GUIDANCE

To: All
From: Jeff Hartman, Attorney Advisor
Re: Guidance on Fifth Circuit Law on Bond; Reasonable/Credible Fear; Due Process
Date: April 5, 2017

I. Bonds

The Fifth Circuit closely adheres to the statutory provisions that allow the government to detain aliens under INA §§ 235(b)(1)(B)(iii)(IV), 236(a), 236(c), 241(a)(2), and 241(a)(6). The Fifth Circuit reviews prolonged detention through individualized habeas corpus petitions under 28 U.S.C. § 2241. *See, e.g.*, *Tran v. Mukasey*, 515 F.3d 478 (5th Cir. 2008) (upholding a grant of habeas corpus where detention under INA § 241(a)(6) exceeded six months); *Oyelude v. Chertoff*, 125 F. App'x 543 (5th Cir. 2005).

A. Detention under INA § 236(c)—Criminal Aliens

Individuals with certain criminal convictions are subject to mandatory detention under INA § 236(c)(1). A detained alien may challenge their inclusion within a mandatory detention class through a hearing pursuant to *Matter of Joseph*, 22 I&N Dec. 660, 671 (BIA 1999). 8 C.F.R. § 1003.19(h)(2)(ii). During a *Joseph* hearing, "the respondent's conviction record" supplies "the requisite 'reason to believe' that the respondent [is] removable" as an alien with a conviction listed in INA § 236(c)(1). *Matter of Joseph*, 22 I&N Dec. at 668 (BIA 1999). If the IJ determines that an alien is not subject to mandatory detention, the IJ must "consider the question of bond under the custody standards of [INA § 236(a)]." *Matter of Joseph*, 22 I&N Dec. at 806.

B. Detention under INA § 236(a)—Detention of Aliens

After DHS makes an initial custody determination, the respondent may seek a custody redetermination and bond from an Immigration Judge. 8 C.F.R. §§ 1003.19(a), 1236.1(d)(1). The respondent may appeal the IJ's decision to the Board of Immigration Appeals. 8 C.F.R. § 1236.1(d)(3)(i). In *Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006), the Board enumerated factors that the IJ should consider when deciding whether to grant bond, including:

1. whether the alien has a fixed address in the United States
2. the alien's length of residence in the United States
3. the alien's family ties in the United States, and whether they may entitle the alien to reside permanently in the United States in the future
4. the alien's employment history
5. the alien's record of appearance in court
6. the alien's criminal record, including the *extensiveness* of criminal activity, the *recency* of such activity, and the *seriousness* of the offenses
7. the alien's history of immigration violations

8. any attempts by the alien to flee prosecution or otherwise escape authorities, and
9. the alien's manner of entry to the United States.

After considering those factors, an Immigration Judge may continue to detain the arrested alien or release the alien on a "bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or conditional parole[.]" INA § 236(a)(2).

C. Detention under INA § 235—Arriving Aliens

Immigration Judges in the Fifth Circuit lack authority to review the custody determination of arriving aliens. *Maldonado v. Macias,* 150 F. Supp. 3d 788, 798 (W.D. Tex. 2015) (citing 8 C.F.R. § 1003.19(h)(2)(i)(B)).

D. Detention under INA § 241(a)(6)—Beyond the Removal Period

Aliens detained beyond the removal period, INA § 241(a)(1)(A), "bear[] the initial burden of proof in showing that [there is no likelihood of removal in the reasonably foreseeable future]." *Andrade v. Gonzalez*, 459 F.3d 538, 543 (5th Cir. 2006). This burden cannot be met through "conclusory statements that [the alien] will not be immediately removed[.]" *Id.*

E. Prolonged Detention

The Fifth Circuit reviews prolonged detention on a case-by-case basis under the framework established by the Supreme Court in *Zadvydas v. Davis*, 533 U.S. 678 (2001). *Tran v. Mukasey*, 515 F.3d 478 (5th Cir. 2008). The Fifth Circuit has not set required standards for prolonged detention cases

II. Credible Fear

If an asylum officer holds an interview and makes a negative credible fear determination, the alien is served with a Notice of Referral to Immigration Judge (Form I-863). "In these proceedings, the Immigration Judge's jurisdiction is limited to review of the asylum officer's negative credible fear determination." *Matter of X–K–* , 23 I&N Dec. 731, 733 (BIA 2005) (citing 8 C.F.R. § 1208.30(g)). If the IJ concurs with the asylum officer, "the expedited removal order is given effect." *Id.* On the other hand, if the IJ finds that a credible fear has been established, the expedited removal order is vacated and "DHS may initiate . . . removal proceedings in which the alien may apply for asylum and withholding." *Id*. If the IJ determines that a credible fear has been established, then the authority of the government to detain the alien shifts to INA § 236 and the Immigration Judge has authority over bond. *Id*. at 736.

