BOND STANDARD LANGUAGE

A. Mandatory Detention of Certain Criminal Aliens and Terrorists Under INA § 236(c)

An alien must be detained by the Department of Homeland Security ("DHS") if "described in" INA § 236(c)(1), unless the narrow exception under INA § 236(c)(2) applies. INA § 236(c)(2). The following aliens are "described in" that provision: (1) an alien who is inadmissible by reason of having committed any offense covered in INA § 212(a)(2); (2) an alien who is deportable by reason of having committed any offense covered in INA § 237(a)(2)(A)(ii), A(iii), B, C, or D; (3) an alien who is deportable under INA § 237(a)(2)(A)(i) on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year; and (4) an alien who is inadmissible under INA § 212(a)(3)(B) or deportable under INA § 237(a)(4)(B). INA § 236(c)(1)(A)-(D). See also Matter of Rojas, 23 I&N Dec. 117, 119-125 (BIA 2001) (concluding that the statutory language refers only to subsections (A) through (D) of INA § 236(c)(1) and does not encompass the qualifying clause "when the alien is released. . .").
The DHS does not need to charge the alien with the ground of removability that provides the basis for his detention under INA § 236(c) for him to be deemed an alien that "is deportable" or "is inadmissible" on that ground. See Matter of Kotliar, 24 I&N Dec. 124, 126-127 (BIA 2007). However, where the basis for detention is not included in the charging document, the alien must be given notice of the circumstances or convictions that provide the basis for mandatory detention. See id. at 127.

Only aliens who are released from non-DHS custody after October 9, 1998, the date the Transition Period Custody Rules (TPCR) expired, are subject to mandatory detention under INA § 236(c). Matter of Adeniji, 22 I&N Dec. 1102, 1104-05 (BIA 1999). Further, the alien must have been released from physical custody of non-DHS authorities. Matter of West, 22 I&N Dec. 1405, 1407-10 (BIA 2000) (finding that an alien released from physical custody prior to the expiration of the TPCR was not subject to INA § 236(c), even though he was later sentenced to probation after its expiration). Section 236(c) applies irrespective of whether the DHS immediately detains the alien upon his release. Kotliar, 24 I&N Dec. at 125; Rojas, 23 I&N Dec. at 119-125. But see Quezada-Bucio v. Ridge, 317 F. Supp.2d 1221, 1227-31 (W.D. Wash. 2004) (finding that INA § 236(c) "does not apply to aliens who have been taken into immigration custody several months or several years after they have been released from state custody").

1. Narrow Statutory Exception to Mandatory Detention Provision

An alien subject to mandatory detention under INA § 236(c)(2) may only be released if the AG decides pursuant to 18 U.S.C. § 3521, entitled "Witness Relocation and Protection," that the release is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or to protect an immediate family member of such witness. INA § 236(c)(2). The alien must also satisfy the AG that he will not pose a danger to the safety of other persons or of property and is likely to appear for hearings. Id.

2. Joseph Hearing

Nevertheless, an Immigration Judge ("IJ") retains jurisdiction to determine whether the alien is "properly included" within INA § 236(c). See 8 C.F.R. § 1003.19(h)(2)(ii); Matter of Joseph, 22 I&N Dec. 660, 663 (BIA 1999) [hereinafter Joseph I], clarified by 22 I&N Dec. 799 (BIA 1999) [hereinafter Joseph II]. This determination may be made either before or after the conclusion of the underlying removal case. Joseph II, 22 I&N Dec. at 800. If made after its resolution, the IJ may rely on the underlying merits decision. Id. However, if made prior to completion of the case in chief, an alien will be considered "properly included" in a mandatory detention category when the IJ is convinced that DHS is "substantially unlikely to establish at the merits hearing the charge or charges that subject the alien to mandatory detention." Id. at 800, 806. But see Tijani v. Willis, 430 F.3d 1241, 1244-47 (9th Cir. 2005) (Tashima, J., concurring) (finding that the Joseph standard violates due process and suggesting that "[o]nly those immigrants who could not raise a 'substantial' argument against their removability should be subject to mandatory detention"). In making this decision, an IJ "must

necessarily look forward to what is likely to be shown during the hearing on the underlying removal case." Joseph II, 22 I&N Dec. at 807. For example, "the failure of the Service to possess a certified copy of a conviction record shortly after taking an alien into custody would not necessarily be indicative of its ability to produce such a record at the merits hearing." Id.

