CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

A GUIDE TO OBTAINING RELEASE FROM IMMIGRATION DETENTION

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I. Introduction

Individuals in removal proceedings—referred to in immigration court proceedings as respondents[1]—face high stakes and substantial hurdles in obtaining relief due to the complexity of immigration law and the fact that many of them undergo the process unrepresented.[2] These hurdles are compounded for those detained during removal proceedings. Because detained cases are a scheduling priority in immigration court, they are placed on a fast track, which gives respondents less time to find representation and prepare their cases.[3] But apart from the time pressure, those in immigration detention also face hurdles in preparing their cases given the inherent difficulties in communicating with the outside world, accessing legal materials, and securing legal representation.[4] For all of these reasons, an individual's ability to fight their case increases significantly if they obtain release from detention.[5]

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[1] An individual in removal proceedings is known as the respondent. *See* Executive Office for Immigration Review (EOIR), Immigration Court Practice Manual Ch. 4.3, justice.gov/eoir/eoir-policy-manual/part-ii-ocij-practice-manual [hereinafter "Immigration Court Practice Manual"]. In general, this guide employs the terms "individual," "client," "respondent," or, less frequently, "non-citizen." This guide uses "noncitizen" less frequently because some individuals apprehended or detained by the Department of Homeland Security are U.S. citizens or have a U.S. citizenship claim.

[2] *See, e.g.*, Karen Barberich & Nina Siulc, Vera Institute of Justice, *Why Does Representation Matter? The Impact of Legal Representation in Immigration Court* (Nov. 2018), vera.org/downloads/publications/why-does-representation-matter.pdf (noting that "representation rates for people in detention have hovered around 30 percent").

[3] *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 ("All cases involving individuals in detention or custody, regardless of the custodian, are priorities for completion."). The January 2018 memo also established immigration court "performance measures" directing that 85 percent of non-status detained removal cases be completed within 60 days of the NTA's filing.

[4] *See, e.g.*, Kyle Kim, *Immigrants Held in Remote ICE Facilities Struggle to Find Legal Aid Before They're Deported*, LOS ANGELES TIMES, Sept. 28, 2017, latimes.com/projects/la-na-access-to-counsel-deportation/.

[5] For one story about how an individual's release from detention allowed him to successfully fight his case, see Mark Hwang, American Civil Liberties Union (ACLU), *How a Bond Hearing Saved Me from Deportation*, (Oct. 3, 2017), aclu.org/blog/immigrants-rights/deportation-and-due-process/how-bond-hearing-saved-me-deportation.

Whether an individual is placed into removal proceedings is a decision subject to the discretion of the Department of Homeland Security (DHS). Likewise, whether or not an individual will be detained during the pendency of the removal proceedings is often a discretionary decision made by the agency. Being able to secure *pro bono* representation in seeking release from detention means that low income individuals do not have to face the difficult choice between using limited funds to pay either legal fees or the bond itself.[6] While both newly developed and long-established *pro bono* and free legal services programs exist in locations throughout the country, these programs only cover a small percentage of detained individuals and some, such as EOIR's Legal Orientation Program (LOP), are limited to providing legal information, not direct representation.[7] As immigration detention continues to be widespread, *pro bono* programs and representation are essential.

The aim of this guide is to provide practitioners with a comprehensive resource for representing clients in immigration bond proceedings.[8] This guide focuses on bond hearings for adults who are detained by DHS. It does not cover bond hearings in children's cases.[9]

Section II of this guide provides an overview of immigration detention, including the various statutory bases for detention and corresponding strategies for seeking release. Section III gives a legal overview of bond procedures in immigration court. Section IV discusses the nuts and bolts of preparing for and representing a client during a bond hearing. Section V discusses appeals of immigration court bond decisions to the Board of Immigration Appeals (BIA). Additionally, the guide includes sample materials that may be of use in preparing bond cases. Find them at cliniclegal.org/resources/bond-guide.

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[6] *See, e.g.*, Gabriela Kahrl, Michelle N. Mendez, & Maureen A. Sweeney, Catholic Legal Immigration Network, Inc. & Maryland Carey School of Law Immigration Clinic, *Presumed Dangerous: Bond, Representation, and Detention in the Baltimore Immigration Court*, at 2–3 (2019), cliniclegal.org/resources/enforcement-and-detention/presumed-dangerous-bond-representation-and-detention-baltimore (stating that individuals face challenges such as the high cost of private attorneys and the limited availability of pro bono and low-bono attorneys for bond hearings and that average bond was set at $11,408 in the observed proceedings) [hereinafter CLINIC *Presumed Dangerous*].

[7] Some examples of programs that assist individuals in bond proceedings include Capital Area Immigrants' Rights Coalition, Rocky Mountain Immigrant Advocacy Network, The Florence Immigrant & Refugee Rights Project, and SPLC's Southeast Immigrant Freedom Initiative. *See also* EOIR, Legal Orientation Program, justice.gov/eoir/legal-orientation-program (last updated Jul. 24, 2020). Some of the legal orientation programs have capacity to represent individuals in bond proceedings or make referrals for *pro bono* bond representation.

[8] This guide does not cover voluntary departure bonds, which are bonds an IJ may require an individual to post as a condition of the voluntary departure grant. The regulations and procedures relating to voluntary departure bonds differ from those discussed in this guide.

[9] In 2017, the Ninth Circuit in *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017), recognized the right to bond hearings for children in the custody of the Office of Refugee Resettlement.

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

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[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"].

have been granted bond or scheduled for a bond hearing.[14] Some practitioners have reported, however, that ICE does not comply with the policy and several federal lawsuits have been brought challenging these practices.[15] Special transfer rules also apply to those protected by the *Orantes* injunction, which covers Salvadorans detained by DHS who are eligible to apply for asylum.[16] ICE's decision to transfer a client can make legal representation much more challenging, particularly where ICE moves the client far away from the representative or the client's family and friends, who might otherwise be able to assist with the case.[17]

[14] *See id.* § 5.2(3) (noting exceptions including transfers for medical or mental health reasons, based on detainee request, "[f]or the safety and security of the detainee, other detainees, detention personnel or any ICE employee," for the agency's convenience when the venue of detention is different than the immigration court venue, due to termination of facility use, to prevent overcrowding, and "[t]o transfer to a more appropriate detention facility based on the detainee's individual circumstances and risk factors"). The ICE National Detainee Handbook provides that a detained individual may request transfer to another facility if the current detention facility does not have outdoor recreation opportunities. ICE ERO, National Detainee Handbook, at 11 (Apr. 2016), ice.gov/sites/default/files/documents/Document/2017/detainee-handbook.PDF ("If your facility has no outdoor recreation, you may be eligible to request voluntary transfer to another facility with outdoor recreation after a certain number of months (ask your ICE officer).").

[15] *See, e.g., Reyna v. Hott*, 921 F.3d 204 (4th Cir. 2019) (denying suit challenging plaintiffs' transfer to facility far from their children based on conclusion that no constitutional right to family unity existed in the context of immigration detention); *Arroyo v. DHS*, No. 8:19-cv-0815, 2019 WL 2912848 (C.D. Cal. June 20, 2019) (granting preliminary injunction prohibiting ICE transfer of certain individuals to facilities outside the ICE Los Angeles field office area of responsibility).

[16] *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1491 (C.D. Cal. 1988), *aff'd.*, 919 F.2d 549 (9th Cir. 1990), created a nationwide permanent injunction upholding the rights of Salvadorans detained by DHS who are eligible to apply for asylum. The injunction orders DHS to comply with a number of requirements, including permitting access to counsel, placing limits on the transfer of unrepresented individuals in immigration detention, and providing access to legal materials. If a practitioner believes an *Orantes* violation has occurred, they can contact class counsel, the National Immigration Law Center (NILC). *See* NILC, The *Orantes* Injunction (Mar. 2011), nilc.org/issues/immigrationenforcement/orantesinjunction/.

[17] For more information about the harmful effects of transferring individuals in immigration detention, see Human Rights Watch, *A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States* (June 2011), hrw.org/report/2011/06/14/costly-move/far-and-frequent-transfers-impede-hearings-immigrant-detainees-united; Letter to Carlton I. Mann, Assistant Inspector General, DHS OIG, from ACLU, Human Rights Watch, AILA & National Immigrant Justice Center, *DHS OIG Audit of Immigration Detainee Transfers and Impact on Legal Representation* (Feb. 6, 2009), aclu.org/sites/default/files/field_document/Transfer_Recommendations_for_DHS_OIG_2-6-09__final__2_.pdf (providing recommendations for amendments to previous detention standards related to transfer and describing harmful impacts of transfer). Note that these sources predate the ICE Transfer Policy, *see supra* note 13.

4. Demographics of Those in Immigration Detention

The immigration detention system encompasses many different populations, including men, women, children present with or without their parents,[18] pregnant women,[19] nursing mothers, and those with serious medical and mental health conditions.[20] The immigration detention system also erroneously catches U.S. citizens in its wide net.[21]

5. Immigration Detention Conditions

The types of detention centers where ICE holds individuals, and the conditions at those facilities, vary. Some individuals are held in state or local jails that contract with ICE and receive payment for each immigration bed they offer. Others are held in facilities run directly by ICE. Still others are detained in facilities run by private for-profit prison companies.[22]

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[18] The legal framework for, and practices governing the release of children in immigration detention is beyond the scope of this guide. Many aspects of the detention of non-citizen children are governed by the *Flores* Settlement Agreement, *Flores v. Reno*, No. 84-4544 (C.D. Cal. filed 1997), aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf; *see Flores v. Rosen*, No. 19-56326, 2020 WL 7705556 (9th Cir. Dec. 29, 2020) (concluding that the district court did not abuse its discretion in declining to terminate the Flores Settlement Agreement, affirming injunction of certain regulations governing detention of children, and allowing other provisions of those regulations to go into effect). Children and youth in immigration detention may find themselves facing unsubstantiated allegations of criminality or gang affiliation. *See Saravia v. Sessions*, 280 F. Supp. 3d 1168 (N.D. Cal. 2017) (granting preliminary injunction ordering that government provide hearings to class of noncitizen children previously placed with a sponsor who were then rearrested on allegations of gang activity, where the child and sponsor could contest the government's evidence). On January 19, 2021, the district court in *Saravia* approved a final settlement agreement providing procedural protections to certain unaccompanied children accused by DHS of gang affiliation. Settlement Agreement and Release, *Saravia v. Barr*, No. 17-03615 (N.D. Cal. Sept. 17, 2020), ECF No. 237-1, ice.gov/doclib/legalNotice/SaraviaSA-Settlement.pdf.

[19] ICE, Directive 11032.3: Identification and Monitoring of Pregnant Detainees (last reviewed/updated Jan. 07, 2021), ice.gov/directive-identification-and-monitoring-pregnant-detainees.

[20] ICE news releases describe the deaths of detained individuals in its custody including those with serious medical conditions. *See,* ICE, News Release, ice.gov/newsroom?field_news_release_topics_tag_target_id=855&field_field_location_administrative_area=All&field_published_date_value%5Bmin%5D=&field_published_date_value%5Bmax%5D=&combine=&field_field_location_country_code=All.

[21] *See, e.g.*, Paige St. John & Joel Rubin, *Must Reads: ICE held an American man in custody for 1,273 days. He's not the only one who had to prove his citizenship*, LOS ANGELES TIMES, Apr. 27, 2018, latimes.com/local/lanow/la-me-citizens-ice-20180427-htmlstory.html.

[22] For more detailed accounts of DHS's use of private prisons, *see* Clyde Haberman, *For Private Prisons, Detaining Immigrants is Big Business*, NEW YORK TIMES (Oct. 1, 2018), nytimes.com/2018/10/01/us/prisons-immigration-detention.html; ACLU, *Shutting Down the Profiteers: Why and How the Department of Homeland Security Should Stop Using Private Prisons* (Sept. 2016), aclu.org/report/shutting-down-profiteers-why-and-how-department-homeland-security-should-stop-using-private?utm_source=aila.org&utm_medium=InfoNet%20Search.

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 care[25]
(3) deaths of individuals while in immigration detention[26]
(4) insufficient access to counsel and/or lack of legal orientation programs[27]
(5) lack of access to a law library[28]

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[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_Justice_Report-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-ln-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).

(6) a negligent and fatal response to the Covid-19 pandemic[29]
(7) the harmful psychological effects of detention,[30] and
(8) violation of wage and hour laws and involuntary labor through the "voluntary work program."[31]

ICE has adopted various detention standards over the years that purport to regulate conditions at immigration detention facilities.[32] ICE's failure to consistently adhere to those standards, however, has been well documented.[33]

B. Overview of Legal Bases for Immigration Detention and Strategies for Securing Release

This section briefly discusses the different detention authorities found in the INA and the classes of individuals to which each applies.[34] Four primary statutory grounds exist under which DHS has authority to detain an individual. Some statutory grounds authorize "mandatory" detention, meaning that the immigration judge (IJ) has no authority to re-determine the person's custody or to set a bond, while others articulate possible discretionary avenues for release. The strategies available for a particular individual to seek release will depend on which classification they fall into. While the rest of this guide focuses on how to prepare and present an effective case for bond in immigration court, this section also gives a brief overview of other strategies for seeking release.

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[29] *See, e.g.*, Center for Migration Studies, *Immigrant Detention and COVID-19: How a Pandemic Exploited and Spread through the US Immigrant Detention System* (Aug. 2020), cmsny.org/wp-content/uploads/2020/08/CMS-Detention-COVID-Report-08-12-2020.pdf; International Rescue Committee, *COVID-19 Escalating in ICE Detention Centers as States Hit Highest Daily Records-and ICE Deportation Flights into Northern Triangle Continue* (Aug. 2020), rescue.org/press-release/covid-19-escalating-ice-detention-centers-states-hit-highest-daily-records-and-ice; Detention Watch Network, *Courting Catastrophe: How ICE Is Gambling with Immigrant Lives Amid a Global Pandemic* (Mar. 2020), detentionwatchnetwork.org/sites/default/files/reports/DWN_Courting%20Catastrophe_How%20ICE%20is%20Gambling%20with%20Immigrant%20Lives%20Amid%20a%20Global%20Pandemic.pdf.

[30] *See, e.g.*, CARA Family Detention Pro Bono Project Complaint to the DHS Office of Civil Rights and Civil Liberties and OIG, *Ongoing Concerns Regarding the Detention and Fast-Track Removal of Children and Mothers Experiencing Symptoms of Trauma* (Mar. 28, 2016), aila.org/advo-media/press-releases/2016/cara-crcl-complaint-concerns-regarding-detention.

