# Rules and Regulations

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## DEPARTMENT OF JUSTICE

### Immigration and Naturalization Service

### 8 CFR Part 273

**[INS No. 1697–95]**

**RIN 1115–AD97**

### Screening Requirements of Carriers

**AGENCY:** Immigration and Naturalization Service, Justice.

**ACTION:** Final rule.

**SUMMARY:** This rule amends the Immigration and Naturalization Service (the Service) regulations by establishing procedures carriers must undertake for the proper screening of passengers at the ports of embarkation to become eligible for a reduction, refund, or waiver of a fine imposed under section 273 of the Immigration and Nationality Act (the Act). This rule is necessary to enable the Service to reduce, refund, or waive fines for carriers that have taken appropriate measures to properly screen passengers being transported to the United States, while continuing to impose financial penalties against those carriers that fail to properly screen passengers.

**DATES:** This rule is effective June 1, 1998. The supplementary information portion of this final rule requires carriers whose Performance Level (PL) is not at or better than the Acceptable Performance Level (APL), to submit evidence to the Service so that they may receive an automatic fine reduction of 25 percent, if certain conditions are met. Since this evidence is considered an information collection which is subject to review by the Office of Management and Budget (OMB) under the Paperwork Reductions Act (PRA), the evidence cannot be submitted until OMB approves the information collection requirements. The Service will publish a notice in the **Federal Register** once OMB approval of the information collection is obtained.

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**SUPPLEMENTARY INFORMATION:** The imposition of administrative fines has long been an important tool in enforcing the United States immigration laws and safeguarding its borders. Both section 273 of the Act and prior law reflect a similar Congressional purpose to compel carriers, under pain of penalties, to ensure enforcement of, and compliance with, certain provisions of the immigration laws. In enacting both section 273 of the Act of 1952 and section 16 of the Immigration Act of 1924 (the precursor to section 273(a) of the Act of 1952), Congress intended to make the carrier ensure compliance with the requirements of the law. The carriers have long sought relief from fines by having the Service consider extenuating circumstances related to the imposition of fines.

Prior to the enactment of section 209(a)(6) of the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. 103–416, dated October 25, 1994, it was the Service's policy not to reduce, refund, or waive fines imposed under section 273 of the Act except pursuant to section 273(c) of the Act where the carrier could, to the satisfaction of the Attorney General, demonstrate that it did not know, and could not have ascertained by the exercise of reasonable diligence, that the individual transported was an alien and that a valid passport or visa was required.

This final rule provides procedures carriers must undertake for the proper screening of aliens at the port of embarkation to become eligible for reduction, refund, or waiver of a fine imposed under section 273 of the Act. Nevertheless, it is important to note that these are voluntary procedures for carriers. This final rule further prescribes conditions the Service will consider before reducing, refunding, or waiving a fine. Of primary importance will be the carrier's performance in screening passengers. The Service will determine a carrier's performance record by analyzing statistics on the number of improperly documented nonimmigrant passengers transported to the United States by each carrier compared to the total number of documented nonimmigrant passengers transported.

This final rule will enable the Service to reduce, refund, or waive a fine imposed under section 273 of the Act for a carrier that demonstrates successful screening procedures by achieving satisfactory performance in the transportation of properly documented nonimmigrants to the United States. This will enable the Service to reduce, refund, or waive fines for carriers that have taken appropriate measures to properly screen passengers while continuing to impose financial penalties on carriers that fail to properly screen passengers. It is important to note that the final rule does not impose any additional requirements on the carriers, and that carriers are free to observe current procedures both in respect to screening their passengers and filing their defenses.

The Service wishes to maintain flexibility in assessing the success of a carrier's screening procedures. The Service has devised an initial means of measurement, as set forth in the following paragraphs, but will re-examine this strategy if such re-examination is appropriate. The Service is committed to working with the carriers and will consult with them on any contemplated changes in the method of assessment.

Under the methodology, a carrier's performance level (PL) will be determined by taking the number of each carrier's nonimmigrant violations of section 273 of the Act for a fiscal year and dividing this by the number of documented nonimmigrants transported by the carrier for the same fiscal year and multiplying the result by 1,000. A carrier's PL will be calculated annually.

The Service shall establish an Acceptable Performance Level (APL), based on statistical analysis of the performance of all carriers, as a means of evaluating whether the carrier has successfully screened all of its passengers in accordance with 8 CFR 273.3. The APL shall be determined by taking the total number of all carrier nonimmigrant violations of section 273 of the Act for a fiscal year and dividing this by the total number of documented nonimmigrants transported by all

carriers for the same fiscal year and multiplying the result by 1,000.

The Service shall establish a Second Acceptable Performance Level (APL2), based on statistical analysis of the performance of all carriers at or better than the APL, as a means of further evaluating carrier success in screening its passengers in accordance with 8 CFR 273.3. Using carrier statistics for only those carriers which are at or better than the APL, the APL2 shall be determined by taking the total number of these carriers' nonimmigrant violations of section 273 of the Act for a fiscal year and dividing by the total number of documented nonimmigrants transported by these carriers for the same fiscal year and multiplying the result by 1,000.

Carriers which have achieved a PL at or better than the APL, as determined by the Service, will be eligible for a 25 percent fine reduction in the amount of any fine covered by this provision if the carrier applies for a reduction, refund, or waiver of fines according to the procedures listed in 8 CFR 280.12 and 8 CFR 280.51. Carriers which have achieved a PL at or better than the APL2, as determined by the Service, will be eligible for a 50 percent fine reduction in the amount of any fine covered by this provision if the carrier applies for a reduction, refund, or waiver of fines according to the procedures listed in 8 CFR 280.12 and 8 CFR 280.51. Additional factors the Service will consider in determining whether the Service will reduce, refund, or waive a fine under section 273 of the Act and the amount of such reduction, refund, or waiver are: (1) The carrier's history of fines violations, (2) the carriers payment record for fines, liquidated damages, and user fees, and (3) the existence of any extenuating circumstances. In the future, the Service may consider other factors in evaluating carrier performance including participation in data sharing initiatives or evaluation of a carrier's performance by particular port(s) of embarkation and/or route(s) to determine carrier fines mitigation levels.

To maintain flexibility in determining the success of a carrier's screening procedures, the Service will not include in the regulation the methodology it will use in determining a carrier's PL, the APL, or the APL2 or the fines reduction percentage levels. Both the methodology used to determine the success of a carrier's screening procedures and the fines reduction percentage will be periodically revisited by the Service to maximize carrier cooperation and vigilance in their screening procedures. The Service shall compute all carrier PLs, the APL, and the APL2 periodically but may elect to use the APL or APL2 from a previous period when determining carrier fines reduction, refunds, or waivers for a specific period(s). While the individual carrier's PL will be computed at least annually, the benchmark APL and APL2 may apply to a longer period. Initially the Service may set the benchmark criteria for 3 years. If this is done, it will be done across the board for all carriers. The Service will publish any significant adverse changes regarding fines reduction in the **Federal Register** in accordance with the Administrative Procedure Act (APA) prior to implementation. Maintaining a flexible approach allows the Service to work in partnership with the carriers toward the mutual goal of decreasing the number of improperly documented nonimmigrants transported to the United States.

Carriers may elect to sign a Memorandum of Understanding (MOU) with the Service for the broader application of the reduction, refund, or waiver of fines imposed under section 273 of the Act by agreeing to perform additional measures to intercept improperly documented aliens at ports of embarkation to the United States. The MOU is attached as an appendix to this final rule. Carriers performing these additional measures to the satisfaction of the Commissioner would be eligible for *automatic* fine reductions, refunds, or waivers as prescribed in the MOU. Carriers signatory to the MOU with the Service would be eligible for an automatic fine reduction of 25 or 50 percent depending on whether a carrier's PL is at or better than the APL or APL2 respectively, as determined by the Service. Carriers not signatory to an MOU would not be eligible for automatic fine reductions, refunds, or waivers. Nevertheless, this rule does not preclude any carrier, whether or not signatory to the MOU, from requesting fines reduction, refund, or waiver according to the procedures listed in 8 CFR 280.12 and 8 CFR 280.51. Even if the carrier's PL is not at or better than the APL, the carrier may receive an automatic fine reduction of 25 percent, if it meets certain conditions, including: (1) It is signatory to the MOU, which is predicated on the carrier submitting evidence that it has taken extensive measures to prevent the transport of improperly documented passengers to the United States, and; (2) it is in compliance with the MOU. This evidence shall be submitted to the Assistant Commissioner for Inspections for consideration. Evidence may include, but is not limited to, the following: (a) Information regarding the carrier's document screening training program, including attendance of the carrier's personnel in any Service, Department of State, or other training programs, the number of employees trained, and a description of the training program; (b) information regarding the date and number of improperly documented aliens intercepted by the carrier at the port(s) of embarkation, including, but not limited to, the alien's name, date of birth, passport nationality, passport number, other travel document information, reason boarding was refused, and port of embarkation, unless not permitted by local law or local competent authority. In such instances, the carrier shall notify the Service of this prohibition and shall propose alternative means for meeting this objective; and, (c) any other evidence to demonstrate the carrier's efforts to properly screen passengers destined for the United States; and, (3) it appears to the satisfaction of the Assistant Commissioner for Inspections that other Service data and information, including a carrier's PL, indicate the carrier has demonstrated improvement in the screening of its passengers. The evidence that must be submitted to the Service by a carrier whose PL is not at or better than the APL, is considered an information collection which is covered under the Paperwork Reduction Act (PRA). Accordingly, those carriers whose PL is below the APL cannot submit evidence to the Service until the information collection is approved by the Office of Management and Budget (OMB) in accordance with the PRA. Once the Service receives approval from OMB on the information collection, it will notify the public by PRA notice in the **Federal Register** that the information collection is approved.

The levels for fines mitigation are loosely based on the Canadian fines mitigation system. Based on performance levels of the carriers, the Canadian system provides for an automatic fines reduction of 25 percent upon the carrier signing an MOU with the Canadian Government. Through attaining performance standards established in the Canadian MOU, carriers can earn further reductions of 50, 75, or 100 percent of their fines.

This rule further clarifies fines imposed under section 273(d) of the Act by stating that provisions of section 273(e) of the Act do not apply to any fine imposed under section 243(c)(1)(B) of the Act, prior section 273(d) of the Act in effect until April 1, 1997, nor under any provisions other than sections 273(a)(1) and 273(b) of the Act.

On June 10, 1996, at 61 FR 29323–29327, the Service published a proposed

rule with requests for comments in the **Federal Register**, in order to comply with section 209(a)(6) of the Immigration and Nationality Technical Corrections Act of 1994, which permitted the Service to mitigate fines in certain cases where the carrier demonstrates that it had screened all passengers in accordance with regulations prescribed by the Attorney General or if circumstances exist that the Attorney General determines would justify such mitigation. Interested persons were invited to submit written comments on or before August 9, 1996. The following is a discussion of those comments received by the Service and the Service's response.

