

ICE Custody Training: All About Bond



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CAIR Coalition

Who Are We?

CAIR
Capital Area Immigrants' Rights
COALITION

On 107 jail visits, **562** Detained Unaccompanied Immigrant Children Received Legal Assistance

nearly **4,500** adult detainees received *know your rights* presentations

& **1,450** adult detainees received individualized screenings. **114** Detained Immigrant Adults & Children Secured Pro Bono Representation

We are a non-profit that provides free legal services to immigrants detained in Maryland and Virginia.

We are the only legal service provider exclusively serving this region's detained immigrant population.

Agenda

- I. Controlling statutory and regulatory provisions for bond
- II. Mandatory detention
- III. Discretionary release on bond
- IV. The bond process
- V. Practice tips

I. Controlling Statutory and Regulatory Provisions for Bond

- INA § 236(a): Discretionary pre-order-of-removal detention
 - Immigration Judge has discretion to review bond
- INA § 236(c): Mandatory pre-order-of-detention
 - Immigration Judge lacks jurisdiction to review DHS pre-order custody determination
- 8 C.F.R. § § 1003.19, 1236.1

I. Controlling Statutory and Regulatory Provisions for Bond

Who is outside the IJ's jurisdiction over custody?

- Final administrative order of removal – entered without inspection and convicted of aggravated felony (INA §238)
- Reinstatement – reentered after prior deportation (INA §241)
- Arriving aliens seeking admission at port of entry (INA § 235)
 - only eligible for **parole by DHS ICE** if pass credible fear interview
 - IJs do have bond jurisdiction over “certain other aliens” in expedited removal who pass a CFI and are then giving an NTA. *Matter of X-K*, 23 I&N Dec. 731 (BIA 2005) (includes EWIs caught less than 100 miles from the border, who have been in the US for less than 14 days).
 - Arriving aliens **include returning LPRs seeking admission** per INA § 101(a)(13)(c).
- Visa Waiver Program individuals in asylum-only proceedings. *Matter of Werner*, 25 I&N Dec. 45 (BIA 2009)

II. Mandatory Detention

- INA 236(c) states “The Attorney General **shall** take into custody any alien” who –
 - Is **inadmissible** under INA 212(a)(2) or INA 212(a)(3)
 - Is **deportable/removable** under INA 237(a)(2) or INA 237(a)(4)
- IJ has **no jurisdiction to set bond** for these individuals.

II. Mandatory Detention

Who is subject to inadmissibility and deportability?

- Grounds of **inadmissibility (INA 212)** apply to non-citizens “seeking admission,” including:
 - Entered without inspection and are now in removal proceedings (i.e. seeking first lawful admission to the U.S.);
 - Applicants for adjustment of status to lawful permanent residence;
 - LPRs returning from travel abroad.
- Grounds of **deportability (INA 237)** apply to non-citizens who have been lawfully admitted, including:
 - Lawful permanent residents (LPRs)
 - Those who entered lawfully (visa overstays)

II. Mandatory Detention

On the Basis of Inadmissibility Grounds

INA 236(c) states “The AG shall take into custody any alien” ...who is inadmissible under **INA 212(a)(2) or (a)(3)**, including:

- Conviction/sufficient admission of CIMT (NB: juvenile and petty offense exceptions)
- **Any** controlled substance violation conviction – no exception
- Multiple criminal offenses with aggregate sentence of over 5 years
- Drugs or human trafficking
- Prostitution/commercialized vice
- Certain aliens involved in serious criminal activity who assert immunity to prosecution
- Foreign officials who engaged in particularly severe violations of religious freedoms
- Money laundering
- Terrorism grounds (i.e., DHS has reason to believe person is engaging in terrorist activities)

II. Mandatory Detention

On the Basis of Deportability Grounds

INA 236(c) states “The AG shall take into custody any alien” ...who is deportable under **INA 237(a)(2) or (a)(3)**, including:

- Conviction of 1 CIMT committed within 5 years of admission with sentence of 1 year or more
- Conviction of 2 or more CIMTs arising from different criminal schemes
- Conviction of aggravated felony
- Any controlled substance conviction (exception for 1 offense simple possession of less than 30g marijuana)
- Admission to habitual drug abuse/addiction
- Conviction for firearms offenses
- Conviction/reason to believe engaging in terrorism

II. Mandatory Detention

Two exceptions to 236(c) mandatory detention

- 236(c)(1) - Witness/cooperating with criminal investigation - may be released if necessary to protect witness (must prove not a danger to the community and likely to appear for hearings).
- Immigrant falls under the Transitional Period Custody Rules (“TPCR”) - i.e., was released from criminal custody on or before October 1998.
Matter of Adeniji, 22 I&N Dec. 1102 (BIA 1999).

