Practice Advisory

When Voluntary Departure Is Not Voluntary: Challenging an Immigration Judge's Grant of Voluntary Departure[1]

November 13, 2026

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I. Introduction

The second Trump administration's immigration enforcement tactics have included increasing pressure on noncitizens to leave the United States and forgo pursuing potentially available forms of immigration relief. These tactics include increased arrests and detentions,[2] expanded application of mandatory immigration detention and restrictions on eligibility for bond hearings,[3] financial incentives and government-funded travel to facilitate voluntary departure,[4] and public messaging promoting "self-departure" as a way to avoid the consequences of immigration enforcement.[5] As a result, the number of immigration court cases ending in voluntary departure in recent months was more than ten times the number at the end of 2024.[6]

Although voluntary departure requires the noncitizen's assent, many detained noncitizens are being coerced or misled into accepting voluntary departure. Misinformation conveyed through public messaging, compounded by harsh detention conditions[7] and increased pressure from the Department of Homeland Security (DHS) and immigration judges (IJs) to accept voluntary departure,[8] has led many detained noncitizens to seek or acquiesce to voluntary departure without fully understanding their legal options or the rights they relinquish by accepting voluntary departure. Some may later reconsider their decision after learning about other legal avenues for seeking release from detention, gaining a better understanding of how long their continued detention may last while awaiting ICE to facilitate their removal, or after having more

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[2] *See* Graeme Blair, David Hausman & Phil Neff, Deportation Data Project, *Understanding the Summer 2026 Surge in ICE Arrests* (Sept. 8, 2026), https://deportationdata.org/analysis/immigration-arrests-in-2026.html.

[3] *See Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025) (holding that noncitizens present in the United States without having been admitted are subject to mandatory detention under INA § 235(b)(2)(A), regardless of how long they have resided in the country); *see also Buenrostro-Mendez v. Bondi*, 166 F.4th 494, 502–08 (5th Cir. 2026) (upholding mandatory detention without bond for noncitizens who entered without inspection and have not been admitted); *Avila v. Bondi*, 170 F.4th 1128, 1137–38 (8th Cir. 2026) (adopting the same interpretation of INA § 235(b)(2)(A)); *see also* Paul Moses & Tim Healy, *"Rubber Stamp" Immigration Judges Flout Federal Court Orders, Again and Again*, DOCUMENTED, Sept. 26, 2026, https://documentedny.com/2026/09/25/immigration-court-judges-bond-hearings-due-process/.

[4] *See* Proclamation No. 10935, Establishing Project Homecoming, 90 Fed. Reg. 20,357 (May 14, 2025); Dep't of Homeland Sec., DHS Announces Historic Travel Assistance and Stipend for Voluntary Self-Deportation (May 5, 2025), https://www.dhs.gov/news/2025/05/05/dhs-announces-historic-travel-assistance-and-stipend-voluntary-self-deportation; U.S. Customs & Border Prot., *CBP Home: Assistance to Voluntarily Self-Deport*, https://www.dhs.gov/cbphome.

[5] *See* Dep't of Homeland Sec., DHS Releases New Nationwide and International Ads Warning Illegal Aliens to Self-Deport (Apr. 21, 2025), https://www.dhs.gov/news/2025/04/21/dhs-releases-new-nationwide-and-international-ads-warning-illegal-aliens-self.

[6] Jacquelyn Pavilon & Neil Agarwal, Vera Institute of Justice, *Newly Appointed Judges and the Rise of Voluntary Departure in Immigration Court* (May 2026), https://www.vera.org/publications/the-rise-of-voluntary-departure-in-immigration-court.

[7] Human Rights Watch & Physicians for Human Rights, *Dying in Detention: Rising Deaths in an Expanding U.S. Immigration Detention System* (June 25, 2026), https://www.hrw.org/report/2026/06/25/dying-in-detention/rising-deaths-in-an-expanding-us-immigration-detention-system.

[8] *See* Tim Henderson, *Voluntary Departure Spikes as Immigrants Face Squalid Detention, Pressure to Leave*, STATELINE, May 26, 2026, https://stateline.org/2026/05/26/voluntary-departures-spike-as-immigrants-face-squalid-detention-pressure-to-leave/; Ximena Bustillo & Celine Castronuovo, *DHS Offers Migrant Children $3,000 to Voluntarily Depart US*, BLOOMBERG, Oct. 9, 2026, https://news.bloomberglaw.com/us-law-week/dhs-offers-migrant-children-3-000-to-voluntarily-depart-us.

information and time to understand the consequences of their decision. It is no surprise that noncitizens may wish to challenge voluntary departure orders.

This practice advisory provides practitioners with a starting point to identify and evaluate potential legal challenges to a noncitizen's waiver of appeal associated with a voluntary departure order issued by an IJ. It provides an overview of relevant considerations and includes a template Notice of Appeal (NOA) to the Board of Immigration Appeals (BIA) that practitioners may adapt to the circumstances of an individual case. This resource focuses on pre-conclusion voluntary departure since that is where these pressures are focused. It does not address challenges to DHS-issued voluntary departure, in lieu of pursuing formal removal proceedings before an IJ. Those circumstances may involve distinct procedures and legal considerations that fall outside the scope of this resource.

II. Background: Voluntary Departure under INA § 240B

Voluntary departure is a longstanding feature of U.S. immigration law, first codified in 1940 and now governed by § 240B of the Immigration and Nationality Act (INA). It allows eligible noncitizens to leave the United States at their own expense rather than remain subject to removal proceedings that may result in a formal removal order.[9] The Supreme Court has described voluntary departure as a "quid pro quo" between the Government and the noncitizen: the Government benefits from the noncitizen's agreement to depart voluntarily because it expedites departure and avoids some of the costs and burdens associated with removal, while the noncitizen receives the benefits of departing voluntarily, including avoiding certain consequences associated with a formal removal.[10] For noncitizens in removal proceedings, the INA provides for two types of voluntary departure: pre-conclusion voluntary departure under INA § 240B(a), which an IJ may grant before completing removal proceedings, and post-conclusion voluntary departure under INA § 240B(b), which an IJ may grant at the conclusion of proceedings. Unlike pre-conclusion voluntary departure under § 240B(a), post-conclusion voluntary departure does not require the noncitizen to waive appeal of all issues. When an IJ grants voluntary departure, the IJ also enters an alternate order of removal that becomes effective if the noncitizen fails to depart within the period allowed for voluntary departure.[11]

Pre-conclusion voluntary departure carries many conditions. To qualify for pre-conclusion voluntary departure a noncitizen generally must request voluntary departure before or at the master calendar hearing at which the case is initially scheduled for an individual merits hearing; concede removability[12]; withdraw any pending applications for relief from removal; waive appeal of all issues; and establish that a favorable exercise of discretion is warranted. The

[9] Voluntary departure may help a noncitizen avoid certain immigration consequences associated with a removal order, including inadmissibility under INA § 212(a)(9)(A). It does not, however, eliminate all immigration consequences of departure. A noncitizen who has accrued sufficient unlawful presence may still trigger the three- or ten-year inadmissibility bar under INA § 212(a)(9)(B) upon departure, depending on the length of unlawful presence and whether the other statutory requirements are met.

[10] *See Dada v. Mukasey*, 554 U.S. 1, 11 (2008).

[11] 8 CFR § 1240.26(d).

[12] Generally, an IJ may not grant pre-conclusion voluntary departure beyond 30 days after the master calendar hearing at which the case is initially calendared for a merits hearing, unless DHS stipulates. 8 CFR § 1240.26(b)(2).

noncitizen also must not have been convicted of an aggravated felony or be removable on specified security-related grounds.[13]

Pre-conclusion voluntary departure has a temporal maximum. Pre-conclusion voluntary departure may be granted for a period of up to 120 days.[14] The IJ may grant a shorter period, but does not have authority to extend the period beyond the date initially set. Any extension of the time to depart must be granted by the DHS officials authorized under 8 CFR § 1240.26(f), and in no event may the total period exceed 120 days.[15]

To ensure that the noncitizen departs by the deadline, the IJ may require the noncitizen to post a voluntary departure bond.[16] A voluntary departure bond may be required even if the noncitizen is detained. However, when voluntary departure is granted subject to safeguards, which generally means that the noncitizen remains in detention pending departure**,** a separate bond is not typically ordered, as the safeguards themselves serve to ensure compliance with the conditions of departure.

Failure to depart the United States within the period authorized for voluntary departure triggers significant immigration consequences. Under INA § 240B(d), a noncitizen who voluntarily fails to depart within the specified period is subject to a civil monetary penalty and becomes ineligible for ten years for further voluntary departure and certain forms of immigration relief, including cancellation of removal under INA § 240A, adjustment of status under INA § 245, and change of status under INA § 248.[17] In addition, failure to depart within the authorized period will result in the alternate removal order taking effect, leaving the noncitizen subject to formal removal and the statutory penalties for failure to depart.[18]

III. Grounds for Challenging Waiver of Appeal

When an IJ grants pre-conclusion voluntary departure under INA § 240B(a), the noncitizen must waive the right to appeal all issues as a condition of receiving that relief.[19] By waiving appeal, the noncitizen relinquishes the opportunity to obtain review of the IJ's decision by the BIA, and the decision generally becomes final and immediately enforceable.[20] Although a waiver of appeal cannot simply be withdrawn, a noncitizen may challenge the validity of the waiver itself by arguing that it was not knowingly and intelligently made.[21]

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[13] *See* 8 CFR § 1240.26(b)(1)(i).
[14] INA § 240B(a)(2); 8 CFR § 1240.26(b)(1)(ii), (b)(2).
[15] 8 CFR § 1240.26(f).
[16] *See* 8 CFR § 1240.26(b)(3)(iii).
[17] INA § 240B(d); 8 CFR § 1240.26(a), (l). Certain VAWA-related exceptions to these penalties apply to individuals who qualify for relief under the applicable provisions of the Violence Against Women Act. *See* INA § 240B(d)(1)–(3); 8 CFR § 1240.26(a), (l). The civil penalty is subject to applicable inflation adjustments and implementing regulations; the amount should be verified under the rules in effect when the order is issued.
[18] 8 CFR § 1240.26(b)(3)(iii), (c).
[19] 8 CFR § 1240.26(b)(1)(i)(D).
[20] *See* 8 CFR § 1003.39.
[21] *See Matter of Rodriguez-Diaz*, 22 I&N Dec. 1320, 1323 (BIA 2000).

