eroBondManagementHandbook2018-ICFO-31476.pdf.

²¹⁰ See 8 CFR § 1236.1(c)(8) (directing that DHS may release noncitizens from custody where “release would not pose a danger to property or persons, and [the noncitizen] is likely to appear for any future proceeding”).

²¹¹ See 8 CFR §§ 1003.19(a), 1236.1(d).

²¹² *Jennings v. Rodriguez*, 583 U.S. 281, 303 (2018).

²¹³ For an overview of qualifying criminal activity that may categorize a person as subject to mandatory 1226(c) detention, including recent expansions made through the 2025 Laken Riley Act, see Immigrant Legal Resource Center, *Understanding Mandatory Detention* (Dec. 19, 2025), <https://www.ilrc.org/resources/understanding-mandatory-detention>.

²¹⁴ For a discussion of case law in this area, including the circuit split on whether prolonged detention requires a bond hearing, see National Immigration Litigation Alliance, *Habeas Corpus Petitions* (Jan. 15, 2025), <https://immigrationlitigation.org/wp-content/uploads/2025/11/25.01.15-Habeasx.pdf>. The Supreme Court has granted certiorari to address this circuit split next term in *Genalo v. Black*, No. 25-886 (U.S. June 15, 2026) (granting certiorari) (Oct. 2026 term), available at <https://www.scotusblog.com/cases/genalo-v-black/>.

²¹⁵ INA § 235(b)(1), 8 U.S.C. § 1225(b)(1).

²¹⁶ INA § 235(b)(2), 8 U.S.C. § 1225(b)(2).

²¹⁷ *Jennings v. Rodriguez*, 583 U.S. 281, 287 (2018).

²¹⁸ See U.S. Immigration and Customs Enforcement, Interim Guidance Regarding Detention Authority for Applicants for Admission (July 8, 2025), AILA Doc. No. 25071607, <https://www.aila.org/library/ice-memo-interim-guidance-regarding-detention-authority-for-applications-for-admission>.

is likely to argue that they are mandatorily detained under INA § 235, 8 U.S.C. § 1225(b) and may not receive a bond hearing in immigration court. This position has been largely upheld in two federal circuits and rejected in four federal circuits, as explained below in section 48.

d. Post-Order Detention Under INA § 241

INA § 241, 8 U.S.C. § 1231 authorizes the detention of noncitizens who have been ordered removed, including individuals in reinstatement or withholding-only proceedings.²¹⁹ To fall in this category, a noncitizen must have received a removal order that is administratively final. This means that the person did not appeal or challenge the removal order, or they appealed the removal order to the BIA and the appeal was denied.²²⁰ For the first 90 days after a removal order becomes administratively final, detention is mandatory under this statutory authority.²²¹ After 90 days, the statute creates a presumption of release under supervision unless the government makes a determination that flight risk, danger to the community, or a significant likelihood of reasonably foreseeably removal from the United States is present.²²² If a person is not sure whether they have received a final order of removal, see additional information on page 50.

B. Challenging Immigration Custody

In general, for a person who was previously granted TPS, there is a strong argument that their immigration detention is not justified because the government has already determined that they are neither a flight risk nor a danger to the community. Individuals may only receive TPS if they have not committed certain crimes, supporting the conclusion that they are not a danger to the community.²²³ Additionally, individuals who have received TPS have been continuously present in the United States for a significant period of time, during which they have built ties to the country and to their community. Facts such as lawful employment, family connections, educational pursuits, compliance with immigration processes, and community engagement can further strengthen an individual's argument that they are not a flight risk.²²⁴

²¹⁹ INA § 241(a)–(b), 8 U.S.C. § 1231(a)–(b).

²²⁰ 8 CFR § 1241.1. If the person lost their BIA appeal and filed a Petition for Review, their detention will revert to pre-order if the court reviewing the PFR issues a judicial stay. 8 U.S.C. § 1231(a)(1)(B)(ii); *see also Farah v. U.S. Att'y Gen.*, 12 F.4th 1312 (11th Cir. 2021).

²²¹ INA § 241(a)(1)–(2), 8 U.S.C. § 1231(a)(1)–(2).

²²² *See* INA § 241(a)(3), 8 U.S.C. § 1231(a)(3) (directing that if a noncitizen is not removed with the removal period, the noncitizen “shall be subject to supervision under regulations prescribed by the Attorney General”); *see, e.g., M.L.G.G. v. Wamsley*, No. 6:25-CV-02012-AA, 2025 WL 3539183, at *3 (D. Or. Dec. 10, 2025) (concluding noncitizen was “entitled to release” where she was detained in violation of due process beyond the 90-day removal period).

²²³ When DHS grants a noncitizen TPS, this grant necessarily involves a determination that the noncitizen is not a danger to the community. *See* INA §§ 244(c)(2)(B)(i), 244(c)(1)(A)(iii), 244(c)(2)(A), 8 U.S.C. §§ 1254a(c)(2)(B)(i), 1254a(c)(1)(A)(iii), 1254a(c)(2)(A) (providing that noncitizens convicted of any felony or two or more misdemeanors, or who are inadmissible on certain criminal grounds, are ineligible for TPS).

²²⁴ *See Castanon Nava v. Dep't of Homeland Sec.*, 806 F. Supp. 3d 823, 854 (N.D. Ill. 2025), *aff'd in part sub nom. Castanon-Nava v. U.S. Dep't of Homeland Sec.*, 175 F.4th 828 (7th Cir. 2026) (delineating the factors courts must consider when assessing flight risk in the immigration-arrest context and discussing the constitutional limits on warrantless arrests where flight risk is relied upon as justification).

If a person is detained by ICE, they should tell ICE that they previously had TPS and explain that they are neither a flight risk nor a danger to the community. If they are nevertheless detained, there are a number of ways to challenge this decision, depending on the facts of each individual's case.