**Discussion of Comments on the Proposed Rule**

The Service received a total of 15 written responses containing comments on the proposed rule. The respondents were classified as follows:

Fourteen respondents commented that the proposed methodology by which the Service will calculate the carrier's individual performance level (PL) and the acceptable performance levels (APL and APL2) are not accurate measures of a carrier performance. Many reasons were cited as follows:

One objection to the methodology was that the carriers were seen as being ''pitted'' against one another instead of being rated on individual merit. The Service does not intend for carriers to compete against each other. The Service does intend to use the APL as a measurement of individual carrier performance. To respond to several commenters on the recalculation of the PL, APL, and APL2 figures, the PL will be calculated annually for individual carriers. The 1994 APL and APL2 will be used as the standard for the past fines being held in abeyance and for the fiscal years 1995–1997 and possibly longer, based on Service discretion. Individual carrier performance is compared against this overall average performance level of all carriers (APL and APL2). Carriers will be rewarded by the mitigation of carrier fines of 25 or 50 percent, depending on a carrier's PL as compared to this overall average. Individual statistical performance needs a baseline to measure performance. Therefore, the Service has used the overall average of all carriers to create the necessary baseline.

Some commenters objected to FY 94 being used as the baseline. The Service chose FY 94 since it was the first year in which the Service was able to obtain the total number of documented nonimmigrant passengers per carrier from the Form I–92, Aircraft/Vessel Report. Prior to FY 94, this data was discarded.

Several commenters claimed that requiring carriers to meet or exceed an ''arbitrary'' APL is inconsistent with the intent of Congress and is unrelated to the basic concept of mitigation. Commenters argued that Congress ''intended'' that section 273(e) would result in complete relief from the fine procedures, so that if a carrier satisfies the screening requirements, the Service would be required to reduce the fine to zero. These commenters believe that the proposed rule is contrary to this ''intent'' because the proposed rule permits the Service to reduce the fine by a specified amount that is less than 100 percent. The Service disagrees with the commenters' claims about Congressional ''intent.'' The intent of any statute is to be found in the text of the statute itself. *See Mallard* v. *U.S. Dist. Ct. for the S. Dist. of Iowa*, 490 U.S. 296, 300 [1989]; *INS* v. *Phinpathya*, 464 U.S. 183, 189 [1984]. Section 273(e) of the Act provides that the Attorney General ''*may* * * * reduce[], refund[], or waive[]'' a fine under section 273(a) and (b), ''*under such regulations as the Attorney General shall prescribe*'' [emphasis added]. Thus, the statute entrusts to the Attorney General's discretion the authority to determine under what circumstances the Service should reduce, refund, or mitigate a fine under section 273(a) and (b). Nothing in section 273(e) of the Act requires the Service, in the exercise of the Attorney General's discretion, either to reduce the fine to zero in every case or to leave the fine at the full statutory amount. Nor does the existing legislative history support the commenters' claims about the ''intent'' of section 273(e) of the Act. *See* 140 Cong. Rec. S14400–S14405 [daily ed. October 6, 1994]; id., H9272–H9281 [daily ed. September 20, 1994]. The Service contends that section 273, read as a whole, provides both a ''positive'' and a ''negative'' incentive for a carrier to ensure that it permits only aliens with proper documents to board airplanes and other vessels bound for the United States. The ''negative'' incentive is the risk of incurring the statutory fine. The ''positive'' incentive is that the amount of the fine may be reduced, if the carrier has acted reasonably in its efforts to screen passengers. The carrier demonstrates that it has properly screened its passengers by having a PL at or better than the APL as determined by the Service. Measuring the performance of carriers is basic to the concept of mitigation. The policy of imposing a monetary penalty, but mitigating the amount of the penalty if a carrier has taken appropriate steps to screen passengers is a reasonable way to implement section 273 as a whole. This policy is well within the authority of the Attorney General to promulgate regulations for the administration of the immigration laws.

It must be emphasized that the Service policy of strictly enforcing the fine provisions of section 273 of the Act in appropriate cases is a continuation of a more than 70-year-old policy of carrying out Congress' intent to hold carriers responsible for passengers they have transported to the United States. The Board of Immigration Appeals (the Board) and the courts have consistently held that carriers must exercise reasonable diligence in boarding their passengers for transport to the United States and are subject to administrative fines for failure to do so, e.g., *Matter of Eastern Airlines, Inc., Flight #798,* 20 I&N Dec. 57 (BIA 1989); *Matter of M/V Guadalupe,* 13 I&N Dec. 67 (BIA 1968); *New York & Porto Rico S.S. Co.* v. *United States,* 66 F.2d 523, 525 (2d Cir. 1933).

The imposition of administrative fines in appropriate cases has long been an important tool in enforcing our immigration laws and safeguarding our borders. In enacting both section 273 of the Act of 1952 as well as section 16 of the Immigration Act of 1924, the precursor of section 273, Congress intended to make the carrier ensure compliance with the requirements of the respective statutory provisions. *See* Joint Hearings on the Revision of Immigration, Naturalization, and Nationality Laws, Senate and House Subcommittees on the Judiciary, Testimony of Stuart G. Tipton, General Counsel, Air Transport Association of America at p. 294 (March 14, 1951); *Matter of M/V ''Runaway'',* 18 I&N Dec. at 128 (citing section 273 cases). Indeed, in enacting section 273 of the Act, Congress strengthened the previous penalty provisions, which only applied to carriers unlawfully transporting immigrants to this country, to include the unlawful transport of nonimmigrants as well. *See Matter of S.S. Greystroke Castle and M/V Western Queen,* 6 I&N Dec. 112, 114–15 (BIA, AG 1954); Legal Opinion of the INS General Counsel, 56336/273a at 6 (Sept. 3, 1953). The intent of Congress embodied in sections 273(e) is to reward carriers which properly screen their passengers prior to coming to the United States. By determining a carrier's PL and rewarding carriers with a satisfactory PL through fines mitigation, the Service fulfills the intent of Congress.

One commenter requested that ''[t]he Service should expressly agree that it will not initiate legislation to increase the amount of the penalty for violation of [section 273 of the Act] for at least five years.'' As stated previously, the Service views the fines program as an important tool in enforcing our immigration laws by imposing financial penalties on those carriers which fail to properly screen passengers. The Executive Branch has a constitutional duty to recommend legislation that the Executive Branch considers necessary or appropriate. Therefore, the Service does not agree with the commenter's request. The Service does note, however, that the Service is required by statute to adjust civil administrative fines by regulation to account for the effect of inflation. Federal Civil Penalty Inflation Adjustment Act of 1990, § 4, *as amended by* Debt Collection Improvement Act of 1996, Pub. L. No. 104–134, ch. 10, § 31001(s)(1)(A), 110 Stat. 1321, ______ (1996).

Some commenters claimed that the APL structure encourages the continuance of the ''adversarial relationship'' between the carriers and the Service. On the contrary, carrier organizations and the Service have conducted extensive dialogue on the formulation of this rule. The past collaboration between the carrier organizations and the Service led to the near-completion of the Carrier Cooperative Agreement. The Agreement was the precursor to the present fine mitigation regulation language and corresponding MOU. The Agreement had the endorsement of the major carrier organizations. The Service also actively enlisted carrier participation in the writing of the fines mitigation proposed rule. Meetings were held with the carrier organizations on several occasions to discuss the fines mitigation legislation and the mutual concerns of the Service and the carriers. The Service maintains a strong customer orientation within the boundaries of its mission as evidenced by the National Performance Review (NPR) initiatives at the major Ports-of-Entry. The Service has actively involved the carriers, as major stakeholders, the re-engineering of the inspection process. The Service values its cooperative relationship with the carriers and their parent organizations. The Service believes the cooperative nature of the MOU to be signed with the carriers will lead to an even closer, mutually beneficial relationship. The ultimate customers, the American people and bona fide passengers, are better served by the carriers and the Service by preventing the transportation of improperly documented aliens to the United States. While none of these considerations eliminates the tension inherent in the relationship between a regulatory agency and the entities subject to regulation, they do bespeak as cooperative a relationship as possible.

Some commenters claimed that the variables used in calculating the PL, APL, and APL2 are not clearly defined while other variables, such as carrier size, market characteristics, risk factors at ports of embarkation, passenger nationalities, local government laws, etc., are not factored in the calculations. The Service contents the factors are clearly defined. The Service will calculate a carrier's PL by dividing the number of each carrier's violations of section 273 of the Act for a fiscal year by the number of documented nonimmigrants transported by the carrier and multiplying the result by 1,000. This calculation will include only those aliens who are documented by the completion of an I–94 and statistically recorded on Form I–92. This calculation does not include violations for improperly documented first-time immigrants or lawful permanent residents, Canadian citizens, lawful residents of Canada, and any other class of nonimmigrant aliens not required to complete the Form I–94 as enumerated in 8 CFR 231.1. In determining the number of passengers transported to the United States by each carrier, the passengers brought from contiguous territory have been omitted from the total number of passengers transported as requested by several commenters to the rule. They correctly pointed out that to include these numbers when section 273 of the Act specifically excludes fines levied for transporting improperly documented passengers from contiguous territory would unfairly alter the PL, APL, and APL2 calculations. The APL will be calculated by taking the total number of all carrier violations of section 273 of the Act for a fiscal year and dividing this by the total number of documented nonimmigrants transported by all carriers for the same fiscal year and multiplying the result by 1,000. The same groups of aliens which have been omitted from the calculation of a carrier's PL have also been omitted for the calculation of the APL. The second Acceptable Performance Level (APL2) will be based on statistical analysis of the performance of all carriers at or better than the APL. Using carrier statistics only for those carriers which are at or better than the APL, the APL2 shall be determined by taking the total number of these carrier violations of section 273 of the Act for a fiscal year and dividing by the total number of documented nonimmigrants transported by these carriers for the same fiscal year and multiplying the result by 1,000. Likewise, the same groups of aliens which have been omitted from the calculation of a carrier's PL and APL have also been omitted for the calculation of the APL2. Carrier size is therefore inconsequential to the determination of a carrier's PL. The three measurements show the number of violations under section 273 of the Act per 1,000 passengers transported. This enables the Service to even the playing field and determine the carrier performance of small and large carriers per 1,000 passengers. Other variables, including market characteristics, risk factors at ports of embarkation, passenger nationalities, and local government laws, have not been factored into these numbers. Nevertheless, even if a carrier's PL is not at or better than the APL, due to these variables, the carrier may receive an automatic 25 percent reduction in fines, if it meets certain conditions, including being signatory to the MOU predicated on the submission of evidence demonstrating that the carrier has taken extensive measures to prevent the transport of improperly documented passengers to the United States and remaining in compliance with the MOU. This evidence must be submitted to the Assistant Commissioner for Inspections for consideration. Evidence may include, but is not limited to, the following: (1) Information regarding the carrier's document screening training program, including attendance of the carrier's personnel in any Service, Department of State, or other training programs, the number of employees trained, and a description of the training program; (2) information regarding the date and number of improperly documented aliens intercepted by the carrier at the port(s) of embarkation including, but not limited to, the alien's name, date of birth, passport nationality, passport number, other travel document information, reason boarding was refused, and port of embarkation; and, (3) any other evidence to demonstrate the carrier's efforts to properly screen passengers destined to the United States. The Service will consider these variables and Service data in determining fines mitigation for carriers failing to meet the APL level. The Service has previously stated in the proposed rule summary that it may consider other factors in evaluating carrier performance, including participation in data sharing initiatives or evaluation of a carrier's performance

by particular port(s) of embarkation and/or route(s) to determine carrier fines mitigation levels at a later date as technology improves and more information is available.

