

**ARRESTED ON BOURBON: DETENTION ISSUES -- CHALLENGING NO BOND
DETERMINATIONS AND PROLONGED DETENTION**

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Ms. Lefebvre has been in practice for 10 years. She began her legal career practicing commercial litigation and transitioned into the exclusive practice of immigration and nationality law in 2008. Her practice includes removal defense and family-based immigration. Ms. Lefebvre has been active in advocacy on behalf of vulnerable immigrants in the community. Currently, she provides pro-bono representation to victims of human trafficking through HP Serve, a local non-profit organization, as well as participates in community outreach seminars.

Ms. Lefebvre received her J.D. from the University of Denver, Sturm College of Law. She is admitted to the State Bar of Texas, is a member of the American Immigration Lawyers Association, Texas and Mid-South Chapters, served as the AILA Dallas Section Co-Coordinator in 2011-2012 and served as the EOIR Oakdale Liaison 2015-2016.

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Ms. Miles has been in practice for a little over three years, in the El Paso, TX location of Noble & Vrapı, P.A. Her practice includes removal defense, advice on immigration consequences to criminal defense counsel, family-based immigration, post-order advocacy with ICE, and litigation around detention issues. Additionally, Ms. Miles is a sitting board member of the New Mexico Immigration Law Section of the New Mexico Bar, committee member on Immigration Specialization for the New Mexico Bar, a committee member of the AILA LGBT working group, and a member at large of the New Mexico Criminal Defense Lawyer's Association. Ms. Miles further participates in immigration local advocacy as a founding member of the Borderland Immigration Council (BIC).

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**I. THE RISK CLASSIFICATION ASSESSMENT TOOL AND
NEGOTIATING A BOND WITH ICE**

The Risk Classification Assessment (RCA) Tool was first introduced in early 2013 as a means to make systemized, evidence-based determinations of who among those coming into ICE custody should be detained and who should be released.¹ RCA is a computer-based data program which

¹ Mark Noferi & Robert Koulish, The Immigration Detention Risk Assessment, Georgetown Immigration Law Journal, 47 (Fall 2014).

uses “personally identifiable information (PII) about the alien and associated information such as criminal history; special vulnerabilities, such as disability or status as a crime victim; substance abuse history; immigration history and case status; ties to the community, including the length of time at current address, the number of family members residing with the alien, and property ownership; and authorization to work or enrollment in school” to make custody recommendations.² The result of the custody determination will be entered on a form I-286, Notice of Custody Determination.

If the RCA recommends detention of your client, it will also include whether the system believes your client to be eligible for bond or is subject to mandatory detention, and also assigns your client a detention classification level of Low, Low/Medium, or High, which will be used to classify your client in detention.³ If the RCA recommends release of your client, it will also indicate whether your client should be subject to technological monitoring, such as GPS.⁴

Although the RCA is already interfaced with the Enforcement Integrated Database (EID) which includes NCIC and immigration history data, this information may be inaccurate based on whether the NCIC data included is a name match or based on biometric data, and is often incomplete as NCIC does not accurately track the final disposition of criminal charges but related to arrests only. More personal information related to status as a crime victim, ties to the US, the existence of USC and LPR family members, etc., must be input into the system manually by an immigration officer based on an interview with your client. Thus, many times the custody recommendation rendered by the RCA is based on incomplete or inaccurate information.

In addition to the RCA, ICE has continually changing guidance regarding ICE’s criteria for whom it chooses to prioritize detaining and under what circumstances. The most recent of these nationally adopted policies is the November 20, 2014 memorandum authored by Sec. Jeh Johnson entitled “Policies for the Apprehension, Detention and Removal of Undocumented Immigrants”⁵. This memorandum characterizes priorities for enforcement operations, which necessarily include the decision to detain an immigrant, into three categories. Generally, those with felony convictions and/or aggravated felony convictions, those suspected of terrorism, and those apprehended at the border or ports of entry while attempted to *unlawfully* enter the United States make up priority one. Priority two for enforcement are people with three or more misdemeanor offenses (excluding traffic citations), people with a conviction for a “significant

² Enforcement Integrated Database (IED), Risk Classification Assessment (RCA 1.0), ENFORCE Alien Removal Module (EARM 5.0), and Crime Entry Screen (CES 2.0), Dept. of Homeland Security, 3 (April 6, 2012), https://www.dhs.gov/xlibrary/assets/privacy/privacy_piaupdate_EID_april2012.pdf

³ Id. at 4.

