Release from Custody: Getting Your Client Bond in Immigration Court

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INTRODUCTION

This practice pointer will address how to get your client released on bond in Immigration Court, including the use of federal litigation to secure a constitutionally adequate bond hearing.

WHAT STATUTE GOVERNS YOUR CLIENT'S DETENTION?

To determine whether your client is bond eligible, you must first determine what statute governs your client's detention.

- **INA §236(a) (8 USC §1226(a))**: INA §236(a) is the default detention provision that applies to noncitizens apprehended in the United States, during the pendency of their removal proceedings. Noncitizens detained under §236(a), if not released by U.S. Immigration and Customs Enforcement (ICE), are eligible for a bond hearing in which the Board of Immigration Appeals (BIA) has determined that the noncitizen must bear the burden of proof. Many noncitizens have successfully challenged the allocation of the burden of proof through habeas petitions in federal court.
- **INA §236(c) (8 USC §1226(c))**: INA §236(c) is a mandatory detention provision that applies during the pendency of removal proceedings to noncitizens subject to a broad range of crime and security-related inadmissibility and deportability categories. Noncitizens detained under §236(c) are generally ineligible for bond. Instead, they are entitled only to

a hearing under *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999) to determine whether they are "properly included" in a mandatory detention category. But in challenges to prolonged detention under §236(c), many courts have determined that detention without a bond hearing under §236(c) must be limited in time, after which a bond hearing is required.

- **INA §235(b) (8 USC §1225(b)):** INA §235(b) applies to noncitizens who are seeking admission to the United States at a port of entry, or who passed a credible fear screening and were referred for further proceedings. Challenges to prolonged detention under INA §235(b) are possible, but have been complicated by the Supreme Court's decision in *DHS v. Thuraissigiam*.[1]
- **INA §241(a) (8 USC §1231(a)):** INA §241(a) governs post-order detention. In general, post-order detainees are not eligible for bond, but may file habeas petitions challenging their detention if there is no "significant likelihood of removal in the reasonably foreseeable future" ("SLRRFF") under the framework established in *Zadvydas v. Davis*, 533 U.S. 678 (2001) (determining that post-order custody was presumptively reasonable only for six months). The remedy in a *Zadvydas* habeas is generally release, not a bond hearing. Several courts also determined that noncitizens subject to prolonged INA §241(a) detention are eligible for bond hearings–a question the Supreme Court is currently considering.[2]

Which Statute Applies?

Special Circumstances

In some cases, determining which detention regime applies to your client is not straightforward. Here are some special cases:

- ***Detention during the pendency of a petition for review***: Detention generally ceases to fall under §§235 or 236 and begins to fall under §241 when a removal order becomes final. But if a federal court reviewing an order of removal grants a stay of removal, §241 detention does *not* kick in, and instead detention continues to be governed by §235 or §236.[3] Various circumstances arise, however, where a motion for a stay of removal is pending, particularly where Circuits have a practice of not ruling on stay motions unless the government signals an intent to remove. Check the law in your circuit.[4] As to which pre-order custody provision applies when §241(a) does not apply, the U.S. Court of Appeals for the Ninth Circuit has held that §236(a) applies when a noncitizen's removal is stayed during a petition for review, even when the noncitizen was previously detained under §1226(c).[5] Noncitizens

[1] 140 S. Ct. 1959 (2020).
[2] *Garland v. Gonzalez*, No. 20-322 (cert. granted Aug. 23, 2021; case argued Jan. 11, 2022).
[3] *See* 8 U.S.C. §1231(a)(1)(B)(ii); *see also Leslie v. Att'y Gen. of United States*, 678 F.3d 265, 270 (3d Cir. 2012); *Prieto-Romero v. Clark*, 534 F.3d 1053, 1058-62 (9th Cir. 2008); *Wang v. Ashcroft*, 320 F.3d 130, 147 (2d Cir. 2003); *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); *but see Akinwale v. Ashcroft*, 287 F.3d 1050 (11th Cir. 2002) (assuming without analysis that §1231 governs detention during a judicial stay of removal).
[4] *See, e.g.*, *Prieto-Romero v. Clark*, 534 F.3d 1053, 1058–62 (9th Cir. 2008).
[5] *Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942, 948 (9th Cir. 2008).

may argue that §236(c) and §235(b) apply only during the pendency of removal proceedings before the agency, and that §236(a) applies during judicial review.[6]

- ***Detention during withholding-only proceedings***: In *Johnson v. Guzman Chavez*,[7] the Supreme Court determined that noncitizens in withholding-only proceedings are detained under the post-order authority of INA §241(a), not the pre-order provisions of INA §236. This ruling abrogated the Second Circuit's decision in *Guerra v. Shanahan*, 831 F.3d 59 (2d Cir. 2016). It applies to those who previously departed on a final order of removal, re-enter the United States, have their removal orders reinstated under 8 USC §1231(a)(5), pass a reasonable fear interview, and are referred for withholding-only proceedings under 8 CFR §208.31.
- ***Detention following a positive credible fear interview***: The BIA previously treated noncitizens who were initially detained under INA §235(b) pending credible fear proceedings to be eligible for bond under INA §236(a) after they passed their interview and were referred for proceedings.[8] But after the Supreme Court cast doubt on this reasoning in *Jennings v. Rodriguez*, 138 S. Ct. 830, 846 (2018), the Attorney General reversed *Matter of X-K-* and determined that noncitizens who passed credible fear interviews remain detained under INA §235(b) throughout their proceedings.[9]

