

Bond and Custody: Mandatory Detention, Bond Redetermination, & Appeal

Panel Members: Eileen Blessinger, Hiroko Kusuda, Glenda
McGraw Regnart. Moderator: Andres Murguia.
Federal Bar Association Immigration Law Conference
2019

Bond/Custody Issues:

- ICE Detention Authority:
 - INA § 235
 - INA § 236
 - INA § 241
- Immigration Judge's Jurisdiction – INA § 236; 8 C.F.R. §§ 1003.19 and 1236.1.
- Bond Hearings are separate from Removal Hearings. 8 C.F.R. § 1003.19(d).
- Before, During, and After the Bond Hearing.

INA § 235 – Arriving Aliens

- Arriving aliens in expedited removal proceedings are subject to mandatory detention, pending a credible fear determination, and if no credible fear, until removed. INA § 235(b)(1)(B)(i)(IV).
- Generally, arriving aliens placed in 240 proceedings, shall also be detained. INA § 235(b)(2)(A).
- An alien “shall be detained pending determination and removal” while inadmissibility is being considered under 8 C.F.R. § 235.3.

INA § 235 -

Present Without Inspection (PWI) Entry Without Inspection (EWI)

- PWIs/EWIs in the country for over 14 days, and apprehended more than 100 miles of the border, who are initially placed in 240 proceedings, may seek a custody redetermination by the IJ.

What about Bond for EWI with positive CFI?

- ***Padilla v. ICE Preliminary Injunction***
 - It provides that class members should get a bond hearing within 7 days of making a request.
 - If the bond hearing does not occur within that time period ICE should release people.
 - During the bond hearing the burden will be on ICE.
 - All bond hearings should be recorded and a transcript provided during any appeal process.
 - The court should provide a written decision making particularized findings.
- ***Matter of M-S-*, 27 I&N 509 (AG 2019)**
 - An alien who is transferred from expedited removal proceedings to full removal proceedings after establishing a credible fear of persecution or torture is ineligible for release on bond. Such an alien must be detained until his removal proceedings conclude, unless he is granted parole.
 - Overrules *Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005) which held that PWIs/EWIs in the country for less than 14 days, and apprehended within 100 miles of the border, who initially have been placed in expedited removal proceedings, but subsequently are placed in 240 proceedings, may seek a custody redetermination by the IJ.

INA 236

- “On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.”
 - § 236(a) - discretionary
 - § 236(c) - mandatory
- Additional authority: 8 C.F.R. §§ 1236.1-1236.6, 1003.19.

Parole

- VERY IMPORTANT AFTER MATTER OF M-S!
- Certain arriving aliens may also be paroled under INA § 212(d)(5) and 8 C.F.R. § 212.5(b) for “urgent humanitarian reasons,” or for “significant public benefit,” provided the alien presents neither a security risk nor a risk of flight. 8 C.F.R. § 212.5(b).
- Parole is permitted as a matter of discretion when it is required to meet a medical emergency, or it is necessary for a legitimate law enforcement objective. 8 C.F.R. § 235.3(b)(2)(iii).
- IJs have no jurisdiction/authority to grant parole requests. *Matter of Oseiwusu*, 22 I&N Dec. 19 (BIA 1998).
- Who are considered Arriving Aliens? 8 C.F.R. 1.2

How Do Bond Hearings Get on the Court's Docket?

- DHS (ERO) makes the initial custody determination on Form I-286. 8 C.F.R. § 1236.1(d)(1); 8 C.F.R. § 1003.19.
- Alien requests redetermination (noted on Form I-286).
- Alien's attorney files written request for redetermination.
- After an initial bond redetermination, subsequent request must be made in writing.
- Alien's circumstances have changed materially since the prior bond hearing. 8 C.F.R. § 1003.19(e).

Does the Court Have Jurisdiction to Redetermine Custody?

