system changes are often needed in order to collect different data and typically provide at least two years notice of any changes. We plan to continue this approach.

Executive Order 12866

This final rule has been determined to be not significant and, therefore, was not reviewed by the Office of Management and Budget (OMB) under Executive Order 12866.

Regulatory Flexibility Act

This final rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U. S. C. 601–612). Shirley R. Watkins, Under Secretary for Food, Nutrition and Consumer Services, has certified that this rule will not have a significant impact on a substantial number of small entities. This rule relates to a provision providing WIC State agencies with increased flexibility in determining which individuals to serve. Although some WIC local agencies are small entities, the effect of this flexibility on local agencies will not be significant.

Paperwork Reduction Act

This final rule imposes no new reporting or recordkeeping requirements that are subject to OMB review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–20).

Executive Order 12372

The Special Supplemental Nutrition Program for Women, Infants and Children (WIC) is listed in the Catalog of Federal Domestic Assistance Programs under 10.557. For reasons set forth in the final rule in 7 CFR part 3015, subpart V, and related notice (48 FR 29115, June 24, 1983), this program is included in the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

Executive Order 12988

This final rule has been reviewed under Executive Order 12998, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full implementation. This rule is not intended to have retroactive effect unless so specified in the **EFFECTIVE DATE** paragraph of this final rule. Prior to any judicial challenge to the application of provisions of this rule, all applicable administrative procedures must be exhausted.

Executive Order 13132

FNS has analyzed this final rule in accordance with the principles set forth in Executive Order 13132. As such, FNS has determined that the rule does not contain policies that have federalism implications as defined in the order and, consequently, a federalism summary impact statement is not required.

Public Law 104–4

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, the FNS generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, or tribal governments, in the aggregate, or the private sector, of $100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires FNS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule.

This rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, and tribal governments or the private sector of $100 million or more in any one year. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

List of Subjects in 7 CFR Part 246

Administrative practice and procedure, Civil rights, Food assistance programs, Food and Nutrition Service, Food donations, Grant programs-health, Grant programs-social programs, Indians, Infants and children, Maternal and child health, Nutrition, Nutrition education, Penalties, Reporting and recordkeeping requirements, WIC, Women.

Accordingly, the interim rule amending 7 CFR part 246, which was published at 65 FR 53523 on September 5, 2000, is adopted as final with the following change:

PART 246—SPECIAL SUPPLEMENTAL NUTRITION PROGRAM FOR WOMEN, INFANTS, AND CHILDREN

1. The authority citation for Part 246 continues to read as follows:

Authority: 42 U.S.C. 1786.

2. Amend § 246.16(c)(3)(i)(A) by adding a new sentence at the end of the paragraph to read as follows:

§ 246.16 Distribution of funds.

* * * * *

(c) * * *

(3) * * *

(i) * * *

(A) * * * If the State agency chooses to exercise the option in § 246.7(c)(2) to limit program participation to U.S. citizens, nationals, and qualified aliens, FNS will reduce the State agency's population of income eligible persons to reflect the number of aliens the State agency declares no longer eligible.

* * * * *

George A. Braley,

Acting Administrator, Food and Nutrition Service.

[FR Doc. 00–32613 Filed 12–20–00; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 212, 236, and 241

[INS No. 2029–00; AG Order No. 2349–2000]

RIN 1115–AF82

Detention of Aliens Ordered Removed

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Final rule.

SUMMARY: This rule amends the Immigration and Naturalization Service (Service) regulations by providing a uniform review process governing the detention of criminal, inadmissible, and other aliens, excluding Mariel Cubans, who have received a final administrative order of removal, deportation, or exclusion but whose departure has not been effected within the 90-day removal period. Such a process is necessary to ensure periodic custody reviews for aliens detained beyond the removal period and to provide for consistency in decision-making. Because the Service is developing a specialized, ongoing administrative review process for these custody determinations, this rule eliminates the appellate role of the Board of Immigration Appeals (Board) in post-final order custody determinations. This rule also amends the Service's regulations to reflect the authority of the Commissioner, and through her, other designated Service officials, to release certain aliens from Service custody, issue orders of supervision, and grant stays of removal.

DATES: This rule is effective December 21, 2000.

FOR FURTHER INFORMATION CONTACT: Joan S. Lieberman, Office of the General Counsel, Immigration and Naturalization Service, 425 I Street NW, Room 6100, Washington, DC 20536, telephone (202) 514–2895 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Why Is the Service Issuing This Final Rule?

Congress has progressively acted to restrict the release into the community of aliens convicted of certain crimes, beginning with amendments affecting aggravated felons in the Anti-Drug Abuse Act of 1988 (ADAA), Public Law 100–690, and the Immigration Act of 1990 (Immact), Public Law 101–649. Congress extended these restrictions to other categories of crimes in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Public Law 104–132, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law 104–208. Pursuant to these amendments, the Service's continued detention of aliens convicted of aggravated felonies has not been subject to the statutory time limits that apply in the case of certain noncriminal aliens. Under section 241(a)(6) of the Immigration and Nationality Act (Act), 8 U.S.C. 1231(a)(6), certain classes of aliens may be detained in the discretion of the Attorney General beyond the 90-day statutory removal period set forth in section 241(a)(1) of the Act, 8 U.S.C. 1231(a)(1), including aliens determined by the Attorney General to constitute a risk to the community or to be unlikely to comply with the order of removal. As a result of this change in the law and other factors, there has been a considerable increase in the number of aliens in immigration custody who have a final order of removal but who the Service is unable to remove during the 90-day removal period.

The Department of Justice (Department) has determined that a separate custody review process is appropriate for aliens who are detained beyond the 90-day removal period. This rule permits a comprehensive and fair review of such post-order detention by establishing an automatic, centralized, and multi-layered process to determine whether detainees may be released from custody and sets forth the procedures governing such release or continued detention. As was the case with the implementation of the Mariel Cuban Review Plan, this review process is intended to balance the need to protect the American public from potentially dangerous aliens who remain in the United States contrary to law with the humanitarian concerns arising from another country's unjustified delay or refusal to accept the return of its nationals. This provision also applies to criminal aliens granted withholding or deferral of removal for whom removal to a third country is impractical.

Currently, 8 CFR 241.4 provides the general procedures governing the detention of criminal, inadmissible, and other aliens who have received a final administrative removal order but whose departure has not been effected within the 90-day removal period specified in section 241(a)(1) of the Act, 8 U.S.C. 1231(a)(1). In 1999, pending promulgation of more specific procedures by regulation, and to institute a more uniform process nationwide, the Service issued a series of memoranda to provide specific guidance to field offices concerning implementation of interim procedures governing post-order custody cases. *Detention Procedures for Aliens Whose Immediate Repatriation is Not Possible or Practicable,* February 3, 1999; *Supplemental Detention Procedures,* April 30, 1999; *Interim Changes and Instructions for Conduct of Post-Order Custody Reviews,* August 6, 1999 (collectively ''the Pearson memoranda'').

This rule establishes permanent procedures for post-order custody reviews. The rule assists the decision-maker in determining whether an alien is an appropriate candidate for release from custody after the expiration of the removal period. On December 21, 2000, these procedures will supersede the Pearson memoranda. The new procedures are modeled after those governing the Mariel Cubans at 8 CFR 212.12 and consist of a records review, the opportunity for a panel interview and recommendation, and a final decision by a separate Service Headquarters unit, the Headquarters Post-Order Detention Unit (HQPDU). Although Mariel Cuban procedures will continue to be conducted pursuant to 8 CFR 212.12, the review process is similar for both groups of aliens.

On June 30, 2000, the Department published in the **Federal Register** at 65 FR 40540 a proposed rule with request for comments to implement a permanent, periodic custody review process for aliens whose removal has not been effected at the expiration of the 90-day removal period pursuant to section 241(a)(6) of the Act, 8 U.S.C. 1231(a)(6). The initial comment period was for 30 days and expired on July 31, 2000. However, in response to several commenters' requests for an extension, the comment period was extended for 10 days until August 11, 2000.

The Department received numerous public comments recommending substantive modifications to the proposed rule. Many of the comments overlap or endorse the submissions of other commenters. For this reason, the Service will address the comments by issue rather than by reference to the individual comments.

After careful consideration of all comments, the Department will retain the basic structure of the proposed rule, with some modifications. This rule implements an important program in furtherance of congressional and executive policy to ensure the removal of aliens who commit serious crimes in this country and to protect the safety of our citizens and lawful residents against dangerous individuals or those posing a flight risk.

Constitutionality and Statutory Authority

Numerous commenters expressed the view that the proposed rule is not authorized by statute or violates the Constitution of the United States. Post-order detention cases are the subject of on-going litigation. Two courts of appeals have upheld the Attorney General's authority to continue detention after the removal period. *See Duy Dac Ho* v. *Joseph Greene,* 204 F.3d 1045 (10th Cir. 2000); *Zadvydas* v. *Underdown,* 185 F.3d 279 (5th Cir. 1999), *cert. granted,* 121 S.Ct. 297 (2000).

The Ninth Circuit held, however, in *Ma* v. *Reno,* 208 F.3d 815, 822 (9th Cir. 2000), *cert. granted,* 121 S.Ct. 297 (2000), that detention may not be extended more than a ''reasonable time'' beyond the statutory removal period. The United States Supreme Court recently granted certiorari in the *Zadvydas* and *Ma* cases to resolve the disagreements in the courts of appeals.

In *Ho,* the Tenth Circuit upheld the detention of inadmissible and deportable criminal aliens under 8 U.S.C. 1231(a)(6) on statutory and constitutional grounds. 204 F.3d at 1055–1060. The court held, among other things, that section 241(a)(6) of the Act, 8 U.S.C. 1231(a)(6), expressly allows the Attorney General, in her discretion, to continue detaining certain aliens, including aliens who she has determined would pose a risk of danger or flight if released, beyond the 90-day removal period while efforts are being made to remove them from the United States. *Id.* at 1057. The court declined to impose a time limit on detention, stating that it will not ''substitute its

judgment for that of Congress by reading into the statute a time limit that is not included in the plain language of the statute.'' *Id.* at 1057.

Like the Tenth Circuit, the Fifth Circuit, in *Zadvydas,* also rejected a constitutional challenge to continued detention under section 241(a)(6) of the Act, 8 U.S.C. 1231(a)(6). 185 F.3d at 294–97. The Fifth Circuit did not question the statutory authority of the Attorney General to detain a criminal alien beyond the 90-day period where the country to which the alien had been ordered removed declined to accept his return in the near future, and it held that the continued detention of a dangerous criminal alien in these circumstances does not violate substantive or procedural due process. The court analyzed the constitutional question on the premise that the detained alien is able to obtain periodic review of his detention under Service regulations, *see* 185 F.3d at 287–88 & n.9, and that the availability of such periodic review precluded characterization of the alien's detention as indefinite or permanent. *Id.* at 291 (citations omitted). While acknowledging that a deportable resident alien is entitled to greater procedural due process rights during the removal proceedings themselves than those accorded an excludable alien, the court in *Zadvydas* concluded that once a removal order has become final and the only act remaining to be carried out is the actual expulsion of the alien, no distinction exists between the constitutional rights of former resident aliens and those of excludable aliens. *Id.* at 294–97. Therefore, the continued detention of a deportable criminal alien who cannot be immediately removed under section 241(a)(6) of the Act, 8 U.S.C. 1231(a)(6), does not violate substantive due process where the government has an interest in protecting society from further criminal activity by the alien and in ensuring that he or she does not flee and thereby frustrate his or her eventual removal. *Id.* at 296–97.