PRELIMINARY STEPS FOR §236(a) BOND HEARINGS

Noncitizens detained under INA §236(a) are entitled to a bond hearing. Bond proceedings before the Immigration Judge (IJ) are "custody redetermination proceedings." U.S. Immigration and Customs Enforcement (ICE) issues the I-286 "Notice of Custody Determination" form. If ICE decides to continue custody or issues a high bond amount, respondents may request IJ Review. Typically, the respondent requests a bond redetermination hearing by marking the I-286 box indicating as such and signing the form at ICE's initial custody determination. However, a bond hearing may also be requested orally (in court), in writing (via written motion for bond redetermination), or, at the discretion of the immigration judge, by telephone.[10]

Under INA §240, an individual in removal proceedings may request a bond hearing at any time while the person is in ICE custody. Thus, a bond hearing can be requested before a Notice to Appear (NTA) is filed with the court, or while removal proceedings are ongoing. Some courts will not schedule bond hearings until the NTA has been filed with the court, however, a bond motion should be filed citing to 8 CFR §1003.14(a) which states that "no charging document is required to be filed with the Immigration Court to commence bond proceedings…"[11]

> ***Practice Pointer:*** DO NOT rely on the EOIR Hotline for bond hearing dates. The EOIR Hotline system (1-800-898-7180), only provides information on the next master or merits hearing dates—the system does not contain bond hearing

[6] For a full development of this argument, see ACLU et al., *Practice Advisory: Prolonged Detention Challenges after Jennings v. Rodriguez* (Mar. 21, 2018), aclu.org/sites/default/files/field_document/2018_03_21_jennings_v_rodriguez_practice_advisory.pdf.
[7] 141 S. Ct. 2271 (2021).
[8] *Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005).
[9] *Matter of M-S-*, 27 I&N Dec. 509 (AG 2019).
[10] 8 CFR §1003.19(b).
[11] 8 CFR §1003.14(a).

information. Attorneys must call the Immigration Court Clerk to inquire about bond hearing information**.**

A Motion for Custody Redetermination Hearing may be filed prior to the initiation of removal proceedings. Bond proceedings run separately, but parallel to removal proceedings. A bond hearing can also be held between removal hearings or scheduled back-to-back with a removal hearing.

The purpose of bond is to ensure the respondent returns to Court. Custody determinations are not a form of punishment.[12]

As noted above, bond proceedings are ***separate*** from the removal proceedings part of the case. This means any documents in testimony taken in removal proceedings are ***not*** part of the record in bond proceedings, and in reverse any documents and testimony taken in the bond hearing are not automatically included in the removal case (but it can be used to impeach the respondent in removal proceedings). In order to have the bond evidence considered in removal proceedings, it must be resubmitted into the record for removal proceedings. Usually, an oral motion in court is enough to request the IJ move the bond evidence into the record in removal proceedings—but the IJ may request resubmission of the evidence to be filed in the removal proceedings with appropriate caption noting the evidence is for the removal part of the case.

PRESENTING YOUR BOND CASE

The Immigration Judge may change the Bond amount previously set by ICE. The immigration judge may lower the bond amount set by ICE, leave it, or increase it. The minimum bond an immigration judge can set is $1500 and there is no maximum amount.[13] Advocates can also request the judge consider nonmonetary conditions of bond—*i.e.*, conditional parole. In the past, immigration judges denied that they had authority to grant release on conditional parole as an alternative to release on a monetary bond. However, a class action lawsuit, *Rivera v. Holder*, resulted in U.S. Department of Homeland Security (DHS) conceding in a brief that the immigration judge does indeed have this authority.[14]

Burden of Proof: On the Respondent Unless Challenged in Federal Litigation in Your Circuit

The respondent should not be detained unless it is determined that s/he is a threat to public safety (persons or property), national security, or a poor bail risk (flight risk).[15] Unless determined otherwise in federal litigation (see below), the immigration courts require respondents to carry the

[12] *Matter of Andrade*, 19 I&N Dec. 488, 499 (BIA 1987).
[13] INA §236(a).
[14] 307 F.R.D. 539 (W.D. Wa. 2015). For a practice advisory on *Rivera v. Holder* and a copy of DHS's brief conceding this issue, see *Rivera v. Holder Practice Advisory* available at, aclu.org/immigrants-rights/rivera-v-holder-practice-advisory. An immigration judge may not refuse to consider nonmonetary conditions of bond. See *Matter of Garcia-Garcia*, 25 I&N Dec. 93 (BIA 2009); *Cevallos v. Ashcroft*, No. 04-civ-23210-SEITZ (S.D. Fla. 2005).
[15] *Matter of Patel*, 15 I&N Dec. 666 (BIA 1976).

burden of proving that they are not a danger to the community[16] and are not a flight risk[17] and thus merit a bond.

