



Practice Advisory

**Fighting for a Day in Court:
Understanding and Responding to Pretermission of Asylum Applications¹**

**July 25, 2025
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In *C-A-R-R-*, the BIA first addressed the completeness of the I-589. The IJ had determined that the first three I-589 applications filed by the respondent were incomplete and then, while finding the fourth I-589 complete, nonetheless deemed the application abandoned for failure to provide a proper translation certificate for an attached declaration. While the BIA noted that each of the first three I-589s filed were “missing answers,” it did not explain which questions on the form were left unanswered. Nor did the decision explain what level of detail was included in the fourth I-589, which the Board did find to be adequate. To the extent that the decision purports to give guidance to practitioners about the importance of filing “complete” I-589s, the decision did not explain what is legally required to deem the application complete.

The decision also did little to explain what qualifies as a substantive answer on an I-589. For the questions that are relevant to the merits of the asylum application, the BIA stated only, “A complete Form I-589 requires a specific substantive answer to every question on the form.”⁸ Importantly, the BIA only requires “a specific substantive answer” to each question; it does not direct the applicant to write an exegesis or even to include every incident in their case in each answer. Indeed, the BIA found that Mr. C-A-R-R-’s fourth application which “included substantive answers to all the questions on the Form I-589,”⁹ was legally sufficient, even though the IJ had found that that application “still lacked sufficient details.”¹⁰

The authors of this advisory have obtained redacted copies of the I-589s underlying the *Matter of C-A-R-R-* decision from counsel on the case.¹¹ The information included in the fourth I-589, which the BIA accepted as legally sufficient, was relatively minimal. The answer to the question regarding past harm described two threats the applicant had suffered. The response did not give the date of the threats. The response also included the line, “I will explain further in a declaration.” By way of contrast, the earlier versions of the I-589 which the IJ had rejected as being legally insufficient had very barebones answers. The answer to the feared harm question only stated, “Gangs are after me. They have machetes to kill me.”¹²

Helpfully, footnote 2 of the BIA decision clarifies that the need to fully answer the questions on the I-589 does not mean that an asylum seeker must complete every box on the form if the question is not relevant to the applicant. “For example, excess spaces to provide personal information regarding an applicant’s children need not be used if the applicant has no children or has fewer than may be included on the form.”¹³ This clear repudiation of the “no blank space” rejection rule that DHS imposed under the first Trump administration¹⁴ is a welcome aspect of the decision.

⁸ 29 I&N Dec. at 16.

⁹ *Id.*

¹⁰ *Id.* at 14.

¹¹ Portions of the redacted third and fourth I-589s can be found in the appendix. The first three I-589s contained the same answers to the narrative questions. See, <https://ninpnl.org/sites/default/files/2026-03/PA-appendix-combined-redacted.pdf>.

¹² *Id.*

¹³ 29 I&N Dec. at 16, n. 2.

¹⁴ Geneva Sands and Priscilla Alvarez, *Biden Administration Announces End to Trump-Era Rule That Rejected Certain Immigration Applications with Blank Spaces*, CNN (Apr. 1, 2021), <https://www.cnn.com/2021/04/01/politics/blank-spaces-immigration-applications>.

Matter of C-A-R-R- also addresses the role of declarations in asylum cases. The BIA found that it was improper for the IJ to deem the application abandoned for the asylum seeker's failure to file a proper declaration and remanded the case, holding that a declaration is not a "constituent" component of the application for asylum, withholding, and Convention against Torture (CAT) protection.¹⁵ The BIA held that because the I-589 instructions do not require a declaration, an application without a declaration cannot be deemed abandoned on that ground alone.¹⁶ However, the BIA went on to explain that an IJ has authority to order an asylum seeker to file a declaration and that the asylum seeker must comply with the IJ's order and any deadline imposed.¹⁷ While the BIA stated that the asylum application cannot be deemed abandoned for failing to file a declaration because the declaration is not a "constituent part" of the asylum application, it also stated that the IJ's remedy for an asylum seeker's failure to comply with a court directive is to exclude the declaration from evidence.¹⁸ The BIA explained that the "absence of the respondent's declaration can then be considered in assessing the applicant's burden of proof."¹⁹ The Board compares the potential lack of a declaration in the record to the lack of corroborating documents, but, of course, the declaration lays out the applicant's own narrative. Nothing in the BIA decision stated that the asylum seeker would be barred from testifying to the information that was included in the declaration. That being said, at least where the declaration itself is excluded from evidence, as it was in *Matter of C-A-R-R-*, the answers on the I-589 will have to fully state a claim for relief, particularly after the *Matter of H-A-A-V-* decision discussed below.

Ultimately, *Matter of C-A-R-R-* raises as many questions as it answers about declarations: they are not required unless an IJ orders one (and then they must be signed and accompanied by a certificate of translation) and an applicant must file a declaration if an IJ orders the applicant to do so (though if they do not comply with the order the application cannot be pretermitted on that basis alone, but the declaration will be excluded from evidence). While *Matter of C-A-R-R-* clarified that a declaration is not required, it is important to understand that nothing in the decision suggests that an IJ can ignore a properly filed declaration when determining whether the application as a whole states a claim for asylum and related protections.

Likewise, concerning the I-589 itself, *Matter of C-A-R-R-* directs that every substantive question must be answered completely, but gives no indication of the level of detail an IJ could require to deem an application complete. The BIA actually disagreed with the IJ in this case, finding that Mr. C-A-R-R-'s fourth I-589 was sufficiently completed, but the decision itself gives no facts about why the IJ found the fourth I-589 insufficient or why the BIA reached the opposite conclusion and determined that it was complete.

While the decision originally seemed largely favorable to noncitizens in that it prevents IJs from pretermitting an I-589 based on failure to include a declaration in the asylum filing²⁰ and

¹⁵ 29 I&N Dec. at 16–17.

¹⁶ *Id.*

¹⁷ *Id.* at 17.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Indeed, in an unpublished decision dated six months after *C-A-R-R-*, the BIA affirmed that it was error for an IJ to deem an asylum applicant's claim abandoned based solely on his "failure to file subsequent documentation before the deadline set by the Immigration Judge." *Matter of [Redacted]*, (BIA Sep. 2, 2025) (unpublished)

includes a helpful footnote clarifying that asylum applicants need not fill in irrelevant demographic information boxes with “N/A,” IJs have weaponized this decision to deny asylum seekers a day in court. The Board’s conclusion that a “‘response to each of the questions,’ for purposes of both the regulation and the form’s instructions, means each question requires a specific, responsive answer,”²¹ gives little guidance to practitioners but has given IJs who are eager to clear their dockets of cases, license to find that information provided on the I-589 is not “specific” and “responsive.”

III. The EOIR Pretermission Memo and *Matter of H-A-A-V-*

A. The Pretermission Memo

On April 11, 2025, one month after the BIA’s *C-A-R-R-* decision, then acting Director of EOIR, Sirce E. Owen, issued a Policy Memorandum, PM 25-28,²² encouraging IJs to “premit” asylum applications in immigration court, stating, “EOIR’s interpretation of applicable law is that adjudicators may premit legally deficient asylum applications without a hearing.”²³ While the Pretermission Memo states that it “provides guidance to adjudicators who encounter legally insufficient asylum applications,”²⁴ it, in fact, does not define what makes an asylum application deficient nor does it specify what procedure, if any, IJs must afford asylum seekers to correct the perceived deficiency in their application.²⁵

As discussed more fully below, the Pretermission Memo contradicts 8 CFR § 1208.3(c)(3),²⁶ which specifies that an incomplete application must be returned to the applicant and “[a]n application returned to the applicant as incomplete shall be resubmitted by the applicant with the additional information if he or she wishes to have the application considered.”²⁷ Even more significantly, 8 CFR § 1208.3(c)(3) goes on to say, “[i]f the Service has not mailed the incomplete application back to the applicant within 30 days, *it shall be deemed complete.*”

https://www.scribd.com/document/1046830832/Appeal-ID-5337564-BIA-Sept-2-2025?secret_password=s3Oz2LUH6sfDnvlucOqt.

²¹ 29 I&N Dec. at 16.

²² Sirce E. Owen, EOIR, PM 25-28, Pretermission of Legally Insufficient Applications for Asylum (Apr. 11, 2025), <https://www.justice.gov/eoir/media/1396411/dl?inline>.

²³ *Id.* at 1.

²⁴ *Id.*

²⁵ The Pretermission Memo does not cite *Matter of C-A-R-R-*, even though it addresses similar issues (though the Pretermission Memo does not mention declarations), likely because the BIA decision highlights certain rights that asylum seekers have, whereas the Pretermission Memo seeks to strip the right to a hearing from asylum seekers.

²⁶ Several asylum regulations issued under the first Trump administration, including 8 CFR § 1208.3, were enjoined and never went into effect. Since they were published, official websites, including government websites, currently include the text of the enjoined regulations. *Matter of C-A-R-R-* acknowledges this issue and cites the older version of the regulation which is in effect now. See 29 I&N Dec. at 15, n. 1. This resource lists enjoined asylum regulations and where to find the version which is currently in effect. National Immigration Project, *Enjoined Asylum Regulations “Cheat Sheet”* (Feb. 3, 2023), <https://nipnlg.org/work/resources/enjoined-asylum-regulations-cheat-sheet>.

²⁷ While the promulgation of 8 CFR § 1208.3 predates EOIR Courts and Appeals System (ECAS) and discusses mail, there is nothing in the regulation to suggest that incomplete applications can be premitted unless the application is first returned to the applicant who must be given an opportunity to resubmit the application. This process is more commonly employed by United States Citizenship and Immigration Services (USCIS) than by EOIR, but the regulations at 8 CFR § 1208.3 apply to EOIR.

(emphasis added). The Pretermission Memo does not cite this regulation at all and *Matter of C-A-R-R-*, which does cite the regulation including this language, does not discuss the “deemed complete” section of the regulation.²⁸

The Pretermission Memo further contradicts another policy memorandum, PM 21-06, “Asylum Processing,”²⁹ from the first Trump administration addressing asylum applications, which EOIR reinstated in February 2025.³⁰ PM 21-06, like the regulations, requires incomplete applications to be returned to the asylum applicant so they can complete them:

For asylum applications submitted in open court at a hearing, the Immigration Judge presiding over that hearing is responsible for determining whether the application is complete. For asylum applications submitted outside of a hearing—e.g. by mail, at the window, or electronically—an Assistant Chief Immigration Judge (ACIJ), through oversight and delegation as appropriate, will ensure that the application is complete. All asylum applications should be reviewed for completeness within 30 calendar days of submission. To the maximum extent practicable, an application that is incomplete should be returned to the applicant within five business days of that determination.³¹

The reimplemented “Asylum Processing” Policy Memorandum (PM) says nothing about pretermission. Although the regulations and the “Asylum Processing” PM directly address the process that IJs should follow when faced with an incomplete application, the Pretermission Memo does not mention or even cite them. By omitting these sources of authority, the Pretermission Memo erroneously suggests to IJs that they may pretermite the I-589 without providing the respondent any opportunity to rectify the alleged legal insufficiency.

