U.S. Department of Homeland Security
Washington, DC 20229

U.S. Customs and Border
Protection

DIS-3 OT:RR:RDL:FAPL
H225675 AML

Via Electronic Mail

April 8, 2014

Ms. Caryn Lederer, Esquire
Hughes Socol Piers Resnick & Dym, Ltd.
70 West Madison Street
Suite 4000
Chicago, IL 60602

Ms. Melissa Crow, Director
Legal Action Center
American Immigration Council
1331 G Street, NW, Suite 200
Washington, DC 20005-3141

RE: AIC v. CBP; Case number 1:12-CV-00932-EGS

Dear Ms. Lederer and Ms. Crow:

This is in further response to your FOIA request, appeal and the above-referenced litigation. As you are aware, five documents remain at issue, and the disputes concern the application of Exemption (b)(7)(E) of the FOIA as the basis for the redactions in the five records (You have indicated that you are not contesting the redactions made under Exemptions (b)(6) and (b)(7)(C)).

Certain information that is contained in the responsive records is exempt from disclosure pursuant to Exemption (b)(7)(E) of the FOIA (5 U.S.C. § 552 (b)(7)(E)) and was therefore redacted from the records disclosed. The information has been withheld pursuant to Exemption (b)(7)(E), which protects from disclosure information compiled for law enforcement purposes, "if such disclosure could reasonably be expected to risk circumvention of the law[.]"

> Exemption 7(E) protects from disclosure law enforcement records "to the extent that the production of such . . . information . . . would disclose

techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). Such records are properly withheld under Exemption 7(E) where disclosure reasonably could lead to circumvention of laws or regulations. See, *e.g.*, *Morley v. CIA*, 453 F. Supp. 2d 137, 157 (D.D.C. 2006), *rev'd on other grounds*, 508 F.3d 1108, 378 U.S. App. D.C. 411 (D.C. Cir. 2007). "Because the Exemption grants categorical protection to these materials, it requires no demonstration of harm or balancing of interests." *Keys v. United States Dep't of Homeland Security*, 510 F. Supp. 2d 121, 129 (D.D.C. 2007) (citation and quotation marks omitted). *Jewett v. United States Dep't of State*, 2013 U.S. Dist. LEXIS 19887, 25-27 (D.D.C. Feb. 14, 2013).

Disclosure of the information in this matter would reveal law enforcement procedures, techniques and considerations used in the apprehension and discretionary processing of aliens illegally entering the United States between ports of entry and would enable potential violators to design strategies to circumvent the border security enforcement procedures developed by CBP.

In this case, the risk of circumvention is readily apparent. The enforcement and consequence documents partially disclosed provide details, discuss priorities and strategies in relation to CBP's law enforcement obligations. Release of this information would reveal CBP's border enforcement priorities, collected intelligence and strategies. Knowledge of this information "in the wrong hands" would increase the risk of circumvention of laws and regulations, compromise the risk assessment systems, facilitate improper access to sensitive investigatory and other law enforcement records, impede the effectiveness of law enforcement strategies and activities, endanger agency investigatory practices and techniques, and either hamper or defeat CBP's effective prosecution of violators of the customs and immigration laws.

The fact that this matter is already in litigation notwithstanding, we are required by law to advise you that, in the event that you are dissatisfied with the disposition of your appeal, you may obtain judicial review of this decision pursuant to the provisions of 5 U.S.C. §552(a)(4)(B) in the United States District Court in the District in which you reside, in the District where the agency records are situated, or in the United States District Court for the District of Columbia.

Sincerely,

Shari Suzuki by DBL

Shari Suzuki, Chief
FOIA Appeals, Policy and Litigation Branch

AIC v. DHS, et al.
Civil Action No. 1:12-cv-932
CBP's further response to AIC's Disputed Redactions 4-4-14

AIC Disputed Redactions Number from AIC March 6 email	CBP production Number and date produced	Description of Document(s) and Author(s); AIC's bases for dispute with case citations omitted	FOIA Exemption(s) Cited	Explanation for Redaction(s) under Exemption Cited
1	Production 1 - 8/10/12	Procedures for Granting of Voluntary Departure and Issuance of Form I-862, Notice to Appear (9/11/97). Please note this is an INS document that was superseded with the creation of DHS in 2003. AIC: Document No. 1 – The remaining redaction on page one of the document "describ[ing] the considerations and procedures for CBP personnel when responding to a request for certain evidence made to a Service Center," as we previously stated, does not appear to have a nexus to CBP's law enforcement duties. As we set forth in detail in our March 6 email, CBP has not provided an adequate basis for withholding this information.	(b)(7)(E)	**CBP has reconsidered the remaining redaction in this document and now releases the document in full.**

AIC Disputed Redactions Number from AIC March 6 email	CBP production Number and date produced	Description of Document(s) and Author(s); AIC's bases for dispute with case citations omitted	FOIA Exemption(s) Cited	Explanation for Redaction(s) under Exemption Cited
2	Production 2 – 9/7/12	CBP, The Exercise of Discretionary Authority (9/3/08) AIC: Document No. 2 – - Paragraph 7.6.12 Footnote – The sentence with CBP's explanation of why Footnote 1 to this paragraph remains redacted is incomplete. - Paragraphs 8.2.6.9, 8.3.3, and 8.3.4 – CBP has stated the redacted language describes "required considerations" the agency employs in granting parole for minor violations, and similar considerations for deferred inspection. As discussed in our March 6 email, this type of information—standards that affect the application of law—is not covered by FOIA exemption (b)(7)(E).	(b)(7)(E)	The information withheld under Exemption (b)(7)(E) would reveal temporal limitations to and specific law enforcement considerations related to the exercise of discretion which are not generally known to the public. Release of this information would be harmful because if it were known the information could be used to exploit the temporal limitations or to avoid or otherwise circumvent the exceptions and situation-specific considerations set forth in the document. **CBP reconsidered this redaction of paragraph 7.6.12 and has attached a copy of the document with the information, including the footnote, disclosed.** **CBP reconsidered this redaction of paragraph 8.2.6.9 and has attached a copy of the document with additional information disclosed.** The remaining language redacted from paragraph 8.2.6.9 concerns possible parole for minor violations. This information, in describing the required considerations, reflects the law enforcement strategies and priorities of the agency. **CBP reconsidered this redaction of paragraph 8.3.3 and has attached a copy of the document with the information disclosed in full.** **CBP reconsidered this redaction of paragraph 8.3.4 and has**

				attached a copy of the document with additional information disclosed. The information redacted from paragraph 8.3.4 concerns permissibility of deferred inspection for lawful permanent residents. This information, in describing the required considerations, reflects the law enforcement strategies and priorities of the agency. The information withheld describes law enforcement considerations and techniques not generally known to the public including deliberations and analysis used in deciding how to respond to different types of inquiries. The information is law enforcement related – it relates directly to CBP's border enforcement responsibilities, including investigatory techniques and requirements for potential prosecution for violations of the customs and immigration laws. Release of this information would be harmful because if it were known the information could be used to evade, avoid or otherwise circumvent the border enforcement and immigration laws.
3	Production 5 - 1/11/13	Voluntary Departure (undated) AIC: Document No. 3 – CBP stated that it reconsidered the redaction in paragraph (e) on page 4 and provided a copy of the document with the information disclosed, but part of paragraph (e) remains redacted without explanation.	(b)(7)(E)	**CBP reconsidered the redaction in paragraph (e) on page 4 and has attached a copy of the document with the information disclosed in full.**
4	Production 8 - 4/19/13	Lesson 3: Removal/ Deportabilities: Day 24, Instructor Guide (Nov. 2012) AIC: Document No. 4 – CBP stated	(b)(7)(E)	The language redacted from paragraph VI sets forth the considerations and procedures to be followed that are related to the framework of deciding whether to use expedited return. **CBP reconsidered this redaction and has attached a copy of the**

		that it reconsidered the redaction in paragraph VI and provided a copy of the document with the information disclosed, but part of paragraph VI remains redacted without explanation.		**document with additional information disclosed.** The information withheld describes law enforcement considerations and techniques not generally known to the public including deliberations and analysis used in deciding how to respond to different types of inquiries. The information is law enforcement related – it relates directly to CBP's border enforcement responsibilities, including investigatory techniques and requirements for potential prosecution for violations of the customs and immigration laws. Release of this information would be harmful because if it were known the information could be used to evade, avoid or otherwise circumvent the border enforcement and immigration procedures and laws.
7	Production 8 - 4/19/13	e3 Processing: Day 5, Instructor Guide (May 2010) (pages 1-5-21 through 1-5-24, section relating to William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008) AIC: Document No. 7 – We respectfully disagree that *ACLU v. U.S. Dep't of Homeland Sec.*, 738 F.Supp.2d (D.D.C. 2010) is controlling here or provides CBP with adequate justification to withhold Document 7. As we detailed in our March 6 email, Exemption (b)(7)(E) only permits withholding when production would disclose guidelines, techniques, or	(b)(7)(E)	The language redacted in the remainder of the record under Exemption (b)(7)(E) describes criteria and procedures related to the detention of juveniles to ensure that they are not detained with human smugglers, which, if known generally, would be used to circumvent CBP attempts to separate human smugglers from their victims. The policy was created in furtherance of CBP's obligations under the anti-human trafficking statute and was created for the law enforcement purpose of protecting immigrant children and enforcing immigration and border security laws. Release of this information would be harmful because if it were known the information could be used to avoid the protections established for unaccompanied minors or could be used to falsely invoke the protections established by the statute. This information, in describing the required considerations, reflects the law enforcement strategies and priorities of the agency.

