

Foreword to the Twenty-Sixth Edition

Asylum Law Under Siege: How Recent Policy Shifts and BIA Decisions Have Eroded Protections

by Victoria Neilson

Introduction

“Asylum grant rates have collapsed Deportations and removal orders are surging.”¹ These twin goals of gutting asylum and accelerating deportations appeared on the White House’s website on April 9, 2026. The White House’s successful pursuit of these goals is reflected throughout changes in the substance and procedures governing asylum and related protections during the past year.

Asylum has been under concerted attack since the beginning of the second Trump Administration. In the spring of 2025, attorneys for the Department of Homeland Security (DHS) began to regularly move to dismiss asylum seekers’ immigration court proceedings while U.S. Immigration and Customs Enforcement (ICE) enforcement officers waited in the courtroom hallways to immediately arrest, detain, and often move them to detention facilities in distant states. In many of these cases, ICE issued expedited removal orders, forcing the asylum seeker to prove a credible fear of persecution in order to get back into removal proceedings before an immigration judge.² Later in the year, the Board of Immigration Appeals (BIA or Board) issued two precedential decisions, *Matter of Q. Li*³ and *Matter of Yajure Hurtado*⁴ which, taken together, adopted DHS’ vastly expanded view of mandatory detention to include virtually all noncitizens who entered the United States without being admitted on a visa. With this sweeping expansion of mandatory detention, DHS largely halted its placement of noncitizens into expedited removal, seemingly because the threat of prolonged detention achieved its goal of forcing many asylum seekers to give up on their claims.

For the first time, ICE also implemented large-scale third-country removals for individuals who had been granted withholding of removal or Convention against Torture (CAT) protection. As a result, noncitizens who have met a higher burden of proving likely persecu-

¹ White House, “Era of Amnesty Is Over: President Trump Restores Rule of Law to Immigration Courts” (Apr. 9, 2026), available at <https://www.whitehouse.gov/releases/2026/04/era-of-amnesty-is-over-president-trump-restores-rule-of-law-to-immigration-courts/>.

² National Immigration Project, “Practice Alert: Protecting Noncitizens from Expedited Removal and Immigration Court Arrests” at 1 (May 30, 2025), available at <https://nipnlg.org/sites/default/files/2025-05/alert-protecting-noncitizens-er.pdf>.

³ *Matter of Q. Li*, 29 I. & N. Dec. 66, 2025 WL 1442892 (B.I.A. 2025).

⁴ *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216, 2025 WL 2674169 (B.I.A. 2025).

tion or torture in their countries of citizenship are at risk of being removed to countries to which they have no connection, including countries with unstable government and documented human rights abuses.⁵

Over the course of this Administration, the entire Executive Office for Immigration Review (EOIR) has been politicized in unprecedented ways. The EOIR has fired immigration judges, seemingly based on their rulings in favor of noncitizens⁶ and appointed new judges often with no immigration experience, including military lawyers.⁷ The BIA has issued more than 150 precedential decisions with all but two being decided in DHS' favor. Among these decisions have been half a dozen precedents encouraging immigration judges to pretermite applications for asylum and related protection without ever allowing the asylum seeker to have an evidentiary hearing. At the same time, the EOIR has made procedural changes, shuffling dockets and increasing the likelihood of in absentia removal orders.

Taken together, the changes to asylum law and procedure have made it extremely difficult for asylum seekers to navigate the application system and win the protection, or even a fair hearing, that they believed the United States would offer them.

Prepermissions for Legally Insufficient Asylum Application Forms

One of the most damaging developments to asylum seekers over the past year has been the Administration's efforts to prevent them from getting a day in court at all. The first of a series of policies that encouraged immigration judges to pretermite asylum cases—deny and end the application without ever scheduling a hearing—was *Matter of C-A-R-R*.⁸ The decision had two primary holdings, one that is helpful to asylum seekers and another that has been weaponized against them.

Prior to *Matter of C-A-R-R*, some immigration judges would deny asylum claims if the judge had ordered the applicant to submit a declaration in support of the claim and the applicant failed to do so. In *Matter of C-A-R-R*, the BIA determined that a declaration is not a “constituent part” of the asylum application, so an immigration judge cannot deny a claim on failure to submit a declaration alone. The second holding has become more significant for asylum seekers—“A complete Form I-589 requires a specific substantive answer to every question on the form.” As a result of this decision, many immigration judges have combed through asylum applications to review the substantive answers and look for missing information. If any subpart of a substantive question is not answered, some judges will pretermite the asylum case, denying it without further consideration.⁹ The decision represents an extraordinary departure from prior asylum practice where it was common for asylum seekers to submit a skeletal asylum application to meet the one-year filing deadline and develop the claim fully as the interview or hearing date approached. Now practitioners must ensure that every question is answered in detail or risk having the application denied without a hearing.

