



An Overview of U.S. Immigration Laws Regulating the Admission and Exclusion of Aliens at the Border

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UPDATE: Following the publication of this Sidebar, on June 20, 2018, President Trump issued an [executive order](#) directing the Department of Homeland Security (DHS) to maintain custody of families who unlawfully enter the United States pending their removal proceedings or any [unlawful entry criminal prosecution](#) of one of the family members. The executive order declares an intent to “maintain family unity, including by detaining alien families together where appropriate and consistent with law and available resources.” The executive order further directs the Attorney General to file a request with the federal district court in the Central District of California to modify the [Flores settlement agreement](#), which generally limits the period of time in which an alien minor may be detained by DHS to 20 days. On June 21, 2018, the Department of Justice filed a [motion to modify](#) the settlement agreement to permit the detention of alien minors and their accompanying parents or legal guardians together in family residential centers during their removal proceedings. While the President’s executive order seeks to prevent families from being separated during the pendency of their removal proceedings, at present, the manner in which the order will be interpreted and applied remains unclear. In particular, as of the date of this update, there reportedly is [some confusion](#) over whether the executive order means that, in the event that an alien minor in DHS custody is released from detention, the minor’s parents must necessarily be released as well to ensure family unity.

The original post from June 15, 2018, is below.

Reports of a “[migrant caravan](#)” traveling from Central America to the United States have sparked considerable attention on the treatment of non-U.S. nationals (aliens) without legal immigration status who are arrested at or near the U.S.-Mexico border. The “caravan” comprises [aliens primarily from](#)

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Honduras, many of whom purportedly came to the United States to escape crime and political instability in their native countries. In recent months, there has been a marked increase in the number of apprehensions of aliens at the border seeking to unlawfully enter the country, with roughly three times as many border apprehensions in May 2018 compared to the same time last year.

In response to this influx of unauthorized border crossings, President Trump and other administration officials have called for stricter immigration laws and enhanced border security. In addition, the Department of Justice (DOJ) has announced a “zero tolerance” policy to criminally prosecute aliens who unlawfully enter the United States at the southern border; a policy which has reportedly led to the separation of children from parents awaiting prosecution for unlawful entry. The Administration and its supporters argue that these policies serve as a “tough deterrent” that is necessary to curb illegal border crossings. Opponents of these policies claim that U.S. immigration laws offer inadequate protections for those seeking a “safe haven” in the United States, and some have also legally challenged the separation of families on constitutional grounds.

The situation at the border and U.S. immigration authorities’ response to it has prompted significant attention and, in some cases, confusion regarding the governing laws and policies. This Legal Sidebar briefly examines the laws governing the admission and exclusion of aliens at the border, including the procedures for aliens seeking asylum and the circumstances in which arriving aliens may be detained. The Sidebar also addresses special rules concerning the treatment of unaccompanied alien children (UACs), as well as legislative proposals that would alter the scope of protections for arriving aliens at the border. A concluding Table provides an overview of the existing laws governing the detention and removal process for aliens.

General Statutory Framework Governing the Removal of Aliens

The Immigration and Nationality Act (INA) establishes a number of avenues by which various categories of aliens can be denied entry or removed from the United States. Typically, when the Department of Homeland Security (DHS) seeks to remove an alien found in the interior of the United States, it institutes removal proceedings under INA § 240. These “formal” proceedings are conducted by an immigration judge (IJ) within DOJ’s Executive Office for Immigration Review. Aliens are afforded a number of procedural protections in such proceedings. For example, the alien may be represented by counsel at his own expense, potentially apply for relief from removal (such as asylum), present testimony and evidence on his own behalf, and appeal an adverse decision to the Board of Immigration Appeals (BIA), the highest administrative body responsible for interpreting and applying U.S. immigration laws. Additionally, the alien may, as authorized by statute, seek judicial review of a final order of removal in the judicial circuit in which the removal proceedings were completed. Generally, DHS may (but is not required to) detain an alien while formal removal proceedings are pending, and may release the alien on bond or grant conditional parole as a matter of discretion (however, detention is mandatory if the alien is removable on certain criminal or terrorist-related grounds except in limited circumstances).

