January 25. 2017

MEMORANDUM FOR: **Kevin McAleenan**
Acting Commissioner
U.S. Customs and Border Protection

Dan Ragsdale
Acting Director
U.S. Immigration and Customs Enforcement

Lori Scialabba
Acting Director
U.S. Citizenship and Immigration Services

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Acting Deputy Assistant Secretary for Policy

FROM: John Kelly
Secretary

SUBJECT: **Implementing the President's Border Security and Immigration Enforcement Improvements Policies**

This memorandum implements Executive Order [ ], "Border Security and Immigration Enforcement Improvements," issued by the President on January 20. 2017. It establishes the President's policy regarding effective border security and immigration enforcement through faithful execution of the laws of the United States. It implements new policy designed to deter illegal immigration and facilitate the detection, apprehension, detention, and removal of aliens who have no lawful authority to enter or remain in the United States. It constitutes guidance to all Department personnel, and supersedes all existing policy, directives, memoranda, and field guidance regarding this subject matter.

A. Policies Regarding the Apprehension and Detention of Aliens Described in Section 235 of the INA.

The President has determined that the lawful detention of arriving aliens pending a determination of their inadmissibility and eligibility for immigration relief has a significant deterrent effect on illegal immigration. Detention also prevents such aliens from committing crimes while at large in the United States and substantially increases the likelihood that aliens lawfully ordered removed will be removed. These policies are consistent with the provisions of the Immigration and Nationality Act (INA), which provide for mandatory detention of such aliens and allow me or my designee to exercise discretionary parole authority pursuant to section 212(d)(5) of the INA only on a case-by-case basis, and only where parole is in the interest of the

United States for urgent humanitarian reasons or significant public benefit. Policies that facilitate the release of removable aliens apprehended at the border and elsewhere, which allow them to abscond and fail to appear at their removal hearings, undermine the border security mission by encouraging more illegal immigration. Such policies, collectively referred to as "catch-and-release," must end.

Accordingly, effective immediately, U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE) personnel may only release from custody an alien described in section 235 of the INA who was apprehended after entering or attempting to enter the United States illegally in the following situations:

1. When removing the alien from the United States pursuant to statute or regulation;

2. When the alien obtains a final order granting relief from removal;

3. When an ICE Field Office Director, CBP Sector Chief, or CBP Director of Field Operations consents to the alien's withdrawal of an application for admission, and the alien departs from the United States;

4. When an ICE Field Office Director, CBP Sector Chief, or CBP Director of Field Operations directs the return of the alien to a foreign territory contiguous to the United States pending the outcome of a removal proceeding under section 240 of the INA;

5. When required to do so by statute, or to comply with a judicial order; or

6. When an ICE Field Office Director, CBP Sector Chief, or CBP Director of Field Operations consents to the alien's parole pursuant to section 212(d)(5) of the INA, and obtains the written concurrence of the Deputy Director of ICE and the Deputy Commissioner of CBP for the exercise of parole.

B. Hiring More Border Patrol Agents

The United States Border Patrol has insufficient agents to apprehend aliens illegally entering the United States. Additional agents are needed to ensure operational control of the border. Accordingly, the Commissioner of CBP shall immediately begin the process of hiring 5,000 additional Border Patrol agents and to take all actions necessary to ensure that such agents enter on duty and are assigned to appropriate duty stations as soon as practicable.

C. Identifying and Quantifying Sources of Aid to Mexico

The President has directed the heads of all executive departments to identify and quantify all sources of direct and indirect aid or assistance to the Government of Mexico. Accordingly, the Under Secretary for Management shall identify all sources of direct or indirect aid or assistance from every departmental component to the Government of Mexico on an annual basis, for the last five fiscal years, and quantify such aid or assistance. The Under Secretary for Management shall submit a report to me reflecting historic levels of such aid or assistance provided annually within 30 days of the date of this memorandum.

