



Securing Release for Immigrant Clients in ICE Custody

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If a person has been arrested by ICE or CBP and is being held in detention, it is critical to help him get out of detention as fast as possible. Not only is it usually very important to your client for other reasons, but it will be very difficult for the person to work closely with you on the case if he is in detention. Also, the immigration court puts the cases of people in detention on a fast track system. The person's removal hearings and appeals will come up rapidly. This gives you less time to prepare, which can affect the outcome of the case.

Arrest and Detention

A person can be arrested and detained by an immigration official (usually a CBP or ICE official) on suspicion of not having lawful immigration status or if someone has lawful status, on suspicion of being removable. After the arrest, the official will interview the person. Often, information from this interview is used against the person to write the Notice to Appear.

A. Arrests for Immigration Purposes

When an ICE or CBP official finds someone whom it believes to be removable, it will often arrest that person. There are many ways it encounters such persons. For example, ICE or CBP may:

- Conduct a raid at the workplace, residence, or public area;
- Pick the person up from jail or prison after he or she has either been arrested or has served a sentence for a criminal offense;
- Receive a tip from someone that the person is undocumented or has committed immigration fraud;
- Arrest the person at or near the Mexican border just after he or she has entered.
- Arrest the person after he files an application with immigration, and convictions are discovered.

After arresting the person, the ICE or CBP official interviews him and completes Form I-213 with notes from the interview. Often the facts gleaned from the interview will be used to write the charges in the Notice to Appear.

In some cases immigration officials will issue the Notice to Appear and begin removal proceedings without taking the person into custody. For example, a person might go into a USCIS office to apply for an immigration benefit (e.g., asylum); if the application is turned down, USCIS might simply hand or mail the person a Notice to Appear without arresting her.

B. Rights Relating to an Arrest for Immigration Violations

For persons who are arrested without a warrant (which is most people), the following procedural protections apply (except for those in expedited removal):

- The person must be examined by an officer other than the arresting officer, if possible, to determine if there is sufficient evidence that the arrestee is in violation of immigration laws. 8 CFR § 287.3(a).
- Within 48 hours after making an arrest the DHS must bring the person before a DHS officer to decide if there are grounds to pursue removal and whether the person will be bonded out or released. Additional time may be granted in the event of emergency or extraordinary circumstances. 8 CFR § 287.3(d).
- The arrested immigrant must be advised of reasons for his or her arrest and of the right to

- counsel at no expense to the government. 8 CFR § 287.3(c).
- DHS shall provide a list of local, free legal services. 8 CFR § 287.3(c).
 - DHS shall inform the arrested immigrant that any statement made by him or her can be used against him or her. 8 CFR § 287.3(c).
 - The immigrant has the right to communicate with a consular official from his or her home country, if the country has a treaty agreement with the U.S. See 8 CFR § 236.1(e).

C. Rights during Immigration Detention

The Secretary of Homeland Security is charged with the safe, secure, and humane detention of the immigrants in DHS custody. INA §§ 232, 235 and 236.

Because ICE has been known to intimidate and trick immigration detainees into making self-incriminating statements or signing their deportation orders, it is crucial for immigration detainees to know their rights while in ICE detention. Here are some basic tips:

- Upon arrest and during any questioning, immigration detainees should be advised not to tell ICE agents anything, but that he or she wishes to speak to an attorney. ICE will often discourage this by telling detainees that attorneys are too expensive, not needed, or that requesting one will result in extra detention time. ICE may even deny access to an attorney and certainly will not provide one for the immigrant. However, as outlined in the section above, immigration detainees have the right to be represented by an attorney, and it is crucial to not divulge any information until the immigrant is able to secure an attorney.
- Detainees should be advised against signing any documents before consulting with a lawyer, as ICE has been known to trick detainees into signing their deportation orders (also known as Stipulated Orders of Removal), or voluntary return documents.

Hutchinson, DHS Mem. Guidance on ICE Implementation of Policy and Practice Changes Recommended by the Department of Justice Inspector General , (March 30, 2004), available at www.ilw.com/articles/2004,0929-ice.pdf (last accessed Feb. 2014).

Alternatives to Detention

With the tremendous growth in immigration detention, discussion about alternative forms of detention has also increased. Several non-governmental organizations have negotiated site specific standards with the DHS to offer humanitarian treatment and housing while the immigrants' cases are under review. The federal government has also funded several social service projects that hold undocumented immigrants in a manner less harsh than traditional detention centers.

In June of 2004, ICE announced a new pilot program providing a less restrictive alternative to detention, called "The Intensive Supervision Appearance Program" or ISAP. Under this program, aliens subject to detention may be offered an alternative in which they are closely supervised and/or subjected to electronic monitoring (bracelets) by a company specializing in such alternatives called Behavioral Interventions, Inc. A second alternative to detention called "Enhanced Supervision/Reporting" or "ESR" was first implemented by ICE in December, 2007. Both ISAP and ESR are operated by outside contractors. A third program, simply titled "Electronic Monitoring" or "EM" is operated by ICE, and was also implemented in December

2007. This program operates in areas not covered by ISAP and ESR. While this program is meant to be an alternative to detention, many on the program wish they had paid a bond instead. Sometimes paying a bond is not an option due to financial constraints. However, the reporting requirements under these programs can be overwhelming. Some individuals are expected to report weekly, with additional hours where they are required to be home. These restrictions make it difficult to hold a job.

While these detention alternatives exist and there are increasingly more people arrested by DHS than there is currently bed space for, DHS continues to detain individuals without resorting to available alternatives. Below is a summary of the various alternatives to detention.

