Mandatory Detention and Bond

The Department of Homeland Security ("DHS") may arrest and detain any alien pending a decision on whether he is to be removed from the United States. Immigration and Nationality Act ("INA") § 236(a). An alien is subject to mandatory detention, and not subject to release on bond or conditional parole, if he is described in INA §§ 236(c)(1)(A)-(D), which encompasses most criminal grounds of removability as well as national security grounds.[1] The Attorney General "shall take into custody" any alien included in the categories "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." INA § 236(c). Only offenses where the alien was released from custody for that offense on or after October 9, 1998, the date of expiration of the Transition Period Custody Rules ("TPCR"), may subject a person to mandatory detention. Matter of Adenji, 22 I&N Dec. 1102, 1107-11 (BIA 1999). The release must be from custody directly tied to an INA §§ 236(c)(1)(A)-(D) offense. Matter of Garcia Arreola, 25 I&N Dec. 267, 271 (BIA 2010). To "avoid the constitutional concerns raised by indefinite detention, an immigrant detained pursuant to [INA § 236(c)] must be afforded a bail hearing before an immigration judge within six months of his or her detention." Lora v. Shanahan, 804 F.3d 601, 616 (2d Cir. 2015).[2] The detainee "must be admitted to bail unless the government establishes by clear and convincing evidence that the immigrant poses a risk of flight or a risk of danger to the community." Id. (citing Rodriguez v. Robbins, 715 F.3d 1127, 1131 (9th Cir. 2013)).

Dangerous aliens are properly detained without bond pending the completion of proceedings to remove them from the United States. See Matter of Urena, 25 I&N Dec. 140, 141 (BIA 2009) (citing Matter of Guerra, 24 I&N Dec. 37, 38 (BIA 2006); Matter of Adeniji, 22 I&N Dec. 1102, 1113 (BIA 1999); Matter of Drysdale, 20 I&N Dec. 815, 817 (BIA 1994)). In this regard, dangerous aliens have no constitutional right to be at liberty in the United States pending the completion of their removal proceedings. See Urena, 25 I&N Dec. at 141; Carlson v. Landon, 342 U.S. 524, 537-42 (1952). An Immigration Judge should only set a bond if he first determines that the alien does not present a danger to the community. See Urena, 25 I&N Dec. at 141; Guerra, 24 I&N Dec. at 38. The alien bears the burden of proving that his or her release would not pose a danger to property or persons. See 8 C.F.R. § 1236.1(c)(8); Urena, 25 I&N Dec. at 141; Adeniji, 22 I&N Dec. at 1113. In determining whether an alien presents a danger to the community at large and thus should not be released on bond pending removal proceedings, an Immigration Judge should consider both direct and circumstantial evidence of dangerousness, including whether the facts and circumstances present national security considerations. *Matter of Fatahi*, 26 I&N Dec. 791 (BIA 2016). Only if an alien demonstrates that he does not pose a danger to the community should an Immigration Judge continue to a determination regarding the

[1] INA § 236(c) exempts the following criminal grounds of removability: INA §§ 237(a)(2)(A)(i), one crime involving moral turpitude within five years of admission, but only if the alien was not sentenced to one year imprisonment or more; (a)(2)(A)(iv), high speed flight; (a)(2)(A)(v), failure to register as a sex offender; (a)(2)(E), crimes of domestic violence, stalking, violations of protective orders, and crimes against children; and (a)(2)(F), traffickers in persons.

[2] Lora addressed detention under INA § 236(c) only and does not extend to individuals detained pursuant to INA § 236(b). See Cardona v. Nalls-Castillo, No. 15-CV-9866 (SAS), 2016 WL 1553430 (S.D.N.Y. Apr. 14, 2016).

extent of flight risk posed by the alien. See Urena, 25 I&N Dec. at 141; Drysdale, 20 I&N Dec. at 817-18.

While an Immigration Judge does not have jurisdiction to release a person subject to mandatory detention, the judge retains jurisdiction to determine whether the person is "properly included" within the mandatory detention provisions. 8 C.F.R. § 1003.19(h)(2)(ii); Matter of Joseph, 22 I&N Dec. 799, 800 (BIA 1999). In a Joseph hearing, the court will uphold the application of INA § 236(c) unless the alien demonstrates that DHS is "substantially unlikely to prevail" in its charge that he is removable on one of the grounds designated in INA §§ 236(c)(1)(A)-(D). Id.

