Office of the General Counsel
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

December 17, 2009

Daniel Kowalski
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Re: **FOIA Request - DHS/OS/PRIV 09-551**

Dear Mr. Kowalski:

This letter is the final response to your April 24, 2009 Freedom of Information Act (FOIA) request addressed to the Department of Homeland Security (DHS), in which you seek a copy of the September 28, 2007, DHS Office of the General Counsel (OGC) formal legal opinion titled Clarification of the Relation Between Release Under Section 236 and Parole Under Section 212 (d)(5) of the Immigration and Nationality Act (INA). Your request was received in the Office of General Counsel at DHS on May 11, 2009.

We conducted a search of files within the Office of General Counsel for records that would be responsive to your request. We located a total of 6 pages, and of those pages, we have determined to release all 6 pages in their entirety.

While an adequate search was conducted, you have the right to appeal. Should you wish to do so, you must send your appeal and a copy of this letter, within 60 days of the date of this letter, to: Associate General Counsel (General Law), U.S. Department of Homeland Security, Washington, D.C. 20528, following the procedures outlined in the DHS FOIA regulations at 6 C.F.R. § 5.9. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at www.dhs.gov/foia.

Provisions of the FOIA allow us to recover part of the cost of complying with your request. In this instance, because the cost is below the $14 minimum, there is no charge.

If you need to contact our office concerning this request, please call 202-282-8598 and refer to case number 09-551.

Sincerely,

Mia Day
FOIA Officer

Office of the General Counsel
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

September 28, 2007

Memorandum For: Chief Counsel, U.S. Customs and Border Protection
Principal Legal Advisor, U.S. Immigration and Customs Enforcement
Chief Counsel, U.S. Citizenship and Immigration Services
Judge Advocate General, U.S. Coast Guard

From: Gus P. Coldebella

Subject: Clarification of the Relation Between Release Under Section 236 and Parole Under Section 212(d)(5) of the Immigration and Nationality Act

I. Question Presented

Is any release of an applicant for admission from immigration custody, including "conditional parole" under section 236(a)(2) of the Immigration and Nationality Act (INA), a "parole" of the alien into the United States for purposes of section 212(d)(5)(A) of the INA?

II. Summary Conclusion

Parole under section 212(d)(5)(A) of the INA is a discretionary act exercised on a case-by-base basis that is expressly limited to aliens applying for admission to the United States and in which circumstances present "urgent humanitarian reasons" for the parole or the parole would serve a "significant public benefit." Release under section 236(a)(2) of the INA, including "conditional parole," is a separate and distinct procedure applicable to an alien who has been arrested and detained pending a decision on whether he or she is to be removed from the United States. Neither statute nor regulations provide that a release under section 236(a)(2) is to be deemed a parole under section 212(d)(5)(A). Because some may read certain language in a 1998 opinion of the General Counsel of the former Immigration and Naturalization Service (INS), *Authority to Parole Applicants for Admission Who are Not Also Arriving Aliens*, No. 98-10 (Aug. 21, 1998) (*1998 Parole Opinion*), as inconsistent with that conclusion, paragraph seven of section III of the *1998 Parole Opinion* (Paragraph Seven) is superseded by the following

analysis.[1] Paragraph Seven is to be given no weight or effect by the Department of Homeland Security ("the Department" or "DHS") and its component agencies.[2]

III. Analysis

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, 110 Stat. 3009-546, amended section 235(a)(1) of the INA to provide that an alien present in the United States who has not been admitted shall be deemed an applicant for admission. The amendment thus expanded the group of aliens deemed applicants for admission to include not only aliens arriving at the ports-of-entry, *see* 8 C.F.R. §§ 1.1(q) (defining "arriving alien"), 1001.1(q) (same), but also aliens present in the United States without inspection or admission. In 1998, the INS General Counsel considered whether applicants for admission other than arriving aliens were eligible for parole into the United States under INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A). The INS General Counsel concluded in the *1998 Parole Opinion* that such aliens were eligible for parole. The Department concurs with this assessment.

In expounding on his reasoning, however, the INS General Counsel made the following statement:

> [R]elease under § 236 of the Act and 8 C.F.R. § 236.1(d)(1) should not be seen as a separate form of relief from custody [from parole under section 212(d)(5)(A)]. Any release of an applicant for admission from custody, without resolution of his or her admissibility, is a parole . . . . In the case of an applicant for admission who is not an "arriving alien," therefore, § 212(d)(5)(A) and § 236 should be seen as complementary, rather than as alternative release mechanisms.

1998 Parole Opinion at § III, ¶ 7. Recent immigration cases have focused attention on the meaning and applicability of this language. Applicants for admission have cited this language as

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[1] The analysis set forth herein also supersedes any prior opinions relying on Paragraph Seven, but only to the extent that the opinions rely on the superseded language.

