STEPHEN W. MANNING, ESQ.
MARIA ANDRADE, ESQ.
KERRY DOYLE, ESQ.
JEREMY MCKINNEY, ESQ
AMERICAN IMMIGRATION LAWYERS ASSOCIATION
P.O. Box 40103
Portland, OR 97240

ALINA DAS, ESQ.
MEREDITH FORTIN, LEGAL INTERN
JORGE M. CASTILLO, LEGAL INTERN
IMMIGRANT RIGHTS CLINIC
WASHINGTON SQUARE LEGAL SERVICES, INC.
245 Sullivan St., 5th Floor
New York, NY 10012

Attorneys for Amicus Curiae

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

In the Matter of: Luis Felipe **GARCIA ARREOLA**, Respondent In Removal Proceedings	File No. A 038 829 033

BRIEF OF AMICUS CURIAE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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INTRODUCTION

Two years of litigation have adequately demonstrated that *Matter of Saysana* was wrongly decided. The immigration detention system—a system which is mismanaged and unaccountable for the manner in which it treats the thousands and thousands of human beings detained every day—has captured and detained individuals under the rubric of a case law architecture that is largely incorrect. In practice, the application of this case law has lead to the unjustified detention of scores of immigrants without bond, contrary to Congressional intent.

Amicus, the American Immigration Lawyers Association (AILA), has long studied the mandatory detention issue, the mandatory detention decisions of the Board, and the means by which the decisions have been implemented. The approach to date has created disuniformity throughout the country in how the statute is implemented. Disuniformity in the application of immigration detention laws creates difficulties for the Department of Homeland Security (DHS) officers who must administer that system, the Immigration Judges who must reconcile judicial decisions, and for many long time residents, it leads to lengthy and frequently unlawful mandatory detention. Noncitizens and advocates have challenged the application of *Matter of Saysana* before the agency, the federal courts and at the highest levels of the Departments of Justice and Homeland Security. DHS Supp. Br. at 2–5 (citing cases reflecting "the federal judiciary's near uniform rejection of *Matter of Saysana*"); *see also* Letter to Attorney General Holder regarding *Matter of Saysana* (attached as Exhibit A).

Section 236(c) of the Immigration and Nationality Act is a categorical directive that requires the detention of a small subset of noncitizens upon their release from criminal incarceration stemming from a conviction for an enumerated offense—the plain language of the statute authorizes nothing more. Overwhelmingly, judicial interpretations are in agreement on this point. Until and unless the BIA acts to bring its interpretation of § 236(c) in line with the

statutory language and the prevailing judicial interpretations, confusion and litigation will continue.

The words on the page are plain and adherence to the statutory language will help ensure that the Board's interpretation is upheld in the future against both the statutory and constitutional challenges. More to the point: the reasoning underlying *Matter of Saysana* has unnecessarily deprived people of their liberty by means Congress did not intend**.** The Board's current interpretation of the statute imposes mandatory detention on noncitizens at least twelve years removed from a conviction for an enumerated offense—noncitizens who are not only the most likely detainees to qualify for bond, but who are also overwhelmingly eligible for relief from removal. Under the BIA's misreading, these noncitizens must now sit in detention without the opportunity for a hearing while they await a decision on the merits of their case, a process that often takes years.[1]

AILA proffers this brief to explain why *Matter of Saysana* should be overruled and why its reasoning governing mandatory detention must be corrected to conform to the statutory directives and statutory analysis outlined herein. AILA proffers an interpretation of the statute that resolves the constitutional and statutory questions using the standard tools of statutory construction and supported by our extensive pragmatic experience.

STATEMENT OF INTEREST

AILA is a national association with more than 11,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of

[1] The backlog of immigration cases pending in the Immigration Court system is currently at an all-time high, with waits in some parts of the country as high as two years. *See* TRAC Immigration, "Backlog in Immigration Cases Continues to Climb," *available at* http://trac.syr.edu/immigration/reports/225/.

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 and the Board of Immigration Appeals), as well as before the United States District Courts, Courts of Appeal, and the Supreme Court of the United States.

ARGUMENT

I. *MATTER OF SAYSANA* WAS WRONGLY DECIDED AND IS OUT OF STEP WITH THE FEDERAL JUDICIARY'S INTERPRETATION OF § 236(C)

The pragmatic impact of the Board's interpretation of § 236(c) on the individuals so detained is illustrated throughout this brief. It causes hardship and, for many, despair—and all of this contrary to Congressional intent. We begin with an example:[2] Jose Reyes is a lawful permanent resident who was declared to be subject to mandatory detention. His detention resulted in the placement of his U.S. citizen daughters in stranger foster care. His removable offense was a seventh degree drug possession misdemeanor, for which he had been sentenced to

[2] This example is illustrative, but in no way unique. Countless noncitizens and their families have suffered due to the BIA's unfounded reading of § 236(c). *See, e.g.*, Brief in Support of His Application for a Bond Hearing, *Park v. Hendricks*, Civ. No. 09-4909 (D.N.J. Sept. 24, 2009) (noting the Mr. Park's unwarranted detention disrupted his life with his U.S. citizen wife and three young children, as well as jeopardized his small business); *Mitchell v. Orsino*, No. 09-CV-7029, 2009 WL 2474709, at *2 (S.D.N.Y. Aug.13, 2009) (noting that in only five months of detention, Mr. Mitchell was moved to several detention centers throughout the Eastern United States, leaving him with difficult access to family and counsel); *Garcia v. Shanahan*, 615 F. Supp. 2d 175 (S.D.N.Y. 2009) (noting that Mr. Garcia's daughter had to enter stranger foster care due to his unnecessary detention); Petition for Habeas Corpus, *Thomas v. Hogan*, Civil No. 1:08-CV-0417 (M.D. Pa. Mar. 5, 2008) (noting that Mr. Thomas's unlawful detention exacerbated his father's high blood pressure condition, was affecting his mother's depression, and left his children without his financial support, leading one of them to begin receiving public assistance).

time served nearly ten years earlier, but not detained when released for that offense. Mr. Reyes also suffers from end stage kidney disease. After initially subjecting him to mandatory detention, the Government eventually stipulated to his release rather than litigating his habeas case. *Reyes v. Shanahan*, Civ. No. 09-CV-06339 (S.D.N.Y. 2009). Congress never intended that individuals like Mr. Reyes be mandatorily detained for the reasons that follow.

