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DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 3 and 241

[INS No. 2156–01; AG Order No. 2533–2001]

RIN 1115–AG29

Continued Detention of Aliens Subject to Final Orders of Removal

AGENCY: Immigration and Naturalization Service and Executive Office for Immigration Review, Justice.

ACTION: Interim rule with request for comments.

SUMMARY: This rule amends the custody review process governing the detention of aliens who are the subject of a final order of removal, deportation or exclusion, in light of the decision of the U.S. Supreme Court in *Zadvydas* v. *Davis,* 533 U.S. ____, 121 S. Ct. 2491 (2001). This rule adds new provisions to govern determinations by the Immigration and Naturalization Service (Service) as to whether there is a significant likelihood that an alien will be removed from the United States in the reasonably foreseeable future, and whether there are special circumstances justifying the continued detention of certain aliens. This rule also makes conforming changes to the existing post-removal-period detention regulations, and provides procedures to implement the statutory provision for the extension of the removal period beyond 90 days if the alien conspires or acts to prevent his or her removal or fails or refuses to assist the Service in obtaining documents necessary to effect his or her removal.

DATES: *Effective date:* This interim rule is effective November 14, 2001. *Comment date:* Written comments must be submitted on or before January 14, 2002.

ADDRESSES: Please submit written comments to the Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street NW., Room 4034, Washington, DC 20536. To ensure proper handling, please reference INS No. 2156–01 on your correspondence. The public may also submit comments electronically to the Service at insregs@usdoj.gov. When submitting comments electronically, please make sure that you include INS No. 2156–01 in the subject field. 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). For matters relating to the Executive Office for Immigration Review: Chuck Adkins-Blanch, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2400, Falls Church, VA 22041, telephone (703) 305–0470.

SUPPLEMENTARY INFORMATION:

I. Background

Section 241(a) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1231(a), authorizes the Attorney General to detain aliens who are subject to final orders of removal, in order to effectuate their removal from the United States. Section 241(a)(1) of the Act provides a general rule that such aliens shall be removed within the 90-day ''removal period,'' commencing on the date the removal order becomes administratively final, the date that the Service is able to execute the removal order after completion of any judicial review (if the court orders a stay of removal), or the date the alien is released from criminal incarceration, whichever is later. Detention of aliens during the pendency of removal proceedings is governed by Section 236 of the Act, 8 U.S.C. 1226, including the mandatory detention provisions contained in Section 236(c).

Section 241(a)(2) of the Act governs detention of aliens during the statutory removal period; it generally mandates detention of criminal and terrorist aliens during that period. Section 241(a)(1)(C) of the Act also provides that the removal period ''shall be extended,'' and an alien subject to a final order of removal may remain in detention during such extended period, if the alien fails or refuses to make timely application for travel or other necessary documents for the alien's departure, or if the alien conspires or acts to prevent the alien's removal. The provisions of section 241(a)(2) of the Act continue to apply until expiration of the removal period, as extended, including provisions that mandate detention of certain criminal and terrorist aliens.

After expiration of the removal period, section 241(a)(6) of the Act grants authority to the Attorney General to continue the detention of:

- Any inadmissible alien;
- Any alien who is deportable under subsections (a)(1)(C), (a)(2), or (a)(4) of section 237 of the Act, 8 U.S.C. 1227; and
- Any alien whom the Attorney General determines is a danger to the community or is unlikely to comply with the removal order.

The Department's existing standards for detention or release of aliens who are the subject of a final order of removal are set forth in 8 CFR 241.4. That section provides automatic administrative custody review procedures for aliens who are the subject of an administratively final order of removal, deportation, or exclusion. Those procedures provide for multi-level reviews scheduled at regular intervals. District directors have initial responsibility for custody decisions. Detention authority then shifts to the INS Headquarters Post-order Detention Unit (HQPDU) pursuant to standards set forth in the regulation regarding the ability to effect the alien's removal from the United States. The review process provides detained aliens with numerous opportunities to present evidence in support of release. In this rule, the discussion of the provisions of § 241.4 concerns detention of aliens subject to a final order of removal, after expiration of the removal period.

What Is the Scope of the Supreme Court's Decision?

In *Zadvydas* v. *Davis,* 533 U.S. ____, 121 S. Ct. 2491 (2001), the Supreme Court held that section 241(a)(6) of the Act generally permits the detention of aliens who have been admitted to the United States and who are under a final order of removal, only for a period reasonably necessary to bring about

their removal from the United States. The Court held that detention of such aliens beyond the statutory removal period, for up to six months after entry of a final removal order, is ''presumptively reasonable.'' 121 S. Ct. at 2504–05. After six months, if an alien can provide ''good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future,'' the government must rebut the alien's showing in order to continue the alien in detention.

In cases where there is a significant likelihood that the alien will be removed in the reasonably foreseeable future, the Supreme Court's decision did not question the Service's authority to detain an lien under section 241(a)(6) of the Act beyond the six-month period, pursuant to the existing detention standards in 8 CFR 241.4. The decision does not require that an alien under a final order of removal be automatically released after six months if he has not yet been removed. Instead, the Court stated: ''To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.'' *Id.,* at 2505. What counts as the ''reasonably foreseeable future'' in this context must take account of the length of the alien's prior post-removal prior detention. *Id.*

In addition, the Supreme Court acknowledged that there may be cases involving ''special circumstances,'' such as those involving terrorists or specially dangerous individuals, in which continued detention may be appropriate even if removal is unlikely in the reasonably foreseeable future. *Id.* at 2499.

The Supreme Court's ruling does not govern those aliens who are legally still at our borders, as arriving aliens under section 235 of the Act, 8 U.S.C. 1225, including those who have been paroled into the country pursuant to section 212(d)(5) of the Act, 8 U.S.C. 1182(d)(5) (such as the Mariel Cubans, who are treated as still seeking admission). ''The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law. * * * It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.'' 121 S. Ct. at 2500. Of particular relevance here, such aliens do not have due process rights to enter or to be released into the United States, and their continued detention may be appropriate to accomplish the statutory purpose of preventing the entry of a person who has, in contemplation of the law, been stopped at the border. Furthermore, the provisions in section 235 of the Act, governing arriving aliens, and section 212(d)(5) of the Act, governing the exercise of the parole authority, along with the inherent authority of the sovereign to control its borders, furnish additional authority for the detention and redetention of arriving aliens, including aliens granted immigration parole.

II. Implementation of the New Review Process

The Supreme Court's decision will require the Service, drawing, as appropriate, on the expertise of the Department of State, to assess the likelihood of the removal of thousands of aliens to many different countries. The Court emphasized in its decision the need to ''take appropriate account of the greater immigration-related expertise of the Executive Branch, of the serious administrative needs and concerns inherent in the necessarily extensive Service efforts to enforce this complex statute, and the Nation's need 'to speak with one voice' in immigration matters.'' 121 S. Ct. at 2504. The Court also stressed the need for courts to give expert Executive Branch ''decisionmaking leeway,'' for deference to ''Executive Branch primacy in foreign policy matters,'' and for uniform administration. *Id.* at 2504–05.

This rule institutes procedures by which the Executive Branch will make the necessary judgments regarding the likelihood of removal, in a regular and consistent manner, based on a review of its experience with the country in question, the evidence submitted by the particular alien, and other relevant evidence.

The Executive Branch has the knowledge and expertise essential to perform successful its responsibilities to enforce the return of criminal and other removable aliens to the country to which removal was ordered or to a third country where possible. Generally, the United States requests and receives travel documents from most nations without a formalized written agreement. The Service routinely works in close consultation with consular officers of foreign countries on repatriation issues. Formal repatriation agreements are uncommon.

Efforts to secure travel documents and normalize immigration relations with other governments are not static in nature. Efforts to achieve comprehensive solutions and joint cooperation with all nations are on-going, and seeking removal in individual cases is a continuous process as well. Even where experience has demonstrated that obtaining travel documents from certain countries is difficult, the Executive Branch continues with diplomatic and other efforts to forge normalized immigration relations with other governments and to pursue removal efforts in individuals cases in the meantime.

Indeed, while the Service's experience has varied significantly from country to country, it has been successful in removing aliens, even criminal aliens, to all countries.

Additionally, the alien and his or her family may be able to secure travel documents or removal to a third country in cases where the Service has been unable to effect removal. The removal process is a shared responsibility among the alien, the Executive Branch and the country of return. In several respects, as discussed in more detail below, the existing provisions of the Act codify the obligation of the alien to cooperate with the removal effort an to comply with requests from the Service to obtain travel documents or to take other necessary steps to effect the alien's removal from the United States.

What Changes Does This Rule Make?

In light of the Supreme Court's decision in *Zadvydas*, this rule revises the Department's regulations by adding a new 8 CFR 241.13, governing certain aspects of the custody determination of a detained alien after the expiration of the removal period. Specifically, the rule provides a process for the Service to make a determination as to whether there is a significant likelihood that the alien will be removed in the reasonably foreseeable future.

Except as provided in this new § 241.13, the existing detention standards in § 241.4 will continue to govern the detention or release of aliens who are subject to a final orders of removal. Thus, aliens who are determined not to be a danger to the community or a flight risk may be released under § 241.4 regardless of whether there is a significant likelihood of removal.

If the Service determines under the procedures of § 241.13 that there is no significant likelihood of removal in the reasonably foreseeable future, then the Service generally will be required to release the alien, under appropriate conditions of supervision intended to protect the public safety and to ensure the Service's continued ability to remove the alien should that become possible in the future. In the alternative, in appropriate cases, the Service may choose to invoke the provisions of § 241.14, as added by this rule, in order to justify continued detention of a

particular alien because of special circumstances, of the sort discussed in the Supreme Court's decision in *Zadvydas*, even though the alien's removal is not significantly likely in the reasonably foreseeable future. In either case, while the Service is evaluating whether or not there is a significant likelihood of removal in the reasonably foreseeable future under § 241.13, or while the Service is pursuing procedures for continued detention of an alien under § 241.14 on account of special circumstances, the Service will be able to continue an alien in detention pending the conclusion of those proceedings as provided for in this rule.

This rule also makes conforming amendments to the existing detention standards in § 241.4 to make appropriate reference to the new procedures for determining whether there is a significant likelihood of removing an alien in the reasonably foreseeable future. This rule does *not* alter either the substantive standards under § 241.4 for the Service to determine whether to release or detain aliens because of risk of flight or danger to the community, or the procedures for the Service to conduct such custody reviews (first by the district director and then by the Service's HQPDU). Thus, aliens who are determined not to be a danger to the community or a flight risk may be released under § 241.4 regardless of whether there is a significant likelihood of removal.

