American Immigration Lawyers Association v. Janet Reno, Att'y Gen.
18 F. Supp. 2d 38 (D.D.C. 1998), *aff'd* 199 F.3d 1352 (D.C. Cir., 2000).

SULLIVAN, District Judge.

Plaintiffs, including ten immigrant assistance organizations and numerous individual aliens, commenced these three separate lawsuits against Attorney General Janet Reno, Commissioner of the Immigration and Naturalization Service ("INS") Doris Meissner, and Director of Immigration Review Executive Office Anthony Moscato, to challenge the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), as well as the regulations, policies, and practices implemented under the new statute.1 The Court has consolidated these cases for the purpose of resolving in one Opinion the related issues raised by the parties.

In their complaints, plaintiffs assert the following claims: that the Interim Regulations implementing IIRIRA violate the intent of IIRIRA; that the INS fails to follow the Interim Regulations; and that IIRIRA and the Interim Regulations violate due process, equal protection, International Law, and the First Amendment.

Pending before the Court are defendants' motions to dismiss all of plaintiffs' claims pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Upon careful consideration of the pleadings, relevant statutes, case law, and the record herein, defendants' motions to dismiss are granted.

I. Statutory Framework

The complexity and intricacy of IIRIRA, the Interim Regulations, and plaintiffs' challenges compel the Court to explain in detail the statutory framework of IIRIRA, prior to discussing and resolving the claims of the individual and organizational plaintiffs.

A. Prior System

These consolidated lawsuits challenge the statutory provisions governing the admittance of aliens arriving at this country's borders. Prior to the implementation of IIRIRA, aliens arriving at a United States port of entry were required to establish to an immigration inspector's satisfaction that they were entitled to enter the United States. If an immigration inspector was doubtful of an alien's right to enter, the inspector referred the alien to a process known as "secondary inspection." During secondary inspection, an immigration inspector briefly interviewed the alien. At that time, the alien could withdraw her application for admission voluntarily. In the event the alien chose not to withdraw her admission application, the alien was entitled to an exclusion hearing. An exclusion hearing was held before an immigration judge, a decision-maker independent of INS. The alien had a right to counsel and was given a list of persons providing free legal services. An alien was then entitled to present evidence and to challenge the government's evidence. If needed, foreign language interpretation was provided by the government. The alien was then entitled to appeal an

adverse decision of the immigration judge to the Board of Immigration Appeals.

B. New System

1. Purpose of IIRIRA

IIRIRA substantially amended the Immigration and Nationality Act of 1952 ("INA") and established a new summary removal process for adjudicating the claims of aliens who arrive in the United States without proper documentation. The decision to adopt an "expedited removal" system was prompted by Congress's finding that "thousands of aliens arrive in the U.S. at airports each year without valid documents and attempt to illegally enter the U.S."H.R.Rep. No. 104-469, pt. 1, at 158 (1996). As noted in the conference report for IIRIRA, the purpose of the new removal procedures

> is to expedite the removal from the United States of aliens who indisputably have no authorization to be admitted ..., while providing an opportunity for such an alien who claims asylum to have the merits of his or her claim promptly assessed by officers with full professional training in adjudicating asylum claims.

H.R. Conf. Rep. No. 104-828, at 209 (1996).

2. The Inspection Process

To understand the "expedited removal" system which IIRIRA and its implementing regulations establish for certain aliens seeking initial entry into the United States, it is first necessary to understand the system for the admission of aliens in general.

Under the statutory scheme, an alien (a person not a citizen or national of the United States) is deemed to be seeking "entry" or "admission" into the United States if she "arrives" at a port of entry (such as an airport) and has not yet been admitted by an immigration officer. See INA § 235(a)(1), 8 U.S.C. § 1225(a)(1); 8 C.F.R. § 1.1(q). Upon her arrival, the alien is subject to "primary inspection," and potentially to "secondary inspection" as well. The INS has explained these procedures in the "Supplementary Information" accompanying IIRIRA's implementing regulations:

> All persons entering the United States at ports-of-entry undergo primary inspection.... In FY 96, the Service conducted more than 475 million primary inspections. During the primary inspection stage, the immigration officer literally has only a few seconds to examine documents, run basic lookout queries, and ask pertinent questions to determine admissibility and issue relevant entry documents.... If there appear to be discrepancies in documents presented or answers given, or if there are any other problems, questions, or suspicions that cannot be resolved within the exceedingly brief period allowed for primary inspection, the person must be referred to a secondary inspection procedure, where a more thorough inquiry may be conducted. In addition, aliens are often referred to secondary inspection for routine matters, such as processing immigration

documents and responding to inquiries.

62 Fed.Reg. 10312, 10318 (1997).

If the immigration officer determines during secondary inspection that the alien is inadmissible either because she possesses fraudulent documentation (INA § 212(a)(6)(C), 8 U.S.C. § 1182(a)(6)(C)) or no valid documentation (INA § 212(a)(7), 8 U.S.C. § 1182(a)(7)), the alien becomes subject to expedited removal. INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i). If the alien is found to be inadmissible for some other reason, she is referred for "regular," non-expedited removal proceedings conducted under INA § 240. See INA § 235(b)(2)(A), 8 U.S.C. § 1225(b)(2)(A).

In order to avoid expedited removal once an inspecting immigration officer has determined that the alien is inadmissible under either INA § 212(a)(6)(C) (fraudulent documentation) or § 212(a)(7) (no valid documentation), an alien must either show that she is a bona fide refugee seeking asylum or that she can claim a valid status as a U.S. citizen, permanent resident, previously admitted parolee, or previously admitted asylee.