Where the alien has not been charged with the ground of removability providing the basis for his detention, the IJ must first "look at the record to determine whether it establishes that the alien has committed an offense and whether the offense would give rise to a charge of removability included in that provision." See Kotliar, 24 I&N Dec. at 126-27.

Moreover, if an IJ finds that the alien has not been properly included within INA § 236(c), he must still apply the custody standards in INA § 236(a) before ordering the alien released. Joseph II, 22 I&N Dec. at 806.

3. Possible Limitations on Mandatory Detention Imposed by Federal Courts

The U.S. Supreme Court has upheld the mandatory detention of aliens under INA § 236(c) as constitutional. See Demore v. Kim, 538 U.S. 510, 517-530 (2003). In Demore, the alien, a lawful permanent resident, conceded that he was deportable as charged and that he was subject to mandatory detention under the terms of INA § 236(c). Id. at 513-514. The Supreme Court held that "Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as respondent be detained for the brief period necessary for their removal proceedings." Id. at 517-531. In his concurring opinion, Justice Kennedy suggested that if the continued detention of a lawful permanent resident pursuant to INA § 236(c) becomes "unreasonable or unjustified," however, that he could be entitled to an individualized determination as to his risk of flight and dangerousness. See id. at 532 (Kennedy, J., concurring).

Subsequently, the Ninth Circuit considered whether the prolonged detention of a lawful permanent resident under INA § 236(c) was constitutional. See Tijani, 430 F.3d at 1242. The Ninth Circuit concluded that "it is constitutionally doubtful that Congress may authorize imprisonment of this duration [two years and eight months] for lawfully admitted resident aliens who are subject to removal." See id. It found that Demore, supra, was distinguishable because, unlike Tijani, the alien conceded removability in Demore. See id. Accordingly, the Ninth Circuit remanded to the District Court with instructions to grant the writ of habeas corpus, unless the DHS first provided the alien a hearing before an IJ empowered to grant bail if the DHS did not establish that he was a flight risk or danger to the community. See id.

B. Mandatory Detention of Suspected Terrorists Under INA § 236A

The AG is authorized to mandatorily detain any person he has certified as having reasonable grounds to believe is (1) a person described in INA §§ 237(a)(4)(A)(i) [engaged in espionage, sabotage, or export control], 237(a)(4)(A)(iii) [opposition by violence or overthrow of U.S. government], or 212(a)(4)(B) [terrorist activity]; or (2) "is engaged in any other activity that endangers the national security of the United States." INA § 236A(a). Only the AG or the Deputy AG may make this certification. INA § 236A(a)(4). The AG must place the alien in removal proceedings, or charge him criminally, no later than seven days after detaining him, or release him. INA § 236A(a)(5). If the alien is placed in removal proceedings, the AG must mandatorily detain him even if he is eligible for relief or obtains relief (e.g. CAT), until the AG determines that he no longer has reason to believe that the alien falls under one of the basis for certification. INA § 236A(a)(2). However, if the alien is finally found not to be removable, his detention shall terminate. Id.

C. Non-Mandatory Detention and Release on Bond Under INA § 236(a)

An IJ has broad discretion in bond proceedings under INA § 236(a) to determine whether to release an alien on bond. Matter of Guerra, 24 I&N Dec. 37, 39-40 (BIA 2006). For all aliens not subject to

mandatory detention, an IJ may (1) continue to detain the alien; or (2) release him on bond of not less than $1,500.00. INA § 236(a)(1)-(2). The statute does not expressly provide for the option of ordering the alien released on his own recognizance. See INA § 236(a).

1. Threshold Requirements

The alien bears the burden of showing to the satisfaction of the IJ that he merits release on bond. Guerra, 24 I&N Dec. at 38. Before an alien may be released under INA § 236(a), he must demonstrate (1) that he is not a threat to national security; (2) that his release would not pose a danger to property or persons; and (3) that he is likely to appear for any future proceedings. Id. at 38, 40; Adeniji, 22 I&N Dec. at 1112-13 (BIA 1999) (finding that 8 C.F.R. § 1236.1(c)(8) applies regardless of the expiration of the TPCR).

