

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF JUSTICE

### Immigration and Naturalization Service

#### 8 CFR Parts 212, 236, and 241

[INS No. 2029-00; AG Order No. 2310-2000]

RIN 1115-AF82

#### Detention of Aliens Ordered Removed

**AGENCY:** Immigration and Naturalization Service, Justice.

**ACTION:** Proposed rule.

**SUMMARY:** This rule would amend the Immigration and Naturalization Service (Service) regulations by providing a uniform review process governing the detention of criminal, inadmissible, and other aliens, excluding Mariel Cubans, who have received a final administrative removal order but whose departure has not been effected within the 90-day removal period. Such a process is necessary to ensure periodic custody reviews for post-order cases and consistency in decision-making. Since the Service is developing a specialized, ongoing administrative review process for these custody determinations, this rule would eliminate the appellate role of the Board of Immigration Appeals in post-final order custody determinations. This rule also would amend the Service's regulations to reflect the authority of the Commissioner, and through her, other designated Service officials, to release certain aliens from Service custody, issue orders of supervision, and grant stays of removal.

**DATES:** Written comments must be submitted on or before July 31, 2000.

**ADDRESSES:** Please submit written comments, in triplicate, to the Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street, NW, Room 5307, Washington, DC 20536. To ensure proper handling, please reference INS No. 2029-00 on your correspondence. Comments are available for public inspection at the above address by calling (202) 514-3048 to arrange for an appointment.

**FOR FURTHER INFORMATION CONTACT:** Joan S. Lieberman, Office of the General Counsel, Immigration and Naturalization Service, 425 I Street NW, Room 6100, Washington, DC 20536, telephone (202) 514-2895 (not a toll-free call).

#### SUPPLEMENTARY INFORMATION:

##### Why is the Service Issuing This Proposed Rule?

Congress has progressively acted to restrict the release into the community of aliens convicted of certain crimes, beginning with amendments affecting aggravated felons in the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, and the Immigration Act of 1990, Public Law 101-649. Congress extended these restrictions to other categories of crimes in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208. Under prior law, criminal aliens who were referred to as deportable under former section 242 of the Immigration and Nationality Act (Act) generally could only be detained for a period of 6 months pending removal after the issuance of a final deportation order. This restriction has been removed. Pursuant to section 241(a)(6) of the Act, 8 U.S.C. 1231(a)(6), certain classes of aliens may be detained in the discretion of the Attorney General beyond the 90-day removal period, including aliens that the Attorney General determines constitute a risk to the community or are unlikely to comply with the order of removal.

As a result of this change in the law and other factors, there has been a considerable increase in the number of aliens in immigration custody who have a final order of removal but who the Service is unable to remove during the removal period set out in section 241(a)(1) of the Act, 8 U.S.C. 1231(a)(1).

Two courts of appeals have upheld the Attorney General's authority to continue detention after the removal period. See *Duy Dac Ho v. Greene*, 204 F.3d 1045 (10th Cir. 2000); *Zadvydov v. Underdown*, 185 F.3d 279 (5th Cir. 1999). The Ninth Circuit recently held, in *Ma v. Reno*,—F.3d —, 2000 WL 358445 (9th Cir. Apr. 10, 2000), that such detention may not be extended more than a reasonable time beyond the statutory removal period, but the Department of Justice is seeking further

review of that decision. This rule will provide procedures to govern detention of aliens with final orders, to the extent that they continue to be detained after the expiration of the removal period.

The Department of Justice has determined that a separate custody review process is appropriate for aliens who are detained beyond the 90-day removal period. This action permits a comprehensive and fair review of post-order cases by establishing multiple levels of review to determine whether certain detained aliens may be released from custody, and sets forth the procedures governing such release or continued detention. As was the case with the implementation of the Mariel Cuban Review Plan, this review process is intended to balance the need to protect the American public from potentially dangerous aliens who remain in the United States contrary to law with the humanitarian problems created by another country's unjustified delay or refusal to accept repatriation of its nationals.

Currently, 8 CFR 241.4 provides the general procedures governing the detention of criminal, inadmissible, and other aliens who have received a final administrative removal order but whose departure has not been effected within the 90-day removal period specified in section 241(a)(1) of the Act, 8 U.S.C. 1231(a)(1). In 1999, pending promulgation of more specific procedures by regulation and to institute a more uniform process nationwide, the Service issued a series of memoranda to provide specific guidance to field offices concerning implementation of interim procedures governing post-order custody cases. *Detention Procedures for Aliens Whose Immediate Repatriation is Not Possible or Practicable*, February 3, 1999; *Supplemental Detention Procedures*, April 30, 1999; *Interim Changes and Instructions for Conduct of Post-Order Custody Reviews*, August 6, 1999 (collectively "the Pearson memoranda").

This rule establishes permanent procedures for post-order custody reviews. The rule will assist the decision maker in determining whether an alien is an appropriate candidate for release from custody after the expiration of the removal period. When the review procedures are adopted in final form, they will supersede the Pearson

memoranda. The new procedures are modeled after those governing the Mariel Cubans at 8 CFR 212.12 and consist of a file review with the opportunity for a panel interview and recommendation, and a final decision by a separate Service Headquarters unit, the Headquarters Post-Order Detention Unit (HQPDU). Although Mariel Cuban procedures will continue to be governed separately, the review process is similar for both groups of aliens.

#### **Who is Covered Under This Proposed Rule?**

This proposed rule would establish a permanent review procedure that would apply to noncriminal aliens as well as inadmissible and criminal aliens whose release after expiration of the 90-day removal period presents a significant risk of noncompliance with the order of removal or a danger to public safety. The Attorney General is authorized to detain these aliens beyond the removal period, as necessary, consistent with section 241(a)(6) of the Act, 8 U.S.C. 1231(a)(6), until they can be removed from the United States.

This permanent review procedure will govern all post-order custody reviews with the exception of Mariel Cubans whose parole under section 212(d)(5) of the Act, 8 U.S.C. 1182(d)(5), is governed by the provisions of 8 CFR 212.12. Mariel Cuban custody reviews will continue to be conducted pursuant to those provisions.

