David A. Martin
Principal Deputy General Counsel
U.S. Department of Homeland Security
Washington, D.C. 20528

NOT DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of	)	
	)	
Luis Felipe Garcia-Arreola	)	File No.: A038 829 033
	)	
In Bond Proceedings	)	
	)	

DEPARTMENT OF HOMELAND SECURITY
MOTION TO ACCEPT SUPPLEMENTAL BRIEF

On August 4, 2009, the U.S. Department of Homeland Security (Department or DHS) filed an appeal with the Board of Immigration Appeals (Board) of the Immigration Judge's bond decision, dated July 9, 2009, granting the respondent's request for release from custody on a $3,000 bond. The Department timely filed its opening brief on October 15, 2009, and the respondent filed his reply brief, also timely, on November 5, 2009.

On December 22, 2009, the U.S. Court of Appeals for the First Circuit issued a decision rejecting the Board's precedent decision in *Matter of Saysana*, 24 I&N Dec. 602 (BIA 2008). *Saysana v. Gillen*, 590 F.3d 7 (1st Cir. 2009). In light of that intervening development and to facilitate the Board's adjudication of this matter, the Department respectfully requests the Board to accept the accompanying DHS Statement of New Legal Authority and Supplemental Brief, which clarifies the Department's position in this matter.

Respectfully submitted:

David A. Martin
Principal Deputy General Counsel
U.S. Department of Homeland Security

On Motion:

Moira A. Skinner
Appellate Counsel
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

2/12/2010

Scott D. Criss[1]
Assistant Chief Counsel
Office of Chief Counsel
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

[1] Service upon DHS should continue to be directed to the U.S. Immigration and Customs Enforcement Office of Chief Counsel in Charlotte, North Carolina at 5701 Executive Center Drive, 3rd Floor, Charlotte, NC 28212.

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing Department of Homeland Security Motion to Accept Supplemental Brief was served on the respondent's attorney by facsimile to 336-334-0036, and by first-class mail, addressed to:

Gerard M. Chapman, Esq.
Chapman Law Firm
P.O. Box 1477
Greensboro, NC 27402

Date: 2/10/2010

Moira A. Skinner
Appellate Counsel
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

David A. Martin
Principal Deputy General Counsel
U.S. Department of Homeland Security
Washington, D.C. 20528

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DHS STATEMENT OF NEW LEGAL AUTHORITY AND SUPPLEMENTAL BRIEF

INTRODUCTION

On August 4, 2009, the U.S. Department of Homeland Security (Department or DHS) filed an appeal with the Board of Immigration Appeals (Board) of the Immigration Judge's bond decision, dated July 9, 2009, granting the respondent's request for release from custody on a $3,000 bond. The Department timely filed its opening brief on October 15, 2009, and the respondent filed his timely reply on November 5, 2009. On December 22, 2009, the U.S. Court of Appeals for the First Circuit issued a decision rejecting the Board's precedent decision in *Matter of Saysana*, 24 I&N Dec. 602 (BIA 2008). *Saysana v. Gillen*, 590 F.3d 7 (1st Cir. 2009) (attached as Appendix A). To facilitate the Board's adjudication of the case, the Department submits this supplemental brief, clarifying its position.

BACKGROUND

Section 236(c)(1) of the Immigration and Nationality Act (INA or Act) requires DHS to take into custody certain classes of inadmissible and deportable aliens, primarily including aliens who have been convicted of certain crimes, when they are "released" from a non-DHS custodial setting. Although the provision did not take effect until after October 8, 1998, the day the Transition Period Custody Rules (TPCR) expired,[1] many of the inadmissibility and deportability grounds defining the classes of aliens subject to mandatory detention thereunder can be satisfied by actions and convictions occurring prior to that date. Over the years, INA § 236(c) raised the question of whether a post-TPCR "release" by a non-DHS custodian would trigger mandatory detention under INA § 236(c)(1) only if the conviction on which the latest non-DHS custody was based falls within the particular inadmissibility or deportability grounds listed in § 236(c)(1), or

[1] Section 236(c) was enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-28, Div. C, § 303(b)(2), 110 Stat. 3009-546, 3009-586 (Sep. 30, 1996). Section 303(b)(3) of IIRIRA provided temporary custody rules, otherwise known as Transition Period Custody Rules (TPCR), whereby implementation of INA § 236(c) was deferred for two years.

whether *any* post-TPCR release of an alien who is so inadmissible or deportable is sufficient to mandate custody.

