SAMPLE Notice of Appeal of a Motion to Pretermit. Prepared by NIJC in December 2025.

***Practitioners should undertake their own research and should update citations and country conditions and specifically tailor their response to each client's individual case.

Addendum to Form EOIR-26, *Notice of Appeal from a Decision of an Immigration Judge*
LASTNAME, Firstname
A# XXX-XXX-XXX

Respondent respectfully requests a three-member panel review of this appeal under 8 C.F.R. § 1003.1(e)(6) because of "[t]he need to review a decision by an Immigration Judge... that is not in conformity with the law or with applicable precedents..." Here, as argued below, the Immigration Judge (IJ) made the following errors:

1. The IJ legally erred in denying Respondent's emergency motion to continue without applying the good cause standard. 8 C.F.R. § 1003.29. Due process requires that an applicant receive a full and fair hearing which provides a meaningful opportunity to be heard. *See Zadvydas v. Davis*, 533 U.S. 678, 679 (2001). Respondents in immigration proceedings have the statutory right to be represented by counsel of their choice at no expense to the Government. *See* INA §§ 240(b)(4)(A), 292. Where this right has not been waived, an IJ must provide a reasonable opportunity for the respondent to speak with counsel before proceeding. *Matter of C-B-,* 25 I. & N. Dec. 888, 891 (BIA 2012). Here, Respondent explained in his emergency motion, filed on December 11, 2025, that all of his legal calls for hearing preparation had been canceled due to a medical quarantine at North Lake Correctional Facility, leaving him unable to communicate with counsel from December 4, 2025 through the day before his merits hearing on December 17, 2025. As a result, Respondent could not adequately prepare for his merits hearing or for a hearing regarding his fear of removal to Honduras. The IJ's denial of the continuance deprived Respondent of a full and fair opportunity to be heard as a result of not being able to consult with counsel and meaningfully prepare for his hearing. The Board should reverse the IJ's decision that pretermitted Respondent's proceedings and remand the matter so that he may present his claims with the proper preparation and assistance of counsel.

2. The IJ legally erred in granting the Department of Homeland Security's ("DHS") untimely motion to pretermit proceedings under the Asylum Cooperative Agreement ("ACA") with Honduras. Non-jurisdictional, claim-processing rules must be raised in a timely manner, and failure to do so results in forfeiture. *See Pierre-Paul v. Barr*, 930 F.3d 684, 693 (5th Cir. 2019). This Court has similarly recognized that procedural challenges not raised in a timely manner may be waived. *See Matter of Nchifor,* 28 I&N Dec. 585,

589 (BIA 2022) (holding that raising an objection for the first time in a motion to reopen was forfeited because the respondent "waited too long to raise this issue"). *See also Matter of Fernandes,* 28 I&N Dec. 605, 610-611 (BIA 2022) (holding that an objection is timely and not forfeited if raised prior to closing of pleadings). Likewise, under the Federal Rules of Civil Procedure, certain procedural defenses must be raised at the first opportunity or they are waived. *See* Fed. R. Civ. P. 12(b).

DHS waited over four months after the ACA with Honduras was entered into on July 8, 2025, to file its motion to pretermit on November 18, 2025. Respondent has been in removal proceedings for more than 3 years, since May 6, 2022, yet DHS made no mention of its intent to file for pretermission until after Respondent's Form I-589 had been filed, pleadings were completed, and Respondent's individual hearing had already been scheduled. By allowing DHS's late-filed motion to pretermit, without applying the forfeiture and waiver principle, the IJ committed legal error.

3. The IJ legally erred by violating Respondent's due process rights through the retroactive application of the Honduras ACA. Nothing in the text of INA § 208(a)(2)(A) expressly authorizes the retroactive application of an ACA, triggering the presumption against retroactivity. Denial of relief and removal to an ACA country would impose new legal consequences that did not exist before the ACA's enactment, thereby upsetting the notions of fair notice, reasonable reliance, and settled expectations. *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). Although the IJ was bound by *Matter of C-I-G-M- & L-V-S-G-,* which permitted retroactive application of an ACA, that conclusion is wrongly decided and warrants reconsideration. 29 I&N Dec. 291, 298 (BIA 2025).

   Respondent has been part of a pending asylum application as a derivative since May 3, 2024. During this time, Respondent continuously pursued his legal rights in the United States, settling here, working, and paying rent in reasonable reliance on the availability of asylum protection. Respondent has a viable asylum claim, and the retroactive application of the ACA erroneously upset his settled expectations, resulting in reversible legal error.

4. The IJ legally erred by denying counsel's request to allow the Respondent to testify regarding his fear of persecution and torture in Honduras and related anti-narcotrafficking political opinion. The IJ's omission of Respondent's testimony amounts to both a statutory and a constitutional due process violation.

