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In practice, most of these cases would have been paroled by CBP through a preclearance airport in Canada. As these flights normally arrive at domestic gates of an airport in the interior of the United States, CBP will not have direct contact with the alien. However, the alien may make his asylum claim to the escorting Canadian officers, airline employees, or other officials and may be brought to the CBP offices in the airport. In these cases, parole status will be terminated and the alien deportee will be placed in expedited removal proceedings and referred to an asylum officer for a credible fear interview, where the alien will first receive a threshold screening determination. The alien should be given the Information About Threshold Screening Interview along with the Form M-444. After processing, DHS will return the alien to Canada. This process should be coordinated with ICE DRO as it will require detention.

(e) Dispute Resolution Under the Safe Third Country Agreement

The Agreement provides that procedures must include mechanisms for resolving differences in interpretation and implementation of the terms of the Agreement. There may be situations where the alien, upon return to the United States, claims that there is new material evidence that was not reasonably available to Canadian officials, or the alien alleges that Canadian officials did not consider all evidence, or the alien's true identity is discovered upon return to the United States. While CBP Officers should not attempt to act as advocates for the alien, they may request a reconsideration of the decision if warranted.

(1) The CBP Port Director may contact the CIC manager in writing, providing the name and FOSS ID number of the alien and a summary of the new material evidence to be considered along with any supporting documentation.

(2) A CIC officer will review the case and determine if the evidence was considered at the time of the interview. If the evidence was already considered, the information will be provided to the CBP Port Director with confirmation that the case will not be redetermined. If the CIC officer requires clarification from the claimant, contact will be by telephone. If it is determined that the applicant is eligible to make a refugee claim in Canada, the CIC manager will request the return of the applicant.

(3) Any further disputes that cannot be resolved at the local level should be referred through the DFO to CBP HQ Immigration Policy and Programs (IPP). IPP will forward the information to the USCIS Asylum Division Director for resolution.

(4) If Canadian officers have similar concerns about an alien returned to Canada under the Agreement, they must contact the Deputy Director of Asylum at USCIS Headquarters.

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17.12 Bonds.

Whenever an alien for whom a bond has been posted is admitted, endorse the reverse of the arrival portion of the I-94 with the "A" number, FCO code and the word "Bond". When a bond has been pre-posted as a condition of visa issuance, the nonimmigrant visa will be so noted by the consular officer.

17.13 Visa Waiver Program Cases. (Revised IN01-04)

See discussion in Chapter 15.7 concerning VWP refusals and limitations on removal hearings. A VWP applicant who claims asylum may be accorded a limited removal hearing, but such a hearing is limited solely to the issue of asylum or withholding of removal, in accordance with 8 CFR 208.2(b). In such a situation, process the applicant using Form I-863, Notice of Referral to Immigration Judge.

17.14 Lookout Intercepts.

See Chapter 31.6.

17.15 Expedited Removal.

(a) Inadmissibility. Section 302 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) amended section 235(b) of the Immigration and Nationality Act (Act) to authorize the Attorney General (now the Secretary of the Department of Homeland Security (DHS)) to remove without a hearing before an immigration judge aliens arriving in the United States who are inadmissible under section 212(a)(6)(C) or 212(a)(7) of the Act. Under these expedited removal provisions, aliens who indicate an intention to apply for asylum or who assert a fear of persecution or torture are referred to an asylum officer for a credible fear interview. Those who are found to have a credible fear by the asylum officer are referred to an immigration judge for a full removal hearing on the merits of their claim or claims.

The expedited removal provisions became effective April 1, 1997. Under section 235(b)(1) of the Act, expedited removal proceedings may be applied to two categories of aliens.

First, section 235(b)(1)(A)(i) of the Act permits expedited removal proceedings for aliens who are arriving in the United States. 8 CFR 1.1(q) defines the term "arriving alien." Refer to section (a)(1) of this chapter for the meaning of "arriving alien." Pursuant to section 235(b)(1)(F) of the Act, Cuban nationals who arrive at U.S. ports-of-entry

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(POEs) by aircraft are exempt from expedited removal proceedings.

Second, section 235(b)(1)(A)(iii) of the Act provides the Attorney General (now the Secretary of DHS) the discretion to designate certain other aliens to whom the expedited removal proceedings may be applied, even though they are not arriving in the United States. This provision permits application of the expedited removal proceedings to any or all aliens who have not been admitted or paroled into the United States and who have not been physically present in the United States continuously for the two-year period prior to a determination of inadmissibility by an immigration officer. The Attorney General delegated this authority to designate classes of aliens to the Commissioner of the Immigration and Naturalization Service, and this has since been delegated to the Commissioner of CBP and the Under Secretary of Immigration and Customs Enforcement (ICE). Pursuant to 8 CFR 235.3(b)(1)(ii), the designation may become effective upon publication of a notice in the Federal Register.

On November 13, 2002, the INS published in the Federal Register a notice designating an additional class of aliens who may be placed in expedited removal proceedings - aliens who arrive in the United States by sea, who are not admitted or paroled, and who have not been physically present in the United States continuously for the two-year period immediately preceding the determination of inadmissibility. Aliens falling within this newly designated class will be detained at the discretion of the government during the course of immigration proceedings. This newly designated class does not include Cuban nationals, crewmen, or stowaways.

(1) Arriving Aliens. For an alien to be subject to the expedited removal provisions at a POE, the alien must first meet the definition of "arriving alien." The term "arriving alien" as defined in 8 CFR 1.1(q) means an applicant for admission coming or attempting to come into the United States at a POE, or an alien seeking transit through the United States at a POE, or an alien interdicted in international or U.S. waters and brought into the United States by any means, whether or not to a designated POE, and regardless of the means of transportation. An arriving alien remains such even if paroled pursuant to section 212(d)(5) of the Act, except that an alien who was paroled before April 1, 1999, or an alien granted parole which the alien applied for and obtained in the United States prior to the alien's departure from and return to the United States shall not be considered an arriving alien for purposes of section 235(b)(1)(A)(i) the Act.

Aliens who entered the United States without inspection; aliens apprehended in the United States without legal status; and aliens who have departed the United States, are refused admission into another country and are thereafter returned back to the United States do not fall within the definition of arriving aliens. Alien stowaways on arriving vessels, lawful permanent resident aliens of the United States, or applicants under the Visa Waiver Program may be considered arriving aliens for other

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purposes under the Act, but are not subject to the expedited removal provisions.

It is the responsibility of the officer to determine whether the alien is an arriving alien subject to being placed in expedited removal proceedings. Also see Chapter 17.11 for processing alien applicants for admission who claim asylum at ports-of-entry.

(2) Applicability. In general, arriving aliens who are inadmissible under section 212(a)(6)(C) and/or (7) are subject to expedited removal under section 235(b)(1) of the Act. Officers should only charge those grounds of inadmissibility that can be fully supported by the evidence and that will withstand any further scrutiny. Officers may, but need not, charge more than one ground of inadmissibility. If 212(a)(6)(C) and/or 212(a)(7) are the only charges lodged, the alien must be processed under expedited removal and may not be referred for an immigration hearing under section 240. If additional charges are lodged, the alien may be referred for a section 240 hearing, but this should only occur in extraordinary circumstances. Generally speaking, if an alien is inadmissible under 212(a)(6)(C) and/or (7), additional charges should not be brought and the alien should be placed in expedited removal. There will be very few instances where it will be advantageous to the government to lodge additional charges and institute section 240 removal proceedings if a solid expedited removal proceeding can be concluded. Even in criminal cases, an expedited removal proceeding will normally be the preferred option.



DHS retains the discretion to permit withdrawal of application for admission in lieu of issuing an expedited removal order (see Chapter 17.2). Provisions for withdrawal are contained in both statute and regulation, with specific guidance in the IFM, and should be followed by all officers with authority to permit withdrawals. As an example, in cases where a lack of proper documents is the result of inadvertent error, misinformation, or where no fraud was intended (e.g. an expired nonimmigrant visa), officers may consider, on a case-by-case basis and at the discretion of the government, any appropriate waivers, withdrawal of application for admission, or deferred inspection to resolve the ground of inadmissibility rather than issue an expedited removal order.

The authority to formally order an alien removed from the United States without a hearing or review, carries with it the responsibility to accurately and properly apply the grounds of inadmissibility.

(3) Grounds of Inadmissibility. All officers should be aware of precedent decisions

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and policies relating to the relevant grounds of inadmissibility. Section 212(a)(6)(C) is an especially difficult charge to sustain unless the case involves obviously fraudulent or counterfeit documents. Misrepresentation is even more difficult to determine. Also keep in mind that an alien who is determined to be inadmissible for fraud or misrepresentation is barred forever from the United States, with few waivers available. Any one or several of the following points should be considered in determining if an alien has committed fraud or misrepresentation.

- To support a charge of having procured a document by fraud or misrepresentation, the procuring must have been done from a government official, not from a counterfeiter, and any misrepresentation must have been practiced on a U.S. Government official.
- The procurement by fraud must relate to a person who has done so to obtain his or her own admission, not someone else's.
- The fraud or misrepresentation must be material, i.e., the alien is inadmissible on the true facts, or the misrepresentation tends to shut off a relevant line of inquiry that might have resulted in a determination of inadmissibility.
- In general, an alien should not be charged with misrepresentation if he or she makes a timely retraction of the misrepresentation, in most cases at the first opportunity.
- Silence or failure to volunteer information does not in itself constitute a misrepresentation.
- Aliens who are determined to be mentally incompetent and small children judged to be incapable of independently forming an intent to defraud should not be ordered removed using section 212(a)(6)(C)(i) as the inadmissibility charge. The preferred charge in such cases would be section 212(a)(7)(A).
- Section 344 of IIRIRA did not create any waiver for immigrants found inadmissible under section 212(a)(6)(C)(ii) relating to false claims to U.S. citizenship. Therefore, immigrants found inadmissible under section 212(a)(6)(C)(ii) are permanently barred from the United States.

(4) Supervisory approval of removal orders. All expedited removal orders require supervisory approval before service upon the alien. By regulation, this approval authority is not to be delegated below the level of a second-line supervisor. Each field office may determine at what level (second-line supervisor or above) this review authority should be delegated.

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The expedited removal provisions are not applicable in pre-clearance or pre-inspection operations. If DHS wishes to proceed with expedited removal of an alien inspected during an en route inspection of a vessel, action on the case will be deferred until the vessel has arrived in the United States. The alien may then be processed as an expedited removal case.

Port directors are responsible for ensuring that all officers conducting expedited removal proceedings, and supervisors approving expedited removal orders, are properly trained in the expedited removal provisions.

See Appendix 17-3 for a flow chart mapping the entire expedited removal process.

(Paragraph (a) amended 8/21/97; IN97-05)

(5) Aliens seeking asylum at land border ports of entry. Section 235(b) of the INA does not provide for an affirmative asylum application process at a port of entry. Therefore, an officer should consider an alien who arrives at a land border port-of-entry and seeks asylum to be an applicant for admission by operation of law. The alien will most likely be inadmissible under section 212(a)(7)(A)(i) of the INA as an intending immigrant without proper documentation or under section 212(a)(6)(C) of the INA as an immigration violator with fraudulent documents. As a result, he or she will be subject to expedited removal proceedings.

Except as noted below, the alien, if otherwise subject, should be placed in expedited removal proceedings, referred for a credible fear interview, and detained pending a final determination of a credible fear of persecution or torture. See INA § 235(b)(1)(B)(iii)(IV); 8 CFR § 235.3(b)(4)(ii). Once it has been determined that an alien has a credible fear of persecution or torture, DHS may continue to detain the alien or parole the alien from custody, as appropriate.

(Paragraph (a)(5) added 11-1-05; CBP 12-06)

(6) Cuban asylum seekers at land border ports-of-entry. Natives or citizens of Cuba arriving at land border ports of entry, whose immediate removal from the United States is highly unlikely, should be placed directly into section 240 proceedings in lieu of expedited removal, without lodging additional charges. These aliens may be paroled directly from the port of entry while awaiting removal proceedings if identity is firmly established, all available background checks are conducted, and the alien does not pose any terrorist or criminal threat. Pursuant to section 235(b)(2)(C) of the INA, they may also be returned to contiguous territory pending removal proceedings under section 240 of the INA. This option should only be considered if the alien is not eligible for the exercise of parole discretion, the alien has valid status in Canada or Mexico, Canadian or Mexican border officials are willing to accept the alien back, and the claim of fear of persecution is

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unrelated to Canada or Mexico.

An officer should not parole a native or citizen of Cuba from a land border port of entry for the sole purpose of allowing the alien to apply for adjustment under the Cuban Adjustment Act of 1966, Pub. L. 89-732, 80 Stat. 1161 (1966), without initiating section 240 proceedings. The Cuban Adjustment Act (CAA) provides that any native or citizen of Cuba who has been admitted or paroled into the United States, *and who is otherwise admissible as an immigrant*, may adjust status to that of a lawful permanent resident after being physically present in the United States for at least one year. It does not, however, require an officer to parole a native or citizen of Cuba at a port of entry without regard to public safety. Therefore, an officer should grant parole to a native or citizen of Cuba only if the alien does not pose a criminal or terrorist threat to the United States.

(Paragraph (a)(6) added 11-1-05; CBP 12-06)

(b) Preparing a case. The expedited removal proceedings give officers a great deal of authority over removal of aliens and will remain subject to serious scrutiny by the public, advocate groups, and Congress. All officers should be especially careful to exercise objectivity and professionalism when processing aliens under this provision. Because of the sensitivity of the program and the potential consequences of a summary removal, you must take special care to ensure that the basic rights of all aliens are preserved, and that aliens who fear removal from the United States are given every opportunity to express any concerns at any point during the process. This includes conducting interviews in an area that affords sufficient privacy, whenever feasible. Since a removal order under this process is subject to very limited review, you must be absolutely certain that all required procedures have been adhered to and that the alien has understood the proceedings against him or her.

The steps to be taken in the expedited removal proceedings differ somewhat from those in which an alien is referred for a removal hearing before an immigration judge. It is important that a complete, accurate record of removal be created, and that any expedited removal be justifiable and non-arbitrary. The following steps must be taken in each case in which an order of expedited removal is contemplated or entered against an alien:

(1) Use of Form I-867A&B. Clearly explain to the alien, in a language he or she understands, the serious nature and impact of the expedited removal process, as noted on the Form I-867A&B. Officers must use an interpreter, when needed, to assist in the expedited removal process. Refer to Chapter 17.18 for Guidance on the Use of Interpreters and Interpreter Services.

Read the statement of rights and consequences contained on the first page of Form I-867A, Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act, to the alien. Explain that you will be taking a statement from him or her, and

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that any information given or discovered will be used in making a decision on the case and may result in his or her prompt removal. Advise the alien that if he or she is found to be inadmissible and a decision is made to order the alien removed, he or she will be immediately removed from the United States. Explain that there is no appeal to this decision and explain that this will be his or her only opportunity to provide any information or state any fear of return or removal that he or she may have.

In every expedited removal case, you must use the Form I-867A&B to take a complete sworn statement from the alien concerning all pertinent facts. If the case did not initially appear to involve inadmissibility and removal under the expedited removal proceedings, and the sworn statement was begun using other forms, you must immediately advise the alien of the rights and warnings on Form I-867A once you determine that the expedited removal proceedings will apply. The officer shall note either on the Forms I-867A&B or in a memorandum, explaining why those other forms are included.

