Congressional Research Service
Informing the legislative debate since 1914

Expedited Removal of Aliens: Legal Framework

Updated September 19, 2018

Congressional Research Service
https://crsreports.congress.gov
R45314

CRS REPORT
Prepared for Members and
Committees of Congress

Congressional Research Service
Informing the legislative debate since 1914

Expedited Removal of Aliens: Legal Framework

SUMMARY

R45314

September 19, 2018

Hillel R. Smith
Legislative Attorney

The federal government has broad authority over the admission of non-U.S. nationals (aliens) seeking to enter the United States. The Supreme Court has repeatedly held that the government may exclude such aliens without affording them the due process protections that traditionally apply to persons physically present in the United States. Instead, aliens seeking entry are entitled only to those procedural protections that Congress has expressly authorized. Consistent with this broad authority, Congress established an expedited removal process for certain aliens who have arrived in the United States without permission.

In general, aliens whom immigration authorities seek to remove from the United States may challenge that determination in administrative proceedings with attendant statutory rights to counsel, evidentiary requirements, and appeal. Under the streamlined expedited removal process created by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and codified in Section 235(b)(1) of the Immigration and Nationality Act (INA), however, certain aliens deemed inadmissible by an immigration officer may be removed from the United States without further administrative hearings or review.

INA Section 235(b)(1) applies only to certain aliens who are inadmissible into the United States because they either lack valid entry documents or have attempted to procure their admission through fraud or misrepresentation. The statute generally permits the government to summarily remove those aliens if they are arriving in the United States. The statute also authorizes, but does not require, the government to apply this procedure to aliens who are inadmissible on the same grounds if they have been physically present in the country for less than two years.

As a matter of practice, however, immigration authorities have applied expedited removal in more limited fashion than potentially authorized by statute—in general, the process is applied strictly to (1) arriving aliens apprehended at a designated port of entry; (2) aliens who arrived in the United States by sea without being admitted or paroled into the country by immigration authorities, and who have been physically present in the United States for less than two years; or (3) aliens who are found in the United States within 100 miles of the border within 14 days of entering the country, who have not been admitted or paroled into the United States by immigration authorities. Nevertheless, expedited removal accounts for a substantial portion of the alien removals each year. And in January 2017, President Trump issued an executive order directing the Department of Homeland Security to expand expedited removal within the broader framework of INA Section 235(b)(1). The agency has yet to promulgate regulations implementing this directive.

In some circumstances, however, an alien subject to expedited removal may be entitled to certain procedural protections before he may be removed from the United States. For example, an alien who expresses a fear of persecution may obtain administrative review of his claim, and if his fear is determined credible the alien will be placed in formal removal proceedings where he can pursue asylum and related protections. Additionally, an alien may seek administrative review of a claim that he is a U.S. citizen, lawful permanent resident, admitted refugee, or asylee. Unaccompanied alien children also are statutorily exempted from expedited removal.

Given the streamlined nature of expedited removal and the broad discretion afforded to immigration officers to implement that process, challenges have been raised contesting the procedure's constitutionality. In particular, some have argued that the procedure violates aliens' due process rights because aliens placed in expedited removal do not have the opportunity to seek counsel or contest their removal before a judge or other arbiter. Reviewing courts have largely dismissed such challenges for lack of jurisdiction, or, in the alternative, rejected the claims on the grounds that aliens seeking entry into the United States generally do not have constitutional due process protections. But such cases have concerned aliens arriving at the U.S. border or designated ports of entry, and such aliens may be entitled to lesser constitutional protections than aliens located within the United States. Expanding the expedited removal process to aliens located within the interior could compel courts to tackle questions involving the relationship between the federal government's broad power over the entry and removal of aliens and the due process rights of aliens located within the United States.

Contents

Tables

Appendixes

Contacts

Introduction

Federal immigration laws set forth procedures governing the exclusion and removal of non-U.S. nationals (aliens) who do not meet specified criteria regarding their entry or presence within the United States.[1] Typically, aliens within the United States may not be removed without due process.[2] Commensurate with these constitutional protections, the Immigration and Nationality Act (INA) generally affords an alien whose removal is sought with certain procedural guarantees, including the right to written notice of the charge of removability, to seek counsel, to appear at a hearing before an immigration judge (IJ), to present evidence, to appeal an adverse decision to the Board of Immigration Appeals (BIA), and to seek judicial review.[3]

Congress, however, has broad authority over the admission of aliens *seeking to enter* the United States.[4] The Supreme Court has repeatedly held that the government may exclude an alien seeking to enter this country without affording him the traditional due process protections that otherwise govern formal removal proceedings; instead, an alien seeking initial entry is entitled only to those procedural protections that Congress expressly authorized.[5]

Consistent with this broad authority, Section 235(b)(1) of the INA provides for the expedited removal of arriving aliens who do not have valid entry documents or have attempted to gain their admission by fraud or misrepresentation.[6] Under this streamlined removal procedure, which Congress established through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, such aliens may be summarily removed without a hearing or further review.[7]

In limited circumstances, however, an alien subject to expedited removal may be entitled to certain procedural protections before he may be removed from the United States. For example, an

---

[1] *See* 8 U.S.C. §§ 1182, 1225(b)(1)(A), 1227, 1228, 1229, 1229a, 1231.

[2] *See e.g.,* Demore v. Kim, 538 U.S. 510, 523 (2003) ("'It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.'") (quoting Reno v. Flores, 507 U.S. 292, 306 (1993)); Plyler v. Doe, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments.") (citing Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953); Wong Wing v. United States, 163 U.S. 228, 238 (1896); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)).

[3] 8 U.S.C. §§ 1229(a)(1), 1229a(b)(4); 8 C.F.R. §§ 1003.1(b), 1240.11(a)(2), 1240.15.

[4] *See e.g.,* Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("This Court has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens") (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)); Kleindienst v. Mandel, 408 U.S. 753, 765–66 (1972) ("The Court without exception has sustained Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'") (quoting Boutilier v. Immigration and Naturalization Serv., 387 U.S. 118, 123 (1967)); *Mezei*, 345 U.S. at 210 ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.").

[5] Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."); United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990) ("[W]e have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States."); Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative"); *Fiallo*, 430 U.S. at 792 ("[I]n the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'") (quoting Mathews v. Diaz, 426 U.S. 67, 80 (1976)).

[6] 8 U.S.C. § 1225(b)(1)(A).

[7] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, P.L. 104-208, § 302, 110 Stat. 3009-546, 579–80 (1996).

alien who expresses a fear of persecution may obtain administrative review of his claim and, if the review determines that his fear is credible, the alien will be placed in "formal" removal proceedings where he can pursue asylum and related protections.[8] Additionally, an alien may seek administrative review of a claim that he is a U.S. citizen, lawful permanent resident (LPR), admitted refugee, or asylee.[9] Unaccompanied alien children also are not subject to expedited removal.[10]

In addition to providing for expedited removal of certain arriving aliens, INA Section 235(b)(1) also confers the Secretary of the Department of Homeland Security (DHS) with the ability to expand the use of expedited removal to aliens present in the United States without being admitted or paroled[11] if they have been in the country less than two years and do not have valid entry documents or have attempted to gain their admission by fraud or misrepresentation.[12] In practice, the government has employed expedited removal only to (1) arriving aliens; (2) aliens who arrived in the United States by sea within the last two years, who have not been admitted or paroled by immigration authorities; and (3) aliens found in the United States within 100 miles of the border within 14 days of entering the country, who have not been admitted or paroled by immigration authorities.[13]

Nevertheless, expedited removal is a major component of immigration enforcement, and in recent years, it has been one of the most regularly employed means by which immigration authorities remove persons from the United States.[14] Furthermore, in January 2017, President Trump issued an executive order directing DHS to apply expedited removal within the broader limitations of the statute.[15] To date, however, DHS has not yet implemented this policy.

This report provides an overview of the statutory and regulatory framework that governs expedited removal under INA Section 235(b)(1).[16] The report also highlights the exceptions to expedited removal, including provisions that permit an alien to seek review of an asylum claim before he may be removed. Finally, the report addresses the scope of judicial review of an expedited removal order, some of the legal challenges that have been raised to the expedited removal process, and briefly considers potential legal issues that may arise if expedited removal

[8] 8 U.S.C. § 1225(b)(1)(A)(ii), (B)(ii); 8 C.F.R. §§ 208.30(f), 235.3(b)(4), 235.6(a)(1)(ii), 235.6(a)(1)(iii), 1003.42(f), 1208.30(g)(2)(iv)(B).

[9] 8 U.S.C. § 1225(b)(1)(C); 8 C.F.R. §§ 235.3(b)(5)(i), 235.3(b)(5)(iv), 235.6(a)(2)(ii).

[10] 8 U.S.C. § 1232(a)(5)(D) (providing for the placement of unaccompanied alien children in formal removal proceedings under INA § 240).

[11] Parole is a process by which an alien may be permitted to enter the United States temporarily pending his application for admission. 8 U.S.C. § 1182(d)(5); Samirah v. O'Connell, 335 F.3d 545, 547 (7th Cir. 2003) ("Parole allows an alien temporarily to remain in the United States pending a decision on his application for admission.").

[12] 8 U.S.C. § 1225(b)(1)(A)(i), (iii).

[13] *See* Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924 (Nov. 13, 2002); Notice Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877 (Aug. 11, 2004).

[14] Bryan Baker, *Immigration Enforcement Actions: 2016*, DHS OFFICE OF IMMIGRATION STATISTICS (Dec. 2017), https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2016.pdf.

[15] *See* Exec. Order No. 13767, 82 Fed. Reg. 8793, 8793 (Jan. 25, 2017).

[16] This report does not address the separate expedited removal procedures for arriving aliens inadmissible on security, terrorist, and related grounds; or the special removal proceedings available for certain incarcerated aliens convicted of aggravated felonies. *See* 8 U.S.C. §§ 1225(c), 1228.

were expanded to cover additional categories of aliens present in the United States.[17] A glossary of some terms used frequently throughout this report can be found in **Appendix A**.

Background

The Government's Plenary Power and Constitutional Protections for Aliens Subject to Removal

The Supreme Court has long recognized the federal government's authority "to expel or exclude aliens" from the United States.[18] The Court has described this authority as a "fundamental act of sovereignty" that stems not only from Congress's legislative power, but also from "the executive power to control the foreign affairs of the nation."[19] The Court also has repeatedly recognized that an alien's admission into the United States is a privilege, but the alien lacks a vested right to be admitted into the country.[20]

Guided by these principles, the Supreme Court has held that the government's decision to exclude an alien from entering the United States generally lies beyond the scope of judicial review.[21] Moreover, the Court has determined, "the decisions of executive or administrative officers, acting within powers expressly conferred by [C]ongress, are due process of law" for aliens seeking to enter this country.[22] Thus, the government's decision to deny entry is often deemed "final and conclusive," and immigration officials are fully "entrusted with the duty of specifying the procedures" for implementing that authority.[23]

Initially, the Supreme Court held that the government's broad authority covered not only the expulsion of foreign nationals seeking to enter the United States, but also aliens who were already within the territorial boundaries of this country.[24] The Court explained that "[t]he right of a nation

[17] This report does not address the separate expedited removal procedures for aliens inadmissible on security, terrorist, and related grounds; or expedited removal of certain aliens convicted of aggravated felonies. *See* 8 U.S.C. §§ 1225(c), 1228.

[18] Fiallo v. Bell, 430 U.S. 787, 792 (1977); Kleindienst v. Mandel, 408 U.S. 753, 765–66 (1972); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953); Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893); Chae Chan Ping v. United States, 130 U.S. 581, 606–09 (1889).

[19] United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); *see also Fong Yue Ting*, 149 U.S. at 711 (observing Congress's "right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare.").

[20] Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative."); *Knauff*, 338 U.S. at 542 ("Admission of aliens to the United States is a privilege granted by the sovereign United States Government.").

[21] Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892); *see also Knauff*, 338 U.S. at 543 ("[I]t is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.").

[22] *Ekiu*, 142 U.S. at 660; *see also Knauff*, 338 U.S. at 544 ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.").

[23] *Knauff*, 338 U.S. at 543.

[24] *Fong Yue Ting*, 149 U.S. at 707 (discussing the deportation of Chinese immigrants under the Chinese Exclusion Act); Wong Wing v. United States, 163 U.S. 228, 236–38 (1896) (holding that the government could summarily expel aliens already residing within the United States, but that it could not subject such aliens to criminal punishment on account of their unlawful presence without due process).

to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country."[25]

Gradually, the Supreme Court modified its position regarding the reach of the government's authority. For example, the Court determined that lawfully admitted aliens were entitled to Fifth Amendment due process protections in formal removal proceedings.[26] The Court explained that "'once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders.'"[27] In these circumstances, the alien is "entitled to notice of the nature of the charge and a hearing at least before an executive or administrative tribunal."[28]

The Supreme Court eventually went further and declared that all aliens who have entered the United States—including those who entered unlawfully—may not be removed without due process.[29] The Court declared that aliens physically present in the United States, regardless of their legal status, are recognized as "persons" guaranteed due process of law by the Fifth and Fourteenth Amendments.[30] Consequently, the Court reasoned, "[e]ven one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection."[31]

Although the Supreme Court has afforded due process protections to aliens physically present in the United States, the Court has consistently held that aliens seeking to enter the country may not avail themselves of those same protections.[32] The Court has reasoned that, although "aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law," an alien "on

[25] *Fong Yue Ting*, 149 U.S. at 707.

[26] Yamataya v. Fisher, 189 U.S. 86, 101 (1903); Kwong Hai Chew v. Colding, 344 U.S. 590, 596–98 (1953); Jay v. Boyd, 351 U.S. 345, 359 (1956); Landon v. Plasencia, 459 U.S. 21, 32–33 (1982).

[27] *Kwong Hai Chew*, 344 U.S. at 596 n. 5 (quoting Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J., concurring)); *see also Yamataya*, 189 U.S. at 101 (concluding that "an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population" may not be deported without due process).

[28] *Kwong Hai Chew*, 344 U.S. at 597.

[29] Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953); Mathews v. Diaz, 426 U.S. 67, 77 (1976); Plyler v. Doe, 457 U.S. 202, 210 (1982).

[30] *Plyler*, 457 U.S. at 210 (citing *Mezei*, 345 U.S. at 212; Wong Wing v. United States, 163 U.S. 228, 238 (1896)); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)).

[31] *Mathews*, 426 U.S. at 77; *see also* Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (explaining that the Due Process Clause applies "to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent"); Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983, 994 (9th Cir. 2012) ("Even aliens who are in the United States illegally may bring constitutional challenges.").

[32] *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative."). The Supreme Court, however, has held that a returning LPR has a due process right to a hearing before he may be denied admission. *See id.* at 33 (describing Supreme Court precedent "as holding 'that the returning resident alien is entitled as a matter of due process to a hearing on the charges underlying any attempt to exclude him'") (quoting Rosenberg v. Fleuti, 374 U.S. 449, 460 (1963)); *Kwong Hai Chew*, 344 U.S. at 600–01 (holding that a returning LPR was entitled to a hearing because he retained the same constitutional rights that he enjoyed prior to leaving the United States); Matter of Huang, 19 I. & N. Dec. 749, 754 (BIA 1988) ("For purposes of the constitutional right to due process, a returning lawful permanent resident's status is assimilated to that of an alien continuously residing and physically present in the United States.") (citing *Kwong Hai Chew*, 344 U.S. at 596). Moreover, under the INA, a returning LPR is not considered an applicant for admission except in certain circumstances. 8 U.S.C. § 1101(a)(13)(C). And before IIRIRA, the Supreme Court had interpreted the term "entry" in the INA as excluding an LPR's return to the United States following "an innocent, casual, and brief excursion" outside the country. *Fleuti*, 374 U.S. at 462.

the threshold of initial entry stands on a different footing" because, theoretically, he is outside of the geographic boundaries of the United States, and thus beyond the scope of constitutional protection.[33]

This distinction, known as the "entry fiction" doctrine, allows courts to treat an alien seeking admission as though he had never entered the country, even if he is, technically, physically within U.S. territory, such as at a border checkpoint or airport.[34] In those circumstances, the alien is legally considered to be "standing on the threshold of entry," and outside the territorial jurisdiction of the United States.[35] By contrast, once an alien "enters" the country, "the legal circumstance changes," and he may become subject to constitutional rights and protections.[36]

The Supreme Court has applied this principle not only with respect to aliens seeking entry into the United States, but also to aliens seeking entry who are detained within the country's borders pending determinations of their admissibility. For example, in *United States* ex rel. *Knauff v. Shaughnessy*, the German wife of a U.S. citizen challenged her exclusion without a hearing under the War Brides Act.[37] The German national was detained at Ellis Island during her proceedings, and, therefore, technically within U.S. territory.[38] Nevertheless, the Supreme Court held that the government had the "inherent executive power" to deny her admission, and that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[39]

Similarly, in *Shaughnessy v. United States* ex rel. *Mezei*, an alien detained on Ellis Island for more than 21 months argued that the government's decision to deny admission without a hearing violated due process.[40] Citing "the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments," the Court determined that the Executive was authorized to deny entry without a hearing, and that the decision was not subject to judicial review.[41] Further, the Court held, although the alien had "temporary harborage" inside the United States pending his exclusion proceedings, he had not effected an "entry" for purposes of immigration law, and could be "treated as if stopped at the border."[42]

---

[33] *Mezei*, 345 U.S. at 212; *see also* Kaplan v. Tod, 267 U.S. 228, 230–31 (1925) (an alien denied entry and initially held at Ellis Island was, notwithstanding her subsequent transfer to the custody of another entity while awaiting removal, "still in theory of law at the boundary line and had gained no foothold in the United States") (citing Nishimura Ekiu v. United States, 142 U.S. 651, 661 (1892)).

[34] *Zadvydas*, 533 U.S. at 693 ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law. It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.").

[35] Alvarez-Garcia v. Ashcroft, 378 F.3d 1094, 1097 (9th Cir. 2004); *but see* Rodriguez v. Robbins, 804 F.3d 1060, 1082–83 (9th Cir. 2015) (holding that, "to avoid serious constitutional concerns," mandatory detention provisions for aliens subject to expedited removal should be subject to six-month time limitation because aliens seeking to enter the United States could in some cases include returning LPRs, who are not subject to the entry fiction doctrine and entitled to due process protections), *rev'd sub nom.* Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

[36] *Zadvydas*, 533 U.S. at 693.

[37] United States *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537, 539–40 (1950).

[38] *Id.* at 539.

[39] *Id.* at 544.

[40] Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 207–09 (1953).

[41] *Id.* at 210–12.

[42] *Id.* at 212–15 (citations omitted). The Court also held that the alien could not be construed as having "entered" the country despite having previously lived in the United States. *Id.* at 213.

