

# Rules and Regulations

Federal Register

Vol. 70, No. 3

Wednesday, January 5, 2005

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 983

[Docket No. FV02-983-1 FR]

#### **Pistachios Grown in California; Delay of the Effective Date for Aflatoxin, Size and Quality Requirements**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule; delay of effective date.

**SUMMARY:** This document delays the effective date from February 1, 2005, to August 1, 2005, for aflatoxin, size and quality requirements established under Marketing Order No. 983 (order). The order regulates the handling of pistachios produced in California. Sections 983.38 through 983.45 of the order establish maximum aflatoxin along with minimum size and quality requirements for California pistachios. The Administrative Committee for Pistachios, which is responsible for locally administering the order, recommended the delay in the effective date. Postponing the effective date of the regulations will provide the industry and the newly established administrative committee with additional preparation time needed to meet the aflatoxin, size and quality requirements of the order. Also, the postponed effective date would correspond with the beginning of the 2005 crop year.

**DATES:** The effective date of §§ 983.38 through 983.45 of 7 CFR part 983 published at 69 FR 17844 is delayed until August 12, 2005.

**FOR FURTHER INFORMATION CONTACT:** Melissa Schmaedick, Marketing Specialist, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, P.O. Box 1035, Moab, Utah 84532; telephone:

(435) 259-7988, Fax: (435) 259-4945; or Rose Aguayo, Marketing Specialist, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, suite 102B, Fresno, California 93721; telephone: (559) 487-5901, Fax: (559) 487-5906.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237; telephone: (202) 720-2491, Fax: (202) 720-8938, or e-mail: [Jay.Guerber@usda.gov](mailto:Jay.Guerber@usda.gov).

**SUPPLEMENTARY INFORMATION:** This document delays the effective date from February 1, 2005, to August 1, 2005, for aflatoxin, size and quality provisions established under Marketing Order No. 983 (order). The order, which became effective in April 2004, regulates the handling of pistachios produced in California. Sections 983.38 through 983.45 of the order establish maximum aflatoxin along with minimum size and quality requirements for California pistachios, and were scheduled to become effective on August 1, 2004.

The Administrative Committee for Pistachios (Committee) recommended the delay in the effective date at a December 8, 2004, meeting. The Committee voted unanimously that postponing the effective date will provide the industry and the Committee with additional time to establish rules, regulations, and program procedures needed to implement the aflatoxin, size and quality requirements of the order. Rules, regulations and program procedures are recommended by the Committee, which is responsible for locally administering the order, for approval by the Secretary. Postponing the effective date of the order's regulatory provisions will allow the new Committee time to become more established and actively participate in implementing the order.

Also, the postponed effective date would correspond with the beginning of the 2005 crop year. Given that the California pistachio marketing order is a newly established regulatory program, the Agricultural Marketing Service deems that the coordination of program reporting and recordkeeping

requirements with the beginning of the program's fiscal and crop year as important to successful implementation of the order.

Thus, the effective date of §§ 983.38 through 983.45 should be delayed until August 1, 2005. This delay will provide sufficient time for the Committee to recommend any rules and regulations deemed necessary.

#### **List of Subjects in 7 CFR Part 983**

Marketing agreements, Pistachios, Reporting and recordkeeping requirements.

**Authority:** 7 U.S.C. 601-674.

Dated: December 29, 2004.

**A. J. Yates,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. 05-182 Filed 1-4-05; 8:45 am]

**BILLING CODE 3410-02-M**

## DEPARTMENT OF HOMELAND SECURITY

### 8 CFR Part 241

[ICE No. 2317-04]

RIN 1653-AA41

## DEPARTMENT OF JUSTICE

### 8 CFR Parts 1240 and 1241

[EOIR No. 146F; AG Order No. 2746-2004]

RIN 1125-AA50

#### **Execution of Removal Orders; Countries to Which Aliens May Be Removed**

**AGENCY:** United States Immigration and Customs Enforcement, Department of Homeland Security; Executive Office for Immigration Review, Department of Justice.

**ACTION:** Final rules.

**SUMMARY:** The Secretary of Homeland Security and the Attorney General publish these final rules to amend their respective agencies' regulations pertaining to removal of aliens.

With the Department of Homeland Security final rule, the Secretary of Homeland Security adopts as final, without substantial change, the proposed regulations published at 69 FR 42910 (July 19, 2004). The Department of Homeland Security amends its

regulations to clarify that acceptance by a country is not required under specific provisions of section 241(b) of the Immigration and Nationality Act in order to remove an alien to that country, and that a "country" for the purpose of removal is not premised on the existence or functionality of a government in that country. This rule further clarifies the countries to which an alien may be removed and the situations in which the Secretary of Homeland Security will remove an alien to an alternative or additional country. Additionally, this rule provides technical changes as a result of amendments to the Immigration and Nationality Act by the Homeland Security Act of 2002.

With the Department of Justice final rule, the Attorney General adopts as final, without substantial change, the proposed regulations at 69 FR 42911 (July 19, 2004). The Department of Justice clarifies the procedure for an alien to designate the country to which he or she would prefer to be removed, provides that the immigration judge shall inform any alien making such a designation that he or she may be removed to another country under section 241(b) of the Immigration and Nationality Act in the discretion of the Secretary of Homeland Security in effecting the foreign policy of the United States, and clarifies the effect of an identification of a country for removal in an immigration judge's order of removal from the United States. This rule clarifies that acceptance by a country is not a factor to be considered by the immigration judge in identifying a country or countries of removal in the administrative order of removal. The Department of Justice also makes technical changes to eliminate unnecessary provisions and update references to reflect the enactment of the Homeland Security Act of 2002.

**DATES:** These final rules are effective February 4, 2005.

**FOR FURTHER INFORMATION CONTACT:** If you have questions regarding the Department of Homeland Security's final rule, call: Mark Lenox, U.S. Immigration and Customs Enforcement, Department of Homeland Security, 801 I Street, NW., Suite 800, Washington, DC 20536, telephone (202) 616-9166 (not a toll-free call).

If you have questions regarding the Department of Justice's final rule, call: Mary Beth Keller, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041, telephone (703) 305-0470 (not a toll-free call).

**SUPPLEMENTARY INFORMATION:**

- A. The Purpose of the Final Rules
- B. Discussion of Comments
  - 1. Promulgation of the Rules
  - 2. Definition of the Term "Country"
  - 3. Acceptance under Section 241(b)(2) of the Act, 8 U.S.C. 1231(b)(2)
  - 4. Acceptance, Judicial Precedent, and Ratification by Congress
  - 5. Lack of Acceptance Requirement and Effect on Other Provisions of the Act
  - 6. Office of Legal Counsel Opinion
  - 7. Agency Operating Instructions
  - 8. Removal of Aliens to Countries without Functioning Governments
  - 9. Foreign Policy Considerations
  - 10. Identifying Country of Removal at Removal Hearing for Protection Requests
  - 11. Modification of Certain Regulations
  - 12. Miscellaneous Comments
- C. Joint and Independent Notice of Rulemaking

**Department of Homeland Security**

**PART 241—Apprehension and Detention of Aliens Ordered Removed.**

**Department of Justice**

**PART 1240—Proceedings to Determine Removability of Aliens in the United States.**

**PART 1241—Apprehension and Detention of Aliens Ordered Removed.**

On July 19, 2004, the Department of Homeland Security (DHS) and the Department of Justice (Justice) jointly published proposed rules with request for comments entitled "Execution of Removal Orders; Countries to Which Aliens May Be Removed" (69 FR 42901). In response to the proposed rulemaking, DHS received a total of 18 separate timely submissions and Justice received a total of 23 separate timely submissions. The commenters included various nongovernmental organizations (NGOs), private attorneys, and other interested individuals. Many of the submissions were duplicates sent to both DHS and Justice that either used or otherwise substantially adopted one set of comments submitted collectively by a group of NGOs. The majority of these comments did not differentiate between the authority of DHS or Justice. Accordingly, to the extent that these rules address two independent sources of authority in this area, the comments are addressed by the appropriate agency with authority over the area raised by the commenter. Additionally, because many of the comments submitted to both DHS and Justice are similar and endorse the submissions of other commenters, the Secretary and the Attorney General address the responses by topic rather than by referencing each specific commenter and comment.

DHS and Justice hereby incorporate the Supplementary Information contained in the Notice of Proposed

Rulemaking, 69 FR 42901, 42902-09, and reiterate that the Secretary and the Attorney General have undertaken to publish these changes in their respective regulations in a single document as a convenience to the public. The Secretary and the Attorney General are each acting independently and within their respective statutory delegations of authority in separately amending the rules of their respective Departments as set forth in these final rules. The rules of DHS and Justice will continue to separately implement the provisions of the Immigration and Nationality Act (Act) within their respective jurisdictions.

**A. The Purpose of the Final Rule**

Section 241(b)(1) and (2) of the Act, 8 U.S.C. 1231(b)(1) and (2), provides the process for determining the countries to which an alien<sup>1</sup> may be removed after a hearing before an immigration judge, the issuance of a final order finding that the alien is removable from the United States and not eligible for relief from removal, and disposition of any administrative and judicial appeals.

Section 241(b)(1) of the Act, 8 U.S.C. 1231(b)(1), relates to arriving aliens<sup>1</sup> whom DHS has placed in removal proceedings, a relatively small category because most arriving aliens are subject to expedited removal under section 235 of the Act, 8 U.S.C. 1225. It should be noted that the authority to initiate expedited removal proceedings in certain circumstances has recently been expanded. See Notice Designating Aliens for Expedited Removal, 69 FR 48877 (August 11, 2004) (authorizing expedited removal proceedings for aliens present in the United States without having been admitted or paroled, who are encountered within 100 miles of the border, and who cannot establish that they have been physically present in the United States continuously for the preceding fourteen days); Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 FR 68924 (November 13, 2002) (authorizing expedited removal proceedings for certain aliens who arrive in the United States by sea, who are not admitted or paroled, and who have not been continuously

<sup>1</sup> The rules and this **SUPPLEMENTARY INFORMATION** use two distinct terms: the term "alien" is broader than the term "respondent," which includes aliens only while they are in removal proceedings. Accordingly, the Department of Homeland Security rule uses the term "alien," the Department of Justice rule uses the term "respondent," and the **SUPPLEMENTARY INFORMATION** uses the term that is applicable in the specific context. The Act generally uses the term "alien" and is not as discrete as the regulations.

physically present in the United States for the preceding two years). Section 241(b)(1) of the Act provides a two-step process to determine the country of removal for an arriving alien: (1) The country from which the alien boarded a conveyance to the United States; or (2) an alternative country, such as the country of citizenship or birth.

