



**Executive Summary
For Director Office of Investigations**

May 7, 2010

ICE IMPLEMENTATION OF DNA SAMPLE COLLECTION

The enclosed memorandum provides insight into the Law Enforcement Support and Information Management Division's implementation plan of the DOJ mandate requiring ICE to begin DNA sampling of all arrestees. The implementation plan calls for sampling to begin in limited locations for a time period of at least six months prior to expanding the program to other OI offices.

Sampling will be conducted under the following conditions:

- The individual being sampled has been arrested by an ICE Special Agent for a violation of state or federal law.
- The Special Agent conducting the sampling has been trained and is assigned to an office under the SAC San Diego, SAC San Juan or SAC Saint Paul.
- The individual being sampled is compliant.

The memorandum provides notice to the SAC offices not participating in the pilot program that sampling could be expanded OI wide six months after the initiation of the DNA sampling pilot program.

Please direct any questions or comments to Unit Chief [redacted] at (202) 732-

[redacted] or via e-mail at [redacted]@dhs.gov.

Federal Law Requiring DNA Sampling

Pursuant to 42 United States Code (U.S.C.) § 14135a(a)(1)(A) and 28 Code of Federal Regulations (CFR) § 28.12, The Department of Homeland Security and other Federal law enforcement agencies are authorized and directed to collect DNA samples from individuals who are arrested, facing charges, or convicted and from non-United States persons who are detained under Federal authority.

It is a Federal offense for an individual from whom DNA sample collection is authorized to refuse to cooperate in the collection of a sample, and cooperation in such collection is a mandatory condition of pretrial release. (See 42 U.S.C. § 14135a(a)(5); 18 U.S.C. § 3142(b), (c)(1)(A).)

The Department of Justice has approved the cheek swab as the approved method for extracting a DNA sample. This procedure is painless and in most cases can be completed in just a few minutes. Two foam applicators will be placed in your mouth in order to absorb the necessary amount of saliva required to capture your DNA. The sample will then be submitted to the FBI laboratory in Quantico, Virginia for processing.

**ICE OI Compliance with the
DOJ DNA Sample Collection Rule, 28 CFR 28.12
Implementation and Annual Operating Cost Estimate**

(b)(5)





U.S. Immigration
and Customs
Enforcement

June 28, 2010

MEMORANDUM FOR: Daniel H. Ragsdale
Executive Associate Director
Management and Administration

FROM: Susan Cullen Dunbar *SCD*
Assistant Director

SUBJECT: ICE Homeland Security Investigations DNA Sampling Pilot
Program

Purpose:

This memorandum updates the Executive Associate Director for Management and Administration on ICE's planned initial implementation of a U.S. Department of Justice (DOJ) regulation on DNA sample collection. Homeland Security Investigations (HSI) is beginning a pilot program in three locations.

Background:

On December 10, 2008, DOJ published a final rule in the *Federal Register*¹ amending regulations on DNA-sample collection to require all federal law enforcement agencies to take DNA samples from "individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under the authority of the United States," subject to certain limitations and exceptions.² First, DNA sample collection may be limited to individuals from whom the agency already collects fingerprints, unless otherwise directed by the Attorney General. Second, the regulation provides several exceptions from sample collection, including "[o]ther aliens with respect to whom the Secretary of Homeland Security, in consultation with the Attorney General, determines that the collection of DNA samples is not feasible because of operational exigencies or resource limitations."³

¹ "DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction." See 73 Fed. Reg. 74932. The rule, which took effect on January 9, 2009, implements the requirements of § 1004 of the DNA Fingerprint Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960, and § 155 of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (both codified at 42 U.S.C. § 14135a (2000)).

² Non-U.S. persons include "persons who are not United States citizens and who are not lawfully admitted for permanent residence as defined in 8 CFR 1.1(p)." 28 CFR § 28.12(b).

³ 73 Fed. Reg. at 74938.

ICE Homeland Security Investigations DNA Sampling Pilot Program

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On January 12, 2009, former Department of Homeland Security (DHS) Deputy Secretary Paul Schneider advised former Attorney General Michael Mukasey that DHS's implementation of the rule was not feasible due to resource limitations and operational exigencies. In March 2009, Secretary Napolitano directed each DHS operational component to create an implementation plan to begin DNA sample collection. ICE submitted its plan calling for a phased approach to implementation in July 2009.

On March 22, 2010, Secretary Napolitano wrote to Attorney General Holder requesting exemptions for DHS from sampling non-U.S. persons detained for processing under administrative proceedings (not facing criminal charges), including juveniles under the age of 18, and non-U.S. persons currently within DHS custody, pending administrative removal proceedings. Secretary Napolitano also requested that the Attorney General exempt DHS from collecting DNA samples from all persons detained or arrested in the event of emergency or unforeseen circumstances or conditions. There has been no formal response from DOJ, although the DHS Office of General Counsel (OGC) and DOJ have had further discussions.

Discussion:

(b)(5)



CC: Beth Gibson

Attachment

(b)(5)





U.S. Immigration
and Customs
Enforcement

Public Affairs Guidance

June 22, 2010
Contact: ICE Public Affairs
202-732-4242

HSI Collection of DNA Samples

BACKGROUND:

In January 2009, a U.S. Department of Justice (DOJ) regulation, pursuant to 42 U.S.C § 14135a(a)(1)(A), went into effect amending regulations on DNA sample collection by federal law enforcement agencies. Under this rule, all federal law enforcement agencies are required to take DNA samples from "individuals who are arrested, facing charges or convicted, and from non-United States persons who are detained under the authority of the United States." In March 2009, Secretary Napolitano directed each Department of Homeland Security (DHS) operational component to create an implementation plan to ensure compliance with the DOJ regulation.

ICE is the first component within DHS to comply with DOJ's rule and will begin a phased approach for implementation of the DNA sampling process. Homeland Security Investigation (HSI) special agents in three Special Agent in Charge (SAC) offices - SAC San Diego, SAC San Juan and SAC St. Paul - have received the necessary training and equipment to collect DNA samples. During the initial implementation, samples will be collected only from individuals arrested on federal or state criminal violations by an HSI special agent. All DNA samples will involve two swabs of the cheek inside the mouth.

Individuals arrested by an HSI special agent on state or federal criminal charges are required to give a DNA sample. It is a federal offense for an individual from whom DNA sample collection is authorized to refuse to cooperate in the collection of a sample. Furthermore, cooperation with the collection of a sample is a mandatory condition of pretrial release. Any DNA sample collected will be sent immediately to the Federal Bureau of Investigation's crime lab for analysis. ICE will not retain any DNA samples.

TALKING POINTS:

- The collection of a DNA sample from an individual arrested by an HSI special agent on a criminal charge brings the agency in compliance with DOJ requirements on DNA sample collection by federal law enforcement agencies.
- ICE is the first DHS component to begin implementing DNA sampling.
- Special agents in the SAC offices in San Diego, San Juan and St. Paul have been trained to collect DNA samples from those arrested on federal or state criminal charges.

- It is a federal offense for an individual from whom DNA sample collection is authorized to refuse to cooperate in the collection of a sample. All DNA samples will involve two swabs of the cheek inside the mouth.
- All DNA samples collected by HSI special agents will be sent immediately to the Federal Bureau of Investigation's (FBI) crime lab for analysis. ICE will not retain any DNA samples.

Q and A's:

Why is ICE collecting DNS samples?

Federal law enforcement agencies are required to take DNA samples from certain individuals pursuant to 42 U.S.C § 14135a(a)(1)(A). ICE is the first agency within DHS to comply with this requirement.

When will ICE begin collecting the DNA samples?

Collection of the DNA samples will begin in the three designated SAC offices – San Diego, San Juan and St. Paul – within 30 days of June 15, 2010. Agents in these three offices have received the necessary training and equipment to begin implementing the collection of DNA samples.

Is the individual who has been arrested on a state or federal criminal charge required to give a DNA sample?

Yes. 42 U.S.C § 14135a(a)(5) establishes criminal penalties to be imposed against an individual from whom DNA sample collection is authorized, but who refuses to cooperate in the collection of a sample. 18 U.S.C § 3142(b) and (c)(1)(A) mandates that cooperation in the DNA sample collection process is a condition of pretrial release.

Will all HSI special agents be required to collect DNA samples?

Yes, but not at this time. This is a pilot program that currently involves three HSI SAC offices. The pilot program is expected to continue at least until the end of 2010 at these locations before expansion to any other SAC office is considered.

Will Enforcement and Removal Operations (ERO) law enforcement personnel be required to collect DNA samples?

Yes, but not at this time. Currently, only three HSI SAC offices are involved in this pilot program. No ERO offices are involved in DNA sample collection at this time.

Will DNA samples be taken from individuals in ICE custody for administrative immigration violations?

At this time, HSI special agents will only obtain DNA samples from criminal arrestees. DHS and DOJ are currently in the process of determining additional categories of individuals from whom DNA samples will be taken.

When will more SAC offices be required to collect DNA samples?

Because ICE is taking a phased approach to complying with the DNA collection requirement, the first phase will be evaluated in six month so that adjustments to the process can be made. No specific timeline is available for an HSI- or ICE-wide implementation.

Who pays for the DNA collection?

All costs associated with collecting DNA samples, including the kits and shipping costs to the FBI crime lab, are paid by the FBI.