⁴ Id.

⁵ https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf

misdemeanor”⁶, recent entrants who entered after January 1, 2014, and/or folks who have “significantly abused the visa or visa waiver programs.”⁷ Finally, the third priority group for enforcement, under the Johnson memo, are people who has a final order or removal issued after January 1, 2014.

It is important to note that just because your client may be considered a priority for enforcement under one of the categories in the Johnson Memo does not mean they should not be released on a bond by ICE. Rather, the Johnson Memo specifically indicates that folks who are eligible for relief should not be prioritized, as well as those who can show that they are not a danger to the community, as well as other factors.⁸

In making custody determinations, ICE is also bound to apply the memorandum regarding “Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities”, issued in 2013 by Acting Director of ICE Josh Sandwig.⁹ Under this memorandum, ICE is to take into account the parental rights and responsibilities of an immigrant in making detention and enforcement decisions, and to make a note of whether an immigrant is the parent and/or *primary caretaker* of a minor U.S. citizen or LPR.¹⁰

Practice Pointers

Although the RCA system is supposed to take into account the priority memorandums and guidance on ICE’s detention decisions, many times the relevant information in your client’s case is not taken into account or entered into the system. For example, where your client may not be the biological parent of a U.S. citizen child but is an established step-parent on whom the child relies, or where your client’s child suffers from an illness that requires close monitoring.

Accordingly, providing ICE with accurate information on your client regarding final dispositions on any arrests or charges, rehabilitation or other factors mitigating criminal history, eligibility for relief (such as DACA, U visa, AOS), family and property ties to the US, and other humanitarian

⁶ Defined as “an offense of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or driving under the influence; or if not an offense listed above, one for which the individual was sentenced to time in custody of 90 days or more (the sentence must involve time to be served in custody, and does not include a suspended sentence)”

⁷ Policies for the Apprehension, Detention and Removal of Undocumented Immigrants, Sec. Jeh Johnson, DHS, 4 (Nov. 20, 2014).

https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf

⁸ These factors are further identified in the memorandum and include humanitarian factors. Id.

⁹ https://www.ice.gov/doclib/detention-reform/pdf/parental_interest_directive_signed.pdf

¹⁰ Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities, Acting Director Josh Sandwig, ICE, FEA No. 306-12-002b (Aug. 23, 2013). https://www.ice.gov/doclib/detention-reform/pdf/parental_interest_directive_signed.pdf

considerations (such as a sick child, or client is a single parent) can aid your client in being released on recognizance (ROR), given a bond, or put on an Alternative To Detention (ATD) such as GPS monitoring. However, many times getting ICE to include this information in the RCA can be difficult and requires advocating for your client in-person or over the phone with a supervisor.

If your client was just taken into custody, try to insert yourself in the RCA process as soon as possible by calling or showing up to the ICE facility with accurate information that will weigh in your client's favor for bond determination.

If the RCA has already recommended against release and your client was not given a bond by ICE, you can still submit a written request for bond to ICE in your sector.

Checklist for Negotiating Bond with ICE

- Is your client eligible for relief that would undermine their supposed priority status, such as U visa, DACA eligibility, and/or acquired or derived U.S. citizenship?
- Have client's family start collecting relevant documentation immediately, such as: birth certificates of children/step-children, proof of eligibility for possible relief (police reports listing client as victim, proof of physical presence and school information to prove DACA).
- If your client is a single parent of a minor child or has some other extenuating and/or humanitarian factor present in their case, make sure you bring that up with ICE.
- If your client is female, ask her if she is pregnant or could be pregnant.
- Get a G-28 as soon as possible

II. UPDATES IN COURT PROCEDURES AND PREFERENCES BY COURT ON HOW TO FILE BOND

If your client is not subject to mandatory detention and is not an arriving alien, then you can move the court for a bond redetermination hearing, assuming ICE has not set an initial bond or your client cannot afford the bond set by ICE. Section 236(a) of the Immigration and Nationality Act (“INA”) gives the Attorney General the discretion to grant bond to aliens in removal proceedings as an exercise of discretion.¹¹ Further, the Attorney General’s authority to grant bond is delegated to Immigration Judges and the Board of Immigration Appeals (“BIA”).

