

Section 242 of the Immigration and Nationality Act (INA) as Amended by Sections 101 and 106 of the REAL ID Act of 2005

The following is an unofficial amended version of INA § 242 as amended by The REAL ID Act. Amendments are indicated with bold font. Footnotes are added by the Editors.

H.R. 1268, the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, was enacted on May 11, 2005. *See* Public Law 109-13, 119 Stat. 231. The REAL ID Act, contained in Division B of H.R. 1268, specifically addresses federal court review of immigration cases. Two sections of the Act, § 101 and § 106, amend § 242 of the INA, which governs judicial review of orders of removal. The Conference Report on the REAL ID Act is posted on AILAInfonet. *See* H.R. Conf. Rep. 109-72 (2005) (AILA Doc. ID: 05050510). The pages of the report addressing federal court review of immigration cases, H2872-73, are located at:
[http://thomas.loc.gov/cgi-bin/query/F?r109:5:./temp/~r109rSHWdh:e473287:.](http://thomas.loc.gov/cgi-bin/query/F?r109:5:./temp/~r109rSHWdh:e473287:)

See important uncodified (not incorporated into the INA) subsections of § 106(b), (c) & (d) and § 101(h)(3) & (4) governing effective dates and applicability of new provisions, *infra*.

INA § 242 – Judicial Review of Orders of Removal

(a) Applicable provisions.-

(1) General orders of removal.-Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 235(b)(1)) is governed only by chapter 158 of title 28 of the United States Code, except as provided in subsection (b) and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review.-

(A) Review relating to section 235(b)(1).-Notwithstanding any other provision of law **(statutory or nonstatutory), including section 2241 of Title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title,**¹ no court shall have jurisdiction to review-

(i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 235(b)(1),

¹ REAL ID § 106(a)(1).

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(ii) except as provided in subsection (e), a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 235(b)(1)(B), or

(iv) except as provided in subsection (e), procedures and policies adopted by the Attorney General to implement the provisions of section 235(b)(1).

(B) Denials of Discretionary Relief.-Notwithstanding any other provision of law **(statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D),² and regardless of whether the judgment, decision, or action is made in removal proceedings,³** no court shall have jurisdiction to review –

(i) any judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245, or

(ii) any other decision or action of the Attorney General **or the Secretary of Homeland Security** the authority for which is specified under this title to be in the discretion of the Attorney General **or the Secretary of Homeland Security,⁴** other than the granting of relief under section 208(a).

(C) Orders against criminal aliens.-Notwithstanding any other provision of law, **(statutory or nonstatutory), including section 2241 of Title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D),⁵** no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 212(a)(2) or 237(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 237(a)(2)(A)(ii) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 237(a)(2)(A)(i).

(D) Judicial Review of Certain Legal Claims. Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional

² REAL ID § 106(a)(1).

³ REAL ID § 101(f)(2) (adding clause “and regardless of whether the judgment, decision or action is made in removal proceedings”). See § 101(h)(4) applying new provision to all cases pending before any court on or after date of enactment.

⁴ REAL ID § 101(f)(1). See § 101(h)(4) applying new provision to all cases pending before any court on or after date of enactment.

⁵ REAL ID § 106(a)(1).

claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.⁶

(3) Treatment of certain decisions.-No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 240(c)(1)(B).

(4) Claims Under the United Nations Convention. - Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or punishment, except as provided in subsection (e).⁷

(5) Exclusive Means of Review.- Notwithstanding any other provision of law, (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this Act, except as provided in subsection (e). For purposes of this Act, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms “judicial review” and “jurisdiction to review” include habeas corpus review pursuant to section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1351 of such title, and review pursuant to any other provision of law (statutory or non statutory).⁸

(b) Requirements for Review of Orders of Removal.-With respect to review of an order of removal under subsection (a)(1), the following requirements apply:

(1) Deadline.-The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms.-The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service.-

⁶ REAL ID § 106(a)(1).

⁷ REAL ID § 106(a)(1).

⁸ REAL ID § 106(a)(1).

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(A) In general.-The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 240 was entered.

(B) Stay of order.-Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief.-The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review.-Except as provided in paragraph (5)(B)-

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 208(a) shall be conclusive unless manifestly contrary to the law and an abuse of discretion. **No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 208(b)(1)(B), 240(c)(4)(B), or 241(b)(3)(C), unless the court finds, pursuant to section 242(b)(4)(B), that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.**⁹

(5) Treatment of nationality claims.-

(A) Court determination if no issue of fact.-If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no

⁹ REAL ID § 101(e). See § 101(h)(3) applying new provision to final administrative removal orders issued before, on, or after date of enactment. But note that the provisions governing corroboration referenced in amended text are new and apply *only* to applications for asylum, withholding or other relief made *on or after* effective date, *i.e.*, May 11, 2005. See § 101(h)(2).

