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**DEPARTMENT OF JUSTICE**

**Executive Office for Immigration Review**

**8 CFR Part 1235**

**AG Order No. 3817-2017**

**RIN 1125-AA80**

**EOIR Docket No. 401**

**Eliminating Exception to Expedited Removal Authority for Cuban Nationals**

**Arriving by Air**

**AGENCY:** Executive Office for Immigration Review, Department of Justice.

**ACTION:** Final rule; request for comments.

**SUMMARY:** This final rule revises Executive Office for Immigration Review (EOIR) regulations to eliminate the categorical exception from expedited removal proceedings for Cuban nationals who arrive in the United States at a port of entry by aircraft. This final rule conforms with a parallel Department of Homeland Security (DHS) regulation. As a result of these changes, Cuban nationals who arrive in the United States at a port of entry by aircraft will be subject to expedited removal proceedings commensurate with nationals of other countries.

**DATES:** This final rule is effective [INSERT DATE OF PUBLIC INSPECTION].

Interested persons are invited to submit written comments on this final rule on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments received by mail will be considered timely if they are

postmarked on or before that date. The electronic Federal Docket Management System (FDMS) will accept comments until midnight Eastern Time at the end of that day.

**ADDRESSES:** Please submit written comments to Jean King, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041. To ensure proper handling, please reference RIN No. 1125-AA80 or EOIR Docket No. 401 on your correspondence. You may submit comments electronically or view an electronic version of this proposed rule at [www.regulations.gov](http://www.regulations.gov).

**FOR FURTHER INFORMATION CONTACT:** Jean King, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041; telephone (703) 605-1744 (not a toll-free call).

**SUPPLEMENTARY INFORMATION:**

**I. Public Participation**

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this rule. EOIR also invites comments that relate to the economic, environmental, or federalism effects that might result from this rule. To provide the most assistance to EOIR, comments should explain the reason for any recommended change, and should include data, information, or authority that supports such recommended change.

All comments submitted for this rulemaking should include the agency name and RIN 1125-AA80 or EOIR Docket No. 401. Please note that all comments received are considered part of the public record and will be made available for public inspection at [www.regulations.gov](http://www.regulations.gov)., including personally identifiable information (such as a person's

name, address, or any other data that might personally identify that individual) voluntarily submitted by the commenter.

If you want to submit personally identifiable information as part of your comment, but do not want it to be posted online, you must include the phrase “PERSONALLY IDENTIFIABLE INFORMATION” in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online, you must include the phrase “CONFIDENTIAL BUSINESS INFORMATION” in the first paragraph of your comment. You also must prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on [www.regulations.gov](http://www.regulations.gov).

Personally identifiable information and confidential business information provided as set forth above will be placed in the agency’s public docket file, but not posted online. To inspect the agency’s public docket file in person, you must make an appointment with agency counsel. Please see the “FOR FURTHER INFORMATION CONTACT” paragraph above for agency counsel’s contact information.

## **II. Background**

This rule conforms to the rule published by DHS in this issue of the Federal Register that revises 8 CFR 235.3(b)(1)(i). This rule revises the parallel Department of Justice (DOJ) regulation, 8 CFR 1235.3(b)(1)(i), which states that the expedited removal provisions apply to “[a]rriving aliens, as defined in [8 CFR 1001.1(q)], except for citizens

of Cuba arriving at a United States port-of-entry by aircraft”.<sup>1</sup> Both the DHS rule and this rule eliminate the provisions in the Departments’ respective regulations that categorically exempt Cuban nationals who arrive at a U.S. port of entry by aircraft from expedited removal proceedings. As a result of these changes, Cuban nationals who arrive in the United States at a port of entry by aircraft will be subject to expedited removal proceedings commensurate with nationals of other countries.

### **III. Statutory and Regulatory Requirements**

#### **A. Administrative Procedure Act**

The implementation of this rule as a final rule, with provisions for post-promulgation public comments, is based on the good cause exception found in section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)(B)). Delaying the implementation of the change announced in this rule to allow pre-promulgation notice and comment would be impracticable and contrary to the public interest. Section 235(b)(1)(A)(iii)(I) of the Immigration and Nationality Act explicitly authorizes the Secretary of Homeland Security to designate categories of aliens to whom expedited removal proceedings may be applied, and makes clear that “[s]uch designation shall be in the sole and unreviewable discretion of the Secretary and may be modified at any time.” 8 U.S.C. 1225(b)(1)(A)(iii)(I). This conforming rule is necessary to conform to the DHS rulemaking, which will allow DHS to remove quickly from the United States certain Cuban nationals who arrive by air at U.S. ports of entry. The ability to detain such aliens

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<sup>1</sup> DOJ initially promulgated 8 CFR 235.3(b)(1)(i) as an exercise of the functions of the former Immigration and Naturalization Service (INS) and the Executive Office for Immigration Review. See 62 FR 10312 (Mar. 6, 1997). Following enactment of the HSA, 8 CFR 235.3(b)(1)(i) was transferred to DHS, and effectively duplicated in parallel DOJ regulations at 8 CFR 1235.3(b)(1)(i). See 68 FR 10349 (Mar. 5, 2003).

while admissibility and identity are determined and protection claims are adjudicated, as well as to quickly remove those without protection claims or claims to lawful status, is a necessity for national security and public safety.

