CHALLENGING DETENTION WITHOUT A BOND HEARING PENDING REMOVAL PROCEEDINGS

This outline is current as of November 2015. The law in this area is rapidly changing. Please contact Judy Rabinovitz at (212) 549-2618 / jrabinovitz@aclu.org or Michael Tan at mtan@aclu.org for further advice.

I. CHALLENGES TO MANDATORY DETENTION UNDER INA § 236(c).

A. Your client does not have a "release" from criminal custody that triggers the statute.

1. Under Board of Immigration Appeals (BIA) precedent, you must be "released" from criminal custody:

(a) after the effective date of the statute (October 20, 1998) and

(b) you must be released from *physical* criminal custody—i.e., appearing for sentencing is not enough.

See Matter of West, 22 I&N Dec. 1405 (BIA 2000); *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999).

2. Under BIA precedent, the "release" must be directly tied to the basis for detention under INA § 236(c).

- ***Matter of Garcia-Arreola*, 25 I&N Dec. 267 (BIA 2010).**

Garcia-Arreola overrules *Matter of Saysana*, 24 I&N Dec. 602 (BIA 2008), which held that any post-Oct 1998 release from custody satisfies the "release" 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).

3. The BIA has held that a *mere arrest* satisfies the "released" requirement.

- ***Matter of Kotliar*, 24 I&N Dec. 124 (BIA 2007); *see also Matter of West*, 22 I&N Dec. 1405 (BIA 2000).**

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

- The Third Circuit has followed *Kotliar*, albeit arguably in dicta and with no reasoning. *Sylvain v. Attorney General*, 714 F.3d 150 (3d Cir. 2013).

- The Second Circuit in *Lora v. Shanahan*, --- F.3d ----, 2015 WL 6499951 (2d Cir. 2015), has declined to defer to *West* and *Kotliar*. Instead, it held that "detention is mandated [under INA § 236(c)] once an alien is convicted of a crime described in section [236(c)(1)] and is not incarcerated, imprisoned, or otherwise detained"—regardless of whether he has been sentenced to a prison term or probation. *Id*. at *6.

- Prior to *Lora*, several district courts in the Second Circuit had held that INA § 236(c) requires a release from *incarceration* pursuant to a conviction for an offense listed in the statute—i.e., a mere arrest and probation or supervised release is not enough.[1]

B. Your client was not taken into ICE custody "when . . . released" from criminal custody.

1. The BIA has held that ICE may subject a noncitizen to mandatory detention *any time after* they are released from criminal custody—i.e., even if ICE does not take custody immediately after the individual is released.

- ***Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001).**

2. The Second, Third, Fourth, and Tenth Circuits have adopted this position as well, albeit on different grounds.

- *Lora v. Shanahan*, --- F.3d ----, 2015 WL 6499951 (2d Cir. 2015) (deferring to *Rojas* and also relying on "loss of authority" cases)

- *Sylvain v. Attorney General*, 714 F.3d 150 (3d Cir. 2013) (refusing to decide the issue of deference to *Rojas*, but finding mandatory detention to apply to those not detained "when . . . released" based on the theory that officials do not lose authority to impose mandatory detention if they delay)

- *Hosh v. Lucero*, 680 F.3d 375 (4th Cir. 2012) (deferring to *Rojas* and also relying on "loss of authority" cases)