A person need not be charged in the Notice to Appear ("NTA") with the crime that would subject him to mandatory detention. Matter of Kotliar, 24 I&N Dec. 124, 126 (BIA 2007). However, DHS must give an alien notice of the basis for mandatory detention and an opportunity to challenge detention in a Joseph hearing. Id. at 127.

Release must be from physical criminal custody for mandatory detention to apply. Matter of West, 22 I&N Dec. 1405, 1410 (BIA 2000). The Board has held that a person may still be subject to mandatory detention even if DHS did not take him into custody immediately after his release from state custody – the date of release is not relevant to whether mandatory detention applies, as long as the release was after October 9, 1998. Matter of Rojas, 23 I&N Dec. 117, 127 (BIA 2001). The Board held that the "when released" language in the statute is ambiguous and that there was strong evidence of legislative intent to detain all criminal aliens described in the statute, not just the ones ICE was able to detain instantly.[3] Id. at 124.

An Immigration Judge has no authority to review an alien's custody status in the course of a review of an adverse credible fear determination made by DHS. 8 C.F.R. § 1003.42(d). If an Immigration Judge makes a positive credible fear determination, he shall vacate DHS's order of removal issued under INA § 235(b)(1)(B)(iii)(I), and DHS shall file an NTA with the IJ to commence removal proceedings. 8 C.F.R. § 1003.42(f).

An Immigration Judge has no authority over the 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 Oseiwusu, 22 I&N Dec. 19, 20 (BIA 1998).

If the alien is not properly included under INA § 236(c), he is detained under INA § 236(a) and is entitled to a bond hearing. An Immigration Judge may not redetermine custody status on his or her own motion, and may do so only upon application by respondent or his representative. Matter of P-C-M-, 20 I&N Dec. 432, 434 (BIA 1991). Nevertheless, the rules for applying for a bond determination relate to venue and are not grounds for an Immigration

[3] Several federal district courts have rejected Rojas and read the "when released" language to require detention by ICE immediately after release for a §§ 236(c)(1)(A)-(D) offense. See, e.g., Louisaire v. Muller, 758 F.Supp.2d 229, 236 (S.D.N.Y. 2010); Scarlett v. U.S. Dep't of Homeland Security, 632 F. Supp. 2d 214, 219 (W.D.N.Y. 2009); Garcia v. Shanahan, 615 F.Supp. 2d 175, 182 (S.D.N.Y. 2009); Waffi v. Loiselle, 527 F.Supp.2d 480, 488 (E.D.Va. 2007). However, absent contrary Second Circuit or Supreme Court precedent, an immigration judge does not have the power to disregard Board precedent on this issue. 8 C.F.R. § 1003.10(d).

Judge to find that he lacks jurisdiction to consider the respondent's application. Matter of Cerda Reyes, 26 I&N Dec. 528, 530 (BIA 2015) (citing 8 C.F.R. § 1003.19(c)). The respondent has the burden of proof to demonstrate by clear and convincing evidence that he does not pose a danger to persons or property or pose a risk of flight. 8 C.F.R. § 1003.19(h)(3); Urena, 25 I&N Dec. 140.

Consideration by the Immigration Judge of an application or request of a respondent regarding custody or bond under 8 C.F.R. § 1003.19 shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding. 8 C.F.R. § 1003.19(d); see also Matter of Chirinos, 16 I&N Dec. 276, 277 (BIA 1977). The hearing is informal and there is no right to a transcript. Chirinos, 16 I&N Dec. 277. The record may contain any information in addition to the memorandum of decision and other EOIR forms. Chirinos, 16 I&N Dec. 276.

General criteria for consideration of bond include a fixed address in the U.S.; length of residence in the U.S.; local family ties and whether the ties may entitle the applicant to reside in the U.S.; record of appearances in court; employment history; criminal record; pending criminal charges; history of immigration violations; attempts to flee prosecution or authorities; manner of entry; membership in community organizations; and immoral acts of participation in subversive activities. Guerra, 24 I&N Dec. at 40; see also Matter of Patel, 15 I&N Dec. 666, 667 (BIA 1976).

Release from detention on "conditional parole" under INA § 236(a) does not constitute being "paroled into the United States" within the meaning of INA § 245(a), and does not establish eligibility for adjustment. Cruz-Miguel v. Holder, 650 F.3d 189, 201-202 (2d Cir. 2011) (affording deference to Matter of Castillo-Padilla, 25 I&N Dec. 275 (BIA 2010)).

