

address in the **FOR FURTHER INFORMATION CONTACT** section.

A 15-day comment period is provided to allow interested persons to respond to this proposed rule. Fifteen days is deemed appropriate because: (1) The 2004–2005 fiscal period began on April 1, and the marketing order requires that the rate of assessment for each fiscal period apply to all assessable Washington-Oregon fresh prunes handled during such fiscal period; (2) the Committee needs to have sufficient funds to pay for expenses which are incurred on a continuous basis; and (3) handlers are aware of this action which was unanimously recommended by the Committee at a public meeting and is similar to other assessment rate actions issued in past years.

#### List of Subjects in 7 CFR Part 924

Plums, Prunes, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 924 is proposed to be amended as follows:

#### **PART 924—FRESH PRUNES GROWN IN DESIGNATED COUNTIES IN WASHINGTON AND IN UMATILLA COUNTY, OREGON**

1. The authority citation for 7 CFR part 924 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

2. Section 924.236 is revised to read as follows:

##### **§ 924.236 Assessment rate.**

On or after April 1, 2004, an assessment rate of \$1.75 per ton is established for the Washington-Oregon Fresh Prune Marketing Committee.

Dated: July 13, 2004.

**A.J. Yates,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. 04–16272 Filed 7–16–04; 8:45 am]

**BILLING CODE 3410–02–P**

#### **DEPARTMENT OF HOMELAND SECURITY**

##### **8 CFR Parts 236 and 241**

[ICE No. 2317–04]

RIN 1653–AA41

#### **DEPARTMENT OF JUSTICE**

##### **8 CFR Parts 1236, 1240 and 1241**

[EOIR No. 146P; AG Order No. 2726–2004]

RIN 1125–AA50

#### **Execution of Removal Orders; Countries to Which Aliens May Be Removed**

**AGENCY:** United States Immigration and Customs Enforcement, Department of Homeland Security; Executive Office for Immigration Review, Department of Justice.

**ACTION:** Joint notice of proposed rulemaking.

**SUMMARY:** The Secretary of Homeland Security and the Attorney General publish this joint notice of proposed rulemaking to amend their respective agencies' regulations pertaining to removal of aliens.

The Department of Homeland Security proposes to amend its rules to establish that acceptance by a country is not required under specific provisions of section 241(b) of the Immigration and Nationality Act (Act) in order to remove an alien to that country, and that a "country" for the purpose of removal is not premised on the existence or functionality of a government in that country. This rule clarifies the countries to which an alien may be removed and the situations in which the Secretary of Homeland Security will remove an alien to an alternative or additional country. The Department of Homeland Security proposed rule also makes technical changes as a result of amendments to the Act by the Homeland Security Act of 2002 (HSA).

The Department of Justice proposed rule clarifies the procedure for an alien to designate the country to which he would prefer to be removed, provides that the immigration judge shall inform any alien making such a designation that the alien may be removed to another country under section 241(b) of the Act in the discretion of the Secretary of Homeland Security in effecting the foreign policy of the United States, and clarifies the effect of an identification of a country for removal in an immigration judge's order of removal from the United States. The rule clarifies that acceptance by a country is not a factor

to be considered by the immigration judge in identifying a country or countries of removal in the administrative order of removal. The Department of Justice proposed rule also makes technical changes to eliminate unnecessary provisions and update references to reflect the enactment of the HSA.

**DATES:** Written comments must be submitted to the appropriate agency on or before August 18, 2004.

**ADDRESSES:** Please submit written comments pertaining to the Department of Homeland Security proposed rule to Director, Regulations and Forms Services Division, Department of Homeland Security, 425 I Street, NW., Room 4034, Washington, DC 20536. To ensure proper handling, please reference ICE No. 2317–04 on your correspondence. Comments may also be submitted electronically to the Department of Homeland Security at [rfs.regs@dhs.gov](mailto:rfs.regs@dhs.gov). Comments submitted electronically must include the ICE No. 2317–04 in the subject heading to ensure that the comments can be transmitted electronically to the appropriate program office. Comments are available for public inspection at the above address by calling (202) 514–3048 (not a toll-free call) to arrange for an appointment.

Please submit written comments pertaining to the Department of Justice proposed rule to Kevin Chapman, Acting General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041. To ensure proper handling, please reference RIN No. 1125–AA50 on your correspondence. You may view an electronic version of this proposed rule at [www.regulations.gov](http://www.regulations.gov). You may also comment via the Internet to the Executive Office for Immigration Review (EOIR) at [eoir.regs@usdoj.gov](mailto:eoir.regs@usdoj.gov) or by using the [www.regulations.gov](http://www.regulations.gov) comment form for this regulation. When submitting comments electronically, you must include RIN No. 1125–AA50 in the subject box.

**FOR FURTHER INFORMATION CONTACT:** Regarding the Department of Homeland Security proposed rule: Mark Lenox, U.S. Immigration and Customs Enforcement, Department of Homeland Security, 801 I Street, NW., Suite 800, Washington, DC 20536, telephone (202) 616–9166 (not a toll-free call).

Regarding the Department of Justice proposed rule: Kevin Chapman, Acting General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia

22041, telephone (703) 305-0470 (not a toll-free call).

#### SUPPLEMENTARY INFORMATION:

- A. The Purpose of the Proposed Regulations
- B. The Statutory Requirements for Removing Aliens to a Country
- C. Effectuation of Orders and Warrants of Removal
- D. The Act and Legislative Policy concerning "Acceptance"
- E. Removal to a Country and the Foreign Relations of the United States
- F. Administrative and Judicial Interpretations
- G. Clarifying the Immigration Judge's Order of Removal from the United States
- H. Joint and Independent Notice of Proposed Rulemaking
- I. Conforming Revisions

#### Department of Homeland Security

- PART 236—APPREHENSION AND DETENTION OF INADMISSIBLE AND DEPORTABLE ALIENS; REMOVAL OF ALIENS ORDERED REMOVED
- PART 241—APPREHENSION AND DETENTION OF ALIENS ORDERED REMOVED

#### Department of Justice

- PART 1236—APPREHENSION AND DETENTION OF INADMISSIBLE AND DEPORTABLE ALIENS; REMOVAL OF ALIENS ORDERED REMOVED
- PART 1240—PROCEEDINGS TO DETERMINE REMOVABILITY OF ALIENS IN THE UNITED STATES
- PART 1241—APPREHENSION AND DETENTION OF ALIENS ORDERED REMOVED

#### A. The Purpose of the Proposed Regulations

Section 241(b)(1) and (2) of the Immigration and Nationality Act (Act) (8 U.S.C. 1231(b)(1) and (2)) provide the process for determining the countries to which an alien<sup>1</sup> may be removed after a hearing before an immigration judge, the issuance of a final order finding that the alien is removable from the United States and not eligible for relief from removal, and disposition of any administrative and judicial appeals.

Section 241(b)(1) of the Act relates to arriving aliens whom the Department of Homeland Security (DHS) has placed in removal proceedings, a relatively small category because most arriving aliens are subject to expedited removal under section 235 of the Act (8 U.S.C. 1225). Section 241(b)(1) provides a two-step

process to determine the country of removal for an arriving alien: (1) to the country from which the alien boarded a conveyance to the United States; or (2) to an alternative country, such as the country of citizenship or birth.

Section 241(b)(2) of the Act applies in the far more common circumstance of the removal of other (*i.e.*, non-arriving) aliens. Section 241(b)(2) provides a three-step process to determine the country of removal for these aliens: (1) the country designated by the alien; (2) an alternative country of which the alien is a subject, national or citizen, with certain conditions; and (3) an additional country, such as the country from which the alien boarded a conveyance to the United States or of the alien's residence or birth.

Sections 241(b)(1) and (2) of the Act use the terms "country" and "accept" without any statutory definition. Some subparagraphs of paragraph (b)(2) state that the alien is to be removed to a "country" that will "accept" the alien, while other provisions do not state that a "country" must "accept" the alien. The United States courts of appeals have differed on the meaning and effect of these terms. *Compare Jama v. INS*, 329 F.3d 630 (8th Cir. 2003), *cert. granted*, 124 S.Ct. 1407 (2004) (No. 03-674), *with Ali v. Ashcroft*, 346 F.3d 873 (9th Cir. 2003), *petition for reh'g pending* (No. 03-35096, 9th Cir.). These rules propose to implement the provisions of the Act and amend the regulations of the Department of Homeland Security and the Department of Justice in response to this intercourt conflict.