[1] *See, e.g.*, *Straker v. Jones*, 986 F. Supp. 3d 345 (S.D.N.Y. 2013); *Martinez-Done v. McConnell*, 56 F. Supp. 3d 535 (S.D.N.Y. 2014); *Escrogin v. Tay-Taylor*, No. 14-cv-2856 (RJS), 2015 WL 509666 (S.D.N.Y. Feb. 5, 2015); *Figueroa v. Aviles*, No. 14-CIV-9360 (S.D.N.Y. Jan. 29, 2015); *Masih v. Aviles*, No. 14 Civ. 0928(JCF), 2014 WL 2106497 (S.D.N.Y. May 20, 2014); *Lora v. Shanahan*, 15 F. Supp. 3d 478 (S.D.N.Y. 2014); *see also Valdez v. Terry*, 874 F. Supp. 2d 1262 (D.N.M. 2012); *but see, e.g., Olmos v. Johnson*, No. 15–cv–00965–RM, 2015 WL 4915651 (D. Colo. Aug. 18, 2015) (deferring to *West* and *Kotliar* and also independently reading "released" to refer to "post-sentencing release into the community"); *Orozco-Valenzuela v. Holder*, No. 1:14 CV 1669, 2015 WL 1530631 (N.D. Ohio Apr. 6, 2015) (applying *West* and *Kotliar*); *accord Khetani v. Petty*, 859 F. Supp. 2d 1036 (W.D. Mo. 2012).

- *Olmos v. Holder*, 780 F.3d 1313 (10th Cir. 2015) (same)

3. A panel of the First Circuit rejected *Rojas*, holding that ICE must take custody within a "reasonable time" after release from criminal custody in order for mandatory detention to apply. *Castañeda v. Souza*, 769 F.3d 32 (1st Cir. 2014). However, the First Circuit subsequently granted the government's petition to rehear the case en banc and vacated the panel decision. En banc review is currently pending.

4. District courts in California, Massachusetts, and Washington have certified classes and granted classwide relief from mandatory detention pursuant to *Rojas*. All three cases are pending on appeal.

- *Preap v. Johnson*, 303 F.R.D. 566 (N.D. Cal. 2014) (certifying class of detainees in California and granting preliminary injunction)

- *Gordon v. Johnson*, 300 F.R.D. 31 (D. Mass. 2014) (certifying class of detainees in Massachusetts and granting permanent injunction to individuals who were not detained by ICE within 48 hours of release from criminal custody)

- *Khoury v. Asher*, 3 F. Supp. 3d 877 (W.D. Wash. 2014) (certifying class of detainees in Washington State and granting classwide declaratory judgment)

5. Other District Court Decisions (i.e., in jurisdictions not covered by the decisions listed above).

District courts that have rejected *Rojas*

- *Mudhallaa v. BICE*, No. 15-10972, 2015 WL 1954436 (E.D. Mich. Apr. 29, 2015)
- *Rosciszewski v. Adducci*, 983 F. Supp. 2d 910 (E.D. Mich. 2013)
- *Rosario v. Prindle*, No. 11–217, 2011 WL 6942560 (E.D. Ky. Nov. 28, 2011), *adopted by* 2012 WL 12920 (E.D. Ky. Jan. 4, 2012)
- *Rianto v. Holder*, No. CV–11–0137–PHX–FJM, 2011 WL 3489613 (D. Ariz. Aug. 9, 2011)
- *Khodr v. Adduci*, 697 F. Supp. 2d 774 (E.D. Mich. 2010)

District courts that have deferred to *Rojas* either as a holding or in dicta:

- *Hernandez v. Prindle*, No. 15-10-ART, 2015 WL 1636138 (E.D. Ky. Apr. 13, 2015)
- *Orozco-Valenzuela v. Holder*, No. 1:14 CV 1669, 2015 WL 1530631 (N.D. Ohio Apr. 6, 2015)

- *Mora-Mendoza v. Godfrey*, No. 3:13–cv–01747–HU, 2014 WL 326047 (D. Or. Jan. 29, 2014)
- *Cisneros v. Napolitano*, No. 13–700 (JNE/JJK), 2013 WL 3353939 (D. Minn. July 3, 2013)
- *Khetani v. Petty*, 859 F. Supp. 2d 1036 (W.D. Mo. 2012)
- *Silent v. Holder*, No. 4:12–cv–00075–IPJ–HGD, 2012 WL 4735574 (N.D. Ala. Sept. 27, 2012)
- *Garcia-Valles v. Rawson*, No. 11–C–0811, 2011 WL 4729833 (E.D. Wis. Oct. 7, 2011)
- *Serrano v. Estrada*, No. 3–01–CV–1916–M, 2002 WL 485699 (N.D. Tex. Mar. 6, 2002) (deferring to *Rojas* in dicta but granting habeas petition based on due process concerns)

