



U.S. Customs and Border Protection

June 1, 2021

MEMORANDUM FOR: Directors, Field Operations
Office of Field Operations

FROM: Executive Director (b) (6), (b) (7)(C)
Admissibility and Passenger Programs
Office of Field Operations

SUBJECT: Clarifying Guidance on Separation of Family Units Due to 8 U.S.C §1326
Prosecutions or Related Criminal History

This memorandum provides clarifying guidance and limits permissible instances of family separation of single parent family units¹ related to: (a) referring a parent/legal guardian for prosecution for 8 U.S.C. § 1326(a) (absent other non-§ 1325, §1326-related criminal history that would justify separation), and (b) the basis of prior criminal history for offenses described in 8 U.S.C. § 1325 or § 1326(a).

The previous guidance, *Interim Guidance on Preliminary Injunction in Ms. L. v. ICE* issued on June 27, 2018, is still in effect as it relates to articulating and recording the permissible instances of family separation by CBP, however, effective immediately, the *Interim Guidance* is amended to prohibit:

- Separation of a parent/legal guardian from their child due solely to a criminal conviction or convictions under 8 U.S.C. § 1326(a).²
- Referral of a parent/legal guardian for prosecution under 8 U.S.C. § 1326(a), unless the parent/legal guardian has other non § 1325 or § 1326(a) criminal history that would justify separation.

Should the need for a separation of a single parent family unit referral of prosecution for 8 USC § 1326 be deemed necessary for national security or public safety reasons, CBP retains that discretion. The decision must be reviewed and approved by a GS 14 or above supervisor. Consultation with the local Associate/Assistant Chief Counsel is required, and justification of the referral must be documented and recorded in the appropriate CBP processing system.

¹ This memo applies to single parent family units, where separation due to parent/legal guardian's referral for prosecution for 8 U.S.C. § 1326(a), or separation due to criminal history related solely related to prior 8 U.S.C. § 1325 or 1326 prosecutions, the accompanying child would be sent to Department of Health and Human Services/Office of Refugee Resettlement custody. It does not preclude instances of separation of two parent families, when one parent has multiple prior § 1325, 1326 convictions.

² Pursuant to the *Interim Guidance*, separation of a parent/legal guardian from their child(ren) due solely to a criminal conviction for a nonviolent misdemeanor such as 8 U.S.C. § 1325 is already prohibited.

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As a reminder, nothing in *the Interim Guidance* changed. CBP continues to retain the ability to separate families for only the following reasons:

1. Referral of a parent/legal guardian for prosecution of a non 8 U.S.C. § 1326 felony.
2. Parent/legal guardian represents a danger to the child.
3. The parent/legal guardian has criminal convictions for violent misdemeanors or felonies.
4. The parent/legal guardian has a communicable disease.

This clarification of the *Interim Guidance* is to be used going forward by CBP, to identify permissible instances of family separation.

Please ensure that this memorandum is disseminated to all ports of entry within your jurisdiction. Should you have any questions or require additional information, please contact (b) (6), (b) (7)(C) Acting Director, Enforcement Programs Division (EPD) at (b) (6), (b) (7)(C)