

Administrative Removal Proceedings Manual (M-430, Rev. June 4, 1999)

Detention and Deportation Officers' Manual
Appendix 14-1

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PREFACE

The law authorizes alternative administrative removal proceedings without hearings before immigration judges for serious criminal offenders. These proceedings apply to certain aliens who have been convicted of one or more aggravated felonies. While incorporating both procedural safeguards and effective quality control methods, the proceedings simplify and expedite removal from the United States. This manual is a ready reference explaining how to do cases under the alternative proceedings. The information in the manual is current as of the date shown on the cover but is subject to change.

I. INTRODUCTION

A. Purpose

This manual is a comprehensive guide for Immigration and Naturalization Service (INS) employees in the processing and adjudication of administrative removal cases. These cases relate to certain aliens who have been convicted of one or more aggravated felonies and who are not lawful permanent residents of the United States. Aliens with conditional permanent resident status as the spouses, sons, and daughters of U.S. citizens or lawful permanent residents are not lawful permanent residents for this purpose.

The manual describes in detail the applicable law, regulations, and procedures. The purpose of the manual is to serve as a reference for and assist in training INS officers and support personnel who participate in the administrative removal process. The manual supplements the regulations in providing for a process which works efficiently while respecting procedural due process and fitting sensibly within the usual routine of investigating cases and initiating removal proceedings.

Previously, most traditional removal cases required hearings before immigration judges (IJ's). As part of the continuing efforts to streamline removal procedures, INS officers may issue final removal orders in administrative removal cases. In view of the seriousness of this responsibility, case processing and adjudication require careful, effective quality control measures. The manual is a major component of the administrative removal quality assurance program.

The manual gives step-by-step explanations on the methods necessary to ensure compilation of thorough records of proceeding (ROP's), adherence to administrative due process and appropriate procedures, and preparation of consistent, legally sufficient decisions. The manual emphasizes the need to create and maintain, on a permanent basis, ROP's that are able to withstand legal challenges or support later proceedings relating to criminal reentry after removal. Following the instructions outlined in the manual will facilitate the uniform and fair adjudication of cases and, when appropriate, the issuance of even-handed, high quality, and legally defensible supplemental written decisions.

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The INS developed this manual in close consultation with its Office of the General Counsel using extensive legal materials furnished by that Office. For example, that Office provided the guidance on creating and maintaining the ROP, judicial review, and legal issues, as well as furnishing all legal citations. Legal questions which are not answered in the manual may be referred to an INS attorney.

B. Historical Background

Since 1986, as part of a general trend in the law toward stricter criminal provisions, Congress has made numerous amendments to the Immigration and Nationality Act (INA) affecting removal of criminal aliens from the United States. For example, the comprehensive Immigration Reform and Control Act of 1986 (IRCA) amended the INA to require initiation of removal proceedings "as expeditiously as possible after conviction" of an offense making an alien subject to removal. The text of IRCA itself declared, "[i]t is the sense of the Congress that...the immigration laws of the United States should be enforced vigorously and uniformly."

Legislative changes starting in 1988 introduced the term "aggravated felony" to immigration law and emphasized removal of aliens convicted of crimes fitting its definition. Examples of crimes now defined as aggravated felonies are murder, rape, sexual abuse of minors, child pornography, certain crimes of violence, and illicit trafficking in controlled substances, firearms, and destructive devices. Current law provides for mandatory detention of aliens in removal proceedings who have been convicted of these crimes.

In 1994, several measures to improve criminal alien removal were signed into law. These included expedited administrative deportation without a hearing before an immigration judge (IJ) for an alien convicted of an aggravated felony who is not a lawful permanent resident and who is not eligible for any relief from removal. Through this legislation, Congress provided for a more streamlined removal process, incorporating statutorily provided procedural safeguards, to simplify and expedite removal in certain cases involving serious criminal offenses.

More recently, the trend towards expediting removal of criminal aliens through statutory change engendered the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the subsequent Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The latter made major changes such as replacing the separate exclusion and deportation processes with a single removal proceeding for deciding both inadmissibility and deportability.

AEDPA made several changes affecting the administrative deportation procedure for aliens convicted of aggravated felonies. IIRIRA modified or eliminated some of these changes. The current expedited procedure, now called administrative removal, also includes aliens who have lawful permanent residence on a conditional basis as the spouses, sons, and daughters of U.S. citizens and lawful permanent residents. Another change makes aliens subject to this procedure ineligible for any discretionary relief from removal.

However, the law requires withholding of removal to a country where the alien's life or freedom would be threatened in the case of an alien convicted of an aggravated felony or felonies for which the alien has been sentenced to an aggregate term of imprisonment of less than five years, unless the crime is determined to be a particularly serious crime. In addition, regulations that became effective on March 22, 1999 prohibit the removal of an

alien to a country where he or she would be tortured regardless of any criminal convictions or background the alien may have. The regulations establish a special screening mechanism, with referral of cases that may trigger either of these provisions to an IJ for adjudication.

C. Legal Authority For Administrative Removal

The Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA), Public Law 103-322, was enacted September 13, 1994 and became effective September 14, 1994. Section 130004 of VCCLEA amended the Immigration and Nationality Act (INA) to eliminate administrative hearings before immigration judges (IJ's) for certain criminal aliens. Section 130004 also amended the INA to limit judicial review in these cases.

The Immigration and Nationality Technical Corrections Act of 1994 (INTCA), Public Law 103-416, enacted October 25, 1994, made minor technical changes to these statutory provisions. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Public Law 104-132, enacted April 24, 1996, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law 104-208, enacted September 30, 1996, further amended these provisions.

Current section 238(b) of the INA authorizes, under regulations prescribed by the Attorney General, administrative removal proceedings without a hearing before an IJ to determine deportability under section 237(a)(2)(A)(iii) of the INA and to issue a removal order. Section 237(a)(2)(A)(iii) relates to conviction of an aggravated felony, as defined in section 101(a)(43) of the INA.

Section 238(b) of the INA requires that, when proceedings under that section of law begin, the alien must not have been lawfully admitted for permanent residence. Conditional permanent residents under section 216 of the INA are not lawful permanent residents for purposes of administrative removal proceedings under section 238(b). Section 216 relates to certain spouses, sons, and daughters of U.S. citizens and lawful permanent resident aliens.

Section 238(b)(5) of the INA states that no alien subject to these proceedings is eligible for any relief from removal. Section 241(b)(3) of the INA, however, requires withholding of removal to a country where the alien's life or freedom would be threatened. This provision, however, does not apply if the alien is subject to certain bars to withholding of removal including, among other grounds, conviction of a particularly serious crime. An alien is considered to have been convicted of a particularly serious crime if the alien has been sentenced to an aggregate term of imprisonment of five or more years for an aggravated felony or felonies, not taking into account any suspension of imposition or execution of the sentence. An aggravated felony for which the alien has been sentenced to an aggregate term of imprisonment of less than five years may still constitute a particularly serious crime, depending on the crime.

On October 21, 1998, the President signed into law the Foreign Affairs Reform and Restructuring Act of 1998, Public Law 105-277. That legislation mandates promulgation of regulations to implement U.S. obligations under Article 3 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT). Article 3 prohibits the removal of any person to a country where he or she would be tortured, with no exceptions for persons with criminal or other background. Neither section 241(b)(3) nor

Article 3 of the CAT are subject to the section 238(b)(5) prohibition on relief for aliens in these proceedings. As a legal matter, neither of these provisions constitutes relief from removal because they are merely restrictions on the place to which an alien may be removed and do not constitute affirmative permission to remain in the United States.

As reflected in the applicable regulations at 8 CFR 238.1(b)(1)(iv), by operation of section 238(c) of the INA, even aliens who entered without inspection may be removed through administrative removal proceedings. Section 238(b)(3) of the INA provides that a removal order issued under section 238(b) of the INA may not be executed for 14 calendar days, unless the alien waives the 14-day period.

Section 238(b)(4) of the INA lists procedural safeguards the Attorney General must afford the alien. These include reasonable notice of the "charges" and of the opportunity to inspect the evidence and rebut the "charges," as well as the actual reasonable opportunity to inspect the evidence and rebut the "charges." A determination must be made for the record that the individual upon whom the notice is served is, in fact, the alien named in the notice. The alien must also be given the privilege of being represented, at no expense to the Government, by authorized counsel of his or her own choosing. Further, a record must be maintained for judicial review. Finally, the same person cannot issue the charges and make the decision to issue the final removal order.

D. The Regulations Implementing Administrative Removal

The administrative removal regulations were originally published on August 24, 1995 with an effective date of September 25, 1995. On March 6, 1997, the regulations were revised to conform with statutory changes, became effective April 1, 1997, and were published in 8 CFR 238.1. Further important regulatory amendments were published on February 19, 1999 and became effective on March 22, 1999. 64 FR 8478 (1999).

These regulations authorize a Deciding Service Officer (DSO) to issue a Final Administrative Removal Order under section 238(b) of the Immigration and Nationality Act (INA) on Form I-851A. They implement the administrative removal process described in this manual. The process begins when an Issuing Service Officer (ISO) serves a charging document called a Notice of Intent to Issue a Final Administrative Removal Order (NOI) on Form I-851.

A DSO may be a district director, a chief patrol agent, or that official's designated representative. The ISO may be any Immigration and Naturalization Service (INS) officer listed in 8 CFR 239.1 as authorized to issue a Notice to Appear to begin removal proceedings before an immigration judge (IJ) under section 240 of the INA. In accordance with the statute, the regulations state that the DSO and the ISO cannot be the same person.

The regulations incorporate all statutorily required procedural safeguards and demand clear, convincing, and unequivocal evidence in support of the deportability charge. Additionally, the regulations provide for either verbal explanation or written translation of the NOI in the alien's native language or a language the alien understands, and require that a list of available free legal services be provided the alien.

The regulations also provide that the NOI must inform the alien that he or she may request withholding of removal to a particular country if he or she fears persecution or torture there.

If the alien requests withholding of removal, he or she is referred, upon issuance of a Final Administrative Removal Order, to an asylum officer for a screening process to determine whether the alien has a "reasonable fear" of persecution or torture under 8 CFR 208.31. If the alien passes the screening process, he or she is referred to an IJ for an adjudication of whether the alien can be returned to the country in question. In addition, the alien may request IJ review of a negative screening determination by an asylum officer.

The regulations provide for termination of proceedings under section 238(b) of the INA when the DSO finds the alien not amenable to administrative removal. If appropriate, the INS may then begin removal proceedings before an IJ.

The regulations include, by operation of section 238(c) of the INA, among those persons subject to administrative removal proceedings, aliens convicted of aggravated felonies who have not been admitted or paroled into the United States. Section 238(c) of the INA states that "(a)n alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States." Therefore, as reflected in the applicable regulations at 8 CFR 238.1(b)(1)(iv), even aliens who entered without inspection may be removed through administrative removal proceedings.

Neither the statute nor the regulations provide for appeal to the Board of Immigration Appeals (BIA) of a DSO's decision entering a Final Administrative Removal Order. In accordance with the law, the regulations require that a record of proceeding (ROP) be maintained "for judicial review...sought by any petition for review."

An alien convicted of an aggravated felony who is subject to administrative removal proceedings is subject to the same detention requirements as any other alien convicted of an aggravated felony. The regulations specify that the INS decision concerning custody or bond is not administratively appealable during the administrative removal process. Since IJ's do not take part in this process, they may not consider or rehear the INS custody or bond decision. The alien's remedy is to file a habeas corpus petition in Federal District Court.