Across all jurisdictions, Immigration Judges look at several factors to determine the amount of bond or decide if the detainee merits a bond.¹² First, is the detainee likely to abscond or otherwise a poor bail risk.¹³ Secondly, is your client a threat to national security or danger to the community?¹⁴ The BIA has held that in order to be granted bond, an alien must establish that he or she “does not pose a danger to persons or property and is not a flight risk.”¹⁵

On August 3, 2016, in *Matter of Fatahi, supra*, the Board of Immigration Appeals held that when an Immigration Judge is determining whether an alien should not be released on bond for being a danger to the community, they “should consider both direct and circumstantial evidence of dangerousness.”¹⁶ The BIA also found that the record of proceedings does not need to “contain specific acts of past violence or direct evidence of a predisposition toward violence” in order to sustain a finding that an alien presents a danger to the community, but rather if the evidence indicates that the alien poses a “more general threat to national security,” then the Immigration Judge is justified in denying bond on the basis of the alien raising significant safety and national security concerns.¹⁷

The burden is on the alien to show that he or she merits release on bond.¹⁸ It is your responsibility, as his attorney, to gather as much evidence as possible to prove your client merits a bond, such as:

- (1) proof of the alien’s fixed address in the United States,
- (2) alien’s length of residence in the United States;

¹¹ 8 C.F.R. 236.1(c)(8) (1999).

¹² *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006).

¹³ *Id.* at 40; *Matter of Patel*, 15 I&N Dec. 666 (BIA 1976).

¹⁴ *Matter of Fatahi*, 26 I&N Dec. 791 (BIA 2016).

¹⁵ *Matter of Adeniji*, 22 I&N Dec. 1101 (BIA 1999); *see also, Matter of Garcia-Arreola*, 25 I&N Dec. 267 (BIA 2010).

¹⁶ *Matter of Fatahi*, 26 I&N Dec. 791 (BIA 2016).

¹⁷ *Id.* at 795 (BIA 2016), *citing Doherty v. Thornburgh*, 943 F.2d 204, 211 (2d. Cir. 1991).

¹⁸ *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006).

- (3) alien's family ties;
- (4) alien's employment history;
- (5) alien's record of appearance in court;
- (6) alien's criminal record, extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses;
- (7) alien's history of immigration violations;
- (8) any attempts by the alien to flee prosecution or otherwise escape from authorities; and
- (9) alien's manner of entry to the United States.¹⁹

PRACTICE POINTERS BY JURISDICTION

While you may be inclined to file a bond request the same or next day after your client retains your services, it is imperative that you submit ample supporting evidence (or supplement at a later time) to position your client to receive a bond and/or an affordable bond. *See Table of Contents attached.* Also, before you file a bond request, it is imperative to familiarize yourself with the court and their procedures.

Most Immigration Courts have developed their own form for requesting a bond hearing. If required, the form is available on the Immigration Court's website, at the court, or by contacting the EOIR Liaison assigned to the specific jurisdiction.²⁰ This form must be completed and filed prior to the Immigration Court scheduling a bond hearing. Some immigration courts do not require such form, and you can move the court simply by filing a motion for bond redetermination hearing.²¹

It is imperative to know the venue and your audience prior to requesting a bond redetermination hearing. The bond amount varies significantly, not only does it depend on the underline crime or whether the detainee has relief, but also on the Immigration Judge presiding over your case. For this reason, you should do your homework prior to walking into court. On occasion, the trial attorney can also impact the bond amount set. Therefore, it is to your advantage to call the trial

¹⁹ *Id.* at 40; see also, *Matter of Saelee*, 22 I&N Dec. 1258 (BIA 2000); *Matter of Andrade*, 19 I&N Dec. 488 (BIA 1987).