A. Release on an Order of Recognizance (ROR)

With ROR, the detainee in immigration proceedings is released from detention, but must abide by certain restrictions, usually periodic reports to the Office of Enforcement and Removal Operations (ERO). ROR is the least restrictive out of all the alternative forms of detention and is usually used when the detainee does not possess the financial resources to post a bond, but does not pose a threat to the community or national security.

B. Release on bond

Under the release on bond alternative, the detainee does not remain in the detention facility, but must post a bond of at least \$1,500 which is forfeited if the detainee fails to appear in court. The bond may be set by an ICE agent at the onset of custody or may be set or re-determined by an immigration judge. In many cases, the bonds are set much higher than \$1,500. Although this is a reasonable alternative to detention, many immigrants do not have enough money to pay bond, and are therefore deprived of this alternative to detention. Often, those immigrants who may be bond eligible are denied because the immigration judge believes that they are flight risks and/or dangers to the community.

C. Intensive Supervision Appearance Program (ISAP)

ISAP is a program available to individuals who are not subject to mandatory detention, and are unlikely to pose a threat to the public or national security. In practice, however, assignment to the program is determined in part by a person's location of residence as it is available to immigrants who live within a 50 to 85 mile radius of the 24 field offices. Participants are generally assigned to a case specialist who is responsible for monitoring them through an electronic monitoring device (ankle bracelet), home visits, work visits and telephone reports. The program is provided by vendors on contract with ICE. ISAP is the most restrictive and costly alternative to detention. For those who would otherwise be detained in an immigration detention facility, ISAP is a better alternative. The restrictions lessen as time passes and as a person complies with the requirements. Sometimes, however, DHS applies ISAP to individuals who would normally be released without such restrictions. Also, some participants have had problems complying with the requirements because they have to go to work or attend school, have family obligations, do not live close to the office administering the program, or have no reliable transportation to get there.

Counsel should also be aware that ISAP can include additional conditions such as restrictive home curfews. While it is possible to seek amelioration of the terms of the program by

requesting a custody redetermination hearing before an immigration judge, the time frame is limited under 8 CFR § 1236.1(d)(1). The BIA held that once DHS releases a detainee from physical custody, which includes release from physical detention into ISAP, he may only request a custody redetermination hearing before an IJ within seven days of his release. In other words, after seven days of the physical release from DHS custody, a detainee cannot submit a request to an IJ to allow him to post bond instead of continuing under restrictive conditions of ISAP. Often, participants feel relieved that they are getting released, only to later realize that the ISAP requirements are burdensome and interfere with participant's ability to maintain employment and care for their families.

D. Electronic Monitoring Devices (EMD)

The electronic monitoring program consists of two monitoring systems—telephonic reporting and radio frequency monitoring, more commonly referred to as the ankle monitor or electronic bracelet. The first, Telephonic Reporting (TR) is a call-in system utilizing voice recognition. This supervision tool may be used as an added condition of release from detention or for supplementing in-person reporting requirements. It is available nationwide and may be used to increase the levels of reporting while under supervision to include reporting daily, weekly, or monthly, as appropriate. Telephonic reporting frequently decreases in-person reporting requirements. Radio Frequency (RF) monitoring is a home curfew system that uses an electronic bracelet. It is considered an alternative for those under consideration for release from custody.

E. Release to NGO shelters that provide community ties

Several non-governmental organizations have also developed alternative programs to traditional detention in cooperation with the government. These programs typically start with an agreement with the government (DHS) to release detainees to the program's custody. The program then promises to use all reasonable efforts to ensure that immigrants show up at their scheduled hearings. Some of these programs provide housing while others use a periodic meeting/reporting method to make sure that their clients appear at their hearings.

The Vera Institute pioneered the program first in the criminal system, but later adopted the methods and applied it to immigration detainees with great success—over 90% of all released immigrants eventually returned and showed up at their scheduled hearings, and supervision was found to be less costly than detention. Vera interviewed asylum seekers who were still eligible to apply for a legal remedy, but whom the immigration authorities indicated were subject to detention. After an asylum seeker was accepted into the project, they were required to report twice a month. Incentives to ensure that they reported included a resource library with materials to help their cases and a referral service for social assistance and legal advice. If they were denied asylum, but were willing to cooperate with their deportation, they also received additional information and administrative assistance.

Examples of other programs include: Asylum House (Baltimore, MD), Freedom House (Detroit, MI), Vive (Buffalo, NY), La Posada Providencia (San Benito, TX), International Friendship House (York, PA), and Casa de San Juan (San Diego, CA), Refugee and Immigration Ministry (Boston, MA), the Florence Project (Florence, AZ), and Catholic Charities (New Orleans, LA). These non-governmental programs are often highly successful, with compliance rates reaching 96%—and they do not require tax funding. This means that an overwhelming majority of

immigrants released by DHS show up at their hearings, and tax payers do not need to pay the government to detain people. Advocating with key government actors regarding detention alternatives is an important step in changing the landscape of immigrant detention.

For those entitled to a bond, it is extremely important to their case that they get bonded out.

Procedures for Release from Custody

A. Custody Release Overview

ICE makes the initial determination about whether to release the immigrant, and if so, under what conditions. In the initial interview, the officer will decide whether the person is eligible for bond (depending on if they are subject to mandatory detention), and if not, whether they are deserving of a bond. On rare occasions ICE may release someone on “conditional parole,” which means without paying a bond. See INA § 236(a)(2)(B). Additionally, ICE might require other terms, like wearing an ankle bracelet or reporting regularly to the ICE office. If an ICE officer elects not to set bond, or the amount the officer sets is too high, the detained person may ask to have the decision reviewed by an immigration judge. This is called a bond re-determination hearing, more commonly referred to as the bond hearing.

