From: (b)(6), (b)(7)c
To:
Subject: FW: Interim Guidance Suspending Alien's Signature Requirement for Form G-28, Notice of Entry of Appearance As Attorney or Accredited Representative, in the Cases of Detained Aliens
Date: Friday, April 11, 2014 11:02:00 AM

This is basically the same as any legal document authorization someone access to your personal information for representation….

From: (b)(6), (b)(7)c
Sent: Thursday, April 10, 2014 7:51 AM
To: Skinner, Felicia S
Subject: RE: Interim Guidance Suspending Alien's Signature Requirement for Form G-28, Notice of Entry of Appearance As Attorney or Accredited Representative, in the Cases of Detained Aliens

Wow! I had not.

(b)(6), (b)(7)c
Chief Counsel, DHS ICE
OPLA/OCC
Georgia, NC, SC
404 893 (6), (b)(7

From: Skinner, Felicia S
Sent: Thursday, April 10, 2014 7:48 AM
To (b)(6), (b)(7)c
Subject: FW: Interim Guidance Suspending Alien's Signature Requirement for Form G-28, Notice of Entry of Appearance As Attorney or Accredited Representative, in the Cases of Detained Aliens

Have u seen this

From: (b)(6), (b)(7)c
Sent: Thursday, April 10, 2014 7:42 AM
Subject: Interim Guidance Suspending Alien's Signature Requirement for Form G-28, Notice of Entry of Appearance As Attorney or Accredited Representative, in the Cases of Detained Aliens

The following message is being sent on behalf of Philip T. Miller, Assistant Director for Field Operations:

To: Assistant Directors, Deputy Assistant Directors, and Field Office Directors

Subject: Interim Guidance Suspending Alien's Signature Requirement for Form G-28, Notice of Entry of Appearance As Attorney or Accredited Representative, in the Cases of Detained Aliens

Please immediately distribute this guidance to your employees.

The Department of Homeland Security has designated Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, as the form on which attorneys or accredited representatives provide information to establish their eligibility to appear and act

on behalf of an applicant, petitioner, or respondent. The companion instructions require that the Form G-28 be signed by the applicant, petitioner, or respondent.

The signature of the applicant, petitioner, or respondent constitutes consent to the disclosure to the named attorney or accredited representative "of any record pertaining to [the alien] that appears in any system of records of USCIS, ICE or CBP." However, disclosure of A-file records, GEMS records, and ENFORCE records to attorneys or representatives for use in proceedings before USCIS, CBP, and ICE are authorized pursuant to routine uses in the respective DHS System of Record Notices (SORNS). *Therefore, the ICE Privacy Officer has determined that the subject alien's signature is not required in order for ICE personnel to disclose information to attorneys or accredited representatives who have executed an otherwise complete and compliant Form G-28.*

In order to facilitate access to counsel and ease administrative burdens on ERO, pending further guidance, **ERO will no longer require that DETAINED aliens sign the Form G-28 before disclosing information to attorneys or accredited representatives who have completed and signed the Form G-28.**

Attorneys or accredited representatives who misrepresent the nature of their relationship with an alien, or otherwise misuse the Form G-28, are accountable under the professional responsibility and ethics rules of their licensing state bars, as well as applicable regulations. Such misuse instances discovered by ERO personnel should immediately be brought to the attention of the local Office of the Chief Counsel. Please note also that *family members* are not, solely based on their relationship, "attorneys or accredited representatives" and thus cannot sign the Form G-28 on behalf of the alien to any legal effect unless they are the alien's parent or legal guardian. Such individuals may receive limited information from DHS records in accordance with the ENFORCE SORN, which allows disclosure "[t]o family members and attorneys or other agents acting on behalf of an alien, to assist those individuals in determining whether (1) the alien has been arrested by DHS for immigration violations; (2) the location of the alien in DHS custody; or (3) the alien has been removed from the United States, provided however, that the requesting individuals are able to verify the alien's date of birth or Alien Registration Number (A-number) or can otherwise present adequate verification of familial or agency relationship with the alien."

(b)(6), (b)(7)c

From: (b)(7)e
Sent: Thursday, April 10, 2014 9:57 AM
To: (b)(7)e
Subject: Interim Guidance Suspending Alien's Signature Requirement for Form G-28, Notice of Entry of Appearance As Attorney or Accredited Representative, in the Cases of Detained Aliens

This message is being sent on behalf of the Acting Field Office Director (b)(6), (b)(7)c

(b)(6), (b)(7)c

From: (b)(6), (b)(7)c
Sent: Thursday, April 10, 2014 07:41 AM Eastern Standard Time
Subject: Interim Guidance Suspending Alien's Signature Requirement for Form G-28, Notice of Entry of Appearance As Attorney or Accredited Representative, in the Cases of Detained Aliens

The following message is being sent on behalf of Philip T. Miller, Assistant Director for Field Operations:

Subject: **Interim Guidance Suspending Alien's Signature Requirement for Form G-28, Notice of Entry of Appearance As Attorney or Accredited Representative, in the Cases of Detained Aliens**

Please immediately distribute this guidance to all employees.

The Department of Homeland Security has designated Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, as the form on which attorneys or accredited representatives provide information to establish their eligibility to appear and act on behalf of an applicant, petitioner, or respondent. The companion instructions require that the Form G-28 be signed by the applicant, petitioner, or respondent.

The signature of the applicant, petitioner, or respondent constitutes consent to the disclosure to the named attorney or accredited representative "of any record pertaining to [the alien] that appears in any system of records of USCIS, ICE or CBP." However, disclosure of A-file records, GEMS records, and ENFORCE records to attorneys or representatives for use in proceedings before USCIS, CBP, and ICE are authorized pursuant to routine uses in the respective DHS System of Record Notices (SORNS). *Therefore, the ICE Privacy Officer has determined that the subject alien's signature is not required in order for ICE personnel to disclose information to attorneys or accredited representatives who have executed an otherwise complete and compliant Form G-28.*

In order to facilitate access to counsel and ease administrative burdens on ERO, pending further guidance, **ERO will no longer require that DETAINED aliens sign the Form G-28 before disclosing information to attorneys or accredited representatives who have completed and signed the Form G-28.**

Attorneys or accredited representatives who misrepresent the nature of their relationship with an alien, or otherwise misuse the Form G-28, are accountable under the professional responsibility and ethics rules of their licensing state bars, as well as applicable regulations. Such misuse instances discovered by ERO personnel should immediately be brought to the attention of the local Office of the Chief Counsel. Please note also that *family members* are not, solely based on their relationship, "attorneys or accredited representatives" and thus cannot sign the Form G-28 on behalf of the alien to any legal effect unless they are the alien's parent or legal guardian. Such individuals may receive limited information from DHS records in accordance with the ENFORCE SORN, which allows disclosure "[t]o family members and attorneys or other agents acting on behalf of an alien, to assist those individuals in determining whether (1) the alien has been arrested by DHS for immigration violations; (2) the location of the alien in DHS custody; or (3) the alien has been removed from the United States, provided however, that the requesting individuals are able to verify the alien's date of birth or Alien Registration Number (A-number) or can otherwise present adequate verification of familial or agency relationship with the alien."

U.S. Immigration and Customs Enforcement

Document Number: ERO 11157.1
Effective Date: 5/14/2013
Office of Primary Responsibility: AD for Secure Communities and Enforcement

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

Enforcement and Removal Operations
Criminal Alien Division
Criminal Alien Program
Handbook

Version 1.0

This document was prepared for authorized distribution only.
It has not been approved for public release.

Approved by: (b)(6), (b)(7)c
Title: AD for Secure Communities & Enforcement
Date signed: 5/14/13

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Code of Federal Regulations

Title 8: Aliens and Nationality

- §1, § 208, § 214, § 217, § 235, § 236, § 238, § 239, § 240, § 241, § 244, § 287, § 292, § 1003, § 1240, § 1244

United States Code

Title 8: Aliens and Nationality

- § 1187, § 1231, § 1225, § 1227, § 1253, § 1254, § 1304, § 1306, § 1324, § 1325, § 1326, § 1357, § 1327, § 1328

Title 18: Crimes and Criminal Procedure

- § 2, § 3, § 371, § 911, § 922, § 1001, § 1546, § 3231, § 3237, § 3238

Immigration and Nationality Act

- § 101, § 103, § 212, § 216, § 217, § 235, § 236, § 237, § 238, § 240, § 241, § 244, § 287, § 328, § 329

Federal Rules of Criminal Procedure

- Title IV, Rule 16, Discovery and Inspection
- Title V, Rule 18, Place of Prosecution and Trial
- Title V, Rule 20, Transfer for Plea and Sentence
- Title VIII, Rule 41, Search and Seizure

Federal Rules of Evidence

- 803 Hearsay Exceptions; Availability of Declarant Immaterial.
- 901, Requirement of Authentication or Identification
- 902, Self-authentication

ICE Policy

- DROPPM, Chapter 14, Removal Process Non-Hearing Removal Cases
- Interim ICE Firearms Policy (July 7, 2004)
- Memoranda:
    - September 3, 2004: "Issuance of Notices to Appear, Administrative Orders of Removal, or Reinstatement of a Final Removal Order on Aliens with United States Military Service," Victor X. Cerda
    - April 27, 2006: "Record of Proceedings in Reinstatement and Administrative Removal Cases," John P. Torres
    - August 20, 2007: "DRO/OI Protocols," Marcy M. Foreman/John P. Torres
    - September 08, 2008: "Prosecution Reporting," James T. Hayes Jr.
    - September 08, 2008: "Reporting Guidance for the Criminal Alien Program (Follow-up to Director's July 11, 2006 Memorandum)," John P. Torres
    - September 1, 2009: "Updated Directives for the CAP Case Identification in ENFORCE," David J. Venturella
    - October 14, 2009: "Department of Defense (DOD) Enlistment of Certain Nonimmigrant and other Aliens Determined to be Vital to the National Interest," David J. Venturella
    - November 19, 2009: "Superseding Guidance on Reporting and Investigation of Claims to United States Citizenship," John Morton
    - March 2, 2011: "Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens," John Morton
    - July 29, 2011: "Enforcement and Removal Encounters," Gary Mead
    - December 3, 2012: "Enforcement Operations Property Protocols Directive," Gary Mead

Other References

- Haitian Refugee Immigration Fairness Act of 1998 (HRIFA)
- Illegal Immigration Reform and Immigrant Responsibility Act of 1996
- Nicaraguan Adjustment and Central American Relief Act (NACARA)
- United Nations Convention Against Torture

Court Cases

- *Berghuis v. Thompkins*, 130 S.Ct. 2250 (2010)
- *Giglio v. United States*, 405 U.S. 150 (1972)
- *INS vs. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271 (2001)
- *Miranda v. State of Arizona*, 384 U.S. 436 (1966)
- *Maryland v. Shatzer*, 130 S.Ct. 1213 (2010)
- *Orantes-Hernandez v. Holder*, No. 82-01107 (C.D. Cal. filed Nov. 26, 2007)
- *United States v. Chen*, 439 F.3d 1037, 1040 (9th Cir. 2006)
- *United States v. Lujan-Castro*, 602 F.2d 877 (9th Cir. 1979)
- *Zadvydas v. Davis*, 533 U.S. 678

PURPOSE AND SCOPE

This handbook provides policies and best practices that are to be followed by all personnel performing Criminal Alien Program (CAP) duties. The handbook is intended to be the foundation for CAP training in Enforcement and Removal field offices and focuses on the identification of criminal aliens, case preparation, and removal proceedings, while allowing for the flexibility to adhere to established local operational procedures. While the handbook contains investigative tools and resources, it should not be construed as an exhaustive guide to conducting CAP operations.

It is the responsibility of the Senior Field Training Officer to monitor and document all CAP training. A complete list of all forms mentioned in this handbook can be found in Appendix 1: List of Forms.

CAP OVERVIEW

One of the most important mandates to U.S. Immigration and Customs Enforcement (ICE) is the enhancement of public safety and the security of the American public. ICE's broad authority allows for the identification and removal of dangerous, often recidivist, criminal aliens engaged in crimes such as murder, predatory sexual offenses, narcotics trafficking, alien smuggling, and a host of other crimes that have a profoundly negative impact on our society. The Criminal Alien Division (CAD) supports this mandate through strategic planning and the establishment of sound policies which augment ICE's ability to arrest and remove these dangerous individuals from the United States. CAD is responsible for allocating resources and personnel to the 24 Enforcement and Removal Operations (ERO) Field Offices, as well as developing and monitoring performance metrics which measure the overall effectiveness of its planning and field office enforcement efforts. CAD achieves these important goals through its three supporting units: CAP, 287(g), and Secure Communities.

CAP's mission is to provide ICE-wide direction and support in the identification and apprehension of foreign born nationals who are incarcerated within federal, state, and local prisons and jails, as well as at-large criminal aliens. It is incumbent upon ICE to ensure that all efforts are made to investigate, arrest, and remove individuals from the United States by processing the alien expeditiously and securing a final order of removal for an incarcerated alien before the alien is released to ICE custody. The identification and processing of incarcerated criminal aliens, before release from jails and prisons, decreases or eliminates the time spent in ICE custody awaiting removal, thereby reducing the overall cost to the federal government.

Additionally, integral to the effective execution of this program is the aggressive prosecution of criminal offenders identified by ERO officers during the course of their duties.

In accordance with its programmatic oversight, CAP oversees the following initiatives:

Violent Criminal Alien Section (VCAS)

The primary responsibility of VCAS is to enforce violations of criminal immigration law found through the enforcement activities of Enforcement and Removal Operations (ERO). The aggressive prosecution of criminal offenders identified by ERO officers, in conjunction with the U.S. Attorney's Office, further enhances public safety and provides a significant deterrent to recidivism.

Joint Criminal Alien Removal Taskforce (JCART)

Mission Statement:

To uphold public safety and national security through the establishment of taskforces in collaboration with federal, state and local law enforcement agencies to identify and arrest at-large criminal aliens.

Responsibilities:

JCART is responsible for the identification, investigation and arrest of at large criminal aliens with, but not limited to, convictions for a multitude of crimes such as drug trafficking offenses, crimes of violence and sex offenses. JCART will also identify and target aliens involved in human trafficking, smuggling, and Transnational Organized Crime (TOC) for increased information collection. JCART will partner with other agencies such as Probation and Parole Offices, the United States Marshals Service, Immigration and Customs Enforcement (ICE) Homeland Security Investigations (HSI), U.S. Customs and Border Protection (CBP), the Bureau of Prisons (BOP), and at the request of local law enforcement agencies (LEA) conducting special operations.

Law Enforcement Agency Response Unit (LEAR)

Mission Statement:

Respond to requests for assistance from federal, state and local law enforcement agencies, to identify and arrest foreign born nationals found illegally in the United States and to disrupt high-risk smuggling pathways.

Responsibilities:

The Law Enforcement Agency Response Unit (LEAR) was established in the ICE Office of Enforcement and Removal Operations (ERO) in Phoenix, Arizona, to provide 24/7 response to all calls for assistance from state and local law enforcement agencies (LEAs) related to suspected immigration law violators. LEAR determines nationality, immigration status and amenability to removal; makes arrests; places immigration detainers; provides transportation; and processes aliens found amenable to removal. LEAR operations will facilitate ICE disruption efforts against human trafficking, smuggling and Transnational Organized Crime.

Probation and Parole

ERO enforcement officers may conduct probation and parole enforcement efforts in order to identify, investigate, and arrest foreign born nationals who have been convicted of crimes which render them eligible for removal.

U.S. Citizenship and Immigration Services (USCIS) Egregious and Non-Egregious Referrals

Working in collaboration with USCIS, ERO receives and investigates referrals in order to place into removal proceedings those applicants who have been denied immigration benefits.

