



CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

A GUIDE TO OBTAINING RELEASE FROM IMMIGRATION DETENTION

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Obligor (the person who pay the bond) p. 71

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II. Overview of Immigration Detention and Strategies for Release

A. Overview of Immigration Detention

1. When Detention Is Most Likely to Occur

Individuals are detained by DHS in a variety of circumstances. Some are detained upon apprehension soon after crossing the border without inspection, or after presenting themselves at a port of entry seeking asylum. Many are detained due to contact with a state or local criminal justice system. For example, an individual might be arrested for a traffic offense, booked into jail, and upon release from state or local custody transferred into Immigration and Customs Enforcement (ICE) custody.¹⁰ Other individuals end up in immigration detention as a result of ICE enforcement actions, such as encounters at the home or workplace.

2. What Happens When an Individual Is Taken into Immigration Detention?

After an individual is arrested by DHS, an officer must make a custody decision: detain the individual, release the individual with conditions (including bond), or release the individual without conditions (called release on recognizance). When DHS apprehends an individual, it typically transfers them to a DHS facility, usually an ICE Enforcement and Removal Operations (ERO) field office or sub-office, for processing.¹¹ During processing, officers interview, fingerprint, and photograph the individual, and make a custody determination based on factors such as criminal history, prior removal data, visa violations, community ties, and alleged gang affiliation.¹² If DHS decides to detain the individual, the individual may be detained at a facility relatively close to their home or DHS may transfer the individual to a detention center anywhere in the country.

3. Transfer of Detained Individuals

ICE may transfer an individual multiple times and without advance warning.¹³ ICE's transfer policy describes transfer criteria and requirements including that detained individuals should generally not be transferred if they have immediate family, an attorney of record, or pending removal proceedings in the jurisdiction, or

¹⁰ See, e.g., INA § 287(g); ICE, Secure Communities, ice.gov/secure-communities (last updated Feb. 9, 2021).

¹¹ Processing may also take place at other locations, such as the state criminal detention facility where the individual is incarcerated for those placed in the "institutional removal program." See, e.g., Memorandum from John P. Torres, Acting Dir., Office of Detention & Removal Operations, Detention and Deportation Officer's Field Manual Update: Chapter 1, at 26 (Mar. 27, 2006), ice.gov/doclib/foia/dro_policy_memos/09684drofieldpolicymanual.pdf.

¹² See U.S. Gov't Accountability Office (GAO), Report to Congressional Committees: Alternatives to Detention, Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness, at 8 (Nov. 2014), gao.gov/assets/670/666911.pdf (describing the ICE Risk Classification Assessment tool).

¹³ DHS is to inform the detained individual "immediately prior to transfer" and to provide notice within 24 hours of the transfer to an individual's representative, if any. ICE, Policy 11022.1: Detainee Transfers § 5.3 (Jan. 4, 2012), ice.gov/doclib/detention-reform/pdf/hd-detainee-transfers.pdf (directing that ICE inform the representative of the transfer "as soon as practicable on the day of the transfer, but in no circumstances later than twenty four (24) hours after the transfer occurs") [hereinafter "ICE Transfer Policy"].

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Immigrant and human rights groups have condemned the conditions of immigration detention facilities,²³ including:

- (1) the use of **solitary confinement** as a means of **punishment** or to "protect" **vulnerable populations**²⁴
- (2) substandard medical care²⁵
- (3) deaths of individuals while in immigration detention²⁶
- (4) insufficient access to counsel and/or lack of legal orientation programs²⁷
- (5) lack of access to a law library²⁸

²³ See, e.g., Penn State Law Center for Immigrants' Rights Clinic, *Imprisoned Justice: Inside Two Georgia Immigrant Detention Centers* (May 2017), projectsouth.org/wp-content/uploads/2017/06/Imprisoned%20Justice%20Report-1.pdf (discussing concerns with detention conditions at two Georgia immigration detention facilities). A December 2017 DHS OIG report inspecting five facilities raised concerns about detainee treatment at four of them, which "undermine the protection of detainees' rights, their humane treatment, and the provision of a safe and healthy environment." DHS OIG, *Concerns about ICE Detainee Treatment and Care at Detention Facilities*, OIG-18-32, at 3 (Dec. 11, 2017), oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-32-Dec17.pdf. A discussion of administrative and federal court mechanisms to challenge detention conditions is beyond the scope of this guide. For general resources, see, for example, Trina A. Realmuto, American Immigration Law Foundation & National Immigration Project of the National Lawyers Guild, *Practice Advisory: Whom to Sue and Whom to Serve in Immigration-Related District Court Litigation* (May 13, 2010), americanimmigrationcouncil.org/sites/default/files/practice_advisory/lac_pa_040706.pdf; Priya Patel, National Immigration Project of the National Lawyers Guild, *Federal Tort Claims Act: Frequently Asked Questions for Immigration Attorneys* (Jan. 24, 2013), nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/fed/2013_24Jan_ftca-faq.pdf.

²⁴ See ICE Policy 11065.1, *Review of the Use of Segregation for ICE Detainees* (Sept. 4, 2013), ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf; DHS OIG, *ICE Field Offices Need to Improve Compliance with Oversight Requirements for Segregation of Detainees with Mental Health Conditions*, OIG-17-119 (Sept. 29, 2017), oig.dhs.gov/reports/2017/ice-field-offices-need-improve-compliance-oversight-requirements-segregation-detainees; see also Susan Greene, *GEO-Run Aurora ICE Detention Center Is Isolating Immigrants—Some Mentally Ill—in Prolonged Solitary Confinement*, THE COLORADO INDEPENDENT, Aug. 6, 2019, coloradoindependent.com/2019/08/06/ice-geo-detainees-solitary-confinement/.

²⁵ See, e.g., Human Rights Watch, *Code Red: The Fatal Consequences of Dangerously Substandard Medical Care in Immigration Detention* (June 20, 2018), hrw.org/report/2018/06/20/code-red/fatal-consequences-dangerously-substandard-medical-care-immigration; Human Rights Watch & Civic, *Systemic Indifference: Dangerous and Substandard Medical Care in U.S. Immigration Detention* (2017), hrw.org/sites/default/files/report_pdf/usimmigration0517_web_0.pdf [hereinafter "Systemic Indifference"].

²⁶ See Systemic Indifference, *supra* note 25; ACLU of Colorado, *Cashing in on Cruelty: Stories of Death, Abuse and Neglect at the GEO Immigration Detention Facility in Aurora* (2019), aclu-co.org/wp-content/uploads/2019/09/ACLU_CO_Cashing_In_On_Cruelty_09-17-19.pdf; see also ACLU, DWN, and NIJC, *Fatal Neglect: How ICE Ignores Deaths in Detention* (2016), detentionwatchnetwork.org/sites/default/files/reports/Fatal%20Neglect%20ACLU-DWN-NIJC.pdf; AILA, *Deaths at Adult Detention Centers*, AILA Doc. No. 16050900, aila.org/infonet/deaths-at-adult-detention-centers?utm_source=aila.org&utm_medium=InfoNet%20Search (compiling list of ICE press releases announcing deaths of detained individuals) (last updated Mar. 17, 2020); Paloma Esquivel, "We Don't Feel OK Here": *Detainee Deaths, Suicide Attempts and Hunger Strikes Plague California Immigration Facility*, LOS ANGELES TIMES, Aug. 8, 2017, latimes.com/local/lanow/la-me-in-adelanto-detention-20170808-story.html.

²⁷ See, e.g., AILA and Others Sue to Challenge Lack of Access to Counsel in Immigration Detention (Apr. 11, 2020), aila.org/infonet/aila-others-sue-lack-of-access-to-counsel.

²⁸ See, e.g., Southern Poverty Law Center, *Detention Center Must Provide Detained Immigrants with Law Library Access* (Aug. 22, 2017), splcenter.org/news/2017/08/22/splc-detention-center-must-provide-detained-immigrants-law-library-access (describing denial of law library access to detained individuals held at a Folkston, Georgia detention center, run by the for-profit prison company Geo Group).

practitioner will need to submit a Form G-28, preferably signed by both the client and the representative.⁴¹ Practitioners can contact the local ERO office or talk to local colleagues to learn the best way of submitting Form G-28, including the availability of fax or e-mail options.⁴² Once the practitioner has submitted Form G-28, they may also request a copy of the client's Notice to Appear or other immigration documents in ICE's possession; ICE may or may not respond to such a request.⁴³

In making a persuasive case to ERO for the client's release, practitioners may submit a packet to the deportation officer, describing why the client would not pose a danger or flight risk if released, and including any evidence of positive equities and humanitarian factors weighing in favor of release. Practitioners may wish to reach out to other knowledgeable practitioners in their jurisdiction to learn about the local ERO office's inclination toward such requests and the odds of success.⁴⁴ Factors to consider in advocating for release include:

- Lack of prior criminal history or immigration violations
- Family members in the United States with lawful immigration status, with whom the client would live if released
- Community ties, such as religious activities or volunteering
- Length of time in the United States
- Existence of any potential immigration relief
- The client's ability to pay bond, and
- Any other humanitarian factors, such as the client's status as the primary caregiver for young children or individuals with health issues and the client's own medical or mental health conditions.⁴⁵

⁴¹ It is wise for practitioners to have an undated, signed G-28 on file for all clients so that they do not face time-consuming additional hurdles in the event of the client's detention. In some jurisdictions, practitioners have reported that ICE will accept a Form G-28 for a detained individual signed only by the representative. This was reportedly national ICE policy at least under the Obama administration. See AILA Infonet, AILA ICE Liaison Committee Meeting Minutes (Apr. 10, 2014), AILA Doc. No. 14102844, aila.org/infonet. If submitting the G-28 to ICE without a detained client's signature, it is advisable to write "Detained" in the client's signature line.

⁴² A list of ICE ERO offices can be found on the ICE website, ice.gov/contact/ero (last updated Mar. 1, 2021). Local ERO offices often share the list of officers and their contact information with legal orientation programs and AILA liaisons, so practitioners may want to reach out to local LOP or AILA liaison contacts to obtain contact information.

⁴³ If ICE will not turn over documents, the practitioner can, where useful, explain to the IJ during proceedings the efforts they have made to move the matter forward by seeking the documents. See also American Immigration Council, *Practice Advisory: Dent v. Holder and Strategies for Obtaining Documents from the Government During Removal Proceedings* (June 12, 2012), americanimmigrationcouncil.org/sites/default/files/practice_advisory/dent_practice_advisory_6-8-12.pdf.

⁴⁴ Practitioners should also consider monitoring any relevant federal court litigation regarding challenges to ERO's release policies in their local jurisdictions. See, e.g., *Velesaca v. Decker*, 458 F. Supp. 3d 224 (S.D.N.Y. 2020) (granting a preliminary injunction based on plaintiffs' likelihood of demonstrating the existence of ICE's "no-release policy").

⁴⁵ See section III *infra* for other aspects of dangerousness and flight risk analysis. In February of 2021, the Biden administration released interim ICE guidance setting forth enforcement priorities as well as mitigating factors. Memorandum from Tae D. Johnson, ICE Acting Dir., Interim Guidance: Civil Immigration Enforcement and Removal Priorities (Feb. 18, 2021), ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf. Practitioners may also wish to draw on agency memoranda issued under previous administrations listing non-exclusive factors that could be considered in

If applicable, the request could state that the client consents to release on reasonable conditions of supervision, including an electronic monitoring device (if the client has consented to that). Practitioners making release requests to ERO, who will likely be operating under significant time pressure, should take care to avoid introducing declarations or other evidence into the record unless they have been carefully vetted for accuracy to ensure that they will not create future problems in the case.

Habeas Petitions in Federal Court

In addition to seeking release with ERO and through an IJ custody redetermination hearing, discussed in sections III and IV below, it may be possible to challenge the legality of an individual's detention under section 236(a) through a habeas petition filed in federal district court. Many federal district courts have granted habeas petitions for individuals detained for a prolonged period under section 236(a) and have ordered a new bond hearing where the government bears the burden of proof.⁴⁶ Even when detention has not been prolonged, practitioners in some jurisdictions have successfully challenged the agency's position

DHS's exercise of prosecutorial discretion. See, e.g., Memorandum from Jeh Johnson, DHS Sec'y, Policies for the Apprehension, Detention and Removal of Undocumented Immigrants, at 6 (Nov. 20, 2014), dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (citing factors including "extenuating circumstances involving the offense of conviction; extended length of time since the offense of conviction; length of time in the United States; military service; family or community ties in the United States; status as a victim, witness or plaintiff in civil or criminal proceedings; or compelling humanitarian factors such as poor health, age, pregnancy, a young child, or a seriously ill relative"); Memorandum from John Morton, ICE Dir., Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, at 4–5 (June 17, 2011), ice.dhs.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf (listing factors); Memorandum from John Morton, ICE Dir., Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011), ice.dhs.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf; Memorandum from Julie L. Myers, Ass't DHS Sec'y, Prosecutorial and Custody Discretion (Nov. 7, 2007), ice.dhs.gov/doclib/foia/prosecutorial-discretion/custody-pd.pdf (discussing nursing mothers). Practitioners may want to include a cover letter referencing relevant memos and linking the facts of the client's case to these factors, along with providing documentation.

⁴⁶ See, e.g., *Velasco Lopez v. Decker*, 978 F.3d 842 (2d Cir. 2020) (affirming district court's order that due process required a new bond hearing where the government must establish dangerousness and flight risk by clear and convincing evidence after respondent had been detained for fifteen months); *Ali v. Brott*, 770 F. App'x 298 (8th Cir. 2019) (unpublished) (concluding that district court erred in granting habeas but remanding to consider constitutional challenge to nearly two-year-detention of lawful permanent resident under INA § 236(a)); *Marroquin Ambriz v. Barr*, 420 F. Supp. 3d 953 (N.D. Cal. 2019) (concluding that because respondent had been subjected to prolonged detention under section 236(a), due process required a bond hearing where the government must establish flight risk or dangerousness by clear and convincing evidence); *Vargas v. Wolf*, No. 219CV02135KJDDJA, 2020 WL 1929842 (D. Nev. Apr. 21, 2020) (same). Practitioners seeking federal court habeas relief will need to craft arguments to avoid the jurisdictional bar to review of discretionary detention decisions found at INA § 236(e).

- expedition against a friendly nation, violating the Military Selective Service Act or Trading with the Enemy Act, travel control provisions, or importation of an alien for an immoral purpose]
- Those deportable under INA § 237(a)(2)(A)(i) "on the basis of an offense for which the alien has been sentence [sic] to a term of imprisonment of at least 1 year" [convicted of a crime involving moral turpitude which has a maximum sentence of at least a year, committed within five years after the date of admission], and
 - Those deportable under INA § 237(a)(4)(B) [relating to terrorist activities].

If an individual is detained under section 236(c), the following strategies can be used to seek release:

- Requesting a *Joseph* hearing before the IJ and arguing that detention was wrongly categorized, and
- Seeking habeas relief in federal court in cases of prolonged detention.

Joseph Hearings

In general, the IJ does not have jurisdiction to set a bond for an individual detained under section 236(c). However, the IJ does have jurisdiction to consider whether the individual has been properly classified as falling under section 236(c).⁵¹ This is done through what is called a *Joseph* hearing, named after the BIA case that set forth the standard for such proceedings. A practitioner who believes that an individual's detention has been improperly categorized as falling under section 236(c) (as opposed to section 236(a)) can file a motion with the immigration court seeking a *Joseph* hearing. The legal standard governing *Joseph* hearings is whether the government is substantially unlikely to prevail in establishing the charge that triggers mandatory detention.⁵²

As is apparent from the complexity of these provisions, determining whether an individual properly falls within INA § 236(c) requires careful attention to the facts and the law—both criminal and immigration. A thorough discussion of the subject is beyond the scope of this guide. Practitioners are cautioned not to accept without scrutiny DHS's determination that a client is subject to section 236(c), as DHS sometimes makes mistakes in its legal analysis. Even if an offense appears to fall within one of the provisions above, the practitioner should reach out to experts to determine if there are legal arguments available that the client is not subject to section 236(c).

There are several ways to establish that the client does not in fact fall under the mandatory detention provision and thus is entitled to seek a bond. To determine whether a client is subject to section 236(c), it is necessary to analyze: (1) whether they are subject to the grounds of inadmissibility or deportability; (2) whether they have committed or been convicted of the criminal offense(s) alleged by DHS that serves as the

⁵¹ See 8 CFR § 1003.19(h)(2)(ii); *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999).

⁵² *Matter of Joseph*, 22 I&N Dec. at 806.

