



AMERICAN IMMIGRATION LAW FOUNDATION

PRACTICE ADVISORY

ARREST, DETENTION AND BOND PROCEDURES FOR NON-CITIZENS *WITHOUT CRIMINAL CONVICTIONS*¹

Updated July 2008²

Immigration agents – most often agents of the Immigration and Customs Enforcement (ICE) within the Department of Homeland Security – arrest and detain on immigration charges many non-citizens who do not have criminal convictions. This practice advisory focuses on the law governing the arrest, detention and bond procedures for non-citizens who 1) are present in the United States and 2) do not have criminal convictions.³

Q. Who can arrest non-citizens for suspected immigration violations?

A: A wide range of immigration officials have the power to arrest and detain non-citizens.⁴ Immigration officials can arrest a non-citizen without a warrant if they have "reason to believe that the alien ... is in the United States in violation of any [immigration] law or regulation and is likely to escape before a warrant can be obtained for his arrest."⁵

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² AILF gratefully acknowledges law clerk Katrin Hussmann for her research and thoughtful contributions to the advisory's update.

³ For helpful materials on detention and bond procedures for non-citizens with criminal convictions and for "arriving" non-citizens, please see "other resources on detention and bond procedures" at the end of this practice advisory.

⁴ 8 C.F.R. § 287.5(c) (2008).

⁵ INA § 287(a)(2), 8 U.S.C. § 1357(a)(2).

Q. What happens after a non-citizen is arrested on a suspected immigration law violation?

A: Upon arrest for an alleged immigration law violation, a non-citizen should be examined "without unnecessary delay" by an immigration officer on his or her right to enter or remain in the United States.⁶ The officer examining the individual after arrest should not be the arresting officer unless another qualifying officer is not available and taking the person before another officer will cause unnecessary delay.⁷ If the examining officer finds prima facie evidence that the person arrested has violated the immigration laws, then the officer will place the non-citizen in removal proceedings or institute expedited removal, if applicable.⁸

If ICE initiates removal proceedings, it should notify the non-citizen of the reasons for his or her arrest.⁹ The examining officer also should inform the non-citizen of the right to counsel at no expense to the government and provide a list of free legal service providers.¹⁰ The officer also should warn the person that any statement made "may be used against him or her in a subsequent proceeding."¹¹

ICE may hold a non-citizen arrested without a warrant for 48 hours, or longer "in the event of emergency or other extraordinary circumstance."¹² On or before the conclusion of this period, ICE must determine whether the individual will continue to be detained or released on bond or on his or her own recognizance.¹³ It also must decide whether to issue a Notice to Appear (NTA) and an arrest warrant.¹⁴

Q: When are non-citizens entitled to be released?

A: The Immigration and Nationality Act (INA) provides for the release of non-citizens arrested for immigration violations on bond or on their own recognizance except for those subject to mandatory detention due to criminal or terrorist grounds specified in INA § 236(c)(1), 8 U.S.C. § 1226(c).¹⁵ The Attorney General may release non-citizens on a

⁶ *Id.*

⁷ 8 C.F.R. § 287.3(a).

⁸ 8 C.F.R. § 287.3(b).

⁹ 8 C.F.R. § 287.3(c).

¹⁰ 8 C.F.R. § 287.3(c).

¹¹ *Id.*

¹² 8 C.F.R. § 287.3(d).

¹³ *Id.*

¹⁴ *Id.* The only exception is when ICE grants voluntary departure pursuant to subpart C of 8 C.F.R. part 240.

¹⁵ INA § 236(a)(2), 8 U.S.C. § 1226(a)(2).

minimum bond of \$1,500 or may grant conditional parole.¹⁶ However, bond or parole may be revoked at any time.¹⁷

Q: How does ICE determine who should be released and under what conditions?

A: The local ICE office makes the initial custody and bond determination.¹⁸ As long as the non-citizen is not subject to mandatory detention due to criminal or terrorist grounds specified in INA § 236(c)(1), 8 U.S.C. § 1226(c)(1), the arrested individual may be released on bond or on his or her own recognizance.¹⁹

In order to be released, a non-citizen "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."²⁰ The factors commonly considered in making the determination to release and/or set bond include:²¹

- 1) Local family ties;
- 2) Prior arrests, convictions, appearances at hearings;
- 3) Membership in community organization;
- 4) Manner of entry and length of time in the United States;
- 5) Immoral acts or participation in subversive activities;
- 6) Financial ability to post bond.

