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ILLEGAL ALIENS

INS' Processes for Denying Aliens Entry Into the United States

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Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss Immigration and Naturalization Service's (INS) processes for handling aliens who attempt to enter the country illegally. The tragic events of September 11, 2001, underscore the importance of effectively controlling the legal and illegal entry of aliens into the United States.

Aliens enter the United States legally or illegally. Generally, legal entry requires aliens to first obtain visas at a U.S. consulate and appropriate travel documents, such as passports, from their own country.¹ They then present themselves for INS inspection at a U.S. port of entry. Aliens may enter legally as "immigrants" or "nonimmigrants." Immigrants enter for purposes of becoming lawful permanent residents. In addition, refugees and immediate relatives—spouses, parents, and children of U.S. citizens—can also be admitted. Nonimmigrants are admitted for a specified period of time for a specific purpose, such as tourism, business, or schooling. Under certain conditions, nonimmigrants in the United States may apply to INS to have their status changed to that of immigrant.

Aliens enter illegally by evading INS inspections. They might enter at a port of entry and present fraudulent documents or cross the U.S. border between ports of entry.

My testimony today draws on our prior reports and focuses mainly on INS' processes for denying aliens entry at land and airports of entry, including the expedited removal and credible fear processes.²

¹ Citizens of some countries are part of the visa waiver program (e.g., England) and do not have to obtain a visa.

² *Illegal Aliens: Changes in the Process of Denying Aliens Entry Into the United States* (GAO/GGD-98-81, Mar. 31, 1998) and *Illegal Aliens: Opportunities Exist to Improve the Expedited Removal Process*, (GAO/GGD-00-176, Sep. 1, 2000).

Changes in the Process of Denying Aliens Entry Into the United States

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (the 1996 Act), which amended the Immigration and Nationality Act (INA),³ as amended, was enacted September 30, 1996 (P.L. 104-208). Among other things, the 1996 Act included a new provision, which is called expedited removal, for dealing with aliens who attempt to enter the United States by engaging in fraud or misrepresentation (e.g., falsely claiming to be a U.S. citizen or misrepresenting a material fact) or who arrive with fraudulent, improper, or no documents (e.g., visa or passport). The expedited removal provision, which went into effect on April 1, 1997, reduces an alien's right to seek review of a determination of inadmissibility decision.

In the years preceding the passage of the 1996 Act, concerns were raised about the difficulty of preventing illegal aliens from entering the United States and the difficulty of identifying and removing the illegal aliens once they entered this country. The expedited removal process was designed to prevent aliens who attempt to enter the United States by engaging in fraud or misrepresentation or who arrive without proper documents from entering this country at our ports of entry.

The 1996 Act also allows expedited removal orders to be issued to aliens who have entered the United States without being inspected or paroled at a port of entry.⁴ INS determined that it would not apply the expedited removal process to aliens who attempted to enter the United States between ports of entry or without inspection or parole.⁵

INS and immigration judges have roles in implementing the provisions of the 1996 Act relating to the expedited removal of aliens. INS' responsibilities include (1) inspecting aliens to determine their admissibility and (2) reviewing the basis and credibility of aliens who are subject to expedited removal but who claim a fear of persecution if returned to their home country or country of last residence.⁶ Aliens can

³ 8 U.S.C. 1101, et seq.

⁴ The 1996 Act only permits INS to issue expedited removal orders against aliens who have been in the United States for less than 2 years.

⁵ Parole is a procedure used to temporarily admit an inadmissible alien into the United States, for emergency reasons or when in the public interest.

⁶ For this testimony, we use the term "home country" in referring to the aliens' home country or their country of last residence.

request that immigration judges review INS' negative credible fear determinations. Immigration judges, who report to the Chief Immigration Judge, are in the Executive Office for Immigration Review (EOIR), within the Department of Justice. The immigration judges are located in immigration courts throughout the country.

