

## DEPARTMENT OF JUSTICE

## Immigration and Naturalization Service

[INS Order No. 2243-02]

**Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act****AGENCY:** Immigration and Naturalization Service, Justice.**ACTION:** Notice.

**SUMMARY:** This Notice authorizes the Immigration and Naturalization Service ("the Service") to place in expedited removal proceedings certain aliens who arrive in the United States by sea, either by boat or other means, who are not admitted or paroled, and who have not been physically present in the United States continuously for the two-year period prior to the determination of inadmissibility under this Notice. Aliens falling within this newly designated class who are placed in expedited removal proceedings will be detained, subject to humanitarian parole exceptions, during the course of immigration proceedings, including, but not limited to, any hearings before an immigration judge. The Service believes that implementing the expedited removal provisions, and exercising its authority to detain this class of aliens under 8 CFR part 235, will assist in deterring surges in illegal migration by sea, including potential mass migration, and preventing loss of life. A surge in illegal migration by sea threatens national security by diverting valuable United States Coast Guard and other resources from counter-terrorism and homeland security responsibilities. Placing these individuals in expedited removal proceedings and maintaining detention for the duration of all immigration proceedings, with limited exceptions, will ensure prompt immigration determinations and ensure removal from the country of those not granted relief in those cases, while at the same time protecting the rights of the individuals affected.

**EFFECTIVE DATES:** This Notice is effective on November 13, 2002.

Written comments must be submitted on or before December 13, 2002.

**ADDRESSES:** Written comments must be submitted to the Regulations and Forms Services Division, Immigration and Naturalization Service, 425 I Street NW., Room 4034, Washington, DC 20536. To ensure proper handling, please reference INS No. 2243-02 on your correspondence. You may also submit comments electronically to the Service

at [insregs@usdoj.gov](mailto:insregs@usdoj.gov) when submitting comments electronically you must include INS 2243-02 in the subject box. Comments are available for public inspection at the above address by calling (202) 514-3291 to arrange for an appointment.

**FOR FURTHER INFORMATION CONTACT:**

Linda M. Loveless, Assistant Chief Inspector, Inspections Division, Immigration and Naturalization Service, 425 I Street, NW., Room 4064, Washington, DC 20536, telephone (202) 616-7489.

**SUPPLEMENTARY INFORMATION:**

Section 302 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, Div. C, 110 Stat. 3009-546 (IIRIRA), amended section 235(b) of the Immigration and Nationality Act ("Act"), 8 U.S.C. 1225(b), to authorize the Attorney General to remove without a hearing before an immigration judge aliens arriving in the United States who are inadmissible under sections 212(a)(6)(C) or 212(a)(7) of the Act, 8 U.S.C. 1182(a)(6)(C) and 1182(a)(7). Under these "expedited removal" proceedings, an alien who indicates an intention to apply for asylum or who asserts a fear of persecution or torture is referred to an asylum officer to conduct an interview as to whether such alien has a "credible fear." Sections 235(b)(1)(A)(ii) and (B) of the Act, 8 U.S.C. 1225(b)(1)(A)(ii) and (B); 8 CFR 235.3(b)(4). Those who meet that standard are referred to an immigration judge for a hearing on the merits of their claim or claims. 8 CFR 208.30(f).

The Service previously published a proposed rule and two interim rules to implement this expedited removal authority. 63 FR 19302-01 (April 20, 1998); 62 FR 10330 (March 6, 1997); and 62 FR 444-01 (Jan. 3, 1997). These rules established the current expedited removal. 8 CFR 235.3(b).

Under section 235(b)(1) of the Act, 8 U.S.C. 1225(b)(1), expedited removal proceedings may be applied to two categories of aliens. First, section 235(b)(1)(A)(i) of the Act, 8 U.S.C. 1225(b)(1)(A)(i), permits expedited removal proceedings for aliens who are "arriving in the United States," except for Cuban citizens who arrive at United States ports-of-entry by aircraft, who are exempted from expedited removal under section 235(b)(1)(F) of the Act, 8 U.S.C. 1225(b)(1)(F). Federal regulations define an "arriving alien." 8 CFR 1.1(g). Second, section 235(b)(1)(A)(iii) of the Act, 8 U.S.C. 1225(b)(1)(A)(iii), permits the Attorney General, in his sole and unreviewable discretion, to designate certain other aliens to whom the

expedited removal provisions may be applied, even though they are not arriving in the United States. Specifically, the Attorney General may apply the expedited removal provisions to any or all aliens who have not been admitted or paroled into the United States and who have not been physically present in the United States continuously for the two-year period prior to a determination of inadmissibility by an immigration officer. The Attorney General delegated his authority to designate classes of aliens to the Commissioner of the Service:

As specifically designated by the Commissioner, aliens who arrive in, attempt to enter, or have entered the United States without having been admitted or paroled following inspection by an immigration officer at a designated port-of-entry, and who have not established to the satisfaction of the immigration officer that they have been physically present in the United States continuously for the 2-year period immediately prior to the date of determination of inadmissibility \* \* \*. When these provisions are in effect for aliens who enter without inspection, the burden of proof rests with the alien to affirmatively show that he or she has the required continuous physical presence in the United States. Any absence from the United States shall serve to break the period of continuous physical presence.

8 CFR 235.3(b)(1)(ii).

The designation may become effective upon publication in the **Federal Register**, or, if the "delay caused by the publication would adversely affect the interests of the United States or the effective enforcement of the immigration laws," the designation may become effective upon issuance and be published as soon as practicable. 8 CFR 235.3(b)(1)(ii). Since the expedited removal authority was added to the Act in 1996, neither the Attorney General nor the Commissioner of the Service has not utilized this "specific designation" authority.

This Notice constitutes the first designation of an additional class of aliens who may be placed in expedited removal proceedings: aliens who arrive in the United States by sea, either by boat or other means, who are not admitted or paroled, and who have not been physically present in the United States continuously for the two-year period prior to a determination of inadmissibility by a Service officer. The alien has the burden affirmatively to show to the satisfaction of an immigration officer that the alien has not been present in the United States continuously for the relevant two-year period. Section 235(b)(1)(A)(iii)(II) of the Act, 8 U.S.C. 1225(b)(1)(A)(iii)(II); 8

CFR 235.3(b)(1)(ii). This Notice does not apply to aliens who arrive at United States ports-of-entry.

It is important to note that certain aliens who arrive in the United States by sea are already subject to expedited removal if they fall within the definition of "arriving alien" in 8 CFR 1.1(q): "an alien interdicted in international or United States 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." This Notice will ensure that all aliens, with one exception noted below, who arrive illegally by sea, whether interdicted or not, will be subject to expedited removal.

This designation is necessary to remove quickly from the United States aliens who arrive illegally by sea and who do not establish a credible fear. The ability to detain aliens while admissibility is determined and protection claims are adjudicated, as well as to remove quickly aliens without protection claims, will deter additional aliens from taking to the sea and traveling illegally to the United States. Illegal migration by sea is perilous and the Department of Justice has repeatedly cautioned aliens considering similar attempts to reject such a hazardous voyage.

Any alien who falls within this designation, who is placed in expedited removal proceedings, and who indicates an intention to apply for asylum or who asserts a fear of persecution or torture will be interviewed by an asylum officer who will determine whether the alien has a credible fear. If that standard is met, the alien will be referred to an immigration judge for a hearing on the merits of the protection claim or claims. Sections 235(b)(1)(A)(ii) and (B) of the Act, 8 U.S.C. 1225(b)(1)(A)(ii) and (B); 8 CFR 235.3(b)(4). The Forms I-867A and I-867B currently used by the officers who process aliens under the expedited removal program, in accordance with the statutory requirement at section 235(b)(1)(B)(iv) of the Act, 8 U.S.C. 1225(b)(1)(B)(iv), carefully explains to all aliens in expedited removal proceedings an alien's right to a "credible fear" interview. The forms also require that the officer determine whether the alien has any reason to fear harm if returned to his or her country. These forms will also be used for aliens placed in expedited removal under this designation. Officers who administer the program are trained to be alert for any verbal or non-verbal indications that the alien may be afraid to return to his or her homeland.

The Service, with limited exceptions, plans to detain aliens designated by this

Notice. Section 235(b)(1)(B)(iii)(IV) of the Act, 8 U.S.C. 1225(b)(1)(B)(iii)(IV) and 8 CFR 235.3(b)(iii) directs that any alien who is placed in expedited removal proceedings shall be detained pending a final determination of credible fear and if found not to have such a fear, such alien shall be detained until removed. Parole of such alien may be permitted only when the Attorney General determines, in the exercise of discretion, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective.

