[ORAL ARGUMENT SCHEDULED FOR NOVEMBER 24, 2008]

Consolidated Case Nos. 08-5424, 08-5425, 08-5426, 08-5428, 08-5429

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMAL KIYEMBA, ET AL.,
Petitioners-Appellees,

v.

GEORGE W. BUSH, ET AL.,
Respondents-Appellants.

On Appeal from a Final Judgment of the
United States District Court for the District of Columbia

BRIEF OF NATIONAL IMMIGRATION JUSTICE CENTER AND AMERICAN IMMIGRATION LAWYERS ASSOCIATION AS *AMICI CURIAE*, SUPPORTING AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Amicus curiae respectfully submit this Certificate as to Parties, Rulings and Related Cases, pursuant to Circuit Rule 28(a)(1):

A. **Parties:** Except for the following, all parties and amici appearing before the district court and in this court are listed in the Brief for Appellants.

Amici Curiae:

(1) The National Immigrant Justice Center.

(2) The Brennan Center, The Constitution Project, and The Rutherford Institute;

(4) the Uig The American Immigration Lawyers Association

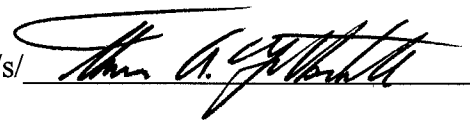
(3) hur American Association.

(5) Law professors Susan Akram, Michael J Churgin, Sarah H. Cleveland, Niels W. Frenzen, Bill Ong Hing, Kevin R. Johnson, Daniel Kanstroom, Stephen H. Legomsky, Hiroshi Motomura , Gerald L. Neuman, Margaret Taylor, Charles D. Weisselberg, Michael J. Wishnie.

(6) Legal and historian habeas scholars Paul Finkelman, Eric M. Freedman, Austin Allen, Paul Halliday, Eric Altice, Gary Hart, H. Robert Baker, William M. Wiecek, Abraham R. Wagner, Cornell W. Clayton, David M. Cobin, Mark R. Shulman, Marcy Tanter, Samuel B. Hoff, Nancy C. Unger, Karl Manheim, and Gabriel J. Chin.
(7) The National Association of Criminal Defense Lawyers.

B. **Ruling Under Review:** Reference to the rulings at issue are listed in the Brief for Appellants.

C. **Related Cases:** References to related cases are listed in the Brief for Appellants.

/s/ 

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GLOSSARY

AILA	American Immigration Lawyers Association
DHS	Department of Homeland Security
GAO	Government Accountability Office
ICE	Immigration & Customs Enforcement
IIRIRA	Illegal Immigration Reform and Immigrant Responsibility Act of 1996
INA	Immigration and Nationality Act
LIRS	Lutheran Immigration and Refugee Services
NIJC	National Immigrant Justice Center

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INTEREST OF *AMICI CURIAE*[1]

Amicus National Immigrant Justice Law Center is a Chicago-based non-profit organization that operates on a regional, national, and international scale, providing legal services for immigrants and engaging in national policy-reform advocacy with respect to immigration law. 0*Amicus* American Immigration Lawyers Association ("AILA") is a national association with over 11,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review (immigration courts), as well as before the United States District Courts, Courts of Appeal, and the Supreme Court of the United States. *Amici* believes that, given the unique facts of this case, immigration law does not preclude or prohibit the release of the petitioners into the United States. We write to share our informed expertise on the immigration aspects of this case.

SUMMARY OF ARGUMENT

In challenging the District Court's October 9, 2008 Order granting the Uighurs' release, the Government relies extensively on the argument that immigration law prohibits the Uighurs' release

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[1] This brief is filed with the consent of the parties.

into the United States, whether because the order intrudes upon the Government's plenary powers over immigration or because the immigration statutes themselves render the Uighurs inadmissible. However, the Government's arguments fundamentally mischaracterize the District Court's order and the impact of the immigration laws on the power of courts to release aliens into the United States pending the determination of their immigration status.

First, immigration law has little relevance to the District Court's order, which merely released from federal detention aliens who were brought involuntarily into the jurisdiction of the United States. The Uighurs have never sought admission under the immigration laws of the United States. Rather, they were involuntarily seized and brought by the Government into the jurisdiction of the United States at Guantanamo Bay, where the Government has detained them for almost seven years. Immigration law recognizes the distinction between aliens voluntarily seeking to enter the United States and those who were brought here involuntarily, and the limited relevance of exclusion to the latter. Moreover, the District Court's order did not purport to confer immigration status on the Uighurs, but only required their physical release inside the United States.

Second, the Government argues that 8 U.S.C. § 1182 precludes the Uighurs' release into the United States because they have no right to enter under § 1182. However, the Uighurs' status under § 1182 has no bearing on the District Court's authority to release the Uighurs from unlawful detention. Immigration laws should not be interpreted to nullify aliens' relief under habeas corpus. The Supreme Court has recognized that aliens, including those inadmissible under immigration laws, cannot be detained indefinitely pending efforts to remove them. Even inadmissible aliens who have been convicted of criminal offenses must be released into the United States pending efforts to remove them to another nation, where removal cannot be accomplished within a reasonable time period. Such a release neither depends upon nor impacts the alien's immigration status.

Indeed, the District Court's order does not restrict the Government's ability to pursue exclusion or institute removal proceedings, provided that the Uighurs are not unlawfully detained during those efforts. The purpose of detention pending removal proceedings is to effectuate removal, not to punish. Consequently, courts have recognized that indefinite detention without any reasonably foreseeable removal would raise serious constitutional questions and violate immigration law. Here, the Government concedes that the Uighurs cannot be returned to their home nation and, despite years of effort, no other nation has indicated a willingness to accept them. Consequently, both constitutional norms and immigration law prohibit the Uighurs' continued detention at Guantanamo or elsewhere, at least until removal is reasonably foreseeable.

Finally, contrary to the Government's apparent assumption, neither release nor parole implies that the alien may "live at large" in the community. After considering any evidence that the Government decides to submit, the District Court may order both formal supervision and reasonable conditions of release. If any petitioner subsequently violates those conditions, his release can be revoked.

ARGUMENT

I. IMMIGRATION LAW HAS LITTLE RELEVANCE TO A DISTRICT COURT'S ORDER TO RELEASE FROM FEDERAL DETENTION TO THE UNITED STATES ALIENS WHO WERE BROUGHT INVOLUNTARILY TO THE UNITED STATES.

The Government seeks to recast this case as one mired in the intricacies of immigration law, despite the fact that the District Court did not act under the United States immigration laws, but rather under that "great bulwark of personal liberty," the writ of habeas corpus. 3 Joseph Story, Commentaries on the Constitution § 1333. The District Court ordered the Uighurs released into the United States because it concluded that the length and indefinite nature of their unlawful detention

required immediate release and the United States was the only country immediately available. *See* District Court Oct. 9, 2008 Opinion ("Opinion") 16-17, J.A. 1615-16 ("[The Government's] 'best efforts' to resettle the petitioners in another country . . . have failed for the last 4 years and have no foreseeable date by which they may succeed. . . . Because [the Uighurs'] detention has already crossed the threshold into infinitum . . . the court grants the petitioners' petition for release into the United States."). The Government has never contended that it can release the Uighur prisoners to another country without delay. *See* Appellants' Br. at 8 ("[D]espite extensive diplomatic efforts on petitioners' behalf, the Government has not to date located an appropriate country willing to accept them for resettlement.").

The Government's arguments that the Uighurs have "no right to admission" to the United States *see* Appellants' Br. at 27, are misplaced. The Uighurs did not come within the jurisdiction of the United States voluntarily. They were captured by bounty hunters in Pakistan, ransomed to the U.S. military, and imprisoned for almost seven years in territory dominated by and under the indefinite control of the United States. *See* Opinion 3, J.A. 1602. Precedents in both the immigration field and in the federal courts limit the application of immigration law when an alien is involuntarily brought under United States jurisdiction. Moreover, the Uighurs' habeas petition did not request admission, nor did the District Court purport to order that remedy. The District Court did not "admit" the Uighurs or make an unnecessary foray into immigration law. Rather, the District Court (1) ordered the release of the prisoners under the writ of habeas corpus, Opinion 17, J.A. 1616, (2) implicitly forbade the immediate re-imprisonment of the Uighurs by the Department of Homeland Security, *see* Transcript 60, J.A. 1592 (Judge Urbina declaring, "I do not expect that these Uighurs will be molested or bothered by any member of the United States Government" pending

further proceedings), and (3) expressed no opinion on the eventual application of the immigration laws to the Uighurs.

A. Immigration Precedent Distinguishes Immigrants Who Voluntarily Seek Admission From Those Who Are Brought To The United States Against Their Will.

The Government transported the Uighurs to a territory that "while technically not part of the United States, is under the complete and total control" of the United States Government.[2] *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008). Because the Uighur prisoners have unwillingly found themselves in the jurisdiction of the United States, *see Boumediene*, 128 S. Ct. at 2261; *Rasul v. Bush*, 542 U.S. 466, 480 (2006), they do not presently fall within the purview of immigration law as aliens seeking admission. That is, immigration concepts such as deportation, exclusion and incidental detention have little, if any, relevance to them, at least until they seek admission. Under immigration precedent, persons brought involuntarily into the United States, "per se" are not "applicants for admission" until they affirmatively seek admission or, until after having been released from captivity and given "a fair and reasonable opportunity to depart" the United States.

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[2] The Government relies heavily on 8 U.S.C. § 1101(a)(38), which defines the United States "in a geographical sense," as not including Guantanamo Bay, to argue that petitioners' available remedies are limited because they are not located within the physical boundaries of the United States. *See* Appellants' Br. at 44, 49. This provision cannot bear the weight the Government seeks to place on it. That geographic location is not determinative under immigration law has long been evidenced by the "entry fiction," *Rosales-Garcia v. Holland*, 322 F.3d 386, 391 n.2 (6th Cir. 2003), whereby an alien may be physically within our borders, but not "within the United States" for purposes of immigration law. *See Leng May Ma v. Barber*, 357 U.S. 185, 186 (1958) (holding that an alien who was paroled within the geographic boundaries of the United States was not "in the United States" for purposes of immigration law). Moreover, since 1996, admissibility determinations no longer take place solely within the United States, see 8 U.S.C. § 1225a (preinspection stations located abroad), and removal proceedings may now occur even while non-citizens reside abroad, *see* 8 U.S.C. § 1225(a)(3)(C). The precise status of Guantanamo under the immigration laws, however, need not be resolved here, because the District Court had authoirity under habeas to order that release, regardless of the legal status of Guantanamo.

United States v. Brown, 148 F. Supp. 2d 191, 198 (E.D.N.Y. 2001), *abrogated on other grounds by United States v. Garcia-Jurado*, 281 F. Supp. 2d 498 (E.D.N.Y. 2003); *Matter of Badalamenti*, 19 I&N Dec. 623, 627 (BIA 1988). Because such aliens are not applicants for admission, they are not subject to exclusion or deportation proceedings, *Brown*, 148 F. Supp. 2d at 198, and such aspects of immigration law have no meaningful relevance to them. *See also Matter of Yam*, 16I. & N. Dec. 535, 537 (BIA 1978) ("[a]n alien does not effect an entry into the United States unless, while free from actual or constructive rerstraint, he crosses into the territory of the United States"; where noncitizen had not entered the United States voluntarily, the "immigration judge was without jurisdiction to determine the issue of deportability.")

The Board of Immigration Appeals in *Badalamenti* addressed an analogous situation to that of the Uighurs. In *Badalamenti*, an Italian citizen was extradited to the United States "against his will," for the purpose of criminal prosecution. *See Badalamenti*, 19 I&N Dec. at 626. After Mr. Badalamenti was acquitted of the charges against him, the Government revoked his parole, and immediately instituted removal proceedings. *Id.* at 625-27. The Board of Immigration Appeals explained that normally "when the purpose of parole has been served, . . . [an alien] shall continue to be dealt with in the same manner as that of any other applicant for admission," and will "at some point become subject to exclusion proceedings as an applicant for admission." *Id.* at 626. However, the Board was "not satisfied that Mr. Badalamenti [was] an applicant for admission to the United States" because "[h]e was brought here against his will." *Id.* Furthermore, the Board held that Mr. Badalamenti would not become an applicant for admission until after he had been given a reasonable opportunity to depart the country voluntarily. The Board declined to identify the length of time required, but noted that relevant factors included "any particular difficulties the alien may have in departing," and "[a]ny evidence that the United States Government impeded his efforts to depart."