Expedited Removal

The INA sets forth a separate removal process for certain arriving aliens who have not been admitted into the United States; a process that significantly differs from the formal removal proceedings governed by INA § 240. Specifically, INA § 235(b)(1) provides that an alien arriving at the U.S. border or a port of entry may be removed from the United States *without a hearing or further review* if he lacks valid entry documents or has attempted to procure his admission by fraud or misrepresentation. (Aliens found inadmissible on most other grounds—e.g., because of certain criminal activity—are not subject to expedited removal and will instead be placed in formal removal proceedings.) The expedited removal statute also authorizes – but does not require – DHS to apply this process to aliens inadmissible on the

same grounds who have not been admitted or [paroled](#) into the United States by immigration authorities, and who have been physically present in the United States for less than two years. Based on this authority, DHS has implemented expedited removal with respect to the following categories of aliens:

1. [arriving aliens seeking entry](#) into the United States;
2. [aliens who entered the United States by sea](#) without being admitted or paroled, and who have been in the country less than two years; and
3. [aliens apprehended within 100 miles of the United States border within 14 days](#) of entering the country, and who have not been admitted or paroled.

Unlike in formal removal proceedings, an alien subject to expedited removal has [limited procedural protections](#). The alien has [no right to counsel](#) during the expedited removal process, [no right to a hearing](#), and [no right to appeal](#) an adverse ruling to the BIA. Judicial review of an expedited removal order also is [limited in scope](#). Further, the [INA provides](#) that an alien “shall be detained” pending expedited removal proceedings. DHS, however, has the [discretion to parole](#) an alien undergoing expedited removal for “urgent humanitarian reasons” or “significant public benefit,” thereby [allowing the alien to temporarily enter the United States](#) pending a determination as to whether he should be admitted. In addition, as an alternative to expedited removal, the agency [may permit the alien to voluntarily return](#) to his country if he intends, and is able, to depart the United States immediately.

Aliens Seeking Asylum

Although an alien subject to expedited removal typically has no right to administrative review, there is [an exception if the alien expresses](#) either an intent to apply for asylum or a more generalized fear of persecution if removed to a particular country. In these circumstances, the alien [must be referred to an asylum officer](#) within DHS’s U.S. Citizenship and Immigration Services (USCIS) to determine whether the alien has a [credible fear of persecution](#) (but this exception [does not apply to certain aliens arriving from Canada](#) who could seek protection in that country). Under this “[low screening standard](#),” the alien has to show a “substantial and realistic possibility of success on the merits” of an application for [asylum](#), [withholding of removal](#), or protection under the [Convention Against Torture](#) (CAT). A determination that the alien has demonstrated a credible fear does not mean that the alien will be granted relief from removal. Instead, if the alien shows a credible fear of persecution or torture, he [will be placed in](#) formal removal proceedings under INA § 240 in lieu of expedited removal, and may pursue an application for asylum and [related protections](#) in those proceedings. To be granted such relief, the alien will have to satisfy a [higher threshold of proof of eligibility](#) for relief than was required to satisfy the initial credible fear screening (e.g., a “well-founded” fear of persecution to qualify for asylum, or that it is “more likely than” not that the alien would face torture to obtain CAT protection). During the formal removal proceedings, the alien [will remain detained](#) unless DHS grants parole.