A. SECTION 236(C) REQUIRES THE CONTINUOUS DETENTION OF NONCITIZENS ONLY WHEN RELEASED FROM CRIMINAL INCARCERATION RELATED TO AN ENUMERATED OFFENSE AFTER OCTOBER 8, 1998

The Board's interpretation of § 236(c) has been colored by its misunderstanding of Congress's intent in the area of immigration detention. *See Matter of Saysana*, 24 I. & N. Dec. 602, 607 (BIA 2008) (concluding that Congress's laws reflect a general intent to increase the use of detention on immigrants with serious criminal histories). This generalized sense is not borne out in the statutory language. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987) (requiring courts to look to the words of the statute to determine Congressional intent). Congress did not require mandatory detention in every case where there is an offense enumerated in § 236(c). Judicial interpretations have examined the language of the statute and concluded that Congress's plain language obviates the need for any further inquiry into legislative intent. *Saysana v. Gillen*, 590 F.3d 7, 17 & 14 (eschewing assumptions about the "general intent" of Congress in favor of close analysis of the specific words used in the statute, as a way to understand congressional intent).

As these federal court decisions make clear, when interpreting the language of a statute, it is important that all of the words of a provision are read and considered in relation to each other. *Saysana v. Gillen*, 590 F.3d 7, 13 (1st Cir. 2009) ("In determining the meaning of a statute, our analysis begins with the language of the statute . . . 'We construe language in its context and in

light of the words surrounding it.'" (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004)). Dividing a statute into its constituent parts and analyzing the meaning of each without reference to each other will often dissolve the clarity that can be had by reading the statute as a whole. *See Saysana v. Gillen*, 590 F.3d at 14–15 (noting that a reading of § 236(c) which "untethers" the words "when released" and the entire clause that follows it from the rest of the subsection results in a strained interpretation). The federal courts have consistently insisted upon reading §§ 236 and 236(c), specifically, as one whole statute whose meaning is derived from the surrounding context. *See*, *e.g.*, *id.*; *Burns v. Weber*, Civ. No. 09-5119, 2010 WL 276229, at *4 (D.N.J. Jan. 19, 2010); *Park v. Hendricks*, Civ. No. 09-4909, 2009 WL 3818084, at *5 (D.N.J. Nov. 12, 2009).

Both the plain language and the surrounding subsections indicate that § 236(c) does not call for DHS to detain without bond all noncitizens who fall within the enumerated classes of § 236(c)(1)(A)–(D). Section 236(c) is only one part of a broader detention scheme, and the subsection contains more than just a list of enumerated offenses that trigger the duty to detain without bond. As the First Circuit noted, Congress qualified that duty by including the limiting phrase "when the alien is released." INA § 236(c); *Saysana v. Gillen*, 590 F.3d at 14–15 (analyzing the phrase). As the federal courts have held, the category of noncitizens subject to mandatory detention is defined, in part, by the "when . . . released" clause. *See, e.g.*, *Saysana v. Gillen*, 590 F.3d at 14; *Ortiz v. Napolitano*, 667 F. Supp. 2d 1108, 1115 (D. Ariz. 2009); *Mitchell v. Orsino*, No. 09-7029, 2009 WL 2474709, at *3 (S.D.N.Y. Aug.13, 2009); *Thomas v. Hogan*, No. 1:08-CV-0417, 2008 WL 4793739, *3 (M.D. Pa. Oct. 31, 2008); *Cox v. Monica,* No. 1:07-CV-0534, 2007 WL 1804335, at *5 (M.D. Pa. June 20, 1997). There is consistent and widespread agreement in judicial interpretations that the statute is plain on this point.

1. THE PLAIN LANGUAGE INDICATES THAT THERE MUST BE A NEXUS BETWEEN THE RELEASE AND THE ENUMERATED OFFENSE

Section 236(c)(1) is made up of only one sentence, which must be read in its entirety. INA § 236(c)(1).[3] The sentence begins by setting out the Attorney General's duty to detain certain noncitizens, after which there are four clauses specifying the classes of deportable noncitizens to whom this duty applies. *Id.* The two clauses at the end of the sentence clarify that the application of the statute will not be limited by the nature of any supervision to which the noncitizen may be released, nor by the possibility that the noncitizen may be incarcerated again "*for the same offense*." *Id.* (emphasis added). The phrase "when the alien is released" specifies that the Attorney General's duty to detain will attach when the noncitizen is released from the criminal incarceration for one of the offenses listed just prior.

When looking at the individual words in that one sentence, the Board should read the sentence in light of the canon that identical words are intended to have the same meaning. *See Dep't of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 341–42 (1994) (applying this rule specifically to the same word used in different parts of one statute). The term "offense" is used three times with regards to who shall be taken into custody and once in a modifying clause by mandating that detention take place regardless of whether or not the noncitizen "may be arrested or imprisoned again for the *same offense*." INA § 236(c)(1) (emphasis added). As the First Circuit noted, the reference to being arrested or imprisoned again "for the same offense" can only be understood to mean the offenses defined earlier in the same sentence of this statutory provision: those enumerated offenses that make a noncitizen removable. *Saysana v. Gillen*, 590 F.3d at 15 ("[T]he preceding text specifically enumerates offenses relating to removability; the

[3] Paragraph (2) of INA § 236(c) lists the only exceptions to the general mandate for detention expressed in paragraph (1), and federal courts have not found subsection (2) to define the scope of the mandate in subsection (1), beyond those few exceptions.

subsequent reference to the 'same offense' is only sensibly read to relate back to the aforementioned statutorily listed 'offense[s].'"). On the basis of that analysis, the court declined to adopt the Board's reasoning in *Matter of Saysana*: "[a]bsent a clear direction in the text to read multiple uses of the same term to carry different meanings, we shall not do so. Rather, we shall read the term uniformly throughout the provision." *Id.* at 14. *See also Garcia v. Shanahan*, 615 F. Supp. 2d 175, 184 (S.D.N.Y. 2009) (quoting *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 570 (1995)).

Additionally, to read "same offense" differently would violate the requirement that "no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citation and quotation marks omitted). As several district court correctly held, separating the "when . . . released" clause from the rest of paragraph (1) requirements would render the words "same offense" mere surplusage. *Garcia*, 615 F. Supp. 2d. at 184 (holding that the BIA's interpretation makes the "same offense" language meaningless); *Ortiz*, 667 F. Supp. 2d at 1119 (same, citing *Garcia*); *Park*, Civ. No. 09-4909, 2009 WL 3818084, at *5 (same, quoting *Garcia*); *see also Saysana v. Gillen*, 590 F.3d at 15 ("This reading transforms an otherwise straightforward statutory command, relating to specific offenses that Congress itself has identified as warranting special attention, into a mere temporal triggering mechanism. We see no justification in the language or structure of the statute for such a transformation."). Only by first establishing the logical conclusion that the word "offense" maintains the same meaning throughout the statute are the rest of the words given a purpose.

