

**DEPARTMENT OF JUSTICE****8 CFR Part 2****28 CFR Part 65**

[INS No. 1924-98; AG Order No.2601-2002]

RIN 1115-AF20

**Powers of the Attorney General to Authorize State or Local Law Enforcement Officers To Exercise Federal Immigration Enforcement Authority During a Mass Influx of Aliens****AGENCY:** Immigration and Naturalization Service, Justice.**ACTION:** Final rule.

**SUMMARY:** This rule implements section 103(a)(8) of the Immigration and Nationality Act (Act), which permits the Attorney General to authorize any State or local law enforcement officer, with the consent of the head of the department, agency, or establishment under whose jurisdiction the individual is serving, to perform or exercise certain powers, privileges, or duties of officers or employees of the Immigration or Naturalization Service (INS or Service) during the period of a declared "mass influx of aliens."

This rule provides a cooperative process by which State or local governments can agree to place authorized State or local law enforcement officers under the direction of the INS in exercising Federal immigration enforcement authority whenever the Attorney General determines that such assistance is necessary during a declared mass influx of aliens. This rule allows the Commissioner of the INS to enter into advance written "contingency agreements" with State or local law enforcement officials to explain the terms and conditions (including the reimbursement of expenses) under which State or local law enforcement officers can exercise Federal immigration enforcement authority during a declared mass influx of aliens. The rule also ensures that appropriate notifications are made to Congress and the Administration.

Finally, this rule is necessary to ensure that the Service, in conjunction and coordination with State or local governments, can respond in an expeditious manner to urgent and quickly developing events during a declared mass influx of aliens to protect public safety, public health, and national security, while ensuring that performance of duties under this special authorization is cognizant of, and

consistent with, constitutional and civil rights protections.

**DATES:** This final rule is effective August 23, 2002.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:****What Authority Does the Department of Justice Have to Publish this Regulation?**

Section 372 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C., 110 Stat. 3009-646, amended section 103(a) of the Act, 8 U.S.C. 1103(a), to permit the Attorney General to authorize any State or local law enforcement officer, with the consent of the head of the department, agency, or establishment under whose jurisdiction the individual is serving, to perform or exercise any of the powers, privileges, or duties conferred or imposed by the Act or implementing regulations upon officers or employees of the Service during a period of a mass influx of aliens.

Under section 103(a)(8) of the Act, the Attorney General may authorize State or local law enforcement officers to perform such powers, privileges, or duties only if the Attorney General determines that "an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate Federal response." Under these regulations, the Attorney General will be authorized to consider factors described in the definitions of "immigration emergency" and "other circumstances" contained in 28 CFR 65.81 when determining whether a mass influx of aliens is imminent or occurring. As described in 28 CFR 65.81, the phrase "immigration emergency" means

an actual or imminent influx of aliens which either is of such magnitude or exhibits such other characteristics that effective administration of the immigration laws of the United States is beyond the existing capabilities of the [INS] in the affected area or areas. Characteristics of an influx of aliens, other than magnitude, which may be considered in determining whether an immigration emergency exists include: the likelihood of continued growth in the magnitude of the influx; an apparent connection between the influx and increases in criminal activity; the actual or imminent imposition of unusual and overwhelming demands on law enforcement agencies; and other similar characteristics.

Finally, the phrase "other circumstances" means "a situation that, as determined by the Attorney General, requires the resources of a State or local government to ensure the proper administration of the immigration laws of the United States or to meet urgent demands arising from the presence of aliens in a State or local government's jurisdiction."

In declaring that a mass influx of aliens is imminent or occurring, the Attorney General will define the boundaries of the geographic area where the declared mass influx of aliens is imminent or occurring. The Commissioner of the INS is authorized to amend and redefine these boundaries to expand or decrease them, as necessary, based on evolving developments. This authority shall not be further delegated. The Attorney General will also define the time periods that denote the beginning and the end of the declared mass influx of aliens. The authority of State or local law enforcement officers to enforce immigration laws under section 103(a)(8) of the Act can be exercised only during a mass influx of aliens, as determined and declared by the Attorney General. State or local law enforcement officers authorized to exercise immigration law enforcement authorities for transporting or guarding aliens in custody may exercise such authorities as necessary beyond the defined geographic boundaries where the declared mass influx of aliens is imminent or occurring. Apart from this exception, State or local law enforcement officers authorized to enforce immigration laws pursuant to section 103(a)(8) of the Act can exercise that authority only within the defined geographic boundaries where the mass influx of aliens has been declared. In all circumstances, State or local officers may exercise authority pursuant to section 103(a)(8) of the Act only during the time period prescribed by the Attorney General.

The implementation of this final rule will facilitate an expeditious and coordinated response during a mass influx of aliens by enabling the Attorney General to draw upon the voluntary assistance of State or local law enforcement resources to meet urgent and quickly developing demands.

A proposed rule with request for comments was published by the Department of Justice in the **Federal Register** on April 8, 1999, 64 FR 17128. The Service received a total of eighteen comments, all of which were considered in the formulation of this final rule. Comments were received from the Office of the Governor of the State of

Florida, the Florida Department of Law Enforcement, law enforcement organizations in the State of Florida representing Florida sheriffs and chiefs of police, and from non-governmental organizations. Of the total, four commenters expressed support for the regulation and fourteen commenters opposed the rule.