C. Your client is not "deportable" or "inadmissible" on one of the specified grounds.

1. Your client has not been *charged* as "deportable" or "inadmissible" under one of the specified grounds.

- *Matter of Leybinski*, A73 569 408 (BIA Mar. 2, 2000) (unpublished) (copy attached).But *see Matter of Kotliar*, 24 I&N Dec. 124 (BIA 2007) (noncitizen need not be charged with the ground that provides the basis for mandatory detention).

2. Your client is not actually "deportable" or "inadmissible" on the ground that triggers mandatory detention.

- Under BIA precedent, an individual is properly subject to INA § 236(c) unless he can show that 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).**

- There is a strong argument that the *Joseph* standard raises serious constitutional concerns. Notably, the Supreme Court in *Demore v. Kim*, 538 U.S. 510 (2003), upheld the mandatory detention of only a noncitizen who conceded deportability (and who was eligible for no relief from removal apart from withholding). *Demore* did not resolve the constitutionality of mandatory detention in other circumstances—and in particular, the mandatory detention of someone with a good faith or substantial challenge to removal. *See Gonzalez v. O'Connell*, 355 F.3d 1010 (7th Cir. 2004) (noting that this "important" constitutional issue was left open in *Demore*)

- When construed to avoid constitutional concerns, INA § 236(c) should not apply where the client has a substantial challenge to the charge of deportability or inadmissibility. 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.

- *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); *see also Zadvydas v. Davis*, 533 U.S. 678 (2001) (court has obligation to construe statute to avoid serious constitutional problem where such a construction is fairly possible).

- *But see Gayle v. Johnson*, 81 F. Supp. 3d 371 (D.N.J. 2015) (holding that an individual is "deportable" for purposes of INA § 236(c) where the government has probable cause that he or she is subject to a criminal ground of deportability).

- Moreover, even if the client concedes threshold deportability or inadmissibility on a ground that triggers mandatory detention, INA § 236(c) arguably does not apply where the client has a substantial claim to relief from removal which if granted would render him/her non-deportable or admissible (e.g., INA § 212(c), cancellation, adjustment, asylum, U-visa, etc.). This argument is particularly strong if IJ has already granted such relief, even if the government has appealed the grant to the BIA.

- *See Papazoglou v. Napolitano*, No. 1:12-cv-00892, 2012 WL 1570778 (N.D. Ill. May 3, 2012) (holding mandatory detention of LPR whom IJ had granted new adjustment of status to lawful permanent residence unconstitutional); *cf. Krolak v. Ashcroft*, No. 04-C-6071 (N.D. Ill. Dec. 1, 2004) (holding mandatory detention under INA § 236(c) unconstitutional as applied to an individual who had a bona fide citizenship claim) (copy attached)

- *But see Gayle v. Johnson*, 4 F. Supp. 3d 692 (D.N.J. 2014) (holding that the term "deportable" in INA § 236(c) refers only to whether individuals are properly included under the criminal grounds of deportability).

NB: this argument would not apply to withholding or CAT, because these claims do not permit individuals to maintain or obtain LPR status, or any legal status.

3. If INA § 236 cannot be construed to prohibit the mandatory detention of individuals with substantial challenges to removal, it violates the Due Process Clause. *See, e.g., Papazoglou v. Napolitano*, No. 1:12- cv-00892, 2012 WL 1570778 (N.D. Ill. May 03, 2012).

D. 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 and thus exhaustion is futile).

2. If circumstances change, i.e.:

- Detention becomes prolonged.

- The IJ finds detainee non-removable or grants relief from removal that renders your client non-deportable/non-inadmissible.

- 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.

