

**Notice Designating Aliens Subject to Expedited Removal
Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act**

67 FED. REG. 68,924 (2002)

1 ACTION: Notice.

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3 SUMMARY: This Notice authorizes the Immigration and Naturalization Service (“the Service”) to place
4 in expedited removal proceedings certain aliens who arrive in the United States by sea, either by boat or
5 other means, who are not admitted or paroled, and who have not been physically present in the United
6 States continuously for the two-year period prior to the determination of inadmissibility under this Notice.
7 Aliens falling within this newly designated class who are placed in expedited removal proceedings will
8 be detained, subject to humanitarian parole exceptions, during the course of immigration proceedings,
9 including, but not limited to, any hearings before an immigration judge. The Service believes that
10 implementing the expedited removal provisions, and exercising its authority to detain this class of aliens
11 under 8 CFR part 235, will assist in deterring surges in illegal migration by sea, including potential mass
12 migration, and preventing loss of life. A surge in illegal migration by sea threatens national security by
13 diverting valuable United States Coast Guard and other resources from counter-terrorism and homeland
14 security responsibilities. Placing these individuals in expedited removal proceedings and maintaining
15 detention for the duration of all immigration proceedings, with limited exceptions, will ensure prompt
16 immigration determinations and ensure removal from the country of those not granted relief in those cases,
17 while at the same time protecting the rights of the individuals affected.

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19 EFFECTIVE DATES: This Notice is effective on November 13, 2002.

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23 SUPPLEMENTARY INFORMATION: Section 302 of the Illegal Immigration Reform and Immigrant
24 Responsibility Act of 1996, Pub. L. 104-208, Div. C, 110 Stat. 3009- 546 (IIRIRA), amended section
25 235(b) of the Immigration and Nationality Act (“Act”), 8 U.S.C. 1225(b), to authorize the Attorney
26 General to remove without a hearing before an immigration judge aliens arriving in the United States who
27 are inadmissible under sections 212(a)(6)(C) or 212(a)(7) of the Act, 8 U.S.C. 1182(a)(6)(C) and
28 1182(a)(7). Under these “expedited removal” proceedings, an alien who indicates an intention to apply
29 for asylum or who asserts a fear of persecution or torture is referred to an asylum officer to conduct an
30 interview as to whether such alien has a “credible fear.” Sections 235(b)(1)(A)(ii) and (B) of the Act, 8
31 U.S.C. 1225(b)(1)(A)(ii) and (B); 8 CFR 235.3(b)(4). Those who meet that standard are referred to an
32 immigration judge for a hearing on the merits of their claim or claims. 8 CFR 208.30(f).

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34 The Service previously published a proposed rule and two interim rules to implement this
35 expedited removal authority. 63 FR 19302-01 (April 20, 1998); 62 FR 10330 (March 6, 1997); and 62
36 FR 444-01 (Jan. 3, 1997). These rules established the current expedited removal. 8 CFR 235.3(b).

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38 Under section 235(b)(1) of the Act, 8 U.S.C. 1225(b)(1), expedited removal proceedings may be
39 applied to two categories of aliens. First, section 235(b)(1)(A)(i) of the Act, 8 U.S.C. 1225(b)(1)(A)(i),
40 permits expedited removal proceedings for aliens who are “arriving in the United States,” except for

1 Cuban citizens who arrive at United States ports-of-entry by aircraft, who are exempted from expedited
2 removal under section 235(b)(1)(F) of the Act, 8 U.S.C. 1225(b)(1)(F). Federal regulations define an
3 “arriving alien.” 8 CFR 1.1(q). Second, section 235(b)(1)(A)(iii) of the Act, 8 U.S.C. 1225(b)(1)(A)(iii),
4 permits the Attorney General, in his sole and unreviewable discretion, to designate certain other aliens to
5 whom the expedited removal provisions may be applied, even though they are not arriving in the United
6 States. Specifically, the Attorney General may apply the expedited removal provisions to any or all aliens
7 who have not been admitted or paroled into the United States and who have not been physically present
8 in the United States continuously for the two-year period prior to a determination of inadmissibility by
9 an immigration officer. The Attorney General delegated his authority to designate classes of aliens to the
10 Commissioner of the Service:

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12 As specifically designated by the Commissioner, aliens who arrive in, attempt to enter,
13 or have entered the United States without having been admitted or paroled following
14 inspection by an immigration officer at a designated port-of- entry, and who have not
15 established to the satisfaction of the immigration officer that they have been physically
16 present in the United States continuously for the 2-year period immediately prior to the
17 date of determination of inadmissibility * * *. When these provisions are in effect for
18 aliens who enter without inspection, the burden of proof rests with the alien to
19 affirmatively show that he or she has the required continuous physical presence in the
20 United States. Any absence from the United States shall serve to break the period of
21 continuous physical presence.