Rapid Repatriation of Eligible Custodial Aliens Accepted for Transfer (Rapid REPAT)

Rapid REPAT is a joint partnership with state correctional/parole agencies designed to expedite the process of identifying and removing criminal aliens from the U.S. by allowing selected non-violent criminal aliens incarcerated in U.S. prisons and jails to accept early release in exchange for voluntarily returning to their country of origin.

Treaty Transfer

Under U.S. law (18 U.S.C. §§ 4100-4115), foreign nationals convicted of a crime in the United States, and United States citizens or nationals convicted of a crime in a foreign country, may apply for a prisoner transfer to their home country if a treaty providing for such transfer is in effect between the United States and the foreign country involved. The list of nations currently holding treaty transfer status is published on the Department of Justice (DOJ) website. http://www.justice.gov/criminal/oeo/iptu/lists.html

DEPORT Center

Located in Chicago, the DEPORT serves as the designated centralized interview and processing site for convicted criminal aliens incarcerated by the Federal Bureau of Prisons. Through the combined effort of the DEPORT Center and local ERO resources, criminal aliens from all 114 federal detention facilities are taken into ERO custody upon completion of their sentences.

ROLES AND RESPONSIBILITIES

Field Office Director (FOD): Implements policies and procedures as set forth by the Executive Associate Director of ERO, within the field office's area of operational responsibility (AOR).

Deputy Field Office Director (DFOD): Ensures FOD directives are implemented within the field office's AOR.

Assistant Field Office Director (AFOD): Assists the FOD and DFOD in managing the daily operations and procedures of enforcement, detention, and removal management throughout the field office's AOR.

Supervisory Detention and Deportation Officer (SDDO): Supervises a staff responsible for the enforcement, detention, and removal of aliens, including conducting legal research to support decisions on the deportation / exclusion of aliens and assisting attorneys in representing the government in court actions. Additionally, SDDOs supervise enforcement operations, detention management, case-management functions, removable alien processing, and operations.

Deportation Officer (DO): Reviews case files and ensures that all documents are legally sufficient for submission to the Office of the Principal Legal Advisor. Function as an Immigration Enforcement Agent or as an SDDO if operational needs dictate.

Immigration Enforcement Agent (IEA): Identifies, apprehends arrests, prosecutes, detains, and removes aliens and apprehends absconders from removal proceedings. Process for removal any aliens encountered who are not authorized to be in or work in the United States.

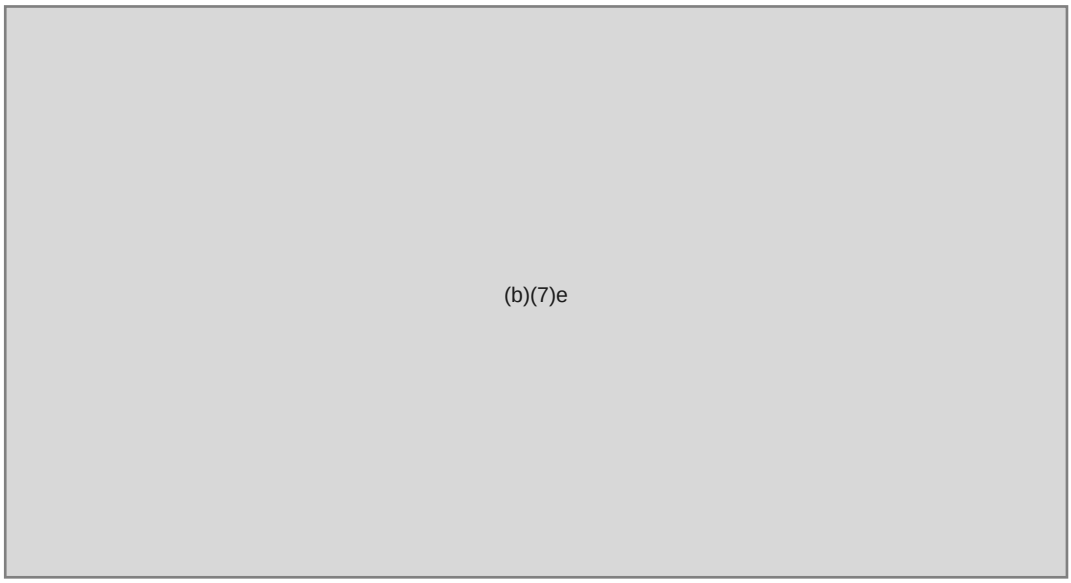
Office of Principal Legal Advisor (OPLA): The Office of Principal Legal Advisor (OPLA) provides legal advice, training, and services to support the ICE mission and defends the interests of the United States in the administrative and federal courts. OPLA protects the security of the United States by providing professional, highly motivated, and client-focused staff in sufficient numbers to promptly and effectively prosecute immigration and customs law violators, particularly those who threaten the safety of our citizenry.

ACCESSING RECORDS

ERO enforcement personnel routinely encounter cases that involve, or appear to involve, removable aliens. In such instances, enforcement personnel must first identify whether an individual is an alien and being truthful about his or her presence in the United States. Next, a determination must be made as to whether the individual has had prior encounters with ICE, the Department of Homeland Security (DHS) or other law enforcement agency, and whether they should be placed in removal proceedings, is amenable to any form of administrative removal, has an outstanding order of final removal, or is eligible for relief from removal. Enforcement personnel who develop successful interview skills and become proficient in document examination are best able to make sound decisions regarding enforcement actions. In addition, familiarization with all automated systems and databases containing information related to the individual's identity, immigration status, and other pertinent records is essential.

Useful automated systems include:

(b)(7)(E)



INTERVIEWS

An interview is a formal or informal questioning of a witness or other individual with knowledge of the matter under inquiry.

Interviews consist of formal questioning of persons, be they the subject of an investigation or a witness, and are designed to elicit specific, pertinent information. During interviews, special techniques and cross-examination may be used. Keep in mind that as an interview progresses and as more information is made known, the interview may develop into an interrogation.

Standard practice is to memorialize interview and interrogation results in writing on Records of Deportable / Inadmissible Aliens, Memoranda of Investigation, Reports of Investigation, and Sworn Statements. Any notes taken by ERO enforcement officers in the course of conducting an interview or interrogation of a potential witness, informant, suspect or subject of an investigation in a criminal case are subject to discovery. When interviewing a subject on a criminal matter, ERO enforcement officers must preserve such notes, even if their contents have been subsequently documented in another system.

Interviews conducted by ERO officers can take place in any number of environments including, but not limited to, federal detention centers, federal and state detention facilities, local jails, and impromptu locations in the field. Various interview methods can be used, which include, but are not limited to, in-person, telephonic, through an interpreter, or via video teleconferencing (VTC). However the interview is conducted, it must follow a distinct line of questioning that ultimately leads to a determination of alienage and removability. This determination is the basis for future detention and processing of the alien and may lead the subject on the path to administrative removal or may lead to the filing of criminal charges.

All attempts will be made to interview an individual in person. If an in-person interview is not possible, VTC or telephonic interviews are acceptable. Even if the interview is not conducted in person, the ERO enforcement officer still must be able, in good faith, to assess the subject's physical and mental states prior to making a determination of alienage.

Interviews of Potential Non-Citizens

ERO enforcement officers should thoroughly prepare in advance for interviews to ensure that all pertinent details are covered. Complete familiarity with all available facts prior to an interview will enable the interviewing officer to detect any discrepancies or misrepresentation of facts. This preparation will also allow the interviewer to immediately confront the subject when discrepancies are identified and provide the interviewer with the opportunity to persuade the subject to provide accurate information. Furthermore, thorough preparation is vital to the successful prosecution of an individual, to include a possible false claim to United States citizenship. All information obtained both during the course of and subsequent to the interview, will be processed into the Enforcement Integrated Database (EID) (i.e., ENFORCE system).

There are three categorical outcomes to the interviews conducted by CAP officers, as the individual is categorized as: 1) an illegal alien; 2) as an alien legally present in the United States (such as a Lawful Permanent Resident (LAPR) or a non-immigrant who is in status); or 3) as a United States Citizen (by birth, derived, or naturalized). (See November 19, 2009 memorandum from ICE Director John Morton, "Superseding Guidance on Reporting and Investigation of Claims to United States Citizenship.")

All ERO enforcement officers who encounter a foreign born individual who makes a claim to United States Citizenship shall immediately notify the FOD through their chain of command. The FOD shall make the appropriate notification to Headquarters (HQ) ERO. FODs shall ensure that all claims to United States Citizenship made by an individual encountered within their AOR, both by ICE ERO staff or 287(g) cross-trained staff, are appropriately reported and investigated.

If an individual is in custody and subjected to questions that are likely to elicit an incriminating response (i.e., information or admission relating to criminal conduct involving the individual being interviewed), ERO enforcement officers must provide the Miranda warning. (See Appendix 2: Miranda Warning.) If they do not administer the warning, officers risk the ability to use statements made by the individual in a subsequent criminal prosecution.

If criminal prosecution is being contemplated and alienage is an element of the crime [e.g., prosecution under 8 U.S.C. § 1325, 8 U.S.C. § 1326, or 18 U.S.C. § 922g(5)],

then questioning about the individual's alienage should not proceed without first advising the individual of his or her rights.

In the event that a foreign-born individual makes a claim to United States citizenship, ERO enforcement officers shall advise them of their Miranda rights as per ICE Form 73-025 and further inform the individual that any false statements will be in violation of 18 U.S.C. § 1001 and that any false claims to United States citizenship will be in violation of 18 U.S.C. § 911. A sworn statement shall be taken and witnessed to ensure that false statements and/or claims to United States citizenship post-Miranda will be admissible in criminal proceedings. The FOD, in consultation with OPLA or the local Office of Chief Counsel, will determine whether sufficient evidence exists to place that individual into removal proceedings or to present the case for criminal prosecution to the local USAO.

United States Citizen Interviews

If, while investigating the commission of a crime during the course of routine duties, an ERO enforcement officer interviews a United States Citizen, and that interview expands beyond basic biographical information, the officer shall administer the Miranda warnings. If the officer determines that there is probable cause to believe that a federal crime has been committed, the subject can be arrested and the case shall be immediately referred to the United States Attorney's Office.

ADVISAL OF RIGHTS

Legal Considerations

Knowledge of the INA and the laws applicable to the specific offense(s) under investigation prior to conducting an interview or interrogation will assist ERO enforcement officers in evaluating the relevance of the information they receive, as well as in detecting incriminating and relevant statements that may further support the government's prosecution efforts.

It is imperative that ERO enforcement officers understand the differences between a criminal proceeding and an administrative proceeding as each requires its own advisement of rights specific to that proceeding. When criminal prosecution is contemplated, the law requires the individual be advised of his or her right against self-incrimination prior to any custodial interrogation. However, in those instances where only administrative proceedings are contemplated, the individual must be advised of his or her rights pursuant to 8 C.F.R. § 287.3(c).

Administrative Proceedings within the Context of Title 8

As stated in ICE memorandum entitled "Superseding Guidance on Reporting and Investigating Claims to United States Citizenship:" issued by ICE Director John Morton on November 19, 2009:

> "While performing their duties, U.S. Immigration and Customs Enforcement (ICE) officers, agents, and attorneys, may encounter aliens who are not certain of their status or claim to be United States citizens. As the Immigration and Nationality Act (INA) provides numerous avenues for a person to derive or acquire U.S. citizenship, ICE officers, agents, and attorneys should handle these matters with the utmost care and highest priority. While some cases may be easily resolved, because of the complexity of citizenship and nationality law, many may require additional investigation and substantial legal analysis. As a matter of law, ICE cannot assert its immigration enforcement authority to arrest and or detain a U.S. citizen. Consequently, investigations into an individual's claim to U.S. citizenship should be prioritized and Office of Enforcement and Removal (ERO) …personnel must consult with the Office of the Principal Legal Advisor's (OPLA) local Office of the Chief Counsel (OCC)…"

As set forth in the INA § 287(a)(1), 8 U.S.C. § 1357(a)(1), and its implementing regulations at 8 C.F.R. § 287.5(1), ERO enforcement officers may question, without a warrant, any alien or person believed to be an alien as to his or her right to be or to remain in the United States. Questioning alone does not constitute a Fourth Amendment seizure. The individual being interviewed, however, must voluntarily remain during the interview. If the individual refuses to speak to the ERO enforcement officer, the individual may not be detained, absent reasonable suspicion that the individual is unlawfully present.

Non-immigrants must provide full and truthful information regarding their immigration status when requested to do so by ERO enforcement officers, and failure to do so shall constitute a failure to maintain their non-immigrant status under INA § 237(a)(1)(C)(i), and 8 U.S.C § 1227 (a)(1)(C)(i). (See also 8 C.F.R. § 214.1(f).)

If the ERO enforcement officer is not seeking information that will be used to criminally prosecute the alien, the interview, including the taking of a sworn statement, should proceed, utilizing standard processing methods, which include advising the individual of his or her rights under the INA. The absence of Miranda warnings does not render an otherwise voluntary statement by the respondent inadmissible in a deportation hearing. Thus, there is no need to provide Miranda warnings to an alien being processed for removal proceedings.

Required Advisements in Administrative Proceedings

An ERO enforcement officer who arrests an alien for an administrative immigration violation without a warrant is not obligated to advise the alien of his right to counsel or that statements made during interrogation may be used against them in a removal proceeding. Once it is determined that an individual is subject to removal from the United States and before the NTA has been filed with the Court, the ERO enforcement officer should advise him or her that:

- He or she has been arrested because it is believed that he or she is an alien not lawfully entitled to be or to remain in the United States;
- He or she has the right to be represented by counsel of their own choice at no expense to the U.S. Government; and
- Any statement he or she makes can be used against him or her in a subsequent administrative proceeding.

Additionally, as set forth in 8 C.F.R. § 287.3(c), at the time ERO enforcement officers provide the individual with a Notice to Appear (NTA), the ERO enforcement officer shall provide the alien with a list of available free legal services. ERO enforcement officers should note on form I-213 that such a list was provided to the alien.

General Privileges During Administrative Proceedings

The removable alien is generally provided a hearing before the Immigration Court to determine whether the alien may remain in the United States. (This is not the case in reinstatements, administrative removals, or visa waiver violations.)

The alien may request to return to his or her country as soon as possible, without a hearing.

The alien may contact an attorney or other legal representative to represent the alien at hearings, or to answer any questions regarding the alien's legal rights in the United States. (See 8 C.F.R. § 292.5.)

The alien may communicate with the consular or diplomatic officer from the alien's country. (This is to be noted on the I-213)

The alien may use a telephone to call a lawyer, other legal representative, or consular officer at any time prior to the alien's departure from the United States.

If the alien wants to consult with counsel or have counsel present, ERO enforcement officers shall obtain the biographic information needed to continue the processing and

allow the alien to call counsel. ERO enforcement officers can reinitiate communication about the case at any time for administrative proceedings.

Miranda Warnings (Criminal Proceedings)

The United States Constitution and statutory authorities require ERO enforcement officers to respect the rights of witnesses and suspects. Confessions, and testimony related to the confessions, are inadmissible at trial if illegally or improperly obtained. Therefore, it is crucial that information obtained during interviews and interrogations is obtained legally. Under no circumstances can ERO enforcement officers justify a violation of an individual's Constitutional rights. ERO enforcement officers must advise an alien of his or her rights pursuant to *Miranda v. State of Arizona*, 384 U.S. 436 (1966) prior to custodial questioning. Two recent Supreme Court decisions provide further guidance regarding Miranda warnings:

- On February 24, 2010, the United States Supreme Court issued a decision outlining the applicability of the Miranda warnings to criminal suspects in custody. *Maryland v. Shatzer*, 130 S.Ct. 1213 (2010). The court determined that an incarcerated individual, who has invoked his right to the presence of counsel during custodial interrogation, may be questioned again if there is a break in *Miranda* custody lasting more than two weeks between the first and second attempts at interrogation.