The custody review provisions of § 241.4 will continue to apply to aliens who are subject to final orders of removal, including aliens who have requested a review under § 241.13. However, after the Service has made a determination in a particular case that removal is not significantly likely, the alien's detention will be governed by § 241.13 rather than by § 241.4. If the Service subsequently determines, because of a change in circumstances, that the Service is now likely to be able to remove the alien in the reasonably foreseeable future, then the provisions of § 241.4 will once again provide the governing standards for the continued detention of the alien. The detention standards of § 241.4 will also apply to aliens who are continued in detention under § 241.4 because of special circumstances.

This rule also amends § 241.4 to add a new procedural provision to implement the statutory directive for extension of the removal period if the alien ''fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal,'' as provided in section 241(a)(1)(C) of the Act, 8 U.S.C. 1231(a)(1)(C). This rule directs the Service to provide a specific notice to the alien, during the 90-day removal period, if the alien has acted in a way to invoke the statutory extension of the removal period. Until the alien acts to comply with the statutory requirements, the removal period will continue to be extended, as provided by section 241(a)(1)(C) of the Act. As long as the alien remains in the removal period, including any extension attributable to the alien's conduct, then the detention provisions of section 241(a)(2) of the Act will continue to apply, including provisions that mandate detention of certain criminal and terrorist aliens. Section 241(a)(6) of the Act applies only to the continued detention of a removable alien after the removal period has expired.

Who Is Covered by the New Procedures in § 241.13 Regarding Likelihood of Removal?

New § 241.13 applies to the following individuals in INS detention who are under a final order of removal:

- Aliens who have been admitted to the United States (including aliens admitted as refugees under section 207 of the Act, 8 U.S.C. 1157), and who are later ordered removed under sections 237 (a)(1)(C), (a)(2), or (a)(4) of the Act; and
- Other deportable aliens who are determined to be a danger to the community or a flight risk; and
- Inadmissible aliens who are present in the United States without inspection.

As discussed below, the Supreme Court's decision in *Zadvydas* does not apply to arriving aliens who are inadmissible, including aliens who have been granted immigration parole into the United States. However, the Department of Justice has determined that the provisions of § 241.13 shall apply to one category of inadmissible aliens: those who are present in the United States without inspection, admission, or parole. Before enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, Div. C, 110 Stat. 3546 (Sept. 30, 1996), these aliens were considered to have ''entered'' the United States. Since the removal provisions of IIRIRA took effect on April 1, 1997, these aliens are no longer considered to have ''entered without inspection,'' but to be applicants for admission who are present without inspection, as provided in section 235(a)(1) of the Act, 8 U.S.C. 1225(a)(1).

Conversely, § 241.13 does not apply to arriving aliens, and those who have not entered the United States, including those who have been granted immigration parole into the country, such as the Mariel Cubans. In *Shaughnessy* v. *United States ex rel. Mezei,* 345 U.S. 206 (1953), the Supreme Court upheld the Attorney General's authority to hold an excludable alien in custody indefinitely, pursuant to section 236(e) of the Act, 8 U.S.C. 1226(e), as it existed prior to enactment of IIRIRA. In *Zadvydas,* the Court acknowledged its opinion in *Mezei,* but distinguished aliens who have entered the United States from such inadmissible aliens who are presumed, in the contemplation of the law, to be ''at the border,'' rather than ''in'' the United States. 121 S. Ct. at 2500. As the Court noted, ''The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law.'' *Id.* Thus, this interim rule reflects what the Court characterized as a ''well-established'' distinction between the rights of those seeking admission and those who have been admitted. Section 241.13 does not apply to Mariel Cubans or parolees. Mariel Cubans will continue to be covered by 8 CFR 212.12, and the provisions of 8 CFR 241.4 govern all other cases where the alien is the subject of an administratively final order of removal.

Section 241.13 does not apply to aliens under a final order of removal while they are still within the statutory removal period. The statutory basis for detention of removable aliens during the removal period, under section 241(a)(2) of the Act, is broader than the authority to detain such aliens under section 241(a)(6) of the Act after the removal period has expired, but it is also strictly time-limited. The Supreme Court's decision in *Zadvydas* was only concerned with the interpretation of section 241(a)(6) of the Act, in light of its concerns that the law should not be read to permit ''indefinite, perhaps permanent, detention.'' 121 S. Ct. at 2502. Those concerns are inapposite to the detention of aliens during the removal period, since that authority, by its terms, expires at the end of the removal period, which is generally 90 days. Section 241(a)(1)(C) of the Act does expressly provide for an extension of the removal period in those cases where the alien ''fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.'' But any extension

of the removal period in such circumstances is entirely attributable to the alien's own conduct. The extension of the removal period will come to an end when the alien complies with his or her statutory obligations.

When Can an Eligible Alien Submit a Request for Release From Custody on the Ground That There Is No Significant Likelihood of His or Her Removal in the Reasonably Foreseeable Future?

As discussed above, the obligation of the Service to respond to issues concerning the likelihood of removal does not arise as long as the alien is still within the removal period. However, § 241.13 will permit an alien subject to a final order of removal to present, at any time after the removal order becomes final, the contention that there is no significant likelihood of removal in the reasonably foreseeable future. The Service may postpone its consideration of such requests until after expiration of the removal period.

In any event, the Service is not obligated to release an alien until after the Service has had the opportunity, during the ''presumptively reasonable'' 6-month period, to endeavor to remove the alien and to make its determination as to whether or not there is a significant likelihood of removal in the reasonably foreseeable future. *See Zadvydas,* 121 S. Ct. at 2503 (faulting the decision of the Ninth Circuit in one of the cases under review because ''its conclusion may have rested solely upon the 'absence' of an 'extant or pending' repatriation agreement without giving due weight to the likelihood of successful future negotiations.'').

Thus, the Service is entitled to make an assessment of the likelihood of removal in each case, including the prospects for a change in circumstances, even if (for example) there is not extant or pending repatriation agreement at the time the alien makes the request for a decision by the Service under § 241.13. The Service works continuously with other countries to accomplish repatriation. The Service will also evaluate the alien's efforts to fulfill his or her statutory obligation to seek to comply with the removal order.

The six-month presumptively reasonable period of detention to effect the alien's removal commences when the removal period begins as set forth in section 241(a)(1) of the Act, unless that removal period is extended. If the removal period is extended because of the alien's failure to comply with the order of removal or to cooperate in securing travel documents, as provided in section 241(a)(1)(C) of the Act, the Service shall have a reasonable period of time after the expiration of the removal period, as extended, to effect the alien's removal.

What are the Procedures for the Alien to Request Release on the Ground That There is no Significant Likelihood of Removal in the Reasonably Foreseeable Future?

Section 241.13 provides the procedures for the Service to evaluate an alien's challenge to the reasonableness of his or her continued detention, as provided in *Zadvydas.* The alien must provide ''good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future,'' 121 S. Ct. at 2505, and may submit any information that may be relevant to support that contention.

As a threshold matter, this rule requires that an alien requesting a determination under § 241.13 demonstrate his or her efforts to comply with the removal order and to cooperate with the Service's efforts to effect his or her removal. As provided in § 241.13(e)(2), if the HQPDU determines that the alien has not established the requisite efforts to comply with the removal order and to cooperate with the Service's removal efforts, then the alien shall be given a written notice stating those findings and indicating the specific actions that the alien will be required to take to come into compliance. Until the alien responds to the Service's findings regarding the lack of compliance or cooperation with the removal effort, the Service will not have complete information as to the likely prospects for obtaining a travel document or for taking other appropriate steps to remove that alien. Accordingly, the rule provides that, until the alien has responded to the Service's notice, the HQPDU does not have an obligation to continue its consideration of the alien's request for release under this section. Once the alien responds, then the HQPDU will take the information provided by the alien into consideration.

In appropriate cases, the rule provides for the HQPDU to advice the Department of State of the alien's contention that his or her removal is not reasonably foreseeable, and to request the assistance and guidance of that Department in evaluating the likelihood of the alien's removal under the circumstances. The referral to the Department of State will not be automatic, because the Service ordinarily will already have considerable information concerning the repatriation of aliens to each country, and related diplomatic circumstances. However, this rule allows for such a feral in those cases where the HQPDU determines that input from the Department of State is needed under the circumstances. Since the nature and status of diplomatic relationships are likely to be relevant to the prospects for removing aliens to various countries, it is important for the Service to take the opportunity, in appropriate cases, to solicit involvement by the Department of State before the HQPDU must decide whether the alien's removal is reasonably foreseeable.

Although this rule does not set a specific time limit for consultation with the State Department, or for the Service's final decision on the likelihood of removal in the reasonably foreseeable future, the HQPDU will have to be mindful of the overall purposes of the detention laws, as interpreted by the Supreme Court. The time for the Service to determine the likelihood of removal must also be reasonable under the circumstances, in light of the interests at stake. the HQPDU review process should not, itself, give rise to the same kinds of concerns about ''indefinite, perhaps permanent'' detention that troubled the Supreme Court. See *Zadvydas,* at 2503 (''for detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the 'reasonably foreseeable future' would have to shrink.'')

The rule provides an opportunity for the alien to comment on the available (unclassified) evidence presented by the Service, including any information provided by the Department of State on which the Service intends to rely. The alien may submit with his or her response any evidence or other information that, the alien believes, shows that removal is no longer significantly likely in the reasonably foreseeable future. This may include evidence of why, even if the Service has been able to effect the removal of other aliens to that country or to a third country, the particular alien's own situation is materially different such that he or she is unlikely to be removed.

After receiving all of the evidence, the HQPDU shall consider all the facts of the case, including, but not limited to, those considerations specified in § 241.13(f) of this rule. The history of the Service's efforts to remove aliens to the particular country is of considerable relevance in the determination of the likelihood of removal in the reasonably foreseeable future. If the Service can demonstrate, for example, that it has been successful in returning most aliens to a particular country but the process may often require longer periods (beyond six months), that information is

highly relevant in making the determination as to whether there is a significant likelihood of removing the alien to that country in the reasonably foreseeable future.