1. Administrative Release Requests

Detained individuals may always ask ICE officials to release them. ICE officers generally have discretion to consider and grant release requests.²²⁵ A release request should be made to a person's deportation officer or, if not known, to a supervisory officer with custody authority over the individual. The request should include an explanation of why the individual is not a flight risk and not a danger to the community, including evidence supporting these facts. The request should also include information of a "sponsor", a trusted individual with some form of lawful immigration status, who can vouch for the detained individual and who would agree to support them if they are released from detention. Including information about any health conditions may also strengthen the request for release.

At this time, it is very rare for ICE to grant individual release requests except in certain specific circumstances:

a. Individuals with Pending Survivor-Based Immigrant Benefits

Noncitizens who have pending VAWA, U visa, or T visa petitions have long been subject to general protection from detention and deportation under ICE policy guidance.²²⁶ As of the date of this advisory, these noncitizens are protected by a temporary order in *Immigration Center for Women and Children v. Noem (ICWC)*, Case No. 2:25-cv-09848-AB-AS, 2026 WL 1455004 (C.D. Cal. May 20, 2026), which preserves the application of this policy guidance to noncitizens survivors with pending petitions.²²⁷ These individuals should be able to submit direct release requests to ICE, a template for which is provided by *ICWC* class counsel.²²⁸

b. Pregnant, Postpartum, or Nursing Individuals

Pursuant to 2021 ICE Guidance, ICE generally "should not detain, arrest, or take into custody for an administrative violation of the immigration laws individuals known to be pregnant,

²²⁵ See INA § 236(a), 8 U.S.C. § 1226(a); 8 CFR § 236.1(d)(1).

²²⁶ See Memorandum from Caleb Vitello, Acting Director, ICE, Interim Guidance on Civil Immigration Enforcement Actions Involving Current or Potential Beneficiaries of Victim-Based Immigration Benefits, Policy No. 11005.4 (Jan. 30, 2025), <https://www.ice.gov/doclib/foia/policy/11005.4.pdf>; ICE, Using a Victim-Centered Approach with Noncitizen Crime Victims, Directive No. 11005.3 (Aug. 10, 2021), <https://niwaplibrary.wel.american.edu/wp-content/uploads/ICE-Victim-Centered-Directive-11005.3.pdf>; Memorandum from John Morton, Director, ICE, All Special Agents in Charge & All Chief Counsel, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs, Policy No. 10076.1 (June 17, 2011), <https://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf>.

²²⁷ See Center for Human Rights and Constitutional Law, *ICWC v. Noem Practice Advisory & Toolkit*, <https://www.centerforhumanrights.org/post/icwc-v-noem-practice-advisory-toolkit> (last visited Jul. 20, 2026).

²²⁸ Center for Human Rights and Constitutional Law, *Template Request for Release from ICE Custody*, https://www.centerforhumanrights.org/files/ugd/ba2119_e720e0297a0643d385ada3c636259d47.docx?dn=Template%20Request%20for%20Release%20from%20ICE%20Custody.docx (last accessed Jul. 20, 2026).

postpartum, or nursing unless release is prohibited by law or exceptional circumstances exist.”²²⁹ Individuals in these categories should submit direct release requests to ICE based on their inclusion in one of these protected groups.

2. Bond Hearings

Persons who are detained under the custody authority of INA § 236(a), 8 U.S.C. § 1226(a) may submit a motion to the immigration court to request a bond hearing.²³⁰ At the bond hearing, the IJ will consider evidence of whether the individual is a flight risk or a danger to the community.²³¹ The IJ may either deny bond or may grant bond at an amount that is considered appropriate to mediate the level of flight risk that the person demonstrates.²³² The statutory minimum amount of under INA § 236(a)(2)(A), 8 U.S.C. § 1226(a)(2)(A), is \$1500, although in recent months immigration bonds are often set at \$3000 or higher.²³³

Before requesting a bond hearing, an individual should be prepared to show the court evidence of why they are neither a flight risk nor a danger to the community. Because it is difficult to gather evidence while in detention, individuals should work with trusted family or community members to collect letters of support and other evidence that shows they have strong community ties to support them in the event of release.²³⁴

A person is not eligible to request a bond hearing if they have an administratively final order of removal. A person who is detained under a mandatory custody authority, INA § 235(b), 8 U.S.C. § 1225(b), or INA § 236(c), 8 U.S.C. § 1226(c), is also not eligible to request a bond hearing unless detention becomes prolonged (typically, more than six months).²³⁵

If a person is not sure whether they can request bond, they should ask the immigration court.

²²⁹ ICE, *Identification and Monitoring of Pregnant, Postpartum, or Nursing Individuals*, Directive No. 11032.4 (July 1, 2021) <https://www.ice.gov/directive-identification-and-monitoring-pregnant-postpartum-or-nursing-individuals>.

²³⁰ See 8 CFR § 1003.19(a)–(b) (recognizing IJ authority to review “[c]ustody and bond determinations made by” DHS through a “bond redetermination”); 8 CFR § 1236.1(d)(1) (providing right to seek a bond hearing following “an initial custody determination” by DHS); Bond Mgmt. Handbook, at 3 (explaining that after initial DHS determination, “the [noncitizen] may request a review of the custody determination” from an IJ); EOIR, Policy Manual, Chapter 8.3, Bond Proceedings (stating that only after custody determinations are “initially” set by DHS does “the [IJ] ha[ve] the authority to redetermine”).

²³¹ 8 CFR § 1003.19(h)(3); *Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006) (requiring IJs to consider factors including “(1) whether the alien has a fixed address in the United States; (2) the alien's length of residence in the United States; (3) the alien's family ties in the United States, and whether they may entitle the alien to reside permanently in the United States in the future; (4) the alien's employment history; (5) the alien's record of appearance in court; (6) the alien's criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses; (7) the alien's history of immigration violations; (8) any attempts by the alien to flee prosecution or otherwise escape from authorities; and (9) the alien's manner of entry to the United States”).

²³² See, e.g., *Matter of Andrade*, 19 I&N Dec. 488, 490 (BIA 1987) (discussing factors impacting amount of bond appropriate to mitigate flight risk).

