No. 19-1838

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MARIAN RYAN, in her official capacity as Middlesex County District Attorney; RACHAEL ROLLINS, in her official capacity as Suffolk County District Attorney; COMMITTEE FOR PUBLIC COUNSEL SERVICES; CHELSEA COLLABORATIVE, INC.,
Plaintiffs-Appellees,

v.

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; MATTHEW T. ALBENCE, in his official capacity as the Acting Deputy Director of U.S. Immigration and Customs Enforcement and Senior Official Performing the Duties of the Director; TODD M. LYONS, in his official capacity as Acting Field Office Director of U.S. Immigration and Customs Enforcement, Enforcement and Removal Operations; U.S. DEPARTMENT OF HOMELAND SECURITY; CHAD WOLF, in his official capacity as Acting Secretary of United States Department of Homeland Security,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
No. 19-cv-11003
The Hon. Indira Talwani

APPELLANTS' OPENING BRIEF

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INTRODUCTION

"[T]he formulation of policies pertaining to the entry of aliens and their right to remain here is entrusted exclusively to Congress." *Herrera-Inirio v. I.N.S.*, 208 F.3d 299, 307 (1st Cir. 2000). Exercising that "plenary" and "pervasive" authority, *id.*, Congress has codified in the Immigration and Nationality Act (INA) the Executive Branch's constitutional and inherent authority to investigate, arrest, and detain aliens who are suspected of being, or found to be, unlawfully present in or otherwise removable from the United States to effectuate their removal. *See* 8 U.S.C. §§ 1182, 1225, 1226, 1231, 1357. Among other things, the INA authorizes federal immigration officials to make civil immigration arrests with an administrative warrant, 8 U.S.C. § 1226(a), and without a warrant, 8 U.S.C. § 1357(a); and it explicitly recognizes that the federal government may undertake enforcement actions at courthouses. 8 U.S.C. § 1229(e).

Consistent with that authority and the Executive Branch's "broad" and "undoubted power" over the enforcement of this Nation's immigration laws, *Arizona v. United States*, 567 U.S. 387, 394 (2012), U.S. Immigration and Customs Enforcement (ICE) has long exercised its arrest authority in and around courthouses, which provide safe locations for arresting certain high-priority aliens removable from the United States. For example, in 2014, ICE promulgated a policy providing that ICE officers may exercise prosecutorial discretion to make arrests in

courthouses of aliens who engage in criminal activity, are in gangs, or are national security threats. *See* Enforcement Actions at or Near Courthouses (Mar. 19, 2014), JA197; *see also* ICE Directive 10076.1: Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011), JA199-201; DHS Instruction 002-02-001: Implementation of Section 1367 Information Provisions (Nov. 7, 2013), JA219; DHS Directive 002-02: Implementation of Section 1367 Information Provisions (Nov. 1, 2013), JA235; ICE Policy 10036.1: Interim Guidance Relating to Officer Procedure Following Enactment of VAWA 2005 (Jan. 22, 2007), https://www.ice.gov/doclib/foia/prosecutorial-discretion/vawa2005.pdf.[1]

Most recently, on January 10, 2018, in response to increased non-cooperation by state and local law enforcement concerning immigration enforcement, and motivated with protecting the safety of the public, the targeted alien, and ICE officers, ICE promulgated Directive 11072.1: Civil Immigration Enforcement Inside Courthouses, the policy at issue in this appeal. JA149-51. Consistent with

[1] The government respectfully requests that this court take judicial notice of this document, which provides information "accurately and readily determined from sources whose accuracy cannot be reasonably questioned" and is "not subject to reasonable dispute." Fed. R. Evid. 201(b)(2). Courts routinely take notice of information made publicly available by government entities. *See Ms. S. v. Regional Sch. Unit 72*, 829 F.3d 95, 103 n.4 (1st Cir. 2016); *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998-99 (9th Cir. 2010). That document is now part of the district court's record, *see Ryan et al. v. ICE et al.*, No. 1:19-cv-11003, ECF 65-4, and the similar policy from 2013 is part of the Joint Appendix. *See* DHS Instruction 002-02-001: Implementation of Section 1367 Information Provisions, JA219; DHS Directive 002-02: Implementation of Section 1367 Information Provisions, JA235.

the 2014 policy, ICE instructed its officers to limit courthouse arrests to aliens convicted of crimes, gang members, and national security or public safety threats. JA149. In addition, ICE revised the 2014 policy by providing that ICE officers may arrest two additional categories of aliens in federal and state courthouses: aliens subject to final orders of removal who failed to depart, and aliens who have illegally reentered the country after being removed. *Id.* It also permits ICE to engage in limited arrests of collaterally present aliens in "special circumstances, such as where the individual poses a threat to public safety or interferes with ICE's enforcement actions." *Id.* Otherwise, the prior ICE policies governing courthouse arrests, promulgated in 2007 and 2014, remain in effect. ICE promulgated the Directive in part because of its need to arrest persons in secure spaces in jurisdictions like Massachusetts where local law enforcement no longer cooperate with ICE to securely transfer custody of those removable aliens who have committed crimes for removal proceedings. *Id.*

Notwithstanding Congress' clear recognition that the Department of Homeland Security (DHS) could engage in courthouse enforcement actions under its valid arrest authority, *see* 8 U.S.C. § 1229(e), and the absence of a single statutory or judicial authority prohibiting federal law enforcement from engaging in courthouse arrests, the district court preliminarily enjoined the Directive, holding that the INA incorporated a common-law privilege against *all* civil arrests in

courthouses, regardless of the purpose of the arrest or the authority for conducting the arrest, and for those coming to and going from courthouses on official business. 18-25. The district court reasoned that the now-defunct privilege against civil arrests for the purpose of initiating a private lawsuit extended to cover those actions. Thus, it held that Directive 11072.1 exceeds ICE's statutory arrest authority under 8 U.S.C. §§ 1226, 1229(e), and 1357, and therefore violates the Administrative Procedure Act (APA). A18-25.[2]

That holding was manifestly wrong. There is no common-law privilege to evade federal law enforcement while attending court proceedings. The authorities that the district court cites (A18-21) recognize a much narrower privilege: a privilege against a civil arrest that initiates a private civil suit when a nonresident enters a state solely to attend court on official business. *See infra* Part I.A. Indeed, the district court did not identify a single case in United States history applying that privilege to federal law enforcement. *Id.* Furthermore, long before the INA was enacted, that privilege against civil arrest evolved into a privilege against service of process based on transient jurisdiction while a person is in a jurisdiction solely on court business. *Id.* Thus, because there was no well-established common-law privilege, the district court erred as a matter of law in holding that the INA incorporated one.

[2] In this brief, "A" denotes the Addendum; "JA" denotes the Joint Appendix.

The district court also erred in holding that the INA did not abrogate the common law to the extent that it existed. *See infra* Part I.B. The INA speaks clearly to the issue of immigration arrests. *Id.* It provides a comprehensive arrest-and-removal scheme. *Id.*; *see* 8 U.S.C. § 1226(a), § 1357; 8 C.F.R. § 287.5(c). And it explicitly mandates procedures to be followed when arrests take place "at a courthouse." 8 U.S.C. § 1229(e). A general bar on civil immigration arrests of aliens at liberty at courthouses and going to and from courthouses is thus irreconcilable with the INA's text and structure, and the district court was wrong to conclude otherwise.

The district court also abused its discretion in concluding that equitable factors warranted an injunction. *See infra* Part I.C. The injunction does manifest harm to the federal government's ability to rely on its congressionally authorized arrest authorities to fulfill its statutory mission of enforcing immigration law and removing unlawfully present aliens from the United States. Often, an immigration arrest is necessary to serve the alien with a Notice to Appear before the immigration court and initiate the removal process or effectuate an immigration judge's final order of removal. *See* 8 U.S.C. § 1229; 8 C.F.R. § 236.1(b)(1), § 1003.14. The district court's prohibition on ICE arrests thus impedes the functioning of the immigration system. Against that harm, the district court pointed to Plaintiffs' alleged difficulties in pursuing cases, which are largely brought on by third parties'

fear of being subject to lawful immigration enforcement, and alleged harms to third-party criminal defendants' defense of their cases — harms that are not cognizable, *see East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1239 (9th Cir. 2019), let alone sufficiently weighty to outweigh the federal government's interest in enforcing the law.

Finally, even if an injunction is warranted, the injunction in this case is overbroad. *See* Part II. The district court's injunction bars the implementation of the Directive in Massachusetts except as to aliens already in criminal custody, enjoins the arrest of any individual going to or returning from courts in Massachusetts, and prohibits ICE from effecting arrests in public spaces outside the courthouse so long as an alien is going to or returning from a courthouse. *Id.* It thus goes far beyond anything necessary to remedy the injuries identified by the Plaintiffs in this case. Moreover, the injunction enjoins not just the 2018 Directive, but any courthouse enforcement action undertaken under all prior ICE guidance as well although Plaintiffs do not challenge that guidance. But even were the court to issue a final-judgment remedy under the APA of "sett[ing] aside" the challenged agency action, that would only permit the court to vacate the 2018 Directive, leaving all prior guidance in place. *See* 5 U.S.C. § 706; *see, e.g.*, *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005); *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 757 (D.C. Cir. 1987). And the district court's injunction is not limited to the

specific courthouses in which the Plaintiff District Attorneys (DAs) and organizations operate, instead covering every courthouse in Massachusetts and therefore far exceeding the necessary scope of any remedy. *Id.* Thus, at the very least, this court should substantially narrow the scope of the injunction to remedy the actual harms that Plaintiffs identify.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1346. On June 20, 2019, the district court issued a preliminary injunction. A30. Defendants filed a timely notice of appeal. JA16. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

I. Whether the district court (A) erred as a matter of law in holding that Plaintiffs are likely to prevail on the merits of their claim that the Immigration and Nationality Act (INA) incorporates a common-law privilege against federal immigration arrests in courthouses and (B) abused its discretion in issuing an injunction based on the balance of harms and public interest when the

government is impeded from lawfully enforcing the immigration laws to the full extent provided by Congress.

II. Whether the district court's injunction is overly broad when it provides relief beyond what is necessary to remedy the alleged injuries suffered by the plaintiffs.

STATEMENT OF THE CASE

A. Legal Background

The federal government "has broad, undoubted power over the subject of immigration and the status of aliens." *Arizona*, 567 U.S. at 394; *see* U.S. Const. art. I, § 8, cl. 4 (granting Congress the power to "establish an uniform Rule of Naturalization"). The Executive Branch is tasked with enforcing the United States' immigration laws, including identifying, apprehending, and removing inadmissible and deportable aliens through immigration removal proceedings initiated after arrest. That is done through the issuance of a Notice to Appear (NTA) filed with the immigration court and served on the alien, often through arrest. 8 C.F.R. §§ 1239.1(a), 1003.14, 1003.18. The immigration court then determines the alien's entitlement to remain in the United States, and may make a determination about the propriety of detention pending immigration proceedings as part of that process. *See* 8 U.S.C. § 1229a(c)(1)(A). With certain exceptions, removal proceedings under 8 U.S.C. § 1229a provide the "sole and

exclusive procedure" for determining whether an alien may be removed from the United States. *See id.* § 1229a(a)(3).

The arrest is often a critical component for initiating those removal proceedings before an immigration judge. Congress has provided that "[o]n a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States."[3] 8 U.S.C. § 1226(a). Congress also has provided that "without [a] warrant," a federal officer may "arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any [] law or regulation and is likely to escape before a warrant can be obtained for his arrest." *Id.* § 1357(a)(2). These statutes confer arrest authority that is generally plenary and unqualified.

In addition to these authorities, in 2006, Congress specifically addressed the issue of courthouse arrests, providing that when ICE takes an "enforcement action leading to a removal proceeding" "at a courthouse (or in connection with that appearance of the alien at a courthouse) if the alien is appearing in connection with a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking, or stalking in which the alien has

[3] Congress has transferred immigration enforcement functions from the Attorney General to the Secretary of Homeland Security. 6 U.S.C. § 251; *Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005).

been battered or subject to extreme cruelty or if the alien is described in subparagraph (T) or (U) of section 1101(a)(15) of this title," then "the Notice to Appear" initiating removal proceedings "shall include a statement that the provisions of [8 U.S.C. § 1367]," which govern the disclosure of confidential information, "have been complied with." 8 U.S.C. § 1229(e)(1), (2).

After arrest, ICE, through an initial custody assessment, 8 C.F.R. § 236.1(c)(8), and then an immigration court, through a bond determination at the alien's request, will consider if detention is necessary during immigration proceedings. 8 C.F.R. § 236.1(d)(1). Once removal proceedings have commenced through the service of an NTA, an immigration judge has jurisdiction over the case to determine whether an alien should be removed from the United States, including evaluating their status and any grounds for relief or protection from removal that the aliens may assert. 8 U.S.C. § 1229a(c)(1)(A). An alien may appeal any decision of the immigration court, including a bond decision, to the Board of Immigration Appeals ("BIA"). 8 C.F.R. §§ 1003.38, 236.1(d)(3). An alien also may move to terminate removal proceedings on constitutional, statutory, or regulatory grounds, and may petition for review of certain BIA decisions in the U.S. Courts of Appeals. 8 U.S.C. § 1252(a)(5).

B. Factual Background

ICE policy has long explicitly provided for special handling of courthouse

arrests consistent with § 1229(e), enacted in 2006. ICE Policy 10036.1, promulgated in 2007, provides that, when an enforcement action leading to a removal proceeding is taken against an alien appearing in certain protected locations, including a courthouse, and that appearance was in connection with a specified activity listed in 8 U.S.C. § 1229(e), the completion of a certificate of compliance with U.S.C. § 1367 is required to ensure that the protections intended for these specific types of victims have not been infringed. ICE Policy 10036.1; *see* DHS Instruction 002-02-001: Implementation of Section 1367 Information Provisions (Nov. 7, 2013), JA219; DHS Directive 002-02: Implementation of Section 1367 Information Provisions (Nov. 1, 2013), JA235.

ICE has provided for other guidance limiting arrests of aliens involved in certain legal proceedings. Additionally, ICE Policy 10076.1, promulgated in 2011 and still in effect, provides guidance precluding arrests of aliens "known to be the immediate victim or witness to a crime," involved in "non-frivolous lawsuits regarding civil rights or liberties violations," or engaged in "protected activity related to civil or other rights," including "employment discrimination or housing conditions" or a "non-frivolous dispute with an employer, landlord, or contractor." ICE Policy 10076.1, JA199-200. This guidance remains in effect under the 2018 Directive, so that those aliens ordinarily will not be subject to courthouse arrests.

And in 2014, ICE issued a further policy on courthouse arrests. Enforcement

Actions at or Near Courthouses (Mar. 19, 2014), JA197. In the 2014 policy, ICE explained that arrests in and around courthouses were important to ensure that aliens convicted of crimes, gang members (16 years or older), and national security or public safety risks can be safely apprehended for removal. *Id.* The 2014 policy restricted enforcement actions against "collaterally" present aliens, "such as family members and friends" of the "target alien," and directed that enforcement actions should, "whenever practicable," "take place outside public areas of the courthouse," "be conducted in collaboration with court security and staff," and "utilize the court building's non-public entrances and exits." *Id.*

Massachusetts state courts and law enforcement officials generally cooperated with federal immigration enforcement efforts; however, in 2017, the Supreme Judicial Court of Massachusetts held that State judicial and law-enforcement officers lack authority to transfer detainees to the federal government in civil immigration matters. *Lunn v. Commonwealth*, 477 Mass. 517, 531 (2017); *see also* Mass. Executive Office of the Trial Court, Policy and Procedures Regarding Courthouse Interactions with the Department of Homeland Security (Nov. 8, 2017) ("Trial Court employees shall not hold any individual who would otherwise be entitled to release based solely on a civil immigration detainer or civil immigration warrant."). As a result, many aliens involved in criminal activity, who were previously transferred to ICE custody in secure locations like jails or prisons,

are now released to the streets of Massachusetts, often immediately following state proceedings. ICE, FAQ on Sensitive Locations and Courthouse Arrests, JA213-17. Accordingly, Massachusetts law now leaves courthouses as one of the few places where "safety risks for the arresting officers, the arrestee, and members of the community are substantially diminished." JA217.

The Massachusetts Executive Office of the Trial Court promulgated a policy governing courthouse interactions with DHS on November 13, 2017. Mass. Executive Office of the Trial Court, Policy and Procedures Regarding Courthouse Interactions with the Department of Homeland Security, JA202-05. Under that policy, the Executive Office recognizes that "DHS officials are permitted to act in the performance of their official duties in Massachusetts courthouses." JA204. It provides that DHS officials must inform courthouse security personnel of their presence and the proposed enforcement action that they plan to undertake. *Id.* It instructs court officers to "neither impede DHS" in arrests nor "assist in the physical act of" taking a person into custody. JA205. It also provides for DHS to take custody of persons who are subject to release from court custody in holding cells once that person has been outprocessed and permits the transport of the arrested alien through the prisoner transport entrance. JA204-05. And the Executive Office of the Trial Court in consultation with ICE has established a process by which detainees in ICE custody can be taken to court appearances through the means of a writ of habeas

corpus. Executive Office Transmittal 19-3, Amended Writ of Habeas Corpus for Persons in ICE Custody (Jan. 15, 2019), JA206. Thus, Massachusetts courts prior to this suit already had worked out a policy that limits disruption while permitting ICE to exercise its lawful authority.

In 2018, ICE promulgated Directive 11072.1 (the Directive), which revised the policy "regarding civil immigration enforcement actions" in courthouses in response to localities' increasing unwillingness to cooperate with ICE in the secure transfer of criminal aliens to immigration custody. JA149. The Directive indicates that courthouse arrests may be necessary when local jurisdictions decline "to cooperate with ICE in the transfer of custody of aliens from" secure locations like "their prisons and jails" because, given that persons who enter courthouses are typically screened for weapons, "immigration enforcement actions taken inside courthouses can reduce safety risks to the public, targeted alien(s), and ICE officers and agents." *Id.*

The Directive substantively differs from the 2014 policy in only three main respects. First, it focuses solely on civil immigration enforcement actions "inside" courthouses rather than those actions taken "at or near" courthouses. JA149, 197. Second, it adds two categories of targeted aliens: "aliens who have re-entered the country illegally after being removed" (a federal felony under 8 U.S.C. § 1326) and "aliens who have been ordered removed from the United States but have failed to

depart." JA149. Third, it articulates "exceptional circumstances" in which ICE may arrest non-target aliens, such as "where the individual poses a threat to public safety or interferes with ICE's enforcement actions." *Id.* As to witnesses and victims of crimes (including domestic violence), ICE policy and 8 U.S.C. § 1367 set additional limitations unchanged for nearly a decade. JA199-201. The Directive instructs ICE officers "generally [to] avoid enforcement actions in courthouses," and proscribes enforcement in areas "that are dedicated to non-criminal (e.g. family court, small claims court) proceedings." JA150. It also does not change the prior 2007 and 2011 policies protecting victims of and witnesses to certain crimes; rather, it merely sets forth other circumstances when courthouse arrests are permitted.

Under the Directive, when an enforcement action inside a courthouse is "operationally necessary," — including when cooperative efforts such as an orderly transfer from a secure location have been prevented — it may be conducted with the approval of a high-level officer. JA150. The Directive "has provisions that attempt to make enforcement actions within courthouses orderly, safe, and nondisruptive." *Matter of C. Doe*, No. SJ-2018-119 (Mass. Sup. Jud. Ct. Sept. 18, 2018), JA139. The Directive mandates that, "[w]hen practicable," ICE officers "conduct enforcement actions discreetly to minimize their impact on court proceedings." JA149. In line with prior policy, the Directive prioritizes non-public arrests when possible. JA150. It directs ICE officers and agents to "exercise sound

judgment," "make substantial efforts to avoid unnecessarily alarming the public," and "make every effort to limit their time at courthouses while conducting civil immigration enforcement actions." JA150. Thus, the Directive balances ICE's legitimate interests in enforcing immigration law and protecting the safety of its officers, the arrestee, and members of the public with the goal of minimizing interference with judicial proceedings.

C. Prior Proceedings

On April 29, 2019, Plaintiffs the Middlesex County and Suffolk County DAs; the Committee for Public Counsel Services (CPCS), Massachusetts' public defender agency; and the Chelsea Collaborative (the Collaborative) filed their complaint and motion for preliminary injunction. JA17-92. The complaint asserts four claims: an APA claim that the Directive is contrary to statute, a standalone claim that the Directive violates the common-law privilege against civil courthouse arrests, a claim that the Directive violates the Tenth Amendment, and a claim that the Directive violates the right of access to the courts. JA38-62. Plaintiffs sought preliminary injunctive relief only on their claim under the APA that the 2018 Directive is "not in accordance with" ICE's statutory authority under the INA. JA73. According to Plaintiffs, ICE's statutory arrest authority "inherently contains within it the common-law limitation that parties, witnesses, and others attending court on official business are privileged from civil arrest." JA39. Plaintiffs thus sought to enjoin ICE

"from implementing [the] Directive, and from arresting individuals attending court on official business, during the pendency of this suit." JA91.

On June 20, 2019, the district court granted Plaintiffs' motion for a preliminary injunction. On the merits, the court held that Plaintiffs were likely to succeed on their APA claim that the courthouse arrest policy exceeds ICE's "statutory jurisdiction" or "authority." A21 (quoting 5 U.S.C. § 706 (2)(C)); *see also* A21-25. The court first concluded that the common law privilege against courthouse arrest applied in the context of civil immigration enforcement. The court observed that, "[i]n England, for many centuries prior to the founding of the United States, civil litigants commenced their suits by having a civil defendant arrested" by way of a "writ of *capias ad respondendum* direct[ing] the sheriff to secure the defendant's appearance by taking him into custody." JA18, 19. But, "'for the purposes of justice' those attending court proceedings were privileged from being arrested on civil process" while attending court because "permitting arrests at courthouses of those attending court on other matters could chill attendance at those other proceedings." JA19 (quoting *The King v. Holy Trinity in Wareham*, 99 Eng. Rep. 531 (1782)). According to the district court, "[t]he United States imported that procedure of civil arrest and that common law privilege against civil arrest at courthouses into its judicial system." *Id.* (citing *Stewart v. Ramsay*, 242 U.S. 128, 130 (1916)). The court acknowledged that in the United States "[t]he writ of *capias ad respondendum*

eventually gave way to personal service of summons or other form of notice." A20 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Nevertheless, the court maintained that "[a]s the preferred means for obtaining a civil defendant's presence in a lawsuit changed from a civil arrest to a summons and civil process, state and federal courts recognized the need for [the common law] privilege's continued applicability." *Id.* Hence the district court concluded that the "privilege against civil arrest remained present at common law when Congress enacted the provisions at issue here." A20-21. However, the district court held that the privilege did not apply to those who were not in "voluntary attendance," including "individuals who are brought to the courthouse in federal or state custody." JA21 n.5.

Next, the district court held that the INA incorporated and did not displace the privilege, and so the Directive conflicted with the INA. JA21-25. It observed that "[s]tatutes which invade the common law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident," or where "the statute speaks directly to the question addressed by the common law." JA21 (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993) (first quote), and *Pasquantino v. United States*, 544 U.S. 349, 359 (2005) (second quote)). Relying on these background principles, the district court held that "[t]he INA, as passed in 1952, did not 'speak[] directly' to the

common law privilege against civil arrest at the courthouse, nor did any subsequent amendments to the statute." A22 (alteration in original). The court concluded that neither § 1226(a) (which addresses arrests premised on administrative warrants) nor § 1357(a) (which addresses warrantless arrests) "speaks to courthouse arrests in any way" or "provide[s] any basis for finding that Congress abrogated the common law privilege against civil arrests in courthouses." *Id.* The court recognized 8 U.S.C. § 1229(e), which provides for certain actions that ICE must take when seeking to arrest an alien at "a courthouse," A23, but concluded that it shed no light on whether Congress meant to displace the common law privilege because the later "enactment of [section 1229(e)] has little bearing on the court's interpretation of Congressional intent regarding courthouse arrests in 1952, and certainly does not amount to a clearly stated intent to abrogate the common law privilege." A24. And the district court rejected any suggestion that because "ICE has long exercised its arrest authority at and around courthouses" and Congress was aware that courthouse "arrests were occurring" when it enacted the disclosure provisions in 2006, Congress meant to abrogate the common law privilege. A24-25.

The court also concluded that the balance of harms supported an injunction. A25-29. As to irreparable harm, it credited Plaintiffs' allegations that they would suffer financial costs because of third parties' lack of cooperation with them for fear of being subject to immigration enforcement. A26-27. It also accepted Plaintiffs'

assertions that the CPCS expends resources locating arrested criminal defendants in ICE detention facilities and that "state criminal and civil cases may well go unprosecuted for lack of victim or witness participation." *Id.* And it noted as a harm that "[c]riminal defendants will be unable to vindicate their rights if they are taken into ICE custody prior to appearing in court or if witnesses in their defense are too fearful to visit a courthouse." A27. The district court thus concluded that "[n]one of these harms can be remedied after the conclusion of this litigation." *Id.* As to the balance of harms and public interest, the district court acknowledged that the two merge when the government is a party. A27-28. However, while it "credit[ed] Defendants' safety concerns, as well as the public's need to be protected from dangerous criminal aliens," it believed that ICE's ability to pursue criminal arrest for criminal aliens ameliorated these harms such that the balance of harms and public interest weighed in favor of the injunction. A29.

Thus, the court enjoined the Directive "in Massachusetts" and enjoined ICE from "civilly arresting parties, witnesses, and others attending Massachusetts courthouses on official business while they are going to, attending, or leaving the courthouse." A31. It included two exceptions: it did "not enjoin the civil arrests of individuals who are brought to the courthouse in state or federal custody, and does not enjoin criminal arrests." *Id.*

This appeal followed.

SUMMARY OF THE ARGUMENT

This Court should vacate the preliminary injunction.

First, the district court erred as a matter of law in holding that the INA incorporated a common-law privilege against federal, civil immigration enforcement for those coming to and returning from courthouses. That unprecedented holding erroneously relied on a privilege against civil arrests that is a defunct artifact from when civil arrest initiated suit between *private parties*, which has never been applied to federal immigration enforcement. And even if that privilege did exist, the district court erred in holding that the INA did not displace it by suggesting that the INA does not speak directly to ICE's arrest authority. The INA provides broadly for arrests with specific, enumerated limitations, of which the location of a courthouse is not one. 8 U.S.C. §§ 1226(a), 1357. Congress specifically recognized courthouse arrests in a provision dictating what ICE must do with information collected in certain enforcement actions taken "at a courthouse." 8 U.S.C. § 1229(e). The district court's holding that the INA incorporates, and does not abrogate, the purported privilege is thus error.

Second, the district court erred in holding that equitable factors supported the injunction. The district court credited the DAs' and organizations' allegations of downstream injuries from third parties' fear of courthouse arrests. It also credited their alleged monetary harms relating to ICE's lawful detention of aliens and the

harms to nonparty criminal defendants in defending their cases. But those injuries are insufficient to support irreparable harm to the *Plaintiffs*, and, in any event, cannot outweigh the harm to the public and the government of blocking ICE's lawful enforcement of the immigration laws and removal from the community of criminal aliens and other aliens of special concern.

Third, the district court issued an overbroad injunction. The injunction not only blocks the Directive throughout Massachusetts, but also enjoins all arrests, regardless of whether effectuated pursuant to the Directive, including those that comport with prior ICE policies not subject to the APA claim. In an APA suit, the proper remedy is to set aside the challenged policy, and issuing a prohibitory injunction is not permitted. The injunction far exceeds any remedy permissible even on final adjudication of the merits — where the court could at most vacate the policy challenged in this suit. And the injunction is not limited to the courthouses in which Plaintiffs practice, thereby providing broader relief than necessary to remedy Plaintiffs' alleged harms. Therefore, at the least, this Court should narrow the injunction to enforcement of the 2018 Directive against aliens at liberty in those courthouses in which Plaintiffs practice and with whom Plaintiffs have a bona fide relationship, and not reach enforcement activities outside of courthouses.

STANDARD OF REVIEW

This Court reviews a grant of a preliminary injunction for abuse of discretion; however, if that "exercise of discretion is premised on an erroneous legal principle," this Court "review[s] that legal error *de novo*." *United States v. Kayser-Roth Corp.*, 272 F.3d 89, 100 (1st Cir. 2001).

ARGUMENT

This Court should vacate the injunction. There is no common-law privilege against federal immigration enforcement in or around courthouses; to the extent that one is erroneously viewed to have existed, the INA abrogated it; equitable factors weigh against an injunction of ICE's lawful arrest authority; and the injunction is overbroad in any event.

I. The District Court Erred in Granting an Injunction, as There Is No Common-Law Privilege Against Immigration Enforcement Incorporated into Federal Law and Equitable Factors Weigh in Favor of the Government.

A. The District Court Erred as a Matter of Law in Holding that There Exists a Common-Law Privilege Against Federal Immigration Enforcement for Those Coming to and Returning from Courthouses that the INA Did Not Abrogate.

The district court erred as a matter of law in holding that (i) there exists a common-law privilege against federal immigration enforcement against those who are coming to or returning from courthouses and (ii) the INA does not abrogate such a privilege.

i. There Is No Common-Law Privilege Against Federal Immigration Enforcement in and around Courthouses.

The district court recognized an overbroad privilege that finds no support in this Court's or Supreme Court precedent: a privilege against *all* civil arrests regardless of jurisdiction or the arresting authority. A18-21. That was wrong.

a. Prior Courts Recognized a Long-Obsolete Common-Law Privilege Against Private Civil Arrest Based on Transient Jurisdiction While Traveling to and from Court, Which Evolved into a Privilege Against Service of Process.

The common-law privilege that the district court recognized is far broader than any privilege previously recognized by any court, and certainly any that was "so well established" at the time the INA was codified in 1952. *See United States v. Craft*, 535 U.S. 274, 288 (2002) (holding that, to conclude that Congress meant to incorporate a common-law rule, that rule must have been "so well established" that it can be "assume[d]" that Congress considered it). The Supreme Court's cases recognize a much narrower privilege: the immunity from *service of process* in a private civil suit based on transient jurisdiction when a person enters a jurisdiction solely to attend a court proceeding as a witness or party. *See Lamb v. Schmitt*, 285 U.S. 222, 225 (1932) (service on an Illinois resident when he was in the Northern District of Mississippi "in attendance on the court"); *Page Co. v. MacDonald*, 261 U.S. 446, 446-47 (1923) (service on a Canadian resident who was in Massachusetts "in attendance before a special master appointed by the superior court"); *Stewart v.*

Ramsay, 242 U.S. 128, 129 (1916) (service on a Colorado resident when in the Northern District of Illinois solely as a witness in a case). As the Supreme Court made clear in *Stewart*, "[t]he true rule, well founded in reason and sustained by the weight of authority, is that suitors, as well as witnesses, *coming from another state or jurisdiction*, are exempt from the *service of civil process* while in attendance upon court, and during a reasonable time in coming and going." *Stewart*, 242 U.S. at 129 (emphasis added); *see, e.g.*, *United States v. Hefti*, 879 F.2d 311, 316 (8th Cir. 1989) ("Stewart ... makes plain that exemption from process is accorded only to non-residents not normally subject to suit in the jurisdiction.").

In the United States, the process-immunity privilege was an extension of the principle recognized in the Supreme Court's decision in *Pennoyer v. Neff*, 95 U.S. 714 (1877), that a state court can constitutionally assert personal jurisdiction over a defendant only if he voluntarily appears in the state court or is served with process while physically present in the forum state. *Id.* at 727, 733. Because physical presence was historically the key to state-court jurisdiction, potential defendants were incentivized not to attend court proceedings in states in which potential plaintiffs might seek to serve them with civil process. To negate this disincentive, courts accorded a privilege to litigants and witnesses who entered a jurisdiction solely to attend a court proceeding. *E.g.*, *Larned v. Griffin*, 12 F. 590, 590 (D. Mass. 1882) (according privilege "from arrest on civil process" to Illinois resident who

entered Massachusetts solely to take a deposition).

The Supreme Court disavowed the physical-presence requirement in *International Shoe Co. v. State of Washington*, holding that "due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it." 326 U.S. 310, 316 (1945). And following *International Shoe Co.*, states began to enact long-arm statutes, which extended state-court jurisdiction to (or near) the due-process limits that *International Shoe Co.* had recognized. *See* Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 493-96 (2004). Once long-arm statutes proliferated, potential defendants could not necessarily avoid civil process by remaining outside a forum state. Any privilege against civil arrest was thus superseded by the process-immunity privilege long before the codification of the current immigration scheme. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 319 (2012) (describing the canon of *cessante ratione legis cessat lex ipsa* that the common law ceases to apply when a change in law means that the reason for the rule no longer exists). Indeed, since the dawn of long-arm jurisdiction, the Supreme Court's cases have not mentioned the common-law privilege.