#### **What Are the Proposed Procedures for Post-Order Custody Reviews?**

Under the proposed rule, the district director maintains the responsibility for the initial custody review when the alien's immediate repatriation is proper but not practicable at the expiration of the removal period. For the initial post-order custody review at the expiration of the removal period (the 90-day custody review), the district director will conduct a file review. In most cases, it will be unnecessary for the district director to undertake a personal interview since the alien's immigration proceedings have recently concluded, and the information of record is recent. The district director has the discretion to conduct a personal or telephonic interview if he or she finds that it will assist him or her in making a custody determination. Further, the alien will be provided with the opportunity to present any relevant written information the alien desires in support of his or her release into the community.

After the 90-day custody review, the district director will notify the alien in writing that he or she is to be released from custody, or that the alien will be

continued in detention pending repatriation or further review of his or her custody status.

Where the district director has notified the alien that he or she will continue to be detained pending repatriation, the district director's authority to reconsider an alien's custody status may be extended for an additional period of up to 3 months after expiration of the removal period. The additional 3-month period will allow the district director to continue efforts to obtain the necessary travel documents to effect the alien's removal before the detention authority is transferred to Service Headquarters.

During the additional 3-month period, the alien may submit a written request to the district director for further review of his or her custody status. The district director shall consider information that the alien submits in support of his or her release from detention demonstrating a material change in circumstances. The district director will provide a written response as appropriate to the alien's submission of such new information and may, in the exercise of discretion, conduct any further review of the alien's custody status that he or she deems appropriate. The district director retains the authority to release the alien during this period as well.

If the alien has not been repatriated or released, detention authority transfers to the newly designated Service component, the HQPDU, under the authority of the Executive Associate Commissioner, Field Operations (Executive Associate Commissioner), either at the end of the 90-day removal period or at the expiration of the 3-month extension period. Under either circumstance, the HQPDU will ordinarily commence a custody review within 30 days of the transfer of detention authority or as soon as possible thereafter should unforeseen or emergent circumstances arise. The alien will receive written notice of the custody review approximately 30 days prior to the scheduled review. The HQPDU will conduct all further custody determinations as long as the alien remains in custody pending removal. Subsequent custody reviews will be conducted at annual intervals (or more frequently in the sole discretion of the HQPDU).

When the detention authority transfers to the HQPDU, that unit will conduct a file review for each alien previously ordered detained by the district director. If the file review does not result in a release decision, the alien will be given the opportunity for a panel interview. The two-member panel will

be chosen from professional staff of the Service. The interview will be conducted in person and a translator will be provided if the Service official determines that a translator's assistance is appropriate. As under the Mariel Cuban Review Plan, the interviewing panel will make a custody recommendation to the HQPDU. Upon receipt of the panel's recommendation, the HQPDU shall determine whether to detain or grant release consistent with the delegation of discretionary authority. The decision of the HQPDU will be final and will not be subject to further administrative review.

The HQPDU is not bound by the panel's recommendation. The HQPDU retains full statutory authority for custody determinations under sections 241(a)(6), 8 U.S.C. 1231(a)(6), and (for inadmissible aliens) 212(d)(5) of the Act, 8 U.S.C. 1182(d)(5). The panel's recommendation is designed to serve as an important guide to the exercise of discretion for the HQPDU, but the decision maker must be free to assess all of the circumstances in arriving at a final custody determination. The decision maker must also take into consideration changes in foreign and domestic affairs, the availability of fiscal resources, public policy and humanitarian concerns, and other factors that could weigh for or against the decision in an individual case.

The subsequent HQPDU periodic review, to be conducted within one year of a refusal to grant release under these procedures or as soon as practicable thereafter in case of unforeseen circumstances or an emergent situation, will address whether the alien can be released into the community if the alien has not been repatriated since the last review. The HQPDU may conduct a custody review at more frequent intervals at its sole discretion and consider written submissions demonstrating any material change in circumstances that supports the alien's release during the interval between reviews. Material change does not include mere disagreement with the decision denying release. The HQPDU will give a written response to the alien's submission of new information as appropriate under the rule. Written submissions, whether to the district director or the HQPDU, must be in English or they may not be given consideration.

The alien may be assisted by a person of his or her choice in preparing or submitting information in response to the notice of custody review. The Service has followed the guidelines set forth in 8 CFR 212.12(d)(4)(ii) (regarding representation of an alien before a

Mariel Cuban parole panel) rather than the more formal rules regarding attorney representatives at 8 CFR 292.1. Both 8 CFR 212.12 and the proposed rule allow the alien to be accompanied by a person of his or her choice at the panel interview (subject to the discretion of the institution and panel). It may be difficult for the detained alien to secure the services of a licensed attorney for each annual review, or counsel may change between reviews. Further, giving the alien discretion in selecting who will assist him or her in preparation of materials for submission to the district director and who will accompany him or her to the panel proceeding promotes two important Service objectives. These objectives are to make this process as flexible and nonadversarial as possible and to promote the alien's level of comfort with the proceedings. The alien's representative will be required to complete an INS Form G-28 (Notice of Entry of Appearance as Attorney or Representative) at the time of the interview or prior to reviewing the detainee's records. Attached to any notice of a file review or interview, the Service will provide a list of free or low cost attorneys and representatives who are located near the alien's place of confinement.

Although the Service will forward any notice or decision relating to the custody review to counsel or other representative of record through regular mail, the alien bears primary responsibility for ensuring that the individual providing assistance to him or her is aware of any notices, decisions, or other documentation relating to the custody review. Experience with the Cuban Review Plan has demonstrated that an alien may have several representatives successively, or may be assisted by an attorney, other person, or organization whose representation is not known to the Service.

Any person assisting the alien should not answer for the alien but assist the alien in the latter's presentation of information supporting a release decision. Whether the alien's case is before the district director for review or the panel for an interview, the purpose of the review process is to collect information. Because the decision maker must evaluate the suitability of the alien for release, it is important for the alien to address the district director or panel directly and be able to speak freely. The district director and panel need to hear from the alien rather than his or her representative.