The words of a statute "interpenetrate" each other, and so one must take all the words "in their aggregate" to find the statute's meaning. *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (internal quotation marks omitted); *see also* 2A SUTHERLAND STATUTORY CONSTRUCTION

§ 46:5 (7th ed. 2007) ("It is always unsafe to construe a statute or contract by a process of etymological dissection, and to separate words and then apply to each, thus separated from its context, some particular definition given by lexicographers, and then to reconstruct the instrument upon the basis of these definitions."). By dissecting the statute and stripping the "when . . . released" phrase from the context supplied by the surrounding words in the sentence, ambiguity may be created where there would otherwise not be any. On the other hand, with the proper reading of the statute as a whole, it becomes clear that the "when . . . released" clause mandates that the subsection will apply to release from criminal incarceration based on a conviction that is tied to a ground of removability. INA § 236(c)(1).

Disregarding the plain language of the statute not only does violence to Congress's intent, but also upsets settled federal court and BIA law on the application of § 236(c). Since its enactment, district courts have found the language of INA § 236(c) and IIRIRA § 303(b) unambiguously prospective, and the BIA agrees that this is the proper interpretation. *See, e.g.*, *Hamada v. Gillen*, 616 F. Supp. 2d 177, 183 n.7 (D. Mass. 2009); *Velasquez v. Reno*, 37 F. Supp. 2d 663, 670–671 & n.8 (D.N.J. 1999); *Matter of Adeniji*, 22 I. & N. Dec. 1102, 1111 (BIA 1999). However, the reasoning of *Matter of Saysana* has turned that previously uncontroversial understanding on its head. The statute's language clearly indicates that it was meant by Congress to be applied prospectively. However, failing to give effect to the nexus requirement means that factors occurring prior to the effective date of the statute are used as a predicate for mandatory detention. Two factors must be present for mandatory detention to apply: criminal incarceration related to an enumerated ground of removability, and a release from that criminal incarceration. INA § 236(c). *Matter of Saysana* mandates using a conviction and release occurring *before* the effective date to satisfy the predicate offenses listed in § 236(c)(1)(A)–(D).

The Board has previously expressed concern that the statute would be logically inconsistent because certain enumerated offenses do not require a criminal conviction or criminal incarceration. *Matter of Saysana*, 24 I. & N. Dec. at 605–06. However, multiple courts have concluded that this concern is unfounded; §§ 236(c)(1)(A) and (D) are not rendered superfluous when a nexus is required between the release from criminal incarceration and the grounds of removability. *See, e.g.*, *Saysana v. Gillen*, 590 F.3d at 14 ("[T]he plain language of the statute does not render the term "when released" meaningless as applied to these subsections."). While not all of the enumerated grounds of removability require a conviction, *all* are satisfied by a criminal conviction. *Id.*; INA § 236(c)(1)(A)–(D).[4] Far from becoming void, those sections will apply to noncitizens who are removable on the basis of the enumerated grounds, and who are serving criminal sentences based upon those grounds. Sections 236(c)(1)(A) and (D) will be fully operative when a nexus is required.

It must be made clear that just because a noncitizen is not subject to *mandatory* detention does not mean he or she is not subject to detention *at all*. Any removable noncitizen who does not fall into § 236(c) by virtue of not having been released from criminal incarceration after 1998 is still subject to detention under § 236(a). The difference is the opportunity to demonstrate to an Immigration Judge that the detained individual is not a danger to society, nor a flight risk. INA § 236(a); *see also Hy v. Gillen*, 588 F. Supp. 2d 122, 127 (D. Mass. 2008) ("If the detainee poses a risk of flight or danger to the community, then the Immigration Judge can make such a finding at a hearing and deny bond.").

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[4] For example, one can fall within the "reason to believe that the alien is a drug trafficker" provision, INA § 212(a)(2)(C), on the basis of a drug conviction. INA § 212(a)(2)(C). *See In re Perez Lopez*, 2009 WL 2437121 (BIA July 24, 2009) (unpublished decision) (upholding IJ's determination that conviction documents created reason to believe that respondent was inadmissible under INA § 212(a)(2)(C)).

It is useful to see how section 236(a) would have worked in a particular case the Board had originally deemed controlled by 236(c). Mr. Hy entered the United States as a refugee from Vietnam in 1981. He has been married for about twenty years, has U.S. citizen and lawful permanent resident family members, and has worked and paid taxes since his arrival. Mr. Hy's wife suffers from several serious ailments including bipolar disorder, scleroderma, diabetes, high blood pressure, and breast cancer. After his district court habeas petition, Mr. Hy proved he was not a danger to the community or a flight risk and was released on his own recognizance. *See* Petitioner-Appellee Brief, *Hy v. Gillen*, No. 09-CV-1182 (1st. Cir. May 5, 2009). Any concerns of danger and risk of flight are adequately addressed through § 236(a), as Congress intended for individuals who have already been released from their removable convictions like Mr. Hy.

Moreover, the interpretation proffered herein adequately protects our nation's security interests in light of Congress's statutory scheme. *See* INA § 236A (providing for the mandatory detention of suspected terrorist immigrants without regard to any "release").[5] The Supreme Court has been quite explicit in the canon of construction that "[t]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme," see *Kucana v. Holder*, 130 S. Ct. 827, 836 (2010) (citation and quotation marks omitted). As with § 236(a), § 236A puts § 236(c) into context. Terrorists need only be certified as suspects by the Attorney General to be subject to mandatory detention. INA § 236A. Should a noncitizen be deemed to be a flight risk *or* a danger to the community, he may be detained throughout the entirety of his removal proceedings. INA § 236(a). Federal courts have considered § 236(c) in the context of these other provisions and have concluded that adhering to its plain meaning would not

[5] On this point, DHS is incorrect in their assertion. Noncitizens who would have fallen within § 236(c)(1)(D) but for the lack of a conviction have already been addressed by Congress in 2001 with the PATRIOT Act. DHS Supp. Br. 8; INA § 236A.

undermine the broader detention scheme or necessarily jeopardize the public at large. *See Hy*, 588 F. Supp. 2d at 127.