		procedures "for law enforcement investigations or prosecutions," 5 U.S.C. § 552(b)(7)(E) (emphasis added), not other, related internal agency policies, even those addressing security issues... Here, much of the material withheld by CBP appears to relate to the administrative processing of unaccompanied children (UAC) in the agency's custody, not investigations or prosecutions: - The redacted information in section 5(b)(ii) and (iii) on page 1-5-22 appears to relate to criteria that CBP uses to determine whether a UAC is capable of making an independent decision to withdraw an application for admission to the United States. - The redacted information in section 7(c) on page 1-5-23 appears to relate to criteria that CBP uses to determine whether to transfer a UAC to ORR. - The redacted information in sections 6(a) and (b) on pages 1-5-22 and 1-5-23 appears to concern processing of UACs subject to the		The information withheld describes law enforcement considerations and techniques not generally known to the public including deliberations and analysis used in deciding how to respond to different types of inquiries. The information is law enforcement related – it relates directly to CBP's border enforcement responsibilities, including investigatory techniques and requirements for potential prosecution for violations of the customs and immigration laws. Release of this information would be harmful because if it were known the information could be used to avoid or otherwise circumvent the border enforcement strategies, tactics and immigration laws.

		Visa Waiver Program. We believe that some or all of this information may be included in another document (copy attached) that CBP previously released in response to a separate FOIA request we filed and thus redaction is inappropriate. - We do not have sufficient information to determine what information has been redacted from section 4(e) on page 1-5-21. - For purposes of clarification, we are not contesting any of the redactions to the marginal notes in this document.		

Line 1 - Procedures for Granting of Voluntary Departure and Issuance of Form I-862

HQ 50/12

SEP 11 1997

Subject Procedures for Granting of Voluntary Departure and Issuance of Form I-862, Notice to Appear

To All Regional Directors from Office of Programs
All Service Center Directors
All District Directors
All Officers in Charge

This memorandum provides guidance on the implementation of Section 240B of the Immigration and Nationality Act (INA) as amended by Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and interim regulations under Title 8, Code of Federal Regulations, Part 240, Sub-part C.

VOLUNTARY DEPARTURE

Effective April 1, 1997, INA Section 240B(a) limited the Attorney General's authority to grant voluntary departure. Voluntary departure can now be granted only to those applicants/beneficiaries who actually request it and agree to its terms and conditions. Pursuant to INA Section 240B(d), noncompliance with the terms of voluntary departure is punishable by civil penalties including a fine, and ineligibility for additional grants of voluntary departure and certain other immigration benefits. Because of the new penalties, the Service must not unilaterally grant voluntary departure, either expressly or implicitly, to an applicant/beneficiary known to the Service as being out of lawful status.

Service Centers will only consider requests for voluntary departure in cases where:

- the applicant/beneficiary clearly and specifically requests it, and
- within that request, the applicant/beneficiary fully acknowledges and agrees to its terms and conditions, and
- the request is attached to a benefit-related application at the time that application is filed.

No subsequent requests for voluntary departure submitted in relation to the benefit related application will be considered at the Service Centers. No requests for evidence issued by Service Centers will make reference to a request for voluntary departure.

If the beneficiary does not request voluntary departure in conjunction with a benefit-related application/petition, but may be eligible to receive it, any denial of the benefit-related application/petition must include specific language informing the

applicant/beneficiary that he/she may wish to request voluntary departure from the District Director of the District having jurisdiction over his/her place of residence. The required language is attached (see attachment 1 &this memorandum). Service Centers will include the statement that the request for voluntary departure must be made at the local office.

If the beneficiary requests voluntary departure according to the above criteria, in conjunction with a benefit-related application/petition, but that request for voluntary departure is denied, the denial of the benefit related application/petition must inform the beneficiary of the reasons for denial and that he/she may be subject to removal proceedings. The required language is attached (see attachment 2 of this memorandum). If the application/petition is adjudicated at a Service Center, the case must then be reviewed for possible referral to the local office for consideration of removal of thc beneficiary. If a request for voluntary departure is denied, but the benefit-related application/petition is approved, a separate notice containing the specific language (see attachment 2 of this memorandum) must be created and issued to the applicant/beneficiary. All offices with CLAIMS capabilities must use this notice until CLAIMS can be enhanced to include the specific language on the Form I-797 approval notices. All other offices must continue to use this notice until given CLAIMS capabilities.

If a request for voluntary departure is received that meets the above conditions and the beneficiary is eligible, the service office must issue a Form I-210 (rev. 4-I-97) to the beneficiary along with any notice of denial of the application/petition that may be issued. Service offices must complete the Form I-210, Notice of Action - Voluntary Departure, as notification to each applicant/beneficiary granted voluntary departure. Only the April 1, 1997 version of the Form I-210 may be used (a copy is attached for reference as attachment 4 of this memo).

Voluntary departure can only be granted for a period not to exceed 120 days in the aggregate. Each Director must specify the period of time permitted for voluntary departure at his/her discretion and may grant extensions. However, the total period allowed, including all extensions, shall not exceed 120 days.

NOTICE TO APPEAR

The Service will not issue a Notice to Appear in cases in which the application/petition is approved.

Normally, the Service would issue a Form I-862, Notice to Appear, in all instances where an applicant/beneficiary is out of status and is not eligible for or has not received voluntary departure. However, there are exceptions.

Aliens Ineligible for Removal Proceedings

One exception includes the following classes of applicant/beneficiaries who are ineligible for removal proceedings:

- crew members who entered on or after 4-I-97;
- Visa Waiver Pilot Program participants;
- stowaways; and
- "S" nonimmigrants.

When denying an application filed by an applicant/beneficiary within the above categories, there is no need to prepare a Form I-862. However, the receipt or A-file containing the application must be sent to the local office having jurisdiction over the applicant/beneficiary's place of residence for review.

Aliens Who May Be Placed Into Removal Proceedings

Sampling data has indicated that if an NTA were issued in all other instances, the volume of NTAs generated by Service Centers would swamp local office dockets, having a serious negative impact upon docket management and removal priorities. Therefore, the Service has decided not to issue routinely Form I-862, Notice to Appear, as a standard part of processing denied applications end/or petitions filed by or on behalf of applicants/beneficiaries who are not maintaining status or in a period of stay authorized by the Attorney General However, the Service Centers will refer to local offices for potential issuance of an NTA, any application/petition denied due to a finding of fraud or criminal record, in which the applicant/beneficiary is not maintaining status (or in a period of stay authorized by the Attorney General), and there is no request for voluntary departure included (or that request has also been denied).

Referral of Cases to Local Offices

All cases being referred to the local office having jurisdiction over the applicant/beneficiary's place of residence will be forwarded only after the denial is completed and after any period in which to file an appeal or motion to reopen/reconsider has passed without one having been filed or, if an appeal or motion is filed within the requisite time period, after any dismissal of the appeal or denial of the motion has been completed.

If the applicant/beneficiary has not been assigned an alien registration number, an A-File will be created prior to shipping to the local office, if an A-File has already been created for the applicant/beneficiary, that A-Number and the location of the A-File must be noted on the referral memorandum (attachment 3 to this memorandum). Prior to shipping the file to the local office, the referral memorandum must be completed and fastened to the front of each file.

For cases being referred in which the alien is ineligible for the issuance of an NTA, a brief explanation, including an indication of the status of the applicant/beneficiary and a

request that the applicant/beneficiary be arrested and removed without a hearing, should be written in the narrative portion of the referral memorandum.

For cases being referred for possible issuance of an NTA, a brief explanation, including an indication of the status of the applicant/beneficiary and a request that the local office consider issuance of a Notice to Appear to the applicant/beneficiary, should be written in the narrative portion of the referral memorandum. The local office may issue a Notice to Appear in those cases it deems appropriate based on local docket management priorities and workload. To enable local docket control managers to more efficiently select cases referred by Service Centers for NTA issuance, HQIRM is developing an interface between the CLAIMS and DACS systems. Once this new process is fully implemented, additional criteria and categories may be designated.

Collection of NTA statistics

For future budget analysis and planning purposes, HQBEN will issue additional guidance on the collection of such data during designated periods of time each fiscal year. In the meantime, Service Centers are no longer required to capture statistics on beneficiaries of applications/petitions who are out of status to determine the number of aliens to whore an NTA could potentially be issued.

This memorandum has the concurrence of the Office of Field Operations.

(b)(6) (b)(7)(C)
Acting Executive Associate Commissioner

Attachments

ATTACHMENT 1

REQUIRED LANGUAGE TO BE USED WHEN NO REQUEST FOR VOLUNTARY DEPARTURE IS MADE BUT THE ALIEN APPEARS ELIGIBLE TO RECEIVE VOLUNTARY DEPARTURE

You may be eligible to receive a grant of voluntary departure from the United States. If you wish to request voluntary departure, you must take this notice and go to your LOCAL office of the Immigration and Naturalization Service to make that request.

