

Fundamentals of Custody and Bond Redeterminations

revised January 2008¹

Juan P. Osuna, Acting Chairman, Board of Immigration Appeals

After this session, you should be able to:

1. Define the jurisdiction and authority of an immigration judge in custody and bond proceedings.
2. Identify classes of aliens who are not eligible for release on bond.
3. List factors that are appropriately considered by an immigration judge in redetermining custody and bond.
4. Explain how to conduct a bond proceeding.

I. Jurisdiction and Authority

A. Statutory and Regulatory Provisions Giving Jurisdiction

1. An Immigration Judge (IJ) is authorized to "exercise the authority in section 236 of the Act" except as otherwise provided. 8 C.F.R. section 1236.1(d)
2. Recourse to bond hearing before an IJ occurs only after an initial custody determination by the Department of Homeland Security (DHS). 8 C.F.R. section 1236.1(d).
3. Service of the charging document on *alien* rather than *filing* of the charging document with the *Court* triggers jurisdiction. See 8 C.F.R. section 1236.1(b).
4. An IJ has the authority to decline to change custody determination (bond stays the same); lower bond (minimum is \$1,500); raise the bond. See INA section 236(a)(2)(A); 8 C.F.R. section 1236.1(d)(1).
5. Request for bond redetermination can be made *at any time* prior to the entry of a final order pursuant to 8 C.F.R. section 1240. 8 C.F.R. section 1236.1(d)(1). IJ maintains jurisdiction over bond and custody issues even while alien's case is pending at the BIA. *Matter of Valles*, 21 I&N Dec. 769 (BIA 1997).

¹ This summary was prepared by Lisa Dornell, an Immigration Judge in Baltimore, Maryland, and updated by Jeffrey Chase, attorney advisor at the Board of Immigration Appeals.

6. Jurisdiction of Court over bond and custody amelioration ends seven calendar days following release from DHS custody. 8 C.F.R. section 1236.1(d)

7. Aliens have a forum, under specific circumstances, to litigate issue of bond jurisdiction, e.g., whether they fall within categories of aliens for whom IJs may not redetermine custody or bond. 8 C.F.R. section 1003.19(h)(2)(ii).

B. Limitations on Jurisdiction and Authority

1. An IJ "may not exercise. . . authority. . . with respect to any alien beyond the custody jurisdiction of the immigration judge as provided in section 1003.19(h) of this chapter." 8 C.F.R. section 1236.1(c)(11).

2. An IJ may not "redetermine conditions of custody" for:

a. Arriving aliens. 8 C.F.R. section 1003.19(h)(2)(i)(B);

b. Aliens in exclusion proceedings. 8 C.F.R. section 1003.19(h)(2)(i)(A);

c. Aliens "described in" INA section 237(a)(4) (security and related grounds). 8 C.F.R. section 1003.19(h)(2)(i)(C);

d. Aliens who are "subject to" the provisions of INA section 236(c)(1) (mandatory custody cases). 8 C.F.R. section 1003.19(h)(2)(i)(D).

e. Aliens whose custody determinations are not made by the DHS "pursuant to 8 C.F.R. part 1236," including:

(1) Any case in which the alien is not in the custody of the DHS

- state or non-DHS federal custody
- juveniles not in DHS custody

(2) Aliens who are the subjects of reinstated prior orders of removal under INA section 241(a)(5) of the Act

(3) Aliens under an administrative order of removal pursuant to INA section 238 (aggravated felons).

(4) Aliens who are subject to removal as stowaways and crewmen.

See INA sections 235(a)(2) and 252(b).

II. Mandatory Custody

A. Applicability of Provisions and Release Date

1. The mandatory custody provisions do not apply to aliens whose release date from criminal custody occurred prior to October 8, 1998, the expiration date for the "Transition Period Custody Rules." *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999).

2. An alien who has been apprehended from home while on probation for criminal convictions is subject to mandatory detention under INA §236(c)(1) regardless of the reason for the most recent criminal custody, provided that the facts establish release after October 8, 1998. *Matter of Kotliar*, 24 I&N Dec. 124 (BIA 2007).

B. Aliens Covered by Mandatory Custody Provisions

1. Aliens inadmissible "by reason of having committed any offense covered in INA section 212(a)(2) (includes crimes involving moral turpitude, controlled substance offenses, drug trafficking, prostitution or commercial vice, foreign government officials who have engaged in particularly severe violations of religious freedom, significant traffickers in persons).

2. Aliens deportable "by reason of having committed" any offense covered in INA sections 237(a)(2)(A)(ii),(iii), (B),(C) or (D) (includes, e.g., CIMT convictions after admission; aggravated felony conviction after admission; controlled substance offense; firearms offense; sabotage, espionage or treason).