2. MANDATORY DETENTION APPLIES TO POST-CONVICTION RELEASE FROM CRIMINAL INCARCERATION

The federal courts have also taken into account the import of the phrase, "without regard to whether the alien is released on parole, supervised release, or probation." INA § 236(c). The clause was added to accomplish a specific purpose: to prevent noncitizens who otherwise fell within the purview of the statute from evading mandatory detention on the basis that they were serving some kind of post-incarceration probation or parole, and thus had not yet *been* "released." *See Matter of Eden*, 20 I. & N. Dec. 209, 211–14 (BIA 1990); *see also Saysana v. Gillen*, 590 F.3d at 16 (citing Q*uezada-Bucio v. Ridge,* 317 F. Supp. 2d 1221, 1230 (W.D. Wash. 2004)). The clause references the kinds of supervised release which typically follow incarceration on the basis of a conviction, and this natural reading of the words makes it clear that mandatory detention will apply to release from post-conviction criminal incarceration, whether or not the noncitizen is subject to continuing supervision by the criminal justice system. INA § 236(c); *see also Saysana v. Gillen*, 590 F.3d at 14 (noting that, when all the words of the statute are read in context, it becomes clear that mandatory detention under § 236(c) will only apply to individuals released from criminal incarceration for one of the offenses listed in subsections (A)–(D)); *Garcia*, 615 F. Supp. 2d at 181.

This reading of the statute is not only supported by its plain language and the interpretation of countless federal court decisions—it is the interpretation long espoused by the agency itself. In 1999—after the Department of Justice's initial expansive interpretation of the mandatory detention statute was roundly rejected by federal courts, much like it is today—the government moved to create uniformity. The Office of Immigration Litigation and the then-

Immigration and Naturalization Service Policy Council drafted an interpretation meant to harmonize the federal court construction of the law with immigration practice, resulting in the Pearson Memorandum. The memorandum clarified that "release" referred to releases from a "criminal sentence" for a conviction and incorporated a nexus requirement between the relevant release and the removable offense:

> The reinterpretation will now **only** mandate detention of those criminal aliens listed in 236(c) who completed their criminal sentences on or after October 9, 1998 . . . .
>
> Any alien . . . who . . . completed a criminal sentence, *on or after 10/9/98*, **based on a conviction which constitutes a removable offense** . . . remains subject to mandatory detention under Section 236(c) of the INA.

Pearson Memorandum (attached as Exhibit B) (emphasis in original).

Once again, the federal courts are consistently rejecting the Board's interpretation of § 236(c), some of which found *Matter of Saysana* wanting for not addressing the present concerns previously addressed by the then-INS in the Pearson Memorandum. *See, e.g.*, *Ortiz*, 667 F. Supp. 2d at 1119; *Garcia*, 615 F.Supp.2d at 184–85; *Mitchell*, 2009 WL 2474709, at *3. With this case, the BIA has the opportunity to give the Memorandum proper consideration. Section 236(c) is meant to be applied only to those noncitizens being released from incarceration after a criminal conviction that is tied to a ground of removability.

B. SECTION 236(C) PRESERVES A CONTINUOUS CHAIN OF CUSTODY FOR NONCITIZENS WITH A HIGH LIKELIHOOD OF REMOVAL FROM THE COUNTRY

Section 236(c) created a system of continuous detention for noncitizens who are imprisoned for the conviction of the enumerated crimes that make them removable. INA § 236(c). When the plain words of the statute are read in their most natural way, as described above, it becomes clear that § 236(c) is meant to ensure that certain classes of removable aliens are transferred from their criminal incarceration for a removable offense to immigration

detention, in order to effectuate their removal based on that offense. After the statute's effective date, release from criminal detention based on an enumerated offense will trigger detention without bond pending the completion of removal proceedings.

The First Circuit found this to be the most reasonable explanation for Congress' intent in drafting the "when released" language of § 236(c): an attempt to ensure the continuous custody of certain criminal aliens. The court stated that it was "not persuaded that the legislature was seeking to justify mandatory immigration custody many months or even years after an alien had been released from state custody." 590 F.3d at 16 (quoting Q*uezada-Bucio,* 317 F. Supp. 2d at 1230); *see also Pastor-Camarena v. Smith*, 977 F. Supp. 1415, 1418 (W.D. Wash. 1997) (holding that the plain language of § 236(c) indicates that the statute was not meant to subject to mandatory detention individuals "released many years earlier."); *Oscar v. Gillen,* 595 F. Supp. 2d 166, 169 (D. Mass. 2009); *Garcia*, 615 F. Supp. 2d at 180-81 ("For over a decade, courts analyzing section 1226(c) have consistently interpreted the statute to authorize the government to take an alien into custody on or about the time he is released from custody for the offense that renders him removable"); *Waffi v. Loiselle,* 527 F.Supp.2d 480, 488 (E.D. Va. 2007); *Bromfield v. Clark*, No. C06-757RSM, 2007 WL 527511, at *4 (W.D. Wash. Feb. 14, 2007); *Boonkue v. Ridge,* No. CV 04-566-PA, 2004 WL 1146525, at *2 (D. Or. May 7, 2004); *Alikhani v. Fasano,* 70 F.Supp. 2d 1124, 1130 (S.D. Cal. 1999).

Section 236(c) was an attempt to prevent a "detention gap" such that noncitizens who were set to be released from criminal incarceration for a removable offense and were unlikely to win relief from removal would simply remain detained during the brief period of time necessary to complete their removal proceedings. S. Rep. No.104-48, at 21 (1995) (discussing problem faced by INS when noncitizens were released from the sentence for their "underlying sentences"

before INS could complete deportation proceedings). These laws aimed to keep certain noncitizens who will eventually be removed from being released into the public before their immigration proceedings were concluded. *Id.*; *see also Demore v. Kim*, 538 U.S. 510, 529–31 & n.13 (2003) (noting that § 236(c) is only necessary as a backstop to deal with deportations that are not completed before the noncitizen is released from the "underlying conviction").

Section 236(c) was not intended to require DHS to reach back in time to detain without bond those individuals who have long since been released from their removable offenses and had built their lives in the United States as contributing members of their communities. For example, Eva Mendes was detained without bond under *Matter of Saysana*, even though the removable conviction upon which that detention was based had taken place twelve years earlier. During those twelve years, she had moved on with her life, started a family, and was raising four U.S. citizen children. Pet. for a Writ of Habeas Corpus and Order, *Mendes v. Gadsden*, No. 09 Civ. 10137 (D. Mass. 2009). These are precisely the factors that an Immigration Judge should have been permitted to take into account through a hearing under § 236(a).

