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Office of the Director

U.S. Department of Homeland Security
500 12th Street, SW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

October 2, 2020

MEMORANDUM FOR: All ICE Employees

FROM: Tony H. Pham
Senior Official Performing the Duties of the Director

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Date: 2020.10.02 14:17:39 -04'00'

SUBJECT: Superseding Implementation Guidance for July 2019 Designation of Aliens Subject to Expedited Removal

This memorandum supersedes ICE Policy Memorandum 11058.1, *Implementation of July 29 Designation of Aliens Subject to Expedited Removal*, issued by then-Acting Director Matthew Albence. That earlier memorandum provided implementation guidance for U.S. Immigration and Customs Enforcement (ICE) personnel with respect to then-Acting Secretary of Homeland Security Kevin McAleenan's designation of certain aliens for expedited removal under section 235(b)(1) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1225(b)(1).

Under that authority, the U.S. Department of Homeland Security (DHS) may remove, without a hearing before an immigration judge, arriving aliens who are inadmissible under sections 212(a)(6)(C) (fraud or willful misrepresentation) or 212(a)(7) (lack of valid immigration documents) of the INA, 8 U.S.C. §§ 1182(a)(6)(C) or 1182(a)(7). The Secretary, in his or her "sole and unreviewable discretion," may also designate certain other aliens to whom the expedited removal provisions may be applied.[1] Former Acting Secretary McAleenan's July 23, 2019 designation exercised the full scope of DHS's statutory authority via publication in the Federal Register of the attached Notice.[2] This expedited removal designation, which was until recently enjoined by a federal court order,[3] applies to applicants for admission (other than unaccompanied alien children as defined in 6 U.S.C. § 279(g)(2)), who:

- are not already subject to an expedited removal designation;[4]

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[1] *See* INA § 235(b)(1)(A)(iii)(I), 8 U.S.C. § 1225(b)(1)(A)(iii)(I); 8 C.F.R. § 235.3(b)(1)(ii).

[2] *See* 84 Fed. Reg. 35409-14 (July 23, 2019).

[3] *See Make the Road New York v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020) (reversing district court's grant of preliminary injunction and holding that Acting Secretary's expedited removal designation was not subject to the Administrative Procedure Act's review standards or notice-and-comment rulemaking requirements). Note, however, that while the preliminary injunction entered by the district court in this matter was reversed on appeal, the case was remanded for further litigation on Plaintiffs' claims that the designation violates the INA and U.S. Constitution.

[4] Aliens already subject to an expedited removal designation include those "encountered anywhere in the United

- are encountered anywhere in the United States;
- have not been admitted or paroled into the United States;
- are determined to be inadmissible under sections 212(a)(6)(C) or (a)(7) of the INA, 8 U.S.C. §§ 1182(a)(6)(C) or 1182(a)(7); and
- have not affirmatively shown, to the satisfaction of an immigration officer, that they have been physically present in the United States continuously for the two-year period immediately preceding the date of the determination of inadmissibility.[5]

ICE immigration officers generally have broad discretion whether to apply expedited removal in individual cases, or whether to instead permit aliens to depart voluntarily or withdraw their applications for admission, or to place aliens in removal proceedings before an immigration judge under section 240 of the INA, 8 U.S.C. § 1229a.[6] Furthermore, as the Senior Official Performing the Duties of the Director, I am exercising my discretion to limit ICE's application of the July 23, 2019 designation. ICE immigration officers may only apply the July 23, 2019 designation *prospectively*, meaning only to aliens who cannot establish to the satisfaction of the immigration officer that they have been physically present in the United States continuously since *before* July 23, 2019, and who otherwise fall within the legal parameters of the expedited removal statute or July 23, 2019 designation. ICE immigration officers must *not* apply the July 23, 2019 designation to aliens who affirmatively show to the satisfaction of the immigration officer that they were continuously physically present since before the designation was published, even if that period of presence is less than two years. I make this discretionary policy decision in order to focus application of the designation on aliens who can clearly be charged with notice of the Acting Secretary's intention to invoke his full statutory authority under INA § 235(b)(1), 8 U.S.C. § 1225(b)(1), and avoid needless litigation over this question that would likely persist well beyond the two-year anniversary of the designation, in any event.[7]

As a practical matter, I anticipate that the July 23, 2019 designation will be primarily used by ICE in the Criminal Alien Program and Worksite Enforcement contexts, when Deportation Officers encounter aliens who have been arrested by another law enforcement agency for criminal activity or when Special Agents encounter unlawful workers at worksites targeted for enforcement action based on investigative leads. In exercising this discretion, ICE immigration

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States for up to two years after the alien arrived in the United States, provided that the alien *arrived by sea* … [and] aliens who entered the United States by crossing a land border … if the aliens were encountered by an immigration officer within 100 air miles of the United States international land border and were continuously present in the United States for less than 14 days immediately prior to that encounter." 84 Fed. Reg. at 35409 (emphasis added). Accordingly, provided they are otherwise subject to expedited removal as a matter of law, the July 23, 2019 designation applies to aliens who entered the United States *by land* and are either: (1) encountered within 100 miles of the border but have been continuously present in the United States at least 14 days but less than two years; or (2) encountered anywhere in the United States beyond 100 miles of the border and have not been continuously present for at least two years.

[5] *See* INA § 235(b)(1)(A)(iii)(II), 8 U.S.C. § 1225(b)(1)(A)(iii)(II).

[6] *See Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520, 522 (BIA 2011) (holding that language in INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i), does not limit DHS's discretion to place aliens amenable to expedited removal into removal proceedings under INA section 240, 8 U.S.C. § 1229a).

[7] This policy decision should in no way be viewed as a concession that ICE could not lawfully apply the July 23, 2019 designation to all aliens who fall within its scope, should it so choose. Rather, in order to focus ICE operations and the issues in litigation, I have exercised my discretion accordingly.

officers should not revisit a determination made prior to July 23, 2019 to place an alien in section 240 removal proceedings, even if the alien is amenable to expedited removal under this new designation. Other potentially relevant factors for consideration by immigration officers in exercising their discretion include, but are not limited to, whether an alien's case presents mental competency issues, whether the alien is the sole caregiver of a U.S. citizen or Lawful Permanent Resident child(ren) or appears eligible for relief available in section 240 removal proceedings, the duration of the alien's presence in the United States and nature of his or her ties to the country, and whether ICE seeks to charge additional inadmissibility grounds (e.g., due to criminal history).

Each applicant for admission encountered by ICE following the publication of this July 23, 2019 expedited removal designation whom an immigration officer seeks to place in expedited removal proceedings—and who is not subject to a previous expedited removal designation—bears the affirmative burden to show to the satisfaction of the encountering immigration officer that he or she has been physically present in the United States continuously for the two-year period immediately preceding the date of the determination of inadmissibility by providing evidence establishing the place, date, and manner of entry into the United States and continuity of presence since that time.[8] (b)(7)(E)

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This document provides internal ICE policy guidance, which may be modified, rescinded, or superseded at any time without notice. This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Likewise, this guidance places no limitations on the otherwise lawful enforcement or litigative prerogatives of DHS.

Attachment

- *Designating Aliens for Expedited Removal*, 84 Fed. Reg. 35409-14 (July 23, 2019).

(b)(7)(E)

[11] This is currently accomplished by placing the alien into removal proceedings under INA § 240, 8 U.S.C. § 1229a.