There is a two-part test:

(1) Danger to the community
(2) Flight risk[18]

If the respondent is not a danger, a bond may be set, and the primary remaining determination is what the bond amount should be to ensure respondent's return to court. The purpose of bond is to ensure the respondent returns to Court. Custody determinations are not a form of punishment.[19] Respondent should not be detained unless it is determined that s/he is a threat to public safety (persons or property), national security, or a poor bail risk (flight risk).[20]

Proving Respondent is Not a Danger

Do not rely on the NTA as an indicator of the client's criminal history—as the NTA is not the client's rap sheet. It is important to speak to your client and go over his/her criminal history. However, do not only depend on the respondent's memory as generally clients are not the best historians especially when such information is from long ago.

In order to get a full understanding of the respondent's criminal history:

- Review the respondent's I-213 (although as an attorney you never want to admit any facts in the I-213 in court, the document may include helpful information about the respondent's contact with law enforcement;
- Ask the ICE attorney to review the respondent's A-File[21];
- Ask the respondent the dates and locations of arrest and check the individual courts for records; and
- Speak to the family to gather additional information and any criminal documents in their possession.

Once the facts have been obtained, speak to the client to expand on the information gathered and work to mitigate the facts. In addition, speak to family members and community members to gather further information regarding the circumstances of the past criminal history, and to offer mitigating

[16] *Matter of Urena*, 25 I&N Dec. 140, 141 (BIA 2009) (clarifying that an immigration judge may not release a person on bond who has not met his burden of demonstrating that his "release would not pose a danger to property or persons"). *See also* 8 CFR §§236.1(c)(8), 1236.1(c)(8).
[17] *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006).
[18] *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999); *Matter of Urena*, 25 I&N Dec. 140 (BIA 2009).
[19] *Matter of Andrade*, 19 I&N Dec. 488, 499 (BIA 1987).
[20] *Matter of Patel*, 15 I&N Dec. 666 (BIA 1976).
[21] For practitioners in the Ninth Circuit—such a request is called a *Dent* request and DHS must provide a copy of the A-File. *See Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010) (holding that government's failure to provide noncitizen copy of his A-file when contents bore on noncitizen's case violated noncitizen's due process rights and that noncitizen was entitled to copy of his A-file under mandatory access provision of removal statute).

evidence to support that the client is not a danger. It is also crucial to prove rehabilitation and/or future plan for rehabilitation (if applicable to the facts of the case).

> ***Practice Pointer:*** For respondents with a criminal history involving Driving Under the Influence (DUI), it is important to put in extra effort to prove rehabilitation and a strong system of accountability. IJs and ICE have taken DUIs very seriously in recent years and such evidence is crucial for respondents to have a chance at a bond.[22]

Proving Respondent is Not a Flight Risk

To determine flight risk: "Immigration Judges may look to a number of factors in determining whether an alien merits release from bond, as well as the amount of bond that is appropriate." The Board in *Matter of Guerra* stated the following may include any or all the listed factors:[23]

- Whether the respondent has a fixed address in the United States;
- The length of residence in the United States;
- Family ties in the United States, and whether they may entitle the respondent to reside permanently in the United States in the future;
- Employment history;
- Record of appearance in court;
- Criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses;
- History of immigration violations;
- Any attempts to flee prosecution or otherwise escape from authorities; and
- Manner of entry to the United States.

Additional factors that should be presented are the respondent's community ties and eligibility for immigration relief.[24]

In its March 2020 decision in *Matter of R-A-V-P-*,[25] the BIA upheld a determination that a noncitizen was properly denied request for custody determination because he presented a flight risk. This is because evidence indicated that the noncitizen did not have family present in the United States, did not have employment or community ties in the United States, and he did not have a probable path to obtain lawful status.[26] This provides precedent that "bond determinations depend heavily on the [immigrant]'s circumstances and the specific facts of the case."[27] In determining whether a nonimmigrant presents a flight risk, the Board has found that an "alien who had prior lawful status and a probable path to future lawful status, as well as immediate family

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[22] In *Matter of Siniauskas*, 27 I&N Dec. 207 (BIA 2018), the Board of Immigration Appeals (BIA) held that "driving under the influence is a significant adverse consideration in determining whether a [noncitizen] is a danger to the community in bond proceedings."
[23] *See Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006).
[24] *Matter of Ellis*, 20 I&N Dec. 641 (BIA 1993) (upholding denial of bond where respondent had no relief available and is, therefore, a flight risk, and has a serious criminal history rendering him a threat).
[25] 27 I&N Dec. 803 (BIA 2020).
[26] *Id.*
[27] *Id.*

members with whom he could continue to reside in the United States, did not present a flight risk."[28]

The more evidence presented to show that the respondent is not a flight risk through the above listed factors, the lower the bond will likely be.[29]

Special Rules in Effect for INA §236(A) Bond Hearings in Particular Jurisdictions

As a result of litigation, certain rules are in effect in particular jurisdictions without the need for a respondent to pursue federal litigation. These rules are evolving, and it is important to check for more recent updates.

