

CHALLENGING MANDATORY AND PROLONGED DETENTION
PENDING FINAL DECISION ON REMOVAL

Note: *This outline is current as of November 5, 2011. The law governing mandatory and prolonged detention is rapidly changing. If you are bringing a challenge to mandatory and prolonged detention, please contact Judy Rabinovitz at (212) 549-2618 / jrabinovitz@aclu.org or Michael Tan at (212) 284-7303 / mtan@aclu.org for further advice.*

I. Legal Arguments Against Mandatory Detention under INA § 236(c).

A. Statutory Challenges (i.e., why your client is not properly subject to INA § 236(c)).

1. Not taken into ICE custody “when released.”

(a) Under Board of Immigration Appeals (BIA) precedent: release must be (1) post-Oct. 1998 and (2) must be release from actual criminal custody, i.e., appearing for sentencing is not enough. *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001); *Matter of West*, 22 I&N Dec. 1405 (BIA 2000); *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999). *But see In re Kotliar*, 24 I&N Dec. 124 (BIA 2007) (post-Oct 1998 “arrest” sufficient to satisfy “when released” requirement).

(i) Open question: under *Kotliar*, does *any* post-1998 arrest satisfy when released requirement? What constitutes an arrest, especially if charges are subsequently dismissed?

(b) Under BIA precedent, the post-Oct. 1998 release must be directly tied to the basis for detention under INA § 236(c). *Matter of Garcia Arrieola*, 25 I&N Dec. 267 (BIA 2010). This overrules *Matter of Saysana*, 24 I&N Dec. 602 (BIA 2008), which held that *any* post-Oct 1998 release from custody satisfies the “when released” requirement, even if not for a crime that is a ground for mandatory detention, as long as the individual was *previously* convicted of (or committed) a crime that falls under the categories designated under INA § 236(c). *See also Saysana v. Gillen*, 590 F.3d 7 (1st Cir. 2009) (holding that BIA’s decision in *Saysana* violated the plain language of the statute).

(c) Under many district court decisions, mandatory detention does not apply if the non-citizen is not taken into ICE custody *immediately* or within a reasonable time upon release from

incarceration but months or years later.¹ *But see Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001).²

2. Not “deportable” or “inadmissible” on one of specified grounds.

(a) Not *charged* as “deportable” or “inadmissible” under one of specified grounds. *Matter of Leybinski*, A73 569 408 (BIA Mar. 2, 2000) (unpublished) (copy attached). *But see In re Kotliar*, 24 I&N Dec. 124 (BIA 2007) (noncitizen need not be charged with the ground that provides the basis for mandatory detention).

(b) Not *actually* “deportable” or “inadmissible” on the ground that triggers mandatory detention.

(i) Under Board precedent, an individual is not properly subject to mandatory detention under INA § 236(c) if the government is “substantially unlikely to prevail” on the charge of deportability or inadmissibility that triggers the statute. *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999).

a. This claim is particularly strong if the immigration judge (IJ) has already rejected the government’s charge, even if the government has appealed the decision to BIA.

(ii) Even if the client can’t meet *Matter of Joseph* standard, the client has a bona fide challenge to the charge of deportability or inadmissibility and therefore is not

¹ See, e.g., *Louisaire v. Muller*, 758 F.Supp.2d 229, 236 (S.D.N.Y. 2010); *Monestime v. Reilly*, 704 F. Supp. 2d 453, 458 (S.D.N.Y. 2010); *Khodr v. Adduci*, 697 F. Supp. 2d 774, 778 (E.D. Mich. 2010); *Scarlett v. U.S. Dep’t of Homeland Security*, 632 F. Supp. 2d 214, 219 (W.D.N.Y. 2009); *Waffi v. Loiselle*, 527 F. Supp. 2d 480, 488 (E.D. Va. 2007); *Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221, 1228 (W.D. Wash. 2004); *Velasquez v. Reno*, 37 F. Supp. 2d 663, 672 (D.N.J. 1999); *Alikhani v. Fasano*, 70 F. Supp. 2d 1124, 1130 (S.D. Cal. 1999); *Grant v. Zemski*, 54 F. Supp. 2d 437, 443 (E.D. Pa. 1999); *Pastor-Camarena v. Smith*, 977 F. Supp. 1415, 1417 (W.D. Wash. 1997). See also *Gonzalez v. Dep’t of Homeland Security*, No. 1:CV-10-0901, 2010 WL 2991396, at *1 (M.D.Pa. July 27, 2010); *Bracamontes v. Desanti*, No. 2:09cv480, 2010 WL 2942760, *18 (E.D. Va. June 16, 2010); *Dang v. Lowe*, No. 1:CV-10-0446, 2010 WL 2044632, *17, 35-36 (M.D. Pa. May 7, 2010); *Bromfield v. Clark*, No. C06-0757-JCC2006, 2007 WL 527511 (W.D. Wash. Oct. 16, 2006); *Zabadi v. Chertoff*, No. 05-03335, 2005 WL 3157377, *5 (N.D. Cal. Nov. 22, 2005).