#### **What Were the Comments and What Changes Are Being Made in This Final Rule?**

Of the fourteen commenters opposing the regulation, nine commenters opposed State or local law enforcement officers exercising Federal immigration enforcement authority under any circumstances. All the opposing comments expressed concern that authorizing State or local law enforcement officers to exercise Federal immigration enforcement authority would result in civil rights violations and racial profiling by State or local police. The majority of opposing comments also expressed concern that the authorization of State or local law enforcement officers to exercise Federal immigration enforcement authority would undermine public safety by interfering with the normal duties of police in serving and protecting the community at large.

#### **Authorization: Scope and Geographic Area**

The commenters opposing the regulation generally based their concerns on the premise that the Attorney General would authorize state or local law enforcement officers to exercise Federal immigration enforcement authority during a declared mass influx of aliens in a large geographic area, thereby creating a greater likelihood for racial profiling. Moreover, commenters were concerned that a conflict in police functions would be created that would be counter to the purpose and intent of neighborhood and community policing. Commenters also were concerned that State and local law enforcement officers would use their authority under section 103(a)(8) of the Act to further particular State and local interests, such as gathering information or evidence relating to a State offense.

The Service recognizes and appreciates these concerns, but notes that pursuant to the provisions of section 103(a)(8) of the Act, the Attorney General will authorize State or local law enforcement officers to exercise Federal immigration enforcement authority only during a declared mass influx of aliens, the determination of which will be based on the factors set forth in the definitions of

the terms "assistance," "immigration emergency," and "other circumstances" as defined in 28 CFR 65.81. The Attorney General will authorize the exercise of only those immigration law enforcement authorities that are essential to meeting the demands imposed by the situation.

In an "immigration emergency," local Service resources are inadequate to meet the immediate threat to public safety, public health, and national security. Immediate response and immigration law enforcement under such circumstances would be essential. It must be presumed that many of the first officials responding to events in such an urgent and quickly developing situation would be State or local law enforcement officers. They must be provided with the necessary authority to provide effective assistance to Federal authorities to contain and control the situation. In these circumstances, the assistance of State or local law enforcement officers would be essential to protect public safety, public health, and national security.

The regulation does not abridge or abrogate constitutional or civil rights protections. The Service believes that sufficient additional safeguards to protect civil rights have been incorporated in the regulation, and that these safeguards will be further strengthened through supplemental policy and procedures. These safeguards include defining the boundaries and duration of the event, thus limiting the geographic area and time period when State and local law enforcement officers would exercise Federal immigration law enforcement authority. The regulation requires Service training and certification for State or local officers who would exercise immigration law enforcement authorities. The Attorney General will authorize the exercise of only those authorities that are essential to meet the demands imposed by the emergent event. The regulation also requires that State or local law enforcement officers exercising Federal immigration law enforcement authorities adhere to applicable Service policies and standards. The regulation also requires that a contingency agreement between the Service and State or local law enforcement agencies include a statement that the exercise of Federal immigration law enforcement authority will not abrogate or abridge constitutional or civil rights protections. Further, the rule requires a complaint reporting and resolution procedure to be in place and a mechanism to record and monitor complaints of misconduct or wrongdoing by State or local officers in

the exercise of Federal immigration law enforcement authority.

Contingency agreements with State or local police agencies that voluntarily agree to assist during a declared mass influx of aliens will detail any authority to enforce immigration laws that State or local law enforcement officers will exercise pursuant to section 103(a)(8) of the Act. State or local law enforcement officers will not be authorized to enforce immigration laws pursuant to section 103(a)(8) of the Act during a declared mass influx of aliens without completing a required training program as required by the regulation.

Preliminary contingency agreements between the Service and several State or local law enforcement agencies in the State of Florida have been developed in order to be in place prior to the authorization of immigration law enforcement in the event a mass influx of aliens is declared. Plans call for the Service to develop and provide training to State or local law enforcement officers who would exercise Federal immigration law enforcement authority during such an event. The Service will oversee and coordinate all immigration law enforcement activities during a declared mass influx of aliens.

The regulation has been modified to provide the Attorney General with the sole authority and responsibility, when declaring a mass influx of aliens, to define the initial geographic boundaries where the mass influx of aliens is imminent or occurring. The regulation will authorize the INS Commissioner subsequently to amend and redefine the boundaries to expand or decrease them as necessary based on evolving developments in the event. The authority to determine and define the boundaries of a mass influx of aliens may not be further delegated. This regulatory scheme will limit the geographic area in which designated State or local law enforcement officers would be authorized to perform the functions of immigration officers.

The regulation has been modified to require the Attorney General to determine when a mass influx of aliens event has concluded, at which point the authorization of State and local law enforcement officers to enforce immigration law under the provisions of section 103(a)(8) of the Act would cease.