Before the 1996 Act, aliens who wanted to be admitted to the United States at a port of entry were required to establish admissibility to an inspector. This requirement remains applicable under the 1996 Act. Generally, aliens provide inspectors with documents that show they are authorized to enter this country. At this primary inspection, the INS inspector either permits the aliens to enter or sends the aliens for a more detailed review of their documents or further questioning by another INS inspector. The more detailed review is called secondary inspection. In deciding whether to admit the alien, the INS inspector is to review the alien's documents for accuracy and validity and check INS' and other agencies' databases for any information that could affect the alien's admissibility. After reviewing the alien's documents and interviewing the alien at the secondary inspection, the inspector may either admit or deny admission to the alien or take other discretionary action. INS can prohibit aliens from entering the United States for a number of reasons (e.g., criminal activity or failing to have a valid visa, passport, or other required documents). Inspectors have discretion to permit aliens to (1) enter the United States under limited circumstances even though they do not meet the requirements for entry or (2) withdraw their applications for admission and depart.

Exclusion Process Before Implementation of the 1996 Act

Before the April 1, 1997, enactment of the expedited removal process, the INA authorized the Attorney General to exclude certain aliens from admission into the United States. Aliens whom inspectors determined to be excludable from this country generally were allowed either to (1) return voluntarily to the country from which they came or (2) appear for an exclusion hearing before an immigration judge. During this hearing, aliens who said they had a fear of persecution if they were returned to their home country could file an application for asylum. The immigration judges' decisions could be appealed to EOIR's Board of Immigration Appeals, which is a quasijudicial body that hears appeals of INS' and immigration judges' decisions. Furthermore, the alien could appeal Board's decision through the federal court system. The scope of the federal court's review was limited to whether the government followed established procedures. Aliens who were excluded from entering the United States under this process generally were barred from reentering this country for 1 year.

Expedited Removal Process After the Implementation of the 1996 Act

Under the 1996 Act, an INS inspector, instead of an immigration judge, can issue an expedited removal order to aliens who (1) are denied admission to the United States because they engage in fraud or misrepresentation or arrive without proper documents when attempting to enter this country and (2) do not express a fear of returning to their home country. INS is to remove the alien from this country.⁷ Aliens who are issued an expedited removal order generally are barred from reentering this country for 5 years.

The expedited removal provision also established a new process for aliens who express a fear of being returned to their home country and who are subject to expedited removal. Inspectors are to refer such aliens to INS asylum officers for an interview to determine whether the aliens have a credible fear of persecution or harm if returned to their home country. This is called a credible fear interview. The term “credible fear of persecution” is defined by statute as “a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under Section 208” of the INA.

Generally, the 1996 Act requires INS to detain aliens who are subject to expedited removal and who express a fear of persecution or torture until they are removed from the country or permitted to remain in the country.⁸ These aliens are initially detained at the port of entry during the inspection process and then transported to a detention facility to await an interview by an asylum officer, unless release⁹ is required to meet a medical emergency or legitimate law enforcement objectives. If an asylum officer determines that the alien has a credible fear of persecution or torture,

⁷ There are other reasons why INS may find an alien inadmissible (e.g., criminal activity). However, expedited removal orders can only be issued to aliens whom INS finds inadmissible because the aliens attempted to enter the United States by engaging in fraud or misrepresentation or arrived without proper documents at the U.S. ports of entry. If INS includes any other charge against an alien, the alien cannot be processed under expedited removal procedures. INS is not required to charge an alien with all of the grounds under which it finds the alien inadmissible. With its new authority under the 1996 Act to issue expedited removal orders, INS’ guidance to its inspectors states that, generally, if aliens are inadmissible because they attempted to enter the United States by engaging in fraud or misrepresentation or arrived without proper documents, additional charges should not be brought, and the alien should be placed in the expedited removal process.

⁸ Generally, aliens who are subject to expedited removal and do not express a fear of persecution or torture are to be detained until they are removed from the country.

