



OVERVIEW OF THE DEPORTATION PROCESS

A Guide for Community Members & Advocates

By Em Puhl

The immigration system is very complex and opaque, containing many intricate moving parts. Most decisions that result in an individual's deportation take place behind closed doors or in remote geographic locations by a variety of government officials. Additionally, the laws, regulations, policy memos, executive orders, and international treaties that regulate immigration detention, relief from deportation, and due process for noncitizens are complex and, at times, contradictory. It is a Kafkaesque system that is prone to human error and requires strong advocacy by community members and advocates to protect a noncitizen's rights along the way.

This advisory¹ gives an orientation to the deportation² process and breaks it down into four steps that typically happen in an immigrant's experience with the deportation system. The amount of time that each step takes for an individual noncitizen varies; the entire process may occur in a matter of hours or one step could take years or decades. Additionally, some individuals may not ever reach the end of the process because they are granted immigration status, the government decides not to deport the person, or international protections do not allow the person to be deported to their country.

The immigration system is made up of an alphabet soup of agencies across multiple Executive Branch departments, each with distinct roles. Below is a list of agencies that are involved in the deportation system in the United States:

Department of Homeland Security



- Immigration and Customs Enforcement (ICE)
- Customs and Border Protection (CBP)
- U.S. Citizenship and Immigration Services (USCIS)

Department of Justice



- Executive Office of Immigration Review (EOIR):
 - Immigration Judges (IJs)
 - Board of Immigration Appeals (BIA)

Department of Health and Human Services



- Office of Refugee Resettlement (ORR):
 - oversees detention of unaccompanied minors (UACs)

¹ Thanks to Aruna Sury and Grisel Ruiz for their help with this advisory.

² After 1996, deportation orders are officially referred to as "removal orders." However, much of the immigration advocate community refers to the physical removal of a noncitizen as "deportation." This advisory uses both of these terms interchangeably.

Step 1: ICE Finds a Person Who is Potentially Deportable

ICE cannot try to remove someone until they find a person whom they want to try to deport.³ Although the constitution prohibits ICE from arresting and detaining a person because of their perceived ethnicity or because they speak a particular language, ICE officers often use these factors to identify potential noncitizens.⁴ Below are some common situations when ICE may attempt to interact with a person and put them into the deportation process:

A. AN INDIVIDUAL IS STOPPED AND ARRESTED BY ICE/CBP AGENTS

CBP and ICE agents routinely stop and ask individuals for proof that they were not born in the United States or do not have a lawful immigration status. This can happen at the border or almost anywhere inside the United States,⁵ including:



- Courthouses
- Amtrak trains, Greyhound buses, and stations
- Traffic stops
- Homes and workplaces

If a person shares information that they were born outside of the United States or have no immigration status, ICE or CBP can arrest them and begin the deportation process. To avoid this, it is important for individuals to assert their Fourth Amendment right to remain silent when they are stopped by DHS officers.

B. LOCAL LAW ENFORCEMENT GIVES ARREST INFORMATION TO ICE



A variety of laws, policies, and memoranda facilitate cooperation between ICE and local law enforcement, including police, sheriffs, highway patrol, and public transit agencies.⁶ Some policies allow local law enforcement to share information about people whom they have arrested and detained or allow ICE to physically look for people inside of a local jail or state prison. Other policies allow local law enforcement to act as ICE officers and arrest people for violations of immigration law. This cooperation can cause people to be physically transferred by local law enforcement to ICE facilities, or allow ICE officers to apprehend a person at the moment that they are released from criminal custody.

C. USCIS DENIES AN APPLICATION FOR IMMIGRATION STATUS



Many people voluntarily give information about their nationality and immigration history when they apply for some form of lawful immigration status, including applications to become a permanent resident (green card holder) or to become a citizen. When USCIS denies an application, the agency can notify ICE that the person violated an immigration law or does not have any lawful status.⁷

³ For an overview of ICE enforcement activities and how to organize against it, see ILRC and United We Dream, *Ending Local Collaboration with ICE: A Toolkit for Immigrant Advocates* (August 2015), https://www.ilrc.org/sites/default/files/resources/toolkit_final.compressed.pdf [hereinafter *Ending Local Collaboration*].