A request for voluntary departure must be made in writing and must be accompanied by your original passport or other travel documentation sufficient to assure your lawful entry into the country to which you intend to depart. If that request is approved, you must also agree to all terms and conditions of the voluntary departure. If that request is approved and you fail to meet the terms and conditions set forth, you will become subject to a civil penalty of not less than $1000 and not more than $5000. Failure to meet the terms and conditions will also result in you being ineligible for any further relief from removal from the United States.

If your request for voluntary departure is denied, you may be subject to removal from the United States.

ATTACHMENT 2

REQUIRED LANGUAGE TO BE USED WHEN VOLUNTARY DEPARTURE IS BEING DENIED

THIS LANGUAGE WILL BE ADDED TO ALL DENIAL NOTICES OF THE BENEFIT-RELATED APPLICATION/PETITION.

THIS LANGUAGE WILL ALSO BE SENT TO ALL APPLICANTS/BENEFICIARIES WHEN THE REQUEST FOR VOLUNTARY DEPARTURE IS DENIED BUT THE BENEFIT-RELATED APPLICATION/PETITION IS APPROVED. IN SUCH CASES, THIS LANGUAGE WILL BE SENT ON A SEPARATE NOTICE

A request for voluntary departure was submitted in conjunction with this application/petition. That request is hereby denied. It has been determined that you are not eligible to receive voluntary departure because ***AD/UDICATOR ADDS REASONS pursuant to 8CFR 240 and/or INA240B***.

*** The following statement will only be added when the benefits related application/petition is denied: You should depart the United States immediately, if you do not depart immediately you may be placed into removal proceedings. ** *

Line 2 - CBP, The Exercise of Discretionary Authority (9/3/08)

CBP Directive No. 3340-043 **Date:** September 3, 2008

ORIGINATING OFFICE: OFO: APP
SUPERSEDES:
REVIEW DATE: September 2011

SUBJECT: THE EXERCISE OF DISCRETIONARY AUTHORITY

1. Purpose. To provide guidance and direction to promote the fair, objective and consistent application of U.S. Customs and Border Protection (CBP) discretionary authority in the enforcement of immigration laws nationwide.

2. Policy.

2.1 It is the policy of CBP to protect the United States of America from threats posed by terrorist organizations and to prevent terrorists as well as suspected terrorists, terrorist funding, weapons, and instruments, including Weapons of Mass Effects (WME), and their precursors from entering the United States.

2.2 It is the policy of CBP, consistent with the Immigration and Nationality Act (INA) to verify the identity, citizenship and admissibility of persons seeking entry into the United States. Where there is a belief, based on an evaluation of available information, that an alien may have ties to or presents a threat related to terrorism, has criminality rendering him or her inadmissible, or is likely to add to the illegal population of the United States, the alien will be denied admission where there is a legal basis to do so.

2.3 It is the policy of CBP that, through the use of all authorities and sanctions provided by law and procedure, enforcement actions will be vigorously pursued against any individual where there exists any reasonable suspicion of association with terrorism, criminality, illegal migration, smuggling or any other activity contrary to national interests or in violation of U.S. statutes.

2.4 It is the policy of CBP to consider the exercise of discretionary measures in favor of aliens who are inadmissible due to a minor or technical violation of the INA. This includes the use of the waiver and parole processes to allow such aliens into the United States, where appropriate and permissible by law. In keeping with the CBP strategy of risk management, CBP will focus resources on those cases that pose the greatest risk.

2.5 It is the policy of CBP that in individual cases involving technical inadmissibility, minor violations, and apparent bona fide travel, where refusal of admission or withdrawal of application for admission would involve detention or undue hardship, it is appropriate to expansively consider the exercise of discretionary authority. This principle must be applied on a case-by-case basis and may not be interpreted to provide relief from the visa requirement in any systemic manner to any particular class of aliens.

2.6 It is the policy of CBP that supervisors and managers will responsibly assess every case involving a prospective adverse action. This will ensure that CBP's legal and discretionary authority is being exercised judiciously and in a manner consistent with the facts of the case.

3. Authority/References. Immigration and Nationality Act (INA); Title 8 United States Code (USC); Title 19 USC; Title 8 Code of Federal Regulations (CFR); Inspector's Field Manual (IFM) Chapters 16.1 (Parole); 17.1 (Deferred Inspection); 17.2 (Withdrawal of Application for Admission); and 17.5 (Waivers).

4. Definitions.

4.1 "Admission," means, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by a CBP officer.

4.2 "Brief overstay," generally means an overstay of approved nonimmigrant status, unintentional in nature or beyond the control of the alien, covering a period of (b)(7)(E) or less.

4.3 "Hardship," must be determined based on the factors presented. Applicants must be encouraged to describe and document all applicable factors, since there is no guarantee that any particular reason will result in a finding that an adverse action would cause extreme or undue hardship.

4.4 "Minor or technical violation," means a single infraction of a CBP statute that does not rise to a level of such a serious nature that would preclude the offering of a form of discretion.

4.5 "Significant public benefit," means that the inadmissibility of an alien is outweighed by the public interest in allowing the alien to enter the United States.

4.6 "Unforeseen emergency," as used in 8 CFR § 212.1(g) generally means:

4.6.1 An alien arriving for a medical emergency (an injury or illness that requires immediate medical attention to prevent life-threatening or disabling conditions);

4.6.2 An emergency or rescue worker arriving in response to a community disaster or catastrophe in the United States;

4.6.3 An alien accompanying or following to join a person arriving for a medical emergency;

4.6.4 An alien arriving to visit a spouse, child, parent, or sibling who within the past 5 days has unexpectedly become critically ill or who within the past 5 days has died; or,

4.6.5 An alien whose passport or visa was lost or stolen within 48 hours of departing the last port of embarkation for the United States.

5. Responsibilities.

5.1 The Assistant Commissioner, Office of Field Operations, is responsible for policy oversight, which includes the formulation and implementation of guidelines and procedures.

5.2 The Executive Director, Admissibility and Passenger Programs (APP), is responsible for the formulation and implementation of the guidelines set forth by the Assistant Commissioner. In addition, the Executive Director, APP, will be responsible for conducting national reviews to ensure compliance with implemented guidelines outlined in this directive.

5.3 Directors, Field Operations (DFOs) are responsible for the overall management and implementation of this program. DFOs will also be responsible for the overall monitoring of the exercise of discretionary authority within their areas of responsibility.

5.4 Port Directors (PDs) are responsible for performing periodic reviews of cases to ensure that the exercise of discretionary authority is being applied in accordance with this directive. PDs are also responsible to ensure that any exercise of discretionary authority is fully warranted.

5.5 Field managers and supervisors are responsible for ensuring that the Discretionary Checklist is utilized in every case involving a prospective adverse action. They are further responsible for assessing every case involving a prospective adverse action to ensure that any exercise of discretionary authority is done judiciously and in a manner consistent with the facts of the case.

5.6 Supervisors are responsible for ensuring that the Discretionary Checklist is completed during case processing. Supervisors are further responsible for ensuring that CBP officers under their supervision are familiar with the policies and procedures established by this directive.

5.7 CBP officers are responsible for knowing, understanding and adhering to the contents of this directive. CBP officers are further responsible for accurately presenting all facts and circumstances resulting from an inspection that may involve a prospective adverse action to the appropriate level of management, through the chain of command.

5.8 CBP officers are responsible for immediately forwarding information to the appropriate level of management, through the chain of command, regarding time-critical situations, including medical emergencies.

6. Port of Entry Environments.

6.1 Land Border and Preclearance Ports of Entry

6.1.1 In these environments, an inadmissible alien can normally be returned to a contiguous country immediately or without the need to arrange for additional transportation or to be taken into federal custody. Ports may need to consider additional factors where refused aliens must be transported to a designated return location.

6.1.2 In these environments, it is generally reasonable to refuse admission, or accept a withdrawal of application, as it would not create an undue hardship on an alien. If necessary, an alien can access a United States Embassy or Consulate in an attempt to correct any documentary deficiencies, or can secure additional evidence to support a subsequent application for admission.

6.1.3 Despite the ease with which aliens may be refused admission in these environments, CBP supervisors and officers must continue to evaluate each case to adequately determine if the exercise of discretionary authority is warranted.

6.2 Air and Sea Ports of Entry

6.2.1 In these environments, there is less flexibility due to external circumstances that must be considered, such as transportation schedules and carrier liabilities.

6.2.2 When a violation is technical or minor in nature, and the purpose for travel is determined to be bona fide, discretionary guidelines shall be applied expansively to minimize hardship on an alien [redacted] This does not preclude the use of restraints or detention where there is an articulable concern for officer safety.

7. Discretionary Checklist

7.1 The attached Discretionary Checklist serves as an aid to frontline personnel and managers in exercising discretionary authority. It also ensures that the INA is consistently applied and that each applicant's admissibility is viewed as a unique, individual case.

7.2 The Discretionary Checklist should be completed by the inspecting CBP officer and reviewed by a first and/or second line supervisor.

7.3 The Discretionary Checklist should be maintained as a part of the alien's port file or A-file (if one exists), regardless of whether discretionary authority is exercised or denied. The checklist should explain why discretion was approved or denied.

7.4 Discretionary authority should generally not be exercised if the alien is unable to establish his or her identity or citizenship.

7.5 Discretionary authority should generally not be exercised if the alien has terrorist ties or affiliations, significant criminal history, or is likely to contribute to the illegal population of the United States. (b) (7)(E) [redacted]

7.6 The factors outlined below should be considered when deciding whether to exercise discretion. Not every factor will apply in every case.