Finally, IIRIRA provides that

> [j]udicial review of any determination made under section 235(b)(1) is available in habeas corpus proceedings, but shall be limited to determinations of—
>
> (A) whether the petitioner is an alien,
>
> (B) whether the petitioner was ordered removed under such section, and
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> (C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 207 [8 U.S.C. § 1157], or has been granted asylum under section 208 [8 U.S.C. § 1158], such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 235(b)(1)(C).

INA § 242(e)(2), 8 U.S.C. § 1252(e)(2). Further,

> [i]n determining whether an alien has been ordered removed under section 235(b)(1), the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

INA § 242(e)(5), 8 U.S.C. § 1252(e)(5).

The habeas court "may order no remedy or relief other than to require that the petitioner be provided a ["regular," non-expedited removal] hearing in accordance with [INA] section 240." INA § 242(e)(4), 8 U.S.C. § 1252(e)(4).

C. The Implementing Regulations

The Interim Regulations enacted in April 1997 to implement IIRIRA's new expedited removal system regulate how the inspecting officer is to determine the validity of travel documents, how the officer should provide information to and obtain information from the alien, and how and when an expedited removal order should be reviewed.

1. Determining the Validity of Documents

In ascertaining the validity of travel documents, the inspecting officer shall "[o]btain forensic analysis, if appropriate." INS Inspector's Field Manual ("Inspector's Manual"), ch. 17.15(b)(5) (*Wood* Defs.' Mot. Ex. 3). The officer is not permitted "to 'rush to judgement', or ... to expeditiously remove an alien based on incomplete evidence." *Id.* Rather, "[i]f forensic analysis is required to establish that the alien is inadmissible, such analysis must be obtained before the Form I-860 [Notice and Order of Expedited Removal] is executed." *Id.* Additionally,

> [a]ll officers should be especially careful to exercise objectivity and professionalism when refusing admission to aliens under this [expedited removal] provision. Because of the sensitivity of the program and the potential consequences of a summary removal, you must take special care to ensure that the basic rights of all aliens are preserved .... Since a removal order under this process is subject to very limited review, you must be absolutely certain that all required procedures have been adhered to and that the alien has understood the proceedings against him or her.... All officers should be aware of precedent decisions and policies relating to the relevant grounds of inadmissibility.... [I]t is important that ... any expedited removal be justifiable and non-arbitrary.

Id., ch. 17.15(a),(b); *see also* Mem. from INS Deputy Comm'r Chris Sale, "Implementation of Expedited Removal," Mar. 31, 1997, at 1 (*AILA* Defs.' Mot. Ex. 2) ("Sale Memo")("Every officer must adhere strictly to required procedures to ensure that the rights of aliens are protected ....").

2. Providing Information

The Interim Regulations state that "[i]n every case in which the expedited removal provisions will be applied and before removing an alien from the United States," the inspecting immigration officer will create a "Record of Sworn Statement" using "Form I-867A/B," titled "Record of Sworn Statement in Proceedings Under Section 235(b)(1) of the [Immigration and Nationality] Act."8 C.F.R. § 235.3(b)(2)(i). Specifically, in every case in which the expedited removal procedures will be applied, the inspecting officer is to read to the alien all the information contained on Form I-867A, record the alien's responses to the questions contained on Form I-867B, and have the alien make any necessary corrections and sign the statement. Id. Although the statute does not require it, the regulations provide that during the foregoing process, "[i]nterpretive assistance shall be used if necessary to communicate with the alien." Id.

a. Form I-867A/B

Form I-867A/B is to be used in every case in which expedited removal procedures will be applied. Form I-867A/B indicates that aliens undergoing expedited removal procedures are to be

given information concerning the asylum interview, regardless of whether they have yet articulated any fear of persecution or intent to apply for asylum. The form, which the inspecting officer must read to the alien in a language the alien understands, explicitly states:

> U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country. If you fear or have a concern about being removed from the United States or about being sent home, you should tell me so during this interview because you may not have another chance. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should remain in the United States and not be removed because of that fear.

Form I-867A (*AILA* Defs.' Mot. Ex. 1).

If upon being read the information and asked the questions in Form I-867A/B, the alien does not indicate any fear of persecution on return to her home country, or any intention to apply for asylum, the inspecting officer shall order the alien removed.

b. Form I-860

The Interim Regulations further state that the inspecting officer "shall advise the alien of the charges against him or her on Form I-860, Notice and Order of Expedited Removal, and the alien shall be given an opportunity to respond to those charges in the sworn statement." 8 C.F.R. § 235.3(b)(2)(i). On the Form I-860 (Wood Defs.' Mot. Ex. 2), the inspecting officer must "[c]heck the appropriate ground(s) of inadmissibility under which the alien is being charged ... and insert a narrative description of each charge." Inspector's Manual, ch. 17.15(b)(3). Any response by the alien to the charges "must be recorded either in the sworn statement or as an addendum to the statement." Id.

Although the statute does not require it, the regulations provide that "[i]nterpretive assistance shall be used if necessary to communicate with the alien." 8 C.F.R. § 235.3(b)(2)(i). The inspecting officer must "[r]ead and explain the charges to the alien in the alien's native language or in a language the alien can understand," and use an interpreter if "required to ensure that the alien understands the allegations and the removal order." Inspector's Manual, ch. 17.15(b)(3).

