

# **n a t i o n a l IMMIGRATION p r o j e c t**

of the National Lawyers Guild

## **Practice Advisory: Understanding and Overcoming Bars to Relief Triggered by a Prior Removal Order**

June 29, 2022<sup>1</sup>

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<sup>1</sup> Copyright 2022, Ready to Stay. The author of this practice advisory is Rebecca Scholtz, Senior Staff Attorney with the National Immigration Project of the National Lawyers Guild (NIPNLG). It was formatted by Arianna Rosales. The author would like to thank the following individuals for their contributions to this advisory: Peggy Gleason, Senior Staff Attorney, Immigrant Legal Resource Center (ILRC); Michelle Mendez, Director of Legal Resources and Training, NIPNLG; and Sarah K. Molina, Molina Immigration Law, LLC. This advisory is intended to assist lawyers and accredited representatives. It does not constitute legal advice nor is it a substitute for independent analysis of the law applicable in the practitioner's jurisdiction. This advisory primarily discusses current law. The law regarding removal orders and bars has changed over time, in particular with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which went into effect on April 1, 1997. Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (Sept. 30, 1996). Practitioners must analyze each client's case based on the law that applies, which in some cases could be prior law.

## **I. Introduction**

People who have been ordered removed by an immigration judge or other immigration official face significant risks and hurdles in establishing eligibility for immigration benefits for which they might otherwise be eligible. For example, individuals with removal orders are generally at risk of summary removal at any time. Having a removal order may also trigger bars to eligibility for immigration relief. And in the case of applications for immigration benefits such as adjustment of status and asylum, the noncitizen must typically first reopen the order before they can apply, and reopening carries its own list of requirements. It is thus important to conduct a careful eligibility analysis at the outset, as part of case assessment. Practitioners assessing immigration options for noncitizen clients with prior removal orders must evaluate several factors including:

1. Whether reopening is required before the client can seek the form of relief contemplated,
2. If reopening is required, whether the client meets the requirements for reopening under the Immigration and Nationality Act (INA) and/or relevant regulations, and
3. Whether the client is eligible for the relief contemplated. This will include assessing whether any bars to relief have been triggered by the removal order, and if so, whether a waiver is available.

This practice advisory addresses the third set of questions.<sup>2</sup> Its purpose is to provide guidance to practitioners analyzing options for clients with prior removal orders who might be eligible for a form of immigration relief. It discusses what bars to relief can arise based on a removal order and provides potential strategies for overcoming them. It also briefly discusses options for Temporary Protected Status (TPS) recipients who have traveled on advance parole after receiving a removal order and are otherwise eligible to adjust status.

## **II. Background on Removal Orders**

Because some bars to relief are only triggered by certain types of removal orders, it is helpful to begin with a few general points about types of removal orders. An immigration judge (IJ) can issue a removal order in removal proceedings under INA § 240, or a Department of Homeland

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<sup>2</sup> This practice pointer does not address the requirements for motions to reopen. Note, however, that one of the requirements for a motion to reopen is to demonstrate *prima facie* eligibility for the underlying relief, including establishing that the noncitizen is not barred from the relief sought due to the prior order (or for any other reason). See INA § 240(c)(7); 8 CFR §§ 1003.23(b)(3), 1003.2(c)(1); *Matter of L-O-G-*, 21 I&N Dec. 413 (BIA 1996). For information on requirements for motions to reopen, see for example CLINIC, *Practice Advisory: Motions to Reopen for DACA Recipients with Removal Orders* (last updated Oct. 12, 2020), <https://cliniclegal.org/resources/removal-proceedings/practice-advisory-motions-reopen-daca-recipients-removal-orders>; Asylum Seeker Advocacy Project & CLINIC, *A Guide to Assisting Asylum-Seekers with In Absentia Removal Orders* (last updated July 2019), <https://cliniclegal.org/resources/asylum-and-refugee-law/guide-assisting-asylum-seekers-absentia-removal-orders>; National Immigration Litigation Alliance & American Immigration Council, *The Basics of Motions to Reopen EOIR-Issued Removal Orders* (Apr. 25, 2022), [https://www.americanimmigrationcouncil.org/practice\\_advisory/basics-motions-reopen-eoir-issued-removal-orders](https://www.americanimmigrationcouncil.org/practice_advisory/basics-motions-reopen-eoir-issued-removal-orders).

Security (DHS) official can issue a removal order in a summary removal process, such as expedited removal under INA § 235(b). In removal proceedings under INA § 240, there are several common ways that a respondent<sup>3</sup> may receive a removal order. An IJ may order removal after they determine that the respondent is removable and deny any applications for immigration relief. An IJ can also order a respondent removed *in absentia*, if the respondent fails to appear at a hearing after receiving written notice required by INA § 239(a), and if DHS shows by “clear, unequivocal, and convincing evidence” that the noncitizen is removable.<sup>4</sup> Another way an individual can receive a removal order is if an IJ grants voluntary departure but the person fails to depart during the required period.<sup>5</sup>

This practice advisory addresses the following grounds of inadmissibility<sup>6</sup> and other bars to immigration relief that can come into play after an order of removal:

1. A bar to certain relief found at INA § 240B(d)(1)(B) for failure to depart following a grant of voluntary departure
2. A bar to certain relief found at INA § 240(b)(7) for those with *in absentia* orders
3. Inadmissibility under INA § 212(a)(6)(B) for failure to attend a removal proceeding, and
4. Inadmissibility provisions under INA § 212(a)(9)(A) and (C)(i)(II) that can arise after a removal order and subsequent departure.

Which bars a noncitizen’s removal order may have triggered depend on the type of order and whether the individual has departed the United States after the removal order’s issuance. Section III below describes each of the above provisions and provides strategies for overcoming these bars.

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<sup>3</sup> “Respondent” is the term used to refer to a noncitizen in removal proceedings.

<sup>4</sup> INA § 240(b)(5)(A).

<sup>5</sup> See 8 CFR §§ 1240.26(d), 1241.1(f).

<sup>6</sup> This practice advisory does not cover certain grounds of inadmissibility found within INA § 212(a)(9) that also create inadmissibility following a noncitizen’s departure, because they do not necessarily involve a removal order: (1) the “3-year bar” under INA § 212(a)(9)(B)(i)(I) for those who were unlawfully present in the United States for more than 180 days but less than a year, voluntarily departed before the commencement of any removal proceedings, and seek readmission within 3 years of departure or removal; (2) the “10-year bar” under INA § 212(a)(9)(B)(i)(II) for those who have been unlawfully present in the United States for one year or longer, subsequently depart or are removed, and seek readmission within 10 years of departure or removal; and (3) “permanent” inadmissibility under INA § 212(a)(9)(C)(i)(I) for an individual who has been unlawfully present for an aggregate period of more than a year, departs, and enters or attempts to reenter without being admitted. For further information about these grounds and waivers for unlawful presence-based inadmissibility, see for example *IMMIGRATION LAW AND THE FAMILY* (Charles Wheeler ed., 6th ed. 2020); *IMMIGRATION LAW AND THE FAMILY* (NIPNLG ed., 2021); *PROVISIONAL WAIVERS: A PRACTITIONER’S GUIDE* (Charles Wheeler et al. eds., 3d ed. 2020).

**Chart: Overview of Removal Order-Based Bars**

| Statute Creating Bar      | How Is Bar Triggered?   | What Relief Is Barred?  | How Long Does Bar Last?  | What Starts the Clock?   | Does Time in the United States Count?   |
|---------------------------|---|---|--|--|---|
| INA § 240B(d)(1)(B)       | Failure to depart during voluntary departure period   | Voluntary departure, cancellation of removal, adjustment of status, change of nonimmigrant classification, and registry               | 10 years   | The expiration of the voluntary departure period   | Yes   |
| INA § 240(b)(7)           | <i>In absentia</i> order  | Voluntary departure, cancellation of removal, adjustment of status, change of nonimmigrant classification, and registry               | 10 years   | Entry of a final order of removal  | Yes   |
| INA § 212(a)(6)(B)        | Failure to attend removal proceeding without reasonable cause <b>and</b> departure or removal   | Any relief requiring a showing of admissibility, unless the noncitizen is granted a relief-specific waiver (no general waiver exists) | 5 years  | The noncitizen's departure or removal  | Maybe/arguable  |
| INA § 212(a)(9)(A)        | Removal order <b>and</b> departure or removal   | Any relief requiring a showing of admissibility, unless USCIS grants permission to reapply for admission (Form I-212)**               | 5 years* for expedited removal orders and orders against "arriving" noncitizens<br><br>10 years* otherwise | The noncitizen's removal<br><br>The noncitizen's departure or removal  | Maybe/arguable  |
| INA § 212(a)(9)(C)(i)(II) | Removal order, departure or removal, <b>and</b> entry or attempted entry without being admitted | Any relief requiring a showing of admissibility, unless the noncitizen is granted a relief-specific waiver (no general waiver exists) | Permanent. Can file for permission to reapply after 10 years outside of the United States                  | The 10-year period before a person can seek permission to reapply starts after the noncitizen's last departure | No. The person must wait outside the United States for 10 years before seeking permission to reapply. |

\* 20 years for second or subsequent removal and permanent where noncitizen has an aggravated felony conviction.

\*\* Certain immigration benefits require a different form to overcome this ground. For example, in the case of petitions for U nonimmigrant status, requests for waivers of inadmissibility, including of INA § 212(a)(9)(A), are filed on Form I-192.