The Ninth Circuit has interpreted the detention statute in a manner that presents a direct conflict with the decisions of the Tenth and Fifth Circuits. In *Ma,* the court stated that it could avoid deciding the constitutional issues by construing the statute to prohibit detention, in many cases, beyond the 90-day removal period. While recognizing that section 241(a)(6) of the Act, 8 U.S.C. 1231(a)(6), unambiguously authorizes the Attorney General to continue criminal aliens in custody ''beyond the removal period,'' the court nevertheless found that the statute does not specify a particular length of time for detention and therefore can be construed to permit detention ''only for a reasonable time beyond the statutory removal period.'' 208 F.3d at 821–22, 827. In *Ma* itself, because it concluded that there was not a reasonable likelihood that the alien would be returned to Cambodia in the reasonably foreseeable future, the court held that the Service was required to release him immediately upon the expiration of the statutory removal period. In reaching that result, the court relied on several Ninth Circuit decisions from the 1920's and 1930's interpreting a provision in the Immigration Act of 1917 and on international law. *Id.* at 822, 827–30. Because it concluded that detention beyond 90 days is not statutorily authorized in Ma's case, the court did not address the substantive and procedural constitutional issues that were addressed in *Ho* and *Zadvydas.*

In formulating the proposed custody review procedure, the Department did not follow the Ninth Circuit's statutory ruling because it is not supported by the statute's text or history. The Attorney General construes section 241(a)(6) to authorize her to continue to detain, beyond the 90-day removal period, criminal aliens and other aliens whose release would present a risk of harm to the community or of flight by the alien. That interpretation is supported by the text of section 241(a)(6), which unambiguously authorizes the Attorney General to detain the specified aliens ''beyond the removal period'' and imposes no time limit; by the related detention provisions in sections 235(c)and 241(a)(2), which make clear that granting the Attorney General even the discretion to release criminal aliens after a notice to appear has been filed is an exception to a general statutory rule of *mandatory* detention of such aliens; by section 241(a)(7), which makes clear that when Congress wanted to create a special exception for aliens whose countries will not immediately accept their return it did so explicitly (*see also* IIRIRA §§ 303(b)(3)(B)(ii) and 307(a)) (referring to situations in which countries will not accept return of their nationals); and by the statutory history of the amendments to the Act leading up to the enactment of section 241(a)(6) in 1996, as well as the legislative history of that enactment itself.

The Attorney General's authority has been sustained by the Third, Fifth, and Tenth Circuits, which have upheld the constitutionality of post-order detention under section 241(a)(6)of the Act, 8 U.S.C. 1231(a)(6), and the Pearson procedures. According to these courts, detention under section 241(a)(6) of the Act, 8 U.S.C. 1231(a)(6), is not unconstitutional where the alien's removal cannot be effected immediately, the alien is determined to be a danger or a flight risk if released, and he or she is afforded a periodic and meaningful opportunity to seek release from custody. *See, e.g., Ho,* 204 F.3d at 1057–60; *Ngo* v. *INS,* 192 F.3d 390, 397 (3rd Cir. 1999); *Zadvydas,* 185 F.3d at 287–88. The final rule is structured to afford this type of review. It provides a custody review procedure that is comparable to the Pearson review scheme that two circuit courts have endorsed, *see Ngo,* 192 F.3d at 395–98; *Zadvydas,* 185 F.3d at 297, and the Mariel Cuban Plan that the Ninth Circuit approved in *Barrera-Echavarria* v. *Rison,* 44 F.3d 1441, 1448 (9th Cir. 1995) (*en banc*). It has the procedural mechanisms that those courts have sustained against procedural due process challenges.

Another commenter felt that the final rule should express commitment to protecting and restoring the alien's liberty. Notwithstanding their physical presence in the United States, aliens under final orders of removal have no greater constitutional rights with respect to their application to be released from custody than excludable aliens seeking admission to the United States for the first time. *Ho,* 204 F.3d at 1058–59; *Zadvydas*, 185 F.3d at 294–95. The government has a compelling interest in expelling aliens under final removal orders, just as it does excludable aliens. *Ho,* 204 F.3d at 1059; *Zadvydas,* 185 F.3d at 296. Furthermore, the failure of another government to agree to the return of its nationals does not divest the United States of its sovereign authority to enforce its immigration laws, nor does it confer on the alien a right to be released back into the United States. *See Jean* v. *Nelson,* 727 F.2d 957, 975 (11th Cir. 1984) *(en banc),* aff'd, 472 U.S. 846 (1985). To conclude otherwise would mean that an alien who has been ordered removed from the United States nonetheless enjoys a constitutional right to release from custody that is greater than what the alien had when he or she was still in proceedings. *Zadvydas,* 185 F.3d at 296.

Finally, a commenter opined that § 241.4(k)(1)(ii) is illegal and should be deleted in its entirety, as well as any other reference in the rule to the additional three-month period that the district director may retain detention authority after the expiration of the removal period. Section 241(a)(6) of the Act, 8 U.S.C. 1231(a)(6), plainly authorizes the Attorney General to exercise her discretion in determining whether to retain custody of criminal

aliens beyond the 90-day removal period. *See* H.R. Rep. No. 104–469, pt.l, at 234 (1996). The Department, while carefully considering the views of the commenters, has determined that the government's statutory interpretation is consistent with the statutory text and history and will retain the basic structure of the proposed rule.

Scope

One commenter suggested changes to proposed §§ 241.4(a) and (a)(4) that would circumscribe the Attorney General's authority contrary to the express language of section 241(a)(6) of the Act, 8 U.S.C. 1231(a)(6). The commenter suggested inserting language that detention be permissible only if necessary to effectuate removal. The Department declines to limit the Attorney General's authority to exercise her discretion in the manner suggested by the commenter.

Some commenters objected to proposed § 241.4(a)(4) because the scope of the rule includes an alien who has been granted withholding or deferral of removal under 8 CFR 208. The nature of the comments suggest that there may be some confusion over the reference to withholding and deferral of removal in proposed § 241.4(a)(4). This section has been revised and paragraphs 241.4(a) and (b)(3) have been added to the final rule to clarify the applicability of these custody procedures.

Many commenters suggested that the rule should create a presumption of immediate release in the case of an alien granted withholding of removal under either section 241(b)(3) of the Act or under the Convention Against Torture. The Department declines to adopt this suggestion, as the decision to detain an individual granted withholding or deferral of removal requires a fact-specific analysis consistent with the provisions of section 241 of the Act. A grant of withholding or deferral of removal is limited to the specific country or countries designated in the order and does not protect an individual from removal to a third country. Moreover, a grant of withholding or deferral of removal does not constitute a grant of admission to the United States; decisions regarding detention and release are subject to section 241 of the Act. With respect to deferral of removal, 8 CFR 208.17(c) specifically provides that persons granted deferral who are otherwise subject to detention continue to be governed by section 241 of the Act. The grant of withholding or deferral is relevant, however, and the decision-maker may consider the grant of protection in reaching a custody determination.

Board Review and Procedural Safeguards

Many commenters expressed concerns over the adequacy of procedural safeguards in the proposed rule and objected to the elimination of Board review of the Service's custody determinations. One commenter opined that the Board ensures consistency of decision making through publication of decisions and suggested that if Board review is eliminated by the final rule, then the Service should publish precedent decisions made available to the public to inform and bind decision-makers in subsequent cases. Further, the commenter noted the regulations should specify that the decisions are binding on the district directors and the Headquarter Post-order Detention Unit (HQPDU). First, the law does not require independent review by the Board. *See Marcello* v. *Bonds,* 349 U.S. 302, 310 (1955). Second, the rule contemplates individualized determinations where each case must be reviewed on its particular facts and circumstances, and affords aliens periodic reconsideration in a non-adversarial process. Appropriate guidance to the public and the Service officers involved is provided by the rules themselves. Appropriate exercise of discretionary authority and consistency in decision making are further achieved by transferring the detention authority from the various district directors nationwide to the centralized HQPDU and provision for specially trained Service officers who will administer the program and make the periodic custody determinations. The Service concurs with the commenter who expressed concern over training issues and recommended that the Service staff should be trained by non-law enforcement personnel. One of the basic requirements for quality decision making is specific training of officers who will be making custody recommendations or determinations. The Service already has an on-going training program for Service officers who participate in Cuban Review Panels and that training program includes non-law enforcement trainers. Training is being provided to Service officers who will administer the program, and will be maintained and routinely monitored with the implementation of the final rule. The commenter also advocated that the final rule provide an enforcement mechanism if the established procedures are not followed, such as a complaint procedure to the Executive Associate Commissioner for Operations, or Director of the HQPDU. Nothing in the rule prevents the detainee from notifying the HQPDU Director of delays in the processing of the detainee's custody review. The Service must maintain some flexibility in scheduling reviews, but any unusual delays or other problems should be brought to the Director's attention.

Several commenters expressed concern that the proposed rule does not give the alien a full opportunity to demonstrate why he or she should be released. The rule provides the alien the opportunity to submit advance documentation pertinent to consideration for release, and the alien has a full opportunity to supplement those materials during the panel interview. The panel will not proceed with or will interrupt an interview if it becomes apparent that the alien does not understand the proceedings. Further, the alien may advise the district director or HQPDU in advance of the scheduled review that he or she requests a translator, and, if appropriate, a competent interpreter will be provided.

Representation at no expense to the government is in accord with statutory requirements at section 292 of the Act, 8 U.S.C. 1362. Far from discouraging the alien from obtaining assistance for a custody review, the rule makes reasonable provision for the alien to secure legal services or assistance of his or her choosing at no expense to the government. The Service will provide detainees with a list of available pro bono or low cost legal representatives who may assist the alien in the custody review process.

Independent Adjudicator

The Service also received numerous comments that the district director and HQPDU custody reviews should be conducted by an independent adjudicator. Custody review procedures do not require an independent adjudicator. In *Marcello*, which dealt with deportation proceedings, the court noted that the fact that the special inquiry officer was subject to the supervision and control of Service officials charged with investigative and prosecuting functions did not so strip the hearing of fairness and impartiality as to make the procedure violative of due process. The court stated that: ''The contention is without substance when considered against the long-standing practice in deportation proceedings, judicially approved in numerous decisions in the federal courts, and against the special considerations applicable to deportation which the Congress may take into account in exercising its particularly broad discretion in immigration matters.'' 349 U.S. at 311.

As indicated, this rule is modeled after the Cuban Review Plan, at 8 CFR 212.12, an analogous statutory and regulatory framework providing for the continued custody of excludable criminal aliens when, subject to periodic reconsideration, the Attorney General determines that release of such aliens would pose a danger to the community. The experience of the Cuban Review Plan concretely demonstrates that these procedures provide sound decision making for both the Government and the alien. Because the Cuban Review Plan's inception in April 1988, parole has been granted in over 7,000 cases (some of these may be the same individuals who are reparoled).

Under the current post-order custody review procedures set forth in 8 CFR 241.4 and the Pearson memorandum, approximately 6,200 aliens have been provided custody reviews by district directors during the period from February 1999 through mid-November 2000, to determine whether detention of the alien beyond the 90-day removal period is warranted. Of those aliens, approximately 3,380 were released.

The Department has carefully considered the views of the commenters, and will retain the proposed procedures in the final rule.

Showing by the Alien

The Service received numerous comments on the showing required of the alien under § 241.4(d)(1). These commenters believed that the Government should bear the burden of demonstrating why the alien should not be released. In other words, there should be a presumption of release. Some commenters objected to the standard of ''to the satisfaction of the Attorney General'' as confusing and also objected to the language that the alien's release not present a danger to the ''safety of other persons or to property.'' One commenter expressed the belief that this was a lesser standard than ''clear and convincing evidence'' and was therefore unacceptable.

One commenter proposed language for § 241.4(d)(1) based on a presumption in favor of release and no detention unless conditions identified in 18 U.S.C. 3142(c) cannot reasonably ensure the alien's appearance for removal and protect against dangers to the community, other persons, or property.

