



U.S. Immigration
and Customs
Enforcement

FEB 20 2004

MEMORANDUM FOR: Field Office Directors

FROM: Anthony S. Tangeman, Director
Office and Detention and Removal

SUBJECT: Detention Policy Where an
Immigration Judge has Granted
Asylum and ICE has ADDealed

A handwritten signature in black ink, appearing to read "Anthony S. Tangeman".

Attached is guidance from Assistant Secretary Garcia reiterating U.S. Immigration and Customs Enforcement (ICE) policy where the immigration court has granted asylum or other protection relief and ICE has entered an appeal of that decision.

ICE policy favors release of such aliens, absent exceptional concerns enumerated in the Assistant Secretary's memorandum. Decisions to continue detention pending appeal must be made after consultation with the Chief Counsel. Note that decisions to keep such aliens in custody may not be delegated below the level of Field Office Director, or anyone acting in that capacity.

If you have any questions regarding this memorandum, please contact Field Operations Division.

FEB 12 2004



**U.S. Immigration
and Customs
Enforcement**

MEMORANDUM FOR CHIEF COUNSEL

FROM: Victor X. Cerda
Acting Principal Legal Advisor

A handwritten signature in black ink, appearing to read "V. Cerda", written over a horizontal line.

SUBJECT: Policy on Appeals of CAT Grants

This memorandum clarifies the appeal policy as it relates to grants of protection under Article 3 of the United Nations Convention Against Torture ("CAT"). Chief Counsel are not required to reserve appeal on all grants of CAT protection by the Immigration Judges. Instead, Chief Counsel and Assistant Chief Counsel should exercise their judgment in determining the type of cases that warrant reserving appeal, based on the individual facts of each case, BIA precedent, and applicable case law. Chief Counsel shall abide by current appeal policy guidelines in determining whether to pursue an appeal.




U.S. Immigration
and Customs
Enforcement

FEB 12 2004

INFORMATION

MEMORANDUM FOR: Chief Counsels, Office of the Principal Legal Advisor

FROM: Victor X. Cerda 
Acting Principle Legal Advisor

SUBJECT: Detention Policy Where an Immigration Judge has Granted Asylum
and ICE has Appealed

Attached, please find a memorandum from Assistant Secretary Michael Garcia to Anthony Tangeman describing U.S. Immigration and Customs Enforcement (ICE) detention policy where the immigration court has granted asylum (or other protection relief, such as withholding of removal or protection under the Convention Against Torture) and ICE has entered an appeal of the decision which is pending before the Board of Immigration Appeals. The attached memorandum favors release pending the appeal absent exceptional circumstances. Decisions to continue detention pending appeal must be made by the Field Office Director in consultation with you.

The Chief Counsel's Office should notify the local Detention and Removal Office whenever a detained case is in this posture, so that they may consider whether release is appropriate under this policy. In addition, please be reminded that all ICE appeals of such immigration judge grants must be reviewed and approved by the Chief Counsel. Further, issues of national policy that may be the subject of the appeal must be raised to the Office of Appellate Counsel.

If you have any questions about this memorandum, please contact: (b)(6),(b)(7)(C) in the Office of the Principal Legal Advisor at (202) (b)(6),(b)(7)(C)


Attachment



U.S. Immigration
and Customs
Enforcement

FEB 9 2004

MEMORANDUM FOR: Anthony Tangeman
Deputy Executive Associate Commissioner
Office of Detention and Removal

FROM: Michael J. Garcia 
Assistant Secretary

SUBJECT: Detention Policy Where an Immigration Judge has Granted
Asylum and ICE has Appealed

This memorandum reiterates the U.S. Immigration and Customs Enforcement (ICE) policy where the immigration court has granted asylum (or other protection relief, such as withholding of removal or protection under the Convention Against Torture) and ICE has entered an appeal of the decision which is pending before the Board of Immigration Appeals.

In general, it is ICE policy to favor release of aliens who have been granted protection relief by an immigration judge, absent exceptional concerns such as national security issues or danger to the community and absent any requirement under law to detain.