II. Mandatory Detention

Categorical Challenges to Mandatory Detention

- Legal sources to challenge mandatory detention - 8 C.F.R. 3.19(h)(2)(ii); *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999).
- “Joseph hearings” are the procedural vehicle to challenge man. det. It is the respondent’s burden to show DHS is unlikely to prevail.
 - When DHS improperly categorizes a conviction as a removable offense (based on new 4th Cir, BIA, or even IJ cases).
 - After successful post-conviction relief.
- If you foresee that ICE will be “substantially unlikely” to prevail on removability charge , another option would be a Motion to Terminate removal proceedings.

II. Mandatory Detention

Constitutional Challenges to Prolonged Detention

- Legal sources:
 - Post-removal order detention. *Zadvydas v. Davis*, 533 U.S. 678 (2001).
 - Pre-removal order. *Demore v. Kim*, 538 U.S. 510 (2003).
- Six circuits have held that 236(c) authorizes detention for only a “reasonable” amount of time.
 - Bright-line rule of 6 months, after which a bond hearing is required (*Lora v. Shanahan* (2d Cir. 2015); *Rodriguez v. Robbins* (9th Cir. 2015), cert. granted).
 - Individualized assessment of factors. (*Reid v. Donelan* (1st Cir. 2016); *Diop v. ICE/Homeland Sec.* (3d Cir. 2011); *Ly v. Hansen* (6th Cir. 2003); *Sopo v. Atty General* (11th Cir. 2016)).
 - No 4th Cir. Decision, but pending Supreme Court decision *Jennings v. Rodriguez*, (oral arguments heard Nov. 30, 2016)

III. Discretionary Release on Bond

- INA 236(a) Discretionary release on bond – “...The Attorney General (1) **may** continue to detain the arrested alien; and (2) **may** release the alien on
 - (a) bond of at least \$1500 with security approved by, and containing conditions prescribed by, the AG, or
 - (b) Conditional parole.”
- For detainees not subject to mandatory detention, IJ has discretion to review a wide variety of factors to determine bond (*Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006)).
Burden is on immigrants to prove they are:
 - **Not a threat** to national security or a danger to property/persons
 - **Not a flight risk** (likely to appear for all future court hearings)

III. Discretionary Release on Bond

Positive Discretionary Factors

- Eligibility for permanent relief from removal (e.g. asylum, cancellation of removal, approved I-130, etc.)
- Family ties, lawful immigration status of family members in U.S., and hardship to family caused by continued detention
- Long residence in the US
- Lawful entry to the US
- Regular payment of taxes/child support
- For criminal charges – argue minor crimes only/charges did not result in convictions/mitigating facts/not recent
- Rehabilitation efforts (certificates from AA, probation requirements, behavioral treatment programs, etc.)
- Fixed address and stable residence in the US
- Steady job/promise of future employment (if lawfully permitted to work)
- Educational efforts/achievements
- Membership in church/community organization
- Letters of support from family, friends, counselors, pastors, etc.

III. Discretionary Release on Bond

Negative Discretionary Factors

- CRIMINAL CONVICTIONS
- Pending criminal charges, including seriousness and number of charges (*Matter of Shaw*, 17 I&N Dec. 177 (BIA 1979))
 - NB: Although they are considered as a discretionary factor, only actual convictions subject a person to mandatory detention
- Prior failure to appear for scheduled court proceedings
- History of probation violations
- No eligibility for permanent relief from removal
- Lack of USC or LPR family in the U.S.
- History of substance abuse
- Criminal gang association
- IJ should consider both direct and circumstantial evidence of dangerousness, including whether evidence presents national security considerations (*Matter of Fatahi*, 26 I&N Dec. 791 (BIA 2016)).
- “General deterrence” should NOT be part of individualized bond hearing.

