

U.S. Customs and Border Protection

CBP Directive No. 3340-043

Date: September 3, 2008

ORIGINATING OFFICE: OFO: APP

SUPERSEDES:

REVIEW DATE: September 2011

SUBJECT: THE EXERCISE OF DISCRETIONARY AUTHORITY

1. Purpose. To provide guidance and direction to promote the fair, objective and consistent application of U.S. Customs and Border Protection (CBP) discretionary authority in the enforcement of immigration laws nationwide.

2. Policy.

2.1 It is the policy of CBP to protect the United States of America from threats posed by terrorist organizations and to prevent terrorists as well as suspected terrorists, terrorist funding, weapons, and instruments, including Weapons of Mass Effects (WME), and their precursors from entering the United States.

2.2 It is the policy of CBP, consistent with the Immigration and Nationality Act (INA) to verify the identity, citizenship and admissibility of persons seeking entry into the United States. Where there is a belief, based on an evaluation of available information, that an alien may have ties to or presents a threat related to terrorism, has criminality rendering him or her inadmissible, or is likely to add to the illegal population of the United States, the alien will be denied admission where there is a legal basis to do so.

2.3 It is the policy of CBP that, through the use of all authorities and sanctions provided by law and procedure, enforcement actions will be vigorously pursued against any individual where there exists any reasonable suspicion of association with terrorism, criminality, illegal migration, smuggling or any other activity contrary to national interests or in violation of U.S. statutes.

2.4 It is the policy of CBP to consider the exercise of discretionary measures in favor of aliens who are inadmissible due to a minor or technical violation of the INA. This includes the use of the waiver and parole processes to allow such aliens into the United States, where appropriate and permissible by law. In keeping with the CBP strategy of risk management, CBP will focus resources on those cases that pose the greatest risk.

2.5 It is the policy of CBP that in individual cases involving technical inadmissibility, minor violations, and apparent bona fide travel, where refusal of admission or withdrawal of application for admission would involve detention or undue hardship, it is appropriate to expansively consider the exercise of discretionary authority. This principle must be applied on a case-by-case basis and may not be interpreted to provide relief from the visa requirement in any systemic manner to any particular class of aliens.

2.6 It is the policy of CBP that supervisors and managers will responsibly assess every case involving a prospective adverse action. This will ensure that CBP's legal and discretionary authority is being exercised judiciously and in a manner consistent with the facts of the case.

3. Authority/References. Immigration and Nationality Act (INA); Title 8 United States Code (USC); Title 19 USC; Title 8 Code of Federal Regulations (CFR); Inspector’s Field Manual (IFM) Chapters 16.1 (Parole); 17.1 (Deferred Inspection); 17.2 (Withdrawal of Application for Admission); and 17.5 (Waivers).

4. Definitions.

4.1 “Admission,” means, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by a CBP officer.

4.2 “Brief overstay,” generally means an overstay of approved nonimmigrant status, unintentional in nature or beyond the control of the alien, covering a period of (b)(7)(E) or less.

4.3 “Hardship,” must be determined based on the factors presented. Applicants must be encouraged to describe and document all applicable factors, since there is no guarantee that any particular reason will result in a finding that an adverse action would cause extreme or undue hardship.

4.4 (b)(7)(E)

4.5 “Significant public benefit,” means that the inadmissibility of an alien is outweighed by the public interest in allowing the alien to enter the United States.

4.6 “Unforeseen emergency,” as used in 8 CFR § 212.1(g) generally means:

4.6.1 An alien arriving for a medical emergency (an injury or illness that requires immediate medical attention to prevent life-threatening or disabling conditions);

4.6.2 An emergency or rescue worker arriving in response to a community disaster or catastrophe in the United States;

4.6.3 An alien accompanying or following to join a person arriving for a medical emergency;

4.6.4 An alien arriving to visit a spouse, child, parent, or sibling who within the past 5 days has unexpectedly become critically ill or who within the past 5 days has died; or,

4.6.5 An alien whose passport or visa was lost or stolen within 48 hours of departing the last port of embarkation for the United States.

5. Responsibilities.

5.1 The Assistant Commissioner, Office of Field Operations, is responsible for policy oversight, which includes the formulation and implementation of guidelines and procedures.

