No. 17-55208

IN THE UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

JENNY LISETTE FLORES, *et al.*,
Plaintiffs/Appellees,

v.

JEFFERSON B. SESSIONS III, *et al.*,
Defendants/Appellants.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
No. 2:85-cv-04544-DMG (AGRx)

PLAINTIFFS-APPELLEES' ANSWERING BRIEF

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QUESTION PRESENTED FOR REVIEW

Whether the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 110 Pub. L. 457, 122 Stat. 5044, *codified in pertinent part at* 8 U.S.C. § 1232 ("TVPRA"), prohibits Defendants from providing children an opportunity to be heard on the reasons for their confinement, as required by a consent decree preserved by savings clauses in the TVPRA and the Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 ("HSA").

STATEMENT OF JURISDICTION

(a) The district court exercised jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1361, and 2241, 8 U.S.C. § 1329, and ¶ 27 of the settlement it approved pursuant to Rule 23(e), Fed. R.Civ.Proc., on January 28, 1997 ("Settlement").

(b) The order on appeal is a final order enforcing ¶ 24A of the Settlement; Plaintiffs-Appellees ("Plaintiffs") agree with Defendants-Appellants' ("Defendants") statement regarding the statutory basis for this Court's jurisdiction.

(c) Plaintiffs agree with Defendants' statement regarding the date of the order on appeal and the timeliness of the filing of their notice of appeal.

STATEMENT OF THE CASE

The Settlement

On January 28, 1997, the court below approved the Settlement at issue.[1] The Settlement sets minimum standards for the detention, housing and release of non-citizen juveniles detained because they are allegedly present in the U.S. without authorization.[2]

The Settlement obliges Defendants to pursue a "general policy favoring release" of juveniles except where their continued detention is "required either to secure [their] timely appearance ... or to ensure the minor's safety or that of others." Settlement ¶ 14, Defendants-Appellants' Excerpts of Record ("DER") 6.

The Settlement guarantees detained children the right to a hearing before an immigration judge—commonly called a "bond redetermination," *see* 8 C.F.R. §§ 1003.19(a), 1236.1(d) (2017)—as a procedural check against confinement that violates this general policy: "A minor in deportation proceedings shall be afforded a bond redetermination hearing before an immigration judge in every case, unless

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[1] Opinions in this action preceding the Settlement include *Flores v. Meese*, 681 F. Supp. 665 (C.D. Cal. 1988); *Flores v. Meese*, 934 F.2d 991 (9th Cir. 1990); *Flores v. Meese*, 942 F.2d 1352 (9th Cir. 1992) (en banc); and *Reno v. Flores*, 507 U.S. 292 (1993).

This Court's recent opinion addressing other parts of the Settlement is reported at *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016).

[2] Although the Settlement contains a five-year sunset clause, in 2001 the parties stipulated that it shall remain binding until "45 days following defendants' publication of final regulations implementing this Agreement." Stipulation and Order [D.Ct. Dkt. 12]. The Government has never published such regulations.

the minor indicates on the Notice of Custody Determination form that he or she refuses such a hearing." Settlement ¶ 24A.[3]

The Homeland Security Act of 2002

In 2002, the HSA dissolved the Immigration and Naturalization Service ("INS") and transferred most of that agency's functions to the Department of Homeland Security ("DHS"). 6 U.S.C § 279. Congress directed, however, that the Office of Refugee Resettlement of the Department of Health and Human Services ("ORR") should care for unaccompanied minors detained pursuant to the Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq*. ("INA").

Congress included a savings clause in the HSA that transferred all of INS's prior legal obligations—including the Settlement—to the INS's successor agencies: "Subsections (a), (b), and (c) of section 1512 shall apply to a transfer of functions under this section in the same manner as such provisions apply to a transfer of functions under this Act to the Department of Homeland Security." HSA § 462(f)(2).

HSA § 1512(a) describes the scope of those prior obligations:

> (1) *Completed administrative actions of an agency shall not be affected* by the enactment of this Act or *the transfer of such agency to the Department, but shall continue in effect according to their terms* until amended, modified,

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[3] Effective April 1, 1997, administrative proceedings to determine a non-citizen's right to be or remain in the United States were generally redesignated as "removal," rather than "deportation" proceedings. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. 104-208, Div C, § 309(a), 110 Stat. 3009 (1996).

> superseded, terminated, set aside, or revoked in accordance with law by an officer of the United States or a court of competent jurisdiction, or by operation of law.
>
> (2) For purposes of paragraph (1), the term "completed administrative action" includes orders, ... *agreements*, grants, contracts, certificates, licenses, registrations, and privileges.

(Emphasis added); *see also* 6 U.S.C. § 552(c) ("pending civil actions shall continue notwithstanding the enactment of this Act or the transfer of an agency to the Department, and in such civil actions, proceedings shall be had, appeals taken, and judgments rendered and enforced in the same manner and with the same effect as if such enactment or transfer had not occurred."[4]

Following enactment of the HSA, the Board of Immigration Appeals ("BIA") repeatedly affirmed that immigration judges may review ORR's custody determinations involving unaccompanied class members. *Matter of A--*, 2005 Immig. Rptr. LEXIS 54924 (BIA 2005); *In Re: Rodriguez-Lopez*, 2004 WL 1398660 (BIA 2004).

The Trafficking Victims Protection Reauthorization Act of 2008

In 2008, Congress enacted the TVPRA. The enactment, *inter alia*, directed

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[4] The Settlement protects "all minors who are detained in the legal custody of the INS," and binds the INS and Department of Justice, as well as "their agents, employees, contractors, and/or successors in office." *Id*. ¶ 1; *see also Bunikyte v. Chertoff,* 2007 WL 1074070 at *2 (W.D. Tex. 2007).

HHS has generally recognized that the Settlement continues to protect juveniles in its custody. *E.g.,* www.acf.hhs.gov/programs/orr/resource/children-entering-the-united-states-unaccompanied-section-2 (last visited March 8, 2017); *see also* H.R. REP. 110-181 (2008) (Congressional committee acknowledges Settlement binding on DHS and ICE).

ORR to promptly place "an unaccompanied alien child ... in the least restrictive setting that is in the best interest of the child. In making such placements, the Secretary may consider danger to self, danger to the community, and risk of flight." 8 U.S.C. § 1232(c)(2).

The TVPRA further directed ORR to exercise its authority over unaccompanied children "*[c]onsistent[ly] with section 462*" of the HSA, which includes the earlier enactment's savings clauses. 8 U.S.C. § 1232(b) (emphasis added). The TVPRA thus incorporates by reference Congress's directive that Defendants must comply with the former INS's obligations, including the Settlement, but is otherwise silent regarding procedural protections for detained children.[5]

Despite the absence of any express language in the TVPRA that would relieve Defendants of their obligations under the Settlement, in November 2015, they announced they would no not present children in ORR custody for hearings as ¶ 24A requires. Plaintiffs' Supplemental Excerpts of Record ("PER") 5 (Email from Office of Immigration Litigation (Nov. 23, 2015).

Defendants do not argue that the Settlement is no longer binding, nor do they contend that any statute or regulation expressly abrogates ¶ 24A. Their central claim is rather that TVPRA § 235—which was enacted with the express purpose of

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[5] The TVPRA directs HHS to conduct "30-day" reviews of the grounds for placing children in secure facilities, as opposed to shelters, a matter distinct from release and on which the Settlement is silent. 8 U.S.C. § 1232(c)(2)(A).

enhancing protections for unaccompanied children—silently nullified ¶ 24A by placing responsibility for the "care and custody of all unaccompanied alien children" in the hands of the Secretary of Health and Human Services ("HHS"). Appellants' Br. 19-21.

On June 28, 2016, the BIA barred immigration judges from reviewing ORR's custody determinations. DER at 74 (*In Re: Aguilar-Ramirez*, A206 775 662 (BIA 2016).

Evidentiary Record

Meanwhile, the uncontroverted record establishes that ORR confined class members for months or years in secure facilities without affording them any meaningful opportunity to be heard.

Megan Stuart, a legal services lawyer who represented ORR detainees in New York declares:

> In multiple cases ... I have advised ORR of the availability of less restrictive placements, including release to parents, guardians, or other appropriate custodians, yet in my experience ORR generally ignores such alternatives or rejects them without providing ... a coherent explanation of why it believes release would be inappropriate, nor does ORR provide any meaningful opportunity to examine, much less explain or rebut, any evidence it may have to support having denied children's release.

PER 72 (Declaration of Megan Stuart, July 29, 2016) ("Stuart Dec."); *see also* PER 65 (Affidavit of Lorilei Williams, August 5, 2016) ("Williams Dec.").

ORR detained class member H_ E_ B_, for example, for 489 days without explanation, presumably, though it never said so, because ORR believed he was

dangerous. PER 102 (Declaration of H_ E_ B_ , Feb. 29, 2016) ("HEB Dec."); PER 297 (Declaration of Helen Lawrence, Jan. 30, 2017) ("Lawrence II"). He describes ORR custody as follows:

> In Yolo, we live in a real prison. The food, the program, the life, the routine: everything is a penitentiary. They treat us badly, like delinquents. The entire time, we live locked up. They don't grab us to go to the park, the library, or anywhere normal. They lock us up in the cells every night, to sleep on benches made out of cement with mattresses. ...
>
> Since I arrived in Yolo, I have never consulted with a lawyer. (Now, a lawyer named Helen is helping me.) I never saw a list of lawyers who help detained minors. No one ever gave me a written explanation of the reason they held me in a high-security prison in Virginia or in Yolo. Up until now, they have not brought me in front of an immigration judge.

PER 104 (HEB Dec. ¶ 16).

Like many class members, H_ E_ B_ was held in ORR custody after having experienced horrific trauma in his native Guatemala, where he had suffered prolonged physical abuse and neglect, as well as three attempts on his life. PER 100-02 (HEB Dec. ¶ 16). Before that, he had spent three years as a smuggler's hostage in Mexico, where he witnessed his captor rape his sister. *Id*.

H_ E_ B_'s attorney noted the deterioration of her client's already fragile mental state as the months of confinement at Yolo dragged on:

> [O]ver the course of representing [H_ E_ B_] I have observed a marked deterioration in his mental functioning. His aspect has transformed from one of optimism and hope to depression and hopelessness, which he attributes to prolonged detention with no end in sight. He reports suffering from fatigue, despair, and insomnia. He now appears isolated from his peers, and reports a preference for being alone. [H_ E_ B_] said that Yolo is "not a detention center, but an insane asylum" and has worried about his own mental health status after so much time detained.

PER 232 (Declaration of Helen Lawrence, Sept. 2, 2016) ("Lawrence I").

After more than a year of unnecessary detention, ORR released H_ E_ B_ to the same caregiver who had sought his custody all along: his mother. PER 297 (Lawrence II ¶ 3).

In August 2016, Plaintiffs moved the district court to enforce the Settlement and require ORR to resume complying with ¶ 24A. Motion to Enforce Settlement, August 12, 2016 [D.Ct. Dkt. 239]. On January 20, 2017, the district court granted Plaintiffs' motion and ordered Defendants to comply with ¶ 24A. DER 45-53 ("Enforcement Order"). This appeal followed.

SUMMARY OF THE ARGUMENT

The principle issue before this Court is whether § 235 of the TVPRA prohibits ORR from providing bond hearings to detained children as Settlement ¶ 24A requires. The district court correctly held that class members remain entitled to the procedural protection ¶ 24A accords.

There is no material dispute regarding the following propositions:

(1) the HSA's savings clauses, which are incorporated by reference in the TVPRA, manifest Congress's determination that Defendants must continue to abide by the INS's preexisting legal obligations, including the Settlement.

(2) The TVPRA's fundamental purpose is to minimize the detention of children and improve their treatment for howsoever long as they remain in federal custody.

(3) The TVPRA does not expressly bars ORR from giving children an opportunity to be heard pursuant to ¶ 24A regarding the Government's reasons for confining them.

Defendants cannot and do not dispute any of the foregoing, but nevertheless insist that Congress somehow authorized ORR to confine youth without regard to fundamental principles of due process: namely, that children should be afforded an opportunity to be heard, at a meaningful time and place, regarding the Government's reasons for confining them.

Defendants' claim is extraordinary. The fundamental purpose of the TVPRA is to minimize the detention of children and improve their treatment while they are in federal custody. Stripping children of basic due process protections against needless confinement is wholly inimical to that aim. If Congress intended to mandate such a remarkable departure from previous practice and fundamental fairness, one would expect the plain language of the TVPRA to contain a provision barring children in ORR custody from receiving a bond hearing. Of course, the statute says nothing of the sort.

Defendants try to allay the qualms their extravagant claim elicits by assuring that ORR unerringly acts "in the best possible interests of UACs in federal custody." Appellants' Br. 19. But professions of good intentions do not automatically lead to just decisions, as the uncontroverted record establishes:

- ORR confines children indefinitely without disclosing its reasons for doing so or affording them any opportunity to examine, explain, or rebut whatever evidence the agency believes justifies such detention.
- Often, the agency simply refuses to decide whether to release a child, leaving him or her with no knowledge of when or if he or she will ever be freed.
- When and if ORR actually reaches a decision regarding a child's detention, the procedures it follows are perfunctory and aberrant, reflecting *neither* well-established practice for the review of immigration custody decisions *nor* standard procedures juvenile courts and child protection agencies everywhere consider fundamental when a child is to be confined.
- ORR arbitrarily denies *unaccompanied* children the protections of ¶ 24A, even though *accompanied* minors and adults unquestionably remain entitled to bond hearings.
- ORR confines youth for months or years, only in the end to release them to parents or other custodians who have sought their custody all along. In other cases, immigration judges have freed youth whom ORR had for months refused to release, merely because they reached the age of majority, were transferred to the custody of Immigration and Customs Enforcement ("ICE"), and were only then accorded bond hearings. This occurs despite the absence of any material change in a child's case.

- ORR's needlessly detaining children is profoundly deleterious: it inflicts long-term psychological, developmental, and physical damage on vulnerable youth, many of whom have experienced horrific violence in their countries of origin.

Defendants' final claim—that as a matter of equity ORR should be permitted to confine children without hearing—is similarly meritless. Controlling precedent requires that *Defendants* request the district court reform the Settlement if they wish to relieve themselves of their ¶ 24A obligations; they did not.

Until last year the BIA had held that immigration judges may review ORR custody decisions.

Finally, the trial court's order grants no remedy for past violations of ¶ 24A, but rather saves children who have yet to come into ORR custody from *future* injury. There is nothing inequitable or untimely about its having done so.