D. Expansion of the 287(g) Program to Include State Guard Units in the Border Region

Section 287(g) of the Immigration and Nationality Act authorizes me to enter into an agreement with a state or political subdivision thereof, for the purpose of authorizing qualified officers or employees of the state or subdivision to perform the functions of an immigration officer. This grant of authority, known as the 287(g) Program, has been a highly successful force multiplier that authorizes state or local law enforcement personnel to perform all law enforcement functions specified in section 287(a) of the INA, including the authority to investigate, identify, apprehend, arrest, detain, and conduct searches of an alien for the purposes of enforcing the immigration laws. From January 2006 through September 2015, the 287(g) Program was credited with identifying more than 402,000 potentially removable aliens, primarily through encounters at local jails.

Empowering state and local law enforcement agencies to assist in the enforcement of federal immigration law is critical to an effective enforcement strategy. Aliens who engage in criminal conduct are priorities for arrest and removal and will most likely be encountered by state and local law enforcement officers during the course of their routine duties. It is in the interest of the Department to partner with those state and local jurisdictions through 287(g) agreements to assist in the arrest and removal of criminal aliens.

Pursuant to Title 32 of the United States Code, State National Guard components are employees of their respective states and are under the command of their Governors when they are not in federal service. Based on their training and experience, these men and women are particularly well-suited to assist in the enforcement of federal immigration law and augment border security operations by Department components.

To maximize participation by state and local jurisdictions in the enforcement of federal immigration law, I am directing the Director of ICE to engage with all willing and qualified law enforcement jurisdictions for the purpose of entering into agreements under section 287(g) of the INA. Additionally, I am directing the Commissioner of CBP and the Director of ICE to immediately engage with the Governors of the States adjacent to the land border with Mexico and those States adjoining such border States for the purpose of entering into agreements under section 287(g) of the INA to authorize qualified members of the State National Guard, while such

members are not in federal service, or qualified members of a state militia or state defense force under the command of the Governor, to perform the functions of an immigration officer in relation to the investigation, apprehension, and detention of aliens in the United States.

The Commissioner of CBP and the Director of ICE should consider the operational functions and capabilities of the jurisdictions willing to enter into 287(g) agreements and structure such agreements in a manner that employs the most effective enforcement model for that jurisdiction, including the detention model, task force officer model, or joint detention-task force officer model.

E. Commissioning a Comprehensive Study of Border Security

In 1991, the Office of National Drug Control Policy, through the former Immigration and Naturalization Service (INS), commissioned Sandia National Laboratories to "conduct a systematic analysis of the security along the United States and Mexico Border between Ports of Entry (POEs) and recommend measures by which control of the border could be improved."[1] In 1993, Sandia produced a three-volume report that concluded that the way to prevent illegal entry is to impose "effective barriers on the free flow of traffic." The study concluded that "[a] three-fence barrier system with vehicle patrol roads between the fences and lights will provide the necessary discouragement."[2] The Sandia study is over twenty years old and should be updated based on the current state of border security.

Accordingly, the Under Secretary for Management is directed to commission an immediate, comprehensive study of the security of the southern border between the ports of entry to identify vulnerabilities and provide recommendations to enhance border security. The study should include all aspects of the current border security environment, including the availability of federal and state resources to develop and implement an effective border security strategy that will achieve complete operational control of the border.

F. Border Wall Construction and Funding

A wall or similar physical barrier along the southern border is necessary to deter and prevent the illegal entry of aliens and is a critical component of the President's overall border security strategy. Congress has mandated the construction of physical barriers at the border to prevent illegal immigration in several statutory provisions, including the Secure Fence Act of 2006, Pub. L. 109- 367. Consistent with the will of Congress and the need to secure the border in the national interest, the Under Secretary for Science and Technology, in consultation with the

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[1] J.D. Williams, et al., *Systematic Analysis of the Southwest Border*, Sandia National Laboratories, RS-9561/93/0001 (Jan. 1993).
[2] *Id.*

appropriate executive departments and agencies, and non-governmental entities having relevant expertise, shall immediately begin planning, design, and construction of a wall or similar physical barrier along the land border with Mexico in accordance with existing law, in the most appropriate location and utilizing appropriate materials and technology to most effectively achieve operational control of the border.

