No. 00-38

# In the Supreme Court of the United States

JANET RENO, ET AL., PETITIONERS

*v.*

KIM HO MA

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## JOINT APPENDIX


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**PETITION FOR WRIT OF CERTIORARI FILED JULY 5, 2000**
**CERTIORARI GRANTED OCTOBER 10, 2000**

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
(SEATTLE)

No. 99-CV-151

KIM HO MA, PETITIONER

*v.*

U.S. IMMIGRATION AND NATURALIZATION SERVICE, ET AL., RESPONDENTS

**DOCKET ENTRIES**

| DATE | DOCKET NUMBER | ENTRY |
|---|---|---|
| 2/2/99 | 1 | PETITION FOR 2241 WRIT OF HABEAS CORPUS by petitioner Kim Ho Ma Receipt No. 256020 (ss) [Entry date 02/08/99] |

* * * * *

| DATE | DOCKET NUMBER | ENTRY |
|---|---|---|
| 4/22/99 | 10 | ORDER ON LEAD CASES & STAY OF RELATED CASES by Judge Coughenour, Judge Rothstein, Judge Zilly, Judge Lasnik & Judge Dwyer. This case is designated as a lead case. The Order of Reference is hereby vacated. Briefing Schedule: Lead case petitioners briefs due by 4/30/99 (50 pg. max.); Non-lead case petitioners briefs due by 5/10/99 (25 pg. max); Respondents briefs due by 5/21/99 (50 pg. max); Lead case petitioners reply brief due by 5/28/99 (25 pg. max); Cnsl to file an orig. plus 9 copies (1 for each file and 1 for each District Judge); Oral arg. is scheduled for 6/17/99 at 1:30 before a Panel of Judge Coughenour, Judge Rothstein, Judge Zilly, Judge Lasnik and Judge Dwyer. All non-lead cases are stayed, except the court will rule on ifp motions, appt. of cnsl motions, service of process and any dismissal orders. Case reassigned to Judge Robert S. Lasnik, , (cc: counsel, Judge) (sl) [Entry date 04/23/99] |

* * * * *

| DATE | DOCKET NUMBER | ENTRY |
|---|---|---|
| 4/30/99 | 16 | OPENING BRIEF OF PETITIONERS IN SUPPORT OF PETITIONS FOR WRITS OF HABEAS CORPUS/MEMORANDUM by petitioner in support re: habeas corpus petition [1-1] (vk) [Entry date 05/06/99] |
| | * * * * * | |
| 5/6/99 | 18 | CERTIFIED ADMINISTRATIVE RECORD by respondent INS (FILED IN EXPANDO) (gm) [Entry date 05/10/99] |
| | * * * * * | |
| 5/14/99 | 21 | DECLARATION of Jay Ashri Srikantiah re motion for leave to participate as amici curiae by ACLU-IRP [20-1] (vk) [Entry date 05/18/99 |
| 5/14/99 | 22 | MEMORANDUM in support of motion for leave to participate as amici curiae by ACLU-IRP [20-1] (vk) [Entry date 05/18/99] |
| | * * * * * | |

| DATE | DOCKET NUMBER | ENTRY |
|---|---|---|
| 5/18/99 | 24 | ORDER GRANTING MOTION TO AMEND PETITION by Judge Robert S. Lasnik: GRANTING motion to amend petition [12-1] (cc: counsel, Judge) (vk) [Entry date 05/19/99] |
| | * * * * * | |
| 5/18/99 | 27 | AMENDED PETITION FOR WRIT OF 2241 HABEAS CORPUS by petitioner Kim Ho Ma (rs) [Entry date 05/24/99] |
| 5/21/99 | 25 | ORDER by Chief Judge John C. Coughenour GRANTING motion for leave to participate as amici curiae by ACLU-IRP [20-1] and petitioners' motion for permission to file a corrected copy of their opening brief (cc: counsel, Judge, ACLU) (vk) |
| 5/21/99 | 26 | AMENDED OPENING BRIEF OF PETITIONERS IN SUPPORT OF PETITIONS FOR WRITS OF HABEAS CORPUS [1-1] (vk) |

| DATE | DOCKET NUMBER | ENTRY |
|---|---|---|
| 5/21/99 | 28 | RESPONSE by respondent to amended habeas corpus petition [27-1] (rs) [Entry date 05/24/99] |
| 5/21/99 | 29 | INS EXHIBITS to response [28-1] re amended petition (rs) [Entry date 05/24/99] |
| 5/28/99 | 30 | REPLY BRIEF by petitioner Kim Ho Ma to habeas corpus petition [27-1] (rs) [Entry date 06/01/99] |
| 5/28/99 | 31 | EXHIBITS by petitioner in support of reply brief [30-1] (rs) [Entry date 06/01/99] |
| | * * * * * | |
| 6/17/99 | 37 | PETITIONERS' SUPPLEMENTAL EXHIBITS (vk) |
| | * * * * * | |
| 6/17/99 | 40 | EXHIBIT "L" by INS (vk) [Entry date 06/23/99] |

| DATE | DOCKET NUMBER | ENTRY |
|---|---|---|
| | | * * * * * |
| 6/18/99 | 38 | TRANSCRIPT of proceedings for the following date(s): 6/17/99 CR initials: L Kelly (kn) |
| | | * * * * * |
| 7/9/99 | 44 | JOINT ORDER by All District Judges: In the orders that follow, we individually apply the due process framework in the lead cases to determine whether continued detention violates the petitioner's right to substantive due process. The court shall provide for expedited review of the remaining petitions that have been stayed pursuant to the 4/22 and 6/29 orders. To that end, the govt is directed to file a status report and recommendation in each of the stayed cases within 20 days of entry of this order. Counsel for each petitioner may file a response in the respective case within 10 days. Each judge |

| DATE | DOCKET NUMBER | ENTRY |
|---|---|---|
| | | shall then consider the petitions pending before him/her. (cc: counsel, Judge) (rs) |
| 7/13/9 | 45 | ORDER SETTING HEARING by Judge Robert S. Lasnik: The Court will schedule a hearing in this matter. The parties are directed to contact this Court's deputy clerk to schedule such a hearing. (cc: counsel, Judge) (gm) |
| | * * * * * | |
| 9/8/99 | 48 | STATUS REPORT AND RECOMMENDATION by respondents (vk) |
| 9/8/99 | 49 | RESPONDENTS' EXHIBITS re: status memorandum [48-1] (vk) |
| | * * * * * | |
| 9/9/99 | 51 | RESPONSE by petitioner re: respondents' status memorandum [48-1] (FILED IN EXPANDO) (vk) [Entry date 09/13/99] |

| DATE | DOCKET NUMBER | ENTRY |
|---|---|---|
| 9/29/99 | 52 | ORDER by Judge Robert S. Lasnik GRANTING petitioner's petition for writ of habeas corpus and respondents are ordered to release Kim Ho Ma subject to appropriate conditions [0-0]case termed (cc: counsel, Judge) (vk) |
| 9/29/99 | 53 | ORDER by Judge Robert S. Lasnik staying order granting petitioner the writ of habeas corpus pending further order of the court (cc: counsel, Judge, INS) (vk) |
| 9/29/99 | 54 | MOTION by respondents for stay pending appeal (vk) [Entry date 09/30/99] |
| 9/29/99 | 55 | RESPONSE by petitioner in opposition to respondents' motion for stay pending appeal [54-1] (vk) [Entry date 09/30/99] |
| 9/30/99 | 56 | REPLY by respondent to petitioner's opposition to respondent's motion for stay pending appeal [55-1] (vk) |

| DATE | DOCKET NUMBER | ENTRY |
|---|---|---|
| 9/30/99 | 57 | ORDER by Judge Robert S. Lasnik: The Ct entered an order granting petitioner the writ of habeas corpus, & the govt requested a stay pending appeal. The Ct finds a stay is not warranted. The govt may have up to 7 days w/in which to request a stay from the Ct of Appeals before this Ct's order must be executed. (cc: counsel, Judge, INS) (gm) |
| 10/6/99 | 58 | NOTICE OF APPEAL by respondent INS from Dist. Court decision [44-1, 57] (cc: CCA, RLS, counsel) (lb) |
| | | * * * * * |
| 10/12/99 | 59 | ORDER (CCA 99-35976) The court, on its own motion, stays the district court's order releasing petitioner, Kim Ho Ma, pending full consideration of the emergency motion for stay pending appeal filed on 10/6/99. (lb) |

| DATE | DOCKET NUMBER | ENTRY |
|---|---|---|
| 10/25/99 | 60 | ORDER (CCA 99-35976) Appellant's emergency motion for stay pending appeal is denied. Petitioner shall be released subject to appropriate conditions before 5:00pm on Monday, 10/25/99. (lb) |
| 11/3/99 | 61 | NOTICE of change of petitioner's custody status by respondent INS (vk) [Entry date 11/04/99] [Edit date 11/08/99] |
| 11/5/99 | 62 | RESPONSE by petitioner re: respondent's notice of change of custody status [61-1] (vk) [Entry date 11/08/99] |
| 11/5/99 | 63 | AMENDED NOTICE by respondent INS of change of petitioner's custody status, and consolidation and expedition of appeals (vk) [Entry date 11/08/99] |

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-35976

KIM HO MA, PETITIONER-APPELLEE

*v.*

IMMIGRATION AND NATURALIZATION SERVICE;
JANET RENO, ATTORNEY GENERAL;
RICHARD C. SMITH, DISTRICT DIRECTOR,
RESPONDENTS-APPELLANTS

**DOCKET ENTRIES**

| DATE | ENTRY |
|---|---|
| | * * * * * |
| 10/6/99 | Filed Appellant INS, Appellant Janet Reno, Appellant Richard C. Smith emergency motion to stay further action. [99-35976] served on 10/6/99 (MOATT) (sf) [99-35976] |

| DATE | ENTRY |
|---|---|
| 10/7/99 | Filed Appellant INS, Appellant Janet Reno, Appellant Richard C. Smith emergency motion for a temporary stay pending this court's disposition of the emergency motion for a stay pending appeal; ; served on 10/6/99 (MOATT) (ft) [99-35976] |
| 10/7/99 | Filed order MOATT (J. C. WALLACE) the ct, on its own mtn, STAYS the DC's order releasing petitioner, Kim Ho Ma, pending full consideration of the emergency mtn for stay pending appeal filed on 10/6/99. (serve only per MOATT) [99-35976] (rc) [99-35976] |
| 10/8/99 | Filed Appellee Kim Ho Ma response in opposition to emergency motion staying further action [3768342-1] served on 10/7/99 (MOATT) [99-35976] (ft) [99-35976] |
| | * * * * * |
| 10/22/99 | Filed order (J.C. WALLACE, Edward LEAVY,): Aplts' emergency motion for a stay pending appeal is denied. Petitioner shall be released subject to appropriate conditions before 5:00 p.m. on Monday 10/25/99. (faxed to panel by N. Tompkins) [99-35976] (ft) [99-35976] |

| DATE | ENTRY |
|---|---|
| | * * * * * |
| 10/25/99 | Filed order (James R. Browning, J. C. WALLACE,): Respondent's emerg motion to stay petitioner's release pending the filing and consideration of an emerg motion for stay in the U.S. Sup Ct is denied. (phoned by N.Tompkins) [99-35976] (ft) [99-35976] |
| 10/25/99 | Filed Appellant INS in 99-35976, Appellant Janet Reno in 99-35976, Appellant Richard C. Smith in 99-35976 emergency motion for a stay of the court's release order pending the filing of an emergency stay motion with the U.S. Sup Court and pending the circuit Justice's consideration of that motion; served on 10/25/99 (MOATT) (ft) [99-35976] |
| | * * * * * |
| 11/29/99 | Filed original and 15 copies Appellant INS in 99-35976, Appellant Janet Reno in 99-35976, Appellant Richard C. Smith in 99-35976 opening brief (Informal: n) 53 pages and five excerpts of record in 2 volumes; served on 11/26/99 [99-35976] (ft) [99-35976] |

| DATE | ENTRY |
|---|---|
| | * * * * * |
| 12/30/99 | Filed Law Professors in 99-35976's motion to become amicus curiae in support of Aple. (PANEL); served on 12/30/99 [99-35976] (sf) [99-35976] |
| 12/30/99 | Received Amicus Law Professors in 99-35976's brief in 15 copies of 24 pages; deficient: motion pending to become amicus; served on NO POS. (PANEL) [99-35976] (sf) [99-35976] |
| 1/3/00 | Received orig. 15 copies Kim Ho Ma in 99-35976's brief of 76 pages; served on 12/27/99 deficient: oversized, motion & brief to PANEL [99-35976] (ft) [99-35976] |
| 1/3/00 | Filed Kim Ho Ma in 99-35976 motion to file oversized brief [99-35976] served on 12/27/99 [3821219] (brief & motion to panel) (ft) [99-35976] |

| DATE | ENTRY |
|---|---|
| 1/3/00 | Received Amicus National Association in 99-35976's brief in 15 copies of 29 pages; deficient: motion pending to become amicus; served on 12/30/99 Notified counsel. (PANEL) [99-35976] response to brief deficiency notice due 1/18/00; (sf) [99-35976] |
| 1/3/00 | Filed Amicus National Association in 99-35976's motion to become amicus curiae. (PANEL) [99-35976] served on 12/30/99 (sf) [99-35976] |
| 1/3/00 | Filed Human Rights Watch's motion to become amicus curiae. (PANEL); served on 12/30/99 [99-35976] (sf) [99-35976] |
| 1/3/00 | Received Amicus Human Rights Watch in 99-35976's brief in 15 copies of 29 pages; deficient: motion pending to become amicus; served on 12/30/99 Notified counsel. [99-35976] (sf) [99-35976] |
| 1/3/00 | Received Amicus ACLUF in 99-35976's brief in 15 copies of 30 pages; deficient: motion pending to Panel w/brief; served on 1/3/00 [99-35976] (ft) [99-35976] |

| DATE | ENTRY |
|---|---|
| 1/3/00 | Filed Amicus ACLUF motion for leave to file brief Amici Curiae of ACLUF; [99-35976] served on 1/3/00 [PANEL] (ft) [99-35976] |
| 1/5/00 | Filed Amicus FPD in 99-35976's motion for leave to file amicus curiae brief pursuant to Rule 29 FRAP; [99-35976] served on 12/30/99 [3821922] (PANEL) (ft) [99-35976] |
| 1/5/00 | Received Immigrants Rights Project's brief in 15 copies of 26 pages; deficient: motion to panel w/ brief; served on 1/3/00 [99-35976] (ft) [99-35976] |
| 1/5/00 | Filed Amicus Immigrants Rights in 99-35976's motion for leave to file proposed brief as amici curiae; and to file exhibits to proposed brief; [99-35976] served on 1/3/00 [Panel with brief] (ft) [99-35976] |
| | * * * * * |
| 1/6/00 | Received Petitioner's additional citations. (Panel) [99-35976] (hj) [99-35976] |

| DATE | ENTRY |
|---|---|
| 1/12/00 | Filed order (Deputy Clerk: GB) Petitioner's motion to file an oversize brief is granted. Petitioner's brief is ordered filed. The caption in the above case should be corrected to reflect the respondent as "Reno" in place of "INS." (phoned counsel; faxed to Panel) [99-35976] (hj) [99-35976] |
| 1/12/00 | Filed order (Deputy Clerk: GB) The motions of amici curiae Federal Public Defenders, Law Professors, National Association of Criminal Defense Lawyers, and Human Rights watch, et al. are hereby granted. The briefs received January 3, 2000 are ordered filed. The INS is hereby given fourteen days from the date of this order within which to respond. The INS' brief shall not exceed thirty pages in length. (phoned counsel; faxed to panel) [3821367-1] [3821342-1] [3821380-1] [3821922-1] [99-35976] (hj) [99-35976] |
| 1/12/00 | Filed original and 15 copies of National Association of Criminal Defense Lawyers 99- 35976's brief of 29 pages; served on 12/30/99. [99-35976] (hj) [99-35976] |

| DATE | ENTRY |
|---|---|
| 1/12/00 | Filed original and 15 copies Human Rights Watch, et al brief of 29 pages; served on 12/30/99. [99-35976] (hj) [99-35976] |
| 1/12/00 | Filed original and 15 copies appellee Kim Ho Ma in 99-35976's 76 pages brief w/ supplemental excerpts in 2 vols; served on 12/27/99 (Panel) [99-35976] (hj) [99-35976] |
| 1/12/00 | Filed original and 15 copies Law Professors in 99-35976's brief of 24 pages; served on 12/30/99. (PANEL) [99-35976] (hj) [99-35976] |
| 1/12/00 | Filed original and 15 copies of FPD's brief of 21 pages; served on 12/30/99. (PANEL-RECORDS) [99-35976] (hj) [99-35976] |
| | * * * * * |
| 1/18/00 | Filed original and 15 copies Respondents-Appellant's 99-35976 reply brief, (Informal: no) 30 pages; served on 1/10/00. (PANEL) [99-35976] (hj) [99-35976] |