II. OVERVIEW

A. Criteria

The administrative removal process relates to an alien who is not a lawful permanent resident when the process begins and who has a final conviction for an aggravated felony. Before starting this process, the officer encountering the alien must consider the following factors:

- (1) Alienage. At the outset, there must be a determination of alienage. The investigation must disclose that there is clear, convincing, and unequivocal evidence that the subject is an alien, that is, neither a citizen nor a national of the United States.
- (2) Immigration status (not a lawful permanent resident). The subject is not a lawful permanent resident. An alien who is a conditional permanent resident under section 216 of the Immigration and Nationality Act (INA) as the spouse, son, or daughter of a U.S. citizen or lawful permanent resident is not a lawful permanent resident for purposes of administrative removal proceedings. Immigration and Naturalization Service (INS) records must corroborate the subject's immigration status.

(3) The existence of a final conviction for an aggravated felony. Deportability based upon a conviction of an aggravated felony, as defined by section 101(a)(43) of the Immigration and Nationality Act (INA), must be established. The public record must be demonstrative of a final conviction for an aggravated felony in a state or Federal court.

B. Procedural Protections

An alien whose life or freedom would be threatened in a specific country or who would be tortured in that country may request withholding of removal. This can be granted under either section 241(b)(3) of the Immigration and Nationality Act (INA) or Article 3 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT).

Section 241(b)(3) requires that an alien's removal to a particular country be withheld if it is more likely than not that the alien's life or freedom would be threatened there on account of race, religion, nationality, membership in a particular social group, or political opinion. This provision, however, does not apply if the alien is subject to certain bars to withholding of removal including, among other grounds, conviction of a particularly serious crime.

An alien is considered to have been convicted of a particularly serious crime if the alien has been sentenced to an aggregate term of imprisonment of five or more years for an aggravated felony or felonies, not taking into account any suspension of imposition or execution of the sentence. An aggravated felony for which the alien has been sentenced to an aggregate term of imprisonment of less than five years may still constitute a particularly serious crime, depending on the crime.

Article 3 of the CAT, as implemented by regulations, creates an additional type of withholding of removal. It prohibits removal of any alien, regardless of any criminal background, to a country where the alien is more likely than not to be tortured. Article 3 is broader than section 241(b)(3) in that it contains no criminal bars to protection and does not require that the torture be on account of any specific reason. It is narrower in that torture is defined narrowly and does not include all types of harm that might constitute persecution.

An alien in administrative removal proceedings may request withholding of removal in his or her response to the Notice of Intent to Issue a Final Administrative Removal Order (NOI). A request for withholding of removal is the mechanism to seek protection from removal to a particular country under either section 241(b)(3) of the INA, based on a fear of persecution, or under Article 3 of the CAT, based on a fear of torture.

If the alien requests withholding of removal in his or her response to the NOI, the alien will, upon issuance of a Final Administrative Removal Order, be referred to an asylum officer. The asylum officer will conduct a screening process to determine whether the alien has a "reasonable fear" of persecution or torture under 8 CFR 208.31. If the asylum officer finds that the alien meets this standard, the case is referred to an immigration judge (IJ) for a withholding determination. If the asylum officer determines that the alien does not meet this standard, the alien may request IJ review of the screening determination only.

If the IJ agrees with the asylum officer's negative reasonable fear finding or if the alien does not request review, the alien may be removed from the United States. If the IJ determines that the alien has a reasonable fear of persecution or torture, the IJ will then make a determination whether the alien is likely to be persecuted or tortured and is, therefore,

entitled to withholding of removal to the country in question under either section 241(b)(3) of the INA or under Article 3 of the CAT.

The regulations implementing Article 3 of the CAT also create a separate form of protection, called deferral of removal, for aliens who would be tortured but who are subject to the bars to withholding. The determination about which form of protection will be granted under the CAT will be made by the IJ, and will not affect the procedures to be followed by INS officers in the administrative removal process. An IJ would grant deferral of removal only when an alien who has requested withholding has been found likely to be tortured but is subject to the bars to withholding. This manual, therefore, will refer generally to the process for withholding of removal under the CAT.

The administrative removal process includes the following procedural protections to the alien provided for in section 238(b) of the INA:

- (1) Reasonable notice of both the removal charge and the opportunity to inspect the evidence and rebut the charge.
- (2) Reasonable opportunity to inspect the evidence and rebut the charge.
- (3) The privilege of being represented by counsel at no expense to the Government.
- (4) A determination for the record that the individual upon whom the NOI is served is, in fact, the alien named in the NOI.
- (5) A record maintained in the event of judicial review.
- (6) The decision to issue a Final Administrative Removal Order not by the person who issues the NOI.

In addition to incorporating these statutorily provided procedural safeguards, the governing regulations (8 CFR 238.1) provide the following protections to the alien:

- (1) The charge of deportability must be supported by clear, convincing, and unequivocal evidence.
- (2) The alien must be furnished a list of available free legal services.
- (3) The Immigration and Naturalization Service (INS) must provide either a written translation of the charging document (NOI) or explain the contents of the charging document in the alien's native language or in a language the alien understands.
- (4) The NOI must explain to the alien that he or she may request withholding of removal to a particular country if he or she fears persecution or torture in that country.

C. Highlights Of The Process

The following are highlights of the administrative removal process which incorporates the procedural protections given the alien:

- (1) The officer encountering the alien determines that the alien's case meets the criteria for administrative removal. Under these criteria, when the process begins, the individual must be an alien who is not a lawful permanent resident. An alien with conditional permanent residence as the spouse, son, or daughter of a U.S. citizen or lawful permanent resident is not a lawful permanent resident for this purpose. The individual must also have a final conviction for an aggravated felony. An alien who has been convicted of an aggravated felony and who has entered the United States without inspection may be removed through administrative removal proceedings. However, an alien who entered the United States under the Visa Waiver Pilot Program (VWPP) or who has been paroled into the United States may not be put into administrative removal proceedings.
- (2) The Issuing Service Officer (ISO) prepares or requests preparation of a charging document called a Notice of Intent to Issue a Final Administrative Removal Order (NOI) on Form I-851. The ISO may be any Immigration and Naturalization Service (INS) officer listed in 8 CFR 239.1 (a) as authorized to issue a Notice to Appear to start removal proceedings before an immigration judge (IJ).
- (3) A determination is made for the record that the individual upon whom the notice is served is the alien named in the notice. The NOI has a statement to that effect to be signed upon service of the NOI if service is in person. However, neither service in person nor verification of the individual's identity at the time of service are required. Identity is established when the encountering officer questions the alien and conducts related record and/or document checks.
- (4) The INS gives the alien reasonable notice by serving the NOI. The NOI explains the alien's opportunity to inspect the Government's evidence and rebut the deportability charge by submitting a written response within ten days, with an extension allowed under certain circumstances. The NOI further explains that, in the response to the NOI, the alien may request withholding of removal if he or she fears persecution or torture in a specific country or countries. The NOI also explains the 14-day period for seeking judicial review if the INS issues a Final Administrative Removal Order unless the alien waives this 14-day period.
- (5) The alien has an opportunity to be represented at no expense to the Government. The NOI explains this opportunity and is accompanied by a list of available free legal services.
- (6) The alien has a reasonable opportunity to inspect the Government's evidence and rebut the allegations and charge. The alien may submit a written response to the NOI within ten calendar days. The Deciding Service Officer (DSO) may, but is not required to, grant more time to submit a response for good cause shown in a written request the INS receives within the original ten-day period. If the written response contains a request to review the evidence, the INS will serve the alien with a copy of that evidence and give the alien an extra ten days to submit a final response. Similarly, if the DSO considers additional evidence from a source other than the alien, the INS will serve the alien with a copy of that evidence and give the alien an extra ten days to submit a final response. If service of the NOI or evidence is by mail, the alien has 13 calendar days to submit his or her response.

- (7) The alien may, in writing, accept immediate issuance of a Final Administrative Removal Order. The alien may also waive the 14-day period for executing the order. The NOI includes statements the alien may sign if the alien chooses to do so.
- (8) The DSO makes a decision. The DSO (not the same person who issues the NOI) decides the case. If the DSO finds deportability established by clear, convincing, and unequivocal evidence in the record of proceeding (ROP), the DSO enters a Final Administrative Removal Order. If the DSO finds the alien not amenable to removal under this process, the DSO must terminate the process. If the DSO finds the alien subject to removal in proceedings before an IJ, the DSO causes a Notice to Appear to be served on the alien to begin these proceedings.
- (9) Removal must, except where statutory bars apply, be withheld to a country where an alien is more likely than not to be persecuted or tortured. An alien must be granted withholding of removal to a country where he or she is more likely than not to be persecuted as long as no statutory bars to withholding exist. Removal to a country where an alien is more likely than not to be tortured is also prohibited. There are no exceptions to the prohibition on removing an alien to a country where it is more likely than not that the alien would be tortured.
- (10) An alien subject to this administrative removal process is by law ineligible for any relief from removal. This includes asylum, voluntary departure, or cancellation of removal. Withholding of removal based on a finding that an alien is more likely than not to be persecuted or tortured is not a form of relief because, as a legal matter, it does not relieve an alien from removal from the United States. It simply restricts the place to which the alien may be removed.
- (11) The INS creates and maintains a permanent ROP. The INS must compile and maintain, throughout the entire process, a thorough ROP for judicial review.
- (12) The INS may not execute a Final Administrative Removal Order during a 14-day period unless the alien waives this period. The statute prohibits execution of a Final Administrative Removal Order for 14 days after it is issued to give the alien an opportunity to apply for judicial review and requires that a record be maintained for that purpose.
- (13) The INS determines custody status as it does in any case involving an alien convicted of an aggravated felony. The alien is subject to the same detention requirements as any other alien convicted of an aggravated felony. The INS custody decision is not administratively appealable, but the alien may seek review of such a decision in habeas corpus proceedings.

III. ENFORCEMENT PROCEDURE

A. Initiation Of The Procedure

First, the officer encountering the alien determines that the alien's case meets the criteria for administrative removal by questioning the alien. Under these criteria, when the process begins, the individual must be an alien who is not a lawful permanent resident. An alien who is a conditional permanent resident under section 216 of the Immigration and Nationality Act (INA) as the spouse, son, or daughter of a U.S. citizen or lawful permanent

resident is not a lawful permanent resident for this purpose. Also, an alien who has entered the United States without inspection may be removed through administrative removal proceedings. However, an alien who entered the United States under the Visa Waiver Pilot Program (VWPP) or who has been paroled into the United States may not be put into administrative removal proceedings. Second, the individual must have a final conviction for an aggravated felony. When processing the alien for this procedure, each of these elements, as well as the alien's identity, must be established.

- (1) Establishing alienage. Establishing alienage in an administrative removal proceeding is no different from establishing alienage in other immigration-related matters. An alien is any person who is not a citizen or national of the United States. In determining if a person is an alien, the officer must consider place of birth, the nationality of the person's parents at birth, and/or subsequent naturalization by the person or his or her parents. Those items which would cause an individual to be an alien must be explored during questioning. If the facts indicate that the person is an alien, they must be documented in a Record of Deportable/Inadmissible Alien (Form I-213), sworn statement, and printouts of records checks. The time and date that the alien was questioned should be noted on the Form I-213, and this evidence must be placed in the record of proceeding (ROP).
- (2) Verifying immigration status (not a lawful permanent resident). In order to establish the alien's immigration status at the time the process begins, the alien must be interviewed and all pertinent Immigration and Naturalization Service (INS) records systems should be checked. All evidence collected must be placed in the ROP. The Form I-213, sworn statement, printouts of records checks, and any documentation such as an Arrival-Departure Record (Form I-94) which indicates entry as a nonimmigrant should be used as evidence that the alien is not a lawful permanent resident. Evidence of conditional permanent resident status as the spouse, son, or daughter of a U.S. citizen or lawful permanent resident is available in both INS automated record systems and hard copy A- files.