Q: Can a non-citizen challenge the ICE's custody/bond determination?

A: Yes. Subject to significant exceptions discussed in the next question and answer, after the initial custody and/or bond determination by ICE, the non-citizen may apply for bond redetermination by an Immigration Judge (IJ)²² at any time until a removal order becomes final.²³ A request for custody and/or bond redetermination may be made orally,

¹⁶ *Id.*

¹⁷ INA § 236(b), 8 U.S.C. § 1226(b).

¹⁸ 8 C.F.R. § 236.1(d), § 1236.1(d).

¹⁹ 8 C.F.R. § 236.1(c)(8), § 1236.1(c)(8).

²⁰ *Id.*

²¹ *See, e.g., Matter of Patel*, 15 I&N Dec. 666 (BIA 1976); *Matter of San Martin*, 15 I&N Dec. 167 (BIA 1974); *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006).

²² 8 C.F.R. § 1003.19(a), § 236.1(d), § 1236.1(d).

²³ 8 C.F.R. § 236.1(d)(1), § 1236.1(d)(1). A removal order is final when the Board of Immigration Appeals (BIA or Board) "renders its decision in the case upon appeal or certification or, where no appeal to the Board is taken, when appeal is waived or the time allotted for appeal has expired." *Matter of Lok*, 18 I&N Dec. 101, 105 (BIA 1981). *See also* 8 C.F.R. § 241.1, § 1241.1; INA § 101(a)(47)(B), 8 U.S.C. § 1101(a)(47)(B).

in writing, or by telephone, if the IJ permits in his or her discretion.²⁴ If the non-citizen is detained, the request for custody and/or bond redetermination should be made to the Immigration Court that has jurisdiction over the place of detention.²⁵ If the non-citizen is not detained, the request should be made to the Immigration Court that has administrative control over the case or, if no court has been designated, to the Office of the Chief Immigration Judge for designation of an appropriate Immigration Court.²⁶

Q: Over what people does an IJ not have authority to review ICE’s custody and/or bond decision?

The regulations prohibit an IJ from reviewing ICE's custody and/or bond determination of the following people:²⁷

- 1) Those considered to be "arriving aliens" under 8 C.F.R. §1.1(q);²⁸
- 2) Those “described in” the terrorism and security related ground of deportability, INA § 237(a)(4), 8 U.S.C. § 1227(a)(4);
- 3) Those subject to mandatory detention under INA § 236(c)(1), 8 U.S.C. § 1226(c)(1);²⁹
- 4) Those in exclusion proceedings;
- 5) Those with final administrative orders of removal under INA § 242(a)(2), 8 U.S.C. § 1252(a)(2).

Even though an IJ does not have jurisdiction to redetermine custody and/or bond for the above groups, the IJ does have jurisdiction to review whether ICE correctly determined that a non-citizen does in fact belong to one of these groups.³⁰

Q: What if a non-citizen has been released from ICE custody but wants to challenge the conditions of release?

²⁴ 8 C.F.R. § 1003.19(b). After an initial bond redetermination, however, a subsequent redetermination can only be made in writing and upon a showing that “circumstances have changed materially since the prior bond redetermination.” 8 C.F.R. §1003.19(e).

²⁵ 8 C.F.R. § 1003.19(c)(1).

²⁶ 8 C.F.R. § 1003.19(c)(2), (3).

²⁷ 8 C.F.R. § 236.1(c)(11), § 1236.1(c)(11); 8 C.F.R. § 1003.19(h)(2).

²⁸ Note that under 8 C.F.R. § 1.1(q), non-citizens who entered without inspection are *not* “arriving aliens.” 8 C.F.R. § 1240.8(b) and (c) also distinguishes “arriving aliens” from “[a]llies present in the United States without being admitted or paroled.”