Aside from challenging the alleged criminal ground of deportability or inadmissibility, practitioners should explore arguments that a client falls outside the scope of INA § 236(c) based on the statute's "when released" language. To trigger mandatory detention under section 236(c), the individual must have been released from criminal custody after October 8, 1998,⁵⁸ and the release must also have been related to an offense serving as a basis for the mandatory detention under INA § 236(c).⁵⁹ On March 19, 2019, the Supreme Court decided *Nielsen v. Preap*, 139 S. Ct. 954 (2019), holding that INA § 236(c) provides for mandatory detention even if the noncitizen is not taken into custody until long after they are "released" from criminal custody. The Supreme Court noted that its decision did "not foreclose as-applied challenges—that is, constitutional challenges to applications of the statute as we have now read it."⁶⁰

Habeas Petitions in Federal Court

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Even if there is no dispute that the respondent's detention falls under section 236(c), it may be possible to seek release by filing a habeas petition in federal district court challenging the legality of the detention where it is prolonged. In a 2003 decision, the Supreme Court upheld the constitutionality of section 236(c) in *Demore v. Kim*, 538 U.S. 510 (2003), but that case did not address the legality of prolonged mandatory detention. Subsequently, in 2018, the Supreme Court issued another decision addressing the legality of immigration detention, *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) (hereinafter "Rodriguez"). In Rodriguez, the Supreme Court reviewed the Ninth Circuit's interpretation of section 236(c). The Ninth Circuit had applied the canon of constitutional avoidance to conclude that noncitizens detained for six months were entitled to a bond hearing where the government had the burden to prove by clear and convincing evidence that the noncitizen required continued detention because they posed a danger or were a flight risk. The Supreme Court reversed the Ninth Circuit's judgment and concluded that the constitutional avoidance interpretation was improper because section 236(c) "mandates detention of any alien falling within its scope and that detention may end prior to the conclusion of removal proceedings 'only if' the alien is released for witness-protection purposes."⁶¹ The Supreme Court remanded for consideration of the respondents' constitutional arguments.

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On November 19, 2018, the Ninth Circuit remanded the constitutional claims and class certification issues back to the district court for it to decide, among other things, the "minimum requirements of due process to be accorded to all claimants that will ensure a meaningful time and manner of opportunity to be heard" and a

⁵⁸ See *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999); see also Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Division C of Pub. L. No. 104-208, § 303(b)(2), 110 Stat. 3009-586; *Matter of West*, 22 I&N Dec. 1405 (BIA 2000) (construing "released" in IIRIRA § 303(b)(2) to refer to release from physical custody); K-S-D-, AXXX XXX 521 (Feb. 8, 2018) (unpublished), [scribd.com/document/374332703/K-S-D-AXXX-XXX-521-BIA-Feb-8-2018?secret_password=GZOv5I9jFHT8tJaPZP53](https://www.scribd.com/document/374332703/K-S-D-AXXX-XXX-521-BIA-Feb-8-2018?secret_password=GZOv5I9jFHT8tJaPZP53) (respondent, who had a 2013 conviction for possession of a short-barreled shotgun, did not fall within INA § 236(c) because he was not "released from custody arising from his 2013 conviction for possession of a short-barrel shotgun").

⁵⁹ *Matter of Garcia Arreola*, 25 I&N Dec. 267 (BIA 2010).

⁶⁰ *Nielsen*, 139 S. Ct. at 972; see also ACLU et al., *Practice Advisory: Constitutional Challenges to Mandatory Immigration Detention After Nielsen v. Preap* (July 2019), aclu.org/sites/default/files/field_document/2019_07_06_preap_advisory.pdf.

⁶¹ *Rodriguez*, 138 S. Ct. at 847.

"reassessment and reconsideration of both the clear and convincing evidence standard and the six-month bond hearing requirement."⁶² In its remand [order], the court also added, "We have grave doubts that any statute that allows for arbitrary prolonged detention without any process is constitutional or that those who founded our democracy precisely to protect against the government's arbitrary deprivation of liberty would have thought so. Arbitrary civil detention is not a feature of our American government. '[L]iberty is the norm, and detention prior to trial or without trial is the carefully limited exception.'"⁶³

Prior to the Supreme Court's *Rodriguez* decision, the Second Circuit had also held that noncitizens subject to section 236(c) detention have the right to a bond hearing within six months of detention, in *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015), *vacated*, 138 S. Ct. 1260 (2018). And other courts of appeal, while not creating a blanket rule in line with the Ninth and Second Circuits, had construed section 236(c) as authorizing detention without a bond hearing for only a limited period of time.⁶⁴ The Supreme Court's ruling in *Rodriguez* abrogates those decisions which rested on constitutional avoidance grounds. However, practitioners can still pursue habeas relief challenging the legality of prolonged detention under section 236(c) on purely constitutional grounds. In the wake of *Rodriguez*, individuals have won habeas relief arguing that their detention under 236(c) violated due process.⁶⁵ In *German Santos v. Warden Pike Cty. Corr. Facility*, 965 F.3d 203, 206 (3d Cir. 2020), the Third Circuit re-affirmed its pre-*Rodriguez* precedent that when the length of section 236(c) detention becomes unreasonable, noncitizens have a due process right to a bond hearing where the government bears the burden of proof.⁶⁶ Moreover, to the extent that pre-*Rodriguez* decisions by other circuit courts were based primarily on due process concerns, they provide persuasive authority for challenges to prolonged mandatory detention.

In addition to arguments about the unconstitutional nature of prolonged mandatory detention, practitioners could consider other challenges to the legality of detention under section 236(c). *Preap* left open the

⁶² *Rodriguez v. Marin*, 909 F.3d 252, 257 (9th Cir. 2018).

⁶³ *Id.* at 256–57.

⁶⁴ See, e.g., *Sopo v. Att'y Gen.*, 825 F.3d 1199 (11th Cir. 2016) (holding that section 236(c) has an implicit limitation against unreasonably prolonged detention without an individualized bond hearing); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003).

⁶⁵ See, e.g., *Rodriguez v. Nielsen*, No. 18-cv-04187-TSH (N.D. Cal. Jan. 7, 2019) (concluding that 440-day detention under INA § 236(c) with no specific end date in sight violated the petitioner's due process rights and ordering an individualized bond hearing); *Sajous v. Decker*, No. 18-CV-2447, 2018 WL 2357266, at *7 (S.D.N.Y. May 23, 2018) (concluding that petitioner was entitled to an individualized bond hearing under INA § 236(c) after more than 8 months of detention); *Hechavarria v. Sessions*, No. 15-CV-1058, 2018 WL 5776421, at *1 (W.D.N.Y. Nov. 2, 2018), *enforcement granted sub nom. Hechavarria v. Whitaker*, 358 F. Supp. 3d 227 (W.D.N.Y. 2019) (concluding that petitioner's five-year detention under INA § 236(c) violated due process and requiring that he be released unless a "neutral decision-maker determine[] by clear and convincing evidence that his detention necessarily supports a legitimate and compelling regulatory purpose"); *Hernandez v. Decker*, No. 18-CV-5026, 2018 WL 3579108, at *6 (S.D.N.Y. July 25, 2018) (concluding that detention under INA § 236(c) had become unreasonably prolonged in violation of due process, requiring an individualized bond hearing where the government had to demonstrate dangerousness and flight risk by clear and convincing evidence and IJ must consider ability to pay); *Portillo v. Hott*, 322 F. Supp. 3d 698, 709 (E.D. Va. 2018) (given prolonged detention under INA § 236(c), due process required individualized bond hearing where government must prove flight risk or dangerousness by clear and convincing evidence).

⁶⁶ *Id.* ("Together, *Diop* and *Chavez-Alvarez* give us a nonexhaustive list of four factors to consider in assessing whether an alien's detention has grown unreasonable."); see *Chavez-Alvarez v. Warden, York County Prison*, 783 F.3d 469 (3d Cir. 2015); *Diop v. ICE/Homeland Security*, 656 F.3d 221 (3d Cir. 2011).

possibility of as-applied due process challenges to section 236(c)'s "when released" language, and such a challenge might be brought for an individual whose criminal offense was long ago and who has shown rehabilitation.⁶⁷ Practitioners could also consider the argument that due process requires that section 236(c) not be applied to those who raise a substantial challenge to removal or a substantial claim to relief from removal.⁶⁸ A discussion of habeas is beyond the scope of this guide;⁶⁹ practitioners, however, should consider habeas relief where appropriate and should partner with those with federal court experience in seeking habeas relief. Partners with federal court experience might include *pro bono* law firms and law school clinics.

Note on Respondents with Serious Mental Disorders or Conditions

An April 22, 2013, EOIR memo announced a number of procedural protections for respondents with serious mental disorders or conditions.⁷⁰ The memo states that EOIR will begin implementation of various measures, which it expects to be "fully operational on a national basis by the end of 2013." Among other measures, the memo directs that "detainees who were identified as having a serious mental disorder or condition that may render them mentally incompetent to represent themselves and who have been held in immigration detention for at least six months will also be afforded a bond hearing." Practitioners who represent

⁶⁷ See ACLU & Asian Americans Advancing Justice, *Practice Advisory: Constitutional Challenges to Mandatory Immigration Detention After Nielsen v. Preap* (July 2019), aclu.org/other/practice-advisory-constitutional-challenges-mandatory-immigration-detention-after-nielsen-v.

⁶⁸ See, e.g., *Gayle v. Johnson*, 81 F. Supp. 3d 371, 397–98 (D.N.J. 2015), vacated and remanded *sub nom. Gayle v. Warden Monmouth Cty. Corr. Inst.*, 838 F.3d 297 (3d Cir. 2016) (upholding *Joseph* framework but requiring ICE to "establish to the satisfaction of an IJ at the *Joseph* hearing that there is probable cause to place an alien in mandatory detention"); *Casas v. Devane*, No. 15-CV-8112, 2015 WL 7293598, at *3 (N.D. Ill. Nov. 19, 2015) (where habeas petitioner had good-faith basis for challenging removal, court concluded that due process required an individualized bond hearing); *Papazoglou v. Napolitano*, No. 1:12-CV-00892, 2012 WL 1570778, at *5–6 (N.D. Ill. May 3, 2012) (where lawful permanent resident had been granted relief from removal by the IJ, this was a "legitimate defense to his removability" and due process required a bond hearing).

⁶⁹ For further discussion of challenges to mandatory detention including arguments that the *Joseph* standard raises serious constitutional concerns, see ACLU Immigration Detention Practice Advisory, *supra* note 48; ACLU, *Practice Advisory: Prolonged Detention Challenges After Jennings v. Rodriguez* (Mar. 21, 2018), aclu.org/other/practice-advisory-prolonged-detention-challenges-after-jennings-v-rodriguez. For other resources on habeas in the context of immigration detention, see, for example, Immigrant Defense Project, Detention Litigation, immigrantdefenseproject.org/detention-litigation (providing consulting, drafting, and technical support for detention-related litigation); American Immigration Council, *Introduction to Habeas Corpus* (June 2008), americanimmigrationcouncil.org/practice_advisory/introduction-habeas-corpus.

⁷⁰ See Press Release, EOIR, Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions (Apr. 22, 2013), justice.gov/eoir/pr/department-justice-and-department-homeland-security-announce-safeguards-unrepresented. These changes were announced during the pendency of class action litigation in the Ninth Circuit on behalf of immigration detainees with mental disabilities, which resulted in a judgment providing protections to certain detainees in Arizona, California, and Washington. *Franco-Gonzalez v. Holder*, No. 10-02211, 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013); see ACLU, *Franco-Gonzalez v. Holder*, aclu.org/cases/franco-gonzalez-v-holder (updated Apr. 24, 2013).

If an individual is an arriving alien, practitioners can employ several strategies, including:

- Making a parole request with ICE, and
- Requesting habeas relief in federal court by challenging prolonged detention or legality of parole procedures used.

Bond Eligibility for Asylum Seekers in Expedited Removal Proceedings

The immigration statutes generally allow for expedited removal of arriving aliens and certain other noncitizens who have recently entered the United States unlawfully⁷⁶ and who are inadmissible based on certain grounds⁷⁷ (other than those who have a verified claim to U.S. citizenship, lawful permanent residence, refugee, or asylee status),⁷⁸ unless the noncitizen asserts an intention to apply for asylum or a fear of persecution.⁷⁹ If an individual in expedited removal proceedings claims fear of persecution, they must be referred to an asylum officer for a "credible fear" interview.⁸⁰ Asylum seekers in expedited removal proceedings who are found to have a credible fear must be referred for section 240 proceedings to present their asylum claim before an IJ.⁸¹

has jurisdiction to rule on whether an Immigration Judge has jurisdiction to make a bond determination."). In several unpublished decisions the BIA has recognized an IJ's authority to make this predicate determination. *See, e.g.*, A-R-S-, AXXX-XXX-161 (June 25, 2020) (unpublished), [scribd.com/document/470813400/A-R-S-AXXX-XXX-161-BIA-June-25-2020?secret_password=tGGIxEtDntCWLUpRAIk8](https://www.scribd.com/document/470813400/A-R-S-AXXX-XXX-161-BIA-June-25-2020?secret_password=tGGIxEtDntCWLUpRAIk8); A-M-Y-, AXXX XXX 169 (Feb. 2, 2018) (unpublished), [scribd.com/document/371997389/A-M-Y-AXXX-XXX-169-BIA-Feb-2-2018?secret_password=owtyrKhKESBoxrjiZri9](https://www.scribd.com/document/371997389/A-M-Y-AXXX-XXX-169-BIA-Feb-2-2018?secret_password=owtyrKhKESBoxrjiZri9) (concluding that IJ had jurisdiction over bond hearing, despite fact that NTA charged respondent as being an "arriving alien," by finding that the respondent was a "member of the class of aliens designated pursuant to the authority in section 235(b)(I)(A)(iii) of the Act"); L-E-V-H-, AXXX XXX 504 (Dec. 21, 2018) (unpublished), [scribd.com/document/398005600/L-E-V-H-AXXX-XXX-504-BIA-Dec-21-2018?secret_password=t9MY64vnVupMdeka8eLZ](https://www.scribd.com/document/398005600/L-E-V-H-AXXX-XXX-504-BIA-Dec-21-2018?secret_password=t9MY64vnVupMdeka8eLZ) (concluding that respondent was not an "arriving alien" and was thus bond eligible, where NTA did not charge him as an "arriving alien" and despite fact that he "may have testified that he 'turned himself in to officials at the border,'" since it was not clear that he "presented himself at a port-of-entry").

⁷⁶ In 2019 the Trump administration expanded expedited removal to the full reach of the statute—that is, to any noncitizen who has not been "admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility under this subparagraph." INA § 235(b)(1)(A)(iii)(II); *see* DHS, Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409 (July 23, 2019). Previously, expedited removal had applied to arriving aliens as well as those who are apprehended within 100 miles of the Canadian or Mexican border and within 14 days of arrival.

⁷⁷ Specifically, those who are inadmissible for misrepresentation or lack of proper entry documents under INA § 212(a)(6)(C) or (a)(7). *See* INA § 235(b)(1)(A).

⁷⁸ *See* INA § 235(b)(1)(C); 8 CFR § 235.3(b)(5). If an individual with a claim to U.S. citizenship, lawful permanent resident, refugee, or asylee status is improperly placed in expedited removal proceedings, they should assert the claim and seek to prevent the issuance of an expedited removal order or have an order already issued canceled. If DHS instead places such an individual in section 240 proceedings, any available arguments for termination should be explored.

⁷⁹ *See* INA § 235(b)(1)(A).

⁸⁰ *See* INA § 235(b)(1)(A)(ii).

⁸¹ *See* 8 CFR § 208.30(f).

Importantly, the Supreme Court remanded for consideration of the respondents' constitutional arguments. Given *Rodriguez*, prolonged detention arguments should be crafted on purely due process constitutional grounds rather than under a theory of statutory interpretation. Indeed, after *Rodriguez*, many district courts have concluded in individual habeas cases that the prolonged detention of "arriving aliens" and others detained under section 235(b) violated due process.⁹⁴

However, practitioners should be prepared for the government to argue that a 2020 Supreme Court decision, *DHS v. Thuraissigiam*, 140 S. Ct. 1959 (2020), forecloses due process challenges to detention of "arriving aliens" and others detained shortly after unlawful entry.⁹⁵ In *Thuraissigiam*, the Supreme Court rejected the argument of the respondent—a Sri Lankan individual who had been detained by CBP within 25 yards of the border after he entered without inspection—that the expedited removal procedures he was subjected to violated *inter alia* his due process rights. In rejecting the respondent's due process challenge, the Supreme Court concluded that, as a noncitizen detained "shortly after unlawful entry," the respondent was in the same position as an "arriving alien" in that he had "only those rights regarding admission that Congress has provided by statute."⁹⁶

Practitioners bringing due process challenges to the prolonged detention of "arriving aliens" should seek to distinguish *Thuraissigiam*'s due process holding because that case addressed only a challenge to admission procedures, and the Court did not consider a challenge to prolonged detention. In the wake of *Thuraissigiam*, some federal district courts have granted habeas relief to individuals detained under INA § 235(b), concluding that their prolonged detention violated due process.⁹⁷ Practitioners should review the case law governing their particular jurisdiction to assess the viability of habeas relief in this context.