⁹ This is parole of aliens into the country either on bond or on their own recognizance.

detention is no longer mandatory. The INS district director, chief patrol agent, or officer in charge has the discretion to release such aliens for whom an asylum officer determined that a credible fear existed, provided there is a determination by an INS district officer the alien is likely to appear for the removal hearing and does not pose a risk to the community.

INS Was Generally in Compliance With the Requirements of the 1996 Act

In our September 2000 report, we stated that our review of documentation in the case files of aliens who had been processed for expedited removal indicated that INS inspectors were complying with the requirements of the expedited removal process in almost all cases at Los Angeles, John Fitzgerald Kennedy, and Miami airports and the San Ysidro port of entry. These requirements include the inspectors' taking aliens' sworn statements and asking aliens if they had a fear of returning to their home country, supervisory oversight, and having the aliens sign their sworn statements. We identified some cases where the supervisors did not sign removal orders, but documentation indicated that supervisors' concurrence was obtained by telephone, which is consistent with INS policy.

In addition, we reported that our review of internal controls at INS' Los Angeles, Miami, and New York Asylum Offices revealed that asylum officers generally complied with requirements, including documenting that mandatory paragraphs were read to the aliens during the interview process and that documentation in the aliens' files indicated that supervisors' review took place. We also found that the asylum officers we surveyed were satisfied with the required training INS provided. Finally, our review showed that the headquarters quality assurance team responsible for reviewing all negative (as well as some positive) determinations was performing these reviews and providing feedback to the asylum offices on their results.

INS Released Many Aliens, and Many of Them Did Not Appear for Their Hearing

INS has the discretion to release from detention aliens for whom an asylum officer determined that a credible fear existed. Its policy favors releasing such aliens provided it determines the aliens are likely to appear for the removal hearing and do not pose a risk to the community. In our September 2000 report, we pointed out that in response to our survey, 29 of 33 INS district offices reported that in fiscal year 1999, an estimated 78 percent of such aliens were released to await their hearing before an immigration judge, although some differences existed in district office detention practices. INS is issuing guidance that would promote more consistent decisions about releasing aliens among district offices.

INS' Policy Favors Releasing Credible Fear Aliens Provided They Meet Certain Conditions

Once an asylum officer determines that aliens have a credible fear of persecution or torture, INS' October 1998 Detention Use Policy favors releasing of such aliens after the district director or certain other INS officials determine that the aliens will likely appear for their removal hearing and will not pose a danger to the community. INS district offices reported to us that in fiscal year 1999, 3,432 (or 78 percent) such aliens were released. In responding to our survey, nearly all district offices told us that they considered the alien's criminal history and/or community ties as important factors in making the decision to release or detain the alien. Officials said that INS plans to clarify that headquarters and regional managers have authority to make detention decisions.

INS' October 1998 national detention policy and priority system has four categories of aliens for the purpose of making detention decisions.

- Category 1 includes aliens who are for the most part required to be detained (e.g., aliens chargeable as terrorists or aliens convicted of aggravated felonies).
- Category 2 includes aliens who are removable because of national concerns or having engaged in alien smuggling.
- Category 3 includes aliens whom INS apprehended at a work site and had committed fraud in obtaining employment.
- Category 4 includes aliens in cases when asylum officers determined that they had a credible fear of persecution or torture and as a result were referred to immigration judges for full removal proceedings.

Under INS' detention policy, the categories are sequentially prioritized (i.e., aliens in category 2 generally should be detained before aliens in category 3). INS requires aliens who express a fear of persecution or torture to an INS inspector at a port of entry to be detained unless release is required to meet a medical emergency or legitimate law enforcement objectives, such as serving as a witness. If an asylum officer determines that the alien has a credible fear of persecution or torture, the alien is to be placed in removal proceedings before an immigration judge where he or she may present a claim for asylum. At this point, the alien is placed in category 4 and can be released at the discretion of the district director or certain other INS officials.