7.6.1 The nature of the inadmissibility should be reviewed to determine if it is a minor or technical concern as opposed to more serious fraud, criminal or security grounds.

7.6.2 All potential grounds of inadmissibility should be reviewed. Generally, if there are multiple grounds of inadmissibility, it is not merely a minor or technical concern.

7.6.3 Previous violations or determinations of inadmissibility should be reviewed (b) (7)(E) [redacted]

7.6.4 Previous grants of parole or waiver should be reviewed (b) (7)(E) [redacted]

7.6.5 An alien's stated purpose of entry should be reviewed (b) (7)(E) [redacted]

7.6.6 An alien's stated family or business ties in the United States should be reviewed and verified to the extent possible. Such ties must be carefully considered as they may support a legitimate reason for entry, or provide evidence indicating intentions to contribute to the illegal population of the United States.

7.6.7 An alien's current and previous immigration status and length of residence in the United States (if applicable) should be reviewed to assess compliance with previous admissions.

7.6.8 An alien's good faith efforts to obtain correct information or documents prior to arrival should be reviewed and verified to the extent possible.

7.6.9 An alien's knowledge or ignorance of correct procedures or admissibility requirements should be reviewed to determine if a violation is inadvertent, or caused by unfamiliarity with the laws and/or language of the United States.

7.6.10 Advance opportunity to obtain travel documents should be reviewed to determine if the situation provided sufficient time for an alien to comply. In some cases, an alien may have been aware of the documentary requirements, but may have a plausible reason for not complying.

7.6.11 Any suspected intentions to circumvent admissibility requirements should be reviewed to determine the underlying reason for inadmissibility, and the extent to which the alien was aware of any inability or unlikelihood of being granted a visa or admission to the United States.

7.6.12 Misrepresentations[1] made during the inspection process should be reviewed and treated with the seriousness they deserve. While certain misrepresentations may subject an alien to Expedited Removal provisions, other misrepresentations may be less severe, and may be made due to fear or distrust of authority, or for cultural reasons. Where inconsistencies in critical information exist due to misrepresentation, the exercise of discretionary authority is less likely to be appropriate.

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[1] *Frequently, applicants for admission make statements on primary, but then recant or change their response during secondary inspection. Examining CBP Officers must be cognizant of the fact that the reason for the discrepancy may be entirely innocent and that, even if purposeful, the misrepresentation must be material and in an attempt to obtain an immigration benefit on the alien's own behalf (e.g., admission to the United States). If it is determined that the reason for the discrepancy is relatively innocent or unintentional, or if the alien made a timely retraction, common sense should prevail and no enforcement action should be taken. If, on the other hand, the interview indicates a clear attempt to mislead or misrepresent, then the alien should be put under oath immediately, and the elements of the misrepresentation established in a sworn statement.*

7.6.13 An alien may not be aware that a previous brief overstay has resulted in either the voidance of a visa, or future ineligibility to enter the United States under the Visa Waiver Program (VWP). In such cases, the alien should be informed of the consequences of his or her previous overstay but discretion may still be considered.

7.6.14 An alien's claim of official misinformation, especially from government officials, should be reviewed to determine the credibility, and verified to the extent possible.

7.6.15 An alien's willingness to cooperate with CBP processing should be reviewed [redacted] (b) (7)(E)

7.6.16 An alien's age and health should be reviewed to determine if he or she requires assistance, as an infant, child, or elderly person, or if he or she is experiencing a life-threatening or long-term illness. Such conditions may impact an alien's ability to travel, be detained or be restrained, and may also affect his or her ability to understand or comply with entry requirements.

7.6.17 Any political or media sensitivities should be reviewed (b) (7)(E) [redacted]

7.6.18 An alien's potential to pose a threat of future terrorist, criminal or violent acts in the United States should be considered.

7.6.19 Any other humanitarian or public interest considerations should be reviewed by the appropriate supervisor to determine if an officer should allow withdrawal of application for admission, or pursue Expedited Removal or removal proceedings before an Immigration Judge. (b) (7)(E) [redacted]

8. Forms of Discretion.

8.1 **Waivers.**

8.1.1 Generally, waivers approved at ports of entry will be for documentary deficiencies and will be documented using Form I-193, *Application for Waiver of Passport and/or Visa.* If an alien is inadmissible for reasons other than documentary deficiencies, such a waiver is not appropriate and cannot be approved at the port of entry. In such cases, parole may be considered as a discretionary means to allow the alien into to the United States.

8.1.2 The authority to approve such waivers under INA § 211(b) and INA § 212(d)(4)(A) is currently delegated to port management at the GS-13 level and above, and port directors at the GS-12 level.

8.1.3 The Form I-193 application fee may be waived for aliens granted a waiver for the first time under INA § 211(b) or INA § 212(d)(4). Such determination shall be made by port management at the GS-13 level and above, or a port director at the GS-12 level. Previous beneficiaries of a fee-exempt waiver may be considered for subsequent fee-exempt waivers on a case-by-case basis.

8.1.4 Ports of entry encountering returning lawful permanent residents lacking evidence of alien registration, and thus inadmissible under INA § 212(a)(7)(A)(i), may offer a visa waiver pursuant to INA § 211(b), if otherwise admissible.

8.1.4.1 If a lawful permanent resident claims his or her evidence of registration has been lost or stolen, the port may accept Form I-90, with fee.

8.1.5 Ports of entry encountering nonimmigrant aliens seeking admission to the United States determined to be inadmissible under INA § 212(a)(7)(B), may offer a waiver pursuant to INA § 212(d)(4).

8.1.5.1 Waivers approved pursuant to INA § 212(d)(4) should generally be for unforeseen emergency situations. Such waivers may also be approved for aliens who fall outside the scope of an unforeseen emergency on a case-by-case basis where it is determined that humanitarian factors support the decision. The following scenarios are a few examples of situations in which a waiver may be appropriate.

8.1.5.2 (b) (7)(E) [redacted]

8.1.5.3 (b) (7)(E) [redacted]

8.1.5.4 (b) (7)(E) [redacted]

8.1.5.5 (b) (7)(E) [redacted]

8.1.5.6 (b) (7)(E) [redacted]

8.2 **Parole.**

8.2.1 Generally, cases requiring parole authorization will present more complex circumstances than those in which a waiver would be considered. Parole authority is normally exercised when

an alien is inadmissible for reasons other than simple documentary deficiencies. Parole is not regarded as an "admission;" therefore, paroled aliens remain subject to proceedings as inadmissible (under INA § 212), rather than removable (under INA § 237), aliens.

8.2.2 The authority to approve a parole under INA § 212(d)(5) is currently delegated to port management at the GS-13 level and above, and port directors at the GS-12 level.

8.2.3 If a parole is provided as a benefit to an alien, the prescribed fee should generally be collected. However, if a parole is provided in the interest of the government, the fee should be waived.

8.2.4 Since there is no application form for a parole, CBP officers must document all approved port of entry paroles (b) (7)(E)

8.2.4.1 Aliens presenting a valid, approved Form I-512, *Authorization for Parole of an Alien into the United States*, need not be documented (b) (7)(E)

8.2.4.2 Port of entry paroles involving emergency or other time-critical situations should be documented in ENFORCE [after the immediate event has been handled], (b) (7)(E)

8.2.4.3 In time-critical situations, an alien may be allowed to enter the United States where case processing and/or documentation of the parole is incomplete, provided the authorization for the parole has been obtained from the appropriate responsible official.

8.2.5 Ports of entry may grant paroles for deferred inspection, referral for removal proceedings, to facilitate an alien's departure, and in other situations deemed to be in the public interest.

8.2.6 The following situations are a few examples in which parole may be appropriate.

8.2.6.1 An inadmissible alien in need of emergency medical treatment.

8.2.6.2 Emergency workers responding to a natural disaster or other emergency situation.

8.2.6.3 **Medical evacuation** — often termed **MEDEVAC** or **medivac** (land and air ambulance) crew and/or patients.

8.2.6.4 A minor accompanying a detained parent.

8.2.6.5 A missing or abducted minor located and paroled to another agency.

8.2.6.6 Sick or injured crewmembers, including shipwreck or plane crash survivors.

8.2.6.7 An unaccompanied minor who is being released pursuant to an order of preference found in 8 CFR § 212.5(b)(3) or 8 CFR § 236.3(b)(1).

8.2.6.8 Significant Public Benefit Parole, including silent parole, requested by other law enforcement agencies. (b) (7)(E) [redacted]

8.2.6.9 In situations involving minor or inadvertent violations and apparent bona fide travel with no other violations, such as a brief overstay of a VWP admission that rendered an alien statutorily ineligible to apply for admission under the VWP, parole may be granted to the alien if the alternative would result in detention or undue hardship. In such cases, the alien should be processed as a VWP refusal, (b) (7)(E) [redacted] not to exceed 90 days. The alien should be advised of the requirement to obtain a visa for future travel to the United States.

8.2.6.10 Foreign students on field trips, aliens attending cultural events, and aliens coming for non-emergency medical treatment determined to be inadmissible for reasons other than documentary deficiencies may also be issued a port of entry parole. When a documentary deficiency is the only apparent ground of inadmissibility, a waiver should be pursued prior to parole consideration.