Practitioners could also explore arguments that the government failed to make an individualized parole determination, failed to follow its own parole directive, or otherwise acted unlawfully in its procedures for

只有长期detention无法释放在违反了due process

⁹⁴ See, e.g., *Brissett v. Decker*, 324 F. Supp. 3d 444, 451–52 (S.D.N.Y. 2018) (concluding that nine-month detention of arriving lawful permanent resident detained at entry was unreasonably prolonged requiring an individualized determination about flight risk and dangerousness); *Kouadio v. Decker*, 352 F. Supp. 3d 235 (S.D.N.Y. 2018) (arriving asylum seeker detained almost two years with pending petition for review of denied asylum claim and judicial stay was "entitled to a bond hearing at which the government must show, by clear and convincing evidence, that Petitioner's dangerousness or flight risk justifies his continued detention"); *Pierre v. Doll*, 350 F. Supp. 3d 327, 332 (M.D. Pa. 2018) (concluding that given prolonged detention of individual detained under INA § 235(b) due process required individualized bond hearing); *Lett v. Decker*, 346 F. Supp. 3d 379, 384 (S.D.N.Y. 2018) (concluding that due process required individualized bond hearing for individual detained for nearly ten months under INA § 235(b) where government had to prove by clear and convincing evidence that continued detention was justified, and the IJ must consider ability to pay and alternative conditions of release).

⁹⁵ See, e.g., *Gonzales Garcia v. Rosen*, No. 6:19-CV-06327 EAW, --- F. Supp. 3d ---, 2021 WL 118933, at *2 (W.D.N.Y. Jan. 13, 2021) (granting government's motion for reconsideration of court's previous order mandating an individualized bond hearing for an asylum seeker detained under INA § 235(b), concluding that under *Thuraissigiam* petitioner was not entitled to the procedural protections of the Due Process Clause).

⁹⁶ 140 S. Ct. at 1982, 1983.

⁹⁷ See, e.g., *Leke v. Holt*, No. 1:20-CV-1382, 2021 WL 710727, at *6 (E.D. Va. Feb. 23, 2021); *Kydyrali v. Wolf*, 2020 WL 6498969, --- F. Supp. 3d --- (S.D. Cal. Nov. 4, 2020), *appeal filed*, No. 21-55014 (9th Cir. Jan. 8, 2021); *Mbalivoto v. Holt*, No. 20-cv-00827 (E.D. Va. Aug. 11, 2020).

denying parole.⁹⁸ For example, during the Trump administration, there was a striking drop in the rate of parole grants to individuals who demonstrated credible fear, with practitioners reporting denials in "virtually all cases" in some jurisdictions.⁹⁹ Practitioners in numerous jurisdictions have successfully challenged the procedures employed by ICE to deny parole to asylum seekers in federal courts. For example, in 2018, the U.S. District Court for the District of Columbia in *Damus v. Nielsen* granted a preliminary injunction requiring ICE to conduct individualized parole determinations that conform with the parole directive for a class of arriving asylum seekers within a certain geographical area.¹⁰⁰ The Court issued a similar injunction in *Aracely R. v. Nielsen* for individual asylum seekers detained in Texas¹⁰¹ and in *Mons v. McAleenan* for those detained in the jurisdiction of the New Orleans ICE field office.¹⁰²

A full discussion of habeas relief is beyond the scope of this guide.¹⁰³

4. Detention Under INA § 241 for Individuals with Administratively Final Orders of Removal

Section 241 of the INA governs the detention and release of individuals who have been ordered removed. This detention scheme applies to those with administratively final removal orders,¹⁰⁴ including those granted withholding of removal and relief under the Convention Against Torture.¹⁰⁵

If an individual in detention has an order of removal, release strategies will depend on the procedural posture of the case but include:

- For persons subject to a judicial stay of removal based on a pending petition for review or in withholding-only proceedings, arguing (if precedent allows) that they are detained under INA § 236 and are entitled to a bond hearing
- For individuals detained under INA § 241(a)(6), seeking release under the post-order custody review regulatory process, and
- Seeking habeas relief in federal court if detention becomes prolonged.

⁹⁸ See, e.g., *Marczak v. Greene*, 971 F.2d 510, 515 (10th Cir. 1992) (interpreting prior version of parole regulations and noting that "a district director who decides parole applications on the basis of broad, non-individualized policies engages in . . . extra-procedural rule-making" and "in each case a district director must determine whether a particular person is likely to flee, and whether that person's continued detention would be in the public interest").

⁹⁹ See *Damus v. Nielsen*, 313 F. Supp. 3d 317 (D.D.C. 2018) (noting that during the Trump administration, ICE "implemented a de facto policy of denying parole in virtually all cases" at certain ICE field offices).

¹⁰⁰ *Id.* For more information about the *Damus* injunction including an explanation of who falls within the class, see American Civil Liberties Union, Center for Gender & Refugee Studies & Human Rights First, *Practice Advisory: Damus v. Nielsen Parole of Arriving Asylum Seekers Who Have Passed Credible Fear* (updated July 30, 2018), aclu.org/legal-document/damus-parole-advisory.

¹⁰¹ *Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 122 (D.D.C. 2018).

¹⁰² *Mons v. McAleenan*, No. CV 19-1593 (JEB), 2019 WL 4225322, at *3 (D.D.C. Sept. 5, 2019).

¹⁰³ See resources discussed in note 69 *supra*.

¹⁰⁴ The regulations describe various circumstances under which an order of removal becomes final. 8 CFR § 1241.1. Typically, an order becomes final if the respondent is ordered removed *in absentia*, if the respondent fails to file an appeal of the IJ's decision with the BIA, or if the BIA dismisses the respondent's appeal.

¹⁰⁵ 8 CFR § 241.4(b)(3).

Detention Classification for Individuals with Pending Petitions for Review

An important initial consideration is whether or not an individual's detention is properly categorized as falling under INA § 241. If an individual has an administratively final removal order, but that order is stayed pending judicial review of the order in a U.S. court of appeals, they may have an argument that the detention is governed by INA § 236. While DHS may take the position that such an individual is detained under INA § 241, some U.S. courts of appeal have held that such individuals are detained under INA § 236.¹⁰⁶

Detention Classification for Individuals in Withholding-Only Proceedings

Similar arguments may be available to individuals in withholding-only removal proceedings. Withholding-only proceedings are afforded to individuals who have a final administrative order of removal but have been found by an asylum officer or IJ to have a reasonable fear of persecution.¹⁰⁷ In withholding-only proceedings, individuals can pursue withholding of removal under the INA and relief under the Convention Against Torture.¹⁰⁸ There is a circuit court split about whether these individuals are detained under INA § 241 or INA § 236, with the U.S. Court of Appeals for the Second Circuit and Fourth Circuits concluding that INA § 236 governs.¹⁰⁹ However, the Third Circuit and Ninth Circuit have concluded that section 241 governs.¹¹⁰ The Supreme Court granted *certiorari* on June 15, 2020 in the Fourth Circuit case and will

¹⁰⁶ See, e.g., *Hechavarria v. Sessions*, 891 F.3d 49, 57 (2d Cir. 2018), (concluding that section 236 governed the detention of the petitioner, where there was a judicial stay of removal and a pending petition for review); *Leslie v. Att'y Gen.*, 678 F.3d 265, 271 (3d Cir. 2012) (concluding that section 236, not section 241, governed detention where there was a judicial stay of removal pending further judicial review, and ordering an individualized bond hearing as the noncitizen's detention had become "unreasonably long"); *Prieto-Romero v. Clark*, 534 F.3d 1053, 1062 (9th Cir. 2008) ("Because Prieto-Romero filed a petition for review and our court entered a stay, his detention is governed by § 1226(a); only if we enter a final order denying his petition for review will the statutory source of the Attorney General's detention authority shift from § 1226(a) to § 1231(a)"); *Bejjani v. INS*, 271 F.3d 670, 689 (6th Cir. 2001), abrogated on other grounds by *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006) (concluding that INA § 241 does not authorize detention while a judicial stay of removal is pending). But see *Akinwale v. Ashcroft*, 287 F.3d 1050 (11th Cir. 2002) (per curiam) (assuming, without analysis, that detention pending a judicial stay is governed by INA § 241). For an article about post-removal order detention and review procedures in the Ninth Circuit, see Eric J. Drootman, *The Expanded Bond Docket for Immigration Judges in the Ninth Circuit: Conducting Bond Hearings After Final Administrative Orders of Removal*, 6 EOIR IMMIGR. LAW ADVISOR 1 (Jan. 2012), justice.gov/sites/default/files/eoir/legacy/2012/02/06/vol6no1.pdf.

¹⁰⁷ See 8 CFR § 208.31.

¹⁰⁸ EOIR, Fact Sheet: Asylum and Withholding of Removal Relief; Convention Against Torture Protections, at 5 (Jan. 15, 2009), justice.gov/sites/default/files/eoir/legacy/2009/01/23/AsylumWithholdingCATProtections.pdf ("Withholding-Only Hearing -- to determine whether an individual who has been ordered removed is eligible for withholding of removal under Section 241(b)(3) of the Immigration and Nationality Act or under the Convention Against Torture.").

¹⁰⁹ *Guzman Chavez v. Hott*, 940 F.3d 867 (4th Cir. 2019), *cert. granted*, *Johnson v. Guzman Chavez*, No. 19-897, 141 S. Ct. 107 (U.S. June 15, 2020); *Guerra v. Shanahan*, 831 F.3d 59 (2d Cir. 2016).

¹¹⁰ *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208 (3d Cir. 2018); *Padilla-Ramirez v. Bible*, 882 F.3d 826 (9th Cir. amended Feb. 15, 2018). Under Ninth Circuit precedent, individuals detained under section 241(a)(6) are entitled to a bond hearing after six months of detention. See *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011).

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decide the question "Whether the detention of an alien who is subject to a reinstated removal order and who is pursuing withholding or deferral of removal is governed by 8 U.S.C. 1231, or instead by 8 U.S.C. 1226."¹¹¹

→ JLY bond & release

Detention Authority for Individuals with Final Removal Orders Who Are Detained During the "Removal Period"

For those individuals who are correctly classified as detained under INA § 241, the statute provides for mandatory detention during the 90-day "removal period."¹¹² The detention authority during the removal period is found at INA § 241(a)(2). The removal period begins on the latest of the following events:

- The date the removal order becomes "administratively final"¹¹³
- If an individual's removal is stayed by a court pending judicial review, the date of the court's "final order," or
- If the individual is detained other than "under an immigration process," the date the individual is released from detention.¹¹⁴

Once the removal period begins, DHS has 90 days to execute the removal order. The 90-day removal period can be extended, with the individual remaining in detention, if they "fail[] or refuse[] to make timely application in good faith for travel or other documents necessary to the alien's departure or conspire[] or act[] to prevent the alien's removal subject to an order of removal."¹¹⁵

Strategies for Release of Individuals with Final Removal Orders Who Are Detained Beyond the "Removal Period"

If the individual is not removed within the removal period, then the statute and regulations list circumstances and conditions under which they may be released subject to DHS supervision.¹¹⁶ At this point, detention authority shifts to INA § 241(a)(6). This section authorizes detention beyond the removal period of individuals who:

- Are inadmissible under INA § 212
- Are removable under INA § 237(a)(1)(C) (violators of nonimmigrant status or conditions of entry), (a)(2) (criminal grounds of deportability), or (a)(4) (security-related grounds), or
- Have been determined to be a "risk to the community or unlikely to comply with the order of removal."¹¹⁷

¹¹¹ *Johnson v. Guzman Chavez*, No. 19-897, 141 S. Ct. 107 (U.S. June 15, 2020).

¹¹² INA § 241(a)(2); *see also* 8 CFR § 241.3(a).

¹¹³ The regulations describe various circumstances under which an order of removal becomes final. 8 CFR § 1241.1.

¹¹⁴ INA § 241(a)(1)(B); 8 CFR § 241.4(g)(1)(i).

¹¹⁵ INA § 241(a)(1)(C); 8 CFR § 241.4(g)(1)(ii).

¹¹⁶ *See* INA § 241(a)(3); 8 CFR § 241.4.

¹¹⁷ INA § 241(a)(6).

The regulations describe who may be detained beyond the removal period, as well as the process for release after the removal period has ended.¹¹⁸ An individual falling within INA § 241(a)(6) may be released after the removal period's expiration if the person "demonstrates to the satisfaction of the Attorney General or her designee that their release will not pose a danger to the community or to the safety of other persons or to property or a significant risk of flight pending such alien's removal from the United States."¹¹⁹ In order to release an individual under these provisions, DHS "must conclude" that: (1) travel documents are not available or the individual's immediate removal is not "practicable or not in the public interest"; (2) the individual is nonviolent and "likely to remain nonviolent if released"; (3) the individual is "not likely to pose a threat to the community following release"; and (4) the individual is not likely to violate release conditions or "pose a significant flight risk if released."¹²⁰ DHS is to weigh various factors in making a decision about continued detention, including the individual's disciplinary history while in custody, "criminal conduct and criminal convictions," mental health records, evidence of rehabilitation, positive factors such as ties to the United States, prior immigration history, history of failure to appear for proceedings, and any other "probative" information about whether the individual is likely to adjust to community life, commit violent or criminal acts, pose a danger to self, others, or property, or violate release conditions.¹²¹

The regulations describe the process by which custody determinations and periodic reviews are to be conducted.¹²² They also describe review procedures for individuals detained beyond the removal period who have "provided good reason to believe there is no significant likelihood of removal to the country to which they were ordered removed, or to a third country, in the reasonably foreseeable future."¹²³ If DHS concludes that there is no significant likelihood of the individual's removal in the reasonably foreseeable future, then the individual should be promptly released on conditions, unless there are "special circumstances justifying continued detention."¹²⁴

If an individual is released after the end of the removal period, the regulations direct that they should be released on an order of supervision and subject to different conditions as determined appropriate by DHS.¹²⁵ DHS can revoke release in various circumstances, including if the individual violates the conditions of release, when the "purposes of release have been served," when it is "appropriate to enforce a removal order" against the individual, or if DHS deems release no longer appropriate.¹²⁶

In Custody 必须遵守纪律

¹¹⁸ 8 CFR §§ 241.4, 241.5, 241.13, 241.14.

¹¹⁹ *Id.* § 241.4(d)(1).

¹²⁰ *Id.* § 241.4(e).

¹²¹ *Id.* § 241.4(f).

¹²² 8 CFR § 241.4.

¹²³ *Id.* § 241.13(a).

¹²⁴ *Id.* § 241.13(g)(1).

¹²⁵ See *id.* §§ 241.5(a), 241.4(j).

¹²⁶ *Id.* § 241.4(l)(2). The regulations provide procedures for "informal" review of the revocation and periodic review of the subsequent detention.

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Finally, due process prohibits the indefinite detention of individuals detained under INA § 241(a)(6). In *Zadvydas v. Davis*, the Supreme Court held that there was an implicit reasonableness limitation on detention under § 241(a)(6) for those admitted to the United States and subsequently ordered removed, and that the presumptive reasonableness limit for post-removal period detention is six months.¹²⁷ In *Clark v. Martinez*, the Supreme Court extended the holding of *Zadvydas* to persons deemed inadmissible.¹²⁸ The Third and Ninth Circuits have construed section 241(a)(6) to require a bond hearing if an individual has been detained for six months.¹²⁹ In other jurisdictions, individuals wishing to challenge the prolonged nature of their detention can bring a habeas action in federal district court.¹³⁰

5. Other Restrictions on Freedom – Alternatives to Detention and Orders of Supervision

Even where an individual is not physically detained initially, or is later released from immigration detention including after paying a bond, ICE may condition release on what are frequently called "alternatives to detention" (ATD).¹³¹ These are restrictions on the person's freedom ranging from an ankle shackle containing a global positioning system (GPS) monitoring device and regular reporting requirements or case management to telephone check-ins.¹³² According to ICE's Detention Management summary, ATD "uses technology and other tools to manage alien compliance with release conditions while they are on the non-detained docket" and considers various factors for enrollment such as "an individual's criminal and immigration history; supervision history; family and/or community ties; status as a caregiver or provider; and other humanitarian or medical considerations."¹³³ One common ATD program is the Intensive Supervision Appearance Program (ISAP), which began in 2004.¹³⁴

¹²⁷ 533 U.S. 678 (2001).

¹²⁸ 543 U.S. 371 (2005).

¹²⁹ *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208 (3d Cir. 2018); *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011). But see *Hamama v. Adducci*, 912 F.3d 869, 879 (6th Cir. 2018) (concluding that 8 U.S.C. § 1252(f)(1) barred class-wide injunctive relief on detention-based claims and stating that district court's ruling that class members detained for six months or more be released or given a bond hearing "created out of thin air a requirement for bond hearings that does not exist in the statute"). In *Aleman Gonzalez v. Barr*, 955 F.3d 762 (9th Cir. 2020), the Ninth Circuit affirmed a district court's preliminary injunction ordering DHS to provide bond hearings for individuals subject to prolonged detention under INA § 241(a)(6). In another opinion issued on the same day as *Aleman-Gonzalez*, however, the Ninth Circuit also concluded that after the first bond hearing at six months, section 241(a)(6) does not require further bond hearings every additional six months of detention. *Flores Tejada v. Godfrey*, 954 F.3d 1245 (9th Cir. 2020).

