

## ANATOMY OF AN IMMIGRATION COURT PROCEEDING

### I. **Introduction**

- A. **Immigration Court** is an agency tribunal within the US Department of Justice. It handles deportation (removal) cases of aliens brought before it by the US Department of Homeland Security to be deported (removed) from the United States. The Immigration Court is an agency tribunal. It is staffed by Immigration Court judges who hear evidence and render decisions. Assisting the judges are court clerks and the judge's individual legal assistants.
- B. **DHS Trial counsel:** The Government is represented by the Department of Homeland Security. These are government attorneys who actually try the cases before the Immigration Court. These attorneys also provide legal counsel to Immigration and Customs Enforcement agents on various legal issues such as search warrants, raids, and detention of aliens.
- C. **Board of Immigration Appeals:** This is the appellate agency tribunal, now as the Board or BIA. The BIA considers appeals from both aliens and the government on adverse decisions from the Immigration Courts throughout the United States. The BIA also considers appeals on the denial of immigrant visa petitions for family members. The BIA's decision are precedent decisions for Immigration Courts throughout the United States, and must be followed unless the BIA has been overruled by particular U.S. Court of Appeals for the jurisdiction in which the Immigration Court presides.

## II. **Immigration Court Procedure**

- A. **Notice to Appear (NTA):** This is the charging document before the Immigration Court to bring charges before the Immigration Court, similar to a trial information or criminal indictment. The NTA sets out the list of allegations against the alien, as well as the specific legal conclusion and law provisions under which the government is alleging the alien is deportable, inadmissible or removable.
- B. **Bond:** The alien may be eligible for bond. This will depend on whether the alien has any criminal convictions, and the type of convictions. Certain convictions are subject to mandatory detention.
1. **Mandatory detention:** Under INA § 236(c), any alien who is deportable under INA § 237(a)(2)(A), (B), (C), or (D) is subject to mandatory detention.
  2. Any alien who is inadmissible under INA § 212(a)(2) is also inadmissible.
  3. Please note this list does not include INA § 237(a)(2)(E), which is the domestic violence subsection. Accordingly, aliens convicted only of domestic assault under Iowa law may be eligible for bond, unless the Immigration Service also alleges a crime of violence aggravated felony as defined under INA § 101(a)(43)(F).
- C. **Master Calendar Hearing:** The Immigration Court sets master calendar hearings in each case. The initial master hearing is to ensure the alien has been served with the NTA. Master hearings are also scheduled for pleadings, legal arguments, call up dates, and as scheduling conference to set individual hearing on the merits, as well

as to deliver the Immigration Court's final decision in a case.

- D. **Pleading:** The alien or representative reviews each allegation contained in the NTA, and either admits or denies the allegation. The ground of inadmissibility, deportability or removability is then either conceded or not conceded. The alien also designates a country of removal.
- E. **Designation of Country:** The government must remove the alien to a specific country. Generally, the alien is removable to the country of birth or country of citizenship. Alternatively, the government can remove an alien to the last known country of habitual residence or any other third country that is willing to accept the alien.
- F. **Motion to Terminate:** These motions are similar to a motion to dismiss in criminal court. A motion to terminate is generally based on a legal argument that the pleading is defective under the law or that sufficient facts are not plead to support the legal conclusion of deportability, inadmissibility or removability. Additionally, there are times when the Immigration Service makes an allegation that a criminal conviction constitutes a ground of inadmissibility, when in fact the attorney for the respondent may feel that this legal conclusion is not warranted. Alternatively, the Immigration Service may have charged the wrong ground of deportability, and there may be some other ground that is available but not charged. The attorney for respondent could then object that the ground check and legal conclusion is not supported by either the law or the alleged facts and move to terminate on this basis.

A motion to terminate is generally submitted in writing to the Immigration Court. It

can also be made orally at a master hearing or individual merits hearing. It is recommended that a legal memorandum accompany the motion, to make clear the various legal arguments supporting the motion to terminate as well as any pertinent legal citations.

- G. **Legal Evidence:** The Federal Rules of Evidence do not apply in Immigration Court. However, they are used as a model or guide for an introduction of evidence and making objections. Evidence itself is admitted at the discretion of the immigration judge. Hearsay and affidavits are admissible. Generally, objections to evidence go to the weight rather than to admissibility of the evidence. However, there are some exceptions, such as expert witness of foundation evidence, and other evidence which may be considered unreliable in some manner.
- H. **Government's Evidence:** The government generally attaches the I-213, which is the agency law enforcement report containing biographic information of the alien, as well as the immigration deportation or immigration officer's factual knowledge and summary of the case. Such items as arrests, convictions, prior deportations, pending immigration applications, and any other pertinent factors are listed on the I-213. The I-213 is generally considered to be admissible in its entirety, with objections permitted as to specific portions of the I-213 on the basis of such items as hearsay, foundation, or legal conclusion. The I-213 can provide sufficient evidence to support a finding of deportability, especially the absence of any opposing evidence from the alien. It is very common for the alien's own statements to be contained in the I-213, which are sometimes the only supporting evidence the government may have to show

deportability. Very frequently, the alien will simply admit that he/she is actually deportable, and their country of origin, and further admit the fact that they entered the United States illegally and are in the United States without proper authorization. Without such statements by the alien, the government frequently will not have sufficient evidence to prove deportability.