A presumption in favor of release along the lines suggested by the commenters would be contrary to recent legislation. Through a series of enactments over the past 13 years, Congress has manifested a serious and growing concern regarding aliens subject to removal who abscond or commit additional crimes while released from custody. Numerous provisions of the Act, as recently amended, address this concern. *See generally* 63 FR 27441 (May 18, 1998) (reviewing enactments and legislative history). Moreover, removal proceedings are civil in nature, and the Supreme Court has held consistently and in a variety of contexts that criminal procedures and legal standards are not applicable to such proceedings.

The language of section 241(a)(6) of the Act, 8 U.S.C. 1231(a)(6), the current provision governing post-order detention, does not create any such presumption of release, nor does an alien enjoy a right to liberty on account of the unwillingness of his or her own or another government to accept him or her. *See Gisbert* v. *Attorney General,* 988 F.2d 1437, 1443, 1447 (5th Cir.), *amended*, 997 F.2d 1122 (5th Cir. 1993); *Garcia-Mir* v. *Smith,* 766 F.2d 1478, 1484 (11th Cir. 1985).

The fact that an alien has been released on parole from a criminal sentence, and has not committed any additional offenses while on parole, may be considered by the Service in determining whether an individual alien may be released, but these facts are not dispositive. For example, an alien's release from criminal custody may be based on the expiration of his or her sentence or other factors such as overcrowding in the penal facility and not related to the alien's dangerousness to the community.

After full consideration of all pertinent comments, the Department will retain the required showing by the alien as provided in the proposed rule.

The Alien's Representative and His Role

Several commenters felt that the alien's representative should have a more active role in the custody review process, including questioning the alien and making closing statements. It was also suggested that the panel interview should be modeled after asylum interviews pursuant to 8 CFR 208.9(d). Nothing in the final rule prohibits the representative from speaking and assisting the alien or making a closing statement; however, the procedures are not formal or adversarial in nature, nor is this a criminal proceeding. The representative may be of assistance in bringing factors in support of the alien's request for release to the attention of the decision-maker that the alien may have neglected to mention and which may assist in explaining any documentation that requires clarification. However, the representative is an advocate and does not replace the need for the initial decision-maker to evaluate the demeanor and credibility of the alien. The decision-maker will evaluate the alien's suitability for release based on observation as well as other relevant circumstances. If the representative could fulfill this function, there would be no need for an interview of the alien. Certainly it is within the decision-maker's discretion to order the alien released after hearing from counsel and receiving any written documentation in support of release just as the decision-maker can order release after a records review. It is not required that the alien participate in an interview, the rule requires that the opportunity be afforded to the alien, however, the decision-maker may draw negative inferences from the alien's failure to participate. The Department finds that it is not necessary to formalize the interview process as has been done with the asylum regulations and will retain the supplemental rule language as written.

A number of commenters objected to the language of §§ 241.4(h)(2) and (i)(3)(ii) referencing the discretion of the panel or the institution to exclude an alien's representative. The Department will modify the language of this section with language similar to that suggested by one of the commenters. To address any security concerns the panel or institution may have in regard to a particular representative, the final rule will reflect that the alien may obtain assistance from a person of his or her choice subject to the panel's and institution's reasonable security concerns.

One commenter also stated that assistance of counsel should be at no expense to the Service rather than at no expense to the Government. The Department has no authority to override the language of section 292 of the Act, 8 U.S.C. 1362, or to authorize expenditures by other government components, and will make no modification to this section of the rule.

Interpreters and Record of Interviews

Many commenters expressed the view that, at the alien's request, the Department should utilize professional interpreters only. One commenter added that interpreters should be utilized whenever one was used in the underlying criminal court case. The Department wishes to stress that wherever communication becomes problematic, the interview will be interrupted or postponed if necessary to secure competent translation. The panel members take notes during the interview process and are instructed

during their training to ensure that the alien understands the nature of the proceedings and has every opportunity to address the panel members and ask questions. Advance notification that the alien desires a translator will enable the decision-maker to investigate the necessity of securing the services of a qualified interpreter and will facilitate conducting the interview as scheduled.

The Department declines to require a taped recording of the interview as some commenters urged. The district director (under § 241.4(c)(1)) and the HQPDU Director (under § 241.4(c)(3)) maintain appropriate files respecting each detained alien who is reviewed for possible release. The HQPDU panel members conducting an interview make contemporaneous notes of the interview, which are made part of the alien's A file. Similarly, when an alien is interviewed as part of the district director's custody review, any notes made of such interview are made part of the alien's A file. In addition, decision-makers may rely on a variety of materials, including those from public records, the Executive Office for Immigration Review's administrative record, and from the alien and his family members and friends. As explained herein, access to the alien's A file is currently provided and that policy remains in effect. Also, as noted below, much of the information in an alien's A file is already in the detainee's possession or is a public record (such as a conviction), and a Freedom of Information Act (FOIA) request can be made for additional items. Any documentation the alien submits will become part of the A file, as does the written recommendation and decision.

Procedural Standards

Some commenters observed that the proposed rule did not impose criminal standards on the custody procedures and suggested that the rule should mandate adherence to principles of criminal law. However, immigration proceedings are civil, not criminal, in nature and rules that are applicable to criminal cases are not so here. *See INS* v. *Lopez-Mendoza,* 468 U.S. 1032, 1038–39 (1984); *Guti* v. *INS,* 908 F.2d 495, 496 (9th Cir. 1992) (*per curiam*) (holding Bail Reform Act inapplicable to immigration proceedings).

Specifically, one commenter said that requiring responses from the alien during the panel interview, *see* § 241.4(i)(4), denies the right against self-incrimination. It is up to the alien to demonstrate that he or she does not constitute a danger to the public safety or a flight risk. While responses are not required, if the alien chooses not to answer questions put to him or her, negative inferences may be drawn from the alien's silence. *See Bilokumsky* v. *Tod,* 263 U.S. 149, 153–54 (1923).

The Decision Making Process

Many commenters felt that § 241.4(d) did not require sufficiently comprehensive decisions detailing how and why a decision to continue custody was made. Several commenters offered replacement language for this section. The Department will retain the language of the proposed rule that mirrors that of 8 CFR 212.12. A decision to continue custody under this rule must specify the reasons for the continued detention. A particular format is not required.

Several commenters noted that the HQPDU Director should not be able to overrule a panel recommendation of release. One commenter expressed the view that the HQPDU be eliminated altogether. The Department will make no changes to the rule in this respect. The purpose of the HQPDU is to act as a reviewing authority. The HQPDU must have discretion to review the panel recommendation. This discretionary authority does not nullify the interview process as one commenter opined. Rather, the process gives the central reviewer crucial information about the alien that will provide a major focal point for the custody review. To ensure consistency, the HQPDU should be authorized to reverse a favorable as well as an unfavorable panel recommendation in the exercise of the Attorney General's discretion. The procedure of centralized review has been successfully used in the Cuban Review Plan. Experience with that program has demonstrated that the Headquarters decision sometimes overrules the recommendation below, whether that recommendation is in favor of release or continued detention.

One commenter stated that the transfer of detention authority to the centralized unit would cause delays in the process. The final rule provides for periodic reviews at scheduled intervals. The Service will adhere to these timetables as provided in the final rule. Other commenters contend that the process has inherent bias as the composition of the panels is selected from Service professionals who are law enforcement personnel rather than social workers, probation officers, or mental health professionals. Decision making authority regarding custody has traditionally been entrusted to officers of the Service. The Supreme Court has long recognized the ability of Service officers to make immigration determinations, including custody determinations, and Service officers have long carried out this responsibility. The present rule is intended to draw upon significant, specialized expertise and experience within the Service, particularly from the Mariel Cuban program, to assist the Department in reaching sound, well-considered custody decisions. The Department believes that this rule will improve the quality and consistency of post-order custody decisions, and will retain the pertinent provisions as currently drafted.

District Director Responsibilities

Several commenters stated that the district directors should be encouraged to interview the alien; that it is insufficient to rely on a records review that may not be complete. Under the final rule, the district director has the discretion to conduct a personal or telephonic interview.

Further, under the final rule the alien has the opportunity to submit any documentation that he or she feels supports his or her request for release. In that way, any recent and probative material including rehabilitative efforts may be considered in conducting the custody review. Also, the recent conclusion of immigration proceedings should mean that the A file maintained by the Service on the alien contains the most recent information available. The Department will not mandate a personal or telephonic interview by the district director for the 90-day custody review. It is impracticable to require a district director to personally interview every alien detained within his or her district. The district director must delegate many duties to the officers working for him or her in order to ensure that tasks for which he or she is responsible are carried out properly and as expeditiously as possible. The final rule provides for an interview after the HQPDU has conducted a records review and has not made an initial determination to order the alien's release.

Travel Documents

Some commenters expressed the view that whether or not the Service could obtain a travel document was either irrelevant or of minimal relevance to the issue of whether the alien was eligible for release. In addition, several commenters suggested that travel documents would have to be in the Service's actual possession in order to trigger an inquiry into further detention. The Department will not change the final rule based on these comments. The comments are contrary to the congressional goal, enacted into law, to ensure that aliens ordered removed from

the United States are available for prompt removal when travel documents are obtained. As indicated in the government's response to comments on the constitutionality of this rule and statutory interpretation, section 241(a)(6) of the Act grants the Attorney General specific authority to continue to detain an alien following the expiration of the removal period. An order of removal does not convert to a grant of admission or de facto admission because a foreign government delays or refuses to accept the return of one of its nationals. Similarly, an alien found deportable and ordered removed does not gain permission to remain in the United States simply because of the refusal of another country to admit the alien. Congress enacted the removal period at section 241(a) of the Act to facilitate the removal of criminal aliens, an objective of paramount importance. Detention has proven to be an effective enforcement tool in the removal of criminal aliens as nondetained aliens often fail to appear for pending immigration proceedings or removal after issuance of a final order. It is within the discretion of the Service to determine the likelihood of receipt of a travel document in the foreseeable future. A policy of automatic release pending the issuance of travel documents would thwart the intention of Congress that the Attorney General be vested with the discretion to detain certain aliens including those who pose a danger to the community or a risk of flight pending their removal. Such a policy could serve to encourage foreign governments to further delay or refuse to accept the return of their nationals if they expect the U.S. Government will release the alien. *See Mezei,* 345 U.S. at 216; *Barrera,* 44 F.3d at 1448.

Two commenters felt that the proposed rule improperly penalizes aliens who fail to cooperate with the Service in seeking a travel document. Although the purposes of immigration detention are not punitive, we wish to emphasize that cooperation in obtaining a travel document is required by law, and that failure of an alien subject to a final removal order to cooperate with the Service in obtaining a travel document is a felony punishable by imprisonment of four to ten years. *See* section 243(a)(1)(D) of the Act, 8 U.S.C. 1253(a)(1)(D) (Supp. IV 1998). An alien who fails or refuses to cooperate in obtaining a travel document not only engages in criminal conduct, but also helps to bring about the very condition he or she complains of—*i.e.,* prolonged detention—by that criminal conduct. Moreover, the Act specifically provides for detention in the event that an alien subject to a final removal order fails or refuses to cooperate in obtaining a travel document. *See* section 241(a)(1)(C) of the Act, 8 U.S.C. 1231(a)(1)(C) (Supp. IV 1998). These provisions manifest a clear congressional policy with regard to cooperation in obtaining travel documents. The Department believes the rule as presently drafted is both consistent with this congressional policy and reasonable in allowing for consideration of the alien's cooperation and compliance with the law. The pertinent provisions will be retained without modification.

Criteria for Release

The Department received several comments objecting to the criteria specified in § 241.4(e) because they differ from the statutory criteria. Other commenters found it confusing to require two separate findings regarding risk to the community and opined that the focus of inquiry should be on prospective behavior in the community. Some commenters found this section gave too much discretion to the decision-maker whereas another felt there was too little discretion. The criteria in this section are consistent with the Mariel Cuban parole regulation at 8 CFR 212.12 and will assist the decision-maker in identifying and evaluating factors relevant to the exercise of discretion regarding continuation of custody. The criteria set out in § 241.4(e) provide essential guidance to the decision-maker in assessing future risk to the community. In making this determination, both past and present behavior are relevant. Restricting the custody review inquiry to behavior subsequent to the alien's release from incarceration or from the time of detention in Service custody would place unacceptable limitations on the decision-maker's ability to fully review the circumstances of an alien's case in making a custody decision.