8.2.7 Aliens placed into expedited removal proceedings must normally be detained until removed from the United States. However, parole may be permitted if there is a medical emergency, or if it is necessary for legitimate law enforcement purposes, such as for criminal prosecution, or to testify in court.

8.3 **Deferred Inspection.**

8.3.1 A deferred inspection may be used when an immediate decision concerning admissibility cannot be made at a port of entry and when it appears likely that the issues surrounding admissibility can be resolved favorably at the onward port of entry. Deferred inspections may be necessary to review an existing file, or some other documentary evidence essential to clarifying admissibility.

8.3.2 As a form of parole, the authority to approve a deferred inspection is currently delegated to port management at the GS-13 level and above, and port directors at the GS-12 level. [redacted]

8.3.3 Deferred inspections should normally be utilized only when it appears the case would most likely be resolved in the alien's favor, with limited exceptions.

8.3.4 (b) (7)(E) [redacted] the deferred inspection of a nonimmigrant with a potential criminal inadmissibility is more broadly disfavored.

8.3.5 CBP processing shall be deferred for a specific purpose, and not as a way to transfer a difficult case to another office.

8.3.6 CBP processing shall be deferred to the office having jurisdiction over the area where the alien will be staying while in the United States.

8.3.7 CBP processing shall not be deferred where the alien is not expected to establish his or her admissibility. If the alien is clearly inadmissible, (b) (7)(E) [redacted] the alien shall be placed in removal proceedings or be allowed to withdraw his or her application for admission.

8.3.8 An inspection shall not be deferred if, based on the totality of circumstances and the presence of articulable facts, there are concerns that the alien may abscond or fail to report for CBP processing as directed.

8.3.9 An inspection may be deferred on behalf of an alien who is the beneficiary of an immediate relative petition, and who has an adjustment of status application pending with U.S. Citizenship and Immigration Services (USCIS), if the only reason for inadmissibility is the alien's failure to have a valid advance parole, and there is a likelihood that USCIS will exercise discretion and allow the alien's adjustment of status application to continue to a final decision.

8.3.10 The deferred inspection provision contained in 8 CFR § 235.2(a) shall not apply to an applicant for admission under INA § 217, except that the removal of a VWP applicant may only be deferred if the alien is paroled for criminal prosecution or punishment. This is the only provision for deferred removal under the Visa Waiver Program.

8.4 **Withdrawal of Application for Admission.**

8.4.1 A nonimmigrant applicant for admission who does not appear to be admissible may be offered the opportunity to withdraw his or her application for admission pursuant to INA § 235(a)(4), rather than being placed in proceedings pursuant to INA § 240 or removed under INA § 235(b)(1).

8.4.2 An alien cannot, as a matter of right, withdraw his or her application for admission, but may be permitted to withdraw if it is determined to be in the best interest of justice that a removal order not be issued. All withdrawals of application for admission (b) (7)(E) [redacted] should be approved by a first-line supervisor.

8.4.2.1 At land border ports of entry, aliens who refuse to pay the fee required for issuance of an entry document (I-94 or I-94W), and aliens who seek immediate return to the country of departure with documented intentions of obtaining or extending status in that country, but who are otherwise admissible, (b) (7)(E) [redacted]

8.4.3 Prior to permitting an alien to withdraw his or her application for admission, the alien must demonstrate both the intent and the means to depart immediately from the United States.

8.4.4 Withdrawal is strictly voluntary and may not be coerced in any way. If withdrawal is offered, but not voluntarily accepted, appropriate removal proceedings should be initiated.

8.4.5 In exercising discretion to permit a withdrawal of application for admission, carefully consider all the facts and circumstances related to the case to determine whether permitting withdrawal would be in the best interest of justice, or conversely, if justice would be ill-served if an order of removal were issued.

8.4.6 In light of the serious consequences of an expedited removal order, including a minimum 5-year bar on re-entry to the United States, the decision to permit withdrawal should be based on a careful consideration of relevant mitigating and aggravating factors in order to reach a reasonable decision.

8.4.7 Withdrawal of application for admission should not be permitted in situations involving obvious, deliberate fraud on the part of the applicant, or when especially egregious CBP violations are uncovered (e.g., long-term or repeated overstays, unauthorized employment).

8.5 **Voluntary Return.**

8.5.1 Voluntary Return (VR) is an act of discretion that can be applied to non-arriving aliens in circumstances analogous to those where withdrawal of application for admission is allowed, and should be approved by a first-line supervisor.

8.5.2 Usually, when an alien has demonstrated his or her intent to depart the United States, it serves no purpose to issue a Notice to Appear, because the alien is already executing the ultimate objective, which is removal from the United States. There is generally no reason to burden the immigration court with these cases.

8.5.3 When feasible, Voluntary Return cases should be documented (b) (7)(E) . When processing (b) (7)(E) , facts should be articulated documenting the unlawful presence, and an A-file (b) (7)(E) record should be created. Without these actions, it may be difficult to sustain a future ground of inadmissibility regarding the alien's unlawful stay.

8.5.4 In circumstances where CBP officers encounter outbound illegal aliens and there is insufficient time before the departure flight to collect biometrics, CBP officers may use available biographic data alone to create an (b) (7)(E) lookout.

8.6 **Detention.**

8.6.1 (b)(7)(E) Non-responsive to the request

8.7 **Fee Collection.**

8.7.1 When a form of discretion under consideration requires the payment of an associated fee (such as waiver applications and certain paroles), CBP should determine if the action taken is solely for the benefit of the alien. If the discretionary action is taken for reasons of significant public benefit, CBP should not charge a fee.

8.7.2 Situations resulting from an action at the port of entry in which it would not be appropriate to charge a fee include the following:

8.7.2.1 Parole for criminal prosecution;

8.7.2.2 Parole for incarceration after conviction for a crime;

8.7.2.3 Parole into the custody of another agency;

8.7.2.4 Parole for INA § 240 proceedings, if detention is not appropriate or feasible;

8.7.2.5 Parole of a stowaway for a medical emergency or legitimate law enforcement objective;

8.7.2.6 Parole of a witness in a judicial, administrative or legislative proceeding being conducted, or to be conducted in the United States;

8.7.2.7 Parole for deferred inspection; and,

8.7.2.8 Parole for deportation from another country through the United States.

8.7.3 Nothing in this directive is intended to diminish the authority of port management to waive fees under other circumstances, where appropriate, in accordance with 8 CFR § 103.7(c).

9. No Private Right Created. The procedures set forth in this Directive are for CBP internal use only and create no private rights, benefits, or privileges for any private person or party.

/s/
Assistant Commissioner
Office of Field Operations

Discretionary Authority Checklist for Alien Applicants

Applicant's Name: _____ **Port #:** _____

Date of Birth: _____ **Date of Action:** _____

Citizenship: _____ **Passport / A-#:** _____

1) Identity / Citizenship:

Identity sufficiently determined: Yes ☐ No ☐
Citizenship sufficiently determined: Yes ☐ No ☐

2) Age, Health and Notoriety of Applicant:

Are age or health relevant factors? Yes ☐ No ☐
Is the applicant a public figure? Yes ☐ No ☐
Congressional or media interest? Yes ☐ No ☐

***NOTE: Discretionary authority should generally not be exercised if identity or citizenship can not be established.*
REMARKS (to include origin, destination and intended length of stay):

3) Intended Purpose of Entry:

Emergency: Yes ☐ No ☐
Medical: Yes ☐ No ☐
Pleasure: Yes ☐ No ☐
Business/Official: Yes ☐ No ☐
Other: Yes ☐ No ☐

4) (b) (7)(E) [redacted]

***NOTE: In the remarks section below, indicate the specific violation(s) or grounds for inadmissibility. The queries listed in number 4 represent the minimum queries that should be conducted.*
REMARKS (to include ENFORCE Event # and FIN #, if applicable):

5) Previous Immigration Violations or Inadmissibility:

Previous Immigration Violation(s): Yes ☐ No ☐
Previous Inadmissibility: Yes ☐ No ☐
Previous Beneficiary of Discretion: Yes ☐ No ☐

6) Nature of Inadmissibility:

(b) (7)(E) [redacted]

REMARKS:

7) Threat posed to the United States:

(b) (7)(E) [redacted]

(b) (7)(E) [redacted]

***NOTE: Discretionary authority should generally not be exercised if a threat is posed to the United States.*
REMARKS:

~~Law Enforcement Sensitive / For Official Use Only~~

8) Other Factors to Consider:

Legitimate reason for entering the United States:	Yes ☐ No ☐
Documentary (Passport / Visa) deficiency only:	Yes ☐ No ☐
Credible claim of official misinformation:	Yes ☐ No ☐
Relationship to a U.S. employer or resident:	Yes ☐ No ☐
Intent to circumvent admissibility requirements:	Yes ☐ No ☐
Misrepresentations made during processing:	Yes ☐ No ☐
Minor children accompanying or already in the United States:	Yes ☐ No ☐
Unaware of visa voidance or consequences of VWP overstay:	Yes ☐ No ☐
Relief available through the parole or waiver process:	Yes ☐ No ☐

REMARKS:

Examining CBP Officer:

Applicable Ground(s) of Inadmissibility:

Applicable Discretionary Action(s):