Conditional permanent residence based on a relationship to a U.S. citizen or lawful permanent resident under section 216 of the INA should not be confused with that for employment-creation entrepreneurs, spouses, and children under section 216A of the INA. Unlike section 216, which is based on a family relationship, section 216A is based on investment in a commercial enterprise. Persons who are conditional permanent residents as employment-creation entrepreneurs under section 216A may not be placed in administrative removal proceedings.

- (3) Establishing conviction of an aggravated felony.

Conviction. The finality of a conviction is not affected by the pendency of post-conviction discretionary petitions, collateral attacks, or other remedies that do not constitute a direct appeal. The alien must establish that he or she has a direct appeal pending (or that the appeal time has not expired) in the criminal court proceedings in order to defend against the criminal ground of deportability alleged in the charging document.

The term conviction is defined in section 101(a)(48)(A) of the INA as, but is not limited to, a formal judgement of guilt by a court. That section of law gives the following test for establishing a conviction for immigration purposes if adjudication of guilt has been withheld: (A) a judge or jury has found the alien guilty or the alien has entered a plea of

guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt; and (B) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. See Section VIIB of this manual for more information about section 101(a)(48)(A).

Aggravated felony. Legislation passed in 1988 defined the term aggravated felony at section 101(a)(43) of the INA. The definition was expanded in 1990, 1994, and 1996. A foreign conviction for which a term of imprisonment was completed within the previous 15 years is recognized as an aggravated felony.

Aggravated felonies are serious criminal offenses including, but not limited to, crimes such as murder, rape, sexual abuse of minors, child pornography, certain crimes of violence, and illicit trafficking in controlled substances, firearms, and destructive devices.

Immigration law was changed September 30, 1996 to provide that the term aggravated felony applies regardless of whether the conviction was before, on, or after that date. Before this change, determining whether a crime was an aggravated felony was very difficult because there were different effective dates for the various crimes. The enacting legislation provided that the term now applies regardless of when the conviction was entered to actions taken on or after September 30, 1996 and to violations on or after that date of section 276 of the INA relating to criminal reentry after removal.

Matter of Lettman, Interim Decision 3370 (BIA 1998), held that an alien convicted of an aggravated felony is subject to removal regardless of the date of the conviction provided the alien is put in proceedings on or after March 1, 1991 and the crime falls within the aggravated felony definition. In *Lettman v. INS*, 168 F.3d 463 (11th Cir.1999), however, the Eleventh Circuit reversed this decision. It held that an alien convicted of murder prior to the effective date of section 7344 of the Anti-Drug Abuse Act (ADAA) of 1988, Public Law 100-690, allowing for deportation of aliens convicted of aggravated felonies, could not be deported under that section. Since the Eleventh Circuit decision is currently the law within that judicial circuit, INS employees working on administrative removal cases in that jurisdiction (Alabama, Georgia, and Florida) should consult District Counsel for guidance.

Conviction record. The record of conviction must be placed in the ROP. The conviction may be proven by any of the documents or records in 8 CFR 3.41 which describes evidence accepted in proceedings before an immigration judge (IJ). [See 8 CFR 3.41 and 8 CFR 287.6(a), which is cited in the former regulation. See also sections 240(c)(3)(B) and (C) of the INA describing types of documentary evidence constituting proof of conviction in immigration proceedings. These sections of law provide a statutory basis for 8 CFR 3.41.]

- (4) **Verifying identity.** When questioning the alien and checking records and documents to determine whether the case meets the criteria for administrative removal, special care must be taken to verify his or her identity. The process for verifying identity in an administrative removal proceeding is, in actuality, no different from that in any other immigration-related matter. The encountering officer is responsible for making absolutely certain that all information is completely consistent and there is no question whatsoever about the identity of the person on whom the Notice of Intent to Issue a Final Administrative Removal Order (NOI) will be served.

The law specifically requires a determination for the record that the individual upon whom the NOI is served is, in fact, the alien named in the NOI. When the NOI is served in

person, the INS employee or other official serving the NOI verifies the identity of the person on whom it is served and signs a statement to that effect in the Certificate of Service on the NOI. In a case where service will be by mail, the investigating officer/agent should prepare a brief written determination regarding verification of the alien's identity for inclusion in the ROP.

- (5) Determining applicability of withholding of removal. Once a case meets the criteria for administrative removal proceedings under section 238(b) of the INA, no relief from removal exists. While no relief from removal is available in these proceedings, cases may arise in which removal to a particular country must be withheld under section 241(b)(3) of the INA or Article 3 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT).

Section 241(b)(3) of the INA provides for withholding of removal to a country where an alien's life or freedom would be threatened because of the alien's race, religion, nationality, membership in a particular social group, or political opinion. This does not apply "if the Attorney General decides that...the alien, having been convicted by a final judgement of a particularly serious crime, is a danger to the community." An alien sentenced to an aggregate term of imprisonment of at least five years for his or her aggravated felony conviction(s) is considered to have committed a particularly serious crime and is statutorily ineligible for withholding of removal. An alien sentenced to less than five years in the aggregate for his or her aggravated felony or felonies, however, may be entitled to withholding of removal under section 241(b)(3).

In addition, Article 3 of the CAT prohibits an alien's removal to a country where he or she is more likely than not to be tortured. There are no exceptions to this prohibition. Therefore, an alien with aggravated felony conviction(s) may be entitled to protection under Article 3, even if he or she has been sentenced to five or more years' imprisonment.

The NOI informs the alien that he or she may request withholding or deferral of removal if he or she fears persecution on account of a protected ground listed in section 241(b)(3) of the INA in a specific country or countries or if he or she fears torture in a specific country or countries. The alien may request withholding on either of these grounds:

By checking the appropriate boxes on the back of the NOI.

By so stating in a written response to the NOI.

If the alien requests, or indicates an intention to request, withholding of removal under section 241(b)(3) of the INA or Article 3 of the CAT, the officer encountering the alien must prepare a memorandum so stating for inclusion in the ROP. Similarly, if the alien expresses a fear of returning to a particular country or countries, the encountering officer must document that in a memorandum for the ROP. Since withholding/deferral of removal is the only remedy available in such a case, this will help ensure that the alien is not ordered removed without an opportunity to express his or her concerns. Such a memorandum will, for example, highlight the need to serve the NOI in person to make absolutely certain the alien knows that he or she may request withholding of removal.

For an alien who expresses a fear of return to a particular country or countries to be considered for withholding, he or she must affirmatively request withholding by checking the appropriate boxes on the back of the NOI or by so stating in a written response to the

NOI. If INS employees working on administrative removal are concerned about whether aliens who expressed fear of return understand this requirement, the employees may contact the Asylum Pre-Screening Officer (APSO) Supervisory Asylum Officer (SAO) at the local asylum office for assistance. The APSO SAO will arrange for asylum officers to help explain the NOI and information about the reasonable fear screening process, either by telephone or in person. The APSO SAO may also assist in finding appropriate interpreters, if necessary.

The officer encountering the alien should continue his or her action to initiate administrative removal proceedings after preparing the memorandum about withholding of removal or fear of return. However, if and when a Final Administrative Removal Order is issued, the alien will be referred for a screening determination under 8 CFR 208.31 by an asylum officer if the alien has affirmatively requested withholding in one of the ways described above.

- (6) Determining applicability of a waiver under section 212(h) of the INA. Pursuant to section 238(b)(5) of the INA, an alien in administrative removal proceedings under section 238(b) of the INA is ineligible to apply for any discretionary relief. However, in *In re Michel*, Interim Decision 3335 (BIA 1998), the Board of Immigration Appeals (BIA) held that an alien not previously admitted to the United States as a lawful permanent resident is statutorily eligible to seek a section 212(h) waiver despite an aggravated felony conviction.

Based on this decision, a Notice to Appear must be served on the alien to begin removal proceedings before an IJ if the alien appears otherwise eligible for a section 212(h) waiver. Such an alien must be immediately eligible to apply for adjustment of status to that of a lawful permanent resident under section 245 of the INA. He or she should not be put in administrative removal proceedings.

INS employees who process and adjudicate administrative removal cases must be thoroughly familiar with section 212(h) and the grounds of inadmissibility in section 212(a)(2) of the INA that it waives. While there is no substitute for knowledge of the statutory provisions, the following simplified overview may be helpful in identifying aliens who may be eligible for section 212(h) waivers.

Section 212(h) of the INA provides for a discretionary waiver of certain criminal and related inadmissibility grounds. In general terms, they relate to conviction of crimes involving moral turpitude, multiple criminal convictions, prostitution and related vice, involvement in serious criminal activity for which immunity from prosecution is asserted, and minor controlled substance violations.

The inadmissibility grounds are set forth in section 212(a)(2)(A)(i)(I), (B), (D), and (E) of the INA and in section 212(a)(2)(A)(i)(II) of the INA as it relates to a single offense of simple possession of 30 grams or less of marijuana. Under section 212(h), these grounds may be waived in the either of the following instances:

In the case of any immigrant. If it is established that (A) the alien is inadmissible only under section 212(a)(2)(D)(i) or section 212(a)(2)(D)(ii) or the activities for which he or she is inadmissible occurred more than 15 years before applying for permanent residence; (B) the alien's admission would not be contrary to the national welfare, safety, or security; and

(C) the alien has been rehabilitated. Section 212(a)(2)(D)(i) relates to prostitution, and section 212(a)(2)(D)(ii) relates to procurement of prostitutes.

In the case of an immigrant who is the spouse, parent, son, or daughter of a U.S. citizen or lawful permanent resident. If it is established that denial of admission would result in extreme hardship to the U.S. citizen or lawful permanent resident spouse, parent, son, or daughter.

A section 212(h) waiver also requires the alien to have been approved for a visa, admission to the United States, or adjustment of status to that of a lawful permanent resident. In addition, a waiver may not be granted in the following cases:

Where the criminal activity involves murder or torture.

Where the alien was previously admitted as a lawful permanent resident if: (A) the alien has been convicted of an aggravated felony since the date of admission; or (B) the alien has not lawfully and continuously resided in the United States for seven years immediately before the date removal proceedings begin.

B. Review And Issuance Of The Charging Document

- (1) Review for legal sufficiency. Immigration and Naturalization Service (INS) attorneys are available to provide advice regarding all aspects of cases being processed under section 238(b) of the Immigration and Nationality Act (INA). Cases must be reviewed for legal sufficiency in accordance with outstanding instructions.
- (2) Preparation of the charging document. The Issuing Service Officer (ISO) prepares or requests preparation of a charging document or Notice of Intent to Issue a Final Administrative Removal Order (NOI). The ISO may be any INS officer listed in 8 CFR 239.1(a) as authorized to issue a Notice to Appear to begin removal proceedings. The NOI must set forth allegations of fact and conclusions of law establishing that the alien is not a lawful permanent resident and is deportable under section 237(a)(2)(A)(iii) of the INA relating to conviction for an aggravated felony. The charge of deportability must be supported by clear, convincing, and unequivocal evidence. (See Sections IV(C) and V(A) regarding this issue.)

C. Serving the Notice, Detainer, and Arrest Warrant

- (1) Serving the Notice of Intent to Issue a Final Administrative Removal Order (NOI). Section 238(b)(4)(D) of the Immigration and Nationality Act (INA) specifically provides for service of the NOI "either in person or by mail." However, where possible, it is preferable to serve the original NOI by personal delivery upon the alien.

Unless the NOI is in, or is accompanied by a written translation in, the alien's native language or in a language the alien understands, it must be served in person. The one exception is where alternative means such as the telephone or video conferencing, where feasible, are used to explain the NOI to the alien in a language he or she understands. In that event, the NOI may be served by mail.

If the alien previously requested or indicated an intention to request withholding of removal based on fear of persecution or torture in the country of removal, the NOI must be served

in person to ensure the alien understands that he or she may request withholding/deferral of removal. The NOI must also be served in person if the alien has expressed a fear of returning to a particular country or countries. In these cases, the one exception to personal delivery is where means such as the telephone or video teleconferencing are used to explain the necessary information to the alien.