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23 8 CFR 235.3(b)(1)(ii).

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25 The designation may become effective upon publication in the Federal Register, or, if the “delay
26 caused by the publication would adversely affect the interests of the United States or the effective
27 enforcement of the immigration laws,” the designation may become effective upon issuance and be
28 published as soon as practicable. 8 CFR 235.3(b)(1)(ii). Since the expedited removal authority was added
29 to the Act in 1996, neither the Attorney General nor the Commissioner of the Service has not utilized this
30 “specific designation” authority.

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32 This Notice constitutes the first designation of an additional class of aliens who may be placed
33 in expedited removal proceedings: aliens who arrive in the United States by sea, either by boat or other
34 means, who are not admitted or paroled, and who have not been physically present in the United States
35 continuously for the two-year period prior to a determination of inadmissibility by a Service officer. The
36 alien has the burden affirmatively to show to the satisfaction of an immigration officer that the alien has
37 not been present in the United States continuously for the relevant two-year period. Section
38 235(b)(1)(A)(iii)(II) of the Act, 8 U.S.C. 1225(b)(1)(A)(iii)(II); 8 CFR 235.3(b)(1)(ii). This Notice does
39 not apply to aliens who arrive at United States ports-of-entry.

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41 It is important to note that certain aliens who arrive in the United States by sea are already subject
42 to expedited removal if they fall within the definition of “arriving alien” in 8 CFR 1.1(q): “an alien
43 interdicted in international or United States waters and brought into the United States by any means,
44 whether or not to a designated port-of-entry, and regardless of the means of transport.” This Notice will
45 ensure that all aliens, with one exception noted below, who arrive illegally by sea, whether interdicted or
46 not, will be subject to expedited removal.

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48 This designation is necessary to remove quickly from the United States aliens who arrive illegally

1 by sea and who do not establish a credible fear. The ability to detain aliens while admissibility is
2 determined and protection claims are adjudicated, as well as to remove quickly aliens without protection
3 claims, will deter additional aliens from taking to the sea and traveling illegally to the United States.
4 Illegal migration by sea is perilous and the Department of Justice has repeatedly cautioned aliens
5 considering similar attempts to reject such a hazardous voyage.

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7 Any alien who falls within this designation, who is placed in expedited removal proceedings, and
8 who indicates an intention to apply for asylum or who asserts a fear of persecution or torture will be
9 interviewed by an asylum officer who will determine whether the alien has a credible fear. If that standard
10 is met, the alien will be referred to an immigration judge for a hearing on the merits of the protection claim
11 or claims. Sections 235(b)(1)(A)(ii) and (B) of the Act, 8 U.S.C. 1225(b)(1)(A)(ii) and (B); 8 CFR
12 235.3(b)(4). The Forms I-867A and I-867B currently used by the officers who process aliens under the
13 expedited removal program, in accordance with the statutory requirement at section 235(b)(1)(B)(iv) of
14 the Act, 8 U.S.C. 1225(b)(1)(B)(iv), carefully explains to all aliens in expedited removal proceedings an
15 alien’s right to a “credible fear” interview. The forms also require that the officer determine whether the
16 alien has any reason to fear harm if returned to his or her country. These forms will also be used for aliens
17 placed in expedited removal under this designation. Officers who administer the program are trained to
18 be alert for any verbal or non-verbal indications that the alien may be afraid to return to his or her
19 homeland.

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21 The Service, with limited exceptions, plans to detain aliens designated by this Notice. Section
22 235(b)(1)(B)(iii)(IV) of the Act, 8 U.S.C. 1225(b)(1)(B)(iii)(IV) and 8 CFR 235.3(b)(iii) directs that any
23 alien who is placed in expedited removal proceedings shall be detained pending a final determination of
24 credible fear and if found not to have such a fear, such alien shall be detained until removed. Parole of
25 such alien may be permitted only when the Attorney General determines, in the exercise of discretion, that
26 parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective.

27 Section 235(b)(1)(B)(ii) of the Act, 8 U.S.C. 1225(b)(1)(B)(ii), directs that if a credible fear has been
28 established, the alien shall be detained for further consideration of the protection claim or claims.
29 Immigration judge review of custody determinations under 8 CFR 3.19(a) are permitted only for bond and
30 custody determinations pursuant to section 236 of the Act, 8 U.S.C. 1226, and 8 CFR part 236. Aliens
31 designated under this notice would not be detained under section 236 of the Act, but rather under section
32 235. Aliens subject to expedited removal procedures under section 235 of the Act are not eligible for
33 bond, and therefore may not seek a bond redetermination before an immigration judge. Parole of such
34 aliens based on humanitarian concerns may be considered in accordance with section 212(d)(5) of the Act,
35 8 U.S.C. 1182(d)(5) and 8 CFR 212.5.

