

PRACTICE ADVISORY

Administrative Removal under 238(b): Questions and Answers

February 16, 2017

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Practice Advisories published by the National Immigration Project of the National Lawyers Guild and Immigrant Defense Project address select substantive and procedural immigration law issues faced by attorneys, legal representatives, and noncitizens.

They are based on legal research and may contain potential arguments and opinions of the author. Practice Advisories are intended to alert readers of legal developments, assist with developing strategies, and/or aid in decision making.

This practice advisory and sample materials are NOT meant to replace independent legal advice provided by an attorney familiar with a client's case.

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Introduction¹

“Administrative removal” is a summary procedure pursuant to § 238(b) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1228(b) that occurs without a hearing before an immigration judge. It applies to noncitizens, other than lawful permanent residents, who are convicted of aggravated felonies. Administrative removals accounted for roughly 9,217 removals in 2013,² but its use may increase under the Trump Administration.

In question and answer format, this practice advisory provides an overview of the administrative removal statute and implementing regulations, as well as some of the problems with this form of removal. The advisory also includes a sample Notice of Intent to Issue a Final Administrative Removal Order, a sample Final Administrative Removal Order, a sample response to a Notice of Intent, and a sample Petition for Review.

1. What is “administrative removal” and which noncitizens are covered?

The immigration statute allows the Department of Homeland Security (DHS) to expeditiously remove non-permanent residents convicted of an aggravated felony without a hearing before an immigration judge. 8 U.S.C. § 1228(b), INA § 238(b). It covers any noncitizen who is not lawfully admitted for permanent residence when proceedings are initiated including conditional lawful permanent residents,³ 8 U.S.C. § 1228(b)(2)(B), INA § 238(b)(2)(B), and noncitizens who have not been admitted or paroled. 8 C.F.R. § 238.1(b)(1)(iv).

In contrast to removal proceedings before an immigration judge under 8 U.S.C. § 1229, INA § 240, there is neither a court hearing nor an impartial adjudicator in administrative removal. It is essentially a paper process, where the alleged noncitizen does not have a right to call witnesses, cross-examine the government’s witnesses, or make any sort of in-person argument to challenge DHS’ allegation or evidence that he or she has been

¹ This advisory was written by Sejal Zota, Dan Kesselbrenner, and Andrew Wachtenheim with valuable comments from Trina Realmuto. Questions about this advisory can be directed to Sejal Zota at sejal@nipnlg.org.

² See Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 Colum. J. of Race & L. 1, 4 (2014).

³ A person who obtains lawful permanent residence based on a recent marriage (less than two years old) or as an investor receives status on a conditional basis for two years. He or she can obtain unconditional permanent residence by following specific procedures.

convicted of an aggravated felony. 8 U.S.C. § 1228(b), INA § 238(b); 8 C.F.R. § 238.1. Instead a low-level DHS officer decides that the respondent is a noncitizen, is not a lawful permanent resident, and has an aggravated felony conviction. The statute bars a noncitizen from all discretionary relief from removal, such as asylum or adjustment of status. 8 U.S.C. § 1228(b)(5), INA § 238(b)(5). Once DHS issues the Final Administrative Removal Order, the noncitizen has no statutory right to file an administrative appeal. 8 U.S.C. § 1228(b)(3); INA § 238(b)(3). DHS can reopen or reconsider a Final Administrative Removal Order under 8 C.F.R. § 103.5.

2. What is the regulatory process for administrative removal?

- DHS initiates proceedings by serving Form I-851, Notice of Intent to Issue a Final Administrative Removal Order (Notice of Intent). *See* Appendix A for a sample Notice of Intent.
- The Notice of Intent contains the factual and legal allegations against the individual, including alienage, the date and statute of conviction, and the specific subsection of the aggravated felony definition charged. 8 C.F.R. § 238.1(b)(2)(i). The Notice of Intent must advise the respondent that he or she has the right to be represented at no expense to the government; may request withholding of removal or CAT; may inspect the evidence supporting the charge; and may rebut the charges. 8 C.F.R. § 238.1(b)(2)(i).
- The DHS officer must provide the noncitizen with a current list of the available free legal services programs. 8 C.F.R. § 238.1(b)(2)(iv).
- The DHS officer must determine that the person served is the person named on the Notice of Intent. 8 U.S.C. § 1228(b)(4)(D), INA § 238(b)(4)(D); 8 C.F.R. § 238.1(b)(2)(iii).
- The noncitizen has ten days to respond to the allegations in the Notice of Intent, or thirteen days if served by mail. 8 C.F.R. § 238.1(b)(2).⁴ At that time, the noncitizen, in her written response, must indicate which finding(s) are being challenged and

