


U.S. Department of Homeland Security
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U.S. Immigration
and Customs
Enforcement

JAN 21 2005

MEMORANDUM FOR: All Field Office Directors

FROM: Victor X. Cerda
Acting Director 

SUBJECT: Interim Guidance Regarding Post-Order Custody Reviews (POCR) After the Supreme Court Decision in *Clark v. Martinez*

On January 12, 2005, the Supreme Court issued a decision in *Clark v. Martinez*, 543 U.S. ____ (2005), holding that the custody provisions of *Zadvydas v. Davis*, 533 U.S. 678 (2001), extend to inadmissible and excludable aliens. This memorandum sets forth interim guidance to comply with this decision until new regulations are promulgated. This guidance is effective immediately. As discussed in more detail below, the Office of Detention and Removal Operations (DRO) will now provide custody reviews pursuant to 8 CFR § 241.13 for all aliens detained post-final order for 180 days, unless a case is in a failure-to-cooperate status, see the Immigration and Nationality Act (INA) § 241(a)(1)(C), or under a judicial stay of removal where the alien is challenging a removal order in federal court, see February 9, 2004 Guidance captioned "Post Order Custody Reviews Responsibilities and Guidance," attached.

For cases now due a 241.13 review under the new guidelines set forth below, field offices must begin these reviews immediately and forward the materials to HQCDU as soon as possible. High priority must be given to completing these reviews.

The Court's Decision

In *Martinez*, the Supreme Court interpreted section 241(a)(6) of the INA to mean that the government may detain inadmissible and excludable aliens beyond the removal period but only for as long as is reasonably necessary to effect removal. The Court found that the six-month presumptive detention period noted in *Zadvydas* applies equally to all categories of aliens described in INA § 241(a)(6). As a result, the provisions of 8 CFR § 241.13 now apply to inadmissible and excludable aliens, including Mariel Cubans, alien crewmen, and stowaways.

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POCR Process

Effective immediately, all aliens detained post-final order for 180 days will receive custody reviews pursuant to the regulations under 8 CFR § 241.13. Custody reviews for Mariel Cubans under 8 CFR § 212.12 are no longer in effect, and therefore Cuban Review Plan (CRP) panels and procedures are to be discontinued, effective immediately. Any portion of previously issued guidance that otherwise limits § 241.13 custody reviews to certain classes of aliens is now superseded by this memorandum.

All offices shall continue to conduct § 241.4 reviews for all cases prior to the expiration of the initial 90-day removal period. Please refer all cases in which the alien has not been released or removed, or whose case has not yet been referred to the Headquarters Custody Determination Unit (HQCDU) by the 180th day of post-final order custody, to HQCDU for review under the § 241. J 3 provisions, unless the case is in a failure-to-cooperate status or a judicial stay is in place where the alien is challenging a removal order in federal court. When conducting a ~§ 241.4 review for a Mariel Cuban, you must contact HQCDU regarding the likelihood of repatriation prior to making any recommendation to release.

For failure-to-cooperate cases, continue to serve the I-229(a) and Instruction Sheet at day 30. Once it has been established that the alien is a failure to comply, and the Notice of Failure to Comply letter has been served on the alien, the field office should assess the compliance of the alien every 30 days. Each subsequent assessment should be documented in the A-file and DACS. If the alien continues to refuse to comply, a new I-229(a) and Instruction Sheet should be served until there is no longer a failure to cooperate. For cases where the alien is challenging a removal order in federal court and a judicial stay has been entered, if the alien remains in custody after the § 241.4 review, conduct annual reviews (unless the attorney representing the government requests an earlier review), and issue any custody decision pursuant to § 241.4 while the stay is in effect. See memoranda dated February 9 and 18, 2004 (captioned Post Older Custody Reviews Responsibilities and Guidance, and Delegation of Authority for Post Order Custody Review Decisions respectively).

Current Custody Cases Where Review Under 8 CFR § 241.13 Is Now Due

Under the new procedures explained above, many cases are now due for a review under 8 CFR § 241.13. **Field offices must begin these reviews immediately and forward the materials to HQCDU as soon as possible. High priority must be given to completing these reviews as soon as practicable.**

If you have forwarded a POCR Worksheet to Headquarters within the last six months, submit a memo (signed by a supervisor) to HQCDU updating any changes or new information in the case, as HQCDU will now review these cases under 8 CFR § 241.13. Include whether or not the alien may possibly meet any of the criteria of 8 CFR § 241.14 for continued detention (see Special Circumstances section below). If release is recommended, include a draft release decision letter. See attached Release Notification (revised 1/19/05). Send the update memorandum and decision letter to HQCDU by overnight mail for final review and approval by HQCDU pursuant to 241.13.

For Mariel Cuban cases in which a CRP panel recommendation is pending at Headquarters, you do not need to complete the POCR worksheet at this time. Headquarters will contact you if additional information is needed to complete the custody review.

