



U.S. Department of Justice
Immigration and Naturalization Service

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MEMORANDUM FOR Regional Counsel

For Distribution to District and Sector Counsel

FROM:

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SUBJECT:

Detention and Release of Aliens with Final Orders of Removal

This memorandum clarifies the Service interpretation of the detention and release provisions of the Immigration and Nationality Act (INA) for aliens with final orders of removal.

Non-Criminal Aliens

During immigration court proceedings, the INS's determination as to whether to detain or release a non-criminal alien is governed by INA § 236(a). Once the alien has an administratively final order of removal (i.e., an unappealed order of removal by an immigration judge or an order of removal by the Board of Immigration Appeals), the "removal period" begins. See INA § 241(a)(1)(B)(i). During the 90-day removal period, the INS must seek to remove the alien. See INA § 241(a)(1)(A).¹

Once the removal period commences, the INS may – but is not required to – detain a non-criminal alien until his removal is effected. See INA § 241(a)(2) (interpreted by INS and the Office of Immigration Litigation as only mandating detention for criminals and terrorists during the removal period). If the alien delays his removal (e.g., by failing to make timely application for travel documents), the removal period is extended beyond 90 days. The INS may continue to detain or may release the alien during this extended removal period. See INA § 241(a)(1)(C).

If the alien files a petition for review (as provided under INA § 242(a)(1)), the removal period continues to run for a period of 90 days from the date of the final

¹ However, the INS must comply with any judicial stay of removal.

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administrative order. However, if the court has issued a stay of the alien's removal, the court's final order on the petition, if adverse to the alien, will trigger a new 90-day removal period. See INA § 241(a)(1)(B)(ii). During the second removal period, the INS may take a previously released alien into custody under INA § 241(a)(2).

If the INS has not removed a non-criminal alien prior to the expiration of the initial removal period, it must release him under an order of supervision pending removal, unless it determines that he is a risk to the community or a flight risk and thus unlikely to comply with his removal order. See INA §§ 241(a)(3), 241(a)(6). This requirement also applies to an alien who has not been removed by the expiration of any second removal period.

Criminal and Terrorist Aliens

During immigration court proceedings, the INS is required to detain all terrorists, all aggravated felons, and almost all other criminal aliens pursuant to INA § 236(c). The only criminal aliens who are not subject to § 236(c) are those who are deportable only under § 237(a)(2)(A)(i) (if sentenced to less than one year), § 237(a)(2)(A)(iv), and/or § 237(a)(2)(E). Those few criminal aliens to whom § 236(c) does not apply are subject to detention and release under INA § 236(a) during their immigration court proceedings.

Once the alien has an administratively final order of removal (i.e., an unappealed order of removal by an immigration judge or an order of removal by the Board of Immigration Appeals), the removal period begins. See INA § 241(a)(1)(B)(i).² Once the removal period begins, the alien is subject to mandatory detention pursuant to INA § 241(a)(2). If the alien delays his removal (e.g., by failing to make timely application for travel documents), the removal period is extended beyond 90 days. See INA § 241(a)(1)(C). The INS must continue to detain the alien during this extended removal period pursuant to INA § 241(a)(2) (which mandates detention even though INA § 241(a)(1)(C) permits release for other aliens during the extended removal period).

If the alien seeks judicial review (whether or not barred from doing so by INA § 242(a)(2)(C)), the removal period continues to run for a period of 90 days from the date of the final administrative order. However, if the court has issued a stay of the alien's removal (or if the alien has filed a petition for a writ of habeas corpus, in which case the INS accepts a stay automatically), the court's final order on the petition, if adverse to the alien, will trigger a new 90-day removal period. See INA §§ 241(a)(1)(A), 241(a)(1)(B)(ii). During the second removal period, the alien is once again subject to mandatory detention under § 241(a)(2).

If the INS has not removed the alien during the initial removal period, it may continue to detain him, as a criminal or a terrorist, pursuant to INA § 241(a)(6), or it may

² Unless a stay is in effect, the INS should seek to remove the alien.

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release him under an order of supervision pending removal pursuant to INA § 241(a)(3).³ INA Sections 241(a)(6) and 241(a)(3) also apply to an alien who has not been removed by the expiration of any second removal period.

Should you have any questions, please contact Deputy General Counsel David Dixon or Associate General Counsel Arthur Strathern at (202) 514-2895.

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³ Presumably, the INS would always detain terrorist aliens and would generally detain criminal aliens pursuant to INA § 241(a)(6). However, release of a criminal under INA § 241(a)(3) may be appropriate where the alien poses no risk and is not likely to be removed.