



**U.S. Customs and
Border Protection**

DEC 31

MEMORANDUM FOR: EXECUTIVE DIRECTORS, FIELD OPERATIONS
DIRECTORS, FIELD OPERATIONS
DIRECTOR, PRECLEARANCE OPERATIONS

FROM: Assistant Commissioner
Office of Field Operations

SUBJECT: Promoting the Use of Discretionary Authority

U.S. Customs and Border Protection (CBP) managers make difficult decisions on a daily basis; discretion is defined as the ability to make responsible decisions. CBP managers are expected to promote a fair and consistent application of available discretionary authorities. Discretion should never be exercised favorably where an alien seeking entry poses (1) a potential threat of terrorism, (2) a potential threat of committing criminal or violent acts in the United States, or (3) a substantial threat of contributing to the illegal population of the United States.

The attached memorandum, dated July 20, 2004, *Exercise of Discretion – Additional Guidance*, was issued “to remind all officers that CBP’s policy is to use discretion where appropriate to admit or parole aliens into the United States where the law permits discretion...” and stated that “this discretion is to be applied on a case-by-case basis, taking into consideration the totality of circumstances of each individual situation.” Also outlined in the memorandum were the various forms of discretion and options for case processing available under the Immigration and Nationality Act (INA).

On July 30, 2004, the “Discretionary Authority Checklist” was distributed as an aid to frontline personnel and managers to promote a fair and consistent application of available discretionary authorities. The attached discretionary checklist was designed to present all relevant, additional (mitigating and aggravating) factors, beyond the apparent facts of the case, to the appropriate deciding official. The deciding official should consider all presented factors and pursue all available options for case processing, prior to making a final disposition determination.

This is to remind all CBP managers that the use of the discretionary checklist is mandatory when determining whether a technical or inadvertent violation of the INA has occurred. CBP managers must take into consideration the totality of circumstances before exercising discretion, either as a benefit to the alien or as justification for an enforcement action. The checklist is to be completed by the examining CBP officer and a first or second line supervisor, and will enable CBP managers to make responsible decisions.

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Please ensure that this guidance is disseminated to all ports of entry within your area of responsibility. Questions on the policy outlined here may be directed to (b) (6), (b) (7)(C) Assistant Executive Director, Admissibility and Passenger Programs, at

(b) (6), (b) (7)(C)

Thomas S. Winkowski

Attachments

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July 20, 2004 /S/

MEMORANDUM FOR: DIRECTORS, FIELD OPERATIONS
DIRECTOR, PRECLEARANCE OPERATIONS

FROM: Assistant Commissioner
Office of Field Operations

SUBJECT: Exercise of Discretion – Additional Guidance

One of the more difficult, complex and significant responsibilities of Customs and Border Protection (CBP) managers is the exercise of discretion under the various provisions authorized by the Immigration and Nationality Act (INA). Several memoranda have been issued addressing various aspects of this authority, most notably the April 30, 2004 memorandum entitled Zero Tolerance Policy: Exercise of Discretion.

This is to remind all officers that CBP's policy is to use discretion where appropriate to admit or parole aliens into the United States where the law permits discretion, in keeping with the CBP strategy of risk management; that is, (b) (7)(E) [REDACTED]. The application of discretion must be consistent with the INA and the statutory standards must be met. Entry must be denied when the alien seeking entry (b) (7)(E) [REDACTED].

(b) (7)(E) [REDACTED]

(b) (7)(E) [REDACTED] However, in cases involving minor or inadvertent violations and apparent bona fide travel, where refusal of admission would involve detention or undue hardship (b) (7)(E) [REDACTED].

(b) (7)(E) [REDACTED]

The attached document contains sections relating to Forms of Discretion, the Delegation of Authority and Considerations for the Exercise of Discretion, and provides guidance on some of the factors to consider in determining whether an inadmissible alien merits the exercise of discretion.

The Port Director is responsible for performing periodic reviews of cases to ensure this authority is being applied in accordance with existing policies.

Additionally, the Port Director is to be actively involved in monitoring the administration of this policy and conducting real time reviews of cases in progress to ensure that they are properly documented and prepared and, when discretionary relief is available, it is fully considered and exercised where appropriate. Responsibility for the overall monitoring of this exercise of authority remains with the Director of Field Operations. Managers will ensure that statistical data on all decisions are properly tracked in the appropriate systems.

All officers must bear in mind that the authority to exercise discretion and make decisions affecting people's lives, carries with it the responsibility for ensuring that all actions advance the goals of professionalism, courtesy, and respect for the position of public trust that we hold. Whether enforcing the laws in denying entry to inadmissible aliens or exercising discretion to allow them into the United States, all officers and managers must maintain the highest levels of professionalism, impartiality, and courtesy to the traveling public.