Therefore, existing Supreme Court jurisprudence recognizes that the federal government has broad plenary power over the admission and exclusion of aliens seeking to enter the United States, and may deny admission without affording due process protections such as the right to a hearing. Aliens seeking entry are thus generally entitled only to those protections that Congress explicitly authorized.[43] Conversely, an alien who has *entered* the United States is generally entitled to due process protections prior to removal.[44] Under the "entry fiction" doctrine, however, aliens who are detained within the United States pending a determination of their admissibility may be "treated, for constitutional purposes" as though they have not entered this country.[45] The extent to which the entry fiction doctrine may apply to aliens who are already within the United States remains an unresolved question. While some courts have held that aliens apprehended *near* the U.S. border may be treated as though they had not effected an entry into the country, the degree to which this principle may be applied to aliens within the interior of the United States is unclear.[46]

Creation of the Expedited Removal Process

Congress established the expedited removal process when it enacted IIRIRA in 1996.[47] Before IIRIRA, federal immigration law distinguished between arriving aliens and aliens who had entered the United States. Based on this distinction, there were two types of proceedings to determine whether an alien should be removed: exclusion proceedings, which were "the usual means of proceeding against an alien outside the United States seeking admission," and deportation proceedings, which applied to aliens "already physically in the United States."[48] In both types of proceedings, however, the alien had statutory rights to counsel, a hearing, and administrative and judicial review before he could be removed from the United States.[49]

Confronted with what it perceived as mounting levels of unlawful migration,[50] Congress enacted IIRIRA in 1996 and made sweeping changes to the federal immigration laws.[51] One major shift was to replace the exclusion/deportation framework, which turned on whether an alien had *physically entered* the United States, with a new framework that turned on whether an alien had been *lawfully admitted* into the country by immigration authorities.[52] Under the new framework, aliens who were lawfully admitted could be removed from the United States if they fell under the

[43] *See* Guzman v. Tippy, 130 F.3d 64, 66 (2d Cir. 1997) ("An excluded alien's rights are determined by the procedures established by Congress and not by the due process protections of the Fifth Amendment.").

[44] Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

[45] *Id.*

[46] *See e.g.,* Castro v. Dep't of Homeland Sec., 835 F.3d 422, 445–50 (3d Cir. 2016) (holding that aliens "apprehended within hours of surreptitiously entering the United States" could not raise a constitutional challenge to their expedited removal because they were "recent clandestine entrants" who could be treated, under the entry fiction doctrine, as aliens seeking initial admission to the country who lack constitutional protections), *cert. denied* 137 S. Ct. 1581 (2017); M.S.P.C. v. U.S. Customs and Border Prot., 60 F. Supp. 3d 1156, 1175 (D.N.M. 2014) ("Petitioner, who undisputedly crossed approximately nine miles over the border and was apprehended within 30 minutes of crossing, does not have any substantial ties to this country to place the nature of her rights near those of a permanent resident. Thus, for purposes of the constitutional right to due process, Petitioner's status is assimilated to that of an arriving alien.").

[47] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, P.L. 104-208, § 302, 110 Stat. 3009-546, 579–585, 625 (1996).

[48] Landon v. Plasencia, 459 U.S. 21, 25 (1982).

[49] 8 U.S.C. §§ 1105a(a)(1), 1105a(b), 1225(b), 1226(b), 1251(b), 1362 (1995).

[50] S.Rept. 104-249, at 1, 3 (1996).

[51] *See generally* Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

[52] *Id.* § 304, 110 Stat. at 587-88 (codified at 8 U.S.C. §§ 1229, 1229a).

grounds of deportability listed in INA Section 237(a).[53] On the other hand, aliens who had not been admitted into the United States—whether first arriving to the United States or having entered the country without being lawfully admitted—could be denied admission and removed from the United States if they fell under the grounds of inadmissibility listed in INA Section 212(a).[54]

Secondly, IIRIRA removed the distinction between deportation and exclusion proceedings. Instead, it established a standard, "formal" removal proceeding under INA Section 240 applicable to aliens regardless of whether they are charged with being inadmissible or deportable.[55] These formal removal proceedings generally entail the same statutory rights and protections that previously governed deportation proceedings.[56]

IIRIRA also created a new, expedited removal process generally required for certain arriving aliens.[57] This expedited removal process, codified in INA Section 235, does not apply to all arriving aliens who are believed inadmissible, but only to those who are inadmissible because they lack valid entry documents or have attempted to procure their admission through fraud or misrepresentation.[58]

Under this new procedure, the federal government could summarily remove these aliens without a hearing or further review unless they expressed an intent to apply for asylum or a fear of persecution.[59] In a separate provision, Congress gave the Attorney General (now the Secretary of DHS) "the sole and unreviewable discretion" to apply this procedure to "certain other aliens" inadmissible on the same grounds if (1) they were not admitted or paroled into the United States, and (2) they could not establish that they have been physically present in the United States continuously for two years at the time of their apprehension.[60]

Table 1 illustrates the differences between expedited removal proceedings, pre-IIRIRA deportation/exclusion proceedings, and post-IIRIRA formal removal proceedings.

[53] *Id.* § 304, 110 Stat. at 589 (codified at 8 U.S.C. § 1229a).

[54] *Id.* § 304, 110 Stat. at 593 (codified at 8 U.S.C. § 1229a).

[55] *Id.* § 304, 110 Stat. at 594 (codified at 8 U.S.C. §§ 1229, 1229a). *See also* Vartelas v. Holder, 566 U.S. 257, 262–63 (2012) (discussing changes made by IIRIRA).

[56] IIRIRA § 304, 110 Stat. at 596-98 (codified at 8 U.S.C. §§ 1229, 1229a).

[57] *Id.* § 302, 110 Stat. at 579-84 (codified at 8 U.S.C. § 1225(b)(1)(A)(i)).

[58] *Id.*

[59] *Id.*

[60] *Id.* § 302, 110 Stat. at 580-81 (codified at 8 U.S.C. § 1225(b)(1)(A)(iii)(I)).

Table 1. Different Forms of Administrative Removal Proceedings Pre- and Post-IIRIRA

Type of Proceedings	Covered Aliens	Right to Counsel	Right to Administrative Hearing	Right to Administrative Appeal and Judicial Review
Pre-IIRIRA Exclusion Proceedings	Arriving aliens seeking entry into the United States	Yes	Yes	Yes
Pre-IIRIRA Deportation Proceedings	Aliens who already entered the United States	Yes	Yes	Yes
Post-IIRIRA Expedited Removal Proceedings	Arriving aliens who are inadmissible because they lack valid entry documents or have sought admission through fraud (may also include aliens inadmissible on same grounds if they are present in the United States without being admitted or paroled and have been in the country less than two years)	No	No	No
Post-IIRIRA Formal Removal Proceedings	Most aliens unless they meet the criteria for expedited removal or another type of removal process	Yes	Yes	Yes

Source: 8 U.S.C. §§ 1105a(a)(1), 1105a(b), 1225(b), 1226(b), 1251(b), 1362 (1995); 8 U.S.C. §§ 1225(b)(1)(A), 1229, 1229a.

Implementation and Expansion of Expedited Removal

Following IIRIRA, the former Immigration and Naturalization Service (INS)[61] initially applied the new expedited removal authority to circumstances mandated by the governing statute (i.e., to arriving aliens), and not to other circumstances where the Attorney General was authorized (but not required) to exercise such authority.[62] In addition, because the expedited removal provisions

[61] On March 1, 2003, the INS ceased to exist as an independent agency under the U.S. Department of Justice, and its functions were transferred to DHS. *See* Homeland Security Act of 2002, P.L. 107-296, §§ 101, 441, 451, 471, 116 Stat. 2135, 2142, 2192, 2195, 2205 (2002). Within DHS, most of the functions were transferred to three new entities: U.S. Immigration and Customs Enforcement (ICE), U.S. Citizenship and Immigration Services (USCIS), and U.S. Customs and Border Protection (CBP). *See id.* §§ 401, 411, 442, 451.

[62] Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 10,312, 10,313–14 (Mar. 6, 1997); *see also* SYMPOSIUM, *Procedures for Expedited Removal and Asylum Screening Under the Illegal Immigration Reform and Immigrant*

exempted aliens from countries in the Western Hemisphere whose governments did not have full diplomatic relations with the United States, and who arrived by aircraft at a port of entry,[63] Cuban nationals who arrived in the United States by aircraft were not subject to expedited removal.[64]

While the expedited removal statute governs the removal of certain aliens who are "arriving" in the United States, it does not define this group. When promulgating regulations implementing the new expedited removal authority, the INS defined the term "arriving alien" to include (1) aliens seeking admission into the United States at a port of entry, (2) aliens seeking transit through the United States at a port of entry, and (3) aliens who have been interdicted at sea and brought into the United States "by any means, whether or not to a designated port-of-entry, and regardless of the means of transport."[65]

Over the years, however, the INS and its successor agency DHS gradually expanded the implementation of expedited removal authority to cover (1) aliens who entered the United States by sea without being admitted or paroled by immigration authorities, and who have been in the country less than two years;[66] (2) aliens apprehended within 100 miles of the U.S. border within 14 days of entering the country, and who have not been admitted or paroled by immigration authorities;[67] and, (3) ultimately, Cuban nationals who met the criteria for expedited removal.[68] But despite these expansions, the agency has never employed expedited removal to the full degree authorized by INA Section 235(b)(1), which would include both arriving aliens and, potentially, all aliens physically present in the United States without being admitted or paroled who have been in the country less than two years and who fall under the expedited removal statute's specified grounds of inadmissibility.

Table 2 shows how the INS and DHS implemented their expedited removal authority since 1997. (A more comprehensive discussion about the exercise of expedited removal authority over time can be found in **Appendix B**.)

Responsibility Act of 1996, 29 CONN. L. REV. 1501, 1505, 1520 (1997).

[63] 8 U.S.C. § 1225(b)(1)(F).

[64] 8 C.F.R. § 235.3(b)(1)(i) (1997). At the time IIRIRA was passed in 1996, the United States did not have diplomatic relations with Cuba. *See* Eliminating Exception to Expedited Removal Authority for Cuban Nationals Arriving by Air, 82 Fed. Reg. 4769, 4769 (Jan. 17, 2017) (noting that the United States and Cuba lacked full diplomatic relations for many years).

[65] Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 444, 445 (Jan. 3, 1997); 8 C.F.R. § 1.2. In its notice of these regulations, the INS recognized that "[a]n exception is provided for Cuban nationals arriving by aircraft at a port-of-entry." Inspection and Expedited Removal of Aliens, 62 Fed. Reg. at 444-45; *see also* 8 U.S.C. § 1225(b)(1)(F) (statutory exception for aliens from countries in the Western Hemisphere whose government does not have diplomatic relations with the United States and who arrived by aircraft). The INS amended the definition of "arriving alien" to exempt from expedited removal aliens who were paroled into the United States before April 1, 1997 (the effective date of IIRIRA), as well as aliens who, either before or after April 1, 1997, returned to the United States pursuant to a grant of advance parole that they applied for and obtained while physically present in the United States and prior to their departure from this country. Amendment of the Regulatory Definition of Arriving Alien, 63 Fed. Reg. 19,382, 19,382 (Apr. 20, 1998).

[66] Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924, 68,924 (Nov. 13, 2002).

[67] Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,877 (Aug. 11, 2004).

[68] Following the restoration of diplomatic relations with Cuba in 2015, DHS eliminated the exceptions to expedited removal that it had implemented for Cuban nationals. *See* Eliminating Exception to Expedited Removal Authority for Cuban Nationals Arriving by Air, 82 Fed. Reg. at 4770; Eliminating Exception to Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea, 82 Fed. Reg. 4902 (Jan. 17, 2017).

Table 2. Expansion of Expedited Removal

Category	*Federal Register* Notice	Date of Notice	Description
Arriving Aliens	62 Fed. Reg. 10,312	March 6, 1997	Aliens seeking entry at a designated port of entry, aliens seeking transit through the United States at a port of entry, and aliens who have been interdicted at sea and brought into the United States "by any means, whether or not to a designated port-of-entry, and regardless of the means of transport."
Aliens who Arrived in the United States by Sea	67 Fed. Reg. 68,924	November 13, 2002	Aliens who arrived in the United States by sea, "either by boat or other means," who (1) have not been admitted or paroled and (2) have been physically present in the United States for less than two years.
Aliens Unlawfully Present in Border Regions[a]	69 Fed. Reg. 48,877	August 11, 2004	Aliens apprehended within 100 miles of border within 14 days of entering the United States, who have not been admitted or paroled.
Cuban Nationals	82 Fed. Reg. 4769; 82 Fed. Reg. 4902	January 17, 2017	All Cuban nationals who fall within the categories of aliens currently subject to expedited removal.

a. Discussion of DHS's implementation of this expansion from designated sectors of the U.S.-Mexico land border in 2004 to the entirety of the U.S. international borders in 2006 is found in **Appendix B**.

Inadmissibility Grounds That Serve as the Basis for Expedited Removal

As noted above, expedited removal authority currently is exercised with regard to the following three overarching categories of aliens:

1. Arriving aliens seeking entry into the United States at a designated port of entry.
2. Aliens who arrived in the United States by sea, who have not been admitted or paroled, and who have been in this country for less than two years.
3. Aliens who are encountered within 100 miles of the border, who have not been admitted or paroled, and who have been in the United States for less than 14 days.[69]

Aliens in these categories are subject to expedited removal only if they fall under the grounds of inadmissibility found in INA Section 212(a)(6)(C) and (a)(7).[70] These grounds of inadmissibility generally apply to aliens who lack valid entry documents or who attempt to procure admission through fraud or misrepresentation.[71]

More specifically, the two inadmissibility grounds apply to the following:

- An alien who is not in possession of (1) a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document; and (2) a valid unexpired passport, or other suitable travel document, or document of identity and nationality if required under applicable regulations.[72] This provision applies, for example, to aliens who arrive with proper documents for entry into the United States for certain purposes, but who intend to enter the United States for reasons that require different authorizing documents.[73]
- An alien whose immigrant visa has been issued in violation of the provisions regarding the numerical limitations on the distribution of immigrant visas.[74]
- An alien whose passport will expire within six months after his authorized period of stay in the United States.[75]
- An alien who is not in possession of a valid nonimmigrant visa or border crossing identification card at the time of his application for admission.[76]

---

[69] 8 U.S.C. § 1225(b)(1)(A)(i), (iii)(II); 8 C.F.R. § 235.3(b)(1)(i), (ii); *see* Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924 (Nov. 13, 2002); Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877 (Aug. 11, 2004).

[70] 8 U.S.C. § 1225(b)(1)(A)(i).

[71] *Id.* § 1182(a)(6)(C), (a)(7).

[72] *Id.* § 1182(a)(7)(A)(i)(I). DHS may waive this ground of inadmissibility if the alien is otherwise admissible, and was unaware that he lacked valid entry or travel documents, and could not have discovered the lack of necessary documents through reasonable diligence before his departure from outside the United States. *Id.* § 1182(a)(7)(A)(ii), (k).

[73] *See id.* § 1184(b) (providing that every alien "shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status"); Smith v. U.S. Customs & Border Prot., 741 F.3d 1016, 1021 (9th Cir. 2014) (discussing application of expedited removal statute to a Canadian national who sought entry into the United States and was deemed to be an intending immigrant because he carried large quantities of undeclared cash and flyers advertising his photography business in Arizona, and he convinced the CBP officer that he intended to work in the United States rather than come as a temporary visitor).

[74] 8 U.S.C. § 1182(a)(7)(A)(i)(II). DHS may waive this ground of inadmissibility if the alien is otherwise admissible, and was unaware that he did not have a properly issued immigrant visa, and could not have discovered it through reasonable diligence before his departure from outside the United States. *Id.* § 1182(a)(7)(A)(ii), (k).

[75] *Id.* § 1182(a)(7)(B)(i)(I). DHS may waive this requirement "(A) on the basis of unforeseen emergency in individual cases, or (B) on the basis of reciprocity with respect to nationals of foreign contiguous territory or of adjacent islands and residents thereof having a common nationality with such nationals, or (C) in the case of aliens proceeding in immediate and continuous transit through the United States pursuant to a contract with transportation companies to guarantee passage through the United States to foreign countries." *Id.* § 1182(d)(4); *see also id.* §§ 1182(a)(7)(B)(ii), 1223(c).

[76] *Id.* § 1182(a)(7)(B)(i)(II). DHS may waive this requirement "(A) on the basis of unforeseen emergency in individual

- An alien who seeks to procure (or has attempted to procure or has procured) a visa, other documentation, or admission into the United States or other immigration benefit through fraud or willful misrepresentation (e.g., an alien presenting a photo-substituted passport, or providing false information on a visa application).[77]
- An alien who falsely represents (or has falsely represented) himself to be a U.S. citizen.[78]

Importantly, expedited removal is available in cases where the alien is charged only with being inadmissible under these grounds. If an immigration officer determines that an alien is inadmissible on *additional grounds* (e.g., because he has engaged in specified criminal activity), then the alien will be placed in formal removal proceedings under INA Section 240.[79]

Expedited Removal Process

INA Section 235(b)(1) instructs that an immigration officer must inspect an alien and determine whether he falls within the category of inadmissible aliens subject to expedited removal.[80] If the alien meets the criteria for expedited removal, the alien will be ordered removed without a hearing or further review, *unless* the alien indicates an intent to apply for asylum or a fear of persecution.[81] The alien will also be barred from reentering the United States for five years, with lengthier or even permanent bars to admission if special factors are present.[82]

While expedited removal is a more streamlined process than formal removal proceedings, it nonetheless can involve a number of determinations by multiple agencies and agency subcomponents—particularly in cases where an alien intends to apply for asylum or expresses a more generalized fear of persecution that could potentially render the alien eligible for relief from removal. U.S. Customs and Border Protection (CBP), the DHS component with primary responsibility for immigration enforcement along the border and at designated ports of entry,[83] typically takes the lead role in the expedited removal process, from the initial inspection or

cases, or (B) on the basis of reciprocity with respect to nationals of foreign contiguous territory or of adjacent islands and residents thereof having a common nationality with such nationals, or (C) in the case of aliens proceeding in immediate and continuous transit through the United States pursuant to a contract with transportation companies to guarantee passage through the United States to foreign countries." *Id.* § 1182(d)(4); *see also id.* §§ 1182(a)(7)(B)(ii), 1223(c).

[77] *Id.* § 1182(a)(6)(C)(i). This provision may be waived if the alien is the spouse, son, or daughter of a U.S. citizen or lawful permanent resident, and establishes that the denial of his admission would result in "extreme hardship" to the citizen or lawful permanent resident spouse or parent. *Id.* §§ 1182(a)(6)(C)(iii), 1182(i)(1). This waiver provision does not apply to aliens who falsely claim to be U.S. citizens. *Id.* § 1182(a)(6)(C)(iii).

[78] *Id.* § 1182(a)(6)(C)(ii). This provision does not apply if the alien's natural or adoptive parents are or were U.S. citizens, the alien permanently resided in the United States before turning 16, and the alien "reasonably believed at the time of making such representation that he or she was a citizen." *Id.* § 1182(a)(6)(C)(ii)(II).

[79] *Id.* § 1225(b)(2)(A) (inspection of other aliens); 8 C.F.R. § 235.3(c).

[80] 8 U.S.C. § 1225(a)(3), (b)(1)(A)(i).

[81] *Id.* § 1225(b)(1)(A)(i), (iii)(I); 8 C.F.R. § 235.3(b)(2)(i).

[82] 8 U.S.C. § 1182(a)(9)(A)(i). In the case of a second or subsequent removal, the alien is barred from seeking admission to the United States within 20 years. *Id.* If the alien is convicted of an aggravated felony, there is a permanent bar to reentry. *Id.* In addition, an alien who unlawfully enters the United States following an expedited removal is permanently barred from admission. *Id.* § 1182(a)(9)(C)(i)(II). These statutory bars, however, are subject to waivers where DHS has consented to the alien applying for admission. *Id.* § 1182(a)(9)(A)(iii), (C)(ii).