Verify the identity of the individual upon whom the notice is served to determine whether or not that individual is, in fact, the alien named in the notice. If so, sign and date the Certificate of Service on the NOI which includes a determination for the record that the individual upon whom the notice is served is the alien named in the notice. Also write the manner of service in the space provided. In addition, sign, date, and write the manner of service on the copy the officer will return to the record of proceeding (ROP).

Read and explain the NOI to the alien in the alien's native language or in a language the alien can understand. Write the name, location, and employer of any interpreter used in the space provided on the NOI and on the copy the officer will return to the ROP. If necessary, the Issuing Service Officer (ISO) should state, on the Record of Deportable/Inadmissible Alien (Form I-213), how the ISO knows the alien understands the language in which the NOI was explained.

Provide a list of free legal services and emphasize the alien's right to obtain counsel of his or her choice.

Note the date the list was provided on Form I- 213.

Request the alien to sign the acknowledgment of receipt of the NOI on the back of the NOI. If the alien designates a country, waives the right to contest the charge and to appeal, and does not request withholding of removal, ask the alien to state the country in the space provided on the NOI and the copy the officer will return to the ROP.

Advise the alien that (A) he or she may check the appropriate boxes on the back of the NOI, in the section called "I Wish to Contest and/or to Request Withholding of Removal" to challenge the charge and any of the allegations, or (B) he or she may wait to respond within ten calendar days of service of the NOI.

Advise the alien that if he or she fears persecution or torture in a specific country or countries, he or she may request withholding/deferral of removal to that country or those countries. Explain to the alien that he or she may do so by checking the appropriate boxes on the back of the NOI or by so stating in a written response to the NOI within ten calendar days of service of the NOI. Explain that, if the alien requests this form of protection, an asylum officer will interview the alien to determine whether the alien has a reasonable fear of persecution or torture. An alien will meet this standard if he or she establishes that there is a reasonable possibility that he or she would be persecuted or tortured in the country in question. Explain that this is only a screening standard. Also explain that, if the alien meets this standard, an immigration judge (IJ) will then determine eligibility for protection from removal to that country based on a finding that he or she is more likely than not to be persecuted or tortured.

Do not stop administrative removal proceedings if the alien requests withholding of removal. Explain to the alien that he or she will be referred to an asylum officer for a

reasonable fear screening interview under 8 CFR 208.31 if and when a Final Administrative Removal Order is issued.

If the alien (A) clearly indicates that he or she understands the nature of the charges; (B) voluntarily waives the right to counsel; (C) does not wish to contest the charge and allegations; (D) does not wish to request withholding of removal; (E) wishes to be removed; and (F) wishes to waive appeal of the Final Administrative Removal Order, then reread the section on the back of the NOI called "I Do Not Wish to Contest or Request Withholding of Removal" to the alien to verify this desire. ONLY if the alien still wishes to sign this section, show him or her the place to sign in the "I Do Not Wish to Contest or Request Withholding of Removal" section of the NOI. If the alien states any reason(s), write the reason(s) down for later inclusion in the ROP under the record of proceeding cover sheet.

If the alien indicates that he or she also wishes to waive the 14-day period for executing the Final Administrative Removal Order, verify this desire. ONLY if the alien still wishes to waive this period, show him or her the block to check in the "I Do Not Wish to Contest or Request Withholding of Removal" section of the NOI.

Never encourage the alien to waive the right to counsel, the right to contest the charges or request withholding of removal, or any other right.

Never encourage the alien to sign the NOI, except the acknowledgment of receipt, if the alien wishes to wait to decide what to do. Be completely neutral. Leave the original NOI with the alien and return the executed duplicate (showing any portions signed by the alien) to the ROP.

- (2) Arrest warrant and detainer. A Warrant of Arrest of Alien should be issued by an authorized officer at the time of issuance of the NOI. If the alien is incarcerated, a detainer should be served on the appropriate authorities at the correctional facility. In that event, the warrant should be maintained in the file and served when the alien is released to the Immigration and Naturalization Service (INS).
- (3) ROP. INS personnel who are involved in issuing and serving NOI's, detainers, and arrest warrants must ensure that the ROP contains all evidence relied on during the process. (See Section IV(F), Section V, and Section VII(B) for detailed information about the ROP).

IV. DECISION PROCEDURE

A. Deciding Service Officer's (DSO's) Duties

The DSO must consider all evidence contained in the record of proceeding (ROP), make a final decision, and issue and cause to be served upon the alien any Final Administrative Removal Order on Form I-851A. The DSO has the option, where warranted, of terminating the administrative removal proceedings instead of issuing a Final Administrative Removal Order. In that event, the DSO may, if appropriate, cause a Notice to Appear to be served on the alien to begin removal proceedings before an immigration judge (IJ).

Whatever the outcome of the case, the DSO must always make sure that complete, accurate records are maintained. This permits any reviewing court to understand all

actions taken from the time of issuance and service of the Notice of Intent to Issue a Final Administrative Removal Order (NOI). on form I-851.

The DSO is responsible for the following tasks:

- (1) Reviewing the file and evaluating all evidence.
- (2) Receiving and considering any response the alien makes.
- (3) When the alien asks to inspect the evidence the Government relies on in support of the NOI, causing photocopies of all of the evidence in question to be served on the alien and notifying the alien in writing about the time period for submitting a final response.
- (4) Granting or denying any requests for additional time and causing to be served on the alien notification of any extended deadline. This notification should be in writing.
- (5) Asking for additional information where warranted and causing to be served on the alien any request for evidence or notification of an interview. Such a request or notification should be in writing.
- (6) Ensuring that an alien subject to these proceedings is not ordered removed without an opportunity to request withholding or deferral of removal. When an alien subject to administrative removal requests this type of protection, the alien must, upon issuance of a Final Administrative Removal Order, be referred to an asylum officer for a reasonable fear screening under 8 CFR 208.31. If an alien is found to have a reasonable fear of persecution due to a protected characteristic (race, religion, etc.) or of torture, an IJ determines the alien's eligibility for withholding, including any bars to withholding, or for deferral, which is not subject to any bars.
- (7) Clearly noting in the ROP any official action taken during the process by making written notations and, if necessary, preparing a separate memorandum for the file with stated reasons.
- (8) Entering into the ROP any document the alien submits. For example, if the alien at any time submits a written waiver of appeal or a copy of his or her petition for review, these items should be placed in the ROP.
- (9) Marking with an exhibit number any document received into the ROP. See Section IV(F) of this manual.
- (10) Preparing the supplemental decision when such a supplemental decision is necessary to support a Final Administrative Removal Order, if issued.
- (11) Preparing notification of termination of the administrative removal proceedings when appropriate.
- (12) Making sure that, promptly upon the Immigration and Naturalization Service's (INS') receipt of a copy of a petition for review, certified copies of the ROP are forwarded to the Office of Immigration Litigation (OIL) of the Department of Justice (DOJ). (The law prohibits execution of the removal order during a 14-day period,

unless waived by the alien, to give him or her an opportunity to apply for judicial review and requires maintenance of a record for that purpose.)

B. Ensuring A Fair Process

Administrative removal proceedings must safeguard against an individual's being taken into custody and removed without a mechanism to be heard and defend his or her right to remain in the United States. The individual in question must not only be advised of a clearly defined charge and allegations to address, but must also have a fair opportunity to inspect the evidence on which the matter is to be decided and to present evidence in his or her favor.

The Deciding Service Officer (DSO) must ensure fairness in the decision process. One of the DSO's important responsibilities with respect to this matter is making every effort to ensure that any response(s) and evidence the alien submits are entered into the record of proceeding (ROP).

To facilitate this process, each Immigration and Naturalization Service (INS) office which decides administrative removal cases must establish an effective means of matching responses with ROP's. Examples may include providing to aliens unfranked envelopes stamped with the address to which any responses must be submitted and/or establishing a special Post Office box only for administrative removal cases.

Deciding which procedure to use in matching responses with ROP's is a local matter. The bottom line is that the procedure must work fairly. If the procedure in place does not result in responses being matched promptly, it must be changed.

C. Case Review

The Deciding Service Officer (DSO) fulfills an important quasi-judicial function. In reaching a decision, the DSO must very carefully review the entire record of proceeding (ROP) to determine whether the evidence supports the charge and every allegation on the Notice of Intent to Issue a Final Administrative Removal Order (NOI). Section 238(b)(4)(E) of the Immigration and Nationality Act (INA) requires that a record be maintained for judicial review.

Alienage and deportability must be established by clear, convincing, and unequivocal evidence. The alien's not being a lawful permanent resident may be supported by a lesser proof such as written verification that Immigration and Naturalization Service (INS) records were diligently checked and disclosed no official record of that status. Other examples include an affidavit, a Record of Deportable/Inadmissible Alien (Form I-213), an Arrival-Departure Record (Form I-94), or printouts from automated systems [e.g., the Central Index System (CIS) and Nonimmigrant Information System (NIIS)]. An alien's written admission against his or her own interest is considered strong evidence. See Section III(A) of this manual about verifying alienage and immigration status.

The law requires a determination for the record that the individual upon whom the NOI is served is, in fact, the alien named in the NOI. When the NOI is served in person, the official serving the NOI signs a statement to that effect in the Certificate of Service on the NOI after verifying that individual's identity. By regulation, an executed duplicate of the NOI in the ROP must be retained as evidence that the individual upon whom the NOI is

served is the alien named in the NOI. Personal verification of the individual's identity at the time of service is, however, not required as the law provides for service of the NOI by mail as well as in person. When service is by mail, other evidence in the ROP supports the required determination of identity which must be established when the encountering officer questions the alien and conducts related record and/or document checks.

This manual contains information on a variety of topics which can assist the DSO in his or her case review. A discussion of the nature and sufficiency of evidence appears in Section VII(A). Procedural matters are treated in Section VII(B). Information on convictions and aggravated felonies is in Section III(A) and Section VII(B). Information in Section I(B), (C) & (D), II(B) and (C); Section III(A) and (C); and Section IV(A), (D), (E), (G) and (L) relates to withholding of removal. Information in Section III(A)(5) explains how to make sure aliens who expressed a fear of return to a particular country or countries understand the need to ask for withholding to be considered for this protection. Eligibility for a waiver of inadmissibility under section 212(h) of the INA is covered in Section III(A)(6).

D. Alien's Response

The alien may submit a written response to the Notice of Intent to Issue a Final Administrative Removal Order (NOI) within ten calendar days from the date of service of the NOI. In some instances (explained below) the Deciding Service Officer (DSO) may grant an additional period of time.

The period for submitting any response is in reality three days longer if service of the notice is by mail. If the final day falls on a Saturday, Sunday, or legal holiday, the time is extended to the next business day.

The alien must submit any response or evidence to the Immigration and Naturalization Service (INS) office at the address shown on the NOI. That office must receive any response to the NOI or to any other notice served on the alien within the required time period.

The alien's response must state which finding(s) in the NOI he or she is challenging. The alien should support his or her response with affidavit(s), documentary information, or other evidence.

The alien may request withholding of removal in either an initial or final response. In so doing, the alien must state the country or countries in which persecution or torture is feared. Any response from the alien indicating an intention to request withholding of removal is considered to be an actual request. See information starting in Section III(A)(5) of this manual about ensuring that aliens who expressed a fear of return to any country or countries understand the requirement to request consideration for withholding to be considered for this protection.

The alien may advise the INS, within any period authorized for submitting a response, regarding his or her choice of country for removal (to be honored only to the extent allowed by law) if the INS issues a Final Administrative Removal Order. The NOI has a space in which the alien can write his or her choice of country when not contesting the allegations and charge and not requesting withholding of removal.