If an alien does *not* establish a credible fear of persecution, he [may still seek administrative review](#) of the asylum officer’s determination before an IJ (if the alien declines further review, the USCIS asylum officer [will issue an order of removal](#)). The IJ’s review [must be conducted](#) “within 24 hours, but in no case later than 7 days” after the asylum officer’s decision, and the alien [will remain detained](#) pending the IJ’s determination unless DHS grants parole. If the IJ concurs with the asylum officer’s finding, the alien [will remain subject to expedited removal](#); on the other hand, if the IJ determines that the alien has a credible fear, the alien [will be placed in formal removal proceedings](#) under INA § 240, and he may pursue an application for asylum and related protections in those proceedings.

Aliens Who Claim to be U.S. Citizens, Lawful Permanent Residents, Admitted Refugees, or Persons Who Have Been Granted Asylum

The INA also provides for an [exception](#) to expedited removal in cases where an alien claims to be a U.S. citizen, a lawful permanent resident (LPR), an admitted refugee, or a person granted asylum. The immigration officer must [attempt to verify](#) the alien's claim *before* issuing an expedited removal order. Further, even if the immigration officer cannot verify the alien's claim, the alien may still obtain [administrative review](#) of his claim before an IJ. The alien [will be detained](#) pending consideration of his claim unless DHS grants parole.

Special Rules Concerning the Treatment and Removal of UACs

Federal law notably sets forth different rules and procedures governing the treatment of UACs, who are [defined by statute to include](#) children under the age of 18 with no lawful immigration status who either (1) have no parent or legal guardian in the United States, or (2) have no parent or legal guardian in the United States available to provide care and physical custody.

UACs are not subject to expedited removal. Instead, a UAC who is determined by immigration authorities to be subject to removal is generally [placed in formal removal proceedings](#) under INA § 240, regardless of whether the alien is found in the interior of the United States or at the border. In limited circumstances, DHS [may permit a UAC to voluntarily return](#) to his country in lieu of removal proceedings, but only if the UAC is “a national or habitual resident of a country that is contiguous with the United States” (i.e., Mexico and Canada), and the child (1) has not been a victim of human trafficking (or is not at risk of human trafficking upon return to his native country); (2) does not have a credible fear of persecution in his country; and (3) is capable of independently withdrawing his application for admission to the United States.

A UAC who is believed to be from Mexico or Canada [is required to be screened within 48 hours](#) of his apprehension to determine whether he meets the criteria for voluntary return. If the UAC does *not* meet the criteria (e.g., the UAC is from a non-contiguous country or, even though he is from a contiguous country, he has a credible fear of persecution), or no determination is made within the 48-hour screening period, the UAC will be [placed in the custody of the Department of Health and Human Services' Office of Refugee Resettlement \(ORR\) pending formal removal proceedings](#) under INA § 240. The UAC typically must be [transferred to ORR within 72 hours](#) after DHS determines that the child is a UAC. Following transfer to ORR, the agency [generally must place](#) the UAC “in the least restrictive setting that is in the best interest of the child.” In assessing the appropriate setting, ORR may consider the child's “danger to self, danger to the community, and risk of flight,” and it may place the child with a sponsoring individual or entity after determining that the sponsor “is capable of providing for the child's physical and mental well-being.” In practice, executive officials have told Congress that the [majority](#) of UACs are released to individual sponsors, most of whom are parents or close relatives, within sixty days.

Federal laws also confer [additional protections for UACs who apply for asylum](#) which are generally unavailable to other categories of aliens. The [one-year time limitation](#) for most asylum applications does not apply to UACs seeking asylum. A UAC also may apply for asylum even if he may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than his native country) where he would not face persecution and could seek asylum-related protections. Further, while aliens seeking asylum [generally apply](#) either “affirmatively” with USCIS or “defensively” in removal proceedings before an IJ, USCIS asylum officers have [initial jurisdiction](#) over any asylum application filed by a UAC. A USCIS asylum officer has [initial jurisdiction even if the UAC is in removal proceedings](#) (though if the asylum officer determines that the UAC is not eligible for asylum, the UAC [may still pursue](#) his application before the IJ in removal proceedings).