⁴ The United States Supreme Court and the Federal Rules of Appellate Procedure treat the date that a pro se prisoner's appeal entered the prison mail system as the filing date. *Houston v. Lack*, 487 U.S. 266 (1988) (creating "prison mailbox" rule); Fed. R. App. P. 25(a)(2)(C) (applying "prison mailbox" rule to all appellate filings). Although the Board of Immigration Appeals does not follow it, four circuits have applied the "prison mailbox" rule to immigration detainees in immigration proceedings. *Compare Matter of J-J-*, 21 I&N Dec. 976, 982-83 (BIA 1997) *with Chavarria-Reyes v. Lynch*, 845 F.3d 275, 278 (7th Cir. 2016); *Barrientos v. Lynch*, 829 F.3d 1064, 1068 (9th Cir. 2016); *Smith v. Conner*, 250 F.3d 277, 279 n.11 (5th Cir. 2001) (dictum); *Arango-Aradondo v. INS*, 13 F.3d 610, 612-13 (2d Cir. 1994).

attach any documents in support of her response, including affidavit(s), documentary information, or other specific evidence supporting the challenge.

- A DHS officer other than the charging officer must decide whether deportability is established, 8 U.S.C. § 1228(b)(4)(F), INA § 238(b)(4)(F); 8 C.F.R. § 238.1(a), by clear, convincing, and unequivocal evidence.⁵ 8 C.F.R. § 238.1(d)(1)&(2)(i). If the officer finds that the charges establish deportability, the officer will issue and serve on the respondent a Final Administrative Removal Order (Form I-851A). *See* Appendix B for a sample Order.
- If the person expresses a fear of return in the course the proceedings, after issuing a Final Administrative Removal Order, DHS must refer the person to an asylum officer for a reasonable fear interview. 8 C.F.R. §§ 238.1(f)(3); 208.31. *See infra* Question 7 for further discussion of reasonable fear proceedings.
- DHS must maintain a record of the entire proceeding for judicial review. 8 U.S.C. § 1228(b)(4)(E), INA § 238(b)(4)(E); 8 C.F.R. §§ 238.1(h).
- If the deciding officer finds that deportability is not established, he or she shall terminate the proceedings, and where appropriate, serve a Notice to Appear to begin removal proceedings before an immigration judge. 8 C.F.R. § 238.1(d)(2)(iii).

3. What rights does a person in administrative removal proceedings have?

- ***Counsel.*** A respondent in administrative removal has the right to be represented at his or her own expense. 8 U.S.C. § 1228(b)(4)(B); INA § 238(b)(4)(B). Accordingly, the implementing regulations require that DHS provide the noncitizen with a list of the available free legal services programs. 8 C.F.R. § 238.1(b)(2)(iv).
- ***Translation/Interpretation.*** DHS must translate or orally interpret the Notice of Intent in a language the respondent understands. 8 C.F.R. § 238.1(b)(2)(v).
- ***Inspection of evidence.*** The respondent has the right to ask to inspect DHS's evidence of removability related to both alienage and the charged criminal conviction, including documents establishing the existence of the conviction (i.e., a record of judgment or plea or other documents enumerated in 8 C.F.R. § 1003.41 that the government may file to prove conviction under a criminal statute). Such a request extends the deadline for the noncitizen's rebuttal to ten days following the service of DHS' evidence. 8 U.S.C. § 1228(b)(4)(C); INA § 238(b)(4)(C); 8 C.F.R. §

⁵ This standard is actually more stringent than that for section 240 removal proceedings, which requires only "clear and convincing" evidence.

238.1(c)(2)(ii). The respondent may also seek an extension of time for his or her response and should state the specific reasons for requesting an extension. 8 C.F.R. § 238.1(c)(1).

- **Judicial review.** A noncitizen ordered removed through administrative removal may seek judicial review by filing a petition to review (PFR) within 30 days of the Final Administrative Removal Order with the appropriate U.S. court of appeals.⁶ 8 U.S.C. § 1228(b)(3); INA § 238(b)(3); 8 U.S.C. §§ 1252(a)(1), (b)(1); INA § 242(a)(1), (b)(1). Unlike any other types of removal orders, DHS may not deport an individual who has a Final Administrative Removal Order for 14 days after the order is issued so that the noncitizen has an opportunity to seek judicial review. 8 U.S.C. § 1228(b)(3); INA § 238(b)(3); 8 C.F.R. § 238.1(f)(1). See Appendix D for sample PFR. *See infra* Question 8 for further discussion about PFR deadlines.

