



U.S. Citizenship
and Immigration
Services

March 7, 2005

MEMORANDUM FOR REGIONAL DIRECTORS
DISTRICT DIRECTORS
NATIONAL BENEFITS CENTER DIRECTOR
OFFICERS IN CHARGE

FROM: William R. Yates /S/
Associate Director for Operations
Citizenship and Immigration Services
Department of Homeland Security

SUBJECT: Implementation of Clark v. Martinez, 125 S. Ct. 716 (2005)

As a result of a recent U.S. Supreme Court decision, Clark v. Martinez, 125 S. Ct. 716 (2005), several hundred long-term detainees have been ordered released from U. S. Immigration and Customs Enforcement (ICE) custody. The aliens in question are Mariel Cubans. Once these aliens have been released from custody, it is likely that many of them will apply for employment authorization.

These aliens are applicants for admission with final removal orders who have been, or will be released under orders of supervision pursuant to the precedential effect of Clark v. Martinez, which held that such aliens could not lawfully be detained indefinitely. Relevant statutory provisions are Immigration and Nationality Act (INA) 212(d)(5)(A), authorizing the Secretary generally to parole applicants for admission into the United States "under such conditions as he may prescribe," and INA 241(a), relating to terms of release for inadmissible aliens with final removal orders. Section 241(a)(3) provides for supervision of the alien by the Secretary, and section 241(a)(7) prohibits employment authorization unless the Secretary specifically finds that the alien cannot be removed due to the refusal of all designated countries to receive the alien, or the removal of the alien is otherwise impracticable or contrary to the public interest. Accordingly, these aliens are eligible for employment authorization under 8 C.F.R. 274a.12(c)(18) as a matter of discretion.

USCIS has determined that there is a compelling public interest in processing the applications of the released detainees at the local offices. Therefore, in addition to the filing process described in the form instructions, USCIS will encourage these individuals to file these applications at the local office.

In order to ensure both a high level of security and uniform handling of applications for employment authorization submitted by these aliens, Employment Authorization Documents will be centrally issued. Local offices will not issue cards. However, the applications will be adjudicated locally. Applications for

Employment Authorization (I-765) will be accepted and adjudicated at local offices. Offices expecting to receive a large number of applications should consider establishing procedures with Community Based Organizations (CBO's) who wish to offer assistance to these aliens. It is recommended that arrangements be made for the CBO's to fax copies of the I-765 to the local CIS office prior to the applicant appearing at a USCIS office. This process will ensure adequate time to perform IBIS checks and obtain A files. Requests for fee waivers will be considered on a case-by-case basis. In the adjudication of these I-765's, IBIS checks will be performed and documented with a view toward any crimes that may have been committed since release from ICE custody and whether there are any outstanding Wants & Warrants.

Under section 241(a)(7) of the INA, an alien ordered removed from the United States is eligible for employment authorization only if a finding is made that the alien cannot be removed due to the refusal of all countries designated by the alien to receive the alien, or the removal of the alien is otherwise impracticable or contrary to the public interest. This requirement can be satisfied upon review of the parole I-94 and Order of Supervision issued to the applicant by ICE. Each applicant should have been issued a parole I-94 at the time of his or her release. Release of an inadmissible alien with a final removal order under an Order of Supervision by ICE on or after January 12, 2005, is sufficient evidence upon which to determine that removal of the alien is impracticable for the purpose of satisfying INA 241(a)(7). If section 241(a)(7) is determined to be satisfied, the application should be adjudicated for a discretionary grant of employment authorization, based upon the factors described in 8 C.F.R. 274a.12(c)(18). In most or all of these cases, it is anticipated that grant of employment authorization would be appropriate based upon economic necessity.

Upon approval of the I-765, an approval stamp will be affixed to the application. A copy of the approved application will be faxed and/or scanned and sent to the National Benefits Center (NBC) for data entry into Claims 3. The NBC will enter the data; assign the MSC receipt number, and note that the application has been approved. The NBC will then transmit the receipt number to the originating office.

Upon receipt of the MSC receipt number, arrangements will be made to schedule the applicant to appear for biometric capture at an ASC (or at the originating office if that office has biometric data capture capability.) When the alien arrives at the ASC for biometric capture, identity must be verified prior to biometric data capture. The identity of the applicant must be verified by comparison with identifying information in the alien's A file. This may include photos, fingerprints, signature, and/or physical description. If the A file is not located at the office where the application is submitted, the file should be requested from ICE. If, for some reason, the file cannot be transferred, ICE should be requested to fax pertinent data to assist in the identification process. In addition, data may be available from other law enforcement databases that would assist in the identification process.

Once the biometric data has been captured, the alien will be advised that he will receive his Employment Authorization Document in the mail.

It is possible that some of these aliens may not be familiar with the process for obtaining an appointment to visit our offices. In the event one or more of these aliens appears at a local office without an appointment, every effort should be made to accept their application for preliminary processing.