Why is the collection of DNA beneficial?

When ICE collects a DNA sample, it is added to the FBI crime lab's repository of DNA samples. Because DNA can be used to link suspects and criminal evidence, the gathering and sharing of this genetic information can be a valuable investigative tool within the law enforcement community.

ICE

U.S. Immigration and Customs Enforcement (ICE) is the largest investigative arm of the Department of Homeland Security. ICE is a 21st century law enforcement agency with broad responsibilities for a number of key homeland security priorities. For more information, visit: www.ICE.gov. To report suspicious activity, call 1-866-347-2423.

Deputy Secretary

U.S. Department of Homeland Security
Washington, DC 20528



Homeland Security

January 12, 2009

The Honorable Michael Mukasey
Attorney General of the United States
Washington, D.C. 20530

Dear Attorney General Mukasey:

On December 10, 2008, the U.S. Department of Justice (DOJ) published a final rule "DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction" implementing provisions of section 1004 of the *DNA Fingerprint Act of 2005*, P.L. 109-162, and section 115 of the *Adam Walsh Child Protection and Safety Act of 2006*, P.L. 109-248 (Adam Walsh Act). Under this rule, effective January 9, 2009, agencies that arrest or detain individuals, or that supervise individuals facing charges, are directed to collect DNA samples from such individuals and from non-United States persons¹ who are detained under the authority of the United States. The Department of Homeland Security (DHS) has a number of Components that will be directly affected by this rule, including, but not limited to, U.S. Customs and Border Protection, U.S. Immigration and Customs Enforcement, the U.S. Coast Guard, the U.S. Secret Service, and the Transportation Security Administration.

Under the final rule, however, DHS is not required to collect DNA samples from:

1. Aliens lawfully in, or being processed for lawful admission to, the United States;
2. Aliens held at a port of entry during consideration of admissibility and not subject to further detention or proceedings; and
3. Aliens held in connection with maritime interdiction.

See 28 C.F.R. § 28.12(b). Further, the final rule excepts DHS from collecting DNA samples from "other aliens with respect to whom the Secretary of Homeland Security, in consultation with the Attorney General, determines that the collection of DNA samples is not feasible because of operational exigencies or resource limitations." Id. at § 28.12(b)(4).

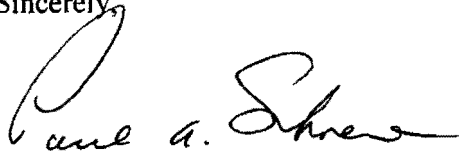
DOJ has agreed to provide affected agencies with the DNA sample collection kits necessary for agencies to collect the DNA samples required under the final rule. However, at this time we are advised that DOJ does not have a sufficient number of kits nor funding to obtain the kits necessary to meet the DNA sample collection requirements of the final rule. Therefore, I have determined that the collection of DNA samples by DHS from any categories of persons, including aliens added by the final rule, is not feasible at this time due to resource limitations and

¹ For purposes of 28 C.F.R. § 28.12(b), "non-United States persons" means persons who are not United States citizens and who are not lawfully admitted for permanent residence as defined in 8 C.F.R. § 1.1(p).

operational exigencies. Once DOJ notifies DHS that it has secured appropriate funding and an adequate supply of DNA collection kits for DHS to meet the requirements of this final rule, DHS will submit an implementation plan and timeline to DOJ and identify any additional resource or operational limitations in accordance with 28 C.F.R. § 28.12(b)(4) at that time.

DOJ's Office of Legal Policy has advised DHS's Office of the General Counsel that DHS may satisfy the consultation requirement under § 28.12(b)(4) by letter. Please have your staff contact Ellen Y. McClain, Assistant General Counsel for Enforcement, at (202) 282-(b)(6),
(b)(7)c if you wish to discuss this further.

Sincerely,

A handwritten signature in cursive script that reads "Paul A. Schneider". The signature is written in black ink and is positioned above the printed name.

Paul A. Schneider

Secretary


U.S. Department of Homeland Security
Washington, DC 20528



Homeland
Security

March 25, 2009

MEMORANDUM FOR: DHS Operational Component Heads

FROM: Janet Napolitano 

SUBJECT: Implementation of DNA Sample Collection Rule

This memorandum directs each Department of Homeland Security (DHS) Operational Component to create an implementation plan that identifies any processes or procedures that will be modified or created to ensure compliance with the DNA sample collection obligations set forth in 28 C.F.R. § 28.12, and to provide the plan to the points of contact listed below not later than April 16, 2009.

On December 10, 2008, the U.S. Department of Justice (DOJ) published in the Federal Register a final rule entitled "DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction." See 73 Federal Register 74932. The rule, which implements the requirements of § 1004 of the *DNA Fingerprint Act of 2005*, P.L. 109-162, and § 155 of the *Adam Walsh Child Protection and Safety Act of 2006*, P.L. 109-248 (Adam Walsh Act), is codified at 28 C.F.R. § 28.12. The rule took effect on January 9, 2009.

In connection with the implementation of this rule, the DHS Deputy Secretary advised the Attorney General in writing on January 12, 2009 that commencement of the DNA sample collection by DHS Operational Components would be contingent on the provision of DNA sample collection kits by DOJ. DOJ has since informed the DHS Office of General Counsel that the DNA sample collection kits are available for use by DHS Operational Components.

The rule allows DNA samples to be collected, along with a subject's fingerprints, as part of the law enforcement identification process for individuals who are arrested, facing charges, or convicted, and from non-United States persons¹ who are detained under the authority of the United States, subject to certain limitations and exceptions. Specifically, the rule exempts the collection of DNA samples from the following classes of persons:

1. Aliens lawfully in, or being processed for lawful admission to, the United States;
2. Aliens held at a port of entry during consideration of admissibility and not subject to further detention or proceedings; and
3. Aliens held in connection with maritime interdiction.

¹ For purposes of 28 C.F.R. § 28.12(b), "non-United States persons" means persons who are not United States citizens and who are not lawfully admitted for permanent residence as defined in 8 C.F.R. § 1.1(p).

See 28 C.F.R. § 28.12(b). Further, the collection of DNA samples is not required from “other aliens with respect to whom the Secretary of Homeland Security, in consultation with the Attorney General, determines that the collection of DNA samples is not feasible *because of operational exigencies or resource limitations.*” *Id.* at § 28.12(b)(4) (emphasis added).

ACTION REQUIRED

This Department is required to institute or modify relevant procedures to enable the collection of DNA samples from individuals described in the rule once DOJ has provided the collection kits. Once obtained, Operational Components must furnish the samples to the Federal Bureau of Investigation for the purposes of analysis and entry into the Combined DNA Index System.

I hereby direct each DHS Operational Component to create an implementation plan that identifies any processes or procedures that will be modified or created in order to ensure compliance with the DNA sample collection obligations set forth in 28 C.F.R. § 28.12. At a minimum, each implementation plan should identify 1) a timetable for implementation of these requirements; 2) an estimate of any costs associated with implementation; 3) a proposed training program for impacted law enforcement personnel and other staff; 4) any interagency agreements that would be contemplated as part of the DNA sample collection process, as described in 28 C.F.R. § 28.12(c); and 5) any activities or programs to which DNA sample collection requirements will not be applicable based on one or more of the exemptions set forth in 28 C.F.R. § 28.12(b).

Pursuant to 28 C.F.R. § 28.12(b)(4), the Department may consult with the Attorney General to seek an exemption from the rule for any other activities or programs for which DNA sample collection is “not feasible because of operational exigencies or resource limitations.” Accordingly, please provide in writing a list of such activities or programs for which your component seeks an exemption along with sufficient background information and analysis in anticipation of consultation with DOJ.

Please provide the implementation plan and any requests for exemptions (and supporting materials) described by this memo no later than April 16, 2009 to the DHS Office of the General Counsel, Operations and Enforcement Law Division. For any additional questions regarding this matter, please contact Ellen McClain, Assistant General Counsel (Enforcement) at (202) 282-(b)(6)
(b)(7)c.