[31] *See, e.g.*, Robin Urevik, *ICE Prison's Dollar-a-Day Wages Face Class-Action Suit*, CAPITAL & MAIN, Dec. 2, 2019, capitalandmain.com/private-ice-prisons-dollar-a-day-wages-1202; Mia Steinle, Project on Government Oversight, *Slave Labor Widespread at ICE Detention Centers, Lawyers Say* (Sept. 7, 2017), pogo.org/investigation/2017/09/slave-labor-widespread-at-ice-detention-centers-lawyers-say/.

[32] *See, e.g.*, ICE, 2011 Operations Manual Performance-Based National Detention Standards, ice.gov/detention-standards/2011 (last updated Mar. 11, 2021); ICE, 2019 National Detention Standards for Non-Dedicated Facilities, ice.gov/detain/detention-management/2019 (last updated Mar. 11, 2021).

[33] *See, e.g.*, T. Alexander Aleinikoff & Donald Kerwin, *Improving the U.S. Immigration System in the First Year of the Biden Administration*, at 13 (Nov. 2020), cmsny.org/wp-content/uploads/2020/11/Improving-the-US-Immigration-System_Proposals_FINAL.pdf ("Oversight for compliance with immigrant detention standards is diffuse, convoluted and largely ineffective.").

[34] In addition to the detention authority discussed herein, there are other situations in which individuals held in immigration detention are not eligible to seek bond with the immigration court, including those in asylum-only proceedings who were admitted pursuant to the Visa Waiver Program and have not been served with a Notice to Appear, *see Matter of A-W-*, 25 I&N Dec. 45 (BIA 2009), and detention of certain suspected terrorists, *see* 8 U.S.C. § 1226a. These forms of detention are beyond the scope of this guide.

1. Discretionary Detention Under INA § 236(a)

Section 236(a) of the INA governs the detention of individuals who are arrested in the interior of the United States and placed in removal proceedings, and who are not subject to the mandatory detention provisions of section 236(c), which are discussed below. This provision is the general detention authority, which describes DHS's discretionary, or permissive, power to detain.[35] The statute provides that "[o]n 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." It further directs that the Attorney General may continue to detain the individual, or may release the individual on either a "bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General,"[36] or on conditional parole.[37]

If an individual is detained under section 236(a), there are two principal fora where they may seek release:

(1) An individual can seek release at any time from ICE ERO, and
(2) An individual may seek release from an IJ after ICE makes its initial custody determination by requesting a custody redetermination hearing and asking for a lower bond or release on conditional parole. IJ release strategies are discussed in sections III and IV.

Negotiating Release with ERO

When ICE first arrests an individual and chooses to detain them, ICE either sets a bond amount or decides that the individual should not be released under any amount. This decision is usually recorded on Form I-286, Notice of Custody Determination. Since ICE has discretion to detain or release those apprehended under section 236(a),[38] a practitioner's first advocacy strategy may be to persuade ERO to release the individual on their own recognizance, or to set or lower the bond to an amount that the client is able to pay right away.[39] This is best accomplished as soon as possible, for example by speaking with the deportation officer while the client is being processed.[40] To communicate with ERO personnel about a client, the

[35] *See Nielsen v. Preap*, 139 S. Ct. 954, 959 (2019) (noting that INA § 236(a) "sets out the general rule regarding [noncitizens'] arrest and detention pending a decision on removal").
[36] One example of a release condition that might be prescribed is participation in an alcohol treatment program for a respondent with a history of driving under the influence. *See, e.g.*, E-C-, AXXX XXX 516 (BIA Apr. 20, 2017) (unpublished), scribd.com/document/349318995/E-C-AXXX-XXX-516-Bia-April-20-2017.
[37] INA § 236(a)(2)(B).
[38] *See* 8 CFR § 1236.1(c)(8) (noting that the DHS officer "may, in the officer's discretion, release an alien not described in section 236(c)(1) of the Act . . . provided that 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").
[39] For more information about paying bond, see section IV.C.1 *infra*.
[40] The regulations direct DHS to make a determination within 48 hours of arrest whether the individual "will be continued in custody or released on bond or recognizance and whether a notice to appear and warrant of arrest . . . will be issued." 8 CFR § 287.3(d).

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]

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[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.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.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.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).

that the respondent bears the burden of proof in bond proceedings to establish that they should be released.[47] A discussion of habeas is beyond the scope of this guide.[48]

2. Mandatory Detention Under INA § 236(c)

Section 236(c) of the INA directs that noncitizens with certain criminal convictions "shall [be] take[n] into custody" when "released" from criminal custody, unless they fall within a narrow exception allowing release for witness protection purposes.[49] The categories of individuals who are subject to INA § 236(c) are as follows:

- Those **inadmissible** for having "committed any offense" covered in INA § 212(a)(2) [which includes those "convicted of, or who admit[] having committed, or who admit[] committing acts which constitute the essential elements of" a crime involving moral turpitude not falling within the petty offense exception or a controlled substance offense; and those convicted of two or more offenses for which the aggregate sentences to confinement were five years or more[50]]
- Those **inadmissible** under INA § 212(a)(3)(B) [relating to those alleged to have engaged in terrorist activities]
- Those **deportable** for "having committed any offense" covered in INA § 237(a)(2)(A)(ii) [convicted of two or more crimes involving moral turpitude not arising out of a single scheme], (A)(iii) [convicted of an aggravated felony], (B) [convicted of a controlled substance offense other than a single offense of possession for own use of thirty grams or less of marijuana; or drug abuser or addict], (C) [convicted of a firearms offense], or (D) [convicted of miscellaneous offenses including espionage, sabotage, treason, sedition, threats against the president,

[47] *See, e.g.*, *Ixchop Perez v. McAleenan*, 435 F. Supp. 3d 1055, 1062 (N.D. Cal. 2020) (collecting cases) ("Accordingly, this court will join the 'consensus view' among District Courts concluding that after *Jennings* 'where . . . the government seeks to detain an alien pending removal proceedings, it bears the burden of proving that such detention is justified.'"); *Singh v. Barr*, 400 F. Supp. 3d 1005, 1018 (S.D. Cal. 2019) ("The Court . . . concludes that the Fifth Amendment's Due Process Clause requires the Government to bear the burden of proving, by clear and convincing evidence, that continued detention is justified at a § 1226(a) bond redetermination hearing.").

[48] For further information on challenges to immigration detention, see ACLU, *Challenging Detention Without a Bond Hearing Pending Removal Proceedings* (Feb. 2018), aclu.org/fact-sheet/challenging-detention-without-bond-hearing-pending-removal-proceedings [hereinafter "ACLU Immigration Detention Practice Advisory"].

[49] The provision further specifies that it applies "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). Despite the provision's language, DHS may release an individual detained under section 236(c). Practitioners have reported instances of ERO releasing an individual detained under this provision, for example, in particularly serious or urgent medical situations.

[50] This provision also includes conduct-based, in addition to conviction-based, grounds of inadmissibility, such as those whom the government has a reason to believe have participated in controlled substance trafficking. *See, e.g.*, INA § 212(a)(2)(C). It appears that DHS's practice is typically to rely on convictions, rather than conduct, in classifying individuals as subject to mandatory detention. In situations where there may be allegations of conduct-based inadmissibility under INA § 212(a)(2) in the absence of a conviction, DHS may also argue for high or no bond for such individuals based on allegations of dangerousness. *See infra* section IV.A.5 (discussing mitigation of harmful evidence or facts).

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.

basis for the mandatory detention[53]; and (3) whether the given criminal offense in fact falls within the relevant immigration ground of inadmissibility or deportability. This latter task will likely involve applying the categorical or modified categorical approach, which is a multi-step inquiry used to determine whether a given offense falls within an immigration criminal ground of removal.[54] There are many excellent resources on this subject. Practitioners are also encouraged to seek mentoring from a knowledgeable local practitioner and reach out to "criminal immigration" experts with specific questions.[55]

Under BIA precedent, a respondent need not be charged in the Notice to Appear (NTA) with the ground of deportability or inadmissibility supporting the exercise of mandatory detention.[56] If the ground of deportability or inadmissibility purportedly subjecting the individual to mandatory detention under section 236(c) is the same ground alleged in the NTA that makes the person removable, and the practitioner believes there are arguments that this ground does not apply, the practitioner should file a motion to terminate the removal proceedings (done separately from the bond proceedings), if they are counsel of record in that portion of the proceedings. In the context of an individual charged with a ground of deportability under INA § 237, it is the government's burden to prove by clear and convincing evidence that the alleged ground applies,[57] and proceedings must be terminated if the government cannot meet its burden. This is a more favorable framework to the respondent than the *Joseph* standard. If the practitioner prevails on the motion to terminate, but DHS reserves appeal, the practitioner can seek bond with the IJ.

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[53] For immigration purposes, "conviction" is a term of art and is defined as "a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed." INA § 101(a)(48).

[54] *See, e.g.*, *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Descamps v. United States*, 133 S. Ct. 2276 (2013); *Moncrieffe v. Holder*, 569 U.S. 184 (2013); *Matter of Chairez*, 26 I&N Dec. 819 (BIA 2016). Practice materials on criminal immigration issues include the following: Katherine Brady, Immigrant Legal Resource Center, *Practice Advisory: How to Use the Categorical Approach Now* (Dec. 2019), ilrc.org/sites/default/files/resources/how_to_use_the_categorical_approach_now_dec_2019_0.pdf; Manny Vargas, Dan Kesselbrenner & Andrew Wachtenheim, National Immigration Project of the National Lawyers Guild & Immigrant Defense Project, *Practice Alert: In* Mathis v. United States*, Supreme Court Reaffirms and Bolsters Strict Application of the Categorical Approach* (July 1, 2016), immigrantdefenseproject.org/wp-content/uploads/2016/07/MATHIS-PRACTICE-ALERT-FINAL.pdf*;* Immigrant Defense Project, *Using and Defending the Categorical Approach*, immigrantdefenseproject.org/using-and-defending-the-categorical-approach/*; see also* Maureen Sweeney, University of Maryland School of Law Immigration Clinic, videos available at youtube.com/watch?v=eDA-wVIedT0 and youtube.com/watch?v=9nlloIrsU0o&t=37s. When consulting practice advisories, practitioners should ensure that they incorporate the latest precedents. Practitioners should also conduct their own research and reach out to experts for tailored and up-to-date guidance.

[55] The Immigrant Defense Project (IDP) offers consultations for individual cases. *See* IDP, Legal Advice, immdefense.org/what-we-do/legal-advice. In addition, some state public defender offices have "criminal immigration" experts who may assist with these inquiries.

[56] *Matter of Kotliar*, 24 I&N Dec. 124, 127 (BIA 2007) ("[W]here the basis for detention is not included in the charging document, the alien must be given notice of the circumstances or convictions that provide the basis for mandatory detention and an opportunity to challenge the detention before the Immigration Judge during the bond redetermination hearing.").

[57] 8 CFR § 1240.8(a).

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

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.

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

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[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 (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

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[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

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[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).

individuals with competency issues could consider arguing that this memo applies and requires a bond hearing after six months in custody.[71]

3. Detention Under INA § 235(b) of "Arriving Aliens" and Other Individuals in the Credible Fear Process

The immigration statutes and regulations provide for the detention of "arriving aliens," and the regulations state that IJs do not have authority to re-determine the custody of arriving aliens.[72] An arriving alien is defined as "an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means . . . ."[73] Arriving aliens include those seeking admission at a port of entry and can include asylum seekers and returning lawful permanent residents who are considered to be seeking admission.[74]

Practitioners should assess whether a client has been properly classified as an arriving alien. Removable individuals who are apprehended within the United States, not at a port of entry, and not subject to a final order of removal, should be detained under INA § 236, and the IJ should have jurisdiction to hold a bond hearing accordingly. Practitioners can determine where the client was apprehended by speaking with the client or trying to obtain a copy of Form I-213, Record of Deportable/Inadmissible Alien, a document that DHS prepares when it processes an individual for removal, from ICE ERO or ICE Office of Chief Counsel (OCC). If a client has been erroneously classified as an arriving alien, practitioners should gather proof and could attempt to persuade DHS to correct the NTA in addition to challenging the arriving alien classification in the removal proceeding. Practitioners could also attempt to challenge the arriving alien classification in a bond proceeding and thus argue that the client is eligible for bond. However, the IJ or DHS may take the position that the regulations do not give the IJ authority to determine whether a respondent is improperly included within the regulatory list found at 8 CFR § 1003.19(h)(2)(i)(B) describing those not eligible for an IJ bond redetermination as arriving aliens. Practitioners could argue that in *Matter of Oseiwusu*, 22 I&N Dec. 19 (BIA 1998), the BIA reached the merits of evaluating whether a respondent was an arriving alien before determining whether the IJ had authority to consider a bond request.[75]

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[71] For further discussion of the legal protections afforded to noncitizens with mental illness in removal proceedings, see Catholic Legal Immigration Network, Inc., *Representing Noncitizens with Mental Illness* (last updated May 12, 2020), cliniclegal.org/resources/removal-proceedings/representing-noncitizens-mental-illness.

[72] INA § 235(b)(1)(B)(ii), 235(b)(1)(B)(iii)(IV), 235(b)(2)(A) (detention of other applicants for admission who are not "clearly and beyond a doubt entitled to be admitted"); 8 CFR § 1003.19(h)(2)(i)(B) (listing "arriving aliens" among the categories of individuals for whom IJs are barred from reviewing custody).

[73] 8 CFR §§ 1.2, 1001.1(q).

[74] Lawful permanent residents are determined to be seeking admission in certain circumstances specified at INA § 101(a)(13)(C), including those who have committed an offense identified in INA § 212(a)(2), such as a crime involving moral turpitude, and have not received a section 212(h) waiver or cancellation of removal. Lawful permanent residents who make brief, casual, and innocent departures and whose conviction pre-dates IIRIRA are not subject to inadmissibility grounds and are not considered arriving aliens. *Vartelas v. Holder*, 566 U.S. 257 (2012).

[75] *See also* Immigration Court Practice Manual, *supra* note 1, Ch. 9.3(b) ("[A]n Immigration Judge has jurisdiction to rule on whether he or she has jurisdiction to conduct a bond hearing."); BIA Practice Manual, *infra* note 360, Ch. 7.2(b)(3) ("The Board

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 unlawfully[76] and who are inadmissible based on certain grounds[77] (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]

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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=tGGIxEtdntCWLUpRAlk8; 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 (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 (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).