Commenters calculated that only 20 percent of the carriers would be entitled to any fines mitigation under the Service's methodology. Some respondents further stated that the rule was deliberately designed to defeat Congress' intent by making a substantial degree of mitigation too difficult for a carrier to achieve.

To the contrary, the Service's calculations, upon which the PL, APL, and APL2 will be determined, show that 41 percent of the carriers (45 out of 109) will qualify for fines mitigation for fiscal year 1995 based on FY 94 violations. Nineteen (19) percent of the carriers (21 out of 109) achieved a PL at or better than the APL2 and are eligible for 50 percent fines mitigation and 24 carriers achieved a PL at or better than the APL and are eligible for 25 percent fines mitigation. This does not include those carriers which apply for fines mitigation based on the submission of evidence as described in section 4.13 of the MOU (*See* attachment). For violations in FY 96, the Service plans to retain the APL2 and APL yardsticks from FY 94 to determine fines mitigation. Further, 53 percent of the carriers (55 our of 104) are eligible for fines mitigation in FY 96 based on violations which occurred in FY 95 using the FY 94 APL yardstick. Thirty-two percent of the carriers (33 out of 104) are eligible for 50 percent fines mitigation in FY 96 for having a PL at or better than the FY 94 APL2 yardstick. The Service envisions that cooperation in the sharing of information regarding fraudulent documents, the training of carrier agents by the Service's Ports-of Entry officers, carrier consultants, and overseas officers, and carrier dissemination of this information to their agents at the ports of embarkation, will continue to lower the number of improperly documented aliens arriving at United States Ports-of-Entry. The Service expects that the number of carriers eligible for fines mitigation to increase for FY 97 and beyond. Carrier interest in the training of its agents in the immigration laws and regulations of the United States together with invaluable Service document training has made the carrier-Service partnership a success.

Several commenters suggested that the Service should increase the levels of fines mitigation for those carriers who meet the APL and APL2, including up to 100 percent fines mitigation. Some respondents suggested having higher levels (for example, APL3 or APL4 levels). The amount of the fines mitigation, including possible increases to a higher percentage for violations of section 273 of the Act for carriers with an exceptional PL, and higher levels of fines mitigation shall be re-examined by the Service at a later date. The Service is not adverse to increasing the amount of fines mitigation or having higher levels providing it is in the interest of the American people to do so.

Several commenters suggested that the Service's methodology in determining performance levels should be entirely abandoned. They stated that, if the Service must employ such a method, the calculation should be made using the carriers' PL median ratio as the APL and giving fines mitigation to all those carriers whose PL is at or better than this average. These respondents contend that such a calculation would be a fairer representation of carrier performance and enable a significantly higher percentage of carriers to qualify for fines mitigation. This calculation simply rewards the top 50 percent of the carriers regardless of the actual performance of the carrier. The Service's methodology of using the overall PL ratio measures a carrier's performance against the average performance of all carriers in FY 94. As stated previously, the Service calculates that 41 percent of the carriers will be eligible for fines mitigation for FY 95 violations of section 273 of the Act. Fifty-three percent of the carriers are eligible for fines mitigation in FY 96 based on violation which occurred in FY 95 using the FY 94 APL. This favorably compares to the respondents suggestion that 50 percent of the carriers should be eligible for fines mitigation. The Service believes its methodology is sound but will re-examine it periodically to ensure that it sets both an appropriate benchmark by which to measure carrier performance and provides an appropriate level of relief for those carriers whose performance exceeds the norm.

Some respondents argue that the results of the calculations would be dramatically different if all passengers were considered in the methodology. Section 273 of the Act clearly specifies that the carrier can only be fined for the transportation of ''* * * (other than from foreign contiguous territory) any *alien* [emphasis added] who does not have a valid passport and an unexpired visa, if a visa is required under this Act or regulations issued thereunder.'' Therefore the Service cannot fine carriers for the transportation of United States (U.S.) citizens or for improperly documented passengers arriving from contiguous territory and maintains no records on improperly documented U.S. citizens or improperly documented passengers arriving from contiguous territory. Since these passengers cannot be fined under section 273 of the Act, they are omitted from the carrier's passenger calculations. The reason that some other groups of aliens are not counted in the passenger number statistics is due to the fact that the Service cannot collect this information because they are exempt from presentation of the Form I–94, Arrival/Departure Record. Intending and returning immigrants and nonimmigrants are not required to complete Form I–94 and are counted together with U.S. citizens of Form I–92, Aircraft/Vessel Report. Only the number of documented nonimmigrants applying for admission to the United States with a Form I–94 is recorded on Form I–92 by the Service. This information on Form I–92 is used by the Service to determine the PL, APL, and APL2.

One respondent argued that if the Service will not consider immigrants in its methodology, then any violations involving those persons who destroy their documents prior to arriving in the United States, also known as document-destroyers, should be removed from the calculations since such aliens are actually intending immigrants. As previously stated, section 273 of the Act requires valid documentation for aliens. A document-destroyer is an alien. Therefore, he or she requires valid documentation. Failure to have valid documentation requires the Service to impose a fine of $3,000 on the carrier for the violation. Every improperly documented alien may be an intending immigrant. The fact remains that the document-destroyers do not possess the necessary documentation required of immigrants or non-immigrants. Therefore, the carrier is liable for fines under section 273 of the Act for bringing an improperly documented alien to the United States. Other commenters simply requested the Service not to count carrier violations involving those aliens who destroy their documents on the aircraft. The Service cannot ignore the fact that the carrier transported a passenger to the United States without proper documents. Carriers are responsible for bringing to the United States aliens with proper documentation. It is unreasonable for the carriers to expect the Service to fail to impose fines on carriers where no documents are presented or any evidence that an apparent valid travel document had existed. Thus, the carrier is responsible for the presentation to the alien to the Service with proper

documentation. Nevertheless, the Service has, under the umbrella of prosecutorial discretion, consistently relieved the carriers of fines for document-destroyers and aliens possessing fraudulent documentation. The former group requires the carrier to present evidence that the alien had documentation whose validity was reasonably apparent at the time of boarding. The Service allows the carrier to present photocopies of the documents presented by aliens who have destroyed their documents. Fines for both groups of improperly documented aliens are only imposed when those documents are ''blatantly fraudulent.'' Through the various carrier-Service training programs, the number of document-destroyers has been significantly reduced during the last 4 years. This is evidenced by the dramatic decrease in document-destroyers at John F. Kennedy International Airport from 3,193 document-destroyers in FY 93 to only 582 document-destroyers in FY 96. According to the National Fines Office (NFO) statistics, the percentage of document-destroyer violations as compared to the total number of violations under section 273(a) of the Act dropped from 37.4 percent in FY 93 to 26.9 percent in FY 94, the last year fine statistics were available due to the pending publication of this final rule.

Some commenters requested that the Service postpone the final rule because of cases on appeal to the Board on the strict liability of section 273 of the Act. The commenters pointed out that the Service has acknowledged in a wire to field offices that the ''* * * carrier[s] cannot be held liable for the level of forensic or law enforcement expertise which is the proper province of an official immigration agency'' (*See* Service Wire # 1501217/01CE/1213.000 dated December, 1989, entitled ''Stowaways on Commercial Airline Flights''). Nevertheless, the wire also states that in instances ''[w]here a document is obviously altered, counterfeit, or expired, or where a passenger is an obvious impostor, to the extent that any reasonable person should be able to identify the deficiency, a carrier is required to refuse boarding as a matter of reasonable diligence. The photocopying of such a document does not provide protection from liability to fine.'' In cases involving fraud, the Service has not held the carrier liable for fines under section 273 of the Act unless the fraud is sufficiently obvious that a reasonable person exercising reasonable diligence could have detected the fraud. In FY 94 only six fraudulent document cases qualified for fines using this standard. The Service does not consider it proper to await the Board's decision in any particular case that might now be pending before promulgating this final rule. The Service must decide a fine case according to the law as it exists at the time of decision. To the extent that future precedent decisions of the Board or of the Federal courts continue to refine the jurisprudence of fine cases, the Service will apply these future precedents into its own decision-making.

One respondent argues that the calculations should not include violations where a nonimmigrant was admitted to the United States under a waiver in accordance with 8 CFR 212.1(g), since the granting of such a waiver negates the concept of a violation. Waiving an applicant's documentary requirements subsequent to an arrival is no defense to liability of the carrier under section 273(a) for bringing to the United States an alien without a visa, if a visa is required by law or regulation. *See The Peninsular & Occidental Steamship Company* v. *The United States*, 242 F. 2d 639 (5 Cir. 1957); *Matter of SS Florida*, 5 I&N Dec. 85 (BIA 1954); *Matter of Plane ''F–BHSQ''*, 9 I&N Dec. 595 (BIA 1962). The regulation, 8 CFR 212.1(g) also parallels the granting of a visa waiver to a lawful permanent resident found in 8 CFR 211.1(b)(3).

The regulation at 8 CFR 212.1(g) was recently amended (*See* 61 FR 11717, dated March 22, 1996) to read, in part:

Upon a nonimmigrant's application on Form I–193, a district director at a port of entry may, in an exercise of his or her discretion, on a case-by-case basis, waive the documentary requirements, if satisfied that the nonimmigrant cannot present the required documents because of an unforeseen emergency.

The clarification at 8 CFR 212.1(g) gave the Service the ability to exercise discretion to admit improperly documented nonimmigrants while penalizing carriers by the imposition of fines for the bringing of these aliens to the United States in violation of section 273 of the Act. Amending the regulation clarified any ambiguity regarding carriers' liability to ensure the transportation of properly documented aliens to the United States and to impose penalties for failure to do so, whether or not a waiver of documents in granted. This is similar to the granting of individual waivers to lawful permanent residents under 8 CFR 211.1(b)(3), which also does not relieve the carrier of fine liability under section 273 of the Act. The authority to fine carriers, even when a waiver of documents is granted, has been the intent of Congress since the enactment of the Immigration Act of 1924 which established section 16, the precursor to section 273 of the Immigration Act of 1952.