B. *Matter of H-A-A-V-*

On September 11, 2025, the BIA issued *Matter of H-A-A-V-*,³² which parroted the conclusions of the Pretermission Memo and held that, “if the factual allegations underlying a claim for asylum, withholding of removal, or protection under the CAT, viewed in the light most favorable to the respondent, do not establish prima facie eligibility for relief or protection, an Immigration Judge may pretermite the applications without a full evidentiary hearing on the merits of the claim.”³³ ICE has relied on this decision to make pretermission motions in asylum cases and IJs have used this decision to pretermite thousands of asylum applications, often *sua sponte*.³⁴

²⁸ 29 I&N Dec. at 15.

²⁹ James McHenry, EOIR, PM 21-06, Asylum Processing (Dec. 4, 2020), <https://www.justice.gov/eoir/page/file/1343191/dl?inline=>.

³⁰ See Sirce E. Owen, EOIR, PM 25-17, Cancellation of Director’s Memorandum 22-05 and Reinstatement of Policy Memoranda 19-05, 21-06, and 21-13 (Feb. 3, 2025), <https://www.justice.gov/eoir/media/1388056/dl?inline=>.

³¹ See McHenry, *supra* note 29, at 3.

³² *Matter of H-A-A-V-*, 29 I&N Dec. 233 (BIA 2025).

³³ *Id.* at 238.

³⁴ Debbie Nathan, *The Secretive, Destructive Work of an ICE Attorney: ‘My Job Is to Do What I’m Told,’* THE GUARDIAN, Feb. 11, 2026, <https://www.theguardian.com/us-news/2026/feb/11/ice-lawyers-immigration-court>.

In *Matter of H-A-A-V-*,³⁵ counsel for the respondent appeared at the second master calendar hearing for a detained asylum seeker from Peru. It was the first appearance on the case by the attorney, and the first time a newly assigned IJ was on the case. Pleadings had been taken and there was a skeletal I-589 on file. Counsel requested a continuance and DHS made an oral motion to pretermite,³⁶ stating merely, “it’s a gang-related claim.” The IJ then pressured counsel into agreeing with the IJ that there were not “any disputed facts in the case,” asked counsel about Mr. H-A-A-V-’s particular social group, and denied counsel’s request to recall the case on second call so that he could speak with his client. The entirety of this exchange was recorded in fewer than two transcript pages in the record.³⁷

The IJ then pretermitted proceedings and the BIA upheld the pretermittance based on the “concession” of counsel that there were “no facts in dispute.”³⁸ At the point that the IJ found that there were “no facts in dispute,” there were almost no facts in the record and newly appearing counsel was clearly not expecting to have to argue the merits of the asylum claim. Yet the BIA used this case as a vehicle to encourage IJs to pretermite asylum claims without scheduling evidentiary hearings.

The BIA disingenuously analogized what happened in immigration court to a motion to dismiss under rule 12(b)(6) or a motion for summary judgment under rule 56 of the Federal Rules of Civil Procedure.³⁹ However, federal district court judges do not issue decisions on these types of motions until both sides have submitted legal briefing on the issues. Moreover, when federal courts grant motions to dismiss, the losing party generally has an opportunity to replead or refile. Motions for summary judgment are similarly not analogous as they generally arise after the plaintiff has survived a motion to dismiss and after discovery has taken place in a case. There is no federal court procedure which allows an article III judge to require counsel to argue the merits of a claim at a routine scheduling hearing.

The BIA determined that because Mr. H-A-A-V- was represented by counsel, he had been afforded the opportunity to present evidence and further concluded that the brief exchange between the IJ and new counsel constituted “an abbreviated hearing on the claim at the master calendar stage.”⁴⁰ The BIA then agreed with the IJ that because the claim in the skeletal I-589 alleged extortion by gangs, the factual allegations “do not meet the requirements” of asylum, withholding or CAT protection and therefore an evidentiary hearing was not necessary.⁴¹ The Board further faulted Mr. H-A-A-V- for not articulating a specific particular social group (PSG), citing *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191 (BIA 2018).⁴² But that decision holds

³⁵ The authors at National Immigration Project represent Mr. H-A-A-V- on his appeal before the Fifth Circuit court of appeals and some of the facts in this section come from the transcript of proceedings.

³⁶ 29 I&N Dec. at 233.

³⁷ On file with the authors.

³⁸ 29 I&N Dec. 233–34.

³⁹ *Id.* at 235, n. 3. See Cornell Law School, Legal Information Institute, Motion to Dismiss, https://www.law.cornell.edu/wex/motion_to_dismiss; see also Michael S. Pardo, *What Makes Evidence Sufficient?*, 65 ARIZ. L. REV. 431 (2023).

⁴⁰ 29 I&N Dec. at 235.

⁴¹ *Id.* at 236. The I-589 also alleged that Mr. H-A-A-V- “feared for [his] life” but that fact was not addressed by the IJ or the BIA.

⁴² *Id.* at 236.

that a noncitizen cannot articulate new PSGs on appeal; it does not require the respondent to articulate the PSG at a preliminary hearing.

The BIA then overruled *Matter of Fefe*, 20 I&N Dec. 116 (BIA 1989)—a bedrock precedent—purportedly because that decision relied on regulations which are no longer in effect.⁴³ While it is true that the regulations have been renumbered since that seminal decision, the substance of the old regulation and the current regulation is almost identical.⁴⁴ In holding that *Matter of Fefe* is no longer binding precedent, the BIA did not engage with the reasoning of *Fefe* at all. In *Matter of Fefe* the Board had concluded that:

[T]he full examination of an applicant [is] an essential aspect of the asylum adjudication process for reasons related to fairness to the parties and to the integrity of the asylum process itself. . . there are cases where a[] [noncitizen] establishes eligibility for asylum by means of his oral testimony when such eligibility would not have been established by the documents alone.⁴⁵

The BIA did not explain why testimony is no longer essential to the asylum application nor why it is no longer important for EOIR to ensure that asylum seekers have the opportunity to establish their eligibility through oral testimony. Given the large percentage of asylum seekers who are pro se, receive limited assistance on the I-589 during legal clinics, are exploited by unauthorized practitioners of immigration law, and like Mr. H-A-A-V-, are detained, oral testimony remains critical for asylum seekers to fully articulate their claims.

Finally, the Board rejected Mr. H-A-A-V-'s arguments that he had been denied due process in his proceedings.⁴⁶ The BIA held that the process here afforded Mr. H-A-A-V- notice and an opportunity to be heard on his claim, and further determined that nothing about the IJ's summary dismissal of the asylum claim and removal order supported Mr. H-A-A-V-'s claim that the IJ was not a neutral arbiter.⁴⁷ The BIA did not separately address Mr. H-A-A-V-'s CAT claim, which would not have required a nexus to a protected characteristic, other than in the single sentence, "[a]s the respondent's past extortion does not rise to the level of persecution, it also does not meet the 'higher bar of torture.'"⁴⁸

The BIA concluded with language seemingly designed to make the decision sound more tempered than it actually is, stating, "many claims for asylum and related relief and protection contain disputed factual issues relevant to a respondent's eligibility for asylum or related relief and thus will warrant a full hearing and cross-examination of the respondent and witnesses before the case is resolved."⁴⁹ Nonetheless, since *Matter of H-A-A-V-* was decided, many IJs

⁴³ *Id.* at 237.

⁴⁴ Former 8 CFR § 208.6 (1988) said that the asylum "applicant shall be examined in person by an immigration officer or judge prior to the adjudication of the asylum application." Current 8 CFR § 1240.11(c)(3)(iii) (2025) says "During the removal hearing, the [noncitizen] shall be examined under oath on his or her application and may present evidence and witnesses in his or her own behalf."

⁴⁵ 20 I&N Dec. at 118.

⁴⁶ 29 I&N Dec. at 237–38.

⁴⁷ *Id.* at 238.

⁴⁸ *Id.* at 236.

⁴⁹ *Id.* at 238.

have pretermitted asylum cases for failure to state a claim, denying asylum seekers the ability to develop their case through oral testimony and often ordering them removed without the opportunity to even submit further evidence or legal briefing.

IV. Fallout from the BIA Decisions and Pretermission Memo

Since the BIA issued *Matter of C-A-R-R-*, EOIR issued PM 25-28, and then the BIA issued *Matter of H-A-A-V-*, practitioners have seen a wide range of actions taken by IJs across the country. These actions have included:⁵⁰

- IJ sending an asylum seeker's counsel notice that the I-589 is deficient and must be updated to include more information (in one case this notice included requiring an updated I-589, personal statement, and corroborating evidence);
- IJ reviewing each I-589 at a master calendar hearing and either deeming the I-589 sufficient or giving counsel 60 days to include a declaration and add information to the I-589;
- IJ ordering a pro se minor removed after the asylum seeker did not comply with an oral order the minor did not understand, to file an identity document and written statement in support of their I-589;
- IJ approaching the Pretermission Memo as presenting an opportunity for summary judgment, giving both parties the opportunity to provide all evidence to determine whether an evidentiary hearing is required;
- IJ *sua sponte* issuing a removal order prior to a scheduled hearing, along with a notice stating that the I-589 had been pretermitted;
- IJ granting a written motion to pretermite filed by the DHS attorney which argued that the asylum application was incomplete pursuant to *Matter of C-A-R-R-* because it referenced an attached declaration rather than filling in the information on the I-589 form (the IJ's order granting the motion also stated that the IJ would issue a separate removal order);
- IJ pretermitting an asylum application at a master calendar hearing and ordering removal where the IJ found that the I-589 was insufficient even though counsel sought a brief continuance from the IJ to supplement the I-589;
- IJ pretermitting based on *Matter of H-A-A-V-* after questioning attorney, not the respondent, for nearly an hour, and not allowing opportunity to file additional evidence and briefing;
- IJ deeming application abandoned and incomplete pursuant to *Matter of C-A-R-R-* stating that, despite the I-589's "clear instructions," the respondent did not provide how long she stayed in the countries she traveled through, what type of status she had, or if she was allowed to go back to those countries. IJ cited the respondent's "ample opportunities to fill out a complete I-589" as she initially sought legal assistance from a help center when first completing the I-589, signed an advisal on the I-589 that she reviewed the application in a language she understood, and current counsel submitted an amended I-589 and lengthy declaration from the Respondent;

⁵⁰ The authors have heard of these examples either through direct communication with other practitioners, through listserv discussions, through calls for examples, or outcomes reported to CGRS. CGRS is tracking pretermission trends; to report a pretermission outcome, either submit a case intake and fill out an outcomes form through the CGRS website, or send a copy of the written decision to CGRS-TA@uclawsf.edu.