[2] In addition to the *1998 Parole Opinion* and opinions implicated by reference in footnote 1, *supra*, the General Counsel of the former Immigration and Naturalization Service (INS) issued other legal opinions and advisory memoranda to advise the INS. These opinions and memoranda did not create any individual rights of action against INS under the Administrative Procedure Act, 5 U.S.C. §§ 500 *et seq.*, or other laws, nor do they create any such rights against DHS. Furthermore, because DHS is a newly-created department charged with, among other things, administering federal immigration law, these former INS opinions and memoranda do not bind the Office of the General Counsel of DHS from providing alternative guidance as it deems appropriate.

support for the position that merely by being released from custody on "conditional parole"[3] pursuant to section 236(a)(2)(B) of the INA, 8 U.S.C. § 1226(a)(2)(B), the applicant thereby has been paroled under section 212(d)(5)(A) of the INA, 8 U.S.C. § 1182(d)(5)(A). *See, e.g., Ortega-Cervantes v. Gonzales*, --- F.3d ---, 2007 WL 2472487 (9th Cir. Sept. 4, 2007) (rejecting argument that aliens granted conditional parole under INA § 236 are "paroled into the United States" within the meaning of INA § 245(a)).

To date, the Ninth Circuit is the only court to have opined on this question. Although the court rejected the argument that release under INA § 236(a)(2)(B) constitutes "parole" for purposes of adjustment of status under INA § 245(a), 8 U.S.C. § 1255(a), *see Ortega-Cervantes*, 2007 WL 2472487 at *1; *5, cases in which aliens rely on the *1998 Parole Opinion* in support of the position rejected in *Ortega-Cervantes* remain pending under the jurisdiction of other circuit courts of appeal.[4] To ensure nationwide uniformity by Department personnel consistent with the Ninth Circuit's holding in *Ortega-Cervantes*, and because the interpretation of the *1998 Parole*

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[3] Section 236(a)(2) of the Act provides that an alien in removal proceedings may be released either on bond or "conditional parole." The origin of the term "conditional parole" can be traced back to at least 1952, when it was adopted in former INA § 242, the predecessor to INA § 236. "Conditional parole" referred to the release of a deportable alien from INS custody without bail. *See Rubenstein v. Brownell*, 206 F.2d 449, 455 (D.C. Cir. 1953) ("Section 242(a) authorizes the Attorney General to keep an alien in custody, release him on bond, or release him on conditional parole."). Similarly, section 23(a) of the Internal Security Act of 1950 had provided for the release from INS custody without bond of a deportable alien and termed it "conditional parole." *Lee Ah Youw v. Shaughnessy*, 102 F. Supp. 799, 800-01 (S.D.N.Y. 1952). Thus, under former INA § 242, a deportable alien could be released on "conditional parole" pending a final determination on deportability.

The 1952 Act also included section 212(d)(5), providing for the discretionary parole of excludable aliens. The term "parole" referred to a procedure to allow excludable aliens into the United States and which INS had utilized for many years prior to the codification of the term in INA § 212(d)(5) in 1952. *See Matter of R-*, 3 I&N Dec. 45, 46 (BIA 1947) ("Parole is an administrative device of long standing."). Prior to the 1952 Act, the enlargement of inadmissible aliens into the United States on parole had been fashioned out of necessity and without statutory sanction. *Matter of Conceiro*, 14 I&N Dec. 278, 279-80 (BIA), *aff'd, Conceiro v. Marks*, 360 F. Supp. 454 (S.D.N.Y. 1973). Under the 1952 regime, deportable aliens were not eligible for section 212 parole. *See Matter of K-H-C-*, 6 I&N Dec. 295, 298 (BIA 1954) ("The authority to continue or detain aliens in, or release them from custody, provided by [Section 242 of the INA] relates solely to an alien apprehended in deportation proceedings. . . . Since this authority relates solely to aliens apprehended in deportation proceedings, it has no application to an alien detained in an exclusion proceeding. Provision for the release of an excluded alien is found in section 212(d)(5)."). Therefore, while lexically similar, the terms "conditional parole" and "parole" referred to two wholly distinct concepts applicable to separate classes of aliens. Although IIRIRA expanded the class of aliens eligible for parole under section 212(d)(5), it did not eliminate the distinction between "conditional parole" under section 236 and parole under section 212.