3. Review

Under the regulations, any removal order by an inspecting officer "must be reviewed and approved by the appropriate supervisor before the order is considered final." 8 C.F.R. § 235.3(b)(7). "Such supervisory review shall not be delegated below the level of the second line supervisor, or a person acting in that capacity" who "may request additional information from any source and may require further interview of the alien." Id."The supervisory review shall include a review of the sworn statement,"id., and "[t]he approving authority must be properly advised of all facts in the case in order to make an informed decision." Inspector's Manual, ch. 17.15(b)(3). The supervisory review is another calculated protection that the regulations provide, even though

IIRIRA does not require it. See 62 Fed.Reg. at 10314.

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IV. Substantive Claims

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The Court will first address the claims of the individual plaintiffs, Ms. Perez and Ms. Aquino de Pacheco, and the government's arguments for dismissing those claims. The Court will address the individual plaintiffs' claims in the following order: first, plaintiffs' claim that the Interim Regulations violate IIRIRA; second, plaintiffs' claim that the agency fails to follow its own regulations; third, plaintiffs' claim that IIRIRA and the Interim Regulations violate due process; and finally, the plaintiffs' claim that implementation of IIRIRA violates equal protection under the Fifth Amendment.[2] Finally, the Court will address the organizational plaintiffs' claim that IIRIRA and the Interim Regulations violate their First Amendment rights.

A. Claim That Interim Regulations Violate IIRIRA

For their first claim, plaintiffs' underlying theory is that, by enacting IIRIRA, Congress intended to establish fair procedures to protect individuals entitled to enter the United States.[3] Plaintiffs thus argue that the Attorney General's Interim Regulations, policies, and procedures for summary removal violate Congress's intent by providing insufficient protections, therefore creating an "unreasonably high risk" that individuals will be erroneously removed.

The government counters plaintiffs' argument that Congress intended for fair procedures by emphasizing that whether the procedures set out by the regulations are "fair" is within the agency's determination under IIRIRA § 309(b) because Congress delegated to the Attorney General the task of establishing procedures. See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co., 463 U.S. 29, 41 (1983); American Fed'n of Labor v. Donovan, 757 F.2d 330, 341 (D.C.Cir.1985); Natural Resources Defense Council v. NRC, 666 F.2d 595, 603 (D.C.Cir.1981).

In reviewing an agency's interpretation of a statute it is charged with administering, the Court must be guided by the framework of Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). See also Halverson v. Slater, 129 F.3d 180, 184 (D.C.Cir.1997). Under the familiar Chevron two-step test, the first step is to ask "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end

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[2] Plaintiffs additionally asserted that IIRIRA violated International Law on refugees and juveniles. However, because the Court has found that none of the organizational or individual plaintiffs have standing to assert the International Law claim, the Court does not discuss that claim.

[3] At the hearing on the government's motion, plaintiffs argued that this Court could not make a decision on whether the Interim Regulations are reasonable without reviewing the administrative record leading to the Interim Regulations. As the government correctly notes, however, plaintiffs have stated they are not challenging "the rulemaking *process,* but the *effects* of that rulemaking in light of express Congressional intent." *AILA/Liberians* Opp'n at 43. The plaintiffs expressly state they are not bringing a claim under the APA to attack the process through which the regulations came about, *id.;* rather plaintiffs claim that the regulations are unreasonable and in violation of Congress's intent because they do not provide individuals with sufficient information and because the regulations provide inadequate procedures.

of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, 467 U.S. at 842-43; see Halverson, 129 F.3d at 184. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Chevron, 467 U.S. at 843; see Halverson, 129 F.3d at 184.

Furthermore, where, as here, Congress has expressly instructed an agency to promulgate regulations carrying out general statutory mandates, see IIRIRA § 309(b), a reviewing court's inquiry is limited to whether the agency's actions in promulgating the regulations were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Motor Vehicle Mfrs. Ass'n, 463 U.S. at 41, 103 S.Ct. 2856. "[T]he scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." Id. at 43.

Finally, an agency is entitled to the highest degree of deference where Congress has delegated to the agency the authority "to promulgate standards or classifications." American Fed'n of Labor v. Donovan, 757 F.2d 330, 341 (D.C.Cir.1985). Such standards or classifications are entitled to "legislative effect" and are to be given "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Id.; Natural Resources Defense Council, 666 F.2d at 603-04 (finding that this "venerable principle" that the construction of a statute by those charged with its execution should be followed unless there are "compelling indications that it is wrong," has even "greater force when Congress has specifically left it to the agency to flesh out the terms of the statute").

Specifically, plaintiffs attack several policies, practices and procedures under the Interim Regulations, "including but not limited to" the following: 1) the ban on aliens' communicating with family, friends and counsel during secondary inspection; 2) the failure to provide adequate language interpretation at secondary inspection; 3) the failure to provide adequate access to and participation of counsel prior to and during the secondary inspection; 4) the failure to provide adequate information on charges and procedures, the opportunity to contest those charges, and the failure to provide for review of removal orders; and 5) the application of these procedures to individuals with facially valid documents.

1. Ban on Aliens' Communication with Family and Friends During Secondary Inspection Violates the Provisions of IIRIRA

In this claim, plaintiffs seek to extend an alien's opportunity to consult with others prior to and during secondary inspection. Plaintiffs argue that consultation prior to and during secondary inspection is important because an arriving alien is often not familiar with English or with INS procedures.

