



# Immigration Laws Regulating the Admission and Exclusion of Aliens at the Border

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Before the Coronavirus Disease 2019 (COVID-19) pandemic, the past few years had seen a marked increase in [the number of apprehensions](#) of non-U.S. nationals (aliens) at the border seeking to unlawfully enter the country. But entry restrictions at the U.S.-Mexico border [in response to the COVID-19 pandemic](#) have significantly reduced the number of alien apprehensions. Border closures and emergency measures in other countries [have also restricted](#) the ability of some “migrant caravans” to reach the United States. Even so, there continues to be [considerable attention concerning the treatment of aliens](#) without legal immigration status who arrive at or near the U.S.-Mexico border.

This Legal Sidebar briefly examines the laws generally governing the admission and exclusion of aliens at the border, including the procedures for asylum seekers and the circumstances in which arriving aliens may be detained. The Sidebar also addresses special rules for the treatment of unaccompanied alien children (UACs), recent policy changes affecting the processing of aliens at the border, and legislative proposals that would alter the scope of protections for arriving aliens. **Table 1** 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 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 the Department of Justice’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 or her own expense, potentially apply for relief from removal (such as [asylum](#)), present testimony and evidence, 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. DHS may (but is not required to) [detain an alien during the pendency of formal removal proceedings](#), but may release the alien on bond or

the alien's own recognizance. 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 further hearing or review](#) if the alien lacks valid entry documents or has attempted to procure admission by fraud or misrepresentation. (Aliens found inadmissible on most other grounds, including because of criminal activity, are not subject to expedited removal and instead are 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 (i.e., unlawful entrants), 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 U.S. border within 14 days](#) of entering the country, and who have not been admitted or paroled.

In 2019, DHS [exercised authority](#) to employ expedited removal to the full degree authorized by INA §235(b)(1), to include all aliens physically present in the United States without being admitted or paroled, who have been in the country less than two years, when those aliens lack valid entry documents or procured admission through fraud or misrepresentation. A federal district court initially [enjoined](#) DHS from implementing this initiative pending the outcome of a lawsuit challenging that expansion, but the U.S. Court of Appeals for the D.C. Circuit [overturned](#) that decision, enabling DHS to apply expedited removal in the interior of the United States pending the outcome of the litigation.

An alien in expedited removal has [limited procedural protections](#). Unlike in formal removal proceedings, 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 a determination as to whether the alien should be subject to expedited removal. DHS, however, has the [discretion to parole](#) an alien undergoing expedited removal in limited circumstances (e.g., because of a medical emergency), [allowing the alien to temporarily enter the United States](#) pending a determination on whether the alien will be admitted. As an alternative to expedited removal, DHS [may permit the alien to voluntarily return](#) to his or her country if the alien 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 shown a credible fear does not mean the alien will be granted relief from removal. Instead, the alien **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 the alien would face torture to obtain CAT protection).

The INA provides that an alien who establishes a credible fear of persecution “**shall be detained**” during the pendency of formal removal proceedings, but authorizes DHS to grant parole as a matter of discretion. For many years, immigration authorities had **construed** the statute and **regulations** to provide that, when an alien apprehended between ports of entry and initially screened for expedited removal was placed in formal removal proceedings following a credible fear determination, that alien could seek review of DHS’s custody decision at a bond hearing and potentially be released from custody during the pendency of those proceedings. In 2019 Attorney General William Barr reversed this position, **ruling** instead that aliens subject to expedited removal who are placed in formal removal proceedings after a positive credible fear determination may not be released on bond, “whether they are arriving at the border or are apprehended in the United States.” But a federal district court **held** that this mandatory detention scheme unconstitutionally denies aliens who have entered the United States the opportunity to seek release on bond. The U.S. Court of Appeals for the Ninth Circuit has **affirmed** that decision. As a result, unlawful entrants transferred to formal removal proceedings for consideration of asylum applications may not be indefinitely detained by immigration authorities without a bond hearing.

If an alien does *not* establish a credible fear of persecution, the alien **may still seek administrative review** of the asylum officer’s determination before an IJ (if the alien declines further review, the 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. Unless DHS grants parole, the alien **will remain detained** pending the IJ’s determination. If the IJ concurs with the asylum officer’s finding, the alien **will remain subject to expedited removal**; but if the IJ finds that the alien has a credible fear, the alien **will be placed in formal removal proceedings**, and may pursue 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 when a person 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 claim *before* issuing an expedited removal order. If the immigration officer cannot verify the claim, the claimant may still obtain **administrative review** before an IJ. The claimant **will be detained** pending consideration of the claim unless DHS grants parole.