Both the Executive Associate Commissioner through the HQPDU and the district director have the authority to withdraw approval for release and to

revoke release or parole in the exercise of discretion. Reasons for withdrawal of approval for release or revocation include the Service's ability to obtain a travel document and remove the alien, the alien's adverse conduct while awaiting release, the decision maker's belief that the alien's actions while in the community pose a threat to public safety, or any other circumstance that indicates that release would no longer be appropriate. If the decision maker withdraws release approval or revokes the alien's release or parole, the alien will receive written notification specifying the reasons for the withdrawal of approval for release or revocation of post-order release or parole.

This rule addresses Service procedures for conducting post-order custody reviews. It does not circumscribe the exercise of the Commissioner's authority to direct otherwise, as appropriate. Section 2.1 of title 8 of the Code of Federal Regulations delegates the authority vested with the Attorney General to the Commissioner. Section 241(a)(3) of the Act vests authority with the Attorney General to promulgate regulations governing supervision of aliens beyond the removal period and section 241(c)(2) vests authority with the Attorney General to grant stays of removal. Therefore, the Commissioner already has the authority to release certain aliens from Service custody, issue orders of supervision, and grant stays of removal. As directed by the Commissioner or Deputy Commissioner, Service officials have authority to release certain aliens from Service custody, issue orders of supervision, and grant stays of removal. Therefore, this rule also amends 8 CFR 241.4, 241.5 and 241.6 to reflect the concurrent authority of the Commissioner and other designated Service officials.

#### **What Other Changes Would This Rule Make?**

This rule would terminate the existing procedure of appeal to the Board of Immigration Appeals (Board) under 8 CFR 236.1 for an alien who receives an unfavorable custody decision from the district director. *See Matter of Saelee*, Interim Decision 3427 (BIA 2000). Since these aliens have final orders of removal, all legal issues involving removability (and any discretionary relief from removal, if available) have been resolved through the Executive Office for Immigration Review or through alternate procedures. Custody determinations at this stage of the process involve separate and distinct issues, and the Service has the

knowledge and expertise required to make these custody decisions.

The proposed rule for permanent procedures provides for an automatic multi-tiered annual review process subsequent to the district director's 90-day review as long as the alien remains in custody. The detainee is assured a periodic and thorough review that does not depend on the alien's request for a custody review or the filing of an appeal, but is required at regular intervals by regulation. This review process will ensure timely, scheduled reviews of each alien's case.

Accordingly, in order to implement a single comprehensive review process for post-order custody cases, this proposed rule removes all references to post-order detention from 8 CFR 236.1. As revised, 8 CFR 236.1 would govern detention issues only for aliens who have not yet received a final removal order.

Any case pending before the Board on the effective date of this rule when it is published as a final rule will be completed by the Board. Should the alien decide to withdraw his or her appeal, the Service shall continue to conduct custody reviews under the provisions of this rule.

This proposed regulation also removes 8 CFR 212.13 and any references to that section in 8 CFR 212.5 and 8 CFR 212.12. Section 212.13 established a single Departmental parole review for all excludable Mariel Cubans who on the effective date of the regulation were detained by virtue of the Attorney General's authority under the Act and whose parole had been denied after the exhaustion of the review procedures of 8 CFR 212.12. The Departmental Review Panels have completed the review of the cases of detainees eligible for such review. Thus, there is no longer a need for this regulation. This action will not otherwise affect the Cuban Review Plan set forth in 8 CFR 212.12.

#### **What Must the Alien Demonstrate to Show His or Her Suitability for Release?**

The alien must be able to show to the satisfaction of the decision maker that he or she does not constitute a danger to public safety or a flight risk pursuant to the criteria set forth in the proposed regulation.

#### **If a Travel Document Can Be Obtained, How Is the Custody Review Process Affected?**

Detention or release of aliens with a final order of removal is tied to the Service's mission to enforce the immigration laws and protect the interests of the United States, pending

the aliens' eventual removal from the United States. Accordingly, district directors will continue to make efforts to obtain travel documents even after review authority has transferred to the HQPDU. Headquarters Detention and Deportation, Office of Field Operations will also assist in the effort to secure travel documents.

The ability to secure a travel document by itself supports a decision to continue detention pending the removal of the alien and obviates the need for further custody review because it means the alien can be deported. See 8 CFR 212.12(g)(1). Custody reviews may be premitted in the case of an alien for whom travel documents are available. Pending litigation, an administrative or judicial stay, or other barrier to removal does not entitle an alien who can be repatriated to release within the United States pending resolution of the underlying action or event. Aliens whose removal is deferred under 8 CFR 208.17 may be considered for release.

#### **Will There Be Special Release Conditions Under the Proposed Rule and Will Work Authorization Be Granted?**

Release conditions and work authorization for aliens subject to a final order of removal will continue to be governed by 8 CFR 241.5. The district director or HQPDU may wish to impose conditions, in addition to those enumerated by regulation, such as that the alien obey all laws, not associate with any persons involved in criminal activity, not associate with anyone convicted of a felony without permission, not carry firearms or other dangerous weapons, or such other conditions as the decision-maker deems appropriate. Under 8 CFR 241.5(c), a grant of work authorization is discretionary but requires the decision maker to make an initial finding that the alien cannot be immediately removed because no country will accept the alien or that the alien's removal is impracticable or contrary to the public interest.

Sponsorship and evidence of financial support may be required as a precursor to release under the proposed rule. The Service has determined that appropriate sponsorship is in the best interest of the alien and community when an alien is approved for release pending repatriation. See, e.g., *Fernandez-Roque v. Smith*, 734 F. 2d 576 (11th Cir. 1984). Although the Service reserves the authority to impose conditions of release, including appropriate sponsorship, this rule does not compel the Government to tailor existing

programs to the needs of individual aliens or to create or fund additional programs if suitable sponsorship is not located or available for an alien.

