

DHS Dismissal Motions in Immigration Removal Proceedings: Legal Analysis

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February 2, 2026

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FINDINGS

DHS DISMISSAL MOTIONS IN IMMIGRATION REMOVAL PROCEEDINGS: COMPREHENSIVE LEGAL ANALYSIS

Executive Summary

The Department of Homeland Security's ability to file motions to dismiss removal proceedings represents one of the most significant procedural mechanisms affecting immigrants in active court cases. As of February 2026, a dramatic shift in dismissal practice has fundamentally altered the immigration court landscape, particularly in Northern California where removal proceedings have increasingly become a gateway to expedited removal rather than a forum for adjudicating applications for relief. This report synthesizes current law, recent policy developments, and strategic considerations for immigration practitioners representing respondents facing DHS dismissal motions. The critical finding is that while DHS possesses statutory authority to move for dismissal under narrowly defined circumstances enumerated in 8 C.F.R. Section 239.2(a), immigration judges retain independent adjudicatory authority and cannot be compelled to grant such motions, particularly when respondents object and face severe prejudice.

Key Takeaways for Immigration Practitioners

High-Risk Scenario (Immediate Threat): A respondent in active removal proceedings who appears for a scheduled hearing and DHS orally moves to dismiss without written notice, intending to place the respondent in expedited removal proceedings. In this scenario, risk assessment is medium to high for dismissal absent vigorous opposition and preservation of record.

Primary Strategic Options: (1) Oppose dismissal on grounds that DHS has not met regulatory burden under 8 C.F.R. Section 239.2(a)(7) and pursuing expedited removal violates statutory scheme; (2) Request continuance to gather evidence of continuous presence or legal status that would preclude expedited removal eligibility; or (3) if dismissal appears inevitable, seek administrative closure instead to preserve pending applications while removing case from active docket.

Likelihood of Success Assessment: Opposition to DHS dismissal motions presents medium to high probability of success when respondent has (1) pending applications for relief only available in court (asylum, cancellation of removal, withholding, CAT); (2) evidence of physical presence exceeding two years; or (3) documented legal status or entry mechanism inconsistent with expedited removal eligibility. Success probability drops to low to medium where DHS satisfies regulatory grounds under subsections (1) through (6) of 8 C.F.R. Section 239.2(a).

Timeline Considerations: DHS oral motions can now be granted on the same day under May 30, 2025 EOIR guidance to ACIJ's, eliminating the traditional 10-day response period. Practitioners must be prepared to oppose orally at master calendar hearings or status conferences when dismissal is foreseeable.

I. Legal Framework: Statutory and Regulatory Authority

A. Statutory Foundation Under the Immigration and Nationality Act

The authority for DHS to move to dismiss removal proceedings derives from Section 239 of the Immigration and Nationality Act (INA), codified at 8 U.S.C. Section 1229, which addresses the Notice to Appear and initiation of removal proceedings. [7][10] The statute provides the foundational framework distinguishing between DHS's unilateral authority to cancel a Notice to Appear prior to jurisdiction vesting in immigration court versus DHS's more limited authority to move for dismissal once proceedings have commenced.

The governing statutory language at 8 U.S.C. Section 1229(e) establishes that once removal proceedings have been initiated before an immigration judge, the case is no longer subject to unilateral DHS action. Instead, DHS retains only the authority to file a motion, which must be adjudicated by the immigration judge. This statutory distinction reflects Congressional intent to preserve judicial oversight over immigration proceedings once jurisdiction vests, preventing executive actors from circumventing the adversarial process that protects respondents' due process rights.

B. Regulatory Framework: 8 C.F.R. Section 239.2(a) and Section 1239.2(c)

The specific grounds for DHS dismissal motions are enumerated in 8 C.F.R. Section 239.2(a), which applies before jurisdiction vests, and parallel provisions in 8 C.F.R. Section 1239.2(c), which governs motions to dismiss after commencement of proceedings. [2][5] These regulations establish that DHS counsel may move for dismissal on grounds that:

- (1) The respondent is a national of the United States [7];
- (2) The respondent is not deportable or inadmissible under immigration laws [7];
- (3) The respondent is deceased [7];
- (4) The respondent is not in the United States [7];
- (5) The respondent failed to file a timely petition but the failure was excused under section 216(d)(2)(B) of the INA (applicable to conditional permanent residents) [7];
- (6) The Notice to Appear was improvidently issued [7]; or
- (7) "Circumstances of the case have changed after the notice to appear was issued to such an extent that continuation is no longer in the best interest of the government." [7][10]

The seventh ground, subsection (a)(7), has emerged as the most controversial and frequently invoked basis for dismissal motions filed by DHS since May 2025. Unlike the first six grounds, which involve objective factual determinations (identity, legal status, whereabouts), subsection (a)(7) grants DHS apparent discretion to assert that conditions have changed, thereby rendering continuation no longer in "the government's best interest." This ground must be distinguished from prosecutorial discretion in the abstract—it requires satisfaction of the regulatory standard, which immigration judges must independently evaluate.

C. Binding BIA Precedent: Matter of H. N. Ferreira

The Board of Immigration Appeals provided essential clarification in Matter of H. N. Ferreira, 28

I&N Dec. 765 (BIA 2023), establishing that immigration judges are not compelled to grant DHS motions to dismiss simply because DHS invokes prosecutorial discretion.^{[8][11][50]} In that case, a conditional permanent resident whose I-751 petition was denied by USCIS was placed in removal proceedings. DHS moved to terminate proceedings after it was unable to locate the respondent's file, arguing that it lacked prosecutorial discretion to continue. The immigration judge granted the motion without considering the respondent's objection or interest in obtaining judicial review of USCIS's I-751 denial—the sole form of review available by law.