The immigration judge can review a decision of the immigration officer that someone is not eligible for a bond, as well as re-determine the amount of bond. A bond hearing can happen before or after a master calendar hearing and is separate from the removal hearing. The minimum bond a judge may set is \$1,500. Additionally, there is some authority indicating that an immigration judge may grant release under conditional parole, or under one’s own recognizance (without a monetary bond).

In a bond hearing, the judge will determine whether or not she believes the person 1) is a danger to the community, and 2) whether the person is a flight risk. If the judge is satisfied that the person is not a danger to society, the judge will determine how much money is necessary to ensure that the person will not abscond. (If the person cannot pay the amount of bond set, or is not offered bond, she will remain in detention throughout the removal proceedings.)

Allowing immigrants to post a bond and be released from detention (“bond out”) used to be the norm. In the past decade, a growing number of immigrants have been detained, in part due to the passage of IIRIRA in 1996 with its long list of people who must be detained and are not allowed to bond out. Persons who cannot bond out are said to be subject to “mandatory detention.” This list is set out below. See also INA § 236; and 8 CFR §§ 236.1, 1003.19(h) & 1236.1 for rules governing detention and bond.

B. Bonding Out of Detention

If the person has been arrested, the Enforcement and Removal Operations of ICE will determine whether or not to release the person and whether the person is eligible to have a bond set to secure her release from custody. An immigration bond is money a family member or friend must post to secure the person’s release from custody. This bond is supposed to guarantee that the

person will come to future hearings and interviews. If the person does not show up, the person who posted the bond will lose the bond money.

For those people who are eligible for release from detention, ICE will usually set an immigration bond of at least \$1500 following the person's arrest and the initiation of removal proceedings. INA § 236(a)(2)(A). ICE also may release a person on "conditional parole." INA § 236(a)(2)(B). A person for whom a bond has been set can only be released from custody if someone pays the full amount of the bond. The bond is called an appearance bond because it is set in order to guarantee the person's appearance at all future hearings and appointments. The person who posts (pays) the bond is called the obligor. If the person absconds (doesn't appear), she is said to breach the bond and the obligor loses the bond money. If the case ends someday—because the person either wins or loses their case—ICE will cancel the bond and return the bond money to the obligor, with interest, assuming the respondent has not missed any hearings and leaves the U.S. if she has been ordered to do so.

The amount of bond set by ICE can be found on the Notice to Appear. This amount can vary greatly depending on ICE's determination of how likely it is that the person will appear at later hearings.

Since most of our clients don't have much money or real property to use as collateral with a bond company, they need to get a low bond. Once ICE sets the bond, the person has a right to a bond redetermination hearing (often called a "bond hearing") before an immigration judge. See 8 CFR §§ 3.19, 236.1, 1003.19 and 1236.1. At the bond redetermination hearing, the person asks the immigration judge to lower the bond or set bond in cases where ICE determined the person should not be released.

C. Bond Redetermination by an Immigration Judge

Following an initial custody determination by DHS, a non-citizen may apply for a review or redetermination by an IJ, and that decision may be appealed to the BIA. See 8 C.F.R. §§ 236.1, 1003.19. At these hearings, the detainee bears the burden of establishing "that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight." *Guerra*, 24 I. & N. Dec. at 38. "After an initial bond redetermination," a request for another review "shall be considered only upon a showing that the alien's circumstances have changed materially since the prior bond redetermination." 8 C.F.R. § 1003.19(e).

Rodriguez v. Robbins, 804 F.3d 1060 *, 2015 U.S. App. LEXIS 18758. See also, 8 CFR 236.1.¹

¹ 8 CFR § 236.1(3)(c)(3) Criminal aliens eligible to be considered for release. Except as provided in this section, or otherwise provided by law, an alien subject to the TPCR may be considered for release from custody if lawfully admitted. Such an alien must first demonstrate, by clear and convincing evidence, that release would not pose a danger to the safety of other persons or of property. If an alien meets this burden, the alien must further demonstrate, by clear and convincing evidence, that the alien is likely to appear for any scheduled proceeding (including

In a bond hearing, the judge will determine whether or not she believes the person 1) is a danger to the community, and 2) whether the person is a flight risk. If the judge is satisfied that the person is not a danger to society, the judge will determine how much money is necessary to ensure that the person will not abscond. *Singh v. Holder*, 638 F.3d 1196, 1206 (9th Cir. 2011). (“In *Prieto-Romero* we explained that, to determine whether aliens like Singh who are detained under § 1226(a) present a ‘flight risk or danger to the community,’ immigration judges ‘should . . . look[] to the factors set forth at *Matter of Guerra*, [24 I. & N. Dec. 37, 40 (B.I.A. 2006)].’ 534 F.3d at 1065-66. The *Guerra* factor most pertinent to assessing dangerousness directs immigration judges to consider ‘the alien's criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses.’ *Guerra*, 24 I. & N. Dec. at 40.

In *Matter of Guerra*, the BIA outlined a number of factors that IJs may consider when assessing whether an alien is dangerous or a flight risk: "(1) whether the alien has a fixed address in the United States; (2) the alien's length of residence in the United States; (3) the alien's family ties in the United States, and whether they may entitle the alien to reside permanently in the United States in the future; (4) the alien's employment history; (5) the alien's record of appearance in court; (6) the alien's criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses; (7) the alien's history of immigration violations; (8) any attempts by the alien to flee prosecution or otherwise escape from authorities; and (9) the alien's manner of entry to the United States." See *Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006). For the purposes of assessing dangerousness, the primary factor is the alien's "criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses." *Id.* *Obregon v. Sessions*, 2017 U.S. Dist. LEXIS 60552, 10.