¹³⁰ See resources listed in note 69 *supra*.

¹³¹ GAO Report to Congressional Committees, *Alternatives to Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness*, GAO-15-26, at 9 (Nov. 2014), [gao.gov/assets/670/666911.pdf](https://www.gao.gov/assets/670/666911.pdf) (noting that "ICE may require participation in the ATD program as a condition of the alien's release during immigration proceedings, or upon receipt of the alien's final order of removal or grant of voluntary departure") [hereinafter "2014 GAO ATD Report"]; see also Congressional Research Service, *Immigration: Alternatives to Detention (ATD) Programs* (July 8, 2019), fas.org/sgp/crs/homesec/R45804.pdf.

¹³² *Id.* at 10–11. See also AILA, et al., *The Real Alternatives to Detention* (June 18, 2019), aila.org/infonet/the-real-alternatives-to-detention; National Immigrant Justice Center, *A Better Way: Community-Based Programming as an Alternative to Immigrant Incarceration* (Apr. 22, 2019), immigrantjustice.org/research-items/report-better-way-community-based-programming-alternative-immigrant-incarceration.

¹³³ ICE ERO, *Detention Management*, ice.gov/detain/detention-management#tab2 (last updated Mar. 31, 2021).

¹³⁴ *Id.*

According to a 2015 DHS Office of Inspector General (OIG) report, there are two types of supervision options within ISAP: "full-service" and "technology-only."¹³⁵ A contractor provides electronic monitoring services for both programs.¹³⁶ The full-service program requires the individual to have periodic in-person contact with the contractor, including office visits and unscheduled home visits. The individual may be required to wear a GPS-enabled ankle shackle, submit to "case management services," and/or report telephonically.¹³⁷ Generally ERO officers decide what the "appropriate level of supervision and type of technology" is for individuals in the ATD program, and can move them from full-service to technology-only and vice versa "at their discretion."¹³⁸

ERO officers decide whether to place an individual in the ATD program. According to a 2014 GAO report, "[w]hen reviewing an alien's case for possible placement in ATD, officers are to consider the alien's criminal history, compliance history, community and family ties, and humanitarian concerns."¹³⁹ ERO officers also decide at what point and in what circumstances an individual may be taken off of the ATD program. Reasons for "termination" from the ATD program include:

- The individual receives relief from removal
- The individual's removal case is administratively closed
- The individual is removed from the United States or voluntarily departs
- The individual is arrested by ICE for removal
- The individual is arrested by another law enforcement agency
- The individual "abscond[s]" or otherwise violates the ATD program conditions
- The individual moves to a jurisdiction that does not offer ATD, and
- The "ICE officers determine the alien is no longer required to participate."¹⁴⁰

An individual may ask the IJ to ameliorate the conditions imposed on their release, including requirements imposed by ICE through an ATD program. This must be done within seven days of release from physical confinement, through a motion to ameliorate the conditions of release filed in immigration court.¹⁴¹ If more than seven days have elapsed, the IJ does not have jurisdiction over the request, and instead the individual

¹³⁵ DHS OIG, U.S. Immigration and Customs Enforcement's Alternatives to Detention (Revised), OIG-15-22, at 4 (Feb. 4, 2015), oig.dhs.gov/assets/Mgmt/2015/OIG_15-22_Feb15.pdf.

¹³⁶ *Id.*

¹³⁷ See 2014 GAO ATD Report, *supra* note 131, at 10.

¹³⁸ *Id.* at 10–11 ("Under the current program, an alien's status in immigration proceedings generally dictates the required number of office visits and unscheduled home visits by the contractor for aliens in the Full-service component.").

¹³⁹ *Id.* at 9.

¹⁴⁰ *Id.* at 11 & 23 n.51.

¹⁴¹ See 8 CFR § 236.1(d)(1) ("If the alien has been released from custody, an application for amelioration of the terms of release must be filed within 7 days of release."); *Matter of Aguilar-Aquino*, 24 I&N Dec. 747 (BIA 2009) (the regulation's reference to "custody" means "actual physical restraint or confinement within a given space"); *Matter of Garcia-Garcia*, 25 I&N Dec. 93 (BIA 2009) (concluding that the IJ had jurisdiction to review DHS's ISAP conditions where respondent filed an application to ameliorate conditions within 7 days of his release from custody).

7天从拘留释放到ATD, 如果不满意, 可以
通知 to ameliorate to IJ, 7天后可能跟ERO讲
30

could seek such relief via a request to ERO.¹⁴² Given ERO's discretion over who should be placed in the program and when an individual can be terminated from the program, a well-documented request presenting equities and hardships would be wise. Note also that ISAP contractors have historically refused to speak with an individual's legal representative. Instead, ISAP asks that the legal representative discuss any concerns with the ERO officer overseeing the individual's case.

Orders of Supervision

Orders of supervision are a form of supervised release from ICE custody, typically imposed on individuals who are subject to an order of removal.¹⁴³ An individual released on an order of supervision is required to comply with certain conditions, such as periodic reporting, continued efforts to obtain a travel document, physical or mental examinations, obtaining advance approval for travel, and providing written change of address information.¹⁴⁴

An individual may seek to reduce or ease the conditions of an order of supervision by making a request with ERO. For example, they might request to have no check-ins or less frequent check-ins. ERO may agree to less frequent check-ins, for example once per year, particularly in cases where the individual can show a long history of compliance. If the individual is subject to an order of removal, another way to end an order of supervision is to seek reopening of the underlying removal order—assuming there is a legal basis to do so—by filing a motion to reopen.¹⁴⁵

C. Chart: Immigration Detention and Remedies to Seek Release

The below chart provides a visual description of the various strategies for release from immigration detention discussed in section II.B. In several places, this guide has referenced arguments that could be made in federal district court habeas actions. As this chart illustrates, these arguments could also be raised before the IJ and on appeal to the BIA, even though the agency may conclude that it lacks authority to consider constitutional arguments or that its own precedent precludes the argument. It may still be wise to raise

¹⁴² 8 CFR § 236.1(d)(2); *Matter of Chew*, 18 I&N Dec. 262, 263 (BIA 1982) ("We find nothing in the regulations that would preclude an alien from reapplying to the District Director for modification of the conditions of his custody status after the immigration judge has been divested of jurisdiction by the lapse of seven days following the alien's release from custody. . . ."); see also *Matter of Daryoush*, 18 I&N Dec. 352, 353 (BIA 1982) (concluding that "in rendering a determination on an application for amelioration of the conditions of bond pursuant to 8 CFR § 242.2(b), the District Director must state the reasons for his decision").

¹⁴³ 8 CFR §§ 241.5(a); 241.4.

¹⁴⁴ 8 CFR § 241.5(a).

¹⁴⁵ For guidance on filing motions to reopen, see Catholic Legal Immigration Network, Inc., *Practice Advisory: Motions to Reopen for DACA Recipients with Removal Orders* (Oct. 14, 2020), cliniclegal.org/resources/removal-proceedings/practice-advisory-motions-reopen-daca-recipients-removal-orders; Catholic Legal Immigration Network, Inc., *A Guide to Assisting Asylum-Seekers with In Absentia Removal Orders* (Jul. 10, 2019), cliniclegal.org/resources/asylum-and-refugee-law/guide-assisting-asylum-seekers-absentia-removal-orders; American Immigration Council, *Basics of Motions to Reopen EOIR-Issued Removal Orders* (Feb. 2018), americanimmigrationcouncil.org/practice_advisory/basics-motions-reopen-eoir-issued-removal-orders; Florence Immigrant and Refugee Rights Project, *Motions to Reopen Guide* (May 2013), firrp.org/media/Motions-to-Reopen-Guide-2013.pdf.



(Strategies discussed in section II.B.4)		attempt to seek a bond hearing if detention becomes prolonged	
Pending petition for review with a stay of removal (Strategies discussed in section II.B.4)	Seek release with ICE through regulatory process	Seek bond hearing arguing that detention falls under section 236(a), if jurisdiction's case law permits, and/or if detention becomes prolonged	Seek habeas relief arguing that the individual's detention is governed by section 236(a), or based on prolonged detention
In removal proceedings – withholding only (Strategies discussed in section II.B.4)	Seek release with ICE through regulatory process	Seek bond hearing arguing that detention falls under section 236(a), if jurisdiction's case law permits, and/or if detention becomes prolonged (Third and Ninth Circuits, provide for bond hearing after six months of detention)	Seek habeas relief arguing that the individual's detention is governed by section 236(a), or based on prolonged detention
Alternatives to detention (Strategies discussed in section II.B.5)	Request that ICE remove or ease conditions	File motion seeking amelioration of conditions within seven days of release from custody	Confer with experienced federal court litigators to determine whether there are viable federal court remedies

III. Overview of Legal Framework for Custody Redetermination in Removal Proceedings

This section provides an overview of the legal authority, case law, and procedures governing custody redetermination hearings—also known as bond hearings¹⁴⁶—in immigration court. This section does not discuss in detail who is eligible to seek bond in immigration court, as that was discussed in section II above. In general, individuals who are detained under INA § 236(a) are eligible to seek bond before the immigration court.

¹⁴⁶ This guide uses both the term “bond redetermination” and “custody redetermination.” References to bond hearings and bond motions in this guide are meant to include requests for conditional parole by the IJ.

must notify the immigration court at which point ICE OCC may seek to change venue by filing a change of venue motion.¹⁵⁷ If ICE transfers a respondent to a distant and inconvenient location and seeks to change venue, the respondent's representative may file an opposition to DHS's venue motion and note the following: the court's ability to call a respondent via video-conference, that the transfer impedes the respondent's right to representation, and the difficulty of traveling to the new detention center, particularly if the practitioner represents the respondent on a *pro bono* basis.¹⁵⁸

Regardless of whether the court changes venue, a custody redetermination hearing could be held in the new location.¹⁵⁹ If DHS transfers an individual to a different jurisdiction after the individual has requested a custody redetermination hearing, practitioners can argue that the original immigration court may adjudicate the custody redetermination motion, given that the regulations focus on the place of detention at the time of filing the custody redetermination motion.¹⁶⁰

C. When Is the Earliest That a Detained Individual Can Request a Bond Hearing?

An individual in immigration detention need not wait until DHS files the NTA or until an initial hearing is scheduled to request a bond hearing with the immigration court.¹⁶¹ However, the immigration court will not have jurisdiction over a bond request unless and until the individual is in immigration custody.¹⁶² The Immigration Court Practice Manual notes that once a respondent requests a bond hearing, the court "schedules the hearing for the earliest possible date and notifies the alien and the Department of Homeland Security."¹⁶³ In practice, the amount of time between a bond redetermination request and the actual hearing will vary from court to court and may range from just a few days to a month.

D. Bond Hearing Procedures – Representation

Respondents may be represented at bond hearings.¹⁶⁴ A practitioner may enter their appearance in a bond hearing by filing Form EOIR-28, Notice of Entry of Appearance as Attorney or Representative Before the

¹⁵⁷ See *id.* § 1003.19(g) (discussing requirement that ICE notify IJ of transfer); Memorandum from MaryBeth Keller, Chief Immigration Judge, EOIR, OPPM 18-01, Change of Venue, at 5 (Jan. 17, 2018), justice.gov/eoir/page/file/1026726/download [hereinafter "2018 Change of Venue OPPM"].

¹⁵⁸ All filings with the immigration court, including an opposition to a change of venue motion, must comply with the Immigration Court Practice Manual, *supra* note 1. The Immigration Court Practice Manual provides for a 10-day deadline for responding to motions for non-detained individuals, Ch. 3.1(b)(1)(B), but response deadlines in detained cases are "as specified by the Immigration Court," Ch. 3.1(b)(1)(C). For this reason, it is wise to file an opposition as soon as possible. If the DHS motion to change venue is granted, practitioners may also seek to appear by telephone or video-conference.

¹⁵⁹ See 2018 Change of Venue OPPM, *supra* note 157, at 5 ("If DHS produces the alien at a court in another location, absent a valid order changing venue or a new charging document, venue and administrative control does not reside at that location, *except for bond redetermination requests, if any.*" (emphasis added)).

¹⁶⁰ 8 CFR § 1003.19(c)(1).

¹⁶¹ See *id.* § 1003.14(a).

¹⁶² *Matter of Sanchez*, 20 I&N Dec. 223 (BIA 1990); *Matter of Lehder*, 15 I&N Dec. 159 (BIA 1975).

¹⁶³ Immigration Court Practice Manual, *supra* note 1, Ch. 9.3(d) (noting also that "[i]n limited circumstances, an Immigration Judge may rule on a bond redetermination request without holding a hearing").

¹⁶⁴ See *id.* Ch. 9.3(e)(2) ("In a bond hearing, the alien may be represented at no expense to the government.").

如果ICE把你transfer到了偏远的地方，律师可以 file motion
to oppose 移交换detention

Immigration Court, with the immigration court and serving a copy on ICE OCC. A legal representative may enter an appearance solely for the bond proceeding by checking the box on Form EOIR-28 indicating that the appearance is for "custody and bond proceedings only."¹⁶⁵ Representatives may appear in person at the bond proceeding or may request leave to appear telephonically.¹⁶⁶ Sometimes the bond hearing is conducted immediately before or after a master calendar hearing, which can cause confusion for the respondent.¹⁶⁷ Practitioners should be cognizant that strategies in the bond proceeding may affect and can be closely tied to strategies in the underlying removal case. Practitioners should be careful about concessions made in the bond proceeding and avoid a strategy that could be prejudicial in the underlying removal case. Practitioners should proceed with particular caution if they are not going to be representing the client in the underlying removal case but rather only in the bond proceeding. Practitioners should also carefully explain to the client if representation will be limited to the bond proceeding and the effect of this limited representation on the removal proceedings.

E. Bond Hearing Procedures – Separate Record

Bond hearings are "separate and apart from" removal proceedings.¹⁶⁸ Bond hearings are not always recorded, and individuals do not generally have a right to a transcript of the bond hearing.¹⁶⁹ The record created in a bond proceeding is kept separate from the Record of Proceeding pertaining to the underlying removal proceedings.¹⁷⁰ Because bond proceedings are separate, a respondent wishing to have evidence from the bond proceeding included in the removal proceedings record should separately file that evidence in the removal proceeding. Likewise, a respondent wishing to have evidence in the removal case considered in the bond case should introduce that evidence into the bond record.¹⁷¹ Even though the proceedings are separate, courts have ruled differently as to whether evidence presented or testimony given during a bond

¹⁶⁵ 8 CFR § 1003.17(a). Form EOIR-28 is available at justice.gov/sites/default/files/pages/attachments/2015/07/24/eoir28.pdf.

¹⁶⁶ See Memorandum from David L. Neal, Chief Immigration Judge, EOIR, OPPM No. 08-04, Guidelines for Telephonic Appearances by Attorneys and Representatives at Master Calendar and Bond Redetermination Hearings (July 30, 2008), justice.gov/sites/default/files/eoir/legacy/2008/08/01/08-04.pdf (directing that IJs adjudicate motions for telephonic appearance on a case-by-case basis, considering a number of enumerated factors).

¹⁶⁷ Cf. Immigration Court Practice Manual, *supra* note 1, Ch. 9.3(d).

¹⁶⁸ 8 CFR § 1003.19(d).

¹⁶⁹ *Matter of Chirinos*, 16 I&N Dec. 276, 277 (BIA 1977) (stating that "there is no right to a transcript of a bond redetermination hearing" nor any requirement of a "formal hearing" and that even a telephonic hearing may be permissible). The Ninth Circuit has held that in the context of bond hearings of individuals with pending petitions for review whose detention has been prolonged, due process requires that the immigration court make a contemporaneous record of the proceeding such as through an audio recording made available to the parties upon request. *Singh v. Holder*, 638 F.3d 1196, 1208–09 (9th Cir. 2011).

¹⁷⁰ Immigration Court Practice Manual, *supra* note 1, Ch. 9.3(e)(4) ("The Immigration Judge creates a record, which is kept separate from the Records of Proceedings for other Immigration Court proceedings involving the alien.").

¹⁷¹ See *id.* Ch. 9.3(e)(5) ("Since the Record of Proceedings in a bond proceeding is kept separate and apart from other Records of Proceedings, documents already filed in removal proceedings must be resubmitted if the filing party wishes them to be considered in the bond proceeding."); *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999) ("[W]e consider it inappropriate to look to portions of the record in the merits appeal that were not referenced in or made part of the bond record.").

G. Bond Amounts

By statute, the minimum monetary bond that an IJ can set is \$1,500.¹⁸⁰ There is no statutory maximum bond amount. A 2019 report showed that the chances of a bond grant, and the amount of bond, varied significantly based on the respondent's nationality and the location of the immigration court.¹⁸¹ Additional data also indicates that whether a respondent is represented and/or faces gang affiliation allegations may affect the likelihood of being granted bond.¹⁸²

The statute further provides that a noncitizen may be released on "conditional parole."¹⁸³ While some IJs have historically concluded that they lack authority to grant this type of release, DHS conceded in a class action lawsuit that IJs do have this authority.¹⁸⁴

When an individual is detained under INA § 236(a), an IJ can do any of the following: set a bond where ICE has held the person without a bond, lower the bond set by ICE, or raise the bond set by ICE.¹⁸⁵ The Ninth Circuit has ruled that IJs must consider the respondent's ability to pay in setting bond amounts; this is discussed in section III.H.4 below.

