

## ADVISALS

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Case Study - [Picca v. Mukasey, 512 F.3d 75 \(2d Cir. 2008\)](#)

## **Advisals Given at the Beginning of the First Master Calendar Hearing**

### *a. Counsel of Choice*

You have the right to be represented, at no expense to the government, by counsel of your choice authorized to practice before this Court. [Require Respondent to state then and there whether he or she desires representation] See 8 C.F.R. § 1240.10(a)(1).

### *b. Free Legal Services*

You may be eligible for free legal services. To help you determine if you might qualify, I am hereby providing you with a list which provides contact information of the persons who might be able to assist you. See 8 C.F.R. § 1240.10(a)(2), (3).

### *c. Evidentiary Rights*

During these proceedings, you will have a reasonable opportunity to examine and object to the evidence against you, to present evidence on your own behalf and to cross-examine witnesses presented by the government. See 8 C.F.R. § 1240.10(a)(4).

### *d. Appeal Rights*

At the conclusion of these proceedings, the Court will decide whether or not you will be removed from the United States. Should you disagree with the Court's decision, you have the right to appeal to a higher tribunal called the Board of Immigration Appeals. To do so, you must file Form EOIR-26 within 30 calendar days after the date the Court enters its decision. If the final date for filing falls on a Saturday, Sunday, or legal holiday, the time period for appeal shall be extended to the next business day. If the time period expires and no appeal has been filed, the decision of this Court becomes final. I am hereby providing you with a copy of your appeal rights which you should thoroughly review. See 8 C.F.R. §§ 1003.38, 1003.39, 1240.10(a)(3).

### *e. Reading and Explanation of the NTA in Non-Technical Language*

[Place Respondent under oath. Read the factual allegations and charges in the NTA to Respondent and explain them in non-technical language. Enter the NTA as an exhibit in the ROP.] See 8 C.F.R. §§ 1240.10(a)(5) - (a)(7).

### *f. Right to Designate Country of Removal*

If you are ordered removed from the United States, the country to which you will be removed will be one that you choose, except as otherwise required by law. [Ask Respondent if he/she would like to designate a country of removal—alien may only designate a country “if the alien is a native, citizen, subject, or national of, or has resided in” that country.] See INA § 241(b)(2); 8 C.F.R. § 1240.10(f).

If you cannot be removed to [designated country], the Court designates in the alternative:

- the country of which the alien is a subject, national, or citizen
- the country from which the alien was admitted to the US
- the country in which is located the foreign port from which the alien left for the US or for a foreign territory contiguous to the US
- a country in which the alien resided before the alien entered the country from which the alien entered the US
- the country in which the alien was born
- the country that had sovereignty over the alien's birthplace when the alien was born
- the country in which the alien's birthplace is located when the alien is ordered removed
- if impracticable, inadvisable, or impossible to remove the alien to each country described in the previous clause of this subparagraph, another country whose government will accept the alien into that country.

See INA § 241(b)(2); 8 C.F.R. § 1240.10(f).

## Advisals Given at the Conclusion of Every Master Calendar Hearing

### *a. Failure to Appear*

Your next hearing is scheduled for [date and time]. If you fail to appear for this hearing and there are no exceptional circumstances beyond your control which caused your absence, a hearing may be held in your absence and an order of removal may be entered against you. Furthermore, you may become ineligible for 10 years after the date of the order of removal for voluntary departure under INA § 240B, cancellation of removal under INA § 240A, and for adjustment of status and change of status under INA §§ 245, 248, and 249. Exceptional circumstances which may excuse your absence are those such as:

- you have a serious illness
- your spouse, child, or parent has a serious illness or has died
- you, your child or parent has suffered battery or extreme cruelty
- but not* circumstances less compelling

See INA § 240(b)(5), (b)(7), (e)(1).

### *b. Change of Address*

You must immediately inform the Court by using Form EOIR-33 whenever you change your address or telephone number. I am now providing you a copy of this form. Any change in the date of your hearing or further notices of hearing will be mailed to the last address which you provided to the Court or to your counsel of record. See INA § 239(a)(1)(F)(ii).

## Advisals Given When Appropriate

### *a. Call-Ups*

The Court will set [date] as the deadline for receipt of [?] application]. If that application is not filed by that date, the Court will deem it abandoned for lack of prosecution. See 8 C.F.R. § 1003.31(c); Matter of Nafi, 19 I&N Dec. 430 (BIA 1987).

### *b. Biometrics*

Failure to timely comply with my order to provide biometrics in conformity with the applicable regulations, the instructions to the applications, the biometrics notice, and the instructions provided by the DHS constitutes an abandonment of your application for [?] and will result in that application being dismissed absent good cause. See 8 C.F.R. § 1003.47(c).