II. THE PLAIN MEANING OF 236(C) IS SUPPORTED BY THE CANON OF CONSTITUTIONAL AVOIDANCE, A SET OF CONCERNS THAT MUST BE ADDRESSED BY THE BOARD

The constitutional implications of the Board's present interpretation are illustrated in the case of Guillermo Ortiz, who spent thirteen months in immigration detention under *Matter of Saysana* for a removable offense committed more than sixteen years ago, combined with a release from a more recent offense unrelated to the grounds enumerated in § 236(c). Waiting to prove that he was eligible for cancellation of removal, this family man and business manager was kept in prison for over a year as a result of *Matter of Saysana*. Br. in Support of Respondent's Eligibility for 212(c) Relief. *Guillermo Ortiz*, No. A 36-725-656. He was finally released after a

federal judge granted his habeas petition and ordered an individualized bond determination. The federal court considering Mr. Ortiz's habeas petition concluded that the reasoning in *Matter of Saysana* led to his unjustified detention based on a reading of the statute that "does not follow the traditional rules of statutory construction." *Ortiz*, 667 F. Supp. 2d at 1119. Had Mr. Ortiz been forced to wait until the completion of his immigration proceedings, he would have been detained even longer. Thirteen months is a long time to be deprived of one's liberty and its impact on Mr. Ortiz cannot be understated.[6] An overbroad reading, which disclaims any nexus between the enumerated offense and the "release," creates an absurd, arbitrary and unjust detention scheme. *Hy*, 588 F. Supp. 2d at 127 (discussing the constitutionally problematic breadth of the Board's prior decision).

A plain language interpretation of the mandatory detention scheme is consistent with Congressional intent to detain a limited class of noncitizens during their removal proceedings and the assumption that Congress does not push the bounds of its power without a clear statement. *See Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–73 (2001) (Congress will not be assumed to push the bounds of its power without a clear statement). Further, a plain language interpretation "avoids attributing to Congress the sanctioning of the arbitrary and inconsequential factor of any post-TPCR custodial release becoming *the controlling factor* for mandatory detention." *Saysana v. Gillen*, 590 F.3d at 17. The Congressional mandate, "to take into custody those aliens who are . . . inadmissible under the covered grounds set forth in sections 236(c)(1)(A) and (D)," noted by the Board in *Matter of Saysana*, 24 I. & N. Dec. at 605–06, suffers nothing from this interpretation because DHS retains

[6] Again, prolonged detentions are not uncommon among these noncitizens who, as explained below, generally have significant equities and access to relief. *See, e.g.*, *Garcia*, 615 F. Supp. 2d 175 (detained for over seven months); *Thomas*, 2008 WL 4793739 (detained for over eight months).

the ability to detain a noncitizen without bond under § 236(a) if the noncitizen cannot demonstrate he is neither a threat to the community nor a flight risk. *See supra* Point I.B.

Furthermore, while some grounds of inadmissibility do not require a conviction, they are all satisfied by a conviction. *See supra* Point I.A. The alternative, hinging the total loss of liberty on release from any non-DHS custody, makes the congressional limitation completely arbitrary. *See Hy*, 588 F. Supp. 2d at 127 ("Even an illegal arrest would be enough to trigger mandatory detention if any release from custody were enough."); *Brodsky v. U.S. Nuclear Regulatory Com'n*, 578 F.3d 175, 181 (2d Cir. 2009) (finding the Court incapable of "read[ing] exemptions into the plain text of" statutes). Congress will not be presumed to create an arbitrary detention scheme. *See Lockhart v. Napolitano*, 573 F.3d 251, 260 (6th Cir. 2009).

The Board's evaluation of the mandatory detention scheme should also take note of the federal courts' concern with the equal protection implications of *Matter of Saysana*. *See Skelly v. INS*, 168 F.3d 88, 91 (2nd Cir. 1999) (holding that noncitizens are protected by the Fifth Amendment and are thus "entitled to equal protection of the laws"). To distinguish between lawful permanent residents on the basis of dismissed charges alone—or, worse, on the basis of illegal arrests—is illegitimate and irrational. The mandatory loss of liberty should not turn on inconsequential or arbitrary occurrences, particularly where there is no clear Congressional statement requiring such harsh effects. *See generally Hy*, 588 F. Supp. 2d at 127. As the First Circuit observed, "[T]he agency's interpretation would treat similarly situated individuals differently on the basis of a factor not logically connected to the mandatory detention provision. *Saysana v. Gillen*, 590 F.3d at 16. An interpretation of § 236(c) that permits a distinction between lawful permanent residents on the basis of dismissed charges alone—or, worse, on the basis of illegal arrests—is illegitimate, and irrational.

In addition, the federal courts have a stated concern that by construing § 236(c) to apply to individuals released from incarceration before the statute's effective date, *Matter of Saysana* mandates the detention of noncitizens who are strong candidates for release on bond and have particularly strong claims for relief from removal. *Hy*, 588 F. Supp. 2d at 127 ("[T]he Government's reading sweeps in the group of criminal aliens most likely to qualify for a bond because only prior criminals who have been released for at least ten years are affected by the interpretation."); *see also St. Cyr*, 533 U.S. 289, 296 & n.5 (2001); *Saysana v. Gillen*, 590 F.3d at 9 ("By any logic, it stands to reason that the more remote in time a conviction becomes and the more time after a conviction an individual spends in a community, the lower his bail risk is likely to be.").

Beyond the substantial merits of their bond cases, however, the Board must also consider what forms of relief are available to these noncitizens. The majority of additional individuals subject to mandatory detention under the *Matter of Saysana* interpretation of § 236(c) are eligible for § 212(c) relief or § 240A relief. *See St. Cyr*, 533 U.S. 289 (holding that § 212(c) relief remained available for those with convictions before the passage of IIRIRA in 1996); INA § 240A (codified at 8 U.S.C. § 1229b). An intent by Congress to subject noncitizens with a relatively low likelihood of removal to mandatory detention cannot be gleaned from the plain language of the statute. Significantly, there is no Congressional statement lending support to this construction of the statute. An interpretation of § 236(c) that strays from the plain meaning of the statute will always risk challenge in the courts.

Mr. Park illustrates all of these concerns. He became a lawful permanent resident in 1980 at the age of ten. He is now married to a U.S. citizen and has three U.S. citizen children, each under nine-years-old. They live in New Jersey where Mr. Park owns and operates a small

business. He was handcuffed and detained in 2009 when Mr. Park presented himself at a naturalization interview, though his removable offense occurred in 1990. He was deemed subject to mandatory detention for that offense and a release from a subsequent non-removable offense in 1999. Although Mr. Park had a very strong 212(c) relief application, he was detained without bond, to the detriment of his family and business. Brief in Support of His Application for a Bond Hearing, *Park*, Civ. No. 09-4909 (D.N.J. Sept. 24, 2009).