⁵ American Immigration Council, “Third-Country Removals in United States Immigration Policy” (Dec. 2025), available at https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/12/Third-Country-Removals-Factsheet_1225.pdf.

⁶ Aleaziz et al., “Judges Fired After Blocking Deportations of Pro-Palestinian Students,” *The New York Times* (Apr. 11, 2026), available at <https://www.nytimes.com/2026/04/11/us/politics/immigration-judges-deportations-students.html>.

⁷ Castronuovo and Penn, “DOD Moves to Order Military Lawyers to Be Immigration Judges,” *Bloomberg Law* (June 29, 2026), available at <https://news.bloomberglaw.com/us-law-week/hegseth-moves-to-order-military-lawyers-to-be-immigration-judges>.

⁸ *Matter of C-A-R-R*, 29 I. & N. Dec. 13, 2025 WL 840536 (B.I.A. 2025).

⁹ Ironically, the actual application which the BIA found to be sufficient in *Matter of C-A-R-R* had minimal substantive answers to the past harm questions and would likely be found deficient by many judges under their reading of the *Matter of C-A-R-R* holding. See National Immigration Project, “Fighting for a Day in Court: Understanding and Responding to Prepermission of Asylum Applications” (July 21, 2026), available at <https://nipnlg.org/work/resources/fighting-day-court-understanding-and-responding-prepermission-asylum-applications>.

Pretermissions for Alleged Failure to State a Prima Facie Claim for Asylum

One month after *Matter of C-A-R-R-*, the Acting Director of EOIR, Sirce E. Owen, issued a policy memorandum titled “Pretermission of Legally Insufficient Applications for Asylum.”¹⁰ The memo concluded that “no existing regulation requires a hearing when there are no factual issues in dispute, including when the facts underlying the legal claim for asylum are undisputed, but the claim itself is legally deficient.” The memo therefore encouraged judges to pretermit asylum applications without a hearing, citing the immigration court backlog as justification. The EOIR memoranda under prior administrations generally focused on procedural issues in the court; the pretermission memo’s substantive directive to not hold hearings was a stark departure from the role that EOIR directors have played in the past.

In September 2025, the BIA issued a precedential decision, *Matter of H-A-A-V*,¹¹ which largely parroted the conclusions of the pretermission memo, holding 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 pretermit the applications without a full evidentiary hearing on the merits of the claim.”¹² In *Matter of H-A-A-V*, the asylum seeker was detained, and, at his second master calendar hearing, an attorney appearing for the first time on the case was not able to articulate a particular social group on his behalf. Rather than grant the attorney’s request to recall the case later during the same master calendar, the judge pretermitted the applicant’s protection claims and ordered him removed.

On appeal, the BIA compared the procedure in this case to a federal court motion to dismiss or motion for summary judgment and found no due process violation. However, in the *Matter of H-A-A-V* case itself, the judge pretermitted the claim before the asylum seeker had any opportunity to develop the record or oppose the oral motion in writing. *Matter of H-A-A-V* does include language that makes the decision sound more moderate than it is, saying, “We recognize that 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.”¹³ Despite this language, immigration judges have often relied on *Matter of H-A-A-V* to pretermit cases with little substantive analysis. Attorneys for DHS may make a written motion prior to a hearing date but often make an oral motion on the day of a master calendar hearing or even an individual hearing, stating that the asylum seeker’s application fails to state a claim.

As discussed below, with the dozens of BIA decisions narrowing protection claims, it is increasingly difficult to state a prima facie case for asylum. Further, with *Matter of C-A-R-R-* forcing asylum seekers to spell out the exact details of their claim at the earliest point in their proceedings, practitioners must commit to a specific theory of the asylum claim long before an immigration judge adjudicates it. As the BIA narrows the law, forcing practitioners to update the claim, DHS may then claim that the asylum seeker’s revised claim is a new asylum basis presented after the one year filing deadline.¹⁴

¹⁰ EOIR, Policy Memorandum 25-28, Pretermission of Legally Insufficient Applications for Asylum (Apr. 11, 2025), available at <https://www.justice.gov/eoir/media/1396411/dl?inline>.