- IJ *sua sponte* raising intent to pretermit under *Matter of H-A-A-V-* at a status conference and ordering the respondent removed to country of origin after hearing counsel's oral response against pretermission;
- IJ premitting claim based on *Matter of C-A-R-R-* and granting voluntary departure after denying counsel additional time to file a written response and supplement the record when pretermission was raised for the first time at the hearing.

This significant variety of approaches by IJs has made it difficult for practitioners who are already confronting rapid changes in immigration law to determine what documents need to be filed when to avoid summary removal. The number of asylum seekers who have been unable to secure counsel for full representation⁵¹ has exacerbated the challenges created by the prevalence of pretermission. Without counsel, it is unlikely that pro se asylum seekers will know how to respond to a pretermission order or how to argue against an oral DHS pretermission motion. Furthermore, as DHS has recalendared thousands of cases that were administratively closed,⁵² practitioners have had to reconnect with clients whose cases may have been dormant for many months or even years to potentially supplement their applications for asylum. Many of these cases were administratively closed during prior administrations that instructed DHS to exercise prosecutorial discretion including, at times, over the objection of the asylum seeker.⁵³

V. Pretermission Violates the Law and Longstanding Practice

Pretermission as a practice likely violates the U.S. Constitution, the Immigration and Nationality Act (INA), regulations, and binding precedent which require EOIR to allow asylum seekers to testify in support of their applications. Practitioners can use the explanation below of how these cases contradict existing law and practice to challenge pretermission before IJs and, if necessary, on appeal.

A. Constitutional Fifth Amendment Right to Due Process

For over 100 years, the Supreme Court has recognized the special considerations in deportation cases and the need for due process. “[Deportation] may result also in loss of both property and life, or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its

⁵¹ The Trump administration has cut most federal funding for immigration legal services. See for example, Laura Romero, *Trump Administration Halts Funding for Legal Aid for Migrant Children*, ABC NEWS, Mar. 21, 2025, <https://abcnews.com/US/trump-administration-halts-funding-legal-aid-migrant-children/story?id=120033078>; Kelly Hessedal, *Legal Aid Society of San Diego Closing Southeast San Diego Office After 45 Years Due to Federal Funding Cuts*, CBS8, Jan. 14, 2026, <https://www.cbs8.com/article/news/local/legal-aid-society-san-diego-closing-southeast-san-diego-45-years-federal-funding-cuts/509-93c5f525-06a3-43b7-a055-3a9c6279c7>; Robert Moore, *Trump Administration Accused of Defying Court Order as El Paso Immigrant Legal Aid Group Faces Closure*, EL PASO MATTERS, July 6, 2026, <http://elpasomatters.org/2026/07/06/federal-funding-delay-threatens-closure-estrella-del-paso-immigrant-legal-aid/>.

⁵² Cody Copeland, *ICE Push for Deportations Could See Nearly 400,000 Cases Added to Court Dockets*, FORT WORTH STAR-TELEGRAM, June 27, 2025, <https://www.star-telegram.com/news/politics-government/article309502975.html#storylink=cpy>.

⁵³ Muzaffar Chishti and Julia Gelatt, Migration Policy Institute, *For Overwhelmed Immigration Court System, New ICE Guidelines Could Lead to Dismissal of Many Low-Priority Cases* (Apr. 27, 2022), <https://www.migrationpolicy.org/article/immigration-court-ice-guidelines>.

guarantee of due process of law.”⁵⁴ The right to due process of law in immigration proceedings is enshrined in the Fifth Amendment of the U.S. Constitution.⁵⁵ “The essence of due process is the requirement that ‘a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.’”⁵⁶ Thus, the Fifth Amendment requires that noncitizens in immigration proceedings receive “a full and fair hearing” and have a “reasonable opportunity to present evidence on [their behalf].”⁵⁷

IJs’ decisions to pretermite asylum applications violate the due process rights of asylum seekers in several ways. First, for those IJs who are pretermiteing the I-589 at master calendar hearings or via written order between hearings, and ordering removal, asylum seekers have no “notice” that their claim is going to be pretermitted and no opportunity to be heard. Whether or not the asylum seeker has counsel, IJs are not meeting minimal due process requirements when they pretermite applications without giving respondents any notice of their intent to do so. However, pro se asylum seekers are especially prejudiced because they will likely receive the order pretermiteing their asylum application, and potentially ordering them removed, in the mail and they will not understand what it means or what their next step should be. By the time pro se asylum seekers obtain legal counsel to explain the meaning of the pretermiteion order, the 30-day notice of appeal deadline (if there is a removal order) will have likely passed. Further, as discussed below, the filing fees were significantly increased by the 2025 “One Big Beautiful Bill” and the fee for a BIA appeal is currently \$1030, potentially making it impossible for noncitizens to fight these removal orders unless they secure a fee waiver, which requires more paperwork.⁵⁸ Furthermore, some pro se noncitizens may not receive the pretermiteion order at all if they have changed addresses and did not understand the requirement to file an E-33 change of address form.

Second, *Matter of H-A-A-V-* deprives many asylum seekers of their due process right to notice by applying a new legal standard retroactively to asylum applications that were filed before the BIA upended longstanding precedent, including through overturning *Matter of Fefe*. The Supreme Court has made it clear that even statutory changes should generally not be enforced retroactively.⁵⁹ The Pretermiteion Memo and *Matter of H-A-A-V-*, raise similar concerns in that asylum seekers and their counsel who filed “barebones” I-589s in the past had no reason to believe that the asylum seeker might never get a day in court as a result—especially when regulations and PM 21-06, as reinstated by PM 25-17 are directly on point and state that

⁵⁴ *Ng Fung Ho v. White*, 259 U.S. 276, 284–85 (1922).

⁵⁵ *Reno v. Flores*, 507 U.S. 292, 306 (1993).

⁵⁶ *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976).

⁵⁷ *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000); see also *Santos-Alvarado v. Barr*, 967 F.3d 428, 439 (5th Cir. 2020); *Mekhoukh v. Ashcroft*, 358 F.3d 118, 128 (1st Cir. 2004). See, e.g., *Quintero v. Garland*, 998 F.3d 612, 623–24 (4th Cir. 2021); *Arteaga-Ramirez v. Barr*, 954 F.3d 812, 813 (5th Cir. 2020); *Mendoza-Garcia v. Barr*, 918 F.3d 498, 504–05 (6th Cir. 2019); *Alhuay v. U.S. Att’y Gen.*, 661 F.3d 534, 548 (11th Cir. 2011); *Al Khouri v. Ashcroft*, 362 F.3d 461, 464–65 (8th Cir. 2004); *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002).

⁵⁸ National Immigration Project, *Comparison Chart of the Immigration-Related Fee Changes Brought by H.R.1 the So-Called One Big Beautiful Bill Act* (July 22, 2025), <https://nippnl.org/work/resources/comparison-chart-immigration-related-fee-changes-brought-hr1-so-called-one-big>. See also EOIR Payment Portal, <https://epay.eoir.justice.gov/index>.

⁵⁹ *I.N.S. v. St. Cyr*, 533 U.S. 289, 316 (2001) (“[This] presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.”).

incomplete asylum applications must be returned or deemed complete. In particular, the regulations require that the IJ determine within a certain amount of time whether the I-589 is complete and, if the I-589 is deemed incomplete, that the asylum applicant be given an opportunity to complete the asylum application.

Finally, when the IJ pretermits the asylum application, the respondent is denied the opportunity to be heard, that is to present evidence in support of their case.⁶⁰ As discussed below, immigration regulations and the I-589 instructions give asylum seekers the right to testify in their asylum proceedings.⁶¹ Moreover, federal courts of appeals have found that IJs have a duty to develop the record—a duty that cannot be complied with in cases where the asylum seeker is prevented from testifying.⁶² The due process right to be heard must include an asylum seeker's ability to actually present their claim to an adjudicator and cannot be satisfied merely by completing an application form which an IJ is free to reject.

B. Statutory Right to a Hearing on the Asylum Claim

The INA entitles noncitizens in immigration proceedings to present testimony and other evidence on their behalf.⁶³ INA § 240(b)(4)(B) states that the noncitizen “shall have a reasonable opportunity to examine the evidence against the [noncitizen], to present evidence on the [noncitizen's] own behalf, and to cross-examine witnesses presented by the Government.” When presenting evidence, the Fifth Amendment right to due process⁶⁴ gives respondents the right to present evidence that is “probative and its admission is fundamentally fair.”⁶⁵ Courts of appeals have therefore found that the agency committed legal error when IJs did not allow full questioning.⁶⁶

Multiple courts of appeals, the BIA, and the attorney general agree that the IJ has a duty to develop the record.⁶⁷ The Board has recognized “the shared responsibility of parties and the IJ to

⁶⁰ *Goldberg v. Kelly*, 397 U.S. 254, 268–69 (1970) (“The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.”).

⁶¹ See INA §§ 240(b)(4)(B); 208; 8 CFR §§ 1208.13(a); § 1240.11(c)(3).

⁶² See, e.g., *Quintero v. Garland*, 998 F.3d 612, 623–24 (4th Cir. 2021); *Lacsina Pangilinan v. Holder*, 568 F.3d 708, 709 (9th Cir. 2009).

⁶³ See INA § 240(b)(1) (IJs shall receive evidence).

⁶⁴ See *Flores*, 507 U.S. at 306 (1993) (“It is well established that the Fifth Amendment entitles [noncitizens] to due process of law in deportation proceedings.”).

⁶⁵ *Matter of Y-S-L-C-*, 26 I&N Dec. 688, 690 (BIA 2015); see also *Espinoza v. INS*, 45 F.3d 308, 310 (9th Cir. 1995) (citing *Trias-Hernandez v. INS*, 528 F.2d 366, 369 (9th Cir. 1975)). Some courts of appeals have defined “fundamental fairness” as meaning that the removal proceedings must be conducted in accordance with the reasonable opportunity to present evidence on one's behalf as afforded by INA § 240(b)(4)(B). See, e.g., *Hassan v. Gonzales*, 403 F.3d 429, 435 (6th Cir. 2005) (“[W]e review evidentiary rulings by IJs only to determine whether such rulings have resulted in a violation of due process.” (internal citations and quotations omitted)); *Doumbia v. Gonzales*, 472 F.3d 957, 961–62 (7th Cir. 2007).

⁶⁶ *Oshodi v. Holder*, 729 F.3d 883, 889 (9th Cir. 2013) (“The statutory and regulatory regime also protects [a noncitizen's] right to present evidence and testimony on his behalf in removal proceedings, including his own testimony.”).