² See also, e.g., *Gomez v. Napolitano*, No. 11-cv-1350, 2011 WL 2224768 (S.D.N.Y. May 31, 2011); *Sulayao v. Shanahan*, No. 09-7347, 2009 WL 3003188 (S.D.N.Y. Sept. 15, 2009); *Serrano v. Estrada*, No. 3:01CV1916M, 2002 WL 485699 (N.D. Tex. Mar. 6, 2002); *Okeke v. Pasquarell*, 80 F. Supp. 2d 635, 637-38 (W.D. Tex. 2000); *Saucedo-Tellez v. Perryman*, 55 F. Supp. 2d 882, 885 (N.D. Ill. 1999).

properly subject to INA § 236(c), i.e. *Matter of Joseph* standard is wrong. See *Tijani v. Willis*, 430 F.3d 1241, 1246-47 (9th Cir. 2005) (Tashima, J. concurring); *Demore v. Kim*, 538 U.S. 510, 577-78 (2003) (Breyer, J. dissenting).

(c) Even if the client *concedes* threshold deportability or inadmissibility on a ground that triggers mandatory detention, the client has a bona fide claim to relief which if granted would render him/her nondeportable or admissible (e.g., INA § 212(c), cancellation, adjustment, or asylum).

NB: this would not apply to withholding or CAT, since those grants do not make you nondeportable or admissible.

(i) Government is “substantially unlikely to prevail” in establishing deportability or “inadmissibility” since the client is likely to obtain relief – i.e., *Matter of Joseph* standard should be construed as applying not only to threshold charges but also to claims for relief that would defeat those charges.

a. This argument is particularly strong if IJ has already granted such relief, even if the government has appealed the grant to the BIA.

(ii) Even if he cannot meet *Matter of Joseph* “substantially unlikely” standard, your client has a bona fide challenge to deportability on this ground and should not be treated as subject to statute, i.e., *Matter of Joseph* standard is wrong. See *Tijani v. Willis*, 430 F.3d 1241, 1246-47 (9th Cir. 2005) (Tashima, J. concurring); *Demore v. Kim*, 538 U.S. 510, 577-78 (2003) (Breyer, J. dissenting).

3. Detained beyond the “brief period necessary for their removal proceedings.” *Demore v. Kim*, 538 U.S. 510, 513 (2003).

(a) In *Demore*, the Supreme Court upheld mandatory detention for the “brief period” necessary for removal proceedings, a period it described as averaging 45 days for those who do not appeal an IJ order, and 5 months for those who do. *Demore*, 538 U.S. at 513. Thus, a number of courts have held that, in light of the serious constitutional problems posed by prolonged detention, see Point I.B., *infra*, INA § 236(c) must be construed as authorizing detention only for a brief and reasonable period of time.

See Casas-Castrillon v. Dep't of Homeland Security, 535 F.3d 942 (9th Cir. 2008); *Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005); (both holding that the mandatory detention statute only authorizes detention for “expeditious” removal proceedings, not those that exceed the brief period of time set forth in *Demore*); *Diop v. ICE/Homeland Security*, 656 F.3d 221 (3d Cir. 2011) (construing INA § 236(c) as only authorizing detention “for a reasonable amount of time”); *Ly v. Hansen*, 351 F.3d 263, 270 (6th Cir. 2003) (INA § 236 “include[s] an implicit requirement that removal proceedings be concluded within a reasonable time”).

(b) Argument is best applied to detention that exceeds six months. *See Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011) (holding, in case construing INA § 241(a)(6), that detention is generally prolonged at six months); *Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006) (holding that where Congress intended to authorize prolonged detention, beyond six months, it did so expressly). *See, e.g.*, INA § 236A (authorizing prolonged detention of individuals certified as terrorists); § 507 (authorizing prolonged detention of individuals in Alien Terrorist Removal Court proceedings).

4. Removal is not significantly likely in the reasonably foreseeable future.

(a) E.g., detainee is from a country without a repatriation agreement, or is entitled to withholding or deferral of removal.

See Nadarajah v. Gonzales, 443 F.3d 1069 (9th Cir. 2006) (holding that general detention statutes do not authorize detention beyond a presumptively reasonable six month period unless removal is significantly likely in the reasonably foreseeable future); *Prieto-Romero v. Clark*, 534 F.3d 1053 (9th Cir. 2008) (same, construing *Nadarajah*).

5. NOTE: Certain of the above arguments—i.e., that *Matter of Joseph* standard is wrong, and that statute does not authorize prolonged mandatory detention—are supported by principle of constitutional avoidance. *See Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (Court has obligation to construe statute to avoid serious constitutional problem where such a construction is fairly possible); *see* Point I.B., *infra*.