¹¹ *Matter H-A-A-V*, 29 I. & N. Dec. 233, 2025 WL 2650230 (B.I.A. 2025).

¹² *H-A-A-V*, 29 I. & N. Dec. at 238.

¹³ *H-A-A-V*, 29 I. & N. Dec. at 238.

¹⁴ See National Immigration Project, “Practice Advisory: Distinguishing *Matter of M-A-F* in the Pretermission Context” (May 22, 2026), available at <https://ninpnl.org/work/resources/practice-advisory-distinguishing-matter-m-f-pretermission-context>.

Premissions Pursuant to So-Called Asylum Cooperative Agreement

Beginning in mid-2025, DHS began moving to premit asylum applications under so-called asylum cooperative agreements (ACAs). INA § 208(b)(1)(A) [8 U.S.C.A. § 1158(b)(1)(A)] includes a provision authorizing the Attorney General to remove asylum seekers to a “safe third country” to pursue asylum there provided that the country has an agreement with the United States, provided that the country offers “access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection,” and provided that the asylum seeker would not face persecution on account of a protected characteristic in that country. While the United States and Canada have had a detailed safe third-country agreement in place since 2002,¹⁵ this section of the INA had not been previously implemented with other countries.

In 2019, during the first Trump Administration, the Department of Justice issued regulations extending the scope of ACAs beyond Canada.¹⁶ The regulations have remained in place since then, but it was not until 2025 that the second Trump Administration aggressively began entering into ACAs with multiple countries and moving to premit asylum application on this basis. As a result, beginning in the summer of 2025, DHS often made one-sentence oral motions to premit to one or more of the countries with which the United States has entered into agreements.¹⁷

In October 2025, the BIA issued the first of four precedential decisions validating ACA premissions, *Matter of C-I-G-M- & L-V-S-G-*.¹⁸ In this case, Guatemalan asylum seekers sought protection in the United States, but DHS made a motion to premit for them to be removed to Honduras pursuant to an ACA with that country. The asylum seekers submitted evidence of generalized violence in Honduras, and the judge denied the premission motion. DHS filed an interlocutory appeal, which the BIA granted, finding that it was error for the judge to deny the motion to premit.

In *Matter of C-I-G-M-*, the BIA systematically negated potential defenses to ACA premissions. The Board decided that immigration judges have no authority to determine whether the asylum seeker will receive a full and fair hearing in the country of proposed removal nor can the judge decide whether it is in the public interest for the noncitizen to be subjected to the ACA. Instead, the judge is only able to determine whether any conditions at 8 C.F.R. § 1240.11(h)(2) apply, essentially limiting a judge’s review to whether the ACA applies in the case and whether the noncitizen can demonstrate that it is more likely than not that the noncitizen will suffer persecution or torture in the third country. While the BIA acknowledged that some cases may require an individualized hearing on persecution or torture in the third country, it also stated that, since the asylum seeker did not seek asylum from the third country, the judge’s “consideration is reasonably more minimalistic than the requisite procedures for deciding asylum and withholding of removal claims on the merits.”¹⁹ The BIA further held that ACAs are applicable to anyone who entered the United States after November 19, 2019—even if they entered the United States long before the U.S. entered into the specific ACA.

¹⁵ U.S. Customs and Border Protection, Safe Third Country Agreement with Canada Additional Protocol Guidance Memo (last modified Jan. 21, 2026), available at <https://www.cbp.gov/document/foia-record/safe-third-country-agreement-canada-additional-protocol-guidance-memo>.

¹⁶ 8 C.F.R. § 1208.11(h).

¹⁷ For a list of countries with ACAs and details of each agreement, see Third Country Deportation Watch, available at <https://www.thirdcountrydeportationwatch.org/>.

¹⁸ *Matter of C-I-G-M- & L-V-S-G-*, 29 I. & N. Dec. 291, 2025 WL 3068152 (B.I.A. 2025).

¹⁹ *C-I-G-M-*, 29 I. & N. Dec. at 296.