⁶⁷ See, e.g., *Quintero*, 998 F.3d at 622–23; see also *Lacsina Pangilinan v. Holder*, 568 F.3d 708, 709 (9th Cir. 2009) (IJ's “obligation [to develop the record] is founded on his statutory duty” under § 1229a(b)(1)); *Hasanaj v. Ashcroft*, 385 F.3d 780, 783 (7th Cir. 2004) (citing § 1229a(b)(1) as basis for the duty to develop the record); *Mekhoukh*, 358 F.3d at 129 n.14 (same); *Constanza-Martinez v. Holder*, 739 F.3d 1100, 1102–03 (8th Cir. 2014) (same); *Matter of*

assure that relevant evidence is included [in] the record.”⁶⁸ The BIA has held that while an IJ must not take on the role of advocate for the respondent, “[i]t is appropriate for [IJs] to aid in the development of the record, and directly question witnesses, particularly where [a noncitizen] appears pro se and may be unschooled in the deportation process”⁶⁹ Because pro se applicants “often lack the legal knowledge to navigate their way successfully through the morass of immigration law”⁷⁰ or “may not possess the legal knowledge to fully appreciate which facts are relevant[,]” the IJ is in a better position to draw out the relevant facts for determining an applicant’s eligibility for relief.⁷¹ Indeed, “it is critical that the IJ scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts”⁷² and adequately explain hearing procedures, including what the respondent must prove to establish eligibility for relief. While an IJ’s duty to develop the record is well recognized in the context of pro se respondents, the Fourth Circuit has held that “[IJs] are charged with a duty to fully develop the record in *all* cases before them,” not only pro se cases.⁷³

Those same courts of appeals, BIA, and attorney general decisions that have recognized that IJs have a duty to develop the record have relied on INA § 240(b)(1) as the source of that duty. That provision states that the IJ “shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the [noncitizen] and any witnesses.” Of course, oaths, interrogation, examination, and cross-examination are possible only in hearing settings. Meanwhile, receiving evidence applies to both documentary evidence submitted prior to a hearing and testimony during a hearing offered in support of an application for relief.

Yet the Pretermission Memo cites the statute in a way that appears to be intentionally misleading. The PM states, “Section 240(b)(1) of the INA authorizes immigration judges to ‘interrogate, examine, and cross-examine the [noncitizen] and any witnesses’ but does not establish a mandatory requirement for them to do so in every case on every application or issue.”⁷⁴ By truncating the full sentence in the statute, the Pretermission Memo selectively edited the statute to leave out three key terms: first, the mandatory verb “shall,” second, the phrase “administer oaths,” which clearly demonstrates that Congress contemplated that testimony would be taken in removal proceedings, and third, “receive evidence,” again indicating Congress’s

J-F-F-, 23 I&N Dec. 912, 922 (A.G. 2006) (citing § 1229a(b)(1) as basis for rule that “[i]t is appropriate for [IJs] to aid in the development of the record, and directly question witnesses, particularly where [the] [noncitizen] appears pro se and may be unschooled in the deportation process. . . .”); *Matter of S-H-*, 23 I&N Dec. 462, 464–65 (BIA 2002) (emphasizing that for an IJ’s decisions to be reviewable, they must include clear and complete findings of fact). *See also* 8 CFR § 1003.10(b) (restating 8 U.S.C. § 1229a, INA § 240(b)(1)).

⁶⁸ *Matter of Y-L-*, 24 I&N Dec. 151, 161–62 (BIA 2007), citing *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997) (en banc).

⁶⁹ *Matter of J-F-F-*, 23 I&N Dec. 912, 922 (A.G. 2006); *see, e.g., Ortiz-Ortiz v. Sessions*, 698 Fed. Appx. 868, 871 (9th Cir. 2017) (unpublished) (failure to ask about key events mentioned in respondents’ I-589 violated due process and was prejudicial).

⁷⁰ *Agyeman*, 296 F.3d at 877; *see also Quintero*, 998 F.3d at 627 (quoting *Rusu v. INS*, 296 F.3d 316, 321 n.7 (4th Cir. 2002)) (“[I]n light of the significant challenges *pro se* individuals in removal proceedings face, such individuals have a particularly strong need for procedural protections, without which they would not be able to ‘receive[] a meaningful hearing.’”).

⁷¹ *Jacinto v. INS*, 208 F.3d 725, 733 (9th Cir. 2000).

⁷² *Agyeman*, 296 F.3d at 877 (internal quotation marks and citation omitted).

⁷³ *Quintero v. Garland*, 998 F.3d 612, 627 (4th Cir. 2021) (emphasis added).

⁷⁴ PM 25-28 at 2.

intent that removal proceedings would result in full evidentiary hearings. As the statutory language suggests, the duty to develop the record is premised on the understanding that immigration court litigants, including asylum seekers, have a right to have their cases fully heard by the IJ and, particularly for *pro se* respondents, this right requires the IJ to play an active role in their cases. Furthermore, it is nonsensical to imagine courts of appeals recognizing a duty for the IJ to ensure that respondents' testimony is fully developed if there is not a corresponding right for the asylum seeker to testify. *Matter of H-A-A-V-* likewise cites to INA § 240(b)(1) but only to support the BIA's statement that "Immigration Judges have broad discretion to conduct and control immigration proceedings and may determine the length and type of hearings held,"⁷⁵ which is not what that section of the INA actually says.

In addition to the rights afforded to all litigants in INA § 240 proceedings, INA § 208(a)(1) provides further rights to asylum seekers. It specifies that, "[a]ny [noncitizen] who is physically present in the United States or who arrives in the United States [. . .] irrespective of such [noncitizen's] status, may apply for asylum in accordance with this section or, where applicable, section [235(b)] of this title."⁷⁶ Thus, an asylum seeker has the right to apply for asylum and, to do that, needs a forum where they can present their application. However, pretermission of their claims deprives asylum seekers of any forum where they can meaningfully pursue their asylum claim, especially if they are ordered removed without a day in court. In that situation, an asylum seeker's only recourse is to file a motion to reopen, which, as discussed below, now carries a \$1065 fee unless the IJ grants a fee waiver. The Ninth Circuit struck down a ban on asylum eligibility in the first Trump administration where the government argued that an asylum ban was lawful if it allowed asylum seekers to *apply* for asylum, even if they could not win asylum by the ban's own terms.⁷⁷ Similarly, *C-A-R-R-* and *H-A-A-V-* allow asylum seekers to *apply* for asylum but encourage IJs to order them removed without ever considering their claim for asylum. Practitioners could therefore argue that such a result runs directly afoul of the right to seek asylum under the INA.

Additionally, INA § 208 provides asylum seekers with the right to testify, specifying that credible testimony alone may be sufficient to meet an asylum seeker's burden of proof in their case. "The *testimony* of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee."⁷⁸ Neither the Pretermission Memo nor *Matter of H-A-A-V-* reference this language in section 208 of the INA—the section that governs asylum applications—at all. Instead, both cite to INA § 240's general rule on burdens of proof.

BIA precedent supports requiring a hearing for the asylum seeker to be afforded an opportunity to meet their burden of proof under INA § 208. *Matter of L-A-C-*, 26 I&N Dec. 516 (BIA 2015) discusses the corroboration requirements under the REAL ID Act, which was codified at INA § 208. "[D]uring the merits hearing, witness testimony and other evidence is presented, the Immigration Judge makes factual findings and legal conclusions, and any applications for relief

⁷⁵ 29 I&N Dec. at 234–35.

⁷⁶ See also INA § 208(a)(1).

⁷⁷ *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 670 (9th Cir. 2021).

⁷⁸ INA § 208(b)(1)(B)(ii) (emphasis added).

are resolved.”⁷⁹ To the extent that the REAL ID Act requires asylum seekers to provide corroborating evidence or explain its absence, the BIA clarified the requirement for testimony on the issue:

At the merits hearing, in circumstances where the Immigration Judge determines that specific corroborating evidence should have been submitted, the applicant should be given an opportunity to explain why he could not reasonably obtain such evidence. *See, e.g., Chukwu v. Att’y Gen. of U.S.* 484 F.3d 185, 192–93 (3d Cir. 2007). The Immigration Judge must also ensure that the applicant’s explanation is included in the record and should clearly state for the record whether the explanation is sufficient.⁸⁰

Likewise in *Matter of Interiano-Rosa*,⁸¹ a case cited favorably in *Matter of C-A-R-R-*, the BIA held, similarly to the *C-A-R-R-* holding, that the result of counsel’s failure to meet a filing deadline for supplementary evidence would be to exclude that evidence—not to pretermitt the application and order removal. Nevertheless, the BIA remanded *Matter of Interiano-Rosa*, directing that the “respondent should have been given an opportunity to proceed to a merits hearing *with his testimony* and the documentary evidence that was properly submitted.”⁸² Indeed, the fact that asylum seekers have a right to testify is so fundamental, that BIA decisions have not generally discussed the right, but rather accepted this right as a given.

C. Regulatory Protections for Asylum Seekers’ Rights

1. Timely Notice of and Opportunity to Cure an Incomplete I-589

As discussed above, 8 CFR § 1208.3(c)(3) requires that an asylum applicant have 30 days to cure a deficient I-589.⁸³ Under that provision, if an asylum seeker submits an incomplete asylum application, meaning the application “does not include a response to each of the questions contained in the Form I-589, is unsigned, or is unaccompanied by the required materials specified in paragraph (a) of this section,” and the court rejects it for legal deficiency, the court must give the applicant 30 days to cure the deficiency.⁸⁴ The regulation further states, “[i]f the Service has not mailed the incomplete application back to the applicant within 30 days, *it shall be deemed complete*.”⁸⁵ While *Matter of C-A-R-R-* does discuss the regulation, it only discusses the requirement to resubmit a returned application; it quotes but does not discuss the provision that applications which are not returned as incomplete are deemed complete after 30 days. There is simply no way to reconcile *Matter of C-A-R-R-* and *Matter of H-A-A-V-* with this clear regulatory language—any I-589 that was accepted by the immigration court and not returned to the asylum seeker is deemed complete. It defies logic that “incomplete” applications, including applications with no written response to a substantive question, must be accepted as “complete”

⁷⁹ 26 I&N Dec. at 521.

⁸⁰ *Id.* at 521–22.

⁸¹ 25 I&N Dec. 264 (BIA 2010).

⁸² *Id.* at 266 (emphasis added).

⁸³ *See, supra* note 26 for information on where to find the correct version of this regulation.

⁸⁴ 8 CFR § 1208.3(c)(3); *see, supra* note 26 for information on where to find the correct version of this regulation.

⁸⁵ *Id.* (emphasis added).

if not returned within 30 days, whereas applications that include minimal substantive responses can be pretermitted.

2. Asylum Seekers Have a Regulatory Right to Testify

Several regulations underscore asylum seekers' right to testify in support of their I-589 at an individual hearing. 8 CFR § 1208.13(a) states that the burden of proof is on the asylum seeker to establish that they are a refugee as defined in INA § 101(a)(42). This regulation, which adopts the *Mogharrabi* standard,⁸⁶ specifies that the "testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration."⁸⁷ The specific mention of testimony suggests that a hearing is required where the asylum applicant will attempt to meet their burden of proof.