Id. at 627. The Board's interpretation of the immigration laws receive *Chevron* deference, *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999); *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

Here, the Uighurs face "particular difficulties" in departing due at least in part to the Government's actions.[3] The Uighurs cannot physically leave, because the Government currently holds them in prison in Guantanamo. And, as the Government has acknowledged, the Uighurs cannot return to their native country, China, because there they would face persecution and possible torture (in part due to the U.S. Government's identification of them as Uighur separatists). *See* Appellants' Br. at 8 (citing J.A. 425–26, 437–38, 440, 491, 503–505; 528, 538–40). Nor will any other country accept the Uighurs, at least in part because the Government has previously designated them "enemy combatants," essentially labeling them terrorists. *See* Opinion 12, J.A. 1611. To the extent that the Government has impeded an alien from departing the country, as it has here, it cannot then detain the alien for not departing; our law does not compel the impossible. *See Matter of C-C-*, 3 I&N Dec. 221, 222 (BIA 1948) (holding under the doctrine of impossibility that an alien held in custody during trial could not be deported once acquitted for overstaying his visa);

While the Courts of Appeals have not addressed this legal issue, the Second Circuit has found that affirmative action by the government to entice or bring a non-citizen to the United States may confer protection under the Constitution. *See United States ex rel. Paktorovics v. Murff*, 260

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[3] The Government's argument that it detains the Uighurs only to prevent them from voluntarily entering the territory of the United States takes too simplistic a view of the Uighurs' circumstances. The Uighurs are not *voluntarily* seeking entry to the United States, and they are not seeking admission to the United States at all; as *Amici* understand their position, the Uighurs only seek release from prison. The Government has placed them in a Catch-22 position where the only effective release is within the United States' geographical borders. But this cannot be held against the Uighurs. If the only door out of their legally unjustified prison leads across the United States' geographical borders, the Uighurs must be permitted to take that route.

F.2d 610 (2d Cir. 1958). In *Paktorovics*, the Court found that a non-citizen had a Fifth Amendment due process right to a hearing prior to the revocation of his parole, despite the fact that he was "outside" the United States under the entry doctrine and, therefore, generally would not be entitled to such a hearing. The Court distinguished Paktorovics's situation from *Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206 (1953), by noting that "Paktorovics was invited here pursuant to the announced foreign policy of the United States as formulated by the President," and reinforced by Congress. *Paktorovics,* 260 F.2d at 614. The court concluded that "the tender of such an invitation and its acceptance by [Paktorovics]" effected "a change in the status of Paktorovics sufficient to entitle him to the protection of our Constitution." *Id.* Of course, the Uighurs did not respond to an "invitation" as did Paktorovics, but the Government affirmatively brought them to Guantanamo and detained them there for almost seven years, approximately five years after the Government determined that the majority of them were eligible for release. *See* Opinion 3, J.A. 1602.

The Government, citing *United States v. Verdugo-Urquidez,* 494 U.S. 259, 274–75 (1990), argues that the Uighurs' lack of a voluntary connection to the United States cuts against constitutional status. That argument misreads *Verdugo*. First, *Verdugo* found that the Fourth Amendment did not apply to the search of a Mexican resident-citizen's home *in Mexico*. *Id.* at 274–75. It said nothing about an alien's constitutional rights while inside the jurisdiction of the United States. *See id.* at 264. To the contrary, Justice Kennedy expressly noted this important limitation on the decision: "The United States is prosecuting a foreign national in a court established under Article III, and all of the trial proceedings are governed by the Constitution. All would agree, for instance, that the dictates of the Due Process Clause of the Fifth Amendment protect the [alien] defendant." *Id.* at 278 (Kennedy, J., concurring). Second, the Supreme Court noted that Fourth Amendment violations are unique because "a violation of the Amendment is 'fully accomplished' at

the time of an unreasonable governmental intrusion. . . . [T]herefore, if there were a violation, it occurred solely in Mexico." *Verdugo*, 494 U.S. at 264. Here, in contrast, the violation was not accomplished elsewhere, but is continuing, and for purposes of applying habeas protections to individuals detained from the Afghanistan conflict, "[i]n every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States." *Boumediene*, 128 S. Ct. at 2261.

The Government also relies on *Sale v. Haitian Centers Council, Inc.* to argue that it is irrelevant under immigration law whether aliens are involuntarily brought to the United States. 509 U.S. 155 (1993). The Government posits that even though the Haitian and Cuban migrants were brought to Guantanamo involuntarily, this "had no effect on the Government's authority to exclude them from the United States." Appellants' Br. at 44. However, the Government ignores the fact that while the migrants in *Sale* were indeed diverted to Guantanamo Bay, they were desperately and voluntarily trying to enter the United States to seek asylum protection when they were diverted. *See Sale*, 509 U.S. at 162–63 (detailing drowning deaths of Haitian refugees attempting to reach U.S. territories). Unlike the Haitian refugees, the Uighur prisoners had no intention of traveling to the United States—they were abducted and forcibly taken to Guantanamo Bay. Because *Sale* addresses aliens willingly seeking to enter the United States, *Badalamenti* remains the controlling precedent for aliens involuntarily brought to the United States.

Because the Uighurs were brought involuntarily to Guantanamo Bay, and were exonerated of the charges against them, the immigration laws present no obstacle to the Uighurs' release into the United States to remedy their current detention.

B. The District Court's Order Does not Unlawfully Challenge The Government's Power Under Immigration Law But Only Provides For Release Under Habeas Corpus.

The District Court's order made no determination regarding the immigration status of the Uighurs. Rather, the District Court exercised its authority in habeas corpus proceedings. Opinion 10-17, J.A. 1609-16. The District Court did prohibited the immediate use of detention authorized by the Department of Homeland Security (DHS). It did not prohibit the institution of removal proceedings at some point in the future, and it made no final orders regarding when, or under what conditions, the Uighur detainees could be brought into DHS custody. *See id.* Thus, rather than impermissibly intruding on the power of the Executive, the District Court's order left the Uighurs' legal status an open question to be determined upon the petitioners' appearance in Judge Urbina's courtroom, where a representative from DHS will be present to advocate that agency's interests. Transcript 65, J.A. 1597.

II. 8 U.S.C. § 1182 DOES NOT BAR THE RELEASE OF THE UIGHURS INTO THE UNITED STATES

The Government argues that the Uighurs have no right to admission under the immigration laws, and contends that immigration law bars the Uighurs' release into the United States. Appellants' Br. at 27-31, 51-52; 8 U.S.C. § 1182. However, Supreme Court precedent recognizes that federal courts have the authority to release non-citizens from detention into the United States regardless of whether they are admissible under § 1182. *See Clark v. Martinez*, 543 U.S. 371 (2005). Furthermore, the release order does not admit the Uighurs into the United States for purposes of immigration law. Indeed, immigration law similarly provides for the parole of inadmissible aliens into the United States, without changing their immigration status. The District Court's order does not preclude the Government from instituting removal proceedings or taking other action under

immigration law to exclude the Uighurs. Nonetheless, becauseremoval is not substantially likely in the reasonably foreseeable future, immigration law would forbids the Government from indefinitely detaining the Uighurs pending completion of such proceedings. Furthermore, the District Court order does not preclude the Government from imposing reasonable supervision and conditions on any release.

A. Federal Courts May Order Release Of Aliens Inadmissible Under 8 U.S.C. § 1182 Without Impacting Their Legal Status.

The Supreme Court has made clear that federal courts have the authority to order the release of non-citizens from detention into the United States—including non-citizens inadmissible under the immigration laws. *See Boumediene*, 128 S. Ct. 2229; *Martinez*, 543 U.S. 371.

In *Martinez*, the Supreme Court held that aliens could not be indefinitely detained, but must be presumptively released from detention into the United States after six months of detention, even though the aliens in *Martinez* were inadmissible under immigration law for having committed serious crimes. 543 U.S. 371. *Martinez* affirms the flexible nature of habeas corpus remedies, including the power to order the release from detention an inadmissible non-citizen into the United States. *Id.* at 374. As the *Boumediene* Court observed, "common-law habeas was, above all, an adaptable remedy", and one that is not "static, narrow, [or] formalistic. . . ." 128 S. Ct. at 2267 (citation omitted). As the immigration laws did not prevent releasing inadmissible non-citizens into the United States in *Martinez*, so too the Uighurs' purportedly inadmissible status should not bar their release from detention into the United States. In addition, the District Court's order of release

does not "admit" the Uighurs for purposes of immigration law or otherwise confer legal status.[4] *See Martinez*, 543 U.S. at 386.

The Government seeks to distinguish *Martinez* by asserting that it applied a provision of the immigration laws that is not at issue in this case. Contrary to the Government's reading, however, *Martinez* sets forth the broad principle that when the Government lacks a continued statutory basis for detaining inadmissible aliens, it must release them. Furthermore, the Court reiterated, in *Zadvydas v. Davis*, 533 U.S. 678 (2001), that statutes authorizing immigration detention ought not to be read to authorize indefinite detention because such a reading "would approach constitutional limits." *Martinez*, 543 U.S. at 384; *see Zadvydas*, 533 U.S. at 696, 699 (applying doctrine of constitutional avoidance because allowing indefinite detention would present "a serious constitutional threat" to the alien's rights under due process). Indeed, courts should not interpret immigration statutes to take away the constitutional rights of habeas corpus unless Congress expressly stated such intent. *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001). Under the Court's rulings in both *Martinez* and *Boumediene*, federal courts have the authority in habeas corpus proceedings to order the release from detention of inadmissible non-citizens. Nothing in § 1182 nullifies such individual's habeas corpus rights, and § 1182 should not be construed to authorize that result.

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[4] Given that the Uighurs did not seek refugee status, 8 U.S.C. § 1157, nor did the District Court grant that status, the Government's reference to 8 U.S.C. § 1252(a)(2)(B)(ii) is inapt. Appellants' Br. at 30 n. 5. Moreover, 8 U.S.C. § 1252(a)(B)(ii) only precludes review of discretionary decisions, not legal or constitutional matters. *See e.g., Nolan v. Holmes*, 334 F.3d 189, 194 (2d. Cir. 2003) ("purely legal challenge" of statutory construction justiciable, not within purview of § 1252(a)(2)(B)); *Gonzalez-Oropeza v. Attorney Gen.*, 321 F.3d 1331, 1333 (11th Cir. 2003) ("Notwithstanding this jurisdictional bar ... § 1252(a)(2)(B) allows review of substantial constitutional challenges to the INA"); *Sierra v. I.N.S.*, 258 F.3d 1213, 1217 (10th Cir. 2001) ("It is never within the Attorney General's discretion to act unconstitutionally.").

B. Immigration Law Further Reflects That The Uighurs Could Be Paroled Into The United States Without Determining Admissibility Under 8 U.S.C. § 1182 Or Their Legal Status.

The Government argues that the District Court erred in granting the *release* of the Uighurs into the United States, because (it argues) they are inadmissible under 8 U.S.C. § 1182(a). As noted by other amici, the Government could comply with District Court's order, if it chose, by paroling the Uighurs into the United States. 8 U.S.C. § 1182(d)(5)(A). Section 1182 makes clear that such parole would not effect an admission of the Uighurs into the United States. 8 U.S.C. § 1182(d)(5)(A) ("[S]uch parole of such alien shall not be regarded as an admission of the alien. . . . ").

Further, Supreme Court precedent plainly establishes that parole does not require admission of the alien, and confers no legal status. *See Leng May Ma*, 357 U.S. at 190, *superseded in part by statute*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, *as recognized in Fieran v. I.N.S.*, 268 F.3d 340, 343–44 (6th Cir. 2001) ("The parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. It was never intended to affect an alien's status."); *Kaplan v. Tod*, 267 U.S. 228, 229-30 (1925) (inadmissible alien paroled into the United States for over ten years held not to have made "entry" under immigration law). Accordingly, the Uighurs' § 1182 admissibility is irrelevant to the determination of whether they could be released into the United States under habeas corpus.

C. Regardless Of Whether The Uighurs Were Released Or Paroled Into The United States, The Government Could Pursue Removal Proceedings, Provided They Are Not Unlawfully Detained.

