

## Bond/Custody

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## BOND AND CUSTODY HEARINGS

### I. OVERVIEW

## A. APPLICATION BEFORE AN IMMIGRATION JUDGE

The controlling provisions for bond/custody redetermination hearings before an Immigration Judge are found at INA § 236; 8 C.F.R. §§ 1003.19 and 1236.1 (2006). The bond hearing is separate and apart from, and shall form no part of the removal hearings. 8 C.F.R. § 1003.19(d) (2006). The application for a bond redetermination hearing is made to one of the following offices, in the following order prescribed at 8 C.F.R. § 1003.19 (2006):

1. If the alien is detained, to the Immigration Court that has jurisdiction over the place of detention. Note: the filing of a charging document is not a prerequisite to bond hearing jurisdiction. See *Matter of Sanchez*, 20 I&N Dec. 223, 225 (BIA 1990);
2. To the Immigration Court that has administrative control over the case. See 8 C.F.R. § 1003.13 (2006); or,
3. To the Office of the Chief Immigration Judge (OCIJ) for designation of the appropriate Immigration Court to accept and hear the application.

## B. TIME

1. After the DHS makes its initial custody determination, and
2. Before an administratively final order of deportation or removal. 8 C.F.R. §§ 1236.1, 1003.19 (2006); *Matter of Valles*, 21 I&N Dec. 769, 771 (BIA 1997); *Matter of Uluocha*, 20 I&N Dec. 133, 134 (BIA 1989); *Matter of Sio*, 18 I&N Dec. 176, 177 (BIA 1981); *Matter of Veal*, 18 I&N Dec. 171, 173 (BIA 1981).

## C. SUBSEQUENT HEARING

The Immigration Judge may conduct a subsequent custody hearing so long as the request is made in writing and based on a showing that the alien's circumstances have changed materially since the initial bond redetermination hearing. 8 C.F.R. § 1003.19(e) (2006); *Matter of Uluocha*, 20 I&N Dec. 133 (BIA 1989).

## D. WHILE A BOND APPEAL IS PENDING

When appropriate, an Immigration Judge may entertain a bond redetermination request, even when a previous bond redetermination by the Immigration Judge has been appealed to the Board of Immigration Appeals (BIA). *Matter of Valles*, 21 I&N Dec. 769 (BIA 1997). If a bond redetermination request is granted by an Immigration Judge while a bond appeal is pending with the BIA, the appeal is rendered moot. *Id.* If an Immigration Judge declines to change the amount or conditions of bond, the DHS must notify the BIA in writing, with proof of service on the opposing party, within 30 days, if it wishes to pursue its original bond appeal. *Id.*

## E. NON-MANDATORY CUSTODY ALIENS

1. Neither section 236(a) of the Act nor the applicable regulations confer on the alien the right to release on bond. In re D-J-, 23 I&N Dec. 572 (A.G. 2003). The denial of a respondent's release on bond does not violate international law. *Id.*

2. For non-mandatory custody aliens, the Act provides that Immigration Judges may: "(1) continue to detain the arrested alien; [or] (2) may release the alien on— (A) bond of at least \$1,500 . . . ; or (B) conditional parole . . ." INA § 236(a). One federal district court has held that that Immigration Judges have authority under INA § 236(a) to grant release on conditional parole, including release on recognizance, instead of imposing monetary bond. *See Rivera v. Holder*, 307 F.R.D. 539 (W.D. Wash. 2015) (ruling that Immigration Judges in Washington state conducting bond hearings under INA § 236(a) must consider whether to grant an alien's request for release on conditional parole, including release on recognizance, in lieu of release on monetary bond).

3. Under BIA case law addressing general bond provisions of prior law, an alien ordinarily would not be detained unless he or she presented a threat to national security or a risk of flight. See *Matter of Patel*, 15 I&N Dec. 666 (BIA 1976). By virtue of 8 C.F.R. § 1236.1(c)(8) (2006), a criminal alien must demonstrate that he is not a threat to the national security, that his release would not pose a danger to property or persons, and that he is likely to appear for any future proceedings. *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006); *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999). But see *In re D-J-*, 23 I&N Dec. 572 (A.G. 2003).