²³³ See INA § 236(a)(2)(A), 8 U.S.C. § 1226(a)(2)(A) (setting \$1,500 as statutory minimum for bond).

²³⁴ See, e.g., National Immigration Project, *A Guide to Obtaining Release from Immigration Detention*, at 40–41 (May 28, 2024), <https://nipnlg.org/work/resources/guide-obtaining-release-immigration-detention>.

²³⁵ See *supra* note 213.

If a person believes they should receive a bond hearing but the IJ refuses to provide such a hearing, or if the hearing that they receive is fundamentally unfair, they may seek to challenge their detention through a habeas corpus case (see below).

3. Habeas

Persons who believe they are unlawfully detained by ICE may file a *habeas corpus* petition to challenge their detention.²³⁶ A habeas petition is filed in federal district court, not in immigration court. A habeas petition must be filed in the federal district court that has jurisdiction over the detention facility where the person is detained.²³⁷

Each district court has its own specific rules that must be followed by practitioners, called Local Rules, which can be found on the court's website. A person in detention may follow the court's instructions to file a habeas petition "pro se", meaning on their own without an attorney.²³⁸ Or, a person may be represented by an attorney who is licensed to practice before the relevant federal court. If a person's attorney wants to file a habeas for them but is not licensed in the correct federal district court, they may be able to obtain local counsel (an attorney who is licensed in the correct district) who can help their primary attorney enter a temporary appearance ("*pro hac vice*") in order to litigate their habeas case.

To determine what kind of habeas petition may be available, a person should first identify what kind of custody authority could authorize their detention.

If the person has not received a final order of removal, they are subject to pre-order detention authority under INA § 236, 8 U.S.C. § 1226, or INA § 235, 8 U.S.C. § 1225, depending on where they are detained and their manner of last entry to the United States. *See Pre-Order Habeas*, below at page 46.

If a person has received an administratively final removal order, they are subject to the government's post-order detention authority under INA § 241, 8 U.S.C. § 1231. *See Post-Order Habeas*, below at page 50.

- o If a person has been ordered removed by an IJ but they are actively appealing that decision before the Board of Immigration Appeals (BIA), they do **not** yet have a final removal order.²³⁹
- o If a person has been ordered removed by an IJ and they waived appeal, they declined to appeal within 30 days, or their appeal was denied or dismissed by the BIA, they **do** have a final removal order, and they are subject to post-order detention authority under

²³⁶ See 28 U.S.C. § 2241.

²³⁷ See 28 U.S.C. § 2241; *Rumsfeld v. Padilla*, 542 U.S. 426, 442 (2004). The appropriate federal district court may be identified using the Federal Court Finder: <https://www.uscourts.gov/federal-court-finder/find>.

²³⁸ For more information and guidance on filing a *pro se* habeas petition, see National Immigration Project, *Habeas Explainer & Pro Se Filing Instructions* (May 1, 2026), <https://nippnl.org/work/resources/habeas-explainer-pro-se-filing-instructions>.

²³⁹ 8 CFR § 1241.1.

INA § 241, 8 U.S.C. § 1231; their removal order is considered administratively final for detention purposes even if they are still seeking review before the relevant federal court of appeals.²⁴⁰

- o If a person has received a final administrative order of removal (“FARO”), for example after having entered the United States under the Visa Waiver Program, that removal order is considered administratively final unless the individual has sought relief and subsequently been placed in asylum-only proceedings.²⁴¹ Unlike an order that may be affected by other forms of proceedings, a FARO issued under INA § 238, 8 U.S.C. § 1228 remains administratively final even if the individual is subsequently placed in withholding-only proceedings.²⁴²

Whether a person is subject to a pre-order or post-order custody authority, they may file a habeas corpus petition to enforce their substantive and procedural due process rights.

a. Due Process

The INA delegates authority to the government to detain noncitizens only in accordance with the Constitution.²⁴³ The Fifth Amendment’s Due Process Clause protects all persons present in the United States, regardless of immigration status, from arbitrary deprivations of liberty.²⁴⁴ “Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.”²⁴⁵

If the government detains an individual without legitimate justification, that individual may challenge their detention on substantive due process grounds. The Due Process Clause prohibits the government from infringing upon certain “fundamental” liberty interests “unless the infringement is narrowly tailored to support a compelling government interest.”²⁴⁶ Thus, the Fifth Amendment’s guarantee “includes a substantive component that mandates the application

²⁴⁰ *Id.* But see n.220, *supra*, for people who have a judicial stay from the court adjudicating their PFR.

²⁴¹ Courts considering the correct detention authority following the issuance of a FARO have generally distinguished such an order as administratively final only if the noncitizen has not sought protection and review before an IJ in asylum-only proceedings. *Compare Nreka v. U.S. Atty. Gen.*, 408 F.3d 1361, 1367 (11th Cir. 2005) (concluding that the petitioner’s placement in asylum-only proceedings means the administrative removal order issued under 1187 is not yet final); *Bader v. Field Off. Dir.*, No. 26-CV-20537, 2026 WL 1459639 at *3 (S.D. Fla. May 22, 2026) (“Petitioner is in asylum-only proceedings before an Immigration Judge. Thus, Petitioner’s Administrative Removal Order is not final. Therefore, § 1226(a) authorizes Petitioner’s detention, and he is not lawfully detained under § 1231.”); *Suarez-Garcia v. Warden Fla. Soft Side S.*, No. 2:26-CV-00687-KCD-DNF, 2026 WL 1396082 at *1 (M.D. Fla. May 19, 2026) (finding not 1231 but instead 1226 applies because petitioner “has a pending, unadjudicated asylum application”), with *Pomaquiza Loja v. Brophy*, No. 26-CV-512-LJV, 2026 WL 1543181 at *4 (W.D.N.Y. June 2, 2026) (Section 1231 governs where Visa Waiver Program overstay not in asylum-only proceedings); *Lee v. Warden, Buffalo Fed. Det. Facility*, No. 6:26-CV-6380 EAW, 2026 WL 1413151, *4 (W.D.N.Y. May 20, 2026) (same).