The BIA subsequently issued three additional precedential decisions, seemingly with the goal of reminding judges that, if DHS makes an ACA pretermission motion, they should generally grant the motion. In *Matter of A-C-M-*,²⁰ DHS moved to pretermit the case of a Cuban asylum seeker and remove her to Ecuador, a country to which she had never been. The immigration judge scheduled an individual hearing in March 2030 on her feared harm in Ecuador, and DHS filed an interlocutory appeal. The BIA found that it was error to schedule an individual hearing since there was no evidence of individualized harm in Ecuador and pretermitted.

In July 2026, the BIA published two more companion cases on ACAs, *Matter of E-A-R-M-*²¹ and *Matter of N-E-R-S-*.²² In both decisions, the BIA granted DHS' interlocutory appeals against pro se noncitizens. In *Matter of E-A-R-M-*, the immigration judge had issued an order to DHS requiring it to affirm whether it actually intended to remove the noncitizen to the third country (Ecuador), what the statutory basis for such a removal would be under INA § 241(b) [8 U.S.C.A. § 1231(b)], and whether Ecuador was actually willing to accept the respondent.²³ DHS did not respond to the order, so the judge denied the motion to pretermit. The BIA held that this denial was legal error and that the judge had no authority to require DHS to respond to these questions. Similarly, in *Matter of N-E-R-S-*, an immigration judge had required DHS to provide the "implementing 'instrument' showing the operating procedures for the ACA or the 'complete set of operative terms and criteria' to show that the respondents are subject to the terms of the agreement with Ecuador."²⁴ Again the Board found reversible error—the judge has no authority to order DHS to provide the implementing instrument; the judge can only determine whether the ACA applies and whether the asylum seeker would be persecuted or tortured in the country of feared removal.

In March 2026, DHS suddenly paused filing new ACA pretermission motions.²⁵ The pause was apparently effected through an email to DHS counsel to not pursue new ACA pretermissions in immigration court but also to continue to pursue pretermission in previously filed motions or appeals. Three out of four BIA precedents were issued after the pause in new filings, so it is not clear whether DHS will return to large scale ACA motions again. There is affirmative litigation pending, *U.T. v. Blanche*, which dates back to the efforts of the first Trump Administration to implement ACAs. That case is currently awaiting a decision on motions to amend the complaint and for class certification.²⁶

BIA Decisions Narrowing Protection

The BIA and Attorney General have issued over 150 precedential decisions since the second Trump Administration took office.²⁷ Among these decisions are a high percentage of cases which were originally unpublished but later designated as precedent by the Attorney General, decisions in which the noncitizen was unrepresented, and decisions in which DHS appealed after the noncitizen won before the immigration judge. The decisions serve the

²⁰ *Matter of A-C-M-*, 29 I. & N. Dec. 703, 2026 WL 1773743 (B.I.A. 2026).

²¹ *Matter of E-A-R-M-*, 29 I. & N. Dec. 746, 2026 WL 2002029 (B.I.A. 2026).

²² *Matter of N-E-R-S-*, 29 I. & N. Dec. 753, 2026 WL 2002026 (B.I.A. 2026).

²³ *E-A-R-M-*, 29 I. & N. Dec. at 747-48.

²⁴ *N-E-R-S-*, 29 I. & N. Dec. at 754-55.

²⁵ Shapiro, "U.S. Pauses Tactic to Deport Asylum-Seekers to 'Third Countries,'" *The Seattle Times* (Mar. 13, 2026), available at <https://www.seattletimes.com/seattle-news/u-s-pauses-tactic-to-deport-asylum-seekers-to-third-countries/>.

²⁶ Center for Gender and Refugee Studies, "*U.T. v. Blanche*," available at <https://cgrs.uclawsf.edu/en/our-work/litigation/ut-v-blanche>.

²⁷ EOIR, BIA Precedential Decisions, Vol. 29, <https://www.justice.gov/eoir/volume-29>.

purpose of both narrowing substantive grounds for winning relief and reminding immigration judges that, if they grant relief, they are likely to be overturned, possibly in a precedential decision, and likely monitored for potential firing.

While the BIA has always been a conservative appellate body, under this administration, it has clearly adopted the “mass deportation” agenda championed by the Administration. After firing several BIA judges and downsizing the BIA, it is now comprised of 15 judges, 13 of whom were appointed by President Trump.²⁸ In its published decisions issued between January 31, 2025, and February 13, 2026, the BIA or Attorney General ruled against the noncitizen in 98.7% of cases.²⁹ As one professor has put it, “No matter what an immigrant suffered, no matter what Congress intended, no matter what the hearing-level judge found: the answer is removal.”³⁰

The BIA has issued dozens of decisions which make asylum, withholding of removal, and CAT protection more difficult to win. These decisions affect virtually every element of asylum—political opinion, nexus, persecution, bars to protection—but the highest number of cases have come in the areas of particular social group and in CAT protection cases.