#### B. The Statutory Requirements for Removing Aliens to a Country

When an alien is charged with being removable from the United States, he or she is provided with a hearing before an immigration judge and asked whether he or she admits or denies the allegations of fact and concedes or disputes the charges in the Notice to Appear. Except for arriving aliens covered by section 241(b)(1) of the Act, the immigration judge then inquires if the alien wishes to designate a country to which he prefers to be removed if removal from the United States is required. Upon such designation by the alien, or refusal to designate, the immigration judge will specify a country, or countries in the alternative, on the record. If the immigration judge finds the respondent to be removable and ineligible for relief from removal, the immigration judge will enter an order of removal from the United States. That order may be appealed to the Board of Immigration Appeals (Board)

and the courts. When an order of removal from the United States becomes final, the Department of Homeland Security is responsible for executing the order and will issue a Warrant of Removal.

Section 241(b)(1) of the Act provides that the Secretary shall ordinarily remove the alien to the country in which the respondent boarded the vessel or aircraft on which the alien arrived in the United States. If removal to that country is not possible because its government is "unwilling to accept the alien into that country's territory, removal shall be to any of the following countries":

(i) The country of which the alien is a citizen, subject, or national.

(ii) The country in which the alien was born.

(iii) The country in which the alien has a residence.

(iv) A country with a government that will accept the alien into the country's territory if removal to each country described in a previous clause of this subparagraph is impracticable, inadvisable, or impossible. Section 241(b)(1)(C) of the Act.

For all other aliens, section 241(b)(2) of the Act sets out the order, or sequence, of countries and territories to which the Secretary shall remove the alien. Generally, an alien in removal proceedings will be removed to the country he or she designates before the immigration judge. However, there are a number of exceptions to this requirement. For example, the alien's designation may be disregarded if the government of the country is not willing to accept the alien into the country.

If one of the exceptions applies, the Secretary shall remove the alien to an alternative country. Section 241(b)(2)(D) of the Act provides that, if an alien is not removed to the country designated by the alien, the Secretary shall remove the alien to a country of which the alien is a subject, national, or citizen unless the government of that country—(i) does not inform the Secretary or the alien finally, within 30 days after the date the Secretary first inquires or within another period of time the Secretary decides is reasonable, whether the government will accept the alien into the country; or (ii) is not willing to accept the alien into the country.

Finally, if removal to an alternative country cannot be made under section 241(b)(2)(D) of the Act, subsection (E) provides that the Secretary shall remove the alien to any of the following countries:

(i) The country from which the alien was admitted to the United States.

<sup>1</sup> The proposed regulations and this Supplementary Information use two distinct terms: the term "alien" is broader than the term "respondent," which includes only aliens while they are in removal proceedings. Accordingly, the Department of Homeland Security rule uses the term "alien," the Department of Justice rule uses the term "respondent," and the Supplementary Information uses the term that is applicable in the specific context. The Immigration and Nationality Act generally uses the term alien and is not as discrete as the regulations.

(ii) The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States.

(iii) A country in which the alien resided before the alien entered the country from which the alien entered the United States.

(iv) The country in which the alien was born.

(v) The country that had sovereignty over the alien's birthplace when the alien was born.

(vi) The country in which the alien's birthplace is located when the alien is ordered removed.

(vii) If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country.

The determination of the country to which the alien is removed under section 241(b)(2)(D) and (E) is exclusively within the discretion of the Secretary.

The structure of the sequence of countries for removal is clear. However, one circuit court has interpreted the final clause of subparagraph (E)(vii), which restricts removal to countries where governments will accept the alien, as modifying the entire subparagraph. As explained in Part D, the Secretary and the Attorney General find that the better reading of the statute is that this language modifies only clause (vii). Accordingly, if the Secretary is unable to remove an alien to a country of designation or an alternative country in subparagraph (D), the Secretary may, in his discretion, remove the alien to any country listed in subparagraphs (E)(i) through (E)(vi), whether or not those countries will accept the alien. The proposed regulations implement this interpretation and eliminate provisions that could be confusing.

### C. Effectuation of Orders and Warrants of Removal

Once an alien receives a final order of removal, the Department of Homeland Security issues a Warrant of Removal, and the process of returning that alien begins. Generally, the first step in the removal process is to ensure that the alien has a valid travel document from the country to which he is to be returned. A valid travel document may consist of a passport from that country (and even an expired passport in certain cases), a *laissez passer*, or other evidence that the Department of State and DHS believe is sufficient to authorize the alien's international

travel, depending on the country involved and the specific relations with that country and any intervening transit countries. In some cases, no travel document is used in the repatriation.

For example, thousands of Mexican nationals are returned across the border to Mexico each year without notification to the government of Mexico and without the requirement of a travel document. Additionally, the United States routinely repatriates aliens without requesting separate travel documents where aliens are apprehended with or provide DHS Immigration and Customs Enforcement (ICE) with valid travel documents. In many cases, repatriations using existing travel documents do not involve specific notification to the alien's home country.

In those cases where a valid travel document does not exist, the DHS Detention and Removal program contacts the foreign government's embassy or consulate in the United States and attempts to obtain a travel document valid for the return of the alien. The local field office of Detention and Removal sends to the embassy or consulate a travel document request that consists of biographical forms, documents that establish nationality, and other documents that may be requested by the embassy or consulate. Contact with the foreign government may also include specific contacts through the Chief of Mission of the United States Embassy in that country with the Foreign Minister of that country and between other officers of the United States Department of State and the foreign country's appropriate Ministry. Once the travel document has been secured, travel arrangements are made, the alien is returned and the Warrant of Removal is executed. The negotiation of travel documents for an alien to a foreign country may be routine and accomplished at the staff level, or may require negotiation by ambassadors, depending on the specific country, the international relations with that country, specific events and other negotiations with that country, and even the specific alien's identity, at the time the travel documents are negotiated.

Depending upon the country, this travel document issuance process can take from days to months. The question of how long the process takes in many instances reflects the general relationship the United States has with a given country. There are certain countries that have historically steadfastly refused to issue documents, even though they know that a given alien is a national of their country. ICE and the Department of State have

attempted to reach an accord or agreement with these countries and will continue to do so.

As a matter of historical practice, ICE has not attempted with any frequency to remove aliens to a particular foreign country if the country has a functioning central government and that government objects to the alien's entry. As a practical matter, removal to a country with a functioning central government is very unlikely to occur unless that government at least implicitly "accepts" the alien.

Also, there are a variety of ways in which foreign governments have manifested their willingness to "accept" a removed alien. Acceptance has not always been expressed through any formal declaration or documentation, and it has not always been specific to an individual alien—an established, agreed-upon practice for dealing with a particular class of aliens has been sufficient. Removal practices vary from country to country. In fact, ICE uses several methods to accomplish the physical removal of aliens from the United States. For example, ICE officers may escort an alien to the United States border, and watch the alien cross the border into a foreign country such as Mexico without more than a determination that the individual is of Mexican nationality or citizenship.

ICE officers may place an alien on a commercial or charter carrier without further escort by ICE, and ensure that the alien is on the commercial or charter carrier and that the carrier departs from the territory of the United States, such as routine returns to most countries of the world, even though intervening transit countries may have only an implicit or tacit agreement to permit the transit of the alien. This is the most common scenario for non-contiguous countries and their citizens or natives and is used routinely for thousands of aliens to most of the nearly 200 countries of the world. For any transit that involves an intervening layover before reaching the final ticketed destination, DHS recognizes that under this scenario, the alien's actual return to a specific country of nativity or citizenship (though paid for by the United States) is entirely dependent on that alien's continuation of through transit ticketing and whether any through transit country will permit the alien to deviate from the existing ticketing.

ICE officers alternatively may accompany an alien when he or she is placed on a commercial or charter carrier through transit to a final destination. This extensive escort service is generally only employed

when removing an alien from the United States where there is a risk of flight or concern about the public safety, such as in the case of certain criminal aliens. These cases require greater cooperation of any transit countries and may entail specific routing of the alien and his or her escort through specific cooperating countries, even though more costly and indirect. For example, while DHS routinely utilizes the Kingdom of the Netherlands as a transit country, it is unable to transit nationals of Burundi through the Netherlands, based upon the latter country's request.

Except for the first method of removal, each of these scenarios may involve the alien stopping in a country of transit prior to his or her final destination. In addition, ICE officers who escort aliens may stop accompanying the alien once the alien stops at and passes through a country of transit on to his or her final destination. For example, an alien being removed to India on a flight transiting through the Netherlands may only be accompanied to the door of the plane in the Netherlands, rather than being accompanied by an ICE officer all the way to India.

