

# CBP Family Unity Policy

## A. Background and Purpose

U.S. Customs and Border Protection (CBP) is committed to protecting family unity when it encounters a parent or legal guardian with their noncitizen minor child. Generally, CBP should not separate a minor child from their accompanying noncitizen parent(s) or legal guardian(s), except in certain limited circumstances as outlined below.

This policy provides guidance for CBP agents and officers in deciding whether to separate a minor child from a parent(s) or legal guardian(s), with the goal of ensuring consistent, transparent, and well-documented decision-making. This policy is issued consistent with the stipulated settlement in *Ms. L v. ICE*, 3:18-cv-00428 (December 11, 2023). It supersedes and replaces all previous CBP policies governing the separation of family units, including *Interim Guidance on Preliminary Injunction in Ms. L v. ICE* (June 27, 2018); *Clarifying Guidance on Separation of Units Due to 8 U.S.C. § 1326(a) Convictions and Prosecutions* (May 28, 2021); and all U.S. Border Patrol (USBP) and Office of Field Operations (OFO) guidance implementing these policies.

## B. Scope

- This policy applies to all CBP agents and officers. It describes the circumstances in which CBP may separate a noncitizen minor child from their his/her accompanying noncitizen parent(s) or legal guardian(s).
- Except in the limited circumstances outlined in Section G, this policy does not apply to the processing of families consisting of a noncitizen parent or legal guardian and a U.S. citizen (USC) minor child.
- This policy does not apply to the processing of family groups consisting of related individuals other than a parent or legal guardian and their noncitizen minor child (e.g., children accompanied by their grandparent, or adult siblings traveling together).

## C. Definitions

- For purposes of this guidance, the following definitions apply:
  - Separation: A situation in which a parent or legal guardian and their child(ren), who are known to have been encountered by CBP together at or between ports of entry, and are transferred out of CBP custody separately. Holding a parent or legal guardian separately from their child in the same facility does not result in a separation as defined in this policy.
  - Parent(s): Noncitizen(s) who are 18 years of age or older, and who are accompanied by his/her/their child(ren). This includes biological parents, legal guardians, and adoptive parents with appropriate supporting documentation.<sup>1</sup>
  - Legal guardian: A person vested with legal custody of the child or vested with legal authority to act on or make decisions on the child's behalf. This does not include a person with a "Power of Attorney" document for the child.

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<sup>1</sup> If there is a question regarding whether the documentation presented is sufficient to show that a person is either a legal guardian or an adoptive parent, agents/officers should consult with the Office of Chief Counsel (OCC).

- Child: An individual under the age of 18, who is accompanied by their parent or legal guardian.
- Family member: A parent, legal guardian, or child.
- Conviction: A criminal conviction that is either foreign or domestic.

#### **D. Processing Separation Requests**

All separation requests by CBP officers and agents must be approved using the following procedure prior to separation of the child from the parent or legal guardian. Both USBP and Office of Field Operations (OFO) must maintain records of separation decisions.

- A separation request must contain a clear and concise narrative providing sufficient facts for an independent decision-maker to understand the basis for the proposed separation.
- The separation must be denied or approved by component-designated field leadership at the GS-14 level or above. The decision must be captured and recorded in the separation request, along with the name of the approver.
- If OCC review is sought, such review should be noted in the separation request, and any legal advice provided should be recorded.
- Any pre-separation communication with U.S. Immigration and Customs Enforcement (ICE) should also be documented in a separation request.
- Where the basis for a separation would be a criminal conviction or applicable ground of mandatory detention, such as Sections 236(c) or 241(a)(2) of the Immigration and Nationality Act (INA), the request will not be approved without OCC review for legal sufficiency on the question of whether the relevant offense falls within the applicable laws or categories of criminal history sufficient to justify a separation, as outlined below. The deciding official(s) may, at their discretion, seek legal advice regarding any aspect of a proposed separation at any time.
- If a situation arises in which the reason for the separation would be based on the actions of a child (rather than a parent), the deciding official(s) must request that the OCC conduct a legal sufficiency review.
- All separations must be reported as significant incidents in accordance with current operational guidance.