STANDARD OF REVIEW

The Court "review[s] the district court's legal conclusions *de novo*." *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 653 (9th Cir. 2002). "Any factual findings supporting the decision to grant the injunction [are] reviewed for clear error." *Id.* This Court should reverse only if the district court "base[d] its decision on an erroneous legal standard or on clearly erroneous findings of fact." *PlayMakers LLC v. ESPN, Inc.*, 376 F.3d 894, 896 (9th Cir. 2004) (quotations omitted).

ARGUMENT

I NOTHING IN THE TEXT, STRUCTURE, OR PURPOSE OF THE TVPRA ABROGATES ¶ 24A OR EXCUSES ORR'S BREACH THEREOF.

The district court held that the HSA savings clause preserves Defendants' legal obligations under the Settlement. DER 50 (Enforcement Order at 5). The district court declined to "presume [that] Congress intended to silently abrogate the *Flores* Agreement's bond hearing provision," *id*. at 6, and held that the TVPRA and the HSA are silent on the issue of bond hearings such that neither statute expressly bars ORR from affording detained children bond hearings. *Id*. at 5. This Court should affirm.

> "[A] party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree. If the moving party meets this standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstance." *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 383, 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992). When the basis for modification is a change in law, *the moving party must establish that the provision it seeks to modify has become "impermissible." Id*. at 388.

Flores v. Lynch, *supra*, 828 F.3d at 911-10 (emphasis supplied).

Defendants must accordingly establish that ORR's complying with ¶ 24A would require it "to violate the law," *Jeff D. v. Kempthorne*, 365 F.3d 844, 854 (9th Cir. 2004), or convert the Settlement into "an instrument of wrong." *Railway Employees' Dept. v. Wright*, 364 U.S. 642, 647 (1961).[6] They did not and cannot

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[6] In *Railway Employees*, non-union employees sued a railroad and its unions for discriminating against them in violation of the Railway Labor Act (RLA). The

do so.

First, Defendants' position is inimical to the overarching purpose of the TVPRA. As has been seen, the enactment aims to give unaccompanied minors *greater* protections, not fewer, against unnecessary detention: that is —

> [1 to] require[] *better* care and custody of unaccompanied alien children to be provided by the Department of Health and Human Services (HHS); [and]
>
> [2 to] *improve[] procedures* for the placement of unaccompanied children in safe and secure settings ...

H. R. Rep. 110-430, 110th Cong., 1st Sess., 57 (2007) (emphasis added).

Rather than subject unaccompanied minors to arbitrary confinement, the TVPRA seeks to reduce their mistreatment and detention. It is aimed at "[c]ombating child trafficking and exploitation in the United States." 8 U.S.C. § 1232(b). It provides detained children *greater* access to counsel in legal

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parties entered a consent decree that prohibited a union shop, a restriction that mirrored the RLA at the time.

Several years later Congress amended the RLA to permit union shops. The Court held modification warranted:

> When the decree in this case was originally made, union shop agreements were prohibited ... Congress has since, *in the clearest terms,* legislated that bargaining for and the existence of a union shop contract ... are not forbidden discriminations ... That provision was well enough under the earlier Railway Labor Act, but to continue it after the 1951 amendment would be to render protection *in no way authorized by the needs of safeguarding statutory rights at the expense of a privilege denied and deniable to no other union*.

Id. at 648 (emphasis added); *see also Orantes-Hernandez v. Gonzales*, 2006 U.S. Dist. LEXIS 95388, *13-16 (C.D. Cal. 2006) (assessing multiple alleged conflicts between permanent injunction and subsequent statutory amendment).

proceedings. 8 U.S.C. § 1232(c)(5). Construing the TVPRA to strip children of their right to be heard on the Government's grounds for detaining them is inconsistent with the very vulnerabilities the TVPRA purports to address.

Second, nowhere does the text of the TVPRA actually conflict with ¶ 24A. TVPRA § 235(b), *codified at* 8 U.S.C. § 1232(b), provides as follows:

> (1) Care and custody of unaccompanied alien children.-- Consistent with section 462 of the Homeland Security Act of 2002 (6 U.S.C. 279), ... the care and custody of all unaccompanied alien children, including responsibility for their detention, where appropriate, shall be the responsibility of the Secretary of Health and Human Services.

Nothing in this language renders bond hearings for children in ORR custody "impermissible." Rather, in expressly directing HHS to exercise its authority "[c]onsistent[ly] with section 462" of the HSA, the TVPRA incorporates by reference the HSA's savings clause, which expressly continues children's rights under ¶ 24A in full force and effect.

On at least two occasions the BIA discharged Defendants' obligations under the Settlement and affirmed immigration judge's authority to review ORR custody decisions.

In *In Re: Rodriguez-Lopez*, 2004 WL 1398660 (BIA 2004), an immigration judge redetermined a juvenile's custody notwithstanding that ORR was detaining him. Although the immigration judge found continued detention warranted "to ensure the respondent's appearance at future proceedings," *id*. at *1, jurisdiction *ab initio* was never questioned. The BIA affirmed because the juvenile had failed to

"demonstrate that his release would not pose a danger to property or persons and that he is likely to appear at any future proceedings..." *Id*. at 2. Implicit in the BIA's disposition was that the immigration judge properly exercised jurisdiction to review ORR's custody determination.

In *Matter of A--*, 2005 Immigr. Rptr. LEXIS 54924 (BIA 2005), the BIA reversed an immigration judge's order disavowing jurisdiction to review ORR's decision to confine a minor:

> We find, however, that, notwithstanding 6 U.S.C. § 279, *an Immigration Judge retains jurisdiction over the threshold issue of whether an unaccompanied minor should be detained at all*. Were an Immigration Judge to determine that an unaccompanied minor should be detained, then the ORR would have exclusive authority over decisions relating to the care and placement of the unaccompanied minor.

Id. at *1-2 (emphasis added).[7]

The TVPRA nowhere mentions, much less reduces, the authority immigration judges exercised at the time of the foregoing BIA decisions. The statute and regulations pursuant to which immigration judges act, 8 U.S.C. § 1226(a) and 8 C.F.R. §§ 1236.1, 1236.3, and 1003.19(a), provide no differently

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[7] Only decisions designated as precedent formally bind the BIA. 8 C.F.R. § 1003.1(g). Still, the BIA relies on non-precedential decisions as persuasive authority in deciding similar cases. *E.g., In re: De la Rosa*, 14 I. & N. Dec. 728 (BIA 1974).

As noted, the BIA has recently reversed course and now holds that immigration judges lack jurisdiction over ORR detention decisions. *In Re: Aguilar-Ramirez*, A206 775 662 (BIA 2016).

than they did in 2004-05.[8]

Fourth, though Defendants complain that immigration judges serve under the Executive Office for Immigration Review, a division of Department of Justice, and not HHS, Congress has required interdepartmental cooperation in managing the placement and release unaccompanied minors ever since it dissolved the INS.

The HSA accordingly directs HHS to "consult with [Immigration and Customs Enforcement] to ensure that unaccompanied alien children ... (i) are likely to appear for all hearings or proceedings ... and (iii) are placed in a setting in which they are not likely to pose a danger to themselves or others..." 6 U.S.C. § 279(b)(2). TVPRA § 235(c)(2) likewise requires such interdepartmental cooperation.

Fifth, Defendants may not, by dint of omission in their own regulations, bar immigration judges' reviewing ORR custody decisions. Paragraph 9 of Settlement provides that the agreement shall "supersede all previous INS policies that are inconsistent with the terms of this Agreement." It further requires Defendants to "publish the ... terms of this Agreement as a Service regulation," *id*.; and that such regulations "not be inconsistent with the terms of this Agreement." *Id*.

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[8] Curiously, 8 U.S.C. § 1226(a) still authorizes *only* "the Attorney General," and not the Secretary of Homeland Security, to take aliens into custody, detain them, set bond, etc., yet ICE, a subordinate agency within the Department of Homeland Security, has performed those functions since 2002.

Immigration judges' reviewing ORR's custody decisions, therefore, is no more inconsistent with § 1226(a) than is their reviewing ICE's custody decisions.

To the extent their regulations fail to confer authority on immigration judges to review ORR custody decisions, Defendants breach ¶ 9 of the Settlement, which is no excuse for their breaching ¶ 24A as well.

Sixth, insofar as detained children's release is concerned, the TVPRA nowhere grants ORR authority to prescribe what process is due. 8 U.S.C. § 1232(c)(2) provides in pertinent part: "The *placement of a child in a secure facility* shall be reviewed, at a minimum, on a monthly basis, *in accordance with procedures prescribed by the Secretary*, to determine if such placement remains warranted." *Id*. (emphasis added). The enactment gives HHS no comparable authority to prescribe process for children's *release*. In granting HHS authority to decide procedures for review of secure placement alone, Congress implicitly denied it like prerogative to prescribe procedures for children's release. 2A N. Singer, SUTHERLAND ON STATUTORY CONSTRUCTION § 46.07, at 202-04 (6th ed. 2000) ("Where one section of a statute contains a particular provision, omission of the same provision from a similar section is significant to show different legislative intent for the two section[s].").

Seventh, just how the TVPRA's adding "custody" to ORR's portfolio materially enlarged its pre-existing authority over unaccompanied class members is anything but clear. In the HSA of 2002 Congress "transferred to [ORR] ... functions ... with respect to the care of unaccompanied alien children that were vested by statute in, or performed by, the [INS]" prior thereto. 6 U.S.C. § 279(a).

At the time the HSA became law, the former INS was responsible for "the detention, release, and treatment of minors in [its] custody" Settlement ¶ 9, as well as for "plac[ing] each detained minor in the least restrictive setting appropriate to the minor's age and special needs ..." *Id*. ¶ 11. The INS was not to release a minor to anyone who might "harm or neglect the minor or fail to present him or her before the INS or the immigration courts ..." *Id*. Until released, minors "remain[ed] in INS legal custody." *Id*. at ¶ 19.

At the time the HSA became law, the INS was *wholly* responsible for the care *and* custody of class members. Apart from granting ICE the authority to "consult" with HHS regarding the release of unaccompanied minors, the HSA effectively transferred the whole of the former INS's authority over unaccompanied minors to HHS. The TVPRA's giving HHS responsibility for the care and custody of unaccompanied class members, therefore, largely reiterated, rather than expanded, the authority ORR had exercised since 2002.

Finally, the TVPRA's tasking ORR with finding appropriate custodians for detained children does nothing to alter this result. From its inception the Settlement charged the INS with responsibility for vetting available custodians. DEF 13 (Settlement ¶ 11).

In § 24A, then, Defendants *agreed* detained children should have bond hearings even though release to any particular custodian may not be required. This hardly cancels the very real benefit of giving children an opportunity to be heard:

> But identifying appropriate custodians and facilities for an unaccompanied child is not the same as answering the threshold question of whether the child should be detained in the first place—that is for an immigration judge at a bond hearing to decide. Assuming an immigration judge reduces a child's bond, or decides he or she presents no flight risk or danger such that he needs to remain in HHS/ORR custody, HHS can still exercise its coordination and placement duties under the TVPRA.

DER 52 (Enforcement Order 6.) "If the initial proposed custodian is unfit to care for the unaccompanied child under the TVPRA, Defendants should follow Paragraph 14 of the *Flores* Agreement, which outlines an order of preference for the minor's release, in order to effectuate the least restrictive form of detention." *Id*. at 6, n5.

In sum, the TVPRA in no way makes ORR's complying with ¶ 24A "impermissible."[9] Rather, as the court below held in granting a prior motion to enforce, the TVPRA is wholly "*consistent with the Agreement's preference for release provision*, such as the TVPRA's requirement that CBP find '[s]afe and secure placements' for children 'in the least restrictive setting that is in the best

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[9] Immigration judges' reviewing initial determinations regarding flight-risk and dangerousness is hardly novel; indeed, they have decades of expertise reviewing such grounds for detention. *E.g., Matter of Patel*, 15 I. & N. Dec. 666 (BIA 1976). On this score, ORR is a relative novice, yet it insists it is uniquely qualified to confine unaccompanied children without affording them anything close to the procedural fairness and transparency both accompanied class members and adults enjoy before immigration judges.

Nor is there any doubt that ORR *does* refuse to release class members because it thinks them dangerous or flight-risks. *E.g.*, PER 141 (Letter from Robert Carey, Director, Office of Refugee Resettlement) (class member refused release because he "poses a safety risk to the community."); PER 121 (Declaration of B_ O_, Jan. 12, 2016) (same).

interests of the child'—typically, 'a suitable family member.'" *Flores v. Johnson,* No. CV 85-4544 2015 WL 13049844, at *16 (C.D. Cal. July 24, 2015), *aff'd in part, rev'd in part,* 828 F.3d 898 (9th Cir. 2016) (emphasis added). This Court should affirm.

II EVEN ASSUMING, *ARGUENDO*, THE TVPRA WERE TO SUPERSEDE ¶ 24A, ORR WOULD REMAIN OBLIGED TO AFFORD DETAINED CHILDREN EQUIVALENT PROCESS.

The foregoing has shown that the district court correctly concluded that the TVPRA does not render ORR's complying with ¶ 24A "impermissible." Yet even assuming, *arguendo*, the TVPRA were to prohibit ORR from giving detained children bond hearings, that would hardly justify its denying them equivalent process. As the Supreme Court has explained, when "changed circumstances warrant a modification in a consent decree, the focus should be on whether the proposed modification is tailored to resolve the problems created by the change in circumstances. *A court should do no more, for a consent decree is a final judgment that may be reopened only to the extent that equity requires*." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 391 (1992) (emphasis added).

In *Flores v. Lynch, supra*, this Court recently rejected Defendants' similar "all-or-nothing" argument for excluding accompanied children from coverage under the Settlement. 828 F.3d at 905-08. There, the district court had ordered Defendants to follow the Settlement with respect to minors apprehended with a parent. *Id*. at 905. Recognizing that the Settlement, according to its plain terms,

covered all youth detained pursuant to the INA, accompanied or not, Defendants had prophylactically moved the district court to modify the agreement on the ground that "that the law has changed substantially since the Settlement was approved." *Id*. at 910. The trial court denied Defendants' motion.

On appeal Defendants argued that subsequent enactments, including the HSA and TVPRA, superseded the Settlement so as to exclude accompanied minors from its protections. *Id*. This Court disagreed, holding that "there is no reason why that bureaucratic reorganization [prescribed by the HSA] should prohibit the government from adhering to the Settlement. *Id*. As regards the TVPRA, the Court held that any conflict with the Settlement "might support modification of the conflicting provisions ... [but] does not make application of the Settlement to accompanied minors "'impermissible.'" *Id*.

Here, too, any conflicts between the TVPRA and ¶ 24A would at most support modifying the Settlement so that HHS would itself provide class members process equivalent to a bond hearing. But such conflicts would not justify the Government's effort to do away with that basic procedural protection altogether.