### III. Removal-Related Bars and Strategies for Overcoming Them

#### A. Bar to Certain Relief for Failure to Depart Within Voluntary Departure Period

*Description of the bar.* An individual granted voluntary departure under INA § 240B who overstays the voluntary departure period becomes subject to a final order of removal.<sup>7</sup> When they “voluntarily fail[] to depart the United States within the time period specified,” the noncitizen also becomes ineligible for 10 years “to receive any further relief under this section and sections 1229b [cancellation of removal], 1255 [adjustment of status], 1258 [change of nonimmigrant status], and 1259 [registry] of this title.”<sup>8</sup> This INA provision does not give rise to inadmissibility; rather, it bars the individual from obtaining certain specified types of discretionary immigration benefits for a 10-year period.<sup>9</sup>

*The “safe zone”—the bar does not apply if:*

- **The noncitizen is not seeking a specified form of relief.** For example, if the client wishes to seek TPS, the INA § 240B(d) bar does not come into play, as TPS is not a form of relief listed in INA § 240B(d).
- **10 years have passed since the noncitizen overstayed the voluntary departure period.** The bar creates ineligibility for a period of 10 years; thus, an individual can avoid the bar by waiting for the 10 years to pass before seeking a listed form of relief, such as adjustment of status.
- **The voluntary departure order was not issued under INA § 240B(d).** Section 240B of the INA went into effect on April 1, 1997. Noncitizens who received voluntary departure in exclusion or deportation proceedings commenced before April 1, 1997, are not subject to this 10-year bar.<sup>10</sup> Before April 1, 1997, failure to depart following a grant of voluntary departure triggered a **5-year bar** to specified relief with an exception if the noncitizen could show exceptional circumstances for the failure to depart.<sup>11</sup>

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<sup>7</sup> The regulations provide that when an IJ grants voluntary departure, they also enter an alternate order of removal. 8 CFR § 1240.26(d). That removal order becomes final “upon overstay of the voluntary departure period, or upon the failure to post a required voluntary departure bond within 5 business days.” 8 CFR § 1241.1(f). If the respondent timely files an appeal, the order becomes final when the Board of Immigration Appeals (BIA) enters a removal order or if the respondent overstays the voluntary departure period granted or reinstated by the BIA. *Id.*

<sup>8</sup> INA § 240B(d)(1)(B).

<sup>9</sup> For further information on this topic, 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/sites/default/files/practice\\_advisory/voluntary\\_departure\\_when\\_the\\_consequences\\_of\\_failing\\_to\\_depart\\_should\\_and\\_should\\_not\\_apply.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/voluntary_departure_when_the_consequences_of_failing_to_depart_should_and_should_not_apply.pdf).

<sup>10</sup> See *Matter of Zmijewska*, 24 I&N Dec. 87, 89 (BIA 2007).

<sup>11</sup> See former INA § 242B(e)(2)(A) (repealed); *id.* § 242B(e)(2)(B) (to trigger bar, noncitizen must have been “provided written notice . . . in English and Spanish and oral notice either in the [noncitizen’s] native language or in another language the [noncitizen] understands of the consequences . . . of the [noncitizen] remaining in the United States after the scheduled date of departure, other than because of exceptional circumstances”).

*Other potential arguments that the bar does not apply:*

- **Argument that the noncitizen meets the Violence Against Women Act (VAWA) exception.** The 10-year bar does not apply to VAWA self-petitioners applying for adjustment of status, applicants for VAWA cancellation under INA § 240A(b)(2), and applicants for VAWA suspension under former 8 U.S.C. § 1254(a)(3), “if the extreme cruelty or battery was at least one central reason for the [noncitizen’s] overstaying the grant of voluntary departure.”<sup>12</sup> Thus if a noncitizen is otherwise eligible for VAWA-based relief and the facts permit, practitioners should argue that the failure to depart was connected to the abuse, and submit evidence to show the connection, such as a declaration or affidavit from the client.
- **Argument that there was insufficient notice of the consequences for failure to depart.** The statute directs that the voluntary departure order “shall inform” the respondent of the penalties for failure to depart “under this subsection.”<sup>13</sup> If the order did not inform the respondent of the consequences of failing to depart, including the specific forms of relief that would be prohibited, one could argue that the bar does not apply.<sup>14</sup> Practitioners should examine the voluntary departure order, review the record of immigration court proceedings, and listen to audio recordings of the client’s hearings to determine if the court’s voluntary departure order contained adequate notice of the consequences of failure to depart.<sup>15</sup>
- **Argument that the failure to depart was not voluntary.** The 10-year bar to relief is triggered when a respondent “voluntarily fails to depart the United States within the time period specified.”<sup>16</sup> If the failure to depart timely was not voluntary, the bar is not triggered. In *Matter of Zmijewska*, 24 I&N Dec. 87 (BIA 2007), the BIA interpreted the word “voluntarily” to mean conduct within the person’s control. The BIA held that a respondent who, “through no fault of his or her own, is unaware of the voluntary departure order or is physically unable to depart,” does not “voluntarily” fail to depart. In *Zmijewska*, the respondent claimed that her representative failed to inform her of the voluntary departure order until after the departure period had ended, and her motion to reopen satisfied the *Matter of Lozada* requirements for alleging ineffective assistance of counsel.<sup>17</sup> The BIA concluded that the respondent had not voluntarily failed to depart.

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<sup>12</sup> INA § 240B(d)(2).

<sup>13</sup> INA § 240B(d)(3).

<sup>14</sup> *Cf. Ordonez v. INS*, 345 F.3d 777, 783–84 (9th Cir. 2003) (concluding that bar was not triggered under previous version of statute that required both oral and written notice, where IJ did not orally indicate the specific forms of relief that would be lost); *Osman Orozco Garcia*, A043 745 973, at 3 (BIA Aug. 9, 2013) (unpublished), <https://www.scribd.com/document/160234895/Osman-Orozco-Garcia-A043-745-973-BIA-Aug-9-2013> (concluding that, where order contained “the necessary written warnings” of the 10-year bar to specified relief for failure to depart, the respondent was barred by INA § 240B(d) from adjustment of status).

<sup>15</sup> For information on how to obtain records and hearing recordings from the immigration court, see Immigration Court Practice Manual Ch. 1.5(c), <https://www.justice.gov/eoir/eoir-policy-manual/ii/1/5>.

<sup>16</sup> INA § 240B(d)(1) (emphasis added).

<sup>17</sup> *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).



Practitioners should explore the factual circumstances surrounding a client's failure to depart to determine if the failure was not voluntary. For example, the bar may be overcome where:

- The respondent's young age, disability, or other individual circumstance prevented them from understanding the order or being physically able to depart<sup>18</sup>
  - The respondent received ineffective assistance of counsel, such as through counsel's failure to timely inform the respondent of the voluntary departure order<sup>19</sup> or giving of "erroneous and bad-faith advice" to remain in the country,<sup>20</sup> or
  - The deadline for departure was not obvious and a *pro se* respondent did not understand what the deadline was.
- 
- **Argument that reopening nullifies the bar.** Depending on the jurisdiction, it may be possible to argue that reopening of the removal order would eliminate the bar by eliminating the underlying voluntary departure order. In a 2005 case, the Seventh Circuit concluded that the grant of a motion to reopen "permanently disposed of the existing Section 240B(d) issue."<sup>21</sup> The current voluntary departure regulation, which was issued after the Seventh Circuit's decision, appears to foreclose this argument, since it provides that "[t]he granting of a motion to reopen or reconsider that was filed after the penalties under section 240B(d) of the Act had already taken effect, as a consequence of the [noncitizen's] prior failure voluntarily to depart within the time allowed, does not have the effect of vitiating or vacating those penalties. . . ." <sup>22</sup> Given that the Seventh Circuit decision is based on statutory rather than regulatory language, practitioners in the Seventh Circuit should argue that it remains good law in that jurisdiction.<sup>23</sup> Other U.S. courts of appeals, and the BIA in unpublished cases, have rejected the argument that reopening eliminates the bar.<sup>24</sup> However, in one unpublished decision, the BIA reopened

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<sup>18</sup> See, e.g., E-R-, AXXX XXX 571, at 1 n.1 (BIA Dec. 21, 2016) (unpublished), <https://www.scribd.com/document/337535116/E-R-XXXX-XXX-571-BIA-Dec-21-2016> (failure to depart not voluntary where 9-year-old respondent, due to age, did not understand consequences of failure to depart and was likely unable to depart on her own); Jonathan Edenilson Climaco-Amaya, AXXX XX3 588, 2016 WL 1084513 (BIA Feb. 25, 2016) (unpublished) (reopening *sua sponte* for adjustment of status as a Special Immigrant Juvenile where respondent was 16 years old at the time of the voluntary departure order and IJ had not considered his argument that, "due to his young age, he did not understand the consequences of not leaving under the voluntary departure order").

<sup>19</sup> See *Singh v. Holder*, 658 F.3d 879, 887–88 (9th Cir. 2011); *Pedroza v. Holder*, 435 F. App'x 688, 690–91 (9th Cir. 2011) (unpublished); Abdel Karim Abdrabboh Al-Tarawneh, AXXX XX5 243, 2010 WL 3027582 (BIA July 8, 2010). But see *Granados-Oseguera v. Mukasey*, 546 F.3d 1011 (9th Cir. 2008).

<sup>20</sup> *Romer v. Holder*, 663 F.3d 40, 44 (1st Cir. 2011) (remanding to consider "whether Romer's remaining in the country on counsel's erroneous and bad-faith advice (a factual premise the IJ is free to accept or reject on consideration of the evidence) rendered his noncompliance involuntary").

<sup>21</sup> *Orichitch v. Gonzales*, 421 F.3d 595, 598 (7th Cir. 2005).

<sup>22</sup> 8 CFR § 1240.26(e)(2).