Releasing the Uighurs into the United States does not preclude the Government from seeking their subsequent removal, and nothing in the District Court's order is to the contrary. Upon their arrival, however, the Government may not simply detain the Uighurs anew under the pretext of

effectuating removal. *Contra* Appellants' Br. at 51 ("Finally, even if petitioners were somehow entitled to be brought into and released in the United States, it is clear that the INA also permits the Government to immediately take petitioners into custody and detain them pending removal to another country upon their arrival."). Detention is not an automatic corollary to removal proceedings. Removal proceedings can, and often are, commenced and concluded without the alien ever being detained. *See, e.g., Zadvydas*, 533 U.S. at 683; *Leng May Ma*, 357 U.S. at 190 ("Physical detention of aliens is now the exception, not the rule. . . ."); *see also Nishimura Ekiu v. United States*, 142 U.S. 651 (1892) (discussing the legal status of an alien immediately released to the custody of the Methodist Episcopal Japanese and Chinese Mission pending her removal). Under these facts, immigration detention would be constitutionally dubious, even if it were not (as apparently perceived by the District Court) merely an end run around the District Court's order.

1. Immigration detention is intended only to facilitate removal, not to punish.

The purpose of immigration detention is not to punish those in the United States without right; the purpose is to effectuate their removal or exclusion. *Zadvydas*, 533 U.S. at 690 ("The proceedings at issue here [detention pending execution of a removal order] are civil, not criminal, and we assume that they are nonpunitive in purpose and effect."). In *Wong Wing v. United States*, 163 U.S. 228 (1896), the Supreme Court clarified that immigration detention "is not a punishment for crime. . . . It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation . . . has determined that his continuing to reside here shall depend." *Id.* at 236.

Once it is clear that continued detention will not serve the purpose of removal or exclusion – because the aliens' removal or exclusion is not "practically attainable" – immigration detention

becomes solely punitive in nature. *Zadvydas*, 533 U.S. at 690-700 ("[W]here detention's goal is no longer practically attainable, detention no longer '[b]ears [a] reasonable relation to the purpose for which the individual was committed.'") (quoting *Jackson v. Indiana*, 406 U.S. 715 (1972)); *see also, e.g., Tuan Thai v. Ashcroft*, 366 F.3d 790, 798 (9th Cir. 2004) (forbidding further detention of a Vietnamese alien because his criminal history, combined with the United States' lack of a repatriation agreement with Vietnam, rendered his removal "not reasonably foreseeable."). As held in *Wong Wing* and *Zadvydas*, without due process of law, punitive detention of aliens is prohibited, not mandatory. *Zadvydas*, 533 U.S. at 699–700 ("[I]f removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute.").

2. Indefinite detention while removal is not reasonably foreseeable would be unlawful.

Moreover, indefinite detention raises serious constitutional concerns. The Supreme Court has recognized the grave constitutional questions that would be raised by using immigration detention – a civil proceeding – to hold people indefinitely. *See Zadvydas*, 533 U.S. at 690 ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem."). Contrary to the Government's assertion, this concern does not disappear merely because the non-citizen has not been admitted. *See Martinez*, 543 U.S. at 378-79 (holding that the limiting construction of statute authorizing detention of admitted but removable aliens, which was necessary to avoid this grave constitutional concern, applies equally to provisions authorizing detention of inadmissible aliens); *Rosales-Garcia v. Holland*, 322 F.3d 386, 410 (6th Cir. 2003) ("[T]he *Zadvydas* Court left open the question whether the indefinite detention of excludable aliens raises the same constitutional concerns under those clauses as the indefinite detention of aliens who have entered the United States. We now conclude that it does.").

Even where Congress has statutorily mandated detention, *see, e.g.*, 8 U.S.C. § 1226(c), such mandates are subject to constitutional limits, chief among them a prohibition on indefinite detention. *See, e.g., Tran v. Mukasey*, 515 F.3d 478, 485 (5th Cir. 2008) (affirming release into United States of alien held in custody for six months whose removal was not reasonably foreseeable); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1082-83 (9th Cir. 2006) (inadmissible alien released from five-year detention); *Ly v. Hansen*, 351 F.3d 263, 273 (6th Cir. 2003) (holding that aliens may only be held under 8 U.S.C. § 1226(c) "for a reasonable period of time required to initiate and conclude removal proceedings promptly"). Thus, assuming the Government's assertion that 8 U.S.C. § 1182(a)(3), and thus 8 U.S.C. § 1226(c), would apply to the Uighurs – a fact that is by no means clear – these laws do not (and cannot) mandate the Uighurs' detention where there is no reasonably foreseeable end to it. To mandate such indefinite detention would violate both the Constitution and immigration law, because "[w]hile it is true that a removable alien has no right to be in the country, it does not mean that he has no right to be at liberty." *Ly*, 351 F.3d at 269.

Nor is it fruitful to engage in speculation – as the Government invites this court to do – about whether the Uighurs could be detained under provisions of the USA Patriot Act. *See* Appellants' Br. at 51; 8 U.S.C. § 1226(a). Not only would such speculation be premature – since the Attorney General has not designated the Uighurs as terrorists under § 1226a(a)(3) and the only question at this stage is whether the writ of habeas corpus entitles the Uighurs to release – worse, it appears to conflict with the Government's own admissions. The Government has already conceded that the Uighurs are not enemy combatants – (its first justification for holding them indefinitely without trial) and does not appear to persist in arguing that they are dangerous. As such, since they cannot be removed to any country, even if 8 U.S.C. § 1226a were invoked, the Uighurs' continued detention

would likely be barred by 8 U.S.C. § 1226a(a)(6) (detention precluded unless detainee's release would "threaten the national security . . . or the security of the community or any person").

3. Because it would be both punitive and indefinite, detention of the Uighurs under the pretense of removal would be illegal.

Detaining the Uighurs pending any removal proceedings would precisely embody the punitive, indefinite immigration detention the courts have forbidden. It is uncontroverted that the Uighur detainees cannot be returned to their home country of China, *see, e.g.,* Appellants' Br. at 8 ("Petitioners fear that they would be subject to mistreatment by the Chinese Government, and the United States Government, in an effort to protect petitioners, has committed not to return them to their home country."), and, despite vigorous efforts by the Department of State, no other country willing to accept the Uighurs has yet been identified by the Government. *See id.* ("[D]espite extensive diplomatic efforts on petitioners' behalf, the Government has not to date located an appropriate country willing to accept them for resettlement.") Furthermore, the Government's mission to locate such a "willing country" may be stymied by the accusations of potential terrorism they have recently leveled against the Uighurs. *See* Gov't's Mot. to Stay at 13–14 (classifying the Uighurs as "individuals who seek to commit terrorist acts against a sovereign Government—and who receive weapons training for the purpose of doing so."). To the extent that successful removal is not reasonably foreseeable at this time, and the Government has proposed no realistic timeline for removal, detention of the Uighurs would be both punitive and indefinite. The Government gives no real reason for requiring their continued detention; but the failure to consider "alternative and less harsh methods" to achieve a non-punitive objective can show that the purpose of the Government action is to punish. *Bell v. Wolfish*, 441 U.S. 520, 539, n. 20 (1979). The District Court did not err in enjoining the Government from imposing such detention.

III. RELEASE OF THE UIGHURS INTO THE UNITED STATES MAY BE SUPERVISED AND SUBJECT TO REASONABLE CONDITIONS

A. Non-Citizens Released Under *Zadvydas* Or *Martinez* Are Subject to Supervision.

Whether release is authorized by parole or terms of supervision, such aliens are not necessarily free from supervision by the Government. Although *Zadvydas* and *Martinez* preclude the Government from detaining certain aliens beyond "a period reasonably necessary to bring about that alien's removal from the United States," *Zadvydas*, 533 U.S. at 689; *Martinez*, 543 U.S. at 378, the Supreme Court clarified that the choice is not simply "between imprisonment and the alien 'living at large.'" *Zadvydas*, 533 U.S. at 696. Rather, "the choice at issue here is between imprisonment and supervision under release conditions that may not be violated." *Id.* at 679-80; 8 C.F.R. § 241.5 (establishing conditions of release after removal period). In fact, violation of the terms of supervision may result in the alien being taken into custody again. 8 U.S.C. § 1253(b).

Such government supervision may include periodic appearances before an immigration judge and reasonable restrictions on conduct or activities. 8 U.S.C. § 1231(a)(3). In fact, regulations that detail the conditions of release for aliens with no significant likelihood of removal specify that the order of supervision may "include any other conditions" that the Secretary of Homeland Security considers necessary to "guarantee the alien's compliance," including, *e.g.*, "attendance at any rehabilitative/sponsorship program." 8 C.F.R. § 241.13(h); 8 U.S.C. § 1253(b); *see also Zadvydas*, 533 U.S. at 695 (holding that Congress may subject aliens "to supervision with conditions when released from detention or [] incarcerate them where appropriate for violations of those conditions").

The statutory scheme for non-citizens paroled into the United States similarly provides for conditions and supervision. Non-citizens arriving on United States shores who apply for admission are generally categorized as "arriving aliens." *See* 8 U.S.C. § 1225(b). These aliens may be paroled

into the United States by the Secretary of Homeland Security "under such conditions as he may prescribe." 8 U.S.C. § 1182(d)(5)(A). Regulations implementing this statute state that parole may be subject to "reasonable assurances that the alien will appear at all hearings and/or depart the United States when required to do so." 8 C.F.R. § 212.5(d). In practice, aliens released on parole are frequently subject to periodic reporting under 8 C.F.R. § 212.5(d)(3).

B. Non-Government Organizations Effectively Monitor Aliens Who Are Released On Parole Or Supervision.

Programs need not be implemented only by the Government or private contractors. Programs operated by non-governmental organizations have also monitored the location and activities of aliens with success. The Vera Institute of Justice, a not-for-profit organization, ran a demonstration program from 1997 to 2000 under a contract with the Immigration and Naturalization Service. At the end of the three-year program, 91% of intensive supervision participants in the Vera Institute's demonstration program had appeared for all required hearings. *See* "Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program," Vera Institute of Justice, August 2000, at 3-4, *available at* http://www.vera.org/publication_pdf/aapfinal.pdf.

Counsel for the Uighurs proffered evidence to the District Court that the Lutheran Immigration and Refugee Services (LIRS) "is prepared to effect a long-term resettlement solution for the Uighur men." J.A. 1469-72. LIRS has a long history of resettling refugees, including hundreds of thousands over the past seven decades, and more than 9,000 in 2008 alone. J.A. 1470. LIRS "organized a network of churches, mosques, synagogues, and other entities in the [Washington,] D.C. area to provide appropriate housing and support for all 17 of the Uighur men." J.A. 1470. The Uighur counsel also proffered evidence that seventeen Uighur families in the

Washington, D.C. area have agreed to house the Uighurs upon release while LIRS makes permanent arrangements for them. J.A. 1471.

Accordingly, upon release, the Uighurs' whereabouts would be known to the Government, to LIRS, and to their community sponsors. The choice for the Uighurs is not between imprisonment and "living at large," *Zadvydas*, 533 U.S. at 696, but between indefinite detention that has been found to be unlawful and release under reasonable conditions.

CONCLUSION

Immigration law poses no meaningful barrier to the petitioners' release from detention into the United States pursuant to the District Court's habeas corpus authority.

Dated: October 31, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,344 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in 13-point font.

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CORPORATE DISCLOSURE STATEMENT

In accordance with D.C. Cir. R. 26.1 and F. R. App. P. 26.1, the National Immigrant Justice Center files this Corporate Disclosure Statement.

The National Immigrant Justice Center states that it is a program of Heartland Human Care Services, an Illinois nonprofit corporation, its parent nonprofit corporation is The Heartland Alliance for Human Needs and Human Rights, which has no corporate parents. It is not publicly traded. The National Immigrant Justice Center is dedicated to ensuring human rights protections and access to justice for all immigrants, refugees and asylum seekers. The National Immigrant Justice Center provides direct legal services to and advocates for these populations through policy reform, impact litigation, and public education.

The American Immigration Lawyers Association states that it has no corporate parents and is not publicly traded. Its statement of interest satisfies the disclosure rule.

CERTIFICATE AS TO SEPARATE BRIEF

Pursuant to Circuit Rule 29(d), counsel states that this amicus curiae brief is being filed separately so that it may address solely those issues that are uniquely within the realm of immigration law, a field in which the National Immigrant Justice Center and the American Immigration Lawyers Association has substantial expertise.