The alien may respond to the NOI in various ways or not respond at all. The procedures relating to different possibilities are described below. More than one of these possible situations could arise in an actual case.

- (1) The alien concedes deportability. The alien may concede deportability by signing the preprinted statement on the NOI or otherwise executing such a statement.
- (2) The alien does not submit a timely response and does not ask for more time to submit a response after the response time has expired. The DSO must decide the case based on the evidence already in the record of proceeding (ROP).
- (3) The alien makes a timely request for more time to submit a response. The DSO may, but is not required to, grant more time to submit a response for good cause shown in a written request the INS receives within the original ten-day period. Such a request must explain specifically why an extension is necessary. Making such a request does not automatically give the alien more time to submit a response. The alien has more than ten days to submit a response only if the DSO permits it in the exercise of his or her discretion. The regulations do not specify a period of time which the DSO may grant. In granting such a request, the DSO must notify the alien that the INS must receive any response submitted within the time period allowed.
- (4) The alien submits a timely response but does not ask to review the evidence in the ROP. The DSO must decide the case based on the original ROP plus the alien's response and any supporting evidence.
- (5) The alien submits a timely response, but the DSO needs more evidence to make a decision. If the DSO finds that the response raises a genuine issue of material fact about the findings in the NOI or believes that more evidence will help in making a decision, the DSO may ask for more evidence from any source including the alien. If the DSO considers additional evidence from a source other than the alien, the DSO must serve the alien with a copy of that evidence and give the alien an extra ten days to submit a final response. In so doing, the DSO must notify the alien that the INS must receive any response submitted within the time period allowed.
- (6) The alien asks to review the evidence in the ROP. If the written response contains a request to review the evidence on which the findings in the NOI were based, the DSO must serve the alien with a copy of that evidence and give the alien an extra ten days to submit a final response. In so doing, the DSO must notify the alien that the INS must receive any response submitted within the time period allowed.
- (7) The alien requests withholding of removal. If the response indicates the alien requests withholding of removal, the alien must, if and when a Final Administrative Removal Order is issued, be referred to an asylum officer for a reasonable fear screening determination under 8 CFR 208.31.

E. Deciding Service Officer's (DSO's) Determination

The Deciding Service Officer (DSO) must be an independent fact-finder. He or she must never rely on evidence outside the record of proceeding (ROP). It is essential that the DSO make an independent evaluation and consider only evidence in the ROP which the alien has had a fair opportunity to rebut.

The DSO's decision must be based on a thorough review of the evidence in the ROP. This includes evidence that is material to the issue of the timeliness of the alien's response. (See Section IV(D) of this manual regarding the time frames for making a response).

The DSO's determinations in administrative removal proceedings are limited to factual matters. Further, he or she is not authorized to make decisions relating to withholding or deferral of removal. Any alien requesting withholding or deferral of removal must, upon issuance of a Final Administrative Removal Order, be referred to an asylum officer for a screening determination under 8 CFR 208.31.

The DSO may, in any case, consult with an Immigration and Naturalization Service (INS) attorney in reaching a decision. As indicated in Section III(A)(5) of this manual, the DSO may also consult with the Asylum Pre-Screening Officer (APSO) Supervisory Asylum Officer (SAO) at the local asylum office.

How the DSO decides the case and the time frames involved depend on whether the alien responds to the Notice of Intent to Issue a Final Administrative Removal Order (NOI) and the nature of that response. Various possibilities are discussed below.

- (1) The alien concedes deportability. The DSO issues a Final Administrative Removal Order (Form I-851A) and causes a copy of Form I-851A to be served on the alien.
- (2) The DSO does not receive a timely response to the NOI. The INS does not receive a response within the time allowed, and the evidence in the ROP establishes deportability by clear, convincing, and unequivocal evidence. The DSO issues Form I-851A and causes a copy of Form I-851A to be served on the alien.
- (3) The alien responds in a timely manner, but the DSO finds that the response presents an insufficient rebuttal. The DSO finds that the response fails to rebut the allegations and charge in the NOI and that deportability is established by clear, convincing, and unequivocal evidence in the ROP. The DSO issues Form I-851A and causes a copy of Form I-851A to be served on the alien.
- (4) The DSO finds that a timely response establishes that the alien is not amenable to removal. The DSO exercises his or her discretion to terminate the administrative removal proceedings and notifies the alien, by letter, about the action taken and the reason(s) for that action.
- (5) The DSO finds that a timely response raises a genuine issue of material fact involving novel, very complex and/or discretionary matters. The DSO exercises his or her discretion to terminate the administrative removal proceedings. If appropriate, the DSO causes a Notice to Appear to be served on the alien to begin removal proceedings before an immigration judge (IJ).
- (6) The DSO finds that a timely response raises a genuine issue of material fact which the DSO will be able to resolve with additional evidence or the DSO believes that more evidence will help in making a decision. In reaching a decision, the DSO may ask for more evidence from any source, including the alien. For example, the DSO may, if he or she deems it necessary, interview the alien. The DSO must serve on the alien a copy of any additional evidence from a source other than the alien and give the alien ten days to furnish a final response. Upon receipt of the alien's final response or

expiration of the time for receiving a response, the DSO renders a decision. Depending on the evidence in the ROP, the outcome will be that described in item 3, item 4, or item 5.

- (7) The alien requests withholding of removal. If the alien requests withholding of removal, the alien must be referred, if and when a final order is issued, to an asylum officer for a screening determination under 8 CFR 208.31. The DSO is not authorized to make determinations about eligibility for withholding or deferral of removal nor about the existence of any bars to withholding. These determinations must be made under the process set out in 8 CFR 208.31.

F. Exhibits In The Record Of Proceeding (ROP)

The Deciding Service Officer's (DSO's) written findings and conclusions of law including the printed findings on the Final Administrative Removal Order (Form I-851A) must be supported by reasonable, substantial, and probative evidence in the ROP. It is helpful to refer to exhibits relied on in entering a final order, especially when the alien raises issues that need to be addressed in a supplemental written decision. The DSO must follow the procedures described here to facilitate any review of the ROP. (See Section V and Section VI(B) for additional information about the ROP).

Arrange and mark exhibits. The DSO should personally mark all documents relied on in the ROP underneath the record of proceeding cover sheet as Exhibits 1, 2, 3, etc. from top to bottom. The exhibit number should be at the bottom of each document. When there is a large number of similar documents (e.g., five affidavits in support of the alien's response attesting to the same assertion), all of these documents can be fastened together and marked as a group exhibit (e.g., Group Exhibit 1).

The exhibits should be placed in some logical order. For example, all documents relied on by the Government can be arranged underneath the Notice of Intent to Issue a Final Administrative Removal Order (NOI) on Form I-851 with all responsive documents, including any briefs or memoranda, below that. When the decision is made, any executed original Form I-851A final order or other decision would become the top document in the ROP (not marked as an exhibit), appearing just below the record of proceeding cover sheet. Any supplemental decision attached to a Form I-851A becomes a part of the final order and is retained in the ROP (as well as being served on the alien).

It is possible that the alien will sign a written waiver of the 14-day period for seeking judicial review after a final order has been issued. Such a waiver must be filed in the ROP on top of the order. This document does not receive an exhibit number if it is not in the ROP at the time of the DSO's decision.

Refer to exhibits in any supplemental decision. The Form I-851A contains critical printed findings of fact and conclusions of law which the DSO may not sign without thoroughly reviewing the ROP and being satisfied that each allegation and conclusion is supported by the requisite evidentiary proof. When the DSO prepares a supplemental decision, the DSO should refer to specific exhibits relied on in making the determination and cite authorities or sections of law. This is particularly important when the alien raises any issues, the DSO requests additional information, or the ROP contains numerous exhibits. The supplemental decision may explain how the exhibits support each contested allegation and conclusion of law recited on Form I-851.

G. Preparing A Supplemental Decision

Need for a supplemental decision. When issuing a Final Administrative Removal Order (Form I-851A), the Deciding Service Officer (DSO) must decide whether or not to prepare a supplemental decision, depending on the issues in the case. A supplemental decision is meant to augment the Final Administrative Removal Order on Form I-851A, which already incorporates preprinted core findings necessary in all cases.

In any case where the alien submits a rebuttal challenging one or more of the allegations and/or the charge in the Notice of Intent to Issue a Final Administrative Removal Order (NOI) on Form I-851, the DSO must prepare a supplemental decision. Examples of cases where supplemental decisions are necessary include those where the alien asserts that he or she is a U.S. citizen or lawful permanent resident or that he or she has not been convicted of an aggravated felony. In such a case, a supplemental decision is essential to assure any reviewing court that the DSO has reviewed and considered all evidence and addressed all the alien's concerns or objections.

In a case where the alien submits a rebuttal that does not raise any substantive issues or address any material facts, a supplemental decision would generally not be necessary. For example, a supplemental decision would most likely not be necessary if the only rebuttal consists of a simple statement such as "I do not want to go home" where no reason is given.

General procedure. The DSO should attach any supplemental decision to the Form I-851A, using either a Continuation Page (Form I-831) or plain bond paper. In a supplemental decision, the DSO should refer to specific exhibits relied upon in the record of proceeding (ROP) to demonstrate that relevant issue(s) raised or evidence submitted was considered. The DSO should always explain very clearly the specific reason(s) the issue(s) or evidence has not overcome the allegations and deportability charge in the NOI. A supplemental decision should also include any appropriate citations.

Do's and don't's of preparing a supplemental decision. The DSO's supplemental written decision should not contain inflammatory language. It should show evenhandedness in discussing issues presented.

The DSO should not use argumentative words and phrases as they are provocative and tend to destroy any appearance of impartiality. Using words or phrases such as "purports" or "would have us believe" is not helpful when more neutral language can be used. The words "states" and "asserts" are less judgmental.

Philosophical commentary or opinions on the wisdom of the immigration laws are not helpful. This is also true of conjecture on the alien's motives.

The DSO should try to refrain from using certain archaic legal terms. The use of words such as "herein," "therein," "aforesaid," and "hereinafter" is unnecessary and should be avoided.

Short sentences and paragraphs are of great assistance to the reader because they make the text easier to understand. Headings and sub-headings can clarify the text even more. A good rule of thumb is that a sentence is usually too long if it is more than three lines long. In those instances where very complex material makes it necessary to write a more

complicated, longer sentence, items in the sentence can normally be listed, indented, and numbered or simply numbered without listing and indentation.

Good legal writing is disciplined and exact. It is straightforward and meant to inform.

The content of a decision is dictated by the issues that must be addressed to resolve the case. It is generally considered improper in legal writing to resolve issues that are not essential to the outcome of the case. Discussions of non-essential issues are considered dictum and are not binding or of precedential value. The sole exception to this rule is dictum of the Supreme Court, which is accorded substantial weight.

The DSO should fight any temptation to address matters which will not lead to the resolution of the case. In most instances, if the resolution of one issue will decide the outcome of the case, that is the only issue that needs to be or should be addressed.

The DSO may not decide discretionary matters during the administrative removal proceeding. Since the process applies only to persons who are not lawful permanent resident aliens and not eligible for any discretionary relief under the Immigration and Nationality Act (INA), weighing favorable and adverse discretionary factors is unnecessary and inappropriate.

The DSO is also not authorized to make decisions about withholding of removal under section 241(b)(3) of the INA or withholding/deferral of removal under Article 3 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT). If an alien makes such a claim, the alien must, if and when a Final Administrative Removal Order is issued, be referred to an asylum officer for a screening determination under 8 CFR 208.31.

If the DSO finds that the alien is not amenable to removal under this administrative process, the DSO must notify the alien, by letter, about the action taken and the reason(s) for that action. If the alien is still subject to removal, the Immigration and Naturalization Service (INS) may issue a Notice to Appear (Form I-862) to begin proceedings before an immigration judge (IJ).