<sup>23</sup> See Case No. 20329347, 2022 WL 1061455, at \*2 (AAO Feb. 25, 2022) (unpublished) ("Accordingly, *Orichitch* is binding precedent in this case and, pursuant to that decision, the Board's grant of the Applicant's motion to reopen and the subsequent termination of his removal proceedings disposed of his voluntary departure order and rendered section 240B(d) inoperative in this case.").

<sup>24</sup> See, e.g., *Odogwu v. Gonzales*, 217 F. App'x 194, 197 (4th Cir. 2007) (unpublished) (holding that reopening "does not retroactively nullify the consequences of a prior violation of a voluntary departure order"); *Singh v. Gonzales*, 468 F.3d 135, 139 (2d Cir. 2006) (holding that reopening "does not undo the effect of a prior violation of a voluntary departure order" for purposes of INA § 240B(d)); *DaCosta v. Gonzales*, 449 F.3d 45, 50-51 (1st Cir. 2006)

proceedings and vacated the prior removal and voluntary departure orders, finding that the respondent's counsel had committed ineffective assistance in seeking voluntary departure without the respondent's consent. The BIA reasoned that because the "grant of voluntary departure was vacated, the penalties for failing to comply with this order were necessarily nullified as well."<sup>25</sup> Practitioners should review case law in their jurisdiction to determine whether this argument is available and the likelihood of its success.

## **B. Bar to Certain Relief for Those with *In Absentia* Orders**

*Description of the bar.* The receipt of an *in absentia* removal order triggers a 10-year bar to certain discretionary relief under INA § 240(b)(7). That provision applies to noncitizens with *in absentia* orders who at the time of the service of the Notice to Appear (NTA) or hearing notice were "provided oral notice, either in the [noncitizen's] native language or in another language the [noncitizen] understands, of the time and place of the proceedings" and of the consequences of failure to appear. If such notice was provided, the noncitizen "shall not be eligible for relief under section 1229b [cancellation of removal], 1229c [voluntary departure], 1255 [adjustment of status], 1258 [change of nonimmigrant status], or 1259 [registry]" for 10 years after the date of the final order.<sup>26</sup>

*The "safe zone"—the bar does not apply if:*

- **The client is not seeking a specified form of relief.** For example, if the client wishes to seek asylum and related relief, the bar does not come into play, as asylum is not a form of relief specified in INA § 240(b)(7). (But note that in order to have a forum in which to apply for asylum, the individual will need to seek reopening of the *in absentia* order, unless filing an asylum application as an unaccompanied child.)
- **10 years have passed since the date of the *in absentia* order.** The bar creates an ineligibility for a period of 10 years after the date of the final order. One option is to wait for the 10 years to pass before seeking a listed form of relief such as adjustment of status.
- **The *in absentia* order was issued in proceedings commenced before April 1, 1997.** The **10-year** bar does not apply to *in absentia* orders issued in proceedings commenced before April 1, 1997. Thus, practitioners must look not only at the date of the order's issuance to determine how many years have passed, but also at the date the proceedings were commenced to see if the 10-year bar applies at all. If the proceedings were commenced before April 1, 1997, then the *in absentia* order triggers at most a **5-year** bar.<sup>27</sup>

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(concluding that reopening did not eliminate INA § 240B(d) bar); Fozi Abdih Ali Al Maoaleh, 2009 WL 773139, at \*1 (BIA Mar. 4, 2009) (unpublished).

<sup>25</sup> Hiram Abecardo Gonzalez-Sarat, A205 164 431, at 1 (BIA Jan. 30, 2017) (unpublished), <https://www.scribd.com/document/339927173/Hiram-Abecardo-Gonzalez-Sarat-A205-164-431-BIA-Jan-30-2017>.

<sup>26</sup> INA § 240(b)(7).

<sup>27</sup> See former INA § 242B(e)(1) (repealed) (applies to deportation proceedings).



- **The *in absentia* order has been rescinded, because rescission nullifies the order *ab initio*.** The INA provides for rescission of an *in absentia* order through a motion to reopen filed at any time if the respondent did not receive statutorily compliant notice, or through a motion to reopen filed within 180 days demonstrating that the failure to appear was because of “exceptional circumstances.”<sup>28</sup> In *Matter of M-S-*, 22 I&N Dec. 349, 353 (BIA 1998), the BIA interpreted the word “rescind” found in an earlier version of the statute to mean “to annul from the beginning all of the determinations reached in the *in absentia* hearing.” Thus, after an *in absentia* order is rescinded the proceedings “go back to the start” and the respondent is “given a new opportunity to litigate the issues previously resolved against her at the *in absentia* hearing” including “any eligibility for relief.”<sup>29</sup> It follows that if an IJ or the BIA rescinds the *in absentia* order, it is as if the order never happened, and the 10-year bar should not apply.<sup>30</sup>

*Other potential arguments that the bar does not apply:*

- **There was no oral notice as required to trigger the bar.** The bar is triggered only where the respondent was provided oral notice in their native language or another language they understand of the time and place of the hearing and the consequences of failure to appear. The oral notice must be provided at the time the NTA or hearing notice is provided. The BIA in *Matter of M-S-*, 22 I&N Dec. 349, 355 (BIA 1998), interpreting a prior version of the statute, concluded that “if the oral warnings are not provided, relief is not precluded” because to “rule otherwise would render surplusage” the statutory oral warnings requirement.<sup>31</sup> Practitioners should thus investigate whether the client received oral notice of the time and place of the hearing and consequences of failure to appear, at the time of the NTA or hearing notice was provided, in a language they understood. Factors to consider include: to the respondent and they never attended a court hearing) then there could be no oral notice and thus no bar to discretionary relief under INA § 240(b)(7)<sup>32</sup>
  - If DHS served the NTA in person, practitioners should review what the certificate of service says regarding whether oral notice was provided, and in what

<sup>28</sup> INA § 240(b)(5)(C). “Exceptional circumstances” is defined at INA § 240(e)(1).

<sup>29</sup> 22 I&N Dec. at 353.

<sup>30</sup> See, e.g., Orlando Antonio Bonilla-Molina, A094 246 276 (BIA Sept. 2, 2015) (unpublished), <https://www.scribd.com/document/281166283/Orlando-Antonio-Bonilla-Molina-A094-246-276-BIA-Sept-2-2015> (granting rescission based on exceptional circumstances and noting potential eligibility for adjustment of status). Because some unpublished BIA cases appear to have taken the view that a joint motion to reopen does not cure the 10-year bar, practitioners should guard against this outcome by seeking a joint motion to *rescind* and reopen and including a proposed order with this language.

<sup>31</sup> See, e.g., Preye Kosu, AXX XX2 099, 2005 WL 3709261, at \*1 (BIA Dec. 30, 2005) (unpublished) (granting timely filed motion to reopen to pursue adjustment of status where respondent “never received the oral warnings regarding her address obligations and the consequences for failing to appear for a hearing”); Blanca Esthela Torres-Martinez, AXX XX0 561, 2004 WL 2374990 (BIA Sept. 17, 2004) (unpublished) (granting joint motion to pursue adjustment of status where no oral warnings had been given).

<sup>32</sup> See, e.g., Caroline Rebecca Ross, No. AXXX XX2 743, 2013 WL 3899679, at \*1 (BIA June 20, 2013) (unpublished) (reopening on joint motion for adjustment of status and concluding there was no bar because the respondent “did not receive the oral warnings when she was served with the Notice to Appear by certified mail”).

language.<sup>33</sup> Perhaps the certificate states that notice was given in a language that is not one the client understands. Or perhaps the certificate says that oral notice was given in the client's native language, but the client says in fact no oral notice was provided or it was not in the right language. In this situation, the practitioner could try to rebut the NTA's assertion but will have to overcome the presumption of reliability generally afforded to government documents.<sup>34</sup> Some individuals, such as members of families whom the U.S. government separated at the border under the Trump administration's "Zero Tolerance" policy, may be able to rebut this presumption by providing evidence of the inadequate process they received during border processing or by showing they were not in a mental state that allowed them to understand the notice.

- If the NTA does not specify the time and place of the hearing and instead says "to be set," practitioners should argue that any NTA certificate stating that the respondent was provided oral notice of the time and place of the hearing is necessarily inaccurate.<sup>35</sup> In this situation practitioners should establish, if possible, that the hearing time and/or place was set after the alleged oral warning in conjunction with NTA service was given, to support the argument that the NTA service was not accompanied by oral notice of the hearing time and/or place.
- If the client attended one or more hearing(s), practitioners should obtain and listen to the audio recordings to determine if there was oral notice of the time and place of the next hearing and the consequences of failure to appear, in the appropriate language.

### C. Inadmissibility for Failure to Attend a Removal Proceeding

*Description of the inadmissibility ground.* Under INA § 212(a)(6)(B), a noncitizen who "without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the [noncitizen's] inadmissibility or deportability and who seeks admission to the United States within 5 years of such [noncitizen's] subsequent departure or removal is inadmissible." This 5-year bar is triggered if a noncitizen fails to attend a removal proceeding and then subsequently departs the United States, including by being removed. U.S. Citizenship and Immigration Services (USCIS) takes the position that this bar can be triggered even if the noncitizen was not issued an *in absentia* order.<sup>36</sup>

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<sup>33</sup> See, e.g., *Yang v. BIA*, 137 F. App'x 406, 409 (2d Cir. 2005) (unpublished) (petitioner's NTA "indicates that Yang received oral notice informing him of the consequences of the failure to appear"); Carlos Antonio Montano-Cruz, AXXX XX9 010, 2015 WL 3483383, at \*1 (BIA May 4, 2015) (unpublished) (respondent was ineligible for adjustment where the "NTA was served personally on the respondent, and he was provided oral notice of the consequences of a failure to appear . . . in his native Spanish").

<sup>34</sup> See *Matter of J-C-H-F-*, 27 I&N Dec. 211, 212 (BIA 2018).