II. CHALLENGES TO PROLONGED DETENTION WITHOUT A BOND HEARING.

A. Challenges to prolonged mandatory detention under INA § 236(c).

- In *Demore v. Kim*, the Supreme Court upheld mandatory detention for the "brief period necessary for removal proceedings"—a period the Court described as averaging 45 days for those who do not appeal an Immigration Judge order, and 5 months for those who do. 538 U.S. 510, 513 (2003). *Demore* did not address the constitutionality of prolonged mandatory detention.

- The four circuit courts that have addressed the issue have held that, in light of the serious constitutional problems posed by prolonged mandatory detention, INA § 236(c) must be construed as authorizing detention for only a limited period of time. *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).

1. Courts Adopting a Six Month Limit on Detention Without a Bond Hearing

- The **Second Circuit** and **Ninth Circuit** have held that prolonged detention without a bond hearing generally raises serious constitutional concerns after **six months**. Thus, at six months, the person is entitled to a bond hearing.

    - *Lora v. Shanahan*, --- F.3d ----, 2015 WL 6499951 (2d Cir. 2015) (construing INA § 236(c))

    - *Rodriguez v. Robbins*, --- F.3d ----, 2015 WL 6500862 (9th Cir. 2015)*; Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013)

    - *See also 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) (holding that INA § 236(c) authorizes mandatory detention only during removal proceedings before the IJ and BIA and only for "expeditious" removal proceedings, not those that exceed the brief period of time set forth in *Demore*).

- The District of Massachusetts also required a bond hearing at six months in a class action filed on behalf of long-term detainees held in Massachusetts. The case is currently on appeal to the First Circuit.

    - *Reid v. Donelan*, 22 F. Supp. 3d 84 (D. Mass. 2014)

- *Compare with* INA § 236A (authorizing prolonged detention of individuals certified as terrorists for additional periods of six months); § 507 (authorizing prolonged detention of individuals in Alien Terrorist Removal Court proceedings).

2. Courts that have adopted a case-by-case approach.

In contrast, the Third and Sixth Circuits have construed INA § 236(c) to authorize mandatory detention for only a "reasonable" period of time, which will vary on a case-by-case basis.

- *Diop v. ICE/Homeland Security*, 656 F.3d 221 (3d Cir. 2011) (requiring a bond hearing where mandatory detention has lasted beyond a reasonable period of time); *see also Leslie v. Attorney General*, 678 F.3d 265 (3d Cir. 2012); *Chavez-Alvarez v. Warden York County Prison*, 783 F.3d 469 (3d Cir. 2015).

- *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003) (requiring release when mandatory detention exceeds a reasonable period of time)

District Courts applying *Diop* to grant bond hearing:

- *Rodriguez-Celaya v. Attorney General*, No. 1:CV–14–0514, 2014 WL 3557133 (M.D. Pa. July 17, 2014)
- *Skinner v. Bigott*, No. 13–4299 (ES), 2014 WL 70066 (M.D. Pa. Jan. 8, 2014)
- *Pujalt-Leon v. Holder*, 934 F. Supp. 2d 759 (M.D. Pa. 2013)
- *Francois v. Napolitano*, No. 12–2806 (FLW), 2013 WL 4510004 (D.N.J. Aug. 23, 2013)
- *Banton v. Sabol*, No. 3:CV–12–1594, 2013 WL 1736804 (M.D. Pa. Apr. 22, 2013)
- *Bango v. Lowe*, No. 3:12–CV–0822, 2012 WL 5955005 (M.D. Pa. Nov. 28, 2012)
- *Martinez v. Muller*, No. 12–1731, 2012 WL 4505895 (D.N.J. Sept. 25, 2012)
- *Nwozuzu v. Napolitano*, No. 12–3963, 2012 WL 3561972 (D.N.J. Aug. 16, 2012)
- *Pierre v. Sabol*, No. 1:11–CV–2184, 2012 WL 1658293 (M.D. Pa. May 11, 2012)
- *Gupta v. Sabol*, No. 1:11–CV–1081, 2011 WL 3897964 (M.D. Pa. Sept. 6, 2011).

3. Numerous district courts in other jurisdictions have held that INA § 236(c) does not authorize prolonged mandatory detention and have granted the petitioner a bond hearing (or, in some cases, release from detention).

