



Post-Postville CLE Conference
Kansas City, Missouri
September 18, 2008

Materials for Understanding “Judicial Orders of Removal” in the Sentencing of Non-Citizen Criminal Defendants

1. 8 U.S.C. § 1228(c)
Full text of statute that provides federal district courts with jurisdiction to enter “judicial orders of removal” against non-citizen defendants at the time of sentencing.
2. ACLU Checklist
Identifies statutory and other requirements for entry of a proper “judicial order of removal.”
3. Government Documents
Includes U.S. Attorney’s Criminal Resource Manual’s guidance on “stipulated judicial deportation” as well as Department of Justice memoranda regarding “judicial orders of removal.”

For questions regarding these materials, please contact Mónica M. Ramírez, Staff Attorney with the ACLU Immigrants’ Rights Project, at mr Ramirez@aclu.org.

1. Judicial Removal Statute

8 U.S.C. § 1228; INA § 238—Expedited Removal of Aliens Convicted of Committed Aggravated Felonies

* * *

(c) Judicial removal

(1) Authority

Notwithstanding any other provision of this chapter, a United States district court shall have jurisdiction to enter a judicial order of removal at the time of sentencing against an alien who is deportable, if such an order has been requested by the United States Attorney with the concurrence of the Commissioner and if the court chooses to exercise such jurisdiction.

(2) Procedure

(A) The United States Attorney shall file with the United States district court, and serve upon the defendant and the Service, prior to commencement of the trial or entry of a guilty plea a notice of intent to request judicial removal.

(B) Notwithstanding section 1252b of this title, the United States Attorney, with the concurrence of the Commissioner, shall file at least 30 days prior to the date set for sentencing a charge containing factual allegations regarding the alienage of the defendant and identifying the crime or crimes which make the defendant deportable under section 1227(a)(2)(A) of this title.

(C) If the court determines that the defendant has presented substantial evidence to establish prima facie eligibility for relief from removal under this chapter, the Commissioner shall provide the court with a recommendation and report regarding the alien's eligibility for relief. The court shall either grant or deny the relief sought.

(D)(i) The alien shall have a reasonable opportunity to examine the evidence against him or her, to present evidence on his or her own behalf, and to cross-examine witnesses presented by the Government.

(ii) The court, for the purposes of determining whether to enter an order described in paragraph (1), shall only consider evidence that would be admissible in proceedings conducted pursuant to section 1229a of this title.

(iii) Nothing in this subsection shall limit the information a court of the United States may receive or consider for the purposes of imposing an appropriate sentence.

(iv) The court may order the alien removed if the Attorney General demonstrates that the

alien is deportable under this chapter.

(3) Notice, appeal, and execution of judicial order of removal

(A)(i) A judicial order of removal or denial of such order may be appealed by either party to the court of appeals for the circuit in which the district court is located.

(ii) Except as provided in clause (iii), such appeal shall be considered consistent with the requirements described in section 1252 of this title.

(iii) Upon execution by the defendant of a valid waiver of the right to appeal the conviction on which the order of removal is based, the expiration of the period described in section 1252(b)(1) of this title, or the final dismissal of an appeal from such conviction, the order of removal shall become final and shall be executed at the end of the prison term in accordance with the terms of the order. If the conviction is reversed on direct appeal, the order entered pursuant to this section shall be void.

(B) As soon as is practicable after entry of a judicial order of removal, the Commissioner shall provide the defendant with written notice of the order of removal, which shall designate the defendant's country of choice for removal and any alternate country pursuant to section 1253(a) of this title.

(4) Denial of judicial order

Denial of a request for a judicial order of removal shall not preclude the Attorney General from initiating removal proceedings pursuant to section 1229a of this title upon the same ground of deportability or upon any other ground of deportability provided under section 1227(a) of this title.

(5) Stipulated judicial order of removal

The United States Attorney, with the concurrence of the Commissioner, may, pursuant to Federal Rule of Criminal Procedure 11, enter into a plea agreement which calls for the alien, who is deportable under this chapter, to waive the right to notice and a hearing under this section, and stipulate to the entry of a judicial order of removal from the United States as a condition of the plea agreement or as a condition of probation or supervised release, or both. The United States district court, in both felony and misdemeanor cases, and a United States magistrate judge in misdemeanor cases, may accept such a stipulation and shall have jurisdiction to enter a judicial order of removal pursuant to the terms of such stipulation.