The sworn statement will be done in question and answer format. Form I-831, Continuation Sheet, or a blank page may be used for the body of the statement. The sworn statement must cover several general areas of inquiry:

- Identity - include true name, aliases, date and place of birth and other biographical data.
- Alienage - determine citizenship, nationality, and residence. Cover any possible claim to U.S. citizenship through parents.
- Inadmissibility - questions should cover the alien's reason for coming to the United States, information about the specific facts of the case and the specific suspected grounds of inadmissibility.
- Fear of persecution or torture - if the alien indicates in any fashion or at any time during the inspections process, that he or she has a fear of persecution, or that he or she has suffered or may suffer torture, you are required to refer the alien to an asylum officer for a credible fear determination. One of the significant differences between expedited removal proceedings and regular removal proceedings is that the inspecting officer has a responsibility to ensure that anyone who indicates a fear of persecution or intent to apply for asylum in the United States is referred to an asylum officer for a credible fear determination. Inspectors should consider verbal as well as non-verbal cues given by the alien. The obligatory questions on the Form I-867B are designed to help in determining whether the alien has such fear. Ask the questions as they appear on the Form I-867B at the end of the sworn statement. If the alien indicates an intention to

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apply for asylum or a fear of harm or concern about returning home, or makes any such statements or comments at any time during the inspections process, the inspector may ask a few additional follow-up questions to ascertain the general nature of the fear or concern. Any comments of concern made by the applicant must be recorded in the sworn statement, including any indications made by the alien prior to the secondary interview.

Do **not** ask detailed questions on the nature of the alien's fear of persecution or torture: leave that for the asylum officer. In determining whether to refer the alien, inspectors should not make eligibility determinations or weigh the strength of the claims, nor should they make credibility determinations concerning the alien's statements. The inspector should err on the side of caution, apply the criteria generously, and refer to the asylum officer any questionable cases, including cases that might raise a question about whether the alien faces persecution or torture. Do not make any evaluation as to the merits of such fear; that is the responsibility of the asylum officer. Officers processing aliens for expedited removal may contact the Asylum office point(s) of contact when necessary to obtain guidance on whether to refer questionable cases involving an expression of fear or a potential asylum claim. See paragraph (d) of this chapter for more detailed information regarding credible fear referrals.

- Impact of decision - once you have gathered all the facts, you will decide, in consultation with a supervisor, the best course of action. Depending on the circumstances, you may admit the alien, allow the alien to apply for any applicable waivers, defer the inspection or otherwise parole the alien, permit the alien to withdraw his or her application for admission, issue an expedited removal order, or refer the alien for a credible fear determination. Whatever decision is made, clearly advise the alien of the impact and consequences of the determination and record this in the sworn statement.

You must use the Form I-867B as the final page of the sworn statement and jurat. Be sure to obtain responses from the alien regarding the mandatory closing questions contained on the form. If the alien in any way indicates a fear of removal or return, follow the procedures in paragraph (d) of this section. Collect any additional evidence relevant to the case that is discovered during the inspections process.

After the sworn statement is completed, have the alien read the statement, or have it read to him or her in a language the alien understands. Use an interpreter if necessary. Make any necessary corrections or additions. Have the alien initial each page and each correction. Provide a copy of the completed statement, upon signature, to the alien. Retain a copy for the A file and a copy for the port file, if one is created

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If at any time you feel that an amendment to the initial sworn statement is needed, you may complete a second sworn statement during the inspections process. An incident may also take place after you have completed the initial sworn statement, but before the alien is removed from the United States, where a second sworn statement may be helpful. Ask the alien enough questions under oath to address all concerns that may have arisen during the process.

The statement must be signed by the alien and by the officer taking the statement, as well as by a witness. An alien cannot avoid expedited removal by refusing to sign the statement or answer the questions. If the alien will not sign, write "Subject refused to sign" on the signature line. If the alien will not answer any questions, take a skeleton sworn statement, listing all pertinent questions, and writing after each "Subject refused to answer". An expedited removal order may still be issued, provided the removal is otherwise substantiated (e.g., if the alien presented a fraudulent document), and is not dependent solely on the alien's statements.

(2) Form I-860, Notice and Order of Expedited Removal. Prepare three copies of Form I-860. Check the appropriate ground(s) of inadmissibility under which the alien is being charged (e.g. 212(a)(6)(C)(i)), and insert a narrative description of each charge and the violation committed. Read and explain the charges to the alien in the alien's native language or in a language the alien can understand. An interpreter may be required to ensure that the alien understands the allegations and the removal order. Interpreters may not be used if they are employees of the government of the alien's home country, such as an employee of a government-owned airline, except for the most routine questioning. Never use an employee of a foreign government if there is any possibility of sensitive areas (e.g., persecution or torture) being discussed. The alien should be given an opportunity to respond to the charges, and any response must be recorded in either the sworn statement or an addendum to the statement. Expedited removal forms exist in other languages. If a form in the alien's native language or in a language the alien understands is used, place only the English version in the file and give the translated version to the alien.

After all statements are taken and other paperwork is complete, present it through your chain of command to the appropriate supervisor (not to be delegated below the second-line supervisor) or a person officially acting in that capacity for review and approval. If the appropriate supervisor is not present at the port, the supervisory review and approval may be obtained telephonically, by fax, or by other means. The approving authority must be properly advised of all facts in the case in order to make an informed decision. Print the name and title of the supervisor approving the order, and check the box on the form indicating that concurrence was obtained telephonically or by other means. The Form I-860 must be signed legibly by the

statements.

(2) Form **I-860**, Notice and Order of Expedited Removal. Prepare three copies of Form **I-860**. Check the appropriate ground(s) of inadmissibility under which the alien is being charged (e.g. **212(a)(6)(C)(i)**), and insert a narrative description of each charge and the violation committed. Read and explain the charges to the alien in the alien's native language or in a language the alien can understand. An interpreter may be required to ensure that the alien understands the allegations and the removal order. Interpreters may not be used if they are employees of the government of the alien's home country, such as an employee of a government-owned airline, except for the most routine questioning. Never use an employee of a foreign government if there is any possibility of sensitive areas (e.g., persecution or torture) being discussed. The alien should be given an opportunity to respond to the charges, and any response must be recorded in either the sworn statement or an addendum to the statement. Expedited removal forms exist in other languages. If a form in the alien's native language or in a language the alien understands is used, place only the English version in the file and give the translated version to the alien.

After all statements are taken and other paperwork is complete, present it through your chain of command to the appropriate supervisor (not to be delegated below the second-line supervisor) or a person officially acting in that capacity for review and approval. If the appropriate supervisor is not present at the port, the supervisory review and approval may be obtained telephonically, by fax, or by other means. The approving authority must be properly advised of all facts in the case in order to make an informed decision. Print the name and title of the supervisor approving the order, and check the box on the form indicating that concurrence was obtained telephonically or by other means. The Form **I-860** must be signed legibly by the preparing officer.

(3) Photographing and fingerprinting. Enroll the alien in [redacted] Take the alien's photograph and fingerprint the alien on FD-249 fingerprint cards (three sets—see **chapter 18.9(c)** for distribution), or electronically, if [redacted] are available at the port. Be sure to complete the entire form and properly code the fingerprint cards with the proper U.S. Code citation, since the FBI will not clear cards without such codes. Following are examples of codes that may be used:

- 18 U.S.C. 1544 Photo substitutions
- 18 U.S.C. 1546 Counterfeit immigrant visa
- 8 U.S.C. 1306 Counterfeit immigration documents, such as alien registration
- 18 U.S.C. 911 False claims to U.S. citizenship (imposters, photo substitution of U.S. passport)
- 18 U.S.C. 1001 Other (fraudulent documents, false statements, imposter, etc.)

(4) Forensic Document Lab (FDL) analysis. Obtain forensic analysis, if appropriate. In cases involving fraudulent documents, if the sworn statement includes an admission of the fraud, no forensic analysis may be required. For the expedited removal proceedings, actual forensic examination of the document by the FDL may not be feasible. This does not mean that it is permissible to "rush to judgement", or that it is permissible to expeditiously remove an alien based on incomplete evidence. If forensic analysis is required to establish that the alien is inadmissible, such analysis must be obtained before the Form **I-860** is executed. If necessary, the alien should be detained until the analysis is performed, and then the Form **I-860** can be executed. (On the other hand, if the alien's inadmissibility under section **212(a)(7)** has been established, there is little or no reason to delay the expedited removal process in order to also establish the **212(a)(6)(C)** charge.) Offices with electronic devices for transmitting quality images should use those technologies whenever possible or necessary. [See **Chapter 32** for details on using FDL services and for contributing documents or intelligence information concerning the fraud.]

(5) Tracking of ER cases. Unless an A number already exists for an alien placed into expedited removal, an A number must be

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assigned to every expedited removal case at the POE in order to ensure proper tracking of the case from the onset.

Codes have been created for entry of expedited removal cases into the Central Index System (CIS). Those codes are:

- ERF Expedited Removal case has been initiated under section 235(b)(1) of the INA and a final decision is pending a credible Fear determination by an asylum officer or immigration judge.
- ERP Expedited Removal case has been initiated under section 235(b)(1) INA and a final decision is Pending for reasons other than referral for credible fear interview before an asylum officer.
- ERR Expedited Removal case has been initiated and alien has been Removed from the United States under that program.

Entry of cases into CIS should be accomplished as quickly as possible in accordance with local policy. To ensure prompt data entry, A files for expedited removal cases should be separated from other files and flagged as expedited removal cases.

Codes have also being created to designate expedited removal cases in the National Automated Immigration Lookup System (NAILS) and the Interagency Border Inspection System (IBIS).

Search for existing records in CIS and other appropriate automated systems. If an A file exists, create a temporary file and request the permanent file. After the file is received, update it with all relevant documents completed or collected during the expedited removal process, and forward it to the proper files control office. If no previous file exists, create a new A file relating to the alien.

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- 6) Consular notification of alien detention. Consult **8 CFR 236.1(e)** to ensure that, if required, the appropriate consular official is immediately notified of the alien's detention, even if the alien **requests** that this **not** be done. Notify the alien that he or she may communicate with a consular official. These steps normally will only be necessary when removal of the alien cannot be accomplished immediately and the alien must be placed in detention for longer than 24 hours. When you contact a consular official, never mention any asylum claim which may have been filed, or give any indication that the alien has expressed a fear of persecution or torture.
- (7) Criminal prosecution. Aliens arriving at the POEs who are subject to the expedited removal provisions may also be subject to criminal prosecution. If criminal prosecution of the alien is contemplated in addition to expedited removal, the criminal action must be completed before the alien is ordered removed. [See **Chapter 18** for procedures for criminal prosecution]. Officers must give the alien his/her Miranda warning and once the warning of rights has been given to the alien, questioning of the alien can only occur with the alien's consent. If the alien refuses to provide a sworn statement, or if the U.S. Attorney's Office prohibits the officer from taking any sworn statements or completing removal processing prior to the completion of the criminal proceedings, the administrative process must be completed after the alien's criminal proceeding is concluded.
- If the alien permits questioning and the U.S. Attorney's Office does not prohibit questioning and processing of the alien, complete the sworn statement and the Form I-860. Do not serve the Form I-860 on the alien, but place it in the A file pending the criminal processing. If the alien is to be turned over to another law enforcement agency, serve a Form I-247, Immigration Detainer - Notice of Action, on the other agency. Once the alien is returned to DHS custody, the Form I-860 may be served and the alien removed under the expedited removal order.
- (8) Service of the Form I-860. Serve the original Form I-860 on the alien, unless the alien is to be deferred to an onward office, in which case the service is accomplished by the onward office. If the alien is being prosecuted criminally, the Form I-860 will be served after the criminal conviction. Place a copy of the Form I-860 in the A file. The third copy may be retained at the port.
- (9) Form I-296, Notice to Alien Ordered Removed/Departure Verification. Check the appropriate box to indicate the period during which the alien must obtain permission to reenter: 5 years for the first removal; 20 years in the case of a second or subsequent removal; at any time if the alien has been **convicted** of an aggravated felony (even though the alien is not being charged as an aggravated felon in this proceeding). Do not check the 10-year box; that is for aliens removed under other provisions of the Act. At the time of actual removal, a photograph and a pressed print of the alien's right index finger should be placed on a copy of the Form I-296, the alien should sign the form, and the particulars of the departure should be entered on the form for retention in the file. Serve the alien with a copy of the Form I-296 before removal. The original form should remain in the A file.
- (10) Form I-275, Consular Notification. Cancel the alien's visa or border crossing card, if appropriate. Complete and distribute the Form I-275 as described in **Chapter 17.2**. Check all the boxes that apply, with a brief description of the denial and removal of the alien. Note the passport with the file number and action taken, for example: "Ordered Removed 6/1/04 NYC/Section 212(a)(6)(C) (i)". Forward a copy of the Form I-860 with the Form I-275 to the Department of State.
- (11) Form I-94, Arrival/Departure Document. Prepare a new Form I-94. If the alien applied for admission at a land border, annotate the Form I-94 to read: "Form I-860 Removal Order issued pursuant to section **235(b)(1)** of the Act. (Date), (Place), (Officer)". If the alien applied for admission at an airport or seaport, use the parole stamp and endorse the I-94 to read: "For removal from the United States by (carrier name). Form I-860 Removal Order issued pursuant to section **235(b)(1)** of the Act. (Date), (Place), (Officer)".
- (12) Detention. Detain the alien as appropriate. Follow local procedures to obtain detention authorization and arrange for detention. Aliens placed into expedited removal proceedings must be detained until removed from the United States. Parole may be permitted only if there is a medical emergency or if it is necessary for legitimate law enforcement purposes, such as for criminal prosecution or to testify in court. Refer to **Chapter 17.8** for the CBP policy on the detention of aliens at POEs. Aliens subject to expedited removal who claim a fear of persecution or torture must be detained pending a credible fear determination. Once an alien has established a credible fear of persecution or is otherwise referred (as provided by regulation) for a full removal proceeding under section **240**,

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release of the alien may be considered under normal parole criteria. Aliens who make false claims to U.S. citizenship, or unverified claims to lawful permanent resident, asylee, or refugee status, must be detained pending review of the removal order by the immigration judge. Aliens arriving at a land border port-of-entry who do not claim lawful status in the United States or a fear of persecution should normally be processed immediately and either returned to Canada or Mexico or detained until removed.

(13) Credible fear interview referral. See paragraph (d) of this chapter for detailed information on credible fear referrals. Credible fear interviews will normally take place at DHS or contract detention facilities. Each POE and detention facility will be provided with a point or points of contact at the Asylum office having responsibility for that geographical area. It is the responsibility of the referring (Inspections) officer to provide the alien being referred for a credible fear interview with both a Form **M-444**, Information about Credible Fear Interview, and a list of free legal services, as provided in **8 CFR part 292**. It is generally the responsibility of the detention and removal personnel to notify the appropriate Asylum office point of contact when an alien subject to the expedited removal process is being detained in DHS custody pending this interview. That officer should also provide any additional information or concerns of the alien, such as whether the alien requires an interpreter or other special requests and considerations. However, in locations where the credible fear interview requires travel by the asylum officer, the referring officer should notify the Asylum office when referring the alien in order to provide as much advance notice as possible. When aliens are detained in non-DHS facilities or at remote locations, the referring officer must notify the appropriate Asylum office. If the alien is subsequently transferred to another detention site, the detention or deportation officer must ensure that the appropriate Asylum office has been notified.

Normally the credible fear interview will not take place sooner than 48 hours after the alien arrives at the detention facility. If the alien requests that the interview be conducted sooner, the referring officer, or any other officer to whom the alien makes the request, should immediately convey that information to the appropriate Asylum office.

(14) Removal from the United States. Most aliens removed under the expedited removal provisions will be promptly removed; however, some aliens, such as those who claim asylum or LPR status, may be detained pending a decision on their claim. At the land border, ensure the alien's departure to the contiguous foreign territory. At air and seaports, serve the carrier of arrival with the Form I-259, Notice to Detain, Remove, or Present Aliens, and check the appropriate boxes to order the carrier to remove the alien when the removal process is finished. If the case cannot be timely completed, advise the carrier of potential liability.

(15) Database entries. The expedited removal process continues to be the subject of extensive inquiry and requires appropriate tracking of specific case data. Expedited removal cases will normally be processed through [REDACTED]. In addition, every case in which an expedited removal order is issued must be entered into the Deportable Alien Control System (DACS) until that system is replaced with the [REDACTED]. Entry of data for those aliens detained by DHS will be handled by the Detention and Removal personnel responsible for the detention facility. Entry of data for aliens who do not require detention and are removed directly from the POEs is the responsibility of CBP. Cases initiated at the POEs and referred for removal proceedings under section 240 will continue to be entered into DACS by Detention and Removal. Complete appropriate closeouts in [REDACTED].