<sup>35</sup> See also *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) (holding that notice to appear lacking required time and/or place information required by INA § 239(a) did not trigger stop-time rule for cancellation of removal).

<sup>36</sup> USCIS Adjudicator's Field Manual (AFM), Ch. 40.6.2(b)(2)(iv), 2010 WL 605336 (updated through Sept. 9, 2014).

*The “safe zone”—this inadmissibility ground does not apply if:*

- **The client is not seeking a form of relief requiring admissibility.** For example, if the client wishes to seek asylum and related relief, this ground does not come into play, as asylum does not require admissibility.
- **The failure to appear happened in deportation or exclusion proceedings that commenced before April 1, 1997.**<sup>37</sup> This inadmissibility bar was created through IIRIRA and only applies to removal proceedings commenced on or after IIRIRA’s effective date of April 1, 1997.
- **There was no departure or removal after the failure to appear.** If a noncitizen failed to attend a hearing but never subsequently departed the United States—whether by removal or otherwise—the ground is not triggered.<sup>38</sup>
- **5 years have passed since the date of departure or removal.** One option is to wait for the 5 years to pass before seeking admission. Practitioners could argue that the statute’s language does not preclude an individual from passing the 5 years within the United States.<sup>39</sup> Some practitioners report success with USCIS for clients who passed the 5 years in the United States. USCIS does not have published guidance on this issue, however, and appears to have taken inconsistent positions in unpublished Administrative Appeals Office (AAO) decisions.<sup>40</sup>

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<sup>37</sup> Memorandum from INS Office of Programs, Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act (Act) (June 17, 1997), AILA Doc. No. 97061790, <https://www.aila.org/infonet/ins-grounds-inadmissibility-unlawful-presence> (“Therefore, any [noncitizen] placed in deportation or exclusion proceedings before April 1, 1997, will not be considered inadmissible under section 212(a)(6)(B) of the Act for failure to attend the removal hearing, even if it was not actually scheduled until after April 1, 1997.”) [hereinafter “1997 Inadmissibility Memo”]; see also AFM Ch. 40.6.2(b)(2)(i), 2010 WL 605336 (updated through Sept. 9, 2014)..

<sup>38</sup> See 1997 Inadmissibility Memo, *supra* note 37.

<sup>39</sup> The relevant language in INA § 212(a)(6)(B) (inadmissibility triggered if noncitizen “seeks admission to the United States within 5 years of such [noncitizen’s] subsequent departure or removal”), is similar to the language found in INA § 212(a)(9)(B)(i) (inadmissibility triggered if noncitizen “seeks admission within [3 or 10] years of the date of such [noncitizen’s] departure or removal”). In 2022, advocates brought a class action challenge to USCIS’s policy of requiring noncitizens subject to INA § 212(a)(9)(B)(i) to pass the required time period outside of the United States, arguing that USCIS’s policy was contrary to the statute’s plain language. *Velasco v. USCIS*, No. 22-368 (W.D. Wash. filed Mar. 25, 2022). On June 24, 2022, USCIS amended its policy manual guidance on INA § 212(a)(9)(B) to recognize that the 3- or 10-year inadmissibility period “begins to run on the day of departure or removal (whichever applies)” and “continues to run, without interruption, regardless of whether or how the noncitizen returned to the United States during the 3-year or 10-year period.” USCIS Policy Manual, Vol. 8, Pt. O, Ch. 6.B, <https://www.uscis.gov/policy-manual/volume-8-part-o-chapter-6>. Practitioners could argue that since the language of INA § 212(a)(6)(B) is similar to the language found in INA § 212(a)(9)(B)(i), USCIS should recognize that the 5-year inadmissibility period under INA § 212(a)(6)(B) can be spent while in the United States.

<sup>40</sup> Compare C-L-M-, ID No. 1672103, 2018 WL 3957208, at \*3 (AAO Aug. 8, 2018) (unpublished) (applicant was inadmissible under INA § 212(a)(6)(B) because “he has not remained outside of the United States for at least five years since departing or being removed”), with W-K-H-R-, 2017 WL 3843557, at \*2 (AAO Aug. 21, 2017) (unpublished) (recognizing that noncitizen’s inadmissibility would expire five years from the departure, despite the fact that the noncitizen was in the United States).

*Other potential avenues for overcoming this inadmissibility ground:*

- **For noncitizens who traveled on advance parole while in TPS status, argument that pursuant to current USCIS policy there was no departure or removal and thus the inadmissibility ground was not triggered.** INA § 101(g) provides that leaving the United States following an order of removal executes the order, and USCIS generally recognizes that departures pursuant to advance parole execute a removal order.<sup>41</sup> However, USCIS currently takes a different position with respect to TPS recipients who travel on advance parole. Under USCIS’s policy, these individuals do not execute their removal orders, and, when they return on advance parole travel, they “resume[] the exact same immigration status and circumstances as when [they] left the United States.”<sup>42</sup> This policy created a number of harmful consequences for TPS recipients seeking adjustment of status, and advocates have challenged it as contrary to the statute’s plain text.<sup>43</sup> But as long as the policy stands, practitioners can argue that TPS clients’ advance parole travel did not trigger any departure or removal-based inadmissibility, including under INA § 212(a)(6)(B). See Section IV below for information about adjustment of status for TPS recipients with prior removal orders who traveled on advance parole.
- **Argument that there was “reasonable cause” for the failure to attend the removal proceeding.** “Reasonable cause” is not defined in the statute or regulations. USCIS and the State Department have defined it as a circumstance “not within the reasonable control of the [noncitizen].”<sup>44</sup> “Reasonable cause” is a less stringent standard than “exceptional circumstances” as defined at INA § 240(e)(1).<sup>45</sup> Thus, if a client has obtained rescission and reopening of an *in absentia* order based on exceptional circumstances, the reasonable cause standard should be satisfied. The BIA has found “reasonable cause” based on situations such as illness.<sup>46</sup> Practitioners should evaluate the context in which the client failed to appear to assess “reasonable cause” arguments. Relevant factors might include

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<sup>41</sup> See Form I-131 Instructions, at 6 (Mar. 24, 2019), <https://www.uscis.gov/i-131> (“If you have been ordered . . . removed, departing from the United States without having had your . . . removal proceedings reopened and administratively closed or terminated will result in your being considered . . . removed, even if . . . you have been granted advance parole.”).

<sup>42</sup> USCIS Policy Manual, Vol. 7, Pt. A, Ch. 3.D n.19, <https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-3>; see *Matter of Z-R-Z-C-*, Adopted Decision 2020-02 (AAO Aug. 20, 2020), <https://www.uscis.gov/sites/default/files/document/aao-decisions/Matter-of-Z-R-Z-C-Adopted-AAO-Decision.pdf>.

<sup>43</sup> See, e.g., *Gomez v. Jaddou*, No. 21-9203 (S.D.N.Y. filed Nov. 8, 2021) (pending litigation challenging *Z-R-Z-C-*), <https://immigrationlitigation.org/impact-litigation/>; *Central American Resource Center v. Cuccinelli*, No. 20-2363 (D.D.C. filed Aug. 26, 2020) (challenging USCIS policy on adjustment of status jurisdiction arising from the same legal interpretation, resulting in settlement agreement discussed *infra* section IV), <https://democracyforward.org/lawsuits/tps-central-american-resource-center-v-cuccinelli-wolf-dhs>. Practitioners should watch for further developments in this area.

<sup>44</sup> AFM Ch. 40.6.2(b)(3)(i), 2010 WL 605336 (updated through Sept. 9, 2014); 9 Foreign Affairs Manual (FAM) 302.9-3(B)(1)(a), <https://fam.state.gov/FAM/09FAM/09FAM030209.html>.

<sup>45</sup> *Matter of N-B-*, 22 I&N Dec. 590, 593 (BIA 1999).

<sup>46</sup> *Matter of Ruiz*, 20 I&N Dec. 91, 93 (BIA 1989); *Matter of N-B-*, 22 I&N Dec. 590, 593 (BIA 1999). But see *Matter of S-A-*, 21 I&N Dec. 1050, 1051 (BIA 1997) (heavy traffic was not reasonable cause); *N-C-R-*, ID No. 1599283, 2018 WL 3241598 (AAO June 14, 2018) (unpublished) (finding no reasonable cause for applicant who received *in absentia* order after failing to provide the court with new address or to contact court to inquire about proceedings until filing motion to reopen 14 years later).

age,<sup>47</sup> disability, illness, ineffective assistance of counsel,<sup>48</sup> lack of notice, abuse, or trauma. Practitioners should ensure that the factual basis for any reasonable cause argument is well documented.<sup>49</sup>

- **Argument that the noncitizen did not receive notice of the hearing compliant with INA § 239(a).** USCIS policy guidance directs that this inadmissibility provision is only triggered if the noncitizen had notice of the proceeding and their obligation to appear.<sup>50</sup> Practitioners could argue that the client received inadequate notice, for example because the NTA or hearing notice was sent to the wrong address, or because the NTA lacked information required by INA § 239(a) such as the hearing's date and time.<sup>51</sup>
- **Application for a relief-specific waiver.** While there is no general waiver for this ground of inadmissibility, certain forms of relief such as U and T nonimmigrant status and adjustment of status based on status as a refugee, asylee, or Special Immigrant Juvenile, have generous discretionary waivers that can waive many inadmissibility grounds including INA § 212(a)(6)(B).<sup>52</sup>

#### D. Inadmissibility for Certain Noncitizens Previously Removed

Section 212(a)(9) of the INA, titled “[noncitizens] previously removed,” creates inadmissibility in three categories of situations, all of which require a departure from the United States.<sup>53</sup> Two provisions within INA § 212(a)(9) are triggered by a removal order:

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<sup>47</sup> For example, some consulates have accepted the argument that the fact that an individual was a minor when they failed to attend the hearing establishes reasonable cause.