The BIA has repeatedly held that a waiver of appeal is not valid unless it is "knowingly and intelligently made."[22] To satisfy this standard, a waiver must be "the product of a free and deliberate choice rather than intimidation, coercion, or deception," and be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[23] Whether a noncitizen knowingly and intelligently waived their right to appeal depends on their understanding of this right and the meaning of accepting a removal order as final.[24]

In assessing whether a waiver was knowing and intelligent, the circumstances of the IJ's advisals and the noncitizen's understanding of the proceedings are particularly important.[25] IJ's have an obligation to conduct removal proceedings in a manner that permits the noncitizen to understand the nature of the proceedings and meaningfully participate in them, including by explaining the right to appeal and the consequences of waiving that right.[26] This duty is especially important where the noncitizen is unrepresented.[27] Because a waiver of appeal relinquishes the right to obtain review of the IJ's decision, the IJ must adequately convey both the available appeal options and the finality associated with waiving appeal.[28]

Whether a waiver satisfies this standard depends on the totality of the circumstances surrounding the decision.[29] No single factor necessarily determines the outcome. However, one important factor is the regulatory requirement that the IJ advise the respondent of the right to appeal.[30]

In cases involving pre-conclusion voluntary departure, practitioners should assess the record for the following objective factors that may establish that the waiver of appeal was not knowing, intelligent, and voluntary: (1) the absence of an explanation from the IJ as to what the respondent was required to give up in exchange for voluntary departure—the quid pro quo; (2) the lack of an express wavier of the right to appeal from the respondent; (3) interpretation issues that may have prevented the respondent from understanding the terms of the quid pro quo or the consequences of waiving appeal; (4) coercion, undue pressure, or material misrepresentation undermined the respondent's voluntary consent ; or (5) ineffective assistance of counsel that usurped the respondent's decision. These factors may overlap and should be evaluated in light of the hearing record and the respondent's circumstances. Practitioners should obtain and review both the Digital Audio Recording (DAR) and the Record of Proceedings (ROP) for this purpose.[31]

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[22] *Matter of Patino*, 23 I&N Dec. 74, 76 (BIA 2001) (citing *United States v. Mendoza-Lopez*, 481 U.S. 828, 840 (1987)); *see also Matter of Shih*, 20 I&N Dec. 697, 699 (BIA 1993); *Matter of Rodriguez-Diaz*, 22 I&N Dec. at 1322.
[23] *United States v. Ray*, 803 F.3d 244, 266 (6th Cir. 2015) (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)).
[24] *Matter of Rodriguez-Diaz*, 22 I&N Dec. at 1322-23.
[25] *Kohwarien v. Holder*, 635 F.3d 174, 179 (5th Cir. 2011) (quoting *Ali v. Mukasey*, 525 F.3d 171, 174 (2d Cir. 2008) ("The finding of knowing and intelligent waiver 'is inevitably a fact-specific inquiry.'"),
[26] *See* INA § 240(b)(1); 8 CFR § 1240.10(a)(3); *Matter of Rodriguez-Diaz*, 22 I&N Dec. at 1322–23.
[27] *See e.g.*, *Quintero v. Garland*, 998 F.3d 612, 622–30 (4th Cir. 2021).
[28] *See Matter of Rodriguez-Diaz*, 22 I&N Dec. at 1322–23.
[29] *Dallio v. Spitzer*, 343 F.3d 553, 563 (2d Cir.2003) (observing that "the Supreme Court has repeatedly emphasized that a knowing and intelligent waiver depends on the totality of facts and circumstances in a given case") (internal quotation marks omitted).
[30] 8 CFR § 1240.10(a)(3).
[31] *See* EOIR, CASE Portal: Digital Audio Recording, https://www.justice.gov/eoir/media/1415286/dl?inline (last visited Nov. 12, 2026); EOIR, Request for Record of Proceedings, https://www.justice.gov/eoir/ROPrequest (last visited Nov. 12, 2026). For an example on how to request a DAR, *see* Michelle N. Méndez, National Immigration

Separately, practitioners should interview the respondent to assess if they understood the proceedings or the consequences of waiving appeal, including language barriers, limited literacy, cognitive or mental illness, confusion about the terms of voluntary departure, lack of meaningful access to counsel, coercion, undue pressure, or misleading advice.

A. IJ's Failure to Adequately Explain the Rights and Relief Relinquished by Accepting Voluntary Departure

A respondent may challenge the validity of an appeal waiver where the IJ fails to provide information necessary for the respondent to make an informed decision about accepting voluntary departure and relinquishing the right to appeal. This includes circumstances in which the IJ fails to develop the record or advise the respondent of a plausible avenue of relief, leaving the respondent unaware of an opportunity to pursue relief.[32] A respondent cannot make a knowing and intelligent decision to relinquish appellate rights when the IJ accepts the waiver without addressing a reasonable possibility of relief apparent from the record.[33]

Accordingly, practitioners should look for facts such as: (1) the respondent asking questions about the proposed disposition or expressing uncertainty about available options; (2) the respondent appearing confused about the consequences of withdrawing applications, accepting voluntary departure, or waiving appeal; (3) the interpreter having to repeat or rephrase questions; (4) the respondent making statements that are inconsistent with, or qualify, an apparent agreement; and (5) a material discrepancy between the terms discussed at the hearing and those ultimately included in the written order. The presence of one or more such circumstances may support an argument that the respondent's agreement was not knowing and voluntary. The strongest cases will generally be those in which the transcript itself captures these concerns and demonstrates that the IJ did not clarify or resolve them before accepting the waiver.

Although the IJ's duty to advise of apparent eligibility is not categorically limited to pro se respondents, a challenge based solely on the IJ's failure to identify or explain potential relief may be less likely to succeed when the respondent was represented. Nevertheless, representation by counsel should not foreclose this argument. Separately, if prior counsel failed to inform the respondent of a plausible avenue of relief or explain its significance before the respondent waived appeal, practitioners should consider raising ineffective assistance of counsel. The claim should identify counsel's specific omission and explain how the failure to communicate the potential relief affected the respondent's ability to make an informed decision about waiving appeal.

1. IJ Duty to Inform the Respondent of Eligibility for Relief

The IJ has a duty to develop the record, particularly when the respondent is unrepresented.[34] Under INA § 240(b)(1), the IJ must "administer oaths, receive evidence, and interrogate,

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Project, *Fifteen Steps for Addressing Orders of Removal Issued by an Immigration Judge* (updated July 20, 2026), https://nipnlg.org/work/resources/fifteen-steps-addressing-orders-removal-issued-immigration-judge.

[32] *See Moran-Enriquez v. INS*, 884 F.2d 420 (9th Cir. 1989).

[33] *See Garcia v. Lynch*, 786, 792 (9th Cir. 2015); *see also United States v. Melendez-Castro*, 671 F.3d 950 (9th Cir. 2011).

[34] See *Matter of J-F-F-*, 23 I&N Dec. 912, 922 (2006) ("It is appropriate for [IJs] to aid in the development of the record, and directly question witnesses, particularly where [a noncitizen] appears pro se and may be unschooled in the deportation process.")

examine, and cross-examine the [noncitizen] and any witnesses." Under 8 CFR § 1240.11(a)(2), an IJ must inform a respondent of their apparent eligibility to apply for benefits available under the immigration regulations and afford them an opportunity to apply during the hearing. This duty is not categorically limited to unrepresented respondents. Rather, the relevant question is whether the record raised a "reasonable possibility" that the respondent was eligible for relief and whether the IJ provided the required opportunity to pursue it.[35] When the record raises such a possibility, the IJ should not proceed without giving the respondent an opportunity to develop the issue.

Courts have recognized that IJs may be required to take an active role in developing the record, particularly when a respondent appears pro se and may not know how to present facts relevant to potential relief, while recognizing that the IJ need not act as the respondent's advocate.[36] Accordingly, when a respondent's testimony or other information suggests a plausible basis for relief, the IJ may be required to make appropriate inquiries to develop the relevant facts and advise the respondent of apparent eligibility for relief, including potential eligibility for Special Immigrant Juvenile Status.[37] A failure to do so may undermine the validity of the purported waiver of appeal.

For example, an IJ's duty to develop the record may include asking a respondent how long they have resided in the United States. If a respondent indicates that they have lived in the United States for over ten years, the IJ should make appropriate follow-up inquiries to determine whether the respondent may qualify for relief, including cancellation of removal under INA § 240A(b)(1). An IJ's failure to explore these facts or provide the respondent an opportunity to apply for potentially available relief may support a challenge to the proceedings, particularly where the respondent was unrepresented and unaware of the relief available to them.

2. IJ Duty to Advise the Respondent of the Opportunity to Apply for Asylum or Withholding of Removal

IJs have a duty to advise a respondent of the opportunity to apply for asylum or withholding of removal and make the appropriate forms available.[38] Under 8 CFR § 1240.11(c)(1), if, at any point in the proceedings, the respondent expressed fear of persecution or harm upon return, but the IJ failed to advise the respondent of the opportunity to apply for asylum or withholding of removal, failed to make the appropriate application forms available, or foreclosed an opportunity to apply by stating that the respondent did not qualify for relief, these failures may provide a basis for challenging the validity of the respondent's appeal waiver. Anecdotal evidence suggests that IJs are telling respondents that removal or voluntary departure were the only available options despite the respondent having expressed a fear of returning to their home country. Such responses violate 8 CFR § 1240.11(c)(1) and mislead respondents into thinking that voluntary departure is the only option aside from an order of removal. When a respondent is misled about their options beyond voluntary departure, the respondent does not accept voluntary departure knowingly.

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[35] *Moran-Enriquez*, 884 at 240.
[36] *See e.g., Quintero v. Garland*, 998 F.3d 612, 618–20 (4th Cir. 2021); *Arteaga-Ramirez v. Barr*, 954 F.3d 812, 813 (5th Cir. 2020).
[37] *See C.J.L.G. v. Barr*, 923 F.3d 622, 626–28 (9th Cir. 2019) (en banc).
[38] *Matter of C-B-*, 25 I&N Dec. 888, 890–91 (BIA 2012).

3. IJ Duty to Explain Right to Appeal and Consequences of Waiving Appeal

For voluntary departure to be knowingly accepted, the IJ must also adequately explain the right to appeal and the consequences of waiving that right. A respondent may not understand that accepting pre-conclusion voluntary departure requires relinquishing the opportunity to obtain BIA review of the IJ's decision. Practitioners should therefore examine whether the IJ explained that the waiver would foreclose appellate review, whether the explanation conveyed the consequences of that decision, and whether the respondent had an opportunity to ask questions or clarify any uncertainty. A respondent's affirmative answer to the IJ's questions does not, by itself, resolve whether the waiver was knowing and intelligent; the advisals and the circumstances surrounding the respondent's agreement must be considered together and can be established based on the ROP, the DAR and the respondent's statements.

When a respondent appears without counsel, the IJ should take greater care to ensure that the respondent understands the legal significance and consequences of waiving the right to appeal. In *Matter of Rodriguez-Diaz*, the IJ asked an unrepresented respondent whether he accepted the decision as "final," and the respondent answered yes.[39] The BIA explained that this shorthand may not adequately communicate the legal significance of the respondent's answer. For an unrepresented respondent, it is not enough merely to identify the right to appeal; the IJ must provide a sufficient explanation of the finality of the decision, including that waiving appeal is irrevocable and means giving up the opportunity to challenge the decision before the BIA. Because pro se respondents lack the benefit of legal counsel to explain the legal significance and consequences of an appeal waiver, they may not fully understand the rights they are relinquishing.[40] Therefore, the IJ must provide more extensive warnings and a detailed explanation of the consequences of waiving appeal to ensure that an unrepresented respondent's waiver is knowing and voluntary.