District courts have since explained that when an out-of-state defendant is subject to civil process under a forum state's long-arm statute, the privilege does

not apply. In *In re Arthur Treacher's Franchise Litigation*, for instance, the court declined to award the privilege to an out-of-state defendant, even though he had traveled to the forum state solely to testify in an unrelated proceeding. 92 F.R.D. 398, 405 (E.D. Pa. 1981). Because the defendant could have been served in his home state under the forum state's long-arm statute, he was not entitled to the privilege. The court reasoned that "it makes little sense to grant immunity to a person who can be served in his home jurisdiction under the forum's long-arm statute." *Id.* (quoting 4A Wright & Miller, *Federal Practice and Procedure: Civil* § 1076 (1969)). Likewise, in *Pavlo v. James*, the court similarly explained that "the reason for the immunity — encouraging voluntary appearances — disappears if a defendant is otherwise subject to the extra-territorial reach of [the forum state's long-arm statute]." 437 F. Supp. 125, 127 (S.D.N.Y. 1977). And in *United States v. Green*, the court held that the privilege was unavailable to out-of-state defendants who "could have been validly served with the subpoenas in question anywhere in the United States." 305 F. Supp. 125, 128 (S.D.N.Y. 1969). The *Green* defendants were not entitled to the privilege because "there [was] no jurisdiction in which [they] could have avoided service of process." *Id.*

Under this law explaining the meaning and scope of the common law privilege, and assuming for purpose of argument that the privilege retains some vitality, it cannot apply here, where there is "no jurisdiction in which [aliens] could

have avoided service of process." *Green*, 305 F. Supp. at 128. The federal immigration scheme is a "comprehensive and unified system" maintained by a "single sovereign," "vested solely in the Federal Government." *Arizona*, 567 U.S. at 407, 409-10. Because the federal government has the sole authority over immigration, it has regulatory authority over all aliens within the United States, regardless of where they may be. Accordingly, aliens subject to immigration enforcement may be arrested *anywhere* in the country. *See* 8 U.S.C. § 1226(a) (providing for arrests "[o]n a warrant" without jurisdictional limitation), § 1357 (providing for warrantless arrests without jurisdictional limitation); 8 C.F.R. § 287.5(c) (similar). Once ICE arrests an alien and initiates their removal proceedings through a Notice to Appear, those proceedings may occur anywhere in the country, such that an out-of-state alien does not "giv[e] up the 'safety' of one jurisdiction" when he attends a Massachusetts court proceeding. *Green*, 305 F. Supp. at 128; *see* 8 C.F.R. § 1003.14(a). Thus, "it makes little sense to grant immunity," because the person "can be served in his home jurisdiction," or anywhere in the country. *In re Arthur Treacher's Franchise Litig.*, 92 F.R.D. at 405. Because the privilege is not needed "to shield an individual from service of process to encourage his or her travel to the forum state," it "should not be enlarged beyond the reason upon which it is founded." *N. Light Tech., Inc. v. N. Lights Club*, 236 F.3d 57, 62 (1st Cir. 2001); *see id.* (rejecting, "[i]n lieu of a specific request for

immunity" from process by a specific individual, a request "to fashion a broad, per se" rule of immunity). That purpose is to "fill[] the gap only where it needs to be filled, that is, in cases where a district court wishes to shield an individual from service of process *to encourage his or her travel to the forum state*." *Id.* (emphasis added).

b. The Privilege Against Civil Arrest Never Applied against the Federal Government or Protected Persons Seeking to Evade Law Enforcement.

As the authorities above show, the privilege against civil arrest applied in *private* suits, not enforcement or arrest actions brought by the federal government.

That distinction rests on solid authority. Supreme Court case law makes clear that the government vindicates public interests that outweigh any private interest that a person has in avoiding service. When a person is traveling to another state for court and is arrested by the federal government, he cannot complain of "a violation of the rule of comity" when the arrest is from "the courts or the sovereignty which is [the] common superior." *Morse v. United States*, 267 U.S. 80, 82 (1925). The Supreme Court has time and again recognized the public interest in law enforcement as outweighing one's objections to arrest — even allowing criminal cases to go forward when a person is brought to a jurisdiction through kidnapping: "The law will not permit a person to be kidnapped and decoyed within the jurisdiction for the purpose of being compelled to answer to a mere private

claim, but in criminal cases the interests of the public override that which is, after all, a mere privilege from arrest." *Ex Parte Johnson*, 167 U.S. 120, 126 (1897). That rule "rest[s] on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized [sic] of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will." *Frisbie v. Collins*, 342 U.S. 519, 522 (1952). Aliens receive constitutionally adequate process through their removal proceedings. Immigration judges generally evaluate whether an alien should be subject to detention or released on bond and they adjudicate aliens' substantive rights to remain in the United States. 8 U.S.C. § 1229a(c)(1)(A); 8 C.F.R. § 236.1(d)(1). Merits decisions may be appealed to the BIA and ultimately a U.S. Court of Appeals. 8 C.F.R. § 1003.38; 8 U.S.C. § 1252(a)(5).

And "the public interest in apprehending" a person for violating immigration laws, like the interest in prosecution, "outweighs the public interests ... in encouraging vindication of private rights and in preventing the interruption of judicial proceedings." *United States v. Conley*, 80 F. Supp. 700, 701-02 (D. Mass. 1948). Indeed, the courthouse-arrest privilege is limited if it impinges the "due administration of justice." *Lamb*, 285 U.S. at 227.

Even in the federal system, a court's authority over an alien under its jurisdiction "and detention of a removable alien pursuant to the INA are separate functions that serve separate purposes and are performed by different authorities." *United States v. Vasquez-Benitez*, 919 F.3d 546, 552 (D.C. Cir. 2019); *see United States v. Lett*, 944 F.3d 467 (2d Cir. 2019) (same). When ICE detains an alien for the purpose of removal, it thus "does not infringe upon the judiciary's role in criminal proceedings." *Vasquez-Benitez*, 919 F.3d at 552. The courts cannot "order the Executive Branch to choose between criminal prosecution or removal." *Lett*, 944 F.3d at 471. That reasoning applies to all instances of immigration detention for purposes of removal and to all types of judicial proceedings, including those of state courts. *Vasquez-Benitez*, 919 F.3d at 552; *United States v. Veloz-Alonso*, 90 F.3d 266, 270 (6th Cir. 2018). And it is well established that state courts must follow federal law even when it conflicts with state policy. *See generally FERC v. Mississippi*, 456 U.S. 742 (1982); *Testa v. Katt*, 330 U.S. 386 (1947); *Mondou v. New York*, 223 U.S. 1 (1912); *Claflin v. Houseman*, 93 U.S. 130 (1876).

c. Because No Federal Common-Law Privilege to Evade Federal Law Enforcement Existed when Congress Enacted the INA, the District Court Erred in Determining that the INA Recognized That Privilege.

Because, as the authorities above show, there was no clearly established privilege, the district court erred in holding that the INA incorporated it.

For a court to hold that Congress incorporated a common-law principle, the

rule must have been so well established that a court may assume that Congress considered the rule when legislating. *Craft*, 535 U.S. at 288. The Supreme Court has rejected incorporation arguments when the "traditional rationales" for the common law rule "d[id] not plainly suggest that it swept so broadly" as to cover a federal statute. *Pasquantino*, 544 U.S. at 360. Moreover, a common law rule cannot restrict the federal government's enforcement of a law when no case at the time of the statute's enactment "held or clearly implied" that the rule "barred the United States" from enforcing that law. *Id.* Such is the case when the rule never applied to a "domestic sovereign acting pursuant to" statutory authority. *Id.* at 363.

As the authorities above show, by the time that Congress established a comprehensive immigration-arrest statutory scheme, any privilege against extra-jurisdictional civil arrest was a historical artifact. The Supreme Court in *Erie Railroad Co. v. Tompkins* years prior had disclaimed the creation of federal common law. 304 U.S. 64, 78 (1938) ("There is no federal general common law."). The arrest statutes cannot have codified the purported privilege, given that such a privilege had never been formally recognized by the Supreme Court, evidently had been applied in federal court only to bar a finding of transient jurisdiction in private litigation, apparently never had been applied to limit federal executive-branch law enforcement, and had long since been replaced with a privilege against service of process. *See, e.g.*, *Pasquantino*, 544 U.S. at 366 (rejecting importation of a common-

law English rule into a statute when "the early English cases rest on a far different foundation from that on which the … rule came to rest").

The district court erred in holding otherwise. It construed the courthouse-arrest privilege broadly by relying on now-defunct English common law and general policy statements rather than evaluating the specific contours of the privilege and applied it to a new context. A18-21. The court relied extensively on dicta in a case involving the Constitution's Speech and Debate Clause, *Williamson v. United States*, 207 U.S. 425 (1908), which could not be presumed to inform Congress' legislation as it involves an enumerated constitutional provision, and failed to even acknowledge this Court's holding in *Northern Light Technology* recognizing the privilege's limits. A19-20. Hence, while the district court correctly recognized that the "writ of *capias ad respondendum* eventually gave way to personal service of summons or other form of notice," it declared the privilege "so fundamental" that it could not have "disappeared simply with the passage of time." A20. But a court cannot hold that Congress legislated with reference to such a generalized and inapposite common-law rule. *See, e.g.*, *Pasquantino*, 544 U.S. at 360.

d. A State Common-Law Privilege Cannot Rewrite Federal Law.

Finally, to the extent that the district court relied on one Massachusetts case, A20 (citing *Diamond v. Earle*, 217 Mass. 499, 501 (1914)), to suggest such a

privilege existed, it erred. "Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 312 (1981). Hence, to the extent any privilege continues to exist at common law, it can only derive from state common-law. *See City of Milwaukee*, 451 U.S. at 312. But under the Supremacy Clause, "federal courts may not use state common law to re-write a federal statute." *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986) (citing *Workers Union of America v. Lincoln Mills of Ala.*, 353 U.S. 448, 456-57 (1957)). Even when state law "makes a different choice" in its law, that "by no means dictates" interpretation of a federal statute. *Craft*, 535 U.S. at 288. In "answering" a "federal question," a court is "in no way bound by state courts' answers to similar questions involving state law." *Id.* Indeed, the "Supremacy Clause … provides the underpinning for the Federal Government's right to sweep aside state-created exemptions" through the enactment of federal law. *United States v. Rodgers*, 461 U.S. 677, 701 (1983).[4]

Thus, the district court erred in imposing a novel and heretofore-unrecognized restriction on the federal government's arrest power.

[4] Nevertheless, like the federal cases, the one state case that the district court cites, *Diamond v. Earle*, 217 Mass. 499 (1914), involves an arrest of a nonresident attending court and thus does not depart from the federal civil-arrest rule. *See* A20 (quoting *Diamond*, 217 Mass. at 501).

ii. In the Alternative, Even if a Common-Law Privilege Existed, the District Court Erred in Holding that the INA Fails to Displace It.

Even if a federal-common-law privilege against civil arrest existed in the unprecedented, broad form that the district court recognized, the district court erred in holding that the INA incorporated it. A21-25. The federal statutory immigration scheme comprehensively speaks to how Congress intended the federal government to enforce federal immigration law, thus supplanting any prior federal common law on the issue.

"The enactment of a federal rule in an area of national concern ... is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress." *City of Milwaukee*, 451 U.S. at 312. Courts must "start with the assumption that it is for Congress, not the federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *Id.* "Courts do not, of course, have free rein to impose rules ... as a matter of policy" while interpreting a statute. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). If a "common-law rule was not so well established" that it "must [be] assume[d] that Congress considered the impact of its enactment" on that rule, it is "not sufficient to overcome the broad statutory language Congress did enact." *Craft*, 535 U.S. at 288.

In determining whether a statutory scheme displaces federal common law, courts do not examine a single statute in isolation, but rather consider the entire

statutory scheme. *See, e.g.*, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011). As the Supreme Court has explained, "'a specific policy embodied in a later federal statute should control ... construction of the [earlier] statute, even though it ha[s] not been expressly amended.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998)). If federal common law applies, the "question" in determining whether Congress meant to displace the common law is "whether the legislative scheme spoke directly to a question." *Milwaukee*, 451 U.S. at 315-17 (internal quotation marks omitted); *see United States v. Texas*, 507 U.S. 529, 534 (1993) (similar). "This interpretive presumption is not ... one that entails a requirement of clear statement, to the effect that Congress must state precisely the intention to overcome the presumption's application to a given statutory scheme." *Astoria*, 501 U.S. at 108; *see* SCALIA & GARNER, READING LAW 318-19 (an alteration of the common law "need not be express, nor should its clear implication be distorted"). No "clear and manifest congressional purpose" to displace federal common law is required. *Am. Elec. Power Co.*, 564 U.S. at 423.

The statutory scheme shows that Congress spoke to the issue of immigration arrests, thus displacing any federal common law and preempting state common law. Federal immigration law is a "comprehensive and unified system" maintained by a "single sovereign." *Arizona*, 567 U.S. at 401. As the Supreme Court has stressed,

"[t]he federal statutory structure instructs when it is appropriate to arrest an alien during the removal process." *Id.* at 407. "'The authority to control immigration — to admit or exclude aliens — is vested solely in the Federal Government.'" *Id.* at 409-10 (quoting *Truax v. Raich*, 239 U.S. 33, 42 (1915)). Any State attempt to alter this comprehensive removal scheme "creates an obstacle to the full purposes and objectives of Congress" and is thus "preempted by federal law." *Id.* at 411. Congress has occupied the field of federal immigration arrest authority. Plaintiffs cannot rest on state common law; nor could state courts prohibit the federal government from acting. *In re Tarble*, 80 U.S. 397 (1871); *M'Culloch v. Maryland*, 17 U.S. 316, 436 (1819).

Because the federal government has the sole authority over immigration, it has regulatory authority over all aliens within the United States. *Cf. Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001) ("[T]he relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law."). Congress thus has the power to create a system that permits arrests of aliens notwithstanding the status of federal or state court proceedings. *See Herrera-Inirio*, 208 F.3d at 307-08 ("[I]n areas in which plenary federal power exists, 'the Supremacy Clause permits no other result,' notwithstanding that Congress may enact laws that 'curtail or prohibit the States' prerogatives to make legislative

choices respecting subjects the States may consider important.'") (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981)); *cf. Vasquez-Benitez*, 919 F.3d at 548 (ICE may arrest alien even while criminal proceedings are pending and after a judge orders release on bond).

Congress has done just that. The INA's comprehensive statutory scheme shows that Congress has spoken completely to ICE's arrest authority and provided no limitations on courthouse arrests. ICE may arrest all aliens except aliens who are in state criminal custody *serving a criminal sentence*. *See* 8 U.S.C. § 1231(a)(4). Under 8 U.S.C. § 1226(a), "on a warrant issued" by DHS attesting to an alien's removability, "an alien may be arrested and detained" during the pendency of removal proceedings, and the Secretary's "discretionary judgment regarding the application of this section shall not be subject to review." *Id.* § 1226(a). An immigration judge ultimately rules on whether continued detention or release on bond is warranted. 8 C.F.R. § 236.1(d)(1). Under 8 U.S.C. § 1226(c), Congress has dictated that certain aliens "shall" be detained pending the completion of the removal process. Under 8 U.S.C. § 1231(a)(2), DHS "shall detain the alien" during the removal period, and certain aliens who are a "risk to the community or unlikely to comply with the order of removal … may be detained beyond the removal period." *Id*. § 1231(a)(6).

Congress was explicit when it delineated limitations on DHS's warrantless

arrest authority. Under 8 U.S.C. § 1357(a)(2), Congress gave immigration officers broad authority "to arrest any alien in the United States" without a warrant if they "have reason to believe that the alien so arrested is in the United States in violation" of "any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens" and "is likely to escape before a warrant can be obtained for his arrest." Congress provided even broader arrest authority within a "reasonable distance from any external boundary of the United States" to "board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance or vehicle." *Id.* § 1357(a)(3). When Congress wanted to restrict immigration officers' powers, it did so explicitly, authorizing "access to private lands" within "twenty-five miles" of the border, but limiting access to "dwellings" and restricting warrantless entry to "the premises of a farm or other outdoor agricultural operation." *Id.* § 1357(a)(3), (e). These provisions show that Congress knew how to limit DHS's arrest authority and made conscious — but limited — choices about when, where, and how to do so, and, by negative implication, did not preclude courthouse arrests. *See generally Russello v. United States*, 464 U.S. 16, 23 (1983). Because Congress specifically recognized DHS's ability to conduct courthouse arrests in a provision simply providing conditions on that action, delineated DHS's immigration-arrest authority, and authorized arrests by warrant without limitation, any federal-common-law privilege

from arrest, even if it once existed, was overridden by the congressional scheme. *See, e.g.*, *Am. Elec. Power Co.*, 564 U.S. at 424.

The relevant statutes set only one limitation on DHS's broad detention authority: the INA, mindful of "cooperative federalism" concerns, limits DHS's authority to take into custody an alien who is currently serving a criminal sentence, requiring DHS to await the completion of the alien's criminal imprisonment subject to certain exceptions laid out in the statute. *Id*. § 1226(c); *see id.* § 1231. Congress has authorized DHS to detain removable aliens whenever they are released from state imprisonment "without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense." *Id*. § 1226(c). When DHS arrests an alien on a warrant, the statute imposes no limitations on that authority. *Id.* § 1226(a).

The INA also specifically recognizes the possibility of courthouse enforcement actions in a provision on the disclosure of information. That provision describes what information can be used from "an enforcement action ... taken against an alien ... [a]t a courthouse (or in connection with that appearance of the alien at a courthouse) if the alien is appearing in connection with a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking, or stalking in which the alien has been subject to extreme cruelty

or if the alien is described" in the U- and T-visa statutory provisions. 8 U.S.C. § 1229(e)(2). By explicitly referencing aliens attending court proceedings, Congress clearly contemplated and authorized ICE to arrest aliens at courthouses. In § 1229(e)(2), Congress placed no limits on ICE's arrest authority; rather, Congress merely restricted what can happen with information collected during certain types of enforcement actions directed at a limited class of aliens subject to certain confidentiality provisions. *Id.*; *see id.* § 1367.

ICE's arrest authority must be read in light of the entire statutory scheme notwithstanding that the arrest provisions in § 1226 and § 1357 were codified prior to § 1229(e). *See Brown & Williamson Tobacco Corp.*, 529 U.S. at 133. The "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." *United States v. Fausto*, 484 U.S. 439, 453 (1988). "[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133. Thus, even if a general privilege against courthouse arrests existed, Congress's later amendment in 2006 clearly shows that the INA authorizes courthouse arrests.

The district court erred in holding otherwise. In doing so, it relied on dicta from a concurrence in the judgment in *Bilski v. Kappos*, 561 U.S. 593 (2010), to hold

that the 2006 amendment "has little bearing on the court's interpretation of Congressional intent regarding courthouse arrests in 1952."[5] A24. But the *Bilski* majority supports interpreting the INA as a harmonious whole. It is only the concurrence in the judgment that uses the language that the district court cites. *Bilski*, 561 U.S. at 645 (Stevens, Breyer, Ginsburg, Sotomayor, J.J., concurring in the judgment). However, the majority opinion engages in no such divining of congressional intent. *Bilski*, 561 U.S. at 607-08 (majority op.). Rather, it does the opposite: it interprets the contested provision in light of the exact statute on which the concurrence in the judgment refuses to rely. *Id.* It applies the "canon against interpreting any statutory provision in a matter that would render another provision superfluous" to interpret the two provisions in tandem. *Id.* It explicitly states that the "principle, of course, applies to interpreting any two provisions in the U.S. Code, even when Congress enacted the provisions at different times." *Id.* at 608. It thus disclaims "judicial speculation as to the subjective intent of various legislators in enacting the subsequent provision."[6] *Id.*

The district court also was incorrect to hold that Congress' explicit action recognizing courthouse arrests amounted to inscrutable "inaction." A24-25. In both

[5] The district court incorrectly cites the concurrence in the judgment as a majority opinion.

[6] Even if this Court were to hold that the proper inquiry was the 1952 statute, as described *supra* at 23-34, there was no clearly established common-law rule against the federal sovereign's authority to arrest in courthouses at the time of enactment.

cases that the district court cites in support, the Supreme Court rejected the argument that Congress' failure to enact legislation or to explicitly disclaim appellate opinions evinced evidence of congressional intent. *See Star Athleta, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1015 (2017) ("history of failed legislation"); *United States v. Wells*, 519 U.S. 482, 495 (1997) (amendment without addressing decisions of Courts of Appeals). Those cases are inapposite here, where Congress explicitly acted to reference the very action on which the district court held it was silent.

Finally, the district court erroneously asserted that courthouse arrests have no bearing on the federal government's plenary authority over immigration because Plaintiffs do not seek "any change in removal proceedings" such that a common-law privilege could be recognized notwithstanding that authority. A23. As detailed *supra* at 8-10, arrest is one of the statutorily enumerated ways in which ICE initiates removal proceedings against an individual and effectuates final orders of removal. The district court's limitation of ICE's authority to initiate removal proceedings against removable aliens thus directly impacts removal proceedings.

This Court should vacate the injunction because the district court erred in holding that the INA incorporated a privilege against federal immigration arrest.

B. The District Court Abused Its Discretion in Granting an Injunction, as the Equitable Factors Support the Government.

Because there is no common-law privilege against courthouse arrest, the district court abused its discretion in holding that equitable factors supported an

injunction of ICE's lawful activity. But even were there any merit to the district court's merits holding, the court still erred in finding that an injunction was warranted.

The district court erred in holding that Plaintiffs suffer irreparable harm. First, it credited Plaintiffs' assertions that their work as organizations has been negatively impacted by ICE's enforcement actions in courthouses because aliens are afraid to appear in court or pursue their claims. A25-27. But the alleged injuries are caused by third-party aliens' decision to remain in the United States in violation of immigration laws or their decision not to attend Massachusetts courts in an effort to evade arrest and removal proceedings. A27. That unlawful and evasive conduct breaks the chain of causation between the ICE Directive and Plaintiffs' putative injuries, "[b]ecause the opposing party must be the source of the harm," so "causation is absent if the injury stems from the independent action of a third party." *Katz v. Pershing*, LLC, 672 F.3d 64, 71-72 (1st Cir. 2012); *see Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976) (no standing where plaintiffs alleged that government policy harmed them, but alleged harm depended on speculation as to third-party conduct). Indeed, with or without the Directive, aliens may avoid courthouses in an effort to evade arrest by ICE, so Plaintiffs cannot show that "invalidating [the Directive] will be reasonably likely to cause" third party aliens seeking to avoid arrest or removal to come to court. *Renal Physicians Ass'n v. U.S.*

HHS, 489 F.3d 1267, 1276 (D.C. Cir. 2007). Moreover, aliens lack a cognizable interest in evading law enforcement, so a fortiori, Plaintiffs lack an injury that is traceable to the Directive. *See Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1093 (10th Cir. 2006) ("[A] person complaining that government action will make his criminal activity more difficult lacks standing because his interest is not 'legally protected.'"). Therefore, these injuries, which are not cognizable, also cannot support irreparable harm.

Second, the district court erred in considering the irreparable harm of "[c]riminal defendants [who] will be unable to vindicate their rights." A27. That purported injury to third parties who are not party to the suit cannot support Plaintiffs' assertions of irreparable harm. *CMM Cable Rep., Inc. v. Ocean Coast Properties, Inc.*, 48 F.3d 618, 622 (1st Cir. 1995) ("[T]he issuance of a preliminary injunction requires irreparable harm *to the movant* rather than to one or more third parties.").

Third, the district court credited the harms alleged by CPCS and the DAs that the "threat of ICE civil arrests looms over Massachusetts courthouses impair[ing] the DAs [sic] and CPCS [sic] ability to successfully perform their functions," that "CPCS will continue to incur costs as defendants are civilly arrested while attempting to respond to criminal complaints," and that the DAs suffer harm in their "ability to prosecute specific cases because victims and witnesses are scared to

participate in the proceedings." A26, 27. But, in our system of dual sovereignty, state actors regularly incur costs that result incidentally from federal action. *See New York v. United States*, 505 U.S. 144, 162-66 (1992). Such costs are not cognizable irreparable harms. *See generally Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923).

Thus, the district court held that these harms outweigh the government's "safety concerns." A28. But that too is wrong. Abstract goals or injuries "in terms of money, time and energy" cannot outweigh the harms caused by the injunction. *Sampson v. Murray*, 415 U.S. 61, 90 (1974). The district court's "injunctive relief deeply intrudes into the core concerns of the executive branch" by impeding the federal government's lawful authority to enforce the immigration laws. *Adams v. Vance*, 570 F.2d 950, 954 (D.C. Cir. 1978), Meanwhile, ICE is hindered in its ability to protect the public from the specific, targeted aliens that the Directive reaches — those who are involved in criminal activity, are involved in gangs, or are national security threats — or to remove those have already been given all process to which they were entitled resulting in a final order of removal. JA149. To arrest those priority aliens, ICE must conduct arrests at large, placing officers, the public, and targeted aliens at higher risk of dangerous escalation and complications. *Id.* These harms outweigh Plaintiffs' inchoate assertions of harm. Furthermore, the district court's injunction harms the public because it overrides Massachusetts' own sovereign policy choices in how to balance its interests with that of the federal

government. *See* Mass. Executive Office of the Trial Court, Policy and Procedures Regarding Courthouse Interactions with the Department of Homeland Security, JA203-205; Executive Office Transmittal 19-3, Amended Writ of Habeas Corpus for Persons in ICE Custody, JA206-07.

Finally, the district court erred in holding that, because ICE generally "does not arrest civil litigants, witnesses, or victims at courthouses," its injunction "will cause no significant harm to the government," and that ICE's ability to obtain criminal arrest warrants provides ICE an "alternative route" for enforcement, mitigating the government's harms. A28. But Congress has provided that ICE may rely on civil administrative warrants or no warrant at all to enforce the immigration laws. It irreparably harms the Executive Branch to require the Executive to procure criminal warrants that Congress itself did not require to enforce a civil enforcement scheme.

Thus, the district court abused its discretion in granting a preliminary injunction because the equitable factors do not support one.

II. Even if Injunctive Relief Were Warranted, the District Court's Injunction is Overbroad and Should be Narrowed.

Even if an injunction were otherwise warranted, the district court's injunction is overbroad, as it goes beyond the scope of what is necessary to remedy Plaintiffs' harms.

As an initial matter, the alleged privilege against arrest applies, if at all, only to individuals conducting court business in specific litigation. The privilege, like any privilege, does not exist as an abstract legal right that any citizen or organization can invoke on behalf of non-litigants. *See* 9A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2463.1 (3d ed. 2019) (party must invoke "a personal right or privilege"). The challenged policy applies only to certain aliens — often those involved in criminal activity — who are subject to immigration detention to allow removal proceedings or removal efforts to be commenced. Thus, only a "person arrested by ICE in a Massachusetts courthouse" would have standing to invoke it. *See Matter of C. Doe*, No. SJ-2018-119, JA145; *cf. N. Light Tech., Inc.*, 236 F.3d at 63 (rejecting, "[i]n lieu of a specific request for immunity" from process by a specific individual, a request "to fashion a broad, per se" rule of immunity unmoored for a specific person's situation).

And, as a general matter, Article III demands that a remedy "be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018) (citation omitted). This principle applies with even greater force to a preliminary injunction, which is an equitable tool designed merely to preserve the status quo during litigation. *University of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *see Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). "[T]he purpose of" preliminary equitable relief "is not to conclusively determine the

rights of the parties, but to balance the equities as the litigation moves forward." *Trump v. IRAP*, 137 S. Ct. 2080, 2087 (2017). Courts thus "'need not grant the total relief sought by the applicant but may mold [their] decree to meet the exigencies of the particular case.'" *Id.* (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2947, at 115).

The district court's injunction is overbroad and goes far beyond anything necessary to remedy the specific injuries alleged by the Plaintiffs. It enjoins the Directive in its entirety throughout the State of Massachusetts. It undermines the cooperative arrangement that the federal government has with the Massachusetts state court system, including the use of habeas corpus to facilitate aliens' appearance in local courts, and the Executive Office's policy permitting DHS arrests in the public spaces of its courthouses. Mass. Executive Office of the Trial Court, Policy and Procedures Regarding Courthouse Interactions with the Department of Homeland Security, JA203-205; Executive Office Transmittal 19-3, Amended Writ of Habeas Corpus for Persons in ICE Custody, JA206-07. The injunction therefore intrudes on the functions of the state court system itself, which has chosen to cooperate with federal immigration enforcement on state property.

The injunction also enjoins not just the 2018 Directive, but courthouse enforcement actions undertaken under all prior ICE Guidance as well. Those prior policies are not challenged in this litigation. Thus, were the court to issue a final-

judgment remedy under the APA of "sett[ing] aside" the challenged agency action, that would only permit the court to vacate the 2018 Directive, leaving all prior guidance in place. *See Sierra Club v. Wagner*, 555 F.3d 21, 27 (1st Cir. 2009) (noting that "where one agency rule is invalidated the previous rule in force applies" (quoting *Action on Smoking and Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983))).

In any event, nothing in the APA indicates that a broad injunction is appropriate at the *preliminary-injunction* stage. The APA provides only that a court may "hold unlawful and set aside agency action." 5 U.S.C. § 706(2). But no part of that text specifies whether any rule or policy, if found likely to be invalid, should be set aside on its face or as applied to the challenger. *Cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring) ("No statute expressly grants district courts the power to issue universal injunctions."); *accord East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019). In the absence of a clear statement to the contrary, this Court should adopt the reasonable — rather than sweeping — reading of the "set aside" language. *See Va. Society for Human Life v. Fed. Election Comm'n*, 263 F.3d 379, 393 (4th Cir. 2001) ("Nothing in the language of the APA, however, requires us to exercise such far-reaching power."). The APA itself provides that, absent a statutory review provision, the proper "form of proceeding" is a traditional suit for declaratory or injunctive relief that is subject to

the rules constraining equitable relief to determining the rights of the parties before the court. 5 U.S.C. § 703. Consistent with such equitable principles, the APA should be read to limit such interim relief to the parties before it. *See* 5 U.S.C. § 705 (relief pending review is appropriate only "to the extent necessary to prevent irreparable injury."). Indeed, the APA's very reference to actions for "declaratory judgments" makes clear that no injunction is compelled by the APA when agency action is held unlawful. *See id.*; *see also* H.R. Rep. No. 1980, 79th Cong., 2d Sess. 42 (1946) (referring to possibility of suits for declaratory relief to "determine the validity or application of a rule or order"); *see also* S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945).

In this case the court has not issued a *final judgment*, "where the court had already held that the rule at issue was unlawful and should be vacated." *United States Ass'n of Reptile Keepers, Inc. v. Jewell*, 106 F. Supp. 3d 125, 128 (D.D.C. 2015), *aff'd sub nom. United States Ass'n of Reptile Keepers, Inc. v. Zinke*, 852 F.3d 1131 (D.C. Cir. 2017). Rather, "the [district] [c]ourt has not finally determined that the [policy] is unlawful," so "the need for narrow tailoring ... is particularly important," and any "injunction should be limited in scope to protect only" parties to the case. *Id.* at 126, 129; *see Neb. Dep't of Health & Human Servs. v. Dep't of Health & Human Servs.*, 435 F.3d 326, 330 (D.C. Cir. 2006) (stating that the "district court should not have enjoined [the] agency from applying [the] challenged regulation to

any party when an injunction covering [the] plaintiff alone adequately protects it from the feared prosecution"); *accord California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018) (narrowing a nationwide preliminary injunction to apply "only to the plaintiff[s]" as that would "provide complete relief to them").

Finally, the injunction is not limited to the courthouses in which the Plaintiffs operate and to the individual aliens in those courthouses with whom the Plaintiffs have a bona fide relationship, i.e. with whom they interact in their course of business. A31. Therefore, at minimum, this Court should limit the scope of the injunction to the arrest of aliens at liberty in the courthouses in which the Plaintiffs operate and with whom Plaintiffs have a demonstrable relationship.

CONCLUSION

For the foregoing reasons, this Court should vacate the preliminary injunction, or, at minimum, narrow it.

Respectfully submitted,

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Dated: January 24, 2020

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of First Circuit Rule 32(a)(7) because it contains 12,165 words. This brief complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 28 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

/s/ Francesca Genova
FRANCESCA GENOVA

No. 19-1838

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MARIAN RYAN, in her official capacity as Suffolk County District Attorney; RACHAEL ROLLINS, in her official capacity as Suffolk County District Attorney; COMMITTEE FOR PUBLIC COUNSEL SERVICES; CHELSEA COLLABORATIVE, INC.; IMMIGRATION REFORM LAW INSTITUTE,
Plaintiffs-Appellees,

v.

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; MATTHEW T. ALBENCE, in his official capacity as the Acting Deputy Director of U.S. Immigration and Customs Enforcement and Senior Official Performing the Duties of the Director; TODD M. LYONS, in his official capacity as Acting Field Office Director of U.S. Immigration and Customs Enforcement, Enforcement and Removal Operations; U.S. DEPARTMENT OF HOMELAND SECURITY; CHAD WOLF, in his official capacity as Acting Secretary of United States Department of Homeland Security,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
No. 19-cv-11003
The Hon. Indira Talwani

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MARIAN RYAN, in her official capacity as Middlesex County District Attorney; RACHAEL ROLLINS, in her official capacity as Suffolk County District Attorney; COMMITTEE FOR PUBLIC COUNSEL SERVICES; and the CHELSEA COLLABORATIVE, INC.,	*	
Plaintiffs,	*	
v.	*	Civil Action No. 19-11003-IT
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; MATTHEW T. ALBENCE, in his official capacity as Acting Deputy Director of U.S. Immigration and Customs Enforcement and Senior Official Performing the Duties of the Director; TODD M. LYONS, in his official capacity as Immigration and Customs Enforcement, Enforcement and Removal Operations, Acting Field Office Director; U.S. DEPARTMENT OF HOMELAND SECURITY; and KEVIN McALEENAN, in his official capacity as Acting Secretary of United States Department of Homeland Security,	*	
Defendants.	*	

MEMORANDUM & ORDER
GRANTING PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION

June 20, 2019

TALWANI, D.J.

Middlesex County District Attorney Marian Ryan, Suffolk County District Attorney Rachael Rollins, the Committee for Public Counsel Services ("CPCS"), and the Chelsea

Collaborative, Inc. (collectively "Plaintiffs") bring this lawsuit against U.S. Immigration and Customs Enforcement ("ICE"), U.S. Department of Homeland Security ("DHS"), and several officials in their official capacity (collectively "Defendants"), challenging ICE's policy and practice of conducting civil immigration arrests inside of state courthouses in Massachusetts. In Count 1 of the Complaint [1], Plaintiffs challenge ICE Directive No. 11072.1, entitled "Civil Immigration Actions Inside Courthouses" (the "Courthouse Civil Arrest Directive"), dated January 10, 2018, under the Administrative Procedure Act, 5 U.S.C. § 706(2)(C). The APA commands a reviewing court to "hold unlawful and set aside agency action . . . found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." Plaintiffs contend that at the time the Immigration and Naturalization Act ("INA") was enacted, all those appearing in court on official court business enjoyed a common law privilege against civil arrest. They argue that the INA does not explicitly extinguish this common law privilege and therefore must be interpreted to be constrained by it. Therefore, Plaintiffs contend, any ICE policies which permit civil courthouse arrests are in excess of the power granted by the INA and must be set aside by the court.

Defendants dispute the existence of a common law privilege against civil arrest in courthouses, and, alternatively, argue that any such privilege was superseded long before the codification of the current immigration scheme. Further, Defendants argue, if such a privilege existed in the past, Plaintiffs nonetheless lack both constitutional and prudential standing to bring this claim. Finally, the government contends that if Plaintiffs do have standing and the common law privilege exists, Congress nonetheless extinguished the privilege when it passed the INA.