- On June 1, 2010, the United States Supreme Court delivered its decision in *Berghuis v. Thompkins*, 130 S.Ct. 2250 (2010) that clarifies the process for asserting Miranda rights for criminal suspects. Pursuant to this decision, an individual who makes statements after being advised that he or she "has the right not to" has not exercised his right to remain silent. While the rights to remain silent and to have an attorney present during questioning are key warnings cited in Miranda, an individual must verbally invoke them. The Supreme Court's majority decision states that suspects must unambiguously invoke their right to remain silent by verbally communicating it to an officer, and the same rule applies when a suspect wants a lawyer.

Additional case law precedent was set in *United States v. Chen*, 439 F.3d 1037, 1040 (9th Cir. 2006). The defendant made statements during an interview with an Immigration and Naturalization Service (INS) agent who was investigating a third party smuggling ring. At the time of the interview, the defendant was in custody on an administrative deportation warrant. The district court concluded that the INS agent was required to give a Miranda warning before the interview, and therefore granted the defendant's motion to suppress. The Ninth Circuit Court of Appeals affirmed the district court's decision to suppress the defendant's statements.

Administering Miranda Warnings

ERO enforcement officers should read the Miranda warning directly from the ICE Form 73-025 (Statement of Rights) as it is the only version of the Miranda warning authorized by ICE. ERO enforcement officers should not attempt to recite the warnings from memory as reading the Miranda warnings ensures that the warnings are recited in the same manner to each and every individual and supports the ERO enforcement officer's claim that the entire Miranda warning was presented to the individual.

ERO enforcement officers should always document the reading of the Miranda warning by having the individual sign the ICE Form 73-025 in the designated location. Whenever possible, the reading and signing of the form should be witnessed by another ERO enforcement officer and documented by the ERO enforcement officer's signature on the form in the designated location. If another ERO enforcement officer is not available, then another law enforcement officer or other reliable person may witness the reading of the rights.

Whenever possible, ERO enforcement officers should record all statements which may be used in criminal proceedings against the individual in a written sworn statement or in electronic media. This statement should reiterate the advisement of rights and should also state clearly that the individual's rights were explained fully and that the individual freely waived his or her rights before the statement was recorded.

If there is a significant time lapse during the interview process, it is best practice to re-advise an individual of the Miranda rights and again obtain a waiver prior to resuming the interview. At a minimum, ERO enforcement officers should confirm that the individual still understands his or her rights and wishes to continue with the interview.

Circumstances in Which Miranda Warnings Are Not Required

Custody is defined as a situation in which a person has been arrested or deprived of his or her freedom of action in any significant way. Miranda warnings are not required if an individual is not in custody. If ERO enforcement officers engage an individual in a consensual interview, defined as one in which the individual believes that he or she is free to terminate the encounter at any time, then the ERO enforcement officers may ask questions without providing the Miranda warnings.

Miranda warnings are not required when interviewing an individual if the sole purpose is to obtain evidence concerning the guilt of someone else, so long as the questions are not likely to elicit an incriminating response and the anticipated answer will not incriminate the individual making the statement.

The Miranda warnings do not have to be provided for custodial interrogation that is reasonably prompted by a concern for the public safety. This occurs in circumstances that give rise to an immediate concern for the safety of the public or officers and applies solely to questions that are reasonably prompted by that concern.

The Right to Remain Silent

If, at any time prior to or during the interview, the individual verbally indicates a wish to remain silent, ERO enforcement officers should not initiate or must terminate the interview. Once the individual has invoked his or her right to remain silent, ERO enforcement officers should not ask any additional questions of the individual being interviewed. There are two circumstances when the interview may continue:

1) If the individual requests on his or her own volition that the interview be resumed; or

2) After waiting a reasonable period of time, ERO enforcement officers may once again approach the individual in an effort to re-initiate the interview but should advise the individual of his or her rights again. See *Maryland v. Shatzer*, 130 S.Ct. 1213 (2010) *Miranda* custody interview guidance.

The Right to Counsel

If the individual wants to consult with counsel, ERO enforcement officers must not initiate any questioning or must immediately cease all questioning and terminate the interview if the interview has already started. A subsequent waiver of Miranda rights by an individual who has previously invoked his or her right to counsel under Miranda, and who is re-approached by ERO enforcement officers, is presumed to be involuntary. Questioning of the individual may resume if the individual being interviewed re-initiates communication about the case with the ERO enforcement officer and verbally indicates that he or she wants to continue with the interview without consulting counsel. This should be properly documented within the person's file.

USE OF INTEPRETERS

It is imperative that ERO enforcement officers communicate with any individual being interviewed as to alienage and removability in a language the individual understands and speaks. Often it will be necessary to utilize an interpreter to comply with this mandate. The willingness to proceed without an interpreter on the part of the individual being interviewed cannot be the sole factor upon which ERO enforcement officers rely in making the determination as to whether or not to utilize an interpreter. The ERO enforcement officer must ensure that the individual is able

to understand and answer all questions being asked. If there is any doubt, the services of an interpreter must be utilized.

If the interpreter is an ICE employee, no oath is necessary; the interpreter is simply identified for the record. If the interpreter is not an ICE employee, the interpreter's qualification to interpret in the language of the individual being interviewed must also be established in the record. This can be accomplished by asking the interpreter to confirm for the record his or her ability to understand the language the individual being interviewed is speaking, as well as his or her ability to translate from that language into English and vice versa.

Documentation of Interpreter Information in the Record

Whether or not an interpreter is used, the record should always include questions and answers concerning the need for an interpreter. When an interpreter is used, the record should indicate that the interpreter and the individual being interviewed have conversed, and that they are able to clearly understand each other.

Many languages have several different dialects which require that the interpreter and the individual being interviewed establish that they are able to clearly understand each other in the specific dialect being utilized. Again, this information should be documented in the written record of the interview.

Any difficulties in communication should be included in the record of the interview, along with the steps taken to resolve the difficulty. Interpreters from the Department of Homeland Security (DHS) Interpreter Pool should be utilized whenever possible.

Precise Instructions for Interpreters

When utilizing an interpreter, ERO enforcement officers must ensure that the interpreter is instructed to translate everything the individual being interviewed says, including any requests for clarification. There should be no side conversations between the individual and the interpreter, including attempts on the part of the interpreter to help the individual understand the question, or to coach the individual as to how to answer a question.

ERO enforcement officers may be unaware of what is transpiring unless they insist the interpreter repeat all answers *verbatim.* Interpreters should never be permitted to say, "He says…" or "She says…" instead of translating exactly what is said by the person being interviewed.

Substitutions of Interpreters

When necessary, a second interpreter may be substituted for the initial interpreter during the course of the interview. As a quality control check, select questions that

were asked through the original interpreter to ensure that they can be repeated; the answers made through the new interpreter will serve both as a check on the veracity of the individual being interviewed, as well as on the ability and performance of the interpreters.

Clarification of Legal and Other Technical Terminology

Care must be taken to ensure the interpreter understands the specific meaning of a word or phrase in an immigration enforcement context. The interviewer should explain to the interpreter that if a word or phrase is used that the interpreter does not clearly understand, the interpreter should ask the interviewer to clarify the specific meaning of that word or phrase.

DETAINERS

Legal Authority

ICE issues immigration detainers to federal, state, and local LEAs to provide notice of ICE's intent to assume custody of an individual presently in a LEA's custody. ICE's detainer authority, codified in 8 C.F.R. § 287.7 and 8 U.S.C. 1357, arises from the Secretary's power under INA § 103(a)(3) to provide regulations "necessary to carry out [her] authority," and from ICE's general authority to detain individuals who are subject to removal or removal proceedings.

Detainers are a particularly important tool in helping ICE to satisfy Congressional mandates to take custody of criminal aliens. For example, INA § 241(a)(1)(B)(iii) requires ICE to take custody of aliens with final removal orders upon release from criminal detention or confinement. Similarly, INA § 236(c) requires ICE to take custody of certain criminal aliens subject to removal proceedings when they are released from criminal custody, including those who are inadmissible.

Immigration detainers have three key functions: 1) to notify a LEA that ICE intends to arrest or remove an alien in the LEA's custody once the alien is no longer subject to the LEA's detention; 2) to request information from a LEA about an alien's impending release so ICE may assume custody before the alien is released from the LEA; and 3) to request that the LEA maintain custody of an alien who would otherwise be released for a period not to exceed 48 hours (excluding Saturdays, Sundays, and holidays) to provide ICE time to assume custody if ICE cannot immediately assume custody. This third function allows ICE to take custody of aliens arrested in remote areas where ICE may not have personnel in place. Immigration detainers have been used in this fashion for several decades and are critical to ICE's mission and function.

Proxy Arrests

To facilitate ICE arrests, 8 C.F.R. § 287.7(d) allows ICE to request the LEA "maintain custody" of aliens who are "not otherwise detained." The "not otherwise detained" language has historically been interpreted to refer to aliens who were arrested by another LEA, but whose detention has ended. If an alien is lawfully arrested but the charges are dropped, bail is granted, or the alien completes his criminal sentence, then the individual is "not otherwise detained." This interpretation is consistent with the phrase "maintain custody," which indicates that the individual is already in the LEA's custody, and with the regulation provision regarding detainers issued on an "alien presently in the custody of [another] agency."

Priorities for the Apprehension, Detention, and Removal of Aliens

ICE is charged with enforcing the nation's immigration laws. This is a critical mission with direct significance for our national security, public safety, and the integrity of our border and immigration controls. In light of the large number of administrative violations the agency is charged with addressing and the limited enforcement resources, ICE must prioritize the use of its enforcement personnel, detention space, and removal resources to ensure that the removals the agency does conduct promote the agency's priorities of national security, public safety, and border security.

As outlined in the March 2, 2011 memorandum from ICE Director John Morton regarding "Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens," the following shall constitute ICE's enforcement priorities, with the first being the highest priority and the second and third constituting equal, but lower, priorities.

Priority 1: Aliens who pose a danger to national security or a risk to public security. These aliens include, but are not limited to:

- Aliens engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security;
- Aliens convicted of crimes, with a particular emphasis on violent criminals, felons, and repeat offenders;
- Aliens not younger than 16 years of age who participated in organized criminal gangs;
- Aliens subject to outstanding criminal warrants; and
- Aliens who otherwise pose a serious risk to public safety.

For purposes of prioritizing the removal of aliens convicted of crimes, ICE personnel should refer to the following offense levels defined by the Secure Communities Program, with Level 1 and Level 2 offenders receiving principal attention.

- Level 1 offenders: aliens convicted of "aggravated felonies," as defined in INA § 101(a)(43) of the Immigration and Nationality Act, or two or more crimes each punishable by more than one year, commonly referred to as "felonies;"
- Level 2 offenders: aliens convicted of any felony or three or more crimes each punishable by less than one year, commonly referred to as "misdemeanors;" and
- Level 3 offenders: aliens convicted of crimes punishable by less than one year.

Priority 2: Recent illegal entrants.

In order to maintain control at the border and at ports of entry, and to avoid a return to the prior practice commonly and historically referred to as "catch and release," the removal of aliens who have recently violated immigration controls at the border, at ports of entry, or through the knowing abuse of the visa and visa waiver programs shall be a priority.

Priority 3: Aliens who are fugitives or otherwise obstruct immigration controls.

In order to ensure the integrity of the removal and immigration adjudication process, the removal of aliens who are subject to a final order of removal and abscond, fail to depart, or intentionally obstruct immigration controls, shall be a priority. These aliens include:

- Fugitive aliens, in descending priority as follows;
  - fugitive aliens who pose a danger to national security;
  - fugitive aliens convicted of violent crimes or who otherwise pose a threat to the community;
  - fugitive aliens with criminal convictions other than a violent crime;
  - fugitive aliens who have not been convicted of a crime;
- Aliens who reenter the country illegally after removal, in descending priority as follows:
  - previously removed aliens who pose a danger to national security;
  - previously removed aliens convicted of violent crimes or who otherwise pose a threat to the community;
  - previously removed aliens with criminal convictions other than a violent crime;
  - previously removed aliens who have not been convicted of a crime; and
- Aliens who obtain admission or status by visa, identification, or immigration benefit fraud.

Liaison with Other Law Enforcement Agencies

To enhance efforts to identify arrest and remove aliens in accordance with ICE removal priorities, FODs may engage in taskforce partnerships and cooperative enforcement activities with federal, state, and local LEAs when such partnerships are available and advantageous to ICE.

Participation in enforcement partnerships with other LEAs is at the discretion of the FOD. A formal Memorandum of Understanding is not required by ERO HQ prior to the inception of a cooperative effort with a LEA. Rather, FODs may enter into partnerships after careful review and consideration of issues and concerns by participating LEAs and ERO. FODs should analyze the local situation and scope of the partnership being considered, and should weigh the advantages and disadvantages of the agreement based on local resources, staffing, and other policy considerations.

While working with other agencies, ERO officers will adhere to all applicable ICE practices and policies. Only immigration officers may issue detainers, which also includes officers of states or political subdivisions of a state who are delegated such authority under INA § 287(g).

Aliens Requiring Detainers (Form I-247)

Immigration officers shall issue detainers only after a LEA has exercised its independent authority to arrest an alien for a criminal violation. If an immigration officer has reason to believe that an individual arrested by the LEA is subject to ICE detention for removal or removal proceedings and issuance of the detainer appears to advance ICE's enforcement priorities, then the officer may issue a detainer.

Particular care is required when dealing with certain individuals that claim legal status (i.e., LAPR, Asylee, Refugee, and Naturalized United States Citizen) because they may not be removable unless convicted. Claims of legal status should be verified through ICE databases and if at that time the alien is not removable, the officer should inform that LEA that ICE is not taking any action at this time. This notice should be provided in writing and should further request the LEA to notify ICE if the alien is convicted of the crime for which he or she is being held so that his or her removability can be re-evaluated.

IMMIGRATION REMOVAL PROCESSING

The removal process involves four phases: 1) identification and processing; 2) case preparation; 3) administrative removal proceeding; and 4) removal.

In passing the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress equipped ICE with a number of significant tools to more

effectively and efficiently process criminal aliens. In relevant part, IIRIRA amended the INA to provide for the following:

- Administrative reinstatement of prior deportation, exclusion and removal orders, pursuant to INA § 241(a)(5);
- Administrative deportation of non-permanent resident aliens convicted of aggravated felonies, pursuant to INA § 238(b); and
- Expanded definition of the term *"aggravated felony,"* broadening the list of crimes constituting aggravated felonies [INA § 101(a)(43)].

Combined, these statutory changes streamlined the removal process by eliminating cumbersome deportation proceedings for most previously removed aliens and expanding the retroactive application of felony offenses, thereby reducing the number of removal cases processed in the immigration courts. In many cases, the avenues of relief from removal were eliminated completely, but aliens processed under these procedures may still apply for withholding of removal and protection under the United Nations Convention Against Torture.

Reinstatement of Prior Order of Removal

INA § 241(a)(5) authorizes ICE to reinstate a final order against an alien who has reentered the United States illegally after having been removed or having departed voluntarily ('self-deports') while under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry. (See also 8 U.S.C. § 1231(a)(5).)

Reinstatement Procedures

As set forth in 8 C.F.R. § 241.8, before reinstating a prior order, the ERO enforcement officer processing the case must determine that the alien believed to have illegally re-entered was previously excluded, deported, or removed from the United States. Included in this class of aliens are those who voluntarily departed the United States while subject to a final order of exclusion, deportation, or removal ("self-deported"). An alien who complied with the terms of a voluntary departure order is not subject to reinstatement since the voluntary departure order is issued in lieu of a removal order. If, however, the alien failed to depart in accordance with the terms of the voluntary departure order, then the alien is subject to the civil penalties of INA § 240B(d). Aliens who have been previously removed pursuant to an expedited removal order are also subject to reinstatement.

The ERO enforcement officer must obtain the alien's A-file or copies of the documents contained therein to verify that the alien was subject to a final order and that the previous order was executed. (Guides to A-files can be found in Appendix 3: A-File Guides.) Generally, suitable database printouts to document these facts will suffice.

