

as an affidavit from a member of the community of good moral character, but only if the applicant provides an affidavit stating that more direct documentary evidence is unavailable.

[57 FR 34507, Aug. 5, 1992]

§§ 240.21–240.39 [Reserved]

**PART 241—CONTROLLED
SUBSTANCE VIOLATIONS**

AUTHORITY: 8 U.S.C. 1103, 1251, 1252, 1357; 8 CFR part 2.

§241.1 Controlled substance convictions.

In determining the deportability of an alien who has been convicted of a violation of any law or regulation of a State, the United States, or a foreign country relating to a controlled substance, the term *controlled substance* as used in section 241(a)(2)(B)(i) of the Act, shall mean the same as that referenced in the Controlled Substances Act, 21 U.S.C. 801, *et seq.*, and shall include any substance contained in Schedules I through V of 21 CFR 1308.1, *et seq.* For the purposes of this section, the term *controlled substance* includes controlled substance analogues as defined in 21 U.S.C. 802(23) and 813.

[53 FR 9282, Mar. 22, 1988. Redesignated at 56 FR 8906, Mar. 4, 1991, and amended at 56 FR 38333, Aug. 13, 1991]

PART 242—PROCEEDINGS TO DETERMINE DEPORTABILITY OF ALIENS IN THE UNITED STATES: APPREHENSION, CUSTODY, HEARING, AND APPEAL

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AUTHORITY: 8 U.S.C. 1103, 1182, 1186a, 1251, 1252, 1252 note, 1252a, 1252b, 1254, 1362; 8 CFR part 2.

§242.1 Order to show cause and notice of hearing.

(a) *Commencement.* Every proceeding to determine the deportability of an alien in the United States is commenced by the filing of an order to show cause with the Office of the Immigration Judge, except for an alien who has been admitted to the United States under the provisions of section 217 of the Act and Part 217 of this chapter other than such an alien who has applied for asylum in the United States. In the proceeding, the alien shall be known as the respondent. Orders to show cause may be issued by:

- (1) District directors (except foreign);
- (2) Deputy district directors (except foreign);
- (3) Assistant district directors for investigations;
- (4) Deputy assistant district directors for investigations;
- (5) Assistant district directors for deportation;
- (6) Deputy assistant district directors for deportation;
- (7) Assistant district directors for examinations;
- (8) Deputy assistant district directors for examinations;
- (9) Officers in charge (except foreign);
- (10) Assistant officers in charge (except foreign);
- (11) Chief patrol agents;
- (12) Deputy chief patrol agents;
- (13) Associate chief patrol agents;
- (14) Assistant chief patrol agents;

- (15) Patrol agents in charge;
- (16) The Assistant Commissioner, Investigations;
- (17) Service center directors;
- (18) Supervisory asylum officers; or
- (19) Institutional Hearing Program Directors.

(b) *Statement of Nature of Proceedings.* The Order to Show Cause shall contain a statement of the nature of the proceeding, the legal authority under which the proceeding is conducted, a concise statement of factual allegations informing the respondent of the act or conduct alleged to be in violation of the law, and a designation of the charge against the respondent and of the statutory provisions alleged to have been violated. The Order shall require the respondent to show cause why he should not be deported. The Order shall call upon the respondent to appear before an Immigration Judge for a hearing at a time and place which shall be specified by the Immigration Court.

(c) *Service.* Service of the order to show cause may be accomplished either by personal service or by routine service; however, when routine service is used and the respondent does not appear for hearing or acknowledge in writing that he has received the order to show cause, it shall be reserved by personal service. When personal delivery of an order to show cause is made by an immigration officer, the contents of the order to show cause shall be explained and the respondent shall be advised that any statement he makes may be used against him. He shall also be advised of his right to representation by counsel of his own choice at no expense to the Government. He shall also be advised of the availability of free legal services programs qualified under part 292a of this chapter and organizations recognized pursuant to §292.2 of this chapter, located in the district where his deportation hearing will be held. He shall be furnished with a list of such programs, and a copy of Form I-618, Written Notice of Appeal Rights, regardless of the manner in which the service of the order to show cause was accomplished. Service of these documents shall be noted on Form I-213.

(d) *Visa Waiver Pilot Program.* Pursuant to section 217(b)(4)(B) of the Act, an alien who has been admitted to the United States under the provisions of that section has waived any right to contest any action against him or her for deportation, other than on the basis of an application for asylum. An alien admitted to the United States under section 217 of the Act shall be taken into custody and removed from the United States upon a determination by an immigration officer (district director who has jurisdiction over the place where the alien is found) that the alien is deportable in accordance with procedures in §217.4(c) of this chapter, and without commencement of a proceeding under this part, except that such an alien who applies for asylum in the United States shall be brought into proceedings as otherwise provided in this part.

[22 FR 9796, Dec. 6, 1957, as amended at 44 FR 4653, Jan. 23, 1979; 52 FR 2939, Jan. 29, 1987; 52 FR 3098, Jan. 30, 1987; 52 FR 5616, Feb. 25, 1987; 53 FR 24903, June 30, 1988; 55 FR 1579, Jan. 17, 1990; 55 FR 12627, Apr. 5, 1990; 56 FR 18502, Apr. 23, 1991; 56 FR 50812, Oct. 9, 1991; 59 FR 42414, Aug. 17, 1994; 60 FR 34090, June 30, 1995; 61 FR 8859, Mar. 6, 1996]

§242.2 Apprehension, custody, and detention.

(a) *Detainers in general.* (1) A detainer may be issued only in the case of an alien who there is reason to believe is amenable to exclusion or deportation proceedings under any provision of law. The following immigration officers are hereby authorized to issue detainers:

- (i) Border patrol agents, including aircraft pilots;
- (ii) Special agents;
- (iii) Deportation officers;
- (iv) Immigration inspectors;
- (v) Immigration examiners;
- (vi) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed above; and
- (vii) Immigration officers who need the authority to issue detainers in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner.

(2) *Availability of records.* In order for the Service to accurately determine the propriety of issuing a detainer,

servicing an order to show cause, or taking custody of an alien in accordance with this section, the criminal justice agency requesting such action or informing the Service of a conviction or act which renders an alien excludable or deportable under any provision of law shall provide the Service with all documentary records and information available from the agency which reasonably relates to the alien's status in the United States, or which may have an impact on conditions of release.

(3) *Telephonic detainers.* Issuance of a detainer in accordance with this section may be authorized telephonically, provided such authorizations are confirmed in writing on Form I-247, or by electronic communications transfer media (e.g. the National Law Enforcement Telecommunications System (NLETS)) within twenty-four hours of the telephonic authorization. The contents of the electronic transfer shall contain substantially the same language as the Form I-247.

(4) *Temporary detention at Service request.* Upon a determination by the Service to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed forty-eight hours, in order to permit assumption of custody by the Service.

(5) *Financial responsibility for detention.* No detainer issued as a result of a determination made under this chapter shall incur any fiscal obligation on the part of the Service, until actual assumption of custody by the Service, except as provided in paragraph (a)(4) of this section.

(b) *Use of convictions.* The term *conviction* as used in section 242(i) of the Act means that—

(1) There has been a conviction by a court of competent jurisdiction; and

(2) All direct appeal rights have been exhausted or waived; or

(3) The appeal period has lapsed.

(c) *Warrant of arrest.* (1) At the time of issuance of the Order to Show Cause, or at any time thereafter and up to the time the respondent becomes the subject of a duly issued warrant of deportation, the respondent may be arrested and taken into custody under the authority of a warrant of arrest. In the

case of a respondent convicted on or after November 18, 1988, of an aggravated felony as defined in section 101(a)(43) of the Act, the respondent shall not be released from custody, either before or after a determination of deportability, unless the respondent has been lawfully admitted and the respondent demonstrates to the satisfaction of the district director that he or she is not a threat to the community and is likely to appear before any scheduled hearings. A warrant of arrest may be served only by those immigration officers listed in § 287.5(e)(2) of this chapter. A warrant of arrest may be issued only by the following immigration officers:

- (i) District directors (except foreign);
- (ii) Deputy district directors (except foreign);
- (iii) Assistant district directors for investigations;
- (iv) Deputy assistant district directors for investigations;
- (v) Assistant district directors for deportation;
- (vi) Deputy assistant district directors for deportation;
- (vii) Assistant district directors for examinations;
- (viii) Deputy assistant district directors for examinations;
- (ix) Officers in charge (except foreign);
- (x) Assistant officers in charge (except foreign);
- (xi) Chief patrol agents;
- (xii) Deputy chief patrol agents;
- (xiii) Associate chief patrol agents;
- (xiv) Assistant chief patrol agents;
- (xv) Patrol agents in charge;
- (xvi) The Assistant Commissioner, Investigations; or
- (xvii) Institutional Hearing Program Directors.

(2) If, after the issuance of a warrant of arrest, a determination is made not to serve it, any officer authorized to issue such warrant may authorize its cancellation. When a warrant of arrest is served under this part, the respondent shall have explained to him/her the contents of the order to show cause, the reason for the arrest and the right to be represented by counsel of his/her own choice at no expense to the Government. He/she shall also be advised of the availability of free legal services

programs qualified under part 292a of this chapter and organizations recognized pursuant to §292.2 of this chapter, located in the district where the deportation hearing will be held. The respondent shall be furnished with a list of such programs, and a copy of Form I-618, Written Notice of Appeal Rights. Service of these documents shall be noted on Form I-213. The respondent shall be advised that any statement made may be used against him/her. He/she shall also be informed whether custody is to be continued or, if release from custody has been authorized, of the amount and conditions of the bond or the conditions of release. Except in cases involving an alien convicted on or after November 18, 1988, of an aggravated felony as defined in section 101(a)(43) of the Act, a respondent on whom a warrant of arrest has been served may apply to any officer authorized by this section to issue such a warrant for release or for amelioration of the conditions under which he/she may be released. When serving the warrant of arrest and when determining any application pertaining thereto, the authorized officer shall furnish the respondent with a notice of decision, which may be on Form I-286, indicating whether custody will be continued or terminated, specifying any conditions under which release is permitted, and advising the respondent appropriately whether he/she may apply to an immigration judge pursuant to paragraph (d) of this section for release or modification of the conditions of release or whether he/she may appeal to the Board. A direct appeal to the Board from a determination by an officer authorized by this section to issue warrants shall not be allowed except as authorized by paragraph (d) of this section.