<sup>48</sup> *But see Matter of Cruz-Garcia*, 22 I&N Dec. 1155, 1159 (BIA 1999) (no reasonable cause based on alleged ineffective assistance of counsel where the respondent failed to comply with the requirements set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988)).

<sup>49</sup> *See V-A-R-B-*, ID No. 1296725, 2018 WL 1963995 (AAO Apr. 5, 2018) (unpublished) (finding no reasonable cause despite applicant's allegation that he was involved in a serious car accident a month before the hearing leaving him with severe memory loss, noting that “[a]lthough the paperwork provides a lists of possible symptoms from which a person with a head injury could suffer, which includes memory problems, there is no information specific to the Applicant concerning any medical diagnoses of him either at the time he was discharged from the emergency room or during any follow-up care he may sought from a medical professional”).

<sup>50</sup> AFM Ch. 40.6.2(b)(2)(iv), 2010 WL 605336 (updated through Sept. 9, 2014) (“In short, the [noncitizen] will be found inadmissible under Section 212(a)(6)(B) of the Act only if the [noncitizen] failed to appear after there was notice that would be sufficient to support the entry of an *in absentia* removal order.”).

<sup>51</sup> *See Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021) (holding that an NTA must contain the time and place of the hearing in a single document in order to trigger the stop-time rule for cancellation of removal); *Singh v. Garland*, 24 F.4th 1315 (9th Cir. 2022) (holding that NTA lacking hearing time and place information provides ground for rescission of an *in absentia* order); *Rodriguez v. Garland*, 15 F.4th 351 (5th Cir. 2021) (same). *But see Matter of Laparra*, 28 I&N Dec. 425 (BIA 2022) (declining to rescind and reopen an *in absentia* order where NTA lacked information about hearing's time and date).

<sup>52</sup> *See, e.g.*, INA § 212(d)(14) (U waiver provision); INA § 212(d)(13)(B)(ii) (T waiver provision); INA § 209(c) (refugee and asylee adjustment waiver provision); INA § 245(h)(2)(B) (SIJS-based adjustment waiver provision); *see also* INA § 212(d)(3) (general waiver for nonimmigrants).

<sup>53</sup> *See, e.g.*, USCIS Academy Training Center, Instructor Guide: Inadmissibility, Deportability and Waivers, at 87 (Jan. 2015), AILA Doc. No. 15082634, <https://www.aila.org/infonet/uscis-instructor-guide-training> [hereinafter “USCIS Inadmissibility Training Guide”].

1. Inadmissibility under **INA § 212(a)(9)(A)** for individuals who depart the United States after a removal order, and
2. Inadmissibility under **INA § 212(a)(9)(C)(i)(II)** for noncitizens who have been ordered removed and “enter[] or attempt[] to reenter the United States without being admitted.”

The scope of each of these two grounds is discussed below, along with possible strategies for overcoming them.

### 1. Inadmissibility Ground Found at INA § 212(a)(9)(A)

*Description of the inadmissibility ground.* INA § 212(a)(9)(A) creates inadmissibility for 10 years—or 5 years if the individual received an expedited removal order under INA § 235(b)(1) or was ordered removed as an “arriving” noncitizen<sup>54</sup>—for individuals who are ordered removed and then depart or are removed from the United States.<sup>55</sup>

*The “safe zone”—this inadmissibility ground does not come into play if:*

- **The noncitizen is not seeking a form of relief requiring admissibility.** For example, if the client wishes to seek asylum and related relief, the ground does not come into play, as asylum does not require admissibility. But unauthorized reentry after a prior removal order may bar relief for other reasons. See section III.D.3 below.
- **The noncitizen was not ordered removed.** Practitioners should carefully investigate the client’s immigration history to determine if there was a removal order, by interviewing the client and making records requests such as through the Freedom of Information Act (FOIA). Not every departure from the United States following contact with the immigration system involves a removal order. Situations that do not result in a removal order include:
  - When a noncitizen arriving at a port of entry without proper documents is allowed to withdraw their request for admission instead of being issued an expedited removal order under INA § 235
  - When a noncitizen is expelled at entry pursuant to Title 42
  - When a noncitizen is apprehended after entering without inspection and is permitted to “voluntarily return” rather than be issued an expedited removal order
  - When a noncitizen departs under a grant of voluntary departure within the voluntary departure period
  - When a noncitizen is processed under the “Migrant Protection Protocols” (MPP) and then required to wait in Mexico for their hearing<sup>56</sup>

<sup>54</sup> The inadmissibility period is 20 years after a second or subsequent removal, and permanent if the individual has been convicted of an aggravated felony.

<sup>55</sup> The 5-year bar under INA § 212(a)(9)(A)(i) does not apply to orders of exclusion issued before April 1, 1997. See USCIS Inadmissibility Training Guide, *supra* note 53, at 87. However, the 10-year bar under INA § 212(a)(9)(A)(ii) applies regardless of when the proceedings commenced or when the individual was ordered removed.

<sup>56</sup> See Memorandum from Kirstjen M. Nielsen, DHS Sec’y, Policy Guidance for Implementation of the Migrant Protection Protocols (Jan. 25, 2019), [https://www.dhs.gov/sites/default/files/publications/19\\_0129\\_OPA\\_migrant-protection-protocols-policy-guidance.pdf](https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf) (describing implementation of MPP under the Trump administration); DHS, Court-Ordered Reimplementation of



- When a noncitizen in ongoing MPP proceedings subsequently attempts to enter the United States and is returned to Mexico<sup>57</sup>
- **There was no departure or removal.** If a noncitizen was ordered removed but was never removed and never subsequently departed the United States, the ground is not triggered.
- **The relevant period of time has passed since the date of departure or removal.** INA § 212(a)(9)(A) creates inadmissibility for a specified number of years after the date of the departure or removal. One option is to wait for that time to pass before seeking admission. Practitioners could argue that the statute's language does not preclude an individual from passing the time within the United States, but it appears that USCIS's view is that the individual must remain outside the United States during the specified number of years.<sup>58</sup> While the BIA has not definitively addressed this issue, language in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), suggests that the period can be passed while inside the United States.<sup>59</sup>

*Other potential avenues for overcoming this inadmissibility ground:*

- **For noncitizens who traveled on advance parole while in TPS status, argument that pursuant to current USCIS policy there was no departure or removal and thus the inadmissibility ground was not triggered.** INA § 101(g) provides that leaving the United States following an order of removal executes the order, and USCIS generally

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the Migrant Protection Protocols (last updated Jan. 20, 2022), <https://www.dhs.gov/migrant-protection-protocols> (describing implementation of MPP under the Biden administration).

<sup>57</sup> For more on "MPP pushbacks," see CLINIC webinar, Orders at the Border (Sept. 29, 2021), *slides and Powerpoint available at* <https://cliniclegal.org/training/archive/orders-border>.

<sup>58</sup> See Form I-212 Instructions, at 6 (Mar. 21, 2022),

<https://www.uscis.gov/sites/default/files/document/forms/i-212instr.pdf> ("If you have remained outside the United States for the entire inadmissibility period, you are no longer required to seek consent to reapply."); 8 CFR § 212.2(a). The relevant language in INA § 212(a)(9)(A)(i) (inadmissibility triggered if noncitizen "seeks admission within 5 years of the date of such removal") and INA § 212(a)(9)(A)(ii) (inadmissibility triggered if noncitizen "seeks admission within 10 years of the date of such [noncitizen's] departure or removal"), is similar to the language found in INA § 212(a)(9)(B)(i) (inadmissibility triggered if noncitizen "seeks admission within [3 or 10] years of the date of such [noncitizen's] departure or removal"). In 2022, advocates brought a class action challenge to USCIS's policy of requiring noncitizens subject to INA § 212(a)(9)(B)(i) to pass the required time period outside of the United States, arguing that USCIS's policy was contrary to the statute's plain language. *Velasco v. USCIS*, No. 22-368 (W.D. Wash. filed Mar. 25, 2022). On June 24, 2022, USCIS amended its policy manual guidance on INA § 212(a)(9)(B) to recognize that the 3- or 10-year inadmissibility period "begins to run on the day of departure or removal (whichever applies)" and "continues to run, without interruption, regardless of whether or how the noncitizen returned to the United States during the 3-year or 10-year period." USCIS Policy Manual, Vol. 8, Pt. O, Ch. 6.B, <https://www.uscis.gov/policy-manual/volume-8-part-o-chapter-6>. Practitioners could argue that since the language of INA § 212(a)(9)(A) is similar to the language found in INA § 212(a)(9)(B)(i), USCIS should recognize that the relevant inadmissibility period under INA § 212(a)(9)(A) can be spent while in the United States.

<sup>59</sup> See *Matter of Torres-Garcia*, 23 I&N Dec. 866, 872 (BIA 2006) ("After the relevant inadmissibility period has elapsed, [a noncitizen's] prior removal no longer stands as a bar to reapplication for admission."); *id.* at 873 ("Section 212(a)(9)(C)(i) differs significantly from section 212(a)(9)(A)(ii) in that it incorporates no temporal limitations on inadmissibility; an individual who has reentered or attempted to reenter the United States after removal or prior unlawful presence is permanently inadmissible.").

recognizes that departures pursuant to advance parole execute a removal order.<sup>60</sup> However, USCIS currently takes a different position with respect to TPS recipients who travel on advance parole. Under USCIS's policy, these individuals do not execute their removal orders, and, when they return on advance parole travel, they "resume[] the exact same immigration status and circumstances as when [they] left the United States."<sup>61</sup> This policy created a number of harmful consequences for TPS recipients seeking adjustment of status, and advocates have challenged it as contrary to the statute's plain text.<sup>62</sup> But as long as the policy stands, practitioners can argue that TPS clients' advance parole travel did not trigger any departure or removal-based inadmissibility, including under INA § 212(a)(9)(A). However, because USCIS does not consider their removal orders to have been executed upon advance parole travel, TPS recipients with previous removal orders seeking adjustment of status after advance parole travel will have to reopen their removal proceedings in order to have a forum in which to apply for adjustment of status. See section IV below.