The BIA's example of a "reasonable comprehensive formulation of an appropriate discussion of appeal rights" in *Matter of Rodriguez-Diaz* serves as a baseline for practitioners to compare to what the IJ did in their client's case. Practitioners could consider including a table that provides a side-by-side comparison of the BIA's example with what transpired in their client's case to demonstrate that the IJ's advisals were deficient:

Adequate Waiver Example from *Matter of Rodriguez-Diaz*, 22 I&N Dec. 1320, 1323 (BIA 2000)	**Respondent's Case**
You have the right to appeal my decision. You do not have to decide today if you want to appeal, but you should decide soon. You can also give up your right to appeal by waiving it. If you want to appeal my decision, or if you want to think about appeal and decide later, you must reserve appeal now. If	IJ: Respondent (through an interpreter):

[39] 22 I&N Dec. 1320, 1322–23 (BIA 2000).
[40] *See Narine v. Holder*, 559 F.3d 246 (4th Cir. 2009).

you reserve appeal, you will have 30 days from today to file your appeal with the Board of Immigration Appeals. Your notice of appeal must actually arrive at and be received by the Board within 30 days. Your appeal right will be lost if the notice of appeal arrives late. If you do not want to appeal my decision, you may waive appeal. If you waive appeal, my decision becomes final, and your case is completely finished. You cannot change your mind later and try to file an appeal. Do you understand? Do you want to reserve appeal or waive appeal? Word Count: 162	IJ: Respondent (through an interpreter): Unofficial Hearing Transcript, at Page [X]: Line [X] to Page [X]: Line [X], [Date]. Word Count: [X][41]

INA § 240(c)(5) requires an IJ who determines that a respondent is removable and orders removal to advise the respondent of the right to appeal and the consequences of failing to depart under the removal order. Because the IJ enters an alternate removal order as part of the disposition, practitioners should argue that the statutory appeal-advisal requirement applies to that order notwithstanding the simultaneous grant of voluntary departure.

A general advisal provided to a group of respondents does not, by itself, establish that an individual respondent understood and intended to waive the right to appeal.[42] This issue may arise where the IJ provides group advisals at the beginning of a hearing but later relies on those advisals when informing an individual respondent that accepting an order of removal entails waiving the right to appeal. The passage of time between the group advisal and the individual exchange, the nature of the intervening discussion, and the absence of an individualized inquiry may all bear on whether the respondent understood the right being relinquished and knowingly agreed to waive it. Accordingly, practitioners should examine whether the IJ specifically addressed the respondent's understanding of the appellate right by ideally repeating those rights and confirmed the respondent's intent to relinquish it, rather than relying solely on advisals previously given to the group.

Similarly, the submission of a joint request for voluntary departure by the respondent and the Office of the Principal Legal Advisor (OPLA), which often includes a written waiver of appeal does not establish that the IJ fulfilled the statutory obligation to advise the respondent of the right to appeal. Where the hearing record contains no oral advisal concerning the right to appeal, practitioners should argue that the failure to advise undermines the validity of the purported waiver, particularly where the respondent was unrepresented. This argument is further strengthened where the IJ also failed to comply with 8 CFR § 1240.48(a), which requires the IJ

[41] Assuming the IJ's advisal includes fewer words than the model advisal in *Matter of Rodriguez-Diaz*, fewer words underscores the deficiency of the advisal.

[42] See *U.S. v. Andrade-Partida*, 110 F. Supp. 2d 1260, 1263 (N.D. Cal. 2000) ("a waiver is insufficient unless the judge asks each deportee individually whether he wants to waive his appellate rights").

to ascertain that the respondent received a copy of Form I-618, *Written Notice of Appeal Rights*. The absence of Form I-618 from the record, together with the absence of an oral advisal concerning appellate rights, further undermines any assertion that the respondent was adequately informed of the right to appeal before relinquishing it.

The absence of an in-person proceeding can further undermines the validity of a purported waiver. Where the IJ grants voluntary departure and accepts the waiver of appeal solely on a written motion, without the respondent appearing before the IJ, the IJ never personally addresses the respondent to confirm that the waiver is knowing and voluntary or that the respondent understands the right to appeal and the consequences of relinquishing it. Practitioners should therefore argue that the absence of any personal inquiry or confirmation by the IJ further undermines the validity of the purported waiver, if the respondent did not get sufficient admonishment from their counsel and especially if the waiver is not explicitly written into counsel's motion.

4. Misunderstanding of Timing of Execution of Voluntary Departure

A respondent may agree to voluntary departure based on a material understanding of when or how the voluntary departure would be executed that differs from what was ultimately imposed.[43] This may include circumstances in which the respondent understood that they would be given a particular period of time to depart, or that departure would occur in a particular manner or under particular conditions, but the terms ultimately imposed or DHS's subsequent actions differed materially from that understanding.

One potential basis for challenging the agreement concerns the period of time within which the respondent understood departure would occur. For example, a respondent may have agreed to voluntary departure with the understanding that DHS would execute the departure within the applicable 120-day period, or within the shorter period specified by the IJ. If DHS detains the respondent beyond that period without executing the departure, the discrepancy may support an argument that the respondent's understanding of the expected duration of detention was not honored. Practitioners should examine the timeline, including the date voluntary departure was granted, the departure period specified by the IJ, and the date DHS ultimately executed—or failed to execute—the departure.

Challenges may also arise where the respondent's understanding of the timing or manner of departure, whether based on express representations or other information, materially influenced their decision to accept voluntary departure and waive appeal. Practitioners should review the hearing transcript for statements by the IJ or OPLA concerning when the respondent would be released or how quickly DHS would arrange departure, as well as any representations ICE made directly to the respondent before the hearing. The respondent's understanding may also be based on prior experiences or information about how ICE facilitated voluntary departures for other detained individuals, even where ICE made no express representation to the respondent. For example, the respondent may have understood that they would be permitted to purchase an airline ticket and that ICE would facilitate their transportation to the airport within a specified period. If ICE subsequently delays or prevents departure despite the respondent's efforts to

[43] *Yoselin Edith Vasquez-Godinez*, A206-767 922, (BIA Sept. 10, 2015) (unpublished), https://www.scribd.com/document/281177982/Yoselin-Edith-Vasquez-Godinez-A206-767-922-BIA-Sept-10-2015.

comply, practitioners may argue that the respondent's agreement was premised on a material understanding of the departure process and timeline that was not honored. This argument may be particularly relevant where the respondent's understanding influenced their decision to accept voluntary departure and waive appeal, and the hearing record or other contemporaneous evidence supports that understanding.

B. Absence of Express Waiver

For a waiver of appeal to be valid, the record must affirmatively establish that the respondent or the respondent's representative expressly relinquished the right to appeal. An express waiver cannot be inferred from the respondent's conduct, silence, or an ambiguous or noncommittal response. In *Matter of Ocampo*, the BIA held that pre-conclusion voluntary departure may not be granted unless the noncitizen or the noncitizen's representative expressly waives the right to appeal.[44] An express waiver requires an unequivocal statement or other clear manifestation of the decision to relinquish appeal.

Challenges based on a respondent's conditional or incomplete understanding are highly fact-specific and are most readily developed where the hearing transcript contains questions from the respondent, expressions of uncertainty, hesitation, difficulty communicating with the interpreter, or other indicia of confusion about the proposed disposition or the consequences of waiving appeal. Practitioners should closely review the DAR, including the sequence and timing of the IJ's advisals looking for statements or exchanges suggesting that the respondent did not understand what was being offered, what rights were being relinquished, or what would happen as a result of the agreement.

When the respondent is represented by counsel, counsel's express waiver of appeal on the respondent's behalf generally satisfies the express-waiver requirement.[45] Practitioners should therefore examine both the written documents and the hearing recording to determine what counsel actually agreed to and whether the scope of the waiver is clear. If counsel expressly waived appeal, a challenge may require a different theory, such as whether the ineffective assistance of counsel affected its validity as being knowing, intelligent, and voluntary. Ineffective-assistance claims are addressed separately later in this practice advisory.

C. IJ's Failure to Ensure Meaningful Language Access and Competent Interpretation

Immigration courts must provide competent interpreters[46] as part of their obligation to provide fundamentally fair removal proceedings consistent with the Fifth Amendment Due Process

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[44] 22 I&N Dec. 1301 (BIA 2000).

[45] *See Ali v. Mukasey*, 525 F.3d 171, 174–75 (2d Cir. 2008) (recognizing that accepting an IJ's decision as final may constitute an effective waiver when the record supports the conclusion that the respondent or counsel understood the nature of the waiver); *Matter of Rodriguez-Diaz*, 22 I&N Dec. 1320, 1322–23 (BIA 2000) (distinguishing unrepresented respondents, who may not understand that accepting an IJ's decision as "final" waives appeal, from respondents represented by counsel, who may understand the legal significance of that response because counsel is presumed to understand its consequences); *see also Adekoya v. Holder*, 516 F. App'x 65 (2d Cir. 2013) (upholding a waiver where counsel accepted the order as final).

[46] *See Matter of Tomas*, 19 I&N Dec. 464, 465 (BIA 1987) ("The presence of a competent interpreter is important to the fundamental fairness of a hearing if the [noncitizen] cannot speak English fluently.")

Clause.[47] Competent interpretation provides a meaningful opportunity to be heard by ensuring that a respondent understands the language being used and communicates effectively with the IJ.[48] Competent interpretation also guarantees that respondents access their statutory right to a reasonable opportunity to examine the evidence against them, present evidence on their own behalf, and cross-examine government witnesses.[49] The implementing regulations likewise require interpreters to be sworn to interpret and translate accurately.[50]

A waiver may be challenged where language barriers or inadequate interpretation prevented the noncitizen from understanding the IJ's advisals, the terms of voluntary departure, or the consequences of waiving appeal. To assess if such a challenge exists, practitioners should obtain the DAR and have it reviewed by someone knowledgeable in both languages to determine whether the interpretation was accurate and complete. If the review identifies deficiencies, the reviewer may provide a declaration explaining the problems with the interpretation and their potential significance to the noncitizen's understanding. Potential indicators include an interpreter using a language or dialect the noncitizen does not understand, material portions of the IJ's explanation not being interpreted, inaccurate translations of the waiver or its consequences, and statements or conduct suggesting that the noncitizen was confused. Practitioners should identify the specific communication failure and connect it to the noncitizen's understanding at the time of waiver. The reviewer should be someone other than the attorney handling the case, even if the attorney is fluent in the relevant languages. These materials should ideally accompany the NOA.

D. Coercion, Undue Pressure, and Material Misrepresentations

A waiver of appeal may be challenged where the circumstances surrounding the respondent's decision involved coercion, undue pressure, or material misrepresentations that undermined the respondent's ability to make a knowing, intelligent, and voluntary choice. The voluntariness inquiry is fact-specific and should consider the totality of the circumstances, including the respondent's individual vulnerabilities and whether those circumstances impaired the respondent's ability to exercise a free and informed choice.[51] Relevant considerations may include the respondent's age, education, language proficiency, mental health, cognitive functioning, intellectual capacity, history of trauma, and any other circumstances affecting the respondent's ability to understand the nature and consequences of waiving appeal.[52] Practitioners should investigate these circumstances as they existed at the time of the waiver, including through interviews with the respondent and individuals familiar with the respondent's circumstances, and review of relevant medical, educational, and other records.

