Office of State, Local and Tribal Coordination
U.S. Department of Homeland Security

U.S. Immigration and Customs Enforcement

Announcement

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ICE issues "Prosecutor Tool Kit" as resource to prosecutors

WASHINGTON – U.S. Immigration and Customs Enforcement (ICE) is pleased to share its new "Prosecutor Tool Kit" — a resource aimed at making it easier for prosecutors to navigate through immigration issues when dealing with criminal cases.

The Prosecutor Tool Kit represents the first comprehensive resource developed by ICE for the justice community. Never before has ICE prosecutorial process, procedure, and practice been outlined in such a meaningful way, and consolidated into a single package.

"ICE wants prosecutors to have all the necessary information at their finger tips to help understand how the different moving parts of the immigration system may affect their cases. The Tool Kit will provide guidance and assistance to attorneys where important witnesses, victims, or defendants may face removal because they are illegally present in the United States," said ICE's Assistant Deputy Director Beth Gibson.

"The Prosecutor Tool Kit is a great resource for prosecutors faced with immigration issues. It explains immigration and visa terminology and each step of the immigration procedure very succinctly," said the National District Attorneys Association President James M. Reams. "It is organized in a way that will make sense to prosecutors. The Prosecutor Tool Kit will make it much easier for prosecutors to respond effectively to immigration issues raised at any time during their criminal cases."

Prosecutor Tool Kit highlights:

- *Accessibility*: The Tool Kit will be posted to ICE's website (ICE.gov) in a prominent location available for downloading and as a web-enabled hyperlinked resource guide.
- *Ease of Use*: The Tool Kit offers a clear outline of topics allowing users to key word search or link directly to a topic.
- *Frequently Asked Questions*: FAQs were developed to create an outline of the tool kit; forming a topical and sensible approach to prosecutor questions.
- *ICE Contact Information*: For each topic, the tool kit provides the contact reference or office for further inquiries.



Tool Kit for Prosecutors

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U.S. Immigration
and Customs
Enforcement

FOREWORD

U.S. Immigration and Customs Enforcement (ICE) is the investigative agency in the Department of Homeland Security (DHS). ICE's primary mission is to promote homeland security and public safety through the criminal and civil enforcement of federal laws governing border control, customs, trade, and immigration. The agency has an annual budget of more than $5.7 billion dollars, primarily devoted to its two principal operating components - Homeland Security Investigations (HSI) and Enforcement and Removal Operations (ERO).

Fostering and sustaining relationships with our external stakeholders, including federal and state prosecutors, is a pivotal priority of ICE. ICE, through the Office of State, Local and Tribal Coordination (OSLTC), builds and improves partnership activities with multiple stakeholders – including state, local and tribal governments, law enforcement agencies/groups, local and state prosecutors, and non-governmental organizations. The building of constructive relationships with our stakeholders fosters community awareness and support for the agency's mission and enhances our understanding of stakeholder issues related to our enforcement operations.

ICE recognizes that there may be situations where our federal and state prosecutor partners may benefit from having a foreign national remain in the United States for a period of time to assist with an ongoing investigation or to serve as a witness. Additionally, ICE understands that there may be situations when a prosecutor requires the presence of an alien witness or victim and that individual currently resides outside of the United States.

To demonstrate our commitment to strengthening coordination with our state and local prosecutor partners, ICE developed this Tool Kit. This Tool Kit is aimed at helping prosecutors navigate situations where important witnesses, victims, or defendants may face removal because they are illegally present in the United States. ICE is committed to supporting the efforts of prosecutors to bring criminals to justice. Our prosecutor partners are encouraged to engage ICE officers, special agents, and attorneys and seek their assistance and expertise.

However, ICE also seeks the support and assistance of federal and state prosecutors to ensure that foreign nationals who engage in criminal conduct are expeditiously removed from the United States. In support of that effort, this Tool Kit includes guidance for obtaining stipulated orders of removal, thereby eliminating the need for protracted immigration court proceedings.

Finally, this Tool Kit is intended to highlight the immigration consequences of a criminal conviction. However, our prosecution partners should be cautioned that this is a complex area of immigration law, and this document is only intended to provide a general overview. ICE looks forward to providing you our continued support as we join together to protect our nation from all threats.

No Private Right Statement

The Tool Kit for Prosecutors is not intended to, and does not create any rights, privileges, or benefits, substantive or procedural, enforceable by any party against the United States; its departments, agencies, or other entities; its officers or employees; contractors or any other person.

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A. What options are available to a prosecutor who needs to keep an alien witness, victim, or defendant in the United States for a criminal trial if that individual is not legally authorized to remain in the United States?

1. Prosecutorial Discretion Tools:

Prosecutorial discretion tools are often used when it is necessary to secure the witness, victim, or defendant's presence for the purpose of testifying at a criminal trial. These tools are not intended to provide for the foreign national's long- term presence in the United States.

In the course of their duties, ICE officers, attorneys, and HSI special agents encounter a variety of situations in which they may be called upon to make discretionary decisions. The legal requirements and the available scope of discretion will vary based upon the unique facts and circumstances of a specific case. Prosecutorial discretion is a decision that a law enforcement agency (LEA) takes regarding whether to enforce the law against someone. Discretion may be utilized at any point in the removal process and may involve a decision not to arrest, charge, prosecute, or remove an alien.

Decisions to exercise prosecutorial discretion are typically not subject to review or reversal by the courts, except in extremely narrow circumstances, which makes it a powerful tool that must be used judiciously. Discretionary decisions should implement ICE priorities and conserve limited agency resources. ICE officers, special agents, and attorneys are expected to exercise discretion in a judicious manner at all stages of the enforcement process—from planning investigations to executing final orders of removal—subject to their chains of command and to the particular responsibilities and authorities applicable to their position. To avoid the arbitrary application of enforcement tools, officers, special agents, and attorneys must be able to articulate the reasoning behind their decisions to refrain from initiating removal actions or utilizing other enforcement tools.

Below is an overview of the various types of prosecutorial discretionary tools that law enforcement officers and prosecutors may find useful when encountering cases involving foreign nationals. These include deferred action and administrative stay of removal. In addition, ICE has other tools to release an alien from custody, such as an order of supervision and an order of recognizance.

a. Deferred Action:

Deferred Action (DA) is not a specific form of relief but rather a term used to describe the decision-making authority of ICE to allocate resources in the best possible manner to focus on high priority cases, potentially deferring action on cases with a lower priority. There is no statutory definition of DA, but federal regulations provide a description: "[D]eferred action [is] "an act of administrative convenience to the government which gives some cases lower priority...." See 8 C.F.R. § 274a.12(c)(14). There are two distinct types of DA requests: (i) those seeking DA based on sympathetic facts and a low-enforcement priority, and (ii) those seeking DA based on his/her status as an important witness in an investigation or prosecution. Basically, DA means the government has decided that it is not in its interest to arrest, charge, prosecute or remove an individual at that time for a specific, articulable reason.

ICE gives LEA requests to exercise DA the utmost consideration as part of its commitment to assist its law enforcement partners and in accordance with its statutory obligation to cooperate with the Attorney General in protecting witnesses in the Witness Security Program., as outlined in 18 U.S.C. § 3521.

Deferred Action (DA): Frequently Asked Questions:
How will I know if an alien witness is eligible for DA?
Does DA confer any immigration status upon an alien?
What is the process to obtain DA?
Does DA expire?
Is an alien who is granted DA permitted to work in the United States?

Q: How will I know if an alien witness is eligible for DA?
A: ICE considers DA requests based on a variety of factors and balances those interests against its core mission to remove persons illegally present in the United States. ICE's decision to grant DA is purely discretionary. However, the factors generally considered include: the criminal history of the alien; national security implications; the likelihood of removal; the presence of sympathetic factors favoring the alien's case; and/or whether a law enforcement agency (LEA) desires the person's presence for an ongoing investigation or prosecution. ICE reviews every LEA request for DA, but the ultimate determination is case specific.

Q: Does DA confer any immigration status upon an alien?
A: No. DA does not confer any immigration status upon an alien, nor is it in any way a reflection of an alien's immigration status. DA does not operate to cure any defect in status under any section of the Immigration and Nationality Act (INA) for any purpose. Since DA is not an immigration status, no alien has the right to obtain DA. Further, the fact that an alien has been granted DA does not preclude ICE from commencing removal proceedings at any time against him/her.

Q: What is the process to obtain DA?
A: To request DA for aliens in ICE custody, the sponsoring law enforcement agency (LEA) (e.g., DEA, FBI, Secret Service, state and local law enforcement, etc.) typically will initiate the process by contacting the local ICE Enforcement and Removal Operations (ERO) Field Office Director (FOD) office. If the alien is not in custody, the request may be made to either the FOD or to the appropriate Homeland Security Investigation's (HSI) Special Agent in Charge (SAC) office. The LEA's written request and accompanying risk and threat assessment should include the alien's name, place of birth, date of birth, and alien number (A-number), as well as relevant details about the alien's immigration status, general background on the investigation, and why the LEA is requesting DA.

If DA is granted and the alien is in detention, the sponsoring LEA will be notified that the alien may be taken into their custody. However, the requesting LEA must arrange for the alien's transportation to any new facility. Also, LEAs are cautioned that if they fail to take custody of an alien granted DA within the agreed upon period, ICE may cancel the grant of DA and expeditiously make efforts to remove the individual from the United

States. Once the alien is in the custody of the sponsoring LEA, it is the responsibility of that LEA to monitor the alien and make sure that he/she abides by all the terms set forth in the DA and to notify ICE of any violations that have occurred.

Procedures may vary depending on the alien's immigration status, (e.g., whether the alien is subject to mandatory detention, is in ERO or U.S. Marshals Service custody, has a final order of removal, or has been approved for full acceptance into the Department of Justice Witness Security Program). ICE will review the facts and merits of each case before granting any request from another LEA.

Q: Does DA expire?

A: DA is granted for a specific period of time that ICE determines to be appropriate. Prior to the DA expiration date, the requesting law enforcement agency should submit an application for renewal. It should be noted that DA may be terminated at any time.