The Under Secretary for Management is directed to immediately identify and allocate all sources of available funding for the planning, design, and construction of a border wall and develop requirements for long-term funding of this project, including preparing Congressional budget requests for the current fiscal year and subsequent fiscal years.

G. Expanding Expedited Removal Pursuant to Section 235(b)(1)(A)(iii)(I) of the INA

It is in the national interest to detain and expeditiously remove from the United States removable aliens apprehended at the border, who have been ordered removed after consideration and denial of their claims for relief from removal. Pursuant to section 235(b)(1)(A)(i) of the INA, if an immigration officer determines that an arriving alien is inadmissible to the United States under section 212(a)(6)(C) or section 212(a)(7) of the INA, the officer shall order the alien removed from the United States without further hearing or review, unless the alien indicates an intention to apply for asylum or a fear of persecution.

Pursuant to section 235(b)(1)(A)(iii)(I) of the INA and other provisions of law, I have been granted the authority to apply the expedited removal provisions in section 235(b)(1)(A)(i) and (ii) of the INA to aliens who have not been admitted or paroled into the United States, who are inadmissible to the United States under section 212(a)(6)(C) or section 212(a)(7) of the INA, and who have not affirmatively shown, to the satisfaction of an immigration officer, that they have been continuously physically present in the United States for the two-year period immediately prior to the determination of their inadmissibility. This expanded authority was used in 2002 by the former INS to include aliens who arrive in the United States by sea, who are not admitted or paroled, and who have not been physically present in the United States continuously for the two-year period prior to a determination of inadmissibility by an immigration officer. *See* 67 FR 68924-01, Nov. 13, 2002. The Department expanded section 235(b)(1)(A)(i) again in 2004 to include aliens who are encountered by an immigration officer within 100 air miles of the U.S. international land border, and who have not established to the satisfaction of an immigration officer that they have been physically present in the U.S. continuously for the 14-day period immediately prior to the date of encounter. *See* 69 FR 48877-01, Aug. 11, 2004.

The recent surge of illegal immigration at the southern border has overwhelmed federal agencies and resources, and has created a significant national security vulnerability that presents a clear and present danger to the United States. Thousands of aliens arrested at the border and placed in removal proceedings have absconded and failed to appear at their removal hearings.

immigration courts are experiencing a historic backlog of removal cases, primarily proceedings under section 240 of the INA. Currently, there are over 526,000 cases pending in immigration courts around the country—a record high.[3] By contrast, there were nearly 168,000 cases pending at the end of FY 2004 when section 235(b)(1)(A)(i) was last expanded.[4] This represents an increase of more than 200% in the number of cases pending completion. The average removal case has been pending for more than two years before an immigration judge.[5] In some immigration Courts, aliens will not have their cases heard by an immigration judge for five years. This is an unacceptable delay that affords removable aliens with no plausible claim for relief to unlawfully remain in the United States for many years.

To ensure the prompt removal of aliens apprehended at or near the border, pursuant to section 235(b)(1)(A)(iii)(I) of the INA, I direct the Commissioner of CBP and the Director of ICE to apply the expedited removal provisions of section 235(b)(1)(A)(i) and (ii) of the INA immediately to all aliens described in section 235(b)(1)(A)(iii)(II)—specifically, aliens apprehended anywhere in the United States, who have not been admitted or paroled into the United States, and who have not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been continuously physically present in the United States for the 90-day period immediately prior to the determination of their inadmissibility.

H. Implementing the Provisions of Section 235(b)(2)(C) of the INA to Return Arriving Aliens to Contiguous Countries

Section 235(b)(2)(C) of the INA authorizes the Department to return aliens arriving from a foreign territory contiguous to the United States, to the territory from which they arrived, pending a formal removal proceeding under section 240 of the INA. When aliens so apprehended do not pose a risk of a subsequent illegal entry or attempted illegal entry, returning them to the foreign contiguous territory from which they arrived pending the outcome of removal proceedings saves the Department's detention and adjudication resources for other priority aliens.