Accompanied Alien Children

Although UACs may not be removed via expedited removal, *accompanied* alien children (such as those arriving in the United States with family members) are generally treated in the same manner as non-citizen adults, and may be subject to either expedited or formal removal proceedings. Generally, DHS has [detained children and their accompanying parents](#) in family residential centers for limited periods (typically [not exceeding 20 days](#)) before releasing them pending their removal proceedings.

Recently, however, DOJ [implemented a "zero tolerance" policy to criminally prosecute](#) aliens who unlawfully enter the United States at the southern border, which [reportedly has resulted](#) in the separation of children from parents who are subject to prosecution. In these cases, the parents are transferred from the custody of immigration authorities in DHS to criminal custody by DOJ, while the children remain in immigration custody. While the parents are [placed in pre-trial detention](#) pending their unlawful entry prosecution, their children are treated by DHS as UACs and [transferred to the custody of ORR](#). The children are [reportedly treated](#) by DHS as UACs because they cannot be detained with their parents in criminal custody, and therefore the children are deemed not to have a parent available to provide “[care and physical custody](#).” According to DHS, however, the agency itself [does not have a policy](#) of automatically separating families at the border and placing them in different immigration detention spaces, but there may be [circumstances where family separation occurs](#) (e.g., when separating children from accompanying adults while determining their family relationship, or when the parents are believed to have engaged in criminal conduct and are transferred to federal criminal law enforcement authorities).

While the INA’s statutory scheme does not prohibit the separation of families detained for immigration enforcement purposes, plaintiffs in California have filed a [class action lawsuit](#) arguing that this practice violates [due process](#) protections of separated persons. Recently, a federal district court in California [refused to dismiss](#) the lawsuit and rejected the government’s contention that the families have no constitutional right to remain together. The district court’s ultimate ruling in the case may significantly impact the government’s policies with respect to families and accompanied children at the border.

Recent Legislative Activity

In recent years, there have been several legislative proposals that would alter the procedures for arriving aliens at the border, generally by restricting their rights and protections. Some of these proposals address the expedited removal process for arriving aliens, including review of asylum claims raised by such persons. For example, the [Asylum Reform and Border Protection Act \(H.R.391\)](#) and the [Repeal Executive Amnesty Act of 2015 \(S.129\)](#) would impose for credible fear assessments an additional requirement that “it is more probable than not that the statements made by the alien in support of the alien’s claim are true.” The bills also would restrict DHS’s ability to grant humanitarian parole except in limited circumstances (e.g., when the alien has a life-threatening medical emergency and is permitted to enter the United States to receive medical care). [Other recent legislation](#) would have (1) expanded the scope of expedited removal under [INA § 235\(b\)\(1\)](#) to cover arriving aliens who pose “threats to public safety” based on certain criminal, gang-related, or terrorist activity, or previous immigration violations; (2) restricted DHS’s ability to grant parole to aliens involved in gang activity; and (3) barred gang members from most forms of discretionary relief, including asylum.

There is also proposed legislation that would modify current law governing UACs. For example, the [Protection of Children Act of 2017 \(H.R.495\)](#) and the [Protecting Children and America’s Homeland Act of 2017 \(PCAHA\) \(Title III, Subtitle B of S.1757\)](#) would allow any UAC to qualify for voluntary return in lieu of removal proceedings, even if the UAC did not come from a contiguous country. The PCAHA would also expand expedited removal under [INA § 235\(b\)\(1\)](#) to cover UACs who have previously entered the United States unlawfully or engaged in certain criminal, terrorist, or gang-related activity. In addition, [H.R. 5163](#), introduced in 2014, would have created a new removal process that would require a threshold

assessment of whether a UAC is likely admissible to the United States or eligible for any form of relief from removal (The PCAHA would create a similar procedure for UACs who meet the criteria for voluntary return but choose not to return to their home country). These bills would also impose time limitations for removal proceedings involving UACs and modify the procedures and requirements for the detention and release of UACs.