In *Jennings v. Rodriguez*, the Supreme Court interpreted INA § 235(b)(1)(B)(ii) to mandate detention of arriving alien asylum seekers who claim fear of persecution or torture, are referred for a credible fear interview, and are determined to have a credible fear.[82] The Court construed INA § 235(b)(1)(B)(ii) as requiring the detention of such asylum seekers pending the resolution of the section 240 proceedings, with the option of discretionary release on parole.[83]

Individuals who enter without inspection, are placed into expedited removal proceedings, and are determined to have a credible fear are also referred to section 240 proceedings. However, in contrast to arriving alien asylum seekers, the BIA recognized this group's eligibility to seek a bond re-determination before the IJ in a 2005 decision called *Matter of X-K-*.[84] A 2019 attorney general decision, *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019), overruled *Matter of X-K-*. Relying on the Supreme Court's *Rodriguez* decision, *Matter of M-S-* asserts that asylum seekers who started out in expedited removal proceedings are not eligible for release on bond pursuant to INA § 235(b)(1)(B)(ii). However, a federal district court effectively overruled *Matter of M-S-* by issuing a preliminary injunction requiring that asylum seekers who enter without inspection be given a bond hearing if they receive a positive credible fear determination.[85] While the preliminary injunction in this case remained in effect at the time of this guide's issuance, litigation is ongoing and practitioners should monitor further developments.[86]

If an asylum seeker in expedited removal proceedings is found *not* to have a credible fear, the government's view is that mandatory detention is authorized under INA § 235(b)(1)(B)(iii)(IV).[87] This section provides for detention until after an IJ reviews the negative credible fear finding and, if such a finding is affirmed, until removal.

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[82] 138 S. Ct. 830, 842 (2018).

[83] See discussion of parole *infra*; *Rodriguez*, 138 S. Ct. at 837 (citing parole authority found at INA § 212(d)(5)(A), 8 CFR § 235.3, and 8 CFR § 212.5(b)).

[84] 23 I&N Dec. 731 (BIA 2005); *see* 8 CFR §§ 236.1(d); 1003.19(h)(2); *see supra* section II.B.1 for discussion of section 236(a) detention authority.

[85] Order on Motions re Preliminary Injunction, *Padilla v. ICE*, No. C18-929 MJP (W.D. Wash. July 2, 2019).

[86] The district court's injunction was later affirmed in large part by the Ninth Circuit on appeal, but the Supreme Court then vacated the Ninth Circuit's decision in light of *DHS v. Thuraissigiam*, 140 S. Ct. 1959 (2020). *See Padilla v. ICE*, 953 F.3d 1134, 1139 (9th Cir. 2020), *cert. granted, judgment vacated sub nom. ICE v. Padilla*, No. 20-234, 2021 WL 78039, --- S. Ct. --- (U.S. Jan. 11, 2021).

[87] Some practitioners have argued that detention of individuals found not to have a credible fear is governed by INA § 241 because they have a final order of removal. Those detained under § 241 could have claims for release due to prolonged detention under the rule announced in *Zadvydas v. Davis*, 533 U.S. 678 (2001). *See infra* section II.B.4. No court has adopted this view to the knowledge of the authors.

Parole Requests

Although arriving aliens are not able to seek bond before the IJ, they can seek release by filing a parole request with ICE, in an exercise of that agency's discretion.[88] The immigration statute and regulations direct that ICE can parole individuals on a case-by-case basis for urgent humanitarian reasons or significant public benefit.[89] A December 2009 ICE policy entitled "Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture" describes the process by which an individual can be released on parole following a positive credible fear interview.[90] Thus, regardless of whether the asylum seeker is eligible for a bond hearing, they should be considered for parole under the ICE parole directive. Parole requests for arriving alien asylum seekers can be made to ERO in the same manner in which other requests for release are made and using similar factors discussed above in Part 1 of this section.[91]

Habeas Petitions

It may also be possible to raise a due process challenge to the prolonged detention of individuals detained under INA § 235(b) through a habeas petition filed in federal district court. The constitutionality of prolonged detention under INA § 235(b) was left open in *Rodriguez*. In that case, the Supreme Court reviewed the Ninth Circuit's interpretation of section 235(b).[92] The Ninth Circuit had applied the canon of constitutional avoidance to conclude that the statute contained an implicit six-month limit and that noncitizens detained for six months were entitled to a bond hearing, at which the government had the burden to prove by clear and convincing evidence that continued detention was justified because the noncitizen posed a danger or was a flight risk. The Supreme Court reversed the Ninth Circuit's judgment, concluding that the statute was clear and that sections 235(b)(1)(B)(ii) and (b)(2)(A) "mandate detention of applicants for admission until [removal] proceedings have concluded."[93]

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[88] *See* 8 CFR § 235.3(c) (parole for arriving aliens placed in removal proceedings); 8 CFR § 235.3(b)(2)(iii) (parole during expedited removal process). There are multiple statutory forms of parole, including parole under INA § 212(d)(5) and conditional parole under INA § 236(a)(2)(B). The type of parole discussed here is governed by INA § 212(d)(5). It is important to identify the relevant type of parole because it can affect eligibility for other immigration remedies. For example, a person paroled under INA § 212(d)(5) is considered paroled into the United States for purposes of adjustment under INA § 245(a), while a person granted conditional parole under INA § 236(a)(2)(B) is not. *See Matter of Castillo-Padilla*, 25 I&N Dec. 257 (BIA 2010).

[89] INA § 212(d)(5); 8 CFR § 212.5(b) (requiring that the parole applicant have one of the following factors: (1) a serious medical condition such that continued detention would be inappropriate; (2) be pregnant; (3) be a juvenile meeting certain requirements; (4) be a witness in proceedings before a judicial, administrative, or legislative body in the United States; (5) be an individual whose continued detention is not in the "public interest").

[90] *See* ICE Directive No. 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture § 6.2 (Dec. 8, 2009), ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf) [hereinafter "ICE Parole Directive"] (directing that parole generally be granted after an individual establishes a credible fear, provided they establish their identity and do not pose a danger or flight risk).

[91] For more information on the process for seeking parole, see American Immigration Council, *The Use of Parole Under Immigration Law* (Jan. 24, 2018), americanimmigrationcouncil.org/research/use-parole-under-immigration-law.

[92] 138 S. Ct. 830 (2018).

[93] *Id.* at 842.

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

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[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); *Kovadio 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. Hott*, 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 Texas[101] 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.

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[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

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[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).

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]

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]

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[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]

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[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.

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]

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[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 (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

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[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).

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

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[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.

arguments before the agency for strategic reasons, including to comply with prudential exhaustion doctrine for those anticipating potential habeas litigation in federal court. A discussion of habeas and exhaustion doctrine is beyond the scope of this guide. Practitioners should research precedents governing their jurisdiction to determine the viability of potential arguments.

Figure 1. Immigration Detention and Remedies to Seek Release

Detention Classification	DHS Remedy?	Immigration Court Remedy?	Federal Court Remedy?
Arriving alien (Strategies discussed in section II.B.3)	File parole request with ICE	If the individual was erroneously classified as an arriving alien, seek IJ review of the determination	Seek habeas relief if prolonged detention or challenging the legality of the process followed in making parole determinations
In removal proceedings – section 236(a) (Strategies discussed in section II.B.1)	Negotiate with ICE ERO for release on recognizance or low bond	Bond hearing	Seek habeas relief if prolonged detention, asking for a new bond hearing where the government bears the burden of proof by clear and convincing evidence and where IJ must consider the respondent's ability to pay
In removal proceedings – section 236(c) (Strategies discussed in section II.B.2)	Seek discretionary release with ERO (unlikely to be granted unless serious and urgent medical issues are present)	Request *Joseph* hearing if there is a basis to challenge the section 236(c) classification, and/or seek bond hearing if detention becomes prolonged	Seek habeas relief if prolonged detention, or based on other theories such as that those with a substantial challenge to removal are not subject to section 236(c)
Final order of removal – section 241	Seek release with ICE through regulatory process	In Third and Ninth Circuits, bond hearings recognized after six months of detention. In other circuits, could still	Seek habeas relief if prolonged detention

(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 hearings[146]—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.

A. Which Agencies Can Set a Bond and How Can a Respondent Request Bond?

As discussed above, ICE has authority in the first instance to set bond for an individual detained under INA § 236(a).[147] Of course, just because ICE has the option to set a bond does not mean that an initial bond will be set.[148] ICE may decline to set any bond, even though the individual is detained under INA § 236(a) and is thus statutorily eligible for bond. Whether or not ICE sets an initial bond, the IJ then has the authority to review the bond amount set by DHS or make a "custody redetermination" for those detained under § 236(a).[149] Note, however, that the respondent must request a bond redetermination hearing from the immigration court; the IJ does not have authority to re-determine bond *sua sponte*.[150] Additionally, a respondent only receives one custody redetermination hearing with the IJ, unless they can show that circumstances have changed materially since the prior hearing.[151] An individual can request a custody redetermination orally at a master calendar hearing, in writing, or by telephone at the discretion of the IJ.[152] Practitioners should be aware that some respondents may have already requested an IJ review of the initial ERO custody determination by checking the appropriate box on from I-286 "Notice of Custody Determination." Whether or not that will automatically trigger the scheduling of a bond hearing, however, will vary based on jurisdiction.

B. In Which Immigration Court Should a Respondent Request a Bond Hearing?

The regulations specify before which immigration court the respondent should file a custody redetermination request, in order of preference: (1) the immigration court with jurisdiction over the place of detention; (2) the immigration court with administrative control over the case; or (3) "the Office of the Chief Immigration Judge for designation of an appropriate Immigration Court."[153] The regulations governing the location of the custody redetermination request are not jurisdictional.[154] ICE determines the place of detention and can move a detained individual at any time.[155] ICE also determines the initial venue for removal proceedings based on where it files the NTA.[156] If ICE transfers an individual while removal proceedings are pending, ICE

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[147] *See* 8 CFR § 236.1(c)(8), (d).

[148] Practitioners can argue that the statute and implementing regulations require ICE to make an individualized custody determination based on flight risk and dangerousness, even though that determination may result in the decision not to set any bond amount. INA § 236(a); 8 CFR § 236.1(c)(8). *See Velesaca* lawsuit referenced in note 44 *supra*.

[149] 8 CFR §§ 1003.19(a), 236.1(d).

[150] *Matter of P-C-M-*, 20 I&N Dec. 432 (BIA 1991).

[151] *See* 8 CFR § 1003.19(e).

[152] *Id.* § 1003.19(b); Immigration Court Practice Manual, *supra* note 1, Ch. 9.3(c); *see also Matter of Valles*, 21 I&N Dec. 769, 771 (BIA 1997) ("In bond proceedings, an alien remains free to request a bond redetermination at any time without a formal motion, without a fee, and without regard to filing deadlines, so long as the underlying deportation proceedings are not administratively final. In other words, no bond decision is final as long as the alien remains subject to a bond.").

[153] 8 CFR § 1003.19(c).

[154] *Matter of Cerda Reyes*, 26 I&N Dec. 528, 530–31 (BIA 2015) (noting that the rules are "mandatory, but not jurisdictional" and that "[a]lthough the regulations suggest that a bond hearing will usually be held in the location where the alien is detained, policies related to the scheduling of bond hearings, including determining the location of the hearing, are properly within the province of the [Office of the Chief Immigration Judge]").

[155] *See supra* section II.A.3 (discussing ICE transfer policies).

[156] *See* 8 CFR § 1239.1(a).

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

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[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.").

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

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[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.").

hearing may be considered in the removal proceeding.[172] DHS may seek to re-submit evidence presented in the bond proceedings during the removal proceedings, such as evidence related to criminal history that falls outside of the requirements governing what is part of the record of conviction.[173] In addition, as a practical matter, the same IJ usually handles bond and removal in a respondent's case, so if the IJ forms a strong impression of the respondent in the bond hearing, it may carry over into the removal case.

F. Bond Hearing Procedures – Evidence

An IJ can consider "any information that is available to the Immigration Judge or that is presented to him or her by the alien or the Service" in making a bond determination.[174] Any evidence that is "probative and specific" can be considered during the bond hearing.[175] This can include evidence of pending criminal charges or other criminal records beyond conviction documents, such as criminal complaints.[176] Unless otherwise stated by the IJ, the usual document filing deadlines do not apply in bond proceedings.[177] However, practitioners should be mindful that, at least in some jurisdictions, filing documents sufficiently in advance will make it more likely that the IJ adequately reviews them before the hearing.[178] There is no filing fee for a bond motion.[179]

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[172] *Compare Joseph v. Holder,* 600 F.3d 1235, 1240–43 (9th Cir. 2010) (IJ erred in using her notes from respondent's testimony during bond hearing to make an adverse credibility determination during the subsequent removal hearing), *with Zivkovic v. Holder*, 724 F.3d 894, 911 (7th Cir. 2013) (IJ can take into account relevant evidence that arises in bond proceedings for consideration in removal proceedings); *see also* E-A-A-M-, AXXX-XXX-461 (BIA May 10, 2018) (unpublished), scribd.com/document/380079140/E-A-A-M-AXXX-XXX-461-BIA-May-10-2018?secret_password=DWbdoOXLelwsOm4DbzKM (concluding that "nothing in the regulation provides that evidence in the bond file cannot be retrieved and offered separately during the merits case if admissible in both settings").

[173] *See Shepard v. United States*, 544 U.S. 13 (2005) (describing what documents are part of the record of conviction). Practitioners should be vigilant any time DHS seeks to introduce evidence and should make timely and proper objections to preserve the record. *See also Cevada Azizyan*, A044 428 950 (BIA May 13, 2016) (unpublished), scribd.com/document/313685922/Cevada-Azizyan-A044-428-950-BIA-May-13-2016 (remanding after termination for further consideration of whether the respondent had been admitted, and directing that the IJ should consider whether the statements the respondent made during bond proceedings regarding his entry into the United States, which were submitted by DHS in the removal proceeding via a transcript, were inconsistent with testimony during the removal proceedings).

[174] 8 CFR § 1003.19(d). Citing this regulation, the Ninth Circuit concluded that it was proper for an unauthenticated Record of Arrests and Prosecutions (RAP) sheet to come into the bond record and that the authentication requirements found at 8 CFR § 287.6(a) do not apply in bond proceedings. *Singh v. Holder,* 638 F.3d 1196, 1209–10 (9th Cir. 2011).

