

submit a response to such additional evidence, such response must be filed with the Service within 10 calendar days of service of the additional evidence (or 13 calendar days if service is by mail). If the deciding Service officer finds, after considering all additional evidence, that deportability is established by clear, convincing, and unequivocal evidence in the record of proceeding, the deciding Service officer shall issue and cause to be served upon the alien a Final Administrative Removal Order that states the reasons for the decision of deportability.

(iii) *Conversion to proceedings under section 240 of the Act.* If the deciding Service officer finds that the alien is not amenable to removal under section 238 of the Act, the deciding Service officer shall terminate the expedited proceedings under section 238 of the Act and shall, where appropriate, cause to be issued a notice to appear for the purpose of initiating removal proceedings before an immigration judge under section 240 of the Act.

(3) *Termination of proceedings by deciding Service officer.* Only the deciding Service officer may terminate proceedings under section 238 of the Act, in accordance with this section.

(e) *Proceedings commenced under section 240 of the Act.* In any proceeding commenced under section 240 of the Act which is based on deportability under section 237 of the Act, if it appears that the respondent alien is subject to removal pursuant to section 238 of the Act, the immigration judge may, upon the Service's request, terminate the case and, upon such termination, the Service may commence administrative proceedings under section 238 of the Act. However, in the absence of any such request, the immigration judge shall complete the proceeding commenced under section 240 of the Act.

(f) *Executing final removal order of deciding Service officer—(1) Time of execution.* Upon the issuance of a Final Administrative Removal Order, the Service shall issue a Warrant of Removal in accordance with §241.2 of this chapter; such warrant shall be executed no sooner than 14 calendar days after the date the Final Administrative Removal Order is issued, unless the alien know-

ingly, voluntarily, and in writing waives the 14-day period.

(2) *Country to which alien is to be removed.* The deciding Service officer shall designate the country of removal in the manner prescribed by section 241 of the Act.

(3) *Withholding of removal.* If the alien has requested withholding of removal under §208.16 of this chapter, the deciding officer shall, upon issuance of a Final Administrative Removal Order, immediately refer the alien's case to an asylum officer to conduct a reasonable fear determination in accordance with §208.31 of this chapter.

(g) *Arrest and detention.* At the time of issuance of a Notice of Intent or at any time thereafter and up to the time the alien becomes the subject of a Warrant of Removal, the alien may be arrested and taken into custody under the authority of a Warrant of Arrest issued by an officer listed in §287.5(e)(2) of this chapter. The decision of the Service concerning custody or bond shall not be administratively appealable during proceedings initiated under section 238 of the Act and this part.

(h) *Record of proceeding.* The Service shall maintain a record of proceeding for judicial review of the Final Administrative Removal Order sought by any petition for review. The record of proceeding shall include, but not necessarily be limited to: the charging document (Notice of Intent); the Final Administrative Removal Order (including any supplemental memorandum of decision); the alien's response, if any; all evidence in support of the charge; and any admissible evidence, briefs, or documents submitted by either party respecting deportability. The executed duplicate of the Notice of Intent in the record of proceedings shall be retained as evidence that the individual upon whom the notice for the proceeding was served was, in fact, the alien named in the notice.

[62 FR 10365, Mar. 6, 1997, as amended at 64 FR 8494, Feb. 19, 1999; 67 FR 39258, June 7, 2002]

PART 239—INITIATION OF REMOVAL PROCEEDINGS

Sec.
239.1 Notice to appear.

§ 239.1

239.2 Cancellation of notice to appear.

239.3 Effect of filing notice to appear.

AUTHORITY: 8 U.S.C. 1103, 1221, 1229; Homeland Security Act of 2002, Public Law 107-296; 8 CFR part 2.

SOURCE: 62 FR 10366, Mar. 6, 1997, unless otherwise noted.

§ 239.1 Notice to appear.

(a) *Issuance of notice to appear.* Any immigration officer, or supervisor thereof, performing an inspection of an arriving alien at a port-of-entry may issue a notice to appear to such alien. In addition, the following officers, or officers acting in such capacity, may issue a notice to appear:

- (1) District directors (except foreign);
- (2) Deputy district directors (except foreign);
- (3) Chief patrol agents;
- (4) Deputy chief patrol agents;
- (5) Assistant chief patrol agents;
- (6) Patrol agents in charge;
- (7) Assistant patrol agents in charge;
- (8) Field operations supervisors;
- (9) Special operations supervisors;
- (10) Supervisory border patrol agents;
- (11) Service center directors;
- (12) Deputy service center directors;
- (13) Assistant service center directors for examinations;
- (14) Supervisory district adjudications officers;
- (15) Supervisory asylum officers;
- (16) Officers in charge (except foreign);
- (17) Assistant officers in charge (except foreign);
- (18) Special agents in charge;
- (19) Deputy special agents in charge;
- (20) Associate special agents in charge;
- (21) Assistant special agents in charge;
- (22) Resident agents in charge;
- (23) Supervisory special agents;
- (24) Directors of investigations;
- (25) District directors for interior enforcement;
- (26) Deputy or assistant district directors for interior enforcement;
- (27) Director of detention and removal;
- (28) Field office directors;
- (29) Deputy field office directors;
- (30) Supervisory deportation officers;
- (31) Supervisory detention and deportation officers;

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(32) Directors or officers in charge of detention facilities;

- (33) Directors of field operations;
- (34) Deputy or assistant directors of field operations;
- (35) District field officers;
- (36) Port directors;
- (37) Deputy port directors;
- (38) Supervisory service center adjudications officers;
- (39) Unit Chief, Law Enforcement Support Center;
- (40) Section Chief, Law Enforcement Support Center; or
- (41) Other officers or employees of the Department or of the United States who are delegated the authority as provided by 8 CFR 2.1 to issue notices to appear.

(b) *Service of notice to appear.* Service of the notice to appear shall be in accordance with section 239 of the Act.

[68 FR 35275, June 13, 2003, as amended at 70 FR 67089, Nov. 4, 2005]

§ 239.2 Cancellation of notice to appear.

(a) Any officer authorized by § 239.1(a) to issue a notice to appear may cancel such notice prior to jurisdiction vesting with the immigration judge pursuant to § 3.14 of this chapter provided the officer is satisfied that:

- (1) The respondent is a national of the United States;
- (2) The respondent is not deportable or inadmissible under immigration laws;
- (3) The respondent is deceased;
- (4) The respondent is not in the United States;
- (5) The notice was issued for the respondent's failure to file a timely petition as required by section 216(c) of the Act, but his or her failure to file a timely petition was excused in accordance with section 216(d)(2)(B) of the Act;
- (6) The notice to appear was inadvertently issued, or
- (7) Circumstances of the case have changed after the notice to appear was issued to such an extent that continuation is no longer in the best interest of the government.

(b) A notice to appear issued pursuant to section 235(b)(3) of the Act may be canceled under provisions in paragraphs (a)(2) and (a)(6) of this section