Under IIRIRA, "[a]n alien who is eligible for [the credible fear] interview may consult with a person or persons of the alien's choosing prior to the interview or any review thereof, according to regulations prescribed by the Attorney General." INA § 235(b)(1)(B)(iv) (emphasis added). The regulations interpret this section to permit an alien to consult with family and friends in the time between secondary inspection and the credible fear interview. See 8 C.F.R. § 235.3(b)(4)(i).

Plaintiffs, however, argue that Congress, by providing that the alien "may consult" with others, clearly recognized the importance of consultation during the process. Plaintiffs thus argue that the Attorney General's regulations limiting an alien's access to others only to consultation after secondary inspection, but prior to the credible fear interview, violates Congress's intent to allow an alien to consult with others. Plaintiffs contend that aliens should be allowed to consult during secondary inspection because of the importance of being able to express a fear of persecution at that time in order to be referred to a credible fear interview.

Second, plaintiffs argue that because the sentence immediately before the consultation provision states that "[t]he Attorney General shall provide information concerning the asylum interview to aliens who may be eligible," INA § 235(b)(1)(B)(iv) (emphasis added), Congress also intended to allow aliens who "may be eligible" to consult with others prior to and during secondary inspection.

In seeking to dismiss plaintiffs' claim that the regulations violate the statute by not allowing consultation prior to or during secondary inspection, the government argues that plaintiffs' interpretation of the statute is in conflict with both the plain language of the statute and the intent of Congress to create an expeditious process.

In response to plaintiffs' argument that all aliens who "may be" eligible for an interview should be allowed to consult with others, the government counters that, under the statute, the Attorney General shall provide information to aliens who "may be" eligible, but then provides an opportunity for consultation only to an alien who "is" eligible. Under the statute, an alien is only eligible for a credible fear interview after "indicat[ing] either an intention to apply for asylum under § 208 or a fear of persecution." INA § 235(b)(1)(A)(ii). The government thus argues that, under the statute, the only individuals to be allowed an opportunity to consult with others are those who indicate a fear of persecution during secondary inspection and are thus referred for a credible fear interview.

Second, the government points to legislative history to support its position that, in order to prevent false claims, Congress specifically did not want aliens to have the opportunity to consult with others prior to making a claim for asylum. See142 Cong. Rec. H2358 (daily ed. Mar. 19, 1996) ("There should be a summary or expedited exclusion process to deal with these people, especially those who do not make a credible claim of asylum when they first set foot off the plane."(statement of Rep. McCollum)).

The Court concludes that Congress has not "spoken directly" to this precise question. However, the Court further finds that in view of the language of the statute and the intent of Congress, the Attorney General could reasonably have determined that the statutory language allowing consultation "prior to the [credible fear] interview" be interpreted to mean consultation during the period between secondary inspection and the credible fear interview and not be interpreted to include consultation at an earlier stage, i.e. prior to and during secondary inspection. Thus, the Court concludes that the Attorney General reasonably concluded that allowing consultation in the time between an alien's secondary inspection and credible fear interview would advance Congress's twin goals of creating a fair yet expedited process. See 62 Fed.Reg. at 10319 ("As for delaying the secondary interview to allow every alien time to rest prior to being

questioned, the [INS] again points out that it conducts more than ten million secondary inspections a year. Most of those questioned are eager to have their inspection completed as quickly as possible. The Department has neither the resources nor the authority to detain all secondary referrals without first conducting a prompt interview to determine admissibility.")4

2. The System Fails to Provide Adequate Language Interpretation at Secondary Inspection

As a general proposition, plaintiffs contend that competent translation services are required for a procedurally fair system. See Augustin v. Sava, 735 F.2d 32, 33 (2d Cir.1984). Although IIRIRA does not mention the need for interpreters, the Interim Regulations nevertheless provide for interpreters during secondary inspection. See8 C.F.R. § 235.3(b)(2)(i), 62 Fed. Reg. 10356 ("Interpretive assistance shall be used if necessary to communicate with the alien."). The government argues that because the regulations provide additional procedural protections not required or mentioned in IIRIRA, then the regulations cannot violate IIRIRA or be considered arbitrary and capricious. See El Rescate Legal Servs. v. EOIR, 959 F.2d 742, 751 (9th Cir.1991) (holding that translation not required in deportation hearings under predecessor statute).

Plaintiffs are correct that a system that provides information that the recipient does not understand cannot be considered to be providing adequate notice. The problem with plaintiffs' argument with respect to the regulations at issue is that the regulations fill in a gap left by the statute and address the translation issue. Plaintiffs' grievance thus is not with the statute or the regulations, but with plaintiffs' perception that the regulations are not being followed or the translators used are incompetent. These issues go to plaintiffs' attack on the regulations not as written, but as applied-an issue the Court will address.

On plaintiffs' challenge to the regulations as written, however, the Court finds that because the statute is silent on the issue of providing for interpretive assistance to aliens, the Court must next ask whether the regulations are based on a permissible interpretation of the statute. Since Congress instructed the agency to promulgate regulations carrying out the general statutory scheme, deference is owed to the agency's interpretation of the statute. See Motor Vehicle Mfrs. Ass'n, 463 U.S. at 41, 103 S.Ct. 2856. The Court further finds that the regulations withstand review on an arbitrary and capricious standard because the regulations provide more procedural protections than the statute itself.

3. System Fails to Provide Adequate Access to and Participation of Counsel During Secondary Inspection

Plaintiffs claim that the Attorney General's Interim Regulations and the agency's policies contradict Congress's intent to provide fair procedures in the expedited removal system by denying aliens access to counsel at the secondary inspection stage.