#### **Potential for Racial Profiling**

The majority of the commenters opposing the implementation of the regulation expressed serious concern that the proposed rule would exacerbate racial profiling. To support these reservations, the commenters cited and quoted several reports and news media

articles. A number of the commenters pointed out that the proposed rule indicated bias by indicating that the authority to exercise Federal immigration law enforcement authority would be limited to State or local law enforcement agencies whose jurisdiction is along the southern land border or the coastline of South Florida, thus implying that a mass influx of aliens would be made up of Latino or Caribbean migrants.

Several aspects of the final rule address these concerns. The final rule has been modified to remove reference to the southern land border and the coastline of South Florida and to insert in place of those references the phrase, "aliens arriving off the coast or near a land border of the United States." During a declared mass influx of aliens, the Service would exercise oversight and control to focus the assisting State or local law enforcement resources on the essential immigration law enforcement activities necessary to contain and control the situation in the defined areas of such an event. Moreover, the potential for unwarranted stops based solely on ethnic appearance would be significantly reduced by the presence of other distinguishing factors consistent with the characteristics of the event.

Several comments dealt with training. Several commenters expressed concern that Service training of State or local law enforcement officers would be insufficient to erase biases or to address the likelihood that police would end up stopping those people who look like members of the group entering or about to enter the United States during a declared mass influx of aliens. Also, given the complex and changing nature of immigration law, concern was expressed that adequate training could not be provided to State or local law enforcement officers to enable them properly to exercise Federal immigration enforcement authority. Concern also was expressed that a significant amount of time could pass between the initial training the Service would provide to State or local law enforcement officers and the time the authorization to exercise Federal immigration authority would occur. Therefore, at the time when they would be expected to apply their knowledge of immigration law, State or local law enforcement officers might not be able to recall crucial elements required for effective enforcement. One commenter recommended that the State or local law enforcement officers who may be called upon to exercise Federal immigration enforcement authority during a mass influx of aliens be required to undergo

thorough retraining on a regular basis. One of the comments noted:

In addition, local law enforcement officers should also be trained to distinguish between situations when they are acting to enforce the INA (Immigration and Nationality Act) and when they are not. Special attention should be paid to this difference so that officers do not abuse their powers and claim to be engaging in immigration enforcement activity that is really a pretext for criminal enforcement activities.

The training concerns and recommendations presented in these comments are noted. The Service agrees that training for State or local law enforcement officers who may be called upon to exercise Federal immigration enforcement authority during a mass influx of aliens is a critically important matter. State or local law enforcement officers cannot perform any functions of a Service officer or employee pursuant to section 103(a)(8) of the Act and under the provisions of this rule until they successfully complete training prescribed by the Service and become certified in basic immigration law, immigration law enforcement fundamentals and procedures, civil rights law, and sensitivity and cultural awareness issues. Recognizing that a significant amount of time could pass between initial training and certification and the time when authorization to enforce immigration laws occurs, the Service also will develop a means to provide appropriate refresher training. The Service believes that it is important to mandate the general requirement for training in the regulation, but that the details of how the training will be developed and provided should be addressed through internal policy. The Service will do its utmost to ensure that the training developed and provided meets the essential and critical requirements for sufficiency and timeliness.

One commenter suggested that in addition to training to prevent constitutional and civil rights violations, the regulation should also require that an entity be established to monitor the exercise of Federal immigration enforcement authority by State or local law enforcement officials. The commenter expressed concern that the proposed regulation did not seem to contemplate the possibility that State or local law enforcement officers authorized pursuant to section 103(a)(8) of the Act to enforce immigration laws would engage in improper activity that might warrant discipline.

The Service agrees that a mechanism is needed to monitor the immigration law enforcement activities of State or local law enforcement officers

conducted pursuant to section 103(a)(8) of the Act, but does not agree that an independent entity needs to be established to do so. The regulation has been modified to direct that a mechanism to monitor complaints and allegations regarding the immigration enforcement activities of State or local law enforcement officers pursuant to section 103(a)(8) of the Act be included in the contingency agreements implemented between participating State or local law enforcement agencies and the Service. There are existing publicized means for reporting complaints of wrongdoing or misconduct against State or local law enforcement officers. The Service believes that creating a separate entity to handle complaints and violations with respect to the exercise of authorized immigration law enforcement powers would be less effective and efficient than the procedures already established. However, because of the importance of this issue, this rule has been modified to require that a complaint reporting and resolution procedure for such allegations be included in the contingency agreement between the cooperating State or local department and the Service.

#### Definition of "Mass Influx of Aliens"

Several commenters opposing the rule expressed concern that the proposed rule was inherently vague in that it allowed the Attorney General to make the determination that a mass influx of aliens is imminent or occurring without precisely defining what constitutes a mass influx of aliens. Some of these commenters expressed the view that the vague nature of these provisions was problematic in that the discretionary power to determine whether the power should be exercised is in the hands of the same person who would exercise the power. They expressed concern that such discretionary power can become arbitrary when there are no limiting factors or guidelines that must be met before the authority can be legitimately triggered. The commenters noted that the notice of proposed rulemaking did not offer historical precedent as to whether a mass influx of aliens has occurred at any time in the past. The commenters also noted that there is no guidance to quantify how many incoming noncitizens need to be at the border or off the coast of the United States before the Attorney General of the United States can determine that a mass influx of aliens is imminent or occurring.