4. What defenses can a noncitizen raise to the Notice of Intent?

Both the Notice of Intent and regulations permit the noncitizen to request an opportunity to review DHS' evidence, 8 C.F.R. § 238.1(c)(2)(ii), and to submit a written response rebutting the allegations supporting the removal charge. 8 C.F.R. § 238.1(c)(1)&(2).

In responding to the Notice of Intent, the respondent should first request the opportunity to review DHS' evidence. This may lead to arguments against removal, and will extend the noncitizen's time for a response to the charges. 8 C.F.R. § 238.1(c)(2)(ii). *See* Appendix C for a sample response to a Notice of Intent.

In rebutting the allegations, the respondent, for example, could argue that there is insufficient evidence to establish that she is not a United States citizen. If the respondent is a United States citizen or lawful permanent resident, she should argue that DHS cannot use administrative removal proceedings at all. The respondent also could argue that she was not convicted of the charged offense. The Notice of Intent and regulations, however, do not specifically indicate that a respondent may raise a *legal* argument that the offense of conviction does not qualify as the type of aggravated felony offense charged. That argument is reviewable by a court of appeals in a PFR and is worth raising since non-lawyer DHS officers are ill-equipped to analyze the nuanced immigration consequences of a crime and mistakenly allege that convictions are aggravated felonies when they are

⁶ For further information on how to file and litigate a petition for review, *see* the American Immigration Council's practice advisory entitled, "How to File a Petition for Review," located at: http://www.americanimmigrationcouncil.org/sites/default/files/lac_pa_041706.pdf

not. *See infra* Question 5 for further discussion about erroneous aggravated felony determinations.

While failure to make the legal argument before DHS arguably should not preclude the court of appeals from reviewing it, at least two courts have held that failure to present the argument renders it unexhausted and therefore unreviewable. *See Malu v. U.S. Atty. Gen.*, 764 F.3d 1282, 1287-89 (11th Cir. 2014); *Escoto–Castillo v. Napolitano*, 658 F.3d 864, 866 (8th Cir. 2011). Therefore, noncitizens should make any legal challenges before DHS as well.

If the deciding officer finds that removability is clearly established by the evidence, the officer shall serve the noncitizen with a Final Administrative Removal Order. 8 C.F.R. § 238.1(d)(1)&(2). If the deciding officer finds there is insufficient evidence for a removal order, DHS will terminate proceedings and, where appropriate, serve a Notice to Appear to begin removal proceedings before an immigration judge. 8 C.F.R. § 238.1(d)(2)(iii).

A noncitizen in administrative removal is ineligible to apply for any discretionary relief from removal. 8 U.S.C. § 1228(b)(5), INA § 238(b)(5). Thus, individuals would be unable to apply for:

- adjustment of status. *See* 8 U.S.C. § 1255(a); INA § 245(a); *Matter of Michel*, 21 I&N Dec. 1101 (BIA 1998) (holding that a noncitizen with an aggravated felony conviction is not precluded from applying for adjustment of status).
- waiver of inadmissibility under INA § 212(h), 8 U.S.C. § 1182(h). *See id.* (holding that a noncitizen not previously admitted for lawful permanent residence and convicted of an aggravated felony is statutorily eligible for a § 212(h) waiver).
- U- or T-nonimmigrant status for victims of human trafficking and violent crime, including domestic violence.⁷ *See* 8 U.S.C. §§ 1182(d)(13)&(14); INA §§ 212(d)(13)&(14).

However, through advocacy, and where the person would be eligible for relief in removal proceedings, counsel is sometimes able to persuade DHS to terminate the administrative

⁷ Even though the Immigration Court does not have jurisdiction to grant these forms of relief, the Immigration Judge can administratively close proceedings or continue hearings in order for Citizenship and Immigration Services (CIS) to adjudicate the visa application.

removal proceedings and place the client in removal proceedings before an immigration judge to apply for such relief.

5. What are the due process concerns in administrative removal?

The due process concerns that might arise include, but are not limited to:

- Lack of a full and fair hearing;
- Lack of an impartial adjudicator;
- Lack of meaningful opportunity to present and rebut evidence;
- Lack of a meaningful opportunity to call or cross-examine witnesses;
- Inability to develop an adequate administrative record;
- Failure to serve the administrative removal order;
- Failure to provide a list of the available free legal services programs;
- Lack of notice and opportunity to be heard based on DHS' failure to interpret/translate the Notice of Intent;
- Lack of lawful evidence of alienage;
- Right to counsel issues, including lack of access to counsel during the administrative removal process because of the limited window to defend the charge, and lack of notice to existing counsel in violation of 8 C.F.R. § 292.5;
- Lack of notice of the right to seek federal court review;
- Unlawful removal prior to the fourteen-day stay where not waived; and
- Erroneous aggravated felony determination. Anecdotal data indicates that non-lawyer DHS officers regularly make erroneous determinations as to whether the offense of conviction is classifiable as an aggravated felony. Determining whether a particular conviction is an aggravated felony involves a complex and legally dense analysis that generally involves close scrutiny of the elements of the statute of conviction. Not surprisingly, courts have overturned DHS's determinations. *See, e.g., Rodriguez-Celaya v. Atty. Gen. of the U.S.*, 597 Fed. Appx. 79, 82 (3d Cir. 2015) (finding in the context of a petition for review from an administrative removal order that neither of petitioner's two convictions qualified as an aggravated felony basis); *United States v. Reyes*, 907 F. Supp. 2d 1068 (N.D. Cal. 2012) (finding in the context of an illegal reentry prosecution that defendant erroneously charged with and deported under § 1228(b) for possession of a short-barreled shotgun and wrongly deprived of the opportunity to apply for voluntary departure). In cases where a noncitizen files a PFR based on a meritorious argument that the offense is not an aggravated felony, the government will often attempt to avoid a helpful circuit decision on the issue either

by asking the court to remand the case to DHS or DHS will cancel the Final Order and place the noncitizen in § 240 removal proceedings before an immigration judge.

Federal courts have generally held the administrative removal scheme comports with the minimum requirements of due process. *See United States v. Benitez-Villafuerte*, 186 F.3d 651, 657-58 (5th Cir. 1999); *United States v. Garcia-Martinez*, 228 F.3d 956, 960-63 (9th Cir. 2000); *United States v. Rangel de Aguilar*, 308 F.3d 1134, 1138 (10th Cir. 2002); *Graham v. Mukasey*, 519 F.3d 546, 551-52 (6th Cir. 2008). However, noncitizens in the context of a PFR or criminal illegal reentry prosecution have successfully challenged specific due process violations in their administrative removal cases where they could establish prejudice. *See, e.g., United States v. Cisneros-Rodriguez*, 813 F.3d 748, 762 (9th Cir. 2015) (reversing illegal reentry conviction and finding underlying administrative removal order “fundamentally unfair” where DHS officer obtained invalid waiver of defendant’s right to counsel and defendant was thereby wrongly deprived of the opportunity to apply for a U-visa before an immigration judge).

6. What are the problems with the Notice of Intent charging document?

The Notice of Intent does not advise noncitizens that they may challenge the aggravated felony designation. *See, e.g., Valdiviez-Hernandez v. Holder*, 739 F.3d 184, 187 (5th Cir. 2013); *Etienne v. Lynch*, 813 F.3d 135, 141-42 (4th Cir. 2015). It is a check-the-box form, and offers three options for contesting deportability as follows:

- “I am a citizen or national of the United States”;
- “I am a lawful permanent resident of the United States”; or
- “I was not convicted of the criminal offense described in allegation number 6 above.”

The absence of a place on the form to challenge DHS’s determination that the conviction is an aggravated felony, which may be the most common basis for contesting deportability in administrative removal, denies noncitizens of notice of the opportunity to raise such challenges.

Further, prior to August 1, 2007, Notices of Intent affirmatively misadvised noncitizens about the deadline for filing a petition for review. The form incorrectly stated that a person subject to administrative removal only had 14 (not 30) days to seek judicial review. This due process concern may provide a basis to challenge an illegal reentry prosecution following a § 238 removal. *See, e.g., United States of America v. Walkes*, No. 15-10396-ADB, 2017 WL 374466 (D. Mass. Jan. 25, 2017).

7. What if the noncitizen fears persecution or torture in his or her country of nationality?

If the noncitizen articulates a fear of return in the course of administrative removal proceedings, after DHS issues a Final Administrative Removal Order, the officer must refer the person to an asylum officer for a reasonable fear determination. 8 C.F.R. § 238.1(f)(3). If an asylum officer finds the noncitizen has a “reasonable fear” of persecution or torture, the officer will refer the case to an immigration judge for adjudication (but only on the withholding/CAT claim). 8 C.F.R. §§ 208.31(e); 1208.31(e). If the immigration judge (IJ) denies the application, the person may appeal the IJ’s decision to the Board of Immigration Appeals (BIA). *Id.*

If the asylum officer determines the person *did not* establish a reasonable fear of persecution, the noncitizen may seek review of that determination by an IJ. 8 C.F.R. §§ 208.31(f), (g); 1208.31(f), (g). If the IJ disagrees with the asylum officer’s determination, the person then may apply for withholding and CAT relief. 8 C.F.R. §§ 208.31(g)(2); 1208(g)(2). If the IJ agrees with the asylum officer’s determinations, the person cannot appeal to the BIA. 8 C.F.R. §§ 208.31(g)(1); 1208.31(g)(1).