⁴ Individuals who are arrested by ICE due to racial profiling may be able to file a motion to suppress if they are in removal proceedings. For more information, see ILRC, *Motions to Suppress Supplement: Developments in Circuit Case Law* (December 2017), https://www.ilrc.org/sites/default/files/resources/motion_to_suppress-update-2017.pdf.

⁵ ICE has a policy limiting enforcement activity in sensitive locations such as schools and churches. For more information, see U.S. Immigration and Customs Enforcement, *FAQ on Sensitive Locations and Courthouse Arrests*, <https://www.ice.gov/ero/enforcement/sensitive-loc> (last visited December 18, 2018).

⁶ See *Ending Local Collaboration*, at 2-6.

⁷ USCIS may also decide to put someone in immigration court proceedings by issuing a Notice to Appear (NTA). See U.S. CITIZENSHIP & IMMIGRATION SERV., PM-602-0050.1, *UPDATED GUIDANCE FOR THE REFERRAL OF CASES AND ISSUANCE OF NOTICES TO APPEAR (NTAs) IN CASES INVOLVING INADMISSIBLE AND DEPORTABLE ALIENS* (June 28, 2018), <https://www.uscis.gov/news/alerts/uscis-begin-implementing-new-policy-memorandum-notices-appear>.

USCIS can also give this information to ICE before they deny an application. In some cases, ICE may arrest an individual even before USCIS denies an application.

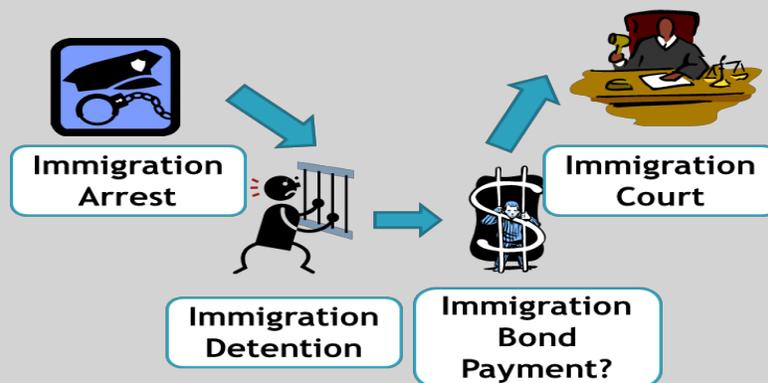
D. A PERSON SEEKS TO ENTER THE UNITED STATES AT THE BORDER



When a person arrives at an airport or a land border crossing, they must show documents allowing them to enter the United States, such as a U.S. passport, visa, or lawful permanent resident (LPR) card, or advance parole document. CBP may decide that the person is deportable when it reviews its databases or interviews the person at the time of attempted entry. A person who fears persecution in their country of citizenship can also tell a CBP officer that they want to apply for asylum if they do not have any documents to enter the country. This person will likely be interviewed by an asylum officer to see if they qualify for asylum or other protection.⁸ However, some people whose case have humanitarian considerations may instead be paroled into the United States without going through this interview.

NOTE: Federal law allows DHS to detain any individual while they determine whether the person is a noncitizen and deportable. This person may stay in detention for their entire immigration court proceedings, and the law even requires some people to be detained during this process. However, DHS always has the discretion to release most people on their own recognizance or on parole. In this case, DHS may instead decide to give the person a Notice to Appear (NTA)⁹ or give them an appointment for Deferred Inspection.¹⁰

Detained individuals who are not released by DHS can request a bond be set by ICE or an immigration judge, or ask a federal court to order their release.¹¹ Some courts have limited the detention of vulnerable groups for long periods of time, such as children and people with mental health issues.¹²



DHS may hold the person in a processing facility, holding facility, or field office. They may also be detained for long periods of time in a private detention center, county jail or state or federal prison.¹³

⁸ This is also known as the credible fear process. For more information, see Human Rights First, *Credible Fear: A Screening Mechanism in Expedited Removal* (February 2018), https://www.humanrightsfirst.org/sites/default/files/Credible_Fear_Feb_2018.pdf.

⁹ A Notice to Appear is a charging document issued by DHS that initiates removal proceedings under section 240 of the Immigration and Nationality Act (INA), 8 C.F.R. § 1003.14.

¹⁰ See U.S. Customs and Border Protection, *Deferred Inspection*, <https://www.cbp.gov/contact/deferred-inspection/overview-deferred-inspection> (last visited December 18, 2018).