a. Threat to National Security

The AG has determined that the release of an undocumented Haitian migrant, who arrived in the United States by sea, would "give rise to adverse consequences for national security and sound immigration policy." See Matter of D-J-, 23 I&N Dec. 572, 579-81 (A.G. 2003). Specifically, the AG found that the release of aliens like him would come to the attention of others in Haiti and encourage further surges in illegal immigration by sea. Id. at 579. Such surges "injure national security by diverting valuable Coast Guard and DOD resources from counterterrorism and homeland security responsibilities." Id. Additionally, the AG considered that the release on bond of such aliens without adequate background screening and investigation presents a risk to national security because aliens from countries such as Pakistan have increasingly used Haiti as a staging point for migration into the United States. Id. at 580.

b. Danger to Persons or Property

An alien who presents a danger to persons or property should not be released while removal proceedings are pending. Guerra, 24 I&N Dec. at 38 (citing Matter of Drysdale, 20 I&N Dec. 815 (BIA 1994)). Danger to the safety of other persons or property is not limited to the threat of violence; for example, the distribution of drugs is a danger to the safety of persons. See Matter of Melo, 21 I&N Dec. 883, 886 (BIA 1997). See also Guerra, 24 I&N Dec. at 41 (upholding IJ's determination that alien posed a risk to others because of his alleged involvement in a drug trafficking scheme). In determining whether an alien poses a threat to the community, an IJ is not restricted to considering only criminal convictions. Guerra, 24 I&N Dec. at 40. Rather, "any evidence in the record that is probative and specific may be considered." Id. at 40-41. For example, the Board of Immigration Appeals ("BIA") has upheld an IJ's reliance on a criminal complaint prepared by a DEA Special Agent because the information contained therein regarding the respondent's alleged involvement in a drug trafficking scheme was specific and detailed. Id.

c. Flight Risk

Further, an alien with a greater likelihood of being granted relief from removal has a greater motivation to appear for a removal hearing than one who, based on a criminal record or otherwise, has less potential of being granted relief. See Matter of Andrade, 19 I&N Dec. 488, 490 (BIA 1987). In D-J-, 23 I&N Dec. at 582, the AG determined that the alien was a flight risk because his application for asylum had been denied by the IJ and was currently pending on appeal before the BIA. The AG also considered that the alien, an undocumented Haitian migrant, was among a group of aliens who sought to evade the Coast Guard and law enforcement officers while attempting to enter the United States by sea. Id. at 581.

In Adeniji, 22 I&N Dec at 114, the alien had been convicted of conspiracy to commit bank fraud and had made false statements to former INS officers. The BIA determined that he was a flight risk "[i]n view of his criminal record and history of other questionable or deceitful behavior." Id. at 114-15.

2. Discretionary Factors

An IJ may also consider a number of other factors in determining whether an alien merits release on bond under INA § 236(a), as well as the amount of bond that is appropriate. See Guerra, 24 I&N Dec. at 40. A decision regarding the amount of bond to be imposed should be based on an objective evaluation of the factors presented. See Matter of Daryoush, 18 I&N Dec. 352, 353 (BIA 1982) (citations omitted). An IJ may choose to give greater weight to one factor over others, so long as the decision is reasonable. Guerra, 24 I&N Dec. at 40. The determination may be based upon any information that is available to the IJ or that is presented to him by the alien or DHS. See 8 C.F.R. § 1003.19(d).

Significant factors in a bond determination include: the alien's fixed address, length of residence, and method of entry into the United States; family ties in the United States, particularly those who can confer immigration benefits on the alien; employment history in the United States, including length and stability; attempts to escape from authorities or other flight to avoid prosecution and prior failures to appear for scheduled court proceedings; immigration record; and criminal record, including extensiveness and recency, indicating consistent disrespect for the law and ineligibility for relief from deportation or removal. See Guerra, 24 I&N Dec. at 40 (citations omitted).

Less significant factors include the alien's early release from prison, parole, or low bond in related criminal proceedings, the alien's ability or inability to pay, and DHS difficulties in executing a final order of deportation. See Matter of Andrade, 19 I&N Dec. 488, 490 (BIA 1987); Matter of Shaw, 17 I&N Dec. 177, 178-79 (BIA 1979); Matter of P-C-M-, 20 I&N Dec. 432, 434 (BIA 1991).

D. Detention of Aliens Initially Screened for Expedited Removal Under INA § 235

An alien who is initially screened for expedited removal under INA § 235, but is subsequently placed in removal proceedings under INA § 240, such as following a final positive credible fear determination, is eligible for a custody redetermination hearing before an IJ, unless he is within a class of aliens specifically excluded from the custody jurisdiction of IJs under 8 C.F.R. § 1003.19(h)(2)(i). Matter of X-K-, 23 I&N Dec. 731 (BIA 2005). Because an IJ lacks custody jurisdiction over arriving aliens pursuant to 8 C.F.R. § 1003.19(h)(2)(i)(B), only "certain other aliens," as designated by the Secretary of the DHS in his discretion, will be eligible. See id.