Withdrawal of Application for Admission:	Yes ☐ No ☐	
Parole to Depart Foreign / Voluntary Return:	Yes ☐ No ☐	Length of parole sought: _____
Humanitarian Parole:	Yes ☐ No ☐	Length of parole sought: _____
Waiver of Passport Requirement:	Yes ☐ No ☐	Period of admission sought: _____
Waiver of Non-Immigrant Visa Requirement:	Yes ☐ No ☐	
Classification: _____		Period of admission sought: _____
Waiver of Immigrant Visa Requirement:	Yes ☐ No ☐	
Waiver of processing fee (if applicable):	Yes ☐ No ☐	
Deferred Inspection:	Yes ☐ No ☐	Deferral Period and Location: _____

Supervisory CBP Officer:

Recommendation:
Approve: Yes ☐ No ☐
Disapprove: Yes ☐ No ☐

Justification for recommendation (to include alternatives, if disapproval is recommended):

Reviewing 2nd Line Manager:
(GS13 or Above)

Decision:
Approved: ☐ Disapproved: ☐

Justification for decision (to include final disposition, if disapproved):

Line 3 - Voluntary Departure (undated)

VOLUNTARY DEPARTURE

INA: Section 240B

Regulations: 8 CFR 240.25, 240.26

13.1 Authority for Voluntary Departure.

Voluntary departure may be granted by the INS or an immigration judge under the conditions specified in section 240B of the Immigration and Nationality Act (Act). Although Section 301 of the Immigration Act of 1990 (IMMACT), Act of Nov. 29, 1990, Pub. L. 101-649, 104 Stat. 4978, provides that beneficiaries of the Family Unity Program may also be granted voluntary departure, this chapter does not fully cover voluntary departure under the Family Unity Program.

The regulations specify when authorized officers may grant voluntary departure, when an immigration judge (IJ) or the Board of Immigration Appeals (BIA) may grant voluntary departure, and when the Service and EOIR can jointly grant voluntary departure (see 8 CFR sections 240.25 and 1240.26), in accordance with the timeline presented below. Note that the first three time frames relate to pre-hearing voluntary departure under section 240B(a) of the Act, while the fourth time frame, "As part of IJ's order," relates to post-hearing voluntary departure under section 240B(b) of the Act.

Time period of event Authority	1. From prior to arrest up to filing of Notice to Appear	2. From filing of NTA up to 30 days after master calendar	3. From 30 days after master calendar up to IJ's order	4. As part of IJ's order
Service	YES	NO	NO	NO
IJ or BIA	NO	YES	NO	YES
Joint Authority	NO	YES	YES	NO

13.2 Determining When to Permit Voluntary Departure.

(a) General. Most aliens present in the United States illegally are eligible for voluntary departure. (See Chapter 15.1, below, for exceptions).

Those eligible may prefer to seek voluntary departure or "voluntary return" rather than undergo formal deportation. Both voluntary departure and voluntary return reduce processing time for INS personnel. At the same time they allow the individuals in question to avoid the potential penalties attached to formal removal proceedings.

(b) Restrictions. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996) limited eligibility

for voluntary departure. Strict criteria govern the granting of voluntary departure in lieu of a removal hearing pursuant to section 240 of the Act, as follows:

(1) Statutory prohibitions. An alien in any of the following categories is ineligible for voluntary departure:

· Aggravated felons or terrorists, deportable under sections 237(a)(2)(A)(iii) or 237(a)(4)(B) of the Act, respectively;

· Previously granted voluntary departure after having been found inadmissible under section 212(a)(6)(A) of the Act;

· In violation of the terms of voluntary departure granted during the past 10 years;

· Overstayed the voluntary departure limit of 120 days allowed before or 60 days after the conclusion of a removal hearing; and

· Classified as arriving aliens.

(2) Likelihood of Departing. Available means of departure (financial and otherwise); willingness to cooperate; and case-specific factors make it reasonable to assume an alien will comply with the departure requirements.

(c) Other Factors. Consider the pros and cons in each case before deciding to offer voluntary departure, such as:

· Prior entry without inspection or other immigration violation;

· Circumstances of apprehension, such as resisting arrest, or failing to cooperate with the arresting officers indicating a need for more stringent enforcement action;

· Age, infirmity, or other mitigating factors;

· Signs of illegal activity;

· Criminal history. Neither an immigration judge nor the Service will grant voluntary departure without first considering the alien's criminal history. (b) (7)(E) [redacted]

· Local or national policy or operational considerations requiring a stricter enforcement policy at a particular location or during a particular time period.

13.3 Pre-Hearing Voluntary Departure.

Prior to initiation of proceedings, INS may grant voluntary departure. The maximum time allowed for departure is 120 days, without exception. The Service may impose additional conditions for departure, e.g., requiring the posting of a bond (mandatory minimum $500); delivery of a passport, confirmed ticket, or similar evidence of intent to depart; etc. [See 8 CFR 240.25.]

13.4 Voluntary Departure During Proceedings.

(a) Background. IIRIRA and its implementing regulations significantly changed the length of the departure period and the conditions under which voluntary departure may be authorized. They also specify by whom and when voluntary departure may be granted. Prior to April 1, 1997, voluntary departure was often granted for extended periods of time. IIRIRA makes clear that voluntary departure is intended only as a relatively short period of time to depart.

(b) Voluntary Departure After Proceedings Have Begun. Voluntary departure includes two distinct categories: (i) At the commencement of removal proceedings (pursuant to section 240B(a) of the Act) and (ii) at the conclusion of removal proceedings (pursuant to 240B(b) of the Act). If the Service so stipulates, voluntary departure may also be granted while proceedings are in progress (see 8 CFR 240.26(b)(2)).

(1) At the commencement of removal proceedings (master calendar), the immigration judge may grant voluntary departure for a period not to exceed 120 days, provided the alien:

- Makes no additional requests for relief;
- Concedes removability;
- Waives appeal of all issues; and
- Has not been convicted of an aggravated felony and is not deportable under section 237(a)(4) of the Act.

(2) At the conclusion of proceedings (merits hearing), the immigration judge may grant voluntary departure for a period not to exceed 60 days, provided the alien:

- Had been physically present in the United States for one year before service of the Notice to Appear;
- Has demonstrated good moral character for at least the past 5 years;
- Provides evidence of the means to depart and intention of doing so; and

· Has not been convicted of an aggravated felony and is not deportable under section 237(a)(4) of the Act.

In addition, for voluntary departure at the conclusion of proceedings, within five business days of the immigration judge's order, the alien must post a voluntary departure bond (mandatory minimum $500).

Failure to post the voluntary departure bond within five business days automatically vacates the order of voluntary departure, and the immigration judge's voluntary departure order reverts to an alternate final order of removal. The final order is effective upon issuance. The officer will then take the actions necessary to effect the alien's removal.

(c) Appeals. If the alien is granted voluntary departure at the conclusion of proceedings and appeals the decision, in order for the alien to avail himself/herself of the voluntary departure he/she must post the voluntary departure bond, and if detained, remains in Service custody until he/she posts the bond (delivery bond) on the merits of the case. The Service can have two bonds on the same case. If not detained, once the voluntary departure is granted the delivery bond (bond on the merits of the case) is canceled unless the alien appeals.

(d) Failure to Depart. If the alien fails to depart as required by the voluntary departure order, a surrender notice will immediately be sent to the alien. (b) (7)(E) [redacted]

(e) Extending Deadline for Voluntary Departure. If the alien has been granted less than the maximum time for voluntary departure (120 days pre- or 60 days post-hearing), the Service may, upon request, extend the deadline to the maximum 120 or 60 days, but only if the alien proves a need for more time and provides evidence of intent to depart. The Service may make the granting of an extension conditional on the presentation of documents, the posting of a bond or other conditions to ensure departure. Standard operating procedure requires that an officer in receipt of an extension request render a decision as soon as possible, in consideration of the serious consequences to the alien of failing to adhere to the terms of voluntary departure

Note: The mere filing of a request for extension does not absolve the alien from penalties that may accrue while the request is pending.

13.5 Pending Pre-IIRIRA Cases.

Pre-IIRIRA rules continue to apply to cases pending before IIRIRA's implementation on April 1, 1997. However, the officer considering an extension request under the more generous terms available pre-IIRIRA must heed the IIRIRA legislators' intent to limit the time allowed for voluntary departure. Only extraordinary circumstances can justify

extending the voluntary departure period contrary to the will of Congress. See 8 CFR Part 240, Subpart F.

13.6 Employment Authorization.

A person granted voluntary departure may not apply for or receive work authorization, and any previous grant of employment authorization may not be extended.

13.7 Penalties for Failure to Adhere to Terms of Voluntary Departure.

Anyone failing to comply with the terms of a grant of voluntary departure will be denied the privilege of voluntary departure for 10 years and may incur civil penalties (see Section 240B(d) of the Act). You must understand and impress on each person granted voluntary departure the consequences of failing to comply with the specified terms, including:

- Formal removal proceedings;
- Ineligibility for voluntary departure, whether from the Service or an immigration judge, during the next 10 years; and
- Ineligibility for certain forms of relief, including benefits provided under sections 245 (Adjustment of Status to a Lawful Permanent Resident), 248 (Change of Nonimmigrant Classification) and 249 (Record of Admission for Permanent Residence in the Case of Certain Aliens Who Entered the US prior to January 1, 1972) of the Act.

(See Form I-210, Voluntary Departure and Verification of Departure.)