Cost Estimate: January 2008

Estimated Costs of DNA Sampling on Existing and Forecast Populations					
DNA Collection Population Forecast			FY09	FY10	
Office of Detention and Removal (DRO) Total Apprehensions*			355,759	398,966	
	Criminal Alien Program (CAP)		165,785	196,365	
	Fugitive Operations (FugOps)		21,283	23,442	
	Office of Border Patrol (OBP)		78,368	78,987	
	Office of Field Operations (OFO)		12,353	12,339	
	Office of State and Local Coordination (OSLC 287(g))		40,063	47,463	
	DRO Other		33,188	35,709	
	Other		4,719	4,681	
Office of Investigations (OI) Apprehensions*			29,555	31,379	
Federal Protective Service (FPS) Arrests with Fingerprinting**			3,433	3,433	
	FPS Estimated Cases per Year		34,334	34,334	
	Estimated Percent Involving Arrest with Fingerprinting		10%	10%	
Total Estimated ICE Apprehensions			388,747	433,778	
Current Population in ICE Detention as of 9/11/08***			34,708	n/a	
Total Estimated ICE DNA Collection Population			423,455	433,778	
Cost Estimate Breakdown†			FY09	FY10	
Cost Driver	Units/Sample	Unit of Measure	Rate	Total	Total
Collection of DNA Buccal Sample	0.50	Man Hour	\$ 64.00	\$ 13,550,572.80	13,880,908.80
Cost of Chain of Custody Forms	1.00	Kit	\$ 10.00	\$ 4,234,554.00	4,337,784.00
Cost of Communications	0.25	Man Hour	\$ 64.00	\$ 6,775,286.40	6,940,454.40
Cost of Shipping Samples	1.00	Flat	\$ 20.00	\$ 8,469,108.00	8,675,568.00
		Primary DNA Collection Cost for FY		\$ 33,029,521.20	33,834,715.20
		Estimated DNA Collection Cost Per Sample		\$ 78.00	78.00
		Secondary DNA Collection Cost for FY‡		\$ 660,590.42	676,694.30
		Estimated DNA Collection Cost Per Person		\$ 79.56	79.56
		Estimated DNA Collection Cost for FY Apprehensions		\$ 30,928,743.14	34,511,409.50
		Estimated DNA Collection Cost for Current Population in ICE Detention		\$ 2,761,368.48	n/a
		Total Estimated DNA Collection Costs for FY		\$ 33,690,111.62	34,511,409.50
Notes					
* Estimate provided by DRO					
** Rough estimate provided by FPS. The percentage of cases involving arrest was unknown but speculated to be anywhere from 1% - 10%. This estimate uses the high end of that range.					
*** The current population in ICE Detention is not listed for FY10 because it only needs to be sampled once; thereafter, ICE will only sample incoming persons.					
† Estimated costs for DNA collection do not include startup costs associated with training, rollout, changes to facilities, specialized equipment, or resources dedicated to shipping/transportation activities. The estimate also does not include the cost of the collection kits nor costs associated with DNA analysis and entry of the profile into CODIS as DOJ/FBI will assume these costs.					
‡ Secondary samples may be required when the original sample is deemed insufficient, degraded, or flawed. We assume a 2% occurrence rate for secondary collections and that the cost of a secondary sample is the same as for a primary sample.					

Working Group on Expanding the Biometric Age Range

March 1, 2011



SECRET

Purpose of the Working Group

- This working group is to support a possible change in DHS Policy concerning the collection of biometrics from individuals entering at the U.S. ports of entry. Such a change would impact US-VISIT, CBP, and DHS Policy.
- This working group will only make such a recommendation if there is sufficient interest to do so.
- The purpose of such a change would be to ensure biometric collection at the ports of entry fully supports or compliments other existing or planned biometric uses.
- This working group does not seek to change the operations or policies of other agencies.

Known Mission Needs

Some agencies are already operating biometric collection under 14 or over 79 and could benefit from expanded collection at the ports of entry.

- At certain consular posts in Mexico, the Department of State is collecting biometrics under 14 years. *-r7 DOS has been since 1998*
- CBP is planning to collect biometrics from children under 14 for their Global Enrollment System trusted traveler program.

Working Group on Expanding the Biometric Age Range

March 1, 2011

Review of Authorities

(b)(6), (b)(7)c

DHS OGC/NPPD/US-VISIT



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Regulations for Biometrics Upon Entry

- **8 C.F.R. § 214.1 – Requirements for admission**

- Admission “conditioned on compliance with any inspection requirement in § 235.1(f)”

- **8 C.F.R. § 235.1 – Scope of inspection**

- (f)(1)(ii): DHS Secretary may require any non-exempt alien “to provide fingerprints, photograph(s) or other specified biometric identifiers” to determine admissibility
- (f)(1)(iv)(A): “Aliens younger than 14 or older than 79 on [the] date of admission” are exempt



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Relevant Rulemaking

- **January 5, 2004 Interim final rule**
 - Aliens to submit biometrics on entry at air and sea ports
- **August 31, 2004 Interim rule**
 - Expanded to Visa Waiver Program participants
 - Expanded to certain land border ports. *SO most highly impacted*
- **December 19, 2008 Final rule** *DHS Rule*
 - Further expanded alien populations subject to US-VISIT - *inc LPRs*



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Two Categories of Statutory Authority

- **Specific statutes requiring (biometric) entry/exit**
 - Immigration and Naturalization Service Data Management Improvement Act (DMIA) of 2000
 - Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001
 - Enhanced Border Security and Visa Entry Reform Act (EBSVERA) of 2002

- **Other statutes regulating admission/travel of aliens**
 - INA § 214 – Admission of nonimmigrants
 - INA § 215 – Travel control of citizens and aliens
 - INA § 235 – Inspection by immigration officers



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Mandate for Entry/Exit

- **Section 2 of the DMIA of 2000** - amended IRIRA; biometrics not mentioned
 - Entry/exit system must integrate all arrival/departure data
- **Section 414 of the USA PATRIOT Act of 2001**
 - Develop and certify biometric technology standard
- **Section 302 of the EBSVERA of 2002**
 - Entry/exit system must use biometric standards certified pursuant to the USA PATRIOT Act

- IRPA?
- 9/11 rules implemented } post-dated regulations



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Regulating Admission/Travel of Aliens

- **INA § 214 – Admission of nonimmigrants**
 - Admission of aliens “under such conditions as the Attorney General may by regulations prescribe”
- **INA § 215 – Travel control of citizens and aliens**
 - Aliens must enter/depart subject to “rules, regulations and orders” prescribed by the President
 - E.O. 13323: Functions for noncitizens assigned to S1
- **INA § 235 – Inspection by immigration officers**
 - Broad authority to inspect aliens



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INA 214 - don't mandate 14-79 age range





**Office of Investigations
DNA Collection Pilot
Project Training
FY 2010**



ICE

Office of Investigations
DNA Collection Pilot
Project Training
FY 2010



DNA Fingerprint Act 2005 / Adam Walsh Child Protection and Safety Act 2006

- **Federal agencies should collect DNA samples from individuals who are “arrested, facing charges, or convicted, or from non-United States persons who are detained under the authority of the United States.”**
- **Effective January 9, 2009.**



Office of the Attorney General
Washington, D. C. 20530

July 22, 2010

The Honorable Janet Napolitano
Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Dear Secretary Napolitano:

Thank you very much for your letter of March 22, 2010, regarding your Department's implementation of DNA sample collection from persons in certain non-convict classes in the federal jurisdiction. I commend your Department's ongoing efforts to implement DNA sample collection under federal law and regulations and look forward to continuing collaboration between our Departments in achieving the public safety benefits of this important reform.

As you know, the policy governing DNA sample collection in the federal jurisdiction for law enforcement identification purposes appears in 28 CFR 28.12, as amended by the rulemaking at 73 FR 74932. The rule exercises statutory authority of the Attorney General under the DNA Fingerprint Act, 42 U.S.C. § 14135a(a)(1)(A). The rule, which went into effect on January 9, 2009, provides that "[a]ny agency of the United States that arrests or detains individuals or supervises individuals facing charges shall collect DNA samples from individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under the authority of the United States." 28 CFR 28.12(b). The rule qualifies this requirement by stating that an agency's collection of DNA samples may generally be limited to individuals from whom the agency collects fingerprints and may be subject to other limitations or exceptions approved by the Attorney General. The rule further affords the Secretary of Homeland Security discretion regarding the collection of DNA samples from aliens in certain categories other than arrestees (*i.e.*, those not arrested on criminal charges). *Id.*

Your letter notes specifically that 28 CFR 28.12(b)(4) authorizes the Secretary of Homeland Security, in consultation with the Attorney General, to exempt from DNA sample collection aliens for whom you determine such collection is not feasible because of operational exigencies or resource limitations. You indicated in your letter that you believe that this standard is met by aliens not facing criminal charges who are "detained for processing under administrative proceedings" or who are "currently within DHS custody . . . pending administrative removal proceedings," and you requested the views

of the Department of Justice on excepting them from DNA sample collection. The proposed policy reflects your judgment that extending DNA sample collection by DHS to such immigration detainees would not be feasible at the present time because of operational exigencies and resource limitations. It is within your authority as Secretary to make such a judgment under 28 CFR 28.12 (b)(4), and the consultation with the Attorney General that the rule requires in such decisions has been effected by our present communications.

With respect to criminal arrestees, you indicate that you intend to “phase-in implementation over the next year, with certain DHS Components to begin the process more quickly than others.” You mention that DHS wishes to pursue further discussions with DOJ regarding training options for such implementation, and that the obstacles to quicker implementation include that “both ICE and CBP must negotiate with their unions to bargain on impact and implementation due to this proposed change in working conditions.”

The principal Department of Justice investigative agencies—FBI, DEA, ATF, and USMS—have already implemented the DNA Fingerprint Act and 28 CFR 28.12 and are collecting DNA samples from their arrestees. All federal agencies that have not already done so, including the DHS agencies, should complete their implementation of arrestee DNA sample collection as expeditiously as possible.

The FBI Laboratory would be pleased to discuss with DHS available training options and resources. The FBI has posted on its website, www.fbi.gov/hq/lab/html/dnau1.htm, step-by-step instructions for collecting DNA samples and forwarding the samples to the FBI laboratory for analysis, and instructions for ordering the sample collection kits. The DNA sample collection kits themselves also include written instructions together with photographic illustrations demonstrating the collection process and instructions for ordering the kits. Additionally, the FBI has prepared a DVD regarding DNA sample collection. The FBI provides these kits, and enters the resulting DNA profiles into the Combined DNA Index System (CODIS), without charge to agencies responsible for collecting samples.