Fourth Circuit: *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).

Fifth Circuit: *Ramirez v. Watkins*, NO. CIV.A. B:10-126, 2010 WL 6269226 (S.D. Tex. Nov 03, 2010).

Sixth Circuit: *Uritsky v. Ridge*, 286 F. Supp. 2d 842 (E.D. Mich. 2003) (granting release).

Eighth Circuit: *Bah v. Cangemi*, 489 F. Supp. 2d 905 (D. Minn. 2007) (granting release); *Moallin v. Cangemi*, 427 F. Supp. 2d 908 (D. Minn. 2006) (granting release).

Eleventh Circuit: *Jeune v. Candameres*, 1:13-cv-22333-CMA (S.D. Fl. Dec. 11, 2013)

4. If INA § 236 cannot be construed to prohibit prolonged mandatory detention, it violates the Due Process Clause. *See, e.g., Diop v. ICE/Homeland Security*, 656 F.3d 221 (3d Cir. 2011).

B. Prolonged detention under INA § 235(b).

1. The Ninth Circuit has held INA § 235(b) does not authorize the prolonged detention (i.e. six months or longer) of arriving asylum seekers and other applicants for admission without a bond hearing. Instead, at six months, the authority for detention shifts to INA § 236(a).

- *See Rodriguez v. Robbins*, --- F.3d ----, 2015 WL 6500862 (9th Cir. 2015); *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013); *Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006) (limiting detention under INA § 235(b) to a "reasonable period of time").

2. Citing *Diop*, at least one district court in the Third Circuit has held that prolonged detention without a bond hearing under INA § 235(b) violates the Due Process Clause.

- *See Bautista v. Sabol*, 862 F. Supp. 2d 375 (M.D. Pa. 2012)

C. Detention pending judicial review where removal has been stayed.

1. What Statute Applies: INA § 236 or INA § 241?

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)
- *Leslie v. Attorney General*, 678 F.3d 265 (3d Cir. 2012)
- *Wang v. Ashcroft*, 320 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)).

2. If INA § 236 applies, is it INA § 236(a) or INA § 236(c)?

- In *Casas-Castrillon v. Dep't of Homeland Security*, 535 F.3d 942 (9th Cir. 2008), the Ninth Circuit held that INA § 236(c) does not apply to an individual whose removal is stayed pending judicial review of his removal order. This is because (1) the mandatory detention statute applies only pending administrative removal proceedings and (2) only authorizes mandatory detention only where proceedings are still "expeditious." Thus, once proceedings are concluded before the BIA, the authority for detention shifts to INA § 236(a). *Id*. at 947.

- By contrast, the Third Circuit in *Leslie v. Attorney General*, 678 F.3d 265 (3d Cir. 2012), while not explicitly discussing the issue, appears to have assumed that INA § 236(c) continues to apply where removal is stayed. The Court subjected the detention of an individual with a stay of removal to the same analysis for prolonged mandatory detention under INA § 236(c) set forth in *Diop*. *See Desrosiers v. Hendricks*, 532 Fed. Appx. 283 (3d Cir. Jul 24, 2013).

- The Ninth Circuit has distinguished between detention where removal is stayed pending a petition for review of a removal order (INA § 236), and detention where removal is stayed pending a petition for review of a denial of a motion to reopen (INA § 241).

- *Compare Prieto-Romero v. Clark*, 534 F.3d 1053 (9th Cir. 2008) *with Diouf v. Mukasey*, 542 F.3d 1222 (9th Cir. 2008).

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) (construing INA § 241(a)(6) to require a bond hearing before the IJ at six months where the government bears the burden of justifying continued imprisonment; holding the custody review process to be inadequate to protect against unlawful prolonged detention).

- *See also, e.g.*, *Oyediji v. Ashcroft*, 332 F. Supp. 2d 747 (M.D. Pa. 2004) (ordering release of individual who was detained pending federal court review pursuant to INA § 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).

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

- *Compare Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005) (rejecting government's 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).