2. ACLU Checklist – Statutory Requirements for Entry of a Proper “Judicial Order of Removal”

- U.S. Attorney failed to file with the U.S. district court, prior to commencement of the trial or entry of a guilty plea, a “notice of intent to request judicial removal.” 8 U.S.C. § 1228(c)(2)(A).
 - Likely waived if stipulated judicial order of removal.
- U.S. Attorney failed to serve upon the defendant and the Department of Homeland Security a “notice of intent to request judicial removal.” 8 U.S.C. § 1228(c)(2)(A).
 - Likely waived if stipulated judicial order of removal.
- U.S. Attorney failed to obtain the proper “concurrence” of DHS. 8 U.S.C. § 1228(c)(1); 8 U.S.C. § 1228(c)(5).
 - Not waived even if stipulated judicial order of removal.
 - U.S. Attorney failed to file “charge” with the court regarding the alienage of the defendant and identifying the crimes which make him or her deportable under 8 U.S.C. § 1227(a)(2)(A). 8 U.S.C. § 1228(c)(2)(B).
 - U.S. Attorney failed to file the “charge” at least 30 days prior to the date set for sentencing. 8 U.S.C. § 1228(c)(2)(B).
 - DHS did not sign the charging document or a letter referencing the charging document. U.S. Attorney Criminal Resource Manual, *available at* http://www.usdoj.gov/usao/cousa/foia_reading_room/usam/title9/crm01929.htm.
- The crime(s) alleged in the removal charges does not render the defendant “deportable” under 8 USC § 1227(a)(2)(A):
 - Not a crime of moral turpitude
 - No multiple criminal convictions involving moral turpitude
 - Not an aggravated felony
 - Not conviction related to high speed flight from an immigration checkpoint
 - Not a situation where the defendant failed to register as a sex offender
- DHS Assistant Secretary improperly delegated authority to act as “Commissioner” to ICE Special Agents in Charge and Resident Agents In Charge, among others (*still being researched as possible argument*)
- Defendant was not permitted to present evidence that he or she is not removable and is eligible for immigration relief. 8 U.S.C. § 1228(c)(2)(C).

- Defendant established prima facie eligibility for relief, but DHS failed to provide the court with a “recommendation and report” regarding the alien’s eligibility for relief. 8 U.S.C. § 1228(c)(2)(C).
- Defendant was not provided with a reasonable opportunity to examine the evidence against him or her, to present evidence on his or her own behalf, or to cross-examine witnesses presented by the government. 8 U.S.C. § 1228(c)(2)(D)(i).
- The district court considered evidence that was not admissible in regular immigration proceedings in denying relief and finding the defendant removable. 8 U.S.C. § 1228(c)(2)(D)(ii).
- Plea agreement is invalid because it did not comply with Rule 11 procedures – plea was not knowing, voluntary and intelligent. 8 U.S.C. § 1228(c)(5).

E-mail Mónica M. Ramírez at mramirez@aclu.org with questions/comments regarding this draft checklist.

3. Government Documents

U.S. Attorney Criminal Resource Manual, *available at*
http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm01929.htm.

1929 Stipulated Judicial Deportation

Under the Department's interpretation of the statute, stipulated judicial deportation should be sought only if the offense to which the alien defendant will plead guilty causes him to be deportable under 8 U.S.C. § 1251(a)(2)(A). As in stipulated administrative deportation situations, prompt and close coordination with INS is necessary. Thus, prior to engaging in plea negotiations with an alien defendant, prosecutors should contact the designated INS contact for an assessment of the defendant's alienage, deportability, and the possibility he will claim relief from deportation. Sample stipulation language for inclusion in plea agreements is attached at Appendix J 1940.

Even if the alien defendant attempts to waive filing of a "notice of intent to request deportation," such notice should be filed because the court has discretion to exercise or decline jurisdiction over the request. Any plea agreement should be consistent with the guidance provided above for stipulated administrative deportation. Similarly, as previously noted, the Rule 11 inquiry must establish a clear record that the alien concedes alienage and deportability, knowingly waives a hearing, accepts the order of deportation knowing that it will result in his deportation from the United States at the expiration of his sentence, and knowingly waives any right to appeal, reopen, or otherwise challenge the deportation order.

At least 30 days prior to the date set for sentencing, a document charging alienage and identifying the crime that causes the alien to be deportable under 8 U.S.C. § 1251(a)(2)(A) must be filed. The allegations in the charging document must be consistent with Department policy as set forth above in General Concerns. Since the filing of the charge requires "concurrence of the Commissioner," such concurrence should be set forth on the charging document and signed by the INS District Director, or a letter referencing the charging document and signed by the INS District Director or other authorized INS official should be appended. The INS Commissioner's concurrence authority has been delegated to the INS District Director of each INS District Office. Delegation down to the level of Assistant District Directors and to the Officer in Charge, where applicable, is also authorized.

[cited in USAM 9-73.500]



Office of the Attorney General Washington, D.C. 20530

April 28, 1995

MEMORANDUM TO ALL FEDERAL PROSECUTORS

FROM: THE ATTORNEY GENERAL

SUBJECT: DEPORTATION OF CRIMINAL ALIENS

I. INTRODUCTION

This Administration is committed to effecting the deportation of criminal aliens from the United States as expeditiously as possible. You can make a major contribution to this effort by effectively using available prosecutive tools for dealing with alien defendants.

This memorandum provides Federal prosecutors with a general overview and policy guidance with respect to: (1) using stipulated administrative deportation orders in connection with plea agreements; (2) providing for deportation as a condition of supervised release under 18 U.S.C. § 3853(d); and (3) seeking judicial deportation orders pursuant to the recently enacted judicial deportation statute, 8 U.S.C. § 1252a(d).

