STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

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In the Matter of the Application of
LUIS VASQUEZ, #05-A-5415,
Petitioner,

For a Judgment Pursuant to Article 78
Of the Civil Practice Laws and Rules

-against-

DECISION AND JUDGMENT
RJI #16-1-2007-0504.108
INDEX # 2007-1353
ORI #NY016015J

DEBRA JOY, Director of Temporary Release,
Respondent.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the petition of Luis Vasquez, verified on September 24, 2007, and stamped as filed in the Franklin County Clerk's office on October 1, 2007. Petitioner, who is an inmate at the Bare Hill Correctional Facility, is challenging the respondent's failure to place him in Phase 2 of the DOCS Comprehensive Alcohol Substance Abuse Treatment (CASAT) program following his successful completion of Phase 1 of the program. The Court issued an Order to Show Cause on October 9, 2007, and has received and reviewed respondent's Answer and Return, verified on November 16, 2007, as well as respondent's Letter Memorandum of November 16, 2007. The Court has received no Reply thereto from the petitioner.

The CASAT program was designed ". . . to prepare chemically dependant inmates for a return to the community, to reduce recidivism by providing education and counseling focused on continuing abstinence from all mood altering substances, and to encourage participation in self-help groups." 7 NYCRR §1950.1. Under DOCS regulations CASAT is a three-phase program with Phase 1 occurring in a DOCS alcohol and substance

abuse treatment correctional annex. Phase 2 of CASAT involves "... a transitional period in a community reintegration component, which would include transfer to a work release facility for employment and placement in appropriate community-based programs ..." 7 NYCRR §1950.2(b). Under DOCS regulations inmates can not be placed in CASAT Phase 1 unless they have already been approved for work release or presumptive work release. 7 NYCRR §1950.3(a)(5). Thus, under the DOCS regulatory scheme, inmates who successfully complete CASAT Phase 1 can transition into CASAT Phase 2 without a further determination of work release/presumptive work release eligibility.[1]

On October 11, 2005, the petitioner was sentenced in Supreme Court, New York County, upon his conviction of the crime of Criminal Sale of a Controlled Substance 2°. On June 22, 2006, he was re-sentenced (L. 2005, c. 643) to a determinate term of six years with five years of post-release supervision. On September 14, 2006, the petitioner was approved for presumptive work release by the DOCS central office pursuant to 7 NYCRR §1951.2. That approval was expressly made contingent upon the petitioner's successful completion of Phase 1 of the CASAT program. It is not disputed that the petitioner did, in fact, successfully complete Phase 1 in April of 2007. Despite petitioner's successful completion of Phase 1 of the CASAT program he was not permitted to transition into Phase 2 of the program. Rather, On May 31, 2007, DOCS officials determined to transfer petitioner from the Hale Creek Correctional Facility to the Bare Hill Correctional Facility, noting as follows:

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[1]CASAT Phase 3, which is not relevant to this proceeding, consists of "... an aftercare component in the community under parole supervision, which will provide for an orderly community transition for participants granted release by the parole board." 7 NYCRR §1950.2(c).

> "I/M [inmate] HAS COMPLETED THE PHASE I OF CASAT BUT IS NOT ELIGIBLE FOR PHASE III [should be II ?] AT THIS TIME DUE TO BICE [Federal Bureau of Immigration and Customs Enforcement] HEARING ADMINISTRATIVELY CANCELLED PENDING HIS APPEAL OF HIS CRIMINAL CONVICTION. BICE WILL REFILE DEPORTATION PAPERS AFTER APPEAL IS FINALIZED."

Under circumstances that are not entirely clear, a new Temporary Release Pre-program application (work release) was filed by, or on behalf of, the petitioner in August of 2007. On September 5, 2007, however, the petitioner was notified by the chairperson of the Temporary Release Committee (TRC) at the Bare Hill Correctional Facility that his application for temporary release had been "CANCELLED." The reason for the cancellation was stated by the chairperson as follows: "BICE ADMINISTRATIVELY TERMINATED CASE. CURRENTLY INELIGIBLE FOR T.R. [temporary release] CONSIDERATION." By letter dated September 14, 2007, the petitioner attempted to administratively appeal the cancellation of his temporary release application to the DOCS central office. By letter dated September 25, 2007, the petitioner was advised by a central office temporary release reviewer, in somewhat cryptic fashion, that "[i]n order to be considered for any form of temporary release you must submit an application to your assigned facility Counselor. Your application will be processed in accordance with Temporary Release Program Rules and Regulations, and you will be notified as to the final decision." Finally, in response to petitioner's inquiry to DOCS Commissioner Fischer, the petitioner was advised in a September 26, 2007, letter from the respondent Joy that "[y]ou are eligible for temporary release consideration as BICE proceedings have been administratively terminated. However, the termination is based solely on your appeal of your criminal conviction. Once your appeal is resolved, BICE may review its interest in

you and will likely refile its detainer and hold. Under these circumstances, you will not be approved for participation in temporary release programming." This proceeding ensued.

An inmate's participation in a DOCS temporary release program, including by extension presumptive work release, is a privilege, not a right. *See* Correction Law §855(9). As such, a court's review of a decision denying an inmate's application to participate in such program is limited to a determination of whether the respondent violated any statutory requirement or constitutional right, or whether the denial determination was affected by irrationality bordering on impropriety. *See Crispino v. Goord*, 31 AD3d 1022, *lv dis* 7 NY3d 854, *Abascal v. Roach*, 22 AD3d 995 and *Patterson v. Goord*, 1 AD3d 845.

