

## **§ 1241.14 Continued detention of removable aliens on account of special circumstances**

(a) Scope. This section provides for the review of determinations by the Department of Homeland Security to continue the detention of particular removable aliens found to be specially dangerous. See 8 CFR 241.14.

(1) Applicability. This section applies to the review of the continued detention of removable aliens because the Department of Homeland Security has determined that release of the alien would pose a special danger to the public, where there is no significant likelihood of removal in the reasonably foreseeable future. This section does not apply to aliens who are not subject to the special review provisions under 8 CFR 241.13.

(2) Jurisdiction. The immigration judges and the Board have jurisdiction with respect to determinations as to whether release of an alien would pose a special danger to the public, as provided in paragraphs (f) through (k) of this section.

(b) to (e) [Reserved]

(f) Detention of aliens determined to be specially dangerous.

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

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

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

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

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

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

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

(g) Referral to Immigration Judge. Jurisdiction for an immigration judge to review a determination by the Service pursuant to paragraph (f) of this section that an alien is specially dangerous shall commence with the filing by the Service of a Notice of Referral to the Immigration Judge (Form I-863)

with the Immigration Court having jurisdiction over the place of the alien's custody. The Service shall promptly provide to the alien by personal service a copy of the Notice of Referral to the Immigration Judge and all accompanying documents.

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

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

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

(i) The alien shall be provided with a list of free legal services providers, and may be represented by an attorney or other representative of his or her choice in accordance with 8 CFR part 1292, at no expense to the Government;

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

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

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

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

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

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

(2) Evidence. The Service must show that there is reasonable cause to conduct a merits hearing under a merits hearing under paragraph (i) of this section. The Service may offer any evidence that is material and relevant to the proceeding. Testimony of

witnesses, if any, shall be under oath or affirmation. The alien may, but is not required to, offer evidence on his or her own behalf.

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

(4) Appeal. If the immigration judge dismisses the review proceedings, the Service may appeal to the Board of Immigration Appeals in accordance with § 1003.38 of this chapter, except that the Service must file the Notice of Appeal (Form EOIR-26) with the Board within 2 business days after the immigration judge's order. The Notice of Appeal should state clearly and conspicuously that it is an appeal of a reasonable cause decision under this section.

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

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

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

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

(1) Evidence. The Service shall have the burden of proving, by clear and convincing evidence, that the alien should remain in custody because the alien's release would

pose a special danger to the public, under the standards of paragraph (f)(1) of this section. The immigration judge may receive into evidence any oral or written statement that is material and relevant to this determination. Testimony of witnesses shall be under oath or affirmation. The alien may, but is not required to, offer evidence on his or her own behalf.

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

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

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

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

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

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

(3) Decision. After the closing of the record, the immigration judge shall render a decision as soon as practicable. The decision may be oral or written. The decision shall state whether or not the Service has met its burden of establishing that the alien should remain in custody because the alien's release would pose a special danger to the public, under the standards of paragraph (f)(1) of this section. The decision shall also include the reasons for the decision under each of the standards of paragraph (f)(1) of this section, although a formal enumeration of findings is not required. Notice of the decision shall be served in accordance with § 1240.13(a) or (b).

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

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

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

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

(ii) The Board shall conduct its review of the appeal as provided in 8 CFR part 3, but shall expedite its review as far as practicable, as the highest priority among the appeals filed by detained aliens. The decision of the Board shall be final as provided in § 1003.1(d)(3) this chapter.

(j) Release of alien upon dismissal of proceedings. If there is an administratively final decision by the immigration judge or the Board dismissing the review proceedings under this section upon conclusion of the reasonable cause hearing or the merits hearing, the Service shall promptly release the alien on conditions of supervision, as determined by the Service, pursuant to § 1241.13. The conditions of supervision shall not be subject to review by the immigration judge or the Board.

(k) Subsequent review for aliens whose release would pose a special danger to the public.

(1) Periodic review. In any case where the immigration judge or the Board has entered an order providing for the alien to remain in custody after a merits hearing pursuant to paragraph (i) of this section, the Service shall continue to provide an ongoing, periodic review of the alien's continued detention, according to §§ 1241.4 and paragraphs (f)(1)(ii) and (f)(1)(iii) of this section.

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

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

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

(5) Review by the Service. If the Service determines, upon consideration of the evidence submitted by the alien and other relevant evidence, that the alien is not likely to commit future acts of violence or that the Service will be able to impose adequate conditions of release so that the alien will not pose a special danger to the public, the Service shall release the alien from custody pursuant to the procedures in § 1241.13. If the Service determines that continued detention is needed in order to protect the public, the Service shall provide a written notice to the alien stating the basis for the Service's determination, and provide a copy of the evidence relied upon by the Service. The notice shall also advise the alien of the right to move to set aside the prior review proceedings under this section.

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

(i) If the immigration judge determines that the alien has provided good reason to believe that, because of a material change in circumstances, releasing the alien would no longer pose a special danger to the public under the standards of paragraph (f)(1) of this

section, the immigration judge shall set aside the determination in the prior review proceedings under this section and schedule a new merits hearing as provided in paragraph (i) of this section.

(ii) Unless the immigration judge determines that the alien has satisfied the requirements under paragraph (k)(6)(i) of this section, the immigration judge shall deny the motion. Neither the immigration judge nor the Board may sua sponte set aside a determination in prior review proceedings. Notwithstanding 8 CFR 1003.23 or 1003.2 (motions to reopen), the provisions set forth in this paragraph (k) shall be the only vehicle for seeking review based on material changed circumstances.

(iii) The alien may appeal an adverse decision to the Board in accordance with § 1003.38 this chapter. The Notice of Appeal should state clearly and conspicuously that this is an appeal of a denial of a motion to set aside a prior determination in review proceedings under this section.