(d) *Authority of the Immigration Judge; Appeals.* After an initial determination pursuant to paragraph (c) of this section, and at any time before a deportation order becomes administratively final, upon application by the respondent for release from custody or for amelioration of the conditions under which he or she may be released, an Immigration Judge may exercise the authority contained in section 242 of the Act to continue to detain a re-

spondent in custody, or to release a respondent from custody, and to determine whether a respondent shall be released under bond, and the amount of the bond, if any. Application for the exercise of such authority shall be made pursuant to §3.19 of this chapter. In connection with such application, the Immigration Judge shall advise the respondent of his or her right to representation by counsel of his or her choice at no expense to the government. He or she shall also be advised of the availability of free legal services programs qualified under part 292a of this chapter and organizations recognized pursuant to §292.2 of this chapter, located in the district where his or her application is heard. The Immigration Judge shall ascertain that the respondent has received a list of such programs and a copy of Form I-618 Written Notice of Appeal Right. Moreover, if the respondent has been released from custody, an application for amelioration of conditions must be made within seven (7) days after the date of such release. Thereafter, application by a released respondent for modification of the terms of release may be made only to the District Director. Upon rendering a decision on an application under this section, the Immigration Judge (or the district director if he renders the decision) shall advise the alien of his or her appeal rights under this section. The alien and the Service may appeal to the Board of Immigration Appeals from any determination of the Immigration Judge as to custody status or bond, pursuant to §3.38 of this chapter. If the determination is appealed, a written memorandum shall be prepared by the Immigration Judge giving reasons for the decision. After a deportation order becomes administratively final, or if recourse to the Immigration Judge is no longer available because the seven day period established by this paragraph has expired, the respondent may appeal directly to the Board from a determination by the District Director, Acting District Director, Deputy District Director, Assistant District Director for Investigations, or Officer in charge of an office enumerated in §242.1(a). Such an appeal shall be perfected by filing a notice of

appeal with the District Director within 10 days after the date when written notification of the determination is served upon the respondent and the Service, except that no appeal shall be allowed when the Service notifies the alien that it is ready to execute the order of deportation and takes him into custody for that purpose. Upon the filing of a notice of appeal from a District Director's determination, the District Director shall immediately transmit to the Board all records and information pertaining to that determination. The filing of an appeal from a determination of an Immigration Judge or a District Director shall not operate to delay compliance, during the pendency of the appeal, with the custody directive from which the appeal is taken, or to stay the administrative proceedings or deportation.

(e) *Revocation.* When an alien who, having been arrested and taken into custody, has been released, such release may be revoked at any time in the discretion of the district director, acting district director, deputy district director, assistant district director for investigations, or officer in charge of an office enumerated in §242.1(a), in which event the alien may be taken into physical custody and detained. If detained, unless a breach has occurred, any outstanding bond shall be revoked and cancelled. The provisions of paragraph (d) of this section shall govern availability to the respondent of recourse to other administrative authority for release from custody.

(f) *Supervision.* Until an alien against whom a final order of deportation has been outstanding for more than six months is deported, he shall be subject to supervision by a district director, acting district director, deputy district director, assistant district director for investigations, or officer in charge of an office enumerated in §242.1(a), and required to comply with the provisions of section 242(d) of the Act relating to his availability for deportation.

(g) *Privilege of communication.* Every detained alien shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States. Existing treaties require immediate communication with

appropriate consular or diplomatic officers whenever nationals of the following countries are detained in exclusion or expulsion proceedings, whether or not requested by the alien and even if the alien requests that no communication be undertaken in his or her behalf:

Albania¹
 Antigua
 Armenia
 Azerbaijan
 Bahamas
 Barbados
 Belarus
 Belize
 Brunei
 Bulgaria
 China (People's Republic of)²
 Costa Rica
 Cyprus
 Czech Republic
 Dominica
 Fiji
 Gambia, The
 Georgia
 Ghana
 Grenada
 Guyana
 Hungary
 Jamaica
 Kazakhstan
 Kiribati
 Kuwait
 Kyrgyzstan
 Malaysia
 Malta
 Mauritius
 Moldova
 Mongolia
 Nigeria
 Philippines
 Poland
 Romania
 Russian Federation
 St. Kitts/Nevis
 St. Lucia
 St. Vincent/Grenadines
 Seychelles
 Sierra Leone
 Singapore
 Slovak Republic
 South Korea
 Tajikistan
 Tanzania
 Tonga
 Trinidad/Tobago
 Turkmenistan
 Tuvalu
 Ukraine
 United Kingdom³
 U.S.S.R.⁴
 Uzbekistan
 Zambia

1. Arrangements with these countries provide that U.S. authorities shall notify responsible representatives within 72 hours of

the arrest or detention of one of their nationals.

2. When Taiwan nationals (who carry "Republic of China" passports) are detained, notification should be made to the nearest office of the Coordination Council for North American Affairs, the unofficial entity representing Taiwan's interests in the United States.

3. British dependencies are also covered by this agreement. They are: Anguilla, British Virgin Islands, Hong Kong, Bermuda, Montserrat, and the Turks and Caicos Islands. Their residents carry British passports.

4. All U.S.S.R. successor states are covered by this agreement. They are: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russian Federation, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan.

(h) *Custody issues; release procedures.*

(1) A lawful permanent resident alien convicted of an aggravated felony may be released from custody, after having completed serving the sentence for such conviction, if the Attorney General determines that he or she is not a danger to the community and that he or she is likely to appear for all scheduled hearings. Review of each case to determine custody or release conditions shall include, but need not be limited to, consideration of the following factors:

- (i) Seriousness of the crime(s) of which convicted;
- (ii) Prior criminal history, especially the nature of the crimes and number of arrests;
- (iii) Sentence(s) imposed and time actually served;
- (iv) History of failures to appear for court (defaults);
- (v) Probation history;
- (vi) Evidence of rehabilitative effort or recidivism;
- (vii) Equities in the United States;
- (viii) Availability of relief from deportation and the likelihood of its being granted; and
- (ix) Prior immigration violations and history.

(2) If, after consideration of all factors listed in paragraph (h)(1) of this section, it is determined that the alien is not a threat to public safety and is likely to appear for all scheduled hearings, he or she may be released from custody under such conditions as the Attorney General may prescribe, in-

cluding the giving of a bond. If an appearance bond is prescribed as a condition of such release, it shall be in an appropriate and sufficient amount to encourage compliance with demands for appearance and with any other conditions of release.

(i) *Notification to Executive Office for Immigration Review of change in custody status.* The Service shall notify the Immigration Court having administrative control over the Record of Proceeding of any change in custody location or of release from, or subsequent taking into, Service custody of a respondent/applicant pursuant to 8 CFR 3.19(g).

[28 FR 8280, Aug. 13, 1963, as amended at 39 FR 20367, June 10, 1974; 39 FR 20959, June 17, 1974; 40 FR 30470, July 21, 1975; 48 FR 31005, July 6, 1983; 51 FR 34081, Sept. 25, 1986; 52 FR 2939, Jan. 29, 1987; 52 FR 16372, May 5, 1987; 53 FR 9283, Mar. 22, 1988; 55 FR 1579, Jan. 17, 1990; 55 FR 24859, June 19, 1990; 55 FR 43327, Oct. 29, 1990; 56 FR 18503, Apr. 23, 1991; 56 FR 23214, May 21, 1991; 57 FR 11573, Apr. 6, 1992; 57 FR 30898, July 13, 1992; 59 FR 42415, Aug. 17, 1994; 60 FR 16043, Mar. 29, 1995; 60 FR 34090, June 30, 1995; 61 FR 8859, Mar. 6, 1996]

§ 242.3 Confined aliens, incompetents, and minors.

(a) *Service.* If the respondent is confined, or if he is an incompetent, or a minor under the age of 14, the order to show cause, and the warrant of arrest, if issued, shall be served in the manner prescribed in § 242.1(c) upon the person or persons named in § 103.5a(c) of this chapter.

(b) *Service custody; cost of maintenance.* An alien confined because of physical or mental disability in an institution or hospital shall not be accepted into physical custody by the Service until an order of deportation has been entered and the Service is ready to deport the alien. When such an alien is an inmate of a public or private institution at the time of the commencement of the deportation proceedings, expenses for the maintenance of the alien shall not be incurred by the Government until he is taken into physical custody by the Service.

[22 FR 9796, Dec. 6, 1957, as amended at 37 FR 11470, June 8, 1972; 43 FR 48620, Oct. 19, 1978]

§ 242.4 Fingerprints and photographs.

Every alien 14 years of age or older against whom proceedings are commenced under this part by service of an order to show cause shall be fingerprinted and photographed. Such fingerprints and photographs shall be made available to Federal, State, and local law enforcement agencies upon request to the district director or chief patrol agent having jurisdiction over the alien's record. Any such alien, regardless of his or her age, shall be photographed and/or fingerprinted if required by any immigration officer authorized to issue an order to show cause as listed in § 242.1(a).

[59 FR 42415, Aug. 17, 1994]

§ 242.5 Voluntary departure prior to commencement of hearing.

(a)(1) *Authorized officers.* The authority contained in section 242(b) of the act to permit aliens to depart voluntarily from the United States may be exercised by district directors, district officers who are in charge of investigations, officers in charge, chief patrol agents, and service center directors, assistant district directors for Examinations, Director, Organized Crime Drug Enforcement Task Force, or Assistant Director, Organized Crime Drug Enforcement Task Force, (New York, NY; Houston, TX; Los Angeles, CA; and Miami, FL).