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

- The Ninth Circuit has held 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," INA § 236(a) applies. *See Casas-Castrillon v. Dep't of Homeland Security*, 535 F.3d 942 (9th Cir. 2008).

E. Procedural safeguards required at a prolonged detention hearing

1. Courts generally have held that prolonged detention requires a bond hearing where the government bears the burden of justifying continued detention based on flight risk or danger.

- *See Rodriguez v. Robbins*, --- F.3d ----, 2015 WL 6500862 (9th Cir. 2015); *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013); *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).

- *But see Reid v. Donelan*, 22 F. Supp. 3d 84 (D. Mass. 2014) (holding that, at six months, detainees are entitled only to ordinary bond hearing where noncitizen bears burden of proof).

2. The Second and Ninth Circuits have specifically held that at a prolonged detention hearing, the government must justify continued detention by *clear and convincing evidence*.

- *Lora v. Shanahan*, --- F.3d ----, 2015 WL 6499951 (2d Cir. 2015)

- *Rodriguez v. Robbins*, --- F.3d ----, 2015 WL 6500862 (9th Cir. 2015); *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013); *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011)

3. The Ninth Circuit has also held that a contemporaneous record of the prolonged detention hearing is required; that periodic bond hearings are required every six months; and that the IJ must consider alternatives to detention in making a custody decision.

- *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011)

- *Rodriguez v. Robbins*, --- F.3d ----, 2015 WL 6500862 (9th Cir. 2015)

III. CHALLENGES TO DETENTION WITHOUT BOND HEARING PENDING "WITHHOLDING-ONLY" PROCEEDINGS.

Several district courts, relying on *Ortiz-Alfaro v. Holder*, 694 F.3d 955 (9th Cir. 2012) and/or, *Luna-Garcia v. Holder*, 777 F.3d 1182 (10th Cir. 2015), have held that INA § 236(a), as opposed to INA § 241, governs the detention of individuals in "withholding-only" proceedings because they do not yet have a final order of removal; therefore they are entitled to a bond hearing.

- *Guerra v. Shanahan*, No. 14-CV-4203 KMW, 2014 WL 7330449 (S.D.N.Y. Dec. 23, 2014)
- *Alvarado v. Clark*, No. C14–1322–JCC, 2014 WL 6901766 (W.D. Wa. Dec. 8, 2014).
- *Guerrero v. Aviles*, No. 14-4367, 2014 WL 5502931 (D.N.J. Oct. 30, 2014)
- *Mendoza v. Asher*, No. C14–0811–JCC–JPD, 2014 WL 8397145 (W.D. Wa. Sept. 15, 2014)
- *Lopez v. Napolitano*, No. 1:12-CV-01750 MJS HC, 2014 WL 1091336, at *3 (E.D. Cal. Mar. 18, 2014)
- *Castillo v. ICE Field Office Director*, 907 F. Supp. 2d 1235 (W.D. Wa. Nov. 14, 2012)
- *Uttecht v. Napolitano*, No. 8:12-CV-347, 2012 WL 5386618 (D. Neb. Nov. 1, 2012)
- *Pierre v. Sabol*, No. 1:11-cv-02184, 2012 WL 1658293 (M.D. Pa. May 11, 2012)

But see the following cases (holding that INA 241 governs)

- *Reyes v. Lynch*, No. 15–cv–00442–MEH, 2015 WL 5081597 (D. Colo. Aug. 28, 2015)
- *Castaneda v. Aitken*, No. 15–cv–01635–MEJ, 2015 WL 3882755 (N.D. Cal. June 23, 2015)
- *Sanchez-Bautista v. Clark*, No. C14–1324–JLR–JPD, 2014 WL 7467022 (W.D. Wa. Dec. 3, 2014)
- *Acevedo-Rojas v. Clark*, No. C14-1323-JLR, 2014 WL 6908540 (W.D. Wa. Dec. 8, 2014)