The Service notes that there have been a number of events during the past two decades that required the Federal

Government to adopt extraordinary measures beyond the capacity of the Service to meet the challenges posed by large groups of undocumented migrants either arriving or en route to the United States. Some of these past events originated in the Caribbean. More recently, significant numbers of undocumented migrants have been discovered bound for this country from China in the holds of cargo vessels. The intent of those directing some of these seagoing cargo vessels has been to run the vessel aground and force their human cargo to abandon ship. In at least one instance, such an event resulted in loss of life. There have been periods when a significant number of such cargo vessels carrying substantial numbers of undocumented migrants in their holds were identified. Again, extraordinary actions by the Federal Government beyond the capacity of the Service were required to deal with these events.

In all of these situations, the undocumented migrants were exposed to extreme hazards and life-threatening conditions. The belief that the Federal Government will not be able to respond and prevent such actions may bolster and encourage such brazen attempts by migrants to enter the United States illegally, with reckless and criminal disregard for human life and safety. The Federal Government must have the capability and the regulatory basis upon which to mobilize and coordinate with State or local law enforcement resources to respond to such events. In so doing, the coordinated efforts of Federal, State, and local governments can be combined to confront, manage, and possibly deter such reckless and illegal behavior by undocumented migrants and those criminal enterprises that seek to prosper unlawfully from them. Such illegal entries into the United States not only greatly endanger the lives of the undocumented migrants, but also endanger the safety, security, and well-being of the United States, affected communities, and the public at large. They cannot go unchecked.

The Service does not believe that it is necessary or appropriate to quantify the basis for the declaring of a mass influx of aliens by the Attorney General. There are several factors articulated in 28 CFR 65.81, specifically those noted in the definitions of "immigration emergency" and "other circumstances," that the Attorney General will consider in determining whether to declare a mass influx of aliens.

Some of the commenters opposed any rule that would authorize State and local law enforcement officers to exercise Federal immigration enforcement authority. The Service

strongly disagrees with this viewpoint. The exercise of Federal law enforcement authority by State and local law enforcement officers is not unique to this rule. For example, the Department has deputized State and local law enforcement officers to assist them in enforcing federal law. Moreover, this final rule sets forth the guidelines under which the Attorney General can authorize State and local officers to exercise Federal immigration law enforcement authority during a mass influx of aliens and establishes appropriate limits on the exercise of such authority.

#### **Coordinated Law Enforcement Response**

Four sets of comments strongly supported the regulation. These comments came from the Office of the Governor of the State of Florida, the Florida Department of Law Enforcement, and from two law enforcement organizations in the State of Florida representing Florida sheriffs and chiefs of police, respectively. All of these commenters pointed out that the State of Florida has experienced a number of immigration-related crises over the years. They unanimously expressed the belief that the implementation of this rule would facilitate coordination between agencies to more effectively meet the challenges and demands that arise during such a mass influx event. These comments strongly advocated the position that safety and security of all parties are the paramount government interests during such an event. The commenters also recognized and supported the establishment of contingency agreements between the Service and State or local law enforcement agencies as an effective means to formalize the working relationships and expectations between the Service and State or local law enforcement agencies during a mass influx event.

The Service believes that these commenters reflected the essence of the statutory intent of section 103(a)(8) of the Act and the purpose of this regulatory action. The declaration of a "mass influx" of aliens by the Attorney General would signal an urgent and quickly developing event that requires a coordinated and effective response by the combined resources of the Federal Government and the State or local governments representing the communities that would be directly affected. During such an event, Service resources by themselves would be inadequate to meet the demands imposed by such a crisis. During such an occurrence, the Service would

require the use of State or local law enforcement resources to augment available Service resources. Prior planning, appropriate authorizations, adequate training, organized mobilization, and sufficient coordination between the Service and State or local law enforcement agencies would be essential to ensure that public safety, public health, and national security are protected. This regulation provides the foundation and framework to accomplish these essential requirements in the event that an Attorney General declares that a mass influx of aliens is imminent or occurring becomes necessary.

#### **Explanation of Changes**

This rule implements the intent of section 103(a)(8) of the Act by providing a mechanism by which a trained cadre of State or local law enforcement officers will be available to enhance the Federal Government's ability to provide an immediate and effective response to a declared mass influx of aliens.

To enable implementation of the Attorney General's authority, the rule provides that the Commissioner of the INS may execute written contingency agreements with State or local law enforcement agencies regarding assistance under section 103(a)(8) of the Act, which may be activated in the event that the Attorney General determines that such assistance is required during a period of a declared mass influx of aliens. Such contingency agreements shall not authorize State or local law enforcement officers to perform any functions of Service officers or employees pursuant to the provisions of section 103(a)(8) of the Act until the Attorney General declares that a mass influx of aliens is imminent or occurring, and specifically authorizes such performance.