If the alien did not depart the United States after having been issued a final order of removal, that order, if still valid, should be executed. In order to reinstate a removal order, identity must be established to ensure that the alien believed to have re-entered illegally is the same individual who was previously removed. If the alien admits to having been previously excluded, deported, or removed, or to having self-deported by leaving after the expiration of a voluntary departure period with an alternate order, the Form I-213 and the sworn statement must so indicate. If a record check or fingerprint hit reveals such prior adverse action, that information must be included in the A-file. The alien should be questioned and confronted with any relevant adverse information from the A-file, record check, or fingerprint hit, and, if applicable, the information must be included in the I-213 and sworn statement.

If the alien disputes the fact that he/she was previously removed, a comparison of the alien's fingerprints with those in the A-file documenting the previous removal must be completed to positively confirm the alien's identity. The fingerprint comparison must either be completed by a locally available expert or by the Forensic Document Laboratory. In the absence of fingerprints in a disputed case, the alien shall not be removed pursuant to section 241(a)(5) INA.

The alien must, in fact, have illegally re-entered the United States. In making this determination, the ERO enforcement officer shall consider all relevant evidence, including statements made by the alien and any evidence in the alien's possession. The ERO enforcement officer shall attempt to verify an alien's claim of lawful admission, if one is made, by searching those data systems available to the ERO enforcement officer.

If the ERO enforcement officer finds that the alien has a former order of deportation or removal that should be reinstated, but is in possession of a seemingly valid visa permitting him or her to seek admittance to the United States, the officer should determine whether the alien applied for and was granted permission to re-enter the United States from the Attorney General or his successor, the Secretary of DHS. If the alien did not apply for and receive permission to re-enter, he or she illegally re-entered the United States, despite having the allegedly valid visa, and is therefore subject to reinstatement.

If the ERO enforcement officer determines that the alien is subject to removal by reinstatement, then the officer must verbally notify the alien with notice by serving them Form I-871, Notice of Intent/Decision to Reinstate Prior Order, of such determination and advise the alien that he or she may make a written or oral statement

contesting the determination. Once all the requirements of 8 C.F.R. § 241.8(a) are met, the alien must be removed under the prior order of exclusion, deportation, or removal in accordance with INA § 241(a)(5), unless one of the regulatory exceptions applies.

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

Record of Sworn Statement

In all cases in which an order may be reinstated, the ERO officer must create a *Record of Sworn Statement* utilizing Form I-877 or ENFORCE Form I-215B. In addition to addressing routine informational elements (identity, alienage, and the required elements listed), these forms will document all statements relevant to determining whether the alien is subject to reinstatement. These forms will also serve to document whether the alien, when asked by the officer, expresses a "reasonable" fear of persecution or torture if removed to the country designated in the prior removal order should that order be reinstated.

If the alien refuses to provide a sworn statement, the record should reflect this refusal. An alien's refusal to execute a sworn statement does not preclude reinstatement of a prior order, provided that the record establishes that all of the required elements discussed have been satisfied. If the alien refuses to give a sworn statement, the ERO enforcement officer must record whatever information the alien has orally provided that relates to reinstatement of the order, or to any claim of possible persecution or torture.

Reinstatement of a Final Order

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

- Notice of Intent / Decision to Reinstate Prior Order (Form I-871)
- The prior final order and executed Warrant of Removal (Form I-205) or Notice to Alien Ordered Removed / Departure Verification (Form I-296)
- Warning to Alien Ordered Removed or Deported (Form I-294)
- The alien's sworn statement / declination to provide such statement or ERO enforcement officer's / agent's attestation of the alien's declination
- Any evidence provided by the alien
- Any additional documentation that rebuts the alien's assertion that reinstatement was improper

- Certified fingerprint match, if required
- Record of Deportable Alien (Form I- 213)

The ERO enforcement officer presents the ROP and all relevant evidence to any officer authorized to issue a Notice to Appear, as listed in 8 C.F.R. § 239.1, for review and signature at the bottom of FormI-871.

These procedures are set forth and standardized in the April 27, 2006 memorandum from John P. Torres entitled, "Record of Proceedings in Reinstatement and Administrative Removal Cases."

Procedure

After the deciding officer signs the Form I-871 reinstating the prior order, the ERO enforcement officer issues a new Warrant of Removal, Form I-205, in accordance with 8 C.F.R. § 241.2.

The ERO enforcement officer indicates on Form I-205, in the section reserved for provisions of law, that removal is pursuant to § 241(a)(5) of the Act, as amended by IIRIRA.

Index and Certification

The ROP shall contain an index noting which documents are contained in the ROP. A blue ROP coversheet should be placed on top of the Index and documents.

Ultimately, the ERO enforcement officer is responsible for the certification of authenticity of the ROP. The certification should be placed under the ROP coversheet.

Exceptions to Reinstatements

Per 8 C.F.R. § 241.8(d), applicants for benefits under section 902 of the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA) or sections 202 or 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA) are excepted from the provisions of INA § 241(a)(5). If an alien who is otherwise subject to any of these sections has applied for adjustment of status under either section 902 of the HRIFA or section 202 of NACARA, the provisions of §241(a)(5) INA shall not apply. The ERO enforcement officer may not reinstate the prior order in accordance with this section unless and until a final decision to deny the application for adjustment has been made. If the application for adjustment of status is granted, the prior order shall be rendered moot.

Reinstatement is not applicable to an alien who was granted voluntary departure by an Immigration Judge and who left the United States in compliance with the terms of

that issuance. In such instances, the alien was not subject to a final order of deportation or removal and consideration whether to place the individual in removal proceedings should be based on their current status in the United States.

Reinstatement of removal does not apply to non-citizens who did not execute their removal orders by leaving the United States. In addition, the reinstatement provision does not apply to excluded or deported individuals who, prior to returning to the United States, obtained consent from the Attorney General or his successor, the Secretary of the Department of Homeland Security, to reapply for admission.

Required Documentation

- I-213 - Record of Deportable/Excludable Alien
- I-217 - Information for Travel Document or Passport (unless from Mexico)
- I-247 - Immigration Detainer (Copy)
- I-871 - Notice of Intent/Decision to Reinstate Prior Order
- I-877 - Record of Sworn Statement in Administrative Proceedings
- Immigration History
- Criminal History (NCIC/TECS, IAFIS)
- FD 249 - Arrest and Institution Fingerprint Card
- Previous removal documents (copies if A-file is not readily available)

Reinstatements and Criminal Prosecution

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

Whenever possible, reinstatement processing should be completed before referring an alien for criminal prosecution. Aliens whose reinstatement processing is completed prior to criminal prosecution will be removed more quickly after any criminal sentence is served. Upon remanding the subject to the custody of another LEA, the ERO enforcement officer must lodge a detainer, Form I-247, and should note on the form that a final order has been entered. ERO enforcement officers must be aware that once the Order of Removal is final, the detention of the alien is permissible only to the extent described as the Removal Period in INA § 241(a)(1), as interpreted in *Zadvydas v. Davis*, 533 U.S. 678, for the purpose of executing the Warrant of Removal.

Additional reference material can be found in the DROPPM, Chapter 14, Removal Process Non-Hearing Removal Cases.

NOTICE TO APPEAR

Notice to Appear (NTA)

Pursuant to 8 C.F.R. § 239.1, ERO officers are authorized to initiate removal proceedings against aliens who have been determined to be removable from the United States by serving them with a NTA (Form I-862). Practically speaking, most criminal aliens will be encountered by ERO in the custody of other law enforcement agencies at federal, state, county, and local jail facilities. ERO enforcement officers assigned to monitor the population of these facilities screen, identify, and issue Immigration Detainers (Form I-247) against removable aliens before an alien's release, whenever possible and practical, in order to pursue immigration charges and secure a final order of removal. In some cases, enforcement personnel issuing immigration detainers may identify aliens who may also be placed in removal proceedings while in the custody of the other law enforcement agency, or who may be subject to administrative removal, reinstatement, or execution of existing final orders of removal.

When an ERO enforcement officer identifies a suspected alien in the custody of another law enforcement agency, the officer must interview the alien, conduct extensive records checks, and verify/establish alienage. When alienage is firmly established, either a new A-File is created after requesting one from a first line supervisor or the original A-file is located and ordered through the Central Index System (CIS). When the original A-file is requested, a temporary file, or T-file, must be created and used pending receipt of the A-file. To maintain file integrity, all alien files—original and created—should be inputted into the National File Tracking System (NFTS).

If the alien is been determined to be removable under § 212 or § 237 of the INA, the enforcement officer issues an immigration detainer [subject to the limitations set forth in 8 C.F.R. § 236.2(b)]. Generally, a detainer can only be lodged immediately against Present Without Admission (PWA), Overstay, Final Order / Reinstatement, and VWP cases, with some exceptions. A detainer should not be placed in any case involving an alien who is not, at the time the detainer is issued, removable from the United States. For example, absent any other immigration violations, a LPR whose conviction is on direct appeal may not be removable pending resolution of the appeal. Because the need to establish removability may take time, individuals may be released from custody before a detainer can be lodged. Issuing an immigration detainer after determining removability may also be delayed pending receipt of certified conviction documents.

Convictions for the types of offenses listed below are among those that may render an alien otherwise lawfully in the United States removable:

- An aggravated felony
- A crime involving moral turpitude (CIMT) committed within five years of the date of admission and for which a sentence of one year or longer may be imposed
- Two CIMTs at any time after admission
- A controlled substance offense (other than a single offense involving possession for one's own use of 30 grams of less of marijuana)
- Certain firearms offenses
- A crime of domestic violence (including violation of an order of protection)

Further reference can be obtained in INA § 212 and INA § 237.

Required Documentation for a NTA

- I-200 - Warrant of Arrest
- I-213 - Record of Deportable Alien
- I-217- Information for Travel Document or Passport (unless from Mexico)
- I-247 - Immigration Detainer (Copy)
- I-265 - Notice to Appear, Bond and Custody Processing Sheet
- I-286 -Notice of Custody Determination
- I-826 - Notice of Rights / I-770 (Juveniles) / I-848A (Salvadorans)
- I-862 - Notice to Appear
- List of legal services
- Criminal History (NCIC/TECS, IAFIS)
- Immigration History
- FD-249 - Arrest and Institution Fingerprint Card
- Conviction documents-certified, if possible (if applicable)
- Notice that the convictions supporting the charge of removability are final, meaning NOT on direct appeal.

STIPULATED ORDERS OF REMOVAL

In lieu of a hearing before an immigration judge, an alien may elect to enter into a written agreement with ICE to accept a stipulated order of removal/deportation from an immigration judge by filing with the court a document entitled "Stipulated Request for Order of Removal" and "Waiver of Hearing." The immigration judge must confirm that the alien is making the request for removal knowingly, voluntarily, and intelligently before he or she issues the final order. (See INA § 240(d) and 8 C.F.R. § 1003.25(b).) Such an agreement is advantageous to the alien and ICE because it allows the alien to depart the United States sooner rather than remain in detention pending scheduling of removal hearings, allows the court to schedule earlier hearings in cases involving disputed removal, and lessens detention costs for ICE. An

additional benefit of a stipulated removal is that the alien swears to an affidavit before the immigration court, clearly stating his citizenship and desire to return to his country. Should the subject re-enter the United States, this affidavit can prove extremely useful in subsequent proceedings.

Before pursuing this alternate form of removal, each ERO enforcement officer should consult the local Office of Chief Counsel to determine local policy regarding the use of stipulated removals in the AOR.

Procedure

After service of the charging document (Form I-862, Notice to Appear) listing the allegations and INA violations, the ERO enforcement officer can explain the stipulated removal process to the alien and inquire whether he or she would like to submit a request for stipulated removal to the immigration judge.

Preparation of a Stipulated Request

Prior to drafting a stipulated request for removal and hearing waiver, confirmation that the alien agrees or complies with the following statements should be obtained:

- Admits the truth of the allegations contained in the charging document;
- Concedes deportability or inadmissibility, as charged;
- Declines the opportunity to apply for any form of relief under the INA,
- Designates a country for deportation or removal;
- Concedes to the introduction of the written stipulation as an exhibit to the Record of Proceeding (documents filed with the court);
- Understands and accepts the consequences of the stipulated request and acknowledges that such request is made knowingly, voluntarily, and intelligently; and
- Agrees to accept a written order of exclusion or removal as final, thus waiving the right to appeal

ICE enforcement personnel should consult with local Office of Chief Counsel (OCC) to request a template for the stipulated agreement, or a legal sufficiency review of the draft Stipulated Request for Order of Removal and Waiver of Hearing. An attorney within OCC must sign the order prior to submission of the request with the court. This packet may include the following documents:

- Cover Sheet
- Stipulated Request for Order of Removal and Waiver of Hearing
- I-200 - Warrant for Arrest of Alien
- I-213 - Record of Deportable / Inadmissible Alien
- I-286 - Notice of Custody Determination

- I-862 - Notice to Appear
- List of Free Legal Service Providers
- Notice of Right to Consular Notification and Communication
- Proposed Order of Removal

The original charging document must be included in the filing to the DOJ, Executive Office of Immigration Review (EOIR).

Required Signatures

The immigration officer must certify that he or she read the Stipulated Request for Order of Removal and Waiver of Hearing, or similar form, to the alien exactly as written and specify the language used. In addition, the request and waiver must be signed by the interpreter, if applicable, the Assistant Chief Counsel representing the government, and by the alien and/or the alien's attorney or representative.

Review by the EOIR

The immigration judge will review the charging document and the written stipulation, as well as any supporting documentation to determine whether an order of removal should be entered without a hearing and outside the presence of the parties. ICE may remove the alien from the United States as soon as the immigration judge signs the removal order, which is an administratively final order.

Restrictions

Stipulated Removals should not be used for unaccompanied alien children, refugees, asylees, or aliens that have been granted any form of relief including Temporary Protected Status, American Baptist Church (ABC), NACARA, or HRIFA. This list represents the more common forms of relief available but is not a comprehensive list of forms of relief exempt from the Stipulated Removal process. If an alien is eligible for a form of relief, the alien should be presented before an immigration judge.

Local OCC should be consulted to determine local policy regarding the use of Stipulated Removals against LPRs, whether represented or unrepresented by counsel.

VOLUNTARY DEPARTURE

Voluntary departure is a discretionary practice whereby an alien, other than an arriving alien, is permitted to depart the U.S. at his or her own expense in lieu of a formal order of removal.

DHS ICE ERO

FODs are authorized to use their discretionary authority under INA § 240B(a) to grant voluntary departure for a period up to 120 days. FODs may attach conditions to the grant of voluntary departure and have the authority to revoke their grant. However, a FOD does not have authority to revoke a grant made by an immigration judge.

EOIR

An immigration judge may grant voluntary departure to a maximum of 120 days if an alien requests voluntary departure prior to the completion of removal proceedings. The alien may be asked to post a departure bond to be surrendered to the surety upon proof of departure within the time period allowed. If an alien requests voluntary departure at the conclusion of such proceedings, an immigration judge is authorized to grant the application only after the alien establishes: 1) physical presence in the U.S. for the year preceding service of the NTA; 2) good moral character during the past five years; 3) that the alien is neither a convicted aggravated felon nor a threat to national security; and 4) that the alien has established by clear and convincing evidence that the alien has the means to depart and intends to do so. The period of voluntary departure at the conclusion of proceedings may not exceed 60 days and the alien is required to post a departure bond.

Whether granted prior to the completion of proceedings or at the conclusion of such proceedings, an alien's failure to comply with a voluntary departure grant within the time allotted is subject to a $1,000 - $5,000 fine and the alien will be ineligible for certain forms of relief for a period of ten years.

The grant of voluntary departure converts to an order of removal if the alien fails to depart the United States as ordered.