[83] *See* 6 U.S.C. § 211(c) (listing functions of CBP).

apprehension of the alien through the issuance of an order of expedited removal.[84] U.S. Immigration and Customs Enforcement (ICE), the DHS component primarily responsible for interior enforcement and removal, also regularly plays a significant role, such as when the alien seeks asylum or expresses a fear of persecution, and ICE takes responsibility for the alien's detention and removal.[85] Another DHS component, U.S. Citizenship and Immigration Services (USCIS), is responsible for interviewing aliens who have claimed a fear of persecution and assesses whether such claims are credible.[86] If such claims are not deemed credible, the agency may issue an expedited removal order.[87] Finally, IJs within the Department of Justice's Executive Office for Immigration Review may become involved in the expedited removal process when either (1) an IJ is asked to review a USCIS determination that an alien does not have a credible fear of persecution or (2) in the event that an alien is determined to have a credible fear, the alien is placed in formal removal proceedings before an IJ where the alien's claim for relief can be adjudicated.[88]

The following sections provide further explanation of the expedited removal process.

Inspection

An alien arriving in the United States *or* an alien present in the United States who has not been admitted is considered an "applicant for admission" who is subject to inspection by an immigration officer.[89] At a designated port of entry, the initial phase of the inspection process is referred to as "primary inspection."[90] During this stage, "the immigration officer literally has only a few seconds to examine documents, run basic lookout queries, and ask pertinent questions to determine admissibility and issue relevant entry documents."[91] If the immigration officer finds discrepancies in the alien's documents or statements, "or if there are any other problems, questions, or suspicions that cannot be resolved within the exceedingly brief period allowed for primary inspection," the alien will be referred to "secondary inspection" for "a more thorough inquiry."[92] During secondary inspection, the immigration officer often will not know if the alien is

[84] *See* Jill E. Family, *The Executive Power of Process in Immigration Law*, 91 CHI.-KENT L. REV. 59, 75–76 (2016) (discussing CBP's responsibilities and expedited removal authority). Within CBP, the U.S. Border Patrol is the agency component primarily charged with the apprehension of aliens unlawfully entering the United States or who have recently entered the country unlawfully away from a designated point of entry. *See* 6 U.S.C. § 211(e)(3).

[85] *See* Family, *supra* note 84, at 63 (discussing ICE's interior enforcement responsibilities).

[86] *See Credible Fear Screenings*, U.S. CITIZENSHIP & IMMIGRATION SERVS., http://www.uscis.gov/unassigned/credible-fear-screenings (last modified Sept. 26, 2008).

[87] 8 C.F.R. § 208.30(g)(1)(ii).

[88] *See* 8 U.S.C. § 1225(b)(1)(B)(ii) (referral of aliens who have a credible fear of persecution to an IJ for consideration of asylum application in formal removal proceedings), (iii)(III) (providing for an IJ's review of a negative credible fear determination by USCIS).

[89] *Id.* § 1225(a)(1) (defining an "applicant for admission" as "[a]n alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters)"), (3) ("All aliens (including alien crewmen) who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States shall be inspected by immigration officers."). DHS, however, may as a matter of discretion parole an alien and defer his inspection to another location if there is insufficient documentation for the immigration officer to determine whether the alien is inadmissible. 8 C.F.R. § 235.2; *see also Deferred Inspection*, U.S. CUSTOMS & BORDER PROT., https://www.cbp.gov/contact/deferred-inspection/overview-deferred-inspection (last modified Apr. 4, 2018).

[90] Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 10,312, 10,318 (Mar. 6, 1997).

[91] *Id.*

[92] *Id.* An alien may also be referred to secondary inspection "for routine matters, such as processing immigration

subject to expedited removal until the officer has sufficiently questioned the alien to assess whether the alien is inadmissible.[93] In order to make that determination, the immigration officer may obtain statements under oath about the purpose and intention of the applicant in coming to the United States.[94] DHS regulations provide that "[i]nterpretative assistance shall be used if necessary to communicate with the alien."[95]

At other locations (e.g., in cases where the alien is found between ports of entry), an alien who is apprehended by immigration authorities is typically taken to a U.S. Border Patrol station for inspection and processing to determine whether the alien is inadmissible and subject to expedited removal.[96]

Inadmissibility Determination and Issuance of Expedited Removal Order

DHS regulations provide that, if an immigration officer determines that an alien is inadmissible and subject to expedited removal, the officer must prepare a Record of Sworn Statement in Proceedings (Form I-867), which contains the facts of the case and any statements made by the alien.[97] The regulations require the immigration officer to record the alien's statements in response to questions concerning his identity, nationality, and inadmissibility.[98] Following questioning, the alien must be given an opportunity to read (or have read to him) the information in the Form I-867 and any statements he made during the inspection.[99] Further, the alien must sign and initial each page of the Form I-867 as well as any corrections made.[100]

DHS regulations also require the immigration officer to prepare a Notice and Order of Expedited Removal (Form I-860) containing the charges of inadmissibility against the alien, and the alien must have an opportunity to respond to the charges.[101] In addition, the regulations instruct that, in cases where an alien is suspected of being present in the United States without being admitted or paroled, the alien must be given an opportunity to show that he was admitted or paroled into the United States after inspection at a port of entry.[102]

---

documents and responding to inquiries." *Id.*

[93] *Id.*

[94] 8 U.S.C. § 1225(a)(5); *see also id.* § 1225(d)(3) ("The [Secretary] and any immigration officer shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, transit through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of [DHS].").

[95] 8 C.F.R. § 235.3(b)(2)(i).

[96] *See* 8 U.S.C. § 1225(a)(3) (requiring all applicants for admission to be inspected by immigration officers); *Zero Tolerance Immigration Prosecutions—Family Fact Sheet*, U.S. CUSTOMS & BORDER PROT., https://www.cbp.gov/newsroom/zero-tolerance-immigration-prosecutions-family-fact-sheet (last modified June 15, 2018) (indicating that individuals apprehended by Border Patrol are taken to stations for processing).

[97] 8 C.F.R. § 235.3(b)(2)(i).

[98] *Id.*

[99] *Id.*

[100] *Id.* If the alien refuses to sign the Form I-867, the immigration officer must write "Subject refused to sign" on the signature line. *See Inspector's Field Manual* § 17.15(b)(1), U.S. CUSTOMS & BORDER PROT., http://www.aila.org/File/Related/11120959F.pdf. Similarly, if the alien refuses to answer questions, the immigration officer should indicate that "Subject refused to answer" after each pertinent question. *Id.* The alien's refusal to sign or answer questions does not prevent expedited removal as long as there is sufficient evidence independent of the alien's statements to show that he is subject to expedited removal. *Id.*

[101] 8 C.F.R. § 235.3(b)(2)(i).

[102] *Id.* § 235.3(b)(6). The alien has the burden of showing that he was lawfully admitted or paroled into the United States. *Id.* If he meets that burden, the immigration officer will determine whether any grounds of deportability apply

As previously noted, an alien placed in expedited removal may be charged with being inadmissible only under the grounds involving a lack of entry documents or attempting to procure admission through fraud or misrepresentation.[103] If the immigration officer determines that the alien is inadmissible on other grounds, and DHS intends to pursue additional charges, the alien will be placed in formal removal proceedings under INA Section 240, and the agency may lodge the additional charges during those proceedings.[104]

An expedited order of removal becomes final after supervisory review.[105] At that point, agency regulations permit the immigration officer to serve the alien with Form I-860 and obtain the alien's signature acknowledging receipt.[106] During this process, the alien is not entitled to an administrative hearing or appeal of the expedited removal order.[107] Upon the issuance of the expedited removal order, the alien will be removed from the United States.[108]

Withdrawal of Application for Admission

As an alternative to expedited removal, DHS may permit an alien to voluntarily withdraw his application for admission if he intends, and is able, to depart the United States immediately.[109] This option allows the agency "to better manage its resources by removing inadmissible aliens quickly at little or no expense to the Government, and may be considered instead of expedited or regular removal when the circumstances of the inadmissibility may not warrant a formal removal."[110]

Under DHS policy, the immigration officer typically considers a number of factors to determine whether an alien may withdraw his application for admission, including (1) the seriousness of the immigration violation; (2) any previous findings of inadmissibility against the alien; (3) the intent on the part of the alien to violate the law; (4) the alien's ability to overcome the ground of inadmissibility; (5) the alien's age and health; and (6) other humanitarian or public interest considerations.[111] An alien does not have a right to withdraw his application for admission; instead, it is up to the discretion of the agency whether to permit the alien to withdraw his application and immediately leave the United States in lieu of undergoing removal proceedings.[112] Furthermore, implementing regulations provide that an alien who is allowed to

---

under INA Section 237(a), or, if the alien was paroled and that parole has been or should be terminated, whether the alien is inadmissible under INA Section 212(a). *Id.* If the alien cannot show a lawful admission or parole, he will be ordered removed under the expedited removal provisions of INA Section 235(b)(1). *Id.*

103 *Id.* § 235.3(b)(3).

104 8 U.S.C. § 1225(b)(2)(A); 8 C.F.R. § 235.3(b)(3), (c). Additionally, if an alien physically present in the United States who is detained pending an expedited removal screening establishes that he does not meet the criteria for expedited removal because he has been continuously present in the country for the requisite period of time prior to his apprehension (e.g., 14 days), he will be placed in formal removal proceedings under INA Section 240. 8 C.F.R. § 235.3(b)(1)(ii).

105 8 C.F.R. § 235.3(b)(7).

106 *Id.* § 235.3(b)(2)(i).

107 8 U.S.C. § 1225(b)(1)(C); 8 C.F.R. § 235.3(b)(2)(ii).

108 8 C.F.R. § 235.3(b)(8).

109 8 U.S.C. § 1225(a)(4); 8 C.F.R. § 235.4.

110 Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 444, 445 (Jan. 3. 1997).

111 United States v. Barajas-Alvarado, 655 F.3d 1077, 1090 (9th Cir. 2011) (citing U.S. DEP'T OF JUSTICE, IMMIGRATION & NATURALIZATION SERV., INSPECTOR'S FIELD MANUAL § 17.2(a) (2001)).

112 8 C.F.R. § 235.4; *see also* Inspection and Expedited Removal of Aliens, 62 Fed. Reg. at 445 ("The option to permit withdrawal is solely at the discretion of the Government, and is not a right of the alien.").

withdraw his application for admission will remain detained pending his departure unless DHS determines that parole is warranted.[113]

Exceptions to Expedited Removal

Generally, an alien subject to expedited removal will be ordered removed without further hearing to contest the immigration officer's determination.[114] But there are exceptions. Notwithstanding these restrictions, further administrative review occurs if an alien in expedited removal indicates an intent to seek asylum or claims that he fears persecution if removed.[115] Administrative review also occurs if a person placed in expedited removal claims that he is a U.S. citizen, an LPR, or has been granted refugee or asylee status.[116] In these limited circumstances, DHS may not proceed with removal until the alien's claim receives consideration.

Credible Fear Determinations

When Congress created the expedited removal process in 1996, it also established special protections for those who claim they qualify for certain forms of relief from removal.[117] Specifically, an alien otherwise subject to expedited removal who expresses an intent to apply for asylum, a fear of persecution or torture, or a fear of returning to his country is entitled to administrative review of that claim before he can be removed.[118] In these circumstances, the statute instructs, the immigration officer must refer the alien for an interview with an asylum officer[119] to determine whether the alien has a "credible fear" of persecution or torture.[120]

A credible fear determination is a screening process that evaluates whether an alien could potentially qualify for asylum, withholding of removal, or protection under the Convention Against Torture (CAT).[121] The INA defines a "credible fear of persecution" as "a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish

[113] 8 C.F.R. § 235.4.

[114] 8 U.S.C. § 1225(b)(1)(A)(i), (C); 8 C.F.R. § 235.3(b)(2)(ii).

[115] 8 U.S.C. § 1225(b)(1)(A)(ii); 8 C.F.R. § 235.3(b)(4).

[116] 8 U.S.C. § 1225(b)(1)(C); 8 C.F.R. § 235.3(b)(5)(i).

[117] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, P.L. 104-208, § 302, 110 Stat. 3009 (1996) (codified at 8 U.S.C. § 1225(b)(1)(A)(i)); *see also Procedures for Expedited Removal*, *supra* note 62, at 1503.

[118] 8 U.S.C. § 1225(b)(1)(A)(i); 8 C.F.R. § 235.3(b)(4).

[119] An asylum officer is an immigration officer who "has had professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of [asylum] applications." 8 U.S.C. § 1225(b)(1)(E)(i). The asylum officer is "supervised by an officer" who has the same training and qualifications, and who "has had substantial experience adjudicating asylum applications." *Id.* § 1225(b)(1)(E)(ii).

[120] 8 U.S.C. § 1225(b)(1)(A)(ii); 8 C.F.R. § 235.3(b)(4). In addition, the Form I-867 prepared by the immigration officer must reflect that the alien indicated an intent to apply for asylum or had a fear of persecution. 8 C.F.R. § 235.3(b)(4).

[121] An alien is eligible for asylum if he has suffered past persecution or has a well-founded fear of future persecution on account of his race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. §§ 1101(a)(42), 1158(b)(1)(B)(i). An alien qualifies for withholding of removal if he can show it is more likely than not that he will be persecuted on account of one of these enumerated grounds. *Id.* § 1231(b)(3)(A); 8 C.F.R. § 208.16(b)(2). And to qualify for CAT protection, an alien must show that it is more likely than not that he will be tortured by a government official or person acting with the consent or acquiescence of that official. 8 C.F.R. §§ 208.16(c)(2), 208.18(a)(1).

eligibility for asylum."[122] A "credible fear of torture" is defined by regulation as "a significant possibility that [the alien] is eligible for [protection] under the Convention Against Torture."[123] Under this "low screening standard,"[124] the alien has to show only a "substantial and realistic possibility of success on the merits" of an application for asylum, withholding of removal, or CAT protection.[125] An alien does not have to show that it is more likely than not that he could establish eligibility for these protections to be found to have a credible fear.[126] The credible fear determination is not intended to fully assess the alien's claims, but only to determine whether those claims are sufficiently viable to warrant more thorough review.[127]

USCIS may conduct the credible fear interview at a designated port of entry or another location, such as a detention center.[128] Before the interview, the alien may consult with another person at no expense to the government; the consulted person may be present at the interview and may be permitted, at the discretion of the asylum officer, to offer a statement.[129] The alien also has the option to present evidence at the interview.[130] DHS regulations provide that the immigration officer who refers the alien for an interview must prepare Form M-444, Information about Credible Fear Interview in Expedited Removal Cases, that explains the credible fear interview process, the right to consultation before the interview, the right to request a review of the asylum officer's determination, and the consequences of failing to show a credible fear of persecution or torture.[131] The regulations direct the asylum officer to confirm that the alien received Form M-444, and that he understands the credible fear interview process.[132]

The asylum officer "will conduct the interview in a nonadversarial manner, separate and apart from the general public," and the purpose of the interview "shall be to elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture."[133] If the alien cannot proceed with the interview in English, the asylum officer "shall arrange for the assistance of an interpreter in conducting the interview."[134]

By regulation, during the interview, the asylum officer will create "a summary of the material facts as stated by the applicant," and, at the end of the interview, will review that summary with the alien, who must have an opportunity to correct any errors.[135] The asylum officer will then

---

[122] 8 U.S.C. § 1225(b)(1)(B)(v); *see also* 8 C.F.R. § 208.30(e)(2).

[123] 8 C.F.R. § 208.30(e)(3).

[124] *See* 142 CONG. REC. S11491–02 (daily ed. Sept. 27, 1996) (statement of Sen. Hatch) (referring to "low screening standard" for credible fear determinations).

[125] *See Asylum Division Officer Training Course: Credible Fear*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Feb. 28, 2014), https://www.uscis.gov/sites/default/files/.../Asylum_and_Female_Genital_Mutilation.pdf#page=14 (citing Holmes v. Amerex Rent-a-Car, 180 F.3d 294, 297 (D.C. Cir. 1999)).

[126] *Id.* (citing Joseph E. Langlois, *Asylum Division, Office of International Affairs, Increase of Quality Assurance Review for Positive Credible Fear Determinations and Release of Updated Asylum Officer Basic Training Course Lesson Plan, Credible Fear of Persecution and Torture Determinations*, Memorandum to Asylum Office Directors, et al. (Washington, DC: 17 April 2006)).

[127] *Id.* at 14-16.

[128] 8 U.S.C. § 1225(b)(1)(B)(i); Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 444, 447 (Jan. 3, 1997).

[129] 8 U.S.C. § 1225(b)(1)(B)(iv); 8 C.F.R. §§ 208.30(d)(4), 235.3(b)(4)(i)–(ii).

[130] 8 C.F.R. § 208.30(d)(4).

[131] 8 U.S.C. § 1225(b)(1)(B)(iv); 8 C.F.R. § 235.3(b)(4)(i).

[132] 8 C.F.R. § 208.30(d)(2).

[133] *Id.* § 208.30(d).

[134] *Id.* § 208.30(d)(5).

[135] *Id.* § 208.30(d)(6).

create a written record of his credible fear determination, which will include the factual summary, any additional facts he relied upon, and his decision as to whether the alien established a credible fear of persecution or torture.[136] The asylum officer's determination will not become final until it is reviewed by a supervisory asylum officer.[137]

Aliens Who Establish a Credible Fear of Persecution or Torture

An alien who has a credible fear of persecution or torture is not automatically granted relief. Rather, he is placed in formal removal proceedings governed by INA Section 240 in lieu of expedited removal.[138] During these formal removal proceedings, the alien may be represented by counsel; challenge the basis for his removability; and pursue applications for asylum, withholding of removal, CAT protection, and other forms of relief.[139] The alien may also administratively appeal the IJ's decision and (as specified by statute) seek judicial review of a final order of removal.[140]

Aliens Who Fail to Establish a Credible Fear of Persecution or Torture

An alien's failure to establish a credible fear to the satisfaction of the asylum officer may also be subject to further review. Under INA Section 235(b)(1) and its implementing regulations, if an asylum officer determines that an alien does not have a credible fear of persecution or torture, the officer will provide the alien with written notice of that decision and inquire whether the alien would like to seek review of the decision before an IJ.[141] The alien indicates whether he wants to seek review on Form I-869, Record of Negative Credible Fear Finding and Request for Review by an IJ.[142] If the alien declines further review, the asylum officer will issue Form I-860, Notice and Order of Expedited Removal, following review by a supervisory asylum officer, and order the alien removed from the United States.[143]

The statute and regulations instruct, however, that if the alien requests review of the asylum officer's negative credible fear finding (or refuses to request or decline such review), the asylum officer will issue Form I-863, Notice of Referral to Immigration Judge, for a *de novo* review of that determination.[144] The IJ's review "shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days" after the asylum officer's decision.[145] The alien has the opportunity to be heard and questioned by the IJ during

[136] *Id.* § 208.30(e)(1).

[137] *Id.* § 208.30(e)(7); *see also* Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 444, 447 (Jan. 3, 1997) ("The supervisory asylum officer may direct the asylum officer to interview the applicant further, or to research country conditions or other matters relevant to the decision.").

[138] 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. §§ 208.30(f), 235.6(a)(1)(ii). An alien who establishes a credible fear will be placed in formal removal proceedings for consideration of an asylum application even if he appears to be subject to one of the statutory bars to asylum (e.g., he may be safely removed to a different country, he has committed a criminal offense or other activity disqualifying him from asylum eligibility). See 8 U.S.C. § 1158(a)(2), (b)(2); 8 C.F.R. § 208.30(e)(5).