Thirteen respondents commented that, although section 273(e) of the Act states that fines may be ''reduced, refunded or waived,'' the proposed rule addresses only the reduction of these fines and fails to address the manner by which fines may be refunded or waived. Respondents argue that the proposed rule offers no guarantee of an avenue of full relief form fine liability. Nine respondents commented that the proposed rule refers to mitigating circumstances and extenuating circumstances which would warrant mitigation of fines but that these circumstances are not defined. The respondents state that the National Fines Office (NFO) should specify the circumstances by which it will mitigate fines and define the degree of mitigation applicable to each circumstance.

The term *refund* as defined by *Black's Law Dictatory* means ''[t]o repay or restore; to return money in restitution or repayment.'' For the purposes of fines, this suggests that a fine has been paid by the carrier and money is refunded (repaid, restored, or returned) to the carrier. Under present fines procedures enumerated in 8 CFR 280.12 and 8 CFR 280.51 the Service is required to issue a Form I–79, Notice of Intent to Fine, and to allow the carrier to present evidence in defense of the fine and/or seek mitigation or remittance of the fine. In contested section 273 violations, no refund of money is due because the Service does not require the payment of a violation prior to the case's final disposition. If the carrier is signatory to the Service's proposed fines mitigation Memorandum of Understanding (MOU), the carrier will receive an automatic reduction of its fine prior to the Form I–79 being sent to the carrier. Signatory carriers to the MOU may, in addition, defend the fine in accordance with the procedures outlined in 8 CFR 280.12 and 8 CFR 280.51 to receive fines mitigation or remission.

The term *waived* is defined by *Black's* to mean ''[t]o abandon, throw away, renounce, repudiate, or surrender a claim, a privilege, a right, or the opportunity to take advantage of some defect, irregularity, or wrong. To give up right or claim voluntarily.'' The respondents fail to consider the entire section of 273(e) added by Congress. Section 273(e) of the Act reads, in its entirety:

(e) A fine under this section may be reduced, refunded, or waived under such regulations as the Attorney General shall prescribe in cases in which—

(1) the carrier demonstrates that it had screened all passengers on the vessel or aircraft in accordance with procedures prescribed by the Attorney General, or

(2) circumstances exist that the Attorney General determines would justify such reduction, refund, or waiver.

The respondents omitted the line "* * * under such regulations as the Attorney General shall prescribe * * *."

In addition to the fines mitigation available to carriers under the Service's policy of performance levels, some mitigating circumstances will warrant a further reduction of 25 percent. Some extenuating circumstances will result in a 100 percent waiver of the fine. These circumstances will not be part of the regulation; however, some of the mitigating and extenuating circumstances under which the Service will either mitigate or waive these penalties are listed in the following paragraphs. It is recommended that carriers defend fines cases in which the carrier believes circumstances exist that would warrant further mitigation or waiver of the fine. These cases will be handled on a case-by-case basis. Due to changes in technology and unforeseen circumstances, this list is not a complete one and additions or deletions to it may become necessary. Though the Service contends that section 273(e) of the Act does not require the Service to provide full relief from fines, the Service has on occasion exercised its prosecutorial discretion to de facto "waive" a fine. The Service now has the statutory authority to waive fines if extenuating circumstances exist and will consider these circumstances on a case-by-case basis. Such circumstances may include, but are not limited to, the following situations:

(a) Canadian national (no visa required) not in possession of their Alien Registration Receipt Card (ARC), Form I–551;

(b) Alien who has been rescued at sea;

(c) Documented evidence of a United States Consulate or Service officer providing incorrect information to the carrier resulting in the transportation of an improperly documented alien;

(d) Lawful permanent resident (LPR) who presents self to the carrier as a Visa Waiver Pilot Program (VWPP) applicant and who is in possession of a return ticket indicating a stay of less than 90 days in the United States;

(e) Lawful permanent resident whose Alien Documentation, Identification, and Telecommunication (ADIT) stamp has no expiration date or the expiration date is placed underneath the ADIT stamp;

(f) Nonimmigrant in possession of a one-or-two entry nonimmigrant visa where the previous Service admission stamp is not on the visa or facing passport page;

(g) Alien arriving on a vessel or aircraft landing for emergent reasons and requiring an unscheduled landing in the United States;

(h) Alien arriving on a United States Government chartered aircraft or vessel;

(i) Nonimmigrant in possession of a machine-readable Canadian Border Crossing Card (BCC) without notation indicating it is valid for crossing the United States-Canadian border;

(j) Lawful permanent resident without Form I–551 and who is only in transit through the United States; and,

(k) Alien not in possession of proper documentation but where the carrier presents photocopies of reasonably apparent valid documents seen at boarding and which were subsequently destroyed or discarded en route to the United States. Waiver of the fine would not occur in this instance if the documents were blatantly fraudulent or if the carrier makes a statement to the Service that they suspected the documents to be fraudulent.

Examples of circumstances that would warrant mitigation by 25 percent may include, but are not limited to the following situations:

(a) Nonimmigrant child who is added to a passport subsequent to the issuance of the nonimmigrant visa where the "s" in the word "BEARER(S)" is crossed out;

(b) Lawful permanent resident who is not in possession of Form I–551, but possesses a Form I–797, Notice of Action, removing conditional status and indicating it is valid for travel and employment;

(c) British subject, including British overseas citizen, British dependent territories citizen, or citizen of a British commonwealth country, seeking entry under WVPP but not eligible for the WVPP because they were not a British citizen with unrestricted right of permanent abode in the United Kingdom; and

(d) A nonimmigrant who would otherwise qualify for admission under the Transit without Visa (TWOV) Program except that he or she is arriving at a non-designated TWOV Port-of-Entry.

Eleven respondents cite § 273.4(b) of the proposed regulation as an area of concern. It states: The Service may, at any time, conduct an inspection of a carrier's document screening procedures at ports of embarkation to determine compliance with the procedures listed in § 273.3. If the carrier's port of embarkation operation is found not to be in compliance, the carrier will be notified by the Service that its fines will not be eligible for refund, reduction, or waiver of fines under section 273(e) of the Act unless the carrier can establish that lack of compliance was beyond the carrier's control.

The respondents express no objection to the Service's intention to conduct an inspection of a carrier's screening procedures at a port of embarkation but question whether the Service has the authority to conduct inspections in sovereign countries. The respondents express concern that the Service might consider the carrier to be non-compliant with the screening requirements if the carrier is otherwise compliant but local authorities prevent the Service from performing an inspection. The Service does concur with the comments regarding § 273.4(b). No Service inspection of a carrier's boarding procedure shall take place if not permitted by the local competent authority. The Service never contemplated penalizing a carrier for non-compliance of its screening procedure due to the inability of the Service to inspect its operation at a port of embarkation due to the refusal of a competent authority to grant the Service inspection privileges. However, the Service does expect the carrier to use its good offices with the local competent authority to secure access for a Service inspection. This section of the regulation shall be amended to read as follows:

The Service may, at any time, conduct an inspection of a carrier's document screening procedures at ports of embarkation to determine compliance with the procedures listed in § 273.3, *to the extent permitted by the local competent authority responsible for port access or security. If necessary, the carrier shall use its good offices to obtain this permission from the local authority* [emphasis added]. If the carrier's port of embarkation * * *.

Similarly, three sections of the MOU, 1.3, 3.4, and 3.7, will also be amended with the same language. Nevertheless, if a carrier cannot comply with a section of the MOU because of local law, the carrier must notify the Assistant Commissioner of Inspections, in writing, listing the specific section of the MOU with which it is unable to be in compliance because of said local law or local competent authority. The carrier must notify the Service within ten (10) days after becoming aware of this

inability to comply in order to be deemed in compliance with the MOU. Section 3.14 has been added to the MOU. It reads as follows:

The Carrier agrees to notify the Assistant Commissioner of Inspections, in writing, if it is unable to comply with any section of the MOU because of local law or local competent authority. The Carrier shall list the specific section of the MOU with which it is unable to comply and, to be in compliance with the MOU, shall notify the Service within ten (10) days after becoming cognizant of this prohibition. Further, in such instances the Carrier shall propose alternative means for meeting the objective sought by the paragraph in question. For instance, where review of foreign boarding procedures cannot be performed by INS personnel, the Carrier could provide that an audit of their operation be performed by local authorities or by private auditors.

Additionally, if a carrier's port of embarkation operation was found not to be in compliance, the carrier's eligibility for refund, reduction, or waiver of fines would be jeopardized only for those violations from that port of embarkation. Fines originating from that specific port of embarkation would not be subject to fines mitigation unless the carrier could establish that lack of compliance was beyond the carrier's control. The carrier's entire fines mitigation could be placed in jeopardy the following year if their PL were adversely affected causing the carrier to have an PL worse than the APL or APL2 itself. The Service would be reluctant to allow a carrier with a declining PL that was lower than the APL to receive fines mitigation unless evidence was presented to suggest that the carrier planned to increase or had increased screening and vigilance procedures or that there were extenuating circumstances beyond the control of the carrier.

Six respondents state that the proposed rule, though supposedly based on the Canadian system of fines mitigation, bears little resemblance to the actual Canadian method, which allows for up-front reductions of 100 percent for eligible carriers. The proposed Service fines mitigation policy, though similar to the Canadian fines mitigation system, is significantly different because of the following: (1) Vast differences in traffic volume in the United States as compared with Canada; (2) the large number of ports of embarkation to the United States; (3) the large number of United States Ports-of-Entry; and, (4) the different statutes themselves. The United States Ports-of-Entry handle almost ten times the volume of traffic transported to Canada. The relative small scale of the air traffic to Canada enables the Canadians to screen each air route to Canada so that a standard is created for carrier screening performance from each port of embarkation. By contrast, the huge number of routes to the United States prevents the Service from performing a similar exercise. The Canadian fines system also allows for carrier fines in the transportation of aliens who destroy or discard their documents prior to arrival in Canada. On the other hand, the United States may accept carrier photocopies of these document-destroyers' apparently valid documents and may terminate the fines case upon their submission whereas the Canadians do not accept photocopies.

The respondents further claim that the Service's proposed rule offers a maximum of 50 percent up-front reduction thereby ''forcing carriers to defend themselves in every instance.'' The Service disagrees that the carriers will be forced to defend themselves in every instance if signatory to the MOU. During 8 years of fines interaction with the Service's NFO, the carriers have obtained a thorough knowledge of the fines process and what fines will be terminated by the Service and what fines will not. The examples of mitigating and extenuating circumstances listed above where the Service will waive or mitigate a fine will provide the carriers with further information to determine whether to defend or seek reduction or waiver of a fine.