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[47] The Fifth Amendment's Due Process Clause guarantees noncitizens in removal proceedings a fundamentally fair hearing. *Reno v. Flores*, 507 U.S. 292 (1993); *see also Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).
[48] *See Matter of Tomas*, 19 I&N Dec. at 465; *see also B.C. v. Attorney General*, 12 F.4th 306, 313–17 (3d Cir. 2021).
[49] INA § 240(b)(4)(B).
[50] 8 CFR §§ 1003.22, 1240.5.
[51] *See Melesio-Rodriguez v. Sessions*, 884 F.3d 675, 678 (7th Cir. 2018); *Kohwarien v. Holder*, 635 F.3d 174, 179 (5th Cir. 2011); *Ali v. Mukasey*, 525 F.3d 171, 174 (2d Cir. 2008); *Matter of Rodriguez-Diaz*, 22 I&N Dec. 1320, 1323 (BIA 2000).
[52] *See United States v. Smith*, 134 F.4th 248 (4th Cir. 2025); *United States v. Ramos*, 623 F.3d 672 (9th Cir. 2010).

1. Coercion

A waiver is not necessarily involuntary merely because the respondent accepted it reluctantly or because one available option appeared more advantageous than another.[53] Nor does the absence of an express threat or other intentional effort by the IJ or DHS to pressure the respondent necessarily foreclose a finding of coercion.[54] Rather, whether a waiver was voluntary is a fact-specific inquiry that considers the totality of the circumstances surrounding the respondent's decision. Coercion exists where the circumstances surrounding the waiver effectively overbear the respondent's ability to exercise a free choice, such that the decision to waive appeal is not the product of a meaningful and voluntary choice. The inquiry therefore considers not only the existence of pressure, but also its nature, severity, and effect on the respondent's ability to understand and exercise the choice presented. The inquiry may include both the conduct of the IJ or DHS and circumstances particular to the respondent that may affect the practical effect of that conduct, including the respondent's age, prior experiences with government officials, history of persecution or trauma, language proficiency, education, mental or emotional state, access to counsel, and familiarity with the immigration process. These circumstances do not themselves establish coercion, but they may bear on whether particular conduct or circumstances had the effect of overbearing the respondent's ability to choose freely. Thus, an advisal intended simply to explain the consequences of appealing may nevertheless have a coercive effect when considered in light of the respondent's particular circumstances.

Detention may present a distinct form of coercive pressure. A respondent may argue that the prospect of continued detention during an appeal effectively constrained the choice to waive appeal, particularly where the respondent faced poor detention conditions, had limited prospects for release, or reasonably understood that waiver was the only practical means of obtaining release or departure. The fact that an IJ accurately advises a respondent that pursuing an appeal will likely result in continued detention does not, standing alone, establish coercion.[55] The relevant circumstances may instead include whether the respondent had a meaningful avenue for seeking release—such as a bond hearing, habeas corpus proceedings, or another available mechanism—and whether the respondent was informed of or understood that avenue. Where such alternatives were unavailable, practically inaccessible, or unknown to the respondent, the prospect of prolonged detention may carry greater coercive force.
Practitioners should examine whether the respondent was accurately informed of the consequences of appealing, including the likelihood and potential duration of continued detention, and whether the respondent understood what avenues, if any, were available to seek release while the appeal was pending. The combination of poor detention conditions, the apparent unavailability of a meaningful avenue for release, and an advisal emphasizing the potentially lengthy duration of an appeal may create pressure that goes beyond the ordinary consequences of choosing to appeal. In such circumstances, practitioners may argue that the respondent's decision to waive appeal was driven not simply by an informed preference between

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[53] *See Rodas-Alfaro v. U.S. Attorney General*, 372 F. App'x 974 (11th Cir. 2010) (per curiam).
[54] *R-M-E-R-*, AXXX-XXX-070 (BIA Dec. 18, 2019) (unpublished), https://www.scribd.com/document/443776456/R-M-E-R-AXXX-XXX-070-BIA-Dec-18-2019?secret_password=JbOFnRX4LICjhA1OA3vy.
[55] *Alexander-Mendoza v. Att'y Gen.*, 55 F.4th 197, 207–08 (3d Cir. 2022) (concluding that an IJ's explanation that the respondent would likely remain detained during an appeal did not, without more, render the respondent's appeal waiver coerced).

available legal options, but by the perceived need to surrender appellate rights to escape continued detention.[56] The argument is particularly strengthened where the respondent expressed concern about remaining detained, asked about the possibility of release, was not advised of an available avenue for release, or otherwise indicated that the prospect of prolonged detention was driving the decision to waive appeal.

a. Mental Illness, Cognitive Limitation, and Minority

A respondent's mental-health condition, cognitive limitation, or young age may undermine the validity of an appeal waiver where it affects the respondent's ability to understand the right to appeal or appreciate the consequences of relinquishing that right, but these vulnerabilities also render a respondent susceptible to coercion. Although these circumstances do not automatically invalidate a waiver,[57] practitioners should consider whether the respondent with these vulnerabilities was able to knowingly and intelligently waive appellate review and look for any signs of coercion.

Competency may be fluid and must be assessed in light of the respondent's condition at the relevant time.[58] A respondent who was previously found competent, or who appeared able to participate during earlier portions of the proceedings, may nevertheless experience changes in mental illness, cognitive functioning, or ability to understand and communicate.[59] Conversely, the presence of a mental illness does not necessarily mean that the respondent lacked competency throughout the proceedings. The relevant question for an appeal-waiver challenge based on competency is whether the respondent was able to understand and make an informed decision to relinquish appellate rights at the time the waiver was purportedly made. Practitioners should therefore examine the respondent's condition at the hearing where they provided a waiver and should not assume that an earlier competency determination resolves whether a later waiver was valid, especially given the inhumane ICE detention conditions.

Because an appeal waiver occurs during removal proceedings, *Matter of M-A-M-* is directly relevant to assessing whether a respondent was competent to understand and meaningfully waive the right to appeal. In *Matter of M-A-M*, the BIA explained that a respondent is competent to participate when the respondent has a rational and factual understanding of the nature and object of the proceedings, can consult with counsel or a representative if one is available, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses.[60] Indicia of incompetency may include a wide range of observations and evidence, including medical reports or assessments, evidence of prior mental-health treatment, school records, testimony from family members or friends, and the respondent's own statements or behavior during

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[56] *See United States v. Jimenez*, 921 F. Supp. 1054, 1057 (S.D.N.Y. 1995) (holding that an IJ's threat that the respondent would be detained for an indefinite period if he contested deportation rendered the proceedings coercive and invalidated any subsequent waiver of fundamental rights, including the rights to counsel and appeal).
[57] *See United States v. Cohen*, 459 F.3d 490, 494 (4th Cir. 2006).
[58] Although competency may fluctuate over time, it does not always do so. Certain cognitive or intellectual disabilities and mental illnesses may manifest in a relatively static manner, particularly where they cannot be effectively treated or meaningfully ameliorated through medication or other therapeutic interventions.
[59] *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011) ("Mental competency is not a static condition. 'It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways.'…As a result, Immigration Judges need to consider indicia of incompetency throughout the course of proceedings…").
[60] *Id*. at 479.

proceedings.[61] The inquiry is not limited to evidence presented directly to the IJ or behavior observed in the courtroom; relevant information may come from any reliable source familiar with the respondent's cognitive, emotional, or behavioral functioning. A respondent may appear, answer questions, and participate to some extent while still having difficulty understanding the legal significance of waiving appeal. Accordingly, practitioners should identify any indicia of mental health or cognitive impairment and explain how those circumstances affected the respondent's ability to understand the right to appeal and the consequences of relinquishing it. Where the IJ accepted an appeal waiver without addressing apparent signs of impairment, practitioners may argue that the record does not adequately establish that the respondent understood the right being relinquished or made an informed decision to waive it.

In evaluating whether the respondent was competent at the time of the waiver, practitioners should first review the entire record for indicia of mental incompetency that may have triggered the IJ's duty to conduct further inquiry. The BIA has recognized that noncitizens are presumed competent to participate in removal proceedings, but has held that an IJ must make further inquiry when the record contains indicia of mental incompetency.[62] Where the evidence raises a bona fide doubt about competency, the IJ must conduct an appropriate inquiry, determine whether the respondent is competent to proceed, consider appropriate safeguards if necessary, and explain the basis for the competency determination.[63] The INA likewise requires safeguards to protect a respondent's rights and privileges when mental incompetency makes it impracticable for the respondent to be present at the proceeding.[64] If the respondent displayed confusion, struggled to understand questions, gave incoherent or unresponsive answers, or otherwise appeared unable to comprehend the proceedings, *Matter of M-A-M-* may have required further inquiry from the IJ under those circumstances.

Relevant indicia may include a history of mental-health treatment or psychiatric hospitalization, traumatic brain injury, self-injurious behavior, poor memory or concentration, disorganized thinking, paranoia, hallucinations, serious depression or anxiety, or impaired intellectual functioning. Such information may appear in medical or educational records, or in observations and accounts from family members, counsel, health-care providers, detention personnel, or other individuals familiar with the respondent.[65]

Practitioners should also interview the respondent and, where appropriate, family members or other individuals with direct knowledge of the respondent's mental state at the time of the waiver. These interviews may help identify additional evidence of incompetency that is not apparent from the existing record. Where the record contained indicia sufficient to raise a bona fide doubt about competency, but the IJ failed to conduct an appropriate judicial inquiry or implement necessary safeguards, practitioners should consider challenging the IJ's failure to

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[61] *Id*. at 479–80.
[62] 25 I&N Dec. 474, 477–84 (BIA 2011).
[63] *Id*. at 480–84.
[64] INA § 240(b)(3).
[65] For additional guidance on identifying indicia of incompetency, evaluating competency concerns, and seeking appropriate procedural safeguards in immigration proceedings, see Acacia Center for Justice, Rocky Mountain Immigrant Advocacy Network, Brooklyn Defenders & Robert F. Kennedy Human Rights, *NQRP Practice Advisory: Procedural Safeguards and Section 504 of the Rehabilitation Act* (updated Oct. 2023), https://acaciajustice.org/wp-content/uploads/2023/12/2023-10-30-NQRP-Practice-Advisory-Procedural-Safeguards-and-Section-504-FINAL-updated-10-2023.pdf.

comply with *Matter of M-A-M-* independently of the argument that the respondent lacked competency when waiving appeal.