| DATE | ENTRY |
|---|---|
| 1/19/00 | Filed order (Deputy Clerk: GB) The Motion filed by Attorney Jayashri Srikantiah to file an amici curiae brief on behalf of the ACLU-IRP, ACLU-WA, and NWIRP, is DENIED. The motion filed by Attorney Frank M. Tse to file an amici curiae brief on behalf of the organizations listed in his motion and in the proposed amici curiae brief, is GRANTED and that brief is ordered filed. Within fourteen (14) days of the filing of this order, the appellants may respond, in not to exceed thirty (30) pages, to the amici curiae brief filed by attorney Tse. (phoned counsel; faxed to panel) [99-35976] (hj) [99-35976] |
| 1/19/00 | Filed original and 15 copies's The Southeast Asia Resource Action Center, Immigration Rights and The Mount Carmel Cambodian Center et al., brief of 26 pages; served on 1/3/00. [99-35976] (hj) [99-35976] |
| | * * * * * |
| 1/31/00 | Received Appellant INS et al., brief in 15 copies 39 pages (Informal: no) deficient-motion pending: notified counsel. Served on 1/28/00. (sent Fed. Ex to PANEL) [99-35976] (hj) [99-35976] |

| DATE | ENTRY |
|---|---|
| 2/2/00 | Received FPD additional citations (PANEL) [99-35976] (hj) [99-35976] |
| | * * * * * |
| 2/4/00 | Filed original and 15 copies aplts' brief in reply to be the briefs of amici curiae of 39-pgs. (Informal: no) (PREVS RECVD) (See ct's order filed 2/4/00) [99-35976] (rc) [99-35976] |
| 2/7/00 | Received FPD in 99-35976 additional citations. (faxed to PANEL) [99-35976] (hj) [99-35976] |
| 2/14/00 | ARGUED AND SUBMITTED TO Stephen R. REINHARDT, David R. THOMPSON, Thomas G. NELSON [99-35976] (jmk) [99-35976] |
| 2/29/00 | FILED, AS OF , CERTIFIED RECORD ON APPEAL IN 1 RTs (orig) [99-35976] (mu) [99-35976] |
| 3/21/00 | Received Oil's additional citations. (PANEL) [99-35976] (hj) [99-35976] |
| 3/30/00 | Received Kim Ho Ma additional citations; served on 3/29/00. ("faxed" PANEL) [99-35976] (dl) [99-35976] |

| DATE | ENTRY |
|---|---|
| 4/10/00 | FILED OPINION: AFFIRMED. (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Stephen R. REINHARDT, author; David R. THOMPSON; Thomas G. NELSON) FILED AND ENTERED JUDGMENT. [99-35976] (rc) [99-35976] |
| 4/21/00 | [3896937] Filed original and 50 copies aplts' petition for rehearing with suggestion for rehearing en banc of 15-pgs; served on 4/21/00. (PANEL AND ALL ACTIVE JUDGES) [99-35976] (rc) [99-35976] |
| 4/21/00 | Filed aplt's mtn to expedite consideration of petition for rehearing and rehearing en banc and for vacatur of the panel's decision; served on 4/21/00. (PANEL) [99-35976] [3896944] [99-35976] (rc) [99-35976] |
| 4/27/00 | Filed order (Stephen Reinhardt, David R. THOMPSON, Thomas G. NELSON) The Government's motion to expedite is GRANTED. Appellee is directed to file a response, of 15 pages or less, to the Petition for Rehearing En Banc no later than seven days from the date of this order. (Phoned parties, Faxed panel 4:50 pm) [99-35976] (ca) [99-35976] |

| DATE | ENTRY |
|---|---|
| 5/2/00 | Filed Washington Legal, and Allied Educational mtn for leave to file brief as amici curiae in support of petition of respondents-aplts for expedited rehearing and rehearing en banc; served on 4/28/00. (PANEL ONLY) [3903956] [99-35976] (rc) [99-35976] |
| 5/2/00 | Received original and 50 copies, Amicus Washington Legal in 99-35976, Amicus Allied Educational in 99-35976's brief in support of petition of respondents-aplts for expedited rehearing and rehearing en banc of 8-pgs; served on 4/28/00; deficient: mtn pending with PANEL to become amicus. (PANEL ONLY) [99-35976] (rc) [99-35976] |
| 5/4/00 | Filed original and 50 copies of aple's response to aplts' petition for expedited rehearing and rehearing en banc of 15-pgs; served on 5/3/00. (PANEL AND ALL ACTIVE JUDGES) [3896937-1] [99-35976] (rc) [99-35976] |

| DATE | ENTRY |
|---|---|
| 5/12/00 | Filed Appellant's motion for leave to file Reply to petitioner's response to respondents' petition for expedited rehearing and rehearing en banc. (Panel) [99-35976] served on 5/11/00 [3909000] [99-35976] (kc) [99-35976] |
| 5/12/00 | Received Appellant's reply to petitioner's response to respondent's petition for expedited rehearing and rehearing en banc; served on 5/11/00. (Panel) [99-35976] (kc) [99-35976] |
| 5/16/00 | Filed Petitioner-Appellee's response to respondent-appellants motion for leave to file reply to petitioner-appellee's response to respondent-appellant's petition for expedited rehearing and rehearing en banc; served on 5/15/00. (PANEL) (ca) [99-35976] |
| 5/19/00 | Filed order (Stephen R. REINHARDT, David R. THOMPSON, Thomas G. NELSON,): The Attorney General's motion for leave to file a reply to the Petitioner's response to the Attorney General's petition for expedited rehearing and rehearing en banc is hereby denied. [99-35976] (ft) [99-35976] |

| DATE | ENTRY |
|---|---|
| 5/31/00 | Received certificate of record. [99-35976] (wp) [99-35976] |
| 6/2/00 | Filed order (Stephen R. REINHARDT, David R. THOMPSON, Thomas G. NELSON) The panel has voted to deny the petition for rehearing and petition for rehearing en banc. The full court was advised of the petition for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges is favor of en banc consideration. The petition for rehearing and the petition for rehearing en banv are DENIED. [99-35976] (ca) [99-35976] |
| 6/12/00 | MANDATE ISSUED [99-35976] (rc) [99-35976] |
| 7/11/00 | Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 00-38. filed on 7/5/00. [99-35976] (ca) [99-35976] |

| DATE | ENTRY |
|---|---|
| 10/16/00 | Received letter from the Supreme Court dated 10/10/00 re: the ct today entered the following order. The mtn of the Washington Legal Foundation, et al. for leave to file a brief as amicus curiae is GRANTED. The mtn of respondent Kim Ho Ma for leave to proceed ifp is GRANTED. The petition for a writ of cert. is GRANTED. The cases are consolidated and a total of one hour is allotted for oral argument. (FAXED TO PANEL) [99-35976] (rc) [99-35976] |

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE
FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Seattle, Washington

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File No.: A 27 365 395

IN THE MATTER OF
KIM HO MA, RESPONDENT

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**ORDER RE**
**REMOVAL PROCEEDINGS**

CHARGE: Section 237(a)(02)(A)(iii), I&N Act [8 U.S.C. Section 1227(a)(2)(A)(iii)] – aggravated felony

APPLICATION: Respondent's eligibility to apply for political asylum or withholding of deportation

| IN BEHALF OF RESPONDENT: | IN BEHALF OF INS: |
|---|---|
| Nicholas Marchi, Esq.<br>1301 Fifth Avenue,<br>Ste. 2804<br>Seattle, WA 98101 | Gregory Fehlings, Esq.<br>Deputy District Counsel<br>P.O. Box 3324<br>Seattle, WA 98114 |

**ORDER OF THE IMMIGRATION JUDGE**

Respondent was admitted to the United States at Seattle, Washington on or about April 26, 1985 as a refugee. His status was adjusted to that of a lawful

permanent resident as of April 26, 1985. (Exhibit 1) The Immigration and Naturalization Service (hereinafter "INS") issued a Notice to Appear (hereinafter "NTA") on July 3, 1997, charging Respondent in Removal proceedings pursuant to Section 237(a)(02)(A)(iii), with aggravated felony. (Exhibit 1)

On August 21, 1997, respondent, through counsel requested that the Court permit him to file for asylum or withholding of deportation. The Court opines that respondent is ineligible for the relief, however, has granted respondent's counsel until September 10, 1997 to file any additional documents or briefs. The INS was granted until September 16, 1997, to file a responsive brief. Respondent has yet to answer to the allegations and charges.

On September 4, 1997, respondent filed a Memorandum Defining 'Danger to Society' and Request for Relief. (Exhibit 2) On September 10, 1996, INS filed its memorandum contending that respondent is statutorily ineligible for a grant of asylum or withholding of deportation, because of his conviction for a particularly serious crime.

On March 1, 1996, the respondent was convicted in the State of Washington, for the offense of "Manslaughter in the First Degree." Respondent argues that he is eligible for withholding of deportation, despite his conviction, as respondent can demonstrate that he has rehabilitated and does not pose a threat to the community. Respondent was sentenced to 38 months in confinement. (Exhibit 1)

Based upon respondent's admissions as to the allegations in the NTA and the Additional Charges of Deportability, as well as respondent's conceding to his removability, and the Judgment and Sentence submitted by the INS (Exhibit 2), I find that removability has been established by clear, convincing and unequivocal evidence. *Woodby v. INS*, 385 U.S. 276 (1966). The Respondent failed to designate a country of removability, should that become necessary, therefore, this Court designates Cambodia, since that is the country of respondent's birth and nativity. The only issue before this Court is whether respondent is eligible for asylum and/or withholding of deportation.

Respondent contends that his conviction is an aggravated felony, but he is not a danger to the community. Respondent contends that he is eligible for asylum, because he has rehabilitated and does not pose a threat to the community. These arguments are without merit.

**STATEMENT OF LAW**

This case is similar to a recent case decided July 29, 1997, *In re L-S-J-*, Interim Decision #3322, (BIA 1997) wherein the Board of Immigration Appeals held that robbery with a gun is an aggravated felony and a particularly serious crime.

*In re L-S-J-*, *supra*, the applicant is excludable under sections 212(a)(2)(A)(i)(I), (A)(i)(II), and (7)(A)(i)(I), of the Immigration and Nationality Act, 8 U.S.C. {{1182(a)(2)(A)(i)(II), (A)(i)(II), and (7)(A)(i)(II) (1994). In that case, applicant's applications for asylum and withholding of deportation to Haiti under sections 208

and 243(h) of the Act, 8 U.S.C. {{1158 and 1253(h) (1994) were pretermitted. Applicant was ordered excluded and deported from the United States.

Respondent is a 20-year old native and citizen of Cambodia. The record establishes that the applicant was convicted on March 1, 1996, of Manslaughter in the First Degree and sentenced to 38 months in prison. (Exhibit 1)

According to the Amended Information filed October 31, 1995, respondent and two other Asian males, on April 23, 1995, with premeditated intent to cause the death of another person did cause the death of Oun Roo Chhay, a human being, who died on or about April 23, 1995. (Exhibit 2) Although respondent was at that time 17 years old, he was ordered to be tried as an adult. Respondent was found guilty after trial. Respondent and two other Asian males were involved in shooting at the victim, which subsequently lead to the victim's death.

Respondent was involved in gang activities. The victim was a member of the OLB (Oriental Lazy Boys), whereas respondent was a member of the LAB (Local Asian Boys). According to the Certification for Determination of Probable Cause (Exhibit 2), the victim was in a parking lot while respondent and the two other Asian males crept towards the victim and opened fire in the direction of the victim. Thus, this was a premeditated and planned killing.

There is no evidence that respondent has rehabilitated. According to the Defense Recommendation in the Defendant's Presentence Report, it is disclosed that

respondent should not have been tried as an adult. There is nothing in the report indicating that respondent has rehabilitated. The report only indicates respondent comes from a very good and responsible family. According to this report, respondent blames his problems on his witnessing of other violence and persecution in his home, Cambodia. The respondent has offered a letter from family members desiring to reunite with him. No letters from any probation officer have been presented. Even if, assuming arguendo, that respondent rehabilitated, his crime is a particularly serious crime and makes him ineligible for withholding of deportation or asylum.

The respondent's crime is now considered an aggravated felony under the revised definition of section 101(a)(43)(F) of the Act, because he has committed a crime of violence for which the term of imprisonment is at least 1 year.

Section 321(a)(3) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of the Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act for 1997, Pub. L. No. 104-208, 110 Stat. 3009, ____ (IIRIRA) (to be codified at 8 U.S.C. { 1101(a)(43)(F) of the Act). *See generally United States v. Gonzalez-Lopez*, 911 F.2d 542 (11th Cir. 1990), *cert. denied*, 500 U.S. 933 (1991) (defining a crime of violence). This revised definition applies to the pending case.

Section 321(c) of the IIRIRA, 110 Stat at ____; *see also Matter of A-A-*, 20 I&N Dec. 492 (BIA 1992); *Matter of U-M-*, 20 I&N Dec. 327 (BIA 1991), *aff'd*, 989 F.2d 1085 (9th Cir. 1993), *modified*, *Matter of C-*, 20

I&N Dec. 529 (BIA 1992). Under section 208(d) of the Act (now sections 208(b)(2)(A)(ii) and (B)(i) of the Act pursuant to section 604(a) of the IIRIRA, 110 Stat. at ____ (to be codified at 8 U.S.C. {{ 1158(b)(20(A)(ii) and (B)(i) (effective April 1, 1997), the applicant may not apply for or be granted asylum because of his conviction for an aggravated felony. *See Matter of A-A-*, *supra.*

The Immigration and Nationality Act was revised by section 413(f) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1269 (enacted April 24, 1996) (AEDPA), which states that the Attorney General may determine whether discretion to withhold deportation should be exercised in favor of any alien in order to comply with the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 26.

In the case of an alien convicted of an aggravated felony but not sentenced to at least 5 years in prison, the type of crime and the circumstances should be examined to determine whether the alien committed a particularly serious crime. *See Matter of O-T-M-T-*, Interim Decision 3300 (BIA 1996). Whether a crime is particularly serious depends on the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and whether the type and circumstances of the crime indicate that the alien will be in a danger to the community. *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982), *modified*, *Matter of C-*, *supra*, *Matter of Gonzalez*, 19 I&N Dec. 682 (BIA 1988).

The respondent was sentenced to 36 months in prison; he threatened violence with handgun against a victim who subsequently died from the gunshot wound. This Court concludes that the respondent has been convicted of a particularly serious crime. Therefore, his application for withholding of deportation is pretermitted. *See Matter of D-*, 20 I&N Dec. 827, 828 n.1 (BIA 1994); *Matter of Garcia-Garrocho*, 19 I&N Dec. 423 (BIA 1986), *modified on other grounds*, *Matter of Gonzalez*, *supra*; *Matter of Carballe*, 19 I&N Dec. 357 (BIA 1986), *modified on other grounds*, *Matter of Gonzalez*, *supra*.

Respondent is ineligible to apply for asylum, since he has been convicted of an aggravated felony. Respondent is also ineligible for withholding of deportation, since his crime is a particularly serious crime.

**ORDER**

IT IS ORDERED that respondent's application for asylum and withholding of deportation be pretermitted.

IT IS FURTHER ORDERED that the respondent be removed from the United States to Cambodia on the charges set forth in the Notice to Appear and the Additional Charges of Deportability.

DATE: Sept. 12, 1997

/s/ ANNA HO
ANNA HO
Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE
FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Seattle, Washington

File No.: A 27 365 395

IN THE MATTER OF
KIM HO MA, RESPONDENT

**ORDER RE**
**BOND REDETERMINATION**

CHARGE: Section 237(a)(02)(A)(iii), I&N Act [8 U.S.C. Section 1227(a)(2)(A)(iii)] – aggravated felony

APPLICATION: Bond Redetermination

| IN BEHALF OF RESPONDENT: | IN BEHALF OF INS: |
|---|---|
| Nicholas Marchi, Esq.<br>1301 Fifth Avenue,<br>Ste. 2804<br>Seattle, WA 98101 | Gregory Fehlings, Esq.<br>Deputy District Counsel<br>P.O. Box 3324<br>Seattle, WA 98114 |

**ORDER OF THE IMMIGRATION JUDGE**

Respondent was admitted to the United States at Seattle, Washington on or about April 26, 1985 as a refugee. His status was adjusted to that of a lawful permanent resident as of April 26, 1985. (Exhibit 1) The Immigration and Naturalization Service (here-

inafter "INS") issued a Notice to Appear (hereinafter "NTA") on July 3, 1997, charging Respondent in Removal proceedings pursuant to Section 237(a)(02)(A)(iii), with aggravated felony. (Exhibit 1)

On August 21, 1997, respondent, through counsel requested that the Court permit him to file for asylum or withholding of deportation. The Court opines that respondent is ineligible for the relief, however, has granted respondent's counsel until September 10, 1997 to file any additional documents or briefs. The INS was granted until September 16, 1997, to file a responsive brief. Respondent has yet to answer to the allegations and charges.