- **The inadmissibility ground can be overcome if the individual receives consent to reapply.**<sup>63</sup> Noncitizens can seek this consent by filing Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, either from abroad or within the United States in connection with an application for adjustment of status.<sup>64</sup> Many noncitizens with removal orders are not eligible for adjustment of status in the United States, however, because if they returned to the United States unlawfully following the removal, they will have triggered the "permanent bar" under INA § 212(a)(9)(C) and also would not have the required entry with admission or parole as needed for adjustment under INA § 245(a). Some exceptions

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<sup>60</sup> See Form I-131 Instructions, at 6 (Mar. 24, 2019), <https://www.uscis.gov/i-131> ("If you have been ordered . . . removed, departing from the United States without having had your . . . removal proceedings reopened and administratively closed or terminated will result in your being considered . . . removed, even if . . . you have been granted advance parole.").

<sup>61</sup> USCIS Policy Manual, Vol. 7, Pt. A, Ch. 3.D n.19, <https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-3>; see *Matter of Z-R-Z-C-*, Adopted Decision 2020-02 (AAO Aug. 20, 2020), <https://www.uscis.gov/sites/default/files/document/aao-decisions/Matter-of-Z-R-Z-C-Adopted-AAO-Decision.pdf>.

<sup>62</sup> See, e.g., *Gomez v. Jaddou*, No. 21-9203 (S.D.N.Y. filed Nov. 8, 2021) (pending litigation challenging *Z-R-Z-C-*), <https://immigrationlitigation.org/impact-litigation/>; *Central American Resource Center v. Cuccinelli*, No. 20-2363 (D.D.C. filed Aug. 26, 2020) (challenging USCIS policy on adjustment of status jurisdiction arising from the same legal interpretation, resulting in settlement agreement discussed *infra* section IV), <https://democracyforward.org/lawsuits/tps-central-american-resource-center-v-cuccinelli-wolf-dhs>. Practitioners should watch for further developments in this area.

<sup>63</sup> INA § 212(a)(9)(A)(iii).

<sup>64</sup> See 8 CFR § 212.2(e), 212.2(i)(2) ("If the [noncitizen] filed Form I-212 in conjunction with an application for adjustment of status under section 245 of the Act, the approval of the application shall be retroactive to the date on which the [noncitizen] embarked or reembarked at a place outside the United States."); *Matter of Garcia-Linares*, 21 I&N Dec. 254 (BIA 1996). An individual who plans to consular process and is otherwise eligible for a provisional waiver of unlawful presence can also file Form I-212 from within the United States, and, if approved, subsequently file Form I-601A, Application for Provisional Unlawful Presence Waiver. 8 CFR §§ 212.2(j), 212.7(e)(4)(iv). For more information on filing Form I-212, see ILRC, *Understanding I-212s for Inadmissibility Related to Prior Removal Orders and the Permanent Bar* (Mar. 2020), [https://www.ilrc.org/sites/default/files/resources/i-212\\_advisory-final.pdf](https://www.ilrc.org/sites/default/files/resources/i-212_advisory-final.pdf).

are described in the following section. Some forms of relief do not require Form I-212 and have relief-specific processes for overcoming this inadmissibility ground.<sup>65</sup>

## 2. Inadmissibility Ground Found at INA § 212(a)(9)(C)(i)(II)

*Description of the inadmissibility ground.* INA § 212(a)(9)(C)(i)(II) creates “permanent” inadmissibility when a noncitizen who has been ordered removed, “enters or attempts to reenter the United States without being admitted.” Individuals who illegally reenter the United States following a removal order are also at risk of having the prior order reinstated under INA § 241(a)(5), which triggers a bar to most immigration relief, and of being charged with the federal crime of illegal reentry after removal. See section III.D.3 below.

*The “safe zone”—this inadmissibility ground does not come into play if:*

- **The client is not seeking a form of relief requiring admissibility.** But unlawful reentry after a prior removal order makes an individual vulnerable to having the removal order reinstated, which creates a bar to most immigration relief under INA § 241(a)(5). See section III.D.3 below.
- **The illegal reentry or attempted reentry happened before April 1, 1997.**<sup>66</sup>
- **The subsequent entry or attempted entry was not “without admission.”** If the individual enters after being admitted (such as on a nonimmigrant visa) they do not trigger the permanent bar. Nor does an individual who is admitted with false documents and commits fraud or misrepresentation trigger the bar, unless they make a false claim of citizenship.<sup>67</sup> Further, while those who enter on advance parole are not considered admitted, USCIS takes the position that such individuals do not trigger the permanent bar. This is because a noncitizen paroled at a port of entry “will continue to be considered an applicant for admission, and so cannot be said to have entered or attempted to enter without admission.”<sup>68</sup>

*Other potential avenues for overcoming this inadmissibility ground:*

- **The inadmissibility ground can be overcome if the form of relief sought provides for a waiver of this ground.** There is no general waiver for the INA § 212(a)(9)(C) bar during the first 10 years after it is triggered, although there are some relief specific waivers, including for VAWA self-petitioners.<sup>69</sup>

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<sup>65</sup> See Form I-212 Instructions, at 4 (Mar. 21, 2022), <https://www.uscis.gov/sites/default/files/document/forms/i-212instr.pdf> (listing categories of noncitizens who file a waiver of inadmissibility rather than a consent to reapply).

<sup>66</sup> See 1997 Inadmissibility Memo, *supra* note 37.

<sup>67</sup> This is because entry with false documents still constitutes an inspection and admission, but entry claiming falsely to be a United States citizen does not involve inspection and admission. *Reid v. INS*, 420 U.S. 619 (1975).

<sup>68</sup> See AFM 40.9.2(6)(B), 2010 WL 605341 (updated through Aug. 9, 2018) (interpreting INA § 212(a)(9)(C)(i)(I)).

<sup>69</sup> INA § 212(a)(9)(C)(iii) (providing for waiver for VAWA self-petitioner “if there is a connection between” the noncitizen’s “battering or subjection to extreme cruelty” and their removal, departure, reentry, or attempted reentry).

- **The inadmissibility ground can be overcome if the noncitizen seeks and obtains consent to re-apply.** Unless there is a relief specific waiver, the individual must wait 10 years outside the United States before they can seek consent to re-apply.<sup>70</sup>
- **Argument that reopening nullifies the predicate for this inadmissibility ground, rendering it inapplicable.** In an unpublished decision from 2019, the BIA reopened *sua sponte* the removal proceedings of a noncitizen who had been removed, had reentered illegally, and had then sought reopening to apply for adjustment of status. While DHS had argued that the individual would be inadmissible under INA § 212(a)(9)(C) even if reopening were granted, the BIA reasoned that upon reopening a noncitizen is “arguably no longer inadmissible under this section because our reopening of this case vacates the [IJ]’s final order of removal.”<sup>71</sup> The BIA referenced *Bonilla v. Lynch*, 840 F.3d 575, 589 (9th Cir. 2016), where the Ninth Circuit observed that once a motion to reopen is granted, “the final deportation order is vacated—that is, it is as if it never occurred.”

### 3. Other Penalties for Unlawful Reentry After Removal

In addition to the inadmissibility provisions discussed above triggered by a removal order and subsequent departure, other immigration provisions impose harsh penalties against noncitizens who return illegally after having been removed from the United States. A federal law, 8 U.S.C. § 1326, makes it a felony to reenter the United States illegally after being removed. An individual who has illegally reentered the United States following a removal order is also at risk of having the prior order reinstated under INA § 241(a)(5), which triggers a bar to most immigration relief.<sup>72</sup> A discussion of the potential remedies and avenues to immigration relief for those with reinstated orders is beyond the scope of this practice advisory.<sup>73</sup> Practitioners with potential clients who have illegally reentered the United States after having been removed must carefully assess the risk of reinstatement or illegal reentry prosecution. If the individual entered lawfully, such as with a nonimmigrant visa or pursuant to a grant of advance parole, reinstatement should not be a concern, since the statute requires three things: a removal order, a departure, and an *illegal* reentry.

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<sup>70</sup> INA § 212(a)(9)(C)(ii). For details on how to file Form I-212, see ILRC, *Understanding I-212s for Inadmissibility Related to Prior Removal Orders and the Permanent Bar* (Mar. 2020), [https://www.ilrc.org/sites/default/files/resources/i-212\\_advisory-final.pdf](https://www.ilrc.org/sites/default/files/resources/i-212_advisory-final.pdf).

<sup>71</sup> C-L-L-M-, AXXX XXX 095, at 2 (BIA Feb. 8, 2019) (unpublished), [https://www.scribd.com/document/402308945/C-L-L-M-AXXX-XXX-095-BIA-Feb-8-2019?secret\\_password=0orz4a911X6Htl3tkH5m](https://www.scribd.com/document/402308945/C-L-L-M-AXXX-XXX-095-BIA-Feb-8-2019?secret_password=0orz4a911X6Htl3tkH5m).

<sup>72</sup> INA § 241(a)(5); see 8 CFR §§ 241.8(e), 208.31.

<sup>73</sup> For further information on this topic, see American Immigration Council & NIPNLG, *Practice Advisory: Reinstatement of Removal* (May 23, 2019), [https://www.nationalimmigrationproject.org/PDFs/practitioners/practice\\_advisories/pr/2019\\_23May\\_Reinstatement\\_of\\_Removal.pdf](https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/pr/2019_23May_Reinstatement_of_Removal.pdf).