[175] *Matter of Guerra*, 24 I&N Dec. 37, 40–41 (BIA 2006). Practitioners should object if evidence offered by DHS is not probative or specific, such as in situations where it is unreliable, the source is not stated, or it contains inaccuracies. *See infra* section IV.A.5 (discussing strategies to combat a dangerousness finding when DHS introduces harmful allegations in the absence of a conviction).

[176] *Matter of Guerra*, 24 I&N Dec. at 41 (finding appropriate IJ's consideration of complaint containing "specific and detailed" allegations related to pending drug trafficking charges, where it was signed by a Drug Enforcement Agency agent, described the source of the allegation that the respondent was involved in selling drugs, and "set[] forth the events leading to the respondent's arrest, including locations, alleged accomplices, and other details").

[177] Immigration Court Practice Manual, *supra* note 1, Ch. 9.3(e)(5).

[178] The practitioner may also argue that the timely advanced filing gave the IJ and the ICE OCC attorney sufficient time to review the documents before the hearing.

[179] Immigration Court Practice Manual, *supra* note 1, Ch. 9.3(c)(2).

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

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[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).

proof. However, the BIA case law has repeatedly asserted that it is the respondent's burden to prove eligibility for bond in immigration court bond proceedings.[187]

Nevertheless, practitioners across the country have been successful in recent years in bringing constitutional challenges to the BIA's framework placing the burden of proof on the respondent. For example, in *Brito v. Barr*, the U.S. District Court for the District of Massachusetts concluded that "the Due Process clause requires the Government bear the burden of proof in §1226(a) bond hearings" and ordered injunctive relief to that end for individuals who are detained in Massachusetts or who are "otherwise subject to the jurisdiction of the Boston Immigration Court."[188] Other litigation has resulted in similar outcomes in the Western District of New York[189] and the District of Maryland.[190] Appeals in those cases remain ongoing, but arguments presented therein may provide a helpful framework for practitioners looking to make similar contentions elsewhere.

Separately, some U.S. circuit courts have held that where bond hearings become required due to the length of detention, due process places the burden of proof on the government to establish by clear and convincing evidence that continued detention is justified.[191]

2. Relevant Factors

In the 1976 case *Matter of Patel*, the BIA stated that "[a]n alien generally is not and should not be detained or required to post bond except on a finding that he is a threat to the national security . . . or that he is a poor bail risk."[192] Through subsequent decisions, the BIA has established that the respondent must show that "he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight."[193] In *Matter of Guerra*, the BIA stated that "[a]n alien who presents a danger to persons or property should not be released during the pendency of removal proceedings."[194] In other words, the IJ should not set any bond if the respondent poses a danger to the community.[195] Only if the IJ concludes that the respondent does not pose a danger does the IJ reach the question of flight risk.[196]

Guerra lists a number of factors that the IJ can consider in making a bond determination, which include:

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[187] *See, e.g.*, *Matter of R-A-V-P-*, 27 I&N Dec. 803 (BIA 2020); *Matter of Siniauskas*, 27 I&N Dec. 207 (BIA 2018); *Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006); *Matter of Drysdale*, 20 I&N Dec. 815, 817 (BIA 1994).
[188] *Brito v. Barr*, 415 F. Supp. 3d 258, 266 (D. Mass. 2019).
[189] *Onosamba-Ohindo v. Barr*, 483 F. Supp. 3d 159 (W.D.N.Y. 2020).
[190] *Dubon Miranda v. Barr*, 463 F. Supp. 3d 632 (D. Md. 2020).
[191] *See, e.g.*, *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 224 n.12 (3d Cir. 2018); *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015), *vacated by Shanahan v. Lora*, 138 S. Ct. 1260 (2018); *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011). *But see Borbot v. Warden Hudson Cty. Corr. Facility*, 906 F.3d 274, 279 (3d Cir. 2018) (rejecting respondent's prolonged detention claims and, among other things, perceiving "no problem" that in section 236(a) bond proceedings "the burden remains on the detainee at all times").
[192] 15 I&N Dec. 666, 666 (BIA 1976).
[193] *Matter of Guerra*, 24 I&N Dec. 37, 38 (BIA 2006).
[194] *Id.*
[195] *Matter of Urena*, 25 I&N Dec. 140, 141 (BIA 2009) ("Dangerous aliens are properly detained without bond.").
[196] *Id.*, see flight risk discussion *infra*.

(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 Siniauskas*, 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,

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[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.*, *Siniauskas*, 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.

however, that "family and community ties generally do not mitigate an alien's dangerousness."[204] The BIA ordered that the respondent be detained without any bond, finding that he had failed to meet his burden of proving he was not a danger to the community because of his recent DUI arrest.

Where detained respondents have DUI arrests or convictions, it will be important for practitioners to distinguish a client's case from *Matter of Siniauskas*, by arguing that the bond analysis requires an individualized determination. Some features of Mr. Siniauskas's case that could be distinguished include:

- There were multiple DUIs (three convictions and a fourth arrest)[205]
- Three of the four incidents, including the recent one, involved accidents
- There was a recent DUI arrest, "undercut[ting] [the respondent's] argument that he has established rehabilitation and does not pose a danger to the community"[206]
- The respondent did not appear to dispute the veracity of the allegations underlying the pending charge, and
- The factors that the respondent presented as mitigation or to negate dangerousness existed before the recent arrest and had not prevented it.

In concluding that the evidence of family and community ties did not mitigate dangerousness, the BIA reasoned that the respondent "ha[d] not shown how his family circumstances would mitigate his history of drinking and driving, except to explain that the most recent incident occurred on the anniversary of his mother's death."[207] In unpublished cases decided after *Siniauskas*, the BIA has concluded that the respondent established lack of dangerousness despite a DUI arrest in situations where the respondent had a single DUI, there was no injury to property or persons, the state court did not impose jail time, there was no conviction and the respondent disputed the charges, the respondent showed post-arrest rehabilitation, and the respondent showed strong family ties and other positive equities.[208]

4. Flight Risk Determinations

Under prevailing BIA case law, the IJ should not consider flight risk unless they first determine that the respondent "would not pose a danger to property or persons."[209] Unlike the dangerousness determination,

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[204] *Id.* at 210.
[205] *See id.* ("This is not a case involving a single conviction for driving under the influence from 10 years ago.").
[206] *Id.* at 209.
[207] *Id.* at 210.
[208] *See, e.g.*, G-C-S-, AXXX XXX 032 (Apr. 30, 2019) (unpublished), scribd.com/document/411263889/G-C-S-AXXX-XXX-032-BIA-April-30-2019 (single recent arrest with no conviction yet, no injury to property or persons, close family and community ties); J-S-R-, AXXX XXX 568 (BIA May 25, 2018) (unpublished), scribd.com/document/382794056/J-S-R-AXXX-XXX-568-BIA-May-25-2018 ("[W]e agree with the Immigration Judge that the respondent's over 17 year residence in the United States, strong family ties, support of her 3 minor United States citizen children, longstanding employment as a daycare worker dedicated to providing young children, and commitment to rehabilitation from alcohol abuse, support the finding that she does not pose a danger to the community."); S-H-H-, AXXX XXX 293 (BIA Apr. 27. 2018) (unpublished), scribd.com/document/380078090/S-H-H-AXXX-XXX-293-BIA-April-27-2018 (single DUI conviction in 15 years).
[209] *Urena*, 25 I&N Dec. at 141–42; *accord Siniauskas*, 27 I&N Dec. at 210.

an IJ can conclude that the respondent poses some level of flight risk and still set a bond to ensure appearance at future hearings.[210] Since "[t]he purpose of the bond is to ensure the respondent's presence at future proceedings," the IJ may set an amount of bond that varies "according to his assessment of the amount needed to motivate the respondent to appear in light of the considerations deemed relevant to bond determinations."[211] In *Matter of Drysdale*, for example, the BIA affirmed a $20,000 bond based on the fact that the respondent had "left his parental home and moved to another area, committed a serious drug trafficking crime soon after entering the United States, and was ineligible for any form of relief from deportation," and had an administratively final order of removal.[212] Sometimes the issue of flight risk overlaps with dangerousness. For example, the IJ may consider a respondent's criminal record as relevant to a flight risk determination (in addition to its more obvious relevance to dangerousness), to the extent that it may affect the respondent's eligibility for immigration relief.[213]

In a 2020 decision, *Matter of R-A-V-P-*, the BIA affirmed the IJ's denial of bond due to flight risk concerns where the respondent had recently arrived in the country, had "minimal ties to the United States," and had a "limited avenue for relief" in the form of his pending asylum application.[214] Additionally, although the respondent presented evidence of a fixed address and a sponsor willing to support him upon his release from detention, the BIA found such evidence "insufficient" to assuage flight risk concerns where there was "a lack of independent evidence establishing [the sponsor's] immigration status, as well as his ability to support the respondent" and no information "regarding how [the sponsor] knows the respondent or the nature of their relationship."[215] And while the respondent argued that his pending asylum application mitigated against flight concerns, the BIA noted that "eligibility for asylum can be difficult to establish, and an Immigration Judge may consider an alien's circumstances in determining how likely it is that his application for relief will ultimately be approved."[216]

Since *Matter of R-A-V-P-* was issued, however, several unpublished BIA cases have already demonstrated the limits of the BIA's holding there. For example, in one case, the BIA remanded the IJ's prior bond denial where the respondent had, in contrast to *Matter of R-A-V-P-*, filed evidence of lawfully present family

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[210] *See Matter of Drysdale*, 20 I&N Dec. 815, 818 (BIA 1994) (noting that "[u]nlike the standard for determining if there is a danger to the community, [the flight risk determination] allows for flexibility"); *see, e.g.*, [Respondent Name Redacted] (BIA Aug. 7, 2014) (unpublished), AILA Doc. No. 14100846, aila.org/infonet (agreeing with IJ that respondent was a flight risk given lack of employment record, no property ownership, and employment of a smuggler to gain entry to the United States, but ordering release on $5,000 bond because "evidence of a fixed address where she will reside, significant family ties in this country, and her claim of relief from removal provide some incentive for her to appear for future immigration proceedings").

[211] *Drysdale*, 20 I&N Dec. at 818. Note that the *Drysdale* case was decided in 1994, before current statutory provisions governing mandatory detention were enacted.

[212] *Id.*

[213] In *Matter of Andrade*, the BIA overruled the IJ's decision to release the respondent on his own recognizance and set a $10,000 bond, reasoning that the respondent's criminal history "negatively affects the discretionary grant" of relief for which he was statutorily eligible, "thereby giving him less motivation to appear at his deportation hearing." 19 I&N 488, 491 (BIA 1987).

[214] 27 I&N Dec. 803, 805–07 (BIA 2020).

[215] *Id.* at 806.

[216] *Id.*

members willing and able to sponsor him.[217] Similarly, in another unpublished opinion, the BIA ordered the respondent released on a $3,000 bond, explaining that *Matter of R-A-V-P-* was distinguishable where the respondent had presented evidence of a U.S. citizen family member willing to sponsor and support him and where the IJ "did not consider the respondent's favorable credible fear interview."[218]

While these cases indicate that a documented sponsor is one strong basis for distinguishing *Matter of R-A-V-P*, practitioners may want to consider other possible grounds for doing so, such as:

- Submitting evidence of a sponsor's financial background and ability to support the respondent upon release, such as pay stubs, tax returns, letters from employers, proof of property ownership, etc.
- Including explicit plans in a sponsor's support letter for how the respondent will get to and from court hearings
- Documenting the depth of a respondent's relationship to the sponsor
- Having the sponsor appear at the bond hearing where safe and feasible
- Filing supporting evidence regarding the viability/strength of the respondent's underlying form of relief.

5. Consideration of Respondent's Ability to Pay in Setting Bond Amount

In *Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017), the U.S. Court of Appeals for the Ninth Circuit ruled that IJs in bond proceedings must consider a respondent's ability to pay as well as their amenability to release on alternatives to detention. The court's ruling was grounded in the Fifth Amendment due process right, which "prohibits our government from discriminating against the poor in providing access to fundamental rights, including the freedom from physical restraints on individual liberty."[219] In that decision, the late Judge Stephen Reinhardt wrote, "While the temporary detention of non-citizens may sometimes be justified by concerns about public safety or flight risk, the government's discretion to incarcerate non-citizens is always constrained by the requirements of due process: no person may be imprisoned merely on account of his poverty."[220] While this ruling is only binding within the Ninth Circuit, practitioners throughout the country should consider arguing that as a matter of due process, IJs in bond proceedings must consider ability to pay and suitability for release on alternatives to detention, citing to the *Hernandez* decision as persuasive authority.[221]

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[217] A-G-T-, AXXX XXX 483 (BIA May 19, 2020).
[218] A-A-F-, AXXX XXX 282 (BIA June 16, 2020).
[219] 872 F.3d at 981.
[220] *Id.*
[221] *See* ACLU, *Practice Advisory: Bond Hearings and Ability-to-Pay Determinations in the Ninth Circuit Under Hernandez v. Sessions* (Dec. 2017), aclu.org/other/practice-advisory-bond-hearing-and-ability-pay-determinations (includes tips on making these arguments in bond hearings and sample *pro se* motions). Individuals unable to pay the bond amount set could also consider habeas relief in federal district court, arguing that the bond amount must take into account the individual's ability to pay. *See* Adam Klasfeld, *Haitian Asylum Seeker Freed in Landmark Bond Case*, COURTHOUSE NEWS, June 14, 2017, courthousenews.com/haitian-asylum-seeker-freed-landmark-bond-case (reporting the case of an individual who successfully argued before the U.S. District Court for the Southern District of New York for a lower bond based on arguments that he was unable to pay the initial bond amount set).

Litigation in several other jurisdictions has also resulted in district court rulings that due process requires consideration of a respondent's ability to pay and alternatives to detention when setting bond under INA § 236(a).[222] Additionally, in the context of INA § 236(c) prolonged detention habeas litigation, district courts have recognized similar due process requirements.[223]

6. The Government's Use of Deterrence as a Bond Factor

In a 2003 opinion, *Matter of D-J-*, the Attorney General ruled that the government could deny bond for the purpose of deterring mass migration, citing national security interests.[224] In 2014, after a surge in the migration of women and children fleeing violence in Central America, the U.S. government began detaining large numbers of mothers and children in family detention centers. It argued that they should not be released on bond despite passing credible fear interviews and cited the deterrent effect as justification. The ACLU filed a class action lawsuit challenging the government's policy of denying bond to families based on a general deterrence rationale rather than considering individualized circumstances.[225] In May of 2015, the government issued a policy stating that it would no longer consider general deterrence in making detention decisions for families; the lawsuit is now administratively closed so long as the government continues to abide by that policy.[226] Note, however, that the government could still invoke deterrence as a national security-based rationale in cases that do not involve detained families.