Finally, the Board has an interest in avoiding mandatory detentions that would raise serious constitutional problems left open by the Supreme Court's decision in *Demore*—i.e., detention that extends beyond the "brief period" typically necessary to conclude removal proceedings, a period that the Court found to generally last between a month and a half and "five months in the minority of cases in which the alien chooses to appeal". *Demore*, 538 U.S. at 530. Multiple circuit and district courts have read *Demore* as implicitly limiting mandatory detention to relatively brief periods of time. *See*, *e.g. Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003); *Alli v. Decker*, No. 4:09-CV-0698, 2009 WL 2430882, at *3 (M.D. Pa. Aug. 10, 2009) (noting references to the temporary nature of § 236(c) detention throughout *Demore*). Cf. *Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006). An interpretation of the mandatory detention statute to reach back in time to individuals who have been released from their removable offenses long ago would likely result in the detention of these generally relief-eligible immigrants far longer than the presumptively reasonable six months.

By virtue of the fact that the relevant removable offense occurred prior to 1996, and that they have, by definition, been present in the country for over twelve years, these noncitizens are largely eligible for relief. However, claims for relief require extensive factual research and

preparation, so, while these noncitizens may have strong claims for relief from removal, they do not have simple claims. An alternative interpretation is very likely to result in the lengthy detention of long-time lawful permanent residents with strong claims for relief, running afoul of the Due Process clause under Supreme Court and lower federal court precedents.

CONCLUSION

We offer one more example to explain why the Board's interpretation in Matter of Saysana is incorrect: that of Mr. Saysana himself. Mr. Saysana came to the United States in 1980 as a refugee from Laos. His wife, his son, and four of his five step-children are all U.S. citizens. Mr. Saysana has been married to his wife for nearly thirty years, and for the several of the past years she has had to rely on him completely for financial and emotional support. Because she is very ill and requires dialysis three times a week, Mr. Saysana must care for her and ensure that she receives the medical treatments she needs. His wife lost that support while Mr. Saysana was detained without bond. After his district court habeas petition, Mr. Saysana made a sufficient showing that he was not a danger to the community or flight risk and was afforded a $3,500 bond. *See* Petitioner-Appellee Brief, *Saysana v. Gillen*, 590 F.3d 7 (1st Cir. May 11, 2009) (No. 09-1179).

Section 236(c) is clear and its interpretation has been confirmed by numerous federal courts. Bringing the Board's interpretation of that statute in line with the federal courts will ensure uniformity, rationality, and a just application of the law.

Dated: March 16, 2010

Respectfully submitted,

_____

STEPHEN W. MANNING, ESQ.
MARIA ANDRADE, ESQ.
KERRY DOYLE, ESQ.
JEREMY MCKINNEY, ESQ
AMERICAN IMMIGRATION LAWYERS ASSOCIATION
P.O. Box 40103
Portland, OR 97240

ALINA DAS, ESQ.
MEREDITH FORTIN, LEGAL INTERN
JORGE M. CASTILLO, LEGAL INTERN
IMMIGRANT RIGHTS CLINIC
WASHINGTON SQUARE LEGAL SERVICES, INC.
245 Sullivan St., 5th Floor
New York, NY 10012

Attorneys for Amicus Curiae
American Immigration Lawyers Association

CERTIFICATE OF SERVICE

I, STEPHEN W. MANNING, hereby certify that I served a copy of Brief of Amicus Curiae by first class mail on March 16, 2010 to:

Office of Chief Counsel
U.S. DEPARTMENT OF HOMELAND SECURITY
120 Montgomery Street Suite 200
San Francisco, CA 94104

Gerald M. Chapman
CHAPMAN LAW FIRM
P.O. BOX 1477
Greensboro, NC 27402

_____
STEPHEN W MANNING

Exhibit A

January 28, 2010

Hon. Eric H. Holder, Jr.
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Re: *Matter of Saysana*, 24 I. & N. Dec. 602 (BIA 2008)

Dear Attorney General Holder:

As community groups and advocacy organizations dedicated to providing justice for noncitizens and detained individuals, we are writing to ask that the Department of Justice abandon and cease to enforce the Board of Immigration Appeal (BIA)'s *Matter of Saysana* decision. This case is the latest BIA decision expanding the scope of mandatory detention to apply to many of our community members and clients who have removable offenses but have long been released from any incarceration they may have served with respect to those old removable offenses. In light of the recent First Circuit decision emphatically rejecting the BIA's reasoning in *Saysana*, *Saysana v. Gillen*, No. 09-117, 2009 WL 4913289 (1st Cir. Dec. 22, 2009), we respectfully ask that the Government reconsider its support for this discredited position.

Every day that *Matter of Saysana* is supported by your Department, individuals around the country are at risk of unlawful and lengthy detention, depriving them of their liberty without an opportunity to seek bond and causing severe emotional and financial strain on both the detained individuals and their family members. The interpretation mandates detention of individuals who have deep ties to their communities and who, by definition, have not committed any removable offense in over ten years. Under this interpretation, long-time residents may be subjected to mandatory detention not because they have committed any new removable offense, or indeed any new criminal offense at all, but as a result of any other interaction with the law, such as a traffic infraction or an arrest resulting in dismissed charges. The people affected by this interpretation are our clients and members of our community, and we write in the hope that your office will reconsider its position and vacate *Matter of Saysana*.

Not only was *Matter of Saysana* recently rejected by the First Circuit Court of Appeals as contrary to the unambiguous meaning of the mandatory detention statute, but every district court to consider the issue has refused to apply the BIA's interpretation.[1] By vacating the BIA's

[1] *See Park v. Hendricks*, 2009 WL 3818084 at *5 (D.N.J. Nov. 12 2009); *Ortiz v. Napolitano*, 2009 WL 3353029 at *3 (D. Ariz., Oct 19, 2009); *Mitchell v. Orsino*, 2009 U.S. Dist. LEXIS 71908 (S.D.N.Y. Aug. 13, 2009); *Oscar v. Gillen*, 595 F. Supp. 2d 166, 170 (D. Mass 2009); *Duy Tho Hy v. Gillen*, 588 F. Supp. 2d 122, 127 (D. Mass. 2008); *Saysana v. Gillen*, 2008 U.S. Dist. LEXIS 106633 at *2 (D. Mass. Dec. 1, 2008); *Thomas v. Hogan*, 2008 U.S. Dist.

patently erroneous interpretation of the law, your office could prevent the unlawful and lengthy detention of long-time residents across the country.