(2) *Authorization.* Notwithstanding any other provision of this section, an alien convicted on or after November 18, 1988, of an aggravated felony as defined in section 101(a)(43) of the Act, shall not be eligible for voluntary departure prior to commencement of hearing. Voluntary departure may be granted to any alien who is statutorily eligible: (i) Who is a native of a foreign contiguous territory and not within the purview of class (vi) of this paragraph; or (ii) whose application for extension of stay as a nonimmigrant is being denied; or (iii) who has voluntarily surrendered himself to the Service; or (iv) who presents a valid travel document and confirmed reservation for transportation out of the United States within 30 days; or (v) who is an F-1, F-2, J-1, or J-2 nonimmigrant and who has lost such status solely because

of a private bill introduced in his/her behalf; or (vi) who is admissible to the United States as an immigrant and: (A) Who is an immediate relative of a U.S. citizen, or (B) is otherwise exempt from the numerical limitation on immigrant visa issuance, or (C) has a priority date for an immigrant visa not more than 60 days later than the date show in the latest Visa Office Bulletin and has applied for an immigrant visa at an American Consulate which has accepted jurisdiction over the case, or (D) who is a third-preference alien with a priority date earlier than August 9, 1978, or (E) who is the beneficiary of an approved sixth-preference petition who satisfies Examinations without another petition that he/she can qualify for third preference and who cannot obtain a visa solely because a visa number is unavailable, and who has a priority date earlier than August 9, 1978; or (vii) who has been granted asylum and has not been granted parole status or a stay of deportation; (viii) in whose case the district director has determined there are compelling factors warranting grant of voluntary departure; or (ix) who is the child of a legalized alien currently residing in the United States, born during an authorized absence from the United States of the mother who is: (A) A legalized alien; or (B) An alien currently residing in the United States under voluntary departure pursuant to the Family Unity Program.

(3) *Periods of time/employment.* (i) Except for paragraphs (a)(2) (v) through (ix) of this section, any grant of voluntary departure shall contain a time limitation of usually not more than 30 days, and an extension of the original voluntary departure time shall not be authorized except under meritorious circumstances, as determined on a case-by-case basis. Upon failure to depart, deportation proceedings will be initiated. As an exception to the 30-day voluntary departure period, an eligible alien under:

(A) Paragraph (a)(2)(v) of this section may be granted voluntary departure in increments of 1 year conditioned upon the F-1 or J-1 alien maintaining a full course of study at an approved institution of learning, or upon abiding by the terms and conditions of the exchange

program within the limitations imposed by 22 CFR 514.23; or

(B) Paragraphs (a)(2)(vi) (A), (B), and (C) of this section may be granted voluntary departure until the American Consul issues an immigrant visa and, at the discretion of the district director, issuance may be in increments of 30 days, conditioned upon continuing availability of an immigrant visa as shown in the latest Visa Office Bulletin and upon the alien's diligent pursuit of efforts to obtain the visa; or

(C) Paragraphs (a)(2)(vi) (D) and (E) of this section may be granted voluntary departure, conditioned upon the continued validity of the approved third- or sixth-preference petition, as appropriate, and the alien's retention of the status established in the petition for an indefinite period until an immigrant visa is available; or

(D) Paragraphs (a)(2) (vii) and (viii) of this section may be granted voluntary departure in increments of time, not to exceed 1 year, as determined by the district director to be appropriate in the case; or

(E) Paragraph (a)(2)(ix) of this section may be granted voluntary departure in increments of time, not to exceed 2 years.

(ii) An alien eligible for voluntary departure in paragraphs (a)(2) (v) through (viii) of this section may apply for employment authorization under the appropriate citation in §274a.12 of this chapter.

(b) *Application.* Any alien who believes himself or herself to be eligible for voluntary departure under section 242(b) of the Act may apply therefore at any office of the Service any time prior to the commencement of deportation proceedings against him or her. The officers designated in paragraph (a) of this section may deny or grant the application and determine the conditions under which the alien's departure shall be effected. An appeal shall not lie from a denial of an application for voluntary departure under this section, but the denial shall be without prejudice to the alien's right to apply for relief from deportation under any provision of law.

(c) *Revocation.* If, subsequent to the granting of an application for voluntary departure under this section, it

is ascertained that the application should not have been granted, that grant may be revoked without notice by any district director, district officer in charge of investigations, officer in charge, chief patrol agent, Director, Organized Crime Drug Enforcement Task Force, or Assistant Director, Organized Crime Drug Enforcement Task Force, (New York, NY; Houston, TX; Los Angeles, CA; and Miami, FL).

[23 FR 9123, Nov. 26, 1958, as amended at 29 FR 13242, Sept. 24, 1964; 35 FR 16362, Oct. 20, 1970; 43 FR 29528, July 10, 1978; 45 FR 27917, Apr. 25, 1980; 46 FR 25598, May 8, 1981; 47 FR 49954, Nov. 4, 1982; 52 FR 2940, Jan. 29, 1987; 55 FR 12627, Apr. 5, 1990; 55 FR 24859, June 19, 1990; 56 FR 18503, Apr. 23, 1991; 60 FR 66067, Dec. 21, 1995]

§242.6 Family Unity Program.

(a) *General.* Except as otherwise specifically provided in paragraph (b) of this section, the definitions contained in Title 8 of the Code of Federal Regulations shall apply to the administration of this section.

(b) *Definitions.* As used in this section:

Eligible immigrant means a qualified immigrant who is the spouse or unmarried child of a legalized alien.

Legalized alien means an alien who:

(i) Is a temporary or permanent resident under section 210 or 245A of the Act; or

(ii) Is a permanent resident under section 202 of the Immigration Reform and Control Act of 1986 (Cuban/Haitian Adjustment).

(c) *Eligibility*—(1) *General.* An alien who is not a lawful permanent resident is eligible to apply for benefits under the Family Unity Program if he or she establishes:

(i) That he or she entered the United States before May 5, 1988 (in the case of a relationship to a legalized alien described in subsection (b)(2)(B) or (b)(2)(C) of section 301 of IMMACT 90), or as of December 1, 1988 (in the case of a relationship to a legalized alien described in subsection (b)(2)(A) of section 301 of IMMACT 90), and has been continuously residing in the United States since that date; and

(ii) That on May 5, 1988 (in the case of a relationship to a legalized alien described in subsection (b)(2)(B) or

(b)(2)(C) of section 301 of IMMACT 90), or as of December 1, 1988 (in the case of a relationship to a legalized alien described in subsection (b)(2)(A) of section 301 of IMMACT 90), he or she was the spouse of unmarried child of a legalized alien, and that he or she has been eligible continuously since that time for family-sponsored second preference immigrant status under section 203(a)(2) of the Act based on the same relationship.

(2) *Legalization application pending as of May 5, 1988 or December 1, 1988.* An alien whose legalization application was filed on or before May 5, 1988 (in the case of a relationship to a legalized alien described in subsection (b)(2)(B) or (b)(2)(C) of section 301 of IMMACT 90), or as of December 1, 1988 (in the case of a relationship to a legalized alien described in subsection (b)(2)(A) of section 301 of IMMACT 90), but not approved until after that date will be treated as having been a legalized alien as of May 5, 1988 (in the case of a relationship to a legalized alien described in subsection (b)(2)(B) or (b)(2)(C) of section 301 of IMMACT 90), or as of December 1, 1988 (in the case of a relationship to a legalized alien described in subsection (b)(2)(A) of section 301 of IMMACT 90), for purposes of the Family Unity Program.

(d) *Ineligible aliens.* The following categories of aliens are ineligible for benefits under the Family Unity Program:

(1) An alien who is deportable under any paragraph in section 241(a) of the Act, except paragraphs (1)(A), (1)(B), (1)(C), and (3)(A); *provided that* an alien who is deportable under paragraph (1)(A) of such Act is also ineligible for benefits under the Family Unity Program if deportability is based upon an exclusion ground described in section 212(a) (2) or (3) of the Act;

(2) An alien who has been convicted of a felony or three or more misdemeanors in the United States; or

(3) An alien described in section 243(h)(2) of the Act.

(e) *Filing—(1) General.* An application for voluntary departure under the Family Unity Program must be filed at the Service Center having jurisdiction over the alien's place of residence. A Form I-817 (Application for Voluntary Departure under the Family Unity Pro-

gram) must be filed with the correct fee required in § 103.7(b)(1) of this chapter and the required supporting documentation. A separate application with appropriate fee and documentation must be filed for each person claiming eligibility.

(2) *Decision.* The Service Center director has sole jurisdiction to adjudicate an application for benefits under the Family Unity Program. The director will provide the applicant with specific reasons for any decision to deny an application. Denial of an application may not be appealed. An applicant who believes that the grounds for denial have been overcome may submit another application with the appropriate fee and documentation.

(3) *Referral of denied cases for consideration of issuance of Order to Show Cause.* If an application is denied, the case will be referred to the district director with jurisdiction over the alien's place of residence for consideration of whether to issue an Order to Show Cause (OSC). After an initial denial, an applicant's case will not be referred for issuance of an OSC until 90 days from the date of the initial denial, to allow the alien the opportunity to file a new Form I-817 application in order to attempt to overcome the basis of the denial. However, if the applicant is found not to be eligible for benefits under paragraph (d)(2) of this section, the Service reserves the right to issue an Order to Show Cause at any time after the initial denial.

(4) *Voluntary departure under § 242.5 and eligibility for employment under § 274a.12(c)(12).* Children of legalized aliens residing in the United States, who were born during an authorized absence from the United States of mothers who are currently residing in the United States under voluntary departure pursuant to the Family Unity Program may be granted voluntary departure under § 242.5(a)(2)(ix) for a period of 2 years.

(5) *Duration of voluntary departure under § 242.6.* An alien whose application for benefits under the Family Unity Program is approved will receive a 2-year period of voluntary departure. The 2-year period will begin on the date the Services approves the application.