4. Juveniles (i.e., under 18) have special conditions of release. See 8 C.F.R. § 1236.3 (2006).

a. Juveniles, in addition to having monetary bond, will have conditions of release in that they can only be released, in order of preference, to :

i. a parent,

ii legal guardian, or

iii. adult relative.

b. The regulation governing juvenile conditions of release is quite detailed and specific. There is no authority for the Immigration Judge to fashion independent conditions of release. See also *In Re Mejia-Andino*, 23 I&N Dec. 533 (BIA 2002); *Matter of Amaya*, 21 I&N Dec. 583 (BIA 1996).

## F. MANDATORY CUSTODY ALIENS

1. The Immigration Court has no bond/custody redetermination authority over those aliens defined in section 236(c)(1) of the Act unless it falls within the enumerated exception. The exception provides that the alien may be released if it is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or to protect an immediate family member of such witness. The alien must satisfy the Attorney General that he or she will not pose a danger to the safety of other persons or of property and is likely to appear for hearings.

2. However, an alien may request a hearing before an Immigration Judge to contest the INS determination that he or she is subject to mandatory detention under section 236(c)(1) of the Act. See 8 C.F.R. §§ 1003.19(h)(1)(ii), 1003.19(h)(2)(ii) (2006).

3. An alien is not subject to mandatory detention under section 236(c) of the Act if he was released from his non-Service custodial setting on or before October 1998, the expiration date of the Transition Period Custody Rules. *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999).

4. Section 236(c)(1) of the Act provides that the Attorney General shall take into custody any alien when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense, who-

a. Is inadmissible by reason of having committed any offense covered in section 212(a)(2) of the Act. This includes:

Conviction or sufficient admission of CIMT

Conviction of controlled substance violation

Multiple criminal convictions with aggregate sentences of 5 years

Controlled substance traffickers and certain immediate relatives

Prostitution and commercialized vice

Certain aliens involved in serious criminal activity who have asserted immunity from prosecution

Foreign government officials who have engaged in particularly severe violations of religious freedom.

b. Is deportable by reason of having committed any offense in section 237(a)(2)(A)(ii) [two or more CIMTs], (A)(iii) [Conviction of aggravated felony], (B) [Conviction of controlled substance violation; drug abusers and addicts], (C) [Conviction of firearms offense], or (D) [Certain enumerated convictions].

c. Is deportable under section 237(a)(2)(A)(i) [CIMT] on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year, or

d. Is inadmissible under section 212(a)(3)(B) of the Act or deportable under section 237(a)(4)(B) of the Act [Terrorist activity].

5. Where the District Director has denied the alien's request for release or has set a bond of \$10,000 or more, any order of the Immigration Judge authorizing release shall be stayed upon the Service's filing of Form EOIR-43 with the Immigration Court on the day the order is issued,

and the decision shall be held in abeyance pending decision on the appeal by the BIA. 8 C.F.R. § 1003.19(i)(2) (2006); Matter of Joseph, 22 I&N Dec. 660 (BIA 1999), clarified, Matter of Joseph, 22 I&N Dec. 799 (BIA 1999).

#### G. WHEN AN IMMIGRATION JUDGE MAY NOT REDETERMINE CUSTODY STATUS:

1. On the Judge's own motion. Matter of P-C-M-, 20 I&N Dec. 432 (BIA 1991). The application must be made by the alien or the alien's counsel or representative. 8 C.F.R. § 1003.19(b) (2006).