Particular Social Groups (PSGs)

Unsurprisingly, Attorney General Bondi reversed decisions issued by Attorney General Garland, thereby reinstating Attorney General precedents issued under the first Trump Administration which severely limited asylum. *Matter of S-S-F-M*,³¹ reinstated *Matter of A-B-I* and *Matter of A B-II*,³² decisions which created a much higher bar for prevailing on asylum cases with private actor harm, especially in the context of gender-based violence. Likewise, in *Matter of R-E-R-M- & J-D-R-M-*,³³ the Attorney General Reinstated *Matter of L-E-A- II*,³⁴ a decision that held that, in the “ordinary” case, a family PSG is not sufficiently socially distinct to constitute a cognizable particular social group.

The current BIA has gone much further in narrowing PSGs than any of the Attorney General decisions under the first Trump Administration. It has held that:

- “Salvadoran women” and “Salvadoran women viewed as property” are not sufficiently socially distinct and that, if Congress had wanted “women” to be a PSG, it would have included sex as a sixth protected characteristic³⁵
- “Married Mexican women who are unable to leave their relationship” is impermissibly circular and lacks particularity³⁶

²⁸ Bustillo and Mukherjee, “An Immigration Court Few Have Heard of Is Quietly Shaping Policy Behind the Scenes,” NPR (Mar. 20, 2026), available at <https://www.npr.org/2026/03/20/nx-s1-5707535/trump-immigration-detention-appeals-board-deportation>.

²⁹ National Immigration Project, “The BIA and AG’s Systemic Destruction of Noncitizens’ Rights in Removal Proceedings” (Feb. 19, 2026), available at <https://nippng.org/work/resources/bia-and-ags-systemic-destruction-noncitizens-rights-removal-proceedings>.

³⁰ Cade, Welcome to the Trump Administration’s Board of Immigration Appeals. The Immigrant Always Loses, 136 Yale L.J.F. 2 (forthcoming 2026).

³¹ *Matter of S-S-F-M-*, 29 I. & N. Dec. 207, 2025 WL 2744900 (U.S. Att’y Gen. 2025).

³² *Matter of A-B-*, 27 I. & N. Dec. 316, 2018 WL 3091048 (U.S. Att’y Gen. 2018) (*Matter of A-B- I*), and *Matter of A-B-*, 28 I. & N. Dec. 199, 2021 WL 146883 (U.S. Att’y Gen. 2021) (*Matter of A-B- II*).

³³ *Matter of R-E-R-M- & J-D-R-M-*, 29 I. & N. Dec. 201, 2025 WL 2744908 (B.I.A. 2025).

³⁴ *Matter of L-E-A-*, 27 I. & N. Dec. 581, 589, 2019 WL 3492202 (U.S. Att’y Gen. 2019) (*Matter of L-E-A- II*).

³⁵ *Matter of K-E-S-G-*, 29 I. & N. Dec. 145, 2025 WL 2048658 (B.I.A. 2025).

³⁶ *Matter of V-A-B-*, 29 I. & N. Dec. 621, 2026 WL 1284955 (B.I.A. 2026).

- “Brazilian children” and “abandoned Brazilian children” are not defined with sufficient particularity³⁷
- “Mexican men with Schizoaffective Disorder” is not defined with sufficient particularity³⁸
- “Perceived Salvadoran gang members” cannot be cognizable since “Salvadoran gang members” is not a cognizable PSG³⁹
- An unspecified “family-based particular social group” lacked social distinction because social distinction must be evaluated on a country-wide rather than a neighborhood-wide level⁴⁰

These decisions have doubled down on the first Trump Administration’s cases narrowing of cognizable PSGs. Together, they seek to eliminate the most common protection formulations for survivors of domestic violence. They also severely limit options for asylum seekers who face harm from gang members either because of their family ties or because of their own perceived gang membership. In particular, *Matter of S-E-M-Z*, while decided in the context of family-based asylum, could be read to require “social distinction” to be country-wide in all PSG cases, which would make it much more difficult for asylum seekers to articulate cognizable PSGs in many other contexts.⁴¹

