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Expedited Removal of Aliens: An Introduction

Non-U.S. nationals (aliens) who do not meet requirements governing their entry or continued presence in the United States may be subject to removal. The Immigration and Nationality Act (INA) establishes different removal processes for different categories of aliens. Most removable aliens apprehended within the interior of the United States are subject to “formal” removal proceedings under INA § 240. Aliens in these proceedings are given certain procedural guarantees including the rights to counsel, to appear at a hearing before an immigration judge (IJ), to present evidence, and to appeal an adverse decision. The INA, however, sets forth a streamlined “expedited removal” process for certain arriving aliens and aliens who recently entered the United States without inspection. This In Focus provides a brief introduction to the expedited removal framework. For a more detailed discussion, see CRS Report R45314, *Expedited Removal of Aliens: Legal Framework*, by Hillel R. Smith.

Statutory Framework and Current Implementation

The expedited removal process, created by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, is codified in INA § 235(b)(1). The statute permits the Department of Homeland Security (DHS) to summarily remove aliens arriving at a designated U.S. port of entry (arriving aliens) “without further hearing or review” if they are inadmissible either because they (1) lack valid entry documents, or (2) tried to procure their admission into the United States through fraud or misrepresentation. INA § 235(b)(1) also authorizes—but does not require—DHS to extend application of expedited removal to “certain other aliens” inadmissible on the same grounds if they (1) were not admitted or paroled into the United States by immigration authorities and (2) cannot establish at least two years’ continuous physical presence in the United States at the time of apprehension.

Immigration authorities have implemented expedited removal for three overarching categories of aliens who lack valid entry documents or attempted to falsely procure admission:

1. arriving aliens (defined by regulation as aliens arriving at U.S. ports of entry);
2. aliens who entered the United States by sea without being admitted or paroled into the United States, and who have been in the country less than two years; and
3. aliens apprehended within 100 miles of the U.S. border within 14 days of entering the country, and who have not been admitted or paroled.

Most aliens subject to expedited removal are thus apprehended either at a designated port of entry or near the international border when trying to enter, or shortly after entering, the United States unlawfully between ports of entry.

Exceptions to Expedited Removal

An alien subject to expedited removal typically will be ordered removed without further hearing or the ability to contest a removal determination. But exceptions exist for certain categories of aliens.

Credible Fear Determinations

An alien otherwise subject to expedited removal who expresses an intent to apply for asylum or a fear of persecution if returned to a particular country is entitled to administrative review of that claim before being removed. INA § 235(b)(1) instructs that the examining immigration officer must refer the alien for an interview with an asylum officer to determine whether the alien has a “credible fear” of persecution or torture.

A credible fear determination is a screening process that evaluates whether an alien might qualify for one of three forms of relief from removal: asylum, withholding of removal, and protection under the Convention Against Torture (CAT). Asylum is the only form of relief that gives the alien a permanent legal foothold in the United States. The credible fear determination is not intended fully to assess the alien’s claims, but only to determine whether they are sufficiently viable to warrant more thorough review.

An alien who shows a credible fear of persecution is placed in formal removal proceedings rather than expedited removal. There, the alien may pursue applications for asylum, withholding of removal, and CAT protection.

If an asylum officer determines that an alien does not have a credible fear of persecution, the alien may request review of that determination before an IJ. If the IJ concurs with the negative credible fear finding, the alien will be subject to expedited removal. But if the IJ finds that the alien has a credible fear of persecution, the IJ will vacate the asylum officer’s determination and the alien will be placed in formal removal proceedings.

Aliens Who Claim to Be U.S. Citizens, Lawful Permanent Residents, Refugees, or Persons Granted Asylum

INA § 235(b)(1) creates an exception to expedited removal procedures for an alien who claims to be either a U.S. citizen, lawful permanent resident (LPR), admitted refugee, or asylee. Under implementing regulations, an immigration

officer must attempt to verify any such claim before issuing an expedited removal order. If the immigration officer cannot verify the claim, the alien may seek administrative review of it before an IJ.

Withdrawal of Application for Admission

As an alternative to expedited removal, DHS may permit an alien to withdraw voluntarily his or her application for admission if the alien intends, and is able, to depart the United States immediately. The immigration officer typically considers several factors to determine whether an alien may withdraw the application for admission, such as the alien's prior immigration history, age and health, and other humanitarian concerns.