¹¹ For more information about bond hearings, see ILRC, *Representing Clients in Bond Hearings: An Introductory Guide* (September 2017), https://www.ilrc.org/sites/default/files/resources/bond_practice_guide-20170919.pdf.

¹² For more information about limits to detention of immigrants with mental health conditions, see American Civil Liberties Union, *Franco v. Holder*, <https://www.aclusocal.org/en/cases/franco-v-holder>.

¹³ For more information about immigration detention in the United States see: <https://www.freedomforimmigrants.org/detention-statistics/>.

Step 2: DHS Decides Whether It Must Start a Removal Proceeding or Can Immediately Deport the Person

Once DHS finds a person who is not a citizen and may be deported, DHS must decide which process it must use to legally deport the person. The agency must also decide whether it is a priority to deport the person. DHS always has prosecutorial discretion, which means that, even if an ICE agent finds someone who can be deported, this agent can choose not to continue the deportation process because of agency priorities. Sometimes this is referred to as “deferred action.”¹⁴ Note that prosecutorial discretion is less common under the current administration, due to an executive order declaring that every person who violates immigration laws should be a priority for removal.¹⁵

If ICE decides that the person is a priority for deportation, it may do one of three things:

A. START A REMOVAL CASE IN IMMIGRATION COURT

Most noncitizens who are encountered by ICE inside of the United States have the right to appear in front of an immigration judge. This legal process is called “removal proceedings,” which are started when DHS files an NTA with an immigration court. Once a person is in immigration court, they can present a defense to being deported, either because they are a U.S. citizen or have not violated the immigration laws. Some individuals who have violated immigration laws can apply for immigration status that allows them to stay in the United States.¹⁶ See Step 3 for more information about the immigration court process.

CAUTION! ICE tries to intimidate or confuse people into agreeing to give up the right to see an immigration judge and many are deported without the opportunity to fight their case in immigration court. Therefore, a person who is arrested by ICE should **never sign any document** before consulting with an attorney. Many people have legal options to avoid deportation but do not know about these options until they speak with an attorney.

B. GIVE THE PERSON AN “EXPEDITED” REMOVAL ORDER

Under the immigration laws, people who are arrested by CBP on the border and do not have a valid visa or asylum claim can be deported within hours without ever going in front of a judge.¹⁷ Many people who crossed the border without permission have received an expedited removal order when they were caught by CBP and taken back to Mexico or another country. It is important for people stopped on the border to request their records from CBP to confirm whether they have received an expedited removal order, as this may affect their immigration options in the future.

¹⁴ Deferred Action for Childhood Arrivals (DACA) is an example of this use of prosecutorial discretion.

¹⁵ For more information about current DHS enforcement priorities, see American Immigration Council, *Summary of Executive Order “Enhancing Public Safety in the Interior of the United States”* (May 19, 2017), <https://www.americanimmigrationcouncil.org/immigration-interior-enforcement-executive-order>.

¹⁶ For an overview of defenses in removal proceedings, see ILRC, *Removal Defense*, <https://www.ilrc.org/removal-defense> (last visited December 18, 2018).

¹⁷ For an overview of the expedited removal process, see American Immigration Council, *A PRIMER ON EXPEDITED REMOVAL* (February 3, 2017): <https://www.americanimmigrationcouncil.org/research/primer-expedited-removal>.

C. ENFORCE A PRIOR REMOVAL ORDER

If a person already has a removal or deportation order, they generally do not have the option to go to immigration court. Instead, DHS can use the removal order to deport the person almost immediately. If the person has re-entered the United States without permission after being officially deported (or leaving after receiving a deportation order), DHS can “reinstate” this original removal or deportation order and use it to deport the person over and over again.

NOTE: A person who has a reinstated removal order can still ask for protection from removal if they fear harm or torture in their home country.¹ These individuals will still have a removal order, but they can live in the United States because international law does not allow the United States to transport them back to their home country. During this process, the person may be detained by ICE without the right to an immediate bond hearing.

Additionally, some people may be able to restart their case in immigration court through a motion to reopen. This may be an option if the person did not know they were in removal proceedings, or the reason they were initially ordered deported is no longer valid. Individuals with a removal or deportation order should speak to an immigration expert about their legal options.