Section 241(b)(2) of the Act, 8 U.S.C. 1231(b)(2), applies in the far more common circumstance of the removal of other (*i.e.*, non-arriving) aliens. Section 241(b)(2) of the Act provides a three-step process to determine the country of removal for these aliens: (1) The country designated by the alien; (2) an alternative country of which the alien is a subject, national, or citizen, with certain conditions; and (3) an additional country, such as the country from which the alien boarded a conveyance to the United States or the country of the alien's residence or birth.

Sections 241(b)(1) and (2) of the Act use the terms "country" and "accept" without any statutory definition. Some subparagraphs within section 241(b)(2) of the Act state that the alien is to be removed to a "country" that will "accept" the alien, while other provisions do not state that a "country" must "accept" the alien. The United States courts of appeals have differed on the meaning and effect of these terms. *Compare Jama v. INS*, 329 F.3d 630 (8th Cir. 2003), *cert. granted*, 124 S.Ct. 1407 (2004) (No. 03-674), with *Ali v. Ashcroft*, 346 F.3d 873 (9th Cir. 2003), *petition for reh'g pending* (No. 03-35096, 9th Cir.). These rules implement the provisions of the Act and amend the regulations of DHS and Justice in response to this intercourt conflict.

## B. Discussion of Comments

The following paragraphs will address each substantive issue raised in comments received by DHS and Justice. This discussion will not describe in detail the provisions outlined in the rules, but rather will address only those provisions relevant to the comments. Commenters frequently addressed identical issues in their comments, and these issues have been consolidated for the response. This discussion has been organized into sections based upon the themes of comments for the convenience of the reader.

### 1. Promulgation of the Rules

Many commenters questioned the authority of the Secretary and the Attorney General to promulgate these final rules. Commenters questioned whether the rules had separation of power implications and whether the rules were ultra vires in light of the

litigation pending around the country regarding the interpretation of section 241 of the Act, 8 U.S.C. 1231, and the language of the statute. *Compare Jama*, 329 F.3d 630 (8th Cir. 2003), with *Ali*, 346 F.3d 873 (9th Cir. 2003). In these comments, the commenters invoke the oft-quoted statement of *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803), that it is "emphatically the province and duty of the judicial department to say what the law is."

These comments fail to appreciate the nature of rulemaking within the structure of the federal law.

Accordingly, the Attorney General and the Secretary must reiterate basic principles of separation of powers and administrative law that govern rulemakings. The three Branches of government operate within defined spheres, but those spheres sometimes overlap. Congress enacts statutes, and delegates to the Executive Branch the authority to make rules that interpret and fill in the administrative details of those statutes. The interpretation of the statutes in these rules are given due deference by the courts when cases present questions of statutory interpretation. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 423-25 (1999); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1983). The invocation of the judicial power, however, does not stay the processes of government; Congress may amend the statute at any time. Similarly, the Executive Branch may amend the regulations under the statute at any time. Not infrequently, these amendments result in different disposition of the cases pending before the courts. *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 549-52 (1979) (amendment of Bureau of Prisons regulations while constitutional challenge to prior regulations pending in Supreme Court); *see also Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996) (amendment to the regulations interpreting "interest" as used in the National Bank Act while issue of what constituted interest was in litigation); *cf. Sanks v. Georgia*, 401 U.S. 144 (1971) (amendment to state statute while constitutional challenge to prior statute pending in Supreme Court). In fact, in *Smiley*, the Court specifically stated: "That it was litigation that disclosed the need for the regulation is irrelevant." *Smiley*, 517 U.S. at 741. As these and a number of other cases make clear, exercise of authority granted to make rules pending litigation is both an acceptable and a long-standing practice. The commenters suggest that the Executive's amendment is an interference with the authority of the

courts. However, as the District of Columbia Circuit has pointed out,

intent is irrelevant: no authority supports the proposition that a rule is arbitrary and capricious merely because it abrogates a circuit court decision. Quite to the contrary, "regulations promulgated to clarify disputed interpretations of a regulation are to be encouraged. Tidying-up a conflict in the circuits with a clarifying regulation permits a nationally uniform rule without the need for the Supreme Court to essay the meaning of every debatable regulation." *Pope v. Shalala*, 998 F.2d 473, 486 (7th Cir. 1993) (citation and internal quotation marks omitted).

*National Mining Association v. Department of Labor*, 292 F.3d 849 (D.C. Cir. 2002). With this in mind, the Attorney General and the Secretary of Homeland Security have undertaken to resolve the conflict through regulation.

Additionally, as noted in the proposed rules, the statute does not define the terms "country" and "acceptance." Given the exclusive province of the Executive in that vast external realm of determining when a "country" has "accepted" its proffer of an alien, the Attorney General and the Secretary, as the respective delegates of the President, are providing the interpretation that conforms with the foreign policy of the United States. These regulations are, thus, wholly within their authority to promulgate.

One commenter stated that it "makes little sense for the government to expend significant staff time and expense to promulgate regulations that could need retraction or extensive overhauling in a matter of months, depending upon the Supreme Court's determination." The Secretary and the Attorney General appreciate the commenters' suggestion but have determined that promulgation of these rules is necessary at this time.

Accordingly, the Secretary and the Attorney General promulgate the regulations as proposed, with minor changes as noted below.

### 2. Definition of the Term "Country"

Some commenters questioned the interpretation of the Secretary and the Attorney General of section 241(b) of the Act, 8 U.S.C. 1231(b), and articulated their position that the term "country" as used in that section is premised on the existence or functionality of a government in that country based on "longstanding judicial interpretations." In support of their argument, the commenters rely on three cases that are far from dispositive of the issue. Further, the difference in terminology used within section 241(b)(2) of the Act and Supreme Court precedent support

the interpretation of the Secretary and Attorney General.

First, the commenters cite three cases in support of their contention that “longstanding judicial interpretations” of “country” require the existence or functionality of a government. In all three cases cited by the commenters, the courts found that the United States could deport the aliens to the proposed country of removal, but whether “country” requires the existence or functionality of a government was not specifically at issue in any of the cases. In *Chuen v. Esperdy*, 285 F.2d 353 (2d Cir. 1960), the Second Circuit addressed whether “Hong Kong, a colony of the United Kingdom,” was a country for purposes of the removal statute. In a per curiam opinion of two paragraphs finding in favor of the government, the court concluded “we think that any place possessing a government with authority to accept an alien deported from the United States can qualify as a ‘country’ under the statute.” *Id.* That issue is not in dispute; a place possessing a government with authority to accept an alien deported from the United States “can” qualify as a country. However, the converse does not flow from this conclusion, *i.e.*, that a place not possessing a government with authority to accept an alien deported from the United States cannot qualify as a country for purposes of section 241(b) of the Act. One conclusion simply does not flow from the other as a matter of logic. In fact, the court in *Chuen* was not faced with, nor did it address, the latter question. Accordingly, *Chuen* does not support the commenters’ position.

Similarly, *Delany v. Moraitis*, 136 F.2d 129 (4th Cir. 1943), finding in favor of the government that an alien (a Greek citizen) could be deported to the custody of the Greek government in exile in England, does not support the proposition that “country” under section 241(b) of the Act requires the existence or functionality of a government. In *Delany*, it was not possible to deport the alien to Greece because it was under German control at the time. *Id.* at 130. The court framed the issue in *Delany* as follows: “The question presented by the appeal, therefore, is whether, under the statute, the [alien] must be allowed to remain in this country, where he has no right to remain under our laws, or whether the statute will be complied with if he be returned to the political dominion and control of the country from which he came. We think the latter is the case.” *Id.* Commenters, in citing *Delany*, focus on the following statement in support of their proposition—“a man’s ‘country’ is

more than the territory in which its people live. The term is used generally to indicate the state, the organization of social life which exercises sovereign power in behalf of the people.” *Id.* at 130. The fact that a country is “more than” the territory in which its people live—especially considering the unique factual circumstance of the case involving a government in exile recognized by the United States—does not exclude that a country is “at least” the territory in which its people live. As such, *Delany* does not support the proposition that “country” under 241(b) of the Act requires the existence or functionality of a government; in fact, as with *Chuen*, *Delany* simply did not address the specific issue of whether the term “country” in the removal provision requires the existence or functionality of a government. Accordingly, *Delany* does not support the commenters’ position. It should be noted that the predecessor to section 241(b)(2)(F) of the Act was enacted post-*Delany* to allow for removal to governments in exile and that the Board of Immigration Appeals (Board) in *Matter of Linnas*, 19 I&N Dec. 302, 305 (BIA 1985), found that *Delany* was no longer effective law for the proposition that “country” can be construed to encompass a government in exile.

Finally, contrary to the commenters’ suggestion, *Rogers v. Sheng*, 280 F.2d 663, 664–65 (D.C. Cir. 1960), finding in favor of the government that Formosa was a country for purposes of removal because it had a government that had “undisputed control of the island,” is also not dispositive of the current issue. Formosa had been ceded by China to Japan in 1895. *Id.* at 664. The alien argued that Formosa was neither a country nor part of any country. *Id.* at 663. The court described the status of Formosa as follows: “Following World War II, Japan surrendered all claims of sovereignty over Formosa. But in the view of our State Department, no agreement has ‘purported to transfer the sovereignty of Formosa to (the Republic of) China.’ At the present time, we accept the exercise of Chinese authority over Formosa, and recognize the Government of the Republic of China \* \* \* as the legal government of China.” *Id.* With this background in mind, the commenters’ reliance on the fact that the court found that Formosa was a country because there was “a government on Formosa which has undisputed control of the island,” *id.*, and therefore that the existence or functionality of a government is a requirement under section 241(b) of the Act, is misplaced. As with *Chuen* and

*Delany*, the court in *Rogers* did not address the precise question of whether the term “country” under the predecessor to section 241(b) of the Act required the existence or functionality of a government. The court simply addressed the question of whether, as espoused by the government, Formosa was a country under the predecessor to section 241(b) of the Act based on the facts of the case, and the court ruled in favor of the government. Accordingly, the commenters’ assertion that these three cases are “longstanding judicial interpretations” demonstrating that the term “country” requires the existence or functionality of a government is incorrect. While the cases were decided decades ago (one in 1943, and two in 1960) and they are “longstanding” in that sense, the remainder of the commenters’ proposition, *i.e.*, that these cases demonstrate that the term “country” requires the existence or functionality of a government, does not follow from these cases. In fact, the cases did not directly address the issue of whether the term “country” as used in section 241(b) of the Act requires existence or functionality of a government. As such, the commenters’ statement that the regulations are *ultra vires* because they contravene established precedent is simply incorrect.

