Office of Detention and Removal Operations

U.S. Department of Homeland Security
425 I Street. NW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

MEMORANDUM FOR: Assistant Directors
Field Office Directors
Deputy Field Office Directors

JAN 22 2007

FROM: John P. Torres
Director

SUBJECT: Expedited Removal for Salvadoran Nationals

Effective January 18,2007, consistent with the recent instructions of Federal District Court Judge Margaret M. Morrow, the restriction on the application of Expedited Removal (ER) to Salvadorans who fall within the classes of aliens designated in existing Federal Register notices has been removed, subject to the following requirements:

- Any Salvadoran national determined by DRO to be amenable to ER, pursuant to INA § 235(b), shall read (or have read to them) in a language that the alien understands; sign; and date the "Modified *Orantes* Advisal." (English and Spanish "Modified *Orantes* Advisals" are attached,)

- The original advisal signed by the Salvadoran, with a copy of the legal services list provided, must be placed in the A-file; and the Salvadoran must be given a copy of the advisal and legal services list to keep. Please note that these requirements are in addition to existing forms and administrative processes.

- If any Salvadoran national is encountered within DRO custody who is amenable to ER, the Notice to Appear should be cancelled and the individual should be processed pursuant to existing ER administrative procedures.

Questions regarding this memorandum may be directed to (b)(6), (b)(7)c Acting Assistant Director for Operations, at (202) 514-(b)(6), (b)(7)c or (b)(6), (b)(7)c

Attachments (3)

Office of Detention and Removal Operations

U.S. Department of Homeland Security
425 I Street. NW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

MEMORANDUM FOR: Field Office Directors
Deputy Field Office Directors

January 12, 2007

FROM: John P. Torres
Acting Director

SUBJECT: Expedited Removal (ER) for Salvadoran Nationals

Purpose

Federal District Court Judge Margaret M. Morrow recently issued on Order regarding facial conflicts between the Orantes Injunction and the Expedited Removal (ER) statute. Judge Morrow modified the injunction to permit the transfer of Salvadorans subject to final orders of removal entered as a result of ER proceedings outside the district of apprehension, without any time restraints. As a result of this recent court ruling, ICE must immediately implement the following procedures with respect to Salvadoran nationals.

- Any Salvadoran national determined by ICE to be amenable to Expedited Removal pursuant to INA § 235(b) shall be provided with, read (or have read to them), sign, and date the "Modified *Orantes* Advisal". (English and Spanish "Modified *Orantes* Advisal" is attached)

- The applicable advisal must be read and administered in a language understood by the Salvadoran. The original administered advisal(s) signed by the alien and a copy of the legal services list provided to each alien must be placed in the A-file. Each Salvadoran will be given a copy of each administered advisal and legal services list to keep. Please note that the above requirements are in addition to existing forms and administrative processes.

Background:

In 1988, U.S. District Court Judge David Kenyon entered an injunction against the Immigration and Naturalization Service ("INS"), and required mat agency to adopt significant changes in its processing, detention, and removal of Salvadoran aliens. See Orantes v. Meese. 685 F.Supp 1488 (C.D. Cal. 1988). The injunction contained several requirements, including enjoining the Government from transferring an unrepresented Salvadoran from the district of apprehension for a period of seven days.

On November 17, 2005, Government filed a Motion to Dissolve the Orantes injunction with the U.S. District Court for the Central District of California. Oral argument on the Government's motion was held on December 20, 2006. Prior to the hearing Judge Margaret M. Morrow provided the parties with a five page statement reflecting the Court's current thinking. Although, it is premature to predict how me Court will ultimately rule, Judge Morrow's statement appeared to favor the Government's position. It is anticipated mat the Court will issue a final order very shortly.

Further Action:

It is requested that ICE/DRO and ICE/OI ensure that the terms of this memorandum are disseminated and given effect immediately. Questions regarding this memorandum may be directed to (b)(6), (b)(7)c Associate Legal Advisor, OPLA at 202-514-(b)(6), (b)(7)c or (b)(6), (b)(7)c

MODIFIED *ORANTES* ADVISAL

Name of Alien _____ **A-** _____

NOTICE OF RIGHTS TO SALVADORANS IN EXPEDITED REMOVAL

You have been detained because immigration officers believe you are illegally in the United States. In the United States, you have legal rights when you are detained. No one can take these rights away from you. This notice will explain those rights to you. You must sign below to show that you have received a copy of this notice and understand it. Read this notice carefully before you decide what you wish to do. You should not sign anything else until you have had the opportunity to read this notice and understand your rights.

RIGHT TO APPLY FOR POLITICAL ASYLUM

If you fear persecution because of your race, religion, nationality, membership in a particular social group, or political opinion, you may request political asylum. If you wish to apply for political asyhim you should advise the officer who gave you this notice. You will then be given an interview with an asylum officer, to whom you can confidentially explain your reasons for not wanting to return to El Salvador. Before the interview, you may consult with someone, including a lawyer. If the asylum officer decides that you have a credible fear of persecution, you will be given a hearing before an immigration judge, who will determine whether you will be given or denied political asylum. Even if the asylum officer decides that you do not have a credible fear of persecution, you can request that an immigration judge review that decision. If you are found to have a credible fear of persecution, you will have some additional rights that are listed below.

COMMUNICATION WITH CONSUL

You may talk to the consular or diplomatic officer of your country. If you wish to do so, your attorney or the officer who gave you this notice may be able to help you get in touch with the proper person.

ADDITIONAL RIGHTS OF PERSONS FOUND TO HAVE A CREDIBLE FEAR OF PERSECUTION: If you apply for asylum and are found to have a credible fear of persecution, you will have the following additional rights:

THE RIGHT TO BE REPRESENTED BY A LAWYER

If you are found to have a credible fear of persecution, you can obtain a lawyer to represent you in front of an immigration judge. The officer who gave you this notice will give you a list of attorneys who will speak to you for little or no cost.

EL AVISO *ORANTES* MODBFICADO

Nornbre del Extraniero **A-**

NOTIFICACIóN DE DERECHOS A LOS SALVADORENOS EN **PROCBSO DE** EXCLUSIóN ACELERADA

uisted ha sido detenido porque los funcionarios de inmigracion creen que sc encuentra ilegalmcnte en los Estados Unidos. En los Estados Unidos usted tienc dcrechos legates cuando k> detienen. Nadie puede negarle esos dcrechos. Este aviso ie explicari a usted esos derechos. Tiene quc finnar al final pare rnostrar que ha recibido una copia de este aviso y que la entiende. Lea atentamente este aviso antes de decidir lo que desea hacer. No debe firmar ninguna otra cosa hasta que haya tenido la opoitunidad de leer este aviso y que entienda sus derechos.

DERECHO A SOLICITAR ASILO POLITICO

Si teme ser perseguido por razon de su raza, religion, nacionalidad, asociactfn en un giupo social espeeffico, u opinion polftica, puede solicitar asilo politico. Si desea solicitar asilo politico, debe avisarle al funcionario que Ie entregd este aviso. Entonccs, le concederan una entrevista con un fuocionario a cargo de asilos, al cual le puede cxplicar de forma confidencial las razones por las cuales no desea tegresar a El Salvador. Previo a la entrevista, puede consuttar con alguien, inchiso un abogado. Si el funcionario a cargo de asilos decide que su tentor a ser perseguido es crefcle, se le concedera una audiencia con un juez de inmigraci6n, el cual determinarfi si se le concede 0 se le niega el asilo politico. . Incluso si el funcionario a cargo de asilos decide que su temor a ser perseguido no es crefbte, usted puede solicitar que un juez de inmigracion revise dicha decision. Si se determina que su temor a ser perseguido es creible, usted tendra algunos derechos adickmales que apwecen enumerados a continuaci6n.

COMUNICAClbN CON UN C6NSUL

Puede hablar con el funcionario consular 0 diplom&tico de su pafe. Si desea hacerlo, su abogado 0 el funcionario que le entreg6 este aviso pueden ayudarlo a comunicarse con la persona adecuada.

DERECHOS ADICIONALES DE LAS PERSONAS QUE SE DETERMINA QUE TIENEN UN TEMOR CREfBLE DE SER PERSEGUIDAS: Si usted solicita asilo y se ha determinado que tiene on temor crefble a ser perseguido, tendra los siguientes derechos adicionales:

EL DERECHO A SER REPRESENT ADO POR UN ABOGADO
Si se determina que su temor a ser perseguido es crefble, puede conseguir un abogado que lo represente frente al juez de inmigracion. El funcionario que le entrego este aviso le entregara una lista de abogados que hablaran con usted a un costo muy.bajo o sin costo alguno.

EL DERECHO A UNA AUUIENCIA FRENTE A UN JUEZ DE INMIGRAaON
Si se determina que su temor a ser perseguido es crefble, le concederan una audiencia frente a un juez de inmigraci6n que determiner^ si usted puede permanecer en los Estados Unidos o si tiene que irse. En esta audiencia puede explicarlc al juez sus razones por las cuales no quiere rcgresar a El Salvador. Durante la audiencia puede estar representado por un abogado a su

Memorandum

HQOPS 50/10.5
Date Mar 31, 1997

Subject Detained Aliens Subject To Expedited Removal

To Regional Directors
District Directors
Border Patrol Sector Chiefs
Officers in Charge (Including SPCs)
Asylum Office Directors

From Office of the Executive Associate Commissioner, Field Operations

Under expedited removal procedures that will become effective on April 1, 1997, INS will detain certain inadmissible aliens who arrive at port-of-entry (POEs). Specifically, those arriving aliens deemed inadmissible pursuant to INA sections 212(a)(6)(C) (fraud of misrepresentation) or 212(a)(7) (lack of proper documents) and who indicate an intent to apply for asylum or a fear of persecution will be detained.

Inspectors will refer these inadmissible aliens for "credible fear" interviews conducted by Asylum Officers serving at the detention facilities. The referring inspector will have already created an A-file, containing among other things a partially completed Form I-860 Notice and Order of Expedited Removal. The Detention and Deportation (D&D) officers will be able to identify an alien subject to expedited removal by the presence of the Form I-860 in the A-file.

The new law provides that the alien may consult with a person or persons of his or her choosing before the credible fear interview or any review by an Immigration Judge. Such consultation, however, shall be at no expense to the Government and shall not unreasonably delay the process. If the asylum officer determines that the alien does not have a credible fear of persecution, the alien may request that an immigration judge review that determination. This review by the judge will include an opportunity for the alien to be heard and questioned by the judge, either in person or by telephonic or video connection. The statute provides that the review by an immigration judge should be concluded as quickly as possible, usually within 24 hours; but in no case will the judge's review take place later than 7 days after the date of the asylum officer's negative credible fear determination.

1. 48 Hour Rule

As a policy matter, it has been determined that an alien subject to expedited removal should normally be permitted at least 48 continuous hours-computed from the time of arrival at the detention facility, not the POE- to consult with a person or persons of his or her choosing before the credible fear interview. The

48-hour period is waivable by the alien if he or she would like an interview earlier. The 48-hour time period may be extended by the asylum officer if the alien requests additional time, and establishes that he or she has made reasonable efforts to effect this consultation and that consultation is likely to be accomplished within the additional period, or in other unusual circumstances.

2. Placement and Access for Consultation/Telephone Use

Every effort should be made to lodge or made aliens subject to expedited to facilities where access for consultation can be facilitated. Aliens subject to expedited removal should be allowed flexibility regarding access to representatives (whether for individual consultation or group presentations), family members, or friends for consultation purposes.

Aliens should be permitted to use telephones at the detention facilities to call a representatives, friend or family member in the United States, collect or at the alien's expense - including after hours and on weekends if practicable. Because that is "consultation," not representation, a G-28 is not required from an individual whom the alien at the credible fear interview.

3. M-444/ Provided at POEs and Detention Facilities

Inspectors at POEs will provide the alien identified for a credible fear interview with a copy of the Form M-444 "Information About Credible Fear interview." Because the alien can be moved, the M-444 will also be provided at the detention facilities. Attached to the M-444 is a list of individuals and organizations who may be able to provide pro bono legal assistance to the alien. D&D officers at the detention facilities will provide the M-444 (with an attached list of local legal providers) to each alien subject to expedited removal in order to avoid the alien having a list of legal aid organizations from a different area.

Questions regarding this memorandum may be addressed to (b)(6), (b)(7)c at (202) 307-(b)(6), (b)(7)c

(b)(6), (b)(7)c
Acting Associate Commissioner

Attachment: M-444

U.S. Immigration and Customs Enforcement

Enforcement and Removal Operations

DROPPM

CHANGE NOTICE

Document Change Number: 13-02
Office of Primary Int

Approved by: (b)(6), (b)(7)c

Date Approved:

Subject: DROPPM Change Notice

Effective immediately, the following DROPPM (Detention and Removal Operations Policy and Procedures Manual) sections are canceled and archived in the ERO Resource Library:

- Chapter 11.3, (c), Removal Process: Docket Control, Initiation of Detention and Removal Actions (Issued 07/15/2003)
- Chapter 14.1, (b), Removal Process: Non-Hearing Removal Cases, General, Processing Forms (Issued 07/15/2003)

Summary:

The DROPPM procedures that are canceled and archived require the use of Form I-170, *Deportation Case Check Sheet* that was placed on the top right-hand side of the A-file for case progress tracking and management. Use of Form I-170 has become redundant and unnecessary now that the same information is currently accounted for within the ENFORCE Alien Removal Module and Electronic Travel Documents systems. Additionally, there is no legal or regulatory necessity within the Immigration and Nationality Act or Title 8, Code of Federal Regulations requiring the use of Form I-170.

This Change Notice cancels the DROPPM procedural requirement to include Form I-170 in A-files under ERO docket control and in non-hearing removal cases.

New DROPPM Language:

Chapter 11.3 (c) – None suggested. The entirety of this section is archived.

Chapter 14.1 (b) - Processing Forms. Do not, under any circumstances, issue the following forms in conjunction with a non-hearing removal case: Notice to Appear, Form I-862, Notice of Custody Determination, Form I-286 and Notice of Rights and Request for Disposition, Form I-826. Additional forms are discussed in the appropriate subsections for each type of case.

Archived DROPPM Language:

~~*Chapter 11.3 (c)* - Deportation Case Check Sheet (Form I-170). For each case placed under docket control, place a new Form I 170, Deportation Case Check Sheet, on the top of the non record side of the file (on the right). As actions listed on Form I 170 are completed, check the appropriate box and provide the date and your initials. Periodically review the I 170 to monitor progress, taking whatever steps necessary to keep the removal process on track.~~

Chapter 14.1 (b) - Processing Forms. Do not, under any circumstances, issue the following forms in conjunction with a non-hearing removal case: Notice to Appear (Form I-862), Notice of Custody Determination (Form I-286), and Notice of Rights and Request for Disposition (Form I-826)~~. Place Form I 170, Deportation Case Check Sheet, on the right side of the file to track case progress, in the same manner as a regular hearing case. Some actions on the I 170 are not required in a non hearing case. These blocks should be marked "N/A" and initialed by the officer.~~ Additional forms are discussed in the appropriate subsections for each type of case.

Please direct any inquiries about the page change or change notice process to ERO Policy at (b)(6), (b)(7)c

Chapter 14: Removal Process: Non-Hearing Removal Cases

References:

INA: 101(a)(15)(A), 217, 208, 238, 241, 250, 252

Regulations: 8 CFR 217.4, 208.31, 241.8, 250, 252.2

Other: Administrative Removal Proceedings Manual (M-430), Appendix 14-1.

Memoranda: Designation of National Security Matters (December 18, 2002), Appendix 11-5, and Guidance Governing the S Nonimmigrant Visa (December 23, 2002) Appendix 14-5.

14.1 General.

(a) Introduction. There are several categories of aliens who are not entitled to a removal hearing before an immigration judge, as provided by section 2.1 of the Act. These aliens are specifically precluded from such hearings, as well as certain forms of relief only available in Immigration Court. Once you determine that an alien who is apprehended falls within one of the classes not entitled to a hearing before an immigration judge, the removal procedures are simplified. Additionally, removal of an alien under these procedures carries the same consequences as an order issued in an immigration court. The specific classes of aliens included in this group, and the procedures to be followed, are described below.

In addition to those aliens not entitled to a removal hearing, there are many aliens who waive their right to a formal hearing, electing instead to voluntarily return to their home country. Such voluntary returns are a form of voluntary departure, not a removal, and are discussed in Chapter 13.

(b) Processing Forms. Do not, under any circumstances, issue the following forms in conjunction with a non-hearing removal case: Notice to Appear, Form I-862, Notice of Custody Determination, Form I-286, and Notice of Rights and Request for Disposition, Form I-862. ~~Place Form I-170, Deportation Case Check Sheet, on the right side of the file to track case progress, in the same manner as a regular hearing case. Some actions on the I-170 are not required in a non-hearing case. These blocks should be marked "N/A" and initialed by the officer.~~ Additional forms are discussed in the appropriate subsections for each type of case. Effective 6/3/2013 use of Form I-170 is discontinued.

(c) Asylum or Withholding of Deportation or Removal. If an alien in any of these categories indicates a fear or persecution or torture, the alien must be referred for a hearing and decision on the claim. In some cases the alien is referred directly to an immigration judge through use of the Notice of Referral to Immigration Judge, Form I-863. In other cases there is a preliminary review by an asylum officer. The following chart illustrates the action by an asylum officer or immigration judge in the various cases.

DECISIONS RELATING TO ASYLUM/WITHHOLDING OF DEPORTATION OR REMOVAL

Type of Case Alien

Action by Asylum Officer

Action by Immigtration Judge

VWPP (at entry or after)

None

Decision on Asylum or Withholding

Crewman

None

Decision on Asylum or Withholding

Stowaway

Credible Fear Decision

Full Consideration of Asylum or Withholding if Credible Fear Found; Review of Negative Credible Fear if Requested

"S" Immigrant

None

Decision on Asylum or Withholding

Reinstatement of Prior Order

Ressonable Fear Decision Relating to Withholding or Deferral Only. *

Full Consideration of Asylum or Withholding if Credible Fear Found; Review of Negative Decision if Requested

Administrative Deportation under 238(b) INA (See 14.7 of this Chapter for a discussion of Administrative Deportation

Reasonable Fear Decision Relating to Withholding or Deferral Only. *

Full Consideration of Asylum or Withholding if Credible Fear Found; Review of Negative Decision if Requested

* Under sections 238(b)(5) and 241(a)(5) of the Act, aliens who meet the criteria to be placed in these proceedings are statutorily ineligible for discretionary relief. Asylum is discretionary but withholding or deferral of deportation or removal is mandatory if the alien meets the criteria. See Chapter 17 of this Manual for further discussion of withholding of removal.

14.2 Visa Waiver Program.

The Visa Waiver program is discussed in depth in Chapter 15.7 of the Inspector's Field Manual. Refer to this link to become familiar with the program and procedures.

(a) General. An alien admitted under the Visa Waiver Pilot Program (section 217 of the Act) who violates status or stays beyond the 90-day admission period is not eligible for a removal hearing, having 'waived' that right upon signing the Form I-94W. These aliens may request an asylum hearing, however. If there is no asylum claim or if asylum is denied, removal may proceed. The order of removal is in the form of a letter from the district director, advising the alien of the determination concerning the violation and ordering removal from the U.S.

(b) Procedure. Upon encountering a visa waiver violator case, the deportation officer may be faced with a variety of unique circumstances. Though evidence of the arrival carrier may exist in the file, certain factors may cause some carriers to refuse assistance in completing the removal, depending upon the carrier/transportation line responsible for the alien's arrival in the US, whether the alien was apprehended at entry and ordered removed, or whether the alien was admitted (legally or fraudulently) and has remained in the US for some period of time. Most unique circumstances involve aliens in violation of the VWPP and apprehended in the interior by Investigations or through the Institutional Removal program. Ensure that the case is entered into DACS as case category 10, and that the decision code is 0.

(1) VWPP Refusals. Arriving aliens refused admission may become part of the detained docket due to criminal prosecution or asylum screening. Ensure that these matters are complete and closed and that the file is complete, as outlined in Chapter 15.7(g) of the Inspector's Field Manual. Generally, such cases are easily processed. In cases of criminal aliens, post certified copies of the conviction documents to the A-file, annotate the appropriate criminal violation codes in the CRIM screens of DACS, and follow the removal procedures discussed in Chapter 16.

(2) VWPP Violators. Enforcement activity may result in the apprehension of a VWPP violator subsequent to admission. Generally, Investigations prepares the case, including the Order of Removal and Warrant of Removal. If not already part of the file, the deportation officer will prepare a notice of intent, to be served on the subject, and an order and warrant. Examples are included at Appendix 14.2. These cases may present some unique deportation/removal challenges. As noted previously, ensure that pending criminal matters and litigation are complete and made a part of the A-file. Make effort to effect the removal at carrier expense to the country of embarkation. This is accomplished by preparing and serving upon the carrier Form I-259 (see Chapter 16.7). In many instances, however, though arrival documentation may exist in service databases, the liable carrier denies responsibility or liability and refuses to accept the subject for removal. In such cases, it may be necessary to remove the alien at government expense, and reimbursement may be sought from the carrier through the financial branch. Also, in cases of fraudulent identity or criminals, it may not be possible to remove the subject to the last point of embarkation prior to arrival in the US. The deportation officer may find it necessary in such cases to determine the true citizenship or nationality of the alien, pursue obtaining an appropriate travel document, and proceed with the removal at government expense. Refer to Chapter 16 for more detail regarding travel documents and the removal process.

14.3 Crewmembers.

(a) General. Crewmembers apprehended for violations of status fall into four categories:

· A crewmember who has remained in the United States beyond 29 days without extension granted by the Service;

· An overstay crewmember whose vessel or aircraft has departed but who has not been paid off or discharged in accordance with section 252(a)(2) of the Act;

· A crewmember whose ship is still in port but who has engaged in activities inconsistent with the terms of the landing permit; or

· A crewmember who has been refused a landing permit or whose landing permit was revoked, but who left the vessel in violation of section 252(b) of the Act.

Regardless of the type of violation, such crewmembers are not entitled to any hearing before an immigration judge, except for the purpose of resolving an asylum claim (see the Inspector's Field Manual, Chapter 23.18, regarding asylum claims by vessel crewmembers). Crewmember cases are annotated in DACS as case category 14.

(b) Processing. Absent an asylum claim, a crewmember whose vessel remains in the U.S. may be issued a Notice of Revocation, Form I-99, and returned to the vessel for removal, in accordance with procedures described in the Inspector's Field Manual, Chapter 23.10. If the vessel or aircraft has departed the U.S., an alien crewmember may be ordered removed by issuing a Notice to Detain, Remove or Present Alien, Form I-259, to the

transportation line or agency representing the transportation line on which the alien served. In addition, if removal occurs within five years of the crewmember's landing in the United States, the carrier is liable for the costs of removal. When carrier liability exists, complete and serve a Notice to Transportation Line Regarding Alien Removal Expenses, Form I-288. Expenses billable to a carrier may be tracked and recorded on a Record of Expenses Billable to Transportation Company, Form I-380. When the transportation company agent directly provides transportation and a GTR is not issued, an explanation should be included on the I-380, block 13. Upon removal, prepare Form G-251, serving the original on the carrier or agent, retaining a copy for the file and sending the remaining copies to the regional office along with a copy of the I-380.

As with all cases, if not already accomplished, violators will be fingerprinted using Form FD-249. Unless the final disposition is reflected on the card, an R-84 must also be completed when removal is verified.

Any assigned alien file number should be entered, in ink, on the inside back cover of the alien's passport or seaman's book, along with the date and place of violation.

(c) Crewmembers Arriving Prior to April 1, 1997. An exception to the preceding discussion exists for crewmembers who landed prior to April 1, 1997. Such crewmember who is apprehended in violation of status and whose vessel has departed must be placed into removal proceedings under section 240 of the Act unless he or she is willing to depart voluntarily. Procedures for assessing carrier liability remain the same. (Refer to 8 CFR 252.2.)

(d) Joining a Vessel for Deportation or Removal. Whenever an alien crewmember is being moved to another port to join a vessel for removal, a memorandum should be attached to the transfer sheet, Form I-216, providing the name and address of the shipping company, the name of the agent with whom arrangements were made, and the office and home telephone numbers of the agent. This can avoid complications if the ship's captain has not been advised in advance of the deportation or removal plans.

(e) Non-willful Violators. See procedures described in the Inspector's Field Manual, Chapter 23.13. Control should be maintained to ensure the vessel's departure. Statistically, do not count such cases as voluntary departure grants under docket control. Report such cases only on the G-23.18, as deportable aliens located and granted voluntary departure.

(f) Special Cases-Deserters from Greek and Spanish Ships of War. Spain and Greece are the only foreign governments with whom treaties are still in effect concerning deserters from ships of war in United States ports (Article XXIV of the 1903 Treaty with Spain; Article XIII of the Convention between the United States and Greece). Although these cases will be rare, procedures for dealing with deserters from Spanish or Greek ships of war can be found at 8 CFR 252.5. See Appendix 14-3 of this manual for samples of notification of charges and findings.

(g) Carrier Fines. In cases where a carrier fails or refuses to take custody of and remove an alien crewman subsequent to the issuance of Form I-259, the deportation officer should recommend the imposition of an administrative fine, through the National Fines Office. Whether the I-259 was issued by Inspections (and the crewman absconded) or the crewman was encountered in an illegal status prior to the issuance of an I-259 is immaterial. Refer to the Inspectors Field Manual, Chapter 43, for detailed information regarding the fines process.

14.4 Stowaways.

A stowaway, whether or not landed, is not entitled to a removal hearing. Unless such case involves an asylum claim, the alien may be ordered removed by serving Forms I-259 and I-288 on the affected carrier. See 8 CFR 235.1(d)(4) and 8 CFR 241.11. Serve the alien with Form I-296, checking the second block (10 year bar). Processing asylum claims by stowaways is discussed further in the Inspector's Field Manual, Chapter 23.18. Stowaways are annotated in DACS as case category 14 (as with crewmembers).

Occasionally, you may encounter an alien who claims to be a stowaway, but cannot or will not provide information concerning the name of the vessel of arrival. Prior to April 1, 1997, such aliens could be handled in the same way as any other EWI (entry without inspection) case and placed into removal proceedings. IIRIRA, however, directs that stowaways, regardless of when encountered, are to be removed without a hearing. Such aliens may be removed by an order signed by the district director (letterhead) citing section 235(a)(2) of the Act as the authority for the action. Serve the alien with Form I-296, checking the second block (10 year bar). For additional information on stowaways see the Inspector's Field Manual, Chapter 23.8.

14.5 Nonimmigrant S-Visa Holders.

In order to receive this nonimmigrant classification, an alien must waive the right to a removal hearing. See 8 CFR 236.4 for procedures for these aliens. S-visa removal cases are annotated in DACS as case category 14 (as with crewmembers or stowaways), if the subject is in violation of status (as in having been convicted of a crime since gaining entry under an S-visa). The subject is ordered removed by the District Director and the decision Code is 7. The case is closed using Dep Cleared Stat code 6. The removal order is prepared in memorandum form, similar to that used in Visa Waiver (VWPP) cases, and an example set of forms is located in Appendix 14-4.

If you encounter the case of a detained alien for whom an S-visa is being pursued by the Service or another law enforcement agency, understand that no such alien may be removed while such a request is pending. That is to say, the removal is deferred, until a decision is rendered by headquarters. The subject, though, may remain in custody. Refer to the memorandum Guidance Governing the S Nonimmigrant Visa, dated December 23, 2002, Appendix 14-5, for an in-depth examination of this subject. For additional details regarding this subject, refer to the Special Agent's Field Manual Chapter 41.4, and the Inspector's Field Manual Chapter 15.4(s).

14.6 Section 250 Removals.

(a) General. Section 250 of the Act provides for the removal of an alien who is in distress or receiving public assistance and who desires to be removed from the United States. Such an alien may be returned to his native country, the country from which he came, the country of which he is a citizen or subject, or to any other country to which he wishes to go and which will receive him. Removal in such cases may be at government expense. In some instances, the alien's own consulate, if contacted, will arrange for removal. If the removal is at the expense of the United States Government, removal under section 250 of the Act is similar to actual deportation in that an alien so removed requires permission to reapply before he or she may be granted a visa or readmission to the United States.

(b) Application. In accordance with 8 CFR 250, an alien requesting removal under section 250 of the Act must file Form I-243, Application for Removal, with the district director. The alien shall be required to obtain a travel document if necessary to effect his removal, but if he is unable to defray the costs, they may be paid from the appropriated funds. If an applicant is suffering from any mental disability, the examining officer shall determine whether the applicant sufficiently understands the proceedings to express a desire to be removed.

(c) Decision. If the district director denies an application, there is no appeal of the decision. If the district director approves the application, Form I-202, Authorization for Removal, will be issued. When the applicant is an alien spouse, or parent, of a United States citizen who intends to accompany the applicant and is unable to pay the transportation costs, such costs may be assumed at Government expense as necessary to accomplish the removal of the applicant.

(d) Removal. If practical, removal cases may be joined to a deportation party. Care and maintenance is not provided until the applicant is actually joined to a deportation party or otherwise sent forward. When removal to Canada is authorized, consent for return to that country is obtained as in the case of a Canadian deportee, and a copy of Form I-243 furnished.

(e) Closing Actions. When the applicant has been removed, Form I-202 is endorsed by the departure port and returned to the authorizing district office. Any passport or other travel document in the possession of an alien being removed is endorsed as follows; "Rem 3/29/03 NYC sec. 250 A12 123 901". If there is a nonimmigrant visa, the endorsement is placed on the page containing the visa. The case is closed in DACS as X.

14.7 Administrative Removals.

(a) General. Administrative removal of criminal aliens, i.e., removal without formal hearing before an immigration judge, is provided by section 238(b) of the Act in the case of certain aliens. The policies and procedures for such administrative removals are discussed in detail in the Administrative Removal Handbook M-430, Appendix 14-1.

14.8 Reinstatement of Final Orders.

(a) Applicability. Section 241(a)(5) of the Act provides that the Attorney General will reinstate (without referral to an immigration court) a final order against an alien who illegally reenters the United States after being deported, excluded, or removed from the United States under a final order, or who departed voluntarily while under a final order of deportation, exclusion, or removal ("self deports"), regardless of the date that the previous order was entered. Thus, an alien who was deported five years ago, but who illegally reenters the United States today, is subject to reinstatement of the final order. Generally, this provision is not limited to orders of removal entered after the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, within which this provision was created, (the 9th and 6th Circuit Courts of Appeal have ruled that the underlying illegal reentry must have occurred after April 1, 1997 in order for this provision of law to apply).

Reinstatement is not applicable, however, to an alien who was granted voluntary departure by an immigration judge and left the United States in compliance with the terms of that grant. In such instances, the alien was not subject to a final order of deportation or removal.

Reinstatement does not preclude criminal prosecution in accordance with local procedures and guidelines. However, in order to properly preserve a case for criminal prosecution, the processing officer must advise an alien of his or her Miranda Rights pursuant to Miranda v. State of Arizona, 384 U.S. 436 (1966) prior to taking the alien's sworn statement.

Much like expedited removal under Section 235(b)(1) of the Act, reinstatement of a final order is a significant expansion in authority for immigration officers to remove aliens from the United States without referral to an immigration judge. It is particularly important in this context to ensure that officers follow all applicable procedures which ensure that aliens understand the reinstatement process, and that officers carefully evaluate all available evidence before determining that an alien was previously removed and illegally reentered the United States.

(b) Procedure. Refer additionally to 8 CFR 241.8.

(1) Required Elements. Before reinstating a prior order, the officer processing the case must determine:

(A) That the alien believed to have reentered illegally was previously excluded, deported, or removed from the United States. Included in this class of aliens are those who voluntarily departed the United States while subject to a final order of exclusion, deportation, or removal ("self deports"). An alien who complied with the terms of a voluntary departure order is not subject to reinstatement. If, however, the alien stayed beyond the period authorized for voluntary departure, or left of his or her own volition

while a final order was outstanding (i.e., the alien "self-deported"), the alien is subject to reinstatement.

The officer must obtain the alien's A-file or copies of the documents contained therein to verify that the alien was subject to a final order and that the previous order was executed. In uncontested cases, suitable database printouts to document these facts will suffice.

(B) That the alien believed to have reentered illegally is the same alien as the one previously removed. If, during questioning, the alien admits to having been previously excluded, deported or removed, or to having self-deported by leaving after the expiration of a voluntary departure period with an alternate order, the Form I-213 and the sworn statement must so indicate. If a record check or fingerprint hit reveals such prior adverse action, that information must be included in the A-file. The alien should be questioned and confronted with any relevant adverse information from the A-file, record check or fingerprint hit, and such information must be included in the I-213 and sworn statement, if applicable.

If the alien disputes the fact that he or she was previously removed, a comparison of the alien's fingerprints with those in the A-file documenting the previous removal must be completed to document positively the alien's identity. The fingerprint comparison must be completed by a locally available expert, or by the Forensic Document Laboratory via Photophone. In the absence of fingerprints in a disputed case, the alien shall not be removed pursuant to this paragraph.

(C) That the alien did in fact illegally reenter the United States. In making this determination, the officer shall consider all relevant evidence, including statements made by the alien and any evidence in the alien's possession. The officer shall attempt to verify an alien's claim, if any, that he or she was lawfully admitted, which shall include a check of service data systems available to the officer.

If the alien has a former order of deportation or removal that the officer finds should be reinstated, but is in possession of an apparently valid visa permitting him or her to enter the United States, the officer should determine whether the alien applied for and was granted permission to reenter the United States from the Attorney General. If the alien did not apply for and receive permission to reenter, he or she did illegally reenter the United States despite having the allegedly valid visa and is subject to reinstatement.

In any case in which the officer is not able to satisfactorily establish the preceding facts, the previous order cannot be reinstated, and the alien must be processed for removal through other applicable procedures, such as administrative removal under section 238 of the Act, or removal proceedings before an immigration judge under section 240 of the Act.

(2) Record of Sworn Statement. In all cases in which an order may be reinstated, the officer must create a record of sworn statement. The record of sworn statement will document admissions, if any, relevant to determining whether the alien is subject to

reinstatement, and whether the alien expressed a fear of persecution or torture if returned on the reinstated order. The basic Record of Sworn Statement is recorded using Form I-877.

In addition to addressing routine informational elements (identity, alienage, and the required elements listed in paragraph (b)(1) above), the sworn statement must include the following question and the alien's response thereto: "Do you have any fear of persecution or torture should you be removed from the United States?"

If the alien refuses to provide a sworn statement, the record should so indicate. An alien's refusal to execute a sworn statement does not preclude reinstatement of a prior order, provided that the record establishes that all of the required elements discussed in paragraph (b)(1) have been satisfied. If the alien refuses to give a sworn statement, the officer must record whatever information the alien orally provided that relates to reinstatement of the order or to any claim of possible persecution.

(3) Form I-871 and Notification to the Alien. Once the processing officer is satisfied that the alien has been clearly identified and is subject to the reinstatement provision (and the sworn statement has been taken), the officer prepares Form I-871, Notice of Intent/ Decision to Reinstate Prior Order. The I-871 must be typed and the officer's printed name shall be legible. The processing officer completes and signs the top portion of the form, provides a copy to the alien and retains a copy for the file. The officer must read, or have read, the notice to the alien in a language the alien understands. The officer will ask the alien if he or she has any evidence to present to rebut the determination that the alien illegally reentered the United States after deportation or removal. The alien has the right to review the evidence that the officer intends to rely on in making the final determination. The alien signs the second box of the file copy and indicates whether he or she intends to rebut the officer's determination. In the event that the alien declines to sign the form, the officer shall note the block that a copy of the form was provided, but that the alien declined to acknowledge receipt or provide any response. If the alien provides a response, the officer shall review the information provided and promptly determine whether reevaluation of the decision or further investigation is warranted. If not, or if no additional information is provided, the officer shall proceed with reinstatement based on the information already available.

(4) Reinstatement of a Final Order. If, after considering the alien's response, the processing officer determines that the alien's prior order should be reinstated, the officer shall create the Record of Proceedings (ROP) for presentation to the deciding official. The ROP shall contain the following:

- Form I-871,
- the prior final order and executed warrant of removal (Form I-205 or I-296),
- Warning to Alien Ordered Removed or Deported (Form I-294),

· the sworn statement or the alien's declination to provide such statement, or officer's attestation of the alien's refusal,

· any evidence provided by the alien,

· any additional documentation that rebuts the alien's assertion that reinstatement was improper,

· fingerprint match, if required, and

· Record of Deportable Alien (Form I- 213).

The officer presents the Form I-871 and all relevant evidence to a deciding officer for review and signature at the bottom of the form. A deciding officer is any officer authorized to issue a Notice to Appear, as listed in 8 CFR 239.1.

After the deciding officer signs the Form I-871 reinstating the prior order, the officer issues a new Warrant of Removal, Form I-205, in accordance with 8 CFR 241.2 . The officer indicates on the I-205, in the section reserved for provisions of law, that removal is pursuant to section 241(a)(5) of the Act, as amended by IIRIRA.

(c) Aliens Expressing a Fear of Persecution or Torture. If the alien expresses a fear of persecution or torture, the alien must be referred to an asylum officer, who determines whether the alien has a reasonable fear of persecution or torture. The fact that an alien will be referred to an asylum officer does not preclude the completion of the reinstatement order. If the alien is subject to reinstatement of the prior order, the reinstatement processing should be finished before forwarding the case to an asylum officer. In referring the alien to the asylum officer, the processing officer provides the alien with Form I-589 and the appropriate list of providers of free legal services. If the asylum officer determines that the alien has a reasonable fear, the asylum officer will refer the case to an immigration judge for a determination only of withholding of removal under section 241(b)(3) of the Act or Article 3 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment of Punishment (the Torture Convention), or for deferral of removal. Either party may appeal the decision of the immigration judge to the Board of Immigration Appeals.