Written agreements regarding assistance under 28 CFR 65.83(d), including contingency agreements, shall include the following:

(1) A statement of the powers, privileges, or duties that State or local law enforcement officers will be authorized to perform or exercise and the conditions under which they may be performed or exercised;

(2) a statement of the types of assistance by State or local law enforcement officers for which the Attorney General shall be responsible for reimbursing the relevant parties in accordance with the procedures set forth;

(3) a statement that the relevant State or local law enforcement officers are not authorized to perform any functions of Service officers or employees pursuant

to section 103(a)(8) of the Act until the Attorney General has made a determination pursuant to that section and authorizes such performance;

(4) a requirement that State or local law enforcement officers cannot perform any authorized functions of Service officers or employees pursuant to section 103(a)(8) of the Act until they have successfully completed and been certified in a Service prescribed course of instruction in basic immigration law, immigration law enforcement fundamentals and procedures, civil rights law, and sensitivity and cultural awareness issues;

(5) a description of the duration of both the written agreement and the authority the Attorney General will confer upon State or local law enforcement officers pursuant to section 103(a)(8) of the Act, along with a mechanism for amending, terminating, or extending the duration of authority and/or the written agreement;

(6) a requirement that the performance of any Service officer functions by State or local law enforcement officers pursuant to section 103(a)(8) of the Act be at the direction of the Service;

(7) a requirement that any State or local law enforcement officer performing Service officer or employee functions pursuant to section 103(a)(8) of the Act must adhere to the policies and standards set forth during the training, including applicable immigration law, immigration law enforcement standards and procedures, civil rights law, and sensitivity and cultural awareness issues;

(8) a statement that the authority to perform Service officer or employee functions pursuant to section 103(a)(8) does not abrogate or abridge constitutional or civil rights protections;

(9) a requirement that a complaint reporting and resolution procedure for allegations of misconduct or wrongdoing by State or local officers designated, or activities undertaken, pursuant to section 103(a)(8) of the Act be in place;

(10) a requirement that a mechanism to record and monitor complaints regarding the immigration enforcement activities of State or local law enforcement officers exercising the authority to enforce immigration laws be in place;

(11) a listing by position (title and name, when available) of the Service officers authorized to provide operational direction to State or local law enforcement officers assisting in a Federal response pursuant to section 103(a)(8) of the Act;

(12) a requirement that a State or local law enforcement agency maintain records of operational expenditures incurred as a result of supporting the Federal response to a mass influx of aliens;

(13) provisions concerning State or local law enforcement officer use of Federal property or facilities, if any;

(14) a requirement that any department, agency, or establishment whose State or local law enforcement officer is performing Service officer or employee functions shall cooperate fully in any Federal investigation related to allegations of misconduct or wrongdoing in conjunction with such functions, or to the written agreement; and

(15) a procedure by which the appropriate law enforcement department, agency, or establishment will be notified that the Attorney General has made a determination under section 103(a)(8) of the Act to authorize State or local law enforcement officers to exercise Federal immigration enforcement authority under the provisions of the respective agreements.

The boundaries of the geographic area where the declared mass influx of aliens is imminent or occurring would be defined by the Attorney General, who would also determine the time period of the mass influx of aliens. The Commissioner is authorized to amend and redefine the geographic boundaries of the area of the mass influx of aliens, including expanding or decreasing the boundaries, as necessary, based on evolving developments in the scope of the event. This authority shall not be further delegated.

State or local law enforcement officers cannot perform any functions of a Service officer or employee pursuant to section 103(a)(8) of the Act and under the provisions of this rule until they successfully complete training prescribed by the Service and become certified in basic immigration law, immigration law enforcement fundamentals and procedures, civil rights law, and sensitivity and cultural awareness issues.

The Service will provide all necessary training materials and will conduct training sessions to designated officers at sites within their jurisdictional or commuting areas when possible. Any employing State or local law enforcement agency, department, or establishment will be required to fund its officers' transportation, lodging, and subsistence costs as may be required.

This rule amends the existing regulations of the Department of Justice relating to the Immigration Emergency Fund. Under the amended rule, the

Department of Justice has the authority to reimburse State or local law enforcement agencies that assist in the Federal response to a mass influx of aliens from any authorizing statutory source or other available funding source, provided such funding exists and has been made available to the Department for this purpose. Therefore, the final rule allows for the reimbursement of these entities up to the amount available to the Department of Justice for such purposes. This rule provides no guarantee of reimbursement for actual expenses incurred but seeks to assure State or local law enforcement agencies that they will not bear undue increased operational expenditures incurred in direct support of a Federal response to declaration of a mass influx of aliens.

Execution of advance contingency agreements will expedite subsequent action by the Attorney General to authorize State or local law enforcement officers to exercise Federal immigration enforcement authority. The execution of advance contingency agreements will also facilitate reimbursement of actual expenditures in support of a Federal response to a mass influx of aliens, pursuant to existing financial requirements.

Within the regulation, the phrase "State or local law enforcement officers" means State law enforcement officers, local law enforcement officers, or both. The phrase "State or local law enforcement agencies" refers to State law enforcement agencies, local law enforcement agencies, or both.