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For all other cases that now require a § 241.13 review, complete a POCR Worksheet (see attached POCR Worksheet revised 1/19/05) and send to HQCDU by overnight mail. HQCDU retains jurisdiction over these cases pursuant to § 241.13 and will conduct the 8 CFR § 241.13 review and issue a custody decision accordingly.

Special Circumstances Cases

The following summarizes the four categories of aliens subject to the continued detention provisions of 8 CFR § 241.14:

- Aliens with a Highly Contagious Disease that is a Threat to Public Safety [8 CFR § 241.14(b)].
- Aliens Detained on Account of Serious Adverse Foreign Policy Consequences [8 CFR § 241.14(c)].
- Aliens Detained on Account of Security or Terrorism Concerns [8 CFR § 241.14(d)].
- Detention of Aliens Determined to be Specially Dangerous [8 CFR § 241.14(f)]. Aliens who pose a threat to public safety because they have committed a crime of violence, have a mental disorder and behavior associated with that disorder, and are likely to be violent in the future.

All cases that may possibly meet any of the above criteria, to include “specially dangerous” aliens, human rights abusers, and aliens who may pose a threat to national security, are to be coordinated with HQDRO/CDU as per the December 3, 2004 memorandum (entitled Special Circumstance Cases Under 8 CFR 241.14, attached), HQCDU, in consultation with other government agencies, will make the initial determination as to whether the case meets all criteria listed in 8 CFR § 241.14. On cases where a definitive determination is made that 8 CFR § 241.14 applies, HQCDU will coordinate the issuance of the custody decision. Potential 8 CFR § 241.14 should be raised to the HQCDU’s attention at the earliest time possible.

Revised POCR Worksheet For All Cases

Effective immediately, field offices must use the revised POCR Worksheet (revised 1/19/05) attached to this memorandum. The worksheet needs to be signed by the deportation officer, as well as a supervisor. If this is the first POCR Worksheet that is being done in the case, it requires the FOD’s signature. When sending the POCR Worksheet to HQCDU, include a copy of the initial custody decision that was served on the alien. Information sent to Headquarters for review with respect to each case must accurately reflect the information contained in the A-file. For all cases, field officers are to indicate on the POCR worksheet whether or not an alien may be subject to any of the 8 CFR § 241.14 provisions.

Upon completion of the custody review process, fill out the POCR, ZREL, and COMD screens in DACS. It is very important that proper DACS entries are done in a timely manner to ensure proper POCR records and case tracking. For releases, officers should serve the revised Release Notification

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(attached), Order of Supervision, and Addendum to the Order of Supervision, and follow the Out-processing Checklist. The use of Electronic Monitoring Devices (EMD), the Intensive Supervision Appearance Program (ISAP), a Public Health Service (PHS) program, or other conditions of release is to be considered at the discretion of the deciding office for all cases, especially for those aliens whose release may pose a threat to the public. The Supreme Court's decision limits our discretion to continue detention and will compel the release of such individuals. Offices should exercise their discretion in using EMD, ISAP, a PHS program, or other forms of supervised release as appropriate. Each office is equipped and trained in using at least one of these tools. Any questions on using such tools should be addressed to the Compliance Division. All notifications to probation, victim witness, et al., are to be documented in the A-file, as well as in DACS. All releases from BOP facilities are to be coordinated with the appropriate warden and BOP staff.

As of the date of this memo, offices shall use only the attached revised versions of the POCR Worksheet and Release Notification. In addition, use only the latest versions of all other letters and forms. These forms are found on the HQCDU Website, <http://powerport.ice.dhs.gov/bulletinboards/hqcdtu/>.

Case Management

As a reminder, field offices are responsible for all case management activities even if the jurisdiction for custody has transferred to HQCDU. Continuous and timely communication between the field offices and HQCDU is essential in the management of all cases. Information exchange is critical in assisting HQCDU to assess the feasibility of removal of these aliens and completing the custody review process. Proper case management will continue to be an area of monitoring and field office audits performed by the HQCDU.

Field Office Directors are to ensure that this guidance is distributed and fully briefed to your staff and immediately implemented. Further, efforts should be made to advise impacted detainee populations of the procedures/processing that will occur pursuant to misguidance. If you have any further questions, please contact John Tsoukaris, Chief, Custody Determination Unit, at (202) 353-4999 or Leonard Kovensky, Deputy Assistant Director, Removal Management Division, at (202) 305-7827. Thank you for your attention to this matter.

Attachments:

- Post-Order Custody Worksheet (revised 1/19/05)
- Release Notification (revised 1/19/05)
- Special Circumstance Cases Under 8 CFR 241.14, December 3, 2004
- Delegation of Authority for Post Order Custody Review Decisions, February 18, 2004
- Post Order Custody Reviews Responsibilities and Guidance memorandum, February 9, 2004

This memorandum has been prepared solely for the purpose of internal agency guidance, and is not to be disseminated outside the agency. This memorandum is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any third party in any manner, civil or criminal, and it does not place any limitations on otherwise lawful activities of the agency.