



Office of the Attorney General  
Washington, D. C. 20530

FEBRUARY 14, 1997

Thomas B. Griffith, Esquire  
Senate Legal Counsel  
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Room 642  
Washington, D.C. 20510-7250

Dear Mr. Griffith:

This letter is to inform you that the Department of Justice has determined not to continue with its appeal of the district court's order in Caballero v. Caplinger, No. 95-3129 (order dated Feb. 6, 1996, judgment entered Feb. 29, 1996, E.D. La.) in light of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009 (Division C of the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3008 (1996)).

Section 303(a) of the IIRIRA amended Section 236 of the Immigration and Nationality Act (INA), 8 U.S.C. 1226, regarding the procedures for detention of aliens who are in removal proceedings (formerly known as deportation or exclusion proceedings). Section 236, as amended, provides that certain criminal aliens will be subject to mandatory detention pending the outcome of such removal proceedings.

Section 303(b)(2) of the IIRIRA further provided, however, that the Section 303(a) detention provision would not go into effect immediately if, within ten days of IIRIRA's enactment, the Attorney General notified the House and Senate Judiciary Committees "that there is insufficient detention space and Immigration and Nationality Service personnel available to carry out" the Section 303(a) mandatory detention provisions in the IIRIRA or in Section 440(c) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996). Upon such notice, a transition-period custody rule set forth in Section 303(b)(3) of the IIRIRA would become effective for a one-year period, subject to extension for an additional year.

On October 9, 1996, the Attorney General, through her delegate the Commissioner of the Immigration and Naturalization Service (INS), submitted to the House and Senate Judiciary Committees a notification in accordance with Section 303(b)(2) of the IIRIRA. See October 9, 1996, Letters from Commissioner Doris Meissner to Hon. Orrin Hatch and Hon. Henry Hyde. Thus, the transition-period custody rule is effective as of October 9, 1996, through the ensuing year.

Under the Section 303(b)(3) transition-period custody rule, the Attorney General is authorized to release on bond certain criminal aliens who are in deportation proceedings. Specifically, the rule provides that, with regard to aliens who were not lawfully admitted, the Attorney General may release such aliens if the alien "cannot be removed because the designated country of removal will not accept the alien, and 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." IIRIRA § 303(b)(3)(B)(ii). The rule also provides that, with respect to aliens who were lawfully admitted, the Attorney General may release such aliens if she, similarly, is satisfied that they are not dangerous and are likely to appear for hearings. IIRIRA § 303(b)(3)(B)(i).

Generally, the INS is able to remove virtually all aliens convicted of aggravated felonies who were not lawfully admitted, so that their continued detention pending deportation, without a bail hearing, does not raise constitutional concerns. There is, however, a small category of aliens who are subject to mandatory detention pending deportation, without any opportunity for bond, but who have no reasonable expectation of deportation within the foreseeable future because the country to which they are to be deported will not admit them.<sup>1</sup>

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<sup>1</sup> According to former Section 242(a)(2) of the INA, 8 U.S.C. 1252(a)(2) (revised by Section 306 of the IIRIRA), upon release from prison of an alien who was convicted of an aggravated felony, the Attorney General must take the alien into custody and, if the alien initially entered the country illegally, the Attorney General "shall not release such felon from custody," 8 U.S.C. 1252(a)(2)(A) (1996). If the alien initially entered lawfully, however, the Attorney General could, under former Section 242(a)(2)(B), release such an alien if the alien demonstrated that he would not be a threat to the community and was likely to appear for any scheduled hearings.

Prior to enactment of the IIRIRA, Section 242(a) had been amended by Section 440(c) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1277  
(continued...)

Caballero v. Caplinger involves such an alien.<sup>2</sup> The district court in that case granted a petition for habeas corpus, finding unconstitutional the alien's inability to obtain a meaningful bail determination hearing under 8 U.S.C. 1252. The district court issued a conditional writ, directing the INS "to give Caballero such a hearing within 30 days of the date" of its order, or the writ would issue. The district court did not order that the INS release the alien outright, but only that it provide a hearing to provide a meaningful bail determination. The district court held that, in the circumstances of the particular case, Section 242(a)(2)'s provision denying a hearing to determine whether the alien could be released pending deportation violated his due process rights under the Fifth Amendment and the Eighth Amendment's prohibition of excessive bail, because it resulted in indefinite detention without opportunity for bond. The United States filed a notice of appeal in the case. After the expiration of a stay, the INS reviewed the case to determine the appropriateness of granting bail or release pursuant to the district court's order. On June 27, 1996, the INS district director issued his determination that Mr. Caballero would be released from INS custody upon compliance with various conditions to meet the requirement that he not be a threat to the community.<sup>3</sup>

The district court's order in Caballero is moot in light of the recent legislation authorizing the Attorney General to

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<sup>1</sup>(...continued)  
(1996), to eliminate subsection (B) and to expand Section 242(a)(2) to apply to a broader group of felony convictions.

<sup>2</sup> Mr. Caballero is a Cuban citizen who entered the United States illegally in 1984, was convicted of an aggravated felony, and cannot presently be returned to his native country because it will not accept him. Mr. Caballero provided substantial assistance to the government with regard to the investigation and prosecution of several serious crimes, and his sentence was reduced upon motion by the United States pursuant to Federal Rule of Criminal Procedure 35(b). Upon being released from incarceration upon the completion of his sentence, he was transferred to the custody of the INS.

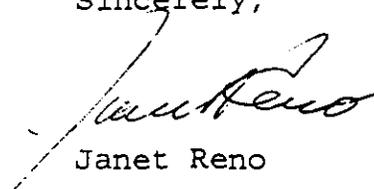
<sup>3</sup> The district director directed that Mr. Caballero participate in a specific substance abuse rehabilitation program. Upon completion of that program, he must demonstrate that he will have a viable family support system during his assimilation into the community, and he must submit a documented offer for employment upon release. Upon meeting all of those conditions, he will be released subject to an order of supervision.

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provide a bail hearing in cases in which the designated country of removal will not accept the alien. The Justice Department therefore filed a motion with the court of appeals asking that it vacate the district court's order in light of IIRIRA and remand to the district court. The alien opposed the motion, and the motion was referred to the panel that would hear the appeal on the merits. Because the case is moot, however, and because the transition-period detention rules now in effect allow for release of aliens in Caballero's position upon the requisite showing, the Department has concluded that a full submission of the merits argument concerning mandatory detention is not warranted at the appellate level at this time in this case. Accordingly, the Department will dismiss its appeal on February 18, 1997, the date on which the government's merits brief would have been due.

In accordance with the practice of the Department, I am informing the Congress that the Department of Justice will not appeal the order in the Caballero case.

Sincerely,



Janet Reno

cc: Geraldine Gennet, Esquire  
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