



U.S. Immigration
and Customs
Enforcement

JAN 22 2008

MEMORANDUM FOR: Assistant Directors
Special Agents in Charge
Deputy Assistant Directors

FROM: Marcy M. Forman 
Director, Office of Investigations

SUBJECT: Options and Forms of Immigration Relief for Victims and
Witnesses in ICE Investigations

ICE recently provided a Department of Justice Working Group with an overview of protocols utilized during worksite and other ICE investigations that potentially involve aliens who are victims or witnesses (victims/witnesses). The working group members expressed concern that ICE was reluctant to offer deferred action to victims/witnesses when appropriate.

In an effort to ensure conformity, SACs are reminded of the dispositional options available to them when encountering victims/witnesses during ICE investigations. These options should be utilized in instances where it has been determined that the victim/witness' presence is required and is in the governments best interest. SACs must thoroughly evaluate the totality of circumstances, identify special considerations (i.e., juveniles, witnesses who are also victims, criminal history, immigration history, security concerns, etc.) and then select the best option for that particular victim/witness. This memorandum contains only brief summaries and is not intended to provide detailed protocols or procedures relating to each option. The following are victim/witness options to consider:

● Material Witness Warrant

Pursuant to 18 U.S.C. §3144, a federal judge or magistrate may order the arrest of a witness in criminal proceedings upon the filing of an affidavit demonstrating that the witness' testimony is material and that it may be impractical to secure the witness' presence by subpoena. The court will determine if the witness shall be detained or released utilizing the conditions set forth in 18 U.S.C. §3142. Witnesses ordered detained are remanded to the custody of the U.S. Marshals Service. SACs may be required to utilize one of the options below for released witnesses who are aliens in the U.S. illegally. An alien witness is not authorized to receive employment authorization based solely upon their designation as a material witness.

● Significant Public Benefit Parole

Significant Public Benefit Parole (SPBP) may be utilized to bring an alien victim/witness, and, in some cases the victim/witness' immediate family members, into

the U.S. for one-year intervals. SPBPs may be utilized for alien witnesses in judicial, administrative or legislative proceedings and alien victims for “urgent humanitarian reasons”. 8 U.S.C. §1182(d)(5)(A). A parole is not an admission into the U.S., however, employment authorization may be granted. Additional guidance for SPBPs can be found in the Director’s June 27, 2006, memorandum entitled “Accountability of U.S. Immigration and Customs Enforcement (ICE) Significant Public Benefit Paroles” and the August 8, 2006, memorandum entitled “Interim Policy and Guidelines for Immediate Assumption of Significant Public Benefit Parole Responsibilities”.

● Deferred Action

Deferred action is defined as “an act of administrative convenience to the government which gives some cases lower priority”. 8 C.F.R. §274a.12(c)(14). In some cases, the determination to issue a deferred action is a discretionary decision made by the SAC (i.e., the decision not to issue a charging document at a particular time). In other cases, such as when a victim has applied for certain benefits, the consideration of deferred action has been established as a matter of policy. Deferred action does not confer legal immigration status upon a victim/witness. An alien victim/witness granted deferred action may, however, be granted employment authorization.

● Administrative Stay of Removal

An Administrative Stay of Removal (ASR) may be utilized for an alien witness with a Final Order of Removal. An ASR may be utilized when an alien is needed to “testify in the prosecution of a person for a violation of a law of the United States or of any State.” 8 U.S.C. §1231(c)(2)(A)(ii). SACs should coordinate this option with the local DRO Field Office Director, who has the discretionary authority to issue an ASR. An ASR does not confer legal immigration status upon an alien witness and the alien witness is not authorized to receive employment authorization based solely upon the ASR.

● S Non-Immigrant Visas

An S visa may be granted to an alien witness, and in some cases to the witness’ immediate family members, whose presence is “essential to the success of an authorized criminal investigation or the successful prosecution of an individual involved in the criminal organization or enterprise”. 8 U.S.C. §1101(a)(15)(S)(i)(III). An alien who is granted an S visa is eligible to receive employment authorization. A sponsoring office may apply for an S visa utilizing Form I-854, Inter-Agency Alien Witness and Informant Record. SACs are advised to coordinate their requests with the ICE OI Headquarters Division Four Investigative Support Unit.

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● Continued Presence

Continued Presence is a temporary legal status afforded victims of severe forms of trafficking in persons who are potential witnesses. Mechanisms utilized for Continued Presence may include: parole, voluntary departure, Stay of Removal, Deferred Action, or any other authorized form of Continued Presence including applicable Non-Immigrant Visas. A victim who receives Continued Presence is eligible for employment authorization.

● Departure Control Order

Although it does not provide authority to physically detain, 8 U.S.C. §1185 permits the Department of Homeland Security to prevent the departure of certain aliens from the U.S. The regulations implementing this provision state that the departure of an "alien who is needed in the United States as a witness in, or as a party to, any criminal case under investigation or pending in a court in the United States" is prejudicial to the interests of the U.S. 8 C.F.R. §215.3(g). When a departure control officer knows or has reason to believe that such person is going to depart, the officer shall serve such person with a written temporary order directing that the person shall not depart until further notified. See 8 C.F.R. §215.2(a). The issuance of a Departure Control Order is issued upon the alien and cannot be used as a substitute for an Administrative Stay of Removal. SACs were delegated departure control authority in ICE Delegation Number 0001. See Delegation of Authority to the Directors, Detention and Removal and Investigations, and to Field Office Directors, Special Agents in Charge and Certain Other Officers of the Bureau of Immigration and Customs Enforcement, June 6, 2003, issued by Michael J. Garcia, Assistant Secretary.

This memorandum is intended to provide internal guidance to ICE OI. It does not, is not intended to, shall not be construed to, and may not be relied upon to create any rights, or standards of conduct or care, substantive or procedural, enforceable at law by any person in any matter. For questions regarding the handling of victims and witnesses, please contact the ICE OI Headquarters Division Four Investigative Support Unit Chief (b)(6),(b)(7)(C) at

(b)(7)(E) @dhs.gov or 202-305 (b)(6),(b)(7)(C)