3. Aliens deportable for conviction under INA section 237(a)(2)(A)(i) (CIMT) where alien has been sentenced to imprisonment of at least 1 year.

4. Aliens inadmissible under INA section 212(a)(3)(B) or deportable under INA section 237(a)(4)(B)(terrorist activities)

5. Aliens who fall under the provisions of INA section 236A (suspected terrorists).

6. Where the record reflects that the alien has committed any of the offenses covered above, the NTA need not charge such ground for the mandatory custody provision of INA §236(c)(1) to apply. *Matter of Kotliar*, 24 I&N Dec. 124 (BIA 2007).

C. Validity of Mandatory Custody Provisions Upheld

Three circuits rejected the mandatory custody provisions for lawful permanent resident aliens. See *Kim v. Ziglar*, 276 F.3d 523 (9th Cir. 2002); *Hoang v. Comfort*, 282 F.3d 1247 (10th Cir. 2002); *Patel v. Zemski*, 275 F.3d 299 (3rd Cir. 2001). However, the Supreme Court has determined that detention of lawful permanent resident aliens under the mandatory custody provision does not violate due process. *Demore v. Kim*, 538 U.S. 510, 123 S.Ct. 1708 (2003).

III. Redetermining Bond: Factors To Consider

Stable employment history; length of residence in the community; family ties in the United States; record of appearance at court proceedings; criminal history; immigration history; use of fraudulent documents; property or business ties; fixed address; use of fraudulent documents; existence of identification document; pending criminal charges; availability and likelihood of relief. See *Matter of Andrade*, 19 I&N Dec. 488, 489 (BIA 1987). Decision may be based upon any evidence available to Immigration Judge, including evidence of misconduct that has not resulted in a criminal conviction. *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006)

IV. Renewed Requests for Redeterminations: Heightened Requirements

After an initial bond redetermination hearing, subsequent requests must be made *in writing* and must be based on a showing that the alien's circumstances have materially changed since the first hearing. 8 C.F.R. section 1003.19(e).

V. Appeals and Stays

A. Appeals

Either party may appeal the decision of an IJ on a bond redetermination within 30 days. 8 C.F.R. section 1236.1(d)(3).

B. Automatic Stays

The DHS is empowered to initiate automatic stay provisions if there is a redetermination and amelioration of a bond set by the DHS of \$10,000 or more, or if the initial determination was to hold the alien without bond. 8 C.F.R. section 1003.19(i)(2). The DHS must file a Form E-43 with the Court within one business day of the entry of the bond order. The stay "shall lapse" within 10 days if the DHS does not perfect its appeal with the Board. *Id.*

VI. The Bond Hearing

A. Recording

Bond hearings are typically not recorded. A recording is not mandatory. *Matter of Chirinos*, 16 I&N Dec. 276 (BIA 1977).

B. Record of Proceeding

Bond record must be separate from the record of the removal hearing. 8 C.F.R. section 1003.19(d).

C. Burden of Proof

The burden is on the alien to show that he is not a flight risk or a threat to the national security. *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999); *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006).

D. Entry of Bond Order

The parties must be informed, orally, or in writing of the basis for the bond decision. 8 C.F.R. section 1003.19(f).

E. Bond Memo

It is the responsibility of the IJ to prepare a written bond memorandum if there is an appeal of the bond order. *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999).

APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
BALTIMORE, MD

FILE:

IN THE MATTER OF:

RESPONDENT

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE
WITH RESPECT TO CUSTODY

Request having been made for a change in the custody status of respondent pursuant to 8 C.F.R. section 1236.1(c), and full consideration having been given to the representations of the Department of Homeland Security and the respondent, it is hereby

_____ ORDERED that the request for a change in custody status be denied.

_____ ORDERED that the request be granted and that respondent be:

_____ released from custody on his own recognizance

_____ released from custody under bond of \$ _____

_____ OTHER _____

Copy of this decision has been served on the respondent and the Department of Homeland Security.