III. Reasonable Fear

An alien in reinstated removal proceedings, INA § 241(a)(5), or expedited removal proceedings, INA § 238(a)(1), who expresses fear of returning to their country of removal receives an reasonable fear interview with an asylum officer. 8 C.F.R. § 208.31(a), (c). The asylum officer can refer respondent for withholding of removal proceedings or, if the asylum

officer determines that the alien has not established a reasonable fear of persecution or torture, the alien can seek a review of the asylum officer's negative determination by an immigration judge. 8 C.F.R § 208.31(e)–(g). If the immigration judge concurs with the asylum officer's negative fear determination, the case is administratively final and ripe for judicial review only. *Ponce-Osorio v. Johnson*, 824 F.3d 502, 505-07 (5th Cir. 2016) (explaining that reinstated removal orders are final only upon completion of reasonable-fear and withholding-of-removal proceedings). For that reason, immigration judges in the Fifth Circuit should *not* grant continuances for applicants to collaterally attack their underlying removal order because the proceedings are not final and the Fifth Circuit lacks jurisdiction to review the underlying removal order until proceedings before the IJ are complete. *Cf. Ponce-Osorio*, 824 F.3d at 507.

The scope of judicial review over an IJ's reasonable fear determination is limited and a few specific examples are worth noting:

- An IJ's finding as to nexus between persecution and a protected ground is a question of fact reviewed for substantial evidence. *Thuri v. Ashcroft*, 380 F.3d 788 (5th Cir. 2004).

- An IJ's determination on questions of law, such as whether a particular social group is cognizable, is reviewed de novo. *Shaikh v. Holder*, 588 F.3d 861, 863 (5th Cir. 2009).

- The Fifth Circuit has rejected broad gang-based PSGs in published decisions, rejecting, for example, "young Salvadoran males between the ages of 8 and 15 who have been recruited by Mara 18 but have refused to join the gang because of their principal opposition to the gang and what they want," as well as, "family members [of individuals subject to gang recruitment]". *Orellana-Monson v. Holder*, 685 F.3d 511, 521-22 (5th Cir. 2012); *see, e.g.*, *Hernandez-Abregon v. Lynch*, — F. App'x — , 2016 WL 3771840 (5th Cir. 2016) (upholding IJ's determination that "individuals who were sexually assaulted by gangs and resisted gang recruitment" was not a cognizable social group).

IV. Continuances

"The grant of a continuance lies within the sound discretion of the IJ, who may grant a continuance for good cause shown." *Masih v. Mukasey*, 536 F.3d 370, 373 (5th Cir. 2008) (internal citation omitted). A decision to grant or deny a continuance is reviewed for abuse of discretion. *Id*. A few examples are worth considering:

- The Fifth Circuit permits an immigration judge to deny a continuance where the alien may be eligible and eventually receive relief from removal but has only begun preliminary steps toward obtaining relief, such as filing a labor certification. *Ahmed v. Gonzales*, 447 F.3d 433, 439 (5th Cir. 2006) ("[T]he [IJ] simply exercised his discretion at the first stage of this lengthy and discretionary process when he refused to grant [petitioner] a continuance for lack of good cause."). However, it is an abuse of discretion to deny a continuance where a respondent is statutorily eligible for adjustment of status—including an available visa—at the time a request for a continuance is made. *Masih v. Mukasey*, 536 F.3d 370, 374–76 (5th Cir. 2008).

- It is not an abuse of discretion to deny a request to hold a case in abeyance to allow the respondent to seek post-conviction relief to invalidate the conviction upon which the removability finding is based. *Cabral v. Holder*, 632 F.3d 886, 890 (5th Cir. 2011); *Perez–Castillo v. Holder*, 477 F. App'x 166, 168 (5th Cir. 2012) ("a pending collateral attack on a conviction did not justify continuance of the removal proceedings or disturb the finality of the conviction for immigration purposes.").
- It is not an abuse of discretion to deny a motion to continue for a respondent to seek post-conviction relief based on ineffective assistance of counsel under *Padilla v. Kentucky*, 559 U.S. 356 (2010). *See Lopez v. Holder*, 521 F. App'x 349, 350 (5th Cir. 2013).

V. Jurisdiction; NTA Defects

Combined, a properly served NTA and Notice of Hearing provide the notice requirements of INA § 239(a)(1). *Haider v. Gonzales*, 438 F.3d 902, 907 (5th Cir. 2006). Once DHS personally serves the respondent with the NTA, the obligation to inform the Immigration Court of any address changes attaches, even if he is unaware of the date, time, or location of proceedings. *Id*. at 908; *see, e.g.*, *Mehdi v. Gonzales*, 216 F. App'x 412, 414 (5th Cir. 2007). A few other issues are worth noting:

- The Fifth Circuit has explained that "by appearing at her initial removal hearing, failing to object to the NTA at that initial hearing, and pleading to the charges contained in the NTA" a respondent waives any challenges to the validity of the NTA. *Chambers v. Mukasey*, 520 F.3d 445, 450 (5th Cir. 2008).
- An English language notice to appear satisfies due process, even if the respondent speaks another language. *Cf. Barboasa v. Filip*, 308 F. App'x 822, 824 (5th Cir. 2009).