(16) Form G-22.1, Inspections Summary Report. Consult G-23 Report of Field Operations Procedures for reporting guidelines.

(c) Withdrawal of application for admission in lieu of an expedited removal order. DHS has the discretion to allow an inadmissible alien to voluntarily withdraw his or her application for admission and to depart the United States in accordance with section **235(a)(4)** of the INA. This discretion applies to aliens subject to expedited removal, and should be applied carefully and consistently, since an officer's decision to allow withdrawal or issue a removal order is final. Officers should keep in mind that an order of expedited removal carries with it all the penalties of an order of removal issued by an immigration judge (including a bar to reentry of at least 5 years following removal pursuant to section **212(a)(9)(A)(i)**).

Follow the guidelines contained in **Chapter 17.2** to determine whether an alien's withdrawal of an application for admission or asylum claim best serves the interest of justice. An officer's decision to permit withdrawal of an application for admission must be properly documented by means of a Form **I-275**, Withdrawal of Application for Admission/Consular Notification, to include the facts surrounding the voluntary withdrawal and the withdrawal of the asylum claim. In addition, an officer should prepare a new sworn statement, or an

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addendum to the original sworn statement on Form I-867A&B, covering the facts pertaining to the alien's withdrawal of the asylum claim.

An alien may not be pressured into withdrawing his or her application for admission or asylum claim under any circumstances. An officer must provide adequate interpretation to ensure that the alien understands the expedited removal process and the effects of withdrawing an application for admission or an asylum claim. Furthermore, an asylum officer must be consulted before an alien who has expressed a fear of return to his or her home country may be permitted to withdraw an asylum claim.

If an officer permits an alien to withdraw his or her application for admission and elects to return the alien to Canada or Mexico, the Form I-275 should indicate the alien's status in Canada or Mexico and the basis for determination of that status. This determination may be based on contacts with Canadian or Mexican authorities, stamps in the alien's passport, or other available documentation. The narrative on Form I-275 should also indicate that the alien has not expressed concern about returning to Canada or Mexico.

If the alien expresses any concern or reluctance about returning to Canada or Mexico and wishes to pursue the asylum claim in the United States, the officer should advise the alien that he or she will be placed in the expedited removal process, unless subject to section 240 proceedings by statute, regulation, or policy, and will be detained pending the credible fear determination. The alien should not be given the Form I-589, Application for Asylum and for Withholding of Removal, nor should an affirmative asylum interview be scheduled at the port of entry.
(Paragraph (c) revised 11-1-05; CBP 12-06)

(d) **Fear of persecution or request for asylum.** Aliens who indicate an intention to apply for asylum or a fear of persecution or torture may not be ordered removed until an asylum officer has interviewed the alien to determine whether the alien has a credible fear of persecution or torture and warrants a full asylum hearing before an immigration judge.

When questioning or taking a sworn statement from any alien subject to the expedited removal provisions, you need not directly solicit an asylum claim. However, to ensure that an alien who may have a genuine fear of return to his or her country is not summarily ordered removed without the opportunity to express his or her concerns, you should determine, in each case, whether the alien has any concern about being returned to his or her country. Further, you should explore any statement or indications, verbal or non-verbal, that the alien actually may have a fear of persecution or torture or return to his or her country. You must fully advise the alien of the process, as indicated on the Form I-867A, and of the opportunity to express any fears.

Keep in mind that the alien need not use the specific terms "asylum" or "persecution" to qualify for referral to an asylum officer, nor does the fear of return have to relate specifically to one of the five grounds contained within the definition of refugee. The United States is bound by both the Protocol on Refugees and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and, except under extraordinary circumstances, may not return an alien to a country where he or she may face torture or persecution.

The alien may convey a fear of violence or harm, a need for protection, an indication of harm to, or disappearance of, relatives or associates, or dangerous conditions in his or her country. Even disputes of a personal nature sometimes may relate to asylum, such as domestic violence, sexual or child abuse, child custody problems, coercive marriage or family planning practices, or forced female genital mutilation. All officers should recognize that sometimes unusual cases have been found eligible for asylum that may not have initially appeared to relate to the five grounds contained in the definition of refugee, such as AIDS victims who face government persecution, land or money disputes with wealthy persons or persons in power, whistle blowers, witnesses to crimes and even organized crime connections. Harm sufficient for a credible fear referral can include

Do not make judgement decisions concerning any fear of persecution, torture, or return. Any alien who by any means indicates a fear of persecution or return **may not** be removed from the United States unless the alien has been interviewed and a credible fear determination been made by an asylum officer. An alien who does not indicate a fear of return but responds to one of the protection-

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related questions by stating that he or she has applied for refugee or asylum status in the United States or elsewhere in the past, or mentions a relative, friend or associate who has done so (even if such claims are still pending or were denied), should be asked further questions to determine whether or not the alien is expressing a fear of return or an intention to apply for asylum indirectly. If, on more detailed questioning, the alien states that he or she has no fear of return and no interest in applying for asylum, the case need not be referred for a credible fear interview.

If the alien answers affirmatively to one the protection-related questions or requests asylum, and later changes the answer or asks to be sent home, the officer should consult with the local Asylum office or refer the case. If an attorney, friend, or relative notifies any officer that an individual in the expedited removal process is planning to apply for asylum or has a fear of return, that officer should notify the port of entry. The officer responsible for the case should either consult with an asylum supervisor or refer the alien for a credible fear interview, even if the alien does not express a fear directly. In the expedited removal process, an attorney, friend, or relative who acts as a consultant to the alien need not file a Form G-28.

Any alien who exhibits any [REDACTED] that alert the office to possible fear of harm should be referred. If an officer notices signs of [REDACTED] the officer should consult an asylum supervisor, or the applicant should be referred. [REDACTED] should be noted in parentheses or brackets in the sworn statement or memo to file.

[REDACTED] It is important to be aware of these possible reactions. Do not dismiss [REDACTED] automatically as signs of uncooperative behavior.

Considerations that should NOT affect the officer's decision to refer an alien for a credible fear interview include:

- [REDACTED] The asylum officer will review the sworn statement and documents and ask the alien about any inconsistencies and discrepancies. Only an asylum officer can make a credibility determination for purposes of deciding whether the alien has a credible fear of persecution.

- [REDACTED] Aliens should be referred, for example, if they claim [REDACTED] or if for example, that they claim [REDACTED]

- Country of origin: No country should be considered safe - or dangerous- for all residents. However, knowledge of conditions in the alien's home country may help alert an officer to non-verbal cues or confused or vague expressions of fear.

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- Whether harm is on account of the alien's race, religion, political opinion, nationality or social group: Officers should not make a determination on whether the harm feared is on account of the alien's race, religion, nationality, membership in a particular social group or political opinion. Asylum law, and particularly the definition of a "social group" is evolving – cases involving domestic violence, spousal abuse, sexual abuse of children, female genital mutilation, coercive family planning practices, organized crime, whistleblowers on government corruption, homosexuality, and AIDS, and other unresolved legal areas should be referred. An alien may also be offered protection from return under Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, when it is more likely than not that the alien would be tortured, even if the motivation for the torture is not on account of the applicant's race, religion, nationality, social group or political opinion.
- Mandatory Bars: The presence of a mandatory bar to asylum should not prevent referral. Referrals should occur even in cases where, for example, the alien appears to be firmly resettled in a third country, transited through a third country, or when there is information that appears to indicate that the alien is a criminal or a danger to national security.
- Stated Preference to Apply for Asylum Elsewhere: If an alien expresses a fear of return, but states that he or she does not want to apply for asylum in the United States because he or she plans to apply for asylum elsewhere, the alien should be referred. Some applicants may not be aware that certain countries will not accept an asylum application from them if they have transited through the United States.

The International Religious Freedom Act of 1998 (IRFA) was passed by Congress out of a growing concern about violations of religious freedom in countries around the world. IRFA requires training for certain government employees on the nature of religious persecution abroad. Violations of religious freedom can include prohibitions on, restrictions of, or punishment for:

- Assembling for peaceful religious activities
- Speaking freely about religious beliefs
- Changing religious beliefs or affiliation
- Possessing and distributing religious literature
- Raising children in the religious practices and teachings of one's choice.

Any of the following acts are violations of religious freedom if committed on account of an individual's religious belief or practice:

- Detention
- Interrogation
- Imposition of onerous financial penalties
- Forced labor
- Forced mass resettlement
- Imprisonment
- Forced religious conversion
- Beating, torture, mutilation, rape, murder, enslavement, and execution

IRFA defines "particularly severe violations of religious freedom" as systematic, ongoing, egregious violations of religious freedom, including violations such as:

- Torture or cruel, inhuman, or degrading treatment or punishment;
- Prolonged detention without charges;
- Causing the disappearance of persons by the abduction or clandestine detention of those persons; or
- Other flagrant denial of the right to a person's life, liberty, or security.

Applicants who are questioned by officers in expedited removal proceedings may not understand that religious persecution is an issue they should reveal in their interview. Sometimes an applicant will not indicate any past incidents of religious persecution, but you might become aware of it incidentally. Perhaps you learn that the applicant is a Jehovah's Witness and realize he or she is from a country in which Jehovah's Witnesses are persecuted.

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You might also come across customs and behavior that are new to you, for example, the wearing of scarves for religious reasons. In talking with that person, you might learn that there is a fear of return, but the person did not realize that religion was a protected ground for asylum at the time of inspection. Therefore, it is important to adhere to the procedural safeguards built into the expedited removal process.

IRFA requires that the State Department annually publish a report on the condition of religious freedom in the world. Specifically, the report describes the status of religious freedom in every foreign country. It also cites any violations of religious freedom or trends toward improvement or deterioration in the respect and protection of religious freedom. There is an Executive Summary at the beginning of the report, which highlights the report's findings. Each Asylum Office has bound copies of the report for reference. The report is also posted every year on the State Department's web site.

IRFA does not change the legal standard for determining refugee or asylum eligibility. It also does not give preference to religious persecution. It does require refugee and asylum officers to receive specialized training concerning religious persecution. When religious issues are involved, adjudicators must become informed about conditions in the applicant's home country by referring to the annual report on religious freedom published by the Department of State. However, a claim cannot be denied solely because an officer cannot find information in the report. As with every case, officers should consult a variety of current and reliable sources for an accurate representation of country conditions. In certain unconventional cases, determining whether an applicant's unique set of beliefs is a religion may require careful consideration and research, and when appropriate, consultation with proper DHS personnel.

While IRFA mandates that certain new processes be implemented, it does not change the basic job requirements.

- IRFA does not authorize individuals housed in DHS facilities to do anything they wish under the guise of religious practice.
- IRFA does not require officers to determine what a religion is or what constitutes religious persecution.
- And while IRFA emphasizes issues of religious persecution, it does not imply that other types of persecution are any less important.

All officers must disregard their own religious convictions and beliefs evaluating an asylum or refugee claim. For example, you may be a Muslim officer interviewing a non-Muslim asylum applicant who claims to be persecuted by Muslims on account of his religion. Upon hearing such claims, you may be surprised, offended, disbelieving, or have other adverse personal reactions because of your own religious convictions and opinions. While it may be difficult, you must evaluate such claims objectively and without personal bias.

If the alien indicates an intention to apply for asylum or asserts a fear of persecution or torture, and is being referred for a credible fear interview with an asylum officer:

- (1) Create an A file, if one does not already exist.
- (2) Fully process the alien as an expedited removal case. Establishing inadmissibility cannot be left to the asylum officer. Record a description of the particulars of the interview and the alien's initial claim to asylum or fear of return by means of a sworn statement using Form I-867A&B. Follow the instructions in paragraph (b)(1) above to ensure that the alien understands the proceedings. Although you should not pursue the asylum claim in detail, enough information should be obtained to inform the asylum officer of the alien's initial claim to asylum or fear of persecution or return. If the alien answers the closing questions on Form I-867B in the affirmative, several other questions may be necessary to determine the general nature of the fear or concern.
- (3) Complete the Determination of Inadmissibility portion of the Form I-860, including sufficient information to support the charges of inadmissibility should the asylum officer find that alien does not have a credible fear of persecution. Sign **only** the Determination portion of the form. The removal part of the order will be signed by the asylum officer only after it is determined that the alien does not have a credible fear of persecution. Refer also to **Chapter 43.3** for documenting any potential fines issues.
- (4) Advise the alien of the purpose of the referral and that the alien may consult with a person or persons of his or her choosing, at no expense to the government and without delaying the process, prior to the interview. The Form **M-444**, Information about Credible Fear Interview, must be given to the alien and explained in a language the alien understands. The alien should sign two

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copies, acknowledging receipt of the information. One copy should be placed in the A file, and the other retained by the alien. Give the alien a current list of organizations and programs prescribed in **8 CFR 292** which provides free legal services.

(5) Arrange for detention of the alien according to local procedures. Although it is normally the responsibility of the detention and removal personnel officer to notify the Asylum office, in some circumstances, you must advise the appropriate Asylum office that an alien being detained requires a credible fear interview. The Asylum office should also be advised whether the alien requires an interpreter and of any other special considerations. It may be helpful for the officer to provide the asylum officer with information on the alien's gender, the language(s) the alien speaks, whether the alien is traveling with a spouse or children, and any special medical needs or unusual behavior. Forward the A file to the location where the credible fear interview will take place. Prepare Form **I-259** and serve it on the affected carrier. Complete Form I-94 for NIS entry notated "Detained at _____ pending credible fear interview pursuant to section **235(b)(1)(B)** of the Act. (Date), (Place), (Officer)".

An asylum officer will conduct an interview to determine if the alien has a credible fear of persecution, either at the detention facility or at a location arranged through the Asylum office having jurisdiction over the place of apprehension, depending on location. If the alien is determined to have a credible fear of persecution or torture, the asylum officer will refer the alien before an immigration judge for full consideration of the asylum and withholding of removal claim in proceedings under section **240** of the Act. If the alien is found not to have a credible fear of persecution or torture, following review by a supervisory asylum officer, the asylum officer will order the alien removed pursuant to section **235(b)(1)**, unless the alien requests that the determination of no credible fear be reviewed by an immigration judge. If the alien makes such a request, the asylum officer will use Form **I-863**, Notice of Referral to Immigration Judge, checking box #1, to refer the alien to the immigration judge for review of the credible fear determination. If the immigration judge determines that the alien does not have a credible fear of persecution, DHS will present the alien for removal to the carrier on which he or she arrived. There may be some situations where the actual carrier of arrival and port of embarkation cannot be ascertained. Such cases may require additional processing, including detention, in order to arrange for travel documents and transportation at government expense (User Fee).

If an alien claims a fear or concern about possible harm, and later asks to be sent home, the officer should review the sworn statement carefully with the alien to determine if there was a misunderstanding. If there was no misunderstanding, the officer should prepare a second Form **I-867A&B** and note that the alien has changed his or her mind. The officer must consult with an asylum supervisor before executing the decision. If the asylum supervisor concurs that it is appropriate to remove the applicant without a credible fear interview, the name of the supervisor, and the date and time of concurrence should be noted in the A file. Both the original and final Form **I-867A&B** must remain in the file.

If the alien maintains throughout the sworn statement that he or she has no fear of return and later claims a fear or a desire to apply for asylum, the applicant should be referred for a credible fear interview. The officer should reinterview the alien and complete an addendum to the statement, re-asking the fear questions. The officer should void the original Form **I-860** and complete a new Determination of Inadmissibility. The Form **I-296** should be voided if the verification of removal section has already been completed, and the officer should complete a memo to file, explaining the circumstances of the case.

(e) Claim to lawful permanent resident, asylee, or refugee status, or U.S. citizenship.

(1) An expedited removal case involving an alien who claims to be a U.S. citizen, to have been lawfully admitted for permanent residence, to have been admitted as a refugee under section **207**, or to have been granted asylum under section **208**, should be handled very cautiously to ensure that the rights of the individual are fully protected. The expedited removal authority provided by IIRIRA is a powerful tool and there are grave consequences involved in incorrectly processing a bona fide citizen, LPR, refugee or asylee for removal. You should be extremely aware of those consequences when you are using this tool. Although the statute and regulations provide certain procedural protections to minimize the risk of such consequences, you should never process a case for expedited removal which you would not feel satisfied processing for a hearing before an immigration judge.