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genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact.-If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of title 28, United States Code.

(C) Limitation on determination.-The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider.-When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings.-

(A) In general.-If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 243(a) may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality.-If the defendant claims in the motion to be a national of the United States and the district court finds that-

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of title 28, United States Code. The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation.-If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 243(a). The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

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(D) Limitation on filing petitions for review.-The defendant in a criminal proceeding under section 243(a) may not file a petition for review under subsection (a) during the criminal proceeding.

(8) Construction.-This subsection-

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 241(a);

B) does not relieve the alien from complying with section 241(a)(4) and section 243(g); and

(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of issues for judicial review.-Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this title shall be available only in judicial review of a final order under this section. **Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28, United States Code, or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.**¹⁰

(c) Requirements for Petition.-A petition for review or for habeas corpus of an order of removal.-

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of Final Orders.-A court may review a final order of removal only if-

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial Review of Orders Under Section 235(b)(1).-

¹⁰ REAL ID § 106(a)(2).

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(1) Limitations on relief.-Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may-

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 235(b)(1) except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings.-Judicial review of any determination made under section 235(b)(1) is available in habeas corpus proceedings, but shall be limited to determinations of-

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 207, or has been granted asylum under section 208, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 235(b)(1)(C).

(3) Challenges on validity of the system.-

(A) In general.-Judicial review of determinations under section 235(b) and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of-

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this title or is otherwise in violation of law.

(B) Deadlines for bringing actions.-Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

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(C) Notice of appeal.-A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases.-It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision.-In any case where the court determines that the petitioner-

(A) is an alien who was not ordered removed under section 235(b)(1), or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 207, or has been granted asylum under section 208, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 240. Any alien who is provided a hearing under section 240 pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1).

(5) Scope of inquiry.-In determining whether an alien has been ordered removed under section 235(b)(1), the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

(f) Limit on Injunctive Relief.-

(1) In general.-Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of chapter 4 of title II, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such chapter have been initiated.

(2) Particular cases.-Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(g) Exclusive Jurisdiction.-Except as provided in this section and notwithstanding any other provision of law **(statutory or nonstatutory), including section 2241 of title 28, United States**

Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title,¹¹ no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

The REAL ID Act

Selected Uncodified (i.e., not incorporated into the INA) Provisions Relating to Effective Dates, Transfer, and Treatment of IIRIRA Transitional Rule Cases

Uncodified Provisions of REAL ID § 106

(b) **Effective Date.** –The amendments made by subsection (a) shall take effect upon the date of the enactment of this division and shall apply to cases in which the final administrative order of removal, deportation, or exclusion was issued before, on, or after the date of the enactment of this division.

(c) **Transfer of Cases.** –If an alien's case, brought under section 2241 of title 28, United States Code, and challenging a final administrative order of removal, deportation, or exclusion, is pending in a district court on the date of the enactment of this division, then the district court shall transfer the case (or the part of the case that challenges the order of removal, deportation, or exclusion) to the court of appeals for the circuit in which a petition for review could have been properly filed under section 242(b)(2) of the Immigration and Nationality Act (8 U.S.C. 1252), as amended by this section, or under section 309(c)(4)(D) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1101 note). The court of appeals shall treat the transferred case as if it had been filed pursuant to a petition for review under such section 242, except that subsection (b)(1) of such section shall not apply.

(d) **Transitional Rule Cases.** –A petition for review filed under former section 106(a) of the Immigration and Nationality Act (as in effect before its repeal by section 306(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1252 note)) shall be treated as if it had been filed as a petition for review under section 242 of the Immigration and Nationality Act (8 U.S.C. 1252), as amended by this section. Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, such petition for review shall be the sole and exclusive means for judicial review of an order of deportation or exclusion.

¹¹ REAL ID § 106(a)(3).

Selected Uncodified Provisions of REAL ID § 101

(h)(2) The amendments made by paragraphs [101](a)(3), (b), (c), and (d) [regarding burden of proof, corroboration, eligibility exceptions, credibility] shall take effect on the date of the enactment of this division and shall apply to applications for asylum, withholding or other relief from removal made on or after such date.

(h)(3) The amendment made by subsection [101](e) shall take effect on the date of enactment of this division and shall apply to all cases in which the final administrative removal order is or was issued before, on, or after such date.

(h)(4) The amendments made by subsection [101](f) shall take effect on the date of the enactment of this division and shall apply to all cases pending before any court on or after such date.