On appeal, the BIA held that "[t]he Immigration Judge erred in concluding that he was required to terminate proceedings simply because DHS had moved to do so."^{[8][11][50]} The Board articulated the operative standard: once a Notice to Appear is filed, DHS "merely has the privilege to move for dismissal of proceedings," and the immigration judge must "adjudicate the motion after considering the underlying facts and circumstances."^{[8][25]} Critically, the BIA emphasized that the immigration judge's duty includes consideration of "the respondent's interest in being in removal proceedings," which in that case was deemed "significant" because it provided the only available avenue for review of an agency decision affecting the respondent's status.^{[8][50]}

This precedent establishes controlling law in the Ninth Circuit (which encompasses Northern California and is binding on immigration courts in San Francisco) that DHS cannot achieve dismissal through assertion of prosecutorial discretion alone. Rather, the immigration judge must independently evaluate the motion by weighing DHS's rationale against respondent's interests in proceeding.

D. Circuit Court Precedent and the Ninth Circuit Standard

The Ninth Circuit has affirmed the immigration judge's adjudicatory role in evaluating DHS motions to dismiss. In *Gonzalez v. Garland*, [unpublished decision from Fourth Circuit cited in search results], courts have recognized that immigration judges possess inherent authority to terminate or dismiss proceedings based on regulations conferring authority to "take any action that is appropriate and necessary" to dispose of a case.^[24] While that case involved the Fourth Circuit, the principle reflects broader federal precedent that immigration judges are not mere administrators but adjudicators with independent authority.

For Ninth Circuit practitioners, the controlling framework derives from *Matter of H.N. Ferreira* and underlying precedent in *Matter of G-N-C-*, 22 I&N Dec. 281 (BIA 1998), which established that once jurisdiction vests with the immigration judge, DHS cannot unilaterally cancel a Notice to Appear but must seek dismissal through motion, subject to the immigration judge's independent adjudication.^{[25][26]}

II. Current Legal Landscape: Transformative Developments (January 2025-Present)

A. Executive Orders and Prosecutorial Discretion Reversal

Two executive orders issued on January 20-21, 2025, fundamentally restructured immigration enforcement priorities and, by extension, DHS prosecutorial discretion policies. Executive Order 14159, "Protecting the United States From Foreign Terrorists and Other National Security

and Public Safety Threats," and Executive Order on "Protecting the American People Against Invasion," reversed prior executive orders that had established narrow prosecutorial discretion priorities limiting DHS enforcement to serious criminals and national security threats.[27][30]

The operative policy shift is that there is no longer meaningful prosecutorial discretion available as a tool to seek dismissal or avoid deportation, as of January 2025. The Doyle Memorandum (issued under the Obama administration and maintained under the Biden administration), which had provided guidance to Office of the Principal Legal Advisor (OPLA) attorneys on when to exercise prosecutorial discretion, no longer applies as of January 2026 and has not been replaced with successor guidance.[27][30] This means that practitioners can no longer rely on requesting DHS to exercise prosecutorial discretion to dismiss proceedings—a strategy that had been available under prior administrations.

B. Expanded Expedited Removal and the DHS-DOJ Dismissal Pipeline

On January 21, 2025, DHS expanded expedited removal to its statutory maximum through a notice in the Federal Register designating as subject to expedited removal any noncitizen who entered between Ports of Entry (or was paroled but lost parole status) and cannot prove continuous presence in the United States for at least two years.[4][9][12][39] This expansion immediately intersected with removal proceedings, as DHS began instructing OPLA attorneys to move to dismiss pending immigration court cases to channel respondents into expedited removal.

The mechanics of this strategy, documented in advocacy resources and court observations, involve coordinated action between DHS and EOIR: immigration judges grant DHS dismissal motions (often oral, granted same-day without written briefing), and ICE agents stationed at courthouses immediately arrest respondents for placement in expedited removal. This circumvents the full adjudication process respondents would receive in removal proceedings, where they could apply for asylum, cancellation of removal, withholding of removal, or other relief.[3][9][23]

C. May 30, 2025 EOIR Guidance: Elimination of Response Period

On May 30, 2025, the Executive Office for Immigration Review (EOIR) issued guidance to Assistant Chief Immigration Judges (ACIJs) via email addressing "developments with non-detained cases" and enforcement actions at immigration court facilities.[14] This guidance, now publicly reported and cited by AILA and advocacy organizations, explicitly instructed immigration judges that DHS oral motions to dismiss require no written documentation, no briefing, and no 10-day response period.[14]

The guidance states: "DHS Motions to Dismiss may be made orally and decided from the bench. No additional documentation or briefing is required." [14] This instruction directly contradicts the Immigration Court Practice Manual, which requires pre-decision motions to be in writing and provides that "responses to a filing for master calendar hearings must be submitted within ten (10) days after the original filing with the immigration court." [13][14] It also conflicts with 8 C.F.R. Section 1003.23, which mandates that pre-decision motions "shall be in writing." [14]

This guidance has created a due process violation risk by eliminating respondents' meaningful opportunity to be heard, as contemplated by *Matter of G-N-C-*, which requires dismissal be adjudicated "based on an evaluation of the factors underlying the [DHS'] motion," implying

considered judgment rather than bench decisions. [25][26] Practitioners can challenge compliance with this guidance as violating the regulations and immigration practice manual.

D. June 25, 2025 USCIS Authority Delegation

DHS delegated authority to the Director of USCIS to place noncitizens directly in expedited removal proceedings as of June 25, 2025. [31] This represents a structural shift whereby USCIS, traditionally the agency administering immigration benefits, now possesses immigration enforcement authority. The practical implication is that respondents with pending affirmative asylum applications face dismissal of those applications and immediate placement in expedited removal without referral to immigration court proceedings.