H. Case Law on Adjudication of Bond Redetermination Requests

1. Burden of Proof

The regulations state that in the context of bond decisions made by DHS, "the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding."¹⁸⁶ In the context of custody redeterminations in immigration court, neither the statute nor the regulations explicitly address which party bears the burden of

¹⁸⁰ INA § 236(a)(2)(A).

¹⁸¹ See Transaction Records Access Clearinghouse, Importance of Nationality in Immigration Court Bond Decisions (Feb. 12, 2019), trac.syr.edu/immigration/reports/545/ (reflecting that less than half of detained noncitizens with bond hearings in Fiscal Year 2018 were granted bond).

¹⁸² See CLINIC *Presumed Dangerous*, *supra* note 6, at 2, 7 (finding that in observed bond hearings at the Baltimore Immigration Court, bond was set for represented respondents in 72% of cases and for unrepresented respondents in 48% of cases. The court denied bond in 88% of cases where the government alleged gang affiliation).

¹⁸³ INA § 236(a)(2)(B).

¹⁸⁴ *Rivera v. Holder*, 307 F.R.D. 539 (W.D. Wash. 2015); see ACLU Immigrants' Rights Project, ACLU of Washington & Northwest Immigrant Rights Project, *Practice Advisory: Immigration Judges' Authority to Grant Release on Conditional Parole Under INA § 236(a) as an Alternative to Release on a Monetary Bond* (Sept. 2015), aclu.org/legal-document/rivera-v-holder-practice-advisory. Due to the district court's ruling in the *Rivera* litigation, IJs in the state of Washington must consider conditional parole in making custody redeterminations. Even though this ruling is not binding outside Washington state, practitioners can argue based on the statutory language that all IJs have the authority to grant, and should consider, conditional parole.

¹⁸⁵ See *Matter of Spiliopoulos*, 16 I&N Dec. 561, 562 (BIA 1978).

¹⁸⁶ 8 CFR § 236.1(c)(8).

- (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;¹⁹⁷
- (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 into the United States.¹⁹⁸

BIA case law affords the IJ "broad discretion" in considering what factors apply and how to weigh these factors.¹⁹⁹

3. Dangerousness

In recent years, the BIA has more explicitly interpreted the dangerousness prong of bond determinations. In a 2016 case, *Matter of Fatahi*, the BIA ruled that the IJ can consider circumstantial evidence of dangerousness, can review the "totality of the facts and circumstances presented," and that the dangerousness question is "broader than determining if the record contains proof of specific acts of past violence or direct evidence of an inclination toward violence."²⁰⁰ There, the respondent had no criminal convictions or charges, but the BIA upheld the IJ's decision not to set a bond because he had made misrepresentations about his use of a fraudulent passport.²⁰¹ Practitioners may seek to distinguish the *Fatahi* case, as it appeared to implicate national security concerns and alleged ties to a terrorist group.

Additionally, in the 2018 case, *Matter of Siniuskas*, the BIA noted that "it is proper for the Immigration Judge to consider not only the nature of a criminal offense but also the specific circumstances surrounding the alien's conduct."²⁰² The respondent in that case had a recent arrest for driving under the influence (DUI) as well as three DUI convictions from over a decade ago. He had presented evidence and argument to show rehabilitation and that he was not a danger to the community. The BIA noted that a number of the factors enumerated in *Matter of Guerra*, such as family and community ties, possibility of discretionary relief, fixed address, long residence in the United States, and employment history, are relevant to flight risk.²⁰³ It stated,

¹⁹⁷ BIA case law allows the IJ to consider evidence of pending charges or arrests where no charges or convictions have resulted. See, e.g., *Siniuskas*, 27 I&N Dec. at 208–09.

¹⁹⁸ 24 I&N Dec. at 40.

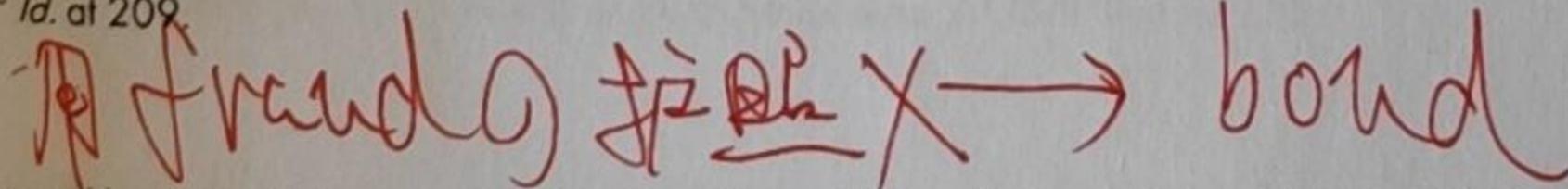
¹⁹⁹ *Id.*

²⁰⁰ 26 I&N Dec. 791, 795 (BIA 2016).

²⁰¹ *Id.*

²⁰² 27 I&N Dec. 207, 208 (BIA 2018).

²⁰³ *Id.* at 209.



A. Bond Hearing Preparation

Adequate preparation in advance of a bond hearing is critical. While it is possible to go forward with a bond hearing with minimal or no preparation and receive a favorable result, respondents must be advised that the IJ will only conduct one custody redetermination hearing, unless the individual can demonstrate that circumstances have changed materially since the prior hearing.²²⁸ Therefore, the first hearing may be the respondent's only opportunity to obtain a low bond amount.

The BIA takes the position that it is the respondent's burden to prove that they are not dangerous and their release does not present a flight risk, although as noted above, in some jurisdictions federal courts have ruled that the government bears the burden of proof.²²⁹ Preparation and submission of documents may be key for winning bond before the IJ, particularly for individuals with any criminal history. Moreover, the IJ has authority to raise the bond or set no bond in addition to lowering it, providing all the more reason for adequate preparation. Finally, if an appeal to the BIA is necessary, having a well-developed record, including written documentation, may improve the chances of success on appeal. For these reasons, it may be wise for the respondent to seek a continuance at their initial appearance in immigration court, rather than going forward with a bond hearing that day, in order to prepare adequately.²³⁰ In the alternative, the respondent may wish to withdraw the request for a bond hearing without prejudice and subsequently file a motion requesting one when they are ready to proceed.

做好准备，可以申请延庭

An important component of preparation is conducting an analysis of likely and possible outcomes of seeking a custody redetermination. Knowing the audience (the particular IJ's practices, as well as the local DHS OCC's position) is crucial to properly advise a client about the risks and benefits of seeking a bond redetermination. In some cases, there may be a high risk that seeking bond redetermination will cause the IJ to raise the bond, and the client may make an informed decision not to request bond redetermination at a particular time. In any event, it will be important to find out from the client what amount the family can afford and how the bond money will be raised by the family or community. Practitioners should compare that amount with what is a realistic bond amount that the IJ might set, and be prepared to ask for a specific bond amount during the hearing. Ideally, a client wishing to proceed with a bond redetermination hearing will have a plan in place as to which trustworthy person known as the obligor can actually pay the bond and how the money will be collected, although this is not a reason to delay the bond hearing.²³¹

²²⁸ See 8 CFR § 1003.19(e). For more information, see section IV.C.6 *infra* discussing the standards for second or successive bond hearings.

²²⁹ See discussion at section III.H.1 *supra*.

²³⁰ If the IJ is hesitant to grant a continuance, respondents and practitioners could note that continuing the bond case does not delay the removal proceeding and should be prepared to articulate why a continuance is warranted under the good cause standard.

²³¹ Identifying a trustworthy individual is important because often that person is paying the bond but the money comes from other sources, such as the client's family, who want the money returned to them when the bond is cancelled. For information on who can pay a bond, see section IV.C.1 *infra*.

1. Working with Detained Clients

Working with detained clients involves a variety of challenges beyond those present in all removal defense work. As noted in the introduction to this guide, detained respondents have their cases heard on an expedited docket, meaning there is less time to prepare the case. Representative-client communication is more challenging, and in-person visits require travel and advanced planning. It is more difficult for the detained client to assist the representative in preparing the case, since they lack the ability to freely gather documents and cannot attend meetings at the representative's office. Given these challenges, it is all the more important that practitioners representing detained clients do so with careful planning and organization that maximizes detention visits and preparation time.

Locating a Detained Client

If a client is detained in immigration custody but their location is unknown, the practitioner can search for the client using the ICE Online Detainee Locator System.²³² This online tool allows a search either using the subject's alien registration number (also known as an "A" number) and country of birth, or by first and last name and country of birth. It has English, Spanish, French, Portuguese, Russian, Somali, Vietnamese, Arabic, and Chinese options. If the practitioner does not have a required piece of information or the individual is not showing up in the online system (which is not uncommon due to lags or transfers), the practitioner can contact the local ERO office, provide a signed Form G-28, and ask about the detained individual's location.²³³ Practitioners may also be able to search online jail rosters of the detention facilities with immigration beds in their area. Family members are often the best source in timely locating a detained individual.

Communicating with a Detained Client

Telephone communication procedures at detention centers vary. Practitioners should contact the detention center where the client is detained to find out procedures for legal representative calls. For example, it may be possible to get on the detention center's legal representative call list such that clients can make direct calls to the law office free of charge. It may be wise to establish a communication protocol with the detained client, such as having a particular day and time every week during which the client will call the practitioner. Practitioners should take care in terms of the substance of phone conversations, given that jail phone calls are typically recorded and their contents may be turned over to the police or prosecutor. Practitioners should inquire about steps that need to be taken to ensure that representative/client calls are confidential and not recorded, and their contents viewed as privileged. Even if the calls are not recorded, practitioners should be aware that jail guards or other detained individuals may be within earshot of the client. For written correspondence, attorneys should label all mail sent to a detained individual as "privileged attorney-client communication."

²³² The detainee locator tool is found on the ICE website, locator.ice.dhs.gov/odls/#/index (last visited Apr. 4, 2021).

²³³ A list of ICE ERO field offices can be found on the ICE website, ice.dhs.gov/contact/ero (last updated Mar. 1, 2021).

In-Person Visits

Practitioners should learn the legal visitation procedures governing the particular detention center, including visitation hours, what documents the practitioner must bring to the visit (such as forms of identification or proof of attorney license), what materials are prohibited, and whether the practitioner must complete a pre-clearance process before arriving at the facility. Practitioners may obtain this information by contacting the detention center. It is also helpful to speak with other practitioners who have recent experience with visits at the facility to learn more about best practices. If the facility is served by an LOP,²³⁴ the LOP staff would be a good source for this information.

Given the logistical challenges of visiting detained clients, practitioners should prepare carefully in advance to make the most of each visit. This will include bringing any documents that require the client's signature, such as medical and non-medical releases, retainer agreement, records request forms to obtain immigration and criminal records, Form G-28, etc. In order to gain as much pertinent information as possible, it is also helpful to prepare a detailed checklist or outline covering the various questions and topics the practitioner needs to discuss with the detained client. Practitioners may wish to develop a detained client intake tool or screening questionnaire for use in such cases.

In addition to gathering initial facts and executing release forms from the client, another important aspect of the meeting will be to ask the client about other points of contact that might help in developing supporting information. In the bond context, this would include individuals who may be able to write a declaration in support of the client's release on bond, who have documents pertinent to the bond proceeding, or who may be willing to testify on behalf of the client at a bond hearing. Of course, any time a practitioner wishes to contact a third party or share information related to a client's case, it is important to obtain the client's permission. This is best done through a written release form. It is also wise to find out if there is any particular information the client does not want shared with a third party. For example, a client may not want individuals to know about their criminal history. However, it is best practice that individuals who will be submitting a supporting declaration or testifying during the bond hearing know the client's background, including negative aspects, so that their declaration will be given full evidentiary value and they are not taken by surprise during cross examination. These discussions with the client will help inform whom the practitioner can and should contact.

As with any client representation, it is important from the outset to establish clear expectations and promote the client's informed decision-making. For example, if the practitioner's representation of the client is limited to the bond hearing, it is crucial that the client understand and consent to this limited scope representation. The client should understand the mechanics of a bond hearing and the removal proceedings, which allow the IJ to switch from one proceeding to the other. In a limited representation agreement, the practitioner will represent the client only during bond proceedings, which may cause confusion when the IJ turns to the removal proceedings and asks the client if they want additional time to find legal representation. The practitioner will want to explain to the client why the IJ is asking the question regarding additional time to find

²³⁴ EOIR, Legal Orientation Program, justice.gov/eoir/legal-orientation-program (updated Jul. 24, 2020).

选择对的 Case Take the right 认人证词.

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反对的 Case refuse to suppress 不呈证词

说“YES”对IJ，要更多时间 prep case.

representation for the removal proceedings, and that the answer to the IJ's question regarding a continuance should be "yes." In cases where practitioners are providing bond representation but the client is proceeding pro se in removal proceedings, it is particularly important to be aware of the pace at which both aspects of the proceedings are advancing and note that the IJ may not grant more than one continuance before requiring the client to identify possible forms of relief.

It is wise to review and sign a written representation agreement with the detained client and discuss it thoroughly. The representation agreement should specify the scope of the representation, including whether or not the agreement includes representation in the event of appeal. Practitioners should also provide the client with an approximate timeline for the case's progress. They should give the client the various possible and likely outcomes (release, IJ setting a bond the client cannot pay, no bond, etc.) that could result from the bond hearing. If the client wishes to go forward with the bond hearing, it is important beforehand to discuss what the client wants to do if the hearing result is not favorable and to identify the circumstances in which the client may want to reserve appeal.

If the practitioner has not had experiences with cases containing similar facts or is new to a particular jurisdiction, they may wish to reach out to other practitioners who have recently handled bond hearings before the same IJ with similar facts. In order to maximize the client's ability to participate in the representation and assist with the case, practitioners should ensure that the client understands the legal standards and burden of proof in the bond context.²³⁵ When counseling a client about bond prospects, it is important to keep in mind that detained respondents may have an inaccurate understanding about bond practices based on what they hear from other detained individuals. Practitioners should remind clients that each case is different and that what happened to one person may be very different than what happens in the client's case.

2. Records Gathering and Fact Development

Gathering and reviewing pertinent records, and developing favorable evidence in support of a client's release on bond, are crucial for successful bond hearing preparation. Practitioners should think about records that already exist, and also about what evidence could be developed to strengthen the case. With respect to the former category, obtaining a document for review is different than deciding whether or not to submit the document. Practitioners should always carefully review all possible evidence to decide whether it is helpful or harmful to the client's case.

Obtaining Existing Records

Given the IJ's wide discretion in the bond context and the non-exclusive list of bond factors,²³⁶ practitioners should think creatively about what records exist that could bear on the IJ's bond decision – both those that would support release and those that might be viewed as negative.

²³⁵ See *supra* section III.H.1.

²³⁶ See *supra* section III.H.2.

Examples of positive records that should be gathered if they already exist include:

- Certificates of completion of any programming, such as for alcohol or substance abuse classes
- Documentation of mental health counseling or efforts to address other issues contributing to criminal activity
- Lease, mortgage, or other documentation showing the client's fixed address, length of residence in the United States, and that the client has a place to live if released
- Birth certificates, marriage certificate, and other citizenship/immigration documentation showing the client's family ties, particularly where the family member has U.S. citizenship or lawful immigration status
- Records showing that the client has paid taxes in the United States²³⁷
- Employment records showing a steady employment history²³⁸
- Documentation, if any, establishing the client's potential immigration relief, such as the birth certificate of a qualifying relative for a non-LPR cancellation of removal application or evidence showing that the client has a pending application for immigration relief with USCIS, such as a receipt notice
- School or educational records, including transcripts, showing the client's participation in or completion of educational programs, such as a diploma or GED
- Documents showing the client's community involvement or recognition, such as volunteer certificates or awards
- Documentation showing the client's charitable contributions
- Documentation showing that the client has registered for the Selective Service
- Photos with family or community members who have lawful immigration status
- Documentation showing any medical conditions of the client or family members. Practitioners should consider filing medical records requests with the detention facility (with a signed authorization for release of information) to support any arguments about the client's health, and
- If relevant, records showing that the client showed up to past court appearances.

Examples of negative documents that should be gathered if they already exist include:

- The client's criminal record, including any arrest or police reports, criminal complaints, and conviction records. It is best practice to review the complete criminal record and not simply those law enforcement encounters that led to a conviction, because DHS will likely argue (and the BIA has held) that arrests and pending charges are relevant to the client's dangerousness

²³⁷ Practitioners should carefully review tax documents before submission to ensure that the client properly filed the taxes and that there were no misrepresentations or other problematic issues, such as the use of an alias or "AKA" that might raise questions from DHS.