III DEFENDANTS' PREFERRED INTERPRETATION OF THE TVPRA AND ORR'S CURRENT POLICY AND PRACTICES FOR CONFINING CHILDREN RAISE GRAVE CONSTITUTIONAL CONCERNS.

Defendants next fault the district court for applying the rule of constitutional avoidance as an additional ground for declining to hold that the TVPRA abrogates ¶ 24A *sub silentio*. DEF 52-53 (Enforcement Order at 7-8) (*citing Nadarajah v.*

Gonzales, 443 F.3d 1069, 1076 (9th Cir. 2006)). Again, the court below was wholly justified in concluding that stripping children of ¶ 24A's protections would leave them bereft of meaningful procedural protection against wrongful confinement and needlessly bring the constitutionality of the TVPRA into question.

The procedure ORR ostensibly follows in confining children appears nowhere in the Code of Federal Regulations, nor even in a published manual. Rather, in January 2015, the agency posted the following on its web page:

> 2.7.7 Appeal of Release Denial
>
> ORR must notify a parent or legal guardian in writing if they are denied the release of a child. The denial notification letter must include: The basis for the denial [and] [i]nformation on the process for requesting reconsideration of the decision[.]
>
> A parent or legal guardian who wants to request reconsideration of a release decision should submit a request to the ACF Assistant Secretary within 30 business days of receipt of the denial notice. The request should include the basis for the request along with any additional information that the requestor would like the ACF Assistant Secretary to consider.
>
> The ACF Assistant Secretary will conduct a review of the decision and notify the requestor of the results.
>
> Sponsors other than parents or legal guardians who would like to request reconsideration of a release decision should submit a letter to ORR requesting a reconsideration of the decision.

DER at 54. This procedure falls far short of affording detained children adequate process.

First, ORR's protocol fails to recognize that detained *children* have a

cognizable, independent right to be heard on whether they will be detained. The agency instead fixates on proposed *custodians*' rights, and then begrudgingly affords only parents a path to cursory administrative review of decisions to confine their children.

Second, the agency nowhere accords children any right to examine the evidence that purportedly warrants continued confinement.

Third, ORR fails to constrain itself to making custody decisions based on credible or even relevant evidence.

Fourth, ORR's protocol nowhere posits any standard of proof, nor does it allocate evidentiary burdens.

Fifth, nowhere does the protocol grant children or proposed custodians the right to be represented by counsel.[10]

Sixth, ORR's procedure fails to set any limit on the time it may take to decide a child's fate, nor is there any requirement that detained children, proposed custodians, or counsel of record receive notice of ORR's decision within any time certain once a decision is made.

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[10] This omission is particularly inexcusable because Congress expressly directed HHS to "ensure, to the greatest extent practicable ... that all unaccompanied alien children who are or have been in the custody of the Secretary ... have counsel to represent them in legal proceedings or matters ..." 8 U.S.C. § 1232(c)(5).

The importance of the right to counsel in legal proceedings where one's liberty is at stake is beyond cavil. The right to be heard is of little avail if it does not comprehend the right to be heard by counsel. *Powell v. Alabama,* 287 U.S. 45, 68-69 (1932).

Seventh, nowhere does ORR grant children the right to an adversarial hearing[11] on its reasons for confining them wherein they would have the right to present evidence and witnesses and have a neutral decision-maker decide their case.[12]

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[11] Every circuit to have visited the issue of whether an adversarial hearing with a neutral judge adds value to determining whether immigrants belong in prolonged detention because they are flight-risks or a dangerous has held such hearings to be constitutionally required. *E.g. Rodriguez v. Robbins,* 804 F.3d 1060 (9th Cir. 2015), *cert. granted*, 136 S. Ct. 2489 (2016)*; Reid v. Donelan,* 819 F.3d 486 (1st Cir. 2016) ("every federal court of appeals to examine § 1226(c) has recognized that the Due Process Clause requires review of a neutral judge after detention has become unreasonable."); *Lora v. Shanahan*, 804 F.3d 601, 606 (2d Cir. 2015) (same); *Diop v. ICE*, 656 F.3d 221, 232-33 (3d Cir. 2011) (same).

[12] On January 19, 2017, ORR slightly revised its policy—without notice, of course—to provide that parents and legal guardians denied custody of a child—but not other proposed custodians or detained children themselves—may request a "hearing" via "teleconference or video conference" before a "Reconsideration Officer." ORR, *Children Entering the United States Unaccompanied* § 2.7.8, *available at* www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2#2.7 (last visited March 7, 2016).

Such hearings become available only after a child has been detained for many weeks *and* his or her parent or guardian has jumped over multiple hurdles: (1) ORR must first deny release; (2) the parent or guardian must then "seek the ORR Director's review of a release denial"; (3) once the ORR Director approves continued confinement, the parent or legal guardian may seek "reconsideration" of the denial by submitting a written request for review by a "Reconsideration Officer." *Id*.

> It is disrespectful enough of a lower court to set its considered judgment aside because the Government has altered the playing field on appeal; it is downright insulting to do so when the Government's bait-and-switch performance *has not for a certainty altered any factor relevant to the decision*. In that situation, at least, we should let the Government live with the consequences of its fickleness or inattention.

Finally, ORR may alter—or jettison—even these perfunctory procedures without notice or restraint. As the Staff Report of U.S. Senate Permanent Subcommittee on Investigations points out,

> ORR's policies are kept and revised in an ad hoc manner. ORR maintains a "Policy Guide" on its website that provides general guidance on ... "Safe and Timely Release from ORR Care," ... The guidance has existed in draft form since 2006, but was not made available on the Internet until January 30, 2015. ...
>
> The Policy Guide is constantly being revised. ...Under its current practice, *ORR can make major changes to its placement procedures without notice to the public, care providers, or other interested parties*.
>
> *Setting governmental policy on the fly*—without basic public notice or even a clear record of revisions to that policy—is *inconsistent with the accountability and transparency that should be expected of every administrative agency*.

Staff Report, U.S. Senate Permanent Subcommittee on Investigations, *Protecting Unaccompanied Alien Children from Trafficking and Other Abuses*, January 2016, at 26 (emphasis added), *available at* www.hsgac.senate.gov/download/majority-and-minority-staff-report_-protecting-unaccompanied-alien-children-from-trafficking-and-other-abuses-the-role-of-the-office-of-refugee-resettlement (last visited August 9, 2016) ("Senate Staff Report").

A ORR's custody protocol does not come close to giving unaccompanied children procedural protection equivalent to what ¶ 24A requires.

In marked contrast to ORR's perfunctory custody protocol, bond hearings

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Stutson v. United States, 516 U.S. 163, 188 (1996) (Scalia, J, dissenting) (emphasis in original).

before immigration judges are governed by both regulation, 8 C.F.R. § 1003.19(b), and an Immigration Court Practice Manual. Office of the Chief Immigration Judge, IMMIGRATION COURT PRACTICE MANUAL, § 9.3(c), *available at* www.justice.gov/eoir/office-chief-immigration-judge-0 (last visited March 2, 2016). Key protections of such hearings include the following:

- Upon being notified that a respondent wishes to be heard on the matter of his or her detention, "the Immigration Court schedules the hearing for the *earliest possible date*." *Id*. § 9.3(d) (emphasis added).
- At the hearing "the alien may be represented at no expense to the government." *Id*. § 9.3(e)(ii).
- A detainee has the right to "make an oral statement ... addressing whether the alien's release would pose a danger to property or persons, whether the alien is likely to appear for future immigration proceedings, and whether the alien poses a danger to national security." *Id*. at § 9.3(e)(vi).
- "The Immigration Judge creates a record, which is kept separate from the Records of Proceedings for other Immigration Court proceedings involving the alien." *Id*. § 9.3(e)(iv).
- An immigration judge must base his or her decision on the evidence *"filed in open court* or, if the request for a bond hearing was made in writing, together with the request." *Id*. (emphasis added). The judge must inform the parties of the reasons for the custody decision. 8 C.F.R. § 1003.19(f).

- A detainee who disagrees with the judge's custody decision may appeal to the BIA. *Id.*; 8 C.F.R. § 1003.38.

These, then, are the basic procedures the Settlement requires ORR to observe in confining a child; it is clear that ORR does nothing of the sort.

B ORR's perfunctory detention protocol falls far short of complying with accepted child welfare or juvenile justice standards.

Defendants expend much effort attempting to distance ORR custody from that of ICE. Defendants go so far as to suggest that ORR's custody decisions unerringly serve "the best possible interests of UACs in federal custody." Appellants' Brief at 19.

Yet when its protocol is evaluated against accepted child welfare and juvenile justice standards, ORR appears far more concerned with its own convenience than with the welfare of detained children. In truth, ORR's process is so profoundly aberrant as to set it apart from *both* immigration *and* child welfare procedural conventions.

Modern child welfare and juvenile justice standards uniformly accord youth rigorous procedural protection against needless confinement. In prevailing practice, a detained child is entitled to a prompt hearing to determine the need for continued detention.

The Guidelines of the National Council of Juvenile and Family Court Judges (NCJFCJ), which are widely followed in all states, provide that a "preliminary protective hearing" "must take place promptly," and in most states, such hearings

occur within three days. National Council of Juvenile and Family Court Judges, *Enhanced Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases* (2016) at 55, *available at* www.ncjfcj.org/sites/default/files/%20NCJFCJ%20Enhanced%20Resource%20Guidelines%2005-2016.pdf (last visited March 7, 2017) ("NCJFCJ Guidelines").

The American Bar Association's Juvenile Justice Standards similarly require that upon a child's being detained, the detaining authority must request a hearing before a judge or referee no more than 24 hours following the juvenile's arrival at a detention facility, and further, that a juvenile court should conduct a hearing no more than 24 hours after that. Institute of Judicial Administration & American Bar Association, *Juvenile Justice Standards Annotated: A Balanced Approach* (1996), at 131, 134, *available at* www.ncjrs.gov/pdffiles1/ojjdp/166773.pdf (last visited March 7, 2017) ("ABA Standards").

Child welfare and juvenile justice standards also detail the basic procedural protections integral to a fair and adequate custody hearing: A child must be given notice of the hearing and of the reasons the state has taken him or her into custody. NCJFCJ Guidelines at 73; ABA Standards at 134; *In re Gault*, 387 U.S. 1, 34 (1967). Child and parent must have a full opportunity to present and confront evidence relevant to custodial status. NCJFCJ Guidelines at 14; ABA Standards at 134-35. A judge or other neutral decision maker must preside over the hearing. NCJFCJ Guidelines at 36; ABA Standards at 131. Minors who continued to be

detained after a hearing must be provided with a written explanation of the reasons for continued confinement. ABA Standards at 135-36.

ORR, of course, fails to provide detained children a hearing at all, and these critical protections are accordingly absent. On its face, ORR's protocol fails to provide procedural protections even approximating those considered essential in child welfare and juvenile justice paradigms. ORR's perfunctory procedures are facially incompatible with its professed role as an unerringly benevolent child welfare agency.

C In practice, ORR needlessly confines children for months on end, never telling them when or if it will release them.

The uncontroverted record also establishes that in practice ORR's decision-making is grossly dysfunctional.

Class member B_ O_ was living with his father after having completed a sentence for juvenile delinquency when ICE arrested him and sent him to ORR. PER 117 (B-O- Dec.). ORR thereafter confined him at juvenile halls, including Yolo County's, from February to May 2013. *Id*.

B_ O_ describes the Kafkaesque experience he and his family endured trying to win his freedom:

> Two weeks after the initial 30 days [of detention] had passed, a women in charge of ORR detainees came ... I told her that my mother had been trying for weeks to have me released to her custody and had done everything she could so that ORR would approve a home study ... She told me I would be able to get released within the next few weeks. My lead ORR case manager [told me the] same ... I was so happy that day, ...

> I had an immigration court on May 11, 2015 ... After I had returned from court, ... I was told that the woman who told me I would be released had changed her mind. ... I did not receive anything in writing about this denial. The ORR official who had promised my release never bothered to speak to me again...

PER 121.

Two days later, B_ O_ turned 18; ORR transferred him to ICE. PER 122. An immigration judge then found B_ O_ was neither a flight-risk nor dangerous and ordered him released. *Id*. "I could not understand," B_ O_ reasonably wonders, "why my delinquent acts were so serious I could not be released safely when I was a minor, yet somehow they did not matter so much once I turned 18." PER 123.[13]

Megan Stuart, an attorney who represented unaccompanied minors in New York, describes the case of S_ I_, a young client who fled Rwanda after being tortured because of her sexual orientation. PER 73-74. In July 2013, after being

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[13] H_ E_ B_, a 15-year old Guatemalan, whom ORR confined for some 15 months, expressed similar bewilderment over his fate:

> In November or December [2015, detention facility personnel] informed me that I had passed the psychological evaluation, but that they were going to keep me detained for maybe another month, until they could finish evaluating my mom's house. Currently, it has been one month or one and a half months since the informed me that the evaluation of my mom's house had also been positive, but I remain detained, and I have no idea when I will leave detention.

PER 103-04.

In May 2016, class counsel was compelled to object to Defendants' having shackled H_ E_ B_ during transport from Yolo to San Francisco and back, so that he might be interviewed on his asylum application. PER 125 (Letter, May 26, 2016).

raped and impregnated en route to join family in Canada, S_ I_ was arrested and consigned to ORR detention. PER 73-74.

On October 2, 2013, Ms. Stuart unsuccessfully pressed ORR to release S_ I_ to an accredited youth shelter. PER 74, 82. In December 2013, Stuart tried again, warning that if ORR did not release S_ I_ before the end of January 2014 she would reach the age of majority and be consigned to an ICE adult detention facility, or else discharged into homelessness, during her third trimester of pregnancy. Ms. Stuart reminded ORR that Covenant House, a licensed youth shelter, had agreed to care for S_ I_ and her baby though S_ I_'s 21st birthday. PER 74, 89.

She describes the results of her efforts as follows:

> Between October and December 2013 I made several additional requests to ORR for S_ I_ to be released so that she could enter foster care, all of which were denied without any explanation of the reasons for the decision, the standards employed, or the evidence upon which the decision was based. S_ I_ remained in ORR custody until January 10, 2014 ... [when ORR] released S_ I_ into URM care, though ORR never offered any explanation for reversing its decision to detain S_ I_.

PER 74-75.

It is virtually self-evident that such needless confinement of children is profoundly injurious. *See, e.g.*, Barry Holman & Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, at 2-3 (Justice Policy Institute 2006), *available at* www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf (last

visited March 10, 2017) (review of recent health research literature shows that "detention has a profoundly negative impact on young people's mental and physical well-being, their education, and their employment").