One commenter suggested additional language for the end of § 241.4(e)(1) (suggested change in italics): ''* * * immediate removal, while proper, is otherwise not practicable or not in the public interest, *or potentially detrimental to the health or well being of the alien.*'' The humanitarian concerns expressed by the commenter are encompassed within the rule's current language of ''not practicable or not in the public interest'' and additional language is not necessary. The Service has the discretion to release a detainee or even to delay removal for humanitarian reasons.

One commenter suggested that the criteria of § 241.4(e)(3) that ''the detainee is likely to remain nonviolent'' be replaced with *the detainee has expressed an intent to remain nonviolent.* The Department believes that the proposed rule correctly captures the relevant inquiry. An expression of intent to refrain from violence, though potentially relevant to a release determination, is not in itself necessarily determinative or even persuasive. Indeed, one of the aims of the process is to assess the detainee's credibility regarding rehabilitation. The language of the proposed rule will be retained, therefore, without modification.

Factors for Consideration

Several comments expressed the view that the commission of disciplinary infractions should not preclude a finding that the alien is not a risk to the community. Other commenters felt that their commission should be afforded minimal weight in the risk assessment because of disparity in detention standards and requirements, constant transfers, and language barriers. There is nothing in the rule that prohibits release in a case where the alien has been involved in the commission of disciplinary infractions. Disciplinary infractions represent one of several factors that are to be considered and afforded appropriate weight in making a recommendation or decision. Some infractions are more serious than others and will be weighed as warranted by the circumstances in each case. As a general matter, however, disciplinary infractions are relevant to danger to the community, because they reflect the alien's present ability to follow rules, respect the rights of others, and act appropriately on his or her own if released into a less structured environment.

The Department received some comments stating that consideration of the detainee's criminal conduct and other criminal history was too broad an inquiry because it allows consideration of unverified charges not resulting in a criminal conviction. However, under the immigration law, grounds of removability may include criminal conduct that does not result from a criminal conviction. Because such conduct is sufficient to support a finding of removability from the United States, it may also be considered for detention purposes. Consideration of criminal history is probative of the threat to the community posed by the alien's potential release. It is relevant to consider the alien's entire criminal history although the weight given to each factor will vary according to the individual facts and circumstances of a

particular case. The rule adequately provides, without additional specificity, for consideration of the nature and severity of the convictions, factors in mitigation of a criminal sentence, the sentence imposed, state parole findings, probation, and other criminal history. Moreover, to the extent that non conviction criminal history information may exist, the decision-maker can make clarifying inquiries with the alien or the alien's representative, as appropriate, and can give criminal history information whatever weight is appropriate in light of the information available.

Commenters suggested that the body of the rule as well as the supplemental information section should state that no negative inference will be made from non-participation in rehabilitation programs if such programs are not available in the facility where the alien is housed. Some commenters wanted the body of the rule to add that (1) barriers to participation include long waiting lists, waiting periods for new detainees, and the unavailability of some programs to detainees, and (2) that program availability at state and local institutions prior to Service detention may be considered.

The Department understands the concerns reflected in these comments, but does not believe that a change in the regulatory text is necessary or appropriate to address them. The relevance of nonparticipation in rehabilitative programs is a proper subject of internal training. It is not necessary, therefore, to reinforce this message through an alteration of regulatory text. Moreover, detainees seeking release are free to submit materials indicating the impossibility or difficulty of enrolling in rehabilitative programs if they wish.

Two commenters felt that the rule should specify the nature of participation in rehabilitation programs, freedom from disciplinary infractions, and other indicia of commitment to good conduct required to secure the alien's release, particularly after commission of violent crimes. In other words, these commenters invite the Department to specify criteria the satisfaction of which would require release from custody.

In general, the custody review determination involves highly individualized case reviews for which mandatory release pursuant to pre-established formulas would not be appropriate. Rather, the Department prefers an approach based on the consideration of factors included in the rule instead of mandatory criteria. The regulation cannot cover every conceivable circumstance and provide enough flexibility to accommodate multiple issues considered in the exercise of discretion under section 241(a)(6) of the Act, 8 U.S.C. 1231(a)(6). To avoid what the commenter terms ''rubber stamp denials,'' the listed factors and other pertinent information will be evaluated in relation to the alien's character, and ability to adjust in the community. The Department declines to change the rule based on this comment.

Similarly, the Department received numerous comments stating that the only factors that should be considered are the enumerated ones and that no single factor should be weighed so as to exclude all others. The Department declines to make any changes to the final rule based on these comments. Maintaining flexibility is essential to the exercise of discretion. The decision-maker may weigh the same factors differently depending on the circumstances of the individual case. Further, the list of factors for consideration provides a guideline (not an exclusive list) for the decision-maker to utilize in reaching a custody determination. If other relevant circumstances are present in a particular case, the decision-maker must be free to consider them. Several commenters suggested that favorable factors should be set out with more specificity in the rule, including prospects for employment, community care placement opportunities, ties to clergy or community organizations, and sponsorship. Such specificity is not needed in the final rule because the rule already addresses sponsorship and provides for consideration of community ties and other factors whether favorable or unfavorable.

Several commenters suggested that the body of the final rule state that there is no presumption of dangerousness due to the existence of a criminal record. The decision-maker's responsibility is to weigh the severity and circumstances of the criminal conduct along with other material considerations, whether favorable or unfavorable, in making a custody determination. The Department will not mandate a result either for release or detention based on the presence or lack of a particular factor for consideration. As discussed above, it is up to the alien ordered removed to demonstrate a lack of danger to the community and flight risk upon release.

Other commenters suggested that only immigration violations relevant to flight risk should be considered and only willful failures to appear. Failure to appear for probation appointments, court hearings, and other mandated proceedings is highly probative of flight risk. As with any other factor, the specific circumstances surrounding the failure to appear will determine how much weight the decision-maker gives it. It is unnecessary to amend the final rule and address this with more specificity.

Two commenters wanted to add as a factor for consideration the length of time the detainee has been in immigration custody. The final rule does not exclude this factor, if relevant, from the decision-maker's consideration, but an explicit mention of this has not been included in the rule.

One commenter suggested that favorable factors such as ties to the United States and availability of work or other programs should not be considered because removable aliens may be deported from this country without regard to such considerations. The Department will not change the final rule based on this comment. The crux of this program is to make a custody determination based on an analysis and weighing of factors that may permit the alien's release into the community until such time as his or her removal can be effected. Ties to the community, work opportunities, and rehabilitative programs are relevant to making a custody determination.

Several commenters suggested the addition of a factor to be weighed heavily in favor of the alien: that the alien cannot be returned to his or her country of origin. Although nothing in the rule prevents a decision-maker from considering such a circumstance in rendering a custody decision, the overriding concerns of the rule are public safety and flight risk, and the likelihood of the alien's successful reintegration into the community pending removal. The Department feels that the list of discretionary factors properly focuses on these issues, but leaves decision-makers with broad discretion to consider other circumstances as may be appropriate in each case. Therefore, the text of the rule will not be modified.

Sponsorship

Several commenters believed that the sponsorship provision should be deleted or modified. The suggested language authorizes the district director or Executive Associate Commissioner, in the exercise of discretion, to condition release on the detainee's having a sponsor or participating in an approved halfway house or mental health or community project, whether residential or not. The language of the rule is sufficiently broad to allow the decision-maker to consider a wide range

of sponsorship possibilities. Given that sponsorship is a permissive rather than a mandatory condition of release, the Department will not expand the language of § 241.4(j)(2).

One commenter suggested that the rule should encourage employment authorization and mandate a grant or denial decision within 30 days of application. Such specificity is not required in the final rule. As with other provisions of the final rule, each case will receive individual consideration. The Service will make decisions on work authorization as expeditiously as possible. It was also suggested that the rule should authorize the presence of the sponsor at the panel interview. The Department has no objection to the sponsor's being selected as the alien's representative, subject to the security concerns of the panel or institution. If the alien desires the presence of his or her sponsor in addition to the presence of counsel or other representative, the alien must make advance arrangements with the panel and the facility.

Release or Order of Supervision

One commenter asked whether the release of an inadmissible alien constitutes a release on parole pursuant to section 212(d)(5) of the Act, 8 U.S.C. 1182(d)(5), and 8 CFR 212.5(d)(2)(i) or under an order of supervision pursuant to section 241(a)(3) of the Act, 8 U.S.C. 1231(a)(3), and 8 CFR 241.5. Reference to the parole statute and regulations is correct and will not be revised. An alien who has been denied admission to the United States continues to be an applicant for admission and pending removal is subject to release in accordance with the Attorney General's parole authority both before and after a final order of exclusion or removal on grounds of inadmissibility. *See, e.g., Leng May Ma* v. *Barber,* 357 U.S. 185, 188 (1958); *Palma* v. *Verdeyen*, 676 F.2d 100, 103 (4th Cir. 1982); *see also* sections 101(a)(13) and 212(d)(5) of the Act, 8 U.S.C. 1101 (a)(13), 8 U.S.C. 1182(d)(5)(A); 8 CFR 212.12. As in the Mariel Cuban program at 8 CFR 212.12, the Attorney General may impose a reporting requirement or other conditions of release in the case of an inadmissible alien who is detained pursuant to section 241(a)(6) of the Act and approved for parole.

Frequency and Timing of Reviews

Numerous commenters objected to the change from review of custody status every six months under the Pearson memoranda to annual reviews. The Department has fully considered this issue and will retain the annual review structure. The final rule is modeled after the Cuban Review Plan, which also operates on an annual review schedule. The Pearson reviews were structured on an interim basis until more permanent procedures could be put in place. The final rule will allow sufficient time between reviews for interview scheduling and compiling of the materials for review. Further, interim reviews are not foreclosed by the annually scheduled custody review. Under § 241.4(k)(2)(iii), the HQPDU will respond to the alien's written request for release based on a showing of a material change in circumstances since the last annual review. One commenter asked why there were no sanctions in the rule if a review is late. The remedy if a review is late is a full review as soon as possible. The Department must preserve flexibility for redeployment of Service staff for national immigration emergencies or other mandates requiring immediate attention. Extreme weather conditions, or other transportation problems may delay a panel's visit to a particular facility. A panel member's illness or other personal emergency, a prison lock-down situation, or the alien's transfer to another facility are some other reasons that interviews might be delayed.

Several commenters objected to § 241.4(k)(3) of the rule allowing for suspension of reviews for removal or good cause. Other commenters urged that this section provide for notice and a right of appeal. The Department will retain this section in the rule as written. This section is essential for administration of the program and in furtherance of removal where practicable. Release under section 241(a)(6) of the Act is a privilege and can be revoked. As provided in the rule, if further review is appropriate after suspension, it will be rescheduled. Any administrative appeal and hearing would only delay the review further and would be inappropriate in cases where prompt removal is practicable.

Several commenters suggested that transfer of detention authority from the district director to the HQPDU should occur upon expiration of the removal period. The Department will retain the rule provisions regarding transfer as written. The rule provides for an orderly transfer of authority and fully sets out the procedures for automatic, periodic review.

One commenter noted that the rule is a tremendous improvement in providing for meaningful and periodic reviews. The balance of comments pertaining to § 241.4(k) concern requiring mandatory deadlines for conducting custody reviews, writing decisions, and serving them on the alien. The Department will not make any changes to the final rule as a result of these comments. As indicated in previous responses, the Service must maintain flexibility for allocation of resources and for working cooperatively with other federal agencies as well as state and local authorities. The Service is obligated to make every reasonable effort to ensure that reviews are held timely and professionally.