While your office considers what to do with respect to this case, we also respectfully request that you take any action within your power to prevent the application of *Matter of Saysana* to individuals currently detained by ICE or who come into ICE custody from this point forward. Given the hardship inherent in mandatory detention and federal court habeas litigation, and the overwhelming and mounting balance of precedent against the BIA's interpretation, we hope that your Department recognizes the unfairness of applying that interpretation to deny bond hearings to detained individuals.

Sincerely,

American Civil Liberties Union Immigrants' Rights Project
Judy Rabinovitz, Deputy Director
JRabinovitz@aclu.org

American Immigration Lawyers Association
Crystal Williams, Executive Director
cwilliams@aila.org

Benedictine Sisters of Baltimore
Sister Patricia Kirk, OSB
pkirk@emmanuelosb.org

Center for Constitutional Rights
Sunita Patel, Staff Attorney
SPatel@ccrjustice.org

Coalition of Latino Leaders
America Gruner, President
amerigruner@live.com

Families for Freedom
Janis Rosheuvel, Director
janis@familiesforfreedom.org

Florence Immigrant and Refugee Rights Project
Tally Kingsnorth
tkingsnorth@firrp.org

LEXIS 88169 (M.D. Pa. Oct. 31, 2008); *cf. Ogunbeken v. Sabol*, 2009 U.S. Dist. LEXIS 93288 at *7–*8 (M.D. Pa. Oct. 6, 2009) (refusing to apply *Matter of Saysana* because of its impermissibly retroactive effect).

Florida Immigrant Coalition
Maria Rodriguez, Director
maria@floridaimmigrant.org

Frey Law Office
R. Mark Frey
rmfrey@cs.com

Georgia Detention Watch
Pricilla H. Padrón, Steering Committee
priscatran@gmail.com

Immigrant Defense Project
Manuel D. Vargas, Esq., Senior Counsel
mvargas@immigrantdefenseproject.org

Immigrant Law Center of Minnesota
John C. Keller, Executive Director
John.Keller@ilcm.org

Immigration Law Club, Georgetown University School of Law
Brittany Hightower, Member
brithightower@gmail.com

Immigrant Legal Resource Center
Katherine Brady, Senior Staff Attorney
kbrady@ilrc.org

Immigrants' Rights Project, Public Counsel
Judy London, Directing Attorney
jlondon@publiccounsel.org

IRATE & First Friends
Gregory Sullivan, Program Director
firstfriends2@juno.com

Legal Services for Prisoners with Children - All of Us or None
Linda Evans
linda@prisonerswithchildren.org

Loyola University New Orleans College of Law Law Clinic & Center for Social Justice
Hiroko Kusuda, Assistant Clinic Professor
hkusuda@loyno.edu

Maria Baldini-Potermin & Associates, PC
Maria Baldini-Potermin, Attorney
maria@baldini-potermin.com

Massachusetts Immigrant and Refugee Advocacy Coalition
Sarang Sekhavat, Federal Policy Director
ssekhavat@miracoalition.org

National Immigrant Justice Center
Helen Harnett, Director of Policy
HHarnett@heartlandalliance.org

National Immigration Project of the National Lawyers Guild
Dan Kesselbrenner, Executive Director
dan@nationalimmigrationproject.org

New York University Immigrant Rights Clinic
Alina Das, Esq.
DasA@exchange.law.nyu.edu

Northern Manhattan Coalition for Immigrant Rights
Angela Fernandez, Esq., Executive Director
afernandez@nmcir.org

The Pennsylvania Immigration Resource Center
Megan Bremer, Managing Attorney
mbremer@pirclaw.org

The Pennsylvania State University, Dickinson School of Law
Victor C. Romero, Maureen B. Cavanaugh Distinguished Faculty Scholar & Professor of Law
vcr1@dsl.psu.edu

Political Asylum / Immigration Representation Project
Sarah Ignatius, Executive Director
signatius@pairproject.org

South Asian Americans Leading Together
Priya Murthy, Esq., Policy Director
priya@saalt.org

Southeast Asia Resource Action Center
Doua Thor, Executive Director
doua@searac.org

The Sylvia Rivera Law Project
Pooja Gehi, Staff Attorney
pooja@srlp.org

University of California, Davis School of Law Clinical Programs
Raha Jorjani, Staff Attorney
rjorjani@ucdavis.edu

Washington Defender Association's Immigration Project
Ann Benson, Directing Attorney
abenson@defensenet.org

World Organization for Human Rights
Elizabeth Badger, Refugee & Detention Project Director
ebadger@humanrightsusa.org

cc: JANET NAPOLITANO, Secretary, Department of Homeland Security
THOMAS W. HUSSEY, Director, Office of Immigration Litigation
JOHN MORTON, Assistant Secretary, Immigration and Customs Enforcement
JUAN OSUNA, Deputy Assistant Attorney General for the Office of Immigration Litigation

Exhibit B

U.S. Department of Justice
Immigration and Naturalization Service

HQOPS (DDP) 50/10

Office of the Executive Associate Commissioner *425 I Street NW Washington, D.C. 20536*

JUL 12 1999

MEMORANDUM FOR REGIONAL DIRECTORS

FROM: Michael A. Pearson
Executive Associate Commissioner for Field Operations
Headquarters

SUBJECT: Field Guidelines for Applying Revised Interpretation of Mandatory Custody Provisions

Effective July 13, 1999, the INS will apply a new interpretation of Section 303(b)(2) of IIRIRA, which pertains to the application of mandatory detention provisions for criminal aliens.[1] This section of law provided that the mandatory detention provisions of Section 236(c) of the Immigration and Nationality Act shall apply to aliens "released" after the expiration of the Transition Period Custody Rules (TPCR) on October 8, 1998. INS has previously interpreted "released" as meaning the alien's release from INS custody. The effect was that an alien was deemed subject to mandatory detention regardless of when he completed his criminal sentence. However, federal courts have consistently rejected the INS position. As a result, the Office of Immigration Litigation has recommended a reinterpretation of the statute. Pursuant to OIL's recommendation and a subsequent decision by the INS Policy Council, the new interpretation of "released" will be release from the alien's criminal sentence.

The reinterpretation will now only mandate detention of those criminal aliens listed in 236(c) who completed their criminal sentences on or after October 9, 1998. The change in interpretation now requires a custody determination to be made in certain cases where detention was previously deemed to be mandatory.

[1] This reinterpretation has no effect on the detention of terrorists under INA Section 236(c). No criminal conviction is required to subject a terrorist to mandatory detention.