All deportable criminal aliens should be deported unless extraordinary circumstances exist. Accordingly, absent such circumstances, Federal prosecutors should seek the deportation of deportable alien defendants in whatever manner is deemed most appropriate in a particular case. Exceptions to this policy must have the written approval of the United States Attorney. In cases handled exclusively by one of the Department's litigating divisions, an exception to the policy must have the written approval of the appropriate Assistant Attorney General or Deputy Assistant Attorney General.

II. STIPULATED ADMINISTRATIVE DEPORTATION IN PLEA AGREEMENTS

A stipulated administrative deportation is predicated on the alien's admission of alienage and deportability. It also requires an alien's waiver of the right to an administrative hearing before an immigration judge, an administrative appeal, and judicial review of the final order of deportation. Generally, these admissions and waivers must be accomplished with advice of counsel. Defendant's counsel must file an appearance with the immigration court, and the defendant will be served with and INS "Order to Show Cause" (the charging document in an administrative deportation proceeding). After the alien stipulates to deportation, the stipulation, the Order to Show Cause, and counsel's notice of appearance must be presented by INS to an Immigration Judge, who will then issue the deportation order.

A stipulated order can be based on the conviction for an offense to which the alien defendant will plead guilty, provided it is one of the kinds of offenses that causes the alien to be deportable under 8 U.S.C. § 1251(a).¹ Alternatively, a stipulated administrative deportation order can be based on any of the numerous other grounds for deportation set forth in 8 U.S.C. § 1251(a) which is applicable to the alien defendant (including certain prior state or federal criminal convictions, entry without inspection, or

violation of nonimmigrant status, 8 U.S.C. § 1251(a)(1)(B) and (C)) even if they are entirely unrelated to the offense to which the alien defendant will plead guilty. These provide an effective basis for securing stipulated administrative deportation in connection with plea agreements.

To obtain such stipulations, prosecutors may agree to recommend a one or two level downward departure from the applicable guideline sentencing range in return for the alien's concession of deportability and agreement to accept a final order of deportation. Such downward departure is justified on the basis that it is conduct not contemplated by the guidelines. *See* U.S.S.G. § 5K2.0.

To ensure that an alien defendant is, in fact, deportable and that deportation can, in fact, be accomplished, prompt and close coordination with INS is required. INS has been directed to provide prompt and timely assistance to prosecutors seeking to effect the deportation of criminal aliens. Accordingly, prior to engaging in plea negotiations with an alien defendant, a prosecutor must notify the designated INS contact.² INS will then advise the prosecutor whether the alien is subject to deportation, provide any necessary documents to obtain a stipulated deportation order, and serve an order to show cause on the alien. Prior concurrence of the designated INS contact is required before such a plea agreement is entered.

Plea agreements should, by their terms, contain the alien defendant's acceptance of an administrative order of deportation prior to or at the time of sentencing.³ In addition, the agreement must provide that the defendant knowingly waives the right to any appeal or other challenge to the administrative deportation order, and that the defendant understands that his agreement to accept a deportation order will result in immediate deportation from the United States at the conclusion of any period of incarceration imposed as a result of the offense that is the subject of the plea agreement. Sample stipulations to administrative deportation for inclusion in plea agreements are attached at Appendices B and C.

When administrative deportation is merely a collateral consequence of a guilty plea, the court is not required, pursuant to Rule 11, F.R.Cr.P., to advise a defendant of the possibility of deportation. However, when a defendant stipulates to deportation as part of a plea agreement, deportation becomes a direct consequence of the plea and, as noted above, may be the basis for a recommendation of a downward departure under the sentencing guidelines. Accordingly, it is imperative that when such a plea is entered, prosecutors urge the court to engage the defendant in a meaningful plea colloquy to establish a clear record concerning the factual basis for alienage and deportability and that the alien knowingly (1) waives his right to a deportation hearing before an immigration judge, (2) accepts the deportation order and understands that he will be deported from the United States at the conclusion of his incarceration, and (3) waives any and all rights to appeal, reopen, or challenge the deportation order in any way.

In addition, at sentencing, prosecutors also should consider requesting the court to provide for deportation as a condition of supervised release, pursuant to 18 U.S.C. § 3583(d). (See discussion below.) The benefit of this approach is that if the alien subsequently reenters this country after deportation, he would be subject to immediate incarceration for violating the terms of supervised release, in addition to being subject to another criminal prosecution for reentry after deportation.