Questions regarding this guidance may be directed to (b) (6), (b) (7)(C), Acting Executive Director, Immigration Policy and Program at (b) (6), (b) (7)(C) or (b) (6), (b) (7)(C) (b) (6), (b) (7)(C).

Jayson P. Ahern /S/

Attachment

CONSIDERATIONS FOR THE EXERCISE OF DISCRETION

The decision to parole an alien into the United States, to parole for deferred inspection, to grant a waiver of documentary requirements, or to exercise other forms of discretion, is a determination that must be made on a case by case basis, taking all of the facts of the individual case into consideration. These factors

(b) (7)(E)
(b) (7)(E) to
overcome minor or inadvertent violations where there is (b) (7)(E)
[Redacted]

Once a determination is made that urgent humanitarian reason, significant public benefit, or unforeseen emergency exists, the decision must be made whether the exercise of discretion is warranted. Consider the totality of the circumstances and weigh all factors.

Following are some of the considerations and factors that should be taken into account when deciding whether to exercise this discretion. Not every factor will apply in every type of case.

(b) (7)(E)

(b) (7) (E)

(b) (7) (E)

Exercise of Discretion – Additional Guidance

Forms of Discretion

Discretion under the INA may take various forms, including, but not limited to, the decision to:

- Permit withdrawal of application for admission rather than place the alien into removal proceedings
- Grant parole to overcome inadmissibility
- Approve a waiver of documentary requirements
- Defer the inspection to an onward office to resolve the issue of admissibility
- Detain or not detain
- Determine the restraint necessary, including detention
- Grant a longer or shorter period of admission
- Grant satisfactory departure where permitted by statute or regulation
- Pursue criminal prosecution

(b) (7)(E)

(b) (7)(E)

When a decision is reached to overcome a deficiency in entry documents, such as a wrong visa classification, an expired passport, or the lack of a visa, a waiver under section 212(d)(4) of the INA is generally the proper remedy when a review of all of the circumstances related to the inspection indicate that discretion is warranted.

When the obstacle to admission is a minor infraction such as inadvertently overstaying a previous visit or unknowingly failing to maintain status, the proper remedy is parole under section 212(d)(5) of the INA, when it can be shown that a significant public benefit will result or there are urgent humanitarian reasons for the exercise of discretion as is provided for in the INA. This exercise of discretion should be broadly applied. It should be noted that in appropriate circumstances, such as for criminal prosecution or other law enforcement purposes, or for compelling humanitarian reasons, parole may be authorized to overcome any ground of inadmissibility.

The period of time given for the person to remain in the United States should be commensurate with the purpose of the visit and the classification. Application for a waiver is Form I-193, with a current fee of \$250. There is no application for parole but there is a fee, currently \$65. Any waiver of fees should conform to guidelines in Chapter 16.1(c) of the Inspector's Field Manual and 8 CFR 103.7(c).

A third remedy is deferred inspection to an onward office pursuant to 8 CFR 235.2, which may be used for such cases as documentary deficiencies other than entry documents, when it is likely the obstacle to admission can be cleared at the office having jurisdiction over the alien's residence or destination. There is no fee for a deferred inspection, which is performed with a Form I-546.

(b) (7)(E)

Each person between the ages of 14 and 79 for whom discretion is exercised with a waiver or a parole (including a parole for deferred inspection) must be processed in (b) (7)(E). A note should be included in the (b) (7)(E) record that such discretion was exercised. The person will be expected to depart the United States promptly by or before the expiration of stay as noted on the executed Form I-94.

Delegation of Authority

On May 22, 2003, the Office of Field Operations issued a memorandum entitled Delegation of Immigration Authority Under Customs and Border Protection (CBP) (TC#03-0495), which delegated authority to grant parole or deferred inspection or approve waivers of documentary requirements, and to issue removal orders for Visa Waiver Program violators, to port directors at the (b) (7)(E). The authority to issue Notices to Appear (NTAs) to aliens other than arriving aliens was delegated to the level of assistant port director. This limited delegation of certain authorities has created some logistical and operational problems, particularly at larger ports.

Limiting the parole, deferred inspection and waiver authority to the Port Directors only has placed an excessive burden on port directors at large ports due to the volume of cases and time consumed to address each request. Many of these requests to grant parole or deferred inspection or approve waivers of documentary requirements can be effectively handled by other managers at the (b) (7)(E), particularly since they do not often involve novel facts or unique circumstances. These discretionary authorities are now being delegated to Assistant Port Directors and Chief Inspectors at the (b) (7)(E). This will ensure that each case receives the attention that it merits and that discretionary relief is considered in each case.

Discretion will continue to be exercised within existing guidelines and applied with the sound judgment noted in the Zero Tolerance Policy: Exercise of Discretion memorandum dated April 30, 2004. Decisions in all cases must be properly documented in accordance with existing procedures and the decision must be justified. First line supervisors must review the case for completeness and legal sufficiency before presentation to the appropriate level supervisor for approval or decision. (b) (7)(E)