#### **Regulatory Flexibility Act**

The Attorney General, 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 impact on a substantial number of small entities because of the following factors:

(1) The Service anticipates that participation in written agreements executed with State or local law enforcement agencies under section 103(a)(8) of the Act and this rule will be limited to those State or local law enforcement agencies whose jurisdiction is along the coast of the United States, or near a land border;

(2) Participation by State or local law enforcement agencies is voluntary, and no State or local law enforcement agency outside the contiguous area of a mass influx of aliens would be affected by implementation of this rule;

(3) This rule provides a means to relieve undue financial burdens on participating law enforcement agencies by allowing for reimbursement of actual

expenses incurred in direct support of a Federal response to declaration of a mass influx of aliens; and

(4) It is anticipated that the authorization of State or local law enforcement officers to enforce immigration law under the provisions of this rule will be infrequent, as such authorization can occur only during times of an actual or imminent mass influx of aliens into the United States pursuant to such declaration by the Attorney General.

#### **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 in the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

#### **Executive Order 12866**

This rule is considered by the Department of Justice to be a "significant regulatory action" under section 3(f) of Executive Order 12866, Regulatory Planning and Review. Accordingly, this regulation has been submitted to the Office of Management and Budget for review.

#### **Executive Order 13132**

This regulation 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 various levels of government. This rule allows for reimbursement by the Department of Justice (contingent upon availability of such funds) as determined by the Attorney General, of actual expenditures incurred by State or local law enforcement agencies whose law enforcement officers are supporting a

Federal response to an actual or imminent mass influx of aliens. Moreover, participation by State or local law enforcement agencies is voluntary. Therefore, in accordance with section six 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**

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

#### **Paperwork Reduction Act**

As contained in this rule under 28 CFR 65.85(e), the Attorney General will consider all applications from State or local governments for reimbursement of actual expenses incurred in direct support of a Federal response to a mass influx of aliens, until the Attorney General has obligated funding available for such purposes as determined by the Attorney General. The information that must be included in the application for reimbursement is described in 28 CFR 65.85(c). The information required in 28 CFR 65.85(c) is considered an information collection covered under the Paperwork Reduction Act (PRA). This information collection has previously been approved by the Office of Management and Budget (OMB) under the PRA. The OMB control number for this approved information collection is 1115-0184.

#### **List of Subjects**

##### *8 CFR Part 2*

Authority delegations (government agencies).

##### *28 CFR Part 65*

Grant programs—law, Law enforcement, Reporting and recordkeeping requirements.

Accordingly, part 2 of chapter I of title 8 of the Code of Federal Regulations, and part 65 of chapter I of title 28 of the Code of Federal Regulations are amended as follows:

#### **TITLE 8—ALIENS AND NATIONALITY**

#### **PART 2—AUTHORITY OF THE COMMISSIONER**

1. The authority citation for part 2 continues to read as follows:

**Authority:** 28 U.S.C. 509, 510; 5 U.S.C. 301; 8 U.S.C. 1103.

2. Section 2.1 is amended by:

(a) Designating the existing text as paragraph (a); and by

(b) Adding a new paragraph (b), to read as follows:

#### **§ 2.1 Authority of the Commissioner.**

\* \* \* \* \*

(b) The Commissioner, pursuant to 28 CFR 65.84(a), may execute written contingency agreements with State or local law enforcement agencies regarding assistance under section 103(a)(8) of the Act, 8 U.S.C. 1103(a)(8), which may be activated in the event that the Attorney General determines that such assistance is required during a period of a declared mass influx of aliens, as provided in 28 CFR 65.83(d). Such contingency agreements shall not authorize State or local law enforcement officers to perform any functions of Service officers or employees pursuant to the provisions of section 103(a)(8) of the Act until the Attorney General declares that a mass influx of aliens is imminent or occurring and specifically authorizes such performance. The boundaries of the geographic area of the mass influx of aliens shall be defined by the Attorney General. In addition, the Attorney General will define the inclusive time period of a mass influx of aliens by declaring the beginning and the end of such an event pursuant to 28 CFR 65.83(d). Based on evolving developments in the scope of the event, the Commissioner is authorized to amend and redefine by new definition, as necessary, the geographic area defined by the Attorney General to expand or decrease the boundaries. This authority shall not be further delegated.

#### **TITLE 28—JUDICIAL ADMINISTRATION**

#### **PART 65—EMERGENCY FEDERAL LAW ENFORCEMENT ASSISTANCE**

3. The authority citation for part 65 continues to read as follows:

**Authority:** The Comprehensive Crime Control Act of 1984, Title II, Chap. VI, Div. I, Subdiv. B, Emergency Federal Law Enforcement Assistance, Pub. L. 98-473, 98 Stat. 1837, Oct. 12, 1984 (42 U.S.C. 10501 *et seq.*); 8 U.S.C. 1101 note; Sec. 610, Pub. L. 102-140, 105 Stat. 832.