Your letter also requests that I authorize, pursuant to 28 CFR 28.12(b), a general exception to DNA sample collection under which DHS officials could exempt from such collection individuals in the following class: “All persons, alien or otherwise, detained or arrested by DHS in the event of emergency or unforeseen circumstances or conditions, including mass migrations, natural or man-made disasters, medical emergencies, and other operational emergencies.” I have decided to reserve to the Department of Justice the authority to allow exceptions to DNA sample collection from criminal arrestees.

There could be situations in which DNA sample collection is not operationally feasible because of sudden mass influxes of aliens without immigration status. In such cases, it may be that most of the aliens will be held as immigration detainees and will not

be criminally charged. Given your intent not to collect DNA samples from immigration detainees who are not criminally charged, this concern does not appear to be an issue.

With respect to individuals who are arrested on criminal charges, DHS should contact the Department of Justice if emergencies or unforeseen circumstances or conditions arise affecting the feasibility of collecting DNA samples. It should be noted in this connection that, even if a situation should arise in which DHS cannot collect DNA samples from certain persons arrested on criminal charges as part of the normal booking process, that would not eliminate the need to take a DNA sample from an individual in the affected class. Arrangements would need to be made to take a DNA sample at a later point, either by DHS or by some other agency, and participation by the Department of Justice may be needed to effect or facilitate such later collection. The matter also impacts on litigation, since persons arrested on criminal charges must be promptly brought before a judicial officer, and when that occurs, cooperation in DNA sample collection comes into play as a mandatory condition of their pretrial release if a sample has not previously been collected. See Fed. R. Crim. P. 5(a); 18 U.S.C. 3142(b), (c)(1)(A). Hence, to ensure proper coordination in such situations and consistent collection of DNA samples as the law and the rule require, I think it best to reserve the authority to allow exceptions for persons arrested on criminal charges to the Department of Justice.

Finally, your letter states that DHS intends to pursue discussions with USMS to seek agreements for USMS to collect DNA samples from DHS arrestees in certain circumstances, and that you “may consider requesting additional exceptions to address these circumstances” if satisfactory agreements are not reached.

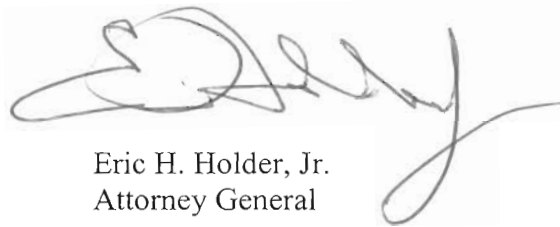
The current DNA policy requires that DNA regularly be taken from arrestees in booking, generally on the same footing as fingerprinting. See 73 FR at 74933-34. The Department of Justice is assisting in many ways to ensure that this policy is fully and consistently carried out, including the provision of DNA sample collection kits, as well as detailed instruction and guidance to complete the sample collection process. Generally, our assistance does not involve directly carrying out DNA sample collection for other agencies, which are responsible for collecting DNA from their arrestees and cannot transfer that responsibility to USMS unless USMS agrees to assume it. See 73 FR at 74935. This follows the principle that arresting agencies are responsible for booking their own arrestees, a principle not changed by expansion of the identification information taken in booking now to include DNA as well as fingerprints. However, we understand there may be situations in which USMS offices may voluntarily assume or assist in booking individuals arrested by other agencies, such as in exigent circumstances in which the arresting officers would not otherwise have access to booking facilities. In such cases, the assistance provided by USMS in carrying out the booking will include assistance in DNA sample collection.

In closing, I again commend DHS for its efforts in carrying out this important reform, which offers great benefits to law enforcement and public safety. Please do not

The Honorable Janet Napolitano
Page 4

hesitate to contact me if I can provide further assistance. Generally, DHS components or personnel desiring assistance from or consultation with the Department of Justice in this area may contact Deputy Assistant Attorney General Rajesh De at (202) 307-3024 or Senior Counsel David Karp at (202) 514-3273.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric H. Holder, Jr.", is centered on the page. The signature is fluid and cursive, with a long, sweeping tail that extends to the right.

Eric H. Holder, Jr.
Attorney General

111TH CONGRESS
2D SESSION

H. R. 4614

IN THE SENATE OF THE UNITED STATES

MAY 19, 2010

Received; read twice and referred to the Committee on the Judiciary

AN ACT

To amend part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968 to provide for incentive payments under the Edward Byrne Memorial Justice Assistance Grant program for States to implement minimum and enhanced DNA collection processes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Katie Sepich Enhanced
3 DNA Collection Act of 2010”.

4 **SEC. 2. INCENTIVE PAYMENTS UNDER THE BYRNE GRANTS**
5 **PROGRAM FOR STATES TO IMPLEMENT MIN-**
6 **IMUM AND ENHANCED DNA COLLECTION**
7 **PROCESSES.**

8 Section 505 of title I of the Omnibus Crime Control
9 and Safe Streets Act of 1968 (42 U.S.C. 3755) is amend-
10 ed by adding at the end the following new subsection:

11 “(i) PAYMENT INCENTIVES FOR STATES TO IMPLE-
12 MENT MINIMUM AND ENHANCED DNA COLLECTION
13 PROCESSES.—

14 “(1) PAYMENT INCENTIVES.—

15 “(A) BONUS FOR MINIMUM DNA COLLEC-
16 TION PROCESS.—Subject to subparagraph (B),
17 in the case of a State that receives funds for a
18 fiscal year (beginning with fiscal year 2011)
19 under this subpart and has implemented a min-
20 imum DNA collection process and uses such
21 process for such year, the amount of funds that
22 would otherwise be allocated under this subpart
23 to such State for such fiscal year shall be in-
24 creased by 5 percent.

25 “(B) BONUS FOR ENHANCED DNA COLLEC-
26 TION PROCESS.—In the case of a State that re-

1 ceives funds for a fiscal year (beginning with
2 fiscal year 2011) under this subpart and has
3 implemented an enhanced DNA collection proc-
4 ess and uses such process for such year, the
5 amount of funds that would otherwise be allo-
6 cated under this subpart to such State for such
7 fiscal year shall be increased by 10 percent.

8 “(2) DEFINITIONS.—For purposes of this sub-
9 section:

10 “(A) MINIMUM DNA COLLECTION PROC-
11 ESS.—The term ‘minimum DNA collection
12 process’ means, with respect to a State, a proc-
13 ess under which the Combined DNA Index Sys-
14 tem (CODIS) of the Federal Bureau of Inves-
15 tigation is searched at least one time against
16 samples from the following individuals who are
17 at least 18 years of age:

18 “(i) Such individuals who are arrested
19 for, charged with, or indicted for a crimi-
20 nal offense under State law that consists of
21 murder or voluntary manslaughter or any
22 attempt to commit murder or voluntary
23 manslaughter.

24 “(ii) Such individuals who are ar-
25 rested for, charged with, or indicted for a

1 criminal offense under State law that has
2 an element involving a sexual act or sexual
3 contact with another and that is punish-
4 able by imprisonment for more than 5
5 years, or an attempt to commit such an of-
6 fense.

7 “(iii) Such individuals who are ar-
8 rested for, charged with, or indicted for a
9 criminal offense under State law that has
10 an element of kidnaping or abduction pun-
11 ishable by imprisonment for 5 years or
12 more.

13 “(B) ENHANCED DNA COLLECTION PROC-
14 ESS.—The term ‘enhanced DNA collection proc-
15 ess’ means, with respect to a State, a process
16 under which the State provides for the collec-
17 tion, for purposes of inclusion in the Combined
18 DNA Index System (CODIS) of the Federal
19 Bureau of Investigation, of DNA samples from
20 the following individuals who are at least 18
21 years of age:

22 “(i) Such individuals who are arrested
23 for or charged with a criminal offense
24 under State law that consists of murder or

1 voluntary manslaughter or any attempt to
2 commit murder or voluntary manslaughter.

3 “(ii) Such individuals who are ar-
4 rested for or charged with a criminal of-
5 fense under State law that has an element
6 involving a sexual act or sexual contact
7 with another and that is punishable by im-
8 prisonment for more than 1 year, or an at-
9 tempt to commit such an offense.

10 “(iii) Such individuals who are ar-
11 rested for or charged with a criminal of-
12 fense under State law that consists of a
13 specified offense against a minor (as de-
14 fined in section 111(7) of the Sex Offender
15 Registration and Notification Act (42
16 U.S.C. 16911(7)), or an attempt to com-
17 mit such an offense.

18 “(iv) Such individuals who are ar-
19 rested for or charged with a criminal of-
20 fense under State law that consists of bur-
21 glary or any attempt to commit burglary.

22 “(v) Such individuals who are ar-
23 rested for or charged with a criminal of-
24 fense under State law that consists of ag-
25 gravated assault.

1 “(3) EXPUNGEMENT OF PROFILES.—The
2 expungement requirements under section 210304(d)
3 of the DNA Identification Act of 1994 (42 U.S.C.
4 14132(d)) shall apply to any samples collected pur-
5 suant to this subsection for purposes of inclusion in
6 the Combined DNA Index System (CODIS) of the
7 Federal Bureau of Investigation.