B. Constitutional challenges

1. *Demore v. Kim*, 538 U.S. 510 (2003), only upheld the mandatory detention of a noncitizen who (a) conceded deportability (and who was eligible for no relief from removal apart from withholding) and (b) was held for the brief period of time needed to conclude removal proceedings. *Demore* does not resolve the constitutionality of mandatory detention in other circumstances.

2. **Prolonged mandatory detention pending completion of removal proceedings would raise serious constitutional problems.**

(a) See Kennedy's concurring opinion in *Demore v. Kim*, 538 U.S. 510 (2003).

(b) *Casas-Castrillon v. Dep't of Homeland Security*, 535 F.3d 942 (9th Cir. 2008); *Tijani v. Willis*, 430 F. 3d 1241 (9th Cir. 2005); *Diop v. ICE/Homeland Security*, 656 F.3d 221 (3d Cir. 2011); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003); *Hussain v. Mukasey*, 510 F.3d 739 (7th Cir. 2007) (not reaching issue but agreeing with *Ly* that "[i]nordinate delay" before entry of removal order "might well justify relief").

See also *Monestime v. Reilly*, 704 F. Supp. 2d 453 (S.D.N.Y. 2010); *Flores-Powell v. Chadbourne*, 677 F. Supp. 2d 455 (D. Mass. 2010); *Sengkeo v. Horgan*, 670 F. Supp. 2d 116 (D. Mass. 2009); *Bourguignon v. MacDonald*, 667 F. Supp. 2d 175 (D. Mass. 2009); *Alli v. Decker*, 644 F. Supp. 2d 535 (M.D. Pa. 2009); *Madrane v. Hogan*, 520 F. Supp. 2d 654 (M.D. Pa. 2007); *Bah v. Cangemi*, 489 F. Supp. 2d 905 (D. Minn. 2007); *Moallin v. Cangemi*, 427 F. Supp. 2d 908 (D. Minn. 2006); *Uritsky v. Ridge*, 286 F. Supp. 2d 842 (E.D. Mich. 2003); *Geegbae v. McDonald*, No. 10-10852, 2010 WL 4292734 (D. Mass. Nov. 1, 2010); *Bracamontes v. Desanti*, No. 2:09-480, 2010 WL 2942760 (E.D. Va. June 16, 2010) (R&R), 2010 WL 2942757 (E.D. Va. July 26, 2010) (order adopting R&R); *Hyppolite v. Enzer*, No. 3:07-cv-00729, 2007 WL 1794096 (D. Conn. June 19, 2007); *Fuller v. Gonzales*, No. 04-2039, 2005 WL 818614 (D. Conn. Apr. 8, 2005).

(c) Several courts have held that prolonged detention requires **heightened procedural protections**—i.e. a bond hearing where the government bears the burden of justifying continued detention based on flight risk or danger. See, e.g., *Casas-Castrillon v. Dep't*

of Homeland Security, 535 F.3d 942 (9th Cir. 2008); *Tijani v. Willis*, 430 F. 3d 1241 (9th Cir. 2005); *Diop v. ICE/Homeland Security*, 656 F.3d 221 (3d Cir. 2011); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003).

See also Singh v. Holder, 638 F.3d 1196 (9th Cir. 2011) (holding that, at a prolonged detention hearing, the government must justify continued detention by clear and convincing evidence).

3. Detention of a Lawful Permanent Resident (LPR) who has a bona fide challenge to deportability would raise serious constitutional questions not addressed in *Demore*.

(a) *Gonzalez v. O'Connell*, 355 F.3d 1010 (7th Cir. 2004) (noting that this issue was left open in *Demore*, but not addressing the issue since the 7th Circuit had rejected the substantive challenge to deportability raised by the petitioner).

(b) *Krolak v. Ashcroft*, No. 04-C-6071 (N.D. Ill. Dec. 1, 2004) (unpublished decision holding that mandatory detention under § 236(c) was unconstitutional as applied to an individual who had a bona fide challenge to removal) (copy attached).

(c) *Tijani v. Willis*, 430 F. 3d 1241, 1246-47 (9th Cir. 2005) (Tashima, J. concurring); *Demore v. Kim*, 538 U.S. 510, 577-78 (Breyer, J. dissenting).

II. Other Issues Re Prolonged and Mandatory Detention.

A. When to Request a *Joseph* Hearing (*Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999)).

1. To exhaust and preserve issues for federal court review (probably only necessary where issue is not already foreclosed by BIA precedent; *see supra*).

2. Request new *Joseph* hearing if circumstances change, i.e.:

(a) Detention becomes prolonged.

(b) IJ finds detainee nonremovable or grants permanent relief from removal.

(c) New case law or post-conviction relief supports argument that convictions are not aggravated felonies or crimes of moral turpitude, and therefore do not trigger mandatory detention.