III. DEPORTATION AS A CONDITION OF SUPERVISED RELEASE

A. Introduction

Where an alien defendant is unwilling to stipulate to deportation, and thus is not the beneficiary of any plea agreement, a provision of the sentencing Reform Act may be used in certain circumstances to

effect the defendant's deportation. Under 18 U.S.C. § 3583(d), a sentencing court has the authority to provide for the deportation of an alien defendant as a condition of supervised release. In relevant part, the statute provides that,

(i)f an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.⁴

B. Background

Two courts of appeals have arrived at conflicting interpretations of this provision. In *United States v. Sanchez*, 923 F.2d 236 (1st Cir. 1991), the court held that section 3583(d) does not authorize a sentencing court to enter a judicial order of deportation, and thus does not deprive an alien defendant of his right to an administrative hearing provided by the Immigration and Nationality Act (INA). Instead, the court held that the statute only permits a district court to order that the alien defendant be delivered to INS for deportation proceedings. See also *United States v. Ramirez*, 948 F.2d 66 (1st Cir. 1991) (Breyer, C.J.). In contrast, the Eleventh circuit held in *United States v. Chukwura*, 5 F.3d 1420 (11th Cir. 1993), *cert. denied*, 115 S. Ct. 102 (1994), that section 3583(d) *does* authorize a district court to order an alien defendant deported as a condition of supervised release without affording the defendant an opportunity for recourse to the administrative procedures set forth in the INA. The decisions in both *Sanchez* and *Chukwura* were consistent with the positions taken by the United States in the respective cases. The petitioner in *Chukwura* noted these inconsistent positions of the United States in the petition for a writ of certiorari that he filed in the United States Supreme Court.

In light of those inconsistent positions, the Solicitor General, in consultation with the Criminal Division, the INS, the Attorney General's Advisory Committee of United States Attorneys, and other components of the Department, undertook a thorough review of the legal issue presented. As a result of that review, the Department concluded that section 3583(d) does not authorize a district court to order an alien defendant deported without recourse to the procedures established by the INA. The Department set forth that new position in its response to *Chukwura's* certiorari petition.

C. Usefulness of the provision

Unlike the First Circuit, however, we do not believe that section 3583(d) relegates a sentencing court to the relatively passive role of merely turning an alien defendant over to INS for deportation proceedings. The statute expressly authorizes a District Court to "provide, as a condition of supervised release," that the alien defendant be deported and remain outside the United States. Although deportation must be accomplished under the established procedures of the INA, it remains part of a judicial order that an alien defendant violates at his peril.

Viewed in this light, section 3583(d) can be used as an effective tool in obtaining the removal of criminal aliens. Indeed, a condition of supervised release requiring a defendant to be deported and to remain outside the United States has several important consequences:

1. An alien defendant subject to such an order violates a condition of his supervised release unless, at the end of his period of incarceration, he is under a final order of deportation and is ready for deportation. If the alien defendant resists or delays deportation at the end of the incarceration period, he may be subject to reincarceration or modification of the conditions of his supervised release.
2. An alien defendant subject to a Section 3583(d) order who is deported and then returns to

the United States violates a condition of his supervised release and is subject to reincarceration, pursuant to 18 U.S.C. § 3583(e)(3). This consequence should provide a deterrent against subsequent illegal entry and will also save prosecutorial resources by eliminating the need for a separate prosecution for reentry after deportation.

3. Delays in the immigration process will be reduced if, in light of the incentives provided by section 3583(d), criminal aliens consent to administrative deportation rather than remain in jail to contest deportation.

D. Procedures

To make effective use of section 3583(d), Federal prosecutors should ensure that probation officers have sufficient information to include in presentence reports: (1) a statement of the reasons why a particular alien defendant is deportable and (2) a recommendation that the sentencing court provide as a condition of supervised release that the defendant be deported, and remain outside the United States. When the presentence investigation report does not contain such a recommendation, the prosecutor should file and/or make such objections as are necessary in order to preserve the issue for sentencing and possible appeal. At sentencing, the prosecutor should recommend directly to the district court that deportation be a condition of supervised release.

A Federal prosecutor prosecuting any alien should inform INS District Counselor the designated INS contact as soon as possible after the defendant is indicted or charged. Timely coordination with INS will allow INS to provide information to the probation officer on the deportability of the defendant, and to complete deportation proceedings against deportable federal inmates while they are serving their sentences.

There may be cases in which, through no fault of the alien, a final deportation order has not been entered by the time the alien's term of imprisonment ends and his period of supervised release is scheduled to begin. In other cases, an alien prisoner may obtain relief from deportation prior to the beginning of his period of supervised release. In these situations, Federal prosecutors generally should consent to a modification of the terms of supervised release, after consultation with INS District Counsel. INS, however, may choose to detain an alien who is still subject to deportation.

E. The Situation in the Eleventh Circuit

Because the Eleventh circuit took a different view of section 3583(d) in *Chukwura*, and because the Supreme Court denied review, district courts within the circuit are not barred by circuit law from ordering deportation as a condition of supervised release, independent of the Attorney General's authority under the INA. Because *Chukwura* does not *require* imposition of such an order, however, the question will arise only when a district court provides for deportation as a condition of supervised release and further seeks, *sua sponte*, to order deportation without regard to the Attorney General's invocation of procedures under the INA. In light of the Department's position, prosecutors in United States Attorney's Offices in the Eleventh circuit should not recommend --and indeed should oppose --a sentencing court's entering of an order providing for deportation as a condition of supervised release, to the extent the court's order would itself require that the alien be deported.

