Thomas K. Ragland
BENACH RAGLAND LLP
1333 H Street NW, Suite 900 West
Washington, DC 20005
(202) 644 8600

DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
ARLINGTON, VIRGINIA

In The Matter of:	
[redacted]	[redacted]
Respondent	
In Bond Proceedings	

Immigration [redacted] **Next Hearing: August 21, 2012 at 8:30 a.m.**

RESPONDENT'S SUPPLEMENTAL MOTION FOR CUSTODY AND BOND DETERMINATION HEARING

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
ARLINGTON, VIRGINIA

In The Matter of:	
[redacted]	**File No.:** **A** [redacted]
Respondent	
In Bond Proceedings	**Next Hearing** **August 21, 2012 at 8:30 a.m.** **before** [redacted]

RESPONDENT'S SUPPLEMENTAL MOTION FOR CUSTODY AND BOND DETERMINATION HEARING

Pursuant to 8 C.F.R. §1003.19(h)(2)(ii), Respondent [redacted], through undersigned counsel, respectfully requests a determination that he is not "properly included" under the mandatory detention provision at Section 236(c) of the Immigration and Nationality Act ("INA"), because his detention by U.S. Immigration and Customs Enforcement ("ICE") has exceeded a "reasonable period of time." *See Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 223 (3d Cir. 2011). Respondent further requests that the Government bear the burden of showing that his continued detention is justified.

In support of this motion, Respondent states the following:

1. In *Demore v. Kim*, 538 U.S. 510 (2003), the U.S. Supreme Court upheld mandatory detention for the "brief period" necessary for removal proceedings, a period it described as averaging 45 days for those who do not appeal an Immigration Judge ("IJ") order, and 5 months for those who do. *Demore*, 538 U.S. at 513. Since that ruling, a number of courts have held that, in light of the

serious constitutional problems posed by prolonged detention, INA §236(c) must be construed as authorizing detention for only a brief and "reasonable period of time." *Diop*, 656 F.3d at 223 (". . . *Demore* emphasized that mandatory detention pursuant to § 1226(c) lasts only for a 'very limited time' in the vast majority of cases"); *Tijani v. Willis*, 430 F.3d 1241, 1249 (9th Cir. 2005) (holding that the mandatory detention statute only authorizes detention for "expeditious" removal proceedings, not for those that exceed the brief period of time set forth in *Demore*); *see also Ly v. Hansen*, 351 F.3d 263, 270 (6th Cir. 2003) (holding that INA §236 "include[s] an implicit requirement that removal proceedings be concluded within a reasonable time"). When mandatory detention exceeds that reasonable period, the Government must bear the burden to show that continued detention of the Respondent is necessary to prevent flight or avoid danger to the community. *Diop*, 656 F.3d at 223.

2. The Respondent may seek a determination from an IJ as to whether he is properly included within Section 236(c), which would otherwise deprive the Immigration Judge of bond jurisdiction. *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999). Section 236(c) of the INA does not bar an IJ from exercising his discretion to determine whether to release a respondent from immigration custody if the period of detention has become unreasonably lengthy. The regulations also vest the Board of Immigration Appeals ("BIA") with jurisdiction to determine whether a respondent's mandatory detention is unreasonably prolonged under *Diop* and thus not authorized by INA §236(c). *See* 8 C.F.R. §1003.1(b)(7).
3. As *Diop* explained, reasonableness is a "function of the length of detention." 656

F.3d at at 232. Thus, an initial period of mandatory detention will become "unreasonable" at some point in time. *Id.* Although the Supreme Court in *Demore* upheld the constitutionality of mandatory immigration detention, it did not uphold mandatory detention for as long as removal proceedings take to conclude. Rather, as Justice Kennedy explained in his concurrence, mandatory detention may come to violate due process "if the continued detention became unreasonable or unjustified." *Demore*, 538 U.S. at 532 (Kennedy, J., concurring). The "constitutional case for continued detention without inquiry into its necessity becomes more and more suspect as detention continues past [the one-and-a-half to five-month] thresholds." *Demore*, 538 U.S. at 510; *Diop*, 656 F.3d at 234.