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37 This Notice applies to certain aliens who arrive in the U.S. by sea on or after November 13, 2002.
38 Furthermore, expedited removal proceedings, however, will not be initiated against Cuban citizens who
39 arrive by sea because it is longstanding U.S. policy to treat Cubans differently from other aliens. See, e.g.,
40 Cuban Adjustment Act, Pub. L. 89-732 (1966) (allowing any native or citizen of Cuba who is inspected
41 and admitted or paroled into the United States to apply for lawful permanent resident status after one
42 year). Finally, crewmen and stowaways will not be subject to this Notice because the Act already
43 mandates specific removal proceedings for such aliens.

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45 This Notice does not require “notice and comment” under the Administrative Procedures Act
46 because Congress explicitly authorized the Attorney General to designate categories of aliens to whom
47 expedited removal proceedings may be applied, and that “[s]uch designation shall be in the sole and
48 unreviewable discretion of the Attorney General and may be modified at any time (emphasis added).”

1 Section 235(b)(1)(A)(iii)(I), 8 U.S.C. 1225(b)(1)(A)(iii)(I). Current regulations of the Service provide
2 public notice that the designation of new categories of aliens to be subjected to expedited removal will
3 be made via publication of a Notice in the Federal Register:

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5 The Commissioner shall have the sole discretion to apply the provisions of section
6 235(b)(1) of the Act, at any time, to any class of aliens described in this section. The
7 Commissioner’s designation shall become effective upon publication of a notice in the
8 Federal Register. However, if the Commissioner determines, in the exercise of
9 discretion, that the delay caused by publication would adversely affect the interests of the
10 United States or the effective enforcement of the immigration laws, the Commissioner’s
11 designation shall become effective immediately upon issuance, and shall be published in
12 the Federal Register as soon as practicable thereafter.

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14 8 CFR 235.3(b)(ii).

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16 In the alternative, the Service’s immediate implementation of this Notice, with provisions for post-
17 promulgation public comments, is based on the “good cause” exceptions found at 5 U.S.C. 553(b)(B) and
18 (d)(3). The reason and necessity for the immediate promulgation of this rule is the need to deter foreign
19 nationals from undertaking dangerous sea voyages to the United States and to detain those that are
20 apprehended doing so. As explained in the SUPPLEMENTARY INFORMATION, a surge in illegal
21 migration by sea, including the potential for a mass migration, would jeopardize or compromise the
22 national security and, therefore, requires the immediate implementation of this Notice.

23
24 Notice of Designation of Aliens Subject to Expedited Removal Proceedings

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26 Pursuant to section 235(b)(1)(A)(iii) of the Immigration and Nationality Act (“Act”) and 8 CFR
27 235.3(b)(1)(ii), I order as follows:

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29 (1) Except as provided in paragraph (5), all aliens who arrive in the United States by sea, either
30 by boat or other means, who are not admitted or paroled, and who have not been physically present in the
31 United States continuously for the two-year period prior to a determination of inadmissibility by a Service
32 officer shall be placed in expedited removal proceedings. The alien has the burden affirmatively to show
33 to the satisfaction of an immigration officer that the alien has been present in the United States
34 continuously for the relevant two-year period. This Notice does not apply to aliens who arrive at United
35 States ports-of-entry. This Notice does not apply to alien crewmen or stowaways as described in the Act.

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37 (2) Any alien who falls within this designation who indicates an intention to apply for asylum or
38 who asserts a fear of persecution or torture will be interviewed by an asylum officer to determine whether
39 the alien has a credible fear as defined in section 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). If that
40 standard is met, the alien will be referred to an immigration judge for a hearing on the merits of the
41 protection claim or claims.

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43 (3) An alien found to have a credible fear and subsequently placed into removal proceedings
44 before an immigration judge will be detained, with certain humanitarian exceptions, throughout those
45 proceedings and will not be eligible to request a bond redetermination hearing before an immigration
46 judge.

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48 (4) This Notice applies to aliens described in paragraph (1) who arrive in the United States by sea

1 on or after November 13, 2002.

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3 (5) Expedited removal proceedings will not be initiated against Cuban citizens or nationals who
4 arrive by sea.

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6 Dated: November 12, 2002.

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8 James W. Ziglar, Commissioner of the Immigration and Naturalization Service