The role of ICE officers in each of these scenarios is not to obtain the acceptance of the country of removal, but to ensure that the removal order has been carried out through witnessing the alien's crossing of a border, the alien's departure on a commercial or charter carrier, or the alien's passage into or through a transiting country on to his or her final destination. ICE officers are utilized to ensure that aliens being removed are placed at a point of no return to the United States. Accordingly, even though the rules distinguish between the immigration judge's order of removal from the United States and the actual removal of the alien to a different country, the actual removal of the alien by DHS is generally not predicated on any acceptance of the alien into any specific country.

The proposed rules also address whether an alien may be removed to a country where there is no functioning "government." With respect to the countries determined pursuant to sections 241(b)(1)(C)(i)–(iii) and (2)(E)(i)–(vi) of the Act, the proposed rules each provide that the absence of a "government" in the receiving country does not preclude the Secretary from removing the alien to that country. This situation is not entirely uncommon. In a number of transitory periods, a specific "country" may not have a "government" or its government may not be recognized by the United States Government, the United Nations, or

other foreign states or international bodies. Whether a country has a government is not a question that can be defined by statute or regulation. It does not follow, however, that the removal of aliens to the territory of such a receiving country must cease until a "government" is organized, or until that government is recognized. Likewise, it is unnecessary to obtain a commitment of acceptance by the receiving country before travel arrangements are made and the alien is transported. Such a commitment is desirable, but national security concerns, including foreign policy concerns, as well as other Executive Branch interests might deem removal appropriate even in the absence of acceptance. Thus, where it is not possible for the United States Government to request the government of a receiving country to accept these aliens through the normal diplomatic channels, the DHS proposed rule provides that the Secretary can designate a country previously identified in section 241(b)(2)(A)–(D) of the Act when selecting an additional removal country pursuant to clause (E)(i)–(vi), if the Secretary determines the designation is in the best interests of the United States.

The discussion in these proposed rules relates only to the determination of the country of removal for purposes of section 241(b) of the Immigration and Nationality Act, and does not address the broader issues relating to what constitutes a government and when a government is recognized by the United States, the latter being a foreign policy responsibility carried out by the Secretary of State.

#### **D. The Act and Legislative Policy Concerning "Acceptance"**

The first reason that the Secretary and the Attorney General conclude that acceptance is not required in sections 241(b)(2)(E)(i) through (vi) of the Act is that the statute does not require acceptance. In construing the Act, as with other Congressional enactments, the Supreme Court repeatedly has held itself "bound to 'assume that the legislative purpose is expressed by the meaning of the words used.'" *INS v. Cardozo-Fonseca*, 480 U.S. 421, 431 (1987) (quoting *INS v. Phinpathya*, 464 U.S. 183, 189 (1984)) (internal quotations omitted). That approach is consistent with the Court's more general admonition that "[t]he plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *United States v. Ron Pair Enters., Inc.*, 489 U.S.

235, 242 (1989) (alteration in original); *see also Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). The Secretary and the Attorney General follow this guidance in the promulgation of the proposed rules, as illustrated more fully below.

The question whether "acceptance" is a legal prerequisite to removal of an alien to a particular country is likely to have practical significance only in situations where the reason that acceptance cannot be obtained is that the relevant country lacks a functioning central government. As a theoretical matter, the same question might arise if the Secretary attempted to remove an alien to a specific country over the objection of that country's government. As previously explained, however, the general practice of the Executive Branch is not to attempt to remove an individual under the Act to a country whose government refuses to accept him.

The text of sections 241(b)(1)(C)(i)–(iii) and 241(b)(2)(E)(i)–(vi) of the Act (8 U.S.C. 1231(b)(1)(C)(i)–(iii) and 1231(b)(2)(E)(i)–(vi)) contains no requirement for acceptance in order to effectuate removal. To the contrary, the Act is plainly designed to give the Executive Branch a wide range of grounds and countries for effecting removal either with or without acceptance. Moreover, although the Act demonstrates a clear and sensible preference for effecting removal with acceptance under sections 241(b)(1)(A), (B) and 241(b)(2)(A)–(D) of the Act, it carefully preserves the discretion of the Executive Branch to effect removal without acceptance—except in the circumstance where the acceptance itself provides the only connection between the alien and the removal country at issue. See sections 241(b)(1)(C)(iv) and 241(b)(2)(E)(vii) of the Act.

As previously set out, sections 241(b)(2)(A) through (C) of the Act address removal to a country designated by the alien. In pertinent part, those provisions state that the Secretary "shall remove" an alien to the country designated by the alien (section 241(b)(2)(A)(ii)), but that the Secretary "may disregard a designation" if, among other things, "the government of the country is not willing to accept the alien into the country" (section 241(b)(2)(C)(iii)) or the Secretary "decides that removing the alien to the country is prejudicial to the United States" (section 241(b)(2)(C)(iv)). These

provisions do not prohibit removal without acceptance: If acceptance is provided, they require removal to the country designated by the alien (unless the Secretary makes a highly discretionary determination that such removal is against the national interest), and if acceptance is not provided, they permit the Secretary not to remove the alien to the country designated by the alien. In no circumstances do these provisions affirmatively prohibit removal without acceptance to the designated country.

Section 241(b)(2)(D) of the Act addresses removal to a country of which the alien is a subject, national, or citizen. In pertinent part, it states that the Secretary “shall remove” the alien to such a country, unless the country “is not willing to accept the alien.” However, that provision also does not affirmatively prohibit removal to such countries without acceptance. Instead, it states a general rule requiring removal with acceptance to any country of which the alien is a national or citizen; and it contains an exception, which permits the Secretary not to remove the alien to such countries without acceptance.

Finally, section 241(b)(2)(E) of the Act specifies “[a]dditional” removal countries if an alien is “not removed to a country” under the prior subsections. The Secretary “shall remove” the alien to any of seven specified countries or categories of countries. The first six of these countries or categories of countries, defined without reference to acceptance, describe countries with some preexisting connection to the alien, e.g., “[t]he country in which the alien was born,” in section 241(b)(2)(E)(iv). The final provision, section 241(b)(2)(E)(vii), states: “If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country.” The “acceptance clause” of this final provision expands the countries to which the Secretary may physically remove the alien to include any country that will accept the alien. This “acceptance clause” is discrete to the final clause (vii) of subparagraph (E) and does not apply to the previous clauses (i) through (vi) of subparagraph (E).

Various structural considerations reinforce the conclusion that acceptance is not required. To begin with, section 241(b)(2) of the Act specifically imposes an acceptance requirement in subparagraph (E)(vii), and specifically addresses the role of acceptance in determining removal under

subparagraphs (A) through (D). Those express acceptance provisions foreclose any reasonable inference that the other pertinent provisions, subparagraphs (E)(i) to (E)(vi), somehow incorporate an implied acceptance requirement. Similarly, section 241(b)(1)(C)(iv) of the Act imposes an acceptance requirement that is absent from subparagraphs (C)(i) to (C)(iii). As the Supreme Court has repeatedly emphasized, “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Cardozo-Fonseca, supra*, 480 U.S. at 432 (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983) (in turn quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))). Respecting such inclusions and omissions is even more important where they appear not only within the same statute, but also within the same section of the same statute. And it is yet more important when the provisions at issue are as “comprehensive and reticulated” as section 241(b)(2). See, e.g., *Great Western Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002). Cf. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (specific qualifications for service in Congress set forth in the text of the Constitution may not be supplemented by Congress or the States).

Extending the narrow acceptance requirement of section 241(b)(2)(E)(vii) of the Act to all of the provisions of subparagraph (E), or the narrow acceptance requirement of section 241(b)(1)(C)(iv) of the Act to all of the provisions of subparagraph (C), would be a particularly egregious violation of these general principles. Subparagraph (E) states six possible removal countries without reference to acceptance, each of which has some past connection to the alien, and it then creates a residual removal provision that does require acceptance; in turn, that residual provision is triggered when it is “impracticable, inadvisable, or impossible to remove the alien” to those countries—not whenever the previously specified countries fail to provide acceptance. To be sure, the Secretary may (but need not) consider it “impracticable, inadvisable, or impossible” to effect removal where a foreign power has affirmatively refused acceptance. But where there is no relevant government capable of providing acceptance, concerns of comity between sovereigns are far diminished. Absent impracticability,

acceptance under sections 241(b)(1)(C)(iv) or 241(b)(2)(E)(vii) of the Act is not even an available option, much less a compelled one.

A construction of the Act that maximizes the government’s removal options is consistent with the dominant goals and objectives of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, section 305(a)(3), 110 Stat. 3009–597 (1996) (“IIRIRA”). As the Supreme Court has explained, “many provisions of IIRIRA are aimed at protecting the Executive’s discretion from the courts—indeed, that can fairly be said to be the theme of the legislation.” *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 486 (1999) (emphasis in original). IIRIRA also sought to facilitate the removal of aliens, see *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. at 481–87, and to enact “wholesale reform[s]” to protect the public against rapidly “increasing rates of criminal activity by aliens,” *Demore v. Kim*, 538 U.S. 510, 518, 123 S. Ct. 1708, 1714–16 (2003).