Q: Is an alien who is granted DA permitted to work in the United States?

A: An alien granted DA may be granted employment authorization. 8 C.F.R. § 274a.12(c)(14). Individuals who are eligible for employment authorization may file a Form I-765, *Application for Employment Authorization*, to request an Employment Authorization Document. Please note ICE does not adjudicate these employment authorization applications; employment authorization applications are submitted to and adjudicated by United States Citizenship and Immigration Services (USCIS), a separate component of the Department of Homeland Security.

Contact information:
ICE Field Offices: http://www.ice.gov/contact/ero/
ICE Special Agent in Charge Offices: http://www.ice.gov/contact/inv/
ICE Offices of Chief Counsel: http://www.ice.gov/contact/opla/

b. Administrative Stay of Removal:

Administrative Stay of Removal (ASR) is a discretionary tool that permits ICE to temporarily delay the removal of an alien. Any alien, or law enforcement agency (LEA) on behalf of an alien, who is the subject of a final order of removal may request ASR from ICE. The request must be filed on ICE Form I-246, *Application for a Stay of Deportation or Removal*, with the Field Office Director (FOD) who has jurisdiction over the place where the alien resides. ASR may be granted after the completion of removal proceedings up to the moment of physical removal. Since ASR is an administrative decision to temporarily suspend removal of an alien, it is not considered an immigration benefit or waiver; rather, it only bestows temporary relief from removal. Furthermore, the decision of the FOD is final and may not be appealed administratively. Neither the filing of the application request nor the failure to receive notice of disposition of the request shall delay removal or relieve the alien from strict compliance with any outstanding notice to surrender for removal.

When deciding whether ASR may be appropriate for your case, it is important to note that there are two forms of ASR—one for admitted aliens ordered removed (aliens who actually presented documents to an immigration officer when they came to the United States) and one for

inadmissible aliens ordered removed (aliens who were not approved for legal admission at the port of entry or aliens who entered the United States without going to a port of entry). As discussed below, the availability of ASR as a temporary relief from removal will ultimately depend on which category of removal is involved. If the final order of removal is based on a ground of removability, the FOD has wide discretion to grant a stay of removal. In this instance, ASR is typically granted in a case involving compelling humanitarian factors or a case where a stay is deemed to be in the best interest of the government. The FOD may grant an ASR upon his/her own initiative without the alien filing an application. Moreover, once granted, the ASR may be for such a period of time and under such conditions as necessary to the individual case. However, the detention provisions of INA § 241, 8 U.S.C. § 1231, will apply to an alien who receives an ASR.

Alternatively, if the final order of removal is based on a ground of inadmissibility, section 241(c)(2) of the Immigration and Nationality Act (INA) authorizes ICE to stay removal of an arriving alien in two limited circumstances: (i) where immediate removal is not practicable or proper, or (ii) where the alien is needed to testify in the prosecution of a case involving a violation of federal or state law. INA § 241(c)(2)(A), 8 U.S.C. § 1231(c)(2)(A). FODs and other designated ICE officials have discretion to grant ASRs to arriving aliens based on the parole factors described in 8 C.F.R. § 212.5, as well as the provisions of section 241(c)(2) of the INA. Note, however, that aliens granted ASR because their removal is not immediately practicable or proper are subject to detention during the period of ASR; meanwhile, aliens granted ASR in order to testify in a legal case may be released upon the filing of an approved bond of at least $500, an agreement to appear and testify as needed, and other prescribed conditions. INA §§ 241(c)(2)(B), (C), 8 U.S.C. §§ 1231(c)(2)(B), (C).

Administrative Stay of Removal: Frequently Asked Questions:
How will I know if the alien defendant or witness is a candidate for ASR?
What is the process to obtain ASR?
How soon will my request for an ASR be decided?
Are there any legal bars (convictions) that might make the alien ineligible for ASR?
Are aliens granted ASR eligible for employment authorization?

Q: How will I know if the alien defendant or witness is a candidate for ASR?
A: Virtually any alien under a final order of removal may be a candidate for ASR. To determine if an alien is the subject of a final order of removal, you may query the individual in the National Law Enforcement Telecommunications System using an Immigration Alien Query (IAQ). The ICE Law Enforcement Support Center will respond to your IAQ electronically via an Immigration Alien Response (IAR). The IAR will indicate if the alien is the subject of a final order of removal. Additionally, you may contact your local ICE ERO Office. Prosecutors should note that ASR may not be the most appropriate method for securing the appearance of an alien in ICE custody at a future criminal proceeding or to act as a confidential informant. For assistance with your request, you may contact your local ICE Office of Chief Counsel (OCC) or local ICE ERO Field Office.

Q: What is the process to obtain ASR?

A: As the prosecutor in a criminal matter, if you are aware that an alien, either in ICE custody or at-large, is needed for an upcoming criminal proceeding as a defendant or witness, you may request ASR from the FOD with authority over your area. The request should contain the exact reasons for the request and any date the alien is needed in court. The FOD will determine if the alien is amenable to ASR in consideration of the factors listed in 8 C.F.R. § 212.5 and INA § 241(c)(2), 8 U.S.C. § 1231(c)(2). The decision of the FOD is final and may not be appealed administratively. Neither the filing of the application request nor the failure to receive notice of disposition of the request shall delay removal or relieve the alien from strict compliance with any outstanding notice to surrender for removal.

Q: How soon will my request for ASR be decided?

A. Generally, all requests that ICE receives are responded to as quickly as possible. If an ICE detainee is needed for a criminal proceeding on a specific date, you should be sure to include this information in your request so that it may be decided in a timely manner.

Q: Are there any legal bars (convictions) that might make the alien ineligible for ASR?

A: While an alien's convictions may be taken into account in determining whether to grant ASR, the statute does not specify any legal bars (such as criminal convictions) that restrict an alien's eligibility for ASR.

Q: Are aliens granted ASR eligible for employment authorization?

A: No. There is no statutory or regulatory authority to grant employment authorization to an alien based on a grant of a stay of deportation or removal.

Contact information:
ICE Field Offices: http://www.ice.gov/contact/ero/
ICE Special Agent in Charge Offices: http://www.ice.gov/contact/inv/
ICE Offices of Chief Counsel: http://www.ice.gov/contact/opla/

2. Procedures for release/transfer from ICE custody to aid state prosecution efforts:

Given its limited resources, ICE strives to utilize its detention space for dangerous criminal aliens. It is important to note that ICE administrative detention is not punitive and serves only to further the removal of an alien.

Many aliens enter ICE custody each year while they have pending criminal proceedings or are needed to provide testimony in a criminal matter. Once an alien is placed in custody, the ICE Field Office Director (FOD) for that area has general responsibility for that individual. In many cases, the FOD has broad discretion and several legal mechanisms available to him/her that could help facilitate the release of detained aliens. Among those tools, the FOD could agree to release an alien to state or local authorities under a state writ or may exercise his/her prosecutorial discretion by granting a request for deferred action (DA) in an alien's case.

If an ICE detainee is needed as a defendant or witness in an upcoming criminal proceeding, you may obtain a writ from an appropriate state or local judge ordering the alien's appearance in

court on a specific date. While federal agencies are not bound by state court orders, ICE will generally honor the writ of a state or local judge directing the appearance of a detainee in court. Once the writ is obtained and ICE has approved it, you should contact the FOD responsible for your area in writing and request that he/she facilitate the alien's transfer to state or local custody. However, the requesting LEA must arrange for the alien's transportation.

As referenced in other sections within this Tool Kit, deferred action (DA) is "an act of administrative convenience to the government which gives some cases lower priority, ..." in recognition that ICE has limited enforcement resources and that every administrative effort should be made to maximize enforcement of our immigration laws. 8 C.F.R. § 274a.12(c)(14). A prosecutor can request DA to secure the release of an alien defendant or witness in a criminal case back into the community. DA does not confer any immigration status upon an alien, nor does it cure any defect in status under any section of the Immigration and Nationality Act (INA) for any purpose.

Furthermore, it is important to understand that ICE has restriction and requirements as part of its civil detention standards. Such rules will not allow ICE to hold an alien solely for the prosecution of a case unrelated to ICE's specific authority for civil detention. In some circumstances, if the state or federal prosecutors are unable to secure the release of the alien or their own custody of the alien witness, ICE may remove the alien from the United States. For example, a writ requesting the alien's presence for a trial in six months will not be honored if the alien is subject to removal and can be removed.

Also referenced in other sections within this Tool Kit, prosecutorial discretion is a powerful tool that ICE personnel must use responsibly and judiciously at all stages in the enforcement process. Decisions as to whether or not to initiate removal proceedings or take other enforcement actions must be determined based on the individual facts of each case. In addition, ICE has other tools to release an alien from custody, such as an order of supervision and an order of recognizance. Contact a local ICE office to discuss these options.

Procedures for release/transfer from ICE custody to aid state prosecution efforts: Frequently Asked Questions

How will I know if the alien defendant or witness is a candidate for release on writ, DA, or other forms of prosecutorial discretion?
What is the process to obtain release on writ, DA, or other forms of prosecutorial discretion?
How soon can the alien be released on writ, DA, or other forms of prosecutorial discretion?
Are there any legal bars (convictions) that might make the alien ineligible for release from ICE custody?

Q: How will I know if the alien defendant or witness is a candidate for release on writ, DA or other forms of prosecutorial discretion?

A: As the prosecutor in a criminal matter, if you are aware that an alien is in ICE custody and is needed for an upcoming criminal proceeding as a defendant or witness, you should consider requesting a writ from a state or local judge directing the alien's appearance in court. Once the writ is obtained, you should contact the FOD responsible for your local area in writing to arrange for the transfer of the alien to state or local custody. There may

be occasions when ICE may decide not to honor the writ. Alternatively, if you desire the alien's release under DA or other exercise of prosecutorial discretion, you must submit a formal written request for the release of the alien (either by facsimile or letter) explaining the reasons for the request along with a risk and threat assessment. The FOD will determine if the alien is amenable to release under DA or other exercise of prosecutorial discretion based on the specific facts of the individual case. If DA is granted, the requesting LEA is responsible for monitoring the alien, ensuring he/she complies with all of the terms of the DA, and notifying ICE of any violations that occur.