A respondent's minority likewise warrants an individualized inquiry into the respondent's understanding and decision-making capacity and coercion susceptibility. There is no categorical age cutoff at which a respondent is presumed unable—or presumed able—to knowingly and voluntarily waive the right to appeal. EOIR's guidance recognizes, however, that immigration cases involving juveniles (generally, individuals under 18) may warrant special consideration and that IJs should account for the circumstances of individual juvenile cases rather than apply a blanket approach.[66] Although the memorandum cautions that legal requirements applicable to all immigration cases are not necessarily diminished solely because the respondent is a juvenile, its recognition that juvenile cases warrant special consideration supports an individualized assessment of whether a particular juvenile understood the right to appeal and the consequences of relinquishing it. A child may understand the right to appeal and the consequences of giving it up, depending on the child's age, maturity, education, experience, and individual circumstances. At the same time, practitioners should not assume that a child understood an appeal waiver merely because the child answered the IJ's questions, agreed with a proposed disposition, or stated that the decision was "final." A child may understand ordinary questions and express a preference about the outcome without understanding the legal distinction between accepting an order and relinquishing the right to challenge it before the BIA.

In evaluating a minor's purported waiver, practitioners should examine the child's age at the time of the hearing, developmental maturity, educational background, literacy, language abilities, prior experience with legal proceedings, and ability to understand the IJ's explanation of appellate rights. The record should also be examined for evidence that the child understood that waiving appeal would eliminate the opportunity for the BIA to review the IJ's decision. For unaccompanied children and other asylum-seeking children, practitioners should also consider whether trauma or other effects of the child's journey to the United States, including separation from family, exposure to violence, exploitation, or other traumatic experiences, may have affected the child's ability to understand the proceedings or make an informed decision. Whether a parent, guardian, attorney, or other adult was present, and whether that person explained the consequences of the waiver, may also be relevant. These considerations are particularly important where the child was unrepresented, appeared without a parent or guardian, or was asked to make a consequential decision without an explanation tailored to the child's level of understanding.

2. Undue Pressure

Undue pressure may arise where, even absent an express threat or intentional effort to force the respondent's decision, the circumstances surrounding the waiver place substantial pressure on the respondent to accept a particular disposition or surrender the right to appeal. The inquiry therefore focuses on whether the circumstances, considered as a whole and in light of the respondent's particular situation, left the respondent with a meaningful and voluntary choice. Relevant circumstances may include the respondent's age and maturity, language abilities,

[66] *See* EOIR Policy Memorandum 17-03, *Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children* (Dec. 20, 2017), reinstated by EOIR Policy Memorandum 25-10 (Jan. 29, 2025), https://www.justice.gov/eoir/file/oppm17-03/dl.

education, access to counsel, familiarity with the immigration process, separation from family or other sources of support, and the respondent's understanding of the consequences of accepting or rejecting the proposed disposition. These circumstances do not themselves establish undue pressure; rather, they bear on how the respondent experienced the circumstances and whether the respondent could meaningfully evaluate the available choices.

a. Minors

Undue pressure concerns may be particularly significant when the respondent is[67] an unaccompanied child in detention. A child's age, maturity, past trauma, and circumstances may affect not only the child's ability to understand the immigration process and identify available legal options, but also the child's ability to appreciate that a proposed disposition is not necessarily the only way to obtain release or resolve the proceedings. A child who is separated from parents and other familiar sources of support may also be particularly vulnerable to pressure from adults in positions of authority. Practitioners should therefore examine whether the child was told or reasonably understood that accepting voluntary departure and waiving appeal was the only way to leave detention, whether the child understood that other legal options remained available, and whether the child was given a meaningful opportunity to consult with counsel, a parent, or another trusted adult before deciding. A child's agreement to accept an offered disposition does not necessarily demonstrate a free choice where the surrounding circumstances led the child reasonably to believe that refusing the offer would result in prolonged detention or leave the child without any practical means of obtaining release.[68]

The availability of financial incentives may further compound undue pressure concerns. In October 2025, reports described a DHS program offering unaccompanied children ages 14 and older a one-time $2,500 stipend if they agreed to voluntarily leave the United States.[69] Where an unaccompanied child in detention is offered money in exchange for accepting voluntary departure and waiving appeal, practitioners should examine how the offer was presented and whether the child understood its terms and consequences. A financial incentive may carry particular weight for a child who lacks parental support, has limited financial resources, or is concerned about supporting family members in the country of origin. The concern is not simply that the child was offered money, but whether the offer, combined with the child's detention and vulnerability, created undue pressure to relinquish appellate rights without understanding the alternatives. The argument is stronger where the child was not informed that other legal options remained available, was led to believe that accepting the offer was the only way to leave detention, or was not given an opportunity to consult with counsel before making the decision.[70]

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[67] Although many people with a prior unaccompanied child determination are now adults, consider if the past trauma that the person endured as a child in the country of origin or during the trip alone to the United States may make them more susceptible to undue pressure.

[68] *See Perez-Funez v. Dep't of Homeland Sec.,* No. CV 81-01457-MWF (Ex), 2026 WL 982623, at *12 (C.D. Cal. Apr. 6, 2026) (reaffirming the concerns underlying the injunction and addressing the coercive effect of advising unaccompanied children that they could expect prolonged detention if they exercised their rights).

[69] *See* Camilo Montoya-Galvez, *U.S. to Offer Migrant Teens $2,500 if They Agree to Voluntarily Leave the Country*, CBS NEWS, Oct. 3, 2025, https://www.cbsnews.com/news/us-immigration-migrant-teens-2500-self-deportation/.

[70] *See J.O.P. v. U.S. Dep't of Homeland Sec.*, No. CV SAG-19-01944, at *8 (D. Md. Aug. 6, 2026) (noting that during a class member's nearly one month in detention, his immigration counsel attempted to contact him numerous times without success and sharing Class Counsel's concern whether acceptance of voluntary departure was truly voluntary).

Practitioners should also investigate whether the child was eligible for the offered payment and whether the terms and eligibility restrictions were accurately explained. For example, the reported stipend program was described as applying to unaccompanied children who were at least 14 years old. A child who did not meet the age requirement, or who otherwise did not qualify, may have been induced to accept a disposition based on a benefit the child would not receive. Even where the child was eligible, practitioners should examine whether the child understood that the payment was an incentive for agreeing to depart, rather than a benefit to which the child was independently entitled, and whether the child understood that accepting voluntary departure could also mean relinquishing the right to appeal. If the child was promised a payment or other benefit that was unavailable, or was not informed of material eligibility restrictions, the misrepresentation or omission may have materially affected the child's decision and provide an independent basis for challenging the waiver.

3. Material Misrepresentation by the IJ

Material misrepresentations concerning the availability of relief other than voluntary departure or the consequences of accepting the voluntary departure may likewise undermine the validity of an appeal waiver. For example, in *Matter of Arguelles*, the BIA found that the IJ's advisal could have led the respondent to believe that abandoning other forms of relief was conditioned on actually receiving voluntary departure, when the respondent risked abandoning those forms of relief even if voluntary departure was denied.[71] While *Matter of Arguelles* was more about an IJ's confusing advisal rather than a misrepresentation, the case supports that an affirmative misrepresentation that the respondent is ineligible for relief may be framed not only as an error concerning the availability of relief, but also as a circumstance undermining the respondent's ability to knowingly and intelligently waive appeal. In such circumstances, practitioners may argue that the IJ's misrepresentation or materially misleading presentation of the available options led to an invalid appeal waiver.

E. Ineffective Assistance of Counsel

Ineffective assistance of counsel may provide a basis for challenging a waiver of appeal where counsel's deficient performance undermined the noncitizen's ability to make an informed decision about waiving appellate rights. For example, counsel may have failed to explain the right to appeal, misrepresented the consequences of accepting voluntary departure, failed to identify a potentially meritorious form of relief, or advised the noncitizen to waive appeal without adequately evaluating the case.

To establish ineffective assistance, practitioners generally must satisfy the procedural requirements set forth in *Matter of Lozada* and demonstrate that counsel's deficient performance prejudiced the noncitizen.[72] In this context, the noncitizen's affidavit should describe in detail the agreement with former counsel, including what counsel told the noncitizen about voluntary departure and the right to appeal, what representations counsel made about the consequences of accepting voluntary departure, and what counsel said about other potentially available forms of relief, or failed to say about such relief.[73] Practitioners must also provide evidence that former

[71] 22 I&N Dec. 811 (BIA 1999).
[72] 19 I&N Dec. 637, 639 (BIA 1988).
[73] *Id.*

counsel[74] was informed of the allegations and given an opportunity to respond, and include evidence that a complaint was filed with the appropriate disciplinary authority or, if no complaint was filed, explain the reasons for not filing one.[75] Any response from former counsel, or evidence of counsel's failure or refusal to respond, should be included.[76] Although the precise application of these requirements may vary by circuit, practitioners should address each requirement when presenting an ineffective assistance claim.

The substantive showing requires more than demonstrating that counsel made an error or provided inadequate advice. Practitioners must explain how counsel's deficient performance affected the fairness of the proceedings and prejudiced the noncitizen.[77] In the context of an appeal waiver, practitioners should establish that the noncitizen relied on counsel's advice in waiving appeal and would have made a different decision had counsel adequately explained the right to appeal, the consequences of waiver, or the potential grounds for challenging the IJ's decision. The noncitizen's declaration should describe what counsel advised, what the noncitizen understood, why the noncitizen relied on that advice, and whether the noncitizen would have pursued an appeal if properly advised.

Where counsel's deficient performance deprived the noncitizen of the opportunity to apply for potentially available relief, practitioners should consider submitting a completed application for that relief, together with supporting evidence demonstrating the noncitizen's prima facie eligibility. If the case is before the IJ, practitioners should submit the application and supporting evidence with a motion to reopen, as discussed below. If the case is pending before the BIA, practitioners should submit them with a motion to remand, also discussed below. This evidence can help establish prejudice by demonstrating that counsel's deficient performance deprived the noncitizen of a meaningful opportunity to seek relief that may have been available.

F. Other Issues to Raise on Appeal

1. Denial of the Opportunity to Obtain Counsel

Respondents in removal proceedings have a statutory privilege to be represented by counsel of their choice, at no expense to the government.[78] When a respondent appears at an initial hearing without counsel, practitioners should examine whether the IJ meaningfully protected that privilege. Two related issues may arise: whether the IJ improperly denied the respondent an opportunity to obtain counsel, and whether the IJ proceeded without first establishing that the respondent knowingly and voluntarily waived the right to representation.

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[74] A practitioner whose conduct is the basis of an ineffective-assistance-of-counsel claim should generally not be the person responsible for preparing or pursuing the filing that raises that claim. In *Matter of Melgar*, 28 I&N Dec. 169, 170–71 & n.2 (BIA 2020), the BIA raised ethical concerns about a practitioner asserting ineffective assistance based on their own conduct, citing ABA Model Rule 1.7 concerning conflicts of interest. Although the practitioner may disclose their prior errors through self-reporting, that disclosure should be distinguished from independently investigating and raising the ineffective-assistance claim. The respondent should therefore be referred to independent, conflict-free counsel to evaluate the allegations and, where appropriate, prepare and pursue the motion or appeal asserting ineffective assistance and address the *Lozada* requirements.

[75] *Id*.

[76] *Id*.

[77] *Id*.