[139] 8 U.S.C. §§ 1225(b)(1)(B)(ii), 1229a(b)(4); 8 C.F.R. §§ 208.30(f), 235.6(a)(1)(ii).

[140] 8 U.S.C. § 1252(a)(1); 8 C.F.R. § 1003.3(a)(1).

[141] 8 U.S.C. § 1225(b)(1)(B)(iii)(III); 8 C.F.R. § 208.30(g)(1).

[142] 8 C.F.R. § 208.30(g)(1).

[143] 8 U.S.C. § 1225(b)(1)(B)(iii)(I); 8 C.F.R. § 208.30(g)(1)(ii).

[144] 8 U.S.C. § 1225(b)(1)(B)(iii)(III); 8 C.F.R. §§ 208.30(g)(1)(i), 235.6(a)(2)(i), 1003.42(a), 1208.30(g)(2)(i).

[145] 8 U.S.C. § 1225(b)(1)(B)(iii)(III); 8 C.F.R. § 1003.42(e).

this review, which is limited to the issue of credible fear, and may be conducted in person or by telephonic or video conferencing.[146]

If the IJ concurs with the asylum officer's negative credible fear finding, "the case shall be returned to [DHS] for removal of the alien," and the IJ's decision "is final and may not be appealed."[147] DHS, however, may reconsider a negative credible fear finding that has been concurred upon by an IJ after providing notice to the IJ.[148] The alien may submit a request for reconsideration to the regional USCIS asylum office that conducted his initial interview, and if the request is granted, the alien will either have a second interview or receive a positive credible fear determination.[149] Based on a 1997 INS memorandum, USCIS will reconsider the alien's credible fear claim if the alien "has made a reasonable claim that compelling new information concerning the case exists and should be considered."[150]

Conversely, if the IJ finds that the alien has a credible fear of persecution or torture, the IJ will vacate the asylum officer's negative credible fear determination, and the alien will be placed in formal removal proceedings under INA § 240, where he will have an opportunity to pursue asylum, withholding of removal, or CAT protection during those proceedings.[151]

Special Rules for Aliens Arriving from Canada

In late 2002, the United States and Canada entered into an agreement that bars certain non-Canadian nationals arriving from Canada, or who are in transit during removal from Canada, from applying for asylum and related protections in the United States.[152] Under the agreement, if such aliens express a fear of persecution or torture, they must be returned to Canada—the country of last presence—to seek protection under Canadian law rather than applying in the United States.[153] Under DHS regulations, if an alien arriving in the United States from Canada expresses a fear of persecution or torture, the asylum officer will determine whether the alien is ineligible to apply for asylum in light of the agreement, or whether he qualifies for an exception.[154] If the

[146] 8 U.S.C. § 1225(b)(1)(B)(iii)(III); 8 C.F.R. § 1003.42(c); Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 444, 447 (Jan. 3, 1997).

[147] 8 C.F.R. § 1208.30(g)(2)(iv)(A); *see also id.* § 1003.42(f) ("No appeal shall lie from a review of an adverse credible fear determination made by an immigration judge.").

[148] *Id.* § 1208.30(g)(2)(iv)(A); *see also* Katherine Shattuck, Comment, *Preventing Erroneous Expedited Removals: Immigration Judge Review and Requests for Reconsideration of Negative Credible Fear Determinations*, 93 WASH. L. REV. 459, 500 (2018) (noting that "this regulation supplies the official basis of a process by which asylum seekers who have received negative credible fear determinations may try to avoid expedited removal and enter [INA] section 240 removal proceedings").

[149] *See* Shattuck, *supra* note 148, at 500. If USCIS denies reconsideration, the alien remains subject to expedited removal. *Id.*

[150] *See* Memorandum from Michael A. Pearson, Exec. Assoc. Comm'r for Field Operations, Immigration & Naturalization Serv., to Reg'l Dirs., Dist. Dirs. & Asylum Office Dirs. Regarding Expedited Removal: Additional Policy Guidance (Dec. 30, 1997), https://www.aila.org/infonet/ins-expedited-removal-additional-policy.

[151] 8 C.F.R. §§ 235.6(a)(1)(iii), 1003.42(f), 1208.30(g)(2)(iv)(B).

[152] Agreement Between the Government of Canada and the Government of the United States for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, Can.-U.S., Dec. 5, 2002, C.T.S. 2004/2, [hereinafter U.S.-Canada Agreement]. The U.S.-Canada Agreement also applies to aliens arriving in Canada from the United States who seek asylum protection. *See Canada-U.S. Safe Third Country Agreement*, CANADA.CA, http://www.cic.gc.ca/english/department/laws-policy/menu-safethird.asp (last modified June 23, 2016).

[153] U.S.-Canada Agreement, *supra* note 152, at art. V cl. a.

[154] 8 C.F.R. § 208.30(e)(6). An arriving alien from Canada (not including an alien who is being removed from Canada in transit through the United States) will be exempt from the agreement if the alien (1) "[i]s a citizen of Canada, or, not having a country of nationality, is a habitual resident of Canada"; (2) has "a spouse, son, daughter, parent, legal

asylum officer (after supervisory consultation) determines that the alien does not qualify for an exception, the alien will be ineligible to apply for asylum in the United States, and will be removed to Canada, where he may pursue his claims.[155] If the alien qualifies for an exception to the agreement, the asylum officer may determine whether the alien has a credible fear of persecution or torture.[156]

Aliens Who Claim to Be U.S. Citizens, Lawful Permanent Residents, Admitted Refugees, or Persons Who Have Been Granted Asylum

When Congress established the expedited removal process, it created an exception to the otherwise applicable expedited removal procedures for any alien who claims to be an LPR, an admitted refugee, a person who has been granted asylum (asylee), or a U.S. citizen.[157] Congress directed the implementing agency to "provide by regulation for prompt review" of an expedited removal order in these circumstances, which involve persons who claim to have some legal foothold into the United States.[158] Pursuant to the implementing regulations, an immigration officer must attempt to verify a claim of U.S. citizenship, LPR status, refugee status, or asylee status before he can issue an expedited order of removal.[159] The verification process includes "a check of all available [DHS] data systems and any other means available to the officer."[160]

Unverified Claims

DHS regulations provide that, if the immigration officer cannot verify the alien's claim that he is an LPR, refugee, asylee, or U.S. citizen, the alien will be advised of the penalties of perjury, and placed under oath or permitted to make an unsworn declaration regarding his claim of lawful status.[161] The immigration officer will obtain a written statement from the alien in his own language and handwriting "stating that he or she declares, certifies, verifies, or states that the claim is true and correct."[162] Following the alien's declaration, the immigration officer will issue an expedited order of removal and refer the alien to an IJ for further review.[163]

---

guardian, sibling, grandparent, grandchild, aunt, uncle, niece, or nephew who has been granted asylum, refugee, or other lawful status in the United States" (unless the alien's relative in the United States only has a nonimmigrant visitor status or visitor status under the Visa Waiver Program); (3) has "a spouse, son, daughter, parent, legal guardian, sibling, grandparent, grandchild, aunt, uncle, niece, or nephew who is at least 18 years old and has an asylum application pending" in the United States; (4) is an unaccompanied minor who "does not have a parent or legal guardian in either Canada or the United States"; (5) "[a]rrived in the United States with a validly issued visa or other valid admission document, other than for transit, issued by the United States," or, "being required to hold a visa to enter Canada, was not required to obtain a visa to enter the United States"; or (6) USCIS determines as a matter of discretion that the alien should be permitted to pursue asylum and related protections in the United States. *Id.* § 208.30(e)(6)(iii).

[155] *Id.* § 208.30(e)(6)(i). An IJ has no jurisdiction to review the asylum officer's determination. *Id.* § 1003.42(h)(1).

[156] *Id.* § 208.30(e)(6)(ii).

[157] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, P.L. 104-208, § 302, 110 Stat. 3009-546, 579–84 (1996) (codified at 8 U.S.C. § 1225(b)(1)(C)); *see also* Landon v. Plasencia, 459 U.S. 21, 33 (1982); Rosenberg v. Fleuti, 374 U.S. 449, 460 (1963); Kwong Hai Chew v. Colding, 344 U.S. 590, 600–01 (1953) (holding that returning resident aliens are entitled to due process before being excluded).

[158] 8 U.S.C. § 1225(b)(1)(C).

[159] 8 C.F.R. § 235.3(b)(5)(i); Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 444, 445 (Jan. 3, 1997).

[160] 8 C.F.R. § 235.3(b)(5)(i).

[161] *Id.*; *see* 28 U.S.C. § 1746.

[162] 8 C.F.R. § 235.3(b)(5)(i).

[163] *Id.* §§ 235.3(b)(5)(i), 235.3(b)(5)(iv), 235.6(a)(2)(ii).

Under the regulations, if the IJ determines that the alien has not been admitted as an LPR or refugee, granted asylum status, or is not a U.S. citizen, the IJ will affirm the expedited order of removal, and DHS typically proceeds with the alien's removal.[164] There is no appeal of the IJ's decision.[165] However, if the IJ determines that the individual has been admitted as an LPR or a refugee, has been granted asylum, or is a U.S. citizen, the IJ will vacate the expedited order of removal and terminate the proceedings.[166] At this point, DHS may admit the individual or, if appropriate, commence formal removal proceedings against him under INA Section 240 "to contest his or her current retention of such status."[167] The agency, however, may not initiate removal proceedings against a U.S. citizen.[168]

Verified Claims

If, upon examination, an immigration officer verifies that an alien is a U.S. citizen, the alien may not be ordered removed and must be admitted.[169] If the immigration officer verifies that an alien is an LPR, and that he continues to hold that status, the immigration officer cannot issue an expedited order of removal against the alien.[170] Instead, the regulations require the immigration officer to determine whether the alien is considered to be applying for admission into the United States.[171] Under the INA, an LPR will not be regarded as an applicant for admission *unless* he

- has abandoned or relinquished his LPR status;
- has been absent from the United States for a continuous period of more than 180 days;
- has engaged in illegal activity after departing the United States;
- has departed the United States while removal or extradition proceedings against him were pending;
- has committed a criminal offense described in INA Section 212(a)(2), such as a crime involving moral turpitude, a controlled substance offense, or a drug trafficking crime, unless the alien was previously granted a discretionary waiver or cancellation of removal; or
- is attempting to enter the United States at a time or place other than as designated by immigration officers, or has not been admitted to the United States after inspection and authorization by an immigration officer.[172]

If the immigration officer concludes that the LPR is an applicant for admission, and that he is otherwise admissible except that he lacks required documentation to enter the country, the officer may waive the documentary requirements if the alien shows good cause for failing to present

---

[164] 8 C.F.R. § 235.3(b)(5)(iv).

[165] *Id.*

[166] *Id.*

[167] *Id.*; *see* Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 444, 446 (Jan. 3, 1997); Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 10,312, 10,314 (Mar. 6, 1997).

[168] 8 C.F.R. § 235.3(b)(5)(iv).

[169] *Id.*

[170] *Id.* § 235.3(b)(5)(ii).

[171] *Id.*

[172] 8 U.S.C. § 1101(a)(13)(C).

documentation.[173] Alternatively, the immigration officer may defer the alien's inspection "to an onward office for presentation of the required documents."[174] On the other hand, if the immigration officer determines that an LPR seeking admission is inadmissible under INA Section 212(a) (e.g., because of certain criminal activity), the officer may initiate formal removal proceedings against the alien under INA Section 240.[175]

Under DHS regulations, if the immigration officer determines, through the verification process, that an alien has previously been admitted as a refugee or granted asylum in the United States, and that he continues to hold such status, the officer cannot issue an expedited order of removal against the alien.[176] Instead, if the alien is not in possession of a valid, unexpired refugee travel document,[177] the immigration officer may accept an application for a refugee travel document from the alien provided that he (1) did not intend to abandon his refugee or asylum status when he departed the United States; (2) did not engage in any activities outside the United States that would conflict with his refugee or asylum status (e.g., the alien engaged in persecution); and (3) has been outside the United States for less than one year.[178] If the application is approved, the immigration officer will readmit the refugee or asylee into the United States.[179] However, if the alien is not eligible to apply for a refugee travel document, the immigration officer may initiate regular removal proceedings against the alien under INA Section 240.[180]

Unaccompanied Children

Under federal statute, unaccompanied alien children are not subject to expedited removal.[181] Instead, the governing statute provides that any unaccompanied alien child (UAC)[182] who is determined by immigration authorities to be subject to removal must be placed in formal removal proceedings under INA Section 240, regardless of whether the alien is found in the interior of the United States or at the border.[183] The governing statute also instructs that, during the formal

---

[173] *Id.* § 1181(b); 8 C.F.R. §§ 211.1(b)(3), 235.3(b)(5)(ii).

[174] 8 C.F.R. § 235.3(b)(5)(ii).

[175] *Id.* If a returning LPR cannot be regarded as seeking admission into the United States (based on the criteria set forth in INA Section 101(a)(13)(C)), he is not an arriving alien for immigration purposes, and DHS must allow him to return to the United States. Matter of Pena, 26 I. & N. Dec. 613, 616 (BIA 2015). If DHS determines that the alien is subject to removal for other reasons (e.g., an alien who had obtained his LPR status through fraud or misrepresentation) and initiates formal removal proceedings, the LPR can only be charged with being deportable under INA Section 237 rather than being charged with inadmissibility under INA Section 212. *Id.* at 618–619; *see* 8 U.S.C. §§ 1182(a), 1227(a) (grounds of inadmissibility and deportability).

[176] 8 C.F.R. § 235.3(b)(5)(iii).

[177] A person who holds refugee or asylum status generally must have a refugee travel document to return to the United States after temporary travel abroad. *Id.* § 223.1(b).

[178] *Id.* §§ 223.2(b)(2)(ii), 235.3(b)(5)(iii).

[179] *Id.* §§ 223.3(d)(2)(i), 235.3(b)(5)(iii).

[180] *Id.* § 235.3(b)(5)(iii).

[181] 8 U.S.C. § 1232(a)(5)(D). This statutory provision was created by Section 235 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, P.L. 110-457, § 235, 122 Stat. 5044, 5077 (2008).

[182] A UAC is defined as a child who has no lawful immigration status in the United States; has not reached the age of 18; and either has no parent or legal guardian in the United States, or has no parent or legal guardian in the United States who is available to provide care and physical custody. 6 U.S.C. § 279(g).

[183] 8 U.S.C. § 1232(a)(5)(D). The UAC will be placed in the custody of the Department of Health and Human Services' (HHS's) Office of Refugee Resettlement (ORR) pending the formal removal proceedings, and typically must be transferred to ORR within 72 hours after DHS determines that the child is a UAC. *Id.* § 1232(a)(4), (b)(3). Following transfer to ORR, the agency generally must place the UAC "in the least restrictive setting that is in the best interest of the child," and may place the child with a sponsoring individual or entity who "is capable of providing for the child's

removal proceedings, the UAC is eligible for voluntary departure in lieu of removal at no cost[184] and will be provided access to pro bono counsel.[185]

In limited circumstances, DHS may permit a UAC to voluntarily return to his country in lieu of removal proceedings,[186] but only if the UAC is "a national or habitual resident of a country that is contiguous with the United States" (i.e., Mexico and Canada), and the child (1) has not been a victim of human trafficking (or is not at risk of human trafficking upon return to his native country or country of last habitual residence); (2) does not have a credible fear of persecution in his native country or country of last habitual residence; and (3) is capable of independently withdrawing his application for admission to the United States.[187]

Detention and Parole of Aliens Subject to Expedited Removal

The INA generally authorizes (but does not require) immigration authorities to detain aliens pending their removal proceedings.[188] Aliens placed in expedited removal, however, are generally subject to detention pending a determination as to whether they should be removed from the United States.[189] Aliens in the expedited removal process who express a fear of persecution or an intent to apply for asylum are likewise generally subject to detention while the viability of those claims is considered.[190] But depending on a number of circumstances, including whether such aliens are apprehended at a designated port of entry or crossing the border surreptitiously, such aliens may potentially be released from detention on bond, on their own recognizance, under an order of supervision, or via the exercise of DHS's parole authority.[191] Moreover, the extended

physical and mental well-being." *Id.* § 1232(c)(2)(A), (3)(A).

184 Generally, under INA Section 240B, an IJ may permit an alien to voluntarily depart the United States at the alien's expense in lieu of being removed if the alien meets certain statutory requirements (including the posting of bond if at the conclusion of removal proceedings). *See* 8 U.S.C. § 1229c(a), (b).

185 *Id.* § 1232(a)(5)(D), (c)(5).

186 "Voluntary return" following a withdrawal of an application of admission is a distinct alternative to "voluntary departure" during formal removal proceeding authorized under INA Section 240B. An alien granted voluntary departure typically must pay the costs associated with departing from the United States as well as a voluntary departure bond, and is subject to a fine and certain other immigration-related penalties if he fails to depart. 8 U.S.C. § 1229c(a)(1), (a)(3), (b)(1), (b)(3), (d)(1).

187 8 U.S.C. § 1232(a)(2)(A), (a)(2)(B), (a)(5)(D). The federal laws concerning UACs are generally consistent with DHS's (and before that, the INS's) previously policy not to implement expedited removal with respect to unaccompanied minors, except in very limited circumstances. *See e.g.,* U.S. DEP'T OF JUSTICE, IMMIGRATION & NATURALIZATION SERV., INSPECTOR'S FIELD MANUAL § 17.15(a)(1) (2001).

188 *See* 8 U.S.C. § 1226(a) (providing that "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States," and that DHS may release the alien on bond of at least $1,500 or grant conditional parole). During the removal proceedings, the alien may request review of DHS's custody determination at a bond hearing before an IJ, and may appeal the IJ's custody decision to the BIA. 8 C.F.R. §§ 236.1(d)(1), 236.1(d)(3)(i), 1003.19(a).

189 *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(IV); 8 C.F.R. § 235.3(b)(2)(iii).

190 *See* 8 U.S.C. § 1225(b)(1)(B)(ii), (iii)(IV); 8 C.F.R. § 235.3(b)(4)(ii).

191 *See Detention and Removal of Illegal Aliens U.S. Immigration & Customs Enforcement*, DEP'T OF HOMELAND SEC. OFFICE OF INSPECTOR GEN. (Apr. 14, 2006), https://www.oig.dhs.gov/assets/Mgmt/OIG_06-33_Apr06.pdf#page=34; *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture* ¶ 8.3(2)(b), U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (Dec. 8, 2009), https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf; Matter of X-K-, 23 I. & N. Dec. 731, 735–36 (BIA 2005) (holding that aliens who unlawfully enter the United States and are initially screened for expedited removal but found to have a

detention of alien minors and their parents is limited by a binding settlement agreement from a case in the U.S. District Court for the Central District of California now called *Flores v. Sessions*.[192]

Detention of Aliens in Expedited Removal Proceedings

INA Section 235(b)(1) and its implementing regulations provide that an alien "shall be detained" pending a determination as to whether the alien should be subject to expedited removal.[193] Historically, executive branch agencies have construed this detention authority as mandatory.[194] The mandatory detention requirement applies not only during the initial expedited removal screening, but also during any determination as to whether the alien has a credible fear of persecution or torture and any administrative review of an alien's claim that he is a U.S. citizen, LPR, asylee, or refugee.[195] DHS, however, has the discretion to parole an alien on a case-by-case basis "for urgent humanitarian reasons or significant public benefit" during these expedited removal proceedings.[196] Based on this statutory authority, the agency has implemented regulations that allow parole of an alien subject to expedited removal, but only if parole "is required to meet a medical emergency or is necessary for a legitimate law enforcement objective."[197] The agency's discretionary decision to grant parole is not subject to administrative or judicial review.[198]

Detention of Aliens Who Establish a Credible Fear of Persecution or Torture

INA Section 235(b)(1) provides that aliens subject to expedited removal who establish a credible fear of persecution or torture "shall be detained" pending consideration of their applications for asylum and related protections in formal removal proceedings.[199] Under DHS regulations, the agency may parole such aliens on a case-by-case basis for "urgent humanitarian reasons" or "significant public benefit," and typically will interview the alien to determine his eligibility for

credible fear of persecution may seek custody determination at bond hearing before an IJ during formal removal proceedings).