²⁴² See *Riley v. Bondi*, 606 U.S. 259, 272 (2025) (holding that withholding-only proceedings do not disturb the finality of an otherwise final order of removal).

²⁴³ See *United States v. Witkovich*, 353 U.S. 194, 202 (1957) (affirming “cardinal principle” that statutes must be read in accordance with Constitution); *accord United States v. Butler*, 297 U.S. 1, 62 (1936) (“All legislation must conform to the principles [the Constitution] lays down.”).

²⁴⁴ *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *Demore v. Kim*, 538 U.S. 510, 523 (2003).

²⁴⁵ *Zadvydas*, 533 U.S. at 690.

²⁴⁶ *Reno v. Flores*, 507 U.S. 292, 302 (1993).

of strict scrutiny whenever the government infringes on fundamental liberty interests, regardless of what process the government provides.”²⁴⁷

To comply with substantive due process, detention must always bear “some reasonable relation to the purpose for which the individual is committed.”²⁴⁸ In the context of federal civil immigration detention, the only legitimate purposes of immigration detention the Supreme Court has recognized are to prevent flight risk or to ensure the safety of the community.²⁴⁹ Detaining a noncitizen to effectuate any other goal is without statutory basis and thus unconstitutional.²⁵⁰ Where the government has “asserted no individualized justification—let alone a special or compelling justification—to continue to deprive [noncitizens] of their physical liberty,” the substantive due process rights of those noncitizens are violated.²⁵¹

If the government detains an individual without adhering to the correct procedures before depriving them of their liberty, that individual may challenge their detention on procedural due process grounds. The government violates the procedural component of the Due Process Clause when it deprives an individual of their liberty without sufficient procedural protections.²⁵² Courts use the three-factor *Mathews v. Eldridge* test to determine what process is due to noncitizens challenging detention.²⁵³ The *Mathews* factors assess: (1) “the private interest that will be affected by the official action”; (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”; and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”²⁵⁴

At the first stage of the *Mathews* test, a detained noncitizen always has a strong and compelling private interest in their liberty.²⁵⁵ This protected liberty interest is heightened when the individual has already been released by the government before – for example, in the immigration context, a prior release on parole, release on recognizance, or release on an order of supervision (OSUP).²⁵⁶

²⁴⁷ *Hasan v. Crawford*, 800 F. Supp. 3d 641, 658 (E.D. Va. 2025).

²⁴⁸ *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

²⁴⁹ *Zadvydas*, 533 U.S. at 690–91.

²⁵⁰ *Jackson v. Indiana*, 406 U.S. 715, 737 (1972); see also *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992) (Because “liberty is the norm, and detention prior to trial or without trial is the carefully limited exception,” the government may imprison people as a preventive measure only within strict limits. (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987))).

²⁵¹ *Jacobo Ramirez v. Noem*, 817 F. Supp. 3d 1037, 1056 (D. Nev. 2025) (finding petitioners who entered without inspection, some previously released on recognizance, likely to prevail on substantive due process claim).

²⁵² See *United States v. Salerno*, 481 U.S. 739, 755 (1987); *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

²⁵³ See *Mathews v. Eldridge*, 424 U.S. 319 (1976).

²⁵⁴ *Id.* at 335.

²⁵⁵ “Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause protects.” *Zadvydas*, 533 U.S. at 690.

²⁵⁶ “[T]he government’s decision to release an individual from custody creates ‘an implicit promise,’ upon which that individual may rely, that their liberty ‘will be revoked only if [they] fail[] to live up to the . . . conditions [of release].’” *Pinchi v. Noem*, 792 F. Supp. 3d 1025, 1032 (N.D. Cal. 2025) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972)).

At the second stage of the *Mathews* test, a detained prior TPS holder can assert that the risk of erroneous deprivation of liberty is extremely high if there has not been an individualized custody decision based on that person's facts and circumstances. Courts have recognized that an individual who was previously granted TPS is entitled to a pre-deprivation hearing *before* ICE detains them, even if they had already lost TPS status.²⁵⁷ Depending on the custody authority that applies under the INA, either pre- or post-removal order, an individual should argue that they are entitled to at least the procedures that are already required by statute and regulations, as delineated below.

Finally, at the third stage of the *Mathews* test, an individual can argue that unlawful detention and violating noncitizens' constitutional rights are contrary to the public interest. Additionally, an individual's erroneous detention imposes high fiscal and administrative burdens on the government. By contrast, releasing the individual and requiring the government to provide a pre-deprivation hearing before re-detaining them would save government resources and effort wasted on erroneous detention.

b. Pre-Order Habeas

The INA identifies two main categories of pre-order detention: INA § 236, 8 U.S.C. § 1226, and INA § 235, 8 U.S.C. § 1225. Most noncitizens who are detained while their removal proceedings are pending are subject to the government's discretionary authority under INA § 236(a), 8 U.S.C. § 1226(a). This statutory authority squarely applies to prior TPS holders **who previously entered the United States on a visa**. This statutory provision requires the government to make an initial individualized custody determination, typically memorialized on a Form I-286 Notice of Custody Determination, based on an official's consideration of the noncitizen's flight risk and danger.²⁵⁸ Without an individualized custody determination analyzing a noncitizen's danger and flight risk *before* they are detained, ICE detention is unmoored from its "carefully limited" statutory purpose.²⁵⁹ If a noncitizen is detained under INA § 236(a), 8 U.S.C. § 1226(a) without an initial custody determination based on their individual facts and circumstances, their continued detention violates not only statute, regulations, and policy, but also due process, and they should be entitled to immediate release.²⁶⁰

By contrast, under the government's recent interpretation of its pre-order custody authority, prior TPS holders **who have previously entered the United States without** documentation are now

²⁵⁷ See *Hernandez Lazo v. Noem*, 818 F. Supp. 3d 328, 348 (E.D.N.Y. 2026); *Majano Mendoza v. Andrews*, No. 1:26-CV-01976-DAD-CSK, 2026 WL 747344, at *2 (E.D. Cal. Mar. 17, 2026).