An interpretation of the current statutory and regulatory environment contrary to that set forth in these rules would erect a *de facto* amnesty program for aliens from countries that lack an effective “functioning government.” Such a regime would effectively apply to all such aliens who cannot practicably be removed to an alternative removal country. For example, in the case of Somalia alone, where there is no functioning government recognized by the United States, the Department of Homeland Security estimates that this includes approximately 8,000 Somali nationals currently subject either to final orders of removal or to pending removal proceedings. Moreover, countries without an effective government are likely to present terrorism concerns, as demonstrated by the present situation in Somalia. See, e.g., *United Nations, Report of the Panel of Experts in Somalia Pursuant to Security Council Resolution 1474* (Oct. 29, 2003) (describing activities of international terrorists in Somalia); U.S. Department of State, *Patterns of Global Terrorism—2002, Africa Overview* at 6 (same) (April 20, 2003) (available at <http://www.state.gov/s/ct/rls/pgtrpt/2002/pdf/>) (last accessed on May 4, 2004); Congressional Research Service, *Report For Congress, Africa and the War on Terrorism*, at 16–17 (same) (Jan. 17, 2002). The consequence of a theory that the Executive Branch cannot remove aliens who fail to qualify for asylum, withholding of removal, or temporary protected status, and whom no other

country is willing to accept, is not only that such aliens may remain in the United States for the indefinite future, but also that they must be released wholesale from immigration detention absent special circumstances. See *Zadvydas v. Davis*, 533 U.S. 678 (2001). This is clearly not the intent of Congress in enacting IIRIRA, and that approach would impair implementation of the foreign policy of the United States.

The absence of a categorical prohibition against removal without acceptance does not render the Act's provisions to be inexplicable. Rather, the Act's provisions must be understood as a step-wise progression of determinations from the country designated by the alien to a country that has minimal contacts with the alien, even one that will not, or has not the capacity to, accept the alien.

Section 243(d) of the Act (8 U.S.C. 1253(d)), which provides for the termination of visa processing in countries that do not accept repatriation of citizens within a reasonable time, is effectively a penalty for forcing the United States to reach the more complicated issues of acceptance on an operational basis, not a limitation on the authority to remove an alien. The alien terrorist removal provisions at section 507(c) of the Act (8 U.S.C. 1537(c)) provide an authorization to the Secretary to maintain custody of an alien terrorist indefinitely if no other country will accept the alien terrorist.

Accordingly, the Secretary and the Attorney General find that the acceptance by a country is not required by the Act's language, structure, purpose, or intent. See *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999) (according deference to Attorney General's interpretation of Act). Moreover, intervening Congressional action, specifically in passage of the Homeland Security Act, and the creation of an intercourt conflict warrant a fresh consideration of the elements contained in these provisions and correction of prior interpretations of the law.

#### E. Removal to a Country and the Foreign Relations of the United States

Foreign policy considerations confirm that the provisions of the Act at issue here should not be read to require acceptance. As the Supreme Court has stressed repeatedly, the right of the Executive Branch to remove aliens "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("power to expel or exclude

aliens" is "a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control") (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)). These considerations apply with special force to immigration issues arising under the Act involving foreign countries that are either hostile, dysfunctional, or lack the capacity to exercise their sovereign authority. In particular, in exercising authority to remove aliens under the Act, the Executive Branch has the responsibility to assess the foreign policy considerations that are presented by a foreign country that has no functioning government to accept its nationals. The Secretary, after consultation with the Secretary of State and other appropriate agencies, may assess such foreign policy considerations on a country-by-country basis.

The actual removal of an alien, even more than the designation of a country of removal by the alien or the identification of a country of removal in an immigration judge's order, "is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–589 (1952). Accordingly, while there may be judicial inquiry into the legal efficacy of the immigration judge's order, and *habeas corpus* may be sought to challenge the lawfulness of detention or restraint, the actual issues of to what "country" an alien may be removed and whether that country "accepts" the alien necessarily raise concerns for the separation of powers in trenching on matters committed to the Executive Branch. See *Department of Navy v. Egan*, 484 U.S. 518, 529 (1988) ("[F]oreign policy [is] the province and responsibility of the Executive") (citation and quotation omitted); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial").

The proposed rule of the Department of Justice amends 8 CFR 1240.10(f) and 1240.12 to clarify the distinction between the administrative adjudication and the effectuation of the alien's removal, which implicates the foreign relations of the United States. The designation by the alien, under section 241(b)(2)(A)(ii) of the Act, and the identification in the immigration judge's order of removal are subject to judicial review. However, the actual removal of the alien to a foreign state pursuant to

the Act is an exercise of the Executive Branch's foreign policy function. The Secretary will consult as appropriate with the Secretary of State in carrying out these functions.

Finally, the provisions relating to the removal of an alien to a foreign country (in contrast to orders of removal from the United States) are not for the benefit of the alien, but as a protection for the lawful foreign policy prerogatives of the United States. This is exemplified in section 241(h) of the Act (8 U.S.C. 1231(h)), which provides a rule of construction that "[n]othing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States. \* \* \*" (emphasis added). This provision has rarely been construed, and there is no legislative history explicating Congressional purpose or intent. As the Supreme Court has noted, this provision is one of several statutory provisions that limit the circumstances in which judicial review of deportation decisions is available. *Zadvydas v. Davis*, 533 U.S. 678, 687–88 (2001).

A similar provision barred an alien's claim to compel initiation of deportation or removal proceedings, or provide damages for failure to initiate proceedings and effect removal in a timely fashion. Of particular note is that after an intercourt conflict had developed in the early 1990s over whether mandamus would lie to compel the former INS to commence deportation proceedings, Congress intervened by enacting the same "no substantive or procedural rights" provision in 1994, and the courts conceded that aliens were no longer within the "zone of interest" of the statute.<sup>2</sup>

<sup>2</sup> In a line of cases, the Ninth Circuit found that incarcerated aliens could seek mandamus to compel immediate deportation proceedings in light of former section 242(i) of the Act (8 U.S.C. 1252(i) (1988)), which provided: "In the case of an alien who is convicted of an offense which makes the alien subject to deportation, the Attorney General shall begin any deportation proceeding as expeditiously as possible after the date of the conviction." See *Silveyra v. Moschorack*, 989 F.2d 1012, 1014 n. 1 (9th Cir. 1993); cf. *Soler v. Scott*, 942 F.2d 597, 605 (9th Cir. 1991), vacated as moot sub nom. *Sivley v. Soler*, 506 U.S. 969 (1992); *Garcia v. Taylor*, 40 F.3d 299, 301 (9th Cir. 1994) (recognizing it is "settled" that "prisoner aliens who seek mandamus to force the INS to start deportation proceedings do have standing"). But see *Giddings v. Chandler*, 979 F.2d 1104, 1108–10 (5th Cir. 1992) (holding that an incarcerated alien lacked standing to invoke the Mandamus Act to compel the institution of deportation proceedings). On the other hand, courts had also held that no private right of action existed under the statute. See *Urbina-Mauricio v. INS*, 989 F.2d 1085 (9th Cir. 1993) (no private cause of action); *Aguirre v. Meese*, 930 F.2d 1292, 1293 (7th Cir. 1991) (same); *Prieto v. Gluch*, 913 F.2d 1159, 1166 (6th Cir. 1990)

Accordingly, Congress has acted to limit the zone of interest in determination of the country to which an alien may be removed and the alien is outside that zone of interest. Cf., *Channer v. Hall*, 112 F.3d 214 (5th Cir. 1997) (damage action for delay in effecting deportation, resulting in State detainer to serve sentence being implemented, failed to state claim under statute); *DiPeppe v. Quarantillo*, 337 F.3d 326, 333–34 (3rd Cir. 2003) (same language in section 239(d)(2) of the Act (8 U.S.C. 1229(d)(2)) relating to prompt initiation of removal proceedings).

Similarly, section 241(a)(6) of the Act does not create a right to parole; section 241(h) of the Act expressly limits construction of the provision so that it does not create substantive or procedural rights. *Benitez v. Wallis*, 337 F.3d 1289, 1300 (11th Cir. 2003), cert. granted, 124 S. Ct. 1143 (2004) (No. 03–7434). Congress has also utilized this construction in other circumstances to limit the zone of interest. See, e.g., sections 208(d)(5)(B)(7) and 238(a)(1) of the Act (8 U.S.C. 1158(d)(5)(B)(7), 1228(a)(1)); 18 U.S.C. 1092, 2340B.