If, after considering the alien's submission, the HQPDU determines that ''there is no significant likelihood of removal in the reasonably foreseeable future,'' 121 S. Ct. at 2505, the HQPDU shall include in the alien's file a written explanation for this decision. The HQPDU shall then arrange for the alien's release from custody under appropriate conditions of release, unless the Service determines that the case should be referred for consideration of further detention under § 241.14, as added by this rule, on account of special circumstances.

Where the determination under § 241.13 is to deny the alien's request for release because there is a significant likelihood of removal in the reasonably foreseeable future, the alien's detention will continue to be governed by § 241.4, including the provisions for periodic review of the continued detention of aliens under those standards.

According to *Zadvydas,* the Service's decision to retain the alien in custody remains lawful as long as there is a significant likelihood of removal in the reasonably foreseeable future. Thus, even after an initial decision denying release under § 241.13, this rule will allow aliens who remain in detention to make a new request for release under § 241.13 after a period of six months since the last determination by HQPDU under § 241.13, or at any time upon a showing of materially changed circumstances.

The review process under § 241.13, as required by the Supreme Court's decision in *Zadvydas,* will result in the release of some removable aliens even though they would otherwise not have been subject to release under the detention standards in § 241.4 on account of a danger to public safety or flight risk. The Department is keenly aware of the need to minimize those concerns whenever possible, through the imposition of appropriate conditions of release for those aliens who can no longer be detained. Accordingly, § 241.13(g) makes all of the conditions of release enumerated in section 241(a)(3) of the Act and 8 CFR 241.5(a) mandatory, and specifically provides for the imposition of additional particular conditions of supervision in order to protect the public safety and to ensure the Service's continued ability to remove the alien should circumstances change in the future.

The Supreme Court's decision made clear that, even if an alien must be released under an order of supervision where there is no significant likelihood of removal in the reasonably foreseeable future, such aliens may also be returned to custody if they violate conditions of release. As the Court noted in its analysis:

> [I]f removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute. In that case, of course, the alien's release may and should be conditioned on any of the various forms of supervised release that are appropriate to the circumstances, and the alien may no doubt be returned to custody upon a violation of those conditions.

Zadvydas, 121 S. Ct. at 2504. *See also id.* 2502 (''The choice is not between imprisonment and the alien 'living at large.' It is between imprisonment and supervision under *release conditions that cannot be violated*.'') (emphasis added).

Accordingly, § 241.13(i) provides that the Service may take back into custody any alien released under § 241.13, if the alien violates any conditions included in the order of supervision. Section 241.13(i) includes provisions modeled on § 241.4(1) to govern determinations to take an alien back into custody. If the alien's release is revoked on account of violations of the conditions of release, this rule specifically provides for referrals of those cases to the U.S. Attorneys for prosecution in appropriation situations, under section 243(b) of the Act, 8 U.S.C. 1253(b). In addition, this rule provides that the alien would once again be subject to detention for a six-month period, a time that the Court has already determined to be presumptively reasonable in the context of the detention of aliens pending removal. After the expiration of the six-month period, the alien would again be able to request release under the provisions of § 241.13. At that time, the Service would again conduct a review under the procedures of § 241.13. In appropriate cases, taking into account the alien's conduct after his or her prior release under § 241.13 and the reasons for revoking release, the Service may decide to initiate proceedings under § 241.14 for continued detention of the alien because of special circumstances.

On the other hand, if the alien is returned to custody because the Service determines that there is now a significant likelihood that the alien may be removed in the reasonably foreseeable future, the alien's continued detention will once again be governed by the regular procedures under § 241.4 rather than § 241.13.

What Substantive Changes Does This Rule Make to 8 CFR 241.4?

This rule amends 8 CFR 241.4(b), as amended by final rule on December 21, 2000, at 65 CFR 80281, to provide that the detention standards of § 241.4 no longer apply to a detained alien *after* the Service has made the determination under § 241.13 that there is no significant likelihood of removal in the reasonably foreseeable future. As long as that determination by the Service remains in effect, the detention or release of the alien is governed by the standards of § 241.13 (or § 241.14 if applicable). However, in any case where, based on a change of circumstances, the Service later makes a determination that there is a significant likelihood that the Service subsequently will be able to remove the alien to the country to which the alien was ordered deported, or to a third country, in the reasonably foreseeable future, the custody provisions of § 241.4 will again apply. In that event, the Service may return the alien to detention in connection with the removal, and any issues relating to the detention or release of the alien pending his or her removal will once again be governed by the standards of § 241.4.

Although §§ 241.4 and 241.13 are related, this rule keeps the standards and procedures for post-removal period custody reviews under § 241.4 unchanged except as necessary to take account of the new review procedures under § 241.13. Under § 241.4(i)(7), as added by this rule, at the time the HQPDU conducts its review of whether a detained alien should continue to be detained under the established post-removal period detention standards in § 241.4, the HQPDU shall also consider whether there is a substantial reason to believe that the removal of an alien who is now covered under the provisions of § 241.13, may not be significantly likely in the reasonably foreseeable future. If so, the HQPDU shall initiate the review procedures under § 241.13, whether or not the alien has make a specific request for such a review. However, the detention standards and procedures of § 241.4 will continue to apply to such an alien unless the Services has made a determination, after competition of the review process under § 241.13, that there is no significant likelihood of removal in the reasonably foreseeable furture.

With these limited changes to take account of the establishment of a separated review procedure under § 241.13, this rule does not make substantive changes to the existing post-removal period detention standards. It is

important to note that this rule does not alter the existing criteria for release in § 241.4(e), the factors for consideration in § 241.4(f), the procedures governing the review and determination of custody issues by the district directors and the HQPDU in § 241.4(d), (h) or (i), the conditions of release in § 241.(j), or the timing of reviews in general as provided in § 241.4(k). For aliens who continue in detention under the standards of § 241.4 (for example, inadmissible aliens who are not covered by the procedures of § 241.13, or deportable aliens for whom there is a significant likelihood of removal), the provisions in § 241.4 for periodic review of the alien's detention will continue to apply. The periodic reviews under § 241.4 will also apply to aliens who are continued in detention because of special circumstances, pursuant to § 241.14.

However, this rule does include procedural instructions to the Service to take account of the statutory provisions relating to the running of the removal period. The removal period is the time during which the Service and the alien seek to effect the final order of removal. The period described by the statute does not commence until the point at which the alien's removal can be effected—in a case that is stayed pending judicial review, the date when, pursuant to the court's orders, any stay of removal has expired. Accordingly, the regulations specify the circumstances to determine the commencement of the removal period under the statute, based on the earliest availability of a final, executable order of removal.

The revisions to § 241.4(g) specifically take account of the existing statutory provision in section 241(a)(1)(C) of the Act, which provides for extension of the length of the removal period beyond 90 days, if the alien fails or refuses to make timely application in good faith for documents necessary to effect the alien's departure or conspires or acts to prevent his or her removal subject to an order of removal, deportation or exclusion. There are also applicable criminal sanctions in section 243(a) of the Act. These are not new obligations—they are clearly established in the existing law—and this rule does not create any novel obligations for aliens who refuse to comply.

Accordingly, this rule directs the Service to provide a Notice of Failure to Comply to the alien in order to make clear the statutory obligations, the grounds for determining that the alien has met those requirements, and the specific actions that the alien will need to take to comply. A Notice of Failure to Comply has the effect of extending the removal period as provided by law. Since the inability to obtain travel documents is the first criterion for release under § 241.4(e), this rule provides that the Service shall also advise the alien that the Service shall not be obligated to complete its pending scheduled custody reviews under § 241.4 until the alien has responded to the Notice of Failure to Comply and has demonstrated his or her compliance with the statutory requirements. Once the alien's statutory obligations are met, the Service will have a reasonable period to effect the alien's removal. (The Service's failure to provide a Notice of Failure to Comply during the 90-day removal period, however, does not have the effect of excusing the alien's conduct.)

Why is the Department Issuing § 241.14 Regarding Special Circumstances?

The Department is issuing § 241.14 to provide procedures for determining whether particular removable aliens may be continued in detention even if their removal is not significantly likely in the reasonably foreseeable future, in light of the Supreme Court's decision in *Zadvydas*. Under section 241(a)(6) of the Act and the post-removal period review procedures in § 241.4, the Service has been continuing to detain aliens subject to a final order of removal beyond the statutory removal period where the Service determines the alien to be either a risk to the community or a risk of flight. *Zadvydas*, however, interpreted section 241(a)(6) of the Act, in general, to provide that the Service cannot continue to detain criminal aliens who pose a risk to the community once there is not a significant likelihood of removal in the reasonably foreseeable future.

However, the Court did acknowledge that there may be special circumstances where continued detention of particular aliens may be appropriate to avoid special risks to the public. The Court also indicated that detention due to dangerousness may be appropriate in certain limited situations where there are particular reasons to consider an alien to be specially dangerous. 121 S. Ct. at 2499 (''[W]e have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals * * *''.). These special circumstances justifying continued detention may also be based on national security or terrorism grounds. 121 S. Ct. at 2502 (''Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security'').

Section 241(a)(6) of the Act explicitly allows the Service to continue to detain aliens whom the Service determines to be a risk to the community. This rule is being issued to provide procedures to determine whether individual aliens can continue to be detained even when their removal is not reasonably foreseeable in accordance with the Court's decision in *Zadvydas*. The regulation is narrowly drawn to allow continued detention only in certain specific situations where the risk to the public is particularly strong, and where no conditions of release can avoid the danger to the public.

This rule has been written to allow continued detention when there is not a significant likelihood of removal in the reasonably foreseeable future, only in limited situations involving: (1) Highly contagious diseases posing a danger to the public; (2) foreign policy concerns; (3) national security and terrorism concerns; and (4) individuals who are specially dangerous due to a mental condition or personality disorder.

The rule provides that, after the Service has determined in accordance with § 241.13 that a particular alien's removal is not significantly likely in the reasonably foreseeable future, the Service may consider whether that alien's release presents such a danger to the public that the alien should remain detained due to those special circumstances.

What is the Procedure for a Determination That Continued Detention is Justified by Special Circumstances?

The procedures for determining whether continued detention is justified on the basis of special circumstances depend upon which justification in § 241.14 is invoked.

Aliens With Highly Contagious Diseases Posing a Danger to the Public

Under § 241.14(b)(1), the Service may continue to detain an alien with a highly contagious disease posing a danger to the public, upon the advice of the Public Health Service. The alien will remain in custody only until the Service, in consultation with the Public Health Service and appropriate state or local health officials, is able to make arrangements for appropriate medical treatment after the alien is released.

