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U.S. Immigration Laws for Aliens Arriving at the Border

Introduction

In recent years, the migrant population arriving at the U.S.-Mexico (Southern) border without legal immigration status has shifted from being comprised predominantly of Mexican adult economic migrants to being comprised primarily of Central American adults, family units (adults with at least one child under age 18), and unaccompanied children, many of whom seek asylum in the United States. How they are processed and what options they have for legal admission and residing lawfully in the United States depend on how they attempt to enter the United States, whether they are children and/or arrive in families, what country they originate from, and if they request asylum.

Aliens (foreign nationals) who wish to enter the United States may request admission legally at a U.S. port of entry or may attempt to enter the United States illegally between ports of entry. The Department of Homeland Security (DHS) has broad discretion to detain aliens, including asylum seekers, during the pendency of removal proceedings that determine whether they are admissible or have other grounds to remain in the United States. Removal proceedings involve either a formal hearing before an immigration judge or a streamlined removal procedure (i.e., *expedited removal*) without hearings or significant review.

Arriving foreign nationals who seek asylum (described below) may request it at a U.S. port of entry before an admissions officer with the DHS Customs and Border Protection (CBP) Office of Field Operations, or upon apprehension between U.S. ports of entry before an agent with CBP's U.S. Border Patrol. All aliens requesting asylum are entitled to an interview with an asylum officer to assess the credibility of their asylum claims.

Illegal U.S. Entry

Aliens entering the United States illegally face two types of penalties. First, the Immigration and Nationality Act (INA) establishes *civil* penalties for persons who are in the United States unlawfully (i.e., without legal status). These penalties apply to aliens who entered the United States illegally as well as those who entered legally but subsequently violated the terms of their admission, typically by “overstaying” their visa duration. Foreign nationals apprehended for such civil immigration violations are generally subject to removal (deportation) and placed in removal proceedings.

Second, the INA establishes *criminal* penalties for (1) persons who are convicted of entering or attempting to enter the United States illegally between ports of entry, (2) eluding examination or inspection by immigration officers, or (3) attempting to enter or obtaining entry to the United States through fraud or willful misrepresentation (generally classified as a misdemeanor). In addition, the INA provides

criminal penalties for persons who are convicted of unlawfully re-entering the United States after being removed from the country previously (generally classified as a felony). Foreign nationals apprehended for criminal immigration violations are subject to prosecution by the Department of Justice (DOJ) in federal criminal courts.

Foreign nationals who attempt to enter the United States without authorization often do so between ports of entry on the U.S. border. If apprehended, they are processed and detained briefly by CBP and either transferred to the custody of another federal agency or placed directly into removal proceedings. Procedurally, removal proceedings occur after any criminal prosecution for illegal entry.

CBP typically refers apprehended aliens to DOJ for criminal prosecution if they meet criminal enforcement priorities (e.g., child trafficking, prior felony convictions, multiple illegal entries). DOJ's U.S. Marshals Service then transports these individuals to DOJ criminal detention facilities for pre-trial detention. After they have been tried—and if convicted, served a criminal sentence—they are transferred to DHS Immigration and Customs Enforcement (ICE) custody and placed in immigration detention. ICE, which represents the government in removal hearings, then commences removal proceedings.

Because children are not permitted in DOJ criminal detention with adults, prosecuting adults who cross the border illegally with their children poses unique challenges. Once DHS transfers an adult to DOJ custody, it generally treats accompanying minor children as unaccompanied alien children (UAC) and transfers them to the care and custody of the Department of Health and Human Services (HHS) Office of Refugee Resettlement (ORR) (see below). However, a California federal court ruled that if DHS separates families to enable the prosecution of adult illegal entrants, DHS is required to reunite the families after criminal proceedings conclude and any sentence is served.

Unaccompanied Children

Federal law contains distinct provisions for unaccompanied alien children, defined as (1) lacking lawful immigration status in the United States, (2) under age 18, and (3) without a parent or legal guardian in the United States or one available to provide care and physical custody.

UACs are not subject to expedited removal. Instead, a UAC who immigration authorities determine to be subject to removal is generally placed in formal removal proceedings. DHS may permit a UAC to voluntarily return to his or her country in lieu of removal proceedings, but only if the UAC is a national or habitual resident of a contiguous country (i.e., Mexico and Canada), and (1) has not been, or is not at

risk in his or her country of being, a victim of human trafficking; (2) does not have a credible fear of persecution in his or her country; and (3) is capable of independently withdrawing his or her application for U.S. admission. A UAC from Mexico or Canada must be screened within 48 hours of apprehension to determine whether he or she can voluntarily return.