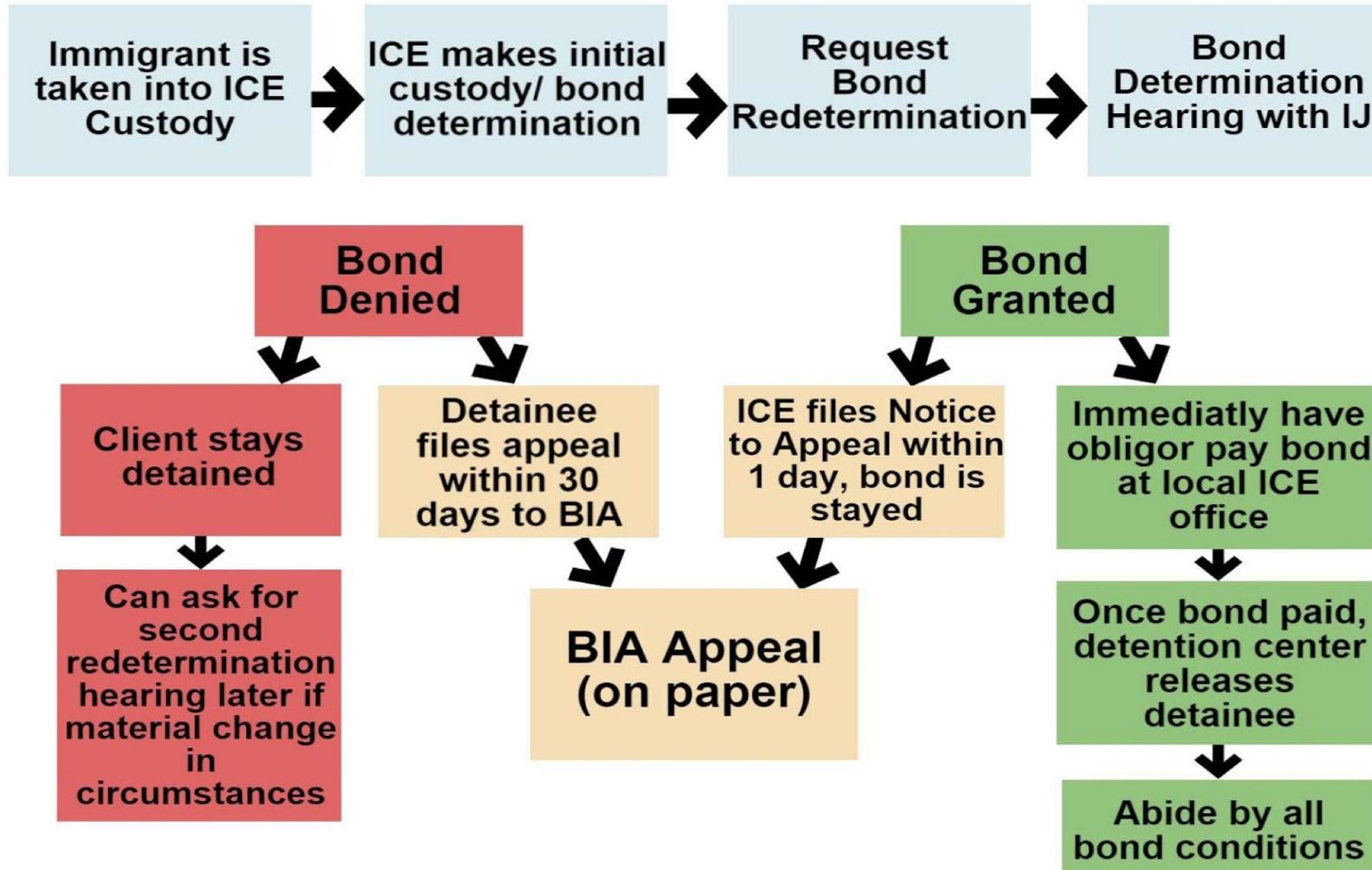
Hypothetical A – Victor

Victor is a Salvadoran man who entered the U.S. undocumented in 2007 through McAllen, Texas. He lives with his long-term girlfriend, who is also undocumented, in Alexandria and they have two U.S. citizen children together, ages 6 and 2; the older child has an autism diagnosis. Victor has worked as a mechanic at his USC cousin's auto repair shop since 2007.

Victor has 2 criminal convictions in Virginia: 2008 conviction for marijuana possession (caught smoking a joint in his car) with no jail sentence but a small fine and community service hours; 2016 conviction for petit larceny (pair of socks in winter) with a sentence of 90 days, all suspended.

- 1) Is Victor bond eligible? Why/why not?
- 2) Would it make a difference if Victor been admitted to the U.S. on a tourist visa?
- 3) If Victor is bond eligible, what kind of documentary evidence could he provide to the court to argue for the lowest possible bond?