As with plaintiffs' claim regarding consultation with family and friends (see Section IV.A.1 above), the Attorney General could reasonably decide to limit an alien's opportunity for consultation with counsel to the time between secondary inspection and a credible fear interview. Because the statutory language is ambiguous in that it provides for consultation "prior to" the credible fear interview, but does not define the contours of that time period, the Court concludes

that the Attorney General's decision to ban an aliens' access to counsel during the secondary inspection stage is reasonable in view of Congress's dual purposes in providing fair procedures while creating a more expedited removal process.

4. The Failure to Provide Adequate Information on Charges and Procedures, the Opportunity to Contest Those Charges, and Review

Plaintiffs claim that aliens in expedited removal proceedings do not receive "adequate information on charges and procedures,"Wood Am. Compl. ¶ 75, "an opportunity to contest those charges,"id., or "any meaningful review of removal orders." Id. Indeed, IIRIRA's expedited removal provisions do not set forth any requirement of notice, opportunity for rebuttal, or review. The statute merely provides that if an immigration officer finds that an arriving alien is inadmissible because she either has fraudulent documentation or no valid documentation and is not claiming "status" or a fear of persecution, "the officer shall order the alien removed from the United States ...." INA § 235(b)(1)(A)(i). Indeed, IIRIRA explicitly states that such removal shall occur "without further hearing or review...." Id. (emphasis added). The Attorney General's Interim Regulations and other written directives fully comport with this bare statutory language.

Moreover, assuming that IIRIRA implicitly does require some notice and opportunity for rebuttal, the Attorney General's writings are in full compliance. Because IIRIRA is silent as to the nature of any required notice and rebuttal opportunity, the Court must defer to the Attorney General's determination as to what procedures are appropriate, so long as that determination is reasonable. See Chevron, U.S.A., 467 U.S. at 842-43, 104 S.Ct. 2778; Halverson, 129 F.3d at 184. Here, the Attorney General's determination was eminently reasonable, in that her writings specifically require that aliens be advised of the inadmissibility charges against them and be given an opportunity to respond. Plaintiffs cannot impose upon the Attorney General any obligation to afford more procedures than the governing statute explicitly requires or that she has chosen to afford in her discretion. See Vermont Yankee Nuclear Power Corp. v. Nat. Resources Defense Council, 435 U.S. 519, 524-25, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978).

While Ms. Perez and Ms. Aquino de Pacheco claim that they were not informed of the basis of their inadmissibility, the Court cannot consider this argument. Again, plaintiffs' argument goes to the regulations not as written, but as specifically applied.

5. Application to Individuals with Facially Valid Visas

[16] Plaintiffs contend that IIRIRA's expedited removal procedures should apply only to aliens whose travel documentation is "facially" invalid, and that defendants are violating the statute by also placing in expedited removal proceedings those aliens found inadmissible under INA § 212(a)(6)(C) or (a)(7) based on factors other than the face of a travel document itself. According to plaintiffs, "Congress intended that any other arriving alien that an immigration officer determines to be inadmissible (for example, based on a belief that the alien intends to remain permanently or otherwise violate the terms of her visa) be referred for a full hearing before an Immigration Judge under the regular removal process of INA § 240." Wood Am. Compl.¶¶ 34, 52. Plaintiffs also claim that "[t]he INS has implemented § 235 by placing in expedited removal persons suspected of having the wrong type of visa or an intent inconsistent with their visa

category." Wood Opp'n at 9. The plain language of IIRIRA conclusively refutes plaintiffs' contention.

IIRIRA states that expedited removal procedures shall apply whenever "an [inspecting] immigration officer determines that an [arriving] alien ... is inadmissible under [INA] section 212(a)(6)(C) or 212(a)(7)." See INA § 235(b)(1)(A)(i). The plaintiffs' own brief quotes the language of section 212(a)(6)(C): "Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure ... or has procured a visa, documentation, or admission into the United States or other benefit provided under this Act is inadmissible." Wood Opp'n at 6. Inadmissibility under INA § 212(a)(6)(C) or (a)(7) plainly can arise for reasons other than "facially" bad or absent papers. The plain language of this section refutes plaintiffs' argument that inspecting immigration officers are restricted determinations of the "facial" validity of documents.

Moreover, the D.C. Circuit has affirmed findings of inadmissibility under the predecessors to IIRIRA based on an alien's fraudulent subjective intentions, despite the lack of any indication of invalidity on the face of a document. See Castaneda-Gonzalez v. INS, 564 F.2d 417, 424 n. 14, 425 (D.C.Cir.1977). There, the circuit found that even where an alien possessed a labor certificate duly issued by the Secretary of Labor, the Attorney General could still exclude the alien under INA § 212(a)(6)(C)'s predecessor, for having obtained the certificate on the basis of a material and willful misrepresentation. Id.; see also Witter v. INS, 113 F.3d 549, 554 (5th Cir.1997) (affirming finding of excludability under predecessor to INA § 212(a)(6)(C) where substantial evidence indicated that aliens did not have "a good faith belief that they were married" when they applied for immigrant visas); Garcia v. INS, 31 F.3d 441, 443 (7th Cir.1994) (affirming finding of excludability under § 212(a)(6)(C)'s predecessor, court focused on alien's "subjective" state of mind in representing that she was unmarried in order to procure visa, notwithstanding subsequent retroactive annulment of marriage); Kalejs v. INS, 10 F.3d 441, 445-46 (7th Cir.1993) (holding that alien with facially valid visa was inadmissible under § 212(a)(6)(C) because he had lied on his visa application about his activities in a pre-Nazi military unit during World War II), cert. denied, 510 U.S. 1196 (1994); Madany v. Smith, 696 F.2d 1008, 1012 (D.C.Cir.1983) (same import as Castaneda-Gonzalez, 564 F.2d 417).