(6) *Employment authorization.* An alien granted benefits under the Family Unity Program is authorized to be employed in the United States and may apply for an employment authorization document on Form I-765 (Application for Employment Authorization). The application may be filed concurrently with Form I-817. The application must be accompanied by the correct fee required by §103.7(b)(1) of this chapter. The validity period of the employment authorization will coincide with the period of voluntary departure.

(7) *Travel outside the United States.* An alien granted Family Unity Program benefits who intends to travel outside the United States temporarily must apply for advance authorization using Form I-131 (Application for Travel Document). The authority to grant an application for advance authorization for an alien granted Family Unity Program benefits rests solely with the district director. An alien who is granted advance authorization and returns to the United States in accordance with such authorization, and who is found not to be excludable under section 212(a) (2) or (3) of the Act, shall be inspected and admitted in the same immigration status the alien had at the time of departure, and provided the remainder of the 2-year voluntary departure previously granted under the Family Unity Program.

(8) *Extension of voluntary departure.* An application for an extension of voluntary departure under the Family Unity Program must be filed by the alien on Form I-817 along with the correct fee required in §103.7(b)(1) of this chapter and the required supporting documentation. The submission of a copy of the previous approval notice will assist in shortening the processing time. An extension may be granted if the alien continues to be eligible for benefits under the Family Unity Program. However, an extension may not be approved if the legalized alien is a lawful permanent resident, and a petition for family-sponsored immigrant status has not been filed in behalf of the applicant. In such case the Service will notify the alien of the reason for the denial and afford him or her the opportunity to file another Form I-817 once the petition, Form I-130, has been

filed in behalf of him or her. No charging document will be issued for a period of 90 days.

(9) *Supporting documentation for extension application.* Supporting documentation need not include documentation provided with the previous application(s). The extension application need only include changes to previous applications and evidence of continuing eligibility since the date of the prior approval.

(f) *Eligibility for Federal financial assistance programs.* An alien granted Family Unity Program benefits based on a relationship to a legalized alien as defined in paragraph (b) of this section is ineligible for public welfare assistance in the same manner and for the same period as the legalized alien is ineligible for such assistance under sections 245A(h) or 210(f) of the Act, respectively.

(g) *Termination of Family Unity Program benefits—(1) Grounds for termination.* The Service may terminate benefits under the Family Unity Program whenever the necessity for the termination comes to the attention of the Service. Such grounds will exist in situations including, but not limited to, those in which:

(i) A determination is made that Family Unity Program benefits were acquired as the result of fraud or willful misrepresentation of a material fact;

(ii) The beneficiary commits an act or acts which render him or her inadmissible as an immigrant or ineligible for benefits under the Family Unity Program;

(iii) The legalized alien upon whose status benefits under the Family Unity Program were based loses his or her legalized status;

(iv) The beneficiary is the subject of a final order of exclusion or deportation issued subsequent to the grant of benefits on any ground of deportability or excludability that would have rendered the alien ineligible for benefits under §242.6(d)(1) of this chapter, regardless of whether the facts giving rise to such ground occurred before or after the benefits were granted; or

(v) A qualifying relationship to a legalized alien no longer exists.

(2) *Notice procedure.* Notice of intent to terminate and of the grounds thereof shall be served pursuant to the provisions of § 103.5a of this chapter. The alien shall be given 30 days to respond to the notice and may submit to the Service additional evidence in rebuttal. Any final decision of termination shall also be served pursuant to the provisions of § 103.5a of the chapter. Nothing in this section shall preclude the Service from commencing exclusion or deportation proceedings prior to termination of Family Unity Program benefits.

(3) *Effect of termination.* Termination of benefits under the Family Unity Program, other than as a result of a final order of deportation or exclusion, shall render the alien amendable to exclusion or deportation proceedings under sections 236 or 242 of the Act, as appropriate.

[60 FR 66067, Dec. 21, 1995]

§ 242.7 Cancellation proceedings.

(a) *Cancellation of an order to show cause.* Any officer authorized by § 242.1(a) of this part to issue an order to show cause may cancel an order to show cause prior to jurisdiction vesting with the Immigration Judge pursuant to § 3.14 of this chapter provided the officer is satisfied that:

(1) The respondent is a national of the United States;

(2) The respondent is not deportable under immigration laws;

(3) The respondent is deceased;

(4) The respondent is not in the United States;

(5) The respondent was placed under proceedings for failure to file a timely petition as required by section 216(c) of the Act, but his or her failure to file a timely petition was excused in accordance with section 216(d)(2)(B) of the Act; or

(6) The Order to Show Cause was improvidently issued.

(b) *Motion to dismiss.* After commencement of proceedings pursuant to § 3.14 of this chapter, any officer enumerated in paragraph (a) of this section may move for dismissal of the matter on the grounds set out under paragraph (a) of this section. Dismissal of the matter shall be without prejudice to the alien or the Service.

(c) *Motion for remand.* After commencement of the hearing, any officer enumerated in paragraph (a) of this section may move for remand of the matter to district jurisdiction on the ground that the foreign relations of the United States are involved and require further consideration. Remand of the matter shall be without prejudice to the alien or the Service.

(d) *Warrant of arrest.* When an order to show cause is cancelled or proceedings are terminated under this section any outstanding warrant of arrest is cancelled.

(e) *Termination of deportation proceedings by immigration judge.* An immigration judge may terminate deportation proceedings to permit the respondent to proceed to a final hearing on a pending application or petition for naturalization when the respondent has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors; in every other case, the deportation hearing shall be completed as promptly as possible notwithstanding the pendency of an application for naturalization during any state of the proceedings.

[47 FR 49954, Nov. 4, 1982; 47 FR 51351, Nov. 15, 1982, as amended at 52 FR 2940, Jan. 29, 1987; 52 FR 3099, Jan. 30, 1987; 52 FR 5616, Feb. 25, 1987; 53 FR 30022, Aug. 10, 1988]

§ 242.7a Waiver of documents; returning residents.

Pursuant to the authority contained in section 211(b) of the Act, an alien previously lawfully admitted to the United States for permanent residence who, upon return from a temporary absence was excludable because of failure to have or to present a valid passport, immigrant visa, reentry permit, border crossing card, or other document required at the time of entry, may be granted a waiver of such requirement in the discretion of the district director: *Provided*, That such alien (a) was not otherwise excludable at the time of entry, or (b) having been otherwise excludable at the time of entry is with respect thereto qualified for an exemption from deportability under section 241(a)(1)(H) of the Act, and (c) is not otherwise subject to deportation. Denial of a waiver by the district director

shall not be appealable but shall be without prejudice to renewal of an application and reconsideration in proceedings before the immigration judge.

[29 FR 6002, May 7, 1964, as amended at 56 FR 38333, Aug. 13, 1991]

§ 242.8 Immigration judges.

(a) *Authority.* In any proceeding conducted under this part the immigration judge shall have the authority to determine deportability and to make decisions, including orders of deportation, as provided by section 242(b) and 242B of the Act; to reinstate orders of deportation as provided by section 242(f) of the Act; to determine applications under sections 208, 212(k), 241(a)(1)(E)(iii), 241(a)(1)(H), 244, 245 and 249 of the Act; to determine the country to which an alien's deportation will be directed in accordance with section 243(a) of the Act; to order temporary withholding of deportation pursuant to section 243(h) of the Act; and to take any other action consistent with applicable law and regulations as may be appropriate. An immigration judge may certify his or her decision in any case to the Board of Immigration Appeals when it involves an unusually complex or novel question of law or fact. Nothing contained in this part shall be construed to diminish the authority conferred on immigration judges under section 103 of the Act.

(b) *Withdrawal and substitution of special inquiry officers.* The special inquiry officer assigned to conduct the hearing shall at any time withdraw if he deems himself disqualified. If a hearing has begun but no evidence has been adduced other than by the respondent's pleading pursuant to § 242.16(b), or if a special inquiry officer becomes unavailable to complete his duties within a reasonable time, or if at any time the respondent consents to a substitution, another special inquiry officer may be assigned to complete the case. The new special inquiry officer shall familiarize himself with the record in the case and shall state for the record that he has done so.

[22 FR 9797, Dec. 6, 1957, as amended at 47 FR 44237, Oct. 7, 1982; 56 FR 38333, Aug. 13, 1991; 57 FR 11574, Apr. 6, 1992; 59 FR 26594, May 23, 1994]

§ 242.9 Trial attorney.

(a) *Authority.* When an additional immigration officer is assigned to a proceedings under this part to perform the duties of a trial attorney, he shall present on behalf of the Government evidence material to the issues of deportability and any other issues which may require disposition by the special inquiry officer. The trial attorney is authorized to appeal from a decision of the special inquiry officer pursuant to § 242.21 and to move for reopening or reconsideration pursuant to § 242.22.

(b) *Assignment.* The district director shall direct the chief legal officer to assign a general attorney to each case within the provisions of § 242.16(c) of this part, and to each case in which an unrepresented respondent is incompetent or under 16 years of age, and is not accompanied by a guardian, relative or friend. A general attorney shall be assigned to every case in which the Commissioner approves the submission of nonrecord information under § 242.17(a) of this part. In his discretion, whenever he deems such assignment necessary or advantageous, the district director may direct the chief legal officer to assign a general attorney to any other case at any stage of the proceeding.

[27 FR 9646, Sept. 29, 1962, as amended at 32 FR 9631, July 4, 1967; 46 FR 43956, Sept. 2, 1981]

§ 242.10 Representation by counsel.

The respondent may be represented at the hearing by an attorney or other representative qualified under part 292 of this chapter.

[22 FR 9797, Dec. 6, 1957]

§ 242.11 Incompetent respondents.

When it is impracticable for the respondent to be present at the hearing because of mental incompetency, the guardian, near relative, or friend who was served with a copy of the order to show cause shall be permitted to appear on behalf of the respondent. If such a person cannot reasonably be found or fails or refuses to appear, the

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custodian of the respondent shall be requested to appear on behalf of the respondent.

[22 FR 9797, Dec. 6, 1957]

§ 242.12 Interpreter.

Any person acting as interpreter in a hearing before an Immigration Judge under this part shall be sworn to interpret and translate accurately, unless the interpreter is an employee of the United States Government, in which event no such oath shall be required.