Accordingly, subject to the requirements of section 1232, Title 8, United States Code, related to unaccompanied alien children, CBP and ICE personnel shall return aliens described in section 235(b)(2)(A) of the INA, who are placed in removal proceedings under section 240 of the INA—and who, in the judgment of an ICE Field Office Director, CBP Sector Chief, or CBP Director of Field Operations, pose no risk of recidivism—to the territory of the foreign contiguous country from which they arrived pending the final resolution of such removal proceedings.

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[3] Syracuse University, *Transactional Records Access Clearinghouse (TRAC) Data Research*; available at http://trac.syr.edu/phptools/immigration/court_backlog/.
[4] *Id.*
[5] *Id.*

To facilitate the completion of removal proceedings for aliens so returned, ICE Field Office Directors, CBP Sector Chiefs, and CBP Directors of Field Operations shall make available facilities for such aliens to appear via video teleconference. The Assistant Secretary of ICE and the Commissioner of CBP shall consult with the Director for the Executive Office for Immigration Review, within the Department of Justice, to establish a functional, interoperable video teleconference system to ensure maximum capability to conduct video teleconference removal hearings at facilities in which aliens are detained.

I. Restoring Integrity to Asylum Referrals and Credible Fear Determinations Pursuant to Section 235(b)(1) of the INA

Arriving aliens and those who are present in the United States and have not been admitted or paroled may assert a claim for asylum. In such cases, an immigration officer must refer the aliens for an interview by an asylum officer to determine whether they have established a credible fear of persecution. *See* section 235(b)(1)(A) and (B) of the INA. To establish a credible fear of persecution, an alien must demonstrate that there is a "significant possibility" that the alien could establish eligibility for asylum, taking into account the credibility of the statements made by the alien in support of the claim and such other facts as are known to the officer. *See* section 235(b)(1)(B)(v) of the INA.

U.S. Citizenship and Immigration Services (USCIS) received over 48,000 credible fear referrals during Fiscal Year (FY) 2015 and credible fear was found in over 34,000 of those cases, which is a positive credible fear rate of more than 70%. Far fewer of those aliens are actually granted asylum on the basis of those claims. In FY 2016, credible fear referrals sharply increased to nearly twice the number of the preceding year. Moreover, USCIS reported that it received over 100,000 asylum claims during FY 2016, an increase of 35% over the preceding year. Of those claims not involving unaccompanied alien minors, more than 20,000 were filed by aliens who claimed to have resided in the United States for more than ten years and the overwhelming majority of those applications were meritless claims filed by aliens merely seeking to be placed in removal proceedings under section 240 of the INA for the purpose of seeking other forms of relief from removal. Clearly, the asylum process is rife with fraud and abuse. Asylum cases should be screened and adjudicated fairly, accurately, and expeditiously, and aliens who file meritless claims should be removed as quickly as possible.

The Director of USCIS shall ensure that asylum officers conduct credible fear interviews in a manner that allows the interviewing officer to reasonably elicit all relevant information from the alien. In determining whether the alien has demonstrated a significant possibility that the alien could establish eligibility for asylum, the asylum officer shall consider the statements of the alien and determine the credibility of such statements, given the nature of the claim and the facts known to the officer. The asylum officer shall make a positive credible fear finding only after the officer has considered all relevant evidence and determined, based on credible evidence, that the

alien has a significant possibility of establishing eligibility for asylum, based on established legal authority.

The Director of USCIS shall also increase the operational capacity of the Fraud Detection and National Security Directorate and integrate its operations more closely with the Refugee, Asylum, and International Operations Directorate and the Field Operations Directorate to detect and prevent fraud in the asylum and benefits adjudication processes.