Where the Executive Branch determines not to create rights in specific administrative actions, the courts have deferred to that determination. Cf. *United States v. Caceres*, 440 U.S. 741 (1979). When Congress itself makes this determination—as it has in section 241 of the Act—the Executive and Judicial Branches both must respect that determination. Here, Congress has determined that the zone of interest does not include the alien, but is limited to the implementation, within Congress' own limited realm, of the foreign policy of the United States.

(same), cert. denied, 498 U.S. 1092 (1991); *Orozco v. INS*, 911 F.2d 539, 541 (11th Cir. 1990) (same); cf. *Gonzalez v. INS*, 867 F.2d 1108, 1109–10 (8th Cir. 1989) (no private right of action under section 242(i), therefore mandamus not available). However, in 1994, Congress enacted a specific provision that “nothing in § 242(i) of the \* \* \* Act \* \* \* shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.” Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103–416, § 225, 108 Stat. 4305 (1994) (citations omitted). With admirable candor, the Ninth Circuit conceded the application of the provision as the demise of this line of cases: “Congress took the opportunity in section 225 of the INTCA to clarify for our benefit that section [242](i) does not create an obligation on the part of the government toward individual incarcerated aliens and that such aliens lack standing to sue for any relief under section [242] because they are outside the ‘zone of interests’ of the statute. \* \* \* By enacting section 225, Congress made clear that the sole purposes of section [242](i) are economic, not humanitarian.” *Campos v. INS*, 62 F.3d 311, 314 (9th Cir. 1995). See also *Hernandez-Avalos v. INS*, 50 F.3d 842, 844 (10th Cir. 1995), cert. denied, 516 U.S. 826 (1995) (consistent).

## F. Administrative and Judicial Interpretations

The Board of Immigration Appeals and the courts have touched upon the subject of the removal of an alien to a specific country in the past. Certain cases warrant further comment because their precedential value will be affected by the interpretation of section 241 of the Act reflected in these proposed rules.

In *Matter of Linnas*,<sup>1</sup> 19 I&N Dec. 302 (BIA 1985), *aff'd on other grounds*, *Linnas v. INS*, 790 F.2d 1024 (2nd Cir. 1986), the Board held that a deportation order could not designate the New York offices maintained on behalf of the “Republic of Estonia” as a country because the term “country” in former section 243 of the Act (8 U.S.C. 1253 (1982)) meant, at a minimum, a foreign place with “territory” in a geographical sense and a “government” in the sense of a political organization that exercises power on behalf of the people subject to its jurisdiction.

However, the only issue before the Board in *Linnas* was whether the offices maintained in New York could be a “country” for the purposes of deportation. The offices of the “Republic of Estonia” contained none of the attributes of a sovereign country. As noted by the Board, the Republic of Estonia possessed no land over which it asserted sovereignty. The New York offices were neither an embassy nor a chancery within the United States. These offices were not “outside” the United States and therefore were not minimally eligible as a place for deportation. Thus, such “offices” do not constitute a country in any use of the term. Although that was enough to decide the question posed by *Linnas*, the Board went further to describe what constitutes a country under the Act. In essence, this description of what constitutes a country is no more than dictum.<sup>3</sup>

<sup>3</sup>To place the *Linnas* decision in the proper context, the Department of Justice notes that *Linnas* had been tried in absentia and found guilty of war crimes in the Union of Soviet Socialist Republics (USSR), which had forcibly absorbed the Republic of Estonia at the conclusion of World War II. *Linnas*'s entry into the United States from a displaced persons administration and subsequent naturalization was based on fraudulent denial of past war crimes, and *Linnas* was denaturalized. See *United States v. Linnas*, 527 F. Supp. 426 (E.D.N.Y. 1981), *aff'd*, 685 F.2d 427 (2nd Cir.), cert. denied, 459 U.S. 883 (1982) (denaturalization of Nazi war criminal ordered). Accordingly, *Linnas* attempted to avoid deportation to the USSR and the imposition of a sentence for war crimes. However, *Linnas* abandoned the issue raised and considered by the Board regarding the “offices” in New York and the definition of a country, and did not pursue it before the court of appeals.

Section 241 of the Act (like former section 243 of the Act), however, does not mandate the result in the Board's decision. In order to give proper deference to the role of the Secretary of State in recognizing foreign governments, conducting international relations, and carrying out the foreign policy of the United States, and the role of the Secretary of Homeland Security in removing aliens under the Act, the Attorney General departs from the interpretation of the term “country” adopted by the Board in *Linnas*. This rule adopts the view that the Department of Homeland Security is authorized to effectuate orders of removal of aliens from the United States under section 241(b) of the Act to a country as determined by the Secretary.

In *Matter of Niesel*, 10 I&N Dec. 57 (BIA 1962), the Board considered a case involving the division of Germany into East Germany and West Germany after World War II. In this case, the former Immigration and Naturalization Service sought to deport a German citizen to West Germany, while she sought deportation to East Germany (a country that the United States did not recognize) in order to establish a basis to pursue asylum. The Board decided that, although the physical location of the alien's place of birth, last habitual residence, and citizenship each may have been within “East Germany,” the alien was nonetheless deportable to West Germany, making no distinction between the two countries.

Neither of these cases fully establishes a record or detailed legal analysis of the definition of a “country” for removal purposes or the requirements for removal to a country.

In *Jama v. INS*, 329 F.3d 630 (8th Cir. 2003), cert. granted, 124 S. Ct. 1407 (2004), the Eighth Circuit concluded that the plain language of section 241(b)(2)(E) of the Act permits removal to an alien's country of birth and does not require that this country “accept” the alien's return. The court explained that “as [a] matter of simple statutory syntax and geometry, the acceptance requirement [in section 241(b)(2)(E)] is confined to clause (vii), and does not apply to clauses (i) through (vi).” 329 F.3d at 634. This syntactic and geometric structure distinguished when acceptance is required and when acceptance is not required, but provides no guidance as to what constitutes “acceptance.” The court rejected the alien's contention that its interpretation of section 241(b)(2)(E) of the Act “nullifies” the provision for acceptance as a condition of removal to the country of which the alien is a subject, national, or citizen, pursuant to section

241(b)(2)(D) of the Act. The court explained that an alien born in the country to which he or she is to be removed under section 241(b)(2)(E)(iv) of the Act “is not always a subject, national or citizen” of that country, so section 241(b)(2)(D) of the Act may not apply to the alien at all. *Id.* The court also observed that “between countries, it is not uncommon behavior to attempt to accomplish a task by asking politely first”—i.e., to attempt consensual removal under section 241(b)(2)(D)—“and then to act anyway if the request is refused.” *Id.* The court concluded that its interpretation of section 241(b)(2) does not conflict with any “settled judicial construction” of former section 243(a) of the Act (8 U.S.C. 1253 (1994)), *id.*, and that the administrative decision cited by petitioner, *Matter of Linnas*, *supra*, did not overrule the earlier decision in *Matter of Niesel*, *supra*, that rejected an acceptance requirement. *Id.* at 635. These proposed rules are consistent with the court’s decision in *Jama*.

In *Ali v. Ashcroft*, 346 F.3d 873 (9th Cir. 2003), *petition for reh’g pending* (No. 03–35096, 9th Cir.), the Ninth Circuit found that the United States cannot remove aliens to a country that does not have a functioning government to accept them. The court of appeals did not provide any analysis of what a “functioning government” might be or how that might be determined—which only begs the question of which governments the United States will recognize and treat and which it will not. The Second Circuit addressed the essentially identical provisions of prior law in *Tom Man v. Murff*, 264 F.2d 926, 928 (2d Cir. 1959), concluding that deportation under any of the subclauses now found in section 241(b)(2)(E) of the Act was subject to the condition that the country be willing to accept the alien. However, as the statute provides no such definition, the courts in these cases have essentially created their own definition.

The sum of these cases lies in the statutory terms of “accept” and “country,” neither of which are defined in the Act. What constitutes “acceptance” by a “functioning government” of a “country” clearly lies “[i]n this vast external realm, with its important, complicated, delicate and manifold problems, [where] the President alone has the power to speak or listen as a representative of the nation.” *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). Accordingly, the Department of Homeland Security proposes to amend its regulations by recognizing that the terms “acceptance” and “country” are

defined, not by the Act or by the courts, but by the Executive Branch, consistent with the foreign policy of the United States.