Step 3: The Court System Decides Whether the Person Can Legally be Deported

If a person is eligible to fight their case before an immigration judge and has not given up this right, they will go through removal proceedings in immigration court. Although the person in proceedings¹⁸ has a right to be represented by an attorney, the government does not provide an attorney to most people in immigration court.¹⁹ However, ICE is represented by an attorney who prosecutes the case.

Removal proceedings in immigration court are a two-step process:²⁰

1. THE COURT HOLDS A “MASTER” HEARING (OR MULTIPLE MASTER HEARINGS)

During this stage, DHS must prove that the person can be deported because they are not a U.S. citizen and have violated immigration laws. For individuals who do not currently have a lawful immigration status, DHS must only prove the country where the person was born, also referred to as their “alienage.”²¹ The immigration judge may also take away a person’s previous immigration status, such as a visa or LPR status.²² A person might be ordered deported in this hearing if they ask to be deported, or do not have any applications to file to stay in the United States.

2. THE COURT HOLDS AN “INDIVIDUAL/MERITS” HEARING

If the immigration judge decides that the person is not, in fact, a U.S. citizen and can be deported, the person has an opportunity in an individual hearing to apply for immigration status that allows them to stay in the United States.²³ In this hearing, the person presents evidence that they are eligible for immigration status, such as based on a family relationship, fear of persecution, or length of time in the United States.²⁴

¹⁸ A person who has a case in immigration court is called a “respondent.”

¹⁹ For more information about appointed counsel in Immigration Court, see American Civil Liberties Union, *Franco v. Holder*,: <https://www.aclusocal.org/en/cases/franco-v-holder> (last visited December 19, 2018).

²⁰ Advocates and individuals can call the EOIR Hotline (1-800-898-7180) for information about the current stage of a respondent’s case.

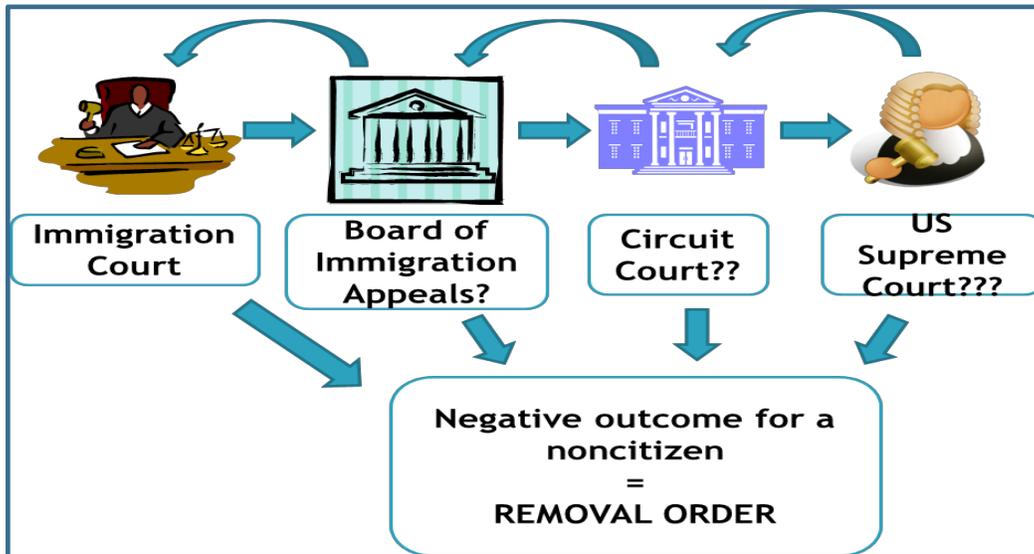
²¹ 8 C.F.R. § 1240.8(c).

²² Note that only a final order of removal can terminate a person’s lawful permanent resident status. *Matter of Lok*, 18 I. & N. Dec. 101, 105 (BIA 1981).

²³ While individual hearings often involve decisions on applications for relief from removal, the immigration judge may also hold an individual hearing to decide other evidentiary issues, such as whether the person’s arrest by ICE was lawful or whether a marriage was bona fide.

²⁴ For summaries of options for relief from removal, see ILRC, *Immigration Relief Toolkit For Criminal Defenders: How to Quickly Spot Possible Immigration Relief For Noncitizen Defendants* (January 2016), https://www.ilrc.org/sites/default/files/resources/n.17_questionnaire_jan_2016_final.pdf.