²⁵⁸ See 8 U.S.C. § 1226(a); 8 CFR § 1003.19(a)–(b) (referring to "[c]ustody and bond determinations made by" DHS); 8 CFR § 1236.1(d)(1) (explaining there will be "an initial custody determination" by DHS); ICE, Bond Mgmt. Handbook, Doc. ERO 11301.1, at 3 (Aug. 19, 2014) (explaining that custody determination under § 1226(a) should be memorialized on a Form I-286 Notice of Custody Determination and only then may a noncitizen seek "IJ redetermination"), available at https://www.ice.gov/doclib/foia/dro_policy_memos/eroBondManagementHandbook2018-ICFO-31476.pdf.

²⁵⁹ See *Salerno*, 481 U.S. at 755; *Jackson*, 406 U.S. at 737; see also 8 CFR § 1236.1(c)(8) (directing that DHS may release noncitizens from custody where "release would not pose a danger to property or persons, and [the noncitizen] is likely to appear for any future proceeding").

²⁶⁰ See, e.g., *J-E-R-P v. Castro*, No. 2:26-cv-791 at 6 (D.N.M. May 28, 2026) (ordering release where Petitioner detained under section 1226 was not afforded due process).

purportedly subject to the government’s mandatory custody authority under INA § 235, 8 U.S.C. § 1225 – even though these individuals have now resided in the United States for years or even decades.

For decades, the government understood that they could use their INA § 236, 8 U.S.C. § 1226 custody authority to detain individuals already present in the United States, while the custody authority delegated in INA § 235, 8 U.S.C. § 1225 covered the detention of noncitizens who arrived without entry documents at the border of the country. In July 2025, however, DHS contravened this longstanding legal framework by beginning to assert that all individuals who entered the country without inspection should be considered to be “seeking admission” and therefore subject to the mandatory-detention provision of INA § 235(b)(2)(A), 8 U.S.C. § 1225(b)(2)(A), regardless of when a person is apprehended.²⁶¹ On September 5, 2025, in sharp departure from decades’ worth of agency policy and practice, the BIA issued a precedential decision in *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025). The Board held that all noncitizens who entered the United States without admission or parole are subject to mandatory detention under INA § 235(b)(2)(A), 8 U.S.C. § 1225(b)(2)(A) and thus ineligible for bond hearings.

Whether an individual can challenge their placement in mandatory INA § 235, 8 U.S.C. § 1225 detention depends on the location of their detention. Hundreds of district courts across the country have repeatedly rejected the government’s new interpretation because it defies the INA, upholding the application of INA § 236, 8 U.S.C. § 1226 to individuals who have lived for years in the United States.²⁶² Multiple circuit courts have now reached the same conclusion.²⁶³ These decisions confirm that DHS’s newly minted theory of mass mandatory detention for interior noncitizens who entered without inspection is incompatible with the text, structure, history, and settled administration of the Immigration and Nationality Act.

However, the United States Courts of Appeals for the Fifth Circuit and the Eighth Circuit have endorsed the government’s new interpretation of these detention authorities.²⁶⁴ As a result, individuals detained in these circuits²⁶⁵ are currently foreclosed from raising purely statutory claims regarding their classification under INA § 236(a), 8 U.S.C. § 1226(a). However, these circuit decisions did not reach any independent constitutional, statutory, or regulatory claims regarding the legality of detention of individuals held pursuant to INA § 235(b), 8 U.S.C. § 1225(b); additionally, many courts in these circuits have granted release on constitutional due process grounds to individuals purportedly detained under the government’s mandatory custody authority.²⁶⁶

²⁶¹ See ICE Interim Guidance *supra* note 218.

²⁶² See, e.g., *Barco Mercado v. Francis*, No. 25-cv-6582 (LAK), 2025 WL 3295903, at *13–14 (S.D.N.Y. Nov. 26, 2025) (collecting more than 350 cases).

²⁶³ See *Barbosa da Cunha v. Freden*, 175 F.4th 61 (2d Cir. 2026); *Lopez-Campos v. Raycraft*, 175 F.4th 713 (6th Cir. 2026); *Hernandez Alvarez v. Warden, Fed. Det. Ctr. Mia.*, 175 F.4th 1258 (11th Cir. 2026).

²⁶⁴ See *Buenrostro-Mendez v. Bondi*, 166 F.4th 494 (5th Cir. 2026); *Avila v. Bondi*, 170 F.4th 1128 (8th Cir. 2026).

²⁶⁵ These circuits encompass individuals detained in Texas, Louisiana, Mississippi, Minnesota, Nebraska, North Dakota, South Dakota, Iowa, Missouri, and Arkansas.

²⁶⁶ In the Fifth Circuit, see, e.g., *Zamudio Sanchez v. Noem*, No. EP-25-CV-00403-DCG, 2026 WL 596133, at *7–8 (W.D. Tex. Mar. 2, 2026); *Alvarez-Rico v. Noem*, No. 4:26-CV-00729, 2026 WL 522322, at *2 n.2 (S.D. Tex. Feb. 25, 2026); *Acosta Espana v. Ortega*, No. 1:26-CV-00300-DAE, 2026 WL 594362, at *2 n.2 (W.D. Tex. Mar. 2,

Where an individual is indisputably detained under INA § 235(b)(2), 8 U.S.C. § 1225(b)(2), they should also consider raising a due process challenge arguing that mandatory detention cannot be imposed without adequate procedural protections including, if applicable, prolonged detention arguments.²⁶⁷

(1) Prior Release from Detention

If an individual has been previously released from immigration custody, they may be able to bring additional arguments to challenge their pre-order detention. Individuals released before a final removal order are typically released through an Order of Release on Recognizance (“OREC” or “ROR”), under INA § 236(a), 8 U.S.C. § 1226(a), or on parole, pursuant to INA § 212(d)(5), 8 U.S.C. § 1182(d)(5).