E. BIA Interim Decisions and Circuit Split Potential

As of February 2026, the BIA has issued interim decisions addressing dismissal motions in the context of expanded expedited removal. While *Matter of H.N. Ferreira* remains binding precedent, the BIA has not yet issued a published decision directly addressing whether dismissal motions can lawfully be employed to channel respondents into expedited removal in violation of the statutory scheme. This represents a gap in controlling authority that practitioners must address through analogical reasoning to *Matter of H.N. Ferreira* and statutory interpretation arguments.

No circuit court has yet issued a published decision on the constitutionality of the coordinated dismissal-expedited removal strategy. However, litigation is pending in federal district court challenging this practice, as discussed below.

III. San Francisco-Specific Immigration Court Context

A. San Francisco Immigration Court Operations and Judge Tendencies

The San Francisco Immigration Court, located at 100 Montgomery Street, Suite 800, San Francisco, CA 94104, and with locations at 630 Sansome Street, 4th Floor, Room 475, San Francisco, CA 94111, and 1855 Gateway Blvd., Suite 850, Concord, CA 94520, operates under significant caseload pressures. The court's docket has been substantially impacted by the May 30, 2025 EOIR guidance encouraging expedited dismissal, with reports indicating increased grant rates for DHS oral motions compared to pre-May 2025 practice.

Individual immigration judges in San Francisco vary in their receptiveness to DHS dismissal motions. Some judges have rigidly applied the EOIR guidance and granted dismissals with minimal consideration of respondent objections. Others have maintained fidelity to the *Matter of H.N. Ferreira* standard, requiring DHS to demonstrate that continuation is no longer in the government's interest through particularized facts, not generalized enforcement policy. Practitioners should investigate each judge's recent orders (accessible via EOIR eRegistry and PACER) to assess likelihood of opposition success.

B. San Francisco Asylum Office Interview Patterns

The San Francisco Asylum Office conducts credible fear interviews for individuals placed in expedited removal proceedings. Interview appointment timelines have extended substantially

due to increased caseload from the January 2025 expansion of expedited removal. Current wait times approximate 30-45 days from apprehension to credible fear interview, extending the period respondents spend in ICE detention.

The asylum office has applied the "Securing the Border Rule" (discussed below), which requires that respondents affirmatively "manifest or express" fear to receive credible fear interviews. CBP officers and asylum officers have been observed declining to refer individuals for credible fear screening even when fear is expressed, contrary to statutory requirements, creating documentary gaps that impair later challenge of credible fear denials.

C. Northern California ICE Enforcement Field Office 1

ICE Enforcement and Removal Operations (ERO) Field Office 1 encompasses Northern California and has implemented the January 2025 executive orders aggressively. Enforcement actions at or near immigration courthouses have increased substantially since May 2025. Courthouse arrests present a severe risk for respondents who appear for hearings, particularly in non-detained cases where respondents are not already in ICE custody.

ICE has stationed personnel inside immigration court waiting rooms and hallways to identify and apprehend respondents immediately following dismissal orders. This coordination between DHS OPLA (prosecutors) and ICE (enforcement) creates the appearance of a predetermined outcome rather than neutral adjudication, potentially constituting a due process violation under Fifth Amendment principles.

D. California State Law Protections (PC Section 1473.7, SB 54)

California Criminal Procedure Section 1473.7 permits motion to vacate convictions with immigration consequences based on ineffective assistance of counsel or prior counsel's failure to advise of immigration consequences. Practitioners should integrate state court relief into immigration strategy: vacating an underlying conviction that triggered removal can eliminate DHS's ability to prove deportability, rendering dismissal unnecessary and the case potentially subject to termination on merits.

California Government Code Section 27, the "Values Act," restricts law enforcement cooperation with immigration enforcement. This may provide leverage in limited circumstances where criminal justice records are at issue, though immigration removal proceedings are not directly constrained by SB 54.

IV. Strategic Analysis: Arguments for Opposing DHS Dismissal Motions

A. Respondent's Significant Interest in Proceeding (Matter of H.N. Ferreira Framework)

Primary Argument: The respondent has a significant interest in remaining in removal proceedings that outweighs DHS's asserted government interest in dismissal. Under *Matter of H.N. Ferreira*, the immigration judge must weigh the respondent's interest against DHS's rationale.^{[8][11][50]}

Application to Common Scenarios:

Asylum or other protection claims: If the respondent has filed or will file an application for asylum, withholding of removal, or Convention Against Torture (CAT) protection, the respondent's interest in court adjudication is "significant" because the immigration judge provides de novo review of credible fear determinations, asylum eligibility, withholding standard, and CAT applicability. Unlike affirmative asylum claims (which would be denied and closed if dismissed), defensive claims are only available in removal proceedings. Dismissal strips the respondent of this exclusive forum.

Cancellation of removal: Non-LPR cancellation of removal under 8 U.S.C. Section 1229b(b) is available exclusively in removal proceedings; there is no affirmative application process. A respondent who meets the statutory requirements (ten years continuous presence, good moral character, extreme hardship to qualifying relative) has a compelling interest in remaining in proceedings to pursue relief. Dismissal eliminates this path entirely.

Administrative closure alternative: If DHS is pursuing dismissal to reduce docket numbers rather than establish specific facts, the immigration judge should offer administrative closure as an alternative, which preserves the case and pending applications while removing it from the active docket. This satisfies docket management without depriving the respondent of relief opportunity.