   A respondent in removal proceedings is entitled to due process of law, including a reasonable opportunity to examine the evidence against them, to present evidence on

their own behalf, and to cross-examine government witnesses. INA § 240(b)(4)(B); *see Matter of R-C-R-*, 28 I. & N. Dec. 74, 77 (BIA 2020). This due process guarantee is satisfied only by a "full and fair hearing" which includes a "reasonable opportunity to present evidence." *Id.*; *see Kowalczyk v. I.N.S.*, 245 F.3d 1143, 1147 (10th Cir. 2001) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.") (*citing Mathews v. Eldridge*, 96 S. Ct. 893 (1976)).

Here, the IJ refused to hear the Respondent's testimony, which would have allowed Respondent's burden of proof to be satisfied with a credible showing that he would be persecuted or tortured in Honduras due to the same anti-narcotrafficking political opinion that led to him being shot and receiving multiple death threats in Colombia. By refusing to allow for any means of this testimony entering the record, the IJ unlawfully deprived Respondent of his statutory right to present evidence on his own behalf regarding why he should not be removed to Honduras based on the ACA, which DHS submitted untimely into evidence.

Moreover, the Fifth Amendment requires that respondent's "be allowed an opportunity to rebut officially noticed facts, particularly when, as in this case, those facts are crucial to—indeed dispositive of—the outcome of the administrative proceeding" *see Kaczmarczyk v. I.N.S.*, 933 F.2d 588, 596 (7th Cir. 1991). Here, the IJ's refusal to permit Respondent to present dispositive testimony about his fear-based claim on account of his political opinion, likely affected the outcome, violated his constitutional rights, and therefore constitutes legal error.

5. The IJ legally erred by asserting that he lacked authority to determine, under INA § 208(a)(2)(A), whether the applicant would have access to a full and fair procedure in the third country. The IJ relied on *Matter of C-I-G-M- & L-V-S-G* for the proposition that IJs lack authority to make the substantive safe third country determinations required by the statute and that their role is instead limited to applying the regulatory framework set forth in 8 C.F.R. § 1240.11(h). However, nothing in the text of INA § 208(a)(2)(A) supports an interpretation that vests exclusive authority in the Secretary of Homeland Security or her delegates to determine whether an applicant would have access to a full and fair asylum procedure in a third country. Because INA § 208(a)(2)(A) requires satisfaction of individualized statutory conditions, *Matter of C-I-G-M- & L-V-S-G-* incorrectly relies on a regulatory interpretation that exceeds the statute's grant of authority and is therefore ultra vires. By refusing to adjudicate whether Respondent would have a full and fair procedure in Honduras, the IJ failed to apply INA § 208(a)(2)(A) and committed reversible legal error.

6. The IJ made both factual and legal errors in finding that Honduras is a safe third country in which the Respondent would have access to a full and fair procedure. Under INA §

208(a)(2)(A), a country may only be considered a safe third country if the applicant would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection. Here, DHS filed a motion to pretermit pursuant to an ACA with Honduras dated July 8, 2025. But the parties agreed that, at the time of Respondent's hearing, the quota for that ACA with Honduras had been met, and therefore, the IJ erred by refusing to consider whether the record evidence established that Respondent could not be returned to Honduras under the ACA. In a written decision, the IJ stated that "Honduras has generally committed to consider the protection requests of any third-country national who arrives at a U.S. port of entry (POE) or crosses the border between POEs," citing the July 8, 2025, ACA. Because Honduras is no longer accepting applicants under the ACA dated July 8, 2025, the Respondent cannot access a full and fair procedure as required under INA § 208(a)(2)(A). The Board should reverse the IJ's factual determination that Honduras has generally committed to protect those who arrive per the ACA dated July 8, 2025. Additionally, the Board should reverse the IJ's finding that Honduras is a safe third country for Respondent, thereby triggering the asylum exception.

7. The IJ legally erred in finding that the Respondent's life would not be threatened in Honduras and in designating Honduras as a safe third country. INA § 208(a)(2)(A) requires that the applicant's "life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion." In his written decision, the IJ stated that the Respondent's fear of persecution in Honduras is speculative and that there was a "lack of substantial connection between the Respondent and Honduras." These conclusory statements do not provide cogent reasoning required of an IJ. The IJ failed to assess the Respondent's anti-narcotrafficking political opinion in Colombia, which forms the foundation of his individualized fear-based claim in Honduras. The Board should reverse the IJ's decision and remand to allow continuation of Respondent's application for asylum in Colombia. Alternatively, it should remand the matter for the IJ to consider Respondent's anti-narcotrafficking political opinion in Colombia and whether it would cause Respondent's life or freedom to be threatened in Honduras.

8. The IJ erred by ignoring substantial country condition evidence establishing that Honduras is an unsafe country. Immigration Judge's decision "shall also contain a discussion of the evidence pertinent to any application made by the respondent [for asylum or withholding of deportation] and the reasons for granting or denying the request." *See* 8 C.F.R. § 242.18(a); s*ee also Matter of S M J*, 21 I&N Dec. 722 (BIA 1997).