Pending before the court is Plaintiffs' Motion for a Preliminary Injunction [5], which seeks to preliminarily enjoin Defendants from implementing the Courthouse Civil Arrest

Directive and from civilly arresting parties, witnesses, and others attending Massachusetts courthouses on official business while they are going to, attending, or leaving the courthouse. Finding that Plaintiffs have standing to bring this suit, are likely to succeed on the merits of their APA claim as to those not in federal or state custody when they arrive, and are likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in Plaintiffs' favor, and that an injunction is in the public interest, Plaintiffs' Motion for a Preliminary Injunction [5] is ALLOWED. Defendants are enjoined from implementing the Courthouse Civil Arrest Directive and from civilly arresting parties, witnesses, and others attending Massachusetts courthouses on official business while they are going to, attending, or leaving the courthouse. The court's order does not limit ICE's criminal arrests of such individuals or its civil arrests of individuals who are brought to Massachusetts courthouses while in state or federal custody.

I. Statutory and Regulatory Background

In 1952, Congress enacted the INA, governing, among other things, the presence of non-citizens (deemed "aliens" in the INA, 8 U.S.C. § 1101(a)(3)) in the United States and the associated procedures for removing those present in the United States without federal authorization. See INA, Pub. L. No. 82-414, 66 Stat. 163 (1952). "Aliens may be removed if they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law." Arizona v. United States, 567 U.S. 387, 396 (2012) (citing 8 U.S.C. § 1227); 8 U.S.C. § 1227 (a)(1)(B) (an alien present in the United States whose nonimmigrant visa has been revoked is deportable). "As a general rule, it is not a crime for a removable alien to remain present in the United States[,]" Arizona v. United States, 567 U.S. at 407, and removal proceedings are civil, not criminal, even where criminal activity underlies the reason for

removal. See id. at 396; see also 6 C. Gordon, S. Mailman, S. Yale-Loehr, & R.Y. Wada, Immigration Law and Procedure § 71.01[4][a] (Matthew Bender, rev. ed. 2016) (acknowledging "the uniform judicial view, reiterated in numerous Supreme Court and lower court holdings, ... that [removal] is a civil consequence and is not regarded as criminal punishment").

Since first enacted, the INA has granted authority for arrests with and without warrants. INA § 242(a), codified at 8 U.S.C. § 1226(a), provided that "[p]ending a determination of deportability in the case of any alien . . . such alien may, upon warrant of the Attorney General, be arrested and taken into custody." INA § 242(a).[1] INA § 287(a)(2), codified as 8 U.S.C. § 1357(a)(2), authorized an immigration officer without a warrant, "to arrest any alien who in his presence or view is entering or attempting to enter the United States" unlawfully, or "to arrest any alien in the United States if [the officer] has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest." Id. § 287(a)(2).[2] "Although 8 U.S.C. § 1357(a)(2) does

[1] In 1996, the provision for an arrest with a warrant was replaced by a substantively similar provision. Omnibus Consolidated Appropriations Act, 1997, PL 104–208, September 30, 1996, 110 Stat 3009. As amended in 1996, 8 U.S.C. § 1226(a) provides:

> On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General--
>
> (1) may continue to detain the arrested alien; and
>
> (2) may release the alien on--
>
> (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or
>
> (B) conditional parole; but
>
> (3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

8 U.S.C. § 1226(a).

[2] Congress also amended this section in 1996 to add laws regulating the "removal of aliens" to the list of applicable laws one could be violating upon "entering or attempting to enter the United

not, by its terms, reveal its 'civil' or 'criminal" character,'" the First Circuit has determined that such arrests are civil. U.S. v. Encarnacion, 239 F.3d 395, 398 (1st Cir. 2001).

"A principal feature of the removal system is the broad discretion exercised by immigration officials." Arizona v. United States, 567 U.S. at 396. ICE instructs its agents and employees on its discretionary enforcement priorities through publicly released memoranda from its director. On March 2, 2011, the then-director of ICE distributed a memorandum about civil immigration enforcement priorities (hereinafter the "2011 Civil Enforcement Priorities Memorandum") as they relate to the apprehension, detention, and removal of aliens. ICE Policy Number 10072.1, 2011 Civil Enforcement Priorities Memorandum (Mar. 2, 2011). That memorandum explained that ICE had resources to remove each year less than four percent of the estimated removable population, and thus would prioritize its resources. Id. According to ICE, its top civil enforcement priority was the removal of "Priority 1" aliens: "[a]liens who pose a danger to national security or a risk to public safety." Id. at 1.

> These aliens include, but are not limited to: aliens engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security; aliens

States[.]" Omnibus Consolidated Appropriations Act, 1997, PL 104–208, September 30, 1996, 110 Stat 3009. Other than that change, 8 U.S.C. § 1357(a)(2), is the same as when the INA was first enacted in 1952, and provides:

> (a) Powers without warrant
> Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
> …
>
> (2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States[.]

8 U.S.C. § 1357(a)(2).

> convicted of crimes, with a particular emphasis on violent criminals, felons, and repeat offenders; aliens not younger than 16 years of age who participated in organized criminal gangs; aliens subject to outstanding criminal warrants; and aliens who otherwise pose a serious risk to public safety.

Id. at 1-2. The memorandum notes that the provision concerning those who otherwise pose a serious risk to public safety "is not intended to be read broadly, and officers, agents, and attorneys should rely on this provision only when serious and articulable public safety issues exist." Id. at 2, n. 1. After those "Priority 1" aliens, ICE prioritizes the apprehension and removal of "[r]ecent illegal entrants" and "[a]liens who are fugitives or otherwise obstruct immigration controls." Id. at 2.

On June 17, 2011, the then-director of ICE distributed a memorandum entitled "Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs" (hereinafter "Prosecutorial Discretion Memo"), Ex. C [28-3], directing ICE officers and attorneys to "exercise all appropriate prosecutorial discretion" in removal cases "to minimize any effect that immigration enforcement may have on the willingness and ability of victims, witnesses, and plaintiffs to call police and pursue justice." Id. at 2. According to this memorandum, "it is against ICE policy to initiate removal proceedings against an individual known to be the immediate victim or witness to a crime." Id. "Absent special circumstances, it is similarly against ICE policy to remove individuals in the midst of a legitimate effort to protect their civil rights or civil liberties." Id. at 3. The memorandum continued that "[t]o avoid deterring individuals from reporting crimes and from pursuing actions to protect their civil rights, ICE officers, special agents, and attorneys are reminded to exercise all appropriate discretion on a case-by-case basis when making detention and enforcement decisions in the cases of victims of crime, witnesses to crime, and individuals pursuing legitimate civil rights complaints." Id.

In 2014, ICE addressed the application of these 2011 policies to "[e]nforcement actions at or near courthouses." Enforcement Actions at or Near Courthouses Memorandum (hereinafter the "2014 Courthouse Memorandum") Ex. B [28-2]. In that memorandum, ICE specified that "[e]nforcement actions at or near courthouses will only be undertaken against Priority 1 aliens, as described in [the 2011 Enforcement Priorities Memorandum]." Id. Further, courthouse enforcement actions, would "only take place against specific, targeted aliens, rather than individuals who may be 'collaterally' present, such as family members or friends who may accompany the target alien to court appearances or functions." Id. at 2. The memorandum directed further that "whenever practicable," such actions will be taken outside of public areas of the courthouse. Id.

On January 25, 2017, the President issued an executive order, entitled "Enhancing Public Safety in the Interior of the United States." Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 30, 2017). Of particular relevance to this case, section five of the Executive Order orders the Secretary of Homeland Security to prioritize the removal of removable aliens who "[h]ave been charged with any criminal offense, where such charge has not been resolved" and "[a]re subject to a final order of removal, but who have not complied with their legal obligation to depart the United States." [3] Id. On February 20, 2017, the then-Secretary of Homeland Security

[3] The Executive Order also instructs the Secretary to prioritize the removal of aliens described in 8 U.S.C. §§ 1182 (a)(2), (a)(3), and (a)(6)(C), 1225, and 1227 (a)(2) and (4). These individuals are inadmissible or deportable due to criminal convictions, are in or attempting to enter the United States to commit espionage, attempted to obtain admission through fraud, or are subject to expedited removal. See 8 U.S.C. §§ 1182 (a)(2), (a)(3), and (a)(6)(C), 1225, and 1227 (a)(2) and (4). The Executive Order further instructs the Secretary to prioritize the removal of removable aliens who:

> "(a) [h]ave been convicted of any criminal offense; . . . (c) [h]ave committed acts that constitute a chargeable criminal offense; (d) [h]ave engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency; (e) [h]ave abused any program related to receipt of public

implemented that Executive Order and issued a memorandum entitled "Enforcement of the Immigration Laws to Serve the National Interest" (hereinafter the "2017 Memorandum"). 2017 Memorandum Ex. 9 [7-9]. The 2017 Memorandum directed ICE to prioritize the removal of aliens in accordance with the Executive Order, including aliens who "have been charged with any criminal offense that has not been resolved" and "are subject to a final order of removal but have not complied with their legal obligation to depart the United States." Id. at 3. The 2017 Memorandum rescinded, with exceptions not relevant here, "all existing conflicting directives, memoranda, or field guidance regarding the enforcement of our immigration laws and priorities for removal . . . to the extent of the conflict [with the 2017 Memorandum]." Id.

On January 10, 2018, ICE issued Directive No. 11072.1, the Courthouse Civil Arrest Directive. Compl. Ex. D [1-4]. The Courthouse Civil Arrest Directive refers to the 2017 Memorandum and explains that ICE civil immigration enforcement actions inside courthouses include actions "against specific, targeted aliens with criminal convictions, gang members, national security or public safety threats, aliens who have been ordered removed from the United States but have failed to depart, and aliens who have re-entered the country illegally after being removed, when ICE officers or agents have information that leads them to believe the targeted aliens are present at that specific location." Id. at 2. According to the policy, ICE will not arrest aliens other than the "target alien . . . absent special circumstances, such as where the individual poses a threat to public safety or interferes with ICE's enforcement actions." Id. The Courthouse Civil Arrest Directive explains that the purpose of this policy, in part, is to "reduce safety risks"

> benefits; . . . or (g) [i]n the judgment of an immigration officer, otherwise pose a risk to public safety or national security."

Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 30, 2017).

because "[i]ndividuals entering courthouses are typically screened by law enforcement personnel to search for weapons and other contraband." Id.

All of the foregoing relates to civil arrests for removal purposes, not criminal arrests. In 1990, the INA was amended to allow immigration officers to make warrantless criminal arrests. Pub.L. 101-649, Title V, § 503(a), (b)(1), Nov. 29, 1990, 104 Stat. 5048, 5049, codified at 8 U.S.C. 1357(a)(4). Those arrests, unlike arrests under § 1357(a)(2), require that the alien be brought before a magistrate judge, rather than an immigration officer. See U.S. v. Encarnacion, 239 F.3d at 398; see also Morales v. Chadbourne, 793 F.3d 208, 214-16 (1st Cir. 2015) (noting that "criminal custody" and ICE enforcement are different contexts). Plaintiffs' APA claim does not challenge ICE's authority to conduct criminal arrests.

II. The Record Before the Court Concerning Courthouse Arrests in Massachusetts State Courts

In July 2017, the Massachusetts Supreme Judicial Court released a decision about civil immigration detainers, holding that "Massachusetts law provides no authority for Massachusetts court officers to arrest and hold an individual solely on the basis of a Federal civil immigration detainer, beyond the time that the individual would otherwise be entitled to be released from State custody." Lunn v. Commonwealth, 477 Mass. 517, 537 (2017).

The Massachusetts Trial Court subsequently promulgated a policy entitled "Policy and Procedures Regarding Interactions with the Department of Homeland Security ["DHS"]." Mass. Trial Ct. Policy at 16-18 [46-1], effective November 13, 2017. The Policy is directed to civil, not criminal, enforcement action, specifically noting that nothing in the policy abrogates a court officer's authority to detain an individual pursuant to a criminal detainer or a warrant authorizing the arrest of an individual for a criminal offense. Id. at 16. According to the policy, Massachusetts Trial Court employees are required to respond to DHS requests for information

about an individual's case or probation in the same manner as a request by any other member of the public. Id. DHS officials "may enter a courthouse and perform their official duties provided that their conduct in no way disrupts or delays court operations, or compromises safety or decorum." Id. As applicable to all law enforcement officers, when an armed DHS official enters a courthouse, courthouse security personnel are directed to ask him or her the official law enforcement purpose for entering the courthouse and the proposed enforcement action to be taken, and that information is to be transmitted to a judicial officer if DHS officials state an intent to take into custody a party or other participant in a case before a judge or magistrate, or a person attending to business in the courthouse. Id.

The Policy includes separate procedures for individuals in custody, and those not in custody. Under the policy, individuals who are brought into court in custody, and are subject to release after a court proceeding, should be processed in the normal course, even if there is an immigration detainer. Id. Court employees do not have the authority to comply with or serve civil immigration warrants, but DHS officials are permitted to enter the holding cell area to take custody if the DHS official presents a civil arrest warrant or detainer and the court officer supervisor determines that the DHS official would otherwise take custody of the individual inside or immediately outside of the courthouse. Id.

As to individuals coming to court who are not in custody, under the Policy, trial court employees may not impede or assist DHS in the physical act of taking such individuals into DHS custody. Id. DHS officials shall not be permitted to take an individual into custody pursuant to a civil immigration detainer or warrant in a courtroom, absent advance permission by a judicial officer. Id. The policy also requires court security personnel to draft an incident report for every instance in which DHS takes an individual into custody in the courthouse. Id.

In support of their motion, Plaintiffs submitted affidavits from the executive director of the Chelsea Collaborative, Vega Decl. Ex. 10 [7-10], an immigration law specialist from the Immigration Impact Unit at CPCS, Klein Decl. Ex. 11 [7-11], the Chief of Victim Witness Services for the Middlesex County DA's office, Foley Decl. Ex. 12 [7-12], the executive director of Lawyers for Civil Rights, an organization providing pro bono legal representation to immigrants, Espinoza-Madrigal Decl. Ex 13 [7-13], and a legal advocacy specialist with HarberCOV, an organization that provides services to people affected by abuse, Moshier Decl. Ex. 14 [7-14]. These affidavits aver that ICE is civilly arresting people at courthouses throughout Massachusetts. Espinoza-Madrigal Decl. ¶ 7, Ex. 13 [7-13]; Klein Decl. ¶ 6, Ex. 11 [7-11]. CPCS "regularly receives calls from defense counsel detailing incidents in which ICE arrests an individual outside the courthouse prior to entering the courthouse for their trial or pre-trial hearing." Klein Decl. ¶ 7, Ex. 11 [7-11]. Plaintiffs allege that these arrests are disruptive of civil and criminal proceedings. For example, Plaintiffs describe an arrest by two ICE officers at Somerville District Court as "look[ing] like a fistfight had broken out" and noting that court officers had to get involved to end the confrontation. Foley Decl. ¶ 7, Ex. 12 [7-12]. Plaintiffs report that prior to ICE targeting courthouses for enforcement actions, "noncitizen[s]…who were potentially removable" "did not express concern about appearing in court as plaintiffs, victims, or witnesses[,]" but now, noncitizens are reluctant to attend court in any capacity, "explicitly pointing to the presence of ICE in the courts." Vega Decl. ¶¶ 6-10, Ex. 10 [7-10]. The Middlesex Victim Witness Services office reports that "noncitizen victims and witnesses frequently express concerns about ICE's presence and deportation." Foley Decl. ¶ 6, Ex. 12 [7-12]. Individuals identified by the declarant as "permanent residents" have reported fear seeking the court's assistance for help with domestic violence concerns. Moshier Decl. ¶ 6, Ex. 14 [7-14].

"[Chelsea] Collaborative members who have been victims of employer abuse and wage theft have also refused to seek court intervention because of their fears of ICE presence in the courthouses." Vega Decl. ¶ 14, Ex. 10 [7-10].

Defendants represented at the hearings on this motion that "generally" ICE is not arresting people prior to their participation in hearings and is not targeting witnesses or victims. Defendants did not submit any countervailing affidavits, but submitted a copy of responses posted on a DHS website to frequently asked questions on sensitive locations policy and courthouse arrests. ICE Frequently Asked Questions on Sensitive Locations and Courthouse Arrests, as printed on May 6, 2019 (hereinafter "FAQ Responses") [46-1]. According to the FAQ Responses, "ICE does not view courthouses as a sensitive location," ICE has "for some time had established practices in place related to civil immigration enforcement inside courthouses," and "the increasing unwillingness of some jurisdictions to cooperate with ICE in the safe and orderly transfer of targeted aliens inside their prisons and jails has necessitated additional at large arrests." FAQ Responses at 8-9 [46-1]. The FAQ Responses note further that "[f]ederal, state, and local law enforcement officials routinely engage in enforcement activity in courthouses throughout the country," that the actions "are consistent with longstanding law enforcement practices nationwide," and that because individuals entering courthouses are typically screened for weapons, "civil immigration enforcement actions taken inside courthouses can reduce safety risks to the public, targeted alien(s), and ICE officers and agents." Id. at 9. The FAQ Responses state further that these arrests "are the result of targeted enforcement actions against specific aliens." Id. at 10. The FAQ Responses also state that "ICE makes every effort to ensure that the arrest occurs after the matter for which the alien was appearing in court has concluded." Id.

III. Plaintiffs' Standing

"Article III of the Constitution confines the judicial power of federal courts to deciding actual 'Cases' or 'Controversies.'" Hollingsworth v. Perry, 570 U.S. 693, 704 (2013). Accordingly, the court turns first to Defendants' challenge to Plaintiffs' constitutional and prudential standing to bring their APA claim. Defs.' Br. at 6-11 [28].

A. Plaintiffs' Constitutional Standing

In order to satisfy the "irreducible constitutional minimum" of Article III standing, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992), a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" Id. at 1548. "The injury need not be 'significant'; a 'small' stake in the outcome will suffice, if it is 'direct.'" Dubois v. U.S. Dep't of Agric., 102 F.3d 1273, 1281 (1st Cir. 1996) (quoting U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 689 n. 14 (1973)). "[A] federal court [may] act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." Simon v. E. Kentucky Welfare Rights Org., 426 U.S. 26, 41–42 (1976). The government argues that Plaintiffs lack an "injury in fact" and that the Plaintiffs' injuries are not traceable to the Courthouse Civil Arrest Directive. Defs.' Br. at 8-11 [34].

The court considers Plaintiffs' injury-in-fact first. Defendants argue that Plaintiffs do not face a threat that the Courthouse Civil Arrest Directive will be applied against them, and moreover, that they have no right to assert a claim against removal on behalf of others who may

be subject to such removal. Id. at 8. But this is not the injury that Plaintiffs are claiming. Plaintiffs "are not asserting incidental injury from Defendants' general enforcement of the immigration laws, but direct injury from Defendants' actions targeting courts for federal immigration enforcement." Pls.' Rep. Br. at 9 [41]. Defendants aptly summarize the DAs' complaints that "the ICE Directive increases their costs, diverts their resources, and makes their prosecutions more 'time consuming and difficult.'" Defs.' Br. at 9 [34] (citing Compl. ¶¶ 80, 82 [1]). The DAs claim that ICE civil arrests *in state courthouses*, the sole forum in which they can prosecute cases, are hindering the DAs' ability to carry out their primary functions as District Attorneys, and Chelsea Collaborative claims that these civil arrests impair their members' ability to protect themselves through the state courts from unlawful actions of other individuals. For example, Plaintiffs allege that survivors of domestic abuse are "reluctant to file for civil protective orders against abusive partners or appear [in] court as witnesses in criminal cases against their abusers." Moshier Decl. ¶ 4, Ex. 14 [7-14]. Fears concerning ICE's presence from victims and witnesses "have been more prevalent since the ICE policy was announced." Foley Decl. ¶ 6, Ex. 12 [7-12]. Victim Witness Advocates can no longer advise victims that their fear of arrest during the court process is unfounded. Foley Decl. ¶¶ 4-5, Ex. 12 [7-12].

Defendants argue that a state prosecutor does not suffer an injury in fact merely because a federal law-enforcement action (or threat of it) increases the time or costs associated with state prosecutions, and assert that they know of no case in which a court has found standing to challenge a federal law on this basis. Defendant conflates two issues, however. Federal prosecutions may well routinely burden state prosecutions (or vice versa), without there being a legal claim that may be asserted. But the inquiry here is whether there is a cognizable injury for purposes of Article III standing. The court agrees with Plaintiffs that being unable to reliably

secure the attendance of defendants, victims, and witnesses hinders the ability of the DAs to prosecute crimes and Chelsea Collaborative's members to secure their rights under state law and amounts to a particularized injury sufficient to constitute injury-in-fact. See Matter of C. Doe, No. SJ-2018-119 at 10-11 (Mass. Sept. 18, 2018), Ex. 7 [7-7] ("[T]he administration of justice in the Commonwealth suffers when litigants, witnesses, and others with business before the courts are afraid to come near a Massachusetts courthouse because they fear being arrested by immigration authorities.").

CPCS alleges that ICE's implementation of the Courthouse Civil Arrest Directive and the fear generated by courthouse arrests is impeding CPCS' representation of its clients and its ability to manage its expenses. CPCS's core function of representing criminal defendants is impeded when its clients are apprehended by ICE prior to appearing in court and proceedings are interrupted or altogether cannot continue. That alone is enough to constitute injury-in-fact. Further, CPCS declares that "time and resources have been consumed by…assisting defense attorneys whose clients have been impacted by this ICE enforcement policy." Klein Decl. ¶ 4, Ex. 11 [7-11]. CPCS has alleged a concrete and particularized injury sufficient to constitute injury-in-fact.

Though Defendants cite to several cases in support of their challenge to Plaintiffs' standing, none are applicable here.[4] The court finds that the injuries alleged by the Plaintiffs satisfy the Article III injury-in-fact requirements.

[4] New York v. United States, 505 U.S. 144 (1992), does not address the requirements for standing. In Massachusetts v. Mellon, 262 U.S. 447 (1923), the Court held that the state did not have standing to sue because the provisions in the challenged statute were voluntary. Plaintiffs here are not suing under similar circumstances. Virginia ex rel. Cuccinelli v. Sebelius, 656 F.3d 253 (4th Cir. 2011), is also inapplicable, because, in that case, Virginia passed a "non-binding declaration," id. at 270, declaring its opposition to a federal statute and then sued based on the conflict between its declaration and the federal law.

As to traceability, the government argues that each Plaintiff's injury is not traceable to the Courthouse Civil Arrest Directive because it results from "third-party aliens' decisions not to attend Massachusetts courts in an effort to evade arrest and removal proceedings." Defs.' Br. at 10 [34]. "This wrongly equates injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation." Bennett v. Spear, 520 U.S. 154, 168–69 (1997). The unwillingness of those at risk of ICE civil arrest to visit courthouses injures the DAs and Chelsea Collaborative members and is alleged be a direct result of the Courthouse Civil Arrest Directive. The DAs report that concerns from witnesses and victims about ICE's presence "have been more prevalent since the ICE policy was announced." Foley Decl. ¶ 6, Ex. 12 [7-12]. Before ICE began civilly arresting people at courthouses, Chelsea Collaborative helped members file suit, and helped members in litigation by filling courtrooms with supporters. Vega Decl. ¶ 6, Ex. 10 [7-10]. Now, Chelsea Collaborative struggles to persuade noncitizen members to go to court as victims, witnesses, or supporters. Vega Decl. ¶ 9, Ex. 10 [7-10]. According to Chelsea Collaborative, the "reluctance to attend court began soon after ICE's increase in targeted enforcement actions in courthouses." Id. The Courthouse Civil Arrest Directive "has caused a strain both on [Chelsea Collaborative's] personnel and [their] budget such that [they] are unable to effectively carry out many of [their] other goals and missions." Vega Decl. ¶ 22, Ex. 10 [7-10]. The injuries alleged by the DAs and Chelsea Collaborative are traceable to the Courthouse Civil Arrest Directive. Accordingly, the DAs and Chelsea Collaborative each have standing to bring this case.

The government argues that CPCS's "alleged injuries are caused by third-party aliens' decisions not to attend Massachusetts courts in an effort to evade arrest and removal proceedings." Defs.' Br. at 11 [34]. However, CPCS is not complaining that its clients are

voluntarily choosing not to attend court, but that ICE is civilly arrested their clients when these individuals come to state court to attend state proceedings against them. These arrests cause CPCS to expend resources to respond to civil courthouse immigration enforcement. CPCS contends that defense attorneys inside courthouses regularly discover that clients are arrested prior to entering the courthouse to appear at criminal proceedings, causing a default judgment to enter. Klein Decl. ¶ 7, Ex. 11 [7-11]. CPCS's cognizable injuries are traceable to ICE's courthouse arrest policy, and not to a third party. Therefore, CPCS also has standing to bring this case.

B. Plaintiffs' Prudential Standing

"The doctrine of standing also includes prudential concerns relating to the proper exercise of federal jurisdiction." Dubois v. U.S. Dep't of Agric., 102 F.3d 1273, 1281 (1st Cir. 1996). "The interest [Plaintiffs] assert[] must be 'arguably within the zone of interests to be protected or regulated by the statute' that [Plaintiffs allege] was violated." Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 224-25 (2012) (noting that the prudential standing test "is not meant to be especially demanding") (internal citation omitted). "In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987). Plaintiffs, therefore, need not be the target of ICE civil arrests or enforcement, but merely have interests that are more than "marginally related" to ICE enforcement in courthouses. The Plaintiffs here, as participants in the state civil and criminal justice systems, represent stakeholders affected by civil immigration arrests in state courthouses. Though no specified Congressional intent to include Plaintiffs in the

zone of interest of the INA is needed, Clarke, 479 U.S. at 399-400, Congress nonetheless indicated its preference that federal immigration enforcement not impede state criminal law enforcement. The INA specifies that the federal government "may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment." 8 U.S.C. § 1231 (a)(4)(A). Considering this provision as an example, the low threshold necessary to satisfy the zone of interest test, and the plain interests of prosecutors, criminal defense attorneys, and an organization serving immigrants in the proper enforcement of immigration laws within courthouses, the court finds that Plaintiffs are within the statute's zone of interest and therefore have standing to pursue this case.

IV. Plaintiffs' Motion for a Preliminary Injunction

Having found that Plaintiffs have standing to bring their APA claim, the court turns to Plaintiffs' motion. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

A. Likelihood of Success on the Merits

1. Common Law Privilege Against Civil Courthouse Arrests

In England, for many centuries prior to the founding of the United States, civil litigants commenced their suits by having a civil defendant arrested. See Clinton W. Francis, Practice, Strategy, and Institution: Debt Collection in the English Common-Law Courts, 1740-1840, 80 Nw. U. L. Rev. 807, 810 (1986); see also Nathan Levy, Jr., Mesne Process in Personal Actions at Common Law and the Power Doctrine, 78 Yale L. J. 52, 61 (1968) (In England, "arrest [was] the usual mode of beginning suit"). "[P]ersons so charged [in civil litigation] could be arrested

anywhere in England and brought within the custody of the [court]." Nathan Levy, Jr., Mesne Process in Personal Actions at Common Law and the Power Doctrine, 78 Yale L. J. 52, 62 (1968). "At common law, the writ of *capias ad respondendum* directed the sheriff to secure the defendant's appearance by taking him into custody." Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344 (1999). The courts recognized that permitting arrests at courthouses of those attending court on other matters could chill attendance at those other proceedings. See The King v. Holy Trinity in Wareham, 99 Eng. Rep. 531 (1782) ("for the purposes of justice" those attending court proceedings were privileged from being arrested on civil process); Meekins v. Smith, 126 Eng. Rep. 363 (1791) (same).

The United States imported that procedure of civil arrest and that common law privilege against civil arrest at courthouses into its judicial system. See Stewart v. Ramsay, 242 U.S. 128, 130 (1916) ("[The privilege] is founded in the necessities of the judicial administration, which would be often embarrassed, and sometimes interrupted, if the suitor might be vexed with process while attending upon the court for the protection of his rights, or the witness while attending to testify.") (quoting Parker v. Hotchkiss, 18 F. Cas. 1137, 1138 (C.C.E.D. Pa. 1849)). "It has long been settled that parties and witnesses attending in good faith any legal tribunal, with or without a writ of protection, are privileged from arrest on civil process during their attendance, and for a reasonable time in going and returning." Larned v. Griffin, 12 F. 590, 590 (C.C.D. Mass 1882). The United States Constitution recognizes a similar privilege from civil arrest during legislative proceedings, stating that members of Congress are "privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same." U.S. CONST. art. I, § 6, cl. 1. In explaining this clause in his treatise on the Constitution, Justice Storey underscored the fundamental nature of the privilege against

courthouse arrests, noting that "[t]his privilege is conceded by law to the humblest suitor and witness in a court of justice." Williamson v. United States, 207 U.S. 425, 443 (1908) (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, (1883)). Indeed, courts in the United States have recognized that "justice requires the attendance of witnesses cognizant of material facts, and hence that no unreasonable obstacles ought to be thrown in the way of their freely coming into court to give oral testimony." Diamond v. Earle, 217 Mass. 499, 501 (1914).

The writ of *capias ad respondendum* eventually gave way to personal service of summons or other form of notice. International Shoe Co. v. Wash., 326 U.S. 310, 316 (1945). As the preferred means for obtaining a civil defendant's presence in a lawsuit changed from a civil arrest to a summons and civil process, state and federal courts recognized the need for that privilege's continued applicability, though this procedure was even less intrusive than a civil arrest. See Page Co. v. MacDonald, 261 U.S. 446, 448 (1923) (recognizing the importance of this privilege and the "necessity of its inflexibility"); Stewart v. Ramsay, 242 U.S. 128, 130 (1916) (citing with approval Parker v. Hotchkiss, 18 F. Cas. at 1138 and applying the privilege against arrest in a courthouse to being served with a summons while attending a court proceeding); Diamond v. Earle, 217 Mass. 499, 501 (1914) (exempting courthouse attendees from service of civil process). Such an "absolutely indispensable" privilege, Williamson, 207 U.S. at 443 (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1883)), so fundamental to the functioning of both federal and state judiciary, cannot be assumed to have disappeared simply with the passage of time. The court therefore concludes that a privilege

against civil arrest remained present at common law when Congress enacted the provisions at issue here.[5]

2. Merits of the Administrative Procedures Act Claim

Plaintiffs argue that this common law privilege against civil arrests of court attendees was not abrogated by Congress and that the Courthouse Civil Arrest Directive therefore exceeds ICE's authority and must be invalidated under the Administrative Procedure Act, 5 U.S.C. § 706 (2)(C). The APA instructs a reviewing court to "hold unlawful and set aside agency action…found to be…in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706 (2)(C).

"Statutes which invade the common law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." United States v. Texas, 507 U.S. 529, 534 (1993) (quoting Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952)) (quotation marks and alterations omitted). "In such cases, Congress does not write upon a clean slate." Id. (citing Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108, 111 (1991)). "This presumption is, however, no bar to a construction that conflicts with a common-law rule if the statute speaks directly to the question addressed by the common law." Pasquantino v. United States, 544 U.S. 349, 359 (2005) (internal quotation marks, citations, and alterations omitted). Compare In re Gitto Glob. Corp., 422 F.3d 1, 8 (1st Cir. 2005) ("Because [statute at issue] speaks directly to the question of public access, however, it supplants the common law for purposes of determining public access to papers filed

[5] The court notes, however, that the privilege is tied to the voluntary attendance of parties, witnesses and others in the courthouse and to the necessities of judicial administration. Plaintiffs offer no authority for the proposition that this privilege extends to individuals who are brought to the courthouse in federal or state custody.

in a bankruptcy case.") with Beck v. Prupis, 529 U.S. 494, 504 (2000) (Holding that Congress intended to "adopt…well-established common-law…principles" where the statute offered no indication to the contrary).

The INA, as passed in 1952, did not "speak[] directly" to the common law privilege against civil arrest at the courthouse, nor did any subsequent amendments to the statute. The civil arrest provisions, detailed above, provide for two types of civil arrest: with and without a warrant. When the ICE has secured a warrant, the civil arrest provision permits that "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). Nothing in this provision or section of the statute speaks to courthouse arrests in any way. See United States v. Texas, 507 U.S. at 534-35 (holding that the Debt Collection Act does not speak directly to the government's common law right to collect prejudgment interest where the statute at issue uses the term "person" and does not specify that "person" includes states).

The provision for warrantless civil arrests includes a specified list of when such arrests are appropriate. An ICE officer or employee may civilly arrest, without a warrant, "any alien…if he has reason to believe that the alien so arrested is in the United States in violation of [an immigration law or regulation] and is likely to escape before a warrant can be obtained for his arrest." 8 U.S.C. § 1357 (a)(2). Like § 1226(a), this section does not address courthouse arrests or provide any basis for finding that Congress abrogated the common law privilege against civil arrests in courthouses.

The government argues that the INA supersedes all common law, that immigration law preempts state law, and that the federal government has the sole authority to control immigration. Defs.' Br. at 20-22 [34]. The government's arguments presume that Plaintiffs are seeking to alter

the removal process, but that is not the relief Plaintiffs seek. Plaintiffs are not arguing for any change in removal proceedings, but are simply contending that civil arrests at state courthouses are outside of the statutory authority granted to the government. Even with the comprehensive immigration law system devised by Congress, there are some limits to how and where the government can arrest those it seeks to remove, including the limits written into the statute itself.[6]

At the second day of hearing, the government argued that 8 U.S.C. § 1229(e) demonstrates Congress's intent that the INA abrogate the privilege against courthouse arrests.[7] Section 1229(e)(1) requires that, "[i]n cases where an enforcement action leading to a removal proceeding was taken against an alien at any of the locations specified in paragraph (2), the Notice to Appear shall include a statement that the provisions of section 1367 of this title have been complied with." 8 U.S.C. § 1229(e)(1).[8] One of those specified locations is "a courthouse…if the alien is appearing in connection with a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking, or stalking in which the alien has been battered or subject to extreme cruelty or if the alien is

[6] The DHS website answers the question "is it legal to arrest suspected immigration violators at a courthouse," with the assertion that "ICE officers and agents are expressly authorized by statute to make arrests of aliens where probable cause exists to believe that such aliens are removable." [46-1]. In fact, warrantless civil arrests further require that the arresting officer believe the person "is likely to escape before a warrant can be obtained for his arrest." 8 U.S.C. § 1357 (a)(2).

[7] The cited paragraph is found in a section of the code entitled "Initiation of Removal Proceedings," and not in either section 8 U.S.C. § 1226, entitled "Apprehension and detention of aliens," where the provision concerning arrests with a warrant is found, or 8 U.S.C. § 1357, entitled "Powers of immigration officers and employees," where provisions concerning warrantless arrests are found.