Interim Reviews

Two commenters suggested revision of § 241.4(k)(2)(iii) to allow for quarterly interim reviews at the alien's request without restriction. The Department understands the commenters' concerns; however, implementing such a program would severely strain Service resources, which do not permit more frequent reviews without cause. The Service would scarcely have completed a review before it would be time to begin another. Frequent re-review of the same facts without any change in circumstances in support of release would merely serve to misdirect Service resources that otherwise could be more usefully employed and would result in delay of reviews in other cases. The Department disagrees with the comment that circumstances cannot change because the alien is detained. For example, an appropriate sponsor might be located, the alien might receive an employment offer, remain incident free, or become eligible for or successfully complete rehabilitative programs that might influence the decision-maker to approve release.

Notice and File Access

Some commenters requested that the notification of custody review be extended to 45 or 60 days prior to the review. The Department declines to extend this notification period. If the alien requires additional time to prepare for a custody review, it may be granted in accordance with the provisions of the final rule. The Department agrees with the commenter who suggests that the alien be given the address of the HQPDU. That information will be supplied to the alien with written notification of the Headquarters custody review.

Some commenters felt that § 241.4(h)(4) should specifically advise the alien if the district director is retaining jurisdiction over the case for the additional three-month period, rather than referring the case to the HQPDU at the expiration of the 90-day removal period. The structure of the final rule permits the district director flexibility in determining what options are available to him or her during the

initial period when the Service has assumed physical custody over the alien. During this additional three-month period, the district director may be able to execute the removal order, may order the alien's release pending removal, or may refer the case to the HQPDU for further review. The rule's notice requirements advise the alien of the results of the 90-day review while maintaining the district director's flexibility to determine what further action the case requires.

Numerous commenters requested full disclosure to the detainee and the representative of the alien's A file and the file of the detention facility. Others requested copies of all documents relied on by the Service at the custody review. Access to the alien A file will be provided to the detainee and the representative in accordance with current Service policy and practice as developed under the Cuban Review Plan, and subject to limited exceptions such as the identities of confidential informants, law enforcement personnel, and documents that cannot be released because the information therein would adversely effect an ongoing investigation.

Because access to the A file is provided, the Service will not provide copies as a matter of course. In any event, much of the information in the A file is already in the detainee's possession as it was originally obtained from the detainee or is a public record (such as conviction documents). A FOIA request can be made for additional items. The detainee or representative must make arrangements for access to files of the detention facility from the custodian of those records in advance of when the party wishes to review them. The Service is not the custodian of files maintained by a non-Service detention facility and has no authority to grant or deny access to such files.

One commenter proposed language changes to the provisions concerning service of notices and decisions to the alien and the representative of record. The Department will not change the wording of §§ 241.4(d)(2) or (d)(3). Section 241.4(d)(3) adequately ensures that the representative of record will receive a copy of any notice or decision.

One commenter requested that the notice required by § 241.4(h)(2) for the district director's 90-day review advise the alien of the criteria of § 241.4(e) and the factors in § 241.4(f). The Department will adopt this recommendation. The notice of a district director or HQPDU custody review will advise the alien of the criteria of § 241.4(e) (conclusions that must be drawn by the decision-maker before approving a release) and factors in § 241.4(f) to assist the alien in preparing for the review. A notice of custody review, whether by the district director or the HQPDU, will briefly advise the alien of the review procedures and display the correct address for submission of any documents. For a more detailed explanation of review procedures, the detainee may consult the final rule.

The Department will not accept the recommendation of a commenter to amend the language of § 241.4(h)(2) so that the alien's request for additional time to submit documentation to the district director extends the time for conducting the custody review only until the additional information has been received. The custody review will be conducted as promptly as scheduling permits.

Withdrawal of Release Approval/ Revocation

One commenter objected to § 241.4(l)(2) (Determination by the Service). Other commenters recommended limiting § 241.4(j)(4) (Withdrawal of release approval) to cases where removal is practicable or there is a material change in the detainee's conduct, indicating he poses a risk to the community. Commenters also requested written notice of withdrawal of release approval and provisions for a hearing process. Upon revocation, commenters suggested that the next review be conducted within 3 months. Depending on the circumstances of a particular case, revocation or withdrawal of release authorization under section 241(a)(6) of the Act, 8 U.S.C. 1231(a)(6), may be appropriate for any of the reasons listed in section 241.4(l)(2) of the rule, including the alien's violation of a condition of release. *Cf.* section 243 of the Act, 8 U.S.C. 1253(b) (authorizing criminal sanctions for violation of release conditions). Section 241.4(l)(1) of the rule provides that, upon revocation, the alien will be provided notice of the reasons for the revocation. In addition, the rule is being modified to provide that the alien will be afforded an initial informal interview promptly after his return to Service custody to provide the alien an opportunity to respond to the reasons for the revocation. The rule currently provides at § 241.4(l)(3) for a full custody review, including an interview, to be conducted within three months of the revocation of release. The rule is being modified to clarify that the custody review will include a final evaluation of any contested facts relevant to the revocation and a determination whether the facts as determined warrant revocation and further denial of release.

Recordkeeping, Reporting, and Ombudsman

Several commenters stated that the district director should forward all documents submitted by the alien to the HQPDU. The Department agrees with this recommendation. The alien's submissions will be included in the HQPDU custody review file.

Several commenters endorsed a recommendation that the Service compile statistics on nationality, length and place of detention, and dates of review, and that these statistics be made available for independent review. The Service will maintain statistics on the detained post-order population. Such statistics may be available through authorized pre-existing procedures. The Department declines to appoint a separate ombudsman to oversee the implementation of the program and keep statistics. The Service has a Headquarters managerial position in the Detention and Removals Branch that fulfills the functions of an ombudsman.

Courts

Some commenters wanted the rule to permit federal court stays. *See* 8 CFR 241.6 (Administrative stay of removal). This rule concerns the delegation and exercise of powers by the Attorney General, not the courts. Thus, the rule will not be modified to account for judicial stays.

Executive Orders

One commenter predicted that the rule will prolong litigation with a corresponding increase in costs if promulgated. The commenter also noted the Government's litigation and detention costs. These comments concern policy determinations made by Congress, which sets immigration policy and passes legislation allocating expenditures within the federal budget. This is not an executive or judicial function.

This commenter also stated that the rule affects the relationship between the states and the federal government by nullifying prior determinations (to release) by state court judges, probation officers, prison authorities, and parole administrators. The commenter stated that the rule requires a federalism summary impact statement. The Department disagrees with the need for an impact statement. States have no authority to regulate immigration. This function is solely within the province of the federal government. This rule concerns civil immigration, not criminal law. The statutes and policies being

implemented by state courts, probation and parole departments, and penal authorities' release determinations are based on different goals and responsibilities than those that govern a release or detention decision affecting an alien under a final order of removal. For example, release from a term of imprisonment is mandated when an individual has been sentenced for commission of a criminal offense and that sentence has been served. There is no authority to detain the individual longer under that criminal sentence. Also, a particular sentence may be mandated by statute irrespective of the risk that the criminal poses to the community upon release. This is exemplified in ''truth-in-sentencing'' jurisdictions. There have also been various instances where a court order mandates the release of criminals because of prison overcrowding. Thus, the Department believes that no impact study is required.

Venue for Panel Reviews

Two commenters stated that panel reviews should be conducted at district processing centers to allow attorney representatives and family to attend. The Department cannot implement this suggestion. The rule already permits the attendance of the attorney representative. Panel interviews will be conducted at the facility where the alien is detained. Moving detainees for interviews would involve significant additional expenditures and security concerns that would detract from the expeditious and efficient operation of the program.

Transition Provisions

The Department will retain the transition provisions as written. Two commenters requested that transitional cases receive an interview irrespective of whether the last review was a records review or included an interview and that the reviews should be held more frequently than specified in the rule. The transition provisions of the rule more closely mirror the permanent procedures than do the commenters' suggestions, which in timing resemble the interim Pearson provisions. The provisions allow the Service to give full consideration to cases that have not yet received any review and advance equal treatment of all cases more expeditiously than the commenters' proposal.

Vera Institute of Justice Study

A commenter noted that the proposed rule did not mention the Vera Institute of Justice study recommending alternatives to detention for aliens ordered removed. The Service recently received the final report of the Vera Institute Appearance Assistance Program, and is currently reviewing it. The Service agrees that there is potential for use of the processes and information from the study in the area of detention of aliens with final removal orders. The Service intends to establish additional pilot projects in several districts in the next year. The projects may include contract or governmental personnel and will test various levels of supervision. Supervised release of post-order detainees will be examined in some of the test sites. These projects may involve halfway houses or other support and rehabilitation programs to prepare detainees for release or for future consideration.

Several commenters suggested deletion of the language in the supplementary information addressing foreign and domestic affairs, availability of resources, public policy, and humanitarian concerns. The Attorney General must be able to take these factors into account and assess their impact on individual and institutional decision making. *INS* v. *Aguirre-Aguirre,* 526 U.S. 415, 424–25 (1999).

Who Is Covered Under This Final Rule?

This rule establishes a permanent review procedure applying to aliens who are detained following expiration of the 90-day removal period. It also applies to aliens released under the provisions of the final rule upon a finding that they do not constitute a risk to the community or a flight risk. The Attorney General is authorized to detain these aliens beyond the removal period consistent with section 241(a)(6) of the Act, 8 U.S.C. 1231(a)(6). This permanent review procedure governs all post-order custody reviews inclusive of aliens who are the subjects of a final order of removal, deportation, or exclusion, with the exception of inadmissible Mariel Cubans whose parole under section 212(d)(5) of the Act, 8 U.S.C. 1182(d)(5), is governed by the provisions of 8 CFR 212.12. Mariel Cuban custody reviews will continue to be conducted pursuant to those provisions.

What Are the Proposed Procedures for Post-Order Custody Reviews?

Under the final rule, the district director maintains the responsibility for the initial custody review when the alien's immediate removal is proper but not practicable at the expiration of the removal period. For the initial post-order custody review at the expiration of the removal period (the 90-day custody review), the district director will conduct a records review. In most cases, it will be unnecessary for the district director to undertake a personal interview because the alien's immigration proceedings have recently concluded, and his or her records are therefore up-to-date. The district director has the discretion to conduct a personal or telephonic interview if he or she finds that it will assist him or her in making a custody determination. Further, the alien will be provided with the opportunity to present any relevant written information the alien desires in support of his or her release into the community.

After the 90-day custody review, the district director will notify the alien in writing that he or she is to be released from custody, or that the alien will be continued in detention pending removal or further review of his or her custody status.

Where the district director has notified the alien that he or she will continue to be detained pending removal, the district director's authority to reconsider an alien's custody status may be extended for an additional period of up to three months after expiration of the removal period. The additional three-month period will allow the district director to continue efforts to obtain the necessary travel documents to effect the alien's removal before the detention authority is transferred to Service Headquarters.

During the additional three-month period, the alien may submit a written request to the district director for further review of his or her custody status. The district director shall consider information that the alien submits in support of his or her release from detention demonstrating a material change in circumstances. The district director will provide a written response as appropriate to the alien's submission of such new information and may, in the exercise of discretion, conduct any further review of the alien's custody status that he or she deems appropriate. The district director retains the authority to release the alien during this period as well.

If the alien has not been removed or released from detention, detention authority transfers to the newly designated Service component, the HQPDU, under the authority of the Executive Associate Commissioner, Field Operations (Executive Associate Commissioner), either at the end of the 90-day removal period or at the expiration of the three-month extension period. Under either circumstance, the HQPDU will ordinarily commence a custody review within 30 days of the transfer of detention authority or as soon as possible thereafter should

unforeseen or emergent circumstances arise. The alien will receive written notice of the custody review approximately 30 days prior to the scheduled review. The HQPDU will conduct all further custody determinations as long as the alien remains in custody pending removal. Subsequent custody reviews will be conducted at annual intervals (or more frequently in the sole discretion of the HQPDU).