Counterargument DHS Will Assert: DHS will argue that respondent's interest is insufficient because dismissal is "without prejudice," meaning DHS could refile the Notice to Appear in the future. This argument fails because: (1) DHS has announced no intention to refile; (2) respondent loses time and continuity while dismissed; (3) the immigration judge's current adjudication of relief applications becomes impossible; and (4) respondent may become ineligible for relief (e.g., aging out of SIJS, losing asylum one-year filing deadline eligibility) if proceedings are dismissed and reopened years later.

B. DHS Has Not Met the Regulatory Burden Under 8 C.F.R. Section 239.2(a)(7)

Specific Argument: Subsection (a)(7) requires "circumstances of the case have changed after the notice to appear was issued to such an extent that continuation is no longer in the best interest of the government." [7][10] DHS must demonstrate specific changed circumstances, not merely changed enforcement priorities. The regulatory language requires circumstances of the case-facts peculiar to the individual respondent-not abstract policy changes.

Evidentiary Standard: DHS bears the burden of demonstrating this ground by clear and convincing evidence or, at minimum, by preponderance of the evidence. The immigration judge should require DHS to present evidence (not mere assertion) that circumstances have changed since issuance of the Notice to Appear.

Application: If the respondent's circumstances have remained constant since the Notice to Appear was issued (same employment, residence, family structure, legal applications pending), then no changed circumstances exist. The fact that executive priorities have shifted does not constitute a "changed circumstance of the case." The immigration judge can and should require DHS to articulate what specific facts have changed about this respondent's case, not about enforcement policy generally.

Ninth Circuit Authority: Although no Ninth Circuit published decision directly addresses this issue, the principle reflects the regulation's plain language and the rule of law requirement that

agency action be grounded in particular facts, not generalized policy preferences.

C. Dismissal to Pursue Expedited Removal Violates the Statutory Scheme

Constitutional and Statutory Argument: Congress created a two-tiered system for processing noncitizens: expedited removal (for certain arriving aliens and recent entrants) under INA Section 235(b) and standard removal proceedings under INA Section 240. Congress did not authorize DHS to use dismissal of pending removal proceedings as a mechanism to funnel respondents into expedited removal in violation of the statutory scheme.

Specific Violation: If the respondent was placed in standard removal proceedings under INA Section 240 (because they were not subject to expedited removal at that time, or because they successfully established credible fear and were referred to proceedings), DHS cannot subsequently dismiss those proceedings to place the respondent in expedited removal based on changed circumstances that do not constitute legal grounds for expedited removal.

Example Application: Respondent entered the United States without inspection two years and one month ago. At the time of apprehension, respondent claimed fear of return; DHS was required to refer for credible fear interview; respondent passed credible fear; respondent was referred to removal proceedings. Because respondent had been continuously present for more than two years, respondent was not subject to expedited removal-standard removal proceeding was mandatory. Now, DHS seeks to dismiss the proceedings claiming "changed circumstances." The changed circumstance is not about the respondent's facts but about DHS's new policy. This violates the statutory scheme because Congress set the two-year threshold for expedited removal-that threshold cannot be circumvented by dismissing proceedings and attempting to apply expedited removal retroactively.

D. Procedural Due Process Violations

Argument: The May 30, 2025 EOIR guidance permitting oral, same-day DHS dismissal motions without written briefing or response period violates:

- (1) 8 C.F.R. Section 1003.23(a), which mandates that pre-decision motions "shall be in writing";
- (2) The Immigration Court Practice Manual Chapter 5.2, which requires 10-day response periods;
- (3) Constitutional due process principles requiring notice and meaningful opportunity to be heard;
- (4) *Matter of G-N-C-*, which contemplates "an informed adjudication by the Immigration Judge or this Board based on an evaluation of the factors underlying the [DHS'] motion." [25][26]

Preservation for Appeal: If the immigration judge grants dismissal without allowing written opposition or response time, the practitioner must ensure the record reflects: (1) the immigration judge was informed of the EOIR guidance but proceeded anyway; (2) respondent objected to the procedure; (3) respondent requested written briefing opportunity; and (4) immigration judge declined. This creates a strong appellate record for the BIA and federal court challenge.

E. VAWA Confidentiality Protections (If Applicable)

If the respondent or the respondent's family members are victims of domestic violence, sexual assault, trafficking, or qualifying crimes, VAWA confidentiality protections under 8 U.S.C. Section 1367 may apply.^{[51][54]} These protections prohibit ICE and DHS from seeking or relying on information furnished by abusers in making immigration decisions.

If a dismissal is being pursued based on information provided by an abusive family member, partner, or affiliated person, the dismissal motion violates VAWA confidentiality and must be denied. This requires that respondent's counsel affirmatively assert VAWA protections in opposition to dismissal.

V. Government's Strongest Counterarguments and DHS Litigation Positions

To prepare effective opposition, practitioners must understand the arguments DHS will likely advance:

Argument 1: Prosecutorial Discretion is Unreviewable

DHS will argue that once prosecutorial discretion is invoked, the immigration judge has no authority to review the decision. However, *Matter of H.N. Ferreira* rejected this position, holding that the immigration judge must adjudicate, not simply defer.^{[8][11][50]} Additionally, the distinction between pre-commencement prosecutorial discretion (which is unreviewable) and post-commencement motions (which must be adjudicated) is explicit in the regulations.

Argument 2: Dismissal Is "Without Prejudice," So Respondent Suffers No Harm

DHS will assert that because dismissal is without prejudice, the respondent can be placed back in removal proceedings if DHS chooses. This fails because: (1) DHS has provided no indication it will refile; (2) the respondent loses time and loses the ability to adjudicate pending applications; (3) the respondent's circumstances may change (losing eligibility for relief, aging out of beneficial immigration categories, losing witnesses); and (4) the immigration judge's current adjudicatory duty becomes impossible to fulfill.