The proposed rules alter the implementation of section 241 of the Act to ensure that “acceptance” by a “country” is limited to the specific subsections within section 241 of the Act, in light of intervening legislation and judicial decisions that warrant reconsideration of the regulations. Cf. *Watt v. Alaska*, 451 U.S. 259, 273 (1981); *see also General Electric Co. v. Gilbert*, 429 U.S. 125, 143 (1976); *INS v. Cardozo-Fonseca*, *supra*, at 446 & n.30. As *Linnas* and *Ali* fail to consider the statutory requirements, the extant legislative policies, long-standing administrative practice, or the foreign relations implications of these provisions, the Attorney General departs from *Linnas* and the Attorney General and the Secretary decline to follow *Ali* outside the jurisdiction of the Ninth Circuit. The statute does not permit the result in *Tom Man* and *Ali*, and because the statute is considered ambiguous, the Executive’s interpretation of the statute is due considerable deference. *Jama* and *Niesel* may have reached the correct conclusion, at least in part, but more detailed analysis of, and deference to, the foreign relations implications of removal of aliens from the United States and to a foreign country is warranted.

#### **G. Clarifying the Immigration Judge’s Order of Removal From the United States**

Immigration judges’ orders of removal from the United States have historically included an identification of the country to which the alien is to be removed, consistent with 8 CFR 1240.12(c). The Act, however, requires only that the alien, or the Attorney General, designate a country for the purpose of removal. Section 241(b)(2)(A) of the Act provides that the respondent (other than an arriving alien) “may designate one country to which the alien wants to be removed.” [emphasis added].

Furthermore, there is no requirement that this designation must be or is an integral element of the immigration judge’s order of removal from the United States. The regulations currently provide:

The immigration judge shall notify the alien that if he or she is finally ordered removed, the country of removal will in the first instance be directed pursuant to section 241(b) of the Act to the country designated by the alien, unless section 241(b)(2)(C) of the Act applies, and shall afford him or her an opportunity then and there to make such designation. The immigration judge shall

then specify and state for the record the country, or countries in the alternative, to which the alien’s removal will be directed pursuant to section 241(b) of the Act if the country of his or her designation will not accept him or her into its territory, or fails to furnish timely notice of acceptance, or if the alien declines to designate a country.

8 CFR 1240.10(f). The existing Department of Justice regulations, 8 CFR 1240.10(g), already make clear that the Secretary, in appropriate circumstances, may remove an alien to a country not previously designated.

The rules previously adopted by the Department of Justice do not specify the legal effect of the alien’s designation or the immigration judge’s order of removal from the United States. Some court decisions have implied that a final order of removal limits the Department of Homeland Security’s authority to remove the alien to a country that was not designated, or relied upon the implication of such an interpretation to find error in considering applications for asylum. *See, e.g., Kuhai v. INS*, 199 F.3d 909 (7th Cir. 1999) (designation altered without chance to address issues); *Andriasian v. INS*, 180 F.3d 1033, 1038–39 (9th Cir. 1999) (designation process adequately explained, but describes immigration judge order as “ordering that [respondent] be deported to either Azerbaijan or Armenia”); *Kossov v. INS*, 132 F.3d 405, 407, 408 (7th Cir. 1998) (“In the alternative, the judge ordered the Kossovs deported to Russia.” “Yet the order itself deports the Kossovs to Russia, not Latvia.”). *But see al Najjar v. Ashcroft*, 257 F.3d 1262, 1294–96 (11th Cir. 2001) (recognizing factual issue of identifying country of last habitual residence and distinguishing previous cited cases). To the extent that the scope of an application for relief depends on the country to which the alien may be actually removed (e.g. asylum, withholding of removal, and the Convention Against Torture), the respondent and the Department of Homeland Security, and to some extent the immigration judge, share responsibility for ensuring that the record illuminates complete consideration of the application as to those countries. However, an implication that the order of removal from the United States itself requires removal only to the countries designated is not supported by the Act or the existing regulations.

Moreover, the identification of a country in an order of removal does not override the prerogatives of the Secretary in effectuating or executing a removal order and warrant of removal under the statute, as is currently

recognized in 8 CFR 1240.10(g). The proposed rule clarifies that identification of a country or countries for removal in the immigration judge's order of removal from the United States does not limit the lawful discretion of the Department of Homeland Security in determining the country to which the alien should be removed, consistent with the requirements of section 241(b) of the Act.

#### H. Joint and Independent Notice of Proposed Rulemaking

In light of a conflict among the United States courts of appeals over whether a foreign country must commit to accept an alien ordered removed from the United States before the alien may be removed to such a country, the Secretary of Homeland Security and the Attorney General publish this joint notice of proposed rulemaking to amend the regulations of their respective Departments pertaining to removal of aliens from the United States.

The Secretary of Homeland Security proposes to amend regulations of the Department of Homeland Security to clarify the authority for removal of aliens to specific countries in the exercise of discretion under section 241 of the Act. The Secretary is exercising his authority under sections 103 and 241 of the Act (8 U.S.C. 1103, 1231).

The Attorney General proposes to amend the regulations of the Department of Justice to clarify the authority and procedures before immigration judges in designating countries of removal in the record of proceedings, to clarify the scope of immigration judge orders of removal from the United States, and to provide further guidance in interpreting the Act. The Attorney General is exercising his authority under section 103(a)(1) and (g) of the Act, and his authority under 28 U.S.C. 503, 509–510.

The Secretary of Homeland Security and the Attorney General have undertaken to publish these proposed changes in their respective regulations in a single notice of proposed rulemaking as a convenience to the public. The rules of the Department of Homeland Security and of the Department of Justice will continue to implement separately the provisions of the Act within their respective jurisdictions. The Secretary of Homeland Security and the Attorney General are each acting independently and within their respective statutory delegations of authority in separately proposing amendments to the rules of their respective Departments as set forth in the separate proposed rulemakings.

#### I. Conforming Revisions

Finally, both proposed rules eliminate a number of provisions from the Code of Federal Regulations that are unnecessary and duplicative. The proposed rules of the Department of Justice eliminate unnecessary regulations from Chapter V of title 8 of the Code of Federal Regulations that are within the authority of the Secretary and the proposed rules of the Department of Homeland Security eliminate unnecessary regulations from Chapter I of title 8 of the Code of Federal Regulations that are within the authority of the Attorney General. As previously noted in transitional regulations adopted by the Attorney General at the time the responsibilities of the former INS were transferred to the Department of Homeland Security—68 FR 9824 (Feb. 28, 2003); 68 FR 10349 (March 5, 2003)—many other overlapping regulatory provisions were initially duplicated in Chapter V to ensure continuity. As planned at that time, further revision is now being made to refine the provisions of title 8 of the Code of Federal Regulations and to remove those regulations pertaining to the Department of Homeland Security not appropriate to be duplicated in the Department of Justice regulations, and *vice versa*. These changes are not subject to the notice and comment provisions of the Administrative Procedure Act, but the Departments would welcome comments and further suggestions.

With the exception of certain provisions, the Department of Justice has determined that most of the provisions of part 1241 are properly codified in the regulations of the Department of Homeland Security in 8 CFR part 241, and need not be duplicated in 8 CFR part 1241. Accordingly, this rule proposes to retain only 8 CFR 1241.1, 1241.3, 1241.6(c), 1241.7 (second sentence), and 1241.31, as well as those portions of 8 CFR 1241.14 pertaining to the authority of the immigration judges to conduct hearings relating to the continued detention of aliens pursuant to 8 CFR 241.14. The retained sections deal with finality of orders of removal and deportation and proceedings before the immigration judges in specific cases and issues.

The remainder of 8 CFR part 1241 deals with the execution of removal and deportation orders and warrants, detention after a removal order has been issued, and other matters that are within the authority of officers of the Department of Homeland Security. Those provisions are removed from the Department of Justice regulations, with

only appropriate informational cross-references being inserted to the regulations of the Department of Homeland Security.

#### Administrative Matters

##### *Regulatory Flexibility Act*

The Secretary and the Attorney General, in accordance with 5 U.S.C. 605(b), have reviewed their respective proposed rules and, by approving them, certify that these rules do not have a significant economic impact on a substantial number of small entities. The proposed rules affect only individual aliens and government agencies.

##### *Unfunded Mandates Reform Act of 1995*

These rules will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

##### *Small Business Regulatory Enforcement Fairness Act of 1996*

Neither of these rules is a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. Neither rule will result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

##### *Executive Order 12866*

These rules have been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. The Departments have determined that their respective rules are significant regulatory actions under section 3(f) of Executive Order 12866, Regulatory Planning and Review. Accordingly, these rules have been submitted to the Office of Management and Budget for review.