Bond Eligibility and Procedure

A. Who Is Eligible to Be Bonded Out?

Generally, [8 U.S.C. §] 1226(a) authorizes detention ‘pending a decision on whether the alien is to be removed from the United States.’ 8 U.S.C. § 1226(a). [However, the] statute also expressly authorizes release on "bond of at least \$1,500" or "conditional parole." *Id.* § 1226(a)(2). *Rodriguez v. Robbins*, 804 F.3d 1060 *, 2015 U.S. App. LEXIS 18758. See also, 8 CFR 236.1. However, some people do not have the right to a bond and are required to remain in immigration custody while they fight the case. These people are subject to “mandatory detention” as described in INA § 236(c). Mandatory detention is discussed in the next section.

B. Individuals Subject to Mandatory Detention

The harsh “permanent” rules for mandatory detention went into effect in October 1998. Under the permanent rules now in effect, the following groups of people are not entitled to a bond and must remain in detention while removal proceedings are pending against them. These rules are contained in INA § 236(c)(1):

any appearance required by the Service or EOIR) in order to be considered for release in the exercise of discretion

- a. Persons who are inadmissible for having committed an offense described in INA § 212(a)(2) [crimes of moral turpitude and drug offenses].
- b. Persons who are deportable for having committed any offense in INA § 237(a)(2)(A)(ii)[multiple criminal convictions], 237(a)(2)(A)(iii) [aggravated felony], 237(a)(2)(B)[drug offense] 237(a)(2)(C)[firearms offenses], or 237(a)(2)(D) [crimes related to espionage];
- c. Persons who are deportable under INA § 237(a)(2)(A)(i) [has been convicted of a crime of moral turpitude that was committed within five years of admission] and has been sentenced to a term of imprisonment of at least one year; and
- d. Persons who are inadmissible under INA § 212(a)(3)(B) or deportable under INA § 237(a)(4)(B) [involved in terrorist activities]

NOTE: For clients with criminal convictions, these mandatory detention rules apply only to persons who completed their criminal sentences on or after October 9, 1998, and whose latest release from state custody is directly tied to a crime listed in § 236(c). *Matter of Garcia-Arreola*, 25 I&N Dec. 267 (BIA 2010). Further, in certain jurisdictions, for mandatory detention to apply ICE needs to have apprehended the person immediately from release from criminal custody. See, e.g., *Preap v. Holder*, No. 13-cv-05754-YGR (N.D. Cal. May 15, 2014); *Castaneda v. Souza*, 952 F.Supp.2d 307 (D. Mass. 2013); *Nimako v. Shanahan*, 2012 WL 4121102 (D.N.J. 2012); *Khoury v. Asher*, 2014 WL 954920 (W.D. Wash. 2014); but see *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001).

1. Mandatory detention during “regular” removal proceedings

A person who is convicted of a crime may not always come to the attention of ICE, even if he or she is deportable. Persons who serve little or no jail time sometimes escape ICE’s attention. However, ICE may later discover the person when, for example, he or she applies for an immigration benefit (including naturalization and replacement of the Alien Registration Card) or when he or she returns from travel abroad. You should always warn clients who have criminal convictions of the risks they face if they apply for an immigration benefit or they want to make a trip abroad.

When ICE discovers persons serving jails sentences, it may place an “immigration hold” or “notification request” on them. People with “immigration holds” or “notification requests” may ultimately be transferred directly from state custody to ICE custody upon completion of their criminal sentences. These are the people who are most affected by the harsh new mandatory detention rules set forth in INA § 236(c). Persons in mandatory detention are disadvantaged in many ways. Not only are they deprived of the companionship of friends and family, but they are disadvantaged legally as well. This is because:

- a. Their confinement makes it difficult for them to find someone to represent them;
- b. If they are lucky enough to find a representative, it is very difficult for them to communicate with their representatives and prepare for their hearings;
- c. Because they are being detained, their hearings are expedited and thus they don’t have the same time to prepare; and

- d. Because they are now in federal immigration custody, they can be transferred to another facility out of state, which makes it even more difficult to find representation and seek assistance and support from family members.

C. Individuals Experiencing Indefinite and/or Prolonged Detention

1. Indefinite detention; persons with final orders of removal

With the expansion of the immigration detention system, lengthy detentions are an increasing problem. Since the 1980's, detainees have challenged the government's indefinite detention in cases where the government had ordered their detention but their home country refused to take them. In June 2001 the Supreme Court held in *Zadvydas v. Davis* that an alien's post-removal period detention should be limited to only a period "reasonably necessary" to bring about that alien's removal. The Court strongly stated that a statute permitting indefinite detention of an alien raises "a serious constitutional problem."

The question, then, is what length of detention is "reasonably necessary" after a removal order is final to secure the person's removal. Once there is a final order of removal, detention is permitted during the 90-day "removal period." Any detention beyond 90 days must then be "reasonably necessary" to secure the alien's removal and must not be indefinite. The Supreme Court held that immigration detention is presumed to be "reasonably necessary" for a period of six months.

Persons who can show that there is no significant likelihood of removal in the reasonable foreseeable future may qualify for release from detention under *Zadvydas*. The government will also have the opportunity to rebut this showing with its own evidence. Examples of individuals who may not be removable in the near future are those from countries where the U.S. does not have a repatriation agreement or the consulate fails to issue travel documents. The Ninth Circuit has found that an applicant for asylum who had won relief from removal three times before the immigration judge, but had been detained nearly five years on the basis of allegations that he had been involved in terrorist activities, fell within *Zadvydas*. The court ordered his release from detention.