A consular officer's issuance of a visa does not by itself authorize an alien to enter the United States. It "does no more than entitle [the] alien to present himself at a port of entry to prove his admissibility before the [INS]." Castaneda-Gonzalez, 564 F.2d at 426; see also INA § 221(a),(e), (g), (h), 8 U.S.C. § 1201(a),(e),(g),(h); 8 C.F.R. § 235.1(d)(1). The INA has long provided that:

Nothing in this Act shall be construed to entitle any alien, to whom a visa or other documentation has been issued, to be admitted to the United States, if, upon arrival at a port of entry in the United States, he is found inadmissible under this Act, or any provision of law. The substance of this subsection shall appear upon every visa application.

INA § 221(h) (emphasis added); see also Castaneda-Gonzalez, 564 F.2d at 427 ("Congress apparently has decided that [the 'double-check' system's] benefits outweigh its costs, and has continued the statutory framework which requires consular officers and the Attorney General independently to address the same issues in different contexts.").

Thus, an inspecting officer can and must refuse admission if a visa holder fails to establish to the inspector's own satisfaction that the visa holder fulfills the requirements for the classification which his visa bears. Contrary to plaintiffs' apparent belief, the inspector is not statutorily limited to ascertaining that the "face" of the visa indicates that a consular officer has found the alien admissible; rather, the inspector undertakes an independent admissibility determination himself. Plaintiffs' claim regarding "facially valid" visas is devoid of merit.

B. Claim that Agency Fails to Follow Regulations

With respect to plaintiffs' "as applied" challenge, plaintiffs allege that INS is failing to follow the Interim Regulations. Plaintiffs support their allegations with examples of the experiences faced by the individual named plaintiffs. Even though the regulations state that individuals should be allowed adequate food, water, and restroom access, plaintiffs Perez and Aquino de Pacheco allege that they were detained without food, water, or access to restroom facilities, and held for extended periods of time. See Wood Am. Com pl.¶¶ 58-59. In the case of Ms. Perez, a 70-year-old woman, plaintiffs allege she was detained by INS for approximately nineteen hours. See id. ¶ 58. Further, plaintiffs claim that both Ms. Perez and Ms. Aquino de Pacheco were told to sign a document that was neither explained nor translated into Spanish. See id.¶¶ 58-59.

The government argues that the plaintiffs are not seeking to challenge the Interim Regulations as violating IIRIRA but rather seek to challenge unwritten policies and practices. Under IIRIRA, however, the government argues that plaintiffs cannot challenge the agency's failure to follow the Attorney General's Interim Regulations because the statute expressly limits systemic challenges to

> determinations of whether such a regulation, written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General ... is not consistent with applicable provisions of this title or is otherwise in violation of law.

§ 242(e)(3)(A)(ii)(emphasis added). The government argues, therefore, that under the provisions of the statute, the agency's failure to follow its own regulations is not actionable.

First, to sidestep IIRIRA's restrictions on judicial review under § 242(e)(3)(A)(ii), plaintiffs argue that the policies and procedures that have resulted from the regulations should be reviewed together with the regulations. Second, to the extent they challenge unwritten practices, which § 242(e)(3)(A)(ii) does not allow, plaintiffs argue that Congress cannot limit review of unwritten policies because this would mean that possibly unconstitutional action by immigration officials would not be reviewable by a court-a result that Congress could not have intended. Plaintiffs also argue that even if the Court finds that plaintiffs' claims are not reviewable under INA § 242(e)(3), the Court would still have federal question jurisdiction under 28 U.S.C. § 1331 over many of these claims.

The Court concludes that, based on the clear language of the jurisdictional provision of §

242(e)(3)(A)(ii), this Court cannot review unwritten policies or practices but rather must limit its review to a "regulation, a written policy directive, written policy guideline, or written procedure." INA § 242(e)(3)(A)(ii); see also Hadera v. INS, 136 F.3d 1338, 1340 (D.C.Cir.1998) (denying alien's appeal of Board of Immigration Appeals decision partly on the basis of the jurisdictional provision in IIRIRA § 309(c)(4)(C)).

The Court is, nevertheless, troubled by the effects of Congress's decision to immunize the unwritten actions of an agency from judicial review, particularly where, as here, so much discretion is placed in the hands of individual INS agents who face only a supervisor's review of their decisions. In their complaints, plaintiffs have alleged serious failures by the INS to follow its own regulations in the treatment of aliens arriving in the United States. Therefore, the Court, in the strongest language possible, admonishes the Immigration and Naturalization Service to comply with its own regulations, policies, and procedures in providing aliens with the treatment, facilities, and information required by the agency's regulations, policies, and procedures.

C. Due Process Claim

Plaintiffs claim that under IIRIRA individuals will be erroneously removed from the United States and thus deprived of liberty and property. Specifically, plaintiffs complain that individuals are deprived of their due process rights through the enforcement of IIRIRA and the implementation of the above discussed procedures, including prohibitions on access to family, counsel, and interpreters. Plaintiffs complain that this system "creates an unreasonably high danger that [those] entitled to enter the United States ... will be erroneously removed." AILA Am. Compl. ¶ 68; see Wood Am. Compl. ¶ 79. As a preliminary matter, the Court must first determine what, if any, due process rights the complaining individuals, Ms. Perez and Ms. Aquino de Pacheco, possess.