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STATUTORY AND REGULATORY PROVISIONS

The statutory and regulatory provisions at issue in this appeal are attached as an addendum to this brief. Except for the statutes and regulatory provisions reproduced in the addendum, all applicable statutes and regulatory provisions at issue in this appeal are contained in the Brief for Appellants.

ADDENDUM

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UNITED STATES CODE ANNOTATED

TITLE 8

Aliens and Nationality

§§ 1158 to 1182f

Comprising All Laws of a General
and Permanent Nature
Under Arrangement of the Official Code of
the Laws of the United States
with
Annotations from Federal Courts

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TABL

the hearing might be used ... did not violate due process. ... Catalano v. Shaughnessy, ... 197 F.2d 65. Administrative Law And Procedure ⇐ 463.1; Constitutional Law ⇐ 274.3

Alien immigrant was entitled to fair and impartial hearing on charge that he was in United States unlawfully and that he had entered country without having an unexpired immigration visa. Harris v. Bizkowicz, C.C.A.8 (Mo.) 1939, 100 F.2d 854. Aliens ⇐ 54(4)

Alien who admitted that he entered United States surreptitiously and that he had testified falsely with respect to date and place of entry and that he was not rightful holder of documentary evidence he adduced, and that he attempted to use documents fraudulently, could not complain that findings of immigration authorities were arbitrary and that hearings were unfair. Ex parte Singh, N.D.Cal. 1935, 12 F.Supp. 147. Aliens ⇐ 54.3(1)

13. Evidence

Proofs in deportation proceeding were conclusive that alien seaman was in country without an unexpired immigration visa and that he had intention of staying as long as he could. Tsimounis v. Holland, C.A.3 (Pa.) 1956, 228 F.2d 907. Aliens ⇐ 54.1(4.1)

14. Habeas corpus

On habeas corpus by alien seaman claiming to have been previously admitted to the United States, evidence showed that he was not the person so previously admitted. Taranto v. Haff, C.C.A.9 (Cal.) 1937, 88 F.2d 85. Aliens ⇐ 54.1(4.1); Habeas Corpus ⇐ 727

The court in considering writ of habeas corpus sought by alien is bound by the record before it and cannot consider facts extrinsic thereto. U.S. ex rel. Gaudio v. Commissioner of Immigration of Port of New York, S.D.N.Y.1937, 18 F.Supp. 705. Habeas Corpus ⇐ 753

On habeas corpus by alien ordered deported, evidence was insufficient to support charge that nonquota immigration visa held by the alien was not valid unexpired visa. U.S. ex rel. Gaudio v. Commissioner of Immigration of Port of New York, S.D.N.Y.1937, 18 F.Supp. 705. Habeas Corpus ⇐ 727

15. Injunction

Injunction did not lie to restrain immigration inspector from interfering with alien's return to United States from Canada, notwithstanding alien offered evidence that he had been employed and engaged in business in United States since his entry prior to April of 1920, where alien had no unexpired immigration visa or re-entry permit, and did not allege that he offered evidence that he had been lawfully admitted into United States. Rash v. Zurbrick, C.C.A.6 (Mich.) 1935, 75 F.2d 934.

§ 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(1) Health-related grounds

(A) In general

Any alien—

(i) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance, which shall include infection with the etiologic agent for acquired immune deficiency syndrome,

(b) Notices of denials

(1) Subject to paragraphs (2) and (3), if an alien's application for a visa, for admission to the United States, or for adjustment of status is denied by an immigration or consular officer because the officer determines the alien to be inadmissible under subsection (a) of this section, the officer shall provide the alien with a timely written notice that—

(A) states the determination, and

(B) lists the specific provision or provisions of law under which the alien is inadmissible or ineligible for entry or adjustment [2] of status.

(2) The Secretary of State may waive the requirements of paragraph (1) with respect to a particular alien or any class or classes of inadmissible aliens.

(3) Paragraph (1) does not apply to any alien inadmissible under paragraph (2) or (3) of subsection (a) of this section.

(c) Repealed. Pub.L. 104–208, Div. C, Title III, § 304(b), Sept. 30, 1996, 110 Stat. 3009–597

(d) Temporary admission of nonimmigrants

(1) The Attorney General shall determine whether a ground for inadmissibility exists with respect to a nonimmigrant described in section 1101(a)(15)(S) of this title. The Attorney General, in the Attorney General's discretion, may waive the application of subsection (a) of this section (other than paragraph (3)(E)) in the case of a nonimmigrant described in section 1101(a)(15)(S) of this title, if the Attorney General considers it to be in the national interest to do so. Nothing in this section shall be regarded as prohibiting the Immigration and Naturalization Service from instituting removal proceedings against an alien admitted as a nonimmigrant under section 1101(a)(15)(S) of this title for conduct committed after the alien's admission into the United States, or for conduct or a condition that was not disclosed to the Attorney General prior to the alien's admission as a nonimmigrant under section 1101(a)(15)(S) of this title.

(2) Repealed. Pub.L. 101–649, Title VI, § 601(d)(2)(A), Nov. 29, 1990, 104 Stat. 5076

(3)(A) Except as provided in this subsection, an alien (i) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under subsection (a) of this section (other than paragraphs (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), and clauses (i) and (ii) of paragraph (3)(E) of such subsection), may, after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer that the alien be

admitted temporarily despite his inadmissibility, be granted such visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General, or (ii) who is inadmissible under subsection (a) of this section (other than paragraphs (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), and clauses (i) and (ii) of paragraph (3)(E) of such subsection), but who is in possession of appropriate documents or is granted a waiver thereof and is seeking admission, may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General. The Attorney General shall prescribe conditions, including exaction of such bonds as may be necessary, to control and regulate the admission and return of inadmissible aliens applying for temporary admission under this paragraph.

(B)(i) The Secretary of State, after consultation with the Attorney General and the Secretary of Homeland Security, or the Secretary of Homeland Security, after consultation with the Secretary of State and the Attorney General, may conclude in such Secretary's sole unreviewable discretion that subsection (a)(3)(B)(i)(IV)(bb) or (a)(3)(B)(i)(VII) of this section shall not apply to an alien, that subsection (a)(3)(B)(iv)(VI) of this section shall not apply with respect to any material support an alien afforded to an organization or individual that has engaged in a terrorist activity, or that subsection (a)(3)(B)(vi)(III) of this section shall not apply to a group solely by virtue of having a subgroup within the scope of that subsection. The Secretary of State may not, however, exercise discretion under this clause with respect to an alien once removal proceedings against the alien are instituted under section 1229a of this title.

(ii) Not later than 90 days after the end of each fiscal year, the Secretary of State and the Secretary of Homeland Security shall each provide to the Committees on the Judiciary of the House of Representatives and of the Senate, the Committee on International Relations of the House of Representatives, the Committee on Foreign Relations of the Senate, and the Committee on Homeland Security of the House of Representatives a report on the aliens to whom such Secretary has applied clause (i). Within one week of applying clause (i) to a group, the Secretary of State or the Secretary of Homeland Security shall provide a report to such Committees.

(4) Either or both of the requirements of paragraph (7)(B)(i) of subsection (a) of this section may be waived by the Attorney General and the Secretary of State acting jointly (A) on the basis of unforeseen emergency in individual cases, or (B) on the basis of reciprocity with respect to nationals of foreign contiguous territory or of adjacent islands and residents thereof having a common nationality with such nationals, or (C) in the case of aliens proceeding in immediate

and continuous transit through the United States under contracts authorized in section 1223(c) of this title.

(5)(A) The Attorney General may, except as provided in subparagraph (B) or in section 1184(f) of this title, in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

(B) The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 1157 of this title.

(6) Repealed. Pub.L. 101–649, Title VI, § 601(d)(2)(A), Nov. 29, 1990, 104 Stat. 5076

(7) The provisions of subsection (a) of this section (other than paragraph (7)) shall be applicable to any alien who shall leave Guam, Puerto Rico, or the Virgin Islands of the United States, and who seeks to enter the continental United States or any other place under the jurisdiction of the United States. The Attorney General shall by regulations provide a method and procedure for the temporary admission to the United States of the aliens described in this proviso.[3] Any alien described in this paragraph, who is denied admission to the United States, shall be immediately removed in the manner provided by section 1231(c) of this title.

(8) Upon a basis of reciprocity accredited officials of foreign governments, their immediate families, attendants, servants, and personal employees may be admitted in immediate and continuous transit through the United States without regard to the provisions of this section except paragraphs (3)(A), (3)(B), (3)(C), and (7)(B) of subsection (a) of this section.

(9), (10) Repealed. Pub.L. 101–649, Title VI, § 601(d)(2)(A), Nov. 29, 1990, 104 Stat. 5076

(11) The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) of subsection (a)(6)(E) of this

section in the case of any alien lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of removal, and who is otherwise admissible to the United States as a returning resident under section 1181(b) of this title and in the case of an alien seeking admission or adjustment of status as an immediate relative or immigrant under section 1153(a) of this title (other than paragraph (4) thereof), if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of such action was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(12) The Attorney General may, in the discretion of the Attorney General for humanitarian purposes or to assure family unity, waive application of clause (i) of subsection (a)(6)(F) of this section—

(A) in the case of an alien lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation or removal and who is otherwise admissible to the United States as a returning resident under section 1181(b) of this title, and

(B) in the case of an alien seeking admission or adjustment of status under section 1151(b)(2)(A) of this title or under section 1153(a) of this title,

if no previous civil money penalty was imposed against the alien under section 1324c of this title and the offense was committed solely to assist, aid, or support the alien's spouse or child (and not another individual). No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this paragraph.

(13)(A) The Attorney General shall determine whether a ground for inadmissibility exists with respect to a nonimmigrant described in section 1101(a)(15)(T) of this title, except that the ground for inadmissibility described in subsection (a)(4) of this section shall not apply with respect to such a nonimmigrant.

(B) In addition to any other waiver that may be available under this section, in the case of a nonimmigrant described in section 1101(a)(15)(T) of this title, if the Attorney General considers it to be in the National interest to do so, the Attorney General, in the Attorney General's discretion, may waive the application of

(i) subsection (a)(1) of this section; and

(ii) any other provision of subsection (a) of this section (excluding paragraphs (3), (4), (10)(C), and (10(E)) [4] if the activities rendering the alien inadmissible under the provision were caused by, or were incident to, the victimization described in section 1101(a)(15)(T)(i)(I) of this title.

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(d) Educational visitor status; foreign residence requirement; waiver.

No person admitted under section 1101(a)(15)(J) of this title or acquiring such status after admission (i) whose participation in the program for which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the Government of the United States or by the government of the country of his nationality or his last residence, (ii) who at the time of admission or acquisition of status under section 1101(a)(15)(J) of this title was a national or resident of a country which the Director of the United States Information Agency, pursuant to regulations prescribed by him, had designated as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien was engaged, or (iii) who came to the United States or acquired such status in order to receive graduate medical education or training, shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 1101(a)(15)(H) or section 1101(a)(15)(L) of this title until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of at least two years following departure from the United States: *Provided*, That upon the favorable recommendation of the Director, pursuant to the request of an interested United States Government agency (or, in the case of an alien described in clause (iii), pursuant to the request of a State Department of Public Health, or its equivalent), or of the Commissioner of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), or that the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion, or political opinion, the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest except that in the case of a waiver requested by a State Department of Public Health, or its equivalent, or in the case of a waiver requested by an interested United States Government agency on behalf of an alien described in

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Labor.
Mineral Lands and Mining.
Money and Finance.
National Guard.
Navigation and Navigable Waters.
Navy (*See Title 10, Armed Forces*).
Patents.
Patriotic and National Observances, Ceremonies, and Organizations.
Pay and Allowances of the Uniformed Services.
Veterans' Benefits.
Postal Service.
Public Buildings, Property, and Works.
Public Contracts.
The Public Health and Welfare.
Public Lands.
Public Printing and Documents.
Railroads.
Shipping.
Telegraphs, Telephones, and Radiotelegraphs.
Territories and Insular Possessions.
Transportation.
War and National Defense.