This provision only applies to highly contagious diseases, such as active tuberculosis, smallpox or yellow fever, where the Public Health Service has affirmatively advised the Service that

releasing that alien would pose a danger to the public. Although the law and applicable regulations contain a much broader definition of contagious diseases for use in other immigration contexts (see section 212(a)(1)(A) of the Act; 42 CFR 34.2), only the narrow definition of highly contagious diseases posing a danger to the public will be considered for purposes of special circumstances under this rule.

Aliens Whose Release Would Cause Serious Adverse Foreign Policy Consequences

Section 241.14(c) allows the Service to continue to detain certain aliens whose release would have serious adverse foreign policy consequences. A determination not to release an alien because of serious adverse foreign policy consequences can only be made upon the recommendation of the Secretary of State.

The Department has determined not to refer a decision to continue to detain someone under this justification for review by an immigration judge, and to rely upon the State Department's expertise in foreign policy matters to determine those rare instances when continued detention is appropriate. A decision to detain an alien on this ground would be based on the expertise of the Secretary of State in foreign relations and would not involve factual determinations of the sort that would necessitate a hearing before an immigration judge.

In this context, due process is satisfied by an administrative determination by the Attorney General or Deputy Attorney General, upon recommendation by the Secretary of State. Courts have long recognized that deference should be given to the Executive Branch regarding issues implicating foreign policy and our relations with other nations. Judicial deference to the Executive Branch is especially appropriate in the immigration context, where officials ''exercise especially sensitive political functions that implicate questions of foreign relations.'' *See INS* v. *Aguirre–Aguirre,* 526 U.S. 415, 425 (1999). In *Zadvydas,* 121 S. Ct. at 2502, the Court acknowledged that the judiciary should give deference to ''Executive Branch primacy in foreign policy matters.''

These issues are addressed in more detail in the following section as well, in conjunction with the discussion of cases involving a significant national security or terrorism risk.

Aliens Whose Release Would Pose Significant National Security or Terrorism Risks

Under § 241.14(d), the Service shall continue to detain an alien whose release would pose a significant threat to the national security or a significant risk of terrorism.

The rule provides that the Commissioner must make the decision to invoke the detention procedures on account of security or terrorism grounds, and provides for several levels of review at the highest levels of the Department of Justice in each case.

At the start of the proceedings, the alien will be advised that the Service intends to keep the alien in custody and, to the greatest extent possible consistent with the protection of national security and classified information, will be provided a written description of the factual basis for the alien's continued detention. The alien will have the opportunity to submit a written statement and relevant evidence for consideration before a certification is made. The Commissioner shall consider all evidence relating to the case, including evidence that the alien has previously committed national security or terrorism-related offenses, has engaged in terrorist activity, or otherwise poses a danger to the national security in the United States or abroad; prior convictions in a federal, state or foreign court of relevance to the risk of release; and any other special circumstances relating to the alien's situation indicating that his or her release would pose a significant threat to the national security or a significant risk of terrorism.

In any case where the basis of the alien's final order of removal was some ground not relating to terrorism or national security, and immigration officer will conduct an interview in person at which the alien may be represented by counsel and present any relevant evidence on his or her behalf. This situation will arise, for example, if an alien was ordered removed because he or she overstayed a student or tourist visa but the government has information indicating that the alien's release would pose a significant threat to the national security or a significant risk of terrorism.

Based on the Commissioner's recommendation, and the recommendation of the Director of the Federal Bureau of Investigation, the Attorney General personally shall determine whether to certify that the alien should not be released from custody because of a significant threat to the national security or a significant risk of terrorism. The rule provides that, before making such a certification, the Attorney General shall order any further hearings or review proceedings as may be appropriate under the circumstances.

A decision to continue detention of a removable alien because of national security or terrorism concerns requires a predictive judgment. It is an attempt to predict an alien's possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, he might act in a way that creates a real and legitimate national security threat or an imminent threat to public safety. The decision may be based upon past or present conduct, but it also may be based on a wide variety of other circumstances. *Cf. Department of the Navy* v. *Egan,* 484 U.S. 518, 528–29 (1988) (applying this rationale in security clearance case). Thus, the ''attempt to define not only the individual's future actions, but those of outside and unknown influences renders the [decision] * * * an inexact science at best.'' *See Adams* v. *Laird,* 420 F.2d 230, 239 (D.C. Cir. 1969), *cert. denied,* 397 U.S. 1039 (1970).

In these circumstances, it is the Attorney General who is best situated to assess the due process interests of any particular alien with respect to the matters at issue, to weigh those interests against the national security and public safety concerns presented in the case, to assess the nature and quality of the information that triggered those concerns, and to provide procedures that honor those competing interests. This section creates a process whereby that Executive authority and expertise can be exercised.

The Department has decided to include these provisions for continued detention because cases may arise where the Attorney General believes that it would be irresponsible to release from detention an alien subject to a final order of removal because the release of the alien would result in serious damage to the national security or pose an imminent threat of terrorism. Similarly, there may arise a case where the Attorney General believes, based on a recommendation by the Secretary of State, that it would be irresponsible to release an alien because of serious adverse foreign policy consequences.

Because of the unique relationship that the Attorney General maintains with the intelligence community, particularly the Federal Bureau of Investigation, and based on the broad delegation of discretionary authority granted the Attorney General by Congress in the Act, as well as the Attorney General's unique responsibilities in the Executive Branch,

this section places in the Attorney General the personal responsibility to make the final certification, in those cases where he determines that continued detention beyond the presumptively reasonably six-month period is warranted because of significant national security or terrorism concerns.

Similarly, as provided in § 241.14(c), the State Department is the appropriate agency to assess the foreign policy implications of the release of a particular alien. The judiciary is not well positioned to shoulder primary responsibility for determining the likelihood and importance of such diplomatic repercussions. *See INS* v. *Abudu,* 485 U.S. 94, 110 (1988).

Where national security, foreign relations, and immigration matters converge, as they do in these cases, the decision to detain a certain alien will require the perspective only a high *Aguirre-Aguirre,* 526 U.S. 415, 425 (1999) (''judicial deference to the Executive Branch is especially appropriate in the immigration context where officials exercise especially sensitive political functions that implicate questions of foreign relations''); *Galvan* v. *Press,* 347 U.S. 522, 531 (1954) (''Policies pertaining to * * * right [of aliens] to remain here are peculiarly concerned with the political conduct of government.''); *Reno* v. *American-Arab Anti-Discrimination Committee,* 525 U.S. 471, 491 (1999) (declaring that courts are unable to assess the adequacy of the Executive's reasons for ''deeming nationals of a particular country a special threat''); *People's Mojahedin Organization of Iran* v. *Department of State,* 182 F.3d 17, 23 (D.C. Cir. 1999) (Executive Branch finding that foreign terrorist organization threatened national security is nonjusticiable because ''[t]hese are political judgments, decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong to the domain of political power not subject to judicial intrusion or inquiry''), *cert. denied,* 529 U.S. 1104 (2000).

Specially Dangerous Aliens

Under § 241.14(f) the Service may seek to detain specially dangerous aliens. Subject to review before an immigration judge, the Service shall continue to detain in alien if the alien's release would create a special danger to the public due to the three factors identified in § 241.14(f)(1):

- The alien must have been convicted of a crime of violence as defined as 18 U.S.C. 16. This will include relevant state convictions where the offense meets the definitions of a ''crime of violence'' under 18 U.S.C. 16.
- Due to a mental condition or personality disorder and behavior associated with that condition or disorder, the alien is likely to engage in acts of violence in the future.
- No conditions of release can reasonably be expected to ensure the safety of the public.

The Department recognizes that freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action. *See, e.g., Youngberg* v. *Romeo,* 457 U.S. 307, 316 (1982). However, the Supreme Court has held that the ''Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest.'' *United States* v. *Salerno,* 481 U.S. 739, 748 (1987); *see also Foucha* v. *Louisiana,* 504 U.S. 71, 80 (1992). Many states ''have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and thereby pose a danger to the public health and safety.'' *Kansas* v. *Hendricks,* 521 U.S. 346, 357 (1997). The Supreme Court has ''consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards.'' *Id.*

Accordingly, the Department has decided that it is necessary to provide specific procedural protections to aliens who may be considered for detention under this standard. *See Zadvydas,* 121 S. Ct. at 2499 (discussing continued detention of ''specially dangerous individuals'' subject to strong procedural protections). Such cases will be referred for a hearing under appropriate standards, where an immigration judge will conduct a full hearing, limited to reviewing the Service's determination regarding dangerousness, and where the Service has the burden of proof by clear and convincing evidence.

This rule contemplates that evidence of the alien's dangerousness must be accompanied by additional evidence relating to whether the alien's mental condition or personality disorder, and associated physical behavior, indicates that the alien is likely to engage in acts of violence in the future. Where preventive detention can be of indefinite duration, the Court ''has demanded that the dangerousness rationale be accompanied by some other special circumstances such as mental illness, that helps to create the danger.'' *Id.*

The rule requires that the Service rely upon a report by a physician employed or designated by the Public Health Service, after a full psychiatric evaluation of the alien, before initiating the review procedures to establish that the alien is specially dangerous. The Service cannot determine the issue of dangerousness without the recommendation of the physician who is a neutral and professional decisionmaker. *Cf. Parham* v. *J.R.,* 442 U.S. 584, 607 (1979) (due process is satisfied where the neutral decisionmaker is a medical professional making a medical judgment); *see also Youngberg* v. *Romeo,* 457 U.S. 397, 323 (1982) (due process only requires the courts to make certain that professional judgment was exercised; a decision, if made by a professional, presumptively valid.)

The provisions of this rule authorizing continuing detention apply only where the alien poses a special danger to others under the standards of the rule, not for those cases where an alien is mentally incompetent but poses no danger to others. In the latter case, where the Service determines that it cannot responsibly release, without continued care or treatment, an alien who is incapable of caring for himself or herself on account of mental illness or mental incompetence, the Service will not continue to detain the alien indefinitely under the authority of section 241(a)(6) of the Act. Instead, the Service will initiate appropriate efforts with the alien's family members, the Public Health Service, or proper State or local government officials to secure proper arrangements for the alien's continued care or treatment, as a condition of the alien's release. Accordingly, § 241.14(f) does not apply to such aliens.