Q: What is the process to obtain release on writ, DA or other forms of prosecutorial discretion?

A: The chief prosecuting attorney for your law enforcement agency (LEA) should submit a formal written request for the specific action desired to the FOD responsible for your local area. The request should contain the exact reasons for the request and any date(s) the alien is needed in court. If you are requesting the transfer of custody of the ICE detainee to a state or local LEA, you should include a copy of the writ directing the alien's appearance in court or an arrest warrant for the alien. Please include a point of contact for the state and local LEA so that transfer arrangements, if approved, can be made as expeditiously as possible.

If you are requesting DA or prosecutorial discretion for an alien in ICE custody, your request should contain the exact reasons for the action desired and indicate if the release from ICE custody is needed by a specific date. Your request should also include a point of contact to whom the alien will be released, if such a decision is made. The FOD will review the individual aggravating and mitigating factors of the case and determine if the request is appropriate. You will receive a formal written notification from the FOD informing you of the decision. If DA is granted, the requesting LEA is responsible for monitoring the alien, ensuring he/she complies with all of the terms of the DA, and notifying ICE of any violations that occur. This includes contacting ICE well ahead of the expiration of the DA to either request another DA or to notify ICE that the LEA does not intend to seek another DA. If at any point the LEA determines there is no longer a need for the alien to remain in DA, or if a violation occurs, the LEA must notify ICE immediately.

Q: How soon can the alien be released on writ, DA, or other forms of prosecutorial discretion?

A: Generally, ICE responds to all the requests it receives as quickly as possible. Regardless of the type of release you seek, if an ICE detainee is needed for a criminal proceeding on a specific date, you should be sure to include this information in your request for release so that it can be decided in a timely manner.

Q: Are there any legal bars (convictions) that might make the alien ineligible for release from ICE custody?

A: Pursuant to sections 236(c) and 241(a)(2) of the INA, 8 U.S.C. §§ 1226, 1231, certain criminal aliens are precluded from release from ICE detention. The FOD will consider requests for release of such criminal aliens in consultation with the local Office of Chief

Counsel and determine what, if any, release decision may be made. ICE reserves the right not to honor a state court writ, or other request for an alien's release. For example, ICE may decline a request where compliance with the writ or request for release would conflict with an ICE enforcement mission, such as the alien's imminent removal from the United States or transfer of an alien elsewhere within the United States.

Contact Information:
You can visit the following websites for contact information:
ICE Field Offices: http://www.ice.gov/contact/ero/
ICE Special Agent in Charge Offices: http://www.ice.gov/contact/inv/
ICE Offices of Chief Counsel: http://www.ice.gov/contact/opla/

3. Petitions for victims of criminal activity:

Petitions for victims of criminal activity are often used to allow an individual to enter or remain in the United States to assist in a criminal investigation or to testify at trial. In appropriate cases this may ultimately enable the individual to remain in the United States for an extended period and ultimately lead to U.S. citizenship. Congress passed the Violence Against Women Act (VAWA) of 1994 as a response to growing concerns over gender-related violence. VAWA provides that abused spouses, children, and parents of U.S. citizens or lawful permanent residents can "self-petition" to obtain lawful permanent residence. These provisions prevent abusers from using a victim's immigration status as a form of power and control by allowing battered victims to independently self-petition for lawful status. Congress subsequently passed the Victims of Trafficking and Violence Protection Act of 2000 (TVPA), which reauthorized the VAWA provisions of 1994 and created two new nonimmigrant categories: T status and U status. See TVPA; Public Law No. 106-386, § 1513, 114 Stat. 1464 (Oct. 28, 2000). VAWA affords victims a number of protections, including rigorous confidentiality requirements and measures that prevent law enforcement reliance upon information provided by the abuser in making adverse determinations regarding the victim's admissibility.

a. Continued Presence:

ICE is the lead DHS law enforcement agency (LEA) that investigates human trafficking crimes. ICE places a priority on human trafficking investigations, recognizes victims of human trafficking as crime victims, and secures access for victims to the rights and benefits afforded them under the Trafficking Victims Protection Act (TVPA), which has since been reauthorized in 2008 by the Trafficking Victims Protection Reauthorization Act (TVPRA).

Continued Presence (CP) is a temporary immigration status provided to individuals identified by law enforcement as victims of human trafficking. This status allows victims of human trafficking to remain in the United States during the ongoing investigation into the human trafficking-related crimes committed against them. CP is initially granted for one year and may be renewed in one-year increments. CP is authorized under the provisions of section 107(c)(3) of the TVPA, which is codified at 22 U.S.C. § 7105(c)(3) and has since been reauthorized in 2008 by the Trafficking Victims Protection Reauthorization Act (TVPRA).

CP is an important tool for federal, state, and local law enforcement in their investigation of human trafficking-related crimes. Victims of human trafficking often play a central role in

building a case against a trafficker. CP affords victims a legal means to temporarily live and work in the United States, providing them a sense of stability and protection. These conditions improve victim cooperation with law enforcement, which leads to more successful prosecutions and the potential to identify and rescue more victims.

Victims may qualify for other forms of immigration benefits depending on their unique circumstances. Law enforcement officials are encouraged to work with the local ICE victim assistance coordinator to obtain referrals to non-governmental victim services providers. These providers may offer a variety of services to assist crime victims, such as immigration legal assistance, crisis intervention, counseling, medical care, housing, job skills training, and case management.

Victims of trafficking are eligible to self-petition to U.S. Citizenship and Immigration Services (USCIS) for either T or U nonimmigrant status (commonly referred to as T and U visas), which permit them to remain in the United States for up to four years and can lead to adjustment of status to lawful permanent residence. Additional information explaining both T and U nonimmigrant status is provided elsewhere in this Tool Kit.

Prosecutors and LEAs conducting criminal investigations with a nexus (or potential nexus) to human trafficking are encouraged to contact the ICE Homeland Security Investigations (HSI) office with jurisdiction over the area. HSI has unique expertise and resources that may prove valuable to your human trafficking investigations.

Continued Presence (CP): Frequently Asked Questions:
Who is a victim of a severe form of human trafficking?
How will I know if the alien victim/witness is a candidate for CP?
What is the process to obtain CP?
Is CP approval dependent on the case being accepted for prosecution?
Does CP require that the victim has suffered a violent form of human trafficking?
As a state or local criminal prosecutor, will I be able to request CP for the witness?
Who authorizes CP?
Is any immigration relief available for the family members of a victim granted CP?
Does CP expire?
What if a victim is involved in ongoing civil litigation because he/she was a victim?
Can CP be renewed?
What is the victim required to do to maintain CP?
What additional responsibilities does a law enforcement agency (LEA) have with respect to victims who are granted CP?
Are there any legal bars (convictions) that might make the alien ineligible for CP?
What are other alternatives to CP?
Can the alien adjust to a lawful permanent residence with CP?

Q: Who is a victim of a severe form of human trafficking?
A: An individual who has been exploited through either: (1) Sex Trafficking —a commercial sex act induced by force, fraud, or coercion, or in which the person induced by any means to perform such act has not attained 18 years of age; or (2) Labor Trafficking —the

recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

Q: How will I know if the alien victim/witness is a candidate for CP?

A: You should determine if the alien is an individual identified as a victim of human trafficking who is a potential witness in the investigation or prosecution of the trafficker. A request for CP should be submitted as soon as practicable upon identification of an alien victim of human trafficking. The request will often be initiated prior to the victim's cooperation with law enforcement. In some cases, the victims may be too traumatized to cooperate at the outset of an investigation; however, this does not preclude the submission of a CP application in credible cases.

Q: What is the process to obtain CP?

A: A federal law enforcement official, primarily ICE, the FBI and federal prosecutors from the U.S. Attorney's Office within the Department of Justice, are authorized to submit CP applications to the ICE Law Enforcement Parole Unit (LEPU) stating that the witness is a victim of a severe form of trafficking and has the potential of being a witness to such trafficking. An application for CP should be initiated immediately upon identification of a victim of human trafficking.

Q: Is CP approval dependent on the case being accepted for prosecution?

A: No. A victim must only be a potential witness to the human trafficking crime. CP is available to all trafficking victims, even if a human trafficking violation is not charged or if charges are never brought. However, once the investigation has ended and a decision not to prosecute has been made, CP is no longer appropriate. In appropriate cases, other forms of immigration benefits may be available to the alien.

Q: Does CP require that the victim has suffered a violent form of human trafficking?

A: No. Human traffickers may employ a range of non-violent forms of coercion to hold victims against their will, such as threats of deportation, threats against family members, document control, and psychological coercion.

Q: As a state or local criminal prosecutor, will I be able to directly request CP for the witness?

A: No. State and local law enforcement officials are strongly encouraged to pursue CP for victims of severe forms of human trafficking, but it must be done through a federal law enforcement official and only in cases where the victim meets the federal definition of a victim of a severe form of trafficking as defined in TVPA, and 22 U.S.C. § 7102. When state or local law enforcement officials identify a victim of human trafficking who is a potential witness, they should coordinate with their federal law enforcement partners to submit an application for CP.

Q: Who authorizes CP?

A: The Law Enforcement Parole Unit (LEPU) has the sole authority to approve or deny CP applications. The LEPU sends those results to the federal submitting official and, in an

approved case, also to the U.S. Department of Health and Human Services (HHS) and the Vermont Service Center (a USCIS component). Once notified, HHS issues a letter authorizing the victim to receive federal and state benefits.

In contrast to adult victims, minor victims are not required to cooperate with law enforcement in order to receive these benefits. Additionally, the U.S. Citizenship and Immigration Services (USCIS) Vermont Service Center produces a Form I-94, *Arrival-Departure Record*, and an Employment Authorization Document (EAD) for the federal submitting official to provide to the victim. An EAD is issued in conjunction with all approved CP applications, including minor victims (the EAD is often used as an identity document).