Some respondents claim the Canadian method resulted in a 50 percent decrease in improperly documented arrivals in the first year of implementation and that the program resulted in enhanced cooperation between the carriers and the Canadian Government. The respondents state that, because the proposed rule does not provide incentives comparable to the Canadian method, relations between the carriers and the Service will not improve and the number of violations of section 273 of the Act will not necessarily decrease.

The Service has seen a downward trend in the transportation of improperly documented aliens nationwide since 1992. The number of violations of section 273 of the Act reached its high point in FY 91 (7,052 violations) and FY 92 (7,072). For FY 94, the last year in which statistics are available due to this final rule, there were only 4,512 violations of section 273 of the Act, a 36 percent decrease. The Service has also noticed the number of document-destroyers at John F. Kennedy International Airport (JFKIA) has decreased from 3,153 in FY 93 to only 582 in FY 96; an 80 percent decrease. The number of asylum claims in JFKIA, which include the document-destroyers and aliens arriving with fraudulent documents, decreased from 9,180 in FY 92 to only 1,213 in FY 96; an 86 percent decrease. The Service views the fines increase to the present sum of $3,000 as the catalyst which made it cost-effective for carriers to seek Service training for its agents stationed at the overseas ports of embarkation. This cooperation between the carriers and the Service has brought both closer to reaching the mutually beneficial goal of reducing the number of improperly documented aliens arriving in the United States. The fines mitigation regulation and corresponding MOU represent an extension of this partnership, where the carrier is financially rewarded for properly screening its passengers prior to embarkation to the United States.

The Service concedes that if this plan is implemented there is no guarantee that the number of violations will decrease. The Service is unsure whether, by decreasing the amount of fines imposed on carriers through this final rule, the carriers will continue to invest the time and monetary resources on the training programs now in place. With carrier turnover of overseas agents at 25 percent per year, the carriers must continue to invest in their training programs on the interception of fraudulent documents and on documentary requirements of the United States so that the number of violations does not increase. Until the effects of fines mitigation on the increase or decrease of violations is known, fines mitigation percentages are to be initiated at only 25 and 50 percent. The Service will retain the flexibility to increase, decrease, or maintain the mitigation reductions and/or the APL and APL2 yardsticks so that any overall decrease in carrier screening can be rectified through appropriate Service action.

Several respondents charged that the Service's proposed rule was deliberately designed to defeat Congressional intent by determining reductions based on payment history. Delinquent carrier fines, liquidated damages, and user fee payments have made this a necessity. Service records reflect that over $5 million of carrier fines, liquidated damages, and user fees are outstanding for more than 30 days. Existing administrative means to enforce collection of these monies are insufficient and have led to litigation. This provision in the final rule will enable the Service to collect the

outstanding obligations of commercial transportation lines in a more timely and cost-effective manner. This policy was first published in the **Federal Register** as a notice of policy regarding contracts between the Service and the carriers (*See* 61 FR 5410, February 12, 1996). In the notice, the Service informed the public of its intention to deny transportation line requests for the following contracts, if the line had an unacceptable fines, liquidated damages, or user fee payment record: (1) Form I–420, Agreement (Land Borders) Between Transportation Line and the United States; (2) Form I–425, Agreement (Preinspection) Between Transportation Line and the United States (At Places Outside of the United States); (3) progressive clearance agreement requests; (4) Form I–426, Immediate and Continuous Transit Agreement, also known as Transit Without Visa (TWOV) agreement; (5) International-to-International (ITI) agreements, also known as In-Transit Lounge (ITL) agreements; and, (6) Form I–775, Visa Waiver Pilot Program (VWPP) Carrier Agreement. An unacceptable fines payment record is one that includes fines or liquidated damages that are delinquent 30 days and have been affirmed by either a final decision or formal order. An unacceptable user fee payment record is one that includes user fees that are delinquent 30 days.

The Service also notified the public of its intention to evaluate existing carrier agreements for possible cancellation on account of a carrier's unacceptable payment record. The Service stated it will notify the affected carrier in writing of the proposed Service decision and will allow the carrier 30 days to make full payment of the debt or to show cause why the debt is not valid. The Service will issue a final determination after the close of the 30-day period. Promptness and good faith in the payment of fines are critically relevant factors in carrier performance which motivates mitigation of fines. It is clearly logical to link the mitigation of fines to the prompt and faithful payment of fines and this reasoning has been upheld in the courts (*See Amwest Surety Insurance Company* v. *Reno,* CA No. 93–56625, DC No. CV–93–03256–JSL[S]). There is no legislative history to support the respondents' claims regarding Congressional intent of section 273(e) of the Act (*See* 140 Cong. Rec. S14400–S14405 [daily ed. October 6, 1994]; id., H9272–H9281 [daily ed. September 20, 1994]).

The Service agrees with the commenter regarding prior notification to the carrier of an unsatisfactory fines, liquidated damages, or user fee payment record before termination of its fines mitigation levels (whether 25 or 50 percent). Therefore, the Service will notify the affected carrier in writing of the proposed Service decision to terminate a carrier's fines mitigation privilege. The Service will allow the carrier 30 days to make full payment of the debt or to show cause why the debt is not valid. Fines incurred during the 30-day period will be mitigated in accordance with the carrier's fines mitigation PL. The Service will issue a final determination after the close of the 30-day period. Carrier fines violations incurred from the date of an adverse determination by the Service to terminate a carrier's fines mitigation privilege will not be subject to automatic fines mitigation based on screening procedures; however, individual requests for reduction, refund, or waiver citing mitigating or extenuating circumstances will be considered.

One respondent requested that the proposed rule include a specific waiver for sanctions against a carrier for the transportation of an alien who is granted asylum or permitted to stay in the United States on humanitarian grounds. The respondent argues that sanctions against the carrier are unfounded as long as the United States has an asylum program and that inhibiting the carrier from transporting refugees to the United States would constitute a human rights violation on the part of the Service. The Service has in place procedures (*See* 8 CFR 280.12 and 280.51) whereby carriers may request mitigation or termination of a fine for extenuating circumstances.

Aliens who desire to request asylum in the United States should follow the normal overseas refugee processing procedures. The Service requires refugees to follow these procedures to obtain the proper documentation to enter the United States. To allow carriers the authority to determine admissibility of aliens not in possession of proper documentation at the port of embarkation, because they indicate a desire to apply for asylum in the United States, would seriously undermine the enforcement of the Act and the security of the United States, and would circumvent existing immigration laws and regulations.

Several commenters have noted that § 273.4(a) requires the carrier to ''provide *evidence* that it screened all passengers on the conveyance for the instant flight or voyage in accordance with the procedures listed in § 263.3'' [emphasis added]. The commenters requested that the term ''evidence'' be explained as to the Service requirement. To fulfill this requirement the carrier must certify, on carrier or its agent's letterhead, that in the particular voyage where an improperly documented alien was transported, the carrier screened all passengers on the conveyance in accordance with the procedures listed in 8 CFR 273.3. Carriers who are not signatory to the MOU who request fines mitigation based on screening procedures must include this certification along with its application for reduction, refund, or waiver of fines in accordance with the procedures outlined in 8 CFR 280.12 and 8 CFR 280.51. Several commenters pointed out the typographical error in § 273.6(b) whereby the word ''not'' was mistakenly omitted form the proposed rule. The sentence is corrected to read as follows:

(b) Carriers signatory to an MOU will *not* [emphasis added] be required to apply for reduction, refund, or waiver of fines in accordance with the procedures outlined in 8 CFR 280.12 and 8 CFR 280.51, but will follow procedures as set forth in the MOU.

Many commenters stated that the regulation and the corresponding MOU have terms which are vague and ambiguous. The Service, during the writing of the Carrier Cooperative Agreement (CCA), the precursor to the present regulation and MOU, was requested to use general language so that the carrier, not the Service, would determine the screening procedures to utilize at the ports of embarkation, since the carrier is in the best position to decide on the amount of screening necessary at particular ports of embarkation. Some ports of embarkation require minimal amount of screening due to the low-risk nature of the passengers while at high-risk ports of embarkation a greater amount is appropriate. The carrier organizations requested that the carriers themselves determine the level of document screening necessary rather than have the Service mandate a level of screening that may not be cost-effective for the carrier.

Several commenters requested the Service to provide fines mitigation based on ''carrier compliance with INS-prescribed screening procedures.'' While the Service has set out the screening requirements carriers must undertake at the ports of embarkation in order to be eligible for fines mitigation, the Service cannot physically verify a carrier's actual screening procedures at every port of embarkation due to the limited Service personnel and the large number of carriers and ports of embarkation. As stated previously, in comparing the Canadian and United States systems for fines mitigation, the

size of the passenger transportation industry in the United States makes the individual verification of a carrier's overseas screening procedures not feasible. The Service contemplates the inspection of only a sampling of carrier screening procedures at foreign ports of embarkation each year. Therefore, the Service is forced to determine carrier screening performance based on the proposed methodology explained previously.

Several respondents claimed that the proposed rule does not "provide carriers with sufficient certainty that fines will be reduced if specified criteria are met." The Service has made it emphatically clear that fines will be reduced if the carrier has effective screening procedures. Effective screening is determined by the carrier's PL and if that PL is at or better than the APL. If the carrier's PL does not meet or exceed the APL, the carrier may still submit evidence in accordance with section 4.13 of the MOU, maintain a satisfactory fines, liquidated damages, and user fee payment record to be eligible for fines mitigation. If there are additional "extenuating circumstances," the carrier may be eligible for additional fines mitigation above and beyond the up-front reductions established by the PL of the carrier. Thus, carriers meeting the first two requirements enumerated in § 273.5(c) of the regulation (i.e. effective screening procedures and satisfactory fines and user fee payment record) can be certain that their fines will be reduced according to the carrier's PL. In addition, carriers not signatory to the MOU may seek mitigation or remission of fines in accordance with the procedures outlined in 8 CFR 280.12 and 8 CFR 280.51.

One respondent incorrectly cites the case of *Linea Area Nacional de Chile S.A.* v. *Sale* to support his argument that it is unfair "to fine a carrier where it has properly screened the passengers for the [Transit Without Visa] TWOV requirements." This case involved a dispute between the carriers and the Service regarding responsibility for the detention of TWOV aliens, and has nothing to do with the boarding of improperly documented TWOV or nonimmigrant aliens.

One commenter queried the significance of the MOU to a carrier whose PL did not meet or exceed the APL and if that carrier would qualify for the 25 percent automatic fines mitigation. *If* the carrier is signatory to the MOU and is *eligible* for automatic fines mitigation, the Service will *not* require the submission of evidence demonstrating the extent to which a carrier prevents the transport of improperly documented passengers for each case. Being signatory to the MOU will satisfy the requirement that the carrier has screened all passengers on the vessel or aircraft in accordance with procedures prescribed by the Attorney General as section 273(e)(1) of the Act requires. Of course, if the carrier can provide evidence that mitigating or extenuating factors should be considered as well, filing a defense for additional fines mitigation would be recommended.

If a carrier is *not signatory* to the MOU, regardless of their PL, the Service *will* require certification that the carrier properly screened its passengers if the carrier is applying for fines mitigation based on screening requirements. The Service intends to consider the evidence presented by a non-signatory carrier, including the carrier's current and past PLs, as well as other Service data and information, prior to the granting of the fines mitigation for screening procedures. In addition, the Service will consider any additional evidence that would demonstrate any mitigating or extenuating factors relevant to additional fines mitigation.

Several commenters wanted the Service to give extra "benefit" to carriers employing professional security agencies. While the Service commends such actions, it would be inappropriate to further reward a carrier for the use of a professional security agency merely because it was deemed "professional." The carrier's reward for the employment of such an agency is the reduction of the number of improperly documented aliens transported to the United States. The fewer number of fines violations a carrier incurs, the lower the carrier's PL. The lower the carrier's PL, the greater the amount of fines reduction. This will result in the reduction in the amount and number of fines imposed on the carriers.

Several commenters requested the source of the figures used in determining a carrier's PL, the APL, and APL2. The number of each carrier's violations is taken from the number of fines violations recorded by the National Fines Office (NFO) for each carrier for each fiscal year. This number omits all fines for lawful permanent residents and fines cases recommended from the Ports-of-Entry which are rejected by the NFO. This number does *not* omit those fines which are appealed to the Board of Immigration Appeals (BIA) by the carrier. To delete the fines appealed by the carrier from this number would decrease a carrier's PL even though the Service contends a fines violation did occur. A carrier which appealed all its fines, no matter how frivolous the appeals, would then have a PL of zero. This result would create a perverse incentive to appeal all cases, regardless of the merits of a particular case. The more prudent course, which the Service will follow, is to consider in the calculation of the PL all fines imposed, including those on appeal, but then to recalculate a carrier's PL, as necessary, to reflect those cases in which the carrier prevails on appeal to the BIA or in the courts.

The source of the number of documented nonimmigrant arrivals per carrier per fiscal year is obtained from the Forms I–92, Aircraft/Vessel reports completed at the individual Ports-of-Entry. Based on the suggestion of some commenters, the Service intends to use the same yardstick (APL and APL2) computed by using data from fiscal year 1994 (FY) for the mitigation of fines for FY 95, FY 96, and for FY 97. The Service may exercise its discretion to use the APL and APL2 FY 94 yardstick for fines mitigation for FY 98 and FY 99. The Service concurs with several commenters' observation that by re-computing the APL and APL2 annually, the Service would continually raise the fines mitigation standard, preventing carriers from ever qualifying for fines mitigation by having a "moving bell curve."

Some commenters have stated that carriers are eligible for fines mitigation under section 273(c) of the Act. The Service does not concur. Section 273(c) of the Act provides for fines remission or refund but not for fines mitigation. The Service has remitted or refunded fines when a carrier demonstrates that it has exercised reasonable diligence. Section 273(c), however, does not provide for fines reduction or mitigation.

Some commenters wanted the Service to "make clear that training is not tied to attendance of such [Carrier] personnel at INS training sessions." The Service has no intention of dictating to the carrier the type of training it should provide its employees. However, the Service does require the carrier to have trained employees at the ports of embarkation to examine all travel documents. Further, carriers signatory to the MOU agree to participate in Service training programs and use Service Information Guides (*See* section 3.9 of the MOU).

Some respondents have stated that, due to time constraints and carrier facilitation needs, the carrier is unable to perform a thorough examination of a passenger's travel documents. In addition, several commenters claim they fear legal action if they refuse to board a passenger. Nevertheless, Congress

requires the carrier to make certain its passengers are properly documented and gives the Service the authority to impose financial penalties on carriers which bring improperly documented aliens to the United States. *See Matter of Swiss Air "Flight 164" 15 I&N Dec 111 (BIA 1974).*

One commenter requested that the Service determine the PL, APL, and APL2 quarterly. At the present time the Service projects a minimum 3-month lag time in the computation of a carrier's PL each fiscal year. If technological advances permit the rapid collection of this information, the Service will consider the commenter's suggestion for quarterly or semi-annual computation of a carrier's PL and/or the APL/APL2. Additionally, the Service is not opposed to future consideration of the proposal made by the commenter requesting that the Service determine carrier PLs, APLs, and APL2s for individual ports of embarkation (i.e., individual routes). As technology improves, the Service will examine the feasibility of making these calculations and presenting this approach to the carriers. Consultations with the carriers on these and other modifications, including risk assessments, route variations, past and present carrier performance history, and a general commitment to the process of proper screening of passengers, should be ongoing so that needed regulatory changes, if any, or changes to the MOU, can be incorporated in the next revision of the fines mitigation program.

The Service concurs with several commenters who suggested that the MOUs should all expire on a certain day rather than 2 years from the date of each carrier's approval by the Service. Accordingly, the MOU will expire on September 30, 2000, for all carriers.

The Service concurs with one commenter's suggestion that the Service should immediately share information with the carrier at the Port-of-Entry where the fines violation occurs and is recommended to the Service. The Service currently provides the carrier with a copy of the Form I–849, Report to National Fines Office [NFO] of Possible Violation of the INA, which gives the carrier the Service's reason(s) for recommendation of the fine to the NFO for issuance of the Form I–79, Notice of Intent to Fine. It is the issuance of Form I–79 that is the official Service notification to a carrier that a violation has occurred for which a fine may be assessed. The Form I–79 is issued by the NFO after review of the evidence submitted. If the carrier would like additional information, the NFO can answer most inquires. If carriers want a revision of the Form I–849, the Office of Inspections should be requested to consider such suggestions when the Service next modifies the Form I–849.

The Service concurs with a commenter that the Service should designate a coordinator to be the contact point for all issues arising from implementation of the MOU. Therefore, section 4.1 has been added to the MOU and subsequent sections re-numbered. Section 4.1 reads as follows:

The Director of the National Fines Office will serve as a coordinator for all issues arising from the implementation of this MOU. The INS shall provide the carrier with the coordinator's name, address, telephone, and facsimile number.

The Service has also taken into consideration suggested changes to several sections of the MOU and concurs on the following amendments to the MOU:

In section 3.2 the word "verify" is replaced by the phrase "confirm, to the best of their ability" and the word "apparent" is added to the last sentence. Section 3.2 is amended to read as follows:

The Carrier agrees to verify that trained personnel examine and screen passengers' travel documents to confirm, to the best of their ability, that the passport, visa (if one of required), or other travel documents presented are valid and unexpired, and that the passenger, and any accompanying passenger named in the passport, is the apparent rightful holder of the document.

In section 3.6 one commenter requested the addition of the sentence "[f[ollowing notification by the INS, or its representative, the" to precede the present section 3.6. The Service concurs with this suggestion. Section 3.6 is amended to read as follows:

Following notification by the INS, or its representative, the Carrier shall refuse to knowingly transport any individual who has been determined by an INS official not to be in possession of proper documentation to enter or pass through the United States. Transporting any improperly documented passenger so identified may result in a civil penalty. At locations where there is no INS presence, carriers may request State Department Consular officials to examine and advise on authenticity of passenger documentation. State Department Consular officials will act in an advisory capacity only.

The Service also concurs with the commenter regarding section 3.8 dealing with carrier security at the port of embarkation. The word "adequate" shall be replaced by the word "reasonable." Section 3.8 is amended to read as follows:

The Carrier shall maintain a reasonable level of security designed to prevent passengers from circumventing any Carrier document checks. The Carrier shall also maintain a reasonable level of security designed to prevent stowaways from boarding the Carrier's aircraft or vessel.

The Service is committed to continuing consultations with the carrier organizations in the area of fines mitigation. The Service views the fines mitigation regulation and the corresponding carrier-Service MOU as prime examples of carrier-Service cooperation in facilitating travel for the general public and protecting the American people through the enforcement of the immigration laws and regulations. The Service views the fines mitigation final rule as a continuance of this carrier-Service interaction and welcomes all future carrier questions and issues to improve passenger facilitation and enforcement of the Act and its regulations.

**Regulatory Flexibility Act**

The Commissioner of the Immigration and Naturalization Service, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that the rule will not have significant economic impact on a substantial number of small entities. This rule will not adversely affect carrier expenditures but will lessen carrier expenditures for certain carriers, including carriers that may qualify as "small entities," which properly screen passengers being transported to the United States. The imposition of fines is a requirement of law and a valuable tool in preventing the landing of undocumented or insufficiently documented aliens in the United States. Fines for transporting improperly documented passengers are imposed by many countries, including Canada, Germany, and the United Kingdom. Currently, if carriers want to lessen the monies paid to the Service for fines violations under section 273 of the Act, the carrier trains its employees in documentary requirements for entering the United States. This training is necessary regardless of fines mitigation provisions. Any additional training required by the MOU can be provided by the Service's Carrier Consultant Program (CCP) upon carrier request. Carrier agent training is generally one to two days and can be conducted at the port of embarkation. Training materials are provided by the Service. The only

cost to the carrier will be the lost productivity of the carrier agent to attend the training sessions. However, that cost exists now so the Service anticipates little or no increase in costs to any participating carrier. The Service has also developed an Information Guide to be distributed to the carriers for use at the foreign ports of embarkation. It will function as a resource to assist carrier personnel in determining proper documentary requirements and detecting fraud. Most carriers probably do a cost-benefit analysis to determine the amount of carrier training versus fines violation costs. Likewise, each carrier will probably conduct a cost-benefit analysis prior to signing the MOU. Carriers signatory to the MOU will have *automatic* fines reduction and will save the cost of filing appeals for every case, unless further reduction or termination of the fine is sought. Smaller carriers that have high violation rates or cannot dedicate resources to training its agents are invited to contact the Service on the best way to address these problems. There is no indication that smaller carriers are fined more or less than larger carriers. Carrier size is not a factor in the determination of a carrier's performance level. With section 286 of the Act being amended by section 124 of the Illegal Immigration Reform And Immigrant Responsibility Act of 1996 (Pub. L. 104–208, Dated September 30, 1996, known as IIRIRA), the Service is mandated to provide training and technical assistance to commercial airline personnel regarding the detection of fraudulent documents at an amount not less than five percent of the Service's user fee revenue. Smaller carriers can therefore rely on the Service to fulfill many of their training requirements. However, ultimately it is up to the carrier to consider the costs and benefits of participating in the program.

**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 1 year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

**Small Business Regulatory Enforcement Fairness Act of 1996**

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in cost or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets.

**Executive Order 12866**

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

The Service has *estimated* the reduction in collections due to the implementation of this regulation as follows:

**FY95 Backlogged Cases: 2033**

Up to 19% of the carriers may receive 50% reduction (based on APL2); up to 22% of the carriers may receive 25% reduction (based on APL); up to 29% of the carriers may receive 25% reduction (based on MOU); and, up to 30% of the carriers may receive no reduction.

*Estimated collections due from FY95 cases:* $4.7 million.

*Estimated collections without mitigation:* $6.1 million.

*Difference in collections:* $1.4 million or 23% reduction.

**FY96 Backlogged Cases: 3086**

Up to 32% of the carriers may receive 50% reduction (based on APL2); up to 21% of the carriers may receive 25% reduction (based on APL); up to 24% of the carriers may receive 25% reduction (based on MOU); and, up to 23% of the carriers may receive no reduction.

*Estimated collections due from FY96 cases:* $6.8 million.

*Estimated collections without mitigation:* $9.3 million.

*Difference in collections:* $2.5 million or 27% reduction.

**FY97 Backlogged Cases: 2097**

Up to 37% of the carriers may receive 50% reduction (based on APL2); up to 18% of the carriers may receive 25% reduction (based on APL); up to 23% of the carriers may receive 25% reduction (based on MOU); and, up to 22% of the carriers may receive no reduction.

*Estimated collections due from FY97 cases:* $4.6 million.

*Estimated collections without mitigation:* $6.3 million.

*Difference in collections:* $1.7 million or 27% reduction.

**Executive Order 12612**

The regulation adopted herein will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

**Executive Order 12988 Civil Justice Reform**

This final rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of E.O. 12988.

**Paperwork Reduction Act of 1995.**

The supplementary information portion of this final rule requires carriers whose PL is not at or better than the APL, to submit evidence to the Service so that they may receive an automatic fine reduction of 25 percent, if certain conditions are met. The evidence is considered an information collection which is subject to review by OMB under the Paperwork Reductions Act of 1995. Therefore, the agency solicits public comments on the information collection requirements for 60 days in order to:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

The Service, in calculating the overall burden this requirement will place upon the public, estimates that approximately 65 carriers whose PL is not at or better than the APL, will submit evidence to take advantage of the 25 percent fines reduction. The Service also estimates that it will take each carrier approximately 100 hours to comply with the evidence requirements. This amounts to 6500 total burden hours.

As required by section 3507(d) of the Paperwork Reduction Act of 1995, the Service has submitted a copy of this final rule to OMB for its review of the information collection requirements. Other organizations and individuals interested in submitting comments regarding this burden estimate or any aspect of these information collection requirements, including suggestions for reducing the burden, should direct them to: Immigration and Naturalization Service, Director, Policy Directives and Instructions Branch, Room 5307, 425 I Street NW., Washington, DC 20536. The comments or suggestions should be submitted within 60 days of publication of this rulemaking.

**List of Subjects in 8 CFR Part 273**

Administrative practice and procedure, Aliens, Carriers, Penalties.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended by adding a new part 273 as follows:

## PART 273—CARRIER RESPONSIBILITIES AT FOREIGN PORTS OF EMBARKATION; REDUCING, REFUNDING, OR WAIVING FINES UNDER SECTION 273 OF THE ACT

Sec.
273.1 General.
273.2 Definition.
273.3 Screening procedures.
273.4 Demonstration by carrier that screening requirements were met.
273.5 General criteria used for reduction, refund, or waiver of fines.
273.6 Memorandum of Understanding.

**Authority:** 8 U.S.C. 1103, 1323; 8 CFR part 2.

### § 273.1 General.

In any fines case in which a fine is imposed under section 273 of the Act involving an alien brought to the United States after December 24, 1994, the carrier may seek a reduction, refund, or waiver of fine, as provided for by section 273(e) of the Act, in accordance with this part. The provisions of section 273(e) of the Act and of this part do not apply to any fine imposed under any provision other than section 273 (a)(1) and (b) of the Act.

### § 273.2 Definition.

As used in this part, the term *Carrier* means an individual or organization engaged in transporting passengers or goods for hire to the United States.

### § 273.3 Screening procedures.

(a) *Applicability.* The terms and conditions contained in paragraph (b) of this section apply to those owners, operators, or agents of carriers which transport passengers to the United States.

(b) *Procedures at ports of embarkation.* At each port of embarkation carriers shall take reasonable steps to prevent the boarding of improperly documented aliens destined to the United States by taking the following steps:

(1) Screening of passengers by carrier personnel prior to boarding and examination of their travel documents to ensure that:

(i) The passport or travel document presented is not expired and is valid for entry into the United States;

(ii) The passenger is the rightful holder; and

(iii) If the passenger requires a visa, the visa is valid for the holder and any other accompanying passengers named in the passport.

(2) Refusing to board any passenger determined to be improperly documented. Failure to refuse boarding when advised to do so by a Service or Consular Officer may be considered by the Service as a factor in its evaluation of applications under § 273.5.

(3) Implementing additional safeguards such as, but not necessarily limited to, the following:

(i) For instances in which the carrier suspects fraud, assessing the adequacy of the documents presented by asking additional, pertinent questions or by taking other appropriate steps to corroborate the identity of passengers, such as requesting secondary information.

(ii) Conducting a second check of passenger documents, when necessary at high-risk ports of embarkation, at the time of boarding to verify that all passengers are properly documented consistent with paragraph (b)(1) of this section. This includes a recheck of documents at the final foreign port of embarkation for all passengers, including those originally boarded at a prior stop or who are being transported to the United States under the Transit Without Visa (TWOV) or International-to-International (ITI) Programs.

(iii) Providing a reasonable level of security during the boarding process so that passengers are unable to circumvent any carrier document checks.

### § 273.4 Demonstration by carrier that screening requirements were met.

(a) To be eligible to apply for reduction, refund, or waiver of a fine, the carrier shall provide evidence that it screened all passengers on the conveyance for the instant flight or voyage in accordance with the procedures listed in § 273.3.

(b) The Service may, at any time, conduct an inspection of a carrier's document screening procedures at ports of embarkation to determine compliance with the procedures listed in § 273.3, to the extent permitted by the local competent authority responsible for port access or security. If necessary, the carrier shall use its good offices to obtain this permission from the local authority. If the carrier's port of embarkation operation is found not to be in compliance, the carrier will be notified by the Service that it will not be eligible for refund, reduction, or waiver of fines under section 273(e) of the Act unless the carrier can establish that lack of compliance was beyond the carrier's control.

### § 273.5 General criteria used for reduction, refund, or waiver of fines.

(a) Upon application by the carrier, the Service shall determine whether circumstances exist which would justify a reduction, refund, or waiver of fines pursuant to section 273(e) of the Act.

(b) Applications for reduction, refund, or waiver of fine under section 273(e) of the Act shall be made in accordance with the procedures outlined in 8 CFR 280.12 and 8 CFR 280.51.

(c) In determining the amount of the fine reduction, refund, or waiver, the Service shall consider:

(1) The effectiveness of the carrier's screening procedures;

(2) The carrier's history of fines violations, including fines, liquidated damages, and user fee payment records; and,

(3) The existence of any extenuating circumstances.

### § 273.6 Memorandum of Understanding.

(a) Carriers may apply to enter into a Memorandum of Understanding (MOU) with the Service for an automatic reduction, refund, or waiver of fines imposed under section 273 of the Act.

(b) Carriers signatory to an MOU will not be required to apply for reduction, refund, or waiver of fines in accordance with the procedures outlined in 8 CFR 280.12 and 8 CFR 280.51, but will follow procedures as set forth in the MOU.

(c) Carriers signatory to an MOU will have fines reduced, refunded, or waived according to performance standards enumerated in the MOU or as determined by the Service.

(d) Carriers signatory to an MOU are not precluded from seeking additional reduction, refund, or waiver of fines in accordance with the procedures outlined in 8 CFR 280.12 and 8 CFR 280.51.

Dated: April 24, 1998.

**Doris Meissner,**

*Commissioner, Immigration and Naturalization Service.*

**Note:** Appendix A, Memorandum of Understanding, will not appear in the Code of Federal Regulations.

**Appendix A—United States Immigration and Naturalization Service Section 273(E) Memorandum of Understanding**

This voluntary Memorandum of Understanding (MOU) is made between ____________________ (hereafter referred to as the ''Carrier'') and the United States Immigration and Naturalization Service (hereafter referred to as the ''INS'').

The purpose of this MOU is to identify the responsibilities of each party to improve the performance of the Carrier with respect to its duty under section 273 of the Immigration and Nationality Act (the Act) to prevent the transport of improperly documented aliens to the United States. Based on the Carrier's Performance Level (PL) in comparison to the Acceptable Performance Level (APL) or Second APL (APL2) set by the INS, and based upon compliance with the other stipulations outlined in the MOU, the INS may refund, reduce, or waive a part of the Carrier's section 273 of the Act administrative penalties. The MOU cannot, by law, exempt the Carrier from liability for civil penalties. Although taking the steps set forth below will not relieve the Carrier of liability from penalties, the extent to which the Carrier has complied with this MOU will be considered as a factor in cases where the INS may reduce, refund, or waive a fine.

It is understood and agreed by the parties that this MOU is not intended to be legally enforceable by either party. No claims, liabilities, or rights shall arise from or with respect to this MOU except as provided for in the Act or the Code of Federal Regulations. Nothing in this MOU relieves the Carrier of any responsibilities with respect to United States laws, the Act, or the Code of Federal Regulations.

This document, once jointly endorsed, will serve as a working agreement to be utilized for all fines cases relating to section 273 of the Act, and reflects the mutual understanding of the Carrier and the INS. This MOU shall take effect immediately upon its approval by the Assistant Commissioner for Inspections and shall be a valid working document and shall expire on September 30, 2000.

The Carrier's compliance with the MOU shall be evaluated periodically. The Carrier shall be notified in writing of its PL and the overall APL for each rating period. Accordingly, the Carrier agrees to begin prompt and complete implementation of all of the terms listed in this MOU. With 30 days written notice, either party may terminate this MOU, for any reason, to include the INS' termination of this MOU for the Carrier's failure to abide by its terms. Any subsequent fines will be imposed for the full penalty amount.

**Memorandum of Understanding**

*1. Introduction*

1.1 The Assistant Commissioner for Inspections shall exercise oversight regarding the Carrier's compliance with this MOU.

1.2 The Carrier agrees to begin implementation of the provisions set forth below immediately upon signing and receipt of the MOU signed by the Assistant Commissioner for Inspections.

1.3 The Carrier agrees to permit the INS to monitor its compliance with the terms of this MOU. The Carrier shall permit the INS to conduct an inspection of the Carrier's document screening procedures at ports of embarkation before arrival in the United States, to determine compliance with the procedures listed in this MOU, to the extent permitted by competent local authorities responsible for port access and security. If necessary, the carrier agrees to use its good offices to obtain this permission.