IV. The Bond Process



IV. The Bond Process

First Steps

- Once an immigrant is taken into ICE custody, the local ICE Field Office (Fairfax, Baltimore) makes an initial custody determination.
- Can request bond redetermination hearing with IJ:
 - Usually first chance is at first master calendar hearing, but can be **any time** after initial DHS custody determination and before final order of removal.
 - Immigrants determined to be subject to mandatory detention can ask for a *Joseph* hearing to contest categorization of conviction.
- First bond redetermination request can be oral or in writing. Subsequent requests must be in writing and show a **change in circumstances**.
- Bond hearing **legally distinct** from deportation proceeding (procedurally, differs by immigration court).

IV. The Bond Process

After bond is granted

- Immediately after bond hearing, attorneys should wait for/request the clerk for the Order of the Immigration Judge with Respect to Custody.
- The “obligor” (bond payer) may go to any local ICE Field Office to pay bond on detainee’s behalf.
 - Obligor must have legal status
 - Bond must be paid in full up front, by a person or bond company
- Once paid, the detention center will immediately releases the person.
- Immigrants must abide by all conditions of release under bond:
 - **Show up for ALL future immigration court hearings** (non-detained docket = hearings months/years in the future).
 - **No more run-ins with the police** of any kind (NB: parole requirements for existing criminal conviction must be completed).
 - Inform court/ICE of any address changes within 5 days.
 - NB: Under INA 236(b), ICE may “at any time revoke bond or parole...rearrest the alien under the original warrant, and detain the alien.” *See also* 8 C.F.R. 1236.1(c)(9).

IV. The Bond Process

Bad Bond Decision?

Motion for Custody Redetermination

- Must be in writing (8 C.F.R. § 1003.19(b)).
- Motion will only be granted if respondent can show there has been a **material change in circumstances** since IJ's initial bond determination. (8 C.F.R. 1003.19(e); *Matter of Uluocha*, 20 I&N Dec. 133 (BIA 1989)).
 - NB: standard for “material change” varies by jurisdiction.

Appeal to BIA

- Both respondent and DHS have a right to appeal within 30 days of IJ's decision – while removal proceedings continue.
- If DHS files a notice of intent to appeal within 1 day of the IJ's order, release on bond may be stayed. 8 C.F.R. 1003.19(h)(4)(i).
- Respondent can still request IJ to redetermine bond while a bond appeal is pending with BIA. If IJ grants the bond redetermination request, appeal is moot. *Matter of Valles*, 21 I&N Dec. 769 (BIA 1997).

Hypothetical B - Mazen

Mazen is a citizen of Jordan who entered the U.S. as a legal permanent resident (LPR) when he was a teenager in the late 1990s. He has lived continuously in Fairfax, Virginia since then. He has a U.S. citizen wife, but they have been separated for the past 4 years. Together they have three U.S. citizen children.

Mazen has a number of alcohol-related criminal convictions, including numerous convictions for public intoxication and disorderly conduct, as well as three DUIs from 2002, 2004, and 2005. He also has a 2008 conviction for grand larceny in Virginia, for which he was sentenced to a total of 12 months. ICE is arguing that Mazen is both deportable and subject to mandatory detention because the grand larceny conviction is an aggravated felony because it is a theft-related conviction with a sentence of one year or more.

1. What kind of argument can his attorney make to convince the judge that Mazen is not subject to mandatory detention?
2. What procedural vehicle should the attorney use to make this argument?

V. Practice Tips

- Lawyers who enter their appearance for bond only (on EOIR-28) should be able to have a bond hearing before pleading to the NTA.
- Take time to prepare well. Ask the IJ for a continuance, if necessary and with client's consent.
- It is usually impossible to get DHS' I-213 ahead of time, so grill the client on any possible criminal history that might show up, no matter how old or minor. Ask about out-of-state arrests.
- Leave time to negotiate bond with TA before hearing. IJ likely to take TA's stipulation into account.
- Know your judge – most have ballpark bond amounts in their heads for detainees with particular convictions.
- Any and all evidence can be entered on bond – including ameliorating facts underlying the criminal conviction.
- Some judges want bond motions and supporting exhibits filed ASAP to allow time to review (if you get more evidence after filing, enter it at the hearing).
- Family and friends should be at the bond hearing – powerful visual argument.
- IJ unlikely to allow witnesses to testify due to time constraints; have family/friends file affidavits instead.
- At hearing, offer concise “opening statement” of detainee's eligibility and equities while referring to submitted evidence.

THANK YOU!



Pro bono cases?
Contact saba@caircoalition.org