

Frequently Asked Questions: Asylum Seekers and the Expedited Removal Process

Over the last few years there has been an increase in the number of asylum seekers placed in “expedited removal” proceedings. The overwhelming majority of individuals placed in expedited removal are from El Salvador, Guatemala, Honduras, and Mexico. A rise in murders, rape, violence against women, kidnappings, extortion, and other forms of brutality—fueled by political instability, economic insecurity, breakdown of the rule of law, and the dominance of local and transnational gangs—has prompted many people to flee their homes.

U.S. immigration enforcement authorities are not required to use expedited removal. And for many years, the process was only implemented at formal entry points. Since deportation decisions are made by immigration enforcement officers, bypassing court processes, expedited removal presents a number of due process concerns, which have been raised by the bipartisan U.S. Commission on International Religious Freedom and other groups. The use of expedited removal may mean that individuals and families who are eligible for asylum protection in the United States are deported to dangerous and life-threatening circumstances, or unnecessarily subjected to immigration detention.

Below are a number of frequently asked questions about expedited removal.

What is “expedited removal”?

The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 includes a provision allowing immigration enforcement officers—rather than judges—to order the deportation of certain individuals who have been charged with inadmissibility under section 212(a)(6)(c) and/or section 212(a)(7) of the Immigration and Nationality Act (INA) through a process called “expedited removal.” Prior to the enactment of IIRIRA, only an immigration judge could order a person removed from the United States. The Department of Homeland Security (DHS) has expanded its use of expedited removal over the years. However, the Board of Immigration Appeals and DHS agree that immigration officials maintain discretion to refer any individual who could be subject to expedited removal to “regular” removal proceedings before an immigration judge instead.

What are “regular” removal proceedings?

Expedited removal is a summary form of removal (or deportation),¹ which is only authorized in certain specific situations as detailed below. By contrast, the regular removal process, known as a “240 proceeding” or “regular removal proceeding,” involves a removal hearing before an immigration judge. At the hearing, an attorney for the government argues for the deportation of the individual and the individual has the opportunity to make a claim to remain in the United States, based on benefits and protections available under U.S. immigration laws.

¹ With some exceptions, including for asylum seekers, immigrants in general cannot seek a judge’s review of an immigration officer’s expedited removal decision. However, supervisors are required to review immigration officers’ removal decisions before the removal order is issued. U.S. General Accounting Office, *Illegal Aliens: Changes in the Process of Denying Aliens Entry Into the United States*, March 1998.

Who is potentially subject to expedited removal?

IIRIRA permits the application of expedited removal proceedings against two categories of immigrants who have been charged under section 212(a)(6)(c) and/or 212(a)(7) of the INA, relating to misrepresentation and lack of documentation.

- First, the legislation authorized the Immigration and Naturalization Service (INS) to use expedited removal against “arriving aliens.” An arriving alien is defined by regulation as “an applicant for admission coming or attempting to come into the United States at a port of entry” (such as an airport or official land border crossing).²
- Second, IIRIRA permits the secretary of homeland security to designate, in his or her “sole and unreviewable discretion,” additional categories of individuals (in addition to “arriving aliens” at ports of entry) against whom the expedited removal provisions may be applied.³

Is the government required to use expedited removal proceedings in particular circumstances?

No. The Board of Immigration Appeals (BIA) and DHS agree that the use of expedited removal is in the discretion of DHS.⁴ In *Matter of E-R-M-*, DHS argued before the BIA that it had discretion to place an arriving alien in section 240 removal proceedings rather than invoking expedited removal. The BIA agreed, finding that “Congress’ use of the term ‘shall’ in section 235(b)(1)(A)(i) of the Act does not carry its ordinary meaning, namely, that an act is mandatory. It is common for the term ‘shall’ to mean ‘may’ when it relates to decisions made by the Executive Branch of Government on whether to charge an individual and on what charges to bring.”⁵

DHS may also limit the use of expedited removal as a matter of policy. For example, on August 21, 1997, several months after implementation of expedited removal began at ports of entry, the INS issued a memorandum stating that unaccompanied minors generally would not be placed into expedited removal proceedings. Since that time, it has been the practice of immigration enforcement authorities to charge an arriving unaccompanied child with a ground of inadmissibility for which expedited removal is not required and place the child into 240 proceedings instead.⁶

Finally, if an immigration officer charges an individual with inadmissibility under *other* sections of the INA (in addition to or instead of 212(a)(6)(c) or 212(a)(7)), the individual must be placed in 240 removal proceedings. As described in the section on expedited removal of the U.S. Customs and Border Patrol Inspector’s Field Manual:

“Officers may, but need not, charge more than one ground of inadmissibility. If 212(a)(6)(c) and/or 212(a)(7) are the only charges lodged, the alien must be processed under expedited removal and may not be referred for an immigration judge hearing under section 240. If additional charges are lodged, the alien must be referred for a section 240 hearing, but this should only occur in extraordinary circumstances. Generally speaking, if an alien is inadmissible under 212(a)(6)(c) and/or 212(a)(7), additional charges should not be brought and the alien should be placed in expedited removal. There will be very few instances where it will be advantageous to the government to lodge additional charges and institute section 240 removal proceedings if a solid expedited removal proceeding can be concluded.”⁷

² An “arriving alien” is defined by federal regulation as “an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport.” 8 CFR § 1.1(q). See also, U.S. Office of Inspector General, *Streamline: Measuring its Effect on Illegal Border Crossing*, May 25, 2015, p. 33 (stating that IIRIRA “authorizes DHS to quickly remove certain inadmissible aliens from the United States, without a hearing before an immigration court”).

³ 8 U.S.C. § 1225(b)(1)(A)(iii).

⁴ *Matter of E-R-M- & L-R-M-*, U.S. Department of Justice, Executive Office for Immigration Review, Board of Immigration Appeals, June 3, 2011.

⁵ *Matter of E-R-M-*.

⁶ See Memorandum from Michael John Garcia and Kate M. Manuel to Multiple Congressional Requesters, “Unaccompanied Alien Children: Current Law Governing Removal From the United States and Selected Legislative Proposals,” July 30, 2014, p. 3 (noting that “immigration authorities would generally charge arriving UACs who lacked proper documentation with a ground of inadmissibility for which expedited removal is *not* required, so that they could be placed in formal removal proceedings”). This practice was later codified into law with passage of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008. 8 U.S.C. § 1232 (a)(5)(D).

⁷ U.S. Customs and Border Protection, Inspector’s Field Manual, February 10, 2006, available at <http://www.aiaa.org/infonet/cbp-inspectors-field-manual>.

How have INS and DHS implemented (and expanded) expedited removal?

The former INS initially implemented expedited removal only at designated ports of entry when the expedited removal provision went into effect on April 1, 1997. For years, the use of expedited removal was limited to formal ports of entry (airports or official land border entry points). During this time, the Border Patrol, which is responsible for securing U.S. borders between ports of entry, was not authorized to use expedited removal.

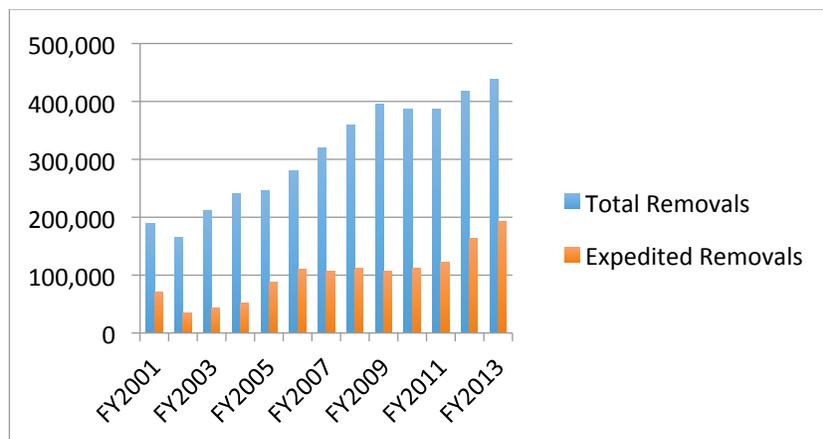
The INS pursued its first, very limited, expansion of the use of expedited removal on November 13, 2002, issuing a notice in the Federal Register providing authority to place individuals in expedited removal who arrived by sea, who had not been admitted or paroled, and who had been present in the U.S. for less than two years.⁸

On August 11, 2004, DHS published a notice authorizing the agency to initiate expedited removal proceedings against individuals encountered at land borders between ports of entry or within 100 miles of a U.S. land border who cannot establish physical presence in the United States during the 14-day period preceding the encounter.⁹ This marked the first time that Border Patrol officers were authorized to use expedited removal. However, the Federal Register notice clarified that expedited removal would not be applied to all individuals potentially subject to the process between ports of entry. Specifically, it stated:

“We recognize that certain aliens [...] may possess equities that weigh against the use of expedited removal proceedings. Accordingly, in appropriate circumstances and as an exercise of prosecutorial discretion, officers will be able to permit certain aliens described in this notice to return voluntarily, withdraw their application for admission, or to be placed in removal proceedings under section 240 of the Act in lieu of expedited removal proceedings.”¹⁰

In fiscal year 2013, DHS removed a total of 438,421 individuals, of which 193,032 were removed through the expedited removal process, representing 44 percent of total removals.¹¹ By contrast, expedited removals represented 21 percent of all formal removals in 2004, or 51,014 out of 240,665 total removals.¹²

Figure 1: Expedited removals and total removals



Source: U.S. Dept of Homeland Security Office of Immigration Statistics Annual Reports 2010 and 2013

⁸ Department of Justice, “Notice Designating Aliens Subject to Expedited Removal Under §235(b)(1)(A)(iii) of the Immigration and Nationality Act,” 67 *Federal Register* 68923, Nov. 13, 2002.

⁹ Department of Homeland Security, “Designating Aliens for Expedited Removal,” 69 *Federal Register* 48877, Aug. 11, 2004.

¹⁰ Department of Homeland Security, “Designating Aliens for Expedited Removal,” 69 *Federal Register* 48877, Aug. 11, 2004.

¹¹ U.S. Department of Homeland Security Office of Immigration Statistics, Annual Report: Immigration Enforcement Actions: 2013, September 2014. Nationals from El Salvador, Guatemala, Honduras, and Mexico accounted for 98 percent of all expedited removals.

¹² U.S. Department of Homeland Security Office of Immigration Statistics, Annual Report: Immigration Enforcement Actions: 2010, June 2011.

What due process concerns does expedited removal present?

Critics of expedited removal have identified a range of due process and implementation concerns. In a comprehensive report issued in 2005, the bipartisan U.S. Commission on International Religious Freedom (USCIRF) identified a number of serious deficiencies in the implementation of expedited removal, including the failure to effectively follow procedures to identify and safeguard individuals expressing a fear of return. For example, the Commission found that "in 15 percent (12/79) of observed cases when an arriving alien expressed a fear of return to the inspector, the alien was not referred [to a credible fear interview by an asylum officer]." The Commission's overarching recommendation was to not expand expedited removal from a port-of-entry program to a program that covers the entire land and sea border of the United States.

In addition to USCIRF, other organizations have documented a history of errors in the implementation of expedited removal, including wrongful deportations. Critics of expedited removal have also maintained that the process deprives individuals of significant rights and safeguards, including the right to apply for immigration protections for which they may be eligible, such as temporary protected status, special immigrant juvenile status, or benefits available under the Violence Against Women Act. Finally, expedited removal invokes a "mandatory detention" provision, meaning that immigration enforcement authorities will detain immigrants subject to expedited removal until their removal from their United States or, in the case of asylum seekers, for the duration of the credible fear screening process and sometimes for the duration of their asylum case. The Inter-American Commission for Human Rights has called for an end to this practice of mandatory detention, emphasizing that detention should only be used in exceptional cases.¹⁸

What is the credible fear processes?

When an individual who has been subjected to expedited removal indicates an intention to apply for asylum or a fear of persecution and/or torture, the immigration officer must refer that individual for an interview by an asylum officer within U.S. Citizenship and Immigration Services (USCIS), known as a "credible fear interview."¹⁹ In the credible fear interview, the asylum seeker must convince the asylum officer that a "significant possibility" exists that he or she will be able to demonstrate eligibility for asylum. If the asylum seeker receives a positive result from the credible fear interview, she or he will be referred to regular removal proceedings, a process under section 240 of the INA, and may present his or her asylum claim before an immigration judge.²⁰

In fiscal year 2005, USCIS received 4,712 credible fear claims. Since fiscal year 2009, the number of credible fear claims referred to USCIS has increased steadily. According to the USCIS Ombudsman's 2015 Annual Report, the increase in credible fear claims has added to the growing backlog of affirmative asylum cases.²¹

¹⁸ Inter-American Commission on Human Rights, Report on Immigration Detention in the United States: Detention and Due Process, December 2010.

¹⁹ The number of people in the expedited removal process who are referred for a credible fear interview is generally small. For example, in fiscal year 2003, three percent of individuals subject to expedited removal were referred for a credible fear interview. Siskin and Wassem, 2005.

²⁰ Siskin and Wassem, 2005.

²¹ Citizenship and Immigration Services Ombudsman, Annual Report 2015, June 26, 2015.