

## IMMIGRATION BOND HEARINGS

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### Initial Custody/Bond Determination by USCIS District Office

- Local District Office makes initial custody and bond determinations. Can release individuals not subject to mandatory detention under INA § 236(c)(1);
- To be released, individual must show that s/he is not a *danger to the community* or a *flight risk*

### Challenging Conditions of Release

- If individual has been released by DHS but seeks to lower bond or otherwise ease conditions of release, must file request with Immigration Court within 7 days of release
- Even if 7 day period expired, can ask DHS to reconsider conditions of release
- If DHS refuses to reconsider, can appeal DHS's decision to BIA within 10 days

### Bond Redetermination Hearings in Immigration Court

- Non-citizens in custody have right to request bond redetermination hearing from IJ (*whether or not NTA has been issued or filed with the Court*)
- Bond proceedings are separate from removal proceedings
  - Not usually recorded by IJ
  - IJ can consider any information that is available or has been presented by DHS
  - Written decision often cursory

### IJ's Jurisdiction to Redetermine Custody/Bond

- IJ lacks jurisdiction to redetermine custody/bond for certain groups:
  - "arriving aliens"
  - individuals charged as deportable on security, terrorism, related grounds
  - individuals subject to mandatory detention
- BUT IJ does have jurisdiction to review whether individual actually falls within one of these groups
  - LPR will not be considered "properly included" in mandatory detention category when IJ or BIA finds it "substantially unlikely" that DHS will prevail on charge of removability specified in section 236(c)(1) ("Joseph hearing")

### Requesting Custody/Bond Redetermination Hearing

- Request for custody and/or bond redetermination may be written or oral (attorneys generally file written motion)
- For detained persons, request should be made to Immigration Court with jurisdiction over place of detention (otherwise, request made to court with administrative control over case)
- IJ cannot redetermine custody/bond *sua sponte*

### Potential Goals of Bond Redetermination Hearing

- Having IJ set bond as quickly as possible
- Encouraging DHS to issue and file NTA as soon as possible (otherwise have to explain to IJ why they are holding someone w/o charge)
- Making DHS specify what information it has or at least give some information about what it's doing
- Making DHS produce the individual at a hearing, allowing the attorney to have personal contact with the client

### Preparation for Bond Hearing

- Get a copy of individual's complete criminal record, if possible;
- May be necessary to file expedited FOIA request;
- May be possible to review DHS file at hearing

### Types of Evidence to Support Request for Release on Bond

- Need to show individual is *not a danger or a flight risk*. Evidence can include:
  - Eligibility for relief from removal;
  - Manner of entry and length of time in US;
  - Local family ties (and relatives' lawful status in US);
  - Non-existence of criminal record (or minor crimes);
  - Rehabilitation following any criminal activity & appearances at prior hearings;
  - Stable place to live;
  - Job to return to or offer of future employment;
  - Membership in community organizations
  - Letters of support from friends and family (can also testify at bond hearing)

### Amount of Bond

- If bond is set, minimum amount is \$1500 (IJ can release person on own recognizance without any bond)
- Sometimes possible to discuss bond amount with DHS attorney off the record. Find out what client can afford ahead of time to see if stipulation is possible
- Individuals charged with visa violations or overstays usually released on minimum bond or no bond

### Posting Bond

- Two ways for friends/family to post bond:
  - Paying full amount of bond in money order to DHS
  - Using authorized bail bond agent (usually requires home with sufficient equity, fee of 10% of bond amount, which is never refunded)
- If individual fails to appear at hearing, bond is forfeited

### Right to Appeal

- At conclusion of hearing, each side must state if they will reserve right to appeal
- 30 days to file appeal with BIA

### Stay of Order During Appeal

- Automatic stay if district director determined that alien should not be released or bond set at \$10,000 or more, but DHS must file EOIR-43 (Notice of Intent to Appeal) within *one business day* of IJ's order and must file notice of appeal with BIA within 10 business days;
- Even if no automatic stay, DHS can request that BIA issue emergency stay of IJ's order at any time.

### Subsequent Request(s) for Bond Redetermination

- If bond is denied, subsequent requests for bond redetermination must show that the alien's circumstances have **changed materially** since the prior redetermination;
- Subsequent request can be made even while appeal is pending.

### After Final Order of Removal

- Once there is a final order of removal, DHS has sole jurisdiction over custody/bond determinations
- Can appeal DHS's post-removal order custody/bond jurisdictions directly to BIA within 10 days of DHS's decision, unless DHS notifies alien that it is ready to execute order of removal and take him/her into custody for that purpose

### "Alternatives to Detention" or Alternative *Forms* of Detention?

- Electronic Monitoring Program (EMP)
- Intense Supervision Appearance Program (ISAP)
  - Radio frequency with "ankle bracelets"
  - Telephonic reporting with voice verification
  - Global position satellites
  - Curfews
  - Frequent in-person reporting
  - Home visits

### ISAP

- Congress authorized \$11 million for ISAP as part of ICE's 2004 budget; ICE contracted Behavioral Interventions, a private company experienced in electronic monitoring of criminals, to implement ISAP; pilot ISAP program implemented in June 2004 in 8 cities
- To be eligible for ISAP, person must not pose threat to community or national security and must not be subject to mandatory detention
- First phase of ISAP involves wearing "ankle bracelet" for 30 days, 12 hours house arrest/day, reporting to BI office 3 times/week, providing schedule of activities ahead of time; "ankle bracelet" removed in second phase and reporting requirement decrease; third phase requires reporting to BI twice/month

### Effects of Electronic Monitoring

- Severe restraint on liberty (often used in conjunction with curfew)
- Limits mobility/ability to work
- Device can cause pain/irritation/discomfort
- Potential health risks (especially for pregnant women)
- Social stigma (people with device perceived and treated like criminals)

### Van Nuys Raid Cases: Background

- In February 2008, ICE raided Micro Solution Enterprises in Van Nuys, CA and arrested over 150 workers. Many workers were placed in Enhanced Supervision/Reporting program (ESR), which required them to wear "ankle bracelets" and remain at home from 7pm to 7am daily.
- Attorneys with LA Raids Response Network challenged ESR as a form of custody

### Van Nuys Raid Cases: Arguments

- DHS argued that EMP is a *condition of release*, and that IJ lacked jurisdiction because application for *amelioration of terms of release* must be filed within 7 days of release (8 C.F.R. 1236.1(d))
- We argued that EMD is a form of custody and IJ therefore retains jurisdiction under 8 C.F.R. 1236.1(d).

### Van Nuys Raid Cases: IJ's Decision

- IJ found that EMP is a form of "custody" because the ankle bracelet "does cause the loss of a great deal of Respondent's liberty, and requires confinement in a specific space, i.e., Respondent's home between 7pm and 7am every day."
- IJ relied on Black's Law Dictionary definition of custody, as well as Supreme Court cases finding that **actual physical custody is not required** to establish "custody" in the habeas context:
  - *Jones v. Cunningham*, 271 US 236 (1962) (holding that prisoner on parole is still "in custody" because of the constraint on liberty)
  - *Hensley v. Municipal Court*, 411 US 345 (1973) (holding that a prisoner released OR but required to appear at all times and places ordered by court was "in custody" because of constraints on liberty)
- IJ released workers on \$1500 bond

### Van Nuys Raid Cases: Impact of Bond Decisions

- After IJ's decision, DHS agreed to release all other workers with "ankle bracelets" on \$1500 bond;
- But DHS has also appealed IJ's decision (appeal currently pending with BIA)
- Getting rid of "ankle bracelets" was very empowering for workers; bond money raised through community organizing efforts