If a UAC is not from a contiguous country or is from a contiguous country but has a credible fear of persecution, or CBP does not make a determination within the 48-hour screening period, the UAC is to be placed in the custody of ORR pending formal removal proceedings.

A child typically must be transferred to ORR within 72 hours after DHS determines he or she is a UAC. ORR must then place the UAC “in the least restrictive setting that is in the best interest of the child.” UACs are typically released to sponsors, most of whom are parents or close relatives already residing in the United States. In 2018, UACs spent an average of 60 days in ORR custody.

Family Units

Although UACs are not subject to expedited removal, *accompanied* alien children, such as those arriving at the border with family members, are generally treated the same as non-citizen adults, and may face either expedited or formal removal proceedings with the family unit. Generally, DHS detains children and accompanying parents in family residential centers for limited periods (typically not exceeding 20 days) before releasing them pending their removal proceedings.

Asylum

Many aliens arriving at the Southern border seek asylum in the United States. Asylum is a protection granted to foreign nationals physically present within the United States or at the U.S. border who meet the definition of a refugee. The INA defines refugee as a person who is outside his or her home country (a second country that is not the United States) and is unable or unwilling to return because of persecution, or a well-founded fear of persecution, on one or more of five possible criteria: (1) race, (2) religion, (3) nationality, (4) membership in a particular social group, or (5) political opinion. Asylum is not numerically limited and is granted on a case-by-case basis. Asylum can be requested by foreign nationals who have legally entered the United States and are not in removal proceedings (“affirmative” asylum, not discussed below) or those who are in removal proceedings and claim asylum as a defense to being removed (“defensive” asylum).

Arriving aliens who are inadmissible, either because they lack proper entry documents or because they attempt U.S. entry through misrepresentation or false claims to U.S. citizenship, are put into expedited removal. Aliens in expedited removal who express a fear of persecution are to be detained by ICE and given a *credible fear* interview with an asylum officer from DHS’s U.S. Citizenship and Immigration Services (USCIS) to determine if the asylum claim has sufficient validity to merit a hearing before an immigration judge.

Credible fear means that there is “a significant possibility,” taking into account the credibility of the statements made by the alien in support of his or her claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum. Those who receive a favorable credible fear determination are placed into formal removal proceedings and given a hearing before an immigration judge, thereby placing an asylum seeker on the defensive path to asylum. Those who receive an unfavorable credible fear determination may request that an immigration judge review the case. Aliens in expedited removal who cannot demonstrate a credible fear are promptly deported.

Removal

Under the formal removal process, an immigration judge from DOJ’s Executive Office for Immigration Review (EOIR) determines whether an alien is removable. The immigration judge may grant certain forms of relief (e.g., asylum, cancellation of removal), and removal decisions are subject to administrative and judicial review.

Under streamlined removal procedures, which include *expedited removal* and *reinstatement of removal* (i.e., when DHS reinstates a removal order for a previously removed alien), opportunities for relief and review are generally limited. Under expedited removal, an alien who lacks proper documentation or has committed fraud or willful misrepresentation to gain admission into the United States may be removed without any further hearings or review, unless he or she indicates a fear of persecution in the home country or an intention to apply for asylum. Two other removal options, often referred to as “returns”—*voluntary departure* and *withdrawal of petition for admission*—require aliens to leave the United States promptly but exempt them from certain penalties associated with other types of removal.

Expedited removal can be applied to any alien who meets the expedited removal inadmissibility criteria described above, has not been admitted or paroled (i.e., given temporary permission to enter or remain in the United States despite being inadmissible), and cannot affirmatively show continuous physical presence for the prior two years. As a matter of policy, however, expedited removal to date has been limited to persons apprehended within 100 miles of the U.S. border and who have been present in the United States for less than 14 days. Executive Order 13767, issued on January 25, 2017, mandates that DHS expand expedited removal to the full extent of the statute. That expansion has not yet occurred.

If apprehended foreign nationals are found to be removable, ICE and CBP share the responsibility for repatriating them. CBP handles removals at the border for unauthorized aliens from Mexico and Canada, and ICE handles all removals from the U.S. interior and removals for all unauthorized aliens from noncontiguous countries.

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