[52 FR 2940, Jan. 29, 1987]

§ 242.13 Postponement and adjournment of hearing.

After the commencement of the hearing, the Immigration Judge may grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the Service.

[52 FR 2940, Jan. 29, 1987]

§ 242.14 Evidence.

(a) *Sufficiency.* A determination of deportability shall not be valid unless it is found by clear, unequivocal and convincing evidence that the facts alleged as grounds for deportation are true.

(b) [Reserved]

(c) *Use of prior statements.* The special inquiry officer may receive in evidence any oral or written statement which is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial.

(d) *Testimony.* Testimony of witnesses appearing at the hearing shall be under oath or affirmation administered by the special inquiry officer.

(e) *Depositions.* The Immigration Judge may order the taking of depositions pursuant to § 3.33 of this chapter.

[22 FR 9797, Dec. 6, 1957, as amended at 32 FR 2883, Feb. 15, 1967; 52 FR 2940, Jan. 29, 1987]

§ 242.15 Contents of record.

The hearing before the special inquiry officer, including the testimony, exhibits, applications and requests, the special inquiry officer's decision, and all written orders, motions, appeals, briefs, and other papers filed in the

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proceedings shall constitute the record in the case. The hearing shall be recorded verbatim except for statements made off the record with the permission of the special inquiry officer. In his discretion, the special inquiry officer may exclude from the record any arguments made in connection with motions, applications, requests, or objections, but in such event the person affected may submit a brief.

[26 FR 12112, Dec. 19, 1961]

§ 242.16 Hearing.

(a) *Opening.* The Immigration Judge shall advise the respondent of his right to representation, at no expense to the Government, by counsel of his own choice authorized to practice in the proceedings and require him to state then and there whether he desires representation; advise the respondent of the availability of free legal services programs qualified under part 292a of this chapter and organizations recognized pursuant to § 292.2 of this chapter, located in the district where the deportation hearing is being held; ascertain that the respondent has received a list of such programs, and a copy of Form I–618, Written Notice of Appeal Rights; advise the respondent that he will have a reasonable opportunity to examine and object to the evidence against him, to present evidence in his own behalf and to cross-examine witnesses presented by the Government; place the respondent under oath; read the factual allegations and the charges in the order to show cause to the respondent and explain them in nontechnical language, and enter the order to show cause as an exhibit in the record. Deportation hearings shall be open to the public, except that the Immigration Judge may, in his discretion and for the purpose of protecting witnesses, respondents, or the public interest, direct that the general public or particular individuals shall be excluded from the hearing in any specific case. Depending upon physical facilities, reasonable limitation may be placed upon the number in attendance at any one time, with priority being given to the press over the general public.

(b) *Pleading by respondent.* The special inquiry officer shall require the respondent to plead to the order to show

cause by stating whether he admits or denies the factual allegations and his deportability under the charges contained therein. If the respondent admits the factual allegations and admits his deportability under the charges and the special inquiry officer is satisfied that no issues of law or fact remain, the special inquiry officer may determine that deportability as charged has been established by the admissions of the respondent. The special inquiry officer shall not accept an admission of deportability from an unrepresented respondent who is incompetent or under age 16 and is not accompanied by a guardian, relative, or friend; nor from an officer of an institution in which a respondent is an inmate or patient. When, pursuant to this paragraph, the special inquiry officer may not accept an admission of deportability, he shall direct a hearing on the issues.

(c) *Issues of deportability.* When deportability is not determined under the provisions of paragraph (b) of this section, the special inquiry officer shall request the assignment of a trial attorney, and shall receive evidence as to any unresolved issues, except that no further evidence need be received as to any facts admitted during the pleading. The respondent shall provide a court certified copy of a Judicial Recommendation Against Deportation to the special inquiry officer when such recommendation will be the basis of denying any charge(s) brought by the Service in the proceedings against the respondent. No Judicial Recommendation Against Deportation is effective against a charge of deportability under section 241(a)(11) of the Act or if the Judicial Recommendation Against Deportation was granted on or after November 29, 1990.

(d) *Additional charges.* The Service may at any time during a hearing lodge additional charges of deportability, including factual allegations, against the respondent. Copies of the additional factual allegations and charges shall be submitted in writing for service on the respondent and entry as an exhibit in the record. The Immigration Judge shall read the additional factual allegations and charges to the respondent and explain them to him or her. The special inquiry officer shall

advise the respondent if he is not represented by counsel that he may be so represented and also that he may have a reasonable time within which to meet the additional factual allegations and charges. The respondent shall be required to state then and there whether he desires a continuance for either of these reasons. Thereafter, the provisions of paragraph (b) of this section shall apply to the additional factual allegations and lodged charges.

[27 FR 9646, Sept. 29, 1962, as amended at 29 FR 13243, Sept. 24, 1964; 32 FR 9632, July 4, 1967; 44 FR 4654, Jan. 23, 1979; 52 FR 2940, Jan. 29, 1987; 56 FR 8907, Mar. 4, 1991]

§ 242.17 Ancillary matters, applications.

(a) *Creation of the status of an alien lawfully admitted for permanent residence.* The respondent may apply to the immigration judge for suspension of deportation under section 244(a) of the Act; for adjustment of status under section 245 of the Act, or under section 1 of the Act of November 2, 1966, or under section 101 or 104 of the Act of October 28, 1977; or for the creation of a record of lawful admission for permanent residence under section 249 of the Act. The application shall be subject to the requirements of parts 244, 245, and 249 of this chapter. The approval of any application made to the immigration judge under section 245 of the Act by an alien spouse (as defined in section 216(g)(1) of the Act) or by an alien entrepreneur (as defined in section 216A(f)(1) of the Act), shall result in the alien's obtaining the status of lawful permanent resident on a conditional basis in accordance with the provisions of section 216 or 216A of the Act, whichever is applicable. However, the Petition to Remove the Conditions on Residence required by section 216(c) of the Act or the Petition by Entrepreneur to Remove Conditions required by section 216A(c) of the Act shall be made to the director in accordance with part 216 of the chapter. In conjunction with any application for creation of status of an alien lawfully admitted for permanent residence made to an immigration judge, if the respondent is inadmissible under any provision of section 212(a) of the Act and believes that he or she meets the eligibility requirements for

a waiver of the ground of inadmissibility, he or she may apply to the immigration judge for such waiver. The immigration judge shall inform the respondent of his or her apparent eligibility to apply for any of the benefits enumerated in this paragraph and shall afford the respondent an opportunity to make application therefor during the hearing. In exercising discretionary power when considering an application under this paragraph, the immigration judge may consider and base the decision on information not contained in the record and not made available for inspection by the respondent, provided the Commissioner has determined that such information is relevant and is classified under Executive Order No. 12356 (47 FR 14874, April 6, 1982) as requiring protection from unauthorized disclosure in the interest of national security. Whenever the immigration judge believes that he or she can do so while safeguarding both the information and its source, the immigration judge should inform the respondent of the general nature of the information in order that the respondent may have an opportunity to offer opposing evidence. A decision based in whole or in part on such classified information shall state that the information is material to the decision.

(b) *Voluntary departure.* The respondent may apply to the special inquiry officer for voluntary departure in lieu of deportation pursuant to section 244(e) of the Act and part 244 of this chapter.

(c) *Applications for asylum or withholding of deportation.* (1) The immigration judge shall notify the respondent that if he is finally ordered deported his deportation will in the first instance be directed pursuant to section 243(a) of the Act to the country designated by the respondent and shall afford him an opportunity then and there to make such designation. The immigration judge shall then specify and state for the record the country, or countries in the alternative, to which respondent's deportation will be directed pursuant to section 243(a) of the Act if the country of his designation will not accept him into its territory, or fails to furnish timely notice of acceptance, or if

the respondent declines to designate a country.

(2) If the alien expresses fear of persecution or harm upon return to any of the countries to which the alien might be deported pursuant to paragraph (c)(1) of this section, and the alien has not previously filed an application for asylum or withholding of deportation that has been referred to the immigration judge by an asylum officer in accordance with §208.14(b) of this chapter, the immigration judge shall:

(i) Advise the alien that he may apply for asylum in the United States or withholding of deportation to those countries; and

(ii) Make available the appropriate application forms.

(3) An application for asylum or withholding of deportation must be filed with the Immigration Court, pursuant to §208.4(c) of this chapter. Upon receipt of an application that has not been referred by an asylum officer, the Immigration Court shall forward a copy to the Department of State pursuant to §208.11 of this chapter and shall calendar the case for a hearing. The reply, if any, of the Department of State, unless classified under E.O. 12356 (3 CFR, 1982 Comp., p. 166), shall be given to both the applicant and to the trial attorney representing the government.

(4) Applications for asylum or withholding of deportation so filed will be decided by the immigration judge pursuant to the requirements and standards established in part 208 of this chapter after an evidentiary hearing that is necessary to resolve factual issues in dispute. An evidentiary hearing extending beyond issues related to the basis for a mandatory denial of the application pursuant to 8 CFR 208.14 or 208.16 is not necessary once the immigration judge has determined that such a denial is required.

(i) Evidentiary hearings on applications for asylum or withholding of deportation will be open to the public unless the applicant expressly requests that it be closed.

(ii) Nothing in this section is intended to limit the authority of the Immigration Judge properly to control the scope of any evidentiary hearing.

(iii) During the deportation hearing, the applicant shall be examined under oath on his application and may present evidence and witnesses in his own behalf. The applicant has the burden of establishing that he is a refugee as defined in section 101(a)(42) of the Act pursuant to the standard set forth in § 208.13 of this chapter.

(iv) The trial attorney for the government may call witnesses and present evidence for the record, including information classified under E.O. 12356 (3 CFR, 1982 Comp., p. 166), provided the immigration judge or the Board has determined that such information is relevant to the hearing. When the immigration judge receives such classified information he shall inform the applicant. The agency that provides the classified information to the immigration judge may provide an unclassified summary of the information for release to the applicant, whenever it determines it can do so consistently with safeguarding both the classified nature of the information and its source. The summary should be as detailed as possible, in order that the applicant may have an opportunity to offer opposing evidence. A decision based in whole or in part on such classified information shall state whether such information is material to the decision.