IV. Nuts and Bolts of Bond Proceedings

This section provides practical tips for effective preparation for and representation of clients during a bond hearing.[227] Part A of this section discusses preparation, including working with the detained client, gathering and developing evidence, and submitting documents to the immigration court. Part B provides tips for the bond hearing itself. Part C covers post bond hearing considerations.

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[222] *See, e.g.*, *Dubon Miranda v. Barr*, 463 F. Supp. 3d 632, 649–50 (D. Md. 2020); *Onosamba-Ohindo v. Barr*, 483 F. Supp. 3d 159 (W.D.N.Y. 2020); *Brito v. Barr*, 415 F. Supp. 3d 258, 267 (D. Mass. 2019). For further discussion of these decisions, see section III.H.1 *supra*.

[223] *See, e.g.*, *Constant v. Barr*, 409 F. Supp. 3d 159, 172 (W.D.N.Y. 2019); *Wilkins v. Doll*, No. 1:17-CV-2354, 2018 WL 3388032, at *2 (M.D. Pa. July 12, 2018).

[224] *Matter of D-J-*, 23 I&N Dec. 572 (A.G. 2003) ("As demonstrated by the declarations of the concerned national security agencies submitted by INS, there is a substantial prospect that the release of such aliens into the United States would come to the attention of others in Haiti and encourage future surges in illegal migration by sea. Encouraging such unlawful mass migrations is inconsistent with sound immigration policy and important national security interests.").

[225] *See R.I.L.R. v. Johnson*, No. 15-11 (D.D.C. filed Jan. 6, 2015). Litigation documents including the complaint and amended complaint are available on the ACLU's website at aclu.org/cases/rilr-v-johnson (updated July 31, 2015).

[226] ACLU, RILR v. Johnson, aclu.org/cases/rilr-v-johnson (updated July 31, 2015).

[227] For other excellent resources providing practice tips for bond hearings, see, for example, Maria Baldini-Potermin, Immigration Trial Handbook §§ 4:22-34 (2019 Ed.); Immigrant Legal Resource Center, Removal Defense: Defending Immigrants in Immigration Court Ch. 6 (3rd ed. 2020); Adilene Nunez, *A Practitioner's Guide to Bond Issues*, 17-02 Immigr. Briefings 1 (Feb. 2017).

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.

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]

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[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.gov/odls/#/index (last visited Apr. 4, 2021).
[233] A list of ICE ERO field offices can be found on the ICE website, ice.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).

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 States[237]
- Employment records showing a steady employment history[238]
- 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 Bond[241]

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*.

- Declarations or letters of support from school staff if the client or the client's child is in school
- Declaration or letter of support from the client's employer, if the client has valid work authorization[243]
- Declarations, letters, or program information from social workers or organizations that have or can accept the client into drug/alcohol rehabilitation programs, domestic violence/anger management class, job training, etc.
- Psychological evaluations or proof that the client has been or will be attending therapy or a support group upon release, and
- If the client lacks a sponsor and may be deemed a flight risk or if they require some type of rehabilitation (such as for substance abuse or anger issues resulting in domestic violence incidents), evidence of a fully developed post-release plan. The plan should articulate the client's intended next steps once released from detention and address issues such as transportation, housing, and treatment programs. Documentation of what the release plan would be if the person needs programmatic support may include a printout of the local Alcoholics Anonymous schedule, acceptance into a residential treatment program, or evidence of the individual's transportation plan if they cannot legally drive.

Practice Tip on Developing an Effective Declaration

An effective declaration or letter submitted on behalf of a detained client seeking bond should state who the declarant is and how they know the respondent. It should provide specific details supporting the respondent's release on bond. The declarant should be asked to include a phone number and should be warned of the unlikely possibility that DHS (or the IJ during the hearing) could call them to verify the information. It is best that only individuals who have lawful immigration status in the United States, preferably U.S. citizens or lawful permanent residents, submit documents in immigration court or appear at court in support of a respondent. If the declarant asks the representative about the risks or consequences of submitting a declaration or letter or of coming to court, the representative might have a conflict of interest and may need to recommend that the person seek independent advice. Organizations may be able to establish informal cross-referrals, whereby one nonprofit agency represents the declarant while another represents the detained individual.

In some situations, such as where the declarant is illiterate, it may be most effective for the practitioner to draft the declaration based on a conversation with the individual. In other situations, it may be preferable to have the declarant prepare the first draft and then the practitioner can edit or polish it. In such situations, practitioners should give the declarant specific suggestions about the content, organization, and format to follow.

An effective declaration or letter should contain sufficient detail and describe how the declarant knows that the respondent is neither a flight risk nor is dangerous. This will require, where the respondent has a criminal

[243] Employers may be concerned about the risks of writing a letter of support, especially if the client lacks an employment authorization document. Practitioners should take care to avoid a conflict of interest when such questions arise.

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

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[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).

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 proceedings to be considered in the bond proceeding, those documents must be separately submitted in the bond proceeding.[264]

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[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.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.

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 phone[265] 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.

OCC attorney or the client's deportation officer, though the likelihood that this request will be successful may vary greatly by jurisdiction.[266] These documents assist the practitioner in better understanding what information the government has and in preparing successfully for the hearing.

Requesting Testimony

Unlike merits hearings in which the respondent is expected to testify, not all IJs expect or find it necessary for a respondent or other witnesses to testify in bond hearings. Those IJs may instead expect an offer of proof from the representative and/or a written declaration.[267] These alternatives to oral testimony allow IJs to keep the bond hearing brief. While written declarations help IJs manage their detained dockets, they do not guarantee that the IJ has carefully read the testimony. As such, and if the pros and cons of the testimony have been carefully assessed, practitioners should orally or in writing move for leave for the respondent and any other witnesses to testify and submit a witness list, if requested. If the IJ denies the motion and then disregards information in the declaration, the due process issue is preserved for appeal.[268] Practitioners should reach out to other local practitioners to find out the typical practice in their jurisdiction and of the specific IJ who will be presiding over the bond hearing.

Preparing the Client for Testimony

A respondent may or may not testify at a bond hearing; the IJ may prefer that the representative provide an offer of proof describing what the testimony would include.[269] Some, but not all, IJs who prefer testimony at the bond hearing will place the client under oath before taking testimony. Whether or not the respondent presents affirmative testimony, the ICE OCC attorney may cross-examine the respondent and the IJ may also

[266] If ICE OCC refuses to provide the Form I-213 before the hearing but seeks to introduce it into evidence at the bond hearing, practitioners should request a continuance to review and discuss the Form I-213 with the client.

[267] For example, in San Francisco it is common for respondents to testify at bond hearings, while in Baltimore IJs generally prefer a written declaration.

[268] Practitioners might cite to U.S. courts of appeal cases in their jurisdiction that consider due process violations generally in removal proceedings. *See, e.g.*, *Atemnkeng v. Barr*, 948 F.3d 231, 242 (4th Cir. 2020) (concluding that the IJ's failure to consider respondent's testimony on remand constituted a due process violation); *Zheng v. Mukasey*, 552 F.3d 277, 286 (2d Cir. 2009) (holding that an IJ's failure to give any consideration to "an undeniably probative piece of evidence amounts to a denial of the traditional standards of fairness that due process demands"); *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000) (remanding because of due process violation where respondent "was not given a full and fair hearing or a reasonable opportunity to present evidence on his behalf"). In an unpublished decision, the BIA remanded for further consideration where the IJ had denied bond but the respondent had not been able to testify because no interpreter was provided at the bond hearing. R-L-P, AXXX-XXX-958 (BIA Oct. 12, 2017) (unpublished), scribd.com/document/365692961/R-L-P-AXXX-XXX-958-BIA-Oct-12-2017 (concluding that respondent had demonstrated prejudice as required and remanding to provide respondent an opportunity to testify in support of her bond request).

[269] Whether or not an offer of proof is accepted may also depend on whether the ICE OCC attorney objects to its use. However, practitioners should not make an offer of proof unless facts are known and there is corroboration in the record. It is problematic when IJs attempt to elicit testimony from the representative regarding facts that would be prejudicial to the client, for example, where an IJ questions the representative about the facts behind an arrest about which there are pending criminal charges. *See infra* section IV.A.5 (discussion beginning with heading "Showing Lack of Dangerousness Where There Are Pending Criminal Charges Against the Respondent").

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.

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.

ways of communicating those facts. Likewise, the witness should be informed about how to raise communication problems if there is an interpreter, and to answer, "I don't know," "I don't remember," or "I don't understand" when those responses are true. The witness should also be prepared for cross-examination by the OCC attorney and questioning by the IJ. The witness should practice pausing briefly after questions on cross-examination to give the practitioner time to make any necessary objection and for the witness to control their nerves. Witnesses should be reminded to think before answering a question, and to answer only the question asked.

Sometimes, such as in cases involving domestic violence allegations or convictions, a domestic partner or other victim will seek to provide written or oral testimony supporting release on bond. Practitioners should take special care in these situations. Practitioners must examine whether there is any no-contact order in place that would prohibit the practitioner from communicating with the victim, as an agent of the respondent. The IJ may want to question this type of witness about whether they are afraid of the respondent, and about how the witness's prior claims resulting in the domestic violence allegations are consistent with the witness's desire that the respondent be released. Furthermore, the ICE OCC attorney could refer the witness to state prosecutors for making a false police report if the witness's testimony in the bond proceeding contradicts the allegations made against the respondent in the underlying criminal matter. Witnesses should be carefully prepared for written or oral testimony. Practitioners should also consider whether there are ethical issues that would prevent speaking or working with a witness whose interests might be adverse to the client, and whether separate representation is needed. At a minimum, the practitioner should confirm in writing with the witness that they represent the respondent, not the witness.

Finally, if a witness's testimony is important but for some reason their physical appearance in court on the day of the hearing is not possible, practitioners can move for leave to present telephonic testimony.[274]

Preparing for Cross of DHS Witnesses

It is rare that DHS would present a witness at a bond hearing. However, if DHS does present any witnesses, respondents have the right to cross-examine them.[275] Practitioners should prepare in advance for cross-examination of any DHS witnesses. If the practitioner is not advised ahead of time that DHS intends to present a witness, they may object or seek a recess or continuance in order to prepare.

5. Mitigating Harmful Evidence, Facts, or Allegations Suggesting Dangerousness

In many cases, success or failure in seeking bond will come down to dealing with harmful or irrelevant evidence or facts that DHS will argue show that the respondent is dangerous and should not be released. BIA case law puts the burden on the respondent to prove that they would not pose a danger to the

[274] The requirements for such motions can be found in the Immigration Court Practice Manual, *supra* note 1, Ch. 4.15(n).
[275] Note that a bond hearing where the government has the burden to prove by clear and convincing evidence that the noncitizen requires continued detention because they pose a danger or are a flight risk will also require that ICE conduct the direct-examination and the practitioner conduct the cross-examination.

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 activity[277]
- 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 relief[278]
- 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 community[279]
- 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 Siniauskas*, 27 I&N Dec. 207 (BIA 2018), was the fact that at least three of the respondent's DUI incidents had involved accidents. Since *Siniauskas* 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-Bismark-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."

- Letters from family or friends stating that they will support the client on release including efforts toward rehabilitation (for example, driving the client to Alcoholics Anonymous meetings)
- Expert evidence, such as a psychological examination, concluding that the client does not pose a danger to the community or is not likely to commit another offense
- Whether the client received good time credits (including listing the relevant factors for receiving those credits), displayed positive behavior while incarcerated, did well on probation, or other evidence that the client was amenable to rehabilitation under the criminal justice system. Consider what evidence might be obtained to establish this, including a letter of recommendation from a probation officer or certificates of completed programming. Practitioners should check to see whether favorable assessments exist that evidence lack of dangerousness or amenability to release. For example, there could be bail assessments, chemical dependency assessments, presentence investigation reports, or records from time in custody in which the respondent was assessed as a good candidate for release within the state criminal justice system
- Any post-release plan that shows, for example, acceptance into a residential alcohol treatment program in the case of a client with a DUI[280]
- If the respondent is on criminal probation, practitioners may wish to highlight probation tracking mechanisms that will take effect upon release, such as drug or alcohol monitoring and regular check-ins
- Arguments that past convictions are insufficient to establish present or future dangerousness.[281] Argue that the IJ must conduct an individualized analysis that considers the recency and seriousness of the convictions as well as the evidence of rehabilitation, and
- If the criminal conduct occurred while the respondent was a juvenile, present scientific studies that suggest that delinquent conduct as a minor is not representative of how the individual will behave as an adult with a fully developed brain.[282]

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[280] *See, e.g.*, E-C-, AXXX XXX 516 (BIA Apr. 20, 2017) (unpublished), scribd.com/document/349318995/E-C-AXXX-XXX-516-Bia-April-20-2017 (dismissing DHS's appeal of a $7,500 bond for a respondent with two 2016 DUI convictions, where the IJ's bond order directed that the respondent remain in treatment after release and the respondent had provided evidence of his participation in alcohol rehabilitation programs while in detention, his enrollment in a residential treatment program if released, and his family support). While the BIA in *Matter of Siniauskas* concluded that the respondent's evidence of rehabilitation including evidence of participation in Alcoholics Anonymous and medical treatment was insufficient to prove lack of dangerousness following multiple DUIs, in that case, the BIA noted that the mitigation factors the respondent presented had "existed prior to his most recent arrest, and . . . did not deter his conduct." 27 I&N Dec. at 210.

[281] *Cf. United States v. Salerno*, 481 U.S. 739, 750 (1987) (upholding constitutionality of pretrial detention scheme found in Bail Reform Act that allowed for detention of those accused of "extremely serious offenses" after a "full-blown adversary hearing" in which the government has the burden to prove by clear and convincing evidence that "no conditions of release can reasonably assure the safety of the community or any person"); *Chi Thon Ngo v. INS.*, 192 F.3d 390, 398 (3d Cir. 1999) (noting that, in context of individual detained for a prolonged period after an order of removal, "presenting danger to the community at one point by committing crime does not place them forever beyond redemption").