2. If the alien is not in DHS custody (e.g., alien is in state custody). Matter of Sanchez, 20 I&N Dec. 223 (BIA 1990).

3. If more than 7 days have elapsed since the alien was released from DHS custody. 8 C.F.R. § 1236.1(d) (2006); Matter of Valles, 21 I&N Dec. 769 (BIA 1997); Matter of Daryoush, 18 I&N Dec. 352 (BIA 1982); Matter of Sio, 18 I&N Dec. 176, 177 (BIA 1981); Matter of Veal, 18 I&N Dec. 171, 173 (BIA 1981). After the expiration of the 7-day period the respondent may request review by the District Director. 8 C.F.R. § 1236.1(d)(2) (2006).

4. The following aliens have no recourse to the Immigration Court for bond hearing:

a. The arriving alien in removal proceedings, including aliens paroled after arrival under section 212(d)(5) of the Act;

b. The alien in claimed status proceedings;

c. The alien in credible fear proceedings;

d. The alien in exclusion proceedings;

e. The alien in summary removal proceedings.

f. An aggravated felon alien in expedited removal proceedings under section 238 of the Act.

5. Neither an Immigration Judge nor the BIA has authority to adjudicate parole matters. Matter of Oseiwusu, 22 I&N Dec. 19 (BIA 1998); Matter of Matelot, 18 I&N Dec. 334, 336 (BIA 1982); Matter of Castellon, 17 I&N Dec. 616 (1981). A returning permanent resident alien is regarded as an "arriving alien" seeking admission if he falls within one of the following categories of section 101(a)(13)(C) of the Act:

a. has abandoned or relinquished that status;

b. has been absent from the United States for a continuous period in excess of 180 days;

c. has engaged in illegal activity after having departed the United States;

d. has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under the INA and extradition proceedings;

e. has committed an offense identified in section 212(a)(2) of the Act, unless since such offense the alien has been granted relief under sections 212(h) or 240A(a) of the Act, or;

f. is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

6. If the alien has an administratively final order of removal or deportation. INA § 241; 8 C.F.R. § 1236.1(d)(1) (2006); Matter of Valles, 21 I&N Dec. 769, 771 (BIA 1997); Matter of Uluocha, 20 I&N Dec. 133, 134 (BIA 1989); Matter of Sio, 18 I&N Dec. 176, 177 (BIA 1981); Matter of Vea, 18 I&N Dec. 171, 173 (BIA 1981). After an order becomes administratively final, the respondent may seek BIA review of the District Director's or Immigration Judge's custody determination. 8 C.F.R. § 1236.1(d)(3) (2006).

## H. SIGNIFICANT FACTORS IN A BOND DETERMINATION

1. Fixed address in the United States. Matter of Guerra, 24 I&N Dec. 37 (BIA 2006); Matter of Patel, 15 I&N Dec. 666 (BIA 1979).

2. Length of residence in the United States. Matter of Guerra, 24 I&N Dec. 37 (BIA 2006); Matter of Andrade, 19 I&N Dec.488 (BIA 1987); Matter of Shaw, 17 I&N Dec. 177 (BIA 1979).

3. Family ties in the United States, particularly those who can confer immigration benefits on the alien. Matter of Guerra, 24 I&N Dec. 37 (BIA 2006); Matter of Andrade, 19 I&N Dec.488 (BIA 1987); Matter of Shaw, 17 I&N Dec. 177 (BIA 1979); Matter of Patel, 15 I&N Dec. 666 (BIA 1979).

4. Employment history in the United States, including length and stability. Matter of Guerra, 24 I&N Dec. 37 (BIA 2006); Matter of Andrade, 19 I&N Dec.488 (BIA 1987); Matter of Shaw, 17 I&N Dec. 177 (BIA 1979); Matter of Patel, 15 I&N Dec. 666 (BIA 1979).

5. Immigration Record. Matter of Guerra, 24 I&N Dec. 37 (BIA 2006); Matter of Andrade, 19 I&N Dec.488 (BIA 1987); Matter of Shaw, 17 I&N Dec. 177 (BIA 1979); Matter of San Martin, 15 I&N Dec. 167 (BIA 1974); Matter of Moise, 12 I&N Dec. 102 (BIA 1967).