If an alien is detained in a facility that does not provide any rehabilitative programs, no negative inference respecting release will be drawn against the alien in making a custody determination based on the fact that the alien did not participate in such programs. However, if the facility has such programs available to the alien but the alien refuses to participate, that fact may be considered by the decision-maker.

#### **Regulatory Flexibility Act**

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule would provide a more uniform review process governing the detention of criminal, inadmissible, and other aliens who have received a final administrative removal order but whose departure has not been effected within the 90-day removal period. This rule does not affect small entities as that term is defined in 5 U.S.C. 601(6).

#### **Unfunded Mandates Reform Act of 1995**

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### **Small Business Regulatory Enforcement Fairness Act of 1996**

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Act of 1996. 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

#### **Executive Order 12866**

This rule is considered by the Department of Justice, to be a "significant regulatory action" under

Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, this rule has been submitted to the Office of Management and Budget for review.

#### **Executive Order 13132**

This regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

#### **Executive Order 12988**

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform.

#### **List of Subjects**

##### *8 CFR Part 212*

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

##### *8 CFR Part 236*

Administrative practice and procedure, Aliens, Immigration.

##### *8 CFR Part 241*

Administrative practice and procedure, Aliens, Immigration.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

#### **PART 212—DOCUMENTARY REQUIREMENTS; NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE**

1. The authority citation for part 212 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1187, 1225, 1226, 1227, 1228, 1252, 8 CFR part 2.

##### **§ 212.5 [Amended]**

2. Section 212.5(f) is amended by revising the phrase “§§ 212.12 and 212.13” to read “§ 212.12.,”

##### **§ 212.12 [Amended]**

3. Section 212.12 is amended by:

- In paragraph (b) introductory text, revising the phrase “Except as provided in § 212.13, the authority” to read “The authority;” and by
- In paragraph (g)(2), removing the word “either” and removing the phrase “or § 212.13, whichever is later.”

**§ 212.13 [Removed]**

4. Remove § 212.13.

**PART 236—APPREHENSION AND DETENTION OF INADMISSIBLE AND DEPORTABLE ALIENS; REMOVAL OF ALIENS ORDERED REMOVED**

5. The authority citation for part 236 continues to read as follows:

**Authority:** 8 U.S.C. 1103, 1182, 1224, 1225, 1226, 1227, 1362; sec. 303(b) of Div. C of Pub. L. No. 104–208; 8 CFR part 2.

6. Section 236.1 is amended by:

- a. Removing the last sentence in paragraph (d)(1);
- b. Revising paragraph (d)(2); and by
- c. Removing paragraph (d)(3)(iii), to read as follows:

**§ 236.1 Apprehension, custody, and detention.**

\* \* \* \* \*

(d) \* \* \*

(2) *Application to the district director.* After expiration of the 7-day period in paragraph (d)(1) of this section, the respondent may request review by the district director of the conditions of his or her release.

\* \* \* \* \*

**PART 241—APPREHENSION AND DETENTION OF ALIENS ORDERED REMOVED**

7. The authority citation for part 241 continues to read as follows:

**Authority:** 8 U.S.C. 1103, 1223, 1227, 1251, 1253, 1255, and 1330; 8 CFR part 2.

8. Section 241.4 is revised to read as follows:

**§ 241.4 Continued detention of inadmissible, criminal, and other aliens beyond the removal period.**

(a) *Scope.* The authority to continue an alien in custody or grant release or parole under sections 241(a)(6) and 212(d)(5)(A) of the Act shall be exercised by the Commissioner or Deputy Commissioner, as follows: Except as otherwise directed by the Commissioner or her designee, the Executive Associate Commissioner Field Operations or the district director may continue an alien in custody beyond the removal period described in section 241(a)(1) of the Act pursuant to the procedures described in this section. Except as provided in paragraph (b)(2) of this section, the provisions of this section apply to custody determinations for the following groups of aliens:

(1) An alien who is inadmissible under section 212 of the Act, including an excludable alien convicted of one or more aggravated felony offenses and subject to the provisions of section

501(b) of the Immigration Act of 1990, Public Law 101–649 (codified at 8 U.S.C. 1226(e)(1) through (3)(1994));

(2) An alien who is removable under section 237(a)(1)(C) of the Act;

(3) An alien who is removable under sections 237(a)(2) or 237(a)(4) of the Act, including deportable criminal aliens whose cases are governed by former section 242 of the Act prior to amendment by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Public Law 104–208, Div. C; and

(4) An alien who is removable under any other section of the Act, including an alien granted withholding or deferral of removal under 8 CFR part 208, may be detained beyond the removal period if the decision maker determines that the alien is unlikely to comply with the removal order or is a risk to the community.

(b) *Applicability to particular aliens—*  
(1) *Motions to reopen.* An alien who has filed a motion to reopen immigration proceedings for consideration of relief from removal, including withholding or deferral of removal pursuant to 8 CFR 208.16 or 208.17, shall remain subject to the provisions of this section unless the motion to reopen is granted. Section 236 of the Act and 8 CFR 236.1 govern custody determinations for aliens who are in pending immigration proceedings before the Executive Office for Immigration Review.

(2) *Parole for certain Cuban nationals.* The review procedures in this section do not apply to any Mariel Cuban who is being detained by the Service pending an exclusion or removal proceeding, or pending his or her return to Cuba or removal to another country. Instead, the determination whether to release on parole, or to revoke such parole, or to detain, shall in the case of a Mariel Cuban be governed by the procedures in 8 CFR 212.12.

(c) *Delegation of authority.* The Attorney General's statutory authority to make custody determinations under sections 241(a)(6) and 212(d)(5)(A) of the Act when there is a final order of removal, is delegated as follows:

(1) *District directors.* The initial custody determination described in paragraph (h) of this section and any further custody determination concluded in the 3-month period immediately following expiration of the 90-day removal period, subject to the provisions of paragraph (c)(2) of this section, will be made by the district director having jurisdiction over the alien. The district director shall maintain appropriate files respecting each detained alien reviewed for possible release, and shall have

authority to determine the order in which the cases shall be reviewed, and to coordinate activities associated with these reviews in his or her respective district.