Second, the specific language chosen by Congress within section 241(b) of the Act demonstrates that “country” does not require the existence or functionality of a government. It is settled that “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *INS v. Cardozo-Fonseca*, 480 U.S. 421, 432 (1987) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). A review of section 241(b) of the Act demonstrates that Congress included and excluded particular language, not only within the same statute, but within the same subsection. Specifically, section 241(b)(2) of the Act contains references to both “country” and to the “government of the country,” the latter term being used in the provisions discussing acceptance. Accordingly, the text of section 241(b)(2) of the Act itself supports the fact that “country” refers to a geographic region, without regard to the existence or functionality of a government. If Congress had intended the term “country” to also encompass an existing or functioning government, it would have been unnecessary for

Congress to have also used “government of the country” within the same subsection as “country.” The fact that Congress deliberately chose both specific terms within such close proximity demonstrates that each term has a separate and distinct meaning, *i.e.*, the term “country” does not depend on the existence or functionality of a government, but the term “government of the country,” used in the provision addressing acceptance, does encompass a “government.” Furthermore, the position of the Secretary and Attorney General is supported by the Supreme Court’s decision in *Smith v. United States*, 507 U.S. 197 (1993). While construing the Federal Tort Claims Act (FTCA) in *Smith*, the Court noted that the “commonsense meaning” of the term “country” is “[a] region or tract of land.” *Id.* at 201. Indeed, the Court held in that case that Antarctica is a “country” within the meaning of the FTCA “even though it has no recognized government.” *Id.* The Court in *Smith* did acknowledge “that this is not the only possible interpretation of the term, and it is therefore appropriate to examine other parts of the statute before making a final determination.” *Id.* As stated above, examining the other parts of section 241(b) of the Act mandates the conclusion that “country” does not depend on the existence or functionality of a government; if it did, other provisions within the same subsection would be rendered meaningless, a result to be avoided in statutory construction. *See, e.g., Dole Food Co. v. Patrickson*, 538 U.S. 468, 477 (2002) (“a statute must, if possible, be construed in such fashion that every word has some operative effect”) (quoting *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992)); *TRW, Inc. v. Andrews*, 534 U.S. 19, 30 (2001) (“[w]e are ‘reluctant to treat statutory terms as surplusage in any setting’”) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

For these reasons, the Secretary and Attorney General reject the commenters’ suggestion that the term “country” in section 241(b)(2) of the Act requires the existence or functionality of a government. Accordingly, the regulations in this area are being promulgated as proposed.

### 3. Acceptance Under Section 241(b)(2) of the Act, 8 U.S.C. 1231(b)(2)

Several commenters generally contended that section 241(b)(2) of the Act, 8 U.S.C. 1231(b)(2), requires acceptance by the government of a country in all circumstances, and that, absent acceptance, the Executive Branch’s authority is legally

circumscribed. As discussed in more detail below, the so-called “acceptance requirement” is not a requirement that precludes the Executive Branch from exercising its authority; in fact, there is no general “acceptance requirement” that precludes action as a legal matter, with the exception contained in section 241(b)(2)(E)(iv) of the Act, where the acceptance itself provides the only connection between the alien and the removal country at issue. Instead of labeling the general acceptance language in section 241(b)(2) of the Act as a general “acceptance requirement,” it is more appropriately labeled the “acceptance exception,” in that parts of section 241(b)(2) of the Act release the Secretary of Homeland Security from the mandatory language of “shall remove” if certain circumstances are not present, one of those circumstances being acceptance by the government of a country. In this regard, there is a difference between a legal requirement that precludes the Executive Branch from exercising its authority generally, which is what the commenters’ proposed interpretation would create, versus a consideration that enables the Executive Branch to carry out its obligations under the Act, while continuing to balance the foreign policy considerations of its actions. Additionally, the question of whether removal should be effectuated absent acceptance by the government of the removal country is a separate inquiry; that question has no bearing on whether the Secretary of Homeland Security is authorized to do so.

In construing the Act, the Supreme Court repeatedly has held itself “bound to assume that the legislative purpose is expressed by the meaning of the words used.” *INS v. Cardozo-Fonseca*, 480 U.S. 421, 431 (1987) (internal quotations omitted). That approach is consistent with the Court’s more general admonition that “[t]he plain meaning of legislation should be conclusive, except in the ‘rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.’” *United States v. Ron Pair Enters. Inc.*, 489 U.S. 235, 242 (1989) (alteration in original); *see also Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (“[A] legislature says in a statute what it means and means in a statute what it says there.”). As set forth below, except for section 241(b)(2)(E)(vii) of the Act, the language of section 241(b)(2) of the Act does not require, as a legal prerequisite, that acceptance be obtained before removal of an alien.

First, section 241(b)(2)(A)–(C) of the Act, which is generally the first step in

the country-of-removal inquiry, addresses removal to a country designated by the alien. In pertinent part, those provisions state that the Secretary of Homeland Security “shall remove” an alien to the country designated by the alien (section 241(b)(2)(A) of the Act), but that the Secretary “may disregard a designation” if “the government of the country is not willing to accept the alien into the country” (section 241(b)(2)(C)(iii) of the Act) or if the Secretary “decides that removing the alien to the country is prejudicial to the United States” (section 241(b)(2)(C)(iv) of the Act). It is important to note that within this provision, Congress employed both the mandatory term “shall” and the permissive term “may.” The use of both these words within the same subsection is highly instructive. *See, e.g., United States v. Rodgers*, 461 U.S. 677, 706 (1983) (“The word ‘may,’ when used in a statute, usually implies some degree of discretion.”); *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (attaching significance to the fact that “Congress’ use of the permissive ‘may’ in [18 U.S.C.] 3621(e)(2)(B) contrasts with the legislators’ use of a mandatory ‘shall’ in the very same section”); *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) (“[W]hen the same [Federal Rule of Civil Procedure] uses both ‘may’ and ‘shall,’ the normal inference is that each is used in its usual sense—the one being permissive, the other mandatory.”). Accordingly, the statute mandates that the Secretary “shall remove” an alien to the country designated, but also provides that the Secretary “may” disregard the designated country of removal if the government of the country is not willing to accept the alien. Nowhere does it require that the Secretary must, as a legal matter, disregard that designation. Far from containing an “acceptance requirement,” section 241(b)(2)(C)(iii) of the Act contains an “acceptance exception” to removal, enabling the Secretary to disregard the designation made by an alien when the government of the country chosen by the alien is not willing to accept the alien, thereby providing the Executive Branch with discretion to act in a manner consistent with its foreign policy. Accordingly, contrary to the commenters’ assertion, the first step of the country-of-removal inquiry does not support the conclusion that acceptance is a legal requirement for removal.

Second, section 241(b)(2)(D) of the Act, the second step in the country-of-removal inquiry, also does not, as a legal matter, preclude removal without

acceptance. In pertinent part, that provision states that the Secretary “shall remove” the alien to a country of which the alien is a subject, national, or citizen, “unless the government of the country \* \* \* is not willing to accept the alien.” As with section 241(b)(2)(C), that provision does not bar removal without acceptance; it requires removal to any country of which the alien is a subject, national, or citizen, but provides an exception when such a country fails to provide acceptance. Accordingly, section 241(b)(2)(D)(ii) of the Act also does not contain a legal impediment to removal; instead, like the language in section 241(b)(2)(C)(iii), it releases the Secretary from the mandatory language of “shall remove” and preserves the discretion of the Secretary of Homeland Security to act.

Finally, section 241(b)(2)(E) of the Act, the third step in the country-of-removal inquiry, does not support the commenters’ position that acceptance by a country is a legal requirement to removal generally. Contrary to the commenters’ assertions, neither the structure, history, nor title of section 241(b)(2)(E) of the Act supports the proposition that acceptance is a requirement. Section 241(b)(2)(E) of the Act states that the Secretary “shall remove” the alien to any of seven specified countries or categories of countries. The first six of these are countries with some prior connection to the alien and are defined without any reference to acceptance, including, for example, “[t]he country in which the alien was born,” see section 241(b)(2)(E)(iv) of the Act. The final provision, on the other hand, states: “If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government *will accept* the alien into that country,” see section 241(b)(2)(E)(vii) of the Act (emphasis added). It is in this last clause, and only in this last clause, that section 241(b)(2) of the Act contains what is appropriately labeled an “acceptance requirement.” Specifically, the wording of this last clause (“another country whose government *will accept* the alien into that country”) stands in stark contrast to any of the other so-called acceptance provisions discussed above. Additionally, the fact that the only reference to acceptance within section 241(b)(2)(E) of the Act is contained in clause (vii) and clearly absent from the other six clauses demonstrates that there is no general acceptance requirement within section 241(b)(2)(E) of the Act. See *Cardozo-Fonseca*, 480 U.S. at 432

(quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”). Not only did Congress include and exclude reference to acceptance within the same statute, it did so within the same subparagraphs of section 241(b)(2)(E) of the Act. Accordingly, the language of section 241(b)(2)(E) of the Act only requires acceptance as a legal prerequisite to removal in clause (vii); it does not require acceptance as a legal prerequisite to removal in clauses (i)–(vi). Additionally, it should be noted that what constitutes acceptance for purposes of the Act is a determination made by the Secretary of Homeland Security.

The commenters’ contention that the history of section 241(b)(2)(E) of the Act supports a broad imposition of the acceptance requirement throughout clauses (i)–(vi) of section 241(b)(2)(E) of the Act, where no reference to acceptance exists, is also erroneous. Several commenters state that because sections 241(b)(2)(C)(iii), 241(b)(2)(D)(ii), and 241(b)(2)(E)(vii) of the Act require acceptance, and that because section 241(b)(2)(E) of the Act is an integral part of 241(b) of the Act, “only the most mechanical and contrived reading would assert that the requirement does not apply with equal force” to sections 241(b)(2)(E)(i)–(vi) of the Act. However, as already discussed above, sections 241(b)(2)(C)(iii) and (D)(ii) do not contain an “acceptance requirement,” but an “acceptance exception”; the only subsection within section 241(b)(2) of the Act that contains an acceptance requirement is 241(b)(2)(E)(vii) of the Act. There is nothing “contrived or mechanical” about reading an acceptance requirement only within that subsection. In fact, far from being “contrived or mechanical,” it is what the statute mandates, since Congress included specific words within one subsection but excluded them within the others.