4. In § 65.80, the first sentence is revised to read as follows:

#### **§ 65.80 General.**

The regulations of this subpart set forth procedures for implementing section 404(b) of the Immigration and Nationality Act ("INA"), 8 U.S.C. 1101 note, by providing for Presidential determinations of the existence of an immigration emergency, and for payments from the Immigration Emergency Fund or other funding available for such purposes, to State and

local governments for assistance provided in meeting an immigration emergency. \* \* \*

5. Section 65.83 is amended by:

a. Revising the introductory text; and by

b. Adding a new paragraph (d), to read as follows:

**§ 65.83 Assistance required by the Attorney General.**

The Attorney General may request assistance from a State or local government in the administration of the immigration laws of the United States or in meeting urgent demands where the need for assistance arises because of the presence of aliens in that State or local jurisdiction, and may provide funding to a State or local government relating to such assistance from the Immigration Emergency Fund or other funding available for such purposes, without a Presidential determination of an immigration emergency, in any of the following circumstances:

\* \* \* \* \*

(d)(1) If, in making a determination pursuant to paragraph (b) or (c) of this section, the Attorney General also determines that the situation involves an actual or imminent mass influx of aliens arriving off the coast or near a land border of the United States and presents urgent circumstances requiring an immediate Federal response, the Attorney General will formally declare that a mass influx of aliens is imminent or occurring. The determination that a mass influx of aliens is imminent or occurring will be based on the factors set forth in the definitions contained in § 65.81 of this subpart. The Attorney General will determine and define the time period that encompasses a mass influx of aliens by declaring when such an event begins and when it ends. The Attorney General will initially define the geographic boundaries where the mass influx of aliens is imminent or occurring.

(2) Based on evolving developments in the scope of the event, the Commissioner of the INS may, as necessary, amend and redefine the geographic area defined by the Attorney General to expand or decrease the boundaries. This authority shall not be further delegated.

(3) The Attorney General, pursuant to section 103(a)(8) of the INA, 8 U.S.C. 1103(a)(8), may authorize any State or local law enforcement officer to perform or exercise any of the powers, privileges, or duties conferred or imposed by the Act, or regulations issued thereunder, upon officers or employees of the Service. Such authorization must be with the consent

of the head of the department, agency, or establishment under whose jurisdiction the officer is serving.

(4) Authorization for State or local law enforcement officers to exercise Federal immigration law enforcement authority for transporting or guarding aliens in custody may be exercised as necessary beyond the defined geographic boundaries where the mass influx of aliens is imminent or occurring. Otherwise, Federal immigration law enforcement authority to be exercised by State or local law enforcement officers will be authorized only within the defined geographic boundaries where the mass influx of aliens is imminent or occurring.

(5) State or local law enforcement officers will be authorized to exercise Federal immigration law enforcement authority only during the time period prescribed by the Attorney General in conjunction with the initiation and termination of a declared mass influx of aliens.

6. Section 65.84 is amended by:

a. Revising the section heading; and

b. Revising paragraph (a) of this section, to read as follows:

**§ 65.84 Procedures for the Attorney General when seeking State or local assistance.**

(a)(1) When the Attorney General determines to seek assistance from a State or local government under § 65.83 of this subpart, or when the President has determined that an immigration emergency exists, the Attorney General shall negotiate the terms and conditions of that assistance with the State or local government. The Attorney General shall then execute a written agreement with appropriate State or local officials, which sets forth the terms and conditions of the assistance, including funding. Such written agreements can be reimbursement agreements, grants, or cooperative agreements.

(2) The Commissioner may execute written contingency agreements regarding assistance under § 65.83(d) of this subpart in advance of the Attorney General's determination pursuant to that section. However, such advance agreements shall not authorize State or local law enforcement officers to perform any functions of Service officers or employees under section 103(a)(8) of the INA, 8 U.S.C. 1103(a)(8), until the Attorney General has made the necessary determinations and authorizes such performance. Any such advance agreements shall contain precise activation procedures.

(3) Written agreements regarding assistance under § 65.83(d) of this subpart, including contingency

agreements, shall include the following minimum requirements:

(i) A statement of the powers, privileges, or duties that State or local law enforcement officers will be authorized to exercise and the conditions under which they may be exercised;

(ii) A statement of the types of assistance by State or local law enforcement officers for which the Attorney General shall be responsible for reimbursing the relevant parties in accordance with the procedures set forth in paragraph (b) of this section;

(iii) A statement that the relevant State or local law enforcement officers are not authorized to exercise any functions of Service officers or employees under section 103(a)(8) of the INA, 8 U.S.C. 1103(a)(8), until the Attorney General has made a determination pursuant to that section and authorizes such performance;

(iv) A requirement that State or local law enforcement officers cannot exercise any authorized functions of Service officers or employees under section 103(a)(8) of the INA, 8 U.S.C. 1103(a)(8), until they have successfully completed and been certified in a Service-prescribed course of instruction in basic immigration law, immigration law enforcement fundamentals and procedures, civil rights law, and sensitivity and cultural awareness issues;

(v) A description of the duration of the written agreement, and of the authority the Attorney General will confer upon State or local law enforcement officers pursuant to section 103(a)(8) of the INA, 8 U.S.C. 1103(a)(8), along with a provision for amending, terminating, or extending the duration of the written agreement, or for terminating or amending the authority to be conferred pursuant to section 103(a)(8) of the INA, 8 U.S.C. 1103(a)(8);