If the asylum officer finds that the alien does not have a reasonable fear, the alien will have an opportunity for an expeditious review by an immigration judge of such negative finding. If the immigration judge upholds the asylum officer's decision, the alien may be removed without further review. If the immigration judge reverses the asylum officer's decision, the immigration judge will make a determination only to withholding or deferral of removal. Either party may appeal this decision of the immigration judge to the Board of Immigration Appeals.

Withholding and deferral of removal are country specific. In some cases, application may be made for removal to an alternate country, based upon the request of the alien or

pursuant to arrangements made by the Service. Form I-241 is used in these circumstances. In such cases, the reinstated order may be executed if the alien is accepted by, and is being removed to, such alternate country.

(d) Criminal Prosecution. Whenever possible, reinstatement processing should be completed before referring an alien for criminal prosecution. Aliens whose reinstatement processing is completed prior to criminal prosecution will be removed more quickly after any criminal sentence is served. Upon remanding the subject to the custody of another law enforcement agency, the officer must lodge a detainer, Form I-247, and note on the form that a final order has been entered. Officers must be aware that, once the Order of Removal is final, the detention of the alien is permissible only to the extent described as the Removal Period in section 241(a)(6) of the Act, for the purpose of executing the Warrant of Removal. For terrorist cases, see Chapter 14.10.

(e) Execution of Reinstated Final Order. At the time of removal, the officer executing the reinstated final order must photograph the alien and obtain a classifiable rolled print of the alien's right index finger on Form I-205. If a classifiable print of the right index finger cannot be obtained, a print of another finger may be used (annotation of such must be made as appropriate). The alien and the officer taking the print must sign in the spaces provided.

Once the final order has been executed, it is attached to a copy of the set of previously executed documents establishing the prior departure, exclusion, deportation, or removal. The officer executing the reinstated order must also serve the alien with a notice of penalties on Form I-294. The penalty period commences on the date the reinstated order is executed. Since the instant removal may be the alien's second (or subsequent) removal, the alien is subject to the 20-year bar; unless the alien is also an aggravated felon, in which case the lifetime bar applies. (Note that the alien being removed need not have been found deportable as an aggravated felon for the lifetime bar to apply, only to have been convicted of an aggravated felony.) The officer routes Form I-205 and a copy of Form I-294 to the A-file. A comparison of the photographs and fingerprints between the original I-205 and the second I-205 executed at the time of reinstatement may prove essential in the event the reinstatement order is questioned at a later date.

(f) Case Tracking Using the Deportable Alien Control System (DACS). As with all removal cases, the progress and completion of these cases must be documented electronically by use of DACS. The basic instructions for entering, managing and closing cases in DACS, contained in the latest version of the DACS Manual, are valid, except for certain additional or revised codes. Use the final charge from the order that is being reinstated on the alien as the initial and final charge codes. Place these cases in (b)(7)e (b)(7)e to indicate that the previous final order has been reinstated and, once they are removed again, close the case using (b)(7)e (b)(7)e (if the order being reinstated was an order of deportation or removal based on deportability) (b)(7)e (if the order being reinstated was an order of exclusion or removal based on inadmissibility).

(g) Authority. Aliens taken into custody pursuant to this section are detained as warrantless arrests in accordance with section 287.2 of the INA. No Warrant of Arrest (Form I-200) is required. Form I-200 is completed for detention pursuant to INA 236, rather than detention pursuant to INA 241. The previously executed Warrant of Removal, Form I-205, serves as authority to detain such aliens.

14.9 Judicial Orders.

(a) General. Pursuant to section 238(c) of the Act, certain aliens may become subject to removal pursuant to a judicial order issued by a judge of a United States district court. Of note, it is relatively rare to encounter a case that involves such a judicial order. Several offices of the United States Attorney prefer not to seek such judicial orders, and instead prefer to rely upon the agency to utilize administrative forms of removal, such as reinstatement (for previously removed subjects) and administrative removal of aggravated felons.

(b) Authority. Authority for judicial orders is outlined in section 238(c)(1) of the Act.

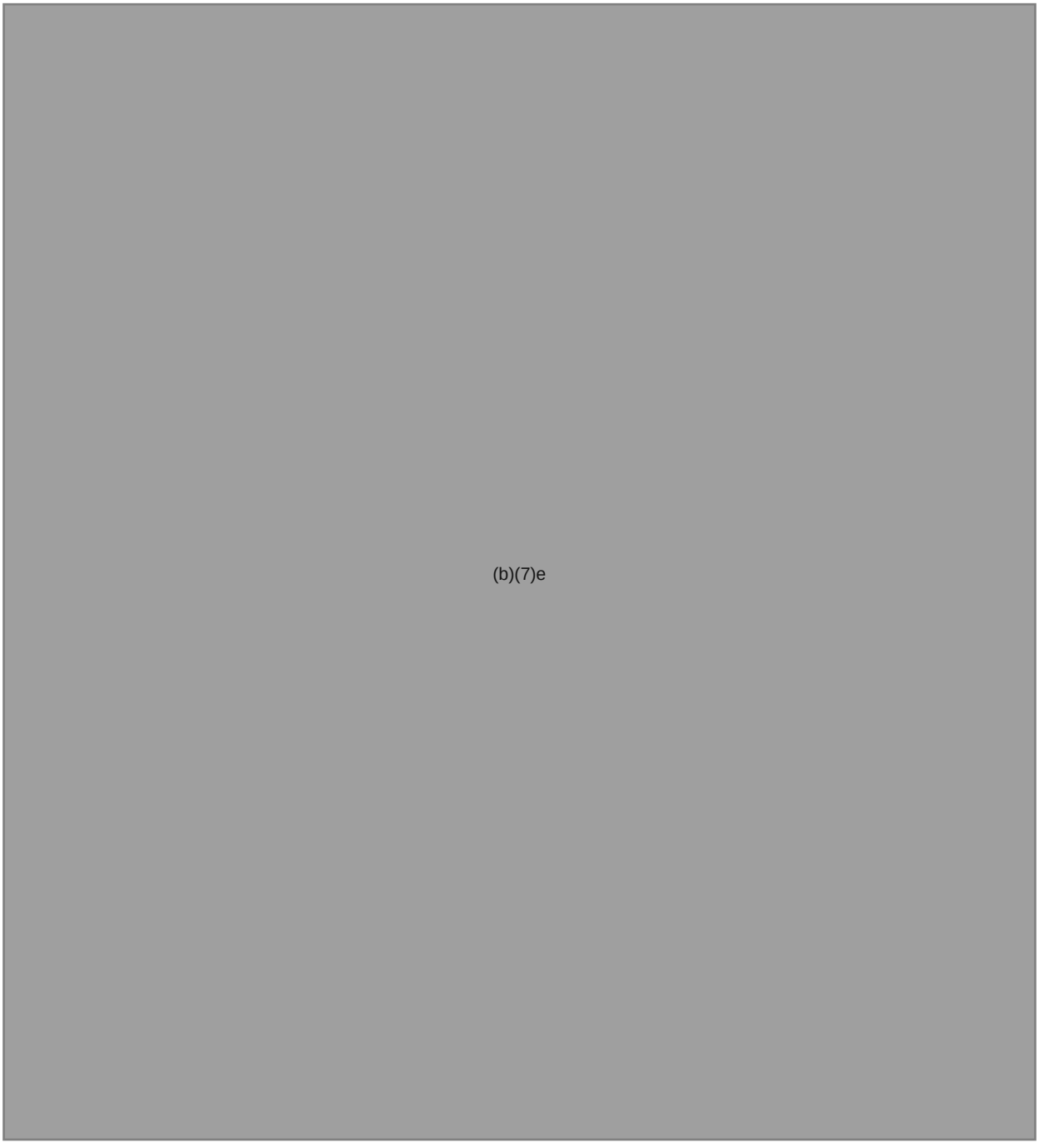
(c) Procedure. The procedure for obtaining such judicial order is outlined in section 238(c)(2) of the Act. Of note, it is incumbent upon the appropriate United States Attorney of the particular district to initiate such action, with the concurrence of the Commissioner. With regard to the Deportable Alien Control System (DACS), the case category code (CASS) for a judicial order is (b)(7)e Officers must determine whether the alien is present in the United States or arriving, and utilize the appropriate case category codes. However, with the submenu of decision codes (DEC), the appropriate decision code for such an order is 2.

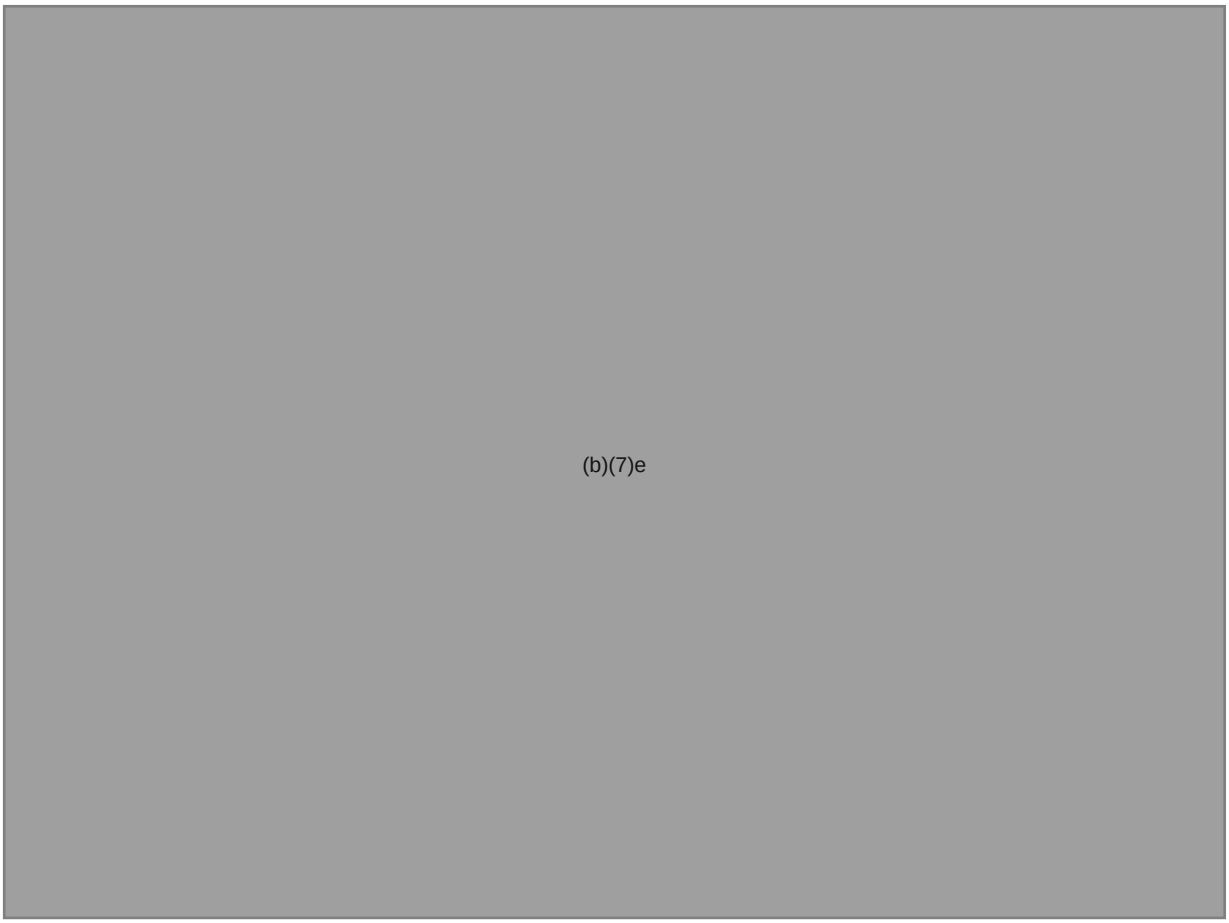
(d) Notice. In accordance with section 238(c)(3)(B), the Commissioner will provide written notice to the alien of the order of removal, and will designate the alien's country of choice for removal, and/or any alternate country, pursuant to section 241(b). The determination of country of removal may or may not be contained in the judicial order. If it is not explicitly stated in the order, the officer must make a determination. Based upon a review of the file, interviews with the alien, and other pertinent information (such as likelihood of removal, alien's ties to another country), the officer will make the effort to effect removal to the desired country. There are some cases, usually special interest cases, wherein the alien will be removed to a country other than that of the alien's birth. The notice is accomplished by completing and serving Form I-294.

(e) Execution of Removal Order. Further processing and removal arrangements are conducted in the same manner as applies to Orders of Removal pursuant to proceedings conducted under relevant sections of the Act. For details regarding the removal process, refer to Chapters 15 and 16. In the case of aliens present in the United States, prepare and serve Forms I-205 and I-294. In the case of arriving aliens, Form I-296 should be used as appropriate. All documentation of the judicial proceedings, order, any appeals taken and decided, and government documents relating to the execution of the removal order must be made a part of the alien's A-file.

(f) Denial of Judicial Order. In any case in which a judicial order of removal was sought by the particular United States Attorney and subsequently denied, the authority and discretion of the Attorney General to institute removal proceedings pursuant to section 240 of the Act is not precluded, and proceedings may be initiated and pursued upon the same ground of deportability or removal or upon any other applicable ground of inadmissibility, deportability or removability provided under section 212(a) or section 237(a).

14.10 Alien Terrorist Removal Procedures.





14.11 Expedited Removal.

Refer to the Inspector's Field Manual, Chapter 17.15, for a discussion of the expedited removal process. While expedited removal is generally accomplished by Inspections, due to some delays, credible fear determinations, or travel document issues, there may arise some instances where the case becomes docketed with Detention and Removal. Further removal processing details are contained in Chapter 16 of this manual. Expedited removal cases are annotated in DACS as either 8F (Expedited Removal), 8G (Credible Fear Referral), 8H (Status Claim Referral), or 8I (Absconder).

Administrative Removal Proceedings Manual (M-430, Rev. June 4, 1999)

Detention and Deportation Officers' Field Manual
Appendix 14-1

Table of Contents

PREFACE

The law authorizes alternative administrative removal proceedings without hearings before immigration judges for serious criminal offenders. These proceedings apply to certain aliens who have been convicted of one or more aggravated felonies. While incorporating both procedural safeguards and effective quality control methods, the proceedings simplify and expedite removal from the United States. This manual is a ready reference explaining how to do cases under the alternative proceedings. The information in the manual is current as of the date shown on the cover but is subject to change.

I. INTRODUCTION

A. Purpose

This manual is a comprehensive guide for Immigration and Naturalization Service (INS) employees in the processing and adjudication of administrative removal cases. These cases relate to certain aliens who have been convicted of one or more aggravated felonies and who are not lawful permanent residents of the United States. Aliens with conditional permanent resident status as the spouses, sons, and daughters of U.S. citizens or lawful permanent residents are not lawful permanent residents for this purpose.

The manual describes in detail the applicable law, regulations, and procedures. The purpose of the manual is to serve as a reference for and assist in training INS officers and support personnel who participate in the administrative removal process. The manual supplements the regulations in providing for a process which works efficiently while respecting procedural due process and fitting sensibly within the usual routine of investigating cases and initiating removal proceedings.

Previously, most traditional removal cases required hearings before immigration judges (IJ's). As part of the continuing efforts to streamline removal procedures, INS officers may issue final removal orders in administrative removal cases. In view of the seriousness of this responsibility, case processing and adjudication require careful, effective quality control measures. The manual is a major component of the administrative removal quality assurance program.

The manual gives step-by-step explanations on the methods necessary to ensure compilation of thorough records of proceeding (ROP's), adherence to administrative due process and appropriate procedures, and preparation of consistent, legally sufficient decisions. The manual emphasizes the need to create and maintain, on a permanent basis, ROP's that are able to withstand legal challenges or support later proceedings relating to criminal reentry after removal. Following the instructions outlined in the manual will facilitate the uniform and fair adjudication of cases and, when appropriate, the issuance of even-handed, high quality, and legally defensible supplemental written decisions.

The INS developed this manual in close consultation with its Office of the General Counsel using extensive legal materials furnished by that Office. For example, that Office provided the guidance on creating and maintaining the ROP, judicial review, and legal issues, as well as furnishing all legal citations. Legal questions which are not answered in the manual may be referred to an INS attorney.

B. Historical Background

Since 1986, as part of a general trend in the law toward stricter criminal provisions, Congress has made numerous amendments to the Immigration and Nationality Act (INA) affecting removal of criminal aliens from the United States. For example, the comprehensive Immigration Reform and Control Act of 1986 (IRCA) amended the INA to require initiation of

removal proceedings "as expeditiously as possible after conviction" of an offense making an alien subject to removal. The text of IRCA itself declared, "[i]t is the sense of the Congress that...the immigration laws of the United States should be enforced vigorously and uniformly."

Legislative changes starting in 1988 introduced the term "aggravated felony" to immigration law and emphasized removal of aliens convicted of crimes fitting its definition. Examples of crimes now defined as aggravated felonies are murder, rape, sexual abuse of minors, child pornography, certain crimes of violence, and illicit trafficking in controlled substances, firearms, and destructive devices. Current law provides for mandatory detention of aliens in removal proceedings who have been convicted of these crimes.

In 1994, several measures to improve criminal alien removal were signed into law. These included expedited administrative deportation without a hearing before an immigration judge (IJ) for an alien convicted of an aggravated felony who is not a lawful permanent resident and who is not eligible for any relief from removal. Through this legislation, Congress provided for a more streamlined removal process, incorporating statutorily provided procedural safeguards, to simplify and expedite removal in certain cases involving serious criminal offenses.

More recently, the trend towards expediting removal of criminal aliens through statutory change engendered the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the subsequent Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The latter made major changes such as replacing the separate exclusion and deportation processes with a single removal proceeding for deciding both inadmissibility and deportability.

AEDPA made several changes affecting the administrative deportation procedure for aliens convicted of aggravated felonies. IIRIRA modified or eliminated some of these changes. The current expedited procedure, now called administrative removal, also includes aliens who have lawful permanent residence on a conditional basis as the spouses, sons, and daughters of U.S. citizens and lawful permanent residents. Another change makes aliens subject to this procedure ineligible for any discretionary relief from removal.

However, the law requires withholding of removal to a country where the alien's life or freedom would be threatened in the case of an alien convicted of an aggravated felony or felonies for which the alien has been sentenced to an aggregate term of imprisonment of less than five years, unless the crime is determined to be a particularly serious crime. In addition, regulations that became effective on March 22, 1999 prohibit the removal of an alien to a country where he or she would be tortured regardless of any criminal convictions or background the alien may have. The regulations establish a special screening mechanism, with referral of cases that may trigger either of these provisions to an IJ for adjudication.

C. Legal Authority For Administrative Removal

The Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA), Public Law 103-322, was enacted September 13, 1994 and became effective September 14, 1994. Section 130004 of VCCLEA amended the Immigration and Nationality Act (INA) to eliminate

administrative hearings before immigration judges (IJ's) for certain criminal aliens. Section 130004 also amended the INA to limit judicial review in these cases.

The Immigration and Nationality Technical Corrections Act of 1994 (INTCA), Public Law 103-416, enacted October 25, 1994, made minor technical changes to these statutory provisions. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Public Law 104-132, enacted April 24, 1996, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law 104-208, enacted September 30, 1996, further amended these provisions.

Current section 238(b) of the INA authorizes, under regulations prescribed by the Attorney General, administrative removal proceedings without a hearing before an IJ to determine deportability under section 237(a)(2)(A)(iii) of the INA and to issue a removal order. Section 237(a)(2)(A)(iii) relates to conviction of an aggravated felony, as defined in section 101(a)(43) of the INA.

Section 238(b) of the INA requires that, when proceedings under that section of law begin, the alien must not have been lawfully admitted for permanent residence. Conditional permanent residents under section 216 of the INA are not lawful permanent residents for purposes of administrative removal proceedings under section 238(b). Section 216 relates to certain spouses, sons, and daughters of U.S. citizens and lawful permanent resident aliens.

Section 238(b)(5) of the INA states that no alien subject to these proceedings is eligible for any relief from removal. Section 241(b)(3) of the INA, however, requires withholding of removal to a country where the alien's life or freedom would be threatened. This provision, however, does not apply if the alien is subject to certain bars to withholding of removal including, among other grounds, conviction of a particularly serious crime. An alien is considered to have been convicted of a particularly serious crime if the alien has been sentenced to an aggregate term of imprisonment of five or more years for an aggravated felony or felonies, not taking into account any suspension of imposition or execution of the sentence. An aggravated felony for which the alien has been sentenced to an aggregate term of imprisonment of less than five years may still constitute a particularly serious crime, depending on the crime.

On October 21, 1998, the President signed into law the Foreign Affairs Reform and Restructuring Act of 1998, Public Law 105-277. That legislation mandates promulgation of regulations to implement U.S. obligations under Article 3 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT). Article 3 prohibits the removal of any person to a country where he or she would be tortured, with no exceptions for persons with criminal or other background. Neither section 241(b)(3) nor Article 3 of the CAT are subject to the section 238(b)(5) prohibition on relief for aliens in these proceedings. As a legal matter, neither of these provisions constitutes relief from removal because they are merely restrictions on the place to which an alien may be removed and do not constitute affirmative permission to remain in the United States.

As reflected in the applicable regulations at 8 CFR 238.1(b)(1)(iv), by operation of section 238(c) of the INA, even aliens who entered without inspection may be removed through

administrative removal proceedings. Section 238(b)(3) of the INA provides that a removal order issued under section 238(b) of the INA may not be executed for 14 calendar days, unless the alien waives the 14-day period.

Section 238(b)(4) of the INA lists procedural safeguards the Attorney General must afford the alien. These include reasonable notice of the "charges" and of the opportunity to inspect the evidence and rebut the "charges," as well as the actual reasonable opportunity to inspect the evidence and rebut the "charges." A determination must be made for the record that the individual upon whom the notice is served is, in fact, the alien named in the notice. The alien must also be given the privilege of being represented, at no expense to the Government, by authorized counsel of his or her own choosing. Further, a record must be maintained for judicial review. Finally, the same person cannot issue the charges and make the decision to issue the final removal order.

D. The Regulations Implementing Administrative Removal

The administrative removal regulations were originally published on August 24, 1995 with an effective date of September 25, 1995. On March 6, 1997, the regulations were revised to conform with statutory changes, became effective April 1, 1997, and were published in 8 CFR 238.1. Further important regulatory amendments were published on February 19, 1999 and became effective on March 22, 1999. 64 FR 8478 (1999).

These regulations authorize a Deciding Service Officer (DSO) to issue a Final Administrative Removal Order under section 238(b) of the Immigration and Nationality Act (INA) on Form I-851A. They implement the administrative removal process described in this manual. The process begins when an Issuing Service Officer (ISO) serves a charging document called a Notice of Intent to Issue a Final Administrative Removal Order (NOI) on Form I-851.

A DSO may be a district director, a chief patrol agent, or that official's designated representative. The ISO may be any Immigration and Naturalization Service (INS) officer listed in 8 CFR 239.1 as authorized to issue a Notice to Appear to begin removal proceedings before an immigration judge (IJ) under section 240 of the INA. In accordance with the statute, the regulations state that the DSO and the ISO cannot be the same person.

The regulations incorporate all statutorily required procedural safeguards and demand clear, convincing, and unequivocal evidence in support of the deportability charge. Additionally, the regulations provide for either verbal explanation or written translation of the NOI in the alien's native language or a language the alien understands, and require that a list of available free legal services be provided the alien.

The regulations also provide that the NOI must inform the alien that he or she may request withholding of removal to a particular country if he or she fears persecution or torture there. If the alien requests withholding of removal, he or she is referred, upon issuance of a Final Administrative Removal Order, to an asylum officer for a screening process to determine whether the alien has a "reasonable fear" of persecution or torture under 8 CFR 208.31. If the alien passes the screening process, he or she is referred to an IJ for an adjudication of whether

the alien can be returned to the country in question. In addition, the alien may request IJ review of a negative screening determination by an asylum officer.

The regulations provide for termination of proceedings under section 238(b) of the INA when the DSO finds the alien not amenable to administrative removal. If appropriate, the INS may then begin removal proceedings before an IJ.

The regulations include, by operation of section 238(c) of the INA, among those persons subject to administrative removal proceedings, aliens convicted of aggravated felonies who have not been admitted or paroled into the United States. Section 238(c) of the INA states that "(a)n alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States." Therefore, as reflected in the applicable regulations at 8 CFR 238.1(b)(1)(iv), even aliens who entered without inspection may be removed through administrative removal proceedings.

Neither the statute nor the regulations provide for appeal to the Board of Immigration Appeals (BIA) of a DSO's decision entering a Final Administrative Removal Order. In accordance with the law, the regulations require that a record of proceeding (ROP) be maintained "for judicial review...sought by any petition for review."

An alien convicted of an aggravated felony who is subject to administrative removal proceedings is subject to the same detention requirements as any other alien convicted of an aggravated felony. The regulations specify that the INS decision concerning custody or bond is not administratively appealable during the administrative removal process. Since IJ's do not take part in this process, they may not consider or rehear the INS custody or bond decision. The alien's remedy is to file a habeas corpus petition in Federal District Court.

II. OVERVIEW

A. Criteria

The administrative removal process relates to an alien who is not a lawful permanent resident when the process begins and who has a final conviction for an aggravated felony. Before starting this process, the officer encountering the alien must consider the following factors:

(1) Alienage. At the outset, there must be a determination of alienage. The investigation must disclose that there is clear, convincing, and unequivocal evidence that the subject is an alien, that is, neither a citizen nor a national of the United States.

(2) Immigration status (not a lawful permanent resident). The subject is not a lawful permanent resident. An alien who is a conditional permanent resident under section 216 of the Immigration and Nationality Act (INA) as the spouse, son, or daughter of a U.S. citizen or lawful permanent resident is not a lawful permanent resident for purposes of administrative removal proceedings. Immigration and Naturalization Service (INS) records must corroborate the subject's immigration status.

(3) The existence of a final conviction for an aggravated felony. Deportability based upon a conviction of an aggravated felony, as defined by section 101(a)(43) of the Immigration and Nationality Act (INA), must be established. The public record must be demonstrative of a final conviction for an aggravated felony in a state or Federal court.

B. Procedural Protections

An alien whose life or freedom would be threatened in a specific country or who would be tortured in that country may request withholding of removal. This can be granted under either section 241(b)(3) of the Immigration and Nationality Act (INA) or Article 3 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT).

Section 241(b)(3) requires that an alien's removal to a particular country be withheld if it is more likely than not that the alien's life or freedom would be threatened there on account of race, religion, nationality, membership in a particular social group, or political opinion. This provision, however, does not apply if the alien is subject to certain bars to withholding of removal including, among other grounds, conviction of a particularly serious crime.

An alien is considered to have been convicted of a particularly serious crime if the alien has been sentenced to an aggregate term of imprisonment of five or more years for an aggravated felony or felonies, not taking into account any suspension of imposition or execution of the sentence. An aggravated felony for which the alien has been sentenced to an aggregate term of imprisonment of less than five years may still constitute a particularly serious crime, depending on the crime.

Article 3 of the CAT, as implemented by regulations, creates an additional type of withholding of removal. It prohibits removal of any alien, regardless of any criminal background, to a country where the alien is more likely than not to be tortured. Article 3 is broader than section 241(b)(3) in that it contains no criminal bars to protection and does not require that the torture be on account of any specific reason. It is narrower in that torture is defined narrowly and does not include all types of harm that might constitute persecution.

An alien in administrative removal proceedings may request withholding of removal in his or her response to the Notice of Intent to Issue a Final Administrative Removal Order (NOI). A request for withholding of removal is the mechanism to seek protection from removal to a particular country under either section 241(b)(3) of the INA, based on a fear of persecution, or under Article 3 of the CAT, based on a fear of torture.

If the alien requests withholding of removal in his or her response to the NOI, the alien will, upon issuance of a Final Administrative Removal Order, be referred to an asylum officer. The asylum officer will conduct a screening process to determine whether the alien has a "reasonable fear" of persecution or torture under 8 CFR 208.31. If the asylum officer finds that the alien meets this standard, the case is referred to an immigration judge (IJ) for a withholding determination. If the asylum officer determines that the alien does not meet this standard, the alien may request IJ review of the screening determination only.

If the IJ agrees with the asylum officer's negative reasonable fear finding or if the alien does not request review, the alien may be removed from the United States. If the IJ determines that the alien has a reasonable fear of persecution or torture, the IJ will then make a determination whether the alien is likely to be persecuted or tortured and is, therefore, entitled to withholding of removal to the country in question under either section 241(b)(3) of the INA or under Article 3 of the CAT.

The regulations implementing Article 3 of the CAT also create a separate form of protection, called deferral of removal, for aliens who would be tortured but who are subject to the bars to withholding. The determination about which form of protection will be granted under the CAT will be made by the IJ, and will not affect the procedures to be followed by INS officers in the administrative removal process. An IJ would grant deferral of removal only when an alien who has requested withholding has been found likely to be tortured but is subject to the bars to withholding. This manual, therefore, will refer generally to the process for withholding of removal under the CAT.

The administrative removal process includes the following procedural protections to the alien provided for in section 238(b) of the INA:

(1) Reasonable notice of both the removal charge and the opportunity to inspect the evidence and rebut the charge.

(2) Reasonable opportunity to inspect the evidence and rebut the charge.

(3) The privilege of being represented by counsel at no expense to the Government.

(4) A determination for the record that the individual upon whom the NOI is served is, in fact, the alien named in the NOI.

(5) A record maintained in the event of judicial review.

(6) The decision to issue a Final Administrative Removal Order not by the person who issues the NOI.

In addition to incorporating these statutorily provided procedural safeguards, the governing regulations (8 CFR 238.1) provide the following protections to the alien:

(1) The charge of deportability must be supported by clear, convincing, and unequivocal evidence.

(2) The alien must be furnished a list of available free legal services.

(3) The Immigration and Naturalization Service (INS) must provide either a written translation of the charging document (NOI) or explain the contents of the charging document in the alien's native language or in a language the alien understands.

(4) The NOI must explain to the alien that he or she may request withholding of removal to a particular country if he or she fears persecution or torture in that country.

C. Highlights Of The Process

The following are highlights of the administrative removal process which incorporates the procedural protections given the alien:

(1) The officer encountering the alien determines that the alien's case meets the criteria for administrative removal. Under these criteria, when the process begins, the individual must be an alien who is not a lawful permanent resident. An alien with conditional permanent residence as the spouse, son, or daughter of a U.S. citizen or lawful permanent resident is not a lawful permanent resident for this purpose. The individual must also have a final conviction for an aggravated felony. An alien who has been convicted of an aggravated felony and who has entered the United States without inspection may be removed through administrative removal proceedings. However, an alien who entered the United States under the Visa Waiver Pilot Program (VWPP) or who has been paroled into the United States may not be put into administrative removal proceedings.

(2) The Issuing Service Officer (ISO) prepares or requests preparation of a charging document called a Notice of Intent to Issue a Final Administrative Removal Order (NOI) on Form I-851. The ISO may be any Immigration and Naturalization Service (INS) officer listed in 8 CFR 239.1(a) as authorized to issue a Notice to Appear to start removal proceedings before an immigration judge (IJ).

(3) A determination is made for the record that the individual upon whom the notice is served is the alien named in the notice. The NOI has a statement to that effect to be signed upon service of the NOI if service is in person. However, neither service in person nor verification of the individual's identity at the time of service are required. Identity is established when the encountering officer questions the alien and conducts related record and/or document checks.

(4) The INS gives the alien reasonable notice by serving the NOI. The NOI explains the alien's opportunity to inspect the Government's evidence and rebut the deportability charge by submitting a written response within ten days, with an extension allowed under certain circumstances. The NOI further explains that, in the response to the NOI, the alien may request withholding of removal if he or she fears persecution or torture in a specific country or countries. The NOI also explains the 14-day period for seeking judicial review if the INS issues a Final Administrative Removal Order unless the alien waives this 14-day period.

(5) The alien has an opportunity to be represented at no expense to the Government. The NOI explains this opportunity and is accompanied by a list of available free legal services.

(6) The alien has a reasonable opportunity to inspect the Government's evidence and rebut the allegations and charge. The alien may submit a written response to the NOI within ten calendar days. The Deciding Service Officer (DSO) may, but is not required to, grant more time to submit a response for good cause shown in a written request the INS receives within the original ten-day period. If the written response contains a request to review the evidence, the INS will serve the alien with a copy of that evidence and give the alien an extra ten days to submit a final response. Similarly, if the DSO considers additional evidence from a source other than the alien, the INS will serve the alien with a copy of that evidence and give the alien an extra ten days to submit a final response. If service of the NOI or evidence is by mail, the alien has 13 calendar days to submit his or her response.

(7) The alien may, in writing, accept immediate issuance of a Final Administrative Removal Order. The alien may also waive the 14-day period for executing the order. The NOI includes statements the alien may sign if the alien chooses to do so.

(8) The DSO makes a decision. The DSO (not the same person who issues the NOI) decides the case. If the DSO finds deportability established by clear, convincing, and unequivocal evidence in the record of proceeding (ROP), the DSO enters a Final Administrative Removal Order. If the DSO finds the alien not amenable to removal under this process, the DSO must terminate the process. If the DSO finds the alien subject to removal in proceedings before an IJ, the DSO causes a Notice to Appear to be served on the alien to begin these proceedings.

(9) Removal must, except where statutory bars apply, be withheld to a country where an alien is more likely than not to be persecuted or tortured. An alien must be granted withholding of removal to a country where he or she is more likely than not to be persecuted as long as no statutory bars to withholding exist. Removal to a country where an alien is more likely than not to be tortured is also prohibited. There are no exceptions to the prohibition on removing an alien to a country where it is more likely than not that the alien would be tortured.

(10) An alien subject to this administrative removal process is by law ineligible for any relief from removal. This includes asylum, voluntary departure, or cancellation of removal. Withholding of removal based on a finding that an alien is more likely than not to be persecuted or tortured is not a form of relief because, as a legal matter, it does not relieve an alien from removal from the United States. It simply restricts the place to which the alien may be removed.

(11) The INS creates and maintains a permanent ROP. The INS must compile and maintain, throughout the entire process, a thorough ROP for judicial review.

(12) The INS may not execute a Final Administrative Removal Order during a 14-day period unless the alien waives this period. The statute prohibits execution of a Final Administrative Removal Order for 14 days after it is issued to give the alien an opportunity to apply for judicial review and requires that a record be maintained for that purpose.

(13) The INS determines custody status as it does in any case involving an alien convicted of an aggravated felony. The alien is subject to the same detention requirements as any other alien convicted of an aggravated felony. The INS custody decision is not administratively appealable, but the alien may seek review of such a decision in habeas corpus proceedings.

III. ENFORCEMENT PROCEDURE

A. Initiation Of The Procedure

First, the officer encountering the alien determines that the alien's case meets the criteria for administrative removal by questioning the alien. Under these criteria, when the process begins, the individual must be an alien who is not a lawful permanent resident. An alien who is a conditional permanent resident under section 216 of the Immigration and Nationality Act (INA) as the spouse, son, or daughter of a U.S. citizen or lawful permanent resident is not a lawful permanent resident for this purpose. Also, an alien who has entered the United States without inspection may be removed through administrative removal proceedings. However, an alien who entered the United States under the Visa Waiver Pilot Program (VWPP) or who has been paroled into the United States may not be put into administrative removal proceedings. Second, the individual must have a final conviction for an aggravated felony. When processing the alien for this procedure, each of these elements, as well as the alien's identity, must be established.

(1) Establishing alienage. Establishing alienage in an administrative removal proceeding is no different from establishing alienage in other immigration-related matters. An alien is any person who is not a citizen or national of the United States. In determining if a person is an alien, the officer must consider place of birth, the nationality of the person's parents at birth, and/or subsequent naturalization by the person or his or her parents. Those items which would cause an individual to be an alien must be explored during questioning. If the facts indicate that the person is an alien, they must be documented in a Record of Deportable/Inadmissible Alien (Form I-213), sworn statement, and printouts of records checks. The time and date that the alien was questioned should be noted on the Form I-213, and this evidence must be placed in the record of proceeding (ROP).

(2) Verifying immigration status (not a lawful permanent resident). In order to establish the alien's immigration status at the time the process begins, the alien must be interviewed and all pertinent Immigration and Naturalization Service (INS) records systems should be checked. All evidence collected must be placed in the ROP. The Form I-213, sworn statement, printouts of records checks, and any documentation such as an Arrival-Departure Record (Form I-94) which indicates entry as a nonimmigrant should be used as evidence that the alien is not a lawful permanent resident. Evidence of conditional permanent resident status as the spouse, son, or daughter of a U.S. citizen or lawful permanent resident is available in both INS automated record systems and hard copy A- files.

Conditional permanent residence based on a relationship to a U.S. citizen or lawful permanent resident under section 216 of the INA should not be confused with that for employment-creation entrepreneurs, spouses, and children under section 216A of the INA. Unlike section 216, which is based on a family relationship, section 216A is based on investment in a commercial enterprise. Persons who are conditional permanent residents as employment-creation entrepreneurs under section 216A may not be placed in administrative removal proceedings.

(3) Establishing conviction of an aggravated felony.

Conviction. The finality of a conviction is not affected by the pendency of post-conviction discretionary petitions, collateral attacks, or other remedies that do not constitute a direct appeal. The alien must establish that he or she has a direct appeal pending (or that the appeal time has not expired) in the criminal court proceedings in order to defend against the criminal ground of deportability alleged in the charging document.