Certain commenters suggest that the undeniably progressive nature of the provisions set forth in section 241 of the Act provides an “indication” that acceptance is required within all subsections of section 241(b)(2)(E) because it would “twist the removal process” if acceptance would be required from a country with the closest connection to the alien, *i.e.*, the country of which the alien is a subject, national, or citizen, but not from countries with

more attenuated connections to the alien. The Secretary of Homeland Security and the Attorney General again reiterate that, contrary to the commenters’ assertion, acceptance is not generally required within section 241(b)(2) of the Act. For the reasons already discussed, there is only one acceptance requirement within section 241(b)(2) of the Act, and it is found at section 241(b)(2)(E)(vii) of the Act. Accordingly, the progressive nature of section 241(b)(2) of the Act, in terms of providing steps for determining the country of removal, has no bearing on acceptance.

Some commenters also proposed that the heading of section 241(b)(2)(E) of the Act indicates that acceptance is required in all circumstances. Commenters state that the change of the heading from “other countries” to “additional removal countries” indicates congressional intent that the countries captured by section 241(b)(2)(E) of the Act be different from the previous countries. However, the title of the section—Additional Removal Countries—is not accurately described as imposing an acceptance requirement not otherwise contained in the text of the provision. Commenters’ statement correctly alludes to the proposition that the “title of a statute and the heading of a section” are “tools available for the resolution of doubt about the meaning of a statute.” *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998); *but see INS v. St. Cyr*, 533 U.S. 289, 308–309 (2001) (noting that “title alone is not controlling”); *INS v. National Center for Immigrants’ Rights, Inc.*, 502 U.S. 183, 189 (1991). However, contrary to the commenters’ proposition, the fact that headings can be “tools available for resolution of doubt” is not instructive in this case where there is no need to resolve any doubt. The change in the heading from “other” to “additional” cannot overcome the fact that clauses (i) through (vi) of section 241(b)(2)(E) of the Act do not contain any mention of acceptance. There is simply no doubt to resolve in this case.

Finally, some commenters also suggested that section 241(b)(2)(E) of the Act generally requires acceptance by all receiving countries because to find otherwise would lead to “unmanageable” and “absurd” results in that an alien could be removed to the “country from which the alien was admitted to the United States,” under section 241(b)(2)(E)(i) of the Act, without acceptance by the government of that country, even if the country was simply a border country through which the alien was traveling or the country was simply host to a major airline. In

this regard, these commenters stated that “[t]he statute did not grant unfettered discretion to the DHS to remove an alien when the agency deemed it possible to do so, and the agency does not have the power to read this authority into the statute.” In fact, the commenters are mistaken. Section 241(b)(2) of the Act simply provides a checklist of sorts outlining the countries to which an alien may be removed. Section 241(b)(2) of the Act, however, does not provide the authority for DHS to remove an alien once that alien is ordered removed; the authority is “‘a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.’” *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy v. United States ex. rel. Mezei*, 345 U.S. 206, 210 (1953)). Commenters are confusing two different concepts, *i.e.*, whether particular action is appropriate, as opposed to whether particular action is authorized. There is a difference between the legal authority to act and the discretion to act. The Secretary of Homeland Security is authorized to remove an alien pursuant to sections 241(b)(2)(E)(i)–(vi) of the Act, regardless of any acceptance by the government of the foreign country. Whether it is wise or practical to do so is simply a separate inquiry, not at all related to whether there is authority to do so. As stated in the Notice of Proposed Rulemaking, “the general practice of the Executive Branch is not to attempt to remove an individual under the Act to a country whose government refuses to accept him.” 69 FR at 42904. This general practice is based upon an acknowledgement that it is not generally practical to remove aliens to a country whose government refuses to accept him. However, the practice is based on considerations of foreign policy, nothing more.

Accordingly, the Secretary of Homeland Security and the Attorney General find it unnecessary to amend the proposed rules based on these comments.

#### 4. Acceptance, Judicial Precedent, and Ratification by Congress

Several commenters suggest that there is historical precedent from both the federal courts and the Board of Immigration Appeals (the Board) requiring acceptance. These commenters suggest that Congress “ratified” this acceptance requirement in adopting the current version of section 241 of the Act, 8 U.S.C. 1231. Neither the decisions of the federal courts or the Board support the position that acceptance is a requirement under

current section 241(b)(2) of the Act, nor has Congress ratified such interpretation.

The federal court cases cited by some commenters do not support the proposition that these courts have interpreted the removal statute to require acceptance as a legal prerequisite. In fact, most of the cases cited have not specifically considered the issue of whether acceptance was a legal prerequisite. In *United States ex rel. Hudak v. Uhl*, 20 F.Supp. 928 (N.D.N.Y. 1937), for example, the court stated that “[i]t will be presumed in every case of deportation that the United States immigration authorities have obtained the consent of the native sovereignty to receive the deported alien.” *Id.* at 930. There was no clear discussion by the court whether its “presumption” was based on a legal prerequisite in the removal provision versus the practical considerations regarding what would occur if an alien is taken to a foreign sovereign and that sovereign refuses to receive the alien. As such, *Hudak* cannot be said to support the commenters’ proposition that acceptance is a legal prerequisite to removal. In *Chi Sheng Liu v. Holton*, 297 F.2d 740 (9th Cir. 1962), the court noted that the appellant contended that the Act required acceptance before he could be deported. *Id.* at 743. The court then considered that a letter from the Consul General of the country was sufficient evidence of acceptance. *Id.* at 744. Because there was an indication of acceptance from the government of the proposed country of removal, there was no need for the court to consider the question of whether that acceptance was a legal prerequisite to removal. Similarly, *United States ex rel. Lee Ming Hon v. Shaughnessy*, 142 F.Supp. 468 (S.D.N.Y. 1956), is a two-paragraph decision, the focus of which is whether a particular document is sufficient proof that the government of the proposed country of removal provided acceptance. There is no discussion regarding whether acceptance is a legal requirement to removal, as opposed to a practical obstacle to removal. Accordingly, these cases do not stand for the proposition that acceptance is a legal requirement to removal. The common thread among the cases involves the practical difficulties in removal where acceptance is lacking, a fact the Executive Branch acknowledged in its Notice of Proposed Rulemaking. *See, e.g.*, 69 FR at 42904.

In *United States ex rel. Tom Man v. Murff*, 264 F.2d 926 (2d Cir. 1959), the court did state “we think that deportation \* \* \* is subject to the condition expressed in the seventh

subdivision [the predecessor to section 241(b)(2)(E) of the Act]: *i.e.*, that the ‘country’ shall be ‘willing to accept’ him ‘into its territory.’” *Id.* at 928; *see also Amanullah & Wahidullah v. Cobb*, 862 F.2d 362 (1st Cir. 1988) (Pettine, J.) (relying on *Tom Man* for the proposition that acceptance is a requirement and noting that there was communication from the proposed country of removal that the aliens would not be accepted); *Lee Wei Fang v. Kennedy*, 317 F.2d 180 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 833 (1963) (citing *Tom Man* for the proposition that acceptance is a requirement, yet not elaborating whether the requirement was legal or practical, and then focusing on what constituted a country). However, aside from the quoted statement itself, there is no elaboration by the court discussing the reason why it “thought” that deportation was subject to acceptance. *Tom Man*, and the cases citing it, did not engage in full analysis of the question whether acceptance is a legal prerequisite to removal.

Similarly, the decisions of the Board cited by the commenters do not support their position that acceptance is a legal prerequisite to removal. In *Matter of Anunciacion*, 12 I&N Dec. 815 (BIA 1968), the Board stated that the question “whether or not a specified country will accept the alien as a deportee is one of comity concerning solely the United States and the country in question.” *Id.* at 817. Accordingly, *Matter of Anunciacion* cannot fairly be described as supporting the position that acceptance is a legal, as opposed to practical, prerequisite to removal. Additionally, commenters rely on *Matter of Linnas*, 19 I&N Dec. 302 (BIA 1985); however, reliance on this case is also misplaced. In *Matter of Linnas*, the main question before the Board was whether the offices of the Republic of Estonia in New York City constituted a country for purposes of removal and whether the alien could therefore be removed to those offices. The Board answered the question in the negative. *Id.* at 307. In determining whether the offices in New York City constituted a country, the Board cited *Tom Man*, as the case arose in that circuit, and found that the language of the removal section “expressly requires, or has been construed to require, that the ‘government’ of a country selected under any of the three steps must indicate it is willing to accept a deported alien into its ‘territory.’” *Id.* However, this statement by the Board was made in the context of deciding what constituted a country for purposes of removal, and the Board was relying

on *Tom Man*, as circuit precedent, in making this statement. The Board did not address the fact that determining what constitutes a country for purposes of removal is one inquiry; the other inquiry being whether acceptance by the government of that country is a legal prerequisite to removal. Accordingly, *Matter of Linnas* is not instructive on whether acceptance is a legal prerequisite to removal because that issue was not before the Board.

It is with this background regarding the existing case law that some commenters assert that Congress has ratified an acceptance requirement into section 241(b)(2) of the Act. The commenters classify the cases as being “long-standing” and having a “consistent construction” of the predecessors to section 241(b)(2) of the Act. However, as already described, there is no consistent construction that acceptance is a legal prerequisite to removal under section 241(b)(2) of the Act, except for section 241(b)(2)(E)(vii) of the Act, which does contain an acceptance requirement. Accordingly, there was no arguable settled precedent for Congress to ratify.

Accordingly, the commenters are incorrect in their assertion that Congress has ratified an acceptance requirement into the entirety of section 241(b)(2) of the Act, even where the text of the section is clear that no such acceptance is legally required. Therefore, the Secretary and the Attorney General are adopting the proposed rules in this area unchanged.

##### 5. Lack of General Acceptance Requirement and Effect on Other Provisions of the Act

Some commenters suggest that the proposed rules would render parts of section 241(b)(2) of the Act, 8 U.S.C. 1231(b)(2), superfluous because the rule allows the Department of Homeland Security to remove an alien under section 241(a)(2)(E)(i)–(vi) of the Act to a country which, for example, would be prohibited under section 241(b)(2)(D) of the Act. The commenters’ characterization is incorrect as there is no general “prohibition” on removal within section 241(b)(2) of the Act. As discussed at length above, the acceptance provisions within section 241(b)(2) of the Act do not prohibit removal; they simply release the Secretary from the requirement to take action under certain circumstances. The authority to choose not to effectuate a removal under certain circumstances, i.e., the discretion granted to the Secretary, cannot accurately be labeled a “prohibition” as these commenters suggest. Accordingly, parts of section

241(b)(2) of the Act are not rendered superfluous.