- I. **Respondent's Evidence:** Respondent generally submits affidavits or other supporting evidence in writing to the court. Oral testimony is also allowed at individual merits hearing or at a preliminary hearing on some factual issue. All evidence by Respondent must be filed directly with the Immigration Court in its original format with copies to the government attorney. A table of contents must precede all the evidence, and the evidence must be paginated and tabbed. If there are multiple volumes of evidence, the page numbers must be consecutive in each succeeding volume.
- J. **Admissibility of Evidence from Foreign Sources.** Evidence from other countries is generally admissible and is used frequently. All items in a foreign language must be accompanied by an English translation and translator's certificate, which certifies that the translator is competent in both English and the foreign language and that the attached English translation is an accurate rendition from the original language.
- K. Criminal court records from other countries are generally subject to similar restrictions as in the Federal Rules of Evidence. Mere certification may not be sufficient to allow introduction of foreign criminal records by the government, especially if the respondent can show if the record keeping procedures of the foreign

jurisdiction may be unreliable or may be subject to tampering by corrupt or otherwise unreliable officials. This is especially true in asylum cases, when the persecuting party may be in power and there may be either fraudulent or tampering criminal records justifying persecution of opposition members such as possibly the respondent in the case before the court. However, foreign convictions are admissible if accompanied by sufficient indicia of reliability.

- L. **Objections to Evidence:** Objections to evidence can either be made orally or in writing. The government generally attaches its initial evidence directly to the Notice to Appear and files the Notice to Appear with the Immigration Court. This is similar to the minutes of testimony or police reports filed in support of a trial information. Respondent's attorney can then lodge written or oral objections against the government's evidence, objecting to either part of the evidence or to its totality. Generally, it is most effective to object to individual portions of the evidence, such as introduction of police reports to prove criminal convictions. If sufficient time allows and the government's evidence is fairly voluminous, it is advisable to file written objections to make sure no specific objection gets overlooked. Generally, evidence is accepted by the Immigration Court subject to objections of either government or respondent's counsel. The court further may consider the evidence in part, or only give the evidence lesser weight due to problems of reliability.
- M. **Burden of Proof for Deportation Proceedings:** The government generally bears the burden of proof in deportation proceedings. The government must show by clear and convincing evidence that respondent is removable under INA § 237. This means

the respondent has been admitted to the United States under some sort of either immigrant or non-immigrant visa. The government must prove by clear and convincing evidence that the respondent should be deported from the United States. If the government fails to carry its burden of proof, Immigration Court proceedings must be terminated.

- N. **Burden of Proof for Inadmissibility Proceedings:** The respondent has the burden of proof to show admissibility when the government charges that the respondent is inadmissible under INA § 212. Generally, the respondent in the case is in the United States either illegally or has been granted parole. Accordingly, it is respondent's burden of proof to show that respondent is admissible to the United States in some manner. Generally, the respondent has a very heavy burden to do so, and generally will be required to show valid immigration or nonimmigrant visa or similar documents.
- O. **Parole:** Parole is granted to an alien who is otherwise not admissible to the United States. Parole allows a person to physically enter the US, but remain under the legal fiction that the person is still outside the US. Accordingly, persons in parole are generally considered to be only seeking admission and to legally be at the port of the US. This means a person can be detained by the Immigration Service at any time, and their detention is not subject to review by the Immigration Court. The judge cannot grant bond to a person who has been paroled. However, the Department of Homeland Security can decide to grant either bond or simply release a person who is on parole. This decision is not reviewable by the immigration judge. A person on

parole is considered to be seeking admission and therefore would be removable under INA § 212 rather than deportable under INA § 237.

P. **Individual Hearing:** An individual hearing with live evidence is held when there are factual issues which must be resolved, such as proving the respondent is removable or inadmissible from the United States. The government may have deportation agents or others testify. Additionally, the respondent can put on live evidence as well. Written evidence may also be submitted and examined at this time. The court generally makes a finding either of fact or law, and may find the respondent to be either deportable or inadmissible at that time and therefore subject to removal. Alternatively, the court could find the government failed to carry its burden and order that the case be terminated or dismissed. This decision, if final as to both merits and removability, would then be subject to appeal to the Board of Immigration Appeals by either the respondent or government.

Q. Individual merits hearings generally, a merits hearing is held after the respondent has already conceded either inadmissibility or deportability, and then request some sort of relief from removal. The person may be eligible for permanent residence through a US citizen spouse, requesting asylum, or possibly cancellation of removal from the United States. Each type of relief from deportation has separate legal requirements and varying burdens of proof, as well as subject to various factual and legal restrictions. It is the respondent's burden to prove eligibility for relief from deportation through one of the various forms of relief available under the law.