Restrictions on Voluntary Departure

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

- Aggravated felons or terrorists removable under INA § 237(a)(2)(A)(iii) or INA § 237(a)(4)(B);
- Aliens previously granted voluntary departure after having been found inadmissible under INA § 212(a)(6)(A);
- Aliens who illegally reenter the United States after being deported, excluded, or removed from the United States under a final order, or who departed voluntarily while under a final order of deportation, exclusion, or removal ("self-deports");

- Aliens who violated the terms of a previous grant of voluntary departure within the past 10 years; or
- Arriving aliens.

Additional restrictions on the eligibility of certain classes may be imposed pursuant to INA § 240B(e).

Required Documentation for Voluntary Departure

- I-94 - Arrival-Departure Record
- I-213 - Record of Deportable / Inadmissible Alien
- I-217 - Information for Travel Document or Passport (if Other Than Mexican)
- Form I-247 - Immigration Detainer (Copy)
- I-826 - Notice of Rights and Request for Disposition
- G-146 - Departure Verification Letter
- FD-249 - Arrest and Institution Fingerprint Card
- Criminal History (NCIC, TECS, IAFIS)
- Immigration History

ADMINISTRATIVE REMOVAL

An alien who is not a LPR (including an alien who may have LPR status on a conditional basis as described in INA § 216) when the administrative removal process begins and who has a final conviction for an aggravated felony as defined by INA § 237(a)(2)(A)(iii) may be ordered removed without referral to an immigration judge for INA § 240 proceedings. (See INA § 238(b) and 8 C.F.R § 238

Procedure

Before starting this process, the ERO enforcement officer encountering the alien must consider the following factors when considering issuing an Administrative Removal:

- Alienage;
- Immigration status (not a lawful permanent resident); and
- The existence of a final conviction for an aggravated felony per ICE guidelines.

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

1) The ERO enforcement officer encountering the alien determines that the alien's case meets the statutory criteria for administrative removal.

2) The ERO enforcement officer prepares or requests preparation of a charging document called a Notice of Intent to Issue a Final Administrative Removal Order (NOI, or the Notice) on Form I-851.
3) The ERO enforcement officer determines for the record that the alien upon whom the NOI is to be served is the alien named in the NOI and annotates this determination on the NOI.
4) The ERO enforcement officer serves the NOI on the alien as soon as possible after issuance.
5) The alien has an opportunity to be represented by counsel authorized to practice in removal proceedings at no expense to the government and is provided with a list of available free legal services programs.
6) The alien has a reasonable opportunity to inspect the government's evidence and rebut the allegations supporting the charges.
7) The alien may, in writing, accept immediate issuance of a Final Administrative Removal Order (Order). The alien may also waive the 14-day period for executing the order in writing.
8) If the alien chooses not to waive the 14-day period and contests the NOI, he or she must submit evidence supporting this rebuttal within 14 days. After 14 days, the service officer submits a memorandum to the deciding service officer describing the evidence submitted by the alien if any, and a recommendation as to whether or not the Order should be issued.
9) ICE may not execute a Final Administrative Removal Order during the 14-day period unless the alien waives this period.
10) ICE creates and maintains a permanent Record of Proceedings (ROP), as outlined below.
11) The Designated Service Official (DSO) (not the same person who issues the NOI) determines whether to issue the Final Administrative Removal Order. If the DSO decides to issue the order, he or she will sign the Form I-851A. The alien has 30 days to rebut the Order. The DSO may also determine additional evidence is required prior to making a decision, or may terminate the administrative removal proceedings and cause a NTA to be issued to initiate removal proceedings under INA § 240.
12) If the alien claims a fear of return, the DSO must, after issuing the Final Administrative Removal Order, immediately refer the alien's case to an asylum officer for a reasonable fear determination. Although the alien is not statutorily eligible for asylum or any other benefit under the INA, he or she may be eligible for withholding of removal. If the alien is determined to have a reasonable fear, he or she will be referred to an immigration judge for withholding proceedings only. The immigration judge lacks jurisdiction to review the Order or the grounds of removability.

Required Documentation for Record of Proceeding

8 C.F.R. § 238.1(h) requires the creation and maintenance of an ROP for an administrative removal. At a minimum, the ROP must include copies of:

- Cover Sheet
- Index
- Certification Document
- I-200 - Administrative Warrant of Arrest
- I-205 - Warrant of Removal / Deportation
- I-213 - Record of Deportable / Inadmissible Alien
- I-217- Information for Travel Document or Passport (if Other Than Mexican),
- I-247 - Immigration Detainer (Copy), if applicable.
- I-286 - Notification of Custody Conditions
- I-826 - Notice of Rights
- I-851 - Notice of Intent to issue a Final Administrative Removal Order
- I-851A - Final Administrative Removal Order
- I-862 - Notice to Appear
- I-877 - Record of Sworn Statement in Administrative Proceedings
- Certified Conviction Documents
- Criminal History (NCIC/TECS, IAFIS)
- Immigration History
- FD-249 - Arrest and Institution Fingerprint Card, if applicable.

If the NOI is contested, a memorandum from the service officer to the deciding service officer should be included in file, after the fourteen day time period has expired.

Expedited Removal

Expedited Removal (ER), provided for in 8 U.S.C. § 1225, is an administrative procedure that authorizes DHS to remove, without a hearing before an immigration judge, aliens arriving in the United States who are inadmissible under INA § 212(a)(6)(C) or 212(a)(7).

ER proceedings may be applied to two categories of aliens. First, INA § 235(b)(1)(A)(i) permits expedited removal proceedings for "arriving aliens" as defined by 8 C.F.R. 1.2, which includes certain parolees (i.e., those paroled after April 1, 1997 who did not receive advance parole). Second, INA § 235(b)(1)(A)(iii) permits the Secretary of DHS to designate certain other aliens to whom expedited removal may be applied. However, the statute limits the application of expedited removal to aliens who were not admitted or paroled and who cannot affirmatively show that they have been continuously present in the United States for the two years period immediately prior to the date they were determined to be inadmissible under the expedited removal procedures. To date, only two groups of aliens have been designated under this category: 1) aliens arriving by sea; and 2) aliens encountered within fourteen days of crossing into the United States and within 100 miles of an international land border.

Aliens subject to ER who indicate an intention to apply for asylum or who assert a fear of persecution or torture must be referred to an asylum officer for a credible fear determination in accordance with 8 C.F.R.§ 208.30. If the alien is deemed to have a credible fear by the asylum officer, the asylum officer will inform the alien of his determination and issue a Form I-862, Notice to Appear, for full consideration of the asylum and withholding of removal claim in INA § 240 proceedings before an immigration judge. If the asylum officer determines that the alien does not have a credible fear of return, the asylum officer shall provide written notice of the determination and inquire if the alien would like to have an immigration judge review the officer's decision. If the alien requests review (or refuses to indicate whether or not he would like a review), the asylum officer will refer the alien for a hearing before an immigration judge using Form I-863.

In the event an alien subject to ER claims they are a LPR, an asylee, or a U.S. citizen, and the officer cannot verify that status, the officer, in accordance with 8 C.F.R.§ 235.3(b)(5)(iv), shall refer that alien to an immigration judge for review of the expedited removal order under INA § 235(b)(1)(C) and 8 C.F.R. § 235.6(a)(2)(ii). Persons placed in ER proceedings are generally to be detained without bond pending their reasonable fear determination, after which they may be considered for parole.

Required Documentation for Expedited Removal

8 C.F.R. § 235.3(b)(2)(i) requires the creation and maintenance of a ROP in cases of ER. At a minimum, the ROP must include copies of:

- I-213 - Record of Deportable / Inadmissible Alien
- I-217 - Information for Travel Document or Passport (if Other Than Mexican)
- I-247 - Immigration Detainer (Copy), if applicable
- I-296 - Notice to Alien Ordered Removed / Departure Verification
- I-860 - Notice and Order of Expedited Removal
- I-867A and B - Record / Jurat of Sworn Statement in Proceedings under INA §235(b)(1)
- Criminal History (NCIC,TECS, IAFIS)
- Immigration History
- FD-249 - Arrest and Institution Fingerprint Card, if applicable.

Restriction

ERO enforcement officers may not issue ER orders for confirmed refugees, asylees, or aliens who have been granted any form of relief under the INA, including, but not limited to, the following: temporary protected status, ABC, NACARA, and HRIFA. The mere claim of legal status does not preclude initiating ER procedures under INA § 235; however, it may result in a review of the claim of status before an immigration judge pursuant to 8 C.F.R. § 235.3(b)(5).

Visa Waiver Program Removal Orders

The Visa Waiver Program (VWP) described in this section is established pursuant to the provisions of INA § 217, 8 U.S.C. 1187, and 8 C.F.R. § 217.

Application

An alien admitted, or who seeks admission under the VWP, even if by fraud, is considered a visa waiver entrant or applicant, respectively. A VWP entrant who violates status or stays beyond the 90-day admission period is not eligible for a removal hearing before an immigration judge, having "waived" that right as a condition of entry. The order of removal from the FOD (or authorized delegate) advises the alien that he or she has violated the terms of his or her admission under the VWP and that the alien is ordered removed from the United States.

Effective January 12, 2009, eligible citizens or nationals from all VWP countries must obtain approval through the Electronic System of Travel Authorization (ESTA) prior to traveling to the United States under the VWP. With the implementation of ESTA, VWP travelers arriving at air and sea ports of entry no longer complete an I-94W, Nonimmigrant Visa Waiver Arrival or Departure Document. If an alien with a VWP removal order files a petition for review with a federal court of appeal and/or a writ of habeas corpus with a United States District Court, a copy of either the I-94W or ESTA should be obtained and included in the required documentation. Some federal courts require that DHS produce proof that the alien waived his or her right to a removal hearing before an immigration judge.

A VWP entrant or applicant who indicates an intent to apply for asylum must be issued a Form I-863, Notice of Referral to an Immigration Judge and referred for a proceeding on the merits of the alien's asylum application only.

Required Documentation for Visa Waiver Program Removal Orders

- I-200 - Warrant for Arrest of Alien
- I-213 - Record of Deportable / Inadmissible Alien
- I-217 - Information for Travel Document or Passport
- I-247 - Immigration Detainer (Copy), if applicable.
- I-259 - Notice to Detain, Remove, or Present Alien
- I-286 - Notice of Custody Determination
- VWP I-294, Notice of Country to which Removal has been directed and Penalty for Re-entry without Permission
- VWP Warrant

- VWP Notice of Intent to Deport / Remove for Violating Terms of Admission under § 217 of the Immigration and Nationality Act
- VWP Order
- FD-249 - Arrest and Institution Fingerprint Card, if applicable.
- Criminal History (NCIC, TECS, IAFIS)
- Immigration History

SPECIAL CIRCUMSTANCES PROCESSING

Orantes Injunction

The "*Orantes* Injunction*"* requires ICE to provide notice to detained El Salvadorans of the right to apply for asylum and prohibits the agency from taking actions that may be perceived as coercing or otherwise discouraging El Salvadorans from seeking asylum. The injunction also requires ICE to provide El Salvadorans with access to telephones during processing, updated legal service lists, and 24-hour notice to counsel if an El Salvadoran citizen or national is to be removed from the United States. Under the injunction, ICE is also prohibited from transferring unrepresented El Salvadorans from the district of their apprehension for at least seven days to allow them the opportunity to obtain counsel. The injunction does not apply to El Salvadorans that have received final orders of removal pursuant to expedited removal proceedings. See *Orantes-Hernandez v. Smith*, 541 F. Supp. 351 (C.D. Cal. 1982), 504 F. Supp. 2d 825 (C.D. Cal. 2007), and Docket No. 855, *Orantes-Hernandez v. Holder*, No. 82-01107 (C.D. Cal. filed Nov. 26, 2007), for additional information and a complete listing of injunction provisions.

Additional Required Documentation for *Orantes* Injunction Cases

- I-217 - Information for Travel Document or Passport
- I-848/I-848A - Notice of Right to Salvadorans
- I-867 A and B - Record/Jurat of Sworn Statement in Proceedings under § 235(b)(1) of the Act
- Expedited Removal Cases with Credible Fear need M-444

Removability of Individuals in Temporary Protected Status (TPS)

TPS is codified in 8 U.S.C. § 1254(a). Per INA § 244(a)(4), the government shall not remove an alien with a pending application for TPS who has established prima facie eligibility for TPS. Prima facie eligibility for TPS is established upon the filing of a completed application containing factual information that, if unrebutted, will establish a claim of eligibility. (See 8 C.F.R. § 244.1 and § 1244.1.) Per INA § 244(d)(4), the government shall not detain an alien provided TPS on the basis of the alien's immigration status. Per 8 C.F.R. § 244.18 and § 1244.18, the issuance of a NTA on

grounds of deportability or inadmissibility that would have rendered the alien statutorily ineligible for TPS may constitute grounds for detention.

TPS regulations also require that written notice of the opportunity to apply for TPS must be given to all aliens who are in pending proceedings during the time a foreign state is designated for TPS. (See 8 C.F.R. § 244.7(d) and §1244.7(d).) Countries currently designated for TPS are found here: http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=848f7f2ef0745210VgnVCM100000082ca60aRCRD&vgnextchannel=848f7f2ef0745210VgnVCM100000082ca60aRCRD#Countries. However, if an alien's TPS has expired and the subject has neglected to reapply for TPS and therefore failed to have his or her status extended, the alien is amenable to removal proceedings and can be processed as such. Additionally, an alien's TPS status may be withdrawn if the alien fails to maintain eligibility for TPS as a result of a felony conviction or two or more misdemeanor convictions based on crimes committed in the U.S. (See INA § 244(c)(2)(B)(i) and § 244(c)(3)(A).) Accordingly, an alien whose TPS status is withdrawn and who otherwise does not have lawful status, is amenable to removal.

Additional Required Documentation for TPS cases

- I-821 - Application for Temporary Protected Status

Issuance of Charging Documents on Aliens with United States Military Service and Their Immediate Relatives

A NTA shall not be issued against any current or former member of the armed forces without prior approval from the FOD. Additionally, such an alien must also be advised, prior to the issuance of the NTA, of any discretionary relief that may be available.

Within ERO, the authority to approve issuance of a NTA, Administrative Order, or Reinstatement in these cases rests with the FOD of each field office. In cases in which an alien is still on active duty when ERO seeks to serve an NTA, Administrative Order, or Reinstatement, FODs should consider the implications of placing an active duty alien into proceedings. This decision will, at a minimum, take into consideration the circumstances in each case as identified below, and will require a memorandum to file for the subject, addressing:

- Whether coordination with the enforcement arm or administration of that branch of the service in which the alien is serving is possible;
- Whether the alien is likely to abscond if he or she is discharged prior to being placed in proceedings; and

- Whether service of the NTA, Administrative Order, or Reinstatement can be coordinated so that the alien may be immediately served upon discharge. Whenever possible, the alien should be served upon being discharged.

This information is not all encompassing and only provides some of the factors to consider when deciding whether or not to exercise prosecutorial discretion in the issuance of a NTA, Administrative Order, or Reinstatement against an alien who has served, or is currently serving, in the United States military. In each specific case, the factors considered and the decision that is ultimately made must be entered into a memorandum to file (with a copy placed in the alien's A-file) in ENFORCE. This memorandum to file will be referenced on the Form I-213, Record of Deportable and Admissible Alien, that is completed for the case. As in all cases, the FOD shall seek assistance from the OCC as necessary.

Additional Required Documentation for Aliens with U.S. Military Service

- DHS Concurrence Letter
- A memorandum with a brief overview of the facts considered shall specifically authorize issuance of the NTA, Administrative Order, or Reinstatement. Prior to making a decision to issue a NTA, a thorough review to determine eligibility for United States Citizenship under INA § 328 and § 329 must be completed in these cases because those sections contain special naturalization provisions for members of the military and, under certain circumstances, an order of removal does not preclude their naturalization.
- DD Form 214 (Certificate of Release or Discharge from Active Duty) for all periods of service

ERO enforcement officers charged with processing aliens for NTAs, Administrative Orders, or Reinstatements should be periodically reminded to inquire about military service during such processing in all cases where service may be a possibility. If an alien's prior military service record does not come to the attention of ICE until after issuance of the NTA, Administrative Order, or Reinstatement, appropriate action should be taken to comply with this guidance, to include exercising discretion by terminating any issued NTA.