Likewise, the claim by certain commenters that section 241(a)(7)(A) of the Act, 8 U.S.C. 1231(a)(7)(A), would be rendered superfluous under these rules is incorrect. In the words of the commenters, “[i]f a receiving country’s refusal to accept a deportee could so easily be overridden, this provision, too, effectively would be useless.” There is nothing “useless” or superfluous about this section. Section 241(a)(7)(A) of the Act provides that an alien ordered removed is not eligible for employment authorization unless the Secretary of Homeland Security makes a “specific finding that the alien cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien.” If the Secretary makes a “specific finding” that the alien cannot be removed as a practical matter because of lack of acceptance, an alien may obtain employment authorization as appropriate. That is all the section provides, and it does so even though the Secretary is legally authorized to remove aliens under section 241(b)(2) of the Act, except for section 241(b)(2)(E)(vii) of the Act, without the proposed removal country’s acceptance. Therefore, this section is not rendered superfluous because it continues to operate notwithstanding these rules.

Some commenters cite to the provisions relating to removal of alien terrorists in section 507(b)(2)(C) of the Act, 8 U.S.C. 1537(b)(2)(C), in the section where they are addressing superfluous provisions, yet they appear to be arguing that section 507(b)(2)(C) of the Act somehow instructs the reading of section 241(b)(2) of the Act without any further elaboration. It is unclear whether commenters are arguing that the alien terrorist removal provisions would be rendered superfluous, or whether the alien terrorist provisions mandate that an acceptance requirement be read into section 241(b)(2) of the Act where none is specifically contained. In any event, either proposition is incorrect. Congress specifically enacted separate provisions to be invoked as appropriate in dealing with alien terrorists. These provisions, detailed in sections 501 through 507 of the Act, include the establishment of a special removal court to handle alien terrorist cases, and create a framework for handling those cases. Accordingly, the provisions relating to removal of alien terrorists contained in sections 501 through 507 of the Act, 8 U.S.C. 1531–1537, are independent of the other provisions dealing with non-terrorist aliens and are not instructive regarding

the general removal provisions and certainly do not in any way support the contention that section 241(b)(2) of the Act legally requires acceptance by the proposed country of removal before removal can be effectuated, except as otherwise provided by Congress in section 241(b)(2)(E)(vii) of the Act.

Some commenters also seem to suggest that section 243(d) of the Act, 8 U.S.C. 1253(d), which permits the Secretary of State to discontinue the issuance of visas to citizens, subjects, nationals, and residents of a country if the government of that country refuses to accept their return, is rendered superfluous. This is incorrect, as nothing in these rules affects the Secretary of State’s legal authority to discontinue the issuance of visas for individuals of certain countries if those countries do not affirmatively accept their citizens, subjects, nationals, or residents when asked to do so by the United States. The Secretary of State may continue to take such action as he or she deems appropriate under this section notwithstanding the interpretations in these rules. Section 243(d) of the Act simply provides a potential consequence when a foreign government refuses to accept its nationals, citizens, etc. The fact that the Secretary of Homeland Security may choose to remove an alien to a foreign country without acceptance by the government of that country because the Secretary has determined that it is in the foreign policy interests of the United States does not negate the import of section 243(d) in authorizing the Secretary of State to take appropriate action against that country by discontinuing issuance of visas. What sometimes cannot be obtained through diplomacy in terms of obtaining the consent of the government of a foreign country to accept its nationals may sometimes be obtained when some adverse consequence attaches to the actions of the government of the foreign country. As a result, the Secretary of Homeland Security rejects the commenters’ claim that the proposed regulations render portions of the Act superfluous.

##### 6. Office of Legal Counsel Opinion

Some commenters focus on an opinion issued by the Office of Legal Counsel (OLC) of the Department of Justice that they contend supports the position that acceptance by the government of a country is a legal prerequisite to removal. See Memorandum Opinion for the Deputy Attorney General: *Re: Limitations on the Detention Authority of the Immigration and Naturalization Service* (OLC Feb.

20, 2003) <http://www.usdoj.gov/olc/INSDetention.htm>. That opinion addressed, *inter alia*, the circumstances under which a removable alien may permissibly be detained for more than 90 days during the pendency of the removal process. *See id.* at 15–24. In explaining why the removal process may sometimes take longer than 90 days, the opinion described step three of the sequential process as follows:

If the country of the alien's citizenship or nationality declines to accept the alien, the Attorney General is instructed to attempt to remove the alien to one of six listed countries, including the country in which the alien was born and the country from which the alien was admitted to the United States. *See* INA § 241(b)(2)(E)(i)–(vi). Each of those countries, of course, would have to be separately negotiated with by the United States, and would also have to be given an appropriate amount of time—presumably 30 days—to decide whether to accept or reject the alien. Finally, if none of the six listed countries is willing to accept the alien, or if the Attorney General decides that it would be “inadvisable” to send the alien to any of the listed countries that is willing to accept him, the Attorney General is instructed to remove the alien to any country of the Attorney General's choice whose government is willing to accept the alien. *See* INA § 241(b)(2)(E)(vii).

*Id.* at 21 n.11. Importantly, the OLC opinion did not address the specific issue of whether acceptance by the government of a country was a legal prerequisite to removal under section 241(b)(2) of the Act or merely a pragmatic consideration. In fact, the section of the opinion quoted by the commenters is contained in a footnote to the opinion, where the text of the opinion is focusing on the length of time negotiating with different governments may take. As was stated in the Notice of Proposed Rulemaking, “the general practice of the Executive Branch is not to attempt to remove an individual under the Act to a country whose government refuses to accept him.” 69 FR at 42904. Accordingly, the OLC opinion was simply relying on what was the standard practice of the Executive Branch as it related to length of time it might take to negotiate with foreign governments; it was not espousing a legal position that acceptance by a government is required under section 241(b)(2) of the Act. In this rule, it is the Attorney General who is construing the legal interpretation of the Act on this particular issue (an issue which was not the focus of the OLC opinion). The Attorney General is vested with the authority to issue interpretations of the Act, and his determinations are controlling, as provided in section 103(a)(1) of the Act, 8 U.S.C. 1103(a)(1).

#### 7. Agency Operating Instructions

Some commenters cite section 243.1(c)(1) of the Immigration and Naturalization Service Operations Instructions for the following statement: “deportation cannot be effected until travel documentation has been obtained.” Based on this statement in the operating instructions, commenters contend that acceptance is generally required under section 241(b)(2) of the Act. However, agency operating instructions provide guidance to its employees and do not have the force and effect of law. *See, e.g., Haitian Refugee Center v. Baker*, 953 F.2d 1498, 1512 (11th Cir.), *cert. denied*, 502 U.S. 1122 (1992); *Perales v. Casillas*, 903 F.2d 1043, 1051 (5th Cir. 1990) (quoting *Dong Sik Kwon v. INS*, 646 F.2d 909, 918–19 (5th Cir. 1989)); *see also United States v. Caceres*, 440 U.S. 741 (1979) (noting that Internal Revenue Service Manual did not create enforceable rights warranting suppression of evidence obtained in violation of Manual). The operations instructions contain guidance for line officers; they are not indicative of agency authority generally. Accordingly, commenters' reliance on this 10-word phrase within the operating instructions dealing with travel documentation does not support the proposition that acceptance is a legal requirement under section 241(b)(2) of the Act. Indeed, as the Secretary of Homeland Security has already recognized, “the general practice of the Executive Branch is not to attempt to remove an individual under the Act to a country whose government refuses to accept him.” 69 FR 42904. Since it is not the general practice of the Executive Branch to do so, and since acceptance can be demonstrated by providing travel documentation, this operating instruction is not inconsistent with the fact that acceptance is not a legal requirement to removal, but a practical one. Additionally, this 10-word phrase within the operating instruction does not create an enforceable right that does not otherwise exist in the statute itself. Therefore, the agency operating instructions do not support the commenters' position that acceptance is generally required.

#### 8. Removal of Aliens to Countries Without Functioning Foreign Governments

Certain commenters suggested that human rights concerns preclude the United States from returning aliens to countries without functioning governments, as could occur under the proposed rules. This proposition by

commenters would eviscerate the specific provisions within the Act and the regulations that provide for protection under certain circumstances and would create a separate protection provision flowing solely from customary international law.

The Act and regulations provide various mechanisms whereby aliens can seek protection from removal. Specifically, an alien present in the United States may apply for asylum if he or she establishes a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, *see* sections 101(a)(42) and 208 of the Act, 8 U.S.C. 1101(a)(42), 1158. Similarly, an alien may apply for withholding of deportation to a particular country under section 241(b)(3)(A) of the Act, 8 U.S.C. 1231(b)(3)(A), if he or she establishes that it is more likely than not that he or she will be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion. Additionally, the regulations implementing the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention Against Torture), provide protection, in the form of withholding of removal or deferral of removal, if an alien is more likely than not to be tortured if removed to the proposed country of removal. 8 CFR 208.16(c)(3), 208.17(a); *see* Convention Against Torture, S. Treaty Doc. No. 100–20 (1988), 23 I.L.M. 1027 (1984), approved by the United States Senate Oct. 28, 1990, 136 Cong. Rec. 36625 (1990). Except for deferral of removal under the Convention Against Torture under 8 CFR 208.17(a), however, these provisions also exclude aliens from seeking protection under certain circumstances. For example, section 208(b)(2) of the Act lists exceptions for aliens seeking asylum; section 241(b)(3)(b) of the Act lists exceptions for aliens seeking withholding of removal; and 8 CFR 208.16(d)(2) lists exceptions for aliens seeking withholding of removal under the Convention Against Torture.

Additionally, section 244 of the Act, 8 U.S.C. 1254a, provides temporary protected status for nationals of a foreign state if the Secretary of Homeland Security “finds that there is an ongoing armed conflict within the state” and returning aliens to the state “would pose a serious threat to their personal safety,” or “there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety, unless

the [Secretary of Homeland Security] finds that permitting the aliens to remain temporarily in the United States is contrary to the national interest of the United States." However, section 244(c)(2) of the Act also excludes certain aliens from temporary protected status.