²³⁸ Practitioners should inquire as to whether the client completed an I-9 and what status was noted on that document, and try to get a copy of the I-9 to ensure that there was no false claim to U.S. citizenship made or other exposure to criminal liability such as for identity theft.

- The client's immigration history, such as documentation of prior immigration violations or misrepresentation. This will include any record of unlawful entry into the United States
- Any evidence suggesting that the client has attempted to flee prosecution or escape from authorities in the past, including bench warrants issued for failure to appear at criminal court proceedings
- Allegations by DHS of criminal history in the client's home country or of gang ties, and
- Any evidence of a transient lifestyle or lack of community ties.

The negative records are important to review because DHS could obtain and introduce them as evidence, and the practitioner will want to have a mitigation strategy for how to deal with such records, including any necessary objections.²³⁹ For example, in some jurisdictions, DHS frequently files RAP sheets, which are not proof of convictions and should be objected to where they are unreliable or harmful.²⁴⁰ These types of negative allegations will also frequently be found on Form I-213. Additionally, an IJ may request certain criminal records such as a complaint/charging document. In jurisdictions where it is the respondent's burden to prove bond eligibility, it may be in their interest to provide those records. However, practitioners should consider whether filing criminal records in bond proceedings could later be used against the client in removal proceedings where, for example, DHS has the burden of establishing deportability. Whether or not the IJ requests any particular record or the practitioner decides to submit any particular evidence, it is important to proactively review all records in order to provide accurate information to the court about the client's criminal history.

Developing New Evidence Supporting Release on Bond²⁴¹

In developing bond evidence, practitioners should remember that they are not limited by what records already exist; often the best bond evidence is developed in the course of preparation for the bond hearing. This requires creativity and persistence on the part of the practitioner. In thinking about what evidence could be developed, practitioners should go through the bond factors and consider what types of evidence could be presented to establish each factor.²⁴² For example, in establishing that the client's release would not pose a danger to the community, consider what documentation could be developed to support such a finding. This might include letters of support from rehabilitation programs, evidence that the client's criminal record did not involve harm to persons or property, or evidence that many years have passed since any unlawful conduct.

Examples of evidence supporting release that could be developed include:

- Declarations or letters of support attesting to the client's good character and responsible nature from family members, friends, co-workers, neighbors, clergy, and other community members

²³⁹ For mitigation ideas, see section IV.A.5 *infra*.

²⁴⁰ Cf. *Francis v. Gonzales*, 442 F.3d 131, 143 (2d Cir. 2006) (stating, in removal proceedings context, that "[r]ap sheets lack the necessary information to describe the full record of conviction and do not necessarily emanate from a neutral, reliable source.").

²⁴¹ For more ideas about bond hearing evidence, see the resources cited in note 227 *supra*.

²⁴² For a summary of factors that IJs consider in bond hearings, see section III.H *supra*.

Object to any negative evidence
fight!!!

history, that the declarant indicate their knowledge of the criminal history. For example, it could include words to the effect that "I have been informed that [name] was arrested by ICE because of pending charges for [X]." Where true, it can be helpful to include details, such as that a neighbor has had the respondent babysit for their children despite knowing of the respondent's past arrest for a DUI, or that a family member has pledged to provide transportation (for a respondent who cannot drive, or is prohibited from driving), housing, or other support.

All declarations must follow the Immigration Court Practice Manual. The document should include language such as: "I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge," followed by the date, signature, and printed name of the person signing.²⁴⁴ Practitioners are encouraged to attach a copy of the declarant's government-issued identification. They should also follow the Practice Manual's directions on foreign language translations. If a document is in a language other than English, it must be accompanied by an English translation along with a certificate of translation.²⁴⁵ The certificate of translation must be signed by the translator who states that they are fluent in both languages, and that the translation is true and accurate to the best of their knowledge and abilities.²⁴⁶

Finally, it is prudent to cross-reference declarations to ensure that there are no inconsistencies between them or with other evidence prepared for filing (examples of common inconsistencies include declarants referencing different dates for a client's arrival in the country of community, referring to a client by a different name or nickname, etc.).

3. Submitting Documents in Advance of the Bond Hearing

When preparing and submitting documents to the immigration court, it is important to review and follow the Immigration Court Practice Manual. Note that there is a chapter devoted to bond proceedings, as well as other sections that discuss immigration court filings and provide sample documents. In addition, practitioners should reach out to experienced local practitioners who may have further insight on any preferences or practices of the particular immigration court or IJ, such as notarization requirements for declarations or letters of support. The practitioner may also be able to contact the immigration court administrator when procedural questions arise.²⁴⁷

Preparing and Filing a Motion for a Bond Redetermination

If a bond hearing has not already been scheduled, practitioners can file a motion requesting a bond redetermination. This could be coupled with a motion for an expedited hearing. Even if a bond hearing has been scheduled, if the client wishes to have a bond hearing held sooner, the practitioner can consider a

²⁴⁴ See Immigration Court Practice Manual, *supra* note 1, Glossary, Declaration Under Penalty of Perjury.

²⁴⁵ See *id.* Ch. 3.3(a) & Appendix H (Sample Certificate of Translation).

²⁴⁶ See *id.* Ch. 3.3(a).

²⁴⁷ A list of immigration courts with contact information including phone numbers is available on the EOIR website. EOIR, EOIR Immigration Court Listing, justice.gov/eoir/eoir-immigration-court-listing (updated Mar. 26, 2021).

motion to advance the bond hearing date: Note, however, that motions to expedite the hearing or advance a hearing date may be unlikely to be granted given the immigration court backlog.²⁴⁸ In many situations, it may be better to use the time to prepare a compelling bond packet. By contrast, some IJs will grant motions to advance and schedule hearings within one or two days if an opening arises. Accordingly, practitioners should be prepared to go forward if filing such motions and/or gain further information about local scheduling trends.

Timing. An individual detained in immigration custody may request that a bond hearing be set even if the NTA has not yet been filed.²⁴⁹ Some detained respondents may not be automatically scheduled for a bond hearing because they did not know to ask for a custody redetermination. Once the immigration court receives a bond hearing request, it should schedule a bond hearing "for the earliest possible date."²⁵⁰ However, in some jurisdictions the initial bond hearing is scheduled concurrently with the first master calendar hearing. Given the volume of cases and court backlogs, this could be weeks or more after the person is detained.

Contents of a Request for Bond Redetermination. The request for a bond redetermination should include the individual's full name and "A" number, the facility where the individual is detained, and the bond amount set by ICE, if any.²⁵¹ It is also helpful to note the detained client's primary language. If this is the practitioner's first appearance in the case, they should also file Form EOIR-28, Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court.²⁵² The practitioner should indicate whether they are entering an appearance for bond proceedings only or for all proceedings. If no NTA has yet been filed with the immigration court, the practitioner must file a paper version of Form EOIR-28, preferably on green paper, and serve OCC.²⁵³ Otherwise, the practitioner may file the EOIR-28 electronically, but must remember to still serve OCC.

The motion for a bond redetermination may be accompanied by a supporting brief. While it is a best practice to file a brief in advance of the hearing where possible so that the IJ may have time to review it prior to the hearing, practitioners may also file any documents at the bond hearing.²⁵⁴ Because some IJs have

²⁴⁸ For data on the immigration court backlog, see TRAC Immigration, Immigration Court Backlog Tool, trac.syr.edu/phptools/immigration/court_backlog (showing 1,299,293 pending cases through February 2021) (last visited Apr. 4, 2021).

²⁴⁹ See *supra* section III.C.

²⁵⁰ Immigration Court Practice Manual, *supra* note 1, Ch. 9.3(d); see also Memorandum from James R. McHenry III, Dir., EOIR, Case Priorities and Immigration Court Performance Measures, at 7 app. A (Jan. 17, 2018), lexisnexis.com/legalnewsroom/immigration/b/immigration-law-blog/archive/2018/01/18/eoir-memo-case-priorities-and-immigration-court-performance-measures-jan-17-2018.aspx?Redirected=true&Redirected=true (directing that 90 percent of all custody determinations be completed within 14 days of the request).

²⁵¹ Immigration Court Practice Manual, *supra* note 1, Ch. 9.3(c)(1).

²⁵² Form EOIR-28 can be downloaded from the EOIR website, justice.gov/sites/default/files/pages/attachments/2015/07/24/eoir28.pdf.

²⁵³ Immigration Court Practice Manual, *supra* note 1, Ch. 2.1(d)(1). Practitioners should note that local service procedures—such as the ability to serve OCC over email—may vary between jurisdictions.

²⁵⁴ *Id.* Ch. 9.3(e)(5) (unless the IJ directs otherwise).

bond hearing ① 时候最好找律师要 legal brief

limited time for oral argument at the hearing, submitting a brief is an important part of making the case to the IJ and creating a record for possible appeal. Practitioners should argue using the legal framework and relevant factors for bond discussed in section III.H above and use the bond brief as a tool to mitigate the damaging effect of any negative factors as discussed below.²⁵⁵ Practitioners may want to draw on published or unpublished BIA cases to argue why the client should be released on bond.²⁵⁶

In practice, given the time constraints in bond proceedings, many practitioners do not submit a brief. In more straightforward cases, a brief may not be needed where the practitioner has presented succinct oral argument and persuasive documentary submissions. Where the practitioner concludes that a brief may be helpful, often a short letter brief may be sufficient. To preserve the best record for appeal, practitioners should take care not to admit facts (such as the fact of a conviction or of alienage) in written submissions or during any bond proceedings that would prove grounds of deportability or inadmissibility, if the client plans to contest those charges or pursue suppression of evidence of alienage. This highlights why it is important, particularly for a practitioner engaged in bond-only representation, to think beyond bond to the larger case strategy.²⁵⁷ Remember, however, that pursuant to the regulations, bond proceedings must be kept separate and apart from removal proceedings.²⁵⁸

Service. As with all filings, the bond redetermination request must be served on ICE OCC.²⁵⁹ The Immigration Court Practice Manual contains a sample certificate of service.²⁶⁰

Preparing and Filing Supplemental Documents in Support of Bond

The practitioner may submit supporting documents in advance of the hearing, along with the bond hearing request, or as a separate packet with a cover page labeled "BOND PROCEEDINGS"²⁶¹ or "Respondent's Evidence in Support of Custody Redetermination." The cover page should state "DETAINED" in the top right corner.²⁶² The filing should include an index of the documents or table of contents. The practitioner may also submit the documents in open court during the bond hearing, unless the IJ has ordered a document filing deadline.²⁶³ If a practitioner wants documents filed in the removal proceeding to be considered in the bond proceeding, those documents must be separately submitted in the bond proceeding.²⁶⁴

²⁵⁵ For tips on mitigating negative facts or evidence, see discussion *infra* below at section IV.A.5.

²⁵⁶ Although unpublished BIA decisions are not binding on IJs, they can provide helpful frameworks for analogizing the facts of a client's case to cases the Board has previously decided. Select unpublished BIA decisions can be accessed through, for example, the Immigrant & Refugee Appellate Center's subscription-based index: irac.net/unpublished/.

²⁵⁷ For further discussion, see, for example, BALDINI-POTERMIN, *supra* note 227, § 4:24.

²⁵⁸ See *supra* note 172 and accompanying text discussing courts' disagreement about whether, and in what circumstances, evidence from the bond proceeding may be considered in the removal proceeding.

²⁵⁹ A list of ICE Principal Legal Advisor offices (OCC) can be found on the ICE website, ice.dhs.gov/contact/legal (last updated Mar. 1, 2021).

²⁶⁰ Immigration Court Practice Manual, *supra* note 1, Appendix F.

²⁶¹ *Id.* Ch. 9.3(e)(5).

²⁶² *Id.* Ch. 3.3(c)(6).

²⁶³ *Id.* Ch. 9.3(e)(5).

²⁶⁴ *Id.*; see also *supra* section III.E.

Do not admit as fact or allegation

Prior to submitting any documents to the court, the practitioner should carefully review the documents to ensure that they do not contain prejudicial information or inconsistencies and that they support the request for bond. The practitioner should also review the proposed document submission with the client so that they are familiar with what will be submitted and can be better prepared for any questioning from either OCC or the IJ. The practitioner must ensure that the client consents to the documents being shared with the court and ICE OCC. Remember that it is one thing for the client to sign a release allowing a third party (such as a hospital) to share records with the client's representative, but it is another for the client to consent to confidential records being shared by the representative with ICE OCC and the immigration court.

4. Hearing Preparation

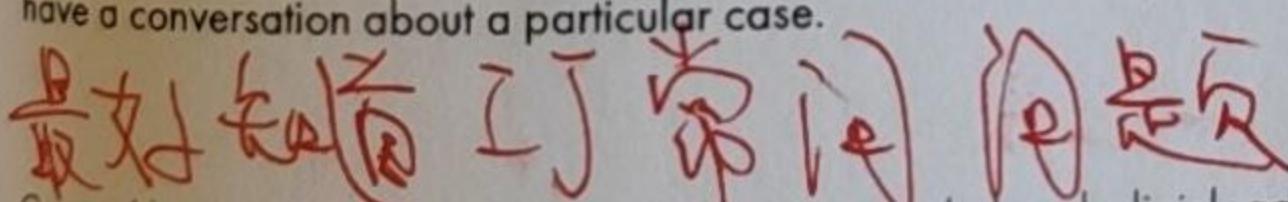
General Preparation

It is wise for practitioners to take the time to learn about the particular IJ who will be presiding over the bond hearing. If the practitioner has not recently had a bond hearing before this IJ, it may be worthwhile to go to the immigration court and observe the IJ during a detained docket. Some jurisdictions have a detained docket observation project run by the local AILA chapter or nonprofit groups. The practitioner should also talk to experienced local practitioners about their recent experiences before this IJ in the bond hearing context. For example, does the IJ allow for witness testimony? What kinds of questions, if any, does the IJ ask of the respondent? What kind of evidence does the IJ want to see and what factors will likely be an obstacle to granting bond for the IJ? What is a realistic amount of bond that this IJ may set? Discovering this information will allow the practitioner to develop tailored arguments and to better prepare the client for any testimony.

Approaching the DHS Attorney

Whether it will be helpful to approach the ICE OCC attorney ahead of time to find out DHS's position on bond and determine if the parties can come to an agreement about a bond amount may depend on the ICE OCC office and the assigned attorney. One advantage of contacting ICE OCC ahead of time (in addition to potentially reaching an agreement on a bond amount) is to advise the ICE OCC attorney of particular facts in a case. Even if the ICE OCC attorney cannot or will not agree to a bond amount, they do not have to aggressively fight bond in every case and could signal a lack of strong opposition to bond or waive appeal at the conclusion of the bond hearing. A practitioner could contact the ICE OCC attorney in advance of the hearing by phone²⁶⁵ or approach the ICE OCC attorney immediately prior to the bond hearing at the immigration court. If the practitioner contacts the ICE OCC attorney ahead of time and it is not possible to reach an agreement, reaching out ahead of time might help give the practitioner a sense of what ICE OCC's arguments against bond will be, which would allow for more tailored preparation. Reaching out also provides the practitioner an opportunity to ask for a copy of the client's NTA and Form I-213 from the ICE

²⁶⁵ The practitioner will need to have either a Form EOIR-28 on file or provide a Form G-28 to the ICE OCC attorney in order to have a conversation about a particular case.



question the respondent, so the client must be prepared to testify. The practitioner should determine the pros and cons of the client's presenting affirmative testimony, including the likelihood that the client will even be permitted to testify or will be questioned by the ICE OCC attorney or the IJ. Practitioners should be mindful of the potential damaging consequences of a respondent's testimony in bond proceedings—not only for bond prospects but also in the removal case—as some IJs have relied on information offered during the bond hearing in making a decision in the removal hearing.²⁷⁰ Since bond records are to be kept separate and apart from the removal hearing, practitioners can object to an IJ's use of information presented in the bond hearing in the subsequent removal hearing. However, since this argument is not guaranteed to prevail and since DHS could seek to introduce evidence presented during the bond hearing in the removal proceeding, respondents testifying under oath in bond proceedings should take care to avoid inconsistencies or raising issues that may impact the removal case.

Preparing the Client for Direct Examination

If the practitioner determines that it would be beneficial for the client to testify affirmatively during the bond hearing, the practitioner should prepare the client in advance for this testimony. In some jurisdictions, the IJ may require the respondent to testify, regardless of their interest in doing so. It is crucial to investigate local practices in bond proceedings in order to adequately prepare. In general, it is better to prepare the client in case they are required to testify, rather than to be underprepared. The practitioner will want to share with the client the non-leading questions they plan to ask during direct examination and practice those questions with the client.²⁷¹ The practitioner should explain to the client the reason for these non-leading questions. The practitioner will also want to remind the client about the burden of proof and legal framework for bond proceedings, and point out the good and bad facts in the client's case. The practitioner should discuss with the client successful ways of communicating those facts during direct examination. Depending on the client's literacy level and learning style, it may be helpful to use written descriptions or visual aids to educate the client about the bond hearing and relevant testimony. The practitioner should ensure that the client is comfortable stating when they do not understand a question. This will be particularly important if it is difficult to secure an interpreter who is fluent in the respondent's best language or dialect but the respondent nevertheless wants to proceed.