(2) Release on Recognizance

For an individual previously released on recognizance under INA § 236(a), 8 U.S.C. § 1226(a), the government may revoke that custody determination only when warranted by an individual’s specific facts and circumstances.²⁶⁸ Once a custody determination has been made, it cannot be revisited without a material change in circumstances.²⁶⁹ Although there is no published guidance as to what constitutes a “material change in circumstance,” in this context, the government may argue that the loss of TPS qualifies. The stronger counterargument is that a blanket decision to terminate TPS for an entire country does not constitute a material change in an individual’s circumstances. Here, the individual is not losing TPS because the government determined that they are personally ineligible for TPS or because they present a flight risk or danger to the community. Rather, the loss of TPS results solely from a country-wide policy decision that is unrelated to the factors governing immigration custody. Because the considerations underlying a custody determination—principally whether the individual poses a flight risk or danger to the community—played no role in the government’s decision to terminate TPS for the designated country, the termination of TPS, standing alone, should not justify reopening or modifying a

2026); *Gomez Hernandez v. ICE Field Off. Dir., El Paso, Texas*, No. EP-26-CV-67-KC, 2026 WL 503958, at *1–2 (W.D. Tex. Feb. 23, 2026); *Bonilla Chicas v. Warden*, 821 F. Supp. 3d 782 (S.D. Tex. 2026). In the Eighth Circuit, see, e.g., *Pedro A.D.L.O.O. v. Bondi*, No. CV 26-1959, 2026 WL 948970 (D. Minn. Apr. 8, 2026); *Axel J.M.C. v. Stanski*, No. 26-2281, 2026 WL 1171344 (D. Minn. Apr. 29, 2026); *Heriberto R.E. v. Blanche*, No. 26-cv-2227, ECF No. 12 (D. Minn. May 1, 2026).

²⁶⁷ For further discussion on strategic considerations for habeas petitions challenging the detention of unadmitted noncitizens in removal proceedings, including how to preserve statutory and constitutional claims, see National Immigration Project, *Habeas After Buenrostro and Avila* (May 28, 2026), <https://nipnlg.org/work/resources/habeas-after-buenrostro-and-avila>.

²⁶⁸ INA § 236(b), 8 U.S.C. § 1226(b); 8 CFR § 1236.1(c)(9); *Jimenez v. Bostock*, No. 3:25-CV-00570-MTK, 2025 WL 2430381, at *5 (D. Or. Aug. 22, 2025) (granting habeas on statutory claim where “[r]espondents made no individualized determination as to Petitioner’s flight risk and danger to the community” before revoking prior release on recognizance).

²⁶⁹ 8 CFR § 1003.19(e); see *Matter of Sugay*, 17 I&N Dec. 637, 640 (BIA 1981) (holding that “where a previous bond determination has been made by an immigration judge, no change should be made by a District Director absent a change of circumstance”).

prior custody determination. The regulations also specify which immigration officials are authorized to revoke release, limiting the authority to designated officials.²⁷⁰

(3) Parole

For individuals subject to custody detention authority under INA § 235, 8 U.S.C. § 1225, the INA provides that DHS “may . . . in [the Secretary’s] discretion parole” an arriving asylum seeker into the United States on a “case-by-case basis for urgent humanitarian reasons or significant public benefit.”²⁷¹ Release on parole is an “express exception” to detention and is a “specific provision authorizing release.”²⁷² INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A) directs that parole may be granted “only on a case-by-case basis” and may be terminated “when the purposes of such parole shall . . . have been served.” Such termination must also comply with the regulations at 8 CFR § 212.5(e). If a noncitizen has been granted parole for a period of time, at the expiration of that time the noncitizen’s parole “shall be terminated” either “upon accomplishment of the purpose for which parole was authorized” or when “neither humanitarian reasons nor public benefit warrants the continued presence of the [noncitizen] in the United States”.²⁷³ Even if a noncitizen’s grant of parole has been lawfully terminated, at least one federal district court has concluded that they are subsequently subject to civil immigration detention under INA § 236(a), 8 U.S.C. § 1226(a).²⁷⁴

Irrespective of an individual’s prior form of release, including if they are unsure of the precise mechanism, they may also raise re-detention claims within a constitutional due process framework, with their prior release by the government affording them a heightened protected liberty interest. “[T]he government’s decision to release an individual from custody creates ‘an implicit promise,’ upon which that individual may rely, that their liberty ‘will be revoked only if [they] fail[] to live up to the . . . conditions [of release].’”²⁷⁵ In this context, re-detention is only consistent with due process if, following an individual’s prior release, there has been a change in circumstances leading the government to believe that the noncitizen now presents a danger or a flight risk.²⁷⁶

²⁷⁰ 8 CFR § 1236.1(c)(9) (listing officials); see *Jimenez v. Bostock*, No. 3:25-CV-00570-MTK, 2025 WL 2430381, at *6 (D. Or. Aug. 22, 2025) (granting habeas “where there was no evidence here that the decision to revoke Petitioner’s release was made by any of the individuals listed in the regulation”); accord *N-E-M-B v. Wamsley*, No. 3:25-CV-989-SI, 2025 WL 3527111, at *7 (D. Or. Dec. 9, 2025) (granting habeas where after prior release on recognizance, “[r]espondents then unlawfully revoked that conditional parole and detained him without due process, or a finding of a change in circumstances, that he was a danger or that he was a flight risk”); *J-E-R-P- v. Castro*, No. 2:26-cv-791 at 6 (D.N.M. May 28, 2026).

²⁷¹ INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A).

²⁷² *Jennings v. Rodriguez*, 583 U.S. 281, 300 (2018).

²⁷³ 8 CFR §§ 212.5(e)(1)(ii), (e)(2)(i).