[78] INA §§ 240(b)(4)(A); 8 CFR §§ 1003.16(b), 1240.3.

In *Matter of C-B-*, the BIA emphasized that, to meaningfully effectuate the privilege of legal representation where it has not been expressly waived, an IJ must provide a reasonable and realistic opportunity for the respondent to seek, speak with, and retain counsel. [79] The BIA subsequently modified that standard in *Matter of A-K-R-*, holding that the only statutory or regulatory time requirement specifically safeguarding the privilege of counsel is the requirement that the first hearing not be scheduled earlier than 10 days after service of the Notice to Appear (NTA).[80] The BIA reasoned that, once the 10-day period has elapsed, the statute permits proceedings to continue even if the respondent has not secured counsel.[81] Although the statutory 10-day requirement applies expressly to the first hearing, the BIA interpreted it as the only specific statutory or regulatory timing protection governing the opportunity to obtain counsel. Accordingly, a request for an additional continuance to obtain counsel is not automatically required to be granted and instead is evaluated under the good-cause standard governing continuances.[82]

Importantly, however, the 10-day statutory minimum does not resolve whether the respondent knowingly and voluntarily waived the privilege of representation. Nor does it eliminate the need to examine whether the IJ properly advised the respondent of the right to counsel and established a valid waiver before requiring the respondent to proceed pro se. Under 8 CFR § 1240.10(a)(1), the IJ must advise the respondent of the right to representation and ascertain whether the respondent has received a list of available pro bono legal service providers. Practitioners should therefore examine through the ROP and the DAR whether the IJ expressly asked whether the respondent wished to proceed without counsel and obtained an affirmative response demonstrating a knowing and voluntary waiver.

Courts have recognized that an IJ generally cannot infer a valid waiver merely because a respondent appears without counsel or proceeds with the hearing. In *Biwot v. Gonzales*, the Ninth Circuit explained that a waiver is generally invalid unless the IJ expressly asks whether the respondent wishes to continue without a lawyer and receives a knowing and voluntary affirmative response.[83] If the respondent does not affirmatively waive the right to counsel, the IJ must inquire whether good cause exists to grant additional time to obtain representation.[84] In *Biwot*, the court found that the IJ's failure to ask whether the respondent wished to proceed without an attorney, coupled with the failure to determine whether additional time was warranted, constituted a denial of the right to counsel.[85]

The right-to-counsel issue may also arise when an IJ seeks to obtain a respondent's agreement to voluntary departure or waiver of appeal before ensuring that the respondent has had a meaningful opportunity to obtain representation.[86] Where a respondent expressly requests counsel but the IJ proceeds without addressing that request or establishing a valid waiver of representation, practitioners should consider challenging both the denial of the statutory privilege to counsel and

[79] 25 I&N Dec. 888, 889 (BIA 2012).
[80] 29 I&N Dec. 839 (BIA 2026).
[81] *See* INA § 239(b)(3).
[82] *See* 8 CFR § 1003.29.
[83] 403 F.3d 1094, 1100 (9th Cir. 2005) (citing *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004)).
[84] *Id*. (citing *Reyes-Palacios v. INS*, 836 F.2d 1154, 1155–56 (9th Cir. 1988) (per curiam)).
[85] *Biwot*, 403 F.3d at 1100.
[86] *See Guandique-de Romero v. Bondi*, 150 F.4th 332, 339-341 (4th Cir. Aug. 13, 2025) (discussing the statutory right to retained counsel and its relationship to the right to a fundamentally fair removal proceeding).

the validity of any subsequent waiver of appeal or acceptance of voluntary departure. This concern is particularly acute where the IJ never asked whether the respondent wished to proceed pro se, but instead presented the respondent with an immediate choice concerning the disposition of the case.

2. Other Independent Procedural Violations by the IJ

In challenging the validity of the respondent's appeal waiver, practitioners should identify all relevant statutory and regulatory obligations the IJ failed to fulfill, including those discussed above. Considered together, these failures may demonstrate that the IJ did not adequately explain the proceedings, ensure that the respondent understood the available rights and forms of relief, or provide the procedural protections necessary for a knowing, intelligent, and voluntary waiver of appeal. Practitioners should also identify these violations as additional standalone challenges to the underlying proceedings.

For example, practitioners should examine whether the IJ:

- Failed to advise the respondent of the availability of pro bono legal services and ascertain that the respondent received the list of providers, as required by 8 CFR § 1240.10(a)(2);
- Failed to ascertain whether the respondent received a copy of the written notice of appeal rights, as required by 8 CFR § 1240.10(a)(3);
- Failed to advise the respondent of the opportunity to examine and object to the evidence, present evidence, and cross-examine government witnesses, as required by 8 CFR § 1240.10(a)(4);
- Failed to read the factual allegations and charges in the NTA and explain them in nontechnical language, as required by 8 CFR § 1240.10(a)(6);
- Failed to develop the record or conduct further inquiry when the respondent's testimony or circumstances warranted clarification;
- Failed to advise the respondent of the opportunity to apply for asylum or withholding of removal after the respondent expressed fear of return, as required by 8 CFR § 1240.11(c)(1);
- Failed to inform the respondent of apparent eligibility for available immigration benefits and afford an opportunity to apply, as required by 8 CFR § 1240.11(a)(2), including adjustment of status under INA § 245, the Cuban Adjustment Act, cancellation of removal, waivers of inadmissibility, or other forms of relief supported by the record.

IV. Procedural Options for Challenging the Appeal Waiver

In *Matter of Patino*, the BIA recognized two procedural avenues for raising such a challenge: (1) filing a timely motion to reconsider with the IJ or (2) filing an appeal directly with the BIA.[87] The regulations also recognize that an individual granted voluntary departure may file a motion to reopen.[88] The appropriate procedure depends on the circumstances of the case.

The options for a motion to reconsider an appeal can be in tension with each other. Once an appeal is filed with the BIA, jurisdiction vests with the BIA, and the IJ can no longer rule on a pending motion to reconsider. Practitioners considering seeking reconsideration before the IJ

[87] 23 I&N Dec. 74, 76 (BIA 2001).
[88] 8 CFR § 1240.26(b)(3)(iii).

should therefore account for the risk that the IJ may not rule on the motion before the deadline to appeal expires. If the IJ has not ruled on the motion as the appeal deadline approaches, practitioners generally should file a timely appeal with the BIA to preserve the opportunity for BIA review. Although doing so may divest the IJ of jurisdiction to decide the pending motion, allowing the appeal deadline to expire risks losing the opportunity for BIA review altogether.

A. Appeal to the Board of Immigration Appeals

Although a valid appeal waiver ordinarily precludes an appeal, the BIA retains authority to determine whether the waiver was valid in the first place.[89] Under 8 CFR § 1003.38(b), an appeal from an IJ's decision generally must be received by the BIA within 30 calendar days after the IJ's decision is rendered. Once the NOA is properly filed, an automatic stay of removal applies.[90]

The NOA should expressly identify that the respondent is challenging the validity of the purported appeal waiver and should state the specific grounds supporting that challenge. This is particularly important because the BIA may summary dismiss an appeal where a waiver of appeal is "clear on the record."[91] Where the respondent contends that the waiver was not knowing, intelligent, and voluntary, the NOA should explain why the totality of the circumstances in the record do not establish a clear and valid waiver that bars the appeal.[92] The respondent should identify the specific deficiencies in the IJ's advisals, the circumstances surrounding the waiver, or other facts demonstrating why the waiver was invalid. The respondent should argue that the BIA must assess these circumstances together, rather than evaluate the waiver based solely on the respondent's affirmative response to the IJ's questions. In cases where the IJ indicated that the respondent had waived appeal, the BIA has nevertheless issued a briefing schedule and reviewed the hearing transcript.[93] Accordingly, where the validity of the waiver is disputed and is not clear from the record, practitioners should argue that the BIA should not summarily dismiss the appeal and should instead provide a transcript and briefing schedule.[94]

The BIA reviews IJs' legal errors and discretionary decisions de novo[95] and an IJ's factual findings for clear error.[96] Accordingly, to the extent a challenge to the validity of an appeal waiver concerns the legal sufficiency of the IJ's advisals, the respondent can argue that the BIA should review that legal issue de novo, which is a more favorable standard than clear error. For example, whether the IJ adequately explained the irrevocable nature of the waiver, the consequences of removal, or the availability of relief may present a question concerning whether the IJ's advisals satisfied the applicable legal requirements. In contrast, challenges concerning the IJ's factual assessment of the respondent's understanding, including whether the respondent

[89] *Matter of Patino,* 23 I&N Dec. 74, 76 (BIA 2001).
[90] *See* 8 CFR § 1003.6(a); *Dada v. Mukasey*, 554 U.S. 1, 10–11 (2008); *Matter of Patino*, 23 I&N Dec. 74, 76 (BIA 2001); INA § 101(a)(47)(B) (providing that an order of deportation becomes final upon the earlier of the BIA's affirmance or expiration of the period in which the noncitizen may seek BIA review).
[91] 8 CFR § 1003.1(d)(2)(i)(G).
[92] 8 CFR § 1003.1(d)(3)(i).
[93] *See H-C-R-*, AXXX-XXX-456 (BIA Dec. 3, 2015) (unpublished); *V-M-*, AXXX-XXX-928 (BIA Apr. 28, 2010) (unpublished); *A-D-W-*, AXXX-XXX-182 (BIA Sept. 22, 2010).
[94] 8 CFR § 1003.3(c)(1).
[95] 8 CFR § 1003.1(d)(3)(ii),
[96] 8 CFR § 1003.1(d)(3)(i).

appeared confused, understood the advisals, or actually agreed to waive appeal, involve factual findings that the BIA reviews for clear error.

A direct appeal may be appropriate when the challenge can be established through the existing record of proceedings. For example, the DAR may show that the IJ failed to adequately explain the consequences of waiving appeal, that the noncitizen expressed confusion about the decision, or that the circumstances reflected in the record call into question whether the waiver was knowing and voluntary. Where the relevant portions of the DAR are important to the waiver challenge, counsel should prepare an unofficial transcript of those portions and submit it with the NOA.[97]

The principal limitation of a direct appeal is that the BIA generally does not consider new evidence in the first instance.[98] However, the need to rely on evidence outside the existing record does not necessarily foreclose filing an appeal with the BIA. Rather, practitioners may consider filing an appeal accompanied by a motion to remand, asking the BIA to return the case to the IJ so the new evidence can be considered. A motion to remand based on new evidence is generally subject to the same substantive requirements as a motion to reopen, including the requirement to present material evidence that was previously unavailable and could not have been discovered or presented at the prior proceeding.[99]

The regulation does not expressly provide for automatic termination of voluntary departure when pursuing review of the IJ's voluntary departure decision. Filing a NOA with the BIA does not automatically terminate voluntary departure. This is an important distinction from the rules governing post-order motions to reopen or reconsider, which automatically terminate voluntary departure under the applicable regulations.[100]

However, termination and tolling are separate questions, and the regulations do not expressly resolve whether a BIA challenge to the validity of a voluntary departure waiver tolls the voluntary-departure period. Although the BIA has recognized that a timely appeal may toll the voluntary departure period in the post-conclusion context, it is unclear whether that principle extends to pre-conclusion voluntary departure, where waiver of appeal is a condition of the grant and the IJ's decision generally becomes final upon waiver pursuant to 8 CFR § 1003.39.[101] Accordingly, practitioners should not assume that filing an appeal challenging the waiver pauses the voluntary-departure period or prevents the alternate removal order from taking effect upon expiration of that period.