#### **IV. Note on Jurisdiction over Adjustment of Status Applications of TPS Recipients with Removal Orders Who Depart and Return with Advance Parole**

A significant number of noncitizens with removal orders who are otherwise eligible for adjustment of status—assuming they can overcome the removal-based bars to relief described above—are TPS recipients who traveled on advance parole after receiving a removal order. This section briefly describes jurisdictional barriers to adjustment of status these individuals face due to current USCIS policy and how a recent settlement agreement may allow these individuals to overcome those barriers.

##### **A. USCIS Policy on Jurisdiction over Adjustment of Status for TPS Recipients**

Pursuant to regulation, the immigration court has jurisdiction over applications for adjustment of status filed by individuals in removal proceedings not charged as “arriving” noncitizens, and USCIS has jurisdiction over adjustment of status applications in all other circumstances.<sup>74</sup> Because USCIS considers an individual with an unexecuted removal order issued by an immigration court to be “in removal proceedings,” most individuals with unexecuted removal orders will need to request reopening in order to pursue adjustment of status with the immigration court (or, if the court terminates or dismisses proceedings, to pursue adjustment with USCIS).<sup>75</sup> INA § 101(g) provides that leaving the United States following an order of removal executes the order, and USCIS generally recognizes that departures pursuant to advance parole execute a removal order.<sup>76</sup> However, USCIS currently takes a different position with respect to TPS recipients who travel on advance parole.

Pursuant to a 2019 USCIS policy still in effect,<sup>77</sup> TPS recipients do not execute prior removal orders when they travel on advance parole, and thus they must successfully reopen their removal proceedings in order to have a forum to apply for adjustment of status.<sup>78</sup> USCIS’s policy is based on a flawed reading of a 1991 law, Section 304(c)(1)(A)(ii) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Pub. L. 102-232, 105 Stat. 1733, 1749 (Dec. 12, 1991). That provision—which says nothing about individuals with removal orders—states that when TPS recipients travel with the consent of the government, they “shall be

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<sup>74</sup> 8 CFR §§ 245.2(a)(1), 1245.2(a)(1).

<sup>75</sup> USCIS Policy Manual, Vol. 7, Pt. A, Ch. 3.D, <https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-3>.

<sup>76</sup> INA § 101(g); 8 CFR § 1241.7; *see* Form I-131 Instructions, at 6 (Mar. 24, 2019), <https://www.uscis.gov/i-131> (“If you have been ordered . . . removed, departing from the United States without having had your . . . removal proceedings reopened and administratively closed or terminated will result in your being considered . . . removed, even if . . . you have been granted advance parole.”).

<sup>77</sup> USCIS, Policy Alert: Effect of Travel Abroad by Temporary Protected Status Beneficiaries with Final Orders of Removal (Dec. 20, 2019), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20191220-TPSTravel.pdf>.

<sup>78</sup> *See* USCIS Policy Manual, Vol. 7, Pt. A, Ch. 3.D n.19, <https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-3>. The BIA in an unpublished decision similarly reasoned that a TPS recipient with a prior removal order who departed and returned on advance parole “remains in removal proceedings that have not been terminated or concluded with the respondent’s removal or departure under an order of removal.” *Margarito Raul Ramirez-Cruz*, AXXX XX6 475, 2018 WL 3416248, at \*1 (BIA May 18, 2018) (unpublished).



inspected and admitted in the same immigration status [they] had at the time of departure.” A year after issuing the 2019 jurisdiction policy, USCIS relied on this same MTINA provision to conclude that a TPS recipient’s entry on advance parole, if it occurred after August 20, 2020, does not satisfy the general adjustment of status requirement that an individual have been “inspected and admitted or paroled in the United States.”<sup>79</sup>

Advocates have brought a number of legal challenges to these two USCIS policies, arguing that the interpretations on which they are based are contrary to the plain language of MTINA, which was merely designed to ensure that TPS recipients retained their TPS status when they returned from authorized travel. A pending putative class action lawsuit, *Gomez v. Jaddou*, challenges the USCIS policy that TPS recipients’ advance parole travel after August 20, 2020 does not meet INA § 245(a)’s “inspected and admitted or paroled” requirement.<sup>80</sup> Regarding USCIS’s policy that it lacks jurisdiction over TPS recipients who travel on advance parole following a removal order, numerous individuals have brought actions in federal court challenging this policy, with mixed success.<sup>81</sup> One such federal court action, *Central American Resource Center (CARECEN) v. Jaddou*, No. 20-2363 (D.D.C.), resulted in a March 2022 settlement agreement that will provide a forum for adjustment of status for many TPS recipients with removal orders who have traveled on advance parole.

## **B. CARECEN v. Jaddou Settlement Agreement**

The CARECEN agreement,<sup>82</sup> entered on March 21, 2022 and which will remain in effect until at least January 19, 2025, creates a prosecutorial discretion policy under which Immigration and Customs Enforcement Office of the Principal Legal Advisor (OPLA) will generally agree to join motions to reopen and dismiss the removal proceedings of certain TPS recipients with prior removal orders who traveled on advance parole and are otherwise eligible for adjustment of status. Once proceedings are reopened and dismissed, USCIS will have jurisdiction over the individual’s adjustment of status application, even in light of USCIS’s 2019 jurisdiction policy.

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<sup>79</sup> *Matter of Z-R-Z-C-*, Adopted Decision 2020-02 (AAO Aug. 20, 2020),

<https://www.uscis.gov/sites/default/files/document/aao-decisions/Matter-of-Z-R-Z-C-Adopted-AAO-Decision.pdf>.

<sup>80</sup> *Gomez v. Jaddou*, No. 21-9203 (S.D.N.Y. filed Nov. 8, 2021), <https://immigrationlitigation.org/impact-litigation/>; see also American Immigration Council, National Immigration Litigation Alliance & American Immigration Lawyers Association, *Practice Advisory: Adjustment of Status for TPS Holders After Matter of Z-R-Z-C-* (Nov. 2, 2020), [https://immigrationlitigation.org/wp-content/uploads/2020/11/20.11.2.TPS-Matter-of-ZRZC-PA.FINAL\\_.pdf](https://immigrationlitigation.org/wp-content/uploads/2020/11/20.11.2.TPS-Matter-of-ZRZC-PA.FINAL_.pdf).

<sup>81</sup> *Compare Martinez v. Wolf*, No. 20-23838 (S.D. Fla. Sept. 29, 2021) (“arriving” noncitizen; executed order); *Mancia v. Mayorkas*, No. 20-01492, 2021 WL 1192952, at \*6-8 (N.D. Ga. Mar. 30, 2021) (“arriving” noncitizen); *Michel v. Mayorkas*, No. 20-10885, 2021 WL 797810, at \*7 (D. Mass. Mar. 2, 2021) (“arriving” noncitizen); *with, e.g., Duarte v. Mayorkas*, 27 F.4th 1044, 1054, 1060-61 (5th Cir. 2022) (not “arriving” noncitizens, did not execute orders); *Jean v. Pekoske*, No. 20-233, 2021 WL 683327, at \*2 (M.D. Fla. Feb. 22, 2021) (did not execute order); *Galindo Gomez v. USCIS*, No. 19-3456, 2020 WL 7419674, at \*4 (D.D.C. Nov. 13, 2020) (not an “arriving” noncitizen, did not execute order); *Jacques v. Wolf*, No. 20-01296-02, 2020 WL 5500208, at \*4 (M.D. Fla. Sept. 11, 2020) (not an “arriving” noncitizen, did not execute order); *Pineda v. Wolf*, No. 19-11201, 2020 WL 4559936, at \*1 (D. Mass. May 13, 2020) (not an “arriving” noncitizen); *Santa Maria v. McAleenan*, No. 18-3996, 2019 WL 2120725, at \*3 n.3 (S.D. Tex. May 15, 2019) (did not execute order); *Gonzalez v. Mayorkas*, No. 13-1230, 2014 WL 585863, at \*5 (E.D. Va. Feb. 12, 2014), *aff’d sub nom. Gonzalez v. Zannotti*, 585 F. App’x 130 (4th Cir. Nov. 3, 2014) (unpublished) (not an “arriving” noncitizen).

<sup>82</sup> Stipulation of Settlement and Dismissal, *CARECEN v. Jaddou*, No. 20-2363 (Mar. 21, 2022), ECF No. 68, <http://democracyforward.org/wp-content/uploads/2022/03/CARECEN-DE-68-Settlement.pdf> [hereinafter “CARECEN agreement”].



Under the *CARECEN* agreement, OPLA will generally join motions to reopen and dismiss of individuals who meet the following criteria:

1. Are not enforcement priorities under current DHS guidance<sup>83</sup>
2. Currently possess TPS
3. Have a removal, deportation, or exclusion order issued by the Executive Office for Immigration Review or its predecessor agency, the U.S. Immigration and Naturalization Service
4. Traveled on advance parole since the order was issued, and
5. Are otherwise *prima facie* eligible to file an adjustment application with USCIS, including those with pending or approved I-130 “immediate relative” visa petitions who meet INA § 245(a)’s “inspected and admitted or paroled” requirement pursuant to USCIS policy, if seeking to adjust under § 245(a). \*Note that unless and until *Z-R-Z-C-* is rescinded, individuals whose advance parole travel occurred after August 20, 2020 will not be able to meet this requirement.\*

Information about how to make a request with OPLA under the *CARECEN* agreement can be found on OPLA’s website.<sup>84</sup> OPLA will process requests to join a motion to reopen and dismiss under this agreement within 90 and 120 days.<sup>85</sup>

If the immigration court grants a joint motion to reopen and dismiss, the noncitizen can then seek adjustment of status with USCIS. The USCIS website contains information about how individuals whose adjustment applications were previously denied for lack of jurisdiction can seek reopening with USCIS of a denied application.<sup>86</sup>

If OPLA declines to join a motion to reopen despite the *CARECEN* agreement, practitioners must assess whether it is in the client’s interest to file a motion to reopen with the immigration court in order to pursue adjustment of status. In the typical case where such a motion is outside of the general 90-day filing deadline, practitioners should assess whether any exceptions apply, such as equitable tolling arguments and arguments for *sua sponte* reopening in the alternative.<sup>87</sup>

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<sup>83</sup> If USCIS granted or renewed TPS despite some criminal history, the settlement provides that OPLA “generally would not rely solely on that same criminal history to find someone a public safety priority for enforcement.” *Id.* ¶ 2.

