

CHALLENGING IMMIGRATION COURT BOND RULINGS

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Agenda

1. Bond Eligibility and Key Resources for Challenging Bond
2. Changed Circumstance Bond Hearings
3. Bond Appeals Before the BIA
4. Bond Challenges Before the Federal District Courts
5. Hypotheticals

Not Covered

- *BIA appeals of DHS custody determinations*
- *Circuit-specific law*

BOND ELIGIBILITY AND KEY RESOURCES FOR CHALLENGING BOND

Primary Detention Statutes

INA § 236(a) – Discretionary detention pending removal proceedings

INA § 236(c) – Mandatory detention pending removal proceedings

INA § 235 – Mandatory detention of “arriving aliens” detained pending decision on admission (usually also means during removal proceedings)

INA § 241 – Mandatory detention after final order of removal

Bond Eligibility

Discretionary Detention

- Individual may be detained but is entitled to bond hearing before IJ.
- IJ may release on bond (bail) of at least \$1,500 or grant conditional parole.
- IJ may not hold additional bond hearing absent materially changed circumstances.

Mandatory Detention

- IJ will not hold bond hearing or set bond.
- Can request “*Joseph* hearing” to challenge the inclusion of your client in mandatory detention category. *See Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999) (IJ can set bond if it is “substantially unlikely” that DHS will establish the charge(s) that subjects the individual to mandatory detention).

Key Resources

- Immigration Court Practice Manual (“IC PM”)
 - Available at: <https://www.justice.gov/eoir/reference-materials/ic>
- Board of Immigration Appeals Practice Manual (“BIA PM”)
 - Available at: <https://www.justice.gov/eoir/reference-materials/bia>
- Agency Memoranda
 - Available at: <https://www.justice.gov/eoir/reference-materials/general/chapter-10>
- Published BIA Decisions
 - Available at: <https://www.justice.gov/eoir/ag-bia-decisions>
- Index of Unpublished Decisions of the BIA (distributed monthly)
 - Available by subscription from the Immigrant and Refugee Appellee Center (IRAC)

CHANGED CIRCUMSTANCE BOND HEARINGS

Basics

- 8 CFR 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.**”
- **Request should be made through written motion to IJ, even if merits case is on appeal before BIA.** BIA PM § 7.2(a); IC PM § 9.3(b).
 - But, IJ’s “continuing jurisdiction” over bond ends with entry of final removal order. BIA PM 7.2(a); No limit on number of bond hearings, as long as each is justified by changed circumstances since the last bond decision. BIA PM 7.2(a); IC PM 9.3(c)(4).
- **If IJ finds the existence of materially changed circumstances, should hold new bond hearing within 3-5 days of receipt of motion.** Case Mgt. and Docketing Practices, PM 20-07 (2020).
- **Different from motion to reconsider based on IJ legal error, which need not show changed circumstances.** 8 CFR § 1003.23(b)(1); IC PM § 5.8.

What Are Material Changed Circumstances?

- **No published BIA guidance; unpublished rulings include:**
 - New relief eligibility was changed circumstance material to flight risk but not dangerousness.
 - Grant of LPR cancellation was changed circumstance for dangerousness and flight risk.
 - Bond grant for detainee in “virtually identical position” as Respondent, along with DHS’s failure to appeal that bond grant, was changed circumstance.
 - Intervening decision finding Respondent incompetent was changed circumstance.
 - Approval of work authorization was changed circumstance for flight risk.
 - Acquiring of counsel was changed circumstance.
- **Other ideas:**
 - Favorable development in criminal case (plea to lesser charge, vacatur, acquittal, new exonerating evidence...).
 - Change to client’s health.
 - Release plan (or improved release plan)/treatment.
 - Good behavior in detention: lack of disciplinary record, work assignment, program or religious service participation, favorable letter from jail social worker or officer...
 - Combination of several new developments!

Discussion: What has worked/not worked in your cases?

BOND APPEALS BEFORE THE BIA

Basics

- **BIA has jurisdiction over appeals of IJ bond rulings, including changed circumstances rulings.** 8 CFR §§ 1003.1(b)(7), 1003.19(f), 1003.38, 1236.1(d)(3)(i).
- **Notice of appeal must be filed on separate E-26 within 30 days of IJ ruling.** BIA PM § 7.3(a).
 - *Day 0 = date of IJ's oral decision or mailing of written decision.*
 - *"Filing" = physical receipt by BIA.*
- **Don't forget your E-27** (even if you already filed one with the merits appeal).
- **No fee for bond appeals.** BIA PM § 7.3(a)(3).
- **Record consists only of documents admitted in *bond* proceedings.** BIA PM § 7.1; IC PM 9.3(e)(5).
- **BIA does not issue transcripts in bond appeals, but you may request one where needed** (may delay appeal and won't be available if hearing was not recorded). BIA PM §§ 4.2(f)(2), 7.3(b)(2).
- **DHS can appeal bond grants but, absent a stay, client may pay bond and be released while appeal is pending.** BIA PM § 7.3(a)(4); IC PM § 9.3(f).

Timeline

1. You file notice of appeal (EOIR-26) and notice of appearance (EOIR-27) within 30 days of IJ bond order.
2. BIA issues schedule with simultaneous briefing deadlines and IJ bond decision attached, usually within 2 weeks of receipt of notice of appeal.
 - Briefing schedule will be 21 days but will get to you with a week already gone.
 - BIA will usually grant ONE 21-day extension per case.
3. BIA will usually issue decision within 2-4 months.
4. Process is slower for non-detained bond appeals, e.g., where DHS appeals a bond that client already paid.
 - Recently took BIA one year to issue briefing schedule for bond appeal in this posture.