You must also issue the Form I-210 in conjunction with every grant of voluntary departure, and secure the alien's signature agreeing to its terms. The alien must understand that in all orders of voluntary departure there is an alternate order of removal if the alien fails to depart by the date specified. You must receive an executed Voluntary Departure and Verification of Departure, Form I-210 within 30 days of the voluntary departure date specified in the judge's order. If you do not receive verification of departure 30 days after the voluntary departure order date, issue an Order of Removal/Deportation, Form I-205 and Notice to Deportable Alien, Form I-166. See (b) (7)(E) [redacted]

13.8 Other Considerations When Granting Voluntary Departure.

(a) Advantages. An alien granted voluntary departure avoids the penalties accompanying an order of deportation or removal. Time spent in the United States pursuant to a grant of voluntary departure is not considered time where an alien is illegally present.

In explaining voluntary departure to an eligible alien, do not attempt to influence the alien's decision whether to choose voluntary departure or to appear before an immigration judge.

(b) Disadvantages. The failure to depart by the scheduled date makes the alien subject to a civil penalty of up to $5,000. (b) (7)(E) [redacted] Furthermore, as noted above, the failure of an alien to depart pursuant to a grant of voluntary departure renders that individual ineligible for certain forms of relief.

(c) Bond prior to completion of removal proceedings. When a bond is required as a condition of voluntary departure the amount must equal or exceed $500. (b) (7)(E) [redacted] The amount at risk if the bond is forfeited may be a deciding factor for certain individuals considering whether to depart voluntarily, as agreed, or to violate the agreement. (b) (7)(E) [redacted]

(d) Bars to re-admission: Unlawful presence. The period of voluntary departure that is granted does not contribute to the time considered as "illegal presence." (See section 212(a)(9)(B)(ii) of the Act.) However, if the alien fails to voluntarily depart as required by the date specified the order automatically converts to an order of removal and "unlawful presence" commences as of that date.

(e) Cancellation of Non-immigrant Visa. All non-immigrant visas will be canceled prior to granting voluntary departure. Use Form I-275, Withdrawal of Application for Admission/Consular Notification to cancel the visa in accordance with 22 CFR 41.122(h)(5).

13.9 Voluntary Departure with Safeguards.

The Service may choose to allow the alien to leave under voluntary departure without safeguards, voluntary departure with safeguards, or it may place the alien in removal proceedings. The distinctions between the first two options can be significant.

An alien granted voluntary departure with safeguards must depart immediately, under the direct observation of the officer.

In general, an alien granted voluntary departure without safeguards is released from Service custody, remaining at liberty until the required departure date.

If an alien has previously been granted voluntary departure by an immigration judge but failed to depart as specified, an alternate order of removal will automatically be in effect. If the alien has not already departed under such alternate order, that alternate order should be executed. If the alien has departed on his own after the expiration of the voluntary

departure under an order of removal, the outstanding order may be reinstated in accordance with section 241(a)(5) of the Act if the alien illegally reenters the United States. [See Chapter 14.8, below, for discussion of reinstatement of a previous removal order.]

13.10 Voluntary Departure vs. Deferred Action.

(b) (7)(E) [redacted]

13.11 Voluntary Departure under the Family Unity Program.

Although as an enforcement officer you will probably not be involved in issuing benefits under the Family Unity Program (8 CFR 236, Subpart B), you may encounter aliens covered by the program. Therefore, you must recognize the following differences. The voluntary departure available through the Family Unity Program:

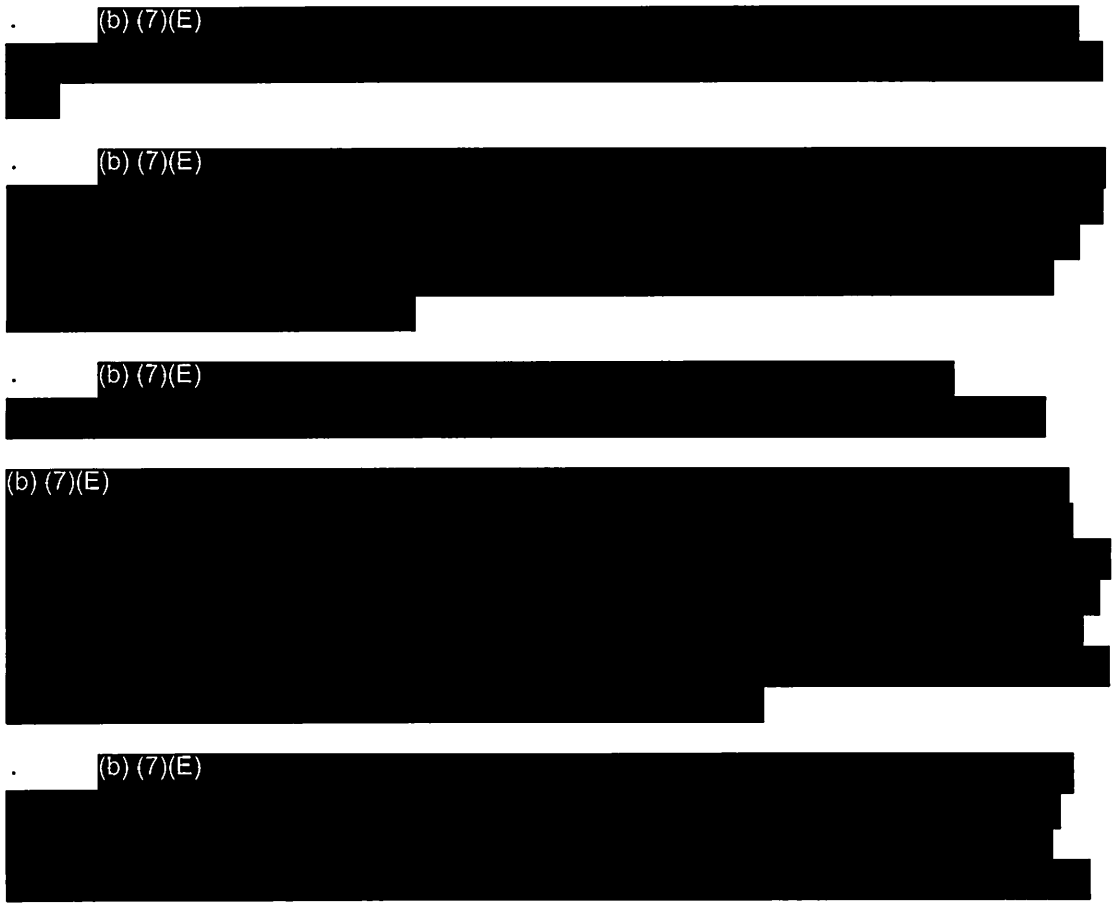
- Is usually granted through an application filed through one of the service centers;
- Applies only to the qualifying spouse or unmarried child of a legalized alien (as defined in 8 CFR 236.11);
- Is usually granted in two-year increments;
- May be extended repeatedly;
- Does not count toward the maximum time limits of 120 days before or during hearings, or 60 days after hearings, and
- Cannot be cancelled under the provisions of section 240B.

13.12 Procedures and Forms.

You may use Form I-826, Notice of Rights and Request for Disposition, to voluntary return an alien in Service custody who is departing immediately and who is not in proceedings (prior to the filing of the Notice to Appear).

Use Form I-210, Voluntary Departure and Verification of Departure, to document any decision to permit or extend/not extend voluntary departure. (b) (7)(E) [redacted]

- (b) (7)(E) [redacted]



13.13 Revocation of Voluntary Departure.

An officer authorized to grant voluntary departure may also, in writing, revoke the privilege (see 8 CFR 240.25(f)). The written revocation must cite the statutory basis for the revocation. The revocation may not be appealed.

13.14 Reinstatement of Voluntary Departure.

Pursuant to 8 CFR 1240.26(h), an immigration judge or the BIA may reinstate voluntary departure in a removal proceeding reopened for some purpose unrelated to voluntary departure, provided the reopening precedes the original voluntary departure date. In such cases, the 60- or 120-day limit continues to apply (unless proceedings commenced before April 1, 1997).

13.15 Voluntary Departure at Government Expense.

The Service may assume the costs of an alien's voluntary removal when it is in the government's interest (see section 241(e)(3)(C) of the Act), except after a removal hearing (see 13.4, above). Post-hearing voluntary departure is available only to aliens with the means to pay their own transportation costs.

Line 4 - Lesson 3: Removal/ Deportabilities: Day 24, Instructor Guide (Nov. 2012)

Lesson 3: Removal/Deportabilities: Day 24

Description

Purpose

Expedited Removal is an administrative disposition available in immigration related cases. This lesson will introduce Border Patrol agents to the Expedited Removal process.

Objectives

Terminal Learning Objective

IM.1 At the conclusion of this course, the student will be able to determine the immigration status of aliens encountered in the United States and recognize violations of the immigration laws.

Enabling Learning Objectives

(b) (7)(E)

Length

(b) (7)(E)

References

Immigration and Nationality Act and United States Code

Methods of Instruction

(b) (7)(E)

Evaluation

(b) (7)(E)

Instructor Guidance

(b) (7)(E)

D. Juvenile Aliens

1. A juvenile is defined as an alien under the age of eighteen years.
2. Based on the 1997 Flores v. Reno Settlement Agreement and the Homeland Security Act of 2002, there are safeguards in place for the detention of these alien minors.
3. The DHS will separate unaccompanied minors from unrelated adults whenever possible.
4. As soon as processing ends (including the locating of an adult or entity to which the alien minor can be released) or not later than 72 hours after custody begins, the juvenile must either be released from detention or transferred to an DHS contract facility specifically for the detention of juveniles.

