NEW YORK
CITY BAR

COMMITTEE ON
IMMIGRATION & NATIONALITY LAW

LINDA KENEPASKE
CHAIR
261 FIFTH AVENUE, SUITE 2000
NEW YORK, NY 10016
Phone: (212) 986-5993
Fax: (212) 889-5697
lindakenepaske@aol.com

ELIZABETH T. REICHARD
SECRETARY
67 WALL STREET, SUITE 1801
NEW YORK, NY 10005
Phone: (212) 425-0555 Ext. 23
Fax: (212) 425-3282
ereichard@cyrusmehta.com

July 20, 2009

The Honorable Janet Napolitano
Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Re: DHS exercise of discretion with regard to detention of lawful permanent residents

Honorable Secretary Napolitano:

On behalf of the New York City Bar Association, I am writing to urge you to review current Department of Homeland (DHS) policy regarding mandatory detention under § 236(c) of the Immigration and Nationality Act (INA), specifically with regard to lawful permanent residents.

Since its founding in 1869, the New York City Bar Association has grown to over 23,000 members. The New York City Bar Association works to promote the public good by advocating for political, legal, and social reform, and by promoting high ethical standards for the legal profession. The Immigration and Nationality Law Committee, which I chair, meets on a monthly basis for discussion of current immigration topics; organizes and sponsors educational programs; and issues reports and recommendations. Most members of the committee regularly represent non-citizens before the Immigration and Customs and Citizenship (ICE) and United States Citizenship and Immigration Service (USCIS) branches of the DHS, and the Executive Office for Immigration Review (EOIR). Many of us have clients currently in ICE detention in various ICE detention facilities across the United States.

We applaud President Obama's determination to pursue reform of the flawed immigration system and have long advocated for reform of the current immigration laws and regulations. Although we are concerned about all detained non-citizens, this letter addresses the current DHS policy of detaining lawful permanent residents (LPRs), who are removable or inadmissible to the United States. LPRs are legally different from individuals who are not lawfully in the United

States, and we believe that DHS should treat them differently from such individuals. The ideal solution would be to eliminate the mandatory detention provisions under INA § 236 (c); however, this would require the time-consuming process of Congressional action and would not be a short term solution to the mounting financial and social costs of detaining individuals who are lawfully in the United States. We suggest that the quickest, fairest, and most efficient way of addressing this problem is for DHS to start exercising discretion in the detention of LPRs, even if an individual is an "arriving alien" under INA § 101 (a) (13) (C) or falls under the mandatory detention provisions of INA § 236(c). With a stroke of your pen you can make this happen.

Financial and Social Costs of Detention

We strongly object to DHS's increased use of detention of non-citizens as an enforcement mechanism, given the excessive and unwarranted fiscal and human costs. The number of detained non-citizens has tripled since 1996, when the mandatory detention provisions of INA § 236 (c) were promulgated. These provisions and ICE's increased emphasis on enforcement have led to a detention population average of more than 30,000 non-citizens each day. That number will likely increase this year.

Approximately two thirds of the detainees are held in the state and county criminal jails, while the other third are held in seven privately contracted detention facilities, eight ICE owned facilities, and five Federal Bureau of Prison facilities. Major newspapers across the United States, including *The New York Times* report regularly on the poor and often dangerous conditions that detainees face in ICE custody. According to ICE's own statistics, 74 detainees have died in ICE custody over the last seven years. Some have died under tragic and shocking circumstances. Federal District Court Judge Denny Chin acknowledged the substandard and abusive conditions in his recent decision ordering the Obama administration to respond to a petition requesting rules governing standards at detention facilities[1].

The financial cost of keeping an average of more than 30,000 detainees in custody is staggering. According to a report published by the Detention Watch Network[2], the average cost of detaining a non-citizen is $99 per day. The daily cost for housing the over 30,000 detainees currently held by DHS is more than $2,900,000 per day, or over $1 billion per year. For the fiscal year 2009, DHS was allocated $71.7 million to pay for additional detainee bed space—enough for 1,400 additional beds. The human and social costs are even more dramatic, with individuals dying in custody and families torn apart by detention and relocation.