The term conviction is defined in section 101(a)(48)(A) of the INA as, but is not limited to, a formal judgment of guilt by a court. That section of law gives the following test for establishing a conviction for immigration purposes if adjudication of guilt has been withheld: (A) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt; and (B) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. See Section VIIB of this manual for more information about section 101(a)(48)(A).

Aggravated felony. Legislation passed in 1988 defined the term aggravated felony at section 101(a)(43) of the INA. The definition was expanded in 1990, 1994, and 1996. A foreign conviction for which a term of imprisonment was completed within the previous 15 years is recognized as an aggravated felony.

Aggravated felonies are serious criminal offenses including, but not limited to, crimes such as murder, rape, sexual abuse of minors, child pornography, certain crimes of violence, and illicit trafficking in controlled substances, firearms, and destructive devices.

Immigration law was changed September 30, 1996 to provide that the term aggravated felony applies regardless of whether the conviction was before, on, or after that date. Before this change, determining whether a crime was an aggravated felony was very difficult because there were different effective dates for the various crimes. The enacting legislation provided that the term now applies regardless of when the conviction was entered to actions taken on or after September 30, 1996 and to violations on or after that date of section 276 of the INA relating to criminal reentry after removal.

Matter of Lettman, Interim Decision 3370 (BIA 1998), held that an alien convicted of an aggravated felony is subject to removal regardless of the date of the conviction provided the alien is put in proceedings on or after March 1, 1991 and the crime falls within the aggravated felony definition. In Lettman v. INS, 168 F.3d 463 (11th Cir.1999), however, the Eleventh Circuit reversed this decision. It held that an alien convicted of murder prior to the effective date of section 7344 of the Anti-Drug Abuse Act (ADAA) of 1988, Public Law 100-690, allowing for deportation of aliens convicted of aggravated felonies, could not be deported under that section. Since the Eleventh Circuit decision is currently the law within that judicial circuit, INS employees working on administrative removal cases in that jurisdiction (Alabama, Georgia, and Florida) should consult District Counsel for guidance.

Conviction record. The record of conviction must be placed in the ROP. The conviction may be proven by any of the documents or records in 8 CFR 3.41 which describes evidence accepted in proceedings before an immigration judge (IJ). [See 8 CFR 3.41 and 8 CFR 287.6(a),

which is cited in the former regulation. See also sections 240(c)(3)(B) and (C) of the INA describing types of documentary evidence constituting proof of conviction in immigration proceedings. These sections of law provide a statutory basis for 8 CFR 3.41.]

(4) Verifying identity. When questioning the alien and checking records and documents to determine whether the case meets the criteria for administrative removal, special care must be taken to verify his or her identity. The process for verifying identity in an administrative removal proceeding is, in actuality, no different from that in any other immigration-related matter. The encountering officer is responsible for making absolutely certain that all information is completely consistent and there is no question whatsoever about the identity of the person on whom the Notice of Intent to Issue a Final Administrative Removal Order (NOI) will be served.

The law specifically requires a determination for the record that the individual upon whom the NOI is served is, in fact, the alien named in the NOI. When the NOI is served in person, the INS employee or other official serving the NOI verifies the identity of the person on whom it is served and signs a statement to that effect in the Certificate of Service on the NOI. In a case where service will be by mail, the investigating officer/agent should prepare a brief written determination regarding verification of the alien's identity for inclusion in the ROP.

(5) Determining applicability of withholding of removal. Once a case meets the criteria for administrative removal proceedings under section 238(b) of the INA, no relief from removal exists. While no relief from removal is available in these proceedings, cases may arise in which removal to a particular country must be withheld under section 241(b)(3) of the INA or Article 3 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT).

Section 241(b)(3) of the INA provides for withholding of removal to a country where an alien's life or freedom would be threatened because of the alien's race, religion, nationality, membership in a particular social group, or political opinion. This does not apply "if the Attorney General decides that...the alien, having been convicted by a final judgement of a particularly serious crime, is a danger to the community." An alien sentenced to an aggregate term of imprisonment of at least five years for his or her aggravated felony conviction(s) is considered to have committed a particularly serious crime and is statutorily ineligible for withholding of removal. An alien sentenced to less than five years in the aggregate for his or her aggravated felony or felonies, however, may be entitled to withholding of removal under section 241(b)(3).

In addition, Article 3 of the CAT prohibits an alien's removal to a country where he or she is more likely than not to be tortured. There are no exceptions to this prohibition. Therefore, an alien with aggravated felony conviction(s) may be entitled to protection under Article 3, even if he or she has been sentenced to five or more years' imprisonment.

The NOI informs the alien that he or she may request withholding or deferral of removal if he or she fears persecution on account of a protected ground listed in section 241(b)(3) of the INA in a specific country or countries or if he or she fears torture in a specific country or countries. The alien may request withholding on either of these grounds:

- By checking the appropriate boxes on the back of the NOI.

- By so stating in a written response to the NOI.

If the alien requests, or indicates an intention to request, withholding of removal under section 241(b)(3) of the INA or Article 3 of the CAT, the officer encountering the alien must prepare a memorandum so stating for inclusion in the ROP. Similarly, if the alien expresses a fear of returning to a particular country or countries, the encountering officer must document that in a memorandum for the ROP. Since withholding/deferral of removal is the only remedy available in such a case, this will help ensure that the alien is not ordered removed without an opportunity to express his or her concerns. Such a memorandum will, for example, highlight the need to serve the NOI in person to make absolutely certain the alien knows that he or she may request withholding of removal.

For an alien who expresses a fear of return to a particular country or countries to be considered for withholding, he or she must affirmatively request withholding by checking the appropriate boxes on the back of the NOI or by so stating in a written response to the NOI. If INS employees working on administrative removal are concerned about whether aliens who expressed fear of return understand this requirement, the employees may contact the Asylum Pre-Screening Officer (APSO) Supervisory Asylum Officer (SAO) at the local asylum office for assistance. The APSO SAO will arrange for asylum officers to help explain the NOI and information about the reasonable fear screening process, either by telephone or in person. The APSO SAO may also assist in finding appropriate interpreters, if necessary.

The officer encountering the alien should continue his or her action to initiate administrative removal proceedings after preparing the memorandum about withholding of removal or fear of return. However, if and when a Final Administrative Removal Order is issued, the alien will be referred for a screening determination under 8 CFR 208.31 by an asylum officer if the alien has affirmatively requested withholding in one of the ways described above.

(6) Determining applicability of a waiver under section 212(h) of the INA. Pursuant to section 238(b)(5) of the INA, an alien in administrative removal proceedings under section 238(b) of the INA is ineligible to apply for any discretionary relief. However, in In re Michel, Interim Decision 3335 (BIA 1998), the Board of Immigration Appeals (BIA) held that an alien not previously admitted to the United States as a lawful permanent resident is statutorily eligible to seek a section 212(h) waiver despite an aggravated felony conviction.

Based on this decision, a Notice to Appear must be served on the alien to begin removal proceedings before an IJ if the alien appears otherwise eligible for a section 212(h) waiver. Such an alien must be immediately eligible to apply for adjustment of status to that of a lawful permanent resident under section 245 of the INA. He or she should not be put in administrative removal proceedings.

INS employees who process and adjudicate administrative removal cases must be thoroughly familiar with section 212(h) and the grounds of inadmissibility in section 212(a)(2) of

the INA that it waives. While there is no substitute for knowledge of the statutory provisions, the following simplified overview may be helpful in identifying aliens who may be eligible for section 212(h) waivers.

Section 212(h) of the INA provides for a discretionary waiver of certain criminal and related inadmissibility grounds. In general terms, they relate to conviction of crimes involving moral turpitude, multiple criminal convictions, prostitution and related vice, involvement in serious criminal activity for which immunity from prosecution is asserted, and minor controlled substance violations.

The inadmissibility grounds are set forth in section 212(a)(2)(A)(i)(I), (B), (D), and (E) of the INA and in section 212(a)(2)(A)(i)(II) of the INA as it relates to a single offense of simple possession of 30 grams or less of marijuana. Under section 212(h), these grounds may be waived in the either of the following instances:

In the case of any immigrant. If it is established that (A) the alien is inadmissible only under section 212(a)(2)(D)(i) or section 212(a)(2)(D)(ii) or the activities for which he or she is inadmissible occurred more than 15 years before applying for permanent residence; (B) the alien's admission would not be contrary to the national welfare, safety, or security; and (C) the alien has been rehabilitated. Section 212(a)(2)(D)(i) relates to prostitution, and section 212(a)(2)(D)(ii) relates to procurement of prostitutes.

In the case of an immigrant who is the spouse, parent, son, or daughter of a U.S. citizen or lawful permanent resident. If it is established that denial of admission would result in extreme hardship to the U.S. citizen or lawful permanent resident spouse, parent, son, or daughter.

A section 212(h) waiver also requires the alien to have been approved for a visa, admission to the United States, or adjustment of status to that of a lawful permanent resident. In addition, a waiver may not be granted in the following cases:

· Where the criminal activity involves murder or torture.

· Where the alien was previously admitted as a lawful permanent resident if: (A) the alien has been convicted of an aggravated felony since the date of admission; or (B) the alien has not lawfully and continuously resided in the United States for seven years immediately before the date removal proceedings begin.

B. Review And Issuance Of The Charging Document

(1) Review for legal sufficiency. Immigration and Naturalization Service (INS) attorneys are available to provide advice regarding all aspects of cases being processed under section 238(b) of the Immigration and Nationality Act (INA). Cases must be reviewed for legal sufficiency in accordance with outstanding instructions.

(2) Preparation of the charging document. The Issuing Service Officer (ISO) prepares or requests preparation of a charging document or Notice of Intent to Issue a Final Administrative

Removal Order (NOI). The ISO may be any INS officer listed in 8 CFR 239.1(a) as authorized to issue a Notice to Appear to begin removal proceedings. The NOI must set forth allegations of fact and conclusions of law establishing that the alien is not a lawful permanent resident and is deportable under section 237(a)(2)(A)(iii) of the INA relating to conviction for an aggravated felony. The charge of deportability must be supported by clear, convincing, and unequivocal evidence. (See Sections IV(C) and V(A) regarding this issue.)

C. Serving the Notice, Detainer, and Arrest Warrant

(1) Serving the Notice of Intent to Issue a Final Administrative Removal Order (NOI). Section 238(b)(4)(D) of the Immigration and Nationality Act (INA) specifically provides for service of the NOI "either in person or by mail." However, where possible, it is preferable to serve the original NOI by personal delivery upon the alien.

Unless the NOI is in, or is accompanied by a written translation in, the alien's native language or in a language the alien understands, it must be served in person. The one exception is where alternative means such as the telephone or video teleconferencing, where feasible, are used to explain the NOI to the alien in a language he or she understands. In that event, the NOI may be served by mail.

If the alien previously requested or indicated an intention to request withholding of removal based on fear of persecution or torture in the country of removal, the NOI must be served in person to ensure the alien understands that he or she may request withholding/deferral of removal. The NOI must also be served in person if the alien has expressed a fear of returning to a particular country or countries. In these cases, the one exception to personal delivery is where means such as the telephone or video teleconferencing are used to explain the necessary information to the alien.

Verify the identity of the individual upon whom the notice is served to determine whether or not that individual is, in fact, the alien named in the notice. If so, sign and date the Certificate of Service on the NOI which includes a determination for the record that the individual upon whom the notice is served is the alien named in the notice. Also write the manner of service in the space provided. In addition, sign, date, and write the manner of service on the copy the officer will return to the record of proceeding (ROP).

Read and explain the NOI to the alien in the alien's native language or in a language the alien can understand. Write the name, location, and employer of any interpreter used in the space provided on the NOI and on the copy the officer will return to the ROP. If necessary, the Issuing Service Officer (ISO) should state, on the Record of Deportable/Inadmissible Alien (Form I-213), how the ISO knows the alien understands the language in which the NOI was explained.

Provide a list of free legal services and emphasize the alien's right to obtain counsel of his or her choice.

Note the date the list was provided on Form I- 213.

· Request the alien to sign the acknowledgment of receipt of the NOI on the back of the NOI. If the alien designates a country, waives the right to contest the charge and to appeal, and does not request withholding of removal, ask the alien to state the country in the space provided on the NOI and the copy the officer will return to the ROP.

· Advise the alien that (A) he or she may check the appropriate boxes on the back of the NOI, in the section called "I Wish to Contest and/or to Request Withholding of Removal" to challenge the charge and any of the allegations, or (B) he or she may wait to respond within ten calendar days of service of the NOI.

· Advise the alien that if he or she fears persecution or torture in a specific country or countries, he or she may request withholding/deferral of removal to that country or those countries. Explain to the alien that he or she may do so by checking the appropriate boxes on the back of the NOI or by so stating in a written response to the NOI within ten calendar days of service of the NOI. Explain that, if the alien requests this form of protection, an asylum officer will interview the alien to determine whether the alien has a reasonable fear of persecution or torture. An alien will meet this standard if he or she establishes that there is a reasonable possibility that he or she would be persecuted or tortured in the country in question. Explain that this is only a screening standard. Also explain that, if the alien meets this standard, an immigration judge (IJ) will then determine eligibility for protection from removal to that country based on a finding that he or she is more likely than not to be persecuted or tortured.

· Do not stop administrative removal proceedings if the alien requests withholding of removal. Explain to the alien that he or she will be referred to an asylum officer for a reasonable fear screening interview under 8 CFR 208.31 if and when a Final Administrative Removal Order is issued.

· If the alien (A) clearly indicates that he or she understands the nature of the charges; (B) voluntarily waives the right to counsel; (C) does not wish to contest the charge and allegations; (D) does not wish to request withholding of removal; (E) wishes to be removed; and (F) wishes to waive appeal of the Final Administrative Removal Order, then reread the section on the back of the NOI called "I Do Not Wish to Contest or Request Withholding of Removal" to the alien to verify this desire. ONLY if the alien still wishes to sign this section, show him or her the place to sign in the "I Do Not Wish to Contest or Request Withholding of Removal" section of the NOI. If the alien states any reason(s), write the reason(s) down for later inclusion in the ROP under the record of proceeding cover sheet.

· If the alien indicates that he or she also wishes to waive the 14-day period for executing the Final Administrative Removal Order, verify this desire. ONLY if the alien still wishes to waive this period, show him or her the block to check in the "I Do Not Wish to Contest or Request Withholding of Removal" section of the NOI.

· Never encourage the alien to waive the right to counsel, the right to contest the charges or request withholding of removal, or any other right.

· Never encourage the alien to sign the NOI, except the acknowledgment of receipt, if the alien wishes to wait to decide what to do. Be completely neutral. Leave the original NOI with the alien and return the executed duplicate (showing any portions signed by the alien) to the ROP.

(2) Arrest warrant and detainer. A Warrant of Arrest of Alien should be issued by an authorized officer at the time of issuance of the NOI. If the alien is incarcerated, a detainer should be served on the appropriate authorities at the correctional facility. In that event, the warrant should be maintained in the file and served when the alien is released to the Immigration and Naturalization Service (INS).

(3) ROP. INS personnel who are involved in issuing and serving NOI's, detainers, and arrest warrants must ensure that the ROP contains all evidence relied on during the process. (See Section IV(F), Section V, and Section VII(B) for detailed information about the ROP).

IV. DECISION PROCEDURE

A. Deciding Service Officer's (DSO's) Duties

The DSO must consider all evidence contained in the record of proceeding (ROP), make a final decision, and issue and cause to be served upon the alien any Final Administrative Removal Order on Form I-851A. The DSO has the option, where warranted, of terminating the administrative removal proceedings instead of issuing a Final Administrative Removal Order. In that event, the DSO may, if appropriate, cause a Notice to Appear to be served on the alien to begin removal proceedings before an immigration judge (IJ).

Whatever the outcome of the case, the DSO must always make sure that complete, accurate records are maintained. This permits any reviewing court to understand all actions taken from the time of issuance and service of the Notice of Intent to Issue a Final Administrative Removal Order (NOI). on form I-851.

The DSO is responsible for the following tasks:

(1) Reviewing the file and evaluating all evidence.

(2) Receiving and considering any response the alien makes.

(3) When the alien asks to inspect the evidence the Government relies on in support of the NOI, causing photocopies of all of the evidence in question to be served on the alien and notifying the alien in writing about the time period for submitting a final response.

(4) Granting or denying any requests for additional time and causing to be served on the alien notification of any extended deadline. This notification should be in writing.

(5) Asking for additional information where warranted and causing to be served on the alien any request for evidence or notification of an interview. Such a request or notification should be in writing.

(6) Ensuring that an alien subject to these proceedings is not ordered removed without an opportunity to request withholding or deferral of removal. When an alien subject to administrative removal requests this type of protection, the alien must, upon issuance of a Final Administrative Removal Order, be referred to an asylum officer for a reasonable fear screening under 8 CFR 208.31. If an alien is found to have a reasonable fear of persecution due to a protected characteristic (race, religion, etc.) or of torture, an IJ determines the alien's eligibility for withholding, including any bars to withholding, or for deferral, which is not subject to any bars.

(7) Clearly noting in the ROP any official action taken during the process by making written notations and, if necessary, preparing a separate memorandum for the file with stated reasons.

(8) Entering into the ROP any document the alien submits. For example, if the alien at any time submits a written waiver of appeal or a copy of his or her petition for review, these items should be placed in the ROP.

(9) Marking with an exhibit number any document received into the ROP. See Section IV(F) of this manual.

(10) Preparing the supplemental decision when such a supplemental decision is necessary to support a Final Administrative Removal Order, if issued.

(11) Preparing notification of termination of the administrative removal proceedings when appropriate.

(12) Making sure that, promptly upon the Immigration and Naturalization Service's (INS') receipt of a copy of a petition for review, certified copies of the ROP are forwarded to the Office of Immigration Litigation (OIL) of the Department of Justice (DOJ). (The law prohibits execution of the removal order during a 14-day period, unless waived by the alien, to give him or her an opportunity to apply for judicial review and requires maintenance of a record for that purpose.)

B. Ensuring A Fair Process

Administrative removal proceedings must safeguard against an individual's being taken into custody and removed without a mechanism to be heard and defend his or her right to remain in the United States. The individual in question must not only be advised of a clearly defined charge and allegations to address, but must also have a fair opportunity to inspect the evidence on which the matter is to be decided and to present evidence in his or her favor.

The Deciding Service Officer (DSO) must ensure fairness in the decision process. One of the DSO's important responsibilities with respect to this matter is making every effort to ensure that any response(s) and evidence the alien submits are entered into the record of proceeding (ROP).

To facilitate this process, each Immigration and Naturalization Service (INS) office which decides administrative removal cases must establish an effective means of matching responses with ROP's. Examples may include providing to aliens unfranked envelopes stamped with the address to which any responses must be submitted and/or establishing a special Post Office box only for administrative removal cases.

Deciding which procedure to use in matching responses with ROP's is a local matter. The bottom line is that the procedure must work fairly. If the procedure in place does not result in responses being matched promptly, it must be changed.

C. Case Review

The Deciding Service Officer (DSO) fulfills an important quasi-judicial function. In reaching a decision, the DSO must very carefully review the entire record of proceeding (ROP)

to determine whether the evidence supports the charge and every allegation on the Notice of Intent to Issue a Final Administrative Removal Order (NOI). Section 238(b)(4)(E) of the Immigration and Nationality Act (INA) requires that a record be maintained for judicial review.

Alienage and deportability must be established by clear, convincing, and unequivocal evidence. The alien's not being a lawful permanent resident may be supported by a lesser proof such as written verification that Immigration and Naturalization Service (INS) records were diligently checked and disclosed no official record of that status. Other examples include an affidavit, a Record of Deportable/Inadmissible Alien (Form I-213), an Arrival-Departure Record (Form I-94), or printouts from automated systems [e.g., the Central Index System (CIS) and Nonimmigrant Information System (NIIS)]. An alien's written admission against his or her own interest is considered strong evidence. See Section III(A) of this manual about verifying alienage and immigration status.

The law requires a determination for the record that the individual upon whom the NOI is served is, in fact, the alien named in the NOI. When the NOI is served in person, the official serving the NOI signs a statement to that effect in the Certificate of Service on the NOI after verifying that individual's identity. By regulation, an executed duplicate of the NOI in the ROP must be retained as evidence that the individual upon whom the NOI is served is the alien named in the NOI. Personal verification of the individual's identity at the time of service is, however, not required as the law provides for service of the NOI by mail as well as in person. When service is by mail, other evidence in the ROP supports the required determination of identity which must be established when the encountering officer questions the alien and conducts related record and/or document checks.

This manual contains information on a variety of topics which can assist the DSO in his or her case review. A discussion of the nature and sufficiency of evidence appears in Section VII(A). Procedural matters are treated in Section VII(B). Information on convictions and aggravated felonies is in Section III(A) and Section VII(B). Information in Section I(B), (C) & (D), II(B) and (C); Section III(A) and (C); and Section IV(A), (D), (E), (G) and (L) relates to withholding of removal. Information in Section III(A)(5) explains how to make sure aliens who expressed a fear of return to a particular country or countries understand the need to ask for withholding to be considered for this protection. Eligibility for a waiver of inadmissibility under section 212(h) of the INA is covered in Section III(A)(6).

D. Alien's Response

The alien may submit a written response to the Notice of Intent to Issue a Final Administrative Removal Order (NOI) within ten calendar days from the date of service of the NOI. In some instances (explained below) the Deciding Service Officer (DSO) may grant an additional period of time.

The period for submitting any response is in reality three days longer if service of the notice is by mail. If the final day falls on a Saturday, Sunday, or legal holiday, the time is extended to the next business day.

The alien must submit any response or evidence to the Immigration and Naturalization Service (INS) office at the address shown on the NOI. That office must receive any response to the NOI or to any other notice served on the alien within the required time period.

The alien's response must state which finding(s) in the NOI he or she is challenging. The alien should support his or her response with affidavit(s), documentary information, or other evidence.

The alien may request withholding of removal in either an initial or final response. In so doing, the alien must state the country or countries in which persecution or torture is feared. Any response from the alien indicating an intention to request withholding of removal is considered to be an actual request. See information starting in Section III(A)(5) of this manual about ensuring that aliens who expressed a fear of return to any country or countries understand the requirement to request consideration for withholding to be considered for this protection.

The alien may advise the INS, within any period authorized for submitting a response, regarding his or her choice of country for removal (to be honored only to the extent allowed by law) if the INS issues a Final Administrative Removal Order. The NOI has a space in which the alien can write his or her choice of country when not contesting the allegations and charge and not requesting withholding of removal.

The alien may respond to the NOI in various ways or not respond at all. The procedures relating to different possibilities are described below. More than one of these possible situations could arise in an actual case.

(1) The alien concedes deportability. The alien may concede deportability by signing the preprinted statement on the NOI or otherwise executing such a statement.

(2) The alien does not submit a timely response and does not ask for more time to submit a response after the response time has expired. The DSO must decide the case based on the evidence already in the record of proceeding (ROP).

(3) The alien makes a timely request for more time to submit a response. The DSO may, but is not required to, grant more time to submit a response for good cause shown in a written request the INS receives within the original ten-day period. Such a request must explain specifically why an extension is necessary. Making such a request does not automatically give the alien more time to submit a response. The alien has more than ten days to submit a response only if the DSO permits it in the exercise of his or her discretion. The regulations do not specify a period of time which the DSO may grant. In granting such a request, the DSO must notify the alien that the INS must receive any response submitted within the time period allowed.

(4) The alien submits a timely response but does not ask to review the evidence in the ROP. The DSO must decide the case based on the original ROP plus the alien's response and any supporting evidence.

(5) The alien submits a timely response, but the DSO needs more evidence to make a decision. If the DSO finds that the response raises a genuine issue of material fact about the findings in the NOI or believes that more evidence will help in making a decision, the DSO may ask for more evidence from any source including the alien. If the DSO considers additional evidence from a source other than the alien, the DSO must serve the alien with a copy of that evidence and give the alien an extra ten days to submit a final response. In so doing, the DSO must notify the alien that the INS must receive any response submitted within the time period allowed.

(6) The alien asks to review the evidence in the ROP. If the written response contains a request to review the evidence on which the findings in the NOI were based, the DSO must serve the alien with a copy of that evidence and give the alien an extra ten days to submit a final response. In so doing, the DSO must notify the alien that the INS must receive any response submitted within the time period allowed.

(7) The alien requests withholding of removal. If the response indicates the alien requests withholding of removal, the alien must, if and when a Final Administrative Removal Order is issued, be referred to an asylum officer for a reasonable fear screening determination under 8 CFR 208.31.

E. Deciding Service Officer's (DSO's) Determination

The Deciding Service Officer (DSO) must be an independent fact-finder. He or she must never rely on evidence outside the record of proceeding (ROP). It is essential that the DSO make an independent evaluation and consider only evidence in the ROP which the alien has had a fair opportunity to rebut.

The DSO's decision must be based on a thorough review of the evidence in the ROP. This includes evidence that is material to the issue of the timeliness of the alien's response. (See Section IV(D) of this manual regarding the time frames for making a response).

The DSO's determinations in administrative removal proceedings are limited to factual matters. Further, he or she is not authorized to make decisions relating to withholding or deferral of removal. Any alien requesting withholding or deferral of removal must, upon issuance of a Final Administrative Removal Order, be referred to an asylum officer for a screening determination under 8 CFR 208.31.

The DSO may, in any case, consult with an Immigration and Naturalization Service (INS) attorney in reaching a decision. As indicated in Section III(A)(5) of this manual, the DSO may also consult with the Asylum Pre-Screening Officer (APSO) Supervisory Asylum Officer (SAO) at the local asylum office.

How the DSO decides the case and the time frames involved depend on whether the alien responds to the Notice of Intent to Issue a Final Administrative Removal Order (NOI) and the nature of that response. Various possibilities are discussed below.

(1) The alien concedes deportability. The DSO issues a Final Administrative Removal Order (Form I-851A) and causes a copy of Form I-851A to be served on the alien.

(2) The DSO does not receive a timely response to the NOI. The INS does not receive a response within the time allowed, and the evidence in the ROP establishes deportability by clear, convincing, and unequivocal evidence. The DSO issues Form I-851A and causes a copy of Form I-851A to be served on the alien.

(3) The alien responds in a timely manner, but the DSO finds that the response presents an insufficient rebuttal. The DSO finds that the response fails to rebut the allegations and charge in the NOI and that deportability is established by clear, convincing, and unequivocal evidence in the ROP. The DSO issues Form I-851A and causes a copy of Form I-851A to be served on the alien.

(4) The DSO finds that a timely response establishes that the alien is not amenable to removal. The DSO exercises his or her discretion to terminate the administrative removal proceedings and notifies the alien, by letter, about the action taken and the reason(s) for that action.

(5) The DSO finds that a timely response raises a genuine issue of material fact involving novel, very complex and/or discretionary matters. The DSO exercises his or her discretion to terminate the administrative removal proceedings. If appropriate, the DSO causes a Notice to Appear to be served on the alien to begin removal proceedings before an immigration judge (IJ).

(6) The DSO finds that a timely response raises a genuine issue of material fact which the DSO will be able to resolve with additional evidence or the DSO believes that more evidence will help in making a decision. In reaching a decision, the DSO may ask for more evidence from any source, including the alien. For example, the DSO may, if he or she deems it necessary, interview the alien. The DSO must serve on the alien a copy of any additional evidence from a source other than the alien and give the alien ten days to furnish a final response. Upon receipt of the alien's final response or expiration of the time for receiving a response, the DSO renders a decision. Depending on the evidence in the ROP, the outcome will be that described in item 3, item 4, or item 5.

(7) The alien requests withholding of removal. If the alien requests withholding of removal, the alien must be referred, if and when a final order is issued, to an asylum officer for a screening determination under 8 CFR 208.31. The DSO is not authorized to make determinations about eligibility for withholding or deferral of removal nor about the existence of any bars to withholding. These determinations must be made under the process set out in 8 CFR 208.31.

F. Exhibits In The Record Of Proceeding (ROP)

The Deciding Service Officer's (DSO's) written findings and conclusions of law including the printed findings on the Final Administrative Removal Order (Form I-851A) must be supported by reasonable, substantial, and probative evidence in the ROP. It is helpful to refer to exhibits relied on in entering a final order, especially when the alien raises issues that need to be addressed in a supplemental written decision. The DSO must follow the procedures described

here to facilitate any review of the ROP. (See Section V and Section VI(B) for additional information about the ROP).

Arrange and mark exhibits. The DSO should personally mark all documents relied on in the ROP underneath the record of proceeding cover sheet as Exhibits 1, 2, 3, etc. from top to bottom. The exhibit number should be at the bottom of each document. When there is a large number of similar documents (e.g., five affidavits in support of the alien's response attesting to the same assertion), all of these documents can be fastened together and marked as a group exhibit (e.g., Group Exhibit 1).

The exhibits should be placed in some logical order. For example, all documents relied on by the Government can be arranged underneath the Notice of Intent to Issue a Final Administrative Removal Order (NOI) on Form I-851 with all responsive documents, including any briefs or memoranda, below that. When the decision is made, any executed original Form I-851A final order or other decision would become the top document in the ROP (not marked as an exhibit), appearing just below the record of proceeding cover sheet. Any supplemental decision attached to a Form I-851A becomes a part of the final order and is retained in the ROP (as well as being served on the alien).

It is possible that the alien will sign a written waiver of the 14-day period for seeking judicial review after a final order has been issued. Such a waiver must be filed in the ROP on top of the order. This document does not receive an exhibit number if it is not in the ROP at the time of the DSO's decision.

Refer to exhibits in any supplemental decision. The Form I-851A contains critical printed findings of fact and conclusions of law which the DSO may not sign without thoroughly reviewing the ROP and being satisfied that each allegation and conclusion is supported by the requisite evidentiary proof. When the DSO prepares a supplemental decision, the DSO should refer to specific exhibits relied on in making the determination and cite authorities or sections of law. This is particularly important when the alien raises any issues, the DSO requests additional information, or the ROP contains numerous exhibits. The supplemental decision may explain how the exhibits support each contested allegation and conclusion of law recited on Form I-851.

G. Preparing A Supplemental Decision

Need for a supplemental decision. When issuing a Final Administrative Removal Order (Form I-851A), the Deciding Service Officer (DSO) must decide whether or not to prepare a supplemental decision, depending on the issues in the case. A supplemental decision is meant to augment the Final Administrative Removal Order on Form I-851A, which already incorporates preprinted core findings necessary in all cases.

In any case where the alien submits a rebuttal challenging one or more of the allegations and/or the charge in the Notice of Intent to Issue a Final Administrative Removal Order (NOI) on Form I-851, the DSO must prepare a supplemental decision. Examples of cases where supplemental decisions are necessary include those where the alien asserts that he or she is a U.S. citizen or lawful permanent resident or that he or she has not been convicted of an aggravated

felony. In such a case, a supplemental decision is essential to assure any reviewing court that the DSO has reviewed and considered all evidence and addressed all the alien's concerns or objections.

In a case where the alien submits a rebuttal that does not raise any substantive issues or address any material facts, a supplemental decision would generally not be necessary. For example, a supplemental decision would most likely not be necessary if the only rebuttal consists of a simple statement such as "I do not want to go home" where no reason is given.

General procedure. The DSO should attach any supplemental decision to the Form I-851A, using either a Continuation Page (Form I-831) or plain bond paper. In a supplemental decision, the DSO should refer to specific exhibits relied upon in the record of proceeding (ROP) to demonstrate that relevant issue(s) raised or evidence submitted was considered. The DSO should always explain very clearly the specific reason(s) the issue(s) or evidence has not overcome the allegations and deportability charge in the NOI. A supplemental decision should also include any appropriate citations.

Do's and don't's of preparing a supplemental decision. The DSO's supplemental written decision should not contain inflammatory language. It should show evenhandedness in discussing issues presented.

The DSO should not use argumentative words and phrases as they are provocative and tend to destroy any appearance of impartiality. Using words or phrases such as "purports" or "would have us believe" is not helpful when more neutral language can be used. The words "states" and "asserts" are less judgmental.

Philosophical commentary or opinions on the wisdom of the immigration laws are not helpful. This is also true of conjecture on the alien's motives.

The DSO should try to refrain from using certain archaic legal terms. The use of words such as "herein," "therein," "aforesaid," and "hereinafter" is unnecessary and should be avoided.

Short sentences and paragraphs are of great assistance to the reader because they make the text easier to understand. Headings and sub-headings can clarify the text even more. A good rule of thumb is that a sentence is usually too long if it is more than three lines long. In those instances where very complex material makes it necessary to write a more complicated, longer sentence, items in the sentence can normally be listed, indented, and numbered or simply numbered without listing and indentation.

Good legal writing is disciplined and exact. It is straightforward and meant to inform.

The content of a decision is dictated by the issues that must be addressed to resolve the case. It is generally considered improper in legal writing to resolve issues that are not essential to the outcome of the case. Discussions of non-essential issues are considered dictum and are not binding or of precedential value. The sole exception to this rule is dictum of the Supreme Court, which is accorded substantial weight.

The DSO should fight any temptation to address matters which will not lead to the resolution

that is the only issue that needs to be or should be addressed.

The DSO may not decide discretionary matters during the administrative removal proceeding. Since the process applies only to persons who are not lawful permanent resident aliens and not eligible for any discretionary relief under the Immigration and Nationality Act (INA), weighing favorable and adverse discretionary factors is unnecessary and inappropriate.

The DSO is also not authorized to make decisions about withholding of removal under section 241(b)(3) of the INA or withholding/deferral of removal under Article 3 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT). If an alien makes such a claim, the alien must, if and when a Final Administrative Removal Order is issued, be referred to an asylum officer for a screening determination under 8 CFR 208.31.

If the DSO finds that the alien is not amenable to removal under this administrative process, the DSO must notify the alien, by letter, about the action taken and the reason(s) for that action. If the alien is still subject to removal, the Immigration and Naturalization Service (INS) may issue a Notice to Appear (Form I-862) to begin proceedings before an immigration judge (IJ).

H. Sample Supplemental Decision Topics

The following are examples of possible supplemental decision topics a DSO may need to address. This list of topics is by no means exhaustive.

(1) Timeliness of the response. "The respondent failed to submit a written response to the Notice of Intent to Issue a Final Administrative Removal Order (NOI) within the time required under 8 CFR 238.1(c), specifically, . See Exhibits 1, 3, and 4, Record of Proceeding [description of exhibits and any necessary explanation regarding these exhibits]. Upon consideration of the entire Record of Proceeding, I find that the respondent's alienage, conviction of an aggravated felony, and deportability are supported by clear, convincing, and unequivocal evidence. I also find that the respondent is not a lawful permanent resident of the United States. Additionally, the respondent is statutorily ineligible for any relief from removal that the Attorney General may grant in an exercise of discretion. See Exhibits 5 and 7 [description of any relevant exhibits and any necessary explanation regarding these exhibits]."

(2) No genuine issue of material fact raised. "In a written response to the Notice of Intent to Issue a Final Administrative Removal Order (NOI), the respondent challenges allegation #_____ and asserts that . In support of the respondent's assertion, the respondent submitted . See Exhibits 8 to 11, Record of Proceeding. This evidence is insufficient to rebut allegation # because [explanation of specific reason(s), e.g., not corroborated by independent evidence]. Therefore, the respondent's response fails to rebut the allegations and charge of deportability in the NOI. Upon consideration of the entire Record of Proceeding, I find that the respondent's alienage, conviction of an aggravated felony, and

The DSO should fight any temptation to address matters which will not lead to the resolution deportability are supported by clear, convincing, and unequivocal evidence. I also find that the respondent is not a lawful permanent resident of the United States. Additionally, the respondent is statutorily ineligible for any relief from removal that the Attorney General may grant in an exercise of discretion. See Exhibits 1, 4, and 7 [description of any relevant exhibits and any necessary explanation regarding these exhibits]."

(3) Insufficient claim to U.S. citizenship. "The respondent claims to be a citizen of the United States and disputes allegation # in the Notice of Intent to Issue a Final Administrative Removal Order (NOI). See Exhibit 2 at Page 3, Record of Proceeding. In support of this claim, the respondent submitted a photocopy of a birth certificate reflecting that was born to_____in the State of on . See Exhibit 10. This document does not satisfy the requirements for publication/attestation of domestic documents under the provisions of 8 CFR 287.6. The record also reflects that on or about , Immigration and Naturalization Service (Service) officer John Doe investigated the official records at the [_____ bureau of vital statistics] to determine the validity of the [description of birth document submitted] and found that no such record exists [in the _____official repository of birth records]. See Exhibit 5, signed declaration of dated . Therefore, the respondent has failed to present sufficient evidence to support his/her claim to U.S. citizenship or to rebut the allegations and charge of deportability. Upon consideration of the entire Record of Proceeding, I find that the respondent's alienage, conviction of an aggravated felony, and deportability are supported by clear, convincing, and unequivocal evidence. I also find that the respondent is not a lawful permanent resident of the United States. Additionally, the respondent is statutorily ineligible for any relief from removal that the Attorney General may grant in an exercise of discretion. See Exhibits 1, 3, 4 at Page 3, and 9 [description of any relevant exhibits and any necessary explanation regarding these exhibits]."

(4) Concession of deportability as charged. "The respondent concedes the allegations of fact and deportability as charged in the Notice of Intent to Issue a Final Administrative Removal Order (NOI). See Exhibit 1 at Page 2 and Exhibit 6, Record of Proceeding [description of exhibits and any necessary explanation regarding these exhibits]. See Exhibit 4 [description of any relevant exhibit and any necessary explanation regarding this exhibit]. Upon consideration of the entire Record of Proceeding, I find that the respondent's alienage, conviction of an aggravated felony, and deportability are supported by clear, convincing, and unequivocal evidence. I also find that the respondent is not a lawful permanent resident of the United States. Additionally, the respondent is statutorily ineligible for any relief from removal that the Attorney General may grant in an exercise of discretion."