NO JURISDICTION IF:

- DHS/ERO has not yet issued a bond determination (Form I-286).
- Alien is subject to a Final Order.
- Alien is not in ICE custody.
- Alien makes no request (IJ's own motion).
- Alien is an arriving alien, transferred from expedited removal to 240 proceedings due to a credible fear interview, or is in exclusion proceedings.
- Alien is served with a Form I-863 (visa waiver, reinstatement, crewman, stowaway).
- Alien is described under INA section 237(a)(4) --National Security.
- Alien is subject to INA section 236(c) -- Mandatory Detention.

But remember ABC Class Members!!

Does Mandatory Detention under 236(c) Apply?

- Inadmissible by reason of having committed any offense under INA § 212(a)(2) (criminal grounds).
- Petty offense exception.
- Deportable by reason of having committed any offense under INA:
 - § 237(a)(2)(A)(ii) (multiple CIMTs)
 - § 237(a)(2)(A)(iii) (aggravated felonies as defined in 101(a)(43))
 - § 237(a)(2)(B) (drug offenses)
 - § 237(a)(2)(C) (firearms offenses)
 - § 237(a)(2)(D) (misc. crimes)
- Deportable by reason of having committed any offense under INA § 237(a)(2)(A)(i), sentenced ≥ 1 year.
- Inadmissible under INA § 212(a)(3)(B) or removable under INA § 237(a)(4)(B) (national security and terrorism).

Mandatory Detention Applies if:

- Alien released from criminal custody on or after October 9, 1998. 8 C.F.R. § 236.1(c)(1) [Transitional Period Custody Rules (TPCR)].
- INA section 236(c) applies to aliens in deportation and removal proceedings.
- “Custody” is satisfied merely by the initial arrest for booking/processing.
- ICE need not take alien into custody immediately upon “release” from criminal custody. *Nielsen v. Preap* No. 16-1363, 586 U.S. ____ (2019); *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001)
- “Release” from criminal custody must be for an offense enumerated in the mandatory custody provisions of INA section 236(c)(1)(A)-(D). *Matter of Garcia*, 25 I&N Dec. 267 (BIA 2010).

Mandatory Detention Under INA § 236(c)

- Applicable ground of removability need not be charged on the NTA/OSC. *Matter of Kotliar*, 24 I&N Dec. 124 (BIA 2007).
- A conviction record is not necessarily required. 8 C.F.R. 1003.41. But make sure crime meets the definition of “conviction.” *Crespo v. Holder*, 631 F.3d 130 (4th Cir. 2011).
- Alien may demonstrate that he or she is not properly included within the mandatory detention provisions. *See* 8 C.F.R. § 1003.19(h)(2)(ii); *see also Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999).

Matter of Joseph I, 22 I&N Dec. 660 (BIA 1999), clarified in *Matter of Joseph II*, 22 I&N Dec 799 (BIA 1999).

Although a conviction document may provide DHS with sufficient reason to believe that an alien is removable under one of the mandatory detention grounds for purposes of charging the alien and making an initial custody determination, neither the IJ nor the BIA is bound by this determination and have jurisdiction to redetermine the custody conditions imposed on the alien.

Helpful Websites

- Immigration Judge Benchbook:

www.justice.gov/eoir/immigration-judge-benchbook

- Immigration Court Practice Manual:

www.justice.gov/eoir/office-chief-immigration-judge-0

- EOIR Virtual Law Library:

<https://www.justice.gov/eoir/virtual-law-library>

236(c)

- An alien who is not subject to Mandatory Detention may be detained as a matter of discretion, released on their own recognizance (O/R), or released on bond of at least \$1,500.
- Generally, the burden of proof is always on the alien. 8 C.F.R. § 1236.1(c)(8); *Matter of Urena*, 25 I&N Dec. 140 (BIA 2009).
- The burden of proof shifts to the DHS in special types of bond hearings (*Rodriguez, Casas, Franco, etc.*)

Factors Considered by the Court

- BIA case law supports that an alien should not be detained unless he or she presents a threat to national security or is a flight risk. *Matter of Patel*, 15 I&N Dec. 66 (BIA 1976).
- A criminal alien must demonstrate he or she is not a danger to persons or property and that he or she is likely to appear for future proceedings. *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006).

What happens at a hearing?