Lorilei Williams, a legal services lawyer who has represented children in ORR custody in Houston and New York, emphasizes the trauma ORR's detention practices inflict on detained youth:

> Although I am not a mental health professional, I have noted the deleterious effects ORR's opaque and oft-delayed release and step-down decisions have on detained youth... *[F]acility staff repeatedly encourage[] my clients, their parents, and myself to believe that ORR would release my clients promptly, whereas in truth and fact the agency delayed its decisions for weeks or months, leaving children, their parents, and their lawyer twisting in the wind*, awaiting a decision from on high that might or might not be favorable and that would never be explained other than in the barest of conclusory terms.
>
> In the face of such extended and faceless uncertainty, detained children—already traumatized by horrific experiences in their countries of origin—have expressed to me feeling profound helplessness and despair, to the point where they are prepared to take extreme measures, including *opting for voluntary return to countries in which they know their lives and freedom will be in jeopardy*, rather than continue to live day after day in ORR's detention facilities never knowing if or when they will be reunited with their families.

PER 66 (Williams Dec. ¶ 18) (emphasis added); *see also* PER 244 (Lawrence I at ¶ 38) ("[O]ver the course of representing [H_ E_ B_] I observed a marked deterioration in his mental functioning.").

D The district court properly declined to construe the TVPRA so as create multiple constitutional controversies.

On this record, it is impossible to fault the district court for concluding that Defendants' position required it "construe the TVPRA in a way that could run

afoul of the Constitution. That is, Defendants want this Court to construe the TVPRA in a way that could result in the indefinite detention of unaccompanied children without the due process protection offered to adult detainees through a bond hearing." DEF 53 (Enforcement Order 7).

A fundamental guarantee of the Due Process Clause, of course, is that the Government must afford those whom it would confine for prolonged periods a meaningful opportunity to be heard. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from ... government custody, detention, or other forms of physical restraint ... lies at the heart of the liberty [the Due Process] Clause protects.").[14]

A second bedrock principle of due process is that a person should be given notice of adverse evidence and a fair opportunity to respond before being deprived of liberty. *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976). Where governmental action seriously injures an individual and is predicated on factual findings, the affected individual must be afforded an opportunity inspect and rebut the evidence supporting those findings. *Greene v. McElroy,* 360 U.S. 474, 496 (1959). "Indeed the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation." *Bowman Transp. v. Arkansas Best*

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[14] *Reno v. Flores,* 507 U.S. 292 (1993), does not eliminate the constitutional concerns raised by Defendants' denying detained children bond hearings. Rather, the Supreme Court there held that children in shelter care facilities have no due process right to be released to unrelated custodians, and the Government therefore is not obliged to inquire into such custodians' fitness. Whether such children should be detained at all is a different question.

Freight Sys., 419 U.S. 281, 288 n. 4 (1974); *see also Goldberg v. Kelly,* 397 U.S. 254, 269 (1970) (due process requires an opportunity to confront and cross-examine adverse witnesses). Under ORR's anemic process, children may be detained for months or years without any ability to inspect or rebut the evidence supporting such prolonged confinement.

Third, when ORR refuses to release children to their parents, important constitutional interests in parental care are at stake, constitutional interests that are entitled to rigorous procedural protection. *Smith v. Organization of Foster Families*, 431 U.S. 816, 843 (1977); *see also Beltran v. Cardall*, 2016 WL 6877035; 2016 U.S. Dist. LEXIS 162111, *21 (E.D. Va. 2016) ("...once ORR decided to withhold RMB from Petitioner's care, ... ORR owed Petitioner some form of adversarial process, and ... could not 'adopt for itself an attitude of "if you don't like it, sue."'" (citations omitted)).

Fourth, in addition to denying unaccompanied children hearings routinely accorded adults, ORR's breaching ¶ 24A also strips unaccompanied children of due process protections their relatively more privileged cohorts receive. Immigration judges clearly retain authority to review the detention not only of adults, but of *accompanied* minors as well. *E.g., Matter of Granados-Gutierrez*, A206 848 455 (I.J. 2014) [D.Ct. Dkt. 239-2], PER 21.

Accepting Defendants' argument leads to the perverse result that youth who enjoy their parent's support and guidance get bond hearings, whereas

unaccompanied children do not. Stripping only the *most defenseless* children of protection under ¶ 24A is so irrational as to raise palpable constitutional concerns. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (equal protection principles bars "treating differently persons who are in all relevant respects alike.").

These many constitutional concerns are wholly at odds with ceding ORR *carte blanche* to detain children without hearing. The district court did not err in shunning a superfluous constitutional farrago.

IV THERE WAS NOTHING UNTIMELY OR PREJUDICIAL IN PLAINTIFFS' HAVING MOVED TO SAVE VULNERABLE CHILDREN FROM ON-GOING INJURY.

Defendants lastly urge this Court to reverse as a matter of equity because Plaintiffs unreasonably delayed litigation to enforce ¶ 24A.[15] Their argument is easily quashed.[16]

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[15] Defendants purport to present distinct equitable arguments: laches, equitable estoppel, and waiver. However, all three arguments boil down to one faulty contention: that Plaintiffs' having delayed litigation until August 2016 somehow prejudiced Defendants such that the present motion should be dismissed. Whether characterized as laches, equitable estoppel, or waiver, all three arguments fail for the reasons discussed in the body.

[16] Defendants' present "delay" argument is much of a piece with what they offered in defense of ICE's placing accompanied children in improper facilities. *See, e.g.*, Brief for Appellants, *Flores v. Lynch*, No. 15-56434 (9th Cir.), PER 174, 202-04 ("Berks has been in operation, and has housed accompanied children ... since 2001... Nonetheless, until this action, Plaintiffs never challenged the detention of minors with their parents at Berks as violating the Agreement.").

Defendants' argument failed to merit mention in this Court's opinion holding that the Settlement covers accompanied class members. *Flores v. Lynch*, *supra,* 828 F.3d 898. The district court should not be reversed for giving Defendants' instant argument similar treatment.

First, *Defendants*—not Plaintiffs—were obliged to ask the district court to reform the Settlement if they believed ORR's complying with ¶ 24A was impermissible in the wake of the TVPRA. *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-37 (1975); *United States v. Atlantic Refining Co.*, 360 U.S. 19, 23 (1959) (that government's interpretation of consent decree might better accord with statute would "not warrant our substantially changing the terms of a decree … without any adjudication of the issues"). Defendants instead took it upon themselves to violate ¶ 24A. Defendants may not resort to equity when they themselves have flouted their legal obligation to request modification of the Settlement.

Second, the instant motion does not seek redress for stale violations of ¶ 24A, but rather to save vulnerable children—untold numbers of whom have not yet come into ORR custody—from *future* injury. Defendants breach the Settlement anew each time ORR refuses to release a class member without affording him or her a meaningful opportunity to be heard. *Havens Realty Corp. v. Coleman,* 455

First, Defendants failed to raise their equitable arguments during the hearing on Plaintiffs' motion to dismiss. *See* Transcript of Proceedings, September 16, 2016, PER 246. The district court was nevertheless cognizant of them. *Id*., PER 252-53 (court inquires as to change in BIA jurisprudence on immigration judge's authority to review ORR custody decisions).

Second, Defendants failed to support their equitable arguments with any evidence. Those arguments accordingly present "a purely legal question that can be resolved without further development in the factual record" by this Court. *Bolker v. Commissioner of Internal Revenue*, 760 F.2d 1039, 1042 (9th Cir. 1985).

U.S. 363, 380-81 (1982) (where violation begins outside the limitations period but continues into the limitations period, action timely if filed within the required limitations period as measured from "*the last asserted occurrence of that practice.*" (emphasis added)).

Third, the BIA held that immigration judges lack jurisdiction to review ORR's custody decisions for the first time on June 18, 2016. Until then, the BIA seemingly offered a viable administrative remedy for class members denied bond hearings.

Fourth, the uncontroverted record establishes that ORR has endeavored to hobble legal aid lawyers who represent indigent class members—as a practical matter, detained children's only real source of legal representation—from challenging its release decisions or procedures. PER 64 (Williams Dec. ¶ 16) (legal services lawyer formerly funded by ORR through Vera Institute "told explicitly that we could not take legal action against ORR because our Vera Institute funding to help detained children would be at risk"); PER 75-76 (Stuart Dec. ¶¶ 22-24) (same). ORR's handcuffing children's lawyers is alone enough to bar their resort to equity. *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814 (1945) ("he who comes into equity must come with clean hands.").

Fifth, the TVPRA could not possibly have placed class counsel on notice that ORR would take it upon itself to ignore ¶ 24A. It is unreasonable to expect Plaintiffs' lawyers to act "like pigs, hunting for truffles" in statutory text, *United*

States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991), perpetually seeking to divine whether some innocuous word or other might embolden Defendants to shirk their duties under the Settlement.[17]

Finally, "laches is not a doctrine concerned solely with timing. Rather, it is primarily concerned with prejudice." *In re Beaty*, 306 F.3d 914, 924 (9th Cir. 2002). Even assuming, *arguendo*, Plaintiffs were to have unreasonably delayed bringing the instant motion, Defendants must demonstrate they suffered substantial prejudice as a result. *EEOC v. Massey-Ferguson, Inc.*, 622 F.2d 271, 275-76 (7th Cir. 1980). Generalized harm from the mere passage of time does not amount to a showing of prejudice. *Equal Employment Opportunity Commission v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979).

Nowhere in their opening brief do Defendants explain how ORR has been prejudiced by Plaintiffs' purported delay nor how they have relied on Plaintiffs' purported waiver. Before the district court, they argued that ORR would not have wasted "significant administrative resources" developing and posting its *ad hoc* release procedure to the internet had it only known Plaintiffs would object to denying detained children bond hearings.

But as the Staff Report notes, "ORR's policies are kept and revised in an ad

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[17] Nor did Defendants notify Plaintiffs' counsel they would ignore ¶ 24A, PER 145 (Declaration of Carlos Holguín, August 31, 2016), despite the Settlement's enjoining them to "provide to Plaintiffs' counsel ... each INS policy or instruction ... regarding the implementation of this Agreement," Settlement ¶ 29.

hoc manner." Staff Report, *supra*, at 26. Accepting that ORR expended "significant administrative resources" prescribing procedure "on the fly" demands extravagant credulity. If anything, Plaintiffs' forbearance only benefitted Defendants, allowing ORR to breach the Settlement with impunity until now. That is hardly the kind of prejudice equity demands; indeed, it is no prejudice at all. *Grand Canyon Trust v. Tucson Elec. Power Co.*, 391 F.3d 979, 988 (9th Cir. 2004) ("We do not see how this delay prejudiced Tucson Electric. Rather, it appears that Grand Canyon's delay worked to the benefit of Tucson Electric because it allowed Tucson Electric the opportunity to recover some or all of its investment in Springerville Units 1 and 2 before this suit was filed.").

Finally, even were Defendants' claims of prejudice and delay at all credible, applying laches to deny children fundamental fairness going forward would remain improper. *Apache Survival Coalition v. United States*, 21 F.3d 895, 905-06 (9th Cir. 1994) (laches "must be invoked sparingly in suits brought to vindicate the public interest." (internal quotation marks and citations omitted)). The district court did not err in so holding.

V CONCLUSION

For the foregoing reasons, this Court should affirm.[18]

Dated: March 10, 2017.

Respectfully submitted,[19]

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/s/Carlos Holguín

/s/Holly Cooper

[18] If Plaintiffs prevail they will seek attorney's fees and costs pursuant to 28 U.S.C. § 2412(d).

[19] Plaintiffs' counsel wish to acknowledge the invaluable assistance of U.C. Davis students Fabián Sánchez Coronado, Michael Benassini, and Wesley Cheung in preparing this brief.

STATEMENT OF RELATED CASES

Plaintiffs-Appellees know of no related cases pending in this Court.

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-1.1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-55208

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

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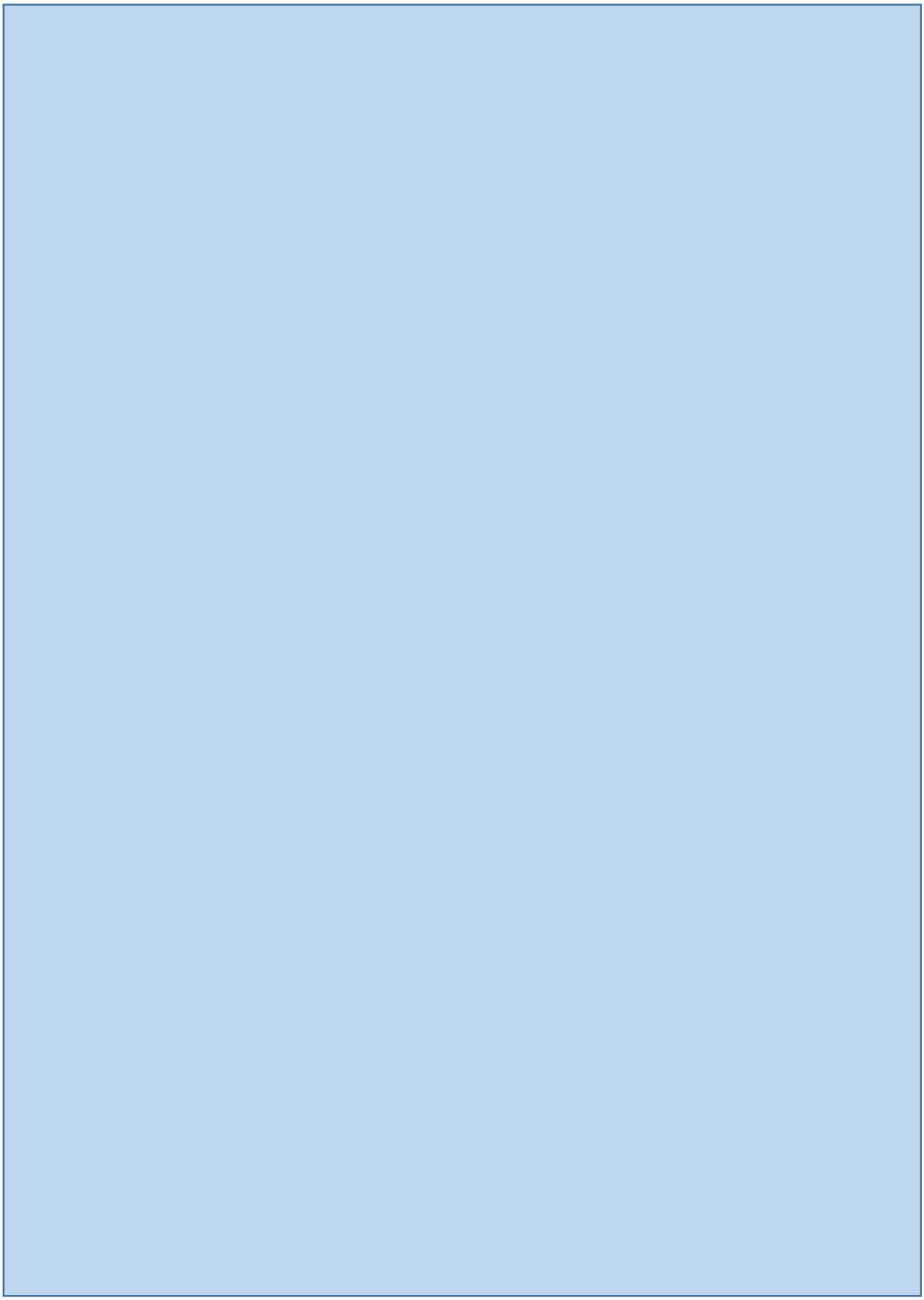
Signature of Attorney or Unrepresented Litigant: s/Carlos Holguín

Date: March 10, 2017

("s/" plus typed name is acceptable for electronically-filed documents)



Addendum

PERTINENT CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, REGULATIONS OR RULES

6 USCS § 279

Current through PL 114-329, approved 1/6/17

United States Code Service - Titles 1 through 54 > TITLE 6. DOMESTIC SECURITY > CHAPTER 1. HOMELAND SECURITY ORGANIZATION > BORDER, MARITIME, AND TRANSPORTATION SECURITY > CITIZENSHIP AND IMMIGRATION SERVICES

§ 279. Children's affairs

(a) Transfer of functions. There are transferred to the Director of the Office of Refugee Resettlement of the Department of Health and Human Services functions under the immigration laws of the United States with respect to the care of unaccompanied alien children that were vested by statute in, or performed by, the Commissioner of Immigration and Naturalization (or any officer, employee, or component of the Immigration and Naturalization Service) immediately before the effective date specified in subsection (d).