Under this priority system, these INS officials have discretion in their implementation of the detention policy. INS requires the reasons for the detention decision to be clearly documented in writing and placed in the alien's file if a custody determination is not in keeping with its policy. INS' policy favors releasing aliens in cases when an asylum officer determined

those aliens to have a credible fear of persecution or torture, provided that the aliens do not pose a risk of flight or danger to the community.

Guidance for making a release decision is found in regulations.¹⁰ In part, the regulations state that the district director may require reasonable assurances that the alien will appear at all hearings. They also state that the aliens do not have to meet all the factors listed in the regulations to be released. The factors to ensure appearance include the alien posting a bond, having community ties, or having to meet such conditions as periodically reporting to INS their whereabouts. The guidance concludes by stating that the district director should apply reasonable discretion in making detention decisions.

In responding to our survey, district offices identified several factors that they considered in making release or detention decisions regarding aliens in cases when an asylum officer determined those aliens to have a credible fear of persecution or torture. They are required to determine if the aliens are likely to appear for their removal hearings before an immigration judge and are not a danger to the community. However, one district office reported only considering the aliens' family ties or sponsorship, whereas officials at another district office said that they considered eight different factors in making the decision to release or detain.

While indicating compliance with INS' detention guidance, 28 district offices in our survey reported other factors they considered when making release or detention decisions. These factors included community ties, such as evidence of family or friends in the United States or sponsorship of religious or charitable groups, and criminal history check against law enforcement databases. One district office reported that since asylum officers were determining that aliens had a credible fear of persecution or torture 99 percent of the time, it did not consider the asylum officers' findings to be a viable prescreening process or useful in making detention decisions. A port director made a similar comment. Another district responded that they deferred to the determination made by the asylum officer (i.e., the district office released the alien if the asylum officer determined that the alien had a credible fear of persecution or torture).

¹⁰ 8 C.F.R. 212.5.

A Significant Number of Released Aliens Are Not Appearing for Their Removal Hearings

In those cases when an asylum officer determines that an alien has a credible fear of persecution or torture and the alien is released from INS custody, the alien is required to appear at removal hearings before an immigration judge. At the removal hearings, aliens are to present their claims for asylum, and the immigration judge is to rule on the merits of the claim. Those aliens whose claims are denied are to be removed from the country and returned to their home country. In using a joint INS and EOIR database, we found that 7,947 aliens were found to have a credible fear of persecution or torture between April 1, 1997, and September 30, 1999. As of February 22, 2000, of the 7,947 aliens, 5,320 aliens were released from INS custody. Of these 5,320 aliens, 2,351 aliens received an immigration judge's decision. Of the 2,351 aliens, 1,000 aliens (or 42 percent) did not appear for their removal hearing before an immigration judge. In all 1,000 cases in which the alien did not appear for their removal hearing, immigration judges ordered them removed from this country in absentia.

It should be noted that many of the 5,320 cases involved aliens who had appeared for their initial removal hearing and were scheduled for subsequent hearings to determine if they should be granted relief from removal (e.g., granted asylum). EOIR officials told us that as more of these cases are completed over time, a greater percentage of aliens will appear for their hearing, which will result in a lower in absentia rate. They estimated that when all the cases are completed, the failure-to-appear rate would fall from 42 percent to as low as 25 percent.

Many Aliens Who Changed Removal Hearing Location Were Not Appearing for Their Hearings

In those cases when an asylum officer determined an alien to have a credible fear of persecution or torture and the alien was subsequently released, the alien can ask an immigration judge for a change in removal hearing location. According to an EOIR official, immigration judges' decisions to grant aliens' requests for a change in the hearing location are done on a case-by-case basis. Further, according to the Chief Immigration Judge, before a change of location may be granted, an address where the alien will reside must be provided to the immigration judge.