The rule provides that review proceedings will take place before an immigration judge in two phases. After the case is referred for a hearing, the immigration judge will promptly schedule a reasonable cause proceeding. The purpose of the reasonable cause hearing is to provide a quick evaluation by a neutral decision maker as to whether there is a sufficient basis to proceed with the review proceedings.

The reasonable cause hearing is intended to be only a preliminary review of the case, and will likely be based on the evidence initially provided by the Service when it instituted the review proceedings. This hearing is not intended to duplicate the full hearing on the merits of the alien's circumstances, but only to determine whether there is reasonable cause to proceed. The merits hearing is necessary in order to provide

due process, but it will also necessarily require additional time for preparation and resolution, and the Service must continue to detain the alien pending the completion of those proceedings.

If the immigration judge determines that the Service has failed to meet its burden of establishing reasonable cause, the immigration judge may dismiss the review proceeding without a full hearing on the merits. In that case, the Service will be able to make an expedited appeal to the Board. Under the rule, a single Board Member will review the record under the Board's rules and determine whether the Service has established reasonable cause to continue the review proceedings.

Once it is determined that there is reasonable cause for further proceedings, the immigration judge will promptly schedule a merits hearing. At all phases of the review process, the alien will have a number of important rights, including the right to be represented by counsel at no cost to the government, the right to examine the evidence presented by the Service, and the right to cross-examine any witnesses that the Service presents. At the merits hearing, the alien will enjoy the additional right to cross-examine the medical doctor who authored any medical report that formed the basis for the Service's determination that the alien is specially dangerous.

In § 241.14(i)(2), the rule provides a non-exclusive list of factors the immigration judge will consider in making a determination at the conclusion of a merits hearing. If the immigration judge concludes that the Service has met its burden by clear and convincing evidence, the immigration judge will enter an order for the continued detention of the alien. If the immigration judge concludes that the Service has not met its burden, the review proceedings will be dismissed.

Either party may appeal the immigration judge's decision after the merits hearing to the Board of Immigration Appeals pursuant to § 3.38, except that the Service will have only five business days to appeal an adverse decision to the Board. If the Service appeals a dismissal of review proceedings, the immigration judge's order shall be automatically stayed until the Board renders its decision. The Board shall expedite review of a decision and shall consider detention cases involving specially dangerous aliens under § 241.14 as its highest priority.

If a final decision by either the immigration judge or the Board orders the dismissal of the review proceedings, the Service will promptly release the alien on conditions of supervision to be determined by the Service pursuant to § 241.13. As in all other cases involving post-order detention, it is the responsibility of the Service to determine the appropriate conditions of supervision, in order to protect the public and to deter the alien's flight. Accordingly, the conditions of release will not be subject to review by either the immigration judge or the Board.

The case of any alien ordered to remain in Service custody by either an immigration judge or the Board will be periodically reviewed to determine whether the alien's release still poses a special danger to the public. The Service will continue to review the alien's case periodically according to § 241.4. The alien may also request review of his or her case by the Service and the immigration judge because, due to materially changed circumstances, the alien's release would no longer pose a special danger to the public.

The alien must make the request first to the Service, in order to allow the Service to evaluate all of the circumstances and to determine whether the alien would still pose a special danger to the public. After the Service responds to the alien's request, the alien will have the right to file a motion to set aside the prior determination in the review proceedings. In that motion, the alien will bear the burden of proof to demonstrate that the alien's circumstances have changed materially, and that because of those changed circumstances, the alien's release would no longer pose a special danger to the public. If the immigration judge determines that the alien has shown good reason to believe that this is true, the immigration judge shall set aside the prior determination and schedule the case for a new merits hearing under § 241.14(i). Otherwise, the immigration judge will deny the motion. If review is denied, the alien may renew the request for release based on changed circumstances six months after the prior determination under § 241.14(i).

Effective Date of This Interim Rule

The Department's implementation of this interim rule effective upon publication in the **Federal Register**, with provision for post-promulgation of public comment, is based upon the ''good cause'' exceptions found at 5 U.S.C. 553(b)(B) and 553(d)(3). In response to the Supreme Court's decision limiting the authority to continue aliens in detention after the removal period under section 241(a)(6) of the Act, it is essential to implement without delay a standardized plan for dealing with the detention or release of numerous aliens whom the Service had determined should not be released because of a danger to the public or a risk of flight. Hundreds of individuals are affected. Failure to act expeditiously would be contrary to the public interest because it would result in continuing uncertainty and delay compliance with the law. Accordingly, the Service finds that there is good cause to forgo prior publication of a notice of proposed rulemaking and to make this rule effective upon publication in the **Federal Register**.

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 certain 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 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 rule 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.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Public Law 104–13, all Departments are required to submit to the Office of Management and Budget (OMB), for review and approval, any reporting or recordkeeping requirements inherent in a final rule. Although § 241.13 and § 241.14 provide that an alien held in a detention facility may submit a written request and supporting documentation in support of his or her assertion that removal is not reasonably foreseeable, the request and documentation are not considered collections of information under 5 CFR 1320.3 and 1320.4. Accordingly, this rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act.

List of Subjects

8 CFR Part 3

Administrative practice and procedure, Immigration, Organization and functions (government agencies).

8 CFR Part 241

Administrative practice and procedure, Aliens, Immigration.

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

PART 3—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

1. The authority citation for part 3 is revised to read as follows:

Authority: 5 U.S.C. 301; 8 U.S.C. 1101 note, 1103, 1252 note, 1252b, 1324b, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub. L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub. L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub. L. 106–554, 114 Stat. 2763A–326 to –328.

2. In § 3.1, the next to last sentence of paragraph (a)(1) is revised and paragraph (b)(14) is added, to read as follows:

§ 3.1 General authorities.

(a) * * *

(1) * * * In addition, a single Board Member may exercise such authority in disposing of the following matters: a Service motion to remand an appeal from the denial of a visa petition where the Regional Service Center Director requests that the matter be remanded to the Service for further consideration of the appellant's arguments or evidence raised on appeal; a case where remand is required because of a defective or missing transcript; an appeal by the Service of a reasonable cause decision under § 241.14(h)(4) of this chapter; and other procedural or ministerial issues as provided by the Chairman. * * *

* * * * *

(b) * * *

(14) Decisions of immigration judges regarding custody of aliens subject to a final order of removal made pursuant to § 241.14 of this chapter.

* * * * *

PART 241—APPREHENSION AND DETENTION OF ALIENS ORDERED REMOVED

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

Authority: 8 U.S.C. 1103, 1223, 1227, 1231, 1253, 1253, 1255, and 1330; 8 CFR part 2.

4. Section 241.4 is amended by

a. Adding a new paragraph (b)(4);

b. Removing the words ''beyond the removal period'' in paragraph (g) heading;

c. Redesignating paragraphs (g)(1) through (g)(4) as paragraphs (g)(2) through (g)(5), respectively;

d. Adding a new paragraph (g)(1);

e. Revising newly redesignated paragraph (g)(5); and by

f. Adding a new paragraph (i)(7).

The additions and revisions reasons as follows:

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

* * * * *

(b) * * *

(4) *Service determination under 8 CFR 241.13.* The custody review procedures in this section do not apply after the Service has made a determination, pursuant to the procedures provided in 8 CFR 241.13, that there is no significant likelihood that an alien under a final order of removal can be removed in the reasonably foreseeable future. However, if the Service subsequently determines, because of a change of circumstances, that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future to the country to which the alien was ordered removed or to a third country, the alien shall again be subject to the custody review procedures under this section.

* * * * *

(g) * * *

(1) *Removal period.* (i) The removal period for an alien subject to a final order of removal shall begin on the latest of the following dates:

(A) the date the order becomes administratively final;

(B) If the removal order is subject to judicial review (including review by habeas corpus) and if the court has ordered a stay of the alien's removal, the date on which, consistent with the court's order, the removal order can be executed and the alien removed; or

(C) If the alien was detained or confined, except in connection with a proceeding under this chapter relating to removability, the date the alien is released from the detention or confinement.

(ii) The removal period shall run for a period of 90 days. However, the removal period is extended under section 241(a)(1)(C) of the Act if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal. The Service will provide such an alien with a Notice of Failure to Comply, as provided in paragraph (g)(5) of this section, before the expiration of the removal period. The removal period shall be extended until the alien demonstrates to the Service that he or she has complied with the statutory obligations. Once the alien has complied with his or her obligations under the law, the Service shall have a reasonable period of time in order to effect the alien's removal.

* * * * *

(5) *Alien's compliance and cooperation.* (i) Release will be denied and the alien may remain in detention if the alien fails or refuses to make timely application in good faith for travel documents necessary to the alien's departure or conspires or acts to prevent the alien's removal. The detention provisions of section 241(a)(2) of the Act will continue to apply, including provisions that mandate detention of certain criminal and terrorist aliens.

(ii) The Service shall serve the alien with a Notice of Failure to Comply, which shall advise the alien of the following: the provisions of sections 241(a)(1)(C) (extension of removal period) and 243(a) of the Act (criminal penalties related to removal); the circumstances demonstrating his or her failure to comply with the requirements of section 241(a)(1)(C) of the Act; and an explanation of the necessary steps that the alien must take in order to comply with the statutory requirements.

(iii) The Service shall advise the alien that the Notice of Failure to Comply shall have the effect of extending the removal period as provided by law, if the removal period has not yet expired, and that the Service is not obligated to complete its scheduled custody reviews under this section until the alien has demonstrated compliance with the statutory obligations.

(iv) The fact that the Service does not provide a Notice of Failure to Comply, within the 90-day removal period, to an alien who has failed to comply with the requirements of section 241(a)(1)(C) of the Act, shall not have the effect of excusing the alien's conduct.

* * * * *

(i) * * *

(7) *No significant likelihood or removal.* During the custody review process as provided in this paragraph (i), or at the conclusion of that review, if the alien submits, or the record contains, information providing a substantial reason to believe that the removal of a detained alien is not significantly likely in the reasonably foreseeable future, the HQPDU shall treat that as a request for review and initiate the review procedures under § 241.13. To the extent relevant, the HQPDU may consider any information developed during the custody review process under this section in connection with the determinations to be made by the Service under § 241.13. The Service shall complete the custody review under this section unless the HQPDU is able to make a prompt determination to release the alien under an order of supervision under § 241.13 because there is no significant likelihood that the alien will be removed in the reasonably foreseeable future.