8 “(4) REPORTS.—The Attorney General shall
9 submit to the Committee of the Judiciary of the
10 House of Representatives and the Committee of the
11 Judiciary of the Senate an annual report (which
12 shall be made publicly available) that—

13 “(A) lists the States, for the year in-
14 volved—

15 “(i) which have (and those States
16 which have not) implemented a minimum
17 DNA collection process and use such proc-
18 ess; and

19 “(ii) which have (and those States
20 which have not) implemented an enhanced
21 DNA collection process and use such proc-
22 ess;

23 “(B) describes the increases granted to
24 States under paragraph (1) for the year in-
25 volved and the amounts that States not receiv-

6/21

DVA Meeting

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on phone

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- DMD/DRD

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DHS DNA Sampling Mtg

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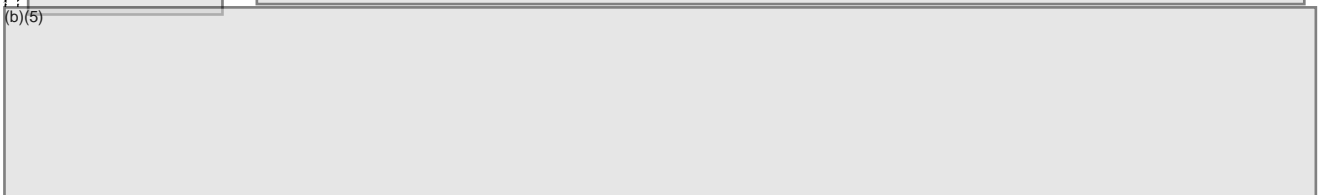
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7/18/11 DNA Sampling Meeting - ICE

Dec 10, 2008 - DOJ published final rule on DNA-Sample Collection

Jan 12, 2009 - ^{former} DHS Dep Sec Paul Schneider advised former AG Michael Mukasey

March 2009 - SI directed components to create an implementation plan to begin sample collection

July 2009 - ICE submitted its plan calling for phased implementation

Oct/Nov 2009 - 3 HSI offices (San Diego, San Juan, Saint Paul) began ^{preparing to} sampling ^{individuals} ~~arrested~~ arrested for violation of federal or state criminal law

~~Apr~~ March 22, 2010 - SI wrote to AG Holder requesting exemptions for DHS

April ²⁶ 2010 - DHS OIG concurred w ICE HSI pilot program

June 15, 2010 - HSI Assistant Director Michael Holt notified SAES that DNA sampling ICE 2011 FOIA 13882.0003 in the

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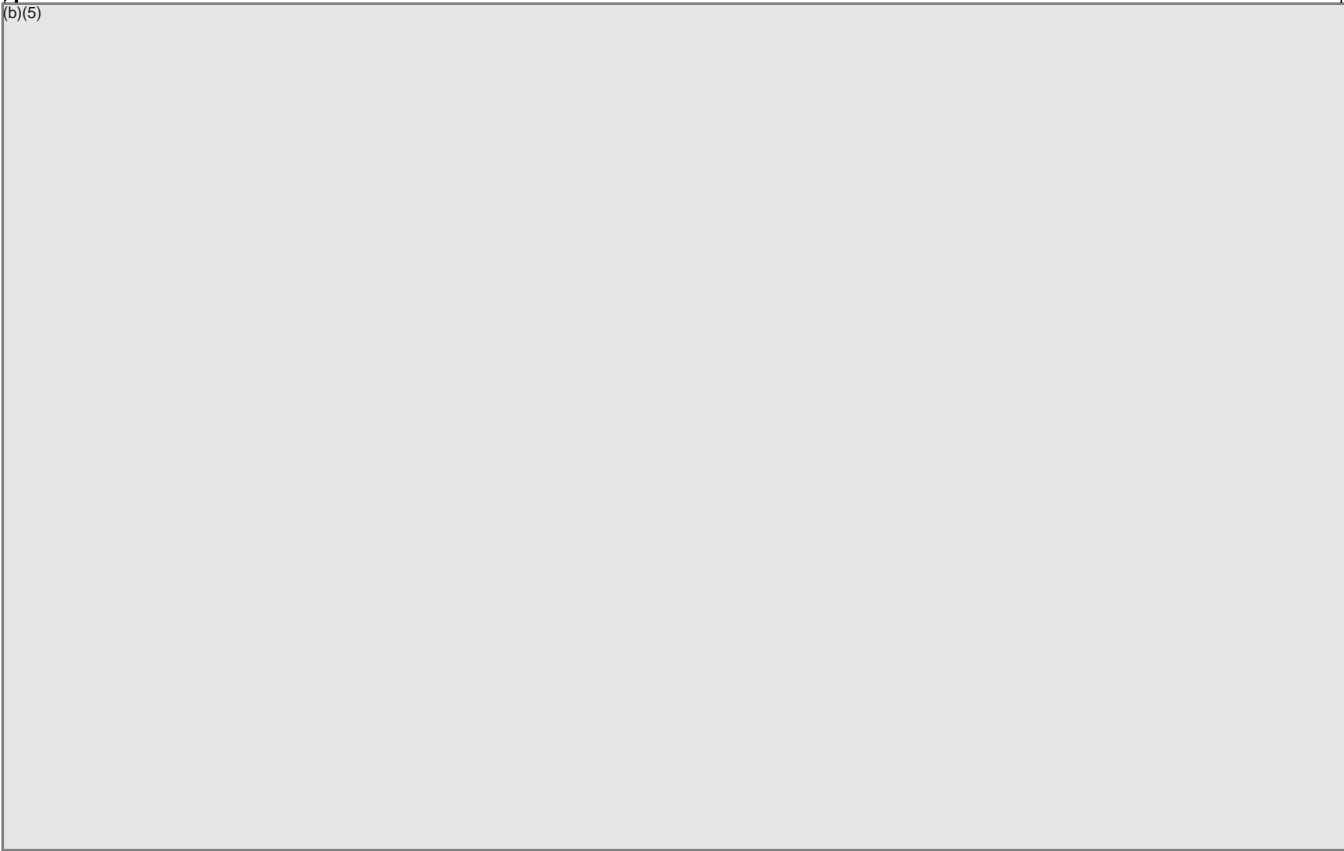
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Certificate

HSL - web based training w/

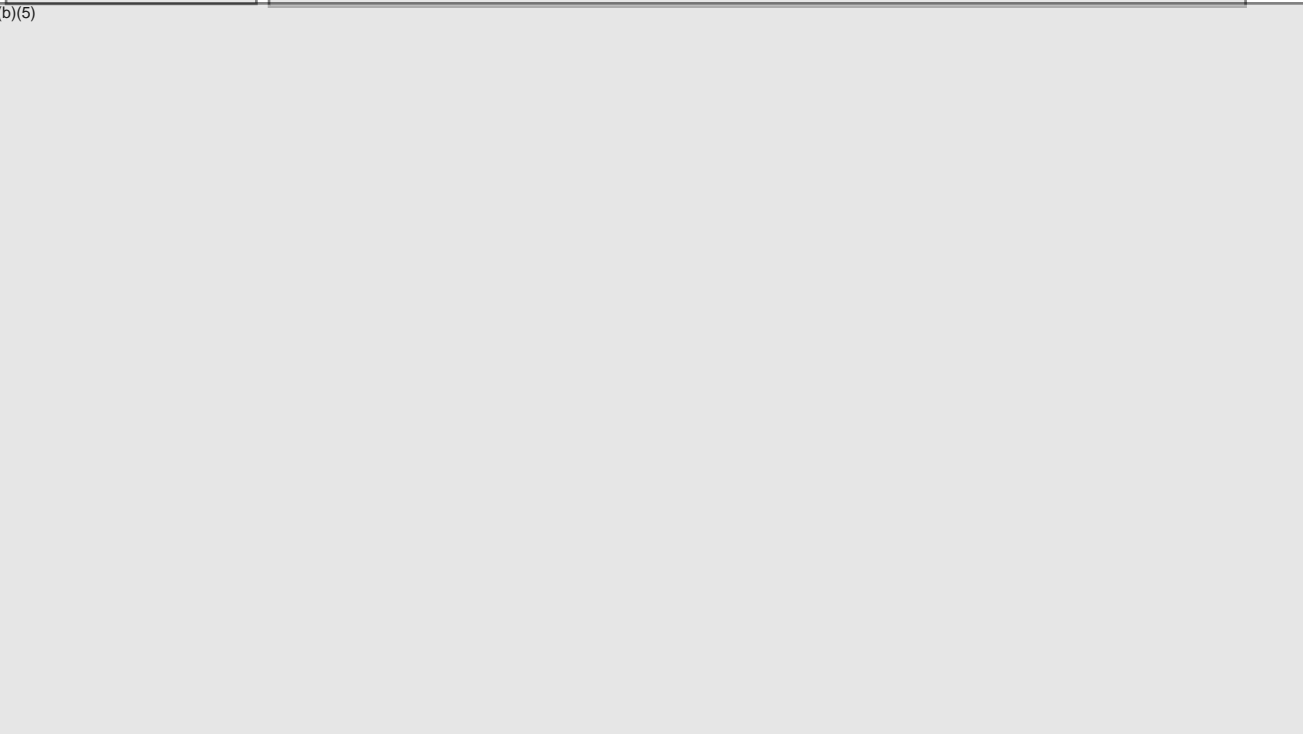
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Privacy-