Only the federal law enforcement official or assigned agency victim assistance coordinator should provide the victim or his/her representative updates on the status of pending CP applications. Due to the sensitivity and confidentiality protections afforded trafficking victims, CP applications are subject to several levels of review within the submitting federal agency before the LEPU receives the application.

Q: Is any immigration relief available for the family members of a victim granted CP?

A: Yes. A law enforcement agency may submit a request to the Law Enforcement Parole Unit for Significant Public Benefit Parole (SPBP) on behalf of a victim's family member if the alien granted CP is under 21 and the family member is his or her spouse, child, parent, or unmarried sibling (under 18 years of age), or if the alien granted CP is 21 or over and the family member is his or her spouse or child, or the parent(s) or sibling(s) of the alien granted CP if they are in present danger due to the alien's escape from trafficking or cooperation with law enforcement (irrespective of the age of the alien).

Q: Does CP expire?

A: Yes. CP is initially granted for one year and may be renewed in one-year increments. The federal law enforcement agency should submit renewal requests in writing to the Law Enforcement Parole Unit a minimum of 30 days prior to expiration of CP status.

Q: What if a victim is involved in ongoing civil litigation because he/she is a victim of trafficking?

A: If a federal law enforcement official files a CP application with the Law Enforcement Parole Unit stating that an alien is a victim of a severe form of trafficking and may be a potential witness to such trafficking, and the alien has filed a civil action under 18 U.S.C. § 1595, the alien may be permitted to remain in the United States until the civil litigation is concluded. *See* Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110 457, Section 205(a)(1).

Q: Can CP be renewed?

A: Yes. CP is initially granted for one year and may be renewed in one-year increments. The federal law enforcement official submits CP renewal requests and his/her agency evaluates them on a case-by-case basis. CP renewal requests should be submitted in writing by the federal law enforcement official to the Law Enforcement Parole Unit 30 days prior to the one year expiration.

Q: What is the victim required to do to maintain CP?

A: Immediate cooperation with law enforcement is not initially required to apply for CP, as victims may be too traumatized to cooperate at the onset of an investigation. A victim's statement alone may be sufficient to demonstrate that the alien is a victim of a severe form of trafficking, provided that the law enforcement official finds it to be credible and that the alien is a potential witness against their trafficker. CP may be terminated if the victim is later determined to not to be a victim of human trafficking, is no longer a potential witness, is not compliant with parole conditions, violates U.S. laws, loses contact with the sponsoring law enforcement agency, or is granted a T visa.

Q: What additional responsibilities does a law enforcement agency (LEA) have with respect to victims who are granted CP?

A: The LEA must: monitor the whereabouts of the victim while present in the U.S.; take reasonable efforts to protect the safety of victims who are granted CP, including measures to protect the victims and their family members from intimidation, threats of reprisals and reprisals from traffickers and their associates; and notify the Law Enforcement Parole Unit of the victim's location and current circumstances on a quarterly basis. If at any point, the LEA determines there is no longer a need for CP, or if a violation occurs, the LEA must notify ICE immediately. The LEA is also responsible for ensuring that the CP grantee departs the U.S. upon expiration of CP unless the grantee has been approved for some other type of status.

Q: Are there any legal bars (convictions) that might make the alien ineligible for CP?

A: Not *per se*; however, law enforcement agencies are responsible for monitoring aliens and thus must consider an alien's criminal history and likelihood to re-offend, and whether such information outweighs the necessity to have the alien to remain in the United States for the investigation and prosecution of the trafficking offense.

Q: What are other alternatives to CP?

A: Law enforcement agencies may apply for deferred action (DA) on behalf of the victim. However, this is not encouraged, as DA is an administrative convenience that delays placing an alien into removal proceedings and it does not allow for victims to receive benefits and services pursuant to the TVPA.

Q: Can the alien adjust to a lawful permanent residence with CP?

A: No. CP is a temporary status. However, many trafficking victims may be eligible to self-petition for T and U visas (discussed herein), which permits them to remain in the United States for up to four years and can lead to lawful permanent residence. Receipt of CP does not guarantee that USCIS will favorably adjudicate other long-term immigration status applications.

Contact information:

ICE Field Offices: http://www.ice.gov/contact/ero/
ICE Special Agent in Charge Offices: http://www.ice.gov/contact/inv/
ICE Offices of Chief Counsel: http://www.ice.gov/contact/opla/

For further information on CP, LEAs should contact the ICE LEPU by e-mail to spbp.lepb@dhs.gov or by calling (202) 732-8164 (law enforcement only). For victim assistance related issues, LEAs may contact ICE Headquarters Victim Assistance: (866) 872-4973 or victimassistance.ice@dhs.gov. For human trafficking-related policy issues, please contact the ICE Headquarters Human Smuggling and Trafficking Unit at: ICEHumanTrafficking.helpdesk@dhs.gov

b. T Nonimmigrant Status

T nonimmigrant status (T visa) is designated for those who are or have been victims of severe forms of human trafficking; have complied with all reasonable requests for assistance in the investigation and prosecution of trafficking crimes; and would suffer extreme hardship involving unusual and severe harm upon removal.
The T visa allows victims to remain in the United States to assist federal authorities in the investigation and prosecution of human trafficking cases.

The T nonimmigrant status (T visa) classification is useful to prosecutors and differs from the S visa in that it is considered a "victim" witness classification. On October 28, 2000, Congress enacted the Victims of Trafficking and Violence Protection Act of 2000 (TVPA), Pub. L. No.106-386, 114 Stat. 1464, (2000). The TVPA and the later amendments reflect Congress' strong stance against trafficking and its intent to vigorously pursue the prosecution of traffickers and the protection of victims. The statutory purposes of the TVPA "are to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims." TVPA § 102(a).

The TVPA provides access to social services and benefits for some victims, creates stronger criminal penalties and enhanced sentencing for traffickers, and designated a new nonimmigrant classification for victims of severe forms of trafficking (T visa).

The T visa is a nonimmigrant classification for people who are victims of severe forms of human trafficking as defined by statute to include commercial sexual exploitation or forced labor. *See* 22 U.S.C § 7101, 8 C.F.R. § 214.11(a). The victim must have either complied with any reasonable request for assistance from law enforcement regarding the investigation and/or prosecution, or be under the age of 18 and would suffer extreme hardship involving unusual and severe harm upon removal. *See* INA § 101(a)(15)(T), 8 U.S.C. § 101(a)(15)(T).

To be considered for a T visa, the victim must file the petition for the T visa, which ***may*** include a supplemental law enforcement agency (LEA) certification Form I-914B, *Declaration of Law Enforcement Officer for Victim of Trafficking in Persons*, attesting that the petitioner: is a victim of a severe form of trafficking; has information about the crime; and has cooperated with reasonable requests from law enforcement for assistance in the investigation or prosecution. Although not a requirement for the visa to be granted, the LEA certification is considered primary evidence of cooperation with law enforcement, and it helps demonstrate the victim's eligibility for the visa. T visa recipients may receive employment authorization while the application is pending.

T visa recipients are also eligible to be certified for refugee benefits through the U.S. Department of Health and Human Services, Office of Refugee Resettlement. These benefits are time-limited and may include housing assistance, cash assistance, Medicaid, and other social services.

T Visa – Victims of Human Trafficking: Frequently Asked Questions:
What is human trafficking?
How will I know if the alien victim is eligible for a T visa?
What is the process to obtain a T visa?
Can the alien adjust to a lawful permanent residence with a T visa?
Does the T visa expire?
Are there any legal bars (convictions) that might make the alien ineligible for a T visa?
As a state prosecutor from a state locality, will I be able to request a T visa for the witness?
Can the trafficking victim's family members request a T visa?
What are the alternatives to a T visa?

Q: What is human trafficking?
A: Under federal law, human trafficking or "severe forms of trafficking in persons" is defined in two ways:

- sex trafficking, in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
- the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

See 22 U.S.C § 7101 and 8 C.F.R. § 214.11(a).

Q: How will I know if the alien victim is eligible for a T visa?
A: You should determine if the alien:

- is or has been a victim of a severe form of trafficking in persons;
- is physically present in the United States on account of the trafficking or due to the subsequent investigation or prosecution;
- has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking (unless a minor or unable to cooperate due to trauma); and
- would suffer extreme hardship involving unusual and severe harm upon removal.

Q: What is the process to obtain a T visa?
A: A victim of a severe form of trafficking must submit a Form I-914, *Application for T Nonimmigrant Status*, to U.S. Citizenship and Immigration Services (USCIS). The Form I-914 should include a personal statement demonstrating that the alien is a victim of a severe form of trafficking. The Form I-914 may also be accompanied by Supplement B, *Declaration of Law Enforcement Officer for Victim of Trafficking in Persons*. In the event that the alien cannot provide a declaration, secondary evidence may be submitted. The submission of Supplement B is strongly encouraged for victims who are over the age of 18 and have no psychological or physical trauma in order to demonstrate that the

victim complied with reasonable requests for assistance in the investigation and/or prosecution of the acts of trafficking. For further instructions, the alien should review USCIS guidance on T nonimmigrant status at http://www.uscis.gov.

Q: Can the alien adjust to a lawful permanent residence with a T visa?

A: Yes. Once a T visa is granted, a victim can apply for permanent residence in the following scenarios, whichever comes first: after three years of continuous presence in the United States; after a continuous period during an investigation or prosecution by submitting the appropriate form with USCIS; or after the conclusion of the criminal proceedings. For further instructions, the alien should review USCIS guidance on T nonimmigrant status at http://www.uscis.gov.

Q: Does the T visa expire?

A: Yes. In general, the T visa will expire four years from the date of approval. The T visa may be extended if law enforcement officials certify that the alien's presence is necessary to assist in the investigation or prosecution of trafficking activity.

Q: Are there any legal bars (convictions) that might make the alien ineligible for a T visa?