IV. JUDICIAL DEPORTATION

A. Statutory provisions

On October 25, 1994, the President signed into law the Immigration and Nationality Technical

Corrections Act of 1994 ("Act"). The Act contains a new judicial deportation provision, to be codified at 8 U.S.C. § 1252a(d). section 1252a(d) (1), provides that a United States District Court can enter a judicial order of deportation at the time of sentencing against an alien whose criminal conviction causes such alien to be deportable under 8 U.S.C. § 1251(a)(2)(A),⁵ if such an order has been requested by the United States Attorney with the concurrence of the Commissioner of INS.

To utilize 8 U.S.C § 1252a(d)(2), the United States Attorney must, prior to commencement of trial or entry of a guilty plea, file with the district court and serve upon the defendant and INS a notice of intent to request judicial deportation. A sample notice of intent is attached at Appendix E. In addition, at least 30 day prior to the date set for sentencing, the United States Attorney must file a charge containing factual allegations regarding the alienage of the defendant and identifying the crime or crimes which make the defendant deportable under 8 U.S.C. § 1251(a)(2)(A). This document requires the concurrence of INS. Sample charging documents are attached at Appendices F, G, and H.

At sentencing, an alien is entitled to a reasonable opportunity to examine the evidence against him, to present evidence on his own behalf, and to cross-examine witnesses presented by the government. In determining whether to enter a judicial deportation order, the court can only consider evidence that would be admissible in administrative deportation proceedings.⁶ The court may order deportation if the Attorney General demonstrates that the alien is deportable under the INA.⁷

B. Special Considerations

The judicial deportation statute contains ambiguities which could make implementation problematic. The Department will propose corrective legislation as needed.

(1) Authority

The statute does not make clear whether the court's authority to order judicial deportation is limited to the current conviction or convictions which cause the alien defendant to be deportable under 8 U.S.C. 1252a (2) (A), and for which the alien is about to be sentenced, or whether the court can order judicial deportation at sentencing for any federal conviction, if the alien has any prior state or federal conviction which causes the alien to be denortable under § 1252a(2)(A). Because the statutory language refers to sentencing upon a conviction which "causes such alien to be deportable," Federal prosecutors should proceed on the more limited premise that Congress intended to limit judicial deportation authority to those convictions for which the alien is before the court for sentencing.

(2) Appeals of Judicial Deportation Orders

In the absence of any clarifying legislative history, it is unclear whether the appeal procedures in the statute contemplate a unitary or bifurcated appeal. The statute provides that the appeal of a judicial deportation order, or of the denial of such an order, "shall be considered consistent with the requirements described in (8 U.S.C. § 1105a)" relating to the judicial review of administrative deportation orders. Section 1105a, in turn, incorporates the provisions and procedures prescribed by chapter 158 of Title 28, United States Code, relating to the review of orders of federal agencies. Although one might infer that Congress intended to separate the appeal of a judicial deportation order from the alien defendant's criminal appeal, the Department's view is that, just as a forfeiture order that accompanies a criminal conviction and sentencing is reviewed as part of the criminal appeal, appellate review of a judicial deportation order also should be accomplished as part of the related criminal appeal, not as a separate civil appeal.

Since the filing deadlines under 8 U.S.C. § 1105a are significantly longer than the deadline for filing a notice of appeal in a criminal case, we must anticipate that contested judicial deportation proceedings may produce independent notices of appeal. In such situations, prosecutors should, wherever possible, move to consolidate any appeal of a judicial deportation order with the defendant's appeal of his criminal conviction and any other aspect of the sentence.

(3) Res Judicata/Collateral Estoppel

The statute expressly provides that denial of a request for a judicial order of deportation, *without* a decision on the merits, does not preclude administrative deportation proceedings against the alien on the same ground of deportability or any other ground of deportability. However, in the absence of extensive case law on the issue, it is unclear whether an adverse judicial decision, *on the merits*, as to alienage, deportability, or relief from deportation, would preclude further administrative deportation proceedings based on principles of res judicata/collateral estoppel. Because of this uncertainty, it is extremely important that Federal prosecutors consult closely with INS on any judicial deportation case to avoid the possibility of obtaining an adverse judicial ruling that might bar administrative deportation.

C. Implementing Judicial Deportation

(1) General Concerns

In order to maintain a consistent national immigration policy, close questions relating to alienage, deportability, and particularly relief from deportation should be initially decided in administrative proceedings, followed by judicial review, rather than having these issues addressed first in criminal cases. Therefore, in view of the Department's responsibility to administer and enforce immigration laws, and considering the ambiguities in the judicial deportation statute, prosecutors should not seek judicial deportation if the district courts necessarily will become involved in contentious immigration issues. Accordingly, requests for judicial deportation should be made only if the alien defendant does not have lawful permanent residence, and where the offense[s] for which the alien is to be sentenced is:

(A) any "aggravated felony," as defined in 8 U.S.C. § 1101(a)43;⁸ or:

(B) a serious crime of violence that indisputably involves moral turpitude -i.e, voluntary manslaughter, kidnapping, sexual abuse, arson, robbery, burglary, or aggravated assault-committed within five years of entry, but which does not amount to an "aggravated felony," since the anticipated sentence of imprisonment, under the sentencing guidelines, will be more than one year, but less than five years; or

(C) two or more serious crimes of violence that indisputably involve moral turpitude--, voluntary manslaughter, kidnapping, sexual abuse, arson, robbery, burglary, or aggravated assault --not arising out of a single scheme, committed any time after entry, but which do not amount to "aggravated felonies," since the anticipated sentence, under the sentencing guidelines, will be less than five years.