Other Asylum Cases

In addition to PSG issues, the BIA has addressed many other elements of asylum and narrowed eligibility. The following holdings narrowing eligibility are just a few of dozens of published decisions with holdings that include:

- nexus can only be established to a “former police officer” PSG if the asylum seeker can demonstrate that the persecutor bears animus to *former* police officers as opposed to current police officers;⁴²
- nexus to family was not established based solely on multiple family members being killed;⁴³
- death threats were insufficient to establish past persecution where the asylum seeker could not specify who made the death threat;⁴⁴
- firm resettlement bar can apply even where the respondent did not receive an offer of permanent status in the third country;⁴⁵ and
- fleeing conscription in an internationally condemned war (the Russian invasion of Ukraine) does not meet a nexus to a protected characteristic.⁴⁶

The onslaught of published, anti-asylum cases sends clear messages to immigration judges—most asylum claims should not win, and the BIA is very willing to overturn asylum grants. With the BIA so weighted against asylum seekers, increasingly practitioners must view the federal courts of appeals as their ultimate audience in asylum cases.

³⁷ *Matter of A-G-O-F*, 29 I. & N. Dec. 772, 2026 WL 2098052 (B.I.A. 2026).

³⁸ *Matter of L-A-D*, 29 I. & N. Dec. 634, 2026 WL 1456658 (B.I.A. 2026).

³⁹ *Matter of L-A-L-T*, 29 I. & N. Dec. 269, 2025 WL 2754543 (B.I.A. 2025).

⁴⁰ *Matter of S-E-M-Z*, 29 I. & N. Dec. 680, 2026 WL 1649394 (B.I.A. 2026).

⁴¹ *Matter of S-E-M-Z*, 29 I. & N. Dec. 680, 2026 WL 1649394 (B.I.A. 2026).

⁴² *Matter of O-A-R-G*, 29 I. & N. Dec. 30, 2025 WL 1148028 (B.I.A. 2025).

⁴³ *Matter of C-I-R-H*, 29 I. & N. Dec. 114, 2025 WL 1806049 (B.I.A. 2025).

⁴⁴ *Matter of E-M-F-S*, 29 I. & N. Dec. 379, 2026 WL 84874 (B.I.A. 2026).

⁴⁵ *Matter of L-T-A*, 29 I. & N. Dec. 362, 2025 WL 3707855 (B.I.A. 2025).

⁴⁶ *Matter of R-A-N*, 29 I. & N. Dec. 739, 2026 WL 1971073 (B.I.A. 2026).

Convention Against Torture

Under the second Trump Administration, the BIA has also issued 19 precedential decisions finding against applicants for CAT protection. In particular, BIA decisions have made it more difficult to win CAT cases based on inhumane prison conditions and have also made the standard for consideration of expert testimony more difficult, affecting asylum adjudication as well as CAT claims.

Since January of 2025, the BIA issued numerous precedential decisions finding that inhumane prison conditions do not meet the legal standard for torture. In *Matter of A-A-R*,⁴⁷ even though the BIA upheld the judge's determination that the respondent would be arrested and sent to the infamous Centro de Confinamiento del Terrorismo (CECOT) prison in El Salvador, the BIA nonetheless held that it was error for the judge to have found that El Salvador intentionally inflicts torture on its prisoners there. While the Board recognized that the Salvadoran government had made statements claiming that gang members deserved the dangerous and unsanitary conditions in its prisons, the BIA nonetheless decided that those statements did not evince an intent to torture; rather, they were made for "political purposes and garner public support, as well as to deter individuals in the community from engaging in gang activity."⁴⁸ The standard of proof articulated in this decision makes it nearly impossible to demonstrate government intent to torture in prison cases given the evidence in this case of the Salvadoran government expressing its intent to allow (if not condone) dangerous prison conditions.