The noncitizen may seek review of the withholding of removal determination in a petition for review. *See, e.g., Andrade-Garcia v. Lynch*, 828 F.3d 829 (9th Cir. 2016).

8. When does the 30-day petition for review clock begin in administrative removal?

The 30-day clock begins to run from the date DHS issues the Final Administrative Removal Order. Courts construe this deadline as jurisdictional and will not exercise jurisdiction over an untimely petition for review (PFR). The reviewing court will treat the date the prisoner files the petition in the prison mail system as the filing date. Fed. R. App. P. 25(a)(2)(C). A respondents or her counsel should be aware that DHS does not always serve or timely serve the final order on the respondent or counsel. This failure to serve the respondent violates DHS’ own regulations. *See* 8 C.F.R. §§ 238.1(d)(1), (2)(i), & 2(ii)(B) (where the evidence establishes deportability or the noncitizen concedes deportability, the deciding DHS officer “shall issue and cause to be served upon the noncitizen a Final Administrative Removal Order that states the reasons for the deportation decision”).

Where the respondent wants to file a PFR and is served after the 30-day clock has already run, she should argue that the 30 days should not commence until she learns or is served with the Final Order. *See, e.g., Villegas de la Paz v. Holder*, 640 F.3d 650, 654-55 (6th Cir. 2010) (holding that where DHS did not serve the reinstatement order on counsel during the 30-day window for filing a PFR, the 30-day clock did not start until DHS

served the order); *Radkov v. Ashcroft*, 375 F.3d 96, 99 (1st Cir. 2004) (“The time for filing a review petition begins to run when the BIA complies with the terms of the applicable regulations by mailing its decision to a petitioner’s address of record.”) (citations omitted). If counsel learns that DHS has issued an administrative removal order, but is not able to obtain the order, counsel should still file a PFR within the 30-day window even if he or she does not have a copy of the order to attach to the petition (as required by 8 U.S.C. § 1252(c), INA § 242(c)). The PFR should detail efforts to obtain the order, let the court know that counsel will file a copy of the order once DHS provides it, and/or ask the court to order DHS to produce the order.

When does the 30-day petition for review clock begin if the person is in reasonable fear proceedings? At least four circuits have held that the PFR deadline does not begin to run until the conclusion of reasonable fear proceedings. *See Ortiz-Alfaro v. Holder*, 694 F.3d 955, 958 (9th Cir. 2012) (holding “that where an alien pursues reasonable fear and withholding of removal proceedings following the reinstatement of a prior removal order, the reinstated removal order does not become final [for petition for review purposes] until the reasonable fear of persecution and withholding of removal proceedings are complete”); *Luna-Garcia v. Holder*, 777 F.3d 1182, 1186 (10th Cir. 2015); *Jimenez-Morales v. U.S. Atty. Gen.*, 821 F.3d 1307, 1308 (11th Cir. 2016); *Ponce-Osorio v. Johnson*, 824 F.3d 502, 506-07 (5th Cir. 2016). Outside these circuits, filing a petition for review within 30 days of the reinstatement order (even if reasonable fear proceedings are ongoing) may be necessary to safeguard an individual’s right to judicial review.

9. Does Filing a Petition for Review Stay the Respondent’s Removal?

Filing a petition for review does not stay the respondent’s removal. 8 U.S.C. § 1252(b)(3)(B); INA § 242(b)(3)(B). A court of appeals can stay the removal order, however. *Id.*⁸ If a respondent is serving a state or federal sentence, DHS cannot execute the order until the prison releases the noncitizen. *See* 8 U.S.C. § 1231(a)(4); INA § 241(a)(4) (stating rule and identifying narrow exceptions).

10. Why do some jurisdictions use this procedure very seldom and others more frequently?

DHS is not required to place noncitizens in administrative removal, but may elect to do so where a non-permanent resident is deportable for an aggravated felony conviction. It is

⁸ DHS has the authority to stay an order of removal. 8 C.F.R. § 241.6. That being said, it is very unlikely that DHS would stay an administrative removal order.

unclear whether there is a policy in place on its use,⁹ but there is a disparity in its use by jurisdiction. For example, in 2013, 915 Final Order of Administrative Removal were issued out of San Francisco, but only 3 out of Newark.¹⁰

* * *

If you need assistance with an administrative removal case, please contact Sejal Zota at sejal@nipnlg.org.

⁹ NIPNLG has filed a FOIA in an effort to obtain any policy that might exist.

¹⁰ These numbers are based on FOIA documents obtained from DHS.