UNITED STATES CODE ANNOTATED

TITLE 8

Aliens and Nationality

§§ 1229b to 1323

Comprising All Laws of a General and Permanent Nature.
Under Arrangement of the Official Code of the Laws of the United States
with
Annotations from Federal Courts

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ing proper registration when they reported for inspection. In re Kempson, D.C.Wash.1926, 14 F.2d 668. Aliens ⇐ 68(3)

Where statements made by alien, both in his application for registry and upon oral examination, were wilfully false and made with intent to deceive, the fraud thus perpetrated invalidated the registry proceeding, and was per se evidence as to alien's lack of good moral character, and the registry proceeding was a complete nullity for all purposes, and did not result in legal adjustment of status of alien, whose presence in United States continued to be unlawful notwithstanding his colorable compliance with requirements of former § 728(a) of this title. U S v. Anastasio, D.C.N.J.1954, 120 F.Supp. 435, reversed on other grounds 226 F.2d 912, certiorari denied 76 S.Ct. 787, 351 U.S. 931, 100 L.Ed. 1460. Aliens ⇐ 68(3)

6. Cancellation of registration

Where arrival of alien was registered and alien was issued a certificate of lawful entry, and Commissioner of Immigration subsequently claimed that record and certificate were procured by falsification, and directed inferior officer to conduct hearing with view to cancelling record and certificate, and issue presented in action by alien for injunction was whether Commissioner had power to make cancellation, action could be maintained against inferior officer without making Commissioner a party defendant. Jeager v. Simrany, C.A.9 (Ariz.) 1950, 180 F.2d 650. Aliens ⇐ 68(3)

In considering legality of cancellation by Commissioner General of Immigration of alien's certificate of registry, trial court was limited in its inquiry as to whether after a fair hearing determination of facts was supported by substantial evidence, and whether law was correctly applied. U.S. ex rel. Dopico v. Revell, C.C.A.4 (Md.) 1934, 73 F.2d 221. Aliens ⇐ 54.3(2.1)

7. Legal residence

The starting point of residence prerequisite to naturalization was the entry of the alien, evidence of which was registry and certificate of entry. In re Simmiolkjier, D.C.Virgin Islands 1947, 71 F.Supp. 553. Aliens ⇐ 62(3)

§ 1231. Detention and removal of aliens ordered removed

(a) Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

(B) Beginning of period

The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

(C) Suspension of period

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(3) Supervision after 90–day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien—

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

(4) Aliens imprisoned, arrested, or on parole, supervised release, or probation

(A) In general

Except as provided in section 259(a) of Title 42 and paragraph (2) [1], the Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment. Parole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal.

(B) Exception for removal of nonviolent offenders prior to completion of sentence of imprisonment

The Attorney General is authorized to remove an alien in accordance with applicable procedures under this chapter before the alien has completed a sentence of imprisonment—

(i) in the case of an alien in the custody of the Attorney General, if the Attorney General determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense related to smuggling or harboring of aliens or an offense described in section 1101(a)(43)(B), (C), (E), (I), or (L) of this title [2] and (II) the removal of the alien is appropriate and in the best interest of the United States; or

(ii) in the case of an alien in the custody of a State (or a political subdivision of a State), if the chief State official exercising authority with respect to the incarceration of the alien determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense described in section 1101(a)(43)(C) or (E) of this title), (II) the removal is appropriate and in the best interest of the State, and (III) submits a written request to the Attorney General that such alien be so removed.

(C) Notice

Any alien removed pursuant to this paragraph shall be notified of the penalties under the laws of the United States relating to the reentry of deported aliens, particularly the expanded penalties for aliens removed under subparagraph (B).

(D) No private right

No cause or claim may be asserted under this paragraph against any official of the United States or of any State to compel the release, removal, or consideration for release or removal of any alien.

(5) Reinstatement of removal orders against aliens illegally reentering

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may

not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

(7) Employment authorization

No alien ordered removed shall be eligible to receive authorization to be employed in the United States unless the Attorney General makes a specific finding that—

(A) the alien cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien, or

(B) the removal of the alien is otherwise impracticable or contrary to the public interest.

(b) Countries to which aliens may be removed

(1) Aliens arriving at the United States

Subject to paragraph (3)—

(A) In general

Except as provided by subparagraphs (B) and (C), an alien who arrives at the United States and with respect to whom proceedings under section 1229a of this title were initiated at the time of such alien's arrival shall be removed to the country in which the alien boarded the vessel or aircraft on which the alien arrived in the United States.

(B) Travel from contiguous territory

If the alien boarded the vessel or aircraft on which the alien arrived in the United States in a foreign territory contiguous to the United States, an island adjacent to the United States, or an island adjacent to a foreign territory contiguous to the United States, and the alien is not a native, citizen, subject, or national of, or does not reside in, the territory or island, removal shall be to the country in which the alien boarded the vessel that transported the alien to the territory or island.

C

Effective:[See Text Amendments]

Code of Federal Regulations Currentness
Title 8. Aliens and Nationality
Chapter I. Department of Homeland Security (Immigration and Naturalization) (Refs & Annos)
Subchapter B. Immigration Regulations
Part 212. Documentary Requirements: Nonimmigrants; Waivers; Admission of Certain Inadmissible Aliens; Parole (Refs & Annos)

➡ § 212.5 Parole of aliens into the United States.

(a) The authority of the Secretary to continue an alien in custody or grant parole under section 212(d)(5)(A) of the Act shall be exercised by the Assistant Commissioner, Office of Field Operations; Director, Detention and Removal; directors of field operations; port directors; special agents in charge; deputy special agents in charge; associate special agents in charge; assistant special agents in charge; resident agents in charge; field office directors; deputy field office directors; chief patrol agents; district directors for services; and those other officials as may be designated in writing, subject to the parole and detention authority of the Secretary or his designees. The Secretary or his designees may invoke, in the exercise of discretion, the authority under section 212(d)(5)(A) of the Act.

(b) The parole of aliens within the following groups who have been or are detained in accordance with § 235.3(b) or (c) of this chapter would generally be justified only on a case-by-case basis for "urgent humanitarian reasons" or "significant public benefit," provided the aliens present neither a security risk nor a risk of absconding:

(1) Aliens who have serious medical conditions in which continued detention would not be appropriate;

(2) Women who have been medically certified as pregnant;

(3) Aliens who are defined as juveniles in § 236.3(a) of this chapter. The Director, Detention and Removal; directors of field operations; field office directors; deputy field office directors; or chief patrol agents shall follow the guidelines set forth in § 236.3(a) of this chapter and paragraphs (b)(3)(i) through (iii) of this section in determining under what conditions a juvenile should be paroled from detention:

(i) Juveniles may be released to a relative (brother, sister, aunt, uncle, or grandparent) not in Service detention who is willing to sponsor a minor and the minor may be released to that relative notwithstanding that the juvenile has a relative who is in detention.

(ii) If a relative who is not in detention cannot be located to sponsor the minor, the minor may be released with an accompanying relative who is in detention.

(iii) If the Service cannot locate a relative in or out of detention to sponsor the minor, but the minor has identified a non-relative in detention who accompanied him or her on arrival, the question of releasing the minor and the accompanying non-relative adult shall be addressed on a case-by-case basis;

(4) Aliens who will be witnesses in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies in the United States; or

(5) Aliens whose continued detention is not in the public interest as determined by those officials identified in paragraph (a) of this section.

(c) In the case of all other arriving aliens, except those detained under § 235.3(b) or (c) of this chapter and paragraph (b) of this section, those officials listed in paragraph (a) of this section may, after review of the individual case, parole into the United States temporarily in accordance with section 212(d)(5)(A) of the Act, any alien applicant for admission, under such terms and conditions, including those set forth in paragraph (d) of this section, as he or she may deem appropriate. An alien who arrives at a port-of-entry and applies for parole into the United States for the sole purpose of seeking adjustment of status under section 245A of the Act, without benefit of advance authorization as described in paragraph (f) of this section shall be denied parole and detained for removal in accordance with the provisions of § 235.3(b) or (c) of this chapter. An alien seeking to enter the United States for the sole purpose of applying for adjustment of status under section 210 of the Act shall be denied parole and detained for removal under § 235.3(b) or (c) of this chapter, unless the alien has been recommended for approval of such application for adjustment by a consular officer at an Overseas Processing Office.

(d) Conditions. In any case where an alien is paroled under paragraph (b) or (c) of this section, those officials listed in paragraph (a) of this section may require reasonable assurances that the alien will appear at all hearings and/or depart the United States when required to do so. Not all factors listed need be present for parole to be exercised. Those officials should apply reasonable discretion. The consideration of all relevant factors includes:

(1) The giving of an undertaking by the applicant, counsel, or a sponsor to ensure appearances or departure, and a bond may be required on Form I-352 in such amount as may be deemed appropriate;

(2) Community ties such as close relatives with known addresses; and

(3) Agreement to reasonable conditions (such as periodic reporting of whereabouts).

(e) Termination of parole--

(1) Automatic. Parole shall be automatically terminated without written notice (i) upon the departure from the United States of the alien, or, (ii) if not departed, at the expiration of the time for which parole was authorized, and in the latter case the alien shall be processed in accordance with paragraph (e)(2) of this section except that no written notice shall be required.

(2)(i) On notice. In cases not covered by paragraph (e)(1) of this section, upon accomplishment of the purpose for which parole was authorized or when in the opinion of one of the officials listed in paragraph (a) of this section, neither humanitarian reasons nor public benefit warrants the continued presence of the alien in the United States, parole shall be terminated upon written notice to the alien and he or she shall be restored to the status that he or she had at the time of parole. When a charging document is served on the alien, the charging document will constitute written notice of termination of parole, unless otherwise specified. Any further inspection or hearing shall be conducted under section 235 or 240 of the Act and this chapter, or any order of exclusion, deportation, or removal previously entered shall be executed. If the exclusion, deportation, or removal order cannot be executed within a reasonable time, the alien shall again be released on parole unless in the opinion of the official listed in paragraph (a) of this section the public interest requires that the alien be continued in custody.

(ii) An alien who is granted parole into the United States after enactment of the Immigration Reform and Control Act of 1986 for other than the specific purpose of applying for adjustment of status under section 245A of the Act shall not be permitted to avail him or herself of the privilege of adjustment thereunder.

Failure to abide by this provision through making such an application will subject the alien to termination of parole status and institution of proceedings under sections 235 and 236 of the Act without the written notice of termination required by § 212.5(e)(2)(i) of this chapter.

(iii) Any alien granted parole into the United States so that he or she may transit through the United States in the course of removal from Canada shall have his or her parole status terminated upon notice, as specified in 8 CFR 212.5(e)(2)(i), if he or she makes known to an immigration officer of the United States a fear of persecution or an intention to apply for asylum. Upon termination of parole, any such alien shall be regarded as an arriving alien, and processed accordingly by the Department of Homeland Security.

(f) Advance authorization. When parole is authorized for an alien who will travel to the United States without a visa, the alien shall be issued Form I-512.

(g) Parole for certain Cuban nationals. Notwithstanding any other provision respecting parole, the determination whether to release on parole, or to revoke the parole of, a native of Cuba who last came to the United States between April 15, 1980, and October 20, 1980, shall be governed by the terms of § 212.12.

(h) Effect of parole of Cuban and Haitian nationals.

(1) Except as provided in paragraph (h)(2) of this section, any national of Cuba or Haiti who was paroled into the United States on or after October 10, 1980, shall be considered to have been paroled in the special status for nationals of Cuba or Haiti, referred to in section 501(e)(1) of the Refugee Education Assistance Act of 1980, Public Law 96-422, as amended (8 U.S.C. 1522 note).

(2) A national of Cuba or Haiti shall not be considered to have been paroled in the special status for nationals of Cuba or Haiti, referred to in section 501(e)(1) of the Refugee Education Assistance Act of 1980, Public Law 96-422, as amended, if the individual was paroled into the United States:

(i) In the custody of a Federal, State or local law enforcement or prosecutorial authority, for purposes of criminal prosecution in the United States; or

(ii) Solely to testify as a witness in proceedings before a judicial, administrative, or legislative body in the United States.