On September 4, 1997, respondent filed a Memorandum Defining 'Danger to Society' and Request for Relief. (Exhibit 2) On September 10, 1996, INS filed its memorandum contending that respondent is statutorily ineligible for a grant of asylum or withholding of deportation, because of his conviction for a particularly serious crime.

On March 1, 1996, the respondent was convicted in the State of Washington, for the offense of "Manslaughter in the First Degree." Respondent argues that he is eligible for withholding of deportation, despite his conviction, as respondent can demonstrate that he has rehabilitated and does not pose a threat to the community. Respondent was sentenced to 38 months in confinement. (Exhibit 1)

Based upon respondent's admissions as to the allegations in the NTA and the Additional Charges of Deportability, as well as respondent's conceding to his

removability, and the Judgment and Sentence submitted by the INS (Exhibit 2), I find that removability has been established by clear, convincing and unequivocal evidence. *Woodby v. INS*, 385 U.S. 276 (1966). The Respondent failed to designate a country of removability, should that become necessary, therefore, this Court designates Cambodia, since that is the country of respondent's birth and nativity.

**STATEMENT OF LAW**

An alien should not be detained or required to post bond unless there is a finding that he is a threat to the national security or a poor bail risk. *Matter of Spiliopoulos*, 16 I&N Dec. 561 (BIA 1978); *Matter of Patel*, 15 I&N Dec. 666 (BIA) 1976; *See Matter of Andrade*, 19 I&N Dec. 488 (BIA 1987). In determining the necessity for and the amount of a bond, such factors as a stable employment history, length of residence in the community, the existence of family ties, a record of nonappearance at court proceedings, and previous criminal or immigration law violations are properly considered. *See Matter of Andrade, supra; Matter of Sugay*, 17 I&N 637 (BIA 1981); *Matter of Shaw*, 17 I&N Dec. 177 (BIA 1979); *Matter of Spiliopoulos, supra; Matter of Patel, supra; Matter of San Martin*, 15 I&N Dec. 167 (BIA 1974); *See also O'Rouke v. Warden, Metropolitan Correction Center*, 539 F. Supp. 1131 (S.D.N.Y. 1982).

A respondent with a greater likelihood of being granted relief from deportation has a greater motivation to appear for a deportation proceedings than one who, based on a criminal record or otherwise, has less potential of being granted further relief. *See Matter of*

*Andrade, supra.* The mere risk of continued narcotics trafficking constitutes danger to safety of persons in the community. *In re Modesto Adalberto Melo-Pena*, A 36 557 334—Oakdale, Decided February 20, 1997 (BIA).

Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the Transitional Period Custody Rules under 309(b)(3)(B) are applicable. The Rule states in pertinent part as follows:

"(B) RELEASE. - The Attorney General may release the alien only if the alien is an alien described in subparagraph (A)(ii) or (A)(iii) and" (Note: (A)(iii) is aggravated felony)

> (i) the alien was lawfully admitted to the United States and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceedings, . . . ."

Therefore, this Court needs to reconsider the Bond in this case, since the respondent is a lawful permanent resident.

**ANALYSIS OF FACTS & LAW**

In this case, respondent has denied deportability due to the manslaughter in the first degree. The Court has received the certified copies of the judgment and sentence in this matter. The Court has entered an Order of Removal in this case. Specifically, this is a conviction for manslaughter in the first degree, an aggravated felony, and under the Antiterrorism and Effective Death Penalty Act, as well as Illegal Immi-

grant Reform and Immigrant Responsibility Act of 1996, respondent would not be entitled to any relief.

The Court balanced the charges against respondent with his ties to the community. Respondent has resided in this country as a Lawful Permanent Resident since April 26, 1985, approximately 12 years ago. Respondent has extensive family. Respondent has continuously worked in this country. Although respondent's conviction makes him a danger to the community, respondent is not a flight risk. Due to the nature of respondent's conviction, this Court finds that he would be a danger to the community. Therefore, no amount of bail would be able to guarantee the community's safety.

However, the offense of which he was convicted was manslaughter in the first degree. This Court holds that Manslaughter in the First Degree is a particularly serious crime. Furthermore, respondent would be a danger to the community if he is released. Therefore, bond is denied.

This Court has already ordered that respondent be removed from the United States by a previous order.

**ORDER**

The respondent shall remain in custody without bond, until he is removed from the United States, as ordered by this Court on September 12, 1997.

DATE: Oct. 7, 1997

/s/ ANNA HO
ANNA HO
Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE
FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Seattle, Washington

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File No.: A 27 365 395

IN THE MATTER OF
KIM HO MA, RESPONDENT

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**ORDER RE**
**BOND REDETERMINATION**

CHARGE: Section 237(a)(02)(A)(iii), I&N Act [8 U.S.C. Section 1227(a)(2)(A)(iii)] – aggravated felony

APPLICATION: Bond Redetermination

| IN BEHALF OF RESPONDENT: | IN BEHALF OF INS: |
|---|---|
| Kaaren L. Barr, Esq.<br>3811 Eastern Avenue North<br>Seattle, WA 98103 | Gregory Fehlings, Esq.<br>Deputy District Counsel<br>P.O. Box 3324<br>Seattle, WA 98114 |

**ORDER OF THE IMMIGRATION JUDGE**

Respondent was admitted to the United States at Seattle, Washington on or about April 26, 1985 as a refugee. His status was adjusted to that of a lawful

permanent resident as of April 26, 1985. (Exhibit 1) The Immigration and Naturalization Service (hereinafter "INS") issued a Notice to Appear (hereinafter "NTA") on July 3, 1997, charging Respondent in Removal proceedings pursuant to Section 237(a)(02)(A)(iii), with aggravated felony. (Exhibit 1)

On September 26, 1997, the Respondent, through previous counsel, Nicholas Marchi, filed a Motion to Reconsider or Clarify Decision. On October 8, 1997, this Court issued an Order Denying Respondent's Request to Redetermine Bond. In this same Court, this Court found respondent removable as charged in the Notice to Appear. On December 30, 1997, respondent, through new counsel, Kaaren L. Barr, filed a Request for Redetermination of Bond.

On March 1, 1996, the respondent was convicted in the State of Washington, for the offense of "Manslaughter in the First Degree." Respondent argues that he is eligible for withholding of deportation, despite his conviction, as respondent can demonstrate that he has rehabilitated and does not pose a threat to the community. Respondent was sentenced to 38 months in confinement. (Exhibit 1)

Based upon respondent's admissions as to the allegations in the NTA and the Additional Charges of Deportability, as well as respondent's conceding to his removability, and the Judgment and Sentence submitted by the INS (Exhibit 2), I find that removability has been established by clear, convincing and unequivocal evidence. *Woodby v. INS*, 385 U.S. 276 (1966). The Respondent failed to designate a country of removability, should that become necessary, therefore, this

Court designates Cambodia, since that is the country of respondent's birth and nativity.

**STATEMENT OF LAW**

An alien should not be detained or required to post bond unless there is a finding that he is a threat to the national security or a poor bail risk. *Matter of Spiliopoulos*, 16 I&N Dec. 561 (BIA 1978); *Matter of Patel*, 15 I&N Dec. 666 (BIA) 1976; *See Matter of Andrade*, 19 I&N Dec. 488 (BIA 1987). In determining the necessity for and the amount of a bond, such factors as a stable employment history, length of residence in the community, the existence of family ties, a record of nonappearance at court proceedings, and previous criminal or immigration law violations are properly considered. *See Matter of Andrade, supra; Matter of Sugay*, 17 I&N 637 (BIA 1981); *Matter of Shaw*, 17 I&N Dec. 177 (BIA 1979); *Matter of Spiliopoulos, supra; Matter of Patel, supra; Matter of San Martin*, 15 I&N Dec. 167 (BIA 1974); *See also O'Rouke v. Warden, Metropolitan Correction Center*, 539 F. Supp. 1131 (S.D.N.Y. 1982).

A respondent with a greater likelihood of being granted relief from deportation has a greater motivation to appear for a deportation proceedings than one who, based on a criminal record or otherwise, has less potential of being granted further relief. *See Matter of Andrade, supra.* The mere risk of continued narcotics trafficking constitutes danger to safety of persons in the community. *In re Modesto Adalberto Melo-Pena*, A 36 557 334 - Oakdale, Decided February 20, 1997 (BIA).

Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the Transitional

Period Custody Rules under 309(b)(3)(B) are applicable. The Rule states in pertinent part as follows:

"(B) RELEASE. - The Attorney General may release the alien only if the alien is an alien described in subparagraph (A)(ii) or (A)(iii) and" (Note: (A)(iii) is aggravated felony)

> (i) the alien was lawfully admitted to the United States and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceedings, . . . ."

Therefore, this Court needs to reconsider the Bond in this case, since the respondent is a lawful permanent resident.

**ANALYSIS OF FACTS & LAW**

In this case, respondent has denied removability due to the manslaughter in the first degree. The Court has received the certified copies of the judgment and sentence in this matter. The Court has entered an Order of Removal in this case. Specifically, this is a conviction for manslaughter in the first degree, an aggravated felony, and under the Antiterrorism and Effective Death Penalty Act, as well as Illegal Immigrant Reform and Immigrant Responsibility Act of 1996, respondent would not be entitled to any relief.

Respondent's new counsel, Kaaren L. Barr, submitted additional letter from the respondent and psychological report from the Washington Corrections Center in Shelton, Washington. (Exhibit 2) According to this information, respondent did not admit that he had anything to do with the crime of which he was convicted. According to this report, respondent states,

"There's nothing to talk about. I was charged with it [manslaughter]. I was there. I didn't know what was happening. I didn't have a gun. I didn't have nothing. I didn't know. I didn't say nothing in my trial." Obviously, respondent feels absolutely no remorse for what he has done.

Respondent denies any connection with gang involvement in the beginning of this report (Exhibit 2, Page 9). Later on, however, respondent stated, ". . . . his community is involved in gangs, and *one adapts to it.* [Emphasis added] . . . . one thing led to another the night of the offense . . . ."

The Psychologist, Carla van Dam, PhD, went on to summarize her impression of respondent as follows: "He (Respondent) exhibited little insight, denied any knowledge of the instant offense, and said he was not involved in any gang activity despite information to the contrary."

Respondent also denied that he abused drugs. However, during the evaluation, respondent stated as follows: "there's no past use. I've experiences with it. I don't abuse it." Respondent was drunk the night of the offense and had been using marijuana that same night.

It is more significant from the report of the Psychologist that respondent is a danger to the community. Respondent come from a good family, but respondent strayed from his family and got involved in drugs and gang activity. Respondent refuses to accept responsibility, although in his letter he finally admitted to his involvement in gang activities. Respondent was 17

when he committed the offense and he is now only 20 years old. There is nothing in the respondent's file to indicate that he has rehabilitated.

The Court balanced the charges against respondent with his ties to the community. Respondent has resided in this country as a Lawful Permanent Resident since April 26, 1985, approximately 12 years. Respondent has extensive family. Respondent has continuously worked in this country. Although respondent's conviction makes him a danger to the community, respondent is not a flight risk. Due to the nature of respondent's conviction, this Court finds that he would be a danger to the community. Therefore, no amount of bail would be able to guarantee the community's safety.

However, the offense of which he was convicted was manslaughter in the first degree. This Court holds that Manslaughter in the First Degree is a particularly serious crime. Furthermore, respondent would be a danger to the community if he is released. Therefore, bond is again denied.

This Court has already ordered that respondent be removed from the United States by a previous order.

**ORDER**

The respondent shall remain in custody without bond, until he is removed from the United States, as previously ordered by this Court.

DATE: Dec. 31, 1997

/s/ ANNA HO
ANNA HO
Immigration Judge

**U.S. Department of Justice**
Executive Office for
Immigration Review

**Decision of the Board of Immigration Appeals**

Falls Church, Virginia 22041

File: A27 365 395 – Seattle Date: OCT 26 1998

In re: KIM HO MA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Kaaren L. Barr, Esquire
3811 Eastern Avenue North
Seattle, Washington 98103

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)]—
Convicted of aggravated felony

APPLICATION: Asylum, withholding of removal

In an oral decision rendered on September 12, 1997, an Immigration Judge found the respondent to be subject to removal as charged, pretermitted his application for asylum and withhholding of removal, and

ordered him deported to Cambodia. The appeal will be dismissed.

## I. DEPORTABILITY

The respondent, a native and citizen of Cambodia, entered the United States as a refugee in 1985. His status was adjusted to that of a lawful permanent resident as of April 25, 1985.

The Immigration Judge properly admitted into evidence the record of conviction. *Matter of Madrigal*, Interim Decision 3274 (BIA 1996). The Second Amended Information shows that the respondent and three others were charged with murder in the first degree in Count One and murder in the second degree in Count Two in the State of Washington. The Information alleged that they caused the death of another person. The Judgment and Sentence report establishes that on March 1, 1996, in a court of the State of Washington, the respondent was convicted of Count One of manslaughter in the first degree in violation of section 9A.32.060(1) of the Revised Code of Washington. A person is guilty of manslaughter in the first degree under Washington law when he recklessly causes the death of another. The crime constitutes a felony. He was sentenced to confinement for 38 months.

We agree with the Immigration Judge that the respondent's crime constitutes a "crime of violence" under the recently amended definition of an aggravated felon in section 101(a)(43)(F) of the Act. 8 U.S.C. § 1101(a)(43)(F), which applies to this case. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, § 321, 110

Stat. 3009, 3009-586 ("IIRIRA"); *Matter of Yeung*, Interim Decision 3297 (BIA 1996) (attempted manslaughter is a crime of violence); *Matter of Alcantar*, 20 I&N Dec. 801 (BIA 1994) (definition of crime of violence). There is no evidence of a direct appeal of the conviction, so it is final for immigration purposes. *Matter of Gabryelsky*, 20 I&N Dec. 750, 752 (BIA 1993).

**II. WITHHOLDING OF REMOVAL**

The respondent is not eligible for most forms of relief from removal due to his conviction for an aggravated felony after his admission to the United States as a lawful permanent resident. *See* section 208 of the Act as amended by the IIRIRA § 604(a), 110 Stat. at 3009-586 (to be codified at 8 U.S.C. § 1158) (asylum); section 212(h) of the Act as amended by the IIRIRA § 348, 110 Stat. at 3009-586 (to be codified at 8 U.S.C. § 1182) (waiver of inadmissibility); section 240A of the Act as added by the IIRIRA § 304(a)(3), 110 Stat. at 3009-586 (to be codified at 8 U.S.C. § 1229b) (cancellation of removal); section 240B of the Act as added by the IIRIRA § 304(a)(3), 110 Stat. at 3009-586 (to be codified at 8 U.S.C. § 1229(c)) (voluntary departure).

1. Section 241(b)(3) of the Act.

In removal proceedings, section 241(b)(3)(A) of the Act specifies that there shall be a restriction on removal to a country where an alien's life or freedom would be threatened on account of race, religion, nationality, membership in a social group, or political

opinion.[1] Section 241(b)(3)(B) of the Act provides certain exceptions to the restriction. In the instant case, we are concerned with section 241(b)(3)(B)(ii) which states that an alien is ineligible for withholding if, "the alien, having been convicted of a particularly serious crime, is a danger to the community of the United States." The final paragraph of section 241(b)(3)(B) states that:

> For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of the sentence imposed, an alien has been convicted of a particularly serious crime. . . .

The final paragraph contains language which was not included in previous versions of the Act. Before interpreting this language, it is helpful to consider the history of the particularly serious crime bar and withholding of deportation.

2. Section 243(h) of the Act.

The statutory provision for withholding of deportation was found at section 243(h) of the Act (previously codified at 8 U.S.C. § 1253(h)).[2] It was initially specified

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[1] This provision was added by section 305(a) of the IIRIRA, 110 Stat. at 3009-586 (to be codified at 8 U.S.C. § 1231(b)(3)(A)).

[2] A more detailed history of section 243(h) of the Act is set forth in *Matter of O-T-M-T-*, Interim Decision 3300, at 9-12 (BIA 1996).

that withholding should be denied to an alien who, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States." *See* section 243(h)(2)(B) of the Act.