B. When to appeal to BIA.

1. Check your jurisdiction's case law on exhaustion.

See, e.g., Leonardo v. Crawford, 646 F.3d 1157, 1161 (9th Cir. 2011) (holding that habeas petitioners should exhaust their administrative remedies by appealing the IJ's custody determination to the BIA. However, there is no statutory exhaustion requirement. Exhaustion is required, if at all, as a prudential matter alone).

C. Detention pending federal court review where BIA removal order has been stayed.

1. What statute applies: INA § 236 or INA § 241?

(a) Courts that have analyzed the issue have held that INA § 236 continues to apply. *See Casas-Castrillon v. Dep't of Homeland Security*, 535 F.3d 942 (9th Cir. 2008); *Wang v. Ashcroft*, 350 F.3d 130 (2d Cir. 2003); *see also Bejjani v. INS*, 271 F.3d 670, 689 (6th Cir. 2001), *abrogated on other grounds by Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006) (holding that INA § 241 does not authorize detention pending judicial stay of removal). *But see Akinwale v. Ashcroft*, 287 F.3d 1050 (11th Cir. 2002) (per curiam) (assuming, without analysis, that a stay serves to "suspend" the removal period, and that detention pending a judicial stay is therefore governed by INA § 241(a)(2)).

(b) Ninth Circuit has distinguished between a stay of removal pending petition for review of a removal order (INA § 236), and stay of removal pending petition for review of a denial of a motion to reopen (INA § 241). *See Prieto-Romero v. Clark*, 534 F.3d 1053 (9th Cir. 2008); *Diouf v. Mukasey*, 542 F.3d 1222 (9th Cir. 2008). The Ninth Circuit has construed INA § 241 to require a bond hearing where detention is prolonged. *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011)

(c) If INA § 236 applies, is it INA § 236(a) or INA § 236(c)? *See Casas- Castrillon v. Dep't of Homeland Security*, 535 F.3d 942

(9th Cir. 2008) (holding that detention pending review of BIA order that has been stayed must be governed by INA § 236(a) since

INA § 236(c) only authorizes detention during pendency of the administrative proceedings themselves).

2. Is challenge to mandatory detention under § 236(c) mooted by a BIA removal order and the 90-day custody review?

(a) *Compare Tijani v. Willis*, 430 F. 3d 1241 (9th Cir. 2005) (rejecting Government argument that habeas was moot) *with Hussain v. Mukasey*, 510 F.3d 739 (7th Cir. 2007) (holding that a habeas challenge to detention pending completion of removal proceedings was mooted by BIA order, even though stayed).

3. To the extent that INA § 241 applies, does that statute authorize prolonged detention of an individual whose removal order has been stayed, absent a constitutionally adequate custody hearing?

See Diouf v. Napolitano, 634 F.3d 1081 (9th Cir. 2011) (holding the custody review process to be inadequate and requiring bond hearing before IJ where the government bears the burden of justifying continued detention)

See also, e.g., Oyediji v. Ashcroft, 332 F. Supp. 2d 747 (M.D. Pa. 2004) (applying *Zadvydas* principles to order release of individual who was detained pending federal court review pursuant to § 241 and had not received meaningful custody review); *Lawson v. Gerlinski*, 332 F. Supp. 2d 735 (M.D. Pa. 2004); *Haynes v. DHS*, No. 05-0339, 2005 WL 1606321 (M.D. Pa. July 8, 2005) (ordering release in absence of meaningful custody review, but not addressing whether due process requires a custody hearing before an IJ or other impartial adjudicator rather than the administrative custody review process before ICE officers).

D. Detention after remand from Court of Appeals to BIA or IJ for new proceedings.

- 1. Strong argument that such detention is governed by INA § 236(a) because INA § 236(c) only authorizes mandatory detention during “expeditious” proceedings, and when case has been remanded for new proceedings, proceedings can no longer be considered “expeditious.”** *See Casas-Castrillon v. Dep’t of Homeland Security*, 535 F.3d 942 (9th Cir. 2008).

E. Where to bring habeas challenge post-*Padilla* (*Rumsfeld v. Padilla*, 542 U.S. 426 (2004))? And against whom?

1. Who is the proper custodian? DHS Secretary, ICE field office director; warden of detention center/jail?

Compare, e.g., Kholyavskiy v. Achim, 443 F.3d 946 (7th Cir. 2006) (warden of state jail is proper custodian even though detainee was being held pursuant to authority of ICE field office director in different state) *with Armentero v. INS*, 340 F.3d 1058 (9th Cir. 2003), *dismissed on other grounds*, 412 F.3d 1088 (9th Cir. 2005) (holding that the Attorney General and the Secretary of Homeland Security are appropriate custodians/respondents because each are in charge of the agencies ultimately responsible for the custody that petitioners contend is unlawful).

F. Application of *Zadvydas* principles to challenge prolonged, non-mandatory detention of “arriving alien” asylum seeker.

See Nadarajah v. Gonzales, 443 F.3d 1069 (9th Cir. 2006).