[8] Section 1367, entitled "Penalties for disclosure of information," prohibits ICE and other enforcement agencies from "mak[ing] an adverse determination of admissibility or deportability…using information solely furnished by…a spouse or parent who has battered the alien or subjected the alien to extreme cruelty or others potentially complicit in the abuse of the alien or their family."

described in subparagraph (T) or (U) of section 1101(a)(15) of this title." 8 U.S.C. § 1229(e)(2)(B).

These provisions were added in 2006. See Violence Against Women and Department of Justice Reauthorization Act, PL 109–162, January 5, 2006, 119 Stat 2960. "The views of a subsequent Congress, however, form a hazardous basis for inferring the intent of an earlier one." Bilski v. Kappos, 561 U.S. 593, 645 (2010) (quoting United States v. Price, 361 U.S. 304, 313 (1960)) (internal quotation marks omitted). "When a later statute is offered as an expression of how the Congress interpreted a statute passed by another Congress a half century before, such interpretation has very little, if any, significance." Bilski, 561 U.S. at 645 (citing Rainwater v. United States, 356 U.S. 590, 593 (1958)) (internal quotation marks and alterations omitted). The 2006 enactment of the Violence Against Women and Department of Justice Reauthorization Act has little bearing on the court's interpretation of Congressional intent regarding courthouse arrests in 1952, and certainly does not amount to a clearly stated intent to abrogate the common law privilege. See, e.g., Pasquantino, 544 U.S. at 359 (requiring Congress to clearly state its intent to abrogate the common law).

The government also argues that "ICE has long exercised its arrest authority at and around courthouses…." Defs.' Br. at 4 [34]; see also 2014 Courthouse Memorandum [28-2]. And the provisions of the Violence Against Women and Department of Justice Reauthorization Act do signal that immigration courthouse arrests were occurring by 2006, that Congress was aware that those arrests were occurring, and that Congress did not legislate to cease those arrests. "But the significance of subsequent congressional action or inaction necessarily varies with the circumstances, and finding any interpretive help in congressional behavior here is impossible." United States v. Wells, 519 U.S. 482, 495 (1997). See also Star Athletica, L.L.C. v. Varsity

Brands, Inc., 137 S. Ct. 1002, 1015 (2017) (quoting Pension Benefit Guaranty Corporation v. LTV Corp., 496 U.S. 633, 650 (1990)) ("'Congressional inaction lacks persuasive significance' in most circumstances."). That this practice has been ongoing and that Congress has not halted courthouse civil arrests does not alter the court's understanding of the common law privilege against civil courthouse arrests at the time the INA civil arrest provisions were enacted, and the absence of any clearly stated intent to abrogate that privilege at that time. Accordingly, the court finds that Plaintiffs have a strong likelihood of success on the merits of their claim that Courthouse Civil Arrest Directive exceeds the authority granted to ICE by the Congress in the civil arrest provisions of the INA and should be invalidated pursuant to the Administrative Procedure Act, 5 U.S.C. § 706(2)(C).

B. Irreparable Harm

"Irreparable injury in the preliminary injunction context means an injury that cannot adequately be compensated for either by a later-issued permanent injunction, after a full adjudication on the merits, or by a later-issued damages remedy." Rio Grande Cmty. Health Ctr., Inc. v. Rullan, 397 F.3d 56, 76 (1st Cir. 2005) (internal quotation marks omitted). "If the plaintiff suffers a substantial injury that is not accurately measurable or adequately compensable by money damages, irreparable harm is a natural sequel." Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 19 (1st Cir. 1996). "'District courts have broad discretion to evaluate the irreparability of alleged harm and to make determinations regarding the propriety of injunctive relief.'" K-Mart Corp. v. Oriental Plaza, Inc., 875 F.2d 907, 915 (1st Cir. 1989) (quoting Wagner v. Taylor, 836 F.2d 566, 575–76 (D.C.Cir.1987)).

Plaintiffs argue they are suffering ongoing and irreparable harm. Pls.' Mem at 17 [6]. Specifically, Chelsea Collaborative argues the Courthouse Civil Arrest Directive forces the

diversion of resources from their normal activities to "an extra-judicial mediation and dispute-resolution system." Id. at 18. Chelsea Collaborative's members are afraid to use the courts to vindicate their rights when they are victimized by employers, landlords, family members, and others. Vega Decl. ¶ 9-10, Ex. 10 [7-10]. Chelsea Collaborative's mediation program redirects efforts from other causes and, as a result, Chelsea Collaborative is "unable to effectively carry out many of [its] other goals and missions." Id. at ¶ 22.

Plaintiffs claim the Courthouse Civil Arrest Directive interferes with the District Attorney's ability to prosecute specific cases because victims and witnesses are scared to participate in the proceedings, Pls.' Mem at 18-19 [6], and because ICE civilly arrests many non-targeted individuals at courthouses. Klein Decl. ¶ 6, Ex. 11 [7-11]. For example, survivors of domestic violence fear utilizing the court system in responding to abuse because of a fear of immigration authorities at courthouses. Moshier Decl. ¶ 3, Ex. 14 [7-14]. Domestic violence perpetrators reinforce this fear when talking to survivors. Foley Decl. ¶ 5, Ex. 12 [7-12]. As a result, survivors are "reluctant to file for civil protective orders against abusive partners." Moshier Decl. ¶ 4, Ex. 14 [7-14]. Even complaints successfully filed may not be pursued if survivors fear returning to court to testify in their own cases. Id. at ¶ 6.

CPCS argues the Courthouse Civil Arrest Directive shifts their staff focus to assist criminal defense attorneys in the process of navigating the potential immigration consequences of their client's circumstances, often including helping counsel locate their client in ICE civil detention. Pls.' Mem at 19 [6]. CPCS expends resources "responding to the effects of courthouse arrests, and… assisting defense attorneys whose clients have been impacted by this ICE enforcement policy." Klein Decl. ¶ 4, Ex. 11 [7-11]. Further, when defendants with pending charges are arrested in the courthouse before they can appear before a judge, a default is entered

against them. Id. at ¶ 9. A default can, among other things, cause "the denial of release on immigration bond and denial of relief from removal." Id. at ¶ 10.

None of the financial costs alleged by Plaintiffs could be recovered from the government in the event Plaintiffs succeed at trial. Further, Plaintiffs have made an unrebutted showing that each day that the threat of ICE civil arrests looms over Massachusetts courthouses impairs the DAs and CPCS ability to successfully perform their functions within the judicial system, and Chelsea Collaborative's members' ability to enforce legal rights, and that absent an injunction, some state criminal and civil cases may well go unprosecuted for lack of victim or witness participation. CPCS will continue to incur costs as defendants are civilly arrested when attempting to respond to criminal complaints. Criminal defendants will be unable to vindicate their rights if they are taken into ICE custody prior to appearing in court or if witnesses in their defense are too fearful to visit a courthouse. None of these harms can be remedied after the conclusion of this litigation. Therefore, the court finds that the Plaintiffs have alleged irreparable harm sufficient to warrant and injunction.

C. *Balance of Harms and Weighing of the Public Interest*

Plaintiffs accurately argue that when the government is the defendant in a case for which a preliminary injunction is sought, the court may aggregate its consideration of the balance of harms and weighing of the public interest. Pls.' Br. at 19 [6] (citing Nken v. Holder, 556 U.S. 418, 435 (2009)).

Plaintiffs contend that without an injunction, victims and witnesses will continue to avoid using the state courts, leading to a failure of state civil and criminal proceedings, ultimately harming the rule of law. Over two days of hearing on this preliminary injunction, counsel for the government repeatedly argued that ICE was not conducting courthouse arrests in the manners

described by Plaintiffs. Specifically, counsel represented that "generally" ICE does not arrest civil litigants, witnesses, or victims at courthouses. If this is the case, then to enjoin the applicability of the Courthouse Civil Arrest Directive as to civil arrests of courthouse attendees other than criminal defendants will cause no significant harm to the government. Plaintiffs, in comparison, and the public in general will suffer harm each day that witnesses and victims refuse to participate in proceedings, as detailed above.

Plaintiffs also contend that without an injunction, state criminal defendants who are arrested by ICE coming or leaving the courthouse will be prevented from attending proceedings against them, impairing the DAs ability to prosecute cases and increasing CPCS's costs in representing criminal defendants. According to Defendants' counsel, ICE's general policy is not to arrest criminal defendants until the conclusion of the hearing that they are attending in state court. Counsel acknowledged, however, that ICE would make courthouse arrests before the targeted individuals leave the courthouse. They contend that ICE's inability "to arrest fugitive aliens at the one place at which it can reliably find them in Massachusetts" would harm both the public and the federal government, and that arrestees, officers and the public would be safer if arrests are conducted in courthouses where individuals are screened for weapons. Defs.' Opp. at 26 [34].

The court credits Defendants' safety concerns, as well as the public's need to be protected from dangerous criminal aliens. But Defendants' attempt to justify civil courthouse arrests on these grounds, and on the fact that Massachusetts courts do not recognize civil detainers, and that Federal, state and local law enforcement activity concerning criminal matters "routinely" occurs in courthouses, ignores a critical distinction regarding the challenged arrests. Plaintiffs here seek only to enjoin civil, not criminal, arrests. Where ICE has an alternative route

regarding targeted and dangerous aliens, namely, to pursue a criminal, rather than a civil arrest, see 8 U.S.C. § 1357(a)(4), the balance of harm and public interest support issuance of the injunction against civil arrests.

V. Conclusion

Having found that Plaintiffs have standing to bring this suit, and that they have demonstrated a likelihood of success on the merits of Count 1 of their Complaint [1], that they are likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in Plaintiffs' favor, and that an injunction is in the public interest, the court GRANTS Plaintiffs' Motion for a Preliminary Injunction [5]. The court will issue a preliminary injunction enjoining Defendants from implementing ICE Directive No. 11072.1, "Civil Immigration Actions Inside Courthouses," dated January 10, 2018, in Massachusetts and from civilly arresting parties, witnesses, and others attending Massachusetts courthouses on official business while they are going to, attending, or leaving the courthouse.

IT IS SO ORDERED.

June 20, 2019

/s/ Indira Talwani
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MARIAN RYAN, in her official capacity as Middlesex County District Attorney; RACHAEL ROLLINS, in her official capacity as Suffolk County District Attorney; COMMITTEE FOR PUBLIC COUNSEL SERVICES; and the CHELSEA COLLABORATIVE, INC.,	*	
Plaintiffs,	*	
v.	*	Civil Action No. 19-11003-IT
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; MATTHEW T. ALBENCE, in his official capacity as Acting Deputy Director of U.S. Immigration and Customs Enforcement and Senior Official Performing the Duties of the Director; TODD M. LYONS, in his official capacity as Immigration and Customs Enforcement, Enforcement and Removal Operations, Acting Field Office Director; U.S. DEPARTMENT OF HOMELAND SECURITY; and KEVIN McALEENAN, in his official capacity as Acting Secretary of United States Department of Homeland Security,	*	
Defendants.	*	

PRELIMINARY INJUNCTION

June 20, 2019

TALWANI, D.J.

Upon consideration of Plaintiffs' Motion for a Preliminary Injunction [5], supporting memoranda, filings, and reply brief, Defendants' opposition and related filings, and *amicus curiae* Immigration Reform Law Institute's brief in support of Defendants, and after hearing oral argument from counsel for the parties, the court finds that Plaintiffs have demonstrated a likelihood of success on the merits of Count 1 of their Complaint [1], that they are likely to

suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in Plaintiffs' favor, and that an injunction is in the public interest.

The court therefore ORDERS that Defendants U.S. Immigrations and Customs Enforcement ("ICE"), Matthew T. Albence, in his official capacity as Acting Deputy Director of U.S. Immigration and Customs Enforcement and Senior Official Performing the Duties of the Director, Todd M. Lyons, in his official capacity as Immigration and Customs Enforcement, Enforcement and Removal Operations, Acting Field Office Director; the U.S. Department of Homeland Security, and Kevin McAleenan, in his official capacity as Acting Director of the U.S. Department of Homeland Security, are enjoined from implementing ICE Directive No. 11072.1, "Civil Immigration Actions Inside Courthouses," dated January 10, 2018, in Massachusetts, and from civilly arresting parties, witnesses, and others attending Massachusetts courthouses on official business while they are going to, attending, or leaving the courthouse.

This order does not enjoin the civil arrests of individuals who are brought to the courthouse in state or federal custody, and does not enjoin criminal arrests.

This order shall remain in effect unless and until modified by the court.

IT IS SO ORDERED.

Indira Talwani
United States District Judge

June 20, 2019

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 703

§ 703. Form and venue of proceeding

Currentness

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

Notes of Decisions (92)

5 U.S.C.A. § 703, 5 USCA § 703
Current through P.L. 116-78.

End of Document

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 705

§ 705. Relief pending review

Currentness

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

Notes of Decisions (64)

5 U.S.C.A. § 705, 5 USCA § 705
Current through P.L. 116-78.

End of Document

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 706

§ 706. Scope of review

Currentness

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

Notes of Decisions (4140)

5 U.S.C.A. § 706, 5 USCA § 706
Current through P.L. 116-5. Title 26 current through 116-7.

End of Document

United States Code Annotated Title 6. Domestic Security (Refs & Annos) Chapter 1. Homeland Security Organization Subchapter IV. Border, Maritime, and Transportation Security (Refs & Annos) Part D. Immigration Enforcement Functions

6 U.S.C.A. § 251

§ 251. Transfer of functions

Effective: February 24, 2016
Currentness

In accordance with subchapter XII (relating to transition provisions), there shall be transferred from the Commissioner of Immigration and Naturalization to the Secretary all functions performed under the following programs, and all personnel, assets, and liabilities pertaining to such programs, immediately before such transfer occurs:

(1) The Border Patrol program.

(2) The detention and removal program.

(3) The intelligence program.

(4) The investigations program.

(5) The inspections program.

CREDIT(S)

(Pub.L. 107-296, Title IV, § 441, Nov. 25, 2002, 116 Stat. 2192; Pub.L. 114-125, Title VIII, § 802(g)(1)(B)(v)(I), Feb. 24, 2016, 130 Stat. 212.)

Notes of Decisions (1)

6 U.S.C.A. § 251, 6 USCA § 251
Current through P.L. 116-91.

End of Document

United States Code Annotated
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter II. Immigration
Part II. Admission Qualifications for Aliens; Travel Control of Citizens and Aliens

8 U.S.C.A. § 1182

§ 1182. Inadmissible aliens

Effective: March 7, 2013
Currentness

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(1) Health-related grounds

(A) In general

Any alien--

(i) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance;

(ii) except as provided in subparagraph (C), who seeks admission as an immigrant, or who seeks adjustment of status to the status of an alien lawfully admitted for permanent residence, and who has failed to present documentation of having received vaccination against vaccine-preventable diseases, which shall include at least the following diseases: mumps, measles, rubella, polio, tetanus and diphtheria toxoids, pertussis, influenza type B and hepatitis B, and any other vaccinations against vaccine-preventable diseases recommended by the Advisory Committee for Immunization Practices,

(iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General)--

(I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or

(II) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior, or

(iv) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict,

is inadmissible.

(B) Waiver authorized

For provision authorizing waiver of certain clauses of subparagraph (A), see subsection (g).

(C) Exception from immunization requirement for adopted children 10 years of age or younger

Clause (ii) of subparagraph (A) shall not apply to a child who--

(i) is 10 years of age or younger,

(ii) is described in subparagraph (F) or (G) of section 1101(b)(1) of this title; and

(iii) is seeking an immigrant visa as an immediate relative under section 1151(b) of this title,

if, prior to the admission of the child, an adoptive parent or prospective adoptive parent of the child, who has sponsored the child for admission as an immediate relative, has executed an affidavit stating that the parent is aware of the provisions of subparagraph (A)(ii) and will ensure that, within 30 days of the child's admission, or at the earliest time that is medically appropriate, the child will receive the vaccinations identified in such subparagraph.

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of--

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21),

is inadmissible.

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if--

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) Multiple criminal convictions

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

(C) Controlled substance traffickers

Any alien who the consular officer or the Attorney General knows or has reason to believe--

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 802 of Title 21), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity,

is inadmissible.

(D) Prostitution and commercialized vice

Any alien who--

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution,

is inadmissible.

(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution

Any alien--

(i) who has committed in the United States at any time a serious criminal offense (as defined in section 1101(h) of this title),

(ii) for whom immunity from criminal jurisdiction was exercised with respect to that offense,

(iii) who as a consequence of the offense and exercise of immunity has departed from the United States, and

(iv) who has not subsequently submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense,

is inadmissible.

(F) Waiver authorized

For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h).

(G) Foreign government officials who have committed particularly severe violations of religious freedom

Any alien who, while serving as a foreign government official, was responsible for or directly carried out, at any time, particularly severe violations of religious freedom, as defined in section 6402 of Title 22, is inadmissible.

(H) Significant traffickers in persons

(i) In general

Any alien who commits or conspires to commit human trafficking offenses in the United States or outside the United States, or who the consular officer, the Secretary of Homeland Security, the Secretary of State, or the Attorney General knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons, as defined in the section 7102 of Title 22, is inadmissible.

(ii) Beneficiaries of trafficking

Except as provided in clause (iii), any alien who the consular officer or the Attorney General knows or has reason to believe is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.

(iii) Exception for certain sons and daughters

Clause (ii) shall not apply to a son or daughter who was a child at the time he or she received the benefit described in such clause.

(I) Money laundering

Any alien--

(i) who a consular officer or the Attorney General knows, or has reason to believe, has engaged, is engaging, or seeks to enter the United States to engage, in an offense which is described in section 1956 or 1957 of Title 18 (relating to laundering of monetary instruments); or

(ii) who a consular officer or the Attorney General knows is, or has been, a knowing aider, abettor, assister, conspirator, or colluder with others in an offense which is described in such section;

is inadmissible.

(3) Security and related grounds

(A) In general

Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in--

(i) any activity (I) to violate any law of the United States relating to espionage or sabotage or (II) to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other unlawful activity, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means,

is inadmissible.

(B) Terrorist activities

(i) In general

Any alien who--

(I) has engaged in a terrorist activity;

(II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv));

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

(IV) is a representative (as defined in clause (v)) of--

(aa) a terrorist organization (as defined in clause (vi)); or

(bb) a political, social, or other group that endorses or espouses terrorist activity;

(V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);

(VI) is a member of a terrorist organization described in clause (vi) (III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

(VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;

(VIII) has received military-type training (as defined in section 2339D(c)(1) of Title 18) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); or

(IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years,

is inadmissible. An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this chapter, to be engaged in a terrorist activity.

(ii) Exception

Subclause (IX) of clause (i) does not apply to a spouse or child--

(I) who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or

(II) whom the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible under this section.

(iii) "Terrorist activity" defined

As used in this chapter, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of Title 18) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any--

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain),

with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

(iv) "Engage in terrorist activity" defined

As used in this chapter, the term "engage in terrorist activity" means, in an individual capacity or as a member of an organization--

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;

(III) to gather information on potential targets for terrorist activity;

(IV) to solicit funds or other things of value for--

(aa) a terrorist activity;

(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;

(V) to solicit any individual--

(aa) to engage in conduct otherwise described in this subsection;

(bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false

documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training--

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

(cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or

(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

(v) "Representative" defined

As used in this paragraph, the term "representative" includes an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity.

(vi) "Terrorist organization" defined

As used in this section, the term "terrorist organization" means an organization--

(I) designated under section 1189 of this title;

(II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in the activities described in subclauses (I) through (VI) of clause (iv); or

(III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv).

(C) Foreign policy

(i) In general

An alien whose entry or proposed activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is inadmissible.

(ii) Exception for officials

An alien who is an official of a foreign government or a purported government, or who is a candidate for election to a foreign government office during the period immediately preceding the election for that office, shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) solely because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States.

(iii) Exception for other aliens

An alien, not described in clause (ii), shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States, unless the Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest.

(iv) Notification of determinations

If a determination is made under clause (iii) with respect to an alien, the Secretary of State must notify on a timely basis the chairmen of the Committees on the Judiciary and Foreign Affairs of the House of Representatives and of the Committees on the Judiciary and Foreign Relations of the Senate of the identity of the alien and the reasons for the determination.

(D) Immigrant membership in totalitarian party

(i) In general

Any immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is inadmissible.

(ii) Exception for involuntary membership

Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that the membership or affiliation is or was involuntary, or is or was solely when under 16 years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and whether necessary for such purposes.

(iii) Exception for past membership

Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that--

(I) the membership or affiliation terminated at least--

(a) 2 years before the date of such application, or

(b) 5 years before the date of such application, in the case of an alien whose membership or affiliation was with the party controlling the government of a foreign state that is a totalitarian dictatorship as of such date, and

(II) the alien is not a threat to the security of the United States.

(iv) Exception for close family members

The Attorney General may, in the Attorney General's discretion, waive the application of clause (i) in the case of an immigrant who is the parent, spouse, son, daughter, brother, or sister of a citizen of the United States or a spouse, son, or daughter of an alien lawfully admitted for permanent residence for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest if the immigrant is not a threat to the security of the United States.

(E) Participants in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing

(i) Participation in Nazi persecutions

Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with--

(I) the Nazi government of Germany,

(II) any government in any area occupied by the military forces of the Nazi government of Germany,

(III) any government established with the assistance or cooperation of the Nazi government of Germany, or

(IV) any government which was an ally of the Nazi government of Germany,

ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion is inadmissible.

(ii) Participation in genocide

Any alien who ordered, incited, assisted, or otherwise participated in genocide, as defined in section 1091(a) of Title 18, is inadmissible.

(iii) Commission of acts of torture or extrajudicial killings

Any alien who, outside the United States, has committed, ordered, incited, assisted, or otherwise participated in the commission of--

(I) any act of torture, as defined in section 2340 of Title 18; or

(II) under color of law of any foreign nation, any extrajudicial killing, as defined in section 3(a) of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note),

is inadmissible.

(F) Association with terrorist organizations

Any alien who the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, determines has been associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States is inadmissible.

(G) Recruitment or use of child soldiers

Any alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of Title 18, is inadmissible.

(4) Public charge

(A) In general

Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.

(B) Factors to be taken into account

(i) In determining whether an alien is inadmissible under this paragraph, the consular officer or the Attorney General shall at a minimum consider the alien's--

(I) age;

(II) health;

(III) family status;

(IV) assets, resources, and financial status; and

(V) education and skills.

(ii) In addition to the factors under clause (i), the consular officer or the Attorney General may also consider any affidavit of support under section 1183a of this title for purposes of exclusion under this paragraph.

(C) Family-sponsored immigrants

Any alien who seeks admission or adjustment of status under a visa number issued under section 1151(b)(2) or 1153(a) of this title is inadmissible under this paragraph unless--

(i) the alien has obtained--

(I) status as a spouse or a child of a United States citizen pursuant to clause (ii), (iii), or (iv) of section 1154(a)(1)(A) of this title;

(II) classification pursuant to clause (ii) or (iii) of section 1154(a)(1)(B) of this title; or

(III) classification or status as a VAWA self-petitioner; or

(ii) the person petitioning for the alien's admission (and any additional sponsor required under section 1183a(f) of this title or any alternative sponsor permitted under paragraph (5)(B) of such section) has executed an affidavit of support described in section 1183a of this title with respect to such alien.

(D) Certain employment-based immigrants

Any alien who seeks admission or adjustment of status under a visa number issued under section 1153(b) of this title by virtue of a classification petition filed by a relative of the alien (or by an entity in which such relative has a significant ownership interest) is inadmissible under this paragraph unless such relative has executed an affidavit of support described in section 1183a of this title with respect to such alien.

(E) Special rule for qualified alien victims

Subparagraphs (A), (B), and (C) shall not apply to an alien who--

(i) is a VAWA self-petitioner;

(ii) is an applicant for, or is granted, nonimmigrant status under section 1101(a)(15)(U) of this title; or

(iii) is a qualified alien described in section 1641(c) of this title.

(5) Labor certification and qualifications for certain immigrants

(A) Labor certification

(i) In general

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that--

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

(ii) Certain aliens subject to special rule

For purposes of clause (i)(I), an alien described in this clause is an alien who--

(I) is a member of the teaching profession, or

(II) has exceptional ability in the sciences or the arts.

(iii) Professional athletes

(I) In general

A certification made under clause (i) with respect to a professional athlete shall remain valid with respect to the athlete after the athlete changes employer, if the new employer is a team in the same sport as the team which employed the athlete when the athlete first applied for the certification.

(II) "Professional athlete" defined

For purposes of subclause (I), the term "professional athlete" means an individual who is employed as an athlete by--

(aa) a team that is a member of an association of 6 or more professional sports teams whose total combined revenues exceed $10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage; or

(bb) any minor league team that is affiliated with such an association.

(iv) Long delayed adjustment applicants

A certification made under clause (i) with respect to an individual whose petition is covered by section 1154(j) of this title shall remain valid with respect to a new job accepted by the individual after the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the certification was issued.

(B) Unqualified physicians

An alien who is a graduate of a medical school not accredited by a body or bodies approved for the purpose by the Secretary of Education (regardless of whether such school of medicine is in the United States) and who is coming to the United States principally to perform services as a member of the medical profession is inadmissible, unless the alien (i) has passed parts I and II of the National Board of Medical Examiners Examination (or an equivalent examination as determined by the Secretary of Health and Human Services) and (ii) is competent in oral and written English. For purposes of the previous sentence, an alien who is a graduate of a medical school shall be considered to have passed parts I and II of the National Board of Medical Examiners if the alien was fully and permanently licensed to practice medicine in a State on January 9, 1978, and was practicing medicine in a State on that date.

(C) Uncertified foreign health-care workers

Subject to subsection (r), any alien who seeks to enter the United States for the purpose of performing labor as a health-care worker, other than a physician, is inadmissible unless the alien presents to the consular officer, or, in the case of an adjustment of status, the Attorney General, a certificate from the Commission on Graduates of Foreign Nursing Schools, or a certificate from an equivalent independent credentialing organization approved by the Attorney General in consultation with the Secretary of Health and Human Services, verifying that--

(i) the alien's education, training, license, and experience--

(I) meet all applicable statutory and regulatory requirements for entry into the United States under the classification specified in the application;

(II) are comparable with that required for an American health-care worker of the same type; and

(III) are authentic and, in the case of a license, unencumbered;

(ii) the alien has the level of competence in oral and written English considered by the Secretary of Health and Human Services, in consultation with the Secretary of Education, to be appropriate for health care work of the kind in which the alien will be engaged, as shown by an appropriate score on one or more nationally recognized, commercially available, standardized assessments of the applicant's ability to speak and write; and

(iii) if a majority of States licensing the profession in which the alien intends to work recognize a test predicting the success on the profession's licensing or certification examination, the alien has passed such a test or has passed such an examination.

For purposes of clause (ii), determination of the standardized tests required and of the minimum scores that are appropriate are within the sole discretion of the Secretary of Health and Human Services and are not subject to further administrative or judicial review.

(D) Application of grounds

The grounds for inadmissibility of aliens under subparagraphs (A) and (B) shall apply to immigrants seeking admission or adjustment of status under paragraph (2) or (3) of section 1153(b) of this title.

(6) Illegal entrants and immigration violators

(A) Aliens present without admission or parole

(i) In general

An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.

(ii) Exception for certain battered women and children

Clause (i) shall not apply to an alien who demonstrates that--

(I) the alien is a VAWA self-petitioner;

(II) (a) the alien has been battered or subjected to extreme cruelty by a spouse or parent, or by a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty, or (b) the alien's child has been battered or subjected to extreme cruelty by a spouse or parent of the alien (without the active participation of the alien in the battery or cruelty) or by a member of the spouse's or parent's family residing in the same household as the alien when the spouse or parent consented to or acquiesced in such battery or cruelty and the alien did not actively participate in such battery or cruelty, and

(III) there was a substantial connection between the battery or cruelty described in subclause (I) or (II) and the alien's unlawful entry into the United States.

(B) Failure to attend removal proceeding

Any alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability and who seeks admission to the United States within 5 years of such alien's subsequent departure or removal is inadmissible.

(C) Misrepresentation

(i) In general

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible.

(ii) Falsely claiming citizenship

(I) In general

Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this chapter (including section 1324a of this title) or any other Federal or State law is inadmissible.

(II) Exception

In the case of an alien making a representation described in subclause (I), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such representation.

(iii) Waiver authorized

For provision authorizing waiver of clause (i), see subsection (i).

(D) Stowaways

Any alien who is a stowaway is inadmissible.

(E) Smugglers

(i) In general

Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible.

(ii) Special rule in the case of family reunification

Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 1153(a)(2) of this title (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(iii) Waiver authorized

For provision authorizing waiver of clause (i), see subsection (d)(11).

(F) Subject of civil penalty

(i) In general

An alien who is the subject of a final order for violation of section 1324c of this title is inadmissible.

(ii) Waiver authorized

For provision authorizing waiver of clause (i), see subsection (d)(12).

(G) Student visa abusers

An alien who obtains the status of a nonimmigrant under section 1101(a)(15)(F)(i) of this title and who violates a term or condition of such status under section 1184(l) of this title is inadmissible until the alien has been outside the United States for a continuous period of 5 years after the date of the violation.

(7) Documentation requirements

(A) Immigrants

(i) In general

Except as otherwise specifically provided in this chapter, any immigrant at the time of application for admission--

(I) who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required under the regulations issued by the Attorney General under section 1181(a) of this title, or

(II) whose visa has been issued without compliance with the provisions of section 1153 of this title,

is inadmissible.

(ii) Waiver authorized

For provision authorizing waiver of clause (i), see subsection (k).

(B) Nonimmigrants

(i) In general

Any nonimmigrant who--

(I) is not in possession of a passport valid for a minimum of six months from the date of the expiration of the initial period of the alien's admission or contemplated initial period of stay authorizing the alien to return to the country from which the alien came or to proceed to and enter some other country during such period, or

(II) is not in possession of a valid nonimmigrant visa or border crossing identification card at the time of application for admission,

is inadmissible.

(ii) General waiver authorized

For provision authorizing waiver of clause (i), see subsection (d)(4).

(iii) Guam and Northern Mariana Islands visa waiver

For provision authorizing waiver of clause (i) in the case of visitors to Guam or the Commonwealth of the Northern Mariana Islands, see subsection (l).

(iv) Visa waiver program

For authority to waive the requirement of clause (i) under a program, see section 1187 of this title.

(8) Ineligible for citizenship

(A) In general

Any immigrant who is permanently ineligible to citizenship is inadmissible.

(B) Draft evaders

Any person who has departed from or who has remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency is inadmissible, except that this subparagraph shall not apply to an alien who at the time of such departure was a nonimmigrant and who is seeking to reenter the United States as a nonimmigrant.

(9) Aliens previously removed

(A) Certain aliens previously removed

(i) Arriving aliens

Any alien who has been ordered removed under section 1225(b)(1) of this title or at the end of proceedings under section 1229a of this title initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens

Any alien not described in clause (i) who--

(I) has been ordered removed under section 1229a of this title or any other provision of law, or

(II) departed the United States while an order of removal was outstanding,

and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) Exception

Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission.

(B) Aliens unlawfully present

(i) In general

Any alien (other than an alien lawfully admitted for permanent residence) who--

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 1254a(e)[2] of this title) prior to the commencement of proceedings under section 1225(b)(1) of this title or section 1229a of this title, and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States,

is inadmissible.

(ii) Construction of unlawful presence

For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

(iii) Exceptions

(I) Minors

No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

(II) Asylees

No period of time in which an alien has a bona fide application for asylum pending under section 1158 of this title shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

(III) Family unity

No period of time in which the alien is a beneficiary of family unity protection pursuant to section 301 of the Immigration Act of 1990 shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

(IV) Battered women and children

Clause (i) shall not apply to an alien who would be described in paragraph (6)(A)(ii) if "violation of the terms of the alien's nonimmigrant visa" were substituted for "unlawful entry into the United States" in subclause (III) of that paragraph.

(V) Victims of a severe form of trafficking in persons

Clause (i) shall not apply to an alien who demonstrates that the severe form of trafficking (as that term is defined in section 7102 of Title 22) was at least one central reason for the alien's unlawful presence in the United States.

(iv) Tolling for good cause

In the case of an alien who--

(I) has been lawfully admitted or paroled into the United States,

(II) has filed a nonfrivolous application for a change or extension of status before the date of expiration of the period of stay authorized by the Attorney General, and

(III) has not been employed without authorization in the United States before or during the pendency of such application,

the calculation of the period of time specified in clause (i)(I) shall be tolled during the pendency of such application, but not to exceed 120 days.

(v) Waiver

The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

(C) Aliens unlawfully present after previous immigration violations

(i) In general

Any alien who--

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 1225(b)(1) of this title, section 1229a of this title, or any other provision of law,

and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception

Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary of Homeland Security has consented to the alien's reapplying for admission.

(iii) Waiver

The Secretary of Homeland Security may waive the application of clause (i) in the case of an alien who is a VAWA self-petitioner if there is a connection between--

(I) the alien's battering or subjection to extreme cruelty; and

(II) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

(10) Miscellaneous

(A) Practicing polygamists

Any immigrant who is coming to the United States to practice polygamy is inadmissible.

(B) Guardian required to accompany helpless alien

Any alien--

(i) who is accompanying another alien who is inadmissible and who is certified to be helpless from sickness, mental or physical disability, or infancy pursuant to section 1222(c) of this title, and

(ii) whose protection or guardianship is determined to be required by the alien described in clause (i),

is inadmissible.

(C) International child abduction

(i) In general

Except as provided in clause (ii), any alien who, after entry of an order by a court in the United States granting custody to a person of a United States citizen child who detains or retains the child, or withholds custody of the child, outside the United States from the person granted custody by that order, is inadmissible until the child is surrendered to the person granted custody by that order.

(ii) Aliens supporting abductors and relatives of abductors

Any alien who--

(I) is known by the Secretary of State to have intentionally assisted an alien in the conduct described in clause (i),

(II) is known by the Secretary of State to be intentionally providing material support or safe haven to an alien described in clause (i), or

(III) is a spouse (other than the spouse who is the parent of the abducted child), child (other than the abducted child), parent, sibling, or agent of an alien described in clause (i), if such person has been designated by the Secretary of State at the Secretary's sole and unreviewable discretion, is inadmissible until the child described in clause (i) is surrendered to the person granted custody by the order described in that clause, and such person and child are permitted to return to the United States or such person's place of residence.

(iii) Exceptions

Clauses (i) and (ii) shall not apply--

(I) to a government official of the United States who is acting within the scope of his or her official duties;

(II) to a government official of any foreign government if the official has been designated by the Secretary of State at the Secretary's sole and unreviewable discretion; or

(III) so long as the child is located in a foreign state that is a party to the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980.