(vi) A requirement that the exercise of any Service officer functions by State or local law enforcement officers pursuant to section 103(a)(8) of the INA, 8 U.S.C. 1103(a)(8), be at the direction of the Service;

(vii) A requirement that any State or local law enforcement officer performing Service officer or employee functions pursuant to section 103(a)(8) of the INA, 8 U.S.C. 1103(a)(8), must adhere to the policies and standards set forth during the training, including applicable immigration law enforcement standards and procedures, civil rights law, and sensitivity and cultural awareness issues;

(viii) A statement that the authority to perform Service officer or employee functions pursuant to section 103(a)(8)



of the INA, 8 U.S.C. 1103(a)(8), does not abrogate or abridge constitutional or civil rights protections;

(ix) A requirement that a complaint reporting and resolution procedure for allegations of misconduct or wrongdoing by State or local officers designated, or activities undertaken, pursuant to section 103(a)(8) of the INA, 8 U.S.C. 1103(a)(8), be in place;

(x) A requirement that a mechanism to record and monitor complaints regarding the immigration enforcement activities of State or local law enforcement officers authorized to enforce immigration laws be in place;

(xi) A listing by position (title and name when available) of the Service officers authorized to provide operational direction to State or local law enforcement officers assisting in a Federal response pursuant to section 103(a)(8) of the INA, 8 U.S.C. 1103(a)(8);

(xii) A requirement that a State or local law enforcement agency maintain records of operational expenditures incurred as a result of supporting the Federal response to a mass influx of aliens;

(xiii) Provisions concerning State or local law enforcement officer use of Federal property or facilities, if any;

(xiv) A requirement that any department, agency, or establishment whose State or local law enforcement officer is performing Service officer or employee functions shall cooperate fully in any Federal investigation related to allegations of misconduct or wrongdoing in conjunction with such functions, or to the written agreement; and

(xv) A procedure by which the appropriate law enforcement agency, department, or establishment will be notified that the Attorney General has made a determination under section 103(a)(8) of the INA, 8 U.S.C. 1103(a)(8), to authorize State or local law enforcement officers to exercise Federal immigration enforcement authority under the provisions of the respective agreements.

\* \* \* \* \*

7. In § 65.85, paragraph (e) is revised to read as follows:

**§ 65.85 Procedures for State or local governments applying for funding.**

\* \* \* \* \*

(e) The Attorney General will consider all applications from State or local governments until the Attorney General has obligated funding available for such purposes as determined by the Attorney General. The Attorney General will make a decision with respect to any application submitted under this section that contains the information described

in paragraph (c) of this section within 15 calendar days of such application.

\* \* \* \* \*

Dated: July 17, 2002.

**John Ashcroft,**

*Attorney General.*

[FR Doc. 02-18655 Filed 7-23-02; 8:45 am]

**BILLING CODE 4410-10-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 25

**[Docket No. NM225; Special Conditions No. 25-207-SC]**

#### **Special Conditions: Embraer Model EMB-135BJ; Interaction of Systems and Structures**

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

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

**SUMMARY:** These special conditions are issued for the Embraer Model EMB-135BJ airplane. The Embraer Model EMB-135BJ airplane will have a novel or unusual design feature involving a fuel transfer system whose failure can affect the structural performance of the airplane. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this system and its effect on structural performance. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the applicable airworthiness standards.

**DATES:** The effective date of these special conditions is July 12, 2002. Comments must be received on or before August 23, 2002.

**ADDRESSES:** Comments on these special conditions may be mailed in duplicate to: Federal Aviation Administration, Transport Airplane Directorate, Aircraft Certification Service, Attention: Rules Docket (ANM-113), Docket No. NM225, 1601 Lind Avenue SW., Renton, Washington 98055-4056; or delivered in duplicate to the Transport Airplane Directorate at the above address. All comments must be marked: Docket No. NM225. Comments may be inspected in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

**FOR FURTHER INFORMATION CONTACT:**

Todd Martin, FAA, Airframe/Cabin Safety Branch, ANM-115, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue, SW., Renton, Washington

98055-4056; telephone (425) 227-1178; facsimile (425) 227-1320.

#### **SUPPLEMENTARY INFORMATION:**

The FAA has determined that notice and opportunity for prior public comment hereon are impracticable because these procedures would significantly delay certification of the airplane and thus delivery of the affected airplanes. The FAA therefore finds that good cause exists for making these special conditions effective upon issuance.

#### **Comments Invited**

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning these special conditions. The docket is available for public inspection before and after the comment closing date. If you wish to review the docket in person, go to the address in the **ADDRESSES** section of this preamble between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

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

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

#### **Background**

On May 22, 2002, Embraer applied for an amendment to Type Certificate No. T00011AT to include a corporate jet version of the Model EMB-135 airplane. The Model EMB-135BJ, which is a derivative of the EMB-135LR aircraft currently approved under Type Certificate No. T00011AT, is a pressurized, low-wing, "T" tail, transport category airplane with tricycle landing gear. It is powered by two Rolls-Royce model AE3007A1P engines, and will carry a maximum of 19 passengers. The primary differences between the existing EMB-135LR and the new EMB-