(2) *Headquarters Post-Order Detention Unit (HQPDU).* For any alien the district director refers for further review after the 90-day removal period, or any alien who has not been released or repatriated by the expiration of the 3-month period after the 90-day review, all further custody determinations will be made by the Executive Associate Commissioner, acting through the HQPDU.

(3) *The HQPDU review plan.* The Executive Associate Commissioner shall appoint a Director of the HQPDU. The Director of the HQPDU shall have authority to establish and maintain appropriate files respecting each detained alien to be reviewed for possible release, to determine the order in which the cases shall be reviewed, and to coordinate activities associated with these reviews.

(4) *Additional delegation of authority.* All references to the Executive Associate Commissioner and district director in this section shall be deemed to include any person or persons (including a committee) designated in writing by the district director or Executive Associate Commissioner to exercise powers under this section.

(d) *Custody determinations.* A copy of any decision by the district director or Executive Associate Commissioner to release or to detain an alien shall be provided to the detained alien. A decision to retain custody shall briefly set forth the reasons for the continued detention. A decision to release may contain such special conditions as are considered appropriate in the opinion of the Service. Notwithstanding any other provisions of this section, there is no appeal from the district director's or the Executive Associate Commissioner's decision.

(1) *Showing by the alien.* The district director or the Executive Associate Commissioner may release an alien if the alien demonstrates to the satisfaction of the Attorney General or her designee that his or her release will not pose a danger to the community or to the safety of other persons or to property or a significant risk of flight pending such alien's removal from the United States. The district director or the Executive Associate Commissioner may also, in accordance with the procedures and consideration of the factors set forth in this section, continue in custody any alien described in paragraphs (a) and (b)(1) of this section.

(2) *Service of decision and other documents.* All notices, decisions, or other documents in connection with the custody reviews conducted under this section by the district director or Executive Associate Commissioner shall be served on the alien, in accordance with 8 CFR 103.5a, by the Service district office having jurisdiction over the alien. Release documentation (including employment authorization if appropriate) shall be issued by the district office having jurisdiction over the alien in accordance with the custody determination made by the district director or by the Executive Associate Commissioner. Copies of all such documents will be retained in the alien's record and forwarded to the HQPDU.

(3) *Alien's representative.* The alien's representative is required to complete an INS Form G-28, Notice of Entry of Appearance as Attorney or Representative, at the time of the interview or prior to reviewing the detainee's records. The Service will forward by regular mail a copy of any notice or decision that is being served on the alien only to the attorney or representative of record. The alien remains responsible for notification to any other individual providing assistance to him or her.

(e) *Criteria for release.* Before making any recommendation or decision to release a detainee, a majority of the Review Panel members, or the Director of the HQPDU in the case of a record review, must conclude that:

(1) Travel documents for the alien are not available or, in the opinion of the Service, immediate removal, while proper, is otherwise not practicable or not in the public interest;

(2) The detainee is presently a non-violent person;

(3) The detainee is likely to remain nonviolent;

(4) The detainee is not likely to pose a threat to the community following his or her release;

(5) The detainee is not likely to violate the conditions of his or her release; and (6) The detainee does not pose a significant flight risk.

(f) *Factors for consideration.* The following factors should be weighed in considering whether to recommend further detention or release of a detainee:

(1) The nature and number of disciplinary infractions or incident reports received while incarcerated or while in Service custody;

(2) The detainee's criminal conduct and criminal convictions, including consideration of the nature and severity of the alien's convictions, sentences

imposed and time actually served, probation and criminal parole history, evidence of recidivism, and other criminal history;

(3) Any available psychiatric and psychological reports pertaining to the detainee's mental health;

(4) Evidence of rehabilitation including institutional progress relating to participation in work, educational, and vocational programs, where available;

(5) Favorable factors, including ties to the United States such as the number of close relatives residing here lawfully;

(6) Prior immigration violations and history;

(7) The likelihood that the alien is a significant flight risk or may abscond to avoid removal, including history of escapes, failures to appear for judicial or other proceedings, absence without leave from any halfway house or sponsorship program, and other defaults; and

(8) Any other information that is probative of whether the alien is likely to adjust to life in a community, is likely to engage in future acts of violence, is likely to engage in future criminal activity, is likely to pose a danger to the safety of himself or herself or to other persons or to property, or is likely to violate the conditions of his or her release from immigration custody pending removal from the United States.

(g) *Travel documents and docket control for aliens continued in detention beyond the removal period—(1) In general.* The district director shall continue to undertake appropriate steps to secure travel documents for the alien both before and after the expiration of the removal period. If the district director is unable to secure travel documents within the removal period, he or she shall apply for assistance from Headquarters Detention and Deportation, Office of Field Operations. The district director shall promptly advise the HQPDU Director when travel documents are obtained for an alien whose custody is subject to review by the HQPDU. The Service's determination that receipt of a travel document is likely may by itself warrant continuation of detention pending the removal of the alien from the United States.

(2) *Availability of travel document.* In making a custody determination, the district director and the Director of the HQPDU shall consider the ability to obtain a travel document for the alien. If it is established at any stage of a custody review that, in the judgment of the Service, travel documents can be obtained, or such document is forthcoming, the alien will not be

released unless immediate removal is not practicable or in the public interest.

(3) *Removal.* The Service will not conduct a custody review under these procedures when the Service notifies the alien that it is ready to execute an order of removal.

(4) *Alien's cooperation.* Release will be denied in accordance with section 241(a)(1)(C) of the Act if the alien fails or refuses to cooperate in the process of obtaining a travel document.

(h) *District director's custody review procedures.* The district director's custody determination will be developed in accordance with the following procedures:

(1) *Record review.* The district director will conduct the initial custody review. For aliens described in paragraphs (a) and (b)(1) of this section, the district director will conduct a file review prior to the expiration of the 90-day removal period. This initial post-order custody review will consist of a review of the alien's records, and any written information submitted in English to the district director by or on behalf of the alien. However, the district director may in his or her discretion schedule a personal or telephonic interview with the alien as part of this custody determination. The district director may also consider any other relevant information relating to the alien or his or her circumstances and custody status.