6/1/11 DHS Biometrics Work Group

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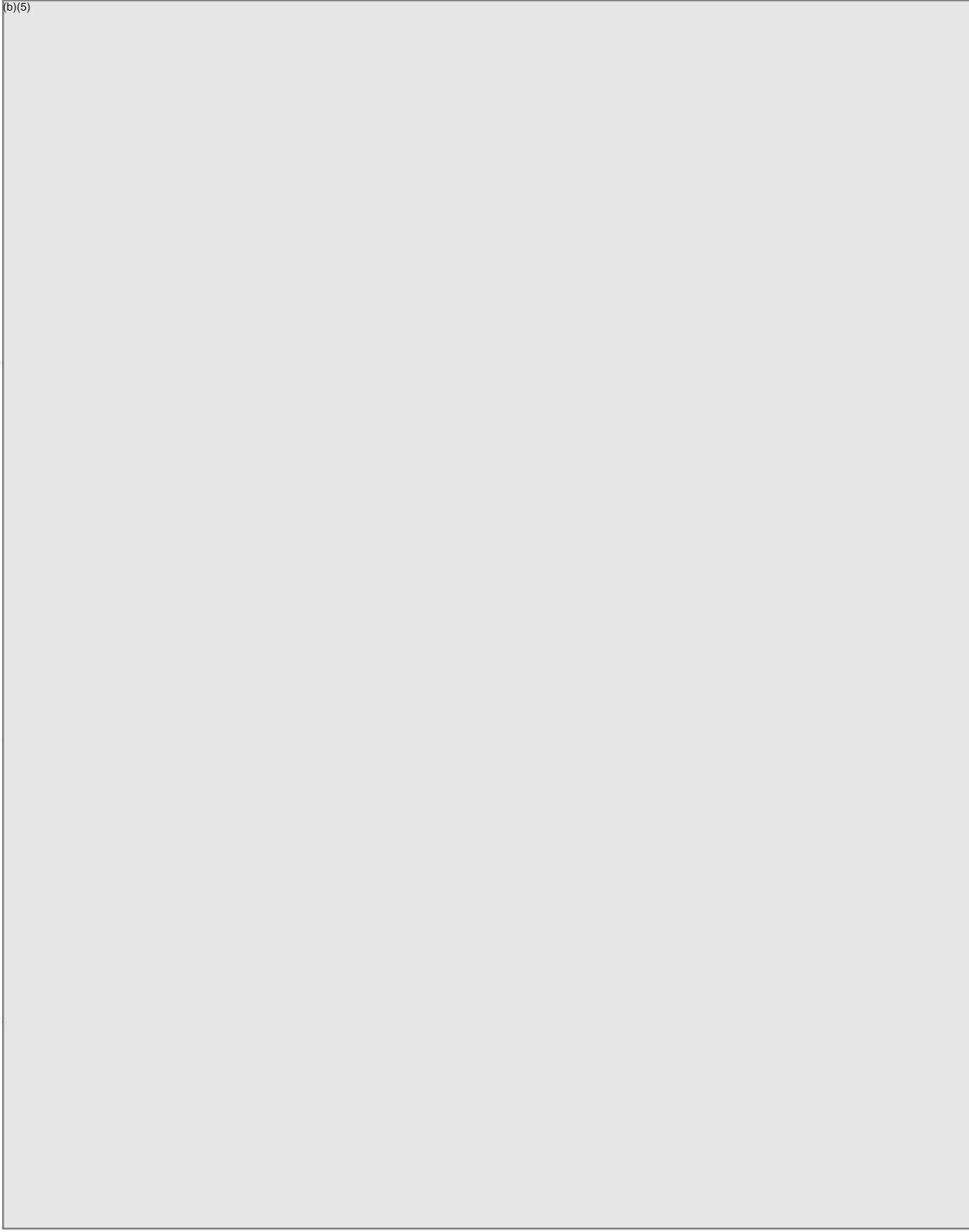
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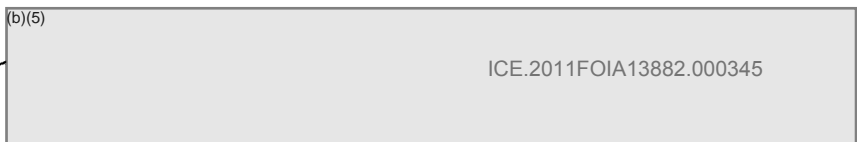
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||| * Lyn Rabinovitch