The government urges dismissal of this claim because "aliens seeking initial admission to the United States have no constitutional rights with respect to their immigration status." AILA Defs.' Mot. at 55. Moreover, the Supreme Court has repeatedly stated that " 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." Fiallo v. Bell, 430 U.S. 787, 792 (1977) (citation omitted). Indeed, "the power to expel or exclude aliens is a fundamental sovereign attribute exercised by the Government's political departments, largely immune from judicial control." Id. (quoting Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953)). Thus, the Supreme Court recognized almost fifty years ago that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

It is also firmly established that "[a]lthough aliens seeking admission into the United States may physically be allowed within its borders pending a determination of admissibility, such aliens are legally considered to be detained at the border and hence as never having effected entry into this country." Gisbert v. United States Att'y Gen., 988 F.2d 1437, 1440 (5th Cir.1993), amended by 997 F.2d 1122, 1123 (5th Cir.1993); see also Sale v. Haitian Ctrs. Council, 509 U.S. 155, 175 (1993); Ukrainian-American Bar Ass'n v. Baker, 893 F.2d 1374, 1382 (D.C.Cir.1990). Because such aliens are not considered to be within the United States, but rather at the border, courts have long recognized that such aliens have "no constitutional right[s]" with respect to their applications

for admission. See Landon v. Plasencia, 459 U.S. 21, 32 (1982) (citing Knauff, 338 U.S. at 542); see also Kleindienst v. Mandel, 408 U.S. 753, 761, 766 (1972); Correa v. Thornburgh, 901 F.2d 1166, 1171 n. 5 (2d Cir.1990) (noting that apart from "protections against gross physical abuse," aliens seeking initial admission are entitled to no constitutional due process protection); Ukrainian-American, 893 F.2d at 1382; Rafeedie v. INS, 880 F.2d 506, 520 (1989).

Indeed, this Circuit has held that

> an initial entrant has no liberty (or other) interest in entering the United States, and thus has no constitutional right to any process in that context; whatever Congress by statute provides is obviously sufficient, so far as the Constitution goes.
>
> Our starting point, therefore, is that an applicant for initial entry has no constitutionally cognizable liberty interest in being permitted to enter the United States.

Rafeedie, 880 F.2d at 520 (emphasis in original).

This circuit has also addressed the similar issue of whether the government was required to give aliens seeking asylum in the United States notice of a bar association's offer to provide free legal services. See Ukrainian-American, 893 F.2d at 1382. The court there noted that " 'an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application.' " Id. (quoting Landon, 459 U.S. at 32 (emphasis added); see also Marincas v. Lewis, 92 F.3d 195, 203 (3d Cir.1996) (holding that inadmissible "asylum applicants do not have constitutional due process protections," but only those procedural rights granted by Congress); Jean v. Nelson, 727 F.2d 957, 981-82, 984 (11th Cir.1984) (en banc) (holding that inadmissible Haitians had "no constitutional rights with respect to their applications for admission, asylum, or parole."), aff'd on other grounds, 472 U.S. 846 (1985)).

Plaintiffs argue that defendants mischaracterize the law of this circuit. Plaintiffs assert that "a returning permanent resident 'has a liberty interest in being permitted to reenter this country and is therefore entitled to due process before [she] can be denied admission.' " Wood Opp'n at 37 (quoting Rafeedie, 880 F.2d at 520)(emphasis added). Plaintiffs further argue that "aliens with community ties to the U.S. may enjoy liberty interests cognizable under the Due Process Clause." Wood Opp'n at 38 (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990)("[A]liens receive constitutional protections when they have come within the territory of the United states and developed substantial connections with this country."); Johnson v. Eisentrager, 339 U.S. 763, 770 (1950) ("[T]he alien ... has been accorded a generous and ascending scale of rights as he increases his identity with our society."); Haitian Ctrs. Council, Inc. v. Sale, 823 F.Supp. 1028, 1042 (E.D.N.Y.1993)("As [aliens'] ties to the United States have grown, so have their due process rights.")).

While plaintiffs accurately cite the foregoing cases, those cases are inapposite here. Plaintiffs rely on cases which suggest that permanent residents or those with "substantial connections" to the United States may be entitled to constitutional protections. Here, however, Ms. Perez and Ms. Aquino de Pacheco are not lawful permanent residents. Moreover, there is no

indication that either has developed "substantial connections" with the United States.

The Court finds that the cases cited by plaintiffs do not establish that Ms. Perez and Ms. Aquino de Pacheco have due process rights with respect to their admission into the United States. To the contrary, the cases cited by defendant are representative of the overwhelming case law, including that of this circuit, holding that initial entrants have no due process rights with respect to their admission. See, e.g., Landon, 459 U.S. at 32; Knauff, 338 U.S. at 544; Ukrainian-American, 893 F.2d at 1382; Rafeedie, 880 F.2d at 520. Thus, in view of long-standing precedent holding that aliens have no due process rights, the Court concludes that the alien plaintiffs here cannot avail themselves of the protections of the Fifth Amendment to guarantee certain procedures with respect to their admission. Therefore, plaintiffs' due process claim must also be dismissed.