H. Sample Supplemental Decision Topics

The following are examples of possible supplemental decision topics a DSO may need to address. This list of topics is by no means exhaustive.

- (1) Timeliness of the response. "The respondent failed to submit a written response to the Notice of Intent to Issue a Final Administrative Removal Order (NOI) within the time required under 8 CFR 238.1(c), specifically, . See Exhibits 1, 3, and 4, Record of Proceeding [description of exhibits and any necessary explanation regarding these exhibits]. Upon consideration of the entire Record of Proceeding, I find that the respondent's alienage, conviction of an aggravated felony, and deportability are supported by clear, convincing, and unequivocal evidence. I also find that the respondent is not a lawful permanent resident of the United States. Additionally, the respondent is statutorily ineligible for any relief from removal that the Attorney General may grant in an exercise of discretion. See Exhibits 5 and 7 [description of any relevant exhibits and any necessary explanation regarding these exhibits]."

- (2) No genuine issue of material fact raised. "In a written response to the Notice of Intent to Issue a Final Administrative Removal Order (NOI), the respondent challenges allegation # _____ and asserts that _____. In support of the respondent's assertion, the respondent submitted _____. See Exhibits 8 to 11, Record of Proceeding. This evidence is insufficient to rebut allegation #because [explanation of specific reason(s), e.g., not corroborated by independent evidence]. Therefore, the respondent's response fails to rebut the allegations and charge of deportability in the NOI. Upon consideration of the entire Record of Proceeding, I find that the respondent's alienage, conviction of an aggravated felony, and deportability are supported by clear, convincing, and unequivocal evidence. I also find that the respondent is not a lawful permanent resident of the United States. Additionally, the respondent is statutorily ineligible for any relief from removal that the Attorney General may grant in an exercise of discretion. See Exhibits 1, 4, and 7 [description of any relevant exhibits and any necessary explanation regarding these exhibits]."
- (3) Insufficient claim to U.S. citizenship. "The respondent claims to be a citizen of the United States and disputes allegation # _____ in the Notice of Intent to Issue a Final Administrative Removal Order (NOI). See Exhibit 2 at Page 3, Record of Proceeding. In support of this claim, the respondent submitted a photocopy of a birth certificate reflecting that _____ was born to _____ in the State of _____ on _____. See Exhibit 10. This document does not satisfy the requirements for publication/attestation of domestic documents under the provisions of 8 CFR 287.6. The record also reflects that on or about _____, Immigration and Naturalization Service (Service) officer John Doe investigated the official records at the [_____ bureau of vital statistics] to determine the validity of the [description of birth document submitted] and found that no such record exists [in the _____ official repository of birth records]. See Exhibit 5, signed declaration of dated _____. Therefore, the respondent has failed to present sufficient evidence to support his/her claim to U.S. citizenship or to rebut the allegations and charge of deportability. Upon consideration of the entire Record of Proceeding, I find that the respondent's alienage, conviction of an aggravated felony, and deportability are supported by clear, convincing, and unequivocal evidence. I also find that the respondent is not a lawful permanent resident of the United States. Additionally, the respondent is statutorily ineligible for any relief from removal that the Attorney General may grant in an exercise of discretion. See Exhibits 1, 3, 4 at Page 3, and 9 [description of any relevant exhibits and any necessary explanation regarding these exhibits]."
- (4) Concession of deportability as charged. "The respondent concedes the allegations of fact and deportability as charged in the Notice of Intent to Issue a Final Administrative Removal Order (NOI). See Exhibit 1 at Page 2 and Exhibit 6, Record of Proceeding [description of exhibits and any necessary explanation regarding these exhibits]. See Exhibit 4 [description of any relevant exhibit and any necessary explanation regarding this exhibit]. Upon consideration of the entire Record of Proceeding, I find that the respondent's alienage, conviction of an aggravated felony, and deportability are supported by clear, convincing, and unequivocal evidence. I also find that the respondent is not a lawful permanent resident of the United States. Additionally, the respondent is statutorily ineligible for any relief from removal that the Attorney General may grant in an exercise of discretion."
- (5) Insufficient evidence submitted to rebut the allegations. "The respondent challenges allegation of fact # _____ in the Notice of Intent to Issue a Final Administrative Removal

Order (NOI). In support of this challenge, the respondent submitted . See Exhibits 4, 5, 8, 9, and 10, Record of Proceeding [description of exhibits and any necessary explanation regarding these exhibits]. After careful review of this documentary evidence, I find that the respondent has failed to rebut allegation # because the evidence submitted is [explanation of specific reason(s), e.g., immaterial; lacks probity; unreliable; uncorroborated self-serving statements; etc.]. The respondent's response does not defeat the relevant, inherently reliable, and probative records of the Immigration and Naturalization Service (Service), Exhibits 1, 2, 6, and 7. See Matter of Mejia, 16 I&N Dec. 6 (BIA 1976) [records made during the regular course of business are admissible]. A Service Record of Deportable/Inadmissible Alien (Form I-213) is deemed to be inherently trustworthy and admissible as a public record and report. *Id.* Upon consideration of the entire Record of Proceeding, I find that the respondent's alienage, conviction of an aggravated felony, and deportability are supported by clear, convincing, and unequivocal evidence. I also find that the respondent is not a lawful permanent resident of the United States. Additionally, the respondent is statutorily ineligible for any relief from removal that the Attorney General may grant in an exercise of discretion."

I. Useful Points And Authorities For A Supplemental Decision

Below are citations the Deciding Service Officer (DSO) may wish to use in preparing supplemental decisions. These citations refer to case law regarding admissibility in proceedings to determine deportability, trustworthiness, and fundamental fairness of evidence.

- (1) To be admissible in proceedings to determine deportability, evidence must be relevant and probative and its use must not be fundamentally unfair. Matter of Ramirez-Sanchez, 17 I&N Dec. 503 (BIA 1980); Matter of Toro, 17 I&N Dec. 340 (BIA 1980).
- (2) Business records are admissible if made during the regular course of business. Matter of Mejia, 16 I&N Dec. 6 (BIA 1976).
- (3) An Immigration and Naturalization Service (Service) Record of Deportable/Inadmissible Alien (Form I-213) is deemed to be inherently trustworthy and admissible as a public record and report. Matter of Mejia, 16 I&N Dec. 6 (BIA 1976).
- (4) An Arrival-Departure Record (e.g., Form I-94) is admissible to establish deportability. See Matter of Doo, 13 I&N Dec. 30 (BIA 1968).
- (5) The use of affidavits is not fundamentally unfair. Matter of Conliffe, 13 I&N Dec. 95 (BIA 1968).
- (6) A Warrant of Removal/Deportation (Form I-205) is admissible as a business record, and the notations on such a document are inherently reliable. U.S. v. Hernandez-Rojas, 617 F.2d 533 (9th Cir. 1980), cert. denied, 449 U.S. 864, 101 S.Ct. 170 (1980).
- (7) An affidavit alone may be relied upon to establish a respondent's deportability by the requisite proof, even if taken without the presence of counsel or under a claim of failure to give Miranda warnings. Matter of Baltazar, 16 I&N Dec. 108 (BIA 1977); Matter of Ramirez-Sanchez, 17 I&N Dec. 503 (BIA 1980).

- (8) Testimonial evidence may be necessary to rebut a prima facie showing that the admissions reflected on Immigration and Naturalization Service (Service) forms were involuntary or inaccurate. *Matter of Garcia*, 17 I&N Dec. 319 (BIA 1980).
- (9) An alien has a right to an impartial deciding officer. *Matter of Exame*, 18 I&N Dec. 303 (BIA 1982).

J. Citing Case Law

The Deciding Service Officer (DSO) may find the following general guidance on citing case law useful in preparing any supplemental decisions.

- (1) When citing case law, use "see" when the conclusion is suggested, but not stated. [See *Matter of Mejia*, 16 I&N Dec. 6 (BIA 1976).]
- (2) Use "e.g.," when more examples exist, but they are not cited. [e.g., *Matter of Mejia*, 16 I&N Dec. 6 (BIA 1976).]
- (3) Use "supra" after the name of a decision cited before in the same supplemental decision. (*Matter of Mejia*, supra.) However, cite the name of the decision without supra when it is cited on the same page as the previous citation. (*Matter of Mejia*.)
- (4) Use "Id." when repeating the preceding citation without any change.

K. Closing Actions

Warrant of Removal/Deportation. If the Deciding Service Officer (DSO) issues a Final Administrative Removal Order (Form I-851A), a Warrant of Removal/Deportation (Form I-205) should be issued in accordance with outstanding instructions. To ensure against removing the alien from the United States prematurely, Form I-205 must not be issued until it is legal and appropriate to enforce the alien's departure.

The warrant cannot be executed sooner than 14 calendar days after the date of issuance of a final removal order on Form I-851A unless the alien knowingly and voluntarily waives the 14-day period. The alien may waive this period once he or she is served with a final order on Form I-851A. If the alien signed the statement on the Notice of Intent to Issue a Final Administrative Removal Order (NOI) on form I-851 conceding deportability and not requesting withholding of removal and also checked the block waiving the 14-day period, the Immigration and Naturalization Service (INS) does not need to wait 14 days.

Deportable Alien Control System (DACS) update. As in the case of any official action taken in an administrative removal case, the DSO must ensure that DACS is updated promptly upon completion of the case. DACS has the capability to provide data on the number of aliens brought under the administrative removal process, by name, A-number, and nationality, as well as the decision and other official action in each case. As this is crucial data, the DSO must make sure that administrative removal cases are always identified in DACS according to the proper case category. (See the *Deportable Alien Control System User Manual*). If a final removal order on Form I-851A is entered, the correct decision code must be filled in on the required screen. Upon removal under a final removal order on Form I-851A, the case must be closed out with the appropriate department-cleared code.

In the event that administrative removal proceedings are terminated, DACS must be updated to reflect this information and any subsequent action taken. When administrative removal proceedings are terminated and other removal proceedings instituted, the DACS case for the administrative removal proceedings should be closed in DACS with the proper codes. An entirely new case must then be entered into DACS using the proper codes and correct data relating to the new removal proceedings. Biographic information, however, will carry over from one case to the other.

DSO's list of administrative removal cases. Upon completion of a case, the DSO should update this list. (The DSO's list of cases is discussed in Section V(B) of this manual.)

L. Request For Withholding Of Removal And Referral To Asylum Officer

A reasonable fear interview is triggered when an alien in administrative removal proceedings who has requested withholding of removal has been ordered removed. In such a case, upon service of the Final Administrative Removal Order (Form I-851A), the Deciding Service Officer (DSO) must immediately refer the case to an asylum officer for a reasonable fear determination under 8 CFR 208.31. In so doing, the DSO must ensure that the following steps are followed:

A Form M-488, Information About Reasonable Fear Interview, is given to the alien and explained to him or her in a language he or she understands.

The alien is told the purpose of the interview with an asylum officer.

The alien is given a list of free legal services. The alien is advised that he or she may, at no expense to the government and without delaying the process, be represented by an attorney or accredited representative with whom he or she may consult before the interview.

The alien must sign and date two copies of Form M-488, acknowledging receipt of notice about the reasonable fear interview and about his or her right to counsel. If the alien refuses to sign Form M-488, the official who gives it to the alien must date and initial it and insert the notation "(name of alien) refused to sign" on the line for the signature of the person being referred to an asylum officer. One copy of Form M-488 is placed in the alien's A-file. The other is retained by the alien.

The appropriate asylum office point of contact is notified about the need for a reasonable fear interview and about any special considerations (e.g., the necessity of an interpreter and/or a request for a female or male interpreter or officer). The asylum office must also be given any other critical information (e.g., the alien's detention in a non-Service facility or at a remote location or the alien's transfer to a different detention site).