192 862 F.3d 863, 869, 874 (9th Cir. 2017). See generally CRS Report R45297, *The "Flores Settlement" and Alien Families Apprehended at the U.S. Border: Frequently Asked Questions*, by Sarah Herman Peck and Ben Harrington.

193 8 U.S.C. § 1225(b)(1)(B)(iii)(IV); 8 C.F.R. § 235.3(b)(2)(iii), (4)(ii), (5)(i).

194 *See e.g.,* Matter of X-K-, 23 I. & N. Dec. at 734 (noting that the INA "provides for the mandatory detention of aliens" who are being processed for expedited removal); Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 10,312, 10,315, 10,323 (Mar. 6, 1997) (observing that detention is required for aliens subject to expedited removal).

195 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) ("Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed"); 8 C.F.R. § 235.3(b)(2)(iii) ("An alien whose inadmissibility is being considered under this section or who has been ordered removed pursuant to this section shall be detained pending determination and removal"), (4)(ii) ("Pending the credible fear determination by an asylum officer and any review of that determination by an [IJ], the alien shall be detained."), (5)(i) (providing that an alien whose claim of being a U.S. citizen, LPR, asylee, or refugee cannot be verified "shall be detained pending review of the expedited removal order under this section").

196 8 U.S.C. § 1182(d)(5)(A); 8 C.F.R. § 235.3(b)(2)(iii), (4)(ii), (5)(i). Parole is not considered a lawful admission into the United States or a determination of admissibility, and the decision whether to grant parole is entirely subject to DHS's discretion and may be revoked at any time. 8 U.S.C. §§ 1101(a)(13)(B), 1182(d)(5)(A).

197 8 C.F.R. § 235.3(b)(2)(iii), (4)(ii), (5)(i).

198 8 U.S.C. § 1252(a)(2)(B)(ii); Rodriguez v. Robbins, 804 F.3d 1060, 1081 (9th Cir. 2015), *rev'd sub nom.* Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

199 8 U.S.C. § 1225(b)(1)(B)(ii).

parole within seven days following the credible fear finding.[200] The regulations list the following five categories of aliens who would generally meet the criteria for parole, provided that they do not present a security or flight risk:

1. aliens who have serious medical conditions;
2. women who have been medically certified as pregnant;
3. alien juveniles (defined as aliens under the age of 18) who can be released to a relative or nonrelative sponsor;
4. aliens who will be witnesses in proceedings conducted by judicial, administrative, or legislative bodies in the United States; and
5. aliens "whose continued detention is not in the public interest."[201]

While INA Section 235(b)(1) generally requires the detention of aliens who establish a credible fear of persecution or torture pending consideration of their applications for asylum and related protections (unless DHS grants parole), the mandatory detention requirement applies only to *arriving aliens*.[202] During the formal removal proceedings, such aliens are not eligible for bond hearings before an IJ under INA Section 236(a) to determine whether they should be released from custody, and may only be considered for parole by DHS.[203]

On the other hand, aliens apprehended between ports of entry (e.g., when suspected of surreptitiously crossing the border) who are initially screened for expedited removal and subsequently placed in formal removal proceedings following a positive credible fear determination are not subject to mandatory detention under INA Section 235(b)(1).[204] Instead, these aliens are subject to INA Section 236(a)'s discretionary detention authority, and, unlike arriving aliens, do not fall within the listed classes of aliens that are excluded from an IJ's custody jurisdiction during formal removal proceedings.[205] Thus, to the extent they are detained by DHS,

---

[200] 8 C.F.R. §§ 208.30(f), 212.5(b); *Parole of Arriving Aliens*, *supra* note 191, at ¶ 4.2.

[201] 8 C.F.R. §§ 212.5(b), 236.3(a). An alien's continued detention is not considered in the public interest if he establishes his identity to an immigration officer, and shows that he presents neither a flight risk nor a danger to the community. *See Parole of Arriving Aliens*, *supra* note 191, at ¶¶ 4.3, 8.3(2); *see also* 8 C.F.R. § 212.5(d) (providing that, in deciding whether to grant parole, agency officials may consider "relevant factors," including whether there are reasonable assurances that the alien will appear at all hearings and/or depart the United States when required to do so; the alien's community ties such as close relatives with known addresses; and any agreement to reasonable conditions such as periodic reporting requirements). If parole is denied, agency guidelines instruct that the immigration officer should advise the alien that he may request reconsideration based on changed circumstances or additional evidence relating to the alien's identity, security risk, or risk of absconding. *Parole of Arriving Aliens*, *supra* note 191, at ¶ 8.2.

[202] *See* Matter of X-K-, 23 I. & N. Dec. 731, 735 (BIA 2005) (clarifying that INA Section 235(b)(1)'s mandatory detention requirement for aliens placed in formal removal proceedings "applies only to arriving aliens").

[203] *See* 8 C.F.R. § 1003.19(h)(2)(i)(B) (providing that an IJ may not review DHS's custody decisions with respect to certain categories of aliens, including "[a]rriving aliens in removal proceedings"); *Matter of X-K-*, 23 I. & N. Dec. at 735 (stating that "arriving aliens in removal proceedings are specifically excluded from the custody jurisdiction of Immigration Judges" under INA Section 236 and that such aliens "may only be considered for parole").

[204] *Matter of X-K-*, 23 I. & N. Dec. at 732, 736.

[205] *See* R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 171–72 (D.D.C. 2015) (stating that INA § 236(a) governs the detention of aliens initially screened for expedited removal following their unlawful entry into the United States, and who are placed in "standard" removal proceedings after a credible fear determination); *Matter of X-K-*, 23 I. & N. Dec. at 732, 735–36 (holding that unlawful entrants who are initially screened for expedited removal but then placed in formal removal proceedings following a credible fear showing do not fall within the specific classes of aliens that are excluded from an IJ's general custody jurisdiction, and are thus eligible for custody redetermination hearings).

this class of aliens may seek a redetermination of their custody status at bond hearings before an IJ.[206]

Detention of Other Applicants for Admission

INA Section 235(b)(2) covers applicants for admission who are *not* subject to expedited removal.[207] This provision would thus cover unadmitted aliens who are inadmissible on grounds other than those specified in INA Section 212(a)(6)(C) and (a)(7) (e.g., because of specified criminal activity); or verified LPRs who are construed to be applicants for admission (based on the narrow criteria set forth by statute) and found to be inadmissible and subject to removal.[208] The INA provides that aliens covered by INA Section 235(b)(2) "shall be detained" pending formal removal proceedings before an IJ.[209] As discussed above, arriving aliens placed in formal removal proceedings are subject to mandatory detention, and may be considered for parole by DHS only in certain circumstances (e.g., aliens with serious medical conditions, pregnant women, juveniles, witnesses, or in cases where detention "is not in the public interest").[210] But aliens apprehended within the United States following entry without inspection who are placed in formal removal proceedings are not subject to mandatory detention, and may seek review of a custody determination before an IJ.[211]

Detention of Minors and Accompanying Family Members

As noted above, detention is generally mandatory pending expedited removal proceedings (including during any credible fear determination), and arriving aliens placed in formal removal proceedings are also subject to detention. However, a 1997 court settlement agreement (the "*Flores* Settlement") generally limits the period of time in which an alien minor may be detained by DHS.[212] Among other things, the settlement agreement requires DHS to transfer within days (subject to exception) a detained alien minor to the custody of a qualifying adult or a nonsecure facility that is licensed by the state to provide residential, group, or foster care services for dependent children.[213] Further, in 2016, the U.S. Court of Appeals for the Ninth Circuit (Ninth

---

[206] 8 C.F.R. §§ 236.1(d)(1), 1003.19(a) (permitting an alien to seek an IJ's review of an initial custody determination by DHS); *R.I.L-R*, 80 F. Supp. 3d at 172 ("[T]he alien has the options of requesting a custody redetermination from an [IJ] within the Department of Justice and appealing an adverse redetermination decision to the [BIA]").

[207] 8 U.S.C. § 1225(b)(2); *see* Jennings v. Rodriguez, 138 S. Ct. 830, 837 (2018) (noting that 8 U.S.C. § 1225(b)(2) "is broader" and applies to applicants for admission "not covered by § 1225(b)(1)").

[208] 8 U.S.C. § 1225(b)(2)(A) (inspection of other aliens); 8 C.F.R. § 235.3(b)(3) ("If an alien appears to be inadmissible under other grounds contained in section 212(a) of the Act, and if [DHS] wishes to pursue such additional grounds of inadmissibility, the alien shall be detained and referred for a removal hearing before an immigration judge pursuant to sections 235(b)(2) and 240 of the Act for inquiry into all charges."), (5) (providing that, if a claim to LPR, refugee, or asylee status is verified, the alien is not subject to expedited removal but may be placed in formal removal proceedings if appropriate).

[209] 8 U.S.C. § 1225(b)(2)(A); 8 C.F.R. § 235.3(b)(3).

[210] 8 C.F.R. §§ 212.5(b) (listing criteria for parole of arriving aliens placed in formal removal proceedings), 235.3(c) ("[A]ny arriving alien who appears to the inspecting officer to be inadmissible, and who is placed in removal proceedings pursuant to section 240 of the Act shall be detained in accordance with section 235(b) of the Act."); *Matter of X-K-*, 23 I. & N. Dec. at 735 (clarifying that mandatory detention requirement for aliens placed in formal removal proceedings "applies only to arriving aliens").

[211] 8 C.F.R. §§ 236.1(d)(1), 1003.19(a), (h)(2)(i)(B); *Matter of X-K-*, 23 I. & N. Dec. at 735–36.

[212] *See* Flores v. Sessions, 862 F.3d 863, 866, 869 (9th Cir. 2017) (discussing *Flores* Settlement).

[213] *See* Stipulated Settlement Agreement at ¶¶ 12.A, 14, Flores v. Reno, No. CV 85-4544-RJK (Px) (C.D. Cal. Jan. 17, 1997).

Circuit)[214] ruled that the *Flores* Settlement applies to both accompanied and unaccompanied minors.[215] Although the court also held that the *Flores* Settlement does not require DHS to release parents along with their children,[216] the effect of the agreement has been that DHS typically will release family units pending their removal proceedings given the difficulties of separating families who may be subject to removal. As a practical matter, DHS would face difficulties locating other relatives or licensed programs to accept the children while their parents remain in detention.[217] Additionally, a federal district court has ruled that a "government practice of family separation without a determination that the parent was unfit or presented a danger to the child" likely violates due process.[218] Therefore, while DHS has broad detention authority over aliens seeking admission into the United States, the agency's ability to detain minors and their accompanying relatives is notably restricted.[219]

Table 3 shows the different detention and parole requirements for applicants for admission subject to expedited removal.

[214] This report references a number of decisions by federal appellate courts of various regional circuits. For purposes of brevity, references to a particular circuit in the body of this report (e.g., the Ninth Circuit) refer to the U.S. Court of Appeals for that particular circuit.

[215] Flores v. Lynch, 828 F.3d 898, 905–08 (9th Cir. 2016). With respect to unaccompanied minors, portions of the *Flores* Settlement effectively have been replaced by a provision of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, P.L. 110-457, 122 Stat. 5044, 5077 (2008), which requires DHS to transfer a UAC to ORR within 72 hours after DHS determines that the child is a UAC; and requires ORR to place the UAC "in the least restrictive setting that is in the best interest of the child." *Id.* at § 235, 5077; *see* 8 U.S.C. § 1232(b)(3), (c)(2)(A).

[216] *Flores*, 828 F.3d at 908–09 ("[P]arents were not plaintiffs in the *Flores* action, nor are they members of the certified classes. The Settlement therefore provides no affirmative release rights for parents.... ").

[217] *See id.* at 903 (listing the categories of individuals and programs to which minors may be released under the *Flores* Settlement).

[218] Ms. L. v. U.S. Immigration & Customs Enforcement, 310 F. Supp. 3d 1133, 1143 (S.D. Cal. 2018), *appeal filed*, No. 18-56151 (Aug. 27, 2018).

[219] On September 7, 2018, DHS proposed new regulations that purport to incorporate the terms of the Flores Settlement with some important modifications, such as creating an alternative federal licensing scheme for DHS family detention facilities (which are not eligible for state licensing) that would enable DHS to detain minors together with their accompanying parents throughout the removal proceedings; and limiting the classes of individuals to whom a minor may be released (i.e., only to a parent or legal guardian). *See generally* Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45,486 (Sept. 7, 2018). For more discussion about the Flores Settlement and its impact on alien families, see CRS Report R45297, *The "Flores Settlement" and Alien Families Apprehended at the U.S. Border: Frequently Asked Questions*, by Sarah Herman Peck and Ben Harrington.

Table 3. Detention and Parole of Applicants for Admission Placed in Expedited Removal

Category of Aliens	Initial Expedited Removal Screening	Credible Fear Processing/ Review of Claim that Alien is a U.S. Citizen, LPR, Asylee, or Refugee	Formal Removal Proceedings (if found to have a credible fear or to be inadmissible on other grounds)
Arriving Aliens	Mandatory detention unless parole is warranted for a medical emergency or law enforcement purposes	Mandatory detention unless parole is warranted for a medical emergency or law enforcement purposes	Mandatory detention unless parole is warranted. Parole may cover aliens with serious medical conditions; women who are pregnant; juveniles; witnesses; and aliens whose detention is not in the public interest. No bond hearings before an IJ in formal removal proceedings.
Aliens apprehended within United States following entry without inspection	Mandatory detention unless parole is warranted for a medical emergency or law enforcement purposes	Mandatory detention unless parole is warranted for a medical emergency or law enforcement purposes	No mandatory detention; DHS may (but is not required to) detain alien. Alien may seek review of custody determination at bond hearing before IJ in formal removal proceedings.
Accompanied alien minors[a]	No mandatory detention; must be released promptly (alien parents in custody are typically released with their children)	No mandatory detention; must be released promptly (alien parents in custody are typically released with their children)	No mandatory detention; must be released promptly (alien parents in custody are typically released with their children)

Source: 8 U.S.C. §§ 1225(b)(1)(B)(ii), 1225(b)(1)(B)(iii)(IV), 1225(b)(2)(A), 1226(a); 8 C.F.R. §§ 212.5(b), 235.3(b)(2)(iii), 235.3(b)(3), 235.3(b)(4)(ii), 235.3(c), 236.1((d)(1), 1003.19(a), 1003.19(h)(2)(i)(B); Stipulated Settlement Agreement at ¶¶ 12.A, 14, Flores v. Reno, No. CV 85-4544-RJK (Px) (C.D. Cal. Jan. 17, 1997).

a. As discussed in this report, *unaccompanied* alien children are not subject to expedited removal, and are placed in the custody of HHS pending formal removal proceedings under INA Section 240 (unless they meet the criteria for voluntary return). 8 U.S.C. § 1232(a)(4), (a)(5)(D), (b)(3).

Litigation Concerning Indefinite Detention of Aliens Pending Removal Proceedings

While the INA authorizes the detention of aliens pending proceedings to determine whether they should be removed, the duration of such detention has been the subject of litigation. Previously, the Ninth Circuit upheld an injunction requiring DHS to provide aliens detained under INA Sections 235(b), 236(a), and 236(c) with individualized bond hearings after six months' detention.[220] The Ninth Circuit had expressed concern that these statutes, if construed to permit

[220] Rodriguez v. Robbins, 804 F.3d 1060, 1090 (9th Cir. 2015), *rev'd sub nom.* Jennings v. Rodriguez, 138 S. Ct. 830

the indefinite detention of aliens pending removal proceedings, would raise "serious constitutional concerns."[221] The court acknowledged that the constitutional concerns raised by extended periods of detention generally involved aliens within the United States, and that reviewing courts had typically considered aliens seeking initial admission into the country as having less due process protection.[222] Nonetheless, the court believed that these constitutional concerns were pertinent to INA Section 235(b), despite this provision primarily addressing aliens seeking initial entry to the United States, because it could in some circumstances apply to returning LPRs[223] who are entitled to more robust protections than aliens seeking initial entry into the United States.[224] Accordingly, the Ninth Circuit ruled that INA Sections 235(b), 236(a), and 236(c) "should be construed through the prism of constitutional avoidance" as containing implicit time limitations.[225]

In *Jennings v. Rodriguez*, the Supreme Court reversed the Ninth Circuit's decision, rejecting as "implausible" the lower court's construction of INA Sections 235(b), 236(a), and 236(c) as containing implicit time limitations.[226] The Court reasoned that both INA Sections 235(b) and 236(c) were textually clear in generally requiring the detention of covered aliens during removal proceedings, and that nothing in INA Section 236(a) *required* bond hearings after an alien was detained under that authority.[227] The Court remanded the case to the Ninth Circuit to address, in the first instance, the plaintiffs' constitutional claim that their indefinite detention under these provisions violated their due process rights.[228] Therefore, while the Supreme Court has upheld DHS's *statutory* authority to detain aliens potentially indefinitely pending their removal

(2018).

[221] *Id.* at 1079, 1082 (citing Rodriguez v. Robbins, 715 F.3d 1127, 1142–43 (9th Cir. 2013) (upholding preliminary injunction)).

[222] *Id.* at 1082.

[223] *See* 8 U.S.C. § 1101(a)(13)(C) (setting forth six categories of lawful permanent residents who are considered applicants for admission).

[224] *Rodriguez*, 804 F.3d at 1082–83 (citing *Rodriguez*, 715 F.3d at 1141–42); *see also* Landon v. Plasencia, 459 U.S. 21, 32–33 (1982) (holding that LPRs are entitled to due process); Jay v. Boyd, 351 U.S. 345, 359 (1956); Kwong Hai Chew v. Colding, 344 U.S. 590, 596–98 (1953).

[225] *Rodriguez*, 804 F.3d at 1079, 1083, 1085 (citing *Rodriguez*, 715 F.3d at 1135, 1138, 1141).

[226] Jennings v. Rodriguez, 138 S. Ct. 830, 842 (2018).

[227] *Id.* at 842–43, 846–48.