The Director of USCIS, the Commissioner of CBP, and the Director of ICE shall review fraud detection, deterrence, and prevention measures throughout their respective agencies and provide me with a consolidated report within 90 days of the date of this memorandum regarding fraud vulnerabilities in the asylum and benefits adjudication processes, and propose measures to enhance fraud detection, deterrence, and prevention in these processes.

J. Allocation of Resources and Personnel to the Southern Border for Detention of Aliens and Adjudication of Claims

The detention of aliens apprehended at the border is critical to the effective enforcement of the immigration laws. Aliens who are released from custody pending a determination of their removability are highly likely to abscond and fail to attend their removal hearings. Moreover, the screening of credible fear claims and adjudication of asylum claims at detention facilities located at or near the point of apprehension will facilitate an expedited resolution of those claims and result in lower costs to detain and transport aliens apprehended at or near the border.

Accordingly, the Director of ICE and the Commissioner of CBP are directed to take all necessary action and allocate all available resources to expand their detention capabilities and capacities at or near the border with Mexico to the greatest extent practicable.

In addition, to the greatest extent practicable, the Director of USCIS is directed to increase the number of asylum officers and anti-fraud officers assigned to detention facilities located at or near the border with Mexico to properly and efficiently adjudicate credible fear, reasonable fear, and asylum claims, and counter asylum-related fraud.

K. Proper Use of Parole Authority Pursuant to Section 212(d)(5) of the INA

The authority to parole aliens into the United States is set forth in section 212(d)(5) of the INA, which provides that the Secretary may, in his discretion and on a case-by-case basis, temporarily parole into the United States any alien for urgent humanitarian reasons or significant public benefit. The statutory language and Congress's consistent and clear intent as expressed in legislative history from the enactment of the Immigration and Nationality Act of 1952 to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, requires that the parole

authority be used rarely, and only in exigent circumstances, in individual cases where, after careful consideration of the circumstances, parole serves the best interests of the United States because of demonstrated urgent humanitarian reasons or significant public benefit. The practice of granting parole to inadmissible aliens in pre-designated categories in order to illegitimately create immigration programs not established by Congress,, has created a border security crisis, undermined the integrity of the immigration laws and the parole process, and created an incentive for additional illegal immigration.

Therefore, the Director of USCIS, the Commissioner of CBP, and the Director of ICE shall ensure that, until final regulations are promulgated clarifying the legitimate scope of the parole power, through written policy guidance and appropriate training that all employees within those agencies exercising parole authority under section 212(d)(5) of the INA are familiar with the proper exercise of parole under that provision and exercise such parole authority only on a case-by-case basis, consistent with written policy guidance.

L. Proper Processing and Treatment of Unaccompanied Alien Minors Encountered at the Border

In accordance with section 235 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (8 U.S.C. § 1232) and section 462(g)(2) of the Homeland Security Act of 2002 (6 U.S.C. § 279(g)(2)), unaccompanied alien minors are provided special protections to ensure that they are properly processed and receive the appropriate care and placement when they are encountered by an immigration officer. An unaccompanied alien minor, defined in section 279(g)(2), Title 6, United States , as an "unaccompanied alien child," is a minor who has no lawful immigration status in the United States; has not attained 18 years of age; and with respect to whom, (1) there is no parent or legal guardian in the United States, or (2) no parent of legal guardian in the United States is available to provide care and physical custody. Approximately 155,000 unaccompanied alien minors have been apprehended at the southern border in the last three years. Most of these minors are from El Salvador, Honduras, and Guatemala, and the vast majority of them travel overland to the southern border with the assistance of a smuggler who is paid several thousand dollars by one or both parents, who reside illegally in the United States.

Upon apprehension, CBP or ICE must immediately determine if a minor meets the definition of an "unaccompanied alien child" and, if so, the minor must be transferred to the custody of the Office of Refugee Resettlement within the Department of Health and Human Services (HHS) within 72 hours. *See* 8 U.S.C. § 1232(b)(3). The determination that the minor is an "unaccompanied alien child" entitles the minor to special protections, including placement in a suitable care facility, access to social services, removal proceedings before an immigration judge under section 240 of the INA, rather than expedited removal proceedings under section 235(b) of the INA, and initial adjudication of any asylum claim by USCIS. *See generally* 8 U.S.C. § 1232;

INA § 208(b)(3)(C).