Unaccompanied Children

Under federal statute, unaccompanied alien children (UACs) are not subject to expedited removal and are placed in formal removal proceedings instead. UACs are generally put in the custody of the Department of Health and Human Services' Office of Refugee Resettlement, but may be released to an adult sponsor. DHS may permit UACs to return voluntarily to their countries in lieu of removal proceedings if they are nationals of Mexico or Canada and meet certain criteria.

Detention and Parole of Aliens Subject to Expedited Removal

INA § 235(b)(1) generally requires the detention of aliens placed in expedited removal, as well as during any credible fear determination or administrative review of a claim that the alien has legal status. The statute's mandatory detention requirements have been construed to cover aliens who are first screened for expedited removal, even if they are later placed in formal removal proceedings (e.g., because the alien established a credible fear of persecution). DHS, however, may "parole" an alien otherwise subject to detention under INA § 235(b)(1) for "urgent humanitarian reasons or significant public benefit," enabling the alien to be released from the agency's physical custody. A federal court injunction issued in *Padilla v. Immigration & Customs Enforcement* currently requires custody hearings for aliens who have entered the United States without inspection and are placed in formal removal proceedings after an initial expedited removal screening. In addition, a 1997 court settlement agreement known as the *Flores* Settlement generally limits the period in which an alien minor may be detained by DHS.

Limitations to Judicial Review of an Expedited Order of Removal

INA § 242(a)(2) generally bars judicial review of an expedited removal order. But judicial review is still available in limited circumstances.

Habeas Corpus Proceedings

Under INA § 242(e)(2), an alien may challenge an expedited removal order in habeas corpus proceedings, contesting the legality of his or her detention. The habeas court's jurisdiction, however, is limited to whether (1) the petitioner in the habeas action is an alien; (2) the petitioner was ordered removed under INA § 235(b)(1)'s expedited removal provisions; and (3) the petitioner can prove by a preponderance of the evidence that he or she is an LPR,

refugee, or asylee. Most courts have construed INA § 242(e)(2) as barring review of the legality of the underlying expedited removal proceedings. The Ninth Circuit, however, held in *Thuraissigiam v. U.S. Dep't of Homeland Security* that an alien may invoke the Suspension Clause to challenge an expedited removal order in habeas corpus proceedings despite INA § 242(e)(2)'s limited scope of review (the Supreme Court has agreed to consider the government's appeal of that decision).

Challenges to the Expedited Removal System

Under INA § 242(e)(3), an alien subject to an expedited order of removal may challenge the validity of the expedited removal system by filing a lawsuit in the U.S. District Court for the District of Columbia. The district court's review is limited to determining whether (1) the expedited removal statute or its implementing regulations is constitutional; and (2) a regulation, written policy directive, written policy guideline, or written procedure issued by DHS to implement expedited removal is consistent with the statute or other laws. The lawsuit must be brought within 60 days after implementation of the challenged statutory provision, regulation, directive, guideline, or procedure.

Collateral Challenges Raised as a Defense during Criminal Proceedings for Unlawful Reentry

INA § 235(b)(1) provides that in criminal prosecutions for unlawful reentry into the United States after removal, courts lack jurisdiction to consider claims challenging the validity of an expedited removal order serving as the basis for the reentry prosecution. But the Fourth and Ninth Circuits have held that the statute does not bar judicial review of whether a prior expedited removal proceeding was "fundamentally unfair" (i.e., that the proceeding violated the alien's right to due process and deprived the alien of the opportunity to seek relief). Thus, in some cases, an alien criminally charged with unlawful reentry after removal may collaterally challenge his or her prior expedited removal order.

Recent Expansion of Expedited Removal

In 2019, DHS exercised authority to employ expedited removal to the full degree authorized by INA § 235(b)(1), to include all aliens physically present in the United States without being admitted or paroled, who have been in the country less than two years, and who lack valid entry documents or procured admission through fraud or misrepresentation. But a federal district court has enjoined DHS from enforcing the expedited removal expansion pending a legal challenge. The court determined that DHS's expedited removal expansion likely violates the Administrative Procedure Act because the agency did not comply with certain notice-and-comment procedures and failed to consider the potential negative impacts of expanding expedited removal into the interior of the United States. As a result, DHS continues to employ expedited removal primarily for aliens apprehended either at a designated port of entry or near the international border when trying to enter, or shortly after entering, the United States unlawfully.

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