Appendix A

Notice of Intent to Issue a Final Administrative Removal Order

In removal proceedings under section 238(b) of the Immigration and Nationality Act

FIN # 1124108023

Event No: CLM1211000132

To: [Redacted]

Address: [Redacted]

(Number, Street, City, State and ZIP Code)

Telephone: [Redacted]
(Area Code and Phone Number)

Pursuant to section 238(b) of the Immigration and Nationality Act (Act) as amended, 8 U.S.C. 1228(b), the Department of Homeland Security (Department) has determined that you are amenable to administrative removal proceedings. The determination is based on the following allegations:

1. You are not a citizen or national of the United States.
2. You are a native of [Redacted] and a citizen of [Redacted]
3. You entered the United States (at)(near) [Redacted] on or about [Redacted]
4. At that time you entered [Redacted]
5. You are not lawfully admitted for permanent residence.
6. You were, on [Redacted], convicted in the [Redacted] Court [Redacted] for the offense of BURGLARY in violation of [Redacted] for which the term of imprisonment imposed was [Redacted]

Charge:

You are deportable under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. 1227(a)(2)(A)(iii), as amended, because you have been convicted of an aggravated felony as defined in section 101(a)(43)(G) of the Act, 8 U.S.C. 1101(a)(43)(G).

Based upon section 238(b) of the Act, 8 U.S.C. 1228(b), the Department is serving upon you this NOTICE OF INTENT TO ISSUE A FINAL ADMINISTRATIVE REMOVAL ORDER ("Notice of Intent") without a hearing before an Immigration Judge.

Your Rights and Responsibilities:

You may be represented (at no expense to the United States government) by counsel, authorized to practice in this proceeding. If you wish legal advice and cannot afford it, you may contact legal counsel from the list of available free legal services provided to you.

You must respond to the above charges in writing to the Department address provided on the other side of this form within 10 calendar days of service of this notice (or 13 calendar days if service is by mail). The Department must RECEIVE your response within that time period.

In your response you may: request, for good cause, an extension of time; rebut the charges stated above (with supporting evidence); request an opportunity to review the government's evidence; admit deportability; designate the country to which you choose to be removed in the event that a final order of removal is issued (which designation the Department will honor only to the extent permitted under section 241 of the Act, 8 U.S.C. 1231); and/or, if you fear persecution in any specific country or countries on account of race, religion, nationality, membership in a particular social group, or political opinion or, if you fear torture in any specific country or countries, you may request withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), or withholding/deferral of removal under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention Against Torture). A grant of withholding or deferral of removal would prohibit your return to a country or countries where you would be persecuted or tortured, but would not prevent your removal to a safe third country.

You have the right to remain in the United States for 14 calendar days so that you may file a petition for review of this order to the appropriate U.S. Circuit Court of Appeals as provided for in section 242 of the Act, 8 U.S.C. 1252. You may waive your right to remain in the United States for this 14-day period. If you do not file a petition for review within this 14-day period, you will still be allowed to file a petition from outside of the United States so long as that petition is filed with the appropriate U.S. Circuit Court of Appeals within 30 calendar days of the date of your final order of removal.

[Redacted Signature]
(Signature and Title of Issuing Officer)

[Redacted]
(City and State of Issuance)

[Redacted]
(Date and Time)

Certificate of Service

I served this Notice of Intent. I have determined that the person served with this document is the individual named on the other side of the form.

[Redacted Signature]

(Signature and Title of Officer)

[Redacted Date]

(Date and Manner of Service)

IN PERSON

I explained and/or served this Notice of Intent to the alien in the _____ language.

(Name of Interpreter)

(Signature of Interpreter)

Location/Employer:

I Acknowledge that I Have Received this Notice of Intent to Issue a Final Administrative Removal Order.

[Redacted Signature]

(Signature of Respondent)

[Redacted Date]

(Date and Time)

The alien refused to acknowledge receipt of this document.

(Signature and Title of Officer)

(Date and Time)

I Wish to Contest and/or to Request Withholding of Removal

I contest my deportability because: (Attach any supporting documentation)

- I am a citizen or national of the United States.
- I am a lawful permanent resident of the United States.
- I was not convicted of the criminal offense described in allegation number 6 above.
- I am attaching documents in support of my rebuttal and request for further review.

I request withholding or deferral of removal to _____ [Name of Country or Countries]:

- Under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), because I fear persecution on account of my race, religion, nationality, membership in a particular social group, or political opinion in that country or those countries.
- Under the Convention Against Torture, because I fear torture in that country or those countries.