[228] *Id.* at 851. Previously, in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court held that the indefinite detention of lawfully admitted aliens who had been ordered removed following formal removal proceedings, but whose removal could not foreseeably be effectuated, "would raise a serious constitutional problem." *Id.* at 690. The Court ruled that the INA implicitly limited an alien's detention to a period reasonably necessary to bring about the alien's removal from the United States, and concluded that, after six months, the alien could not be detained unless the government produced evidence showing a significant likelihood that the alien would be removed in the reasonably foreseeable future (however, the Court suggested that indefinite detention would be permissible if the statute "appl[ied] narrowly to 'a small segment of particularly dangerous individuals'" such as terrorists). *Id.* at 691-92 (quoting Kansas v. Hendricks, 521 U.S. 345, 356 (1997)); *see id.* at 699-702. In *Jennings*, the Supreme Court distinguished *Zadvydas* because the statute at issue in that case (INA § 241) did not clearly provide that an alien's detention after an initial 90-day period was required; accordingly, in *Zadvydas*, the Court could appropriately construe that statute as containing an implicit time limitation to avoid the constitutional issue raised if the statute was read to permit the indefinite detention of an alien who, though ordered removed, could not foreseeably be transferred to another country. *Jennings*, 138 S. Ct. at 843. On the other hand, the Court reasoned, INA Sections 235(b) and 236(c) provided for detention for a specified period of time, and the statutes were textually clear in generally requiring the detention of covered aliens during removal proceedings. *Id.* at 844, 846. Moreover, in *Demore v. Kim*, 538 U.S. 510 (2003), which involved a challenge to INA Section 236(c)'s mandatory detention provision for criminal aliens pending formal removal proceedings, the Court had ruled that "[d]etention during removal proceedings is a constitutionally permissible part of that process." *Id.* at 527–28, 531.

proceedings, the Court has left unresolved the issue of whether such detention is constitutionally permissible.

Limitations to Judicial Review of an Expedited Order of Removal

An alien who is in expedited removal proceedings generally has no right to a hearing or administrative appeal of an immigration officer's determination that he should be removed from the United States.[229] In addition to these restrictions, the alien has no statutory right to seek judicial review of the expedited order of removal except in limited circumstances.[230]

Statutory Framework

Under Section 242 of the INA, the federal courts of appeals generally have jurisdiction to review a final order of removal,[231] and a petition for review may be filed in the circuit court in the jurisdiction where the Immigration Court proceedings were completed.[232] INA Section 242(a)(2)(A), however, expressly precludes judicial review of an expedited order of removal unless the alien's claim falls within one of the exceptions referenced in INA Section 242(e).[233] The jurisdictional bar applies to claims that an immigration officer improperly placed an alien in expedited removal proceedings; challenges to an immigration officer's credible fear determination; arguments challenging the procedures and policies implemented by DHS to expedite removal; and claims contesting the expedited removal order itself.[234] Additionally, although INA Section 242(a)(2)(D) typically grants the courts jurisdiction to review constitutional claims or questions of law raised in a petition for review that would otherwise be foreclosed on

---

[229] 8 U.S.C. § 1225(b)(1)(A)(i), (C); 8 C.F.R. § 235.3(b)(2)(ii).

[230] 8 U.S.C. § 1252(a)(2)(A).

[231] For purposes of judicial review, an order of removal becomes final when the BIA affirms the order on appeal. *See* Abdisalan v. Holder, 774 F.3d 517, 521 (9th Cir. 2014); 8 U.S.C. § 1101(a)(47)(B)(i); 8 C.F.R. § 1241.1(a).

[232] 8 U.S.C. § 1252(a)(1), (b)(2).

[233] Specifically, Section 242(a)(2)(A) of the INA provides that no court shall have jurisdiction to review—

> (1) "[E]xcept as provided in [INA Section 242(e)], any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title";
>
> (2) "[E]xcept as provided in [INA Section 242(e)], a decision by the [Secretary] to invoke the provisions of such section";
>
> (3) "[T]he application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) [no credible fear]"; or
>
> (4) "[E]xcept as provided in [INA Section 242(e)], procedures and policies adopted by the [Secretary] to implement the provisions of section 1225(b)(1) of this title."

Id. § 1252(a)(2)(A).

[234] *See* United States v. Barajas-Alvarado, 655 F.3d 1077, 1082 (9th Cir. 2011) ("Congress expressly deprived courts of jurisdiction to hear a direct appeal from an expedited removal order."); Shunaula v. Holder, 732 F.3d 143, 146 (2d Cir. 2013) (noting that, with limited exceptions arising in habeas petitions, INA Section 242(a)(2)(A) "deprives this court of jurisdiction to hear challenges relating to the [Secretary's] decision to invoke expedited removal, his choice of whom to remove in this manner, his 'procedure and policies,' and the 'implementation or operation' of a removal order") (quoting 8 U.S.C. § 1252(a)(2)(A)).

jurisdictional grounds, this provision does not apply to petitions challenging expedited removal orders.[235]

The statutory bar to review of an expedited order of removal, however, is not without *any* exception. There are limited circumstances where an alien may seek review of an expedited order of removal.

Habeas Corpus Proceedings

Under INA Section 242(e)(2), an alien subject to an expedited order of removal may challenge the underlying order in a habeas corpus proceeding.[236] The district court's jurisdiction, however, is strictly limited to the following three narrow issues:

1. whether the petitioner in the habeas action is an alien;
2. whether the petitioner was ordered removed under INA Section 235(b)(1)'s expedited removal provisions; and
3. whether the petitioner can prove by a preponderance of the evidence that he is an LPR, that he has been admitted as a refugee, or that he has been granted asylum.[237]

INA Section 242(e)(5) provides that, in reviewing whether the petitioner was ordered removed under the expedited removal provisions, the district court's inquiry "shall be limited to whether such an order in fact was issued and whether it relates to the petitioner."[238] However, "[t]here shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal."[239] If the court determines that the petitioner is an alien who was not ordered removed under the expedited removal statute, or that he was lawfully admitted for permanent residence, admitted as a refugee, or granted asylum, "the court may order no remedy or relief other than to require that the petitioner be provided a hearing" in formal removal proceedings under Section 240 of the INA.[240] Further, the alien may seek judicial review of any final order of removal issued in those proceedings.[241]

Challenges to the Expedited Removal System

Under INA Section 242(e)(3), an alien subject to an expedited order of removal may challenge the validity of the expedited removal system by filing a lawsuit in the U.S. District Court for the

[235] *See* 8 U.S.C. § 1252(a)(2)(D) (allowing courts to exercise jurisdiction notwithstanding "subparagraph (B) or (C) [of section 242(a)(2)], or [ ] any other provision of this chapter (*other than this section*) which limits or eliminates judicial review") (emphasis added); Fernandez-Ruiz v. Gonzales, 410 F.3d 585, 587 (9th Cir. 2005) ("In short, Congress repealed all jurisdictional bars to our direct review of final removal orders other than those remaining in 8 U.S.C. § 1252 (in provisions *other than* (a)(2)(B) or (C)) following the amendment of that section by the REAL ID Act.") (emphasis added), *rev'd en banc on other grounds*, 466 F.3d 1121 (9th Cir. 2006).

[236] 8 U.S.C. § 1252(e)(2).

[237] *Id.* Because the statute permits consideration of whether the petitioner is an alien, such habeas challenges would also encompass claims that the petitioner is a U.S. citizen. *Id.*

[238] *Id*. § 1252(e)(5).

[239] *Id.*

[240] *Id.* § 1252(e)(4)(B).

[241] *Id.*; *see also id.* § 1252(a)(1), (b).

District of Columbia.[242] The district court's review, however, is limited to determining one of the following issues:

1. whether the expedited removal statute or its implementing regulations is constitutional; or
2. whether a regulation, written policy directive, written policy guideline, or written procedure issued by DHS to implement expedited removal is consistent with the statute or other laws.[243]

A lawsuit raising a systemic challenge to expedited removal must be brought within 60 days after implementation of the challenged statutory provision, regulation, directive, guideline, or procedure.[244] The D.C. District Court has held that the 60-day requirement "is jurisdictional rather than a traditional limitations period," and, therefore, the period runs from the initial implementation of the challenged provision or policy, rather than from the date they were applied to a particular alien.[245]

Finally, an alien challenging the validity of the expedited removal system may file a notice of appeal within 30 days of the district court's order.[246] The statute instructs the appellate courts to conduct review in an expedited manner.[247]

Collateral Challenges Raised as a Defense During Criminal Proceedings for Unlawful Reentry into the United States

In some cases, an alien who is criminally charged with unlawful reentry after removal may collaterally challenge an expedited order of removal. Under INA Section 276, an alien who "has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding," and subsequently "enters, attempts to enter, or is at any time found in, the United States" shall be subject to criminal penalty.[248] The INA provides that, in prosecutions for unlawful reentry, the courts do not have jurisdiction to consider any claim challenging the validity of an expedited order of removal, including a determination that an alien failed to show a credible fear of persecution.[249]

In *United States v. Mendoza-Lopez*, however, the Supreme Court held that an alien who is prosecuted for unlawful reentry may challenge the validity of an underlying removal order during his criminal proceedings if the removal proceeding "effectively eliminates the right of the alien to obtain judicial review" of that order.[250] The Court reasoned that "where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal

[242] *Id.* § 1252(e)(3)(A).

[243] *Id.*

[244] *Id.* § 1252(e)(3)(B).

[245] Am. Immigration Lawyers Ass'n v. Reno, 18 F. Supp. 2d 38, 44–47 (D.D.C. 1998).

[246] 8 U.S.C. § 1252(e)(3)(C).

[247] *Id.* § 1252(e)(3)(D).

[248] *Id.* § 1326(a). The statute allows an exception if DHS expressly consented to the alien reapplying for admission, or if the alien shows that he was not required to obtain advance permission to reenter the United States. *Id.* § 1326(a)(2).

[249] *Id.* § 1225(b)(1)(D). The statute also bars challenges to validity of an expedited removal order in the context of a prosecution for unlawful entry under INA Section 275, 8 U.S.C. § 1325.

[250] United States v. Mendoza-Lopez, 481 U.S. 828, 838–39 (1987).

sanction, there must be *some* meaningful review of the administrative proceeding."[251] The Court thus declared that, at a minimum, "where the defects in an administrative proceeding foreclose judicial review of that proceeding, an alternative means of obtaining judicial review must be made available before the administrative order may be used to establish conclusively an element of a criminal offense."[252]

In response to the Supreme Court's decision, Congress enacted a new clause to the unlawful reentry statute, which provides that an alien charged with unlawful reentry may challenge the validity of an underlying removal order if (1) he exhausted any administrative remedies that may have been available to seek relief against the order; (2) the prior removal proceedings in which the order was issued deprived the alien of the opportunity to seek judicial review; and (3) the entry of the order was "fundamentally unfair."[253]

Subsequently, the Ninth Circuit determined that "the principle established by *Mendoza-Lopez* is equally applicable in the expedited removal order context."[254] The Ninth Circuit ruled that the Supreme Court's rationale that aliens must have "some meaningful review" of their underlying removal orders if they serve as a basis for criminal prosecution is applicable to a criminal defendant "regardless of whether the defendant was a nonadmitted alien or an alien in the United States when the removal order was issued."[255] The Ninth Circuit thus held that a defendant charged with the crime of unlawful reentry may challenge an expedited removal order that serves as the basis for prosecution if he contends that the expedited removal order is "fundamentally unfair."[256] According to the Ninth Circuit, an expedited removal proceeding is "fundamentally unfair" if it deprives the alien of due process and results in prejudice.[257] The Ninth Circuit, for example, has determined that expedited removal proceedings are fundamentally unfair if the immigration officer failed to obtain interpretative assistance, provide the alien with notice of the charge and nature of the proceedings, and afford the alien an opportunity to review his sworn statement—as DHS regulations require.[258]

In sum, the INA generally limits the ability of an alien to challenge an underlying expedited removal order in a subsequent criminal prosecution for unlawful reentry in violation of the order. That order can be challenged only in limited circumstances, primarily centering on whether the entry of the order was "fundamentally unfair."[259]

---

[251] *Id.* at 838 (emphasis in original).

[252] *Id.*

[253] 8 U.S.C. § 1326(d); United States v. Gonzalez-Flores, 804 F.3d 920, 926 (9th Cir. 2015), *cert denied sub nom.*, Gonzalez-Flores v. United States, 136 S. Ct. 1234 (Feb. 29, 2016).

[254] United States v. Barajas-Alvarado, 655 F.3d 1077, 1083 (9th Cir. 2011).

[255] *Id.* at 1083–84.

[256] *Id.* at 1085. Further, for purposes of 8 U.S.C. § 1326(d), an alien challenging an expedited removal order would likely be able to show that he exhausted any available remedies to seek relief from the order because the expedited removal provisions do not provide for administrative review except in limited circumstances (e.g., when an alien placed in expedited removal is seeking asylum, claiming to be a lawful permanent resident, etc.). 8 U.S.C. § 1225(b)(1)(A)–(C). The alien would also likely be able to show that he had no meaningful opportunity for judicial review of the expedited removal order because the statute forecloses appeal of that order. *Id*. § 1252(a)(2)(A).

[257] *Barajas-Alvarado*, 655 F.3d at 1085–88 (citing United States v. Arias-Ordonez, 597 F.3d 972, 976 (9th Cir. 2010)).

[258] United States v. Raya-Vaca, 771 F.3d 1195, 1204–06 (9th Cir. 2014); *Barajas-Alvarado*, 655 F.3d at 1088. *See also* 8 C.F.R. § 235.3(b)(2)(i).

[259] *Barajas-Alvarado*, 655 F.3d at 1087–88. Outside of the Ninth Circuit, at least one other Circuit has considered an alien's collateral challenge in criminal proceedings to an expedited removal order issued under INA Section 235(b)(1), but without addressing the threshold question of whether an alien charged with unlawful reentry may challenge the prior expedited removal order as "fundamentally unfair." *See* United States v. Santos-Pulido, 815 F.3d 443, 445–46

Constitutional and Legal Challenges to Expedited Removal

Given its summary nature and comparatively limited procedural protections, the expedited removal process has been subject to legal challenges since its implementation in 1997. However, in part because of the strict limitations to judicial review of an expedited order of removal, courts have largely dismissed such challenges for lack of jurisdiction, or, in the few occasions where courts have entertained such challenges, rejected them on substantive grounds. Nevertheless, these cases raise important issues concerning the breadth and scope of the expedited removal statute and the constitutionality of its provisions.

Challenges to the Expedited Removal System: *American Immigration Lawyers Association v. Reno*

In 1997, shortly after IIRIRA's implementation, a group of immigrant assistance organizations and aliens who had been removed challenged the new expedited removal statute and regulations in the federal district court for the District of Columbia.[260] In *American Immigration Lawyers Association v. Reno*, the plaintiffs argued, among other things, that the expedited removal procedures offered insufficient protections for aliens seeking entry into the United States because they did not afford an opportunity to consult with family or counsel during that process, or to contest and seek further review of an expedited removal order.[261] The plaintiffs also claimed that the expedited removal procedures violated aliens' due process rights because those aliens could be erroneously removed from the country without additional protections provided in formal removal proceedings.[262]

The district court held that the limited protections afforded by the expedited removal statute reasonably "advance[d] Congress's twin goals of creating a fair yet expedited process," and fell well within the statute's command that an alien be summarily removed "without further hearing or review."[263] The court also cited Congress's broad legislative authority over the admission of aliens, and the "long-standing precedent" that aliens seeking to enter the United States—including those detained just within the border—have no constitutional due process protections concerning their applications for admission, apart from what Congress provided by statute.[264]

(8th Cir. 2016) (concluding that alien failed to show that her expedited removal proceeding violated her right to due process where she argued that she had a right to withdraw her application for admission).

[260] Am. Immigration Lawyers Ass'n v. Reno, 18 F. Supp. 2d 38, 44–46 (D.D.C. 1998). As discussed in the preceding section, judicial review of an expedited order of removal is permitted if a lawsuit is filed in the D.C. District Court within 60 days after implementation of the expedited removal provision, regulation, directive, guideline, or procedure, and the court's review is limited to (1) whether the expedited removal statute and its implementing regulations is constitutional, or (2) whether a regulation, written policy directive, written policy guideline, or written procedure issued by DHS to implement expedited removal is consistent with the statute or other laws. 8 U.S.C. § 1252(e)(3).

[261] *Am. Immigration Lawyers Ass'n*, 18 F. Supp. 2d at 44–59, 66–67.

[262] *Id.*

[263] *Id.* at 52, 56 (citing 8 U.S.C. § 1225(b)(1)(A)(i)).

[264] *Id.* at 58–60. The court also ruled that it lacked jurisdiction to review the plaintiffs' contention that, in practice, expedited removal resulted in extended detentions, the signing of documents without explanation or translation, and a lack of food, water, and restroom access. *Id.* at 57–58. The court explained that INA Section 242(e)(3)(A)(ii) expressly limited the court's review "to a 'regulation, written policy directive, written policy guideline, or written procedure,'" rather than *unwritten* policies or practices. *Id.* (quoting 8 U.S.C. § 1252(e)(3)(A)(ii)). The court, however, was

The plaintiffs appealed the district court's order to the D.C. Circuit.[265] In a published decision, the D.C. Circuit affirmed the dismissal of the plaintiffs' complaints "substantially for the reasons stated in the [district] court's thorough opinion."[266] The court also held that the organizational plaintiffs lacked standing to challenge the expedited removal procedures because there was nothing in the statute governing judicial review of an expedited order of removal that permitted litigants to bring claims on behalf of aliens subject to expedited removal.[267]

Challenges to Expedited Removal in Individual Cases

Although the U.S. District Court for the District of Columbia rejected a legal challenge to the expedited removal system itself, some courts have addressed challenges to the application of expedited removal in individual cases. Despite the jurisdictional limitations governing review of expedited removal orders,[268] courts have entertained such challenges in a few notable cases. The majority of reviewing courts, however, have dismissed such challenges based on jurisdictional limitations.

For example, a federal district court in Michigan held that INA Section 242(e)(2) allowed the court to consider in habeas corpus proceedings whether the expedited removal statute was "lawfully applied" to the petitioners.[269] Because INA Section 242(e)(2) permits judicial inquiry in habeas proceedings into "whether the petitioner was ordered removed" under the expedited removal statute, the district court determined it could consider "whether such an order in fact was issued and whether it relates to the petitioner."[270] Such review, the court reasoned, necessarily entails a determination by a reviewing court of whether the expedited order was "lawfully applied" to the alien.[271] Applying this standard, the court struck down the implementation of expedited removal to a group of Lebanese nationals who had entered the United States with fraudulent advance parole documents because they were not "arriving aliens" subject to the statute.[272]

In a separate case, the Third Circuit disagreed with the Michigan federal district court's determination that judicial review in habeas proceedings of whether an expedited removal order

"troubled by the effects of Congress's decision to immunize the unwritten actions of an agency from judicial review, particularly where, as here, so much discretion is placed in the hands of individual INS agents who face only a supervisor's review of their decisions." *Id.* at 58. The court thus cautioned the INS "to comply with its own regulations, policies, and procedures in providing aliens with the treatment, facilities, and information required by the agency's regulations, policies, and procedures." *Id.*

[265] Am. Immigration Lawyers Ass'n v. Reno, 199 F.3d 1352, 1356–57 (D.C. Cir. 2000).

[266] *Id.* at 1357.

[267] *Id.* at 1358–64.

[268] 8 U.S.C. § 1252(a)(2)(A).

[269] Am.-Arab Anti-Discrimination Comm. v. Ashcroft, 272 F. Supp. 2d 650, 660–63 (E.D. Mich. 2003).

[270] *Id.*; *see* 8 U.S.C. § 1252(e)(5) ("In determining whether an alien has been ordered removed under [INA Section 235(b)(1)], the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner.").

[271] *Am.-Arab Anti-Discrimination Comm.*, 272 F. Supp. 2d at 660–63.