Even if the voluntary-departure period is not tolled and the alternate removal order becomes effective upon its expiration, a timely appeal to the BIA challenging the validity of the appeal waiver still stays execution of the removal order. A timely appeal from an IJ's decision ordinarily

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[97] The unofficial transcript should be accompanied by a certificate of transcription. Sample language: "I, Jane Doe, do hereby certify that this transcription of the Digital Audio Recording from Respondent's [DATE] hearing in his removal proceedings before the Executive Office of Immigration Review was prepared and transcribed by me, and is a true and correct transcript to the best of my ability and understanding."
[98] *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).
[99] *See Matter of Coelho*, 20 I&N Dec. 464, 471 (BIA 1992).
[100] *See* 8 CFR § 1240.26.
[101] *See Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977); *Matter of A-M-*, 23 I&N Dec. 737 (BIA 2005).

stays execution of that decision while the appeal is pending, and an appeal challenging the validity of the waiver is no different.[102]

For practitioners advising a detained noncitizen facing imminent removal, filing a NOA that expressly challenges the validity of an appeal waiver provides the best protection against removal by providing an automatic stay while the BIA considers the waiver challenge. Accordingly, after filing the NOA, practitioners should promptly notify the appropriate ICE Enforcement and Removal Operations (ERO) office, provide a copy of the filed notice, expressly request that ICE recognize the automatic stay, and seek written confirmation that removal will be withheld pending the BIA's review. If ICE does not recognize the stay or indicates that removal will proceed, practitioners should consider seeking emergency relief, including habeas relief in federal district court or other available administrative or judicial remedies.[103]

B. Motion to Reconsider

A motion to reconsider asks the IJ to reexamine a decision based on an error of law or fact[104] and generally must be filed within 30 days of the date of entry of the final administrative order.[105] Whether an appeal waiver was "knowingly and voluntarily made" may be challenged as a factual error in the IJ's determination that the waiver was valid if the existing administrative record without additional evidence.[106] For example, the record may indicate that the noncitizen appeared confused about the waiver, that the IJ's advisals regarding the waiver of appeal were unclear or incomplete, or that interpretation issues may have impeded the noncitizen's understanding of the waiver and its consequences. Such circumstances may support an argument that the IJ erred in determining that the waiver was knowing and voluntary.

If the existing record lacks evidence that the waiver was not "knowingly or voluntarily" made, the IJ may have grounds to deny the motion to reconsider. The BIA has not held that an IJ may consider evidence outside the existing record when deciding a motion to reconsider in this context. Although *Patino* recognized reconsideration as a procedural avenue for challenging a waiver, it did not resolve whether an IJ may consider evidence outside the administrative record in deciding such a motion.

Courts of appeals have taken differing approaches to whether a motion to reconsider may rely on evidence outside the administrative record to challenge the validity of an appeal waiver. In *Alexander-Mendoza v. Attorney General*, the Third Circuit held that a motion to reconsider is

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[102] *See Kevin J.R.M. v. Blanche*, No. 0:26-cv-03122, ECF No. 13, at 5 (D. Minn. July 17, 2026), report and recommendation 7 adopted, ECF No. 14 (D. Minn. Aug. 3, 2026) ("Unless and until the BIA finds that Petitioner's appeal waiver was invalid and dismisses the appeal, the order of removal is not administratively final."); *Tellez Fuga v. Warden, Cal. City Detention Facility*, No. 2:26-CV-00654-JLT-SAB (HC), 2026 WL 1396685, at *3 (E.D. Cal. May 19, 2026) ("[D]espite Petitioner's waiver of his right to an appeal, Petitioner's removal order is not administratively final until the BIA determines that his waiver was valid.").

[103] *See* American Immigration Council & National Immigration Project, *Practice Advisory, Stays of Removal* (updated Mar. 13, 2026), https://nipnlg.org/work/resources/stays-removal*; Matter of Herrera-Nunez,* 29 I&N Dec. 691 (BIA 2026) (announcing a policy requiring noncitizens with final orders of removal to first request a discretionary stay from DHS before seeking a stay from the BIA in connection with a motion to reopen or reconsider); *see also* National Immigration Project, *Habeas Explainer & Pro Se Filing Instructions* (Aug. 4, 2026), https://nipnlg.org/work/resources/habeas-explainer-pro-se-filing-instructions.

[104] INA § 240(c)(6)(C).

[105] 8 CFR § 1003.23(b)(1).

[106] *Matter of Patino*, 23 I&N Dec. 74, 76 (BIA 2001).

limited to the existing administrative record and that extra-record factual allegations challenging the validity of an appeal waiver should instead be raised through a motion to reopen.[107] The court therefore concluded that the petitioner's extra-record allegations challenging the validity of his appeal waiver could not be considered on reconsideration. The Fourth Circuit took a different approach in *Narine v. Holder*. There, the petitioner submitted an affidavit from his former counsel with his motion for reconsideration, and the Fourth Circuit considered the affidavit notwithstanding that it had not been part of the original administrative record.[108] The court concluded that the waiver was not knowing and intelligent and vacated the BIA's decision and remanded for further proceedings.[109] Other circuits have addressed related challenges to appeal waivers without squarely resolving whether extra-record evidence may be considered on a motion to reconsider.[110] These cases suggest that, where the existing administrative record does not contain evidence supporting a challenge to the waiver of appeal, a motion to reconsider may be an ineffective procedural vehicle. Instead, a motion to reopen or an appeal to the BIA, with a motion to remand as appropriate, may be a better option.

If a motion to reconsider is strategically the best option in a particular case, it is important to know how reconsideration impacts the voluntary departure order. When an IJ grants voluntary departure and the noncitizen waives appeal, the 30-day deadline generally runs from the date of the waiver of appeal, not from the expiration of the voluntary departure period.[111] The filing of a motion to reconsider during the voluntary departure period automatically terminates voluntary departure and triggers the alternate order of removal.[112] The regulation provides, however, that the penalties for failure to depart under INA § 240B(d) do not apply if the noncitizen files a post-decision motion to reopen or reconsider during the period allowed for voluntary departure.[113] For detained noncitizens or those facing imminent removal, termination of voluntary departure is particularly consequential because the alternate removal order takes effect and becomes immediately executable, notwithstanding the pendency of the motion to reconsider. Accordingly, practitioners should assess and advise clients of the risk of removal associated with filing a motion to reconsider and be prepared to seek an administrative and/or judicial stay of removal, if appropriate.[114]

A motion to reconsider is generally decided by the same IJ who granted voluntary departure and accepted the waiver of appeal. Depending on the circumstances, this may be advantageous or disadvantageous. The IJ may be best positioned to quickly reassess the noncitizen's understanding of the waiver, evaluate whether the advisals provided at the hearing were adequate, and correct an error in the original decision. Conversely, the IJ may be reluctant to revisit or reverse the prior determination and may stand by the original finding that the waiver was valid. Practitioners should therefore consider the particular IJ's handling of the original proceeding, the nature of the alleged error, and, where possible, seek insight from colleagues

[107] 55 F.4th 197, 203–05 (3d Cir. 2022).
[108] 559 F.3d 246, 249–51 (4th Cir. 2009).
[109] *Id.*
[110] *See, e.g.*, *Kohwarien v. Holder*, 635 F.3d 174, 179–81 (5th Cir. 2011); *Camick v. Sessions*, 891 F.3d 1101 (8th Cir. 2018); *Rodas-Alfaro v. U.S. Att'y Gen.*, 372 F. App'x 974 (11th Cir. 2010) (per curiam); *see also Matter of O-S-G-*, 24 I&N Dec. 56, 57–58 (BIA 2006).
[111] *See* 8 CFR § 1241.1(b).
[112] *See* 8 CFR § 1240.26(b)(3)(iii), (c)(3)(iii).
[113] 8 CFR § 1240.26(e)(1).
[114] *See* supra note 103.

familiar with the IJ's general approach and decision-making. These considerations may help inform the appropriate procedural strategy, including whether to first seek reconsideration from the IJ, pursue review before the BIA, or consider both avenues as appropriate.

C. Motion to Reopen

Although *Matter of Patino* identifies a motion to reconsider or a direct appeal to the BIA as avenues for challenging the validity of an appeal waiver without addressing motions to reopen, practitioners may also consider reopening where new evidence calls into question the circumstances surrounding the grant of voluntary departure or otherwise provides a basis for the IJ to reach a different decision.

Unlike a motion to reconsider, which generally identifies errors in the existing record, a motion to reopen is appropriate when the challenge depends on material evidence that was not previously available and could not have been discovered or presented at the earlier proceeding.[115] Depending on the case, relevant evidence might include a declaration from the noncitizen explaining their understanding of the proceedings, whether they understood the consequences of accepting voluntary departure and waiving appeal, and whether they knowingly and voluntarily intended to accept voluntary departure.

Reopening may be particularly advantageous when the noncitizen seeks to pursue an application for relief that was not previously filed or has only recently become available. In such circumstances, the motion may serve not only to challenge whether the noncitizen knowingly and voluntarily accepted voluntary departure but also to request an opportunity to pursue the underlying claim for relief. For example, evidence concerning the noncitizen's understanding of the voluntary departure order and the circumstances surrounding its acceptance may support reopening, while a proposed application for relief may establish the substantive basis for seeking a different outcome. Practitioners should identify the specific relief sought and submit the required supporting evidence, including any proposed application and accompanying documentation, as appropriate.