With regard to (B) and (C) above, although 8 U.S.C. § 1251(a)(2) could encompass any "crime involving moral turpitude," it is important that prosecutors not seek judicial deportation in situations where the courts may be required to define the limits of that term. Such determinations are better made in administrative proceedings.

For similar reasons, a judicial order of deportation should not be sought if the alien has any colorable claim for relief from deportation. A request for a judicial order of deportation should

be withdrawn if it appears that a colorable claim for relief from deportation exists. In this regard, you should be aware that an alien aggravated felon without lawful permanent residence (green card) status would generally be ineligible for any form of relief from deportation.

Further, if a federal prosecutor, as part of plea negotiations, agrees not to seek judicial deportation, such plea agreement shall not bar or otherwise affect a pending or future administrative deportation proceeding against the defendant by INS.

(2) Stipulated Judicial Deportation

Under the Department's interpretation of the statute, stipulated judicial deportation should be sought only if the offense to which the alien defendant will plead guilty causes him to be deportable under 8 U.S.C. § 1251(a)(2)(A). As in stipulated administrative deportation situations, prompt and close coordination with INS is necessary. Thus, prior to engaging in plea negotiations with an alien defendant, prosecutors should contact the designated INS contact for an assessment of the defendant's alienage, deportability, and the possibility he will claim relief from deportation. Sample stipulation language for inclusion in plea agreements is attached at Appendix J.

Even if the alien defendant attempts to waive filing of a "notice of intent to request deportation," such notice should be filed because the court has discretion to exercise or decline jurisdiction over the request. Any plea agreement should be consistent with the guidance provided above for stipulated administrative deportation. Similarly, as previously noted, the Rule 11 inquiry must establish a clear record that the alien concedes alienage and deportability, knowingly waives a hearing, accepts the order of deportation knowing that it will result in his deportation from the United States at the expiration of his sentence, and knowingly waives any right to appeal, reopen, or otherwise challenge the deportation order.

At least 30 days prior to the date set for sentencing, a document charging alienage and identifying the crime that causes the alien to be deportable under 8 U.S.C. § 1251(a)(2)(A) must be filed. The allegations in the charging document must be consistent with Department policy as set forth above in *General Concerns*. Since the filing of the charge requires "concurrence of the commissioner," such concurrence should be set forth on the charging document and signed by the INS District Director, or a letter referencing the charging document and signed by the INS District Director or other authorized INS official should be appended.⁹

(3) Contested Judicial Deportation

In contested cases, it will be particularly important to coordinate with INS to ensure that the available evidence will be sufficient to establish alienage and deportability. For example, in view of the res judicata/collateral estoppel implications discussed above, a judicial finding that the government's evidence was insufficient to establish alienage might preclude any further efforts to deport the alien.

The notice of intent to request judicial deportation, as well as the charging document setting forth the Commissioner's concurrence, must be filed in a timely manner, as with stipulated deportations.

For purposes of determining whether to enter a deportation order, the court can only consider evidence that would be admissible in administrative deportation proceedings, where the rules of evidence are traditionally inapplicable. The INA requires only that the evidence in deportation proceedings be "reasonable, substantial, and probative." 8 U.S.C. § 1252(b)(4)

Essentially, the evidence in a deportation hearing must have probative value and be consistent with a fair hearing. For example, under immigration law, the INS administrative record pertaining to the alien

is admissible to establish alienage and immigration status. *See generally Gordon and Mailman, Immigration Law and Procedure*, § 72.04. The same rules should apply in judicial deportation proceedings. Under the statute, the alien is entitled to a reasonable opportunity to examine the evidence, to present evidence in his or her own behalf, and to cross-examine witnesses presented by the government. Prosecutors should seek the assistance of INS District Counsel if substantive issues of immigration law arise, or if there are issues about the admissibility of evidence at deportation proceedings.

The statute provides that the court may order the alien deported if the Attorney General demonstrates that the alien is deportable under the INA. With regard to the burden of proof in deportation hearings, the Supreme Court has held that "no deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true." *Woodby v. INS*, 385 U.S. 276 (1976). The same standard has been incorporated into INS regulations. 8 C.F.R. § 242.14.

As noted earlier, either party may appeal a judicial order of deportation or a denial of such an order to the court of appeals for the circuit in which the district court is located. Due to the above-noted ambiguity relating to the appeal procedures in the statute, the Department intends to minimize the number of appeals until corrective legislation can be enacted. Accordingly, contested judicial deportation should be pursued only in situations in which there is compelling evidence of alienage and deportability, and where the alien has no colorable claim of relief from deportation.