5.2 The Executive Director, Admissibility and Passenger Programs (APP), is responsible for the formulation and implementation of the guidelines set forth by the Assistant Commissioner. In addition, the Executive Director, APP, will be responsible for conducting national reviews to ensure compliance with implemented guidelines outlined in this directive.

5.3 Directors, Field Operations (DFOs) are responsible for the overall management and implementation of this program. DFOs will also be responsible for the overall monitoring of the exercise of discretionary authority within their areas of responsibility.

5.4 Port Directors (PDs) are responsible for performing periodic reviews of cases to ensure that the exercise of discretionary authority is being applied in accordance with this directive. PDs are also responsible to ensure that any exercise of discretionary authority is fully warranted.

5.5 Field managers and supervisors are responsible for ensuring that the Discretionary Checklist is utilized in every case involving a prospective adverse action. They are further responsible for assessing every case involving a prospective adverse action to ensure that any exercise of discretionary authority is done judiciously and in a manner consistent with the facts of the case.

5.6 Supervisors are responsible for ensuring that the Discretionary Checklist is completed during case processing. Supervisors are further responsible for ensuring that CBP officers under their supervision are familiar with the policies and procedures established by this directive.


5.7 CBP officers are responsible for knowing, understanding and adhering to the contents of this directive. CBP officers are further responsible for accurately presenting all facts and circumstances resulting from an inspection that may involve a prospective adverse action to the appropriate level of management, through the chain of command.

5.8 CBP officers are responsible for immediately forwarding information to the appropriate level of management, through the chain of command, regarding time-critical situations, including medical emergencies.


6. Port of Entry Environments.

6.1 Land Border and Preclearance Ports of Entry

6.1.1 (b) (7)(E)



6.1.2 (b) (7)(E)



6.1.3 (b) (7)(E)

6.2 Air and Sea Ports of Entry

6.2.1 (b) (7)(E)

6.2.2 (b) (7)(E)

7. Discretionary Checklist

7.1 The attached Discretionary Checklist serves as an aid to frontline personnel and managers in exercising discretionary authority. It also ensures that the INA is consistently applied and that each applicant's admissibility is viewed as a unique, individual case.

7.2 The Discretionary Checklist should be completed by the inspecting CBP officer and reviewed by a first and/or second line supervisor.

7.3 The Discretionary Checklist should be maintained as a part of the alien's port file or A-file (if one exists), regardless of whether discretionary authority is exercised or denied. The checklist should explain why discretion was approved or denied.

7.4 Discretionary authority should generally not be exercised if the alien is unable to establish his or her identity or citizenship.

7.5 Discretionary authority should generally not be exercised if the alien has terrorist ties or affiliations, significant criminal history, or is likely to contribute to the illegal population of the United States. (b) (7)(E)

7.6 The factors outlined below should be considered when deciding whether to exercise discretion. Not every factor will apply in every case.

7.6.1 The nature of the inadmissibility should be reviewed (b) (7)(E)

7.6.2 All potential grounds of inadmissibility should be reviewed. (b) (7)(E)

7.6.3 Previous violations or determinations of inadmissibility should be reviewed (b) (7)(E)

7.6.4 Previous grants of parole or waiver should be reviewed (b) (7)(E)

7.6.5 An alien's stated purpose of entry should be reviewed (b) (7)(E)

7.6.6 An alien's stated family or business ties in the United States should be reviewed (b) (7)(E)

7.6.7 An alien's current and previous immigration status and length of residence in the United States (if applicable) should be reviewed (b) (7)(E)

7.6.8 An alien's good faith efforts to obtain correct information or documents prior to arrival should be reviewed (b) (7)(E)

7.6.9 An alien's knowledge or ignorance of correct procedures or admissibility requirements should be reviewed (b) (7)(E)

7.6.10 Advance opportunity to obtain travel documents should be reviewed (b) (7)(E)

7.6.11 Any suspected intentions to circumvent admissibility requirements should be reviewed to determine the underlying reason for inadmissibility, and the extent to which the alien was aware of any inability or unlikelihood of being granted a visa or admission to the United States.