- **U.S. Court of Appeals for the First Circuit**: The government must prove dangerousness by clear and convincing evidence or flight risk by a preponderance of the evidence in order to justify detention. Currently, the IJ must also consider alternatives to detention and ability to pay.
    - In November 2019 in the *Pereira Brito v. Barr* case, a Massachusetts district court held that Due Process required DHS to bear the burden in INA §236(a) bond hearings. In a class-wide injunction, the Judge required DHS to show dangerousness by clear and convincing evidence or flight risk by a preponderance of the evidence in a bond hearing under INA §236(a). The order also required IJs to consider alternative conditions to detention, as well as respondents' ability to pay bond.[30]
    - In *Hernandez-Lara v. Lyons*, 10 F.4th 19, 41 (1st Cir. 2021), the First Circuit agreed that "due process requires the government to either (1) prove by clear and convincing evidence that she poses a danger to the community or (2) prove by a preponderance of the evidence that she poses a flight risk." The government has not sought certiorari or rehearing en banc for this decision, and it is the law of the Circuit that must be followed.
    - Then, in *Pereira Brito v. Garland*, 22 F.4th 240 (1st Cir. 2021), the First Circuit vacated the district court's class-wide injunction in *Pereira-Brito*. Although the Court reaffirmed its holding from *Hernandez-Lara* regarding the burden and standard of proof, it vacated the district court's injunction requiring consideration of alternatives to detention and ability to pay. The district court's injunction is still in effect, however, because the mandate has not issued; the parties have until June 1, 2022 to petition for rehearing.
- **U.S. District Court for the Western District of New York**: Individuals detained under §1226(a) at the Buffalo Federal Detention Facility who will have bond hearings before the Batavia or Buffalo immigration courts are similarly entitled to a bond hearing in which the government bears the burden to prove flight risk or dangerousness by clear and convincing evidence. The immigration judge must consider alternatives to detention and, if setting bond, ability to pay.[31]

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[28] *Id.*
[29] *See also ILRC, Detention & Bond: Defending Noncitizens in Immigration Custody* (1st Ed. 2021).
[30] *Pereira Brito v. Barr*, 395 F. Supp. 3d 135 (D. Mass.), modified, 415 F. Supp. 3d 258 (D. Mass. 2019).
[31] *Onosamba-Ohindo v. Barr*, No. 1:20-CV-00290 EAW, 2020 WL 5226495 (W.D.N.Y. Sept. 2, 2020).

- The case will be argued at the Second Circuit on June 6, 2022.[32]

- **District Court of Maryland**: For all §1226(a) bond hearings in the district of Maryland, noncitizens are entitled to a bond hearing in which the government bears the burden to prove flight risk or dangerousness by clear and convincing evidence. The immigration judge must consider alternatives to detention and, if setting bond, ability to pay.[33]
  - The case was argued at the Fourth Circuit on October 27, 2021.[34]
- **Federal District Court for the Central District of California**: The Central District of California in *Hernandez v. Garland* approved a settlement on October 25, 2021, that would consider a detained nonimmigrant's financial ability to pay bond. This class action lawsuit challenged the federal government's long-held practice for setting bond amounts for noncitizens in immigration proceedings without consideration of the noncitizen's affordability and capability of paying the bond. This practice often resulted in the detention of noncitizens for months or even years merely because they could not afford to pay the large sum amount of bond. Prior to *Hernandez v. Garland*, the government was not required to consider the financial ability of the noncitizen before setting bond. The settlement requires the U.S. Immigration and Customs Enforcement (ICE) and immigration judges in Southern California to consider a detained person's financial circumstances and financial ability to pay a bond, to not set bond at a greater amount than necessary to ensure the detained person's appearance at all future immigration proceedings, and to consider whether the detained person may be released on alternative conditions of release. This settlement ensures that conditions of release, including monetary bonds, "will better serve their purpose while not punishing those who cannot pay."[35]

FEDERAL LITIGATION TO CHALLENGE TO DETENTION UNDER INA §236(a)

Noncitizens who are not in jurisdictions in which the burden of proof has already been placed on the government, and are denied bond, may file habeas petitions arguing that their detention violates due process because the government has not been required to justify their detention. Individuals presenting such claims may wish to present both constitutional arguments, like those adopted by the First Circuit in *Hernandez-Lara v. Lyons*,[36] and administrative law analysis, like that adopted by the dissent in that case, which agreed that the burden should be placed on the government for administrative law reasons rather than constitutional ones.

> ***Practice Pointer:*** Petitioners may wish to both challenge the burden of proof–*i.e.*, the fact that the burden is placed on the respondent–and argue for a heightened *standard of proof*, such that the government would be required to prove dangerousness and flight risk by clear and convincing evidence. As the Second Circuit determined, it is "improper to allocate the risk of error evenly between the individual and the Government when the potential injury is as significant as the

[32] *See Onosamba-Ohindo v. Garland*, No. 21-1044 (2d Cir.).
[33] *Dubon Miranda v. Barr*, 463 F. Supp. 3d 632 (D. Md. 2020).
[34] *Miranda v. Garland*, No. 20-1828 (4th Cir.).
[35] *See* Daniel M. Kowalski, *ICE Settles SoCal Bond Litigation: Hernandez v. Garland*, LexisNexis, Mar. 30, 2022, www.lexisnexis.com/LegalNewsRoom/immigration/b/insidenews/posts/ice-settles-socal-bond-litigation-hernandez-v-garland.
[36] 10 F.4th 19 (1st Cir. 2021); *see also* Singh v. Holder, 638 F.3d 1196 (9th Cir. 2011).

