



REPRESENTATION IN IMMIGRATION BOND HEARINGS

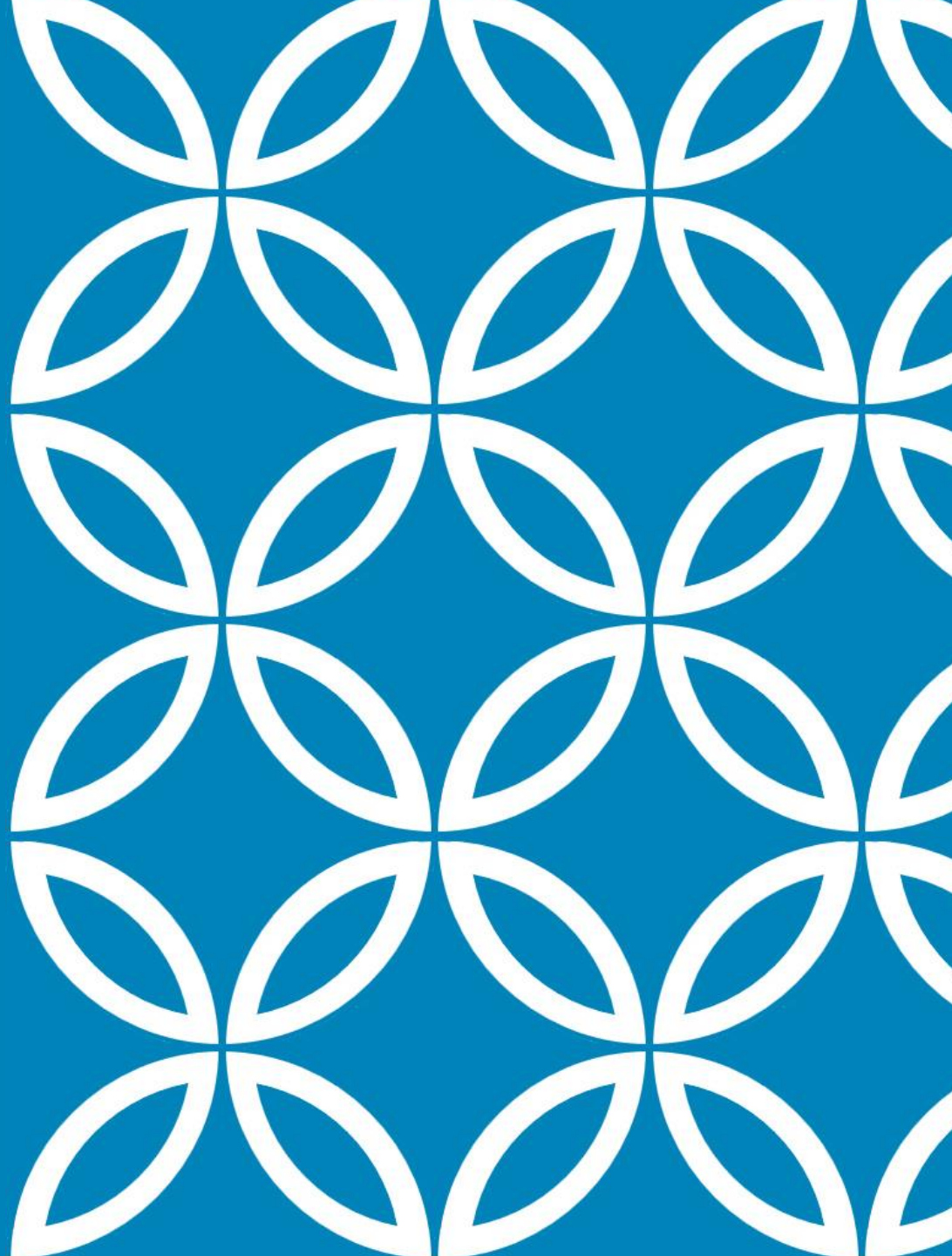
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Edward McCarthy and Nabila Taj
Senior Staff Attorneys, NYIFUP, Brooklyn Defender
Services

*Prepared for the Vera Institute of Justice's SAFE Network and
NYIFUP members*

PART I

GOVERNMENT ENFORCEMENT PRIORITIES



ENFORCEMENT PRIORITY = ANYONE OUT OF STATUS

Currently, everyone who is out of status is subject to ICE arrest and detention

Highlights:

- Unlimited scope – judgment of immigration officer
- No criminal charge necessary
- Open criminal charges → accusations are sufficient

PRACTICAL IMPLICATIONS OF ENFORCEMENT

ICE does not seem to be utilizing their discretion:

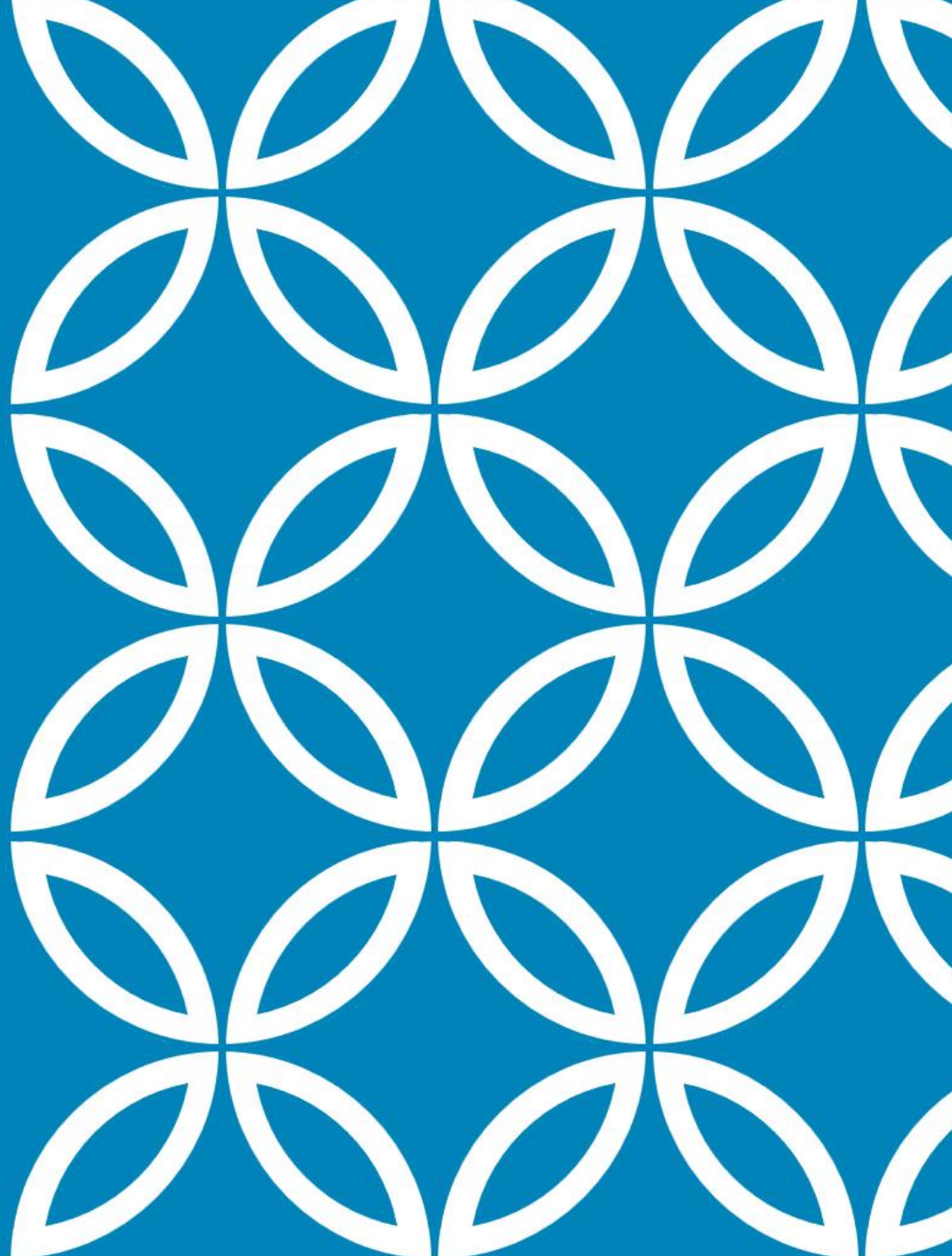
- ICE bonds nearly unheard of
- Criminal arrest → detention

There is an increase of courthouse arrests:

- 1700% increase of courthouse arrests in New York State
- Clients end up in ICE detention with open criminal cases

PART II

LEGAL BASES FOR DETENTION



“BIG THREE” LEGAL BASES FOR IMMIGRATION DETENTION

INA § 236/8 USC § 1226 – Detained pending removal proceedings

INA § 235/8 USC § 1225 – “Arriving alien” detained pending decision on admission (usually also means during removal proceedings)

INA § 241/8 USC § 1231 – Detained with final order of removal, pending removal from the United States

VISA WAIVER ENTRANTS

8 CFR § 1003.14(a) – Immigration judges have no jurisdiction over bond hearings for individuals who have not been issued and served an NTA in relation to removal proceedings pursuant to 8 CFR § 1240.