(5) The decision of an immigration judge to grant or deny asylum or withholding of deportation shall be communicated to the applicant and to the trial attorney for the government. An adverse decision will state why asylum or withholding of deportation was denied.

(d) *Application for relief under sections 241(a)(1)(H) and 241(a)(1)(E)(iii).* The respondent may apply to the immigration judge for relief from deportation under sections 241(a)(1)(H) and 241(a)(1)(E)(iii) of the Act.

(e) *General.* An application under this section shall be made only during the hearing and shall not be held to constitute a concession of alienage or deportability in any case in which the respondent does not admit his alienage or deportability. However, nothing in this section shall prohibit the INS from using information supplied in an application for asylum or withholding of de-

portation submitted to an asylum officer pursuant to § 208.2 of this chapter on or after January 4, 1995 as the basis for issuance of an Order to Show Cause under § 242.1 or to establish alienage or deportability in a case referred to an immigration judge under § 208.14(b) of this chapter. The respondent shall have the burden of establishing that he is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion. The respondent shall not be required to pay a fee on more than one application within paragraphs (a) and (c) of this section, provided that the minimum fee imposed when more than one application is made shall be determined by the cost of the application with the highest fee. When a motion to reopen or reconsider is made concurrently with an application for relief seeking one of the immigration benefits set forth in paragraphs (a) and (c) of this section, only the fee set forth in § 103.7(b)(1) of this chapter for the motion must accompany the motion and application for relief. If such a motion is granted, the appropriate fee for the application for relief, if any, set forth in 8 CFR 103.7(b)(1), must be paid within the time specified in order to complete the application. Nothing contained herein is intended to foreclose the respondent from applying for any benefit or privilege which he believes himself eligible to receive in proceedings under this part.

[26 FR 12112, Dec. 19, 1961, as amended at 34 FR 13921, Aug. 30, 1969; 39 FR 25642, July 12, 1974; 39 FR 43055, Dec. 10, 1974; 43 FR 18644, May 2, 1978; 45 FR 41393, June 19, 1980; 47 FR 12133, Mar. 22, 1982; 47 FR 44237, Oct. 7, 1982; 47 FR 44990, Oct. 13, 1982; 53 FR 30022, Aug. 10, 1988; 55 FR 30687, July 27, 1990; 56 FR 38333, Aug. 13, 1991; 59 FR 26593, 26594, May 23, 1994; 59 FR 62302, Dec. 5, 1994; 60 FR 34090, June 30, 1995; 61 FR 46374, Sept. 3, 1996]

§ 242.18 Decision of the immigration judge.

(a) *Contents.* The decision of the immigration judge may be oral or written. Except when deportability is determined on the pleadings pursuant to § 242.16(b), the decision of the immigration judge shall include a discussion of the evidence and findings as to deportability. The formal enumeration of findings is not required. The decision

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shall also contain a discussion of the evidence pertinent to any application made by the respondent under § 242.17 and the reasons for granting or denying the request. The decision shall be concluded with the order of the immigration judge.

(b) *Summary decision.* Notwithstanding the provisions of paragraph (a) of this section, in any case where deportability is determined on the pleadings pursuant to § 242.16(b) and the respondent does not make an application under § 242.17, or the respondent applies for voluntary departure only and the immigration judge grants the application, the immigration judge may enter a summary decision on Form I-38, if deportation is ordered, or on Form I-39, if voluntary departure is granted with an alternate order of deportation.

(c) *Order of the immigration judge.* The order of the immigration judge shall direct the respondent's deportation, or the termination of the proceedings, or such other disposition of the case as may be appropriate. When deportation is ordered, the immigration judge shall specify the country, or countries in the alternate, to which respondent's deportation shall be directed. The immigration judge is authorized to issue orders in the alternative or in combination as he may deem necessary.

[26 FR 12112, Dec. 19, 1961, as amended at 59 FR 62302, Dec. 5, 1994]

§ 242.19 Notice of decision.

(a) *Written decision.* A written decision shall be served upon the respondent and the trial attorney, together with the notice referred to in § 3.3 of this chapter. Service by mail is complete upon mailing.

(b) *Oral decision.* An oral decision shall be stated by the special inquiry officer in the presence of the respondent and the trial attorney, if any, at the conclusion of the hearing. Unless appeal from the decision is waived, the respondent shall be furnished with Notice of Appeal, Form EOIR-26, and advised of the provisions of § 242.21. A typewritten copy of the oral decision shall be furnished at the request of the respondent or the trial attorney.

(c) *Summary decision.* When the special inquiry officer renders a summary

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decision as provided in § 242.18(b), he shall serve a copy thereof upon the respondent at the conclusion of the hearing. Unless appeal from the decision is waived, the respondent shall be furnished with Notice of Appeal, Form EOIR-26, and advised of the provisions of § 242.21.

[26 FR 12212, Dec. 19, 1961, as amended at 27 FR 9647, Sept. 29, 1962; 61 FR 18909, Apr. 29, 1996]

§ 242.20 Finality of order.

The decision of the Immigration Judge shall become final in accordance with § 3.39 of this chapter.

[52 FR 2941, Jan. 29, 1987, as amended at 59 FR 26595, May 23, 1994]

§ 242.21 Appeals.

(a) Pursuant to part 3 of this chapter, an appeal shall lie from a decision of an Immigration Judge to the Board, except that no appeal shall lie from an order of deportation entered in absentia. The procedures regarding the filing of a Notice of Appeal (Form EOIR-26), fees, and briefs are set forth in §§ 3.3, 3.31, and 3.38 of this chapter. An appeal shall be filed within 30 calendar days after the mailing of a written decision, the stating of an oral decision, or the service of a summary decision. The filing date is defined as the date of receipt of the Notice of Appeal by the Board of Immigration Appeals. The reasons for the appeal shall be stated in the Notice of Appeal (Form EOIR-26) in accordance with the provisions of § 3.3(b) of this chapter. Failure to do so may constitute a ground for dismissal of the appeal by the Board pursuant to § 3.1(d)(1-a) of this chapter.

(b) *Prohibited appeals; legalization or applications.* An alien respondent defined in § 245a.2(c) (6) or (7) of this chapter who fails to file an application for adjustment of status to that of a temporary resident within the prescribed period(s), and who is thereafter found to be deportable by decision of an immigration judge, shall not be permitted to appeal the finding of deportability

based solely on refusal by the immigration judge to entertain such an application in deportation proceedings.

[29 FR 7236, June 3, 1964, as amended at 52 FR 16194, May 1, 1987; 53 FR 10064, Mar. 29, 1988; 54 FR 29439, July 12, 1989; 61 FR 18909, Apr. 29, 1996]

§ 242.22 Reopening or reconsideration.

Motions to reopen or reconsider are subject to the requirements and limitations set forth in § 3.23 of this chapter. The immigration judge may upon his/her own motion, or upon motion of the trial attorney or the respondent, reopen or reconsider any case in which he/she had made a decision, unless jurisdiction in the case is vested in the Board of Immigration Appeals under part 3 of this chapter. An order by the immigration judge granting a motion to reopen may be made on Form I-328. A motion to reopen will not be granted unless the immigration judge is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing; nor will any motion to reopen for the purpose of providing the respondent with an opportunity to make an application under § 242.17 be granted if respondent's rights to make such application were fully explained to him/her by the immigration judge and he/she was afforded an opportunity to do so at the hearing, unless circumstances have arisen thereafter on the basis of which the request is being made. The filing of a motion under this section with an immigration judge shall not serve to stay the execution of an outstanding decision; execution shall proceed unless the immigration judge who has jurisdiction over the motion specifically grants a stay of deportation. The immigration judge may stay deportation pending his/her determination of the motion and also pending the taking and disposition of an appeal from such determination. The filing of a motion to reopen pursuant to the provisions of § 3.23(b)(4)(iii) of this chapter shall stay the deportation of the alien pending the disposition of the motion and the adjudication

of any properly filed administrative appeal.

[52 FR 26470, July 15, 1987, as amended at 61 FR 18909, Apr. 29, 1996; 61 FR 21065, May 9, 1996]

§ 242.23 Proceedings under section 242(f) of the Act.

(a) *Order to show cause.* In the case of an alien within the provisions of section 242(f) of the Act, the order to show cause shall charge him with deportability under section 242(f) of the Act. The prior order of deportation and evidence of the execution thereof, properly identified, shall constitute prima facie cause for deportability under this section.

(b) *Applicable procedure.* Except as otherwise provided in this section, proceedings under section 242(f) of the Act shall be conducted in general accordance with the rules prescribed in this part.

(c) *Deportability.* In determining the deportability of an alien alleged to be within the purview of paragraph (a) of this section, the issues shall be limited solely to a determination of the identity of the respondent, i.e., whether the respondent is in fact an alien who was previously deported, or who departed while an order of deportation was outstanding; whether the respondent was previously deported as a member of any of the classes described in paragraph (2), (3) or (4) of section 241(a) of the Act; and whether respondent has unlawfully reentered the United States.

(d) *Order.* If deportability as charged in the order to show cause is established, the Immigration Judge shall order that the respondent be deported under the previous order of deportation in accordance with section 242(f) of the Act.

(e) *Trial attorney; additional charges.* When a trial attorney is assigned to a proceeding under this section and additional charges are lodged against the respondent, the provisions of paragraphs (c) and (d) of this section shall cease to apply.

[26 FR 12282, Dec. 28, 1961, as amended at 27 FR 9647, Sept. 29, 1962; 30 FR 2021, Feb. 13, 1965; 56 FR 38333, Aug. 13, 1991]

§ 242.24 Detention and release of juveniles.

(a) *Juveniles.* A juvenile is defined as an alien under the age of eighteen (18) years.