These provisions demonstrate that Congress provided for protection from removal in specific circumstances and, even when protection is available, excluded certain aliens from obtaining such protection. The commenters' general assertions that international law prohibits removal of aliens to a country without a functioning government, notwithstanding an alien's inability to qualify for protection under any or the provisions of the Act or regulations mentioned above, are misplaced because it would create obligations for the United States that are not cognizable in domestic courts. "Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing. These reasons argue for great caution in adapting the law of nations to private rights." *Sosa v. Alvarez-Machain*, 542 U.S. 124 S.Ct. 2739, 2763-64 (No. 03-339, June 28, 2004) (citing 138 Cong. Rec. 8071 (1992)). For example, article 3 of the Convention Against Torture, is often relied upon for the requirement that the United States may not remove an individual to a country where it is more likely than not that the individual will be tortured. However, the Convention Against Torture is not self-executing, as the United States Senate made clear in its reservations, understandings, declarations, and provisos contained in its resolution of ratification of the Convention Against Torture. The Senate required separate implementing legislation and regulations. Regulations implementing the Convention were adopted pursuant to a congressional directive in section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. 105-277, 112 Stat. 2681-761, 2681-822. See 64 FR 8478, 8488 (February 19, 1999). Thus, the protection afforded by the Convention Against Torture, cognizable in domestic courts, is contained in the implementing legislation and regulations. General reference to international law does not create more "law" in this area than was otherwise specifically domestically authorized and implemented.

Accordingly, statutory and regulatory provisions provide protection to aliens as appropriate; customary international law cannot be said to provide additional rights cognizable in domestic courts than are already provided under domestic law. Therefore, the Secretary and the Attorney General will not modify the proposed regulations in response to this comment.

#### 9. Foreign Policy Considerations

Some commenters suggest that the proposed rule raises serious foreign policy concerns because nothing in the rule prohibits DHS from removing aliens to a country over the country's objection. In so doing, these commenters reference the norm of customary international law of sovereign equality. The commenters fail to recognize, however, that the rule does not need to address, nor is it the place to address, foreign policy considerations such as sovereign equality. As stated in the Notice of Proposed Rulemaking, the "general practice of the Executive Branch is not to attempt to remove an individual under the Act to a country whose government refuses to accept him." 69 FR at 42904. The commenters, while acknowledging this statement in the Notice of Proposed Rulemaking, indicate that nothing in the Notice specifically prohibits the Executive Branch from doing so. Commenters are correct that nothing in the rule prohibits the Executive Branch from doing so because nothing in the Act prohibits the Executive Branch from doing so, and foreign policy considerations, which are entrusted to the Executive Branch, do not compel reading such a prohibition into the Act.

The Executive Branch is vested with the discretion to act in the foreign policy interests of the United States. As the Supreme Court has stressed repeatedly, the right of the Executive Branch to remove aliens "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). The "power to expel or exclude aliens" is "a fundamental sovereign attribute exercised by the Government's political departments." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). As stated in the Notice of Proposed Rulemaking, "[t]hese considerations apply with special force to immigration issues arising under the Act involving foreign countries that are either hostile, dysfunctional, or lack the capacity to exercise their sovereign authority. In particular, in exercising authority to remove aliens under the Act, the Executive Branch has the

responsibility to assess," and is in the best position to assess, the foreign policy implications of its actions. 69 FR at 42906. Therefore, sovereign equality is an issue for the Executive Branch to determine; it does not create a private right of action nor does it suggest, much less compel, that the authority of the Executive Branch to effect removals to a particular country over that country's objection is in any way affected as a matter of domestic law cognizable in domestic courts.

#### 10. Identifying Country of Removal at Removal Hearing for Protection Requests

Some commenters state that an alien has a due process right to know the country to which he or she will be removed during the removal hearing. These commenters note that choosing the country of removal has due process implications to the extent that the proposed country or countries of removal may affect an alien's decision to apply for asylum, withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), and protection under the Convention Against Torture. Accordingly, these commenters request that the proposed rule be modified to "protect the rights of asylum applicants and those fearing persecution."

The Secretary and Attorney General find it unnecessary to amend the proposed rule in response to this comment. In this context, it is important to differentiate between asylum, withholding of removal under section 241(b)(3) of the Act, and protection under the Convention Against Torture in discussing what protection is available to aliens. Under section 101(a)(42) of the Act, 8 U.S.C. 1101(a)(42), an alien may apply for asylum if he or she has been persecuted, or has a well-founded fear of persecution, from his or her country of nationality or the country where he or she last habitually resided. An alien in the United States may apply for asylum regardless of whether removal proceedings are pending and regardless of the country or countries designated for removal. By contrast, an alien may apply for withholding of removal under section 241(b)(3) of the Act or protection under the Convention Against Torture under 8 CFR 208.16(c)(2), 208.17(a) to prevent removal only to a specific country or countries. Accordingly, the proposed country of removal does not in any way affect an alien's ability to apply for asylum. Therefore, in discussing protection claims in the next few paragraphs, the Secretary of Homeland Security and the Attorney General will be referring to withholding of removal

under 241(b)(3) of the Act and protection under the Convention Against Torture, as these are specific to the proposed country of removal, but will not be referring to asylum since it is not dependent upon the proposed country of removal.

In terms of arriving aliens who are covered under section 241(b)(1) of the Act, each potential country of removal can be identified during the removal hearing, except for section 241(b)(1)(C)(iv) of the Act, where the alien may be removed to “[a] country with a government that will accept the alien into the country’s territory.” Similarly, for aliens covered under section 241(b)(2) of the Act, each potential country of removal can be identified during the removal hearing, except for section 241(b)(2)(E)(vii) of the Act, where the alien may be removed to “another country whose government will accept the alien into that country.” Thus, an alien will have the opportunity to apply for protection as appropriate from any of the countries that are identified as potential countries of removal under section 241(b)(1) or (b)(2) of the Act. In this respect, the Secretary and Attorney General are aware of the cases cited by the commenters wherein the potential countries of removal were not all specifically named and where the aliens were not afforded the opportunity to apply for protection as appropriate from those countries. *See, Kossow v. INS*, 132 F.3d 405 (7th Cir. 1998); *Kuhai v. INS*, 199 F.3d 909 (7th Cir. 1999); *but see Andriasian v. INS*, 180 F.3d 1033, 1041 (9th Cir. 1999) (wherein the agency agreed that alien was entitled to remand where potential country of removal was not designated until the end of the removal hearing). It is important to note, however, that there are cases where protection claims from more than one country are identified and considered at the removal hearing. *See, e.g., Ambartsoumian v. Ashcroft*, 388 F.3d 85 (3rd Cir. 2004). As discussed in the Notice of Proposed Rulemaking, all parties in the removal proceeding share responsibility for ensuring that the record identifies the countries to which the alien may be removed where removal is premised upon some previous connection to that country. 69 FR at 42908. Indeed, 8 CFR 1240.10(f), as amended by this rule, requires that immigration judges identify for the record the countries to which an alien may be removed. Accordingly, except for removals pursuant to sections 241(b)(1)(C)(iv) or 241(b)(2)(E)(vii) of the Act, an alien will know at the time of the removal hearing all of the potential countries of removal

and may apply for protection from the country or countries as appropriate. Any protection claims will then be addressed as part of the removal hearing, which itself provides the process that is due.

The Secretary does acknowledge that identification of a removal country under sections 241(b)(1)(C)(iv) or 241(b)(2)(E)(vii) of the Act, where removal will be to a country with no connection to the alien other than a determination by the Secretary of Homeland Security that the country is willing to accept the alien, will likely not occur until after the removal proceeding is concluded. Importantly, the vast majority of removals are to countries with which the alien has some connection and for which the alien would have had ample opportunity to apply for protection as necessary. To the extent that removal will occur under section 241(b)(1)(C)(iv) or 241(b)(2)(E)(vii) of the Act, the Executive Branch will identify the particular country and then assess whether the government of the proposed country of removal is willing to accept the alien. In the exercise of its functions as it relates to removal under either of these sections, the Executive Branch, through the Secretary of Homeland Security and the Secretary of State, is aware of the relevant law as it relates to the protection of aliens being removed to any particular country. *Cf.* 22 CFR 95.3 (implementing the Convention Against Torture in extradition cases and providing that allegations relating to torture will be reviewed by appropriate “policy and legal offices”). In appropriate circumstances, DHS may agree to join motions to reopen that would otherwise be barred by time and number limitations. *See* 8 CFR 1003.2(c)(3)(iii), 1003.23(b)(4)(iv).

#### 11. Modification of Certain Regulations

Certain commenters suggested that existing regulations are not consistent with the approach taken in these rules. The commenters correctly note that with these rules, DHS is amending its regulations to reflect its interpretation of the Act. As a result of these amendments, DHS’s regulations will become uniform and consistent with its interpretation of the Act.

Commenters also suggested that the language of 8 CFR 241.4(g)(2) and (3) are in conflict with the interpretation of the Act, as set forth in these regulations. As currently written, 8 CFR 241.4(g)(2) directs the local United States Immigration and Customs Enforcement Detention and Removal Office of the Department of Homeland Security responsible for an alien’s case to attempt to secure travel documents for an alien,

and to elevate the case to headquarters in the event that the local office is unable to secure such documents. Section 241.4(g)(3) discusses how the status of travel documents should be considered as part of a custody determination. The fact that regulations, in the section dealing with travel documents, state that the agency should attempt to obtain travel documents, and that availability of travel documents is a relevant factor in the custody determination, is not inconsistent with these rules. Because the Executive Branch does not generally “attempt to remove an individual under the Act to a country whose government refuses to accept him,” 69 FR at 42904, there is nothing inconsistent about regulations where the district director is instructed to “undertake appropriate steps to secure travel documents.” Nothing in the two regulations cited by the commenters prohibit the Secretary of Homeland Security from effectuating a removal absent those travel documents; they simply incorporate the standing practice that removals will not generally occur if the government of the proposed country of removal refuses to accept the alien. To the extent that issuance of a travel document is but one of many methods employed by the Secretary of Homeland Security to determine that the country does not refuse to accept the alien, the two regulations are nothing more than a realization of the practical aspects of removal. Accordingly, in this context, commenters again mistake the difference between the practical aspects of removal and the legal authority by which to effectuate those removals.

#### 12. Miscellaneous Comments

The Departments were also asked by one commenter what the phrase “zone of interest” meant as used in the preamble to the proposed regulations. *See* 69 FR at 42906. This phrase is discussed in detail in footnote 2 of the preamble to the proposed regulation, and the Secretary and Attorney General decline to address further the meaning of the phrase at this time.