When the detention authority transfers to the HQPDU, that unit will conduct a records review for each alien previously ordered detained by the district director. If the records review does not result in a release decision, the alien will be given the opportunity for a panel interview. The two-member panel will be chosen from professional staff of the Service. The interview will be conducted in person and a translator will be provided if the Service official determines that a translator's assistance is appropriate. As under the Mariel Cuban Review Plan, the interviewing panel will make a custody recommendation to the HQPDU. Upon receipt of the panel's recommendation, the HQPDU shall determine whether to detain the alien or grant release consistent with the delegation of discretionary authority. The decision of the HQPDU will be final and will not be subject to further administrative review.

The HQPDU is not bound by the panel's recommendation. The HQPDU retains full statutory authority for custody determinations under sections 241(a)(6), 8 U.S.C. 1231(a)(6), and (for inadmissible aliens) 212(d)(5) of the Act, 8 U.S.C. 1182(d)(5). The panel's recommendation is designed to serve as an important guide to the exercise of discretion for the HQPDU, but the decision-maker must be free to assess all of the circumstances in arriving at a final custody determination. The decision-maker must also take into consideration changes in foreign and domestic affairs, the availability of fiscal resources, public policy and humanitarian concerns, and other factors that could weigh for or against the decision in an individual case.

The subsequent HQPDU periodic review, to be conducted within one year of a decision declining to grant release under these procedures or as soon as practicable thereafter in case of unforeseen circumstances or an emergent situation, will address whether the alien can be released into the community if the alien has not been removed since the last review. The HQPDU may conduct a custody review at more frequent intervals at its sole discretion and consider written submissions demonstrating any material change in circumstances that supports the alien's release during the interval between reviews. Material change does not include mere disagreement with the decision denying release. The HQPDU will give a written response to the alien's submission of new information as appropriate under the rule. Written submissions, whether to the district director or the HQPDU, must be in English or they may not be given consideration.

The alien may be assisted by a person of his or her choice in preparing or submitting information in response to the notice of custody review. The Service has followed the guidelines set forth in 8 CFR 212.12(d)(4)(ii) (regarding representation of an alien before a Mariel Cuban parole panel) rather than the more formal rules regarding attorney representatives at 8 CFR 292.1. Both 8 CFR 212.12 and this final rule allow the alien to be accompanied by a person of his or her choice at the panel interview (subject to the discretion of the institution and panel). It may be difficult for the detained alien to secure the services of a licensed attorney for each annual review, or counsel may change between reviews. Further, giving the alien discretion in selecting who will assist him or her in preparation of materials for submission to the district director and who will accompany him or her to the panel proceeding promotes two important Service objectives. These objectives are to make this process as flexible and nonadversarial as possible and to promote the alien's level of comfort with the proceedings. The alien's representative will be required to complete a Form G–28, Notice of Entry of Appearance as Attorney or Representative, at the time of the interview or prior to reviewing the detainee's records. Attached to any notice of a records review or interview, the Service will provide a list of free or low cost attorneys and representatives who are located near the alien's place of confinement.

Although the Service will forward a copy of all notices and decisions relating to the custody review to counsel or other representative of record through regular mail, the alien bears primary responsibility for ensuring that the individual providing assistance to him or her is aware of any notices, decisions, or other documentation relating to the custody review. Experience with the Cuban Review Plan has demonstrated that an alien may have several representatives successively, or may be assisted by an attorney, other person, or organization whose representation is not known to the Service.

Any person assisting the alien should not answer for the alien but should assist the alien in the latter's presentation of information supporting a release decision. Whether the alien's case is before the district director for review or the panel for an interview, the purpose of the review process is to collect information. Because the decision-maker must evaluate the suitability of the alien for release, it is important for the alien to address the district director or panel directly and be able to speak freely. The district director and panel need to hear from the alien rather than his or her representative.

Both the Executive Associate Commissioner through the HQPDU and the district director have the authority to withdraw approval for release and to revoke release or parole in the exercise of discretion. Reasons for withdrawal of approval for release or revocation include the Service's ability to obtain a travel document and remove the alien, the alien's adverse conduct while awaiting release, the decision-maker's belief that the alien's actions while in the community pose a threat to public safety, or any other circumstance that indicates that release would no longer be appropriate. If the decision-maker withdraws release approval or revokes the alien's release or parole, the alien will receive written notification specifying the reasons for the withdrawal of approval for release or revocation of post-order release or parole. The alien will be afforded an initial informal interview promptly after his or her return to Service custody to afford the alien an opportunity to respond to the reasons stated in the notice. A full custody review, including an interview, will be conducted within three months of the revocation of release and will include a final evaluation of any contested facts relevant to the revocation, and a determination whether the facts as determined warrant revocation and further denial of release.

This rule addresses Service procedures for conducting post-order custody reviews. It does not circumscribe the exercise of the Commissioner's authority to direct otherwise, as appropriate. Section 2.1 delegates the authority vested with the Attorney General to the Commissioner. Section 241(a)(3) of the Act vests authority with the Attorney General to promulgate regulations governing supervision of aliens beyond the removal period and section 241(c)(2) of the Act vests authority with the Attorney General to grant stays of removal. Therefore, the Commissioner already has the authority to release certain aliens from Service custody,

issue orders of supervision, and grant stays of removal. As directed by the Commissioner or Deputy Commissioner, Service officials have authority to release certain aliens from Service custody, issue orders of supervision, and grant stays of removal. Therefore, this rule also amends 8 CFR 241.4, 241.5, and 241.6 to reflect the concurrent authority of the Commissioner and other designated Service officials.

What Other Changes Does This Rule Make?

This rule terminates the existing procedure of appeal to the Board of Immigration Appeals (Board) under 8 CFR 236.1 for an alien who receives an unfavorable custody decision from the district director. *See Matter of Saelee,* Interim Decision 3427 (BIA 2000). Because these aliens have final orders of removal, all legal issues involving removability (and any relief from removal, if available) have been resolved through the Executive Office for Immigration Review or through alternate procedures. Custody determinations at this stage of the process involve separate and distinct issues, and the Service has the knowledge and expertise required to make these custody decisions.

This rule for permanent procedures provides for an automatic multi-tiered annual review process subsequent to the district director's 90-day review as long as the alien remains in custody. The detainee is assured a periodic and thorough review that does not depend on the alien's request for a custody review or the filing of an appeal, but is required at regular intervals by regulation. This review process will ensure timely, scheduled reviews of each alien's custody status.

Accordingly, in order to implement a single comprehensive review process for post-order custody cases, this rule removes all references to post-order detention from 8 CFR 236.1. As revised, 8 CFR 236.1 would govern detention issues only for aliens who have not yet received a final removal order.

Any case pending before the Board on December 21, 2000 will be completed by the Board. Should the alien decide to withdraw his or her appeal, the Service shall continue to conduct custody reviews under the provisions of this rule.

This rule also removes 8 CFR 212.13 and any references to that section in 8 CFR 212.5 and 8 CFR 212.12. Section 212.13 established a single Departmental parole review for all excludable Mariel Cubans who on December 21, 2000 were detained by virtue of the Attorney General's authority under the Act and whose parole had been denied after the exhaustion of the review procedures of 8 CFR 212.12. The Departmental Review Panels have completed the review of the cases of detainees eligible for such review. Thus, there is no longer a need for 8 CFR 212.13. This action will not otherwise affect the Cuban Review Plan set forth in 8 CFR 212.12.

What Must the Alien Demonstrate To Show His or Her Suitability for Release?

The alien must be able to show to the satisfaction of the decision-maker that he or she does not constitute a danger to public safety or a flight risk pursuant to the criteria set forth in this rule.

If a Travel Document Can Be Obtained, How Is The Custody Review Process Affected?

Detention or release of aliens with a final order of removal is tied to the Service's mission to enforce the immigration laws and protect the interests of the United States, pending the aliens' eventual removal from the United States. Accordingly, district directors will continue to make efforts to obtain travel documents even after review authority has transferred to the HQPDU. Headquarters Detention and Removals, Office of Field Operations will also assist in the effort to secure travel documents.

The ability to secure a travel document by itself supports a decision to continue detention pending the removal of the alien and obviates the need for further custody review because it means the alien can be deported promptly. *See* 8 CFR 212.12(g)(1). Custody reviews may be pretermitted in the case of an alien for whom travel documents are available. Pending litigation, an administrative or judicial stay, or other barrier to removal does not entitle a removable alien to be released within the United States pending resolution of the underlying action or event. Aliens whose removal is withheld under 8 CFR 208.16 or deferred under 8 CFR 208.17 may be considered for release.

Will There Be Special Release Conditions Under This Rule and Will Work Authorization Be Granted?

Release conditions and work authorization for aliens subject to a final order of removal will continue to be governed by 8 CFR 241.5. The district director or HQPDU may wish to impose conditions, in addition to those enumerated by regulation, such as that the alien obey all laws, not associate with any persons involved in criminal activity, not associate with anyone convicted of a felony without permission, not carry firearms or other dangerous weapons, and such other conditions as the decision-maker deems appropriate. Under 8 CFR 241.5(c), a grant of work authorization is discretionary but requires the decision-maker to make an initial finding that the alien cannot be immediately removed because no country will accept the alien or that the alien's removal is impracticable or contrary to the public interest.

Sponsorship and evidence of financial support may be required as a precursor to release under the rule. The Service has determined that appropriate sponsorship is in the best interest of the alien and community when an alien is approved for release pending removal. *See, e.g., Fernandez-Roque* v. *Smith*, 734 F.2d 576, 583 (11th Cir. 1984). Although the Service reserves the authority to impose conditions of release, including appropriate sponsorship, this rule does not compel the Government to tailor existing programs to the needs of individual aliens or to create or fund additional programs if suitable sponsorship is not located or available for an alien.

If an alien is detained in a facility that does not provide any rehabilitative programs, no negative inference respecting release will be drawn against the alien in making a custody determination based on the fact that the alien did not participate in such programs. However, if the facility has such programs available to the alien but the alien refuses to participate, that fact may be considered by the decision-maker.

Effective Date of this Final Rule

The Department's implementation of this final rule effective upon publication in the **Federal Register** is based upon the ''good cause'' exception found at 5 U.S.C. 553(d)(3). The Pearson reviews were intended for interim use only; through this rule, the agency has now adopted permanent and more comprehensive procedures for post-order detainees. Implementation upon publication affords both the Government and detainees the benefits of the new procedures as soon as possible. Delaying the effective date of this rule would be contrary to the public interest.

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this regulation and, by approving it, certifies

that this rule will not have a significant economic impact on a substantial number of small entities. This rule would provide a more uniform review process governing the detention of certain aliens who have received a final administrative removal order but whose departure has not been effected within the 90-day removal period. This rule does not affect small entities as that term is defined in 5 U.S.C. 601(6).

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Act of 1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

This rule is considered by the Department, to be a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, this rule has been submitted to the Office of Management and Budget for review.

Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform.

List of Subjects

8 CFR Part 212

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

8 CFR Part 236

Administrative practice and procedure, Aliens, Immigration.

8 CFR Part 241

Administrative practice and procedure, Aliens, Immigration.

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

PART 212—DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

1. The authority citation for part 212 continues to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1187, 1225, 1226, 1227, 1228, 1252; 8 CFR part 2.

§ 212.5 [Amended]

2. Section 212.5(f) is amended by revising the phrase ''§§ 212.12 and 212.13'' to read ''§ 212.12''.

§ 212.12 [Amended]

3. Section 212.12 is amended by:

a. Revising the phrase ''Except as provided in § 212.13, the authority'' to read ''The authority'' in paragraph (b) introductory text; and by

b. Removing the word ''either'' and removing the phrase ''or § 212.13, whichever is later'' in paragraph (g)(2).