G. Challenge to arbitrary discretionary detention (i.e., absent evidence of danger or flight risk).

See Parlak v. Baker, 374 F. Supp. 2d 551 (E.D. Mich. 2005), *vacated as moot*, No. 05-2003, 2006 WL 3634385 (6th Cir. Apr. 27, 2006); *Kambo v. Poppell*, No. 07-800, 2007 WL 3051601 (W.D. Tex. Oct. 18, 2007) (both reviewing bond determination notwithstanding § 236(e)).

H. Challenge to lack of custody determination by impartial adjudicator for returning LPRs who are now treated as “arriving aliens.”

See Olatunji v. Ashcroft, 387 F.3d 383 (4th Cir. 2004) (applying retroactivity principles to require bond hearing). *But see Tineo v. Ashcroft*, 350 F.3d 382 (3d Cir. 2003) (rejecting bond hearing for LPR but not addressing due process issue).

**U.S. Department of Justice
Executive Office for Immigration Review**

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

A73 569 408 - New York City

Date: **MAR - 2 2000**

GERMAN LEVBINSKY a.k.a. Drobb Kohobaob a.k.a. Alex Muxulob

IN BOND PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Irwin J. Berowitz, Esquire
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APPLICATION: Change in custody status

The respondent appeals the Immigration Judge's April 9, 1999, order denying the respondent's request for a change in custody status. The Immigration Judge found that the respondent was ineligible for bond pursuant to section 236(c) of the Immigration and Nationality Act, 8 U.S.C. § 1226(c). The respondent filed a timely appeal of this decision. The appeal is sustained; and the record is remanded for further proceedings.

The bond record indicates that the respondent is in removal proceedings pursuant to the issuance of a Notice to Appear (Form I-862). The Immigration and Naturalization Service (Service) has charged the respondent with removability pursuant to section 237(a)(1)(B) of the Act, as an alien who after admission as a nonimmigrant under section 101(a)(15) of the Act, has remained in the United States for a time longer than permitted. The Notice to Appear indicates that the respondent conceded that he is subject to removal under section 237(a)(1)(B) of the Act (Exh. 1, Immigration Judge's notation indicating that the respondent conceded the charge, dated April 23, 1999).

At his bond hearing, the respondent admitted and does not contest on appeal that on May 6, 1996, he was convicted of the offense of sexual abuse in the first degree, in violation of New York Penal Law § 130.65, and received an indeterminate sentence of 1 to 3 years of imprisonment (Tr. at 7; Oral Decision of the Immigration Judge at 2-3). Section 130.65 of the New York Penal Law, sexual abuse in the first degree, provides that, "[a] person is guilty of sexual abuse in the first degree when he subjects another person to sexual contact [1] By forcible compulsion; or [2] When the other person is incapable of consent by reason of being physically helpless; or [3] Less than eleven years old." N.Y. Penal Law § 130.65 (McKinney 1999). Based on the respondent's admissions at his bond hearing, the Immigration Judge found that the respondent was subject to the mandatory detention provision of section 236 of the Act because he had admitted that he has been convicted of an aggravated felony under section 101(a)(43)(F) of the Act, and is thus removable pursuant to section 237(a)(2)(A)(iii) of the Act.

We note that it is unclear from this record when the respondent came into the custody of the Service and whether the Service's new policy regarding the applicability of mandatory detention provisions applies to the respondent.¹

Section 236(c) of the Act directs the Attorney General to take into custody any alien who "is inadmissible," or who "is deportable," under certain enumerated sections of the Act. We note, however, that the Service has not charged the respondent with removability pursuant to any of these specifically-enumerated sections of the Act. Instead, the Service has charged the respondent with removability under section 237(a)(1)(B) of the Act, and this ground of removability does not subject him to mandatory detention under section 236(c) of the Act.

Irrespective of this circumstance, the Immigration Judge determined that the respondent is ineligible for bond pursuant to section 236(c)(1)(B), which directs the Attorney General to take into custody any alien who "is deportable" by having committed any offense covered in section 237(a)(2)(A)(iii) of the Act covering aliens convicted of aggravated felonies at any time after admission. See Oral Decision of the Immigration Judge, dated April 9, 1999. The Service has elected to proceed against the respondent on the ground that he is removable under section 237(a)(1)(B) of the Act as an alien who after being admitted remained in the United States longer than permitted. Inasmuch as the Service is treating the respondent as being subject to the grounds set forth in section 237(a)(1)(B) of the Act, and this record does not show that the Service has charged the respondent with removability under sections 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of the Act, we find it inappropriate for the Immigration Judge to find that he is subject to mandatory detention under section 236(c)(1) of the Act.