(b) Functions.

(1) In general. Pursuant to the transfer made by subsection (a), the Director of the Office of Refugee Resettlement shall be responsible for--

(A) coordinating and implementing the care and placement of unaccompanied alien children who are in Federal custody by reason of their immigration status, including developing a plan to be submitted to Congress on how to ensure that qualified and independent legal counsel is timely appointed to represent the interests of each such child, consistent with the law regarding appointment of counsel that is in effect on the date of the enactment of this Act [enacted Nov. 25, 2002];

(B) ensuring that the interests of the child are considered in decisions and actions relating to the care and custody of an unaccompanied alien child;

(C) making placement determinations for all unaccompanied alien children who are in Federal custody by reason of their immigration status;

(D) implementing the placement determinations;

(E) implementing policies with respect to the care and placement of unaccompanied alien children;

(F) identifying a sufficient number of qualified individuals, entities, and facilities to house unaccompanied alien children;

(G) overseeing the infrastructure and personnel of facilities in which unaccompanied alien children reside;

(H) reuniting unaccompanied alien children with a parent abroad in appropriate cases;

(I) compiling, updating, and publishing at least annually a state-by-state list of professionals or other entities qualified to provide guardian and attorney representation services for unaccompanied alien children;

(J) maintaining statistical information and other data on unaccompanied alien children for whose care and placement the Director is responsible, which shall include--

(i) biographical information, such as a child's name, gender, date of birth, country of birth, and country of habitual residence;

(ii) the date on which the child came into Federal custody by reason of his or her immigration status;

(iii) information relating to the child's placement, removal, or release from each facility in which the child has resided;

(iv) in any case in which the child is placed in detention or released, an explanation relating to the detention or release; and

(v) the disposition of any actions in which the child is the subject;

(K) collecting and compiling statistical information from the Department of Justice, the Department of Homeland Security, and the Department of State on each department's actions relating to unaccompanied alien children; and

(L) conducting investigations and inspections of facilities and other entities in which unaccompanied alien children reside, including regular follow-up visits to such facilities, placements, and other entities, to assess the continued suitability of such placements.

(2) Coordination with other entities; no release on own recognizance. In making determinations described in paragraph (1)(C), the Director of the Office of Refugee Resettlement--

(A) shall consult with appropriate juvenile justice professionals, the Director of the Bureau of Citizenship and Immigration Services, and the Assistant Secretary of the Bureau of Border Security [Bureau of Immigration and Customs Enforcement] to ensure that such determinations ensure that unaccompanied alien children described in such subparagraph--

(i) are likely to appear for all hearings or proceedings in which they are involved;

(ii) are protected from smugglers, traffickers, or others who might seek to victimize or otherwise engage them in criminal, harmful, or exploitive activity; and

(iii) are placed in a setting in which they are not likely to pose a danger to themselves or others; and

(B) shall not release such children upon their own recognizance.

(3) Duties with respect to foster care. In carrying out the duties described in paragraph (1), the Director of the Office of Refugee Resettlement is encouraged to use the refugee children foster care system established pursuant to section 412(d) of the Immigration and Nationality Act (8 U.S.C. 1522(d)) for the placement of unaccompanied alien children.

(4) Rule of construction. Nothing in paragraph (2)(B) may be construed to require that a bond be posted for an unaccompanied alien child who is released to a qualified sponsor.

(c) Rule of construction. Nothing in this section may be construed to transfer the responsibility for adjudicating benefit determinations under the Immigration and Nationality Act (8 U.S.C. 1101 et seq.) from the authority of any official of the Department of Justice, the Department of Homeland Security, or the Department of State.

(d) Effective date. Notwithstanding section 4 [6 USCS § 101 note], this section shall take effect on the date on which the transfer of functions specified under section 441 [6 USCS § 251] takes effect [March 1, 2003].

(e) References. With respect to any function transferred by this section, any reference in any other Federal law, Executive order, rule, regulation, or delegation of authority, or any document of or pertaining to a component of government from which such function is transferred--

(1) to the head of such component is deemed to refer to the Director of the Office of Refugee Resettlement; or

(2) to such component is deemed to refer to the Office of Refugee Resettlement of the Department of Health and Human Services.

(f) Other transition issues.

(1) Exercise of authorities. Except as otherwise provided by law, a Federal official to whom a function is transferred by this section may, for purposes of performing the function, exercise all authorities under any other provision of law that were available with respect to the performance of that function to the official responsible for the performance of the function immediately before the effective date specified in subsection (d).

(2) Savings provisions. Subsections (a), (b), and (c) of section 1512 [6 USCS § 552] shall apply to a transfer of functions under this section in the same manner as such provisions apply to a transfer of functions under this Act to the Department of Homeland Security.

(3) Transfer and allocation of appropriations and personnel. The personnel of the Department of Justice employed in connection with the functions transferred by this section, and the assets, liabilities, contracts, property, records, and unexpended balance of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available to, or to be made available to, the Immigration and Naturalization Service in connection with the functions transferred by this section, subject to section 202 of the Budget and Accounting Procedures Act of 1950 [31 USCS § 1531], shall be transferred to the Director of the Office of Refugee Resettlement for allocation to the appropriate component of the Department of Health and Human Services. Unexpended funds transferred pursuant to this paragraph shall be used only for the purposes for which the funds were originally authorized and appropriated.

(g) Definitions. As used in this section--

(1) the term "placement" means the placement of an unaccompanied alien child in either a detention facility or an alternative to such a facility; and

(2) the term "unaccompanied alien child" means a child who--

(A) has no lawful immigration status in the United States;

(B) has not attained 18 years of age; and

(C) with respect to whom--

(i) there is no parent or legal guardian in the United States; or

(ii) no parent or legal guardian in the United States is available to provide care and physical custody.

History

(Nov. 25, 2002,P.L.107-296, Title IV, Subtitle E, § 462, 116 Stat. 2202; Dec. 23, 2008, P.L. 110-457, Title II, Subtitle D, § 235(f), 122 Stat. 5081.)

End of Document

6 USCS § 552

Current through PL 114-329, approved 1/6/17

United States Code Service - Titles 1 through 54 > TITLE 6. DOMESTIC SECURITY > CHAPTER 1. HOMELAND SECURITY ORGANIZATION > TRANSITION > TRANSITIONAL PROVISIONS

§ 552. Savings provisions

(a) Completed administrative actions.

(1) Completed administrative actions of an agency shall not be affected by the enactment of this Act or the transfer of such agency to the Department, but shall continue in effect according to their terms until amended, modified, superseded, terminated, set aside, or revoked in accordance with law by an officer of the United States or a court of competent jurisdiction, or by operation of law.

(2) For purposes of paragraph (1), the term "completed administrative action" includes orders, determinations, rules, regulations, personnel actions, permits, agreements, grants, contracts, certificates, licenses, registrations, and privileges.

(b) Pending proceedings. Subject to the authority of the Secretary under this Act--

(1) pending proceedings in an agency, including notices of proposed rulemaking, and applications for licenses, permits, certificates, grants, and financial assistance, shall continue notwithstanding the enactment of this Act or the transfer of the agency to the Department, unless discontinued or modified under the same terms and conditions and to the same extent that such discontinuance could have occurred if such enactment or transfer had not occurred; and

(2) orders issued in such proceedings, and appeals therefrom, and payments made pursuant to such orders, shall issue in the same manner and on the same terms as if this Act had not been enacted or the agency had not been transferred, and any such orders shall continue in effect until amended, modified, superseded, terminated, set aside, or revoked by an officer of the United States or a court of competent jurisdiction, or by operation of law.

(c) Pending civil actions. Subject to the authority of the Secretary under this Act, pending civil actions shall continue notwithstanding the enactment of this Act or the transfer of an agency to the Department, and in such civil actions, proceedings shall be had, appeals taken, and judgments rendered and enforced in the same manner and with the same effect as if such enactment or transfer had not occurred.

(d) References. References relating to an agency that is transferred to the Department in statutes, Executive orders, rules, regulations, directives, or delegations of authority that precede such transfer or the effective date of this Act shall be deemed to refer, as appropriate, to the Department, to its officers, employees, or agents, or to its corresponding organizational units or functions. Statutory reporting requirements that applied in relation to such an agency immediately before the effective date of this Act shall continue to apply following such transfer if they refer to the agency by name.

(e) Employment provisions.

(1) Notwithstanding the generality of the foregoing (including subsections (a) and (d)), in and for the Department the Secretary may, in regulations prescribed jointly with the Director of the Office of Personnel Management, adopt the rules, procedures, terms, and conditions, established by statute, rule, or regulation before the effective date of this Act, relating to employment in any agency transferred to the Department pursuant to this Act; and

(2) except as otherwise provided in this Act, or under authority granted by this Act, the transfer pursuant to this Act of personnel shall not alter the terms and conditions of employment, including compensation, of any employee so transferred.

(f) Statutory reporting requirements. Any statutory reporting requirement that applied to an agency, transferred to the Department under this Act, immediately before the effective date of this Act shall continue to apply following that transfer if the statutory requirement refers to the agency by name.

History

(Nov. 25, 2002,P.L. 107-296, Title XV, Subtitle B, § 1512, 116 Stat. 2310.)

End of Document

8 USCS § 1226

Current through PL 114-329, approved 1/6/17

United States Code Service - Titles 1 through 54 > TITLE 8. ALIENS AND NATIONALITY > CHAPTER 12. IMMIGRATION AND NATIONALITY > IMMIGRATION > INSPECTION, APPREHENSION, EXAMINATION, EXCLUSION, AND REMOVAL

§ 1226. Apprehension and detention of aliens

(a) Arrest, detention, and release. On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General--

(1) may continue to detain the arrested alien; and

(2) may release the alien on--

(A) bond of at least $ 1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

(b) Revocation of bond or parole. The Attorney General at any time may revoke a bond or parole authorized under subsection (a), rearrest the alien under the original warrant, and detain the alien.

(c) Detention of criminal aliens.

(1) Custody. The Attorney General shall take into custody any alien who--

(A) is inadmissible by reason of having committed any offense covered in section 212(a)(2) [8 USCS § 1182(a)(2)],

(B) is deportable by reason of having committed any offense covered in section 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) [8 USCS § 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D)],

(C) is deportable under section 237(a)(2)(A)(i) [8 USCS § 1227(a)(2)(A)(i)] on the basis of an offense for which the alien has been sentence [sentenced] to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 212(a)(3)(B) [8 USCS § 1182(a)(3)(B)] or deportable under section 237(a)(4)(B) [8 USCS § 1227(a)(4)(B)],

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release. The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18, United States Code, that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

(d) Identification of criminal aliens.

(1) The Attorney General shall devise and implement a system--

(A) to make available, daily (on a 24-hour basis), to Federal, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;

(B) to designate and train officers and employees of the Service to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and release of any alien charged with an aggravated felony; and

(C) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony, and indicates those who have been removed.

(2) The record under paragraph (1)(C) shall be made available--

(A) to inspectors at ports of entry and to border patrol agents at sector headquarters for purposes of immediate identification of any alien who was previously ordered removed and is seeking to reenter the United States, and

(B) to officials of the Department of State for use in its automated visa lookout system.

(3) Upon the request of the governor or chief executive officer of any State, the Service shall provide assistance to State courts in the identification of aliens unlawfully present in the United States pending criminal prosecution.

(e) Judicial review. The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

History

(June 27, 1952, ch 477, Title II, Ch 4, § 236,66 Stat. 200; Nov. 29, 1990, P.L. 101-649, Title V, Subtitle A, § 504(c), Title VI, § 603(a)(12), 104 Stat. 5050, 5083; Dec. 12, 1991, P.L. 102-232, Title III, § 306(a)(5), 105 Stat. 1751; Sept. 30, 1996, P.L. 104-208, Div C, Title III, Subtitle A, § 303(a), Subtitle F, § 371(b)(5), 110 Stat. 3009-585, 3009-645.)

End of Document

8 USCS § 1232

Current through PL 114-329, approved 1/6/17

United States Code Service - Titles 1 through 54 > TITLE 8. ALIENS AND NATIONALITY > CHAPTER 12. IMMIGRATION AND NATIONALITY > IMMIGRATION > INSPECTION, APPREHENSION, EXAMINATION, EXCLUSION, AND REMOVAL

§ 1232. Enhancing efforts to combat the trafficking of children

(a) Combating child trafficking at the border and ports of entry of the United States.

(1) Policies and procedures. In order to enhance the efforts of the United States to prevent trafficking in persons, the Secretary of Homeland Security, in conjunction with the Secretary of State, the Attorney General, and the Secretary of Health and Human Services, shall develop policies and procedures to ensure that unaccompanied alien children in the United States are safely repatriated to their country of nationality or of last habitual residence.

(2) Special rules for children from contiguous countries.