(5) Insufficient evidence submitted to rebut the allegations. "The respondent challenges allegation of fact # in the Notice of Intent to Issue a Final Administrative Removal Order (NOI). In support of this challenge, the respondent submitted . See Exhibits 4, 5, 8, 9, and 10, Record of Proceeding [description of exhibits and any necessary explanation regarding these exhibits]. After careful review of this documentary evidence, I find that the respondent has failed to rebut allegation # because the evidence submitted is [explanation of specific reason(s), e.g., immaterial; lacks probity; unreliable; uncorroborated selfserving statements; etc.]. The respondent's response does not defeat the relevant, inherently reliable, and probative records of the Immigration and Naturalization Service (Service), Exhibits 1, 2, 6, and 7. See

are admissible]. A Service Record of Deportable/Inadmissible Alien (Form I-213) is deemed to be inherently trustworthy and admissible as a public record and report. Id. Upon consideration of the entire Record of Proceeding, I find that the respondent's alienage, conviction of an aggravated felony, and deportability are supported by clear, convincing, and unequivocal evidence. I also find that the respondent is not a lawful permanent resident of the United States. Additionally, the respondent is statutorily ineligible for any relief from removal that the Attorney General may grant in an exercise of discretion."

I. Useful Points And Authorities For A Supplemental Decision

Below are citations the Deciding Service Officer (DSO) may wish to use in preparing supplemental decisions. These citations refer to case law regarding admissibility in proceedings to determine deportability, trustworthiness, and fundamental fairness of evidence.

(1) To be admissible in proceedings to determine deportability, evidence must be relevant and probative and its use must not be fundamentally unfair. Matter of Ramirez-Sanchez, 17 I&N Dec. 503 (BIA 1980); Matter of Toro, 17 I&N Dec. 340 (BIA 1980).

(2) Business records are admissible if made during the regular course of business. Matter of Mejia, 16 I&N Dec. 6 (BIA 1976).

(3) An Immigration and Naturalization Service (Service) Record of Deportable/Inadmissible Alien (Form I-213) is deemed to be inherently trustworthy and admissible as a public record and report. Matter of Mejia, 16 I&N Dec. 6 (BIA 1976).

(4) An Arrival-Departure Record (e.g., Form I-94) is admissible to establish deportability. See Matter of Doo, 13 I&N Dec. 30 (BIA 1968).

(5) The use of affidavits is not fundamentally unfair. Matter of Conliffe, 13 I&N Dec. 95 (BIA 1968).

(6) A Warrant of Removal/Deportation (Form I-205) is admissible as a business record, and the notations on such a document are inherently reliable. U.S. v. Hernandez-Rojas, 617 F.2d 533 (9th Cir. 1980), cert. denied, 449 U.S. 864, 101 S.Ct. 170 (1980).

(7) An affidavit alone may be relied upon to establish a respondent's deportability by the requisite proof, even if taken without the presence of counsel or under a claim of failure to give Miranda warnings. Matter of Baltazar, 16 I&N Dec. 108 (BIA 1977); Matter of Ramirez-Sanchez, 17 I&N Dec. 503 (BIA 1980).

(8) Testimonial evidence may be necessary to rebut a prima facie showing that the admissions reflected on Immigration and Naturalization Service (Service) forms were involuntary or inaccurate. Matter of Garcia, 17 I&N Dec. 319 (BIA 1980).

Matter of Mejia, 16 I&N Dec. 6 (BIA 1976) [records made during the regular course of business
(9) An alien has a right to an impartial deciding officer. Matter of Exame, 18 I&N Dec. 303 (BIA 1982).

J. Citing Case Law

The Deciding Service Officer (DSO) may find the following general guidance on citing case law useful in preparing any supplemental decisions.

(1) When citing case law, use "see" when the conclusion is suggested, but not stated. [See Matter of Mejia, 16 I&N Dec. 6 (BIA 1976).]

(2) Use "e.g.," when more examples exist, but they are not cited. [e.g., Matter of Mejia, 16 I&N Dec. 6 (BIA 1976).]

(3) Use "supra" after the name of a decision cited before in the same supplemental decision. (Matter of Mejia, supra.) However, cite the name of the decision without supra when it is cited on the same page as the previous citation. (Matter of Mejia.)

(4) Use "Id." when repeating the preceding citation without any change.

K. Closing Actions

Warrant of Removal/Deportation. If the Deciding Service Officer (DSO) issues a Final Administrative Removal Order (Form I-851A), a Warrant of Removal/Deportation (Form I-205) should be issued in accordance with outstanding instructions. To ensure against removing the alien from the United States prematurely, Form I-205 must not be issued until it is legal and appropriate to enforce the alien's departure.

The warrant cannot be executed sooner than 14 calendar days after the date of issuance of a final removal order on Form I-851A unless the alien knowingly and voluntarily waives the 14-day period. The alien may waive this period once he or she is served with a final order on Form I-851A. If the alien signed the statement on the Notice of Intent to Issue a Final Administrative Removal Order (NOI) on form I-851 conceding deportability and not requesting withholding of removal and also checked the block waiving the 14-day period, the Immigration and Naturalization Service (INS) does not need to wait 14 days.

Deportable Alien Control System (DACS) update. As in the case of any official action taken in an administrative removal case, the DSO must ensure that DACS is updated promptly upon completion of the case. DACS has the capability to provide data on the number of aliens brought under the administrative removal process, by name, A-number, and nationality, as well as the decision and other official action in each case. As this is crucial data, the DSO must make sure that administrative removal cases are always identified in DACS according to the proper case category. (See the Deportable Alien Control System User Manual). If a final removal order on Form I-851A is entered, the correct decision code must be filled in on the required screen. Upon removal under a final removal order on Form I-851A, the case must be closed out with the appropriate depart-cleared code.

to reflect this information and any subsequent action taken. When administrative removal proceedings are terminated and other removal proceedings instituted, the DACS case for the administrative removal proceedings should be closed in DACS with the proper codes. An entirely new case must then be entered into DACS using the proper codes and correct data relating to the new removal proceedings. Biographic information, however, will carry over from one case to the other.

DSO's list of administrative removal cases. Upon completion of a case, the DSO should update this list. (The DSO's list of cases is discussed in Section V(B) of this manual.)

L. Request For Withholding Of Removal And Referral To Asylum Officer

A reasonable fear interview is triggered when an alien in administrative removal proceedings who has requested withholding of removal has been ordered removed. In such a case, upon service of the Final Administrative Removal Order (Form I-851A), the Deciding Service Officer (DSO) must immediately refer the case to an asylum officer for a reasonable fear determination under 8 CFR 208.31. In so doing, the DSO must ensure that the following steps are followed:

· A Form M-488, Information About Reasonable Fear Interview, is given to the alien and explained to him or her in a language he or she understands.

· The alien is told the purpose of the interview with an asylum officer.

· The alien is given a list of free legal services. The alien is advised that he or she may, at no expense to the government and without delaying the process, be represented by an attorney or accredited representative with whom he or she may consult before the interview.

· The alien must sign and date two copies of Form M-488, acknowledging receipt of notice about the reasonable fear interview and about his or her right to counsel. If the alien refuses to sign Form M-488, the official who gives it to the alien must date and initial it and insert the notation "(name of alien) refused to sign" on the line for the signature of the person being referred to an asylum officer. One copy of Form M-488 is placed in the alien's A-file. The other is retained by the alien.

· The appropriate asylum office point of contact is notified about the need for a reasonable fear interview and about any special considerations (e.g., the necessity of an interpreter and/or a request for a female or male interpreter or officer). The asylum office must also be given any other critical information (e.g., the alien's detention in a non-Service facility or at a remote location or the alien's transfer to a different detention site).

· Copies of the completed Forms M-488, I-851 (Notice of Intent to Issue a Final Administrative Removal Order), and I-851A and any Notice of Entry of Appearance as Attorney or Representative (Form G-28) are faxed to the asylum office.

In the event that administrative removal proceedings are terminated, DACS must be updated

· If the alien is detained by the INS, arrangements are made in coordination with the asylum office point of contact for the reasonable fear interview and appropriate interview space. If there is no room for an interview where an alien in INS custody is housed, arrangements should be made, where feasible, to move the alien to a location where the asylum officer can conduct the interview. If the alien is incarcerated in a Federal, state, or local institution, the DSO or his or her support staff should, to the extent possible, assist the asylum office in locating suitable interview space.

The DSO and his or her support staff must make sure that the ROP does not leave the DSO's possession and control during the pendency of any adjudication and ensuing legal challenge or during any reasonable fear proceedings. The entire ROP should be photocopied and the duplicate ROP copy certified as a true copy of the DSO's administrative ROP. The certified copy of the ROP should then be made available to the appropriate asylum office in the most expeditious way possible.

Most of the time, the alien's A-file will be in the DSO's possession. In that event, it should be provided to the asylum office with the copy of the ROP. Otherwise, arrangements must be made to have the A-file sent to the asylum office immediately in the most expeditious way possible.

The asylum officer must, except in exceptional circumstances, process reasonable fear cases within ten days, but the ten-day period begins only when the asylum officer receives the A-file and the certified copy of the ROP. Any delay in providing the asylum officer with these items will delay the processing of the case.

Neither the pendency of reasonable fear proceedings nor the issuance of an order deferring removal to a particular country alters INS authority to detain an alien otherwise subject to detention. The reasonable fear screening process is intended to permit fair and expeditious resolution of withholding claims without unduly disrupting the streamlined process used in administrative removal proceedings.

The asylum office should, in most cases, notify the DSO the same day a reasonable fear decision is served on the alien. In unusual circumstances, notification may be made the following business day.

In most cases, the asylum officer will serve any decisions on the applicant personally. However, if the DSO is willing and it would expedite the process, the DSO may serve the decision on the alien, with an asylum officer and interpreter (if necessary) available by telephone to answer any questions the alien may have.

If reasonable fear is found, the case is referred to an immigration judge (IJ). The DSO should obtain information about the status and outcome of such a case from the trial attorney representing the INS.

If reasonable fear is not found and the alien requests IJ review of the negative finding, the asylum officer should monitor the IJ review and notify the DSO of the outcome. The asylum

officer is also responsible for notifying the DSO if the asylum office has agreed to an applicant's request to withdraw from the reasonable fear proceedings, either before or after the asylum officer interviews the alien.

Departure must be enforced where appropriate, provided the 14-day period after issuance of a final order is past. Departure may be enforced only when reasonable fear is not found or withholding or deferral of removal is denied or terminated and any request for review or appeal has resulted in a negative determination or when the request for withholding or deferral has been withdrawn.

An alien who is granted withholding or deferral of removal may not be removed to the country or countries to which his or her removal has been withheld or deferred. Such an alien, however, may be removed to a safe country.

V. RECORD OF PROCEEDING

A. Creating The Record Of Proceeding (ROP)

In accordance with the statute and governing regulations, the Immigration and Naturalization Service (INS) must permanently maintain the administrative ROP in each case in which a Final Administrative Removal Order (Form I-851A) is issued. This is necessary to enable the court to review the entire record in the event of a legal challenge. Such a record will also serve as proof of the removal proceedings in any subsequent prosecution for criminal reentry after removal.

Under the regulations, the ROP must consist of, but not necessarily be limited to: (1) the charging document [Notice of Intent to Issue a Final Administrative Removal Order (NOI) on Form I-851]; (2) all evidence relied on by the INS in support of the charges; (3) the alien's response, if any; (4) all admissible evidence, briefs, or other documents submitted by either party respecting deportability; and (5) Form I-851A.

Just as the immigration court carefully maintains an ROP, INS personnel engaged in the administrative removal process, particularly the investigating agent and the officer who issues the NOI, must ensure that the ROP is carefully compiled and permanently maintained. The ROP, which contains the Government's entire case, may be subjected to court review. [There is no review by an immigration judge (IJ) or the Board of Immigration Appeals (BIA)].

The investigating officer/agent must ensure that each document relied upon to support the allegations and charge in the NOI (i.e., to establish alienage, deportability, and conviction) is included in the ROP. All documents in support of the NOI must be placed under the record of proceeding cover sheet on the left hand side of the A-file (in chronological order, with the NOI on top).

The executed duplicate NOI, which reflects the date and manner of service and any other endorsements made in the sections provided on the form, must be placed immediately in the ROP. By regulation, an executed duplicate of the NOI in the ROP must be retained as evidence that the individual upon whom the NOI is served is the alien named in the NOI. When the NOI is served in person, verification of the identity of the alien upon whom it is served is included in the Certificate of Service on the NOI. In a case where the NOI is served by mail, the written determination regarding verification of the alien's identity prepared by the investigating officer/ agent must be included in the ROP.

After issuing the NOI and causing it to be served upon the alien, the investigating officer must ensure that the ROP is promptly made available to the Deciding Service Officer (DSO) for review and decision. If the alien clearly waives the right to counsel and voluntarily endorses the portion of the NOI showing that he or she admits the truth of the allegations and charge, does not wish to contest them or request withholding of removal, and waives appeal, the decision may be made immediately. On the other hand, the decision may need to await the expiration of the response period or any extension granted by the DSO.

(1) Where to place evidence in the ROP. Place copies of all evidence relied upon in support of the charging document underneath the record of proceeding cover sheet and the NOI on the left hand side of the A-file.

(2) Record of proceeding cover sheet. Always keep the record of proceeding cover sheet on top of all ROP copies of documents, attached to the left hand side of the A-file.

(3) Evidence of status checks. Make sure the results of records checked [e.g., the Central Index System (CIS), the Refugee, Asylum, and Parole System (RAPS), the Nonimmigrant Information System (NIIS), the National Automated Immigration Lookout System (NAILS), etc.] are evidenced by printouts or other official records. Highlight relevant portions to indicate the alien's not being a lawful permanent resident, etc. [This is not necessary if an Arrival-Departure Record (Form I-94) can be used.] Since the NOI contains the allegation that the alien is not a lawful permanent resident alien, the ROP must support why this preliminary determination is made (NOI allegation #5).

Once alienage is established by clear, convincing, and unequivocal evidence [i.e., a Record of Deportable/Inadmissible Alien (Form I-213), sworn statement, etc.], the Government need not establish lack of lawful permanent residence by the same burden of proof. This is because the legal burden then shifts to the alien to establish time, place, and manner of entry under section 291 of the Immigration and Nationality Act (INA). Section 291 provides that if the alien's burden "is not sustained, such person shall be presumed to be in the United States in violation of law." Nevertheless, the INS' diligent efforts to check the alien's immigration status must always be evidenced in the ROP, to support NOI allegation #5.

(4) Evidence of criminal history. Copies of Federal Bureau of Investigation (FBI) rap sheets may be inserted in the ROP to show a criminal history other than the conviction for an aggravated felony. Evidence of a criminal background may help the Government determine whether a particular case is a suitable vehicle for a Government appeal, if this background information is in the ROP.

(5) Sample ROP configuration at the NOI stage. The issuing officer should ensure that the ROP is securely attached to the left hand side of the A-file, with copies of all evidence relied on by the Government in support of the NOI allegations and charge placed underneath the NOI. The ROP's documents may be arranged in the following order (from the top of the ROP to the bottom):

Record of proceeding cover sheet (on top)
NOI
Form I-213
Conviction record (aggravated felony)
Evidence of alienage
Form I-94; evidence of not being a lawful permanent resident
Other evidence re: immigration status (including copies/notes of records checked; printouts)
FBI rap sheet

Sworn statement, if taken
Other relevant information

B. Maintaining The Record Of Proceeding (ROP)

Proper maintenance and handling of the ROP is an extremely important part of the administrative removal process and cannot be overemphasized. The Deciding Service Officer (DSO) and his or her support staff should receive and place in the ROP, in some logical order, all responses made by the alien. The ROP must include evidence of all official actions including service of any notices or copies of documents. When copies of documents are served on the alien, the originals must naturally be kept in the ROP. Only the DSO should mark the exhibit numbers on evidence in the ROP because deciding the relevance of evidence relied upon in the proceedings is the DSO's sole province as the deciding officer. The DSO should also prepare and certify the ROP for any court review. (See Sections IV(F), V(A) and VI(B) for additional information about the ROP.)

Another responsibility of the DSO and his or her support staff is to make sure that the ROP does not leave the DSO's possession and control during the pendency of any adjudication and ensuing legal challenge or during any reasonable fear proceedings. This will make the process more efficient by ensuring that the ROP is always readily available for any required official action during the proceedings and for any judicial review. To help track his or her administrative removal cases, the DSO should keep a list of all cases by name and A-number and file them in an accessible place.

VI. JUDICIAL REVIEW

A. Petition For Review

Section 242 of the Immigration and Nationality Act (INA) governs judicial review of orders of removal. In removal proceedings before an immigration judge (IJ), once an alien has received a final order of removal entered by the Board of Immigration Appeals (BIA), he or she may seek judicial review by filing a petition for review in the Circuit Court of Appeals under that section. The alien must file the petition for review within 30 days from issuance of the final order of removal. Section 242(b)(3)(B) of the INA provides that the alien does not receive a stay of removal pending the determination on the petition for review "unless the court orders otherwise."

Pursuant to section 238(b)(3) of the INA, the Immigration and Naturalization Service (INS) may not execute the Final Administrative Removal Order "until 14 calendar days have passed from the date that such order was issued, unless waived by the alien." This means that, absent a waiver by the alien, the INS should execute a final administrative removal order after the fourteenth calendar day, unless the Court of Appeals affirmatively "orders otherwise" by a stay order entered under section 242(b)(3)(B) of the INA. It should be noted that no appeal lies with the BIA in administrative removal proceedings under section 238(b) of the INA.

B. Certifying The Record Of Proceeding (ROP)

Upon receiving notice of the filing of a legal challenge, the Deciding Service Officer (DSO) must promptly cause the ROP to be prepared and certified for judicial review. Before certifying the ROP, it is recommended that all pages in the ROP be numbered in sequence by pen. This will make it easier for the court, Government attorneys, and opposing counsel to refer to particular pages in the ROP. The Final Administrative Removal Order (Form I-851A) should be on top, just under the record of proceeding cover sheet.

Two photocopies of the entire ROP should be made and both duplicate copies certified as true copies of the DSO's administrative ROP. The certified copies should be promptly forwarded in the most expeditious way possible to the Department of Justice's (DOJ's) Office of Immigration Litigation (OIL). That office will represent the Immigration and Naturalization Service (INS) before the court.

The materials for the OIL should be addressed as follows:

Director, Office of Immigration Litigation
United States Department of Justice
Civil Division
P.O. Box 878, Ben Franklin Station
Washington, DC 20044

The phone and FAX numbers at the OIL are:

(202) 616-(b)(6), (b)(7)c

FAX (202) 616-4948

Notations reflecting the date the certified copies of the ROP are forwarded to the OIL must be made in the original ROP and on the DSO's list of administrative removal cases. (The DSO's list of cases is discussed in Section V(B) of this manual.)

Sample contents of a certified copy of an ROP forwarded to the court.

Record of proceeding cover sheet (on top)
Form I-851A
Ex. 1. Notice of Intent to Issue a Final Administrative Removal Order (NOI) on Form I-851
Ex. 2. Record of Deportable/Inadmissible Alien (Form I-213)
Ex. 3. Conviction record (aggravated felony)
Ex. 4. Arrival-Departure Record (Form I-94), if any; evidence of not being a lawful permanent resident
Ex. 5. Other evidence of alienage presented
Ex. 6. Alien's sworn statement, if any
Group Ex. 7. Copies of records checks/printouts
Ex. 8. Federal Bureau of Investigation (FBI) rap sheet (regarding other criminal history, if any)
Ex. 9. Any other relevant Government information
Group Ex. 10. Alien's evidence in response to NOI
Ex. 11. Alien's supporting memorandum, if any

VII. LEGAL ISSUES

A. The Nature And Sufficiency Of Evidence

In general, the strict judicial rules of evidence do not apply in civil proceedings to determine deportability. Calhoun v. Bailar, 626 F.2d 145 (9th Cir. 1980), cert. denied, 452 U.S. 906, 101 S.Ct. 3033 (1981); Marlowe v. INS, 457 F.2d 1314 (9th Cir. 1972). To be admissible in these proceedings, evidence must be relevant and probative and its use must not be fundamentally unfair. Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 505 (BIA 1980); Matter of Toro, 17 I&N Dec. 340, 343 (BIA 1980). Business records are admissible if made during the regular course of business. Matter of Mejia, 16 I&N Dec. 6 (BIA 1976). The Record of Deportable/Inadmissible Alien (Form I-213) is deemed to be inherently trustworthy and admissible as a public record and report. Id. A Warrant of Removal/Deportation (Form I-205) is admissible as a business record, and the notations on such a document are inherently reliable. U.S. v. Hernandez-Rojas, 617 F.2d 533 (9th Cir. 1980), cert. denied, 449 U.S. 864, 101 S.Ct. 170 (1980). The crewman nonimmigrant record (Form I-95) is admissible to establish deportability. Matter of Doo, 13 I&N Dec. 30 (BIA 1968).

The courts have recognized that issues of impropriety in obtaining evidence can be overlooked when deportability is established by independent, untainted evidence. Matter of Mejia. Independent evidence can be admitted even if an alleged illegal search or arrest revealed the respondent's identity and led to the discovery of the untainted evidence, e.g., preexisting official Immigration and Naturalization Service (INS) records relating to the encountered alien. Matter of Mejia; U.S. v. Orozco-Rico, 589 F.2d 433 (9th Cir. 1978), cert. denied, 440 U.S. 967, 99 S.Ct. 1518 (1979). Information in the INS database or files constitutes prior knowledge of the Government and may establish respondent's deportability on the charges contained in the charging document. Woodby v. INS, 385 U.S. 276 (1966); Matter of Doo; Matter of Mejia.

During the interrogation of an alien, an INS investigative officer typically takes a sworn statement from the alien and completes a Form I-213. These documents constitute official records made in the ordinary course of business, are admissible in evidence, and can be sufficient to support the allegations contained in the charging document by the requisite clear, convincing, and unequivocal evidence. Matter of Mejia. The hearsay evidence rule is not applicable to proceedings to determine deportability. Matter of Davila, 15 I&N Dec. 781 (BIA 1976); Matter of Ponco, 15 I&N Dec. 120 (BIA 1974).

The use of affidavits is not fundamentally unfair. Matter of Conliffe, 13 I&N Dec. 95 (BIA 1968). An affidavit alone may be relied upon to establish a respondent's deportability by the requisite proof, even if taken without the presence of counsel or under a claim of failure to give Miranda warnings. Matter of Baltazar, 16 I&N Dec. 108 (BIA 1977); Matter of Ramirez-Sanchez. However, testimonial evidence may be necessary to rebut a prima facie showing that admissions reflected on INS forms were involuntary or inaccurate. Matter of Garcia, 17 I&N Dec. 319 (BIA 1980).

Where an INS officer acts in good faith, the courts and the Board of Immigration Appeals (BIA) have held that evidence obtained by an alleged improper search or seizure in violation of

the Fourth Amendment is not suppressible in proceedings to determine deportability. See Matter of Sandoval, 17 I&N Dec. 70 (BIA 1979); Lopez-Mendoza v. INS, 104 S. Ct. 3479 (1984). And, reliance placed on illegally obtained evidence does not necessarily offend the Fifth Amendment fundamental fairness requirements. Matter of Toro. The manner of seizing evidence must be "so egregious" a Fourth Amendment violation that to rely on it would violate Fifth Amendment fundamental fairness requirements. Id.; Lopez-Mendoza; see, for example, Ex Parte Jackson, 263 F. Supp. 110 (D. Mont. 1920) (invading an orderly meeting of union to which respondent belonged held to "undermine the morale of the people, excite the latter's fears, cause distrust of our institutions, doubts of the sufficiency of law and authority..."). Absent egregious conduct, the Supreme Court has pointed to the civil nature of the removal process, the existence of alternatives in deterring misconduct of INS officers, and the administrative burdens in denying invocation of the exclusionary rule. Lopez-Mendoza. (The exclusionary rule relates to evidence being excluded from consideration because it was improperly seized in violation of Constitutional protections.)

B. Procedural Matters

Burden of proof. Deportability must be established by evidence which is "clear, convincing, and unequivocal." See Woodby v. INS, 385 U.S. 276 (1966). The Government has the burden of proof on "alienage." The alien has the burden of proof as to time, place, and manner of entry. Immigration and Nationality Act (INA) section 291. An alien's admissions alone are sufficient to meet the "clear and convincing" standard. See Khano v. INS, 999 F.2d 1203 (7th Cir. 1993).

Refusal to answer. An alien may only refuse to answer questions which would incriminate him or her in a criminal matter. United States v. Alderete-Deras, 743 F.2d 645 (9th Cir. 1984). Even there, a refusal to testify may form the basis of an adverse inference in a proceeding to determine deportability. Id. A respondent's silence when confronted with evidence of alienage, circumstances of entry, or deportability, may leave himself or herself open to adverse inferences, which may properly lead to a finding of deportability. Matter of Guevara, 20 I&N Dec. 238 (BIA 1990, 1991); see Cabral-Avila v. INS, 589 F.2d 957 (3d Cir. 1968), cert. denied, 440 U.S. 920, 99 S.Ct. 1245 (1969). However, a respondent's silence alone, in the absence of any other evidence, is insufficient to constitute evidence of alienage. Id.

Binding precedent. The published decision of a Circuit Court of Appeals is binding upon proceedings held within the jurisdiction of that circuit. Matter of Anselmo, 20 I&N Dec. 25 (BIA 1989). However, the Board of Immigration Appeals (BIA) does not consider the published decision of a United States District Court to be binding in cases arising in the same district. Matter of K-S-, 20 I&N Dec. 715 (BIA 1993).

Manner of seizing evidence. Improperly obtained evidence may be admitted in evidence and considered by the Deciding Service Officer (DSO) if the Immigration and Naturalization Service (INS) officer acted in good faith. Matter of Sandoval, 17 I&N Dec. 70 (BIA 1979). Evidence is excludable if the manner of seizing it is so "egregious" that to rely on it would be fundamentally unfair, in violation of the Fifth Amendment. Bustos-Torres v. INS, 898 F.2d 1053 (5th Cir. 1990); Lopez-Mendoza v. INS, 104 S. Ct. 3479 (1984).

Conviction record. The conviction may be proved by any document or record prescribed by 8 CFR 3.41. Documentary evidence constituting proof of conviction in immigration proceedings is also described in sections 240(c)(3)(B) and (C) of the INA which provide a statutory basis for 8 CFR 3.41. Conviction records may include, where applicable, the plea transcript. See Matter of Mena, 17 I&N Dec. 38 (BIA 1979).

Elements of a conviction. The various states have provisions of law for withholding the adjudication of guilt and ameliorating the effects of a conviction. In the past, whether a conviction existed for immigration purposes was determined under a three- pronged test set forth in Matter of Ozkok, 19 I&N Dec. 546 (BIA 1988).

On September 30, 1996, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law 104-208, added section 101(a)(48)(A) defining conviction to the INA. This definition applies to convictions entered before, on, or after September 30, 1996.

Section 101(a)(48)(A) of the INA provides that a conviction with respect to an alien is not limited to a formal judgement of guilt by a court. Where adjudication of guilt has been withheld, that section of law gives a two-pronged test for establishing a conviction: (A) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt; and (B) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Definition of aggravated felony. The definition of aggravated felony was added to immigration law in 1988 and expanded several times. In the past, whether a crime was an aggravated felony depended on factors such as the provision of immigration law at issue and when the conviction was entered or the crime committed. The most recent change made all defined offenses aggravated felonies for all purposes regardless of when the conviction was entered. The enacting legislation provided for application of this change to actions taken on or after September 30, 1996 and to violations on or after that date of section 276 of the INA relating to criminal reentry after removal.

The term aggravated felony now applies to any offense defined in section 101(a)(43) of the INA in violation of foreign law for which the term of imprisonment was completed within the previous 15 years. INS employees who process and adjudicate administrative removal cases must be thoroughly familiar with the statutory language of section 101(a)(43). They must also refer to Section III(A)(3) of this manual for information about case law affecting this definition, particularly within the Eleventh Circuit (Alabama, Georgia, and Florida).

Expungement. In considering the effect of an expunged conviction, the BIA has overruled the holdings in precedent decisions which address the impact of state rehabilitative actions on whether an alien is convicted for immigration purposes. These decisions include Matter of G-, 9 I&N Dec. 159 (BIA 1960, A.G. 1961); Matter of Ibarra-Obando, 12 I&N Dec. 576 (BIA 1966, A.G. 1967); and Matter of Luviano, Interim Decision 3267 (BIA 1996).

In re Roldan-Santoyo, Interim Decision 3377 (BIA 1999), held that an alien subject to a conviction as defined in section 101(a)(48)(A) of the INA remains convicted for immigration

purposes despite later state action to erase the original finding of guilt under a rehabilitative procedure.

The decision in Roldan-Santoyo, supersedes that in Matter of Manrique, Interim Decision 3250 (BIA 1995). Matter of Manrique provided that first offenders guilty of simple possession offenses could escape the immigration consequences of their convictions based on their having been the beneficiaries of state rehabilitative actions under state statutes.

Roldan-Santoyo does not address the effect on immigration proceedings of first offender treatment under 18 U.S.C. § 3607 accorded by a Federal court. Further, the decision in Roldan-Santoyo is inapplicable to state actions that vacate a conviction on the merits or on any ground related to the violation of a statutory or constitutional right in the underlying criminal proceeding.

I-851 Notice of Intent to Issue a Final Administrative Removal Order

I-851A Final Administrative Removal Order

Administrative Removal Proceedings Manual (M-430, Rev. June 4, 1999)

Detention and Deportation Officers' Manual
Appendix 14-1

Table of Contents

PREFACE

The law authorizes alternative administrative removal proceedings without hearings before immigration judges for serious criminal offenders. These proceedings apply to certain aliens who have been convicted of one or more aggravated felonies. While incorporating both procedural safeguards and effective quality control methods, the proceedings simplify and expedite removal from the United States. This manual is a ready reference explaining how to do cases under the alternative proceedings. The information in the manual is current as of the date shown on the cover but is subject to change.

I. INTRODUCTION

A. Purpose

This manual is a comprehensive guide for Immigration and Naturalization Service (INS) employees in the processing and adjudication of administrative removal cases. These cases relate to certain aliens who have been convicted of one or more aggravated felonies and who are not lawful permanent residents of the United States. Aliens with conditional permanent resident status as the spouses, sons, and daughters of U.S. citizens or lawful permanent residents are not lawful permanent residents for this purpose.

The manual describes in detail the applicable law, regulations, and procedures. The purpose of the manual is to serve as a reference for and assist in training INS officers and support personnel who participate in the administrative removal process. The manual supplements the regulations in providing for a process which works efficiently while respecting procedural due process and fitting sensibly within the usual routine of investigating cases and initiating removal proceedings.

Previously, most traditional removal cases required hearings before immigration judges (IJ's). As part of the continuing efforts to streamline removal procedures, INS officers may issue final removal orders in administrative removal cases. In view of the seriousness of this responsibility, case processing and adjudication require careful, effective quality control measures. The manual is a major component of the administrative removal quality assurance program.

The manual gives step-by-step explanations on the methods necessary to ensure compilation of thorough records of proceeding (ROP's), adherence to administrative due process and appropriate procedures, and preparation of consistent, legally sufficient decisions. The manual emphasizes the need to create and maintain, on a permanent basis, ROP's that are able to withstand legal challenges or support later proceedings relating to criminal reentry after removal. Following the instructions outlined in the manual will facilitate the uniform and fair adjudication of cases and, when appropriate, the issuance of even-handed, high quality, and legally defensible supplemental written decisions.

The INS developed this manual in close consultation with its Office of the General Counsel using extensive legal materials furnished by that Office. For example, that Office provided the guidance on creating and maintaining the ROP, judicial review, and legal issues, as well as furnishing all legal citations. Legal questions which are not answered in the manual may be referred to an INS attorney.

B. Historical Background

Since 1986, as part of a general trend in the law toward stricter criminal provisions, Congress has made numerous amendments to the Immigration and Nationality Act (INA) affecting removal of criminal aliens from the United States. For example, the comprehensive Immigration Reform and Control Act of 1986 (IRCA) amended the INA to require initiation of removal proceedings "as expeditiously as possible after conviction" of an offense making an alien subject to removal. The text of IRCA itself declared, "[i]t is the sense of the Congress that...the immigration laws of the United States should be enforced vigorously and uniformly."

Legislative changes starting in 1988 introduced the term "aggravated felony" to immigration law and emphasized removal of aliens convicted of crimes fitting its definition. Examples of crimes now defined as aggravated felonies are murder, rape, sexual abuse of minors, child pornography, certain crimes of violence, and illicit trafficking in controlled substances, firearms, and destructive devices. Current law provides for mandatory detention of aliens in removal proceedings who have been convicted of these crimes.

In 1994, several measures to improve criminal alien removal were signed into law. These included expedited administrative deportation without a hearing before an immigration judge (IJ) for an alien convicted of an aggravated felony who is not a lawful permanent resident and who is not eligible for any relief from removal. Through this legislation, Congress provided for a more streamlined removal process, incorporating statutorily provided procedural safeguards, to simplify and expedite removal in certain cases involving serious criminal offenses.

More recently, the trend towards expediting removal of criminal aliens through statutory change engendered the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the subsequent Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The latter made major changes such as replacing the separate exclusion and deportation processes with a single removal proceeding for deciding both inadmissibility and deportability.

AEDPA made several changes affecting the administrative deportation procedure for aliens convicted of aggravated felonies. IIRIRA modified or eliminated some of these changes. The current expedited procedure, now called administrative removal, also includes aliens who have lawful permanent residence on a conditional basis as the spouses, sons, and daughters of U.S. citizens and lawful permanent residents. Another change makes aliens subject to this procedure ineligible for any discretionary relief from removal.

However, the law requires withholding of removal to a country where the alien's life or freedom would be threatened in the case of an alien convicted of an aggravated felony or felonies for which the alien has been sentenced to an aggregate term of imprisonment of less than five years, unless the crime is determined to be a particularly serious crime. In addition, regulations that became effective on March 22, 1999 prohibit the removal of an

alien to a country where he or she would be tortured regardless of any criminal convictions or background the alien may have. The regulations establish a special screening mechanism, with referral of cases that may trigger either of these provisions to an IJ for adjudication.

C. Legal Authority For Administrative Removal

The Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA), Public Law 103-322, was enacted September 13, 1994 and became effective September 14, 1994. Section 130004 of VCCLEA amended the Immigration and Nationality Act (INA) to eliminate administrative hearings before immigration judges (IJ's) for certain criminal aliens. Section 130004 also amended the INA to limit judicial review in these cases.

The Immigration and Nationality Technical Corrections Act of 1994 (INTCA), Public Law 103-416, enacted October 25, 1994, made minor technical changes to these statutory provisions. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Public Law 104-132, enacted April 24, 1996, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law 104-208, enacted September 30, 1996, further amended these provisions.

Current section 238(b) of the INA authorizes, under regulations prescribed by the Attorney General, administrative removal proceedings without a hearing before an IJ to determine deportability under section 237(a)(2)(A)(iii) of the INA and to issue a removal order. Section 237(a)(2)(A)(iii) relates to conviction of an aggravated felony, as defined in section 101(a)(43) of the INA.

Section 238(b) of the INA requires that, when proceedings under that section of law begin, the alien must not have been lawfully admitted for permanent residence. Conditional permanent residents under section 216 of the INA are not lawful permanent residents for purposes of administrative removal proceedings under section 238(b). Section 216 relates to certain spouses, sons, and daughters of U.S. citizens and lawful permanent resident aliens.

Section 238(b)(5) of the INA states that no alien subject to these proceedings is eligible for any relief from removal. Section 241(b)(3) of the INA, however, requires withholding of removal to a country where the alien's life or freedom would be threatened. This provision, however, does not apply if the alien is subject to certain bars to withholding of removal including, among other grounds, conviction of a particularly serious crime. An alien is considered to have been convicted of a particularly serious crime if the alien has been sentenced to an aggregate term of imprisonment of five or more years for an aggravated felony or felonies, not taking into account any suspension of imposition or execution of the sentence. An aggravated felony for which the alien has been sentenced to an aggregate term of imprisonment of less than five years may still constitute a particularly serious crime, depending on the crime.

On October 21, 1998, the President signed into law the Foreign Affairs Reform and Restructuring Act of 1998, Public Law 105-277. That legislation mandates promulgation of regulations to implement U.S. obligations under Article 3 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT). Article 3 prohibits the removal of any person to a country where he or she would be tortured, with no exceptions for persons with criminal or other background. Neither section 241(b)(3) nor

Article 3 of the CAT are subject to the section 238(b)(5) prohibition on relief for aliens in these proceedings. As a legal matter, neither of these provisions constitutes relief from removal because they are merely restrictions on the place to which an alien may be removed and do not constitute affirmative permission to remain in the United States.

As reflected in the applicable regulations at 8 CFR 238.1(b)(1)(iv), by operation of section 238(c) of the INA, even aliens who entered without inspection may be removed through administrative removal proceedings. Section 238(b)(3) of the INA provides that a removal order issued under section 238(b) of the INA may not be executed for 14 calendar days, unless the alien waives the 14-day period.

Section 238(b)(4) of the INA lists procedural safeguards the Attorney General must afford the alien. These include reasonable notice of the "charges" and of the opportunity to inspect the evidence and rebut the "charges," as well as the actual reasonable opportunity to inspect the evidence and rebut the "charges." A determination must be made for the record that the individual upon whom the notice is served is, in fact, the alien named in the notice. The alien must also be given the privilege of being represented, at no expense to the Government, by authorized counsel of his or her own choosing. Further, a record must be maintained for judicial review. Finally, the same person cannot issue the charges and make the decision to issue the final removal order.