²⁹ Non-citizens have succeeded in challenging their detention under § 236(c), 8 U.S.C. § 1226(c) by arguing that their case does not fall within the statutorily prescribed limits for mandatory detention. *See, e.g., Waffi v. Loisel*, 527 F. Supp. 2d 480 (E.D. Va. 2007); *Matter of West*, 22 I&N Dec. 1405 (BIA 2000). While the provision generally has been found constitutional, *Demore v. Kim*, 538 U.S. 510 (2003), its application in specific circumstances may be unconstitutional. *See, e.g., Ly v. Hansen*, 351 F.3d 263, 271 (6th Cir. 2003); *Gonzalez v. O’Connell*, 355 F.3d 1010, 1019-21 (7th Cir. 2004).

³⁰ 8 C.F.R. § 1003.19(h)(2)(ii); *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999).

A: A non-citizen who has been released from detention but is seeking to lower the bond or otherwise ease the conditions of his or her release, may file a request to ameliorate the terms of release with the Immigration Court within seven days of release.³¹ Even if the seven day period has expired, however, the non-citizen may nonetheless ask ICE to reconsider the conditions of release.³² If ICE refuses to reconsider, the non-citizen may appeal ICE's decision directly to the BIA within 10 days of ICE's decision.³³

Q: Can a non-citizen work with authorization after release from immigration custody?

A: A non-citizen who is a lawful permanent resident (LPR) is work-authorized incident to status, even if he or she is released from custody and is in removal proceedings.³⁴ A non-citizen who is a non-LPR also may be authorized to work.³⁵

Q: Can a non-citizen request the Immigration Court to redetermine custody and/or bond even though ICE has not filed a Notice to Appear with the Immigration Court?

A: Yes. An IJ can conduct a bond hearing even if ICE has not filed a Notice to Appear (NTA) with the Immigration Court.³⁶ This is important because ICE may delay issuing the NTA, or may issue the NTA but then delay filing it with the Immigration Court.

Q: How do bond proceedings differ from removal proceedings?

A: Bond proceedings are separate from, and not a part of, removal proceedings.³⁷ Unlike removal proceedings, bond hearings are not usually recorded by the IJ. Also, the IJ can conduct a bond hearing even if ICE did not file a charging document.³⁸ In a bond hearing, the non-citizen has the burden of proof and must show that she or he does not present a danger to persons or property, is not a threat to national security, and does not pose a risk of flight.³⁹ Furthermore, the IJ may consider "any information that is available to the Immigration Judge or that is presented to him or her by the alien or the Service."⁴⁰ While the IJ may explain the reasons for his or her decision orally, the

³¹ 8 C.F.R. § 236.1(d)(1), § 1236.1(d)(1).

³² 8 C.F.R. § 236.1(d)(2), § 1236.1(d)(2).

³³ 8 C.F.R. § 236.1(d)(3)(ii), § 1236.1(d)(3)(ii).

³⁴ INA § 236(a)(3), 8 U.S.C. § 1226(a)(3).

³⁵ For example, *see*, 8 C.F.R. § 208.7, § 245.13(j), § 245.15(n), § 241.5(c).

³⁶ 8 C.F.R. § 1003.14(a).

³⁷ 8 C.F.R. § 1003.19(d).

³⁸ 8 C.F.R. § 1003.14(a).

³⁹ *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006).

⁴⁰ 8 C.F.R. § 1003.19(d).

written decision often is cursory. For these reasons, notes of the bond hearing will be helpful later if there is an appeal of the IJ's decision to the BIA.

Q: Can a non-citizen appeal an IJ's custody and/or bond redetermination?

A: Either the non-citizen or ICE may appeal the IJ's custody and/or bond determination to the BIA within 30 days of the IJ's decision.⁴¹

Q: If an IJ orders the release of a non-citizen or lowers the bond required for release, can ICE stay that order during an appeal to the BIA?

A: An IJ's order authorizing release may be automatically stayed in any case where ICE had originally:

- 1) determined that the non-citizen should not be released; or
- 2) set a bond of \$10,000 or more⁴²

In order for the automatic stay to kick in, however, ICE must file an EOIR-43 Notice of Service Intent to Appeal Custody Determination within *one business day* of the IJ's order.⁴³ Moreover, the automatic stay ends if ICE does not file a notice of appeal within *ten business days* of the IJ's order.⁴⁴ Several courts have found the automatic stay provision unconstitutional as applied in the cases before them.⁴⁵

Even if the IJ's order is not automatically stayed, the BIA may stay the IJ's order pending the outcome of ICE's appeal, if ICE requests the Board to stay the IJ's order when ICE appeals.⁴⁶ ICE can request an emergency stay from the Board at any time.⁴⁷

Q: Can a non-citizen ask for more than one custody and/or bond redetermination?