The Ninth Circuit has held that the detainee may not bring a constitutional challenge to indefinite detention during the 90-day removal period because the statute explicitly authorizes detention during these 90 days. However, following the *Zadvydas* decision, the former-INS published regulations to implement the Supreme Court's decision. Under these regulations, an individual may file an administrative request for supervised release within the 90-day removal period. Persons must show that there is no significant likelihood that he or she will be removed in the reasonably foreseeable future. Under *Zadvydas*, the government must decide whether to grant supervised release within 6 months of post removal detention. If the request is denied, detainees may file a petition for habeas corpus in the federal district courts to challenge the agency's decision.

Federal regulations at 8 CFR § 1241.14 further provide that the government may continue to detain a person past six months who meets any of the following criteria:

1. The person has a highly contagious disease that is a threat to public safety;

2. The person is detained on account of serious adverse foreign policy consequences of release;
3. The person is detained on account of security or terrorism concerns, or
4. The person is determined to be “specially dangerous.” “Specially dangerous” is defined as those who have committed one or more crimes of violence described in 18 USC § 16, persons for whom no conditions of release can reasonably be expected to ensure the safety of the public, and persons with mental disorders that make them likely to engage in future acts of violence.

Detention of “specially dangerous” aliens has been successfully challenged. In *Thai v. Ashcroft*, the Ninth Circuit held that the Supreme Court’s construction of INA § 241(a)(6) did not authorize the continued and potentially indefinite detention of a person based on a determination that the alien’s mental illness made him specially dangerous to the community. The court also held that the danger of criminal conduct by an alien was not automatically a matter of national security as that term was used in *Zadvydas*.

2. Prolonged detention pending removal proceedings

The courts have not extended the heightened protections in *Zadvydas* to persons who are subject to prolonged immigration detention while removal proceedings are ongoing. Thus, while removal proceedings are either pending or have not yet concluded, a person’s right against prolonged detention is significantly diminished. This is particularly true for detainees with a criminal record. Noncitizens who are detained based on criminal grounds are not yet in the 90-day removal period because their removal is still pending. Due to the criminal grounds, many will be held in mandatory detention without the opportunity to go before an immigration judge to ask for release on bond.

However, due to the increased prolonged detention of immigrants over the course of their removal proceedings and federal appeals process, which may and often lasts years, many district courts, and in at least one instance, a federal circuit court have found that this prolonged detention may still be unreasonable and violate due process, leading to release of immigrants from detention pending the outcome of their cases.

3. Bond hearings for those in prolonged detention

Joseph Hearing. Even if someone is allegedly subject to mandatory detention, the person still may be able to show that he or she is not subject to mandatory detention at a Joseph hearing by showing that he or she is not properly included within a mandatory detention category.

Matter of Joseph held that a permanent resident is not properly included within a mandatory detention category if ICE is “substantially unlikely” to establish at the merits hearing that the charges that would subject the person to mandatory detention. A Joseph hearing should be scheduled immediately after requested, or else it may be a violation of the person’s rights. If the person prevails at the Joseph hearing, he or she is entitled to a bond hearing. The results of the Joseph hearing, however, may be challenged in federal court.

In *Tijani v. Willis*, the Ninth Circuit questioned the holding in *Matter of Joseph*, finding that imposing the burden of proving that ICE is “substantially unlikely” to establish the charges on the permanent resident is contrary to the Constitution. When the fundamental right of liberty is at stake, the Supreme Court has consistently rejected laws that place the burden of protecting his or her fundamental right on the individual. Thus, representatives should argue that when ICE alleges that a person is subject to mandatory detention under INA § 236(c), ICE should also bear the burden of proving that it would be substantially likely to prevail in sustaining the charges before a permanent resident client can be denied the right to bond. Representatives in the Ninth Circuit should cite to *Tijani v. Willis*, while representatives in other jurisdictions should cite both to *Tijani v. Willis* and to the Supreme Court cases cited therein.

Rodriguez Hearings. In *Rodriguez v. Robbins*, the Ninth Circuit stated that all noncitizens, even those subject to mandatory detention, are allowed to request bond hearings after they have been detained for six months or more pending removal proceedings. Additionally, the government bears the burden of justifying continued imprisonment by clear and convincing evidence. The hearing must be accompanied by several other procedural safeguards as well. A similar decision, *Lora v. Shanahan*, exists in the Second Circuit.

Rodriguez clarifies that after 6 months of detention, the government must show by clear and convincing evidence (a standard higher than a preponderance of evidence) that the detainee is a flight risk or danger to the community. This also includes detainees held under other subsections, including recently entered aliens under Section 1225 and criminal defendants under 1226(c):

... in *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011), we clarified the procedural requirements for bond hearings held pursuant to our decision in *Casas* (“*Casas* hearings”). In light of “the substantial liberty interest at stake,” we held that “due process requires a contemporaneous record of *Casas* hearings,” and that the government bears the burden of proving “by clear and convincing evidence that an alien is a flight risk or a danger to the community to justify denial of bond.” *Id.* at 1203, 1208. To evaluate whether the government has met its burden, [**15] we instructed IJs to consider the factors set forth in *In re Guerra*, 24 I. & N. Dec. 37 (BIA 2006), in particular “the alien’s criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses.” *Singh*, 638 F.3d at 1206 (quoting *Guerra*, 24 I. & N. Dec. at 40). *Rodriguez v. Robbins*, 804 F.3d 1060 *, 2015 U.S. App. LEXIS 18758

As we held in *Casas-Castrillon*, the burden of establishing whether detention is justified falls on the government. *See Casas-Castrillon*, 535 F.3d at 951 (“[A]n alien is entitled to release on bond unless the ‘government establishes that he is a flight risk or will be a danger to the community.’” (emphasis added) (quoting *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005))). *Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011)

While these decisions have been a great success in the challenge against mandatory detention, advocates have raised concerns over the way that EOIR is processing these cases. For example, individuals released under *Rodriguez v. Robbins* have had their master calendar cases scheduled between 10 and 28 days after release from detention, increasing the potential for individuals to

accidentally miss their hearings and receive orders of removal in absentia. For a practice guide meant to assist, especially pro se respondents in this situation, see www.aclu.org/feature/immigration-detention-resources.