§ 212.13 [Removed]

4. Remove section 212.13.

PART 236—APPREHENSION AND DETENTION OF INADMISSIBLE AND DEPORTABLE ALIENS; REMOVAL OF ALIENS ORDERED REMOVED

5. The authority citation for part 236 continues to read as follows:

Authority: 8 U.S.C. 1103, 1182, 1224, 1225, 1226, 1227, 1362; sec. 303(b) of Div. C of Pub. L. No. 104–208; 8 CFR part 2.

6. Section 236.1 is amended by:

a. Removing the last sentence in paragraph (d)(1);

b. Revising paragraph (d)(2); and by

c. Removing paragraph (d)(3)(iii), to read as follows:

§ 236.1 Apprehension, custody, and detention.

* * * * *

(d) * * *

(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.

* * * * *

PART 241—APPREHENSION AND DETENTION OF ALIENS ORDERED REMOVED

7. The authority citation for part 241 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1223, 1227, 1231, 1251, 1253, 1255, and 1330; 8 CFR part 2.

8. Section 241.4 is revised to read as follows:

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

(a) *Scope.* The authority to continue an alien in custody or grant release or parole under sections 241(a)(6) and 212(d)(5)(A) of the Act shall be exercised by the Commissioner or Deputy Commissioner, as follows: Except as otherwise directed by the Commissioner or his or her designee, the Executive Associate Commissioner Field Operations (Executive Associate Commissioner) or the district director may continue an alien in custody beyond the removal period described in section 241(a)(1) of the Act pursuant to the procedures described in this section. Except as provided in paragraph (b)(2) of this section, the provisions of this section apply to custody determinations for the following groups of aliens:

(1) An alien ordered removed who is inadmissible under section 212 of the Act, including an excludable alien convicted of one or more aggravated felony offenses and subject to the provisions of section 501(b) of the Immigration Act of 1990, Public Law 101–649, 104 Stat. 4978, 5048 (codified at 8 U.S.C. 1226(e)(1) through (e)(3)(1994));

(2) An alien ordered removed who is removable under section 237(a)(1)(C) of the Act;

(3) An alien ordered removed who is removable under sections 237(a)(2) or 237(a)(4) of the Act, including deportable criminal aliens whose cases are governed by former section 242 of the Act prior to amendment by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C of Public Law 104–208, 110 Stat. 3009–546; and

(4) An alien ordered removed who the decision-maker determines is unlikely to comply with the removal order or is a risk to the community.

(b) *Applicability to particular aliens.*—(1) *Motions to reopen.* An alien who has filed a motion to reopen immigration proceedings for consideration of relief from removal, including withholding or deferral of removal pursuant to 8 CFR 208.16 or 208.17, shall remain subject to the provisions of this section unless the motion to reopen is granted. Section 236 of the Act and 8 CFR 236.1 govern custody determinations for aliens who are in pending immigration proceedings before the Executive Office for Immigration Review.

(2) *Parole for certain Cuban nationals.* The review procedures in this section do not apply to any inadmissible Mariel Cuban who is being detained by the Service pending an exclusion or removal proceeding, or following entry of a final exclusion or pending his or her return to Cuba or removal to another country. Instead, the determination whether to release on parole, or to revoke such parole, or to detain, shall in the case of a Mariel Cuban be governed by the procedures in 8 CFR 212.12.

(3) *Individuals granted withholding or deferral of removal.* Aliens granted withholding of removal under section 241(b)(3) of the Act or withholding or deferral of removal under the Convention Against Torture who are otherwise subject to detention are subject to the provisions of this part 241. Individuals subject to a termination of deferral hearing under 8 CFR 208.17(d) remain subject to the provisions of this part 241 throughout the termination process.

(c) *Delegation of authority.* The Attorney General's statutory authority to make custody determinations under sections 241(a)(6) and 212(d)(5)(A) of the Act when there is a final order of removal is delegated as follows:

(1) *District directors.* The initial custody determination described in paragraph (h) of this section and any further custody determination concluded in the three-month period immediately following expiration of the 90-day removal period, subject to the provisions of paragraph (c)(2) of this section, will be made by the district director having jurisdiction over the alien. The district director shall maintain appropriate files respecting each detained alien reviewed for possible release, and shall have authority to determine the order in which the cases shall be reviewed, and to coordinate activities associated with these reviews in his or her respective district.

(2) *Headquarters Post-Order Detention Unit (HQPDU).* For any alien the district director refers for further review after the 90-day removal period, or any alien who has not been released or removed by the expiration of the three-month period after the 90-day review, all further custody determinations will be made by the Executive Associate Commissioner, acting through the HQPDU.

(3) *The HQPDU review plan.* The Executive Associate Commissioner shall appoint a Director of the HQPDU. The Director of the HQPDU shall have authority to establish and maintain appropriate files respecting each detained alien to be reviewed for possible release, to determine the order in which the cases shall be reviewed, and to coordinate activities associated with these reviews.

(4) *Additional delegation of authority.* All references to the Executive Associate Commissioner and district director in this section shall be deemed to include any person or persons (including a committee) designated in writing by the district director or Executive Associate Commissioner to exercise powers under this section.

(d) *Custody determinations.* A copy of any decision by the district director or Executive Associate Commissioner to release or to detain an alien shall be provided to the detained alien. A decision to retain custody shall briefly set forth the reasons for the continued detention. A decision to release may contain such special conditions as are considered appropriate in the opinion of the Service. Notwithstanding any other provisions of this section, there is no appeal from the district director's or the Executive Associate Commissioner's decision.

(1) *Showing by the alien.* The district director or the Executive Associate Commissioner may release an alien if the alien demonstrates to the satisfaction of the Attorney General or her designee that his or her release will not pose a danger to the community or to the safety of other persons or to property or a significant risk of flight pending such alien's removal from the United States. The district director or the Executive Associate Commissioner may also, in accordance with the procedures and consideration of the factors set forth in this section, continue in custody any alien described in paragraphs (a) and (b)(1) of this section.

(2) *Service of decision and other documents.* All notices, decisions, or other documents in connection with the custody reviews conducted under this section by the district director or Executive Associate Commissioner shall be served on the alien, in accordance with 8 CFR 103.5a, by the Service district office having jurisdiction over the alien. Release documentation (including employment authorization if appropriate) shall be issued by the district office having jurisdiction over the alien in accordance with the custody determination made by the district director or by the Executive Associate Commissioner. Copies of all such documents will be retained in the alien's record and forwarded to the HQPDU.

(3) *Alien's representative.* The alien's representative is required to complete Form G–28, Notice of Entry of Appearance as Attorney or Representative, at the time of the interview or prior to reviewing the detainee's records. The Service will forward by regular mail a copy of any notice or decision that is being served on the alien only to the attorney or representative of record. The alien remains responsible for notification to any other individual providing assistance to him or her.

(e) *Criteria for release.* Before making any recommendation or decision to release a detainee, a majority of the Review Panel members, or the Director of the HQPDU in the case of a record review, must conclude that:

(1) Travel documents for the alien are not available or, in the opinion of the Service, immediate removal, while proper, is otherwise not practicable or not in the public interest;

(2) The detainee is presently a non-violent person;

(3) The detainee is likely to remain nonviolent if released;

(4) The detainee is not likely to pose a threat to the community following release;

(5) The detainee is not likely to violate the conditions of release; and

(6) The detainee does not pose a significant flight risk if released.

(f) *Factors for consideration.* The following factors should be weighed in considering whether to recommend further detention or release of a detainee:

(1) The nature and number of disciplinary infractions or incident reports received when incarcerated or while in Service custody;

(2) The detainee's criminal conduct and criminal convictions, including consideration of the nature and severity of the alien's convictions, sentences imposed and time actually served, probation and criminal parole history, evidence of recidivism, and other criminal history;

(3) Any available psychiatric and psychological reports pertaining to the detainee's mental health;

(4) Evidence of rehabilitation including institutional progress relating

to participation in work, educational, and vocational programs, where available;

(5) Favorable factors, including ties to the United States such as the number of close relatives residing here lawfully;

(6) Prior immigration violations and history;

(7) The likelihood that the alien is a significant flight risk or may abscond to avoid removal, including history of escapes, failures to appear for immigration or other proceedings, absence without leave from any halfway house or sponsorship program, and other defaults; and

(8) Any other information that is probative of whether the alien is likely to—

(i) Adjust to life in a community,

(ii) Engage in future acts of violence,

(iii) Engage in future criminal activity,

(iv) Pose a danger to the safety of himself or herself or to other persons or to property, or

(v) Violate the conditions of his or her release from immigration custody pending removal from the United States.

(g) *Travel documents and docket control for aliens continued in detention beyond the removal period*—(1) *In general.* The district director shall continue to undertake appropriate steps to secure travel documents for the alien both before and after the expiration of the removal period. If the district director is unable to secure travel documents within the removal period, he or she shall apply for assistance from Headquarters Detention and Deportation, Office of Field Operations. The district director shall promptly advise the HQPDU Director when travel documents are obtained for an alien whose custody is subject to review by the HQPDU. The Service's determination that receipt of a travel document is likely may by itself warrant continuation of detention pending the removal of the alien from the United States.

(2) *Availability of travel document.* In making a custody determination, the district director and the Director of the HQPDU shall consider the ability to obtain a travel document for the alien. If it is established at any stage of a custody review that, in the judgment of the Service, travel documents can be obtained, or such document is forthcoming, the alien will not be released unless immediate removal is not practicable or in the public interest.

(3) *Removal.* The Service will not conduct a custody review under these procedures when the Service notifies the alien that it is ready to execute an order of removal.

(4) *Alien's cooperation.* Release will be denied if the alien fails or refuses to cooperate in the process of obtaining a travel document. *See, e.g.,* section 241(a)(1)(C) of the Act.

(h) *District director's custody review procedures.* The district director's custody determination will be developed in accordance with the following procedures:

(1) *Records review.* The district director will conduct the initial custody review. For aliens described in paragraphs (a) and (b)(1) of this section, the district director will conduct a records review prior to the expiration of the 90-day removal period. This initial post-order custody review will consist of a review of the alien's records and any written information submitted in English to the district director by or on behalf of the alien. However, the district director may in his or her discretion schedule a personal or telephonic interview with the alien as part of this custody determination. The district director may also consider any other relevant information relating to the alien or his or her circumstances and custody status.

(2) *Notice to alien.* The district director will provide written notice to the detainee approximately 30 days in advance of the pending records review so that the alien may submit information in writing in support of his or her release. The alien may be assisted by a person of his or her choice, subject to reasonable security concerns at the institution and panel's discretion, in preparing or submitting information in response to the district director's notice. Such assistance shall be at no expense to the Government. If the alien or his or her representative requests additional time to prepare materials beyond the time when the district director expects to conduct the records review, such a request will constitute a waiver of the requirement that the review occur prior to the expiration of the removal period.

(3) *Factors for consideration.* The district director's review will include but is not limited to consideration of the factors described in paragraph (f) of this section. Before making any decision to release a detainee, the district director must be able to reach the conclusions set forth in paragraph (e) of this section.

(4) *District director's decision.* The district director will notify the alien in writing that he or she is to be released from custody, or that he or she will be continued in detention pending removal or further review of his or her custody status.

(5) *District office staff.* The district director may delegate the authority to conduct the custody review, develop recommendations, or render the custody or release decision to those persons directly responsible for detention within his or her district. This includes the deputy district director, the assistant director for detention and deportation, the officer-in-charge of a detention center, persons acting in such capacities, or such other persons as the district director may designate from the professional staff of the Service.

(i) *Determinations by the Executive Associate Commissioner.* Determinations by the Executive Associate Commissioner to release or retain custody of aliens shall be developed in accordance with the following procedures.

