UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Denver, Colorado

IN THE MATTER OF:	)	
	)	**In Removal Proceedings**
John Smith	)	
	)	
	)	
A# XXX XXX XXX	)	

Motion Requesting a *Matter of Joseph*[1] Hearing

Respondent, John Smith, through counsel, moves the Court hold a *Joseph* hearing for the purpose of determining whether or not Mr. Smith is properly included in a mandatory detention category under section 236 of the Immigration and Nationality Act and 8 C.F.R. section 1003.19(h)(ii). In support of this motion, Respondent states:

1. Mr. Smith, a citizen of Mexico, is a Lawful Permanent Resident of the United States. He was served with a Notice to Appear (NTA) on June 23, 2008.[2]
2. In item number three of the Notice to Appear it is alleged that Mr. Smith's status "was adjusted to that of lawful permanent resident on March 9, 1993."[3]
3. Item number four of the Notice to Appear alleges that Mr. Smith was " on 11/27/2007, convicted in the Weld County and District Court [at] Greeley,

---

1 *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999)
2 Exhibit A, Notice to Appear, 6/23/08
3 *Id.*

Colorado for the offense of Sex Assault – overcome victim's will-ATT, in violation of C.R.S. 18-3-402(1)(a)."[4]

4. Item number five of the Notice to Appear alleges that Mr. Smith was "sentenced to a term of 8 years probation with the Weld County Work Release Program."

5. In fact, the Sentence Order of April 1, 2008 demonstrated that Mr. Smith was initially sentenced to 6 months of work release, 8 years probation, and assessed court fines and costs.[5] Counsel provided ICE with a copy of this initial sentencing order on May 14, 2008 when Mr. Smith was prevented from participating in the work release program as a result of the ICE hold.[6]

6. Since the ICE hold prevented Mr. Smith from participating in the work release program, on June 19, 2008 the Weld County Court Judge modified Mr. Smith's sentence to 90 days straight time *nunc pro tunc* to April 10, 2008. The modified sentence order was sent to an ICE officer on June 20, 2008.[7]

7. Based on the allegations in the NTA, ICE is charging that Mr. Smith is subject to removal from the United States pursuant to Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act in that Mr. Smith is an alien that at any time after admission, has been convicted of an aggravated felony as defined in section 101(a)(43)(F) a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment at least one year.

---

4 *Id.*
5 Exhibit B, Sentencing Order, 4/01/08
6 Exhibit C, Fax to ICE Officer with copy of Sentencing Order, 5/14/08
7 Exhibit D, Letter to ICE Officer with copy of Re-Sentence Order, 6/20/08

8. The Immigration and Nationality Act prescribes mandatory detention for certain aliens, including those who are inadmissible for having committed any offense in section 212(a)(2). INA §236(c)(1)(A).

9. "The regulations generally do not confer jurisdiction on Immigration Judges over custody or bond determinations respecting those aliens subject to mandatory detention" *Matter of Joseph,* 22 I&N Dec. (BIA 1999) *citing* 8 C.F.R. section 1003.19(h)(2)(i)(D). The regulations, nevertheless, specifically allow an alien to seek a determination from an Immigration Judge "that the alien is not properly included within" certain of the regulatory provisions which would deprive the Immigration Judge of bond jurisdiction." *Matter of Joseph,* 22 I & N Dec. 799 (BIA 1999); *citing* 8 C.F.R. section 1003.19(h)(2)(ii).

10. The Board of Immigration Appeals determined in *Matter of Joseph* that "the Immigration Judge may make a determination on whether a lawful permanent resident 'is not properly included' in a mandatory detention category, in accordance with 8 C.R.S. section 1003.19(h)(2)(ii), either before or after the conclusion of the underlying removal case." *Matter of Joseph,* 22 I & N Dec. 799 (BIA 1999).

11. Mr. Smith is not properly included in the mandatory detention category.

12. First, Mr. Smith is a lawful permanent resident of the United States having obtained his permanent residency on March 9, 1993 [See Exhibit 1, Notice to Appear].

13. Having been conferred the benefit of lawful permanent residence, Mr. Smith is presumed to be a lawful resident, and maintains his lawful permanent residence unless and until there is a final administrative order of exclusion, deportation or removal. 8 C.F.R. §1.1(p).

Mr. Smith is not removable under INA 237(a)(2)(A)(iii) as charged on the Notice to Appear because his criminal conviction does not constitute an aggravated felony.

14. The Notice to Appear alleges that Mr. Smith was convicted of Sex Assault in violation of CRS 18-3-402(1)(a). On the basis of this allegation, the NTA charges that Mr. Smith is subject to removal from the United States under section 237(a)(2)(a)(iii) for having been convicted of an aggravated felony at any time after admission.

15. In order to support this charge and allegation, ICE must not only prove the conviction of the crime, but must also show that the crime is a crime which falls within one of the definitions of aggravated felony found at INA section 101(a)(43).

16. ICE has charged Mr. Smith under INA § 237(a)(2)(iii) for having been convicted of an aggravated felony as defined in INA § 101(a)(43)(F). Such section requires that the offense be a crime of violence as defined in section 16 of title 18, United States Code, not including a purely political offense) for which the ***term of imprisonment at least one year*** (emphasis added). INA § 101(a)(43)(F). In order for ICE to prevail on the allegation and charge, they must prove that the conviction for the offense defined above is an offense is both a crime of violence as defined by section 16 of title 18, United States

Code and that the sentence imposed was a term of imprisonment for at least one year.

17. Department will be unable to meet their burden of proof.

18. When examining the elements, it is clear that Mr. Smith's sentence does not meet the requirement as charged on the NTA that "the term of imprisonment ordered is at least one year." As such, Mr. Smith has not been convicted of an aggravated felony as defined in Section 101(a)(43)(F) of the Act, a crime of violence (as defined in section 16 of Title 18, United States Code, but including a purely political offense) for which the term of imprisonment ordered is at least one year.

ICE is substantially unlikely to establish at the merits hearing, the charge that subjects Mr. Smith to mandatory detention under 236(c), and in such circumstances, Mr. Smith is eligible for release

19. In *Matter of Joseph,* 22 I&N Dec. 799 (BIA 1999), the Board found that the Service was "substantially unlikely to establish the charge of deportability it is appeal of the underlying removal case. Under such circumstances, we find it inappropriate to continue to treat the respondent as an alien who is subject to mandatory detention." *Id.*

20. The Board concluded, "[W]e determine that a lawful permanent resident will not be considered 'properly included' in a mandatory detention category when an Immigration Judge or the Board is convinced that the Service is substantially unlikely to establish at the merits hearing, or on appeal, the

charge or charges that would otherwise subject the alien to mandatory detention." *Id.*

21. "The regulations . . . allow this determination to be made by the Immigration Judge at a very early stage of the overall proceedings." *Id.*

WHEREFORE, Respondent prays the court to immediately release the client on his own recognizance or immediately set this matter for a bond hearing under INA section 236(a). *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999).

Respectfully submitted,

Jeff Joseph
Joseph Law Firm, P.C.
12203 E. 2nd Ave
Aurora, CO 80012

Dated this ___ day of July, 2008