[40 FR 49767, Oct. 24, 1975; as amended at 46 FR 24929, May 4, 1981; 47 FR 30045, July 9, 1982; 47 FR 46494, Oct. 19, 1982; 52 FR 16194, May 1, 1987; 52 FR 48802, Dec. 28, 1987; 53 FR 17450, May 17, 1988; 61 FR 36611, July 12, 1996; 62 FR 10348, March 6, 1997; 63 FR 31895, June 11, 1998; 65 FR 80294, Dec. 21, 2000; 65 FR 82255, Dec. 28, 2000; 66 FR 7863, March 26, 2001; 67 FR 39257, June 7, 2002; 68 FR 35152, June 12, 2003; 69 FR 69489, Nov. 29, 2004]

SOURCE: 52 FR 16193, May 1, 1987; 52 FR 16372, May 5, 1987; 52 FR 48083, Dec. 18, 1987; 52 FR 48802, Dec. 28, 1987; 53 FR 9282, March 22, 1988; 53 FR 17450, May 17, 1988; 53 FR 24900, June 30, 1988; 53 FR 30017, Aug. 10, 1988; 53 FR 40867, Oct. 19, 1988; 55 FR 24859, June 19, 1990; 55 FR 36259, Sept. 5, 1990; 59 FR 13870, March 24, 1994; 60 FR 34090, June 30, 1995; 66 FR 236, Jan. 3, 2001; 67 FR 71447, Dec. 2, 2002; 68 FR 10923, March 6, 2003; 68 FR 35152, June 12, 2003; 68 FR 35275, June 13, 2003; 68 FR 46928, Aug. 7, 2003; 71 FR 68429, Nov. 24, 2006; 73 FR 18415, April 3, 2008, unless otherwise noted.

AUTHORITY: 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1187, 1223, 1225, 1226, 1227, 1359; 8 U.S.C. 1185 note (section 7209

of Pub.L. 108-458, as amended by section 546 of Pub.L. 109-295 and by section 723 of Pub.L. 110-53).

8 C. F. R. § 212.5, 8 CFR § 212.5
Current through October 23, 2008; 73 FR 63259

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C

Effective:[See Text Amendments]

Code of Federal Regulations Currentness
Title 8. Aliens and Nationality
Chapter I. Department of Homeland Security (Immigration and Naturalization) (Refs & Annos)
Subchapter B. Immigration Regulations
Part 241. Apprehension and Detention of Aliens Ordered Removed (Refs & Annos)
Subpart A. Post-Hearing Detention and Removal

→ § 241.13 Determination of whether there is a significant likelihood of removing a detained alien in the reasonably foreseeable future.

(a) Scope. This section establishes special review procedures for those aliens who are subject to a final order of removal and are detained under the custody review procedures provided at § 241.4 after the expiration of the removal period, where the alien has provided good reason to believe there is no significant likelihood of removal to the country to which he or she was ordered removed, or to a third country, in the reasonably foreseeable future.

(b) Applicability to particular aliens.

(1) Relationship to § 241.4. Section 241.4 shall continue to govern the detention of aliens under a final order of removal, including aliens who have requested a review of the likelihood of their removal under this section, unless the Service makes a determination under this section that there is no significant likelihood of removal in the reasonably foreseeable future. The Service may release an alien under an order of supervision under § 241.4 if it determines that the alien would not pose a danger to the public or a risk of flight, without regard to the likelihood of the alien's removal in the reasonably foreseeable future.

(2) Continued detention pending determinations.

(i) The Service's Headquarters Post-order Detention Unit (HQPDU) shall continue in custody any alien described in paragraph (a) of this section during the time the Service is pursuing the procedures of this section to determine whether there is no significant likelihood the alien can be removed in the reasonably foreseeable future. The HQPDU shall continue in custody any alien described in paragraph (a) of this section for whom it has determined that special circumstances exist and custody procedures under § 241.14 have been initiated.

(ii) The HQPDU has no obligation to release an alien under this section until the HQPDU has had the opportunity during a six-month period, dating from the beginning of the removal period (whenever that period begins and unless that period is extended as provided in section 241(a)(1) of the Act), to make its determination as to whether there is a significant likelihood of removal in the reasonably foreseeable future.

(3) Limitations. This section does not apply to:

(i) 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 § 212.12 of this chapter;

(ii) Aliens subject to a final order of removal who are still within the removal period, including aliens whose removal period has been extended for failure to comply with the requirements of section 241(a)(1)(C) of the Act; or

(iii) Aliens who are ordered removed by the

Alien Terrorist Removal Court pursuant to title 5 of the Act.

(c) Delegation of authority. The HQPDU shall conduct a review under this section, in response to a request from a detained alien, in order to determine whether there is no significant likelihood that the alien will be removed in the reasonably foreseeable future. If so, the HQPDU shall determine whether the alien should be released from custody under appropriate conditions of supervision or should be referred for a determination under § 241.14 as to whether the alien's continued detention may be justified by special circumstances.

(d) Showing by the alien--

(1) Written request. An eligible alien may submit a written request for release to the HQPDU asserting the basis for the alien's belief that there is no significant likelihood that the alien will be removed in the reasonably foreseeable future. The alien may submit whatever documentation to the HQPDU he or she wishes in support of the assertion that there is no significant likelihood of removal in the reasonably foreseeable future.

(2) Compliance and cooperation with removal efforts. The alien shall include with the written request information sufficient to establish his or her compliance with the obligation to effect his or her removal and to cooperate in the process of obtaining necessary travel documents.

(3) Timing of request. An eligible alien subject to a final order of removal may submit, at any time after the removal order becomes final, a written request under this section asserting that his or her removal is not significantly likely in the reasonably foreseeable future. However, the Service may, in the exercise of its discretion, postpone its consideration of such a request until after expiration of the removal period.

(e) Review by HQPDU--

(1) Initial response. Within 10 business days after the HQPDU receives the request (or, if later, the expiration of the removal period), the HQPDU shall respond in writing to the alien, with a copy to counsel of record, by regular mail, acknowledging receipt of the request for a review under this section and explaining the procedures that will be used to evaluate the request. The notice shall advise the alien that the Service may continue to detain the alien until it has made a determination under this section whether there is a significant likelihood the alien can be removed in the reasonably foreseeable future.

(2) Lack of compliance, failure to cooperate. The HQPDU shall first determine if the alien has failed to make reasonable efforts to comply with the removal order, has failed to cooperate fully in effecting removal, or has obstructed or hampered the removal process. If so, the HQPDU shall so advise the alien in writing, with a copy to counsel of record by regular mail. The HQPDU shall advise the alien of the efforts he or she needs to make in order to assist in securing travel documents for return to his or her country of origin or a third country, as well as the consequences of failure to make such efforts or to cooperate, including the provisions of section 243(a) of the Act. The Service shall not be obligated to conduct a further consideration of the alien's request for release until the alien has responded to the HQPDU and has established his or her compliance with the statutory requirements.

(3) Referral to the State Department. If the HQPDU believes that the alien's request provides grounds for further review, the Service may, in the exercise of its discretion, forward a copy of the alien's release request to the Department of State for information and assistance. The Department of State may provide detailed country conditions information or any other information that may be relevant to

whether a travel document is obtainable from the country at issue. The Department of State may also provide an assessment of the accuracy of the alien's assertion that he or she cannot be returned to the country at issue or to a third country. When the Service bases its decision, in whole or in part, on information provided by the Department of State, that information shall be made part of the record.

(4) Response by alien. The Service shall permit the alien an opportunity to respond to the evidence on which the Service intends to rely, including the Department of State's submission, if any, and other evidence of record presented by the Service prior to any HQPDU decision. The alien may provide any additional relevant information to the Service, including reasons why his or her removal would not be significantly likely in the reasonably foreseeable future even though the Service has generally been able to accomplish the removal of other aliens to the particular country.

(5) Interview. The HQPDU may grant the alien an interview, whether telephonically or in person, if the HQPDU determines that an interview would provide assistance in reaching a decision. If an interview is scheduled, the HQPDU will provide an interpreter upon its determination that such assistance is appropriate.

(6) Special circumstances. If the Service determines that there are special circumstances justifying the alien's continued detention notwithstanding the determination that removal is not significantly likely in the reasonably foreseeable future, the Service shall initiate the review procedures in § 241.14, and provide written notice to the alien. In appropriate cases, the Service may initiate review proceedings under § 241.14 before completing the HQPDU review under this section.

(f) Factors for consideration. The HQPDU shall consider all the facts of the case including, but not limited to, the history of the alien's efforts to comply with the order of removal, the history of the Service's efforts to remove aliens to the country in question or to third countries, including the ongoing nature of the Service's efforts to remove this alien and the alien's assistance with those efforts, the reasonably foreseeable results of those efforts, and the views of the Department of State regarding the prospects for removal of aliens to the country or countries in question. Where the Service is continuing its efforts to remove the alien, there is no presumptive period of time within which the alien's removal must be accomplished, but the prospects for the timeliness of removal must be reasonable under the circumstances.

(g) Decision. The HQPDU shall issue a written decision based on the administrative record, including any documentation provided by the alien, regarding the likelihood of removal and whether there is a significant likelihood that the alien will be removed in the reasonably foreseeable future under the circumstances. The HQPDU shall provide the decision to the alien, with a copy to counsel of record, by regular mail.

(1) Finding of no significant likelihood of removal. If the HQPDU determines at the conclusion of the review that there is no significant likelihood that the alien will be removed in the reasonably foreseeable future, despite the Service's and the alien's efforts to effect removal, then the HQPDU shall so advise the alien. Unless there are special circumstances justifying continued detention, the Service shall promptly make arrangements for the release of the alien subject to appropriate conditions, as provided in paragraph (h) of this section. The Service may require that the alien submit to a medical or psychiatric examination prior to establishing appropriate conditions for release or determining whether to refer the alien for further proceedings under § 214.14 because of special circumstances justifying continued detention. The Service is not required to release an alien if the

alien refuses to submit to a medical or psychiatric examination as ordered.

(2) Denial. If the HQPDU determines at the conclusion of the review that there is a significant likelihood that the alien will be removed in the reasonably foreseeable future, the HQPDU shall deny the alien's request under this section. The denial shall advise the alien that his or her detention will continue to be governed under the established standards in § 214.4. There is no administrative appeal from the HQPDU decision denying a request from an alien under this section.

(h) Conditions of release--

(1) In general. An alien's release pursuant to an HQPDU determination that the alien's removal is not significantly likely in the reasonably foreseeable future shall be upon appropriate conditions specified in this paragraph and in the order of supervision, in order to protect the public safety and to promote the ability of the Service to effect the alien's removal as ordered, or removal to a third country, should circumstances change in the future. The order of supervision shall include all of the conditions provided in section 241(a)(3) of the Act, and § 241.5, and shall also include the conditions that the alien obey all laws, including any applicable prohibitions on the possession or use of firearms (see, e.g., 18 U.S.C. 922(g)); and that the alien continue to seek to obtain travel documents and provide the Service with all correspondence to Embassies/Consulates requesting the issuance of travel documents and any reply from the Embassy/Consulate. The order of supervision may also include any other conditions that the HQPDU considers necessary to ensure public safety and guarantee the alien's compliance with the order of removal, including, but not limited to, attendance at any rehabilitative/sponsorship program or submission for medical or psychiatric examination, as ordered.

(2) Advice of consequences for violating conditions of release. The order of supervision shall advise an alien released under this section that he or she must abide by the conditions of release specified by the Service. The order of supervision shall also advise the alien of the consequences of violation of the conditions of release, including the authority to return the alien to custody and the sanctions provided in section 243(b) of the Act.

(3) Employment authorization. The Service may, in the exercise of its discretion, grant employment authorization under the same conditions set forth in § 241.5(c) for aliens released under an order of supervision.

(4) Withdrawal of release approval. The Service may, in the exercise of its discretion, withdraw approval for release of any alien under this section prior to release in order to effect removal in the reasonably foreseeable future or where the alien refuses to comply with the conditions of release.

(i) Revocation of release--

(1) Violation of conditions of release. Any alien who has been released under an order of supervision under this section who violates any of the conditions of release may be returned to custody and is subject to the penalties described in section 243(b) of the Act. In suitable cases, the HQPDU shall refer the case to the appropriate U.S. Attorney for criminal prosecution. The alien may be continued in detention for an additional six months in order to effect the alien's removal, if possible, and to effect the conditions under which the alien had been released.

(2) Revocation for removal. The Service may revoke an alien's release under this section and return the alien to custody if, on account of changed circumstances, the Service determines that there is a significant likelihood that the ali-

en may be removed in the reasonably foreseeable future. Thereafter, if the alien is not released from custody following the informal interview provided for in paragraph (h)(3) of this section, the provisions of § 241.4 shall govern the alien's continued detention pending removal.