(1) *Review panels.* The HQPDU Director shall designate a panel or panels to make recommendations to the Executive Associate Commissioner. A Review Panel shall, except as otherwise provided, consist of two persons. Members of a Review Panel shall be selected from the professional staff of the Service. All recommendations by the two-member Review Panel shall be unanimous. If the vote of the two-member Review Panel is split, it shall adjourn its deliberations concerning that particular detainee until a third Review Panel member is added. The third member of any Review Panel shall be the Director of the HQPDU or his or her designee. A recommendation by a three-member Review Panel shall be by majority vote.

(2) *Records review.* Initially, and at the beginning of each subsequent review, the HQPDU Director or a Review Panel shall review the alien's records. Upon completion of this records review, the HQPDU Director or the Review Panel may issue a written recommendation that the alien be released and reasons therefore.

(3) *Personal interview.* (i) If the HQPDU Director does not accept a panel's recommendation to grant release after a records review, or if the alien is not recommended for release, a Review Panel shall personally interview the detainee. The scheduling of such interviews shall be at the discretion of the HQPDU Director. The HQPDU Director will provide a translator if he or she determines that such assistance is appropriate.

(ii) The alien may be accompanied during the interview by a person of his or her choice, subject to reasonable security concerns at the institution's and panel's discretion, who is able to attend at the time of the scheduled interview. Such assistance shall be at no expense to the Government. The alien may submit to the Review Panel any information, in English, that he or she

believes presents a basis for his or her release.

(4) *Alien's participation.* Every alien shall respond to questions or provide other information when requested to do so by Service officials for the purpose of carrying out the provisions of this section.

(5) *Panel recommendation.* Following completion of the interview and its deliberations, the Review Panel shall issue a written recommendation that the alien be released or remain in custody pending removal or further review. This written recommendation shall include a brief statement of the factors that the Review Panel deems material to its recommendation.

(6) *Determination.* The Executive Associate Commissioner shall consider the recommendation and appropriate custody review materials and issue a custody determination, in the exercise of discretion under the standards of this section. The Executive Associate Commissioner's review will include but is not limited to consideration of the factors described in paragraph (f) of this section. Before making any decision to release a detainee, the Executive Associate Commissioner must be able to reach the conclusions set forth in paragraph (e) of this section. The Executive Associate Commissioner is not bound by the panel's recommendation.

(j) *Conditions of release.*—(1) *In general.* The district director or Executive Associate Commissioner shall impose such conditions or special conditions on release as the Service considers appropriate in an individual case or cases, including but not limited to the conditions of release noted in 8 CFR 212.5(c) and § 241.5. An alien released under this section must abide by the release conditions specified by the Service in relation to his or her release or sponsorship.

(2) *Sponsorship.* The district director or Executive Associate Commissioner may, in the exercise of discretion, condition release on placement with a close relative who agrees to act as a sponsor, such as a parent, spouse, child, or sibling who is a lawful permanent resident or a citizen of the United States, or may condition release on the alien's placement or participation in an approved halfway house, mental health project, or community project when, in the opinion of the Service, such condition is warranted. No detainee may be released until sponsorship, housing, or other placement has been found for the detainee, if ordered, including but not limited to, evidence of financial support.

(3) *Employment authorization.* The district director and Executive Associate Commissioner may, in the exercise of discretion, grant employment authorization under the same conditions set forth in § 241.5(c) for aliens released under an order of supervision.

(4) *Withdrawal of release approval.* The district director or Executive Associate Commissioner may, in the exercise of discretion, withdraw approval for release of any detained alien prior to release when, in the decision-maker's opinion, the conduct of the detainee, or any other circumstance, indicates that release would no longer be appropriate.

(k) *Timing of reviews.* The timing of reviews shall be in accordance with the following guidelines:

(1) *District director.* (i) Prior to the expiration of the 90-day removal period, the district director shall conduct a custody review for an alien described in paragraphs (a) and (b)(1) of this section where the alien's removal, while proper, cannot be accomplished during the 90-day period because no country currently will accept the alien, or removal of the alien prior to expiration of the removal period is impracticable or contrary to the public interest. As provided in paragraph (h)(4) of this section, the district director will notify the alien in writing that he or she is to be released from custody, or that he or she will be continued in detention pending removal or further review of his or her custody status.

(ii) When release is denied pending the alien's removal, the district director in his or her discretion may retain responsibility for custody determinations for up to three months after expiration of the 90-day removal period, during which time the district director may conduct such additional review of the case as he or she deems appropriate. The district director may release the alien if he or she is not removed within the three-month period following the expiration of the 90-day removal period, in accordance with paragraphs (e), (f), and (j) of this section, or the district director may refer the alien to the HQPDU for further custody review.

(2) *HQPDU reviews.* (i) *District director referral for further review.* When the district director refers a case to the HQPDU for further review, as provided in paragraph (c)(2) of this section, authority over the custody determination transfers to the Executive Associate Commissioner, according to procedures established by the HQPDU. The Service will provide the alien with approximately 30 days notice of this further review, which will ordinarily be conducted by the expiration of the removal period or as soon thereafter as practicable.

(ii) *District director retains jurisdiction.* When the district director has advised the alien at the 90-day review as provided in paragraph (h)(4) of this section that he or she will remain in custody pending removal or further custody review, and the alien is not removed within three months of the district director's decision, authority over the custody determination transfers from the district director to the Executive Associate Commissioner. The initial HQPDU review will ordinarily be conducted at the expiration of the three-month period after the 90-day review or as soon thereafter as practicable. The Service will provide the alien with approximately 30 days notice of that review.

(iii) *Continued detention cases.* A subsequent review shall ordinarily be commenced for any detainee within approximately one year of a decision by the Executive Associate Commissioner declining to grant release. Not more than once every three months in the interim between annual reviews, the alien may submit a written request to the HQPDU for release consideration based on a proper showing of a material change in circumstances since the last annual review. The HQPDU shall respond to the alien's request in writing within approximately 90 days.

(iv) *Review scheduling.* Reviews will be conducted within the time periods specified in paragraphs (k)(1)(i), (k)(2)(i), (k)(2)(ii), and (k)(2)(iii) of this section or as soon as possible thereafter, allowing for any unforeseen circumstances or emergent situation.

(v) *Discretionary reviews.* The HQPDU Director, in his or her discretion, may schedule a review of a detainee at shorter intervals when he or she deems such review to be warranted.

(3) *Postponement of review.* In the case of an alien who is in the custody of the Service, the district director or the HQPDU Director may, in his or her discretion, suspend or postpone the custody review process if such detainee's prompt removal is practicable and proper, or for other good cause. The decision and reasons for the delay shall be documented in the alien's custody review file or A file, as appropriate. Reasonable care will be exercised to ensure that the alien's case is reviewed once the reason for delay is remedied or if the alien is not removed from the United States as anticipated at the time review was suspended or postponed.

(4) *Transition provisions.* (i) The provisions of this section apply to cases that have already received the 90-day

review. If the alien's last review under the procedures set out in the Executive Associate Commissioner memoranda entitled *Detention Procedures for Aliens Whose Immediate Repatriation is Not Possible or Practicable,* February 3, 1999; *Supplemental Detention Procedures,* April 30, 1999; *Interim Changes and Instructions for Conduct of Post-order Custody Reviews,* August 6, 1999; *Review of Long-term Detainees,* October 22, 1999, was a records review and the alien remains in custody, the HQPDU will conduct a custody review within six months of that review (Memoranda available at http://www.ins.usdoj.gov). If the alien's last review included an interview, the HQPDU review will be scheduled one year from the last review. These reviews will be conducted pursuant to the procedures in paragraph (i) of this section, within the time periods specified in this paragraph or as soon as possible thereafter, allowing for resource limitations, unforeseen circumstances, or an emergent situation.

(ii) Any case pending before the Board on December 21, 2000 will be completed by the Board. If the Board affirms the district director's decision to continue the alien in detention, the next scheduled custody review will be conducted one year after the Board's decision in accordance with the procedures in paragraph (i) of this section.

(l) *Revocation of release*—(1) *Violation of conditions of release.* Any alien described in paragraph (a) or (b)(1) of this section who has been released under an order of supervision or other conditions of release who violates the conditions of release may be returned to custody. Any such alien who violates the conditions of an order of supervision is subject to the penalties described in section 243(b) of the Act. Upon revocation, the alien will be notified of the reasons for revocation of his or her release or parole. The alien will be afforded an initial informal interview promptly after his or her return to Service custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notification.

(2) *Determination by the Service.* The Executive Associate Commissioner shall have authority, in the exercise of discretion, to revoke release and return to Service custody an alien previously approved for release under the procedures in this section. A district director may also revoke release of an alien when, in the district director's opinion, revocation is in the public interest and circumstances do not reasonably permit referral of the case to the Executive Associate Commissioner. Release may be revoked in the exercise of discretion when, in the opinion of the revoking official:

(i) The purposes of release have been served;

(ii) The alien violates any condition of release;

(iii) It is appropriate to enforce a removal order or to commence removal proceedings against an alien; or

(iv) The conduct of the alien, or any other circumstance, indicates that release would no longer be appropriate.

(3) *Timing of review when release is revoked.* If the alien is not released from custody following the informal interview provided for in paragraph (l)(1) of this section, the HQPDU Director shall schedule the review process in the case of an alien whose previous release or parole from immigration custody pursuant to a decision of either the district director or the Executive Associate Commissioner under the procedures in this section has been or is subject to being revoked. The normal review process will commence with notification to the alien of a records review and scheduling of an interview, which will ordinarily be expected to occur within approximately three months after release is revoked. That custody review will include a final evaluation of any contested facts relevant to the revocation and a determination whether the facts as determined warrant revocation and further denial of release. Thereafter, custody reviews will be conducted annually under the provisions of paragraphs (i), (j), and (k) of this section.

9. Section 241.5 is amended by revising paragraph (a) introductory text to read as follows:

§ 241.5 Conditions of release after removal period.

(a) *Order of supervision.* An alien released pursuant to § 241.4 shall be released pursuant to an order of supervision. The Commissioner, Deputy Commissioner, Executive Associate Commissioner Field Operations, regional director, district director, acting district director, deputy district director, assistant district director for investigations, assistant district director for detention and deportation, or officer-in-charge may issue Form I–220B, Order of Supervision. The order shall specify conditions of supervision including, but not limited to, the following:

* * * * *

10. Section 241.6 is revised to read as follows:

§ 241.6 Administrative stay of removal.

(a) Any request of an alien under a final order of deportation or removal for a stay of deportation or removal shall be filed on Form I–246, Stay of Removal, with the district director having jurisdiction over the place where the alien is at the time of filing. The Commissioner, Deputy Commissioner, Executive Associate Commissioner Field Operations, regional director, or district director, in his or her discretion and in consideration of factors listed in 8 CFR 212.5 and section 241(c) of the Act, may grant a stay of removal or deportation for such time and under such conditions as he or she may deem appropriate. Neither the request nor the failure to receive notice of disposition of the request shall delay removal or relieve the alien from strict compliance with any outstanding notice to surrender for deportation or removal.

(b) Denial by the Commissioner, Deputy Commissioner, Executive Associate Commissioner Field Operations, regional director, or district director of a request for a stay is not appealable, but such denial shall not preclude an immigration judge or the Board from granting a stay in connection with a previously filed motion to reopen or a motion to reconsider as provided in 8 CFR part 3.

(c) The Service shall take all reasonable steps to comply with a stay granted by an immigration judge or the Board. However, such a stay shall cease to have effect if granted (or communicated) after the alien has been placed aboard an aircraft or other conveyance for removal and the normal boarding has been completed.

Dated: December 15, 2000.

Janet Reno,

Attorney General.

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BILLING CODE 4410–10–P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 705

Community Development Revolving Loan Program for Credit Unions

AGENCY: National Credit Union Administration (NCUA).

ACTION: Interim final rule with request for comments.

SUMMARY: The NCUA is revising its regulations pertaining to the Community Development Revolving Loan Program for Credit Unions (CDRLP) to make more flexible the manner in which NCUA may deliver