[272] *Id.* at 668. The court concluded that the expedited removal system was intended to be applied to aliens seeking admission at a port of entry, and that "neither the expedited removal statute nor the definition of 'arriving alien' appear[ed] to have been applied to aliens who are deemed arriving aliens *simply or solely* by virtue of the application of the entry fiction doctrine." *Id.* at 665–66 (emphasis in original). Notably, the court issued its decision before DHS began to implement expedited removal with respect to aliens who were already within the United States (in 2004). Hence, the court focused its analysis on whether the petitioners were "arriving aliens." *Id.*

"relates to the petitioner" includes consideration of whether the order was "lawfully applied."[273] The Third Circuit found that this construction of the statute was "not just unsupported, but also flatly contradicted by the plain language of the [expedited removal] statute itself," which explicitly bars judicial review of the application of expedited removal to individual aliens.[274] Similarly, the Fifth Circuit has held that a district court in habeas proceedings could not consider whether the agency properly applied the expedited removal statute to an alien.[275] The court observed that the statutory language permitting habeas review of "whether the petitioner was ordered removed" expressly limits such inquiry to "whether such an order in fact was issued and whether it relates to the petitioner," and that "the matter ends there."[276]

Outside of the habeas context, some courts have exercised jurisdiction to review expedited removal orders that served as predicates for unlawful reentry prosecutions under INA Section 276.[277] As discussed in the preceding section, the Ninth Circuit has held that, under INA Section 276(d), a court may review whether an alien's underlying expedited removal proceedings were "fundamentally unfair" when the resulting expedited removal order serves as a basis for the unlawful reentry prosecution.[278] Applying this standard, the court found that an arriving alien's contention that his expedited removal violated his right to counsel lacked merit because nonadmitted aliens have no right to representation, and "are entitled only to whatever process Congress provides."[279] By contrast, in another unlawful reentry case, the Ninth Circuit held that an alien was entitled to due process during his expedited removal proceedings because he was already within the United States when he was apprehended, and that the immigration officer's failure to provide the alien notice of his inadmissibility charge and an opportunity to review his sworn statement violated due process.[280]

---

[273] Castro v. Dep't of Homeland Sec., 835 F.3d 422, 432 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 1581 (2017); *see also* 8 U.S.C. § 1252(e)(5).

[274] *Castro*, 835 F.3d at 432–33; *see also* 8 U.S.C. § 1252(a)(2)(A)(iii) (barring review of application of expedited removal statute to an alien). The Third Circuit also rejected the petitioners' claim that INA § 242(e)(2)'s jurisdictional limitations in habeas cases violated the Suspension Clause, which provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." *Castro*, 835 F.3d at 434, 444–50 (quoting U.S. CONST. art. I, § 9, cl. 2). The court held that the petitioners were not entitled to constitutional protections under the Suspension Clause "because the Supreme Court has unequivocally concluded that 'an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application,'" and because the petitioners were "recent clandestine entrants," they were essentially aliens seeking admission to the United States who could not raise a constitutional challenge to their removal "in an effort to force judicial review beyond what Congress has already granted them." *Id.* at 445–46, 449–50 (quoting Landon v. Plasencia, 459 U.S. 21, 32 (1982)).

[275] Brumme v. Immigration and Naturalization Serv., 275 F.3d 443, 447–48 (5th Cir. 2001).

[276] *Id.* at 448 (quoting 8 U.S.C. § 1252(e)(5)). *See also* De Rincon v. Dep't of Homeland Sec., 539 F.3d 1133, 1139–40 (9th Cir. 2008) (holding that district court lacked jurisdiction to review alien's due process challenge to the summary nature of her expedited removal proceedings because alien did not contest the order on any of the three specified grounds for habeas review set forth in INA § 242(e)(2), and, moreover, she had no constitutional right to due process at the border); M.S.P.C. v. U.S. Customs and Border Prot., 60 F. Supp. 3d 1156, 1163, 1175 (D.N.M. 2014) (rejecting alien's "expansive reading" of INA § 242(e)(2) as permitting habeas review of whether she should have been subject to expedited removal, and further rejecting alien's constitutional challenge to statute's jurisdictional limitations because, as a recent surreptitious entrant, she had no constitutional due process rights).

[277] United States v. Barajas-Alvarado, 655 F.3d 1077, 1080 (9th Cir. 2011).

[278] *Id.* at 1083–84.

[279] *Id.* at 1088 (citing United States *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950)).

[280] United States v. Raya-Vaca, 771 F.3d 1195, 1203–06 (9th Cir. 2014). *See* 8 C.F.R. § 235.3(b)(2)(i) (detailing the procedural requirements during expedited removal).

Apart from habeas and criminal reentry cases, the courts have addressed challenges to expedited removal orders raised in petitions for review filed directly with the federal courts of appeals. In these cases, the petitioners have argued that their expedited removal proceedings violated their right to due process because they were detained, had no right to counsel, and did not have an opportunity to contest their charges of inadmissibility.[281] As discussed in this report, an alien subject to a final order of removal generally may file a petition for review of that order in the judicial circuit where the administrative removal proceedings were completed.[282] The courts of appeals, however, have dismissed petitions for review challenging expedited removal orders, citing INA Section 242(a)(2)(A)'s language barring judicial review of claims arising in the context of expedited removal proceedings.[283] The courts have further determined that, although INA Section 242(a)(2)(D) restores jurisdiction to review constitutional claims or questions of law raised in a petition for review that is otherwise subject to jurisdictional limitations, this exception does not apply to the statutory provisions barring judicial review of an expedited removal order.[284] Although some courts have expressed concern that the expedited removal process is "fraught with risk of arbitrary, mistaken, or discriminatory behavior," reviewing courts have nonetheless ruled that they are not "free to disregard jurisdictional limitations" imposed by statute on the review of expedited removal orders.[285]

Potential Expansions of Expedited Removal and Legal Implications

Since the enactment of the expedited removal statute, immigration authorities have implemented expedited removal with respect to three overarching categories of aliens: (1) those who arrive in the United States at a designated port of entry; (2) those who arrived in the United States by sea, and who have been in the country for less than two years; and (3) those found within 100 miles of the U.S. border, within 14 days of entering the country.[286] The overwhelming majority of aliens subject to expedited removal, in other words, have been inspected or apprehended at a designated port of entry or near the international border when attempting to enter, or shortly after entering, the United States.[287]

But as previously discussed, the expedited removal statute permits the Secretary of DHS to apply expedited removal to any alien inadmissible due to a lack of entry documents or because he sought to obtain entry through fraud or misrepresentation, regardless of the alien's location, provided that the alien has not been admitted or paroled and has been in the country for less than

---

[281] *See e.g.*, Pena v. Lynch, 815 F.3d 452, 455 (9th Cir. 2015); Shunaula v. Holder, 732 F.3d 143, 145 (2d Cir. 2013); Khan v. Holder, 608 F.3d 325, 330 (7th Cir. 2010); Turgerel v. Mukasey, 513 F.3d 1202, 1205 (10th Cir. 2008).

[282] 8 U.S.C. § 1252(a)(1), (b)(1), (b)(2).

[283] *See id.* § 1252(a)(1) (providing for "[j]udicial review of a final order of removal (*other than* an order of removal without a hearing pursuant to section 1225(b)(1) of this title)") (emphasis added), (a)(2)(A) (barring review of expedited removal); *Pena*, 815 F.3d at 456; *Turgerel*, 513 F.3d at 1205–06; *Khan*, 608 F.3d at 327; *Shunaula*, 732 F.3d at 145–47.

[284] *Pena*, 815 F.3d at 456; *Turgerel*, 513 F.3d at 1206; *Khan*, 608 F.3d at 328–29.

[285] *Khan*, 608 F.3d at 329; *accord* Castro v. Dep't of Homeland Sec., 835 F.3d 422, 432–33 (3d Cir. 2016), *cert. denied* 137 S. Ct. 1581 (2017).

[286] Jennifer M. Chacon, *Essay: Immigration and the Bully Pulpit*, 130 HARV. L. REV. F. 243, 261 (2017).

[287] *See* Shattuck, *supra* note 148, at 474 (expedited removal "deputizes individual immigration officers near borders and ports of entry to issue removal orders against individuals found ineligible to enter the United States.").

two years.[288] Thus, DHS has the statutory authority to expand expedited removal on a much larger geographic and temporal scale.

To that end, on January 25, 2017, President Trump issued an executive order directing the DHS Secretary to apply expedited removal within the broader framework of INA Section 235(b)(1).[289] Less than a month later, then-DHS Secretary John Kelly announced a series of border security and immigration enforcement initiatives.[290] Among other measures, Secretary Kelly announced that "[t]o ensure the prompt removal of aliens apprehended soon after crossing the border illegally, the Department will publish in the *Federal Register* a new Notice Designating Aliens Subject to Expedited Removal Under [INA] Section 235(b)(1)(a)(iii)," which may "depart from the limitations set forth in the designation currently in force."[291] As reasons for this policy change, Secretary Kelly pointed to a "surge of illegal immigration at the southern border," a "historic backlog" of immigration court cases, and an increase in the number of apprehensions between ports of entry on the southern border.[292] In response, some immigrant rights advocates reportedly "denounced the proposed expansion ... warning that the policy would strip more immigrants of due process rights to seek asylum or other legal protections that would allow them to remain in the country."[293]

While federal statute clearly confers DHS with authority to employ expedited removal in a broader fashion, extending the process to aliens away from the border or its functional equivalent would likely prompt legal challenge. As previously discussed, the Supreme Court has long recognized that, while aliens seeking entry into the United States have no constitutional rights regarding their applications for admission,[294] aliens who have *entered* the United States, even unlawfully, are entitled to some due process protections before they can be removed.[295] Such due

[288] 8 U.S.C. § 1225(b)(1)(A)(iii)(II).

[289] Exec. Order No. 13767, 82 Fed. Reg. 8793, 8796 (Jan. 25, 2017) ("The Secretary shall take appropriate action to apply, in his sole and unreviewable discretion, the provisions of section 235(b)(1)(A)(i) and (ii) of the INA to the aliens designated under section 235(b)(1)(A)(iii)(II).").

[290] *See* Memorandum from John Kelly, Sec'y of Homeland Sec., to Kevin McAleenan, Acting Comm'r, U.S. Customs & Border Prot., et al., Regarding Implementing the President's Border Security and Immigration Enforcement Improvement Policies (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf.

[291] *Id.* at 6, 11.

[292] *Id.* at 6.

[293] Abigail Hauslohner & David Nakamura, *In Memo, Trump Administration Weighs Expanding the Expedited Deportation Powers of DHS*, WASH. POST (Jul. 14, 2017), http://wapo.st/2t0phNX?tid=ss_mail&utm_term=.69c7e3b24f36.

[294] *See e.g.*, Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application"); United States *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned").

[295] *See e.g.*, Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent"); Plyler v. Doe, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as "persons" guaranteed due process of law by the Fifth and Fourteenth Amendments."); Shaughnessy v. United States *ex rel*. Mezei, 345 U.S. 206, 212 (1953) ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law"). *See also* David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of* Zadvydas v. Davis, 2001 SUP. CT. REV. 47, 97 (2001) ("Practice has traditionally treated an entrant without inspection (EWI) more favorably, for purposes of constitutional and statutory claims, than parolees or applicants for admission at the border.").

process protections typically involve the right to a hearing and a meaningful opportunity to be heard.[296] As discussed in this report, an alien subject to expedited removal has no right to a hearing or further review of a determination that he should be removed from the United States.[297] Thus, expanding expedited removal to cover aliens present in *any* part of the United States could come into conflict with these constitutional notions. Moreover, although some courts have, in light of the entry fiction doctrine, determined that aliens apprehended near the border may not avail themselves of these constitutional protections,[298] the extent to which this principle may be applied to aliens in the interior, or who have developed ties to the United States, is far from certain.[299]

However, the Supreme Court, at times, has appeared to view *admission* into the United States by immigration authorities as the key factor that determines whether an alien is entitled to constitutional protections. For example, in *Landon v. Plasencia*, the Supreme Court stated that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly."[300] The Court has also suggested that the length of time that an alien has spent in the United States may inform the scope and degree of constitutional protections.[301] These principles might support the argument that expedited removal can be applied on a wider basis to aliens within the interior of the United States who have been in the country for relatively short periods of time.

---

[296] Mathews v. Eldridge, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'") (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)); *see also* Kwong Hai Chew v. Colding, 344 U.S. 590, 597 (1953) (recognizing that due process requires "notice of the nature of the charge and a hearing at least before an executive or administrative tribunal"); Salgado-Diaz v. Gonzales, 395 F.3d 1158, 1162 (9th Cir. 2005) ("Immigration proceedings, although not subject to the full range of constitutional protections, must conform to the Fifth Amendment's requirement of due process.").

[297] 8 U.S.C. § 1225(b)(1)(A)(i); 8 C.F.R. § 235.3(b)(2)(ii).

[298] *See e.g.*, Castro v. United States Dep't of Homeland Sec., 835 F.3d 422, 445–50 (3d Cir. 2016) (holding that aliens "apprehended within hours of surreptitiously entering the United States" could not raise a constitutional challenge to their expedited removal because they were "recent clandestine entrants" who could be treated as aliens seeking initial admission to the country who lack constitutional protections), *cert. denied*, 137 S. Ct. 1581 (2017); M.S.P.C. v. U.S. Customs and Border Prot., 60 F. Supp. 3d 1156, 1175 (D.N.M. 2014) ("Petitioner, who undisputedly crossed approximately nine miles over the border and was apprehended within 30 minutes of crossing, does not have any substantial ties to this country to place the nature of her rights near those of a permanent resident. Thus, for purposes of the constitutional right to due process, Petitioner's status is assimilated to that of an arriving alien.").

[299] *See* Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 197–98 (2017) (describing expansion of expedited removal away from ports of entry "as an example of the shifting nature of the immigration border and the border's increased disassociation from settled physical boundaries," and arguing that an expansion into the interior of the United States "would constitute a radical boost to the scope of CBP's powers.").

[300] *Landon*, 459 U.S. at 32; *see also Kwong Hai Chew*, 344 U.S. at 596 n.5 ("'The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien *lawfully* enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders.'") (quoting Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J., concurring) (emphasis added).

[301] *See e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (explaining that, for purposes of the Fourth Amendment, constitutional protections extend "to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community"); *Landon*, 459 U.S. at 32 (emphasizing the "ties" that an alien develops with the United States in determining the degree of constitutional protections); Johnson v. Eisentrager, 339 U.S. 763, 770 (1950) (an alien is "accorded a generous and ascending scale of rights as he increases his identity with our society"); Yamataya v. Fisher, 189 U.S. 86, 101 (1903) (holding that "an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population" may not be deported without due process). *See also* Martin, *supra* note 295, at 99 (claiming that, when unlawfully present aliens accrue lengthy periods of presence in the United States, they develop social connections that "deserve some weight in deciding on the exact protections owed them").

But notwithstanding the language in *Landon,* the Supreme Court has continued to describe an alien's physical presence in the United States, whether lawful or unlawful, as the critical factor in assessing whether due process attaches.[302] Therefore, if DHS undertakes a future expansion of expedited removal, the courts may be confronted with further challenges to the agency's implementation of that procedure down the road. Until now, courts have addressed such challenges only within the confines of enforcement actions at or near the border. If DHS implements expedited removal on a broader scale throughout the United States, the courts may need to address critical questions concerning the scope of the federal government's plenary power over the admission of aliens, and the limits of that "sovereign prerogative" with respect to aliens already present in the United States.[303]

[302] *See e.g.*, Zadvydas v. Davis, 533 U.S. 678, 693 (2001); Plyler v. Doe, 457 U.S. 202, 210 (1982); Matthews v. Diaz, 426 U.S. 67, 77 (1976); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953).

[303] *Landon*, 459 U.S. at 32.

Appendix A. Glossary

Admission	The lawful entry of an alien into the United States after inspection and authorization by an immigration officer.
Alien	Any person who is not a citizen or national of the United States.
Applicant for Admission	By statute, an alien present in the United States who has not been admitted by immigration authorities or who arrives in the United States (whether or not at a designated port of entry and including an alien who is brought to the United States after having been interdicted in international or U.S. waters).
Arriving Alien	By regulation, an alien coming or attempting to come into the United States at a designated port of entry, or an alien seeking transit through the United States at a port of entry, or an alien interdicted in international or U.S. waters and brought into the United States by any means, whether or not to a designated port of entry (and regardless of the means of transport).
Asylee	A person in the United States who has applied for and received asylum.
Asylum	A form of relief available for aliens who arrive in or are physically present in the United States who establish that they suffered past persecution or have a well-founded fear of future persecution on account of their race, religion, nationality, membership in a particular social group, or political opinion.
Board of Immigration Appeals (BIA)	The highest administrative body responsible for interpreting and applying federal immigration laws; a component of the Department of Justice's Executive Office of Immigration Review, the BIA has jurisdiction to hear appeals from decisions issued by immigration judges and certain DHS officials.
Credible Fear	A significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the asylum officer, that the alien could establish eligibility for asylum, withholding of removal, or protection under the Convention Against Torture.
Deportability	The status of being subject to removal following a lawful admission into the United States.
Expedited Removal	A streamlined removal process that applies to certain arriving aliens and other aliens physically present in the United States who are inadmissible on the grounds that they lack valid entry documents or have attempted to procure their admission through fraud or misrepresentation.
Formal Removal Proceedings	A formal removal process under INA Section 240 in which an alien subject to removal is issued a notice to appear at a hearing before an immigration judge, where the alien may contest his removability, obtain counsel, present evidence, and apply for any available forms of relief from removal.
Immigration Judge (IJ)	An attorney employed by the Department of Justice's Executive Office for Immigration Review who conducts and adjudicates removal proceedings.
Inadmissibility	The status of being ineligible for admission into the United States for certain disqualifying grounds (e.g., lack of valid entry documents, fraud).
Lawful Permanent Resident (LPR)	An alien who has been lawfully accorded the privilege of residing permanently in the United States in accordance with the immigration laws.
Parole	Permission to enter the United States pending a determination as to whether an alien should be admitted; typically granted as a matter of discretion for urgent humanitarian reasons or significant public benefit, but not regarded as a lawful admission of the alien for immigration purposes.
Port of Entry	A location designated as a place for the authorized entry of persons and merchandise into the United States, whether arriving by land, air, or sea. It may include designated locations along the international borders or within the interior of the United States (e.g., international airports).

Refugee	A person outside of the United States who has been granted permission to enter the United States because he suffered past persecution or has a well-founded fear of future persecution on account of his race, religion, nationality, membership in a particular social group, or political opinion, and is not firmly resettled in another country.
U.S. Border Patrol	An agency component within CBP that is primarily charged with the apprehension of aliens unlawfully entering the United States or who have recently entered the country unlawfully away from a designated point of entry along the border.
U.S. Citizenship and Immigration Services (USCIS)	An agency within DHS that adjudicates petitions for immigration benefits and naturalization; conducts credible fear interviews of aliens at the border who seek asylum or express a fear of persecution or torture.
U.S. Customs and Border Protection (CBP)	An agency within the Department of Homeland Security (DHS) that is primarily responsible for immigration enforcement along the border and at designated ports of entry.
U.S. Immigration and Customs Enforcement (ICE)	An agency within DHS that is primarily responsible for immigration enforcement in the interior of the United States, including the detention and removal of aliens.

Appendix B. Implementation and Expansion of Expedited Removal: 1997-2017

The following discussion is a more comprehensive overview of the Executive's implementation and expansion of expedited removal following the passage of IIRIRA in 1996.