At the same time, we note that the respondent's admissions during his bond hearing indicate that the respondent was convicted of crime of violence, as defined by section 101(a)(43)(F) of the Act, and it appears that the Service could have charged him with removability under section 237(a)(2)(A)(iii) of the Act as an alien convicted of an aggravated felony. Had the Service done so, the respondent would have been directly subject to the mandatory custody provisions of section 236(c) of the Act. See section 236(c)(1)(B) (directing the Attorney General to take into custody any alien who "is deportable by reason of having committed any offense covered in section 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D)" of the Act).

The question left for decision then is whether the respondent "is deportable" for purposes of section 236(c)(1)(B) of the Act in light of his testimony admitting that he was convicted of the offense of sexual abuse in the first degree containing as an element forcible compulsion or inability to consent, but in the absence of his having been specifically charged with deportability on this basis under section 237(a)(2)(A)(iii) of the Act. We conclude that he is not subject to mandatory detention

¹ On remand, the Immigration Judge should ascertain the date of the respondent's release from criminal custody in case the information becomes important later.

because he has not been charged with removability under any of the sections of the Act specifically enumerated in section 236(c) of the Act.

As noted above, section 236(c) of the Act instructs the Attorney General to take into custody any alien who "is inadmissible," or who "is deportable," under certain enumerated sections of the Act. The Board has addressed the use of "is deportable" language and related issues in other contexts. For example, in Matter of T-, 5 I&N Dec. 459 (BIA 1953), the Board concluded an alien should not be held statutorily ineligible for voluntary departure based on his noncompliance with the Act's address registration requirement where he had not been ordered deported based on that ground of deportation.

In Matter of Ching, 12 I&N Dec. 710 (BIA 1968), an applicant for suspension of deportation had two narcotic law convictions, but was not charged with deportability based on either or both of these convictions. In framing the issue presented for decision, the Board stated:

The question before us is whether the phrase "is deportable" means that an alien is to be considered within section 244(a)(2) only if he is charged with and found deportable as an alien within one of the classes of aliens mentioned in paragraph (2) of section 244(a) or does the quoted phrase require an application for suspension of deportation to be considered under paragraph (2) where the record establishes that[,] had deportability been charged under one or more of the specified provisions of section 244(a)(2), it would have been sustained[,] but no such charge was in the warrant of arrest, the order to show cause[,] or lodged during the course of the hearing.

Id. at 712.

The Board noted in part that the federal regulations required that "an alien must be furnished with notification of the charge against him [and] must be given an opportunity to defend against it." The Board went on to conclude that the phrase "is deportable" in section 244(a)(2) of the Act relates to an alien who has been charged with and found deportable on one or more of the provisions specifically enumerated within section 244(a)(2) of the Act. Id.

Matter of Melo, 21 I&N Dec. 883 (BIA 1997), concerned the issue of the presumptions of dangerousness and flight risk for an aggravated felon in cases subject to section 242(a)(2) of the Act, 8 U.S.C. § 1252(a)(2) (1994).² In that case, the Board addressed the meaning of "is deportable" as used in the Transition Period Custody Rules, which were enacted by section 303(b)(3) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208.

² The provisions of section 242(a)(2) of the Act are inapplicable to the custody determination in the instant removal proceedings.

110 Stat. 3009-546, 3009-586 (IRIRA), and which were then in effect but have since expired. See Matter of Noble, 21 I&N Dec. 672 (BIA 1997). The Board stated, "[w]e are not satisfied that the meaning of the 'is deportable' language in section 303(b)(3)(A)(iii) of the IRIRA, a bond provision, is controlled by Matter of Ching, supra, or Matter of T-, supra." Matter of Melo, supra, at 4 n.2. The Board noted that the precedent decisions cited therein involved eligibility for relief from deportation considered only after findings of deportability already had been made. In contrast, bond determinations are normally rendered before any finding of deportability is made. Id.

Most recently, the Board examined the use of the "is deportable" language in Matter of Fortiz, 21 I&N Dec. 1199 (BIA 1998). In that case, the alien had been convicted of malicious burning, but was not charged with deportability as an alien convicted of an aggravated felony. The Service argued that the alien's conviction for malicious burning constituted a conviction for an aggravated felony. As such, he was ineligible for section 212(c) relief pursuant to section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (enacted Apr. 24, 1996). The Board concluded that for an alien to be barred from eligibility for a waiver under section 212(c) of the Act as one who "is deportable" by reason of having committed a criminal offense covered by one of the criminal deportation grounds enumerated in the statute, the alien must have been charged with, and have been found deportable on, such ground(s). Id. at 4 n.3. See also Choeum v. INS, 129 F.3d 29 (1st Cir. 1997); Matter of Fortiz, supra (Filppu, concurring) (contrasting Congress' use of "is deportable" and "convicted of"). But see Mendez-Morales v. INS, 119 F.3d 738 (8th Cir. 1997); Abdel-Razek v. INS, 114 F.3d 831 (9th Cir. 1997); Matter of Fortiz, supra (Jones, concurring and dissenting).