Copies of the completed Forms M-488, I-851 (Notice of Intent to Issue a Final Administrative Removal Order), and I-851A and any Notice of Entry of Appearance as Attorney or Representative (Form G-28) are faxed to the asylum office.

If the alien is detained by the INS, arrangements are made in coordination with the asylum office point of contact for the reasonable fear interview and appropriate interview space. If there is no room for an interview where an alien in INS custody is housed, arrangements

should be made, where feasible, to move the alien to a location where the asylum officer can conduct the interview. If the alien is incarcerated in a Federal, state, or local institution, the DSO or his or her support staff should, to the extent possible, assist the asylum office in locating suitable interview space.

The DSO and his or her support staff must make sure that the ROP does not leave the DSO's possession and control during the pendency of any adjudication and ensuing legal challenge or during any reasonable fear proceedings. The entire ROP should be photocopied and the duplicate ROP copy certified as a true copy of the DSO's administrative ROP. The certified copy of the ROP should then be made available to the appropriate asylum office in the most expeditious way possible.

Most of the time, the alien's A-file will be in the DSO's possession. In that event, it should be provided to the asylum office with the copy of the ROP. Otherwise, arrangements must be made to have the A-file sent to the asylum office immediately in the most expeditious way possible.

The asylum officer must, except in exceptional circumstances, process reasonable fear cases within ten days, but the ten-day period begins only when the asylum officer receives the A-file and the certified copy of the ROP. Any delay in providing the asylum officer with these items will delay the processing of the case.

Neither the pendency of reasonable fear proceedings nor the issuance of an order deferring removal to a particular country alters INS authority to detain an alien otherwise subject to detention. The reasonable fear screening process is intended to permit fair and expeditious resolution of withholding claims without unduly disrupting the streamlined process used in administrative removal proceedings.

The asylum office should, in most cases, notify the DSO the same day a reasonable fear decision is served on the alien. In unusual circumstances, notification may be made the following business day.

In most cases, the asylum officer will serve any decisions on the applicant personally. However, if the DSO is willing and it would expedite the process, the DSO may serve the decision on the alien, with an asylum officer and interpreter (if necessary) available by telephone to answer any questions the alien may have.

If reasonable fear is found, the case is referred to an immigration judge (IJ). The DSO should obtain information about the status and outcome of such a case from the trial attorney representing the INS.

If reasonable fear is not found and the alien requests IJ review of the negative finding, the asylum officer should monitor the IJ review and notify the DSO of the outcome. The asylum officer is also responsible for notifying the DSO if the asylum office has agreed to an applicant's request to withdraw from the reasonable fear proceedings, either before or after the asylum officer interviews the alien.

Departure must be enforced where appropriate, provided the 14-day period after issuance of a final order is past. Departure may be enforced only when reasonable fear is not found or withholding or deferral of removal is denied or terminated and any request for review or

appeal has resulted in a negative determination or when the request for withholding or deferral has been withdrawn.

An alien who is granted withholding or deferral of removal may not be removed to the country or countries to which his or her removal has been withheld or deferred. Such an alien, however, may be removed to a safe country.

V. RECORD OF PROCEEDING

A. Creating The Record Of Proceeding (ROP)

In accordance with the statute and governing regulations, the Immigration and Naturalization Service (INS) must permanently maintain the administrative ROP in each case in which a Final Administrative Removal Order (Form I-851A) is issued. This is necessary to enable the court to review the entire record in the event of a legal challenge. Such a record will also serve as proof of the removal proceedings in any subsequent prosecution for criminal reentry after removal.

Under the regulations, the ROP must consist of, but not necessarily be limited to: (1) the charging document [Notice of Intent to Issue a Final Administrative Removal Order (NOI) on Form I-851]; (2) all evidence relied on by the INS in support of the charges; (3) the alien's response, if any; (4) all admissible evidence, briefs, or other documents submitted by either party respecting deportability; and (5) Form I-851A.

Just as the immigration court carefully maintains an ROP, INS personnel engaged in the administrative removal process, particularly the investigating agent and the officer who issues the NOI, must ensure that the ROP is carefully compiled and permanently maintained. The ROP, which contains the Government's entire case, may be subjected to court review. [There is no review by an immigration judge (IJ) or the Board of Immigration Appeals (BIA)].

The investigating officer/agent must ensure that each document relied upon to support the allegations and charge in the NOI (i.e., to establish alienage, deportability, and conviction) is included in the ROP. All documents in support of the NOI must be placed under the record of proceeding cover sheet on the left hand side of the A-file (in chronological order, with the NOI on top).

The executed duplicate NOI, which reflects the date and manner of service and any other endorsements made in the sections provided on the form, must be placed immediately in the ROP. By regulation, an executed duplicate of the NOI in the ROP must be retained as evidence that the individual upon whom the NOI is served is the alien named in the NOI. When the NOI is served in person, verification of the identity of the alien upon whom it is served is included in the Certificate of Service on the NOI. In a case where the NOI is served by mail, the written determination regarding verification of the alien's identity prepared by the investigating officer/ agent must be included in the ROP.

After issuing the NOI and causing it to be served upon the alien, the investigating officer must ensure that the ROP is promptly made available to the Deciding Service Officer (DSO) for review and decision. If the alien clearly waives the right to counsel and voluntarily endorses the portion of the NOI showing that he or she admits the truth of the allegations and charge, does not wish to contest them or request withholding of removal,

and waives appeal, the decision may be made immediately. On the other hand, the decision may need to await the expiration of the response period or any extension granted by the DSO.

- (1) Where to place evidence in the ROP. Place copies of all evidence relied upon in support of the charging document underneath the record of proceeding cover sheet and the NOI on the left hand side of the A-file.
- (2) Record of proceeding cover sheet. Always keep the record of proceeding cover sheet on top of all ROP copies of documents, attached to the left hand side of the A-file.

(b)(7)(E)

Once alienage is established by clear, convincing, and unequivocal evidence [i.e., a Record of Deportable/Inadmissible Alien (Form I-213), sworn statement, etc.], the Government need not establish lack of lawful permanent residence by the same burden of proof. This is because the legal burden then shifts to the alien to establish time, place, and manner of entry under section 291 of the Immigration and Nationality Act (INA). Section 291 provides that if the alien's burden "is not sustained, such person shall be presumed to be in the United States in violation of law." Nevertheless, the INS' diligent efforts to check the alien's immigration status must always be evidenced in the ROP, to support NOI allegation #5.

- (4) Evidence of criminal history. Copies of Federal Bureau of Investigation (FBI) rap sheets may be inserted in the ROP to show a criminal history other than the conviction for an aggravated felony. Evidence of a criminal background may help the Government determine whether a particular case is a suitable vehicle for a Government appeal, if this background information is in the ROP.
- (5) Sample ROP configuration at the NOI stage. The issuing officer should ensure that the ROP is securely attached to the left hand side of the A-file, with copies of all evidence relied on by the Government in support of the NOI allegations and charge placed underneath the NOI. The ROP's documents may be arranged in the following order (from the top of the ROP to the bottom):

- Record of proceeding cover sheet (on top)
- NOI
- Form I-213
- Conviction record (aggravated felony)
- Evidence of alienage
- Form I-94; evidence of not being a lawful permanent resident
- Other evidence re: immigration status (including copies/notes of records checked; printouts)
- FBI rap sheet
- Sworn statement, if taken

Other relevant information

B. Maintaining The Record Of Proceeding (ROP)

Proper maintenance and handling of the ROP is an extremely important part of the administrative removal process and cannot be overemphasized. The Deciding Service Officer (DSO) and his or her support staff should receive and place in the ROP, in some logical order, all responses made by the alien. The ROP must include evidence of all official actions including service of any notices or copies of documents. When copies of documents are served on the alien, the originals must naturally be kept in the ROP. Only the DSO should mark the exhibit numbers on evidence in the ROP because deciding the relevance of evidence relied upon in the proceedings is the DSO's sole province as the deciding officer. The DSO should also prepare and certify the ROP for any court review. (See Sections IV(F), V(A) and VI(B) for additional information about the ROP.)

Another responsibility of the DSO and his or her support staff is to make sure that the ROP does not leave the DSO's possession and control during the pendency of any adjudication and ensuing legal challenge or during any reasonable fear proceedings. This will make the process more efficient by ensuring that the ROP is always readily available for any required official action during the proceedings and for any judicial review. To help track his or her administrative removal cases, the DSO should keep a list of all cases by name and A-number and file them in an accessible place.

VI. JUDICIAL REVIEW

A. Petition For Review

Section 242 of the Immigration and Nationality Act (INA) governs judicial review of orders of removal. In removal proceedings before an immigration judge (IJ), once an alien has received a final order of removal entered by the Board of Immigration Appeals (BIA), he or she may seek judicial review by filing a petition for review in the Circuit Court of Appeals under that section. The alien must file the petition for review within 30 days from issuance of the final order of removal. Section 242(b)(3)(B) of the INA provides that the alien does not receive a stay of removal pending the determination on the petition for review "unless the court orders otherwise."

Pursuant to section 238(b)(3) of the INA, the Immigration and Naturalization Service (INS) may not execute the Final Administrative Removal Order "until 14 calendar days have passed from the date that such order was issued, unless waived by the alien." This means that, absent a waiver by the alien, the INS should execute a final administrative removal order after the fourteenth calendar day, unless the Court of Appeals affirmatively "orders otherwise" by a stay order entered under section 242(b)(3)(B) of the INA. It should be noted that no appeal lies with the BIA in administrative removal proceedings under section 238(b) of the INA.

B. Certifying The Record Of Proceeding (ROP)

Upon receiving notice of the filing of a legal challenge, the Deciding Service Officer (DSO) must promptly cause the ROP to be prepared and certified for judicial review. Before certifying the ROP, it is recommended that all pages in the ROP be numbered in sequence by pen. This will make it easier for the court, Government attorneys, and opposing counsel

to refer to particular pages in the ROP. The Final Administrative Removal Order (Form I-851A) should be on top, just under the record of proceeding cover sheet.

Two photocopies of the entire ROP should be made and both duplicate copies certified as true copies of the DSO's administrative ROP. The certified copies should be promptly forwarded in the most expeditious way possible to the Department of Justice's (DOJ's) Office of Immigration Litigation (OIL). That office will represent the Immigration and Naturalization Service (INS) before the court.

The materials for the OIL should be addressed as follows:

Director, Office of Immigration Litigation
 United States Department of Justice
 Civil Division
 P.O. Box 878, Ben Franklin Station
 Washington, DC 20044

The phone and FAX numbers at the OIL are:

(202) 616-4900
 FAX (202) 616-4948

Notations reflecting the date the certified copies of the ROP are forwarded to the OIL must be made in the original ROP and on the DSO's list of administrative removal cases. (The DSO's list of cases is discussed in Section V(B) of this manual.)

Sample contents of a certified copy of an ROP forwarded to the court.