> individual's liberty."[37] While many courts that have required the government to bear the burden of proof have also required that burden to be carried by clear and convincing evidence, the First Circuit has differentiated the standards by requiring clear and convincing evidence of dangerous but only a preponderance of the evidence of flight risk.[38]

It is critical to examine the existing law of your circuit with regard to the burden of proof.

For example, the Second Circuit in *Velasco Lopez v. Decker* considered whether the government could continue to detain a former DACA recipient for nearly fifteen months during deportation proceedings without having to show that he would pose a flight risk or danger to the community if released.[39] The Court concluded that respondent's "prolonged incarceration" without "a determination that he was a danger or flight risk" violated his due process rights.[40] The Court decided that a new hearing was required in which the government would bear the burden of showing by clear and convincing evidence that respondent was either a flight risk or a threat to his community.[41] Shifting the burden of proof to the government "promotes the [g]overnment's interest—one we believe to be paramount—in minimizing the enormous impact of incarceration in cases where it serves no purpose."[42]

District Courts in the U.S. Court of Appeals for the Second Circuit have split over the impact of *Velasco Lopez*. Some have determined that the decision is consistent with the previous holdings of many district courts that due process categorically requires the government to bear the burden in INA §236(a) bond hearings; others interpret *Velasco Lopez* to require a case-by-case analysis under the factors articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976) in order to determine whether due process requires a bond hearing in which the government bears the burden.[43]

> ***Practice Pointer***: Noncitizens may want to argue both that the bond hearing in §236(a) bond hearings is *categorically* on the government, and that due process requires the bond hearing to be placed on the government due to case-specific *Mathews v. Eldridge* factors.

MANDATORY DETENTION UNDER §236(c) AND *MATTER OF JOSEPH*

Immigration and Nationality Act (INA) §236(c) imposes mandatory detention on a noncitizen who is deportable or inadmissible on a criminal ground of removal, "when the alien is released" from relevant criminal custody.

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[37] *Velasco Lopez v. Decker*, 978 F.3d 842, 856 (2d Cir. 2020).
[38] *Hernandez-Lara v. Lyons*, 10 F.4th 19, 39-41 (1st Cir. 2021).
[39] *Id.*
[40] No. 19-2284 (2d Cir. 2020).
[41] See *Id*; *see also Pereira Brito v. Barr*, 395 F. Supp. 3d 135 (D. Mass.), modified, 415 F. Supp. 3d 258 (D. Mass. 2019) (finding that the Government bears the burden of proving dangerousness by clear and convincing evidence or his risk of flight by a preponderance of the evidence).
[42] *Id.*
[43] *See Huanga v. Decker*, — F. Supp. —-, 2022 WL 1145048, *4 (S.D.N.Y. Apr. 19, 2022) (collecting cases following either position).

The BIA and federal courts have imposed various requirements for mandatory detention that apply from the outset of removal proceedings. Where those requirements are not met, the noncitizen is entitled to a bond hearing under INA §236(a).[44]

There are four mandatory detention categories in 236(c):

1) The noncitizen is ***inadmissible*** under INA §212(a)(2) based on the commission of a crime involving moral turpitude, a controlled substance violation, a drug trafficking offense, a human trafficking offense, money laundering, or any two or more criminal offenses resulting in a conviction for which the total term of imprisonment is at least five years.

2) The noncitizen is ***deportable*** under INA §237(a)(2) based on an aggravated felony, two or more crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, a controlled substance violation (other than a single offense involving possession of 30 grams or less of marijuana), or a firearm offense.

3) The noncitizen is ***deportable*** under INA §237(a)(2)(A)(i) based on the conviction of a crime involving moral turpitude committed within five years of admission for which they were sentenced to at least one year of imprisonment.

4) The noncitizen is ***inadmissible*** or ***deportable*** for engaging in terrorist activity, being a representative or member of a terrorist organization, being associated with a terrorist organization, or espousing or inciting terrorist activity.

A respondent does not need to be charged in the NTA with the specific ground that provides the basis for mandatory detention.[45] The respondent however needs to be subject to inadmissibility under §212, in order to be inadmissible under §236(c) and subject to mandatory detention, or subject to deportability under §236(c) in order to be deportable for mandatory detention purposes.

Challenges to §236(C) Detention in Immigration Court

Never take for granted ICE's designation of whether the respondent is subject to mandatory detention.

First, note the effective date of mandatory detention which is **October 8, 1998**. If the respondent was released from criminal custody after this date with respect to the offense that is listed in §236 (c), they are subject to mandatory detention. However, if the individual was released from criminal custody ***on or before*** October 8, 1998, they are not subject to the mandatory detention statute due to that offense.

[44] *See* Michael K.T. Tan, Marty Rosenbluth, Zachary M. Nightingale, "Hot Topics in Indefinite, Prolonged and Mandatory Detention," *Immigration Practice Pointers* (AILA 2017-2018 Ed).
[45] *Matter of Kotliar,* 24 I&N Dec. 124, 126 (BIA 2007) (where the record reflects that the respondent has committed an offense listed in section 236(c), they are subject to mandatory detention "without regard to whether [DHS] has exercised its prosecutorial discretion to lodge a charge based on the offense).