Immigration judges also have no jurisdiction over Visa Waiver Program individuals in asylum-only proceedings. *Matter of Werner*, 25 I&N Dec. 45 (BIA 2009).

DISCRETIONARY RELEASE

1. Parole/Discretionary Release

- ICE can release anyone they want
 - File humanitarian release request (similar to bond packet) with ICE Enforcement and Removal Operations (ERO)
- Arriving aliens can be “paroled”
 - Can also file parole request with ERO

2. Bond Hearings

- Individuals detained under 236(a) (i.e. in removal proceedings, and not in mandatory detention)

BOND ELIGIBILITY

Discretionary Detention- INA 236(a)

- An individual may be detained
- OR released on a bond (bail) of at least \$1,500
- OR granted conditional parole (aka ROR)

ICE can do any of the above 3 things AND the Immigration Judge can re-determine ICE's decision using these same 3 options.

MANDATORY DETENTION - NOT ELIGIBLE FOR BOND

INA § 236(c) – client subject to mandatory detention if.....Certain criminal convictions

INA § 235(b): “Arriving Aliens”

These are people deemed to be seeking admission at the border but may be new arrivals OR long time LPRs....strange category

INA § 241: People with final removal orders

Unless they pass a “reasonable fear” interview and are in withholding-only proceedings (*Guerra v. Shanahan*)

MANDATORY DETENTION: 236(C)

Deportable (prior lawful admission) for –

- 2 CIMTs
- 1 CIMT with a sentence of 1 yr or more
- Aggravated Felony
- Controlled Substance Offense
- Firearms Offense
- Other crimes (espionage, terrorism)

Inadmissible (has not already been admitted) for:

- 1 CIMT (and has no petty offense exception)
- Controlled Substance Offense
- Drug Trafficking Offense
- 2+ offense with aggregate sentence of 5 yrs

HOW DO WE DETERMINE WHETHER A CONVICTION IS A CIMT/AF/CSO ?

- Document collection to determine criminal history
- Contact criminal defense attorney
- Plea/sentencing minutes (maybe)
- Appeal pending? (Finality issue)
- Crim/Imm analysis
- Need not be listed on NTA!!

MANDATORY DETENTION: 235(B)

INA § 235(b) – “Arriving aliens” are subject to mandatory detention

- Those seeking admission at the border
- Includes long-time LPRs, in some instances

MANDATORY DETENTION: 235(B) – EXCEPTION??

Expedited removal → *removal proceedings* → *entitled to bond hearing*
(??)

- ***Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005)**
 - Expedited removal, pass CFI, then placed in removal proceedings – can have bond hearing

***Matter of M-S -*, I&N Dec. 509 (A.G. 2019)**

- Overrules *Matter of X-K-*
- Passing CFI and moving to removal proceedings, ineligible for bond

***Padilla v. ICE*, 953 F.3d 1134 (9th Cir. March 27, 2020)**

- Granting preliminary injunction affirming bond hearings to immigrants in expedited removal who pass CFI then placed in removal proceedings

LITIGATING BOND ELIGIBILITY

If an individual is subject to mandatory detention, the IJ has no power to set bond