6. Attempts to escape from authorities or other flight to avoid prosecution. Matter of Guerra, 24 I&N Dec. 37 (BIA 2006); Matter of Patel, 15 I&N Dec. 666 (BIA 1979); Matter of San Martin, 15 I&N Dec. 167 (BIA 1974).

7. Prior failures to appear for scheduled court proceedings. Matter of Guerra, 24 I&N Dec. 37 (BIA 2006); Matter of Andrade, 19 I&N Dec. 488 (BIA 1987); Matter of Shaw, 17 I&N Dec. 177 (BIA 1979); Matter of Patel, 15 I&N Dec. 666 (BIA 1979); Matter of San Martin, 15 I&N Dec. 167 (BIA 1974).

8. Criminal record, including extensiveness and recency, indicating consistent disrespect for the law and ineligibility for relief from deportation/removal. Matter of Guerra, 24 I&N Dec. 37 (BIA 2006); Matter of Andrade, 19 I&N Dec. 488 (BIA 1987).

## I. LESS SIGNIFICANT FACTORS IN A BOND DETERMINATION

1. Early release from prison, parole, or low bond in related criminal proceedings. Matter of Andrade, 19 I&N Dec. 488 (BIA 1987); Matter of Shaw, I&N Dec. 177 (BIA 1979).

2. Ability to pay is not dispositive.

3. DHS difficulties in executing a final order of deportation. Matter of P-C-M, 20 I&N Dec. 432 (BIA 1991).

## II CASE CITATIONS--QUICK REFERENCE

Matter of Kotliar, 24 I&N Dec. 124 (BIA 2007). An alien who has been apprehended at home while on probation for criminal convictions is subject to mandatory detention under section 236 (c)(1) of the Act, regardless of the reason for the most recent criminal custody. The only proviso is that it must be ascertained that the alien was released from custody after October 8, 1998, which was the expiration date of the Transitional Period Custody Rules. An alien need not be charged with a ground that provides for mandatory detention.

Matter of Guerra, 24 I&N Dec. 37 (BIA 2006). In a custody redetermination under section 236(a) of the Act, where an alien must establish to the satisfaction of the IJ that the alien does not present a danger to others, a threat to national security, or a flight risk, the IJ has wide discretion in deciding the factors that may be considered. In deciding whether an alien is a danger to others, the IJ may consider evidence that the alien was criminally charged in an alleged controlled substance trafficking scheme, even if the alien was not convicted of a criminal offense.

Matter of X-K, 23 I&N Dec. 731 (BIA 2005). An alien who is initially screened for expedited removal under section 235(b)(1)(A) of the Act as a member of the class of aliens designated pursuant to the authority in section 235(b)(1)(A)(iii) of the Act, but who is subsequently placed in removal proceedings under section 240 of the Act following a positive credible fear determination, is eligible for a custody redetermination hearing before an IJ unless the alien is a member of any of the listed classes of aliens who are specifically excluded from the custody jurisdiction of IJs pursuant to federal regulation.

Matter of D-J-, 23 I&N Dec. 572 (A.G. 2003). Neither section 236(a) of the Act nor the applicable regulations confer on an alien the right to release on bond. In determining whether to release on bond undocumented migrants who arrive in the U.S. by sea seeking to evade inspection, it is appropriate to consider national security interests implicated by the encouragement of further unlawful mass migrations and the release of undocumented alien migrants into the U.S. without adequate screening. In bond proceedings involving aliens seeking to enter the U.S. illegally, where the Government offers evidence from sources in the Executive Branch with relevant expertise establishing that significant national security interests are implicated, IJs and the BIA shall consider such interests. Considering national security grounds applicable to a category of aliens in denying an unadmitted alien's request for release on bond does not violate any due process right to an individualized determination in bond proceedings under section 236(a) of the Act.