(D) Unlawful voters

(i) In general

Any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is inadmissible.

(ii) Exception

In the case of an alien who voted in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such violation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such violation.

(E) Former citizens who renounced citizenship to avoid taxation

Any alien who is a former citizen of the United States who officially renounces United States citizenship and who is determined by the Attorney General to have renounced United States citizenship for the purpose of avoiding taxation by the United States is inadmissible.

(b) Notices of denials

(1) Subject to paragraphs (2) and (3), if an alien's application for a visa, for admission to the United States, or for adjustment of status is denied by an immigration or consular officer because the officer determines the alien to be inadmissible under subsection (a), the officer shall provide the alien with a timely written notice that--

(A) states the determination, and

(B) lists the specific provision or provisions of law under which the alien is inadmissible or adjustment [3] of status.

(2) The Secretary of State may waive the requirements of paragraph (1) with respect to a particular alien or any class or classes of inadmissible aliens.

(3) Paragraph (1) does not apply to any alien inadmissible under paragraph (2) or (3) of subsection (a).

(c) Repealed. Pub.L. 104-208, Div. C, Title III, § 304(b), Sept. 30, 1996, 110 Stat. 3009-597

(d) Temporary admission of nonimmigrants

(1) The Attorney General shall determine whether a ground for inadmissibility exists with respect to a nonimmigrant described in section 1101(a)(15)(S) of this title. The Attorney General, in the Attorney General's discretion, may waive the application of subsection (a) (other than paragraph (3)(E)) in the case of a nonimmigrant described in section 1101(a)(15)(S) of this title, if the Attorney General considers it to be in the national interest to do so. Nothing in this section shall be regarded as prohibiting the Immigration and Naturalization Service from instituting removal proceedings against an alien admitted as a nonimmigrant under section 1101(a)(15)(S) of this title for conduct committed after the alien's

admission into the United States, or for conduct or a condition that was not disclosed to the Attorney General prior to the alien's admission as a nonimmigrant under section 1101(a)(15)(S) of this title.

(2) Repealed. Pub.L. 101-649, Title VI, § 601(d)(2)(A), Nov. 29, 1990, 104 Stat. 5076

(3)(A) Except as provided in this subsection, an alien (i) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under subsection (a) (other than paragraphs (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), and clauses (i) and (ii) of paragraph (3)(E) of such subsection), may, after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General, or (ii) who is inadmissible under subsection (a) (other than paragraphs (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), and clauses (i) and (ii) of paragraph (3)(E) of such subsection), but who is in possession of appropriate documents or is granted a waiver thereof and is seeking admission, may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General. The Attorney General shall prescribe conditions, including exaction of such bonds as may be necessary, to control and regulate the admission and return of inadmissible aliens applying for temporary admission under this paragraph.

(B)(i) The Secretary of State, after consultation with the Attorney General and the Secretary of Homeland Security, or the Secretary of Homeland Security, after consultation with the Secretary of State and the Attorney General, may determine in such Secretary's sole unreviewable discretion that subsection (a)(3)(B) shall not apply with respect to an alien within the scope of that subsection or that subsection (a)(3)(B)(vi)(III) shall not apply to a group within the scope of that subsection, except that no such waiver may be extended to an alien who is within the scope of subsection (a)(3)(B)(i)(II), no such waiver may be extended to an alien who is a member or representative of, has voluntarily and knowingly engaged in or endorsed or espoused or persuaded others to endorse or espouse or support terrorist activity on behalf of, or has voluntarily and knowingly received military-type training from a terrorist organization that is described in subclause (I) or (II) of subsection (a)(3)(B)(vi), and no such waiver may be extended to a group that has engaged terrorist activity against the United States or another democratic country or that has purposefully engaged in a pattern or practice of terrorist activity that is directed at civilians. Such a determination shall neither prejudice the ability of the United States Government to commence criminal or civil proceedings involving a beneficiary of such a determination or any other person, nor create any substantive or procedural right or benefit for a beneficiary of such a determination or any other person. Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review such a determination or revocation except in a proceeding for review of a final order of removal pursuant to section 1252 of this title, and review shall be limited to the extent provided in section 1252(a)(2)(D). The Secretary of State may not exercise the discretion provided in this clause with respect to an alien at any time during which the alien is the subject of pending removal proceedings under section 1229a of this title.

(ii) Not later than 90 days after the end of each fiscal year, the Secretary of State and the Secretary of Homeland Security shall each provide to the Committees on the Judiciary of the House of Representatives and of the Senate, the Committee on International Relations of the House of Representatives, the Committee on Foreign Relations of the Senate, and the Committee on Homeland Security of the House of Representatives a report on the aliens to whom such Secretary has applied clause (i). Within one week of applying clause (i) to a group, the Secretary of State or the Secretary of Homeland Security shall provide a report to such Committees.

(4) Either or both of the requirements of paragraph (7)(B)(i) of subsection (a) may be waived by the Attorney General and the Secretary of State acting jointly (A) on the basis of unforeseen emergency in individual cases, or (B) on the basis

of reciprocity with respect to nationals of foreign contiguous territory or of adjacent islands and residents thereof having a common nationality with such nationals, or (C) in the case of aliens proceeding in immediate and continuous transit through the United States under contracts authorized in section 1223(c) of this title.

(5)(A) The Attorney General may, except as provided in subparagraph (B) or in section 1184(f) of this title, in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

(B) The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 1157 of this title.

(6) Repealed. Pub.L. 101-649, Title VI, § 601(d)(2)(A), Nov. 29, 1990, 104 Stat. 5076

(7) The provisions of subsection (a) (other than paragraph (7)) shall be applicable to any alien who shall leave Guam, the Commonwealth of the Northern Mariana Islands, Puerto Rico, or the Virgin Islands of the United States, and who seeks to enter the continental United States or any other place under the jurisdiction of the United States. The Attorney General shall by regulations provide a method and procedure for the temporary admission to the United States of the aliens described in this proviso.[4] Any alien described in this paragraph, who is denied admission to the United States, shall be immediately removed in the manner provided by section 1231(c) of this title.

(8) Upon a basis of reciprocity accredited officials of foreign governments, their immediate families, attendants, servants, and personal employees may be admitted in immediate and continuous transit through the United States without regard to the provisions of this section except paragraphs (3)(A), (3)(B), (3)(C), and (7)(B) of subsection (a) of this section.

(9), (10) Repealed. Pub.L. 101-649, Title VI, § 601(d)(2)(A), Nov. 29, 1990, 104 Stat. 5076

(11) The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) of subsection (a)(6)(E) in the case of any alien lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of removal, and who is otherwise admissible to the United States as a returning resident under section 1181(b) of this title and in the case of an alien seeking admission or adjustment of status as an immediate relative or immigrant under section 1153(a) of this title (other than paragraph (4) thereof), if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of such action was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(12) The Attorney General may, in the discretion of the Attorney General for humanitarian purposes or to assure family unity, waive application of clause (i) of subsection (a)(6)(F)--

(A) in the case of an alien lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation or removal and who is otherwise admissible to the United States as a returning resident under section 1181(b) of this title, and

(B) in the case of an alien seeking admission or adjustment of status under section 1151(b)(2)(A) of this title or under section 1153(a) of this title,

if no previous civil money penalty was imposed against the alien under section 1324c of this title and the offense was committed solely to assist, aid, or support the alien's spouse or child (and not another individual). No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this paragraph.

(13)(A) The Secretary of Homeland Security shall determine whether a ground for inadmissibility exists with respect to a nonimmigrant described in section 1101(a)(15)(T) of this title, except that the ground for inadmissibility described in subsection (a)(4) shall not apply with respect to such a nonimmigrant.

(B) In addition to any other waiver that may be available under this section, in the case of a nonimmigrant described in section 1101(a)(15)(T) of this title, if the Secretary of Homeland Security considers it to be in the national interest to do so, the Secretary of Homeland Security, in the Attorney General's [5] discretion, may waive the application of--

(i) subsection (a)(1); and

(ii) any other provision of subsection (a) (excluding paragraphs (3), (4), (10)(C), and (10(E)) [6] if the activities rendering the alien inadmissible under the provision were caused by, or were incident to, the victimization described in section 1101(a)(15)(T)(i)(I) of this title.

(14) The Secretary of Homeland Security shall determine whether a ground of inadmissibility exists with respect to a nonimmigrant described in section 1101(a)(15)(U) of this title. The Secretary of Homeland Security, in the Attorney General's [5] discretion, may waive the application of subsection (a) (other than paragraph (3)(E)) in the case of a nonimmigrant described in section 1101(a)(15)(U) of this title, if the Secretary of Homeland Security considers it to be in the public or national interest to do so.

(e) Educational visitor status; foreign residence requirement; waiver

No person admitted under section 1101(a)(15)(J) of this title or acquiring such status after admission (i) whose participation in the program for which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the Government of the United States or by the government of the country of his nationality or his last residence, (ii) who at the time of admission or acquisition of status under section 1101(a)(15)(J) of this title was a national or resident of a country which the Director of the United States Information Agency, pursuant to regulations prescribed by him, had designated as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien was engaged, or (iii) who came to the United States or acquired such status in order to receive graduate medical education or training, shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 1101(a)(15)(H) or section 1101(a)(15)(L) of this title until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate

of at least two years following departure from the United States: *Provided,* That upon the favorable recommendation of the Director, pursuant to the request of an interested United States Government agency (or, in the case of an alien described in clause (iii), pursuant to the request of a State Department of Public Health, or its equivalent), or of the Commissioner of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), or that the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion, or political opinion, the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest except that in the case of a waiver requested by a State Department of Public Health, or its equivalent, or in the case of a waiver requested by an interested United States Government agency on behalf of an alien described in clause (iii), the waiver shall be subject to the requirements of section 1184(l) of this title: *And provided further,* That, except in the case of an alien described in clause (iii), the Attorney General may, upon the favorable recommendation of the Director, waive such two-year foreign residence requirement in any case in which the foreign country of the alien's nationality or last residence has furnished the Director a statement in writing that it has no objection to such waiver in the case of such alien.

(f) Suspension of entry or imposition of restrictions by President

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate. Whenever the Attorney General finds that a commercial airline has failed to comply with regulations of the Attorney General relating to requirements of airlines for the detection of fraudulent documents used by passengers traveling to the United States (including the training of personnel in such detection), the Attorney General may suspend the entry of some or all aliens transported to the United States by such airline.

(g) Bond and conditions for admission of alien inadmissible on health-related grounds

The Attorney General may waive the application of--

(1) subsection (a)(1)(A)(i) in the case of any alien who--

(A) is the spouse or the unmarried son or daughter, or the minor unmarried lawfully adopted child, of a United States citizen, or of an alien lawfully admitted for permanent residence, or of an alien who has been issued an immigrant visa,

(B) has a son or daughter who is a United States citizen, or an alien lawfully admitted for permanent residence, or an alien who has been issued an immigrant visa; or

(C) is a VAWA self-petitioner,

in accordance with such terms, conditions, and controls, if any, including the giving of bond, as the Attorney General, in the discretion of the Attorney General after consultation with the Secretary of Health and Human Services, may by regulation prescribe;

(2) subsection (a)(1)(A)(ii) in the case of any alien--

(A) who receives vaccination against the vaccine-preventable disease or diseases for which the alien has failed to present documentation of previous vaccination,

(B) for whom a civil surgeon, medical officer, or panel physician (as those terms are defined by section 34.2 of title 42 of the Code of Federal Regulations) certifies, according to such regulations as the Secretary of Health and Human Services may prescribe, that such vaccination would not be medically appropriate, or

(C) under such circumstances as the Attorney General provides by regulation, with respect to whom the requirement of such a vaccination would be contrary to the alien's religious beliefs or moral convictions; or

(3) subsection (a)(1)(A)(iii) in the case of any alien, in accordance with such terms, conditions, and controls, if any, including the giving of bond, as the Attorney General, in the discretion of the Attorney General after consultation with the Secretary of Health and Human Services, may by regulation prescribe.

(h) Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E)

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if--

(1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that--

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien; or

(C) the alien is a VAWA self-petitioner; and

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

(i) Admission of immigrant inadmissible for fraud or willful misrepresentation of material fact

(1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien or, in the case of a VAWA self-petitioner, the alien demonstrates extreme hardship to the alien or the alien's United States citizen, lawful permanent resident, or qualified alien parent or child.

(2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).

(j) Limitation on immigration of foreign medical graduates

(1) The additional requirements referred to in section 1101(a)(15)(J) of this title for an alien who is coming to the United States under a program under which he will receive graduate medical education or training are as follows:

(A) A school of medicine or of one of the other health professions, which is accredited by a body or bodies approved for the purpose by the Secretary of Education, has agreed in writing to provide the graduate medical education or training under the program for which the alien is coming to the United States or to assume responsibility for arranging for the provision thereof by an appropriate public or nonprofit private institution or agency, except that, in the case of such an agreement by a school of medicine, any one or more of its affiliated hospitals which are to participate in the provision of the graduate medical education or training must join in the agreement.

(B) Before making such agreement, the accredited school has been satisfied that the alien (i) is a graduate of a school of medicine which is accredited by a body or bodies approved for the purpose by the Secretary of Education (regardless of whether such school of medicine is in the United States); or (ii)(I) has passed parts I and II of the National Board of Medical Examiners Examination (or an equivalent examination as determined by the Secretary of Health and Human Services), (II) has competency in oral and written English, (III) will be able to adapt to the educational and cultural environment in which he will be receiving his education or training, and (IV) has adequate prior education

and training to participate satisfactorily in the program for which he is coming to the United States. For the purposes of this subparagraph, an alien who is a graduate of a medical school shall be considered to have passed parts I and II of the National Board of Medical Examiners examination if the alien was fully and permanently licensed to practice medicine in a State on January 9, 1978, and was practicing medicine in a State on that date.

(C) The alien has made a commitment to return to the country of his nationality or last residence upon completion of the education or training for which he is coming to the United States, and the government of the country of his nationality or last residence has provided a written assurance, satisfactory to the Secretary of Health and Human Services, that there is a need in that country for persons with the skills the alien will acquire in such education or training.

(D) The duration of the alien's participation in the program of graduate medical education or training for which the alien is coming to the United States is limited to the time typically required to complete such program, as determined by the Director of the United States Information Agency at the time of the alien's admission into the United States, based on criteria which are established in coordination with the Secretary of Health and Human Services and which take into consideration the published requirements of the medical specialty board which administers such education or training program; except that--

(i) such duration is further limited to seven years unless the alien has demonstrated to the satisfaction of the Director that the country to which the alien will return at the end of such specialty education or training has an exceptional need for an individual trained in such specialty, and

(ii) the alien may, once and not later than two years after the date the alien is admitted to the United States as an exchange visitor or acquires exchange visitor status, change the alien's designated program of graduate medical education or training if the Director approves the change and if a commitment and written assurance with respect to the alien's new program have been provided in accordance with subparagraph (C).

(E) The alien furnishes the Attorney General each year with an affidavit (in such form as the Attorney General shall prescribe) that attests that the alien (i) is in good standing in the program of graduate medical education or training in which the alien is participating, and (ii) will return to the country of his nationality or last residence upon completion of the education or training for which he came to the United States.

(2) An alien who is a graduate of a medical school and who is coming to the United States to perform services as a member of the medical profession may not be admitted as a nonimmigrant under section 1101(a)(15)(H)(i)(b) of this title unless--

(A) the alien is coming pursuant to an invitation from a public or nonprofit private educational or research institution or agency in the United States to teach or conduct research, or both, at or for such institution or agency, or

(B)(i) the alien has passed the Federation licensing examination (administered by the Federation of State Medical Boards of the United States) or an equivalent examination as determined by the Secretary of Health and Human Services, and

(ii) (I) has competency in oral and written English or (II) is a graduate of a school of medicine which is accredited by a body or bodies approved for the purpose by the Secretary of Education (regardless of whether such school of medicine is in the United States).

(3) Omitted

(k) Attorney General's discretion to admit otherwise inadmissible aliens who possess immigrant visas

Any alien, inadmissible from the United States under paragraph (5)(A) or (7)(A)(i) of subsection (a), who is in possession of an immigrant visa may, if otherwise admissible, be admitted in the discretion of the Attorney General if the Attorney General is satisfied that inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, the immigrant before the time of departure of the vessel or aircraft from the last port outside the United States and outside foreign contiguous territory or, in the case of an immigrant coming from foreign contiguous territory, before the time of the immigrant's application for admission.

(l) Guam and Northern Mariana Islands visa waiver program

(1) In general

The requirement of subsection (a)(7)(B)(i) may be waived by the Secretary of Homeland Security, in the case of an alien applying for admission as a nonimmigrant visitor for business or pleasure and solely for entry into and stay in Guam or the Commonwealth of the Northern Mariana Islands for a period not to exceed 45 days, if the Secretary of Homeland Security, after consultation with the Secretary of the Interior, the Secretary of State, the Governor of Guam and the Governor of the Commonwealth of the Northern Mariana Islands, determines that--

(A) an adequate arrival and departure control system has been developed in Guam and the Commonwealth of the Northern Mariana Islands; and

(B) such a waiver does not represent a threat to the welfare, safety, or security of the United States or its territories and commonwealths.

(2) Alien waiver of rights

An alien may not be provided a waiver under this subsection unless the alien has waived any right--

(A) to review or appeal under this chapter an immigration officer's determination as to the admissibility of the alien at the port of entry into Guam or the Commonwealth of the Northern Mariana Islands; or

(B) to contest, other than on the basis of an application for withholding of removal under section 1231(b)(3) of this title or under the Convention Against Torture, or an application for asylum if permitted under section 1158 of this title, any action for removal of the alien.

(3) Regulations

All necessary regulations to implement this subsection shall be promulgated by the Secretary of Homeland Security, in consultation with the Secretary of the Interior and the Secretary of State, on or before the 180th day after May 8, 2008. The promulgation of such regulations shall be considered a foreign affairs function for purposes of section 553(a) of Title 5. At a minimum, such regulations should include, but not necessarily be limited to--

(A) a listing of all countries whose nationals may obtain the waiver also provided by this subsection, except that such regulations shall provide for a listing of any country from which the Commonwealth has received a significant economic benefit from the number of visitors for pleasure within the one-year period preceding May 8, 2008, unless the Secretary of Homeland Security determines that such country's inclusion on such list would represent a threat to the welfare, safety, or security of the United States or its territories; and

(B) any bonding requirements for nationals of some or all of those countries who may present an increased risk of overstays or other potential problems, if different from such requirements otherwise provided by law for nonimmigrant visitors.

(4) Factors

In determining whether to grant or continue providing the waiver under this subsection to nationals of any country, the Secretary of Homeland Security, in consultation with the Secretary of the Interior and the Secretary of State, shall consider all factors that the Secretary deems relevant, including electronic travel authorizations, procedures for reporting lost and stolen passports, repatriation of aliens, rates of refusal for nonimmigrant visitor visas, overstays, exit systems, and information exchange.

(5) Suspension

The Secretary of Homeland Security shall monitor the admission of nonimmigrant visitors to Guam and the Commonwealth of the Northern Mariana Islands under this subsection. If the Secretary determines that such admissions have resulted in an unacceptable number of visitors from a country remaining unlawfully in Guam or the Commonwealth of the Northern Mariana Islands, unlawfully obtaining entry to other parts of the United States, or seeking withholding of removal or asylum, or that visitors from a country pose a risk to law enforcement or security interests of Guam or the Commonwealth of the Northern Mariana Islands or of the United States (including the interest in the enforcement of the immigration laws of the United States), the Secretary shall suspend the admission of nationals of such country under this subsection. The Secretary of Homeland Security may in the Secretary's discretion suspend the Guam and Northern Mariana Islands visa waiver program at any time, on a country-by-country basis, for other good cause.

(6) Addition of countries

The Governor of Guam and the Governor of the Commonwealth of the Northern Mariana Islands may request the Secretary of the Interior and the Secretary of Homeland Security to add a particular country to the list of countries whose nationals may obtain the waiver provided by this subsection, and the Secretary of Homeland Security may grant such request after consultation with the Secretary of the Interior and the Secretary of State, and may promulgate regulations with respect to the inclusion of that country and any special requirements the Secretary of Homeland

Security, in the Secretary's sole discretion, may impose prior to allowing nationals of that country to obtain the waiver provided by this subsection.

(m) Requirements for admission of nonimmigrant nurses

(1) The qualifications referred to in section 1101(a)(15)(H)(i)(c) of this title, with respect to an alien who is coming to the United States to perform nursing services for a facility, are that the alien--

(A) has obtained a full and unrestricted license to practice professional nursing in the country where the alien obtained nursing education or has received nursing education in the United States;

(B) has passed an appropriate examination (recognized in regulations promulgated in consultation with the Secretary of Health and Human Services) or has a full and unrestricted license under State law to practice professional nursing in the State of intended employment; and

(C) is fully qualified and eligible under the laws (including such temporary or interim licensing requirements which authorize the nurse to be employed) governing the place of intended employment to engage in the practice of professional nursing as a registered nurse immediately upon admission to the United States and is authorized under such laws to be employed by the facility.

(2)(A) The attestation referred to in section 1101(a)(15)(H)(i)(c) of this title, with respect to a facility for which an alien will perform services, is an attestation as to the following:

(i) The facility meets all the requirements of paragraph (6).

(ii) The employment of the alien will not adversely affect the wages and working conditions of registered nurses similarly employed.

(iii) The alien employed by the facility will be paid the wage rate for registered nurses similarly employed by the facility.

(iv) The facility has taken and is taking timely and significant steps designed to recruit and retain sufficient registered nurses who are United States citizens or immigrants who are authorized to perform nursing services, in order to remove as quickly as reasonably possible the dependence of the facility on nonimmigrant registered nurses.

(v) There is not a strike or lockout in the course of a labor dispute, the facility did not lay off and will not lay off a registered nurse employed by the facility within the period beginning 90 days before and ending 90 days after the date of filing of any visa petition, and the employment of such an alien is not intended or designed to influence an election for a bargaining representative for registered nurses of the facility.

(vi) At the time of the filing of the petition for registered nurses under section 1101(a)(15)(H)(i)(c) of this title, notice of the filing has been provided by the facility to the bargaining representative of the registered nurses at the facility

or, where there is no such bargaining representative, notice of the filing has been provided to the registered nurses employed at the facility through posting in conspicuous locations.

(vii) The facility will not, at any time, employ a number of aliens issued visas or otherwise provided nonimmigrant status under section 1101(a)(15)(H)(i)(c) of this title that exceeds 33 percent of the total number of registered nurses employed by the facility.

(viii) The facility will not, with respect to any alien issued a visa or otherwise provided nonimmigrant status under section 1101(a)(15)(H)(i)(c) of this title--

(I) authorize the alien to perform nursing services at any worksite other than a worksite controlled by the facility; or

(II) transfer the place of employment of the alien from one worksite to another.

Nothing in clause (iv) shall be construed as requiring a facility to have taken significant steps described in such clause before November 12, 1999. A copy of the attestation shall be provided, within 30 days of the date of filing, to registered nurses employed at the facility on the date of filing.

(B) For purposes of subparagraph (A)(iv), each of the following shall be considered a significant step reasonably designed to recruit and retain registered nurses:

(i) Operating a training program for registered nurses at the facility or financing (or providing participation in) a training program for registered nurses elsewhere.

(ii) Providing career development programs and other methods of facilitating health care workers to become registered nurses.

(iii) Paying registered nurses wages at a rate higher than currently being paid to registered nurses similarly employed in the geographic area.

(iv) Providing reasonable opportunities for meaningful salary advancement by registered nurses.

The steps described in this subparagraph shall not be considered to be an exclusive list of the significant steps that may be taken to meet the conditions of subparagraph (A)(iv). Nothing in this subparagraph shall require a facility to take more than one step if the facility can demonstrate that taking a second step is not reasonable.

(C) Subject to subparagraph (E), an attestation under subparagraph (A)--

(i) shall expire on the date that is the later of--

(I) the end of the one-year period beginning on the date of its filing with the Secretary of Labor; or

(II) the end of the period of admission under section 1101(a)(15)(H)(i)(c) of this title of the last alien with respect to whose admission it was applied (in accordance with clause (ii)); and

(ii) shall apply to petitions filed during the one-year period beginning on the date of its filing with the Secretary of Labor if the facility states in each such petition that it continues to comply with the conditions in the attestation.

(D) A facility may meet the requirements under this paragraph with respect to more than one registered nurse in a single petition.

(E)(i) The Secretary of Labor shall compile and make available for public examination in a timely manner in Washington, D.C., a list identifying facilities which have filed petitions for nonimmigrants under section 1101(a)(15)(H)(i)(c)of this title and, for each such facility, a copy of the facility's attestation under subparagraph (A) (and accompanying documentation) and each such petition filed by the facility.

(ii) The Secretary of Labor shall establish a process, including reasonable time limits, for the receipt, investigation, and disposition of complaints respecting a facility's failure to meet conditions attested to or a facility's misrepresentation of a material fact in an attestation. Complaints may be filed by any aggrieved person or organization (including bargaining representatives, associations deemed appropriate by the Secretary, and other aggrieved parties as determined under regulations of the Secretary). The Secretary shall conduct an investigation under this clause if there is reasonable cause to believe that a facility fails to meet conditions attested to. Subject to the time limits established under this clause, this subparagraph shall apply regardless of whether an attestation is expired or unexpired at the time a complaint is filed.

(iii) Under such process, the Secretary shall provide, within 180 days after the date such a complaint is filed, for a determination as to whether or not a basis exists to make a finding described in clause (iv). If the Secretary determines that such a basis exists, the Secretary shall provide for notice of such determination to the interested parties and an opportunity for a hearing on the complaint within 60 days of the date of the determination.

(iv) If the Secretary of Labor finds, after notice and opportunity for a hearing, that a facility (for which an attestation is made) has failed to meet a condition attested to or that there was a misrepresentation of material fact in the attestation, the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $1,000 per nurse per violation, with the total penalty not to exceed $10,000 per violation) as the Secretary determines to be appropriate. Upon receipt of such notice, the Attorney General shall not approve petitions filed with respect to a facility during a period of at least one year for nurses to be employed by the facility.

(v) In addition to the sanctions provided for under clause (iv), if the Secretary of Labor finds, after notice and an opportunity for a hearing, that a facility has violated the condition attested to under subparagraph (A)(iii) (relating to payment of registered nurses at the prevailing wage rate), the Secretary shall order the facility to provide for payment of such amounts of back pay as may be required to comply with such condition.

(F)(i) The Secretary of Labor shall impose on a facility filing an attestation under subparagraph (A) a filing fee, in an amount prescribed by the Secretary based on the costs of carrying out the Secretary's duties under this subsection, but not exceeding $250.

(ii) Fees collected under this subparagraph shall be deposited in a fund established for this purpose in the Treasury of the United States.

(iii) The collected fees in the fund shall be available to the Secretary of Labor, to the extent and in such amounts as may be provided in appropriations Acts, to cover the costs described in clause (i), in addition to any other funds that are available to the Secretary to cover such costs.

(3) The period of admission of an alien under section 1101(a)(15)(H)(i)(c) of this title shall be 3 years.

(4) The total number of nonimmigrant visas issued pursuant to petitions granted under section 1101(a)(15)(H)(i)(c) of this title in each fiscal year shall not exceed 500. The number of such visas issued for employment in each State in each fiscal year shall not exceed the following:

(A) For States with populations of less than 9,000,000, based upon the 1990 decennial census of population, 25 visas.

(B) For States with populations of 9,000,000 or more, based upon the 1990 decennial census of population, 50 visas.

(C) If the total number of visas available under this paragraph for a fiscal year quarter exceeds the number of qualified nonimmigrants who may be issued such visas during those quarters, the visas made available under this paragraph shall be issued without regard to the numerical limitation under subparagraph (A) or (B) of this paragraph during the last fiscal year quarter.

(5) A facility that has filed a petition under section 1101(a)(15)(H)(i)(c) of this title to employ a nonimmigrant to perform nursing services for the facility--

(A) shall provide the nonimmigrant a wage rate and working conditions commensurate with those of nurses similarly employed by the facility;

(B) shall require the nonimmigrant to work hours commensurate with those of nurses similarly employed by the facility; and

(C) shall not interfere with the right of the nonimmigrant to join or organize a union.

(6) For purposes of this subsection and section 1101(a)(15)(H)(i)(c) of this title, the term "facility" means a subsection (d) hospital (as defined in section 1886(d)(1)(B) of the Social Security Act (42 U.S.C. 1395ww(d)(1)(B))) that meets the following requirements:

(A) As of March 31, 1997, the hospital was located in a health professional shortage area (as defined in section 254e of Title 42).

(B) Based on its settled cost report filed under title XVIII of the Social Security Act [42 U.S.C.A. § 1395 et seq.] for its cost reporting period beginning during fiscal year 1994--

(i) the hospital has not less than 190 licensed acute care beds;

(ii) the number of the hospital's inpatient days for such period which were made up of patients who (for such days) were entitled to benefits under part A of such title [42 U.S.C.A. § 1395c et seq.] is not less than 35 percent of the total number of such hospital's acute care inpatient days for such period; and

(iii) the number of the hospital's inpatient days for such period which were made up of patients who (for such days) were eligible for medical assistance under a State plan approved under title XIX of the Social Security Act [42 U.S.C.A. § 1396 et seq.], is not less than 28 percent of the total number of such hospital's acute care inpatient days for such period.

(7) For purposes of paragraph (2)(A)(v), the term "lay off", with respect to a worker--

(A) means to cause the worker's loss of employment, other than through a discharge for inadequate performance, violation of workplace rules, cause, voluntary departure, voluntary retirement, or the expiration of a grant or contract; but

(B) does not include any situation in which the worker is offered, as an alternative to such loss of employment, a similar employment opportunity with the same employer at equivalent or higher compensation and benefits than the position from which the employee was discharged, regardless of whether or not the employee accepts the offer.

Nothing in this paragraph is intended to limit an employee's or an employer's rights under a collective bargaining agreement or other employment contract.

(n) Labor condition application

(1) No alien may be admitted or provided status as an H-1B nonimmigrant in an occupational classification unless the employer has filed with the Secretary of Labor an application stating the following:

(A) The employer--

(i) is offering and will offer during the period of authorized employment to aliens admitted or provided status as an H-1B nonimmigrant wages that are at least--

(I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or

(II) the prevailing wage level for the occupational classification in the area of employment,

whichever is greater, based on the best information available as of the time of filing the application, and

(ii) will provide working conditions for such a nonimmigrant that will not adversely affect the working conditions of workers similarly employed.

(B) There is not a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment.

(C) The employer, at the time of filing the application--

(i) has provided notice of the filing under this paragraph to the bargaining representative (if any) of the employer's employees in the occupational classification and area for which aliens are sought, or

(ii) if there is no such bargaining representative, has provided notice of filing in the occupational classification through such methods as physical posting in conspicuous locations at the place of employment or electronic notification to employees in the occupational classification for which H-1B nonimmigrants are sought.

(D) The application shall contain a specification of the number of workers sought, the occupational classification in which the workers will be employed, and wage rate and conditions under which they will be employed.

(E)(i) In the case of an application described in clause (ii), the employer did not displace and will not displace a United States worker (as defined in paragraph (4)) employed by the employer within the period beginning 90 days before and ending 90 days after the date of filing of any visa petition supported by the application.

(ii) An application described in this clause is an application filed on or after the date final regulations are first promulgated to carry out this subparagraph, and before [7] by an H-1B-dependent employer (as defined in paragraph (3)) or by an employer that has been found, on or after October 21, 1998, under paragraph (2)(C) or (5) to have committed a willful failure or misrepresentation during the 5-year period preceding the filing of the application. An application is not described in this clause if the only H-1B nonimmigrants sought in the application are exempt H-1B nonimmigrants.

(F) In the case of an application described in subparagraph (E)(ii), the employer will not place the nonimmigrant with another employer (regardless of whether or not such other employer is an H-1B-dependent employer) where--

(i) the nonimmigrant performs duties in whole or in part at one or more worksites owned, operated, or controlled by such other employer; and

(ii) there are indicia of an employment relationship between the nonimmigrant and such other employer;

unless the employer has inquired of the other employer as to whether, and has no knowledge that, within the period beginning 90 days before and ending 90 days after the date of the placement of the nonimmigrant with the other employer, the other employer has displaced or intends to displace a United States worker employed by the other employer.

(G)(i) In the case of an application described in subparagraph (E)(ii), subject to clause (ii), the employer, prior to filing the application--

(I) has taken good faith steps to recruit, in the United States using procedures that meet industry-wide standards and offering compensation that is at least as great as that required to be offered to H-1B nonimmigrants under subparagraph (A), United States workers for the job for which the nonimmigrant or nonimmigrants is or are sought; and

(II) has offered the job to any United States worker who applies and is equally or better qualified for the job for which the nonimmigrant or nonimmigrants is or are sought.

(ii) The conditions described in clause (i) shall not apply to an application filed with respect to the employment of an H-1B nonimmigrant who is described in subparagraph (A), (B), or (C) of section 1153(b)(1) of this title.

The employer shall make available for public examination, within one working day after the date on which an application under this paragraph is filed, at the employer's principal place of business or worksite, a copy of each such application (and such accompanying documents as are necessary). The Secretary shall compile, on a current basis, a list (by employer and by occupational classification) of the applications filed under this subsection. Such list shall include the wage rate, number of aliens sought, period of intended employment, and date of need. The Secretary shall make such list available for public examination in Washington, D.C. The Secretary of Labor shall review such an application only for completeness and obvious inaccuracies. Unless the Secretary finds that the application is incomplete or obviously inaccurate, the Secretary shall provide the certification described in section 1101(a)(15)(H)(i)(b) of this title within 7 days of the date of the filing of the application. The application form shall include a clear statement explaining the liability under subparagraph (F) of a placing employer if the other employer described in such subparagraph displaces a United States worker as described in such subparagraph. Nothing in subparagraph (G) shall be construed to prohibit an employer from using legitimate selection criteria relevant to the job that are normal or customary to the type of job involved, so long as such criteria are not applied in a discriminatory manner.

(2)(A) Subject to paragraph (5)(A), the Secretary shall establish a process for the receipt, investigation, and disposition of complaints respecting a petitioner's failure to meet a condition specified in an application submitted under paragraph (1) or a petitioner's misrepresentation of material facts in such an application. Complaints may be filed by any aggrieved person or organization (including bargaining representatives). No investigation or hearing shall be conducted on a complaint concerning such a failure or misrepresentation unless the complaint was filed not later than 12 months after the

date of the failure or misrepresentation, respectively. The Secretary shall conduct an investigation under this paragraph if there is reasonable cause to believe that such a failure or misrepresentation has occurred.