Advocates can also challenge an individual's designation under §236(c), by requesting a *Joseph* hearing before the IJ and argue that detention was wrongly categorized.[46] The BIA held in *Matter of Jospeh* that the IJ is not bound by DHS' finding that the respondent is subject to mandatory detention under §236(c).[47] The legal standard governing *Joseph* hearings is whether DHS is ***substantially likely*** to prevail in establishing the charge that triggers mandatory detention. Determining whether the respondent properly falls under §236(c) requires careful attention to the facts and law, and a skilled criminal immigration analysis is required to determine if the mandatory detention statute applies.

FEDERAL LITIGATION TO CHALLENGE TO DETENTION UNDER INA §236(c)

Since the Supreme Court upheld the constitutionality of INA §236(c) mandatory detention in *Demore v. Kim*, 538 U.S. 510, 513 (2003), courts have granted numerous challenges to the statute's application to particular noncitizens or, sometimes, categories of noncitizens. Two types of challenges–to prolonged detention and to detention on the basis of a release from criminal custody that occurred years ago–are discussed below.[48]

Prolonged Detention

The most common challenges to detention under INA §236(c) focus on the duration of detention without a bond hearing. Since the court in *Demore* emphasized that it was upholding mandatory detention "for the brief period necessary for their removal proceedings,"[49] numerous courts have determined that, after a reasonable period of time, noncitizens subject to §236(c) must receive a bond hearing in order to justify further custody. At first, many of these decisions reached this conclusion as a matter of statutory construction, using the canon of constitutional avoidance and reasoning that §236(c) did not specify that detention had to continue even when removal proceedings became prolonged. But in *Jennings v. Rodriguez*, the Supreme Court rejected that rationale, determining that INA §236(c) unambiguously permits release only within the circumstances enumerated in the statute (relating to witness protection), and that there is no room to read §236(c) to allow for release when proceedings become prolonged.[50] After *Jennings*, Courts have continued to use constitutional rationales to limit detention to a reasonable period of time.[51]

Courts considering the permissible duration without a bond hearing may consider a range of factors:

The most important factor in the analysis is the duration of detention. This includes whether and how long detention is likely to continue. Courts also consider the reasons for the delay, including dilatory tactics, carelessness or bad faith by the respondent or by the government prolonged the

[46] *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999).
[47] *Id.*
[48] The petitioners in *Gayle v. Warden Monmouth Cty. Corr. Inst.* brought a third type of challenge, to the adequacy of *Matter of Joseph* hearings. 12 F.4th 321 (3d Cir. 2021).
[49] *Demore v. Kim*, 538 U.S. 510, 513 (2003).
[50] *Jennings v. Rodriguez*, 138 S. Ct. 830, 847 (2018).
[51] *Reid v. Donelan*, 17 F.4th 1, 7 (1st Cir. 2021); *German Santos v. Warden Pike Cty. Corr. Facility*, 965 F.3d 203, 210 (3d Cir. 2020); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 234 (3d Cir. 2011).

proceedings. Finally, a court may consider whether the conditions of a noncitizen's detention are meaningfully different from criminal punishment.[52]

A noncitizens' pursuit of appeals and defenses to removal should not count against them.[53] Instead, to "hold an alien's good-faith challenge to his removal against him, even if his appeals or applications for relief have drawn out the proceedings . . . would effectively punish [an alien] for pursuing applicable legal remedies."[54]

> ***Practice Pointer*:** In a habeas petition challenging detention under INA §236(c), you should emphasize the amount of time your client has already been detained, and explain the anticipated future course of proceedings (such as whether proceedings are still at an early stage before the BIA or have been remanded, anticipated appeals). Be sure to address any careless or unreasonable government conduct that has delayed proceedings and to explain or put in context any continuances sought by your client. If your client is detained in the facilities and/or conditions as individuals who are charged or convicted of crime in your jurisdiction, you should argue that this weighs against the reasonableness of a prolonged period of detention.

Post-*Preap* Challenges to Detention Following a Prolonged Period of Law-Abiding Conduct

In *Nielsen v. Preap*, the U.S. Supreme Court held that §236(c) applies even when a noncitizen was not transferred directly into ICE custody from criminal custody for a crime constituting a predicate for §236(c) detention.[55] Because the statute's text mandates detention for noncitizens subject to certain removability grounds "when [they are] released," some courts had determined that the statute was inapplicable when a noncitizen had been detained months or years after their release from the relevant criminal custody.[56]

After *Preap*, it is still possible to raise as-applied constitutional arguments where the gap between criminal and immigration custody is such that a noncitizen's liberty interest in remaining free requires a bond hearing.[57] In determining whether due process requires a bond hearing in a particular case, courts may consider noncitizens' rehabilitation and integration into the community, the life that noncitizens have built in the intervening time in reliance on their liberty, and the fact that noncitizens were not absconding and any awareness by the government of the noncitizen's removability and whereabouts, and other factors.[58]

FEDERAL LITIGATION TO CHALLENGE TO DETENTION UNDER INA §235(b)