The precedent decisions discussed above, relating to the term "is deportable," provide guidance in deciding the question now before us. The reasoning employed in Matter of Ching, supra, that an alien must be furnished with notification of the charge against him and must be given an opportunity to defend against it, is persuasive. The reasoning found in both Matter of T-, supra, and Matter of Fortiz, supra, that an alien must be charged with and be found deportable on the disqualifying ground of deportation before he can be found to be statutorily ineligible for relief based on that ground of deportation, also is persuasive. In addition, we find relevant the distinction noted in Matter of Melo, supra, regarding the context of bond determinations vis-a-vis other immigration proceedings. See Matter of Fortiz, supra (Filppu, concurring); 8 C.F.R. § 3.19(d) (1998). Normally, an Immigration Judge's bond redetermination decision is made near the beginning of an alien's immigration proceedings. Thus, at the time the Immigration Judge is making the bond decision, it is frequently the case that no finding of inadmissibility, deportability, or removability has been made.

Given the context of an Immigration Judge's bond redetermination decision, we find that there need not have been an actual finding of deportability under section 237(a)(2)(A)(iii) of the Act before the mandatory detention provisions of section 236(c)(1)(B) of the Act could be applied in the respondent's case. At the same time, however, we find that at the very least the respondent herein must have been put on notice that his criminal conviction formed a basis for his removal, such as

through a charge of removability under section 237(a)(2)(A)(iii) of the Act, before he can be found to be ineligible for bond pursuant to section 236(c)(1)(B) of the Act.³ See Briseno v. INS, ___ F.3d ___, 1999 WL 812942 (9th Cir. 1999) (considering meaning of jurisdictional provision barring review for an alien deportable "by reason of having committed" an aggravated felony).

Because the respondent has not been charged with removability pursuant to any of the sections of the Act specifically enumerated in section 236(c) of the Act, or even put on notice that his conviction is at issue with respect to removability, questions regarding his custody and eligibility for bond are not governed by section 236(c) of the Act, as the Immigration Judge concluded. Rather, such questions are governed by section 236(a) of the Act.

Accordingly, the record is remanded for consideration of the respondent's request for change in custody status and bond determination based on the provisions of section 236(a) of the Act.

ORDER: The appeal is sustained.

FURTHER ORDER: The record is remanded for further proceedings consistent with the foregoing opinion and the entry of a new decision.


FOR THE BOARD

³ We also note that, in such a situation, there must be some evidence in the record to support the charge, lest we leave aliens vulnerable to "empty" charges.

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6/16/05

TO:

Sudy Rabinovitz

FAX #:

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Number of pages including cover:

3

REMARKS:

Sudy,

Attached is the order we discussed by
e-mail. Incidentally, I much enjoyed the
class I took from you at NYU in 1999.
-Geoff

Note: This message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged and confidential. If the reader of this message is not the intended recipient or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone so that we can arrange for the return of the document to us at no cost to you. Thank You.

ORDER

Petitioner Szymon Krolak seeks an order requiring that he be given a bond hearing.

Respondent Deborah Achim contends that this court does not have subject matter jurisdiction over this case because petitioner has not exhausted his administrative remedies and the exceptions the Seventh Circuit has recognized to the exhaustion requirement do not apply. In addition, respondent contends that petitioner is not entitled to relief on the merits of the claims he has made.

Where as in this case there is not a mandatory statutory exhaustion requirement, the discretionary judicial exhaustion doctrine applies. See Gonzalez v O'Connell, 355 F3d 1010, 1015 (7th Cir 2004). The Seventh Circuit has held that exhaustion is to be excused when:

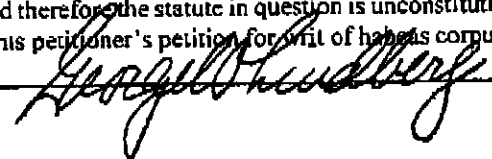
- (1) requiring exhaustion of administrative remedies causes prejudice, due to unreasonable delay or an indefinite timeframe for administrative action; (2) the agency lacks the ability or competence to resolve the issue or grant the relief requested; (3) appealing through the administrative process would be futile because the agency is biased or has predetermined the issue; or (4) where substantial constitutional issues are raised.

Gonzalez v O'Connell, 355 F3d 1010, 1016 (7th Cir 2004), quoting Iddir v INS, 301 F3d 492, 498 (7th Cir 2002). Since the filing of the petition for writ of habeas corpus, the BIA affirmed the decision with respect to bond, and stated that "[t]he decision below is, therefore, the final agency decision."