Additional references include: Memorandum, "Issuance of Notices to Appear, Administrative Orders of Removal, or Reinstatement of a Final Removal Order on Aliens with United States Military Service," by Victor X. Cerda, 2004; and Memorandum, "Department of Defense (DOD) Enlistment of Certain Nonimmigrant and other Aliens Determined to be Vital to the National Interest," by David J. Venturella, October 14, 2009.

INS vs. St. Cyr, 533 U.S. 289, 121 S.Ct. 2271 (2001)

On March 8, 1996, Enrico St. Cyr, a lawful permanent resident, pleaded guilty to a charge of selling a controlled substance. That conviction made him deportable; however, under the pre-Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 law applicable at the time of his conviction, St. Cyr would have been eligible for an INA § 212(c) waiver of deportation at the discretion of the Attorney General. Since removal proceedings against St. Cyr were not commenced until April 10, 1997, after both AEDPA and the IIRIRA became effective, St. Cyr was no longer eligible for a 212(c) waiver according to the Attorney General's interpretation of the new statutes.

Upon appeal, the Board of Immigration Appeals ruled that St. Cyr was removable by reason of having pleaded guilty to an aggravated felony and was ineligible to apply for discretionary relief from deportation. This decision was later reversed by the Federal District Court with jurisdiction over the case and affirmed by the U.S. Court of Appeals.

On final appeal to the U.S. Supreme Court, the Court held that the provisions of AEDPA and IIRIRA repealing discretionary relief from deportation did not apply retroactively to St. Cyr, who pled guilty before the statutes' enactment.

Consistent with the St. Cyr decision, only aliens who entered into plea agreements prior to the enactment of AEDPA or IIRIRA will be eligible to apply for section 212(c) relief. The rule does not benefit aliens who were found guilty as a result of a trial because the St. Cyr decision focused primarily on an alien's reliance on section 212(c) relief as an inducement for entering into a plea agreement.

Under the rule, aliens who pleaded guilty to crimes prior to the enactment of AEDPA on April 24, 1996, may apply for section 212(c) as it existed prior to that date. Section 212(c), as it existed prior to April 24, 1996, was available to most lawful permanent residents who had resided in the United States for at least seven years. It was not available to aliens who had been convicted of one or more aggravated felonies and had served a term of imprisonment of at least five years.

Aliens who pleaded guilty to crimes after April 24, 1996, but prior to IIRIRA's effective date of April 1, 1997, may apply for section 212(c) relief as it existed during that time period. The version of section 212(c) that existed during that time period was the version modified by AEDPA. AEDPA restricted the availability of section 212(c) relief and made it unavailable to aliens who were deportable by reason of their convictions for certain criminal offenses, including aggravated felonies, controlled substance offenses, certain firearms offenses, espionage, or more than one crime of moral turpitude.

Aliens who pleaded guilty to crimes on or after April 1, 1997, would remain ineligible for section 212(c) relief because section 212(c) was repealed as of that date. (News Release-St. Cyr Rule Affording Relief to Certain Criminal Aliens)

Required Documentation

- I-200 - Warrant of Arrest
- I-213 - Record of Deportable Alien
- I-217 - Information for Travel Document or Passport (if Other Than Mexican)
- I-247 - Immigration Detainer (copy if applicable)
- I-265 - Notice to Appear, Bond and Custody Processing Sheet
- I-286 - Notice of Custody Determination
- I-826 - Notice of Rights / I-770 (Juveniles) / I-848A (El Salvadorans)
- I-862 - Notice to Appear
- List of legal services
- Certified Criminal Conviction Documents
- Criminal History (NCIC, TECS, IAFIS)
- Immigration History
- FD-249 - Arrest and Institution Fingerprint Card (if applicable)
- Conviction documents-certified, if possible (if applicable)

In addition to the conviction documents, a notice that there are no appeals pending on the criminal conviction is necessary, as convictions on appeal cannot be used against an alien in a removal hearing.

United States v. Lujan-Castro, 602 F.2d 877 (9th Cir. 1979)

Carlos Lujan-Castro moved the U.S. District Court for the District of Arizona to dismiss the indictment against him for transporting illegal aliens on the grounds that the waiver of his right to have the government maintain the presence of four deportable alien witnesses was ineffective. The Court of Appeals for the Ninth Circuit affirmed the district court's denial of the motion to dismiss, and Lujan-Castro subsequently was convicted of two counts of transporting illegal aliens, in violation of 8 U.S.C. § 1324(a)(2).

Required Documentation to satisfy *United States v. Lujan-Castro*

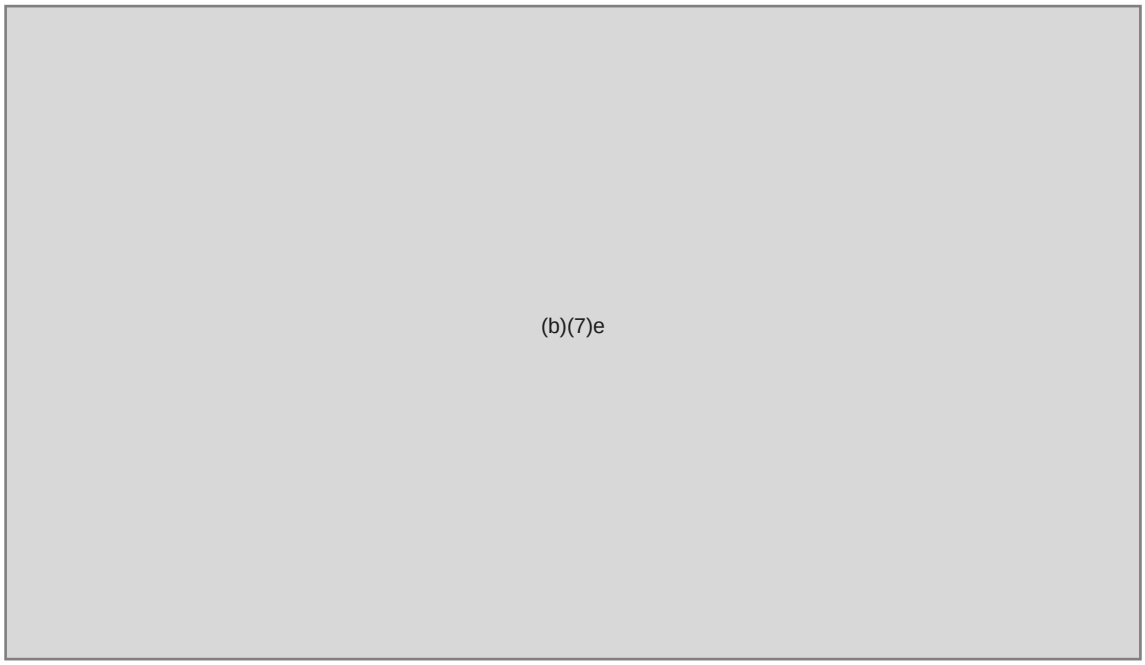
With regard to the arrest of a subject for violation of a crime that requires a material witness, per *United States v. Lujan-Castro,* it is imperative that the arresting ERO enforcement officer obtain written documented evidence that the subject knowingly and intelligently waived his/her right to retain a deportable alien witness, so that the waiver is effective.

FUGITIVE ALIENS

Fugitive aliens are aliens not currently in the custody or control of ICE who have failed to depart the United States pursuant to a final order of removal, deportation, or exclusion, or who have failed to report to an ICE officer after having received notice to do so. ERO enforcement officers regularly encounter fugitive aliens in the course of routine CAP duties, and should therefore be fully knowledgeable of the proper processing requirements.

Procedure

ERO enforcement officers will be able to identify fugitive aliens through interviews and records searches. Some common identifiers of fugitive aliens include recognizing the Case Category for a fugitive in the ENFORCE Alien Removal Module (EARM):



All fugitive aliens should be processed through the Initial Event screen of ENFORCE, which includes an in-depth narrative detailing the alien's relatives, address, any documents that verify his identity, as well as any and all information that may be useful if this alien is encountered in the future.

Required Documentation

- I-205 - Warrant of Removal/Deportation
- I-213 - Record of Deportable/Excludable Alien

- I-217 - Information for Travel Document or Passport (if Other Than Mexican)
- I-294 - Warning to Alien Ordered Removed or Deported
- Verification of identity (IAFIS Rap Sheet, IDENT)
- Immigration History
- Criminal History
- The current Administrative Removal Order
- FD-249 - Arrest and Institution Fingerprint Card

Criminal Prosecutions

The criminal prosecution program is a critical component of any enforcement action that ERO undertakes. An effective prosecution program in compliance with prosecutorial guidelines issued by the USAO permits ERO to target individuals who constitute the most serious enforcement challenges and are the greatest threats to the community. Furthermore, there is a deterrent effect by incarcerating such individuals for significant periods as consequences for the crimes committed. Most violators encountered by ERO have committed, at a minimum, a misdemeanor violation of the criminal provisions of the INA.

Through criminal prosecution, ERO seeks to increase community safety. ERO will target all federal violations within its statutory and regulatory authority, focusing primarily on violations of 8 U.S.C. § 1326 committed by those aliens encountered through any ERO enforcement action.

General Guidelines for ERO Prosecution Program

Any guidelines for the ERO prosecution program must be general in nature and must provide ample flexibility for adaptation to conditions in each AOR. At a minimum, each prosecution program should contain the following elements:

Case Review: A supervisor or other designated third party within the agency should review all cases proposed for prosecution to verify the following:

1) Sufficient evidence exists to substantiate the offense being charged;
2) The elements of the offense being charged are satisfied;
3) Jurisdiction and venue questions have been correctly addressed; and,
4) The applicable and appropriate prosecutorial guidelines have been followed.

Determination to Pursue Criminal Prosecution or Administrative Remedies: The resources of the federal judicial system are limited, and most violations of the INA encountered by ERO enforcement officers will be handled through removal proceedings. All prosecution programs should have

a provision for a regular review of cases proposed for prosecutions. These reviews will assist ERO in determining whether administrative remedies can satisfactorily resolve the cases, or whether the violations cause such a serious impact on our society, innocent members of the public, and agency operations that criminal prosecution should be pursued.

Notification to USAO: All prosecution programs must have a procedure for the appropriate notification to the proper USAO of proposed prosecutions.

Notification to Federal Court: All prosecution programs must have a procedure for notifying the appropriate Federal Court of cases approved for prosecution and, if necessary and at the discretion of the local USAO, scheduling the defendant's initial court appearance.

Dependent upon local court procedures, the prosecution program may also be responsible for notification of Pre-Trial Services (if available), for making the defendants available to that agency, and for providing defense attorneys for interviews before the defendants' initial court appearance.

Also dependent upon local court procedures, the prosecution program may be responsible for notifying the USMS and or booking the defendants into a designated jail facility following their initial court appearance.

Preparation of Prosecution Reports: All prosecution programs shall be responsible for preparing statistical prosecution reports for field office directors and ensuring data quality and validity of said reports.

Powers of immigration officers and employees are granted under 8 U.S.C. § 1357 and INA § 287.

Establishing a Criminal Case

The establishment of a criminal case can be both a very simple matter and a highly complex procedure.

The responsibility for the most important steps in establishing a prosecutable case lies with the investigating ERO enforcement officer. The ERO enforcement officer's direct observations, evidence gathering, and documentation of the facts are the foundation upon which all successful prosecutions are built. At every stage of the initial processing of a case, the ERO enforcement officer must evaluate the evidence at hand and determine if it is sufficient to prove the elements of the criminal charge being contemplated. Adequate evidence to prove each element of the crime being charged must be obtained prior to a prosecution being submitted for acceptance. (See Federal Rules of Criminal Procedure, Title IV, Rule 16, Discovery and Inspection regarding statements of defendant.)

Careful attention must be paid to proper evidence seizure requirements. Thorough documentation of the chain of evidence, from initial discovery to admission must be treated with equal respect and care. The seizure must be extensively documented, both in the ERO enforcement officer's reports and in evidence logs. Any break in the chain of custody of the evidence or, more commonly, failure to properly document any portion of the chain of custody, will result in a successful Motion to Suppress by defense counsel, which could inevitably lead to dismissal of the case. (See Federal Rule of Evidence 901, Requirement of Authentication or Identification; 902, Self-authentication, and 803 Hearsay Exceptions; Availability of Declarant Immaterial.)

Case Preparation and Presentation

Case preparation must be comprehensive and must set forth all relevant information for consideration by the prosecutor and the court. Careful attention should be administered to ensure that all factors, both probative and exculpatory, are fully investigated and clearly documented. The Assistant U.S. Attorney (AUSA) handling the case should be apprised of all the facts and circumstances relating to the case.

Although case preparation and presentation procedures must be strictly followed, those procedures can significantly vary depending upon the judicial district in which the offense was committed. ERO enforcement officers routinely work in two or more judicial districts on a daily basis.

Within general guidance from DHS and DOJ, each USAO has its own priorities, procedures and prosecutorial guidelines that are specifically tailored to conditions in each USAO office. ERO enforcement officers must be constantly aware of the guidelines and the requirements of the judicial district in which they are working. To successfully prosecute a case, ERO enforcement officers must be aware of, and comply with, the applicable regulations and guidelines.

The USAOs in some judicial districts require all of the reports and possible exhibits be presented to the AUSA handling the case prior to the acceptance of a criminal prosecution. The presentation of criminal violations for prosecution under this variety of conditions obviously makes a single method of case presentation impossible. However, common practices exist in order to guide the ERO enforcement officer's presentation of all cases involving potentially prosecutable criminal violations:

- Where applicable, prosecution guidelines must be thoroughly understood, and the facts of each particular case must be evaluated against the local guidelines to ensure compliance.
- Case preparation must be thorough and complete in all cases to be considered for criminal prosecution. All cases must set forth all relevant information for consideration by the prosecuting attorneys and the courts.

- It is absolutely imperative that all factors, both probative and exculpatory, be clearly detailed in the presentation. The AUSA handling the case must be informed of all facts and circumstances relating to the case. It is an axiom of all good trial attorneys that a question should not be asked in court unless the attorney asking the question already knows the answer to that question. Likewise, it should be an axiom of all ERO enforcement officers presenting cases for criminal prosecution that the AUSA handling the case is never surprised by information previously known or available to the ERO enforcement officers involved in the case. Case officers should also provide information regarding knowledge of those officers who may encounter *Giglio issues* (*Giglio v. United States*, 405 U.S. 150 (1972)) should the case proceed to trial.

Jurisdiction and Venue

The distinction must be clearly understood between "jurisdiction" and "venue." These terms are defined below.

The term "jurisdiction," as ordinarily used, is the authority to adjudicate concerning the subject matter in a given case. Jurisdiction includes not only the authority to hear and determine, but also the authority to render the particular judgment in the particular case. The district courts of the United States have original jurisdiction, exclusive of the courts of the States, over all offenses against the laws of the United States. (See 18 U.S.C. § 3231.)

The term "venue" refers to the judicial district in which a case is to be tried. The Constitution of the United States provides that a defendant shall have the right to be tried in the district where the crime was committed. (See Federal Rules of Criminal Procedure, Title V, Rule 18, Place of Prosecution and Trial.)

ERO enforcement officers must work closely with the local AUSA when determining if there is proper jurisdiction to exist, although venue in a particular district may seem improper. It is possible for an action to be brought in the appropriate venue (geographic location), although the forum in which it is brought lacks jurisdiction to hear the case (e.g., holding a trial for a violation of a federal criminal statute before a state court).