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S/2 Biometrics Meeting

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- Imm Law Team OGC

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- OGC

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- ICE

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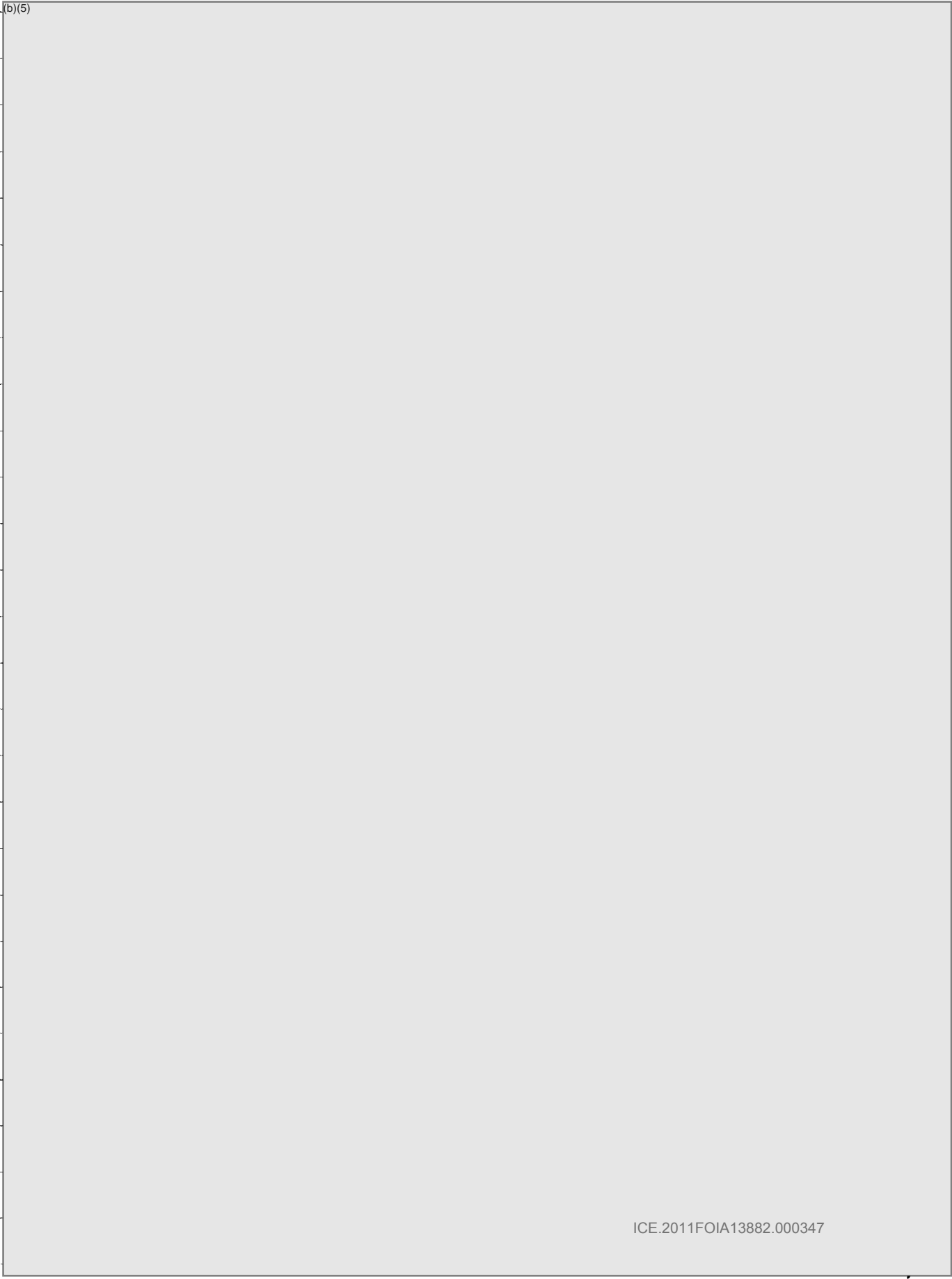
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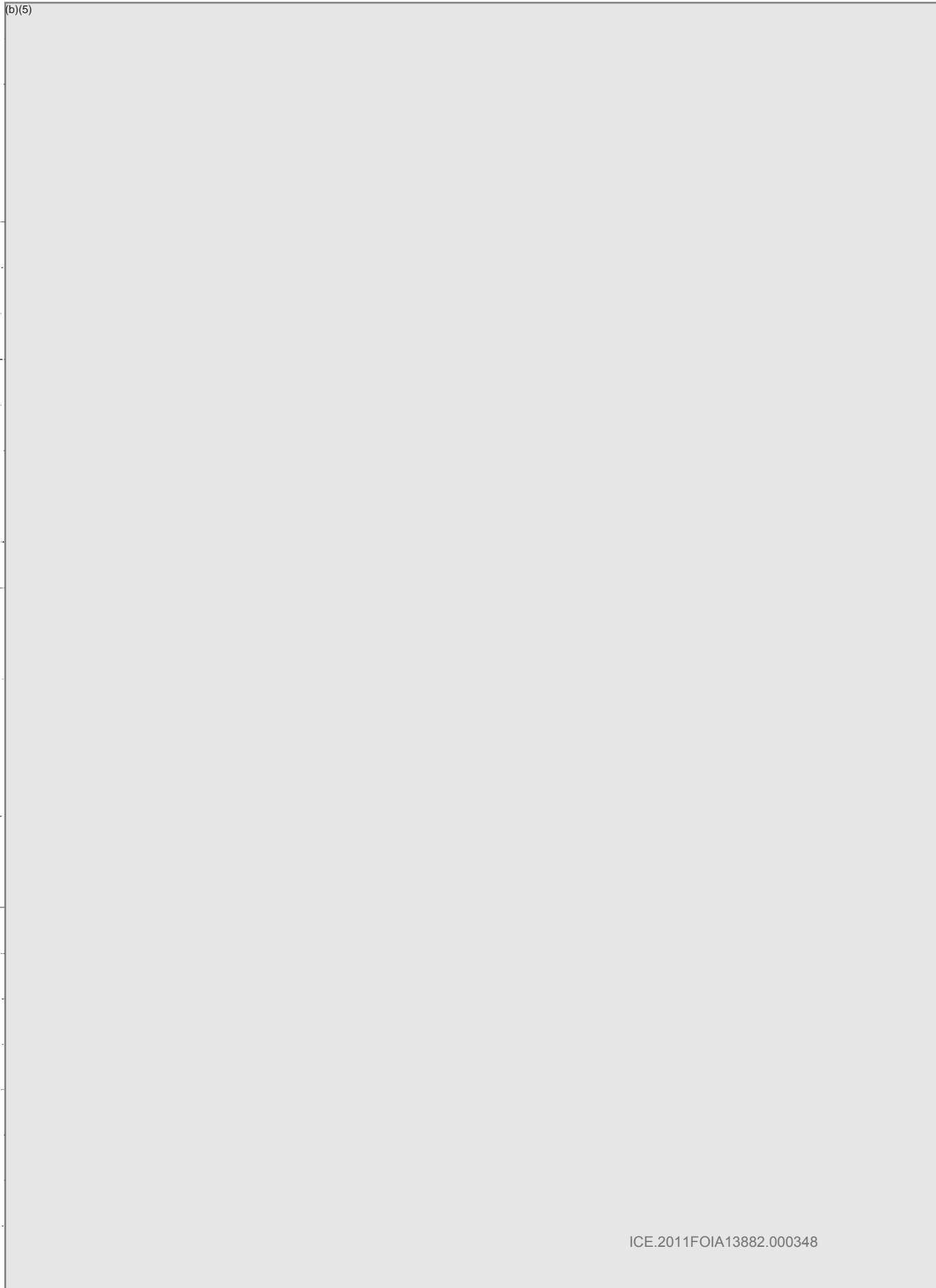
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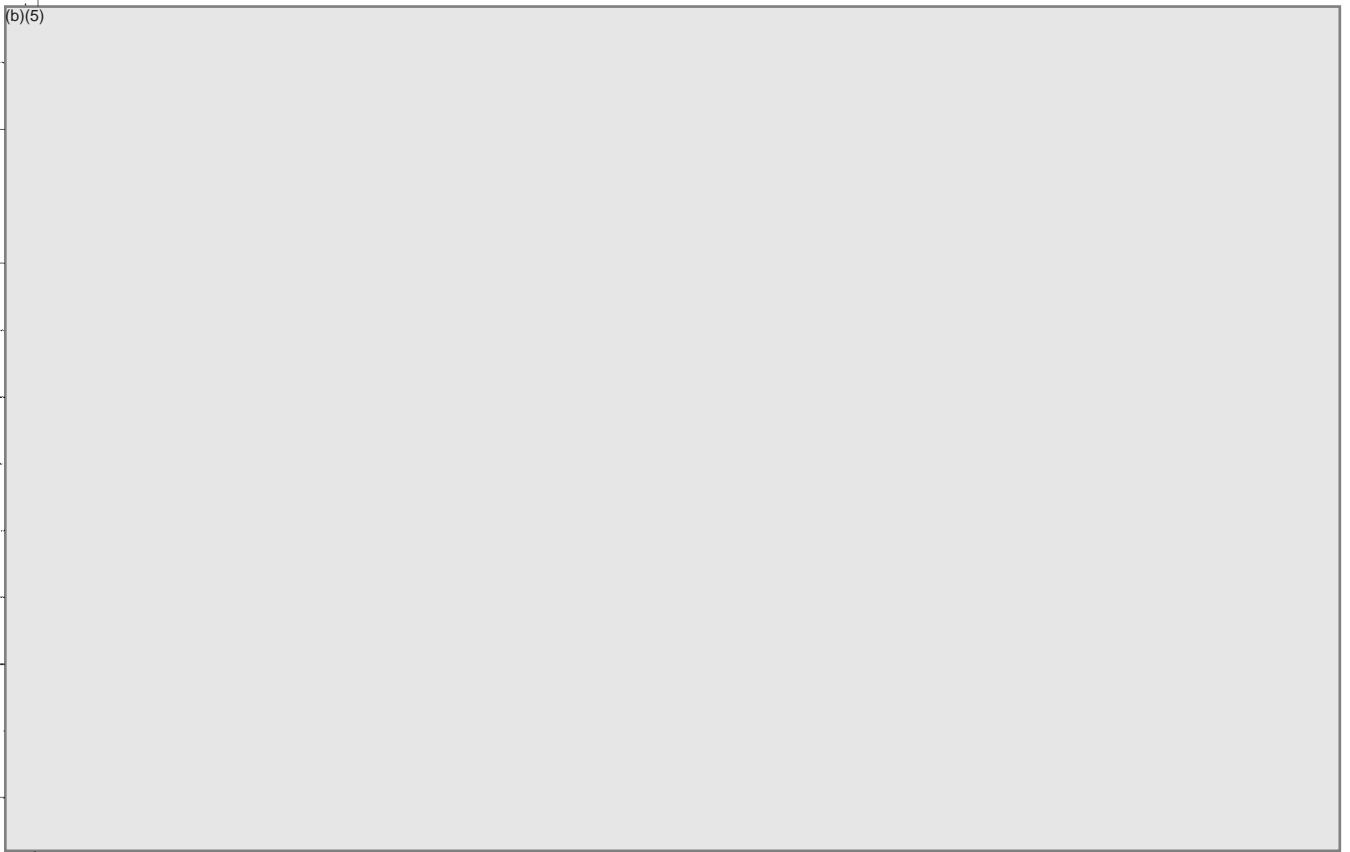
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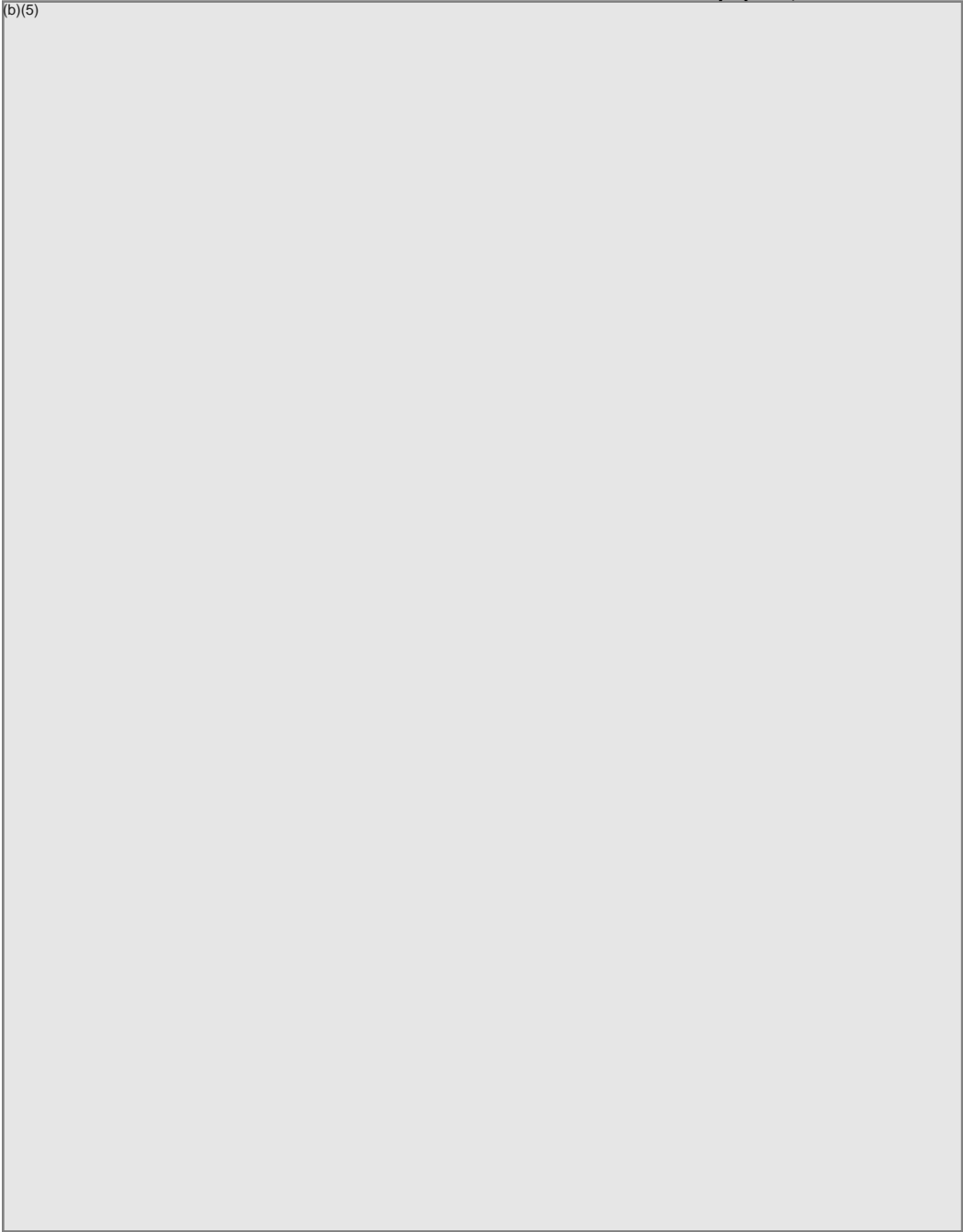
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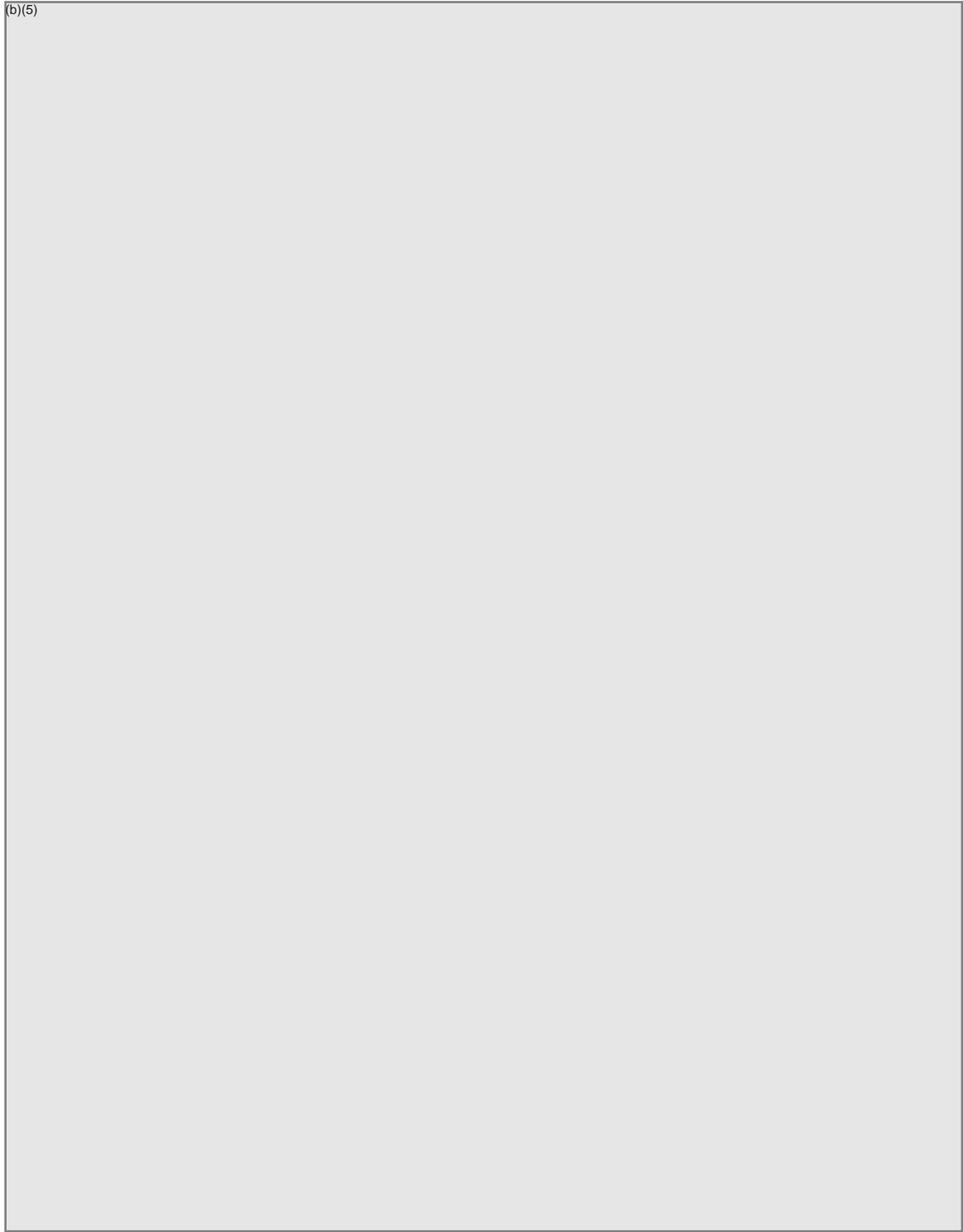