<sup>84</sup> ICE OPLA, Prosecutorial Discretion (PD) Requests for Certain Temporary Protected Status (TPS) Recipients with Orders of Removal or Deportation, <https://www.ice.gov/about-ice/opla/prosecutorial-discretion#PD-TPS>.

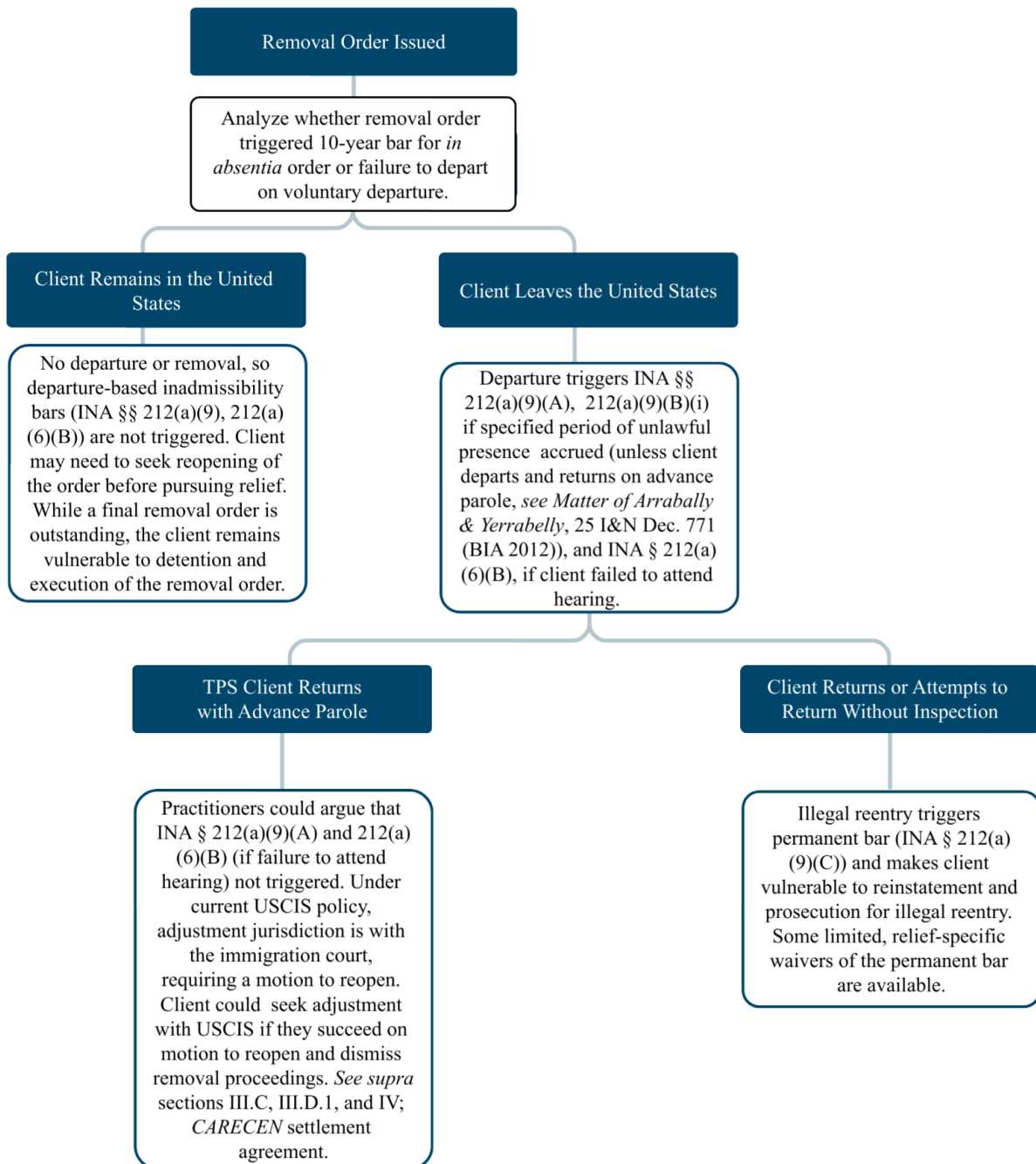
<sup>85</sup> *CARECEN* agreement, *supra* note 82, ¶ 5.

<sup>86</sup> USCIS, Certain Temporary Protected Status (TPS) Recipients with Orders of Removal or Deportation Seeking Adjustment of Status With USCIS (last reviewed/updated May 5, 2020), <https://www.uscis.gov/laws-and-policy/other-resources/class-action-settlement-notice-and-agreements/certain-temporary-protected-status-tps-recipients-with-orders-of-removal-or-deportation-seeking> (directing that individuals may either file a new adjustment application or move to reopen the denied adjustment application with USCIS “at any time by following the usual procedures for filing a motion to reopen on Form I-290B”; “You should write ‘TPS Removal Order’ at the top of the first page of your Form I-290B to assist with identification and prevent rejection for untimely filing. Any individual in litigation on this basis may work through the government’s representative in litigation.”).

<sup>87</sup> See CLINIC, *Practice Advisory: Motions to Reopen for DACA Recipients with Removal Orders* (last updated Oct. 12, 2020), <https://cliniclegal.org/resources/removal-proceedings/practice-advisory-motions-reopen-daca-recipients-removal-orders>. The Immigrant and Refugee Appellate Center’s index of unpublished BIA decisions contains a number of decisions where the BIA granted *sua sponte* reopening in this scenario.

## V. Flow Chart on Departure-Based Inadmissibility for Those with Removal Orders

As discussed above, the inadmissibility grounds under INA § 212(a)(9) and INA § 212(a)(6)(B) are only triggered if the person departs or leaves the United States. They do not apply to noncitizens with removal orders who have never left the United States. Those noncitizens, however, may still need reopening to pursue relief and may still have triggered a ten-year bar to certain relief if they received an *in absentia* order or failed to depart during a voluntary departure period. This flow chart illustrates how the different bars come into play.



## VI. Practice Tips

Practitioners may also consider the following general tips in weighing options for clients with previous removal orders:

- **Gather records.** Fact investigation is crucial to determine what bars are in play, what relief might be available, and what agency has jurisdiction over the potential relief. In addition to thorough client interviewing, practitioners should seek the client's full immigration history through FBI fingerprint checks, FOIA requests to the applicable agencies, as well as requesting audio recordings of any immigration court hearings.
- **Diagnose the removal order.** Part of fact gathering will require ascertaining if there is a removal order at all, what type of removal order it is, when it was issued, and what version of the law applies.
- **Assess what bars are in play based on the facts and have a back-up plan.** Are there arguments that the bar does not apply? Is there a waiver available if the bar does apply? If a waiver is available, does the client qualify for it and are they a good candidate? What supporting documentation can be gathered to establish eligibility? If eligibility is unclear, is there an option to wait out the ineligibility period?
- **Know the adjudicator.** Given the many uncertainties highlighted throughout this practice advisory, it is important to know what position the adjudicator will likely take on the client's eligibility for the relief sought in light of the bars discussed above, as well as how the adjudicator might view a waiver application. It is wise to reach out to experienced local practitioners to find out about recent experiences with similar facts.
- **Assess which agency has jurisdiction over the relief and whether a motion to reopen is necessary before the relief can be filed.** Even if a motion to reopen is not necessary to pursue the relief, would a motion to reopen benefit the client, and what is the ideal timing for filing it?
- **Have a legal defense plan in place in the event of enforcement.** Given the vulnerability to apprehension and swift removal of those with removal orders, practitioners should create an emergency plan in the event of immigration enforcement. This will depend on the facts and posture of the case, but it might include (1) having a G-28 for ICE signed by the client; (2) having an ICE stay application prepared; (3) having a motion to reopen and accompanying stay motion ready to file with the immigration court or BIA, as relevant; and (4) considering federal court options such as a habeas petition.
- **Counsel the client about the risks and benefits of various options, so that the client can make an informed decision about whether and what to file.** Individuals with prior removal orders are at heightened risk of being torn away from their families and communities. And, as described throughout this practice advisory, these individuals'

eligibility for relief can be complicated. A client with a removal order who is considering filing for relief should understand the likelihood of success of possible options and the potential negative consequences if unsuccessful, such as having a prior order reinstated. There may also be considerations about whether to wait for an ineligibility period to expire versus applying now and arguing for eligibility. Ultimately, it is the client's decision, having weighed the relative risks and benefits, about how to proceed. It may be wise to convey these advisals in writing and obtain the client's written signature on an agreed-upon plan of action indicating awareness of the risks.

## **VII. Conclusion**

The law regarding eligibility for immigration relief is complex, and even more complex with regard to noncitizens with prior removal orders. It is thus important that practitioners conduct a careful eligibility analysis for clients seeking relief who have prior orders and, when in the client's interest to do so, make all available arguments about why a given removal-related bar does not apply or has been overcome.