A: Currently, the DHS Secretary has not designated any specific bars. The DHS Secretary determines whether a ground for inadmissibility exists with respect to a T nonimmigrant visa applicant. The DHS Secretary has the discretion to waive some grounds of inadmissibility if considered to be in the national interest to do so. *See* INA § 212 (d)(13).

Q: As a state prosecutor from a state locality, will I be able to request a T visa for the witness?

A: No. The witness must self-petition for a T visa by submitting Form I-914, *Application for T Nonimmigrant Status,* directly to USCIS. A law enforcement endorsement is not required; however, it is strongly encouraged and may be provided by submitting a law enforcement agency endorsement using Form I-914, Supplement B, *Declaration of Law Enforcement Officer for Victim of Trafficking in Persons*.

Q: Can the trafficking victim's family members request a T visa?

A: Yes. An alien who has applied or been granted a T visa may apply for admission of certain immediate family members, known as derivatives, who are otherwise admissible, and are accompanying or following to join the principal alien. For victims under 21 years of age, derivatives include the spouse, children, unmarried minor siblings, and parents. For victims over the age of 21, derivatives include the spouse and children. While only 5,000 T visas are authorized per year, this annual limitation on T visas does not apply to T visa derivatives.

Q: What are the alternatives to a T visa?

A: Another immigration status that victims of human trafficking may be eligible for is U nonimmigrant status (U visa). However, unlike the T visa, an individual granted a U visa

is not eligible for refugee benefits. Additional information on the U visa is provided herein.

Continued Presence (CP) allows a victim of trafficking to remain in the United States while his/her trafficking case is being investigated or prosecuted. CP is a one year temporary legal status that can only be requested by a federal law enforcement agency. Additional information on CP is provided herein.

Contact information:
ICE Field Offices: http://www.ice.gov/contact/ero/
ICE Special Agent in Charge Offices: http://www.ice.gov/contact/inv/
ICE Offices of Chief Counsel: http://www.ice.gov/contact/opla/

For more information about T visas, please visit USCIS website at http:/ www.uscis.gov. To report an incident of trafficking, please call the Trafficking in Persons and Worker Exploitation Task Force Complaint Line at 1-888-428-7581.

c. U Nonimmigrant Status:

The U nonimmigrant status (U visa) was created in the Victims of Trafficking and Violence Protection Act of 2000 (TVPA). Pub. L. No.106-386, 114 Stat. 1464, (2000). This legislation is intended to strengthen the ability of law enforcement agencies to investigate and prosecute cases of domestic violence, sexual assault, human trafficking, and other crimes while at the same time, offering protection to victims of such crimes.

U nonimmigrant status is set aside for victims of certain crimes who have suffered substantial mental or physical abuse as a result of criminal activity and are willing to help law enforcement authorities in the investigation or prosecution of the criminal activity. Congress limited the amount of available U visas to 10,000 per fiscal year.

The U visa is a nonimmigrant classification for people who are victims of substantial mental or physical abuse as a result of domestic violence, sexual assault, trafficking, and other certain crimes. The Frequently Asked Questions section includes a full list of the qualifying crimes.

The U visa was created to strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases, while at the same time offering protection to victims of serious offenses. *See* TVPA § 1513(a)(2)(A). U nonimmigrant status protects victims of crimes who have suffered substantial mental or physical abuse due to the crime and are willing to help law enforcement authorities in the investigation or prosecution of the criminal activity. The victim must have assisted, currently be assisting, or be likely to assist in the investigation and/or prosecution of the criminal case. The victim files the petition for the U visa, which, unlike the T visa, must include a law enforcement agency certification (Form I-918B, *U Nonimmigrant Status Certification*). The various factors that are considered to determine if a victim witness is eligible for U visas are discussed more thoroughly in the Frequently Asked Question section.

Beneficiaries of U visas are required to comply with reasonable requests for assistance in the investigation or prosecution of the criminal activity.

U Visa—Victims of Criminal Activity: Frequently Asked Questions:
Who is a candidate for a U visa?
How will I know if the alien witness is candidate for a U visa?
What is a qualifying crime or criminal activity?
What is the process to obtain a U visa?
Can the alien adjust to a lawful permanent residence with a U visa?
Does the U visa expire?
Are there any legal bars (convictions) that might make the alien ineligible for a U visa?
As a state prosecutor from a state locality, will I be able to request a U visa for the witness?
Can the family members of the victim witness request a U visa?

Q: Who is a candidate for the U visa?
A: U nonimmigrant status protects victims of crimes who have suffered substantial mental or physical abuse as a result of a qualifying crime and are willing to help law enforcement authorities in the investigation or prosecution of the criminal activity.

Q: How will I know if the alien witness is candidate for a U visa?
A: Determine whether your victim witness has suffered substantial mental or physical abuse due to a qualifying crime and was, is, or will likely be willing to help law enforcement authorities in the investigation or prosecution of the criminal activity.

Q: What is a qualifying crime or criminal activity?
A: There are several criminal activities, or similar activities, in violation of federal, state, or local criminal laws that could trigger a victim's eligibility for a U visa. The crimes or criminal activity include:

- rape;
- torture;
- trafficking;
- incest;
- domestic violence;
- sexual assault;
- abusive sexual contact;
- prostitution;
- sexual exploitation;
- female genital mutilation;
- being held hostage;
- peonage;
- involuntary servitude;
- slave trade;
- kidnapping;
- abduction;
- unlawful criminal restraint;

- false imprisonment;
- blackmail;
- extortion;
- manslaughter;
- murder;
- felonious assault;
- witness tampering;
- obstruction of justice;
- perjury; or
- attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.

Criminal activity in which the nature and elements of the offense are substantially similar to the above offenses may qualify as similar activity and therefore, may also trigger a victim's eligibility for a U visa.

Q: What is the process to obtain a U visa?

A: A victim of a qualifying crime must submit a Form I-918, *Petition for U Nonimmigrant Status,* to U.S. Citizenship and Immigration Service (USCIS). In addition, a law enforcement certification—confirming that the alien was, is, or will likely be helpful in the prosecution of the qualifying crime of which they are a victim—must be submitted within six months immediately preceding the filing of the Form I-918. For further instructions, the alien should review USCIS guidance on U nonimmigrant status at http://www.uscis.gov.

Q: Can the alien adjust to a lawful permanent residence with a U visa?

A: Yes. Once a U visa is granted, a victim can apply for permanent residence after three years of continuous presence in the United States since the date of admission by submitting the appropriate form with USCIS. For further instructions, the alien should review USCIS guidance on U nonimmigrant status at http://www.uscis.gov.

Q: Does the U visa expire?

A: Yes. The U visa may be approved for a period not to exceed four years in the aggregate. Extensions are available upon attestation by the certifying official that the alien's presence in the United States continues to be necessary to assist in the investigation or prosecution of the qualifying criminal activity.

Q: Are there any legal bars (convictions) that might make the alien ineligible for a U visa?

A: Yes. The DHS Secretary determines whether a ground for inadmissibility exists with respect to a U nonimmigrant visa applicant. The DHS Secretary has the discretion to waive some grounds of inadmissibility if considered to be in the national interest to do so, but the DHS Secretary cannot waive the grounds of inadmissibility for alien participants in Nazi persecution, as described in the Immigration and Nationality Act (INA) section 212 (a)(3)(E). *See* INA § 212 (d)(14).

Q: As a state prosecutor from a state locality, will I be able to request a U visa for the witness?

A: The witness must self-petition for a U visa by submitting Form I-918, *Petition for U Nonimmigrant Status,* directly to USCIS. A law enforcement certification is required on Supplement B of Form I-918 pursuant to 8 C.F.R. § 214.14(c)(2).

Q: Can the family members of the victim witness request a U visa?

A: Yes. An alien who has petitioned for or has been granted a U visa may apply for admission of certain immediate family members who are otherwise admissible and are accompanying or following to join the principal alien. For victims under 21 years of age, qualifying family members include the spouse, children, unmarried minor siblings and parents. For victims over the age of 21, qualifying family members include the spouse and children.

Contact information:
ICE Field Offices: http://www.ice.gov/contact/ero/
ICE Special Agent in Charge Offices: http://www.ice.gov/contact/inv/
ICE Offices of Chief Counsel: http://www.ice.gov/contact/opla/

For more information about U visas, please visit USCIS website at http:/ www.uscis.govwww.uscis.gov
To report an incident of trafficking, please call the Trafficking in Persons and Worker Exploitation Task Force Complaint Line at 1-888-428-7581.

4. S Nonimmigrant Status (S Visa):

S visas are a powerful law enforcement tool because they allow investigators and prosecutors to work closely with foreign national witnesses and informants who provide continued cooperation in investigations and can supply valuable information on criminal organizations and terrorist activities.

The S visa program was established to provide these witnesses (and qualified family members) with an avenue through which they can maintain nonimmigrant status in the United States in exchange for their cooperation in investigations and prosecutions.

All S visa applications for alien witnesses or informants, along with accompanying applications for qualifying family members, must be sponsored and submitted by a law enforcement agency. Individuals cannot self-petition for receipt of an S visa.

S Visa—Witnesses and Informants Who Can Supply Valuable Information: Frequently Asked Questions
What are the types of S visas?
Does the S visa expire?
What is the process to obtain an S visa?

Q: What are the types of S visas?

A: There are three sub-classifications of S visas:

- S-5 visa: An alien who possesses critical, reliable information concerning a substantial criminal matter, is willing to supply such information to a federal or state law enforcement agency, and whose presence is essential to the success of an authorized criminal investigation or prosecution of an individual involved in the criminal organization or enterprise is eligible for an S-5 visa. By federal statute, only 200 S-5 visas can be issued each fiscal year.

- S-6 visa: An alien who possesses critical, reliable information concerning a terrorist organization, enterprise or operation, is willing to supply such information to a federal law enforcement agency, has been placed in danger or is in danger as a result of providing such information and is eligible to receive a reward under section 36(a) of the State Department Basic Authorities Act of 1956, 22 U.S.C. §2708(a) is eligible for an S-6 visa. Congress limited the amount of S-6 visas to 50 per year.