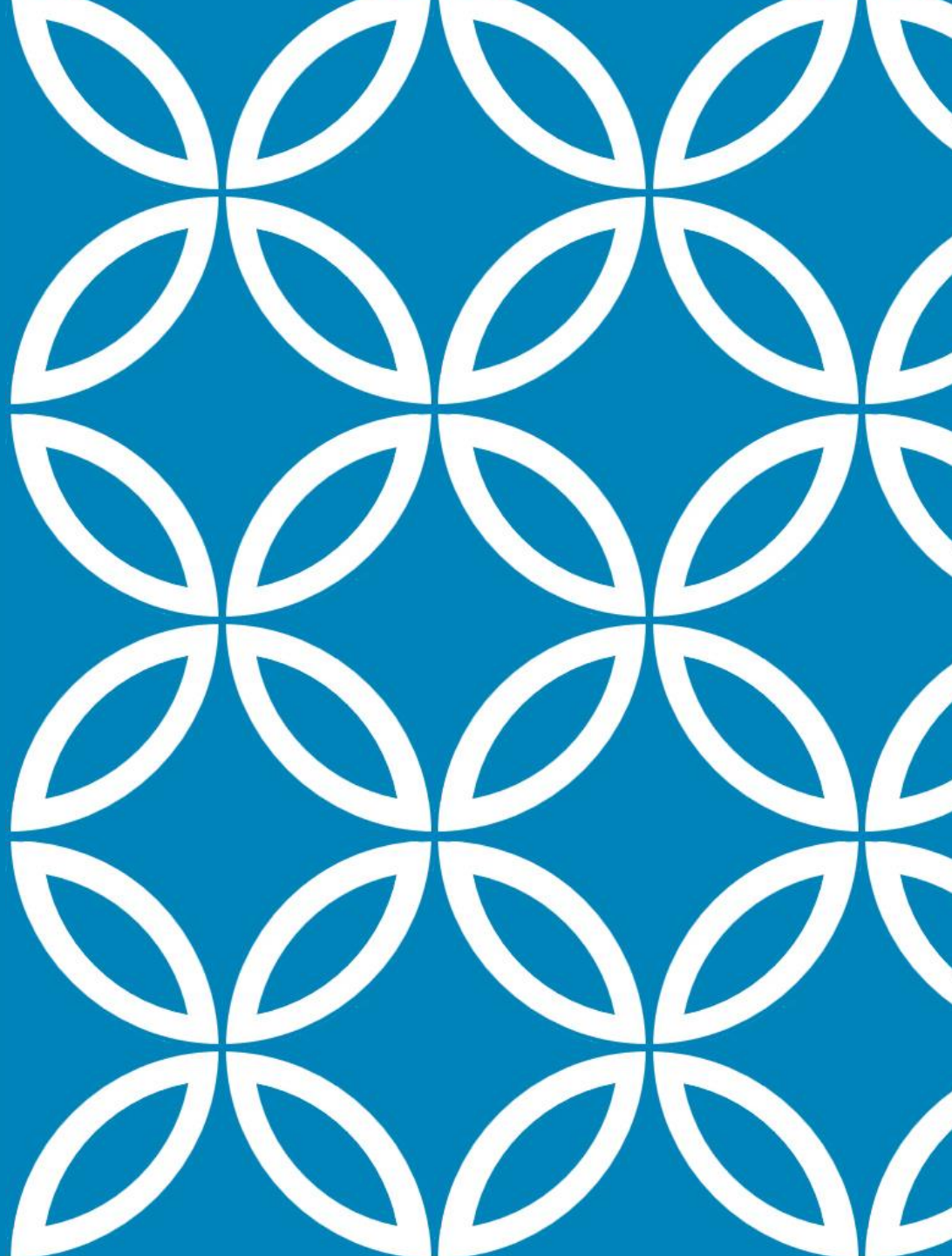
But you can challenge the inclusion of your client in a mandatory detention category

Matter of Joseph, 22 I&N Dec. 799 (BIA 1999)

- An IJ can set bond if it is “substantially unlikely” that DHS will establish the charge(s) that subjects the individual to mandatory detention

PART III

BOND NUTS & BOLTS



BOND HEARINGS: WHO HAS THE BURDEN?

- At the “custody redetermination,” or bond hearing, the IJ will consider if the person is a flight risk or a danger to the community.
 - Burden: Respondent
 - Argument: Burden should instead be on DHS, by CCE
 - The Due Process Clause of the Fifth Amendment to the U.S. Constitution requires that the government justify Respondent’s detention by proving, through clear and convincing evidence, that he is a danger to the public or likely to abscond.
 - *Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011)
 - *German Santos v. Warden*, 965 F.3d 203 (3d Cir. 2020)
 - *Darko v. Sessions*, 342 F. Supp. 3d 429, 436 (S.D.N.Y. 2018)
 - *Pensamiento v. McDonald*, 315 F. Supp. 3d 684, 692 (D. Mass. 2018)

BURDEN OF PROOF

Matter of Guerra, 24 I&N Dec. 37 (BIA 2006)- The burden of proof is on the respondent to show that they merit a grant of bond.