The Ninth Circuit has held that aliens may only be detained pursuant to INA § 235(b)(1)(B)(ii) and (b)(2)(A) for "a reasonable period" and "only if there is a significant likelihood of removal in the reasonably foreseeable future." Nadarajah v. Gonzales, 443 F.3d 1069, 1079 (9th Cir. 2006).

E. Special Considerations for Juveniles

A juvenile is defined as an alien under the age of 18 years. 8 C.F.R. § 1236.3(a). Juveniles may only be released, in order of preference, to (1) a parent; (2) a legal guardian; or (3) an adult relative (brother, sister, aunt, uncle, grandparent) who is not presently in DHS detention. 8 C.F.R. § 1236.3(b)(1). If the parent or legal guardian is in DHS detention or is outside of the United States, the juvenile may be released to a person designated by the parent or legal guardian in a sworn affidavit, executed before an immigration officer or consular officer, as capable and willing to care for the juvenile's well-being. 8 C.F.R. § 1236.3(b)(3).

F. Bond Record

Custody proceedings must be kept separate and apart from removal proceedings. Adeniji, 22 I&N Dec. at 1115 (citing 8 C.F.R. § 1003.19(d)). Information adduced during a removal hearing, however, may be considered during a custody hearing so long as it is made part of the bond record. See id. Accordingly, before an IJ may rely on evidence from the merits case, this evidence must be introduced or otherwise reflected in the bond record, such as through a summary of merits hearing testimony. See id.

G. Detention After Entry of Final Order of Removal

The Supreme Court has limited the detention of aliens pursuant to INA § 241(a)(6) after the entry of a final removal order and subsequent to the ninety-day removal period. See Clark v. Martinez, 543 U.S. 371 (2005); Zadvydas v. Davis, 533 U.S. 678 (2001). Section 241(a)(6) provides that an alien "may" be detained beyond the ninety-day removal period if he has been ordered removed and is (1) inadmissible under INA § 212; (2) removable under INA §§ 237(a)(1)(C), 237(a)(2), or 237(a)(4); or (3) has been determined by the AG to be a risk to the community or unlikely to comply with the order or removal. INA § 241(a)(6). In light of the "serious constitutional threat" posed by the potentially indefinite detention of aliens admitted to the United States, the Supreme Court in Zavydas, 533 U.S. at 689, 699, interpreted this provision as authorizing the AG to detain aliens in the second category only so long as is "reasonably necessary" to remove them from the country. It concluded that only detention related to the statute's "basic purpose [of] effectuating an alien's removal," is permissible and that "once removal is no longer reasonably foreseeable, continued detention is no longer authorized." Id. at 696-699. The Supreme Court further held that the presumptive period during which the detention of an alien is reasonably necessary to effectuate his removal is six months; thereafter, the alien is eligible for conditional release if he can demonstrate that there is "no significant likelihood of removal in the reasonable future." Id. at 701. However, it clarified that the present case did not involve "terrorism or other special circumstances where special arguments might be made for preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security." Id. at 695-96. In Clark, 543 U.S. at 378-387, the Supreme Court extended its interpretation of this provision to include the first category of aliens listed in INA § 241(a)(6), those who are inadmissible under INA § 212.

Nevertheless, the Ninth Circuit has held that the DHS may detain an alien pursuant to INA § 241(a)(2) during the ninety-day removal period, even if his removal is not reasonably foreseeable. See Khotesouvan v. Morones, 386 F.3d 1298, 1300-01 (9th Cir. 2004).

1. Continued Detention Review

Subsequent to Zadvydas, supra, the Service promulgated regulations providing for the continued detention of aliens whose release "would pose a special danger to the public," even "where there is no significant likelihood of removal in the reasonably foreseeable future." 8 C.F.R. § 1241.14(a)(1). The regulations provide that the DHS shall continue to detain an alien if release of the alien would pose a special danger to the public because (1) the alien has previously committed one or more crimes of violence, as defined in 18 U.S.C. § 16; (2) due to a mental condition or personality disorder and behavior associated with that condition or disorder, the alien is likely to engage in acts of violence in the future; and (3) no conditions of release can reasonably be expected to ensure the safety of the public. 8 C.F.R. § 1241.4(f). The regulations do not apply to arriving aliens, including those who have not entered the United States, those who have been granted immigration parole into the United States, and Mariel Cubans whose parole is governed by 8 C.F.R. § 212; aliens subject to a final order of removal who are still within the removal period; and aliens who are ordered removed by the Alien Terrorist Removal Court. 8 C.F.R. § 1241.14(a)(1); 8 C.F.R. § 241.13(b)(3).