Matter of H-A-A-V- focuses on the language at 8 CFR § 1240.11(c)(3), which states that applications for asylum and withholding of removal are to be adjudicated by the IJ "after an evidentiary hearing to resolve factual issues in dispute."⁸⁸ However, it does not acknowledge that the regulation also states that no further evidentiary hearing is necessary once an IJ determines certain grounds for mandatory denial apply.⁸⁹ The uncited text of 8 CFR § 1240.11(c)(3) states that "[a]n evidentiary hearing *extending beyond* issues related to the basis for a mandatory denial of the application pursuant to § 1208.14 or § 1208.16 of this chapter is not necessary once the [IJ] has determined that such a denial is required" (emphasis added). A determination that a mandatory bar precludes asylum after an IJ has already taken evidence on the issue of the bar, is very different from pretermitting an asylum application entirely based on the content of the submitted form. Moreover, if an asylum seeker is also pursuing deferral of removal under CAT, there are no mandatory denials and the IJ would have to conduct a hearing to determine CAT eligibility even if the IJ determines that the respondent is barred from asylum. Finally, the instructions to the I-589 form, which underwent a notice and comment rulemaking process and thus have the force of regulations,⁹⁰ mention "testimony" from witnesses three times.⁹¹

VI. Practical Steps to Prevent Pretermission

It is difficult to suggest a one-size-fits-all approach for practitioners to address *Matter of C-A-R-R-* and *Matter of H-A-A-V-*, given how differently IJs are applying these decisions and how quickly practices are changing in courtrooms. Nonetheless, practitioners must adjust their asylum practice to the new reality of filing for asylum in immigration court following these decisions. Practitioners can break down the effect of the directives into two categories: how to

⁸⁶ *Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987).

⁸⁷ 8 CFR § 1208.13(a).

⁸⁸ 29 I&N Dec. at 234.

⁸⁹ PM 25-28 at 2.

⁹⁰ See USCIS Policy Manual, Chapter 3 (current as of June 26, 2026), <https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-3>, in the context of adjustment of status, stating "The form instructions have the same force as a regulation and provide detailed information an applicant must follow," and citing 8 CFR § 103.2(a)(1) ("Every form, benefit request, or other document must be submitted to DHS and executed in accordance with the form instructions.").

⁹¹ Instructions for Application for Asylum and Withholding of Removal at 8, 11 (Jan. 20, 2025), <https://www.uscis.gov/sites/default/files/document/forms/i-589instr.pdf>.

ensure newly filed applications comply with the decisions and how to ensure existing applications meet the newly articulated standard under these cases and are not pretermitted.

A. Steps to Take for New Filings

Practitioners should ensure that newly filed I-589 applications strictly comply with *Matter of C-A-R-R* and all substantive questions on the I-589 are fully answered. Practitioners may accomplish this compliance by first obtaining guidance on the record from the IJ about what the IJ deems to be a legally sufficient I-589. Insulating a case from *Matter of H-A-A-V*-pretermittance is more difficult since different IJs will have very different ideas of what constitutes a prima facie asylum claim.

1. Request Clarification from the IJ at a Master Calendar Hearing or Case Conference

For cases that have upcoming master calendar hearings where the IJ did not send a scheduling order, the practitioner should ask the IJ on the record what the asylum seeker must file to meet the IJ's standard for legal sufficiency. Having the IJ state on the record, for example, whether a declaration is required, will assist the practitioner to understand how the particular IJ defines legal sufficiency. If the IJ requires or permits a declaration, the practitioner should clarify with the IJ whether the I-589 can incorporate the declaration by reference, such as through language like, "see attached declaration for a more detailed explanation" or whether the IJ requires the entire asylum narrative to be written on the I-589. The goal is to understand the IJ's expectations and ensure that the record is complete.

If the practitioner knows that the IJ who is presiding over the case has been pretermitted other I-589s, the practitioner might consider making a motion for a pre-hearing conference pursuant to the Immigration Court Practice Manual (ICPM) § 3.17. According to that section, "[p]re-hearing conferences are held between the parties and the Immigration Judge to narrow issues, obtain stipulations between the parties, exchange information voluntarily, and otherwise simplify and organize the proceeding." Thus, a practitioner who is unsure about what an IJ requires for a sufficient filing could pursue a pre-hearing conference with the goal of simplifying and organizing the proceeding to go on the record and ask the IJ for clarification. Of course, the practitioner should request the pre-hearing conference well before the one-year filing deadline to be able to timely file the I-589 after obtaining guidance from the IJ.

2. Include Required Attachments

Some of the notices practitioners have received from IJs refer to the instructions which accompany the I-589; practitioners should carefully read that entire 12-page form.⁹² In addition to some information in those instructions about how to respond to each question, page 8 of the instructions contains a list of required documents, including: a passport (if the applicant has one); U.S. immigration documents; other identification documents; and proof of relationship to family

⁹² USCIS, Instructions for Application for Asylum and for Withholding of Removal (last updated Jan. 20, 2025) <https://www.uscis.gov/sites/default/files/document/forms/i-589instr.pdf>. It is worth noting that this instruction form, like many forms that have been issued since the start of the Trump administration, is backdated to the first day of his presidency. Practitioners are advised to always check the instructions in the event that there is an unannounced change to the instructions.

members included in the application. This section of the instructions also specifies that the I-589 must be signed and that all documents must be translated.⁹³ Since some IJs appear to be looking for ways to pretermite I-589s, it is important to include all required documents as the IJ may not give the applicant a second chance to submit them.

3. “Legally Sufficient” Answers

Matter of C-A-R-R- does not provide much guidance on legal sufficiency, instead stating, circularly, “[a] ‘response to each of the questions,’ for purposes of both the regulation and the form’s instructions, means each question requires a specific, responsive answer.”⁹⁴ So, each “response” must be “specific” and “responsive” but the decision does not define these terms.

Matter of C-A-R-R- states that the rejected I-589s in that case had “missing answers,” rather than answers that were not “specific,”⁹⁵ implying that some of the substantive questions on the rejected I-589s had no answer whatsoever. Thus, if a practitioner must argue that a specific answer on their client’s I-589 was legally sufficient, the practitioner could note that in *Matter of C-A-R-R-* the BIA determined that an I-589 with “missing answers” was inadequate but does not address what makes an answer to a question sufficient or insufficient.⁹⁶

Practitioners could argue that the amount of detail that the BIA determined to be legally sufficient in *Matter of C-A-R-R-* was less than what was included in their client’s I-589. As noted in section II, the information included in the fourth I-589, which the BIA accepted as legally sufficient, was minimal. The answer to the question on past harm included a short description of two threats the applicant had suffered and the line, “I will explain further in a declaration.”⁹⁷

Given that *Matter of C-A-R-R-* references the I-589 instructions,⁹⁸ it is helpful to look at those instructions for further guidance. While the I-589 instructions do advise applicants to “[c]learly describe any of your experiences or those of family members or others who have had similar experiences that may show that you are a refugee,” the instructions go on to say:

If you have experienced harm that is difficult for you to write down and express, you must be aware that these experiences may be very important to the decision-making process regarding your request to remain in the United States. *At your interview with an asylum officer or hearing with an immigration judge, you will need to be prepared to discuss the harm you have suffered.*⁹⁹

⁹³ *Id.* at 8.

⁹⁴ 29 I&N Dec. at 16.

⁹⁵ *Id.* at 13.

⁹⁶ In fact, some of the rejected versions of the I-589s in *C-A-R-R-* left some answers blank while others did not leave any of the narrative questions blank, but the answers were very short and vague, *see C-A-R-R-* I-589s at Appendix.

⁹⁷ *See C-A-R-R-* I-589s at Appendix. Practitioners could attach the appendices to this practice advisory to opposition papers to a motion to pretermite to demonstrate that the BIA found relatively minimal answers sufficient in its own precedential decision that spawned IJ pretermittions.

⁹⁸ I-589 Instructions, at 6 (Jan. 20, 2025), <https://www.uscis.gov/sites/default/files/document/forms/i-589instr.pdf>.

⁹⁹ *Id.* at 6 (emphasis added).

Thus, the instructions clearly contemplate that the adjudicator will elicit information beyond the information the asylum seeker writes on the I-589. Practitioners should highlight this language if an IJ is threatening to pretermite the application. One strategy could be to answer the substantive question about past harm with the following language, “Pursuant to page 6 of the I-589 instructions, I will be prepared to discuss the past harm that I have experienced at the individual hearing. It is difficult for me to write about it right now [because I am in therapy, if true, or I am still processing the experiences and how to deal with the impact on my mental health].”

In addition to thoroughly reviewing the I-589 instructions, practitioners should carefully read each question on the I-589 form, especially the substantive questions concerning the claim, which begin on page 5 of the form.¹⁰⁰ Practitioners who have completed many I-589s in the past may be so accustomed to completing these forms in a particular way, that they may not have carefully read the questions themselves in some time.

For example, question 1.A. at page 5 asks:

Have you, your family, or close friends or colleagues ever experienced harm or mistreatment or threats in the past by anyone?

If ‘Yes,’ explain in detail:

1. What happened;
2. When the harm or mistreatment or threats occurred;
3. Who caused the harm or mistreatment or threats;
4. Why you believe the harm or mistreatment or threats occurred.

For asylum seekers who have experienced multiple incidents of past harm, completing this question alone may require several pages of narrative. Many practitioners have, in the past, provided a brief summary in this box and then attached a declaration that provides a detailed, chronological narrative.

Following *Matter of C-A-R-R-* and *Matter of H-A-A-V-*, practitioners should rethink this customary asylum practice where the details are including in a separate declaration. Unless an IJ has stated on the record that providing a narrative in a declaration will be considered legally sufficient, it may be prudent for practitioners to describe the harm on the I-589 itself. Of course, it will likely be impossible to include all the required details in the small boxes given, so practitioners will need to continue each longer answer on the supplement page, page 12 of the I-589. Page 5 of the asylum instructions form states, “If you need more space, attach Form I-589 Supplement A or B (included in the application package) and/or additional sheet(s) indicating the question number(s) you are answering.”¹⁰¹ Although the I-589 form itself only has one Supplement B page, the instructions state that the asylum seeker can attach multiple sheets of supplement pages. Practitioners should be sure to include the applicant’s name, A#, and signature on each Supplement A and/or Supplement B page that they attach to avoid rejection of the sheets. Page 6 of the instructions further indicates that the asylum seeker can include more details on “additional sheets of paper,” other than Supplement B (“If you answer ‘Yes’ to any

¹⁰⁰ Form I-589, Application for Asylum and for Withholding of Removal (Jan. 20, 2025) <https://www.uscis.gov/sites/default/files/document/forms/i-589.pdf>.