Put simply, this new interpretation of 303(b)(2) means:

1. Any alien, regardless of status, who (a) completed a criminal sentence, *on or before 10/8/98*, based on a conviction which constitutes a removable offense; (b) is currently in INS custody or comes into INS custody in the future; and (c) has not yet been issued a final order of removal, is eligible for a custody determination.

2. Any alien, regardless of status, who (a) completed a criminal sentence,[2] *on or after 10/9/98*, based on a conviction which constitutes a removable offense, regardless of the date of such conviction, and (b) is currently in INS custody or comes into INS custody in the future, regardless of whether or not the INS has taken custody immediately upon his release from criminal incarceration, remains subject to mandatory detention under Section 235(c) of the INA.[3]

3. Any alien, regardless of status, who (a) is in proceedings based on a criminal conviction that is not described under Section 236(c), and (b) is currently in INS custody or comes into INS custody in the future, is eligible for a custody determination regardless of the date when he completed his sentence. This does not represent a change in policy.

The operational impact of this change in policy will require an immediate review of records identified in the Deportable Alien Control System (DACS) under the Category 2 (aliens in proceedings -no final order) detained cases. In applying the above definitions, INS officers must apply close scrutiny to the dates on which aliens completed their criminal sentences. There will likely be some cases which will require consultation with District Counsel for determination of the applicability of this new interpretation (some deferred adjudication cases, diversion sentences, cases of completed or pending habeas corpus, etc). After identifying a case in which a custody determination should now be made, INS officers must complete a Form I-286, Notice of

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[2] Note that an alien may still be subject to mandatory detention even if he never served his entire sentence or never served time in prison at all. Section 101(a)(48)(B) of the INA provides that an alien is deemed to have served the full term of imprisonment ordered by a court, regardless of any suspension of that term of imprisonment in whole or in part. This provision is important when an alien is charged with removability based on an aggravated felony that requires a minimum prison term. For example, if a court imposes a term of imprisonment of two years for a crime of violence but suspends the requirement that the alien must serve the sentence in jail, the alien is still deemed to have served the full sentence. He is an aggravated felon and may be subject to mandatory detention under Section 236(c). Since the alien served no time in prison, the date of the court's sentence would be the date of "release" for the purposes of 236(c). For an alien who served time in prison but whose sentence was suspended in part, the date the alien was released from physical incarceration would be the date of "release" for purposes of 236(c).

[3] Aggravated felons in old exclusion proceedings are still subject to mandatory detention under old INA 236(e). They never fell under the TPCR, and therefore IIRIRA 303(b)(2) — and thus new INA 236(c) — do not apply to those cases.

Subject: Field Guidelines for Applying Revised Interpretation of Mandatory Custody Provisions

Custody Determination. This new I-286 should be annotated as a new custody determination review based on the change in interpretation of Section 303(b)(2). INS officers shall apply normal factors to determine bond conditions, such as an individual's likelihood of danger to the public, flight risk, health factors, equities, family ties, etc. The alien shall be personally served with the I-286 and provided the opportunity to request a redetermination of custody conditions by the Executive Office for Immigration Review (EOIR). If the alien is represented and a Form G-28, Notice of Legal Representation, is on file, the INS shall provide a copy of the Form I-286 to the representative without delay.

This reinterpretation may impact EOIR by requiring immigration courts to schedule redetermination hearing times into calendars already filled. While EOIR has been alerted to this potential, the DDP managers should work closely with EOIR and local District Counsel to afford redetermination hearings resulting from this change in policy as quickly as possible.

These reviews should be completed by July 19, 1999. Each District office shall provide a memorandum to Regional Directors attesting to the completion of review for all cases affected by this change in policy. Regional Directors shall forward a report to HQDDP/Operations summarizing the field reports. Statistical information should be maintained by each office on the following:

number of cases reviewed,
number of cases released on recognizance by District Director,
number of cases where bond set by District Director
number of cases set for EOIR redetermination hearing
number of cases where EOIR released on recognizance
number of cases where EOIR set bond
number of cases where alien is releases on bond

Other than the cases that are affected by the change in interpretation under Section 303(b)(2), the procedures and guidelines contained in the October 7, 1998 memo entitled INS Detention Use Policy, and other guiding memorandums remain in effect. As an added measure of guidance, we have attached to this memo a number of scenarios which we hope are useful in determining the application of this policy change to individual cases.

Attachment

Field Guidelines for Applying Revised Interpretation of Mandatory Custody Provisions

SAMPLE SCENARIOS

1. An alien who has been a lawful resident since 1965 appears before an INS Adjudicator in a naturalization interview. The alien freely admits to, and the record reveals, convictions for battery, criminal trespass and grand theft auto in 1969, for which he was sentenced to 18 months incarceration. These are his only convictions. The INS issues a Notice to Appear. Is the alien eligible for a custody determination or is he subject to mandatory detention?

   The alien is eligible for a custody determination. Although his convictions fall within Section 236(c), his sentence was completed prior to 10/9/98.

2. An alien comes to INS' attention as a referral from a local police officer who stopped the alien on a traffic violation and discovered numerous outstanding traffic warrants. The alien has a 1975 conviction for assault with a weapon for which he was sentenced to 2 years, served 6 months, and completed the remaining time on parole. He has no other criminal convictions but for the traffic violations he is currently being arrested for. The alien is turned over to INS custody from the local police officer. Is the alien eligible for a custody determination or is he subject to mandatory detention?

   The alien is eligible for a custody determination. Although his removable conviction for an aggravated felony falls within Section 236(c), his sentence was completed prior to 10/9/98.

3. An LPR alien is encountered by INS agents in the course of an investigation. The alien has a 1996 arrest and conviction for drug trafficking for which he was sentenced to 5 years incarceration. He served 3 years and was released on June 2, 1999. Is the alien eligible for a custody determination or is he subject to mandatory detention?

   The alien is subject to mandatory detention. Although he was convicted prior to October 9, 1998, his sentence was not completed before that date.

4. An LPR alien is encountered by INS agents in the course of an investigation for marriage fraud. It has been revealed that the alien has a March 17, 1999 conviction for possession of narcotics (cocaine) and Driving Under the Influence, for which he was given a suspended sentence of 18 months. Other than his initial arrest, he was not in jail for these offenses. The agents arrest him and place him in proceedings for the removable offense of a conviction for possession of a controlled substance. Is the alien eligible for a custody determination or is he subject to mandatory detention?

   The alien is subject to mandatory detention without any eligibility for redetermination. His conviction falls within Section 236(c), and he was sentenced on or after October 9, 1998. Note: If the same alien had been convicted and sentenced on October 1, 1998 instead, he would not be subject to mandatory detention because of the actual sentencing date.