Record of proceeding cover sheet (on top)
 Form I-851A
 Ex. 1. Notice of Intent to Issue a Final Administrative Removal Order (NOI) on Form I-851
 Ex. 2. Record of Deportable/Inadmissible Alien (Form I-213)
 Ex. 3. Conviction record (aggravated felony)
 Ex. 4. Arrival-Departure Record (Form I-94), if any; evidence of not being a lawful permanent resident
 Ex. 5. Other evidence of alienage presented
 Ex. 6. Alien's sworn statement, if any
 Group Ex. 7. Copies of records checks/printouts
 Ex. 8. Federal Bureau of Investigation (FBI) rap sheet (regarding other criminal history, if any)
 Ex. 9. Any other relevant Government information
 Group Ex. 10. Alien's evidence in response to NOI
 Ex. 11. Alien's supporting memorandum, if any

VII. LEGAL ISSUES

A. The Nature And Sufficiency Of Evidence

In general, the strict judicial rules of evidence do not apply in civil proceedings to determine deportability. *Calhoun v. Bailar*, 626 F.2d 145 (9th Cir. 1980), cert. denied, 452

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U.S. 906, 101 S.Ct. 3033 (1981); *Marlowe v. INS*, 457 F.2d 1314 (9th Cir. 1972). To be admissible in these proceedings, evidence must be relevant and probative and its use must not be fundamentally unfair. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 505 (BIA 1980); *Matter of Toro*, 17 I&N Dec. 340, 343 (BIA 1980). Business records are admissible if made during the regular course of business. *Matter of Mejia*, 16 I&N Dec. 6 (BIA 1976). The Record of Deportable/Inadmissible Alien (Form I-213) is deemed to be inherently trustworthy and admissible as a public record and report. *Id.* A Warrant of Removal/Deportation (Form I-205) is admissible as a business record, and the notations on such a document are inherently reliable. *U.S. v. Hernandez-Rojas*, 617 F.2d 533 (9th Cir. 1980), cert. denied, 449 U.S. 864, 101 S.Ct. 170 (1980). The crewman nonimmigrant record (Form I-95) is admissible to establish deportability. *Matter of Doo*, 13 I&N Dec. 30 (BIA 1968).

The courts have recognized that issues of impropriety in obtaining evidence can be overlooked when deportability is established by independent, untainted evidence. *Matter of Mejia*. Independent evidence can be admitted even if an alleged illegal search or arrest revealed the respondent's identity and led to the discovery of the untainted evidence, e.g., preexisting official Immigration and Naturalization Service (INS) records relating to the encountered alien. *Matter of Mejia*; *U.S. v. Orozco-Rico*, 589 F.2d 433 (9th Cir. 1978), cert. denied, 440 U.S. 967, 99 S.Ct. 1518 (1979). Information in the INS database or files constitutes prior knowledge of the Government and may establish respondent's deportability on the charges contained in the charging document. *Woodby v. INS*, 385 U.S. 276 (1966); *Matter of Doo*; *Matter of Mejia*.

During the interrogation of an alien, an INS investigative officer typically takes a sworn statement from the alien and completes a Form I-213. These documents constitute official records made in the ordinary course of business, are admissible in evidence, and can be sufficient to support the allegations contained in the charging document by the requisite clear, convincing, and unequivocal evidence. *Matter of Mejia*. The hearsay evidence rule is not applicable to proceedings to determine deportability. *Matter of Davila*, 15 I&N Dec. 781 (BIA 1976); *Matter of Ponco*, 15 I&N Dec. 120 (BIA 1974).

The use of affidavits is not fundamentally unfair. *Matter of Conliffe*, 13 I&N Dec. 95 (BIA 1968). An affidavit alone may be relied upon to establish a respondent's deportability by the requisite proof, even if taken without the presence of counsel or under a claim of failure to give Miranda warnings. *Matter of Baltazar*, 16 I&N Dec. 108 (BIA 1977); *Matter of Ramirez-Sanchez*. However, testimonial evidence may be necessary to rebut a prima facie showing that admissions reflected on INS forms were involuntary or inaccurate. *Matter of Garcia*, 17 I&N Dec. 319 (BIA 1980).

Where an INS officer acts in good faith, the courts and the Board of Immigration Appeals (BIA) have held that evidence obtained by an alleged improper search or seizure in violation of the Fourth Amendment is not suppressible in proceedings to determine deportability. See *Matter of Sandoval*, 17 I&N Dec. 70 (BIA 1979); *Lopez-Mendoza v. INS*, 104 S. Ct. 3479 (1984). And, reliance placed on illegally obtained evidence does not necessarily offend the Fifth Amendment fundamental fairness requirements. *Matter of Toro*. The manner of seizing evidence must be "so egregious" a Fourth Amendment violation that to rely on it would violate Fifth Amendment fundamental fairness requirements. *Id.*; *Lopez-Mendoza*; see, for example, *Ex Parte Jackson*, 263 F. Supp. 110 (D. Mont. 1920) (invading an orderly meeting of union to which respondent belonged held to "undermine the morale of the people, excite the latter's fears, cause distrust of our

institutions, doubts of the sufficiency of law and authority..."). Absent egregious conduct, the Supreme Court has pointed to the civil nature of the removal process, the existence of alternatives in deterring misconduct of INS officers, and the administrative burdens in denying invocation of the exclusionary rule. *Lopez-Mendoza*. (The exclusionary rule relates to evidence being excluded from consideration because it was improperly seized in violation of Constitutional protections.)

B. Procedural Matters

Burden of proof. Deportability must be established by evidence which is "clear, convincing, and unequivocal." See *Woodby v. INS*, 385 U.S. 276 (1966). The Government has the burden of proof on "alienage." The alien has the burden of proof as to time, place, and manner of entry. Immigration and Nationality Act (INA) section 291. An alien's admissions alone are sufficient to meet the "clear and convincing" standard. See *Khano v. INS*, 999 F.2d 1203 (7th Cir. 1993).

Refusal to answer. An alien may only refuse to answer questions which would incriminate him or her in a criminal matter. *United States v. Alderete-Deras*, 743 F.2d 645 (9th Cir. 1984). Even there, a refusal to testify may form the basis of an adverse inference in a proceeding to determine deportability. *Id.* A respondent's silence when confronted with evidence of alienage, circumstances of entry, or deportability, may leave himself or herself open to adverse inferences, which may properly lead to a finding of deportability. *Matter of Guevara*, 20 I&N Dec. 238 (BIA 1990, 1991); see *Cabral-Avila v. INS*, 589 F.2d 957 (3d Cir. 1968), cert. denied, 440 U.S. 920, 99 S.Ct. 1245 (1969). However, a respondent's silence alone, in the absence of any other evidence, is insufficient to constitute evidence of alienage. *Id.*

Binding precedent. The published decision of a Circuit Court of Appeals is binding upon proceedings held within the jurisdiction of that circuit. *Matter of Anselmo*, 20 I&N Dec. 25 (BIA 1989). However, the Board of Immigration Appeals (BIA) does not consider the published decision of a United States District Court to be binding in cases arising in the same district. *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993).

Manner of seizing evidence. Improperly obtained evidence may be admitted in evidence and considered by the Deciding Service Officer (DSO) if the Immigration and Naturalization Service (INS) officer acted in good faith. *Matter of Sandoval*, 17 I&N Dec. 70 (BIA 1979). Evidence is excludable if the manner of seizing it is so "egregious" that to rely on it would be fundamentally unfair, in violation of the Fifth Amendment. *Bustos-Torres v. INS*, 898 F.2d 1053 (5th Cir. 1990); *Lopez-Mendoza v. INS*, 104 S. Ct. 3479 (1984).

Conviction record. The conviction may be proved by any document or record prescribed by 8 CFR 3.41. Documentary evidence constituting proof of conviction in immigration proceedings is also described in sections 240(c)(3)(B) and (C) of the INA which provide a statutory basis for 8 CFR 3.41. Conviction records may include, where applicable, the plea transcript. See *Matter of Mena*, 17 I&N Dec. 38 (BIA 1979).

Elements of a conviction. The various states have provisions of law for withholding the adjudication of guilt and ameliorating the effects of a conviction. In the past, whether a conviction existed for immigration purposes was determined under a three- pronged test set forth in *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988).

On September 30, 1996, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law 104-208, added section 101(a)(48)(A) defining conviction to the INA. This definition applies to convictions entered before, on, or after September 30, 1996.

Section 101(a)(48)(A) of the INA provides that a conviction with respect to an alien is not limited to a formal judgement of guilt by a court. Where adjudication of guilt has been withheld, that section of law gives a two-pronged test for establishing a conviction: (A) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt; and (B) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Definition of aggravated felony. The definition of aggravated felony was added to immigration law in 1988 and expanded several times. In the past, whether a crime was an aggravated felony depended on factors such as the provision of immigration law at issue and when the conviction was entered or the crime committed. The most recent change made all defined offenses aggravated felonies for all purposes regardless of when the conviction was entered. The enacting legislation provided for application of this change to actions taken on or after September 30, 1996 and to violations on or after that date of section 276 of the INA relating to criminal reentry after removal.

The term aggravated felony now applies to any offense defined in section 101(a)(43) of the INA in violation of foreign law for which the term of imprisonment was completed within the previous 15 years. INS employees who process and adjudicate administrative removal cases must be thoroughly familiar with the statutory language of section 101(a)(43). They must also refer to Section III(A)(3) of this manual for information about case law affecting this definition, particularly within the Eleventh Circuit (Alabama, Georgia, and Florida).

Expungement. In considering the effect of an expunged conviction, the BIA has overruled the holdings in precedent decisions which address the impact of state rehabilitative actions on whether an alien is convicted for immigration purposes. These decisions include *Matter of G-*, 9 I&N Dec. 159 (BIA 1960, A.G. 1961); *Matter of Ibarra-Obando*, 12 I&N Dec. 576 (BIA 1966, A.G. 1967); and *Matter of Luviano*, Interim Decision 3267 (BIA 1996).

In *re Roldan-Santoyo*, Interim Decision 3377 (BIA 1999), held that an alien subject to a conviction as defined in section 101(a)(48)(A) of the INA remains convicted for immigration purposes despite later state action to erase the original finding of guilt under a rehabilitative procedure.

The decision in *Roldan-Santoyo*, supersedes that in *Matter of Manrique*, Interim Decision 3250 (BIA 1995). *Matter of Manrique* provided that first offenders guilty of simple possession offenses could escape the immigration consequences of their convictions based on their having been the beneficiaries of state rehabilitative actions under state statutes.

Roldan-Santoyo does not address the effect on immigration proceedings of first offender treatment under 18 U.S.C. § 3607 accorded by a Federal court. Further, the decision in *Roldan-Santoyo* is inapplicable to state actions that vacate a conviction on the merits or on any ground related to the violation of a statutory or constitutional right in the underlying criminal proceeding.

APPENDIX

Sections Of Law Relating To Administrative Removal

Section 238(b) of the INA. This section authorizes administrative removal proceedings without hearings before immigration judges (IJ's) for certain serious criminal offenders.

Section 238(c) of the INA. This section provides for presumption of deportability of an alien convicted of an aggravated felony.

Section 241(b)(3) of the INA. This section provides for withholding of removal to a country where the alien's life or freedom would be threatened in the case of an alien convicted of an aggravated felony or felonies for which the alien has been sentenced to an aggregate term of imprisonment of less than five years.

Section 212(a)(2) of the INA. This section sets forth various criminal and related grounds of inadmissibility to the United States.

Section 101(h) of the INA. This section defines serious criminal offense which is used in section 212(a)(2)(E) of the INA.

Section 212(h) of the INA. This section provides for a waiver of certain criminal and related inadmissibility grounds set forth in section 212(a)(2) of the INA.

Section 101(a)(43) of the INA. This section defines aggravated felony. As a result of conflicting amendments to section 101(a)(43)(P) of the INA, it is not clear whether "is at least 12 months," in section 101(a)(43)(P) is correct. Consultation with an INS attorney about this provision is, therefore, necessary.

Section 101(a)(48) of the INA. This section defines conviction and explains the meaning of term of imprisonment or sentence.

Sections 240(c)(3)(B) and (C) of the INA. These sections describe the types of documentary evidence which constitute proof of conviction in immigration proceedings.

Administrative Removal Regulations:

8 CFR 238.1 Proceedings under section 238(b) of the Act

Regulations On Conviction Records:

8 CFR 3.41: Evidence of Criminal Conviction

8 CFR 287.6(a): Proof of Official Records

Administrative Removal Forms

I-851 Notice of Intent to Issue a Final Administrative Removal Order

I-851A Final Administrative Removal Order

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