In 2008, the Board specifically addressed the issue, holding that *any* post-TPCR release from non-DHS custody, regardless of whether the release was from criminal custody for a conviction that rendered the alien inadmissible or deportable, was sufficient to mandate detention under INA § 236(c)(1). *Matter of Saysana*, 24 I&N Dec. at 606, 608. The respondent in that case filed a habeas petition with the U.S. District Court for the District of Massachusetts, which ruled that INA § 236(c) did not apply to that alien and ordered the government to provide him a bond hearing. *See Saysana v. Gillen*, No. 08-11749, 2008 WL 5484553, at *1 (D. Mass. Dec. 1, 2008). The government appealed to the U.S. Court of Appeals for the First Circuit.

On appeal, the government argued that *Matter of Saysana* was entitled to deference as a reasonable interpretation by the Board of ambiguous statutory language under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). On December 22, 2009, however, the First Circuit rejected the Board's interpretation, concluding instead that the "when...released" language of INA § 236(c)(1), when read in context, unambiguously mandates detention only for aliens released from non-DHS custody after October 8, 1998, for an offense enumerated in subparagraphs 236(c)(1)(A)—(D) and not to "any" offense. *Saysana v. Gillen*, 590 F.3d at 16. Alternatively, the court held that, even if the statute was ambiguous, the Board's interpretation of the statute was not reasonable as it rested upon "a series of speculative conclusions" about Congress' intent in enacting the mandatory custody provision. *Id.* at 17.

Like the First Circuit, a number of U.S. district courts have disagreed with the holding of *Matter of Saysana*. *See Burns v. Weber*, No. 09-5119, at 10 (D.N.J. Jan. 19, 2010) (finding no nexus between pre-TPCR and post-TPCR releases) (attached as Appendix B); *Garcia v.*

Shanahan, 615 F.Supp.2d 175, 180 (S.D.N.Y. 2009) (concluding that "[t]he mandatory detention provision cannot be retroactively applied to aliens who were released from custody for removable offenses prior to October 9, 1998—even if they are later released from custody for a nonremovable offense"); *Oscar v. Gillen*, 595 F.Supp.2d 166, 170 (D. Mass. 2009) (awarding Equal Access to Justice Act fees to the alien as prevailing party); *Hyung Woo Park v. Hendricks*, No. 09-4909, 2009 WL 3818084 (D.N.J. Nov. 12, 2009) (respectfully disagreeing with the Board and finding INA § 236(c) unambiguous); *Ortiz v. Napolitano*, --- F.Supp.2d ---, 2009 WL 3353029, at *3 (D. Ariz. Oct. 19, 2009) ("Consistent with every district court that has considered this issue, the Court concludes that the mandatory detention provision, 8 U.S.C. § 1226(c), does not apply to Petitioner because he was released from custody for the removable offense well before the effective date of the mandatory detention provision."); *Mitchell v. Orsino*, No. 09-7029, 2009 WL 2474709, at *3 (S.D.N.Y. Aug. 13, 2009) ("Petitioner's release from custody after the effective date of [INA § 236(c)] for a nonremovable offense does not make him subject to mandatory detention under the statute."); *Hy v. Gillen*, 588 F. Supp. 2d 122, 127 (D. Mass. 2008) (concluding that the alien was not subject to mandatory detention "[b]ecause the 2007 'release' from state custody is not related to the 1991 offense rendering Petitioner removable"); *Thomas v. Hogan*, No. 08-0417, 2008 WL 4793739, at *3 (M.D. Pa. Oct. 31, 2008) (concluding that "the date of release from the offense for which the individual is found removable determines whether the individual is entitled to an individualized bond hearing or subject to the mandatory detention provision"); *Cox v. Monica*, No. 07-0534, 2007 WL 1804335, at *5 (M.D. Pa. Jun. 20, 2007) (analogizing to INA § 212(c) case law and finding that it would be impermissibly retroactive to apply INA § 236(c) if the release that relates to the removable offense occurred prior to the TPCR "because the provision clearly attaches new legal consequences to actions