Casas-Castrillon Hearings. Due to the constitutional problems raised by lengthy detention without any type of hearing, the federal circuit courts and district courts have held that the government must provide a bond hearing at a certain point. In a significant opinion called *Casas-Castrillon v. DHS*, the Ninth Circuit Court of Appeals found that a person in certain circumstances cannot continue to be detained throughout the length of his removal proceedings without an opportunity for a bond hearing. The court specifically held that where an individual is initially apprehended and subject to mandatory detention, the noncitizen is entitled to an individualized bond hearing once he files a petition for review, and the Ninth Circuit grants a stay of removal. The Third Circuit Court of Appeals held that the individual is entitled to a bond hearing once detention exceeds a reasonable amount of time.

In *Casas-Castrillon*, the Ninth Circuit reasoned that lengthy detention without due process cannot be constitutional and thus, the court held that the individual's custody status changes under immigration law so that he is no longer held under mandatory detention. *Casas-Castrillon* also found that the burden in such a bond proceeding is on the government to prove that the person should not be released because he is a flight risk or a danger to the community. In a later decision, the Ninth Circuit held a high standard of proof applies; the government burden is to prove flight risk by "clear and convincing" evidence. Under this decision and other court decisions, many immigrants are now challenging whether their lengthy detention during the circuit court appellate process is constitutional and permitted under the immigration detention statute scheme.

4. Indefinite detention; persons with final orders of removal

What happens if someone has a final order of removal, but no country will take him? This scenario occurs frequently. Countries such as, Laos and Cuba will not take people back after they have been ordered removed from the United States.

INA § 241(a)(1)(A) mandates that a final order of removal must be carried out within a 90 day period, called the "removal period." INA § 241(a)(2) requires that persons subject to final orders of removal may be detained during the removal period, and that persons who have been found inadmissible or removable for criminal or security related grounds must be detained during this time.

In 2001, in a case called *Zadvydas v. Davis*, 533 U.S. 678 (2001), the U.S. Supreme Court decided that the detention of aliens with final orders of removal under INA § 241 is limited to a period that is reasonably necessary to bring about the person's removal, and does not permit indefinite detention. The court designated six months as a "reasonably necessary period" to bring about deportation. After six months, if an alien provides good reason to believe that there is no significant likelihood that he'll be removed in the reasonably foreseeable future, the Government must rebut that showing to continue detention.

Even before the Supreme Court's ruling, INA § 241(a)(3) provided that persons subject to final orders of removal could be released under supervision after the 90-day removal period was over. However, the government was detaining many people who had little or no possibility of being returned to their home countries for very long periods of time. That's why the Supreme Court ultimately had to decide the issue.

a. Regulations governing release of aliens up to six months after final order

Regulations governing the terms and procedures for release are found beginning at 8 CFR §§ 241.4 and 1241.14. The former INS first issued proposed regulations to implement the Supreme Court's decision in *Zadvydas* in November 2001. The proposed regulations left standing the established procedures to secure the release of individuals from detention in the first six months following a final order of removal. Those procedures are discussed in this section. However, the proposed regulations significantly modified the procedures after the six-month period.

Under these regulations, persons who are inadmissible or removable for criminal or security grounds, for prior immigration violations, or who are determined to be "a risk to the community or unlikely to comply with the removal order" may be detained beyond the removal period. INA § 241(a)(6); 8 CFR §§ 241.4(a) & (b) and 1241(a) & (b). The regulations authorize local ICE Directors to continue to detain such individuals during the 90-day removal period plus an additional three months. 8 CFR §§ 241(c)(1) and 1241(c)(1).

People detained under this section have a right to all notices, decisions, or other documents in connection with custody reviews made either by District Directors or the Headquarters Post-Order Detention Unit (HQPDU). The decision must specify the reasons for continued detention. 8 CFR §§ 241.4(d) and 1241(d). People detained under these sections also have the right to representation by an attorney or other representative. 8 CFR § 241.4(d)(3) and 1241(d)(3).

If an individual can demonstrate that his or her release from custody will not pose a danger to the community or the safety of people or property, and he or she is not a flight risk, he or she may be released from custody. 8 CFR § 241.4(d)(1).

However, before someone with a final order of removal can be released from detention, the District Director must make the following findings:

1. Travel documents are unavailable or immediate removal is not practicable or in the public interest;
2. The detainee is now a nonviolent person;
3. The detainee is likely to remain nonviolent if released;
4. The detainee is not likely to pose a threat to the community following release;
5. The detainee is not likely to violate the conditions of release; and
6. The detainee does not pose a significant flight risk if released.

8 CFR §§ 241.4(e) and 1241.4(e).

The type of evidence the District Director will use to determine a person's eligibility for release following the 90-day removal period is specified at 8 CFR §§ 241.4(f) and 1241.4(f). This evidence includes such things as the person's criminal history, if any, disciplinary record, psychological or psychiatric reports, and evidence of rehabilitation. Someone who refuses to cooperate with ICE's efforts to secure travel documents for their deportation will be denied release. 8 CFR §§ 241.4(g)(5) and 1241.4(g)(5).