Matter of Rojas, 23 I&N Dec. 117 (BIA 2001). A criminal alien who is released from criminal custody after the expiration of the Transition Period Custody Rules is subject to mandatory detention pursuant to section 236(c) of the Act even if the alien is not immediately taken into custody by INS or DHS authorities when released from incarceration.

Matter of West, 22 I&N Dec. 1405 (BIA 2000). The mandatory detention provisions of section 236(c) of the Act do not apply to an alien who was convicted after the expiration of the Transition Period Custody Rules ("Transition Rules"), but who was last released from the physical custody of state authorities prior to the expiration of the Transition Rules and who was not physically confined or restrained as a result of that conviction.

Matter of Saelee, 22 I&N Dec. 1258 (BIA 1999). The BIA has jurisdiction over an appeal from a district director's custody determination that was made after the entry of a final order of deportation or removal under 8 C.F.R. § 236.1 (1999). An alien subject to a final order of deportation based on a conviction for an aggravated felony, who is unable to be deported, may be eligible for release from detention after the expiration of the removal period pursuant to section 241(a)(6) of the Act.

Matter of Adeniji, 22 I&N Dec. 1102 (BIA 1999). Section 236(c) of the Act does not apply to aliens whose most recent release from non-Service custody occurred prior to October 9, 1998. A criminal alien seeking custody redetermination under section 236(a) of the Act must show he or she does not present a danger to property or persons. It is the responsibility of the Immigration Judge and parties to ensure the bond record establishes the nature and substance of the specific factual information considered in reaching the bond determination.

Matter of Joseph, 22 I&N Dec. 799 (BIA 1999). The requisite "reason to believe" that allows the INS to claim a respondent is subject to the mandatory detention for purposes of the automatic stay is not sufficient for the merits of the bond appeal. Matter of Joseph, 22 I&N Dec. 660 (BIA 1999), clarified. For purposes of determining the custody conditions of a lawful permanent resident under section 236(c) of the Act, a lawful permanent resident will not be considered "properly included" in a mandatory detention category when an Immigration Judge or the BIA finds it is substantially unlikely that the INS will prevail on a charge of removability specified under section 236(c)(1) of Act.

Matter of Joseph, 22 I&N Dec. 660 (BIA 1999). The filing of a Form EOIR-43 (Notice of Intent to Appeal Custody Redetermination) provides an automatic stay of an IJ's order releasing an alien who is charged with removal under one of the mandatory detention grounds set forth in section 236(c)(1) of the Act, even where the IJ has determined that an alien is not subject to section 236(c)(1) of the Act and has terminated the removal proceedings on that charge. The filing of an appeal from an Immigration Judge's merits decision terminating removal proceedings does not operate to stay the Judge's release order in related bond proceedings. Matter of Valles, 21 I&N Dec. 769 (BIA 1997), modified.

Matter of Oseiwusu, 22 I&N Dec. 19 (BIA 1998). An Immigration Judge has no authority over the apprehension, custody, and detention of arriving aliens and is therefore without authority to consider the bond request of an alien returning pursuant to a grant of advance parole.

Matter of Collado, 21 I&N Dec. 1061 (BIA 1998). A returning lawful permanent resident cannot use the Fleuti doctrine to seek admission to the United States. The alien must be admissible to the United States. Matter of Ellis, 20 I&N Dec. 641 (1993), distinguished.

Matter of Melo, 21 I&N Dec. 883 (BIA 1997). In bond proceedings under the Transition Period Custody Rules, the standards set forth in Matter of Drysdale, 20 I&N Dec. 815 (BIA 1994), apply to the determinations of whether the alien's release pending deportation proceedings will pose a danger to the safety of persons or of property and whether he or she is likely to appear for any scheduled proceeding. The "in deportable" language as used in the Transition Period Custody Rules does not require that an alien have been charged and found deportable on that deportation ground.