If the alien falsely (or apparently falsely) claims to be a U.S. citizen, LPR, refugee, or asylee, and is not in possession of documents

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to prove the claim, make every effort to verify the alien's claim prior to proceeding with the case. This can be accomplished through a thorough check of the data systems, manual request to the Records Division, careful questioning of the alien, or prudent examination of documents presented. Use whatever means at your disposal to verify or refute a claim to U.S. citizenship, including verification of birth records with state authorities, etc.

(2) **Verifiable claim.** When inspecting an alien whose claim to LPR status has been verified, determine whether the alien is considered to be making an application for admission within the meaning of section **101(a)(13)(C)**. [See discussion in **Chapter 13.4**.] Although the LPR may not be considered to be seeking admission, he or she is nonetheless required to present proper documents to establish his or her status as an LPR. If the claim is verified and the alien appears to be admissible except for lack of the required documents, consider a waiver under section **211(b)** for an LPR. When inspecting an alien who had previously been admitted as a refugee or granted asylum status and who had departed the United States without having applied for a refugee travel document, consider accepting an application for a refugee travel document in accordance with **8 CFR 223.2(b)(2)(ii)** for a refugee or asylee. Refer to **Chapters 13.2** and **17.5** for a discussion of this and other options for admitting returning residents.

If the claim is verified, but a waiver is not available or is not clearly warranted, such as when fraud was committed in obtaining status or upon entry, or in cases where the alien appears to have abandoned his or her residence, you may initiate removal proceedings under section **240** of the Act. Procedures for preparing for removal hearings and processing inadmissible LPRs are discussed in **Chapters 17.6** and **17.10**. Although the charging document, Form **I-862**, Notice to Appear, is the same for both inadmissible and deportable aliens, immigration officers performing inspections at a POE are authorized to issue a Notice to Appear only to arriving aliens, as defined in **8 CFR 1.1(q)**. If an LPR is not considered to be seeking admission, he or she is not an arriving alien. If a Notice to Appear is to be issued charging the returning resident as a deportable alien, the Notice to Appear must be issued by one of the authorizing officers listed in **8 CFR 239.1**, including port directors.

(3) **Unverifiable Claim.** If no record of the alien's lawful admission for permanent residence, grant of refugee status, admission as an asylee, or citizenship can be found after a reasonably diligent search, advise the alien that you are placing him or her under oath, or take a declaration as permitted in 28 U.S.C. 1746, and warn the alien of the penalties for perjury. Section 1746 of the Title 28 U.S. Code reads as follows:

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him as true under penalty of perjury, and dated, in substantially the following form:

- If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)".
- If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)".

The penalties for perjury contained in 18 U.S.C. 1621 (perjury generally) provide for fine and imprisonment of not more than 5 years, or both. The penalties for perjury contained in 18 U.S.C. 1546 (fraud and misuse of visas, permits, and other documents) provide for fine and imprisonment of not more than 10 years, or both.

If the alien declares under oath, pursuant to the advice above, that he or she is a citizen, LPR, refugee, or asylee, order the alien removed under section **235(b)(1)(A)** and refer to the immigration judge for review of the order. Complete Form **I-860** after completing all procedures in this chapter. Serve the Form **I-860** on the alien. Serve Form **I-259** on the affected carrier, if

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appropriate. Use Form **I-863**, checking Box #4, to refer the removal order to the immigration judge for review. The alien should be detained pending review of the order by the immigration judge. In the event an alien who has made a verbal claim to citizenship or to LPR, refugee, or asylee status declines to make a sworn statement, conclude the expedited removal process in the same manner as any other nonimmigrant in the same situation.

If the immigration judge determines that the individual is not a citizen or is an alien who has never been admitted as an LPR, refugee, or asylee, the expedited removal order will be affirmed and the alien removed. There is no appeal from the decision of the immigration judge. If the judge determines that the individual is a citizen, the process is terminated and the citizen is released. If the judge determines that the alien was once admitted as an LPR, refugee, or asylee, and that status has not been terminated, the judge will vacate the expedited removal order and the government may initiate removal proceedings under section **240**.

(f) **Special Treatment of Unaccompanied Minors.** When a minor (a person under the age of eighteen) who is unaccompanied and 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.

(1) **Withdrawal of application for admission by minors.** Whenever appropriate, officers 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 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 notifications to family members and government officials have been made, the minor may be permitted to withdraw.

(2) **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

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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 DHS-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 inspections and removal process, officers should take every precaution to ensure that the minor's rights are protected and that he or she is treated with respect and concern. [See **Appendix 17-4**, policy memorandum discussing the Flores settlement.]

(3) 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:

- has, in the presence of a DHS officer, engaged in criminal activity that would qualify as an aggravated felony if committed by an adult; or
- 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 director of field operations, 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.

(4) 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. Like all persons being detained at POEs, officers must provide the minors access to toilets, sinks, drinking water, food, and medical 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 may attempt to escape. Unaccompanied minors should not be held with unrelated adults. Any detention following processing at the POE must be in accordance with the Flores v. Reno settlement.

(Paragraph (f) added 8/21/97; IN97-05)

(g) 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.

(h) United Nations High Commissioner for Refugees monitoring guidelines. The United States has signed various international agreements accepting an obligation to protect refugees and asylum-seekers from return to persecution or torture, and to follow certain international standards in processing those needing protection. The organization that monitors compliance with these agreements and provides guidance on their implementation is the United Nations High Commissioner for Refugees (UNHCR). As such, the United States has a responsibility to cooperate with UNHCR's requests for access to processes involving those needing protection. Therefore, DHS believes it is appropriate for the UNHCR to observe, to the extent within the resources available to the UNHCR, the expedited removal process to make a fair and impartial assessment of the process.

For these reasons, full cooperation with visiting UNHCR delegations is essential. Below are general guidelines and procedures to follow regarding a visit from the UNHCR. While the guidelines concentrate on the limits of the UNHCR's access and potential problem areas, in our experience the UNHCR has approached site visits professionally and responsibly, providing us with positive comments and useful feedback, and problems are unlikely to arise during its site visits.

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(1) UNHCR requests. The UNHCR has agreed to make all requests to observe the expedited removal process at POEs or the credible fear interview at detention facilities in writing to the Office of Field Operations. If any field office receives a request for access to the expedited removal process from a representative of the UNHCR, the field office should advise the representative to make the request to the Office of Field Operations.

Written requests from UNHCR to conduct a site visit must be received a minimum of two weeks in advance. CBP will consider written requests submitted less than two weeks in advance for only exceptional circumstances. The request will include the purpose and site (s) of the visit, the duration of the visit, the complete list of names of the UNHCR staff on the delegation, the title and official responsibilities of everyone on the delegation, the information about the person leading the delegation, and any special needs or requests. The Office of Field Operations will evaluate the request in consultation with the field and make a decision as quickly as possible.

Should there be a need to clarify or confirm the identities of visiting team members, local CBP staff will call the Office of Field Operations.

(2) Scope of UNHCR's access to secondary inspection processing. The UNHCR has agreed to maintain the confidentiality of any information to which it has access such as training materials and procedures manuals. Therefore, it can be given full access to tour the primary and secondary inspection areas, holding cells, food storage facilities, and other areas related to processing of expedited removal cases. While at the port, UNHCR representatives should be accompanied by a CBP officer, unless CBP has arranged for the representatives to talk confidentially with an alien. For safety reasons, the representatives will not be allowed to participate or be used as witnesses in baggage and personal effects search or body-pat-down search. Viewing of the baggage search may be allowed if there is no safety concern or threat to the representatives. The representatives should not be given access to computer databases or programs containing sensitive law enforcement information, but may be given a demonstration of certain programs in relation to the expedited removal process. The representatives may ask questions about the process, so long as their movements and the timing of their questions do not impede the processing of cases.

The port will designate a supervisor on the shift to whom the UNHCR team may direct questions about the processing. As time permits, the supervisor may arrange for the representatives to talk directly with line officers. During a secondary inspection, when possible, the representatives should be allowed to view the secondary inspection from an area (seated or standing) that would enable them to hear and see all participants.

The port will designate one or more secondary and primary officers on the shift to whom the UNHCR representatives may direct questions. Designation of these officers should be initially on a voluntary basis.

(3) Interactions between UNHCR and aliens in secondary inspection. If UNHCR representatives ask to sit in on interviews of either specific aliens or a random sample of aliens in secondary, the CBP officer should explain to the alien that the UNHCR representatives do not work for the U.S. Government, but work for the United Nations, and have asked to observe some interviews to understand the U.S. process. No more than two representatives may be present during the interview, and business cards will be provided to the alien after the interview is completed. The officer should explain that it is the alien's decision whether the UNHCR representatives are allowed to observe the interview or not, and that CBP will ask the same questions and follow the same procedures either way. If the alien does not want the UNHCR representatives to sit in on the interview, his or her wish should be respected. If the applicant requests to talk briefly and confidentially with the UNHCR representatives, he or she may do so after the officer finishes the secondary interview and process.

If the alien indicates that he or she does not want the presence of the representatives, and the representatives appear to be questioning that decision, a supervisor should be notified immediately and should support the alien's decision to be interviewed without UNHCR observers with no further discussion. The CBP supervisor will provide an explanation to the UNHCR delegation lead official that the interview will not continue with their participation. Additionally, the supervisor reserves the right to terminate the entire site visit, any part of an interview, or a particular portion of the site visit. A reason must be provided to the lead UNHCR official at the time of the termination. Prior to a decision to terminate the entire site visit, the supervisor must immediately advise the

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Headquarters Field Operations point-of-contact through appropriate channels. The alien's agreement or refusal to have a UNHCR presence at the interview should not be factored into the officer's decision to refer a case for a credible fear interview.

If an alien agrees to be interviewed with the UNHCR representatives present, the UNHCR representatives may observe the interview, and will be given a few minutes at the end of the interview to communicate directly with the applicant. In general, the UNHCR representatives should not ask questions or make comments during the interview. The CBP officer may, however, at his or her discretion, allow the representatives to make a comment or ask a question if the officer believes that it is facilitating the progress of the interview. Any interruptions of the interview will be recorded in the sworn statement.

CBP is not responsible for interpreting the interview verbatim or locating an interpreter to provide a verbatim interpretation in such circumstances. If the CBP officer and the alien are communicating in a language other than English without the assistance of an interpreter, and the representatives do not understand the language, the officer should explain what is being stated or asked.

When the interview is concluded, the UNHCR representatives should be invited to communicate briefly with the applicant. Any questions or statements asked by the representatives or the applicant, and any responses, will be recorded in the sworn statement.

If the UNHCR team or the alien requests a brief private discussion, the request should be accommodated within the constraints of the facility. Normally the issues aliens bring up with the UNHCR are the same like those they bring up during secondary inspections, e.g.: when can they call a relative, how long does the process take, and so forth. This request should be noted on the sworn statement. Generally, the meeting should take place out of hearing, but not out of sight, of CBP staff. If the UNHCR team requires translation and is not able to locate its own telephonic interpreter quickly, an interpreter should be provided when feasible. The local Asylum office will have been notified that the UNHCR is conducting a site visit and can cover the cost of interpretation using a commercial interpreter service if necessary. However, if an interpreter cannot be located quickly and there are time constraints (such as finishing in time to put an applicant on a scheduled plane), the officer should consult with his or her supervisor to decide whether there are compelling reasons for delaying the process to provide the representatives time to obtain an interpreter.

If the UNHCR team reports back to the CBP officer, after a private conference, that the alien alleged abusive treatment, either by CBP, an airline employee, or a smuggler, a supervisor should be notified immediately and the alien should be asked further questions in the representatives' presence. If the UNHCR team indicates that the alien has expressed a fear during the private conference which was not expressed during the interview with the CBP officer, the officer should ask the alien, in the representatives' presence, whether the alien is afraid of or concerned about return and would like to discuss his or her situation privately with an asylum officer. The alien's answer to the above questions should be recorded in the sworn statement or in a memo to file.

If the alien appears unwilling to discuss the alleged claim of fear with the CBP officer, states that the UNHCR representatives misunderstood, or does not want to be detained for a credible fear interview, the officer should call the local Asylum office for guidance on whether to refer the alien for a credible fear interview.

(4) Follow-up. If serious problems or misunderstandings arise during the UNHCR site visit, a CBP supervisor should immediately contact the Headquarters Field Operations representative who set up the meeting. After the UNHCR visit is completed, the field office will provide the Office of Field Operations feedback on how the visit went and alert it to any issues which the UNHCR representative (s) might raise.

(Added IN 00-22.)

(h) Non-governmental organizations secondary inspection access guidelines.

Since the implementation of expedited removal, many non-governmental organizations (NGOs) have requested access to observe and monitor this process at POEs. It is the DHS policy to promote a fair and open process by granting such requests for access to the extent that the visits do not compromise fundamental law enforcement interests and confidentiality as well as privacy rights. The aim of this policy is to achieve a reasonable balance between providing access to government information and protecting fundamental law

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enforcement obligations and the individual interests of arriving aliens. The following guidelines provide the procedures and practices to be followed by field offices and POEs receiving requests for visits or tours of CBP inspection facilities and operations by NGOs. An NGO may be generally defined as a group of individuals outside of the public and for-profit sectors, usually established to serve the interests of their communities, of a particular target group, or the common good. This definition should be interpreted broadly, and may include local and international organizations, business and professional associations, chambers of commerce, and policy development and research institutes. It is not intended to include the media or persons or organizations whose intent is to provide legal representation to individuals during secondary inspection processing at the time of their visit.

(1) Requests for visits.

- Any request to visit an inspection facility or observe secondary immigration inspection processing must be made in writing to the director of field operations having jurisdiction over the POE to be visited. The request must be made sufficiently in advance of the proposed visit, normally at least two weeks, to allow coordination with all affected parties, including facility operators and other agencies as appropriate. Special tours by visiting dignitaries or other special interest groups may be arranged at the discretion of the director of field operations, or at the request of headquarters offices.
- The request will include the proposed purpose and site(s) of the visit, the duration of the visit, the full names of the organization and the proposed visitors, whether they will have any special needs or requests, and point of contact. The field office receiving the request, in consultation with the site to be visited, will make a prompt decision and notify the interested party either in writing or telephonically of that decision. Whenever possible, visitors should be provided with a copy of these guidelines prior to their arrival at the POE.
- The size of the group and the number and duration of visits permitted are to be determined by the director of field operations, based on operational and resource considerations. If the director of field operations, port director, or other official determines that the visit will have an adverse effect on port operations, staffing resources, or the confidentiality or integrity of the inspection process, the request may be denied, the visit postponed, or the terms of the visit limited in a way appropriate to the potential adverse effects. If the director of field operations feels that an excessive number of requests would have an adverse impact on operations, he or she may ask the NGOs to consolidate their requests for visits. The director of field operations may also deny, limit, or terminate a visit based on particular law enforcement or security concerns, but should not deny such requests as a routine matter.
- If the director of field operations denies the request, the requesting party will be notified, in writing, of the specific reasons for the denial.
- The field office will retain a record of all POE visit requests. The record will include, at a minimum, the number of requests made, the disposition of each request, the name of the organization and the number of participants in each visit, and the date on which each visit occurred. Field offices may include comments on significant incidents, impact on operations, or other relevant information.

(2) Scope of access.

- Visitors will be escorted through the facility at all times. They may be present only in parts of the inspection area that are authorized by the official escorting them. For safety concerns, they will not be allowed to participate in baggage searches or be used as witnesses in baggage or body searches. They may be permitted to view a baggage search, with the consent of the alien, unless the officer determines there may be a safety concern or threat.
- Visitors may be permitted to observe the overall immigration inspections process, both primary and secondary, in such a way that it does not interfere with port operations. The port director may designate a supervisor or officer to whom the visitor may direct questions about the processing. As time and circumstances permit, the port official may arrange for visitors to talk directly

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to officers.