(3) Revocation procedures. Upon revocation, the alien will be notified of the reasons for revocation of his or her release. The Service will conduct an initial informal interview promptly after his or her return to Service custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notification. The alien may submit any evidence or information that he or she believes shows there is no significant likelihood he or she be removed in the reasonably foreseeable future, or that he or she has not violated the order of supervision. The revocation custody review will include an evaluation of any contested facts relevant to the revocation and a determination whether the facts as determined warrant revocation and further denial of release.

(j) Subsequent requests for review. If the Service has denied an alien's request for release under this section, the alien may submit a request for review of his or her detention under this section, six months after the Service's last denial of release under this section. After applying the procedures in this section, the HQPDU shall consider any additional evidence provided by the alien or available to the Service as well as the evidence in the prior proceedings but the HQPDC shall render a de novo decision on the likelihood of removing the alien in the reasonably foreseeable future under the circumstances.

[66 FR 56977, Nov. 14, 2001; 70 FR 673, Jan. 5, 2005]

SOURCE: 62 FR 10378, March 6, 1997; 65 FR 80294, Dec. 21, 2000; 66 FR 29451, May 31, 2001; 67 FR 19511, April 22, 2002; 68 FR 4367, Jan. 29, 2003; 68 FR 10923, March 6, 2003; 68 FR 35275, June 13, 2003; 70 FR 67089, Nov. 4, 2005, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1103, 1182, 1223, 1224, 1225, 1226, 1227, 1228, 1231, 1251, 1253, 1255, 1330, 1362; 18 U.S.C. 4002, 4013(c)(4); Pub.L. 107-296, 116 Stat. 2135 (6 U.S.C. 101, et seq.); 8 CFR part 2.

8 C. F. R. § 241.13, 8 CFR § 241.13
Current through October 23, 2008; 73 FR 63259

C

Effective:[See Text Amendments]

Code of Federal Regulations Currentness
Title 8. Aliens and Nationality
Chapter I. Department of Homeland Security (Immigration and Naturalization) (Refs & Annos)
Subchapter B. Immigration Regulations
Part 241. Apprehension and Detention of Aliens Ordered Removed (Refs & Annos)
Subpart A. Post-Hearing Detention and Removal

→ § 241.5 Conditions of release after removal period.

(a) Order of supervision. An alien released pursuant to § 241.4 shall be released pursuant to an order of supervision. The Commissioner, Deputy Commissioner, Executive Associate Commissioner Field Operations, regional director, district director, acting district director, deputy district director, assistant district director for investigations, assistant district director for detention and deportation, or officer-in-charge may issue Form I-220B, Order of Supervision. The order shall specify conditions of supervision including, but not limited to, the following:

(1) A requirement that the alien report to a specified officer periodically and provide relevant information under oath as directed;

(2) A requirement that the alien continue efforts to obtain a travel document and assist the Service in obtaining a travel document;

(3) A requirement that the alien report as directed for a mental or physical examination or examinations as directed by the Service;

(4) A requirement that the alien obtain advance approval of travel beyond previously specified times and distances; and

(5) A requirement that the alien provide the Service with written notice of any change of address on Form AR-11 within ten days of the change.

(b) Posting of bond. An officer authorized to issue an order of supervision may require the posting of a bond in an amount determined by the officer to be sufficient to ensure compliance with the conditions of the order, including surrender for removal.

(c) Employment authorization. An officer authorized to issue an order of supervision may, in his or her discretion, grant employment authorization to an alien released under an order of supervision if the officer specifically finds that:

(1) The alien cannot be removed in a timely manner; or

(2) The removal of the alien is impracticable or contrary to public interest.

[65 FR 80298, Dec. 21, 2000; 70 FR 673, Jan. 5, 2005]

SOURCE: 62 FR 10378, March 6, 1997; 65 FR 80294, Dec. 21, 2000; 66 FR 29451, May 31, 2001; 67 FR 19511, April 22, 2002; 68 FR 4367, Jan. 29, 2003; 68 FR 10923, March 6, 2003; 68 FR 35275, June 13, 2003; 70 FR 67089, Nov. 4, 2005, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1103, 1182, 1223, 1224, 1225, 1226, 1227, 1228, 1231, 1251, 1253, 1255, 1330, 1362; 18 U.S.C. 4002, 4013(c)(4); Pub.L. 107-296, 116 Stat. 2135 (6 U.S.C. 101, et seq.); 8 CFR part 2.

8 C. F. R. § 241.5, 8 CFR § 241.5

Current through October 23, 2008; 73 FR 63259

END OF DOCUMENT

Effective:[See Notes]

United States Code Annotated Currentness
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter II. Immigration
Part IV. Inspection, Apprehension, Examination, Exclusion, and Removal (Refs & Annos)

→ § 1225. Inspection by immigration officers; expedited removal of inadmissible arriving aliens; referral for hearing

(a) Inspection

(1) Aliens treated as applicants for admission

An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this chapter an applicant for admission.

(2) Stowaways

An arriving alien who is a stowaway is not eligible to apply for admission or to be admitted and shall be ordered removed upon inspection by an immigration officer. Upon such inspection if the alien indicates an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview under subsection (b)(1)(B) of this section. A stowaway may apply for asylum only if the stowaway is found to have a credible fear of persecution under subsection (b)(1)(B) of this section. In no case may a stowaway be considered an applicant for admission or eligible for a hearing under section 1229a of this title.

(3) Inspection

All aliens (including alien crewmen) who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States shall be inspected by immigration officers.

(4) Withdrawal of application for admission

An alien applying for admission may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission and depart immediately from the United States.

(5) Statements

An applicant for admission may be required to state under oath any information sought by an immigration officer regarding the purposes and intentions of the applicant in seeking admission to the United States, includ-

ing the applicant's intended length of stay and whether the applicant intends to remain permanently or become a United States citizen, and whether the applicant is inadmissible.

(b) Inspection of applicants for admission

(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled

(A) Screening

(i) In general

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

(ii) Claims for asylum

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B).

(iii) Application to certain other aliens

(I) In general

The Attorney General may apply clauses (i) and (ii) of this subparagraph to any or all aliens described in subclause (II) as designated by the Attorney General. Such designation shall be in the sole and unreviewable discretion of the Attorney General and may be modified at any time.

(II) Aliens described

An alien described in this clause is an alien who is not described in subparagraph (F), who has not been admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility under this subparagraph.

(B) Asylum interviews

(i) Conduct by asylum officers

An asylum officer shall conduct interviews of aliens referred under subparagraph (A)(ii), either at a port of entry or at such other place designated by the Attorney General.

(ii) Referral of certain aliens

If the officer determines at the time of the interview that an alien has a credible fear of persecution (within the meaning of clause (v)), the alien shall be detained for further consideration of the application for asylum.

(iii) Removal without further review if no credible fear of persecution

(I) In general

Subject to subclause (III), if the officer determines that an alien does not have a credible fear of persecution, the officer shall order the alien removed from the United States without further hearing or review.

(II) Record of determination

The officer shall prepare a written record of a determination under subclause (I). Such record shall include a summary of the material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's analysis of why, in the light of such facts, the alien has not established a credible fear of persecution. A copy of the officer's interview notes shall be attached to the written summary.

(III) Review of determination

The Attorney General shall provide by regulation and upon the alien's request for prompt review by an immigration judge of a determination under subclause (I) that the alien does not have a credible fear of persecution. Such review shall include an opportunity for the alien to be heard and questioned by the immigration judge, either in person or by telephonic or video connection. Review shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the determination under subclause (I).

(IV) Mandatory detention

Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.

(iv) Information about interviews

The Attorney General shall provide information concerning the asylum interview described in this subparagraph to aliens who may be eligible. An alien who is eligible for such interview may consult with a person or persons of the alien's choosing prior to the interview or any review thereof, according to regulations prescribed by the Attorney General. Such consultation shall be at no expense to the Government and shall not unreasonably delay the process.

(v) "Credible fear of persecution" defined

For purposes of this subparagraph, the term "credible fear of persecution" means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's

claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 1158 of this title.

(C) Limitation on administrative review

Except as provided in subparagraph (B)(iii)(III), a removal order entered in accordance with subparagraph (A)(i) or (B)(iii)(I) is not subject to administrative appeal, except that the Attorney General shall provide by regulation for prompt review of such an order under subparagraph (A)(i) against an alien who claims under oath, or as permitted under penalty of perjury under section 1746 of Title 28, after having been warned of the penalties for falsely making such claim under such conditions, to have been lawfully admitted for permanent residence, to have been admitted as a refugee under section 1157 of this title, or to have been granted asylum under section 1158 of this title.

(D) Limit on collateral attacks

In any action brought against an alien under section 1325(a) of this title or section 1326 of this title, the court shall not have jurisdiction to hear any claim attacking the validity of an order of removal entered under subparagraph (A)(i) or (B)(iii).

(E) "Asylum officer" defined

As used in this paragraph, the term "asylum officer" means an immigration officer who--

(i) has had professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of applications under section 1158 of this title, and

(ii) is supervised by an officer who meets the condition described in clause (i) and has had substantial experience adjudicating asylum applications.

(F) Exception

Subparagraph (A) shall not apply to an alien who is a native or citizen of a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations and who arrives by aircraft at a port of entry.

(2) Inspection of other aliens

(A) In general

Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.

(B) Exception

Subparagraph (A) shall not apply to an alien--

(i) who is a crewman,

(ii) to whom paragraph (1) applies, or

(iii) who is a stowaway.

(C) Treatment of aliens arriving from contiguous territory

In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

(3) Challenge of decision

The decision of the examining immigration officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer and such challenge shall operate to take the alien whose privilege to be admitted is so challenged, before an immigration judge for a proceeding under section 1229a of this title.

(c) Removal of aliens inadmissible on security and related grounds

(1) Removal without further hearing

If an immigration officer or an immigration judge suspects that an arriving alien may be inadmissible under subparagraph (A) (other than clause (ii)), (B), or (C) of section 1182(a)(3) of this title, the officer or judge shall--

(A) order the alien removed, subject to review under paragraph (2);

(B) report the order of removal to the Attorney General; and

(C) not conduct any further inquiry or hearing until ordered by the Attorney General.

(2) Review of order

(A) The Attorney General shall review orders issued under paragraph (1).

(B) If the Attorney General--

(i) is satisfied on the basis of confidential information that the alien is inadmissible under subparagraph (A) (other than clause (ii)), (B), or (C) of section 1182(a)(3) of this title, and

(ii) after consulting with appropriate security agencies of the United States Government, concludes that disclosure of the information would be prejudicial to the public interest, safety, or security,

the Attorney General may order the alien removed without further inquiry or hearing by an immigration judge.

(C) If the Attorney General does not order the removal of the alien under subparagraph (B), the Attorney General shall specify the further inquiry or hearing that shall be conducted in the case.

(3) Submission of statement and information

The alien or the alien's representative may submit a written statement and additional information for consideration by the Attorney General.

(d) Authority relating to inspections

(1) Authority to search conveyances

Immigration officers are authorized to board and search any vessel, aircraft, railway car, or other conveyance or vehicle in which they believe aliens are being brought into the United States.

(2) Authority to order detention and delivery of arriving aliens

Immigration officers are authorized to order an owner, agent, master, commanding officer, person in charge, purser, or consignee of a vessel or aircraft bringing an alien (except an alien crewmember) to the United States--

(A) to detain the alien on the vessel or at the airport of arrival, and

(B) to deliver the alien to an immigration officer for inspection or to a medical officer for examination.

(3) Administration of oath and consideration of evidence

The Attorney General and any immigration officer shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, transit through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service.

(4) Subpoena authority

(A) The Attorney General and any immigration officer shall have power to require by subpoena the attendance and testimony of witnesses before immigration officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service, and to that end may invoke the aid of any court of the United States.

(B) Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer may, in the event of neglect or refusal to respond to a subpoena issued under this paragraph or refusal to testify before an immigration officer, issue an order requiring such persons to appear before an immigration officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

CREDIT(S)

(June 27, 1952, c. 477, Title II, ch. 4, § 235, 66 Stat. 198; Nov. 29, 1990, Pub.L. 101-649, Title VI, § 603(a)(11), 104 Stat. 5083; Apr. 24, 1996, Pub.L. 104-132, Title IV, §§ 422(a), 423(b), 110 Stat. 1270, 1272; Sept. 30, 1996, Pub.L. 104-208, Div. C, Title III, §§ 302(a), 308(d)(5), 371(b)(4), 110 Stat. 3009-579, 3009-619, 3009-645.)