At the initial stage of processing an inmate's temporary release application, a TRC interviewer must ". . . make sure that the inmate is statutorily or otherwise eligible for temporary release." 7 NYCRR §1900.4(c). One element of an inmate's threshold eligibility for temporary release consideration centers around his or her immigration status. In this regard 7 NYCRR §1900.4(c)(7)(iii)(d) provides as follows:

> "(d) Immigration status
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> (1) Prior to the processing of a temporary release program application, the Department of Correctional Services must request clarification of an alien inmate applicant's immigration status from the United States Immigration and Naturalization Service. The purpose of this inquiry is to determine the inmate's immigration status and to clarify whether the Immigration and Naturalization Service is going to commence deportation proceedings upon the inmate's release from State custody.
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> (2) A letter must be forwarded to the Immigration and Naturalization Service regarding the possibility of deportation proceedings against the inmate. A failure by the Immigration and Naturalization Service to respond

> to an inquiry within 30 days will be construed as an indication by the Immigration and Naturalization Service that they do not intend to initiate deportation proceedings. The letter must advise them of the 30-day deadline.
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> (3) An inmate shall be ineligible for temporary release consideration if a response from the Immigration and Naturalization Service:
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> > (i) indicates deportation proceedings are underway;
> > (ii) indicates a show cause order for deportation; and
> > (iii) there is an actual INS warrant on file."

There is nothing in the record to suggest that the requisite inquiry into petitioner's immigration status was conducted to prior to consideration/approval of his original temporary release program (presumptive work release) application and his successful completion of the six-month Phase 1 of the CASAT program. Indeed, the record does not indicate when any inquiry into the petitioner's immigration status was initiated. Although, as alluded to previously, the determination not to permit petitioner to transition into CASAT Phase 2, based on immigration status concerns, was made at the end of May, 2007, the only correspondence from federal immigration authorities contained in the record is dated June 7, 2007. In that letter officials at the Hale Creek Correctional Facility were advised that the petitioner ". . . is not amenable to removal/deportation proceedings at this time since his/her criminal conviction is currently under appeal with the New York State Supreme Court, Appellate Division of the 2nd Department. If applicable, please remove any previous holds/detainer and retain this letter for your records." In any event it is clear, and the respondent concedes, that petitioner's immigration status did not and does not render him ineligible to participate in the DOCS Temporary Release Program under the criteria set forth in the previously-quoted provisions of 7 NYCRR §1900.4(c)(7)(iii)(d)(3). Rather, citing

7 NYCRR §1900(l)(4), the respondent asserts that a TRC is authorized to deny an inmate's temporary release application ". . . if the inmate's presence in the community would pose an unwarranted threat to his own or to public safety. . ." In support of her argument that discretionary denial of petitioner's temporary release application was not irrational, the affidavit of the respondent, sworn to on November 15, 2007, has been annexed to her Answer and Return. Paragraphs three and four of that affidavit state, as follows:

> "3. In the experience of New York State Department of Correctional Services, it has been the consistent practice of the Federal Bureau of Immigration and Customs Enforcement to administratively terminate ongoing deportation proceedings when an inmate appeals his conviction, presumably out of a desire not prejudice the State appellate process. However, generally speaking, BICE commences deportation proceedings anew upon an inmate losing his appeal.
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> 4. Following the terrorist attacks of September 11, 2001, and in consideration of the safety of the community (*see* Correction Law §§ 852(1), 855(4)), the Department determined it would not approve temporary release applications by inmate's such as Petitioner where the sole reason deportation proceedings were terminated was the pendency of an appeal of a conviction. It did so out of caution and prudence, given the high likelihood those proceedings would be reinstated. An inmate out on temporary release who learns that BICE has recommenced deportation proceedings would have substantial incentive to abscond."

After careful consideration the Court is constrained to conclude that the determination denying petitioner's transition into Phase 2 of the CASAT program, after his presumptive work release approval and successful completion of Phase 1, violated DOCS regulatory provisions and, therefore, must be vacated. As noted previously, where an inmate has been approved for work release or presumptive work release and subsequently completes Phase 1 of the CASAT program in a DOCS alcohol and substance abuse treatment correctional annex, there is no regulatory basis for a re-assessment of his

or her work release/presumptive work release eligibility prior to such inmate's transition into CASAT Phase 2. Although 7 NYCRR Part 1904 establishes procedures for the removal of an inmate from the DOCS Temporary Release Program, which procedures include a somewhat formal TRC hearing with a right to administrative appeal, there is nothing in the record to indicate that those removal procedures were utilized in the case at bar. This Court takes no position with respect to the issue of whether or not petitioner's immigration status, as detailed herein, could have served as the basis for either the denial of his original presumptive work release application or his removal from the DOCS Temporary Release Program pursuant to 7 NYCRR Part 1904. Neither of those issues is before the Court inasmuch as the petitioner's presumptive work release application was approved and no removal proceedings appear to have been instituted.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ADJUDGED, that the petition is granted, without costs or disbursements, but only to the extent that the respondent is directed to forthwith implement petitioner's transition into Phase 2 of the CASAT program in accordance with the provisions of this Decision and Judgment.

Dated: February 15 , 2008, at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice