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DHS ANNOUNCES UNPRECEDENTED EXPANSION OF EXPEDITED REMOVAL TO THE INTERIOR

By Mary Kenney

The Department of Homeland Security (DHS) announced by public notice on August 11, 2004 that it will expand “expedited removal” and – for the first time – apply it to certain non-citizens apprehended *within the United States*. 69 Fed. Reg. 48877 (August 11, 2004). Expedited removal is a procedure that allows a DHS official to summarily remove a non-citizen without a hearing or review by an immigration judge (IJ) or the Board of Immigration Appeals (BIA). See 8 U.S.C. § 1225(b)(1). Prior to the publication of this notice, DHS (and the legacy INS) only applied expedited removal to “arriving aliens”² seeking entry at a port of entry and to a limited class of individuals who arrive in the United States by sea. See 67 Fed. Reg. 68924 (Nov. 13, 2002).

In the current public notice, DHS Secretary Tom Ridge ordered that, effective immediately, DHS officials are authorized to place in expedited removal any non-citizen who:

- is encountered within 100 miles of the U.S./Mexico or U.S./Canada border;
- is inadmissible under INA §§ 212(a)(6)(C) or (7) (8 U.S.C. §§ 1182(a)(6)(C) or (7)); and
- cannot establish that s/he has been continuously present in the United States for 14 days or longer.

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² An “arriving alien” is defined by regulation as an applicant for admission coming or attempting to come into the U.S. at a port or entry, or a non-citizen interdicted in U.S. or international waters and brought to the U.S.. 8 C.F.R. § 1.1(q). A non-citizen who has made an entry into the U.S. is not an “arriving alien,” although s/he may remain an “applicant for admission.”

DHS' decision to apply expedited removal to individuals apprehended *within the U.S.* is unprecedented. For the first time, a non-citizen who has made a land entry into the United States can be removed without the procedural safeguards of a removal hearing, including the right to counsel, right to cross-examine the government's witnesses and examine the government's evidence, and significantly, the right to an impartial adjudicator. Moreover, individuals placed in expedited removal thereby lose the opportunity to apply for relief from removal other than relief based upon a fear of persecution.

Because there is no IJ or BIA review over expedited removal decisions and only limited judicial review, a low-level immigration officer's authority to decide that an individual is removable and to order removal is virtually unchecked. The officer's decision to place the person in expedited rather than regular removal proceedings can result in the person losing substantive rights. Indeed, there have been reports of abuse of the procedure since it was first implemented at the ports of entry and many individuals with valid legal status have been erroneously removed.³ The expansion of the procedure to allow summary removal of individuals already present in the United States – in essence “interior” expedited removal⁴ – provides greater opportunity for unchecked misuse of the procedure.

Although the notice permitting interior expedited removal is effective immediately, the DHS is nevertheless accepting comments on the notice for a 60-day period, until October 12, 2004. 69 Fed. Reg. at 48878.

This practice advisory will outline the expansion of the expedited removal process and discuss the types of issues that may arise in its implementation. This advisory does not substitute for individual legal advice supplied by a lawyer familiar with a client's case.

What is expedited removal and how has it been applied until now?

Expedited removal was enacted as part of Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA). IIRAIRA § 302(a), codified at INA § 235(b), 8 U.S.C. § 1225(b). The statute mandates the application of expedited removal to arriving aliens seeking entry at a port of entry. Additionally, Congress delegated to the Attorney General (and now to the Secretary of DHS) the discretionary authority to expand expedited removal and apply it to certain non-citizens within the United States. 8 U.S.C. § 1225(b)(1)(A)(iii).

As initially implemented in 1997, expedited removal was only applied to arriving aliens at ports of entry. At a port of entry, if an INS officer determines that a person “who is arriving in the United States” is inadmissible under INA §§ 212(a)(6)(C) or 212(a)(7), that is, does not have valid and proper documents to enter the United States, or is

³ See, e.g., Report on the First Three Years of Implementation of Expedited Removal, Center for Human Rights and International Justice, University of California, Hastings College of Law (May 2000).

⁴ To distinguish the expanded expedited removal from the existing procedure, this practice advisory will refer to it as “interior expedited removal.”

attempting entry through fraud or misrepresentation, the officer has the authority to block the person's entry. The officer can make this determination on the basis of an informal interview. The arriving person is not permitted to communicate with family, friends, business associates, or counsel.⁵ The officer's determination is not subject to review by an IJ or the BIA and to only limited judicial review. It results in the immediate exclusion or removal of the person from the United States, with a five-year bar on entering the U.S. 8 U.S.C. § 1182(a)(9)(a)(i).

The only exceptions to the summary exclusion system are for people who, during their examination by the immigration officer, express a fear that they may be persecuted if excluded, or express an intent to apply for asylum, and for people who claim to be United States citizens, lawful permanent residents (LPRs), refugees or asylees. *See* INA § 235(b)(1)(A)(i) and (ii), 8 C.F.R. §§ 235.3(b)(4) and (b)(5).

The INS issued implementing regulations in April 1997, detailing how officers should provide information to and obtain information from the person being interviewed, and when an expedited removal order should be reviewed by another immigration officer. *See* 8 C.F.R. §§ 235.3(b)(2)(i) and (b)(7). Although the statute did not require it, the regulations say that interpretive assistance shall be used if necessary. 8 C.F.R. § 235.3(b)(2)(i)

In 2002, the legacy INS expanded expedited removal by designating its applicability to aliens arriving by sea. *See* 67 Fed. Reg. 68924 (Nov. 13, 2002).

How has DHS expanded the application of expedited removal to the interior?

In the August 11, 2004 notice, DHS Secretary Ridge announced that he was exercising his discretionary statutory authority to expand expedited removal to apply to certain non-citizens within the United States. Expedited removal will now be applied to non-citizens who:

- are inadmissible under INA §§ 212(a)(6)(C) or (7) (8 U.S.C. §§ 1182(a)(6)(C) or (7));
- are physically present in the U.S. without having been admitted or paroled following inspection by an immigration officer at a port of entry;
- are encountered by an immigration officer within 100 miles of the U.S./Mexico or U.S./Canada border;⁶ and

⁵ *See Sinclair v. INS*, No. 98 Civ. 0537 (DC), 1998 U.S. Dist. Lexis 19152 at *8-9 (S.D.N.Y. Dec. 9, 1998) (alien not entitled to an attorney under INA § 235(b)(1)(A)(i) before he signed the expedited removal order, therefore denying his constitutional claim that he was denied the right to an attorney).

⁶ The order states that the notice will be effective with respect to apprehensions made within the Border Patrol sectors of Laredo, McAllen, Del Rio, Marfa, El Paso, Tucson, Yuma, El Centro, San Diego, Blaine, Spokane, Havre, Grand Forks, Detroit, Buffalo, Swanton, and Houlton. These sectors cover the entire land borders between and United States and Canada and Mexico. The only Border Patrol sectors not affected by the notice are Livermore, California; New Orleans, Louisiana; Miami, Florida; and Ramey, Puerto Rico. *See* 8 C.F.R. § 100.4(d).

- cannot establish to the satisfaction of an immigration officer that they have been continuously present in the United States for 14 days immediately prior to the encounter.

All of the regulations that apply to expedited removal at a port of entry also will apply to interior expedited removal. As with expedited removal at a port of entry, an individual placed in interior expedited removal will not have the right of review by an IJ or the BIA and will not be eligible to apply for relief from removal, other than relief based upon a fear of persecution. An individual ordered removed pursuant to interior expedited removal also will be barred from entering the United States for a period of five years. 8 U.S.C. § 1182(a)(9)(A)(i).

Is anyone exempt from expedited removal under the public notice?

Yes. The same groups who are exempted from expedited removal at the border are exempted from interior expedited removal. Any individual subject to interior expedited removal who claims to be a U.S. citizen or to have lawful permanent resident, refugee or asylee status is to be processed according to 8 C.F.R. § 235.3(b)(5). This section prohibits the immigration officer from continuing with expedited removal if the officer is able to verify the individual's status as claimed. Where the immigration officer is unable to verify the individual's status, the regulations provide for an immigration judge to review the decision to place the individual in expedited removal. 8 C.F.R. § 235.3(b)(5)(i).

Additionally, any individual placed in interior expedited removal who indicates an intention to apply for asylum or who asserts a fear of persecution or torture will be processed in the same way that an asylum-seeker is processed in expedited removal cases at the port of entry. The individual will be interviewed by an asylum officer to determine if s/he has a credible fear of persecution. 8 U.S.C. §§ 1225(b)(1)(A)(ii) and (b)(1)(B). If that standard is met, the individual will be referred to an immigration judge for a removal hearing under INA § 240. 8 C.F.R. § 235.3(b)(4). People claiming asylum, however, are subject to being detained during the asylum officer procedure and the subsequent immigration judge procedure. 8 U.S.C. 1225(b)(1)(B)(iii)(IV); 8 C.F.R. § 235.3(b)(4)(ii).

Finally, pursuant to the statutory directive, Cuban citizens and nationals are exempted altogether from interior expedited removal procedure, just as they are from expedited removal at a port of entry.

Does the notice include any other limitations on how the expansion is to be carried out?

The actual Notice of Designation that orders the expansion of expedited removal does not contain any additional limitations on how it is to be implemented. However, there is supplemental information that precedes the Notice of Designation that suggests that the newly expanded procedure is intended to have additional limits. Specifically, the supplemental information said that, as a matter of prosecutorial discretion, DHS does not

intend to place Mexicans or Canadians in interior expedited removal unless the individual has a history of criminal or immigration violations, such as smugglers or those who have made numerous illegal entries. Other Mexicans and Canadians will continue to be “voluntarily” returned to their home countries. Interior expedited removal will be applied to all nationals of other countries who satisfy the criteria.

The supplemental information also indicates that immigration officials will have the discretion *not* to place an individual in interior expedited removal. DHS indicates that this may be appropriate in cases in which the equities weigh against expedited removal, such as cases involving unaccompanied minors, ABC class members,⁷ and individuals who may be eligible for cancellation of removal. In appropriate circumstances, the immigration officer can permit these individuals to return voluntarily to their home countries, withdraw their application for admission, or be placed in regular removal proceedings instead of expedited removal.⁸ The notice contains no guidance on how DHS officers will make these decisions.

The supplemental information also states that DHS “anticipate[s]” that interior expedited removal will be employed against individuals apprehended “immediately proximate” to a land border who have negligible ties or equities in the U.S. Despite this, a 100 mile range has been designated, and there is nothing in the notice to prevent full implementation of interior expedited removal within that geographic range.

How will an officer determine if an individual is subject to expedited removal?

According to the notice, the individual has the burden of demonstrating to the satisfaction of the officer that s/he has been in the U.S. for fourteen days or longer. The very nature of expedited removal will make it almost impossible for the individual to present any evidence to demonstrate this presence, other than his or her own statement. After an individual has been apprehended, s/he will be interviewed immediately, either at the arrest site or after being taken back to a border patrol office. The individual will have no

⁷ *American Baptist Church v. Thornburgh*, 760 F. Supp. 796 (N.D. Ca. 1991).

⁸ While the notice lists all three actions as possible, they are not equally beneficial in all cases. For example, an individual who is eligible for cancellation of removal may lose that eligibility if s/he departs under an order of voluntary departure, as both the BIA and numerous courts have held that voluntary departure breaks the continuous physical presence required for cancellation. See, e.g., *Matter of Romalez-Alcaide*, 23 I. & N. Dec. 423 (BIA 2002); *Palomino v. Ashcroft*, 354 F.3d 942 (8th Cir. 2004); *Vasquez-Lopez v. Ashcroft*, 315 F.3d 1201 (9th Cir. 2003), reh’g denied 343 F.3d 961 (9th Cir. 2003); *Mireles-Valdez v. Ashcroft*, 349 F.3d 213, 217-19 (5th Cir. 2003). Therefore, a cancellation eligible person may want to insist on being placed in regular removal proceedings.

Moreover, persons who accept voluntary departure in lieu of being removed may avoid the inadmissibility bars applicable to persons previously removed (8 U.S.C. § 1182(a)(9)(A)(i)), but they do not avoid other bars to inadmissibility, such as the ten year bar for unlawful presence (8 U.S.C. § 1182(a)(9)(B)(i)(II)). However, a person who is not already subject to the ten year bar will avoid the three year unlawful presence bar by accepting voluntary departure *subsequent to the commencement* of proceedings under 8 U.S.C. § 1225(b)(1). See 8 U.S.C. § 1182(a)(9)(B)(i)(I).

chance to collect documents or to contact family, friends or an attorney. Thus, the immigration officer has virtually unchecked authority to reject an individual's sworn statement regarding presence in the U.S. The notice provides absolutely no guidance on how an officer is to evaluate an individual's statement.

Who will be the most severely impacted by the expanded expedited removal?

Since expedited removal was first implemented at ports of entry in 1997, there have been reported instances in which U.S. citizens, legal permanent residents, others with valid legal status, and asylum-seekers have all been erroneously denied entry and ordered removed. These groups will all remain vulnerable to being erroneously placed in interior expedited removal. Additionally, the following groups could be adversely impacted:

- Individuals eligible to apply for cancellation of removal: The 10 year physical presence requirement for non-LPR cancellation is not broken by any one absence from the country of less than 90 days, or absences in the aggregate that are less than 180 days. 8 U.S.C. § 1229b(d)(2). It is possible that individuals who have resided in the United States for ten years or longer will be placed in interior expedited removal. Although short absences from the U.S. will not break the physical presence requirement for cancellation, immigration officials will treat *any* absence from the country as breaking the fourteen-day presence requirement for internal expedited removal. Thus, an individual who has lived for ten years in the U.S. and who is apprehended within 14 days of returning from a short trip to Mexico, could be subject to interior expedited removal. If this happens, the individual will lose the opportunity to apply for cancellation. There is no guidance in the notice as to how an immigration officer is to determine whether an individual might be eligible for cancellation, or what factors the officer is to consider in exercising discretion not to place such a person in expedited removal.
- Battered spouses and children eligible for cancellation: It is even more likely that battered spouses and children will erroneously be subject to interior expedited removal because the physical presence requirement for these individuals is only three years. 8 U.S.C. § 1229b(b)(2).
- ABC class members and their families: Individuals who may be eligible for relief under the terms of the settlement agreement in *American Baptist Church v. Thornburgh*, 760 F. Supp. 796 (N.D. Ca. 1991) could lose their opportunity to seek this relief.
- Unaccompanied minors: According to an August 21, 1997 memorandum of the legacy INS, unaccompanied minors should generally be placed in expedited removal in only limited circumstances. With the expansion to interior expedited removal, there is a greater chance that minors will be erroneously placed in these proceedings and will lose any opportunity for relief that they may have.

Another potential outcome of interior expedited removal is that there will be an increase in criminal prosecutions for unlawful reentry under 8 U.S.C. § 1326. This offense is a

continuing one, applicable to any non-citizen previously ordered removed who reenters, attempts to reenter or is “found in the United States. 8 U.S.C. § 1326(a)(3).”

Is there any way to challenge an expedited removal order?

The INA limits judicial review over expedited removal orders. Due to the nature of expedited removal – which results in the individual being removed prior to having the chance to contact an attorney – there have been very few federal court challenges to individual expedited removal decisions. In the few cases that do exist, the courts disagree as to the scope of judicial review available over these orders.

The INA states that judicial review of an expedited removal order is available in habeas corpus proceedings, but limits that review to three questions:

- 1) whether the petitioner is an alien;
- 2) whether the petitioner was ordered removed under the expedited removal provisions; and
- 3) whether the petitioner can prove by a preponderance of the evidence that s/he is a lawful permanent resident, or was granted refugee or asylee status, and therefore is not subject to expedited removal.

8 U.S.C. § 1252(e)(2). The statute further clarifies that in determining the second question above, the court is limited to determining whether an order was in fact issued and whether it relates to the petitioner. 8 U.S.C. § 1252(e)(5). The statute further prohibits any review of whether the individual is actually inadmissible or entitled to any relief from removal. *Id.*

At least one court has found that the question of whether an expedited removal order was issued against an individual and whether it relates to that individual necessarily includes a review of whether the statute was lawfully applied. *AADC v. Ashcroft*, 272 F.Supp. 2d 650 (E.D. Mich. 2003); see also *Meng Li v. Eddy*, 259 F.3d 1132, 1136 (9th Cir. 2001) (Hawkins, J., dissenting). Other courts have rejected this view, however, and instead held that there is no review over whether the procedure was properly invoked but instead, that review is limited to whether the procedure was invoked at all. *Brumme v. INS*, 275 F.3d 443 (5th Cir. 2001); *Meng Li v. Eddy*, 259 F.3d 1132 (9th Cir. 2001), *vacated as moot*, 324 F.3d 1109 (9th Cir. 2003).