(B) Under such process, the Secretary shall provide, within 30 days after the date such a complaint is filed, for a determination as to whether or not a reasonable basis exists to make a finding described in subparagraph (C). If the Secretary determines that such a reasonable basis exists, the Secretary shall provide for notice of such determination to the interested parties and an opportunity for a hearing on the complaint, in accordance with section 556 of Title 5, within 60 days after the date of the determination. If such a hearing is requested, the Secretary shall make a finding concerning the matter by not later than 60 days after the date of the hearing. In the case of similar complaints respecting the same applicant, the Secretary may consolidate the hearings under this subparagraph on such complaints.

(C)(i) If the Secretary finds, after notice and opportunity for a hearing, a failure to meet a condition of paragraph (1)(B), (1)(E), or (1)(F), a substantial failure to meet a condition of paragraph (1)(C), (1)(D), or (1)(G)(i)(I), or a misrepresentation of material fact in an application--

(I) the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $1,000 per violation) as the Secretary determines to be appropriate; and

(II) the Attorney General shall not approve petitions filed with respect to that employer under section 1154 or 1184(c) of this title during a period of at least 1 year for aliens to be employed by the employer.

(ii) If the Secretary finds, after notice and opportunity for a hearing, a willful failure to meet a condition of paragraph (1), a willful misrepresentation of material fact in an application, or a violation of clause (iv)--

(I) the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $5,000 per violation) as the Secretary determines to be appropriate; and

(II) the Attorney General shall not approve petitions filed with respect to that employer under section 1154 or 1184(c) of this title during a period of at least 2 years for aliens to be employed by the employer.

(iii) If the Secretary finds, after notice and opportunity for a hearing, a willful failure to meet a condition of paragraph (1) or a willful misrepresentation of material fact in an application, in the course of which failure or misrepresentation the employer displaced a United States worker employed by the employer within the period beginning 90 days before and ending 90 days after the date of filing of any visa petition supported by the application--

(I) the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $35,000 per violation) as the Secretary determines to be appropriate; and

(II) the Attorney General shall not approve petitions filed with respect to that employer under section 1154 or 1184(c) of this title during a period of at least 3 years for aliens to be employed by the employer.

(iv) It is a violation of this clause for an employer who has filed an application under this subsection to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against an employee (which term, for purposes of this clause, includes a former employee and an applicant for employment) because the employee has disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of this subsection, or any rule or regulation pertaining to this subsection, or because the employee cooperates or seeks to cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of this subsection or any rule or regulation pertaining to this subsection.

(v) The Secretary of Labor and the Attorney General shall devise a process under which an H-1B nonimmigrant who files a complaint regarding a violation of clause (iv) and is otherwise eligible to remain and work in the United States may be allowed to seek other appropriate employment in the United States for a period not to exceed the maximum period of stay authorized for such nonimmigrant classification.

(vi)(I) It is a violation of this clause for an employer who has filed an application under this subsection to require an H-1B nonimmigrant to pay a penalty for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer. The Secretary shall determine whether a required payment is a penalty (and not liquidated damages) pursuant to relevant State law.

(II) It is a violation of this clause for an employer who has filed an application under this subsection to require an alien who is the subject of a petition filed under section 1184(c)(1) of this title, for which a fee is imposed under section 1184(c)(9) of this title, to reimburse, or otherwise compensate, the employer for part or all of the cost of such fee. It is a violation of this clause for such an employer otherwise to accept such reimbursement or compensation from such an alien.

(III) If the Secretary finds, after notice and opportunity for a hearing, that an employer has committed a violation of this clause, the Secretary may impose a civil monetary penalty of $1,000 for each such violation and issue an administrative order requiring the return to the nonimmigrant of any amount paid in violation of this clause, or, if the nonimmigrant cannot be located, requiring payment of any such amount to the general fund of the Treasury.

(vii)(I) It is a failure to meet a condition of paragraph (1)(A) for an employer, who has filed an application under this subsection and who places an H-1B nonimmigrant designated as a full-time employee on the petition filed under section 1184(c)(1) of this title by the employer with respect to the nonimmigrant, after the nonimmigrant has entered into employment with the employer, in nonproductive status due to a decision by the employer (based on factors such as lack of work), or due to the nonimmigrant's lack of a permit or license, to fail to pay the nonimmigrant full-time wages in accordance with paragraph (1)(A) for all such nonproductive time.

(II) It is a failure to meet a condition of paragraph (1)(A) for an employer, who has filed an application under this subsection and who places an H-1B nonimmigrant designated as a part-time employee on the petition filed under section 1184(c)(1) of this title by the employer with respect to the nonimmigrant, after the nonimmigrant has entered into employment with the employer, in nonproductive status under circumstances described in subclause (I), to fail to pay

such a nonimmigrant for such hours as are designated on such petition consistent with the rate of pay identified on such petition.

(III) In the case of an H-1B nonimmigrant who has not yet entered into employment with an employer who has had approved an application under this subsection, and a petition under section 1184(c)(1) of this title, with respect to the nonimmigrant, the provisions of subclauses (I) and (II) shall apply to the employer beginning 30 days after the date the nonimmigrant first is admitted into the United States pursuant to the petition, or 60 days after the date the nonimmigrant becomes eligible to work for the employer (in the case of a nonimmigrant who is present in the United States on the date of the approval of the petition).

(IV) This clause does not apply to a failure to pay wages to an H-1B nonimmigrant for nonproductive time due to non-work-related factors, such as the voluntary request of the nonimmigrant for an absence or circumstances rendering the nonimmigrant unable to work.

(V) This clause shall not be construed as prohibiting an employer that is a school or other educational institution from applying to an H-1B nonimmigrant an established salary practice of the employer, under which the employer pays to H-1B nonimmigrants and United States workers in the same occupational classification an annual salary in disbursements over fewer than 12 months, if--

(aa) the nonimmigrant agrees to the compressed annual salary payments prior to the commencement of the employment; and

(bb) the application of the salary practice to the nonimmigrant does not otherwise cause the nonimmigrant to violate any condition of the nonimmigrant's authorization under this chapter to remain in the United States.

(VI) This clause shall not be construed as superseding clause (viii).

(viii) It is a failure to meet a condition of paragraph (1)(A) for an employer who has filed an application under this subsection to fail to offer to an H-1B nonimmigrant, during the nonimmigrant's period of authorized employment, benefits and eligibility for benefits (including the opportunity to participate in health, life, disability, and other insurance plans; the opportunity to participate in retirement and savings plans; and cash bonuses and noncash compensation, such as stock options (whether or not based on performance)) on the same basis, and in accordance with the same criteria, as the employer offers to United States workers.

(D) If the Secretary finds, after notice and opportunity for a hearing, that an employer has not paid wages at the wage level specified under the application and required under paragraph (1), the Secretary shall order the employer to provide for payment of such amounts of back pay as may be required to comply with the requirements of paragraph (1), whether or not a penalty under subparagraph (C) has been imposed.

(E) If an H-1B-dependent employer places a nonexempt H-1B nonimmigrant with another employer as provided under paragraph (1)(F) and the other employer has displaced or displaces a United States worker employed by such other employer during the period described in such paragraph, such displacement shall be considered for purposes of this paragraph a failure, by the placing employer, to meet a condition specified in an application submitted under paragraph

(1); except that the Attorney General may impose a sanction described in subclause (II) of subparagraph (C)(i), (C)(ii), or (C)(iii) only if the Secretary of Labor found that such placing employer--

(i) knew or had reason to know of such displacement at the time of the placement of the nonimmigrant with the other employer; or

(ii) has been subject to a sanction under this subparagraph based upon a previous placement of an H-1B nonimmigrant with the same other employer.

(F) The Secretary may, on a case-by-case basis, subject an employer to random investigations for a period of up to 5 years, beginning on the date (on or after October 21, 1998) on which the employer is found by the Secretary to have committed a willful failure to meet a condition of paragraph (1) (or has been found under paragraph (5) to have committed a willful failure to meet the condition of paragraph (1)(G)(i)(II)) or to have made a willful misrepresentation of material fact in an application. The preceding sentence shall apply to an employer regardless of whether or not the employer is an H-1B-dependent employer. The authority of the Secretary under this subparagraph shall not be construed to be subject to, or limited by, the requirements of subparagraph (A).

(G)(i) The Secretary of Labor may initiate an investigation of any employer that employs nonimmigrants described in section 1101(a)(15)(H)(i)(b) of this title if the Secretary of Labor has reasonable cause to believe that the employer is not in compliance with this subsection. In the case of an investigation under this clause, the Secretary of Labor (or the acting Secretary in the case of the absence of[8] disability of the Secretary of Labor) shall personally certify that reasonable cause exists and shall approve commencement of the investigation. The investigation may be initiated for reasons other than completeness and obvious inaccuracies by the employer in complying with this subsection.

(ii) If the Secretary of Labor receives specific credible information from a source who is likely to have knowledge of an employer's practices or employment conditions, or an employer's compliance with the employer's labor condition application under paragraph (1), and whose identity is known to the Secretary of Labor, and such information provides reasonable cause to believe that the employer has committed a willful failure to meet a condition of paragraph (1)(A), (1)(B), (1)(C), (1)(E), (1)(F), or (1)(G)(i)(I), has engaged in a pattern or practice of failures to meet such a condition, or has committed a substantial failure to meet such a condition that affects multiple employees, the Secretary of Labor may conduct an investigation into the alleged failure or failures. The Secretary of Labor may withhold the identity of the source from the employer, and the source's identity shall not be subject to disclosure under section 552 of Title 5.

(iii) The Secretary of Labor shall establish a procedure for any person desiring to provide to the Secretary of Labor information described in clause (ii) that may be used, in whole or in part, as the basis for the commencement of an investigation described in such clause, to provide the information in writing on a form developed and provided by the Secretary of Labor and completed by or on behalf of the person. The person may not be an officer or employee of the Department of Labor, unless the information satisfies the requirement of clause (iv)(II) (although an officer or employee of the Department of Labor may complete the form on behalf of the person).

(iv) Any investigation initiated or approved by the Secretary of Labor under clause (ii) shall be based on information that satisfies the requirements of such clause and that

(I) originates from a source other than an officer or employee of the Department of Labor; or

(II) was lawfully obtained by the Secretary of Labor in the course of lawfully conducting another Department of Labor investigation under this chapter of[8] any other Act.

(v) The receipt by the Secretary of Labor of information submitted by an employer to the Attorney General or the Secretary of Labor for purposes of securing the employment of a nonimmigrant described in section 1101(a)(15)(H)(i)(b) of this title shall not be considered a receipt of information for purposes of clause (ii).

(vi) No investigation described in clause (ii) (or hearing described in clause (viii) based on such investigation) may be conducted with respect to information about a failure to meet a condition described in clause (ii), unless the Secretary of Labor receives the information not later than 12 months after the date of the alleged failure.

(vii) The Secretary of Labor shall provide notice to an employer with respect to whom there is reasonable cause to initiate an investigation described in clauses[9] (i) or (ii), prior to the commencement of an investigation under such clauses, of the intent to conduct an investigation. The notice shall be provided in such a manner, and shall contain sufficient detail, to permit the employer to respond to the allegations before an investigation is commenced. The Secretary of Labor is not required to comply with this clause if the Secretary of Labor determines that to do so would interfere with an effort by the Secretary of Labor to secure compliance by the employer with the requirements of this subsection. There shall be no judicial review of a determination by the Secretary of Labor under this clause.

(viii) An investigation under clauses[9] (i) or (ii) may be conducted for a period of up to 60 days. If the Secretary of Labor determines after such an investigation that a reasonable basis exists to make a finding that the employer has committed a willful failure to meet a condition of paragraph (1)(A), (1)(B), (1)(C), (1)(E), (1)(F), or (1)(G)(i)(I), has engaged in a pattern or practice of failures to meet such a condition, or has committed a substantial failure to meet such a condition that affects multiple employees, the Secretary of Labor shall provide for notice of such determination to the interested parties and an opportunity for a hearing in accordance with section 556 of Title 5 within 120 days after the date of the determination. If such a hearing is requested, the Secretary of Labor shall make a finding concerning the matter by not later than 120 days after the date of the hearing.

(H)(i) Except as provided in clauses (ii) and (iii), a person or entity is considered to have complied with the requirements of this subsection, notwithstanding a technical or procedural failure to meet such requirements, if there was a good faith attempt to comply with the requirements.

(ii) Clause (i) shall not apply if--

(I) the Department of Labor (or another enforcement agency) has explained to the person or entity the basis for the failure;

(II) the person or entity has been provided a period of not less than 10 business days (beginning after the date of the explanation) within which to correct the failure; and

(III) the person or entity has not corrected the failure voluntarily within such period.

(iii) A person or entity that, in the course of an investigation, is found to have violated the prevailing wage requirements set forth in paragraph (1)(A), shall not be assessed fines or other penalties for such violation if the person or entity can establish that the manner in which the prevailing wage was calculated was consistent with recognized industry standards and practices.

(iv) Clauses (i) and (iii) shall not apply to a person or entity that has engaged in or is engaging in a pattern or practice of willful violations of this subsection.

(I) Nothing in this subsection shall be construed as superseding or preempting any other enforcement-related authority under this chapter (such as the authorities under section 1324b of this title), or any other Act.

(3)(A) For purposes of this subsection, the term "H-1B-dependent employer" means an employer that

(i)(I) has 25 or fewer full-time equivalent employees who are employed in the United States; and (II) employs more than 7 H-1B nonimmigrants;

(ii)(I) has at least 26 but not more than 50 full-time equivalent employees who are employed in the United States; and (II) employs more than 12 H-1B nonimmigrants; or

(iii)(I) has at least 51 full-time equivalent employees who are employed in the United States; and (II) employs H-1B nonimmigrants in a number that is equal to at least 15 percent of the number of such full-time equivalent employees.

(B) For purposes of this subsection

(i) the term "exempt H-1B nonimmigrant" means an H-1B nonimmigrant who--

(I) receives wages (including cash bonuses and similar compensation) at an annual rate equal to at least $60,000; or

(II) has attained a master's or higher degree (or its equivalent) in a specialty related to the intended employment; and

(ii) the term "nonexempt H-1B nonimmigrant" means an H-1B nonimmigrant who is not an exempt H-1B nonimmigrant.

(C) For purposes of subparagraph (A)

(i) in computing the number of full-time equivalent employees and the number of H-1B nonimmigrants, exempt H-1B nonimmigrants shall not be taken into account during the longer of--

(I) the 6-month period beginning on October 21, 1998; or

(II) the period beginning on October 21, 1998, and ending on the date final regulations are issued to carry out this paragraph; and

(ii) any group treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of Title 26 shall be treated as a single employer.

(4) For purposes of this subsection:

(A) The term "area of employment" means the area within normal commuting distance of the worksite or physical location where the work of the H-1B nonimmigrant is or will be performed. If such worksite or location is within a Metropolitan Statistical Area, any place within such area is deemed to be within the area of employment.

(B) In the case of an application with respect to one or more H-1B nonimmigrants by an employer, the employer is considered to "displace" a United States worker from a job if the employer lays off the worker from a job that is essentially the equivalent of the job for which the nonimmigrant or nonimmigrants is or are sought. A job shall not be considered to be essentially equivalent of another job unless it involves essentially the same responsibilities, was held by a United States worker with substantially equivalent qualifications and experience, and is located in the same area of employment as the other job.

(C) The term "H-1B nonimmigrant" means an alien admitted or provided status as a nonimmigrant described in section 1101(a)(15)(H)(i)(b) of this title.

(D)(i) The term "lays off", with respect to a worker--

(I) means to cause the worker's loss of employment, other than through a discharge for inadequate performance, violation of workplace rules, cause, voluntary departure, voluntary retirement, or the expiration of a grant or contract (other than a temporary employment contract entered into in order to evade a condition described in subparagraph (E) or (F) of paragraph (1)); but

(II) does not include any situation in which the worker is offered, as an alternative to such loss of employment, a similar employment opportunity with the same employer (or, in the case of a placement of a worker with another employer under paragraph (1)(F), with either employer described in such paragraph) at equivalent or higher compensation and benefits than the position from which the employee was discharged, regardless of whether or not the employee accepts the offer.

(ii) Nothing in this subparagraph is intended to limit an employee's rights under a collective bargaining agreement or other employment contract.

(E) The term "United States worker" means an employee who--

(i) is a citizen or national of the United States; or

(ii) is an alien who is lawfully admitted for permanent residence, is admitted as a refugee under section 1157 of this title, is granted asylum under section 1158 of this title, or is an immigrant otherwise authorized, by this chapter or by the Attorney General, to be employed.

(5)(A) This paragraph shall apply instead of subparagraphs (A) through (E) of paragraph (2) in the case of a violation described in subparagraph (B), but shall not be construed to limit or affect the authority of the Secretary or the Attorney General with respect to any other violation.

(B) The Attorney General shall establish a process for the receipt, initial review, and disposition in accordance with this paragraph of complaints respecting an employer's failure to meet the condition of paragraph (1)(G)(i)(II) or a petitioner's misrepresentation of material facts with respect to such condition. Complaints may be filed by an aggrieved individual who has submitted a resume or otherwise applied in a reasonable manner for the job that is the subject of the condition. No proceeding shall be conducted under this paragraph on a complaint concerning such a failure or misrepresentation unless the Attorney General determines that the complaint was filed not later than 12 months after the date of the failure or misrepresentation, respectively.

(C) If the Attorney General finds that a complaint has been filed in accordance with subparagraph (B) and there is reasonable cause to believe that such a failure or misrepresentation described in such complaint has occurred, the Attorney General shall initiate binding arbitration proceedings by requesting the Federal Mediation and Conciliation Service to appoint an arbitrator from the roster of arbitrators maintained by such Service. The procedure and rules of such Service shall be applicable to the selection of such arbitrator and to such arbitration proceedings. The Attorney General shall pay the fee and expenses of the arbitrator.

(D)(i) The arbitrator shall make findings respecting whether a failure or misrepresentation described in subparagraph (B) occurred. If the arbitrator concludes that failure or misrepresentation was willful, the arbitrator shall make a finding to that effect. The arbitrator may not find such a failure or misrepresentation (or that such a failure or misrepresentation was willful) unless the complainant demonstrates such a failure or misrepresentation (or its willful character) by clear and convincing evidence. The arbitrator shall transmit the findings in the form of a written opinion to the parties to the arbitration and the Attorney General. Such findings shall be final and conclusive, and, except as provided in this subparagraph, no official or court of the United States shall have power or jurisdiction to review any such findings.

(ii) The Attorney General may review and reverse or modify the findings of an arbitrator only on the same bases as an award of an arbitrator may be vacated or modified under section 10 or 11 of Title 9.

(iii) With respect to the findings of an arbitrator, a court may review only the actions of the Attorney General under clause (ii) and may set aside such actions only on the grounds described in subparagraph (A), (B), or (C) of section 706(a)(2) of Title 5. Notwithstanding any other provision of law, such judicial review may only be brought in an appropriate United States court of appeals.

(E) If the Attorney General receives a finding of an arbitrator under this paragraph that an employer has failed to meet the condition of paragraph (1)(G)(i)(II) or has misrepresented a material fact with respect to such condition, unless the Attorney General reverses or modifies the finding under subparagraph (D)(ii)--

(i) the Attorney General may impose administrative remedies (including civil monetary penalties in an amount not to exceed $1,000 per violation or $5,000 per violation in the case of a willful failure or misrepresentation) as the Attorney General determines to be appropriate; and

(ii) the Attorney General is authorized to not approve petitions filed, with respect to that employer and for aliens to be employed by the employer, under section 1154 or 1184(c) of this title--

(I) during a period of not more than 1 year; or

(II) in the case of a willful failure or willful misrepresentation, during a period of not more than 2 years.

(F) The Attorney General shall not delegate, to any other employee or official of the Department of Justice, any function of the Attorney General under this paragraph, until 60 days after the Attorney General has submitted a plan for such delegation to the Committees on the Judiciary of the United States House of Representatives and the Senate.

(o) Omitted

(p) Computation of prevailing wage level

(1) In computing the prevailing wage level for an occupational classification in an area of employment for purposes of subsections (a)(5)(A), (n)(1)(A)(i)(II), and (t)(1)(A)(i)(II) in the case of an employee of--

(A) an institution of higher education (as defined in section 1001(a) of Title 20), or a related or affiliated nonprofit entity; or

(B) a nonprofit research organization or a Governmental research organization,

the prevailing wage level shall only take into account employees at such institutions and organizations in the area of employment

(2) With respect to a professional athlete (as defined in subsection (a)(5)(A)(iii)(II)) when the job opportunity is covered by professional sports league rules or regulations, the wage set forth in those rules or regulations shall be considered as not adversely affecting the wages of United States workers similarly employed and be considered the prevailing wage.

(3) The prevailing wage required to be paid pursuant to subsections (a)(5)(A), (n)(1)(A)(i)(II), and (t)(1)(A)(i)(II) shall be 100 percent of the wage determined pursuant to those sections.

(4) Where the Secretary of Labor uses, or makes available to employers, a governmental survey to determine the prevailing wage, such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision. Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3, the difference between the 2 levels offered, adding the quotient thus obtained to the first level and subtracting that quotient from the second level.

(q) Academic honoraria

Any alien admitted under section 1101(a)(15)(B) of this title may accept an honorarium payment and associated incidental expenses for a usual academic activity or activities (lasting not longer than 9 days at any single institution), as defined by the Attorney General in consultation with the Secretary of Education, if such payment is offered by an institution or organization described in subsection (p)(1) and is made for services conducted for the benefit of that institution or entity and if the alien has not accepted such payment or expenses from more than 5 institutions or organizations in the previous 6-month period.

(r) Exception for certain alien nurses

Subsection (a)(5)(C) shall not apply to an alien who seeks to enter the United States for the purpose of performing labor as a nurse who presents to the consular officer (or in the case of an adjustment of status, the Attorney General) a certified statement from the Commission on Graduates of Foreign Nursing Schools (or an equivalent independent credentialing organization approved for the certification of nurses under subsection (a)(5)(C) by the Attorney General in consultation with the Secretary of Health and Human Services) that--

(1) the alien has a valid and unrestricted license as a nurse in a State where the alien intends to be employed and such State verifies that the foreign licenses of alien nurses are authentic and unencumbered;

(2) the alien has passed the National Council Licensure Examination (NCLEX);

(3) the alien is a graduate of a nursing program--

(A) in which the language of instruction was English;

(B) located in a country--

(i) designated by such commission not later than 30 days after November 12, 1999, based on such commission's assessment that the quality of nursing education in that country, and the English language proficiency of those who complete such programs in that country, justify the country's designation; or

(ii) designated on the basis of such an assessment by unanimous agreement of such commission and any equivalent credentialing organizations which have been approved under subsection (a)(5)(C) for the certification of nurses under this subsection; and

(C)(i) which was in operation on or before November 12, 1999; or

(ii) has been approved by unanimous agreement of such commission and any equivalent credentialing organizations which have been approved under subsection (a)(5)(C) for the certification of nurses under this subsection.

(s) Consideration of benefits received as battered alien in determination of inadmissibility as likely to become public charge

In determining whether an alien described in subsection (a)(4)(C)(i) is inadmissible under subsection (a)(4) or ineligible to receive an immigrant visa or otherwise to adjust to the status of permanent resident by reason of subsection (a)(4), the consular officer or the Attorney General shall not consider any benefits the alien may have received that were authorized under section 1641(c) of this title.

(t) [0] Nonimmigrant professionals; labor attestations

(1) No alien may be admitted or provided status as a nonimmigrant under section 1101(a)(15)(H)(i)(b1) of this title or section 1101(a)(15)(E)(iii) of this title in an occupational classification unless the employer has filed with the Secretary of Labor an attestation stating the following:

(A) The employer--

(i) is offering and will offer during the period of authorized employment to aliens admitted or provided status under section 1101(a)(15)(H)(i)(b1) of this title or section 1101(a)(15)(E)(iii) of this title wages that are at least--

(I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question; or

(II) the prevailing wage level for the occupational classification in the area of employment,

whichever is greater, based on the best information available as of the time of filing the attestation; and

(ii) will provide working conditions for such a nonimmigrant that will not adversely affect the working conditions of workers similarly employed.

(B) There is not a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment.

(C) The employer, at the time of filing the attestation--

(i) has provided notice of the filing under this paragraph to the bargaining representative (if any) of the employer's employees in the occupational classification and area for which aliens are sought; or

(ii) if there is no such bargaining representative, has provided notice of filing in the occupational classification through such methods as physical posting in conspicuous locations at the place of employment or electronic notification to employees in the occupational classification for which nonimmigrants under section 1101(a)(15)(H)(i)(b1) of this title or section 1101(a)(15)(E)(iii) of this title are sought.

(D) A specification of the number of workers sought, the occupational classification in which the workers will be employed, and wage rate and conditions under which they will be employed.

(2)(A) The employer shall make available for public examination, within one working day after the date on which an attestation under this subsection is filed, at the employer's principal place of business or worksite, a copy of each such attestation (and such accompanying documents as are necessary).

(B)(i) The Secretary of Labor shall compile, on a current basis, a list (by employer and by occupational classification) of the attestations filed under this subsection. Such list shall include, with respect to each attestation, the wage rate, number of aliens sought, period of intended employment, and date of need.

(ii) The Secretary of Labor shall make such list available for public examination in Washington, D.C.

(C) The Secretary of Labor shall review an attestation filed under this subsection only for completeness and obvious inaccuracies. Unless the Secretary of Labor finds that an attestation is incomplete or obviously inaccurate, the Secretary of Labor shall provide the certification described in section 1101(a)(15)(H)(i)(b1) of this title or section 1101(a)(15)(E)(iii) of this title within 7 days of the date of the filing of the attestation.

(3)(A) The Secretary of Labor shall establish a process for the receipt, investigation, and disposition of complaints respecting the failure of an employer to meet a condition specified in an attestation submitted under this subsection or misrepresentation by the employer of material facts in such an attestation. Complaints may be filed by any aggrieved person or organization (including bargaining representatives). No investigation or hearing shall be conducted on a complaint concerning such a failure or misrepresentation unless the complaint was filed not later than 12 months after the date of the failure or misrepresentation, respectively. The Secretary of Labor shall conduct an investigation under this paragraph if there is reasonable cause to believe that such a failure or misrepresentation has occurred.

(B) Under the process described in subparagraph (A), the Secretary of Labor shall provide, within 30 days after the date a complaint is filed, for a determination as to whether or not a reasonable basis exists to make a finding described in subparagraph (C). If the Secretary of Labor determines that such a reasonable basis exists, the Secretary of Labor shall provide for notice of such determination to the interested parties and an opportunity for a hearing on the complaint, in accordance with section 556 of Title 5, within 60 days after the date of the determination. If such a hearing is requested, the Secretary of Labor shall make a finding concerning the matter by not later than 60 days after the date of the hearing. In the case of similar complaints respecting the same applicant, the Secretary of Labor may consolidate the hearings under this subparagraph on such complaints.

(C)(i) If the Secretary of Labor finds, after notice and opportunity for a hearing, a failure to meet a condition of paragraph (1)(B), a substantial failure to meet a condition of paragraph (1)(C) or (1)(D), or a misrepresentation of material fact in an attestation--

(I) the Secretary of Labor shall notify the Secretary of State and the Secretary of Homeland Security of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $1,000 per violation) as the Secretary of Labor determines to be appropriate; and

(II) the Secretary of State or the Secretary of Homeland Security, as appropriate, shall not approve petitions or applications filed with respect to that employer under section 1154, 1184(c), 1101(a)(15)(H)(i)(b1), or 1101(a)(15)(E)(iii) of this title during a period of at least 1 year for aliens to be employed by the employer.

(ii) If the Secretary of Labor finds, after notice and opportunity for a hearing, a willful failure to meet a condition of paragraph (1), a willful misrepresentation of material fact in an attestation, or a violation of clause (iv)--

(I) the Secretary of Labor shall notify the Secretary of State and the Secretary of Homeland Security of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $5,000 per violation) as the Secretary of Labor determines to be appropriate; and

(II) the Secretary of State or the Secretary of Homeland Security, as appropriate, shall not approve petitions or applications filed with respect to that employer under section 1154, 1184(c), 1101(a)(15)(H)(i)(b1), or 1101(a)(15)(E)(iii) of this title during a period of at least 2 years for aliens to be employed by the employer.

(iii) If the Secretary of Labor finds, after notice and opportunity for a hearing, a willful failure to meet a condition of paragraph (1) or a willful misrepresentation of material fact in an attestation, in the course of which failure or misrepresentation the employer displaced a United States worker employed by the employer within the period beginning 90 days before and ending 90 days after the date of filing of any visa petition or application supported by the attestation--

(I) the Secretary of Labor shall notify the Secretary of State and the Secretary of Homeland Security of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $35,000 per violation) as the Secretary of Labor determines to be appropriate; and

(II) the Secretary of State or the Secretary of Homeland Security, as appropriate, shall not approve petitions or applications filed with respect to that employer under section 1154, 1184(c), 1101(a)(15)(H)(i)(b1), or 1101(a)(15)(E)(iii) of this title during a period of at least 3 years for aliens to be employed by the employer.

(iv) It is a violation of this clause for an employer who has filed an attestation under this subsection to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against an employee (which term, for purposes of this clause, includes a former employee and an applicant for employment) because the employee has disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of this subsection, or any rule or regulation pertaining to this subsection, or because the employee cooperates or seeks to cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of this subsection or any rule or regulation pertaining to this subsection.

(v) The Secretary of Labor and the Secretary of Homeland Security shall devise a process under which a nonimmigrant under section 1101(a)(15)(H)(i)(b1) of this title or section 1101(a)(15)(E)(iii) of this title who files a complaint regarding a violation of clause (iv) and is otherwise eligible to remain and work in the United States may be allowed to seek other appropriate employment in the United States for a period not to exceed the maximum period of stay authorized for such nonimmigrant classification.

(vi)(I) It is a violation of this clause for an employer who has filed an attestation under this subsection to require a nonimmigrant under section 1101(a)(15)(H)(i)(b1) of this title or section 1101(a)(15)(E)(iii) of this title to pay a penalty for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer. The Secretary of Labor shall determine whether a required payment is a penalty (and not liquidated damages) pursuant to relevant State law.

(II) If the Secretary of Labor finds, after notice and opportunity for a hearing, that an employer has committed a violation of this clause, the Secretary of Labor may impose a civil monetary penalty of $1,000 for each such violation and issue an administrative order requiring the return to the nonimmigrant of any amount paid in violation of this clause, or, if the nonimmigrant cannot be located, requiring payment of any such amount to the general fund of the Treasury.

(vii)(I) It is a failure to meet a condition of paragraph (1)(A) for an employer who has filed an attestation under this subsection and who places a nonimmigrant under section 1101(a)(15)(H)(i)(b1) of this title or section 1101(a)(15)(E)(iii) of this title designated as a full-time employee in the attestation, after the nonimmigrant has entered into employment with the employer, in nonproductive status due to a decision by the employer (based on factors such as lack of work), or due to the nonimmigrant's lack of a permit or license, to fail to pay the nonimmigrant full-time wages in accordance with paragraph (1)(A) for all such nonproductive time.

(II) It is a failure to meet a condition of paragraph (1)(A) for an employer who has filed an attestation under this subsection and who places a nonimmigrant under section 1101(a)(15)(H)(i)(b1) of this title or section 1101(a)(15)(E)(iii) of this title designated as a part-time employee in the attestation, after the nonimmigrant has entered into employment with the employer, in nonproductive status under circumstances described in subclause (I), to fail to pay such a nonimmigrant for such hours as are designated on the attestation consistent with the rate of pay identified on the attestation.

(III) In the case of a nonimmigrant under section 1101(a)(15)(H)(i)(b1) of this title or section 1101(a)(15)(E)(iii) of this title who has not yet entered into employment with an employer who has had approved an attestation under this subsection with respect to the nonimmigrant, the provisions of subclauses (I) and (II) shall apply to the employer beginning 30 days after the date the nonimmigrant first is admitted into the United States, or 60 days after the date the nonimmigrant becomes eligible to work for the employer in the case of a nonimmigrant who is present in the United States on the date of the approval of the attestation filed with the Secretary of Labor.

(IV) This clause does not apply to a failure to pay wages to a nonimmigrant under section 1101(a)(15)(H)(i)(b1) of this title or section 1101(a)(15)(E)(iii) of this title for nonproductive time due to non-work-related factors, such as the voluntary request of the nonimmigrant for an absence or circumstances rendering the nonimmigrant unable to work.

(V) This clause shall not be construed as prohibiting an employer that is a school or other educational institution from applying to a nonimmigrant under section 1101(a)(15)(H)(i)(b1) of this title or section 1101(a)(15)(E)(iii) of this title an established salary practice of the employer, under which the employer pays to nonimmigrants under section 1101(a)(15)(H)(i)(b1) of this title or section 1101(a)(15)(E)(iii) of this title and United States workers in the same occupational classification an annual salary in disbursements over fewer than 12 months, if--

(aa) the nonimmigrant agrees to the compressed annual salary payments prior to the commencement of the employment; and

(bb) the application of the salary practice to the nonimmigrant does not otherwise cause the nonimmigrant to violate any condition of the nonimmigrant's authorization under this chapter to remain in the United States.

(VI) This clause shall not be construed as superseding clause (viii).

(viii) It is a failure to meet a condition of paragraph (1)(A) for an employer who has filed an attestation under this subsection to fail to offer to a nonimmigrant under section 1101(a)(15)(H)(i)(b1) of this title or section 1101(a)(15)(E)(iii) of this title, during the nonimmigrant's period of authorized employment, benefits and eligibility for benefits (including the opportunity to participate in health, life, disability, and other insurance plans; the opportunity to participate in retirement and savings plans; and cash bonuses and non-cash compensation, such as stock options (whether or not based on performance)) on the same basis, and in accordance with the same criteria, as the employer offers to United States workers.

(D) If the Secretary of Labor finds, after notice and opportunity for a hearing, that an employer has not paid wages at the wage level specified in the attestation and required under paragraph (1), the Secretary of Labor shall order the employer to provide for payment of such amounts of back pay as may be required to comply with the requirements of paragraph (1), whether or not a penalty under subparagraph (C) has been imposed.

(E) The Secretary of Labor may, on a case-by-case basis, subject an employer to random investigations for a period of up to 5 years, beginning on the date on which the employer is found by the Secretary of Labor to have committed a willful failure to meet a condition of paragraph (1) or to have made a willful misrepresentation of material fact in an attestation. The authority of the Secretary of Labor under this subparagraph shall not be construed to be subject to, or limited by, the requirements of subparagraph (A).