- S-7 visa: Accompanying qualified dependents or "derivatives" (e.g., spouses, children, or parents) of S-5 or S-6 alien witnesses or informants are eligible for an S-7 visa.

Q: Does an S visa expire?

A: Yes. All S visas expire three years from the date of approval. There is no provision in the law for extensions of the S Nonimmigrant Status. Sponsoring law enforcement agencies (LEAs) are responsible for tracking expiration dates, as well as maintaining the alien's status throughout the process. This includes submitting quarterly and annual reports to the Department of Justice, Office of Enforcement Operations documenting that the alien is reporting as required, whether he/she has been compliant with the terms of the S visa, and other events that affect the alien's ability to cooperate with the government.

In addition, the sponsoring LEA is responsible for submitting requests for adjustments to legal permanent resident status within the three-year period. In the event an adjustment is not requested, the sponsoring LEA shall ensure that the alien witness or informant and any derivatives depart the United States.

Q: What is the process to obtain an S visa?

A: The process for sponsoring an S visa application is as follows:

1) The sponsoring law enforcement agency (LEA) initiates the application and submits it to its headquarters entity for review and signature. Before submitting the application to Department of Justice (DOJ), Office of Enforcement Operations (OEO), all Federal, state and local LEAs must first obtain the signature of the United States Attorney with jurisdiction over their district to endorse the application. Without concurrence and signature from the United States Attorney, the application will not be reviewed and will be returned to the sponsoring state and local LEA or prosecutor's office.

2) DOJ OEO reviews the application and forwards it to the DOJ Office of the Deputy Assistant Attorney General for recommendation or denial.

3) If recommended, the application is submitted to the ICE Homeland Security Investigations (HSI) directorate for review. Following review, the application is submitted to HSI's Executive Associate Director (EAD).

4) Upon HSI EAD's recommendation, the application is provided to the U.S. Citizenship and Immigration Services for final approval or denial.

Due to the unique nature of each application, please allow adequate time for review.

Contact information:
ICE Field Offices: http://www.ice.gov/contact/ero/
ICE Special Agent in Charge Offices: http://www.ice.gov/contact/inv/
ICE Offices of Chief Counsel: http://www.ice.gov/contact/opla/

B. What options are available to a prosecutor who needs to bring an alien witness, victim or defendant into the United States for a criminal trial who may not be legally authorized to enter the United States?

1. Significant Public Benefit Parole:

Significant Public Benefit Parole (SPBP) may be utilized to bring an alien witness, defendant, or cooperating source, and if necessary in extremely limited cases, the alien's immediate family members, into the United States for up to one year. It must be emphasized that SPBP will only be granted for the minimum period of time required to accomplish the purpose of the request INA § 212 (d) (5) (A), 8 U.S.C. § 1182(d)(5)(A). A parole is a temporary measure used to allow an alien who is otherwise inadmissible to be present in the United States. Parole does not constitute a formal admission to the United States and confers only temporary authorization to be present in the United States without having been admitted; employment authorization may be granted.

Significant Public Benefit Parole (SPBP): Frequently Asked Questions:
How will I know if the alien witness is a candidate for SPBP?
What is the process to obtain SPBP?
As a prosecutor from a state locality, will I be able to request SPBP for the witness?
Can the family members of the alien witness request SPBP?
Does SPBP expire?
Are there additional responsibilities relating to SPBP?
Are there any legal bars (convictions) that might make the alien ineligible for SPBP?
What are other alternatives to SPBP?
Can the alien adjust to a lawful permanent residence with SPBP?

Q: How will I know if the alien is a candidate for SPBP?
A: SPBP is a critical enforcement tool that enhances a law enforcement agency's ability to conduct operations and protect the American people. It is a temporary measure used to support law enforcement efforts by providing a legal mechanism for informants,

witnesses, and defendants who are otherwise inadmissible, to be present in the United States in order to assist with ongoing investigations, prosecutions, or other activities necessary to protect national security and that are beneficial to the United States.

Q: What is the process to obtain SPBP?

A. SPBP requests may be submitted by federal, state, local and tribal law enforcement agencies (LEA). Requesting LEAs are required to adhere to existing ICE policy and procedure in both requesting and administering SPBPs. The process is initiated by submitting an application packet through designated ICE Special Agent in Charge Parole Coordinators or designated federal agency headquarter programs (e.g., FBI, DEA, USMS, ATF). The application packet consists of several forms and supporting documents: the DHS SPBP Parole Template, Law Enforcement Agency certification, agency memorandum and record checks for immigration and criminal history. The sponsoring LEA is responsible for supervising and monitoring the whereabouts of the parolee while present in the United States, and must ensure the parolee's timely departure. An alien may be re-paroled by the sponsoring official by submitting a new DHS SBPB packet 30 days prior to the initial parole expiration. A re-parole may be granted up to one year.

Q: As a prosecutor from a state locality, will I be able to request SPBP for the witness?

A: Yes. A prosecutor from a state locality may request SPBP for a witness in support of a criminal prosecution. The state agency must agree to adhere to the ICE policy and procedures, particularly with regard to monitoring, supervising, and ensuring the parolee's departure at the end of the authorized period. It is recommended that you contact the responsible Homeland Security Investigation's Special Agent in Charge office to help facilitate the SPBP request.

Q: Can the family members of the alien witness request SPBP?

A: Yes. Family members of the alien witness may request SPBP upon request of the sponsoring law enforcement agency (LEA). However, it should be noted that SPBP is administered very sparingly in this regard and only for immediate family members (the alien's spouse, parents and/or unmarried children under the age of 21 at the time of the SPBP application) who are at risk due to the principal parolee's cooperation with an LEA. Additionally, SPBP requests for family members require the LEA to submit a threat assessment. Moreover, monitoring and supervision requirements similar to those of the principal parolee apply.

Q: Does SPBP expire?

A: Yes. An alien is initially paroled into the United States for a specified time, from one day to one year. Additional extensions may be requested to allow the alien to remain in the United States for another specified period of time, normally lasting under one year. It is important to note that SPBP requests are only authorized for the minimum period of time required to accomplish the law enforcement objective. At the conclusion, the parolee is required to depart the United States.

Q: Are there additional responsibilities relating to SPBP?

A: Yes. Both the requesting law enforcement agency (LEA) and the alien must comply with all established conditions specified in the monitoring and reporting requirements. Additional restrictions may also be imposed, such as limited or no operation of a motor vehicle by the alien while under authorized parole.

Q: Are there any legal bars (convictions) that might make the alien ineligible for SPBP?

A: Yes. A person denied of crewmen status may not be paroled into the United States unless the Attorney General determines that the alien's parole is necessary for national security purposes. See 8 USC § 1184(f). In addition, aliens who present a security risk or a risk of absconding may be denied parole. See 8 C.F.R. § 212.5. Otherwise, there are no other legal bars per se. However, the sponsoring law enforcement agency (LEA) is responsible for closely monitoring paroled aliens and thus must consider the alien's criminal history, likelihood to re-offend, any possible threat to public safety and national security and whether such information outweighs the necessity to have the alien remain in the U.S. for the investigation and prosecution of the trafficking offense.

Q: What are other alternatives to SPBP?

A: An alien paroled into the country has no immigration status and is typically treated as any other applicant for admission into the United States. If an alien is present in the United States with no legal status, that individual may be considered for deferred action, when appropriate.

Q: Can the alien adjust to a lawful permanent residence with SPBP?

A: No. Parole does not confer any legal status to an alien, and it cannot be used to circumvent normal visa issuing and immigration procedures.

Contact information:
ICE Field Offices: http://www.ice.gov/contact/ero/
ICE Special Agent in Charge Offices: http://www.ice.gov/contact/inv/
ICE Offices of Chief Counsel: http://www.ice.gov/contact/opla/

For further information on SPBP, LEAs should contact the ICE Law Enforcement Parole Unit (LEPU) by e-mail to spbp.lepb@dhs.gov or by calling (202) 732-8164 (law enforcement only).

2. S Nonimmigrant Status (S Visa):

S visas are a powerful law enforcement tool because they allow investigators and prosecutors to work closely with foreign national witnesses and informants who provide continued cooperation in investigations and can supply valuable information on criminal organizations and terrorist activities.

The S visa program was established to provide these witnesses (and qualified family members) with an avenue through which they can maintain nonimmigrant status in the United States in exchange for their cooperation in investigations and prosecutions.

All S visa applications for alien witnesses or informants, along with accompanying applications for qualifying family members, must be sponsored and submitted by a law enforcement agency. Individuals cannot self-petition for receipt of an S visa.

S Visa—Witnesses and Informants Who Can Supply Valuable Information: Frequently Asked Questions

What are the types of S visas?
Does the S visa expire?
What is the process to obtain an S visa?

Q: What are the types of S visas?

A: There are three sub-classifications of S visas:

- S-5 visa: An alien who possesses critical, reliable information concerning a substantial criminal matter, is willing to supply such information to a federal or state law enforcement agency, and whose presence is essential to the success of an authorized criminal investigation or prosecution of an individual involved in the criminal organization or enterprise is eligible for an S-5 visa. By federal statute, only 200 S-5 visas can be issued each fiscal year.

- S-6 visa: An alien who possesses critical, reliable information concerning a terrorist organization, enterprise or operation, is willing to supply such information to a federal law enforcement agency, has been placed in danger or is in danger as a result of providing such information and is eligible to receive a reward under section 36(a) of the State Department Basic Authorities Act of 1956, 22 U.S.C. §2708(a) is eligible for an S-6 visa. Congress limited the amount of S-6 visas to 50 per year.

- S-7 visa: Accompanying qualified dependents or "derivatives" (e.g., spouses, children, or parents) of S-5 or S-6 alien witnesses or informants are eligible for an S-7 visa.

Q: Does an S visa expire?

A: Yes. All S visas expire three years from the date of approval. There is no provision in the law for extensions of the S Nonimmigrant Status. Sponsoring law enforcement agencies (LEAs) are responsible for tracking expiration dates, as well as maintaining the alien's status throughout the process. This includes submitting quarterly and annual reports to the Department of Justice, Office of Enforcement Operations documenting that the alien is reporting as required, whether he/she has been compliant with the terms of the S visa, and other events that affect the alien's ability to cooperate with the government.