For cases where a bond has been required but not posted, the bond should be reviewed following an immigration judge's grant of asylum so that an alien can be released in accordance with this ICE policy. Arriving aliens should be considered for parole.

In all cases, the Field Office Director must approve a decision to keep an alien granted protection relief in custody pending appeal, in consultation with the Chief Counsel. This review cannot be delegated beyond the Field Office Director or anyone acting in that capacity.

If you have any questions regarding this memorandum, please contact your local Chief Counsel.

cc: Victor Cerda
Acting Principal Legal Advisor

MEMORANDUM FOR REGIONAL DIRECTORS

Page 1

Subject: Detention and Deportation Effective October 9, 1998



U. S. Department of Justice
Immigration and Naturalization Service

HQOPS (DDP) 50/10-C

Office of the Executing Associate Commissioner

425 I Street NW
Washington, DC 20536

OCT - 7 1998

MEMORANDUM FOR: REGIONAL DIRECTORS

A handwritten signature in black ink, appearing to read "Michael A. Pearson".

FROM: Michael A. Pearson
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Detention Guidelines Effective October 9, 1998

As you know, the Immigration and Naturalization Service (INS) supported a legislative proposal for extension of the Transition Period Custody Rules (TPCR). This extension will allow us to continue the exercise of discretion in custody determinations. However, we expect that it will be some time before this discretion is granted with the result that as of October 9, 1998, TPCR discretionary authority will no longer be in effect. Attached with this memorandum are the detention guidelines which will be in effect as of October 9.

I recognize that 100 percent compliance with these guidelines will be virtually impossible to achieve immediately. Furthermore, 100 percent adherence to the guidelines would have major impacts on other program operations which, are critical to the overall INS mission. We have met with Congressional staff to advise them of the impacts on our operations resulting from the expiration of TPCR. We have been advised that we may get future Congressional support for some type of discretionary relief from mandatory detention, but only if we earn document and demonstrate that a maximum effort to comply with the detention mandates has been made. Shortly, we will provide you with guidance concerning additional data that we will need to collect and provide to Congress.

At this time, I am directing that, to the extent possible, you adhere to the detention scheme outlined in the attached and work toward utilizing 80 percent of your bed space for mandatory detention cases. In the event that a District Director, Chief Patrol Agent, or Officer In Charge makes a custody determination which is not in keeping with the guidelines (e.g., a Category 1 case is released to make detention space for a Category 2 or 3), the reasons for the decision must be clearly documented in writing and placed in the alien's file. At any time the mandatory detention occupancy falls below 80 percent of available bed space, the responsible field manager must notify the Regional Director.

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MEMORANDUM FOR REGIONAL DIRECTORS

Page 1

Subject: Detention and Deportation Effective October 9, 1998

In the event that your District Directors have released someone prior to October 9, who is now subject to detention, nothing in this memorandum should be construed as requiring their re-arrest/detention. However, if conditions have changed or circumstances warrant, nothing should preclude you from exercising your authority to re-arrest and detain.

Additionally, each Regional Director is directed to prepare a written monthly summary of custody determinations made by field offices within your respective jurisdictions which are inconsistent with the attached detention guidelines. The monthly summaries will be used to justify our need for continued discretion in detention decisions in our ongoing discussions with the Department of Justice, the Administration, and the Congress. The first monthly summary will be for the month ending October 31. Regions should forward the summaries to this office not later than 1 week after the end of the month.

Attachment

REL0000025022



U.S. Department of Justice
Immigration and Naturalization Service

HQOPS 50/10

*425 I Street NW
Washington, DC 20536*

OCT - 7 1998

INS DETENTION USE POLICY

October 9, 1998

I. INTRODUCTION

This policy governs the detention of aliens and supersedes the Detention Use Policy issued July 14, 1997. The purpose of this policy is to revise the detention priorities of the Immigration and Naturalization Service (INS) in light of the expiration of the Transition Period Custody Rules (TPCR). Section 236(c) of the Immigration and Nationality Act (IKA) is now in full force and effect. With the expiration of the TPCR, certain portions of 8 C.P.R. § 3.19 and § 236.1, as noted in those flections, no longer apply.