1.4 The Carrier agrees to designate a coordinator to be the contact point for all issues arising from the implementation of this MOU. The Carrier shall provide the INS with the coordinator's name, title, address, telephone number, and facsimile number.

1.5 The Carrier shall require that all of its employees, including its representatives, follow the provisions of this MOU, and comply with all requirements of the Act. The Carrier further agrees to cooperate with the INS in an open two-way exchange of pertinent information.

*2. Prompt Payment*

2.1 The INS agrees to authorize a reduction in fine penalties based on compliance with this MOU only if the Carrier has paid all administrative fines, liquidated damages, and user fees. This includes interest and penalties that have been imposed by either a formal order or final decision, except cases on appeal.

2.2 The Carrier agrees to promptly pay all administrative fines, liquidated damages, and user fees. This includes interest and penalties that are imposed by a formal order or a final decision during the time this MOU is in effect, except cases on appeal. Prompt payment for the purposes of this MOU means payments made within 30 days from the date of billing.

2.3 The INS shall periodically review the Carrier's record of prompt payment for administrative fines, liquidated damages, and user fees including interest and penalties. Failure to make prompt payment will result in the loss of benefits of the MOU.

2.4 The Carrier agrees to select a person from its organization as a contact point in the INS Office of Finance for the resolution of payment issues. The Carrier shall provide the INS with the contact person's name, title, address, telephone number, and facsimile number.

*3. Carrier Agreement*

3.1 The Carrier shall refuse to knowingly carry any improperly documented passenger.

3.2 The Carrier agrees to verify that trained personnel examine and screen passengers' travel documents to confirm, to the best of their ability, that the passport, visa (if one is required), or other travel documents presented are valid and unexpired, and that the passenger, and any accompanying passenger named in the passport, is the apparent rightful holder of the document.

3.3 The Carrier agrees to conduct additional document checks when deemed appropriate, to verify that all passengers, including transit passengers, are in possession of their own, and proper, travel documents as they board the aircraft, and to identify any fraudulent documents.

3.4 The Carrier agrees to permit INS and State Department Consular officials to screen passengers' travel documents before or after the Carrier has screened those passengers for boarding, to the extent permitted by the competent local authorities responsible for port access and security. If necessary, the carrier agrees to use its good offices to obtain this permission.

3.5 In cases involving suspected fraud, the Carrier shall assess the adequacy of the documents presented by questioning individuals or by taking other appropriate steps to corroborate the identity of the passengers, such as requesting secondary identification.

3.6 Following notification by the INS, or its representative, about a particular passenger or passengers, the carrier shall refuse to knowingly transport any such individual determined by an INS official not to be in possession of proper documentation to enter or pass through the United States. Transporting any improperly documented passenger so identified may result in a civil penalty. At locations where there is no INS presence, carriers may request State Department Consular officials to examine and advise on authenticity of passenger documentation. State Department Consular officials will act in an advisory capacity only.

3.7 Where the Carrier has refused to board a passenger based on a suspicion of fraud or other lack of proper documentation, the Carrier agrees to make every effort to notify other carriers at that port of embarkation about that passenger, to the extent permitted by competent local authorities responsible for port access and security. If necessary, the carrier agrees to use its good offices to obtain this permission.

3.8 The Carrier shall maintain a reasonable level of security designed to prevent passengers from circumventing any Carrier document checks. The Carrier shall also maintain an adequate level of security designed to prevent stowaways from boarding the Carrier's aircraft or vessel.

3.9 The Carrier agrees to participate in INS training programs and utilize INS Information Guides and other information provided by the INS to assist the Carrier in determining documentary requirements and detecting fraud.

3.10 The Carrier agrees to make the INS Information Guides and other information provided by the INS readily available for use by Carrier personnel, at every port of embarkation.

3.11 The Carrier agrees to make appropriate use of technological aids in screening documents including ultra violet lights, magnification devices, or other equipment identified by the INS to screen documents.

3.12 The Carrier agrees to expeditiously respond to written requests from the appropriate INS official(s) for information pertaining to the identity, itinerary, and seating arrangements of individual passengers. The Carrier also agrees to provide manifests and other information, required to identify passengers, information and evidence regarding the identity and method of concealment of a stowaway, and information regarding any organized alien smuggling activity.

3.13 Upon arrival at a Port-of-Entry (POE) and prior to inspection, the Carrier agrees to notify INS personnel at the POE of any unusual circumstances, incidents, or problems at the port of embarkation involving the transportation of improperly documented aliens to the United States.

3.14 The Carrier agrees to notify the Assistant Commissioner of Inspections, in writing, if it is unable to comply with any section of the MOU because of local law or local competent authority. The Carrier shall list the specific section of the MOU with which it is unable to comply and, to be in compliance with the MOU, shall notify the Service within ten (10) days after becoming cognizant of this prohibition to comply. Further, in such instances the Carrier shall propose alternative means for meeting the objective sought by the paragraph in question. For instance, where review of foreign boarding procedures cannot be performed by INS personnel, the Carrier could provide that an audit of its operation be performed by local authorities or by private auditors.

*4. INS Agreement*

4.1 The Director of the National Fines Office will serve as a coordinator for all issues arising from the implementation of this MOU. The INS shall provide the carrier with the coordinator's name, address, telephone number, and facsimile number.

4.2 The INS agrees to develop an Information Guide to be used by Carrier personnel at all ports of embarkation prior to boarding passengers destined to the United States. The Information Guide will function as a resource to assist Carrier personnel in determining proper documentary requirements and detecting fraud.

4.3 The INS agrees to develop a formal, continuing training program to assist carriers in their screening of passengers. Carriers may provide input to the INS concerning specific training needs that they have identified. Initial and annual refresher training will be conducted by the INS or Carrier representatives trained by the INS.

4.4 To the extent possible, INS and State Department Consular officials will consult, support, and assist the Carrier's efforts to screen passengers prior to boarding.

4.5 The INS shall determine each Carrier's Performance Level (PL) based on statistical analysis of the Carrier's performance, as a means of evaluation whether the Carrier has successfully screened all of its passengers in accordance with 8 CFR 273.3 and this MOU. The PL is determined by taking the number of each Carrier's violations of section 273 of the Act for a fiscal year 1/ and dividing this by the number of documented nonimmigrants (i.e., those nonimmigrants that submit an Arrival/Departure Record, Form I–94, I–94T, or I–94W) transported by the Carrier and multiplying the result by 1,000.

4.6 The INS shall establish an Acceptable Performance Level (APL), based on statistical analysis of the performance of all carriers, as a means of evaluating whether the Carrier has successfully screened all of its passengers in accordance with 8 CFR 273.3 and this MOU. The APL shall be determined by taking the total number of all carrier violations of section 273 of the Act for a fiscal year 1/ and dividing this by the total number of documented nonimmigrants (i.e., those nonimmigrants that submit an Arrival/Departure Record, Form I–94, I–94T, or I–94W) transported by all carriers for a fiscal year and multiplying the result by 1,000.

4.7 The INS shall establish a Second Acceptable Performance Level (APL2), based on statistical analysis of the performance of all carriers at or better than the APL, as a means of further evaluating carrier success in screening its passengers in accordance with 8 CFR 273.3 and this MOU. Using carrier statistics for only those carriers which are at or better than the APL, the APL2 shall be determined by taking the total number of these carrier violations of section 273 of the Act for a fiscal year [1] and dividing by the total number of documented nonimmigrants (i.e., those nonimmigrants that submit an Arrival/Departure Record, Form I–94, I–94T, or I–94W) transported by these carriers and multiplying the result by 1,000.

4.8 The PL, APL, and APL2 may be recalculated periodically as deemed necessary, based on Carrier performance during the previous period(s).

4.9 Carriers whose PL is at or better than the APL are eligible to receive an automatic 25 percent reduction, if signatory to and in compliance with this MOU, on fines imposed under section 273 of the Act for periods determined by the INS.

4.10 Carriers whose PL is at or better than the APL2 are eligible to receive an automatic 50 percent reduction, if signatory to and in compliance with this MOU, on fines imposed under section 273 of the Act for periods determined by the INS.

4.11 If the Carrier's PL is not at or better than the APL, the Carrier may receive an automatic 25 percent reduction in fines, if it meets certain conditions, including being signatory to and in compliance with the MOU, and the carrier submits evidence that it has taken extensive measures to prevent the transport of improperly documented passengers to the United States. This evidence shall be submitted to the Assistant Commissioner for Inspections for consideration. Evidence may include, but is not limited to, the following: (1) Information regarding the Carrier's training program, including participation of the Carrier's personnel in any INS, Department of State (DOS), or other training programs and the number of employees trained: (2) information regarding the date and number of improperly documented aliens intercepted by the Carrier at the port(s) of embarkation, including, but not limited to, the aliens' name, date of birth, passport nationality, passport number or other travel document information, and reason boarding was refused, if otherwise permitted under local law; and, (3) other evidence, including screening procedure enhancements, technological or otherwise, to demonstrate the Carrier's good faith efforts to properly screen passengers destined to the United States.

4.12 The Carrier may defend against imposition or seek further reduction of an administrative fine if the case is timely defended pursuant to 8 CFR part 280, in response to the Form I–79, Notice of Intent to Find, and the Carrier establishes that mitigating or extenuating circumstances existed at the time of the violation.

4.13 Nothing in this MOU precludes a carrier from seeking fine reduction, refund, or waiver under 8 CFR 273.4.

____________________

(Representative's Signature)

____________________

(Title)

____________________

(Carrier Name)

Dated: ________________

____________________

Assistant Commissioner, Office of Inspection, United States Immigration and Naturalization Service.

Dated: ________________

[1] The total number of carrier violations of section 273 of the Act for a fiscal year is determined by taking the total number of violations minus violations for the transportation of improperly documented lawful permanent residents and rejected cases. Rejected cases include those cases where the INS has determined that either: (1) no violation occurred; or, (2) sufficient evidence was not submitted to support the imposition of a fine.

[FR Doc. 98–11481 Filed 4–29–98; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 39

**[Docket No. 97–CE–134–AD; Amendment 39–10505; AD 98–09–24]**

**RIN 2120–AA64**

## Airworthiness Directives; Diamond Aircraft Industries Models H–36 ''Dimona'' and HK 36 R ''Super Dimona'' Sailplanes

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Final rule.

**SUMMARY:** This amendment adopts a new airworthiness directive (AD) that applies to certain Diamond Aircraft Industries (Diamond) Models H–36 ''Dimona'' and HK 36 R ''Super Dimona'' sailplanes. This AD requires: inspecting the elevator rib area for damage on certain Models H–36 ''Dimona'' and HK 36 R ''Super