52. The BIA has held that detention cannot be mandatory where the government is “substantially unlikely to prevail” on its charges of removability. Matter of Joseph, 22 I&N Dec. 799, 807 (BIA 1999). Additionally, the circuit courts to have taken up the issue have found that mandatory detention cannot be applied where the respondent has a substantial argument against removability. See Tijani v. Willis, 430 F.3d 1241, 1244–47 (9th Cir. 2005) (Tashima, J., concurring); Gonzalez v. O’Connell, 355 F.3d 1010, 1019–21 (7th Cir. 2004); see also Demore, 538 U.S. at 578 (Breyer, J., dissenting) (arguing that the “substantial question of law or fact” standard found in the federal bail statute, 18 U.S.C. § 3143(b)(1)(B), should be applied in the immigration context, as it would effectively balance the “special governmental interest in detention” while protecting “a detained alien’s liberty interest”); Gayle v. Johnson, 4 F.Supp.3d 692, 721 (D.N.J. 2014).

53. Here, Petitioner has been detained longer than the time period addressed in Demore. Additionally, distinct from other cases heard by this Court and others, Petitioner’s actions are not the source of the prolonged nature of his detention. Petitioner is not in detention after losing his case while an appeal is pending before the Board of Immigration Appeals; instead, he was granted relief, and he is currently being incarcerated while DHS’s appeal is pending. This detention has now exceeded six months. This specific situation is not contemplated by the immigration statutes, nor has it been explicitly discussed by reviewing courts. Such detention cannot have been intended by Congress, as to do so would create a backdoor means to violate Due Process and indefinitely detain an alien. The continuing detention of Petitioner does not serve to ensure the safety of the community or the appearance of Petitioner at future court hearings; instead, it effectively punishes him for having won relief in his case and pressures him to accept deportation to escape jail even though he has a judicially-recognized claim to remain in the United States with his family.