In addition, the sponsoring LEA is responsible for submitting requests for adjustments to legal permanent resident status within the three-year period. In the event an adjustment is not requested, the sponsoring LEA shall ensure that the alien witness or informant and any derivatives depart the United States.

Q: What is the process to obtain an S visa?

A: The process for sponsoring an S visa application is as follows:

1) The sponsoring law enforcement agency (LEA) initiates the application and submits it to its headquarters entity for review and signature. Before submitting the application to Department of Justice (DOJ), Office of Enforcement Operations (OEO), all Federal, state and local LEAs must first obtain the signature of the United States Attorney with jurisdiction over their district to endorse the application. Without concurrence and signature from the United States Attorney, the application will not be reviewed and will be returned to the sponsoring state and local LEA or prosecutor's office.

2) DOJ OEO reviews the application and forwards it to the DOJ Office of the Deputy Assistant Attorney General for recommendation or denial.

3) If recommended, the application is submitted to the ICE Homeland Security Investigations (HSI) directorate for review. Following review, the application is submitted to HSI's Executive Associate Director (EAD).

4) Upon HSI EAD's recommendation, the application is provided to the U.S. Citizenship and Immigration Services for final approval or denial.

Due to the unique nature of each application, please allow adequate time for review.

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C. What are some general immigration consequences of a criminal conviction?

1. Overview of immigration consequences of criminal charge:

A criminal defendant who is an alien or a non-citizen of the United States may become subject to removal because of a conviction. In order for an alien to be removed from the United States, the alien must be found removable under the Immigration and Nationality Act (INA). The INA sets out specific grounds of removability at sections 212 and 237, 8 U.S.C. §§ 1182, 1227. These provisions provide that aliens who commit a variety of crimes, including crimes defined at INA § 101(a)(43), 8 U.S.C. § 1101(a)(43), are removable.

A federal or state conviction may subject an alien to removal proceedings on the ground that he or she is generally no longer permitted: (a) to remain in the United States; (b) to be admitted into the United States, if he/she travels abroad; or (c) both. Removal proceedings are civil and adversarial in nature. While some proceedings may be expedited in nature, the majority of aliens go through formal proceedings conducted by an Immigration Judge, where the DHS must prove removal charges against the alien. The alien has the right to contest the removal charges and, if eligible, to seek relief from removal. DHS typically relies on readily available conviction records, including written plea agreements, to determine whether an alien is removable from the United States and to prove removal charges based on criminal convictions.

2. Ineffective Assistance of Counsel

Convictions based on guilty pleas may be subject to challenge under the Supreme Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), if the alien was not properly apprised of the immigration consequences of his/her plea agreement. In order to prevent such a challenge, DHS recommends that all plea agreements include language warning individuals that if they are an alien, their guilty plea may subject them to removal from the United States.

General Immigration Consequences of a Criminal Conviction: Frequently Asked Questions:

Where can I find comprehensive information about the process for the removal of aliens from the United States?
Does an alien's immigration status at the time of a conviction impact the process for removal?
How can I find out if an alien's conviction will result in the alien's removal?
What documents does DHS and DOJ use in determining whether an alien is removable?
Can an alien request that his conviction be vacated as a result of the immigration consequences of his/her criminal offense?
Are there immigration consequences to a conviction other than just removal of an alien?

Q: Where can I find comprehensive information about the process for the removal of aliens from the United States?

A: A helpful and comprehensive guide about the removal process can be found by viewing the following U.S. Department of Justice Office of Immigration Litigation (OIL) monograph at http://www.justice.gov/civil/oil/Padilla_Monograph.htm. Section 1 of the monograph provides information on the various legal methods that the U.S. government might use to secure a removal order against an alien. The monograph provides a comprehensive discussion of *Padilla*, which may generally be useful to prosecutors, particularly in determining whether a prior conviction may be subject to vacatur under *Padilla*. Additionally, you may wish to contact a local ICE Office of Chief Counsel for advice about a specific case in which an alien is challenging a criminal conviction based on the alleged ineffective assistance of counsel.

Q: Does an alien's immigration status at the time of a conviction impact the process for removal?

A: Yes. Whether an alien is subject to removal proceedings before an Immigration Judge under INA § 240, 8 U.S.C. § 1229a, rather than an alternative administrative or expedited removal process (e.g., under INA § 238, 8 U.S.C. § 1228), may depend on the alien's immigration status or lack thereof. Similarly, aliens who lack a lawful immigration status may potentially be subject to removal proceedings regardless of any convictions or vacaturs thereof. Please consult the monograph for more detailed information.

Q: How can I find out if an alien's conviction will result in the alien's removal?

A: Whether an alien is subject to removal as a result of a criminal conviction depends on a variety of factors, including: (1) the nature of the crime, (2) the alien's prior criminal history (see, e.g., INA § 237(a)(2)(A)(ii), 8 U.S.C. §1227(a)(2)(A)(ii), which provides for removability of certain aliens convicted of multiple offenses), (3) the jurisdiction in which removal proceedings will take place and (4) the information available to DHS and

DOJ about the criminal conviction(s). The monograph provides a comprehensive list of crimes that may result in an alien's removal. Highlights of crimes that generally make an alien removable include the following:

- Controlled substance offenses.
- Crimes determined to involve "moral turpitude." "Moral turpitude" is not defined in the INA, but has been found to include crimes that involve fraud or that involve conduct that is inherently dishonest, base, vile, or depraved.
- Firearm and destructive device convictions.
- Crimes of domestic violence in certain cases, stalking, child abuse, child abandonment or neglect, as well as certain violations of a protective order.
- Failure to register as a sex offender.
- Aggravated felonies listed in INA §101(a)(43). This list includes offenses such as murder, rape, sexual abuse of a minor; money laundering; certain theft offenses (depending on term of imprisonment); certain crimes of violence (depending on term of imprisonment); trafficking in controlled substances such as possession with intent, importation and/or distribution; fraud in which the loss to the victim is at least $10,000; and failure to appear in court to answer to a charge of a felony. Attempts or conspiracies to commit aggravated felonies are themselves aggravated felonies.

The INA makes aliens removable for crimes that they are convicted of and, in some cases, crimes that they commit irrespective of a conviction. However, the INA does not contain a clear, easily accessible list of offenses, in part because it is designed to capture offenses that vary from state to state. This information has been collected in Part A of Section II of the aforementioned monograph: http://www.justice.gov/civil/oil/Padilla_Monograph.htm. Please note that whether a particular state offense meets the definition of one or more specified criminal grounds of removal is a question generally answered by the Board of Immigration Appeals as well as the federal circuit courts.

Please note that simply because a conviction makes an alien removable, it does not mean the alien will be actually removed from the United States. In some cases, an alien may be subject to removal based upon a criminal conviction, but be eligible for relief from removal. If you have a specific question about a particular crime or offense, you may wish to contact the nearest ICE Office of Chief Counsel to discuss it.

Q: What documents does DHS and DOJ use in determining whether an alien is removable?

A: If an alien has been admitted to the United States, then DHS has the burden of proving that he/she was convicted of a crime that renders him/her removable. The Immigration and Nationality Act (INA) and its implementing regulations permit DHS to rely on certain court documents, including indictments, plea agreements and judgments of conviction, in order to meet this burden. In some cases, establishing that an alien is subject to removal is difficult because the limited documents that may be used do not clearly identify all of the elements of the crime that make an alien removable. For example, the INA makes aliens removable for crimes of domestic violence, but the relevant documents for a guilty plea to simple assault, for example, may not always

identify the victim as the spouse. Inclusion of information such as the victim-perpetrator relationship may need to be present in the record of conviction to render an alien removable. Please see Appendix D of the aforementioned monograph for a discussion on determining what information is necessary for a state offense to "match" a federal immigration offense, thereby rendering an alien removable. *See* http://www.justice.gov/civil/oil/Padilla_Monograph.htm.

Q: Are there immigration consequences to a conviction other than just removal of an alien?

A: Yes. Convictions that do not render an alien removable may still have other consequences for the alien convicted. Some aliens are removable irrespective of a criminal conviction, such as those who are present without inspection. For such aliens, a criminal conviction may nonetheless significantly impact their ability to remain in the United States. For example, aliens who are convicted of aggravated felonies are ineligible for most forms of relief from removal, including asylum, adjustment of status, and cancellation of removal. Even if a conviction does not make an alien ineligible for relief as a matter of law, criminal activity presents a significant adverse discretionary factor. *See, e.g.*, 8 C.F.R. § 1212.7(d); *Matter of Jean*, 23 I. & N. Dec. 373, 383-84 (A.G. 2002). Similarly, aliens with Temporary Protected Status under INA § 244, 8 U.S.C. § 1254a—individuals who are permitted to reside in the United States while their country experiences temporary conditions making their return difficult—may lose such status upon conviction of a felony, regardless of whether the felony is an independent ground of removal. These examples are representative of potential immigration consequences, other than removability, that may result from criminal activity and/or convictions. The scope and intent of this overview does not allow a comprehensive review of all the consequences. The full range of potential immigration consequences would be impossible to list comprehensively.

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D. What are the options available to obtain a removal order without a formal immigration hearing?

As previously noted, the majority of aliens go through formal proceedings conducted by an Immigration Judge, where the DHS must prove removal charges against the alien. While some aliens (by nature of their classification) are not entitled to this hearing (e.g., previously removed aliens who are unlawfully re-enter in the United States, alien stowaways, alien crew members, visa waiver entrants, etc.), aliens who are amenable to removal proceedings pursuant to the Immigration and Nationality Act (INA) § 240, 8 U.S.C. § 1229a, are able to obtain a removal order without a formal immigration hearing. Specifically, aliens can elect to avoid formal immigration hearings by entry of removal orders upon stipulation as authorized under INA § 240(d). These stipulated orders allow interested aliens, such as a criminal foreign national, who are removable from the United States and are ineligible for or do not wish to pursue relief from removal, to have their cases adjudicated expeditiously and without an in-person formal

immigration hearing. For such aliens, a stipulated removal order helps ensure swift justice, reduces their time in detention and expedites their return to their homeland. Furthermore, stipulated removal orders are a good avenue for judicial economy in that they create operational efficiencies for both the immigration and criminal courts. A prosecutor interested in presenting a request for a stipulated removal order to an alien defendant should consult with his/her local ICE Office of Chief Counsel.