- *Dutton-Myrie v. Lowe*, No. 3:CV–13–2160, 2014 WL 5474617 (M.D. Pa. Oct. 28, 2014)
- *Moreno–Gonzalez v. Johnson*, No. 1:14–CV–423, 2014 WL 5305470 (S.D. Ohio Oct. 15, 2014)
- *Khemlal v. Shanahan*, No. 14–CV–5186, 2014 WL 5020596 (S.D.N.Y. Oct. 8, 2014)
- *Giron-Castro v. Asher*, No. C14–0867JLR, 2014 WL 8397147 (W.D. Wa. Oct. 2, 2014)
- *Santos v. Sabol*, No. 3:14-cv-00635 (M.D. Pa. June 5, 2014)

IV. OTHER ISSUES

A. Your client's removal is not significantly likely in the reasonably foreseeable future and therefore he should be released.

1. Your client is from a country without a repatriation agreement with the United States or is unlikely to be removed to his home country.

- *See Owino v. Napolitano*, 575 F.3d 952 (9th Cir. 2009) (remanding to district court to determine whether detainee "faces a significant likelihood of removal to [Kenya] once his judicial and administrative review process is complete.").

2. Your client has won withholding or deferral of removal.

- *See Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006) (holding, in case of client who had won CAT relief, 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*).

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

- Courts have sustained constitutional challenges to detention under INA § 236(a) in extreme circumstances, where the continued detention appeared to lack any regulatory purpose.

- *See Kambo v. Poppell*, No. 07-800, 2007 WL 3051601 (W.D. Tex. Oct. 18, 2007) (ordering release of petitioner where DHS had sought stay of his initial bond determination, had then refused tender of bond, and had subsequently appealed IJ decision granting him adjustment of status); *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) (reviewing bond determination notwithstanding INA § 236(e)).

C. 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).

D. Does INA § 236(e) bar judicial review?

1. Courts have held that INA § 236(e) applies only to review of the Attorney General's discretionary judgment, and not to review of constitutional claims or questions of law.

- *See Demore v. Kim*, 538 U.S. 510 (2003); *Saint Fort v. Ashcroft*, 329 F.3d 191 (1st Cir. 2003); *Sylvain v. Attorney General*, 714 F.3d 150, 155 (3d Cir. 2013); *Al-Siddiqi v. Achim*, 531 F.3d 490, 494 (7th Cir. 2008); *Singh v. Holder*, 638 F.3d 1196 (9th Cir.2011).

2. The Ninth Circuit has held that INA § 236(e) bars review of the IJ's discretionary decision to set a particular bond amount.

- See *Prieto-Romero v. Clark*, 534 F.3d 1053 (9th Cir. 2008).

- *But see Doan v. INS*, 311 F.3d 1160 (9th Cir. 2002) (INA § 236(e) does not preclude challenge to bond amount where detention is not statutorily authorized); *Shokeh v. Thompson*, 369 F.3d 865 (5th Cir. 2004), *vacated as moot*, 375 F.3d 351 (5th Cir. 2004) (holding that a post-removal order bond that "has the effect of preventing an immigrant's release because of inability to pay and that results in potentially permanent detention is presumptively unreasonable") (internal quotation marks omitted).

E. Should I appeal the IJ's custody decision to the BIA prior to filing a habeas?

- 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 typically 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, and the traditional exceptions to such exhaustion apply).

F. Where to bring habeas challenge and against whom (i.e. who is the proper custodian)?

1. Under the immediate custodian rule, the proper respondent in a habeas action is the warden of the facility where the petitioner is detained. This rule restricts the petitioner to file in the district where he is confined.

2. The Supreme Court in *Rumsfeld v. Padilla*, 542 U.S. 426, 435 n.8 (2004), reserved the question of whether the immediate custodian rule applies to immigration detention cases.

The following circuits have held that the immediate custodian rule applies to habeas actions challenging immigration detention.