(A) Determinations. Any unaccompanied alien child who is a national or habitual resident of a country that is contiguous with the United States shall be treated in accordance with subparagraph (B), if the Secretary of Homeland Security determines, on a case-by-case basis, that--

(i) such child has not been a victim of a severe form of trafficking in persons, and there is no credible evidence that such child is at risk of being trafficked upon return to the child's country of nationality or of last habitual residence;

(ii) such child does not have a fear of returning to the child's country of nationality or of last habitual residence owing to a credible fear of persecution; and

(iii) the child is able to make an independent decision to withdraw the child's application for admission to the United States.

(B) Return. An immigration officer who finds an unaccompanied alien child described in subparagraph (A) at a land border or port of entry of the United States and determines that such child is inadmissible under the Immigration and Nationality Act (8 U.S.C. 1101 et seq.) may--

(i) permit such child to withdraw the child's application for admission pursuant to section 235(a)(4) of the Immigration and Nationality Act (8 U.S.C. 1225(a)(4)); and

(ii) return such child to the child's country of nationality or country of last habitual residence.

(C) Contiguous country agreements. The Secretary of State shall negotiate agreements between the United States and countries contiguous to the United States with respect to the repatriation of children. Such agreements shall be designed to protect children from severe forms of trafficking in persons, and shall, at a minimum, provide that--

(i) no child shall be returned to the child's country of nationality or of last habitual residence unless returned to appropriate employees or officials, including child welfare officials where available, of the accepting country's government;

(ii) no child shall be returned to the child's country of nationality or of last habitual residence outside of reasonable business hours; and

(iii) border personnel of the countries that are parties to such agreements are trained in the terms of such agreements.

(3) Rule for other children. The custody of unaccompanied alien children not described in paragraph (2)(A) who are apprehended at the border of the United States or at a United States port of entry shall be treated in accordance with subsection (b).

(4) Screening. Within 48 hours of the apprehension of a child who is believed to be described in paragraph (2)(A), but in any event prior to returning such child to the child's country of nationality or of last habitual residence, the child shall be screened to determine whether the child meets the criteria listed in paragraph (2)(A). If the child does not meet such criteria, or if no determination can be made within 48 hours of apprehension, the child shall immediately be transferred to the Secretary of Health and Human Services and treated in accordance with subsection (b). Nothing in this paragraph may be construed to preclude an earlier transfer of the child.

(5) Ensuring the safe repatriation of children.

(A) Repatriation pilot program. To protect children from trafficking and exploitation, the Secretary of State shall create a pilot program, in conjunction with the Secretary of Health and Human Services and the Secretary of Homeland Security, nongovernmental organizations, and other national and international agencies and experts, to develop and implement best practices to ensure the safe and sustainable repatriation and reintegration of unaccompanied alien children into their country of nationality or of last habitual residence, including placement with their families, legal guardians, or other sponsoring agencies.

(B) Assessment of country conditions. The Secretary of Homeland Security shall consult the Department of State's Country Reports on Human Rights Practices and the Trafficking in Persons Report in assessing whether to repatriate an unaccompanied alien child to a particular country.

(C) Report on repatriation of unaccompanied alien children. Not later than 18 months after the date of the enactment of this Act, and annually thereafter, the Secretary of State and the Secretary of Health and Human Services, with assistance from the Secretary of Homeland Security, shall submit a report to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives on efforts to improve repatriation programs for unaccompanied alien children. Such report shall include--

(i) the number of unaccompanied alien children ordered removed and the number of such children actually removed from the United States;

(ii) a statement of the nationalities, ages, and gender of such children;

(iii) a description of the policies and procedures used to effect the removal of such children from the United States and the steps taken to ensure that such children were safely and humanely repatriated to their country of nationality or of last habitual residence, including a description of the repatriation pilot program created pursuant to subparagraph (A);

(iv) a description of the type of immigration relief sought and denied to such children;

(v) any information gathered in assessments of country and local conditions pursuant to paragraph (2); and

(vi) statistical information and other data on unaccompanied alien children as provided for in section 462(b)(1)(J) of the Homeland Security Act of 2002 (6 U.S.C. 279(b)(1)(J)).

(D) Placement in removal proceedings. Any unaccompanied alien child sought to be removed by the Department of Homeland Security, except for an unaccompanied alien child from a contiguous country subject to exceptions under subsection (a)(2), shall be--

(i) placed in removal proceedings under section 240 of the Immigration and Nationality Act (8 U.S.C. 1229a);

(ii) eligible for relief under section 240B of such Act (8 U.S.C. 1229c) at no cost to the child; and

(iii) provided access to counsel in accordance with subsection (c)(5).

(b) Combating child trafficking and exploitation in the United States.

(1) Care and custody of unaccompanied alien children. Consistent with section 462 of the Homeland Security Act of 2002 (6 U.S.C. 279), and except as otherwise provided under subsection (a), the care and custody of all unaccompanied alien children, including responsibility for their detention, where appropriate, shall be the responsibility of the Secretary of Health and Human Services.

(2) Notification. Each department or agency of the Federal Government shall notify the Department of Health and Human services within 48 hours upon--

(A) the apprehension or discovery of an unaccompanied alien child; or

(B) any claim or suspicion that an alien in the custody of such department or agency is under 18 years of age.

(3) Transfers of unaccompanied alien children. Except in the case of exceptional circumstances, any department or agency of the Federal Government that has an unaccompanied alien child in custody shall transfer the custody of such child to the Secretary of Health and Human Services not later than 72 hours after determining that such child is an unaccompanied alien child.

(4) Age determinations. The Secretary of Health and Human Services, in consultation with the Secretary of Homeland Security, shall develop procedures to make a prompt determination of the age of an alien, which shall be used by the Secretary of Homeland Security and the Secretary of Health and Human Services for children in their respective custody. At a minimum, these procedures shall take into account multiple forms of evidence, including the non-exclusive use of radiographs, to determine the age of the unaccompanied alien.

(c) Providing safe and secure placements for children.

(1) Policies and programs. The Secretary of Health and Human Services, Secretary of Homeland Security, Attorney General, and Secretary of State shall establish policies and programs to ensure that unaccompanied alien children in the United States are protected from traffickers and other persons seeking to victimize or otherwise engage such children in criminal, harmful, or exploitative activity, including policies and programs reflecting best practices in witness security programs.

(2) Safe and secure placements.

(A) Minors in Department of Health and Human Services custody. Subject to section 462(b)(2) of the Homeland Security Act of 2002 (6 U.S.C. 279(b)(2)), an unaccompanied alien child in the custody of the Secretary of Health and Human Services shall be promptly placed in the least restrictive setting that is in the best interest of the child. In making such placements, the Secretary may consider danger to self, danger to the community, and risk of flight. Placement of child trafficking victims may include placement in an Unaccompanied Refugee Minor program, pursuant to section 412(d) of the Immigration and Nationality Act (8 U.S.C. 1522(d)), if a suitable family member is not available to provide care. A child shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense. The placement of a child in a secure facility shall be reviewed, at a minimum, on a monthly basis, in accordance with procedures prescribed by the Secretary, to determine if such placement remains warranted.

(B) Aliens transferred from Department of Health and Human Services to Department of Homeland Security custody. If a minor described in subparagraph (A) reaches 18 years of age and is transferred to the custody of the Secretary of Homeland Security, the Secretary shall consider placement in the least restrictive setting available after taking into account the alien's danger to self, danger to the community, and risk of flight. Such aliens shall be eligible to participate in alternative to detention programs, utilizing a continuum of alternatives based on the alien's need for supervision, which may include placement of the alien with an individual or an organizational sponsor, or in a supervised group home.

(3) Safety and suitability assessments.

(A) In general. Subject to the requirements of subparagraph (B), an unaccompanied alien child may not be placed with a person or entity unless the Secretary of Health and Human Services makes a determination that the proposed custodian is capable of providing for the child's physical and mental well-being. Such determination shall, at a minimum, include verification of the custodian's identity and relationship to the child, if any, as well as an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the child.

(B) Home studies. Before placing the child with an individual, the Secretary of Health and Human Services shall determine whether a home study is first necessary. A home study shall be conducted for a child who is a victim of a severe form of trafficking in persons, a special needs child with a disability (as defined in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102(2))), a child who has been a victim of physical or sexual abuse under circumstances that indicate that the child's health or welfare has been significantly harmed or threatened, or a child whose proposed sponsor clearly presents a risk of abuse, maltreatment, exploitation, or trafficking to the child based on all available objective evidence. The Secretary of Health and Human Services shall conduct follow-up services, during the pendency of removal proceedings, on children for whom a home study was conducted and is authorized to conduct follow-up services in cases involving children with mental health or other needs who could benefit from ongoing assistance from a social welfare agency.

(C) Access to information. Not later than 2 weeks after receiving a request from the Secretary of Health and Human Services, the Secretary of Homeland Security shall provide information necessary to conduct suitability assessments from appropriate Federal, State, and local law enforcement and immigration databases.

(4) Legal orientation presentations. The Secretary of Health and Human Services shall cooperate with the Executive Office for Immigration Review to ensure that custodians receive legal orientation presentations provided through the Legal Orientation Program administered by the Executive Office for Immigration Review. At a minimum, such presentations shall address the custodian's responsibility to attempt to ensure the child's appearance at all immigration proceedings and to protect the child from mistreatment, exploitation, and trafficking.

(5) Access to counsel. The Secretary of Health and Human Services shall ensure, to the greatest extent practicable and consistent with section 292 of the Immigration and Nationality Act (8 U.S.C. 1362), that all unaccompanied alien children who are or have been in the custody of the Secretary or the Secretary of Homeland Security, and who are not described in subsection (a)(2)(A), have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking. To the greatest extent practicable, the Secretary of Health and Human Services shall make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge.

(6) Child advocates.

(A) In general. The Secretary of Health and Human Services is authorized to appoint independent child advocates for child trafficking victims and other vulnerable unaccompanied alien children. A child advocate shall be provided access to materials necessary to effectively advocate for the best interest of the child. The child advocate shall not be compelled to testify or provide evidence in any proceeding concerning any information or opinion received from the child in the course of serving as a child advocate. The child advocate shall be presumed to be acting in good faith and be immune from civil liability for lawful conduct of duties as described in this provision.

(B) Appointment of child advocates.

(i) Initial sites. Not later than 2 years after the date of the enactment of the Violence Against Women Reauthorization Act of 2013 [enacted March 7, 2013], the Secretary of Health and Human Services shall appoint child advocates at 3 new immigration detention sites to provide

independent child advocates for trafficking victims and vulnerable unaccompanied alien children.

(ii) Additional sites. Not later than 3 years after the date of the enactment of the Violence Against Women Reauthorization Act of 2013 [enacted March 7, 2013], the Secretary shall appoint child advocates at not more than 3 additional immigration detention sites.

(iii) Selection of sites. Sites at which child advocate programs will be established under this subparagraph shall be located at immigration detention sites at which more than 50 children are held in immigration custody, and shall be selected sequentially, with priority given to locations with--

(I) the largest number of unaccompanied alien children; and

(II) the most vulnerable populations of unaccompanied children.

(C) Restrictions.

(i) Administrative expenses. A child advocate program may not use more that 10 percent of the Federal funds received under this section for administrative expenses.

(ii) Nonexclusivity. Nothing in this section may be construed to restrict the ability of a child advocate program under this section to apply for or obtain funding from any other source to carry out the programs described in this section.

(iii) Contribution of funds. A child advocate program selected under this section shall contribute non-Federal funds, either directly or through in-kind contributions, to the costs of the child advocate program in an amount that is not less than 25 percent of the total amount of Federal funds received by the child advocate program under this section. In-kind contributions may not exceed 40 percent of the matching requirement under this clause.

(D) Annual report to Congress. Not later than 1 year after the date of the enactment of the Violence Against Women Reauthorization Act of 2013 [enacted March 7, 2013], and annually thereafter, the Secretary of Health and Human Services shall submit a report describing the activities undertaken by the Secretary to authorize the appointment of independent Child Advocates for trafficking victims and vulnerable unaccompanied alien children to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives.

(E) Assessment of Child Advocate Program.

(i) In general. As soon as practicable after the date of the enactment of the Violence Against Women Reauthorization Act of 2013 [enacted March 7, 2013], the Comptroller General of the United States shall conduct a study regarding the effectiveness of the Child Advocate Program operated by the Secretary of Health and Human Services.

(ii) Matters to be studied. In the study required under clause (i), the Comptroller General shall--collect information and analyze the following:

(I) analyze the effectiveness of existing child advocate programs in improving outcomes for trafficking victims and other vulnerable unaccompanied alien children;

(II) evaluate the implementation of child advocate programs in new sites pursuant to subparagraph (B);

(III) evaluate the extent to which eligible trafficking victims and other vulnerable unaccompanied children are receiving child advocate services and assess the possible budgetary implications of increased participation in the program;

(IV) evaluate the barriers to improving outcomes for trafficking victims and other vulnerable unaccompanied children; and

(V) make recommendations on statutory changes to improve the Child Advocate Program in relation to the matters analyzed under subclauses (I) through (IV).

(iii) GAO report. Not later than 3 years after the date of the enactment of this Act [enacted March 7, 2013], the Comptroller General of the United States shall submit the results of the study required under this subparagraph to--

(I) the Committee on the Judiciary of the Senate;

(II) the Committee on Health, Education, Labor, and Pensions of the Senate;

(III) the Committee on the Judiciary of the House of Representatives; and

(IV) the Committee on Education and the Workforce of the House of Representatives.

(F) Authorization of appropriations. There are authorized to be appropriated to the Secretary and Human Services to carry out this subsection--

(i) $ 1,000,000 for each of the fiscal years 2014 and 2015; and

(ii) $ 2,000,000 for each of the fiscal years 2016 and 2017.

(d) Permanent protection for certain at-risk children.

(1) [Omitted]

(2) Expeditious adjudication. All applications for special immigrant status under section 101(a)(27)(J) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(J)) shall be adjudicated by the Secretary of Homeland Security not later than 180 days after the date on which the application is filed.

(3) [Omitted]

(4) Eligibility for assistance.

(A) In general. A child who has been granted special immigrant status under section 101(a)(27)(J) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(J)) and who was in the custody of the Secretary of Health and Human Services at the time a dependency order was granted for such child, was receiving services pursuant to section 501(a) of the Refugee Education Assistance Act of 1980 (8 U.S.C. 1522 note) at the time such dependency order was granted, or has been granted status under section 101(a)(15)(U) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(U)),[,] shall be eligible for placement and services under section 412(d) of the Immigration and Nationality Act (8 U.S.C. 1522(d)) until the earlier of--

(i) the date on which the child reaches the age designated in section 412(d)(2)(B) of the Immigration and Nationality Act (8 U.S.C. 1522(d)(2)(B)); or

(ii) the date on which the child is placed in a permanent adoptive home.