[1] Nina Bernstein, *Homeland Security is Ordered to Respond to Petition on Immigration Jails*, 06/27/2009, The New York Times at A16

[2] *About the U.S. Detention and Deportation System*, available online at www.detentionwatchnetwork.org/aboutdetention

Overview and Impact of Detention of LPRs

The mandatory detention provisions in INA § 236(c) require the detention of non-citizens with certain criminal convictions, including minor crimes involving moral turpitude. Immigration Judges have no jurisdiction to grant release from custody on bond to the detained individual, and he must remain in DHS custody during the pendency of his removal proceedings, even if he is eligible for relief from removal and likely to be granted such relief.

Many of the non-citizens who fall under the mandatory detention provisions of INA § 236(c) are LPRs, who come to the attention of DHS returning to the United States after traveling abroad. DHS often takes these individuals into custody and holds them without bond. DHS can also take an LPR who is returning from a trip abroad into custody, if he is excludable because of a criminal conviction, even if the crime does not cause the non-citizen to fall under the mandatory custody provisions of INA § 236 (c). The non-citizen would then be considered an "arriving alien" under INA § 101(a) (13) (C), who would be ineligible for release for bond. Immigration Judges have no jurisdiction to consider to review the terms of the custody of an "arriving alien," under 8 CFR § 1003.19(h)(2)(i)(B).

DHS, however, does have discretionary authority to release those detainees considered "arriving aliens" from custody on "parole" under INA § 212(d)(5), implementing regulations at 8 CFR § 212.5, and general guidance regarding the favorable exercise of discretion provided in government memoranda[3]. Under this framework, DHS may parole certain aliens on a case-by-case basis for "urgent humanitarian reasons" or "significant public benefit," provided the aliens present neither a security risk nor a risk of absconding. Among the issues to be considered are age, medical condition, family and community ties, pregnancy, length of residence in the United States, military service, and likelihood of removal. Despite its authority to release individuals, and the policy memoranda encouraging the favorable exercise of discretion, DHS often chooses not to exercise such discretion.

Most, if not all, LPRs have ties to the community. Most have families in the United States who depend on them for support. Many of those family members are United States citizens or LPRs. More importantly, many of the LPRs who are taken into custody under the mandatory detention provisions are *prima facie* eligible for relief from removal, have meritorious cases for relief and are unlikely to be removed. The individuals have every reason to show up for their removal proceedings, and, indeed, in many cases have appeared many times before the Court, *before*

[3] The key policy memorandum was issued in 2000: Memorandum, Doris Meissner, INS Commissioner, *Exercising Prosecutorial Discretion*, (11/17/2000), available at http://tinyurl.com/yool8l .

See also: Memorandum, William J. Howard, Principal Legal Advisor, *Prosecutorial Discretion*, (10/24/2005), available at www.refugees.org/uploadedFiles/Participate/National_Center/Resource_Library/Oct24th%202005(1).pdf ; and Memorandum, Julie L. Myers, Assistant Secretary, *Prosecutorial and Custody Discretion*, (11/07/2007), available at www.aila.org/content/default.aspx?docid=23835

DHS changes its position and, with dramatic effect and painful impact, decides to take them into custody.

Waiting to have the merits of a case heard can take as long as six months in the New York area. During that time a detainee is unable to support his family, financially or emotionally, and his family can become destitute. Even the most patient employer is usually unable to hold a job open for six months or more, especially in the current economic climate. The detainee, even if he prevails in his immigration case and is released from custody, will likely be without employment upon his release. Because of ICE policy of transferring detainees without warning to locations distant from their normal place of residence, the detainee is often unable to communicate with, let alone see, his family. Some detainees, when faced with months of detention under unpleasant and sometimes dangerous conditions, "give up" and allow themselves to be removed despite their eligibility for relief.