D. The Regulations Implementing Administrative Removal

The administrative removal regulations were originally published on August 24, 1995 with an effective date of September 25, 1995. On March 6, 1997, the regulations were revised to conform with statutory changes, became effective April 1, 1997, and were published in 8 CFR 238.1. Further important regulatory amendments were published on February 19, 1999 and became effective on March 22, 1999. 64 FR 8478 (1999).

These regulations authorize a Deciding Service Officer (DSO) to issue a Final Administrative Removal Order under section 238(b) of the Immigration and Nationality Act (INA) on Form I-851A. They implement the administrative removal process described in this manual. The process begins when an Issuing Service Officer (ISO) serves a charging document called a Notice of Intent to Issue a Final Administrative Removal Order (NOI) on Form I-851.

A DSO may be a district director, a chief patrol agent, or that official's designated representative. The ISO may be any Immigration and Naturalization Service (INS) officer listed in 8 CFR 239.1 as authorized to issue a Notice to Appear to begin removal proceedings before an immigration judge (IJ) under section 240 of the INA. In accordance with the statute, the regulations state that the DSO and the ISO cannot be the same person.

The regulations incorporate all statutorily required procedural safeguards and demand clear, convincing, and unequivocal evidence in support of the deportability charge. Additionally, the regulations provide for either verbal explanation or written translation of the NOI in the alien's native language or a language the alien understands, and require that a list of available free legal services be provided the alien.

The regulations also provide that the NOI must inform the alien that he or she may request withholding of removal to a particular country if he or she fears persecution or torture there.

If the alien requests withholding of removal, he or she is referred, upon issuance of a Final Administrative Removal Order, to an asylum officer for a screening process to determine whether the alien has a "reasonable fear" of persecution or torture under 8 CFR 208.31. If the alien passes the screening process, he or she is referred to an IJ for an adjudication of whether the alien can be returned to the country in question. In addition, the alien may request IJ review of a negative screening determination by an asylum officer.

The regulations provide for termination of proceedings under section 238(b) of the INA when the DSO finds the alien not amenable to administrative removal. If appropriate, the INS may then begin removal proceedings before an IJ.

The regulations include, by operation of section 238(c) of the INA, among those persons subject to administrative removal proceedings, aliens convicted of aggravated felonies who have not been admitted or paroled into the United States. Section 238(c) of the INA states that "(a)n alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States." Therefore, as reflected in the applicable regulations at 8 CFR 238.1(b)(1)(iv), even aliens who entered without inspection may be removed through administrative removal proceedings.

Neither the statute nor the regulations provide for appeal to the Board of Immigration Appeals (BIA) of a DSO's decision entering a Final Administrative Removal Order. In accordance with the law, the regulations require that a record of proceeding (ROP) be maintained "for judicial review...sought by any petition for review."

An alien convicted of an aggravated felony who is subject to administrative removal proceedings is subject to the same detention requirements as any other alien convicted of an aggravated felony. The regulations specify that the INS decision concerning custody or bond is not administratively appealable during the administrative removal process. Since IJ's do not take part in this process, they may not consider or rehear the INS custody or bond decision. The alien's remedy is to file a habeas corpus petition in Federal District Court.

II. OVERVIEW

A. Criteria

The administrative removal process relates to an alien who is not a lawful permanent resident when the process begins and who has a final conviction for an aggravated felony. Before starting this process, the officer encountering the alien must consider the following factors:

(1)Alienage. At the outset, there must be a determination of alienage. The investigation must disclose that there is clear, convincing, and unequivocal evidence that the subject is an alien, that is, neither a citizen nor a national of the United States.

(2)Immigration status (not a lawful permanent resident). The subject is not a lawful permanent resident. An alien who is a conditional permanent resident under section 216 of the Immigration and Nationality Act (INA) as the spouse, son, or daughter of a U.S. citizen or lawful permanent resident is not a lawful permanent resident for purposes of administrative removal proceedings. Immigration and Naturalization Service (INS) records must corroborate the subject's immigration status.

(3)The existence of a final conviction for an aggravated felony. Deportability based upon a conviction of an aggravated felony, as defined by section 101(a)(43) of the Immigration and Nationality Act (INA), must be established. The public record must be demonstrative of a final conviction for an aggravated felony in a state or Federal court.

B. Procedural Protections

An alien whose life or freedom would be threatened in a specific country or who would be tortured in that country may request withholding of removal. This can be granted under either section 241(b)(3) of the Immigration and Nationality Act (INA) or Article 3 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT).

Section 241(b)(3) requires that an alien's removal to a particular country be withheld if it is more likely than not that the alien's life or freedom would be threatened there on account of race, religion, nationality, membership in a particular social group, or political opinion. This provision, however, does not apply if the alien is subject to certain bars to withholding of removal including, among other grounds, conviction of a particularly serious crime.

An alien is considered to have been convicted of a particularly serious crime if the alien has been sentenced to an aggregate term of imprisonment of five or more years for an aggravated felony or felonies, not taking into account any suspension of imposition or execution of the sentence. An aggravated felony for which the alien has been sentenced to an aggregate term of imprisonment of less than five years may still constitute a particularly serious crime, depending on the crime.

Article 3 of the CAT, as implemented by regulations, creates an additional type of withholding of removal. It prohibits removal of any alien, regardless of any criminal background, to a country where the alien is more likely than not to be tortured. Article 3 is broader than section 241(b)(3) in that it contains no criminal bars to protection and does not require that the torture be on account of any specific reason. It is narrower in that torture is defined narrowly and does not include all types of harm that might constitute persecution.

An alien in administrative removal proceedings may request withholding of removal in his or her response to the Notice of Intent to Issue a Final Administrative Removal Order (NOI). A request for withholding of removal is the mechanism to seek protection from removal to a particular country under either section 241(b)(3) of the INA, based on a fear of persecution, or under Article 3 of the CAT, based on a fear of torture.

If the alien requests withholding of removal in his or her response to the NOI, the alien will, upon issuance of a Final Administrative Removal Order, be referred to an asylum officer. The asylum officer will conduct a screening process to determine whether the alien has a "reasonable fear" of persecution or torture under 8 CFR 208.31. If the asylum officer finds that the alien meets this standard, the case is referred to an immigration judge (IJ) for a withholding determination. If the asylum officer determines that the alien does not meet this standard, the alien may request IJ review of the screening determination only.

If the IJ agrees with the asylum officer's negative reasonable fear finding or if the alien does not request review, the alien may be removed from the United States. If the IJ determines that the alien has a reasonable fear of persecution or torture, the IJ will then make a determination whether the alien is likely to be persecuted or tortured and is, therefore,

entitled to withholding of removal to the country in question under either section 241(b)(3) of the INA or under Article 3 of the CAT.

The regulations implementing Article 3 of the CAT also create a separate form of protection, called deferral of removal, for aliens who would be tortured but who are subject to the bars to withholding. The determination about which form of protection will be granted under the CAT will be made by the IJ, and will not affect the procedures to be followed by INS officers in the administrative removal process. An IJ would grant deferral of removal only when an alien who has requested withholding has been found likely to be tortured but is subject to the bars to withholding. This manual, therefore, will refer generally to the process for withholding of removal under the CAT.

The administrative removal process includes the following procedural protections to the alien provided for in section 238(b) of the INA:

(1) Reasonable notice of both the removal charge and the opportunity to inspect the evidence and rebut the charge.

(2) Reasonable opportunity to inspect the evidence and rebut the charge.

(3) The privilege of being represented by counsel at no expense to the Government.

(4) A determination for the record that the individual upon whom the NOI is served is, in fact, the alien named in the NOI.

(5) A record maintained in the event of judicial review.

(6) The decision to issue a Final Administrative Removal Order not by the person who issues the NOI.

In addition to incorporating these statutorily provided procedural safeguards, the governing regulations (8 CFR 238.1) provide the following protections to the alien:

(1) The charge of deportability must be supported by clear, convincing, and unequivocal evidence.

(2) The alien must be furnished a list of available free legal services.

(3) The Immigration and Naturalization Service (INS) must provide either a written translation of the charging document (NOI) or explain the contents of the charging document in the alien's native language or in a language the alien understands.

(4) The NOI must explain to the alien that he or she may request withholding of removal to a particular country if he or she fears persecution or torture in that country.

C. Highlights Of The Process

The following are highlights of the administrative removal process which incorporates the procedural protections given the alien:

(1)The officer encountering the alien determines that the alien's case meets the criteria for administrative removal. Under these criteria, when the process begins, the individual must be an alien who is not a lawful permanent resident. An alien with conditional permanent residence as the spouse, son, or daughter of a U.S. citizen or lawful permanent resident is not a lawful permanent resident for this purpose. The individual must also have a final conviction for an aggravated felony. An alien who has been convicted of an aggravated felony and who has entered the United States without inspection may be removed through administrative removal proceedings. However, an alien who entered the United States under the Visa Waiver Pilot Program (VWPP) or who has been paroled into the United States may not be put into administrative removal proceedings.

(2)The Issuing Service Officer (ISO) prepares or requests preparation of a charging document called a Notice of Intent to Issue a Final Administrative Removal Order (NOI) on Form I-851. The ISO may be any Immigration and Naturalization Service (INS) officer listed in 8 CFR 239.1(a) as authorized to issue a Notice to Appear to start removal proceedings before an immigration judge (IJ).

(3)A determination is made for the record that the individual upon whom the notice is served is the alien named in the notice. The NOI has a statement to that effect to be signed upon service of the NOI if service is in person. However, neither service in person nor verification of the individual's identity at the time of service are required. Identity is established when the encountering officer questions the alien and conducts related record and/or document checks.

(4)The INS gives the alien reasonable notice by serving the NOI. The NOI explains the alien's opportunity to inspect the Government's evidence and rebut the deportability charge by submitting a written response within ten days, with an extension allowed under certain circumstances. The NOI further explains that, in the response to the NOI, the alien may request withholding of removal if he or she fears persecution or torture in a specific country or countries. The NOI also explains the 14-day period for seeking judicial review if the INS issues a Final Administrative Removal Order unless the alien waives this 14-day period.

(5)The alien has an opportunity to be represented at no expense to the Government. The NOI explains this opportunity and is accompanied by a list of available free legal services.

(6)The alien has a reasonable opportunity to inspect the Government's evidence and rebut the allegations and charge. The alien may submit a written response to the NOI within ten calendar days. The Deciding Service Officer (DSO) may, but is not required to, grant more time to submit a response for good cause shown in a written request the INS receives within the original ten-day period. If the written response contains a request to review the evidence, the INS will serve the alien with a copy of that evidence and give the alien an extra ten days to submit a final response. Similarly, if the DSO considers additional evidence from a source other than the alien, the INS will serve the alien with a copy of that evidence and give the alien an extra ten days to submit a final response. If service of the NOI or evidence is by mail, the alien has 13 calendar days to submit his or her response.

(7)The alien may, in writing, accept immediate issuance of a Final Administrative Removal Order. The alien may also waive the 14-day period for executing the order. The NOI includes statements the alien may sign if the alien chooses to do so.

(8)The DSO makes a decision. The DSO (not the same person who issues the NOI) decides the case. If the DSO finds deportability established by clear, convincing, and unequivocal evidence in the record of proceeding (ROP), the DSO enters a Final Administrative Removal Order. If the DSO finds the alien not amenable to removal under this process, the DSO must terminate the process. If the DSO finds the alien subject to removal in proceedings before an IJ, the DSO causes a Notice to Appear to be served on the alien to begin these proceedings.

(9)Removal must, except where statutory bars apply, be withheld to a country where an alien is more likely than not to be persecuted or tortured. An alien must be granted withholding of removal to a country where he or she is more likely than not to be persecuted as long as no statutory bars to withholding exist. Removal to a country where an alien is more likely than not to be tortured is also prohibited. There are no exceptions to the prohibition on removing an alien to a country where it is more likely than not that the alien would be tortured.

(10) An alien subject to this administrative removal process is by law ineligible for any relief from removal. This includes asylum, voluntary departure, or cancellation of removal. Withholding of removal based on a finding that an alien is more likely than not to be persecuted or tortured is not a form of relief because, as a legal matter, it does not relieve an alien from removal from the United States. It simply restricts the place to which the alien may be removed.

(11) The INS creates and maintains a permanent ROP. The INS must compile and maintain, throughout the entire process, a thorough ROP for judicial review.

(12) The INS may not execute a Final Administrative Removal Order during a 14-day period unless the alien waives this period. The statute prohibits execution of a Final Administrative Removal Order for 14 days after it is issued to give the alien an opportunity to apply for judicial review and requires that a record be maintained for that purpose.

(13) The INS determines custody status as it does in any case involving an alien convicted of an aggravated felony. The alien is subject to the same detention requirements as any other alien convicted of an aggravated felony. The INS custody decision is not administratively appealable, but the alien may seek review of such a decision in habeas corpus proceedings.

III. ENFORCEMENT PROCEDURE

A. Initiation Of The Procedure

First, the officer encountering the alien determines that the alien's case meets the criteria for administrative removal by questioning the alien. Under these criteria, when the process begins, the individual must be an alien who is not a lawful permanent resident. An alien who is a conditional permanent resident under section 216 of the Immigration and Nationality Act (INA) as the spouse, son, or daughter of a U.S. citizen or lawful permanent

resident is not a lawful permanent resident for this purpose. Also, an alien who has entered the United States without inspection may be removed through administrative removal proceedings. However, an alien who entered the United States under the Visa Waiver Pilot Program (VWPP) or who has been paroled into the United States may not be put into administrative removal proceedings. Second, the individual must have a final conviction for an aggravated felony. When processing the alien for this procedure, each of these elements, as well as the alien's identity, must be established.

(1) Establishing alienage. Establishing alienage in an administrative removal proceeding is no different from establishing alienage in other immigration-related matters. An alien is any person who is not a citizen or national of the United States. In determining if a person is an alien, the officer must consider place of birth, the nationality of the person's parents at birth, and/or subsequent naturalization by the person or his or her parents. Those items which would cause an individual to be an alien must be explored during questioning. If the facts indicate that the person is an alien, they must be documented in a Record of Deportable/Inadmissible Alien (Form I-213), sworn statement, and printouts of records checks. The time and date that the alien was questioned should be noted on the Form I-213, and this evidence must be placed in the record of proceeding (ROP).

(2) Verifying immigration status (not a lawful permanent resident). In order to establish the alien's immigration status at the time the process begins, the alien must be interviewed and all pertinent Immigration and Naturalization Service (INS) records systems should be checked. All evidence collected must be placed in the ROP. The Form I-213, sworn statement, printouts of records checks, and any documentation such as an Arrival-Departure Record (Form I-94) which indicates entry as a nonimmigrant should be used as evidence that the alien is not a lawful permanent resident. Evidence of conditional permanent resident status as the spouse, son, or daughter of a U.S. citizen or lawful permanent resident is available in both INS automated record systems and hard copy A- files.

Conditional permanent residence based on a relationship to a U.S. citizen or lawful permanent resident under section 216 of the INA should not be confused with that for employment-creation entrepreneurs, spouses, and children under section 216A of the INA. Unlike section 216, which is based on a family relationship, section 216A is based on investment in a commercial enterprise. Persons who are conditional permanent residents as employment-creation entrepreneurs under section 216A may not be placed in administrative removal proceedings.

(3) Establishing conviction of an aggravated felony.

Conviction. The finality of a conviction is not affected by the pendency of post-conviction discretionary petitions, collateral attacks, or other remedies that do not constitute a direct appeal. The alien must establish that he or she has a direct appeal pending (or that the appeal time has not expired) in the criminal court proceedings in order to defend against the criminal ground of deportability alleged in the charging document.

The term conviction is defined in section 101(a)(48)(A) of the INA as, but is not limited to, a formal judgement of guilt by a court. That section of law gives the following test for establishing a conviction for immigration purposes if adjudication of guilt has been withheld: (A) a judge or jury has found the alien guilty or the alien has entered a plea of

guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt; and (B) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. See Section VIIB of this manual for more information about section 101(a)(48)(A).

Aggravated felony. Legislation passed in 1988 defined the term aggravated felony at section 101(a)(43) of the INA. The definition was expanded in 1990, 1994, and 1996. A foreign conviction for which a term of imprisonment was completed within the previous 15 years is recognized as an aggravated felony.

Aggravated felonies are serious criminal offenses including, but not limited to, crimes such as murder, rape, sexual abuse of minors, child pornography, certain crimes of violence, and illicit trafficking in controlled substances, firearms, and destructive devices.

Immigration law was changed September 30, 1996 to provide that the term aggravated felony applies regardless of whether the conviction was before, on, or after that date. Before this change, determining whether a crime was an aggravated felony was very difficult because there were different effective dates for the various crimes. The enacting legislation provided that the term now applies regardless of when the conviction was entered to actions taken on or after September 30, 1996 and to violations on or after that date of section 276 of the INA relating to criminal reentry after removal.

Matter of Lettman, Interim Decision 3370 (BIA 1998), held that an alien convicted of an aggravated felony is subject to removal regardless of the date of the conviction provided the alien is put in proceedings on or after March 1, 1991 and the crime falls within the aggravated felony definition. In Lettman v. INS, 168 F.3d 463 (11th Cir.1999), however, the Eleventh Circuit reversed this decision. It held that an alien convicted of murder prior to the effective date of section 7344 of the Anti-Drug Abuse Act (ADAA) of 1988, Public Law 100-690, allowing for deportation of aliens convicted of aggravated felonies, could not be deported under that section. Since the Eleventh Circuit decision is currently the law within that judicial circuit, INS employees working on administrative removal cases in that jurisdiction (Alabama, Georgia, and Florida) should consult District Counsel for guidance.

Conviction record. The record of conviction must be placed in the ROP. The conviction may be proven by any of the documents or records in 8 CFR 3.41 which describes evidence accepted in proceedings before an immigration judge (IJ). [See 8 CFR 3.41 and 8 CFR 287.6(a), which is cited in the former regulation. See also sections 240(c)(3)(B) and (C) of the INA describing types of documentary evidence constituting proof of conviction in immigration proceedings. These sections of law provide a statutory basis for 8 CFR 3.41.]

(4) Verifying identity. When questioning the alien and checking records and documents to determine whether the case meets the criteria for administrative removal, special care must be taken to verify his or her identity. The process for verifying identity in an administrative removal proceeding is, in actuality, no different from that in any other immigration-related matter. The encountering officer is responsible for making absolutely certain that all information is completely consistent and there is no question whatsoever about the identity of the person on whom the Notice of Intent to Issue a Final Administrative Removal Order (NOI) will be served.

The law specifically requires a determination for the record that the individual upon whom the NOI is served is, in fact, the alien named in the NOI. When the NOI is served in

person, the INS employee or other official serving the NOI verifies the identity of the person on whom it is served and signs a statement to that effect in the Certificate of Service on the NOI. In a case where service will be by mail, the investigating officer/agent should prepare a brief written determination regarding verification of the alien's identity for inclusion in the ROP.

(5) Determining applicability of withholding of removal. Once a case meets the criteria for administrative removal proceedings under section 238(b) of the INA, no relief from removal exists. While no relief from removal is available in these proceedings, cases may arise in which removal to a particular country must be withheld under section 241(b)(3) of the INA or Article 3 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT).

Section 241(b)(3) of the INA provides for withholding of removal to a country where an alien's life or freedom would be threatened because of the alien's race, religion, nationality, membership in a particular social group, or political opinion. This does not apply "if the Attorney General decides that...the alien, having been convicted by a final judgement of a particularly serious crime, is a danger to the community." An alien sentenced to an aggregate term of imprisonment of at least five years for his or her aggravated felony conviction(s) is considered to have committed a particularly serious crime and is statutorily ineligible for withholding of removal. An alien sentenced to less than five years in the aggregate for his or her aggravated felony or felonies, however, may be entitled to withholding of removal under section 241(b)(3).

In addition, Article 3 of the CAT prohibits an alien's removal to a country where he or she is more likely than not to be tortured. There are no exceptions to this prohibition. Therefore, an alien with aggravated felony conviction(s) may be entitled to protection under Article 3, even if he or she has been sentenced to five or more years' imprisonment.

The NOI informs the alien that he or she may request withholding or deferral of removal if he or she fears persecution on account of a protected ground listed in section 241(b)(3) of the INA in a specific country or countries or if he or she fears torture in a specific country or countries. The alien may request withholding on either of these grounds:

By checking the appropriate boxes on the back of the NOI.

By so stating in a written response to the NOI.

If the alien requests, or indicates an intention to request, withholding of removal under section 241(b)(3) of the INA or Article 3 of the CAT, the officer encountering the alien must prepare a memorandum so stating for inclusion in the ROP. Similarly, if the alien expresses a fear of returning to a particular country or countries, the encountering officer must document that in a memorandum for the ROP. Since withholding/deferral of removal is the only remedy available in such a case, this will help ensure that the alien is not ordered removed without an opportunity to express his or her concerns. Such a memorandum will, for example, highlight the need to serve the NOI in person to make absolutely certain the alien knows that he or she may request withholding of removal.

For an alien who expresses a fear of return to a particular country or countries to be considered for withholding, he or she must affirmatively request withholding by checking the appropriate boxes on the back of the NOI or by so stating in a written response to the

NOI. If INS employees working on administrative removal are concerned about whether aliens who expressed fear of return understand this requirement, the employees may contact the Asylum Pre-Screening Officer (APSO) Supervisory Asylum Officer (SAO) at the local asylum office for assistance. The APSO SAO will arrange for asylum officers to help explain the NOI and information about the reasonable fear screening process, either by telephone or in person. The APSO SAO may also assist in finding appropriate interpreters, if necessary.

The officer encountering the alien should continue his or her action to initiate administrative removal proceedings after preparing the memorandum about withholding of removal or fear of return. However, if and when a Final Administrative Removal Order is issued, the alien will be referred for a screening determination under 8 CFR 208.31 by an asylum officer if the alien has affirmatively requested withholding in one of the ways described above.

(6) Determining applicability of a waiver under section 212(h) of the INA. Pursuant to section 238(b)(5) of the INA, an alien in administrative removal proceedings under section 238(b) of the INA is ineligible to apply for any discretionary relief. However, in In re Michel, Interim Decision 3335 (BIA 1998), the Board of Immigration Appeals (BIA) held that an alien not previously admitted to the United States as a lawful permanent resident is statutorily eligible to seek a section 212(h) waiver despite an aggravated felony conviction.

Based on this decision, a Notice to Appear must be served on the alien to begin removal proceedings before an IJ if the alien appears otherwise eligible for a section 212(h) waiver. Such an alien must be immediately eligible to apply for adjustment of status to that of a lawful permanent resident under section 245 of the INA. He or she should not be put in administrative removal proceedings.

INS employees who process and adjudicate administrative removal cases must be thoroughly familiar with section 212(h) and the grounds of inadmissibility in section 212(a)(2) of the INA that it waives. While there is no substitute for knowledge of the statutory provisions, the following simplified overview may be helpful in identifying aliens who may be eligible for section 212(h) waivers.

Section 212(h) of the INA provides for a discretionary waiver of certain criminal and related inadmissibility grounds. In general terms, they relate to conviction of crimes involving moral turpitude, multiple criminal convictions, prostitution and related vice, involvement in serious criminal activity for which immunity from prosecution is asserted, and minor controlled substance violations.

The inadmissibility grounds are set forth in section 212(a)(2)(A)(i)(I), (B), (D), and (E) of the INA and in section 212(a)(2)(A)(i)(II) of the INA as it relates to a single offense of simple possession of 30 grams or less of marijuana. Under section 212(h), these grounds may be waived in the either of the following instances:

In the case of any immigrant. If it is established that (A) the alien is inadmissible only under section 212(a)(2)(D)(i) or section 212(a)(2)(D)(ii) or the activities for which he or she is inadmissible occurred more than 15 years before applying for permanent residence; (B) the alien's admission would not be contrary to the national welfare, safety, or security; and

(C) the alien has been rehabilitated. Section 212(a)(2)(D)(i) relates to prostitution, and section 212(a)(2)(D)(ii) relates to procurement of prostitutes.

In the case of an immigrant who is the spouse, parent, son, or daughter of a U.S. citizen or lawful permanent resident. If it is established that denial of admission would result in extreme hardship to the U.S. citizen or lawful permanent resident spouse, parent, son, or daughter.

A section 212(h) waiver also requires the alien to have been approved for a visa, admission to the United States, or adjustment of status to that of a lawful permanent resident. In addition, a waiver may not be granted in the following cases:

Where the criminal activity involves murder or torture.

Where the alien was previously admitted as a lawful permanent resident if: (A) the alien has been convicted of an aggravated felony since the date of admission; or (B) the alien has not lawfully and continuously resided in the United States for seven years immediately before the date removal proceedings begin.

B. Review And Issuance Of The Charging Document

(1) Review for legal sufficiency. Immigration and Naturalization Service (INS) attorneys are available to provide advice regarding all aspects of cases being processed under section 238(b) of the Immigration and Nationality Act (INA). Cases must be reviewed for legal sufficiency in accordance with outstanding instructions.

(2) Preparation of the charging document. The Issuing Service Officer (ISO) prepares or requests preparation of a charging document or Notice of Intent to Issue a Final Administrative Removal Order (NOI). The ISO may be any INS officer listed in 8 CFR 239.1(a) as authorized to issue a Notice to Appear to begin removal proceedings. The NOI must set forth allegations of fact and conclusions of law establishing that the alien is not a lawful permanent resident and is deportable under section 237(a)(2)(A)(iii) of the INA relating to conviction for an aggravated felony. The charge of deportability must be supported by clear, convincing, and unequivocal evidence. (See Sections IV(C) and V(A) regarding this issue.)

C. Serving the Notice, Detainer, and Arrest Warrant

(1) Serving the Notice of Intent to Issue a Final Administrative Removal Order (NOI). Section 238(b)(4)(D) of the Immigration and Nationality Act (INA) specifically provides for service of the NOI "either in person or by mail." However, where possible, it is preferable to serve the original NOI by personal delivery upon the alien.

Unless the NOI is in, or is accompanied by a written translation in, the alien's native language or in a language the alien understands, it must be served in person. The one exception is where alternative means such as the telephone or video teleconferencing, where feasible, are used to explain the NOI to the alien in a language he or she understands. In that event, the NOI may be served by mail.

If the alien previously requested or indicated an intention to request withholding of removal based on fear of persecution or torture in the country of removal, the NOI must be served

in person to ensure the alien understands that he or she may request withholding/deferral of removal. The NOI must also be served in person if the alien has expressed a fear of returning to a particular country or countries. In these cases, the one exception to personal delivery is where means such as the telephone or video teleconferencing are used to explain the necessary information to the alien.

Verify the identity of the individual upon whom the notice is served to determine whether or not that individual is, in fact, the alien named in the notice. If so, sign and date the Certificate of Service on the NOI which includes a determination for the record that the individual upon whom the notice is served is the alien named in the notice. Also write the manner of service in the space provided. In addition, sign, date, and write the manner of service on the copy the officer will return to the record of proceeding (ROP).

Read and explain the NOI to the alien in the alien's native language or in a language the alien can understand. Write the name, location, and employer of any interpreter used in the space provided on the NOI and on the copy the officer will return to the ROP. If necessary, the Issuing Service Officer (ISO) should state, on the Record of Deportable/Inadmissible Alien (Form I-213), how the ISO knows the alien understands the language in which the NOI was explained.

Provide a list of free legal services and emphasize the alien's right to obtain counsel of his or her choice.

Note the date the list was provided on Form I- 213.

Request the alien to sign the acknowledgment of receipt of the NOI on the back of the NOI. If the alien designates a country, waives the right to contest the charge and to appeal, and does not request withholding of removal, ask the alien to state the country in the space provided on the NOI and the copy the officer will return to the ROP.

Advise the alien that (A) he or she may check the appropriate boxes on the back of the NOI, in the section called "I Wish to Contest and/or to Request Withholding of Removal" to challenge the charge and any of the allegations, or (B) he or she may wait to respond within ten calendar days of service of the NOI.

Advise the alien that if he or she fears persecution or torture in a specific country or countries, he or she may request withholding/deferral of removal to that country or those countries. Explain to the alien that he or she may do so by checking the appropriate boxes on the back of the NOI or by so stating in a written response to the NOI within ten calendar days of service of the NOI. Explain that, if the alien requests this form of protection, an asylum officer will interview the alien to determine whether the alien has a reasonable fear of persecution or torture. An alien will meet this standard if he or she establishes that there is a reasonable possibility that he or she would be persecuted or tortured in the country in question. Explain that this is only a screening standard. Also explain that, if the alien meets this standard, an immigration judge (IJ) will then determine eligibility for protection from removal to that country based on a finding that he or she is more likely than not to be persecuted or tortured.

Do not stop administrative removal proceedings if the alien requests withholding of removal. Explain to the alien that he or she will be referred to an asylum officer for a

reasonable fear screening interview under 8 CFR 208.31 if and when a Final Administrative Removal Order is issued.

If the alien (A) clearly indicates that he or she understands the nature of the charges; (B) voluntarily waives the right to counsel; (C) does not wish to contest the charge and allegations; (D) does not wish to request withholding of removal; (E) wishes to be removed; and (F) wishes to waive appeal of the Final Administrative Removal Order, then reread the section on the back of the NOI called "I Do Not Wish to Contest or Request Withholding of Removal" to the alien to verify this desire. ONLY if the alien still wishes to sign this section, show him or her the place to sign in the "I Do Not Wish to Contest or Request Withholding of Removal" section of the NOI. If the alien states any reason(s), write the reason(s) down for later inclusion in the ROP under the record of proceeding cover sheet.

If the alien indicates that he or she also wishes to waive the 14-day period for executing the Final Administrative Removal Order, verify this desire. ONLY if the alien still wishes to waive this period, show him or her the block to check in the "I Do Not Wish to Contest or Request Withholding of Removal" section of the NOI.

Never encourage the alien to waive the right to counsel, the right to contest the charges or request withholding of removal, or any other right.

Never encourage the alien to sign the NOI, except the acknowledgment of receipt, if the alien wishes to wait to decide what to do. Be completely neutral. Leave the original NOI with the alien and return the executed duplicate (showing any portions signed by the alien) to the ROP.

(2) Arrest warrant and detainer. A Warrant of Arrest of Alien should be issued by an authorized officer at the time of issuance of the NOI. If the alien is incarcerated, a detainer should be served on the appropriate authorities at the correctional facility. In that event, the warrant should be maintained in the file and served when the alien is released to the Immigration and Naturalization Service (INS).

(3) ROP. INS personnel who are involved in issuing and serving NOI's, detainers, and arrest warrants must ensure that the ROP contains all evidence relied on during the process. (See Section IV(F), Section V, and Section VII(B) for detailed information about the ROP).

IV. DECISION PROCEDURE

A. Deciding Service Officer's (DSO's) Duties

The DSO must consider all evidence contained in the record of proceeding (ROP), make a final decision, and issue and cause to be served upon the alien any Final Administrative Removal Order on Form I-851A. The DSO has the option, where warranted, of terminating the administrative removal proceedings instead of issuing a Final Administrative Removal Order. In that event, the DSO may, if appropriate, cause a Notice to Appear to be served on the alien to begin removal proceedings before an immigration judge (IJ).

Whatever the outcome of the case, the DSO must always make sure that complete, accurate records are maintained. This permits any reviewing court to understand all

actions taken from the time of issuance and service of the Notice of Intent to Issue a Final Administrative Removal Order (NOI). on form I-851.

The DSO is responsible for the following tasks:

(1) Reviewing the file and evaluating all evidence.

(2) Receiving and considering any response the alien makes.

(3) When the alien asks to inspect the evidence the Government relies on in support of the NOI, causing photocopies of all of the evidence in question to be served on the alien and notifying the alien in writing about the time period for submitting a final response.

(4) Granting or denying any requests for additional time and causing to be served on the alien notification of any extended deadline. This notification should be in writing.

(5) Asking for additional information where warranted and causing to be served on the alien any request for evidence or notification of an interview. Such a request or notification should be in writing.

(6) Ensuring that an alien subject to these proceedings is not ordered removed without an opportunity to request withholding or deferral of removal. When an alien subject to administrative removal requests this type of protection, the alien must, upon issuance of a Final Administrative Removal Order, be referred to an asylum officer for a reasonable fear screening under 8 CFR 208.31. If an alien is found to have a reasonable fear of persecution due to a protected characteristic (race, religion, etc.) or of torture, an IJ determines the alien's eligibility for withholding, including any bars to withholding, or for deferral, which is not subject to any bars.

(7) Clearly noting in the ROP any official action taken during the process by making written notations and, if necessary, preparing a separate memorandum for the file with stated reasons.

(8) Entering into the ROP any document the alien submits. For example, if the alien at any time submits a written waiver of appeal or a copy of his or her petition for review, these items should be placed in the ROP.

(9) Marking with an exhibit number any document received into the ROP. See Section IV(F) of this manual.

(10) Preparing the supplemental decision when such a supplemental decision is necessary to support a Final Administrative Removal Order, if issued.

(11) Preparing notification of termination of the administrative removal proceedings when appropriate.

(12) Making sure that, promptly upon the Immigration and Naturalization Service's (INS') receipt of a copy of a petition for review, certified copies of the ROP are forwarded to the Office of Immigration Litigation (OIL) of the Department of Justice (DOJ). (The law prohibits execution of the removal order during a 14-day period,

unless waived by the alien, to give him or her an opportunity to apply for judicial review and requires maintenance of a record for that purpose.)

B. Ensuring A Fair Process

Administrative removal proceedings must safeguard against an individual's being taken into custody and removed without a mechanism to be heard and defend his or her right to remain in the United States. The individual in question must not only be advised of a clearly defined charge and allegations to address, but must also have a fair opportunity to inspect the evidence on which the matter is to be decided and to present evidence in his or her favor.

The Deciding Service Officer (DSO) must ensure fairness in the decision process. One of the DSO's important responsibilities with respect to this matter is making every effort to ensure that any response(s) and evidence the alien submits are entered into the record of proceeding (ROP).

To facilitate this process, each Immigration and Naturalization Service (INS) office which decides administrative removal cases must establish an effective means of matching responses with ROP's. Examples may include providing to aliens unfranked envelopes stamped with the address to which any responses must be submitted and/or establishing a special Post Office box only for administrative removal cases.

Deciding which procedure to use in matching responses with ROP's is a local matter. The bottom line is that the procedure must work fairly. If the procedure in place does not result in responses being matched promptly, it must be changed.

C. Case Review

The Deciding Service Officer (DSO) fulfills an important quasi-judicial function. In reaching a decision, the DSO must very carefully review the entire record of proceeding (ROP) to determine whether the evidence supports the charge and every allegation on the Notice of Intent to Issue a Final Administrative Removal Order (NOI). Section 238(b)(4)(E) of the Immigration and Nationality Act (INA) requires that a record be maintained for judicial review.

Alienage and deportability must be established by clear, convincing, and unequivocal evidence. The alien's not being a lawful permanent resident may be supported by a lesser proof such as written verification that Immigration and Naturalization Service (INS) records were diligently checked and disclosed no official record of that status. Other examples include an affidavit, a Record of Deportable/Inadmissible Alien (Form I-213), an Arrival-Departure Record (Form I-94), or printouts from automated systems [e.g., the Central Index System (CIS) and Nonimmigrant Information System (NIIS)]. An alien's written admission against his or her own interest is considered strong evidence. See Section III(A) of this manual about verifying alienage and immigration status.

The law requires a determination for the record that the individual upon whom the NOI is served is, in fact, the alien named in the NOI. When the NOI is served in person, the official serving the NOI signs a statement to that effect in the Certificate of Service on the NOI after verifying that individual's identity. By regulation, an executed duplicate of the NOI in the ROP must be retained as evidence that the individual upon whom the NOI is

served is the alien named in the NOI. Personal verification of the individual's identity at the time of service is, however, not required as the law provides for service of the NOI by mail as well as in person. When service is by mail, other evidence in the ROP supports the required determination of identity which must be established when the encountering officer questions the alien and conducts related record and/or document checks.

This manual contains information on a variety of topics which can assist the DSO in his or her case review. A discussion of the nature and sufficiency of evidence appears in Section VII(A). Procedural matters are treated in Section VII(B). Information on convictions and aggravated felonies is in Section III(A) and Section VII(B). Information in Section I(B), (C) & (D), II(B) and (C); Section III(A) and (C); and Section IV(A), (D), (E), (G) and (L) relates to withholding of removal. Information in Section III(A)(5) explains how to make sure aliens who expressed a fear of return to a particular country or countries understand the need to ask for withholding to be considered for this protection. Eligibility for a waiver of inadmissibility under section 212(h) of the INA is covered in Section III(A)(6).

D. Alien's Response

The alien may submit a written response to the Notice of Intent to Issue a Final Administrative Removal Order (NOI) within ten calendar days from the date of service of the NOI. In some instances (explained below) the Deciding Service Officer (DSO) may grant an additional period of time.

The period for submitting any response is in reality three days longer if service of the notice is by mail. If the final day falls on a Saturday, Sunday, or legal holiday, the time is extended to the next business day.

The alien must submit any response or evidence to the Immigration and Naturalization Service (INS) office at the address shown on the NOI. That office must receive any response to the NOI or to any other notice served on the alien within the required time period.

The alien's response must state which finding(s) in the NOI he or she is challenging. The alien should support his or her response with affidavit(s), documentary information, or other evidence.

The alien may request withholding of removal in either an initial or final response. In so doing, the alien must state the country or countries in which persecution or torture is feared. Any response from the alien indicating an intention to request withholding of removal is considered to be an actual request. See information starting in Section III(A)(5) of this manual about ensuring that aliens who expressed a fear of return to any country or countries understand the requirement to request consideration for withholding to be considered for this protection.