[4] *See, e.g., Francisco-Lorenzo v. Gonzales*, No. 06-0768-AG (2d Cir. petition filed Feb. 17, 2006) (considering petition for review of decision where the Board of Immigration Appeals (BIA) rejected the argument that "conditional parole" under INA § 236(a)(2) is to be equated with parole under INA § 212(d)(5)(A) and declined to follow *1998 Parole Opinion* to the extent it reasoned otherwise); *Espino Del Angel v. Gonzales*, No. 06-2832-AG (2d Cir. petition filed June 13, 2006) (same). Pursuant to joint stipulations, the petitions for review in *Francisco-Lorenzo* and *Espino Del Angel* were withdrawn. The cases are again pending before the Immigration Court for determination as to whether the petitioners were paroled into the United States.

Opinion forwarded by certain litigants is directly contrary to the language and structure of the INA, Paragraph Seven hereby is superseded by the analysis set forth in this memorandum.[5]

Parole under section 212(d)(5)(A) of the INA and release, including "conditional parole," under section 236 of the INA are separate and distinct procedures. *Ortega-Cervantes*, 2007 WL 2472487 at *7 ("Even after IIRIRA, the parole provisions of § 1182(d)(5)(A) and § 1226(a) continue to serve distinct purposes."). Parole under section 212(d)(5)(A) is a discretionary act exercised by DHS on a case-by-case basis and restricted to circumstances where urgent humanitarian reasons justify the parole or where a significant public benefit will result from the parole. By contrast, a release under section 236 may be justified by factors that would not be adequate for parole under section 212(d)(5)(A). *See, e.g., Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006) ("An Immigration Judge has broad discretion in deciding the factors that he or she may consider in custody redeterminations."). For example, a release under section 236 could be predicated on no more than a determination that the alien does not present a danger to persons or property, is not a threat to national security, and does not pose a flight risk. *See id.*; *Matter of Adeniji*, 22 I&N Dec. 1102, 1111-13 (BIA 1999). A release under section 236 need not be for humanitarian reasons or for a significant public benefit. Therefore, to hold that any release under section 236 is a parole under section 212(d)(5)(A) would be contrary to the statutory framework restricting parole under section 212(d)(5)(A) to specified circumstances. Moreover, automatically deeming a release under section 236 a parole under section 212(d)(5)(A) would violate the explicit statutory mandate that a parole under section 212(d)(5)(A) is permitted only after a case-by-case assessment based on the section 212(d)(5) criteria.[6] *See Ortega-Cervantes*, 2007 WL 2472487 at *8.

Equating a release under section 236 with parole under section 212(d)(5)(A) also would create a conflict with the regulations implementing the INA. Although the Executive Office for Immigration Review (EOIR), along with DHS, has authority under section 236 to make custody determinations, EOIR does not have authority to grant a section 212(d)(5)(A) parole. It was well-settled law at the time of IIRIRA's enactment, and at the time of the *1998 Parole Opinion*, that the parole authority under section 212(d)(5) of the INA had been exclusively delegated to the INS by the Attorney General since 1952, and that EOIR both lacked parole authority and would be ill-equipped to exercise parole authority even if it were available. *See Matter of United*

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[5] The Department's conclusion that release from custody under section 236(a)(2) is not deemed a parole under section 212(d)(5)(A) is consistent with the cases on which the INS General Counsel relied in Paragraph Seven of the *1998 Parole Opinion*. The cited cases address a separate issue regarding the legal status of aliens who have been paroled, and not whether all releases from custody amount to a parole. *See Leng May Ma v. Barber*, 357 U.S. 185 (1958) (considering whether paroled alien was eligible for relief under provision of the INA applicable to aliens "within the United States"); *Matter of L-Y-Y-*, 9 I&N Dec. 70 (BIA 1960) (considering whether exclusion proceedings may be converted to deportation proceedings following termination of alien's parole).

[6] Significantly, only aliens "applying for admission" are eligible for parole under INA § 212(d)(5)(A), while release under INA § 236 is applicable to all aliens who have been arrested and detained pending a decision on whether the alien is to be removed from the United States.

Airlines Flight UA802, 22 I&N Dec. 777, 782 (BIA 1999) (noting that "the district director [of the INS] has exclusive jurisdiction to parole an alien into the United States"); *Matter of Singh*, 21 I&N Dec. 427, 434 (BIA 1996) (stating that neither the immigration judge nor the BIA has jurisdiction to exercise parole power); *Matter of Conceiro*, 14 I&N Dec. 278, 281-82 (BIA) (stating that BIA is "ill-equipped to make the inquiries and to conduct the investigations needed to make the summary decisions relating to the parole of recently arrived aliens"), *aff'd*, *Conceiro v. Marks*, 360 F. Supp. 454 (S.D.N.Y. 1973); 8 C.F.R. §§ 212.5(a) (listing those who can invoke parole authority under section 212(d)(5)(A) of the Act), 1212.5(a) (recognizing that granting of parole is done "by the Department of Homeland Security" and referencing 8 C.F.R. § 212.5). As an authority delegated exclusively to the INS, the parole authority was transferred to DHS by the Homeland Security Act. *See* 6 U.S.C. §§ 251–298. The Department has retained the parole authority in its regulations as an authority to be exercised only by DHS: therefore, that authority is not one that may be exercised by EOIR under section 236(a)(2) or any other provision of the INA. *See* 8 C.F.R. § 212.5(a); *cf.* 8 C.F.R. §§ 1236.1 (EOIR regulations setting forth release procedures under INA section 236), 1240.1 (listing authority of EOIR to determine applications under specified sections of the INA, and excluding section 212(d)(5)); *Matter of D-J-*, 23 I&N Dec. 572 (A.G. 2003) (considering EOIR release solely in terms of INA § 236 authority and standards).