[282] *See* Laurence Steinberg, *A Dual Systems Model of Adolescent Risk-Taking*, 52 DEVELOPMENTAL PSYCHOBIOLOGY 216 (Mar. 8, 2010), onlinelibrary.wiley.com/doi/10.1002/dev.20445/pdf.

Showing Lack of Dangerousness Where There Are Pending Criminal Charges Against the Respondent

In some situations, the outcome of pending charges will affect the client's eligibility for relief. Practitioners should consider whether the client's chances for a good bond outcome would be increased if the client postponed the bond hearing and sought to resolve the pending criminal charges first. This may be a particularly useful strategy if the pending charges are serious or a conviction would cause mandatory detention and it is likely that the IJ will deny bond based on them. If the respondent has a criminal defense attorney, practitioners should reach out to this person and discuss the possibility of having the state court issue a writ (*i.e.* an order) to return the client to state custody to face the charges. If there is no criminal defense attorney, practitioners could reach out to local public defenders to find out if one could be appointed, and if not, reach out to or partner with a local criminal defense attorney who can assist with this process. Practitioners should also coordinate with criminal defense counsel to craft a plan for what to do if ICE ignores or refuses to honor the state court writ. If criminal defense counsel is not able to obtain a writ, practitioners can also inquire whether there are other criminal law mechanisms to resolve the pending charge, such as having the client enter a written, favorable plea agreement, dismissal for failure to prosecute, or through speedy trial or mandatory disposition of detainers act provisions.[283]

When a respondent seeking bond has pending criminal charges, practitioners should expect DHS to argue that those pending charges establish dangerousness and preclude the respondent's release. The idea that pending charges (even where there has been no determination of guilt) can establish dangerousness is supported by BIA precedent, including in *Matter of Siniauskas*, 27 I&N Dec. 207 (BIA 2018) and *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006). Some IJs may assume that the facts alleged in the underlying arrest or police reports are true. To counter these arguments, practitioners should focus on how the facts in the particular case differ from the *Guerra* case,[284] where the BIA found that the allegations in the criminal complaint were sufficiently "specific and detailed." The purpose is to establish why the proffered evidence is not probative or reliable and thus not deserving of consideration. Practitioners should ground arguments

[283] If the client is facing pending federal charges, there may be additional arguments to raise in the federal court criminal proceedings which, if successful, could result in dismissal of the federal case or prevent the client's being transferred to ICE custody upon release from federal criminal custody. *See, e.g.*, *United States v. Santos-Flores*, 794 F.3d 1088 (9th Cir. 2015) (concluding that existence of an ICE detainer was not an adequate reason to deny release under the Bail Reform Act and that if an individual fails to appear due to having been placed into ICE custody the court may craft an "appropriate remedy"); *United States v. Boutin*, 269 F. Supp. 3d 24 (E.D.N.Y. 2017); *United States v. Trujillo-Alvarez*, 900 F. Supp. 2d 1167 (D. Or. 2012) (ordering that federal criminal defendant who had been ordered released from criminal custody under the Bail Reform Act either be released from ICE custody or federal charge would be dismissed with prejudice). *But see United States v. Barrera-Landa*, 964 F.3d 912 (10th Cir. 2020) (order releasing defendant under the Bail Reform Act did not conflict with ICE's authority under the INA to facilitate his removal, even while the criminal case was still pending); *United States v. Vasquez-Benitez*, No. 18-3076 (D.C. Cir. Mar. 26, 2019) (reversing district court decision prohibiting ICE from detaining defendant after release from federal custody based on the mistaken belief that the Bail Reform Act was the exclusive authority for detaining a defendant charged with illegal reentry); *United States v. Veloz-Alonso*, 910 F.3d 266, 270 (6th Cir. 2018) (finding no conflict between the Bail Reform Act and the INA's mandate to detain "certain illegal aliens"); *United States v. Villatoro-Ventura*, 330 F. Supp. 3d 1118 (N.D. Iowa 2018) (concluding that dismissal of defendant's indictment for illegal reentry was not warranted based on his detention by ICE following his pretrial release under the Bail Reform Act).

[284] Practitioners could also point out that in *Matter of Siniauskas* there did not appear to be any challenge to the consideration of the pending DUI charge in the dangerousness analysis, or any dispute about the accuracy of the allegations.

within BIA precedents and also the due process evidentiary framework that governs removal proceedings. Under that framework, the test for whether evidence should be admitted is "whether it is probative and its admission is fundamentally fair."[285] If the facts permit, practitioners should point out how in their case, unlike in *Guerra*:

- The evidence of the alleged criminal activity is not specific and detailed[286]
- The source of the allegations is not clear
- The author of the report or complaint is not identified
- There is a history of false charges against the respondent
- The charges are clearly overbroad compared to the conducted alleged, or
- Other reasons exist that raise doubt about the respondent's guilt.

Practitioners could also argue that charging documents are not proof of the alleged conduct described in them, and that although the IJ can look at them, they should not be taken as true given their unreliability and the presumption of innocence.[287] Of course, a prior conviction for the same or similar charged conduct will make it more difficult to succeed with the above arguments.[288]

In *Ortega-Rangel v. Sessions*, 313 F. Supp. 3d 993 (N.D. Cal. 2018), a federal district court ruled that an IJ's denial of bond relying only on the fact of the habeas petitioner's arrest and pending charge for possession for sale of a controlled substance violated due process. The court reasoned that the mere fact of the respondent's arrest was not "probative and specific" evidence as required by *Guerra*, and contrasted the evidence in the case with the evidence in the *Guerra* case. The district court noted that the IJ had found that the petitioner had sold drugs but the record did not contain sufficient evidence to show that she had committed the crime she was arrested for. The court noted that that the respondent did not have a criminal record, had not admitted to selling drugs, that there had been no probable cause determination by the state court, and that the sheriff's office declaration did not contain facts showing that she sold drugs. The district court ordered that the IJ conduct a bond hearing compliant with due process within 15 days. Where relevant, practitioners could draw on the reasoning of this case in distinguishing *Guerra* and *Siniauskas* and arguing for release on bond for clients with pending charges.

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[285] *Matter of Y-S-L-C-*, 26 I&N Dec. 688, 690 (BIA 2015).

[286] Practitioners may also want to cite *United States v. Salerno*, 481 U.S. 739 (1987), a case interpreting the provisions of the Bail Reform Act that required the government to prove by clear and convincing evidence that no conditions could reasonably assure the safety of any other person and the community in order to justify pretrial detention. In *Salerno*, the Supreme Court noted that the government must prove an "identified and articulable threat to an individual or the community" to justify pretrial detention. While the context of civil immigration detention is distinct, practitioners could argue that similar principles apply when weighing unproven allegations and their effect on a dangerousness determination precluding release.

[287] See also discussion below under subheading "Showing Lack of Dangerousness When DHS Introduces Harmful Allegations, in the Absence of Any Pending Charges or Criminal Convictions" (further discussing potential strategies to challenge allegations in the absence of a conviction and noting relevant case law).

[288] *Cf. Matter of Siniauskas*, 27 I&N Dec. at 209 (no bond warranted where respondent had previous DUI convictions and a recent DUI arrest, noting that he "asserts that he will not repeat his dangerous drinking and driving behavior, but his actions are a better indication of his future conduct than his assurances to the contrary").

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 Siniauskas*, 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).

the client of their rights and the consequences of answering the questions, and provide the client with careful advice before the hearing.

When considering whether or not to invoke the Fifth Amendment privilege, practitioners should advise the client that the IJ may draw an adverse inference if the client chooses to remain silent.[291] If a client wishes to invoke the Fifth Amendment, practitioners should consider filing a motion *in limine* seeking to prohibit questioning of the client about the underlying conduct based on the Fifth Amendment privilege, perhaps with a letter from criminal defense counsel. If this is not successful, the practitioner should advise the client of the need to invoke the Fifth Amendment privilege in response to each question that could elicit incriminating information and prepare the client on how to do so.[292] If the client has difficulty asserting this privilege, the practitioner could argue that this privilege can be invoked by the practitioner.[293]

The option of asserting the Fifth Amendment privilege must be balanced against the respondent's burden of proof in bond proceedings, including the burden to show that their release would not pose a danger. Current precedents allow an IJ to consider pending charges in the dangerousness analysis. This "catch-22" scenario demonstrates the harmful effect on respondents' rights when ICE chooses to arrest and detain an individual who is in the midst of criminal court proceedings. The individual is prevented from being able to face the criminal charges, sometimes is issued a warrant for failure to appear at the criminal proceeding, and is also prejudiced at the immigration bond hearing because of the pending charge that ICE prevented the respondent from confronting. Practitioners should consider other ways besides the respondent's testimony to argue that the allegations are unreliable and should be afforded minimal weight.

Showing Lack of Dangerousness When DHS Introduces Harmful Allegations, in the Absence of Any Pending Charges or Criminal Convictions

In cases where DHS introduces harmful allegations or evidence of previous arrests, but there are no pending charges or convictions, practitioners may want to consider some of the strategies detailed in the sections above related to respondents with pending charges. For example, practitioners could contrast the proffered DHS evidence in the particular case from the "specific and detailed" evidence the BIA accepted in *Guerra*.

Practitioners can argue that the IJ's discretion is not so broad as to extend to conduct that does not lead to charges, unlike the facts of *Guerra* and *Siniauskas* where charges had been filed. In particular, practitioners can argue that evidence in bond hearings must meet the same standards for being probative and reliable

[291] *See, e.g.*, *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) ("[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them. . . ."); *Gutierrez v. Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011) ("In a deportation hearing there is no prohibition against drawing an adverse inference when a petitioner invokes his Fifth Amendment right against self-incrimination.").

[292] The practitioner should help the client practice invoking the Fifth Amendment privilege. One strategy is to type out a sentence for the client to state and have them practice it many times.

[293] *See Matter of Sandoval*, 17 I&N Dec. 70, 72 n.1 (BIA 1979) (finding that the Fifth Amendment privilege had been properly raised where the respondent stated that she did not "like to answer," counsel explained that the client was in fact invoking the privilege, and the client faced a "language barrier").

that 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]

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[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)).

- Does the document lack detail?[298]
- What is the source of the statements contained in the document?[299]
- How was the document prepared or created? The ICE OCC attorney may not lay proper foundation for documents they seek to introduce.
- Is the source for the document's statements identified or does the document rely on confidential informants or other undisclosed sources?[300]
- Is ICE relying on evidence that the client is listed in a gang database? If so, can evidence be introduced to show that the gang database is unreliable?[301] For example, what "evidence" was relied on to justify the client's inclusion in the database?
- Does the person making the allegations have a bias? For example, did racial profiling play a role in the stop? In examining law enforcement officer bias, practitioners could investigate whether complaints have been filed against that particular officer and whether there is a pattern of race-based conduct.
- Is the proffered evidence irrelevant? For example, if DHS seeks to introduce generalized information not specific to the particular respondent, such as a flyer about the dangers of DUIs, the practitioner could object on relevance grounds and argue in the alternative that it should be afforded little weight.

Practitioners should make objections to the admission of DHS evidence when the evidence fails to meet the immigration court evidentiary standard, and argue in the alternative that even if the evidence is admitted, it should be afforded minimal weight.[302]

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[298] *See, e.g.*, *Lin*, 459 F.3d at 270; *Ezeagwuna v. Ashcroft*, 325 F.3d 396, 408 (3d Cir. 2003).

[299] *See, e.g.*, *Lin*, 459 F.3d at 272 (concluding that government document should have been excluded in part because the source of the information was "highly unreliable"); *Ezeagwuna*, 325 F.3d at 406 (concluding that it was a due process violation to rely on government documents that reported the statements of "declarants who are far removed from the evidence sought to be introduced").

[300] *See, e.g.*, *Banat v. Holder*, 557 F.3d 886, 892 (8th Cir. 2009) (concluding that government evidence was unreliable in part because it relied on unidentified sources without any attempt to verify the claims made by the source or any showing of the qualifications or experience of the unidentified sources); *Alexandrov*, 442 F.3d at 407 (concluding that IJ should not have relied on Department of State report because it was unreliable, in part because it did not identify who the investigator was or what type of investigation was conducted).

[301] For discussion of gang databases, see CUNY School of Law Immigrant and Non-Citizen Rights Clinic, *Toolkit to Challenge Gang Allegations Against Immigrant New Yorkers* (2019), law.cuny.edu/wp-content/uploads/media-assets/INRC_Toolkit_TOC_0729.pdf; National Immigration Law Center, *Untangling the Immigration Enforcement Web*, at 10–12 (Sept. 2017), nilc.org/wp-content/uploads/2017/09/Untangling-Immigration-Enforcement-Web-2017-09.pdf [hereinafter "Untangling the Immigration Enforcement Web"]; Immigrant Legal Resource Center, *Practice Advisory: Understanding Allegations of Gang Membership/Affiliation in Immigration Cases* (Apr. 2017), ilrc.org/sites/default/files/resources/ilrc_gang_advisory-20170509.pdf [hereinafter "Understanding Allegations of Gang Membership"]. For specific strategies to combat gang allegations in immigration court, see Immigrant Defense Project, *Challenging Evidence of Gang-Related Activity at Immigration Court Bond Hearings* (Aug. 3, 2017), immigrantdefenseproject.org/wp-content/uploads/Practice-Note-8-3-17-gang-bond-hearings-1.pdf.

[302] For an overview on the rules of evidence in immigration court, see Rebecca Scholtz and Michelle Mendez, Catholic Legal Immigration Network, Inc., *Practice Advisory: Rules of Evidence in Immigration Court Proceedings* (Mar. 13, 2020), cliniclegal.org/resources/removal-proceedings/practice-advisory-rules-evidence-immigration-court-proceedings.

Objections Based on Hearsay

Many types of allegations that DHS seeks to introduce to prove a respondent's dangerousness may be in the form of hearsay, such as police reports or DHS memos of gang affiliation. Hearsay is an out-of-court statement used to prove the truth of the matter asserted.[303] Practitioners should analyze separately each layer of hearsay in a document and what arguments can be made against its admission into evidence. Unlike in federal court proceedings, in immigration court hearsay is generally admissible, and case law supports the admission of hearsay statements such as police reports in the consideration of a respondent's request for discretionary relief.[304] However, hearsay evidence may be excluded if it is unreliable or its admission would otherwise be fundamentally unfair. Thus, practitioners should make particularized arguments about why admission of the proffered ICE hearsay evidence would be fundamentally unfair, and argue in the alternative that if the immigration court decides to admit the hearsay evidence over the respondent's objection, it should be afforded minimal weight. Instead of or in addition to grounding the objection within a hearsay framework, the practitioner might also consider objecting, where appropriate, based on the source's lack of personal knowledge, speculation, improper lay witness opinion, conclusory statements, or attack the qualifications of any source the ICE OCC attorney tries to present as an "expert."