Other bills would modify current law regarding UACs by amending the UAC definition to exclude application to a child who has an adult sibling, aunt, uncle, grandparent, or adult cousin who may provide care and physical custody. Finally, with respect to accompanied children, there have been [legislative proposals](#) to prohibit the separation of alien children from their families. In short, lawmakers have proposed various options in recent years to alter the scope of protections for UACs specifically and aliens arriving in the United States generally, though to date no such measure has been enacted. Given recent developments concerning “migrant caravans,” Congress may consider additional legislative initiatives in the future.

Table: Overview of Laws Governing the Exclusion and Removal of Aliens

Category	Removal Process	Procedural Rights and Protections	Detention and Custody	Credible Fear and Asylum	Voluntary Departure/Voluntary Return in Lieu of Removal
Alien within the interior of the United States	Generally formal removal proceedings under INA § 240 (unless the alien meets the statutory criteria to be placed in a different type of removal proceeding)	Right to counsel, right to a hearing, right to present evidence and apply for relief from removal, right to appeal adverse decision to BIA, and (as authorized by statute) right to seek judicial review	DHS generally may detain alien pending proceedings, but may release alien on bond or grant conditional parole; detention is mandatory for aliens removable on certain criminal/terrorist-related grounds except in limited circumstances	May apply for asylum and related protections during removal proceedings; no credible fear assessment required before applying for asylum	Alien may apply for voluntary departure under INA § 240B prior to or upon completion of removal proceedings if certain statutory requirements are met
(1) Arriving alien (2) Alien who entered the United States by sea without being admitted or paroled and who has been in the country for less than two years (3) Alien apprehended within 100 miles of U.S. border within 14 days of entering the country who has not been admitted or paroled	Expedited removal proceedings under INA § 235(b)(1) if alien lacks valid entry documents or has attempted to procure admission through fraud/misrepresentation (if inadmissible on other grounds, alien is subject to formal removal proceedings under INA § 240)	Generally no right to counsel, hearing, or further review. Judicial review of expedited removal order available only in limited circumstances	Detention is mandatory but DHS may parole alien for “urgent humanitarian reasons” or “significant public benefit”	Credible fear determination required if alien expresses an intent to apply for asylum or a fear of persecution; if alien shows a credible fear, he may pursue asylum and related protections in formal removal proceedings under INA § 240 ; if credible fear claim is rejected by the asylum officer, the alien may still seek administrative	DHS may permit alien to voluntarily return to his country in lieu of expedited removal proceedings if he intends, and is able, to depart the United States immediately

Category	Removal Process	Procedural Rights and Protections	Detention and Custody	Credible Fear and Asylum	Voluntary Departure/Voluntary Return in Lieu of Removal
Unaccompanied Alien Children	Formal removal proceedings under INA § 240 (regardless of whether alien is found in the interior of the U.S. or at the border)	Right to counsel, right to a hearing, right to present evidence and apply for relief from removal, right to appeal adverse decision to BIA, and (as authorized by statute) right to seek judicial review	Alien is placed in custody of ORR pending removal proceedings; ORR may place alien with a sponsor who “is capable of providing for the child’s physical and mental well-being”	<p>review before IJ</p> <p>May apply for asylum and related protections during removal proceedings; no credible fear assessment required.</p> <p>Alien is not subject to one-year time limitation for asylum applications, and may pursue asylum even if he may be removed to third country where he could seek asylum-related protections under the receiving country’s laws;</p> <p>USCIS has initial jurisdiction over any asylum application even if alien is in removal proceedings; alien may still pursue application before IJ in removal proceedings</p>	Alien may be permitted to voluntarily return to his country in lieu of formal removal proceedings if he is “a national or habitual resident of a country that is contiguous with the United States” and alien (1) lacks a credible fear of persecution; (2) is not a victim or likely victim of trafficking; and (3) is capable of agreeing to return