An alien subject to reinstatement of a previous order of removal who is in pending withholding-only proceedings, is detained under INA § 236 rather than § 241(a)(2), and thus may be eligible for a bond hearing. Guerra v. Shanahan et al., No. 15-504-cv, --- F.3d ---, 2016 WL 4056035 (2d Cir. 2016); *see also* INA §236(a).

Post-*Harbin* Custody Redeterminations

DHS may arrest and detain any alien pending a decision on whether he is to be removed from the United States. INA § 236(a). An alien is subject to mandatory detention, and not subject to release on bond or conditional parole, if he is described in INA §§ 236(c)(1)(A)-(D), which encompasses most criminal grounds of removability as well as national security grounds.[4] The Attorney General "shall take into custody" any alien included in the categories "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." INA § 236(c). Only offenses where the alien was released from custody for that

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offense on or after October 9, 1998, the date of expiration of the Transition Period Custody Rules ("TPCR"), may subject a person to mandatory detention. *Matter of Adenji*, 22 I&N Dec. 1102, 1107-11 (BIA 1999). To "avoid the constitutional concerns raised by indefinite detention, an immigrant detained pursuant to [INA § 236(c)] must be afforded a bail hearing before an [IJ] within six months of his or her detention." *Lora v. Shanahan*, 804 F.3d 601, 616 (2d Cir. 2015). The detainee "must be admitted to bail unless the government establishes by clear and convincing evidence that the immigrant poses a risk of flight or a risk of danger to the community." *Id.* (citing *Rodriguez v. Robbins*, 715 F.3d 1127, 1131 (9th Cir. 2013)).

The material change in circumstances provision at 8 C.F.R. § 1003.19(e) applies only in custody redeterminations for respondents being held in custody pursuant to INA § 236(a). 8 C.F.R. § 1003.19(e). Section 236(c) of the INA mandates that the Attorney General "shall take into custody" certain classes of aliens, and 8 C.F.R. § 1003.19(h)(2)(i) unequivocally strips IJs of jurisdiction from redetermining the custody status of persons subject to INA § 236(c)(1). 8 C.F.R. § 1003.19(h)(2)(i) ("[A]n immigration judge may not redetermine conditions of custody imposed by the Service with respect to the following classes of aliens: . . . (D) Aliens in removal proceedings subject to section 236(c)(1) of the Act."); *see also* 8 C.F.R. § 1236.1(c)(11) ("An immigration judge may not exercise the authority provided in this section, and the review process described in paragraph (d) of this section shall not apply, with respect to any alien beyond the custody jurisdiction of the immigration judge as provided in § 1003.19(h) of this chapter.").

The Second Circuit's decision in *Lora v. Shanahan* does not affect the material change in circumstances provision at 8 C.F.R. § 1003.19(e). Nor does the *Lora* decision provide a person held under INA § 236(c) with anything other than one bond hearing within six months of detention. Indeed, the Second Circuit in *Lora* otherwise recognized the constitutionality of mandatory detention under INA § 236(c). 804 F.3d at 613-14 (citing *Demore v. Kim*, 538 U.S. 510 (2003)). Extending the holding of *Lora* to require more than one bond hearing within six months of a person's detention pursuant to INA § 236(c) is beyond the scope of authority of this Court because the *Lora* decision specifically dealt with constitutional concerns. 804 F.3d at 616; *Matter of Fitzpatrick*, 26 I&N Dec. 559, 562 (BIA 2015) (holding IJs and the BIA have "no authority to rule on the constitutionality of the laws enacted by Congress"). Thus, there is no legal authority granting a person held pursuant to INA§ 236(c) the right to a custody determination or redetermination before an IJ beyond what is provided for in *Lora*, even in the event of changed circumstances. Therefore, while the Second Circuit's decision in *Harbin* may constitute a changed circumstance, these changes are not relevant to the extent a respondent continues to be held pursuant to INA § 236(c). *See* 8 C.F.R. § 1003.19.

While an Immigration Judge does not have jurisdiction to release a person subject to mandatory detention, the judge retains jurisdiction to determine whether the person is "properly included" within the mandatory detention provisions. 8 C.F.R. § 1003.19(h)(2)(ii); *Matter of Joseph*, 22 I&N Dec. 799, 800 (BIA 1999). In a *Joseph* hearing, the court will uphold the application of INA § 236(c) unless the alien demonstrates that DHS is "substantially unlikely to prevail" in its charge that he is removable on one of the grounds designated in INA §§ 236(c)(1)(A)-(D). *Id.* A person need not be charged in the Notice to Appear ("NTA") with the crime that would subject him to mandatory detention. *Matter of Kotliar*, 24 I&N Dec. 124, 126

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