taken before its enactment"); *Cavazos v. Moore*, No. 03-347 (S.D. Tex. Jan. 7, 2005) (attached as Appendix C) (certifying class of aliens in Harlingen District and imposing an injunction precluding DHS from arguing mandatory detention for aliens whose post-TPCR release was not related to a conviction described in INA § 236(c)(1)). *See also Quezada-Bucio v. Ridge*, 317 F.Supp.2d 1221, 1229-30 (W.D. Wash. 2004) (citing to *Pastor-Camarena v. Smith*, 977 F. Supp. 1415, 1417-18 (W.D. Wash. 1997), for the proposition that the "when released" language applies only to release for the underlying offense, and mandatory detention does not apply to aliens taken into immigration custody years after they are released from criminal custody); *Alikhani v. Fasano*, 70 F.Supp.2d 1124, 1130-32 (S.D. Cal. 1999) (finding statute clear and applicable only prospectively, but concluding that section 236(c) applied in this case because the post-TPCR release (probation violation) was related to the pre-TPCR conviction). *But see Chivilchez v. Holder*, No. 09-475, 2009 WL 2244219, at *1 (M.D. Fla. July 27, 2009) (concluding that alien taken into DHS custody after release from 2009 DWI arrest was properly detained under INA § 236(c) based on pre-October 9, 1998 convictions).

DISCUSSION

In its notice of appeal and appeal brief, the Department primarily argued that the Immigration Judge erred by ignoring Board precedent in reliance on non-binding district court decisions. Alternatively, the Department argued that the Immigration Judge erred in finding that the facts of this case were distinguishable from *Matter of Saysana* and thus concluding that the Board's precedent was inapplicable. In support of the Immigration Judge's decision, the respondent in his reply brief argued that the facts of this case are materially distinguishable from *Matter of Saysana*, noted the adverse district court decisions, and invited the Board to "clearly define the limits of the holding in *Saysana*." Respondent's Brief at 6-7 (Resp. Brief). Given the

federal judiciary's near uniform rejection of *Matter of Saysana*, the Department now asks the Board to revisit, in a superseding precedent decision, the issue of whether a post-TPCR release from non-DHS custody must be for an offense enumerated in sections 236(c)(1)(A)-(D) of the Act in order to trigger mandatory detention.

By asking the Board to revisit *Matter of Saysana*, the Department does not concede that the Board's interpretation was unreasonable. The Department accepts that the statutory language is ambiguous on the issue and that the Board's interpretation was reasonable, in light of that ambiguity. But given the widespread rejection of the decision by the federal judiciary, a superseding precedent is warranted. The Board acts on behalf of the Attorney General to provide "clear and uniform guidance to the [Department], the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations." 8 C.F.R. § 1003.1(d)(1); *Matter of E-L-H-*, 23 I&N Dec. 814, 825 (BIA 2005). *See also* 8 C.F.R. §§ 1003.1(g) (providing that Board precedent decisions are "binding on all officers and employees of the Department of Homeland Security or immigration judges in the administration of the immigration laws of the United States"). If the Board elects to adopt a position more in line with the First Circuit's order and does so in a precedent decision, the Board can reinstate nationwide uniformity on the issue, and thereby provide clarity to the Department, the immigration courts, and the public.[2]

In its decision, the First Circuit framed the issue by asking "whether the mandatory detention provision [of INA § 236(c)(1)] applies only when an alien is released from a criminal custody the basis for which is one of the offenses listed in [INA § 236(c)(1)(A)-(D)]," or whether

[2] Nationwide uniformity can be critical to DHS operations, particularly in the context of alien detention, as the Department detains aliens in facilities nationwide and may have to transfer aliens to different locations as operational needs arise. A uniform national rule on custody authority helps to settle the expectations of DHS operational personnel, aliens detained by the Department, and their families and representatives.

any release from criminal custody, regardless of the reason for the detention, could trigger mandatory detention if the alien had previously been convicted of an offense that falls within § 236(c)(1)(A)-(D). *Saysana v. Gillen*, 590 F.3d at 11. In rejecting *Matter of Saysana*, the First Circuit concluded that mandatory detention under section 236(c)(1) arises from a release "for an offense specified in the statute, not merely *any* release from *any* non-DHS custody." *Id.* at 18. It also characterized its approach as supporting a Congressional "purpose of preventing the return to the community of those released *in connection with* the enumerated offenses." *Id.* at 17 (emphasis added); *see also id.* at 15 (criticizing the approach taken in *Matter of Saysana* because it "read[s] a separate, intervening event—post-TPCR non-DHS custody *unrelated to the enumerated offenses*—into the statute without any direct language to support such a reading") (emphasis added).[3] As a whole, the First Circuit's decision stands for the proposition that an alien's post-TPCR "release" must be release from custody for an offense specified in INA § 236(c)(1) in order to trigger mandatory custody.