The following is a typical example taken from the files of one of our members:

> The respondent, a 28 year old male, has lived in the United States as an LPR since he was 8 years old. His entire immediate family resides in the United States. He attended school in the U.S., and began working and filing income tax returns after his graduation from high school. In 2006, he was arrested on three separate occasions. The arrests resulted in a misdemeanor conviction for a small amount (under 30 grams) of marijuana for which he received a fine; a disorderly conduct offense (a violation); and a traffic offense (driving with an expired license). In 2008, he was engaged to be married and his fiancé was pregnant with their first child. The individual traveled to his home country for a funeral and upon his return was taken aside by DHS, after they discovered that he had a criminal record. DHS made a discretionary decision to "parole" the individual into the United States so that he could continue his inspection before DHS. The individual appeared before DHS with copies of his conviction records, as requested, and he was placed under removal proceedings by the issuance of a Notice to Appear.
>
> This individual, as a long time lawful permanent resident with many equities, was *prima facie* eligible for relief from removal under INA § 240A (a) (Cancellation of Removal for permanent residents). He prepared his application and appeared at his first scheduled hearing before the Court in February 2009. The Immigration Judge set a new hearing date for him, and as he left the courtroom, ICE agents who had been waiting outside the courtroom took him into custody. This is a typical scenario and has a chilling effect on respondents appearing before the Immigration Court.
>
> Notwithstanding the fact that the individual had appeared both at the DHS offices for his deferred inspection and at his removal hearing, DHS took him into custody because DHS decided that he fell under the mandatory detention provisions. DHS could have exercised its discretion as it did before by declining to detain him and by placing him on a reporting schedule, placing him on the Intensive Supervision Appearance Program (ISAP) program with an ankle bracelet, or simply allowing him to continue attending his removal hearings. Instead, DHS held him in prison for approximately two months.
>
> The Immigration Judge declined to set a bond for the individual, as he was an arriving alien. The individual filed a request for release from custody under humanitarian parole and two months after he was taken into custody, DHS granted the request and released him from custody. During the two months he was in custody, the individual was not able to work, was unable to support his fiancée, for whom he had been the sole source of support, and was unable to be present at the birth of his first child.

This example illustrates why DHS should have maintained its initial decision to exercise discretion in the respondent's favor from the outset: he had an extremely minor record, was eligible for relief from removal, and most importantly, had already appeared before DHS and before the Court. His detention created unnecessary expenses, caused misery to the individual and his family, and further clogged up the already over-burdened Immigration Court system. Keeping such an individual in custody also resulted in unnecessary costs to DHS (i.e., the taxpayer), the individual, and his family.

Had DHS decided to pursue another means of supervision, such as placing the individual under the ISAP program, the costs, instead of $99 per day, would have been as low as $12 per day and the individual would have been able to continue working and supporting his family. The individual described above was fortunate that DHS granted his parole request. Most detainees are not so fortunate and remain in DHS custody for months, while they are waiting to be heard.

Policy Recommendation: Discretion Based on Humanitarian Factors

To remedy this problem, we suggest that DHS adopt a nationwide policy of applying its discretion, using the factors provided in INA § 212(d)(5), 8 CFR § 212.5(b), and government memoranda discussed above, before taking such a lawful permanent resident into custody, even if the individual is subject to mandatory detention. We suggest that the DHS exercise its discretion not only for lawful permanent residents who are "arriving aliens," but for all lawful permanent residents who fall under the mandatory detention provisions. In exercising its discretion, DHS may decide to release the individual on his own recognizance, place him on a "reporting schedule" to the DHS office, or place him on the ISAP program. All of these options have the advantage of lowering DHS costs dramatically and allowing the individual to remain with his family, thus easing the burden to himself, his family, the community, and the taxpayers. This process would also allow DHS to differentiate in a meaningful way between those non-citizens who are lawfully in the United States and have a right to live and work in the United States, and those non-citizens who are here unlawfully.

We respectfully ask that you consider our suggestion. Thank you for your attention and consideration.

Sincerely yours,

Linda Kenepaske
Chair, Immigration and Nationality Law Committee*

cc: The Honorable Dora Shriro
Special Advisor on Immigration and Customs Enforcement
Detention & Removal

*Committee Member Myriam Jaidi assisted in the drafting of this letter