1. Stipulated Order of Removal by an Immigration Judge:

Procedurally, to obtain a stipulated order of removal by an Immigration Judge (IJ), an alien or his/her representative and ICE make a joint motion to the IJ requesting that an order of removal be entered against the alien without a hearing and in the absence of the parties. Pursuant to the joint request, the IJ may enter a removal order based solely on a review of the charging document, the written stipulation, and supporting documentation, if any. If the alien is without representation, the IJ must determine that the alien's request for a waiver of a formal hearing is voluntary, knowing, and intelligent. A stipulated removal order shall constitute a conclusive determination of the alien's removability from the United States. *See* 8 C.F.R. § 1003.25(b).

Immigration Court Stipulated Order of Removal: Frequently Asked Questions:

How will I know if an alien defendant is a candidate for a stipulated removal order?
What is the process to obtain a stipulated removal order?
How long does it take to obtain a stipulated removal order?
Can an alien appeal the stipulated removal order of an Immigration Judge?
Does an alien need to be in ICE detention in order to request and receive a stipulated removal order from an Immigration Judge?
Are there any legal bars that might make the alien ineligible for a stipulated removal order?

Q: How will I know if an alien defendant is a candidate for a stipulated removal order?

A: Most aliens who are amenable to removal proceedings pursuant to INA § 240, 8 U.S.C. § 1229a, are eligible for stipulated removal. However, some aliens (by nature of their classification) are not entitled to a hearing. For example, previously removed aliens (that have re-entered illegally), alien stowaways, alien crew members, visa waiver entrants, etc., are not eligible to an automatic hearing in front of an Immigration Judge. Therefore, for such class of aliens, stipulated orders of removal are not appropriate. For aliens in immigration proceedings with legal representation, the alien's attorney and an ICE counsel from the local Office of Chief Counsel should communicate to ensure and determine whether stipulated removal order is the appropriate vehicle to remove the alien.

Q: What is the process to obtain a stipulated removal order?

A: If stipulated removal is deemed an appropriate avenue and the alien requests it ("Motion for Stipulated Removal Order"), an ICE officer will prepare and duly serve a document containing a joint stipulated request for an order of removal and waiver of a hearing along with a charging document, Form I-862, *A Notice to Appear*. The stipulation, along with the waiver documents, will need to be signed by the alien and his/her representative (if the alien is represented). (Note: Form EOIR-28, *A Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court*, must be filed by the attorney

or representative.) The Office of Chief Counsel will then review the waiver documents for completeness and concurrence. Once properly completed and executed, the waiver documents are then forwarded to an Immigration Judge (IJ). The IJ, on completion of an independent review, will adjudicate and either grant or deny the Motion for Stipulated Removal Order. The IJ may adjudicate the motion in the parties' absence. *See* 8 C.F.R. § 1003.25(b).

Q: How long does it take to obtain a stipulated removal order?

A: The time that it takes from signing the paperwork to the Immigration Judge's determination on the Motion for Stipulated Removal varies depending on ICE and court schedules. In most locations, the stipulated order is approved within a few business days.

Q: Can an alien appeal the stipulated removal order of an Immigration Judge?

A: No. However, the alien can file a motion to reopen removal proceedings in an attempt to vacate the removal order.

Q: Does an alien need to be in ICE detention in order to request and receive a stipulated removal order from an Immigration Judge?

A: No. An alien does not need to be in ICE detention to file such a request. The alien can also request a stipulated removal order while in a federal, state, or local prison.

Q: Are there any legal bars that might make the alien ineligible for a stipulated removal order?

A: Not all aliens are amenable to removal under INA § 240 and may therefore be ineligible for stipulated removal. Some aliens (by nature of their classification) are not entitled to a hearing (e.g., previously removed aliens who have illegally re-entered the United States, alien stowaways, alien crew members, visa waiver entrants, etc). Therefore, such classes of aliens are statutorily barred, and thus a stipulated order of removal is not appropriate.

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2. Stipulated Judicial Order of Removal (Federal Court):

Aliens who are deportable under the Immigration and Nationality Act (INA) and are defendants in federal criminal cases may be eligible for judicial removal. Unlike stipulated removal orders issued by an Immigration Judge (IJ), a stipulated judicial order of removal allows a U.S. District Court to grant such an order (at the time of sentencing) against a deportable alien. The U.S. District Court order may be granted pursuant to a request of a federal prosecutor, such as an Assistant United States Attorney (AUSA), along with the concurrence of the ICE Director. *See* INA § 238(c). Therefore, an AUSA may wish to present a plea agreement to an alien defendant and his/her legal representative that includes the alien's request for a stipulated judicial order of removal, as outlined in INA § 238(c)(5), in return for a reduced sentencing recommendation when appropriate and permitted under law. Prior to completing a plea agreement packet that

includes a stipulated judicial order of removal, an AUSA should obtain ICE's recommendation, as well as charging documents, conviction, and immigration records from the local ICE office.

Stipulated Judicial Order of Removal: Frequently Asked Questions:
How will I know if an alien defendant is a candidate for a stipulated judicial order of removal?
What is the process to obtain a stipulated judicial order of removal?
When can the alien defendant obtain a stipulated judicial order of removal?
Can an alien appeal the stipulated judicial order of removal?
If the United States District Court judge or magistrate refuses to accept the plea agreement or issue the stipulated judicial order of removal, can an alien defendant still be removed?
Does an alien need to be in the custody of a law enforcement agency to receive a stipulated judicial order of removal?
Are there any legal bars that might make the alien ineligible for a stipulated judicial order of removal?

Q: How will I know if an alien defendant is a candidate for a stipulated judicial order of removal?

A: Aliens who are removable under the INA and are defendants in federal criminal cases may be eligible for judicial removal. *See* INA § 238(c). However, it is important to note that judicial removal may not be the most appropriate removal proceeding for all federal alien defendants. Federal prosecutors who are interested in pursuing a removal order against an alien defendant should contact their local Office of Chief Counsel to determine if a judicial removal order is the appropriate avenue to effectuate the defendant's removal from the United States.

Q: What is the process to obtain a stipulated judicial order of removal?

A: Federal prosecutors are authorized to enter into plea agreements with federal defendants. *See* Fed. R. Crim. P. 12. Additionally, INA § 238(c)(5) sets forth the process regarding stipulated judicial orders of removal, whereby an alien can enter into a plea agreement subject to DHS concurrence. Under such plea agreements, the alien stipulates to being removed from the United States as part of his/her criminal sentence. The statute further sets forth that as part of the plea agreement, the alien waives a formal immigration hearing and waives the right to appeal from the order of removal. Please note, both a U.S. District Court judge (in felony and misdemeanor cases) and a U.S. magistrate judge (in misdemeanor cases only) may accept such stipulation and enter a judicial order of removal. A federal prosecutor who desires to seek such an order should contact the local Office of Chief Counsel in order to determine if the alien defendant is removable and whether a judicial order of removal is the most appropriate removal proceeding.

Q: When can the alien defendant obtain a stipulated judicial order of removal?

A: Generally, a U.S. District Court judge or a U.S. magistrate judge will enter the judicial removal order at the time of sentencing.

Q: Can an alien appeal the stipulated judicial order of removal?

A: No. INA § 238 (c)(5) requires that the alien explicitly waive the right to appeal from such orders.

Q: If the U. S. District Court judge or magistrate refuses to accept the plea agreement or issue the stipulated judicial order of removal, can an alien defendant still be removed?

A: Yes. The denial of a judicial removal order does not preclude ICE from initiating removal proceedings against an alien under INA § 240, 8 U.S.C. § 1229a, based on any charge of removability.

Q: Does an alien need to be in the custody of a law enforcement agency in order to receive a stipulated judicial order of removal?

A: No. However, if it is believed that a stipulated judicial removal order will be entered at the time of sentencing, ICE should be notified to ensure required steps are taken to coordinate removal efforts where appropriate.

Q: Are there any legal bars that might make the alien ineligible for a stipulated judicial order of removal?

A: Not all aliens are removable under the INA; therefore, the alien may be ineligible for a stipulated judicial removal order. Also, pursuant to the Immigration and Nationality Act, there are various classes of aliens who may be removed from the United States without a hearing (e.g., previously removed aliens who are currently unlawfully present in the United States, alien stowaways, alien crew members, visa waiver entrants). For these aliens, a judicial order of removal is unnecessary. Therefore, a federal prosecutor interested in seeking a judicial removal order should consult with his/her local ICE Office of Chief Counsel to determine the appropriate removal process.

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ICE created the Tool Kit because the agency recognizes that there may be situations where our federal and state prosecutor partners may benefit from having a foreign national remain in the United States for a period of time to assist with an ongoing investigation or to serve as a witness. Additionally, ICE understands that there may be situations when a prosecutor requires the presence of an alien witness or victim and that individual currently resides outside of the United States.

Fostering and sustaining relationships with our external stakeholders, including federal and state prosecutors, is a pivotal priority of ICE. ICE, through the Office of State, Local and Tribal Coordination (OSLTC), builds and improves partnership activities with multiple stakeholders – including state, local and tribal governments, law enforcement agencies/groups, local and state prosecutors, and non-governmental organizations. The building of constructive relationships with our stakeholders fosters community awareness and support for the agency's mission and enhances our understanding of stakeholder issues related to our enforcement operations.

ICE

U.S. Immigration and Customs Enforcement (ICE) is the largest investigative arm of the Department of Homeland Security. ICE is a 21st century law enforcement agency with broad responsibilities for a number of key homeland security priorities. For more information, visit: www.ICE.gov. To report suspicious activity, call 1-866-347-2423.