7.6.12 Misrepresentations¹ made during the inspection process should be reviewed (b) (7)(E)

¹(b) (7)(E)

7.6.13 An alien may not be aware that a previous brief overstay has resulted in either the avoidance of a visa, or future ineligibility to enter the United States under the Visa Waiver Program (VWP). (b) (7)(E)

7.6.14 An alien's claim of official misinformation, especially from government officials, should be reviewed (b) (7)(E)

7.6.15 An alien's willingness to cooperate with CBP processing should be reviewed (b) (7)(E)

7.6.16 An alien's age and health should be reviewed (b) (7)(E)

7.6.17 Any political or media sensitivities should be reviewed (b) (7)(E)

7.6.18 An alien's potential to pose a threat of future terrorist, criminal or violent acts in the United States should be considered.

7.6.19 Any other humanitarian or public interest considerations should be reviewed (b) (7)(E)

8. Forms of Discretion.

8.1 Waivers.

8.1.1 non-responsive

8.1.2 non-responsive

8.1.3 non-responsive [redacted]

8.1.4 non-responsive [redacted]

8.1.4. non-responsive [redacted]

8.1.5 non-responsive [redacted]

8.1.5.1 non-responsive [redacted]

8.1.5.2 non-responsive [redacted]

8.1.5.3 non-responsive [redacted]

8.1.5.4 non-responsive [redacted]

8.1.5.5 non-responsive [redacted]

8.1.5.6 non-responsive [redacted]

8.2 Parole.

8.2.1 Generally, cases requiring parole authorization will present more complex circumstances than those in which a waiver would be considered. Parole authority is normally exercised when

an alien is inadmissible for reasons other than simple documentary deficiencies. Parole is not regarded as an “admission;” therefore, paroled aliens remain subject to proceedings as inadmissible (under INA § 212), rather than removable (under INA § 237), aliens.

8.2.2 The authority to approve a parole under INA § 212(d)(5) is currently delegated to port management at the GS-13 level and above, and port directors at the GS-12 level.

8.2.3 If a parole is provided as a benefit to an alien, the prescribed fee should generally be collected. However, if a parole is provided in the interest of the government, the fee should be waived.

8.2.4 Since there is no application form for a parole, CBP officers must document all approved port of entry paroles (b) (7)(E)

8.2.4.1 Aliens presenting a valid, approved Form I-512, *Authorization for Parole of an Alien into the United States*, need not be documented (b) (7)(E)

8.2.4.2 Port of entry paroles involving emergency or other time-critical situations should be documented (b) (7)(E)

8.2.4.3 In time-critical situations, an alien may be allowed to enter the United States (b) (7)(E)

8.2.5 Ports of entry may grant paroles for deferred inspection, referral for removal proceedings, to facilitate an alien’s departure, and in other situations deemed to be in the public interest.

8.2.6 The following situations are a few examples in which parole may be appropriate.

8.2.6.1 An inadmissible alien in need of emergency medical treatment.

8.2.6.2 Emergency workers responding to a natural disaster or other emergency situation.

8.2.6.3 **Medical evacuation** — often termed **MEDEVAC** or **medivac** (land and air ambulance) crew and/or patients.

8.2.6.4 A minor accompanying a detained parent.

8.2.6.5 A missing or abducted minor located and paroled to another agency.

8.2.6.6 Sick or injured crewmembers, including shipwreck or plane crash survivors.

8.2.6.7 An unaccompanied minor who is being released pursuant to an order of preference found in 8 CFR § 212.5(b)(3) or 8 CFR § 236.3(b)(1).

8.2.6.8 Significant Public Benefit Parole, including silent parole, requested by other law enforcement agencies. (b) (7)(E)

8.2.6.9 In situations involving minor or inadvertent violations and apparent bona fide travel with no other violations, such as a brief overstay of a VWP admission that rendered an alien statutorily ineligible to apply for admission under the VWP, (b) (7)(E)

8.2.6.10 Foreign students on field trips, aliens attending cultural events, and aliens coming for non-emergency medical treatment determined to be inadmissible for reasons other than documentary deficiencies may also be issued a port of entry parole. When a documentary deficiency is the only apparent ground of inadmissibility, a waiver should be pursued prior to parole consideration.

8.2.7 Aliens placed into expedited removal proceedings (b) (7)(E)

8.3 Deferred Inspection.

8.3.1 A deferred inspection may be used when an immediate decision concerning admissibility cannot be made at a port of entry and when it appears likely that the issues surrounding admissibility can be resolved favorably at the onward port of entry. Deferred inspections may be necessary to review an existing file, or some other documentary evidence essential to clarifying admissibility.