Arguments to consider in challenging aspects of the hearsay evidence include:

- Lack of oversight and due process involved in creating the record (for example, in the gang database context), makes it unreliable[305]
- The evidence contains multiple levels of hearsay, indicating that it is unreliable[306]
- The evidence relies on statements from an unnamed confidential source and thus it would be unfair to admit it given the impossibility of evaluating the reliability of the source
- ICE has not produced the source for cross-examination and thus it would be unfair to admit the hearsay into evidence in light of the respondent's statutory right to "examine the evidence against

[303] F. R. Evid. 801(c) ("Hearsay means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.").
[304] *See, e.g.*, *Carcamo v. U.S. Dep't of Justice*, 498 F.3d 94, 98 (2d Cir. 2007) ("[P]olice reports and complaints, even if containing hearsay and not a part of the formal record of conviction, are appropriately admitted for the purposes of considering an application for discretionary relief."); *Matter of Grijalva*, 19 I&N Dec. 713, 722 (BIA 1998) ("[T]he admission into the record of the information contained in the police reports is especially appropriate in cases involving discretionary relief from deportation, where all relevant factors concerning an arrest and conviction should be considered to determine whether an alien warrants a favorable exercise of discretion.").
[305] *See* Untangling the Immigration Enforcement Web, *supra* note 302, at 10–12; Understanding Allegations of Gang Membership, *supra* note 301.
[306] *See, e.g.*, *Banat*, 557 F.3d at 892 (concluding that government document should not have been relied on due to its lack of details and given that it contained "multiple levels of hearsay"); *Lin*, 459 F.3d at 272 (concluding that a document was unreliable in part because it "contain[ed] multiple levels of hearsay that exacerbate its myriad reliability problems"); *Ezeagwuna*, 325 F.3d at 406 (concluding that the BIA erred in relying on government document that contained "multiple hearsay of the most troubling kind").

[them] . . . and to cross-examine witnesses presented by the Government."[307] To fully preserve this argument, practitioners should request to cross-examine the source of the statements, including asking the court to issue a subpoena or seeking a deposition.[308]

- The fact that there is no corroboration for the hearsay evidence [309] and, if true, that there is contrary evidence in the record (submitted by the respondent).

This last point is particularly important. While the BIA has generally upheld admission of hearsay evidence such as arrest records and police reports in consideration of a respondent's application for discretionary relief,[310] it has also suggested that independent corroborative evidence is required in order to justify giving such hearsay records substantial weight.[311] For example, in one unpublished decision, the BIA remanded concluding that the gang affiliation evidence provided by DHS (a Facebook printout) was not sufficient to show that the respondent was a danger to the community and thus not amenable to release on bond.[312] Accordingly, practitioners should argue that without corroborative evidence, hearsay allegations should be afforded minimal weight.

Where possible, practitioners should also present their own contrary evidence that establishes why the DHS evidence should be afforded minimal weight (and that also demonstrates why the respondent should be

[307] INA § 240(b)(4)(B); *see, e.g.*, *Arias-Minaya v. Holder*, 779 F.3d 49, 55 (1st Cir. 2015) (concluding that consideration of hearsay in police report was proper in part because "both the IJ and the BIA determined that use of the police report was not fundamentally unfair since the petitioner was given an opportunity to challenge its veracity and refute its contents"); *Bondarenko v. Holder*, 733 F.3d 899, 907 (9th Cir. 2013) (concluding that petitioner's due process rights were violated when the IJ refused to grant him a continuance to investigate a forensic report introduced by DHS at the hearing); *Pouhova v. Holder*, 726 F.3d 1007, 1016 (7th Cir. 2013) (concluding that it was in violation of petitioner's statutory rights and not fundamentally fair to admit government's unreliable hearsay documents without giving her an reasonable opportunity to cross-examine the source).

[308] Practitioners should also consider the possible drawbacks of in-person testimony from a DHS witness in terms of how such testimony might weaken the respondent's case for bond. This will of course depend on the individual circumstances of the case.

[309] *See, e.g.*, *Abbas v. Lynch*, 647 F. App'x 671, 672 (9th Cir. 2016) (unpublished) (upholding reliance on reports where they were corroborated by testimony); *Avila-Ramirez v. Holder*, 764 F.3d 717, 724 (7th Cir. 2014) (finding error in giving "significant weight to uncorroborated arrest reports" where the respondent "denied any wrongdoing" and "was not prosecuted or convicted after these arrests, and there was no corroboration introduced at the immigration hearing"); *Lanzas-Ramirez v. Att'y Gen.*, 508 F. App'x 885, 889 (11th Cir. 2013) (unpublished) (noting that the police report was corroborated by a police officer deposition summarizing interviews of alleged victims, in contrast to in *Arreguin* where the BIA "implicitly acknowledged . . . reliability concerns when it decided to give little weight to arrest reports that are not corroborated by other evidence" (internal quotations omitted)); *Garces v. Att'y Gen.*, 611 F.3d 1337, 1350 (11th Cir. 2010) ("Absent corroboration, the arrest reports by themselves do not offer reasonable, substantial, and probative evidence that there is reason to believe Garces engaged in drug trafficking."); *Matter of Arreguin*, 21 I&N 38, 42 (BIA 1995).

[310] *See, e.g.*, *Matter of Grijalva*, 19 I&N Dec. at 722.

[311] *Matter of Arreguin*, 21 I&N Dec. at 42 (affording an arrest record little weight where respondent denied smuggling allegations contained in an old arrest record, and "[c]onsidering that prosecution was declined and that there is no corroboration, from the applicant or otherwise").

[312] *Rigoberto Alfonso Sibrian*, A095 707 745, 2010 WL 1976004, at *1 (BIA Apr. 23, 2010) (unpublished) (sustaining appeal and remanding to IJ to determine appropriate bond amount, where IJ considered DHS allegations, denied by respondent, that he was associated with a gang based on printout of respondent's Facebook page).

granted bond).[313] Indeed, the BIA in *Guerra* specifically noted that "the respondent failed to present any evidence or argument that tended to undermine the reliability of the information contained in the complaint."[314] Examples of contrary evidence might include a short declaration from the respondent refuting the allegations, a letter from the alleged victim or a witness discussing what really happened,[315] or a declaration from a paralegal stating that they ordered records and they do not exist. Practitioners should consider asking a reputable person such as a law clerk to do an independent factual investigation of the allegations and present their findings in a declaration. In the alternative, if no third party is available to conduct the investigation, practitioners may consider whether the applicable rules of professional conduct permit the practitioner to conduct the investigation themselves and present the findings in a declaration.[316]

Note on Smuggling Allegations

Practitioners should be prepared for the possibility that the IJ or the ICE OCC attorney will ask the respondent questions about any smuggling history. When advising clients on how to respond to these questions, practitioners should consider how admissions relating to smuggling could affect the client's removal case or have criminal consequences.

In arguing that past smuggling-related conduct is not evidence of dangerousness, practitioners can remind the IJ that DHS has characterized smuggling as "a crime against a border" in contrast to human trafficking,

[313] In preparing for the hearing, practitioners should consider whether it will benefit the client to cross-examine the source of any derogatory information put forward by DHS. Practitioners should also think carefully about whether such testimony could further damage the respondent's case before seeking to question an adverse witness on the record. If the practitioner believes that cross-examination of the source of the derogatory information would benefit the client, the practitioner should ask for the opportunity to cross-examine the source and, if relevant, seek a subpoena from the IJ. In arguing for a subpoena or a deposition, practitioners might point out that under INA § 240(b)(4)(B), respondents have the right to examine the evidence against them and to cross-examine the government's witnesses. Practitioners could argue that denying the respondent the opportunity to question the source of derogatory information and then relying on that derogatory information to reach a negative decision would violate notions of fundamental fairness.

[314] 24 I&N Dec. at 39.

[315] Practitioners should be mindful of ethical rules and possible unintended consequences when seeking the participation of alleged victims. See discussion *supra* section IV.A.4 under subheading entitled "Hearing Preparation."

[316] In particular, practitioners will want to look at ABA Model Rule 3.7 and its state law equivalents. Rule 3.7 prohibits, with some exceptions, lawyers from "act[ing] as advocate at a trial in which the lawyer is likely to be a necessary witness." ABA Model Rules of Professional Responsibility, Rule 3.7, americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_7_lawyer_as_witness.html. Even if the practitioner determines that a dual witness-advocate role is permitted in the non-jury trial, administrative bond hearing context, they should be prepared for the IJ to strike the declaration since courts "disfavor[] attorney testimony regarding factual matters, contested or uncontested." *Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1204 (7th Cir. 1995) (affirming, in a non-immigration court context, the lower court's decision to strike an attorney affidavit). *But see, e.g., Heard v. Foxshire Associates, LLC.*, 806 A.2d 348 (Md. Ct. Spec. App. 2002) (discussing the use of "at trial" in Rule 3.7 and concluding that the Maryland Rules of Professional Conduct distinguish between "at trial" and administrative hearings: "We further conclude that the MRPC does not preclude the giving of evidence by an attorney of record for a party before an administrative agency.").

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.

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[317] DHS Human Smuggling and Trafficking Center, Fact Sheet, Human Trafficking v. Human Smuggling (June 15, 2016), ctip.defense.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*.

Note on VTC Hearings:
If the hearing will be conducted by VTC, practitioners should tell family and others who plan to attend about this and that they might not have a chance to speak with the respondent. Practitioners should also prepare the client for the VTC appearance and explain that they may only have a limited view of the courtroom. Practitioners should also discuss who else will be in the room, and what to do if the respondent and practitioner need to confer.

Remember that there is generally no requirement that bond proceedings be recorded; the practitioner, however, may wish to ask the IJ to record the bond hearing.[321] Given that the bond proceeding may not be recorded, it is important that the practitioner or a colleague take careful notes throughout the proceeding, including of witness testimony, arguments made by DHS, and the IJ's questions, comments, and decision.

According to the Immigration Court Practice Manual, during the bond hearing DHS "should state whether a bond has been set and, if a bond has been set, the amount of the bond and the DHS justification for that amount."[322] The Practice Manual directs that the respondent or the respondent's representative "should make an oral statement (an 'offer of proof' or 'proffer') addressing whether the alien's release would pose a danger to property or persons, whether the alien is likely to appear for future immigration proceedings, and whether the alien poses a danger to national security."[323] The IJ may or may not allow witnesses to testify.[324] If the IJ does not allow a witness to testify, it is important that the practitioner make an offer of proof detailing what that witness would say if allowed to testify, in the event that the bond decision is appealed. The practitioner should prepare for the oral argument they will present as to why, under the governing legal framework, the client merits release on bond. The bond argument should generally be a maximum of a few minutes, after which the IJ may have specific questions. The practitioner should also be prepared to address any negative factors, such as prior convictions or pending criminal charges, and argue why the respondent nevertheless has established that they merit release.

During the bond hearing, DHS may introduce evidence or witnesses to support its position that the respondent should not be released on bond or that a high bond amount should be set. It is rare that DHS would present a witness at a bond hearing and in some cases may seek to prevent willing police officers from testifying[325]; however, harmful DHS evidence is common, particularly if the individual has any criminal history. In order for the practitioner to best respond to and mitigate this evidence, they should prepare by gathering information and records in advance of the hearing.[326] In addition to the mitigation strategies discussed above, practitioners should be prepared to object where warranted to the admission of DHS evidence on grounds that the evidence is not probative or reliable and its admission would be fundamentally unfair, and argue in the alternative that it should be afforded minimal weight.

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[321] *See* BALDINI-POTERMIN, *supra* note 227, § 4:32.
[322] Immigration Court Practice Manual, *supra* note 1, Ch. 9.3(e)(6).
[323] *Id.*
[324] *See id.* ("At the Immigration Judge's discretion, witnesses may be placed under oath and testimony taken.").
[325] The authors know of one instance in Baltimore, Maryland during which the ICE OCC attorney informed the IJ that they had been in contact with the arresting police officer who had previously agreed to testify at the bond proceeding and that he would no longer be testifying. Practitioners who experience similar ICE OCC attorney obstruction should contact Michelle Mendez, co-author of this guide, at mmendez@cliniclegal.org.
[326] *See supra* section IV.A.2.

The IJ will usually make an oral decision at the end of the bond hearing.[327] The decision may be "based on any information that is available to the Immigration Judge or that is presented by the parties."[328] The decision is not transcribed, but if a party appeals, the IJ should prepare a written decision based on their notes. Failure by the IJ to prepare a written decision will lead to the BIA's remanding the case to the IJ for a written decision, which will unnecessarily prolong the client's detention.

C. Post Bond Hearing Considerations

1. Paying the Bond

After a bond has been set by either DHS or the IJ, the individual may be released once the bond amount has been paid.[329] If a client is unable to gather bond money independently, practitioners may want to consider connecting the client with third-party resources such as bond funds.[330] Private bond companies also exist in certain jurisdictions but often impose high interest rates and other costs that should always be carefully reviewed.[331]

When the bond money is ready, an "obligor" (the person paying the bond) will need to be identified. That individual must be at least 18 years old and have lawful immigration status.[332] The obligor may pay the bond at any ICE office.[333] It need not be the ICE office closest to where the individual is being detained.[334] It is wise to call the local ICE office before making the trip to inquire about any local bond procedures or requirements, such as scheduling an appointment, especially if the client is not detained near that office.

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

[328] *Id.* (referencing 8 CFR § 1003.19(d)).

[329] 8 CFR § 103.6. While this section is titled "Surety Bonds," it encompasses both bonds secured by cash and bonds issued by surety companies. Because this regulation was issued by the former INS, it includes bonds that are not currently issued by ICE, such as public charge bonds and maintenance of status bonds.

[330] *See, e.g.*, lgbtqfund.org/.

[331] *See, e.g., U. S. Consumer Watchdog, States Sue Firm over Alleged Immigrant Services Scam*, REUTERS, Feb. 22, 2021, reuters.com/article/usa-cfpb-immigrants/update-1-u-s-consumer-watchdog-states-sue-firm-over-alleged-immigrant-services-scam-idUSL1N2KS1YJ.