A: Once the IJ has rendered an initial custody and/or bond redetermination, a subsequent request for bond redetermination will only be considered if the non-citizen's

⁴¹ 8 C.F.R. § 236.1(d)(3)(i), § 1003.19(f). *See also* 8 C.F.R. § 1003.38.

⁴² 8 C.F.R. § 1003.19(i)(2).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *See, e.g., Ashley v. Ridge*, 288 F.Supp.2d 662 (D.N.J. 2003); *Uritsky v. Ridge*, 286 F.Supp.2d 842, 847 (E.D. Mich. 2003); *Bezmen v. Ashcroft*, 245 F.Supp.2d 446, 449-450 (D. Conn. 2003); *Zavala v. Ridge*, 310 F. Supp.2d 1071 (N.D. Cal. 2004) (holding that the regulation violated substantive due process, procedural due process as applied in the particular case, and was ultra vires). *But see Pisciotto v. Ashcroft*, 311 F.Supp.2d 445, 453-56 (D.N.J. 2004) (upholding the automatic stay provision as constitutional under *Demore v. Kim*, 538 U.S. 510 (2003)).

⁴⁶ 8 C.F.R. § 1003.19(i)(1).

⁴⁷ *Id.*

"circumstances have changed materially since the prior bond determination."⁴⁸ Successive requests for custody and/or bond redeterminations must be submitted in writing.⁴⁹

An IJ can consider subsequent bond redeterminations even if a prior bond decision is on appeal to the Board.⁵⁰ If the IJ grants the non-citizen's request for a subsequent bond redetermination, the appeal of the prior decision will become moot, and the BIA will return the record to the IJ unless ICE notifies the Board in writing within 30 days that it wishes to pursue the original appeal.⁵¹ If the non-citizen appeals the subsequent bond redetermination, the IJ must forward the new decision and the record to the BIA with any other recent submissions.⁵²

Other resources on detention and bond procedures:

For other helpful material and resources on immigration-related detention, see:

- People with criminal issues:

Manuel D. Vargas, New York State Defenders Association (NYSDA)'s Immigrant Defense Project, "Removal Defense Checklist in Criminal Charge Cases," pp. 1-2. The checklist can be found on the NYSDA website at <http://www.nysda.org/idp/webPages/deportation.htm> (follow "removal defense checklist" hyperlink).

- "Arriving" non-citizens:

Mark Davidson, Meredith Linsky, Lee Teran and Joe Vail, "Applications for Asylum at Ports of Entry," 1 Immigration and Nationality Law Handbook 294 (2002-03 ed.).

- Access to bond funds:

The National Immigrant Bond Fund (NIBF) provides access to funds for immigrant detainees swept up in ICE enforcement actions. The Fund seeks to reaffirm the values of dignity and due process by assisting these individuals to post bond quickly in order to secure a fair hearing in Immigration Court. Information on how the fund can be accessed is available at www.immigrantbondfund.org.

⁴⁸ 8 C.F.R. § 1003.19(e).

⁴⁹ *Id.*

⁵⁰ *Matter of Valles-Perez*, 21 I&N Dec. 769 (BIA 1997).

⁵¹ *Id.*

⁵² *Id.*

- Others:

Robert Pauw, “Mandatory Detention and Bond,” Immigration and Nationality Law Handbook 407 (2007-08 ed.)

Jeff Joseph, Holly S. Cooper, and David W. Leopold, “Getting Out: Strategies for Challenging Unlawful Detention in Federal Court” Immigration and Nationality Law Handbook 213 (2006-07 ed.)

Websites:

American Civil Liberties Union Immigrants’ Rights Project
<http://www.aclu.org/immigrants/detention/index.html>

Detention Watch Network:
<http://www.detentionwatchnetwork.org/>

Families for Freedom:
<http://www.familiesforfreedom.org/httpdocs/deportation101.html>