APPEAL: waived - reserved

BALTIMORE - BALTIMORE, MARYLAND

Date:

Immigration Judge

Name _____ A# _____
DHS Bond _____ Respondent's request _____
Date: _____

Language: English Spanish Other Interpreter: _____

DHS Atty: _____ Counsel for Respondent: _____

Pro se

Legal Service List/Advisals Provided _____

Age: _____ Marital Status: Single Common Law
Legal Marriage Separated/Divorced

Family Ties:

Spouse mother father Brothers/sisters
_____ children _____
Aunts, Uncles, Cousins _____

Immigration Status and History:

Entered/Arrived _____ Status at entry _____
Status today _____ derived through _____
Mother natz' d/year _____ Father natz' d/year _____
Age of respondent at time of mother's natz/father's natz _____

Criminal history

Date of arrest Crime Disposition/Date Sentence

Prior Immigration record:

Educational and Employment history:

History of non-appearances:

Prima Facie eligibility for relief:

Address if released:

Bond Decision:

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BALTIMORE, MARYLAND 21202**

IN THE MATTER OF

S-P-

(RESPONDENT)

* IN REMOVAL PROCEEDINGS

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* CASE #A75*****

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MEMORANDUM AND DECISION OF THE IMMIGRATION JUDGE

On July 11, 2005, the parties presented their arguments regarding the respondent's request that the Court reconsider the \$70,000.00 bond that was set by the DHS. The Court received information on that date from counsel for the DHS that the respondent was the subject of a protective order which was obtained against him by his ex-wife. The DHS indicated that the existence of the order was the impetus for the setting of such a high bond.

On the day of the bond hearing, counsel for the respondent, who had just recently been retained, did not have information to provide in support of the respondent's request for an amelioration of the bond. On July 12, 2005, the respondent filed a motion to reconsider the July 11, 2005, decision in which the Court concurred with the DHS that, given the facts presented, there was evidence that the respondent constituted a danger to the community.

The Court has now considered the information provided by the respondent in his motion, which reflects his presence in the United States from 1996. The Court observes that the respondent provides no details about his family ties in the United States, and other than simply stating that he is not a "threat to society," does not at all address the issue raised by the DHS about the existence of a protective order that was issued for the protection of his ex-wife. In the absence of any specific and persuasive evidence to show that the respondent does not constitute a danger, the Court declines to reach a different conclusion. The bond initially set by the DHS in the amount of \$70,000.00 will not be changed.

ORDER

The request for redetermination is DENIED.

LISA DORNELL
Immigration Judge
Baltimore, Maryland

July 29, 2005

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
BALTIMORE, MARYLAND**

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IN THE MATTER OF

A-M-
a.k.a. John Doe
(RESPONDENT)

* IN REMOVAL PROCEEDINGS
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* CASE #A70 *** **
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MEMORANDUM AND DECISION OF THE IMMIGRATION JUDGE

On or about May 5, 2002, the parties presented their positions to the Court regarding the respondent's request for bond. The respondent sought a redetermination of the decision of the INS district director to impose bond in the amount of \$25,000. The INS argued that that bond amount was appropriate given the fact that the agency doesn't know who he is. According to the INS, the British Embassy has provided information that the respondent tried to renew a passport in the name of "M-A-." According to the Embassy, information from the United Kingdom shows that "M-A-" died at birth. The INS stated that the respondent also sought adjustment of status under the name of "M-A-." The INS argued that a high bond is justified because the respondent will not reveal his true identity.

The respondent argued, through his counsel, that even everything the INS says is true, he is not a flight risk. He argued that he has been in the United States for a lengthy period of time, has been married for ten years, has three children, and owns a home in the United States and has lived at his current address since 1997. He argued that he has a stable employment history and has been with his current employer since 1995.

He noted that he has regularly shown up for his appointments with the INS. The respondent said that he has never been convicted of any crime. He further argued that even if the immigration charges against him turn out to be true, he has avenues for relief available to him related to his close ties the United States community.

Appropriate factors to consider in the context of a bond redetermination hearing are evidence of stable employment history, any state or other court bond amount, the length of residence in the community, the existence of family ties, a record of nonappearance at court proceedings, manner of entry, and previous criminal or immigration law violations. See, e.g., Matter of Sugay, 17 I&N Dec. 637 (BIA 1981); Matter of Shaw, 17 I&N Dec. 177 (BIA 1979); Matter of Spiloipoulos, 16 I&N Dec. 561 (BIA 1978); Matter of Patel, 15 I&N Dec. 666 (BIA 1976).

There are serious questions which have been raised concerning the respondent's true identity. However, who ever he is, the INS granted him lawful status in the United States (according to an allegation in the notice to appear). The respondent, whoever he is, has made a life for himself in the United States. He has significant ties to the community. He has a citizen wife and children, stable employment, and owns real property. The respondent, notwithstanding the unanswered questions about his true identity, does not appear to be a significant flight risk, nor is there any evidence to suggest that he is a danger to the community. A bond in the amount of \$6,000.00 ought to provide sufficient incentive for the respondent to meet his obligations to appear as scheduled.

Lisa Dornell
Immigration Judge
Baltimore, Maryland

September 23, 2002