We reported in September 2000 that many aliens who requested a change in removal hearing location failed to appear at their hearing. Our analysis of the INS and EOIR data from April 1, 1997, through fiscal year 1999 showed that 3,695 of the 5,320 aliens who were released received a change of location for their removal hearing. Of those 3,695 aliens, 1,467 aliens had a decision made by an immigration judge. Of the 1,467 aliens, 557 aliens (or 38 percent) were ordered removed in absentia because they failed to appear for their removal hearings. During our discussion with

immigration judges in New York City, they said that the records of some aliens who received a change of hearing location to New York from Los Angeles contained incorrect information, such as nonexistent addresses as their residences.

Many Aliens Are Not Filing Asylum Applications

To determine whether or not aliens who claimed to have a fear of persecution or torture pursued their claim of asylum, we reviewed the rate by which claimants failed to file applications for asylum. Generally, these aliens have 1 year from their arrival to file an application showing their intent to request asylum.

Our analysis of the joint INS and EOIR database showed that since the inception of the expedited removal program on April 1, 1997, through fiscal year 1999, 7,947 aliens were determined to have a credible fear of persecution or torture. Of these 7,947 aliens, 3,140 aliens had not filed for asylum, as of February 22, 2000. Of the 3,140 aliens who had not filed, 1,338 (or 43 percent) aliens missed the 1-year required filing deadline and as a result, generally may not be able to file for asylum. In addition, 1,239 of the 3,140 aliens who did not file an asylum application were subsequently ordered removed by an immigration judge.

In our September 2000 report, we concluded that many aliens may be using the credible fear process to illegally remain in the United States. In addition, our analysis showed that aliens who requested and received a change of location of their removal hearing did not appear for their hearings. Accordingly, we recommended that the INS reevaluate its policy for when to release aliens who have a credible fear of persecution or torture, and that INS and EOIR work together to establish a system to provide better information from the aliens when they request a change of venue of their removal hearing. The Department of Justice agreed with our recommendations and said that it is are studying how to address our recommendations.

INS' Processes for Denying Aliens Entry Between Ports of Entry and Without Inspection

As previously mentioned, INS decided not to subject aliens who attempt to enter the country between ports of entry or without inspection or parole to the expedited removal process. Instead, once an alien is apprehended, generally by the Border Patrol, INS usually takes one of two courses of action.

Under the first course of action, an apprehended alien can request INS to permit him or her to voluntarily depart the country. This is commonly

referred to as voluntary return to home country. By permitting the aliens to voluntarily return to their country, the aliens would not be subject to any penalty or fine. But if they wanted to return to the United States their subsequent visa applications may note that they had previously enter the country without permission. Voluntary departure can take place immediately after the alien's background is checked or at a future date specified by INS. INS considers these requests on a case-by-case basis and would permit the alien to voluntarily depart if, for example, the alien had no criminal record or history of illegal attempts to enter the country.

INS has a reciprocal agreement with Mexico and Canada, that they will accept their citizens. The aliens from Mexico or Canada who are apprehended near their border would be returned immediately under a voluntary removal granted by the INS. If apprehended away from their border and INS granted voluntary removal, the aliens would then be flown to their home country. For aliens who are not from Mexico or Canada, they would be flown home if INS offered them voluntary removal. INS officials said that in such situations, the aliens would usually remain under INS' control until they can be returned to their country.

Under the second course of action, INS can place aliens in a removal hearing before an immigration judge. This action results in a penalty that would limit the alien's ability to reenter the country in the future. During removal hearings, aliens can apply for relief from their removal (e.g., apply for asylum). INS can detain aliens during the removal hearing process or release the aliens on bond or on their on recognizance. In deciding whether or not to detain the aliens, INS considers such factors as the likelihood that the aliens will appear for their removal hearing or whether aliens present a danger to the community.

Mr. Chairman, this completes my statement. I would be pleased to answer any questions that you or other members of the Subcommittee may have.

Contact and Acknowledgment

For further information regarding this testimony, please contact Richard M. Stana at (202) 512-8777. James M. Blume made key contribution to this testimony.