D. Equal Protection Claim

The Wood complaint raises a Fifth Amendment equal protection claim for discrimination, alleging that "[i]ndividuals who are considered suspect by INS inspecting officers because of race, color, gender, accent, and ethnic origin have been and will continue to be subject to illegal procedures and practices of the INS."Wood Am. Compl. ¶ 83. Plaintiffs Perez and Aquino de Pacheco assert that the "implementation of IIRIRA is subject to equal protection scrutiny, even as applied to arriving aliens." Wood Opp'n at 49.

The government seeks to dismiss plaintiffs' equal protection claim on the basis that plaintiffs have not demonstrated a prima facie case of discrimination on any basis as plaintiffs have not identified any individual plaintiff allegedly singled out for expedited removal because of race, color, gender, accent, or ethnic origin. In their opposition to defendants' motion to dismiss, plaintiffs assert that because they state this claim through the organizations, "it is not fatal that no individual named plaintiff presents a claim that the removal order in her particular claim resulted from discrimination." Wood Opp'n at 49.

Because the Court has concluded that the organizational plaintiffs only have standing to raise their First Amendment claim, and because plaintiffs put forth no facts on which to base a Fifth Amendment equal protection claim as to plaintiffs Perez and Aquino de Pacheco, the Court concludes that plaintiffs fail to state a claim upon which relief may be granted. Therefore, plaintiffs' Fifth Amendment equal protection claim must be dismissed.

E. First Amendment Claim

Plaintiffs next claim that defendants have violated plaintiffs' rights under the First Amendment to the United States Constitution by refusing to allow plaintiffs access to the secondary inspection process, and by otherwise impeding plaintiffs' access to persons subject to expedited removal procedures. AILA/Liberians Am. Compl. ¶ 96; Wood Am. Compl.¶¶ 86-88. The government concedes that the organizational plaintiffs have standing to bring this claim. See Wood Defs.' Mot. at 21 n. 8.

The D.C. Circuit has squarely addressed this issue. See Ukrainian-American, 893 F.2d 1374 (D.C.Cir.1990). The decision in Ukrainian-American stemmed from an attempt by a

Ukrainian merchant seaman, who jumped ship, to obtain political asylum in the United States. Attorneys who learned of the incident offered to assist the seaman in seeking asylum, but the government rejected their offers. Id. at 1376. The individual attorneys and the Ukrainian-American Bar Association ("UABA") then brought suit, alleging denial of their First Amendment rights of access to the seaman and others like him for the purpose of counseling such individuals regarding their ability to apply for political asylum. Id. at 1376-77. The district court ordered the INS to forward plaintiffs' offer of assistance to each person from a Soviet or East bloc country who sought asylum, but did not require the government to notify UABA every time a Ukrainian sought asylum, or to provide access without the alien's specifically having requested legal assistance. Id. at 1377. On appeal by the government, the Court of Appeals reversed the district court's grant of relief. Id. at 1382.

The D.C. Circuit explicitly considered and rejected the *Ukrainian-American* plaintiffs' argument that the government, once having acted to place an alien in custody, violates the First Amendment rights of third parties, such as the organizational plaintiffs here, when it declines to make arrangements for the third parties to contact the alien. *Id.* at 1381. The court held:

> [W]hen an unadmitted alien is taken into custody for interrogation and "immediate action," his entrance into custody does not infringe the right of any third party-whether a lawyer or another with an interest in getting a message through to the alien-to engage in constitutionally protected political expression.
>
> . . . . .
>
> Furthermore, the Government does not infringe a third party's first amendment right to associate with an alien by holding the alien for a period of time during which the third party is unable to contact him. The loss of the right of association while the alien is held incommunicado by the Government is not of constitutional significance; it is but an indirect consequence of the Government's pursuit of an important task.

Id.

Finally, the circuit likened the UABA's First Amendment "access" claim to a claim that the government's interview of a potential defector constitutes a public forum wherein all persons have a right to express their views. *Id.* at 1381. The circuit rejected any such claim, finding that the government's exclusion of private citizens from INS interviews, so long as it is not selective and not based upon the content of views, does not violate the public forum doctrine. *Id.* In reaching this conclusion, the circuit noted that if there were a right to speak in such a forum, "the Government might find it very difficult to get on with the business of governing" and would suffer a "substantial burden." *Id.*"The multiplicity of requests for access to a single alien or to different categories of aliens would divert the Government from its priority of resolving the issue requiring 'immediate action.' " *Id.* at 1382.

Plaintiffs attempt to avoid the on-point holding of this circuit by distinguishing *Ukrainian-American,* arguing that *Ukrainian-American* upheld a restriction on speech if it is "not selective and not based upon the content of the views presented." *Id.* at 1381. Plaintiffs argue that in *Ukrainian-American,*"the restriction was not viewpoint or content-based because the Government

was denying access to all potentially interested parties." *See Wood* Opp'n at 50 (citing *Ukrainian-American,* 893 F.2d at 1382). While in this case, plaintiffs suggest that the government is denying access based on content.

There are several problems with plaintiffs' argument. First, plaintiffs never asserted in their complaint that the restrictions on their access to entrants into the United States are content-based. *See AILA/Liberians* Am. Com pl.¶¶ 108-10; *Wood* Am. Compl.¶¶ 86-88. Second, the Court finds that the restriction here, like that in *Ukrainian-American,* is not content-based because the government denies access to all organizations.

Given the D.C. Circuit's holding in *Ukrainian-American* that legal assistance organizations do not have a First Amendment right to government-provided access to aliens in removal proceedings, the organizational plaintiffs' First Amendment claim is devoid of merit and must therefore be dismissed.

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