The most important difference between "jurisdiction" and "venue" is that a party may consent to an action in a district that otherwise would be an improper venue, and that the party waives objection to venue if there is a failure to properly assert it. However, it would be improper for a person properly charged with violation of a federal criminal statute to be tried before a state court for that federal violation, whether or not the defendant requests such an arrangement.

Transfer of a Defendant's Case between Districts: A prosecution may be transferred from the district where the indictment or information is pending, or from which a warrant on a complaint or indictment has been issued. If the following conditions are met, a prosecution may be transferred to the district where the defendant is arrested, held, or present:

- The defendant states in writing a wish to plead "guilty" or "nolo contendere" and to waive trial in the district where the indictment, information, or complaint is pending;
- The defendant consents in writing to the court's disposing of the case in the transferee district;
- The defendant files the statement in the transferee district; and,
- The U.S. Attorneys in both districts approve the transfer in writing.

(See Federal Rules of Criminal Procedure, Title V, Rule 20, Transfer for Plea and Sentence.)

Trial for an offense which began or was committed outside of the United States shall be in the district where the offender, or any one of two or more joint offenders, is arrested or is first brought. (See 18 U.S.C. § 3238.)

Any offense against the United States committed in more than one district may be prosecuted in any district in which such offense was begun, continued, or completed. (See 18 U.S.C. § 3237.)

Common Criminal Codes

INA § 287(a)(5)(A) and 8 U.S.C. § 1357(a)(5)(A) confer through regulations prescribed by the Attorney General or his successor, the Secretary of the Department of Homeland Security, the authority to make warrantless arrests under certain conditions "for any offense against the United States, if the offense is committed in the officer's or employee's presence." To make the most efficient use of the agency's resources, exercise of the authority to make warrantless arrests will be limited to those federal criminal offenses that are directly under the investigative jurisdiction of ICE or that are most commonly encountered by ICE.

Common criminal codes used by ERO enforcement officers in presenting cases for prosecutions are discussed below. Ensure that consultation with the local AUSA is done prior to charging a person to ensure a successful case.

- 8 U.S.C. § 1324 deals with bringing in and harboring certain aliens and has numerous subsections. Those most commonly encountered by ERO enforcement officers are frequently referred to as "smuggling," "transporting," and "harboring."

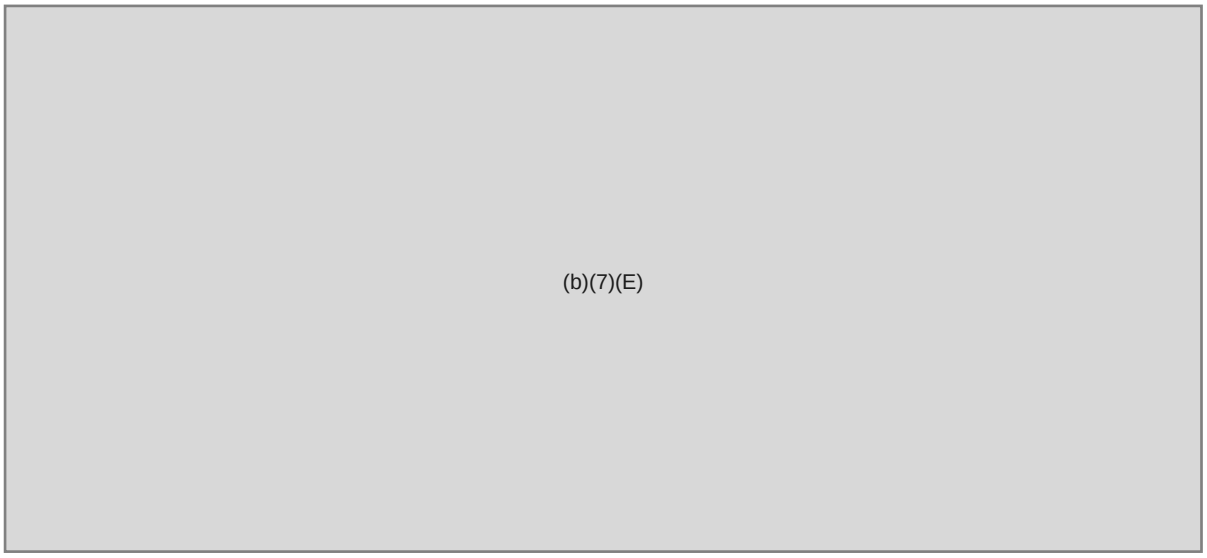
- 8 U.S.C. § 1325 is concerned with the entry of aliens at improper times or places; avoidance of examination or inspection; misrepresentation, and concealment of facts. Commonly referred to as EWI (Entry Without Inspection), § 1325 encompasses multiple criminal subsections and includes provisions for imposing civil penalties.
- 8 U.S.C. § 1326. Re-entry of removed aliens
- 18 U.S.C. § 2. Principals, Aiding and Abetting
- 18 U.S.C. § 3. Accessory after the Fact
- 18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States
- 18 U.S.C. § 922(g) relates to aliens/felons and firearms.
- 18 U.S.C. § 911 addresses false claims to United States citizenship.
- 18 U.S.C. § 1001 Fraud and False Statements.
- 18 U.S.C. § 1546. Fraud and misuse of visas, permits, and other documents
- 8 U.S.C. § 1253(b). Willful failure to comply with terms of release under supervision
- 8 U.S.C. § 1304(e) addresses failure of alien to carry with, and have in his / her possession an alien registration receipt card or certificate of alien registration.
- 8 U.S.C. § 1306(a) addresses willful failure of aliens to apply for registration and to be fingerprinted, failure of aliens to give written notice of change of address, fraudulent alien registration, and unlawfully photographing, printing, or creating the likeness of any certificate of alien registration or alien registration card.
- 8 U.S.C. § 1327 addresses aiding or assisting certain (convicted aggravated felons, terrorists, saboteurs, espionage agents and subversives) aliens to enter the United States.
- 8 U.S.C. § 1328. Importation of aliens for immoral purposes.

Case Management and Prosecution Reporting

In order to accurately track the prosecutorial efforts of ERO field offices, all cases formally presented to the USAO will be recorded in ENFORCE, TECS, IDENT, and the alien's A-file. No blanket declinations will be recorded in TECS or sought by ERO offices. (See Memorandum, "Prosecution Reporting," James T. Hayes Jr., September 08, 2008.)

TECS is a critical tool in the statistical reporting of ERO's prosecutorial efforts. In order to maintain data integrity, it is imperative that the input regarding these cases fully encompasses all information, from initial presentation to conclusion. In order to quickly and accurately access the information, field offices will be accountable for training their personnel in the proper use of TECS case management.

(b)(7)(E)



Following these procedures enables HQ to produce accurate statistical reports. Any required modifications to cases after supervisory approval in TECS must be routed, through the appropriate channels, to the HQ CAP Unit Chief or his or her designee, who will take action.

Criminal Arrests

In order to accurately track criminal arrests, ERO enforcement officers must use Seized Asset and Case Tracking System (SEACATS) for statistical purposes regarding a criminal arrest in all criminal prosecution cases. The SEACATS Incident Report should be completed within 24 hours of the criminal arrest. The criminal arrest takes place when the alien is remanded to the custody of the USMS.

In addition to following the SEACATS requirement, ERO supervisors are to ensure that all cases initiated in TECS are completed in compliance with ICE directives. Creation and maintenance of a prosecution file is also required. ERO enforcement officers must create and maintain prosecution files for every person that has been criminally arrested. These files are to be considered sensitive, and the attached procedures must be followed to ensure utmost security and maintenance.

SECURE COMMUNITIES

Secure Communities is a federal information-sharing partnership that utilizes the biometric systems from the DHS and the DOJ — DHS's Automated Biometric Identification System (IDENT) and DOJ's Integrated Automated Fingerprint Identification System (IAFIS) — to assist ICE with identifying criminal aliens and those others who fall within ICE's enforcement priorities.

When state and local law enforcement arrest or book someone into a jail facility for a violation of a state criminal offense, they will generally fingerprint the person. After fingerprinting the person, the state and local authorities electronically submit the fingerprints to DOJ's biometric system for a criminal history check. These fingerprints are automatically sent to DHS's biometric system to check against its immigration and law enforcement records. If the fingerprints match those in DHS's biometric system, ICE's LESC will receive an automatic notification.

Upon notification of a fingerprint match in DHS's biometric system, the LESC will evaluate the immigration information and make an initial immigration status determination as to the individual's amenability for removal. The LESC will send the status determination to the ICE field office that has jurisdiction over the area in which the LEA resides to determine appropriate enforcement action based upon ICE's enforcement priorities.

RAPID REMOVAL OF ELIGIBLE PAROLEES ACCEPTED FOR TRANSFER (Rapid REPAT)

Rapid REPAT is a joint partnership between ICE and state correctional / parole agencies that allows for the early release of non-violent aliens with final orders of removal from state custody to ICE custody for the purpose of removal from the United States. Rapid REPAT is one component of the ICE ACCESS (ICE Agreements of Cooperation in Communities to Enhance Safety and Security) initiative whereby ICE seeks to partner with state governments to maximize immigration enforcement capabilities by promptly removing eligible aliens upon completion of their criminal sentence.

Under Rapid REPAT, aliens incarcerated in state prison and who have been convicted of non-violent offenses may receive early conditional release if they have a final order of removal and agree not to return to the United States. Eligible aliens agree to waive appeal rights associated with their state conviction(s). If an alien who was removed under Rapid REPAT re-enters the United States, the federal statute mandates confinement of the alien for the remainder of the sentence that was pending at the time of the parole or supervised release. Additionally, the alien may be prosecuted under a federal statute that provides for a fine and or up to 20 years in prison for illegally reentering the United States. Rapid REPAT allows state agencies to capitalize on ICE's ability to efficiently identify and remove criminal aliens from the United States while still preserving the integrity of the criminal justice system.

Rapid REPAT is administered by ERO pursuant to INA §241(a)(4)(B)(ii) and 8 U.S.C.1231(a)(4)(B)(ii), which requires i) that the alien is confined pursuant to a final conviction for a non- violent offense; ii) that removal is appropriate and in the best interest of the state; and iii) that the state submits a written request to ICE that the alien be removed.

Benefits

Rapid REPAT is another ICE law enforcement tool that assists the CAP program in meeting its overall goal. Non-violent criminal aliens are identified and processed for removal prior to their release from institutions, which helps prevent criminal aliens from being released without ICE's knowledge. Obtaining a final order of removal / deportation prior to release from state custody allows ICE to more efficiently remove such aliens from the United States, thereby maximizing detention space and conserving taxpayer resources.

EVIDENCE AND SEIZURES

On March 17, 2009, Robert Helwig, Assistant Director for Removal Management, sent guidance to the Field Office Directors on recovering firearms, ammunition and contraband processing, which was also approved by Marc J. Moore, Assistant Director for Field Operations.

The guidance noted that during the course of daily field office enforcement activities, ERO enforcement officers often recover contraband, such as narcotics, ammunition and weapons, which are routinely turned over to other agencies (OA) or held as evidence in a pending case and then referenced the ICE Firearms Policy.

According to the Interim ICE Firearms Policy (July 7, 2004), Parts 6.I.1., and 2.:

> "When a confiscated / seized or abandoned firearm (other than an ICE-issued firearm) comes into the custody of an ICE officer, that firearm must be immediately reported by the responsible ICE officer to the Senior Firearms Instructor (SFI) and a record of that firearm entered into the ICE automated firearms inventory system, ensuring compliance with federal property control regulations. During all subsequent legal proceedings the confiscated / seized or abandoned firearm will be controlled by the ICE evidence system. All firearms confiscated / seized or acquired by abandonment by ICE must be

(b)(7)(E)

To comply with Federal Rules of Criminal Procedure, Title VIII, Rule 41, Search and Seizure, it is imperative that all ERO enforcement officers performing law enforcement functions document recovered firearms, ammunition, and other contraband incident to an arrest or investigation. Therefore, on March 17, 2009, it was ordered that all recovered and or seized firearm(s), ammunition, and or any other contraband will require the generation of an I-44 through the ENFORCE system. This will allow a record of the event to be created and will facilitate the proper

handling of recovered firearms, ammunition, and other contraband according to established policy and procedure.

During the course of duty, Office of Enforcement and Removal Operations (ERO) enforcement officers encounter evidence of criminal or administrative violations, contraband or other property, including abandoned property. The following policies are relevant to the seizure of property by ERO officers and agents:

Under U.S. Immigration and Customs Enforcement (ICE) protocols (i.e., the *DRO/OI Protocols* agreement), ERO coordinates law enforcement and intelligence gathering activities with Homeland Security Investigations (HSI). This includes case de-confliction and ensures referral to HSI any criminal investigation other than those violations listed in the ICE protocols (i.e., 8 U.S.C. 1324, 8 U.S.C. 1546)

Regarding seized firearms, ERO officers are to coordinate with HSI in accordance with the above mentioned *Protocols* memo. If HSI is unable to assist with the seizure and forfeiture of a firearm, and/or if ICE does not possess the statutory authority for forfeiture, officers are to follow the Office of the Principal Legal Advisor (OPLA) Memorandum, *Disposition of seized firearms that have not been abandoned or forfeited.* This memorandum directs ICE officers to pursue judicial forfeiture or promptly seek assistance from the Bureau of Alcohol, Tobacco, Firearms, and Explosives or state or local law enforcement. In addition, the OPLA Memorandum states that officers must document evidence, contraband, or other forfeitable property confiscated, seized or acquired by abandonment through search warrants, consent searches, grand jury subpoenas, administrative summonses, surveillances, trash runs, or other means.

ERO enforcement officers who seize property to be used as evidence **must** attempt to turn over seized property to HSI. If HSI is unable to accept said property, ERO officers may seek to transfer property to another law enforcement agency, or temporarily detain said property. At all times, ERO officers will document such seizures and transfers by preparing an I-44 (Report of Apprehension or Seizure) in the ENFORCE system to document the recovery of the contraband. ERO may also store such property if the other agencies decline to accept the property (e.g., due to its de-minimus value) in accordance with current CBP and ICE policies.

The ERO enforcement officer will record in a ROI and I-44 narrative the facts of this encounter (b)(7)(E) The SFI will secure contraband, specifically firearms, pending its transfer to HSI or another agency in accordance with the Interim ICE Firearms policy. A signed copy of the I-44 will remain attached to the contraband for proper identification. All I-44 reports will be reviewed and approved by a first line supervisor. If the contraband will be turned over to another agency, an I-44 must still be completed to properly document the recovery and transfer action of the contraband. The receiving agency officer must sign the I-44 accepting the contraband from the releasing officer /

agency. The receiving agency will be provided a copy of the signed I-44 with the contraband.

FODs shall ensure that all law enforcement officers comply with the requirement to complete an I-44 when a weapon(s), ammunition, or any other contraband is recovered in the performance of official duties. (See Memorandum, "DRO/OI Protocols," Marcy M. Foreman/John P. Torres, August 20, 2007.)

CRIMINAL ALIEN PROGRAM OVERSIGHT REQUIREMENTS

This serves as guidance for all personnel to ensure proper compliance with handbook and electronic CAP statistical reporting requirements. Consistently following proper statistical reporting requirements assists in effectively tracking cases that involve subjects who have been arrested and processed by ERO for the purposes of performance measurement, resource allocation, statistical tracking, and assigning future human resources. A CAP case is defined as any removable alien identified in a federal, state, and local jail/prison or at-large in the community, ***regardless of the status of conviction***.