¹⁰¹ *Id.* at 5.

question, explain in detail using Form I-589 Supplement B *or additional sheets of paper*, as needed.”).¹⁰²

4. Beware of Expanded Data Collection

DHS and DOJ issued requests for comments in May 2025 to redo many common USCIS forms including the I-589, to greatly expand the data that the government will collect on noncitizens’ applications.¹⁰³ When the new forms are published, asylum seekers will be required to share all of their social media identifiers for the five years prior to filing. Additionally, a different rulemaking will add requirements to forms that the asylum seeker indicate the date of birth, place of birth, full street address, and telephone numbers (with start and end date of use) for parents, spouse, siblings, and children dating back five years. There is no exception for deceased, estranged or step-relations.¹⁰⁴ These additional questions, with their expansive data collection, will make the I-589 completion process more laborious and some asylum seekers may find it difficult to submit complete applications if they do not have access to the date of birth, place of birth, full street address, and telephone numbers for parents, spouse, siblings, and children dating back five years. Forcing asylum seekers to provide information that is difficult to access provides IJs more opportunities to pretermite or may force asylum applicants to run up on the one-year filing deadline.

B. Steps to Take in Pending Filings

Practitioners should review all asylum filings they have made in pending cases. Practitioners must pay attention to trends in the court(s) where they practice and prioritize review of cases pending before IJs whom they have heard have been aggressively pretermiteing cases. Even if a practitioner believes that an asylum case is assigned to an IJ who has not been regularly pretermiteing cases, it is best practice to review all filings; EOIR frequently reassigns cases, especially as the agency continues to terminate IJs, and practitioners should not assume that their case will remain with the IJ to whom it was previously assigned.¹⁰⁵

¹⁰² *Id.* at 6 (emphasis added).

¹⁰³ See National Immigration Project, *National Immigration Project Submits Comments on Changes to USCIS Forms Which Will Vastly Increase Government Data Collection* (May 6, 2025), <https://nipnlg.org/work/resources/national-immigration-project-submits-comments-changes-uscis-forms-which-will-vastly>.

¹⁰⁴ *Id.*

¹⁰⁵ Many immigration judges hired under the Biden administration have been terminated without being given a reason. As the Trump administration continues what appear to be ideological firings, it may become more likely that IJs who ensure noncitizens receive due process will lose their jobs, and asylum seekers’ cases will be reassigned to IJs who adhere to the administration’s policy priorities. See Nicolae Viorel Butler, Migrant Insider, *Trump Purges Immigration Judges with Biden Ties* (July 9, 2025), <https://migrantinsider.com/p/trump-purges-immigration-judges-with>; Anusha Mathur and Ximena Bustillo, *U.S. Has a Quarter Fewer Immigration Judges Than It Did a Year Ago. Here’s Why*, Feb. 23, 2026, <https://www.vpm.org/npr-news/npr-news/2026-02-23/u-s-has-a-quarter-fewer-immigration-judges-than-it-did-a-year-ago-heres-why>; Olga R. Rodriguez, *San Francisco Immigration Court Shuts Down After Purge of Judges, Leaving Asylum Cases in Chaos*, KCRA3, May 25, 2026, <https://www.kcra.com/article/san-francisco-immigration-court-shuts-down-after-purge-of-judges-leaving-asylum-cases-in-chaos/71401445>.

1. Reviewing and Supplementing Pending Asylum Applications for “Prima Facie Eligibility”

While *Matter of H-A-A-V-* held that IJs need not schedule evidentiary hearings if the asylum application does not establish “prima facie eligibility” for asylum, *H-A-A-V-* does not define this standard.¹⁰⁶ Practitioners should review the filed I-589 and determine whether, without testimony to further develop the claim, there is sufficient information in the I-589 for an IJ to grant the case. If there is not sufficient detail, then the practitioner must work with the asylum seeker to supplement the I-589 as well as provide other documents that support the claim.

Significantly, page 5 of the I-589 instructions states, “You can amend or supplement your application at the time of your asylum interview with an asylum officer and at your hearing in Immigration Court by providing additional information about your asylum claim.”¹⁰⁷ While an IJ may find that their own scheduling order on when supplemental material is due supersedes the general instructions that the application can be supplemented “at your hearing,” the instructions clearly provide for the possibility of supplementing the application after its initial filing. Of course, if the instructions allow for supplemental material at the hearing, then it stands to reason that supplemental material is allowed prior to the hearing.

Since the start of the second Trump administration, the BIA has issued a record number of precedential decisions, with almost all of them finding against the noncitizen and none leading to a grant of asylum.¹⁰⁸ Instead, the BIA’s decisions on asylum have narrowed the cognizability of particular social groups, made the nexus standard more difficult to meet, and interpreted asylum bars more expansively. This constant narrowing of eligibility for asylum makes it especially challenging to ensure that asylum applications state a prima facie claim for asylum. For example, an asylum seeker might have filed an I-589 in 2024 with a PSG of “married women in Guatemala who are unable to leave their relationship,” which would have been a clearly cognizable PSG, but by 2026, an IJ would likely find that an applicant who only put forth that protected characteristic has not established prima facie eligibility for asylum because of subsequent BIA decisions.¹⁰⁹

Asylum law continues to change, and narrow, at unprecedented speed, so practitioners must keep abreast of BIA decisions, especially on PSGs, and be prepared to amend their clients’ applications. It is not unreasonable to amend a client’s filing or submit new briefing

¹⁰⁶ 29 I&N Dec. at 234. Prior BIA precedent, *Matter of L-O-G-*, 21 I&N Dec. 413, 423 (BIA 1996) says, “The concept of a prima facie case must be measured against the ultimate statutory requirement in order to have practical meaning” and held that prima facie eligibility requires a reasonable likelihood of satisfying the requirements for relief.

¹⁰⁷ Form I-589, Application for Asylum and for Withholding of Removal (Jan. 20, 2025) <https://www.uscis.gov/sites/default/files/document/forms/i-589.pdf>.

¹⁰⁸ Ximena Bustillo and Rahul Mukherjee, *An Immigration Court Few Have Heard of Is Quietly Shaping Policy Behind the Scenes*, NPR, Mar. 20, 2026, <https://www.npr.org/2026/03/20/nx-s1-5707535/trump-immigration-detention-appeals-board-deportation>. See also, Jason A. Cade, *Welcome to the Trump Administration’s Board of Immigration Appeals. The Immigrant Always Loses*, 136 YALE L.J.F. (forthcoming 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6506380.

¹⁰⁹ See *Matter of S-S-F-M-*, 29 I&N Dec. 207 (A.G. 2025) (reinstating *Matter of A-B-I* and *Matter of A-B-II* as precedent). For additional guidance, see, CGRS, *Domestic Violence-Based Claims for Asylum and Related Relief* (Dec. 2025).

distinguishing the case with each new relevant decision that the BIA issues if doing so is in the client's interests. Of course, it is not possible to change the facts of why an asylum seeker fled their country and is afraid to return, and in some cases, recent BIA precedent may seem to foreclose avenues for protection. In these situations, practitioners need to make the best factual record possible and preserve all legal arguments for potential federal circuit appeal.

2. Beware of *Matter of M-A-F-*

As practitioners review their cases and make decisions about the need to supplement prior filings, it is critical that they be familiar with *Matter of M-A-F-*.¹¹⁰ The National Immigration Project issued a practice advisory that delves more deeply into *M-A-F-* and pretermission, which practitioners should review if this decision is an issue in their case.¹¹¹

In *M-A-F-*, the BIA considered the case of an asylum seeker who had initially filed an application with false information in 2003, but later supplemented the application and provided truthful responses to the questions.¹¹² The BIA determined that both for purposes of applying the REAL ID Act, which was passed in 2006, and for calculating the clock on the One Year Filing Deadline, the date of the second application controlled in the case. The BIA held that:

A later filed application that presents a previously unraised basis for relief—such as a fear of persecution on account of a different protected ground—will generally be considered a new application. Even an application that is based on the same protected ground may also be considered a new application if the [noncitizen's] later claim is predicated on a new or substantially different factual basis. By contrast, a subsequent application that merely clarifies or slightly alters the initial claim will generally not be considered a new application.¹¹³

Before assuming that *M-A-F-* forecloses their client's ability to win asylum if they add additional claims to the application, practitioners should reread the *M-A-F-* decision and be fully familiar with it. The facts in *M-A-F-* are extreme, and likely distinguishable from most cases: the first asylum application in *M-A-F-* contained admittedly false information, including that he had been detained and tortured.¹¹⁴ In the context of the REAL ID Act analysis, the BIA specifically determined that he should not be permitted to “bypass” the more stringent credibility standard based on his having previously filed a false claim.¹¹⁵ Similarly, it makes sense that the BIA would determine that Mr. M-A-F- should not avoid the one year filing deadline by having submitted an initial asylum application with false information.

¹¹⁰ *Matter of M-A-F-*, 26 I&N Dec. 651 (BIA 2015).

¹¹¹ See, National Immigration Project, *Practice Advisory: Distinguishing Matter of M-A-F- in the Pretermission Context* (May 22, 2026), <https://nipnlg.org/work/resources/practice-advisory-distinguishing-matter-m-f-pretermission-context> for a more in-depth discussion of this issue.

¹¹² 26 I&N Dec. at 656.

¹¹³ *Id.* at 655.

¹¹⁴ *Id.* Given the false narrative, it is surprising that the BIA did not make a frivolous asylum finding pursuant to 8 CFR § 1208.20.

¹¹⁵ *Id.*

Nonetheless, IJs may mechanically cite to *M-A-F-* for the proposition that an asylum application that substantially adds to the initial asylum filing restarts the one-year filing deadline clock. Thus, in all cases where the asylum seeker is beyond the one-year filing deadline, and the practitioner is reviewing applications for legal sufficiency, the practitioner must determine whether the information the practitioner would like to add would be based on a new protected ground and/or a substantially different factual basis. Even if the new filing goes beyond “slightly altering” the existing application, the practitioner can argue that the asylum seeker’s prior filing of a truthful asylum application within the first year comports with Congress’s intent in enacting a filing deadline. Congress determined that individuals fleeing harm would know that they left their country to seek asylum and therefore should be able to file for asylum within one year.¹¹⁶ There is no reason to punish asylum seekers who timely file and subsequently retain counsel (or retain more thorough counsel) by applying the one-year filing deadline as the BIA does in *M-A-F-*. Of course, IJs and the BIA are bound by *M-A-F-*, so practitioners would only make these arguments to preserve them for appeal.¹¹⁷

If, based on the facts of the case, the practitioner believes the applicant can prevail on the existing claim with greater detail, rather than a different claim, it will be easier to argue that *Matter of M-A-F-* does not apply. If practitioners are adding facts to an existing claim, they should frame the addition as “clarification” if the facts warrant doing so. Especially in cases where the asylum seeker was previously unrepresented, practitioners can argue that the adjudicator cannot have expected the unrepresented noncitizen to understand every potential ground for asylum.