Arriving Aliens

Initially, the former INS limited the application of its expedited removal authority to aliens arriving in the United States.[304] In order to clarify the scope of the term "arriving alien," the INS issued regulations that defined the term to include aliens seeking admission into the United States at a port of entry, aliens seeking transit through the United States at a port of entry, and aliens who have been interdicted at sea and brought into the United States "by any means, whether or not to a designated port-of-entry, and regardless of the means of transport."[305]

In response to opposition to the inclusion of aliens interdicted at sea in the definition of "arriving alien," the INS pointed to BIA precedent holding that "the mere crossing into the territorial waters of the United States has never satisfied the test of having entered the United States," and reasoned that "[a]liens who have not yet established physical presence on land in the United States cannot be considered as anything other than arriving aliens."[306] Furthermore, the INS declared, "[t]he inclusion of aliens interdicted at sea in the definition of arriving alien will support the Department's mandate to protect the nation's borders against illegal immigration."[307]

The INS further determined that "[a]n arriving alien remains an arriving alien even if paroled pursuant to INA Section 212(d)(5), and even after any such parole is terminated or revoked."[308] The INS explained that the inclusion of paroled aliens was based on the language of INA Section 212(d)(5), which indicated that the parole of an alien did not constitute an admission into the United States, and that the alien would be considered an applicant for admission once the purpose of the parole had been served.[309]

---

[304] Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 10,312, 10,313–14 (Mar. 6, 1997); *see also Procedures for Expedited Removal*, *supra* note 62, at 1505, 1520.

[305] Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 444, 445 (Jan. 3, 1997); 8 C.F.R. § 1.2. In its notice of these regulations, the INS recognized that "[a]n exception is provided for Cuban nationals arriving by aircraft at a port-of-entry." Inspection and Expedited Removal of Aliens, 62 Fed. Reg. at 444-45; *see also* 8 U.S.C. § 1225(b)(1)(F) (statutory exception for aliens from countries in the Western Hemisphere whose government does not have diplomatic relations with the United States and who arrived by aircraft). The INS concluded that the expedited removal statute, coupled with other references to "arriving aliens" located elsewhere in the INA, "seemed to differentiate more clearly between aliens at ports-of-entry and those encountered elsewhere in the United States," and interpreted the term "arriving alien" primarily in reference to aliens encountered at ports of entry. Inspection and Expedited Removal of Aliens, 62 Fed. Reg. at 10,312–13.

[306] Inspection and Expedited Removal of Aliens, 62 Fed. Reg. at 10,313 (citing Matter of G, 20 I. & N. Dec. 764 (BIA 1993)).

[307] *Id.*; *see also* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 187–88 (1993) (holding that statutory and treaty protections that governed the treatment of refugees within the United States had no extraterritorial application to Haitian migrants interdicted on the high seas).

[308] Inspection and Expedited Removal of Aliens, 62 Fed. Reg. at 444–45.

[309] Inspection and Expedited Removal of Aliens, 62 Fed. Reg. at 10,313. However, if an alien was paroled into the United States before April 1, 1997, *or* was paroled on or after April 1, 1997, pursuant to a grant of advance parole which the alien applied for and received in the United States prior to his departure from and return to the United States, the alien will not be considered an "arriving alien" for purposes of expedited removal. 8 C.F.R. § 1.2.

Looking ahead, the INS "reserve[d] the right to apply expedited removal procedures to additional classes of aliens *within the limits set by the statute*, if, in the Commissioner's discretion, such action is operationally warranted."[310] This expanded category of aliens, the INS explained, "may be localized, in response to specific needs within a particular region, or nationwide, as appropriate."[311] The agency declared that "a proposed expansion of the expedited removal procedures may occur at any time and may be driven either by specific situations such as a sudden influx of illegal aliens motivated by political or economic unrest or other events or by a general need to increase the effectiveness of enforcement operations at one or more locations."[312]

The INS, however, recognized that expanding the reach of expedited removal would "involve more complex determinations of fact and will be more difficult to manage," and indicated that, for the time being, it would apply the new procedures "on a more limited and controlled basis."[313] Therefore, upon IIRIRA's passage, the new expedited removal statute covered only arriving aliens in the United States, which, in turn, encompassed (1) aliens arriving at a port of entry, (2) aliens in transit at a port of entry, and (3) aliens interdicted at sea who have been brought into the United States.[314] Nevertheless, at the outset, the INS's expedited removal authority "dramatically affect[ed] the pool of persons subject to expedited procedures."[315]

Criminal Aliens Held in Texas Correctional Facilities (Proposed but Not Implemented)

In 1999, the INS considered, but ultimately did not implement, a "pilot program" that would have extended expedited removal to aliens who (1) had been convicted of unlawful entry; (2) had not been admitted or paroled into the United States, and had been physically present in the United States for less than two years; and (3) were serving criminal sentences in designated correctional facilities in Texas.[316]

To support its proposed expansion, the INS cited INA Section 235(b)(1)(A)(iii) and its implementing regulations, which gave it the authority to apply expedited removal to aliens who entered the United States without being admitted or paroled, and who have not been in the United States for at least two years.[317] Citing a lack of detention space and an increase in the number of

---

[310] Inspection and Expedited Removal of Aliens, 62 Fed. Reg. at 10,314 (emphasis added).

[311] Inspection and Expedited Removal of Aliens, 62 Fed. Reg. at 444–45.

[312] Inspection and Expedited Removal of Aliens, 62 Fed. Reg. at 10,314; *see also* 8 C.F.R. § 235.3(b)(1)(ii) ("The Commissioner shall have the sole discretion to apply the provisions of section 235(b)(1) of the Act, at any time, to any class of aliens described in this section").

[313] Inspection and Expedited Removal of Aliens, 62 Fed. Reg. at 10,313–14.

[314] Subsequently, in 1998, the INS amended its definition of "arriving alien" to exempt from expedited removal aliens who were paroled into the United States before April 1, 1997 (the effective date of IIRIRA), as well as aliens who, either before or after April 1, 1997, returned to the United States pursuant to a grant of advance parole that they applied for and obtained while physically present in the United States and prior to their departure from this country. Amendment of the Regulatory Definition of Arriving Alien, 63 Fed. Reg. 19,382, 19,382 (Apr. 20, 1998). The agency explained that, as a matter of policy, this group of paroled aliens was "not best regarded as arriving aliens for purposes of the applicability of expedited removal" because it covered aliens who were initially paroled well before expedited removal came into effect, and aliens previously present in the United States for lengthy periods of time who departed from and later returned to the United States on advance parole. *Id.*

[315] *Procedures for Expedited Removal*, *supra* note 62, at 1520.

[316] Advance Notice of Expansion of Expedited Removal to Certain Criminal Aliens Held in Federal, State, and Local Jails, 64 Fed. Reg. 51,338, 51,338–39 (Sept. 22, 1999).

[317] *Id.* at 51,339; *see* 8 U.S.C. § 1225(b)(1)(A)(iii); 8 C.F.R. § 235.3(b)(1)(ii).

criminal alien apprehensions, the INS determined that a more effective procedure to remove aliens serving short criminal sentences was warranted.[318] Despite this proposed expansion, neither the INS nor DHS implemented this policy.

Aliens Who Arrived in the United States by Sea

In 2002, the INS authorized expedited removal for a "newly designated class" of aliens: those who arrived in the United States by sea, "either by boat or other means," and who (1) have not been admitted or paroled, and (2) have not been physically present in the United States for a continuous period of at least two years at the time of their apprehension.[319] As it had done before, the INS cited INA Section 235(b)(1)(A)(iii) as the statutory authority for expanding expedited removal to aliens "who arrive illegally by sea."[320] The INS noted that this expansion did not include aliens who arrived in the United States at a designated port of entry, or who were interdicted at sea and brought into the United States, because they were already subject to the expedited removal process for arriving aliens.[321] In addition, the INS did not apply its expansion to Cuban nationals who arrived in the United States by sea because of the "longstanding U.S. policy to treat Cubans differently from other aliens."[322]

Therefore, apart from Cuban nationals, all aliens who unlawfully arrived by sea in the United States, in a location other than a port of entry, would now be subject to expedited removal, and, with limited exceptions, detained pending any determination as to whether they had a credible fear of persecution.[323] The INS claimed that this expansion would "assist in deterring surges in illegal migration by sea, including potential mass migration, and preventing loss of life."[324] The agency explained that "[a] surge in illegal migration by sea threatens national security by diverting valuable U.S. Coast Guard and other resources from counterterrorism and homeland security responsibilities."[325] In addition, channeling the original legislative intent behind IIRIRA's amendments, the agency determined that its decision was "necessary to remove quickly from the United States aliens who arrive illegally by sea and who do not establish a credible fear."[326] The INS thus announced that it would implement expedited removal for aliens who arrived in this country by sea on or after November 13, 2002.[327]

Aliens Unlawfully Present in the United States Within 100 Miles of the Border

A few years later, in 2004, DHS (which had now replaced the INS) authorized CBP to implement expedited removal for aliens who were unlawfully present in the United States without being admitted or paroled, if (1) they were apprehended within 100 miles of the border, and (2) they had

[318] Advance Notice of Expansion of Expedited Removal, 64 Fed. Reg. at 51,339.

[319] Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924, 68,924 (Nov. 13, 2002).

[320] *Id.* at 68,924.

[321] *Id.*

[322] *Id.* at 68,925.

[323] *Id.* at 68,924–25.

[324] *Id.*at 68,924.

[325] *Id.*

[326] *Id.*

[327] *Id.* at 68,925.

not been physically present in the United States for a continuous period of at least 14 days.[328] As the statutory basis for this expansion, the agency again cited INA Section 235(b)(1)(A)(iii), which gave it the discretion to apply expedited removal to aliens who were physically present in the United States without being admitted or paroled, and who could not establish their continuous physical presence in this country for up to two years.[329]

In support of its decision to extend expedited removal to border areas, DHS pointed to "an urgent need to enhance [its] ability to improve the safety and security of the nation's land borders, as well as the need to deter foreign nationals from undertaking dangerous border crossings, and thereby prevent the needless deaths and crimes associated with human trafficking and alien smuggling operations."[330] DHS thus determined that expanding the reach of expedited removal to aliens encountered shortly after they unlawfully entered the United States through the border would improve national security, "increase the deterrence of illegal entries by ensuring that apprehension quickly leads to removal," and "impair the ability of smuggling organizations to operate."[331]

Ultimately, though, DHS limited its new designation of expedited removal to aliens who were neither nationals of Mexico nor Canada, and Mexican and Canadian nationals who had histories of criminal or immigration violations.[332] With regard to non-Mexican and non-Canadian nationals ("third-country nationals"), DHS explained that there were logistical difficulties of initiating formal removal proceedings against nearly 1 million aliens apprehended each year, particularly along the southern border with Mexico, and that, while the majority of those aliens were Mexican nationals who could be "voluntarily returned" to Mexico without any formal removal process, aliens from other countries could not simply be returned to Mexico.[333] Instead, they had to be detained pending arrangements for their return by aircraft, or pending formal removal proceedings.[334] Given the agency's lack of resources to detain all third-country nationals, DHS explained, many of these aliens were released with instructions to appear for their removal proceedings, only to subsequently disappear in the United States.[335] For these reasons, DHS had a greater incentive to apply expedited removal to third-country nationals in border areas, than it did for Mexican and Canadian nationals.[336] On the other hand, given the agency's interest in improving national security and public safety, Mexican and Canadian nationals with prior criminal or immigration violations would be subject to expedited removal.[337]

DHS also limited the scope of its new expedited removal designation to border areas. The agency recognized that INA Section 235(b)(1)(A)(iii) did not geographically restrict expedited removal for aliens present in the United States without being admitted or paroled, and that the statute permitted expedited removal for aliens who could not establish their continuous physical presence in this country for up to two years.[338] Nevertheless, the agency concentrated its enforcement

[328] Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,877 (Aug. 11, 2004).

[329] *Id.* at 48,878.

[330] *Id.* at 48,879.

[331] *Id.* at 48,879–80.

[332] *Id.* at 48,878.

[333] *Id.*

[334] *Id.*

[335] *Id.*

[336] *Id.*

[337] *Id.* at 48,878–79.

[338] *Id.*

resources "upon unlawful entries that have a close spatial and temporal nexus to the border."[339] Therefore, instead of implementing expedited removal nationwide, DHS limited it to "aliens who are apprehended immediately proximate to the land border and have negligible ties or equities in the U.S."[340] The agency determined that an area within 100 miles of the border was "immediately proximate" to the border "because many aliens will arrive in vehicles that speedily depart the border area, and because other recent arrivals will find their way to near-border locales seeking transportation to other locations within the interior of the U.S."[341] DHS also cited to agency regulations that had already established that the 100-mile range was a "reasonable distance" from the external boundary of the United States.[342]

Accordingly, DHS limited its new application of expedited removal to aliens apprehended within 14 days after they entered the United States, and within 100 miles of any international land border.[343] Aliens falling into this category would be detained pending their removal and any determination as to whether they feared persecution.[344] Consistent with other expedited removal designations, however, DHS excluded Cuban nationals because their removal to Cuba "[could not] presently be assured and for other U.S. policy reasons."[345]

DHS indicated that it would implement expedited removal for aliens apprehended in border areas beginning on August 11, 2004.[346] Based on this latest expansion, DHS could now apply its expedited removal authority not only to aliens who arrived in the United States at ports of entry or by sea, but also to aliens who were encountered within this country's border regions *between* ports of entry.[347]

Expansion to Entire Southwest Border

Initially, DHS limited the implementation of its new expedited removal authority to parts of the southwestern United States, specifically the border sectors of Tucson, Arizona; Yuma, Arizona; McAllen, Texas; Laredo, Texas; San Diego, California; and El Centro, California.[348] On September 14, 2005, DHS announced the expansion to three additional border sectors in Del Rio, TX; Marfa, TX; and El Paso, TX—thereby implementing the policy across the entire Southwest border.[349] Former Secretary of Homeland Security Michael Chertoff, who headed the agency at the time, declared that the expansion "gives Border Patrol agents the ability to gain greater control of our borders and to protect our country against the terrorist threat."[350] Further, according

[339] *Id.* at 48,879.

[340] *Id.*

[341] *Id.*

[342] *Id.*; *see* 8 C.F.R. § 287.1(a)(2).

[343] Designating Aliens for Expedited Removal, 69 Fed. Reg. at 48,878.

[344] *Id.* at 48,879.

[345] *Id.* at 48,879–80.

[346] *Id.* at 48,880.

[347] DHS noted, however, that although it was geographically restricting expedited removal to border areas, it retained the discretion to implement "the full nationwide enforcement authority of the statute through publication of a subsequent Federal Register notice." *Id.* at 48,879.

[348] Press Release, U.S. Dep't of Homeland Sec., DHS Expands Expedited Removal Authority Along Southwest Border (Sept. 14, 2005), http://www.hsdl.org/?view&did=477118.

[349] *Id.*; *see also* Designating Aliens for Expedited Removal, 69 Fed. Reg. at 48,878 (identifying border sectors where expedited removal would be implemented).

[350] Press Release, *supra* note 348.

to DHS, the expedited removal process "will disrupt the vicious human smuggling cycle that occurs along the southwest border."[351] Following the announcement, DHS implemented expedited removal along the entire land border with Mexico.

Expansion to Entire U.S. Border

A few months later, on January 30, 2006, DHS announced the implementation of expedited removal along the entire U.S.-Canadian border and all U.S. coastal areas.[352] Noting decreased unlawful border crossings since expedited removal began in the southwestern United States, Secretary Chertoff asserted that expanding the process along all borders "will provide DHS agents and officers with an additional tool to protect our nation's boundaries and quickly remove those who entered our country illegally."[353] According to the agency, expedited removal had proven to be "an effective border management process that swiftly returns illegal aliens to their countries of origin while maintaining protections for those who fear persecution."[354] DHS also pointed to the disruption of "human smuggling cycles" as a factor warranting the expansion of expedited removal.[355] Therefore, with this expansion in place, DHS could now implement expedited removal in the northern border sectors of Blaine, WA; Spokane, WA; Havre, MT; Grand Forks, ND; Detroit, MI; Buffalo, NY; Swanton, VT; and Houlton, ME.[356]

Cuban Nationals Arriving in the United States

On July 20, 2015, the United States formally restored diplomatic relations with Cuba.[357] In addition, on January 12, 2017, former President Barack Obama announced an end to the long-standing "wet-foot, dry-foot" policy, which allowed Cubans who arrived on American soil the right to remain in the United States and apply for lawful permanent resident status, while those who were detained at sea were returned to Cuba.[358]

In response to the restoration of diplomatic relations, DHS eliminated the exception to expedited removal for Cuban nationals who arrive in the United States at a designated port of entry by aircraft.[359] The agency observed, moreover, that the policy justifications for exempting Cuban nationals were no longer valid given Cuba's agreement to facilitate the return of Cuban nationals ordered removed from the United States.[360] In addition, DHS determined that "a significant increase in attempts by Cuban nationals to illegally enter the United States" meant that an

---

[351] *Id.*

[352] Press Release, U.S. Dep't of Homeland Sec., DHS Streamlines Removal Process Along Entire U.S. Border (Jan. 30, 2006), https://www.hsdl.org/?abstract&did=476965.

[353] *Id.*

[354] *Id.*

[355] *Id.*

[356] Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,880 (Aug. 11, 2004).

[357] Karen De Young, *Cuba and U.S. Quietly Restore Full Diplomatic Ties After 5 Decades*, WASH. POST, July 20, 2015, http://wapo.st/1TLMGtS?tid=ss_tw&utm_term=.c7a5c88b1750.

[358] *See* United States v. Dominguez, 661 F.3d 1051, 1067 (11th Cir. 2011) (discussing "special treatment to Cuban nationals who come to the United States").

[359] Eliminating Exception to Expedited Removal Authority for Cuban Nationals Arriving by Air, 82 Fed. Reg. 4769, 4769–70 (Jan. 17, 2017); *see* 8 U.S.C. § 1225(b)(1)(F) (providing that expedited removal does not apply "to an alien who is a native or citizen of a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations and who arrives by aircraft at a port of entry").

[360] Eliminating Exception to Expedited Removal Authority for Cuban Nationals Arriving by Air, 82 Fed. Reg. at 4770.

exception for Cuban nationals would significantly undermine efforts to remove aliens who had no authorization to be in this country.[361] Therefore, Cuban nationals who arrived in the United States at a designated port of entry by aircraft were now subject to expedited removal.

DHS additionally eliminated the exception for Cuban nationals who arrive in the United States by sea, who have not been admitted or paroled, and who have not been physically present in this country for less than two years.[362] DHS also removed the exception for Cuban nationals who are encountered within 100 miles of the border, who have not been admitted or paroled, and who have not been in the United States for less than 14 days.[363] The agency again cited the restoration of diplomatic relations between the United States and Cuba and other "significant changes" in the relationship between the two countries as factors that warranted a change in policy that "reflect[ed] these new realities."[364] Therefore, regardless of the manner in which they came to the United States, Cuban nationals were now subject to expedited removal if they met the statutory criteria for that process.

Author Information

Hillel R. Smith
Legislative Attorney

Disclaimer

[361] *Id.*

[362] Eliminating Exception to Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea, 82 Fed. Reg. 4902 (Jan. 17, 2017).

[363] *Id.*

[364] *Id.* at 4904.