Under this policy, the four categories of alien detention are: (1) required (with limited exceptions), (2) high priority, (3) medium priority, and (4) lower priority. Aliens in category 1--required detention--must be detained, with a few exceptions. Aliens in categories 2, 3, and 4 may be detained depending on the availability of detention space and the facts of each case. Aliens in category 2 should be detained before aliens in categories 3 or 4, and aliens in category 3 should be detained before aliens in category 4. The District Director or Sector Chief retains the discretion, however, to do otherwise if the facts of a given case require.

These instructions do not apply to the detention and release of juveniles, which is covered in other INS policies.

II. DEFINITIONS

- *Required detention:* Detention of certain classes of aliens required by the INA or applicable regulations. With few exceptions, aliens subject to required detention must be detained and are not eligible for release.
- *Discretionary detention:* Detention of aliens authorized but not required by the INA or applicable regulations. All aliens in proceedings are subject to discretionary detention unless they fit into one of the categories covered by required detention. Aliens subject to discretionary detention are eligible to be considered individually for release.
- *Final order of removal:* Final removal order issued by an immigration officer, an immigration judge (IJ), the Board of Immigration Appeals, or a Federal judge to an alien placed in proceedings on or after April 1, 1997. INS officers should consult District counsel on issues regarding the finality of removal orders.
- *Final order of deportation or exclusion:* Final deportation or exclusion order issued by an immigration officer, an immigration judge, the Board of Immigration Appeals, or a Federal judge to an alien placed in proceedings before April 1, 1997. INS officers should consult District counsel on issues regarding the finality of deportation or exclusion orders.

III. DETENTION CATEGORIES

A. Arriving Aliens: Expedited Removal under INA § 235

Category I: Required detention (with exceptions)

- *Aliens in Expedited Removal.* Arriving aliens at Ports of-Entry who are inadmissible under INA § 212(a)(6)(C) or 212(a)(7) are subject to expedited removal proceedings pursuant to INA § 235(b)(1). Any alien placed into expedited removal must be detained until

removed from the United States and may not be released from detention unless (1) parole is required to meet a medical emergency or legitimate law enforcement objective, or (2) the alien is referred for a full removal proceeding under § 240 (for example, upon a finding of “credible fear of persecution”). Although parole is discretionary in all cases where it is available, it is INS policy to favor release of aliens found to have a credible fear of persecution, provided that they do not pose a risk of flight or danger to the community. See INA §§ 235(b)(1) and 8 C.F.R. § 235.3.

Aliens who are ordered removed under expedited removal and who make an unverified claim to United States citizenship, or to lawful permanent resident, refugee, or asylee status. These aliens are referred to an IJ for a status review under 8 C.F.R. § 235.3(b)(5)(iv). Such aliens must be detained pending this review, unless parole is required to meet a medical emergency or legitimate law enforcement objective.

If there is insufficient detention space to detain an alien in expedited removal who arrived at a land border Port-of-Entry and claims a fear of persecution unrelated to Canada or Mexico, that alien may be required to wait in Canada or Mexico pending a final determination of his or her asylum claim. If an alien expresses a fear of persecution related to Canada or Mexico, the alien must be detained for proceedings and may not be required to wait in that country for a determination of the claim.

Aliens subject to expedited who arrive at a land border Port-of-Entry, but do not claim lawful status in the United States or a fear of persecution. These aliens should be immediately detained until removed, and they should not be required to wait in Mexico or Canada pending the issuance of an expedited removal order.

The INS may permit an alien in expedited removal to withdraw his or her application for admission.

Note that the IMS maintains approximately 1,100 User Fee beds, which are funded by the User Fee Account. The INS can only use these beds for aliens arrested in support of airport operations.