²⁷⁴ See *Qasemi v. Francis*, No. 25-cv-10029 (LJL), 2025 WL 3654098, at *11 (S.D.N.Y. Dec. 17, 2025) (observing that 8 U.S.C. § 1225(b)(1)(A)(ii)(II) “expressly exempts from the ambit of the mandatory detention scheme one who has been paroled”); see also 8 CFR § 236.1(c)(8); *Jennings v. Rodriguez*, 583 U.S. 281, 303 (2018) (describing 8 U.S.C. § 1226 as the “default rule” of custody applying to noncitizens “already present in the United States”).

²⁷⁵ *Pinchi v. Noem*, 792 F. Supp. 3d 1025, 1032 (N.D. Cal. 2025) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972)).

²⁷⁶ See, e.g., *J-E-R-P- v. Castro*, No. 2:26-cv-791 at 6 (D.N.M. May 28, 2026) (ordering release where Petitioner detained under section 1226 was not afforded due process); *Jimenez v. Bostock*, No. 3:25-CV-00570-MTK, 2025 WL 2430381, at *7 (D. Or. Aug. 22, 2025).

c. Post-Order Habeas

Section 1231 governs the detention of noncitizens “during” and “beyond” the “removal period.”²⁷⁷ When a noncitizen has been ordered removed from the United States, the government must generally remove that person within a 90-day period.²⁷⁸ That 90-day “removal period” begins once a noncitizen’s removal order “becomes administratively final.”²⁷⁹ After that initial removal period, ICE may only detain noncitizens if they are (1) inadmissible, (2) removable due to certain enumerated violations, or (3) “ha[ve] been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal.”²⁸⁰ In *Zadvydas v. Davis*, the Supreme Court read a prohibition on *indefinite* post-removal-period detention into INA § 241(a)(6), 8 U.S.C. § 1231(a)(6), reasoning that detaining a noncitizen awaiting removal for over six months may raise constitutional concerns.²⁸¹ Because recently-detained prior TPS holders are unlikely to be subjected to indefinite post-order detention at the time of this practice advisory, *Zadvydas* claims are not explained here in further depth.²⁸²

(1) Mandatory Detention during the 90-Day Removal Period

During the 90-day removal period after a removal order becomes administratively final, the statute directs that ICE “shall remove the [noncitizen] from the United States” and “shall detain the [noncitizen]” as it effectuates removal. INA § 241(a)(1)-(2), 8 U.S.C. § 1231(a)(1)-(2). As a result of this mandatory language, an individual is unlikely to have a viable habeas claim for their release during this period.

(2) Continued Detention After the 90-Day Removal Period

If an individual is not removed within the 90-day removal period, the INA presumes that such individual should be released under conditions of supervision, such as periodic reporting and other reasonable restrictions.²⁸³ The government may continue to detain certain noncitizens beyond the 90-day removal period only if they meet certain conditions, such as being

²⁷⁷ INA § 241(a)(2)–(6), 8 U.S.C. § 1231(a)(2)–(6).

²⁷⁸ INA § 241(a), 8 U.S.C. § 1231(a).

²⁷⁹ INA § 241(a)(1)(B), 8 U.S.C. § 1231(a)(1)(B). For some people their removal order becomes administratively final when they are non-detained. Most courts consider the removal period to begin once the person has been taken into custody.

²⁸⁰ INA § 241(a)(6), 8 U.S.C. § 1231(a)(6).

²⁸¹ 533 U.S. 678, 699–701 (2001).

²⁸² For additional context on this category of claims, please see American Bar Association Commission on Immigration, *Habeas: Seeking Release from Indefinite Detention* (2017), <https://abaprobar.org/wp-content/uploads/2021/08/English-Habeas-Seeking-Release-from-Indefinite-Detention.pdf>.

²⁸³ See INA § 241(a)(3), 8 U.S.C. § 1231(a)(3) (directing that if a noncitizen is not removed with the removal period, the noncitizen “shall be subject to supervision under regulations prescribed by the Attorney General”); see, e.g., *M.L.G.G. v. Wamsley*, No. 6:25-CV-02012-AA, 2025 WL 3539183, at *3 (D. Or. Dec. 10, 2025) (concluding noncitizen was “entitled to release” where she was detained in violation of due process beyond the 90-day removal period).

inadmissible or deportable under specified statutory categories, or if they are determined to be a “risk to the community.” INA § 241(a)(6), 8 U.S.C. § 1231(a)(6).

For an individual not removed within the 90-day removal period who falls within the scope of INA § 241(a)(6), 8 U.S.C. § 1231(a)(6), the government has “the authority to continue [a noncitizen] in custody or grant release” pursuant to 8 CFR § 241.4. These federal regulations require that ICE conduct a review of the noncitizen’s records and make an individualized custody determination to either grant release or extend their custody. *See* 8 CFR § 241.4(a), (d). Such determinations made more than 180 days after a final removal order must be made by “the Executive Associate Commissioner” or delegates who are “designated in writing.” *See* 8 CFR § 241.4(c). In making a post-removal period custody determination, qualified officials must consider a number of enumerated factors that speak to the individual’s danger to the community and risk of flight, “including ties to the United States.” 8 CFR § 241.4(f).

Notably, at least one federal district court has held that where the government does not detain an individual during the 90-day-removal period, the government has no statutory custody authority to later detain them under 8 U.S.C. § 1231, which only “provides for a period of *continued* detention”, not a “right to arrest and detain people any time”.²⁸⁴ If an individual is being detained for the first time beyond the 90-day-removal period, they should also argue that they cannot be detained without pre-deprivation notice and an opportunity to be heard, in line with their due process rights.²⁸⁵

(3) OSUPs and Revocation Procedures

ICE may also release a noncitizen from detention at any time after a final removal order – including during the removal period – subject to certain conditions, on an OSUP.²⁸⁶ DHS has promulgated two regulations, 8 CFR § 241.4 and 8 CFR § 241.13, that govern when a noncitizen may be released on an OSUP and when that release may be revoked.²⁸⁷ Once released on an OSUP, a noncitizen must comply with the OSUP’s requirements, which can include periodic in-person reporting or obtaining advance approval before traveling outside of a prescribed boundary.²⁸⁸

²⁸⁴ *Diallo v. Joyce*, 817 F. Supp. 3d 202, 205 (S.D.N.Y. 2025); *see also M.L.G.G. v. Wamsley*, No. 6:25-CV-02012-AA, 2025 WL 3539183, at *3 (D. Or. Dec. 10, 2025) (concluding that petitioner “is entitled to release because she is being detained [for the first time] after the expiration of the ninety-day removal period”).