3/1/11 US VISIT

Age Range work Group

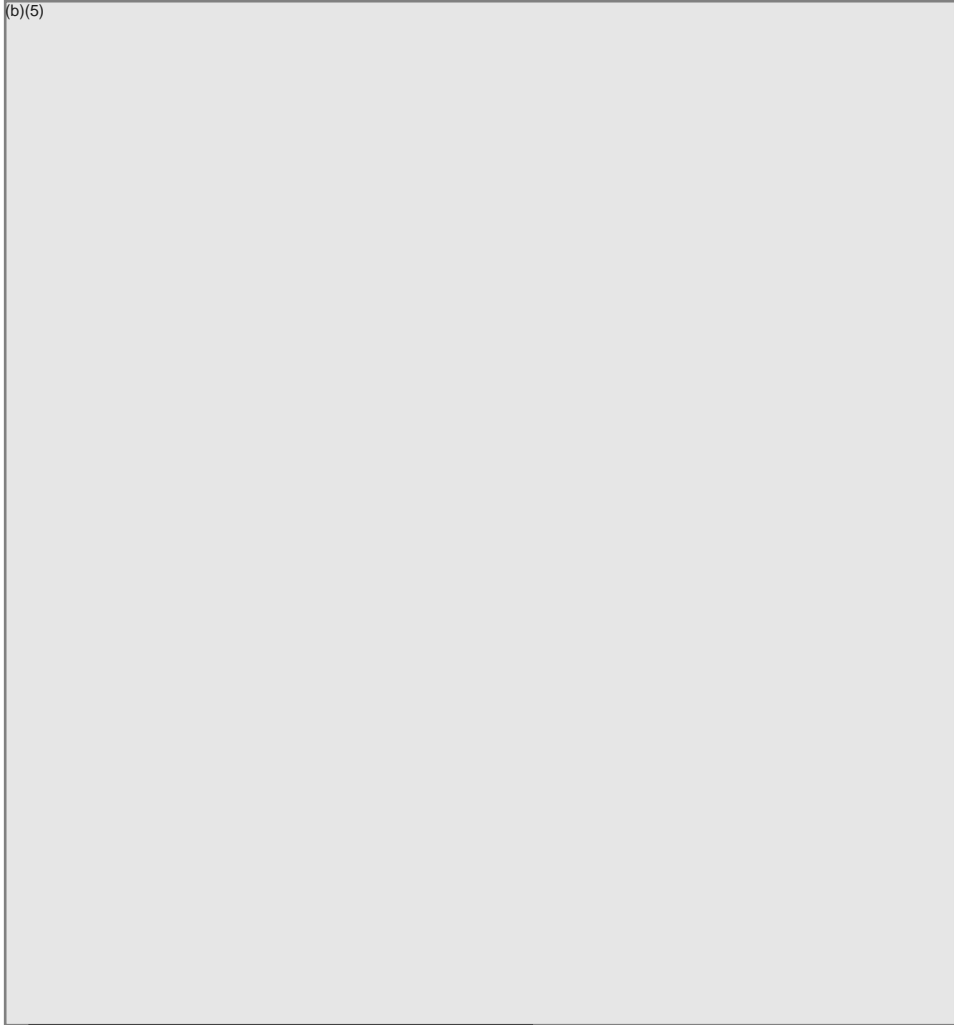
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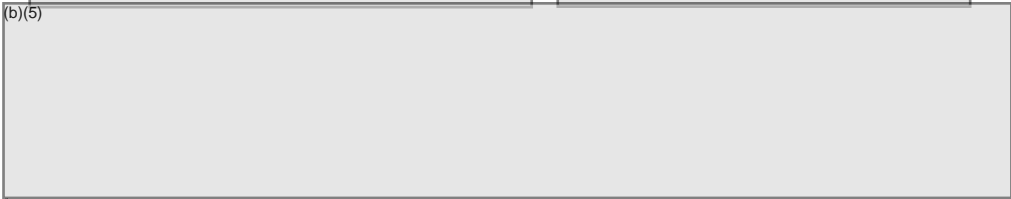
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