B. Aliens in Proceedings: INA § 240 (Removal), § 238 (Expedited Removal of Criminal Aliens), Former INA § 236 (Exclusion), and former INA § 242 (Deportation)

1. **Category 1: Required detention (with exceptions)**

- *Aliens subject to required detention in removal and deportation proceedings.* Pursuant to INA § 236(c), the INS must take into custody all aliens who are chargeable as terrorists, and virtually all aliens who are chargeable as criminals, upon their release from criminal incarceration or custody. § 236(c) does not apply to the following groups of aliens who are removable as criminals: (a) aliens who are removable under § 237 for a single crime involving moral turpitude, if they were sentenced to less than a year; (b) aliens who are removable under § 237 for a conviction for high-speed flight from an immigration checkpoint (18 U.S.C. § 758); and (c) aliens who are removable under § 237 for crimes relating to domestic violence, stalking, and the abuse or neglect of children.

§ 236(c) applies to aliens in both removal proceedings under § 240 and deportation proceedings under former § 242. Therefore, under § 236(c) the INS must continue to detain aliens who are described in that section (by their § 237 equivalents) if (a) they were previously taken into custody while in deportation proceedings (i.e., charged under § 241 in proceedings commenced prior to April 1, 1997) and (b) they are still in custody upon the expiration of the TPCR.

Note that current § 236(c) does not apply to aliens in exclusion proceedings under former § 236.

Once in INS custody, the alien may be released during proceedings only if the Attorney General determines that it is necessary to protect a witness, a person cooperating with an investigation, or a family member of such a person. To be considered for release in the exercise of discretion, the alien must also demonstrate that release would not pose a danger to persons or property and that the alien does not pose a flight risk. See the requirements set forth at INA § 236(c)(2).

- *Aliens with aggravated felony convictions in exclusion proceedings.* The INS must detain any alien in exclusion proceedings under former § 236 (i.e., charged under § 212 in proceedings commenced prior to April 1, 1997) who has been convicted of an aggravated felony, as currently defined under INA § 101(a)(43). The INS may not parole such an alien during exclusion proceedings. Note that the expiration of the TPCR has no effect on these aliens since the TPCR did not apply to them.

2. Category 2: High Priority

- Aliens removable on security and related grounds, if not subject to required detention.
- Other criminal aliens not subject to required detention.
- Aliens who are a danger to the community or a flight risk, if not subject to required detention.
- Aliens whose detention is essential for border enforcement but are not subject to required detention.
- Aliens engaged in alien smuggling, if not subject to required detention.

3. Category 3: Medium Priority

- Inadmissible, non-criminal arriving aliens who are not in expedited removal proceedings and are not subject to required detention.
- Aliens who have committed fraud before the INS, if not subject to required detention.
- Aliens apprehended at the worksite who have committed fraud in obtaining employment, if not subject to required detention.

4. Category 4: Low Priority

- Other removable aliens, if not subject to required detention.
- Aliens originally placed in expedited removal who have been referred for a full removal proceeding under § 240 upon a finding of a “credible fear of persecution.” See the discussion at section A.1 above regarding the INS policy favoring release.

C. Aliens with Final Orders of Removal, Deportation, or Exclusion

1. Category 1: Required detention (with exceptions)

- All aliens who have final orders of removal and all aliens who have final orders of deportation and are subject to required detention. This category includes all aliens ordered removed under revised § 240, whether or not they are terrorists or criminals, and all criminal aliens ordered removed under revised § 238. It also includes all terrorist and criminal aliens ordered deported under former § 242 if subject to required detention under § 236(c).

Revised INA § 241(a) requires the INS to remove within 90 days any of the aliens in this category. The alien may not be released during this 90-day period. See INA § 241(a)(2).

Aliens whom INS is unable to remove within 90 days should be released under an order of supervision. See INA § 241(a)(3). However, the INS may continue to detain certain aliens, including, among others, those who are inadmissible on any ground; deportable or removable on criminal or security grounds; dangerous; or flight risks. See INA § 241(a)(6).