* * * * *

§ 241.4 [Amended]

5. Section 241.4 is further amended by removing the term ''90-day'' whenever that term appears in the following paragraphs:

(c)(1)

(c)(2)

(h)(1)

(k)(1)(i)

(k)(1)(ii)

6. Section 241.13 is added to read as follows:

§ 241.13 Determination of whether there is a significant likelihood of removing a detained alien in the reasonably foreseeable future.

(a) *Scope.* This section establishes special review procedures for those aliens who are subject to a final order of removal and are detained under the custody review procedures provided at § 241.4 after the expiration of the removal period, where the alien has provided good reason to believe there is no significant likelihood of removal to the country to which he or she was ordered removed, or to a third country, in the reasonably foreseeable future.

(b) *Applicability to particular aliens.* (1) *Relationship to § 241.4.* Section 241.4 shall continue to govern the detention of aliens under a final order of removal, including aliens who have requested a review of the likelihood of their removal under this section, unless the Service makes a determination under this section that there is no significant likelihood of removal in the reasonably foreseeable future. The Service may release an alien under an order of supervision under § 241.4 if it determines that the alien would not pose a danger to the public or a risk of flight, without regard to the likelihood of the alien's removal in the reasonably foreseeable future.

(2) *Continued detention pending determinations.* (i) The Service's Headquarters Post-order Detention Unit (HQPDU) shall continue in custody any alien described in paragraph (a) of this section during the time the Service is pursuing the procedures of this section to determine whether there is no significant likelihood the alien can be removed in the reasonably foreseeable future. The HQPDU shall continue in custody any alien described in paragraph (a) of this section for whom it has determined that special circumstances exist and custody procedures under § 241.14 have been initiated.

(ii) The HQPDU has no obligation to release an alien under this section until the HQPDU has had the opportunity during a six-month period, dating from the beginning of the removal period (whenever that period begins and unless that period is extended as provided in section 241(a)(1) of the Act), to make its determination as to whether there is a significant likelihood of removal in the reasonably foreseeable future.

(3) *Limitations.* This section does not apply to:

(i) Arriving aliens, including those who have not entered the United States, those who have been granted immigration parole into the United States, and Mariel Cubans whose parole is governed by § 212.12 of this chapter;

(ii) Aliens subject to a final order of removal who are still within the removal period, including aliens whose removal period has been extended for failure to comply with the requirements of section 241(a)(1)(C) of the Act; or

(iii) Aliens who are ordered removed by the Alien Terrorist Removal Court pursuant to title 5 of the Act.

(c) *Delegation of authority.* The HQPDU shall conduct a review under this section, in response to a request from a detained alien, in order to determine whether there is no significant likelihood that the alien will be removed in the reasonably foreseeable future. If so, the HQPDU shall determine whether the alien should be released from custody under appropriate conditions of supervision or should be referred for a determination under § 241.14 as to whether the alien's continued detention may be justified by special circumstances.

(d) *Showing by the alien.* (1) *Written request.* An eligible alien may submit a written request for release to the HQPDU asserting the basis for the alien's belief that there is no significant likelihood that the alien will be removed in the reasonably foreseeable future to the country to which the alien was ordered removed and there is no third country willing to accept the alien. The alien may submit whatever documentation to the HQPDU he or she wishes in support of the assertion that there is no significant likelihood of removal in the reasonably foreseeable future.

(2) *Compliance and cooperation with removal efforts.* The alien shall include with the written request information sufficient to establish his or her compliance with the obligation to effect his or her removal and to cooperate in the process of obtaining necessary travel documents.

(3) *Timing of request.* An eligible alien subject to a final order of removal may submit, at any time after the removal order becomes final, a written request under this section asserting that his or her removal is not significantly likely in the reasonably foreseeable future. However, the Service may, in the exercise of its discretion, postpone its consideration of such a request until after expiration of the removal period.

(e) *Review by HQPDU.* (1) *Initial response.* Within 10 business days after the HQPDU receives the request (or, if later, the expiration of the removal

period), the HQPDU shall respond in writing to the alien, with a copy to counsel of record, by regular mail, acknowledging receipt of the request for a review under this section and explaining the procedures that will be used to evaluate the request. The notice shall advise the alien that the Service may continue to detain the alien until it has made a determination under this section whether there is a significant likelihood the alien can be removed in the reasonably foreseeable future.

(2) *Lack of compliance, failure to cooperate.* The HQPDU shall first determine if the alien has failed to make reasonable efforts to comply with the removal order, has failed to cooperate fully in effecting removal, or has obstructed or hampered the removal process. If so, the HQPDU shall so advise the alien in writing, with a copy to counsel of record by regular mail. The HQPDU shall advise the alien of the efforts he or she needs to make in order to assist in securing travel documents for return to his or her country of origin or a third country, as well as the consequences of failure to make such efforts or to cooperate, including the provisions of section 243(a) of the Act. The Service shall not be obligated to conduct a further consideration of the alien's request for release until the alien has responded to the HQPDU and has established his or her compliance with the statutory requirements.

(3) *Referral to the State Department.* If the HQPDU believes that the alien's request provides grounds for further review, the Service may, in the exercise of its discretion, forward a copy of the alien's release request to the Department of State for information and assistance. The Department of State may provide detailed country conditions information or any other information that may be relevant to whether a travel document is obtainable from the country at issue. The Department of State may also provide an assessment of the accuracy of the alien's assertion that he or she cannot be returned to the country at issue or to a third country. When the Service bases its decision, in whole or in part, on information provided by the Department of State, that information shall be made part of the record.

(4) *Response by alien.* The Service shall permit the alien an opportunity to respond to the evidence on which the Service intends to rely, including the Department of State's submission, if any, and other evidence of record presented by the Service prior to any HQPDU decision. The alien may provide any additional relevant information to the Service, including reasons why his or her removal would not be significantly likely in the reasonably foreseeable future even though the Service has generally been able to accomplish the removal of other aliens to the particular country.

(5) *Interview.* The HQPDU may grant the alien an interview, whether telephonically or in person, if the HQPDU determines that an interview would provide assistance in reaching a decision. If an interview is scheduled, the HQPDU will provide an interpreter upon its determination that such assistance is appropriate.

(6) *Special circumstances.* If the Service determines that there are special circumstances justifying the alien's continued detention nowithstanding the determination that removal is not significantly likely in the reasonably foreseeable future, the Service shall initiate the review procedures in § 241.14, and provide written notice to the alien. In appropriate cases, the Service may initiate review proceedings under § 241.14 before completing the HQPDU review under this section.

(f) *Factors for consideration.* The HQPDU shall consider all the facts of the case including, but not limited to, the history of the alien's efforts to comply with the order of removal, the history of the Service's efforts to remove aliens to the country in question or to third countries, including the ongoing nature of the Service's efforts to remove this alien and the alien's assistance with those efforts, the reasonably foreseeable results of those efforts, the views of the Department of State regarding the prospects for removal of aliens to the country or countries in question, and the receiving country's willingness to accept the alien into its territory. Where the Service is continuing its efforts to remove the alien, there is no presumptive period of time within which the alien's removal must be accomplished, but the prospects for the timeliness of removal must be reasonable under the circumstances.

(g) *Decision.* The HQPDU shall issue a written decision based on the administrative record, including any documentation provided by the alien, regarding the likelihood of removal and whether there is a significant likelihood that the alien will be removed in the reasonably foreseeable future under the circumstances. The HQPDU shall provide the decision to the alien, with a copy to counsel of record, by regular mail.

(1) *Finding of no significant likelihood of removal.* If the HQPDU determines at the conclusion of the review that there is no significant likelihood that the alien will be removed in the reasonably foreseeable future, despite the Service's and the alien's efforts to effect removal, then the HQPDU shall so advise the alien. Unless there are special circumstances justifying continued detention, the Service shall promptly make arrangements for the release of the alien subject to appropriate conditions, as provided in paragraph (h) of this section. The Service may require that the alien submit to a medical or psychiatric examination prior to establishing appropriate conditions for release or determining whether to refer the alien for further proceedings under § 214.14 because of special circumstances justifying continued detention. The Service is not required to release an alien if the alien refuses to submit to a medical or psychiatric examination as ordered.

(2) *Denial.* If the HQPDU determines at the conclusion of the review that there is a significant likelihood that the alien will be removed in the reasonably foreseeable future, the HQPDU shall deny the alien's request under this section. The denial shall advise the alien that his or her detention will continue to be governed under the established standards in § 214.4. There is no administrative appeal from the HQPDU decision denying a request from an alien under this section.

(h) *Conditions of release.* (1) *In general.* An alien's release pursuant to an HQPDU determination that the alien's removal is not significantly likely in the reasonably foreseeable future shall be upon appropriate conditions specified in this paragraph and in the order of supervision, in order to protect the public safety and to promote the ability of the Service to effect the alien's removal as ordered, or removal to a third country, should circumstances change in the future. The order of supervision shall include all of the conditions provided in section 241(a)(3) of the Act, and § 241.5, and shall also include the conditions that the alien obey all laws, including any applicable prohibitions on the possession or use of firearms (*see, e.g.,* 18 U.S.C. 922(g)); and that the alien continue to seek to obtain travel documents and provide the Service with all correspondence to Embassies/Consulates requesting the issuance of travel documents and any reply from the Embassy/Consulate. The order of supervision may also include any other conditions that the HQPDU considers necessary to ensure public safety and guarantee the alien's compliance with the order of removal, including, but not limited to, attendance at any rehabilitative/sponsorship program or

submission for medical or psychiatric examination, as ordered.

(2) *Advice of consequences for violating conditions of release.* The order of supervision shall advise an alien released under this section that he or she must abide by the conditions of release specified by the Service. The order of supervision shall also advise the alien of the consequences of violation of the conditions of release, including the authority to return the alien to custody and the sanctions provided in section 243(b) of the Act.

(3) *Employment authorization.* The Service may, in the exercise of its 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 Service may, in the exercise of its discretion, withdraw approval for release of any alien under this section prior to release in order to effect removal in the reasonably foreseeable future or where the alien refuses to comply with the conditions of release.

(i) *Revocation of release.*

(1) *Violation of conditions of release.* Any alien who has been released under an order of supervision under this section who violates any of the conditions of release may be returned to custody and is subject to the penalties described in section 243(b) of the Act. In suitable cases, the HQPDU shall refer the case to the appropriate U.S. Attorney for criminal prosecution. The alien may be continued in detention for an additional six months in order to effect the alien's removal, if possible, and to effect the conditions under which the alien had been released.