²⁰ Please call the court clerk to find out if they require a bond work sheet. Some Immigration Courts require a bond work sheet, yet do not have it posted on their website.

²¹ See Immigration Court Practice Manual, available at: <https://www.justice.gov/eoir/office-chief-immigration-judge-0>

attorney to agree upon a bond amount or simply to have an idea of their stance prior to the scheduled bond hearing.

Below are court procedures/preferences by Immigration Court (“IC”):

EOIR - Oakdale, Louisiana

Is a bond work sheet required?

- Yes, Oakdale Immigration Judges prefers practitioners file a bond hearing work sheet, which you can find on the EOIR Oakdale website. *See* copy attached.

What happens after you request a bond hearing?

- Upon receiving your bond hearing work sheet and/or motion for bond redetermination, the Oakdale IC staff will call you to schedule a bond hearing. If you do not receive a call, then you should take the initiative to call to inquire or simply wait for the notice of hearing. Usually, bond hearings are scheduled about 6-10 days after receiving your bond request, unless a master calendar hearing is already scheduled.

What’s Trending?

- Judge Beatmann has retired. The two remaining Immigration Judges, Honorable Reese and Honorable Duck, and both grant telephonic bond hearings.
- Bond amounts vary depending on the crime and on whether the detainee has relief.
- DWI’s – first offense – \$3,500 - \$7,500 (however, it depends on the Judge).

Suggestions/Practice Tips?

- Highly advisable to FedEx or Express mail your request because it can take about a week for any regular USPS mail to arrive in Oakdale, Louisiana.
- Serve OCC a copy of your bond packet via email. If you are appearing in person, it does not hurt to bring an extra copy of your bond packet in case it did not make it to the trial attorney’s file.

EOIR - Dallas, Texas

Is a bond work sheet required?

- Dallas Immigration Judges prefer attorneys file an Application for Redetermination of Custody located on their website. *See* copy attached.

What happens after you request a bond hearing?

- Upon receiving your bond request, the court will mail a hearing notice to notify you; however, on occasion the clerks will call as a courtesy.
- Bond hearings are set within 2-3 weeks of filing request, unless a Master Calendar Hearing is already set.
- Telephonic bond hearings seldom granted, but it depends on the Immigration Judge.

What's Trending?

- Immigration Judges are becoming more conservative on DWIs and pending criminal prosecution cases. The trend is higher bond amounts and denials.
- Dallas IC is denying bond for detainees with three DWI convictions. For individuals with one or two DWIs, depending on recency and whether they have relief, bonds are being set between \$7,500 and \$30,000.
- Currently, Judge Sims handles all bond hearings stemming from Johnson County. Judge Nugent handles all bonds hearings stemming from Rolling Plains.
- Denying bonds for DACA recipients where USCIS has revoked DACA or where DACA is automatically deemed revoked as a matter of law, upon the filing of the NTA.

Suggestions/ Practice Tips?

- Know your audience. If you are not familiar with the Immigration Judge, call the EOIR Liaison and/or local practitioners.

EOIR Houston, Texas

Is a bond work sheet required?

- Houston IC prefer attorneys file a bond hearing work sheet, which is not located on their website; however, I secured a copy from their EOIR Liaison. *See* copy attached.

What happens after you request a bond hearing?

- Upon receiving your bond request, the court will mail a hearing notice to notify you; however, on occasion the clerks will call as a courtesy.
- Hearings are set within 10 business days, unless a Master Calendar Hearing is scheduled.
- Houston Judges are tough/strict on bonds; therefore if you secure an agreement from OCC, take it!

What's Trending?

- Immigration Judges are likely to set a high bond on recent criminal activity.
 - o Example: Recent DWI – first – \$15,000 or no bond (danger to community)
 - o Example: DWI that occurred a few years ago with no alcohol related criminal activity – \$10,000
 - o Example: DWI – 2 or more – no bond

Suggestions/ Practice Tips?

- It is likely the Immigration Judge and/or Trial Attorney will question your client. Prepare your client for cross examination.

EOIR San Antonio and Pearsall, Texas

Is a bond work sheet required?

- Immigration Judges prefer practitioners file an Application for Redetermination of Custody.