The alien may advise the INS, within any period authorized for submitting a response, regarding his or her choice of country for removal (to be honored only to the extent allowed by law) if the INS issues a Final Administrative Removal Order. The NOI has a space in which the alien can write his or her choice of country when not contesting the allegations and charge and not requesting withholding of removal.

The alien may respond to the NOI in various ways or not respond at all. The procedures relating to different possibilities are described below. More than one of these possible situations could arise in an actual case.

(1) The alien concedes deportability. The alien may concede deportability by signing the preprinted statement on the NOI or otherwise executing such a statement.

(2) The alien does not submit a timely response and does not ask for more time to submit a response after the response time has expired. The DSO must decide the case based on the evidence already in the record of proceeding (ROP).

(3) The alien makes a timely request for more time to submit a response. The DSO may, but is not required to, grant more time to submit a response for good cause shown in a written request the INS receives within the original ten-day period. Such a request must explain specifically why an extension is necessary. Making such a request does not automatically give the alien more time to submit a response. The alien has more than ten days to submit a response only if the DSO permits it in the exercise of his or her discretion. The regulations do not specify a period of time which the DSO may grant. In granting such a request, the DSO must notify the alien that the INS must receive any response submitted within the time period allowed.

(4) The alien submits a timely response but does not ask to review the evidence in the ROP. The DSO must decide the case based on the original ROP plus the alien's response and any supporting evidence.

(5) The alien submits a timely response, but the DSO needs more evidence to make a decision. If the DSO finds that the response raises a genuine issue of material fact about the findings in the NOI or believes that more evidence will help in making a decision, the DSO may ask for more evidence from any source including the alien. If the DSO considers additional evidence from a source other than the alien, the DSO must serve the alien with a copy of that evidence and give the alien an extra ten days to submit a final response. In so doing, the DSO must notify the alien that the INS must receive any response submitted within the time period allowed.

(6) The alien asks to review the evidence in the ROP. If the written response contains a request to review the evidence on which the findings in the NOI were based, the DSO must serve the alien with a copy of that evidence and give the alien an extra ten days to submit a final response. In so doing, the DSO must notify the alien that the INS must receive any response submitted within the time period allowed.

(7) The alien requests withholding of removal. If the response indicates the alien requests withholding of removal, the alien must, if and when a Final Administrative Removal Order is issued, be referred to an asylum officer for a reasonable fear screening determination under 8 CFR 208.31.

E. Deciding Service Officer's (DSO's) Determination

The Deciding Service Officer (DSO) must be an independent fact-finder. He or she must never rely on evidence outside the record of proceeding (ROP). It is essential that the DSO make an independent evaluation and consider only evidence in the ROP which the alien has had a fair opportunity to rebut.

The DSO's decision must be based on a thorough review of the evidence in the ROP. This includes evidence that is material to the issue of the timeliness of the alien's response. (See Section IV(D) of this manual regarding the time frames for making a response).

The DSO's determinations in administrative removal proceedings are limited to factual matters. Further, he or she is not authorized to make decisions relating to withholding or deferral of removal. Any alien requesting withholding or deferral of removal must, upon issuance of a Final Administrative Removal Order, be referred to an asylum officer for a screening determination under 8 CFR 208.31.

The DSO may, in any case, consult with an Immigration and Naturalization Service (INS) attorney in reaching a decision. As indicated in Section III(A)(5) of this manual, the DSO may also consult with the Asylum Pre-Screening Officer (APSO) Supervisory Asylum Officer (SAO) at the local asylum office.

How the DSO decides the case and the time frames involved depend on whether the alien responds to the Notice of Intent to Issue a Final Administrative Removal Order (NOI) and the nature of that response. Various possibilities are discussed below.

(1) The alien concedes deportability. The DSO issues a Final Administrative Removal Order (Form I-851A) and causes a copy of Form I-851A to be served on the alien.

(2) The DSO does not receive a timely response to the NOI. The INS does not receive a response within the time allowed, and the evidence in the ROP establishes deportability by clear, convincing, and unequivocal evidence. The DSO issues Form I-851A and causes a copy of Form I-851A to be served on the alien.

(3) The alien responds in a timely manner, but the DSO finds that the response presents an insufficient rebuttal. The DSO finds that the response fails to rebut the allegations and charge in the NOI and that deportability is established by clear, convincing, and unequivocal evidence in the ROP. The DSO issues Form I-851A and causes a copy of Form I-851A to be served on the alien.

(4) The DSO finds that a timely response establishes that the alien is not amenable to removal. The DSO exercises his or her discretion to terminate the administrative removal proceedings and notifies the alien, by letter, about the action taken and the reason(s) for that action.

(5) The DSO finds that a timely response raises a genuine issue of material fact involving novel, very complex and/or discretionary matters. The DSO exercises his or her discretion to terminate the administrative removal proceedings. If appropriate, the DSO causes a Notice to Appear to be served on the alien to begin removal proceedings before an immigration judge (IJ).

(6) The DSO finds that a timely response raises a genuine issue of material fact which the DSO will be able to resolve with additional evidence or the DSO believes that more evidence will help in making a decision. In reaching a decision, the DSO may ask for more evidence from any source, including the alien. For example, the DSO may, if he or she deems it necessary, interview the alien. The DSO must serve on the alien a copy of any additional evidence from a source other than the alien and give the alien ten days to furnish a final response. Upon receipt of the alien's final response or

expiration of the time for receiving a response, the DSO renders a decision. Depending on the evidence in the ROP, the outcome will be that described in item 3, item 4, or item 5.

(7) The alien requests withholding of removal. If the alien requests withholding of removal, the alien must be referred, if and when a final order is issued, to an asylum officer for a screening determination under 8 CFR 208.31. The DSO is not authorized to make determinations about eligibility for withholding or deferral of removal nor about the existence of any bars to withholding. These determinations must be made under the process set out in 8 CFR 208.31.

F. Exhibits In The Record Of Proceeding (ROP)

The Deciding Service Officer's (DSO's) written findings and conclusions of law including the printed findings on the Final Administrative Removal Order (Form I-851A) must be supported by reasonable, substantial, and probative evidence in the ROP. It is helpful to refer to exhibits relied on in entering a final order, especially when the alien raises issues that need to be addressed in a supplemental written decision. The DSO must follow the procedures described here to facilitate any review of the ROP. (See Section V and Section VI(B) for additional information about the ROP).

Arrange and mark exhibits. The DSO should personally mark all documents relied on in the ROP underneath the record of proceeding cover sheet as Exhibits 1, 2, 3, etc. from top to bottom. The exhibit number should be at the bottom of each document. When there is a large number of similar documents (e.g., five affidavits in support of the alien's response attesting to the same assertion), all of these documents can be fastened together and marked as a group exhibit (e.g., Group Exhibit 1).

The exhibits should be placed in some logical order. For example, all documents relied on by the Government can be arranged underneath the Notice of Intent to Issue a Final Administrative Removal Order (NOI) on Form I-851 with all responsive documents, including any briefs or memoranda, below that. When the decision is made, any executed original Form I-851A final order or other decision would become the top document in the ROP (not marked as an exhibit), appearing just below the record of proceeding cover sheet. Any supplemental decision attached to a Form I-851A becomes a part of the final order and is retained in the ROP (as well as being served on the alien).

It is possible that the alien will sign a written waiver of the 14-day period for seeking judicial review after a final order has been issued. Such a waiver must be filed in the ROP on top of the order. This document does not receive an exhibit number if it is not in the ROP at the time of the DSO's decision.

Refer to exhibits in any supplemental decision. The Form I-851A contains critical printed findings of fact and conclusions of law which the DSO may not sign without thoroughly reviewing the ROP and being satisfied that each allegation and conclusion is supported by the requisite evidentiary proof. When the DSO prepares a supplemental decision, the DSO should refer to specific exhibits relied on in making the determination and cite authorities or sections of law. This is particularly important when the alien raises any issues, the DSO requests additional information, or the ROP contains numerous exhibits. The supplemental decision may explain how the exhibits support each contested allegation and conclusion of law recited on Form I-851.

G. Preparing A Supplemental Decision

Need for a supplemental decision. When issuing a Final Administrative Removal Order (Form I-851A), the Deciding Service Officer (DSO) must decide whether or not to prepare a supplemental decision, depending on the issues in the case. A supplemental decision is meant to augment the Final Administrative Removal Order on Form I-851A, which already incorporates preprinted core findings necessary in all cases.

In any case where the alien submits a rebuttal challenging one or more of the allegations and/or the charge in the Notice of Intent to Issue a Final Administrative Removal Order (NOI) on Form I-851, the DSO must prepare a supplemental decision. Examples of cases where supplemental decisions are necessary include those where the alien asserts that he or she is a U.S. citizen or lawful permanent resident or that he or she has not been convicted of an aggravated felony. In such a case, a supplemental decision is essential to assure any reviewing court that the DSO has reviewed and considered all evidence and addressed all the alien's concerns or objections.

In a case where the alien submits a rebuttal that does not raise any substantive issues or address any material facts, a supplemental decision would generally not be necessary. For example, a supplemental decision would most likely not be necessary if the only rebuttal consists of a simple statement such as "I do not want to go home" where no reason is given.

General procedure. The DSO should attach any supplemental decision to the Form I-851A, using either a Continuation Page (Form I-831) or plain bond paper. In a supplemental decision, the DSO should refer to specific exhibits relied upon in the record of proceeding (ROP) to demonstrate that relevant issue(s) raised or evidence submitted was considered. The DSO should always explain very clearly the specific reason(s) the issue(s) or evidence has not overcome the allegations and deportability charge in the NOI. A supplemental decision should also include any appropriate citations.

Do's and don't's of preparing a supplemental decision. The DSO's supplemental written decision should not contain inflammatory language. It should show evenhandedness in discussing issues presented.

The DSO should not use argumentative words and phrases as they are provocative and tend to destroy any appearance of impartiality. Using words or phrases such as "purports" or "would have us believe" is not helpful when more neutral language can be used. The words "states" and "asserts" are less judgmental.

Philosophical commentary or opinions on the wisdom of the immigration laws are not helpful. This is also true of conjecture on the alien's motives.

The DSO should try to refrain from using certain archaic legal terms. The use of words such as "herein," "therein," "aforesaid," and "hereinafter" is unnecessary and should be avoided.

Short sentences and paragraphs are of great assistance to the reader because they make the text easier to understand. Headings and sub-headings can clarify the text even more. A good rule of thumb is that a sentence is usually too long if it is more than three lines long. In those instances where very complex material makes it necessary to write a more

complicated, longer sentence, items in the sentence can normally be listed, indented, and numbered or simply numbered without listing and indentation.

Good legal writing is disciplined and exact. It is straightforward and meant to inform.

The content of a decision is dictated by the issues that must be addressed to resolve the case. It is generally considered improper in legal writing to resolve issues that are not essential to the outcome of the case. Discussions of non-essential issues are considered dictum and are not binding or of precedential value. The sole exception to this rule is dictum of the Supreme Court, which is accorded substantial weight.

The DSO should fight any temptation to address matters which will not lead to the resolution of the case. In most instances, if the resolution of one issue will decide the outcome of the case, that is the only issue that needs to be or should be addressed.

The DSO may not decide discretionary matters during the administrative removal proceeding. Since the process applies only to persons who are not lawful permanent resident aliens and not eligible for any discretionary relief under the Immigration and Nationality Act (INA), weighing favorable and adverse discretionary factors is unnecessary and inappropriate.

The DSO is also not authorized to make decisions about withholding of removal under section 241(b)(3) of the INA or withholding/deferral of removal under Article 3 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT). If an alien makes such a claim, the alien must, if and when a Final Administrative Removal Order is issued, be referred to an asylum officer for a screening determination under 8 CFR 208.31.

If the DSO finds that the alien is not amenable to removal under this administrative process, the DSO must notify the alien, by letter, about the action taken and the reason(s) for that action. If the alien is still subject to removal, the Immigration and Naturalization Service (INS) may issue a Notice to Appear (Form I-862) to begin proceedings before an immigration judge (IJ).

H. Sample Supplemental Decision Topics

The following are examples of possible supplemental decision topics a DSO may need to address. This list of topics is by no means exhaustive.

(1) Timeliness of the response. "The respondent failed to submit a written response to the Notice of Intent to Issue a Final Administrative Removal Order (NOI) within the time required under 8 CFR 238.1(c), specifically, . See Exhibits 1, 3, and 4, Record of Proceeding [description of exhibits and any necessary explanation regarding these exhibits]. Upon consideration of the entire Record of Proceeding, I find that the respondent's alienage, conviction of an aggravated felony, and deportability are supported by clear, convincing, and unequivocal evidence. I also find that the respondent is not a lawful permanent resident of the United States. Additionally, the respondent is statutorily ineligible for any relief from removal that the Attorney General may grant in an exercise of discretion. See Exhibits 5 and 7 [description of any relevant exhibits and any necessary explanation regarding these exhibits]."

(2) No genuine issue of material fact raised. "In a written response to the Notice of Intent to Issue a Final Administrative Removal Order (NOI), the respondent challenges allegation #_____ and asserts that . In support of the respondent's assertion, the respondent submitted . See Exhibits 8 to 11, Record of Proceeding. This evidence is insufficient to rebut allegation # ……because [explanation of specific reason(s), e.g., not corroborated by independent evidence]. Therefore, the respondent's response fails to rebut the allegations and charge of deportability in the NOI. Upon consideration of the entire Record of Proceeding, I find that the respondent's alienage, conviction of an aggravated felony, and deportability are supported by clear, convincing, and unequivocal evidence. I also find that the respondent is not a lawful permanent resident of the United States. Additionally, the respondent is statutorily ineligible for any relief from removal that the Attorney General may grant in an exercise of discretion. See Exhibits 1, 4, and 7 [description of any relevant exhibits and any necessary explanation regarding these exhibits]."

(3) Insufficient claim to U.S. citizenship. "The respondent claims to be a citizen of the United States and disputes allegation # in the Notice of Intent to Issue a Final Administrative Removal Order (NOI). See Exhibit 2 at Page 3, Record of Proceeding. In support of this claim, the respondent submitted a photocopy of a birth certificate reflecting that was born to_____ in the State of on . See Exhibit 10. This document does not satisfy the requirements for publication/attestation of domestic documents under the provisions of 8 CFR 287.6. The record also reflects that on or about , Immigration and Naturalization Service (Service) officer John Doe investigated the official records at the [_____ bureau of vital statistics] to determine the validity of the [description of birth document submitted] and found that no such record exists [in the _____ official repository of birth records]. See Exhibit 5, signed declaration of dated . Therefore, the respondent has failed to present sufficient evidence to support his/her claim to U.S. citizenship or to rebut the allegations and charge of deportability. Upon consideration of the entire Record of Proceeding, I find that the respondent's alienage, conviction of an aggravated felony, and deportability are supported by clear, convincing, and unequivocal evidence. I also find that the respondent is not a lawful permanent resident of the United States. Additionally, the respondent is statutorily ineligible for any relief from removal that the Attorney General may grant in an exercise of discretion. See Exhibits 1, 3, 4 at Page 3, and 9 [description of any relevant exhibits and any necessary explanation regarding these exhibits]."

(4) Concession of deportability as charged. "The respondent concedes the allegations of fact and deportability as charged in the Notice of Intent to Issue a Final Administrative Removal Order (NOI). See Exhibit 1 at Page 2 and Exhibit 6, Record of Proceeding [description of exhibits and any necessary explanation regarding these exhibits]. See Exhibit 4 [description of any relevant exhibit and any necessary explanation regarding this exhibit]. Upon consideration of the entire Record of Proceeding, I find that the respondent's alienage, conviction of an aggravated felony, and deportability are supported by clear, convincing, and unequivocal evidence. I also find that the respondent is not a lawful permanent resident of the United States. Additionally, the respondent is statutorily ineligible for any relief from removal that the Attorney General may grant in an exercise of discretion."

(5) Insufficient evidence submitted to rebut the allegations. "The respondent challenges allegation of fact # in the Notice of Intent to Issue a Final Administrative Removal

Order (NOI). In support of this challenge, the respondent submitted . See Exhibits 4, 5, 8, 9, and 10, Record of Proceeding [description of exhibits and any necessary explanation regarding these exhibits]. After careful review of this documentary evidence, I find that the respondent has failed to rebut allegation # because the evidence submitted is [explanation of specific reason(s), e.g., immaterial; lacks probity; unreliable; uncorroborated selfserving statements; etc.]. The respondent's response does not defeat the relevant, inherently reliable, and probative records of the Immigration and Naturalization Service (Service), Exhibits 1, 2, 6, and 7. See Matter of Mejia, 16 I&N Dec. 6 (BIA 1976) [records made during the regular course of business are admissible]. A Service Record of Deportable/Inadmissible Alien (Form I-213) is deemed to be inherently trustworthy and admissible as a public record and report. Id. Upon consideration of the entire Record of Proceeding, I find that the respondent's alienage, conviction of an aggravated felony, and deportability are supported by clear, convincing, and unequivocal evidence. I also find that the respondent is not a lawful permanent resident of the United States. Additionally, the respondent is statutorily ineligible for any relief from removal that the Attorney General may grant in an exercise of discretion."

I. Useful Points And Authorities For A Supplemental Decision

Below are citations the Deciding Service Officer (DSO) may wish to use in preparing supplemental decisions. These citations refer to case law regarding admissibility in proceedings to determine deportability, trustworthiness, and fundamental fairness of evidence.

(1) To be admissible in proceedings to determine deportability, evidence must be relevant and probative and its use must not be fundamentally unfair. Matter of Ramirez-Sanchez, 17 I&N Dec. 503 (BIA 1980); Matter of Toro, 17 I&N Dec. 340 (BIA 1980).

(2) Business records are admissible if made during the regular course of business. Matter of Mejia, 16 I&N Dec. 6 (BIA 1976).

(3) An Immigration and Naturalization Service (Service) Record of Deportable/Inadmissible Alien (Form I-213) is deemed to be inherently trustworthy and admissible as a public record and report. Matter of Mejia, 16 I&N Dec. 6 (BIA 1976).

(4) An Arrival-Departure Record (e.g., Form I-94) is admissible to establish deportability. See Matter of Doo, 13 I&N Dec. 30 (BIA 1968).

(5) The use of affidavits is not fundamentally unfair. Matter of Conliffe, 13 I&N Dec. 95 (BIA 1968).

(6) A Warrant of Removal/Deportation (Form I-205) is admissible as a business record, and the notations on such a document are inherently reliable. U.S. v. Hernandez-Rojas, 617 F.2d 533 (9th Cir. 1980), cert. denied, 449 U.S. 864, 101 S.Ct. 170 (1980).

(7) An affidavit alone may be relied upon to establish a respondent's deportability by the requisite proof, even if taken without the presence of counsel or under a claim of failure to give Miranda warnings. Matter of Baltazar, 16 I&N Dec. 108 (BIA 1977); Matter of Ramirez-Sanchez, 17 I&N Dec. 503 (BIA 1980).

(8) Testimonial evidence may be necessary to rebut a prima facie showing that the admissions reflected on Immigration and Naturalization Service (Service) forms were involuntary or inaccurate. Matter of Garcia, 17 I&N Dec. 319 (BIA 1980).

(9) An alien has a right to an impartial deciding officer. Matter of Exame, 18 I&N Dec. 303 (BIA 1982).

J. Citing Case Law

The Deciding Service Officer (DSO) may find the following general guidance on citing case law useful in preparing any supplemental decisions.

(1) When citing case law, use "see" when the conclusion is suggested, but not stated. [See Matter of Mejia, 16 I&N Dec. 6 (BIA 1976).]

(2) Use "e.g.," when more examples exist, but they are not cited. [e.g., Matter of Mejia, 16 I&N Dec. 6 (BIA 1976).]

(3) Use "supra" after the name of a decision cited before in the same supplemental decision. (Matter of Mejia, supra.) However, cite the name of the decision without supra when it is cited on the same page as the previous citation. (Matter of Mejia.)

(4) Use "Id." when repeating the preceding citation without any change.

K. Closing Actions

Warrant of Removal/Deportation. If the Deciding Service Officer (DSO) issues a Final Administrative Removal Order (Form I-851A), a Warrant of Removal/Deportation (Form I-205) should be issued in accordance with outstanding instructions. To ensure against removing the alien from the United States prematurely, Form I-205 must not be issued until it is legal and appropriate to enforce the alien's departure.

The warrant cannot be executed sooner than 14 calendar days after the date of issuance of a final removal order on Form I-851A unless the alien knowingly and voluntarily waives the 14-day period. The alien may waive this period once he or she is served with a final order on Form I-851A. If the alien signed the statement on the Notice of Intent to Issue a Final Administrative Removal Order (NOI) on form I-851 conceding deportability and not requesting withholding of removal and also checked the block waiving the 14-day period, the Immigration and Naturalization Service (INS) does not need to wait 14 days.

Deportable Alien Control System (DACS) update. As in the case of any official action taken in an administrative removal case, the DSO must ensure that DACS is updated promptly upon completion of the case. DACS has the capability to provide data on the number of aliens brought under the administrative removal process, by name, A-number, and nationality, as well as the decision and other official action in each case. As this is crucial data, the DSO must make sure that administrative removal cases are always identified in DACS according to the proper case category. (See the Deportable Alien Control System User Manual). If a final removal order on Form I-851A is entered, the correct decision code must be filled in on the required screen. Upon removal under a final removal order on Form I-851A, the case must be closed out with the appropriate depart-cleared code.

In the event that administrative removal proceedings are terminated, DACS must be updated to reflect this information and any subsequent action taken. When administrative removal proceedings are terminated and other removal proceedings instituted, the DACS case for the administrative removal proceedings should be closed in DACS with the proper codes. An entirely new case must then be entered into DACS using the proper codes and correct data relating to the new removal proceedings. Biographic information, however, will carry over from one case to the other.

DSO's list of administrative removal cases. Upon completion of a case, the DSO should update this list. (The DSO's list of cases is discussed in Section V(B) of this manual.)

L. Request For Withholding Of Removal And Referral To Asylum Officer

A reasonable fear interview is triggered when an alien in administrative removal proceedings who has requested withholding of removal has been ordered removed. In such a case, upon service of the Final Administrative Removal Order (Form I-851A), the Deciding Service Officer (DSO) must immediately refer the case to an asylum officer for a reasonable fear determination under 8 CFR 208.31. In so doing, the DSO must ensure that the following steps are followed:

A Form M-488, Information About Reasonable Fear Interview, is given to the alien and explained to him or her in a language he or she understands.

The alien is told the purpose of the interview with an asylum officer.

The alien is given a list of free legal services. The alien is advised that he or she may, at no expense to the government and without delaying the process, be represented by an attorney or accredited representative with whom he or she may consult before the interview.

The alien must sign and date two copies of Form M-488, acknowledging receipt of notice about the reasonable fear interview and about his or her right to counsel. If the alien refuses to sign Form M-488, the official who gives it to the alien must date and initial it and insert the notation "(name of alien) refused to sign" on the line for the signature of the person being referred to an asylum officer. One copy of Form M-488 is placed in the alien's A-file. The other is retained by the alien.

The appropriate asylum office point of contact is notified about the need for a reasonable fear interview and about any special considerations (e.g., the necessity of an interpreter and/or a request for a female or male interpreter or officer). The asylum office must also be given any other critical information (e.g., the alien's detention in a non-Service facility or at a remote location or the alien's transfer to a different detention site).

Copies of the completed Forms M-488, I-851 (Notice of Intent to Issue a Final Administrative Removal Order), and I-851A and any Notice of Entry of Appearance as Attorney or Representative (Form G-28) are faxed to the asylum office.

If the alien is detained by the INS, arrangements are made in coordination with the asylum office point of contact for the reasonable fear interview and appropriate interview space. If there is no room for an interview where an alien in INS custody is housed, arrangements

should be made, where feasible, to move the alien to a location where the asylum officer can conduct the interview. If the alien is incarcerated in a Federal, state, or local institution, the DSO or his or her support staff should, to the extent possible, assist the asylum office in locating suitable interview space.

The DSO and his or her support staff must make sure that the ROP does not leave the DSO's possession and control during the pendency of any adjudication and ensuing legal challenge or during any reasonable fear proceedings. The entire ROP should be photocopied and the duplicate ROP copy certified as a true copy of the DSO's administrative ROP. The certified copy of the ROP should then be made available to the appropriate asylum office in the most expeditious way possible.

Most of the time, the alien's A-file will be in the DSO's possession. In that event, it should be provided to the asylum office with the copy of the ROP. Otherwise, arrangements must be made to have the A-file sent to the asylum office immediately in the most expeditious way possible.

The asylum officer must, except in exceptional circumstances, process reasonable fear cases within ten days, but the ten-day period begins only when the asylum officer receives the A-file and the certified copy of the ROP. Any delay in providing the asylum officer with these items will delay the processing of the case.

Neither the pendency of reasonable fear proceedings nor the issuance of an order deferring removal to a particular country alters INS authority to detain an alien otherwise subject to detention. The reasonable fear screening process is intended to permit fair and expeditious resolution of withholding claims without unduly disrupting the streamlined process used in administrative removal proceedings.

The asylum office should, in most cases, notify the DSO the same day a reasonable fear decision is served on the alien. In unusual circumstances, notification may be made the following business day.

In most cases, the asylum officer will serve any decisions on the applicant personally. However, if the DSO is willing and it would expedite the process, the DSO may serve the decision on the alien, with an asylum officer and interpreter (if necessary) available by telephone to answer any questions the alien may have.

If reasonable fear is found, the case is referred to an immigration judge (IJ). The DSO should obtain information about the status and outcome of such a case from the trial attorney representing the INS.

If reasonable fear is not found and the alien requests IJ review of the negative finding, the asylum officer should monitor the IJ review and notify the DSO of the outcome. The asylum officer is also responsible for notifying the DSO if the asylum office has agreed to an applicant's request to withdraw from the reasonable fear proceedings, either before or after the asylum officer interviews the alien.

Departure must be enforced where appropriate, provided the 14-day period after issuance of a final order is past. Departure may be enforced only when reasonable fear is not found or withholding or deferral of removal is denied or terminated and any request for review or

appeal has resulted in a negative determination or when the request for withholding or deferral has been withdrawn.

An alien who is granted withholding or deferral of removal may not be removed to the country or countries to which his or her removal has been withheld or deferred. Such an alien, however, may be removed to a safe country.

V. RECORD OF PROCEEDING

A. Creating The Record Of Proceeding (ROP)

In accordance with the statute and governing regulations, the Immigration and Naturalization Service (INS) must permanently maintain the administrative ROP in each case in which a Final Administrative Removal Order (Form I-851A) is issued. This is necessary to enable the court to review the entire record in the event of a legal challenge. Such a record will also serve as proof of the removal proceedings in any subsequent prosecution for criminal reentry after removal.

Under the regulations, the ROP must consist of, but not necessarily be limited to: (1) the charging document [Notice of Intent to Issue a Final Administrative Removal Order (NOI) on Form I-851]; (2) all evidence relied on by the INS in support of the charges; (3) the alien's response, if any; (4) all admissible evidence, briefs, or other documents submitted by either party respecting deportability; and (5) Form I-851A.

Just as the immigration court carefully maintains an ROP, INS personnel engaged in the administrative removal process, particularly the investigating agent and the officer who issues the NOI, must ensure that the ROP is carefully compiled and permanently maintained. The ROP, which contains the Government's entire case, may be subjected to court review. [There is no review by an immigration judge (IJ) or the Board of Immigration Appeals (BIA)].

The investigating officer/agent must ensure that each document relied upon to support the allegations and charge in the NOI (i.e., to establish alienage, deportability, and conviction) is included in the ROP. All documents in support of the NOI must be placed under the record of proceeding cover sheet on the left hand side of the A-file (in chronological order, with the NOI on top).

The executed duplicate NOI, which reflects the date and manner of service and any other endorsements made in the sections provided on the form, must be placed immediately in the ROP. By regulation, an executed duplicate of the NOI in the ROP must be retained as evidence that the individual upon whom the NOI is served is the alien named in the NOI. When the NOI is served in person, verification of the identity of the alien upon whom it is served is included in the Certificate of Service on the NOI. In a case where the NOI is served by mail, the written determination regarding verification of the alien's identity prepared by the investigating officer/ agent must be included in the ROP.

After issuing the NOI and causing it to be served upon the alien, the investigating officer must ensure that the ROP is promptly made available to the Deciding Service Officer (DSO) for review and decision. If the alien clearly waives the right to counsel and voluntarily endorses the portion of the NOI showing that he or she admits the truth of the allegations and charge, does not wish to contest them or request withholding of removal,

and waives appeal, the decision may be made immediately. On the other hand, the decision may need to await the expiration of the response period or any extension granted by the DSO.

(1) Where to place evidence in the ROP. Place copies of all evidence relied upon in support of the charging document underneath the record of proceeding cover sheet and the NOI on the left hand side of the A-file.

(2) Record of proceeding cover sheet. Always keep the record of proceeding cover sheet on top of all ROP copies of documents, attached to the left hand side of the A-file.

(3) Evidence of status checks. Make sure the results of records checked [e.g., the Central Index System (CIS), the Refugee, Asylum, and Parole System (RAPS), the Nonimmigrant Information System (NIIS), the National Automated Immigration Lookout System (NAILS), etc.] are evidenced by printouts or other official records. Highlight relevant portions to indicate the alien's not being a lawful permanent resident, etc. [This is not necessary if an Arrival-Departure Record (Form I-94) can be used.] Since the NOI contains the allegation that the alien is not a lawful permanent resident alien, the ROP must support why this preliminary determination is made (NOI allegation #5).

Once alienage is established by clear, convincing, and unequivocal evidence [i.e., a Record of Deportable/Inadmissible Alien (Form I-213), sworn statement, etc.], the Government need not establish lack of lawful permanent residence by the same burden of proof. This is because the legal burden then shifts to the alien to establish time, place, and manner of entry under section 291 of the Immigration and Nationality Act (INA). Section 291 provides that if the alien's burden "is not sustained, such person shall be presumed to be in the United States in violation of law." Nevertheless, the INS' diligent efforts to check the alien's immigration status must always be evidenced in the ROP, to support NOI allegation #5.

(4) Evidence of criminal history. Copies of Federal Bureau of Investigation (FBI) rap sheets may be inserted in the ROP to show a criminal history other than the conviction for an aggravated felony. Evidence of a criminal background may help the Government determine whether a particular case is a suitable vehicle for a Government appeal, if this background information is in the ROP.

(5) Sample ROP configuration at the NOI stage. The issuing officer should ensure that the ROP is securely attached to the left hand side of the A-file, with copies of all evidence relied on by the Government in support of the NOI allegations and charge placed underneath the NOI. The ROP's documents may be arranged in the following order (from the top of the ROP to the bottom):

Record of proceeding cover sheet (on top)
NOI
Form I-213
Conviction record (aggravated felony)
Evidence of alienage
Form I-94; evidence of not being a lawful permanent resident
Other evidence re: immigration status (including copies/notes of records checked; printouts)
FBI rap sheet
Sworn statement, if taken

Other relevant information

B. Maintaining The Record Of Proceeding (ROP)

Proper maintenance and handling of the ROP is an extremely important part of the administrative removal process and cannot be overemphasized. The Deciding Service Officer (DSO) and his or her support staff should receive and place in the ROP, in some logical order, all responses made by the alien. The ROP must include evidence of all official actions including service of any notices or copies of documents. When copies of documents are served on the alien, the originals must naturally be kept in the ROP. Only the DSO should mark the exhibit numbers on evidence in the ROP because deciding the relevance of evidence relied upon in the proceedings is the DSO's sole province as the deciding officer. The DSO should also prepare and certify the ROP for any court review. (See Sections IV(F), V(A) and VI(B) for additional information about the ROP.)

Another responsibility of the DSO and his or her support staff is to make sure that the ROP does not leave the DSO's possession and control during the pendency of any adjudication and ensuing legal challenge or during any reasonable fear proceedings. This will make the process more efficient by ensuring that the ROP is always readily available for any required official action during the proceedings and for any judicial review. To help track his or her administrative removal cases, the DSO should keep a list of all cases by name and A-number and file them in an accessible place.

VI. JUDICIAL REVIEW

A. Petition For Review

Section 242 of the Immigration and Nationality Act (INA) governs judicial review of orders of removal. In removal proceedings before an immigration judge (IJ), once an alien has received a final order of removal entered by the Board of Immigration Appeals (BIA), he or she may seek judicial review by filing a petition for review in the Circuit Court of Appeals under that section. The alien must file the petition for review within 30 days from issuance of the final order of removal. Section 242(b)(3)(B) of the INA provides that the alien does not receive a stay of removal pending the determination on the petition for review "unless the court orders otherwise."

Pursuant to section 238(b)(3) of the INA, the Immigration and Naturalization Service (INS) may not execute the Final Administrative Removal Order "until 14 calendar days have passed from the date that such order was issued, unless waived by the alien." This means that, absent a waiver by the alien, the INS should execute a final administrative removal order after the fourteenth calendar day, unless the Court of Appeals affirmatively "orders otherwise" by a stay order entered under section 242(b)(3)(B) of the INA. It should be noted that no appeal lies with the BIA in administrative removal proceedings under section 238(b) of the INA.

B. Certifying The Record Of Proceeding (ROP)

Upon receiving notice of the filing of a legal challenge, the Deciding Service Officer (DSO) must promptly cause the ROP to be prepared and certified for judicial review. Before certifying the ROP, it is recommended that all pages in the ROP be numbered in sequence by pen. This will make it easier for the court, Government attorneys, and opposing counsel

to refer to particular pages in the ROP. The Final Administrative Removal Order (Form I-851A) should be on top, just under the record of proceeding cover sheet.

Two photocopies of the entire ROP should be made and both duplicate copies certified as true copies of the DSO's administrative ROP. The certified copies should be promptly forwarded in the most expeditious way possible to the Department of Justice's (DOJ's) Office of Immigration Litigation (OIL). That office will represent the Immigration and Naturalization Service (INS) before the court.

The materials for the OIL should be addressed as follows:

Director, Office of Immigration Litigation
United States Department of Justice
Civil Division
P.O. Box 878, Ben Franklin Station
Washington, DC 20044

The phone and FAX numbers at the OIL are:

(202) 616-(b)(6), (b)(7)c
FAX (202) 616-4948

Notations reflecting the date the certified copies of the ROP are forwarded to the OIL must be made in the original ROP and on the DSO's list of administrative removal cases. (The DSO's list of cases is discussed in Section V(B) of this manual.)

Sample contents of a certified copy of an ROP forwarded to the court.

Record of proceeding cover sheet (on top)
Form I-851A
Ex. 1. Notice of Intent to Issue a Final Administrative Removal Order (NOI) on Form I-851
Ex. 2. Record of Deportable/Inadmissible Alien (Form I-213)
Ex. 3. Conviction record (aggravated felony)
Ex. 4. Arrival-Departure Record (Form I-94), if any; evidence of not being a lawful permanent resident
Ex. 5. Other evidence of alienage presented
Ex. 6. Alien's sworn statement, if any
Group Ex. 7. Copies of records checks/printouts
Ex. 8. Federal Bureau of Investigation (FBI) rap sheet (regarding other criminal history, if any)
Ex. 9. Any other relevant Government information
Group Ex. 10. Alien's evidence in response to NOI
Ex. 11. Alien's supporting memorandum, if any

VII. LEGAL ISSUES

A. The Nature And Sufficiency Of Evidence

In general, the strict judicial rules of evidence do not apply in civil proceedings to determine deportability. Calhoun v. Bailar, 626 F.2d 145 (9th Cir. 1980), cert. denied, 452

U.S. 906, 101 S.Ct. 3033 (1981); Marlowe v. INS, 457 F.2d 1314 (9th Cir. 1972). To be admissible in these proceedings, evidence must be relevant and probative and its use must not be fundamentally unfair. Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 505 (BIA 1980); Matter of Toro, 17 I&N Dec. 340, 343 (BIA 1980). Business records are admissible if made during the regular course of business. Matter of Mejia, 16 I&N Dec. 6 (BIA 1976). The Record of Deportable/Inadmissible Alien (Form I-213) is deemed to be inherently trustworthy and admissible as a public record and report. Id. A Warrant of Removal/Deportation (Form I-205) is admissible as a business record, and the notations on such a document are inherently reliable. U.S. v. Hernandez-Rojas, 617 F.2d 533 (9th Cir. 1980), cert. denied, 449 U.S. 864, 101 S.Ct. 170 (1980). The crewman nonimmigrant record (Form I-95) is admissible to establish deportability. Matter of Doo, 13 I&N Dec. 30 (BIA 1968).

The courts have recognized that issues of impropriety in obtaining evidence can be overlooked when deportability is established by independent, untainted evidence. Matter of Mejia. Independent evidence can be admitted even if an alleged illegal search or arrest revealed the respondent's identity and led to the discovery of the untainted evidence, e.g., preexisting official Immigration and Naturalization Service (INS) records relating to the encountered alien. Matter of Mejia; U.S. v. Orozco-Rico, 589 F.2d 433 (9th Cir. 1978), cert. denied, 440 U.S. 967, 99 S.Ct. 1518 (1979). Information in the INS database or files constitutes prior knowledge of the Government and may establish respondent's deportability on the charges contained in the charging document. Woodby v. INS, 385 U.S. 276 (1966); Matter of Doo; Matter of Mejia.

During the interrogation of an alien, an INS investigative officer typically takes a sworn statement from the alien and completes a Form I-213. These documents constitute official records made in the ordinary course of business, are admissible in evidence, and can be sufficient to support the allegations contained in the charging document by the requisite clear, convincing, and unequivocal evidence. Matter of Mejia. The hearsay evidence rule is not applicable to proceedings to determine deportability. Matter of Davila, 15 I&N Dec. 781 (BIA 1976); Matter of Ponco, 15 I&N Dec. 120 (BIA 1974).