ENACTMENT OF SUBSEC. (B)(1)(G)

C

Effective: October 26, 2001

United States Code Annotated Currentness
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter II. Immigration
Part IV. Inspection, Apprehension, Examination, Exclusion, and Removal (Refs & Annos)

→ § 1226a. Mandatory detention of suspected terrorists; habeas corpus; judicial review

(a) Detention of terrorist aliens

(1) Custody

The Attorney General shall take into custody any alien who is certified under paragraph (3).

(2) Release

Except as provided in paragraphs (5) and (6), the Attorney General shall maintain custody of such an alien until the alien is removed from the United States. Except as provided in paragraph (6), such custody shall be maintained irrespective of any relief from removal for which the alien may be eligible, or any relief from removal granted the alien, until the Attorney General determines that the alien is no longer an alien who may be certified under paragraph (3). If the alien is finally determined not to be removable, detention pursuant to this subsection shall terminate.

(3) Certification

The Attorney General may certify an alien under this paragraph if the Attorney General has reasonable grounds to believe that the alien--

(A) is described in section 1182(a)(3)(A)(i), 1182(a)(3)(A)(iii), 1182(a)(3)(B), 1227(a)(4)(A)(i), 1227(a)(4)(A)(iii), or 1227(a)(4)(B) of this title; or

(B) is engaged in any other activity that endangers the national security of the United States.

(4) Nondelegation

The Attorney General may delegate the authority provided under paragraph (3) only to the Deputy Attorney General. The Deputy Attorney General may not delegate such authority.

(5) Commencement of proceedings

The Attorney General shall place an alien detained under paragraph (1) in removal proceedings, or shall charge the alien with a criminal offense, not later than 7 days after the commencement of such detention. If

the requirement of the preceding sentence is not satisfied, the Attorney General shall release the alien.

(6) Limitation on indefinite detention

An alien detained solely under paragraph (1) who has not been removed under section 1231(a)(1)(A) of this title, and whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person.

(7) Review of certification

The Attorney General shall review the certification made under paragraph (3) every 6 months. If the Attorney General determines, in the Attorney General's discretion, that the certification should be revoked, the alien may be released on such conditions as the Attorney General deems appropriate, unless such release is otherwise prohibited by law. The alien may request each 6 months in writing that the Attorney General reconsider the certification and may submit documents or other evidence in support of that request.

(b) Habeas corpus and judicial review

(1) In general

Judicial review of any action or decision relating to this section (including judicial review of the merits of a determination made under subsection (a)(3) or (a)(6)) is available exclusively in habeas corpus proceedings consistent with this subsection. Except as provided in the preceding sentence, no court shall have jurisdiction to review, by habeas corpus petition or otherwise, any such action or decision.

(2) Application

(A) In general

Notwithstanding any other provision of law, including section 2241(a) of Title 28, habeas corpus proceedings described in paragraph (1) may be initiated only by an application filed with--

(i) the Supreme Court;

(ii) any justice of the Supreme Court;

(iii) any circuit judge of the United States Court of Appeals for the District of Columbia Circuit; or

(iv) any district court otherwise having jurisdiction to entertain it.

(B) Application transfer

Section 2241(b) of Title 28 shall apply to an application for a writ of habeas corpus described in subparagraph (A).

(3) Appeals

Notwithstanding any other provision of law, including section 2253 of Title 28, in habeas corpus proceedings

described in paragraph (1) before a circuit or district judge, the final order shall be subject to review, on appeal, by the United States Court of Appeals for the District of Columbia Circuit. There shall be no right of appeal in such proceedings to any other circuit court of appeals.

(4) Rule of decision

The law applied by the Supreme Court and the United States Court of Appeals for the District of Columbia Circuit shall be regarded as the rule of decision in habeas corpus proceedings described in paragraph (1).

(c) Statutory construction

The provisions of this section shall not be applicable to any other provision of this chapter.

CREDIT(S)

(June 27, 1952, c. 477, Title II, ch. 4, § 236A, as added Oct. 26, 2001, Pub.L. 107-56, Title IV, § 412(a), 115 Stat. 350.)

HISTORICAL AND STATUTORY NOTES

References in Text

This chapter, referred to in subsec. (c), was in the original, "this Act", meaning the Immigration and Nationality Act, June 27, 1952, c. 477, 66 Stat. 163, as amended, which is classified principally to this chapter. For complete classification, see Tables.

Abolition of Immigration and Naturalization Service and Transfer of Functions

For abolition of Immigration and Naturalization Service, transfer of functions, and treatment of related references, see note set out under 8 U.S.C.A. § 1551.

Reports

Pub.L. 107-56, Title IV, 412(c), Oct. 26, 2001, 115 Stat. 352, provided that: "Not later than 6 months after the date of the enactment of this Act [Oct. 26, 2001], and every 6 months thereafter, the Attorney General shall submit a report to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate, with respect to the reporting period, on--

"(1) the number of aliens certified under section 236A(a)(3) of the Immigration and Nationality Act, as added by subsection (a) [subsec.(a)(3) of this section];

"(2) the grounds for such certifications;

"(3) the nationalities of the aliens so certified;

"(4) the length of the detention for each alien so certified; and

"(5) The number of aliens so certified who--

"(A) were granted any form of relief from removal;

"(B) were removed;

"(C) the Attorney General has determined are no longer aliens who may be so certified; or

"(D) were released from detention."

LAW REVIEW COMMENTARIES

Civil liberties and human rights in the aftermath of September 11. Philip B. Heymann, 25 Harv. J.L. & Pub. Pol'y 441 (2002).

Counterterrorism and checks and balances: The Spanish and American examples. Note, 82 N.Y.U. L. Rev. 602 (2006).

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Immigration and nationality law. Robert Charles Hill and Donald Kerwin, 36 Int'l Law. 527 (2002).

Patriotic or unconstitutional? The mandatory detention of aliens under the USA Patriot Act. Note, 55 Stan. L.Rev. 1419 (2003).

Rushing to judgment: The unintended consequences of the USA PATRIOT Act for bona fide refugees. Regina Germain, 16 Geo. Immigr. L.J. 505 (2002).

Seven weeks: The making of the USA Patriot Act. Beryl A. Howell, 72 Geo. Wash. L. Rev. 1145 (2004).

The due process implications of mandatory immigration detention: Mandatory detention of criminal and suspected terrorist aliens. Veronica Ascarrunz, 13 Geo.Mason U.L.Rev. 79 (2003).

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American Digest System

Aliens ⚿ 18, 44, 53, 53.9, 54, 54.3.

Key Number System Topic No. 24.

Corpus Juris Secundum

CJS Aliens § 1403, Detention of Terrorist Aliens.
CJS Aliens § 1404, Habeas Corpus and Judicial Review.

RESEARCH REFERENCES

Effective:[See Notes]

United States Code Annotated Currentness
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter II. Immigration
Part V. Adjustment and Change of Status (Refs & Annos)

→ § 1253. Penalties related to removal

(a) Penalty for failure to depart

(1) In general

Any alien against whom a final order of removal is outstanding by reason of being a member of any of the classes described in section 1227(a) of this title, who--

(A) willfully fails or refuses to depart from the United States within a period of 90 days from the date of the final order of removal under administrative processes, or if judicial review is had, then from the date of the final order of the court,

(B) willfully fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure,

(C) connives or conspires, or takes any other action, designed to prevent or hamper or with the purpose of preventing or hampering the alien's departure pursuant to such, or

(D) willfully fails or refuses to present himself or herself for removal at the time and place required by the Attorney General pursuant to such order,

shall be fined under Title 18, or imprisoned not more than four years (or 10 years if the alien is a member of any of the classes described in paragraph (1)(E), (2), (3), or (4) of section 1227(a) of this title), or both.

(2) Exception

It is not a violation of paragraph (1) to take any proper steps for the purpose of securing cancellation of or exemption from such order of removal or for the purpose of securing the alien's release from incarceration or custody.

(3) Suspension

The court may for good cause suspend the sentence of an alien under this subsection and order the alien's release under such conditions as the court may prescribe. In determining whether good cause has been shown to justify releasing the alien, the court shall take into account such factors as--

(A) the age, health, and period of detention of the alien;

(B) the effect of the alien's release upon the national security and public peace or safety;

(C) the likelihood of the alien's resuming or following a course of conduct which made or would make the alien deportable;

(D) the character of the efforts made by such alien himself and by representatives of the country or countries to which the alien's removal is directed to expedite the alien's departure from the United States;

(E) the reason for the inability of the Government of the United States to secure passports, other travel documents, or removal facilities from the country or countries to which the alien has been ordered removed; and

(F) the eligibility of the alien for discretionary relief under the immigration laws.

(b) Willful failure to comply with terms of release under supervision

An alien who shall willfully fail to comply with regulations or requirements issued pursuant to section 1231(a)(3) of this title or knowingly give false information in response to an inquiry under such section shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

(c) Penalties relating to vessels and aircraft

(1) Civil penalties

(A) Failure to carry out certain orders

If the Attorney General is satisfied that a person has violated subsection (d) or (e) of section 1231 of this title, the person shall pay to the Commissioner the sum of $2,000 for each violation.

(B) Failure to remove alien stowaways

If the Attorney General is satisfied that a person has failed to remove an alien stowaway as required under section 1231(d)(2) of this title, the person shall pay to the Commissioner the sum of $5,000 for each alien stowaway not removed.

(C) No compromise

The Attorney General may not compromise the amount of such penalty under this paragraph.

(2) Clearing vessels and aircraft

(A) Clearance before decision on liability

A vessel or aircraft may be granted clearance before a decision on liability is made under paragraph (1) only if a bond approved by the Attorney General or an amount sufficient to pay the civil penalty is deposited with the Commissioner.

(B) Prohibition on clearance while penalty unpaid

A vessel or aircraft may not be granted clearance if a civil penalty imposed under paragraph (1) is not paid.

(d) Discontinuing granting visas to nationals of country denying or delaying accepting alien

On being notified by the Attorney General that the government of a foreign country denies or unreasonably delays accepting an alien who is a citizen, subject, national, or resident of that country after the Attorney General asks whether the government will accept the alien under this section, the Secretary of State shall order consular officers in that foreign country to discontinue granting immigrant visas or nonimmigrant visas, or both, to citizens, subjects, nationals, and residents of that country until the Attorney General notifies the Secretary that the country has accepted the alien.

CREDIT(S)

(June 27, 1952, c. 477, Title II, ch. 5, § 243, 66 Stat. 212; Oct. 3, 1965, Pub.L. 89-236, § 11(f), 79 Stat. 918; Oct. 30, 1978, Pub.L. 95-549, Title I, § 104, 92 Stat. 2066; Mar. 17, 1980, Pub.L. 96-212, Title II, § 203(e), 94 Stat. 107; Dec. 29, 1981, Pub.L. 97-116, § 18(i), 95 Stat. 1620; Nov. 29, 1990, Pub.L. 101-649, Title V, § 515(a)(2), Title VI, § 603(b)(3), 104 Stat. 5053, 5085; Apr. 24, 1996, Pub.L. 104-132, Title IV, § 413(a), (f), 110 Stat. 1269; Sept. 30, 1996, Pub.L. 104-208, Div. C, Title III, § 307(a), 110 Stat. 3009-612.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1952 Acts. House Report No. 1365 and Conference Report No. 2096, see 1952 U.S. Code Cong. and Adm. News, p. 1653.

1965 Acts. Senate Report No. 748 and Conference Report No. 1101, see 1965 U.S. Code Cong. and Adm. News, p. 3328.

1978 Acts. House Report No. 95-1452, see 1978 U.S. Code Cong. and Adm. News, p. 4700.

1980 Acts. Senate Report No. 96-256 and House Conference Report No. 96-781, see 1980 U.S. Code Cong. and Adm. News, p. 141.

1981 Acts. House Report No. 97-264, see 1981 U.S. Code Cong. and Adm. News, p. 2577.

1990 Acts. House Report No. 101-723(Parts I and II), House Conference Report No. 101-955, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 6710.

1996 Acts. Senate Report No. 104-179 and House Conference Report No. 104-518, see 1996 U.S. Code Cong. and Adm. News, p. 924.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief for National Immigrant Justice Center as *Amici Curiae* was served electronically, and two copies were served by overnight delivery, postage prepaid, on October 31, 2008:

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