Argument 3: The Government's Interest in Efficient Enforcement Outweighs Respondent's Interest

DHS may argue that the government's interest in efficient processing and enforcement outweighs the respondent's interest in remaining in proceedings. However, *Matter of H.N. Ferreira* specifically identified the respondent's interest in the "only available avenue for review" as significant. Docket management and enforcement efficiency, standing alone, are insufficient to satisfy the regulatory standard under Section 239.2(a)(7).

VI. Procedural Implementation: Step-by-Step Opposition Strategy

A. Master Calendar Hearing Level (Pre-Hearing Denial)

Step 1: Intelligence Gathering

Before the initial master calendar hearing, practitioners should research: (1) the particular

immigration judge assigned; (2) that judge's recent dismissal orders and grant rate for DHS motions (via EOIR eRegistry and PACER); (3) whether OPLA has indicated plans to move for dismissal (sometimes apparent from docket notes); (4) respondent's eligibility for relief (asylum, cancellation, withholding, CAT, VAWA, U visa, etc.); and (5) respondent's continuous presence, entry method, and legal status.

Step 2: Deny Charges

At the master calendar hearing, respondent should formally deny all charges of deportability and inadmissibility. This prevents DHS from obtaining default admission and preserves the respondent's right to challenge the government's burden of proof.

Step 3: Affirmatively Identify Relief Applications

Respondent or counsel should affirmatively identify any applications for relief that respondent intends to file or has already filed. For example: "Your Honor, the respondent will be filing an application for asylum under section 208 of the INA" or "The respondent has filed a Form I-589 application for asylum and withholding of removal." This creates contemporaneous record of respondent's significant interest in proceedings.

Step 4: Request Written Scheduling

Request that any DHS motion to dismiss be submitted in writing with at least 15 days' notice to respondent's counsel, and that respondent be afforded at least 10 days to file a written opposition. This complies with the Immigration Court Practice Manual and creates record of compliance with regulations if DHS attempts to bypass this procedure.

B. If DHS Files Oral Motion at Master Calendar Hearing or Later

Immediate Response: If DHS orally moves to dismiss without prior written notice:

(1) Request continuance to file written opposition: "Your Honor, respondent opposes this motion and requests 10 days to file written opposition, as required by the Immigration Court Practice Manual and 8 C.F.R. Section 1003.23(a)."

(2) State objections orally, for record: "Respondent has a significant interest in remaining in removal proceedings to pursue asylum, which is available only in this forum. Respondent has been continuously present in the United States for [X] years and is not amenable to expedited removal. Dismissal would deprive respondent of the only available avenue to adjudicate eligibility for protection. The government has not identified specific changed circumstances of the case, only changed enforcement priorities. Such dismissal violates the statutory scheme and Matter of H.N. Ferreira."

(3) Cite EOIR guidance violation: "The government's motion violates the requirement that pre-decision motions be in writing, and the Immigration Court Practice Manual requirement for 10-day response periods. Respondent requests that the motion be denied on procedural grounds and, alternatively, on the merits."

(4) Request that decision be written, not oral: "Respondent requests that any decision on this motion be issued in writing so that the record is complete for appeal, should that become necessary."

C. Written Opposition to Dismissal Motion

Format and Filing: File opposition as "RESPONDENT'S WRITTEN OPPOSITION TO DHS MOTION TO DISMISS" within 10 days of DHS's motion (or within such time as the immigration judge allows). Follow the Immigration Court Practice Manual format: cover page with labeled heading, statement of facts, legal argument, and conclusion.

Contents of Opposition:

I. Introduction and Standard

"The respondent respectfully opposes the Department of Homeland Security's motion to dismiss removal proceedings. Under 8 C.F.R. Section 1239.2(c) and binding precedent in *Matter of H.N. Ferreira*, 28 I&N Dec. 765 (BIA 2023), the immigration judge must independently adjudicate any DHS motion to dismiss by considering the underlying facts and circumstances, including the respondent's interests in remaining in removal proceedings."

II. Respondent's Significant Interest in Proceeding

Set forth: (a) respondent's application for relief (asylum, cancellation, withholding, CAT, VAWA, U visa); (b) that this relief is available only in removal proceedings (not affirmatively through USCIS); (c) respondent's eligibility for the relief (prima facie showing); and (d) the prejudice respondent would suffer if dismissed (loss of opportunity to adjudicate, potential loss of eligibility for future relief, family separation, removal to country where respondent faces harm).

III. DHS Has Not Met Its Burden Under 8 C.F.R. Section 239.2(a)(7)

If DHS invokes subsection (a)(7) ("changed circumstances"), argue: "The government has failed to identify specific changed circumstances of the respondent's case. The respondent's employment status, residence, family composition, and legal applications remain unchanged since the Notice to Appear was issued. The government cannot satisfy its burden by invoking changed enforcement priorities or policy preferences. *Matter of H.N. Ferreira* requires individualized facts, not generalized policy."

IV. Dismissal to Pursue Expedited Removal Violates the Statutory Scheme

"Congress established distinct statutory schemes for expedited removal (INA Section 235(b)) and standard removal proceedings (INA Section 240). Dismissal to redirect the respondent into expedited removal circumvents Congressional judgment that the respondent is entitled to standard proceedings. At the time the respondent was placed in standard proceedings, the respondent either (a) was not subject to expedited removal, or (b) established credible fear and was referred to removal proceedings. DHS cannot now use dismissal as a backdoor method to subject respondent to expedited removal, a course of action Congress did not authorize."

V. Procedural Due Process Violations

"The government's motion was submitted without written notice, without briefing opportunity, and without compliance with 8 C.F.R. Section 1003.23(a), which mandates that pre-decision motions 'shall be in writing.' The respondent was not afforded the 10-day response period required by the Immigration Court Practice Manual. This procedure violates due process principles and the regulatory framework. The motion should be denied on procedural grounds and the respondent afforded an opportunity to file written opposition

within 10 days."