- Visitors may observe individual immigration secondary inspections of applicants for admission only with the consent of the applicant and the port officials. The port official will explain to the alien who the visitor is and what he or she wishes to observe. The alien's consent must be entirely voluntary, and should be noted in the sworn statement, if taken, or otherwise in the file. Visitors may not interfere with or interrupt the inspection or question applicants for admission. They may ask the inspector questions about the case being processed only when the alien is not present. Inspectors must not divulge any information about any secondary case that may compromise law enforcement confidentiality or the privacy of any alien. Visitors may not speak confidentially to an alien during the inspection process or while the alien is in CBP custody at the POE.
- CBP is not responsible for interpreting the interview verbatim for visitors or locating an interpreter to provide a verbatim interpretation in cases where the CBP officer and the alien are communicating without the assistance of an interpreter in a language other than English.
- Visitors may not have access to computer databases or programs containing sensitive law enforcement nature of the information, but may be given a demonstration of programs that are not law enforcement sensitive. They may not observe video display monitor outputs of systems data on screen or in print relating to specific applicants for admission.
- Visitors may not film, photograph, videotape, or audiotape POE operations, inspectors, or applicants for admission.
- CBP reserves the right to terminate the entire site visit, a particular portion of the site visit, or access to any part of an interview, if it determines that the visit has become disruptive to port operations or may in any way compromise the integrity of the inspection process. For safety reasons, port officials may remove visitors from the inspection area or terminate the visit if any visitor or applicant for admission becomes unruly or violent, or if any other safety hazard becomes apparent.
- Any violations of this policy by visitors to POEs will be documented in writing, and any significant incidents or interruptions will be reported to Headquarters Office of Field Operations through the chain of command.

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17.16 Members and Representatives of Terrorist Organizations. (Added IN98-04)

(a) General. Section 212(a)(3)(B) of the INA, as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, added new grounds of inadmissibility applicable to members and representatives of terrorist organizations. Section 219 of the Act provides authority for the Secretary of State to compile and publish an official list of organizations whose members and representatives are subject to this ground of inadmissibility. The official list was published in the Federal Register on October 8, 1997. [See Appendix 17-5 of this manual.]

These new procedures are extremely important enforcement tools designed to keep such aliens out of the U.S. and prevent domestic terrorism. Some members and representatives of designated terrorist organizations may possess a visa issued prior to publication of the list of terrorist organizations. Such aliens are nonetheless inadmissible if they fall within the descriptions discussed above.

(b) Definitions.

(1) Representatives. Under Section 212(a)(3)(B)(i)(IV) of the Act, an alien who is a "representative" of a designated terrorist organization is inadmissible. Section 212(a)(3)(B)(iv) of the Act states that the term "representative" includes: an officer, official or spokesman of an organization, and any person who directs, counsels, commands or induces an organization or its members to engage in terrorist activity.

If an alien falls within this definition, he or she is inadmissible. Evidence of past representative status is a highly probative, although not dispositive, factor which should be considered when determining if current representative status exists.

(2) Members. Under Section 212(a)(3)(B)(i)(V) of the Act, an alien who is a member of a designated terrorist organization is inadmissible if the alien "knows or should have known" the organization is a terrorist organization. The statute does not define "member." However, membership does not require actual participation in terrorist activities. Some organizations require that an individual take an oath or perform an act that is a prerequisite of membership, but some do not. The Service must determine whether an alien is member of a designated organization on a case-by-case basis. Factor relevant to determining membership include but are not limited to the following:

- Past membership without evidence that the alien terminated membership
- Acknowledgment of membership by the organization, by other members, or by the alien
- Actively working to further the organization's aims and methods
- Occupying a position of trust in the organization, either past or present

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- Receiving financial support from the organization, such as a scholarship, salary or pensions
- Contributing money or other items of value to the organization
- Frequent association with other members
- Participation in the organization's activities, even if lawful
- Voluntarily displaying symbols of the group
- Receiving honors and awards given by the group
- Determination of membership by a competent court

These factors must be considered in their entirety, and some may not be sufficient in isolation to support a finding of membership. For example, while contributing money to an organization in itself does not necessarily indicate membership, it may indicate membership in certain situations, depending on the nature of the organization.

To make a finding of inadmissibility, the Service must determine that an alien is not only a "member" of a designated organization, but additionally, that the alien "knows or should have known" that the organization is a terrorist organization. This "mens rea" or "state of mind" determination should also be made on a case-by-case basis. Factors relevant to this determination are: the specific organization involved; classified or unclassified information regarding the alien's participation in the organization, including the alien's statement; and any other relevant information.

(c) Procedures. In order to implement these provisions, the following procedures must be strictly followed:

(1) The list of terrorist organizations will be distributed to all ports-of-entry and included in the Inspector's Field Manual. Port directors will ensure that all inspectors and other officers are familiar with and have ready access to the list at both primary and secondary inspection booths.

(2) Immigration inspectors who have reason to believe an applicant for admission may be a member or representative of an organization on the list must refer the applicant for secondary inspection. Inspectors may develop a suspicion concerning such membership as a result of questioning during primary inspection or as a result of lookout information or other intelligence. In any case where the secondary officer establishes inadmissibility under this provision, he or she must take a sworn statement addressing the factors described in paragraph (b).

(3) If the inspecting officer concludes that the alien is inadmissible, the officer must inform the alien that he or

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she is inadmissible to the United States and complete processing for a removal hearing, withdrawal, or temporary removal, as appropriate and in accordance with outstanding instructions. [See Chapters 17.2, 16.6 and 17.7 of this manual.] The type of removal proceeding will depend on the alien's status and whether the evidence is classified or unclassified.

(4) Forward copies of all sworn statements and other relevant documentation to Headquarters, Office of Field Operations, attention: Counterterrorism Coordinator.

(5) The Counterterrorism Coordinator will take appropriate action, which may include consultation with other agencies, such as the Federal Bureau of Investigation and the Department of State.

17.17 Technical Notes. (Redesignated as 17.17, previously 17.16; IN98-04)

(a) [Reserved] (Removed by CBP 3-04)

(b) Inadmissibility after Alien Leaves Primary but Remains in Inspectional Area. There are occasions when an alien, after completing primary inspection, is intercepted by another CBP officer and is found to be inadmissible. Such alien may be held for removal proceedings if he or she has not left the confines of the federal inspection area, regardless of the fact that the passport may have been stamped "Admitted" and an I-94 issued. Case law has made it clear that an alien does not effect an "entry" into the United States for immigration purposes unless all of the following elements are present: (1) the alien is physically present in the territory of the United States; (2) the alien has been inspected and admitted for immigration purposes or the alien has actually and intentionally evaded inspection; and (3) the alien is free from official restraint. *Correa v. Thornburgh*, 901 F.2d 1166 (2d Cir. 1990); *In re Dubblosi*, 191 F. Supp. 65 (E.D. Va. 1961); *Matter of Pierre*, 14 I & N Dec. 467 (BIA 1973) [See also **General Counsel Opinion 91-37**]. Although the definition of "entry" is no longer defined in the INA, and has been replaced by the definition of "admission" and "admitted" in section **101(a)(13)**, the general provisions still apply in this context. (Revised by CBP 3-04)

17.18 Use of Interpreters and Interpreter Services.

(a) **General.** In the inspections process, an interpreter may be required to ensure that an alien being interviewed understands the process. The alien needs to be given an opportunity to respond to questions during a sworn statement and to be able to understand and respond to any charges and allegations brought against him or her. It is the responsibility of the officer to read and explain to the alien, in the alien's native language or in a language the alien understands, any determination regarding admissibility and/or removal from the United States. In an interview requiring an interpreter, the role of the interpreter is crucial and any misinterpretation can lead to an incorrect determination of an alien's admissibility.

During the expedited removal process, an interpreter may be required to ensure that the alien understands the allegations and the removal order. As part of the process, the applicant for admission is questioned and a sworn statement taken to establish inadmissibility and to ascertain that the alien has no fears or concerns about being returned to his or her home country or country of last residence. The officer needs to be aware of whether the alien requires an interpreter to convey any concerns or fears he or she may have. Any alien who indicates an intention to apply for asylum or a fear of persecution or torture may not be removed until an asylum officer interviews the alien to determine whether he or she has a credible fear of persecution or torture and warrants a full asylum hearing before an immigration judge.

The International Religious Freedom Act of 1998 (IRFA), PL 105-292, 112 Stat. 2787, section 603, seeks to safeguard aliens against the inadvertent use of interpreters who may have hostile biases. In particular, when interviewing possible asylum applicants, inspectors are

prohibited from using airline personnel or other interpreters provided by the airline if the airline is owned by a government that is "known to be involved in practices which would meet the definition of persecution under international refugee law." Since an inspector may not actually know which foreign carriers are privately owned and which are state owned, inspectors should use other officers or commercial interpreters whenever possible.

(b) Interpretations and Translations. Ports of entry (POEs) should accommodate, whenever possible, special requests from an alien, such as a request for a male or female interpreter or request for an interpreter with a specific dialect or from a specific part of the country. Officers are to monitor the quality of interpretation the alien and the translation. If a problem with the interpretation/translation persists, a new interpreter shall be obtained.

Officers are also responsible for informing the interpreter of their role in the process. Below are some guidelines to be aware of when using interpreters.

(1) Interpreters and Translators. If the alien being inspected cannot speak English well enough to fully understand the questions and answer them without difficulty, the alien must be provided with an interpreter. While some aliens can speak and understand English well enough to be interviewed without an interpreter, many aliens may feel more comfortable with an interpreter during the interview.

It is important to know who is qualified to serve as an interpreter and who is not. Officers may use another officer who is fluent in the alien's language, a commercial interpreter services company, a family member, another passenger, an employee or representative from an airline that is not foreign-owned, or on a limited basis, the legacy Immigration and Naturalization Service (INS) New York Interpreters Unit. In sensitive cases, particularly those involving expedited removal, officers should use professionally trained and certified interpreters, rather than family members, other passengers, or airline employees.

(2) Beginning the Interview. Before an interview with an alien, the officer shall emphasize to the interpreter (whether it be another officer, contract interpreter, family member, airline employee, or other individual) the importance of interpreting verbatim, without adding or omitting any information. If a translation of a form(s) in the alien's language is needed, the officer will provide the interpreter with a copy of the form(s), either by physically handing the form to the interpreter, or by faxing a copy of the form(s) to the interpreter before the interview takes place, if the interpretation is being conducted telephonically.

Officers should stress to interpreters the confidentiality of all information discussed, and that the interpreter must remain neutral and objective throughout the interview. The interpreter should also be told that the interviewer or alien may ask for clarification whenever necessary.

(3) Interpreter's Certification. Currently there is no standardized interpreter's certification form. Therefore, a statement must be added at the bottom of the sworn statement. With an expedited removal case, an interpreter's certification may be added at the bottom of the Form I-867B (i.e.; "I _____ certify that I have literally and fully translated the questions asked by the officer into the _____ language and that I truthfully, literally and fully translated the answers to such questions into English.").

(4) Role of the Interpreter. The role of the interpreter is an important one. Interpreters allow the two parties to communicate with each other. Any misinterpretation may result in the applicant for admission being admitted, detained or removed in error. The fundamental role of the interpreter is to faithfully translate everything that is said, and nothing else. The interpreter guidelines specified below do not constitute an exhaustive list but are considered basic interpreter requirements.

- The interpreter must be fluent in both English and a language the alien fully understands

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- The interpreter is to remain neutral and impartial.
- The interpreter must not engage in conversation with the alien during the interview.

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interview.

- The interpreter must interpret verbatim using the officer and alien's choice of words, rather than the interpreter's choice of words.
- The interpreter should advise the officer if certain terminology cannot be interpreted verbatim and that an interpretation that will accurately convey the meaning of what is being said will be used instead.
- The interpreter should not try to resolve ambiguities or to paraphrase or summarize the exchange with the alien.
- The interpreter should use the same grammatical voice as the speaker (e.g., "I came to visit my family" rather than "He says he came to visit his family").
- The interpreter is not to adopt the role of inspector or take on a primary questioning role, or to indicate in any way his or her opinion of what the alien is saying.

(5) Competency of the Interpreter. Competency of the interpreter is not always easy to determine. There are a number of signs that indicate that there may be miscommunication or that the interpreter is having difficulty interpreting. The alien may indicate non-verbally that he or she is confused or does not understand. It is important that the officer look for signs of miscommunication between the alien and the interpreter. Below are some indications that misinterpretation exists:

- Response to the officer's question does not answer the question or only partially answers the question.
- Officer recognizes words not being interpreted.
- Interpreter uses many more words to interpret the question than the question appears to have.
- Lengthy response from the alien is interpreted from the interpreter as a very brief response.
- There is back-and-forth dialogue between the interpreter and the alien.
- The alien indicates non-verbally that he or she is confused, concerned, or does not understand.

If the officer notices any indication that the alien and/or interpreter do not fully understand each other, or if the officer and interpreter do not fully understand each other, the officer must stop the interview and contact another interpreter as soon as possible. The officer will note on the sworn statement or in a memo to the file that a second interpreter was obtained and include the reason. The officer, in consultation with the supervisor, has the discretion to obtain another interpreter for the interview. A statement/question should be added to the sworn statement to verify that the alien fully understands and feels comfortable with the interpreter (i.e.; "Do you understand and are you satisfied with the translation provided to you?")

(6) Factors Affecting the Accuracy of the Interpretation.

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- The interpreter may not be sufficiently competent in English or the other language.
- The interpreter may have biases.
- The interpreter may have difficulties interpreting from one language to another.
- The alien and interpreter may be communicating through a second language.
- The alien and interpreter may speak different versions of a language.
- Either the interpreter or the alien may exhibit unprofessional behavior.
- The alien may not know how to best communicate through an interpreter.
- There may be cultural differences between interpreter and alien.
- The disposition of the interpreter may not foster good communication.

(7) Ways to Facilitate the Interpretation Through an Interpreter.

- Address the alien directly, not the interpreter.
- Avoid conversations with the interpreter in front of the alien that are not interpreted to the alien.
- Be conscious of your speech patterns.
- Choose your words carefully and avoid idioms.
- Be conscious of the use of certain pronouns and avoid them if possible (i.e.; he, she, they). It is better to use words that denote relationship or refer specifically to an individual (by using name, position, etc.) rather than certain pronouns.
- Speak clearly, and when necessary, speak slowly.
- Ask straightforward questions and avoid making statements disguised as questions.
- Keep questions clear and simple, asking specific questions one at a time.
- Break down what is to be said into reasonable amounts of information.
- Ask the alien to break his or her statements into short segments so the interpreter can interpret accurately.
- Repeat the question/statement slowly or rephrase it if the interpreter does not appear to understand.
- Check with the interpreter to be sure that he or she understands what is being said, particularly at the beginning of the interview.
- Speak with both the interpreter and alien as soon as it appears that there is a problem in interpretation.
- Remind the interpreter of his or her role when necessary during the interview.

(8) Ending the interview. Before ending the interview with the alien and the interpreter, the officer shall stress to the alien the need for any information relevant to the case and address the alien's questions and concerns. With an expedited removal case, the mandatory closing questions on the Form I-867B must be asked. An interpreter's certification statement should be added at the bottom of the Form I- 867B (see subsection "(c)" above, "Interpreter's Certification"). The sworn statement must be read back to the alien, and a copy of the statement given to the alien after the alien and the officer(s) sign it. If the alien is being referred for a credible fear interview, the officer

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must provide the alien with the Form M-444, Information About Credible Fear Interview. This information should be provided while the interpreter is available, in order to ensure that the alien understands the information and to address any questions the alien may have. The 3/22/99 revision of Form M-444 has been translated into Mandarin, Arabic, Haitian Creole, French, and Albanian. If available, the officer should provide the alien with a Form M-444 in the language the alien understands. The officer must make sure that all needed interpretations and translations are completed before dismissing the interpreter/translator.

(c) Interpretation/Translation Services. When the officer cannot find an interpreter / translator at the POE, he or she should use an interpreter service. Each field office should have arrangements with one or more commercial interpreter services for telephonic interpretations 24 hours a day, 7 days a week. These services either have a contract with the agency or accept payment with a government credit card. Certified interpreters may also be available on a limited basis through the legacy INS's New York Interpreters Unit.