[332] *See* Nunez, *supra* note 227. Because DHS will ask for information about the obligor's immigration status, *see* 74 Fed. Reg. 243 (Dec. 21, 2009), gpo.gov/fdsys/pkg/FR-2009-12-21/html/E9-30265.htm, it is best for a U.S. citizen or lawful permanent resident to pay the bond. *See* note 320 *supra* (reporting instance in which DACA recipient was detained by ICE when she went to post bond for someone else). Attorneys and legal representatives should be wary of agreeing to be the obligor in a client's case. Representatives may be asked to do this when a client has no one willing or able to come forward as the obligor. It is important to carefully consult the applicable ethical rules to determine whether this course of action complies with rules of professional responsibility. In particular, practitioners should consider whether this scenario presents a conflict of interest given that the obligor has a financial interest in getting their bond money back, which will only happen if the client is deported or wins the case.

[333] *Cf.* ICE ERO, Bond Management Handbook, at 23 (Aug. 19, 2014), AILA Doc. No. 16051730, aila.org/File/Related/16051730f.pdf [hereinafter "ERO Bond Management Handbook"].

[334] A list of ICE bond acceptance facilities can be found at ice.gov/detain/ice-ero-bond-acceptance-facilities (last updated Jan. 7, 2021). In situations where the individual is not detained in the same jurisdiction as the obligor, the obligor can pay the bond amount at the ICE office closest to where they live. That ICE office communicates with the ICE office in the location where the individual is being detained and makes arrangements for release.

The 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, their "A" number, detention location, date and country of birth, nationality, date and manner of arrival, and contact 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]

2. 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.

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[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.

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[347] *See Matter of M-A-S-*, 24 I&N 762 (BIA 2009); s*ee 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).

6. Second or Successive Requests for Bond Redetermination

The regulations provide that once a respondent has had an initial bond hearing, they may only be considered for a subsequent bond redetermination if their "circumstances have changed materially since the prior bond redetermination."[352] The request for a subsequent bond redetermination should be made in writing.[353] A detained respondent can request a subsequent bond redetermination with the IJ even while the initial bond decision is on appeal to the BIA.[354] The following factors have been found in unpublished BIA decisions to be material changes in circumstances that justified a subsequent bond redetermination request:

- The respondent has been granted relief from removal[355]
- The respondent submitted evidence that two of his pending criminal charges were dismissed, that he had made efforts at rehabilitation, and that his adjustment of status application was likely to be granted[356]
- Another detained individual in a virtually identical position as the respondent was released on bond and DHS did not appeal that decision.[357]

Practitioners have reported that IJs have considered the following changed circumstances: the fact that the respondent retained an attorney; a situation where pending charges were dropped and defense counsel provided a letter stating that the arrest was a case of mistaken identity; the filing of an application for immigration relief with USCIS, the issuance of an order in family court establishing eligibility for Special Immigrant Juvenile Status, obtaining a signed law enforcement certification for U nonimmigrant status, or other steps toward immigration relief; and family's proven inability to pay the bond set.

[352] *See* 8 CFR § 1003.19(e).
[353] *Id.* § 1003.19(e).
[354] *Matter of Valles*, 21 I&N Dec. 769 (BIA 1997) (holding that an IJ has continuing jurisdiction to consider a bond redetermination request while the previous bond redetermination is on appeal with the BIA).
[355] W-S-, AXXX XXX 991 (BIA Sept. 28, 2017) (unpublished), scribd.com/document/362583564/W-S-AXXX-XXX-991-BIA-Sept-28-2017.
[356] B-G-L-, AXXX XXX 714 (BIA Nov. 8, 2019) (unpublished).
[357] Wajid Ali Siddiqi, A095 473 104 (BIA Apr. 26, 2011) (unpublished), scribd.com/document/198852089/Wajid-Ali-Siddiqi-A095-473-104-BIA-April-26-2011. This highlights the benefit of frequent communication and sharing of recent outcomes with colleagues.

V. Bond Appeals

A. Legal Overview of Bond Appeals

1. Bond Appeals Generally

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*

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[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).

novo.[366] In general, practitioners may have more success with arguments about legal errors rather arguing that the IJ should have weighed the evidence differently in their discretion. Examples of legal error would include the IJ taking a prosecutorial role, misrepresenting the record, failing to conduct an individualized hearing, and failing to consider positive *Guerra* factors.

The regulations allow DHS to seek a stay of the IJ's custody determination pending a BIA appeal, which if granted would prevent the individual from being released pursuant to the IJ's bond decision during the pendency of the BIA appeal. However, if DHS does not seek a stay, the filing of a bond appeal "shall not operate to delay compliance with the [IJ's bond] order . . . nor stay the administrative proceedings or removal."[367] As described below, the regulations contemplate an automatic stay in some circumstances, and allow for a discretionary stay in other circumstances.

2. Automatic Stays of an IJ's Bond Decision

The automatic stay provision is triggered "[i]n any case in which DHS has determined that an alien should not be released or has set a bond of $10,000 or more."[368] In automatic stay cases, the IJ custody order "shall be stayed upon DHS's filing of a notice of intent to appeal the custody redetermination (Form EOIR-43) with the immigration court within one business day of the order."[369] DHS has discretion to file or not file Form EOIR-43. Accordingly, even though this type of stay is labeled "automatic," the bond decision will not be stayed if DHS does not trigger a stay by filing Form EOIR-43 within one day of the IJ's decision. [370] The regulations direct that the BIA "avoid unnecessary delays in completing the record for decision" in automatic stay cases.[371] If the automatic stay is invoked, the IJ's bond decision remains "in abeyance pending decision of the appeal by the Board."[372] The following exceptions allow for the automatic stay to lapse:

- If DHS does not file a notice of appeal with the BIA within 10 business days of the IJ custody order.[373] To preserve the automatic stay, DHS must identify the appeal as an automatic stay case, and file with the notice of appeal a certification by a "senior legal official" that the official has approved the appeal filing "according to review procedures established by DHS" and "is satisfied that the contentions justifying the continued detention of the alien have evidentiary support, and the legal arguments are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing precedent or the establishment of new precedent."[374]

[366] 8 CFR § 1003.1(d)(3)(ii).
[367] *Id.* § 236.1(d)(4).
[368] *Id.* § 1003.19(i)(2).
[369] *Id.*
[370] *See id.* ("The decision whether or not to file Form EOIR-43 is subject to the discretion of the Secretary.").
[371] *Id.* § 1003.6(c)(3).
[372] *Id.* § 1003.19(i)(2).
[373] *Id.* § 1003.6(c)(1).
[374] *Id.* § 1003.6(c)(1)(i)–(ii). The regulations also provide that the IJ must prepare a written decision within five business days after the IJ is advised that DHS has filed a notice of appeal in such cases. *See id.* § 1003.6(c)(2) (noting that in "exigent circumstances"

- 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]

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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.*

B. Nuts and Bolts of the Bond Appeal Process

1. Initial Considerations Prior to Filing the Appeal

As is true for any appeal from an immigration court ruling, it is crucial that practitioners build a strong record before the IJ in order to maximize the chances of success. A strong record may include substantial documentation establishing lack of dangerousness, absence of flight risk, and the respondent's community ties and other equities. Given that bond proceedings may not be recorded and no transcript will be created for the appeal, it is also important that the practitioner (or a colleague) take careful notes of the discussion that occurs during the bond hearing, including the substance of any testimony, attorney and IJ discussion during the hearing, and the IJ's oral decision. At the conclusion of the bond hearing, if there is any chance that the respondent may wish to appeal, the practitioner should reserve appeal.

2. Filing the Bond Appeal

The BIA Practice Manual is a must-read source of information and instructions on how to prepare an appeal. Particularly relevant portions include Chapter 3 (Filing with the Board), Chapter 4 (Appeals of IJ Decisions), Chapter 7 (Bond), and the appendices that provide sample documents.

The BIA appeal, filed on Form EOIR-26, Notice of Appeal,[383] must be *received* at the BIA within 30 calendar days of the IJ's decision.[384] With the exception of voluntary departure bond appeals, there is no filing fee for bond appeals.[385] Practitioners should not mix the bond appeal with the appeal of any other matter, such as the merits decision. Instead, the bond appeal should be filed separately on Form EOIR-26.[386] A complete bond appeal filing packet includes a cover page, Form EOIR-26, Form EOIR-27 (Notice of Entry of Appearance as Attorney or Representative Before the Board of Immigration Appeals) if the respondent is represented on the appeal,[387] and any supporting documentation. All forms should be completed in full, including proper signatures and proof of service. The packet should be two-hole punched at the top.[388]

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[383] In contrast, Form EOIR-29 is used to appeal a DHS decision. BIA Practice Manual, *supra* note 359, Ch. 7.3(a)(1).
[384] *Id.* Ch. 3.1(a)(1) ("For appeals and motions that must be filed with the Board, the appeal or motion is not deemed 'filed' until it is *received* at the Board." (emphasis in original)); *supra* section V.A (discussing appeal deadline).
[385] *Id.* Ch. 7.3(a)(3).
[386] *Id.* Ch. 4.4(b)(5)(A) (directing that "[e]ach Immigration Judge decision must be appealed separately"); *id.* Ch. 7.3(a)(1) (noting that bond appeal "*must not* be combined with an appeal of a decision regarding the alien's removal or deportation" (emphasis in original)).
[387] The representative must complete Form EOIR-27 even if they were the respondent's representative below and there is a Form EOIR-28 on file with the immigration court. *See id.* Ch. 2.1(b)(1). Form EOIR-27 can be found on the EOIR website at justice.gov/eoir/list-downloadable-eoir-forms. For unrepresented respondents, the Florence Project's website contains a number of useful *pro se* resources and guides, available at firrp.org/resources/prose/ (last updated May 2013). *See, e.g.*, Florence Project, *Appealing Your Case to the Board of Immigration Appeals* (May 2013), firrp.org/media/BIA-Appeal-Guide-2013_new-BIA-address-2013.pdf.
[388] BIA Practice Manual, *supra* note 359, Ch. 3.3(c)(8).

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).

transcript.[397] Even though the practitioner will not have the benefit of a transcript, if the IJ recorded the bond proceeding, the practitioner can request the audio recording with the local immigration court.[398]

If the practitioner indicated on the Form EOIR-26 that they planned to file a brief, the BIA will mail a briefing schedule. In detained cases, the parties are typically given 21 calendar days from the date of the briefing schedule notice to simultaneously brief the appeal.[399] On request, the BIA may grant one briefing extension in detained cases, of 21 additional days.[400] Practitioners will need to carefully consider and discuss with the client how a bond appeal timeline will map onto the timeline of the detained merits case. While the bond appeal progresses, the detained client will often be pushed to move ahead with the merits hearing on any immigration relief. It may be difficult to get a decision in the bond appeal before the individual hearing. If the goal is to obtain a bond appeal decision before the merits hearing, practitioners could consider strategies such as preparing a draft bond appeal brief before the written IJ bond decision is received, foregoing a briefing extension, and/or writing a shorter bond appeal brief in order to save time.

A complete brief filing packet will include:

- BIA briefing notice (stapled on top of the cover page)
- Cover page
- Brief, which should be signed by the preparer with their EOIR ID number and include the respondent's "A" number on the cover page and on the bottom right corner of each subsequent page, and
- Proof of service.

For detailed instructions about the format and contents of BIA briefs, practitioners should consult the BIA Practice Manual, particularly Chapter 4.6. The practitioner should be sure to send the brief to ensure it arrives prior to the briefing deadline.

While the BIA will not issue a briefing receipt, practitioners can keep track of BIA appeals by calling the BIA Clerk's Office.[401] The BIA will serve a copy of its decision on the parties by regular mail.[402] In a situation where DHS appeals a favorable IJ bond decision, practitioners should apply the appropriate standard of review and vigorously defend the IJ's decision in briefing to the BIA.

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[397] *See* BIA Practice Manual, *supra* note 359, Ch. 4.2(f)(2) (noting that "[t]ranscripts are not normally prepared" in bond determination appeals).
[398] *Id.* (directing that the practitioner "[c]ontact the Clerk's Office or the local Immigration Court to make arrangements to listen to the digitally recorded hearings"); *see also id.* Ch. 4.6(d)(7) (providing the citation format for the audio recording where a transcript is not prepared).
[399] *Id.* Ch. 4.7(a)(2).
[400] *Id.* Ch. 4.7(c)(1)(B). Unless and until a briefing extension request is granted, the original deadline applies and practitioners should file any extension request well in advance of the briefing deadline. *See id.* Ch. 3.1(b)(6) ("A pending extension request does not excuse a party from meeting a filing deadline.").
[401] *Id.* Ch. 1.6(b) (providing automated hotline information for certain inquiries). Case information may also be tracked via the EOIR portal at portal.eoir.justice.gov/.
[402] *Id.* Ch. 7.3(b)(3).

VI. Conclusion

It is important that representatives understand the legal framework governing bond proceedings in order to harness that knowledge toward zealous and well-prepared advocacy on behalf of detained respondents. Successful bond representation can make all the difference in whether an individual is able to secure release and ultimately prevail on the merits of their case. Effective representation in bond proceedings also helps to safeguard the due process rights of detained individuals. The authors encourage practitioners to consider *pro bono* opportunities available in their jurisdiction or remotely, which not only help meet a compelling need but can also provide practitioners with experience and mentoring. Given the ever-changing landscape of immigration detention, practitioners are encouraged to remain connected to others doing bond work in order to share information about the latest trends, successful strategies, and best practices. Finally, the authors wish to remind readers that this guide is intended for general educational use only and that practitioners should independently research the law governing their jurisdiction, as this area of law (like many in the immigration field) is complex and frequently changing.

Get free resources to help you defend immigrants!
cliniclegal.org/defending-vulnerable-populations

This guide is intended to assist lawyers and fully accredited representatives. It does not constitute legal advice, nor is it a substitute for independent analysis of the law applicable in the practitioner's jurisdiction.

The authors of this guide, which was originally published in May 2018, are Rebecca Scholtz, Senior Attorney with CLINIC's Defending Vulnerable Population (DVP) Program, and Michelle Mendez, Director of CLINIC's DVP Program. The 2021 revisions to this guide were written by Tanika Vigil, Consulting Attorney with CLINIC's DVP Program.

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