If the noncitizen wins in either step of these proceedings, then the person is allowed to remain in the United States. However, if the noncitizen loses their case at the end of the individual hearing (or decides not to apply for relief from removal), the immigration judge signs a removal order, which allows DHS to remove the person from the United States. Both DHS and the noncitizen have the right to appeal the immigration judge's decision to the Board of Immigration Appeals (BIA), so the immigration judge's decision may not be the final word. If the noncitizen loses at the BIA, they can appeal to the Federal Circuit Court of Appeals, and possibly to the U.S. Supreme Court. If a court finds that the immigration judge issued an incorrect decision, then the case will be sent back to redo the decision, and possibly redo the entire case. Because of this, the court process may take mere weeks, or could last for more than a decade. However, if the last court to decide the case agrees that the person can be deported, the person will have a "final removal order" that allows the government to deport the person.



Step 4: ICE Decides Whether It Can Physically Return the Person to Another Country

Once a person has a final removal order, DHS can legally remove the person from the United States at any time. However, a country must accept the person in order for DHS to deport them. Therefore, not everyone who has a removal or deportation order is actually deported from the United States. It may take a long time to arrange transportation to the person's country of citizenship because of limited DHS resources or the complexity of travel to that particular country. Additionally, individuals may be unable to get a travel document (such as a birth certificate or a passport) from their home country, possibly because of political conflict or a lack of infrastructure in the country to provide confirmation of citizenship. Finally, some governments will not actually allow the United States to deport people back to the country, especially if that government believes the individuals are political dissidents or not citizens of the country at all. As a result, it may be impossible to actually deport a person from the United States, even though U.S. law allows it.

If ICE cannot physically deport a person from the United States, it has three options:

1. DETAIN THE PERSON WHILE ICE ARRANGES TO PHYSICALLY DEPORT THEM

Federal law allows ICE to detain people for up to 180 days after receiving a final removal order, so the person must remain in detention during this time if ICE decides not to release them. After the first 90 days, ICE does a "post-order custody review" to decide whether the person would be a danger to the community or a flight risk (meaning that they would not appear for future appointments with ICE). After 180 days, the person has the right to file a habeas corpus

petition with a federal court and ask to be released. Additionally, people in some parts of the country may be eligible to ask for bond from an immigration judge.²⁵

2. RELEASE THE PERSON WHILE ICE ARRANGES TO PHYSICALLY DEPORT THEM

ICE always has the discretion to release a person until they can be deported. This may happen during the immigration court proceedings or after the person is ordered removed by an immigration judge. Typically, people who are released are given an order of supervision, which may include a work permit (Employment Authorization Document) that allows them to lawfully work in the United States. An order of supervision requires a person to check in with ICE periodically so that ICE can decide if it wants to detain the person again or try again to deport them.

3. DELAY DEPORTATION FOR HUMANITARIAN REASONS

Finally, even if ICE can deport the person to a country, ICE can decide to give the person a stay of removal because it is important that the person continue living in the United States. Some reasons for a stay of removal include supporting U.S.-citizen family members, having a serious medical condition, or violence in the country of removal. People who are granted a stay of removal typically also have an order of supervision and a work permit.²⁶ While many people received a stay of removal in the past, ICE has been revoking many of these in recent years, in a concerted effort to deport as many people as possible.