Finally, in connection with any judicial deportation proceeding, prosecutors may also request the court to provide for deportation as a condition of supervised release, pursuant to 18 U.S.C. § 3583(d). As noted above, such an alien who reenters after deportation would be subject to immediate incarceration for violating the terms of supervised release in addition to prosecution for reentry after deportation.

1 Typically, these would include certain crimes involving moral turpitude, 8 U.S.C. § 1251(a)(2)(A)(i) and (ii), or any aggravated felony, 8 U.S.C. § 1251(a)(2)(A)(iii). In addition, a plea to certain offenses relating to controlled substances, firearms, document fraud, and national security would cause an alien to be deportable. 8 U.S.C. § 1251(a)(2), (3) and (4).

2 A list of designated INS contacts is attached at Appendix A.

3 If deportability will be based on the conviction to which the alien will plead guilty, the alien must accept the deportation order at the time of sentencing. However, if deportability will be based on independent grounds, such as entry without inspection, the deportation order can be obtained prior to sentencing. In any event, the deportation order will not be executed until after sentencing and the service of any term of incarceration that is imposed.

4 Unlike a judicial order of deportation (see section IV *infra*) which may be entered only if a defendant is deportable based on certain criminal convictions, 8 U.S.C. § 1251(a)(2)(A), the court may provide for deportation as a condition of supervised release under section 3583(d) if the defendant is deportable for any reason. The most common grounds of deportation are entry without inspection and violation of nonimmigrant status.

5 Grounds for deportability under 8 U.S.C. § 1251(a)(2)(A), which encompass convictions for certain crimes involving moral turpitude and "aggravated felonies," are discussed at Appendix D.

6 However, the statute provides that nothing in it limits the information the court may receive for purposes of imposing sentence.

7 If the court determines that the defendant has presented substantial evidence to establish prima facie eligibility for relief from deportation, INS must provide the court with a report regarding the alien's eligibility for relief, 8 U.S.C. § 1252a(d)(2)(C). A more detailed discussion of the available relief from deportation is provided at Appendix I.

8 In addition to the judicial deportation procedure, section 130004 of the Violent Crime Control and Law Enforcement Act of 1994 creates expedited *administrative* procedures for the deportation of an alien who is not lawfully admitted for permanent residence, who has committed an aggravated felony, and who is not eligible for relief from deportation. Although this expedited administrative procedure provides the alien with a number of procedural protections, it dispenses with the need for an administrative hearing before an immigration judge. Regulations implementing this provision will issued soon.

9 The INS commissioner's concurrence authority has been delegated to the INS District Director of each INS District Office. Delegation down to the level of Assistant District Directors and to the Officer in Charge, where applicable, is also authorized.

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CO 766.9

Subject:

Guidance re: Judicial Orders of Deportation

Date:

FEB 22 1995

To: District Directors
From: Office of the Commissioner

A. Introduction

The Immigration and Nationality Technical Corrections Act of 1994 ("the Act") amends section 242A of the Immigration and Nationality Act (INA) by adding a new subsection providing for judicial deportation at the request of the United States Attorney [Attachment 1]. This memorandum describes the salient provisions of the Act and the procedures to be followed by Immigration and Naturalization Service (INS) field offices where judicial deportation procedures under the Act are contemplated.

Under this provision, United States District Court judges have jurisdiction to enter a judicial order of deportation at the time of sentencing against an alien whose criminal conviction causes such alien to be deportable under section 241(a)(2)(A) of the INA as -

- (1) an alien convicted of one crime involving moral turpitude (CMT) committed within 5 years of entry and for which such alien is sentenced to confinement in a prison or correctional institution for 1 year or longer;
- (2) an alien convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial; or
- (3) an alien convicted of an aggravated felony at any time after entry.

The court may order the deportation only if the order has been requested by the United States Attorney with the concurrence of the INS Commissioner and then, only if the court chooses to exercise such jurisdiction.

The Act sets forth the procedures to be followed with respect to judicial deportation. Prior to commencement of trial or entry of a guilty plea, the United States Attorney shall file a notice of

intent to request judicial deportation with the United States district court and serve that notice upon both the defendant and the INS. At least 30 days prior to the date set for sentencing, and with the concurrence of the INS Commissioner, the United States Attorney will then file with the district court a charge containing the factual allegations relating to the alienage of the defendant and identifying the crime or crimes making the defendant deportable under the INA section 241(a)(2)(A).

If the defendant presents substantial evidence establishing prima facie eligibility for relief from deportation, the INS Commissioner shall provide the court with a recommendation and report concerning the defendant's eligibility for relief. [Concurrence with the Notice and preparation of a recommendation and report concerning the defendant's eligibility for relief shall be delegated to the INS District Director]. The court will then either grant or deny the relief sought and may order the defendant deported if the INS demonstrates that the alien is deportable under the Act.