## Relief Specific Advisals

### a. *Frivolous Asylum*

Before you file an asylum application, Form I-589, the law requires that you be advised specifically about the consequences of knowingly filing a frivolous application for asylum. If you knowingly file a frivolous application for asylum, you will be barred forever from receiving any benefit under the Immigration and Nationality Act. A frivolous application for asylum is one which contains statements or responses to questions that are deliberately fabricated. Not being granted asylum does not mean that your application is frivolous. See INA §§ 208(d)(4), (6); 8 C.F.R. § 1208.20.

### b. *Voluntary Departure*

#### i. Pre-Conclusion Voluntary Departure

You have been granted the privilege of voluntary departure from the US pursuant to INA § 240B on or before [date]. If you voluntarily fail to depart the United States within this time period, you will become ineligible for ten years from that date for certain forms of relief from removal, including voluntary departure under INA § 240B, cancellation of removal under INA § 240A, and for adjustment of status and change of status under INA §§ 245, 248, and registry under INA § 249. Your voluntary departure bond, if any, will also be breached. Additionally, you shall be subject to a civil penalty of \$3,000 [*Judge may set amount between \$1,000 and \$5,000, but \$3,000 is presumed the proper amount*]. See INA § 240B(d).

If you file a motion to reopen or reconsider during the voluntary departure period given by the Judge, the grant of voluntary departure is **terminated automatically** and an alternate order of removal will take effect immediately. Moreover, the civil penalty and 10 year bar described in INA § 240B(d) shall not apply. See 8 C.F.R. § 1240.26(b)(3)(iii).

#### ii. Post-Conclusion Voluntary Departure

You have been granted the privilege of voluntary departure from the US pursuant to INA § 240B on or before [date]. If you voluntarily fail to depart the United States within this time period, you will become ineligible for ten years from that date for certain forms of relief from removal, including voluntary departure under INA § 240B, cancellation of removal under INA § 240A, and for adjustment of status and change of status under INA §§ 245, 248, and registry under INA § 249. Your voluntary departure bond, if any, will also be breached. Additionally, you shall be subject to a civil penalty of \$3,000 [*Judge may set amount between \$1,000 and \$5,000, but \$3,000 is presumed the proper amount*]. See INA § 240B(d).

You are required to post a bond of \$\_\_\_ [*minimum \$500*] with the Immigration and Customs Enforcement Field Office Director within 5 business days from today's date. See 8 C.F.R. § 1240.26(c)(3)(i).

If you appeal this decision, you are required to submit sufficient proof of having posted this bond. This proof must be filed with the Board of Immigration Appeals within 30 days of filing the appeal. If you fail to do so, the Board of Immigration Appeals will not reinstate voluntary departure in its final order. See 8 C.F.R. § 1240.26(c)(3)(ii).

If you file a motion to reopen or reconsider during the voluntary departure period given by the Judge, the grant of voluntary departure is **terminated automatically** and an alternate order of removal will take effect immediately. See 8 C.F.R. § 1240.26(c)(3)(iii).

*Note -- Unlike pre-conclusion voluntary departure, the regulations do not require the Judge to advise the alien that upon the filing of a motion to reopen or reconsider, the civil penalty and 10 year bar described in INA § 240B(d) shall not apply.*

*c. Deferral of Removal under the Convention Against Torture*

You have been found eligible for relief called deferral of removal under the convention against torture. This relief provides that your removal to [*country*] shall be deferred because you would likely be tortured if you returned. This relief protects you only from [*country*] and does not prevent your removal at any time to another country where you will not likely be tortured. This relief does not give you any lawful or permanent immigration status in the U.S. and will not necessarily result in your release from custody. Finally, the deferral of your removal is not necessarily permanent—it is subject to review and termination if it is determined that: (1) it is not likely that you would be tortured in [*country*], or (2) you request that the deferral of your removal be terminated. See 8 C.F.R. § 1208.17(b).

## **Advisals Given at the Conclusion of Proceedings**

### *a. Appeal Rights*

I have entered a decision finding you removable from the United States. If you disagree with my decision, you have the right to appeal to a higher tribunal called the Board of Immigration Appeals. To perfect this appeal, you must file Form EOIR-26 with the Board of Immigration Appeals within 30 calendar days from today's date. If the final date for filing falls on a Saturday, Sunday, or legal holiday, the time period for appeal shall be extended to the next business day. If the time period expires and no appeal has been filed, the decision of this Court becomes final. I [have previously / am hereby] providing you with a copy of your appeal rights which you should thoroughly review. See 8 C.F.R. §§ 1003.38, 1003.39, 1240.10(a)(3).