Approximately 60% of minors initially determined to be an "unaccompanied alien child" are placed in the care of one or more parents illegally residing in the United States. However, by Department policy, such minors maintained their status as an "unaccompanied alien child," notwithstanding that they no longer met the statutory definition because they were in the custody of a parent in the United States who could provide care for the minor. Such a policy is inconsistent with the statutory provisions designed to provide additional protections for unaccompanied minors. The policy also led to abusive practices by many of the parents and legal representatives of those minors, which has contributed to significant administrative delays in adjudications by Immigration Courts and USCIS.

To end these abusive practices and to restore integrity to the system of identifying and processing unaccompanied alien children consistent with the statutory framework, the Director of USCIS, the Commissioner of CBP, and the Director of ICE are directed to develop uniform written guidance and training for all employees and contractors of those agencies regarding the proper processing and custodial placement of unaccompanied alien minors, the timely and fair adjudication of their claims for relief from removal, and, if appropriate, their safe repatriation at the conclusion of removal proceedings. In developing such guidance and training, they shall establish standardized review procedures to determine if alien minors who are initially determined to be an "unaccompanied alien child," as defined in section 279(g)(2), Title 6, United States Code, remain eligible for the special protections afforded to minors who fall within that statutory definition.

M. Prioritizing Criminal Prosecutions for Immigration Offenses Committed at the Border

The surge of illegal immigration at the southern border has produced a significant increase in organized criminal activity in the border region. Mexican drug cartels, Central American gangs, and other violent transnational criminal organizations have established sophisticated criminal enterprises on both sides of the border. The large-scale movement of Central Americans, Mexicans, and other foreign nationals into the border area has significantly strained federal agencies and resources dedicated to border security. These criminal organizations have monopolized the human trafficking and smuggling, and drug trafficking trades in the border region. The vast majority of unaccompanied alien minors arriving in the United States were smuggled in by these organizations. The parents of these minors, who are often illegally present in the United States, pay smugglers several thousand dollars to bring their children into this country. Tragically, many of these children fall victim to robbery, extortion, kidnapping, sexual assault, and other crimes of violence by the smugglers and other criminal elements along the dangerous journey through Mexico to the United States. It is in the national interest of the United States to prevent criminals and criminal organizations from destabilizing border security through

the proliferation of illicit transactions and violence perpetrated by criminal organizations.

To counter this substantial and ongoing threat to the security of the southern border, the Commissioner of CBP and the Director of ICE are directed to create a task force at the earliest practicable time to enhance border security and deter crime through the investigation and prosecution of violations of federal laws within their respective law enforcement authorities. The task force should include participants from other federal, state, and local agencies, and should target individuals and organizations whose criminal conduct undermines border security or the integrity of the immigration system, including offenses related to alien smuggling or trafficking, drug trafficking, illegal entry and reentry, visa fraud, identity theft, unlawful possession or use of official documents, and acts of violence committed against persons or property at or near the border.

N. Public Reporting of Border Apprehensions Data

The Department has an obligation to perform its mission in a transparent and forthright manner. The public is entitled to know, with a reasonable degree of detail, information pertaining to the aliens unlawfully entering at our borders.

Therefore, in an effort to promote transparency and renew confidence in the Department's border security mission, the Commissioner of CBP and the Director of ICE are directed to develop a standardized method for public reporting of statistical data regarding aliens apprehended at or near the border for violating the immigration law. The reporting method shall include uniform terminology and shall utilize a format that is easily understandable by the public and a medium that can be readily accessed. At a minimum, in addition to statistical information currently being publicly reported regarding apprehended aliens, the following information must be included: convicted criminals and the nature of their offenses, gang members, prior immigration violators, custody status of aliens and, if released, the reason for release and location of their release, aliens ordered removed, and aliens physically removed.