Pre-promulgation notice and comment would undermine these interests, while endangering human life and having a potential destabilizing effect in the region.

Specifically, the Department is concerned that publication of the rule as a proposed rule, which would signal a significant change in policy while permitting continuation of the exception for Cuban nationals, could lead to a surge in migration of Cuban nationals seeking to travel to and enter the United States during the period between the publication of a proposed and a final rule. Such a surge would threaten national security and public safety by diverting valuable Government resources from counterterrorism and homeland security responsibilities. A surge could also have a destabilizing effect on the region, thus weakening the security of the United States and threatening its international relations. Additionally, a surge could result in significant loss of human life.

Accordingly, DOJ finds that it would be impracticable and contrary to the public interest to accept pre-promulgation comments on this rule. For the same reasons, DOJ also finds good cause to issue this rule without a 30-day delayed effective date requirement of the APA, see 5 U.S.C. 553(d).<sup>2</sup>

In addition, the change implemented by this rule is part of a major foreign policy initiative announced by the President, and is central to ongoing diplomatic discussions between the United States and Cuba with respect to travel and migration

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<sup>2</sup> In addition, in light of the lack of pre-publication notice-and-comment and a delayed effective date for the related notice that DHS has published in this issue of the Federal Register, a delay in the effective date of this regulation would be incongruous and unnecessary.

between the two countries. DOJ, in consultation with the Department of State, has determined that eliminating the exception from expedited removal proceedings for Cuban nationals involves a foreign affairs function of the United States, 5 U.S.C. 553(a)(1), and is also exempt from the notice and comment and 30-day delayed effective date requirements of the APA on that basis. DOJ is nevertheless providing the opportunity for the public to provide comments.

### **B. Executive Orders 13563 and 12866**

Executive Orders 13563 and 12866 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

The Office of Management and Budget has not designated this rule as a significant regulatory action under section 3(f) of Executive Order 12866. Accordingly, the Office of Management and Budget has not reviewed this rule.

### **C. Regulatory Flexibility Act**

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996, requires an agency to prepare a regulatory flexibility analysis that describes the effect of a proposed rule on small entities when the agency is required to publish a general notice of proposed rulemaking. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business

per the Small Business Act); a small not-for-profit organization; or a small governmental jurisdiction (locality with fewer than 50,000 people). Because this final rule is exempt from notice-and-comment rulemaking requirements under 5 U.S.C. 553, a regulatory flexibility analysis is not required.

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

This rule 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 it 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.

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

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996. *See* 5 U.S.C. 804. This rule will not 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 enterprises to compete with foreign-based enterprises in domestic and export markets.

#### **F. Executive Order 13132: Federalism**

This rule 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, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

**G. Executive Order 12988: Civil Justice Reform**

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

**H. Paperwork Reduction Act**

The provisions of the Paperwork Reduction Act of 1995, Public Law 104-13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this rule because there are no new or revised recordkeeping or reporting requirements.

**List of Subjects in 8 CFR Part 1235**

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated in the preamble, part 1235 of title 8 of the Code of Federal Regulations is amended as follows:

**PART 1235—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**

1. The authority citation for part 1235 continues to read:

Authority: 8 U.S.C. 1101 and note, 1103, 1183, 1185 (pursuant to E.O. 13323, 69 FR 241, 3 CFR, 2003 Comp., p. 278), 1201, 1224, 1225, 1226, 1228, 1365a note, 1379, 1731-32; Title VII of Public Law 110-229; 8 U.S.C. 1185 note (section 7209 of Pub. L. 108-458).

2. Revise § 1235.3(b)(1)(i) to read as follows:

§ 1235.3 Inadmissible aliens and expedited removal.

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(i) Arriving aliens, as defined in § 1001.1(q) of this chapter;

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Dated: January 11, 2017.

Loretta E. Lynch,

**Attorney General.**

[FR Doc. 2017-00902 Filed: 1/13/2017 8:45 am; Publication Date: 1/17/2017]