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[52] *German Santos v. Warden Pike Cty. Corr. Facility*, 965 F.3d 203, 211 (3d Cir. 2020); *Martinez v. Clark*, No. C18-1669-RAJ-MAT, 2019 WL 5968089, at *9 (W.D. Wash. May 23, 2019), report and recommendation adopted, No. 18-CV-01669-RAJ, 2019 WL 5962685 (W.D. Wash. Nov. 13, 2019).
[53] *Reid v. Donelan*, 819 F.3d 486, 500 n.4 (1st Cir. 2016); *Ly v. Hansen*, 351 F.3d 263, 272 (6th Cir. 2003).
[54] *German Santos v. Warden Pike Cty. Corr. Facility*, 965 F.3d 203, 210 (3d Cir. 2020).
[55] 139 S. Ct. 954 (2019).
[56] *Castaneda v. Souza*, 810 F.3d 15 (1st Cir. 2015) (en banc) (affirming lower court by 3-3 tie).
[57] *Nielsen v. Preap*, 139 S. Ct. 954, 972 (2019) (noting possibility of as-applied challenges).
[58] *See Perera v. Jennings*, No. 21-CV-04136-BLF, 2022 WL 1128719 (N.D. Cal. Apr. 15, 2022).

Before *DHS v. Thuraissigiam,*[59] many courts had concluded that a noncitizen's prolonged detention "will—at some point—violate the right to due process."[60] And with regard to one group of §235(b) detainees, *i.e.* those who passed credible fear interviews, a nationwide injunction required bond hearings on due process grounds.[61]

DHS v. Thuraissigiam significantly changed the landscape of §235(b) litigation.[62] The Court in *Thuraissigiam* held that that a noncitizen who had recently crossed the border lacked a due process right to judicial review of a negative credible fear determination. In January 2021, the Supreme Court vacated the injunction in *Padilla v. ICE* and remanded the case in light of *Thuraissigiam.*[63] And since *Thuraissigiam*, some district courts have held that noncitizens detained under §235(b) have cannot have due process rights to a bond hearing at all, even when detention has become prolonged.[64]

Notwithstanding these decisions, it is still possible to argue that a noncitizen's detention under §235(b) is unconstitutionally prolonged. As one court recently pointed out, "no case persuasively holds that an arriving alien subject to prolonged and indefinite detention has no right to a bond hearing."[65] That court explained, "*Thuraissigiam* does not govern here, as the Supreme Court there addressed the singular issue of judicial review of credible fear determinations and did not decide the issue of an Immigration Judge's review of prolonged and indefinite detention."[66]

FEDERAL LITIGATION TO CHALLENGE TO DETENTION UNDER INA §241(a)

INA §241(a) governs post-order detention. In general, post-order detainees are not eligible for bond. Under *Zadvydas v. Davis*, §241(a) detainees may file habeas petitions challenging their detention if there is no "significant likelihood of removal in the reasonably foreseeable future" ("SLRRFF") under the framework established in the case.[67] The remedy in a *Zadvydas* habeas is generally release, not a bond hearing.

INA §241(a) detainees may also seek a bond hearing if their detention pending challenges to removal becomes prolonged. This may occur, for example, when noncitizens seek review of a

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[59] 140 S. Ct. 1959 (2020).
[60] *Banda v. McAleenan*, 385 F.Supp.3d 1099, 1116 (W.D. Wash. 2019).
[61] *Padilla v. Immigr. & Customs Enf't*, 953 F.3d 1134 (9th Cir. 2020), *cert. granted, judgment vacated,* 141 S. Ct. 1041, 208 L. Ed. 2d 513 (2021).
[62] 140 S. Ct. 1959 (2020); *but see id.* at 2013 n.12 (Sotomayor, J., dissenting) ("Presumably a challenge to the length or conditions of confinement pending a hearing before an immigration judge falls outside of that class of cases. Because respondent only sought promised asylum procedures, today's decision can extend no further than these claims for relief.").
[63] *Immigr. & Customs Enf't v. Padilla*, 141 S. Ct. 1041 (2021) (granting the petition for a writ of certiorari and remanding for further consideration considering *DHS v. Thuraissigiam*).
[64] *Petgrave v. Aleman*, 529 F. Supp. 3d 665, 679 (S.D. Tex. 2021); *Gonzales Garcia v. Rosen*, No. 6:19-CV-06327 EAW, 2021 WL 118933 (W.D.N.Y. Jan. 13, 2021).
[65] *Leke v. Hott*, 521 F. Supp. 3d 597, 604 (E.D. Va. 2021).
[66] *Leke v. Hott*, 521 F. Supp. 3d 597, 604 (E.D. Va. 2021).
[67] 533 U.S. 678 (2001) (determining that post-order custody was presumptively reasonable only for six months). If a noncitizen then "provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," the government must rebut the showing or release the noncitizen. *Id.* at 689. For discussion of *Zadvydas* challenges prior to six months, see Ian Bratlie & Adriana Lafaille, *A 180-Day Free Pass? Zadvydas and Post-Order Detention Challenges Brought Before the Six-Month Mark*, 30 Geo. Immigr. L.J. 213 (2016).

reinstated order, are in withholding-only proceedings, have a final order of removal and remain detained pending administrative adjudication of a motion to reopen, or petition for review of a denied motion to reopen, individuals petition for direct review of a removal order but no stay of removal has been issued.