There are no additional costs to the Department of Justice in the implementation of the proposed rules other than the minimal amount of time required for immigration judges to explain the possibility that an alien may be removed to a country other than designated. Similarly, there are no additional costs of the Department of Homeland Security other than in the

small number of cases in which execution of an order of removal will be to a country other than as previously designated, in which officials of DHS will be required to ensure compliance with United States law and international obligations. There are no costs to individuals.

The benefits of the rule lie in the clarification of the law and the elimination of delay in effecting a small number of removal orders, but these benefits are not quantifiable. In some cases, the individual alien will already be in the custody of DHS and, therefore, reducing the time required to execute an order of removal will reduce the costs of detaining that alien.

#### *Executive Order 13132*

These rules will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, the respective Departments have determined that these rules do not have sufficient federalism implications to warrant a federalism summary impact statement.

#### *Executive Order 12988*

These rules meet the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform.

#### *Paperwork Reduction Act of 1995*

These rules do not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act.

#### *Plain Language Instructions*

We try to write clearly. If you can suggest how to improve the clarity of these regulations, call or write the individuals identified in the **ADDRESSES** section.

#### **List of Subjects**

##### *8 CFR Part 236*

Administrative practice and procedure, Aliens, Immigration.

##### *8 CFR Part 241*

Administrative practice and procedure, Aliens, Immigration.

##### *8 CFR Part 1236*

Administrative practice and procedure, Aliens, Immigration.

##### *8 CFR Part 1240*

Administrative practice and procedure, Aliens.

##### *8 CFR Part 1241*

Administrative practice and procedure, Aliens, Immigration.

#### **DEPARTMENT OF HOMELAND SECURITY**

##### **8 CFR Chapter I**

##### **Authority and Issuance**

Accordingly, for the reasons stated in the joint preamble and pursuant to the authority vested in me as the Secretary of Homeland Security, chapter I of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

#### **PART 236—APPREHENSION AND DETENTION OF INADMISSIBLE AND DEPORTABLE ALIENS; REMOVAL OF ALIENS ORDERED REMOVED**

1. The authority citation for 8 CFR part 236 continues to read as follows:

**Authority:** 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1103, 1182, 1224, 1225, 1226, 1227, 1231, 1362; 18 U.S.C. 4002, 4013(c)(4); 8 CFR part 2.

2. In § 236.1, paragraph (c)(1) is revised to read as follows:

##### **§ 236.1 Apprehension, custody, and detention.**

\* \* \* \* \*

(c) \* \* \*

(1) *In general.* No alien described in section 236(c)(1) of the Act may be released from custody during removal proceedings, except pursuant to section 236(c)(2) of the Act.

\* \* \* \* \*

#### **PART 241—APPREHENSION AND DETENTION OF ALIENS ORDERED REMOVED**

3. The authority citation for 8 CFR part 241 continues to read as follows:

**Authority:** 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1103, 1182, 1223, 1224, 1225, 1226, 1227, 1231, 1251, 1253, 1255, 1330, 1362; 18 U.S.C. 4002, 4013(c)(4); 8 CFR part 2.

4. Section 241.1 is revised to read as follows:

##### **§ 241.1 Final order of removal.**

An order of removal becomes final in accordance with 8 CFR 1241.1.

\* \* \* \* \*

5. Section 241.3 is amended by adding a new paragraph (d), to read as follows:

##### **§ 241.3 Detention of aliens during removal period.**

\* \* \* \* \*

(d) *Information regarding detainees.* Disclosure of information relating to detainees shall be governed by the provisions of 8 CFR 236.6.

\* \* \* \* \*

##### **§ 241.4 [Amended]**

6. Section 241.4(k)(1)(i) is amended by removing the phrase “because no country currently will accept the alien,” and by removing the phrase “removal of the alien prior to expiration of the removal period” in the first sentence.

7. Section 241.5 is amended by revising paragraph (c)(1), to read as follows:

##### **§ 241.5 Conditions of release after removal period.**

\* \* \* \* \*

(c) \* \* \*

(1) The alien cannot be removed in a timely manner; or

\* \* \* \* \*

##### **§ 241.13 [Amended]**

8. Section 241.13 is amended by:

a. Removing the phrase “to the country to which the alien was ordered removed and there is no third country willing to accept the alien” in the first sentence of paragraph (d)(1); and by

b. Adding the term “and” immediately before the phrase “the views of the Department of State” and by removing the phrase “, and the receiving country’s willingness to accept the alien into its territory” in the first sentence of paragraph (f).

9. Section 241.15 is revised to read as follows:

##### **§ 241.15 Countries to which aliens may be removed.**

(a) *Country.* For the purposes of section 241(b) of the Act (8 U.S.C. 1231(b)), the Secretary retains discretion to remove an alien to any country described in section 241(b) of the Act (8 U.S.C. 1231(b)), without regard to the nature or existence of a government.

(b) *Acceptance.* For the purposes of section 241(b) of the Act (8 U.S.C. 1231(b)), the Secretary retains discretion to determine the effect, if any, of acceptance or lack thereof, when an acceptance by a country is required, and what constitutes sufficient acceptance.

(c) *Absence or lack of response.* The absence of or lack of response from a *de jure* or functioning government (whether recognized by the United States, or otherwise) or a body acting as a *de jure* or functioning government in the receiving country does not preclude the removal of an alien to a receiving country.

(d) *Prior commitment.* No commitment of acceptance by the receiving country is required prior to designation of the receiving country, before travel arrangements are made, or before the alien is transported to the receiving country.

(e) *Specific provisions regarding acceptance.* Where the Department

cannot remove an alien under section 241(b)(2)(A)–(D) of the Act, acceptance is not required to remove an alien to a receiving country pursuant to section 241(b)(2)(E)(i)–(vi) of the Act. Where the Department cannot remove an arriving alien under section 241(b)(1)(A) or (B) of the Act, acceptance is not required to remove an alien to a receiving country pursuant to section 241(b)(1)(C)(i)–(iii) of the Act.

(f) *Interest of the United States controlling.* The Secretary or his designee may designate a country previously identified in section 241(b)(2)(A)–(D) of the Act when selecting a removal country under section 241(b)(2)(E) of the Act (and may designate a country previously identified in section 241(b)(1)(A) or (B) of the Act when selecting an alternative removal country under subsection 241(b)(1)(C) of the Act) if the Secretary or his designee determines that such designation is in the best interests of the United States.

(g) *Limitation on construction.* Nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

10. Section 241.25(b) is revised to read as follows:

**§ 241.25 Deportation.**

\* \* \* \* \*

(b) *Place to which deported.* Any alien (other than an alien crewmember or an alien who boarded an aircraft or vessel in foreign contiguous territory or an adjacent island) who is ordered excluded shall be deported to the country where the alien boarded the vessel or aircraft on which the alien arrived in the United States. Otherwise, the Secretary may, as a matter of discretion, deport the alien to the country of which the alien is a subject, citizen, or national; the country where the alien was born; the country where the alien has a residence; or any other country.

\* \* \* \* \*

11. Section 241.31 is revised to read as follows:

**§ 241.31 Final order of deportation.**

An order of deportation becomes final in accordance with 8 CFR 1241.31.

**§ 241.33 [Amended]**

12. Section 241.33(a) is amended by:

a. Revising the second sentence in the introductory text to read “An order of deportation becomes final in accordance with 8 CFR 1241.31.”; and

b. Removing paragraphs (a)(1), (2), (3), and (4).

Dated: July 9, 2004.

**Tom Ridge,**

*Secretary, Department of Homeland Security.*

**DEPARTMENT OF JUSTICE**

**8 CFR Chapter V**

**Authority and Issuance**

Accordingly, for the reasons stated in the joint preamble and pursuant to the authority vested in me as the Attorney General of the United States, chapter V of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

**PART 1236—APPREHENSION AND DETENTION OF INADMISSIBLE AND DEPORTABLE ALIENS; REMOVAL OF ALIENS ORDERED REMOVED**

1. The authority citation for part 1236 is revised to read as follows:

**Authority:** 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1103, 1182, 1224, 1225, 1226, 1227, 1231, 1362; 18 U.S.C. 4002, 4013(c)(4).

2. Section 1236.1 is amended as follows:

a. Paragraph (c)(1) is revised to read as set forth below; and

b. Paragraph (f) is amended by revising “Service” to read “Department of Homeland Security” in each place that it appears.

**§ 1236.1 Apprehension, custody, and detention.**

\* \* \* \* \*

(c) \* \* \*

(1) *In general.* No alien described in section 236(c)(1) of the Act may be released from custody during removal proceedings, except pursuant to section 236(c)(2) of the Act.

\* \* \* \* \*

3. Section 1236.2 is amended:

a. In paragraph (a) by removing the paragraph designation and heading and

b. By removing paragraph (b).