   The Respondent submitted over 500 pages of country conditions evidence demonstrating that Honduras is not a safe country. Yet the IJ's written decision failed to analyze this evidence, instead making only a general reference to the "evidence Respondent offered, including country condition articles and the most recent 2024 Department of State Human Rights Report for Honduras." The decision does not address that last year the Department of State reported that Honduras has "epidemic levels of gang violence, rape and sexual violence, and other violence against women and lesbian, gay, bisexual,

transgender, queer, or intersex ('LGBTQI+') people; serious restrictions on freedom of expression; ineffective policing and entrenched corruption; and state violence including torture and extrajudicial killings." *See Exhibits Supporting Respondent's Response in Opposition to the Department's Motion to Pretermit,* Ex. JJ, filed November 24, 2025. The report also noted that as of last year, Honduras has only "a nascent system to provide legal protection to refugees" and that migrants and "asylum seekers with pending cases were vulnerable to abuse and sexual exploitation by criminal organizations." *Id.* In addition, the IJ neglected to mention that the State Department's 2025 Trafficking in Persons Report for Honduras states that migrants are targeted by human traffickers present in the country, reflecting Honduras' broader failure to shield asylum applicants from persecution or torture. *Id.* at Ex. AA2.

The IJ's finding that the Respondent's life or freedom would not be threatened on account of his anti-narcotrafficking political opinion without discussion of dispositive evidence, and therefore applying the Safe Third Country exception, constitutes both a factual and legal error.

9. The IJ erred by failing to require DHS to specify and file the purported new controlling ACA agreement that allegedly increased the quota of ACAs Honduras had agreed to accept. Evidence that is not presented or made part of the record cannot form the basis of an IJ's decision. *See Banks v. Gonzales*, 453 F.3d 449, 454 (7th Cir. 2006) (holding that ALJ's findings must be based on the evidentiary record and they "cannot play doctor but must have evidence")

   Here, DHS conceded that the 240-slot quota previously agreed with Honduras had been satisfied. DHS then asserted, without further explanation that a new ACA agreement with Honduras had been executed permitting additional individuals to be sent there. However, no documentation of this alleged agreement was filed either before or during the hearing, despite Respondent's counsel requesting further information. DHS did not indicate the date that the alleged controlling ACA agreement was signed nor the new quota under this agreement. It was error for the IJ to allow and rely on these unsupported assertions without requiring DHS to submit evidence.

   Moreover, the IJ's willingness to accept unsupported assertions by DHS and late filings, while also denying Respondent an opportunity to provide testimony against DHS's claim was legal error in violation of Respondent's constitutional and statutory rights, directly leading to his order of removal to Honduras.

   While DHS did not submit a new written motion or frame this argument as a separate motion, to the extent that it constitutes a separate motion, the IJ further erred by considering it without provide Respondent sufficient notice of DHS's claims or any opportunity to respond. DHS also forfeited its right to present this new "motion" orally,

at the hearing, for the same reasons its initial motion was untimely and raised forfeited arguments.

10. Independently of pretermitting the Respondent's asylum proceedings for Colombia, the IJ erred by not allowing the continuation of the Respondent's withholding of removal and protection under the Convention Against Torture (CAT) claims for Colombia. The IJ erroneously relied on ultra vires regulatory language to conclude that pretermission also precluded these forms of relief. *See* 8 C.F.R. § 1240.11(h)(4). INA § 208(a)(2)(A) solely relates to a respondent's eligibility to apply for asylum in the United States and it does not reference nor does it have anything to do with withholding of removal. There is no statutory language in INA § 208(a)(2)(A) or in any other authority that gives DHS the unilateral right, through a federal regulation, to eliminate Respondents' statutory right to apply for withholding of removal under INA § 241(b)(3). This constitutes legal error on the part of the IJ.

11. The IJ erred by not allowing the Respondent additional time to file a Form I-589 after expressing that he fears he will be persecuted or tortured in Honduras. When a respondent expresses a fear of persecution, the IJ has a duty to inform them of their eligibility to apply for asylum and withholding of removal. *See* INA §§ 208(a)(1), 208(d)(5); 8 C.F.R. § 208.3(b); *see also Matter of C-B-,* 25 I&N Dec. 888 (BIA 2012) ("the regulations require the Immigration Judge to advise the respondent of the right to apply for asylum or withholding of removal (including protection under the Convention Against Torture) and make the appropriate application forms available"). The IJ's failure to advise the Respondent, who expressed a fear of persecution in Honduras, and denied him the opportunity to file a Form I-589 for Honduras, constitutes a legal error.

Respondent reserves the right to amend and supplement his arguments as well as raise any additional errors discovered upon receipt of a written transcript of the record of proceedings.