(2) *Notice to alien.* The district director will provide written notice to the detainee approximately 30 days in advance of the pending record review so that the alien may submit information in writing in support of his or her release. The alien may be assisted by a person of his or her choice, subject to the institution and panel's discretion, in preparing or submitting information in response to the district director's notice. Such assistance shall be at no expense to the Government. If the alien or his or her representative requests additional time to prepare materials beyond the time when the district director expects to conduct the file review, such a request will constitute a waiver of the requirement that the review occur prior to the expiration of the removal period.

(3) *Factors for consideration.* The district director's review will include but is not limited to consideration of the factors described in paragraph (f) of this section. Before making any decision to release a detainee, the district director must be able to reach the conclusions set forth in paragraph (e) of this section.

(4) *District director's decision.* The district director will notify the alien in writing that he or she is to be released from custody, or that he or she will be

continued in detention pending repatriation or further review of his or her custody status.

(5) *District office staff.* The district director may delegate the authority to conduct the custody review, develop recommendations, or render the custody or release decision to those persons directly responsible for detention within his or her district. This includes the deputy district director, the assistant director for detention and deportation, the officer-in-charge of a detention center, persons acting in such capacities, or such other persons as the district director may designate from the professional staff of the Service.

(i) *Determinations by the Executive Associate Commissioner.*

Determinations by the Executive Associate Commissioner to release or retain custody of aliens shall be developed in accordance with the following procedures.

(1) *Review panels.* The HQPDU Director shall designate a panel or panels to make recommendations to the Executive Associate Commissioner. A Review Panel shall, except as otherwise provided, consist of two persons. Members of a Review Panel shall be selected from the professional staff of the Service. All recommendations by the two member Review Panel shall be unanimous. If the vote of the two-member Review Panel is split, it shall adjourn its deliberations concerning that particular detainee until a third Review Panel member is added. The third member of any Review Panel shall be the Director of the HQPDU or his or her designee. A recommendation by a three-member Review Panel shall be by majority vote.

(2) *Record review.* Initially, and at the beginning of each subsequent review, the HQPDU Director or a Review Panel shall review the alien's file. Upon completion of this record review, the HQPDU Director or the Review Panel may issue a written recommendation that the alien be released and reasons therefore.

(3) *Personal interview.* (i) If the HQPDU Director does not accept a panel's recommendation to grant release after a record review, or if the alien is not recommended for release, a Review Panel shall personally interview the detainee. The scheduling of such interviews shall be at the discretion of the HQPDU Director. The HQPDU Director will provide a translator if he or she determines that such assistance is appropriate.

(ii) The alien may be accompanied during the interview by a person of his or her choice, subject to the institution's and the panel's discretion, who is able

to attend at the time of the scheduled interview. Such assistance shall be at no expense to the Government. The alien may submit to the Review Panel any information, in English, that he or she believes presents a basis for his or her release.

(4) *Alien's participation.* Every alien shall respond to questions or provide other information when requested to do so by Service officials for the purpose of carrying out the provisions of this rule.

(5) *Panel recommendation.* Following completion of the interview and its deliberations, the Review Panel shall issue a written recommendation that the alien be released or remain in custody pending removal or further review. This written recommendation shall include a brief statement of the factors that the Review Panel deems material to its recommendation.

(6) *Determination.* The Executive Associate Commissioner shall consider the recommendation and appropriate file material and issue a custody determination, in the exercise of discretion under the standards of this section. The Executive Associate Commissioner's review will include but is not limited to consideration of the factors described in paragraph (f) of this section. Before making any decision to release a detainee, the Executive Associate Commissioner must be able to reach the conclusions set forth in paragraph (e) of this section. The Executive Associate Commissioner is not bound by the panel's recommendation.

(j) *Conditions of release—(1) In general.* The district director or Executive Associate Commissioner may in his or her discretion impose such conditions or special conditions on release as the Service considers appropriate in an individual case or cases, including but not limited to the conditions of release noted in § 212.5(c) of this chapter and § 241.5. An alien released under this section must abide by the release conditions specified by the Service in relation to his or her release or sponsorship.

(2) *Sponsorship.* The district director or Executive Associate Commissioner may, in the exercise of discretion, condition release on placement with a close relative who agrees to act as a sponsor, such as a parent, spouse, child, or sibling who is a lawful permanent resident or a citizen of the United States, or may condition release on the alien's placement or participation in an approved halfway house, mental health project, or community project when, in the opinion of the Service, such condition is warranted. No detainee may be released until sponsorship,

housing, or other placement has been found for the detainee, if ordered, including but not limited to evidence of financial support.

(3) *Employment authorization.* The district director and Executive Associate Commissioner may in their discretion grant employment authorization under the same conditions set forth in § 241.5(c) for aliens released under an order of supervision.

(4) *Withdrawal of release approval.* The district director or Executive Associate Commissioner may, in their discretion, withdraw approval for release of any detained alien prior to release when, in the decision maker's opinion, the conduct of the detainee, or any other circumstance, indicates that release would no longer be appropriate.

(k) *Timing of reviews.* The timing of reviews shall be in accordance with the following guidelines:

(1) *District director.* (i) Prior to the expiration of the 90-day removal period, the district director shall conduct a custody review for an alien described in paragraphs (a) and (b)(1) of this section where the alien's removal, while proper, cannot be accomplished because no country will accept the alien, or removal of the alien prior to expiration of the removal period is impracticable or contrary to the public interest. As provided in paragraph (h)(4) of this section, the district director will notify the alien in writing that he or she is to be released from custody, or that he or she will be continued in detention pending repatriation or further review of his or her custody status.