Relevant factors:

- Fixed address in US
- Length of residence in US
- Family in US
- Employment history
- Record of appearance in court and attempts to escape from authorities
- Criminal record (number, recency and seriousness of offenses)
- Manner of entry and history of immigration violations

Potential evidence in support of low bond

- Letters of support from family, friends, or employers
- Proof of eligibility for relief (Often the application)
- Proof of date and manner of entry
- Certificates of disposition for convictions
- Bills or records showing fixed address
- Birth and marriage certificates
- Family photos and artwork
- Proof of employment and tax history
- Proof of rehabilitative programs or probation compliance
- Unpublished bond decisions
- Evidence of limited ability to pay high bond (???)

BOND RESOURCE in English and Spanish:

<http://welcometocup.org/Projects/TechnicalAssistance/FreedomTogether>

COMMON CHALLENGES

DANGER	FLIGHT RISK
<ul style="list-style-type: none">• Criminal history• Alleged gang affiliation• Incident reports (while in detention)• Juvenile adjudications• <i>Spoiler alert</i>: always oppose!	<ul style="list-style-type: none">• Prior orders for removal• <i>In absentia</i>• “Disregard for immigration laws”• Failures to appear• Client non-cooperation• No relief• Lack of community ties

BOND HEARINGS: TESTIMONY

- IJ may ask whether the attorney intends to take testimony.
- Even if you don't plan on taking testimony, TA may request to take testimony, so you need to prep your client either way
- Each IJ is different so reach out to local practitioners to determine which approach a particular IJ favors.

FLIGHT RISK

- Ingrid Eagly, *Measuring In Absentia Removal in Immigration Court*, Penn Law R. (March 2020)
<https://www.pennlawreview.com/2020/06/21/measuring-in-absentia-removal-in-immigration-court/>
 - 96% of represented individuals attend all hearings
 - 95% who filed app for relief attended all hearing
- Conditions of Release
- Don't allow DHS to use community ties as evidence of flight risk
- *Matter of Andrade*, 19 I&N Dec. 488 (BIA 1987), the BIA found that, while the client's ELIGIBILITY for an application for relief from removal was a proper factor in the consideration of flight risk, the MERITS of that application were "beyond the scope of review in these bond proceedings." Id. at 491.

CHARGING DOCUMENTS

While charging documents and arrest reports can be admitted for the purpose of weighing discretionary factors, an IJ “may not base its decision denying relief upon the assumption that the facts contained in such documents are true.” *Padmore v. Holder*, 609 F.3d 62, 69-70 (2d Cir. 2010); *Matter of Arreguin De Rodriguez*, 21 I&N Dec. 38, 42 (BIA 1995) (“Just as we will not go behind a record of conviction to determine the guilt or innocence of an alien, so we are hesitant to give substantial weight to an arrest report, absent a conviction or corroborating evidence of the allegations contained therein.”);

It would be a legal error to find negative factor where client does not admit to everything in complaint. *James v. Mukasey*, 522 F.3d 250, 257 (2d Cir. 2008) (admonishing the agency for crediting a factual allegation in a charging instrument connected with charges that were dismissed); *Matter of Thomas*, 21 I&N Dec. 20, 24 (BIA 1995) (holding that in discretionary determinations, criminal documents should be weighed differently depending on the degree to which charges had “progressed,” and finding that the respondent’s convictions deserved substantial weight where there was a conviction by a jury, and had “advanced far beyond the point” of initial arrest and charges).

WHAT IF THERE WAS NO CONVICTION?

Argue that a charging document relating to charges that did not result in conviction is not an objective account of the truth, and it is highly inappropriate to use dismissed charges to discredit otherwise credible testimony. *United States v. Juwa*, 508 F.3d 694, 700-01 (2d Cir. 2007) (calling it “axiomatic” that a charging document is not evidence of guilt and is not intended to serve a “evidentiary function”); *United States v. Rosa*, 507 F.3d 142, 154-56 (2d Cir. 2007) (noting that the charging document “did not help define the crime” of conviction, but simply limited what the State would have been allowed to prove at a trial).