The Board addressed the question of what would be a "particularly serious crime" in *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982), *modified*, *Matter of C-*, 20 I&N Dec. 529 (BIA 1992); *Matter of Gonzalez*, 19 I&N Dec. 682 (BIA 1988). In *Matter of Frentescu*, the Board held that in judging the seriousness of a crime, we look to such factors as the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and most importantly, whether the type and circumstances of the crime indicate that the respondent is a danger to the community. *See id.* at 247. Further, we stated that crimes against persons are more likely to be categorized as particularly serious, but that there may be instances where crimes (or a crime) against the property will be considered to be particularly serious. *Id.* It was subsequently established that once an alien is found to have committed a particularly serious crime, there is no need for a separate determination to address whether the alien is a danger to the community. *See Matter of K-*, 20 I&N Dec. 418 (BIA 1991), *aff'd Kofa v. INS* , 60 F.3d 1084 (4th Cir. 1995); *see also Matter of O-T-M- T-*, Interim Decision 3300, at 11 (BIA 1996).

The Board also determined that certain crimes could be considered per se particularly serious, and therefore once the conviction was established, there was no need to proceed to an individualized examination of the crime. *See Matter of Frentescu*, *supra*, at 247. *See also*

*Hamama v. INS*, 78 F.3d 233, 240 (6th Cir. 1996) (recognizing the Board's practice of finding that some crimes are inherently particularly serious); *Ahmetovic v. INS*, 62 F.3d 48, 52 (2d Cir. 1995) (upholding a Board decision which found that first degree manslaughter was an inherently particularly serious crime). However, the Ninth Circuit Court of Appeals questioned this practice in *Beltran-Zavala v. INS*, 912 F.2d 1027 (9th Cir. 1990). In that case, the Court found that section 243(h)(2)(B) of the Act did not erect per se classifications of crimes precluding immigration and nationality benefits, and that the statutory language committed the Board to an analysis of the characteristics and circumstances of the alien's conviction. *See id.* at 1032.

Congress amended section 243(h)(2) of the Act through the Immigration Act of 1990. *See generally Matter of A-A-*, 20 I&N Dec. 492 (BIA 1992). Specifically, a final sentence was added to section 243(h)(2) which stated that aggravated felonies are to be considered particularly serious crimes for the purpose of section 243(h)(2). This addition eliminated the need for an individual analysis of the underlying facts and circumstances in any case which the conviction was for an aggravated felony. *See Matter of C-*, *supra*, *(modifying Matter of Frentescu* and its progeny in light of statutory amendment); *see also Urbina-Mauricio v. INS*, 989 F.2d 1085, 1088 (9th Cir. 1993) (stating that statutory amendment effectively overruled *Beltran-Zavala v. INS*, *supra*).

The next major change in the withholding law occurred with the passage of section 413(f) of the Antiterrorism and Effective Death Penalty Act of 1996,

Pub. L. No. 104-132, 110 Stat. 1214 (enacted April 24, 1996). The Board considered the effects of this provision on the aggravated felony bar in *Matter of O-T-M-T-*, *supra*. We concluded that an alien who has been convicted of an aggravated felony or felonies, and sentenced to at least 5 years of incarceration, is conclusively barred from withholding of deportation. However, an alien who was convicted of an aggravated felony or felonies, and sentenced to an aggregate of less than 5 years of incarceration, would be subject to a rebuttable presumption that he or she has been convicted of a particularly serious crime which would bar eligibility from withholding. The holding in *Matter of O-T-M-T-*, was intended to apply to cases which were initiated before April 1, 1997, and were not controlled by IIRIRA.

3. Section 241(b)(3)(B) of the Act

We now address the contents of current section 241(b)(3)(B)(ii) of the Act in conjunction with the final paragraph of section 241(b)(3)(B) of the Act. The plain language of the first sentence of the final paragraph makes it clear that an alien who has been convicted of an aggravated felony (or felonies), and sentenced to at least 5 years, is barred from withholding of removal. This creates an absolute bar. Therefore, once the aggravated felony conviction and length of sentence are found to trigger the bar, no further analysis of the conviction is necessary.

This leaves the question of what standards should be used for aliens, such as the respondent, who have been convicted of an aggravated felony (or felonies), and have been sentenced to less than 5 years. We find that

the *Frentescu* factors are still a viable framework for evaluating whether a crime is "particularly serious." We therefore will employ them in this case where a determination must be made as to the nature of the crime for the purpose of section 241(b)(3)(B) of the Act. This inquiry does not involve an examination of the respondent's family or community ties, or the risk of persecution in the alien's native country. *See Ramirez-Ramos v. INS*, 814 F.2d 1394, 1397-1398 (9th Cir. 1987). Further, we do not engage in a retrial of the alien's criminal case or go behind the record of conviction to redetermine the alien's innocence or guilt. *See Matter of O-T-M-T-*, *supra*, at 20. Our review of any testimony or other evidence beyond the official records of conviction will be very limited and will focus on the underlying nature and circumstances of the crime.

4. The Respondent's Conviction

Therefore, the Immigration Judge in this case properly cited *Matter of Frentescu*, *supra*, and its factors in determining whether the respondent had committed a particularly serious crime. She concluded that the respondent had been convicted of a particularly serious crime because he was sentenced to 36 months in prison and he threatened violence with a handgun against a victim who subsequently died from the gunshot wound.

The respondent contends that the Immigration Judge abused her discretion in holding that the respondent had been convicted of a "particularly serious crime," and thus, pretermitting his application for withholding of removal. Upon consideration of the relevant factors, the Board agrees with the Immigration Judge that the

respondent's conviction is for a particularly serious crime.

Looking first to the statute under which the respondent was convicted to determine the nature of the conviction, the respondent was found guilty as previously noted of first degree manslaughter by recklessly causing the death of another. This offense contrasts with the offense of second degree manslaughter which requires only criminal negligence in causing death. *See* West's RCWA 9A.32.060, 9A.32.070. Therefore, he acted with a higher degree of culpability in causing the death of another even though he committed the crime without specific intent. Furthermore, at the time of the conviction, his offense was classified a Class B felony, the second most serious type of felony out of three categories of felonies under Washington law.[3] The statute under which he was convicted indicates he was convicted of a particularly serious crime.

Looking to the respondent's Judgment and Sentence, we note that the maximum term of punishment provided for the offense was 10 years with a sentencing range applicable to the respondent of 31 to 41 months based on his criminal record of no prior convictions. *See* West's RCWA 9.94A.310, 9.94A.320, 9.94A.360 (sentencing guidelines). We acknowledge that he received less than the one-half of the maximum due to the absence of prior convictions, but we also note that he received almost the maximum sentence that could be

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[3] It is now classified a Class A felony, the most serious felony under Washington law. *See* RCWA 9A.20.10(1)(b) (classification); 9A.32.060 (first degree manslaughter); 9.94A.360(2) (indicating severity of categories of felonies).

ordered based on his criminal record, further indicating the seriousness of his crime.

The respondent asserts that he was only 17-years-old at the time of the commission of the crime and that he should have been tried as a juvenile where he would have received a sentence of less than 1 year. However, Washington law mandates 16 and 17-years-old be tried as adults if they committed first degree manslaughter (but not second degree manslaughter) because it is considered a serious violent offense. *See* West's RCWA 9.94A.030(31) (definition of serious violent offense); 13.04.030(e)(v)(A) (juvenile court jurisdiction). The State requirement that he be tried as an adult further indicates the particular seriousness of his crime.

The respondent further contends that the Immigration Judge committed error by considering facts contained in the documents charging the respondent with first degree murder as an adult rather than considering those facts contained in the documents relating to his conviction for first degree manslaughter. The respondent is referring to Second Amended Information and to the Certification For Determination of Probable Cause.

We find consideration of these documents by the Immigration Judge was appropriate in this case in determining the underlying circumstances of the respondent's crime. When the Judgment and Sentence and the Second Amended Information are considered together, they establish that the jury found him guilty under Count 1 of the lesser included crime of first degree manslaughter rather than first degree murder. The Immigration Judge was not prejudiced by her

awareness that he had been charged with a much more serious homicide. In addition, he did not challenge, either during the proceedings or on appeal, the essential facts recited in the probable cause affidavit. The probable cause affidavit is detailed in nature and sworn to by the prosecuting attorney. Moreover, the facts alleged in the probable cause affidavit are not inconsistent with his conviction for the less serious crime of first degree manslaughter. It was reasonable for the Immigration Judge to consider the probable cause affidavit in determining the underlying circumstances of the crime.

Considering the probable cause affidavit in the light most favorable to the respondent, it indicates that he was a part of a group of five gang members that ambushed and shot a fellow gang member who subsequently died. Even if he was not one of the two shooters, the nature of the conviction, the severity of the sentence, and the description of the crime establish that he was part of a group that planned to assault the victim with handguns. The jury found him to be culpable for the victim's death as the result of the ambush even if he did not pull the trigger or intend the victim to die. His conviction and sentence to confinement for more than 3 years reflects the seriousness of his participation in the commission of this violent crime. Crimes against persons are more likely to be categorized as particularly serious crimes. *Matter of Frentescu*, *supra*. Considering the totality of the circumstances of the crime, we agree with the Immigration Judge that his participation in a gang related violent ambush resulting in the death of victim constitutes a particularly serious crime and bars him from applying for withholding of removal. *Cf. Matter of L-S-J-*,

Interim Decision 3322 (BIA 1997) (alien convicted of armed robbery); *Matter of Carballe*, 19 I&N Dec. 357 (BIA 1986) (alien convicted of armed robbery).

The respondent contends that the Immigration Judge erred when she pretermitted his application for withholding of removal without making a specific finding that he is both convicted of a particularly serious crime and he is presently a danger to the community as required by the statute. However, as previously noted, a particularly serious crime is one that by its nature represents a danger to the community. *See Urbina-Mauricio v. INS*, *supra; Matter of K-*, *supra.*

The respondent contends that his constitutional right to due process was violated when he was ordered removed without an opportunity for relief from removal for having been convicted of a crime committed prior to his 18th birthday. We do not have the authority to consider constitutional challenges to the laws we administer. *See Matter of C-*, 20 I&N 529 (BIA 1992); *Matter of Anselmo*, 20 I&N Dec. 25, 30 (BIA 1989). Furthermore, we find that the Immigration Judge did not deny him a meaningful opportunity to be heard. *See Liu v. Waters*, 55 F.3d 421 (9th Cir. 1995) (the Board has authority to fix administratively correctable errors even when those errors are failures to follow due process).

In light of the foregoing, we enter the following order.

ORDER: The appeal is dismissed.

/*s*/ PAUL W. SCHMIDT
FOR THE BOARD

Notification of Review of Detention Status
At Seattle, WA

To: Kim Ho Ma

File: A27 365 395

You have been held in detention while the Immigration and Naturalization Service (INS) made arrangement for your deportation.

The law allows that INS keep you in detention until your deportation is carried out (8 CFR 241.4). However, if it appears that INS will encounter delays in making arrangements for your deportation that law also says that the District Director may allow your release at his discretion. Before he will consider your release he must be satisfied of two things. Those are

- That you will **not** pose a danger to the community if you are released, and
- That you **will** appear for all future proceedings, including an order to report back to this Service for deportation once arrangements are finalized.

In reaching a decision about those two things he must consider at least the following factors:

- The nature and seriousness of your criminal convictions;
- Other criminal history;
- Sentence(s) imposed and time actually served;
- History of failures to appear for court (defaults);
- Probation history;
- Disciplinary problems while incarcerated;

- Evidence of rehabilitative effort or recidivism;
- Equities in the United States; and
- Prior immigration violations and history.

As a part of this process you may present evidence proving that you will not be a danger to the community, and that you will appear as ordered in any future proceedings. If you are a criminal alien that evidence must be clear and convincing. If you have no criminal background the evidence must simply be satisfactory to the District Director.

An officer will meet with you soon to allow you the opportunity to make any oral statements you wish. Any evidence you wish to present must be in writing and submitted to that officer.

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Provided to the alien by (**hand**) (institution mail).

/s/ M. MELENDEZ — 4/13/99
Officer Signature — Date

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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NO. C 99-0151WD

KIM HO MA, PLAINTIFF

*vs.*

IMMIGRATION AND NATURALIZATION SERVICE,
DEFENDANT

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[Filed: Apr. 23, 1999]

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**AMENDED PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN FEDERAL CUSTODY PURSUANT TO 28 U.S.C. § 2241**

1. **Name and location of place of confinement:**[1]

King County Correctional Facility, Regional Justice Center Kent, 620 West James Street, Kent, Washington 98032, pursuant to a contractual arrangement with petitioner's custodian, the INS District Director at Seattle, Washington.

**2. Name and location of court causing confinement:**

INS District Director, Seattle, Washington

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[1] This petition substantially conforms to the Model Forms for petitions under 28 U.S.C. § 2241.

**3. Case Name and Number:** A 27 365 395

**4. Date of judgment and conviction:**

Placed in INS detention on June 6, 1997; petitioner was ordered deported in September of 1997; petitioner appealed his deportation order to the BIA, which denied his appeal in October of 1998.

**5. Sentencing Date:** N/A

**6. Sentencing:** N/A

**7. Sentencing Judge:** N/A

**8. Nature of offense or offenses for which you were convicted:** N/A

**9. What was your plea:** N/A

**10. Kind of trial:** N/A

**11. Did you testify at trial?** N/A

**12. Did you appeal from the judgment of conviction or sentence?** No.

**13. If you did appeal, list the court to which you appealed:**

**(a) Name of Court:**

**(b) Result:**

**(c) Date of Result:**

**14. Did you seek any further review?** N/A

**15. List the court(s) to which you sought further review?**

**(a) Name of Court:**

**(b) Nature of Review:**

**(c) Result:**

**(a) Name of Court:**

**(b) Nature of Review:**

**(c) Result:**

**16. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to your confinement in any court, state or federal?**

Subsequent to this petition, petitioner filed a Petition for Writ of Habeas Corpus by a Person in Federal Custody Pursuant to 28 U.S.C. §2241 (Case No. C99-0337C, U.S. Dist. Ct., W.D. Wa.)

**17. GROUNDS FOR RELIEF:**

**A.** Petitioner's indefinite detention by respondent INS is in violation of his rights to procedural and substantive due process, as guaranteed by the Fifth Amendment to the United States Constitution.

**B.** Because petitioner is seeking relief related only to his custody status, which is not inconsistent with an order of deportation, exhaustion of administrative remedies, if any, is not required.

C. Petitioner's detention is unconstitutional, because he is not a flight risk, and he does not present a danger to society.

**17a. Facts in support of grounds for relief as set forth in §17:**

**A.** Petitioner is subject to an order of deportation, *not* incarceration, however he is being deprived of personal liberty indefinitely because Cambodia, his native country, refuses to accept his return.

B. Petitioner has asked the Immigration Judge for release to community supervision, and has been denied bail three times. Petitioner went on a hunger strike to bring attention to his unlawful detention, but the INS did nothing.

Petitioner should not be required to exhaust administrative remedies (if any such remedies are actually available) relating to the underlying order for deportation in order to be released from his indefinite incarceration, which violates his constitutional rights.

C. Petitioner has many family members who would support him if he were released. He has a good job waiting for him and a place to live in a safe environment. Petitioner would make a positive contribution to society if he were released.

Although the INS is holding petitioner because it believes he is a danger to the community or a flight risk, or both, it is not giving him any access to educational, rehabilitative or vocational programs. Petitioner is therefore not being given any chance to prove his rehabilitation.

**D.** Petitioner filed the instant *pro se* petition on February 2, 1999. The Federal Public Defender's Office was appointed to represent Petitioner on April 22, 1999. As of today's date, counsel for Petitioner has not received the Administrative File (A-file) from Respondent.

Petitioner's claim that he is being detained unconstitutionally is the same claim raised by over fifty other petitioners presently seeking relief in this district. By Order of the District Court for the Western District of Washington, Petitioner's case will be heard before a "panel" of all five district court judges along with four other "lead" cases. Counsel for Petitioner intends to perform a comprehensive review of the Petitioner's A-file, as well as independently investigate the individual circumstances of Petitioner's claims, which Petitioner anticipates will disclose additional facts supporting the above-stated claims.

The Petitioner reserves the right to assert additional facts once Respondent provides counsel with his INS administrative file, and in rebuttal to facts alleged by the INS in its brief in this proceeding.

**18. Do you have any petition or appeal now pending in any court or administrative body as to the claims raised above?** No.

**19. Have you exhausted your administrative remedies with respect to the claims raised above?**

See 17(D), above.