The U.S. Courts of Appeals for the Third and Ninth Circuits have held that noncitizens detained under §241(a) are entitled to a bond hearing after six months unless removal or release is imminent. In that bond hearing, the government bears the burden to prove flight risk or danger to the community.[68] In the Ninth Circuit, this requirement has been further implemented through two class-wide injunctions requiring bond hearings after six months of post-order custody in which the government bore the burden to prove dangerousness and flight risk by clear and convincing evidence.[69] These cases are now pending at the Supreme Court, where they were argued on January 11, 2022.[70]

> ***Practice Pointer***: In prolonged detention challenges under §241(a), the government frequently points to the procedures provided under the post-order custody regulations ("POCR") at 8 CFR. §§241.4 and 241.13. But the government's focus when focus of six-month POCR reviews is SLRRFF—*i.e.*, the likelihood of removal, not danger or flight risk. And the limited procedures available through these regulations are inadequate to satisfy due process.[71]

OTHER AVENUES TO SEEK RELEASE OF YOUR CLIENT

COVID-19: Fraihat v. ICE

In Aug. 2019, advocates filed *Fraihat v. ICE* in the Central District of California, alleging that the long-standing issues involving COVID-19 in ICE detention centers are due to ICE's failure to monitor and oversee the activities of its contractors throughout the ICE detention system, allowing conditions in ICE detention to violate the Constitution (5th Amendment Due Process) and disability law (Rehabilitation Act Section 504).[72]

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[68] *Guerrero-Sanchez v. Warden York County Prison*, 905 F.3d 208 (3d Cir. 2018); *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011).
[69] *See Aleman Gonzalez v. Barr*, 955 F.3d 762 (9th Cir. 2020), cert. granted sub nom. *Garland v. Gonzalez*, 142 S. Ct. 919 (2021); *Flores Tejada v. Godfrey*, 954 F.3d 1245 (9th Cir. 2020), cert. granted sub nom. *Garland v. Gonzalez*, 142 S. Ct. 919 (2021).
[70] *Garland v. Gonzalez*, No. 20-322 (cert. granted Aug. 23, 2021).
[71] *See Guerrero-Sanchez v. Warden York Cnty. Prison*, 905 F.3d 208, 227 (3d Cir. 2018) (holding custody reviews inadequate because they are conducted "by DHS employees who are not ostensibly neutral decision makers such as immigration judges," place the burden of proof on the individual, and provide for no appeal); *Diouf v. Napolitano*, 634 F.3d 1081, 1091 (9th Cir. 2011) ("The regulations do not afford adequate procedural safeguards because they do not provide for an in-person hearing, they place the burden on the alien rather than the government, and they do not provide for a decision by a neutral arbiter such as an immigration judge.").
[72] ***See*** Complaint, ***Fraihat***, (C.D. Cal, Aug. 19, 2019), ECF No. 1. https://creeclaw.org/wp-content/uploads/2019/08/E-filed-Fraihat_v_ICE_Complaint_to_file_8_19.pdf. *See also* **2020 AILA Crimes and Immigration Virtual Conference:** Sui Chung, Kerry E. Doyle, Elizabeth Jordan, and Zachary Nightingale, "Custody, Bond, and *Habeas Corpus* Petitions: Where Are We Now?" 2020 AILA Crimes and Immigration Virtual Conference (AILA 2020).

In March 2020, advocates filed for provisional class certification and a preliminary injunction specific to people who are at heightened risk for COVID-19 complications or death in ICE detention throughout the country.

On April 20, 2020, the judge in *Fraihat v. ICE* case ordered ICE to establish a process to:

1. Screen all people detained in ICE custody for established risk factors within five days of their detention;
2. review whether people with risk factors can be protected from COVID-19 infection within ICE custody and release them if they cannot;
3. update their protocols to better protect detainees from COVID-19 infections; and
4. implement the requirements of this order at every detention facility across the country regardless of its management.

Due to this case, attorneys can request Fraihat[73] custody redetermination for clients with preexisting conditions. The results of these attempts have been inconsistent throughout the country.[74]

> **NOTE:** The government appealed this emergency order, and in November 2021, the Ninth Circuit Court of Appeals ruled that the order should be overturned. However, a 'mandate' has not been issued yet, so the emergency order is still in effect. The earliest the mandate will be issued is ***June 12, 2022***. When the mandate is issued, *Fraihat* custody redeterminations may no longer be granted. Until then, they are still being processed, so please submit your request as soon as possible.

[73] *Fraihat v. ICE*, 445 F. Supp. 3d 709.

[74] In April 2020, advocates representing immigrants detained at two California detention facilities (Mesa Verde Detention Facility and Yuba County Jailed) filed a class action against ICE alleging that conditions of confinement at the facilities violation their constitutional rights by exposing them to unreasonable risks of infection and death from COVID-19. In June 2020, a preliminary injunction was issued which initiated a bail process where a number of detainees were temporarily released. A second preliminary injunction was issued in December 2020 that required the defendants to put into effect rigorous distancing, quarantine, intake, and testing protocols. In January 2022, immigrants detained during COVID-19 pandemic in two California detention facilities reached a settlement with enforcement of safety protocols at the facilities and limit ICE's authority to redetain those released during the course of the lawsuit.