(F) Nothing in this subsection shall be construed as superseding or preempting any other enforcement-related authority under this chapter (such as the authorities under section 1324b of this title), or any other Act.

(4) For purposes of this subsection:

(A) The term "area of employment" means the area within normal commuting distance of the worksite or physical location where the work of the nonimmigrant under section 1101(a)(15)(H)(i)(b1) of this title or section 1101(a)(15)(E)(iii) of this title is or will be performed. If such worksite or location is within a Metropolitan Statistical Area, any place within such area is deemed to be within the area of employment.

(B) In the case of an attestation with respect to one or more nonimmigrants under section 1101(a)(15)(H)(i)(b1) of this title or section 1101(a)(15)(E)(iii) of this title by an employer, the employer is considered to "displace" a United States worker from a job if the employer lays off the worker from a job that is essentially the equivalent of the job for which the nonimmigrant or nonimmigrants is or are sought. A job shall not be considered to be essentially equivalent of another job unless it involves essentially the same responsibilities, was held by a United States worker with substantially equivalent qualifications and experience, and is located in the same area of employment as the other job.

(C)(i) The term "lays off", with respect to a worker--

(I) means to cause the worker's loss of employment, other than through a discharge for inadequate performance, violation of workplace rules, cause, voluntary departure, voluntary retirement, or the expiration of a grant or contract; but

(II) does not include any situation in which the worker is offered, as an alternative to such loss of employment, a similar employment opportunity with the same employer at equivalent or higher compensation and benefits than the position from which the employee was discharged, regardless of whether or not the employee accepts the offer.

(ii) Nothing in this subparagraph is intended to limit an employee's rights under a collective bargaining agreement or other employment contract.

(D) The term "United States worker" means an employee who--

(i) is a citizen or national of the United States; or

(ii) is an alien who is lawfully admitted for permanent residence, is admitted as a refugee under section 1157 of this title, is granted asylum under section 1158 of this title, or is an immigrant otherwise authorized, by this chapter or by the Secretary of Homeland Security, to be employed.

(t) [0] Foreign residence requirement

(1) Except as provided in paragraph (2), no person admitted under section 1101(a)(15)(Q)(ii)(I) of this title, or acquiring such status after admission, shall be eligible to apply for nonimmigrant status, an immigrant visa, or permanent residence under this chapter until it is established that such person has resided and been physically present in the person's country of nationality or last residence for an aggregate of at least 2 years following departure from the United States.

(2) The Secretary of Homeland Security may waive the requirement of such 2-year foreign residence abroad if the Secretary determines that--

(A) departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or an alien lawfully admitted for permanent residence); or

(B) the admission of the alien is in the public interest or the national interest of the United States.

CREDIT(S)

(June 27, 1952, c. 477, Title II, ch. 2, § 212, 66 Stat. 182; July 18, 1956, c. 629, Title III, § 301(a), 70 Stat. 575; Pub.L. 85-508, § 23, July 7, 1958, 72 Stat. 351; Pub.L. 86-3, § 20(b), Mar. 18, 1959, 73 Stat. 13; Pub.L. 86-648, § 8, July 14, 1960, 74 Stat. 505; Pub.L. 87-256, § 109(c), Sept. 21, 1961, 75 Stat. 535; Pub.L. 87-301, §§ 11-15, Sept. 26, 1961, 75 Stat. 654, 655; Pub.L. 89-236, §§ 10, 15, Oct. 3, 1965, 79 Stat. 917, 919; Pub.L. 91-225, § 2, Apr. 7, 1970, 84 Stat. 116; Pub.L. 94-484, Title VI, § 601(a), (c), (d), Oct. 12, 1976, 90 Stat. 2300, 2301; Pub.L. 94-571, §§ 5, 7(d), Oct. 20, 1976, 90 Stat. 2705, 2706; Pub.L. 95-83, Title III, § 307(q)(1), (2), Aug. 1, 1977, 91 Stat. 394; Pub.L. 95-549, Title I, §§ 101, 102, Oct. 30, 1978, 92 Stat. 2065; Pub.L. 96-70, Title III, § 3201(b), Sept. 27, 1979, 93 Stat. 497; Pub.L. 96-212, Title II, § 203(d), (f), Mar. 17, 1980, 94 Stat. 107; Pub.L. 96-538, Title IV, § 404, Dec. 17, 1980, 94 Stat. 3192; Pub.L. 97-116, §§ 4, 5(a)(1), (2), (b), 18(e), Dec. 29, 1981, 95 Stat. 1611, 1612, 1620; Pub.L. 98-454, Title VI, § 602[(a)], Oct. 5, 1984, 98 Stat. 1737; Pub.L. 98-473, Title II, § 220(a), Oct. 12, 1984, 98 Stat. 2028; Pub.L. 99-396, § 14(a), Aug. 27, 1986, 100 Stat. 842; Pub.L. 99-570, Title I, § 1751(a), Oct. 27, 1986, 100 Stat. 3207-47; Pub.L. 99-639, § 6(a), Nov. 10, 1986, 100 Stat. 3543; Pub.L. 99-653, § 7(a), Nov. 14, 1986, 100 Stat. 3657; Pub.L. 100-204, Title VIII, § 806(c), Dec. 22, 1987, 101 Stat. 1399; Pub.L. 100-525, §§ 3(1)(A), 7(c)(1), (3), 8(f), 9(i), Oct. 24, 1988, 102 Stat. 2614, 2616, 2617, 2620; Pub.L. 100-690, Title VII, § 7349(a), Nov. 18, 1988, 102 Stat. 4473; Pub.L. 101-238, § 3(b), Dec. 18, 1989, 103 Stat. 2100; Pub.L. 101-246, Title I, § 131(a), (c), Feb. 16, 1990, 104 Stat. 31; Pub.L. 101-649, Title I, § 162(e)(1), (f)(2)(B), Title II, §§ 202(b), 205(c)(3), Title V, §§ 511(a), 514(a), Title VI, § 601(a), (b), (d), Nov. 29, 1990, 104 Stat. 5011, 5012, 5014, 5020, 5052, 5053, 5067, 5075 to 5077; Pub.L. 102-232, Title III, §§ 302(e)(6), (9), 303(a)(5)(B), (6), (7)(B), 306(a)(10), (12), 307(a) to (g), 309(b)(7), Dec. 12, 1991, 105 Stat. 1746, 1747, 1751, 1753 to 1755, 1759; Pub.L. 103-43, Title XX, § 2007(a), June 10, 1993, 107 Stat. 210; Pub.L. 103-317, Title V, § 506(a), Aug. 26, 1994, 108 Stat. 1765; Pub.L. 103-322, Title XIII, § 130003(b)(1), Sept. 13, 1994, 108 Stat. 2024; Pub.L. 103-416, Title II, §§ 203(a), 219(e), (z)(1), (5), 220(a), Oct. 25, 1994, 108 Stat. 4311, 4316, 4318, 4319; Pub.L. 104-132, Title IV, §§ 411, 412, 440(d), Apr. 24, 1996, 110 Stat. 1268, 1269, 1277; Pub.L. 104-208, Div. C, Title I, § 124(b)(1), Title III, §§ 301(b)(1), (c)(1), 304(b), 305(c), 306(d), 308(c)(2)(B), (d)(1), (e)(1)(B), (C), (2)(A), (6), (f)(1)(C) to (F), (3)(A), (g)(1), (4)(B), (10)(A), (H), 322(a)(2)(B), 341(a), (b), 342(a), 343, 344(a), 345(a), 346(a), 347(a), 348(a), 349, 351(a), 352(a), 355, Title V, § 531(a), Title VI, §§ 602(a), 622(b), 624(a), 671(e)(3), Sept. 30, 1996, 110 Stat. 3009-562, 3009-576, 3009-578, 3009-597, 3009-607, 3009-612, 3009-616, 3009-619 to 3009-622, 3009-625, 3009-629, 3009-635 to 3009-641, 3009-644, 3009-674, 3009-689, 3009-695, 3009-698, 3009-723; Pub.L. 105-73, Nov. 12, 1997, 111 Stat. 1459; Pub.L. 105-277, Div. C, Title IV, §§ 412, 413, 415(a), 431(a), Div. G, Title XXII, § 2226(a), Oct. 21, 1998, 112 Stat. 2681-642 to 2681-651, 2681-654, 2681-658, 2681-820; Pub.L. 105-292, Title VI, § 604(a), Oct. 27, 1998, 112 Stat. 2814; Pub.L. 106-95, §§ 2(b), 4(a), Nov. 12, 1999, 113 Stat. 1312, 1317; Pub.L. 106-120, Title VIII, § 809, Dec. 3, 1999, 113 Stat. 1632; Pub.L. 106-313, Title I, §§ 106(c)(2), 107(a), Oct. 17, 2000, 114 Stat. 1254, 1255; Pub.L. 106-386,

8 USCS § 1226

Current through PL 115-89, approved 11/21/17

United States Code Service - Titles 1 through 54 > TITLE 8. ALIENS AND NATIONALITY > CHAPTER 12. IMMIGRATION AND NATIONALITY > IMMIGRATION > INSPECTION, APPREHENSION, EXAMINATION, EXCLUSION, AND REMOVAL

§ 1226. Apprehension and detention of aliens

(a) Arrest, detention, and release. On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General--

(1) may continue to detain the arrested alien; and

(2) may release the alien on--

(A) bond of at least $ 1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

(b) Revocation of bond or parole. The Attorney General at any time may revoke a bond or parole authorized under subsection (a), rearrest the alien under the original warrant, and detain the alien.

(c) Detention of criminal aliens.

(1) Custody. The Attorney General shall take into custody any alien who--

(A) is inadmissible by reason of having committed any offense covered in section 212(a)(2) [*8 USCS § 1182(a)(2)*],

(B) is deportable by reason of having committed any offense covered in section 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) [*8 USCS § 1227(a)(2)(A)(ii)*, (A)(iii), (B), (C), or (D)],

(C) is deportable under section 237(a)(2)(A)(i) [*8 USCS § 1227(a)(2)(A)(i)*] on the basis of an offense for which the alien has been sentence [sentenced] to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 212(a)(3)(B) [*8 USCS § 1182(a)(3)(B)*] or deportable under section 237(a)(4)(B) [*8 USCS § 1227(a)(4)(B)*],

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release. The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to *section 3521 of title 18, United States Code*, that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

(d) Identification of criminal aliens.

(1) The Attorney General shall devise and implement a system--

(A) to make available, daily (on a 24-hour basis), to Federal, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;

(B) to designate and train officers and employees of the Service to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and release of any alien charged with an aggravated felony; and

(C) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony, and indicates those who have been removed.

(2) The record under paragraph (1)(C) shall be made available--

(A) to inspectors at ports of entry and to border patrol agents at sector headquarters for purposes of immediate identification of any alien who was previously ordered removed and is seeking to reenter the United States, and

(B) to officials of the Department of State for use in its automated visa lookout system.

(3) Upon the request of the governor or chief executive officer of any State, the Service shall provide assistance to State courts in the identification of aliens unlawfully present in the United States pending criminal prosecution.

(e) Judicial review. The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

History

(June 27, 1952, ch 477, Title II, Ch 4, § 236,*66 Stat. 200*; Nov. 29, 1990, *P.L. 101-649*, Title V, Subtitle A, § 504(c), Title VI, § 603(a)(12), *104 Stat. 5050*, 5083; Dec. 12, 1991, *P.L. 102-232*, Title III, § 306(a)(5), *105 Stat. 1751*; Sept. 30, 1996, *P.L. 104-208*, Div C, Title III, Subtitle A, § 303(a), Subtitle F, § 371(b)(5), *110 Stat. 3009*-585, 3009-645.)

Annotations

Notes

References in text:

"This Act", referred to in this section, is Act June 27, 1952, ch 477, *66 Stat. 163*, popularly known as the "Immigration and Nationality Act", which appears generally as *8 USCS §§ 1101* et seq. For full classification of such Act, consult USCS Tables volumes.

Explanatory notes:

The bracketed word "sentenced" has been inserted in subsec. (c)(1)(C) to indicate the word probably intended by Congress.

Effective date of section:

Act June 27, 1952, ch 477, Title IV, § 407, *66 Stat. 281*, which appears as *8 USCS § 1101* note, provided that this section is effective at 12:01 ante meridian United States Eastern Standard Time on the 180th day immediately following enactment on June 27, 1952.

United States Code Annotated
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter II. Immigration
Part IV. Inspection, Apprehension, Examination, Exclusion, and Removal (Refs & Annos)

8 U.S.C.A. § 1229

§ 1229. Initiation of removal proceedings

Effective: August 12, 2006
Currentness

(a) Notice to appear

(1) In general

In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:

(A) The nature of the proceedings against the alien.

(B) The legal authority under which the proceedings are conducted.

(C) The acts or conduct alleged to be in violation of law.

(D) The charges against the alien and the statutory provisions alleged to have been violated.

(E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) and (ii) a current list of counsel prepared under subsection (b)(2).

(F)(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1229a of this title.

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

(iii) The consequences under section 1229a(b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph.

(G)(i) The time and place at which the proceedings will be held.

(ii) The consequences under section 1229a(b)(5) of this title of the failure, except under exceptional circumstances, to appear at such proceedings.

(2) Notice of change in time or place of proceedings

(A) In general

In removal proceedings under section 1229a of this title, in the case of any change or postponement in the time and place of such proceedings, subject to subparagraph (B) a written notice shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying--

(i) the new time or place of the proceedings, and

(ii) the consequences under section 1229a(b)(5) of this title of failing, except under exceptional circumstances, to attend such proceedings.

(B) Exception

In the case of an alien not in detention, a written notice shall not be required under this paragraph if the alien has failed to provide the address required under paragraph (1)(F).

(3) Central address files

The Attorney General shall create a system to record and preserve on a timely basis notices of addresses and telephone numbers (and changes) provided under paragraph (1)(F).

(b) Securing of counsel

(1) In general

In order that an alien be permitted the opportunity to secure counsel before the first hearing date in proceedings under section 1229a of this title, the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear, unless the alien requests in writing an earlier hearing date.

(2) Current lists of counsel

The Attorney General shall provide for lists (updated not less often than quarterly) of persons who have indicated their availability to represent pro bono aliens in proceedings under section 1229a of this title. Such lists shall be provided under subsection (a)(1)(E) and otherwise made generally available.

(3) Rule of construction

Nothing in this subsection may be construed to prevent the Attorney General from proceeding against an alien pursuant to section 1229a of this title if the time period described in paragraph (1) has elapsed and the alien has failed to secure counsel.

(c) Service by mail

Service by mail under this section shall be sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with subsection (a)(1)(F).

(d) Prompt initiation of removal

(1) In the case of an alien who is convicted of an offense which makes the alien deportable, the Attorney General shall begin any removal proceeding as expeditiously as possible after the date of the conviction.

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

(e) Certification of compliance with restrictions on disclosure

(1) In general

In cases where an enforcement action leading to a removal proceeding was taken against an alien at any of the locations specified in paragraph (2), the Notice to Appear shall include a statement that the provisions of section 1367 of this title have been complied with.

(2) Locations

The locations specified in this paragraph are as follows:

(A) At a domestic violence shelter, a rape crisis center, supervised visitation center, family justice center, a victim services, or victim services provider, or a community-based organization.

(B) At a courthouse (or in connection with that appearance of the alien at a courthouse) if the alien is appearing in connection with a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking, or stalking in which the alien has been battered or subject to extreme cruelty or if the alien is described in subparagraph (T) or (U) of section 1101(a)(15) of this title.

CREDIT(S)

(June 27, 1952, c. 477, Title II, § 239, as added Pub.L. 104-208, Div. C, Title III, § 304(a)(3), Sept. 30, 1996, 110 Stat. 3009-587; amended Pub.L. 109-162, Title VIII, § 825(c)(1), Jan. 5, 2006, 119 Stat. 3065; Pub.L. 109-271, § 6(d), Aug. 12, 2006, 120 Stat. 763.)

Notes of Decisions (92)

8 U.S.C.A. § 1229, 8 USCA § 1229
Current through P.L. 116-18

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United States Code Annotated
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter II. Immigration
Part IV. Inspection, Apprehension, Examination, Exclusion, and Removal (Refs & Annos)

8 U.S.C.A. § 1231

§ 1231. Detention and removal of aliens ordered removed

Currentness

(a) Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

(B) Beginning of period

The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

(C) Suspension of period

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(3) Supervision after 90-day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien--

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

(4) Aliens imprisoned, arrested, or on parole, supervised release, or probation

(A) In general

Except as provided in section 259(a) of Title 42 and paragraph (2) , the Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment. Parole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal.

(B) Exception for removal of nonviolent offenders prior to completion of sentence of imprisonment

The Attorney General is authorized to remove an alien in accordance with applicable procedures under this chapter before the alien has completed a sentence of imprisonment--

(i) in the case of an alien in the custody of the Attorney General, if the Attorney General determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense related to smuggling or harboring of aliens or an offense described in section 1101(a)(43)(B), (C), (E), (I), or (L) of this title[2] and (II) the removal of the alien is appropriate and in the best interest of the United States; or

(ii) in the case of an alien in the custody of a State (or a political subdivision of a State), if the chief State official exercising authority with respect to the incarceration of the alien determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense described in section 1101(a)(43)(C) or (E) of

this title), (II) the removal is appropriate and in the best interest of the State, and (III) submits a written request to the Attorney General that such alien be so removed.

(C) Notice

Any alien removed pursuant to this paragraph shall be notified of the penalties under the laws of the United States relating to the reentry of deported aliens, particularly the expanded penalties for aliens removed under subparagraph (B).

(D) No private right

No cause or claim may be asserted under this paragraph against any official of the United States or of any State to compel the release, removal, or consideration for release or removal of any alien.

(5) Reinstatement of removal orders against aliens illegally reentering

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

(7) Employment authorization

No alien ordered removed shall be eligible to receive authorization to be employed in the United States unless the Attorney General makes a specific finding that--

(A) the alien cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien, or

(B) the removal of the alien is otherwise impracticable or contrary to the public interest.

(b) Countries to which aliens may be removed

(1) Aliens arriving at the United States

Subject to paragraph (3)--

(A) In general

Except as provided by subparagraphs (B) and (C), an alien who arrives at the United States and with respect to whom proceedings under section 1229a of this title were initiated at the time of such alien's arrival shall be removed to the country in which the alien boarded the vessel or aircraft on which the alien arrived in the United States.

(B) Travel from contiguous territory

If the alien boarded the vessel or aircraft on which the alien arrived in the United States in a foreign territory contiguous to the United States, an island adjacent to the United States, or an island adjacent to a foreign territory contiguous to the United States, and the alien is not a native, citizen, subject, or national of, or does not reside in, the territory or island, removal shall be to the country in which the alien boarded the vessel that transported the alien to the territory or island.

(C) Alternative countries

If the government of the country designated in subparagraph (A) or (B) is unwilling to accept the alien into that country's territory, removal shall be to any of the following countries, as directed by the Attorney General:

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

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

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

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

(2) Other aliens

Subject to paragraph (3)--

(A) Selection of country by alien

Except as otherwise provided in this paragraph--

(i) any alien not described in paragraph (1) who has been ordered removed may designate one country to which the alien wants to be removed, and

(ii) the Attorney General shall remove the alien to the country the alien so designates.

(B) Limitation on designation

An alien may designate under subparagraph (A)(i) a foreign territory contiguous to the United States, an adjacent island, or an island adjacent to a foreign territory contiguous to the United States as the place to which the alien is to be removed only if the alien is a native, citizen, subject, or national of, or has resided in, that designated territory or island.

(C) Disregarding designation

The Attorney General may disregard a designation under subparagraph (A)(i) if--

(i) the alien fails to designate a country promptly;

(ii) the government of the country does not inform the Attorney General finally, within 30 days after the date the Attorney General first inquires, whether the government will accept the alien into the country;

(iii) the government of the country is not willing to accept the alien into the country; or

(iv) the Attorney General decides that removing the alien to the country is prejudicial to the United States.

(D) Alternative country

If an alien is not removed to a country designated under subparagraph (A)(i), the Attorney General shall remove the alien to a country of which the alien is a subject, national, or citizen unless the government of the country--

(i) does not inform the Attorney General or the alien finally, within 30 days after the date the Attorney General first inquires or within another period of time the Attorney General decides is reasonable, whether the government will accept the alien into the country; or

(ii) is not willing to accept the alien into the country.

(E) Additional removal countries

If an alien is not removed to a country under the previous subparagraphs of this paragraph, the Attorney General shall remove the alien to any of the following countries:

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

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

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

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

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

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

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

(F) Removal country when United States is at war

When the United States is at war and the Attorney General decides that it is impracticable, inadvisable, inconvenient, or impossible to remove an alien under this subsection because of the war, the Attorney General may remove the alien--

(i) to the country that is host to a government in exile of the country of which the alien is a citizen or subject if the government of the host country will permit the alien's entry; or

(ii) if the recognized government of the country of which the alien is a citizen or subject is not in exile, to a country, or a political or territorial subdivision of a country, that is very near the country of which the alien is a citizen or subject, or, with the consent of the government of the country of which the alien is a citizen or subject, to another country.

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception

Subparagraph (A) does not apply to an alien deportable under section 1227(a)(4)(D) of this title or if the Attorney General decides that--

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States;

(iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime. For purposes of clause (iv), an alien who is described in section 1227(a)(4)(B) of this title shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.

(C) Sustaining burden of proof; credibility determinations

In determining whether an alien has demonstrated that the alien's life or freedom would be threatened for a reason described in subparagraph (A), the trier of fact shall determine whether the alien has sustained the alien's burden of proof, and shall make credibility determinations, in the manner described in clauses (ii) and (iii) of section 1158(b)(1)(B) of this title.

(c) Removal of aliens arriving at port of entry

(1) Vessels and aircraft

An alien arriving at a port of entry of the United States who is ordered removed either without a hearing under section 1225(b)(1) or 1225(c) of this title or pursuant to proceedings under section 1229a of this title initiated at the time of such alien's arrival shall be removed immediately on a vessel or aircraft owned by the owner of the vessel or aircraft on which the alien arrived in the United States, unless--

(A) it is impracticable to remove the alien on one of those vessels or aircraft within a reasonable time, or

(B) the alien is a stowaway--

(i) who has been ordered removed in accordance with section 1225(a)(1) of this title,

(ii) who has requested asylum, and

(iii) whose application has not been adjudicated or whose asylum application has been denied but who has not exhausted all appeal rights.

(2) Stay of removal

(A) In general

The Attorney General may stay the removal of an alien under this subsection if the Attorney General decides that--

(i) immediate removal is not practicable or proper; or

(ii) the alien is needed to testify in the prosecution of a person for a violation of a law of the United States or of any State.

(B) Payment of detention costs

During the period an alien is detained because of a stay of removal under subparagraph (A)(ii), the Attorney General may pay from the appropriation "Immigration and Naturalization Service--Salaries and Expenses"--

(i) the cost of maintenance of the alien; and

(ii) a witness fee of $1 a day.

(C) Release during stay

The Attorney General may release an alien whose removal is stayed under subparagraph (A)(ii) on--

(i) the alien's filing a bond of at least $500 with security approved by the Attorney General;

(ii) condition that the alien appear when required as a witness and for removal; and

(iii) other conditions the Attorney General may prescribe.

(3) Costs of detention and maintenance pending removal

(A) In general

Except as provided in subparagraph (B) and subsection (d)[3], an owner of a vessel or aircraft bringing an alien to the United States shall pay the costs of detaining and maintaining the alien--

(i) while the alien is detained under subsection (d)(1), and

(ii) in the case of an alien who is a stowaway, while the alien is being detained pursuant to--

(I) subsection (d)(2)(A) or (d)(2)(B)(i),

(II) subsection (d)(2)(B)(ii) or (iii) for the period of time reasonably necessary for the owner to arrange for repatriation or removal of the stowaway, including obtaining necessary travel documents, but not to extend beyond the date on which it is ascertained that such travel documents cannot be obtained from the country to which the stowaway is to be returned, or

(III) section 1225(b)(1)(B)(ii) of this title, for a period not to exceed 15 days (excluding Saturdays, Sundays, and holidays) commencing on the first such day which begins on the earlier of 72 hours after the time of the initial presentation of the stowaway for inspection or at the time the stowaway is determined to have a credible fear of persecution.

(B) Nonapplication

Subparagraph (A) shall not apply if--

(i) the alien is a crewmember;

(ii) the alien has an immigrant visa;

(iii) the alien has a nonimmigrant visa or other documentation authorizing the alien to apply for temporary admission to the United States and applies for admission not later than 120 days after the date the visa or documentation was issued;

(iv) the alien has a reentry permit and applies for admission not later than 120 days after the date of the alien's last inspection and admission;

(v)(I) the alien has a nonimmigrant visa or other documentation authorizing the alien to apply for temporary admission to the United States or a reentry permit;

(II) the alien applies for admission more than 120 days after the date the visa or documentation was issued or after the date of the last inspection and admission under the reentry permit; and

(III) the owner of the vessel or aircraft satisfies the Attorney General that the existence of the condition relating to inadmissibility could not have been discovered by exercising reasonable care before the alien boarded the vessel or aircraft; or

(vi) the individual claims to be a national of the United States and has a United States passport.

(d) Requirements of persons providing transportation

(1) Removal at time of arrival

An owner, agent, master, commanding officer, person in charge, purser, or consignee of a vessel or aircraft bringing an alien (except an alien crewmember) to the United States shall--

(A) receive an alien back on the vessel or aircraft or another vessel or aircraft owned or operated by the same interests if the alien is ordered removed under this part; and

(B) take the alien to the foreign country to which the alien is ordered removed.

(2) Alien stowaways

An owner, agent, master, commanding officer, charterer, or consignee of a vessel or aircraft arriving in the United States with an alien stowaway--

(A) shall detain the alien on board the vessel or aircraft, or at such place as the Attorney General shall designate, until completion of the inspection of the alien by an immigration officer;

(B) may not permit the stowaway to land in the United States, except pursuant to regulations of the Attorney General temporarily--

(i) for medical treatment,

(ii) for detention of the stowaway by the Attorney General, or

(iii) for departure or removal of the stowaway; and

(C) if ordered by an immigration officer, shall remove the stowaway on the vessel or aircraft or on another vessel or aircraft.

The Attorney General shall grant a timely request to remove the stowaway under subparagraph (C) on a vessel or aircraft other than that on which the stowaway arrived if the requester has obtained any travel documents necessary for departure or repatriation of the stowaway and removal of the stowaway will not be unreasonably delayed.

(3) Removal upon order

An owner, agent, master, commanding officer, person in charge, purser, or consignee of a vessel, aircraft, or other transportation line shall comply with an order of the Attorney General to take on board, guard safely, and transport to the destination specified any alien ordered to be removed under this chapter.

(e) Payment of expenses of removal

(1) Costs of removal at time of arrival

In the case of an alien who is a stowaway or who is ordered removed either without a hearing under section 1225(a)(1)[4] or 1225(c) of this title or pursuant to proceedings under section 1229a of this title initiated at the time of such alien's arrival, the owner of the vessel or aircraft (if any) on which the alien arrived in the United States shall pay the transportation cost of removing the alien. If removal is on a vessel or aircraft not owned by the owner of the vessel or aircraft on which the alien arrived in the United States, the Attorney General may--

(A) pay the cost from the appropriation "Immigration and Naturalization Service--Salaries and Expenses"; and

(B) recover the amount of the cost in a civil action from the owner, agent, or consignee of the vessel or aircraft (if any) on which the alien arrived in the United States.

(2) Costs of removal to port of removal for aliens admitted or permitted to land

In the case of an alien who has been admitted or permitted to land and is ordered removed, the cost (if any) of removal of the alien to the port of removal shall be at the expense of the appropriation for the enforcement of this chapter.

(3) Costs of removal from port of removal for aliens admitted or permitted to land

(A) Through appropriation

Except as provided in subparagraph (B), in the case of an alien who has been admitted or permitted to land and is ordered removed, the cost (if any) of removal of the alien from the port of removal shall be at the expense of the appropriation for the enforcement of this chapter.

(B) Through owner

(i) In general

In the case of an alien described in clause (ii), the cost of removal of the alien from the port of removal may be charged to any owner of the vessel, aircraft, or other transportation line by which the alien came to the United States.

(ii) Aliens described

An alien described in this clause is an alien who--

(I) is admitted to the United States (other than lawfully admitted for permanent residence) and is ordered removed within 5 years of the date of admission based on a ground that existed before or at the time of admission, or

(II) is an alien crewman permitted to land temporarily under section 1282 of this title and is ordered removed within 5 years of the date of landing.

(C) Costs of removal of certain aliens granted voluntary departure

In the case of an alien who has been granted voluntary departure under section 1229c of this title and who is financially unable to depart at the alien's own expense and whose removal the Attorney General deems to be in the best interest of the United States, the expense of such removal may be paid from the appropriation for the enforcement of this chapter.

(f) Aliens requiring personal care during removal

(1) In general

If the Attorney General believes that an alien being removed requires personal care because of the alien's mental or physical condition, the Attorney General may employ a suitable person for that purpose who shall accompany and care for the alien until the alien arrives at the final destination.

(2) Costs

The costs of providing the service described in paragraph (1) shall be defrayed in the same manner as the expense of removing the accompanied alien is defrayed under this section.

(g) Places of detention

(1) In general

The Attorney General shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal. When United States Government facilities are unavailable or facilities adapted or suitably located for detention are unavailable for rental, the Attorney General may expend from the appropriation "Immigration and Naturalization Service--Salaries and Expenses", without regard to section 6101 of Title 41, amounts necessary to

acquire land and to acquire, build, remodel, repair, and operate facilities (including living quarters for immigration officers if not otherwise available) necessary for detention.

(2) Detention facilities of the Immigration and Naturalization Service

Prior to initiating any project for the construction of any new detention facility for the Service, the Commissioner shall consider the availability for purchase or lease of any existing prison, jail, detention center, or other comparable facility suitable for such use.

(h) Statutory construction

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

(i) Incarceration

(1) If the chief executive officer of a State (or, if appropriate, a political subdivision of the State) exercising authority with respect to the incarceration of an undocumented criminal alien submits a written request to the Attorney General, the Attorney General shall, as determined by the Attorney General--

(A) enter into a contractual arrangement which provides for compensation to the State or a political subdivision of the State, as may be appropriate, with respect to the incarceration of the undocumented criminal alien; or

(B) take the undocumented criminal alien into the custody of the Federal Government and incarcerate the alien.

(2) Compensation under paragraph (1)(A) shall be the average cost of incarceration of a prisoner in the relevant State as determined by the Attorney General.

(3) For purposes of this subsection, the term "undocumented criminal alien" means an alien who--

(A) has been convicted of a felony or two or more misdemeanors; and

(B)(i) entered the United States without inspection or at any time or place other than as designated by the Attorney General;

(ii) was the subject of exclusion or deportation proceedings at the time he or she was taken into custody by the State or a political subdivision of the State; or

(iii) was admitted as a nonimmigrant and at the time he or she was taken into custody by the State or a political subdivision of the State has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section 1258 of this title, or to comply with the conditions of any such status.

(4)(A) In carrying out paragraph (1), the Attorney General shall give priority to the Federal incarceration of undocumented criminal aliens who have committed aggravated felonies.

(B) The Attorney General shall ensure that undocumented criminal aliens incarcerated in Federal facilities pursuant to this subsection are held in facilities which provide a level of security appropriate to the crimes for which they were convicted.

(5) There are authorized to be appropriated to carry out this subsection--

(A) $750,000,000 for fiscal year 2006;

(B) $850,000,000 for fiscal year 2007; and

(C) $950,000,000 for each of the fiscal years 2008 through 2011.

(6) Amounts appropriated pursuant to the authorization of appropriations in paragraph (5) that are distributed to a State or political subdivision of a State, including a municipality, may be used only for correctional purposes.

CREDIT(S)

(June 27, 1952, c. 477, Title II, ch. 4, § 241, as added and amended Pub.L. 104-208, Div. C, Title III, §§ 305(a)(3), 306(a)(1), 328(a)(1), Sept. 30, 1996, 110 Stat. 3009-598, 3009-607, 3009-630; Pub.L. 107-273, Div. C, Title I, § 11014, Nov. 2, 2002, 116 Stat. 1824; Pub.L. 109-13, Div. B, Title I, § 101(c), May 11, 2005, 119 Stat. 304; Pub.L. 109-162, Title XI, § 1196(a), (b), Jan. 5, 2006, 119 Stat. 3130.)

Notes of Decisions (2362)

Footnotes

1 So in original. Probably should be “subparagraph (B) .

2 So in original. Probably should be followed by a closing parenthesis.

3 So in original. Probably should be subsection “(e) .

4 So in original. Probably should be “1225(b)(1) .

8 U.S.C.A. § 1231, 8 USCA § 1231

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Part V. Adjustment and Change of Status (Refs & Annos)

8 U.S.C.A. § 1252

§ 1252. Judicial review of orders of removal

Effective: May 11, 2005
Currentness

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review--

(i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e), a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e), procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review--

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(4) Claims under the United Nations Convention

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e).

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e). For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of Title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1), the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)--

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to subsection (b)(4)(B), that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of Title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that--

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of Title 28.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) during the criminal proceeding.

(8) Construction

This subsection--

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) of this title and section 1253(g) of this title; and

(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of Title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal--

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of final orders

A court may review a final order of removal only if--

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may--

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of--

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of--

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

(B) Deadlines for bringing actions

Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal

A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases

It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision

In any case where the court determines that the petitioner--

(A) is an alien who was not ordered removed under section 1225(b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1).