(ii) When release is denied pending the alien's repatriation, the district director in his or her discretion may retain responsibility for custody determinations for up to 3 months after expiration of the 90-day removal period, during which time the district director may conduct such additional review of the case as he or she deems appropriate. The district director may release the alien if he or she is not removed within the 3-month period following the expiration of the 90-day removal period, in accordance with paragraphs (e), (f), and (j) of this section, or the district director may refer the alien to the HQPDU for further custody review.

(2) *HQPDU reviews—(i) District director referral for further review.* When the district director refers a case to the HQPDU for further review, as provided in paragraph (c)(2) of this section, authority over the custody determination transfers to the Executive Associate Commissioner, according to procedures established by the HQPDU. The Service will provide the alien with approximately 30 days notice of this

further review, which will ordinarily be conducted by the expiration of the removal period or as soon thereafter as practicable.

(ii) *District director retains jurisdiction.* When the district director has advised the alien at the 90-day review as provided in paragraph (h)(4) of this section that he or she will remain in custody pending repatriation, and the alien is not removed within 3 months of the district director's decision, authority over the custody determination transfers from the district director to the Executive Associate Commissioner. The initial HQPDU review will ordinarily be conducted at the expiration of the 3-month period after the 90-day review or as soon thereafter as practicable. The Service will provide the alien with approximately 30 days notice of that review.

(iii) *Continued detention cases.* A subsequent review shall ordinarily be commenced for any detainee within approximately one year of a refusal by the Executive Associate Commissioner to grant release. Not more than once every three months in the interim between annual reviews, the alien may submit a written request to the HQPDU for release consideration based on a proper showing of a material change in circumstances since the last annual review. The HQPDU shall respond to the alien's request in writing within approximately 90 days.

(iv) *Review scheduling.* Reviews will be conducted within the time periods specified in paragraphs (k)(1)(i), (k)(2)(i), (k)(2)(ii), and (k)(2)(iii) of this section or as soon as possible thereafter, allowing for any unforeseen circumstances or emergent situation.

(v) *Discretionary reviews.* The HQPDU Director, in his or her discretion, may schedule a review of a detainee at shorter intervals when he or she deems such review to be warranted.

(3) *Postponement of review.* In the case of an alien who is in the custody of the Service, the district director or the HQPDU Director may, in his or her discretion, suspend or postpone the custody review process if such detainee's prompt deportation is practicable and proper, or for other good cause. The decision and reasons for the delay shall be documented in the alien's file. Reasonable care will be exercised to assure that the alien's case is reviewed once the reason for delay is remedied or if the alien is not removed from the United States as anticipated at the time review was suspended or postponed.

(4) *Transition provisions.* (i) The provisions of this section apply to cases that have already received the 90-day review. If the alien's last review under

the procedures set out in the Executive Associate Commissioner memoranda entitled *Detention Procedures for Aliens Whose Immediate Repatriation is Not Possible or Practicable*, February 3, 1999; *Supplemental Detention Procedures*, April 30, 1999; *Interim Changes and Instructions for Conduct of Post-order Custody Reviews*, August 6, 1999, was a file review and the alien remains in custody, the HQPDU will conduct a custody review within 6 months of that review. If the alien's last review included an interview, the HQPDU review will be scheduled one year from the last review. These reviews will be conducted pursuant to the procedures in paragraph (i) of this section, within the time periods specified in this paragraph or as soon as possible thereafter, allowing for resource limitations, unforeseen circumstances, or an emergent situation.

(ii) Any case pending before the Board on the effective date (after this rule is published as a final rule) will be completed by the Board. If the Board affirms the district director's decision to continue the alien in detention, the next scheduled custody review will be conducted one year after the Board's decision in accordance with the procedures in paragraph (i) of this section.

(l) *Revocation of release—(1) Violation of conditions of release.* Any alien described in paragraphs (a) or (b)(1) of this section who has been released under an order of supervision or other conditions of release who violates the conditions of release may be returned to custody. Any such alien who violates the conditions of an order of supervision is subject to the penalties described in section 243(b) of the Act. Upon revocation, the alien will be notified of the reasons for revocation of his or her release or parole.

(2) *Determination by the Service.* The Executive Associate Commissioner shall have authority, in the exercise of discretion, to revoke release and return to Service custody an alien previously approved for release under the procedures in this section. A district director may also revoke release of an alien when, in the district director's opinion, revocation is in the public interest and circumstances do not reasonably permit referral of the case to the Executive Associate Commissioner. Release may be revoked in the exercise of discretion when, in the opinion of the revoking official:

(i) The purposes of release have been served;

(ii) The alien violates any condition of release;

(iii) It is appropriate to enforce a removal order or to commence removal proceedings against an alien; or

(iv) The conduct of the detainee, or any other circumstance, indicates that release would no longer be appropriate.

(3) *Timing of review when release is revoked.* The HQPDU Director shall schedule the review process in the case of an alien whose previous release or parole from immigration custody pursuant to a decision of either the district director or the Executive Associate Commissioner under the procedures in this section has been or is subject to being revoked. The normal review process will commence with notification to the alien of a file review and scheduling of an interview, which will ordinarily be expected to occur within approximately 3 months after release is revoked. Thereafter, custody reviews will be conducted annually under the provisions of paragraphs (i), (j), and (k) of this section.

9. Section 241.5 is amended by revising paragraph (a) introductory text to read as follows:

**§ 241.5 Conditions of release after removal period.**

(a) *Order of supervision.* An alien released pursuant to § 241.4 shall be released pursuant to an order of supervision. The Commissioner, Deputy Commissioner, Executive Associate Commissioner Field Operations, regional director, district director, acting district director, deputy district director, assistant district director for investigations, assistant district director for detention and deportation, or officer-in-charge may issue Form I-220B, Order of Supervision. The order shall specify conditions of supervision including, but not limited to, the following:

\* \* \* \* \*

10. Section 241.6 is revised to read as follows:

**§ 241.6 Administrative stay of removal.**

(a) Any request of an alien under a final order of deportation or removal for a stay of deportation or removal shall be filed on Form I-246, Stay of Removal, with the district director having jurisdiction over the place where the alien is at the time of filing. The Commissioner, Deputy Commissioner, Executive Associate Commissioner Field Operations, regional director, or district director, in his or her discretion and in consideration of factors such as are listed in § 212.5 of this chapter and section 241(c) of the Act, may grant a stay of removal or deportation for such time and under such conditions as he or she may deem appropriate. Neither the request nor the failure to receive notice

of disposition of the request shall delay removal or relieve the alien from strict compliance with any outstanding notice to surrender for deportation or removal.

(b) Denial by the Commissioner, Deputy Commissioner, Executive Associate Commissioner Field Operations, regional director, or district director of a request for a stay is not appealable, but such denial shall not preclude an immigration judge or the Board from granting a stay in connection with a motion to reopen or a motion to reconsider as provided in 8 CFR part 3.

(c) The Service shall take all reasonable steps to comply with a stay granted by an immigration judge or the Board. However, such a stay shall cease to have effect if granted (or communicated) after the alien has been placed aboard an aircraft or other conveyance for removal and the normal boarding has been completed.

Dated: June 23, 2000.

**Janet Reno,**

*Attorney General.*

[FR Doc. 00-16560 Filed 6-29-00; 8:45 am]

BILLING CODE 4410-10-P

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## DEPARTMENT OF AGRICULTURE

### Food Safety and Inspection Service

#### 9 CFR Parts 317, 318, 319, 381

[Docket No. 97-036R]

#### Other Consumer Protection (OCP) Activities—Reopening of Comment Period

**AGENCY:** Food Safety and Inspection Service, USDA.

**ACTION:** Proposed rule; reopening of comment period.

**SUMMARY:** The Food Safety and Inspection Service (FSIS) is reopening the comment period for the advanced notice of proposed rulemaking "Other Consumer Protection (OCP) Activities" for 60 days. This action responds to a request to allow additional time for comments.

**DATES:** Comments must be received on or before August 29, 2000.

**ADDRESSES:** Submit one original and two copies of written comments to: FSIS Docket Clerk, Docket # 97-036R, Room 102, Cotton Annex Building, 300 12th Street, SW, Washington, DC 20250-3700. All comments received in response to this notice will be considered part of the public record and will be available for viewing in the FSIS Docket Room between 8:30 a.m. and

4:30 p.m., Monday through Friday. FSIS has made a technical paper available in the FSIS Docket Room and on the FSIS homepage ([www.fsis.usda.gov](http://www.fsis.usda.gov)).

**FOR FURTHER INFORMATION CONTACT:**

Daniel Engeljohn, Director, Regulations Development and Analysis Division, Food Safety and Inspection Service, Washington, DC 20250-3700, at (202) 720-5627, fax number (202) 690-0486.

**SUPPLEMENTARY INFORMATION:** On March 17, 2000, FSIS published the advanced notice of proposed rulemaking (ANPR) "Other Consumer Protection (OCP) Activities" (65 FR 14486). FSIS published this ANPR to request comments on the need and desirability of revising its approach to verifying that meat and poultry products are not misbranded, economically adulterated, or otherwise unacceptable for reasons that do not necessarily raise food safety or public health concerns. In the ANPR, FSIS referred to these program activities as "other consumer protection" (OCP) activities. The ANPR defined and described FSIS' OCP activities and discussed the Agency's need for revised regulations and verification and enforcement procedures.

FSIS has received a request to extend the comment period for an additional 180 days because of the large scope of the ANPR. FSIS agrees that the ANPR addresses many issues and wants to receive as much input as possible. However, because this is an ANPR, and any further actions by the Agency will be issued in a notice and comment proposed rulemaking, FSIS is reopening the comment period for 60 days. After the comment period closes, FSIS, intends to proceed with development of various OCP notice and comment proposed rulemakings.

**Additional Public Notification**

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to better ensure that minorities, women, and persons with disabilities are aware of this notice, FSIS will announce it and provide copies of this **Federal Register** publication in the FSIS Constituent Update. FSIS provides a weekly FSIS Constituent Update, which is communicated via fax to over 300 organizations and individuals. In addition, the update is available on line through the FSIS web page located at <http://www.fsis.usda.gov>. The update is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, recalls, and any other types of information that could affect or would be of interest to our constituents/

stakeholders. The constituent fax list consists of industry, trade, and farm groups, consumer interest groups, allied health professionals, scientific professionals, and other individuals that have requested to be included. Through these various channels, FSIS is able to provide information to a much broader, more diverse audience.

For more information and to be added to the constituent fax list, fax your request to the Congressional and Public Affairs Office, at (202) 720-5704.

Done at Washington, DC on: June 22, 2000.

**Thomas J. Billy,**

*Administrator.*

[FR Doc. 00-16520 Filed 6-29-00; 8:45 am]

BILLING CODE 3410-DM-P

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## NUCLEAR REGULATORY COMMISSION

### 10 CFR Parts 30, 31, 32, 33, 34, 35, 36, 39, 40, 50, 61, 70, 72, and 76

[Docket No. PRM-30-63]

#### Natural Resources Defense Council; Receipt of Petition for Rulemaking

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Petition for rulemaking; Notice of receipt.

**SUMMARY:** The Nuclear Regulatory Commission (NRC) has received and requests public comment on a petition for rulemaking filed by the Natural Resources Defense Council (NRDC). The petition has been docketed by the Commission and has been assigned Docket No. PRM-30-63. The petitioner requests that the NRC amend its regulations to require that an individual report illegal payments to regulators if the individual has knowledge or evidence of the illegal payments. The petitioner requests that an individual who fails to make such a report not be issued a license or allowed to retain a license.

**DATES:** Submit comments by September 13, 2000. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given except as to comments received on or before this date.

**ADDRESSES:** Submit comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Attention: Rulemakings and Adjudications staff.

Deliver comments to 11555 Rockville Pike, Rockville, Maryland, between 7:30 am and 4:15 pm on Federal workdays.

For a copy of the petition, write to David L. Meyer, Chief, Rules and