8.3.2 As a form of parole, the authority to approve a deferred inspection is currently delegated to port management at the GS-13 level and above, and port directors at the GS-12 level. (b) (7)(E)

8.3.3 (b) (7)(E)

8.3.4 (b) (7)(E)

8.3.5 CBP processing shall be deferred for a specific purpose, and not as a way to transfer a difficult case to another office.

8.3.6 CBP processing shall be deferred to the office having jurisdiction over the area where the alien will be staying while in the United States.

8.3.7 CBP processing shall not be deferred where the alien is not expected to establish his or her admissibility. (b)(7)(E)

8.3.8 (b)(7)(E)

8.3.9 (b)(7)(E)

8.3.10 The deferred inspection provision contained in 8 CFR § 235.2(a) shall not apply to an applicant for admission under INA § 217, except that the removal of a VWP applicant may only be deferred if the alien is paroled for criminal prosecution or punishment. This is the only provision for deferred removal under the Visa Waiver Program.

8.4 **Withdrawal of Application for Admission.**

8.4.1 A nonimmigrant applicant for admission who does not appear to be admissible may be offered the opportunity to withdraw his or her application for admission pursuant to INA § 235(a)(4), rather than being placed in proceedings pursuant to INA § 240 or removed under INA § 235(b)(1).

8.4.2 An alien cannot, as a matter of right, withdraw his or her application for admission, but may be permitted to withdraw if it is determined to be in the best interest of justice that a removal order not be issued. All withdrawals of application for admission (b)(7)(E) should be approved by a first-line supervisor.

8.4.2.1 At land border ports of entry, aliens who refuse to pay the fee required for issuance of an entry document (I-94 or I-94W), and aliens who seek immediate return to the country of departure with documented intentions of obtaining or extending status in that country, but who are otherwise admissible, (b)(7)(E)

8.4.3 Prior to permitting an alien to withdraw his or her application for admission, the alien must demonstrate both the intent and the means to depart immediately from the United States.

8.4.4 Withdrawal is strictly voluntary and may not be coerced in any way. If withdrawal is offered, but not voluntarily accepted, appropriate removal proceedings should be initiated.

8.4.5 In exercising discretion to permit a withdrawal of application for admission, carefully consider all the facts and circumstances related to the case to determine whether permitting withdrawal would be in the best interest of justice, or conversely, if justice would be ill-served if an order of removal were issued.

8.4.6 In light of the serious consequences of an expedited removal order, including a minimum 5-year bar on re-entry to the United States, the decision to permit withdrawal should be based on a careful consideration of relevant mitigating and aggravating factors in order to reach a reasonable decision.

8.4.7 Withdrawal of application for admission should not be permitted in situations involving obvious, deliberate fraud on the part of the applicant, or when especially egregious CBP violations are uncovered (e.g., long-term or repeated overstays, unauthorized employment).

8.5 **Voluntary Return.**

8.5.1 Voluntary Return (VR) is an act of discretion that can be applied to non-arriving aliens in circumstances analogous to those where withdrawal of application for admission is allowed, and should be approved by a first-line supervisor.

8.5.2 Usually, when an alien has demonstrated his or her intent to depart the United States, it serves no purpose to issue a Notice to Appear, because the alien is already executing the ultimate objective, which is removal from the United States. There is generally no reason to burden the immigration court with these cases.

8.5.3 When feasible, Voluntary Return cases should be documented (b)(7)(E) [REDACTED] facts should be articulated documenting the unlawful presence, (b)(7)(E) [REDACTED] Without these actions, it may be difficult to sustain a future ground of inadmissibility regarding the alien's unlawful stay.

8.5.4 In circumstances where CBP officers encounter outbound illegal aliens and there is insufficient time before the departure flight to collect biometrics, CBP officers may use available biographic data alone to create an (b)(7)(E) [REDACTED] lookout.

8.6 **Detention.**

8.6.1 non-responsive [REDACTED]

8.7 **Fee Collection.**

8.7.1 When a form of discretion under consideration requires the payment of an associated fee (such as waiver applications and certain paroles), CBP should determine if the action taken is solely for the benefit of the alien. If the discretionary action is taken for reasons of significant public benefit, CBP should not charge a fee.