What happens after you request a bond hearing?

- San Antonio will schedule a bond hearing within 5-14 days. Sometimes judges only hold bond hearings two days out of the week, so it will depend on when the court receives your motion.

- Pearsall will schedule a bond hearing within 2 weeks. However, if you were previously scheduled on another matter, then the clerks are likely to schedule you on your bond hearing on that same day.

What's Trending?

- DWI – First offense – Judges are likely to set a \$5,000-\$10,000 bond if you can demonstrate no one was injured and/or no property damage occurred as a result, the person has rehabilitated and is not likely to commit a second offense.
- DWI's – Second and Third Offenses – Judges will likely deny bond; unless the second conviction is pending, you can possibly obtain a “high” bond if you can demonstrate with ample evidence that the detainee is not a danger to the community and/or show the detainee has relief before the court.
- Pearsall trial attorneys are requesting that practitioner's submit financial fitness evidence for the detainee's sponsor.
 - o Example: Submit evidence of a fixed address (Identification/Driver's License); submit proof of employment (check stubs/ITR/W2s); a letter of support from sponsor; and/or ensure that the sponsor is readily available to testify at the bond hearing if necessary, to attest that they will ensure the detainee, if released, will appear at the next hearing.

Suggestions/ Practice Tips?

- Immigration Judges in this jurisdiction require that you include supporting evidence with your bond hearing request. Also, you must submit the evidence well in advance of the hearing. Please email/mail supporting evidence to trial attorney (email is preferred).
- It is imperative that you submit criminal documents for all convictions.
- San Antonio has new Immigration Judges and are about to acquire more in the coming months.
- San Antonio IJs often grant telephonic hearings to out of town attorneys, including bond hearings.

EOIR El Paso, Texas –

Is a bond work sheet required?

- No, the Immigration Judges in El Paso, Texas do not require practitioners to file a bond work sheet. However, Judge Abbott has a standing order for bond cases indicating several pieces of information included in the bond packet. *See attached.* This includes, for cases where asylum is the anticipated form of relief, a sworn statement of the specific facts supporting the claim for asylum. If the client has had a credible fear determination, he will accept the summary at the end in lieu of a new sworn statement.

What happens after you request a bond hearing?

- Depending on which Judge you are assigned, bond hearings are usually scheduled within 1-3 weeks.
- If you are assigned to Judge Abbott, you will receive a copy of his standing order.

What's Trending?

- Only two of the four judges allow telephonic appearances for bond. Judge Abbott will permit written pleadings for bond and does not require the attorney to be present.
- Denials of bond on dangerousness based on a DWI is judge specific:
 - o IJ Gonzales and IJ Mahtabfar are much more likely to deny bond for any DWI offense, unless you can show copious evidence of rehabilitation.
 - o IJ Abbott and IJ Ruhle are more likely to set a bond with a DWI arrest, but rehabilitation evidence should be submitted.
- Bonds in asylum cases also vary wildly by Judge, and each IJ will only set a bond where they consider the claim colorable regardless of the existence of a positive Credible Fear Interview (CFI).
 - o One judge routinely sets bonds for asylum between \$10,000 and \$20,000; while the other IJ's set bond anywhere between \$2,500 and \$10,000 depending on the strength of the claim.
- OCC typically opposes the setting of bond in ALL cases, but will normally not reserve appeal when bond is set.

Suggestions/ Practice Tips?

- IJ Abbott
 - Comply with Judge's standing order regarding bonds.
 - If client did not express fear when first encountered by immigration officials, submit detailed affidavit as to why and provide corroborative evidence of basis of claim.
- IJ Gonzales
 - Does not permit telephonic appearance
 - Prep your client to answer questions regarding basis for asylum, and relationship to sponsor.
- IJ Mahtabfar
 - Permits telephonic appearance.
 - Prepare your client to answer questions regarding basis for asylum, and/or basis for other forms of relief.
- IJ Ruhle
 - Be prepared to offer oral argument as to your legal theory for asylum of the case under Fifth Circuit precedent. Submit this briefing in written format for a better outcome.
 - Will often ask "how much is too much for your client to afford", and you should be prepared with that answer.