Following is a list of available commercial interpreter services. Others companies may also be available.

AT&T Language Line Services	(800) 419-9206	
CyraCom International	(800) 713-4950	(520) 745-9447
Language Learning Enterprises	(800) 234-0780	
Language Line Services	(800) 874-9426	(800) 523-1786
Language Services Associates	(800) 305- 9673	
TransPerfect Translations:	(212) 689-5555	

Chapter 18: Criminal Prosecution (Added INS - TM2)

- 18.1 General
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References:

INA: Sections 235, 252, 287.

Other: Title 18 U.S.C; and Form M-69, The Law of Search and Seizure for Immigration Officers,

18.1 General.

Every criminal prosecution originates from the commission of an offense, which for the purposes of this text, generally occurs during the primary or secondary inspection process. This is also the case with administrative proceedings. Development of the investigation of either type is basically the same. The issues must be determined, all essential elements of the violation established, witnesses located and interviewed, and supporting evidence gathered.

The difference between the two types of investigations is the adherence or non-adherence to a strict application of the rules of evidence in the resulting administrative or court proceedings. Any evidence that is relevant may be accepted in an administrative hearing. The immigration judge (IJ) has wide discretionary latitude about what is acceptable as evidence in a hearing. The case can be continued or can be reopened upon discovery of more or better evidence. During criminal proceedings, however, a strict application of the rules of evidence holds true in the Federal Courts. A lost case is irretrievable. The case can not be reopened and the finding of better or more evidence will not allow for a retrial. Moreover, a lost case may have lasting negative impact on all future similar cases within that judicial district.

Although most investigations will be conducted at the port-of-entry, nothing in this chapter should be construed as restricting case development strictly to the confines of a port for port-related case development. The gathering of evidence, interviewing and locating witnesses, and executing requests from Assistant United States Attorneys are some examples where this may be applicable.

Typically, senior immigration inspectors are tasked with conducting investigations upon which criminal prosecution proceedings are based for port related cases, but this is not necessarily the case at all ports.

Text within this chapter is meant to familiarize officers with useful material and references for development of criminal cases for prosecution.

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18.2 Criminal Offenses Under the INA.

A chart of the criminal offenses within the purview of this chapter will be found in Appendix 18-1. The description of a criminal offense is abbreviated; therefore, officers should become familiar with the complete section of the INA and the United States Criminal Code.

A criminal offense is any violation of law that is punishable in a criminal proceeding.

Generally, offenses are classified as follows:

- (1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.
- (2) Any other offense is a misdemeanor.
- (3) Any misdemeanor, the penalty for which, as set forth in the provision defining the offense, does not exceed imprisonment for a period of six months or a fine of not more than \$5,000 for an individual and \$10,000 for a person other than an individual or both, is a petty offense.

The senior immigration inspector, or any other officer assigned these duties, is charged with a knowledge of the essential elements of each of the offenses set forth as well as the pertinent regulatory, manual, and instructional material.

18.3 Types of Arrest.

By regulation, the Attorney General has delegated administrative enforcement authority to the Commissioner, who in turn has re-delegated authority to immigration officers. The term immigration officer includes, among others, immigration inspectors, investigators, and border patrol agents [See Chapter 2.2 and sections 235, 252, 287 of the Act and, Form M-69, The Law of Search and Seizure for Immigration Officers].

An INS officer is authorized to make arrests for both administrative (civil) and criminal violations of the Act. The procedures for administrative and criminal arrests differ substantially and will be addressed separately.

(a) Administrative Arrest (Civil Arrest).

(1) Authority and Purpose of Administrative Arrest. The law strongly favors the use of an arrest warrant, even for a non-criminal arrest. Therefore, warrants are required unless a specific exception to the warrant requirement exists. The Act and regulations promulgated pursuant to the Act address the warrant requirement in administrative arrest situations, i.e., where the only legal action to be taken relates to the inadmissibility or deportability of an alien.

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Section 287(a)(2) of the Act empowers an INS officer to arrest without warrant any alien "who in his presence or view is entering or attempting to enter the United States" if he has "reason to believe" (probable cause) that the particular alien is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his or her arrest.

The regulations provide that an alien arrested without a warrant under section 287(a)(2) of the Act (e.g. for removal hearing) shall be taken without unnecessary delay before an INS officer other than the arresting INS officer and examined concerning his or her right to enter or remain in the United States. If no other qualified INS officer is readily available and it would entail unnecessary delay to take the alien before another INS officer, the arresting INS officer may examine the alien if the conduct of such an examination is part of the duties assigned to that arresting officer. The purpose of this procedure is for the examining officer to decide if there is sufficient evidence to determine whether the individual is an alien who is excludable or deportable.

Section 287(a)(5) of the Act authorizes immigration officers to execute and serve any warrant, subpoena, summons, order, or other process issued under the authority of the United States. Section 236(a) of the Act provides the authority to arrest an alien upon warrant of the Attorney General pending determination of his or her removability. When an order of removal becomes final, the alien must be detained for 90 days or released on bond pursuant to section 241(a) of the Act. INS may detain an alien under Form M-69 section 235 of the Act at any time to remove him or her after he or she has been finally so ordered pursuant to section 240 or 235(b) of the Act.

Likelihood of escape before a warrant can be obtained may be shown by evidence of previous escapes or evasions of immigration authorities, as well as lack of ties to the community such as family, home, or a job. Attempted flight from an INS officer or nervous behavior suggesting that the suspect is looking for an opportunity to abscond may justify an arrest without a warrant. The mobility of the suspect may justify a belief that the suspect is likely to escape before a warrant can be obtained.

(2) Warnings Required Following Administrative Arrest. Once the examining officer determines that formal removal proceedings will be instituted, certain advisories must be given to the alien (e.g., 8 CFR 287.1). The alien must be informed of the reason for the arrest, of the right to be represented by counsel of his or her choice at no expense to the Government, and of the availability of free legal services programs and or organizations recognized pursuant to 8 CFR 292.2 located in the district where the proceedings are to be held. The alien must be given a list of such programs and organizations. The alien also must be advised that any statement made may be used against him or her in a subsequent proceeding. If arrested without a warrant, the alien must be advised that a decision will be made within 24 hours whether custody will be continued or whether release on bond or on personal recognizance will be available. The I-862 (Notice to Appear) provides the required warnings to aliens placed in removal proceedings or granted administrative voluntary departure. Miranda warnings need not be given where the only contemplated legal action

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against the alien is removal or voluntary departure. Where the alien is in custody and the focus of the interrogation shifts to contemplated criminal prosecution, Miranda warnings must be given. If Miranda warnings are not provided, evidence derived is inadmissible in the criminal prosecution, unless it is otherwise discoverable.

Aliens arrested under section 287(a)(2) of the Act will be provided with a Notice of Rights and Request for Disposition, Form I-826. Upon request, such aliens will be given two hours to contact counsel before questioning can proceed. Complete the lower portion of the I-826 for those aliens who will be offered the option of voluntary return in lieu of removal proceedings, and who accept this offer.

(b) Criminal Arrest. Whenever feasible, INS officers should obtain a warrant prior to making an arrest. Section 287(a)(4) of the Act permits officers authorized by the Attorney General through regulation to arrest without a warrant any person for felonies cognizable under the immigration laws if the officer has reason to believe (probable cause) that the particular person committed such felony and is likely to escape before a warrant can be obtained.

Section 287(a)(5) of the Act has expanded the arrest authority of those officers designated by the Attorney General through regulation to have such authority. Pursuant to Section 287(a)(5)(A) of the Act an officer may arrest for offenses against the United States committed in his or her presence. Under Section 287(a)(5)(B) of the Act, an officer may arrest for any felony cognizable under the laws of the United States, if the officer has reason to believe (probable cause) that the person to be arrested has committed or is committing such a felony.

To exercise authority under section 287(a)(5)(A) or (B) of the Act, an officer must be performing duties relating to the enforcement of the immigration laws at the time of the arrest and there must be likelihood that the person will escape before an arrest warrant can be obtained. An officer must be certified as having completed a designated training program before exercising the authority contained in section 287(a)(5)(B) of the Act.

Other felonies that fall within the jurisdiction of the INS include those described in sections 243(a) and 276(d) of the Act as well as certain felonies in Title 18 of the United States Code that relate to the immigration of aliens. General criminal offenses are found in Title 18 of the United States Code. However, other criminal offenses can be found in other titles.

Rule 41 of the Federal Rules of Criminal Procedure sets forth the procedure for an arrest made pursuant to a criminal warrant. A person arrested without a warrant must be taken without unnecessary delay before a United States Magistrate Judge. The judicial determination of probable cause must be made as soon as possible, and in no case more than 48 hours of the arrest, absent an emergency or extraordinary circumstances. For purposes of computation, the time includes weekends and holidays. A person arrested must be taken without unnecessary delay before a magistrate-judge for arraignment.

18.4 Arrest Authority.

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(a) General. An arrest is the taking of control, under real or assumed authority, of another for the purpose of holding them to answer to a criminal or administrative charge. It is the seizing of another's body.

In the Federal system, the authority to make arrests varies from agency to agency. The scope of a Federal officer's authority is set forth by statute, and each individual officer must know the authority granted to them. For some officers, their authority is limited to certain geographical areas, while for others, their authority is limited to certain subject matter.

Therefore, just because a crime, Federal or otherwise, has been committed, it does not mean that a Federal officer may make the arrest. Officers may do so only if they have the statutory authority to arrest for that specific crime. An officer must be acting under real legal authority in taking a person into official custody. This power, or authority, to arrest must be statutory in nature as to the person, the place and the crime. There are three types of arrest authority: Federal statutory authority, state peace officer authority and citizens arrest authority.

(b) Federal Statutory Authority. Authority is granted to Federal officers/agents by acts of Congress. All Federal arrest authority is based on laws passed by the Congress. This authority varies from agency to agency.

(c) State Peace Officer Authority. Power granted by some states to some Federal officers/agents authorizing them to enforce state law. As separate sovereigns, each state may determine who is authorized to enforce the laws of that state. Usually this means that arrest power is granted to state police, sheriffs, and to various municipal police departments. Some states have enacted legislation designating Federal law enforcement officers as state peace officers with the power to enforce state law. Whether or not a specific Federal officer has this state authority is sometimes difficult to determine.

Some states enumerate by title those officers who qualify as peace officers, but most merely list some officials and then add either "or other officers who have the authority to arrest for specific or general crimes" or similar language. While this would appear to indicate that Federal officers are included, some state court decisions have limited their application to state law enforcement officers only. Other states have not had the opportunity to interpret the language and it is unsettled as to whether or not Federal officers are included. Do not assume that as a Federal officer you are considered as a state peace officer. You should check with the U.S. Attorney for your district for advice as to your "peace officer" status.

In addition, it may be possible to obtain state peace officer status by being "deputized" by a local sheriff or other state law enforcement official. If you are so deputized, be sure that it is not just an honorary deputation but actually carries with it the power of arrest.

In any event, recognize that the state authority is being granted to assist you in your enforcement of Federal law.

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If a Federal officer, acting as a peace officer, deprives an individual of any of the rights, privileges or immunities secured by the Constitution and laws of the United States, that Federal officer could be subject to a civil rights suit under 42 U.S.C. § 1983.

(d) Citizens Arrest Authority. The power is granted in some states to permit citizens who witness a felony crime to arrest for that crime. In the absence of Federal arrest authority, the law of the state in which the arrest takes place is controlling. Since most states do not confer peace officer status on Federal officers, any arrest made by them outside of their statutory Federal arrest authority will generally be treated as a citizen's arrest.

Federal law enforcement officers with statutory Federal arrest authority may make arrests with probable cause, with or without a warrant, for a Federal felony offense which is encompassed by their authority. If you make an arrest with probable cause for a crime over which you have statutory authority, you will generally be protected from criminal charges and/or civil liability.

While most, if not all, states allow the so-called citizen's arrest to be made, such authority should only be exercised in limited situations because a citizen making such an arrest acts at their own peril. In most states, a citizen is privileged to make an arrest only when they have reasonable grounds for believing in the guilt of the person arrested and a felony crime has in fact been committed.

Note that unlike an officer's authority to arrest on probable cause that a felony has been committed, the general rule for a citizen's arrest is that a felony must have occurred, a certain cause standard, instead of a probable cause standard.

An absolute defense to a false arrest suit based on a citizen's arrest is the actual conviction of the person arrested. Additionally, Federal law enforcement officers in states where a citizen's arrest may be made on "reasonable cause" would appear to be free of liability for false arrest where they have verified a NCIC felony warrant before making a citizen's arrest.

When an arrest is made for a state offense by a Federal officer under citizen's arrest authority, the accused should be turned over to a state peace officer, without undue delay, or brought before a state magistrate or judge in accordance with the law of that state. Federal officers must remember that the Terry doctrine will allow a limited detention for investigative matters, and once that continued detention becomes unreasonable, then either a valid Federal violation must be charged, peace officer status invoked, arrest as a citizen, or release the individual. Clearly, arresting for a Federal violation enables the Federal officer to remain within scope of Federal authority, and affords the highest level of civil liability protection. When you arrest under color of state law, exposure to liability increases, and a citizen's arrest requires that the citizen be right, or be liable.

18.5 Arrests Based on IBIS or National Crime Information Center (NCIC) Information.

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(a) Outstanding Federal Warrant. Authority to arrest is limited to agency statutory arrest authority. An officer should verify that a warrant is still valid and that the person to be arrested is the person specified on the warrant. The officer need not have the warrant in possession at the time of the arrest, but upon request the officer is required to show the warrant to the suspect as soon as possible. If the officer does not have the warrant at the time of the arrest, the officer should inform the suspect of the offense charged and of the fact that a warrant has been issued. See Rule 4(d)(3), Federal Rules of Criminal Procedure.

Should you discover that a person you have detained has an outstanding Federal warrant for a crime outside the scope of your statutory authority, you may detain the individual until an officer or agent with the proper authority can make the 'official' arrest. This could be either a Federal or state officer.

(b) Outstanding State Warrants. No Federal statute authorizes an arrest by a Federal law enforcement officer based on an outstanding state warrant. Federal officers making such an arrest are arresting either as a peace officer or a citizen depending on the law of the state in which the arrest is made.

However, when a person moves or travels in interstate or foreign commerce with the intent either:

to avoid prosecution, or custody or confinement after conviction for a felony under the laws of the place from which the fugitive flees, or

to avoid giving testimony in any felony criminal proceeding, or

to avoid service of, or contempt proceedings for alleged disobedience of lawful process requiring attendance,

that person has committed a Federal felony under 18 U.S.C. § 1073.

The better practice is to detain an individual for a reasonable period of time until state or local police officers can effect an arrest. When you call the state or local police officers, ask them if they want you to hold the suspect for them. If they say yes, state law may give you additional authority because of their request.

If an individual is detained beyond a reasonable time because of delay in the arrival of state or local police, the Federal officer will have, in fact, arrested the individual. Authority for that arrest will be based on state law and the existence of the outstanding warrant will provide the necessary probable cause.

18.6 Warrantless Searches and Seizures.

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(a) Border Searches. Routine searches by INS officers at an international border or the "functional equivalent" (International Airports) may be conducted without a warrant or probable cause. The interrogation and search of individuals and their effects at the border without probable cause or a warrant, is considered reasonable under the fourth amendment.

INS officers may interrogate individuals to determine admissibility without reasonable suspicion or probable cause. However, border searches are subject to constitutional limitations. Searches of persons, particularly body cavity searches and similar intrusive procedures, require some level of suspicion under the fourth amendment. Routine searches of persons or things may be made upon their entry or exit in or from the country without probable cause or a search warrant. The border search authority extends to all persons or vehicles attempting to enter or seen entering the United States.