An additional commenter suggested that these regulations were part of the DHS effort to streamline expedited removal. These rules only address the countries to which an alien may be removed after the alien has been ordered removed; they do not affect the expedited removal procedures. The Secretary does note, however, that the authority to initiate expedited removal proceedings has recently been expanded. *See* Notice Designating Aliens for Expedited Removal, 69 FR 48877 (August 11, 2004) (authorizing expedited removal proceedings for

aliens present in the United States without having been admitted or paroled, who are encountered within 100 miles of the border, and who cannot establish that they have been physically present in the United States continuously for the preceding fourteen days); Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 FR 68924 (November 13, 2002) (authorizing expedited removal proceedings for certain aliens who arrive in the United States by sea, who are not admitted or paroled, and who have not been continuously physically present in the United States for the preceding two years).

Some commenters generally alleged that some of the factual background provided in the Notice of Proposed Rulemaking was irrelevant. The Secretary of Homeland Security and the Attorney General disagree that the factual background was irrelevant, as it was provided to assist the public in understanding the purpose and scope of this rule.

One commenter argued that the statutory limitations on motions to reopen in section 240(c)(6)(C)(ii) of the Act reflect Congress's intent to give legal effect to an immigration judge's designation of a country for removal. Accordingly, the commenter argues that the restrictions on motions to reopen do not permit removal of an alien to a third country not named by the immigration judge. The commenter further argues that at a minimum, Justice should modify 8 CFR 1003.2 and 1003.23 to account for changes in the country of intended removal. Justice disagrees with this commenter and declines to accept the proposed changes. Contrary to the commenter's claim, current immigration law provides the United States with the authority to remove aliens to countries other than those designated by an immigration judge. For aliens who have not made a formal entry into the United States, the alien may be removed to any country that satisfies the criteria listed in section 241(b)(1) of the Act, and for all other aliens, the alien may be removed to any country that satisfies the criteria listed in sections 241(b)(2)(C), (D), and (E) of the Act, without approval from an immigration judge. See also 8 CFR 1240.10(g) (recodified in 8 CFR 1240.12(d)). Additionally, for those aliens who wish to raise new issues regarding the designated country of removal, current law already provides a mechanism for reopening their cases. When appropriate, DHS may agree to waive the time and numerical limits on an alien's right to file a motion to reopen, 8 CFR 1003.2(c)(3)(iii),

1003.23(b)(4)(iv), or the immigration judge or the Board of Immigration Appeals may reopen the case *sua sponte*, 8 CFR 1003.2(a), 1003.23(b)(1).

One commenter addressed a portion of the Justice regulation relating to 8 CFR 1241.8, suggesting that the word "may" should be changed to "shall" in order to more accurately reflect the existing requirement in the cross-referenced section at 8 CFR 241.8. However, the Department of Justice has decided to defer making any revisions to section 1241.8, pending further consideration, and accordingly this rule makes no change in the existing language of 8 CFR 1241.8 at this time.

Similarly, DHS and Justice have decided to defer making revisions to 8 CFR 236.1 and 1236.1, pending further consideration, and accordingly this rule makes no change in the existing language of 8 CFR 236.1 and 1236.1 at this time.

Finally, Justice received several miscellaneous comments from one commenter who supported sending illegal immigrant lawbreakers back to a country of the immigration judge's choosing immediately, asserted that the United States has too many illegal immigrants (which causes taxes to go up), and that it is time we seal our borders. As discussed above, the Department declines to expand upon the authority provided by Congress in sections 241(b)(1) and (2) of the Act to allow an immigration judge to send an alien back to a country of the judge's choosing. The Department of Justice, DHS, and other agencies of the United States government vigorously enforce American immigration laws against illegal immigration, and these rules are only one aspect of the effort to ensure that the United States is able to effectuate the removal of aliens who are deportable or inadmissible. The Department of Justice believes that the remaining proposals suggested by this commenter fall outside the scope of this rule and will not be addressed.

### C. Joint and Independent Notice of Rulemaking

The Secretary of Homeland Security hereby amends regulations of the Department of Homeland Security to clarify the authority for removal of aliens to specific countries in the exercise of discretion under section 241 of the Act. The Secretary is exercising his authority under sections 103 and 241 of the Act (8 U.S.C. 1103, 1231). The Attorney General hereby amends the regulations of the Department of Justice to clarify the authority and procedures before immigration judges in designating countries of removal in the

record of proceedings, to clarify the scope of immigration judge orders of removal from the United States, and to provide further guidance in interpreting the Act. The Attorney General is exercising his authority under section 103(a)(1) and (g) of the Act, and his authority under 28 U.S.C. 503, 509–510.

### Administrative Matters

#### *Regulatory Flexibility Act*

The Secretary and the Attorney General, in accordance with 5 U.S.C. 605(b), have reviewed their respective rules and, by approving them, certify that these rules do not have a significant economic impact on a substantial number of small entities. The rules affect only individual aliens and government agencies.

#### *Unfunded Mandates Reform Act of 1995*

These rules will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### *Small Business Regulatory Enforcement Fairness Act of 1996*

Neither of these rules is a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. Neither rule will result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

#### *Executive Order 12866*

These rules have been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. The Departments have determined that their respective rules are significant regulatory actions under section 3(f) of Executive Order 12866, Regulatory Planning and Review. Accordingly, these rules have been submitted to the Office of Management and Budget for review.

There are no additional costs to the Department of Justice in the implementation of the rule other than the minimal amount of time required for immigration judges to explain the possibility that an alien may be removed to a country other than designated.

Similarly, there are no additional costs of the Department of Homeland Security other than in the small number of cases in which execution of an order of removal will be to a country other than as previously designated, in which officials of DHS will be required to ensure compliance with United States law and international obligations. There are no costs to individuals.

The benefits of the rule lie in the clarification of the law and the elimination of delay in effecting a small number of removal orders, but these benefits are not quantifiable. In some cases, the individual alien will already be in the custody of DHS and, therefore, reducing the time required to execute an order of removal will reduce the costs of detaining that alien.

#### *Executive Order 13132*

These rules will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, the respective Departments have determined that these rules do not have sufficient federalism implications to warrant a federalism summary impact statement.

#### *Executive Order 12988*

These rules meet the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform.

#### *Paperwork Reduction Act of 1995*

These rules do not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act.

#### **List of Subjects**

##### *8 CFR Part 241*

Administrative practice and procedure, Aliens, Immigration.

##### *8 CFR Part 1240*

Administrative practice and procedure, Aliens.

##### *8 CFR Part 1241*

Administrative practice and procedure, Aliens, Immigration.

#### **Department of Homeland Security**

##### *8 CFR Chapter I*

Authority and Issuance

■ Accordingly, for the reasons stated in the joint preamble and pursuant to the authority vested in me as the Secretary of Homeland Security, chapter I of title

8 of the Code of Federal Regulations is amended as follows:

#### **PART 241—APPREHENSION AND DETENTION OF ALIENS ORDERED REMOVED**

■ 1. The authority citation for part 241 continues to read as follows:

**Authority:** 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1103, 1182, 1223, 1224, 1225, 1226, 1227, 1231, 1251, 1253, 1255, 1330, 1362; 18 U.S.C. 4002, 4013(c)(4); 8 CFR part 2.

■ 2. Section 241.1 is revised to read as follows:

##### **§ 241.1 Final order of removal.**

An order of removal becomes final in accordance with 8 CFR 1241.1.

■ 3. Section 241.3 is amended by adding a new paragraph (d), to read as follows:

##### **§ 241.3 Detention of aliens during removal period.**

\* \* \* \* \*

(d) *Information regarding detainees.* Disclosure of information relating to detainees shall be governed by the provisions of 8 CFR 236.3.

##### **§ 241.4 [Amended]**

■ 4. Section 241.4(k)(1)(i) is amended by removing the phrase “because no country currently will accept the alien,” and by removing the phrase “removal of the alien prior to expiration of the removal period” in the first sentence.

■ 5. Section 241.5 is amended by revising paragraph (c)(1), to read as follows:

##### **§ 241.5 Conditions of release after removal period.**

\* \* \* \* \*

(c) \* \* \*

(1) The alien cannot be removed in a timely manner; or

\* \* \* \* \*

##### **§ 241.13 [Amended]**

■ 6. Section 241.13 is amended by:

■ a. Removing the phrase “to the country to which the alien was ordered removed and there is no third country willing to accept the alien” in the first sentence of paragraph (d)(1); and by

■ b. Adding the term “and” immediately before the phrase “the views of the Department of State” and by removing the phrase “, and the receiving country’s willingness to accept the alien into its territory” in the first sentence of paragraph (f).

■ 7. Section 241.15 is revised to read as follows:

##### **§ 241.15 Countries to which aliens may be removed.**

(a) *Country.* For the purposes of section 241(b) of the Act (8 U.S.C.

1231(b)), the Secretary retains discretion to remove an alien to any country described in section 241(b) of the Act (8 U.S.C. 1231(b)), without regard to the nature or existence of a government.

(b) *Acceptance.* For the purposes of section 241(b) of the Act (8 U.S.C. 1231(b)), the Secretary retains discretion to determine the effect, if any, of acceptance or lack thereof, when an acceptance by a country is required, and what constitutes sufficient acceptance.

(c) *Absence or lack of response.* The absence of or lack of response from a de jure or functioning government (whether recognized by the United States, or otherwise) or a body acting as a de jure or functioning government in the receiving country does not preclude the removal of an alien to a receiving country.

(d) *Prior commitment.* No commitment of acceptance by the receiving country is required prior to designation of the receiving country, before travel arrangements are made, or before the alien is transported to the receiving country.

(e) *Specific provisions regarding acceptance.* Where the Department cannot remove an alien under section 241(b)(2)(A)–(D) of the Act, acceptance is not required to remove an alien to a receiving country pursuant to section 241(b)(2)(E)(i)–(vi) of the Act. Where the Department cannot remove an arriving alien under section 241(b)(1)(A) or (B) of the Act, acceptance is not required to remove an alien to a receiving country pursuant to section 241(b)(1)(C)(i)–(iii) of the Act.

(f) *Interest of the United States controlling.* The Secretary or his designee may designate a country previously identified in section 241(b)(2)(A)–(D) of the Act when selecting a removal country under section 241(b)(2)(E) of the Act (and may designate a country previously identified in section 241(b)(1)(A) or (B) of the Act when selecting an alternative removal country under subsection 241(b)(1)(C) of the Act) if the Secretary or his designee determines that such designation is in the best interests of the United States.