(Signature of Respondent)

(Printed Name of Respondent)

(Date and Time)

I Do Not Wish to Contest and/or to Request Withholding of Removal

I admit the allegations and charge in this Notice of Intent. I admit that I am deportable and acknowledge that I am not eligible for any form of relief from removal. I waive my right to rebut and contest the above charges. I do not wish to request withholding or deferral of removal. I wish to be removed to _____

I understand that I have the right to remain in the United States for 14 calendar days in order to apply for judicial review. I do not wish this opportunity. I waive this right.

[Redacted Signature]

(Signature of Witness)

[Redacted Name]

(Printed Name of Respondent)

[Redacted Name]

(Printed Name of Witness)

[Redacted Date]

(Date and Time)

[Redacted Date]

(Date and Time)

**RETURN THIS FORM TO:
Department Of Homeland Security**

ATTENTION:

The Department office at the above address must **RECEIVE** your response within 10 calendar days from the date of service of this Notice of Intent (13 calendar days if service is by mail).

Appendix B

Final Administrative Removal Order

In removal proceedings under section 238(b) of the Immigration and Nationality Act

Event No: [Redacted]
FIN # [Redacted]
File Number [Redacted]
Date [Redacted]

To: [Redacted]

Address: [Redacted]
(Number, Street, City, State and ZIP Code)

Telephone: [Redacted]
(Area Code and Phone Number)

ORDER

Based upon the allegations set forth in the Notice of Intent to Issue a Final Administrative Removal Order and evidence contained in the administrative record, I, the undersigned Deciding Officer of the Department of Homeland Security, make the following findings of fact and conclusions of law. I find that you are not a citizen or national of the United States and that you are not lawfully admitted for permanent residence. I further find that you have a final conviction for an aggravated felony as defined in section 101(a)(43)(G) of the Immigration and Nationality Act (Act) as amended, 8 U.S.C. 1101(a)(43)(G), and are ineligible for any relief from removal that the Secretary of Homeland Security, may grant in an exercise of discretion. I further find that the administrative record established by clear, convincing, and unequivocal evidence that you are deportable as an alien convicted of an aggravated felony pursuant to section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. 1227(a)(2)(A)(iii). By the power and authority vested in the Secretary of Homeland Security, and in me as the Secretary's delegate under the laws of the United States, I find you deportable as charged and order that you be removed from the United States to:

[Redacted]

or to any alternate country prescribed in section 241 of the Act.

[Redacted Signature]
(Signature of Authorized Official)

(D) AFOD
(Title of Official)

[Redacted Date and Location]
(Date and Office Location)

Certificate of Service

I served this FINAL ADMINISTRATIVE REMOVAL ORDER upon the above named individual.

[Redacted Date, Time, Place and Manner of Service]

[Redacted Signature and Title of Officer]

SAMPLE - APPENDIX C

This response is not a substitute for independent legal advice supplied by a lawyer familiar with a client’s case. It is not intended as, nor does it constitute, legal advice. DO NOT TREAT THIS SAMPLE RESPONSE AS LEGAL ADVICE.

Response to Department of Homeland Security to Notice of Intent to Issue a Final Administrative Order under 8 U.S.C. § 1228(b); INA § 238(b)

In the Matter of _____, Respondent.

A Number _____

- A. Respondent asks to inspect the Department of Homeland Security’s (DHS) evidence of removability related to both alienage and the charged criminal offense, including documents establishing the existence of the conviction as permitted under 8 U.S.C. § 1228(b)(4)(C); INA § 238(b)(4)(C); 8 C.F.R. § 238.1(c)(2)(ii). This request extends the deadline for rebuttal to ten days following the service of DHS’ evidence. 8 U.S.C. § 1228(b)(4)(C); INA § 238(b)(4)(C); 8 C.F.R. § 238.1(c)(2)(ii). Respondent, thus, reserves the right to make additional arguments after inspecting DHS’ evidence.

- B. **(If applicable)** Respondent seeks an extension of time to secure counsel and prepare an additional response. 8 C.F.R. § 238.1(c)(2)(ii). The ten-day window to respond to the Notice of Intent is inadequate to meaningfully pursue Respondent’s right to counsel under 8 U.S.C. § 1228(b)(4)(B); INA § 238(b)(4)(B); 8 C.F.R. § 238.1(b)(2)(iv).

- C. DHS must establish deportability by clear, convincing, and unequivocal evidence. 8 C.F.R. § 238.1(d)(1)&(2)(i). In determining whether a conviction qualifies as an aggravated felony, generally the categorical approach applies. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1184 (2013). Under the categorical approach, the least of the acts criminalized under the statute of conviction must come within the elements of the generic aggravated felony provision. *Id.* Because DHS has not proven that every violation of the statute of conviction falls within the generic aggravated felony ground, it cannot establish deportability by clear, convincing, and unequivocal evidence. *See Matter of Chairez*, 26 I&N Dec. 819 (BIA 2016) (concluding that the evidence does not establish respondent’s removability for a conviction of an aggravated felony where it was unclear whether statute of conviction, which included reckless discharge of a firearm, was divisible).