- Aliens with final orders under expedited removal. The INS must detain aliens who have been issued final orders under expedited removal (revised § 235(b)(1)) on grounds of being inadmissible under INA § 212(a)(6)(C) or § 212(a)(7). Pending immediate removal, the INS must detain such an alien. However, the INS may stay the removal of such an alien if removal is not practicable or proper, or if the alien is needed to testify in a criminal prosecution. See INA § 241(c)(2).
- Aliens convicted of aggravated felonies with final orders of exclusion. The INS must continue to detain until removal any alien with a final order of exclusion (i.e., charged under section 212 in proceedings commenced prior to April 1, 1997) who has been convicted of an aggravated felony, as currently defined under INA § 101(a)(43) . The INS may not parole such an alien unless the alien is determined to be irremovable pursuant to old INA § 236(e)(2) and the alien meets the criteria for release under that provision. See former INA § 236(e) (as designated prior to April 1, 1997) and the Mariel Cuban parole regulations at 8 C.F.R. §§ 212.12 and 212.13.

2. Category 2: High Priority

- Aliens with final orders of deportation (if not terrorists or criminals subject to required detention under § 236(c) and § 241(a)) or exclusion (if not aggravated felons). Aliens placed into proceedings

prior to April 1, 1997, who were or are ordered deported or excluded, are only subject to required detention if terrorists or convicted of certain crimes. See part C.1 above.

Otherwise, they are subject to discretionary detention and, once they have a final order of deportation or exclusion, their detention should ordinarily be a high priority.

Please note that the 6-month rule of former INA § 242(c) and (d), which regards detention and release continues to apply to these non-terrorist and non-criminal aliens with final orders of deportation. Non-aggravated felon aliens with final orders of exclusion may be paroled from custody in the discretion of the INS.

IV. GENERAL DIRECTIONS

A. Category 1

Aliens subject to required detention shall have first priority for all available¹ INS detention space.

With the exceptions noted above, category 1 aliens shall be detained.

Each Region should ensure that it maintains sufficient non-criminal detention space to provide basic support for its full spectrum of law enforcement objectives. However, with the exception of this basic level of non-criminal detention space, each Region, District,

¹ Available detention space means space that is both available and suitable for the detention of the alien in question. For example, an alien terrorist subject to required detention would have first priority for all INS beds suitable for the detention of terrorists. No alien should be detained in an INS bed unsuitable for that alien's detention (regardless of the detention category).

and Sector must seek to comply with the detention priorities outlined above.

If a category 1 alien comes into INS custody but no detention space is available locally, the responsible office should pursue the following options in rank order:

- 1) acquire additional detention space locally, securing funds from the Region if necessary;
- 2) transfer the alien to another INS District or Region where space or funding is available;
- 3) release an alien in local INS custody who is not subject to required detention (i.e., an alien in category 2, 3, or 4) to make space for the category 1 alien; or
- 4) release an alien in INS custody in another District who is not subject to required detention (i.e., an alien in category 2, 3, or 4) to make space for the category 1 alien.

If a category 1 alien comes into INS custody when all INS criminal beds nationwide (i.e., beds not reserved for juveniles, User Fee operations, or non-criminal detention) are occupied by other category 1 aliens and there are no additional detention funds available, the responsible office should contact its Regional Director to arrange for the release of a lower-priority category 1 alien in order to permit the detention of a higher-priority category 1 alien.

INA § 236(c) does not require the INS to arrest any alien who is described in that section but was released from criminal incarceration or custody previously. However, if the INS later encounters such an alien in a non-custodial setting and elects to initiate immigration proceedings, the alien is subject to required detention.

PAGE 10

- INA § 236© does not require the INS to re-arrest any alien who is described in that section but was released from INS custody under the TPCR.

However, the INS may re-arrest such an alien under INA § 236(b) if conditions have changed or if circumstances otherwise warrant.

B. Categories 2, 3, and 4

- Aliens in categories 2, 3, or 4 should generally be detained according to rank, higher priorities before lower priorities. Exceptions to this general rule may be made as follows:
 - 1) The District Director or Sector Chief may make an exception in individual cases if local circumstances require.
 - 2) The Regional Director, with the concurrence of the Executive Associate Commissioner for Field Operations, may make an exception to accommodate special regional enforcement initiatives.
 - 3) The Executive Associate Commissioner for Field Operations may make an exception to accommodate special national enforcement initiatives or to address an emergency.

C. Juvenile Aliens

- This Detention Use Policy does not apply to juvenile aliens or juvenile detention space. Please refer to the instructions for the detention and release of juvenile aliens issued previously.