The use of affidavits is not fundamentally unfair. Matter of Conliffe, 13 I&N Dec. 95 (BIA 1968). An affidavit alone may be relied upon to establish a respondent's deportability by the requisite proof, even if taken without the presence of counsel or under a claim of failure to give Miranda warnings. Matter of Baltazar, 16 I&N Dec. 108 (BIA 1977); Matter of Ramirez-Sanchez. However, testimonial evidence may be necessary to rebut a prima facie showing that admissions reflected on INS forms were involuntary or inaccurate. Matter of Garcia, 17 I&N Dec. 319 (BIA 1980).

Where an INS officer acts in good faith, the courts and the Board of Immigration Appeals (BIA) have held that evidence obtained by an alleged improper search or seizure in violation of the Fourth Amendment is not suppressible in proceedings to determine deportability. See Matter of Sandoval, 17 I&N Dec. 70 (BIA 1979); Lopez-Mendoza v. INS, 104 S. Ct. 3479 (1984). And, reliance placed on illegally obtained evidence does not necessarily offend the Fifth Amendment fundamental fairness requirements. Matter of Toro. The manner of seizing evidence must be "so egregious" a Fourth Amendment violation that to rely on it would violate Fifth Amendment fundamental fairness requirements. Id.; Lopez-Mendoza; see, for example, Ex Parte Jackson, 263 F. Supp. 110 (D. Mont. 1920) (invading an orderly meeting of union to which respondent belonged held to "undermine the morale of the people, excite the latter's fears, cause distrust of our

institutions, doubts of the sufficiency of law and authority..."). Absent egregious conduct, the Supreme Court has pointed to the civil nature of the removal process, the existence of alternatives in deterring misconduct of INS officers, and the administrative burdens in denying invocation of the exclusionary rule. Lopez-Mendoza. (The exclusionary rule relates to evidence being excluded from consideration because it was improperly seized in violation of Constitutional protections.)

B. Procedural Matters

Burden of proof. Deportability must be established by evidence which is "clear, convincing, and unequivocal." See Woodby v. INS, 385 U.S. 276 (1966). The Government has the burden of proof on "alienage." The alien has the burden of proof as to time, place, and manner of entry. Immigration and Nationality Act (INA) section 291. An alien's admissions alone are sufficient to meet the "clear and convincing" standard. See Khano v. INS, 999 F.2d 1203 (7th Cir. 1993).

Refusal to answer. An alien may only refuse to answer questions which would incriminate him or her in a criminal matter. United States v. Alderete-Deras, 743 F.2d 645 (9th Cir. 1984). Even there, a refusal to testify may form the basis of an adverse inference in a proceeding to determine deportability. Id. A respondent's silence when confronted with evidence of alienage, circumstances of entry, or deportability, may leave himself or herself open to adverse inferences, which may properly lead to a finding of deportability. Matter of Guevara, 20 I&N Dec. 238 (BIA 1990, 1991); see Cabral-Avila v. INS, 589 F.2d 957 (3d Cir. 1968), cert. denied, 440 U.S. 920, 99 S.Ct. 1245 (1969). However, a respondent's silence alone, in the absence of any other evidence, is insufficient to constitute evidence of alienage. Id.

Binding precedent. The published decision of a Circuit Court of Appeals is binding upon proceedings held within the jurisdiction of that circuit. Matter of Anselmo, 20 I&N Dec. 25 (BIA 1989). However, the Board of Immigration Appeals (BIA) does not consider the published decision of a United States District Court to be binding in cases arising in the same district. Matter of K-S-, 20 I&N Dec. 715 (BIA 1993).

Manner of seizing evidence. Improperly obtained evidence may be admitted in evidence and considered by the Deciding Service Officer (DSO) if the Immigration and Naturalization Service (INS) officer acted in good faith. Matter of Sandoval, 17 I&N Dec. 70 (BIA 1979). Evidence is excludable if the manner of seizing it is so "egregious" that to rely on it would be fundamentally unfair, in violation of the Fifth Amendment. Bustos-Torres v. INS, 898 F.2d 1053 (5th Cir. 1990); Lopez-Mendoza v. INS, 104 S. Ct. 3479 (1984).

Conviction record. The conviction may be proved by any document or record prescribed by 8 CFR 3.41. Documentary evidence constituting proof of conviction in immigration proceedings is also described in sections 240(c)(3)(B) and (C) of the INA which provide a statutory basis for 8 CFR 3.41. Conviction records may include, where applicable, the plea transcript. See Matter of Mena, 17 I&N Dec. 38 (BIA 1979).

Elements of a conviction. The various states have provisions of law for withholding the adjudication of guilt and ameliorating the effects of a conviction. In the past, whether a conviction existed for immigration purposes was determined under a three- pronged test set forth in Matter of Ozkok, 19 I&N Dec. 546 (BIA 1988).

On September 30, 1996, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law 104-208, added section 101(a)(48)(A) defining conviction to the INA. This definition applies to convictions entered before, on, or after September 30, 1996.

Section 101(a)(48)(A) of the INA provides that a conviction with respect to an alien is not limited to a formal judgement of guilt by a court. Where adjudication of guilt has been withheld, that section of law gives a two-pronged test for establishing a conviction: (A) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt; and (B) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Definition of aggravated felony. The definition of aggravated felony was added to immigration law in 1988 and expanded several times. In the past, whether a crime was an aggravated felony depended on factors such as the provision of immigration law at issue and when the conviction was entered or the crime committed. The most recent change made all defined offenses aggravated felonies for all purposes regardless of when the conviction was entered. The enacting legislation provided for application of this change to actions taken on or after September 30, 1996 and to violations on or after that date of section 276 of the INA relating to criminal reentry after removal.

The term aggravated felony now applies to any offense defined in section 101(a)(43) of the INA in violation of foreign law for which the term of imprisonment was completed within the previous 15 years. INS employees who process and adjudicate administrative removal cases must be thoroughly familiar with the statutory language of section 101(a)(43). They must also refer to Section III(A)(3) of this manual for information about case law affecting this definition, particularly within the Eleventh Circuit (Alabama, Georgia, and Florida).

Expungement. In considering the effect of an expunged conviction, the BIA has overruled the holdings in precedent decisions which address the impact of state rehabilitative actions on whether an alien is convicted for immigration purposes. These decisions include Matter of G-, 9 I&N Dec. 159 (BIA 1960, A.G. 1961); Matter of Ibarra-Obando, 12 I&N Dec. 576 (BIA 1966, A.G. 1967); and Matter of Luviano, Interim Decision 3267 (BIA 1996).

In re Roldan-Santoyo, Interim Decision 3377 (BIA 1999), held that an alien subject to a conviction as defined in section 101(a)(48)(A) of the INA remains convicted for immigration purposes despite later state action to erase the original finding of guilt under a rehabilitative procedure.

The decision in Roldan-Santoyo, supersedes that in Matter of Manrique, Interim Decision 3250 (BIA 1995). Matter of Manrique provided that first offenders guilty of simple possession offenses could escape the immigration consequences of their convictions based on their having been the beneficiaries of state rehabilitative actions under state statutes.

Roldan-Santoyo does not address the effect on immigration proceedings of first offender treatment under 18 U.S.C. § 3607 accorded by a Federal court. Further, the decision in Roldan-Santoyo is inapplicable to state actions that vacate a conviction on the merits or on any ground related to the violation of a statutory or constitutional right in the underlying criminal proceeding.

APPENDIX

Sections Of Law Relating To Administrative Removal

Section 238(b) of the INA. This section authorizes administrative removal proceedings without hearings before immigration judges (IJ's) for certain serious criminal offenders.

Section 238(c) of the INA. This section provides for presumption of deportability of an alien convicted of an aggravated felony.

Section 241(b)(3) of the INA. This section provides for withholding of removal to a country where the alien's life or freedom would be threatened in the case of an alien convicted of an aggravated felony or felonies for which the alien has been sentenced to an aggregate term of imprisonment of less than five years.

Section 212(a)(2) of the INA. This section sets forth various criminal and related grounds of inadmissibility to the United States.

Section 101(h) of the INA. This section defines serious criminal offense which is used in section 212(a)(2)(E) of the INA.

Section 212(h) of the INA. This section provides for a waiver of certain criminal and related inadmissibility grounds set forth is section 212(a)(2) of the INA.

Section 101(a)(43) of the INA. This section defines aggravated felony. As a result of conflicting amendments to section 101(a)(43)(P) of the INA, it is not clear whether "is at least 12 months," in section 101(a)(43)(P) is correct. Consultation with an INS attorney about this provision is, therefore, necessary.

Section 101(a)(48) of the INA. This section defines conviction and explains the meaning of term of imprisonment or sentence.

Sections 240(c)(3)(B) and (C) of the INA. These sections describe the types of documentary evidence which constitute proof of conviction in immigration proceedings.

Administrative Removal Regulations:

8 CFR 238.1 Proceedings under section 238(b) of the Act

Regulations On Conviction Records:

8 CFR 3.41: Evidence of Criminal Conviction

8 CFR 287.6(a): Proof of Official Records

Administrative Removal Forms

I-851 Notice of Intent to Issue a Final Administrative Removal Order

I-851A Final Administrative Removal Order

Appendix 14-2 VWPP Sample Packet

UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

_____

ORDER OF DEPORTATION
Section 217

TO: LAST NAME, First Name (A00-000-000)

Having determined that:
1) You are neither a citizen nor a national of the United States, and;

2) You were admitted to the United States on _____at _____under Section 217 of the Immigration and Nationality Act, and authorized to remain until _____.

3) You have violated the conditions of that admission in that:

After admission as a nonimmigrant under Section 217 of said Act, you have remained in the United States longer than authorized [Section 237(a)(1)(B)];

4) You have waived your rights to contest any action for deportation, except to apply for asylum, having been admitted under Section 217 of the Immigration and Nationality Act,

By virtue of the authority vested in the Attorney General of the United States, and in me as his delegate, by the laws of the United States,

I HEREBY ORDER that you be deported from the United States of America.

_____ __ _____
(Signature) (Date)

_____ _____
(Name and Title) (Place)

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

WARRANT
Section 217

File No. A00 000 000

TO ANY OFFICER OR EMPLOYEE OF THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE:

Pursuant to Section 217 of the Immigration and Nationality Act, an authorized officer of the United States Immigration and Naturalization service has ordered that:

LAST NAME, First Name

who entered the United states at _____on the _____th day of _____, ____be deported from the United States of America. Therefore, I, the undersigned officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United States and by his direction, command you to take into custody and deport the said alien pursuant to law, at the expense of (Carrier)

Signature:

Title: District Director

Date:

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

NOTICE OF INTENT TO DEPORT FOR VIOLATING THE TERMS OF YOUR ADMISSION UNDER SECTION 217 OF THE IMMIGRATION AND NATIONALITY ACT

TO: LAST NAME, First Name

File No. A 00 000 000

The Immigration and Naturalization Service has determined that you entered the United States pursuant to Section 217 of the Immigration and Nationality Act. Accordingly, you executed a Form I-791, Visa Waiver Pilot Program Information Form, that explained to you the conditions of admission under the Visa Waiver Pilot Program. When you signed Form I-791, you also waived your right to contest deportability before an immigration judge and the Board of Immigration Appeals, and to any judicial review of any and all of the above decisions.

The Immigration and Naturalization Service has determined that you have violated the terms of your admission under Section 217 of the Immigration and Nationality Act on the grounds that:

You have remained in the United States for a time longer than permitted.

Accordingly, the United States Immigration and Naturalization Service has entered an order that you be deported and removed from the United States.

Signature:

Title: District Director

Place: Location

WARRANT FOR DEPORTATION OF

LAST NAME, First Name (A00 000 000)
(Name of Deportee)

Deported at Port of on

(Port of departure from the U.S.)
(Date of departure)

Via

(Manner of departure; identify airline or ship; if other, state: afoot, car, etc.)

Departure witnessed by:

(Signature and title of officer)

If actual departure not witnessed, fully identify source or means of departure verification:

If self-deportation pursuant to 8 CFR 243.5, check here

Officer Executing Warrant:

(Signature and Title)

Date Form Completed:

Comments:

(Signature of Person Fingerprinted)

Right Thumb Print

(Signature of Official Taking Print)

(Title of Official Taking Print)

GPO 863 444

U.S. Department of Justice
Immigration and Naturalization Service

Notice of Country to which Deportation has been directed and Penalty for reentry without Permission

PLEASE REFER TO THIS FILE NO. A00 000 000

DATE: 00/00/0000

Dear Mr. LAST NAME, First Name:

This is a warning. please read carefully.

It has been ordered that you be deported to (country) .

You will be informed, if appropriate, when departure arrangements are complete. If needed, we will assist you as much as possible in arranging your personal affairs for your departure. However, you may be deported at any time and without further notice.

Should you wish to return to the United States you must write this office or the United States Consular Office nearest your residence abroad as to how to obtain permission to return after deportation. Permission must be obtained from the Attorney General if you are seeking admission within five (5) years of deportation or removal, or within twenty (20) years if your deportation was subsequent to a conviction for an aggravated felony.

By law, (Title 8 of the United States Code, Section 1326), any alien who has been arrested and deported or excluded and deported who enters , attempts to enter, or is at any time found in the United States shal be subject to the penalties listed below unless, prior to his reembarkation at a place outside of the United States or his application for admission from a foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission:

(a) Any such alien, other than an alien convicted of a felony, shall be fined not more than $250,000.00 or imprisoned for not more than two (2) years. [8 U.S.C. 1326(a)]

(b) Any such alien whose deportation was subsequent to a conviction for a felony (Other than an aggravated felony) shall be fined not more than $250,000.00, imprisoned for not more than five (5) years, or both. [8 U.S.C. 1326(b)(1)].

(c) Any such alien whose deportation was subsequent to a conviction for an aggravated felony shall be fined not more than $250,000.00, imprisoned for not more than fifteen (15) years, or both. [8 U.S.C.1326(b)(2)].

Very truly yours,

(Name)
(Title)

Form I-294 (Rev. 06/12/92)N (SUBS)

Departmento de Justicia de los Estados Unidos
Servicio de Inmigracion y Naturalizacion

SIRVASE REFERIRSE A ESTE NUMERO DE REGISTRO
A00 000 000 FECHA: 00 / 00 / 0000

Estimado Sr. (NAME):

Esta carta es una advertencia. Le pedimos que la lea ciudadosamente.

Se ha ordenado su deportatacion a
(country) .

Se le informara, si es apropiado, cuando se hayan concluido los tramites para su salida. En caso necesario, le ayudaremos lo mas posible para arreglar sus asuntos personales antes de su salida. Sin embargo, puede ser deportado en cualquier momento y sin previo aviso.

En caso de que desee regresar a los Estados Unidos, debe dirigirse por escrito a esta oficina o al Consulado de los Estados Unidos mas cercano a su domicilio en el extranjero y preguntar como obtener permiso para regresar despues de su deportacion. Debe obtener el permiso del Secretario de Justicia si trata de entrar en el palzo de cinco (5) anos a partir de su deportacion o retiro, o en el plazo de veinte (20) anos si su deportacion se llevo a cabo despues de una condena por delito grave con agravantes.

Segun la ley (Seccion 1326 del Titulo 8, Codigo de los Ustados Unidos), todo extranjero que haya sido arrestado y deportado o excluido y deportado y que entre, trate de entrar o se encuentre en cualquier momento en los Estados Unidos estara sujeto a las penas mencionadas a continuacion a menos que, antes de reembarcar de un lugar fuera del territorio de los Estados Unidos o antes de la presentacion de su solicitud de entrada desde un territorio extranjero contiguo, el Secretorio de Justicia acceda expresamente a que dicho extranjero vuelva a solicitar la entrada en el pais:

(a) Todo extranjero, salvo un extranjero condenado por un delito grave sera condenado a multa de no mas de $250,000 o a encarcelamiento que no exceda de dos anos. [Seccion 1326 (a) del titulo 8, Codigo de los Estados Unidos].

(b) Todo extranjero deportado despues de una condena por delito grave (salvo un delito grave con agravantes) sera condenado a multa de no mas de $250,000, o encarcelamiento que no exceda de cinco anos o ambas penas. [Seccion 1326(b)(1) del Titulo 8, Codigo de los Estados Unidos].

(c) Todo extranjero deportado despues de una condena por delito grave con agravantes sera condenado a multa de no mas de $250,000, o encarcelamiento que no exceda de quince anos, o ambas penas. [Seccion 1326(b)(2) de Titulo 8, Codigo de los Estados Unidos].

Atentamente,

Director de distrito

Form I-294 (Rev. 06/12/92)N(Subs.)

Appendix 14-3 Sample Notification and Findings for Deserters from a Greek and Spanish Ship of War

Sample Notification and Findings for Deserters from Greek and Spanish Ship of War

When preparing notifications of charges and findings, the following may be used as guides only and shall be modified, as needed, to accord with the case at hand.

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
20 West Broadway
New York, New York, 10007

NOTIFICATION OF CHARGES

To (b)(6), (b)(7)c Date: February 23, 1966

An official representative of the government of Spain has presented evidence and charged that while you were a member of the Spanish ship of war (b)(6), (b)(7)c you deserted such vessel on or about November 25, 1965, at Philadelphia, pennsylvania. He has requested that you be taken into custody and surrendered to him.

Therefore, under the provisions of Article XXIV of the 1903 Treaty of Friendship and General Relations between the United States and Spain, as implemented by Executive Order No.11267 of January 19, 1966, and section 252.5 of Title 8 of the Code of Federal Regulations, you are detained pending an examination of the charges. You have the right to be represented during the examination by counsel of your choice, at your expense.

(United States Immigration Officer)

CERTIFICATE OF SERVICE
A copy of this notice was handed to the above named individual, and read and explained to him by the undersigned on February 23, 1966.

(United States Immigration Officer)

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
New York, New York

NOTICE OF FINDINGS

Re: (b)(6), (b)(7)c File No.

Whereas, after due examination and upon the basis thereof,I find that: (1) Spanish Consul-General Ramirez has requested this Service in writing to arrest and return (b)(6), (b)(7)c a citizen of Spain and a member of the crew of the Spanish ship of war (b)(6), (b)(7)c who deserted said vessel on or about November 25, 1965, at Philadelphia, Pennsylvania; (2) as evidence thereof, a duly certified copy of the crew list of the (b)(6), (b)(7)c has been presented and reflects that (b)(6), (b)(7)c was a member of said ship's company at the time of desertion; (3) you have acknowledged that you did desert said vessel on or about the date and at the place stated; (4) you are the (b)(6), (b)(7)c referred to above and the charge alleged against you are true; (5) you are not a citizen of the United States; and (6) you have not been previously arrested for the same cause.

Therefore, by virtue of the authority vested in me under the provisions of Article XXIV of the 1903 Treaty of Friendship and General Relations between the United States and Spain, as implemented by Executive Order No. 11267 of January 19, 1966, and section 252.5 of Title 8 of the Code of Federal Regulations, I hereby order that you be surrendered to the official representatives of the Spanish government when they are prepared to affect your departure from the United States. I further order that, if requested by the Spanish authorities, you be detained for a period of not more than three months from the day of your arrest to afford opportunity for the Spanish authorities to complete travel arrangements.

_____

Date: March 10, 1966

CERTIFICATE OF SERVICE

A copy of this notice was delivered to the above -named individual, and read and explained to him by the undersigned on March 10, 1966.

Appendix 14-4 S-Visa Sample Packet

UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

_____
ORDER OF DEPORTATION
Section 214

TO: LAST NAME, First Name (A00-000-000)

Having determined that:
1) You are neither a citizen nor a national of the United States, and;

2) You were admitted to the United States on _____at _____under Section 214(k)(1) of the Immigration and Nationality Act, and authorized to remain until _____.

3) You have violated the conditions of that admission in that after admission as a nonimmigrant under Section 214 of said Act, you :

___(A) failed to report not less often than quarterly to the Attorney General such information concerning the your whereabouts and activities as the Attorney General has required; or

___(B) have been convicted of a criminal offense punishable by a term of imprisonment of 1 year or more after date of such admission; or

___(C) failed to abide by any other condition, limitation, or restriction imposed by the Attorney General.

4) You have waived your rights (Form I-854, Part B.1.) to contest any action for deportation, except to apply for withholding of deportation, having been admitted under Section 214 of the Immigration and Nationality Act,

By virtue of the authority vested in the Attorney General of the United States, and in me as his delegate, by the laws of the United States,

I HEREBY ORDER that you be deported from the United States of America.

_____ __ _____
(Signature) (Date)

_____ _____

(Name and Title) (Place)

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

_____

WARRANT
Section 214

File No. A00 000 000

TO ANY OFFICER OR EMPLOYEE OF THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE:

Pursuant to Section 214 of the Immigration and Nationality Act, an authorized officer of the United States Immigration and Naturalization service has ordered that:

LAST NAME, First Name

who entered the United states at (Port of Arrival) on the xxth day of Month, Year be deported from the United States of America. Therefore, I, the undersigned officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United States and by his direction, command you to take into custody and deport the said alien pursuant to law, at the expense of (Carrier)

Signature:

Title: District Director

Date: _____

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

NOTICE OF INTENT TO DEPORT FOR VIOLATING THE TERMS OF YOUR ADMISSION UNDER SECTION 214 OF THE IMMIGRATION AND NATIONALITY ACT

TO: LAST NAME, First Name

File No. A 00 000 000

The Immigration and Naturalization Service has determined that you entered the United States pursuant to Section 214 of the Immigration and Nationality Act. Accordingly, you executed a Form I-854, Inter-Agency Alien Witness and Informant Record , that explained to you the conditions of your admission. When you signed Form I-854 Part B.1., you waived your right to contest deportability before an immigration judge and the Board of Immigration Appeals, and to any judicial review of any and all of the above decisions.

The Immigration and Naturalization Service has determined that you have violated the terms of your admission under Section 214 of the Immigration and Nationality Act on the grounds that:

__ (A) You failed to report not less often than quarterly to the Attorney General such information concerning the your whereabouts and activities as the Attorney General has required; and/or

___(B) You have been convicted of a criminal offense punishable by a term of imprisonment of 1 year or more after date of such admission, to wit: You were, on _____ date at _____location, convicted in the court of _____(jurisdiction) for the offense of _____; and/or

___(C) You failed to abide by any other condition, limitation, or restriction imposed by the Attorney General, to wit:_____.

Accordingly, the United States Immigration and Naturalization Service has entered an order that you be deported and removed from the United States.

Signature:
Title: District Director

Place: Location ___

WARRANT FOR DEPORTATION OF

LAST NAME, First Name (A00 000 000)
(Name of Deportee)

Deported at Port of on

(Port of departure from the U.S.)
(Date of departure)

Via

(Manner of departure; identify airline or ship; if other, state: afoot, car, etc.)

Departure witnessed by:

(Signature and title of officer)

If actual departure not witnessed, fully identify source or means of departure verification:

If self-deportation pursuant to 8 CFR 243.5, check here

Officer Executing Warrant:

(Signature and Title)

Date Form Completed:

Comments:

(Signature of Person Fingerprinted)

Right Thumb Print

(Signature of Official Taking Print)

(Title of Official Taking Print)

GPO 863 444

U.S. Department of Justice
Immigration and Naturalization Service

Notice of Country to which Deportation has been directed and Penalty for reentry without Permission

PLEASE REFER TO THIS FILE NO. A00 000 000

DATE: 00/00/0000

Dear Mr. LAST NAME, First Name:

This is a warning. please read carefully.

It has been ordered that you be deported to (country) .

You will be informed, if appropriate, when departure arrangements are complete. If needed, we will assist you as much as possible in arranging your personal affairs for your departure. However, you may be deported at any time and without further notice.

Should you wish to return to the United States you must write this office or the United States Consular Office nearest your residence abroad as to how to obtain permission to return after deportation. Permission must be obtained from the Attorney General if you are seeking admission within five (5) years of deportation or removal, or within twenty (20) years if your deportation was subsequent to a conviction for an aggravated felony.

By law, (Title 8 of the United States Code, Section 1326), any alien who has been arrested and deported or excluded and deported who enters , attempts to enter, or is at any time found in the United States shal be subject to the penalties listed below unless, prior to his reembarkation at a place outside of the United States or his application for admission from a foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission:

(a) Any such alien, other than an alien convicted of a felony, shall be fined not more than $250,000.00 or imprisoned for not more than two (2) years. [8 U.S.C. 1326(a)]

(b) Any such alien whose deportation was subsequent to a conviction for a felony (Other than an aggravated felony) shall be fined not more than $250,000.00, imprisoned for not more than five (5) years, or both. [8 U.S.C. 1326(b)(1)].

(c) Any such alien whose deportation was subsequent to a conviction for an aggravated felony shall be fined not more than $250,000.00, imprisoned for not more than fifteen (15) years, or both. [8 U.S.C. 1326(b)(2)].

Very truly yours,

(Name)
(Title)

Form I-294 (Rev. 06/12/92)N (SUBS)

Departmento de Justicia de los Estados Unidos
Servicio de Inmigracion y Naturalizacion

SIRVASE REFERIRSE A ESTE NUMERO DE REGISTRO
A00 000 000
FECHA: 00 / 00 / 0000

Estimado Sr. (NAME):

Esta carta es una advertencia. Le pedimos que la lea ciudadosamente.

Se ha ordenado su deportatacion a (country) .

Se le informara, si es apropiado, cuando se hayan concluido los tramites para su salida. En caso necesario, le ayudaremos lo mas posible para arreglar sus asuntos personales antes de su salida. Sin embargo, puede ser deportado en cualquier momento y sin previo aviso.

En caso de que desee regresar a los Estados Unidos, debe dirigirse por escrito a esta oficina o al Consulado de los Estados Unidos mas cercano a su domicilio en el extranjero y preguntar como obtener permiso para regresar despues de su deportacion. Debe obtener el permiso del Secretario de Justicia si trata de entrar en el palzo de cinco (5) anos a partir de su deportacion o retiro, o en el plazo de veinte (20) anos si su deportacion se llevo a cabo despues de una condena por delito grave con agravantes.

Segun la ley (Seccion 1326 del Titulo 8, Codigo de los Ustados Unidos), todo extranjero que haya sido arrestado y deportado o excluido y deportado y que entre, trate de entrar o se encuentre en cualquier momento en los Estados Unidos estara sujeto a las penas mencionadas a continuacion a menos que, antes de reembarcar de un lugar fuera del territorio de los Estados Unidos o antes de la presentacion de su solicitud de entrada desde un territorio extranjero contiguo, el Secretorio de Justicia acceda expresamente a que dicho extranjero vuelva a solicitar la entrada en el pais:

(a) Todo extranjero, salvo un extranjero condenado por un delito grave sera condenado a multa de no mas de $250,000 o a encarcelamiento que no exceda de dos anos. [Seccion 1326 (a) del titulo 8, Codigo de los Estados Unidos].

(b) Todo extranjero deportado despues de una condena por delito grave (salvo un delito grave con agravantes) sera condenado a multa de no mas de $250,000, o encarcelamiento

que no exceda de cinco anos o ambas penas. [Seccion 1326(b)(1) del Titulo 8, Codigo de los Estados Unidos].

(c) Todo extranjero deportado despues de una condena por delito grave con agravantes sera condenado a multa de no mas de $250,000, o encarcelamiento que no exceda de quince anos, o ambas penas. [Seccion 1326(b)(2) de Titulo 8, Codigo de los Estados Unidos].

Atentamente,

Director de distrito

Form I-294 (Rev. 06/12/92)N(Subs.)

Appendix 14-5 “Guidance Governing the S Nonimmigrant Visa,” Memorandum, dated December 23, 2002

Office of Detention and Removal Operations
U.S. Department of Homeland Security
425 I Street, NW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

SEP 1 4 2004

MEMORANDUM FOR: All Field Office Directors

FROM: (b)(6), (b)(7)c
Acting Director

(b)(6), (b)(7)c

SUBJECT: Expedited Removal Guidance

BACKGROUND

The Department of Homeland Security (DHS) Undersecretary for Border and Transportation Security recently announced plans to expand control of the United States borders through increased use of immigration laws to combat illegal entry between the ports-of-entry. This will be accomplished, in part, by immediately expanding the use of expedited removal (ER) processing from the ports-of-entry to locations along the United States border. The expanded authority was announced in the attached Federal Register Notice (FR). See 69 FR 48877-01 (August 11, 2004).

LAREDO AND TUCSON BORDER SECTORS FIRST

ER has traditionally been employed at official ports-of-entry and has not been applied on the land borders to aliens seeking to illegally enter the United States between ports-of-entry. DHS will now apply its ER authority to certain locations along both northern and southern land borders between ports-of-entry. Border Patrol agents will be trained to exercise this authority. Border Patrol plans to initially implement this expansion of ER between the ports-of-entry in the Laredo and Tucson border sectors.

PRIMARY FOCUS

As the extension of ER is meant as a border-enforcement tool, it will be limited to illegal aliens who have spent less than 14 days in the United States after evading inspection, and who are apprehended within 100 miles of a U. S. international land border. The primary focus of this expansion of ER is directed at "third country nationals" who are not citizens of Mexico or Canada, and who have nominal equities in and ties to the United States. DHS will retain operational discretion to place citizens of Mexico or Canada into ER proceedings, but only expects to apply it to those Mexican and Canadian citizen/nationals with histories of criminal or repeated immigration violations, such as recidivists, alien smugglers, guides, drivers, etc.

ER EXCEPTIONS

ER will not be applied to unaccompanied juveniles, citizens and nationals of Cuba and El Salvador, and aliens who are members of the Class Action Settlement in American Baptist Churches v. Thornburg, (ABC), which settled the claims of a specific class of Salvadorans and Guatemalans regarding the handling of asylum claims.

CREDIBLE FEAR REFERRALS TO CITIZENSHIP AND IMMIGRATION SERVICES

The expansion of ER does not eliminate existing protections for individuals seeking asylum. When an alien is placed in ER, Customs and Border Protection (CBP) Border Patrol Agents must inquire whether the alien has any reason to fear harm if returned to his or her country, and will refer any alien who expresses an intention to apply for asylum, or a fear of persecution or torture, or a fear of return to his or her home country to a Citizenship and Immigration Services (CIS) Asylum Officer for a "credible fear" interview. Before remanding those aliens who have been referred to a CIS Asylum Officer for a credible fear interview to Detention and Removal Operations (DRO), CBP Border Agents are responsible for providing local CIS Asylum Offices (either by fax or electronically) with a copy of the following paperwork:

Form I-860, *Notice and Order of Expedited Removal*

Form I-867A, *Record of Sworn Statement and Proceedings under § 235(b)(1) of the Immigration and Nationality Act (INA)*

Form I-867B, *Jurat for Record of Sworn Statement and Proceedings under INA § 235(b)(1)*

M-444, *Information About Credible Fear Interview*

List of Free Legal; Services Providers

Detention of Border Patrol ER cases is under INA § 235; therefore, Form I-286, *Notice of Custody Determination*, and a Warrant of Arrest are not issued for these cases, even when a case is referred to an Immigration Judge (IJ) after a credible fear finding.

CUSTODY

Aliens placed in ER will be processed in the Enforcement Case Tracking System, (ENFORCE), by CBP Border Patrol Agents and will normally be detained and removed by DRO as soon as possible, consistent with the legal process. In order to properly manage bed space, Field Office Directors are to maximize removal efforts, recommend alternate detention sites (if necessary), and continue to review non-mandatory detention cases pursuant to existing guidelines.

At the time of custody referral, Field Office Directors must ensure that all cases have been properly processed and that all requisite forms have been completed by CBP Border Patrol Agents and

included in the alien file (A-file). Pursuant to the July 20, 2004 Memorandum from Undersecretary for Border and Transportation Security relating to Costs Associated with the Care and Custody of Aliens, DRO will take physical custody of the alien after CBP has completed all of the required paperwork.

To the extent possible, CBP Border Patrol Agents will update the Deportable Alien Control System (DACS) and the Central Index System (CIS) prior to an alien being transferred to DRO custody. However, the final responsibility for this critical task lies with the Field Office Directors. Please ensure the proper updating of DACS in a timely manner.

PAROLE POLICY

Aliens placed in ER will be detained under INA § 235, not INA § 236. Any release of these aliens will be considered under parole authority of INA § 212(d)(5). Unless an alien is found to have a credible fear, parole is authorized only on a case-by-case basis if required to meet a medical emergency or a legitimate law enforcement objective. See 8 CFR 235.3(b)(2)(iii) and 8 CFR 235.3(b)(4)(ii).

If an alien is found to have a credible fear and referred for section 240 removal proceedings, detention authority will continue to be under INA § 235, and DRO policy is that parole should be granted under 8 § CFR § 212.5(b) only in exceptional cases of medical emergency or where continued detention would cause unusual hardship. Juveniles are a special class and must continue to be treated in accordance with the Flores v. Reno settlement and other special laws applicable to juveniles.

Once credible fear is found, each case must be individually reviewed under these custody criteria, and each file must be documented that the review took place. If the alien or the alien's counsel has independently submitted a parole request, the review should take into account any information submitted as part of the request.

If an alien is transferred to another field office pending conclusion, the receiving Field Office Director shall make custody and parole determinations in accordance with the above policy. As per the above, custody will be maintained absent any new medical emergency, law enforcement objective, or circumstance of unusual hardship if credible fear has been found.

If an IJ grants asylum or withholding of removal, Field Office Directors will apply existing policy in determining whether the alien will be continued in detention or released on parole.

WEEKLY/MONTHLY REPORTS

Field Office Directors will be responsible for the development of weekly and, later, monthly ER tracking reports. The Phoenix and San Antonio Field Offices will be directly impacted by the initial expansion of authority and will bear the greatest reporting burden. However, all field offices

receiving ER cases from this expanded authority will adhere to reporting requirements. Reports will contain the information listed below:

1. The number of aliens (broken down by nationality and numbers) who:

- did not request credible fear interviews and are awaiting removal;
- are awaiting credible fear interviews;
- have received credible fear interviews and continue in detention awaiting proceedings; and
- have received credible fear interviews and have been paroled based on exceptional circumstances.

2. The average length of stay for aliens (broken down by nationality and numbers) in ER. Include those having credible fear, and who are placed in regular proceedings. Include how much of the detention time is due solely to travel document requests and break down this group by nationality and numbers.

3. The number of aliens (broken down by nationality and numbers) granted relief, to include asylum and withholding of removal.

Headquarters DRO will develop a metric to measure if the number of removals is increasing due to ER.

COMMUNICATION AND FLEXIBILITY

It cannot be emphasized enough that the success of this initiative is dependent upon communication and flexibility on the part of all DRO, CBP and CIS components. Accurate and timely data collection and reporting will permit DHS to continuously evaluate the effect of this pilot. Please keep Headquarters DRO informed of any issues and of the progress related to expanded ER.

Attachments

(OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by September 10, 2004.

ADDRESSES: OMB is still experiencing significant delays in the regular mail, including first class and express mail, and messenger deliveries are not being accepted. To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: Fumie Yokota, Desk Officer for FDA, FAX: 202-395-6974.

FOR FURTHER INFORMATION CONTACT: Karen L. Nelson, Office of Management Programs (HFA-250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-827-1482.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Draft Guidance for Industry on Pharmacogenomic Data Submissions (OMB Control Numbers 0910-0014, 0910-0001, and 0910-0338)–Extension

The guidance provides recommendations to sponsors submitting or holding investigational new drugs (INDs), new drug applications (NDAs), or biologic licensing applications (BLAs) on what pharmacogenomic data should be submitted to the agency during the drug development process. Sponsors holding and applicants submitting INDs, NDAs, or BLAs are subject to FDA requirements in parts 312, 314, and 601 (21 CFR 312, 314, and 601) for submitting to the agency data relevant to drug safety and efficacy (§§ 312.22, 312.23, 312.31, 312.33, 314.50, 314.81, 601.2, and 601.12).

Description of Respondents: Sponsors submitting or holding INDs, NDAs, or BLAs for human drugs and biologies.

Burden Estimate: The guidance interprets FDA regulations for IND, NDA, or BLA submissions, clarifying when the regulations require pharmacogenomics data to be submitted and when the submission of such data is voluntary. The pharmacogenomic data submissions described in the guidance that are required to be submitted to an IND, NDA, BLA, or annual report are covered by the information collection requirements under parts 312, 314, and 601 and are approved by OMB under control numbers 0910–0014 (part 312—INDs; approved until January 1, 2006); 0910-0001 (part 314—NDAs and annual reports; approved until March 31, 2005); and 0910-0338 (approved until August 31, 2005).

The guidance distinguishes between pharmacogenomic tests that may be considered valid biomarkers appropriate for regulatory decision making, and other, less well developed exploratory tests. The submission of exploratory pharmacogenomic data is not required under the regulations, although the agency encourages the voluntary submission of such data.

The guidance describes the voluntary genomic data submission (VGDS) that can be used for such a voluntary submission. The guidance does not recommend a specific format for the VGDS, except that such a voluntary submission be designated as a VGDS. The data submitted in a VGDS and the level of detail should be sufficient for FDA to be able to interpret the information and independently analyze the data, verify results, and explore possible genotype-phenotype correlations across studies. FDA does not want the VGDS to be overly burdensome and time-consuming for the sponsor.

FDA has estimated the burden of preparing a voluntary submission described in the guidance that should be designated as a VGDS. Based on FDA's familiarity with sponsors' interest in submitting pharmacogenomic data during the drug development process, FDA estimates that approximately 20 sponsors will submit approximately 80 VGDSs and that, on average, each VGDS will take approximately 10 hours to prepare and submit to FDA.

In the **Federal Register** of November 4, 2003 (68 FR 62461), FDA published a 60-day notice requesting public comment on the information collection provisions. No comments were received on the information collection estimates.