On the other hand, if the initial I-589 did not include the strongest claim, the practitioner may feel that it would be best practice to add the stronger claim. The practitioner could consider whether the second application would fall under a one-year filing deadline exception. For example, the newly added protected ground could be based on changed circumstances in the applicant’s life, such as a religious conversion, new political activity, or recently coming out as LGBTQ+. In such a situation, the asylum seeker can argue for an exception under 8 CFR § 208.4(a)(4). Likewise, the asylum seeker may be able to put forward an exception based on extraordinary circumstances under 8 CFR § 208.4(a)(5) if prior counsel was ineffective in failing to consider all grounds for asylum.¹¹⁸ Sometimes, asylum seekers may be able to argue both

¹¹⁶ Michele R. Pistone and Philip G. Schrag, *The New Asylum Rule: Improved but Still Unfair*, 16 GEO. IMMIGR. L.J. 1, 11–12 (2001) (“Despite the fact that most genuine refugees were not able to apply within one year of their arrival, members of the 104th Congress were intent on imposing a deadline, apparently under the belief that such a bar was necessary to prevent time-consuming adjudication of fraudulent applications.”).

¹¹⁷ At least one federal court of appeals has rejected the reasoning of *M-A-F-*. *Ordonez Azmen v Barr*, 965 F3d 128, 137 (2d Cir. 2020) (“Our reading of § 1158(a)(2)(D) and these other provisions of the INA persuades us that Congress did not intend to bar the agency from considering the asylum application of an applicant who shows changed circumstances that first arise after the application is filed, and did not require that the changed circumstances even relate to the delay in filing. To the contrary, Congress clearly contemplated that the agency could consider a change in circumstances such as the one alleged here at several stages in an applicant’s proceedings—even when the change bears no relation to the reason for the delay, and even as late as a motion to reopen a final order of removal.”).

¹¹⁸ To successfully argue ineffective assistance of counsel, the asylum seeker will need to follow the *Lozada* requirements set forth at 8 CFR § 208.4(a)(5)(iii), namely including an affidavit about the alleged ineffective assistance, informing prior counsel of their deficiency, and filing a disciplinary complaint or explaining why such a complaint was not filed.

exceptions covering different periods of time. Practitioners should carefully review all of the one-year filing deadline exceptions.¹¹⁹ If, for example, the asylum seeker has been maintaining lawful parole status since entry, then they would only need to file the asylum application within a reasonable period of time after the second application is filed.¹²⁰ The asylum office and BIA appeals have generally found that a filing delay exceeding six months is not a reasonable time period, although reasonableness decisions should be made on a case-by-case basis.¹²¹

3. Consider the Role of Declarations

As discussed in Section II above, *Matter of C-A-R-R-* raises more questions than it answers regarding the role of declarations in asylum applications. One reading of the decision is that the safest practice for asylum seekers would be to stop submitting declarations as separate documents, and instead include the narrative that would be written in declaration form on the unlimited extra pages provided with the I-589. Using the extra form pages rather than writing in numbered paragraphs in an attached declaration would seem to raise form over substance in completing an asylum application, but including a narrative on the pages of the I-589 form may be the easiest way to technically comply with *Matter of C-A-R-R-* while also including enough substantive information about the claim to show prima facie eligibility as required by *Matter of H-A-A-V-*.

For practitioners who regularly include lengthy declarations with their asylum applications, and only short answers on the I-589 form itself, *Matter of C-A-R-R-* does not clearly indicate whether such an application would be deemed “complete.” *Matter of C-A-R-R-* references an obscure supporting document¹²² to a 2024 rulemaking updating the form I-589 for the proposition that an application form is necessary in asylum cases to collect the relevant information rather than “permitting a free narrative.”¹²³ But neither the BIA decision nor the Supporting Statement to the I-589 discuss how much information needs to be written on the I-589 itself, especially in cases where an applicant also includes a declaration.

4. Fully Develop CAT Claims

Practitioners should ensure that CAT claims are fully articulated. Unlike asylum, there is no nexus requirement for CAT claims, meaning that the applicant does not need to link the feared harm to a protected characteristic.¹²⁴ The legal standard for CAT is different, however, and to

¹¹⁹ Practitioners may also cite the USCIS Asylum Officer’s Training Plan on the One-Year Filing Deadline (May 6, 2013), https://www.uscis.gov/sites/default/files/document/lesson-plans/One_Year_Filing_Deadline_Asyum_Lesson_Plan.pdf. It is not clear to what extent asylum officers are still using these training materials, particularly since the last publicly available version of this Training Plan is more than a decade old. Furthermore, practitioners should bear in mind that the USCIS training materials are not binding on EOIR, though the reasoning may be persuasive.

¹²⁰ 8 CFR § 208.4(a)(5)(iv) (“The applicant maintained Temporary Protected Status, lawful immigrant or nonimmigrant status, or was given parole, until a reasonable period before the filing of the asylum application”).

¹²¹ See USCIS, One-Year Filing Deadline Lesson Plan at 24, *supra* n. 119.

¹²² See Supporting Statement for Application for Asylum and for Withholding of Removal OMB Control No.: 1615-0067 Collection Instrument(s): Form I-589, available at https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202412-1615-003.

¹²³ 29 I&N Dec. at 16.

¹²⁴ See 8 CFR 1208.16(c).

prevail the applicant must demonstrate that it is more likely than not they will face torture in their country of origin.¹²⁵

Practitioners should review I-589s to determine whether there is sufficient detail on the CAT claim question and, if the respondent fears torture by their country's government or has an argument that their government will acquiesce in torture, the practitioner should consider supplementing this claim. There is no one-year filing deadline for CAT claims, so even adding a new CAT claim will not raise the *Matter of M-A-F*- concerns discussed above. Likewise, there are no bars to CAT deferral,¹²⁶ so even if the IJ determines on the papers that there is a mandatory asylum bar, the respondent can still seek CAT deferral. Both practitioners and IJs frequently give short shrift to CAT claims, which have a different legal standard from asylum and statutory withholding. Practitioners should be sure to fully explore and articulate CAT claims in the event the IJ determines the respondent's claimed protected characteristic is not viable.¹²⁷

Of course, with this administration's use of third country removal even for those who prevail on CAT claims, "winning" CAT may not offer long-term protection in the United States, but fully developing these arguments may be enough to convince the IJ to schedule an individual hearing in the case. At the individual hearing, the practitioner can again argue that asylum should not have been pretermitted. Whether or not the IJ allows testimony on asylum, making a record on the CAT claim allows the noncitizen to better develop the record for appeal.

VII. Options If an I-589 Is Pretermitted

A. Options Before the IJ

Different IJs approach motions to pretermite differently. Some IJs who grant the motion to pretermite, particularly if the motion is in written form, will pretermite the asylum application but still schedule the case for a subsequent master calendar hearing. Other IJs will pretermite and order removal in the same order, such as the order by the IJ at a master calendar hearing in *Matter of H-A-A-V-*.

If the IJ pretermits the asylum application but does not order removal, the practitioner may file a motion to late-file an amended I-589 or further documentation in support of the asylum application. While it is likely that the IJ will deny the motion for late filing, making a motion to submit an amended I-589 that cures whatever defect the IJ found will at least create a better record for appeal. Furthermore, if the IJ does not order removal, then the proceedings are still pending before the IJ and, unlike filing a motion to reopen or reconsider, there should be no fee for filing the motion.¹²⁸

¹²⁵ *Id.*

¹²⁶ 8 CFR 1208.17(a).

¹²⁷ See CGRS's practice advisory *Seeking Protection under the Convention Against Torture* (June 2026) for guidance on CAT claims.

¹²⁸ ICPM § 4.10, titled Other Motions, clearly differentiates motions while the case is pending from motions to reconsider or motions to reopen which are filed after a removal order and which carry a \$1065 fee. See EOIR Payment Portal. <https://epay.eoir.justice.gov/index>. Compare 8 CFR § 1003.23(a) with 8 CFR § 1003.23(b).

If the IJ pretermitted the asylum application and ordered the asylum seeker removed, the practitioner will need to decide whether the best next step is to appeal to the BIA or whether there is any reason to file a motion to reconsider with the IJ. In most cases, it is unlikely that an IJ who ordered pretermission and removal would be open to arguments that the IJ committed an error of fact or law. However, there may be cases where the IJ commits a blatant procedural error, such as pretermittting for failing to file a statement of prima facie eligibility when, in fact, the practitioner did file the required document, where it may be possible to prevail on a motion to reconsider.

If the IJ denies the motion to reconsider, the practitioner can then appeal the denial of the motion to reconsider at the same time that the merits decision is appealed. However, practitioners should be aware that filing a motion to reconsider does not stop the 30-day filing deadline clock for filing the Notice of Appeal with the BIA. Thus, if the IJ does not issue a decision before the appeal is due, the practitioner must file the BIA Notice of Appeal and the IJ would lose jurisdiction over the motion. Practitioners should also consider that filing a Motion to Reconsider and, likely, a Notice of Appeal, will incur two filing fees, \$1065 for the motion and \$1030 for the appeal.¹²⁹

B. Appealing to the BIA

A respondent may appeal an IJ's decision to the BIA by completing and filing a Notice of Appeal with the Board within 30 calendar days of the IJ's decision.¹³⁰ The 30-day period starts to run from the IJ's oral decision or the mailing or electronic notification of a written decision.¹³¹ Notices of Appeal now carry a \$1030 filing fee, although it is still possible to seek a fee waiver.¹³² The Notice of Appeal should include a concise statement to identify the grounds for the appeal. If neither the Notice of Appeal nor the documents filed with it adequately identify the basis for the appeal, the BIA may summarily dismiss the appeal.¹³³

The noncitizen will need to appeal in several circumstances in the pretermission context. First, if the IJ has developed a practice of pretermittting most asylum applications, and the practitioner determines that filing a motion with the IJ would be futile, the practitioner should file an appeal with the BIA as quickly as possible. Likewise, if a practitioner is retained after the application has been pretermitted, and the appeal deadline is approaching, the practitioner should file the Notice of Appeal with the BIA immediately. Even where the I-589 lacked sufficient detail about the past harm, future harm, and/or the asylum seeker's protected characteristic or otherwise has a deficient record, it is generally best to appeal to the BIA to trigger a stay of removal¹³⁴ and

¹²⁹ See EOIR Payment Portal. <https://epay.eoir.justice.gov/index>.

¹³⁰ BIA Practice Manual Chapter 4.4(b); Chapter 3.1(b).

¹³¹ 8 CFR § 1003.38(b).