(b) *Release.* Juveniles for whom bond has been posted, for whom parole has been authorized, or who have been ordered released on recognizance, shall be released pursuant to the following guidelines:

(1) Juveniles shall be released, in order of preference, to: (i) A parent; (ii) legal guardian; or (iii) adult relative (brother, sister, aunt, uncle, grandparent) who are not presently in INS detention, unless a determination is made that the detention of such juvenile is required to secure his timely appearance before the Service or the immigration court or to ensure the juvenile's safety or that of others.

In cases where the parent, legal guardian or adult relative resides at a location distant from where the juvenile is detained, he or she may secure release at an INS office located near the parent, legal guardian, or adult relative.

(2) If an individual specified in paragraph (b)(1) of this section cannot be located to accept custody of a juvenile, and the juvenile has identified a parent, legal guardian, or adult relative in INS detention, simultaneous release of the juvenile and the parent, legal guardian, or adult relative shall be evaluated on a discretionary case-by-case basis.

(3) In cases where the parent or legal guardian is in INS detention or outside the United States, the juvenile may be released to such person as designated by the parent or legal guardian in a sworn affidavit, executed before an immigration officer or consular officer, as capable and willing to care for the juvenile's well-being. Such person must execute an agreement to care for the juvenile and to ensure the juvenile's presence at all future proceedings before the Service or an immigration judge.

(4) In unusual and compelling circumstances and in the discretion of the district director or chief patrol agent, a juvenile may be released to an adult, other than those identified in paragraph (b)(1) of this section, who executes an agreement to care for the ju-

venile's well-being and to ensure the juvenile's presence at all future proceedings before the INS or an immigration judge.

(c) *Juvenile Coordinator.* The case of a juvenile for whom detention is determined to be necessary should be referred to the *Juvenile Coordinator*, whose responsibilities should include, but not be limited to, finding suitable placement of the juvenile in a facility designated for the occupancy of juveniles. These may include juvenile facilities contracted by the INS, state or local juvenile facilities, or other appropriate agencies authorized to accommodate juveniles by the laws of the state or locality.

(d) *Detention.* In the case of a juvenile for whom detention is determined to be necessary, for such interim period of time as is required to locate suitable placement for the juvenile, whether such placement is under paragraph (b) or (c) of this section, the juvenile may be temporarily held by INS authorities or placed in any INS detention facility having separate accommodations for juveniles.

(e) *Refusal of release.* If a parent of a juvenile detained by the INS can be located, and is otherwise suitable to receive custody of the juvenile, and the juvenile indicates a refusal to be released to his/her parent, the parent(s) shall be notified of the juvenile's refusal to be released to the parent(s), and shall be afforded an opportunity to present their views to the district director, chief patrol agent or immigration judge before a custody determination is made.

(f) *Notice to parent of application for relief.* If a juvenile seeks release from detention, voluntary departure, parole, or any form of relief from deportation, where it appears that the grant of such relief may effectively terminate some interest inherent in the parent-child relationship and/or the juvenile's rights and interests are adverse with those of the parent, and the parent is presently residing in the United States, the parent shall be given notice of the juvenile's application for relief, and shall be afforded an opportunity to present his or her views and assert his or her interest to the district director

or immigration judge before a determination is made as to the merits of the request for relief.

(g) *Voluntary departure.* Each juvenile apprehended in the immediate vicinity of the border who resides permanently in Mexico or Canada, shall be informed, prior to presentation of the voluntary departure form, that he or she may make a telephone call to a parent, close relative, a friend, or to an organization found on the free legal services list. Each other juvenile apprehended shall be provided access to a telephone and must in fact communicate with either a parent, adult relative, friend, or with an organization found on the free legal services list prior to presentation of the voluntary departure form. If the juvenile, of his or her own volition, asks to contact a consular officer, and does in fact make such contact the requirements of this section are satisfied.

(h) *Notice and Request for Disposition.* When a juvenile alien is apprehended, he or she must be given a Notice and Request for Disposition. If the juvenile is under fourteen years of age or unable to understand the notice, the notice shall be read and explained to the juvenile in a language the juvenile understands. In the event a juvenile who has requested a hearing pursuant to the Notice subsequently decides to accept voluntary departure, a new Notice and Request for Disposition shall be given to, and signed by the juvenile.

[53 FR 17450, May 17, 1988]

§ 242.25 Proceedings under section 242A(b) of the Act.

(a) *Definitions.* As used in this section—*Deciding Service officer* means a district director, chief patrol agent, or another immigration officer designated by a district director or chief patrol agent, who is not the same person as the issuing Service officer. *Issuing Service officer* means any Service officer listed in § 242.1(a) as authorized to issue orders to show cause. *Prima facie claim* means a claim that, on its face and consistent with the evidence in the record of proceeding, demonstrates an alien's present statutory eligibility for a specific form of relief from deportation under the Immigration and Nationality Act ("the Act").

(b) *Preliminary consideration and Notice of Intent to issue a Final Administrative Deportation Order; commencement of proceedings—(1) Basis of Service charge.* An issuing Service officer shall cause to be served upon an alien a Notice of Intent to issue a Final Administrative Deportation Order (Notice of Intent, Form I-851), if the officer is satisfied that there is sufficient evidence, based upon questioning of the alien by an immigration officer and upon any other evidence obtained, to support a finding that the individual:

- (i) Is an alien;
- (ii) Has not been lawfully admitted for permanent residence;
- (iii) Has been convicted (as demonstrated by one or more of the sources listed in § 3.41 of this chapter) of an aggravated felony and such conviction has become final;
- (iv) Is deportable under section 241(a)(2)(A)(iii) of the Act; and
- (v) Does not appear statutorily eligible for any relief from deportation under the Act.

(2) *Notice.* (i) Deportation proceedings under section 242A(b) of the Act shall commence upon personal service of the Notice of Intent upon the alien, as prescribed by §§ 103.5a(a)(2) and 103.5a(c)(2) of this chapter. The Notice of Intent shall set for the preliminary determinations and inform the alien of the Service's intention to issue a Final Administrative Deportation Order (Final Administrative Deportation Order, Form I-851A) without a hearing before an Immigration Judge. This Notice shall constitute the charging document. The Notice of Intent shall include allegations of fact and conclusions of law. It shall advise that the alien: has the privilege of being represented by counsel of the alien's choosing, at no expense to the Government, as long as counsel is authorized to practice in deportation proceedings; may inspect the evidence supporting the Notice of Intent; and may rebut the charges within ten (10) calendar days after service of such Notice (or thirteen (13) calendar days if service of the Notice was by mail).

(ii) The Notice of Intent also shall advise the alien that he or she may designate in writing, within ten (10) calendar days of service of the Notice

of Intent (or thirteen (13) calendar days if service is by mail), the country to which he or she chooses to be deported in accordance with section 243 of the Act, in the event that a Final Administrative Deportation Order is issued, and that the Service will honor such designation only to the extent permitted under the terms, limitations, and conditions of section 243 of the Act.

(iii) The Service shall provide the alien with a list of available free legal services programs qualified under part 292a of this chapter and organizations recognized pursuant to part 292 of this chapter, located within the district or sector where the Notice of Intent is issued.

(iv) The Service must either provide the alien with a written translation of the Notice of Intent or explain the contents of the Notice of Intent to the alien in the alien's native language or in a language that the alien understands.

(c) *Alien's response*—(1) *Time for response*. The alien will have ten (10) calendar days from service of the Notice of Intent, or thirteen (13) calendar days if service is by mail, to file a response to the Notice. If the final date for filing such a response falls on a Saturday, Sunday, or legal holiday, the response shall be considered due on the next business day. In the response, the alien may: Designate his or her choice of country for deportation; submit a written response rebutting the allegations supporting the charge and/or requesting the opportunity to review the Government's evidence; and/or request in writing an extension of time for response, stating the specific reasons why such an extension is necessary. Alternatively, the alien may, in writing, choose to accept immediate issuance of a Final Administrative Deportation Order. The deciding Service officer may extend the time for response for good cause shown. A request for extension of time for response will not automatically extend the period for the response. The alien will be permitted to file a response outside the prescribed period only if the deciding Service officer permits it. The alien must send the response to the deciding Service officer

at the address provided in the Notice of Intent.

(2) *Nature of rebuttal or request to review evidence*. (i) If an alien chooses to rebut the allegations contained in the Notice, the alien's written response must indicate which finding(s) are being challenged and should be accompanied by affidavit(s), documentary information, or other specific evidence supporting the challenge. If the alien asserts that he or she is entitled to statutory relief from deportation, the alien also should include with the response a completed and signed application designed for the relief sought.

(ii) If an alien's written response requests the opportunity to review the Government's evidence, the Service shall serve the alien with a copy of the evidence in the record of proceeding upon which the Service is relying to support the charge. The alien may, within ten (10) calendar days following service of the Government's evidence (thirteen (13) calendar days if service is by mail), furnish a final response in accordance with paragraph (c)(1) of this section. If the alien's final response is a rebuttal of the allegations, such a final response should be accompanied by affidavit(s), documentary information, or other specific evidence supporting the challenge. If the alien asserts that he or she is entitled to statutory relief from deportation, the alien also should include with the final response a completed and signed application designed for the relief sought.

(d) *Determination by deciding Service officer*—(1) *No response submitted or concession of deportability*. If the deciding Service officer does not receive a timely response and the evidence in the record of processing establishes deportability by clear, convincing, and unequivocal evidence, or if the alien concedes deportability, then the deciding Service officer shall issue and cause to be served upon the alien a Final Administrative Deportation Order that states the reasons for the deportation decision. The alien may knowingly and voluntarily waive in writing the 30-day waiting period before execution of the final order of deportation provided in paragraph (f) of this section.

(2) *Response submitted*—(i) *Insufficient rebuttal; no prima facie claim or genuine*

issue of material fact: If the alien timely submits a rebuttal to the allegations, but the deciding Service officer finds that deportability is established by clear, convincing, and unequivocal evidence in the record of proceeding, and that the alien has not demonstrated a prima facie claim of eligibility for relief from deportation under the Act, the deciding Service officer shall issue and cause to be served upon the alien a Final Administrative Deportation Order that states the reasons for the deportation decision.