Accordingly, the Department respectfully suggests that the Board interpret the statute to regard mandatory detention under INA § 236(c)(1) as arising from a post-TPCR "release" when that release is from custody based on an underlying criminal conviction that gives rise to the qualifying inadmissibility or deportability set out in INA § 236(c)(1)(A)-(D).[4] While the

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[3] By its framing of the issue, the court focused on the criminal provisions of INA § 236(c)(1). Although it acknowledged that some of the provisions in INA § 236(c)(1) do not require a conviction, *see Saysana v. Gillen*, 590 F.3d at 14, the First Circuit did not directly address non-conviction scenarios implicated by section 236(c)(1), such as the "engaged in terrorist activities" provision referred to in INA § 236(c)(1)(D).

[4] In addition to a pre-October 9, 1998 conviction for which an alien is released post-TPCR after serving the original sentence, the Department notes that mandatory detention would also apply in the following scenario: an alien is sentenced to serve time in jail for a pre-October 9, 1998 conviction, but the jail term is suspended and the alien is released on probation prior to the October 8, 1998 expiration of the TPCR, then violates the terms of his probation and the original jail sentence is reinstated, resulting in a post-TPCR release from criminal custody for the offense. *See, e.g., Alikhani v. Fasano*, 70 F.Supp.2d 1124, 1132 (S.D. Cal. 1999) (concluding that revocation of probation and cancellation of the suspension of a previously imposed sentence "puts that sentence into full force and effect," that alien who was taken into custody after violating probation was serving

Department does not necessarily agree with all of the respondent's arguments on appeal[5] or his characterization of the *Matter of Saysana* decision, the respondent does seem to advocate for such an interpretation. Resp. Brief at 8-11.

Adopting this interpretation would not undercut needed protections against dangerous individuals. A criminal alien not covered by mandatory detention can nevertheless be detained if the facts and circumstances show that he or she is a flight risk or danger to the community. *See* INA § 236(a); *Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006) (holding that the burden is on the alien to show to the satisfaction of the Immigration Judge and the Board that he or she does not pose a flight risk or danger to the community). As the Board has acknowledged, "an alien in removal proceedings has no constitutional right to release on bond." *Id.* at 39 (citing to *Carlson v. Landon*, 342 U.S. 524, 534 (1952)). The nature and extent of any criminal activities or favorable equities developed since the pre-October 9, 1998 offense would be relevant in any discretionary custody determination. *Matter of Guerra*, 24 I&N Dec. at 40 (including examples of factors that may be relevant in a discretionary INA § 236(a) custody determination). Congress was concerned about criminal aliens remaining at large and committing additional crimes or not being available for proceedings or deportation if ordered removed. An alien who has committed additional crimes after the TPCR or evidences a significant risk of flight can be detained under INA § 236(a), which would allay Congress's concerns. If Congress concludes that the federal

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time for his original crime, and that therefore his post-TPCR release from that custody was a release from incarceration for the predicate conviction for which he was found to be deportable).

[5] For example, although the respondent alleges a constitutional violation, *see* Resp. Brief at 8 n.3, the Department does not concede that the holding in *Matter of Saysana* is unconstitutional. In any event, the Board lacks jurisdiction to rule on the constitutionality of the statutes and regulations it interprets and administers. *See Matter of Fuentes-Campos*, 21 I&N Dec. 905, 912 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529, 532 (BIA 1992).

court interpretations and any amended Board decision are not in keeping with its aims, it has the capacity to amend the Act.

In making the suggestion that the Board can take this opportunity to revisit *Matter of Saysana*, the Department does not ask the Board to disturb its prior holdings that an alien need not be convicted of *any* offense in order to be removable as charged and subject to INA § 236(c) mandatory detention. *See, e.g., Matter of Saysana*, 24 I&N Dec. 602, 605 and n.3 (citing to grounds of inadmissibility and deportability that subject an alien to mandatory detention but do not require a criminal conviction); *Matter of Kotliar*, 24 I&N Dec. 124 (BIA 2007) (holding that "an alien need not be charged with the ground that provides the basis for mandatory detention in order to be found 'deportable' on that ground"). For example, an alien who has engaged in or is likely to engage in terrorist activity within the meaning of INA § 212(a)(3)(B), would be subject to mandatory detention. In such cases, however, we would not expect a conviction (or even a non-DHS arrest) to have occurred; as such, no release of any kind is required to trigger mandatory detention.[6] *See, e.g., Grant v. Zemski*, 54 F. Supp. 2d 437, 443 (E.D. Pa. 1999) (citing to *Velasquez v. Reno*, 37 F. Supp. 2d 663, 672 (D.N.J. 1999) for the proposition that INA § 236(c) appears to include aliens who would never be released, such as aliens who have "engaged in" terrorist activities).