Another issue on which the BIA made it more difficult to prevail in CAT cases is the use of expert testimony. In *Matter of G-M-I*,⁴⁹ the BIA found that it was error for the immigration judge to give full credit to an expert witness' opinion where the expert relied largely on publicly available information about the treatment of individuals with drug convictions in China. The BIA faulted the expert for lacking "direct knowledge" of torture and death penalty cases for drug traffickers in China, seemingly creating an impossible standard where experts would need to put themselves in harm's way to witness human rights abuses or report on government statistics of human rights abuses that do not exist.⁵⁰

In *Matter of D-J-L*,⁵¹ the BIA found an expert's testimony unreliable for the opposite reason—because the expert was too close to the issues on which she was giving an opinion and was therefore biased. The BIA determined that the immigration judge had erred in giving full weight to the expert's testimony where she worked at a nonprofit in Haiti and had at one point advocated that no criminal deportees should be removed to Haiti. Finding that this past advocacy meant that she was unwilling to consider contrary evidence and that she therefore could not be a reliable witness, the BIA overturned the judge's reliance on her opinion.

As claims for asylum and related protection become more adversarial and more difficult to win, it is critical to include expert testimony, in addition to making a strong documentary evidence record, wherever possible. However, these decisions on expert witnesses open the door for immigration judges to give diminished weight to expert opinions.

⁴⁷ *Matter of A-A-R*, 29 I. & N. Dec. 38, 2025 WL 1206681 (B.I.A. 2025).

⁴⁸ *Matter of A-A-R*, 29 I. & N. Dec. at 43-44.

⁴⁹ *Matter of G-M-I*, 29 I. & N. Dec. 431, 2026 WL 328651 (B.I.A. 2026).

⁵⁰ *Matter of G-M-I*, 29 I. & N. Dec. at 433-34.

⁵¹ *Matter of D-J-L*, 29 I. & N. Dec. 485, 2026 WL 687226 (B.I.A. 2026).

Third-Country Removals Continue

Individuals who are ineligible for asylum because of certain bars or who fear torture rather than persecution connected to a protected characteristic may be eligible for less secure forms of protection, such as withholding of removal under INA § 241(b)(3) [8 U.S.C.A. § 1231(b)(3)], withholding of removal under the CAT, or deferral of removal under the CAT.⁵² These forms of protection are issued by an immigration judge concurrently with an order of removal; the noncitizen therefore is ordered removed, but the protection order prohibits removal to the specific country where they will face persecution or torture.

Under this Administration, DHS has aggressively sought to remove noncitizens with withholding or CAT protection to third countries. In almost all cases, the protected individual has no connection to the third country, and often the third country is in the midst of conflict or is otherwise dangerous.⁵³ Additionally, these third countries may return the noncitizen back to the country from which the United States has granted protection. As with the expansion of mandatory detention, it seems that the goal of removing noncitizens to dangerous countries is to coerce them into accepting removal to the country from which they won protection.

Procedural Hurdles in Asylum Cases

In addition to the substantive narrowing of asylum law, the Asylum Office and the EOIR have also erected procedural hurdles to having a fair hearing on their cases. Asylum offices have become increasingly uncommunicative with the immigration bar. Recently the asylum offices announced that they would no longer respond to emails, postal mail, or phone calls or accept walk-in inquiries,⁵⁴ rendering it virtually impossible to reschedule a case or make other inquiries or updates. At the same time, some asylum cases are being referred to immigration court without the Asylum Office ever scheduling an interview, seemingly based only on the fact that the asylum seeker is currently out of status. On July 28, 2026, U.S. Citizenship and Immigration Services issued an interim final rule allowing asylum offices to prepermit asylum applications without scheduling an interview and refer them directly to immigration court.⁵⁵

In immigration court, docketing practices have also become increasingly chaotic. It is common for cases that are scheduled for individual hearing months or years in the future to suddenly be set for an individual hearing within a matter of weeks. Often counsel receives no notice of the rescheduling unless counsel happens to check the online EOIR case portal. At the same time, as judges feel pressure to clear their dockets, asylum hearings which may have received three hours of court time in the past are frequently being scheduled for a mere hour before the judge, forcing asylum seekers to hurry through their cases while giving little grace for failure to corroborate claims when there is no time to do so. In *Matter of J-H-M-H*,⁵⁶ the BIA found no error in the immigration judge refusing to accept a stipulation between DHS and the asylum seeker that she should be granted relief or even that she had met her burden of proof. In *Matter of A-M-Z-F*,⁵⁷ the BIA found that the judge had not violated the asylum seeker's right to due process by preventing counsel from making a closing argument in the case.

⁵² 8 C.F.R. §§ 1208.16 to 1208.18.

⁵³ See Third Country Deportation Watch, <https://www.thirdcountrydeportationwatch.org/>, for a list of countries to which the United States has removed noncitizens with withholding or CAT protection.