### **Special Rules Concerning the Treatment and Removal of UACs**

Federal law sets forth different rules for the treatment of UACs, **defined by statute to include** those under 18 without 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, and are generally **placed in formal removal proceedings** under INA §240, regardless of whether found in the United States or at the border. DHS **may permit a UAC to voluntarily return** to his or her country in lieu of removal proceedings if the UAC is “a national or habitual resident of a country that is contiguous with the United States” (i.e., Mexico or Canada), and the child (1) has not been a victim of human trafficking (or is not at risk of human trafficking upon return to the child’s native country); (2) does not have a credible fear of persecution in his or her country; and (3) is capable of independently withdrawing his or her application for admission to the United States.

A UAC believed to be from Mexico or Canada [is required to be screened within 48 hours](#) of apprehension to determine whether he or she meets the criteria for voluntary return. If the UAC does *not* meet the criteria (e.g., the UAC is from a noncontiguous country or, even though the UAC is from a contiguous country, he or she 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 60 days.

Federal law also confers [additional protections for UACs who apply for asylum](#) that are generally unavailable to other aliens. The [one-year time limitation](#) for most asylum applications does not apply to UACs. A UAC also may apply for asylum even if he or she may be removed, pursuant to a safe third country agreement, to a different country where he or she 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 applications filed by UACs. 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](#) the application before the IJ in formal removal proceedings).

## Accompanied Alien Children

While UACs are not subject to expedited removal, *accompanied* alien children arriving with family members may be subject to expedited or formal removal proceedings. Generally, DHS detains children and accompanying parents in [family residential facilities](#) for limited periods (typically [not exceeding 20 days](#) due to a [court settlement agreement](#)) before releasing them for the pendency of removal proceedings. In 2018, DOJ started a “zero tolerance” [policy to criminally prosecute](#) aliens who unlawfully enter the United States at the southern border, resulting in the [separation of children from parents](#) subject to prosecution (following the parents’ transfer to criminal custody by DOJ, the children were treated by DHS as UACs and [transferred to ORR custody](#)). A federal court [issued a preliminary injunction](#) barring DHS from detaining parents without their minor children at the border, unless the parents are unfit or present a danger to the child, or have a criminal history or communicable disease. The court also ordered DHS to reunite separated families. Following the injunction, DHS [stopped referring parents](#) for unlawful entry prosecution if they had entered the United States as part of a family unit. The agency also allowed the separation of parents from children [only if](#) the parent has a criminal history, presents a danger to the child, has a communicable disease, or presents a fraudulent claim of parental relationship. The government, which has made efforts to reunite families that have been separated, is not appealing the injunction.

## Recent Policy Changes Affecting the Processing of Aliens at the Border

Since 2019, the Trump Administration has implemented [new policies](#) affecting the processing of aliens arriving at the southern border who would normally be subject to expedited removal (e.g., because they lack valid entry documents). These policies, [discussed in more detail in other CRS products](#), include the following:

1. The **Migrant Protection Protocols (MPP)** (or “Remain in Mexico” policy). Under this 2019 [policy](#), some aliens arriving at the southern border are placed in formal removal

proceedings rather than expedited removal, and returned to Mexico pending the outcome of those proceedings. The MPP does not apply to Mexican nationals, UACs, or those who show that it is more likely than not they will face persecution or torture in Mexico.

2. The **third-country transit asylum bar**. In 2019, DHS and DOJ jointly promulgated a [rule](#) that makes aliens arriving at the southern border ineligible for asylum if they traveled through another country without first seeking protection in that country. Such aliens will be found not to have a credible fear of persecution, but may pursue withholding of removal and CAT protection in formal removal proceedings if they show a “reasonable fear” of persecution or torture. The rule potentially applies to UACs, who are placed in formal removal proceedings rather than expedited removal. The rule is currently [enjoined](#) from implementation by a federal district court.
3. **Safe third country agreements (STCAs)**. In 2019, DHS [signed STCAs](#) with Guatemala, Honduras, and El Salvador to enable the transfer of asylum seekers arriving at the U.S. southern border to those countries. So far only the [Guatemalan STCA](#) has been implemented, and only Honduran and El Salvadoran nationals have been subject to it. Under the STCA, aliens screened for expedited removal who indicate an intention to apply for asylum or a fear of persecution are [sent to the receiving country](#) (e.g., Guatemala) to pursue relief. But if the alien shows that he or she is more likely than not to face persecution in the receiving country, the STCA does not apply and DHS will proceed with the expedited removal process. The STCA does not apply to UACs.
4. **Border entry restrictions**. Responding to the COVID-19 pandemic, DHS limited nonessential travel at land ports of entry at the [northern](#) and [southern borders](#). These measures were supplemented by an order from the Centers for Disease Control and Prevention, [barring entry](#) for most aliens arriving from Canada or Mexico and requiring their immediate return to the countries they entered from (or their country of origin). DHS has [temporarily suspended](#) the inspection and processing of aliens arriving at the border in most cases. Reportedly, UACs [have also been subject](#) to these entry restrictions.