(B) State reimbursement. Subject to the availability of appropriations, if State foster care funds are expended on behalf of a child who is not described in subparagraph (A) and has been granted special immigrant status under section 101(a)(27)(J) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(J)), or status under section 101(a)(15)(U) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(U)),[,] the Federal Government shall reimburse the State in which the child resides for such expenditures by the State.

(5) State courts acting in loco parentis. A department or agency of a State, or an individual or entity appointed by a State court or juvenile court located in the United States, acting in loco parentis, shall not be considered a legal guardian for purposes of this section or section 462 of the Homeland Security Act of 2002 (6 U.S.C. 279).

(6) Transition rule. Notwithstanding any other provision of law, an alien described in section 101(a)(27)(J) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(J)), as amended by paragraph (1), may

not be denied special immigrant status under such section after the date of the enactment of this Act based on age if the alien was a child on the date on which the alien applied for such status.

(7) [Omitted]

(8) Specialized needs of unaccompanied alien children. Applications for asylum and other forms of relief from removal in which an unaccompanied alien child is the principal applicant shall be governed by regulations which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children's cases.

(e) Training. The Secretary of State, the Secretary of Homeland Security, the Secretary of Health and Human Services, and the Attorney General shall provide specialized training to all Federal personnel, and upon request, state and local personnel, who have substantive contact with unaccompanied alien children. Such personnel shall be trained to work with unaccompanied alien children, including identifying children who are victims of severe forms of trafficking in persons, and children for whom asylum or special immigrant relief may be appropriate, including children described in subsection (a)(2).

(f) [Omitted]

(g) Definition of unaccompanied alien child. For purposes of this section, the term "unaccompanied alien child" has the meaning given such term in section 462(g) of the Homeland Security Act of 2002 (6 U.S.C. 279(g)).

(h) Effective date. This section--

(1) shall take effect on the date that is 90 days after the date of the enactment of this Act [enacted Dec. 23, 2008]; and

(2) shall also apply to all aliens in the United States in pending proceedings before the Department of Homeland Security or the Executive Office for Immigration Review, or related administrative or Federal appeals, on the date of the enactment of this Act [enacted Dec. 23, 2008].

(i) Grants and contracts. The Secretary of Health and Human Services may award grants to, and enter into contracts with, voluntary agencies to carry out this section and section 462 of the Homeland Security Act of 2002 (6 U.S.C. 279).

History

(Dec. 23, 2008,P.L. 110-457, Title II, Subtitle D, § 235, 122 Stat. 5074; March 7, 2013, P.L. 113-4, Title XII, Subtitle D, §§ 1261-1263, 127 Stat. 156.)

End of Document

8 CFR 1003.19

This document is current through the March 8, 2017 issue of the Federal Register. Pursuant to 82 FR 8346, all regulations that have a future effective date on or after January 20, 2017, will be delayed for 60 days. Title 3 is current through March 3, 2017.

Code of Federal Regulations > TITLE 8 -- ALIENS AND NATIONALITY > CHAPTER V -- EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, DEPARTMENT OF JUSTICE > SUBCHAPTER A -- GENERAL PROVISIONS > PART 1003 -- EXECUTIVE OFFICE FOR IMMIGRATION REVIEW > SUBPART C -- IMMIGRATION COURT -- RULES OF PROCEDURE

§ 1003.19 Custody/bond.

(a) Custody and bond determinations made by the service pursuant to 8 CFR part 1236 may be reviewed by an Immigration Judge pursuant to 8 CFR part 1236.

(b) Application for an initial bond redetermination by a respondent, or his or her attorney or representative, may be made orally, in writing, or, at the discretion of the Immigration Judge, by telephone.

(c) Applications for the exercise of authority to review bond determinations shall be made to one of the following offices, in the designated order:

(1) If the respondent is detained, to the Immigration Court having jurisdiction over the place of detention;

(2) To the Immigration Court having administrative control over the case; or

(3) To the Office of the Chief Immigration Judge for designation of an appropriate Immigration Court.

(d) Consideration by the Immigration Judge of an application or request of a respondent regarding custody or bond under this section shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding. The determination of the Immigration Judge as to custody status or bond may be based upon any information that is available to the Immigration Judge or that is presented to him or her by the alien or the Service.

(e) After an initial bond redetermination, an alien's request for a subsequent bond redetermination shall be made in writing and shall be considered only upon a showing that the alien's circumstances have changed materially since the prior bond redetermination.

(f) The determination of an Immigration Judge with respect to custody status or bond redetermination shall be entered on the appropriate form at the time such decision is made and the parties shall be informed orally or in writing of the reasons for the decision. An appeal from the determination by an Immigration Judge may be taken to the Board of Immigration Appeals pursuant to § 1003.38.

(g) While any proceeding is pending before the Executive Office for Immigration Review, the Service shall immediately advise the Immigration Court having administrative control over the Record of Proceeding of a change in the respondent/applicant's custody location or of release from Service custody, or subsequent taking into Service custody, of a respondent/applicant. This notification shall be in writing and shall state the effective date of the change in custody location or status, and the respondent/applicant's current fixed street address, including zip code.

(h)

(1)

(i) While the Transition Period Custody Rules (TPCR) set forth in section 303(b)(3) of Div. C of Pub. L. 104-208 remain in effect, an immigration judge may not redetermine conditions of custody imposed by the Service with respect to the following classes of aliens:

(A) Aliens in exclusion proceedings;

(B) Arriving aliens in removal proceedings, including persons paroled after arrival pursuant to section 212(d)(5) of the Act;

(C) Aliens described in section 237(a)(4) of the Act;

(D) Aliens subject to section 303(b)(3)(A) of Pub. L. 104-208 who are not "lawfully admitted" (as defined in § 1236.1(c)(2) of this chapter); or

(E) Aliens designated in § 1236.1(c) of this chapter as ineligible to be considered for release.

(ii) Nothing in this paragraph shall be construed as prohibiting an alien from seeking a redetermination of custody conditions by the Service in accordance with part 1235 or 1236 of this chapter. In addition, with respect to paragraphs (h)(1)(i)(C), (D), and (E) of this section, nothing in this paragraph shall be construed as prohibiting an alien from seeking a determination by an immigration judge that the alien is not properly included within any of those paragraphs.

(2)

(i) Upon expiration of the Transition Period Custody Rules set forth in section 303(b)(3) of Div. C. of Pub. L. 104-208, an immigration judge may not redetermine conditions of custody imposed by the Service with respect to the following classes of aliens:

(A) Aliens in exclusion proceedings;

(B) Arriving aliens in removal proceedings, including aliens paroled after arrival pursuant to section 212(d)(5) of the Act;

(C) Aliens described in section 237(a)(4) of the Act;

(D) Aliens in removal proceedings subject to section 236(c)(1) of the Act (as in effect after expiration of the Transition Period Custody Rules); and

(E) Aliens in deportation proceedings subject to section 242(a)(2) of the Act (as in effect prior to April 1, 1997, and as amended by section 440(c) of Pub. L. 104-132).

(ii) Nothing in this paragraph shall be construed as prohibiting an alien from seeking a redetermination of custody conditions by the Service in accordance with part 1235 or 1236 of this chapter. In addition, with respect to paragraphs (h)(2)(i)(C), (D), and (E) of this section, nothing in this paragraph shall be construed as prohibiting an alien from seeking a determination by an immigration judge that the alien is not properly included within any of those paragraphs.

(3) Except as otherwise provided in paragraph (h)(1) of this section, an alien subject to section 303(b)(3)(A) of Div. C of Pub. L. 104-208 may apply to the Immigration Court, in a manner consistent with paragraphs (c)(1) through (c)(3) of this section, for a redetermination of custody conditions set by the Service. Such an alien must first demonstrate, by clear and convincing evidence, that release would not pose a danger to other persons or to property. If an alien meets this burden, the alien must further demonstrate, by clear and convincing evidence, that the alien is likely to appear for any scheduled proceeding or interview.

(4) Unremovable aliens. A determination of a district director (or other official designated by the Commissioner) regarding the exercise of authority under section 303(b)(3)(B)(ii) of Div. C. of Pub. L. 104-208 (concerning release of aliens who cannot be removed because the designated country of removal will not accept their return) is final, and shall not be subject to redetermination by an immigration judge.

(i) Stay of custody order pending appeal by the government --

(1) General discretionary stay authority. The Board of Immigration Appeals (Board) has the authority to stay the order of an immigration judge redetermining the conditions of custody of an alien when the Department of Homeland Security appeals the custody decision or on its own motion. DHS is entitled to seek a discretionary stay (whether or not on an emergency basis) from the Board in connection with such an appeal at any time.

(2) Automatic stay in certain cases. In any case in which DHS has determined that an alien should not be released or has set a bond of $ 10,000 or more, any order of the immigration judge authorizing release (on bond or otherwise) shall be stayed upon DHS's filing of a notice of intent to appeal the custody redetermination (Form EOIR-43) with the immigration court within one business day of the order, and, except as otherwise provided in 8 CFR 1003.6(c), shall remain in abeyance pending decision of the appeal by the Board. The decision whether or not to file Form EOIR-43 is subject to the discretion of the Secretary.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 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.

History

[57 FR 11571, Apr. 6, 1992; 60 FR 34089, June 30, 1995; 62 FR 10312, 10332, Mar. 6, 1997; 63 FR 27441, 27448, May 19, 1998; 66 FR 54909, 54911, Oct. 31, 2001; redesignated and amended at 68 FR 9824, 9830, 9846, Feb. 28, 2003; 68 FR 10349, 10350, Mar. 5, 2003; 70 FR 4743, 4753, Jan. 31, 2005; 71 FR 57873, 57884, Oct. 2, 2006]

End of Document

8 CFR 1236.1

This document is current through the March 8, 2017 issue of the Federal Register. Pursuant to 82 FR 8346, all regulations that have a future effective date on or after January 20, 2017, will be delayed for 60 days. Title 3 is current through March 3, 2017.

Code of Federal Regulations > TITLE 8 -- ALIENS AND NATIONALITY > CHAPTER V -- EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, DEPARTMENT OF JUSTICE > SUBCHAPTER B -- IMMIGRATION REGULATIONS > PART 1236 -- APPREHENSION AND DETENTION OF INADMISSIBLE AND DEPORTABLE ALIENS; REMOVAL OF ALIENS ORDERED REMOVED > SUBPART A -- DETENTION OF ALIENS PRIOR TO ORDER OF REMOVAL

§ 1236.1 Apprehension, custody, and detention.

(a) Detainers. The issuance of a detainer under this section shall be governed by the provisions of § 287.7 of 8 CFR chapter I.

(b) Warrant of arrest.

(1) In general. At the time of issuance of the notice to appear, or at any time thereafter and up to the time removal proceedings are completed, the respondent may be arrested and taken into custody under the authority of Form I-200, Warrant of Arrest. A warrant of arrest may be issued only by those immigration officers listed in § 287.5(e)(2) of 8 CFR chapter I and may be served only by those immigration officers listed in § 287.5(e)(3) of 8 CFR chapter I.

(2) If, after the issuance of a warrant of arrest, a determination is made not to serve it, any officer authorized to issue such warrant may authorize its cancellation.

(c) Custody issues and release procedures.

(1) In general.

(i) After the expiration of the Transition Period Custody Rules (TPCR) set forth in section 303(b)(3) of Div. C of Pub. L. 104-208, no alien described in section 236(c)(1) of the Act may be released from custody during removal proceedings except pursuant to section 236(c)(2) of the Act.

(ii) Paragraph (c)(2) through (c)(8) of this section shall govern custody determinations for aliens subject to the TPCR while they remain in effect. For purposes of this section, an alien "subject to the TPCR" is an alien described in section 303(b)(3)(A) of Div. C of Pub. L. 104-208 who is in deportation proceedings, subject to a final order of deportation, or in removal proceedings. The TPCR do not apply to aliens in exclusion proceedings under former section 236 of the Act, aliens in expedited removal proceedings under section 235(b)(1) of the Act, or aliens subject to a final order of removal.

(2) Aliens not lawfully admitted. Subject to paragraph (c)(6)(i) of this section, but notwithstanding any other provision within this section, an alien subject to the TPCR who is not lawfully admitted is not eligible to be considered for release from custody.

(i) An alien who remains in status as an alien lawfully admitted for permanent residence, conditionally admitted for permanent residence, or lawfully admitted for temporary residence is "lawfully admitted" for purposes of this section.

(ii) An alien in removal proceedings, in deportation proceedings, or subject to a final order of deportation, and not described in paragraph (c)(2)(i) of this section, is not "lawfully admitted" for

purposes of this section unless the alien last entered the United States lawfully and is not presently an applicant for admission to the United States.

(3) Criminal aliens eligible to be considered for release. Except as provided in this section, or otherwise provided by law, an alien subject to the TPCR may be considered for release from custody if lawfully admitted. Such an alien must first demonstrate, by clear and convincing evidence, that release would not pose a danger to the safety of other persons or of property. If an alien meets this burden, the alien must further demonstrate, by clear and convincing evidence, that the alien is likely to appear for any scheduled proceeding (including any appearance required by the Service or EOIR) in order to be considered for release in the exercise of discretion.

(4) Criminal aliens ineligible to be considered for release except in certain special circumstances. An alien, other than an alien lawfully admitted for permanent residence, subject to section 303(b)(3)(A) (ii) or (iii) of Div. C. of Pub. L. 104-208 is ineligible to be considered for release if the alien:

(i) Is described in section 241(a)(2)(C) of the Act (as in effect prior to April 1, 1997), or has been convicted of a crime described in section 101(a)(43)(B), (E)(ii) or (F) of the Act (as in effect on April 1, 1997);

(ii) Has been convicted of a crime described in section 101(a)(43)(G) of the Act (as in effect on April 1, 1997) or a crime or crimes involving moral turpitude related to property, and sentenced therefor (including in the aggregate) to at least 3 years' imprisonment;

(iii) Has failed to appear for an immigration proceeding without reasonable cause or has been subject to a bench warrant or similar legal process (unless quashed, withdrawn, or cancelled as improvidently issued);

(iv) Has been convicted of a crime described in section 101(a)(43)(Q) or (T) of the Act (as in effect on April 1, 1997);

(v) Has been convicted in a criminal proceeding of a violation of section 273, 274, 274C, 276, or 277 of the Act, or has admitted the factual elements of such a violation;

(vi) Has overstayed a period granted for voluntary departure;

(vii) Has failed to surrender or report for removal pursuant to an order of exclusion, deportation, or removal;

(viii) Does not wish to pursue, or is statutorily ineligible for, any form of relief from exclusion, deportation, or removal under this chapter or the Act; or

(ix) Is described in paragraphs (c)(5)(i)(A), (B), or (C) of this section but has not been sentenced, including in the aggregate but not including any portions suspended, to at least 2 years' imprisonment, unless the alien was lawfully admitted and has not, since the commencement of proceedings and within the 10 years prior thereto, been convicted of a crime, failed to comply with an order to surrender or a period of voluntary departure, or been subject to a bench warrant or similar legal process (unless quashed, withdrawn, or cancelled as improvidently issued). An alien eligible to be considered for release under this paragraph must meet the burdens described in paragraph (c)(3) of this section in order to be released from custody in the exercise of discretion.