⁵⁴ See New York Asylum Office (last updated Apr. 20, 2026), <https://www.uscis.gov/about-us/asy/NY/New%20York>.

⁵⁵ 91 Fed. Reg. 47101 (July 28, 2026).

⁵⁶ *Matter of J-H-M-H*, 29 I. & N. Dec. 278, 2025 WL 2860656 (B.I.A. 2025).

⁵⁷ *Matter of A-M-Z-F*, 29 I. & N. Dec. 551, 2026 WL 1022397 (B.I.A. 2026).

Federal Court Review

As the BIA has become a willing participant in the Administration's goal of carrying out mass deportations, it will become more important for counsel to pursue petitions for review (PFRs) to seek fair adjudication of the issues raised in asylum and protection cases. INA § 242(b)(9) [8 U.S.C.A. § 1252(b)(9)] channels all questions of law and fact arising from removal proceedings into individual petitions for review of the agency's action before the federal courts of appeals. As a result, the Administration is largely shielded from affirmative litigation to challenge changes to removal defense procedures, and noncitizens' PFRs have become even more important to address the ongoing erosion of rights in removal proceedings.

Practitioners should be aware of a recent Supreme Court decision, *Urias-Orellana v. Bondi*,⁵⁸ which affects the standard of review that federal courts of appeals will employ in asylum PFRs. The issue in the *Urias-Orellana* was whether the federal court should review the BIA's determination that an asylum seeker was not persecuted under the deferential substantial evidence standard or whether the federal court should only review the agency's fact-finding under substantial evidence and then apply its own de novo review in applying the law to the facts. In a 9–0 decision, the Court ruled that the substantial evidence standard is correct. Although this case only addressed the legal standard issue in the context of defining “persecution,” federal courts may read the decision more broadly to require the application of the substantial evidence standard to mixed questions of facts and law in asylum cases. Given the poor-quality, results-driven decisions of the BIA over the past 18 months, the timing of *Urias-Orellana* could not be worse.

Conclusion

There is no question that undermining the right to seek asylum has been a central component of the second Trump Administration's mass deportation campaign. The Administration has used every lever of immigration authority—BIA decisions curbing asylum eligibility, immigration judge and asylum office pretermission denying asylum seekers the ability to present their claims, and ICE detentions to force asylum seekers to give up their claims, to name just a few. At the same time, the federal government has cut funding to immigration legal services providers⁵⁹ and threatened to eliminate the Department of Justice accreditation program⁶⁰ at a moment when noncitizens' chances of winning their cases without representation is becoming vanishingly slim.

In these very dark times for asylum seekers, the work of immigration practitioners to fight for their clients' rights has never been more critical. Difficult as it is to fight so hard for clients who should win protection and likely will not, asylum practitioners should take some comfort in being on the right side of history. As Justice Sonia Sotomayor recently wrote in a strongly worded dissent condemning the Supreme Court's majority opinion allowing the United States to deny asylum seekers entry into the United States through metering at the border, “Congress passed the Refugee Act in 1980 because it did not want this country to repeat the mistakes of its past. Yet if the refugees on the M. S. St. Louis were to walk up to a port of entry on our southern border today, the majority's interpretation would allow immigration officers to refuse even to consider their asylum applications by physically blocking

⁵⁸ *Urias-Orellana v. Bondi*, 607 U.S. 537, 146 S. Ct. 845, 224 L. Ed. 2d 346 (2026).

⁵⁹ Villarreal, “Thousands of Immigrant Children Risk Losing Lawyers After Trump Aid Cuts,” *The Guardian* (July 22, 2026), available at <https://www.theguardian.com/us-news/2026/jul/22/immigrant-children-trump-cuts>.

⁶⁰ Vera Institute, *Advocates for Due Process Alarmed by Reported Gutting of Immigration Legal Assistance Program* (Mar. 24, 2026), available at <https://www.vera.org/newsroom/advocates-for-due-process-alarmed-by-reported-gutting-of-immigration-legal-assistance-program>.

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them from stepping foot onto U. S. soil.”⁶¹ The U.S. government is working to close the door on asylum seekers in so many ways; as their counsel, we are all fighting to keep that door open.

⁶¹ *Mullin v. Al Otro Lado*, 146 S. Ct. 2079, 2118 (2026).