¹³² Sirce E. Owen, EOIR, PM 25-36, Update and Supplement EOIR Policy Regarding Fees (July 17, 2025), <https://www.justice.gov/eoir/media/1408356/dl?inline>; see also, EOIR, Types of Appeals, Motions, and Required Fees (Updated July 8, 2025) <https://www.justice.gov/eoir/types-appeals-motions-and-required-fees>.

¹³³ BIA Practice Manual Chapter 3.16.

¹³⁴ 8 CFR §1003.6(a).

thereafter file a motion to remand with a more developed I-589 and supporting evidence.¹³⁵ The National Immigration Project created a template Notice of Appeal on *Matter of C-A-R-R-* and *Matter of H-A-A-V-* issues, which is a good starting point for both the Notice of Appeal and for citations for the legal brief.¹³⁶

While appeals to the BIA can and should preserve due process and other constitutional issues, the BIA is more likely to grant an appeal based on arguments grounded in the INA, regulations, and binding precedent.¹³⁷ Given the current composition of the BIA and political pressure on executive branch employees, practitioners should be sure to preserve all arguments that they may need to make in PFRs in a federal court of appeals, including constitutional arguments.

C. Filing a Motion to Reopen

A motion to reopen (MTR) is a request to the IJ or to the BIA to reopen proceedings in which a final administrative order¹³⁸ has already been entered. A motion to reopen is the proper vehicle for submitting new evidence. A motion to reopen would be the primary recourse,¹³⁹ if the appeal period—more than 30 days—has passed since the IJ pretermitted their I-589 and issued a removal order. Motions to reopen before the IJ now carry a \$1065 fee.¹⁴⁰

There are different statutory grounds and regulatory grounds for seeking reopening. Joint motions to reopen¹⁴¹ and reopening based on the EOIR adjudicator's *sua sponte*¹⁴² authority are regulatory reopening vehicles. While no deadline or number limitation applies to regulatory grounds for seeking reopening, these motions are vulnerable to the EOIR adjudicator's discretionary whims, do not trigger an automatic stay of removal, and present jurisdictional concerns for U.S. courts of appeals. Conversely, statutory-based motions to reopen are subject to strict deadlines or other requirements, and noncitizens are generally limited to one motion per

¹³⁵ See 8 CFR § 1003.2(c)(4) (a motion to reopen before the BIA is generally considered to be a motion to remand to the IJ).

¹³⁶ National Immigration Project, *Template BIA Notice of Appeal for CARR and HAAV Pretermissions* (Mar. 13, 2026), <https://nipnlg.org/work/resources/template-bia-notice-appeal-carr-and-haav-pretermissions>.

¹³⁷ While the BIA stated in *Matter of H-A-A-V-*, 29 I&N Dec. at 237 n.6 that it has jurisdiction over constitutional claims, including due process arguments, it is hard to imagine that the current BIA would find that a due process violation occurred.

¹³⁸ An order of removal becomes final: (1) upon an immigration judge's order if the noncitizen waives his or her right to appeal to the BIA (including a stipulated order of removal by which the noncitizen automatically waives appeal pursuant to 8 CFR § 1003.25(b)); (2) upon expiration of the 30-day period for filing a BIA appeal if the right to appeal is reserved but no appeal is timely filed; (3) upon the BIA's dismissal of the appeal; (4) if the case is certified to the BIA or the Attorney General, upon the subsequent order; (5) upon an immigration judge's order of removal in absentia; (6) where the immigration judge grants voluntary departure, upon overstay of the voluntary departure period or failure to timely post the required bond; or (7) where the immigration judge grants voluntary departure and the noncitizen appeals to the BIA, upon the BIA's order of removal or overstay of the voluntary departure period granted by the BIA. 8 CFR §§ 241.1; 1241.1.

¹³⁹ Alternatively, practitioners may file the Notice of Appeal late and seek equitable tolling of the 30-day deadline. See *Matter of Morales-Morales*, 28 I&N Dec. 714 (BIA 2023) (holding that the 30-day filing deadline for a Notice of Appeal is subject to equitable tolling). The practitioner could explore with the noncitizen whether extraordinary circumstances prevented filing the appeal and whether the noncitizen diligently pursued their rights.

¹⁴⁰ EOIR Payment Portal, <https://epay.eoir.justice.gov/index>.

¹⁴¹ 8 CFR § 1003.23(b)(4)(iv) (IJ).

¹⁴² 8 CFR § 1003.23(b)(1) (IJ).

removal proceedings, but are beneficial in that some bases trigger a stay of removal.¹⁴³ Statutory-based motions to reopen also provide a strong jurisdictional anchor if they must be appealed to the U.S. courts of appeals. Generally, it is best practice to present at least one statutory basis and a *sua sponte* argument in motions to reopen.

Where a removal order was not issued *in absentia*, as in the pretermission context, practitioners should seek reopening pursuant to INA § 240(c)(7)(B). This reopening ground requires presenting newly discovered facts or a change in the noncitizen's circumstances since the time of their last hearing in immigration court¹⁴⁴ and is subject to a 90-day deadline from the final removal order.¹⁴⁵ When seeking to reopen based on newly discovered facts or a change in the noncitizen's circumstances since the time of their last hearing in immigration court pursuant to INA § 240(c)(7)(B), the respondent will need to establish why the facts included in the motion to reopen could not have been discovered or presented at a prior hearing.¹⁴⁶ A motion to reopen to apply for discretionary relief, such as asylum, must be based on circumstances that arose after the hearing, or establish that the respondent was not fully apprised of their right to apply for such relief or provided the opportunity to do so at the prior hearing.¹⁴⁷ In pretermission cases, the practitioner can argue a due process violation—the asylum seeker never had an opportunity to be heard because the asylum application was pretermitted without notice and without giving the respondent a chance to provide further facts in support of their case. The practitioner could also argue that the IJ prevented the material facts from being part of the record by pretermitting the asylum application instead of applying 8 CFR § 1208.3(c)(3) and giving the respondent 30 days to correct any deficiencies. Finally, the practitioner could argue that the IJ failed to fulfill their duty to develop the record which requires the asylum seeker to have an opportunity to present testimony.

While most represented pretermission-based motions to reopen will likely proceed pursuant to INA § 240(c)(7)(B) and be filed within the 90-day deadline, pro se individuals may miss the 90-day deadline because they are unaware of the deadline and/or are unable to secure counsel in a timely manner. While the short and strict 90-day deadline makes it difficult to file a timely motion to reopen, practitioners can raise an equitable tolling argument.¹⁴⁸ The common law principle of equitable tolling effectively functions as an extension of the filing deadline.¹⁴⁹ U.S. courts of appeals and the BIA have recognized that equitable tolling is warranted in various immigration contexts, including government interference and due process violations at the prior removal hearing.¹⁵⁰

¹⁴³ For a full discussion on stays of removal, refer to the National Immigration Project and American Immigration Council, *Practice Advisory: Stays of Removal* (Jan. 17, 2025), <https://nipnlg.org/work/resources/stays-removal>.

¹⁴⁴ INA § 240(c)(7)(B); *see also* 8 CFR § 1003.23(b)(3) (IJ).

¹⁴⁵ INA § 240(c)(7)(C)(i); 8 CFR § 1003.23(b)(1) (IJ).

¹⁴⁶ 8 CFR § 1003.23(b)(3) (IJ).

¹⁴⁷ *Id.*

¹⁴⁸ *Holland v. Florida*, 560 U.S. 631 (2010).

¹⁴⁹ *See Singh v. Holder*, 658 F.3d 879, 884 (9th Cir. 2011); *Lugo-Resendez v. Lynch*, 831 F.3d 337, 343 (5th Cir. 2016).

¹⁵⁰ *See, e.g., Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000); *Borges v. Gonzales*, 402 F.3d 398 (3d Cir. 2005); *Kuusk v. Holder*, 732 F.3d 302 (4th Cir. 2013); *Lugo-Resendez v. Lynch*, 831 F.3d 337 (5th Cir. 2016); *Harchenko v. INS*, 379 F.3d 405 (6th Cir. 2004); *Pervaiz v. Gonzales*, 405 F.3d 488 (7th Cir. 2005); *Hernandez-Moran v. Gonzales*, 408 F.3d 496 (8th Cir. 2005); *Socop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir. 2001) (en banc) (overruled in part on

Practitioners filing motions to reopen beyond the 90-day deadline should also assess if their client is eligible for a motion to reopen under INA § 240(c)(7)(C)(iv) (Violence Against Women Act (VAWA) eligible) as this statutory motion to reopen ground has a waivable one-year deadline.¹⁵¹ It is possible that during the longstanding backlogs in immigration courts VAWA-based facts may have arisen in a client's case. Indeed, it is not uncommon for an asylum seeker to have filed an I-589 many years ago and, because of their vulnerability, married an abusive lawful permanent resident or U.S. citizen.

It is also possible that some asylum seekers whose applications are pretermitted are eligible to file a motion to reopen based on changed country conditions.¹⁵² To prevail on this reopening ground, the asylum applicant must establish prima facie eligibility for asylum through the motion to reopen filing.¹⁵³ The asylum seeker must also prove that country conditions have materially changed in the asylum seeker's country of origin and evidence of those changed conditions was "not available and would not have been discovered or presented at the previous proceeding."¹⁵⁴ Ineffective assistance of counsel or lack of any counsel could serve as the reason why the material change in country conditions evidence was not previously available or discoverable. One advantage of presenting ineffective assistance of counsel through this reopening vehicle is the lack of filing deadline,¹⁵⁵ which eliminates the need to establish that the asylum seeker merits equitable tolling of a deadline. That is, where there is no filing deadline, there is no need for equitable tolling. While the less time that has passed between the pretermission order and the motion to filing likely means that the country conditions have not changed at all, let alone materially, many countries in the world are changing significantly, especially politically. Therefore, it is not a foregone conclusion that no asylum seeker can benefit from a motion to reopen based on changed country conditions.

VIII. Conclusion

Matter of C-A-R-R- and *Matter of H-A-A-V-* add new land mines to the already-difficult area of asylum practice. Practitioners must remain apprised of BIA asylum precedent and take proper steps in newly filed and existing cases to ensure that their clients have an opportunity to present their cases in immigration court while preserving issues for federal appeal if necessary.

other grounds by *Smith v. Davis*, 953 F.3d 582 (9th Cir. 2020) (en banc)); *Avila-Santoyo v. U.S. Att'y Gen.*, 713 F.3d 1357 (11th Cir. 2013) (en banc); *Matter of Morales-Morales*, 28 I&N Dec. 714 (BIA 2023) (finding the BIA appeal deadline is subject to equitable tolling).

¹⁵¹ However, the BIA has held that the VAWA reopening provision does waive the one motion numerical bar. *Matter of B-S-H-*, 29 I&N Dec. 313 (BIA 2025).

¹⁵² INA § 240(c)(7)(C)(ii).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ INA § 240(c)(7)(C)(ii); 8 CFR § 1003.23(b)(4)(i).