4. Respondent's prolonged detention exceeds the "brief period necessary for [his] removal proceedings." *Demore*, 538 U.S. at 513. [redacted] has been detained for more than 50 days prior to his first hearing before an Immigration Judge. This exceeds the threshold envisioned by the Court in *Demore*.

5. In addition, Respondent has done nothing to prolong his detention. Rather, his detention has been prolonged unreasonably due to government delay. ICE arrested and detained [redacted] on June 28, 2012, from his home in Centreville, Virginia. Despite repeated requests from undersigned counsel, ICE unreasonably delayed filing a Notice to Appear in Immigration Court. In fact, only after undersigned counsel filed a Motion for a *Matter of Joseph* Hearing with the Court did ICE file the Notice to Appear – more than 21 days after Respondent was taken into custody. [redacted] has been detained at the Farmville Detention Center for the entire duration.

6. Following the unreasonable delay by ICE in filing the Notice to Appear with the Court, [redacted] was scheduled for a first Master Calendar Hearing on August 21, 2012 – a full month after the Notice to Appear was filed. Despite never having served any time in jail following his conviction, [redacted] has already served more than 50 days in ICE detention prior to his first hearing in front of an Immigration Judge. This exceeds the entire length of proceedings estimated by the *Demore* Court as sufficient to complete proceedings. Considering that [redacted] is not a violent criminal, poses no flight risk, and is not a danger to the community, such prolonged detention is unreasonable and manifestly contrary to the purposes of the mandatory detention provision at INA §236(c).

7. Furthermore, Respondent faces an unreasonable period of future mandatory detention. First, [redacted] is not likely to be scheduled for an Individual Calendar Hearing by the Immigration Judge for several months, and he already anticipates a lengthy detention. Second, if [redacted] does not prevail at his merits hearing, he will continue to be detained while pursuing an appeal to the BIA and, subsequently, to the U.S. Court of Appeals for the Fourth Circuit. *See Diouf v. Napolitano,* 634 F.3d 1081, 1091 n.13 (9th Cir. 2011) (noting that when a court "grants a stay of removal in connection with an alien's petition for review from a denial of a motion to reopen, the alien's prolonged detention becomes a near certainty"). This stretches the conclusion of [redacted] removal proceedings from 50 days to a year or more, during which time he would remain in detention. Such a lengthy period of detention is plainly not reasonable.

8. The Government is also "substantially unlikely to prevail" in establishing deportability or inadmissibility, because [redacted] is likely to obtain relief from removal. The Government bears the burden of proving that [redacted] is removable as charged by clear, unequivocal, and convincing evidence. *Woodby v. INS*, 385 U.S. 276 (1966); 8 C.F.R. §1240.8(a). In the event [redacted] is found removable, he is prima facie eligible for cancellation of removal under INA §240A(a). He has been a lawful permanent resident for more than 25 years, since December 1, 1986. *See* Exh. A. He has resided in the United States continuously since his admission as a lawful permanent resident. And he has not been convicted of an aggravated felony. *See* Exh. B. Additionally, [redacted] is neither a flight risk nor a danger to the community, and thus he should be released on a reasonable bond to await his next hearing before this Court.

9. Even if [redacted] cannot meet the *Matter of Joseph* "substantially unlikely to prevail" standard, he has a bona fide challenge to deportability and should not be treated as subject to mandatory detention. *See Tijani v. Willis*, 430 F. 3d 1241, 1246-47 (9th Cir. 2005) (Tashima, J. concurring); *Demore*, 538 U.S. at 577-78 (Breyer, J, dissenting). The *Matter of Joseph* standard should be construed as applying not only to threshold charges, but also to claims for relief that would defeat those charges. [redacted] has a strong claim for cancellation of removal under INA §240A(a). He has the support of numerous U.S. citizen family members, including his mother and his wife and children, who need and want him to remain in the United States. *See* Exh. C. He has built a successful business in [redacted] which is greatly suffering from his absence – and

which, in turn, is hurting his employees and family members. *See* Exh. C. He has admitted his guilt, cooperated with prosecutors, and repented for his wrongdoings. *See* Exh. C.