(b) Extended Border Searches. An extended border search takes place after a person, vehicle, mail or some other property has crossed the border or cleared a prior checkpoint, or a significant amount of time has elapsed since the object first arrived in the United States. An extended search must be justified by "reasonable suspicion" that the subject of the search was involved in criminal activity. An extended border search requires:

reasonable suspicion of criminal activity;

reasonable certainty that the vehicle/person crossed the border; and

reasonable certainty that the condition of the vehicle/person remained unchanged since the border was crossed (often established through constant surveillance).

(c) Functional Equivalent. The broad authority which exists at the international border also extends to areas found to be the "functional equivalent". An airport which is the destination of a nonstop flight from outside the United States. If there is a mixture of domestic traffic with the international traffic, then the location will not be considered a functional equivalent. If there is any question of whether a particular area is a functional equivalent, an officer should apply reasonable suspicion and probable cause standards for searches and seizures that are applicable to interior locations.

The functional equivalent of the border may be the mouth of a canyon, or the confluence of trails or rivers. The key factor for consideration is whether the person or item entered into the country from outside. Three factors are used to determine whether a location other than the actual border is a "functional equivalent":

reasonable certainty that a border crossing has occurred;

lack of time or opportunity for the object to have changed materially since the crossing; and

execution of the search at the earliest practical point after the actual crossing.

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(d) Entry of Lands Within 25 Miles of the Border. Immigration officers may enter private lands, but not dwellings, within 25 miles from any external boundary of the United States for the purpose of "patrolling the border to prevent illegal entry of aliens into the United States" as "conducting such activities as are customary, or reasonable and necessary, to prevent the illegal entry of aliens into the United States."

A dwelling is protected under the fourth amendment of the constitution and entry should only occur with consent, exigent circumstances, or a properly executed search warrant.

As to private lands, the officer shall inform the owner or occupant that they propose to avail themselves of their power of access to those lands.

(e) Checkpoints. The Border Patrol conducts two types of inland traffic-checking operations: checkpoints and roving patrols. Border Patrol agents can make routine vehicle stops without any suspicion to inquire into citizenship and immigration status at a reasonably located permanent or temporary checkpoint provided the checkpoint is used for the purpose of determining citizenship of those who pass through it, and not for the general search for those persons or the vehicle. Inquiries must be brief and limited to the immigration status of the occupants of the vehicle. The only permissible search is a "plain view" inspection to ascertain whether there are any concealed illegal aliens.

In contrast, INS officers on roving patrol may stop a vehicle only if aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion (reasonable suspicion) that the vehicle contains illegal aliens. Absent consent, a more in-depth search requires probable cause for both types of inland traffic-checking operations.

18.7 Degrees of Suspicion.

(a) Mere Suspicion. At the border or its functional equivalent, an inspector needs only mere suspicion to justify a search and comply with the requirements of the Fourth Amendment. This is because the person is attempting to enter the United States from abroad and may reasonably be required to demonstrate that the person and his or her belongings are entitled to enter the United States.

(b) Reasonable Suspicion. Before an inspector may constitutionally detain a person (non-entry related case), the inspector must have reasonable suspicion that the person is an alien and is illegally in the United States. This higher degree of suspicion arises generally in questioning persons encountered in and around the port who are awaiting persons referred to secondary. This suspicion is based on questioning of alienage alone and also involves specific articulable facts, such as particular characteristics or circumstances which the inspector can describe in words.

(c) Probable Cause. Probable cause is the degree of suspicion which an inspector must have before constitutionally making an arrest under either civil or criminal law. An inspector has probable cause to arrest or search if evidence and circumstances which would lead a

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reasonable person to believe that an offense has been or is being committed are known by the inspector.

18.8 Criminal Action Procedures.

There are three accepted modes of initiating criminal action against an accused person in a federal district court. They are:

(a) By COMPLAINT - In criminal law, a charge, proffered before a magistrate-judge having jurisdiction, that a person named (or an unknown person) has committed a specified offense, with an offer to prove the fact, to the end that a prosecution may be instituted. Although the complaint charges an offense, an indictment or information may be the formal charging document. The complaint is a written statement of the essential facts constituting the offense charged. In the federal courts, it is to be made upon oath before a magistrate-judge. If it appears from the complaint that probable cause exists that the person named in the complaint committed the alleged crime, a warrant for his arrest will be issued.

If the magistrate-judge has reason to believe from the evidence presented at the examination that a crime has been committed and the accused probably committed the offense, he or she will order the defendant held for the filing of an indictment or an information to answer in the district court. In so doing, he or she may order the accused held in custody, or released under bond or on his own recognizance. If the magistrate-judge does not believe there is *probable cause* to hold the accused he may discharge the defendant.

The complaint shall not be filed without the consent of the United States Attorney.

(b) By INDICTMENT - A formal written accusation originating with a prosecutor and issued by a grand jury against a party charged with a crime. An indictment is merely a charge which must be proved at trial beyond a reasonable doubt before defendant may be convicted. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information.

(c) By INFORMATION - A written accusation made by a United States Attorney, without the intervention of a grand jury. Function of an "information" is to inform defendant of the nature of the charge made against him and the act constituting such charge so that he can prepare for trial and to prevent him from being tried again for the same offense. It is signed by the United States Attorney or one of his or her Assistants.

18.9 Procedures After the Arrest.

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(a) General. An arrest may be made with or without a warrant under either Federal or state arrest authority. If the crime is a state crime and not a Federal offense, you must follow the state post-arrest procedures. If it is a Federal crime, the Federal Rules of Criminal Procedure require you to take the adult defendant before the nearest available Federal magistrate-judge without unnecessary delay. [See Rule 5a, Federal Rules of Criminal Procedure.] A detailed flow chart of the Federal criminal case processing system will be found in Appendix 18.4.

Every Federal officer is responsible for knowing the location of the nearest U.S. Magistrate-Judge or other United States District Court Judge. If a Federal judicial official is not available, the defendant may be brought before certain state officers for the initial appearance [See 18 U.S.C. § 3041.].

In the event that a defendant must be held in jail before the initial appearance, the prisoner must be placed in a Federally approved detention facility. It is the responsibility of the arresting officer to transport the defendant to the holding facility and from there to the court for the initial appearance. The U.S. Marshal's Service will not take custody of a prisoner until ordered to do so by the court.

It is the responsibility of the arresting officer to see after the well-being of the arrestee. This means seeing that food, shelter, etc., are available. If the arrestee is injured, or has special medical problems such as diabetes or drug addiction, the officer should obtain medical assistance for the arrestee.

(b) Evidence Processing. Each arresting officer is responsible for preserving physical evidence seized and for assuring that the chain of custody for that evidence is properly established. Names and addresses of witnesses should be recorded and the necessary paper work completed. Additional discussion of case related evidence can be found in section 18.11 of this chapter.

(c) Fingerprinting. Every alien 14 years of age or older who has been:

- arrested under a warrant of arrest or without a warrant; or
- a willful crewman violator;
- served with a notice to appear;
- excluded from the United States; or
- removed from the United States under the expedited removal program

shall be fingerprinted on a criminal card (FD-249) which shall be sent to the Identification Division, FBI. A second FD-249 card shall be prepared and forwarded by first class mail to.

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Biometric Support Center
1151 "M" Seven Locks Road
Potomac, MD 20854-2905

A third FD-249 shall be prepared and retained in the file.

FBI Form R-84 shall be prepared at the time of processing. In the case where criminal prosecution is contemplated, two FBI Form R-84's shall be prepared to timely record administrative and criminal disposition. The final disposition of each case shall be reported to the Identification Division, FBI, on FBI Form R-84. (Revised IN00-25)

(1) Administrative Arrests. In administrative arrest, notification of disposition shall be prepared after receipt of verification of departure. Verification of departure documents, which are handled by the Detention & Deportation Branch, usually consist of an executed I-94 and/or executed Warrant of Deportation or Removal, or an executed Notice of Exclusion. Final disposition shall be shown as follows: "deported, departed voluntarily, status adjusted to lawful permanent resident, notice to appear canceled, proceedings terminated by IJ (BIA), alienage not established, released as U.S. citizen (lawful resident alien), or the alien died." The date of occurrence should follow each instance. After the date, in appropriate cases include the mode of government or commercial transportation used for removal.

(2) Criminal Arrests. In criminal arrest, notification of disposition shall be prepared by the case agent (officer) after sentencing by the court of record. Final disposition shall include the judgement and sentence. This information serves to timely update the criminal history records in the National Crime Information Center (NCIC) of offenders and/or significant violations and the final disposition.

(d) Release of an Arrested Person. Situations sometimes arise where a person is arrested but before the initial appearance, the officer learns that the U.S. Attorney has declined to prosecute, that the warrant has been withdrawn, or that additional facts are discovered which cause the officer to realize that there is no longer probable cause for the arrest. The Federal Rules require that any time a person is arrested, they must be taken before a U.S. Magistrate-Judge without unnecessary delay [See Rule 5a, Federal Rules of Criminal Procedure.].

Should you be required to travel to a magistrate-judge's office, sometimes several hours away, to have the magistrate-judge release the suspect? The Department of Justice has considered this question and is of the opinion that the person could be released. Once released, there is no need to present the defendant before the magistrate-judge as that would serve no useful purpose. Note however, that this is only an opinion of the Department of Justice based upon their interpretation of Rule 5(a) of the Federal Rules of Criminal Procedure, and not the result of an actual court decision.

The methodology of the release would depend upon how far the arrest had progressed. If it

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was determined that the subject should be released before booking, the officer may release the subject. If the prisoner has been booked, the officer should go through the Assistant U.S. Attorney who would notify the magistrate-judge and the officer should prepare a memo for the AUSA stating the facts behind the arrest and the subsequent decision to release the subject.

It should be noted that the above is only a recommendation and actual policy may vary from district to district (e.g., INS related detainers). You should seek advice from your agency and the U.S. Attorney's office to learn the procedure in the district in which you will be working.

Many districts have instituted a procedure known as 'citation release,' which authorizes certain officials in the agencies to review the personal information provided by an arrestee, and if the charge is a minor one, to either collect collateral for the charge, or release on personal recognizance with a mandatory court date. This process is closely monitored by court personnel, and serves to speed up the process by which some Federal agencies, who commonly make numerous misdemeanor arrests, handle their prisoners.

(e) Initial Appearance. After making an arrest, Rule 5(a) Federal Rules of Criminal Procedure requires that the arresting officer take the arrested person before the nearest available U.S. Magistrate-Judge without unnecessary delay. The term 'without unnecessary delay' means exactly what it says and does not mean that prisoner be taken there when it is convenient or practical. The amount of acceptable delay will vary according to the district in which the arrest takes place. For instance, the amount of time a juvenile can be processed before transportation to a U.S. Magistrate-Judge for an Initial Appearance is considerably less than the time allowed for processing an adult.

Title 18 U.S.C. § 3501 addresses what is reasonable delay for the purpose of admitting statements taken during that processing period. The 'six hour rule of reasonableness' means that if the arrested person makes any statements within six hours of the arrest, it will be presumed that any statements taken during that six hour period were voluntary. Any statements taken after the six hours following an arrest are presumed to be coerced, and only admissible after review by the trial judge. Note, however, that it is only a presumption and it may be rebutted by either side.

(f) Unnecessary Delay. Following an arrest, the arresting officer has adequate time to process the defendant, i.e. fingerprint, photograph, interrogate, etc. In other words, there is adequate time to do the normal booking procedures prior to the initial appearance. If you intentionally fail to comply with the 'without unnecessary delay' requirement, there are serious consequences. You could be held liable for violating the person's civil rights, your case could be dismissed, and/or any confession could be suppressed.

(g) Magistrate-Judge or Other Official. If no U.S. Magistrate-Judge is available, you may take the defendant before any other person authorized in 18 U.S.C. § 3041, such as:

Any U.S. Judge or Justice;

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Judge of a supreme court or superior court;

Chief or first judge of common pleas;

Mayor of a city; or

Justice of the peace or other magistrate of any state where the offender may be found.

Note: that if you take the defendant before someone other than a Federal judge or magistrate-judge, the obvious practice is that the official should be of a level where written records are kept of the proceedings. A good rule of thumb to follow is: should you need to use a state official, only use a judge of a state court of record, i.e. one that has the power to punish for contempt and maintains a record of its proceedings. A state court that can hear felony cases will be a court of record.

The Rule requires that you take your prisoner before the nearest available U.S. Magistrate-Judge. If the nearest available magistrate-judge is in another district, in order to avoid additional paperwork and other problems, take the prisoner to the magistrate-judge in the district of the arrest even though that magistrate-judge may be further away.

(h) Arrests Made Without Warrants. Should you arrest someone without a warrant, they must be taken before a magistrate-judge without unnecessary delay and a complaint needs to be filed prior to the holding of the initial appearance.

(i) Detaining Prisoners. If the defendant is to be housed in jail prior to the initial appearance, the prisoner can only be housed in a Service or federally approved detention facility.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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18.10 Jurisdiction and Venue.

(a) Venue. The Constitution requires that the trial of all crimes shall be held in the state and district where the crime was committed, or, if not committed in any state, where Congress shall direct. The place where the offense may be tried is known as "venue." Rule 18 of the Federal Rules of Criminal Procedure states that prosecution will generally be in the district in which the offense was committed.

In determining where the offense was committed, consideration is given to whether a single act was involved, or whether the offense was a continuing one or one which involved more than one act. In the latter cases, venue would lie at any point where a criminal act occurred. In cases involving offenses against the United States committed on the high seas, in a foreign country, or when more than one person is involved, venue is determined by where the offender(s) are first arrested or transported into the United States, 18 U.S.C. § 3238.

(1) Venue Distinguished from Jurisdiction (Rule 18). "Jurisdiction" is the inherent power of the court to decide a case. All U.S. District Courts have jurisdiction over offenses committed against the United States. Venue refers to the particular place (judicial district) where a court that has jurisdiction may hear and decide a case. A district court may have jurisdiction to decide a case but may lack the venue to hear it. Time of Motions to transfer the case to another district will be made at or before arraignment, or as the rules or court allow (Rule 22).

(2) Change of Venue [Rule 21]. Under Rule 21, the court may, upon motion of the defendant, transfer the proceedings to another district if:

There exists in the district where the prosecution is pending so great a prejudice that the defendant cannot obtain a fair or impartial trial; or

It appears that the transfer of proceedings against the defendant or any one or more of the counts against the defendant would be more convenient for the parties and witnesses, and in the interest of justice.

(3) Transfer from the District for Plea and Sentence (Rule 20). If a defendant is arrested or held pursuant to indictment or information in a district other than the one in which the indictment or information is pending, the defendant may state in writing that they wish to plead guilty or nolo contendere, to waive trial in the district of indictment or information, and to consent to disposition of the case in the district where they were arrested or are being held. If the United States Attorneys for both districts agree to this procedure, the relevant papers will be transferred to the clerk of the court where disposition is to occur and the prosecution will continue in that district. The defendant may also waive that right to be indicted in the venue district.

(4) Commitment to Another District (Rule 40). A defendant may be arrested on a warrant based on a complaint, an information or indictment; or arrested without a warrant based on

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probable cause. If this occurs in a district other than one where the offense occurred or the proceedings are pending, and the defendant wishes to plead not guilty to the pending charges, the defendant must be returned to the original district. As with other arrest situations, the first step is to take the arrested person to the nearest available magistrate-judge without unnecessary delay. The court will then proceed with the initial appearance, in accordance with Rule 5, to include advisement of the provisions of Rule 20.

If the defendant has been indicted, an information has been returned, or if the defendant elects to have the preliminary examination, pursuant to Rule 5, conducted in the district in which the warrant was issued, there will be no preliminary examination in the district of arrest. Instead, the magistrate-judge will determine at the initial appearance whether the arrested person is the person named in the indictment, information, or warrant. If so, the defendant will be ordered to return, if on bail; or the magistrate-judge will order the defendant returned, if not on bail, to the district where the prosecution is pending, subsequent to the court receiving the warrant or certified copy of such, which may now be submitted by facsimile (fax) transmission.

Otherwise, pursuant to Rule 5.1, the magistrate-judge will hear evidence in the district of arrest as to probable cause for the arrest. If the magistrate-judge finds that there is probable cause to believe a crime has been committed and that the arrested person committed it, the magistrate-judge will order the defendant's removal to the district in which the prosecution is pending.