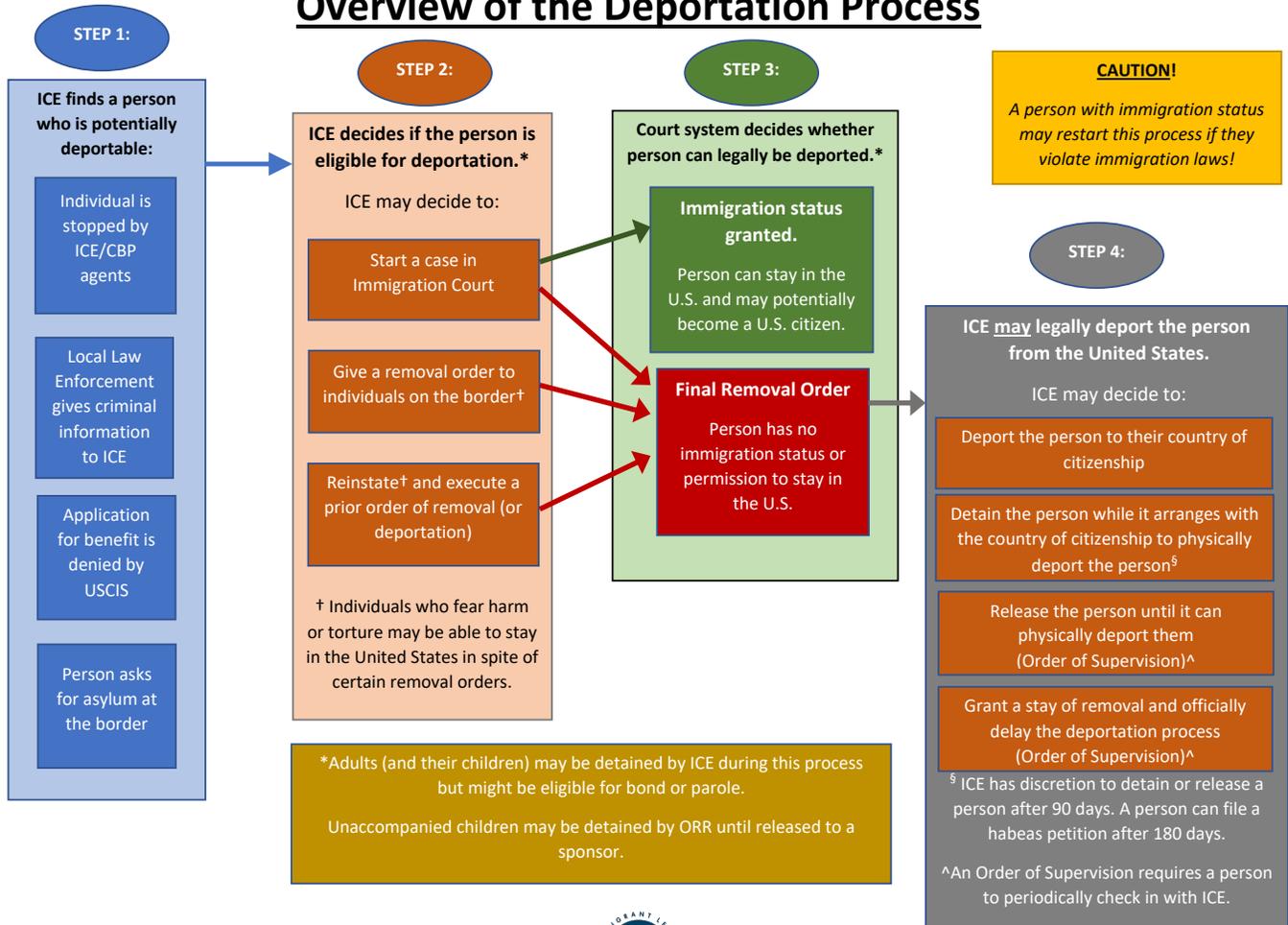
Conclusion

The immigration system is a confusing and opaque structure that is difficult to navigate by immigrants and new advocates alike. This advisory attempts to provide a basic orientation to the deportation process, to help noncitizens and their advocates understand their options and create strategies for the future. See the attached flow-chart for an illustration of the process described in this advisory. For more in-depth information, please consult the sources cited in this advisory, as well as ILRC's removal defense resources: <https://www.ilrc.org/removal-defense>.

²⁵ For more information about such bond hearings in the Ninth Circuit, see Van Der Hout, Brigagliano & Nightingale LLP, et al., *Prolonged Detention Bond Hearings in the Ninth Circuit under Aleman Gonzalez v. Sessions* (June 7, 2018), https://centrolegal.org/wp-content/uploads/2018/06/2018.06.07_Aleman-Gonzalez_Practice-Advisory_FINAL.pdf.

²⁶ For a general overview of judicial and DHS stays of removal, see Catholic Legal Immigration Network, Inc., *Stays of Removal for DACA Recipients with Removal Orders* (March 9, 2018), https://cliniclegal.org/sites/default/files/Stay-PA_1.pdf.

Overview of the Deportation Process



NOTE: A removal order is the same as a deportation order (the official term changed to "removal" in 1997)



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About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of immigrant families and communities.