#### **E. Documentation and Reporting**

- All separations must be documented in the relevant electronic system of record. This documentation must include the reason for the separation, including facts specific to the separated individual which support the decision to separate, known biographic information of the separated parent or legal guardian and child(ren), and any known location information of the separated parent or legal guardian and child (e.g., the location to which a separated parent or legal guardian or child is transferred).
- Unless a document contains national security or sensitive information prohibited from disclosure by law, documents supporting the decision to separate must be included in the A-files of both the parent or legal guardian and the child(ren).
- Upon separation, CBP shall provide the parent or legal guardian with a tear sheet documenting the separation; providing the reason for the separation, including facts specific to the individual parent or legal guardian at a level of detail that does not disclose

national security or other sensitive information; and providing additional information about how a parent or legal guardian may provide additional information to ICE and U.S. Department of Health and Human Services' (HHS) Office of Refugee Resettlement (ORR) for purposes of reunification. This tear sheet shall be either provided to, or read to, the parent or legal guardian in a language they understand. The fact that the tear sheet was provided to the parent shall be documented on the parent or legal guardian's I-213.

- In addition to the tear sheet described above, upon separation, CBP shall provide an ORR-created tear sheet to the parent or legal guardian and child.
- All separations, including the reason for the separation, must be reported to ICE after they occur. This reporting should include known biographical information for the separated parent or legal guardian and child, including names, A-numbers, and dates of birth, and any supporting documentation. This reporting should also include the location of the separated child's ORR placement, if known at the time of referral.
- When referring a child to ORR, CBP shall share the following information with ORR, to the extent legally permissible: the fact that the child was separated from their parent or legal guardian; the parent's location and contact information, if known; the reason for the separation, including facts specific to the individual parent or legal guardian at a level of detail that does not disclose national security or other sensitive information; any known or reported information regarding special needs of the child; and any information regarding the parent or legal guardian that might assist with reunification.
- If a U.S. citizen child is referred to the custody of a state or local child welfare agency, CBP shall inform the noncitizen parent of the state and local entity where the child went and any known contact information for the agency. CBP shall take steps to inform the state or local agency, at the time that the child is referred, that the child was separated from their parent or legal guardian.
- When transferring a parent or legal guardian to the custody of the U.S. Marshals Service (USMS), CBP shall share the following information with the USMS, to the extent legally permissible: the fact that the child was separated from their parent or legal guardian; the reason for the separation; and location of the separated child's ORR placement, if known at the time of referral.
- When transferring a parent or legal guardian to the custody of a state or local agency, CBP shall inform the state or local entity that the parent or legal guardian was separated from their child and, if the child has been referred to ORR and the information is known at the time of referral, information on how the parent or legal guardian may contact their child.

## **F. Bases for Separation**

The bases for separation described below apply equally to one-parent or legal guardian families and two-parent or legal guardian families. In a two-parent/legal guardian family, CBP will not separate a child from either of his/her/their parents or legal guardians unless one or more bases for separation are present for each parent or legal guardian from whom the child is separated.

A parent or legal guardian may not be separated from his/her/their child based solely on the parent or legal guardian's immigration history, including prior removals.

### Basis for Separation 1 - National Security Threats

A parent or legal guardian who is determined to have engaged in or is suspected of terrorism, espionage, or terrorism-related or espionage-related activities, such that detention of the parent or legal guardian is warranted, may be separated from his/her/their child(ren) for the purpose of detaining the parent or legal guardian. Whether a parent or legal guardian poses a national security threat shall be determined in relation to the specific circumstances of the parent or legal guardian.

### Basis for Separation 2 - Public Safety Threats

A parent or legal guardian who is determined to pose a threat to public safety such that detention of the parent or legal guardian is warranted, may be separated from his/her/their child(ren) for the purpose of detaining the parent or legal guardian.

Subsections I-III below provide a list of the categories of public safety threats that may, depending on the circumstance, justify a separation.

#### *I. Criminal Convictions*

The INA allows for, and in specific circumstances mandates, the detention of certain noncitizens because of terrorism grounds or a criminal offense pending their removal proceedings before the Executive Office for Immigration Review or their removal from the United States, for reasons of public safety. If the noncitizen being detained is a parent or legal guardian, this may lead to a separation.

Such separations, done for reasons of public safety, are permissible when the parent or legal guardian has a felony criminal conviction for the following crimes or an analogous crime abroad, and is determined to pose an ongoing threat to public safety:

- Homicide (including Manslaughter)
- Terrorism
- Arson
- Kidnapping
- Rape or sexual assault
- Sexual abuse or sexual exploitation
- Domestic violence/child abuse
- Drug trafficking/distribution
- Human trafficking
- Firearms
- Robbery/carjacking
- Assault/battery

#### **OR**

Where the parent or legal guardian has been convicted of two or more misdemeanors that involve the above categories and is determined to pose an ongoing threat to public safety.