## Recent Legislative Activity

Proposals in the 116th Congress would alter procedures for arriving aliens at the border, though none have been enacted. Some address the expedited removal process for arriving aliens, including review of asylum claims raised by such persons. For example, some bills ([H.R. 517](#), [H.R. 3360](#)) would heighten the credible fear standard, while others ([H.R. 3775](#), [H.R. 3918](#), [H.R. 4202](#)) would clarify which immigration officers may serve as “asylum officers.” Some bills would address the detention of aliens placed in expedited removal, either by barring prolonged detention ([S. 1243](#), [H.R. 2415](#), [H.R. 3918](#)); or, conversely, allowing indefinite detention and limiting the availability of parole ([S. 1303](#), [S. 1494](#), [H.R. 586](#), [H.R. 2522](#), [H.R. 3360](#)). Proposed legislation would also modify current law governing UACs. Some bills ([H.R. 586](#), [H.R. 2522](#), [H.R. 3940](#), [S. 1303](#), [S. 1494](#)) would allow any UAC to qualify for voluntary return in lieu of removal proceedings, even if the UAC is not from a contiguous country; or require the placement of UACs in expedited removal if they engaged in certain criminal activity ([S. 1303](#), [H.R. 2522](#)). In addition, some bills would remove DHS’s ability to return arriving aliens to Mexico or Canada pending the outcome of formal removal proceedings ([H.R. 5207](#)), or require an alien’s “affirmative consent” before being returned under that process ([H.R. 3775](#)). One bill ([H.R. 3918](#)) would prohibit the separation of an alien minor from a parent or legal guardian near the border except in certain circumstances.

**Table I. Procedures for 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 placed in formal removal proceedings under <a href="#">INA §240</a> (unless the alien meets the statutory criteria to be placed in a <a href="#">different type of removal proceeding</a> ).	Aliens in formal removal have a right to counsel, to a hearing, to present evidence and apply for relief from removal, to appeal adverse decision to BIA, and (as authorized by statute) to seek judicial review.	DHS may detain alien during the pendency of proceedings, or release the alien on bond or conditional parole. Aliens removable for certain criminal or terrorist activity generally must be detained.	Alien may apply for asylum and other protections during formal removal proceedings; no credible fear assessment is required before applying for asylum.	Alien may apply for voluntary departure under <a href="#">INA §240B</a> prior to or upon completion of proceedings if statutorily eligible.
(1) Arriving alien (2) Alien found in any part of the United States who has not been admitted or paroled, and who has been in the country less than two years	Generally placed in expedited removal under <a href="#">INA §235(b)(1)</a> 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 <a href="#">INA §240</a> ). DHS may opt to return aliens encountered at or near the U.S.-Mexico border to Mexico pending formal removal proceedings under the MPP instead of expedited removal.	Generally no right to counsel, hearing, or further review in expedited removal. Judicial review of expedited removal order is available only in limited circumstances. But greater procedural protections are afforded if an alien otherwise subject to expedited removal is placed in formal removal proceedings under the MPP.	An alien is normally detained during expedited removal, including while awaiting a credible fear determination, but DHS may parole the alien for “urgent humanitarian reasons” or “significant public benefit.” If an alien screened for expedited removal is placed in formal removal proceedings, detention is mandatory unless parole is granted. The alien generally may not be released on bond. (An injunction now requires bond hearings for unlawful entrants initially screened for expedited	In expedited removal proceedings, a credible fear determination is required if an alien expresses an intent to apply for asylum or a fear of persecution. If the alien shows a credible fear, asylum and related protections may be pursued in formal removal proceedings under <a href="#">INA §240</a> ; if a credible fear claim is rejected by the asylum officer, the alien may still seek review from an IJ. <b>Note:</b> Safe third country agreements and third-country transit bar may preclude consideration of many asylum claims.	DHS may permit an alien to voluntarily return to his or her country in lieu of expedited removal 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	UACs may only be placed in removal proceedings under <a href="#">INA §240</a> , regardless of whether they are found in the interior or arriving at the U.S. border. (UACs are not subject to the MPP.)	Aliens in formal removal have a right to counsel, to a hearing, to present evidence and apply for relief from removal, to appeal adverse decision to BIA, and (as authorized by statute) to seek judicial review.	removal but then placed in formal removal proceedings.)  UACs are placed in the custody of ORR during pendency of removal proceedings. ORR may place a UAC with a sponsor who “is capable of providing for the child’s physical and mental well-being.”	UACs are not categorically exempted from the third-country transit asylum bar. Non-disqualified UACs may apply for asylum during removal proceedings without an initial credible fear assessment. UACs are not subject to one-year limitation for seeking asylum, and may pursue asylum even if they may safely be removed to a third country. USCIS has initial jurisdiction over UACs’ asylum applications even in removal proceedings. But a UAC may still pursue application before an IJ during removal proceedings.	A UAC may be permitted to voluntarily return to his or her country in lieu of formal removal proceedings if UAC is “a national or habitual resident” of Mexico or Canada, and the 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.

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