Detainees who remain in custody six months after the entry of the removal order must seek custody reviews from the Executive Associate Commissioner, acting through the HQPDU. 8 CFR §§ 241.4(c)(2) and 1241.4(c)(2) and may also file a habeas petition in federal court.

b. Regulations governing release of aliens more than 6 months following a final order of removal

In November 2001, the former INS issued interim regulations designed to implement the Supreme Court's decision in *Zadvydas*, and set forth the procedures to be followed after the six-month reasonably necessary period to bring about a person's deportation has expired.

Under 8 CFR §§ 241.13(g)(1) and 1241.13(g)(1), after six months (generally, the 90-day removal period plus another 90-days), the HQPDU will conduct a review to determine whether there is a significant likelihood that the alien will be removed in the reasonably foreseeable future. Until that determination is made, however, 8 CFR §§ 241.4 and 1241.4 continue to govern the terms of detention. In addition, if the alien fails to cooperate with the authorities to help effectuate his or her removal, the 90-day removal period can be extended, thereby subjecting the person to the requirements of 8 CFR §§ 241.4 and 1241.4 even though more than six months would have passed.

A person who is detained and believes that there is no likelihood that he or she will be able to be removed does not have to wait six months after the final order to petition ICE for release. See 8 CFR §§ 241.13(d)(3) and 1241.13(d)(3). On the other hand, ICE has no obligation to consider the application for release until that six-month period is over. See 8 CFR §§ 241.13(b)(2)(ii) and 1241.13(b)(2)(ii).

Once the HQPDU determines that there is no significant likelihood that the alien will be removed in the reasonably foreseeable future, then the person can be released subject to certain conditions deemed necessary. Even if released, the person can be detained again if he or she violates the conditions of release. See 8 CFR §§ 241.13(i) and 1241.13(i). Also if the HQPDU determines later on that due to changed circumstances removal has become likely once again, then the person's custody status will once again be governed by 8 CFR §§ 241.4 and 1241.4, and he or she may be taken into custody once again. See 8 CFR §§ 241.13(i)(2) and 1241.13(i)(2).

If after review, the HQPDU determines that there are special circumstances justifying continued detention, the person will continue to be detained. See 8 CFR §§ 241.13, 241.14, 1241.13 & 1241.14. If the person is denied release under 8 CFR §§ 241.13(g) and 1241.13(g), he or she can petition for another review every 6 months, or at any time if there are materially changed circumstances.

You should note that practically speaking some aliens might be detained indefinitely if there are special circumstances justifying continued detention. The Supreme Court decision did not bar ICE from detaining deportable individuals per se. Rather, ICE must release detainees if there is no possibility for removal in the reasonably foreseeable future unless it is absolutely necessary to hold them in detention. Under 8 CFR §§ 241.14 and 1241.14. ICE defines these “special circumstances” meriting continued detention as cases where:

- the person has a highly contagious disease that is a threat to public safety;
- there are serious adverse foreign policy considerations;
- the person’s is suspected of being a threat to national security or a terrorist; or
- the person is determined to be “especially dangerous.”

Persons whose continued detention is due to a finding that they are especially dangerous can have that finding reviewed by an immigration judge. They also have the right to appeal to the Board of Immigration Appeals. See 8 CFR §§ 241.14(g) & (h) and 1241.14(g) & (h). This is a change from previous regulations that prohibited review by the Board of Immigration Appeals. People whose continued detention is due to highly contagious disease, serious foreign policy considerations or terrorism grounds do not have a right to an immigration court hearing or BIA review.

5. Mandatory detention for suspected terrorists

The Attorney General (AG) or the Deputy Attorney General (DAG) has the power to segregate from the above-noted detention rules any suspected terrorists. This rule was created by the USA-PATRIOT Act, passed by Congress in the wake of the terrorist attacks on the United States on September 11, 2001. Under INA § 236A, the AG or the DAG may certify an individual if there are reasonable grounds to believe the person falls within one of the terrorism grounds of inadmissibility or deportability. The AG or DAG may also certify an individual where there are reasonable grounds to believe that the person is engaged in any other activity that endangers the national security of the United States. Only the AG or DAG can certify someone for detention under § 236A.

Once a person has been so certified, he or she is subject to special detention provisions. Under these provisions, the Attorney General must place the person in removal proceedings, or charge the person with a criminal offense, within seven days of commencement of detention. Otherwise the person must be released. INA § 236A(a)(5). Normally, ICE and CBP can detain someone only 48 hours before instituting removal proceedings or having to release the person. See 8 CFR § 287.3(d).

While proceedings are pending, the person must remain in custody, even if he or she is eligible for, or is granted, relief from removal, unless the Attorney General determines that the alien no longer falls within one of the specified grounds. INA § 236A(a)(2).

Following a finding that the person is removable, he or she may continue to remain in custody if the person’s release will threaten the national security of the United States, or the safety of the

community or any person. The need for continued detention must be re-evaluated in six-month intervals. INA § 236A(a)(7).

Although it is unlikely that one of your clients will be detained under this special national security provision, it is important to know that it exists. Someone detained under this section should be referred to an attorney or agency with experience in detention issues, such as the American Civil Liberties Union or the Detention Watch Network (www.detentionwatchnetwork.org).