**20. State the administrative remedies that you pursued?**

**(a) Nature of Review:**

**(b) Result:**

**(a) Nature of Review:**

**(b) Result:**

**(a) Nature of Review:**

**(b) Result:**

21. Give the name and addresses, if known, of each attorney who represented you in the following stages of the underlying judgment:

**(a) At preliminary hearing: N/A**

**(b) At arraignment and plea: N/A**

**(c) At change of plea: N/A**

**(d) At trial: N/A**

**(e) At sentencing: N/A**

**(f) On Appeal: N/A**

**(g) In any post-conviction proceedings: N/A**

**(h) On appeal from any adverse ruling in post conviction proceedings: N/A**

**(i) Other:**

**(j) Other:**

**22. Do you have any future sentence to serve after you complete the sentence imposed by the underlying judgment in your case?** No.

**23. If you are seeking leave to proceed in forma pauperis, have you completed the sworn affidavit setting forth the required information?** Yes.

**PRAYER FOR RELIEF**

Based upon the illegal and unconstitutional actions listed above, Petitioner requests that the Court grant his petition and direct respondent to release him from custody, as well as any other relief to which he may be entitled in this proceeding under 28 U.S.C. § 2241.

On information and belief, the foregoing information is true and correct.

Dated: April 23, 1999.

Respectfully submitted,

/s/ JAY STANSELL
JAY STANSELL
Assistant Federal Public Defender
Attorney for Petitioner Kim Ho Ma
Federal Public Defender
1111 Third Avenue, Suite 1100
Seattle, WA 98101
(206) 553-1100

[seal omitted] **U.S. Department of Justice**
Immigration and Naturalization Service
Western Region, Seattle Division

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Office of Detention & Deportation 815 Airport Way South
Seattle, WA 98134
(206) 553-5948/7915
Fax: (206) 553-2387

May 5, 1999

Consulate General of Cambodia
4500 16th Street NW
Washington, DC 20011

Dear Consul General:

Kim Ho MA, A27 365 395, a native and citizen of Cambodia, is in the custody of the Immigration and Naturalization Service. He is under removal proceedings, and has been ordered removed from the United States by the Immigration Judge. Therefore, it is respectfully requested that a travel document be issued to facilitate his return to Cambodia.

The attached are documents that your office requires. Your expeditious handling of this matter of mutual interest is greatly appreciated. We have included a return FedEx airbill and envelop for your convenience.

If additional information is needed, please call either Deportation Officer Michael A. Melendez or Richard McNees, at the numbers given above.

Thank you for your assistance in this matter.

Sincerely,

/s/ GEORGE L. MORONES
GEORGE L. MORONES
Assistant District Director,
Detention & Deportation

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

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Civil Action No. C 99-151L
INS # A27 365 395

KIM HO MA, PETITIONER,

*v.*

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES; THE IMMIGRATION AND
NATURALIZATION SERVICE; AND,
RICHARD C. SMITH, DISTRICT DIRECTOR OF THE INS,
SEATTLE DISTRICT OFFICE, RESPONDENT

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**DECLARATION OF PATRICK O'REILLY**

1. I am a Staff Officer, assigned to the Immigration and Naturalization Service, Field Operations Division, United States Department of Justice, Washington, D.C. I have been employed by the Service since 1971.

2. My present duties include development of policy and regulations relating to the enforcement of final orders of deportation and the removal of criminal aliens from the United States. In my current position I am personally familiar with inter- and intra- governmental efforts that have been undertaken to establish a procedure for the repatriation of persons who are citizens and nationals of the Cambodia and have been ordered excluded, deported, or removed from the United States.

3. I am aware that the petitioner in this matter has a petition for a writ of habeas corpus pending before the United States District Court for the Western District of Washington. This declaration will provide the District Court with evidence setting forth the current status of efforts to establish a protocol for obtaining travel documents for citizens of Cambodia who have been deported from the United States.

4. I am aware that the Service is detaining criminal aliens from Cambodia pending receipt of travel documents, and that the government of Cambodia has not honored requests from the Service for travel documents in most such cases. The Service is actively seeking to resolve this problem and establish a procedure to obtain travel documents for persons from Cambodia. In the meantime, all requests for travel documents are handled on a case-by-case basis through the Embassy's Consular Section.

5. The process of establishing such procedures for the return of persons who are citizens and nationals of Cambodia, however, is a sensitive and complicated matter for both governments. Cambodia, for example, like other countries, regulates travel and emigration of its citizens. It has, in recent years, cooperated with other governments with respect to both the resettlement abroad and the return of Cambodian nationals, e.g., the Orderly Departure Program (ODP).

6. It is the position of the United States that other countries, including Cambodia are required as a matter of international law to accept and repatriate their citizens who are excluded or expelled from this country

and who have not obtained another nationality in the interim.

7. Pending establishment of procedures for repatriation of nationals of Cambodia, criminal aliens can be considered for release from Service custody in accordance with the Immigration and Nationality Act (INA) and the regulations promulgated thereunder if the country of removal refuses repatriation.

8. Further, when an alien's removal from the United States has been delayed by the failure of the alien's own government to issue travel documents, such alien may seek admission to a third country. Additional removal countries are discussed generally in Section 241(b) of the INA.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed in Washington, D.C.

Dated: 5/20/99 /s/ PATRICK O'REILLY
PATRICK O'REILLY,
Staff Officer
Immigration and Naturalization Service
Department of Justice

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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Civil Action No. S-98-1299 WBS JFM
INS # A25197145
DJ# 39-11E-252

CHEA PHOENG, PETITIONER

v.

MR. THOMAS SCHILTGEN, DISTRICT DIRECTOR,
UNITED STATES IMMIGRATION AND
NATURALIZATION SERVICE, RESPONDENT

---

**DECLARATION OF PATRICK O'REILLY**

1. I am a Staff Officer, assigned to the Immigration and Naturalization Service, Field Operations Division, United States Department of Justice, Washington, D.C. I have been employed by the Service since 1971.

2. My present duties include development of policy and regulations relating to the enforcement of final orders of deportation and the removal of criminal aliens from the United States. In my current position I am personally familiar with inter-and intra- governmental efforts that have been undertaken to establish a procedure for the repatriation of persons who are citizens and nationals of the Cambodia and have been ordered excluded, deported, or removed from the United States.

3. I am aware that the petitioner in this matter has a petition for a writ of habeas corpus pending before the United States District Court for the Eastern District of

California. This declaration will provide the District Court with evidence setting forth the current status of efforts to establish a protocol for obtaining travel documents for citizens of Cambodia who have been deported from the United States.

4 I am aware that the Service is detaining criminal aliens from Cambodia pending receipt of travel documents, and that the government of Cambodia has not honored requests from the Service for travel documents. The Service is actively seeking to resolve this problem and establish a procedure to obtain travel documents for persons from Cambodia.

5. The process of establishing such procedures for the return of persons who are citizens and nationals of Cambodia, however, is a sensitive and complicated matter for both governments. Cambodia, for example, like other countries, regulates travel and emigration of its citizens. It has in recent years cooperated with other governments with respect to both the resettlement abroad and the return of Cambodian nationals, e.g., the Orderly Departure Program (ODP).

6. It is the position of the United States that other countries, including Cambodia, are required as a matter of international law to accept and repatriate their citizens who are excluded or expelled from this country and who have not obtained another nationality in the interim. The Department of Justice and Department of State are developing a strategy to strengthen the cooperation with the government of Cambodia which would be similar to the draft agreement currently being developed for the Republic of Vietnam.

7. Pending establishment of procedures for repatriation and nationals of Cambodia, criminal aliens can be considered for release from Service custody in accordance with the Immigration and Nationality Act (INA) and the regulations promulgated thereunder if the country of removal refuses repatriation.

8. Further, when an alien's removal from the United States has been delayed by the failure of the alien's own government to issue travel documents, such alien may seek admission to a third country. Additional removal countries are discussed generally in Section 241(b) of the INA.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed in Washington, D.C.

Dated: 11/18/98 /s/ PATRICK O'REILLY
PATRICK O'REILLY,
Staff Officer
Immigration and
Naturalization Service
Department of Justice

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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No. Civ. S-98-1299 WBS

CHEA PHOENG, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

---

DEPOSITION OF PATRICK O'REILLY

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[July 12, 1999]

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REPORTED BY: CHERREE P. GAGE
CSR No. 11108, RPR

* * * * *

[7] MR. BRODERICK: I would like to put on the record a stipulation of attorneys regarding objections and preservation of objections.

MR. KLINE: All objections are preserved for any future proceedings, save those as to form.

MR. BRODERICK: We agree. Now if you could administer the oath.

(Witness sworn.)

EXAMINATION BY MR. BRODERICK

Q Mr. O'Reilly, I'd like to start with Cambodia. Exhibit 1 is your November 18th, 1998, declaration filed in the case of Chea Phoeng versus the INS. In that declaration you state that the INS is, quote, actively, close quote, seeking to establish a procedure to obtain travel documents from Cambodia.

I wonder if you could tell us, what specifically was the INS doing? What were you referring to in that sentence? It's actually the last sentence of paragraph four.

A What the agency was—what the Immigration Service was attempting to do was to finalize our draft agreement that we had prepared for the Vietnam, Cambodian, Laotian countries, and we were processing it through internally in the Immigration Service at the time.

[8]

Q Now, with respect to Cambodia, was there a separate draft agreement from the one for Vietnam?

A No. The draft agreement for Vietnam started out to be a draft agreement for Vietnam. But as the Cambodian and Laotian government expressed a need for a draft agreement, we made a generic agreement, basically, which we figured would be utilized at a later date when we approached the various governments. This was back at the planning stage in 1996.

Q Now, with respect to some other acts, as of November 18th, 1998, had a representative of the INS met with the Cambodian Ambassador?

A No, they had not.

Q Had the United States been invited by Cambodia to submit a proposed repatriation agreement?

A Through correspondence the Cambodia Consulate, the Embassy in Washington, D.C., has expressed a need for a return agreement.

Q Now, I want to get on that. In fact, they had said —what you're referring to, I think, is—let's look at Exhibit 3, second paragraph. First line says, "The government of the United States of America and the Royal Government of Cambodia have not yet negotiated an agreement to cover the deportation and [9] return of former Cambodian citizens to Cambodia." This is signed by the 2nd Secretary and Consul. Is that what you're referring to?

A I'm referring to letters similar to this. This is more or less a format type of letter sent out by the Cambodian government when it responds to various inquiries to get travel documents. They always—the format usually states we haven't negotiated an agreement as of yet and they would not be issuing travel documents.

Q I'm not referring in my question to the fact there is no agreement, as this letter seems to indicate. What I'm asking is if the Cambodian Embassy has actually invited or requested the United States to submit a proposed repatriation agreement similar to what the Vietnam Ambassador did?

MR. KLINE: Object as to form. There's lack of foundation for the question.

Q BY MR. BRODERICK: Did you understand the question?

A I understood the question.

Q Okay. Go ahead and answer.

A I understood the question to say has there been a formal letter to the United States Immigration Service requesting negotiations for—is this what you're [10] asking?

Q Or oral. Oral or in writing.

A In writing, yes. This is a request telling us that they are waiting for us to negotiate an agreement. It's not a direct request to the Commissioner of the Immigration Service. This is a request saying we're waiting for the United States government to sit down with us and negotiate an agreement. This is what this paragraph tells me.

Q Let's look at Exhibit 15, for example. This will be 15. If we turn to page three of Exhibit 15, the second line—I'm sorry. The last sentence of paragraph number seven. It goes, "In May of this year representatives of the Service," meaning the INS, "met with SRV Ambassador Le Bang, who invited the United States to submit a proposed repatriation agreement for possible negotiation between the two states." Did this happen with Cambodia?

A No, it did not.

Q Now, has the State Department been asked to prepare a draft agreement for Cambodia?

A By who?

Q By the INS.

A No.

Q Do you know if accompanying Circular 175 [11] authority—do you know what that is?

A Yes.

Q Do you know if a memo with accompanying Circular 175 authority was prepared by the State Department?

A I became aware last month at a meeting with staff officials at the State Department, Department of Justice and the INS that this was in the process of being done as soon as—the draft agreement was being signed off by the Commissioner, the DAG's office and forwarded to the State Department.

Q There has been no 175 authority memo prepared as of this date to Cambodia?

MR. KLINE: I object.

Q BY MR. BRODERICK: Is it yes or no?

A To my knowledge, it has not been prepared.

Q Do you know if a draft agreement has been cleared within the State Department?

A What type of draft?

Q Draft agreement with respect to Cambodia and the repatriation of former Cambodian nationals?

A A draft agreement? We submitted a draft agreement to them. They have sent it back to us throughout this whole process over the last few years, and they now—at our meeting that we had last month, we agreed on the wording in the draft agreement. And [12] this is why it's at a point now we're waiting for the appropriate officials to sign off on it so the preparations can be made for negotiations.

Q Now, is this the draft agreement that will be presented to the Republic of Vietnam?

A It's the draft agreement which we're requesting to be presented to the Republic of Vietnam, Laotian government and the Cambodia government.

Q Do you know if the draft agreement that you're referring to has been cleared with other interested federal agencies besides INS?

A It has been cleared with the INS, Department of State and we're cleared in the sense of a verbal—once it's signed off by the DAG's office, we will sign off on it here. And those are the only three agencies that have been involved in it.

Q So it was never shown to the Department of International Trade or Department of Commerce?

A There was not a requirement for that.

Q Do you know if it was shown to them?

A No.

Q And you say the draft agreement has been presented to the INS General Counsel's Office?

A It's been signed off. Last time I checked, which left a week ago, it was signed off by the General [13] Counsel. I'll repeat myself. The meeting we had in June at the State Department, everybody was in agreement to the wording, it was a matter of tweaking a few things and having it sent over and signed off by the Commissioner.

My understanding is it's at the Executive Secretary's office and it will be sent to the Deputy Commissioner and the Commissioner, signed, and then to the DAG's for signature and Department of State.

Q Do you know if the supporting memorandum that accompanied the draft agreement has been signed off by the General Counsel's office?

A Yes, I do.

Q When was that?

A I became aware of it last month at the meeting.

Q What date last month?

A Mid-June. I mean, I don't recall the exact date.

Q That's okay. That's okay. Do you know if any State Department employee has requested the necessary negotiating authority from the Secretary of State? This is, again, Circular 175 authority.

A I was advised at the meeting last month by the legal counsel of the State Department that once the document was hand delivered to them with the appropriate signatures on them, that they would [14] request this.

Q So the answer is no State Department employee has requested the necessary negotiating authority from the Secretary State?

MR. KLINE: Object to form of question. That isn't what he said.

Q BY MR. BRODERICK: Can you answer the question?

A Once the draft agreement is received by the legal counsel, the State Department—from the DAG's office, it will be presented.

Q To the Secretary of State's office—Department of State? Excuse me.

A Yes.

Q So I will ask you again, has any – to your knowledge, has any State Department employee requested the necessary negotiating authority from the Secretary of State?

A They have been unable to because they haven't received the draft yet.

Q So is the answer to my question no?

A No, not at this time.

Q No, it's not, or, no, they haven't requested it?

A No, I have no knowledge of them requesting it.

Q So has the negotiating draft been submitted to Cambodia?

[15]

A No, it hasn't.

Q Do you know if Cambodia has reviewed any of the negotiating draft?

A To my knowledge, no.

Q Do you know if Cambodia has proposed time and venue for actual negotiations?

A No.

Q And I take it no agreement has been accepted by both sides, Cambodia and the United States?

A The United States has a draft agreement they're ready to go forward with.

Q Has any final agreement been accepted by the United States?

A As soon as the Commissioner and the DAG's office sign off on it, it will be a final agreement on the Department of State.

Q Has Cambodia accepted any final agreement?

A Cambodia hasn't been given the agreement. We haven't gone into negotiations yet.

Q Has the United States signed any agreement with Cambodia?

A No, they have not.

Q Has any agreement been implemented with Cambodia?

A No, it has not.

MR. KLINE: Object as to the question. Vague and [16] ambiguous as to what agreement you're speaking of there.

MR. BRODERICK: I'm talking about the agreement—

Q You understand the agreement I'm talking about?

A I'm hoping it's the agreement I've been working on.

Q The one you referred to in a draft agreement?

A Correct.

MR. KLINE: Please don't hope and don't assume.

Q BY MR. BRODERICK: You signed a declaration May 20th, 1999. That's Exhibit No. 2. That also indicates that the INS is actively seeking to obtain travel documents from Cambodia. Was there anything different or anything new that happened between November 1998 and May 20th, 1999. Anything different than what you just explained?

A No.

Q Today's July the 12th, 1999. Again, is there anything different between now and what you just explained, except for meeting in June?

MR. KLINE: Objection. He explained more than just meeting in June.

Q BY MR. BRODERICK: Well, I just want to know if there's anything else besides the meeting in June?

[17]

A As far as I know, the draft agreement has not been—has not left the INS as of yet. It's at the Exec Sec's office waiting to be given to the Deputy Commissioner.

Q Now, turning back to Exhibit No. 1, page two, paragraph five. You indicate in the last sentence of that paragraph, you mention the Orderly Departure Program, ODP, and you indicate that Cambodia has "cooperated with other governments with respect to both the resettlement abroad and the return of Cambodian nationals."

By "other governments" did you mean not the United States government?

A Yes, sir.

Q In your paragraph six of that same declaration you state that the Department of Justice—again, last sentence, "The Department of Justice and Department of State are," quote, "developing a strategy to strengthen the cooperation with the government of Cambodia."

Prior to November 18th, 1998, when was the last meeting on this issue between the Department of Justice and Department of State?

A There were—

MR. KLINE: If you know.

[18] THE WITNESS: I don't know the exact dates. There were many follow-up meetings and meetings with the Department of State, with the Office of International Affairs, INS General Counsel regarding the whole process.

Q BY MR. BRODERICK: How many is "many," less than five?

A I'd say more than five.

Q Less than ten?

A Yes.

Q When was the last one in relation to November that you can recall?

MR. KLINE: Objection. Vague and ambiguous question.

Q BY MR. BRODERICK: When was the last one prior to November 18th, 1998?

A I don't recall.

Q Between November 1998 and may the 20th 1999, how many meetings were there?

A There were no meetings.

Q In between May '99 and today, July 12th, 1999, how many meetings?

A There was one meeting.

Q And that was in June?

A That's correct.

[19]

Q You indicated that there were many, quote, follow-up meetings. What were you referring to when you said "follow-up"?

A CC mails—well, all right. Meetings. If we submitted a—if there was some question on the draft, if they wanted additional information or clarification or they felt this was no need to be in the draft agreement, those were the follow-up meetings we discussed on issues like that.

A lot of times they would be telephonic, face-to-face, writing things, stuff like that. It involved the General Counsel's office, it involved Department of State, it involved International Affairs, it involved the Program and Field Operations. You had many different entities involved in the various meetings.

Q Okay. If we look at Exhibit 1, paragraph six, the last sentence again, "The Department of Justice and Department of State are developing a strategy to strengthen the cooperation with the government of Cambodia which would be similar to the draft agreement currently being developed for the Republic of Vietnam."

Now, in that paragraph you don't indicate that the draft agreement would refer to all three [20] countries; is that correct?

A No, I don't.

Q When did that change?

A When did it change?

Q When did the draft agreement become a draft agreement for the all three countries?

A It was part of a strategy that we had spoken about through the years of using this. We had found out that the various countries involved here wanted agreements, wanted removal type of return agreements set up with their country. This was always in the back of our mind when we were developing this whole thing.

Q Who's "we"?

A The INS Field Operations.

Q And who is that specifically in terms of persons?

A Myself, Robert Obenshane (phonetic) and possibly one or two other persons involved. But myself and Mr. Obenshane were the two ones that wrote the agreement.

Q Now, if you look at that sentence and then turn to Exhibit No. 2 and look at, again, paragraph six, same paragraph, that sentence is not there in paragraph six. Do you know why?

MR. KLINE: Do you understand the question?

THE WITNESS: No.

[21]

Q BY MR. BRODERICK: Well, let me make it clear. Paragraph six of Exhibit 1, the last sentence is there. Do you see it?

A Okay. Yeah.

Q Paragraph six, Exhibit No. 2, it's not there. Why?

A Because we had already developed a strategy. The draft was already finalized. It had been sent to the General Counsel's office. As far as my involvement in the whole process was done with, and at that point in time in '98 through '99 I was just making call ups of about every 60 days to find if out what the status was of the actual document itself and how it was moving along through the General Counsel's chain of management. And—I mean, the strategy was done, as far as I was concerned. We weren't developing it anymore.

Q So as of May 20th, 1999, it was done?

A May or June, yeah. Around May.

Q Well, the declaration was May 20th, 1999.

A Then it was May.

Q Any earlier than that?

A No.

Q Now, again, Exhibit 2, paragraph number four, it states, "All requests for travel documents are handled [22] on a case-by-case basis through the Embassy's Consular Section." I apologize for the copy on—

A That's fine.

Q That's the only copy we have.

A I wrote it, so I remember what it says.

Q Do you mean handled by the INS on a case-by-case basis, is that what you were referring to?

A I'll give you a little background on it. The actual process itself when you receive a final order on a case, what you'll do is the district office responsible for the case, the deportation section of the investigation, depending on who was handling it, would request a travel document through the local consulate. Due to the fact these three countries were small and didn't have local consulate sections, they would request through the embassy. They would send a presentation request to issue a travel document for this person from the district level, and that's what I was referring to when I wrote that.

Q So we are referring to handled by the INS on a case-by-case basis?

A Yes.

Q Now if you could look at Exhibit No. 3 again, that's a letter from the Cambodian Embassy. And I think you indicated previously that you have seen [23] several letters like this?

A Uh-huh.

Q Is that correct?

A Yes. I've seen letters that have the same substance.

Q Could you read aloud the first line of the second paragraph.

A "The government of the United States of America and the Royal Government of Cambodia have not yet negotiated an agreement to cover the deportation and return of former Cambodian citizens to Cambodia."

Q Now, as you understand it, does that appear to be a policy statement applicable to all cases?

A It's a statement. I don't know if it's a policy statement.

Q Does it appear that the Cambodian to you—does it appear to you—from the statement does it appear that the Cambodian government is reviewing each case on a case-by-case basis?

A Not to me. It appears to me that they are blanketly denying the request for travel documents until there is actually an agreement negotiated between the two governments. That's my interpretation of this, my personal intrepretation.

Q Right. If a request were made for travel [24] documents in an individual case and it received a response such as this in writing, would that request and the response go in the individual detainee's INS A file?

A Yes.

Q So if no request or response was made –

MR. KLINE: Excuse us.

MR. BRODERICK: Let the record indicate that Richard Cohen, also staff attorney for the Federal Defender's Office of the Eastern District of California, just walked in. Richard, you can figure out who everybody is later.

Q BY MR. BRODERICK: So if the request or the response is not in an individual's A file, does that

indicate that either no request or no response was received?

MR. KLINE: Object to the question. "No request or response was received"?

Q BY MR. BRODERICK: Sorry. No request was made or no response received?

A I can't answer that honestly. I don't know.

Q Do you know if they're supposed to go in the A file if they're made or received?

A I would—from my experience of working in various field offices, I would place that in the [24] particular A file. Okay? If it's not in there, to me, if I was reviewing the file, I would request whether there was a request made, but I can't say whether it was or not. I don't know what the—maybe one district might be doing it differently. I have no idea.

Q Are you aware of any situations in your personal experience in which request was made in writing or a response received in writing and not placed in the A file?

A To my knowledge, no.

Q Now, in Exhibit No. 2, returning back to Exhibit 2, paragraph four, again, this is a declaration of Patrick O'Reilly made on May the 20th, 1999, and filed in the Western District of Washington.

If you look at paragraph number four and the first sentence, probably about the third line, you state that "The government of Cambodia has not honored

requests from the Service for travel documents in," quote, "most such cases."

Now, are you aware of Cambodia honoring any requests from the INS for travel documents for detained aliens?

A From the United States?

Q From the United States? Detained aliens from [26] the United States.

A Yes.

Q How many?

A One that I'm personally aware of.

Q When was that?

A 1997

Q And who was that individual?

A I don't have the name. I have the copy of it at my office.

Q And did that person have either exit or passport papers from the Cambodian government? Is it he or she?

A It was a family, as a matter of fact.

Q Now, we have a declaration of you regarding a Laotian family.

A I also had a Cambodian family, too.

Q How many members of the family?

A I think it was a man, wife and child, two children.

Q And did this family exit Cambodia with either a passport or—

A They had a passport.

Q So they had a Cambodian passport?

A They had a travel document, correct.

Q So are you aware of any other cases in which [27] someone who did not have a travel document, where the Cambodian government honored a request?

A To my knowledge of any cases that were brought forth to me for assistance, no.

Q And you're the person in charge of this?

A In charge of what?

Q You're the person who develops policy and regulations relating to the enforcement of final orders of deportation and the removal of criminal aliens from the United States?

A Yes, I develop policies. I don't handle cases nationwide.

Q So why did you use the word "most" in this declaration?

A "Most" where?

Q That line, "in most such cases."

A Well, "most" is the fact that they honored one request that I was aware of, that's why I used the word. It wasn't they weren't honoring any.

Q But you indicated that these people that were from Cambodia had travel documents?

A I just indicated that to you now, they had expired travel documents. They had overstayed their visas. They were illegal in the country.

Q This refers to honoring requests from the Service [28] for travel documents in most such cases. Is there a difference?

A I made a request to the—I was representing the Service when I made the request of the Cambodian Embassy to renew the expired passport for these people, and I'm the one that received it.

Q Why didn't you indicate in your declaration that it involved one family?

A I just didn't. I didn't. It was one family that I personally was aware of that I was personally involved with.

Q Why didn't you indicate in your declaration that this family had actually had proper travel documents to leave Cambodia.

A I didn't see it—I didn't see a need for it.

Q In your declaration with respect to Laos, and I believe it is Exhibit No. 8 and exhibit—Exhibit No. 8, yes. I'm sorry. Exhibit No. 7. I'm sorry, Exhibit No. 7.

Exhibit No. 7, page two, paragraph four. You indicate in the last sentence that, "The Laotian government has issued documents in the last two years for a Laotian family who left the People's Republic of Laos with an exit visa and passport, but it has not issued travel documents for those who left without a [29] passport and exit visas."

You did not state those with respect to Cambodia, did you?

A No, I did not. It wasn't on my mind. I remembered it was done when I did this document. When I did the document on the Cambodia, it was done on 5-20-99. A couple years passed and it wasn't on my mind, so I didn't put it in the declaration. Had I remembered this, I would have placed it in the declaration.

Q So when you completed the declaration on Exhibit 7, 4-28-99, did that refresh your recollection of what happened with the Cambodian individuals? In other words, did you remember the Cambodia case at that point?

A No.

Q So when did you first remember this about the Cambodian family?

A Upon reviewing files that I have in my office to see what the status was of various cases that have been processed through there.

Q And what date was that?

A That I reviewed the files?

Q Uh-huh.

A I would say during the time I was making out the [30] declaration.

MR. KLINE: I'm going to object to this line of questioning. The whole premise is he says on paragraph four in Exhibit 2 that "The government of Cambodia has not honored requests from the Service for travel documents in most such cases."

Somehow or other Mr. Broderick has taken "most such cases," compared it to a Laotian declaration and wondered why it is the declarant has managed to leave out many further thoughts in this particular paragraph. And I think that the question is unfair and argumentative.

MR. BRODERICK: Objection noted.

Q Did you think that in using the word "most" someone could be misled into thinking that there was more than one request?

A Definitely not.

Q But let's go back to Exhibit No. 1 and Exhibit No. 2. You indicate—take your pick. Let's take Exhibit No. 1.

A Sure. You take your pick.

Q And that will go to paragraph eight. You indicate that "Such alien may seek admission to a third country." Are you aware of any third countries who have accepted criminal INS aliens from deportation [31] from Cambodia?

A No, I am not.

Q Why did you put it in there?

A It's an option to the alien at the removal hearing. The alien can request to go a third country, a former residence or possible citizenship. That's an option open to the alien. That's why I placed it in there.

Q Is there anything that the alien can do, other than indicate a country to obtain travel documents from a third nation, that the United States government cannot do?

A I don't understand your question.

Q In other words, the Service is attempting to get agreement to get travel documents from Cambodia. And the Service, according to you, has been meeting and has developed a strategy, correct?

A Yes.

Q And the Service hopes to put together a draft agreement that will eventually be presented to the Cambodia government, correct?

A The Service has a draft agreement that they hope to present to the Cambodian government, correct.

Q Is there anything that the individual alien can do to get these travel documents that the United [32] States government is not or cannot do?

A Yes.

Q What?

A Apply for it.

Q And who does he apply to?

A The Cambodian Embassy in Washington, D.C.

Q And if he applies to the Cambodian Embassy and receives a response similar to Exhibit No. 3, is there anything else that that individual can do?

MR. KLINE: Objection. Calls for speculation. And lack of foundation that any alien has applied to the Cambodian Embassy and received a response similar to Exhibit No. 3.

MR. BRODERICK: Fine.

Q Do you understand my question? Is there anything else the alien can do if they get a response like this?

MR. KLINE: Same objection.

MR. BRODERICK: Let me make it easier.

Q In light of the response, particularly the first sentence to the paragraph, is there anything the alien can do?

A Reapply.

Q Anything else?

MR. KLINE: I still object to the question. I [33] mean, there's no showing that any individual alien—

THE WITNESS: Reapply.

MR. KLINE: Stop.—that any individual alien has ever applied to the Cambodian government and gotten a letter back that says "The government of the United States of America and the Royal Government of Cambodia have not yet negotiated an agreement to cover the deportation and return of former Cambodian citizens to Cambodia."

MR. BRODERICK: Objection noted.

Q Anything else they can do?

A Yes. Reapply.

Q Anything else?

A Reapply.

Q So the only thing they can continue to do is reapply.

A Yes.

Q Are you aware of any change in the Cambodian government's position in the last 10 years?

A I have never really looked into it as far as what their policies are as far as have they changed in—as far as what I know personally is that we have requested travel documents for individual cases through district offices, they have turned us down based on the fact they want a draft agreement.

[34] Any other policy that they have or any other type of way of negotiating or way of getting travel documents I am unaware of.

Q So based upon Exhibit No. 3 and the statement in that letter, as well as the policy that you've indicated, would it be futile for an alien to apply individually to the Embassy?

A I don't see why they wouldn't.

Q My question is, do you think it would be futile? Do you know what that means?

A No. Explain it to me.

Q Would it be ineffective? Would they be unable to obtain travel documents by simply applying to the Embassy?

A I don't know.

Q Do you have an opinion?

A No.

Q Under oath, no opinion?

A I don't have an opinion. I think if they apply for a document, they should try.

Q You have no opinion about whether or not they would receive a response similar in kind to Exhibit No. 3.

A I can only—yeah, I would have an opinion.

MR. KLINE: Don't speculate.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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No. CIV S-98-1552 LKK JFM P

HUNG VAN LE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

---

PETITION FOR WRIT OF HABEAS CORPUS

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**DECLARATION OF JAMES G. HERGEN**

I, JAMES G. HERGEN, declare as follows:

1. I am the Assistant Legal Adviser for East Asian and Pacific Affairs, Office of the Legal Adviser, United States Department of State, Washington, D.C. 20520, a position that I have held since 1992. Prior to that time, I occupied the position of Assistant Legal Adviser for Consular Affairs, since 1983. From 1974-1982, I was a Trial Attorney in the Office of Foreign Litigation, Civil Division, United States Department of Justice. I am a member in good standing of the District of Columbia Bar.

2. My duties as Assistant Legal Adviser for Consular Affairs related in substantial part to the enforcement and administration of the immigration and nationality laws of the United States, including the admission of

aliens to and, as appropriate, their removal from the United States. Such duties included occasional communications with foreign states, including the Socialist Republic of Vietnam ("SRV") to persuade them to accept back their nationals or former nationals.

3. My current duties include responsibility for diverse legal issues that affect U.S. relations with East Asia (including Vietnam, Laos, and Cambodia) and the South Pacific region. I am personally familiar with, and have been a participant in, many of the efforts that have been undertaken by the U.S. government over the past decade to encourage the SRV to accept back its nationals who have been ordered excluded, deported, or removed from the U.S.

4. I am aware that the petitioner in this matter has filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of California. The purpose of this declaration is to provide the court with information regarding the current status of U.S. efforts to negotiate an agreement with the SRV for the repatriation of its nationals and former nationals who have been so ordered excluded, deported, or removed from the U.S. (I have authorized the Department of Justice to use this declaration in connection with other, similar litigation.)

5. This declaration is based solely and exclusively upon information that is known to me in the course and scope of the performance of my official duties.

6. Shortly after assuming my current position in the early 1990's, I visited the SRV Mission to the United Nations ("U.N.") in New York, inter alia to attempt to persuade the SRV to accept back certain of its deport-

able nationals. The SRV's Permanent Representative to the U.N. ("Permrep") listened politely to our presentation (which was made on behalf of the Immigration and Naturalization Service, "INS"), but expressed regret that there was not very much he could do in the absence of relations between the U.S. and Vietnam. (Although I did not attend subsequent meetings with the SRV Permrep, I recall having "cleared" several sets of "talking points" on the repatriation subject for subsequent visits to the SRV Permrep by other Department of State officials.)

7. I was personally and substantially involved in the planning and execution of the U.S. decisions to end the U.S. trade embargo against the SRV (February 1994); to establish "liaison offices" (January 1995); and, to establish diplomatic relations with the SRV (July 12, 1995).

8. My current recollection is that, shortly after the opening of "liaison offices" and the establishment of diplomatic relations, the Department of State invited the SRV Embassy to send representatives to attend a meeting at the Department of State with officials of the INS for the purpose of exploring options for the repatriation of SRV nationals. According to my current recollection, I made a brief presentation to the SRV officials concerning state obligations under international law with respect to their nationals, and INS made a presentation regarding the numbers of SRV nationals whom it wished the SRV to accept, and the modalities with respect to such returns. The SRV officials listened politely, but were noncommittal, and explained that they would have to transmit the INS's information to the appropriate authorities in Hanoi for further analy-

sis. I believe that there may have been at least one follow-up meeting some time later, but that this meeting was also inconclusive. I am aware that in 1997 the Department of State had consulted with SRV Charge Thong concerning this subject, and that Charge Thong had expressed a willingness to negotiate some form of accord with the U.S. There may well also have been other formal and informal discussions with the SRV on this subject concerning which I was unaware. I can also say with a high degree of confidence that the SRV was aware that this was a serious bilateral issue for the U.S., and that we incorporated the subject into our ongoing, official discussions with Vietnamese authorities between 1993 and 1998.

9. According to my current recollection, INS representatives approached the Department of State at some point in late 1997 or early 1998 to request that we again approach the SRV regarding the repatriation issue. After consulting with the Vietnam Desk, I informed the INS that the Department of State would be happy to comply with their request, and I recommended that we propose to the SRV that our two countries enter a formal international agreement on this subject. In the interests of time, however, INS suggested that we first propose to the SRV the negotiation of a working-level memorandum of understanding between INS and the SRV's INS counterpart organization.

10. In compliance with the INS's request, Department of State officers escorted INS representatives to the SRV Embassy in Washington, D.C., on or about April 13, 1998, for the purpose of making their proposal for a memorandum of understanding directly to SRV

Ambassador Le Bang. Ambassador Bang received the INS delegation, listened politely to their proposal, and explained that his country would only consider a more formal international agreement.

11. At the request of the INS, I promptly drafted a proposed U.S.-SRV repatriation agreement for INS consideration (based upon an earlier, INS-drafted version), together with appropriate documentation to obtain negotiating authority under the Case-Zablocki Act, 1 U.S.C. 112(b), and Department of State Circular 175 (11 Foreign Affairs manual Part 720). These materials were circulated for appropriate clearances within the federal interagency process in about June, 1998.

12. Between June, 1998, and this month, there were a number of communications among the Department of State, the Department of Justice, and the INS regarding the proposed agreement with the SRV. On or about July 15, I received final comments and clearances from the Department of Justice and INS, and immediately arranged to have the authorization package transmitted to the Deputy Secretary of State, who approved the negotiation on July 19. In addition to the SRV, the authority also permits the negotiation of similar agreements with Cambodia and Laos, should that be appropriate. (Note: The draft U.S.-SRV agreement and the accompanying authorization documents are classified as national security information, at the "Confidential" level, under sections 1.5(b) and (d) of E.O. No. 12958).

13. Depending upon scheduling considerations for U.S. and SRV officials, and possible consultations with appropriate congressional staff, we currently anticipate presenting the proposed repatriation agreement to the

SRV Embassy in Washington, D.C., within the next thirty (30) days, together with a request to hold initial bilateral negotiations as soon thereafter as may be mutually convenient. Since we now have authority to negotiate similar agreements with Cambodia and Laos, we can initiate initiatives with those states as well as the SRV, and I have recommended that we do so promptly.

14. Because of the very nature of such negotiations, it is not possible to predict when they may conclude. However, I can state that, based upon the fact that the SRV has recently entered into a repatriation agreement with Canada; the general state of U.S.-SRV relations; and, the generally receptive attitude of the SRV officials with whom I have dealt previously on this issue, I am confident of the prospects for successfully negotiating an agreement with the SRV. Nor am I aware of any reasons why we would not be able also successfully to negotiate such agreements with Cambodia and Laos.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my information, recollection, and belief.

Executed at Washington, D.C.
July 21, 1999

/s/ JAMES G. HERGEN
JAMES G. HERGEN

KINGDOM OF CAMBODIA

[Seal Omitted]
NATION - RELIGION - KING

ROYAL EMBASSY OF CAMBODIA
TO THE UNITED STATES OF AMERICA
WASHINGTON, D.C.

July 27, 1999

Mr. Jay W. Stansell
Assistant Federal Public Defender
Western District of Washington

Dear Mr. Stansell,

I have the honor to acknowledge receipt of your letter date July 26, 1999, regarding the Travel Document of the former Cambodia citizen to deport from United States to Cambodia. I would like to inform you that the Royal Government of Cambodia has no extradition treaty with the United States. Therefore, subject must be detained under the law of the United States.

Please accept the assurances of my high consideration.

Sincerely,

/s/ NOU HAK
NOU HAK
First Secretary and Consul

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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No. C 99-151-L

KIM HO MA, PETITIONER

v.

JANET RENO; UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE; AND RICHARD SMITH, RESPONDENTS

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# AFFIDAVIT OF NUALA NI MHUIRCHEARTAIGH

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STATE OF WASHINGTON )
COUNTY OF KING ): ss

I, Nuala Ni Mhuircheartaigh, being duly sworn and upon my oath, depose and say:

1. I am currently engaged as the Thomas Addis Emmett International Fellow at the Federal Public Defender's Office in Seattle, WA, where I am assisting Jay Stansell, Assistant Federal Public Defender, and Jennifer Wellman, Staff Attorney, in their representation of Mr. Kim Ho Ma. The statements in this declaration are based on my direct knowledge and a series of telephone conversations with the Consulate General of Cambodia in Washington, D.C.

2. On Wednesday, July 12, 1999, I engaged in a telephone conversation with the Cambodian Consul Mr. Nou Hak at the Consulate General of Cambodia in Washington, D.C. The purpose of this conversation was to ascertain whether any possibility existed of Cambodia issuing travel documentation for Mr. Ma and allowing his deportation to that State.

3. To this end I informed Mr. Hak of the relevant aspects of Mr. Ma's history as revealed by his INS A-file, including but not limited to, the nationality of his parents, his place and date of birth, his criminal conviction while a Permanent Resident of the United States, and the Final Order of Deportation to which he is now subject.

4. Mr. Hak informed me that no possibility existed of issuance of travel documentation to Mr. Ma or any other Cambodian national, because at present, there is no formal deportation agreement between the United States and Cambodia. The Cambodian government has only one international deportation agreement, with Thailand, and as a result, all requests from all other countries for travel documents for Cambodian nationals who have been ordered deported, are refused. Mr. Hak confirmed in this regard, that he was not aware of any successful deportation to Cambodia from the United States.

5. On Thursday, September 9, 1999, I engaged in a follow-up conversation with Mr. Hak concerning the specific case of Mr. Kim Ho Ma. Mr. Hak again confirmed that at present no agreement is in place between the government of Cambodia and the United States, and that as a result, the deportation of Mr. Ma to

Cambodia is at present not possible. Mr. Ma must be processed under United States law, he stated.

6. Mr. Hak also informed me that on Saturday, September 4, 1999, officials of the United States State Department met with officials of the Cambodian Consulate with regard to the State Department's preliminary proposals for a deportation agreement between the two states. Mr. Hak confirmed, however, that the Cambodian Government and Consulate made no input with regard to the proposal in question. Officials of the Consulate, he stated, will now send a report of the meeting and State Department proposals to the Cambodian Government for comment. Mr. Hak stated, however, that he cannot foretell how much time will pass before the Cambodian Government will pass preliminary comment on the United States State Department proposals. He further stated that he cannot foresee when any possible agreement will be concluded, if indeed such an agreement is ever reached. No definite time can be stated, he emphasized, when a deportation agreement between the United States and Cambodia may be completed.

7. The situation thus remains as heretofore, Mr. Hak repeated: at present, no possibility of authorization of removal of Mr. Ma from the United States to Cambodia exists, and further, he cannot predict when, if ever, such authorization will be forthcoming.

The foregoing is true and correct to the best of my knowledge, information and belief.

DATED this 9th day of September, 1999.

/s/ NUALI NI MHUIRCHEARTAIGH
NUALI NI MHUIRCHEARTAIGH

SUBSCRIBED and SWORN to before me this 9th day of September, 1999.

/s/ KAREN A. CRAWFORD
Printed Name: KAREN A. CRAWFORD
NOTARY PUBLIC in and for the State of Washington, residing at Isoaquat
My appointment expires 7/19/02

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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PETITION FOR WRIT OF HABEAS CORPUS
No. CIV S-99-0302-LKK

LE THAN GIANG, PETITIONER,

*v.*

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

---

**DECLARATION OF JAMES G. HERGEN**

I, JAMES G. HERGEN, declare as follows:

1. I am the Assistant Legal Adviser for East Asian and Pacific Affairs, Office of the Legal Adviser, United States Department of State, Washington, D.C., 20520, a position that I have held since 1992. Prior to that time, I occupied the position of Assistant Legal Advisor for Consular Affairs, since 1983. From 1974-1982, I was a Trial Attorney in the Office of Foreign Litigation, Civil Division, United States Department of Justice. I am a member in good standing of the District of Columbia Bar.

2. My duties as Assistant Legal Adviser for Consular Affairs related in substantial part to the enforcement and administration of the immigration and nationality laws of the United States, including the admissions of aliens to and, as appropriate, their removal from the

United States. Such duties included occasional communications with foreign states, including the Socialist Republic of Vietnam ("SRV") to persuade them to accept back their nationals or former nationals.

3. My current duties include responsibility for diverse legal issues that affect U.S. relations with East Asia (including Vietnam, Laos, and Cambodia) and the South Pacific region. I am personally familiar with, and have been a participant in, many of the efforts that have been undertaken by the U.S. government over the past decade to encourage the SRV to accept back its nationals who have been ordered excluded, deported, or removed from the U.S.

4. I am aware that the petitioner in this matter has filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of California. The purpose of this declaration is to provide the court with information regarding the current status of U.S. efforts to negotiate an agreement with the SRV, Cambodia, and Laos for the repatriation of their nationals and former nationals who have been so ordered excluded, deported, or removed from the U.S. (I have authorized the Department of Justice to use this declaration in connection with other, similar litigation.)

5. This declaration is based solely and exclusively upon information that is known to me in the course and scope of the performance of my official duties.

6. Shortly after assuming my current position in the early 1990's, I visited the SRV Mission to the United Nations ("U.N.") in New York, inter alia to attempt to persuade the SRV to accept back certain of its

deportable nationals. The SRV's Permanent Representative to the U.N. ("Permrep") listened politely to our presentation (which was made on behalf of the Immigration and Naturalization Service ("INS")) but expressed regret that there was not very much he could do in the absence of relations between the U.S. and Vietnam. (Although I did not attend subsequent meetings with the SRV Permrep, I recall having "cleared" several sets of "talking points" on the repatriation subject for subsequent visits to the SRV Permrep by other Department of State officials.)

7. I was personally and substantially involved in the planning and execution of the U.S. decisions to end the U.S. trade embargo against the SRV (February 1994); to establish "liaison offices" (January 1995); and, to establish diplomatic relations with the SRV (July 12, 1995).

8. My current recollection is that, shortly after the opening of "liaison offices" and the establishment of diplomatic relations, the Department of State invited the SRV Embassy to send representatives to attend a meeting at the Department of State with officials of the INS for the purpose of exploring options for the repatriation of SRV nationals. According to my current recollection, I made a brief presentation to the SRV officials concerning state obligations under international law with respect to their nationals, and INS made a presentation regarding the numbers of SRV nationals whom it wished the SRV to accept, and the modalities with respect to such returns. The SRV officials listened politely, but were noncommittal, and explained that they would have to transmit the INS's information to the appropriate authorities in Hanoi for

further analysis. I believe that there may have been at least one follow-up meeting some time later, but that this meeting was also inconclusive. I am aware that in 1997 the Department of State had consulted with SRV Chargé Thong concerning this subject, and that Chargé Thong has expressed a willingness to negotiate some form of accord with the U.S. There may well also have been other formal and informal discussions with the SRV on this subject concerning which I was unaware. I can also say with a high degree of confidence that the SRV was aware that this was a serious bilateral issue for the U.S., and that we incorporated the subject into our ongoing, official discussions with Vietnamese authorities between 1993 and the present.

9. According to my current recollection, INS representatives approached the Department of State at some point in late 1997 or early 1998 to request that we again approach the SRV regarding the repatriation issue. After consulting with the Vietnam Desk, I informed the INS that the Department of State would be happy to comply with their request, and I recommended that we propose to the SRV that our two countries enter a formal international agreement on this subject. In the interests of time, however, INS suggested that we first propose to the SRV the negotiation of a working-level memorandum of understanding between the INS and the SRV's INS counterpart organization.

10. In compliance with the INS's request, Department of State officers escorted INS representatives to the SRV Embassy in Washington, D.C., on or about April 13, 1998, for the purpose of making their proposal for a memorandum of understanding directly to SRV Ambassador Le Bang. Ambassador Bang received the

INS delegation, listened politely to their proposal, and explained that his country would only consider a more formal international agreement.

11. At the request of the INS, I promptly drafted a proposed U.S.-SRV repatriation agreement for INS consideration (based upon an earlier, INS-drafted version), together with appropriate documentation to obtain negotiating authority under the Case-Zablocki Act, 1 U.S.C. 112(b), and Department of State Circular 175 (11 Foreign Affairs manual Part 720). These materials were circulated for appropriate clearances within the federal interagency process in about June, 1998.

12. Between June, 1998, and this July, 1999, there were a number of communications among the Department of State, the Department of Justice, and the INS regarding the proposed agreement with the SRV. On or about July 15, 1999, I received final comments and clearances from the Department of Justice and INS, and immediately arranged to have the authorization package transmitted to the Deputy Secretary of State, who, on July 19 approved the opening of formal negotiations with the SRV, Cambodia, and Laos concerning the proposed agreements.

13. On or about August 24, we obtained from the Department's Office of Translation Services translations of the U.S. negotiating draft into the Vietnamese, Khmer, and Laotian languages.

14. On September 1, U.S. representatives (including the undersigned) presented the U.S. negotiating drafts, and accompanying translations, to the Ambassadors of

Laos (Ambassador Vang Rattanavong) and the SRV (Ambassador Le Bang), in Washington, D.C. On September 2, we presented a copy of the negotiating draft, and accompanying Khmer translation, to the Cambodian Chargé (Counselor Tan Vunyaung) in Washington, D.C. In each case, we made an extensive presentation regarding the importance of the issue to the aliens detained in INS custody, as well as to the bilateral relations of the U.S. and the country concerned, and requested the Ambassador (or, in the case of Cambodia, the Chargé) promptly to inform his government of our presentation and to provide us with a preliminary position within 30-60 days. Independently, we have provided copies of the draft agreements to our embassies in Hanoi, Phnom Penh, and Vientiane, and we intend to request each of the three governments to receive a U.S. delegation for preliminary negotiations in November, or as soon thereafter as possible.

15. Because of the very nature of such negotiations, it is not possible to predict when they may conclude. However, I can state that, based upon the fact that the SRV has recently entered into a repatriation agreement with Canada; the general state of U.S.-SRV relations; the fact that the SRV currently accepts at least some of its deportable nationals from Canada, Sweden, and other states; and, the generally receptive attitude of the SRV officials with whom I have dealt previously on this issue, I am confident of the prospects for successfully negotiating an agreement with the SRV. Nor am I aware of any reasons why we would not be able also successfully to negotiate such agreements with Cambodia and Laos.

I declare under penalty of perjury, pursuant to 28 U.S.C. §1746, that the foregoing is true and correct to the best of my information, recollection, and belief.

Executed at Washington, D.C.,
September 15, 1999

/s/ JAMES G. HERGEN
JAMES G. HERGEN

**U.S. Department of Justice** **Order of Supervision**
Immigration and
Naturalization Service

File No: A27 365 395
Date: October 25, 1999

Name MA, Kim Ho 20702 113 PL S.E. Kent, WA 98031 ph# (253) 856-188X
On 10/26/1998, you were ordered:

☐ Excluded or deported pursuant to proceedings commenced prior to April 1, 1997.