IJs have jurisdiction to determine whether release of an alien would pose a special danger to the public. 8 C.F.R. § 1241.14(a)(2). Jurisdiction commences when the DHS files Form I-863, Notice of Referral to the Immigration Judge, with the Immigration Court having jurisdiction over the place of the alien's custody. 8 C.F.R. § 1241.14(g).

a. Reasonable Cause Hearing

Within ten business days of the filing of Form I-863, the IJ must hold a preliminary hearing to determine whether the evidence supporting the DHS's determination that the alien would pose a special danger to the public is "sufficient to establish reasonable cause to go forward with a merits hearing." 8 C.F.R. § 1241.14(h). During this hearing, the DHS may offer any evidence that is material and relevant to the proceeding. 8 C.F.R. § 1241.14(h)(2). Five business days after the close the

record, the IJ must render a summary decision. 8 C.F.R. § 1241.14(h)(3). If the IJ determines that the DHS has met its burden of establishing reasonable cause, he must schedule a merits hearing to review the DHS's determination that the alien is specially dangerous. Id. However, if the IJ concludes that the DHS has not met its burden, he must dismiss the review proceedings. Id.

b. Merits Hearing

The DHS bears the burden of proving, by clear and convincing evidence, that the alien should remain in custody because his release would pose a special danger to the public. 8 C.F.R. § 1241.14(i)(1). An IJ may receive into evidence any oral or written statement that is material and relevant to this determination. Id. The following factors must be considered: (1) the alien's prior criminal history, particularly the nature and seriousness of any prior crimes involving violence or threats of violence; (2) the alien's previous history of recidivism, if any, upon release from either DHS or criminal custody; (3) the substantiality of the DHS's evidence regarding the alien's current mental condition or personality disorder; (4) the likelihood that the alien will engage in acts of violence in the future; and (5) the nature and seriousness of the danger to the public posed by the alien's release. 8 C.F.R. § 1241.14(i)(2).

c. Subsequent Review

An alien may subsequently request review of his custody status from the DHS, no earlier than six months after the last decision of the IJ or the BIA, if the IJ's decision was appealed. 8 C.F.R. § 1241.14(j)(3). If the DHS denies his release from custody, the alien may file a motion with the Immigration Court that had jurisdiction over the merits hearing to set aside its prior determination. 8 C.F.R. § 1241.14(j)(6). If the IJ determines that the alien has provided "good reason to believe that, because of a material change in circumstances, releasing him would not longer pose a special danger to the public," he must set aside the determination in the prior review proceedings and schedule a new merits hearing. 8 C.F.R. § 1241.14(j)(6)(i)

2. Limitations Under Ninth Circuit Precedent

The Ninth Circuit has considered the application of 8 C.F.R. § 1241.14 where the DHS continues to detain an alien based on his prior criminal activity and mental illness. See Tuan Thai v. Ashcroft, 366 F.3d 790 (9th Cir. 2004). In Tuan Thai, 366 F.3d at 792, Thai's post-removal period detention exceeded sixteen months, even though his removal to Vietnam was not reasonably foreseeable. The DHS continued his detention pursuant to 8 C.F.R. § 1241.14 because his mental illness made him a danger to the community. Id. After entering the United States, Thai had been convicted of assault, harassment, and third-degree rape. Id. at 793.

The Ninth Circuit interpreted the implication in Zadvydas that "terrorism or other special circumstances" might justify an alien's continued detention after the removal period, as being limited only to "matters of national security." Id. at 797. The Ninth Circuit further considered that "the danger of criminal conduct is not automatically a matter of national security, as that term was used in Zadvydas." Id. Whereas offenses such as rape and assault are serious crimes, they are not matters of national security per se. Id. As such, the Ninth Circuit concluded that the DHS must release Thai since his case was not a matter of national security and therefore the statute, as interpreted by the Supreme Court, and the DHS regulations did not authorize his continued detention. Id. at 797-798.