#### **OR**

Where a determination has been made that the parent or legal guardian is subject to a mandatory detention statute, such as INA §§ 236(c) or 241(a)(2).

Whether a parent or legal guardian poses a public safety risk shall be determined in relation to the specific circumstances of the parent or legal guardian. If the convictions are more than ten years old,<sup>2</sup> and a determination has not been made that a mandatory detention statute applies,

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<sup>2</sup> The ten years is calculated from date of conviction.

separation may not be appropriate. The length of time since an arrest or conviction does not apply to national security concerns.

When CBP determines separation may be appropriate on the basis of a criminal conviction, it shall coordinate with ICE prior to effectuating the separation to ascertain whether the parent or legal guardian will be detained. If the parent or legal guardian will not be detained, CBP shall not separate the parent/legal guardian from his/her/their child(ren) and will process the parent/legal guardian and child(ren) together as a family.

When a separation is contemplated as a result of a parent's or legal guardian's criminal conviction(s), documentation indicating the conviction, such as a printout or electronic record from the relevant law enforcement database documenting the conviction(s), must be included in or attached to the separation request.

## *II. Gang Affiliation/Transnational Criminal Organization (TCO) Membership*

A family may not be separated *solely* because a parent or legal guardian is determined to have a gang affiliation or to be a member of a TCO.

However, a family may be separated if the parent or legal guardian is determined to have a gang affiliation/TCO membership, there is evidence the parent or legal guardian has engaged in violent criminal activity, and it is determined that the parent or legal guardian poses an ongoing public safety threat, such that detention is warranted.

If the basis for the separation is gang affiliation/TCO membership, the separation request must document either that a government database contains a parent or legal guardian's gang affiliation/TCO membership or, alternatively, the criteria used to determine that the parent or legal guardian had such an affiliation/ membership. The request must also include evidence that supports the parent having engaged in violent criminal activity.

## *III. Other Public Safety Separations*

In the instance that CBP has significant, articulable concerns that a parent or legal guardian poses a current threat to public safety that are not covered in the previous subsections, it may separate a parent or legal guardian from their child(ren), if there is confirmation from ICE or another law enforcement entity that the parent or legal guardian will be detained. The separation request must include confirmation that the parent or legal guardian presents a current threat to public safety, and confirmation that the parent will be detained.

### Basis for Separation 3 - Material Witnesses

If a parent or legal guardian is taken into the custody of another law enforcement entity to serve as a material witness, and it is impossible or unsafe for the child to remain with the parent or legal guardian, CBP may effectuate a separation.

When this leaves one or more children with another parent or legal guardian in CBP custody, CBP should provide the parent or legal guardian remaining in CBP custody with any known contact information for the entity using the other parent or legal guardian as a material witness and the case number for the case in which the parent or legal guardian is serving as witness, if known.

When a parent or legal guardian serving as a material witness leaves one or more children in CBP custody without a parent or legal guardian, CBP shall refer the child(ren) to ORR for placement, unless it is expected that the parent or legal guardian will return to CBP custody within 24 hours. The referral to ORR should specify any known contact information for the entity handling the case in which the parent or legal guardian will serve as a material witness, the case number, if known, and any known contact information for the parent or legal guardian, and request that local placement be pursued for the purpose of expeditious reunification when the parent or legal guardian is released from the law enforcement entity's custody.

#### Basis for Separation 4 - Hospitalization

In some cases, it may be necessary to separate a family due to one or more family member's hospitalization. Whenever this occurs, CBP will seek to ensure that the family member(s) remaining in CBP custody are not removed during the period of the family member's hospitalization. Whenever possible, CBP will also seek to expeditiously process the family member(s) remaining in CBP custody such that they can be reunited with the hospitalized family member(s). To the maximum extent possible, this processing should occur prior to the release from the hospital of the hospitalized family member. Where mobile processing is not available or appropriate, all processing documents should be prepared, to the extent operationally possible, before the family member's release from the hospital to expedite processing. To the extent possible, and as appropriate, and consistent with the other provisions of this policy, all family members in this scenario should be processed for the same disposition.

Additionally, while the family members are separated by hospitalization, CBP should allow a daily phone call between the hospitalized family member(s) and the family member(s) remaining in CBP custody, as permitted by the hospital, and based on the family members' health and capacity to participate in a phone call. If CBP learns that the condition of a hospitalized family member could be terminal, CBP should facilitate a visit of the non-hospitalized family member(s) to the hospital, to the maximum extent operationally feasible and as permitted by the hospital, unless there is a concern that doing so would pose a safety risk to one or more family members.