Standards of Review

- **BIA reviews questions of law, discretion, and judgment de novo.** 8 C.F.R. § 1003.1(d)(3)(ii).
- **BIA reviews IJ factual findings for clear error.** 8 CFR § 1003.1(d)(3)(i).
- **BIA MAY NOT engage in de novo fact finding**, “except for taking administrative notice of commonly known facts such as current events or the contents of official documents...” 8 CFR § 1003.1(d)(3)(iv).
- **Risk of flight or future danger are predictive questions of fact.** *See Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015).
- **BUT**, factors underlying these determinations may be **legal**, such as:
 - Determinations concerning immigration consequences of criminal convictions;
 - Evidentiary rulings;
 - Due process rulings/violations;
 - Conclusions concerning relief eligibility;
 - And more...

DHS BOND APPEALS

- DHS can appeal bond grants.
- When doing so, they generally attach a short brief to their notice of appeal and do not file any further briefing (see sample documents).
- Defending your bond grant:
 - Argue that IJ's rulings were all factual and can only be reversed for *clear error*.
 - Attach new favorable evidence to your brief and argue that, even if BIA believes IJ clearly erred, remand is appropriate for IJ to consider this new evidence.

Common Challenges to Bond Denials

- **Improperly imposed mandatory detention.** *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999).
- **Imposed higher burden of proof than “to the satisfaction of” the IJ.** *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006).
- **Failed to consider one of the factors outlined in *Matter of Guerra*** (or other relevant factor/evidence).
- **Failed to consider client’s “ability to pay” in imposing monetary bond.** *Matter of Drysdale*, 20 I&N Dec. 815 (BIA 1994).
- **Relied on fundamentally unfair evidence or “unsupported assertions and speculation.”** (sloppy ICE records, unproven criminal allegations, attorney representations, IJ musings, etc.). *Matter of Mariscal-Hernandez*, 28 I&N Dec. 666 (BIA 2022); *Matter of Velasquez*, 25 I&N Dec. 680 (BIA 2012).
- **Failed to consider “specific circumstances” surrounding criminal conduct.** *Matter of Siniauskas*, 27 I&N Dec. 207 (BIA 2018).
- **Failed to consider likelihood of winning relief when assessing flight risk.** *Matter of RAVP*, 27 I&N Dec. 803 (BIA 2020).
- **Prejudged strength of relief applications without sufficient briefing/evidence.**

Discussion: Under what circumstances have you seen the BIA reverse an IJ’s bond ruling?

BOND CHALLENGES BEFORE THE FEDERAL DISTRICT COURTS

DISTRICT COURT JURISDICTION OVER BOND CHALLENGES

No bar to legal and constitutional challenges to BIA bond rulings in district court:

- There is no higher agency review than the BIA.
- No channeling provision (circuit courts only have jurisdiction over final orders of removal. 8 USC § 1252.)
- With relation to custody rulings, the INA only bars federal court jurisdiction over “[t]he Attorney General’s *discretionary* judgment regarding the application of [§ 1226].” 8 USC § 1226(e) (emphasis added).

Subject matter jurisdiction may be established under:

- 28 USC § 1331 (Federal Question): civil actions arising under the US Constitution, laws, or treaties.
- 28 USC § 1361 (Mandamus): actions to compel US agency or officer to perform an owed duty.
- 28 USC § 2241 (Habeas): actions challenging legality of federal custody.
- 28 USC § 1651 (All Writs Act): all writs necessary and “agreeable to the usages and principles of law.”
- 5 USC § 703 (Administrative Procedure Act): final agency action for which there is no other adequate remedy.
- 28 USC § 2201 (Declaratory Judgment Act): requests for injunctive and declaratory relief.

Other Factors to Consider

➤ Venue

- For habeas: where is your client detained/who is their immediate custodian?
- For other federal actions: look to 28 USC § 1391 to determine venue

➤ Exhaustion

- Did you raise all claims before the BIA?
- If not, is there an applicable exception to prudential exhaustion?

➤ Mootness

- Will your federal action likely moot out through a final order of removal or other change in statute of detention?
- Is your client ready to fight this out, even if detained the whole time?

Potential Claims

- Must be legal or constitutional in nature.
- Commonly framed as violations of the INA, Administrative Procedure Act, or Due Process Clause.
- Focus on BIA's violations of relevant precedent, evidentiary rules, federal regulations, or constitutional protections.
- Should address only the BIA's ruling and those portions of the IJ's ruling affirmed or reversed by the BIA.
- Examples:
 - BIA engaged in de novo fact-finding.
 - BIA failed to review IJ fact-finding for clear error.
 - BIA violated due process by requiring detainee to carry burden of proof, not considering ability to pay, not considering alternatives to detention, or relying on fundamentally unfair evidence.
 - BIA exhibited (or endorsed IJ's) bias/prejudice/lack of impartiality.
 - BIA ignored or mischaracterized evidence to such a degree that it rises to legal error (but careful because the "weight" given to evidence is a discretionary determination that federal courts generally will not review).

Discussion: Have you challenged a bond ruling in federal court? If so, how and what result?

HYPOTHETICALS

What Would You Do?

- IJ subjects your client to mandatory detention by finding they have an aggravated felony conviction, when in fact their *only* criminal case is still open—what are your options?
- IJ reconsiders her mandatory detention ruling and holds a bond hearing, but denies bond based on the allegations in the open criminal case—what claims might you bring on appeal?
- While BIA appeal is pending, client's criminal case is dismissed—what are your options?
- IJ and BIA continue ruling you failed to prove your client is not a danger to the community in light of the allegations in the dismissed criminal case—what can you do?
- What claims might you bring to a district court?

Questions? Ideas?

Individual Case Consultations for SAFE & NYIFUP



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