Administrative remedies have most certainly been exhausted with respect to Counts I and III of the petition. In Count I, petitioner contends that language in the INA stating "the Attorney General shall take into custody any alien when the alien is released" from custody for a conviction for which he may be deported means that the alien must be taken into custody as soon as he is released. The "when" in this provision could mean what petitioner claims; that the alien must be taken into custody immediately. It could alternatively mean "after" rather than "immediately." The language is thus ambiguous, and this court will therefore defer to the BIA's interpretation. See Saucedo-Tellez v Perryman, 55 F Supp 2d 882, 885, (N D Ill 1999). Petitioner is therefore not entitled to habeas relief on the basis of Count I. Count III claims petitioner was not convicted of a predicate offense that would require him to be held without a bond hearing. The statute at issue provides: "The Attorney General shall take into custody any alien who— . . . (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title[.]" 8 USC § 1226(c)(1). The referenced section provides in part: "Any alien who at any time after admission has been convicted of . . . any law . . . of a State . . . relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable." 8 USC § 1227(a)(2)(B)(1). Petitioner's conviction was for two offenses involving possession of marijuana. (The court notes that this resolution does not require a determination of whether petitioner's conviction was for an aggravated felony, which remains an open question.) Therefore, the statute provides for his detention without a bond hearing.

In Count II petitioner contends that it is required that he be an alien to be detained without a bond hearing under the statute. Petitioner's premise is essentially that he should have been naturalized. However, he was not naturalized. The issue of whether he will be naturalized has not yet been adjudicated administratively—i.e., administrative remedies have not been exhausted with respect to this issue—so it will not be ruled upon by this court. Suffice it to say that at present petitioner remains an alien, and so Count II fails on its own terms.

In Count IV petitioner contends that he has a "colorable claim that he is not in fact deportable," and therefore the statute providing for detention without a bond hearing is unconstitutional as applied to him. Taking out of consideration the question of whether he should have been naturalized, there is no question on the basis of what is before this court that he is deportable as an alien convicted of two offenses of possession of marijuana. See 8 USC § 1227(a)(2)(B)(1). Thus, the only basis on which he could have a colorable claim would be his claim that he should have been naturalized. That issue turns on the actions of the agency with respect to his parents's applications for citizenship. What is indisputable is that by the time his own application was determined, petitioner was over the age of 18 and so ineligible for the automatic citizenship for which he was applying. Petitioner contends that certain procedures to expedite his application should have been used, and that he was entitled to automatic citizenship under a statutory provision he did not apply under. Thus, petitioner's constitutional question is in fact premised on this question involving statutes and agency regulations, and the currently pending administrative proceedings in this matter concern this underlying issue. This is thus a colorable and good faith claim that petitioner is not in fact deportable. The Supreme Court has stated: "Detention during removal proceedings is a constitutionally permissible part of the process. See Demore v Kim, 538 US 510, 123 S Ct 1708, 1721-22 (2003). However, the Court's determination was premised on the detainee in Kim conceding deportability. This court is of the opinion that when an alien has a colorable claim that he is not in fact deportable, detention without a bond hearing is violative of due process, and therefore the statute in question is unconstitutional as applied to petitioner. Therefore, on the basis of Count IV the court grants petitioner's petition for writ of habeas corpus."



United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	George Lindberg	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	04 C 6071	DATE	12-1-04
CASE TITLE	Szymon Krolak vs. Deborah Achim		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

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DOCKET ENTRY:

- (1) ☐ Filed motion of [use listing in "Motion" box above.]
- (2) ☐ Brief in support of motion due _____.
- (3) ☐ Answer brief to motion due _____. Reply to answer brief due _____.
- (4) ☐ Ruling/Hearing on _____ set for _____ at _____.
- (5) ☐ Status hearing[held/continued to] [set for/re-set for] on _____ set for _____ at _____.
- (6) ☐ Pretrial conference[held/continued to] [set for/re-set for] on _____ set for _____ at _____.
- (7) ☐ Trial[set for/re-set for] on _____ at _____.
- (8) ☐ [Bench/Jury trial] [Hearing] held/continued to _____ at _____.
- (9) ☐ This case is dismissed [with/without] prejudice and without costs[by/agreement/pursuant to]
☐ FRCP4(m) ☐ Local Rule 41.1 ☐ FRCP41(a)(1) ☐ FRCP41(a)(2).
- (10) ☒ [Other docket entry] The court, sua sponte, dismisses John Ashcroft and Tom Ridge as respondents because Deborah Achim is the only proper party respondent in this action. Szymon Krolak's petition for writ of habeas corpus [1] is granted. Judgment granting Szymon Krolak's petition for writ of habeas corpus shall be set forth on a separate document and entered in the civil docket. FRCP 58(a)(1), (b)(2)(A), 79(a).

- (11) ☒ [For further detail see order on the reverse side of the original minute order.]

No notices required, advised in open court.		number of notices	Document Number
No notices required.		date docketed	
Notices mailed by judge's staff.		docketing deputy initials	
Notified counsel by telephone.		date mailed notice	
Docketing to mail notices.		mailing deputy initials	
Mail AO 450 form.			
Copy to judge/magistrate judge.			
slb	courtroom deputy's initials	Date/time received in central Clerk's Office	