Preparing the Client for Cross Examination and Questions by the IJ

The client should be prepared for cross-examination by the ICE OCC attorney and questioning by the IJ. The practitioner should explain to the client that the ICE OCC attorney will likely ask questions that call for a yes or no answer. The practitioner can explain that during a good cross examination, the government will essentially be testifying and will try to get the client to agree to its version of the facts. The practitioner should further explain that after the cross, they will have a chance to try to remedy any damage or clarify confusion

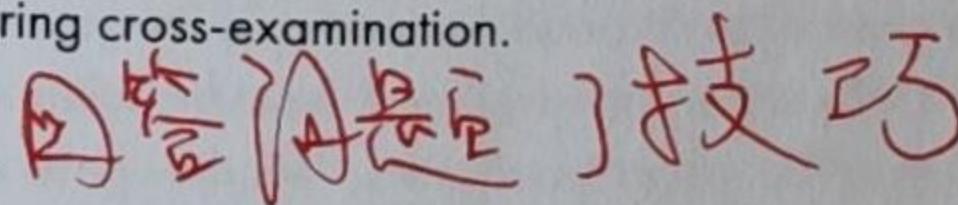
²⁷⁰ See *supra* notes 171–72 and accompanying text.

²⁷¹ For further resources on trial skills, including preparing effective direct examinations, practitioners may want to consider resources and trainings, such as immigration court advocacy specific trainings provided by the National Institute for Trial Advocacy, nita.org.

through re-direct examination. Practitioners should find out ahead of time what kinds of questions the IJ and the ICE OCC attorney will likely ask, so that they can best prepare the client. Some common questions that may be directed at the respondent include any smuggling history, prior immigration violations including how the individual arrived in the United States, gang interactions or association, with whom the respondent lives, family relationships and closeness to those family members, any past use of controlled substances, and criminal history.²⁷² Practitioners should have the client practice pausing after every question to give the practitioner time to make any necessary objection. Clients should be instructed to think before answering a question, to answer only the question asked, and to ask for clarification if they do not understand a question. Practitioners can explain that generally brief answers will be more appropriate, as long answers tend to be not well thought out and can create other problems during cross-examination.

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Preparing the Client for Testimony Using an Interpreter



The client should be directed to immediately alert the IJ if they have problems understanding the interpreter. In general, the client should also be empowered to answer "I don't know" or "I don't remember" if those answers are accurate, rather than guessing at something the client does not know.²⁷³ The client should be informed that if they do not understand a question, they should state this and ask that the question be rephrased. It is wise to have the client practice asserting these responses prior to the hearing. Clients should be instructed to wait for the interpreter to restate the question in their language before answering it. If the practitioner does not speak and understand the client's language, it is wise to have a family or community member present at the bond proceeding who is fluent in both English and the client's language. That person can alert the practitioner of any inaccurate interpretation.

Preparing Other Witnesses for Testimony

The IJ may or may not allow witnesses to testify at the bond hearing. Practitioners should inquire in advance with colleagues or the local court clerk about whether witnesses will likely be permitted to testify, and if there are any restrictions, such as minors not being permitted to testify. Practitioners should also inquire with colleagues about what kinds of questions the IJ and the ICE OCC attorney will likely ask. Among other things, ICE OCC may ask the witness about how they entered the United States, how they acquired lawful immigration status, and where they live and work. Thus, it is best for a witness to be a U.S. citizen or lawful permanent resident to minimize risk of negative consequences to the witness.

Practitioners should take time to prepare any witness who may testify. As with client preparation, the practitioner will want to share with the witness the questions they plan to ask and educate the witness about the burden of proof and legal framework for bond proceedings. The practitioner should highlight the aspects of the witness's testimony that would be most relevant to the client's release on bond and discuss successful

²⁷² See BALDINI-POTERMIN, *supra* note 227, § 4:28.

²⁷³ See Amanda McShane, Michelle Mendez, and Rebecca Scholtz, *Practice Pointer: Refreshing Recollection in Immigration Court Proceedings*, Catholic Legal Immigration Network, Inc. (Mar. 13, 2020), cliniclegal.org/resources/removal-proceedings/practice-pointer-refreshing-recollection-immigration-court.

community if released, and states that the dangerousness analysis is binary—either the respondent poses a danger and should not be released, or the respondent does not pose a danger and may be released taking into consideration factors to determine the level of flight risk.²⁷⁶ For this reason, it will be crucial for practitioners to develop a strategy regarding how to combat any harmful or irrelevant evidence or allegations in order to prove to the IJ that the respondent does not pose a danger. The following discussion provides preliminary tips about devising strategies to combat a dangerousness finding based on various types of “bad” evidence or facts.

Showing Lack of Dangerousness Where the Respondent Has Criminal Conviction(s)

If the respondent has prior criminal convictions, the practitioner will want to analyze each one to determine best arguments about lack of present dangerousness. Factors to consider in constructing successful arguments may include:

- Lack of recency of any criminal activity
- Lack of any injury to a victim or damage to property resulting from the criminal activity²⁷⁷
- Showing that the criminal conduct was accidental, negligent, or “at worst, reckless,” along with other positive factors such as family and community ties and eligibility for relief²⁷⁸
- The offense was treated as minor by the criminal adjudicative body, for example that it was classified as a “petty” offense, misdemeanor, or that the person was not sentenced to any jail time
- If there was a victim, having a declaration or testimony from the victim supporting the respondent’s release and providing further context demonstrating that the respondent does not pose a danger to the community²⁷⁹
- If the client has any family or friends in law enforcement, a letter from that person discussing lack of dangerousness and taking the conviction into account
- Evidence showing the client’s rehabilitation, such as attendance in rehabilitation programs (including while in detention) and evidence that the respondent is making efforts to address drug, alcohol, anger, or other problems
- Written declaration or oral testimony from the client evidencing responsibility, remorse, and rehabilitation

²⁷⁶ See *supra* section III.H.

²⁷⁷ Significant to the Board’s analysis in *Matter of Siniuskas*, 27 I&N Dec. 207 (BIA 2018), was the fact that at least three of the respondent’s DUI incidents had involved accidents. Since *Siniuskas* was issued, many unpublished BIA cases have distinguished those facts from other DUI histories that did not involve accidents or injuries and therefore did not reflect dangerousness. See, e.g., A-A-D-Z-, AXXX XXX 819 (BIA March 19, 2019) (unpublished) (reversing the IJ’s finding of dangerousness where respondent’s DUI conviction was his only criminal history in the United States and involved no injury or property damage).

²⁷⁸ See, e.g., Eddy Bismarck Nunez-Garrido, A099 115 048 (BIA Feb. 3, 2011) (unpublished), scribd.com/document/155930372/Eddy-Bismarck-Nunez-Garrido-A099-115-048-BIA-Feb-3-2011.

²⁷⁹ See discussion of caveats to consider when presenting victim testimony, *supra* in subsection IV.A.4 entitled “Hearing Preparation.”

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When the charges, even if proven, do not tend to establish that the respondent is dangerous, the practitioner will want to make this argument. Some of the arguments about criminal convictions discussed in the section above may be drawn upon in this context. For example, if the pending charge is for a minor state law infraction that does not carry possible jail time and does not involve any injury to property or persons, the practitioner could argue that this pending allegation is not relevant to the dangerousness analysis.

Practitioners could also consider arguing, in the context of a respondent with pending domestic violence-related charges, that the existence of an active state court protection order is a mitigating factor, because there will be immediate, state-imposed consequences if the respondent violates the order. Other mitigation arguments in the domestic violence context would include proof that the respondent has moved out or intends to move out, together with documentary evidence of the new residence, and that the respondent understands the need to change their way of communication. Furthermore, any evidence of the respondent's willingness to enroll in anger management programs or participate in therapy may support a stated intention to rehabilitate.

For a pending DUI charge, mitigation arguments might include showing that the respondent has arranged for other means of transportation, such as selling the car or stating that they understand that they are not permitted to drive and will not drive if released. Family and friends writing supporting declarations can include their intention to provide transportation to the respondent if released. The respondent may also include evidence that they intend to use public transportation. In some cases, substance abuse treatment programs will allow individuals who are detained to make appointments to initiate services even if still in ICE custody. Practitioners should seek to distinguish *Matter of Siniuskas*, 27 I&N Dec. 207 (BIA 2018), where the BIA concluded that no bond should be set for a respondent with a pending DUI charge and previous DUI convictions. Section III.H.2 above provides some ideas for how this case might be distinguished.²⁸⁹ In sum, the mitigation arguments and documentation should be tailored to the nature of the alleged criminal activity.

Invoking the Fifth Amendment Privilege. If the respondent chooses to go forward with the bond hearing while criminal charges are pending or if there are arrests that have not yet led to a conviction, practitioners should prepare the client for what to do if the ICE OCC attorney or the IJ asks the client questions about the underlying conduct. Answering such questions could implicate the client's Fifth Amendment right against self-incrimination and prejudice the client's options in future criminal proceedings.²⁹⁰ If the client has a criminal defense attorney, it would be wise to consult with this person in developing a strategy. Even if there is no criminal defense attorney currently assigned to the case, practitioners should still consult with a criminal defense attorney about the options. Practitioners should consider possible strategies and thoroughly inform

²⁸⁹ See 27 I&N Dec. at 210 (noting that the respondent "has not shown how his family circumstances would mitigate his history of drinking and driving" and noting that there could be situations where a family member's "influence over a young respondent's conduct could affect the likelihood that he would engage in future dangerous activity").

²⁹⁰ Even without pending criminal charges, there may be instances in which a client's Fifth Amendment rights are implicated. For example, if the plan is to file a motion to suppress evidence of alienage and contest the charges in the NTA, the practitioner should take care to ensure that no independent admissions of alienage are made at the bond hearing that could be used against the respondent in the removal proceedings to establish alienage. See *supra* section III.E (discussing the regulation that bond proceedings be kept separate and apart, as well as its potential limitations).

not are applicable generally in removal proceedings, since this standard is grounded in the due process requirement of fundamental fairness.²⁹⁴ Practitioners may want to consider the common reasons why an arrest does not lead to a charge in making the argument that allegations related to an uncharged arrest should not be given weight. For example, perhaps the prosecuting agency could not pursue charges because there was insufficient evidence that a crime had been committed, or an informant recanted the allegations that formed the basis for the arrest. It may be worthwhile to investigate why the law enforcement office that arrested the client did not pursue charges.

If the arrest did not lead to formal charges, but did lead to an ICE transfer, or if the arrest led to gang allegations without formal charges, practitioners could reach out to the arresting law enforcement officer and request their presence at the bond hearing. This strategy may be useful where the circumstances of the arrest suggest that the underlying allegations were unfounded or pretextual. If the law enforcement officer does not agree to come voluntarily or does not respond to the request after a reasonable amount of time, the practitioner may wish to seek the immigration court's assistance by ordering a deposition or issuing a subpoena.²⁹⁵ If the law enforcement officer does not testify despite these efforts, practitioners could argue that the court should give no weight to the arrest report in the absence of the officer's testimony. Practitioners should only pursue this strategy if they conclude that the potential risks of having the officer testify outweigh the benefits, and should carefully prepare witness examination.

Practitioners should consider specific strategies to challenge the allegations' admission into evidence, or to argue that they should be given little weight. These arguments will depend on the nature of the documents the ICE OCC attorney introduces containing the allegations. In general, though, these arguments are based on the "fundamental fairness" standard for admission of evidence in removal proceedings – that is, arguing that the evidence is not probative or reliable. Some questions to consider include:

- What about the document makes it unreliable?²⁹⁶
- Are there obvious factual errors?²⁹⁷

²⁹⁴ See, e.g., *Matter of Y-S-L-C-*, 26 I&N Dec. 688, 690 (BIA 2015) (citing the evidentiary standard applicable in removal proceedings).

²⁹⁵ See 8 CFR §§ 1003.35(a) (providing that an IJ "may order the taking of deposition either at their own instance or upon application of a party"); 1003.35(b) (describing IJ subpoena authority). For information on the immigration court subpoena issuance process, see *Immigration Court Practice Manual*, *supra* note 1, Ch. 4.20 (discussing subpoenas).

²⁹⁶ See, e.g., *Pouhova v. Holder*, 726 F.3d 1007 (7th Cir. 2013) (remanding after determining that the government's evidence against the respondent should not have been admitted because it was unreliable and there was no opportunity to cross-examine the documents' authors, where one statement was taken without an interpreter and another document memorializing a conversation was written seven years after the conversation happened); *Lin v. U.S. Dep't of Justice*, 459 F.3d 255, 269 (2d Cir. 2006) (concluding that consular report submitted by DHS was unreliable where it was based on the opinions of Chinese government officials who had "powerful incentives" not to be candid and lacked detail).

²⁹⁷ See, e.g., *Alexandrov v. Gonzales*, 442 F.3d 395, 407 (6th Cir. 2006) (noting that a government memorandum was unreliable because, among other things, it contained significant errors). But see, e.g., *Jian Hui He v. Holder*, 589 F. App'x 587, 589 (2d Cir. 2014) (unpublished) (upholding reliance on government document despite the fact that it "inaccurately identified [the petitioner] as female, given the accuracy of the other, more detailed identifying information, i.e., [petitioner's] name, date of birth, and passport number" (emphasis in original)).

which DHS has labeled as "a crime against a person."³¹⁷ Smuggling-related conduct is therefore more akin to a trespass to land violation, and not a dangerous criminal offense. Using DHS's own distinction, the IJ should therefore not factor past smuggling-related conduct into the dangerousness assessment.

B. Bond Hearing Practice Tips

As always, practitioners should review the Immigration Court Practice Manual, relevant EOIR policy guidance,³¹⁸ and any local immigration court rules pertinent to bond hearings. Practitioners who have not recently handled a bond matter before the specific IJ may also wish to observe a bond hearing presided over by that IJ prior to the day of the bond proceeding. Local practices can change frequently, as can the practices of ICE OCC attorneys in terms of their opposition to bond or arguments about particular bond factors.

Practitioners should arrive early for the bond hearing and follow the immigration court's check-in procedures. Practitioners should be aware that they may have to wait several hours before the case is called, given that many immigration courts schedule a morning or afternoon group of cases all for the same start time.

Practitioners should notify any witnesses or other family or community members who plan to attend the bond hearing in advance about where and when to show up, and about local court procedures, such as passing through security and forms of identification needed. It is important that only those with lawful immigration status come to immigration court.³¹⁹ Practitioners may also want to provide attendees with guidance and specific examples of appropriate and inappropriate attire. If possible, and if the practitioner believes there is a good chance the IJ will grant bond, the person who will be paying the bond (the obligor) could come to court ready to pay the bond, so that they can pay the bond immediately if the IJ grants the requested bond amount.³²⁰ If there are family or community members who attend the bond proceeding, the practitioner should point out their presence to the IJ at the beginning of the bond hearing. If the respondent is appearing by videoconference (called VTC), this should be done once the respondent appears on the screen, so that the respondent knows who is there and possibly gains confidence from seeing those present to support them.

³¹⁷ DHS Human Smuggling and Trafficking Center, Fact Sheet, Human Trafficking v. Human Smuggling (June 15, 2016), dhs.dhs.gov/Portals/12/Documents/HSTC_Human%20Trafficking%20vs.%20Human%20Smuggling%20Fact%20Sheet.pdf?ver=2016-07-14-145555-320.

³¹⁸ EOIR policy memoranda are available on the EOIR website, at justice.gov/eoir/oppm-log (updated Jan. 8, 2021), and justice.gov/eoir/eoir-policy-manual/vii (updated Apr. 2, 2021).

³¹⁹ Even noncitizens present with some protection, such as deferred action, should be cautioned about the risks of presenting at a hearing or posting bond at an ICE office. See, e.g., Mark Curnutte, *ICE Detains Young Kentucky Mother Who Has Legal Status*, USA Today, Aug. 23, 2017, usatoday.com/story/news/nation-now/2017/08/23/ice-detains-young-ohio-mother-who-has-legal-status/595355001/ (noting that DACA holder was detained when she went to an ICE office to "post bond for another immigrant who was eligible for release").