In all cases, the decision as to whether family members can remain with this hospitalized individual will be made in consultation with the hospital or medical facility.

- I. *Where one parent or legal guardian in a two-parent or legal guardian family requires hospitalization and the other parent or legal guardian and the child(ren) remain in CBP custody*

CBP should advise the parent or legal guardian remaining in custody of the name of the hospital where the other parent or legal guardian is receiving treatment as soon as practicable, but no longer than 12 hours after the parent or legal guardian is transported to the hospital, or before the parent or legal guardian remaining in CBP custody is released/transferred out of CBP custody, whichever comes first.

*II. Where a child is hospitalized and one or more parents or legal guardians remain in CBP custody*

Unless CBP believes that it would pose a safety risk to the child, CBP will advise the parent(s) or legal guardian(s) remaining in custody of the name of the hospital where the child is receiving treatment as soon as practicable, but no later than 12 hours after the child is transported to the hospital. Unless a separation is otherwise justified pursuant to this policy, at least one parent or legal guardian, and both parents or legal guardians if operationally feasible, should be allowed to travel with their child(ren) to the hospital, if permitted by the emergency medical services provider and where CBP has no reason to believe doing so would pose a safety risk to the child(ren).

*III. Where one parent or legal guardian in a single-parent or legal guardian family or two parents or legal guardians in a two-parent or legal guardian family are hospitalized and the child(ren) remain in CBP custody*

If the parent(s) or legal guardian(s) are treated at the hospital and CBP has reason to believe the parent(s) or legal guardian(s) will be admitted to the hospital and remain there for 24 hours or longer, CBP will immediately refer the child(ren) to ORR. The referral to ORR should specifically state where the parent(s) or legal guardian(s) are hospitalized, any known contact information for the parent(s) or legal guardian(s) and/or the hospital, and request local placement for the child, for the purpose of expeditious reunification when the parent(s) or legal guardian(s) are released from the hospital.

If the child(ren) are referred to ORR, CBP will process the parent(s) or legal guardian(s), including, as appropriate on a case-by-case basis, for release from custody. To the maximum extent possible, this processing should occur before the parent(s) or legal guardian(s)' release from the hospital. Where mobile processing is not available or appropriate, all processing documents should be prepared, to the extent operationally possible, before the parent(s) or legal guardian(s)' release from the hospital to expedite processing.

Basis for Separation 5 - Child Abuse or a Threat to the Safety of the Child

CBP may separate a parent or legal guardian from a child where it suspects that the parent or legal guardian has or is abusing the child or presents an articulable threat to the safety of the child. A threat to the safety of a child is defined as a threat to life or health to the extent that injury or harm may be likely if the child were returned to or left in the custody of his or her parent or legal guardian. Any threat to the safety of a child must be evaluated on a case-by-case basis and may not use a presumption of a threat to the safety of a child based on a parent or legal guardian's past criminal or immigration history.

Within 180 days of this policy being signed, CBP, in consultation with ORR, will develop guidance for CBP personnel to use in assessing whether a separation is warranted due to a child having been or is being abused or if a parent or legal guardian presents an articulable threat to the safety of the child. The guidance shall include procedures for consultation with the CMO or his or her designee with a medical or social work background. CBP will also develop training for agents and officers at CBP short-term holding facilities/ports to recognize the signs of child

abuse. The training shall include procedures for consultation with the CMO or his or her designee with a medical or social work background. Such agents and officers shall receive refresher training on an annual basis.

- Following development of the training, only agents/officers who have received the training should make separation decisions based on the finding of abuse.
- While the guidance is being developed, if an agent/officer believes there is justification for a separation based on child abuse or an articulable threat to the safety of the child, they should consult the CMO or his/her designee for a recommendation as to separation. If the agent/officer determines after consulting the CMO or his/her designee that separation is warranted, the date/time of the contact and the CMO's recommendation should be noted in the separation request process outlined in Section D.

#### Basis for Separation 6 - Warrants and Criminal Prosecution

- CBP shall honor Federal warrants, and may honor state criminal warrants, if the entity charged with executing the warrant affirmatively indicates that it will seek extradition or take a parent/legal guardian into custody and execute the warrant.
- Where no other permissible circumstances for separation are present, CBP will not refer a parent/legal guardian for prosecution solely under 8 U.S.C. § 1325(a). However, CBP may generally refer a parent/legal guardian for the prosecution of a felony offense. However, a parent/legal guardian may not be referred for prosecution under 8 U.S.C. § 1326(a) or 8 U.S.C. § 1326(b) if the parent or legal guardian's only prior criminal conviction is a prior conviction for 8 U.S.C. § 1325 or 8 U.S.C. § 1326(a).