(ii) *Additional evidence required.* (A) If the deciding Service officer finds that the record of proceeding, including the alien's timely rebuttal, raises a genuine issue of material fact regarding the preliminary findings, the deciding Service officer may either obtain additional evidence from any source, including the alien, or cause to be issued an order to show cause to initiate deportation proceedings under section 242(b) of the Act. The deciding Service officer also may obtain additional evidence from any source, including the alien, if the deciding Service officer deems that such additional evidence may aid the officer in the rendering of a decision.

(B) If the deciding Service officer considers additional evidence from a source other than the alien, that evidence shall be made a part of the record of proceeding, and shall be provided to the alien. If the alien elects to submit a response to such additional evidence, such response must be filed with the Service within ten (10) calendar days of service of the additional evidence (or thirteen (13) calendar days if service is by mail). If the deciding Service officer finds, after considering all additional evidence, that deportability is established by clear, convincing, and unequivocal evidence in the record of proceeding, and that the alien does not have a prima facie claim of eligibility for relief from deportation under the Act, the deciding Service officer shall issue and cause to be served upon the alien a Final Administrative Deportation Order that states the reasons for the deportation decision.

(iii) *Statutory eligibility for relief; conversion to proceedings under section 242(b) of the Act.* If the deciding Service

officer finds that the alien is not amenable to deportation under section 242A(b) of the Act or has presented a prima facie claim of statutory eligibility for a specific form of relief from deportation, the deciding Service officer shall terminate the expedited proceedings under section 242A(b) of the Act, and shall, where appropriate, cause to be issued an order to show cause for the purpose of initiating an Immigration Judge proceeding under section 242(b) of the Act.

(3) *Termination of proceedings by deciding Service officer.* Only the deciding Service officer may terminate proceedings under section 242A(b) of the Act, in accordance with this section.

(e) *Proceedings commenced under section 242(b) of the act.* In any proceeding commenced under section 242(b) of the Act, if it appears that the respondent alien is subject to deportation pursuant to section 242A(b) of the Act, the Immigration Judge may, upon the Service's request, terminate the case and, upon such termination, the Service may commence administrative proceedings under section 242A(b) of the Act. However, in the absence of any such request, the Immigration Judge shall complete the pending proceeding commenced under section 242(b) of the Act.

(f) *Executing final deportation order of deciding Service officer—(1) Time of execution.* Upon the issuance of a Final Administrative Deportation Order, the Service shall issue a warrant of deportation in accordance with 8 CFR 243.2; such warrant shall be executed no sooner than 30 calendar days after the date the Final Administrative Deportation Order is issued, unless the alien knowingly, voluntarily and in writing waives the 30-day period. The 72-hour provisions of §243.3(b) of this chapter shall not apply.

(2) *Country to which alien is to be deported.* The deciding Service officer shall designate the country of deportation in the manner prescribed by section 243(a) of the Act.

(g) *Arrest and detention.* At the time of issuance of a Notice of Intent or at any time thereafter and up to the time the alien becomes the subject of a warrant of deportation, the alien may be arrested and taken into custody under

the authority of a warrant of arrest issued by an officer listed in § 242.2(c)(1) of this chapter. Pursuant to section 242(a)(2)(A) of the Act, the deciding Service officer shall not release an alien who has not been lawfully admitted. Pursuant to section 242(a)(2)(B) of the Act, the deciding Service officer may release an alien who has been lawfully admitted if, in accordance with § 242.2(h) of this chapter, the alien demonstrates that he or she is not a threat to the community and is likely to appear at any scheduled hearings. The decision of the deciding Service officer concerning custody or bond shall not be administratively appealable during proceedings initiated under section 242A(b) of the Act and this section.

(h) *Record of proceeding.* The Service shall maintain a record of proceeding for judicial review of the Final Administrative Deportation Order sought by any petition for review. The record of proceeding shall include, but not necessarily be limited to: the charging document (Notice of Intent); the Final Administrative Deportation Order (including any supplemental memorandum of decision); the alien's response, if any; all evidence in support of the charge; and any admissible evidence, briefs, or documents submitted by either party respecting deportability or relief from deportation.

(i) Effective March 3, 1997, the Service will cease issuance of both Form I-851 and Form I-851A. The Service retains the authority to execute at any time Form I-851A that is final before March 3, 1997. The Service will resume the issuance of Form I-851 and Form I-851A after April 1, 1997, pursuant to regulations implementing section 238(b) of the Act, as amended by the Illegal Immigration Reform and Responsibility Act of 1996.

[60 FR 43961, Aug. 24, 1995, as amended at 61 FR 69020, Dec. 31, 1996]

EFFECTIVE DATE NOTE: At 61 FR 69020, Dec. 31, 1996, § 242.25 was amended by adding a new paragraph (i), effective Mar. 3, 1997.

§ 242.26 Deportation of S-5, S-6, and S-7 nonimmigrant.

(a) *Condition of classification.* As a condition of classification and continued stay in classification pursuant to section 101(a)(15)(S) of the Act, non-

immigrants in S classification must have executed Form I-854, Part B, certifying that they have knowingly waived their right to a deportation hearing and right to contest, other than on the basis of an application for withholding of deportation, any deportation action, including detention pending deportation, instituted before lawful permanent resident status is obtained.

(b) *Determination of deportability.* A determination to deport an alien classified pursuant to section 101(a)(15)(S) of the Act shall be made by the district director having jurisdiction over the place where the alien is located.

(1) A determination to deport such an alien shall be based on one or more of the deportation grounds listed in section 241 of the Act based on conduct committed after, or conduct or a condition not disclosed to the Service prior to, the alien's classification as an S nonimmigrant under section 101(a)(15)(S) of the Act, or for a violation of, or failure to adhere to, the particular terms and conditions of status in S nonimmigrant classification.

(c) *Deportation procedures.* (1) A district director who determines to deport an alien witness or informant in S nonimmigrant classification shall notify the Commissioner, the Assistant Attorney General, Criminal Division, and the relevant LEA in writing to that effect. The Assistant Attorney General, Criminal Division, shall concur in or object to that decision. Unless the Assistant Attorney General, Criminal Division, objects within 7 days, he or she shall be deemed to have concurred in the decision. In the event of an objection by the Assistant Attorney General, Criminal Division, the matter will be expeditiously referred to the Deputy Attorney General for a final resolution. In no circumstances shall the alien or the relevant LEA have a right of appeal from any decision to deport.

(2) A district director, who has provided notice as set forth in paragraph (c)(1) of this section and who has been advised by the Commissioner that the Assistant Attorney General, Criminal Division, has not objected, shall issue a warrant of deportation. The alien shall immediately be arrested and taken into custody by the district director

initiating the deportation. An alien classified under the provisions of section 101(a)(15)(S) of the Act who is determined, pursuant to a warrant issued by a district director, to be deportable from the United States shall be deported from the United States to his or her country of nationality or last residence. The LEA who requested the alien's presence in the United States shall ensure departure from the United States and so inform the district director in whose jurisdiction the alien has last resided. The district director, if necessary, shall oversee the alien's departure from the United States and, in any event, shall notify the Commissioner of the alien's departure.

(d) *Withholding of deportation.* An alien classified pursuant to section 101(a)(15)(S) of the Act who applies for withholding of deportation shall have 10 days from the date the warrant of deportation is served upon the alien to file an application for such relief with the district director initiating the deportation order. The procedures contained in 8 CFR 208.2 and 208.16 shall apply to such an alien who applies for withholding of deportation.

[60 FR 44268, Aug. 25, 1995]

PART 243—DEPORTATION OF ALIENS IN THE UNITED STATES

Sec.	
243.1	Final order of deportation.
243.2	Warrant of deportation.
243.3	Expulsion.
243.4	Stay of deportation.
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243.6	Notice to transportation line.
243.7	Special care and attention for aliens.
243.8	Imposition of sanctions.

AUTHORITY: 8 U.S.C. 1103, 1253.

SOURCE: 26 FR 12113, Dec. 19, 1961, unless otherwise noted.

§ 243.1 Final order of deportation.

Except as otherwise required by section 242(c) of the Act for the specific purposes of that section, an order of deportation, including an alternate order of deportation coupled with an order of voluntary departure, made by the special inquiry officer in proceedings under part 242 of this chapter shall become final upon dismissal of an appeal by the Board of Immigration Appeals,

upon waiver of appeal, or upon expiration of the time allotted for an appeal when no appeal is taken; or, if such an order is issued by the Board or approved by the Board upon certification, it shall be final as of the date of the Board's decision.

§ 243.2 Warrant of deportation.

A Form I-205, Warrant of deportation, based upon the final administrative order of deportation in the alien's case shall be issued by a district director. The district director shall exercise the authority contained in section 243 of the Act to determine at whose expense the alien shall be deported and whether his/her mental or physical condition requires personal care and attention en route to his/her destination.

[54 FR 39337, Sept. 26, 1989]

§ 243.3 Expulsion.

(a) *Execution of Order.* Except in the exercise of discretion by the district director, and for such reasons as are set forth in § 212.5(a) of this chapter, once an order of deportation becomes final, an alien shall be taken into custody and the order shall be executed. For the purposes of this part, an order of deportation is final and subject to execution upon the date when any of the following occurs:

(1) A grant of voluntary departure expires;

(2) An immigration judge enters an order of deportation without granting voluntary departure or other relief, and the alien respondent waives his or her right to appeal;

(3) The Board of Immigration Appeals enters an order of deportation on appeal, without granting voluntary departure or other relief; or

(4) A federal district or appellate court affirms an administrative order of deportation in a petition for review or habeas corpus action.

(b) *Service of decision.* In the case of an order entered by any of the authorities enumerated above, the order shall be executed no sooner than 72 hours after service of the decision, regardless of whether the alien is in Service custody, *provided* that such period may be waived on the knowing and voluntary request of the alien. Nothing in this