The timing of the motion is particularly important because the deadline for seeking reopening and the period for avoiding the penalties associated with failure to depart voluntarily are distinct. A motion to reopen generally must be filed within 90 days of the final administrative decision.[116] In this context, where the respondent waives appeal, the IJ's decision becomes the final administrative decision at the time of the waiver, even though the respondent has been granted a separate period in which to depart voluntarily.[117] The alternate removal order, however, does not become effective merely because the IJ's decision has become final. When the respondent is granted voluntary departure, the alternate removal order generally remains inoperative during the voluntary departure period and becomes effective when that period expires if the respondent has not departed, subject to circumstances that may terminate voluntary departure earlier.[118] Thus, a respondent who remains in the United States after the voluntary departure period expires may still be within the 90-day period for filing a motion to reopen calculated from the final administrative decision, but the respondent may already have become subject to the penalties

[115] *See* INA § 240(c)(7)(B); 8 CFR §§ 1003.23(b)(3), 1003.2(c)(1).
[116] *See* 8 CFR §§ 1003.23(b)(1), 1003.2(c)(2).
[117] *See* 8 CFR § 1003.39.
[118] *See* 8 CFR § 1240.26(c)(3)(iii), (d), (e)(1)–(2).

under INA § 240B(d) for failing to depart within the authorized voluntary departure period.[119] This distinction matters when the respondent seeks reopening to pursue relief that is subject to the penalties under § 240B(d). Once those penalties attach, the respondent may be barred from seeking relief such as cancellation of removal or adjustment of status unless the respondent can establish that the penalties do not apply under the circumstances.[120] Thus, a respondent may still be timely for purposes of the 90-day deadline for filing a motion to reopen but nevertheless face a separate statutory bar to pursuing the underlying relief because the voluntary departure period has expired without departure. By contrast, if the noncitizen files a post-decision motion to reopen before the voluntary departure period expires, the motion automatically terminates the grant of voluntary departure and the alternate removal order takes effect, but the penalties for failure to depart under § 240B(d) do not apply.[121]

Practitioners should evaluate not only whether a motion to reopen can be timely filed, but also whether it should be filed before the voluntary departure period expires. As with a motion to reconsider, filing a motion to reopen during the voluntary departure period automatically terminates voluntary departure and triggers the alternate order of removal, rendering that order immediately executable absent a stay. At the same time, filing during the voluntary departure period preserves the regulatory exception to the penalties for failure to depart.[122] Practitioners must therefore weigh the potential benefits of pursuing reopening against the immediate risk of removal and, where appropriate, seek an administrative or judicial stay of removal.

V. Conclusion

A noncitizen's decision to leave through pre-conclusion voluntary departure should not become an irrevocable surrender of appellate rights unless that decision was truly knowing, intelligent, and voluntary. The growing use of pre-conclusion voluntary departure makes it increasingly important for practitioners to evaluate the circumstances surrounding appeal waivers and act quickly when their validity is in question. Where an appeal waiver was invalid, practitioners must identify potential challenges, choose the appropriate procedural vehicle, and take steps to prevent removal while the challenge is pending.

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[119] *See Matter of Ontiveros-Diaz*, 30 I&N Dec. 222, 223–26 (BIA 2026).
[120] For a more detailed discussion of the penalties for failure to depart voluntarily and the circumstances in which those penalties should or should not apply, *see* American Immigration Council, *Voluntary Departure: When the Consequences of Failing to Depart Should and Should Not Apply* (updated Dec. 21, 2017), https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/voluntary_departure_when_the_consequences_of_failing_to_depart_should_and_should_not_apply.pdf.
[121] *See* 8 CFR § 1240.26(e)(1).
[122] *See* 8 CFR § 1240.26(b)(3)(iii), (c)(3)(iii).

Sample Addendum to Form EOIR-26, Notice of Appeal from a Decision of an Immigration Judge

LAST NAME, First name A# XXX-XXX-XXX

The Board has jurisdiction to consider the validity of Respondent's purported waiver of appeal made in connection with pre-conclusion voluntary departure. *See Matter of Patino*, 23 I&N Dec. 74, 76 (BIA 2001) (recognizing the Board's authority to review the validity of an appeal waiver and proceed to the substance of an appeal if the waiver is invalid and the Board otherwise has jurisdiction).

Respondent respectfully requests that the Board find the purported waiver of appeal invalid. A waiver of the right to appeal must be knowing, intelligent, and voluntary. *Id.* Where, as here, a noncitizen is unrepresented, a waiver of appeal is not knowingly and intelligently made unless the Immigration Judge (IJ) "adequately convey[s] both the alien's appeal options and the finality associated with waiving appeal." *Matter of Rodriguez-Diaz*, 22 Dec. 1320, 1323 (BIA 2000). Whether a waiver satisfies this standard must be evaluated in light of the totality of the circumstances. The IJ erred in accepting Respondent's purported waiver because, considering the totality of the circumstances, Respondent did not knowingly, intelligently, and voluntarily relinquish the right to appeal. The attached hearing transcript prepared from the Digital Audio Recording (DAR), together with the remaining administrative record, demonstrates that Respondent did not knowingly, intelligently, and voluntarily relinquish the right to appeal. The relevant portions of the hearing transcript and administrative record are identified.

Background

[Include relevant facts]

Issues on Appeal

1. **The IJ Failed to Obtain an Express Waiver of Respondent's Right to Appeal.**

Include this section if the IJ did not obtain an express waiver of appeal or the language used was ambiguous.

A respondent must expressly waive the right to appeal before an IJ may grant pre-conclusion voluntary departure. *Matter of Ocampo*, 22 I&N Dec. 1301 (BIA 2000). The waiver must reflect a clear relinquishment of the right to appeal; an ambiguous response or agreement to accept the IJ's decision as "final" may not suffice where the respondent was not adequately informed of the right to appeal and the consequences of waiving it.

If Respondent appeared pro se [Additional care is required when a respondent appears without counsel. *See Matter of Rodriguez-Diaz*, 22 I&N Dec. 1320, 1323 (BIA 2000).]

Here, [describe what the IJ asked and how Respondent answered, including any ambiguity in the exchange and whether the IJ explained the right to appeal and the consequences of waiving it]. The relevant exchange appears at [hearing transcript page and line numbers] and [corresponding DAR timestamp]**.** Respondent's statements did not establish a clear, express waiver of the right to appeal. It was therefore error for the IJ to accept the purported waiver.

2. The IJ Failed to Address Respondent's Apparent Eligibility for Relief and to Develop the Record.

Include this section if the record contained facts suggesting potential eligibility for relief that the IJ failed to address before accepting the waiver.

The IJ failed to adequately address Respondent's apparent eligibility for relief before accepting the waiver. Under 8 C.F.R. § 1240.11(a)(2), the IJ must inform a respondent of apparent eligibility for relief and provide an opportunity to apply. In addition, an IJ has a duty to fully develop the record, including by making the factual inquiries necessary to identify and evaluate potential claims for relief supported by the record. *See Quintero v. Garland*, 998 F.3d 612, 621–25 (4th Cir. 2021) (holding that IJs have a legal duty to fully develop the record in all cases and explaining that the scope of that duty depends on the circumstances of the case, including the respondent's characteristics and the forms of relief sought).

Here, [identify the relief for which Respondent may have been eligible and the facts in the record that put the IJ on notice]. See [Hearing Transcript at __; DAR at __]. The IJ did not adequately inquire into those facts, identify the potential relief, or ensure that Respondent had a meaningful opportunity to understand and pursue it before accepting the waiver. Respondent was therefore not adequately informed of the potential relief available before agreeing to voluntary departure and waiving appeal.

3. Respondent Did Not Unequivocally Accept Voluntary Departure

Include this section if Respondent misunderstood the length or conditions of voluntary departure, the effect of failing to depart, or other material terms.

Respondent's purported waiver was not knowing and intelligent because Respondent did not understand the material terms or consequences of voluntary departure. Specifically, [describe the misunderstanding, inaccurate advisal, discrepancy between the IJ's oral explanation and written order, or other relevant facts]. This misunderstanding affected Respondent's decision to accept voluntary departure and relinquish the right to appeal.

4. Respondent Did Not Have Meaningful Language Access.

Include this section if interpretation or language barriers affected Respondent's ability to understand the proceedings or waiver.

Respondent could not meaningfully understand the IJ's advisals or communicate with the Court because [describe the language barrier, interpretation problem, dialect mismatch, or translation error]. Despite [describe any indication that Respondent was having difficulty understanding or communicating], the IJ failed to take adequate steps to ensure that Respondent could understand the proceedings and meaningfully participate. As a result, Respondent did not have a meaningful opportunity to understand the right to appeal or the consequences of relinquishing it. The record therefore does not establish that Respondent knowingly, intelligently, and voluntarily waived appeal.

5. Respondent Was Denied a Meaningful Opportunity to Obtain Counsel.

Include this section if Respondent was not given a reasonable opportunity to consult or retain counsel, or the IJ failed to obtain a valid waiver of counsel.

Respondent was not afforded a meaningful opportunity to obtain counsel before being asked to accept voluntary departure and waive appeal. Specifically, [describe Respondent's request for counsel, the time provided to seek counsel, or the IJ's failure to inquire whether Respondent wished to proceed without counsel]. These circumstances undermined Respondent's ability to make an informed decision about relinquishing appellate rights.

6. The IJ Failed to Adequately Account for Respondent's Mental Health, Cognitive Limitations, or Age Before Accepting the Waiver.

Include this section if Respondent's age, mental health, or cognitive limitations raised questions about their ability to understand the waiver.

Under *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011), when the record contains indicia of mental incompetency, the IJ must conduct an appropriate inquiry and, if necessary, provide safeguards to ensure that the respondent can meaningfully participate in the proceedings. Although competency to participate in proceedings and the ability to knowingly and intelligently waive appeal are distinct inquiries, evidence of mental health conditions, cognitive limitations, or developmental immaturity may bear on whether a respondent understood the significance of relinquishing appellate rights.

At the time of the waiver, Respondent [describe relevant age, mental health condition, cognitive limitation, or observed difficulty understanding the proceedings]. The IJ [describe any failure to inquire into competency or provide appropriate safeguards despite indicia of mental incompetency]. These circumstances raise substantial questions about whether Respondent understood the right to appeal and the consequences of relinquishing it. Accordingly, the record does not establish that Respondent knowingly and intelligently waived appeal.

7. Respondent's Waiver Was the Product of Coercion, Undue Pressure, or Material Misrepresentation.

Include this section if the circumstances surrounding the decision to accept voluntary departure undermined Respondent's ability to choose freely.

Respondent's decision to waive appeal was not voluntary under the circumstances and in light of the respondent's previously discussed vulnerabilities. Specifically, [describe statements by the IJ, DHS, or other individuals; pressure associated with continued detention; threats or misleading representations; financial incentives; or other circumstances affecting Respondent's decision]. Where these circumstances are reflected in the hearing proceedings, cite the relevant hearing transcript pages and lines and corresponding DAR timestamps. Where they depend on evidence outside the administrative record, identify and cite the supporting declaration or other documentation. In light of the totality of the circumstances, Respondent's decision was not a free and voluntary relinquishment of appellate rights.

8. Prior Counsel's Ineffective Assistance Undermined the Validity of Respondent's Waiver.

Include this section if prior counsel's conduct contributed to Respondent's decision to accept voluntary departure or waive appeal. Practitioners should address the applicable requirements under Matter of Lozada.

Prior counsel provided ineffective assistance by [describe counsel's deficient conduct, such as failing to explain the right to appeal, misrepresenting the consequences of voluntary departure, or failing to advise Respondent of potential relief]. Had Respondent received competent advice, [explain how Respondent would have acted differently]. This deficient representation prejudiced Respondent by causing them to relinquish the right to appeal without an adequate understanding of their options.

Respondent satisfies the requirements for asserting ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988). Specifically, Respondent has submitted (1) a declaration describing the agreement with prior counsel and the specific representations or actions that constituted ineffective assistance; (2) evidence that prior counsel was notified of the allegations and given an opportunity to respond, along with counsel's response or an explanation that no response was received; and (3) [a copy of the disciplinary complaint filed with the appropriate bar authority or an explanation for why no complaint was filed]. These materials establish Respondent's compliance with the procedural requirements of *Lozada*.