(2) *Revocation for removal.* The Service may revoke an alien's release under this section and return the alien to custody if, on account of changed circumstances, the Service determines that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future. Thereafter, if the alien is not released from custody following the informal interview provided for in paragraph (h)(3) of this section, the provisions of § 241.4 shall govern the alien's continued detention pending removal.

(3) *Revocation procedures.* Upon revocation, the alien will be notified of the reasons for revocation of his or her release. The Service will conduct an initial informal interview promptly after his or her return to Service custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notification. The alien may submit any evidence or information that he or she believes shows there is no significant likelihood he or she be removed in the reasonably foreseeable future, or that he or she has not violated the order of supervision. The revocation custody review will include an evaluation of any contested facts relevant to the revocation and a determination whether the facts as determined warrant revocation and further denial of release.

(j) *Subsequent requests for review.* If the Service has denied an alien's request for release under this section, the alien may submit a request for review of his or her detention under this section, six months after the Service's last denial of release under this section. After applying the procedures in this section, the HQPDU shall consider any additional evidence provided by the alien or available to the Service as well as the evidence in the prior proceedings but the HQPDC shall render a *de novo* decision on the likelihood of removing the alien in the reasonably foreseeable future under the circumstances.

7. Section 241.14 is added to read as follows:

§ 241.14 Continued detention of removable aliens on account of special circumstances.

(a) *Scope.* The Service may invoke the procedures of this section in order to continue detention of particular removable aliens on account of special circumstances even though there is no significant likelihood that the alien will be removed in the reasonably foreseeable future.

(1) *Applicability.* This section applies to removable aliens as to whom the Service has made a determination under § 241.13 that there is no significant likelihood of removal in the reasonably foreseeable future. This section does not apply to aliens who are not subject to the special review provisions under § 241.13.

(2) *Jurisdiction.* The immigration judges and the Board have jurisdiction with respect to determinations as to whether release of an alien would pose a special danger to the public, as provided in paragraphs (f) through (k) of this section, but do not have jurisdiction with respect to aliens described in paragraphs (b), (c), or (d) of this section.

(b) *Aliens with a highly contagious disease that is a threat to public safety.* If, after a medical examination of the alien, the Service determines that a removable alien presents a threat to public safety initiate efforts with the Public Health Service or proper State and local government officials to secure appropriate arrangements for the alien's continued medical care or treatment.

(1) *Recommendation.* The Service shall not invoke authority to continue detention of an alien under this paragraph except upon the express recommendation of the Public Health Service. The Service will provide every reasonably available form of treatment while the alien remains in the custody of the Service.

(2) *Conditions of release.* If the Service, in consultation with the Public Health Service and the alien, identifies an appropriate medical facility that will treat the alien, then the alien may be released on condition that he or she continue with appropriate medical treatment until he or she no longer poses a threat to public safety because of a highly contagious disease.

(c) *Aliens detained on account of serious adverse foreign policy consequences of release.* (1) *Certification.* The Service shall continue to detain a removable alien where the Attorney General or Deputy Attorney General has certified in writing that:

(i) Without regard to the grounds upon which the alien has been found inadmissible or removable, the alien is a person described in section 212(a)(3)(C) or section 237(a)(4)(C) of the Act;

(ii) The alien's release is likely to have serious adverse foreign policy consequences for the United States; and

(iii) No conditions of release can reasonably be expected to avoid those serious adverse foreign policy consequences,

(2) *Foreign policy consequences.* A certification by the Attorney General or Deputy Attorney General that an alien should not be released from custody on account of serious adverse foreign policy consequences shall be made only after consultation with the Department of State and upon the recommendation of the Secretary of State.

(3) *Ongoing review.* The certification is subject to ongoing review on a semi-annual basis but is not subject to further administrative review.

(d) *Aliens detained on account of security or terrorism concerns.* (1) *Standard for continued detention.* Subject to the review procedures under this paragraph (d), the Service shall continue to detain a removable alien based on a determination in writing that:

(i) The alien is a person described in section 212(a)(3)(A) or (B) or section 237(a)(4)(A) of (B) of the Act or the alien has engaged or will likely engage in any other activity that endangers the national security;

(ii) The alien's release presents a significant threat to the national security or a significant risk of terrorism; and

(iii) No conditions of release can reasonably be expected to avoid the

threat to the national security or the risk of terrorism, as the case may be.

(2) *Procedure.* Prior to the Commissioner's recommendation to the Attorney General under paragraph (d)(5) of this section, the alien shall be notified of the Service's intention to continue the alien in detention and of the alien's right to submit a written statement and additional information for consideration by the Commissioner. The Service shall continue to detain the alien pending the decision of the Attorney General under this paragraph. To the greatest extent consistent with protection of the national security and classified information:

(i) The Service shall provide a description of the factual basis for the alien's continued detention; and

(ii) The alien shall have a reasonable opportunity to examine evidence against him or her, and to present information on his or her own behalf.

(3) *Aliens ordered removed on grounds other than national security or terrorism.* If the alien's final order of removal was based on grounds of inadmissibility other than any of those stated in section 212(a)(3)(A)(i), (A)(iii), or (B) of the Act, or on grounds of deportability other than any of those stated in section 237(a)(4)(A) or (B) of the Act:

(i) An immigration officer shall, if possible, conduct an interview in person and take a sworn question-and-answer statement from the alien, and the Service shall provide an interpreter for such interview, if such assistance is determined to be appropriate; and

(ii) The alien may be accompanied at the interview by an attorney or other representative of his or her choice in accordance with 8 CFR part 292, at no expense to the government.

(4) *Factors for consideration.* In making a recommendation to the Attorney General that an alien should not be released from custody on account of security or terrorism concerns, the Commissioner shall take into account all relevant information, including but not limited to:

(i) The recommendations of appropriate enforcement officials of the Service, including the director of the Headquarters Post-order Detention Unit (HQPDU), and of the Federal Bureau of Investigation or other federal law enforcement or national security agencies;

(ii) The statements and information submitted by the alien, if any;

(iii) The extent to which the alien's previous conduct (including but not limited to the commission of national security or terrorism-related offenses, engaging in terrorist activity or other activity that poses a danger to the national security and any prior convictions in a federal, state or foreign court) indicates a likelihood that the alien's release would present a significant threat to the national security or a significant risk of terrorism; and

(iv) Other special circumstances of the alien's case indicating that release from detention would present a significant threat to the national security or a significant risk of terrorism.

(5) *Recommendation to the Attorney General.* The Commissioner shall submit a written recommendation and make the record available to the Attorney General. If the continued detention is based on a significant risk of terrorism, the recommendation shall state in as much detail as practicable the factual basis for this determination.

(6) *Attorney General certification.* Based on the record developed by the Service, and upon this recommendation of the Commissioner and the Director of the Federal Bureau of Investigation, the Attorney General may certify that an alien should continue to be detained on account of security or terrorism grounds as provided in this paragraph (d). Before making such a certification, the Attorney General shall order any further procedures or reviews as may be necessary under the circumstances to ensure the development of a complete record, consistent with the obligations to protect national security and classified information and to comply with the requirements of due process.

(7) *Ongoing review.* The detention decision under this paragraph (d) is subject to ongoing review on a semi-annual basis as provided in this paragraph (d), but is not subject to further administrative review. After the initial certification by the Attorney General, further certifications under paragraph (d)(6) of this section may be made by the Deputy Attorney General.

(e) [Reserved]

(f) *Detention of aliens determined to be specially dangerous.* (1) *Standard for continued detention.* Subject to the review procedures provided in this section, the Service shall continue to detain an alien if the release of the alien would pose a special danger to the public, because:

(i) The alien has previously committed one or more crimes of violence as defined in 18 U.S.C. 16;

(ii) Due to a mental condition or personality disorder and behavior associated with that condition or disorder, the alien is likely to engage in acts of violence in the future; and

(iii) No conditions of release can reasonably be expected to ensure the safety of the public.

(2) *Determination by the Commissioner.* The Service shall promptly initiate review proceedings under paragraph (g) of this section if the Commissioner has determined in writing that the alien's release would pose a special danger to the public, according to the standards of paragraph (f)(1) of this section.

(3) *Medical or mental health examination.* Before making such a determination, the Commissioner shall arrange for a report by a physician employed or designated by the Public Health Service based on a full medical and psychiatric examination of the alien. The report shall include recommendations pertaining to whether, due to a mental condition or personality disorder and behavior associated with that condition or disorder, the alien is likely to engage in acts of violence in the future.

(4) *Detention pending review.* After the Commissioner or Deputy Commissioner has made a determination under this paragraph, the Service shall continue to detain the alien, unless an immigration judge or the Board issues an administratively final decision dismissing the review proceedings under this section.

(g) *Referral to Immigration Judge.* Jurisdiction for an immigration judge to review a determination by the Service pursuant to paragraph (f) of this section that an alien is specially dangerous shall commence with the filing by the Service of a Notice of Referral to the Immigration Judge (Form I–863) with the Immigration Court having jurisdiction over the place of the alien's custody. The Service shall promptly provide to the alien by personal service a copy of the Notice of Referral to the Immigration Judge and all accompanying documents.

(1) *Factual basis.* The Service shall attach a written statement that contains a summary of the basis for the Commissioner's determination to continue to detain the alien, including a description of the evidence relied upon to reach the determination regarding the alien's special dangerousness. The Service shall attach copies of all relevant documents used to reach its decision to continue to detain the alien.

(2) *Notice of reasonable cause hearing.* The Service shall attach a written notice advising the alien that the Service is initiating proceedings for the continued detention of the alien and informing the alien of the procedures governing the reasonable cause hearing, as set forth at paragraph (h) of this section.

(3) *Notice of alien's rights.* The Service shall also provide written notice advising the alien of his or her rights during the reasonable cause hearing and the merits hearing before the Immigration Court, as follows:

(i) The alien shall be provided with a list of free legal services providers, and may be represented by an attorney or other representative of his or her choice in accordance with 8 CFR part 292, at no expense to the Government;

(ii) The Immigration Court shall provide an interpreter for the alien, if necessary, for the reasonable cause hearing and the merits hearing.

(iii) The alien shall have a reasonable opportunity to examine evidence against the alien, to present evidence in the alien's own behalf, and to cross-examine witnesses presented by the Service; and

(iv) The alien shall have the right, at the merits hearing, to cross-examine the author of any medical or mental health reports used as a basis for the determination under paragraph (f) of this section that the alien is specially dangerous.