- D. **(If applicable)** Respondent requests that DHS terminate the administrative removal proceedings and place the Respondent in removal proceedings before an immigration judge so that Respondent may apply for relief from removal, for which Respondent is eligible.

Dated: _____

Respectfully submitted,



APPENDIX D

SAMPLE

This response is not a substitute for independent legal advice supplied by a lawyer familiar with a client’s case. It is not intended as, nor does it constitute, legal advice. DO NOT TREAT THIS SAMPLE RESPONSE AS LEGAL ADVICE.

UNITED STATES COURTS OF APPEALS
FOR THE [REDACTED] CIRCUIT

[REDACTED] [NAME])

)

)

Petitioner)

)

)

v.)

)

Immigration File No.:

A [REDACTED]

)

JEFF SESSIONS, Attorney)

General of the United States;)

JOHN KELLY, U.S. Department)

Homeland Security, Secretary of)

Homeland Security¹)

)

)

Respondents)

PETITION FOR REVIEW OF DECISION ISSUED BY THE
DEPARTMENT OF HOMELAND SECURITY

¹ Pursuant to 8 U.S.C. § 1252(b)(3)(A), Petitioner lists the Attorney General as a respondent. However, as the Department of Homeland Security (“DHS”) issued the agency decision for which Petitioner seeks review, Petitioner also has listed the Secretary of Homeland Security.

The above-named Petitioner hereby petitions for review by this Court of the final administrative order of removal entered by the U.S. Immigration and Customs Enforcement (“ICE”) pursuant to 8 U.S.C. § 1228(b). A copy of the order on Form I-851A is attached. To date, no court has upheld the validity of the order.

Jurisdiction is asserted pursuant to 8 U.S.C. § 1252(a)(1). This petition raises “constitutional claims” [and/or] “questions of law.” 8 U.S.C. § 1252(a)(2)(D). Venue is asserted pursuant to 8 U.S.C. § 1252(b)(2) because ICE completed proceedings in [REDACTED] [CITY, STATE], within the jurisdiction of this judicial circuit.

This petition is timely filed pursuant to 8 U.S.C. § 1252(b)(1) as it is filed within 30 days of the issuance of the administrative removal order.

[Insert this request for counsel if applicable] Petitioner seeks the appointment of counsel. Petitioner cannot afford to retain counsel, and appeals of administrative removal orders involve complex legal issues, including whether a conviction is for an aggravated felony and whether ICE has complied with its statutory, regulatory, and constitutional obligations in conducting administrative removal proceedings against the Petitioner. Unsurprisingly, courts have found that non-lawyer DHS officers have erred in issuing orders of removal under the administrative removal statute, including on the question of whether an offense of conviction is classifiable as an aggravated felony, and whether an individual is a

U.S. citizen or lawful permanent resident. *See, e.g., Rodriguez-Celaya v. Atty. Gen. of the U.S.*, 597 F. App'x 79, 82 (3d Cir. 2015) (noncitizen's "conviction ... cannot be considered an aggravated felony"); *Walker v. Atty. Gen. of the U.S.*, 625 F. App'x 87, 88, 90 (3d Cir. 2015) (noncitizen "wrongly subjected to [administrative] removal proceedings" because he was not "convicted of an aggravated felony"); *United States v. Reyes*, 907 F. Supp. 2d 1068 (N.D. Cal. 2012) (finding in the context of an illegal reentry prosecution that the defendant was erroneously deported under § 1228(b) for a conviction that was not an aggravated and wrongly deprived of the opportunity to apply for voluntary departure from an Immigration Judge); *Morales v. Chadbourne*, 996 F. Supp. 2d 19 (D. R.I. 2014) (ICE erroneously concluded that a naturalized U.S. citizen—who had been arrested by local law enforcement—was not a U.S. citizen). Determining whether a particular conviction is an aggravated felony is sufficiently complex to have reached the Supreme Court six times in ten years. *Cf. Luna-Torres v. Lynch*, 136 S. Ct. 1619, 1636 (2015) (listing cases); *see also Moncrieffe v. Holder*, 133 S. Ct. 1678, 1692 (2013) ("This is the third time in seven years that we have considered whether the Government has properly characterized a low-level drug offense as ... an 'aggravated felony.'"). Issues of the unlawfulness of government practices in establishing alienage or of citizenship are no less complicated. *See, e.g., INS v.*