Matter of Valles, 21 I&N Dec. 769 (BIA 1997). An Immigration Judge maintains continuing jurisdiction to entertain bond redetermination requests by an alien even after the timely filing of an appeal with the BIA from a previous bond redetermination request.

Matter of Valdez, 21 I&N Dec. 703 (BIA 1997). The Transition Period Custody Rules invoked October 9, 1996, govern bond redeterminations of aliens falling within the nonaggravated felony criminal grounds of deportation covered in those rules, regardless of when the criminal offenses and convictions occurred. The Transition Period Custody Rules govern bond redetermination appeals of otherwise covered criminal aliens who are not now in custody by virtue of immigration bond rulings rendered prior to the October 9, invocation of those rules.

Matter of Noble, 21 I&N Dec. 672 (BIA 1997). Bond redeterminations of detained deportable aliens convicted of an aggravated felony are governed by the Transition Period Custody Rules irrespective of how or when the alien came into immigration custody.

Matter of Khalifah, 21 I&N Dec. 107 (BIA 1995). An alien subject to criminal proceedings for alleged terrorist activities in the country to which the INS seeks to deport him is appropriately ordered detained without bond as a poor bail risk.

Matter of Drysdale, 20 I&N Dec. 815 (BIA 1994). An aggravated felon must pass a two-step analysis for an aggravated felon to overcome the rebuttable presumption against his release. One, that he is not a threat to the community, and two, that he is not likely to abscond.

Matter of Ellis, 20 I&N Dec. 641 (BIA 1993). In bond proceedings governed by section 242(a)(2)(B) of the Act, the alien bears the burden of showing that he is lawfully admitted to the United States, not a threat to the community, and likely to appear before any scheduled hearings.

Matter of P-C-M-, 20 I&N Dec. 432 (BIA 1991). An Immigration Judge may not redetermine custody status on his own motion, only upon application by respondent or his representative.

Matter of De la Cruz, 20 I&N Dec. 346 (BIA 1991), modified, Matter of Ellis, 20 I&N Dec. 641 (BIA 1993). There is a presumption against the release of any alien from Service custody convicted of an aggravated felony unless the alien demonstrates certain factors. See also Matter of Yeung, 21 I&N Dec. 610 (BIA 1996).

Matter of Sanchez, 20 I&N Dec. 223 (BIA 1990). It is not proper for an Immigration Judge to make a custody determination under 8 C.F.R. § 242.2(c) (1990) unless INS has custody of the respondent. A respondent who is in the custody of a state or agency other than the INS is not in the custody of INS.

Matter of Eden, 20 I&N Dec. 209 (BIA 1990). An alien convicted of an aggravated felony is subject to detention under section 242(a)(2) of the Act upon completion of the incarceration or confinement ordered by the court for such conviction.

Matter of Uluocha, 20 I&N Dec. 133 (BIA 1989) Immigration Judges may further consider requests to modify bonds by detained aliens without a formal motion to reopen. Such requests should be considered on the merits. However, if there are no changed circumstances shown, the Immigration Judge may decline to change the prior bond decision.

Matter of Andrade, 19 I&N Dec. 488 (BIA 1987). Case includes factors to consider and effect of early releases on parole.

Matter of Sugay, 17 I&N Dec. 637 (BIA 1981). Factors to consider when analyzing a bond case include employment history; length of residence in community; family ties; record of nonappearance; criminal violations; immigration violations; and eligibility for relief.

Matter of Shaw, 17 I&N Dec. 177 (BIA 1979). Factors to consider in a bond case include the manner of entering; community ties; criminal arrest and characteristics; state criminal bond amount; and family ties.

Matter of Chirinos, 16 I&N Dec. 276 (BIA 1977). A bond hearing is a hearing separate and apart from other proceedings. The hearing is informal and there is no right to a transcript. The record may contain any information in addition to the memorandum of decision and other EOIR forms.