The court's decision may be appealed by either party to the court of appeals for the circuit in which the District is located. The appeal shall be considered consistent with the requirements described in section 106 of the INA. (However, the order of deportation is final and shall be executed at the conclusion of the term of imprisonment in accordance with the terms of the order, where (1) the defendant executes a valid waiver of appeal of the conviction on which the deportation order is based, (2) the period described in section 106(a)(1) expires, or (3) there is a final dismissal of any appeal from the conviction.) Reversal of the conviction on direct appeal voids the judicial deportation order. As soon as practicable after the entry of a judicial order of deportation, the INS Commissioner shall provide the defendant with written notice of the order, designating the defendant's country of choice for deportation or in accordance with section 243(a) of the INA, or any alternate country designated pursuant to section 243(a) of the INA.

A denial of a request for judicial deportation without a decision on the merits does not preclude the INS from initiating deportation proceedings on the same grounds or on any other appropriate grounds of deportability under the INA.

B. Procedures Relating to Judicial Deportation Orders

1. I hereby delegate my concurrence authority to the District Director of each INS District Office. Delegation down to the level of Assistant District Directors and to the Officer in Charge, where applicable, is also authorized. The concurrence required for judicial deportation shall be in writing and will be incorporated into the U.S. Attorney's Notice of Intent to Request Judicial Deportation (hereinafter, "the Notice"). Blanket concurrences are not authorized. The Assistant United States Attorney (AUSA) encountering a criminal defendant whom he or she believes is amenable to judicial deportation, shall contact the INS District Director's Office within the jurisdiction where the criminal proceedings are pending to determine whether the INS concurs in the recommendation for judicial deportation. A listing of designated Points of Contact issued by the Office of the Executive Associate Commissioner for Field Operations is attached [Attachment 4]. The

INS official responsible for concurrence shall also be responsible for providing assistance to the AUSA in the preparation of the charge which supports the judicial deportation. The responsible official should also ensure that a detainer is lodged in all judicial deportation cases so that the INS receives notification prior to the release of the alien.

2. If the defendant/alien agrees that he or she will be deported pursuant to a judicial deportation order as a result of a plea bargain in the criminal case, then the defendant must complete a "Defendant's Plea Statement in Judicial Deportation Proceeding" form [Attachment 2].

3. If the INS concurs that the criminal conviction will cause the defendant to be deportable under the INA section 241(a)(2)(A), the Notice, Factual Allegations and Charge shall be prepared [Samples of the Notice and different charges of deportability are attached hereto as Attachment 3]. The Notice must be signed by the United States Attorney with the concurrence of the Commissioner. The Notice advises both the district court and the defendant that the Government will request judicial deportation. The factual allegations regarding the defendant's offenses, along with the crime or crimes which make the defendant deportable under section 241(a)(2)(A) of the INA, may be filed concurrently with the Notice but must be filed no later than 30 days prior to the sentencing date, as required by the statute.

4. A copy of the Notice (with the signed concurrence) and charge containing factual allegations in support of deportation shall be forwarded to the appropriate INS Regional Director's Office. Each Regional Director will coordinate with Headquarters as directed to obtain uniform application of the Act, allowing for a nationally coordinated effort.

5. If the defendant contests deportability and the court determines that the defendant has presented substantial evidence to establish prima facie eligibility for relief from deportation, the Commissioner (through her designee, the same official responsible for concurrence with the Notice and preparation of the charge) shall provide the court with a report and recommendation regarding the defendant's eligibility for relief.

6. As soon as is practicable following entry of the judicial deportation order, the concurring official shall provide the defendant with written notice of the order of deportation which shall designate the defendant's country of choice for deportation pursuant to section 243(a) or any alternate country designated in accordance with section 243(a) of the INA.

7. The Act allows judicial deportation requests to be made in those situations where an alien is rendered deportable under section 241(a)(2)(A) of the INA relating to the commission of one or more CIMTs or an aggravated felony. There are many situations where a defendant/alien is entitled to relief from deportation notwithstanding conviction of the pending charge. For the reasons stated below during the initial phases of the program the Service should pursue the least complicated cases, i.e., aggravated felony cases where the alien is not a lawful permanent resident. Exceptions to this policy shall be approved by the Regional Director.

The INS has multiple procedures available which provide for the expeditious removal of criminal aliens. As a result of INA/ACT 90, many Districts already utilize institutional hearing programs allowing for administrative hearings while a defendant is incarcerated for his or her criminal conviction. Some Districts have implemented a stipulated waiver of deportation program. In addition, with the passage of the Violent Crime Control and Law Enforcement Act of 1994, the INS is now working on plans and procedures to implement administrative deportations for aggravated felons ineligible for relief from deportation. The implications of the various avenues for removing criminal aliens require careful study to discern which procedure is most beneficial to the INS in a particular situation. At this time, an administrative hearing before an immigration judge is the preferred procedure for contested deportation proceedings.

As with any new legislation, certain sections (such as the appeal provisions) of the Act present ambiguities that will take time to resolve either through technical amendments to the legislation or through instructions to field offices. As these issues arise, the field office shall notify the appropriate Regional Director who will coordinate with Headquarters so that the issue may be resolved.



Doris Meisner
Commissioner

Attachments