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

CREDIT(S)

(June 27, 1952, c. 477, Title II, ch. 5, § 242, 66 Stat. 208; Sept. 3, 1954, c. 1263, § 17, 68 Stat. 1232; Pub.L. 97-116, § 18(h)(1), Dec. 29, 1981, 95 Stat. 1620; Pub.L. 98-473, Title II, § 220(b), Oct. 12, 1984, 98 Stat. 2028; Pub.L. 99-603, Title VII, § 701, Nov. 6, 1986, 100 Stat. 3445; Pub.L. 100-525, § 9(n), Oct. 24, 1988, 102 Stat. 2620; Pub.L. 100-690, Title VII, § 7343(a), Nov. 18, 1988, 102 Stat. 4470; Pub.L. 101-649, Title V, §§ 504(a), 545(e), Title VI, § 603(b)(2), Nov. 29, 1990, 104 Stat. 5049, 5066, 5085; Pub.L. 102-232, Title III, §§ 306(a)(4), (c)(7), 307(m)(2), 309(b)(9), Dec. 12, 1991, 105 Stat. 1751, 1753, 1757, 1759; Pub.L. 103-322, Title II, § 20301(a), Title XIII, § 130001(a), Sept. 13, 1994, 108 Stat. 1823, 2023; Pub.L. 103-416, Title II, §§ 219(h), 224(b), Oct. 25, 1994, 108 Stat. 4317, 4324; Pub.L. 104-132, Title IV, §§ 436(a), (b)(1), 438(a), 440(c), (h), Apr. 24, 1996, 110 Stat. 1275, 1277, 1279; Pub.L. 104-208, Div. C, Title III, §§ 306(a), (d), 308(g)(10)(H), 371(b)(6), Sept. 30, 1996, 110 Stat. 3009-607, 3009-612, 3009-625, 3009-645; Pub.L. 109-13, Div. B, Title I, §§ 101(e), (f), 106(a), May 11, 2005, 119 Stat. 305, 310.)

Notes of Decisions (2062)

Footnotes

1 So in original. Section 1253 of this title was amended by Pub.L. 104 208, Div. C, Title III, § 307(a), Sept. 30, 1996, 110 Stat. 3009 612, and as so amended, no longer contains a subsec. (g); provisions similar to those contained in former 8 U.S.C.A. § 1253(g) are now contained in 8 U.S.C.A. § 1253(d).

8 U.S.C.A. § 1252, 8 USCA § 1252
Current through P.L. 116-18

United States Code Annotated
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter II. Immigration
Part VIII. General Penalty Provisions

8 U.S.C.A. § 1326

§ 1326. Reentry of removed aliens

Effective: September 30, 1996
Currentness

(a) In general

Subject to subsection (b), any alien who--

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a), in the case of any alien described in such subsection--

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V, and who thereafter, without the permission of the Attorney General, enters the United

States, or attempts to do so, shall be fined under Title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence. or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

(c) Reentry of alien deported prior to completion of term of imprisonment

Any alien deported pursuant to section 1252(h)(2)[2] of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that--

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

CREDIT(S)

(June 27, 1952, c. 477, Title II, ch. 8, § 276, 66 Stat. 229; Pub.L. 100-690, Title VII, § 7345(a), Nov. 18, 1988, 102 Stat. 4471; Pub.L. 101-649, Title V, § 543(b)(3), Nov. 29, 1990, 104 Stat. 5059; Pub.L. 103-322, Title XIII, § 130001(b), Sept. 13, 1994, 108 Stat. 2023; Pub.L. 104-132, Title IV, §§ 401(c), 438(b), 441(a), Apr. 24, 1996, 110 Stat. 1267, 1276, 1279; Pub.L. 104-208, Div. C, Title III, §§ 305(b), 308(d)(4)(J), (e)(1)(K), (14)(A), 324(a), (b), Sept. 30, 1996, 110 Stat. 3009-606, 3009-618 to 3009-620, 3009-629.)

Notes of Decisions (1336)

Footnotes

1 So in original. The period probably should be a semicolon.

2 So in original. Section 1252 of this title, was amended by Pub.L. 104 208, Div. C, Title III, § 306(a)(2), Sept. 30, 1996, 110 Stat. 3009 607, and as so amended, does not contain a subsec. (h); for provisions similar to those formerly contained in section 1252(h)(2) of this title, see 8 U.S.C.A. § 1231(a)(4).

8 U.S.C.A. § 1326, 8 USCA § 1326

Current through P.L. 116-17.

8 USCS § 1357

Current through PL 115-89, approved 11/21/17

United States Code Service - Titles 1 through 54 > TITLE 8. ALIENS AND NATIONALITY > CHAPTER 12. IMMIGRATION AND NATIONALITY > IMMIGRATION > MISCELLANEOUS

§ 1357. Powers of immigration officers and employees

(a) Powers without warrant. Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant--

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States;

(4) to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, expulsion, or removal of aliens, if he has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be taken without unnecessary delay before the nearest available officer empowered to commit persons charged with offenses against the laws of the United States; and

(5) to make arrests--

(A) for any offense against the United States, if the offense is committed in the officer's or employee's presence, or

(B) for any felony cognizable under the laws of the United States, if the officer or employee has reasonable grounds to believe that the person to be arrested has committed or is committing such felony,

if the officer or employee is performing duties relating to the enforcement of the immigration laws at the time of the arrest and if there is a likelihood of the person escaping before a warrant can be obtained for his arrest.

Under regulations prescribed by the Attorney General, an officer or employee of the Service may carry a firearm and may execute and serve any order, warrant, subpoena, summons, or other process issued under the authority of the United States. The authority to make arrests under paragraph (5)(B) shall only be effective on and after the date on which the Attorney General publishes final regulations which (i) prescribe the categories of officers and employees of the Service who may use force (including deadly force) and the circumstances under which such force may be used, (ii) establish standards with respect to enforcement activities of the Service, (iii) require that any officer or employee of the Service is not authorized to make arrests under paragraph (5)(B) unless the officer or employee has received certification as having completed a training program which covers such arrests and standards described in clause (ii), and (iv) establish an expedited, internal review process for violations of such standards, which process is consistent with standard agency procedure regarding confidentiality of matters related to internal investigations.

(b) Administration of oath; taking of evidence. Any officer or employee of the Service designated by the Attorney General, whether individually or as one of a class, shall have power and authority to administer oaths and to take and consider evidence concerning the privilege of any person to enter, reenter, pass through, or reside in the United States, or concerning any matter which is material or relevant to the enforcement of this Act and the administration of the Service; and any person to whom such oath has been administered (or who has executed an unsworn declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code), under the provisions of this Act, who shall knowingly or willfully give false evidence or swear (or subscribe under penalty of perjury as permitted under section 1746 of title 28, United States Code) to any false statement concerning any matter referred to in this subsection shall be guilty of perjury and shall be punished as provided by section 1621, title 18, United States Code.

(c) Search without warrant. Any officer or employee of the Service authorized and designated under regulations prescribed by the Attorney General, whether individually or as one of a class, shall have power to conduct a search, without warrant, of the person, and of the personal effects in the possession of any person seeking admission to the United States, concerning whom such officer or employee may have reasonable cause to suspect that grounds exist for denial of admission to the United States under this Act which would be disclosed by such search.

(d) Detainer of aliens for violation of controlled substances laws. In the case of an alien who is arrested by a Federal, State, or local law enforcement official for a violation of any law relating to controlled substances, if the official (or another official)--

(1) has reason to believe that the alien may not have been lawfully admitted to the United States or otherwise is not lawfully present in the United States,

(2) expeditiously informs an appropriate officer or employee of the Service authorized and designated by the Attorney General of the arrest and of facts concerning the status of the alien, and

(3) requests the Service to determine promptly whether or not to issue a detainer to detain the alien,

the officer or employee of the Service shall promptly determine whether or not to issue such a detainer. If such a detainer is issued and the alien is not otherwise detained by Federal, State, or local officials, the Attorney General shall effectively and expeditiously take custody of the alien.

(e) Restriction on warrantless entry in case of outdoor agricultural operations. Notwithstanding any other provision of this section other than paragraph (3) of subsection (a), an officer or employee of the Service may not enter without the consent of the owner (or agent thereof) or a properly executed warrant onto the premises of a farm or other outdoor agricultural operation for the purpose of interrogating a person believed to be an alien as to the person's right to be or to remain in the United States.

(f) Fingerprinting and photographing of certain aliens.

(1) Under regulations of the Attorney General, the Commissioner shall provide for the fingerprinting and photographing of each alien 14 years of age or older against whom a proceeding is commenced under section 240 *[8 USCS § 1229a].*

(2) Such fingerprints and photographs shall be made available to Federal, State, and local law enforcement agencies, upon request.

(g) Performance of immigration officer functions by State officers and employees.

(1) Notwithstanding section 1342 of title 31, United States Code, the Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.

(2) An agreement under this subsection shall require that an officer or employee of a State or political subdivision of a State performing a function under the agreement shall have knowledge of, and adhere to, Federal law relating to

the function, and shall contain a written certification that the officers or employees performing the function under the agreement have received adequate training regarding the enforcement of relevant Federal immigration laws.

(3) In performing a function under this subsection, an officer or employee of a State or political subdivision of a State shall be subject to the direction and supervision of the Attorney General.

(4) In performing a function under this subsection, an officer or employee of a State or political subdivision of a State may use Federal property or facilities, as provided in a written agreement between the Attorney General and the State or subdivision.

(5) With respect to each officer or employee of a State or political subdivision who is authorized to perform a function under this subsection, the specific powers and duties that may be, or are required to be, exercised or performed by the individual, the duration of the authority of the individual, and the position of the agency of the Attorney General who is required to supervise and direct the individual, shall be set forth in a written agreement between the Attorney General and the State or political subdivision.

(6) The Attorney General may not accept a service under this subsection if the service will be used to displace any Federal employee.

(7) Except as provided in paragraph (8), an officer or employee of a State or political subdivision of a State performing functions under this subsection shall not be treated as a Federal employee for any purpose other than for purposes of chapter 81 of title 5, United States Code *[5 USCS §§ 8101* et seq.] (relating to compensation for injury), and sections 2671 through 2680 of title 28, United States Code (relating to tort claims).

(8) An officer or employee of a State or political subdivision of a State acting under color of authority under this subsection, or any agreement entered into under this subsection, shall be considered to be acting under color of Federal authority for purposes of determining the liability, and immunity from suit, of the officer or employee in a civil action brought under Federal or State law.

(9) Nothing in this subsection shall be construed to require any State or political subdivision of a State to enter into an agreement with the Attorney General under this subsection.

(10) Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State--

(A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or

(B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

(h) Protecting abused juveniles. An alien described in section 101(a)(27)(J) of the Immigration and Nationality Act *[8 USCS § 1101*(a)(27)(J)] who has been battered, abused, neglected, or abandoned, shall not be compelled to contact the alleged abuser (or family member of the alleged abuser) at any stage of applying for special immigrant juvenile status, including after a request for the consent of the Secretary of Homeland Security under section 101(a)(27)(J)(iii)(I) of such Act *[8 USCS § 1101*(a)(27)(J)(iii)(I)].

History

(June 27, 1952, ch 477, Title II, Ch 9, § 287,*66 Stat. 233;* Oct. 18, 1976, P.L. 94-550, § 7, *90 Stat. 2535;* Oct. 27, 1986, P.L. 99-570, Title I, Subtitle M, § 1751(d), *100 Stat. 3207-47;* Nov. 6, 1986, P.L. 99-603, Title I, Part B, § 116, *100 Stat. 3384;* Oct. 24, 1988, P.L. 100-525, §§ 2(e), 5, *102 Stat. 2610, 2615;* Nov. 29, 1990, P.L. 101-649, Title V, Subtitle A, § 503(a), (b)(1), *104 Stat. 5048, 5049;* Dec. 12, 1991, P.L. 102-232, Title III, § 306(a)(3), *105 Stat. 1751;* Sept. 30, 1996, P.L. 104-208, Div C, Title I, Subtitle C, § 133, Title III, Subtitle A, § 308(d)(4)(L), (e)(1)(M), (g)(5)(A)(i), *110 Stat. 3009-563, 3009-618, 3009-619, 3009-623;* Jan. 5, 2006, P.L. 109-162, Title VIII, Subtitle C, § 826, *119 Stat. 3065;* Aug. 12, 2006, P.L. 109-271, § 6(g), *120 Stat. 763.)*

Annotations

United States Code Annotated
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter II. Immigration
Part IX. Miscellaneous

8 U.S.C.A. § 1367

§ 1367. Penalties for disclosure of information

Effective: March 7, 2013
Currentness

(a) In general

Except as provided in subsection (b), in no case may the Attorney General, or any other official or employee of the Department of Justice, the Secretary of Homeland Security, the Secretary of State, or any other official or employee of the Department of Homeland Security or Department of State (including any bureau or agency of either of such Departments)--

(1) make an adverse determination of admissibility or deportability of an alien under the Immigration and Nationality Act [8 U.S.C.A. § 1101 et seq.] using information furnished solely by--

(A) a spouse or parent who has battered the alien or subjected the alien to extreme cruelty,

(B) a member of the spouse's or parent's family residing in the same household as the alien who has battered the alien or subjected the alien to extreme cruelty when the spouse or parent consented to or acquiesced in such battery or cruelty,

(C) a spouse or parent who has battered the alien's child or subjected the alien's child to extreme cruelty (without the active participation of the alien in the battery or extreme cruelty),

(D) a member of the spouse's or parent's family residing in the same household as the alien who has battered the alien's child or subjected the alien's child to extreme cruelty when the spouse or parent consented to or acquiesced in such battery or cruelty and the alien did not actively participate in such battery or cruelty,

(E) in the case of an alien applying for status under section 101(a)(15)(U) of the Immigration and Nationality Act [8 U.S.C.A. § 1101(a)(15)(U)], the perpetrator of the substantial physical or mental abuse and the criminal activity,

(F) in the case of an alien applying for status under section 101(a)(15) (T) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(T)), under section 7105(b)(1)(E)(i)(II)(bb) of Title 22, under section 244(a)(3) of the Immigration and Nationality Act (8 U.S.C. 1254a(a)(3)), as in effect prior to March 31, 1999, or as a VAWA self-petitioner

(as defined in section 101(a)(51) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(51)), [2] the trafficker or perpetrator,

unless the alien has been convicted of a crime or crimes listed in section 237(a)(2) of the Immigration and Nationality Act [8 U.S.C.A. § 1227(a)(2)]; or

(2) permit use by or disclosure to anyone (other than a sworn officer or employee of the Department, or bureau or agency thereof, for legitimate Department, bureau, or agency purposes) of any information which relates to an alien who is the beneficiary of an application for relief under paragraph (15)(T), (15)(U), or (51) of section 101(a) of the Immigration and Nationality Act [8 U.S.C.A. § 1101(a)(15)(T), (U), (51)] or section 240A(b)(2) of such Act [8 U.S.C.A. § 1229b(b)(2)].

The limitation under paragraph (2) ends when the application for relief is denied and all opportunities for appeal of the denial have been exhausted.

(b) Exceptions

(1) The Secretary of Homeland Security or the Attorney General may provide, in the Secretary's or the Attorney General's discretion, for the disclosure of information in the same manner and circumstances as census information may be disclosed by the Secretary of Commerce under section 8 of Title 13.

(2) The Secretary of Homeland Security or the Attorney General may provide in the discretion of the Secretary or the Attorney General for the disclosure of information to law enforcement officials to be used solely for a legitimate law enforcement purpose in a manner that protects the confidentiality of such information.

(3) Subsection (a) shall not be construed as preventing disclosure of information in connection with judicial review of a determination in a manner that protects the confidentiality of such information.

(4) Subsection (a)(2) shall not apply if all the battered individuals in the case are adults and they have all waived the restrictions of such subsection.

(5) The Secretary of Homeland Security and the Attorney General are authorized to disclose information, to Federal, State, and local public and private agencies providing benefits, to be used solely in making determinations of eligibility for benefits pursuant to section 1641(c) of this title.

(6) Subsection (a) may not be construed to prevent the Attorney General and the Secretary of Homeland Security from disclosing to the chairmen and ranking members of the Committee on the Judiciary of the Senate or the Committee on the Judiciary of the House of Representatives, for the exercise of congressional oversight authority, information on closed cases under this section in a manner that protects the confidentiality of such information and that omits personally identifying information (including locational information about individuals).

(7) Government entities adjudicating applications for relief under subsection (a)(2), and government personnel carrying out mandated duties under section 101(i)(1) of the Immigration and Nationality Act [8 U.S.C.A. § 1101(i)(1)], may, with the prior written consent of the alien involved, communicate with nonprofit, nongovernmental victims' service providers for the sole purpose of assisting victims in obtaining victim services from programs with expertise working with immigrant victims. Agencies receiving referrals are bound by the provisions of this section. Nothing in this paragraph shall be construed as affecting the ability of an applicant to designate a safe organization through whom governmental agencies may communicate with the applicant.

(8) Notwithstanding subsection (a)(2), the Secretary of Homeland Security, the Secretary of State, or the Attorney General may provide in the discretion of either such Secretary or the Attorney General for the disclosure of information to national security officials to be used solely for a national security purpose in a manner that protects the confidentiality of such information.

(c) Penalties for violations

Anyone who willfully uses, publishes, or permits information to be disclosed in violation of this section or who knowingly makes a false certification under section 239(e) of the Immigration and Nationality Act [8 U.S.C.A. § 1229(e)] shall be subject to appropriate disciplinary action and subject to a civil money penalty of not more than $5,000 for each such violation.

(d) Guidance

The Attorney General, Secretary of State, and the Secretary of Homeland Security shall provide guidance to officers and employees of the Department of Justice, Department of State, or the Department of Homeland Security who have access to information covered by this section regarding the provisions of this section, including the provisions to protect victims of domestic violence and severe forms of trafficking in persons or criminal activity listed in section 1101(a)(15)(U) of this title from harm that could result from the inappropriate disclosure of covered information.

CREDIT(S)

(Pub.L. 104-208, Div. C, Title III, §§ 308(g)(8)(D), 384, Sept. 30, 1996, 110 Stat. 3009-624, 3009-652; Pub.L. 105-33, Title V, § 5572(b), Aug. 5, 1997, 111 Stat. 641; Pub.L. 106-386, Div. B, Title V, § 1513(d), Oct. 28, 2000, 114 Stat. 1536; Pub.L. 109-162, Title VIII, § 817, Jan. 5, 2006, 119 Stat. 3060; Pub.L. 109-271, § 6(h), Aug. 12, 2006, 120 Stat. 763; Pub.L. 113-4, Title VIII, § 810(a), (b), (d), Mar. 7, 2013, 127 Stat. 117, 118.)

Footnotes

1 So in original. Probably should be followed by "or .

2 So in original. Probably should be followed by a closing parenthesis.

8 U.S.C.A. § 1367, 8 USCA § 1367

Current through P.L. 116-17.

End of Document

8 CFR 287.5

This document is current through the December 6, 2017 issue of the Federal Register. Pursuant to 82 FR 8346 ("Regulatory Freeze Pending Review"), certain regulations will be delayed pending further review. See Publisher's Note under affected rules. Title 3 is current through December 4, 2017.

Code of Federal Regulations > TITLE 8 -- ALIENS AND NATIONALITY > CHAPTER I -- DEPARTMENT OF HOMELAND SECURITY (IMMIGRATION AND NATURALIZATION) > SUBCHAPTER B -- IMMIGRATION REGULATIONS > PART 287 -- FIELD OFFICERS; POWERS AND DUTIES

§ 287.5 Exercise of power by immigration officers.

(a) Power and authority to interrogate and administer oaths. Any immigration officer is hereby authorized and designated to exercise anywhere in or outside the United States the power conferred by:

(1) Section 287(a)(1) of the Act to interrogate, without warrant, any alien or person believed to be an alien concerning his or her right to be, or to remain, in the United States, and

(2) Section 287(b) of the Act to administer oaths and to take and consider evidence concerning the privilege of any person to enter, reenter, pass through, or reside in the United States; or concerning any matter which is material or relevant to the enforcement of the Act and the administration of the immigration and naturalization functions of the Department.

(b) Power and authority to patrol the border. The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the power to patrol the border conferred by section 287(a)(3) of the Act:

(1) Border patrol agents;

(2) Air and marine agents;

(3) Special agents;

(4)CBP officers;

(5) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(6) Immigration officers who need the authority to patrol the border under section 287(a)(3) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner of CBP, or the Assistant Secretary/Director of ICE.

(c) Power and authority to arrest -- (1) Arrests of aliens under section 287(a)(2) of the Act for immigration violations. The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the arrest power conferred by section 287(a)(2) of the Act and in accordance with *8 CFR 287.8(c)*:

(i) Border patrol agents;

(ii) Air and marine agents;

(iii) Special agents;

(iv) Deportation officers;

(v)CBP officers;

(vi) Immigration enforcement agents;

(vii) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(viii) Immigration officers who need the authority to arrest aliens under section 287(a)(2) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner of CBP, the Assistant Secretary/Director of ICE, or the Director of the USCIS.

(2) Arrests of persons under section 287(a)(4) of the Act for felonies regulating the admission or removal of aliens. The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the arrest power conferred by section 287(a)(4) of the Act and in accordance with *8 CFR 287.8(c)*:

(i) Border patrol agents;

(ii) Air and marine agents;

(iii) Special agents;

(iv) Deportation officers;

(v)CBP officers;

(vi) Immigration enforcement agents;

(vii) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(viii) Immigration officers who need the authority to arrest persons under section 287(a)(4) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner of CBP, the Assistant Secretary/Director of ICE, or the Director of the USCIS.

(3) Arrests of persons under section 287(a)(5)(A) of the Act for any offense against the United States. The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the arrest power conferred by section 287(a)(5)(A) of the Act and in accordance with *8 CFR 287.8(c)*:

(i) Border patrol agents;

(ii) Air and marine agents;

(iii) Special agents;

(iv) Deportation officers;

(v)CBP officers;

(vi) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(vii) Immigration officers who need the authority to arrest persons under section 287(a)(5)(A) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner of CBP, or the Assistant Secretary/Director of ICE.

(4) Arrests of persons under section 287(a)(5)(B) of the Act for any felony. (i) Section 287(a)(5)(B) of the Act authorizes designated immigration officers, as listed in paragraph (c)(4)(iii) of this section, to arrest persons, without warrant, for any felony cognizable under the laws of the United States if:

(A) The immigration officer has reasonable grounds to believe that the person to be arrested has committed or is committing such a felony;

(B) The immigration officer is performing duties relating to the enforcement of the immigration laws at the time of the arrest;

(C) There is a likelihood of the person escaping before a warrant can be obtained for his or her arrest; and

(D) The immigration officer has been certified as successfully completing a training program that covers such arrests and the standards with respect to the immigration enforcement activities of the Department as defined in *8 CFR 287.8*.

(ii) The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the arrest power conferred by section 287(a)(5)(B) of the Act and in accordance with *8 CFR 287.8(c)*:

(A) Border patrol agents;

(B) Air and marine agents;

(C) Special agents;

(D) Deportation officers;

(E)CBP officers;

(F) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(G) Immigration officers who need the authority to arrest persons under section 287(a)(5)(B) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner of CBP or the Assistant Secretary/Director of ICE.

(iii) Notwithstanding the authorization and designation set forth in paragraph (c)(4)(ii) of this section, no immigration officer is authorized to make an arrest for any felony under the authority of section 287(a)(5)(B) of the Act until such time as he or she has been certified as successfully completing a training course encompassing such arrests and the standards for enforcement activities are defined in *8 CFR 287.8*. Such certification will be valid for the duration of the immigration officer's continuous employment, unless it is suspended or revoked by the Commissioner of CBP or the Assistant Secretary/Director of ICE, or their respective designees, for just cause.

(5) Arrests of persons under section 274(a) of the Act who bring in, transport, or harbor certain aliens, or induce them to enter.

(i) Section 274(a) of the Act authorizes designated immigration officers, as listed in paragraph (c)(5)(ii) of this section, to arrest persons who bring in, transport, or harbor aliens, or induce them to enter the United States in violation of law. When making an arrest, the designated immigration officer shall adhere to the provisions of the enforcement standard governing the conduct of arrests in *8 CFR 287.8(c)*.

(ii) The following immigration officers who have successfully completed basic immigration law enforcement training are authorized and designated to exercise the arrest power conferred by section 274(a) of the Act:

(A) Border patrol agents;

(B) Air and marine agents;

(C) Special agents;

(D) Deportation officers;

(E)CBP officers;

(F) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(G) Immigration officers who need the authority to arrest persons under section 274(a) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner of CBP or the Assistant Secretary/Director of ICE.

(6) Custody and transportation of previously arrested persons. In addition to the authority to arrest pursuant to a warrant of arrest in paragraph (e)(3)(iv) of this section, detention enforcement officers and immigration enforcement agents who have successfully completed basic immigration law enforcement training are hereby authorized and designated to take and maintain custody of and transport any person who has been arrested by an immigration officer pursuant to paragraphs (c)(1) through (c)(5) of this section.

(d) Power and authority to conduct searches. The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the power to conduct searches conferred by section 287(c) of the Act:

(1) Border patrol agents;

(2) Air and marine agents;

(3) Special agents;

(4) Deportation officers;

(5)CBP officers;

(6) Immigration enforcement agents;

(7) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(8) Immigration officers who need the authority to conduct searches under section 287(c) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner of CBP, the Assistant Secretary/Director of ICE, or the Director of USCIS.

(e) Power and authority to execute warrants -- (1) Search warrants. The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the power conferred by section 287(a) of the Act to execute a search warrant:

(i) Border patrol agents;

(ii) Air and marine agents;

(iii)CBP officers;

(iv) Special agents;

(v) Deportation officers;

(vi) Immigration enforcement agents;

(vii) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(viii) Immigration officers who need the authority to execute search warrants under section 287(a) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner of CBP or the Assistant Secretary/Director of ICE.

(2) Issuance of arrest warrants for immigration violations. A warrant of arrest may be issued by any of the following immigration officials who have been authorized or delegated such authority:

(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;

8 CFR 287.5

(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) Division chiefs;

(xiv) Assistant chief patrol agents;

(xv) Patrol agents in charge;

(xvi) Deputy patrol agents in charge;

(xvii) Border Patrol watch commanders;

(xviii) Special operations supervisors;

(xix) Supervisory border patrol agents;

(xx) Directors of air operations;

(xxi) Directors of marine operations;

(xxii) Supervisory air and marine interdiction agents;

(xxiii) Executive Associate Director of Homeland Security Investigations;

(xxiv) Institutional Hearing Program directors;

(xxv) Director, Field Operations;

(xxvi) Assistant Director, Field Operations;

(xxvii) Port directors;

(xxviii) Assistant port directors;

(xxix) Field operations watch commanders;

(xxx) Field operations chiefs;

(xxxi) Supervisory deportation officers;

(xxxii) Supervisory detention and deportation officers;

(xxxiii) Group Supervisors;

(xxxiv) Director, Office of Detention and Removal Operations;

(xxxv) Special Agents in Charge;

(xxxvi) Deputy Special Agents in Charge;

(xxxvii) Associate Special Agents in Charge;

(xxxviii) Assistant Special Agents in Charge;

(xxxix) Field Office Directors;

(xl) Deputy Field Office Directors;

(xli) District Field Officers;

(xlii) Supervisory immigration services officers;

(xliii) Supervisory immigration officers;

(xliv) Supervisory asylum officers;

(xlv) Supervisory special agents;

(xlvi) Director of investigations;

(xlvii) Directors or officers in charge of detention facilities;

(xlviii) Directors of field operations;

(xlix) Deputy or assistant directors of field operations;

(l) Unit Chief, Law Enforcement Support Center;

(li) Section Chief, Law Enforcement Support Center;

(lii) Immigration Enforcement Agents; or

(liii) Other duly authorized officers or employees of the Department of Homeland Security or the United States who are delegated the authority as provided in *8 CFR 2.1* to issue warrants of arrest, and who have successfully completed any required immigration law enforcement training.

(3) Service of warrant of arrests for immigration violations. The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the power pursuant to section 287(a) of the Act to execute warrants of arrest for administrative immigration violations issued under section 236 of the Act or to execute warrants of criminal arrest issued under the authority of the United States:

(i) Border patrol agents;

(ii) Air and marine agents;

(iii) Special agents;

(iv) Deportation officers;

(v) Detention enforcement officers or immigration enforcement agents (warrants of arrest for administrative immigration violations only);

(vi)CBP officers;

(vii) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(viii) Immigration officers who need the authority to execute arrest warrants for immigration violations under section 287(a) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner of CBP or the Assistant Secretary/Director of ICE.

(4) Service of warrant of arrests for non-immigration violations. The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the power to execute warrants of criminal arrest for non-immigration violations issued under the authority of the United States:

(i) Border patrol agents;

(ii) Air and marine agents;

(iii)CBP officers

(iv) Special agents;

(v) Deportation officers;

(vi) Immigration enforcement agents;

(vii) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(viii) Immigration officers who need the authority to execute warrants of arrest for non-immigration violations under section 287(a) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner of CBP or the Assistant Secretary/Director of ICE.

(f) Power and authority to carry firearms. The following immigration officers who have successfully completed basic immigration enforcement training are hereby authorized and designated to exercise the power conferred by section 287(a) of the Act to carry firearms provided that they are individually qualified by training and experience to handle and safely operate the firearms they are permitted to carry, maintain proficiency in the use of such firearms, and adhere to the provisions of the enforcement standard governing the use of force in *8 CFR 287.8(a)*:

(1) Border patrol agents;

(2) Air and marine agents;

(3) Special agents;

(4) Deportation officers;

(5) Detention enforcement officers or immigration enforcement agents;

(6)CBP officers;

(7) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(8) Immigration officers who need the authority to carry firearms under section 287(a) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner of CBP or the Assistant Secretary/Director of ICE.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

8 U.S.C. 1103, 1182, 1225, 1226, 1251, 1252, 1357; Homeland Security Act of 2002, Pub. L. 107-296 (6 U.S.C. 1, et seq.); 8 CFR part 2.

History

[29 FR 12584, Sept. 4, 1964; *59 FR 42415,* Aug. 17, 1994; *62 FR 10312, 10390,* March 6, 1997; *67 FR 39255, 39260,* June 7, 2002; *68 FR 35273, 35277,* June 13, 2003; *70 FR 67087, 67089,* Nov. 4, 2005; *76 FR 53764, 53797,* Aug. 29, 2011; *81 FR 62353, 62356,* Sept. 9, 2016]

Annotations

Notes

[EFFECTIVE DATE NOTE:

Code of Federal Regulations
Title 8. Aliens and Nationality
Chapter V. Executive Office for Immigration Review, Department of Justice (Refs & Annos)
Subchapter A. General Provisions (Refs & Annos)
Part 1003. Executive Office for Immigration Review (Refs & Annos)
Subpart C. Immigration Court—Rules of Procedure (Refs & Annos)

8 C.F.R. § 1003.14

§ 1003.14 Jurisdiction and commencement of proceedings.

Currentness

(a) Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service. The charging document must include a certificate showing service on the opposing party pursuant to § 1003.32 which indicates the Immigration Court in which the charging document is filed. However, no charging document is required to be filed with the Immigration Court to commence bond proceedings pursuant to §§ 1003.19, 1236.1(d) and 1240.2(b) of this chapter.

(b) When an Immigration Judge has jurisdiction over an underlying proceeding, sole jurisdiction over applications for asylum shall lie with the Immigration Judge.

(c) Immigration Judges have jurisdiction to administer the oath of allegiance in administrative naturalization ceremonies conducted by the Service in accordance with § 1337.2(b) of this chapter.

(d) The jurisdiction of, and procedures before, immigration judges in exclusion, deportation and removal, rescission, asylum-only, and any other proceedings shall remain in effect as it was in effect on February 28, 2003, until the regulations in this chapter are further modified by the Attorney General. Where a decision of an officer of the Immigration and Naturalization Service was, before March 1, 2003, appealable to the Board or an immigration judge, or an application denied could be renewed in proceedings before an immigration judge, the same authority and procedures shall be followed until further modified by the Attorney General.

Credits

[57 FR 11571, April 6, 1992; 59 FR 1899, Jan. 13, 1994; 60 FR 34089, June 30, 1995; 62 FR 10332, March 6, 1997; 68 FR 9832, Feb. 28, 2003; 68 FR 10350, March 5, 2003]

AUTHORITY: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub.L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub.L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub.L. 106–554, 114 Stat. 2763A–326 to –328.

Notes of Decisions (38)

Current through November 28, 2019; 84 FR 65606.

End of Document

Code of Federal Regulations
Title 8. Aliens and Nationality
Chapter V. Executive Office for Immigration Review, Department of Justice (Refs & Annos)
Subchapter A. General Provisions (Refs & Annos)
Part 1003. Executive Office for Immigration Review (Refs & Annos)
Subpart C. Immigration Court—Rules of Procedure (Refs & Annos)

8 C.F.R. § 1003.38

§ 1003.38 Appeals.

Currentness

(a) Decisions of Immigration Judges may be appealed to the Board of Immigration Appeals as authorized by 8 CFR 3.1(b). [1]

1 So in original; probably should read 1003.1(b). See 68 FR 9824.

(b) The Notice of Appeal to the Board of Immigration Appeals of Decision of Immigration Judge (Form EOIR–26) shall be filed directly with the Board of Immigration Appeals within 30 calendar days after the stating of an Immigration Judge's oral decision or the mailing of an Immigration Judge's written decision. If the final date for filing falls on a Saturday, Sunday, or legal holiday, this appeal time shall be extended to the next business day. A Notice of Appeal (Form EOIR–26) may not be filed by any party who has waived appeal.

(c) The date of filing of the Notice of Appeal (Form EOIR–26) shall be the date the Notice is received by the Board.

(d) A Notice of Appeal (Form EOIR–26) must be accompanied by the appropriate fee or by an Appeal Fee Waiver Request (Form EOIR–26A). If the fee is not paid or the Appeal Fee Waiver Request (Form EOIR–26A) is not filed within the specified time period indicated in paragraph (b) of this section, the appeal will not be deemed properly filed and the decision of the Immigration Judge shall be final to the same extent as though no appeal had been taken.

(e) Within five working days of any change of address, an alien must provide written notice of the change of address on Form EOIR–33 to the Board. Where a party is represented, the representative should also provide to the Board written notice of any change in the representative's business mailing address.

(f) Briefs may be filed by both parties pursuant to 8 CFR 3.3(c). [2]

2 So in original; probably should read 1003.3(c). See 68 FR 9824.

(g) In any proceeding before the Board wherein the respondent/applicant is represented, the attorney or representative shall file a notice of appearance on the appropriate form. Withdrawal or substitution of an attorney or representative may be permitted by the Board during proceedings only upon written motion submitted without fee.

Credits

[57 FR 11571, April 6, 1992; 59 FR 1899, Jan, 13, 1994; 60 FR 34089, June 30, 1995; 61 FR 18908, April 29, 1996]

AUTHORITY: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub.L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub.L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub.L. 106–554, 114 Stat. 2763A–326 to –328.

Notes of Decisions (22)

Current through November 28, 2019; 84 FR 65606.

End of Document

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2020, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the First Circuit by using the CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system to the following:

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I further certify that this brief is identical to the brief that was filed on January 24, 2020, other than the amended caption.

By: */s/ Francesca Genova*
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