Were the Board to revisit *Matter of Saysana* via a superseding precedent decision that substantially adopts the approach advocated herein, the respondent would not be subject to mandatory detention under INA § 236(c) because his post-TPCR release is not related to his pre-TPCR release. Nonetheless, the respondent would need to establish his eligibility for release under INA § 236(a).

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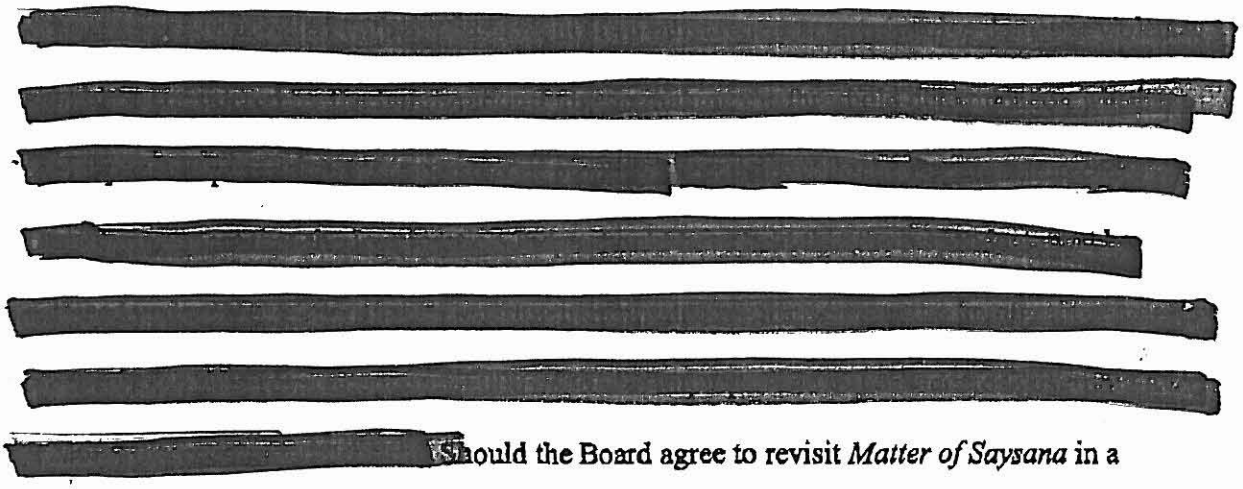
[6] As explained, *Saysana v. Gillen* involved criminal arrests, and the First Circuit did not address factual scenarios where an alien is described in INA § 236(c)(1) but no arrest, and therefore no release, occurs.

In redetermining bond under INA § 236(a), the Immigration Judge should permit release on bond only if the respondent demonstrates that he does not pose a danger to property or persons. *Matter of Urena*, 25 I&N Dec. 140, 141 (BIA 2009); *Matter of Guerra*, 24 I&N Dec. at 38. [redacted]

[redacted]



Should the Board agree to revisit *Matter of Saysana* in a superseding precedent, the Department would accordingly request that the bond proceedings be remanded to the Immigration Judge for a full assessment of the respondent's eligibility for release under INA § 236(a).

CONCLUSION

In light of the current state of federal jurisprudence and the respondent's invitation to the Board to clarify its holding in *Matter of Saysana*, the Department respectfully suggests that the Board take the opportunity to revisit its prior precedent decision, as outlined above. If the Board chooses to revisit its prior precedent and concludes that the respondent is not subject to INA § 236(c) detention, then the Department asks that bond proceedings be remanded for additional fact-finding and a thorough assessment by the Immigration Judge of the respondent's eligibility for release under INA § 236(a).

Respectfully submitted:

David A. Martin
Principal Deputy General Counsel
U.S. Department of Homeland Security

On Brief:

Moira A. Skinner
2/12/2010
Appellate Counsel
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

Scott D. Criss[8]
Assistant Chief Counsel
Office of Chief Counsel
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

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