²⁸⁵ *Diallo*, 817 F. Supp. 3d at 208.

²⁸⁶ *See* INA § 241(a)(1)(A), 8 U.S.C. § 1231(a)(1)(A); Memorandum from Bo Cooper, INS General Counsel, Detention and Release During the Removal Period of Aliens Granted Withholding or Deferral of Removal (Apr. 21, 2000), AILA Doc. No. 24122035, <https://www.aila.org/infonet> (clarifying that even during the 90-day removal period, “the INS may—but is not required to—detain a non-criminal [noncitizen]”); *see also M.S.L. v. Bostock*, No. 6:20-cv-01204-AA, ECF 32, 2025 WL 2430267 (D. Or. Aug. 21, 2025).

²⁸⁷ Section 241.4 provides generally applicable requirements governing the use of OSUPs. Section 241.13 applies specifically when OSUPs are used or revoked because there has been a change in the likelihood of the noncitizen’s removal in the reasonably foreseeable future. Release on an OSUP requires a fact-intensive inquiry into the noncitizen’s suitability for release and extensive administrative review. 8 CFR § 241.4(e); *see also* 8 CFR § 241.4(i).

²⁸⁸ 8 CFR §§ 241.4(i), 241.5(a).

Regardless of the reason for the noncitizen's release, the government may only revoke an OSUP when a noncitizen violates their "conditions of release," or certain circumstances, such as the likelihood of their removal, have changed.²⁸⁹ Specifically, an OSUP may be revoked when the ICE Executive Associate Director or the district director determines that: (i) "The purposes of release have been served"; (ii) The noncitizen has violated a condition of release; (iii) "It is appropriate to enforce a removal order or to commence removal proceedings against a" noncitizen; or (iv) The conduct of the noncitizen, "or any other circumstance, indicates that release would no longer be appropriate."²⁹⁰

8 CFR § 241.4(l) and § 241.13(i)(3) outline the procedural protections ICE must provide to released noncitizens whom they seek to re-detain. These regulations impose four key requirements.

1. The **designated officials and findings requirement**. Only certain ICE officials have authority to revoke release. The OSUP revocation regulations clearly explain that only the Executive Associate Commissioner²⁹¹ has the authority to revoke an OSUP.²⁹² A lower-ranking ICE official, the "district director," may revoke an OSUP, but only after making findings that revocation is "in the public interest and circumstances do not reasonably permit referral of the case to the Executive Associate Commissioner."²⁹³
2. The **notice requirement**. 8 CFR § 241.4(l)(1) and § 241.13(i)(3) both require that "[u]pon revocation, the [noncitizen] will be notified of the reasons for revocation of his or her release." These reasons must be specific enough to allow the noncitizen an opportunity to meaningfully respond to them.
3. The **interview requirement**. 8 CFR § 241.4(l)(1) and § 241.13(i)(3) both require ICE to provide noncitizens with "an initial informal interview promptly after his or her return to Service custody." The purpose of this interview is "to afford the [noncitizen] an opportunity to respond to the reasons for revocation stated in the notification."²⁹⁴
4. The **finding of likelihood of removal requirement**. When ICE seeks to revoke an OSUP not because of a violation or change in the appropriateness of release, but instead to effect removal, the agency must make a specific finding as to the likelihood of removal. ICE can only revoke an OSUP in these circumstances if it can show that "*on account of changed circumstances*," "there is a significant likelihood that the [noncitizen] may be removed in the reasonably foreseeable future."²⁹⁵

²⁸⁹ 8 CFR § 241.4(l)(1).

²⁹⁰ 8 CFR § 241.4(l)(2).

²⁹¹ This title refers to a position under the now-defunct Immigration and Naturalization Service (INS). The modern-day equivalent is the Executive Associate Director of ICE. *See Ceesay v. Kurzdorfer*, 781 F. Supp. 3d 137, 160 (W.D.N.Y. 2025) ("[T]he Executive Associate Commissioner [of] INS is equivalent to the Executive Associate Director [of] ICE." (citing 8 CFR § 1.2)); *see also* ICE Leadership, Department of Homeland Security, <https://www.ice.gov/leadership> (last visited July 20, 2026) (listing Marcos Charles, John Condon, and Susan Dunbar as the current Executive Associate Directors and Acting Executive Associate Directors of ICE).

²⁹² 8 CFR § 241.4(l)(2).

²⁹³ *Id.*

²⁹⁴ 8 CFR § 241.4(l)(1).

²⁹⁵ 8 CFR § 241.13(i)(2) (emphasis added).

ICE may revoke a noncitizen's OSUP and take them back into custody only after meeting all of these requirements. If the correct OSUP revocation procedures have not been filed, an individual may challenge their detention by raising these claims in habeas under the statute, regulations, and due process.

For prior TPS holders seeking to challenge their detention through habeas, we recommend the following resources²⁹⁶:

- For individuals previously granted parole: [Pre-Order Detention \(Prior Parole\) Template](#)
- For all other individuals, including individuals who last entered the United States on a valid visa or without inspection: [Pre-Order Detention \(No Prior Parole\) Template](#)
- For individuals previously granted TPS, who do have an administratively final order of removal: [Post-Order Detention Template](#).

²⁹⁶ For *pro se* petitioners, see National Immigration Project, *Habeas Explainer & Pro Se Filing Instructions*, *supra* note 238.