Factors Considered in Deciding Bond

An immigration judge is supposed to make her decision about bond based on only one question aside from national security considerations: how likely it is that the person will come to future hearings. To decide this, the judge takes into consideration a large number of factors. These factors are known as bond equities. When we represent a client at a bond redetermination hearing, it is very important to present information which shows the judge that our client, once released, will show up at her future immigration hearings. This information includes our client's community and family ties, the existence of other forms of immigration relief for our client, and our client's character.

A. Community and Family Ties

Several factors may show strong community and family ties. These include:

- **Permanent Address:** A stable address is very important. The longer a client has resided at one address, or in one town, the better.
- **Employment:** If a client is currently employed, it tends to show that she has a strong reason to remain in the area.
- **Relatives with Legal Status:** If a client has relatives (a spouse or children, for example) who are either U.S. citizens or lawful permanent residents, the judge will be more likely to believe that a client's ties to the community are real and strong. This is especially true if the family has lived in the area for a considerable length of time.
- **Other Community Ties:** Any other evidence that we can present to show that a client has strong ties to the community and therefore is likely to remain for her future hearings is very important as well. Church membership or attendance, enrollment in classes, membership in organizations or sports clubs, and involvement in children's school activities are examples of such community ties.

B. Eligibility for Immigration Relief

Another important consideration is whether a client has the legal means to stay in the United States. For example, if the person soon will immigrate through a family member or is eligible to apply for relief from removal, he has more invested in coming to court and is less likely to abscond. In that case the judge should be more willing to lower the bond.

C. Character of Client

A person who lacks a sense of responsibility is arguably less likely to appear at her removal hearings. Therefore, our client's character is very relevant in bond redetermination issues. If we can show that our client is a responsible individual, we will be more successful in arguing for a bond reduction. Important factors to point out, whenever it is relevant or possible, are the following:

- Our client is dedicated to her family.
- Our client has had no serious criminal activity, and shows respect for the law.
- Our client has come to past proceedings, which tends to prove that she is responsible and will likely continue to show up at future proceedings.
- Our client has been steadily employed, or else has been looking hard for a job, or just obtained a job. Again, this tends to show responsibility.

D. Portraying Your Client Positively

When you present your case to the judge, make sure you portray your client in the best light possible. Here are some tips to keep in mind:

- Try to get letters from employers, landlords, teachers, churches, etc. which tend to show your client has strong ties to the community.
- Try to get witnesses to come to the hearing. If you are saying your client is a good family provider, then it helps if the family is present. If you are saying your client has a good job and is liked by the boss, then it helps if the boss can also be present (although an employer's appearance can be difficult to arrange).
- If negative factors are going to come out against your client, bring them up yourself. It is better if you mention negative factors first before the ICE attorney does. That way, you will have the opportunity to frame them, minimize their importance, and focus instead on the positive factors. By admitting to any negative factors, downplaying them, and then moving on to the positive factors, you will be able to control the presentation and show the judge that your client, in spite of "a few minor slip-ups," is indeed a good, responsible person. Moreover, if you do not bring up bad factors that will inevitably come out, it will look like you client is "hiding the ball" and this will hurt your client's credibility.

Preparing for the Bond Redetermination Hearing

When representing a client during a bond redetermination hearing, you often cannot have everything you would like. You would like to prepare thoroughly for the hearing, to sit down with the client and interview her, make sure you get all the information you need to build the strongest case possible, including employment history, family and community ties, and immigration remedies. You would like to have the opportunity to gather relevant documents (such as letters from employers and landlords) to show the judge. You would like to get witnesses such as family members and the employer to come to the hearing.

Unfortunately, in the majority of the cases you do not have the luxury of time. The usual situation is that your client is in detention, and you have very little time both to meet with her and to prepare for the hearing.

Since you have such a short amount of time, it is important that you make the best of it. In this time you must explain to your client what the situation is, what the law is, what she needs to

show, and how she can get the bond lowered. The following are some suggestions for how best to use the short amount of time you will have in a bond hearing.

Spend the time to explain to your client what you are trying to show the judge. The client must understand what you are trying to prove. By understanding why you are asking certain questions, for example, your client will be better able to think of things in her life that will help prove the case to the judge. It may also be helpful to give your client pro se bond materials that explain the process.

Explain the basics to your client. For example, that the purpose of the hearing is to lower the amount of the bond so she can get out of custody. Therefore, you need to tell the judge things about the person's life that show that she will come back for hearings and will not run away. Explain the factors (community ties, immigration relief, good character) that may influence this decision. You also should know about negative factors that ICE will know about, such as arrests or previous removal or a history of immigration violations. Ask the client to help you think of factors to use in the case.

Posting the Bond

The following are some practical tips on posting (paying) the bond so that a person can get out of ICE custody.

- A. Who can pay the bond? Any person (a relative, friend, the legal worker) can post the bond. However, in practice, the person posting the bond should have legal status in the U.S. If ICE discovers that the person posting the bond, called the obligor, is not here legally, it can put him or her in removal proceedings.
- B. Where can the obligor post the bond? The obligor can post the bond at ANY ICE Enforcement and Removal branch office.
- C. How does the obligor make the payment to post the bond? The obligor can either post a bank's CASHIER'S CHECK or U.S. POSTAL MONEY ORDER. The obligor cannot post a money order from any other business, such as Western Union—it must be from the post office. Additionally, a person can post the bond through a BOND COMPANY, which will require collateral (often real property like a house or condominium) and a non-refundable fee.
- D. What happens if the person released on bond fails to show up for a court hearing or an immigration appointment? If this occurs, it is possible that the obligor will lose the bond. (This is called a breach of the bond.) If the person misses a court hearing, he will also most likely be ordered removed in his absence by the judge- this is an in absentia order of removal.