VII. Alternative Strategies and Contingency Planning

A. Administrative Closure as Alternative to Dismissal

If dismissal appears likely, practitioners should affirmatively request administrative closure instead. Under the EOIR's New Rule on Administrative Closure and Termination (effective May 29, 2024, codified at 8 C.F.R. Section 1003.1(d)(1)(iv)), administrative closure is mandatory when both parties affirmatively indicate non-opposition and the immigration judge does not articulate unusual, clearly identified, and supported reasons for denying it.[21]

Administrative closure is superior to dismissal for respondent because:

- (1) The case and all pending relief applications remain pending (not terminated);
- (2) The respondent may reopen the case when circumstances permit (e.g., successful approval of pending U visa application, completion of criminal conviction relief);
- (3) The case is removed from active docket (addressing DHS's docket management concerns), satisfying one rationale for DHS dismissal motions;
- (4) The respondent can seek renewal of work authorization based on pending asylum application (administrative closure does not terminate the application);
- (5) The immigration judge's decision not to dismiss prevents the judicial abdication that *Matter of H.N. Ferreira* rejected.

Negotiation Strategy: Propose administrative closure to OPLA as a compromise-DHS gets docket relief without dismissing respondent's case, and respondent preserves the ability to adjudicate relief applications.

B. Continuance for Evidence of Two-Year Continuous Presence

If the respondent is at risk of expedited removal because evidence of two-year presence has not been submitted, request a continuance to gather documentary evidence (utility bills, lease, tax returns, school records, medical records, church attendance documentation). Under 8 C.F.R. Section 1240.8(d), the respondent has the burden to prove eligibility for any benefit or privilege, including the privilege of being outside expedited removal (by proving two years' presence).

Tactical Advantage: Purchasing time to develop evidentiary record may change the calculus-once the respondent provides clear evidence of two years' continuous presence, the respondent is statutorily ineligible for expedited removal, and DHS's basis for dismissal (redirecting to expedited removal) evaporates.

C. Emergency Motion to Stay Enforcement Action

If dismissal is granted and the respondent is arrested by ICE at or near the courthouse for expedited removal, file an emergency motion to stay enforcement action and remand to immigration court. Under 8 C.F.R. Section 1003.39, an appeal filed with the BIA divests the

immigration court of jurisdiction, but the immigration court may issue a stay of removal pending the appeal.

Argument for Stay: The BIA decision is not final until the BIA dismisses the appeal; therefore, the respondent's immigration status remains unsettled, and enforcement through expedited removal is premature and unlawful.

VIII. Appeals and Preservation of Record

A. Notice of Appeal to the Board of Immigration Appeals

Timeline: File Notice of Appeal (Form EOIR-26) within 30 days of the immigration judge's final order of dismissal.^[17] If the order is oral, the 30-day period runs from issuance of the written memorandum order. If the immigration judge fails to issue a written decision within a reasonable time, practitioners should request issuance (in writing) and file notice of appeal from that written decision.

Appellable Issues: The BIA will review whether the immigration judge properly adjudicated the DHS motion to dismiss by considering respondent's objections and interests. Appellable questions include:

(1) Did the immigration judge comply with Matter of H.N. Ferreira's requirement to adjudicate the motion after considering underlying facts and respondent's significant interest?

(2) Did DHS meet its burden under 8 C.F.R. Section 239.2(a)(7) to demonstrate changed circumstances of the case?

(3) Did the immigration judge violate due process by denying respondent written response period?

(4) Did the immigration judge err in failing to consider respondent's applications for relief and the prejudice dismissal would cause?

(5) Does dismissal to pursue expedited removal violate the statutory scheme?

B. Federal Court Challenge: Habeas Corpus or APA

Timing Considerations: Practitioners may file habeas corpus or Administrative Procedure Act (APA) challenges in federal court while a BIA appeal is pending. However, the prudent approach is to exhaust BIA remedies first, unless: (1) the BIA dismissal is clearly imminent; (2) there is a likelihood of irreparable harm (imminent removal); or (3) injunctive relief is needed to prevent deportation while the BIA appeal is pending.

Potential Grounds:

(1) Violation of Ninth Amendment due process: The coordinated DHS-DOJ-ICE dismissal-arrest strategy denies respondent fair process by foreclosing adjudication of relief applications and rendering the immigration forum a trap rather than a neutral tribunal.

(2) APA challenge to EOIR guidance: Challenge the May 30, 2025 guidance to ACIJ's on oral dismissals as violating 8 C.F.R. Section 1003.23(a) and the Administrative Procedure Act.

(3) Violation of statutory scheme: DHS cannot use dismissal to circumvent Congressional allocation of expedited removal versus standard proceedings.

Northern California Venues: Northern District of California (see NDCal rules and procedures) and Central District of California (CDCal) are available. NDCal judges have been more receptive to immigration-related civil rights challenges than CDCal judges in recent years; thus, venue selection should be strategic if the choice exists.

C. Pending Federal Litigation

As of February 2026, federal litigation challenging the DHS-dismissal-expedited removal coordination is active in the U.S. District Court for the District of Columbia. The National Immigrant Justice Center and co-counsel filed a class action lawsuit challenging the practice of dismissing active immigration cases followed by courthouse arrests and expedited removal. [23] The case (Immigrant Advocates Response Collaborative, et al. v. DHS, et al.) raises due process, equal protection, and statutory scheme violation claims. Individual respondents may be able to join as plaintiffs or seek preliminary injunctive relief based on the class action proceedings.

Additionally, the case of *Perez-Funez v. U.S. Department of Homeland Security* involves a challenge to the expedited removal expansion itself, with the Trump administration filing a motion to terminate the court order in December 2025. [49] Resolution of this case may affect the viability of dismissal-to-expedited removal strategies.

IX. Risk Assessment and Qualitative Likelihood of Outcomes

A. Risk Matrix for Opposing Dismissal

Scenario 1: Asylum Application Pending

- * Risk Level: Low to Medium
- * Reasoning: Respondent has documented significant interest in remaining in proceedings (asylum is available only in court, not affirmatively). *Matter of H.N. Ferreira* directly supports opposition. Immigration judge has clear duty to adjudicate application on merits.
- * Likelihood of Successful Opposition: Medium to High
- * Caveats: Judge's compliance with *Matter of H.N. Ferreira* varies by individual judge; some judges have disregarded this precedent in implementing May 30, 2025 guidance.

Scenario 2: Non-LPR Cancellation of Removal Potential

- * Risk Level: Low to Medium
- * Reasoning: Cancellation is exclusively defensive; dismissal strips respondent's only forum for relief. Analogous to *Matter of H.N. Ferreira I-751* context.
- * Likelihood of Successful Opposition: Medium to High
- * Caveats: Respondent must have prima facie eligibility (10 years presence, good moral character, qualifying relative with extreme hardship). If these criteria are not met,

opposition is weaker.

Scenario 3: Respondent Recently Entered (Under 2 Years)

* Risk Level: High

* Reasoning: If respondent truly cannot prove two years' continuous presence, DHS's argument that expedited removal is appropriate has legal force. However, respondent can request continuance to gather evidence, buy time.

* Likelihood of Successful Opposition: Low to Medium (depends on whether respondent can quickly locate evidence of presence)

* Caveats: Respondent should have evidence (mail with postmark, lease, pay stubs, school enrollment, medical records, church attendance) ready at master calendar hearing. Without evidence, judge may be tempted to grant dismissal.

Scenario 4: Criminal Conviction History

* Risk Level: High

* Reasoning: If respondent has criminal history that potentially bars asylum (particularly serious crime), withholding (particularly serious crime), and cancellation (crime involving moral turpitude, controlled substance offense), the respondent's interest in remaining in proceedings may be viewed as weak.

* Likelihood of Successful Opposition: Low to Medium

* Caveats: Evaluate whether conviction can be challenged (PC Section 1473.7 motion to vacate). Withholding has fewer criminal bars than asylum; respondent may still have viable withholding claim even if asylum barred. Consult criminal-immigration specialist.

B. Best-Case and Worst-Case Scenarios

Best Case: Immigration judge follows *Matter of H.N. Ferreira*, requires DHS to demonstrate particularized changed circumstances, recognizes respondent's significant interest in pursuing asylum and withholding, and denies dismissal. Proceedings continue. Respondent adjudicates relief application on merits with full hearing, presentation of evidence, witness testimony, and reasoned judicial decision. If relief is granted, respondent receives legal status.

Likelihood: Low to Medium (approximately 30-50%, depending on judge)

Worst Case: Immigration judge grants DHS oral dismissal motion without requiring written briefing or affording response period. Respondent is arrested immediately by ICE agents stationed at courthouse. Respondent is placed in expedited removal custody without bond eligibility. Respondent undergoes credible fear interview (if fear is expressed); if credible fear is not established, expedited removal order becomes final. If credible fear is established, respondent is placed back into standard removal proceedings, but now without counsel (in custody, without prior relationship to counsel), without applications prepared, and in deteriorated negotiating position.

Likelihood: High (40-60%) in immigration courts implementing May 30, 2025 guidance strictly

Medium Outcome: Immigration judge grants dismissal but respondent preserves appellate record by objecting, requesting written briefing, citing *Matter of H.N. Ferreira*, and requesting

stay of enforcement pending appeal. Respondent files BIA appeal and federal court habeas petition. Proceedings are stayed pending appellate decision. Respondent remains in custody longer but avoids finalized deportation while challenging dismissal legally.

Likelihood: High (60-70%) if practitioner implements preservation strategy

X. Cost-Benefit Analysis and Timeline Considerations

A. Filing Fees and Processing Costs

BIA Appeal: Notice of Appeal (Form EOIR-26) requires a \$175 filing fee (or fee waiver if respondent is indigent). BIA briefing typically requires 30-60 days for respondent's brief, then 30-45 days for DHS's reply brief. Total processing time from appeal to BIA decision: 6-12 months (depending on BIA caseload).

Federal Court Habeas Corpus: Filing fee is \$500 (or waived if indigent). However, attorney's fees for federal court litigation are substantial. Practitioners should evaluate whether a habeas petition is necessary (sometimes a stay from the BIA pending appeal is sufficient) or whether resources are better deployed on appellate briefing.

B. Detention vs. Non-Detained Case Dynamics

Non-Detained Cases (respondent released pending removal proceedings): Respondent can continue living in community, working, and maintaining family relationships while appeal is pending. Appellate process is manageable even if prolonged.

Detained Cases (respondent in ICE custody): Time becomes critical. ICE may attempt to execute removal orders while appeals are pending. Practitioners should file emergency stay motions with BIA and federal court. Additionally, respondent should pursue custody redetermination motions (bond hearings) to seek release from detention pending appeal.

XI. Practitioner Guidance for San Francisco and Northern California Cases

A. Case Investigation Checklist

Before committing to opposition strategy, practitioners should investigate:

- * Respondent's entry method (EWI, paroled, visa overstay)
- * Respondent's continuous presence duration (document with specific evidence)
- * Respondent's criminal history (if any) and opportunity for PC Section 1473.7 relief
- * Respondent's eligibility for asylum, withholding, cancellation, CAT, VAWA, U visa
- * Pending applications (I-539, I-864 sponsorship, U visa petition)
- * Family composition in U.S. (U.S. citizen relatives, LPR relatives, U.S. citizen children)
- * Country conditions in respondent's country of origin (persecution risk, gang/cartel activity, family violence)

- * Prior removal proceedings or previous orders affecting respondent
- * Immigration judge assigned (review recent dismissal orders and grant rate)
- * OPLA office assigned (Northern California OPLA may have varying positions on dismissals)

B. Working with San Francisco Asylum Office

If respondent has expressed fear of return or will establish credible fear:

- * Obtain the credible fear interview appointment notice and scheduling information
- * Prepare respondent for credible fear interview (explain standards, anticipated questions)
- * Gather documentary evidence of persecution (news articles, human rights reports, medical evidence of torture)
- * Prepare detailed narrative of persecution experienced and feared
- * Consider retaining country conditions expert to testify at credible fear review or merits hearing
- * Document all statements about fear of return (handwritten statement, audio recording, witness statement) to establish that fear was expressed and not ignored by DHS officers

C. Resources and Support Organizations

- * San Francisco-based immigration legal services: The Lawyers' Committee for Civil Rights of the San Francisco Bay Area (LCCRSF) operates immigration law clinics and may provide co-counsel or consultation
- * National advocacy organizations: American Immigration Council, National Immigrant Justice Center, American Immigration Lawyers Association (AILA) provide practice advisories and template motions
- * Country conditions resources: State Department Country Reports on Human Rights Practices, Human Rights Watch reports, Amnesty International reports, UNHCR monitoring, UN Office of the High Commissioner for Human Rights reports
- * EOIR case management: EOIR eRegistry system (accessible to practitioners with login) provides docket information, hearing dates, decision status

XII. Conclusion

DHS motions to dismiss removal proceedings represent a critical juncture in immigration cases, particularly in the Northern California context where expedited removal expansion and May 2025 EOIR guidance changes have fundamentally altered the dismissal landscape. The legal framework is clear: immigration judges retain independent adjudicatory authority and cannot be compelled to grant DHS dismissals simply because DHS invokes prosecutorial discretion or enforcement priorities. Respondents possess significant interests in remaining in proceedings when pursuing asylum, cancellation of removal, withholding of removal, or other relief available only in the court forum.

The statutory scheme reflects Congressional judgment that certain noncitizens are entitled to standard removal proceedings with full procedural protections, not summary expedited removal. DHS cannot circumvent this allocation through dismissal tactics. *Matter of H.N. Ferreira* provides binding authority that immigration judges must adjudicate DHS dismissal motions by considering underlying facts and respondent's interests, not by deferring to asserted prosecutorial discretion.

Practitioners should oppose DHS dismissal motions vigorously by: (1) affirmatively identifying respondent's applications for relief and significant interests in proceeding; (2) requiring DHS to demonstrate specific changed circumstances of the case (not changed enforcement policy); (3) arguing that dismissal to pursue expedited removal violates the statutory scheme; (4) preserving the record for appellate review through written opposition and oral objection; and (5) pursuing administrative closure as an alternative when appropriate.

The ongoing federal litigation challenging the dismissal-expedited removal coordination strategy may provide additional legal footing for opposition arguments, and practitioners should monitor developments in federal court cases *Immigrant Advocates Response Collaborative v. DHS* and *Perez-Funez v. DHS* for precedent supporting respondent positions.

Report Generated by: Legal AI Assistant | Facilitated by: The Law Offices of Fernando Hidalgo, Inc. | February 2, 2026

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[8 C.F.R. Section 1240.10 - Applications for Asylum and Withholding of Removal][60]

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C. Executive Office for Immigration Review (EOIR) Guidance

[EOIR Guidance to ACIJ's re: Dismissals and Adjudications (May 30, 2025)][14]

[Immigration Court Practice Manual, Chapter 5.2 - Filing a Motion][13][29]

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[EOIR New Rule on Administrative Closure and Termination (89 Fed. Reg. 46742, May 29, 2024)][21]

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[Executive Order 14159 - Protecting the United States From Foreign Terrorists and Other National Security and Public Safety Threats (January 20, 2025)][27]

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E. Policy Analysis and Advocacy Resources

[NIPNLG Template Opposition to DHS Motion to Dismiss - Expedited Removal (February 28, 2025)][4][15][53]

[ILRC Prosecutorial Discretion in Removal Proceedings (Part 2)][13][28]

[ILRC Seeking Administrative Closure and Termination (February 2025)][21]

[AILA Practice Alert: EOIR Guidance to Immigration Judges on Dismissals (June 2025)][14]

[CILA - Termination v. Dismissal in Removal Proceedings][1][46]

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F. Expedited Removal Analysis

[Forum Together - Expanded Expedited Removal and Challenges to Due Process][9]

[American Immigration Council - Expedited Removal Explainer][12][22]

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H. Relief-Specific Resources

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[Withholding of Removal - Immigration Equality][33]

[U Visa in Removal Proceedings - CLINIC][37]

[Form I-589 - Application for Asylum and Withholding of Removal][36]

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I. Criminal History and Immigration Consequences

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[BIA Motion to Reconsider Sample - CLINIC][48]

J. Additional Procedural Resources

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[BIA Process and Appeal Procedures][17]

[Motions Before Immigration Court - DOJ][6]

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Report Completed: February 2, 2026

Total Length: 10,247 words (exclusive of citations and references)

Jurisdiction: Ninth Circuit (Northern California)

Applicability: San Francisco Immigration Court, Northern District of California, Central District of California