#### **G. Other Circumstances**

##### 1. Family Consisting of a USC Child Referred to a State or Local Agency

In general, the provisions of this policy do not apply to the processing of families that include USC minor children. However, if a USC minor child who, at encounter, was accompanied by their noncitizen parent or legal guardian is transferred to a state or local agency, CBP will endeavor to inform the noncitizen parent of the state and local entity to which the child was transferred, and any known contact information for the agency. CBP will endeavor to inform the state or local agency, at the time that the child is referred, that the child was separated from their parent or legal guardian.

##### 2. Family Consisting of an Adult Parent, a Minor Parent, and their Child(ren)

If CBP encounters a family consisting of an adult parent or legal guardian, a minor parent (a parent under the age of 18), and their minor child, and the minor parent is not accompanied by their own parent or legal guardian, the minor parent must be processed as an unaccompanied child. If there is an independent reason to separate the adult parent from their child(ren), the child(ren) should be referred to ORR with the minor parent. If there is not an independent reason to separate the adult parent from their child(ren), CBP personnel should first ask the adult parent and minor parent with whom the child(ren) should remain, and defer to that outcome, absent any evidence of abuse or an articulable threat to the safety of a child concerns. The parents' choice should be documented in the narratives of both parents' I-213s.

If the parents cannot agree, CBP personnel shall make the determination with whom the child should remain. This decision should take into account circumstances such as the child(ren)'s



age and the ages of the child(ren)'s parents; any wishes of the child, in consideration of their age and maturity; physical dependency of the child on a parent (e.g., breastfeeding mothers); ORR's ability to house the child(ren) with his/her/their minor parent; and any articulable trafficking, abuse, or safety considerations.

This section only applies to situations in which the minor parent is not accompanied by their own parent(s) or legal guardian(s). In situations in which a minor parent is accompanied by their own adult parent or legal guardian, that minor parent and their adult parent or legal guardian shall be treated as a family unit, and thus may only be separated consistent with this guidance.

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4. Withdrawals and Voluntary Returns

In a one-parent family:

- If a child is separated from their parent or legal guardian under this policy, and the parent or legal guardian is either permitted to withdraw their application for admission or voluntarily return, CBP will provide the parent or legal guardian with an opportunity, consistent with applicable law, to depart with his/her child(ren), unless CBP has reason to believe the child is being or has been abused, doing so would pose a threat to the safety of the child(ren) or there are other legal restrictions that prohibit the departure of the child(ren).

In a two-parent family:

- If a child is separated from both parents or legal guardians, and both parents or legal guardians are either permitted to withdraw their application for admission or voluntarily return, CBP will provide the parents or legal guardians with an opportunity, consistent with applicable law, to depart with their child(ren), unless CBP has reason to believe the child is being or has been abused, doing so would pose a threat to the safety of the child(ren), or there are other legal restrictions that prohibit the departure of the child(ren).
- If a child is separated from one parent or legal guardian, and that parent or legal guardian is either permitted to withdraw their application for admission or voluntarily return, CBP will provide the separated parent or legal guardian the opportunity to depart with his/her/their child and the other parent or legal guardian, unless CBP has reason to believe the child is being or has been abused, doing so would pose a threat to the safety of the child(ren), or there are other legal restrictions that prohibit the departure of either the child(ren) or other

parent/legal guardian.

5. Reunification When Separation is No Longer Necessary

If a separation occurs that is not consistent with this guidance, CBP will act as expeditiously as possible to reunify the parent(s)/legal guardian(s) and child(ren).

- CBP will coordinate with the U.S. Department of Justice, ICE, and HHS for reunifying parents and children in this situation.
- Reunification efforts must be clearly documented in the relevant electronic system of record.

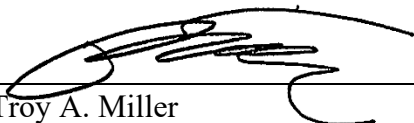
**H. Effective Date**

This policy becomes effective on the day the policy is signed.

**I. No Private Right**

This is an internal policy statement of CBP and does not create or confer any rights, privileges, or benefits on any person or party.

**J. Approval Authority**

	<u>December 11, 2023</u>
Troy A. Miller	Date
Senior Official Performing the Duties of the Commissioner	
U.S. Customs and Border Protection	

Attachment 1- Information for the Parents Tear Sheet\_English  
Attachment 2- Information for the Parents Tear Sheet\_Spanish