☒ Removed pursuant to proceedings commenced on or after April 1, 1997.

Because the Service has not effected your deportation or removal during the period prescribed by law, it is ordered that you be placed under supervision and permitted to be at large under the following conditions:

☒ That you appear in person at the time and place specified, upon each and every request of the Service, for identification and for deportation or removal.

☒ That upon request of the Service, you appear for medical or psychiatric examination at the expense of the United States Government.

☒ That you provide information under oath about nationality, circumstances, habits, associations, and activities and such other information as the Service considers appropriate.

☒ That you do not travel outside Washington State for more than 48 hours without first having notified this Service office of the dates and places of such proposed travel.

☒ That you finish written notice to this Service office of any change of residence or employment within 48 hours of such change.

☒ That you report in person on the 10th day of each month to this Service office at:

US INS 815 Airport Way South, Seattle, WA
3rd floor Deportation Section

unless you are granted written permission to report on another date.

☒ That you assist the Immigration and Naturalization Service in obtaining any necessary travel documents.

☒ Other :

If the 10th day falls on a holiday or weekend, report the next business day

☒ See attached sheet containing other specified conditions (Continue on separate sheet if required)

**[photographs fingerprint omitted]**

GEORGE L. MORONES
(Signature of INS official)

George L. Morones, ADD/DDP
(Print name and title of INS official)

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**Alien's Acknowledgment of Conditions of Release under an Order of Supervision**

I hereby acknowledge that I have (read) (had interpreted and explained to me in the English language) the contents of this order, a copy of which has been given to me. I understand that failure to comply with the term of this order may subject me to a fine, detention, or prosecution.

[ILLEGIBLE]
(Signature of INS official serving order)

KIM HO MA — 10-25-99
(Signature of INS alien) (Date)

Attachment to Order of Supervision for Kim Ho MA/
A27 365 395
Dated October 25, 1999 at Seattle, WA.

The following conditions are imposed in addition to those listed on the face page of the I220B

- You will report to INS office at:

  **815 Airport Way South, Seattle, WA 98134**
  **Detention and Deportation Section 3rd Floor**
  **10th day of each month**

You will give this document to the person who meets you at the counter. You may also be ordered in writing to report for special interview outside that schedule. At any time you will be expected to answer questions about your employment, activities and associations.

- You will assist the Immigration Service in obtaining a travel document to return to your country by providing any information required, or corresponding or speaking with your consul.

- You will not associate with a gang of any sort, nor will you associate with gang members.

- You will not possess or use illegal drugs, nor will you knowingly associate with anyone who does.

- You will not possess or use any firearm.

You will abide by all laws. If you are arrested for any reason you must report the arrest to a deportation officer within 48 hours of the arrest. You, or someone acting for you, will do so by calling (206) 553-5948 and providing the person who answers with the following information:

- your name and A number;
- the date and time of the arreast;
- the reason you were arrested; and
- the name of the department or agency that arrested you.

Failure to report an arrest within 48 hours may result in your being rearrested by INS and placed back into custody.

> *If you are arrested an INS officer will contact the department that arrested you and obtain a copy of the arrest report. He may interview the officer who arrested you. He will determine the circumstances of the arrest, then he will present his findings to the Assistant District Director of Detention and Deportation (ADDD). The ADDD will determine if, in his judgment, you have become a threat to public safety or a flight risk. Depending on his findings, he may change the conditions of your supervision, or he may order that you be brought back into INS custody at the earliest possible moment.*

- You will immediately surrender to an officer of this Service for deportation upon being ordered to do so.

Any departure from the United States, regardless of purpose of duration, executes your deportation: you will not be allowed to return to this country.

These conditions are in effect as long as you are at large in the United States.

NOTHING FURTHER

| GEORGE L. MORONES | KIM HO MA |
| --- | --- |
| George L. Morones | Alien—Signature |
| Assistant District Director/ Detention & Deportation | |

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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No. C-99-1363R

BUNNY VATH, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL,
ET AL., RESPONDENTS

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PETITION FOR WRIT OF HABEAS CORPUS

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**SUPPLEMENTAL DECLARATION OF JAMES G. HERGEN**

1. This declaration supplements my previous declarations of July 21 and September 15, 1999, in related cases regarding the same issue.

2. As noted in my previous declarations, I have been personally involved in ongoing efforts to encourage the governments of Cambodia, Laos, and Vietnam to accept back their nationals who have been ordered excluded, deported, or removed from the U.S.

3. Today, I was informed that this Honorable Court has granted the petition for writ of habeas corpus filed by Mr. Vath, and has ordered that Mr. Vath be released from immigration custody. In light of

this order, the Department of Justice asked me to provide an urgent update concerning the ongoing diplomatic efforts by the U.S. government to encourage the Royal Government of Cambodia ("RGC") to take back Cambodian nationals who have been ordered excluded, deported, or removed from the U.S. (I have authorized the Department of Justice to use this declaration in connection with other, similar pending litigation in the federal courts.)

4. As noted in my declaration of September 15, a high-level delegation of officials from the Department of State, the Immigration and Naturalization Service (INS), and the Department of Justice made an extensive, formal presentation to the Cambodian Charge d'Affairs, Counselor Tan Vunyanug, on September 2, presented him with a draft agreement, and asked him to have his government provide us with a preliminary response to our request for negotiation within 60 days. Independently, we instructed our Embassy in Phnom Penh to make a parallel overture to the RGC in Cambodia.

5. On November 10, the Department of State sent a follow-up cable to our Embassy in Phnom Penh, in which we instructed our Embassy to request the RGC to receive a U.S. delegation as early in the New Year as possible, so that we could begin detailed negotiations with a view towards resolving this in a mutually satisfactory manner. Although the RGC has not yet answered us formally, our Embassy in Phnom Penh has informed us informally that the RGC will presumably be willing to

meet with U.S. negotiators in early 2000, when a U.S. delegation is scheduled to travel to the region for talks with Vietnam and Laos.

6. Moreover, I am particularly encouraged by other positive developments with respect to Cambodia over the past month. On October 21, the Deputy Director of the Department of State's Office of Burma, Cambodia, Laos, Thailand, and Vietnam Affairs (EAP/BCLTV) met with the new Cambodian Ambassador to the U.S., The Honorable Roland Eng, *inter alia* to discuss issues related to the proposed repatriation agreement. Ambassador Eng expressed an exceptionally positive attitude, and undertook to dispatch Cambodian consular officers to interview detainees whom the INS identifies as Cambodian nationals. On November 16, EAP/BCLTV sent Ambassador Eng a list of detained Cambodians, and provided him with the name of an INS contact person who can facilitate such travel to the detainees. This is the first of the three countries to make such an undertaking, and we view this initiative as both a sign of RGC good faith and a significant step forward.

7. While it is extremely difficult to predict the ultimate outcome of such delicate diplomatic negotiations, based on my personal involvement and my various communications with senior U.S. officials, I am increasingly sanguine about the prospects for achieving a mutually satisfactory arrangement on this issue between the U.S. and the RGC.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my information and belief.

Executed at Washington, D.C.
November 17, 1999

/s/ JAMES G. HERGEN
JAMES G. HERGEN

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON AT SEATTLE

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No. C 99-1363R

BUNNY VATH, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL,
ET AL., RESPONDENTS

---

PETITION FOR WRIT OF HABEAS CORPUS

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**SUPPLEMENTAL DECLARATION OF JAMES G. HERGEN**

This declaration supplements my previous declarations of July 21, September 15, and November 17, 1999, in this and related cases regarding the same issue.

1. As noted in my previous declarations, I have been personally involved in ongoing efforts to encourage the governments of Cambodia, Laos, and Vietnam to accept back their nationals who have been ordered excluded, deported, or removed from the U.S.

2. This declaration, which I have prepared at the request of the Department of Justice, provides an update concerning recent developments in the ongoing diplomatic efforts by the U.S. government

to encourage the Royal Government of Cambodia ("RGC") and the Lao People's Democratic Republic ("LPDR") to take back Cambodian and Laotian nationals who have been ordered excluded, deported, or removed from the U.S. (I have authorized the Department of Justice to use this declaration in connection with other, similar pending litigation in the federal courts).

3. As noted in my declaration of September 15, a high-level delegation of officials from the Department of State, the Immigration and Naturalization Service (INS), and the Department of Justice made an extensive, formal presentation to the Cambodian Charge d'Affairs, Counselor Tan Vunyanug, on September 2, presented him with a draft agreement, and asked him to have his government provide us with a preliminary response to our request for negotiations within 60 days. On September 1, we made a similar presentation and request to Laotian Ambassador, Vang Rattanavong. Independently, we instructed our Embassies in Phnom Penh and Vientiane to make parallel overtures to the appropriate host country authorities in Cambodia and Laos.

4. On November 10, the Department of State sent a follow-up cable to our Embassies in Phnom Penh and Vientiane, instructing them to request the host governments to receive a U.S. delegation as early in the New Year as possible.

5. In my supplemental declaration of November 17, I also reported concerning several other positive developments that encouraged me in my belief that the RGC will cooperate with the U.S. in achieving a mutually satisfactory resolution to this issue.

6. Shortly after I filed my supplemental declaration of November 17, our Embassies in Phnom Penh and Vientiane reported that both the RGC and the LPDR will likely receive a U.S. delegation early in the New Year, as we have requested. (The Department of State is continuing its efforts to arrange with the Socialist Republic of Vietnam ("SRV") a mutually acceptable date early in the New Year for discussions on this issue. Our objective is to arrange a date with the SRV that will permit the U.S. negotiating team to visit all three countries during a single visit to the region. I shall report to the court regarding the status of these efforts on or before January 11, 2000, as directed in the Court's Order of November 12, 1999, in the case of Thong Vi Duong v. Reno, No. C99-930R (W.D. Wash.).

7. The U.S. considers the foregoing developments to be significant, positive steps in the negotiating process, and as particular signs of sincerity and good faith on the part of the RGC and LPDR.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my information and belief.

Executed at Washington, D.C.
November 26, 1999

/s/ JAMES G. HERGEN
JAMES G. HERGEN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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No. C 99-1294C

TINH VINH TRUONG, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENTS

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# AFFIDAVIT OF HEATHER LYNN WINSLOW

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STATE OF WASHINGTON COUNTY OF KING: ss

I, Heather Lynn Winslow, being duly sworn and upon my oath, depose and say:

1. I am currently engaged as a Research Attorney at the Federal Public Defender's Office in Seattle, WA, where I am assisting Jay Stansell, Assistant Federal Public Defender, and Jennifer Wellman, Staff Attorney, in their representation of Mr. Tinh Vinh Truong. The statements in this declaration are based on my direct knowledge and conversations with the Embassy and Consulate of Vietnam.

2. On Wednesday, December 1, 1999, I engaged in a telephone conversation with Mr. Ly at the Embassy of Vietnam, in Washington, D.C. The purpose of this conversation was to ascertain whether there was any

possibility that Vietnam would issue travel documentation for Mr. Truong in the foreseeable future.

3. Mr. Ly informed me that there is no possibility that Vietnam will issue travel documents for Mr. Truong, or any other individual ordered deported from the United States, until the two countries reach a formal repatriation agreement.

4. According to Mr. Ly, Vietnam and the United States do not presently have a repatriation agreement under which Vietnam will accept persons ordered deported from the United States. Mr. Ly stated that negotiations between the United States and Vietnam have recently begun, but he is unable to predict when a repatriation agreement may be reached.

5. I asked Mr. Ly whether the recent negotiations between Vietnam and Canada could provide some indication of how long it may take for the United States and Vietnam to reach a similar repatriation agreement. He stated that it could not. According to Mr. Ly, the negotiations for reaching such an agreement involve extended discussions between the two countries, and the process may vary from situation to situation, depending on the particular issues raised by the party countries.

6. Mr. Ly stated that he is aware of the draft repatriation agreement which the United States recently submitted to Vietnam. However, he indicated that after the draft has been presented to the Vietnamese government, there is no way to predict how long it may take for the government to respond. He further stated that no one could now predict the total length of the process because it depends entirely on the number of issues each country raises and how long the respective governments take to respond to the other's issues.

The foregoing is true and correct to the best of my knowledge, information and belief.

DATED this 2nd day of December, 1999.

/s/ HEATHER LYNN WINSLOW
HEATHER LYNN WINSLOW

SUBSCRIBED AND SWORN to before me this 2d day of December, 1999.

/s/ LYNN SHAMULKA
Printed Name: LYNN SHAMULKA
NOTARY PUBLIC in and for the State of Washington, residing at Seattle, WA
My appointment expires 5/19/02

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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Case No. CIV-98-1568 DFL JFM P

THAN DUC TRAN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENTS

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PETITION FOR WRIT OF HABEAS CORPUS

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**SUPPLEMENTAL DECLARATION OF JAMES G. HERGEN**

---

1. This declaration supplements my previous declarations of July 21, September 15, November 17, and 26, 1999 and January 7, 2000, in this and related cases.

2. I have been personally involved in ongoing efforts to encourage the governments of Cambodia, Laos, and Vietnam to accept back their nationals who have been ordered excluded, deported, or otherwise removed from the U.S. by lawful authority.

3. The Department of Justice has requested that I provide this further supplemental declaration in order to describe the current status of the ongoing diplomatic efforts by the U.S. government to encourage the governments of Vietnam, Cambo-

dia, and Laos to take back their nationals who have been ordered excluded, deported, or removed from the U.S.

4. I have authorized the Department of Justice to use this declaration in connection with similar pending litigation in this and other federal courts.

5. A high level delegation of Department of State, Department of Justice, and Immigration and Naturalization (INS) officials traveled to Phnom Penh, Cambodia; Hanoi, Vietnam; and Vientiane, Laos between February 25 and March 8, 2000 to discuss the repatriation of Cambodian, Vietnamese, and Laotian nationals currently in the U.S. who have been ordered removed to those countries after undergoing immigration proceedings. I was a member of the U.S. delegation, and this declaration is based upon my personal knowledge.

6. The U.S. delegation held discussions with the Cambodian government for approximately six hours on February 28 and 29; with the Vietnamese government for approximately six hours on March 3; and with the Laotian government for approximately two hours on March 6.

7. All three governments were represented by high-level officials from their respective Ministries of Foreign Affairs. In addition, the Vietnamese delegation included high-level officials from the Ministry of Justice and the Ministry of Public Security, and the Cambodian delegation included high-level officials from the Ministry of Interior. Our discussions with all three countries were frank, constructive, and positive in both tone and substance. The U.S. side stressed the importance and urgency that our government attaches to the

repatriation issue. The delegations of all three countries evinced an apparently sincere desire to work constructively with the U.S. to resolve the repatriation issue in the interest of improved bilateral relations.

8. The talks focused primarily on describing how the U.S. deals with similar issues with other countries; on explaining how the repatriation process works in the U.S.; and on eliciting from the three foreign governments what information their authorities might require about potential individual returnees before they would issue appropriate travel documents. The U.S. side made specific proposals concerning the implementation of repatriation agreements and invited the foreign governments to send teams to the U.S. for the purpose of consulting with INS officials to better understand the procedures involved in the removal of aliens from this country. All three governments agreed to respond to us in the near future regarding further discussions. We have already received preliminary advice from our Embassy in Vientaine that the Government of Laos is prepared to invite another U.S. delegation back for further, more detailed discussions as early as April or May. The Department of State is attempting to confirm whether it will be possible to coordinate further discussions with Vietnam and Cambodia during the same time frame.

9. Based upon what I saw and heard during the above-described discussions in Hanoi, Phnom Penh, and Vientiane, I am genuinely and increasingly encouraged that all three countries are interested in achieving agreements with the United States in the foreseeable future that will normalize our bilateral immigration procedures as they af-

> fect the repatriation of nationals. I also believe that all three countries are acting in good faith, and that they are sincerely interested in establishing a process that will facilitate a prompt and thorough examination of each case on its individual merits.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Executed at Washington, D.C.
March 23, 2000

/s/ JAMES G. HERGEN
JAMES G. HERGEN
Assistant Legal Adviser for
East Asian & Pacific Affairs
United States Department
of State

SUPREME COURT OF THE UNITED STATES

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No. 00-38

JANET RENO, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

KIM HO MA, RESPONDENT

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Oct. 10, 2000

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Case below, 208 F.3d 815.

Motion of Washington Legal Foundation, et al., for leave to file a brief as amici curiae granted. Motion of respondent for leave to proceed in forma pauperis granted. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted. Case consolidated with No. 99-7791, *Zadvydas v. Underdown*, — U.S. —, 121 S. Ct. 297, — L.Ed.2d — (2000), and a total of one hour is allotted for oral argument.