- Evidentiary Standard -- Any information that is available to the court or that is presented to the court by the alien or by the Department. 8 C.F.R. § 1003.19(d).
- Proceedings are informal and usually not recorded by the Digital Audio Recording system (DAR).
- BUT now ... Padilla might change both of these.

Examples of DHS Evidence Presented at Bond Hearings:

- Arrest and Conviction Records, including indictment, complaint, and Pre-sentence Investigation Reports.
- Identification Documents or Fraudulent Documents Used.
- Sworn Statements and Records of Deportable/Inadmissible Alien (Form I-213).
- Witnesses.
- Record of Appearance in Court - Failures to Appear, Bench Warrants, Bail Jumping, etc.
- Special Interest or Operation Cases.
- History of immigration violations and manner of entry.

Examples of Alien's Evidence Presented at Bond Hearings:

- Availability and Strength of Relief.
- Residence: length, fixed nature, stable, and safety.
- Family and Community Ties.
- Good moral character.
- Employment and Financial Ties.
- Rehabilitation following any criminal activity.
- Skills/Talents.
- Membership in community organizations.
- Letters of support from friends and family.

Evidence Presented at Bond Hearings:

- Separate from evidence that is submitted in master calendar hearings.
- There is no “commingling” of evidence – completely separate Records of Proceeding even if the documents are contained in the same file.
- Documents and Testimony permissible.

Possible Decision of Immigration Judge

- Custody Status Remains the Same.
- Bond Reduced.
- Bond Increased.
- Bond Revoked.

Automatic Stay Rules

Automatic Stay with Appeal:

- Only applicable when ICE initially declines to set a monetary bond or when the bond set by ICE is \$10,000 or greater.
- Form E-43 must be filed with the Immigration Court within 24 hours. 8 C.F.R. § 1003.19(i)(2).
- Form E-26 must be filed with the Board within 10 days.

No Automatic Stay with Appeal:

- Form E-26 must be filed with the Board within 30 days.
- May request a discretionary stay at any time, including after an automatic stay is filed. 8 C.F.R. § 1003.19(i)(2).

Alien Files Bond Appeal

- A detained alien may file an E-26 within 30 days of the Immigration Judge's bond decision. It must be **received by the BIA** within 30 days or is deemed untimely.
- 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. 8 C.F.R. § 236.1(d)(1).

When May ICE Revoke a Bond That Was Determined By ICE or Redetermined By the IJ?

- At Any Time if There Has Been a Change of Circumstances. 8 C.F.R. § 1236.1(c)(9).
- Alien Has the Right to Seek Review of the Redetermination before the Immigration Judge.

ROUND 2

Motion for Subsequent Bond

- Governed by 8 CFR 1003.19(e)
- Request must be submitted in writing and
- Based on changed circumstance. *Matter of Sugay*, 17 I&N Dec. 637 (BIA 1981).
- What constitutes “changed circumstances?”

Cases/Issues to Watch For

- *Jennings v. Rodriguez*, 583 U.S. ____, 138 S. Ct. 830 (2/27/2018)(neither regulations nor statutes provide for a periodic bond hearing for immigrant detainees nor place a clear and convincing burden on the government; remanded to the Ninth Circuit for constitutionality of immigration detention)
- *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 4/16/2019)(overruled *Matter of X-K-*)(arriving aliens who were placed in INA sec. 240 proceedings after passing the CFI have no right to a bond hearing.)
- *Padilla v. ICE*, 2019 WL 1506754 (D.C. Wash. 4/5/2019)(certain detained asylum seekers must receive bond hearing within 7 days of requesting one; DHS bears burden; hearing record must be made; implementation within 30 days of the decision)
- *Damus v. Nielsen*, 2018 WL 3232515 (D.D.C. 7/2/2018)(ordering enforcement of 2009 ICE Parole Directive in Detroit, El Paso, Los Angeles, Newark, and Philadelphia Field Offices).
- *Pensamiento v. McDonald, Jr., et al.*, 315 F.Supp.3d 684 (D.C. Mass. 5/21/2018)(habeas) (“The Constitution requires placing the burden of proof on the government in [INA sec. 236(a)] hearing.”).
- Parole Denial Expansion