DUI ISSUES

- Injury to person or property?
- Distinguish *Matter of Siniauskus*, 27 I&N Dec. 207 (2018)
- Rehabilitation, including in-jail services
- Each IJ is different so reach out to local practitioners to determine which approach a particular IJ favors.
- Release plan, including any probation or testing requirements

DOMESTIC VIOLENCE

- Injuries?
- Orders of Protection issues
 - Limited vs. full orders
 - Complainant's presence in courtroom
- Evidence undermining allegations
 - Texts, facebook posts
 - Letter from Complainant
- Rehabilitation
 - DV programs

MITIGATING ALLEGED GANG AFFILIATIONS

Things are not always as they seem.

- Object, Suppress, Terminate
- Context: Did your client get arrested in a gang sweep? (E.g. Operation Matador; egregious and widespread 4th Amendment violations). If evidence of gang involvement exists, provide mitigating context.
- When ICE submits unsworn allegations of gang-related activity without a witness who can be cross-examined, argue that under constitutional standards of fundamental fairness such evidence is unreliable, and inadmissible or entitled to little weight, due to (1) lack of neutrality or accuracy by the preparing witness and (2) absence of opportunity to cross-examine the preparing witness
- Emphasize where there is no criminal history (gang enhancements) tied to alleged gang affiliation (if applicable)

OPEN CHARGES

- Work with Criminal Defense Attorney
 - Letter summarizing helpful evidence, offers, timeline
- Use evidence from client's release in criminal court to argue against dangerousness
- Letter from complainant or witnesses
- Client may need to plead 5th if asked to testify

NEW HEARING DUE TO CHANGED CIRCUMSTANCES

8 C.F.R. § 1003.19(e)

After an initial bond redetermination, an alien's request for a subsequent bond redetermination shall be made in writing and shall be considered only upon a showing that the alien's circumstances have changed materially since the prior bond redetermination.

Examples of changes circumstances:

- Merits grant
- Criminal case resolution
- New bond hearing – former atty IAC

CLIENTS WITH MENTAL ILLNESSES

- Educate the court that jail is not appropriate facility for the mentally ill
- Work with social worker to formulate release plan
- Be judicious in submitting medical records
- Housing instability does not necessarily mean flight risk, especially with plan in place
- Resist offering client up for testimony if unhelpful, especially pre-MAM hearing

BOND FOR RECENT ARRIVALS

- Sponsor
 - Proof of address/income
- Use positive CFI results to your advantage
- Family ties
- Distinguish from *Matter of RAVP*, 27 I&N Dec. 803 (BIA 2020)

HABEAS PETITIONS - 28 U.S.C. § 2241

This statute can be used broadly for illegal civil detention in the immigration context:

- Client detained indefinitely without bond or procedural protections
- Client should not be detained in the first place under the INA
- Client is detained under the wrong statute
- Anything about client's detention or custody is in violation of the INA or the Constitution
- Prudential exhaustion: This situation can't be fixed by the agency or we shouldn't have to wait for that

PROLONGED-DETENTION HABEAS PETITIONS

Bright Line Rule - E.g. 6 months is presumptively unreasonable but the courts not that into it

Individualized determination (multi-factor test)

- Length of detention
- Reason for delay
- Defenses to removal
- Length of civil detention compared with length of criminal sentence
- If conditions of confinement are distinguishable from jail-like conditions
- Gap between criminal and civil custody (as applied left open by *Preap*)
- Likelihood of future delay

GETTING OUT OF DETENTION

Who can post a bond?

- Individual with immigration status
- If bond is \$5,000 or higher it must be a bank check
- Delivered to the local ERO/ICE office
- NOTE: Obligor may have to wait years before the money is returned.

Release Process

- Call Deportation Officer (DO) once bond posted
- Release is typically late in the day
- If past 6:30, contact SDDO, continue going up the chain
- Transportation – do your best to arrange it, nothing provided by facilities to use public transportation

STEPS TO TAKE AFTER RELEASE

- Immediately file a Form E-33 – Change of Address form to ensure detainee is notified of next Master Calendar or Individual Hearing date.
- If you were appearing in a limited scope capacity- file a Motion to Withdraw as Counsel
- Note: Individual Hearing dates cannot be set less than 60 days from the Master Calendar Hearing. But given case completion goals, dates can be quicker.

INDIVIDUAL CASE CONSULTATIONS FOR SAFE & NYIFUP



• safecitiesconsult@bds.org



• nyifupconsult@bds.org