**§§ 1236.3, 1236.5, and 1236.6 [Removed]**

4. Sections 1236.3, 1236.5 and 1236.6 are removed.

**PART 1240—PROCEEDINGS TO DETERMINE REMOVABILITY OF ALIENS IN THE UNITED STATES**

5. The authority citation for part 1240 is revised to read as follows:

**Authority:** 8 U.S.C. 1103, 1182, 1186a, 1224, 1225, 1226, 1227, 1229, 1229a, 1229b, 1229c, 1253, 1255, and 1362.

6. Section 1240.10 is amended by revising paragraph (f) and removing paragraph (g), to read as follows:

**§ 1240.10 Hearing.**

\* \* \* \* \*

(f) *Country of removal.* With respect to an arriving alien covered by section 241(b)(1) of the Act, the country, or countries in the alternative, to which the alien may be removed will be determined pursuant to section 241(b)(1) of the Act. In any other case, the immigration judge shall notify the respondent that if he or she is finally ordered removed, the country of removal will in the first instance be the country designated by the respondent, except as otherwise provided under section 241(b)(2) of the Act, and shall afford him or her an opportunity then and there to make such designation. The immigration judge shall also identify for the record a country, or countries in the alternative, to which the alien's removal may be made pursuant to section 241(b)(2) of the Act if the country of the alien's designation will not accept him or her into its territory, or fails to furnish timely notice of acceptance, or if the alien declines to designate a country. In considering alternative countries of removal, acceptance or the existence of a functioning government is not required with respect to an alternative country described in section 241(b)(1)(C)(i)–(iii) of the Act or a removal country described in section 241(b)(2)(E)(i)–(iv) of the Act. See 8 CFR 241.15.

7. Section 1240.12 is amended by revising paragraph (c) and adding a new paragraph (d), to read as follows:

**§ 1240.12 Decision of the immigration judge.**

\* \* \* \* \*

(c) *Order of the immigration judge.* The order of the immigration judge shall direct the respondent's removal from the United States, or the termination of the proceedings, or other such disposition of the case as may be appropriate. The immigration judge is authorized to issue orders in the alternative or in combination as he or she may deem necessary.

(d) *Removal.* When a respondent is ordered removed from the United States, the immigration judge shall identify a country, or countries in the alternative, to which the alien's removal may in the first instance be made, pursuant to the provisions of section 241(b) of the Act. In the event that the Department of Homeland Security is unable to remove the alien to the specified or alternative country or countries, the order of the immigration judge does not limit the authority of the Department of Homeland Security to remove the alien to any other country as permitted by section 241(b) of the Act.

## PART 1241—APPREHENSION AND DETENTION OF ALIENS ORDERED REMOVED

8. The authority citation for Part 1241 is revised to read as follows:

**Authority:** 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1103, 1182, 1223, 1224, 1225, 1226, 1227, 1231, 1251, 1253, 1255, 1330, 1362; 18 U.S.C. 4002, 4013(c)(4).

### §§ 1241.3, 1241.4, 1241.5, 1241.9, 1241.10, 1241.11, 1241.12, and 1241.13 [Removed]

9. Sections 1241.3, 1241.4, 1241.5, 1241.9, 1241.10, 1241.11, 1241.12, and 1241.13 are removed.

10. Section 1241.2 is revised to read as follows:

### § 1241.2 Warrant of removal; detention of aliens during removal period.

For the regulations of the Department of Homeland Security with respect to the detention and removal of aliens who are subject to a final order of removal, see 8 CFR part 241.

11. Section 1241.6 is amended by revising paragraphs (a) and (b), to read as follows:

### § 1241.6 Administrative stay of removal.

(a) An alien under a final order of deportation or removal may seek a stay of deportation or removal from the Department of Homeland Security as provided in 8 CFR 241.6.

(b) A denial of a stay by the Department of Homeland Security shall not preclude an immigration judge or the Board from granting a stay in connection with a previously filed motion to reopen or a motion to reconsider as provided in 8 CFR part 1003.

\* \* \* \* \*

### § 1241.7 [Amended]

12. Section 1241.7 is amended by removing the first sentence.

13. Section 1241.8 is revised to read as follows:

### § 1241.8 Reinstatement of removal orders.

An alien who illegally reenters the United States after having been removed, or having departed voluntarily, while under an order of exclusion, deportation, or removal may be removed from the United States by reinstating the prior order. *See* 8 CFR 241.8. The alien has no right to a hearing before an immigration judge in such circumstances, except as provided in 8 CFR 1208.2(c)(2)(i).

14. Section 1241.14 is amended by revising paragraph (a), and removing and reserving paragraphs (b), (c), and (d), to read as follows:

### § 1241.14 Continued detention of removable aliens on account of special circumstances.

(a) *Scope.* This section provides for the review of determinations by the Department of Homeland Security to continue the detention of particular removable aliens found to be specially dangerous. *See* 8 CFR 241.14.

(1) *Applicability.* This section applies to the review of the continued detention of removable aliens because the Department of Homeland Security has determined that release of the alien would pose a special danger to the public, where there is no significant likelihood of removal in the reasonably foreseeable future. This section does not apply to aliens who are not subject to the special review provisions under 8 CFR 241.13.

(2) *Jurisdiction.* The immigration judges and the Board have jurisdiction with respect to determinations as to whether release of an alien would pose a special danger to the public, as provided in paragraphs (f) through (k) of this section.

\* \* \* \* \*

15. Section 1241.15 is revised to read as follows:

### § 1241.15 Lack of jurisdiction to review other country of removal.

The immigration judges and the Board of Immigration Appeals have no jurisdiction to review any determination by officers of the Department of Homeland Security under 8 CFR 241.15.

16. Section 1241.20 is revised to read as follows:

### § 1241.20 Aliens ordered excluded.

For the regulations of the Department of Homeland Security pertaining to the detention and deportation of excluded aliens, *see* 8 CFR 241.20 through 241.25.

### §§ 1241.21, 1241.22, 1241.23, 1241.24, and 1241.25 [Removed]

17. Sections 1241.21 through 1241.25 are removed.

18. Section 1241.30 is revised to read as follows:

### § 1241.30 Aliens ordered deported.

For the regulations of the Department of Homeland Security pertaining to the detention and deportation of aliens ordered deported, *see* 8 CFR 241.30 through 241.33.

\* \* \* \* \*

Dated: July 12, 2004.

John Ashcroft,

Attorney General.

[FR Doc. 04-16193 Filed 7-16-04; 8:45 am]

BILLING CODE 4410-10-P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 39

### Cessna Aircraft Company Models 401, 401A, 401B, 402, 402A, 402B, 402C, 411, and 411A, and 414A Airplanes; Notice of Public Meeting

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Notice of public meeting.

**SUMMARY:** This document announces a public meeting of interest to owners and operators of Cessna Aircraft Company (Cessna) Models 401, 401A, 401B, 402, 402A, 402B, 402C, 411, and 411A, and 414A airplanes. The purpose of the meeting is to discuss technical issues and proposed corrective actions related to the potential of wing spar cap failure due to undetected fatigue cracks.

**DATES:** The Federal Aviation Administration (FAA) will hold the public meeting on August 18, 2004, starting at 8:30 a.m. at the Kansas City Marriott Downtown, in Kansas City, Missouri. Registration will begin at 8 a.m. on the day of the meeting.

**ADDRESSES:** We will hold the public meeting at the Kansas City Marriott Downtown, 200 NW 12th Street, Kansas City, Missouri 64105.

If you are unable to attend, you may mail comments and information to FAA, Small Airplane Directorate, Continued Operational Safety Branch, ACE-113, 901 Locust, Room 301, Kansas City, Missouri 64106. You may also send comments electronically to the following addresses: [marvin.nuss@faa.gov](mailto:marvin.nuss@faa.gov) or [larry.werth@faa.gov](mailto:larry.werth@faa.gov). If you send comments electronically as attached electronic files, the files must be formatted in Microsoft Word 97 for Windows or ASCII text.

We will give the same consideration to any comments or information mailed to us as those presented at the public meeting.

### FOR FURTHER INFORMATION CONTACT:

- *For Requests to Present a Statement at the Meeting:* Contact Marv Nuss, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329-4117; facsimile: (816) 329-4090; e-mail: [marvin.nuss@faa.gov](mailto:marvin.nuss@faa.gov).

- *For Questions Regarding the Previously Proposed ADs:* Contact Paul Nguyen, Aerospace Engineer, FAA, Wichita Aircraft Certification Office, 1801 Airport Road, Mid-Continent Airport, Wichita, Kansas 67209;