8.7.2 Situations resulting from an action at the port of entry in which it would not be appropriate to charge a fee include the following:

8.7.2.1 Parole for criminal prosecution;

8.7.2.2 Parole for incarceration after conviction for a crime;

8.7.2.3 Parole into the custody of another agency;

8.7.2.4 Parole for INA § 240 proceedings, if detention is not appropriate or feasible;

8.7.2.5 Parole of a stowaway for a medical emergency or legitimate law enforcement objective;

8.7.2.6 Parole of a witness in a judicial, administrative or legislative proceeding being conducted, or to be conducted in the United States;

8.7.2.7 Parole for deferred inspection; and,

8.7.2.8 Parole for deportation from another country through the United States.

8.7.3 Nothing in this directive is intended to diminish the authority of port management to waive fees under other circumstances, where appropriate, in accordance with 8 CFR § 103.7(c).

9. No Private Right Created. The procedures set forth in this Directive are for CBP internal use only and create no private rights, benefits, or privileges for any private person or party.

/s/

Assistant Commissioner
Office of Field Operations

Discretionary Authority Checklist for Alien Applicants

Applicant's Name: **Port #:**

Date of Birth: **Date of Action:**

Citizenship: **Passport / A-#:**

1) Identity / Citizenship:

Identity sufficiently determined: Yes No

Citizenship sufficiently determined: Yes No

2) Age, Health and Notoriety of Applicant:

Are age or health relevant factors? Yes No

Is the applicant a public figure? Yes No

Congressional or media interest? Yes No

***NOTE: Discretionary authority should generally not be exercised if identity or citizenship can not be established.*

REMARKS (to include origin, destination and intended length of stay):

3) Intended Purpose of Entry:

Emergency: Yes No

Medical: Yes No

Pleasure: Yes No

Business/Official: Yes No

Other: Yes No

4) (b) (7)(E)

(b)(7)(E)

REMARKS (b)(7)(E) :

5) Previous Immigration Violations or Inadmissibility:

Previous Immigration Violation(s): Yes No

Previous Inadmissibility: Yes No

Previous Beneficiary of Discretion: Yes No

6) Nature of Inadmissibility:

(b) (7)(E)

REMARKS:

7) Threat posed to the United States:

(b) (7)(E)

(b) (7)(E)

***NOTE: Discretionary authority should generally not be exercised if a threat is posed to the United States.*

REMARKS:

8) Other Factors to Consider:

Legitimate reason for entering the United States:	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Documentary (Passport / Visa) deficiency only:	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Credible claim of official misinformation:	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Relationship to a U.S. employer or resident:	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Intent to circumvent admissibility requirements:	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Misrepresentations made during processing:	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Minor children accompanying or already in the United States:	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Unaware of visa avoidance or consequences of VWP overstay:	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Relief available through the parole or waiver process:	Yes <input type="checkbox"/>	No <input type="checkbox"/>

REMARKS:

Examining CBP Officer:

Applicable Ground(s) of Inadmissibility:

Applicable Discretionary Action(s):

Withdrawal of Application for Admission:	Yes <input type="checkbox"/>	No <input type="checkbox"/>	
Parole to Depart Foreign / Voluntary Return:	Yes <input type="checkbox"/>	No <input type="checkbox"/>	Length of parole sought: _____
Humanitarian Parole:	Yes <input type="checkbox"/>	No <input type="checkbox"/>	Length of parole sought: _____
Waiver of Passport Requirement:	Yes <input type="checkbox"/>	No <input type="checkbox"/>	Period of admission sought: _____
Waiver of Non-Immigrant Visa Requirement:	Yes <input type="checkbox"/>	No <input type="checkbox"/>	Period of admission sought: _____
Classification: _____			Period of admission sought: _____
Waiver of Immigrant Visa Requirement:	Yes <input type="checkbox"/>	No <input type="checkbox"/>	
Waiver of processing fee (if applicable):	Yes <input type="checkbox"/>	No <input type="checkbox"/>	
Deferred Inspection:	Yes <input type="checkbox"/>	No <input type="checkbox"/>	Deferral Period and Location: _____

Supervisory CBP Officer:

Recommendation:

Approve: Yes No

Disapprove: Yes No

Justification for recommendation (to include alternatives, if disapproval is recommended):

Reviewing 2nd Line Manager:
(GS13 or Above)

Decision:

Approved: Disapproved:

Justification for decision (to include final disposition, if disapproved):