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DEPARTMENT OF JUSTICE (DOJ)

Immigration and Naturalization Service (INS)

8 CFR Part 287

[INS No. 2171-01]

RIN 1115-AG40

Custody Procedures

66 FR 48334

DATE: Thursday, September 20, 2001

ACTION: Interim rule with request for comment.

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[*48334]

SUMMARY: This rule amends the Immigration and Naturalization Service (Service) regulations on the period of time after an alien's arrest within which the Service must make a determination whether the alien will be continued in custody or released on bond or recognizance and whether to issue a notice to appear and warrant of arrest. This rule provides that unless voluntary departure has been granted, the Service must make such determinations within 48 hours of arrest, except in the event of emergency or other extraordinary circumstance in which case the Service must make such determinations within an additional reasonable period of time.

DATES: *Effective date:* September 17, 2001.

Comment date: Written comments must be submitted on or before November 19, 2001.

ADDRESSES: Please submit written comments to the Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street, NW., Room 4034, Washington, DC 20536. To ensure proper handling please reference

INS No. 2171-01 on your correspondence. You may also submit comments electronically to the Service at *insregs@usdoj.gov*. When submitting comments electronically please include INS No. 2171-01 in the subject box. Comments are available for public inspection at the above address by calling (202) 514-3048 to arrange for an appointment.

FOR FURTHER INFORMATION CONTACT: Cristina Hamilton, Office of the General Counsel, Immigration and Naturalization Service, 425 I Street, NW., Room 6100, Washington, DC 20536, telephone (202) 514-2895.

SUPPLEMENTARY INFORMATION:

Background

What Is the Basis for the Interim Rule?

The current rule provides that unless voluntary departure is granted, the Service must make determinations within 24 hours of an alien's arrest whether to continue the alien in custody or to release the alien on bond or recognizance and whether to issue a notice to appear and a warrant of arrest. However, this 24-hour period is not mandated by constitutional requirements. The interim rule provides the Service 48 hours to make these determinations, except in the event of emergency or other extraordinary circumstance in which case the Service must make such determinations within an additional reasonable period of time.

Explanation of Changes

The interim rule amends § 287.3(d), "Custody procedures." The current language of that section provides that unless voluntary departure has been granted pursuant to subpart C of 8 CFR part 240, the Service has a period of 24 hours following the arrest of an alien in which it must determine whether the alien will be continued in custody or released on bond or recognizance and whether to issue a notice to appear and warrant of arrest as prescribed in 8 CFR parts 236 and 239.

Inasmuch as the 24-hour determination period is not mandated by constitutional principles, the Service is amending the rule to provide that unless voluntary departure has been granted pursuant to subpart C of 8 CFR part 240, the Service generally must make the determinations as to custody or release of the alien and as to the issuance of the notice to appear and warrant of arrest within 48 hours of arrest. The Service may often require this additional time in order to establish an alien's true identity; to check domestic, foreign, or international databases and records systems for relevant information regarding the alien; and to liaise with appropriate law enforcement agencies in the United States and abroad.

In situations involving an emergency or other extraordinary circumstance, the Service may require additional time beyond 48 hours to process cases, to arrange for additional personnel or resources, and to coordinate with other law enforcement agencies. Therefore, the interim rule provides an exception to the 48-hour general rule for any case arising during or in connection with an emergency or other extraordinary circumstance, in which case the Service must

make the determinations as to custody or release and as to the issuance of the notice to appear and warrant of arrest within an additional reasonable period of time.

Administrative Procedure Act 5 U.S.C. 553

The Service's implementation of this rule as an interim rule, with provision for post-promulgation public comment, is based on the foreign affairs exception, 5 U.S.C. 553(a)(1), and upon findings of good cause pursuant to 5 U.S.C. 553(b)(B) and (d).

The immediate implementation of this interim rule without public comment is necessary to ensure that the Service has sufficient time, personnel, and resources to process cases-including establishing true identities and communicating with other law enforcement agencies-that arise in connection with the emergency posed by the recent terrorist activities perpetrated on United States soil. This rule does not alter the standards for issuing charging documents or determining the issue of custody or release, but simply extends the period by which the Service must make such determinations. For this reason, the Service has determined that there is good cause to publish this interim rule and to make it effective immediately, because the delays inherent in the regular notice and comment process would be "impracticable, unnecessary and contrary to the public interest." [*48335]

Regulatory Flexibility Act

The Commissioner of the Immigration and Naturalization Service, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. The rule addresses only government operations. It places no new obligations on small entities or other private individuals or businesses. It should have no appreciable economic impact.

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.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. 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 companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

This rule is considered by the Department of Justice, Immigration and

Naturalization Service, to be a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, this regulation has been submitted to the Office of Management and Budget for review.

Executive Order 13132

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.

Executive Order 12988 Civil Justice Reform

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

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Public Law 104-13, all Departments are required to submit to the Office of Management and Budget (OMB), for review and approval, any reporting and recordkeeping requirements inherent in a final rule. This rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act.

List of Subjects in 8 CFR Part 287

Administrative practice and procedure, Aliens, Immigration.

Accordingly, part 287 of chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 287--FIELD OFFICERS; POWERS AND DUTIES

1. The authority citation for part 287 continues to read as follows:

Authority: 8 U.S.C. 1103, 1182, 1225, 1226, 1251, 1252, 1357; 8 CFR part 2.

2. Section 287.3(d) is revised to read as follows:

§ 287.3 -- Disposition of cases of aliens arrested without warrant.

* * * * *

(d) *Custody procedures.* Unless voluntary departure has been granted pursuant to subpart C of 8 CFR part 240, a determination will be made within 48 hours of the arrest, except in the event of an emergency or other extraordinary circumstance in which case a determination will be made within an additional reasonable period of time, whether the alien will be continued in custody or released on bond or recognizance and whether a notice to appear and warrant of arrest as prescribed in 8 CFR parts 236 and 239 will be issued.

Dated: September 17, 2001.

66 FR 48334, *48335

James W. Ziglar,

Commissioner, Immigration and Naturalization Service.

[FR Doc. 01-23545 Filed 9-17-01; 4:51 pm]

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