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN[1]

	Number of Respondents	Number of Responses per Respondent	Total Annual Responses	Hours per Response	Total Hours
Voluntary genomic data submissions	20	4	80	10	800

[1] There are no capital costs or operating and maintenance costs associated with this collection.

Dated: August 5, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04-18360 Filed 8-6-04; 12:04 pm]

BILLING CODE 4160–01–S

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

Designating Aliens For Expedited Removal

AGENCY: Bureau of Customs and Border Protection, DHS.

ACTION: Notice.

SUMMARY: This notice authorizes the Department of Homeland Security to place in expedited removal proceedings any or all members of the following class of aliens: Aliens determined to be inadmissible under sections 212(a)(6)(C) or (7) of the Immigration and Nationality Act who are present in the U.S. without having been admitted or paroled following inspection by an immigration officer at a designated port-of-entry, who are encountered by an immigration officer within 100 air miles of the U.S. international land border, and who have not established to the satisfaction of an immigration officer that they have been physically present in the U.S. continuously for the fourteen-day (14-day) period immediately prior to the date of encounter. DHS believes that exercising its statutory authority to place these individuals in expedited removal proceedings will enhance national security and public safety by facilitating prompt immigration determinations, enabling DHS to deal more effectively with the large volume of persons seeking illegal entry, and ensure removal from the country of those not granted relief, while at the same time protecting the rights of the individuals affected.

DATES: This notice is effective on August 11, 2004.

ADDRESSES: Please submit written comments to: Regulations Branch, Office of Regulations and Rulings, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Washington, DC 20229. *See* SUPPLEMENTARY INFORMATION section for more details on submission of comments.

FOR FURTHER INFORMATION CONTACT: Dana E. Graydon, Acting Associate Chief, Office of Border Patrol, U.S. Customs and Border Protection,1300 Pennsylvania Ave., NW., Suite 6.5-E, Washington, DC 20229, *dana.graydon@dhs.gov*, 202-344-3153.

SUPPLEMENTARY INFORMATION: Please submit written comments, original and two copies, to the address listed above on or before after October 12, 2004. Submitted comments may be inspected at the Office of Regulations and Rulings, Bureau of Customs and Border Protection, 799 9th Street, NW., Washington, DC, during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572-8768.

Section 302 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law 104-208, Div. C, 110 Stat. 3009-546, amended section 235(b) of the Immigration and Nationality Act ("Act"). 8 U.S.C. 1225(b), to authorize the Attorney General (now the Secretary of Homeland Security as designated under the Homeland Security Act of 2002) to remove, without a hearing before an immigration judge, aliens arriving in the U.S. who are inadmissible under sections 212(a)(6)(C) or 212(a)(7) of the Act, 8 U.S.C. 1182(a)(6)(C) and 1182(a)(7). Under section 235(b)(1) of the Act, 8 U.S.C. 1225(b)(1), expedited removal proceedings may be applied to two categories of aliens. First, section 235(b)(1)(A)(i) of the Act, 8 U.S.C. 1225(b)(1)(A)(i), permits expedited removal proceedings for aliens who are "arriving in the United States." "Arriving aliens" are defined by regulation to mean "an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international waters and brought into the United States by any means whether or not to a designated port-of-entry." (8 CFR 1.1(q)). Cuban citizens who arrive at U.S. ports-of-entry by aircraft are exempted from this first category of aliens subject to expedited removal under section 235(b)(1)(F) of the Act, 8 U.S.C. 1225(b)(1)(F). Second, section 235(b)(1)(A)(iii) of the Act, 8 U.S.C. 1225(b)(1)(A)(iii), permits the Attorney General (now the Secretary of Homeland Security), in his or her sole and unreviewable discretion, to designate certain other aliens to whom the expedited removal provisions may be applied. Section 235(b)(1)(A)(iii), 8 U.S.C. 1225(b)(1)(A)(iii), authorizes the Secretary to apply (by designation) expedited removal proceedings to aliens who arrive in, attempt to enter, or have entered the U.S. without having been admitted or paroled following inspection by an immigration officer at a designated port-of-entry, and who have not established to the satisfaction of the immigration officer that they have been physically present in the U.S. continuously for the two-year period immediately prior to the date of determination of inadmissibility.

By statute, an alien present in the U.S. who has not been admitted shall be deemed for purposes of the Act to be an applicant for admission. 8 U.S.C. 1225(a), section 235(a)(1) of the Act. Once alienage has been established, an alien applicant for admission has the burden of establishing that he or she is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 212 of this Act. Aliens who have not been admitted or paroled and who are subject to expedited removal under this designation have the burden of proof to show affirmatively that they are not inadmissible and have maintained the required continuous physical presence in the U.S. Any absence from the U.S. shall serve to break the period of continuous physical presence. 8 CFR 235.3(b)(1)(ii).

Pursuant to 8 CFR 235.3(b)(1)(ii) (62 FR 10312, 10355, March 6, 1997), the Attorney General provided that her designation authority would be exercised by the Commissioner of the former Immigration and Naturalization Service (INS). Pursuant to sections 102(a), 441, 1512(d) and 1517 of the Homeland Security Act of 2002, Public Law 107-296, 116 Stat. 2310, 6 U.S.C. 112, 251, 552(d). 557, and 8 CFR 2.1, the authority of the Attorney General and the Commissioner of the INS in accordance with 8 U.S.C. 235(b)(1)(A)(iii) and 8 CFR 235.3(b)(1)(ii), respectively, was transferred to the Secretary of Homeland Security, and references to the Attorney General or the Commissioner in the statute and regulations are deemed to refer to the Secretary.

DHS has a pressing need to improve the security and safety of the nation's land borders, and expanding expedited removal between ports of entry will provide DHS officers with a valuable tool to meet that objective. Presently DHS officers cannot apply expedited removal procedures to the nearly 1 million aliens who are apprehended each year in close proximity to the borders after illegal entry. It is not logistically possible for DHS to initiate formal removal proceedings against all such aliens. This is primarily a problem along the southern border, and thus the majority of such aliens are Mexican nationals, who are "voluntarily" returned to Mexico without any formal removal order. Based upon anecdotal evidence, many of those who are returned to Mexico seek to reenter the U.S. illegally, often within 24 hours of being voluntarily returned (it is not uncommon for DHS officers to apprehend the same individual many times over a span of several months). On the southern land border with Mexico, those aliens who are apprehended who are not Mexican nationals cannot be returned to Mexico. Currently, non-Mexican nationals who are inadmissible may be voluntarily returned to their country of citizenship or nationality via aircraft, or placed in formal removal proceedings under section 240 of the Act. Because DHS lacks the resources to detain all third-country nationals (aliens who are neither nationals of Mexico nor Canada) who have been apprehended after illegally crossing into the U.S. from both the northern and southern land borders, many of these aliens are released in the U.S. each year with a notice to appear for removal proceedings. Many of these aliens subsequently fail to appear for their removal proceedings, and then disappear in the U.S.

Without limiting its ability to exercise its discretion in the event of a national emergency, other unforeseen events, or a change in circumstances, DHS plans under this designation as a matter of prosecutorial discretion to apply expedited removal only to (1) third-country nationals and (2) to Mexican and Canadian nationals with histories of criminal or immigration violations, such as smugglers or aliens who have made numerous illegal entries. We recognize that certain aliens, including unaccompanied minors, members of the Class Action Settlement in *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991) (which settled the claims of a class of Salvadorans and Guatemalans regarding handling of asylum claims), and aliens who may be eligible for cancellation of removal under section 240A of the Act,

for example, may possess equities that weigh against the use of expedited removal proceedings. Accordingly, in appropriate circumstances and as an exercise of prosecutorial discretion, officers will be able to permit certain aliens described in this notice to return voluntarily, withdraw their application for admission, or to be placed into regular removal proceedings under section 240 of the Act in lieu of expedited removal proceedings.

In the interests or focusing enforcement resources upon unlawful entries that have a close spatial and temporal nexus to the border, this notice dues not implement the full nationwide expedited removal authority available to DHS pursuant to section 235 of the Act, 8 U.S.C. 1225. Nor does this notice limit DHS from implementing the full nationwide enforcement authority of the statute through publication of a subsequent **Federal Register** notice. The statute provides DHS with the authority to apply expedited removal to aliens who cannot establish that they have maintained a physical presence in the U.S. continuously for the two-year period immediately prior to the date of determination of inadmissibility. The statute also does not limit geographically the application of expedited removal. At this time, DHS has elected to assert and implement only that portion of the authority granted by the statute that bears close temporal and spatial proximity to illegal entries at or near the border. Accordingly, this notice applies only to aliens encountered within 14 days of entry without inspection and within 100 air miles of any U.S. international land border.

It is anticipated under this designation that expedited removal will be employed against those aliens who are apprehended immediately proximate to the land border and have negligible ties or equities in the U.S. Nevertheless, this designation extends to a 100-mile operational range because many aliens will arrive in vehicles that speedily depart the border area, and because other recent arrivals will find their way to near-border locales seeking transportation to other locations within the interior of the U.S. The 100-mile range already has been established by regulation as a reasonable distance from the external boundary of the U.S. for the purpose of preventing the illegal entry of aliens into the U.S. See section 287(a)(3) of the Act: 8 CFR 287.1 (a)(2) and (c).

The use of expedited removal orders, which prohibit reentry for a period of 5 years, will deter unlawful entry, and make it possible to pursue future criminal prosecution against those aliens who continue to enter the U.S. in violation of law. It will also accelerate the processing of inadmissible aliens because it generally does not require an appearance before an immigration judge, except in certain circumstances. Deterring future entries and accelerating removals will enhance DHS's ability to oversee the border, and to focus its resources on threats to public safety and to national security. DHS also believes that the use of expedited removal will likely interfere with human trafficking and alien smuggling operations, which are growing in sophistication, and which induce aliens from all over the world to cross the country's borders. Alien smuggling organizations have been responsible for numerous violent crimes, including homicide, hostage-taking, and crimes involving sexual exploitation. DHS expects that the expansion of expedited removal under this notice will ultimately reduce the number of aliens who risk injury or death attempting to enter the U.S. through difficult mountainous and desert terrain, as well as decrease property crimes in border areas.

All aliens placed into expedited removal as a result of this designation will have the same rights to a credible fear screening by an asylum officer, and the right to review of an adverse credible fear determination by an immigration judge, that are provided to arriving aliens who are currently placed into expedited removal after being denied admission at a port of entry. Any alien who falls within this designation, who is placed in expedited removal proceedings, and who indicates an intention to apply for asylum or who asserts a fear of persecution or torture will be interviewed by an asylum officer who will determine whether the alien has a credible fear as defined in section 235(b)(1)(B)(v) of the Act, 8 U.S.C. 1225(b)(1)(B)(v). If that standard is met, the alien will be referred to an immigration judge for a removal proceeding under section 240 of the Act, sections 235(b)(1)(A)(ii) and (B) of the Act, 8 U.S.C. 1225(b)(1)(A)(ii) and (B); 8 CFR 235.3(b)(4), The Forms I-867A and I-867B currently used by officers who process aliens under the expedited removal program provide to all aliens in expedited removal proceedings information concerning the credible fear interview, in accordance with the statutory requirement at section 235(b)(1)(B)(iv) of the Act, 8 U.S.C. 1225(b)(1)(B)(iv). The forms require that the officer inquire whether the alien has any reason to fear harm if returned to his or her country. Officers authorized to administer the expedited removal program will be trained to be alert for any verbal or non-verbal indications that the alien may be afraid to return to his or her homeland.

Similarly, all aliens placed into expedited removal as a result of this designation, who claim lawful permanent resident, refugee, asylee status, or U.S. citizenship will receive the same procedures, including the right to review of any adverse expedited removal order by an immigration judge, that are provided to arriving aliens making similar status claims who are currently placed in expedited removal at ports of entry under 8 CFR 235.3(b). DHS, with limited exceptions, plans to detain aliens who are placed in expedited removal under this designation. Section 235(b)(1)(B)(iii)(IV) of the Act, 8 U.S.C. 1225(b)(1)(B)(iii)(IV), and 8 CFR 235.3(b)(2)(iii) direct that any alien who is placed in expedited removal proceedings shall be detained pending a final determination of credible fear and, if found not to have such a fear, such alien shall be detained until removed. Parole of such alien under 8 CFR 235.3(b)(2)(iii) may be permitted only when the Secretary determines, in the exercise of discretion, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective. Section 235(b)(1)(B)(ii) of the Act, 8 U.S.C. 1225(b)(1)(B)(ii), directs that if a credible fear has been established, the alien shall be detained for further consideration of the protection claim or claims. Under Department of Justice regulations, immigration judge review of custody determinations is permitted only for bond and custody determinations pursuant to section 236 of the Act, 8 U.S.C. 1226, 8 CFR 1236, and 8 CFR 1003.19(a). Aliens subject to expedited removal procedures under section 235 of the Act (including those aliens who are referred after a positive credible fear determination to an immigration judge for proceedings under section 240 of the Act) are not eligible for bond, and therefore are not eligible for a bond redetermination before an immigration judge. Parole of aliens determined to have a credible fear may be considered in accordance with section 212(d)(5) of the Act, 8 U.S.C. 1182(d)(5), and 8 CFR 212.5.

The expedited removal authority implemented in this Notice will not be employed against Cuban citizens because removals to Cuba cannot presently be assured and for other U.S. policy reasons.

The Department has determined that good cause exists under the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(3)(B) and (d)(3), to exempt this notice from the notice and comment requirements under the APA. Delaying the implementation of this notice to allow public notice and comment would be impracticable, unnecessary and contrary to the public interest.

Congress explicitly authorized the Secretary of Homeland Security to designate categories of aliens to whom expedited removal proceedings may be applied, and made clear that "[s]uch designation shall be in the sole and unreviewable discretion of the Secretary and may be modified at any time." Section 235(b)(1)(A)(iii)(1) of the Act, 8 U.S.C. 1225(b)(1)(A)(iii)(I). The large volume of illegal entries, and attempted illegal entries, and the attendant risks to national security presented by these illegal entries, necessitates that DHS expand the expedited removal program as provided in this designation. DHS is confident that the experience gained through implementation of the expedited removal program at ports of entry will enable DHS to expand the program in a manner that is both effective and humane.

There is an urgent need to enhance DHS's ability to improve the safety and security of the nation's land borders, as well as the need to deter foreign nationals from undertaking dangerous border crossings, and thereby prevent the needless deaths and crimes associated with human trafficking and alien smuggling operations. The expansion of expedited removal will increase the deterrence of illegal entries by ensuring that apprehension quickly leads to removal. This is especially critical because of the environmental dangers faced by aliens illegally entering the U.S. across desert or mountainous areas. In the Arizona desert alone, since the initiation of the Arizona Border Control Initiative (ABC) in March of 2004, the Border Patrol has rescued hundreds of aliens in distress and has unfortunately discovered over 40 aliens who have died in the attempt to enter the U.S.

This designation is necessary to remove quickly from the U.S. aliens who are encountered shortly after illegally entering the U.S. across the land borders. The ability to detain aliens while admissibility and identity is determined and protection claims are adjudicated, as well as to quickly remove aliens without protection claims or claims to lawful status, is a necessity for national security and public safety. As a critical element of a number of DHS initiatives to enhance security along the border, the expansion of expedited removal will increase national security, diminish the number of illegal entries, and impair the ability of smuggling organizations to operate. Accordingly, for the foregoing reasons, the Department has determined that public notice and comment prior to promulgation of this notice would be impracticable, unnecessary and contrary to the public interest as those terms are used under the APA.

Although the Department believes for the foregoing reasons that pre-promulgation notice and comment procedures are not statutorily mandated in this case, DHS is interested in receiving comments from the public on all aspects of the expedited removal program, but especially on the effectiveness of the program, problems envisioned by the commenters, and suggestions on how to address those problems. DHS believes that by maintaining a dialogue with interested parties, DHS can ensure that the program is even more effective in combating and deterring illegal entry, while at the same time protecting the rights of the individuals affected.

The expansion of expedited removal under this notice will also support the Arizona Border Control Initiative (ABC), a program designed to secure and protect the Arizona border. Working with other Federal, State, local and tribal entities, DHS has placed significant personnel and technical assets on the border to decrease the deaths of illegal immigrants in the desert; and to lower the rate of violent crime related to illegal border traffic in Southern Arizona. The ABC began operations in March 2004. For the reasons stated above, the ABC's success will rely in part upon the ability of DHS officers to place inadmissible aliens apprehended shortly after illegal entry into expedited removal.

Every year, illegal aliens from many different countries continue to enter the U.S. illegally across the nation's land borders. It is critical for public safety and national security that these aliens are not released into the U.S. without adequate verification of their identities and backgrounds.

Notice of Designation of Aliens Subject to Expedited Removal Proceedings

Pursuant to section 235(b)(1)(A)(iii) of the Immigration and Nationality Act ("Act") and 8 CFR 235.3(b)(1)(ii), I order as follows:

(1) Except as provided in paragraph (5), the Department of Homeland Security, through its component bureaus, may place in expedited removal proceedings any or all members of the following class of aliens: Aliens who are inadmissible under sections 212(a)(6)(C) or (7) of the Act, who are physically present in the U.S. without having been admitted or paroled following inspection by an immigration officer at a designated port-of-entry, who are encountered by an immigration officer within 100 air miles of any U.S. international land border, and who have not established to the satisfaction of an immigration officer that they have been physically present in the U.S. continuously for the 14-day period immediately prior to the date of encounter. Each alien subject to this notice bears the affirmative burden to show to the satisfaction of an immigration officer that the alien has been present in the U.S. continuously for the relevant 14-day period. This notice does not apply to aliens who arrive at U.S. ports-of-entry, as these aliens are already subject to expedited removal. This notice will be given effect only with respect to apprehensions made within the CBP Border Patrol sectors of (Laredo, McAllen, Del Rio, Marfa, El Paso, Tucson, Yuma, El Centre San Diego, Blame, Spokane, Havre, Grand Forks, Detroit, Buffalo, Swanton, and Houlton).

(2) Any alien who falls within this designation who indicates an intention to apply for asylum or who asserts a fear of persecution or torture will be interviewed by an asylum officer to determine whether the alien has a credible fear as defined in section 235(b)(1)(B)(v) of the Act, 8 U.S.C. 1225(b)(1)(B)(v). If that standard is met, the alien will be referred to an immigration judge for proceedings under section 240 of the Act, 8 U.S.C. 1229a.

(3) Any alien who is placed in expedited removal proceedings under this designation who claims lawful permanent resident, refugee, asylee status, or U.S. citizenship will be processed in accordance with the procedures provided in 8 CFR 235.3(b) and 8 CFR 1235.3(b).

(4) Any alien who is placed in expedited removal proceedings under this designation will be detained pursuant to section 235(b) of the Act, 8 U.S.C. 1225(b), with certain exceptions, until removed. However, aliens determined to have a credible fear may be considered by DHS for parole in accordance with section 212(d)(5) of the Act and 8 CFR 212.5. Aliens detained pursuant to the expedited removal provisions under section 235 of the Act (including those aliens who are referred after a positive credible fear determination to an immigration judge for proceedings under

section 240 of the Act) are not eligible for a bond, and therefore are not eligible for a bond redetermination before an immigration judge.

(5) This notice applies to aliens described in paragraph (1) who are encountered within the U.S. beginning August 11, 2004.

(6) The expedited removal proceedings contemplated by this notice will not be initiated against Cuban citizens or nationals.

Dated: August 3, 2004.

Tom Ridge,

Secretary of Homeland Security.

[FR Doc. 04-18469 Filed 8-10-04; 8:45 am]

BILLING CODE 4820-02-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-4903-N-63]

Notice of Proposed Information Collection: Comment Request; Contract and Subcontract Activity

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for in view, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

This is a request for approval of a revision to the currently approved information collection, which enables HUD to monitor and evaluate Minority Business Enterprise (MBE) activities against the total program activity and the designated MBE goals. Reports are submitted annually to Congress. This information collection combines two previously approved collections, OMB control numbers 2577-0088 and 2502-0355. OMB control number 2535-pending will now be used for this collection.

DATES: *Comments due:* October 12, 2004.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Wayne Eddins, Reports Management Officer, AYO, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail *Wayne_Eddins@HUD.gov;* telephone (202) 708-2374. This is not a toll-free number. Copies of available documents may be obtained from Mr. Eddins and at HUD's Web site at *http://www5.hud.gov:6300l/po/i/icbts/collectionsearch.cfm.*

FOR FURTHER INFORMATION CONTACT: Lillian Deitzer, Information Technology Specialist, AYO, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail *Lillian_L_Deitzer@HUD.gov*, telephone (202) 708-2374. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Contract and Subcontract Activity.

OMB Control Number, if applicable: 2535–pending.

Description of the need for the information and proposed use: Information will enable HUD to monitor and evaluate Minority Business Enterprise (MBE) activities against the total program activity and the designated MBE goals. Reports are submitted annually to Congress. This information collection combines two previously approved collections, OMB control numbers 2577-0088 and 2502-0355. OMB control number 2535-pending will now be used for this collection.

Agency form numbers, if applicable: HUD 2516.

Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: An estimation of the total numbers of hours needed to prepare the information collection is 5,000, number of respondents is 5,000, frequency of response is "annually," and the hours per response is 1 hour.

Status of the proposed information collection: Revision of a currently approved collection.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: August 4, 2004.

Wayne Eddins,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 04-18301 Filed 8-10-04; 8:45 am]

BILLING CODE 4210-72-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-4907-N-26]

Notice of Proposed Information Collection: Comment Request; Automated Clearing House (ACH) Program Application—Title I Insurance Charge Payments System

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* October 12, 2004.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Wayne Eddins, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, SW., L'Enfant Plaza Building, Room 8001, Washington, DC 20410 or *Wayne_Eddins@hud.gov.*

FOR FURTHER INFORMATION CONTACT: Lester J. West, Director, Financial Operations Center, Department of Housing and Urban Development, 52 Corporate Circle, Albany, NY 12203, telephone (518) 464-4200 x4206 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

(b)(6), (b)(7)c

From: (b)(6), (b)(7)c
Sent: Tuesday, August 19, 2014 2:33 PM
To:
Cc: (b)(6), (b)(7)c
Subject: TVPRA (UACs and reinstatement/VR/VD etc)

(b)(6), (b)(7)c we reached out to OPLA to coordinate responses for the 2 questions you conveyed (reinstatements for UAC & funding VRs/VDs) and have learned that (b)(6), (b)(7)c tasked them as well, so they are working on it. In the meantime, for what it may be worth at this point, (b)(6), (b)(7)c culled the below from the ICE/DRO Field Guidance for TVPRA document that's online

(b)(7)e

Reinstatements

Expedited Removal/Reinstatement.

UAC are not subject to *expedited removal or reinstatement*, and if sought to be removed from the U.S., except for UAC from contiguous countries apprehended at a land border or POE and who are permitted to withdraw their application for admission as described in the TVPRA, must be placed in removal proceedings following the issuance of a Notice to Appear.

Section 240 of the Immigration and Nationality Act (INA)

The TVPRA requires, with limited exceptions, that all UAC whom DHS seeks to remove from the United States be placed in removal proceedings under Section 240 of the Immigration and Nationality Act (INA). The removal order of a UAC may not be reinstated, nor as a matter of law may UAC be placed in expedited removal.

VR/VD

ICE Voluntary Departure

ICE/DRO can no longer offer, as a matter of law, voluntary return or offer voluntary departure to any UAC who is apprehended in the U.S. ICE DRO may however, under limited circumstances, allow a UAC from a contiguous country who is apprehended at a land border or POE to withdraw his or her application for admission if the UAC is properly screened and if return occurs within 48 hours of apprehension.

Voluntary Departure while Under 240 Proceedings

TVPRA § eliminates the requirement of the UAC to pay for the cost of voluntary departure. Therefore, DRO shall make all necessary travel arrangements for the UAC and shall incur the associated costs.

(b)(6), (b)(7)c

From: (b)(6), (b)(7)c
Sent: Friday, August 01, 2014 4:45 PM
To: Miller, Philip T; Homan, Thomas
Subject: RE: IMPORTANT UPDATE: Bond eligibility for ER Aliens Encountered Outside a POE

(b)(5)

From: Miller, Philip T
Sent: Friday, August 01, 2014 8:42:21 PM
To: (b)(6), (b)(7)c Homan, Thomas
Subject: RE: IMPORTANT UPDATE: Bond eligibility for ER Aliens Encountered Outside a POE

(b)(5)

From: (b)(6), (b)(7)c
Sent: Friday, August 01, 2014 8:41:41 PM
To: Miller, Philip T; Homan, Thomas
Subject: RE: IMPORTANT UPDATE: Bond eligibility for ER Aliens Encountered Outside a POE

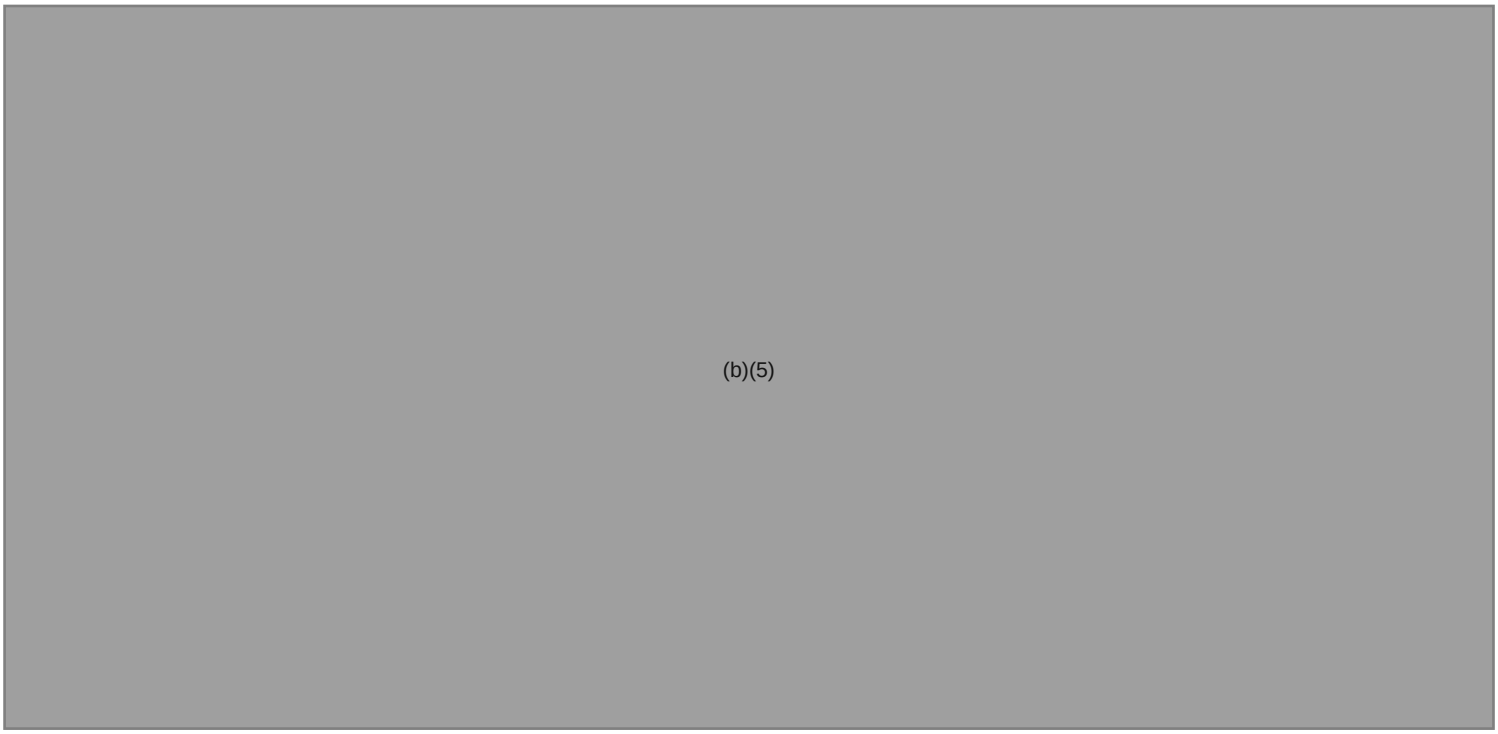
(b)(5)

From: Miller, Philip T
Sent: Friday, August 01, 2014 8:24:24 PM
To: Homan, Thomas; (b)(6), (b)(7)c
Subject: FW: IMPORTANT UPDATE: Bond eligibility for ER Aliens Encountered Outside a POE

(b)(5)

From: (b)(6), (b)(7)c
Sent: Friday, August 01, 2014 8:22:57 PM
To: Miller, Philip T
Subject: IMPORTANT UPDATE: Bond eligibility for ER Aliens Encountered Outside a POE

(b)(5)



From: (b)(6), (b)(7)c
Sent: Friday, June 06, 2014 11:42 AM
Subject: Bond eligibility for ER Aliens Encountered Outside a POE

This message is sent on behalf of Philip T. Miller, Assistant Director for Field Operations:

To: Field Office Directors and Deputy Field Office Directors

Subject: Bond eligibility for ER Aliens Encountered Outside a POE

Several Field Offices have requested clarification concerning bond eligibility for aliens subject to expedited removal, who are encountered outside a port of entry, within 14 days of entry, and within 100 air miles of the U.S. international border. In 2004, DHS designated this category of alien for expedited removal (ER) by Federal Register Notice. Designating Aliens for Expedited Removal, 69 FR 48877 (Aug. 11, 2004). The issue of bond eligibility for these designated aliens may have caused confusion in light of section 240 proceeding referrals based on credible fear claims and because aspects of earlier interpretations have been supplanted by the Board of Immigration Appeals' decision in *Matter of X-K,* 23 I&N Dec. 731 (BIA 2005).

In light of that decision, *aliens subject to the 2004 ER designation*:

- *Prior* to referral for section 240 proceedings based on a finding of credible fear, these aliens are subject to mandatory detention and may only be released pursuant to DHS's parole authority under INA section 212(d)(5).
- *After* referral for section 240 proceedings based on a finding of credible fear, until there is a final removal order, these aliens are detained under INA section 236, may be released on bond, and may seek a bond redetermination before an immigration judge.

Please note that “arriving aliens” subject to ER, even when referred to the immigration court after a positive credible fear determination, are ineligible for bond or a bond redetermination by an immigration judge. They may only be released pursuant to DHS’s parole authority under INA section 212(d)(5). As a reminder, “arriving aliens” are those aliens who are applicants for admission at a port of entry, seeking transit through the U.S. at a port of entry, or interdicted in international or U.S. waters and brought to the United States.

Questions regarding these clarifications may be directed to your local Office of Chief Counsel.

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[8/21, Virtue] INS Advises on "Unaccompanied Minors" & Removal
Cite as "*Posted on* AILA InfoNet at Doc. No. 97082191 (Aug. 21, 1997)"

Date: August 21, 1997

To: Management Team
Regional Directors
District Directors
Officers-in-Charge
Chief Patrol Agents
Asylum Office Directors
Port Directors
Director, Policy Directives and Instructions
ODTF Glynco
ODTF Artesia

Subject: Unaccompanied Minors Subject to Expedited Removal

The expedited removal and mandatory detention provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) have generated concerns about the treatment of minors subject to expedited removal. This memorandum sets forth new policy for the charging of minors during inspection, procedures to be taken when permitting an unaccompanied minor to withdraw an application for admission, and detention of minors in expedited removal proceedings.

This policy guidance supersedes the previous direction concerning unaccompanied juveniles contained in the memorandum entitled Implementation of Expedited Removal issued March 31, 1997, by the Deputy Commissioner. Further instructions for processing, treatment, and placement of minors are contained in a memorandum dated July 18, 1997, entitled Settlement *of Jenny Lisette Flores, et al. v. Janet Reno*. All Service officers must comply with the terms of the settlement agreement in *Flores v. Reno*, as outlined in the July 18 memorandum and its attachments. The following revisions will be made in the next release of the Immigration and Naturalization Service Easy Research and Transmittal System (INSERTS).

Chapter 17.15(f) is added to read as follows:

(f) Special Treatment of Minors.

(1) **General Policy.** When an unaccompanied minor (a person under the age of eighteen) appears to be inadmissible under section 212(a)(6)(C) or (7) of the Act, officers should first try to resolve the case under existing guidelines. Existing guidelines permit granting a waiver, deferring the inspection, or employing other discretionary means, if applicable, including withdrawal of an application for admission.

(2) **Withdrawal of Application for Admission by Minors.** Whenever appropriate, the INS should permit unaccompanied minors to withdraw their application for admission rather than placing them in formal removal proceedings. In deciding whether to permit an unaccompanied minor to withdraw his or her application for admission, every precaution should be taken to ensure the minor's safety and well-being. Factors to be considered include the seriousness of the offense in seeking admission, previous

findings of inadmissibility against the minor, and any intent by the minor to knowingly violate the law.

Before permitting a minor to withdraw his or her application for admission, the INS officer must be satisfied either that the minor is capable of understanding the withdrawal process, or that a responsible adult (relative, guardian, or in cases where a relative or guardian is not available, a consular officer) is aware of the actions taken and the minor's impending return. Officers must attempt to contact a relative or guardian either in the United States or in another country regarding the minor's inadmissibility whenever possible. A minor brought to the United States by a smuggler is to be considered an unaccompanied minor, unless the smuggler is an adult relative (parent, brother, sister, aunt, uncle, or grandparent) or legal guardian. If the smuggler is not a relative or guardian, he or she should not be consulted concerning the disposition of the minor's case.

The true nationality of the minor must be ascertained before permitting the minor to withdraw. Another factor to consider is whether the port of embarkation to which the minor will be returned is the country of citizenship of the minor. A minor may not be returned to or be required to transit through a country which may not be willing or obligated to accept him or her. If the minor is being returned to a third country through a transit point, officers must ensure that an immediate and continuous transit will be permitted.

When deciding whether to permit the minor to withdraw his or her application for admission, officers must also make every effort to determine whether the minor has a fear of persecution or return to his or her country. If the minor indicates a fear of persecution or intention to apply for asylum, or if there is any doubt, especially in the case of countries with known human rights abuses or where turmoil exists, the minor should be placed in removal proceedings under section 240 of the Act. If there is no possibility of a fear of persecution or return and the INS permits the minor to withdraw his or her application for admission, the consular or diplomatic officials of the country to which the minor is being returned must be notified. Safe passage can then be arranged, and after all notification to family members and government officials have been made, the minor may be permitted to withdraw.

(3) **Minors Referred for Section 240 Proceedings.** Except as noted below, if a decision is made to pursue formal removal charges against the unaccompanied minor, the minor will normally be placed in removal proceedings under section 240 of the Act rather than expedited removal. The unaccompanied minor will be charged under both section 212(a)(7)A(i)(I) of the Act as an alien not in possession of proper entry documents and section 212(a)(4) of the Act as an alien likely to become a public charge. This additional charge renders the minor subject to removal proceedings under section 240 of the Act. Other charges may also be lodged, as appropriate. As a general rule, minors should not be charged with section 212(a)(6)(C) of the Act, unless circumstances indicate that the alien clearly understood that he or she was committing fraud or that the minor is knowingly involved in criminal activity relating to fraud.

Minors who are placed in section 240 proceedings and who are not in expedited removal may either be released in accordance with the parole provisions, or placed in a Service-approved juvenile facility, shelter, or foster care in accordance with existing juvenile detention policies and the *Flores v. Reno* settlement. At all stages of the inspection and removal process, officers should take every precaution to ensure that the minors rights are protected and that he or she is treated with respect and concern [See Appendix 17-4, policy memorandum discussing the *Flores* settlement.]

(4) **Expedited Removal of Minors.** Under limited circumstances, an unaccompanied minor may be placed in expedited removal proceedings. The minor may be removed under the expedited removal provisions only if the minor:

***[Editor's Note:** The policy memorandum discussing Flores is not currently available to AILA.*

has, in the presence of an INS officer, engaged in criminal activity that would qualify as an aggravated felony if committed by an adult;

has been convicted or adjudicated delinquent of an aggravated felony within the United States or another country, and the inspecting officer has confirmation of that order; or

has previously been formally removed, excluded, or deported from the United States.

If an unaccompanied minor is placed in expedited removal proceedings, the removal order must be reviewed and approved by the district director or deputy district director, or person officially acting in that capacity, before the minor is removed from the United States. This is in addition to the normal supervisory approval required of all expedited removal cases.

(5) **Treatment of Minors during Processing.** Officers should treat all minors with dignity and sensitivity to their age and vulnerability. Processing of minors should be accomplished as quickly as possible. As with all persons being detained at ports-of-entry, officers must provide the minor access to toilets and sinks, drinking water and food, and assistance if needed. Minors may not be placed in short-term hold rooms, nor may they be restrained, unless they have shown or threatened violent behavior, they have a history of criminal activity, or there is a likelihood the juvenile will attempt to escape. Unaccompanied minors should not be held with unrelated adults. Any detention following processing at the port-of-entry must be in accordance with the *Flores v. Reno* removal proceedings.

(6) **Minors Accompanied by Relatives or Guardians.** If formal proceedings are initiated against an accompanying adult relative or legal guardian, the minor should be placed in the same type of proceeding (i.e. expedited removal or 240 proceedings) as the adult. However, withdrawal of application for admission by the minor should be considered whenever appropriate, even though the relative or guardian may remain subject to formal removal proceedings.

Issues concerning minors, both accompanied and unaccompanied, will continue to arise as the expedited removal program proceeds. Questions concerning treatment and detention of minors may be directed to (b)(6), (b)(7)c, Office of Detention and Deportation, at 202/307-(b)(6), (b)(7)c or (b)(6), (b)(7)c Office of Inspections, at 202/616-(b)(6), (b)(7)c

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