³²⁰ For more information about paying the bond, see section IV.C.1 *infra*.

obligor should bring proof of their lawful status and identity, the full amount of bond in the form of a money order, certified check, or cashier's check made out to "U.S. Department of Homeland Security,"³³⁵ a copy of the IJ order granting bond, as well as information about the detained individual including name, alien "A" number, detention location, date and country of birth, nationality, date and manner of arrival, and information upon release.³³⁶ The obligor will have to complete ICE Form I-352, which asks for the aforementioned information, at the ICE office.³³⁷ After the obligor gives the completed Form I-352 and bond money to the ICE officer, the obligor will receive a copy of Form I-352 as well as a receipt for the bond amount.³³⁸ It is very important that the obligor keep these documents in a safe place in order to recoup the bond money later. The obligor should also notify ICE of any address changes.³³⁹ Once these steps are completed, the detained individual should be released from ICE detention, although the precise amount of time between posting of the bond and the client's release will vary based on local practices. Even if DHS appeals the bond decision, the respondent can usually still pay the bond amount and be released; in some limited situations, however, the respondent may remain detained if DHS invokes a regulatory stay of the IJ's bond order in conjunction with a bond appeal.³⁴⁰ If the individual is being detained in another state, ICE may require the obligor to provide proof that the individual has transportation from the detention facility to the place they will reside upon release.³⁴¹

Result of Release on Bond

It is important to remind clients that achieving release on bond is not the same as resolving the underlying removal case. Getting released on bond has no legal effect on the underlying removal case, which will continue to proceed. Once a respondent is released from detention, their case may be moved from the immigration court's detained docket to a non-detained docket, which may slow the pace of proceedings and typically results in the assignment of a different IJ.³⁴² DHS is supposed to "immediately advise" the immigration court of a respondent's release from custody,³⁴³ but this may not always happen. Some IJs prefer that the respondent's representative file a motion to transfer the case from the detained docket to the

³³⁵ Practitioners should confer with the ICE ERO office where the bond will be posted to confirm the accepted bond payment methods and procedures.

³³⁶ If the respondent is seeking to suppress evidence of alienage in the removal case, the obligor could note that the country of birth and nationality information provided is based on what DHS has alleged.

³³⁷ Form I-352 is available on the ICE website, at ice.gov/sites/default/files/documents/Document/2017/i352.pdf.

³³⁸ See ERO Bond Management Handbook, *supra* note 333, at 5. Form I-352 contains instructions as well as the bond's general terms and conditions, which explain the parties' obligations under the bond agreement and identify events that automatically cancel the bond. The obligor should request a copy of Form I-352 if ICE ERO does not provide it.

³³⁹ This can be done via ICE Form I-333, Obligor Change of Address, at ice.gov/doclib/forms/i333.pdf. Practitioners should explain the importance of keeping the address updated using Form I-333. In some circumstances, ICE may contact the bond obligor looking for the respondent, such as with a bag and baggage letter, and it can create problems for the respondent if the obligor's address is not current.

³⁴⁰ See *infra* section V.A.

³⁴¹ See Nunez, *supra* note 227.

³⁴² See Memorandum from James R. McHenry III, Dir., EOIR, Case Priorities and Immigration Court Performance Measures, at 2 (Jan. 17, 2018), justice.gov/eoir/page/file/1026721/download (noting that detained individuals are a priority).

³⁴³ 8 CFR § 1003.19(g).

non-detained docket. If the respondent desires to change the venue of the removal proceedings upon release, they must file a motion for a change of venue in the removal case, not the bond proceeding. If the practitioner only represents the client in the bond proceeding, it may be advisable for the client to file a *pro se* motion to change venue, although the practitioner should ensure that the client understands the process for filing and may wish to review the client's *pro se* filing. Practitioners should inquire about local immigration court practices and preferences.

It is important for practitioners to remind the client of their obligation to continue to appear in court, and that failing to appear will result in an in absentia order of removal. To ensure that the client is informed of any change in venue or hearing date, practitioners should file a change of address form, EOIR-33, with the immigration court within five days of the client being released (or after any other move), and serve a copy on ICE OCC. Clients should be reminded that if they change address at any time, the immigration court must be informed within five days of the change; clients should notify their representative immediately of any address change. Additionally, practitioners and clients should regularly call the immigration court's automated information phone line—1-800-898-7180—to stay informed of any changes in the date or location of the next removal hearing.³⁴⁴

3. Getting Bond Money Back at the Conclusion of the Removal Case

After the respondent's removal proceedings have concluded, either from being ordered removed or granted relief, the immigration bond should be cancelled and ICE should send a notice to the obligor on ICE Form I-391, Notice of Immigration Bond Cancelled.³⁴⁵ It may also be possible to receive a bond refund if the respondent has returned to the home country without completing removal proceedings, or if the respondent's case concludes through voluntary departure.³⁴⁶ If a respondent's case is administratively closed or the removal is stayed, ICE generally will not return the bond. However, there is variation in policy by some offices and officers, so the obligor could reach out to their local office and seek return of the bond money.

³⁴⁴ For audio instructions on checking immigration court case status in four Mayan Languages, including Mam, K'iche', Q'anjob'al, and Q'eqchi', see Catholic Legal Immigration Network, Inc., *Audio Instructions for Checking Immigration Court Case Status in Mayan Languages* (Mar. 4, 2021), cliniclegal.org/resources/removal-proceedings/audio-instructions-checking-immigration-court-case-status-mayan.

³⁴⁵ For detailed information and tips on the bond refund process, see Michelle Mendez, CLINIC, *Immigration Bond: How to Get Your Money Back*, available in English and Spanish at cliniclegal.org/resources/immigration-bond-how-get-your-money-back. Much of the information provided in this subsection was obtained from the Mendez article.

³⁴⁶ See *id.* (describing the process by which the obligor can seek rescission of the bond breach, reinstatement of the bond, and bond cancellation by proving that the respondent has departed).

In practice, bond obligors may wish to contact ICE affirmatively to initiate the bond cancellation process. Once the obligor receives ICE Form I-391, they can send it along with a copy of the bond receipt and a letter requesting the refund to:

Debt Management Center
Attention: Bond Unit
P.O. Box 5000
Williston, VT 05495-5000
Telephone: (802) 288-7600
Fax: (802) 288-1226

If the respondent fails to appear for removal proceedings or immigration appointments with ICE, the individual may be deemed a fugitive and in breach of the bond terms. In this scenario, ICE will send the obligor ICE Form I-340, Notice to Obligor to Deliver Alien, which demands that the obligor present the respondent at the ICE field office at a specific date and time. If the obligor does not comply with Form I-340's demands, ICE will send ICE Form I-323, Notice of Immigration Bond Breached. In that case, the obligor will not receive a bond refund.

4. Voluntary Departure in Detention

A respondent may be granted voluntary departure without being released from detention.³⁴⁷ This process is sometimes referred to as voluntary departure "under safeguards."³⁴⁸ If the respondent receives voluntary departure under safeguards, they may have to post the amount of the plane ticket with ICE by a certain date. The respondent should not be required to pay a separate bond if not being released from detention.³⁴⁹

5. Bond Revocation

The INA provides for the revocation of bond and re-arrest and detention of an individual "at any time."³⁵⁰ DHS can also raise a bond amount if there has been a change in circumstances since the IJ set the bond.³⁵¹ If DHS revokes bond and re-detains an individual, that person can seek redetermination of DHS's new custody decision with the IJ and, if necessary, appeal the IJ's decision to the BIA.

³⁴⁷ See *Matter of M-A-S-*, 24 I&N 762 (BIA 2009); see also *Edwin Nunez Bencosme*, A206 223 455 (BIA Oct. 4, 2016) (unpublished), scribd.com/document/328156619/Edwin-Nunez-Bencosme-A206-223-455-BIA-Oct-4-2016?utm_source=aila.org&utm_medium=InfoNet%20Search ("[A] respondent's desire to file an appeal in separate bond proceedings is not an appropriate factor on which to deny voluntary departure in the exercise of discretion.").

³⁴⁸ *Id.*

³⁴⁹ See *Matter of M-A-S-*, 24 I&N at 767 (noting that "where continued detention is ordered, it makes no sense to require a bond, because the purpose of the bond—to assure that the respondent will appear for departure—is already fully served by the continued detention"); *Antonio Ivarra*, A205-506-209 (BIA June 20, 2016) (unpublished), scribd.com/document/318753711/Antonio-Ivarra-A205-506-209-BIA-June-20-2016?utm_source=aila.org&utm_medium=InfoNet%20Search (inappropriate to require voluntary departure bond for respondent granted voluntary departure without release from detention).

³⁵⁰ INA § 236(b); 8 CFR § 236.1(c)(9).

³⁵¹ *Matter of Sugay*, 17 I&N Dec. 637 (BIA 1981).

V. Bond Appeals

A. Legal Overview of Bond Appeals

1. Bond Appeals Generally

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As with other IJ decisions, either party can appeal a custody determination made by the IJ to the BIA.³⁵⁸ The Notice of Appeal must be filed with the BIA within 30 calendar days of the IJ decision.³⁵⁹ Unlike an appeal of a merits decision in removal proceedings, in bond proceedings a respondent cannot appeal the BIA decision to the federal appeals court via a petition for review.³⁶⁰ However, federal district courts do have jurisdiction to consider habeas actions challenging the legality of an individual's detention in immigration custody.³⁶¹ While an IJ's custody decision is on appeal with the BIA, the IJ still has jurisdiction to reconsider the bond decision.³⁶² The BIA Practice Manual specifies situations in which the BIA does not have authority to review a bond decision, which include:

- The respondent leaves the United States
- The respondent is granted relief by the IJ and DHS does not appeal, or is denied relief by the IJ and does not appeal
- The respondent is granted or denied relief by the BIA
- The respondent is released "on the conditions requested in the bond appeal" or "on conditions more favorable than those requested in the bond appeal," or
- The IJ grants a subsequent request for bond redetermination and DHS does not appeal.³⁶³

As with other types of appeals, in a bond appeal the BIA will not consider new evidence that was not submitted to the IJ.³⁶⁴ The BIA applies a "clearly erroneous" standard of review to all factual findings made by an IJ.³⁶⁵ The BIA reviews all questions of law, discretion, and judgment and all other issues on appeal *de novo*.

³⁵⁸ 8 CFR §§ 1003.19(f), 236.1(d)(3)(i).

³⁵⁹ *Id.* § 1003.38(b). In contrast, in situations where the respondent is appealing DHS's decision regarding a request for amelioration of conditions made outside the seven-day period after release necessary for IJ review under 8 CFR § 236.1(d)(2), the respondent has ten days to file an appeal of DHS's decision with the BIA. 8 CFR § 236.1(d)(3)(ii); BIA Practice Manual Ch. 7.3(a)(2)(B), justice.gov/eoir/eoir-policy-manual/iii ("In the limited instances in which the Board has jurisdiction over the appeal from a DHS bond decision, the deadline for filing an appeal is ten days from the date of the DHS bond decision.") [hereinafter "BIA Practice Manual"].

³⁶⁰ INA § 236(e) (stating that "[t]he Attorney General's discretionary judgment regarding the application of this section shall not be subject to review" and that "[n]o court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole").

³⁶¹ See *supra* section II.B; *Demore v. Kim*, 538 U.S. 510, 516–17 (2003); *Zadvydas v. Davis*, 533 U.S. 678, 686–88 (2001).

³⁶² *Matter of Valles*, 21 I&N Dec. 769 (BIA 1997).

³⁶³ BIA Practice Manual, *supra* note 359, Ch. 7.2(c). The occurrence of these same conditions may render a pending BIA appeal moot. *Id.* Ch. 7.4.

³⁶⁴ *Id.* Ch. 4.8.

³⁶⁵ See 8 CFR § 1003.1(d)(3)(i); *Matter of R-S-H-*, 23 I&N Dec. 629, 637 (BIA 2003).

- If the BIA has not issued a decision within “90 days after the filing of the notice of appeal.” The 90-day period is tolled if the respondent receives a requested briefing extension, for the same number of days as the briefing extension is granted.³⁷⁵

DHS can prevent a stay from automatically lapsing after 90 days by filing a motion for a discretionary stay.³⁷⁶ The motion must be filed “at a reasonable time before the expiration of the period of the automatic stay.”³⁷⁷ If DHS timely files such a motion and the BIA fails to issue a decision on the motion before the 90-day period ends, the stay remains in effect for up to 30 additional days while the BIA decides DHS’s discretionary stay motion.³⁷⁸

If the BIA issues a decision authorizing release, denies DHS’s motion for a discretionary stay, or does not act on a discretionary stay motion during the automatic stay period, the respondent’s release is automatically stayed for another five business days.³⁷⁹ During those five business days, DHS may refer the custody case to the Attorney General. If it does so, the individual’s release is “stayed pending the Attorney General’s consideration of the case,” but the automatic stay expires 15 business days after the case is referred to the Attorney General.

Several federal district courts have held that a previous version of the automatic stay regulation violated the respondent’s due process rights.³⁸⁰

3. Discretionary Stays of an IJ’s Bond Decision

The regulations also give the BIA discretion to stay an IJ’s custody order upon DHS’s motion for a discretionary stay in connection with a DHS appeal of a bond decision.³⁸¹ DHS can seek a discretionary stay “at any time” in connection with a BIA bond appeal.³⁸²

and with the approval of the BIA a five-day extension may be permitted, and that the court “shall prepare and submit the record of proceedings without delay”).

³⁷⁵ *Id.* § 1003.6(c)(4).

³⁷⁶ *Id.* § 1003.6(c)(5) (“DHS may seek a discretionary stay pursuant to 8 CFR § 1003.19(i)(1) to stay the immigration judge’s order in the event the Board does not issue a decision on the custody appeal within the period of the automatic stay.”).

³⁷⁷ *Id.*

³⁷⁸ *Id.*

³⁷⁹ *Id.* § 1003.6(d).

³⁸⁰ See, e.g., *Zabadi v. Chertoff*, No. C 05-01796, 2005 WL 1514122 (N.D. Cal. June 17, 2005) (unpublished) (also concluding that the regulation was *ultra vires*); *Zavala v. Ridge*, 310 F. Supp. 2d 1071 (N.D. Cal. 2004); *Ashley v. Ridge*, 288 F. Supp. 2d 662 (D.N.J. 2003). But see, e.g., *Pisciotta v. Ashcroft*, 311 F. Supp. 2d 445 (D.N.J. 2004). These decisions predated the current regulation found at 8 CFR § 1003.6(c) which contains the 90-day automatic lapse provision.

³⁸¹ 8 CFR § 1003.19(i)(1).

³⁸² *Id.*

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In completing Form EOIR-26, practitioners should carefully read and follow the form's instructions, which are available on the EOIR website.³⁸⁹ In particular, Question 6 directs that the appealing party "[s]tate in detail the reason(s) for this appeal." In the response box, or in an attachment filed with the form, the practitioner should lay out specific and detailed bases for the appeal and identify the error(s) made by the IJ.³⁹⁰ Specific reasons should be given even if the practitioner plans to file a brief.³⁹¹ Question 8 asks if the appealing party "intend[s] to file a separate written brief or statement after filing" the EOIR-26. Practitioners should only check "yes" if they indeed plan to file a brief. If an appealing party checks "yes" and then does not submit a brief without notifying the BIA, this is grounds for summary dismissal of the appeal.³⁹² Note that a well-written brief is a persuasive advocacy tool and a good idea for any appeal to the BIA. In general, practitioners should take care to follow all instructions, including deadlines, signatures, proof of service, and careful completion of the forms, in order to avoid rejection by the BIA.³⁹³ The completed appeal packet should be mailed to the BIA at the following address:

Board of Immigration Appeals
Clerk's Office
5107 Leesburg Pike, Suite 2000
Falls Church, VA 22041

Practitioners should send the appeals packet with ample time before the deadline to avoid unforeseen delays caused by weather or mail mishaps, and use a form of mail that includes a delivery confirmation. Practitioners must serve a copy of the filing on the ICE OCC office that represented DHS during the bond hearing.³⁹⁴

3. Appeal Brief, Processing, and Decision

Within several weeks after the appeal has been filed, the BIA will typically issue a filing receipt.³⁹⁵ The BIA will also mail the parties the IJ's memorandum of bond decision, which is written by the IJ once an appeal notice has been filed.³⁹⁶ Unlike merits appeals, in bond appeal cases the BIA will likely not issue a

³⁸⁹ The Form EOIR-26 is available for download on the EOIR website, justice.gov/eoir/file/eoir26/download.

³⁹⁰ See BIA Practice Manual, *supra* note 359, Ch. 4.16(b) (failure to specify the grounds for an appeal is grounds for summary dismissal of the appeal).

³⁹¹ One practitioner noted that on bond appeals where the practitioner indicates that they will file a brief, it is sufficient to write a short summary such as: "The IJ erred in denying bond because the totality of the evidence demonstrated that Respondent was not a danger to the community or a risk of flight. The IJ misapplied the factors in *Matter of Guerra* and disregarded evidence of equities and rehabilitation."

³⁹² See BIA Practice Manual, *supra* note 359, Ch. 4.16(b), (d) (noting grounds for summary dismissal); see also *id.* Ch. 4.7(e) (specifying process for filing a "briefing waiver" with the BIA prior to the brief deadline to inform the BIA if the appealing party decides not to file a brief).

³⁹³ See *id.* Ch. 3.1(c).

³⁹⁴ See *id.* Ch. 3.2 (discussing service requirements for BIA filings).

³⁹⁵ See *id.* Ch. 3.1(d)(1) ("If a filing receipt is not received within approximately two weeks, parties may call the Automated Case Information Hotline for current information on appeals or the Clerk's Office for current information on appeals or motions.").

³⁹⁶ Immigration Court Practice Manual, *supra* note 1, Ch. 9.3(e)(7).