(4) *Record.* All proceedings before the immigration judge under this section shall be recorded. The Immigration Court shall create a record of proceeding that shall include all testimony and documents related to the proceedings.

(h) *Reasonable cause hearing.* The immigration judge shall hold a preliminary hearing to determine whether the evidence supporting the Service's determination is sufficient to establish reasonable cause to go forward with a merits hearing under paragraph (i) of this section. A finding of reasonable cause under this section will be sufficient to warrant the alien's continued detention pending the completion of the review proceedings under this section.

(1) *Scheduling of hearing.* The reasonable cause hearing shall be commenced not later than 10 business days after the filing of the Form I–863. The Immigration Court shall provide prompt notice to the alien and to the Service of the time and place of the hearing. The hearing may be continued at the request of the alien or his or her representative.

(2) *Evidence.* The Service must show that there is reasonable cause to conduct a merits hearing under a merits hearing under paragraph (i) of this section. The Service may offer any evidence that is material and relevant to the proceeding. Testimony of witnesses, if any, shall be under oath or affirmation. The alien may, but is not required to, offer evidence on his or her own behalf.

(3) *Decision.* The immigration judge shall render a decision, which should be in summary form, within 5 business days after the close of the record, unless that time is extended by agreement of both parties, by a determination from the Chief Immigration Judge that exceptional circumstances make it impractical to render the decision on a highly expedited basis, or because of delay caused by the alien. If the immigration judge determines that the Service has met its burden of establishing reasonable cause, the immigration judge shall advise the alien and the Service, and shall schedule a merits hearing under paragraph (i) of this section to review the Service's determination that the alien is specially dangerous. If the immigration judge determines that the Service has not met its burden, the immigration judge shall order that the review proceedings under this section be dismissed. The order and any documents offered shall be included in the record of proceedings, and may be relied upon in a subsequent merits hearing.

(4) *Appeal.* If the immigration judge dismisses the review proceedings, the Service may appeal to the Board of Immigration Appeals in accordance with § 3.38 of this chapter, except that the Service must file the Notice of Appeal (Form EOIR–26) with the Board within 2 business days after the immigration judge's order. The Notice of Appeal should state clearly and conspicuously that it is an appeal of a reasonable cause decision under this section.

(i) If the Service reserves appeal of a dismissal of the reasonable cause hearing, the immigration judge's order shall be stayed until the expiration of the time to appeal. Upon the Service's filing of a timely Notice of Appeal, the immigration judge's order shall remain in abeyance pending a final decision of the appeal. The stay shall expire if the Service fails to file a timely Notice of Appeal.

(ii) The Board will decide the Service's appeal, by single Board Member review, based on the record of proceedings before the immigration judge. The Board shall expedite its review as far as practicable, as the highest priority among the appeals filed by detained aliens, and shall determine the issue within 20 business days of the filing of the notice of appeal, unless that time is extended by agreement of both parties, by a determination from the Chairman of the Board that exceptional circumstances make it impractical to render the decision on a highly expedited basis, or because of delay caused by the alien.

(iii) If the Board determines that the Service has met its burden of showing reasonable cause under this paragraph (h), the Board shall remand the case to the immigration judge for the scheduling of a merits hearing under paragraph (i) of this section. If the Board determines that the Service has not met its burden, the Board shall dismiss the review proceedings under this section.

(i) *Merits hearing.* If there is reasonable cause to conduct a merits hearing under this section, the immigration judge shall promptly schedule the hearing and shall expedite the proceedings as far as practicable. The immigration judge shall allow adequate time for the parties to prepare for the merits hearing, but, if requested by the alien, the hearing shall commence within 30 days. The hearing may be continued at the request of the alien or his or her representative, or at the request of the Service upon a showing of exceptional circumstances by the Service.

(1) *Evidence.* The Service shall have the burden of proving, by clear and convincing evidence, that the alien should remain in custody because the alien's release would pose a special danger to the public, under the standards of paragraph (f)(1) of this section. The immigration judge may receive into evidence any oral or written statement that is material and relevant to this determination. Testimony of witnesses shall be under oath or affirmation. The alien may, but is not required to, offer evidence on his or her own behalf.

(2) *Factors for consideration.* In making any determination in a merits hearing under this section, the immigration judge shall consider the following non-exclusive list of factors:

(i) The alien's prior criminal history, particularly the nature and seriousness of any prior crimes involving violence or threats of violence;

(ii) The alien's previous history of recidivism, if any, upon release from either Service or criminal custody;

(iii) The substantiality of the Service's evidence regarding the alien's current mental condition or personality disorder;

(iv) The likelihood that the alien will engage in acts of violence in the future; and

(v) The nature and seriousness of the danger to the public posed by the alien's release.

(3) *Decision.* After the closing of the record, the immigration judge shall render a decision as soon as practicable. The decision may be oral or written. The decision shall state whether or not the Service has met its burden of

establishing that the alien should remain in custody because the alien's release would pose a special danger to the public, under the standards of paragraph (f)(1) of this section. The decision shall also include the reasons for the decision under each of the standards of paragraph (f)(1) of this section, although a formal enumeration of findings is not required. Notice of the decision shall be served in accordance with § 240.13(a) or (b).

(i) If the immigration judge determines that the Service has met its burden, the immigration judge shall enter an order providing for the continued detention of the alien.

(ii) If the immigration judge determines that the Service has failed to meet its burden, the immigration judge shall order that the review proceedings under this section be dismissed.

(4) *Appeal.* Either party may appeal an adverse decision to the Board of Immigration Appeals in accordance with § 3.38 of this chapter, except that, if the immigration judge orders dismissal of the proceedings, the Service shall have only 5 business days to file a Notice of Appeal with the Board. The Notice of Appeal should state clearly and conspicuously that this is an appeal of a merits decision under this section.

(i) If the Service reserves appeal of a dismissal, the immigration judge's order shall be stayed until the expiration of the time to appeal. Upon the Service's filing of a timely Notice of Appeal, the immigration judge's order shall remain in abeyance pending a final decision of the appeal. The stay shall expire if the Service fails to file a timely Notice of Appeal.

(ii) The Board shall conduct its review of the appeal as provided in 8 CFR part 3, but shall expedite its review as far as practicable, as the highest priority among the appeals filed by detained aliens. The decision of the Board shall be final as provided in § 3.1(d)(3) of this chapter.

(j) *Release of alien upon dismissal of proceedings.* If there is an administratively final decision by the immigration judge or the Board dismissing the review proceedings under this section upon conclusion of the reasonable cause hearing or the merits hearing, the Service shall promptly release the alien on conditions of supervision, as determined by the Service, pursuant to § 241.13. The conditions of supervision shall not be subject to review by the immigration judge or the Board.

(k) *Subsequent review for aliens whose release would pose a special danger to the public.* (1) *Periodic review.* In any case where the immigration judge or the Board has entered an order providing for the alien to remain in custody after a merits hearing pursuant to paragraph (i) of this section, the Service shall continue to provide an ongoing, periodic review of the alien's continued detention, according to § 241.4 and paragraphs (f)(1)(ii) and (f)(1)(iii) of this section.

(2) *Alien's request for review.* The alien may also request a review of his or her custody status because of changed circumstances, as provided in this paragraph (k). The request shall be in writing and directed to the HQPDU.

(3) *Time for review.* An alien may only request a review of his or her custody status under this paragraph (k) no earlier than six months after the last decision of the immigration judge under this section or, if the decision was appealed, the decision of the Board.

(4) *Showing of changed circumstances.* The alien shall bear the initial burden to establish a material change in circumstances such that the release of the alien would no longer pose a special danger to the public under the standards of paragraph (f)(1) of this section.

(5) *Review by the Service.* If the Service determines, upon consideration of the evidence submitted by the alien and other relevant evidence, that the alien is not likely to commit future acts of violence or that the Service will be able to impose adequate conditions of release so that the alien will not pose a special danger to the public, the Service shall release the alien from custody pursuant to the procedures in § 241.13. If the Service determines that continued detention is needed in order to protect the public, the Service shall provide a written notice to the alien stating the basis for the Service's determination, and provide a copy of the evidence relied upon by the Service. The notice shall also advise the alien of the right to move to set aside the prior review proceedings under this section.

(6) *Motion to set aside determination in prior review proceedings.* If the Service denies the alien's request for release from custody, the alien may file a motion with the Immigration Court that had jurisdiction over the merits hearing to set aside the determination in the prior review proceedings under this section. The immigration judge shall consider any evidence submitted by the alien or relied upon by the Service and shall provide an opportunity for the Service to respond to the motion.

(i) If the immigration judge determines that the alien has provided good reason to believe that, because of a material change in circumstances, releasing the alien would no longer pose a special danger to the public under the standards of paragraph (f)(1) of this section, the immigration judge shall set aside the determination in the prior review proceedings under this section and schedule a new merits hearing as provided in paragraph (i) of this section.

(ii) Unless the immigration judge determines that the alien has satisfied the requirements under paragraph (k)(6)(i) of this section, the immigration judge shall deny the motion. Neither the immigration judge nor the Board may *sua sponte* set aside a determination in prior review proceedings. Notwithstanding 8 CFR 3.23 or 3.2 (motions to reopen), the provisions set forth in this paragraph (k) shall be the only vehicle for seeking review based on material changed circumstances.

(iii) The alien may appeal an adverse decision to the Board in accordance with § 3.38 of this chapter. The Notice of Appeal should state clearly and conspicuously that this is an appeal of a denial of a motion to set aside a prior determination in review proceedings under this section.

Dated: November 6, 2001.

John Ashcroft,

Attorney General.

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BILLING CODE 4410–10–M

NUCLEAR REGULATORY COMMISSION

10 CFR Part 72

RIN 3150–AG87

List of Approved Spent Fuel Storage Casks: FuelSolutions™ Cask System Revision

AGENCY: Nuclear Regulatory Commission.

ACTION: Direct final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending its regulations revising the BNFL Fuel Solutions (FuelSolutions™) cask system listing within the ''List of Approved Spent Fuel Storage Casks'' to include Amendment No. 2 to Certificate of Compliance (CoC) Number 1026. Amendment No. 2 will modify the Technical Specifications (TS). The current TS require that if the W74 canister is required to be removed from its storage cask, then the canister must be returned to the spent fuel pool. The modified TS will allow the W74 canister to be placed in the transfer cask until the affected storage cask is repaired or replaced. The TS will also be modified