Section 235(b)(1)(B)(ii) of the Act, 8 U.S.C. 1225(b)(1)(B)(ii), directs that if a credible fear has been established, the alien shall be detained for further consideration of the protection claim or claims. Immigration judge review of custody determinations under 8 CFR 3.19(a) are permitted only for bond and custody determinations pursuant to section 236 of the Act, 8 U.S.C. 1226, and 8 CFR part 236. Aliens designated under this notice would not be detained under section 236 of the Act, but rather under section 235. Aliens subject to expedited removal procedures under section 235 of the Act are not eligible for bond, and therefore may not seek a bond redetermination before an immigration judge. Parole of such aliens based on humanitarian concerns may be considered in accordance with section 212(d)(5) of the Act, 8 U.S.C. 1182(d)(5) and 8 CFR 212.5.

This Notice applies to certain aliens who arrive in the U.S. by sea on or after November 13, 2002. Furthermore, expedited removal proceedings, however, will not be initiated against Cuban citizens who arrive by sea because it is longstanding U.S. policy to treat Cubans differently from other aliens. *See, e.g.,* Cuban Adjustment Act, Pub. L. 89-732 (1966) (allowing any native or citizen of Cuba who is inspected and admitted or paroled into the United States to apply for lawful permanent resident status after one year). Finally, crewmen and stowaways will not be subject to this Notice because the Act already mandates specific removal proceedings for such aliens.

This Notice does not require "notice and comment" under the Administrative Procedures Act because Congress explicitly authorized the Attorney General to designate categories of aliens to whom expedited removal proceedings may be applied, and that "[s]uch designation shall be in the sole and unreviewable discretion of the Attorney General and may be modified at any time (emphasis added)." Section 235(b)(1)(A)(iii)(I), 8 U.S.C.

1225(b)(1)(A)(iii)(I). Current regulations of the Service provide public notice that the designation of new categories of aliens to be subjected to expedited removal will be made via publication of a Notice in the **Federal Register**:

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. The Commissioner's designation shall become effective upon publication of a notice in the **Federal Register**. However, if the Commissioner determines, in the exercise of discretion, that the delay caused by publication would adversely affect the interests of the United States or the effective enforcement of the immigration laws, the Commissioner's designation shall become effective immediately upon issuance, and shall be published in the **Federal Register** as soon as practicable thereafter.

8 CFR 235.3(b)(ii).

In the alternative, the Service's immediate implementation of this Notice, with provisions for post-promulgation public comments, is based on the "good cause" exceptions found at 5 U.S.C. 553(b)(B) and (d)(3). The reason and necessity for the immediate promulgation of this rule is the need to deter foreign nationals from undertaking dangerous sea voyages to the United States and to detain those that are apprehended doing so. As explained in the **SUPPLEMENTARY INFORMATION**, a surge in illegal migration by sea, including the potential for a mass migration, would jeopardize or compromise the national security and, therefore, requires the immediate implementation of this Notice.

#### **Notice of Designation of Aliens Subject to Expedited Removal Proceedings**

Pursuant to section 235(b)(1)(A)(iii) of the Immigration and Nationality Act ("Act") and 8 CFR 235.3(b)(1)(ii), I order as follows:

(1) Except as provided in paragraph (5), all aliens who arrive in the United States by sea, either by boat or other means, who are not admitted or paroled, and who have not been physically present in the United States continuously for the two-year period prior to a determination of inadmissibility by a Service officer shall be placed in expedited removal proceedings. The alien has the burden affirmatively to show to the satisfaction of an immigration officer that the alien has been present in the United States continuously for the relevant two-year period. This Notice does not apply to aliens who arrive at United States ports-of-entry. This Notice does not apply to

alien crewmen or stowaways as described in the Act.

(2) Any alien who falls within this designation who indicates an intention to apply for asylum or who asserts a fear of persecution or torture will be interviewed by an asylum officer to determine whether the alien has a credible fear as defined in section 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). If that standard is met, the alien will be referred to an

immigration judge for a hearing on the merits of the protection claim or claims.

(3) An alien found to have a credible fear and subsequently placed into removal proceedings before an immigration judge will be detained, with certain humanitarian exceptions, throughout those proceedings and will not be eligible to request a bond redetermination hearing before an immigration judge.

(4) This Notice applies to aliens described in paragraph (1) who arrive in

the United States by sea on or after November 13, 2002.

(5) Expedited removal proceedings will not be initiated against Cuban citizens or nationals who arrive by sea.

Dated: November 12, 2002.

**James W. Ziglar,**

*Commissioner, Immigration and Naturalization Service.*

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