- First Circuit: *Vasquez v. Reno*, 233 F.3d 688 (1st Cir. 2000) (but recognizing that extraordinary circumstances may justify naming the Attorney General as the proper respondent where, for example, the government continually spirits the alien from one site to another in an attempt to manipulate jurisdiction)

- Third Circuit: *Yi v. Maugans*, 24 F.3d 500 (3d Cir. 1994)

  - *But see Chavez-Rivas v. Olsen*, 194 F. Supp. 2d 368 (D.N.J. 2002) (distinguishing *Yi* and holding that Attorney General was proper "custodian" of noncitizen challenging his indefinite detention, following petitioner's transfer from prison in New Jersey to prison in Tennessee after petition was filed, where Attorney General was legal custodian of petitioner, and where petitioner's challenge was directed at actions of the Attorney General and INS rather than warden of any particular facility).

- Seventh Circuit: *Kholyavskiy v. Achim*, 443 F.3d 946 (7th Cir. 2006).

In addition, district courts in the Fifth, Tenth, Eleventh and D.C. Circuits have applied the immediate custodian rule to habeas actions challenging immigration detention.

- *Bonitto v. BICE*, 547 F. Supp. 2d 747 (S.D. Tex. 2008)
- *Novitskiy v. Holm*, No. 12-CV-00965-MSK, 2013 WL 229577 (D. Colo. Jan. 22, 2013); *Gudoshnikov v. Napolitano*, No. CIV-11-958-C, 2012 WL 668820 (W.D. Okla. Jan. 27, 2012), *adopted*, No. CIV-11-958-C, 2012 WL 668818 (W.D. Okla. Feb. 28, 2012)
- *Braithwaite v. Holder*, No. 4:11-CV-56 CDL-MSH, 2012 WL 4210367 (M.D. Ga. Aug. 27, 2012), *adopted*, No. 4:11-CV-56 CDL, 2012 WL 4120416 (M.D. Ga. Sept. 19, 2012)
- *Nken v. Napolitano*, 607 F. Supp. 2d 149 (D.D.C. 2009).

- The Sixth Circuit considers the ICE district director to be the proper custodian of persons in immigration detention. *Roman v. Ashcroft*, 340 F.3d 314 (6th Cir. 2003).

- The Second Circuit has declined to rule on the issue. Henderson v. I.N.S., 157 F.3d 106 (2d Cir. 1998). Some district courts within the Second Circuit have found the proper custodian to be the Attorney General and/or DHS, see, *e.g.*, *Farez-Espinoza v. Chertoff*, 600 F. Supp. 2d 488 (S.D.N.Y. 2009), while the majority have recognized the warden of the detention facility as the proper custodian. *See, e.g.*, *Santana v. Muller*, No. 12 Civ. 430(PAC), 2012 WL 951768 (S.D.N.Y. Mar. 21, 2012).

- The Ninth Circuit held in *Armentero v. INS*, that the Attorney General and the Secretary of Homeland Security are proper respondents because each is in charge of the agencies ultimately responsible for the petitioner's custody. The case was ultimately dismissed on other grounds. *Armentero v. INS*, 340 F.3d 1058 (9th Cir. 2003), *dismissed on other grounds*, 412 F.3d 1088 (9th Cir. 2005); *but see Bogarin-Flores v. Napolitano*, No. 12CV0399 JAH WMC, 2012 WL 3283287 (S.D. Cal. Aug. 10, 2012) (applying immediate custodian rule).

A73 569 408 - New York City

Date: MAR - 2 2000

GERMAN LEYBINSKY a.k.a. Drobb Kohobsob a.k.a. Alex Muxaulob

IN BOND PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Irwin J. Berowitz, Esquire
Bretz & Associates
299 Broadway, Suite 810
New York, New York 10007

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) 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 Chiang, 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).[3] 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,

[3] 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 (IIRIRA), 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 IIRIRA, 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 inadmissability, 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.

(Reserved for use by the Court)

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 mans 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.

George W. Lindberg

Minute Order Form (06/97)

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:

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.		
	Mail AO 450 form.		
	Copy to judge/magistrate judge.		
slb	courtroom deputy's initials	Date/time received in central Clerk's Office	mailing deputy initials