10. In order to prevail in continuing its detention beyond the "brief period" described in *Demore*, the Government must demonstrate that a detainee is a flight risk or a danger to society. *Diop* requires an individualized inquiry into whether detention is necessary to fulfill the purpose of the statute, which is to ensure that a respondent will attend removal proceedings and prevent the release of an individual who would endanger the community. *Diop*, 656 F.3d at 231. During his criminal sentencing, the Government recognized that [redacted] is not a violent criminal, is not a flight risk, and is not a danger to the community, and consequently allowed him to serve his time in home detention with electronic monitoring. *See* Exh. B. The Government did not seek detention, other than "weekend time," and did not oppose [redacted] being released with conditions, so that he could continue to go to work and manage his business, [redacted]. This is informative for the IJ in determining that [redacted] is indeed, not a flight risk and danger to the community, and therefore, should be released on bond.

11. Mandatory detention is not mandatory without any exceptions. ICE has the authority to exercise prosecutorial discretion with respect to [redacted]. Detention Guidelines published by the legacy INS establish four priorities for detention, beginning with noncitizens whose detention is "required (with limited exceptions)" by INA §236(c). The Guidelines state that even "required" detainees

may be released in the discretion of the INS: "The District Director or the Sector Chief retains discretion to do otherwise [than detain] if the facts of a given case require."

12. [redacted] is precisely the type of person for whom ICE should favorably exercise its discretion. He is a long-time resident of the United States. His crime was not violent and there is virtually no risk that it will be repeated. Moreover, he is not a flight risk because he has resided in Virginia for 25 years, has a business to run in order to support his family, has extensive family and community ties, and is prima facie eligible for cancellation of removal. *See* Exh. C. He has numerous U.S. citizen family members who depend on him for financial and emotional support. *See* Exh. C. The Government should take into account the availability of less restrictive alternatives – such as release on electronic monitoring – that that would address their concerns over keeping the Respondent in detention.

WHEREFORE, Respondent respectfully moves this Court to assume jurisdiction over his request for release on bond and order him released from custody on posting of a reasonable bond, and under such conditions as are deemed to be necessary and appropriate.

Respectfully submitted,

_____ _____

Thomas K. Ragland
BENACH RAGLAND LLP
1333 H Street NW, Suite 900 West
Washington, D.C. 20005
T: 202.644.8600
F: 202.644.8615

Counsel for Respondent

Date

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
ARLINGTON, VIRGINIA

In The Matter of:	
[redacted]	**File No.:** [redacted]
Respondent	
In Bond Proceedings	**Next Hearing** **August 21, 2012 at 8:30 a.m.** **before** [redacted]

ORDER OF THE IMMIGRATION JUDGE

Upon consideration of Respondent's Supplemental Motion for Custody and Bond Determination Hearing it is HEREBY ORDERED that the motion be [ ] GRANTED [ ] DENIED because:

[ ] DHS does not oppose the motion.
[ ] The respondent does not oppose the motion.
[ ] A response to the motion has not been filed with the court.
[ ] Good cause has been established for the motion.
[ ] The court agrees with the reasons stated in the opposition to the motion.
[ ] The motion is untimely per _____.
[ ] Other:

Deadlines:

The Respondent's Motion to Change Venue must be filed by _____.
The respondent must comply with DHS biometrics instructions by _____.

_____ _____
Date U.S. Immigration Judge

Certificate of Service
This document was served by: [ ] Mail [ ] Personal Service
To: [ ] Alien [ ] Alien co/Custodial Officer [ ] Alien's Atty/Rep [ ] DHS
Date: _____ By: Court Staff

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
ARLINGTON, VIRGINIA

In The Matter of:	)	
[redacted]	)	**File No.:** [redacted]
Respondent	)	
In Bond Proceedings	)	**Next Hearing** **August 21, 2012 at 8:30 a.m.** **before** [redacted]

PROOF OF SERVICE

On August 17, 2012, I, Thomas K. Ragland, served a copy of this Respondent's Supplemental Motion for Custody and Bond Determination Hearing and any attached pages to the U.S. Department of Homeland Security, Immigration and Customs Enforcement, Office of the Chief Counsel at the following address: 901 North Stuart Street, 7th Floor, Arlington, Virginia 22203, by hand delivery.

_____ _____
Thomas K. Ragland Date