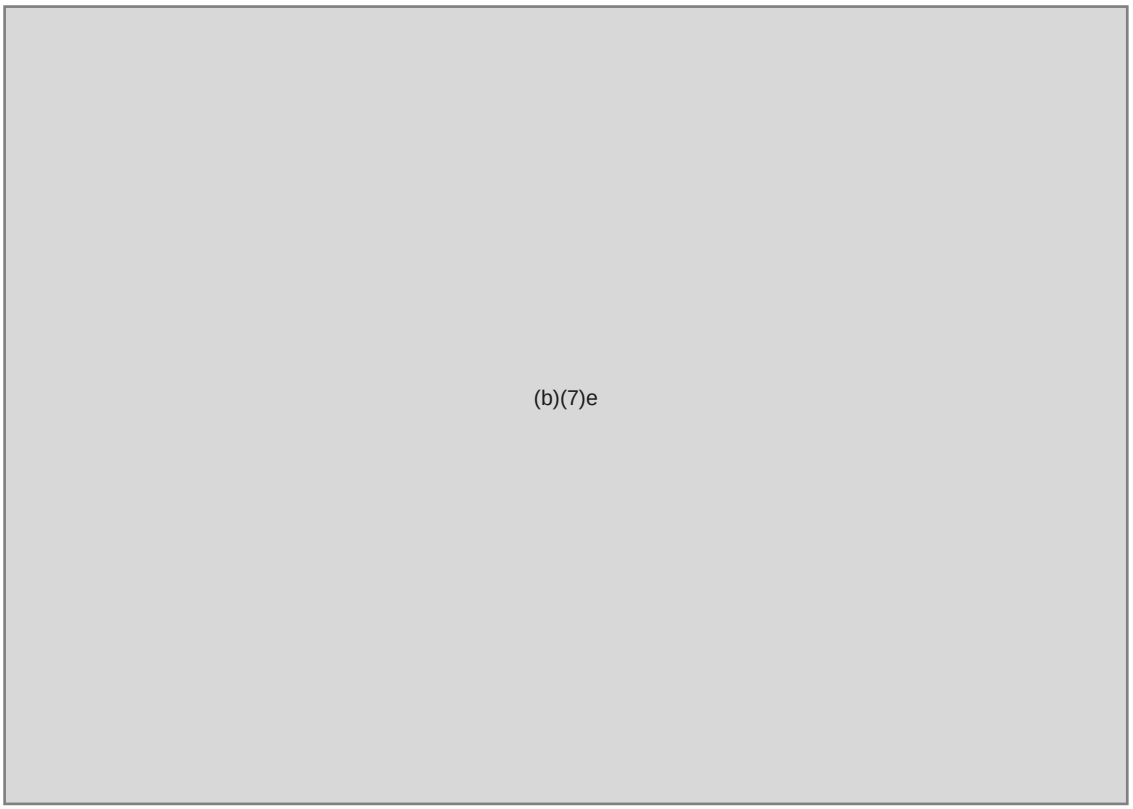
Procedures

All detainers lodged with an institution will be processed utilizing ENFORCE. In addition, ENFORCE must be updated to reflect the appropriate Crime Code, Status Code, and Status Date. For additional guidance on the procedures, review the following memoranda:

- September 1, 2009, "Updated Directives for the CAP Case Identification in ENFORCE," David J. Venturella.
- July 29, 2011, "Enforcement and Removal Encounters," Gary Mead.

The following three blocks from ENFORCE will allow CAP staff to track and report statistical information on cases that are processed at each level of incarceration. The codes noted below are used in the appropriate blocks of ENFORCE on all cases processed by ERO personnel.

(b)(7)e



It is crucial that these procedures are followed for all CAP cases to ensure that ERO has reliable data integrity in the management of CAP cases and that ERO receives credit for all CAP cases identified, processed and removed. This is not an inclusive set of instructions for a CAP event. ERO enforcement officers are to follow the most current ERO processing procedures at all times.

CAP Stats in ENFORCE

CAP data captured from all 24 Field Offices will be consolidated and routinely analyzed. HQ CAP works with Field Offices to ensure that this information is correctly inputted.

HQ CAP provides access to its ICE Integrated Decision System (IIDS) reports weekly through a shared server. These reports provide a view of a field offices statistics that re not to be used for official reporting but are to be used for the review of a field office internally. Contact your HQ CAP POC to request access to this shared server.

Consistently, HQ CAP reviews the following for data quality and/or progress:

1) Encounter processing and duplication of encounters
2) Screenings vs. coverage
3) Detainers lodged

4) Charging Document Issued (CDIs)
5) SURGE and at large operations
6) The percentage of processing occurring prior to the release of an alien from an LEA.
7) Criminal removals
8) Criminal prosecutions presented/accepted/indicted/convicted

Electronic CAP Reporting Requirements

HQ CAP will only capture, maintain and retrieve statistical data electronically. CAP data will not be manually reported, and field offices will ensure that:

- Create and update all appropriate EARM/RCA/CES and booking screens and fields once an encounter is created and a detainer is lodged;
- Process all CAP Charging Documents in ENFORCE and ensure all processing requirements are followed in accordance with the current ERO processing guide.
- Continue to monitor and update case status, if applicable, in EARM; and
- Continue to record and update all ERO criminal prosecution cases in TECS and EARM.

These procedures are set forth in the September 8, 2008 memorandum from John P. Torres entitled, "Reporting Guidance for the Criminal Alien Program (Follow-up to Director's July 11, 2006 Memorandum).

Record Checks

(b)(7)e

(b)(7)e

APPENDICES

Appendix 1: List of Forms

G--46	Departure Verification Letter
I-94	Arrival/Departure Record
I-94W	Nonimmigrant Visa Waiver Arrival or Departure Document
I-200	Warrant of Arrest/Warrant for Arrest of Alien/Administrative Warrant of Arrest
I-205	Warrant of Removal/Deportation
I-213	Record of Deportable/Inadmissible Alien
I-215	Applicant's Record of Sworn Statement in Affidavit Form
I-217	Information for Travel Document or Passport (Unless from Mexico)
I-247	Immigration Detainer
I-259	Notice to Detain, Remove, or Present Alien
I-265	Notice to Appear, Bond and Custody Processing Sheet
I-286	Notice of Custody Determination
I-294	Warning to Alien Ordered Removed or Deported
I-296	Notice to Alien Ordered Removed / Departure Verification
I-770	Notice of Rights and Request for Disposition (for Juveniles)
I-821	Application for Temporary Protected Status
I-826	Notice of Rights and Request for Disposition
I-848	Notice of Rights and Request for Disposition for El Salvadorans
I-848A	Notice of Rights and Request for Disposition for El Salvadorans (Spanish version)
I-851	Notice of Intent to Issue a Final Administrative Removal Order
I-851A	Final Administrative Removal Order
I-860	Notice and Order of Expedited Removal
I-862	Notice to Appear
I-863	Notice of Referral to Immigration Judge

I-867 A and B	Record / Jurat of Sworn Statement in Proceedings under INA §235(b)(1)
I-871	Notice of Intent/Decision to Reinstate Prior Order
I-877	Record of Sworn Statement in Administrative Proceedings
ICE Form 73-025	Miranda Rights
VWP I-294	Notice of Country to which Removal has been Directed and Penalty for Re-entry without Permission
G-146	Departure Verification Letter
FD-249	Arrest and Institution Fingerprint Card
M-444	Information About Credible Fear Interview

Appendix 2: Miranda Warning /Disposition of Firearms

Statement of Rights (Miranda) Form.pdf

ICE Disposal of Firearms (2009) (2).p

Appendix 3: A-File Guides

(b)(7)e

Appendix 4: Glossary of Acronyms

ABC	American Baptist Church
AFOD	Assistant Field Office Director
AOR	Area of Responsibility
BOP	Bureau of Prisons
CAD	Criminal Alien Division
CAP	Criminal Alien Program
CBP	Customs and Border Protection
CCD	Consular Consolidated Database
DFOD	Deputy Field Office Director
DHS	Department of Homeland Security
DO	Deportation Officer
DOJ	Department of Justice
DoS	Department of State
DSO	Designated Signing Official
EARM	ENFORCE Alien Removal Module
EID	Enforcement Integrated Database
EOIR	Executive Office of Immigration Review
ER	Expedited Removal
ERO	Enforcement and Removal Operations
FOD	Field Office Director
HQ	Headquarters
HRIFA	Haitian Refugee Immigration Fairness Act
HSI	Homeland Security Investigations
IAFIS	Integrated Automated Fingerprint Identification System
ICE	Immigration and Customs Enforcement
ICE ACCESS	ICE Agreements of Cooperation in Communities to Enhance Safety and Security
IDENT	Automated Biometric Identification System
IEA	Immigration Enforcement Agent
IIRIRA	Illegal Immigration Reform and Immigrant Responsibility Act

INA	Immigration and Nationality Act
JCART	Joint Criminal Alien Removal Taskforce
LEA	Law Enforcement Agency
LEAR	Law Enforcement Agency Response
LEO	Law Enforcement Online
LPR	Lawful Permanent Resident
NACARA	Nicaraguan Adjustment and Central American Relief Act
NOI	Notice of Intent
NTA	Notice to Appear
OPLA	Office of the Principal Legal Advisor
PACER	Public Access to Court Electronic Records
PIERS	Passport Information Electronic Records System
Rapid REPAT	Rapid Repatriation of Eligible Custodial Aliens Accepted for Transfer
ROP	Record of Proceedings
SEACATS	Seized Asset and Case Tracking System
SDDO	Supervisory Detention and Deportation Officer
TOC	Transnational Organized Crime
TPS	Temporary Protected Status
USAO	United States Attorney's Office
USCIS	United States Citizenship and Immigration Services
USMS	United States Marshals Service
VCAS	Violent Criminal Alien Section
VTC	Video Teleconferencing
VWP	Visa Waiver Program

Office of Enforcement and Removal Operations

U.S. Department of Homeland Security
500 12th St. SW
Washington, D.C. 20536

U.S. Immigration and Customs Enforcement

APR 23 2013

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

FROM: Thomas Homan
Acting Executive Associate Director

SUBJECT: ERO Support of the Department of Justice's (DOJ) Executive Office for Immigration Review (EOIR) Legal Orientation Program (LOP)

This memorandum serves to provide guidance to the Field Office Directors (FODs), Deputy Field Office Directors (DFODs), and Assistant Field Office Directors (AFODs) in support of the Department of Justice's (DOJ) Executive Office for Immigration Review (EOIR) Legal Orientation Program (LOP) which operates in 25 of our detention facilities.

Background

Since April of 2000, the DOJ, EOIR Office of Legal Access Programs (formerly known as the Legal Orientation and Pro Bono Program) has worked to improve access to legal information and counseling and increase rates of representation for immigrants appearing before the Immigration Courts and Board of Immigration Appeals (BIA). This has been carried out primarily through initiatives which facilitate access to information for attorneys and law students to accept pro bono cases.

The EOIR Office of Legal Access Programs (OLAP) focuses on four main initiatives - the LOP, the Legal Orientation Program for Custodians of Unaccompanied Alien Children (LOPC), the BIA Pro Bono Project, and the Model Hearing Program. In addition to these initiatives, OLAP also provides access to self-help materials which can assist all aliens in removal proceedings learn about the immigration court process and the forms of relief from removal.

Since 2003, EOIR has carried out the LOP to improve judicial efficiency and assist all parties in detained removal proceedings - detained aliens, the immigration court, ICE and the detention facility. Experience has shown that the LOP has had positive effects on the immigration court process: detained individuals make informed decisions and are more likely to obtain

representation, non-profit organizations reach a wider audience of people with minimal resources, and cases are more likely to be completed faster, resulting in fewer court hearings and less time spent in detention. Through the LOP, representatives from nonprofit organizations provide comprehensive explanations about immigration court procedures along with other basic legal information to large groups of detained individuals.

The orientations are normally comprised of three components: 1) the interactive group orientation, which is open to general questions; 2) the individual orientation, where non-represented individuals can briefly discuss their cases with experienced counselors; and 3) the referral/self-help component, where those with potential relief, or those who wish to voluntarily depart the country or request removal are referred to pro bono counsel, or given self-help legal materials and basic training through group workshops, where appropriate.

Currently, the EOIR LOP is being carried out in 25 ICE detention facilities. A list of those facilities is attached (*See* Attachment A).

Discussion

FODs who have EOIR LOP contractors in facilities within their area of responsibility (AOR) should note the best practices outlined below.

Accommodations

FODs are encouraged to establish consistent times and adequate space for the LOP contractors to meet with detainees. Additionally to maintain a strong relationship with the LOP contractors, ERO should appoint dedicated points of contact (POC) to help facilitate the relationship between ICE, the facility, and the LOP contractors. This schedule, along with the POC information, should be shared with the LOP contractors;

Attendance

FOD should ensure the greatest possible detainee attendance at LOP group orientations. In doing so, ERO and/or facility providers should assist LOP contractors to identify all detainees eligible to attend a LOP. ERO and/or facility staff should share with LOP providers relevant and available information regarding detainee arrival dates, type of immigration proceeding and housing locations (such as through creation of attendance lists on a daily or weekly basis) in order to ensure that all eligible and interested detainees have access to attend an LOP group orientation prior to their first appearance in court.

Legal Documentation and Availability of LOP Materials

FODs should allow detainees to keep their legal documents with them (e.g. Notice to Appear) in order to bring these to the LOP, as well as to their immigration court hearings. In addition, FODs should ensure that LOP materials are available in the law libraries so that the detainees are well informed and can prepare their cases on their own.

Information Sharing

FODs are encouraged to share information between ICE, EOIR, and LOP contractors. Per the 2009 Systems of Record Notice (SORN), the following information can be shared with LOP contractors:

- alien name, file number,
- country of birth,
- amount of bond,
- hearing date,
- sections of law under which inadmissibility/removability is alleged, and;
- government decisions concerning an individual's request for immigration benefits and information about other immigration-related actions by the Government (e.g. dismissals, entry of orders of removal, etc.)

Use of Laptops

FODs should allow EOIR LOP contractors to use their laptops in the facilities, subject to the local facility policies and procedures. The use of laptops will enable providers to quickly organize information and ensure that detainee information is available for subsequent LOP services, as well as enable providers to access legal reference materials without bringing cumbersome physical copies into detention facilities.

Attachment EOIR LOP Facility Sites

ICE Facilities with EOIR LOP Contractors				
Name	City	State	AOR	Type
Adelanto Correctional Facility	Adelanto	CA	LOS	DIGSA
Eloy Federal Contract Facility	Eloy	AZ	PHO	DIGSA
El Paso Service Processing Center	El Paso	TX	ELP	SPC
Otero County Processing Center	Chaparral	NM	ELP	DIGSA
Northwest Detention Center	Tacoma	WA	SEA	CDF
Houston Contract Detention Facility	Houston	TX	HOU	CDF
Buffalo (Batavia) Service Processing Center	Batavia	NY	BUF	SPC
Denver Contract Detention Facility	Aurora	CO	DEN	CDF
York County Prison	York	PA	PHI	IGSA
Berks County Family Shelter	Leesport	PA	PHI	Family
South Texas Detention Complex	Pearsall	TX	SNA	CDF
Monmouth County Jail	Freehold	NJ	NYC	IGSA
Hudson County Jail	Kearney	NJ	NYC	IGSA
Port Isabel	Los Fresnos	TX	SNA	SPC
Essex County Jail	Newark	NJ	NEW	IGSA
San Diego Contract Detention Facility - Otay	San Diego	CA	SND	CDF
Jena/LaSalle Detention Facility	Jena	LA	NOL	IGSA
Stewart Detention Center	Lumpkin	GA	ATL	DIGSA
Pinal County Jail	Florence	AZ	PHO	IGSA
Krome North Service Processing Center	Miami	FL	MIA	SPC
Hampton Roads Regional Jail	Portsmouth	VA	WAS	IGSA
Immigration Centers of America Farmville	Farmville	VA	WAS	DIGSA
Bergen County Jail	Hackensack	NJ	NYC	IGSA
Orange County Jail	Goshen	NY	NYC	IGSA
North Georgia Detention Center	Gainesville	GA	ATL	DIGSA