(g) *Limitation on construction.* Nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

■ 8. Section 241.25(b) is revised to read as follows:

##### **§ 241.25 Deportation.**

\* \* \* \* \*

(b) *Place to which deported.* Any alien (other than an alien crewmember or an alien who boarded an aircraft or vessel in foreign contiguous territory or an adjacent island) who is ordered excluded shall be deported to the country where the alien boarded the vessel or aircraft on which the alien arrived in the United States. Otherwise, the Secretary may, as a matter of discretion, deport the alien to the country of which the alien is a subject, citizen, or national; the country where the alien was born; the country where the alien has a residence; or any other country.

\* \* \* \* \*

■ 9. Section 241.31 is revised to read as follows:

**§ 241.31 Final order of deportation.**

An order of deportation becomes final in accordance with 8 CFR 1241.31.

**§ 241.33 [Amended]**

■ 10. Section 241.33 is amended by:

- a. Revising the last sentence in paragraph (a) introductory text, to read “An order of deportation becomes final in accordance with 8 CFR 1241.31.”; and by
- b. Removing paragraphs (a)(1), (2), (3), and (4).

Dated: December 28, 2004.

**Tom Ridge,**  
*Secretary.*

**Department of Justice**

*8 CFR Chapter V*

Authority and Issuance

■ Accordingly, for the reasons stated in the joint preamble and pursuant to the authority vested in me as the Attorney General of the United States, chapter V of title 8 of the Code of Federal Regulations is amended as follows:

**PART 1240—PROCEEDINGS TO DETERMINE REMOVABILITY OF ALIENS IN THE UNITED STATES**

■ 1. The authority citation for part 1240 is revised to read as follows:

**Authority:** 8 U.S.C. 1103, 1182, 1186a, 1224, 1225, 1226, 1227, 1229, 1229a, 1229b, 1229c, 1253, 1255, and 1362.

■ 2. Section 1240.10 is amended by:

- a. Revising paragraph (f); and by
- b. Removing paragraph (g).

The revision reads as follows:

**§ 1240.10 Hearing.**

\* \* \* \* \*

(f) *Country of removal.* With respect to an arriving alien covered by section 241(b)(1) of the Act, the country, or countries in the alternative, to which

the alien may be removed will be determined pursuant to section 241(b)(1) of the Act. In any other case, the immigration judge shall notify the respondent that if he or she is finally ordered removed, the country of removal will in the first instance be the country designated by the respondent, except as otherwise provided under section 241(b)(2) of the Act, and shall afford him or her an opportunity then and there to make such designation. The immigration judge shall also identify for the record a country, or countries in the alternative, to which the alien’s removal may be made pursuant to section 241(b)(2) of the Act if the country of the alien’s designation will not accept him or her into its territory, or fails to furnish timely notice of acceptance, or if the alien declines to designate a country. In considering alternative countries of removal, acceptance or the existence of a functioning government is not required with respect to an alternative country described in section 241(b)(1)(C)(i)–(iii) of the Act or a removal country described in section 241(b)(2)(E)(i)–(iv) of the Act. See 8 CFR 241.15.

■ 3. Section 1240.12 is amended by revising paragraph (c) and adding a new paragraph (d), to read as follows:

**§ 1240.12 Decision of the immigration judge.**

\* \* \* \* \*

(c) *Order of the immigration judge.* The order of the immigration judge shall direct the respondent’s removal from the United States, or the termination of the proceedings, or other such disposition of the case as may be appropriate. The immigration judge is authorized to issue orders in the alternative or in combination as he or she may deem necessary.

(d) *Removal.* When a respondent is ordered removed from the United States, the immigration judge shall identify a country, or countries in the alternative, to which the alien’s removal may in the first instance be made, pursuant to the provisions of section 241(b) of the Act. In the event that the Department of Homeland Security is unable to remove the alien to the specified or alternative country or countries, the order of the immigration judge does not limit the authority of the Department of Homeland Security to remove the alien to any other country as permitted by section 241(b) of the Act.

**PART 1241—APPREHENSION AND DETENTION OF ALIENS ORDERED REMOVED**

■ 4. The authority citation for part 1241 is revised to read as follows:

**Authority:** 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1103, 1182, 1223, 1224, 1225, 1226, 1227, 1231, 1251, 1253, 1255, 1330, 1362; 18 U.S.C. 4002, 4013(c)(4).

**§§ 1241.3, 1241.4, 1241.5, 1241.9, 1241.10, 1241.11, 1241.12, and 1241.13 [Removed]**

■ 5. Sections 1241.3, 1241.4, 1241.5, 1241.9, 1241.10, 1241.11, 1241.12, and 1241.13 are removed.

■ 6. Section 1241.2 is revised to read as follows:

**§ 1241.2 Warrant of removal; detention of aliens during removal period.**

For the regulations of the Department of Homeland Security with respect to the detention and removal of aliens who are subject to a final order of removal, see 8 CFR part 241.

■ 7. Section 1241.6 is amended by revising paragraphs (a) and (b), to read as follows:

**§ 1241.6 Administrative stay of removal.**

(a) An alien under a final order of deportation or removal may seek a stay of deportation or removal from the Department of Homeland Security as provided in 8 CFR 241.6.

(b) A denial of a stay by the Department of Homeland Security shall not preclude an immigration judge or the Board from granting a stay in connection with a previously filed motion to reopen or a motion to reconsider as provided in 8 CFR part 1003.

\* \* \* \* \*

**§ 1241.7 [Amended]**

■ 8. Section 1241.7 is amended by removing the first sentence.

■ 9. Section 1241.14 is amended by revising paragraph (a), and removing and reserving paragraphs (b), (c), and (d), to read as follows:

**§ 1241.14 Continued detention of removable aliens on account of special circumstances.**

(a) *Scope.* This section provides for the review of determinations by the Department of Homeland Security to continue the detention of particular removable aliens found to be specially dangerous. See 8 CFR 241.14.

(1) *Applicability.* This section applies to the review of the continued detention of removable aliens because the Department of Homeland Security has determined that release of the alien would pose a special danger to the

public, where there is no significant likelihood of removal in the reasonably foreseeable future. This section does not apply to aliens who are not subject to the special review provisions under 8 CFR 241.13.

(2) *Jurisdiction.* The immigration judges and the Board have jurisdiction with respect to determinations as to whether release of an alien would pose a special danger to the public, as provided in paragraphs (f) through (k) of this section.

\* \* \* \* \*

■ 10. Section 1241.15 is revised to read as follows:

**§ 1241.15 Lack of jurisdiction to review other country of removal.**

The immigration judges and the Board of Immigration Appeals have no jurisdiction to review any determination by officers of the Department of Homeland Security under 8 CFR 241.15.

■ 11. Section 1241.20 is revised to read as follows:

**§ 1241.20 Aliens ordered excluded.**

For the regulations of the Department of Homeland Security pertaining to the detention and deportation of excluded aliens, see 8 CFR 241.20 through 241.25.

**§§ 1241.21, 1241.22, 1241.23, 1241.24, and 1241.25 [Removed]**

■ 12. Sections 1241.21 through 1241.25 are removed.

■ 13. Section 1241.30 is revised to read as follows:

**§ 1241.30 Aliens ordered deported.**

For the regulations of the Department of Homeland Security pertaining to the detention and deportation of aliens ordered deported, see 8 CFR 241.30 through 241.33.

Dated: December 28, 2004.

**James B. Comey,**

*Acting Attorney General.*

[FR Doc. 05-125 Filed 1-4-05; 8:45 am]

BILLING CODE 4410-10-P

---

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 25**

[Docket No. NM297; Special Conditions No. 25-279-SC]

**Special Conditions: Raytheon Model 4000 Horizon; Side-Facing Single-Occupant Seats**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final special conditions; request for comments.

**SUMMARY:** These special conditions are issued for the Raytheon Model 4000 Horizon airplane. This airplane will have a novel or unusual design feature associated with side-facing single-occupant seats. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

**DATES:** The effective date of these special conditions is December 22, 2004. Send your comments on or before February 22, 2005.

**ADDRESSES:** Comments on these special conditions may be mailed in duplicate to: Federal Aviation Administration, Transport Airplane Directorate, Attn: Rules Docket (ANM-113), Docket No. NM297, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; or delivered in duplicate to the Transport Airplane Directorate at the above address. Comments must be marked: Docket No. NM297. Comments may be inspected in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

**FOR FURTHER INFORMATION CONTACT:** John A. Sheldon, FAA, Airframe/Cabin Safety Branch, ANM-115, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (425) 227-2785, facsimile (425) 227-1232.

**SUPPLEMENTARY INFORMATION:** The substance of these special conditions has been subject to the notice and comment period in several prior instances and has been derived without substantive change from those previously issued. For this reason, and because a delay would significantly affect the certification of the airplane, which is imminent, the FAA has determined that prior public notice and comment are unnecessary and impracticable, and good cause exists for adopting these special conditions upon issuance. We are requesting comments to allow interested persons to submit views that may not have been submitted in response to the prior opportunities for comment.

**Comments Invited**

We invite interested persons to participate in this rulemaking by submitting written comments, data, or views. The most helpful comments

reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning these special conditions. The docket is available for public inspection before and after the comment closing date. If you wish to review the docket in person, go to the address in the **ADDRESSES** section of this preamble between 7:30 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

We will consider all comments we receive on or before the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change these special conditions in light of the comments we receive.

If you want the FAA to acknowledge receipt of your comments on these special conditions, include with your comments a pre-addressed, stamped postcard on which the docket number appears. We will stamp the date on the postcard and mail it back to you.

**Background**

On August 1, 1996, Raytheon Aircraft Company, 9709 E. Central, Wichita, KS 67201, applied for a type certificate for their new Model 4000 Horizon airplane and reapplied on May 31, 2001. The Model 4000 Horizon is a twin-engine, pressurized executive jet airplane with standard seating provisions for 10 passenger/crew and allowance for baggage and optional equipment. This airplane will have a maximum takeoff weight of 36,000 pounds and will have two aft-mounted Pratt & Whitney PW 308A engines.

**Type Certification Basis**

Under the provisions of 14 CFR 21.17, the Raytheon Aircraft Company must show that the Model 4000 Horizon airplane meets the applicable provisions of part 25, effective February 1, 1965, as amended by amendment 25-1 through amendment 25-101.

If the Administrator finds that the applicable airworthiness regulations (*i.e.*, 14 CFR part 25) do not contain adequate or appropriate safety standards for the Raytheon Model 4000 Horizon airplane because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

In addition to the applicable airworthiness regulations and special conditions, the Raytheon Model 4000