E. Hearing Before An Immigration Judge

1. The immigration judge will conduct proceedings to determine if the alien is subject to removal.
2. Regulations require a fair and impartial hearing. The decision must be based on clear, convincing, unequivocal evidence.
3. The immigration judge shall make determinations, including orders of removal.
4. The immigration judge shall administer oaths, present and receive evidence, interrogate, and examine or cross-examine the alien and/or witnesses.
5. If, without reasonable cause, the alien fails or refuses to attend or remain in attendance, the immigration judge may proceed to a determination as if the alien were in attendance.

F. Voluntary Departure (V/D) and Voluntary Return (V/R) (b) (7)(E)

1. The Secretary of Homeland Security may permit an alien to voluntarily depart the United States at the alien's own expense.
2. There are two types of voluntary departure (V/D):
   a. Voluntary Departure prior to removal hearing, and
   b. Voluntary Departure in lieu of removal.

3. Restrictions to Voluntary Departure
    a. The Secretary of DHS may not remove an alien if s/he decides that the alien would be subject to persecution due to race, religion, or political opinion.
    b. This relief from deportation is not discretionary in that if it were shown that it is more likely than not that the alien would be persecuted, then withholding must be granted.
    c. The following classes are ineligible for this relief:
        i. Aliens who persecuted others for race, religion, etc.
        ii. Aliens convicted of serious crime (includes aggravated felons),
        iii. Aliens who have committed serious non-political crimes outside the United States, and
        iv. Aliens who are a threat to U.S. security.

II. Expedited Removal

(b) (7)(E)

A. At the conclusion of the Expedited Removal Training you will be able to:
    1. Identify the applicable charges for Expedited Removal
    2. Recognize the conditions making an alien amenable to Expedited Removal
    3. Properly process an alien for Expedited Removal
    4. Recognize circumstances that require referral for a credible fear interview or Judicial Review

B. Expedited Removal (ER), under INA 235(b)(1)(A)(iii) and 8 CFR §235.3(b), grants the Border Patrol Agent in the field the authority to formally remove certain aliens from the U.S. without a further hearing or review.

(b) (7)(E)

(b) (7)(E)

    1. An expedited removal order carries the same legal weight as a removal order issued by a judge.

(b) (7)(E)

    2. As a result this use of this authority is limited to some extent by both the law and policy.

(b) (7)(E) [redacted]

D. Notify alien that s/he may communicate with consular or diplomatic officer of his/her country in accordance with 8 C.F.R. 236.1(e). (b) (7)(E) [redacted]

E. If the immigration judge determines that the individual is not a USC or has never been admitted as a lawful permanent resident, refugee, or asylee, the expedited removal order will be affirmed and the alien removed. There is no appeal from the decision of the immigration judge.

F. If the immigration judge determines the individual is a citizen or an alien who was once admitted as a lawful permanent resident, refugee, or asylee, and that status has not been terminated, the judge will vacate the expedited removal order. At that point the agency may initiate removal proceedings under INA 240 if appropriate (unless the individual is a citizen).

VI. When To Use Expedited Removal (b) (7)(E) [redacted]

A. What are the steps you must take to determine when expedited removal is appropriate?

B. In deciding when to use ER as opposed to another action, ask the series of questions below to help choose the appropriate course of action. These questions assume the alien was arrested, (b) (7)(E) [redacted] formally removed.

1. (b) (7)(E) [redacted]
2. ER applies only to aliens who have not been admitted or paroled into the U.S. prior to apprehension. 8USC 1225(b)(1)(A)(iii)(II).

C. Step 1. Question

1. Will we seek a formal removal of the individual in question?
2. If yes: proceed to Step 2

   a. If no: VR per existing local procedure.

Line 7 - e3 Processing: Day 5, Instructor Guide (May 2010) (pages 1-5-21 through 1-5-24, section relating to William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008)

2. (b) (7)(E)

D. Adding a Narrative

(b) (7)(E)

1.
2.
3.
4.

E. Printing

1. (b) (7)(E)

2. Distribution

a. (b) (7)(E)

F. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008

1. In December 2008, Congress approved the William Wilberforce Trafficking Protection Reauthorization Act (TVPRA). (b) (7)(E)

2. The TVPRA provides requirement for Department of Homeland Security (DHS) to combat the trafficking of children along the Borders of the United States and U.S. Ports of Entry. The TVPRA has developed Interim Guidance for Processing Unaccompanied Alien Children

(UAC), created CBP Form 93-UAC Screening Addendum (see Appendix C).

3. A flowchart has been created to help you in TVPRA decision making (see flowchart "Interim Unaccompanied Alien Children Guidance, Appendix C). (b) (7)(E) [redacted]
4. A UAC is defined by Homeland Security Act of 2002, Section 462(g) (6 USC 279(g)) as a child who:
   a. has no lawful immigration status in the US;
   b. has not attained 18 years of age; and
   c. with respect to whom:
      i. there is no parent or legal guardian in the United States; or
      ii. No parent or legal guardian in the United States is available to provide care and physical custody.
         1. Documentation as to guardianship should be examined by CBP to determine is validity.
         2. Immediate family member (e.g. grandparent, aunt/uncle, and brother/sister) not in possession of valid supporting documentation of guardianship is capable of providing care and physical custody of UAC under the TVPRA family reunification procedures.
   d. Agents will continue to process UAC as current policy; Agents will also screen all UAC using CBP Form 93 for possible victimization. This form will be inserted into the aliens file (A-file) or Voluntary return (VR) packets. Agents will need to use a hard copy until this form is placed into the E3 processing. (b) (7)(E) [redacted]
   e. Sectors should make sure the ICE Field Office Juvenile Coordinator (FOJC) and the Department of Health and Human Services-Office of Refugee Resettlement (HSS/ORR) are contacted after a UAC is processed to arrange placement.
   f. CBP will ensure that UAC are processed in an expeditious and complete manner. As current policy UAC (b) (7)(E) [redacted] unable to

understand his/her rights, the agents must read and explain all documents in a language that the UAC will understand.

5. Special Rules for Children from Contiguous Countries (UAC Screening)
   a. The TVPRA states that any UAC found to be a national or resident of a contiguous territory to the US shall be subject to the screening process as they may return.
   b. UAC Screening: If the UAC wishes to withdraw the application for admission they may do so if CBP determines the following three criteria:
      i. The CBP must determine, on a case by case basis, if the UAC is able to make an independent decision. CBP must take into consideration:
      ii. If UAC is (b) (7)(E) [redacted] they can make an independent decision unless factors indicate otherwise.
      iii. Any UAC (b) (7)(E) [redacted] unable to make an independent decision unless factors indicate otherwise.
   c. The UAC should not have a fear of returning to his/her country of nationality or last residence due to a credible fear of persecution.
      i. The CBP FORM 93 will provide for the UAC to express that fear during the screening process.
      ii. If the UAC or the CBP indicates a fear is likely to exist then removal proceedings will be initiated under INA 240 and the UAC will be transferred to ORR custody.
6. Visa Waiver Program (VWP).
   a. Any UAC that applies for admission under INA 217 and are determined to be ineligible for admission under that INA 217, or to be inadmissible under INA 212, or who are in possession of and present a fraudulent or counterfeit travel document should be denied admission into the US. CBP can process the UAC as VWP Refusals but assess if the UAC is at risk to

trafficking and/or credible fear using the screening process.

b. Any UAC found to be at risk to trafficking and/or credible fear should be referred to an Immigration Judge (IJ) using Form I-863. Possible/Confirmed victims of trafficking should also be referred to ICE-OI and custody be transferred to ORR.

7. All Other Children

a. Any UAC who has not met the exceptions above and CBP wishes to remove that UAC from the US must be placed in removal proceeding under INA 240. The Juvenile Coordinator within ORR, ICE Detention and Removal Operations (DRO), and Division of Unaccompanied Children's Services (DUCS) must be notified immediately of the situation. Notification must occur within 48 hours from the apprehension, discovery of a UAC, or any claim/suspicion that an alien in custody is unaccompanied and under 18 years of age.

b. CBP will process UAC and complete the necessary documents for inclusion into the A-File, along with providing the alien with a Form I-770, Notice of Rights and Disposition of Juveniles.

c. If alien is (b)(7)(E) and transferred to ORR, then ORR will sign the issued Form I-862, Notice To Appear (NTA) on behalf of the UAC. Custody to ORR will be performed normally through DRO no later than 72 hours after determining the alien is a UAC, this will include any UAC that is amenable to criminal prosecution.

d. While being detained by CBP awaiting transfer to ORR, the UAC will be held in accordance to CBP guidelines for detention of juveniles.

8. Summary

a. To successfully accomplish the mission, an agent that processes an alien for admission or removal must ensure to determine whether the alien is considered to be a UAC.

b. If it is determined if the alien being processed is a UAC then assess the risk of trafficking and/or credible fear by following all stipulated guidelines in the TVPRA of 2008 and utilize CBP Form 93.

c. If the UAC is to be processed for removal proceedings under INA 240 then process the UAC expeditiously as per CBP and TVPRA guidelines.

d. If the UAC is determined to be at risk of trafficking and/or credible fear then detain and transfer the UAC as per CBP and TVPRA guidelines.