


Mandatory Detention Under INA §236(c)

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Text of §236(c)(1)

“The Attorney General shall take into custody any alien who—

- (A) is inadmissible by reason of having committed any offense covered in section 212(a)(2)
- (B) is deportable by reason of having committed any offense covered in section 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D)
- (C) is deportable under section 237(a)(2)(A)(i) on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least one year, or
- (D) is inadmissible under section 212(a)(3)(B) or deportable under section (237(a)(4)(B)

Simple, Right?

Maybe Not....

212(a)(2)
REMEMBER: CONVICTIONS NOT REQUIRED

- Crimes of Moral Turpitude 212(a)(2)(A)(i)(I)
- Controlled Substance Violations 212(a)(2)(A)(i)(II)
- multiple convictions of any type if aggregate sentence is 5 years or more confinement 212(a)(2)(B)
- reason to believe controlled substance trafficker or family member who receives benefit 212(a)(2)(C)

212(a)(2)
REMEMBER: CONVICTIONS NOT REQUIRED

- Prostitution and Commercialized Vice 212(a)(2)(D)
- People who have asserted immunity from prosecution 212(a)(2)(G)
- Foreign Government Officials who have committed Particularly Severe Violations of Religious Freedom 212(a)(2)(E)
- Significant Traffickers in Persons (212)(a)(2)(H)
- Money Laundering 212 (a)(2)(I)

236(c)(1)(B)

- 237(a)(2)(A)(ii) 2 CIMTS
- 237(a)(2)(A)(iii)- Aggravated Felonies
- 237(a)(2)(B)- Controlled Substance Offenses
 * 30 grams marijuana exception
- 237(a)(2)(C)- Firearms
- 237(a)(2)(D)- Miscellaneous crimes (espionage, sabotage, treason, trading with the enemy)

236(c)(1)(C)

- 237(a)(2)(A)(i)- CIMT within five years of admission + IF ACTUALLY sentenced to imprisonment of at least one year (cf. with 237(a)(2)(A)(i) alone which only requires possibility of one year sentence)
- Be creative about what is an admission! see *Shivaraman v. Ashcroft*, 360 F.3d 1142, 1146 (9th Cir. 2004)
 - Visas vs. parole or TPS

236(a)(1)(D)

- 212(a)(3)(B) and 237(a)(4)(B) Terrorist Grounds

236(c)(2)

- Release available if A.G. decides is necessary to provide protection to a witness, potential witness, person cooperating with an investigation into major criminal activity...

Reviewing the NTA isn't enough

“Need not be charged with the ground that provides the basis for mandatory detention under section 236(c)(1) of the Act in order to be considered an alien who “is deportable” on that ground”
Matter of Kotliar, 24 I&N Dec. 124 (BIA 2007)

So Who Can Get Bond?

- People Removable for:
 - Domestic Violence (complicated if D/V is CIMT)
 - Smuggling
 - False Claims to Citizenship
 - Simple DUIs and California Aggravated DUIs (AZ Aggravated DUIs still up in the air)
- People who can qualify under petty offense exception (including “wobblers”) - but only one
 - *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1078 (2005)
- Juvenile convictions don't count

But What if I have an old conviction?

- Mandatory Detention only applies to people “released after” October 9, 1998 *Matter of Ademiji*, 22 I&N Dec. 1102 (BIA 1999)
- But the BIA very narrowly defines “release”
 - Irrelevant if person released but not immediately taken into custody *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001)
 - Release is from physical custody- probation doesn't count *Matter of West* 22 I&N Dec. 1405 (BIA 2000) **BUT**
 - Physical custody is almost anything- arrest preceding a conviction even if probation results: *Matter of Keibor*, 24 I&N Dec. 124 (BIA 2007)- implied custody!
 - How does this square with *West* where Respondent had posted bond?

Some Federal Court Challenges

- *Zabadi v. Chertoff*, 2005 U.S. Dist. LEXIS 31914 (N.D. 2005) (236 (c) doesn't apply if petitioner taken into custody two years after end of criminal sentence)
- *Quezada-Bucio v. Ridge* 317 F.Supp.2d 1221, 1227-31 (W.D. Wash. 2004) (236(c) doesn't apply for petitioner taken into custody 3 years after completion of sentence)

Matter of Joseph

22 I&N Dec. 799 (BIA 1999)

- A Lawful Permanent Resident is not "properly included" in mandatory detention if it is "substantially unlikely" that DHS will be able to prove that they cannot prevail on a charge of removability specified in 236(c)(1)
- U.S. citizens in detention are also eligible for Joseph hearings
- Realistically, Joseph hearings are only successful if IJ has already terminated proceedings
 - IJ's very free about "substantially likely" including relying on I 213 alone
- Usually Joseph will be unsuccessful if Respondent was initially charged as arriving alien (LPR at Port of Entry)
- Joseph also usually cannot be used if Respondent was granted relief from removal after IJ sustained the charges. (Cancellation, Adjustment, Asylum)