If the person is arrested for a probation violation, the court will proceed in accordance with 32.1 (revocation or modification of probation), or conduct a prompt preliminary examination if the alleged violation occurred within the district of arrest.

If bail has been set in the original district, the magistrate-judge in the district of arrest will take into account that the amount of bail previously fixed and the reasons therefore, if any. The magistrate-judge is not bound by this amount, however, and may fix a different bail if it appears that a different amount would more reasonably assure the presence of the accused at future judicial proceedings.

(5) Trial (Rule 23(a)). If the defendant has previously entered a plea of not guilty, the question of guilt will be determined at a trial of the defendant. At the trial, the government will attempt to offer evidence to support a finding of guilt beyond a reasonable doubt. The defendant may offer a defense to disprove the allegation of guilt but is not obliged to do anything at all inasmuch as the burden of proof is on the government.

(6) Functions of the Judge and Jury. In general, the judge decides questions of law, and the jury decides questions of fact. Defendants may waive jury trial if they do so in writing and the request is approved by the court and the government. In such cases, the judge will decide questions of both law and fact.

(7) Trial By Jury (Rule 23(a)). A trial jury is sometimes called a petit jury, as opposed to a grand jury. A grand jury is selected and impaneled by the judge. A trial jury, however, is

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selected upon the basis of a voir dire conducted by either the judge and/or the attorneys for each side. In a trial by jury, the jury will consist of 12 jurors. At any time before verdict, however, the parties may stipulate in writing, with the approval of the court, that the jury may consist of any number less than 12. This allows a verdict to be returned should the court need to excuse one or more jurors for just cause after trial has begun. In fact, the court may allow a jury consisting of 11 jurors to return a verdict even without the approval of both parties. As to the statute of limitations, it does not begin to run until the criminal conduct ceases. In a conspiracy, the statute of limitations begins to run with the last overt act.

(8) Tolling the Statute. To 'toll' the statute is to suspend or interrupt the running of the statute over a period of time. This will extend the date on which the statute ends and prosecution is subsequently barred. A statute may be tolled when it can be shown that an individual is 'fleeing from justice.' Title 18 U.S.C. § 3290 provides: 'No statute of limitations shall extend to any person fleeing from justice.'

The essential characteristics of fleeing from justice have been defined as "leaving one's residence, usual place or resort, or concealing one's self with intent to avoid punishment." The key word in the definition is 'intent.' One of the most common ways of fleeing from justice is to leave the country to avoid prosecution, but it is not the only one. Using a false name in a location other than one's usual habitat is generally sufficient. Once a person has fled from justice, the reasons for his continued absence have no effect on tolling the statute, so that an excuse that the individual was in jail in Mexico is irrelevant if the original intent in going to Mexico was to avoid prosecution in the United States. The burden of proving the intent to flee is on the government. If proven, the statute will be tolled for the duration of the time the individual was "fleeing from justice."

(9) Extradition. When an individual has fled the jurisdiction of the United States to a foreign country, the process for bringing that person back to this country is known as extradition. It is important to remember that in the Federal system, the term "extradition" applies only to transfers of defendants and potential defendants on the international level. Transfers within the jurisdiction of the United States are covered by Rule 40 (Commitment to Another District).

Extradition is effected through a request from the U.S. Attorney to the Attorney General to conduct extradition proceedings. These proceedings are accomplished through the U.S. State Department which will deal with the foreign government concerned. In order to extradite an individual from a foreign country, there must be an extradition treaty between the United States and the foreign country involved. The United States does not have such treaties with all countries. In addition to the existence of an extradition treaty between the two countries, there must be enough evidence to make a strong case and the offense charged must be one that is recognized by both countries. If the offense charged is not a crime in the host country, there can be no extradition.

Refer to Chapter 209, Title 18 U.S.C., Extradition, Sections 3181 through 3196; for the procedural requirements, and the listing of extradition treaties.

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18.11 Case Presentation.

There are no general guidelines for criminal prosecution of immigration related matters in the Federal courts. Practices and policies may vary from one judicial district to another. In certain judicial districts, blanket authority has been granted by the United States Attorney to file complaints for specified violations.

(a) Role of the United States Attorney and Their Assistants. These are the officials who, with certain exceptions, represent and defend the United States in both civil and criminal trials in Federal Courts. They determine, on the basis of all the evidence, whether authority should be granted to file a complaint. Unless the information given the United States Attorney is concise, clear, and completely explanatory of the supporting evidence for each element of the offense, the United States Attorney may deny authority to file a complaint. The clearest possible presentation of the admissible evidence supporting each element of the offense is essential to insure full consideration of the case for prosecution.

Any questions regarding cases (criminal INS) or the charges should be directed to this office. You may be asked to attend an informal pretrial conference to discuss a case with the Assistant U.S. Attorney (AUSA) who is assigned to the case. At this time, you should inform him or her of any problems you have with the case. Do not wait until the trial where they could be surprised. The AUSA may require you to do some additional work on the case (e.g., locate, obtain statements, and subpoena witnesses, etc.). Remember, he or she has a right to make such decisions.

(b) Liaison. An amiable acquaintance with the United States Attorney's staff, the magistrate-judge's office, and the Federal District Court hierarchy is of critical importance as to whether a case will be prosecuted. Friendly, person-to-person liaison on a local level must be emphasized if there is to be a successful prosecution program.

The thrust of the Inspections prosecutions program is to have every possible case accepted for prosecution that is presented. This can be accomplished through a thorough investigation and a complete willingness to assist the Assistant United States Attorney in the preparation of the case after it is accepted for prosecution.

The prosecution officer must sell the case. Just as the Service sets priorities based upon available resources, the court system sets priorities. An innovative approach or an energetic officer can often effect a change in priority commitment.

(c) Appearance Before United States Magistrate-Judge. Most prosecutions are begun by filing a complaint before a United States Magistrate-Judge after authority for this action has been granted by the AUSA. One exception is in the case of an arrest without a warrant for a felony involving the immigration laws where the person arrested is likely to escape (see Chapter 18.6 - Warrantless Searches and Seizures). In such case, the person must be taken without unnecessary delay before the nearest available United States magistrate-judge, or some other officer empowered to commit person charged with offenses against the laws of the United States, and complaint filed forthwith.

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The magistrate-judge informs the defendant of the right to a preliminary examination, right to counsel, retained or appointed, and right to remain silent. The defendant is not required to plead before the United States magistrate-judge.

If the defendant does not waive preliminary examination, the magistrate-judge hears the evidence, including the testimony of the person filing the complaint. During examination, the defendant has the right to examine witnesses and to present witnesses in his or her own behalf, as well as to give testimony himself or herself.

The magistrate-judge may order the accused held in custody, or released under bond or on his or her own recognizance.

An AUSA will generally appear at the preliminary examination before the United States magistrate-judge to represent the Government and to examine witnesses.

(d) Action After Accused Held by United States Magistrate-Judge. After the defendant is ordered held by the United States magistrate-judge, that official reports the action to the clerk of the appropriate United States district court. If the violation for which the defendant is held is a misdemeanor, the AUSA files the information in court. If the offense is a felony, a draft of an indictment is drawn by the AUSA and the case is presented to the appropriate grand jury for its consideration.

Frequently, if the crime involved is a felony, and if a grand jury is sitting, the facts are presented directly to the grand jury, without first being considered by a United States magistrate-judge.

(e) Case Report. A good investigative report should stand alone. An AUSA, without talking to the case officer, should by use of the report alone, decide on prosecution. A good investigation without a good report is meaningless. An investigation develops facts, a report renders these facts into a final product upon which to adjudicate or to base a prosecution.

The report should set forth clearly the basis for the investigation, the acts of the accused which constitute the elements of the crime, when and where such acts were committed, and all relevant circumstances surrounding the commission of the acts. It is particularly important that all facts establishing jurisdiction and venue be clearly set forth. The report should also show the manner in which each of the acts constituting the elements of the crime is to be proved, whether through witnesses, documents, admissions or confessions of defendant, etc. It should be confined to those facts which will be of value to the AUSA in determining whether the defendant should be prosecuted, and which will be of assistance to the AUSA during the trial.

The report will vary depending on whether your case is a planned operation or an unplanned apprehension. When a case is planned, the sooner the AUSA is brought into the picture, the better. At various stages of the case, the evidence should be shown to the AUSA and the report should be developed as you go. In an unplanned apprehension, the

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case officer (or agent, as typically referred to by the AUSA) will be required to do a great deal of work at the last minute. Early in the process, the agent should discuss grand jury with the AUSA. The case report should be submitted prior to grand jury. If some evidence will not be available by that time, the report should be submitted with an explanation for the missing evidence and an estimated date for the supplemental case report containing that evidence.

Keep in mind, an AUSA will not want to present a case to a grand jury without all the evidence before him. The lack of a case report may not cause the AUSA to reject the case in hand, but the next time you seek his authorization, he may be slow to commit himself. Also, keep in mind that without the evidence acquired in the case, the AUSA cannot comply with the court's discovery order. Failure to comply with discovery orders can result in the exclusion of evidence and may cause the case to be dismissed.

Elements of the case report should be tabbed and bound. It should contain the following items:

- (1) Synopsis, a brief analysis of the case.
- (2) List the crime and the elements of the crime.
- (3) List the defendants and a brief biological sketch including immigration, criminal history, and detention status.
- (4) List the witnesses, including the aliens, with a brief biological sketch and information on how to reach the witnesses. The sketch should state any criminal or immigration history.
- (5) Any related forfeiture proceedings.
- (6) The narrative should discuss the case as it relates to the evidence and should explain how the evidence will satisfy all of the elements of the offense.
- (7) List of the exhibits.
- (8) List of all other evidence.
- (9) Any indications of a defense, a weakness in the case or evidence we have uncovered that would aid the defendant's case.
- (10) Attachments:
 - a. Affidavits of each law enforcement officer who participated in the case.
 - b. Statements taken from any of the aliens, defendants, or other witnesses.

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- c. Copies of any tapes, if applicable.
- d. Copies of all photographs.
- e. A list of physical evidence detained by the Service including money, vehicles, and personal property.
- f. Any conviction records or immigration records that might be relevant to the prosecution (e.g. prior exclusion/deportation/removal records, etc.).
- (f) Testifying in Court. As an officer involved in prosecuting a case, you will be called upon to testify in open court. A guide to conducting yourself in court is contained in Appendix 18.2.

18.12 General Rules of Evidence.

It is impossible to discuss all of the possible rules of evidence here, but all Immigration Inspectors should be familiar with the general rules of evidence. However, there can be no substitute for initiative and experience.

(a) The following is a brief summary of some of the more important rules essential in establishing sufficient evidence to successfully prosecute for violations of the INA and related laws:

- (1) Evidence is anything which tends to prove or disprove a fact in issue, and must be relevant, and competent to the point or fact at issue.
- (2) A witness may testify to what he sees, hears, or knows.
- (3) Opinion evidence - (i.e., Testimony from a handwriting analysis expert that the defendant in a smuggling case wrote the note used by the alien for directions on how to enter the U.S. and later found in the possession of the alien(s).)
- (4) Only the best evidence may be introduced in evidence unless it is shown that the best evidence is not available. (**Note:** Black's Law Dictionary states that "the words 'testimony' and 'evidence' are not synonymous.") Although testimony is evidence, evidence may or may not be testimony or may, and in most cases does consist of more than testimony."
- (5) Hearsay testimony, with certain exceptions, as in pedigree cases, is not admissible. (The pedigree exception to hearsay rule allows consideration of hearsay evidence regarding a person's family relationship as proof of existence of the relationship.)
- (6) Any fact that shows motive or preparation for the criminal act is admissible against the defendant.

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(7) Evidence is admissible to show any conduct or condition of the defendant subsequent to the act charged, apparently influenced or caused by the doing of the act, and any act done in consequence of it, or by the authority of it; but the defendant will not be permitted to introduce evidence as to what are generally known as self-serving acts or declarations.

(8) When the defendant's conduct is in issue, or is relevant to the issue, evidence as to statements made in his presence and hearing, by which his conduct is likely to be affected, and the manner of his reception of such statements, is admissible. For example, a statement is made in the hearing of a person and is such that if false, he would naturally deny it and he remains silent.

(9) Res Gestae means literally things or things happened. It is considered as an exception to the hearsay rule. In its operation it renders acts and declarations which constitute a part of the things done and said admissible in evidence, even though they would otherwise come within the rule excluding hearsay evidence or self-serving declarations. The rule is extended to include, not only declarations by the parties involved, but statements or exclamations made by bystanders and strangers asserting the circumstances of the occasion as it is observed by them, is admissible as a spontaneous statement or exclamation.

(10) Evidence of the commission of other crimes may or may not be admissible. The officer should endeavor to learn of other crimes committed by the defendant and should report his information in that respect. The information may at least be helpful to the trial judge in fixing sentence.

(11) In a conspiracy trial, some acts and declarations of co-conspirators are admissible against the defendant on trial, and others are not. Effort should be made to learn about all such acts and declarations, all of which should be reported.

(12) Dying declarations are admissible only in homicide cases.

(13) Statements or declarations made by the defendant or by another person acting under this authority, are admissible against him, but not in his favor.

(14) Character testimony may or may not be admissible, depending on the case.

(15) All facts must be secured. Those that might clear the suspect in the case are just as important as those that might assure his conviction. No possible excuse has ever existed for concealing evidence. Establish sufficient evidence during the course of your inquiry to assure a conviction when the accused comes to trial.

18.13 Definitions.

A list of commonly used definitions in the U.S. court system is contained in Appendix 18.3.

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Chapter 21: Land Border Inspection (Added INS - TM2)

- 21.1 Land Border Inspection Procedures
- 21.2 Secondary Inspection
- 21.3 Persons Arriving by Common Carrier
- 21.4 Cross Designation
- 21.5 Mexican Border Crossing Cards
- 21.6 Canadian Border Crossing Cards
- 21.7 Use of Form I-94
- 21.8 Commuters
- 21.9 Northern Border Inspection System (NorBIS)
- 21.10 Secure Electronic Network for Traveler's Rapid Inspection (SENTRI)
- 21.11 Facilities Inspections
- 21.12 Emergency Procedures during Canadian Air Traffic Controller Strikes

References:

INA: Sections 212, 235.

Regulations: 8 CFR 100, 211, 212, 235.

21.1 Land Border Inspection Procedures.

(a) General. More than 85% of all persons entering the United States each year apply for admission at land border ports of entry. There are several individual land border ports where the number of persons processed annually exceeds the total for all sea and air ports of entry combined.

(b) (1) Land border ports of entry are designated and approved by the Commissioner of CBP. The ports of entry are divided into three classes, depending upon which categories of aliens may be processed. [See 8 CFR 100.4(c)(2).]

(2) The great majority of persons arriving at land border ports are residents of the border area who cross frequently and who are familiar with requirements concerning their entry into the United States. Consequently, at land border ports of entry a screening procedure has been established to rapidly inspect applicants for admission, passing those found readily admissible and referring for further action those requiring more detailed examination.

(3) Without an efficient primary inspection, it would be impossible to process the great volume of applicants at large land border ports or utilize manpower effectively at the smaller ports. The effectiveness of inspections at such ports is entirely

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dependent on the effectiveness of the primary officer. Despite the limited time devoted to each inspection, primary officers at land borders intercept a high volume of fraudulent documents and false claims to U.S. citizenship. Officers at land borders are trained in respective sections of the law pertaining to immigration, import/export of goods and agriculture in order to conduct an effective primary inspection.

(4) (A) An effective primary inspection will not only pertain to an officer's keen ability to oral questioning, but for the officer to be well versed in primary enforcement database systems as well. (Paragraph (b)(4) revised 11/3/04; CBP 6-04)

(B)



(C) Where a passport is not required of an applicant for admission; officers may omit the passport number and passport issuing country. However, where an applicant for admission is not required to present a passport, but does so voluntarily, officers must query the document using the criteria provided in 21.1(b)(5)(B) above.

(D)



(E)



pedestrian applicants

(F)



(G)

