

## Practice Advisory<sup>1</sup>

### Advocating for the Release of Detained Immigrants Based on the COVID-19 Pandemic

March 21, 2020

#### I. Introduction

The rapid advancement of the global COVID-19 pandemic has caused a public health emergency and presents a fatal threat to incarcerated people. Thousands of immigrants are held in the patchwork of detention facilities in the United States, which is comprised of federal immigrant detention facilities, private detention facilities, and local jails and prisons contracted by the Department of Homeland Security (DHS) to hold immigrant detainees. At the time of this writing, the Executive Office of Immigration Review (EOIR) continues to hold hearings to determine the custody of detained immigrants, and the relief from removal available to them.<sup>2</sup> In addition, DHS continues to detain immigrants in these facilities despite the growing danger of infection as the virus continues to spread, and despite the special vulnerability of detainees living with existing health conditions, immune suppression, or who are elderly.<sup>3</sup>

This practice advisory is intended to assist advocates seeking release of their clients from immigrant detention based on the threat COVID-19 presents to their life and health, using mechanisms available to them at different stages of the removal process, including humanitarian parole, motions for bond and custody determination hearings, motions for redetermination of bond and custody, and habeas petitions.<sup>4</sup> The practice advisory includes sample filings addressing the emergent nature of the COVID-19 pandemic and its impact on the detained immigrant population.

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<sup>2</sup> Memorandum from James McHenry III, Director, EOIR, Immigration Court Practices During the Declared National Emergency Concerning the COVID-19 Outbreak, March 18, 2020, n. 3, <https://www.justice.gov/eoir/file/1259226/download>.

<sup>3</sup> See Catherine Shoichet, *Doctors warn of 'tinderbox scenario' if coronavirus spreads in ICE detention*, CNN Health, March 20, 2020, <https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html>

<sup>4</sup> A more complete guide to these various forms of advocacy may be found at Practitioners Guide to Obtaining Release from Immigration Detention, CLINIC, May 24, 2018 (hereinafter "CLINIC Detention Guide"), <https://cliniclegal.org/resources/enforcement-and-detention/practitioners-guide-obtaining-release-immigration-detention>

## **II. Strategies for Seeking Release of Detained Immigrants Based on the COVID-19 Pandemic**

### **A. Humanitarian Parole**

When an immigrant is first detained, they are subject to an initial custody determination by Immigration and Customs Enforcement (ICE).<sup>5</sup> If denied release or issued a bond amount too high for them to overcome, they may request parole from the same agency. Section 212(d)(5)(A) of the Immigration and Nationality Act (INA) permits the Attorney General, at his or her discretion, to “parole” any noncitizen into the United States “temporarily under such conditions as [they] may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit.”<sup>6</sup> The COVID-19 pandemic, and its impact on incarcerated populations, presents a strong argument for release of immigrant detainees for both humanitarian and public benefit reasons.<sup>7</sup>

### **B. Bond/Custody Hearing Before Immigration Court**

Whether or not ICE sets an initial bond or declines to grant parole, the Immigration Court has the authority to review the bond amount set by ICE or make a custody redetermination for those detained pursuant to section 236(a) of the INA.<sup>8</sup> To obtain a redetermination of custody or bond from the Immigration Court, practitioners must request one from the Immigration Judge presiding over the case.<sup>9</sup> In the context of the COVID-19 pandemic, practitioners should consider asking for release of their client from detention either on bond or as a matter of conditional parole.<sup>10</sup> In light of current circumstances, in which the danger of infection is so high in the closed environment of jail or detention, the potential impact on the detainee fatal, and the economic impact on family members of COVID-19 containment measures imposed by state and local governments, an Immigration Judge may be more willing to grant release from detention without a requirement of bond, and under certain conditions.

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<sup>5</sup> 8 CFR §§ 236.1(c)(8); 1236.1(c)(8); 287.3(d).

<sup>6</sup> INA § 212(d)(5).

<sup>7</sup> Additional factors that may be considered by DHS in the application of its parole discretion include “extenuating circumstances involving the offense of conviction; extended length of time since the offense of conviction; length of time in the United States; military service; family or community ties in the United States; status as a victim, witness, or plaintiff in civil or criminal proceedings; or compelling humanitarian factors such as poor health, age, pregnancy, a young child, or a seriously ill relative.” Memorandum from Jeh Johnson, DHS Sec’y, Policies for the Apprehension, Detention and Removal of Undocumented Immigrants, at 6 (Nov. 6, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf)

<sup>8</sup> 8 CFR §§ 1003.19(a); 236.1(d).

<sup>9</sup> For a more extensive discussion of bond hearing procedures, please see the CLINIC Detention Guide, *supra* note 4.

<sup>10</sup> See INA § 236(a)(2) (“the Attorney General...may release the [non-citizen] on: (A) bond...or (B) conditional parole”).

### **C. Bond/Custody Redetermination Before Immigration Court**

An immigrant detainee receives only one bond redetermination hearing from the Immigration Court, unless they can show that circumstances have changed materially since the prior hearing.<sup>11</sup> For a client who has already had a bond hearing and either been denied bond, or was granted bond in an amount beyond their capacity to pay, practitioners should request a redetermination of bond, or in the alternative, release on conditional parole, for the reasons set forth in section II.B. above.

### **D. Habeas Petitions**

Where immigrant detainees are barred by statute from seeking bond from the Immigration Court and ICE refuses to grant parole, or a motion for bond reconsideration or parole has been unsuccessful, or the client is especially high-risk for severe illness or death from COVID-19, or the detention center has confirmed cases of COVID-19, practitioners should consider filing a habeas petition in federal court to challenge the constitutionality of their client's continued detention. Practitioners filing habeas petitions on behalf of their clients should include declarations from public health experts and factual information about the conditions of the detention center where their client is located. We have included a generic declaration in this practice advisory. Practitioners should also review the law in their own circuit; the sample petitions attached here rely on Second Circuit and Ninth Circuit case law. We will continue to add and circulate habeas petitions from other circuits as they become available.

## **III. Sample Materials Included**

Included as appendices to this practice advisory are sample filings addressing the impact of the COVID-19 pandemic in each of these advocacy contexts. They are as follows:

Appendix A: Sample Humanitarian Parole Request to ICE (google doc available [here](#))

Appendix B: Motion for Bond and Custody Determination

Appendix C: Motion for Bond and Custody Redetermination

Appendix D: Redacted habeas petition submitted in the Southern District of New York

Appendix E: Habeas petition in *Dawson v. Asher*

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<sup>11</sup> 8 CFR § 1003.19(e).

Appendix F: Public health expert declaration on dangers of COVID-19 spread in immigration detention (with expert's CV)

#### **IV. Conclusion**

Advocates, families, and medical professionals continue to express tremendous concern about the dangers posed by the rapidly spreading COVID-19 pandemic to immigrant detainees that continue to be held in ICE custody, and particularly those with heightened vulnerability to infection. This practice advisory and accompanying materials intend to provide assistance to those working to release their clients. Moreover, detainees who are appearing for final asylum hearings during this time may argue that in addition to past persecution on a protected ground, they would be vulnerable to [“other serious harm”](#) in countries struggling to contain and treat COVID-19. NIPNLG will continue to update these materials and guidance as needed.

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