(5) Criminal aliens ineligible to be considered for release. (i) A criminal alien subject to section 303(b)(3)(A)(ii) or (iii) of Div. C of Pub. L. 104-208 is ineligible to be considered for release if the alien has been sentenced, including in the aggregate but not including any portions suspended, to at least 2 years' imprisonment, and the alien

(A) Is described in section 237(a)(2)(D)(i) or (ii) of the Act (as in effect on April 1, 1997), or has been convicted of a crime described in section 101(a)(43)(A), (C), (E)(i), (H), (I), (K)(iii), or (L) of the Act (as in effect on April 1, 1997);

(B) Is described in section 237(a)(2)(A)(iv) of the Act; or

(C) Has escaped or attempted to escape from the lawful custody of a local, State, or Federal prison, agency, or officer within the United States.

(ii) Notwithstanding paragraph (c)(5)(i) of this section, a permanent resident alien who has not, since the commencement of proceedings and within the 15 years prior thereto, been convicted of a crime, failed to comply with an order to surrender or a period of voluntary departure, or been subject to a bench warrant or similar legal process (unless quashed, withdrawn, or cancelled as improvidently issued), may be considered for release under paragraph (c)(3) of this section.

(6) Unremovable aliens and certain long-term detainees.

(i) If the district director determines that an alien subject to section 303(b)(3)(A)(ii) or (iii) of Div. C of Pub. L. 104-208 cannot be removed from the United States because the designated country of removal or deportation will not accept the alien's return, the district director may, in the exercise of discretion, consider release of the alien from custody upon such terms and conditions as the district director may prescribe, without regard to paragraphs (c)(2), (c)(4), and (c)(5) of this section.

(ii) The district director may also, notwithstanding paragraph (c)(5) of this section, consider release from custody, upon such terms and conditions as the district director may prescribe, of any alien described in paragraph (c)(2)(ii) of this section who has been in the Service's custody for six months pursuant to a final order of deportation terminating the alien's status as a lawful permanent resident.

(iii) The district director may release an alien from custody under this paragraph only in accordance with the standards set forth in paragraph (c)(3) of this section and any other applicable provisions of law.

(iv) The district director's custody decision under this paragraph shall not be subject to redetermination by an immigration judge, but, in the case of a custody decision under paragraph (c)(6)(ii) of this section, may be appealed to the Board of Immigration Appeals pursuant to paragraph (d)(3)(iii) of this section.

(7) Construction. A reference in this section to a provision in section 241 of the Act as in effect prior to April 1, 1997, shall be deemed to include a reference to the corresponding provision in section 237 of the Act as in effect on April 1, 1997. A reference in this section to a "crime" shall be considered to include a reference to a conspiracy or attempt to commit such a crime. In calculating the 10-year period specified in paragraph (c)(4) of this section and the 15-year period specified in paragraph (c)(5) of this section, no period during which the alien was detained or incarcerated shall count toward the total. References in paragraph (c)(6)(i) of this section to the "district director" shall be deemed to include a reference to any official designated by the Commissioner to exercise custody authority over aliens covered by that paragraph. Nothing in this part shall be construed as prohibiting an alien from seeking reconsideration of the Service's determination that the alien is within a category barred from release under this part.

(8) Any officer authorized to issue a warrant of arrest may, in the officer's discretion, release an alien not described in section 236(c)(1) of the Act, under the conditions at section 236(a)(2) and (3) of the Act; provided that the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding. Such an officer may also, in the exercise of discretion, release an alien in deportation proceedings pursuant to the authority in section 242 of the Act (as designated prior to April 1, 1997), except as otherwise provided by law.

(9) When an alien who, having been arrested and taken into custody, has been released, such release may be revoked at any time in the discretion of the district director, acting district director, deputy district director, assistant district director for investigations, assistant district director for detention and deportation, or officer in charge (except foreign), in which event the alien may be taken into physical

custody and detained. If detained, unless a breach has occurred, any outstanding bond shall be revoked and canceled.

(10) The provisions of § 103.6 of 8 CFR chapter I shall apply to any bonds authorized. Subject to the provisions of this section, the provisions of § 1003.19 of this chapter shall govern availability to the respondent of recourse to other administrative authority for release from custody.

(11) An immigration judge may not exercise the authority provided in this section, and the review process described in paragraph (d) of this section shall not apply, with respect to any alien beyond the custody jurisdiction of the immigration judge as provided in § 1003.19(h) of this chapter.

(d) Appeals from custody decisions.

(1) Application to immigration judge. After an initial custody determination by the district director, including the setting of a bond, the respondent may, at any time before an order under 8 CFR part 1240 becomes final, request amelioration of the conditions under which he or she may be released. Prior to such final order, and except as otherwise provided in this chapter, the immigration judge is authorized to exercise the authority in section 236 of the Act (or section 242(a)(1) of the Act as designated prior to April 1, 1997 in the case of an alien in deportation proceedings) to detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released, as provided in § 1003.19 of this chapter. If the alien has been released from custody, an application for amelioration of the terms of release must be filed within 7 days of release.

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

(3) Appeal to the Board of Immigration Appeals. An appeal relating to bond and custody determinations may be filed to the Board of Immigration Appeals in the following circumstances:

(i) In accordance with § 1003.38 of this chapter, the alien or the Service may appeal the decision of an immigration judge pursuant to paragraph (d)(1) of this section.

(ii) The alien, within 10 days, may appeal from the district director's decision under paragraph (d)(2)(i) of this section.

(4) Effect of filing an appeal. The filing of an appeal from a determination of an immigration judge or district director under this paragraph shall not operate to delay compliance with the order (except as provided in § 1003.19(i)), nor stay the administrative proceedings or removal.

(e) Privilege of communication. Every detained alien shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States. Existing treaties with the following countries require immediate communication with appropriate consular or diplomatic officers whenever nationals of the following countries are detained in removal proceedings, whether or not requested by the alien and even if the alien requests that no communication be undertaken in his or her behalf. When notifying consular or diplomatic officials, Service officers shall not reveal the fact that any detained alien has applied for asylum or withholding of removal.

Albania n1

n1 Arrangements with these countries provide that U.S. authorities shall notify responsible representatives within 72 hours of the arrest or detention of one of their nationals.

Antigua

Armenia

Azerbaijan

Bahamas

Barbados

Belarus

Belize

Brunei

Bulgaria

China (People's Republic of) n2

n2 When Taiwan nationals (who carry "Republic of China" passports) are detained, notification should be made to the nearest office of the Taiwan Economic and Cultural Representative's Office, the unofficial entity representing Taiwan's interests in the United States.

Costa Rica

Cyprus

Czech Republic

Dominica

Fiji

Gambia, The

Georgia

Ghana

Grenada

Guyana

Hungary

Jamaica

Kazakhstan

Kiribati

Kuwait

Kyrgyzstan

Malaysia

Malta

Mauritius

Moldova

Mongolia

Nigeria

Philippines

Poland

Romania

Russian Federation

St. Kitts/Nevis

St. Lucia

St. Vincent/Grenadines

Seychelles

Sierra Leone

Singapore

Slovak Republic

South Korea

Tajikistan

Tanzania

Tonga

Trinidad/Tobago

Turkmenistan

Tuvalu

Ukraine

United Kingdom n3

n3 British dependencies are also covered by this agreement. They are: Anguilla, British Virgin Islands, Hong Kong, Bermuda, Montserrat, and the Turks and Caicos Islands. Their residents carry British passports.

U.S.S.R. n4

n4 All U.S.S.R. successor states are covered by this agreement. They are: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russian Federation, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan.

Uzbekistan

Zambia

(f) Notification to Executive Office for Immigration Review of change in custody status. The Service shall notify the Immigration Court having administrative control over the Record of Proceeding of any change in custody location or of release from, or subsequent taking into, Service custody of a respondent/applicant pursuant to § 1003.19(g) of this chapter.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

5 U.S.C. 301, 552, 552a; 8 U.S.C. 1103, 1182, 1224, 1225, 1226, 1227, 1231, 1362; 18 U.S.C. 4002, 4013(c)(4); 8 CFR part 2.

History

[42 FR 46045, Sept. 14, 1977; 62 FR 10312, 10360, March 6, 1997, as corrected and amended at 62 FR 15362, 15363, April 1, 1997; 63 FR 27441, 27449, May 19, 1998; 65 FR 80281, 80294, Dec. 21, 2000; 68 FR 9824, 9838, Feb. 28, 2003; 68 FR 10349, 10354, Mar. 5, 2003]

8 CFR 1236.3

This document is current through the March 8, 2017 issue of the Federal Register. Pursuant to 82 FR 8346, all regulations that have a future effective date on or after January 20, 2017, will be delayed for 60 days. Title 3 is current through March 3, 2017.

Code of Federal Regulations > TITLE 8 -- ALIENS AND NATIONALITY > CHAPTER V -- EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, DEPARTMENT OF JUSTICE > SUBCHAPTER B -- IMMIGRATION REGULATIONS > PART 1236 -- APPREHENSION AND DETENTION OF INADMISSIBLE AND DEPORTABLE ALIENS; REMOVAL OF ALIENS ORDERED REMOVED > SUBPART A -- DETENTION OF ALIENS PRIOR TO ORDER OF REMOVAL

§ 1236.3 Detention and release of juveniles.

(a) Juveniles. A juvenile is defined as an alien under the age of 18 years.

(b) Release. Juveniles for whom bond has been posted, for whom parole has been authorized, or who have been ordered released on recognizance, shall be released pursuant to the following guidelines:

(1) Juveniles shall be released, in order of preference, to:

(i)A parent;

(ii) Legal guardian; or

(iii) An adult relative (brother, sister, aunt, uncle, grandparent) who is not presently in Service detention, unless a determination is made that the detention of such juvenile is required to secure his or her timely appearance before the Service or the Immigration Court or to ensure the juvenile's safety or that of others. In cases where the parent, legal guardian, or adult relative resides at a location distant from where the juvenile is detained, he or she may secure release at a Service office located near the parent, legal guardian, or adult relative.

(2) If an individual specified in paragraphs (b)(1)(i) through (iii) of this section cannot be located to accept custody of a juvenile, and the juvenile has identified a parent, legal guardian, or adult relative in Service detention, simultaneous release of the juvenile and the parent, legal guardian, or adult relative shall be evaluated on a discretionary case-by-case basis.

(3) In cases where the parent or legal guardian is in Service detention or outside the United States, the juvenile may be released to such person as is designated by the parent or legal guardian in a sworn affidavit, executed before an immigration officer or consular officer, as capable and willing to care for the juvenile's well-being. Such person must execute an agreement to care for the juvenile and to ensure the juvenile's presence at all future proceedings before the Service or an immigration judge.

(4) In unusual and compelling circumstances and in the discretion of the Director of the Office of Juvenile Affairs, a juvenile may be released to an adult, other than those identified in paragraphs (b)(1)(i) through (b)(1)(iii) of this section, who executes an agreement to care for the juvenile's well-being and to ensure the juvenile's presence at all future proceedings before the Service or an immigration judge.

(c) Juvenile coordinator. The case of a juvenile for whom detention is determined to be necessary should be referred to the "Juvenile Coordinator," whose responsibilities should include, but not be limited to, finding suitable placement of the juvenile in a facility designated for the occupancy of juveniles. These may include juvenile facilities contracted by the Service, state or local juvenile facilities, or other appropriate agencies authorized to accommodate juveniles by the laws of the state or locality.

(d) Detention. In the case of a juvenile for whom detention is determined to be necessary, for such interim period of time as is required to locate suitable placement for the juvenile, whether such placement is under paragraph (b) or (c) of this section, the juvenile may be temporarily held by Service authorities or placed in any Service detention facility having separate accommodations for juveniles.

(e) Refusal of release. If a parent of a juvenile detained by the Service can be located, and is otherwise suitable to receive custody of the juvenile, and the juvenile indicates a refusal to be released to his or her parent, the parent(s) shall be notified of the juvenile's refusal to be released to the parent(s), and they shall be afforded the opportunity to present their views to the district director, chief patrol agent, Director of the Office of Juvenile Affairs or immigration judge before a custody determination is made.

(f) Notice to parent of application for relief. If a juvenile seeks release from detention, voluntary departure, parole, or any form of relief from removal, where it appears that the grant of such relief may effectively terminate some interest inherent in the parent-child relationship and/or the juvenile's rights and interests are adverse with those of the parent, and the parent is presently residing in the United States, the parent shall be given notice of the juvenile's application for relief, and shall be afforded an opportunity to present his or her views and assert his or her interest to the district director, Director of the Office of Juvenile Affairs or immigration judge before a determination is made as to the merits of the request for relief.

(g) Voluntary departure. Each juvenile, apprehended in the immediate vicinity of the border, who resides permanently in Mexico or Canada, shall be informed, prior to presentation of the voluntary departure form or being allowed to withdraw his or her application for admission, that he or she may make a telephone call to a parent, close relative, a friend, or to an organization found on the free legal services list. A juvenile who does not reside in Mexico or Canada who is apprehended shall be provided access to a telephone and must in fact communicate either with a parent, adult relative, friend, or with an organization found on the free legal services list prior to presentation of the voluntary departure form. If such juvenile, of his or her own volition, asks to contact a consular officer, and does in fact make such contact, the requirements of this section are satisfied.

(h) Notice and request for disposition. When a juvenile alien is apprehended, he or she must be given a Form I-770, Notice of Rights and Disposition. If the juvenile is less than 14 years of age or unable to understand the notice, the notice shall be read and explained to the juvenile in a language he or she understands. In the event a juvenile who has requested a hearing pursuant to the notice subsequently decides to accept voluntary departure or is allowed to withdraw his or her application for admission, a new Form I-770 shall be given to, and signed by the juvenile.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

5 U.S.C. 301, 552, 552a; 8 U.S.C. 1103, 1182, 1224, 1225, 1226, 1227, 1231, 1362; 18 U.S.C. 4002, 4013(c)(4); 8 CFR part 2.

History

[55 FR 30686, July 27, 1990; 59 FR 62302, Dec. 5, 1994; 60 FR 34090, June 30, 1995; 62 FR 10312, 10362, March 6, 1997; 67 FR 39255, 39258, June 7, 2002; 68 FR 9824, 9838, Feb. 28, 2003]

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 10, 2017.

I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system:

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