Furthermore, equating release under section 236 with parole under section 212(d)(5)(A) would create tension with the statutory scheme as implemented by DHS consistent with the intent of Congress. For example, an alien who is arrested for being present in the United States without inspection and who is subsequently released under section 236 pending the outcome of removal proceedings, may, under such an interpretation, become eligible by virtue of the "parole" for certain benefits that would not otherwise be available—including ceasing to accrue unlawful presence time, *see* INA § 212(a)(9)(B)(ii), 8 U.S.C. § 1182(a)(9)(B)(ii); adjustment of status under INA § 245(a), 8 U.S.C. § 1255(a), *see Ortega-Cervantes*, 2007 WL 2472487 at *8 ("Given that § 1255(i) permits unlawful entrants to adjust their status only under certain specified conditions, it would be odd to read § 1255(a) to authorize unlawful entrants who do not meet those conditions to seek adjustment of status whenever they are conditionally paroled pursuant to § 1226(a)."); and a discretionary grant of work authorization, *compare* INA § 236(a)(3), 8 U.S.C. § 1226(a)(3) (prohibiting work authorization for aliens released under section 236 unless otherwise eligible), *with* 8 C.F.R. § 274a.12(c)(11) (authorizing grants of employment authorization to aliens paroled under INA § 212). Such an expansion of benefits is contrary to the overall structure of IIRIRA, which was designed to reduce, not increase, the opportunities available to aliens present without inspection. Likewise, equating section 236 release with parole would drastically expand the frequency with which "parole" is granted, contrary to the purpose of section 602 of IIRIRA.[7] *See Ortega-Cervantes*, 2007 WL 2472487 at *8 ("Congress responded in IIRIRA by narrowing the circumstances in which aliens could

[7] IIRIRA § 602(a) amended INA § 212(d)(5)(A) by striking the phrase "for emergent reasons or for reasons deemed strictly in the public interest" and replacing it with "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit," captioned under the title "Limitation on Use of Parole."

qualify for 'parole into the United States' under § 1182(d)(5)(A) and thus become eligible for adjustment of status.").

IV. Conclusion

A release from custody of an applicant for admission under section 236(a)(2) of the INA without resolution of his or her admissibility is not a parole under section 212(d)(5)(A). Although sections 212(d)(5)(A) and 236(a)(2) both provide applicants for admission a means of securing temporary release from the physical custody of immigration officials, these provisions are separate and distinct, and the legal status of an applicant released under section 236 is not identical to that of an applicant paroled under section 212(d)(5)(A). Equating section 236 release with section 212(d)(5) parole is contrary to the language, history, and policy of the INA and related regulations. Due to the possibility that language in the *1998 Parole Opinion* could be read as suggesting otherwise, that language hereby is superseded.[8]

[8] By issuing this superseding memorandum, DHS neither concedes nor intends to suggest that the interpretation forwarded by the applicants in the cases cited above is a correct reading of the *1998 Parole Opinion*. The language of Paragraph Seven is at best ambiguous, and the remainder of the opinion correctly reaffirms that parole under section 212(d)(5)(A) is restricted to situations where a case-by-case assessment determines certain circumstances to be present justifying parole of the alien. *See, e.g., 1998 Parole Opinion* at § 3, ¶ 2 ("[T]he Attorney General must find, on a case-by-case basis, either that 'urgent humanitarian reasons' justify the parole, or that paroling the alien will yield a 'significant public benefit.'"); *id.* at § 3, ¶ 9 ("[T]he Service may, in the exercise of discretion, parole any applicant for admission, if the Service finds that parole would serve urgent humanitarian reasons or yield a significant public benefit."). In fact, the Ninth Circuit explicitly rejected a broad reading of the *1998 Parole Opinion* suggested by the petitioner in that case. *See Ortega-Cervantes*, 2007 WL 2472487 at *7 ("[T]he [*1998 Parole Opinion*] does not further state that every conditional parole under § 1226(a) necessarily constitutes a 'parole into the United States' within the meaning of § 1255(a).").